NOTES & COMMENTS

MENTAL DISABILITY AND THE EXECUTIVE: A COMPARATIVE ANALYSIS OF THE SEPARATION OF POWERS

by
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The doctrine of Separation of Powers is integral to the United States' constitutional system. To prevent tyranny, governmental power must be separated to ensure that no government institution nor official gains too much power. The U.S. Constitution was drafted with this central concern in mind. To achieve successful separation of powers, constitutions must make clear—or at least discernible—the boundaries and scope of each power. One of the most significant areas in which this clarity is required is in the election, maintenance, and removal of the country's executive leadership.

For over 175 years, the U.S. Constitution lacked a procedure for removing its president from office for reasons of ill health. This was not due to a surplus of healthy presidents. In fact, the history of U.S. presidents is one of frequent illness, sudden traumas, and eleventh-hour miracles. Numerous presidents narrowly avoided death, while countless others kept hidden their struggles with physical frailty and decline. Beyond physical ailments, presidents endure stress

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and mental conditions unmatched anywhere else. Yet, it was not until the passing of the Twenty-Fifth Amendment in 1967 that the United States had a constitutional procedure to handle presidential disability.

The Twenty-Fifth Amendment accomplished a great number of things. This Note examines Section Four of that amendment, which is the only provision that has never been used. Section Four governs the devolution of presidential powers when the president is unable or unwilling to recognize his own disability. This section has never been employed, but contemporary scholarship routinely examines its potential applications and consequences. One contested area within this scholarship is the application of Section Four to a situation where a president becomes mentally unfit to fulfill his official obligations. Most scholarship examines the difficulties of such an application, the flexibility of the procedure in such circumstances, and the various ways in which the amendment may be improved to handle such scenarios. However, two pertinent topics are largely absent from these conversations.

When the Twenty-Fifth Amendment was debated in Congress, much discussion was given to the issue of separation of powers. In this discussion, the proper roles of the legislative and executive powers were discussed at length. Discussion of the judicial power was less encompassing. At present, scholarship focused on the Twenty-Fifth Amendment largely ignores separation of powers or discusses the doctrine only as needed to propel a particular discussion.

Before the Twenty-Fifth Amendment was drafted, at the onset of the national discussion regarding presidential disability, John D. Feerick published an article identifying the significant gap in constitutional procedures to handle a situation of presidential disability. In this work, Feerick briefly touched upon how other countries handle such situations. Since that seminal article, virtually no attention has been given to the approaches of foreign nations to the issue of presidential disability.

This Note aims principally to reinvigorate these topics within contemporary scholarship and, in doing so, provide a thorough examination of how countries around the world use their governmental powers to address presidential disability. More specifically, this Note seeks to answer a novel question: what is the prudent—i.e. logical, practical, and legitimate—arrangement of government powers to address situations of a mentally disabled president? To answer this question, this Note engages in a multi-part investigation. Part I briefly discusses the American history of presidential disability leading to the creation of the Twenty-Fifth Amendment. The discussion then turns to the amendment's text, applications, and chief issues. Part II examines the constitutions of 126 countries and identifies broad trends in removal processes and establishes the first comprehensive taxonomy of constitutional approaches to the issue of presidential disability. To this end, this Note adds to modern scholarship the first

comprehensive analysis of the arrangement of governmental powers, medical professionals, constituents, and organs of state as used in constitutions around the world to determine and act upon head of state disability. Section II further parses this data and presents a macro-level picture of these various approaches before contextualizing the United States among international trends. Part III presents a novel recommendation based on lessons learned from the world's constitutions. These recommendations seek to improve the Section Four removal procedure while avoiding the pitfalls identified in contemporary scholarship.

It is the hope of this author that the arguments and data presented here serve to reinvigorate a narrowing field of scholarship, as well as encourage novel reconsideration of the assumptions that underlie that field.

INTRODUCTION

> History tells us that Presidents do more than win nominations and elections. They even do more than govern. They also do many of the same things that non-presidents do. They are energized and they become weary, they succeed and they fail, they rejoice and they mourn, they become sick and they die.
>
> —Robert E. Gilbert[1]

The prospect of a mentally ill president is unsettling. That the democratically chosen leader of the nation, international representative of its citizens, chief executive of its government, and commander in-chief of its military forces, could succumb to the ravages of mental impairment and wield their power dangerously, is an uncomfortable possibility. Yet, presidents are only human. Because of the president's significance, the immense power they wield, and the growing competencies of modern medicine, it is imperative that issues pertaining to the president's mental health be thoroughly considered. One significant component to consider must be the proper procedure for handling situations of mental impairment.

Formal scholarship on presidential disability in the United States began in 1963 with John D. Feerick's article entitled: "The Problem of Presidential Inability—Will Congress Ever Solve It?"[2] Feerick's exploration of the issue catalyzed meaningful policy discussions that resulted in the ratification of the Twenty-Fifth Amendment. This amendment addresses presidential disability by establishing two procedures for the devolution of presidential powers in situations of disability.[3] Since Feerick's seminal article, the issue of presidential disability has gathered increasing academic attention.[4] However, few scholars have focused intently on how

[1] Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by Psychological Illness*, 79 FORDHAM L. REV. 843, 843 (2010).

[2] John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).

[3] Part II examines these procedures in greater detail.

[4] *See, e.g.*, Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, *in* YALE FAC. SCHOLARSHIP SERIES 2010, http://digitalcommons.law.yale.edu/fss_papers/786; Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027 (2017); Joel K. Goldstein, *Taking from the Twenty-Fifth*

the doctrine of separation of powers should be applied to a situation of a disabled president. What is the prudent—i.e., logical, practical, and legitimate—arrangement of the executive, legislative, and judicial powers in such a scenario? Current scholarship is surprisingly quiet on this question. And while focus has been given to state constitutional procedures relating to executive disability,[5] virtually no scholar has examined non-U.S. constitutional provisions pertaining to the issue.[6] Furthermore, no scholar has examined the arrangement of constitutional powers in these procedures. These gaps in scholarship are significant.

The question of the prudent separation of powers in situations of presidential disability is of tremendous concern, despite receiving minimal attention by scholars. Separation of powers ensures the democratic legitimacy of the various branches and actions of government. The executive, legislative, and judicial departments have their mandates from the constituents of their republic. While not a clear-cut allocation of authority, these mandates nonetheless cultivate a legal culture that focuses intently on the origin and limits of constitutional authority. In a situation where a president is mentally impaired while in office, separation of powers is essential to determine the prudent and constitutionally permissible mode of addressing the problem. Succinctly, the question posed by this doctrine becomes: in a democratic system of government, who has the authority to remove, suspend, or otherwise displace the electorate's legitimately selected chief executive? This question is of unparalleled significance. Even if the president's mental impairment were apparent—even if it were obvious to every person in the country—a lack of constitutional authority to act upon such disability could be catastrophic. Without a clear constitutional procedure, any action in that scenario would objectively amount to a coup. At the same, any procedure delegating such authority creates by default an avenue for potential abuse. At one end, a de jure coup; at the other end, a de facto coup. The United States addresses this situation with the Twenty-Fifth Amendment, although the amendment has never been deployed in such a scenario. Because the amendment has not been used in this manner, questions and concerns abound.

This Note chiefly serves three purposes. The first purpose is to identify and discuss two of these paramount concerns. The second is to identify the various arrangements of governmental powers used in removal processes throughout the

Amendment: Lessons in Ensuring Presidential Continuity, 79 FORDHAM L. REV. 959 (2010); William Michael Treanor, *Introduction: The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements*, 79 FORDHAM L. REV. 775 (2010).

[5] *See, e.g.*, Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373 (2000); Feerick, *supra* note 2, at 102.

[6] For example, the discussion of foreign constitutions in Feerick's seminal article encompasses slightly over four pages and provides few specific examples. Feerick, *supra* note 2, at 105–10.

world to address the issue of presidential disability. The final purpose is to recommend congressional action to resolve some of the chief concerns identified based on lessons learned from analyzing world constitutions.

To achieve these principal aims, this Note is arranged into three parts. Part I examines the history of presidential disability in the United States, as well as the text, applications, and limitations of the Twenty-Fifth Amendment. Part II examines the constitutions of 192 countries and identifies their uses of the governmental powers in their constitutional procedures pertaining to presidential disability. This Section further discusses broad trends in the uses of these powers and contextualizes the United States' procedure among these trends. Part III further recommends congressional action to bring the U.S. more in line with international trends and address some problems with the Twenty-Fifth Amendment as it currently exists.

A. Terminology

Before turning to Part I, it is worthwhile to briefly discuss terms that will be used throughout this Note.

First, the term "disability" will refer to mental or physical ailments that negatively affect the president's ability to responsibly and meaningfully execute the duties of their office. By focusing on "mental disability," this Note is centered on the hypothetical situation of a president whose baseline ability to perform his functions is impacted significantly by cognitive ailment and who, as a consequence, wields the powers of his office irrationally and dangerously. Despite the various terms used by constitutions throughout the world,[7] this Note will use the term "disability."[8]

Second, the "arrangement of governmental powers" means the involvement of the legislative, executive, and judicial powers in the removal process. Terms related to governmental powers (i.e., legislative power) carry a broad interpretation and encompass collective bodies as well as significant members of those bodies. Thus, the executive power is comprised of not only the chief executive, but also any vice president(s) and Cabinet as well. Similarly, involvement of courts as well as individual judges equally constitute uses of the judicial power.

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[7] *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010, art. 130(1)(d) ("incapacity"); CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(20) ("permanent mental disability"); CONSTITUCÍON DE LA REPÚBLICA DE CHILE [C.P.] art. 29 ("illness"); CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 160 ("permanent inability"); CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40, 41 ("impediment").

[8] In using the terms "disability," "mental disability," "disabled," and "mentally disabled," this Note in no ways speaks in regard to individuals with mental or physical disabilities. The sole concern here, with the term "disability," is the disability of the president to responsibly execute the functions of her office as a result of a physical or mental impairment.

Third, the terms "another body" or "other body" broadly refer a constitutionally established body that is not wholly comprised of a state's legislature, judiciary, or executive branch, but that nonetheless has a prominent role within the country's constitutional structure.[9]

Fourth, the terms "removal" and "removal process" refer to the constitutional process for devolving the president's powers due to disability. The outcomes of these processes vary by country; however, this Note's focus is on the mechanisms leading to the devolution of presidential powers, and not on the outcome of such devolution.

Fifth, the phrase "final authority" refers to the ultimate authority to declare the president disabled. Focus here is on the actor(s) that has final discretion in determining whether the president is disabled.

Finally, the terms "state," "country," and "nation" liberally to refer to internationally recognized political-geographic units that have their own constitutional structures. The key is the presence of an independent constitution. Thus, disputed nations like Taiwan are included within this Note as a "state" despite controversies surrounding their international status.

I. PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT

A. Presidential Disability Historically

> Let's face it. Obviously, you'd like to have a president who could run the New York marathon every couple or three months, but presidents are human and some of them are going to get sick.
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> —Birch Bayh[10]

[9] For example, Iran uses an assembly of experts to appoint and remove its head of state. AMENDMENT TO CONSTITUTION OF ISLAMIC REPUBLIC OF IRAN 1989, art. 111. Cyprus uses its attorney general and deputy attorney general, which are collectively classified as "another body" because they are "Independent Officers of the Republic" and cannot be removed "except on the like grounds and in the like manner as such judge of the High Court." CONSTITUTION OF THE REPUBLIC OF CYPRUS 2015, pt. VI, ch. I, art. 112(4). Subnational executive and legislative actors constitute "other bodies" as well due to this paper's focus on national governmental powers. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF PALAU 1981 (rev. 1992), art. VIII, § 10; CONSTITUTION OF THE REPUBLIC OF VANUATU 1988, ch. 6, art. 36(2).

[10] Senator Birch E. Bayh, Jr., *The Twenty-Fifth Amendment: Its History and Meaning*, *in* PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 1, 34 (Kenneth W. Thompson ed., 1988).

Although presidential disability was discussed at the 1787 Constitutional Convention,[11] thirty-five presidents steered the nation before the constitution addressed the issue. Yet, the issue had been present since the country's earliest days. Indeed, Professor Robert E. Gilbert argues that "[t]he history of the American presidency has been replete with instances of serious physiological illness in Presidents."[12] The Wilson, Pierce, and Coolidge presidencies best demonstrate the human vulnerabilities of presidents as well as the severe consequences that can result from presidential disability.

1. President Woodrow Wilson

Perhaps the most widely-known example of presidential disability is President Woodrow Wilson. On October 2, 1919, Wilson suffered a stroke that damaged his vision and speech and left him partially paralyzed.[13] For the subsequent seventeen months, the country was "without the services of an able President."[14]

After Wilson's stroke, three people "controlled the flow of information" to and from Wilson.[15] Feerick states that Mrs. Wilson, Dr. Cary Grayson, and Wilson's secretary Joseph Tumulty "decided who saw the President and what matters, documents, and notes were forwarded to him."[16] They kept information about Wilson's

[11] Feerick, *supra* note 2, at 83 ("John Dickinson of Delaware . . . remark[ed] that Article X, section 2, was 'too vague. What is the extent of the term 'disability' & who is to be the judge of it?' His questions were never answered.") (citations omitted).

[12] Robert E. Gilbert, *The Twenty-Fifth Amendment and the Establishment of Medical Impairment Panels: Are the Two Safely Compatible?*, 86 FORDHAM L. REV. 1111, 1111 (2017). Presidents affected by physical illnesses "include Washington, Adams, Madison, Monroe, Jackson, W.H. Harrison, Taylor, Lincoln, Garfield, Arthur, Cleveland, McKinley, Wilson, Harding, F.D. Roosevelt, Eisenhower, Kennedy, Johnson, Reagan, George H.W. Bush, and Clinton." *Id.* "Strikingly, of the forty-[five] men who have served as President of the United States, nine were Vice Presidents who succeeded to the office. Eight of those Vice Presidents took office as a result of the death of the President . . . ." William Michael Treanor, *Introduction: The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements*, 79 FORDHAM L. REV. 775, 775 (2010). Presidents after Kennedy similarly faced health problems; however, these presidents had the guidance of the Twenty-Fifth Amendment. *Id.* at 779.

For more details on presidential illnesses throughout history, see JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT, ITS COMPLETE HISTORY AND APPLICATIONS ix–xix (1992); John Ferling & Lewis E. Braverman, *John Adams's Health Reconsidered*, 55 WM. & MARY. Q. 83, 98 (1998); Gilbert, *supra* note 1; 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, 938–40 (2017) [hereinafter Second Fordham University].

[13] FEERICK, *supra* note 12, at 13; Gilbert, *Psychological Illness*, *supra* note 1, at 851.

[14] FEERICK, *supra* note 12, at 13.

[15] *Id.*

[16] *Id.* at 14.

condition from Congress, the Cabinet, the vice president, and the public.[17] As a result, these three assumed de facto presidential power.

Wilson's Cabinet considered having him resign or having him certified as disabled so his vice president could act as president; however, both ideas were ultimately rejected.[18] The consequences of this impasse were near-disastrous. Feerick describes the ensuing chaos:

> As a result of the lack of presidential leadership . . . , United States participation in the League of Nations was defeated in the Senate; numerous governmental vacancies went unfilled; twenty-eight bills became law by default of any action by the President; foreign diplomats were prevented from submitting their credentials to the President; letters and notes to the White House either went unanswered or were answered by Mrs. Wilson, or by the President in illegible handwriting; and, in many other ways, the business of government was brought to a standstill in 1919 and 1920.[19]

2. President Franklin Pierce

Franklin Pierce's presidency was "[f]rom beginning to end[,] . . . an unhappy one."[20] Shortly before Pierce's inauguration, a train derailment killed his son, Benny.[21] Pierce's wife, already upset at Pierce's return to politics, grew significantly more detached from Pierce after Benny's passing.[22] Consequently, Pierce succumbed to "despondency, fears of personal inadequacy, and renewed drinking."[23] In a private letter, Pierce confided the immensity of his mental anguish: "How I shall be able to summon my manhood and gather up my energies for all the duties before me it is hard to see."[24]

The impacts of Pierce's mental suffering were felt throughout the country. Distracted by grief and drinking, Pierce "created a leadership vacuum at a time of great

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[17] *Id.* at 13. Moreover, the few members of Wilson's Cabinet who were informed of Wilson's condition were told only in the strictest of confidence. *Id.*

[18] *Id.* at 13–14.

[19] *Id.* at 14–15.

[20] Gilbert, *supra* note 1, at 859.

[21] *Id.* at 855.

