ARTICLES

PRESIDENTIAL DISABILITY: THE TWENTY-FIFTH AMENDMENT STILL AN UNTRIED TOOL

CALVIN BELLAMY*

The assassination of President John F. Kennedy riveted the attention of the nation and indeed the world. The grainy home movie showing the actual assassination and the heartrending funeral ceremony were defining moments for a whole generation.[1] Less than twenty years later, in 1981, another crazed gunman shot and seriously wounded President Ronald Reagan. The President seemed to recover fairly rapidly,[2] only to face major cancer surgery in 1985.[3] In 1991, George Bush experienced discomfort while jogging and was diagnosed with an irregular heart-beat. Doctors administered drugs and prepared the President for surgery. The drug therapy worked, and the President was able to leave the hospital within two days without surgery.[4]

These events represent some of the nation's recent experiences with the disability of our chief executives. The Kennedy assassination occurred prior to the

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* Bank Calumet Chairman and Chief Executive Officer, University of Michigan Law School, J.D. 1967.

[1] On July 16, 1999, the sudden death of 38-year-old John F. Kennedy, Jr., in a small plane crash reignited painful memories for his father's generation and created new memories for younger Americans. *See* Nancy Gibbs, *The Lost Horizon*, TIME, July 26, 1999 at 26-29.

[2] All agree that the President's wounds were serious. His two surgeons have written a graphic account of his injuries, but they maintain that his "mind was unusually clear given his injuries." Benjamin L. Aaron, M.D. & S. David Rockoff, M.D., *The Attempted Assassination of President Reagan*, 272 JAMA 1689, 1692 (1994). In their first visit to the president following his discharge from the hospital (about twenty-two days after he was shot), these same two physicians noted that "contrary to published reports, the President was observed to be already actively participating in governmental activities." Six weeks later, they judged their patient to be "fully recovered." *Id.* A different perspective of the immediate postoperative period is found in HERBERT L. ABRAMS, THE PRESIDENT HAS BEEN SHOT 190 (1992), where the author recounts the surprise of hospital personnel that the President was watching cartoons instead of live coverage of a Polish political crisis that prompted Russian troops to mass at the frontier for possible military intervention.

[3] *See* ABRAMS, *supra* note 2, at 197-209.

[4] *See id.* at 261.

drafting of the Twenty-Fifth Amendment, but there was only minimal difficulty in transferring the presidency to Vice President Johnson. The original constitutional provision was clearly designed to handle the death (especially the nearly instantaneous death) of the President.[5] The two Reagan episodes, as well as the Bush illness, occurred after the ratification of the Twenty-Fifth Amendment.[6] The Reagan team did not invoke the Amendment's procedures after the 1981 shooting and used it only half-heartedly during Reagan's 1985 illness.[7] In 1991, Bush

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[5] *See* U.S. CONST. art. II, § 1, cl. 6: "In case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of said Office, the Same shall devolve on the Vice President." On February 10, 1967, this language was superseded by Section 1 of the Twenty-Fifth Amendment, which reads: "In case of the removal of the President from office or of his death or resignation, the Vice President shall become President." U.S. CONST. amend. XXV, § 1.

[6] *See* U.S. CONST. amend. XXV, §§ 3 and 4 deal with the disability of a living president:

> 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
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> 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
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> Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Id.

[7] *See* Arthur S. Link & James F. Toole, M.D., *Presidential Disability and the Twenty-Fifth Amendment*, 272 JAMA 1694, 1695 (1994). President Reagan signed a letter specifically stating that he was not invoking section 3, but that Vice President Bush would nonetheless stand in for him until he recovered sufficiently from his surgery. That same evening, while still heavily medicated with postoperative painkillers, he signed another letter

announced that Vice President Quayle would become acting president if Bush required surgery. Since he recovered without surgery, the Amendment was again not used. [8]

All of these cases of disability—or potential disability—were straightforward. The facts were clear and undisputed. Yet Reagan was reluctant, at best, to use the disability procedures provided in the Amendment, and Bush's resolve to do so was not tested. Consequently, more than thirty years after ratification of the Twenty-Fifth Amendment, we still have a largely untried tool—even in the most straightforward situations.

I. DISABILITY: PHYSICAL AND OTHERWISE

If Presidents, their staffs and cabinets are reluctant to implement disability procedures in the simplest cases, what will happen when the facts are less than clear?[9] The following possibilities, while in no way exhaustive, will help illustrate the point:[10]

Mortally wounded by a disappointed former supporter, the President lingers for eighty days, alternating between hallucinations and unconsciousness, at best feeble, and unable to focus on the affairs of state.

While on a speaking tour in the western United States seeking support for his programs, the President suffers a paralyzing stroke. For the balance of his term (over eighteen months), he remains a reclusive invalid.

In three successive years, the President suffers a serious heart attack, undergoes major abdominal surgery, and sustains a stroke that affects his speech.

Reportedly depressed by the lack of progress on his policy initiatives, the chief executive announces that he will withdraw to a rural cabin to relax only with his family. At first, this sabbatical is to last one week, but actually stretches into three weeks before he feels ready to return to the rigors of life in the capital city.

Impeached by the House of Representatives, the President faces a long and highly partisan trial in the Senate, including public disclosure of intimate facts about the First Family's private lives and business dealings. Preparation for this ordeal becomes an overwhelming obsession, with the nation's business deferred.

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revoking his first letter and reclaiming the powers of his office. *See also* ABRAMS, *supra* note 2, at 199-209.

[8] *See* ABRAMS, *supra* note 2, at 261.

[9] Suppose President Reagan had been standing where Press Secretary James Brady was, only a few feet away. The President would have suffered permanent and serious brain damage. *See* Herbert L. Abrams, *Shielding the President From the Constitution: Disability and the Twenty-Fifth Amendment*, 23 PRESIDENTIAL STUD. Q. 533 (1993).

[10] Other situations are described in the concurring opinion to In re Comm'n on Governorship, 603 P.2d 1357, 1367 (1979) (Newman, J., concurring): Disability "could be caused by serious illness. It could occur when he is incommunicado—in a jungle or a mountain wilderness, for instance, or because of a national disaster or other catastrophe. It could be the result of electronic or other malfunctioning." *Id.*

Twice, bands of terrorists attempt to abduct the President while he travels between the White House and military facilities in the Washington area. Their aim is to hold the President somewhere in rural Virginia until their political demands are met.

Terrorists succeed in commandeering the President's plane while he and his family are on board during a goodwill visit overseas. His captors demand the release of a vicious guerilla leader held in a Russian prison.

A philandering President's romantic tryst turns violent. To save the President from serious physical injury, two secret service agents burst into the bedroom and shoot the woman dead. The President and his agents engage in an elaborate cover-up of the murder.

Some of these situations actually occurred. James Garfield died in 1881, eighty days after being shot.[11] Woodrow Wilson experienced a stroke in September 1919 while trying to rally public support for the League of Nations treaty.[12] Dwight Eisenhower suffered a heart attack in 1955, underwent surgery for an abdominal blockage in 1956, and had a stroke in 1957.[13] In 1998, the Prime Minister of Norway retreated to a quiet cabin in a mountain valley where he took long walks, watched soccer games on television, and played dice with his family. After nearly a month's absence, he returned to Oslo announcing, "My strength is back."[14] Presumably, American leaders are as susceptible as Norwegians to mental and physical exhaustion. After agonizing for months, Richard Nixon resigned in 1974 before the Articles of Impeachment came to a vote in the House of Representatives.[15] In 1998, Bill Clinton was impeached by the House, but acquitted after only a brief trial in the Senate.[16]

In September 1864, Confederate spy Thomas Nelson Conrad and three accomplices crossed Union lines, arriving in Washington, where they planned to kidnap President Lincoln as his carriage approached the Soldiers' Home. The plan was aborted because the President was accompanied by a larger than usual military escort—a reaction to an unrelated threat on the President's life. Several months

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[11] *See* John D. Feerick, *Disability, Presidential in* 1 LEONARD W. LEVY & LOUIS FISHER (ed.), ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 379 (1994).

[12] *See id.* at 380.

[13] *See id. See also* ABRAMS, *supra* note 9, at 534.

[14] *Norway's Leader Recovers*, CHI. SUN TIMES, Sept. 25, 1998, at 41, and *Norway Leader Ends Leave For Depression*, N.Y. TIMES, Sept. 26, 1998, at A4.

[15] Nixon's son-in-law Edward Cox is quoted as saying the President was drinking heavily, acting irrationally, not sleeping, walking up and down halls at night talking to the pictures of former Presidents, also giving speeches to these portraits. *See* BOB WOODWARD & CARL BERNSTEIN, THE FINAL DAYS 395 (Touchstone 2d ed. 1994).

[16] President Clinton was reported at various stages of the lengthy investigations into his business and personal activities as being in "dangerous self-denial," "withdrawn," and "in a rage." BOB WOODWARD, SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE 454, 509, 495 (1999). For discussion of impeachment as a basis for "suspending" the chief executive until his trial is completed, see Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 NEB. L. REV. 697, 709-10 (1961).

later, in early 1865, John Wilkes Booth and his six co-conspirators considered various schemes for kidnapping President Lincoln, finally settling on a plan very similar to the Conrad attempt. Booth was also thwarted when the President cancelled his trip to Campbell Hospital, and instead remained in the city to review a returning regiment of Indiana volunteers.[17]

The terrorist attack on Air Force One[18] and the murderous romantic encounter[19] are both works of fiction, but perhaps not outside the realm of possibility. While the Twenty-Fifth Amendment receives little attention in real life, the novel *Air Force One* contains a multi-page discussion of the Amendment's use while the President is held captive on his plane.[20] In this account, the President's closest advisors press the Vice President to join them in invoking section 4 of the Amendment. The Vice President is portrayed favorably for refusing to join in this effort, which would have made her President. She stoutly decides to "stand behind my President."[21] This fictional account, while focusing needed attention on the Twenty-Fifth Amendment, sends a strong message that use of the disability provisions is equivalent to the betrayal of a friend—a taint not likely to encourage its future real-life use.[22]

II. IN SEARCH OF A DEFINITION

A. The Constitution

The original succession clause, set out in Article II, section 1, uses a phrase ("Inability to discharge the Powers and Duties of the said office") and two unmodified single words ("inability" and "disability") to convey its meaning. The Twenty-Fifth Amendment uses a slightly different phrase, repeating it four times in sections 3 and 4: "unable to discharge the powers and duties of his office." Section

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[17] *See* DAVID HERBERT DONALD, LINCOLN 549, 586-88 (1995). Booth's hatred of Lincoln led him to contemplate several schemes, including a bizarre kidnapping idea planned for Ford's Theatre in January 1865. The plotters planned to burst into Lincoln's box, bind, gag, and lower him to the stage in front of a thousand spectators and from there, carry off the 6 foot 4 inch former champion wrestler to the Confederacy. This attempt was also foiled by a change in Lincoln's plans. *See id.* at 588. Eventually, however, Booth finally succeeded in killing Lincoln on April 15, 1865 at Ford's Theatre. *See id.*

[18] *See* MAX ALLAN COLLINS, AIR FORCE ONE (1997).

