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# Protecting Against an Unable President: Reforms for Invoking the 25th Amendment and Overseeing Presidential Nuclear Launch Authority

Democracy and the Constitution Clinic

Fordham University School of Law

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Louis Cholden-Brown, Daisy de Wolff, Marcello Figueroa, Kathleen McCullough

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This report was researched and written during the 2018-2019 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, which is focused on developing non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic is supervised by John D. Feerick and John Rogan.

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**Dedication: Senator Birch Bayh, principal architect of the 25th Amendment, January 22, 1928-March 14, 2019**

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## Executive Summary

The immense powers of the presidency and the vast array of global threats facing the United States make it essential to always have a president who is physically and mentally capable of discharging the office's responsibilities. The 25th Amendment was designed to protect against the dangers of an unable president. The amendment's Section 4, which to-date has not been invoked, sets forth the mechanism by which the vice president and either the principal officers of executive departments or an other body created by legislation can declare a president unable to continue discharging the duties of his or her office.

But the 25th Amendment does not necessarily shield the nation from all harms that an unable president might cause. One of the president's most important responsibilities—the power to deploy nuclear weapons—can be exercised unilaterally and essentially at a moment's notice. Current launch procedures may not provide enough time for invocation of the 25th Amendment.

Reforms are needed to help ensure that the 25th Amendment can be invoked when necessary and to diminish the possibility that an unable president may misuse the office's nuclear powers.

This report chronicles the history and text of the 25th Amendment and describes recent legislation introduced by members of the House of Representatives and the Senate for establishing a Section 4 "other body" to conduct presidential disability assessments as well as legislation to limit the president's nuclear authority. This report then makes four proposals.

Proposal 1 recommends that Congress create a three-person other body composed of the highest-ranking members of the current president's political party in the House of Representatives and the Senate, as well as a third individual. Suggestions for the third member of the other body include a recently retired Supreme Court justice appointed by the

current president's political party, the White House chief-of-staff, and former presidents and vice presidents of the current president's political party. This other body would be established by Congress if the vice president certifies that the president has dismissed at least one-third of the principal officers of the executive departments within 30 days.

Proposal 2 recommends an internal reporting mechanism allowing certain high-ranking personnel from the Executive Office of the President as well as other individuals, such as the first lady and the White House physician, to anonymously report observations of possible presidential disability to the White House chief-of-staff and White House counsel. If, by the joint assessment of the chief-of-staff and counsel, reports of presidential disability are sufficiently corroborated, then the counsel would have a duty to bring the matter to the attention of the vice president, who is the indispensable actor in the process of invoking the 25th Amendment's Section 4.

Proposal 3 would require the Office of Legal Counsel to develop procedures at the start of each presidential administration for recording the votes of the participants in a presidential disability determination, transmitting the declaration of presidential disability to Congress, and for all other legal and technical matters related to a Section 4 inability determination. After developing these procedures, the Office of Legal Counsel would be required to distribute the procedures to all participants in a potential presidential disability assessment.

Finally, Proposal 4 recommends that Congress use its appropriations power to require the Department of Defense to consult with House and Senate leadership on a regular basis about the nation's nuclear weaponry program. Congress might also require the Department of Defense to advise the vice president and principal officers of executive departments who serve on the National Security Council of any unanticipated changes in the nation's nuclear footing. Such notification could lead those officials to invoke the 25th Amendment if an unable president attempted to misuse his or her nuclear authorities.

# Introduction

The assassination of President John F. Kennedy in November 1963 was the eighth time that a president had died in office.<sup>1</sup> In addition to the presidents who had not survived their tenures, others had suffered serious physical and psychological ailments.<sup>2</sup> Several of the prior presidential deaths and disabilities had triggered discussion of the gaps in the Constitution's procedures for presidential succession, especially the absence of a constitutional method for declaring a president unable.<sup>3</sup> But sufficient momentum for reform never built—until the Kennedy assassination. Two months after the assassination, Congress held hearings on presidential succession<sup>4</sup> and, in a year-and-a-half, the proposed 25th Amendment headed to the states for ratification, which it received in February 1967.<sup>5</sup>

The nation had experienced the perils of presidential frailty before, but the time in which the Kennedy assassination occurred was different. It was the beginning of the nuclear age, and the need to always have an able president was greater than ever.<sup>6</sup> With the Cold War as a backdrop, Congress acted quickly to clarify and elaborate on the constitutional provisions for presidential succession.<sup>7</sup> The 25th Amendment included procedures for removing an “unable” president from the office's powers and duties.<sup>8</sup> A major purpose behind those procedures was ensuring that a capable president was always on guard to defend the nation from any threats it might face and that a president who had lost his or her capacity could not do any harm.<sup>9</sup>

This report addresses one of the same challenges the 25th Amendment's framers confronted: protecting against the dangers of an unable president. The 25th Amendment provides the constitutional mechanism for separating a president from his or her powers and duties when necessary. But, as this report highlights, action is needed to plan for implementations of the amendment. Additionally, there are some scenarios where the amendment's invocation might be impractical, such as fast-moving emergencies or situations where the officials empowered to invoke the amendment are hesitant to act. These scenarios demand reevaluation of the policies that provide the president with one of the office's most consequential powers—the unilateral authority to launch nuclear weapons. Accordingly, in addition to advancing recommendations for the 25th Amendment's implementation, this report also recommends reforms designed to prevent undue harm that might result from the president's nuclear powers.

Part I of this report discusses existing constitutional procedures for scenarios where the president becomes unable and provides an overview of relevant proposed legislation. Part II focuses on the provision of the 25th Amendment that allows Congress to create an “other body” to act with the vice president to declare the president “unable.” This Part ultimately proposes a three-person “other body” that would serve if a certain number of principal officers of the executive departments are dismissed. Part III proposes creating a reporting mechanism for Executive Office of the President (“EOP”) personnel who have concerns about the president's capacity. Part III also clarifies procedural aspects of the 25th Amendment and recommends that the Office of Legal Counsel (“OLC”) create procedures for recording votes cast under Section 4 of the 25th Amendment to declare the president unable, transmitting the disability determination to Congress, and resolving legal and technical issues related to Section 4. Finally, Part IV focuses on the president's unfettered power to deploy nuclear weapons and proposes that Congress utilize budgetary powers to mandate closer coordination with the Department of Defense with respect to the nuclear arsenal. The final Part also recommends that Congress consider requiring the defense secretary to notify the vice president and other principal officers of the executive department who sit on the National Security Council of any unanticipated changes in the nation's nuclear footing, in case use of the 25th Amendment is needed to remove unable president before nuclear weapons are deployed.

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1 See JARED COHEN, *ACCIDENTAL PRESIDENTS: EIGHT MEN WHO CHANGED AMERICA* xi (2019).

2 See John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 907, 918-22; see generally Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed By Psychological Illness*, 79 *FORDHAM L. REV.* 843 (2010).

3 JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 49-55 (3d ed. 2014).

4 See *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. (1964).

5 FEERICK, *supra* note 3, at 104-05.

6 See Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 964 (2010).

7 See *id.* at 963-64.

8 U.S. CONST. amend. XXV, §§ 3-4.

9 See Goldstein, *supra* note 6, at 964.

# I. Procedures for an “Unable” President

This Part begins with a description of the 25th Amendment’s provisions. It then discusses the meaning of presidential inability and its relation to concerns over the president’s nuclear powers. This Part concludes with an overview of recent proposed legislation regarding the 25th Amendment’s other body provision and the president’s authority to order nuclear launches.

## A. The 25th Amendment

The 25th Amendment addresses what happens when the president is unable to discharge the power and duties of his or her office, in addition to clarifying the vice president’s status upon succession to the presidency and creating a way to fill vacancies in the vice presidency. The amendment is made up of four sections. Section 1 states the vice president shall become president if the president is removed from office, dies, or resigns.<sup>10</sup> Some interpretations of the Constitution’s original Succession Clause had asserted that the vice president became president when he acted in place of an unable president, permanently displacing the president from the office.<sup>11</sup> The prospect of preventing a disabled president from returning from office, even if he recovered, discouraged some vice presidents from acting in place of disabled presidents.<sup>12</sup> The 25th Amendment clarified that the vice president only becomes president in cases where a president permanently leaves office due to death, resignation, or removal.