[22] Gilbert describes that Jane "became deeply embittered that her husband's presidency had been gained at the price of Benny's life, and she could never fully forgive him for the boy's sad fate." As a result, Jane "did little more than reinforce her husband's deep despondency." *Id.* at 856–57.

[23] *Id.* at 856.

[24] *Id.* at 857. Pierce opened his Inaugural Address by opining that "[I]t is a relief to feel that no heart but my own can know the personal regret and bitter sorrow over which I have been borne to a position so suitable for others rather than desirable for myself." *Id.* at 856 (brackets in original).

national crisis."[25] As Gilbert describes, Pierce shirked leadership over his Cabinet.[26] As a result, Pierce failed to confront the "serious and pressing problems" of the nation.[27] Gilbert details that "[t]he larger problems slid by little touched by Presidential power: trouble in Cuba, Mexico, and Central America; ailing relations with England, Kansas torn and bleeding."[28] Pierce's administration has been hailed one of the most problematic in history.[29]

3. President Calvin Coolidge

Calvin Coolidge's presidency was similarly marred by personal tragedy. He ascended to the presidency in 1923 following the death of President Warren Harding.[30] In this one-year term, Coolidge made several strides in domestic and foreign affairs.[31] After winning his election, however, his impressive leadership came to an immediate halt when his son, Calvin Jr., died suddenly of pathogenic blood poisoning.[32]

Coolidge never recovered from Calvin Jr.'s death.[33] According to Coolidge's wife, he "lost his 'zest for living' as a result of the boy's death."[34] This transformation was noticeable to those who worked with Coolidge.[35] However, as Gilbert notes, "no one in or outside the White House realized that Coolidge was psychologically

[25] *Id.* at 858–59.

[26] Cabinet members "saw their role largely as being cheerleaders for the President and trying to boost his depleted spirit." *Id.* at 857.

[27] *Id.* at 858.

[28] *Id.* (citation omitted).

[29] According to historian Larry Gara, "[i]n light of subsequent events, the Pierce administration can be seen only as a disaster for the nation." *Id.* at 859–60 (quoting LARRY GARA, THE PRESIDENCY OF FRANKLIN PIERCE 183–84 (1991)).

[30] *Id.* at 860.

[31] Coolidge had a reputation for "diligence, conscientiousness[,] and competence," and he worked to develop "congenial relationship[s]" with Congressmen from all parties to "build support for his programs." *Id.* For a list of his accomplishments—which progressively span several policy arenas, including civil rights, the environment, child labor, and veterans' benefits—see *id.* at 860–62.

[32] *Id.* at 862.

[33] One poignant even demonstrates the depth of Coolidge's emotional suffering. Gilbert describes that, as Calvin Jr.'s death neared, Coolidge "became hysterical, taking his son into his arms and shouting that he would soon join him and the President's mother in death." *Id.* The physician who witnessed this event, Dr. Albert Kolmer, later "described this episode 'as the most touching and heart-rending experience of my whole professional career.'" *Id.*

[34] *Id.* (citation omitted). Coolidge's other son described him as "never the same again." *Id.* at 863.

[35] *Id.* at 866 (Coolidge's secretary "told his doctors that the president was definitely showing signs of 'mental sickness,'" White House employees "noticed that he was 'highly disturbed[,]'" and his physicians "described him as showing many signs of 'a little disturbance' and of 'temperamental derangement.'") (internal citations omitted).

ill *and* would never fully recover."[36] Gilbert argues that Coolidge likely suffered a "major depressive episode":

> [Coolidge] began to eat compulsively and suffered frequent abdominal pain. He complained often of exhaustion and began to sleep fifteen hours out of every twenty-four. He experienced feelings of severe guilt . . . Often he complained of feeling ill, of having severe indigestion and being unable to breathe. Intensely irritable, he would fly into rages, frequently for reasons that were insignificant or inconsequential.[37]

In his autobiography, Coolidge explained that "'when [his son] went, the power and the glory of the Presidency went with him.'"[38]

After his son's death, Coolidge "largely abandoned his presidential responsibilities[.]"[39] Gilbert explains that Coolidge instructed Cabinet members "to handle the affairs of their own departments without help or guidance from him."[40] Coolidge further exhibited "a shocking degree of disinterest and ignorance" in the lead-up to the Great Depression.[41] Although President Coolidge is now derided as among the worst U.S. presidents, his presidency evinces the impact mental health issues can have on the president and the country.[42]

B. The Twenty-Fifth Amendment

The Twenty-Fifth Amendment was officially certified as adopted on February 23, 1967.[43] The Amendment reads as follows:

> SECTION. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

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[36] Gilbert, *supra* note 12, at 1112.

[37] Gilbert, *supra* note 1, at 863–64 (internal citations omitted).

[38] *Id.* at 866 (citation omitted) (brackets in original).

[39] *Id.* at 864.

[40] *Id.*

[41] *Id.* at 865. Coolidge "was simply impervious to the nation's economic problems and unable to see the dangers that they posed." *Id.*

[42] "[Coolidge's] behavior has long been seen as the sign of an incompetent and negligent Chief Executive. But considering his first successful year as President and his impressive earlier political career, and noting the other behavioral changes that engulfed his life after July 7, 1924, what really had emerged here was a disabled President, one suffering from a paralyzing and persistent clinical depression." *Id.*

[43] For behind-the-scenes details on the development of the Twenty-Fifth Amendment, see generally John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 FORDHAM L. REV. 1075 (2017); Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1137 (2017); Rebecca C. Lubot, *"A Dr. Strangelove Situation": Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1175 (2017).

SECTION. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has 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.

SECTION. 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. Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has 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.[44]

[44] U.S. CONST. amend. XXV.

This amendment is significant for numerous reasons.[45] However, the focus here is Section Four, the only provision of the amendment that has never been invoked.[46] Section Four addresses scenarios where the president is unable to declare her own disability.[47] For these situations, Section Four provides a multi-part procedure. First, whenever the vice president believes that the president is "unable to discharge the powers and duties of his office," he and a majority of either (a) the Cabinet,[48] or (b) "such other body as Congress may by law provide[,]"[49] write a declaration stating this belief and send it to the leaders of the Senate and House of Representatives.[50] Upon sending this declaration, the vice president "immediately assume[s] the powers and duties of the office as Acting President."[51] The vice president remains acting president until the president transmits to congressional leadership a declaration stating that he is not disabled.[52] This declaration triggers a four-day window.[53] The vice president and either identified body can challenge the president by resending their declaration, or they can let the window close and the president return to power.[54] If they resubmit their declaration, Congress must assemble

[45] "[The Twenty-Fifth Amendment] is the only part of the Constitution which confers an explicit power on the President's Cabinet, places specific time limits on congressional actions, empowers persons other than the President to convene a special session of Congress, and assigns the House of Representatives a role in the appointive process. It also adds to the Vice President's constitutional duties, establishes a procedure in addition to impeachment by which a President can be prevented from discharging his powers and duties, and prescribes for the first time a method of filling a vice presidential vacancy. Finally, it is one of the longest amendments to the Constitution and its every detail is filled with considerable meaning." FEERICK, *supra* note 12, at xxxv–xxxvi.

[46] Gilbert, *supra* note 12, at 1115.

[47] President Eisenhower addressed this concern as well in 1958. In a letter to Vice President Nixon, Attorney General Rogers, and Secretary of State Dulles, identifying the informal agreement to be followed in any future bouts of incapacity, President Eisenhower stated:

> . . . this was the thing that frightened me: suppose something happens to you in the turn of a stroke that might incapacitate you mentally and you wouldn't know it, and the people around you, wanting to protect you, would probably keep this away from the public. So I decided that what we must do is make the Vice President decide when the president can no longer carry on, and then he should take over the duties, and when the President became convinced that he could take back his duties, he would be the one to decide.

FEERICK, *supra* note 12, at 55.

[48] More specifically, a majority of the "principal officers of the executive departments." U.S. CONST. amend. XXV, § 4.

[49] For concision, (a) and (b) will hereafter be collectively referred to as "either identified body."

[50] U.S. CONST. amend. XXV, § 4.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

within forty-eight hours.[55] Congress then has twenty-one days to determine whether the president is unable to exercise the duties of her office.[56] If a two-thirds majority in both chambers of Congress agree that the president is disabled, the vice president remains acting president.[57] Otherwise, the president resumes power.[58]

1. Applications

Section Four has two paramount applications: (1) unexpected physical incapacity (*e.g.*, emergency surgery, kidnapping); and (2) mental disability.[59] If a president becomes mentally unstable, Section Four is the sole constitutional authority by which his authority could be lawfully constrained.

History is replete with examples of leaders with questionable mental infirmities who exercised unconstrained power. Although the structural checks and balances system was designed to prevent tyrannical power, the gradual expansion of executive power has augmented the calamities that could result from executive mental disability. Consequences could be felt wherever the president has predominant constitutional authority. The president's military power is a prime example. Although the president cannot declare war, she has the sole constitutional authority to "'accept the challenge'" where "circumstances are such that war is made on the Nation rather than declared by the Congress[.]"[60] The Supreme Court gives wide deference to the president in this theatre, particularly in the context of domestic conflict.[61] However, this power can also be used to launch unilateral military action, such as quarantines,

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] The role of Congress in this procedure has been well-described as "a court of appeal when the President disputes his subordinates' declaration of presidential inability." Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 461 (2009).

[59] Second Fordham University, *supra* note 12, at 929 ("Representative Richard Poff, a manager of the Amendment in the House, said Section 4 inability included physical impairments that prevented the President from declaring himself unable and psychological impairments that prevented the President from 'mak[ing] any rational decision, including particularly the decision to stand aside.'"). The broad language of the Amendment carries with it further applications to unprecedented circumstances, such as kidnapping or the President being lost at sea. *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 802 (2010) [hereinafter *Interview with Birch Bayh*].

[60] El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1363 (Fed. Cir. 2004) (quoting The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863)).

[61] The Prize Cases, 67 U.S. at 670 ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.'") (emphasis added).

military actions, and interventions.[62] A mentally disabled president would possess unchecked authority to determine if any act of hostility was sufficient to trigger his obligation "to accept the challenge without waiting for any special legislative authority."[63]

The president also has the significant power to withdraw the United States from international treaties;[64] the presence of the United States in the United Nations, NATO, and as signatories to significant international agreements could be immediately undone by a president with diminished capacity. Finally, due to nuclear weapons, a mentally disabled president would "literally [have] the power of life and death and the continuity of mankind in his hands[.]"[65]

With these powers representing a small number of those of concern in the context of a mentally disabled president, it is significant that Section Four is the only constitutional procedure that addresses presidential disability. This safeguard must be workable if constitutional crisis is to be avoided. The following sections discuss two issues that bring the workability of this process into question. Summarily, these issues pose the question of how the procedure can be used responsibly when medical evidence is not required to remove the president and there is no judicial recourse for abuse.

2. Lack of Medical Input

The largest concern for the workability of Section Four is the lack of requirements concerning medical evidence. By not including medicine, Section Four is made far more susceptible to abuse because the president can be removed without medical justification. With the unparalleled significance of the removal process, it is imperative to identify the deliberate reason medical evidence is not required.

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[62] For example, President Barak Obama authorized military intervention in Libya in 2011 without a congressional declaration of war. *See generally* DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, AUTHORITY TO USE MILITARY FORCE IN LIBYA (2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf ("The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest. Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.").

[63] *El-Shifa Pharm. Indus. Co.*, 378 F.3d at 1363.

[64] While this power has not been constitutionally cemented, practice by presidents since Jimmy Carter has demonstrated presidential power to unilaterally nullify the United States' participation in treaties. *See generally* Goldwater v. Carter, 444 U.S. 997 (1979).

[65] Lubot, *supra* note 43, at 1179. The Twenty-Fifth Amendment was drafted with this issue in mind. *Id.* at 1176–77 ("The Twenty-Fifth Amendment was designed to secure the line of presidential succession in cases of disaster such as a sudden strike and, at the same time, prevent a President who had become crazy or mentally unstable from controlling the bomb."). Birch Bayh, architect of the Amendment, has admitted that "[t]he Cuban Missile Crisis 'was very much a reason' for the Amendment . . . ." *Id.* at 1179–80.

The predominant reason that medical evidence is not required is that medical assessment of the president is difficult and unlikely to be fruitful. Put simply, it would be incredibly hard to give doctors access to the president.[66] No law requires the president to submit for medical examination, and scholars argue that any such law would likely violate the Fourth Amendment[67] and the separation of powers.[68] Even if access were granted, it is questionable whether doctors would be able to diagnose mental impairment. Mental illness is notoriously difficult to diagnose, and doctors disagree on diagnostic criteria.[69] Moreover, scholars argue that "even a President that's not all there can come across pretty astute for half an hour in front of . . . doctors."[70]

As a consequence, there is a profound risk of unwarranted damage to the president's political power if doctors are used in the removal process. Because of the difficulties with diagnosis and access, doctors may easily disagree on the president's condition. As Gilbert argues, disagreement among doctors would "paralyze[]" the political system, "since political decision-makers would be justifiably confused and reluctant to act."[71] Even if only one doctor among many diagnosed the president as disabled, that doctor's opinion "would be used against the President in various avenues by political enemies, political pundits, talk show hosts, comedians, etc. . . ."[72] This could directly undercut a president's relationships with government actors and the public; an asterisk on the president's clean bill of health could pull overwhelming attention for the duration of their time in office.

In addition to these concerns, there is also a significant issue of legitimacy in mandating doctors be involved in the removal process. As unelected, unconfirmed, un-democratically accountable persons, doctors have no tie to the constituent power that underlies the United States' democratic order. By what authority may they evaluate and remove the democratically-elected president? Section Four places authority in the vice president, the Cabinet, and Congress, each of whose legitimacy can be traced back to the ballot. According to scholars, this issue "was a number-one point of contention with the Twenty-Fifth Amendment."[73]

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[66] Gilbert, *supra* note 1, at 871.

[67] Second Fordham University, *supra* note 12, at 998.

[68] Robert E. Gilbert, Coping with Presidential Disability: The Proposal for a Standing Medical Commission, 22 POL. & LIFE SCI. 2, 6 (2003) [hereinafter Gilbert, Medical Commission].

[69] Gilbert, *supra* note 1, at 872.

[70] *Interview with Birch Bayh*, *supra* note 59, at 794. "Of course, you could have a raving lunatic and I think that would be dealt with pretty quickly, but there is the possibility of someone who could be very ill mentally but smart enough to know how to act." Bayh, *supra* note 10, at 19–20.

[71] Gilbert, *supra* note 1, at 877.

[72] *Id.*

[73] *Interview with Birch Bayh*, *supra* note 59, at 795.

While other concerns exist,[74] the foregoing represent the paramount concerns for giving authority to doctors in the removal process. Additionally, the amendment's drafters believed that Congress would consult medical professionals as needed during the twenty-one-day window.[75] Despite these rationales, however, the fact remains that Section Four allows the president to be removed from office without any medical justification. Absent a constitutional amendment, however, the only way to include medical input in the removal process would be for Congress to use them as part of an "other body" formed pursuant Section Four.

3. Lack of Judicial Involvement

Another significant issue is Section Four's lack of judicial involvement. The total exclusion of the judicial power from Section Four results in two significant problems.

First, there is no judicial review for a president wrongly ousted through Section Four. Any use of Section Four would be immune from judicial review because the amendment likely falls under the political question doctrine, which states that certain issues fall outside the scope of the judiciary's adjudicatory authority. A lack of judicial review makes Section Four easier to abuse, as there is no judicial recourse for a wrongly ousted president. Whether the political question doctrine applies depends on six factors.[76] The application of these factors reveals a strong likelihood that the procedure would fall within the political question doctrine.[77]

The first factor asks whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[78] Because determination of presidential disability is explicitly committed to the vice president, the Cabinet, and Congress, this factor leans toward non-justiciability. The second factor asks whether there is "a lack of judicially discoverable and manageable standards for

[74] For example, there may be issues relating to doctor-patient confidentiality as well as issues of personal biases. For discussion on the former, see Aaron Seth Kesselheim, *Privacy Versus the Public's Right to Know: Presidential Health and the White House Physician*, 23 J. LEGAL MED. 523, 541 (2002); Kirath Raj, *The Presidents' Mental Health*, 31 AM. J.L. & MED. 509, 518–21 (2005). For discussion on personal biases, see FEERICK, *supra* note 12, at 14; Gilbert, *supra* note 12, at 1123–24.

[75] Presidency scholar Joel K. Goldstein argues that the drafters of the Amendment believed that decision-making under the Amendment "should be based on data and deliberation. . . . [T]hey clearly thought that a decision should be informed by medical expertise and specifically so stated in conspicuous places in the legislative history." Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 993 (2010).