[19] *See* DAVID BALDACCI, ABSOLUTE POWER 23-29 (1996).

[20] *See* COLLINS, *supra* note 18, at 195-96, 207-08 and 256-58.

[21] *Id.* at 208. *See also infra* notes 91, 99, 100, and 102 for the reaction of governors' inner circles in actual disability cases, and notes 114-116 for the reaction by Wilson's and Reagan's staff. Contrary to the fictional account, the personal aides of real chief executives disliked invoking disability provisions and often openly opposed their use.

[22] For additional details on actual cases of presidential disability from James Madison through the Kennedy assassination, *see* JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT 4-23 (1992). *See also* FEERICK, FROM FAILING HANDS 118-30 (Garfield), 166-77 (Wilson) and 213-26 (Eisenhower) (1965).

4 uses the unmodified "inability" once. The current Succession Act, by which Congress determines who becomes President if both that position and the Vice Presidency become vacant, uses "inability" and "disability," both unmodified, as well as the phrase "disability to discharge the powers and duties of the office of President."[23] Two obvious questions arise: What do these various terms mean? Is there any difference among them?

Records from the Constitutional Convention focus more on who should succeed if a vacancy occurs, rather than on defining what would cause that vacancy. Delegate Dickinson expressed concern about the vagueness of "disability,"[24] but no response to his concerns or follow-up discussion is recorded. Perhaps the Framers were bequeathing the resolution of this issue to the future.

The next best authority on the constitution, *The Federalist*, adds nothing to the definition of disability, making only the obvious (if ambiguous) point that "the Vice President may occasionally become a substitute for the President."[25]

B. The Celler Committee[26]

The most systematic attempt to define the terms of presidential disability occurred twenty years prior to the adoption of the Twenty-Fifth Amendment, when the House Judiciary Committee ("Celler Committee") conducted extensive hearings, prepared a written questionnaire, and sought input from twenty-six scholars and other experts. The Committee's work, undertaken in response to President Eisenhower's 1955 heart attack, did not result in legislation. It did, however, provide background information for the framers of the Twenty-Fifth Amendment.

The Committee's survey posed eleven questions, including the respondents' opinion on the constitutional meaning of "inability." Summarizing the answers received, the Committee report noted that a few respondents felt the framers intentionally failed to define "inability." The remaining respondents generally agreed on three points: "(1) Inability might be either of a temporary or permanent nature; (2) inability and disability as used in the clause are synonymous; (3) inability covers every instance in which a President is unable, for any reason, to discharge the powers and duties of his office."[27]

While a listing of everyone's opinion might seem like little more than "a collection of truisms having no real value in arriving at a finding of inability,"[28]

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[23] 3 U.S.C.A. §19 (West 1997).

[24] *See* 3 THE RECORDS OF THE FEDERAL CONVENTION 427 (Max Farrand ed., 1966).

[25] THE FEDERALIST NO. 68, at 461 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[26] New York Congressman Emanuel Celler was chairman of the House Committee on the Judiciary at the time this work was done.

[27] HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., AN ANALYSIS OF REPLIES TO A QUESTIONNAIRE AND TESTIMONY AT A HEARING ON PRESIDENTIAL INABILITY 1 (Comm. Print 1957).

[28] *Id.* at 7 (response of Pritchett).

these informed opinions do at least confirm that the disability terms have a comprehensive scope, in at least five specific areas:

1. There is no difference among the various terms used: the terms "inability" and "disability" are in this context synonymous.[29]
2. A President's particular disability may be mental, physical or any other significant event producing unavailability, such as: "the unavailability of the President for the performance of his duties whatever the cause involved might be—mental or physical illness, airplane crash in some inaccessible place, kidnapping, wartime capture, etc."[30]
3. Mere absence from the country is not normally enough to constitute disability: "[A]bsence from the country does not in itself constitute inability, and would not ordinarily do so in fact, but might conceivably produce consequences which constituted de facto inability."[31]
4. A disability may be of any duration, but a very short-term disability usually would not be significant enough to merit invoking the succession mechanism: "A period of time would not have to be specified in the definition. Brief periods of inability would appear to come within the rule of de minimis."[32]
5. Aside from the nature of the disability, the immediacy of the moment should also play a role in the activation of the procedure: "It depends upon the particular demands at the particular time: Under some conditions, pneumonia might render the President unable to discharge his duties. At other times, the demands might not be so pressing; a delay in Presidential action might not result in a failure to discharge his responsibilities."[33]

C. The Twenty-Fifth Amendment

By the mid-1960s, the time was finally right to formulate a disability procedure. Drawing on the Celler Committee's work, congressional debate on the Twenty-Fifth Amendment featured several attempts to clarify the meaning of "unable" and "inability." Senator Birch Bayh, the Amendment's main author, defined these terms as "an impairment of the President's faculties, mean[ing] that he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office."[34] Apparently concerned that Senator Bayh's definition seemed limited to a physical condition, Senator Pastore read from an earlier statement in which Senator Bayh had explained that "the intention of this legislation is to deal with any type of inability, whether it is from traveling from

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[29] *See id.* at 2 (response of Hart).

[30] *Id.* at 10 (response of Lien). Another form of unavailability may come from inability to manage the "burdens of his office which have been brought about by the demands of modern Government." (Committee paraphrase of Aikin response.) *Id.* at 2.

[31] *Id.* at 2 (response of Hart).

[32] *Id.* at 10 (response of Peters).

[33] *Supra* note 27, at 7 (response of Peltason).

[34] III CONG. REC. 3282 (1965).

one nation to another, a breakdown of communications, capture by the enemy, or anything that is imaginable."[35] Senator Bayh then reaffirmed this broader definition.[36]

Some months later, when the Senate was debating passage of the conference committee report, Senators Bayh, Dirkson, and Robert Kennedy engaged in a discussion to further clarify the concepts, but they did not reach a precise definition. Senator Bayh's responses to various questions can be summarized as follows:

1. "Disability" does not include the situation "when a President makes an unpopular decision."[37]
2. Typical cases might involve a serious operation or heart attack.[38]
3. Inability includes situations beyond physical and mental disability. "It is conceivable that the President might fall into the hands of the enemy, for example."[39]
4. The disability might be temporary. In rare cases, even a very temporary disability might be sufficient, depending on the broader context: A President who was unconscious for thirty minutes when missiles were flying toward this country might only be disabled temporarily, but it would be of severe consequence when viewed in the light of the problems facing the country. So at that time, even for that short duration, someone would have to make a decision. But a disability which has persisted for only a short time would ordinarily be excluded.[40]

D. Summary Statement

The Framers of the Constitution, as well as congressmen of every era, political scientists, and legal scholars, have all shied away from a precise definition of disability. Their general statements on the subject boil down to a common theme, however: "inability" and "disability" are synonymous and include any situation, whatever the cause or duration, occurring whenever public business requires the President's attention.[41] The problem is that the general public lacks an

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[35] *Id.*

[36] *See id.*

[37] *Id.* at 15381.

[38] *See id.* at 15593.

[39] *Supra* note 34, at 15381.

[40] *See id.* at 15381. *See also* BIRCH BAYH, ONE HEART BEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 271, 308-9 (1968) where Senator Bayh summarizes his attempt to build a legislative record that would at least provide guidance in defining disability.

[41] *See* THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961):

> Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of

understanding of the meaning and implications of presidential disability. Wider and more regular discussion of this issue would increase public understanding, and from greater understanding may come greater acceptance—and even the expectation—that the constitutional disability mechanism will be used at least in the clearest cases.

This optimism, however, has yet to be tested. From the beginning of our republic, people have discussed presidential disability only when faced with a crisis; these discussions are only "brief spasms of public discussion."[42] Once the moment passes, Americans seem content to let "succession issues . . . return to the subconscious 'unthinkable' category."[43]

Each of the fifty states also faces the potential of a disabled chief executive. Have they been any more successful in defining and dealing with gubernatorial disability?

III. STATE EXPERIENCES

Our individual states provide fifty separate opportunities to define "disability" of their chief executive officer. To a greater or lesser extent, every state has addressed this issue.

A. State Phrases

Most states use terms similar to the federal constitution such as "unable to discharge the powers and duties of his office" without further elaboration. Some states add general modifiers to the usual formula, such as "unsoundness of mind, or other disability,"[44] "suffering from a physical or mental disability,"[45] "become insane, or be otherwise incapacitated,"[46] or "from mental or physical disease or otherwise become incapable of performing the duties of his office."[47] Like the Twenty-Fifth Amendment, state constitutions interchange terms such as "inability," "disability," and "unable." At least on the surface, none of the general phrases employed by the states adds much clarity or certainty beyond the terms already used in the Twenty-Fifth Amendment.

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ambition, of faction, and of anarchy.

Id.

[42] William F. Brown & Americo R. Cinquegrana, *The Realties of Presidential Succession: 'The Emperor Has No Clones,'* 75 GEO. L.J. 1389, 1392 (1987).

[43] Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers*, 20 HASTINGS CONST. L.Q. 105, 106 (1992).

[44] ALA. CONST. art. V, § 127.

[45] COLO. CONST. art. IV, § 13(5).

[46] R.I. CONST. art. 4, § 3.

[47] WYO. CONST. art. 4, § 6.