Section 2 allows the president to nominate a vice president when there is a vacancy in the office. The president’s nominee must receive approval from majorities of both houses of Congress.<sup>13</sup> This section ensures that the 25th Amendment’s inability procedures function as intended; without a vice president, those procedures are essentially inoperable.

Section 3 permits the president to voluntarily transfer the powers and duties of the presidency to the vice president when he or she is unable to discharge the powers and duties of the presidency.<sup>14</sup> Section 4 creates a method for the vice president, acting with either the principal officers of the executive departments or an other body created by Congress, to declare the president unable. The vice president serves as acting president following such a declaration, but the president can contest the determination, which might result in Congress evaluating the president’s capacity.<sup>15</sup>

## B. Presidential Disability and Nuclear Implications

A test for determining whether a president is “unable to discharge the powers and duties” of his or her office was intentionally left out of the 25th Amendment.<sup>16</sup> Although the amendment’s legislative record frequently references physical and mental ailments,<sup>17</sup> its inability procedures are not dependent on a medical determination.<sup>18</sup> But the amendment’s framers did not intend it to be a means of ousting of an unpopular president.<sup>19</sup>

Senator Birch Bayh, one of the principal architects of the 25th Amendment, quoted President Dwight Eisenhower to explain that “the determination of Presidential disability is really a political question.”<sup>20</sup> The 25th Amendment leaves that political determination to the vice president and either “the principal officers of the executive departments” or an “other body” created by Congress.<sup>21</sup>

The debate around the adoption of the 25th Amendment played out against a backdrop of nuclear anxiety.<sup>22</sup> As the discussions of an American Bar Association Conference on Presidential Inability and Succession demonstrated, little

10 U.S. CONST. amend. XXV, § 1.

11 See Feerick, *supra* note 2, at 918-19.

12 See *id.* at 919-20.

13 U.S. CONST. amend. XXV, § 2.

14 U.S. CONST. amend. XXV, § 3.

15 U.S. CONST. amend. XXV, § 4.

16 Jeffrey Rosen, *The 25th Amendment Makes Presidential Disability a Political Question*, ATLANTIC, May 23, 2017, <https://www.theatlantic.com/politics/archive/2017/05/presidential-disability-is-a-political-question/527703/>; *A Modern Father of Our Constitution: An Interview With Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 802 (2010) (“So the question that I think you have lurking throughout the document is, ‘What’s disability?’”).

17 When the 25th Amendment was being debated by Congress in 1965, Senator Birch Bayh, the amendment’s sponsor in the Senate, said Section 4 was intended for use when the president is “unable to make or communicate his decisions as to his own competency.” 111 CONG. REC. 3282 (1965); Second Fordham University School of Law Clinic on Presidential Succession, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 929 (2017). Representative Richard Poff said inability under Section 4 included physical impairments that would inhibit the president’s ability to declare himself unable as well as psychological impairments that prevented the president from “mak[ing] any rational decision, including particularly the decision to stand aside.” *Id.*

18 *A Modern Father of Our Constitution*, *supra* note 16, at 802.

19 John D. Feerick, *Response to Akhil Reed Amar’s Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 Hous. L. REV. 41, 55 (2010) (“At various times during the debate of 1964 and 1965, it was made clear that unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an ‘inability’ within the meaning of the Amendment.”).

20 Birch Bayh, *The White House Safety Net*, N.Y. TIMES, Apr. 7, 1995, <https://www.nytimes.com/1995/04/08/opinion/the-white-house-safety-net.html>.

21 U.S. CONST. amend. XXV, § 4.

22 See Rebecca C. Lubot, “A Dr. Strangelove Situation”: *Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1175 (2017).

was perceived as possible to forestall the misuse of nuclear weapons by an “insane” president.<sup>23</sup> These nuclear fears were illustrated during the Watergate scandal.<sup>24</sup> As the possibility of impeachment grew in 1974, President Richard Nixon was drinking heavily and some officials viewed him as unstable.<sup>25</sup> Around the same time, Nixon told reporters, “I can go back into my office and pick up the telephone and in 25 minutes 70 million people will be dead.”<sup>26</sup> In the days before Nixon’s resignation, Defense Secretary James Schlesinger took the constitutionally dubious step of ordering the military to disregard orders from the president, including those pertaining to the use of nuclear weapons, unless confirmed by him or Secretary of State Henry Kissinger.<sup>27</sup>

## C. Recent Proposals

Recent legislative proposals have called for reforms related to the 25th Amendment’s other body provision and the president’s nuclear launch authority.

### 1. Oversight Commission on Presidential Capacity Act

On April 6, 2017, Democratic Representative Jamie Raskin of Maryland proposed the Oversight Commission on

Presidential Capacity Act.<sup>28</sup> This act proposed an eleven-member commission to serve as the other body under the 25th Amendment’s Section 4. If directed by Congress, the commission would carry out a medical examination of the president to determine whether a disability exists. The proposed commission would be composed of physicians and psychiatrists appointed by the majority and minority leaders of the House and Senate. Additionally, two members would be former high-ranking officials, such as former presidents and vice presidents.<sup>29</sup> The Oversight Commission on Presidential Capacity Act did not pass in the 115th Congress, but it received media attention<sup>30</sup> and 67 cosponsors.<sup>31</sup>

### 2. Legislation to Restrict First Use of Nuclear Weapons

In January 2019, two proposals were introduced in the 116th Congress to restrict the first use of nuclear weapons. The first of these two bills was introduced by Representative Ted Lieu (D-CA) and Senator Ed Markey (D-MA) and prohibits a first-use nuclear strike absent authorization from Congress.<sup>32</sup> This bill received 57 cosponsors in the House<sup>33</sup> and 13 cosponsors in the Senate.<sup>34</sup> Senator Elizabeth Warren (D-MA) and Representative Adam Smith (D-WA) similarly proposed legislation establishing that the United States generally will not use nuclear weapons first. This bill received 21 cosponsors in the House and four cosponsors in the Senate.<sup>35</sup>

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23 JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 252 (1965) (“there is practically nothing that could be done to meet a case where a President suddenly became insane and pulled the ‘nuclear trigger.’”).

24 While named for the break-in into Democratic National Committee headquarters by men associated with the reelection campaign of President Nixon, Watergate has by metonymy come to refer to various illegal and clandestine activities undertaken by the administration against political opponents spurring congressional inquiry and eventually the resignation of President Nixon to avoid impeachment.

25 See John A. Farrell, *The Year Nixon Fell Apart*, POLITICO MAG., Mar. 26, 2017, <https://www.politico.com/magazine/story/2017/03/john-farrell-nixon-book-excerpt-214954>; Robert D. McFadden, *James R. Schlesinger, Willful Aide to Three Presidents, Is Dead at 85*, N.Y. TIMES, Mar. 27, 2014, <https://www.nytimes.com/2014/03/28/us/politics/james-r-schlesinger-cold-war-hard-liner-dies-at-85.html>.

26 Richard Rhodes, *Absolute Power*, N.Y. TIMES, Mar. 21, 2014, <https://www.nytimes.com/2014/03/23/books/review/thermonuclear-monarchy-by-elaine-scarry.html>.

27 McFadden, *supra* note 25.

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28 H.R. 1987, 115th Cong. (2017).

29 Other high-ranking officials include the Secretary of State, Attorney General, Secretary of the Treasury, Secretary of Defense, or Surgeon General.

30 Ashley Killough, *Dem Proposes Panel to Remove President if Unfit to Lead*, CNN (July 3, 2017, 7:22 PM), <https://www.cnn.com/2017/06/30/politics/jamie-raskin-bill-panel-remove-donald-trump/index.html>.

31 All co-sponsors were Democrats. See H.R. 1987, 115th Cong. (2017).

32 All co-sponsors were Democrats or Independents other than Representative Walter B. Jones, Jr (R-NC). See H.R. 669, 116th Cong. (2019); S. 200, 116th Cong. (2019).