[76] *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

[77] A similar analysis by the Second Fordham University School of Law Clinic of Presidential Succession came to the same conclusion. Second Fordham University, *supra* note 12, at 984–85.

[78] *Baker*, 369 U.S. at 217.

resolving" the issue.[79] This factor similarly leans toward non-justiciability because Section Four contains no substantive standards for decision-making. The only standards the court could use would center on whether the procedure was appropriately followed. The court has no substantive standard by which it could adjudge the actions of the vice president, the Cabinet, or Congress under Section Four, and no standard by which it may decide whether the president is fit to remain in office. The United States Supreme Court has held these two factors dispositive, although the remaining factors also lean toward non-justiciability.[80] Therefore, the court would likely find issues pertaining to Section Four to be political questions outside the reach of the judicial power. Although significant, this lack of justiciability cannot be alleviated without a constitutional amendment to Section Four.

In addition to precluding judicial review, Section Four's current exclusion of the judicial power prevents non-political actors from playing a meaningful role in significant decision-making. All actors involved in the removal procedure are necessarily political actors, compelled and guided by varying interests, loyalties, and duties. Thus, in the right circumstances, Section Four can allow and legitimize a coup that is immune from judicial review. The response of the amendment's drafters, according to Goldstein, was that "constitutional morality" would compel reasonable action in such situations.[81] The drafters "assumed that public officials . . . would not allow personal ambition or partisanship to interfere with their obligation to act in accordance with the constitutional values implicit in the Amendment."[82] Indeed, without basic reasonableness, the drafters argued, "no procedure could work."[83] While this argument has intuitive strength, it must be emphasized that "constitutional morality" is neither objective nor legally mandated. A mentally ill president would present a situation of grave and virtually unparalleled constitutional crisis. Considering that a consistent majority of the public has disapproved of Congress for the past thirteen years, and that the public has generally disapproved of Congress

[79] *Id.*

[80] The remaining four factors ask if there is: [3] "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

[81] Goldstein, *supra* note 75, at 996.

[82] *Id.* (internal citations omitted).

[83] *Id.* ("No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists.").

for the past several decades,[84] it is questionable whether public faith in political actors in situations involving Section Four is sufficient. Thus, by not including the judicial power, Section Four leaves the most significant opportunity for political coup and constitutional crisis completely in the hands of fully political actors.

Thus, doctors and the judicial power may be involved through an "other body," while judicial review is unalterable absent a constitutional amendment. While Congress may form an "other body" that includes medical professionals and/or judicial actors, the question is whether Congress should do so. To determine the prudence of these options, this Note examines removal procedures used around the globe. Because the risk of head of state disability affects all countries, it is worthwhile to view how other countries address that risk. This is the primary contribution of this Note, and is the focus of the next Section.

II. CONSTITUTIONAL APPROACHES

To determine international trends in removal processes, this Note examines the constitutions of 192 countries;[85] however, sixty-six of these countries are excluded from full analysis: twenty-one lack an applicable constitutional provision;[86] twenty-two have relevant provisions that lack sufficient clarity for analysis;[87] fifteen

[84] *Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx (last visited Feb. 8, 2019).

[85] These constitutions were obtained via The Comparative Constitutions Project. *About*, CONSTITUTE, https://constituteproject.org/content/about?lang=en (last visited Feb 8, 2019). As of July 20, 2018, Constitute had 192 constitutions publicly available.

[86] *See* CONSTITUTION OF THE KINGDOM OF BAHRAIN 2002 (rev. 2012); CONSTITUTION OF BRUNEI DARUSSALAM 1959 (rev. 2006); CONSTITUTION OF BOSNIA AND HERZEGOVINA 1995 (rev. 2009); CONSTITUTION OF THE DOMINICAN REPUBLIC 2015; CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA 1994; DUSTŪR JUMHŪRĪYAT AL-'IRĀQ [CONSTITUTION OF THE REPUBLIC OF IRAQ] 2005; NIHONKOKU KENPŌ [Kenpō] [CONSTITUTION] 1946 (Japan); CONSTITUTION OF KUWAIT 1962 (rev. 1992); CONSTITUTION OF LUXEMBOURG 1868 (rev. 2009); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CP] 2015 (Mex.); CONSTITUTION OF MONGOLIA 2001; CONSTITUTION OF MOROCCO 1992 (rev. 2011); CONSTITUTION OF THE KINGDOM OF NORWAY 1814 (rev. 2016); CONSTITUTION OF OMAN 1996 (rev. 2011); CONSTITUTION OF THE REPUBLIC OF PANAMA 1972 (rev. 2004); CONSTITUTION OF SAUDI ARABIA 1992 (rev. 2013); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999 (Switz.); CONSTITUTION OF TONGA 1875 (rev. 1988); CONSTITUTION OF THE UNITED ARAB EMIRATES 1971 (rev. 2009); CONSTITUTION OF URUGUAY 1966 (rev. 2004); CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN 1992 (rev. 2011).

[87] art. 88, CONSTITUCIÓN NACIONAL [Const. Nac] (Arg.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 79 (Braz.); CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU 1984 (rev. 1996), art. 71(2); CONSTITUTION OF GEORGIA 1995 (rev. 2013), art. 76(1); CONSTITUTION OF THE REPUBLIC OF HAITI 1987 (rev. 2012), arts. 148–149; INDIA CONST. art. 65, § 2; art. 86 COSTITUZIONE [Cost.] [CONSTITUTION] (It.); CONSTITUTION OF LEBANON 1926 (rev. 2004), pt. III(A), art. 74; CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR 2008, ch. III,

lack constitutional control over their head of state;[88] and eight delegate the issue of executive disability to non-constitutional fulfillment.[89] Therefore, this Note analyzes the 126 countries whose constitutions have a reasonably clear, applicable procedure for addressing head of state disability.

These 126 constitutions are presented in two groups. The first classifies states according to the actors they use in their removal processes. This classification reveals what these countries consider to be the prudent arrangement of government powers, medical professionals, and organs of state in addressing head of state disability. The second group classifies countries according to which actors have final authority to

art. 73(a); CONSTITUTION OF PARAGUAY 1992 (rev. 2011), art. 234; DAEHANMINKUK HUNBEOB [Hunbeob] [CONSTITUTION], art. 71 (S. Kor.); ROMANIA CONST. art. 97 (2003); KONSTITUTSIIA ROSSIISKOI FEDERATSII [Konst. RF] [CONSTITUTION], ch. 4, art. 92(2) (Russ.); CONSTITUTION OF SÃO TOMÉ AND PRÍNCIPE 1975 (rev. 2003), tit. II, art. 80; CONSTITUTION OF THE REPUBLIC OF SERBIA 2006, art. 120; CONSTITUTION OF THE REPUBLIC OF SLOVENIA 1991 (rev. 2016), art. 106; PROVISIONAL CONSTITUTION OF THE FEDERAL REPUBLIC OF SOMALIA 2012, ch. 7, art. 94(1); CONSTITUTION OF SURINAME 1987 (rev. 1992), ch. XII, § 1, art. 98(a); CONSTITUTION OF THE SYRIAN ARAB REPUBLIC 2012, arts. 92–93; CONSTITUTION OF THE REPUBLIC OF TURKEY 1982 (rev. 2017), art. 106; CONSTITUTION OF THE REPUBLIC OF YEMEN 1991 (rev. 2015), pt. III, ch. II, art. 116.

For example, Germany's constitution states that "[i]f the Federal President is unable to perform his duties, or if his office falls prematurely vacant, the President of the Bundesrat shall exercise his powers." GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [CONSTITUTION], art. 57 (Ger.). However, the constitution lacks a procedure for determining that the president is "unable to perform his duties."

[88] CONSTITUTION OF ANTIGUA AND BARBUDA 1981, ch. V, pt. 1, art. 68(1); AUSTRALIAN CONSTITUTION, art. 61; CONSTITUTION OF THE COMMONWEALTH OF THE BAHAMAS 1973, ch. VI, art. 71(1); CONSTITUTION OF BARBADOS 1966 (rev. 2007), ch. VI, art. 63(1); CONSTITUTION OF BELIZE 1981 (rev. 2011), pt. V, art. 36; CONSTITUTION OF CANADA 1876 (rev. 2011), art. 9; CONSTITUTION OF GRENADA 1973 (rev. 1992), ch. IV, art. 57(1); CONSTITUTION OF JAMAICA 1962 (rev. 2015), ch. VI, art. 68(1); CONSTITUTION OF NEW ZEALAND 1852 (rev. 2014), pt. 1, art. 2(1); CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975 (rev. 2016), pt. V, div. 1, art. 82(1); CONSTITUTION OF SAINT CHRISTOPHER AND NEVIS 1983, ch. V, art. 51(1) (St. Kitts and Nevis); CONSTITUTION OF SAINT LUCIA 1978, ch. IV, art. 59(1); CONSTITUTION OF SAINT VINCENT AND THE GRENADINES 1979, ch. IV, art. 50(1); CONSTITUTION OF SOLOMON ISLANDS 1978 (rev. 2014), ch. 1, art. 1(2); CONSTITUTION OF TUVALU 1986 (rev. 2010), pt. IV, div. 1, art. 48(1). The Queen of the U.K. is the constitutional head of state for these Commonwealth states. Because these countries have no constitutional provisions for removing the Queen, they cannot remove their heads of state without revising their constitutions. Thus, these countries have no procedure for removing their heads of state for disability.

[89] CONSTITUTION OF THE PRINCIPALITY OF ANDORRA 1993, tit. III, art. 49; CONSTITUTION OF DENMARK 1953, pt. II(9); CONSTITUTION OF THE REPUBLIC OF LIBERIA 1986, ch. IV, art. 63(c); CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA 1978 (rev. 1990), art. X, § 6; CONSTITUTION OF THE PRINCIPALITY OF MONACO 1962 (rev. 2002), ch. II, art. 11; CONST. (1987), art. VII, § 7 (Phil.); CONSTITUTION OF THE KINGDOM OF SWAZILAND 2005, art. 5; *see also* Regency Act 1937, § 1 (1 Edw 8 and 1 Geo 6).

declare the head of state disabled. While the first group identifies the players involved in the removal process, this second group reveals who has ultimate discretionary authority over the head of state's removal or continuance in office.[90]

In analyzing these constitutions, this Note uses a "reasonable" approach. This methodology asks what constitutional provision could reasonably be used to remove a disabled head of state. For example, a procedure that removes a head of state due to their "inability to perform" their functions[91] falls within this Note's analysis, while a process providing for impeachment based on "crimes" does not. This approach includes procedures that broadly allow removal of heads of state, so long as they could reasonably be employed to remove them in situations of mental disability.[92]

Because this Note is focused on improving the United States' removal procedure, governmental powers and actors used in foreign constitutions are reasonably interpreted as they would be applied in the context of the United States Constitution. For example, some countries use other bodies that are outside the explicit delineation of the country's judicial power, but they nonetheless operate in a manner similar to that of the United States' courts.[93] Based on the jurisdiction and powers of those bodies, and the similarity of these characteristics to those possessed by the United States judiciary, this Note considers that these bodies fall within the judicial power despite the fact that their countries may consider them to be outside of the judicial power.[94] A similar approach is used in detailing the executive power because few countries have a unified executive like the United States. Thus, this Note categorizes the head of state and her direct subordinates as falling within the executive

[90] The focus of this paper is on the removal processes pertaining to heads of state. This focus is merited because the potential abuses of presidential power identified in Part I are most analogous to those abuses possible with mentally disabled heads of state.

[91] CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89(1).

[92] For example, Bolivia's constitution identifies that its head of state's powers may devolve if he suffers an impediment; however, there is no specific removal procedure for establishing or acting upon an impediment. Nonetheless, there is a broader procedure that allows the head of state to be removed. Because that procedure would be applicable in circumstances of mental disability, that section falls within the scope of this paper's analysis. CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA 2009, ch. IV, art. 240.

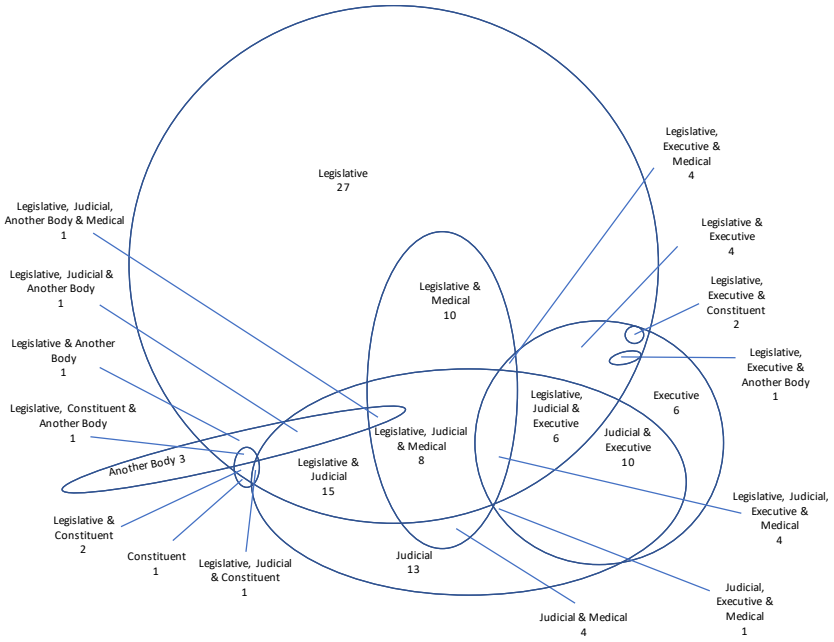
[93] For example, Cameroon's Constitutional Council has authority over the constitutionality of laws and treaties and adjudicates conflicts between state institutions and between the national and regional governments. CONSTITUTION OF CAMEROON 1972 (rev. 2008), pt. VII, art. 47(1). Although the judicial power is enunciated in a separate chapter, *id*. at part V, the jurisdiction of the constitutional council fits within the scope of the judicial power as understood in the United States.

[94] The CIA's interpretation of these countries is instructive but not dispositive in interpreting the scope of these countries' judiciaries. *The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/resources/the-world-factbook/index.html (last visited Feb. 8, 2019).

power, notwithstanding a country's demarcation of that power. For states with a prime minister and a head of state, for example, both officials and their subordinates fall within the executive power because both would fall under that power as understood in the United States.

A. Actors in the Removal Process

This Section classifies states according to which actors are used in their removal processes. The graph below demonstrates the macroscopic uses of the legislative, judicial, executive, and constituent powers, as well as medical professionals and other bodies. The subsequent chart identifies the countries that constitute each category.