Some states have carried the process a step further, seeking certainty by relating disability to the passage of time. For example, Alaska,[48] Maine,[49] and New Jersey[50] consider a disability of six months' duration to cause a "vacancy" in the office of governor. Mississippi requires a "protracted illness" for even a temporary transfer to the lieutenant governor.[51] Whether a requirement of prolonged disability is in the best interest of a state may be open to question. At the federal level, the President's national and international responsibilities provide crucial challenges on a daily, or even more frequent, basis. In this setting, requiring prolonged disability or any specific time period would not provide an improvement over the Twenty-Fifth Amendment's current provisions.

B. Absence From the State

Twenty-nine states deem the governor's physical absence from the state to be sufficient reason to transfer his authority to the lieutenant governor. (See Table I).

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[48] *See* ALASKA CONST. art. III, § 12.

[49] *See* ME. CONST. art. 5, Pt. 1, § 14.

[50] *See* N.J. CONST. art. 5, § 1,¶ 8 requires a six month continuous period for a permanent vacancy to exist. New Jersey's constitution also has a provision for temporary disability and absence. For these temporary conditions, there is no fixed waiting period. *See* art. 5, § 1, ¶ 7.

[51] *See* MISS. CONST. art. 5, § 131.

Table I

Succession Based on Governor's Absence From the State

Immediate Transfer of Duties*

Arkansas
California
Connecticut
Mississippi
New Hampshire
Oklahoma
Oregon

Other Time-Related Triggers**

Alabama (20 days)
Montana (45 days)
South Dakota ("continuous absence")

"Effective" Absence***

Missouri
Nevada
New Jersey
Wisconsin

Timing Not Clearly Determined****

Alaska
Arizona
Colorado
Hawaii
Idaho
Louisiana
Massachusetts
Michigan
New Mexico
New York
North Carolina
South Carolina
Texas
Vermont
Wyoming

* See *infra* note 54 for judicial and attorney general opinions defining "absence" as meaning *any* absence from the state.

** For Alabama and Montana see *infra* notes 52, 53; *see also* S.D. CONST. art. IV, § 6.

*** See *infra* note 55 for judicial decisions and attorney general interpretations defining "absence" to mean "effective absence."

**** ALASKA CONST. art. III, § 9; ARIZ. CONST. art. 5, § 6; COLO. CONST. art. IV, § 13(5); HAW. CONST. art. V, § 4; IDAHO CODE § 67-805(A)(1995); LA. CONST. art. 4, § 19; MASS. CONST. § 72; MICH. CONST. art. 5, § 26; N.M. CONST. art. V, § 7; N.Y. CONST. art. 4, § 6; N.C. CONST. art. III, § 3(2); S.C. CONST. art. IV, § 11; TEX. CONST. art. 4, § 16; VT. STAT. ANN. tit. 3, § 1 (1996); and WYO. CONST. art 4, § 6.

Many of these state constitutions take a very matter-of-fact approach. For example, two states have established time-related triggers—more than twenty days' absence from Alabama[52] and forty-five days for Montana.[53] In several states, usually through judicial interpretation, the governor's power transfers *immediately* upon his or her departure from the state.[54] Other state courts, finding the word "absence" to be ambiguous, have developed the concept of "effective absence." In *Sawyer v. First Judicial District Court*,[55] the Nevada Supreme Court expressed this concept in the following words:

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[52] *See* ALA. CONST. art V, § 127.

[53] *See* MONT. CONST. art. VI, § 14 (2).

[54] *See* Walls v. Hall, 154 S.W.2d 573, (Ark. 1941): While the governor and lieutenant governor were absent from the state for brief periods (the governor four days and the lieutenant governor parts of some of those days), the president pro tempore asserted authority as acting governor and vetoed particular legislation. *See id.* at 575. The state supreme court upheld the veto, quoting from the opinion of the lower court:

> It would be violating the language and spirit of this constitutional provision and would also be venturesome on the part of this court, to hold or attempt to prescribe the length of time the Governor must be out of the state, or the distance he must be away from the state before a vacancy occurs . . . .

Id. at 577.

In 1979, the California Supreme Court upheld the lieutenant governor's authority to nominate a candidate for a judicial vacancy during the governor's forty hour absence from the state. However, since the nomination had not been acted on, the governor was able to withdraw it upon his return. *See* In re Comm'n on Governorship, 603 P.2d 1357 (Cal. 1979). In Bratsenis v. Rice, 438 A.2d 789 (Conn. 1981), the governor signed an arrest warrant while he was absent from the state for three days. Even though the lieutenant governor and president pro tempore of the state senate were also away from the state, the court interpreted the 1818 constitution to mean that the governor's absence from the state for any length resulted in a suspension of his authority. Even though means of transportation and communication had changed dramatically in the intervening 150 years, the court felt compelled to give the provision a literal interpretation, noting, "It is not, however, the function of this court to rewrite the constitution." *Id.* at 791. In New Hampshire, the attorney general has interpreted pt. 2, art. 49 of their constitution as follows: "The Governor is therefore absent for purposes of Article 49, when he crosses the state line. The length or nature of his absence is irrelevant. . . ." Op. Att'y Gen. 87-5. (1987). Years earlier, the Mississippi Supreme Court addressed the same issue in Montgomery v. Cleveland, 98 So. 111 (Miss. 1923), in a situation where the governor was away for only six hours. The court held, "Whenever the governor is beyond the confines of the state, he is absent from the state, and he cannot perform the duties of his office during such absence." *See id.* at 114. Similarly, the Oklahoma Supreme Court held that "absence from the state for any purpose and for any period of time, however short . . . causes a transfer of authority from the governor to the next official in line of succession." *Ex parte* Crump, 135 P. 428, 436 (Okla. 1913). *See also Ex parte* Hawking, 136 P. 991 (Okla. 1913). The Oregon Supreme Court reached the same conclusion in Stadter v. Patterson 251 P.2d 123 (Or. 1952). See also the discussion in 38 AM. JUR. 2D *Governor* § 13 (1999) and 81A C.J.S. *States* § 89 (1997).

[55] *See* 410 P.2d 748 (Nev. 1966). While the governor was absent from the state for a

> The dispute is whether "absence from the state" as contained within Sec. 18 was intended by the framers of our state Constitution to mean simply physical nonpresence, however brief, or whether it was written into our Constitution to indicate some other condition. The overwhelming majority of states which have examined identical or nearly identical provisions have found that "absence" as contained within rules for orderly succession in government means "effective absence"—i.e., an absence which is measured by the state's *need* at a given moment for a particular act by the official then physically not present.[56]

While the cases on gubernatorial absence demonstrate the political intrigues associated with even the temporary transfer of power, they have little direct application to the President. The President now travels frequently, and no assertion has been raised in modern times that routine domestic or foreign travels create an automatic disability.[57] However, the "effective absence" doctrine, if developed further, may provide situations analogous to what might constitute disability on the presidential level—that is, relating disability to the need at that moment for some

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period of less than four hours on a Sunday evening, the lieutenant governor attempted to have a judge impanel a grand jury to investigate the state highway department. *See id.* at 749. In ruling in the governor's favor, the court noted, "Not only was there no immediate need for an NRS6.135 request during that brief period, but as events proved, no action could even be initiated on such a request until courts opened Monday morning, at which time the governor had returned." *Id.* at 750. See also Ashcroft v. Blunt, 813 S.W.2d 849 (Mo. 1991) where the governor, during an absence of over two weeks, signed and faxed various documents. Validating the governor's actions, the court held that ". . . the Governor's temporary absence was not such as to *disable* him from performing the duties of his office." *Id.* at 853. The New Jersey court held in *In re* An Act Concerning Alcoholic Beverages, 31 A.2d 837 (N.J. 1943) that transfer of the governor's authority when absent from the state depends "upon the particular facts and circumstances of each 'absence' from the state." *Id.* at 841. For similar interpretation of WISC. CONST. art. 5, § 7, see Op. Att'y Gen. 41-79. *See generally* 38 AM. JUR. 2D *Governor* § 13 (1999), and 81A C.J.S. *States* § 89 (1997).

[56] *See* Sawyer v. First Judicial District Court, at 749. See also the discussion of "absence" in Basile S. Uddo, *"Who's In Charge?": The Louisiana Governor's Power to Act in Absentia*, 29 LOY. L. REV. 1 (1983).

[57] From the beginning of George Washington's first term in 1789, and lasting until 1906, no President had ever left U.S. territory while in office. As historian Martin Gilbert has observed,

> Many Americans believed that it must be part of the constitution that a President could not leave the national jurisdiction. There was puzzlement, therefore, and some anger when President [Theodore] Roosevelt announced he was going to visit the Isthmus of Panama to see for himself how the work on the Panama Canal was preceding.

MARTIN GILBERT, A HISTORY OF THE TWENTIETH CENTURY 137 (1997). There is also some evidence that the Framers may have considered adding "absence" to the list of circumstances that would enable the Vice President to assume presidential duties. However, the word did not appear in the final draft of the Constitution. *See* FEERICK, FROM FAILING HANDS, *supra* note 22, at 48-49.

action or decision. The potential is there, but state case law has not yet matured sufficiently to enhance our understanding of "effective absence."

C. *Voluntary Disability Procedure*

More directly on point are specific state provisions permitting the governor to step aside voluntarily if he judges himself to be sufficiently impaired. Twenty states have such provisions, mostly similar to the federal mechanism established in the Twenty-Fifth Amendment. These provisions are usually set out in the state constitution, but sometimes they are established by statute.[58] (See Table II) While these states provide twenty potential laboratories for discovering how this mechanism works in practice, so far there is no evidence of any state using its procedure.[59]

D. *Involuntary Procedure*

Nineteen states have no established procedures for implementing the general disability language of their constitutions.[60] (See Table II) Of the remaining thirty-one states, a large number involve their supreme courts. Usually, courts become involved after some preliminary action is taken by a variety of executive or legislative officials wishing to invoke the involuntary disability provision.[61] A

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[58] *See* COLO. CONST. art. IV, § 13(6); CONN. CONST. art 4, § 18(c); DEL. CONST. art. III, § 20(b); ILL. CONST. art. V, § 6(c); IND. CONST. art. 5, § 10(c); KY. CONST. § 84; LA. CONST. art. 4, § 17; ME. CONST. art. 5, pt. 1, § 15; MD. CONST. art. II, § 6(b); MINN. STAT. ANN. § 4.06(c) (West 1997); MO. CONST. art. 4, § 11(b); MONT. CONST. art. VI, § 14(2); N.H. CONST. pt. 2, art. 49-a; N.C. CONST. art. III, § 3(3) (but only as to physical incapacity with the legislature being the sole judge of mental incapacity); OKLA. STAT. tit. 74, § 8A (West 1995); PA. STAT. ANN. tit. 71 §§ 784.1 and 784.3 (West 1990); S.C. CONST. art. IV, § 12(l); TENN. CODE ANN. § 8-1-109(b) (Tenn. 1993) (which provides a limited power of attorney mechanism for affixing the governor's signature to legislation, veto messages and pardons); UTAH CONST. art. VII, § 11; and VA. CONST. art. V, § 16.