33 H.R. 669, 116th Cong. (2019).

34 S. 200, 116th Cong. (2019).

35 S. 272, 116th Cong. (2019); H.R. 921, 116th Cong. (2019).



## II. The “Other Body” Under the 25th Amendment’s Section 4

Section 4 of the 25th Amendment sets forth a protocol for transferring power from the president to the vice president in situations in which the president is unable to discharge the powers and duties of his or her office but refuses to or cannot voluntarily transfer power. Section 4 states:

Whenever the Vice President and a majority<sup>36</sup> 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.<sup>37</sup>

The 25th Amendment does not set forth who should serve on the other body or the circumstances under which a Section 4 other body should be established. Nor does the 25th Amendment specify when Congress should create an other body. This omission allows Congress to wait to create an other body until circumstances require it.

Our proposal for an other body seeks to preserve the dignity of the presidency and to protect national security by minimizing a power void that could incite domestic, social, or financial panic, or incentivize opportunistic foreign aggression. The proposal aims to provide precise guidelines for restoring certainty and stability as quickly as possible in a situation where the president’s capacity is called into question.

The framers of the 25th Amendment designated the principal officers of the executive departments<sup>38</sup> as the default panel to work with the vice president to assess a president’s ability to perform his or her duties. Although the language of this

amendment does not specify under what circumstances an other body should evaluate the president’s ability, the legislative history makes clear that the other body is for when the principal officers of the executive departments “for political reasons or otherwise, becom[e] a roadblock” to assessing the president’s ability.<sup>39</sup>

### **Proposal 1: A Three-Person Other Body Should be Created When the President Dismisses More Than One-Third of the Principal Officers of the Executive Departments**

Congress should create an other body to make a presidential disability determination with the vice president if, within 30 calendar days after principal officers of the executive departments discuss invoking Section 4, the president discharges more than one-third of them. A president might take such an action to prevent the amendment’s invocation.

Given the vice president’s integral role in a presidential disability assessment, he or she should have the responsibility of certifying that the criteria for convening the other body are met. A vice president may choose not to certify the existence of these requisite conditions if the vice president believes the president dismissed one-third or more of the principal officers for good cause. For example, between July 19 and July 20, 1979, President Jimmy Carter dismissed five Cabinet secretaries to “shake up” his administration,<sup>40</sup> not to block invocation of the 25th Amendment.

Once the vice president certifies the dismissal of one-third or more of the principal officers within the relevant 30-day period, Congress should act to create the other body to displace the principal officers of the executive departments as the panel for making presidential disability determinations.<sup>41</sup> This other body would exist until the president who, having formerly been

36 In the April 1965 House of Representatives floor debates, Representative Richard Poff (R-VA) proposed that an other body should be convened if the principal officers of the executive departments are deadlocked in their inability determination. There is no constitutional requirement that Congress take any further action if there is a tie vote because a tie vote means that there is no majority. There currently are 15 executive department heads, making a 50-50 vote unlikely. However, a “tie” could occur if (a) one or more principal officers is unavailable or abstains from voting or (b) if the number of executive departments changes. Representative Poff proposed that, if there is a tie among the executive department heads, the other body should be all of the principal officer of the executive departments plus one individual to cast a tie-breaking vote. See 111 CONG. REC. 7941 (1965).

37 U.S. CONST. amend. XXV, § 4.

38 The principal officers of the executive departments are often incorrectly assumed to be the heads of every Cabinet-level official. The 15 executive departments are set forth in 5 U.S.C. § 101. They are the departments of: State, the Treasury, Defense, Justice, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Education, Veterans Affairs, and Homeland Security. 5 U.S.C. § 101 (2006).

39 Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 446 (1995).

40 See John Dickerson, *What Happened When President Carter Fired Five Cabinet Officials*, SLATE (Aug. 2, 2017, 1:47 PM), <https://slate.com/news-and-politics/2017/08/whistlestop-on-carters-cabinet-purge.html>; *Cabinet Officers in the Carter Administration*, JIMMY CARTER PRESIDENTIAL LIBR., [https://www.jimmycarterlibrary.gov/about\\_us/cabinet\\_officers](https://www.jimmycarterlibrary.gov/about_us/cabinet_officers).

41 In period before Congress took this action, the remaining principal officers of the executive departments, and any of their successors appointed pursuant to the Federal Vacancies Reform Act, 5 U.S.C. § 3345 (2016), would serve as the presidential disability review panel together with the vice president.

declared disabled by the vice president and the other body, reassumes the powers and duties of the presidency.<sup>42</sup>

The 25th Amendment states that the vice president must act with a “majority” of the principal officers of the executive departments and implies that the vice president should act with a “majority” of the members of an other body if one is created.<sup>43</sup> Therefore, it would be preferable for the other body to be composed of an odd number of members.<sup>44</sup> To ensure the other body convenes quickly and acts effectively, we propose a three-person<sup>45</sup> other body. This other body should consist of: (1) the highest-ranking member of the president’s political party in the House of Representatives (presumably either the speaker of the House or the minority leader); (2) the highest-ranking member of the president’s political party in the Senate (presumably either the president pro tempore or minority leader), and (3) another member of the president’s political party selected by the vice president and the other members of the other body.<sup>46</sup>

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42 If the president transmits in writing to the president pro tempore of the Senate and the speaker of the House of Representatives that he or she is no longer disabled, the vice president and the other body have four days in which to declare that the president continues to be disabled. The other body would be disbanded if the vice president and the other body do not contest the president’s resumption of his or her presidential powers. Retaining the other body as the disability determination panel throughout the duration of a president’s inability is desirable because the members of the panel would be familiar with the reasons for the initial presidential disability determination.

43 U.S. CONST. amend. XXV, § 4.

44 The language of Section 4 of the 25th Amendment clearly states that the vice president must act with a “majority” of the principal officers of the executive departments. However, because of the manner in which Section 4 is punctuated, it is unclear whether the amendment also requires a majority of the members of the other body to join with the vice president for purposes of declaring a presidential inability. See John D. Feerick, *The 25th Amendment: Its Crafting and Drafting Process, 2018-2019 CONLAWNOW* 161, 172. Dean Feerick raises a question as to whether, because commas setting off the other body provision were dropped without explanation from the final text of the amendment, the “majority” requirement in Section 4 applies only to the principal officers of the executive departments. *Id.*

45 In its “Reader’s Guide” to the 25th Amendment, Yale Law School’s Rule of Law Clinic notes that the dictionary meaning of the word “body” implies that a body of persons consist of more than one individual and that this interpretation of the word body is supported by the requirement that a majority of the other body find a presidential disability in order to trigger Section 4. See YALE LAW SCH. RULE OF LAW CLINIC, *THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER’S GUIDE* 17 (2018). We propose that the other body be made up of three people. If the majority requirement ultimately is held to apply to the other body, the other body should be composed of an odd number of individuals so there is an affirmative decision and votes do not fail simply because there is a tie. If the other body is convened, the nation will likely be in a period of crisis and having a small number of other body members would make it more likely to reach a decision expeditiously. The other body should consist of more than one individual and three is the smallest odd number greater than one.

46 If for any reason, the vice president and the two members of the other body fail to agree upon a third member within 48 hours of first convening, the other body could proceed by unanimous vote of the vice president and the two other body members.

The other body should be made up of members of the president’s political party for two primary reasons. First, they presumably have some loyalty to the president and are less likely to improperly invoke Section 4 for partisan benefit. Second, composing the other body of officials who share the president’s political affiliation is in keeping with the selection of the principal officers of the executive departments as the primary evaluation group under the amendment.

Three possible third members of an other body include the most recently retired Supreme Court justice who was nominated by a president of the current president’s political party, the White House chief-of-staff, or former presidents or vice presidents of the current president’s political party. A retired Supreme Court justice who was nominated by a president of the current president’s party could be an ideal other body member because he or she would likely be able to make a non-partisan inability determination. Furthermore, a retired justice would also understand the proper parameters for invoking the 25th Amendment and the political implications of an inability determination.