ACTOR(S) USED IN REMOVAL PROCESS	NUMBER OF COUNTRIES	CONSTITUTIONAL PROVISIONS
Legislative Power	27	1) CONSTITUTION OF THE REPUBLIC OF BELARUS 1994 (rev. 2004), § 4, art. 88; 2) XIANFA [CONSTITUTION] art. 63, § 1 (China); 3) CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 194; 4) CONSTITUTION OF COSTA RICA 1949 (rev. 2015), ch. II, art. 121(8);

		5) CONSTITUTION OF CUBA 1976 (rev. 2002), ch. X, art. 75(I)(o); 6) ÚSTAVNÍ ZÁKON [CONSTITUTION] č. 1/1993 Sb., ch. III, art. 66 (Czech); 7) CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 1972 (rev. 2016), ch. 6, § 1, art. 91(6); 8) CONSTITUTION OF ERITREA 1997, ch. V, art. 41(6)(c) 9) 1975 SYNTAGMA [SYN.] [CONSTITUTION] 34 (Greece); 10) CONSTITUTION OF HONDURAS 1982 (rev. 2013), ch. V, § II, art. 234; 11) MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. 12; 12) CONSTITUTION OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC 1991 (rev. 2003), ch. V, art. 53, § 6; 13) CONSTITUTION OF LATVIA 1922 (rev. 2016), ch. III, art. 51; 14) CONSTITUTION OF LIBYA 2011 (rev. 2012), ch. III, art. 24; 15) CONSTITUTION OF MALTA 1964 (rev. 2016), ch. V, art. 48(3)(b); 16) CONSTITUTION OF THE REPUBLIC OF MONTENEGRO 2007 (rev. 2013), pt. III, art. 91; 17) CONSTITUTION OF THE REPUBLIC OF NAMIBIA 1990 (rev. 2014), ch. 5, art. 29(2); 18) CONSTITUTION OF NEPAL 2015 (rev. 2016), pt. 8, art. 101; 19) CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. VIII, ch. III, art. 149(2)(c), LA GACETA, DIARIO OFICIAL [L.G.]; 20) CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973 (rev. 2017), pt. III, ch. 1, art. 47 (2017); 21) CONSTITUTION OF PERU 1993 (rev. 2009), ch. IV, arts. 113–114 (2009); 22) CONSTITUTION OF THE REPUBLIC OF POLAND 1997 (rev. 2009), ch. V, art. 131(2)(4);

		23) CONSTITUTION OF VIETNAM 1992 (rev. 2013), ch. V, arts. 70(7), 74(6); 24) S. AFR. CONST. 1996 (rev. 2012), ch. 5, art. 89(1)(c) 25) CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 59(2) (Spain); 26) INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF THE SUDAN 2005, pt. III, ch. II, art. 59(c); 27) CONSTITUTION OF ZIMBABWE 2013 (rev. 2017), ch. 5, pt. 2, art. 97(1)(d).
Legislative & Judicial Powers	15	1) CONSTITUTION OF ALBANIA 1998 (rev. 2016), ch. IV, pt. 4, art. 91(2); 2) CONSTITUTION OF ALGERIA 1989 (rev. 2016), tit. II, ch. I, art. 102; 3) CONSTITUTION OF ANGOLA 2010, tit. IV, ch. II, § IV, art. 129; 4) CONSTITUTION OF AZERBAIJAN 1995 (rev. 2016), pt. 3, ch. VI, art. 104(III); 5) CONSTITUTION OF BENIN 1990, tit. III, art. 50; 6) CONSTITUCÍON DE LA REPÚBLICA DE CHILE [C.P.] art. 29; 7) CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1); 8) CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 160; 9) CONSTITUTION OF INDONESIA 1945 (rev. 2002), ch. III, art. 7B(6); 10) CONSTITUTION OF LITHUANIA 1992 (rev. 2006), ch. VI, art. 88(6); 11) CONSTITUTION OF MADAGASCAR 2010, tit. III, subsec. I, art. 50); 12) CONSTITUTION OF NIGER 2010, tit. III, § 1, art. 53; 13) CONSTITUTION OF SENEGAL 2001 (rev. 2016), tit. III, arts. 39, 41; 14) CONSTITUTION OF SRI LANKA 1975 (rev. 2015), ch. VII, art. 38(2); 15) CONSTITUTION OF TRINIDAD AND TOBAGO 1976 (rev. 2007), ch. III, art. 36(1)(a).

Judicial Power	13	1) CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. IV, art. 36(5); 2) CONSTITUTION OF BULGARIA 1991 (rev. 2015), ch. IV, art. 97; 3) CONSTITUTION OF CAMEROON 1972 (rev. 2008), pt. II, art. 6(4); 4) CONSTITUTION OF CAPE VERDE 1980 (rev. 1992), tit. V, ch. II, art. 237(c); 5) CONSTITUTION OF EQUATORIAL GUINEA 1991 (rev. 2012), ch. VI, art. 101(2)(d); 6) CONSTITUTION OF ESTONIA 1992 (rev. 2015), ch. V, art. 83; 7) CONSTITUTION OF IRELAND 1937 (rev. 2015), art. 12(3)(1); 8) CONSTITUTION OF REPUBLIC OF MACEDONIA 1991 (rev. 2011), ch. III, pt. 2, art. 82; 9) CONSTITUTION OF REPUBLIC OF MOLDOVA 1994 (rev. 2016), tit. III, ch. V, art. 90(3); 10) CONSTITUTION OF PORTUGAL 1976 (rev. 2005), tit. VI, art. 223(2)(a); 11) CONSTITUTION OF SLOVAKIA 1992 (rev. 2014), arts. 105(2), 131(1); 12) CONSTITUTION OF TIMOR-LESTE 2002, tit. II, ch. 1, art. 82(2); 13) CONSTITUTION OF TUNISIA 2014, tit. 4, pt. 1, art. 84.
Judicial & Executive Powers	10	1) CONSTITUTION OF THE REPUBLIC OF ARMENIA 1995 (rev. 2015), ch. 5, art. 143; 2) CONSTITUTION OF BURKINA FASO 1991 (rev. 2012), tit. III, art. 43; 3) CONSTITUTION OF BURUNDI 2005, tit. V, art. 121; 4) CONSTITUTION OF CHAD 1996 (rev. 2005), tit. III, ch. I, art. 76; 5) CONSTITUTION OF COMOROS 2001 (rev. 2005), tit. III, ch. I, art. 14; 6) CONSTITUTION OF CÔTE D'IVOIRE 2016, tit. III, ch. II, art. 62; 7) CONSTITUTION OF THE REPUBLIC OF CROATIA 1991 (rev. 2013), art. 97; 8) CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005 (rev. 2011), tit. III, ch. 1, § 1, art. 76;

		9) 1958 LA CONSTITUTION, tit. II, art. 7 (Fr.); 10) CONSTITUTION OF THE REPUBLIC OF TOGO 1992 (rev. 2007), tit. IV, art. 65.
Legislative Power & Medical Professionals	10	1) CONSTITUTION OF BANGLADESH 1972 (rev. 2014), pt. IV, art. 53(2); 2) CONSTITUTION OF ECUADOR 2008 (rev. 2015), tit. IV, ch. 3, § 1, art. 145(4); 3) CONSTITUTION OF EL SALVADOR 1983 (rev. 2014), tit. VII, ch. I, § 1, art. 131(20th); 4) CONSTITUTION OF GUATEMALA 1985 (rev. 1993), tit. IV, ch. II, § 2, art. 165(i); 5) CONSTITUTION OF ISRAEL 1958 (rev. 2013), art. 21(b); 6) CONSTITUTION OF KOSOVO 2008 (rev. 2016), ch. V, art. 91(2); 7) CONSTITUTION OF KYRGYZSTAN 2010 (rev. 2016), § III, art. 66; 8) CONSTITUTION OF SOUTH SUDAN 2011 (rev. 2013), pt. 6, ch. II, art. 103; 9) CONSTITUTION OF TAJIKISTAN 1994 (rev. 2003), ch. 4, art. 71; 10) CONSTITUTION OF TURKMENISTAN 2008 (rev. 2016), § III, ch. II, art. 75.
Legislative &, Judicial Powers & Medical Professionals	8	1) CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1996 (rev. 2004), ch. VI, pt. 1, art. 66; 2) CONSTITUTION OF GHANA 1992 (rev. 1996), ch. VIII, pt. I art. 69; 3) CONSTITUTION OF GUINEA 2010, tit. III, subsec. I, arts. 40–41; 4) CONSTITUTION OF KAZAKHSTAN 1995 (rev. 2017), § III, art. 47(1); 5) CONSTITUTION OF KIRIBATI 2013 (rev. 2013), ch. IV, art. 34; 6) CONSTITUTION OF UGANDA 1995 (rev. 2017), ch. VII, art. 107; 7) CONSTITUTION OF UKRAINE 1996 (rev. 2014), ch. V, art. 110; 8) CONSTITUTION OF VENEZUELA (BOLIVARIAN REPUBLIC OF) 1999 (rev. 2009), tit. V, ch. II, § 1, art. 233.
Executive Power	6	1) 2014 CONST. art. 93 (Belg.); 2) CONSTITUTION OF FINLAND 1999 (rev. 2011), ch. 5, § 55;

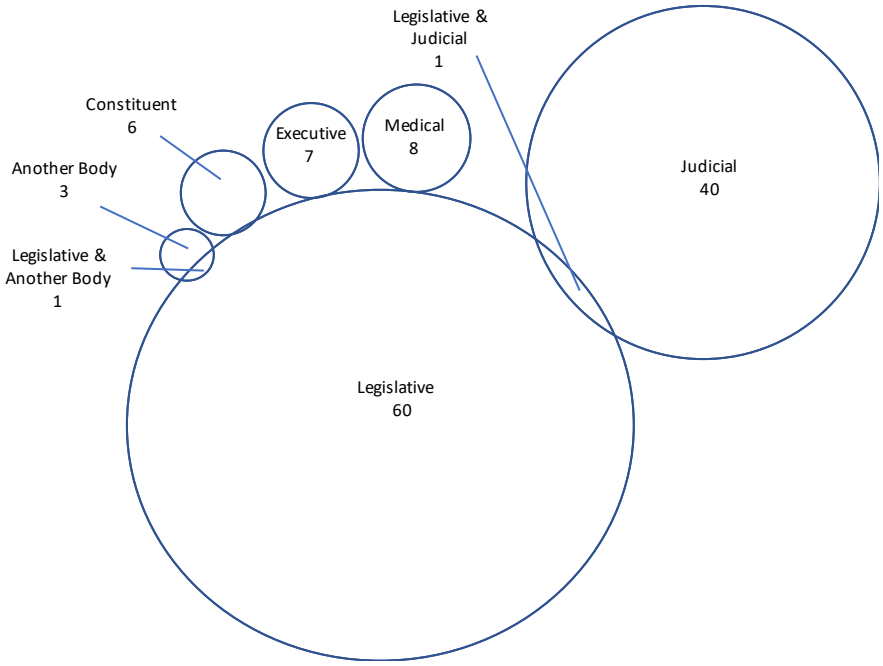
		3) CONSTITUTION OF THE REPUBLIC OF MALDIVES 2008, ch. IV, art. 123(b); 4) CONSTITUTION OF THE MARSHALL ISLANDS 1979 (rev. 1995), art. V, § 9; 5) CONSTITUTION OF NAURU 1968 (rev. 2015), pt. III, art. 21; 6) CONSTITUTION OF THAILAND 2017, ch. II, § 17.
Legislative, Judicial & Executive Powers	6	1) CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992 (rev. 2010), tit. III, art. 29; 2) CONSTITUTION OF GABON 1991 (rev. 2011), tit. II, art. 13; 3) CONSTITUTION OF THE REPUBLIC OF MALI 1992, tit. III, art. 36; 4) CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40–41; 5) CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; 6) CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L.
Legislative, Judicial & Executive Powers & Medical Professionals	4	1) CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89; 2) CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), arts. 93, 179; 3) CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53; 4) CONST. OF ZAMBIA (1991) § 107.
Legislative & Executive Powers	4	1) CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1952 (rev. 2016), ch. 4, pt. 1, art. 28(m); 2) CONSTITUTION OF LESOTHO 1993 (rev. 2011), ch. V, art. 53; 3) REGERINGSFORMEN [RF] [CONSTITUTION] 5:6 (Swed.) 4) U.S. CONST. amend. XXV, § 4.
Judicial Power & Medical Professionals	4	1) CONSTITUTION OF AFGHANISTAN 2004, ch. III, art. 67; 2) CONSTITUTION OF MOZAMBIQUE 2004 (rev. 2007), tit. VI, ch. I, art. 156;

		3) CONSTITUTION OF RWANDA 2003 (rev. 2015), ch. VII, § 3, subsec. 1, art. 105; 4) CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23(2).
Legislative & Executive Powers & Medical Professionals	4	1) CONSTITUTION OF THE KINGDOM OF CAMBODIA 1993 (rev. 2008), ch. II, art. 11; 2) CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87; 3) CONSTITUTION OF NIGERIA 1999 (rev. 2011), ch. VI, pt. 1(A), § 144; 4) CONSTITUTION OF SIERRA LEONE 1993 (rev. 2013), ch. V, pt. I, art. 50.
Another Body	3	1) AMENDMENT TO CONSTITUTION OF ISLAMIC REPUBLIC OF IRAN 1989, art. 111; 2) CONSTITUTION OF MALAYSIA 2007, art. 38(6)(a); 3) CONSTITUTION OF QATAR 2003, art. 15.
Legislative & Constituent Powers	2	1) CONSTITUTION OF ICELAND 1944 (rev. 2013), art. 11; 2) MINGUO XIANFA [CONSTITUTION] (1947) art. 2 (Taiwan).
Legislative, Executive, & Constituent Powers	2	1) CONSTITUTION OF AUSTRIA 1920 (rev. 2013), ch. III, art. 60(6); 2) CONSTITUTION OF THE PRINCIPALITY OF LIECHTENSTEIN 1921 (rev. 2011), ch. II, art. 13ter.
Legislative & Constituent Powers & Another Body	1	CONSTITUTION OF THE REPUBLIC OF PALAU 1981 (rev. 1992), art. VIII, § 10.
Judicial & Executive Powers & Medical Professionals	1	CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2).
Constituent Power	1	CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA 2009, ch. IV, art. 240.
Legislative Power & Another Body	1	CONSTITUTION OF THE REPUBLIC OF VANUATU 1988, ch. 6, art. 36(2).
Legislative & Executive Powers & Another Body	1	GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION], ch. 2, § 1, art. 35 (Neth.).
Legislative & Judicial Powers & Another Body	1	CONSTITUTION OF THE REPUBLIC OF CYPRUS 2015, pt. III, ch. I, art. 44(3).

Legislative, Judicial & Constituent Powers	1	CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(20)–(25).
Legislative &, Judicial Powers, Another Body & Medical Professionals	1	CONSTITUTION art. 144 (2010) (Kenya).

B. Final Authority in the Removal Process

While the previous Section identified who is involved in the removal process, this Section focuses on who wields final authority to determine head of state disability. The graph below demonstrates the macro uses of the legislative, judicial, executive, and constituent powers as well as medical professionals and other bodies. The subsequent chart identifies the countries that constitute each category.



ACTOR(S) USED IN REMOVAL PROCESS	NUMBER OF COUNTRIES	CONSTITUTIONAL PROVISIONS
Legislative Power	27	1) CONSTITUTION OF THE REPUBLIC OF BELARUS 1994 (rev. 2004), § 4, art. 88; 2) XIANFA [CONSTITUTION] art. 63, § 1 (China); 3) CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 194; 4) CONSTITUTION OF COSTA RICA 1949 (rev. 2015), ch. II, art. 121(8); 5) CONSTITUTION OF CUBA 1976 (rev. 2002), ch. X, art. 75(I)(o); 6) ÚSTAVNÍ ZÁKON [CONSTITUTION] č. 1/1993 Sb., ch. III, art. 66 (Czech); 7) CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 1972 (rev. 2016), ch. 6, § 1, art. 91(6); 8) CONSTITUTION OF ERITREA 1997, ch. V, art. 41(6)(c) 9) 1975 SYNTAGMA [SYN.] [CONSTITUTION] 34 (Greece); 10) CONSTITUTION OF HONDURAS 1982 (rev. 2013), ch. V, § II, art. 234; 11) MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. 12; 12) CONSTITUTION OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC 1991 (rev. 2003), ch. V, art. 53, § 6; 13) CONSTITUTION OF LATVIA 1922 (rev. 2016), ch. III, art. 51; 14) CONSTITUTION OF LIBYA 2011 (rev. 2012), ch. III, art. 24; 15) CONSTITUTION OF MALTA 1964 (rev. 2016), ch. V, art. 48(3)(b); 16) CONSTITUTION OF THE REPUBLIC OF MONTENEGRO 2007 (rev. 2013), pt. III, art. 91; 17) CONSTITUTION OF THE REPUBLIC OF NAMIBIA 1990 (rev. 2014), ch. 5, art. 29(2);

		18) CONSTITUTION OF NEPAL 2015 (rev. 2016), pt. 8, art. 101; 19) CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. VIII, ch. III, art. 149(2)(c), LA GACETA, DIARIO OFICIAL [L.G.]; 20) CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973 (rev. 2017), pt. III, ch. 1, art. 47 (2017); 21) CONSTITUTION OF PERU 1993 (rev. 2009), ch. IV, arts. 113–114 (2009); 22) CONSTITUTION OF THE REPUBLIC OF POLAND 1997 (rev. 2009), ch. V, art. 131(2)(4); 23) CONSTITUTION OF VIETNAM 1992 (rev. 2013), ch. V, arts. 70(7), 74(6); 24) S. AFR. CONST. 1996 (rev. 2012), ch. 5, art. 89(1)(c) 25) CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 59(2) (Spain); 26) INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF THE SUDAN 2005, pt. III, ch. II, art. 59(c); 27) CONSTITUTION OF ZIMBABWE 2013 (rev. 2017), ch. 5, pt. 2, art. 97(1)(d).
Legislative & Judicial Powers	15	1) CONSTITUTION OF ALBANIA 1998 (rev. 2016), ch. IV, pt. 4, art. 91(2); 2) CONSTITUTION OF ALGERIA 1989 (rev. 2016), tit. II, ch. I, art. 102; 3) CONSTITUTION OF ANGOLA 2010, tit. IV, ch. II, § IV, art. 129; 4) CONSTITUTION OF AZERBAIJAN 1995 (rev. 2016), pt. 3, ch. VI, art. 104(III); 5) CONSTITUTION OF BENIN 1990, tit. III, art. 50; 6) CONSTITUCÍON DE LA REPÚBLICA DE CHILE [C.P.] art. 29; 7) CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1); 8) CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 160; 9) CONSTITUTION OF INDONESIA 1945 (rev. 2002), ch. III, art. 7B(6); 10) CONSTITUTION OF LITHUANIA 1992 (rev. 2006), ch. VI, art. 88(6);