[59] The day before Illinois Governor Henry Horner died, his chief aide signed and filed with the secretary of state a "certificate of disability." This procedure was not specifically sanctioned by the then operative sections of the Illinois constitution, but since death followed so quickly, the issue became immediately moot. See *infra* discussion at pp. 30-31 and note 101.

[60] The states lacking implementation procedures are: Alaska, Arizona, Arkansas, Hawaii, Idaho, Kansas, Massachusetts, Nevada, New Mexico, New York, North Dakota, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. (See Table II). Tennessee can also be deemed to have no implementation provision, since it only features an extremely narrow provision that allows the governor to give a power of attorney to an individual to sign certain documents on the governor's behalf. However, the agent has no discretionary authority; he acts only at the direction of the governor to perform the mechanical act of affixing a signature. *See* TENN. CODE ANN. § 8-1-109(b) (1979).

[61] *See* ALA. CONST. art. 5, § 128 (supreme court can act upon the affidavit of any two officials including designated executive branch department heads and the two top officials of

limited number of state constitutions require formal action by the full legislature to initiate the process, leaving final determination to their supreme court.[62] Two states give their courts the exclusive role in determining disability.[63] New Jersey takes a different approach: the New Jersey governor must be unable to discharge his duties "for a period of six months" prior to action by the supreme court.[64]

Only two states, Montana and North Carolina, focus the process primarily within the legislature.[65] Four additional states follow a procedure roughly similar to the Twenty-Fifth Amendment, where the initial disability determination is made by the

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the legislature); FLA. CONST. art. 4, § 3(b) (supreme court determines disability upon written suggestions by four cabinet members); GA. CONST. art. V, § IV, ¶ II (supreme court decides upon petition of "any four of the elected constitutional executive officers" with the hearing to include testimony from not fewer than three qualified physicians in private practice, one of whom must be a psychiatrist); IND. CONST. art. 5, § 10(d) (upon senate president pro tempore and house speaker filing a written statement suggesting disability, the supreme court will convene within 48 hours to decide the matter); KY. CONST. § 84 (supreme court determines disability upon petition of the state attorney general.); ME. CONST. art. 5, pt. 1, § 15 (secretary of state petitions the supreme court for determination of disability); MICH. CONST. art. 5, § 26 (disability determined by a majority of the supreme court upon joint request of the senate president pro tempore and the house speaker); MISS. CONST. art. 5, § 131 (secretary of state submits question of disability to supreme court for determination); N.H. CONST. pt. 2, art. 49-a (when it appears to attorney general and a majority of the five elected gubernatorial counselors that the governor is disabled, the attorney general petitions the supreme court for a declaratory judgment); UTAH CONST. art VII, § 11 (disability is determined by the supreme court on the joint request of the senate president and house speaker).

[62] *See* COLO. CONST. art. IV, § 13(6) (upon joint resolution adopted by two-thirds vote in each house, the supreme court determines disability); MD. CONST. art. II, § 6(c) (by affirmative vote of three-fifths of all members of the legislature in joint session, the disability question is referred to state court of appeals for decision); OHIO CONST. art. III, § 22 (upon joint resolution adopted by two-thirds of members elected to each house, the supreme court has exclusive jurisdiction to determine the disability question and is required to make its determination within 21 days).

[63] *See* ILL. CONST. art. 5, § 6(d) ("The Supreme Court shall have . . . jurisdiction to review [a procedure established by the legislature and] in the absence of such a law, shall make the determination under such rules as it may adopt") and S.D. CONST. art. IV, § 6 (supreme court determines disability on its own initiative).

[64] *See* N.J. CONST. art. 5, § 1, ¶ 8 (after a continuous disability period of six months, and upon a concurrent resolution adopted by two-thirds vote of each house, the supreme court decides whether to declare a vacancy in the office of governor). Art. 5, § 1, ¶ 7 addresses temporary absences and inabilities.

[65] *See* MONT. CONST. art. VI, § 14 (upon transmittal from lieutenant governor and attorney general, the legislature decides the governor's disability by a two-thirds vote of its members. However, § 14(3) provides that if the governor is "so disabled as to be unable to communicate," the lieutenant governor assumes office automatically, without determination by the legislature) and N.C. CONST. art. III, § 3 (mental incapacity is determined "only by joint resolution adopted by a vote of two-thirds of all members of each house.") However, § 3(3) leaves the determination of physical incapacity solely to the governor himself. *Id.*

executive branch, with the final appeal reserved to the legislature.[66] Oklahoma involves all three state government branches in making a disability determination. A panel of state executives makes the initial recommendation, which the legislature then reviews. If the legislature agrees with the executive panel's recommendation by a two-thirds vote, the issue is then transferred to the Oklahoma Supreme Court for a final decision.[67]

[66] *See* LA. CONST. art. IV, § 18 (majority of statewide elected officials make the initial determination of disability, but if the governor challenges this declaration within forty-eight hours, he remains in office. The legislature must then convene within three days and decide the disability question within an additional seventy-two hours by two-thirds vote of each house); PA. STAT. ANN. tit. 71, §§ 784.2, 784.3 (West 1990) (lieutenant governor and majority of governor's cabinet make initial determination which empowers lieutenant governor to assume governor's duties. Upon counter declaration by the governor and recertification of disability by lieutenant governor and cabinet, the legislature is required to assemble within forty-eight hours. The legislature must act within twenty-one days, with a determination of disability requiring a two-thirds vote in each house); S.C. CONST. art. IV, § 12 (majority of attorney general, secretary of state, comptroller general, and state treasurer make the initial decision on disability, thereby vesting the governor's duties in the lieutenant governor. If the governor disagrees and the same officials renew their disability declaration, the legislature has twenty-one days to confirm disability by two-thirds vote of each house); VA. CONST. art. V, § 16 (initial determination is made by unanimous action of attorney general, senate president and house speaker or by a majority of the total membership of the legislature. Upon the governor's objection and a reaffirmation of disability by the named officials, the legislature must convene within forty-eight hours and determine within twenty-one additional days by three-fourths vote of the elected membership of each house.).

[67] *See* OKLA. STAT. ANN. tit. 74, §§ 8B-D (West 1995).

Table II

State Constitution Disability Procedures

State	Voluntary/Governor Initiated	Involuntary/Initial Decision Maker*
Alabama		Supreme Court
Alaska		**
Arizona		**
Arkansas		**
California		Disability Commission
Colorado	X	Supreme Court
Connecticut	X	Disability Commission
Delaware	X	Disability Commission
Florida		Supreme Court
Georgia		Supreme Court
Hawaii		**
Idaho		**
Illinois	X	Supreme Court
Indiana	X	Supreme Court
Iowa		Disability Commission
Kansas		**
Kentucky	X	Supreme Court
Louisiana	X	Executive Branch Officials
Maine	X	Supreme Court
Maryland	X	Supreme Court
Massachusetts		**
Michigan		Supreme Court
Minnesota	X	Disability Commission
Mississippi		Supreme Court
Missouri	X	Disability Commission
Montana	X	Legislature
Nebraska		Disability Commission
Nevada		**
New Hampshire	X	Supreme Court
New Jersey		Supreme Court
New Mexico		**
New York		**
North Carolina	X	Legislature
North Dakota		**
Ohio		Supreme Court
Oklahoma	X	Executive Branch Officials
Oregon		Disability Comm'n & Supreme Court
Pennsylvania	X	Executive Branch Officials
Rhode Island		**
South Carolina	X	Executive Branch Officials

Table II (continued)

State	Voluntary/Governor Initiated	Involuntary/Initial Decision Maker*
South Dakota		Supreme Court
Tennessee	X	**
Texas		**
Utah	X	Supreme Court
Vermont		**
Virginia	X	Executive Branch & Legislature
Washington		**
West Virginia		**
Wisconsin		**
Wyoming		**

* Many state constitutions permit the governor to challenge this initial determination. If challenged, the governor stays in office until the question is reviewed by another body, usually the legislature or supreme court.

** The relevant state constitution establishes no specific procedure for declaring the governor disabled.

A final group of states utilizes a special panel of officials, usually a mixture of public officials and medical experts, to determine gubernatorial disability. (See Table II) Only Delaware and Missouri specify the composition of their disability panel in the state constitution.[68] The other six states using such a system define membership by statute.[69] For example, California's Commission on the Governorship consists of "the President pro Tempore of the Senate, the Speaker of the Assembly, the President of the University of California, the Chancellor of the California State Colleges, and the [state] Director of Finance."[70] Minnesota's panel has a different mix: the chief justice of the supreme court, the lieutenant governor, a governor-designated member of the cabinet, the governor's chief of staff, and his personal physician.[71] Four other states using commissions include the dean of the state medical school, the head of the state mental health agency, or other medical officials as members of the panel making the disability determination.[72] Missouri limits its panel solely to political office holders,[73] and Connecticut permits its current governor to select four out of the nine members of their disability council.[74] Iowa and Oregon vest their panels with final authority to declare the governor

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[68] *See* DEL. CONST. art. III, § 20(b); MO. CONST. art. 4, § 11(b).

[69] Other commission states include California, Connecticut, Iowa, Minnesota, Nebraska, and Oregon. See *infra* notes 70-75 for their specific constitutional provisions.

[70] CAL. GOV'T CODE § 12070 (West 1992), implementing CAL. CONST. art. 5, § 10.