But there are drawbacks to involving members of the Court. Former Chief Justice Warren Burger told the University of Virginia’s Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment that sitting justices should not be involved in a 25th Amendment inability determination in case the Supreme Court was called to rule on an application of the 25th Amendment.<sup>47</sup> A retired justice would not be called to rule an application of the 25th Amendment. However, even a retired Supreme Court Justice might not be willing to participate in a Section 4 inability determination because he or she may feel that participation in an inability determination could somehow bias the decision-making of the sitting Supreme Court. A retired justice may also decline to vote on a disability determination due to lack of regular contact with the current president, which could be helpful to assess changes in the president’s behavior.

The chief-of-staff presumably works with the president on a daily basis and would thus be able to assess whether the president was exhibiting signs of cognitive impairment. Additionally, the chief-of-staff would most likely be a member of the president’s political party and be loyal to the president. However, because the chief-of-staff serves at the pleasure of the president, a president who has already discharged one-

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47 MILLER CTR. COMM’N No. 4, REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 9 (1988), [https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth\\_amendment\\_reports](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_reports).

## 8 Protecting Against an Unable President

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third of the principal officers of the executive departments who participated in an inability determination might well also dismiss a chief-of-staff for the same reason.

Finally, former presidents and vice presidents of the current president's political party are strong candidates for an other body because they are familiar with the demands of the presidency as well as the political implications of making an inability determination. However, a former president or vice president may have little, if any, regular contact with the current president. Additionally, former presidents and vice presidents may not wish to risk their legacies by becoming involved in a contentious matter.

The principal officers of the executive departments are part of the same branch of government as the president. The framers of the 25th Amendment included them in Section 4 to preserve the separation of powers.<sup>48</sup> However, if their ability to determine presidential inability with the vice president is compromised, as it would be if the president fired one-third or more of them, then the involvement of other branches of government is necessary.

The advantage of having congressional leaders on the other body is four-fold. First, if the issue at hand is a psychological illness, congressional leaders would be as familiar with the president's personality and mannerisms as most principal officers of the executive departments. This familiarity would let them make personal observations about changes in the president's behavior. Second, congressional leaders would be extremely sensitive to the political implications of a disability determination. Third, if the president could not convince these congressional leaders that he or she was able to perform the duties of the office, then the chances of successfully appealing his or her case to the entirety of Congress is low. Finally, the other body must be created by Congress "by law."<sup>49</sup> Therefore, any bill establishing this other body is subject to a presidential veto, absent an override by Congress. A president is more likely to sign a bill delegating authority to make a disability determination to members of Congress from his or her political party.

Even though Congress should not create an other body before a presidential inability scenario arises, lawmakers should develop a conception of what officials would be part of the other body beforehand. It would be inauspicious for Congress to spend time debating the composition of an other body when

a disability determination is needed. The legislative history of Section 4 suggests that the amendment's framers anticipated that any legislation creating an other body would be enacted when that other body was required to make an inability determination.<sup>50</sup> For example, in the Senate floor debates on the 25th Amendment, Senator Bayh indicated that an other body might be created where the vice president fails to obtain a majority vote of the principal officers but still believes the president is unfit to carry out his or her official duties.<sup>51</sup> At such a time, the president would be either unable or disinclined to sign into law legislation creating an other body. Because it is unlikely that the president would sign any such legislation, the unsigned bill would not become law for ten days (excluding Sundays) if the president did not affirmatively veto the bill sooner, assuming Congress remained in session for the ten days.<sup>52</sup> More likely, the president would veto the legislation, and Congress would then have to collectively override a presidential veto with a two-thirds vote of each house of Congress.<sup>53</sup> Given the political controversy inherent in a presidential disability determination, creating additional dissension would not serve the best interests of the nation.

It might seem desirable to pass legislation setting forth who would serve on an other body before the need arises. However, having an other body in existence that will not make a disability determination until a contingency occurs might lead to confusion about the process of invoking the 25th Amendment. Furthermore, allowing an other body to be created by Congress at the time when a president's ability is called into question would allow Congress to make a definitive determination on the composition of the other body. For example, former presidents from the current president's political party might be suitable members of the other body; however, at the time of a disability determination, there may not be individuals who are living, able, and willing to serve in that capacity.

To preserve the dignity of the presidency and the safety and prestige of the United States, it is essential that, if a president's fitness to lead is called into question, proceedings to evaluate his or her ability be conducted respectfully and responsibly. This proposal aligns with the intent of the 25th Amendment and ensures the efficiency in what is likely to be a tense and uncertain time.

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48 See Goldstein, *supra* note 6, at 987-88.

49 U.S. CONST. amend. XXV, § 4.

50 111 CONG. REC. 15,384 (1965).

51 *Id.* at 15,383.

52 See U.S. CONST. art. I, § 7.

53 *Id.*

### III. Section 4 Procedure and Reporting Mechanisms

Section 4 of the 25th Amendment makes the vice president the indispensable participant in its procedure for removing an “unable” president from the office’s powers and duties.<sup>54</sup> Yet there is no publicly known process or mechanism to bring concerns about a president being “unable to discharge the duties of his office” to the vice president’s attention. It is also unclear whether detailed procedures are in place for how the vice president and the principal officers of the executive departments or other body should utilize Section 4. Given the provision’s complexity, guidance on how to properly use it is essential. Further, the intense loyalty staff members feel toward a president may prevent serious concerns about presidential disability from being raised.<sup>55</sup> With these realities in mind, the proposals in this section aim to create a set of processes to bring concerns about presidential disability to the attention of the vice president and to resolve uncertainties related to Section 4 procedures.

Proposal 2, the first proposal discussed in this section, would create a reporting mechanism to allow specific personnel from the Executive Office of the President (“EOP”) to report observations of possible presidential disability to the White House chief-of-staff and White House counsel. If the chief-of-staff and the counsel agree that reports of presidential disability are sufficiently corroborated, then the counsel would have a duty to bring the matter to the attention of the vice president. Proposal 3 requires the Office of Legal Counsel (“OLC”) to develop procedures for recording the votes of the participants in a presidential disability determination, transmitting the declaration of presidential disability to Congress, and for any other legal and technical matters related to Section 4. After developing these procedures, the OLC would be required to distribute the procedures to all of the constitutional participants named in the 25th Amendment: the president, the vice president, the principal officers of the executive departments or other body, the speaker of House, and the president pro tempore of the Senate.

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54 See U.S. CONST. amend. XXV, § 4; THOMAS H. NEALE, CONG. RESEARCH SERV., R45394, PRESIDENTIAL DISABILITY UNDER THE TWENTY-FIFTH AMENDMENT: CONSTITUTIONAL PROVISIONS AND PERSPECTIVES FOR CONGRESS 8 (2018); Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships in Managing Crisis*; PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 195 (Robert E. Gilbert ed., 2000).

55 MILLER CTR. COMM’N No. 4, *supra* note 47, at 8.

#### Proposal 2: Create a Reporting Mechanism for Executive Office of the President Personnel

EOP personnel may play an important role in assessing presidential disability because of their continuous interaction and communication with the president.<sup>56</sup> The EOP includes many of the president’s closest advisers in matters of policy, politics, and management.<sup>57</sup> Thus, EOP personnel can directly observe possible manifestations of presidential disability and assess whether the president is “unable to discharge the duties of his office.”<sup>58</sup> However, concerns about job security and intense loyalty to a president may hinder serious discussions about president’s capacity.<sup>59</sup>

An internal reporting mechanism should be created to ensure personal loyalty and job security concerns do not inhibit EOP staff from raising serious concerns about a president’s ability to discharge the office’s responsibilities.<sup>60</sup> The reporting mechanism should provide confidentiality and protection from reprisal. The mechanism should allow personnel from the EOP who have been designated either assistant to the president, special assistant to the president, or deputy assistant to the president to report observations of possible presidential disability.<sup>61</sup> Those reports should then be brought to the attention of the chief-of-staff and White House counsel. The reporting mechanism should also be open to select persons who are not part of the EOP, or who do not possess the above-listed designations but are in a unique position to observe the manifestation of a disability, such as the first lady and the White House physician.<sup>62</sup> The chief-of-staff and counsel should be tasked with jointly determining if the disability report is sufficiently corroborated by other reports,

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56 See *id.*; *A Modern Father of Our Constitution*, *supra* note 16, at 795.