		11) CONSTITUTION OF MADAGASCAR 2010, tit. III, subsec. I, art. 50); 12) CONSTITUTION OF NIGER 2010, tit. III, § 1, art. 53; 13) CONSTITUTION OF SENEGAL 2001 (rev. 2016), tit. III, arts. 39, 41; 14) CONSTITUTION OF SRI LANKA 1975 (rev. 2015), ch. VII, art. 38(2); 15) CONSTITUTION OF TRINIDAD AND TOBAGO 1976 (rev. 2007), ch. III, art. 36(1)(a).
Judicial Power	13	1) CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. IV, art. 36(5); 2) CONSTITUTION OF BULGARIA 1991 (rev. 2015), ch. IV, art. 97; 3) CONSTITUTION OF CAMEROON 1972 (rev. 2008), pt. II, art. 6(4); 4) CONSTITUTION OF CAPE VERDE 1980 (rev. 1992), tit. V, ch. II, art. 237(c); 5) CONSTITUTION OF EQUATORIAL GUINEA 1991 (rev. 2012), ch. VI, art. 101(2)(d); 6) CONSTITUTION OF ESTONIA 1992 (rev. 2015), ch. V, art. 83; 7) CONSTITUTION OF IRELAND 1937 (rev. 2015), art. 12(3)(1); 8) CONSTITUTION OF REPUBLIC OF MACEDONIA 1991 (rev. 2011), ch. III, pt. 2, art. 82; 9) CONSTITUTION OF REPUBLIC OF MOLDOVA 1994 (rev. 2016), tit. III, ch. V, art. 90(3); 10) CONSTITUTION OF PORTUGAL 1976 (rev. 2005), tit. VI, art. 223(2)(a); 11) CONSTITUTION OF SLOVAKIA 1992 (rev. 2014), arts. 105(2), 131(1); 12) CONSTITUTION OF TIMOR-LESTE 2002, tit. II, ch. 1, art. 82(2); 13) CONSTITUTION OF TUNISIA 2014, tit. 4, pt. 1, art. 84.
Judicial & Executive Powers	10	1) CONSTITUTION OF THE REPUBLIC OF ARMENIA 1995 (rev. 2015), ch. 5, art. 143; 2) CONSTITUTION OF BURKINA FASO 1991 (rev. 2012), tit. III, art. 43; 3) CONSTITUTION OF BURUNDI 2005, tit. V, art. 121; 4) CONSTITUTION OF CHAD 1996 (rev. 2005), tit. III, ch. I, art. 76;

		5) CONSTITUTION OF COMOROS 2001 (rev. 2005), tit. III, ch. I, art. 14; 6) CONSTITUTION OF CÔTE D'IVOIRE 2016, tit. III, ch. II, art. 62; 7) CONSTITUTION OF THE REPUBLIC OF CROATIA 1991 (rev. 2013), art. 97; 8) CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005 (rev. 2011), tit. III, ch. 1, § 1, art. 76; 9) 1958 LA CONSTITUTION, tit. II, art. 7 (Fr.); 10) CONSTITUTION OF THE REPUBLIC OF TOGO 1992 (rev. 2007), tit. IV, art. 65.
Legislative Power & Medical Professionals	10	1) CONSTITUTION OF BANGLADESH 1972 (rev. 2014), pt. IV, art. 53(2); 2) CONSTITUTION OF ECUADOR 2008 (rev. 2015), tit. IV, ch. 3, § 1, art. 145(4); 3) CONSTITUTION OF EL SALVADOR 1983 (rev. 2014), tit. VII, ch. I, § 1, art. 131(20th); 4) CONSTITUTION OF GUATEMALA 1985 (rev. 1993), tit. IV, ch. II, § 2, art. 165(i); 5) CONSTITUTION OF ISRAEL 1958 (rev. 2013), art. 21(b); 6) CONSTITUTION OF KOSOVO 2008 (rev. 2016), ch. V, art. 91(2); 7) CONSTITUTION OF KYRGYZSTAN 2010 (rev. 2016), § III, art. 66; 8) CONSTITUTION OF SOUTH SUDAN 2011 (rev. 2013), pt. 6, ch. II, art. 103; 9) CONSTITUTION OF TAJIKISTAN 1994 (rev. 2003), ch. 4, art. 71; 10) CONSTITUTION OF TURKMENISTAN 2008 (rev. 2016), § III, ch. II, art. 75.
Legislative &, Judicial Powers & Medical Professionals	8	1) CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1996 (rev. 2004), ch. VI, pt. 1, art. 66; 2) CONSTITUTION OF GHANA 1992 (rev. 1996), ch. VIII, pt. I art. 69; 3) CONSTITUTION OF GUINEA 2010, tit. III, subsec. I, arts. 40–41; 4) CONSTITUTION OF KAZAKHSTAN 1995 (rev. 2017), § III, art. 47(1); 5) CONSTITUTION OF KIRIBATI 2013 (rev. 2013), ch. IV, art. 34; 6) CONSTITUTION OF UGANDA 1995 (rev. 2017), ch. VII, art. 107;

		7) CONSTITUTION OF UKRAINE 1996 (rev. 2014), ch. V, art. 110; 8) CONSTITUTION OF VENEZUELA (BOLIVARIAN REPUBLIC OF) 1999 (rev. 2009), tit. V, ch. II, § 1, art. 233.
Executive Power	6	1) 2014 CONST. art. 93 (Belg.); 2) CONSTITUTION OF FINLAND 1999 (rev. 2011), ch. 5, § 55; 3) CONSTITUTION OF THE REPUBLIC OF MALDIVES 2008, ch. IV, art. 123(b); 4) CONSTITUTION OF THE MARSHALL ISLANDS 1979 (rev. 1995), art. V, § 9; 5) CONSTITUTION OF NAURU 1968 (rev. 2015), pt. III, art. 21; 6) CONSTITUTION OF THAILAND 2017, ch. II, § 17.
Legislative, Judicial & Executive Powers	6	1) CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992 (rev. 2010), tit. III, art. 29; 2) CONSTITUTION OF GABON 1991 (rev. 2011), tit. II, art. 13; 3) CONSTITUTION OF THE REPUBLIC OF MALI 1992, tit. III, art. 36; 4) CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40–41; 5) CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; 6) CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L.
Legislative, Judicial & Executive Powers & Medical Professionals	4	1) CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89; 2) CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), arts. 93, 179; 3) CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53; 4) CONST. OF ZAMBIA (1991) § 107.
Legislative & Executive Powers	4	1) CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1952 (rev. 2016), ch. 4, pt. 1, art. 28(m); 2) CONSTITUTION OF LESOTHO 1993 (rev. 2011), ch. V, art. 53; 3) REGERINGSFORMEN [RF] [CONSTITUTION] 5:6 (Swed.)

		4) U.S. CONST. amend. XXV, § 4.
Judicial Power & Medical Professionals	4	1) CONSTITUTION OF AFGHANISTAN 2004, ch. III, art. 67; 2) CONSTITUTION OF MOZAMBIQUE 2004 (rev. 2007), tit. VI, ch. I, art. 156; 3) CONSTITUTION OF RWANDA 2003 (rev. 2015), ch. VII, § 3, subsec. 1, art. 105; 4) CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23(2).
Legislative & Executive Powers & Medical Professionals	4	1) CONSTITUTION OF THE KINGDOM OF CAMBODIA 1993 (rev. 2008), ch. II, art. 11; 2) CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87; 3) CONSTITUTION OF NIGERIA 1999 (rev. 2011), ch. VI, pt. 1(A), § 144; 4) CONSTITUTION OF SIERRA LEONE 1993 (rev. 2013), ch. V, pt. I, art. 50.
Another Body	3	1) AMENDMENT TO CONSTITUTION OF ISLAMIC REPUBLIC OF IRAN 1989, art. 111; 2) CONSTITUTION OF MALAYSIA 2007, art. 38(6)(a); 3) CONSTITUTION OF QATAR 2003, art. 15.
Legislative & Constituent Powers	2	1) CONSTITUTION OF ICELAND 1944 (rev. 2013), art. 11; 2) MINGUO XIANFA [CONSTITUTION] (1947) art. 2 (Taiwan).
Legislative, Executive, & Constituent Powers	2	1) CONSTITUTION OF AUSTRIA 1920 (rev. 2013), ch. III, art. 60(6); 2) CONSTITUTION OF THE PRINCIPALITY OF LIECHTENSTEIN 1921 (rev. 2011), ch. II, art. 13ter.
Legislative & Constituent Powers & Another Body	1	CONSTITUTION OF THE REPUBLIC OF PALAU 1981 (rev. 1992), art. VIII, § 10.
Judicial & Executive Powers & Medical Professionals	1	CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2).

Constituent Power	1	CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA 2009, ch. IV, art. 240.
Legislative Power & Another Body	1	CONSTITUTION OF THE REPUBLIC OF VANUATU 1988, ch. 6, art. 36(2).
Legislative & Executive Powers & Another Body	1	GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION], ch. 2, § 1, art. 35 (Neth.).
Legislative & Judicial Powers & Another Body	1	CONSTITUTION OF THE REPUBLIC OF CYPRUS 2015, pt. III, ch. I, art. 44(3).
Legislative, Judicial & Constituent Powers	1	CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(20)–(25).
Legislative &, Judicial Powers, Another Body & Medical Professionals	1	CONSTITUTION art. 144 (2010) (Kenya).

C. Trends in Constitutional Approaches

What is the prudent arrangement of governmental powers to remove a head of state for disability? The preceding Sections reveal the enormous diversity of constitutional answers to that question. This Section will analyze the data and discuss the broad uses of governmental powers and medical professionals in removal processes. This will paint a cohesive picture within which we may contextualize Section Four.

1. Executive Power

The executive power is the least called upon to address presidential disability. This power is invoked in the removal process in thirty-eight (30.16%) of the 126 constitutions examined but holds final authority in only seven (5.56%). There is a

trend against using the executive power in the removal process, and a strong trend against granting this power final authority.

The removal procedures of thirty-one countries invoke the executive power, but do not grant that power final authority.[95] These states overwhelmingly use the executive power as a call-to-action. Twenty-six states have their executive officials begin the removal process by calling upon either the legislative or judicial powers. Of these twenty-six countries, twenty have their executive officials call upon the

[95] CONSTITUTION OF THE REPUBLIC OF ARMENIA 1995 (rev. 2015), ch. 5, art. 143; CONSTITUTION OF AUSTRIA 1920 (rev. 2013), ch. III, art. 60(6); CONSTITUTION OF BURKINA FASO 1991 (rev. 2012), tit. III, art. 43; CONSTITUTION OF BURUNDI 2005, tit. V, art. 121; CONSTITUTION OF THE KINGDOM OF CAMBODIA 1993 (rev. 2008), ch. II, art. 11; CONSTITUTION OF CHAD 1996 (rev. 2005), tit. III, ch. I, art. 76; CONSTITUTION OF COMOROS 2001 (rev. 2005), tit. III, ch. I, art. 14; CONSTITUTION OF CÔTE D'IVOIRE 2016, tit. III, ch. II, art. 62; CONSTITUTION OF THE REPUBLIC OF CROATIA 1991 (rev. 2013), art. 97; CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005 (rev. 2011), tit. III, ch. 1, § 1, art. 76; CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992 (rev. 2010), tit. III, art. 29; CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89; 1958 LA CONSTITUTION, tit. II, art. 7 (Fr.); CONSTITUTION OF GABON 1991 (rev. 2011), tit. II, art. 13; CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), arts. 93, 179; CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1952 (rev. 2016), ch. 4, pt. 1, art. 28(m); CONSTITUTION OF LESOTHO 1993 (rev. 2011), ch. V, art. 53; CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87; CONSTITUTION OF THE REPUBLIC OF MALI 1992, tit. III, art. 36; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40–41; CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION], ch. 2, § 1, art. 35 (Neth.); CONSTITUTION OF NIGERIA 1999 (rev. 2011), ch. VI, pt. 1(A), § 144; CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53; CONSTITUTION OF SIERRA LEONE 1993 (rev. 2013), ch. V, pt. I, art. 50; CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L; REGERINGSFORMEN [RF] [CONSTITUTION] 5:6 (Swed.); CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2); CONSTITUTION OF THE REPUBLIC OF TOGO 1992 (rev. 2007), tit. IV, art. 65; U.S. CONST. amend. XXV; CONST. OF ZAMBIA (1991) § 107.

judiciary,[96] and six call upon the legislature.[97] The remaining five states vary in their use of the executive power.[98]

When the executive power is granted final authority, it is generally granted to officials close to the head of state. Of the seven states that grant this power final

[96] Fifteen of these twenty states leave final authority with the judicial power. CONSTITUTION OF THE REPUBLIC OF ARMENIA 1995 (rev. 2015), ch. 5, art. 143; CONSTITUTION OF BURKINA FASO 1991 (rev. 2012), tit. III, art. 43; CONSTITUTION OF BURUNDI 2005, tit. V, art. 121; CONSTITUTION OF CHAD 1996 (rev. 2005), tit. III, ch. I, art. 76; CONSTITUTION OF COMOROS 2001 (rev. 2005), tit. III, ch. I, art. 14; CONSTITUTION OF CÔTE D'IVOIRE 2016, tit. III, ch. II, art. 62; CONSTITUTION OF THE REPUBLIC OF CROATIA 1991 (rev. 2013), art. 97; CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005 (rev. 2011), tit. III, ch. 1, § 1, art. 76; 1958 LA CONSTITUTION, tit. II, art. 7 (Fr.); CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2); CONSTITUTION OF THE REPUBLIC OF TOGO 1992 (rev. 2007), tit. IV, art. 65. Djibouti, Gabon, and Mauritania follow this structure, but give authority to call upon the judiciary to both the executive and legislative powers. CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992 (rev. 2010), tit. III, art. 29; CONSTITUTION OF GABON 1991 (rev. 2011), tit. II, art. 13; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40–41. Mali's process is similar, but requires these powers to act jointly to call upon the judiciary. CONSTITUTION OF THE REPUBLIC OF MALI 1992, tit. III, art. 36.

Four of the twenty states have their executive officials call upon the judiciary to investigate the issue, with final authority over removal assigned to the legislative power. CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53; CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L; CONST. OF ZAMBIA (1991) § 107.The remaining state follows the preceding structure, but places final authority in medical professionals. CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89.

[97] Four of these six states leave final authority with the legislature. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1952 (rev. 2016), ch. 4, pt. 1, art. 28(m); GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION], ch. 2, § 1, art. 35 (Neth.); REGERINGSFORMEN [RF] [CONSTITUTION] 5:6 (Swed.). The remaining two states leave final authority with medical professionals. CONSTITUTION OF NIGERIA 1999 (rev. 2011), ch. VI, pt. 1(A), § 144; CONSTITUTION OF SIERRA LEONE 1993 (rev. 2013), ch. V, pt. I, art. 50.

[98] CONSTITUTION OF AUSTRIA 1920 (rev. 2013), ch. III, art. 60(6); (executive power convokes full legislature after process begins); CONSTITUTION OF THE KINGDOM OF CAMBODIA 1993 (rev. 2008), ch. II, art. 11 (executive power picks medical professionals in conjunction with legislative power); CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), art. 179 (executive power communicates between other powers); CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87 (executive power devolves presidential power, with conflicts resolved by the legislature); U.S. CONST. amend. XXV, § 4 (same).

authority, six use the head of state's direct subordinates,[99] while one grants authority to the head of state himself.[100]

The executive power has a restrained role in determining head of state disability. When used, the executive power predominantly serves as a call-to-action that spurs investigation and decision-making by other actors. 68.42% of countries that use the executive power do so in this fashion. Moreover, 52.63% of states that use the executive power call upon the judiciary, with 39.47% of them leaving final authority with the judiciary. Among states that do not grant the executive power final authority over removal, these percentages rise to 64.52% and 48.39% respectively. Thus, for countries like the United States that use the executive power to begin, but not end, the removal procedure, a strong majority use the executive power to call upon the judiciary.