[71] *See* MINN. STAT. ANN. § 4.06(d) (West 1997), implementing MINN. CONST. art. 5, § 5..

[72] *See* DEL. CONST. art. III, § 20(b) (chief justice, president of state medical society, and commissioner of mental health make the initial determination. If the governor disagrees, the legislature has ten days to decide by two-thirds vote of all elected members); IOWA CODE ANN. § 7.14 (West 1995 & Supp. 1998) (chief justice, director of mental health, and dean of medicine at the state university are directed to examine the governor and make the final determination); NEB. REV. STAT. §§ 84-127 and 84-130 (1994) (commission consisting exclusively of medical experts—dean of college of medicine, chairman of the state university's department of psychiatry, and another medical school dean selected by the other two members makes the initial decision. The governor, or any voter, may appeal this decision to the supreme court "within one month"); OR. REV. STAT. § 176.040 (1997) (a panel consisting of the chief justice, the state hospital's chief medical officer, and the dean of Health Sciences University makes the final decision).

[73] *See* MO. CONST. art. 4, § 11(b) (the majority of the lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, president pro tempore of the senate, speaker of the house, majority leaders of each house of the legislature make the initial determination; if the governor disagrees with the findings, and the disability board reconfirms and transmits its declaration to the supreme court, the court then makes the final determination within twenty-one days).

[74] *See* CONN. GEN. STAT. ANN. § 3-1a (a) (West 1988) (besides the governor's four appointees, the Council on Incapacity includes the chief justice, president pro tempore of the senate, speaker of the house, and minority leaders of each house. The council determines incapacity by two-thirds vote. CONN. CONST. art. 4, § 18d then requires the legislature within 21 days to review the council's decision. A two-thirds vote of each house is required to confirm the governor's incapability; otherwise, the governor's authority is restored).

disabled.[75] The remaining states require commission decisions to be reviewed or confirmed by either the legislature or the supreme court. (See Table II)

It may be worth examining and considering the usefulness of these state panels in the federal context, since the Twenty-Fifth Amendment empowers Congress to establish a similar body as a substitute for the President's cabinet in disability determinations. Even if such a panel were created at the federal level, the Vice President's concurrence would still be required before an initial determination of presidential disability could be declared.[76] Regardless, Congress's role as final arbiter would remain unchanged.

E. What Can Be Said of These State Procedures?

Unlike the Twenty-Fifth Amendment, most state disability provisions give a central role to their supreme court. These states see the process as requiring judicial fact finding, whereas the Twenty-Fifth Amendment empowers Congress, the other elected branch, to make the ultimate decision on presidential disability. States that use their courts for this purpose might be on sounder, or at least more traditional, ground since the courts are traditionally the place where ordinary citizens' competence is determined. [77] Regardless of the merits of this approach, a further constitutional amendment would be required to give the federal courts decision-making power in cases of presidential disability. The cumbersome amendment process is not likely to be undertaken for what might be considered "fine tuning," however. The other device fashioned at the state level, the disability commission, could be adopted at the federal level by the simpler expedient of regular legislation.[78] The commission approach is discussed further in the final section of this Article.[79]

F. Disabled Governors

Over the years, several governors have suffered from various forms of disability. These situations provide case studies that help uncover the dynamics of disability succession in real situations.

On May 15, 1972, a little over a year into his second term, Alabama Governor George C. Wallace was seriously wounded and permanently paralyzed. Despite his profound injuries, he continued as governor until 1979. After four years out of

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[75] See *supra* note 72 for summary of the procedures followed in Iowa and Oregon.

[76] The Vice President's concurrence would still be required since the amendment uses the conjunctive: "the Vice President and a Majority of [the cabinet] or such other body as Congress may by law provide." U.S. CONST. amend. XXV § 4.

[77] *See, e.g.*, UNIF. PROBATE CODE § 5-401 (amended 1998) (defining disability to exist when "the person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance").

[78] *See* U.S. CONST. amend. XXV § 4.

[79] *See infra* pp. 21-23 and 27-28.

office, he returned to serve as governor from 1983 to 1987, despite suffering increased complications from his wounds, which served as his "dark companions."[80] The Alabama Constitution does not provide for a governor's voluntarily stepping aside, and no record exists of any statewide elected official petitioning the supreme court to declare the governor "to be of unsound mind."[81]

Early in 1980, Connecticut Governor Ella Grasso was diagnosed with cancer. Surgery was performed promptly, but her chemotherapy was postponed until May 8, the day after the legislature adjourned.[82] During much of the next two months, she "suffered from the debilitating side effects of the chemotherapy."[83] In November, she underwent more surgery, as the cancer had spread. "The stoic Mrs. Grasso then ran the state from her hospital room."[84] By December 1980, however, she no longer felt able to continue in office, and announced that she would resign at the end of the year. She died on February 5, 1981. Governor Grasso apparently never considered using the state's disability procedures.[85]

On June 24, 1983, Kentucky Governor John Y. Brown was hospitalized and the next day underwent triple bypass surgery at the University of Kentucky Hospital. While his initial post-operative status was reported to be excellent,[86] within three

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[80] *See* THOMAS S. HEALEY, THE TWO DEATHS OF GEORGE WALLACE 132-34 (1996). Governor Wallace provides a classic example of the strong urge to hold on to the prerogatives of office. The nature of his wounds made it too risky to immediately remove the bullet lodged next to this spine. A second operation would be required. Once he regained consciousness, Wallace wanted to return to Alabama for follow-up surgery. "There was a political reason for the urgency. According to Alabama law if a governor is out of the state for twenty days, he loses his authority and the lieutenant governor takes over until he returns . . . . Wallace bridled at the thought of not having power directly in his own hands." *Id.* at 123. Wallace's serious medical condition made it impossible for him to return at that point, but by July, he was able to reclaim the office when his plane landed in Alabama just long enough for him to address an airport crowd. After this twenty minute speech, he returned to the plane and flew off to the Democratic National Convention, once again governor of Alabama. *See id.* at 125-26.

[81] *See* ALA. CONST. art. V, § 128.

[82] *See generally* SUSAN BYSIEWICZ, ELLA 127-128 (1984). This chapter of Mrs. Grasso's life is summarized at 127-30.

[83] *See id.* at 128.

[84] *Id.* at 129.

[85] *Id.* Bysiewicz's book is silent on the issue of invoking Connecticut's disability procedure.

[86] *See* Robert T. Garrett, *Governor Stable and Eager to Work After His Operation*, COURIER J., June 27, 1983, at A1, reporting the governor's condition as follows: "Scribbling notes while still groggy and asking for a bank of telephones to be installed at his bedside, Governor John Y. Brown Jr. emerged from open heart surgery in fine fettle and stable condition." The governor was "scribbling notes" because a respirator tube rendered him unable to speak, making the bank of phones also useless to him. *Id.* Doubtless this optimistic report was based on statements from the governor's staff trying to put the best possible face on his situation.

days he experienced serious complications that required heavy sedation.[87] Though the governor was virtually unconscious on June 29, a spokesman for the lieutenant governor stated that there was no need for her to become acting governor "unless there's a crisis situation."[88] This was the lieutenant governor's initial reaction during the first twenty-four hours of the onset of the governor's setback. However, after several additional days with no improvement in Governor Brown's condition, Lieutenant Governor Collins announced on July 2 that she had consulted a former chief justice of the Kentucky Supreme Court, and asked him to render an opinion under Kentucky's then-existing constitutional disability provision.[89] The retired jurist concluded that Governor Brown was constitutionally disabled. The lieutenant governor promptly became acting governor.[90] By July 24, Governor Brown greatly improved; he was released from the hospital, and informed Lieutenant Governor Collins that he was resuming his duties as governor.[91] No specific provision of the Kentucky Constitution or law, then or now, authorized the precise succession procedure used by the lieutenant governor, but it apparently worked satisfactorily,[92] perhaps because she had the will to act and the politics were right.[93]

Two well-documented cases of gubernatorial disability occurred some decades earlier: the protracted saga of Louisiana Governor Earl K. Long during the late 1950s, and an almost textbook fact situation in the 1930s involving Illinois Governor Henry Horner. Both cases demonstrate the intense political struggles that arise even in clearly documented cases of disability.

Earl Long, the brother of the famed Huey "the King Fish" Long, had for years enjoyed a colorful and irreverent reputation of his own.[94] His heavy drinking was

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[87] *See* Robert T. Garrett & Ed Ryan, *Governor Suffers Partial Lung Failure, Is Heavily Sedated*, COURIER J, June 30, 1983, at A1.

[88] *Id.* at A16. Succession in a previous case of gubernatorial disability was less uncertain. In 1972, then-governor Wendell Ford required surgery for a weakened abdominal artery. Since his surgery occurred in Texas, the lieutenant governor automatically became acting governor until Governor Ford returned to Kentucky. *See* Ed Ryan, *Brown Has Heart Surgery to Bypass Blocked Arteries*, COURIER J., June 26, 1983, at A1, A20.

[89] *See* Richard Wilson, *Collins Says in Statement She's Acting Governor*, COURIER J., July 3, 1983, at A-1.

[90] *See id.* at A1 and A20.

[91] *See* Livingston Taylor, *Brown Goes Home From the Hospital, Resumes Duties*, COURIER J., July 25, 1983, at A1.

[92] Even so, two of Governor Brown's closest aides reacted negatively to the Lieutenant Governor's announcement, reportedly "irked at the circumstance of its release." Mrs. Brown also expressed her "disappointment" at not being informed personally by Lieutenant Governor Collins. *See* Richard Wilson, *supra* note 89.

[93] At the time of Brown's illness, Collins had already been nominated by their party to succeed him. She won the November election by a large margin and became governor in her own right. *See* Bob Johnson, *Collins Elected State's First Woman Governor*, COURIER J., Nov. 9, 1983, at A1.