57 See Executive Office of the President, USA.GOV, <https://www.usa.gov/executive-office-of-the-president> (last visited July 24, 2019).

58 See U.S. CONST. amend. XXV, § 4.

59 See MILLER CTR. COMM’N No. 4, *supra* note 47, at 8.

60 JANE MAYER & DOYLE McMANUS, LANDSLIDE: THE UNMAKING OF THE PRESIDENT viii-x (1988). In 1987, concerns about President Reagan’s mental acuity were uncovered when Jim Cannon, an aide to newly appointed Chief-of-Staff Howard Baker, interviewed White House staffers in private and gave them assurances of confidentiality. *Id.*

61 The three EOP designations specified in the proposal are representations of staff rank within the EOP and do not necessarily correspond with a staffer’s job title. Senior-level staff are designated assistant to the president, second-level staff are designated deputy assistant to the president, and third-level staff are designated as special assistant to the president. See Martha Joynt Kumar, *Assistants to the President at 18 Months: White House Turnover Among the Highest Ranking Staff and Positions*, WHITE HOUSE TRANSITION PROJECT, at 4 (2018), [http://www.whitehousetransitionproject.org/wp-content/uploads/2018/10/Kumar\\_Assistants\\_to\\_the\\_President\\_Turnover\\_10-02-2018.pdf](http://www.whitehousetransitionproject.org/wp-content/uploads/2018/10/Kumar_Assistants_to_the_President_Turnover_10-02-2018.pdf).

62 See MILLER CTR. COMM’N No. 4, *supra* note 47, at 10-11.

personal observations, or other information. If sufficiently corroborated, the counsel should then have a duty to report the matter to the vice president.<sup>63</sup> The counsel and chief-of-staff should also bring the matter to the attention of the president if they reasonably believe that the president would consider voluntarily transferring power by activating Section 3 of the 25th Amendment until the alleged disability has dissipated or been resolved.<sup>64</sup> After receiving a report of disability from the counsel, the vice president may convene the principal officers of the executive departments or other body to determine what next steps should be taken.<sup>65</sup>

The reporting mechanism should not be open to persons who will later vote to answer the question of whether the president is “unable to discharge the powers and duties of his office.” Because the vice president, principal officers of the executive departments, or other body members will assess whether a disability has rendered the president “unable,” special care must be taken to maintain their objectivity and independent judgment.<sup>66</sup> In limiting the use of the reporting mechanism to persons who are not a part of the line of succession, concerns over “endless mischief” stemming from the actions of a vice president or specific principal officers of the executive departments or other body members would be partially dispelled.<sup>67</sup>

### **Proposal 3: Requiring the Office of Legal Counsel to Establish Procedures to Record the Votes of Participating Constitutional Actors, Transmit the Written Declaration of Disability to Congress, and Resolve All Other Legal and Technical Matters Related to Section 4.**

At the start of each presidential administration, the OLC should be charged with establishing procedures and clarifying ambiguities related to all legal and technical aspects of activating Section 4. Because the OLC is responsible for providing opinions to the executive branch on constitutional matters, it is already empowered to research and opine on ambiguous and difficult questions of law related to Section 4.<sup>68</sup> The OLC has established procedures to guide the conduct of executive officials.<sup>69</sup> Further, no one within the OLC is in the line of succession, nor would anyone in the OLC participate in a presidential disability determination. Therefore, OLC’s input is unlikely to raise concerns relating to conflicts of interest or political motivations of OLC attorneys. This last point may be especially important in conveying a sense of procedural legitimacy to the public in two key areas: recording the votes of the Section 4 participants and transmitting a declaration of presidential disability to Congress.<sup>70</sup>

The 25th Amendment’s text does not elaborate on how the vice president and the “principal officers” or other body should cast their votes on a potential presidential inability or transmit an inability declaration to the president pro tempore of the Senate and the speaker of the House.<sup>71</sup> The OLC should draw on the amendment’s legislative history and any other relevant legal and practical considerations to develop detailed procedures. Because of the unique circumstances that would surround a Section 4 disability determination vote, it is unclear whether the voting and transmittal procedures used by other executive or legislative committees would be appropriate. Further, it would likely undermine public confidence in the process of declaring a president disabled if rules related to voting and transmittal were determined in an ad hoc manner. Allowing the OLC to

63 It is important to note that Office of White House Counsel is not a statutorily created or recognized entity and does not have any statutorily defined duties. The White House counsel however, is constrained by professional ethical obligations which require him or her to act in the interest of the institution of the presidency, which may be different from the interests of a sitting president. See generally Jeremy Rabkin, *At the President's Side: the Role of the White House Counsel in Constitutional Policy*, 56 *LAW & CONTEMP. PROBS.* 63 (1993).

64 OFFICE OF THE COUNSEL TO THE PRESIDENT, CONTINGENCY PLANS—DEATH OR DISABILITY OF THE PRESIDENT 7 (Mar. 16, 1993), [https://ir.lawnet.fordham.edu/twentyfifth\\_amendment\\_executive\\_materials/10](https://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials/10) (stating that “a Section 3 transfer of authority is much more preferable to a Section 4 transfer”).

65 The vice president may also decide to discuss the possibility of invoking Section 3 of the 25th Amendment with the president.

66 *A Modern Father of Our Constitution*, *supra* note 16, at 795.

67 See MILLER CTR. COMM’N No. 4, *supra* note 47, at 10 (The Miller Commission stated that “it makes good political and common sense to try to relieve the Vice President the ambivalence that results from having to initiate the process leading to his or her own self-promotion to the highest office in the land.”); see NEALE, *supra* note 54, at 11.

68 28 C.F.R. § 0.25 (2016). Under the Judiciary Act of 1789, the president and the principal officers of the executive departments may request written opinions to questions of law from the attorney general. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (codified as amended at 28 U.S.C. §§ 511-513 (2012)). The authority has been delegated to several entities since 1933 and the OLC was ultimately vested with this power in 1953. See Att’y Gen. Order No. 9-53 (Apr. 3, 1953); see generally Foreword, 1 Op. O.L.C. Supp., at vii (2013) (documenting the organizational origins of OLC).

69 For example, during the Carter administration, the OLC “assumed a singular, centralizing role in intelligence oversight. The Office ‘played a major role’ in drafting President Carter’s executive order governing intelligence activities. The order gave the Attorney General Griffin B. Bell responsibility for oversight and regulation of executive intelligence activities, and the OLC both served as his ‘principal legal adviser’ and also had ‘primary responsibility for coordinating the drafting of the procedures as well as for their effective implementation.’” Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 822 (2017).

70 After Watergate and other scandals of the 1970s, President Carter and Attorney General Griffin B. Bell, relied in the institutions of formal legal review at the OLC to rebuild public confidence. Renan, *supra* note 69, at 904.

71 See OFFICE OF THE COUNSEL TO THE PRESIDENT, *supra* note 64, at 126.

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develop procedures that specify how the votes of the Section 4 participants are to be recorded and how the declaration of presidential disability is to be transmitted to Congress will compel those participating in a Section 4 determination to follow a pre-determined process. Once developed, the OLC procedures should be reviewed and, if necessary, revised at the beginning of each presidential administration.

There are some ambiguities in Section 4, most of which can be clarified by referring to the amendment's legislative history and, where necessary, taking clear positions on issues where there are conflicting statements in the legislative history.<sup>72</sup> For example, whether the vice president continues as acting president during the four days after the president has transmitted to Congress his or her written declaration that no inability exists<sup>73</sup> and what constitutes receipt of the president's written declaration to commence the 21-day period within which Congress must decide on the president's contested disability.<sup>74</sup> Given its responsibility to provide legal advice to the executive branch on all constitutional questions, the OLC can provide immediate clarity at the start of a new administration and avoid some of the public uncertainty might develop during Section 4 proceedings.