2. Legislative Power

The legislative power is the most called upon to address presidential disability. Of the 126 constitutions analyzed, eighty-eight (69.84%) invoke the legislative power and sixty-two (49.21%) grant it final authority. Although the legislative power does not have final authority in a majority of countries, it dwarfs the frequency of other government powers in this role.[101]

The legislative power has final authority to declare head of state disability in sixty-two countries. Twenty-nine states grant general authority over the issue to their legislatures.[102] This is the most frequent use of the legislative power, amounting to 23.02% of the 126 constitutions examined. These legislatures address head

[99] 2014 CONST. art. 93 (Belg.) (Ministers); CONSTITUTION OF FINLAND 1999 (rev. 2011), ch. 5, § 55 ("Government" composed of Prime Minister and ministers, all of whom are appointed by President in conjunction with other actors); CONSTITUTION OF THE REPUBLIC OF MALDIVES 2008, ch. IV, art. 123(b) (Vice President and majority of Cabinet); CONSTITUTION OF THE MARSHALL ISLANDS 1979 (rev. 1995), art. V, § 9 (Cabinet); CONSTITUTION OF NAURU 1968 (rev. 2015), pt. III, art. 21 (Cabinet); CONSTITUTION OF THAILAND 2017, ch. II, § 17 (Privy Council).

[100] CONSTITUTION OF THE PRINCIPALITY OF LIECHTENSTEIN 1921 (rev. 2011), ch. II, art. 13ter.

[101] The judicial power has final authority in 32.54% of constitutions, the executive power has final authority in 5.56%, and the constituent power has final authority in 4.76%.

[102] CONSTITUTION OF THE REPUBLIC OF BELARUS 1994 (rev. 2004), § 4, art. 88; XIANFA [CONSTITUTION] art. 63, § 1 (China); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 194; CONSTITUTION OF COSTA RICA 1949 (rev. 2015), ch. II, art. 121(8); CONSTITUTION OF CUBA 1976 (rev. 2002), ch. X, art. 75(I)(o); ÚSTAVNÍ ZÁKON [CONSTITUTION] č. 1/1993 Sb., ch. III, art. 66 (Czech); CONSTITUTION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 1972 (rev. 2016), ch. 6, § 1, art. 91(6); CONSTITUTION OF ERITREA 1997, ch. V, art. 41(6)(c); 1975 SYNTAGMA [SYN.] [CONSTITUTION] 34 (Greece); CONSTITUTION OF HONDURAS 1982 (rev. 2013), ch. V, § II, art. 234; MAGYARORSZÁG ALAPTÖRVÉNYE [The Fundamental Law of Hungary], Alaptörvény, art. 12; CONSTITUTION OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC 1991 (rev. 2003), ch. V, art. 53, § 6; CONSTITUTION OF LATVIA 1922 (rev. 2016), ch. III, art.

of state disability as part of their routine business and do not require any additional actors be involved in the removal process. The second most common use of the legislative power consists of twenty-five (19.84%) states that grant the legislative power the authority to begin and finalize the removal process, but require other actors be involved as well. Of these twenty-five countries, fourteen have their legislatures call upon the judiciary to either investigate the head of state's condition or oversee a medical investigation,[103] nine have their legislatures call upon or appoint doctors to investigate,[104] and two have their legislatures call upon doctors and the

51; CONSTITUTION OF LIBYA 2011 (rev. 2012), ch. III, art. 24; CONSTITUTION OF MALTA 1964 (rev. 2016), ch. V, art. 48(3)(b); CONSTITUTION OF THE REPUBLIC OF MONTENEGRO 2007 (rev. 2013), pt. III, art. 91; CONSTITUTION OF THE REPUBLIC OF NAMIBIA 1990 (rev. 2014), ch. 5, art. 29(2); CONSTITUTION OF NEPAL 2015 (rev. 2016), pt. 8, art. 101; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] tit. VIII, ch. III, art. 149(2)(c), LA GACETA, DIARIO OFICIAL [L.G.]; CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973 (rev. 2017), pt. III, ch. 1, art. 47 (2017); CONSTITUTION OF PERU 1993 (rev. 2009), ch. IV, arts. 113–114 (2009); CONSTITUTION OF THE REPUBLIC OF POLAND 1997 (rev. 2009), ch. V, art. 131(2)(4); S. AFR. CONST. 1996 (rev. 2012), ch. 5, art. 89(1)(c); CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 59(2) (Spain); INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF THE SUDAN 2005, pt. III, ch. II, art. 59(c); CONSTITUTION OF VIETNAM 1992 (rev. 2013), ch. V, arts. 70(7), 74(6); CONSTITUTION OF ZIMBABWE 2013 (rev. 2017), ch. 5, pt. 2, art. 97(1)(d). Egypt follows this pattern, but grants final authority to both the legislative and judicial power, with the latter filling in for the former in particular circumstances. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 160. Vanuatu grants final authority to the legislature and another body acting collectively. CONSTITUTION OF THE REPUBLIC OF VANUATU 1988, ch. 6, art. 36(2).

[103] CONSTITUCÍON DE LA REPÚBLICA DE CHILE [C.P.] art. 29; CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1996 (rev. 2004), ch. VI, pt. 1, art. 66; CONSTITUTION OF GHANA 1992 (rev. 1996), ch. VIII, pt. I art. 69(2); CONSTITUTION OF INDONESIA 1945 (rev. 2002), ch. III, art. 7B(1); CONSTITUTION art. 144 (2010) (Kenya); CONSTITUTION OF KIRIBATI 2013 (rev. 2013), ch. IV, art. 34; CONSTITUTION OF LITHUANIA 1992 (rev. 2006), ch. VI, art. 88(6); CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; CONSTITUTION OF SRI LANKA 1975 (rev. 2015), ch. VII, art. 38(2)(c); CONSTITUTION OF TRINIDAD AND TOBAGO 1976 (rev. 2007), ch. III, art. 36(1)(a); CONSTITUTION OF UGANDA 1995 (rev. 2017), ch. VII, art. 107. Seychelles and Singapore follow this format, but allow either the executive or legislative power to call upon the judiciary. CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53; CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L.

[104] CONSTITUTION OF BANGLADESH 1972 (rev. 2014), pt. IV, art. 53(2); CONSTITUTION OF ECUADOR 2008 (rev. 2015), tit. IV, ch. 3, § 1, art. 145(4); CONSTITUTION OF EL SALVADOR 1983 (rev. 2014), tit. VII, ch. I, § 1, art. 131(20th); CONSTITUTION OF GUATEMALA 1985 (rev. 1993), tit. IV, ch. II, § 2, art. 165(i); CONSTITUTION OF ISRAEL 1958 (rev. 2013), art. 21(b); CONSTITUTION OF KOSOVO 2008 (rev. 2016), ch. V, art. 91(2); CONSTITUTION OF KYRGYZSTAN 2010 (rev. 2016), § III, art. 66; CONSTITUTION OF TAJIKISTAN 1994 (rev. 2003), ch. 4, art. 71; CONSTITUTION OF TURKMENISTAN 2008 (rev. 2016), § III, ch. II, art. 75.

judiciary for separate investigations.[105] The remaining eight states grant their legislatures only final authority over the issue of head of state disability. Of these eight states, four have the legislature be called upon by executive officials,[106] two have the legislature decide the issue if there is a conflict between the head of state and executive officials,[107] and two have the legislature decide the issue after judicial investigation.[108]

Twenty-six countries invoke the legislative power in their removal procedures but do not grant it final authority. This amounts to 20.63% of all constitutions examined. These states have three primary uses for the legislative power: thirteen states have their legislatures call upon the judiciary,[109] five states have their legislatures appoint doctors to investigate the head of state's condition,[110] and four states

[105] CONSTITUTION OF KAZAKHSTAN 1995 (rev. 2017), § III, art. 47; CONSTITUTION OF UKRAINE 1996 (rev. 2014), ch. V, art. 110.

[106] CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN 1952 (rev. 2016), ch. 4, pt. 1, art. 28(m); CONSTITUTION OF LESOTHO 1993 (rev. 2011), ch. V, art. 53; GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION], ch. 2, § 1, art. 35 (Neth.); REGERINGSFORMEN [RF] [CONSTITUTION] 5:6 (Swed.).

[107] CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87; U.S. CONST. amend. XXV.

[108] CONSTITUTION OF ALGERIA 1989 (rev. 2016), tit. II, ch. I, art. 102; CONST. OF ZAMBIA (1991) § 107.

[109] CONSTITUTION OF ALBANIA 1998 (rev. 2016), ch. IV, pt. 4, art. 91(2); CONSTITUTION OF ANGOLA 2010, tit. IV, ch. II, § IV, art. 129; CONSTITUTION OF AZERBAIJAN 1995 (rev. 2016), pt. 3, ch. VI, art. 104(III); CONSTITUTION OF BENIN 1990, tit. III, art. 50; CONSTITUTION OF GUINEA 2010, tit. III, subsec. I, arts. 40–41; CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), arts. 93, 179; CONSTITUTION OF MADAGASCAR 2010, tit. III, subsec. I, art. 50; CONSTITUTION OF NIGER 2010, tit. III, § 1, art. 53; CONSTITUTION OF SENEGAL 2001 (rev. 2016), tit. III, arts. 39, 41. Djibouti, Gabon, and Mauritania follow this procedure, but allow either the executive or legislative power to call upon the judiciary. CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992 (rev. 2010), tit. III, art. 29; CONSTITUTION OF GABON 1991 (rev. 2011), tit. II, art. 13; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40–41. Mali also follows this procedure but requires the legislative and executive power jointly call upon the judiciary. CONSTITUTION OF THE REPUBLIC OF MALI 1992, tit. III, art. 36.

[110] CONSTITUTION OF THE KINGDOM OF CAMBODIA 1993 (rev. 2008), ch. II, art. 11; CONSTITUTION OF NIGERIA 1999 (rev. 2011), ch. VI, pt. 1(A), § 144; CONSTITUTION OF SIERRA LEONE 1993 (rev. 2013), ch. V, pt. I, art. 50; Venezuela differs slightly, as the judicial power appoints the doctors and the legislature approves the appointments. CONSTITUTION OF VENEZUELA (BOLIVARIAN REPUBLIC OF) 1999 (rev. 2009), tit. V, ch. II, § 1, art. 233.

have their legislatures call upon constituents to decide the issue.[111] The remaining four states have idiosyncratic uses of their legislative power.[112]

Although diverse, constitutions overwhelmingly demonstrate that the legislative power is the preferred governmental power for handling head of state disability. The legislative power is invoked in eighty-eight, or 69.84%, of the 126 constitutions examined, with sixty-two, or 49.21%, of them granting it final authority. Among states that grant final authority to the legislature, twenty-nine, or 46.77%, provide general authority over the issue, while twenty-five, or 40.32%, require the involvement of other powers and actors in the process. Among states that invoke the legislative power but do not grant it final authority, thirteen, or 50%, have their legislatures call upon the judiciary, while five, or 19.23%, have their legislatures appoint doctors and four, or 15.38%, call upon citizens. Overall, states that invoke the legislative power do so in two dominant ways: twenty-nine states give the legislature general authority over the issue while twenty-seven states call upon the judiciary to resolve or investigate the issue. These amount to 32.95% and 30.68% of the eighty-eight constitutions that use the legislative power, and 23.02% and 21.43% of the 126 constitutions examined.

The prudent arrangement of the governmental powers, then, is one that heavily uses the legislative power, particularly in the final determination of disability. In using the legislative power, a prudent removal process should either grant full authority to the legislature or should involve the judicial power operating at some level at the legislature's request.

3. Judicial Power

The judicial power is used less than the legislative power but more than the executive power. The judicial power is invoked in sixty-four of the 126 constitutions examined and has final authority in forty-one constitutions.

The dominant use of the judicial power in removal processes is to determine head of state disability. This constitutes 32.54% of the 126 constitutions examined.

[111] CONSTITUTION OF AUSTRIA 1920 (rev. 2013), ch. III, art. 60(6); CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(20)–(25); CONSTITUTION OF ICELAND 1944 (rev. 2013), art. 11; MINGUO XIANFA [Constitution] (1947) art. 2 (Taiwan).

[112] CONSTITUTION OF THE REPUBLIC OF CYPRUS 2015, pt. III, ch. I, art. 44(3) (legislature makes general resolution about the issue); CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89(4) (legislature ratifies, without discretion, report of medical investigators); CONSTITUTION OF THE PRINCIPALITY OF LIECHTENSTEIN 1921 (rev. 2011), ch. II, art. 13ter (legislature comments on citizen-requested referendum); CONSTITUTION OF THE REPUBLIC OF PALAU 1981 (rev. 1992), art. VIII, § 10 (legislature establishes special election board to oversee referendum).

Seventeen of these constitutions grant authority generally to entities wielding judicial power.[113] The other twenty-four states have the judiciary resolve the matter after being called upon by other actors: eleven such processes begin with the executive power,[114] eight begin with the legislature power,[115] three begin with either power,[116] one begins with both powers acting jointly,[117] and one begins with the legislative power and another body acting jointly.[118]

Twenty-three constitutions invoke the judicial power but do not grant it final authority. These procedures comprise 18.25% of all 126 constitutions examined.

[113] Three of these states grant general authority to their Chief Justices. CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. IV, art. 36(5); CONSTITUTION OF RWANDA 2003 (rev. 2015), ch. VII, § 3, subsec. 1, art. 105; CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23(2). However, Samoa and Rwanda both condition by requiring their Chief Justices consult or follow medical evidence. The remaining fourteen states grant general authority to a court or council. CONSTITUTION OF BULGARIA 1991 (rev. 2015), ch. IV, art. 97; CONSTITUTION OF CAMEROON 1972 (rev. 2008), pt. II, art. 6(4); CONSTITUTION OF CAPE VERDE 1980 (rev. 1992), tit. V, ch. II, art. 237(c); CONSTITUTION OF EQUATORIAL GUINEA 1991 (rev. 2012), ch. VI, art. 101(2)(d); CONSTITUTION OF ESTONIA 1992 (rev. 2015), ch. V, art. 83; CONSTITUTION OF IRELAND 1937 (rev. 2015), art. 12(3)(1); CONSTITUTION OF REPUBLIC OF MACEDONIA 1991 (rev. 2011), ch. III, pt. 2, art. 82; CONSTITUTION OF REPUBLIC OF MOLDOVA 1994 (rev. 2016), tit. III, ch. V, art. 90(3); CONSTITUTION OF PORTUGAL 1976 (rev. 2005), tit. VI, art. 223(2)(a); CONSTITUTION OF SLOVAKIA 1992 (rev. 2014), arts. 105(2), 131(1); CONSTITUTION OF TIMOR-LESTE 2002, tit. II, ch. 1, art. 82(2); CONSTITUTION OF TUNISIA 2014, tit. 4, pt. 1, art. 84. Egypt grants this authority secondarily to the court, if the legislature is dissolved, and Mozambique requires a medical board certify the head of state's disability before letting the court remove the head of state. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 160; CONSTITUTION OF MOZAMBIQUE 2004 (rev. 2007), tit. VI, ch. I, art. 156(1).

[114] CONSTITUTION OF THE REPUBLIC OF ARMENIA 1995 (rev. 2015), ch. 5, art. 143; CONSTITUTION OF BURUNDI 2005, tit. V, art. 121; CONSTITUTION OF BURKINA FASO 1991 (rev. 2012), tit. III, art. 43; CONSTITUTION OF CHAD 1996 (rev. 2005), tit. III, ch. I, art. 76; CONSTITUTION OF COMOROS 2001 (rev. 2005), tit. III, ch. I, art. 14; CONSTITUTION OF CÔTE D'IVOIRE 2016, tit. III, ch. II, art. 62; CONSTITUTION OF THE REPUBLIC OF CROATIA 1991 (rev. 2013), art. 97; CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO 2005 (rev. 2011), tit. III, ch. 1, § 1, art. 76; 1958 LA CONSTITUTION, tit. II, art. 7 (Fr.); CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2); CONSTITUTION OF THE REPUBLIC OF TOGO 1992 (rev. 2007), tit. IV, art. 65.

[115] CONSTITUTION OF ALBANIA 1998 (rev. 2016), ch. IV, pt. 4, art. 91(2); CONSTITUTION OF ANGOLA 2010, tit. IV, ch. II, § IV, art. 129; CONSTITUTION OF AZERBAIJAN 1995 (rev. 2016), pt. 3, ch. VI, art. 104(III); CONSTITUTION OF BENIN 1990, tit. III, art. 50; CONSTITUTION OF GUINEA 2010, tit. III, subsec. I, arts. 40–41; CONSTITUTION OF MADAGASCAR 2010, tit. III, subsec. I, art. 50; CONSTITUTION OF NIGER 2010, tit. III, § 1, art. 53; CONSTITUTION OF SENEGAL 2001 (rev. 2016), tit. III, arts. 39, 41.