[94] *See generally* MICHAEL L. KURTZ ET AL., THE SAGA OF UNCLE EARL AND LOUISIANA POLITICS 211-29 (1990).

matched only by his wild betting on horse races. He enjoyed the company of young women, and was often seen with them on public occasions. His long nights on the town required large quantities of pep pills to keep him going during the day. Then, the sixty-three year old married governor fell in love with a twenty-three year old stripper known as Blaze Starr. They were often seen together with increasing frequency at New Orleans nightclubs. By May 1959, Long's increasingly bizarre behavior became too serious to ignore. Late that month, he delivered a ninety- minute harangue to a joint session of the legislature. His remarks were incoherent and obscenity-laden, attacking certain legislators and others whom he considered his enemies. Finally, no longer able to speak, he was helped from the Capitol building and returned to the governor's mansion. There he was confined to his bedroom while his wife made preparations to take him to a psychiatric clinic in Texas. Not content to wait quietly, he shattered his bedroom window and started screaming "murder." Long did not leave for Texas quietly or willingly, but once he was out of the state, his lieutenant governor automatically assumed the position of acting governor.[95]

After more than two weeks of Long's constant demands and threats, as well as in response to his writ of habeas corpus, the family agreed he could return to Louisiana, provided that he would seek further treatment at a Louisiana hospital. Long was then admitted to the agreed upon institution, but he left within a few hours, only to be involuntarily re-institutionalized at another state facility. Making full use of his telephone privileges, Long arranged to become legally separated from his wife so that she could no longer file commitment papers. He also fired the head of the state hospital board, installing a political ally who in turn fired the hospital's superintendent. The new superintendent promptly released the governor. The Louisiana attorney general, sensing a political opportunity, certified the governor "unable to carry out the duties of his office."[96] Yet again, however, Long was saved when the secretary of state, with the full support of the lieutenant governor, refused to sign the papers authorizing the lieutenant governor to serve as governor. The net result was to leave Long in office for the balance of his term.[97]

So ended Louisiana's first experience with managing the disability of its chief executive. Less than four decades later, the state had another opportunity to deal with the state's disability provision. Louisiana's colorful recent governor, Edwin Edwards, served a record-setting four terms between 1972 and 1996. Twice indicted for racketeering and bribery during his third term, Edwards escaped judgment first by a hung jury and the second time by acquittal.[98] Despite lengthy

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[95] *See* LA. CONST. art. IV, § 19 (defining the state's current succession provision).

[96] KURTZ & PEOPLES, *supra* note 94, at 221.

[97] *See id.* at 211-23.

[98] *See* Tyler Bridges, *The Big Sleazy*, THE NEW REPUBLIC, Apr. 18, 1994, at 19; Jim Yardley, *Around the South: Fast Eddie Slows Down: Louisiana Governor Folds His Cards, Retires Form Public Office*, ATLANTA J. AND CONST., Jan. 7, 1996, at C8.

trials and demands for his resignation,[99] no one apparently thought of implementing the state's elaborate disability section.[100]

On November 8, 1938, Illinois Governor Henry Horner suffered what must have been a very serious heart attack. [101] Shortly thereafter, he began a four and a half month convalescence in Florida. His absence from Illinois automatically vested the lieutenant governor with the powers of his office. Upon Horner's return to the state in April 1939, his authority was instantly restored, but he rarely came to his office in the state house, and only his closest advisors had access to him. A leading legislator suggested that a committee of clergymen and physicians examine the governor, but since this suggestion was made in the heat of a primary election campaign, it was not pursued. The day before the April 1940 primary election, the lieutenant governor, citing the governor's illness, proclaimed himself acting governor, but the secretary of state and attorney general sided with Governor Horner. They instructed other state officials to ignore the lieutenant governor's proclamation. Candidates loyal to the governor defeated both the lieutenant governor and the state auditor in the primary.

Following the election, and after the legislature reconvened, a committee of state legislators called on the governor and found him to be in apparent good health. By June, however, his condition must have declined, as he left his home in Springfield by ambulance for a residence he had leased in a northern suburb of Chicago. His condition failed to improve, and within a few more months, pretense gave way to reality. On October 5, the governor's secretary signed and filed with the secretary of state a "certificate of disability." The next day, the governor died.

In this limited way, Illinois established some precedent for a voluntary disability procedure, despite the lack of any specific constitutional or legal provision giving the governor's aide authority to take such an action.[102]

Fifty years later, Illinois would have another governor suffering from heart disease. Despite careful diet and a regular regimen of exercise, Governor Jim Edgar required heart bypass surgery in 1994.[103] His condition necessitated further

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[99] Press accounts after his first indictment reported concern that the governor would not have time for his official duties. "There was speculation that Edwards was beginning to hammer together a team to handle the day-to-day operation of state government while he turns his attention to preparations for what is expected to be a lengthy trial." Raad Cawthon, *Charges Mark Sharp Reversal in Edward's Career*, ATLANTA J. AND CONST., Mar. 1, 1985, at A2.

[100] *See* LA. CONST. art. IV, §§ 17-18.

[101] For an account of the Horner story, see generally Clyde F. Snider, Notes, *Gubernatorial Disability*, 8 U. CHI. L. REV. 521 (1941) and Michael S. Reich, *Executive Disability In Illinois—An Unresolved Problem*, 65 CHI. BAR REC. 162 (1983).

[102] The current Illinois Constitution was not drafted until 1969. See Reich, *supra* note 101, at 165-71 for a discussion of the new constitution's provisions.

[103] *See* Thomas Hardy, *Edgar's Health Is Issue Now and for Fall Campaign*, CHI. TRIB., July 9, 1994, at 1. The 47-year-old governor required quadruple heart bypass surgery four months before the general election. His administrative and campaign staffs were quick to provide a "rosy prognosis." *Id.* The article summed up the Governor's condition twelve

medical intervention in 1998.[104] Both times, and especially following the 1994 surgery, he underwent a period of reduced activity and convalescence, but no transfer of office occurred.[105] Perhaps none was necessary, but in any case, Illinois did not build on the Horner precedent.

G. Summary

What can we conclude from our states' experience with disability succession, beyond their rich variety of constitutional and legislative approaches? Some state provisions mirror the federal approach.[106] Others have created special disability commissions or involved their courts.[107] A few have failed to flesh out any specific procedures. No state has yet developed a consistent pattern for applying their disability procedures, with the sole exception of addressing when a governor's absence from the state requires transfer of power to the lieutenant governor. Other disability situations have been "handled" by delaying implementation of the procedure, or by using some mechanism not provided by law at the time.[108] While more recently developed state procedures provide interesting ideas, unfortunately, they too remain untried.

IV. WHAT, IF ANY, CORRECTIVE ACTION IS NEEDED AT THE FEDERAL LEVEL?

The Twenty-Fifth Amendment provides three points at which action can be taken: (1) the President can invoke the disability provisions and step aside on his own initiative;[109] (2) the Vice President and a majority of the Cabinet (or such other

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hours after surgery: "Edgar was alert and placing telephone calls from the intensive care unit at Good Samaritan Hospital." *Id.* at 10. The article also reminded readers of the governor's low fat diet and 45 minute daily workout. *See id.*

[104] *See* Ray Long, *Edgar Is out of Hospital*, CHI. TRIB., June 10, 1998, at 2-4.

[105] *See* Rick Pearson, *A 'Heartbeat Away' Hits Home as Edgar Recovers From Surgery*, CHI. TRIB., July 10, 1994, at 12-4: "Aides to Edgar said they saw no need to transfer the duties of governor to [Lieutenant Governor] Kustra, as provided for in the state constitution. They also highlighted the fact that Edgar spoke to the legislative leaders by conference call on Friday from his hospital bed." *Id.* Succession in 1994 was complicated by the fact that the lieutenant governor had announced 10 days prior to the heart attack that he would resign within a few weeks to begin a new career as a radio talk show host. *See id.* Apparently, Governor Edgar has nine lives, since in addition to his 1994 bypass surgery and 1998 angiogram and drug treatment, he has had angioplasty in October 1992 and gallbladder surgery in June 1993. *See id.* In 1996, his State of Illinois airplane was struck by lightning, filling the cabin with smoke and requiring an emergency landing. *See* Rick Pearson and William Mullen, *For Planes, Lightning Not a Shock*, CHI. TRIB., May 9, 1996, at 1.

[106] *See supra* at p. 21.

[107] *See supra* at 22-24 (commissions) and 19-20 (courts).

[108] *See* Hansen, *supra* note 16, at 721-24 for brief descriptions of various cases of gubernatorial disability prior to 1961.

[109] U.S. CONST. amend. XXV, § 3 directs the President to transmit his written declaration of disability to the President pro Tempore of the Senate and the Speaker of the House of

body as Congress may designate) can declare the president disabled;[110] and (3) if the President objects to the involuntary determination of disability, the final decision is made by Congress with two-thirds vote of each house required to sustain the determination of disability.[111]

The Twenty-Fifth Amendment aims to resolve the disability issue within the Executive Branch itself, if possible, first by the President's own declaration and if not, then by the Vice President in conjunction with the Cabinet (or "other body"). If the Executive Branch cannot solve the problem, then the final decision rests with the other political branch, Congress. The bias in favor of the Executive Branch is reinforced by limiting Congress's role to that of a "court of last resort." Thus, congressional involvement is triggered only after a referral from the Executive Branch, and Congress has *no* power to initiate a disability proceeding. The third branch, the federal judiciary, has no role at all. By limiting the role of Congress and providing no role for the federal judiciary, the Twenty-Fifth Amendment is designed to sustain the separation of powers doctrine, one of the major principles underpinning the federal constitution.

A. Constitutionally Sound, But Can It Work?

While remaining faithful to the constitutional doctrine of separation of powers, the Twenty-Fifth Amendment ironically gives the power to initiate the disability process to the people most beholden to the President. Even if the Vice President was not a presidential political ally prior to their election, the Vice President is generally "hand picked" by the same President against whom he must now move.