Some may assert that this proposal will exacerbate

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72 Fred F. Fielding, *An Eyewitness Account of Executive "Inability,"* 79 *FORDHAM L. REV.* 823, 833 (2010).

73 See NEALE, *supra* note 54, at 14-15; OFFICE OF THE COUNSEL TO THE PRESIDENT, *supra* note 64, at 22.

74 See U.S. CONST. amend. XXV, § 4; OFFICE OF THE COUNSEL TO THE PRESIDENT, *supra* note 64, at 21.

opportunities for "endless mischief" by inserting individuals who do not participate in a Section 4 determination into the process of declaring a president disabled. History, however, indicates that individuals who are not part of the Section 4 decision-making process have played significant roles in matters related to presidential disability.<sup>75</sup> This appears to be especially true when administrations have undertaken contingency planning.<sup>76</sup>

This proposal does not advocate for the OLC to implement the mechanisms specified in Section 4. Instead, this proposal calls for the OLC to clarify textual ambiguities and specify what procedures should be followed if the mechanisms of Section 4 were activated. Once procedures related to the legal and technical aspects of activating Section 4 have been established, the OLC would be required to disseminate the procedures, at a minimum, to all relevant constitutional actors, the White House chief-of-staff, and other high-level EOP staff. The OLC's clarification and procedures will, therefore, make it more difficult for any actor to create "mischief" under Section 4.

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75 See Fielding, *supra* note 72, at 830. In 1985, White House Counsel Fred Fielding convinced President Reagan to follow the procedures of Section 3 of the 25th Amendment before he underwent cancer surgery. After the surgery, Fielding, the chief-of-staff, and the press secretary decided to test whether Reagan was lucid enough to resume the powers of his office by having him read a letter. In responding to criticisms that Fielding, as a non-constitutional actor, inappropriately inserted himself into the process, Fielding has said "presidential declaration that he or she is fit . . . will never, in any real sense, stand alone . . . the role of any presidential adviser, on this or other issues, is to evaluate the circumstances for the President and provide your judgment and your recommendation to the President." *Id.* at 830-32.

76 *Id.*; see generally NEALE, *supra* note 54.

## IV. The President's Nuclear Authority

Section 4 of the 25th Amendment sought to address the fundamental question of how to prevent an unable president from exercising the most critical powers of the office—including the authority to launch nuclear weapons. During the Cold War, the president's power to act in emergencies or to repel invasion<sup>77</sup> was deemed superior to congressional authority to select warfare prerogatives.<sup>78</sup> However, a rebalancing is now warranted. As the Arms Control Association<sup>79</sup> warned in 2017, "Continuing to vest such destructive power in the hands of one person is undemocratic, irresponsible, unnecessary and increasingly untenable."<sup>80</sup> This Part evaluates a series of proposals over the past 40 years for constraining presidential authority to utilize nuclear weapons in particular circumstances. These proposals may sufficiently elongate launch processes to enable triggering constitutional protections, including the 25th Amendment, in cases of presidential instability. However, each proposal presents unresolved constitutional questions regarding the division of war powers that undermine their capacity to structurally reform present procedures. This Part, therefore, proposes Congress leverage its spending power to (1) require more close consultation between the Department of Defense and congressional leadership and (2) ensure the vice president and the principal officers of the executive departments on the National Security Council are kept apprised of any unanticipated changes in the nation's nuclear footing for scenarios where invocation of the 25th Amendment may be needed.

### A. Nuclear Launch Procedures

While specific nuclear launch procedures are highly-classified,<sup>81</sup> the basic contours for presidential authorization of a nuclear launch are well-known. When the president decides to consider launching a nuclear strike, whether preemptive or in response

to an impending or successful attack against U.S. assets, he or she confers with senior military and civilian leadership.<sup>82</sup> If initiated in response to an imminent or successful attack, such consultation may last mere minutes.<sup>83</sup> If the president determines to proceed, he or she will authenticate the order using the "biscuit," a laminated card with challenge code responses kept in the "nuclear football."<sup>84</sup> Once confirmed, the orders are transmitted to launch crews around the world who authenticate the order and prepare the missiles for launch.<sup>85</sup> This process takes as few as five minutes for land-based ordinance and 15 for launches from submarines.<sup>86</sup>

The requirement for final authentication by the launch crews is meant to assure the legality of any order by including principles of "military necessity, distinction and proportionality."<sup>87</sup> However, questions persist regarding whether the present procedure is sufficiently cumbersome to preclude imprudent launches<sup>88</sup> and whether relying on ad hoc disobedience, which is "both unreliable and fraught with constitutional and policy implications," is the appropriate solution.<sup>89</sup>

### B. War Powers

Congress's ability to curtail the president's authority to utilize nuclear weapons, whether in particular circumstances or pursuant to particular procedures, is predicated upon a contested interpretation of the president's war powers. The president is the commander-in-chief of the armed forces.<sup>90</sup> However, Congress possesses the authority to declare war and "make rules for the government and regulation of the land and naval forces."<sup>91</sup> Congress has repeatedly utilized these powers to define many aspects of the military, including size and

77 See *Prize Cases*, 67 U.S. 635 (1863).

78 Richard K. Betts & Matthew C. Waxman, *The President and the Bomb*, 97 FOREIGN AFFAIRS 119, 127 (2018) ("In the past, the enormous stakes of nuclear decision-making were used to justify expanded presidential powers, but today, the better argument is that the special challenges of nuclear decisions justify giving Congress some authority to regulate them.").

79 A nonpartisan membership organization founded in 1971, with the self-stated mission of "promoting public understanding of and support for effective arms control policies."

80 Daryl G. Kimball & Kingston Reif, *Time To Revise Nuclear Launch Policy*, HILL (Nov. 13, 2017, 10:15 AM), <https://thehill.com/blogs/congress-blog/foreign-policy/360055-time-to-revise-nuclear-launch-policy>; see also *Editorial: No One Should Have Sole Authority to Launch a Nuclear Attack*, SCI. AMERICAN, Aug. 1, 2017, <https://www.scientificamerican.com/article/no-one-should-have-sole-authority-to-launch-a-nuclear-attack/>.

81 See Joseph Trevichik, *Here's America's Plan for Nuking its Enemies, Including North Korea*, DRIVE, Apr. 17, 2017, <http://www.thedrive.com/the-war-zone/9056/heres-americas-plan-for-nuking-its-enemies-including-north-korea> (analyzing a redacted copy of present nuclear plans).

82 Bruce Blair, *Strengthening Checks on Presidential Nuclear Launch Authority*, ARMS CONTROL TODAY, Jan.-Feb. 2018, at 7-8.

83 *Id.*

84 *Id.* at 8; Michael Dobbs, *The Real Story of the "Football" That Follows the President Everywhere*, SMITHSONIAN MAG., Oct. 2014, <https://www.smithsonianmag.com/history/real-story-football-follows-president-everywhere-180952779/>. The nuclear football is carried by a military aide who accompanies the president at all times. *Id.*

85 Blair, *supra* note 82, at 8.

86 *Id.*

87 See *Authority to Order the Use of Nuclear Weapons: Hearing Before the S. Comm. on Foreign Relations*, 115th Cong. (2017) (statement of General C. Robert Kehler).

88 Betts & Waxman, *supra* note 78, at 120 ("[A]lthough common sense and careful official planning dictate a process to prevent an imprudent and impulsive president from starting a nuclear war, there is nothing stopping a determined president from overriding it.").

89 *Id.* at 122.