[116] CONSTITUTION OF THE REPUBLIC OF DJIBOUTI 1992 (rev. 2010), tit. III, art. 29; CONSTITUTION OF GABON 1991 (rev. 2011), tit. II, art. 13; CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA Mar. 20, 2012, arts. 40–41.

[117] CONSTITUTION OF THE REPUBLIC OF MALI 1992, tit. III, art. 36.

[118] CONSTITUTION OF THE REPUBLIC OF CYPRUS 2015, pt. III, ch. I, art. 44(3).

The most prevalent procedure, used by eleven states, uses the power to appoint medical professionals to investigate the head of state's capacity.[119] Another nine states use the judicial power to directly investigate the head of state's condition and report its findings to another actor, often the legislature.[120] The remaining three states use their judicial power idiosyncratically.[121]

Constitutions of the world exhibit a significant role for the judicial power in the removal process. The judicial power is invoked in sixty-four, or 50.79%, of the 126 constitutions examined. Forty-one, or 64.06%, of these constitutions grant final authority to the judicial power, while the remaining twenty-three, or 35.94%, use this power predominantly to appoint investigatory officials or to conduct the investigation directly. Thus, constitutions exhibit two significant functions for the judicial power in removal processes: if not resolving the issue itself, the judicial power is heavily involved in the investigation of the heads of state's condition. These functions make sense in light of judicial officials' reliance on reason, objectivity, and heightened integrity when dealing with significant issues of public interest.

Three procedural variants merit brief mention. First, some states set specific voting requirements for courts determining presidential disability.[122] Second, some

[119] Nine of these states grant appointment authority to their Chief Justices. CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89(3); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1996 (rev. 2004), ch. VI, pt. 1, art. 66(1); CONSTITUTION OF GHANA 1992 (rev. 1996), ch. VIII, pt. I art. 69(5); CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), arts. 93, 179(1); CONSTITUTION art. 144(1) (2010) (Kenya); CONSTITUTION OF KIRIBATI 2013 (rev. 2013), ch. IV, art. 34(1); CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53(5); CONSTITUTION OF UGANDA 1995 (rev. 2017), ch. VII, art. 107(9); CONST. OF ZAMBIA (1991) § 107. The remaining two states grant this authority to a court. However, Venezuela requires the legislature give approval to the court's appointees. CONSTITUTION OF AFGHANISTAN 2004, ch. III, art. 67; CONSTITUTION OF VENEZUELA (BOLIVARIAN REPUBLIC OF) 1999 (rev. 2009), tit. V, ch. II, § 1, art. 233.

[120] CONSTITUCÍON DE LA REPÚBLICA DE CHILE [C.P.] art. 53(7); CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1); CONSTITUTION OF INDONESIA 1945 (rev. 2002), ch. III, art. 7B(4); CONSTITUTION OF LITHUANIA 1992 (rev. 2006), ch. VI, art. 88(6); CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30(3); CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L(7); CONSTITUTION OF SRI LANKA 1975 (rev. 2015), ch. VII, art. 38(2)(d); CONSTITUTION OF TRINIDAD AND TOBAGO 1976 (rev. 2007), ch. III, art. 36(1)(d); CONSTITUTION OF UKRAINE 1996 (rev. 2014), ch. V, art. 110.

[121] CONSTITUTION OF ALGERIA 1989 (rev. 2016), tit. II, ch. I, art. 102 (judiciary calls upon the legislature); CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(23) (Chief Justice presides over legislative vote on the issue); CONSTITUTION OF KAZAKHSTAN 1995 (rev. 2017), § III, art. 47(2) (judiciary confirms the legislature's observance of removal procedure).

[122] CONSTITUTION OF AZERBAIJAN 1995 (rev. 2016), pt. 3, ch. VI, art. 104(III) (six judge majority required); CONSTITUTION OF CHAD 1996 (rev. 2005), tit. III, ch. I, art. 76 ("absolute majority" required); 1958 LA CONSTITUTION, tit. II, art. 7 (Fr.) ("absolute majority" required); CONSTITUTION OF IRELAND 1937 (rev. 2015), art. 12(3)(1) (five judge majority required);

states establish constitutional standards for establishing incapacity that can guide the court's resolution of the issue.[123] Finally, some states grant significant authority to the Chief Justice rather than the full court.[124]

4. Constituent Power

The constitutions of the world reveal a remarkably limited role for the constituent power in the determination of presidential disability. Only seven of the 126 constitutions examined use their citizenry in their removal processes, with six granting citizens final authority.[125] This amounts to 5.56% and 4.76% of the constitutions examined, respectively. Of the six states that grant citizens final authority, five have their citizenry decide the issue via referendum but require other actors to begin the process,[126] while one state puts the full power over the removal process with its citizens.[127] Thus, in the broad picture that emerges from the world's constitutions the constituent power is but a small speck.

5. Medical Professionals

Although not a governmental power, medical professionals are an important component of many removal procedures. Doctors are involved in the removal processes of thirty-two constitutions but have final authority in only eight. This amounts to 25.40% and 6.35% of the 126 constitutions examined, respectively.

One chief variation within the procedures of these thirty-two countries is who selects the doctors: thirteen states appoint doctors using their judiciaries,[128] eight

CONSTITUTION OF SLOVAKIA 1992 (rev. 2017), ch. 7, pt. 1, art. 131(1) ("absolute majority" of judges in plenary session required).

[123] For example, Guinea's constitution defines "definitive incapacity" explicitly and Samoa's constitution sets an explicit standard for evidence to be used by the Chief Justice. CONSTITUTION OF GUINEA 2010, tit. III, subsec. I, arts. 40; CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23(2).

[124] CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. IV, art. 36(5); CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89(3); CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30(8); CONSTITUTION OF RWANDA 2003 (rev. 2015), ch. VII, § 3, subsec. 1, art. 105.

[125] Bhutan and Iceland grant their constituents final authority, while Liechtenstein allows citizens to table a motion of no confidence in parliament to begin the removal process. CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(24); CONSTITUTION OF ICELAND 1944 (rev. 2013), art. 11; CONSTITUTION OF THE PRINCIPALITY OF LIECHTENSTEIN 1921 (rev. 2011), ch. II, art. 13ter.

[126] CONSTITUTION OF AUSTRIA 1920 (rev. 2013), ch. III, art. 60(6); CONSTITUTION OF THE KINGDOM OF BHUTAN July 18, 2008, art. 2(24); CONSTITUTION OF ICELAND 1944 (rev. 2013), art. 11; CONSTITUTION OF THE REPUBLIC OF PALAU 1981 (rev. 1992), art. VIII, § 10; MINGUO XIANFA [CONSTITUTION] (1947) art. 2 (Taiwan).

[127] CONSTITUTION OF THE PLURINATIONAL STATE OF BOLIVIA 2009, ch. IV, art. 240.

[128] CONSTITUTION OF AFGHANISTAN 2004, ch. III, art. 67; CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89(b)(3); CONSTITUTION OF GHANA 1992 (rev. 1996),

using their legislatures,[129] one using the legislature and executive officials,[130] and one using the judiciary and legislature.[131] The remaining nine states delegate the appointment to idiosyncratic laws or actors.[132] Thus, when doctors are used in the removal process, they are predominantly appointed by the judicial power, with the legislative power secondary in this role.

Unsurprisingly, the primary role of doctors in the removal process is to investigate the head of state's condition. Because only eight of the thirty-two states that use doctors grant them final authority to determine disability, 75% of countries that involve doctors in the removal process reserve final determination of the issue for a political branch. Thus, while medical evidence is important enough to be mandated in 25.40% of the world's constitutions, only 6.35% of constitutions make that evidence authoritative.

ch. VIII, pt. I art. 69(5); CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), arts. 93, 179(1); CONSTITUTION art. 144(3)(a) (2010) (Kenya); CONSTITUTION OF KIRIBATI 2013 (rev. 2013), ch. IV, art. 34(1); CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23(2); CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53(5); CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1996 (rev. 2004), ch. VI, pt. 1, art. 66(1); CONSTITUTION OF UGANDA 1995 (rev. 2017), ch. VII, art. 107(9); CONST. OF ZAMBIA (1991) § 107(4). Guinea does not state who appoints doctors; however, its procedure provides that a declaration of a "college of specialized doctors" that the president is unfit to stay in office due to disability constitutes "definitive incapacity." Because the Constitutional Court declares the vacancy of the presidency, and because that court would likely follow that standard, this paper assumes that the Constitutional Court would appoint the doctors in the adjudication of the possible vacancy. CONSTITUTION OF GUINEA 2010, tit. III, subsec. I, arts. 40–41.

[129] CONSTITUTION OF BANGLADESH 1972 (rev. 2014), pt. IV, art. 53(2); CONSTITUTION OF EL SALVADOR 1983 (rev. 2014), tit. VII, ch. I, § 1, art. 131(20th); CONSTITUTION OF KAZAKHSTAN 1995 (rev. 2017), § III, art. 47(1); CONSTITUTION OF KYRGYZSTAN 2010 (rev. 2016), § III, art. 66(2); CONSTITUTION OF NIGERIA 1999 (rev. 2011), ch. VI, pt. 1(A), § 144(4); CONSTITUTION OF SIERRA LEONE 1993 (rev. 2013), ch. V, pt. I, art. 50(1); CONSTITUTION OF TAJIKISTAN 1994 (rev. 2003), ch. 4, art. 71; CONSTITUTION OF TURKMENISTAN 2008 (rev. 2016), § III, ch. II, art. 75.

[130] CONSTITUTION OF THE KINGDOM OF CAMBODIA 1993 (rev. 2008), ch. II, art. 11.

[131] Constitution of Venezuela (Bolivarian Republic of) 1999 (rev. 2009), tit. V, ch. II, § 1, art. 233.

[132] CONSTITUTION OF ECUADOR 2008 (rev. 2015), tit. IV, ch. 3, § 1, art. 145(4); CONSTITUTION OF GUATEMALA 1985 (rev. 1993), tit. IV, ch. II, § 2, art. 165(i); CONSTITUTION OF ISRAEL 1958 (rev. 2013), art. 21(b); CONSTITUTION OF KOSOVO 2008 (rev. 2016), ch. V, art. 91(2); CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87(2); CONSTITUTION OF MOZAMBIQUE 2004 (rev. 2007), tit. VI, ch. I, art. 156(1); CONSTITUTION OF RWANDA 2003 (rev. 2015), ch. VII, § 3, subsec. 1, art. 105; CONSTITUTION OF SOUTH SUDAN 2011 (rev. 2013), pt. 6, ch. II, art. 103(6); CONSTITUTION OF UKRAINE 1996 (rev. 2014), ch. V, art. 110.

D. The United States in Context

What is the prudent arrangement of governmental powers in the process for removing a head of state due to disability, and how does Section Four compare? While vast nuance exists, this Note's examination of 126 constitutions reveals a generally prevailing arrangement. This arrangement grants the executive power a reduced role, one largely confined to calling attention to the potential issue of disability and spurring other actors into motion. The legislative power dominates the removal process as well as the final determination of disability. Between these poles lies the judicial power, which flexibly serves either to (a) resolve the issue itself, or (b) assist the legislative power by investigating the president's condition.

Section Four conforms unevenly to these general trends. Although its procedure mirrors international trends with regard to the use of medical professionals and its use of the legislative power for the final determination of disability, Section Four's total exclusion of the judicial power falls outside the norm.

1. Medical Professionals

With regard to medical evidence, Section Four strongly comports with international trends. Of the 126 countries examined, only 25.04% require medical professionals be involved and only 6.35% grant doctors with the final authority to determine disability. The United States is thus within the strong majority of states that do not require the involvement of medical professionals in the removal process or give doctors final authority in that process.

2. The Judicial Power

Although Section Four's total exclusion of the judicial power in the removal process is not wholly abnormal, its use of the executive and legislative powers, in absence of the judicial power, constitutes an unusual use of those powers. Section Four's exclusion of the judicial power stands at odds with international uses of the powers both individually and jointly. These abnormalities manifest when comparing the structure of Section Four's procedure with international uses of the powers invoked in Section Four. Succinctly, Section Four uses the executive and legislative powers in an abnormal fashion, individually and jointly, by excluding the judicial power.

a. Executive Power

The United States is among the thirty-one countries that invoke the executive power without granting that power final authority. Within this group, the United States stands out significantly.

The United States, along with Malawi,[133] use its executive powers to devolve presidential power without calling upon other actors; however, their executive pow-

[133] CONSTITUTION OF THE REPUBLIC OF MALAWI 1994 (rev. 2017), ch. VIII, art. 87.

ers do not have final authority to determine head of state disability. These two countries comprise 6.45% of constitutions within this group. Conversely, twenty-six, or 83.87%, of countries within this group use their executive powers to call upon other actors to either continue or finalize the removal process.[134] The largest use of the executive power within this group is to call upon the judicial power. Twenty, or 64.52%, of the thirty-one countries use their executive power in this fashion. Thus, when a country uses the executive power in the removal process, without granting it final authority, that country is ten times more likely to have the executive power call upon the judiciary than to have that power function as it does in Section Four.

This trend manifests similarly on the broader level of all countries that use the executive power in their removal process. Among the thirty-eight countries that invoke the executive power, the United States and Malawi constitute 5.26% of constitutions, while countries that use the executive power to call upon the judiciary constitute 52.63% of constitutions. Clearly, Section Four's use of the executive power stands at odds with international trends.

b. Legislative Power

The United States is among the sixty-two countries that grant the legislature final authority over determining head of state disability. More specifically, the United States is one of the eight countries that give only the legislative power final authority. This subgroup constitutes 12.90% of the constitutions that grant final authority to the legislative power. Within this minority, the United States and Malawi again stand apart. The small size of this group, however, makes the deviation of these countries less significant. The United States and Malawi's use of the legislative power constitutes 25% of this group, while 25% of the group grants the legislative power final authority following a judicial investigation, and the remaining 50% has the executive power directly call upon the legislative power to resolve the issue. Thus, Section Four's use of the legislative power constitutes a small part of a small subgroup of states that use the legislative power. Within this minority, Section Four's use of the legislative power falls outside the typical use of that power, in which it resolves the issue of head of state disability after being called upon by the executive power.

At the broader level, however, Section Four's use of the legislative power stands apart more readily from international trends. Among the sixty-two countries that grant final authority to the legislative power, twenty-nine, or 46.77%, grant that power general authority and fourteen, or 22.58%, grant that power authority to begin and finalize the removal process, with the judiciary investigating the issue be-

[134] While executive officials in the United States and Malawi can unilaterally devolve the president's powers, with the legislature resolving the issue if the president formally disagrees with those officials, executive officials in the larger group merely initiate the removal procedure by calling other actors into action to address the issue.

fore the final legislative vote. These constitute the most common uses of the legislative power when that power has final authority. Relative to these trends, the United States is one of only two countries that grant the legislative power final authority only after the executive power suffers an internal conflict. When a country grants final authority to the legislative power, then, that country is *over fourteen times* more likely to simply grant all authority to the legislative power than to arrange that power how it is in Section Four; moreover, that country is *almost seven times* more likely to have the legislature call upon the judiciary to oversee an investigation into the head of state's condition.

At the broadest level, Section Four's use of the legislative power stands out even more emphatically. Among the eighty-eight countries that invoke the legislative power in the removal process, twenty-nine, or 32.95%, grant that power general authority and twenty-seven, or 30.68%, have that power call upon the judicial power to continue the process. The United States' use of the legislative power, in this broad context, falls within the minute subgroup that constitutes 2.27% of constitutions. Thus, if a country uses the legislative power in any form in the removal process, that country is *over fourteen times* more likely to grant that power general authority over the issue than use it how Section Four does; furthermore, that country is *over nine times* more likely to have the legislative power call upon the judicial power.

Thus, Section Four's use of the legislative power falls within a very minor subcategory of uses of that power. At the narrowest level, it stands apart from the trend of having the executive call directly upon the legislature. Through a broader lens, Section Four more clearly fails to comport with international trends on the use of the legislative power in removal procedures.

c. Executive and Legislative Powers

The United States' use of only the legislative and executive powers in Section Four's removal process also bucks international trends. Thirty-one states use only two government powers in their removal processes. Among these states, four, or 12.90%, use the executive and legislative powers, fifteen, or 48.39%, use the legislative and judicial powers, ten, or 32.26%, use the judicial and executive powers, and two, or 6.45%, use the legislative and constituent powers. Thus, if a state uses only two government powers, like Section Four, it is *3.75 times* more likely to use the legislative and judicial powers than the legislative and executive powers; moreover, it is *2.5 times* more likely to use the judicial and executive powers.