Representatives. The President can resume his office by sending to the same officials a declaration that his disability no longer exists. In both cases, logic would seem to require similar notices to the Vice President, though this section contains no such requirement. *See id.*

[110] U.S. CONST. amend XXV, § 4 provides that when the Vice President and a majority of the Cabinet (or other body designed by Congress) deliver to the President Pro Tempore and Speaker a declaration of the President's disability, the Vice President immediately becomes Acting President. If the President transmits to the same congressional officials a declaration that he is not disabled, the Vice President and majority of the Cabinet (or other body) have four days to react. If they agree with the President, he resumes his office. If they still feel that the President is disabled, the Vice President continues as Acting President, but the issue is then transferred to Congress for final decision. *See id.*

[111] *See id.* Once in the hands of Congress, speed becomes a consideration. Section 4 requires a vote "within 21 days after receipt of the written declaration" of disability. At this stage, with the legislative branch determining the leadership of the Executive Branch, the President is given the advantage. The disability determination can only be sustained by two-thirds vote in each house. If the vote in either house fails to reach this level, the President resumes his office. Presumably, the Vice President and Cabinet would be free to begin the process over, but the President probably could be expected rather rapidly to make, from his point of view, appropriate changes in the Cabinet. *See id.*

The Cabinet serves at the sufferance of the President, and most Cabinet members surely will be reluctant to "betray" the President.[112]

When President James A. Garfield was shot in 1881, Vice President Chester Arthur initially decided not to even return to Washington, for fear that he would appear too eager to seize power from the stricken leader.[113] Vice President Marshall made it clear that he would take no action to assume the duties of the disabled President, Woodrow Wilson.[114] Absent any leadership from Marshall, Secretary of State Lansing called the Cabinet into session several times between October 1919 and February 1920. When Wilson was informed of these actions, he demanded Lansing's resignation; it was tendered February 12, 1920.[115]

When President Reagan was shot in 1981, the President's staff and Cabinet gathered at the White House to discuss the President's condition. The Attorney General explained the Twenty-Fifth Amendment. The President's assistant quickly concluded that the "subject was inappropriate" and the rest of the group agreed.[116] Why was there this reluctance when the facts seemed so clear? The answer may lie in the fact that the Cabinet and especially the large White House staff are extensions of the President himself. They often have no power base of their own. Their authority, their status derives directly from their personal relationship with the President.[117] Thus, requiring them to decide the President's disability puts them in the awkward position of jeopardizing their own positions, since the Vice President may want others to assume their duties.

Some commentators looking at this sorry record conclude that "the complicated procedures provided in section 4 are not likely to be enforced unless the President is comatose or obviously cognitively impaired."[118] Yet the mechanism can work if the President and Vice President plan for its use. President Reagan more or less invoked the procedures during his 1985 cancer surgery,[119] and President Bush was prepared to turn power over to his Vice President if he had needed surgery in 1991.[120] President Eisenhower and Vice President Nixon formalized their understanding of disability in the pre-Twenty-Fifth Amendment era. Presidents Kennedy and Johnson had similar agreements with their respective Vice

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[112] *See* ABRAMS, *supra* note 2, at 243-45. *See also* Link & Toole, *supra* note 7, at 1695-96.

[113] *See* JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT 8-9 (1992); *see also* FEERICK, FROM FAILING HANDS *supra* note 22, at 121.

[114] *See* FEERICK, FROM FAILING HANDS, *supra* note 22, at 176. Marshall would only act if Mrs. Wilson and the President's doctor agreed to a joint resolution from Congress asking him to assume the duties of the presidency. *Id.*

[115] *See id.* at 170-71, 175-77.

[116] *See* Abrams, *supra* note 9, at 538. The report on White House staff attitudes continues at 539-40.

[117] *See id.* at 541-42.

[118] Link & Toole, *supra* note 7, at 1695.

[119] *See id.* (discussing Reagan's action).

[120] *See* ABRAMS, *supra* note 2, at 261.

Presidents.[121] Nothing would preclude current and future Presidents and Vice Presidents from entering similar arrangements. In fact, such agreements would seem both more necessary and easier to invoke, now that there is a specific procedure to implement. While such understandings might not work in every situation, they certainly could contribute to a more automatic implementation of the process if the political will is present at the appropriate time.

B. Would Creation of a Formal Commission on Presidential Disability Improve the Current Process?

As noted earlier, several states have adopted disability commissions.[122] While the commission system has yet to be tested in any of those jurisdictions, the idea has a certain plausibility: by taking the decision out of partisan politics and letting disinterested experts decide, the potential for a smoother transition should be enhanced. Advocates of this approach cite the medical profession's experience in applying the *Guides to the Evaluation of Permanent Impairment*[123] or other systems of medical logic as a means for determining disability on the basis of medical fact and not political power dynamics.[124] Underlying this approach is the belief that physicians routinely differentiate between conditions that cause some degree of impairment and those that produce disability.[125]

Despite its seeming attractions, there are several limitations to the commission approach. Vesting such a commission with decision-making power in the federal context will require another constitutional amendment. Considering the length of time required to enact the Twenty-Fifth Amendment, a further amendment to create a commission could take years or decades, especially absent a real crisis to force the issue into the spotlight.[126] However, by a simple vote of Congress, a

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[121] *See* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 22 at 55-56.

[122] *See supra* text at 25-26.

[123] *See* Bert E. Park, M.D., *Protecting the National Interest: A Strategy For Assessing Presidential Impairment Within The Context of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 593, 598 (1995). The *Guides* are prepared under the direction of the American Medical Association. *See id.*

[124] *See* ABRAMS, *supra* note 2, at 222-27 where the author develops his own guidelines for activating the succession mechanism—e.g., surgery requiring general anesthesia, treatments requiring significant amounts of psychoactive drugs (such as narcotics, tranquilizers, and barbiturates), illness, injury or emotional condition that impairs judgment, life threatening diseases, death of immediate family member, diagnosis of Alzheimer's, and inability to communicate. *See id.*

[125] *See* Park, *supra* note 123, at 595-56 (discussing how doctors, unlike politicians, at least have the training to do so, though noting that a physicians' unfamiliarity with the President's particular condition would be an obstacle to making a truly informed determination).

[126] *See* Feerick, *supra* note 11, at 380-81 for a concise history of the Twenty-Fifth Amendment. The first case of prolonged presidential disability was the 80-day agony of James Garfield in 1881. The Twenty-Fifth Amendment was ratified in 1967, in the aftermath of Eisenhower's three illnesses and Kennedy's assassination. *See id.*

commission of medical experts could be designated as the "other body" referred to in section 4 of the amendment. Absent further constitutional change, a commission would still have to act with the concurrence of the Vice President, but at least informed medical experts would play enough of a role in the process to perhaps minimize some of the political considerations that have previously prevented the use of presidential disability procedures.

Even this more limited proposal has drawbacks. Unless the panel meets and establishes guidelines prior to a crisis, the designated physicians may find it difficult to function in an emergency setting. Moreover, there is an issue of who and how to select the panel's members. Would panel participants be subject to normal federal rules governing conflicts of interest and financial disclosure?[127] Would they have fixed terms? Would they be compensated? One possible solution is to name physicians already serving in government positions such as the Surgeon General, the head of the National Institutes of Health, or a panel of doctors from the Institutes, high ranking physicians from the military, etc. One commentator boldly describes a panel of physicians with specific specialties:

> Because the type of presidential impairment that should concern us most relates to diseases that adversely affect brain function and consequent decision-making, I would envision a team of consultants to include (but not necessarily be restricted to) the following physicians: two neurologists, two internists with demonstrable expertise in hypertension and cardiopulmonary pathology, and two psychiatrists. The seventh member should be the White House physician, who not only would provide an overview of the President's health, but might represent the swing vote in the unlikely event a deadlock ensues. Nominated before an upcoming election by either the Institute of Medicine or the American Medical Association, the credentials of prospective nominees could then be examined in a public forum such as open House and Senate committee hearings. The White House physician, in consultation with the President and Vice President, would then select the team for a four-year tenure.[128]

One technical difficulty with naming a panel of doctors as the "other body" is raised by the amendment's author, former Senator Birch Bayh. In his view, legislative history indicates that Congress intended the "other body" to replace the Cabinet only if the Cabinet is deadlocked for political or other reasons and cannot

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[127] *See* Katy J. Harriger, *Who Should Decide? Constitutional and Political Issues Regarding Section 4 of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 563, 582 (1995).

[128] *See* Park, *supra* note 123, at 596-97; *cf.* Edwin M. Yoder Jr., *Determining Presidential Health Under the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 607, 613 (1995) (noting "It is idle to suppose that medical specialists, however distinguished, will ever be invited to override the political decisionmakers, to interfere materially with political judgment, or to intervene in a presidency in the absence of severe traumatic illness or injury.") *Id.* at 612. He also expresses concern about "the multiplicity of speculation" that medical specialists might conjure up. *Id.*

resolve the issue.[129] If this view prevails, a commission could be formulated only after a crisis had developed and Executive Branch deadlock occurred. If the President's disability lasts only a few weeks or months, then it is unlikely that the commission would be established and functioning before the crisis had passed. While this approach may work well for determining whether the President suffers from a permanent disability, it is too cumbersome and time-consuming to be used for a disability of short duration. Of course, Congress might disagree with Senator Bayh's reading of legislative history, and create a disability commission long before the crisis point.

Arguments in favor of physician panels are grounded on the assumption that disability is solely rooted in medical causes. While presidential disabilities so far have been caused by illness or injury, it need not always be so. Some of the examples at the beginning of this Article describe obvious non-medical situations, such as the President's being taken hostage, or becoming preoccupied by impeachment or criminal charges. In these situations, a physician panel would not possess insight beyond that of the Vice President and the Cabinet.

There is another, perhaps more subtle reason to question whether a panel of physicians would possess the proper perspective on when to invoke the procedure. A physician's role is always patient-focused: What is the condition of *this* patient? What is in the best interest of *this* patient? When it comes to presidential disability, this traditional physician orientation, while certainly relevant, may not be dispositive. There is a broader context to be considered when the patient is the President, and the key issue is not only what is best for the patient, but what is best for the country. This latter aspect reintroduces political considerations that must often co-exist with medical ones. Former Senator Bayh has expressed this point in these words:

> A panel would be ill-equipped to understand the various political factors which weigh in the determination of whether a specific President or Vice President is better able to fulfill the powers and duties of the presidency at a given point in time. For example, who would have been best equipped to determine whether an ill Woodrow Wilson or a Vice President Thomas Marshall could better serve as President? Who would have been best qualified to choose between an ill Franklin Roosevelt and a relatively unknown Vice President Henry Wallace? A critically wounded Ronald Reagan or Vice President George Bush? The Vice President and the Cabinet were given their responsibilities under the Twenty-Fifth Amendment because they are personally familiar with whether or not the President is doing his job. They are also in a position to be able to assess the alternatives and the gravity of governmental circumstances at the time.[130]

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[129] *See* Birch Bayh, *The Twenty-Fifth Amendment: Dealing With Presidential Disability*, 30 WAKE FOREST L. REV. 437, 446 (1995).