90 U.S. CONST. art. II, § 2.

91 U.S. CONST. art. I, § 8.

armaments.<sup>92</sup> In 1973, over the veto of President Nixon, Congress adopted the War Powers Resolution, curtailing the executive branch's authority to commit forces to armed conflict absent congressional authorization or certain exigent circumstances.<sup>93</sup> In the Senate Foreign Relations Committee report approving the bill, Chairman J. William Fulbright wrote, "I concur wholly . . . that Congress must retain control over the conventional or nuclear character of a war."<sup>94</sup> Fulbright subsequently offered an amendment to the legislation providing that, except in a declared war or "in response to a nuclear attack or irrevocable launch of nuclear weapons, the President may not use nuclear weapons without the prior, explicit authorization of the Congress."<sup>95</sup> The majority of the debate on the amendment addressed whether the resolution was the appropriate venue for resolving concerns over nuclear powers,<sup>96</sup> though some senators also expressed concern over the provision's constitutionality.<sup>97</sup> The amendment was defeated 68-10.<sup>98</sup> Since then, some have argued that Congress has explicitly<sup>99</sup> or through inaction<sup>100</sup> condoned unilateral presidential power in the nuclear arena, though any such delegations would be revocable.

One factor in the continued debate over inherent presidential authority to utilize nuclear weaponry without congressional

approval is the absence of consensus regarding whether nuclear weapons are improperly classified as conventional weapons. For example, many concur with President Truman's assertion that a nuclear weapon "isn't a military weapon. It is used to wipe out women and children and unarmed people, and not for military uses. So we have got to treat [nuclear weapons] differently from rifles and cannon and ordinary things like that."<sup>101</sup> Others, such as Senator Barry Goldwater, advocate for arming infantrymen with tactical nuclear weapons under the belief that they are conventional weapons.<sup>102</sup>

### C. Prior Proposals

Proposals to amend nuclear launch authority have fallen into three categories: consultation, approval, and prohibition. In 1975, the first major proposal after the unsuccessful Fulbright amendment was offered by the Federation of American Scientists ("FAS"). The FAS proposed that in all conflicts, with no exceptions, "so long as no nuclear weapons (or other weapons of mass destruction<sup>103</sup>) have been used by others, the President shall not use nuclear weapons without consulting with, and securing the assent of a majority of, a committee"<sup>104</sup> of Congress.<sup>105</sup> The proposal received significant attention

92 See A General Military Law, 10 U.S.C. subtit. A (governing procurement, organization, powers and personnel); Chemical and Biological Warfare Program, 50 U.S.C. ch. 32 (regulating chemical and biological warfare program).

93 War Powers Resolution, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548).

94 Jeremy Stone, *Presidential First Use is Unlawful*, 56 FOREIGN POL'Y 94, 100 (1984).

95 *Id.* at 100-01.

96 See, e.g., 118 CONG. REC. 12,453 (1972) (statement of Sen. Eagleton) ("this bill is not the proper vehicle for restricting the President's use of weapons previously appropriated by Congress to the executive arsenal. . . ."); *id.* at 12,451 (statement of Sen. Javits) ("I do not believe that this is the time or the place to make the decision that we will not use a nuclear weapon under any circumstances[.]").

97 *Id.* at 12,451 (statement of Sen. Javits) ("I have deep concern, and I am not trying to conclude the question, as to whether the President of the United States with his constitutional authority as Commander in Chief can be prevented from using a nuclear weapon in our arsenal in defense of the United States or in defense of the Armed Forces of the United States."); *id.* at 12,454 (statement of Sen. Cooper) ("I do not think that writing this language into a statute can in any way limit the constitutional authority of the President to use nuclear weapons if he thought it necessary to protect the existence of our country. We cannot by statute deny the constitutional power of the President.").

98 Stone, *supra* note 94, at 101.

99 The Atomic Energy Act of 1946 delegated to the president the authority to "direct the [Atomic Energy] Commission to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense." Authority of Commission, 42 U.S.C. § 2121(b).

100 See Peter Raven-Hansen, *Nuclear War Powers*, 83 AM. J. INT'L L. 786, 791 (1989).

101 See ROBERT H. FERRELL, HARRY S. TRUMAN: A LIFE 344 (1994); see also Yonkel Goldstein, Note, *The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1577 (1988).

102 *Nation: The Fear and the Facts*, TIME, Sept. 25, 1964. Such a distinction has been dismissed by former Defense Secretary James Mattis. Aaron Mehta, *Mattis: No Such Thing as a 'Tactical' Nuclear Weapon, But New Cruise Missile Needed*, DEFENSE NEWS, Feb. 6, 2018, <https://www.defensenews.com/space/2018/02/06/mattis-no-such-thing-as-a-tactical-nuclear-weapon-but-new-cruise-missile-needed/>; see Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION WHO DECIDES? 109, 119 (Peter Raven-Hansen ed., 1987) (arguing that no constitutional analysis can distinguish a nuclear weapon from a conventional one).

103 No treaty or customary international law provides an authoritative definition for weapons of mass destructions, but the Department of Defense define them as "[c]hemical, biological, radiological, or nuclear weapons capable of a high order of destruction or causing mass casualties, and excluding the means of transporting or propelling the weapon where such means is a separable and divisible part from the weapon." DEP'T OF DEFENSE, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 232 (2019), <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf>.

104 The committee would consist of the president pro tempore of the Senate and speaker of the House of Representatives, majority and minority leaders of the House of Representatives, majority and minority leaders of the Senate, chairmen and ranking minority members of the (1) Senate Committee on Armed Services; (2) House Committee on Armed Services; (3) Senate Committee on Foreign Relations; (4) House Committee on International Relations; and (5) Joint Committee on Atomic Energy (now defunct).

105 William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. OF LEG. 1, 3 (1986).



and review over the subsequent decades.<sup>106</sup> However, it was criticized based on its limited scope, concerns about difficulties defining “covered launches,”<sup>107</sup> and debates over whether it constituted a legislative veto prohibited by *INS v. Chadha*.<sup>108</sup> Noted constitutional law professor and commentator, Arthur S. Miller, rejected the FAS proposal and instead advocated for reviving legislative proposals requiring the president to consult with a congressionally created “Council of State.”<sup>109</sup> Other proposals call for constitutional amendments to resolve the underlying war powers controversy.<sup>110</sup>

In recent years, three approaches have been identified as potential methods for checking presidential action in the nuclear arena. First, congressional action could prohibit the first use of nuclear weapons. Two bills prohibiting such first use have been introduced in the 116th Congress.<sup>111</sup> The first bill discusses presidential war powers,<sup>112</sup> while the latter bill contains only one sentence that states, “It is the policy of the United States to not

use nuclear weapons first.”<sup>113</sup> This approach has received some criticism, including from Bruce Blair, who cites the potential of inextricably tying the president’s hands in the case of an “imminent and seemingly irrevocable nuclear strike,” especially given how long it might take to secure congressional approval.<sup>114</sup> Blair also cautions that a unilateral bad decision remains possible if a conflict lengthens or shifts after Congress grants authority for nuclear launch.<sup>115</sup> The legislation has also been attacked by Republican Senator Deb Fischer of Nebraska, the chairwoman of the Armed Services Committee Subcommittee on Strategic Forces. Fischer stated the proposed legislation “betrays a naïve and disturbed world view” since “Presidents from both parties, including the Obama administration, have rejected a no-first-use policy because it erodes deterrence, undermines allied confidence in US security guarantees, and risks emboldening potential adversaries.”<sup>116</sup>

A second avenue includes proposals that seek to bolster or supplement aspects of the 25th Amendment. These proposals include procedures that would require other officials to be advised of a possible nuclear launch and provide approval. Richard K. Betts<sup>117</sup> and Matthew C. Waxman,<sup>118</sup> in a joint paper supporting these proposals, stated: “any presidential order to launch nuclear weapons that is not in response to an enemy nuclear attack should require the concurrence of the Secretary of Defense and the Attorney General.”<sup>119</sup> While recognizing that this proposal may merely “[l]engthen[] the time in which an irrational launch order could be held up,” Betts and Waxman suggest it would “buy time for the most extreme solution” of determining a president disabled pursuant to the 25th Amendment.<sup>120</sup>

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106 See generally FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? (Peter Raven-Hansen ed., 1987).

107 Goldstein, *Failure of Constitutional Controls over War Powers in the Nuclear Age*, *supra* note 101, at 1583.

108 462 U.S. 919 (1983) (finding one house legislative veto violated separation of powers). Proponents of FAS proposal distinguished it as not revoking executive authority but extending it and argued that *Chadha* did not apply in the foreign policy arena where powers were shared. Allan Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, 3 HASTINGS CONST. L.Q. 233 (1985); William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1 (1986); see also *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 459 (D.C. Cir. 1982), *aff’d mem sub nom. Process Gas Consumers Group v. Consumers Energy Council of Am.*, 463 U.S. 1216 (1983) (“[T]he foreign affairs veto presents unique problems since in that context there is the additional question whether Congress or the President or both have the inherent power to act.”).

109 See Arthur S. Miller & H. Bart Cox, *Congress, the Constitution, and First Use of Nuclear Weapons*, 48 REV. OF POL. 424 (1986).

110 Goldstein, *Failure of Constitutional Controls over War Powers in the Nuclear Age*, *supra* note 101, at 1544 (“The proposed amendment would both (1) clearly establish congressional authority to set policy in all matters relating to the preparation and execution of war, hostilities, aggression, or defense of the United States, American citizens, and American interests, and (2) establish a private right of action against Congress for its failure to make diligent efforts to ascertain the relevant facts, to debate, and to set policy in this area.”); see also Ray Forrester, *Presidential Wars in the Nuclear Age: An Unresolved Problem*, 57 GEO. WASH. L. REV. 1636, 1639 (1989).

111 Restricting First Use of Nuclear Weapons Act of 2019, H.R. 669/S. 200, 116th Cong. (2019). Some contend that “whether Congress likes it or not, it must be involved in any [] decision” to order first use of nuclear weapons since “it is [otherwise] unconstitutional, in the absence of a declaration of war.” Jeremy Stone, *Presidential First Use is Unlawful*, 56 FOREIGN POL’Y 94, 95 (1984). Peter Raven-Hansen argues that the non-delegation doctrine requires Congress to make the choice of first-use policy but “cannot make it in advance of the event because that would give the President a blank check to declare war.” Raven-Hansen, *supra* note 100, at 791.

112 Restricting First Use of Nuclear Weapons Act of 2019, H.R. 669, 116th Cong. (2019).

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113 H.R. 921, 116th Cong. (2019).

114 Blair, *supra* note 82, at 10.

115 *Id.*

116 Ryan Browne, *Warren introduces bill to stop US using nuclear weapons first*, CNN (Jan. 30, 2019, 7:26 PM), <https://www.cnn.com/2019/01/30/politics/warren-adam-smith-nuclear-weapons/index.html>. President Barack Obama had considered declaring a “no first use” policy for nuclear weapons in the final year of his administration but was deterred by opposition from Secretary of State John Kerry and Secretary of Defense Ash Carter. Ankit Panda, *‘No First Use’ and Nuclear Weapons*, COUNCIL ON FOREIGN REL. (July 17, 2018), <https://www.cfr.org/background/under-no-first-use-and-nuclear-weapons>.

117 Director of the Saltzman Institute of War and Peace Studies at Columbia University and an Adjunct Senior Fellow at the Council on Foreign Relations.

118 Liviu Librescu Professor of Law at Columbia Law School and an Adjunct Senior Fellow at the Council on Foreign Relations.

119 Betts & Waxman, *supra* note 78, at 120; see also Kimball & Kingston, *supra* note 80.

120 Betts & Waxman, *supra* note 78, at 125.

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Finally, another proposal would designate the next two people in the presidential line of succession—ordinarily, the vice president and speaker of the House—as the necessary concurring officers.<sup>121</sup> Proponents of this approach argue that it has three important advantages: political legitimacy, democratic input, and independence of the concurring individuals. The assent requirement from both officers would be applicable regardless of whether the action was proactive, preemptive, or in response to an attack. The two officials could veto the launch order if they determined the president to be mentally unstable or otherwise unfit. The purpose would be to provide a necessary safeguard regarding the order’s lawfulness because there may not be sufficient time to activate the 25th Amendment in these situations.<sup>122</sup>

As the repeated actions of presidents of both political parties have demonstrated, the validity of the War Powers Resolution remains highly contested, and compliance has been incredibly inconsistent. Such volatility exemplifies the difficulty of evaluating the practical impacts of implementing any contested proposal for limiting unilateral presidential authority to initiate a nuclear strike. The possibility remains that adherence to the current policy will remain highly reliant on the ad hoc behavior of military officers who will be forced to determine whether a relayed presidential order is lawful. It is possible that the informal adjudication of the conflict presented between a presidential order and a congressional mandate will provide the requisite delay to permit consideration of the incapacity of the president and triggering Section 4 of the 25th Amendment. It is also important to consider concerns raised by many of the various proposals regarding implications for the deterrent value of the nuclear defense system<sup>123</sup> and the debate about

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121 Lisbeth Gronlund, David Wright & Steve Fetter, *How to Limit Presidential Authority to Order the use of Nuclear Weapons*, BULLETIN OF THE ATOMIC SCIENTISTS, Jan. 23, 2018. See also Forrester, *supra* note 110, at 1641 (“[R]equire the President to receive the concurrence of at least one of the two [representatives of the House and Senate] in the President’s plan of action”).

122 Gronlund et al., *supra* note 121.

123 See, e.g., Goldstein, *Failure of Constitutional Controls over War Powers in the Nuclear Age*, *supra* note 101, at 1586 (“to adhere religiously to orthodox principles of congressional war declaration would be to render the entire nuclear defense deterrence system virtually worthless”); *Authority to Order the Use of Nuclear Weapons*, *supra* note 87 (remarks of Peter Feaver) (“You want to make sure that you don’t propose a legislative fix that undermines the nuclear deterrent and, thus, compromises the effectiveness of why we have nuclear weapons.”); *id.* (remarks of Gen. Kehler) (“it enhances our deterrence to have some doubt in the mind of an adversary about under what conditions we would use a nuclear weapon”).

command and control itself.<sup>124</sup> However, absent a constitutional amendment, the respective postures of the executive and legislative branches make implementation of the prior four proposals unlikely.

#### **Proposal 4: Utilize Congressional Budgetary Powers to Mandate Closer Coordination with Defense Department on Nuclear Arsenal**

Congress should utilize its budgetary powers to ensure increased consultation regarding nuclear arsenal plans. Given Congress’ contested authority to legislatively preclude the use of nuclear weapons or to mandate the assent of executive or congressional officials, the power of the purse is the optimal choice to ensure the implementation of desired checks and balances. Congress should, therefore, compel the Department of Defense to engage in frequent consultation with House and Senate leadership about the nation’s nuclear arsenal plans and require updates when there are any sudden or unplanned changes in the United States’ nuclear footing. Such consultation would further empower Congress to fund only those purchases or that maintenance it considers integral to national security and to force the attrition of those systems or stockpiles it believes to not be in the nation’s best interest. Congress could additionally mandate that the secretary of defense inform executive branch national security leadership, including the vice president and other principal officers of the executive departments on the National Security Council, when there is an unanticipated change in the nation’s nuclear footing. Such notification could result in those officials evaluating the initiation a Section 4 process under the 25th Amendment.

This proposal would ensure that Congress (1) plays the proper role in outfitting and positioning nuclear weaponry and (2) contributes to a potential consensus around the need to activate Section 4. By avoiding the unresolved debate over the president’s war powers, this proposal presents the best option to provide immediate and meaningful protections against errant launches.

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124 See, e.g., *Authority to Order the Use of Nuclear Weapons*, *supra* note 87 (remarks of Sen. Rubio) (“[T]his is an important conversation, but one we should tread lightly on. Our allies who rely on U.S. defense assurances are watching, and if we create doubt in their minds about the capability or the willingness of the United States to live up to those commitments . . . it could have repercussions that are significant . . . I also think our adversaries are watching.”).

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## V. Conclusion

More than half-a-century ago, the framers of the 25th Amendment made great strides in planning for the perils of an unable president. Today's policymakers should continue to build on that legacy by working to ensure that it is possible to effectively invoke the amendment when needed and that there are additional checks placed on the president's nuclear authorities for scenarios where invocation of the amendment is not practical.



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