[130] *Id.* at 448.

C. *If a Physician-Only Panel Isn't Right, Is There a Better Group of Decision Makers?*

As noted earlier,[131] several states have disability commissions that mix medical experts and political officials. In the aggregate, these states draw panel members from a wide variety of backgrounds, including the governor's chief of staff, his personal physician, the lieutenant governor, various executive branch officials, leaders of each house of the legislature, the chief justice, state university officials, and medical school deans. Connecticut is unique in permitting the governor to name four of the nine members.[132]

Various suggestions for a federal panel include: the Chief Justice, senior cabinet officials, and congressional leaders from both parties.[133] Presumably, such a grouping could be assembled by statute and empowered to act with the Vice President as the "other body" provided for in section 4. However, the Chief Justice may refuse to participate. During consideration of the Twenty-Fifth Amendment, some advocated a role for the federal judiciary, by either including federal judges as panel participants, or giving the judiciary exclusive jurisdiction to determine disability. Then Chief Justice Earl Warren, speaking for himself and his eight associate justices, expressed opposition to serving in any such capacity.[134] In addition, congressional involvement in the early stage of a potential disability determination would surely raise the separation of powers issue. A combination of medical experts and political officials may find making a decision difficult since they do not have a common framework for determining disability.

D. *How Can the Present Structure Be Made More Effective?*

The Twenty-Fifth Amendment cannot be easily changed, and that may be a good thing. If our political leaders would try harder to make the current process work, much could be accomplished in short order. With cooperation and goodwill, many of the suggested improvements described in this Article could easily be grafted onto our present structure. To achieve this result, four things must occur: (1) commitment by the President to develop the necessary procedures and clarify the respective roles of the people taking part in the decision; (2) cooperation and involvement by the Vice President and Cabinet; (3) voluntary participation of the American Medical Association or other agencies of organized medicine; and (4) sustained interest by the press and public in the disability issue. This last factor, probably the most difficult to achieve, is the most vital, since sustained public attention is likely the key to achieving the other three.

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[131] *See supra* text at 22-24, and notes 68-75.

[132] *See* CONN. GEN. STAT. ANN. § 3-1a(a) (West 1988).

[133] *See* Paul H. Blackman, *Presidential Disability and the Bayh Resolution*, 20 W. POL. Q. 440, 452 (1967).

[134] *See id.* at 452-53.

E. President's Commitment

As mentioned elsewhere in this Article, several Presidents have had formal disability agreements with their Vice Presidents.[135] While these agreements provide a historical starting point, any agreement used today must be expanded to address the full range of disability situations, both medical and non-medical. Medical contingencies could usefully be subdivided into categories such as emergency situations, prescheduled surgery, and the management of chronic illness.[136] The duration and degree of disability obviously differ depending on the situation and these differences may dictate different responses. If procedures do not already exist, immediate attention should be given to clarifying the command structure and emergency communication procedures that will be used to deal with crisis situations.[137] As the Reagan incidents illustrate, the White House staff will have to be made to understand that the disability procedure, and not their natural desire to protect the President (and preserve their own positions and authority), must prevail.

F. Involvement of Vice President and Cabinet

The Vice President and the Cabinet will undoubtedly commit themselves to following the disability procedures if the President makes clear his own commitment to use the procedure. The entire Cabinet serves at the President's pleasure; if they believe that he wants the disability protocols used, they are much more likely to fulfill the role prescribed for them by the Amendment. The Cabinet's record to date has not been good.[138] To raise the bar, both the President and Vice President should address the issue during their election campaigns. The issue should also play a part in the confirmation process of each Cabinet member. This increased inquiry will heighten awareness of the disability issue and focus attention on the seriousness of this portion of the Cabinet's legal duties.

G. Support of Organized Medicine

Even without a formal commission on disability staffed by medical personnel, the active involvement of organized medicine could provide the Vice President and Cabinet with important background information. These physicians could serve as an advisory group, rather than as the decision-making "other body" referred to in the Amendment's section 4. One logical way to organize this group is to have the President appoint a group of five or seven doctors with different specialties that reflect the President's own medical history. These appointments could be made for four years at the beginning of the President's term, subject to review and rating of

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[135] *See* ABRAMS, *supra* note 2; *see also* FEERICK, *supra* note 121.

[136] *See* Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 501 (1995).

[137] *See* Abrams, *supra* note 9, at 547.

[138] *See supra* notes 114-15 (Wilson Cabinet) and notes 116-17 (Reagan Cabinet).

the physicians by the American Medical Association.[139] Since it would be best if these physicians knew each other before a crisis developed, they should meet once a year to at least review the results of the President's annual physical, as well as have the opportunity to meet and interact with the White House staff designated as their liaisons. Of course, the President would have to agree to the disclosure of his medical report to the advisory board. Without the President's active involvement and cooperation, no disability procedure will work well. The key role of an expert panel would be their input on the point at which a presidential impairment crosses over into disability.[140]

H. Public and Media Focus

As is always the case, if Americans are indifferent to and ignore the burdens of democracy, they cannot enjoy the full benefits of the democratic form of government. Disability of the people's chief executive should be of central importance to everyone, since it is not that rare an occurrence. Former President Jimmy Carter noted that of the eighteen Presidents serving during the twentieth century, four died in office; nine had cardiac disease; five had serious hypertension; and four suffered strokes. Six twentieth-century Presidents experienced major surgery;[141] these are just the medical histories we know about. It does not stretch the imagination to assume that any number of these Presidents suffered mild or more severe depression associated with the pressures of the job or political or personal setbacks. Furthermore, there is no reason to assume that presidential disability will be any less of a concern in the twenty-first century.[142]

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[139] This procedure is analogous to the American Bar Association's screening of nominees for federal judgeships. *See* Harriger, *supra* note 127, at 578-79.

[140] *See* Park, *supra* note 123, at 594, 596-97, 601.

[141] *See* Jimmy Carter, *Presidential Disability and the Twenty-Fifth Amendment*, 272 JAMA 1698 (1994). Chief Executive disability, of course, is not solely an American problem. The most recent foreign example involved the President of Croatia, Franjo Tudjman, who by November 1999 was no longer able to govern. Incomplete Constitutional provisions and divided political leadership delayed the transfer of certain presidential powers for several weeks. *See* Steven Erlanger, *With President Gravely Ill, Croats Face Succession Issue*, N. Y. TIMES, Nov. 25, 1999 at A6. *See also* Erlanger, *Croatia Moves to Declare President Incapacitated*, N.Y. TIMES, Nov. 26, 1999 and Erlanger, *With Leader Incapacitated, Croatian Power Is Transferred*, N.Y. TIMES, Nov. 27, 1999, at A6.

[142] Very early in the 2000 presidential election the Democratic hopeful, former Senator Bill Bradley, announced that he suffered from arterial fibrilation, often referred to as an irregular heart-beat. This disorder was first diagnosed in 1996 and since that time, Senator Bradley has on three occasions received a treatment known as cardioversion, which requires a brief period of sedative-induced unconsciousness. Asked by New York Times medical correspondent Lawrence K. Altman what he would do as President if such a procedure were needed, Senator Bradley was quoted as saying, "Interesting, I do not know. I had not thought of that. [T]he 25th Amendment sounds like a reasonable way to go." He then added that this is "a decision that I can make down the road a little bit." Lawrence K. Altman, *Bradley's Doctors Say He Is in Excellent Shape*, NY TIMES, Jan. 30, 2000, at National 18.

Given the importance of the presidential office, and the frequency of presidential medical problems (not to mention non-medical reasons for disability), the American people should demand that candidates address the disability procedures during their campaigns. Each presidential nominee should commit to a proactive use of the disability procedure, including empowering the Vice President and Cabinet and appointing a medical advisory board to advise the President and his staff. The media should monitor whether the President is fulfilling his commitment. The President needs to understand that the people expect their business to be addressed, and that no shame attaches to implementation of the disability mechanism, even for short-term reasons. The President must accept the concept; so too must the citizens, beholden officials, and political allies who sometimes think of the President as larger than life.[143]

These recommendations would require little or no legislation,[144] and no change at all to the Constitution. The presidential election of 2000 provides a window of opportunity to press for these results. The only "catch" (and it is a serious one) is obtaining and sustaining a commitment from the President. That responsibility rests squarely with the public and media.

V. CONCLUSION

The challenges of presidential disability will not go away. The central importance of the President to our national life and to world order requires a national dialogue on how best to address his potential disability. Except for brief periods after each incident of presidential disability, the public has been largely indifferent. With the aging of America, more families will be facing disability issues on a very personal level. Now is therefore the ideal time to expand this thought process to include the leader of our national family. Without changing one word, the Twenty-Fifth Amendment can be made a far more useful tool. But no

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Appearing on the ABC News program *This Week* the day the New York Times article was published, Senator Bradley was again asked about invoking the Twenty-Fifth Amendment. His response was still tentative:

> Well, President Bush has the same condition. And they talked about what they would do in that circumstance, and concluded that it would be appropriate if a cardioversion was to take place, that there would be a transfer. I've looked at it. I think that's probably appropriate. I'll make the decision at the time, but I think that it would be an appropriate thing if I decided to do a cardioversion.

THIS WEEK with Sam Donaldson and Cokie Roberts: On the Campaign Trail (ABC television broadcast, Jan. 30, 2000). Senator Bradley's response reflects an *ad hoc* approach. If the Twenty-Fifth Amendment is to play a larger role in the American presidency, the candidates will have to think more deeply about the subject. The media and the public will also need to press for a more formal and more automatic transfer procedure.

[143] *See* Bayh, *supra* note 129, at 449-50, discussing the fourth recommendation of the Miller Commission on Presidential Disability, urging broader public discussion of the issue.

[144] A Presidential Medical Advisory Board might be best formalized by legislation that included a modest budget and small staff.

tool works well by itself. Modifying the existing mechanism or creating new tools will have little practical impact without the public and presidential will to use them. The people as a whole, and their elected and appointed officials are the craftsmen who can, if they will, make our existing disability tools work for the well-being of all.