This trend remains even when additional actors, such as other bodies and medical professionals, are included in the removal procedures. Among the 45 states that fall within this category, eight, or 17.78%, use the legislative and executive powers while twenty-three, or 51.11%, use the legislative and judicial powers, eleven, or 24.44%, use the judicial and executive powers, and three, or 6.67%, use the legislative and constituent powers. Thus, if a state uses two governmental powers, with or

without additional actors, it is *2.88 times* more likely to use the legislative and judicial powers than the legislative and executive powers; moreover, it is *1.37 times* more likely to use the judicial and executive powers.

Thus, in addition to bucking international trends regarding the use of the legislative and executive powers individually, Section Four deviates from the international uses of two governmental powers in removal procedures.

III. IMPROVING SECTION FOUR

A. Recommendation: A Judicial Commission

This Section recommends congressional action to bring the U.S. more in line with global understandings of the prudent use of governmental powers in executive removal and alleviate some of Section Four's chief problems. The author recommends that Congress create an "other body." In the fifty-year history of the amendment, this has never been done.[135] Many bodies have been suggested before and after the ratification of the Amendment.[136] Proposals vary, but they generally include medical professionals.[137] The primary focus of most proposed bodies is thus to establish medical facts regarding the President's condition.[138] However, by man-

[135] Report of the Fordham University School of Law's Clinic on Presidential Succession, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 20 n.15 (2012) [hereinafter Fordham University Report].

[136] For a general discussion of committees, panels, and bodies proposed before ratification of the Twenty-Fifth Amendment, see FEERICK, *supra* note 12, at 51–58.

[137] For example, four dominant proposals examined by Gilbert were all constituted predominantly with medical professionals. Gilbert, *Medical Commission*, *supra* note 68, at 5–6. President Jimmy Carter similarly recommended a body composed of medical professionals. *Carter: Let Outside Doctors Decide Whether a President is Disabled*, WASH. POST (Dec. 7, 1994), https://www.washingtonpost.com/archive/politics/1994/12/07/carter-let-outside-doctors-decide-whether-a-president-is-disabled/3ac8246f-51d7-4a46-96ed-df490a2fa1f1/?utm_term=.253e01e3766f. Additionally, the recommendation of the recent Fordham University School of Law Clinic on Presidential Succession was premised on a guideline-drafting commission whose membership is "at least half" comprised of medical doctors. Second Fordham University, *supra* note 12, at 52. However, the focus on medical professionals is not uniform. For example, in 2012 the Fordham University School of Law Clinic of Presidential Succession recommended a body comprised of "a majority of governors or some other group of individuals from outside of Washington D.C." Fordham University Report, *supra* note 135, at 107. In April 2017, Representative Blumenauer (D-OR) introduced H.R. 2093, which proposed to establish an "alternative body" composed of all living former presidents and vice presidents. H.R. 2093, 115th Cong. (2017).

[138] *See, e.g.*, Gilbert, *Medical Commission*, *supra* note 68; Herbert L. Abrams, *Can the Twenty-Fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-Ups*, 29 PRESIDENTIAL STUD. Q. 115, 118 (1999).

dating the inclusion of doctors in the "other body," these proposals beget the problems identified in Part I; moreover, they counter the strong international trend of not utilizing doctors in the removal process.

Because the international community has demonstrated a strong hesitation toward using medical professionals, this Note will not follow the usual path of recommending that a medical panel be created by Congress pursuant to Section Four. Rather, this Note urges Congress to use its power to bring the United States more in line with the global understanding of the role the judicial power can play in the removal process. In making this proposal, this Note aims to resolve some issues with Section Four and thereby mitigate potential abuse of the procedure. Because judicial review would require a constitutional amendment, including the judicial power by statute addresses the issue of having only political actors included in the removal of the president.

B. Overview

Congress should statutorily create another body—tentatively called the Commission of the Twenty-Fifth Amendment ("the Commission")—comprised of three justices of the Supreme Court of the United States. The Commission should be chaired by the chief justice, with the other justices separately appointed by the House of Representatives and the Senate. The two justices should be appointed for renewable six-year terms, with no limit on reelection. Justices should be barred from campaigning, testifying, or otherwise seeking appointment to the Commission. The Commission should convene only at the request of the vice president. When convened, the Commission's sole duty is to determine whether the vice president's stated concerns are substantiated. The decision of the Commission, regardless of the actual voting record, should be presented as a collective decision, with no public comments or dissent as to its decision by individual justices. Of critical importance, the statute establishing this Commission, and the procedures by which it operates, must require that the Commission be "satisfied by medical evidence" before it can support the vice president's initiation of Section Four's procedures. The Commission should have no legal power to compel examination of the president or to subpoena, and its proceedings should be highly classified and out of public access.

This recommendation has several key provisions that require unpacking. The following Sections will evaluate these individual components.

C. Why Justices?

As demonstrated in Part II, 50.79% of the world's constitutions use the judicial power to address presidential disability. There are several reasons why using the judicial power in this process would be beneficial.

First, justices are the only high-ranking government officials who are expected to maintain impartiality in the execution of their duties. Justices are further expected

to maintain integrity in the face of immense public scrutiny, political disapproval, and the consequences that result from the fulfilment of their duties. As a consequence, justices carry immense legitimacy. This legitimacy would carry into Section Four obligations and give greater respect to any uses of the removal procedure.

Additionally, justices have no incentive to abuse Section Four because they have nothing to gain professionally from removing the president. After the vice president, the line of presidential succession goes to the speaker of the House of Representatives and then to the president pro tempore of the Senate.[139] With lifetime appointments and no position in the presidential line of succession, justices have no professional interest that could be furthered by removing the president.

Furthermore, because justices are appointed for life, they are more likely to be impartial in their assessment of the president's condition. The average tenure of a justice is sixteen years,[140] meaning the average justice, at minimum, serves across the administration of at least two different presidents. Unlike congressional actors, executive officials, and non-governmental agents, the justices are uniquely positioned to withstand the change of political winds and are less tied to any particular political regime, policy agenda, or administration.

By virtue of the significance of the issue and the consequences of executing Section Four, justices will also be inclined to be appropriately cautious in approaching the issue of presidential disability. In terms of evidentiary burden, it is difficult to imagine a more difficult panel of individuals to convince of the need to remove a democratically elected president than one composed of Supreme Court justices. This is advantageous. The decision to execute Section Four is of immense—indeed, unmatched—significance. Those behind the decision should demand and use the highest of objective standards in making that decision. This supports the use of justices in that determination.[141]

The use of justices would also assist the president in assessing his situation if Section Four is invoked. One significant reason the president has a four-day window to contest the declaration of the vice president and either identified body is "to permit some time [for him] to deliberate[.]"[142] As Birch Bayh explained:

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[139] 3 U.S.C. § 19(a)–(b) (2006). These congressional leaders are "two and three heartbeats away" from assuming the presidency. Goldstein, *supra* note 75, at 1019.

[140] *FAQs – Supreme Court Justices, Supreme Court of the United States*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/faq_justices.aspx (last visited May 14, 2018).

[141] Moreover, because the traditional work of the justices demands impartiality, there is a strong incentive to respond to abusive actions by the justices on the Commission. If the Commission is overly aggressive in trying to implement Section Four, their impartiality on the Court would be brought into question. Thus, justices would be held to a strict and objective role on the Commission to ensure their continuance on the Court.

[142] Bayh, *supra* note 10, at 19.

> [The four-day window is] to permit some time to deliberate before making that decision [to contest the devolution of his powers] because the president himself needs to be aware that there are going to be people who are going to disagree with him on that. Then maybe he'll go back and have a conversation with his doctors and say, "Am I really well?"[143]

Any invocation of Section Four against the president would likely lead to deep deliberation by the president. However, if Section Four's initiation is backed by a Commission composed of three justices, the president would likely be more solemn in his consideration of his health. Similarly, if the Commission backs the vice president's decision to invoke Section Four, the vice president can warn the president of the impending removal and allow the president to voluntarily execute Section Three's assignment of power to the vice president. This would mitigate damage to the president's power in the long-term[144] and would make the president's return to power easier. These benefits could incentivize a president to realistically obtain help for his condition before seeking return to office.

Finally, the use of justices allows a significant check on the Commission's activities that is unavailable against other actors.[145] Because Congress has authority to impeach justices, abuse of Section Four by the Commission could lead to removal from the Supreme Court.[146] No justice has ever been impeached and removed from office, and no justice wants to break that record.

D. The Selection of Justices

The Commission should be comprised of the Chief Justice and two additional justices of the Supreme Court.[147] Because the chief justice's only constitutional duty

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[143] *Id.*

[144] Indeed, the president may actually be perceived as more prudent for recognizing her disability and acting accordingly.

[145] Some safeguards are available to Congress regardless who is on the Commission. For example, because Congress would create the body via statute, Congress always has statutory options for reprimanding the Commission. Additionally, the requirement of vice-presidential agreement for Section Four presents a universal safeguard against abuse of the removal procedure.

[146] U.S. CONST. art. III § 1. Note that Congress has both statutory and constitutional options available to it. In essence, the difference is the degree of severity with which Congress wishes to charge and punish a justice. Statutory checks will only suffice to remove a Justice from the Commission, whereas impeachment will remove a justice from the Commission as well as the Supreme Court.

[147] The reasoning for a three-member Commission, rather than any other number, is to ensure a majoritarian model of decision-making, to expedite decision-making, and to prevent the Commission's activities from resembling those of the Supreme Court. This model, wherein the Chief Justice is joined with other judges, is utilized by Dominica, Trinidad and Tobago, Singapore, and Mauritius. However, these procedures have the Chief Justice appoint the remaining judges, while the Commission recommended here would not grant that power to the

is to preside over impeachment trials of the president,[148] involving the Chief Justice on the Commission would establish a similar level of significance with the removal process. Additionally, the prestige, integrity, and competence inherent in the position of chief justice has, around the globe, resulted in chief justices holding immense power in the removal process.[149] However, in this Commission the Chief Justice's power would be limited to managing the investigation and voting on whether to invoke Section Four.

The other two justices should be appointed individually by the House of Representatives and the Senate. The appointment procedure should be decided separately by each chamber. This, in essence, would make the Commission a modified form of the tribunal utilized by Dominica.[150] However, unlike that tribunal the power of the Chief Justice would be constrained. This limit will permit greater congressional involvement in the removal process and reduce potential for abuse by the justices, both of which add greater democratic legitimacy to any use of Section Four. Additionally, this split appointment procedure reflects the separate chamber votes that is necessary to remove the president. If both chambers are ultimately called upon to resolve the issue, it is constructive for both chambers to be involved in appointing the body that may be called upon to initiate the procedure. Because the Commission is not temporary, these appointments must be made continuously by Congress to ensure institutional stability across presidencies.

Although the appointment procedures may be left to the individual houses, Congress should strictly mandate that justices are not allowed to campaign, testify, or otherwise seek nomination to the Commission. Appointment of a particular justice should reflect the appointing chamber's trust in the integrity of that justice and not a particular ideology or approach to the issue of presidential disability. It is imperative that Congress ensures impartiality in the Commission's functions by foreclosing any avenue for seeking appointment to the Commission.

Additionally, Congress should set renewable term limits on the justice's participation on the Commission. While a six-year term would nicely ensure routine reexamination of the Commission's composition, a longer term may be more in line with the infrequent nature of the Commission's work. That is, if the Commission is called upon infrequently, it may be more practical to have term limits of nine or

Chief Justice. CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1); CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L; CONSTITUTION OF TRINIDAD AND TOBAGO 1976 (rev. 2007), ch. III, art. 36.

[148] U.S. CONST. art. I § 3.

[149] *See, e.g.*, CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. IV, art. 36(5); CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23.

[150] CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1).

ten years. Regardless, the term length should splice presidential terms so that the Commission's composition does not change with each president.[151]

Congress should further mandate that a justice cannot serve on the Commission during the administration of the president who appointed her. This is to prevent the appearance or creation of partisanship on the Commission. Although justices are presumably not bound to political parties or individual presidents, there is no constitutional requirement mandating that distance. If a president and Senate confirmed a pro-president justice, and that justice was further elected to the Commission, the purpose of the Commission would be undercut by subterfuge. In certain circumstances, such as multiple simultaneous Court vacancies,[152] the entire Commission could be stocked by partisan justices. Therefore, Congress should mandate distance between sitting presidents and their appointed justices in the context of the Commission.

E. Functions of the Commission

Based on the various uses of the judicial power identified earlier in Part II, this Note recommends that the Commission function as an investigatory body.[153] Because a constitutional amendment would be impractical, and because an amendment would be required to have the judicial power directly resolve the issue or to permit judicial review, the United States is incapable of following the majority use of the judicial power as final adjudicator of the issue. Moreover, because of the significant issues that accompany the use of doctors in the removal process,[154] it is imprudent to follow the procedural model that utilizes the judicial power to appoint

[151] Any vacancies arising as the result of a justice's death, retirement, or resignation, should be fulfilled by the chamber from which that justice was appointed.

[152] Although rare, simultaneous vacancies on the Court have occurred. From April 30, 1861 to July 21, 1862, the Court had two simultaneous vacancies. Drew Desilver, *Long Supreme Court Vacancies Used to Be More Common*, PEW RES. CTR. (Feb. 26, 2016), http://www.pewresearch.org/fact-tank/2016/02/26/long-supreme-court-vacancies-used-to-be-more-common/.

[153] For uses of justices and the judicial power as investigatory actors, see CONSTITUCÍON DE LA REPÚBLICA DE CHILE [C.P.] art. 53(7); CONSTITUTION OF THE COMMONWEALTH OF DOMINICA 1978 (rev. 2014), ch. II, art. 25(1); CONSTITUTION OF INDONESIA 1945 (rev. 2002), ch. III, art. 7B(4); CONSTITUTION OF LITHUANIA 1992 (rev. 2006), ch. VI, art. 88(6); CONSTITUTION OF THE REPUBLIC OF MAURITIUS 1968 (rev. 2016), ch. IV, art. 30; CONSTITUTION OF THE REPUBLIC OF SINGAPORE 1963 (rev. 2016), pt. V, ch. 1, art. 22L; CONSTITUTION OF SRI LANKA 1975 (rev. 2015), ch. VII, art. 38(d); CONSTITUTION OF TRINIDAD AND TOBAGO 1976 (rev. 2007), ch. 3, art. 36(d); CONSTITUTION OF UKRAINE 1996 (rev. 2014), ch. V, art. 110.

[154] *See supra* Part I.A.B.2.

doctors.[155] Therefore, the most prudent way to bring the United States more into alignment with international trends in its removal procedure, while fitting current structural constraints and avoiding identified pitfalls, is to use the Commission as an investigatory body.

Specifically, the Commission's purpose would be to investigate and consider the concerns expressed to it by the vice president; however, the Commission would not be tasked with definitively diagnosing the president's condition. Because Congress has the final authority on the issue, the burden of definitively establishing presidential disability must remain with Congress and the experts they consult to determine disability.[156] At bottom, the Commission would serve to provide the vice president with a more objective, detached body than the Cabinet to consider the necessity of invoking Section Four. Because the vice president is necessary under Section Four, the Commission should supplement and assist his judgment in determining whether to use Section Four.

To fulfill this limited role without damaging the president's public power, the Commission must operate largely outside public view. The following procedural limitations are suggested as means of achieving these aims.

First, the Commission must convene only at the request of the vice president. The vice president can summon the Commission through a private message to the Chief Justice, who thereafter assembles the other justices. This summons should be private, as should any meetings between the vice president and the Commission. The confidential nature of these interaction is necessary to ensure open, frank discussion of the issue. More significantly, this secrecy allows an uncertain vice president to receive feedback on his concerns without the president or the public becoming aware of his concerns. If the Vice President is uncertain of the president's condition, he is unlikely to push the issue with the president directly, and even less

[155] For uses of the judicial power in this fashion, see CONSTITUTION OF AFGHANISTAN 2004, ch. III, art. 67; CONSTITUTION OF THE REPUBLIC OF FIJI 2013, ch. 4, pt. A, art. 89(1); CONSTITUTION OF THE REPUBLIC OF THE GAMBIA 1996 (rev. 2004), ch. VI, pt. 1, art. 66; CONSTITUTION OF GHANA 1992 (rev. 1996), ch. VIII, pt. I art. 69(5); CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA 1980 (rev. 2016), art. 179; CONSTITUTION art. 144 (2010) (Kenya); CONSTITUTION OF KIRIBATI 2013 (rev. 2013), ch. IV, art. 34; CONSTITUTION OF THE REPUBLIC OF SEYCHELLES 1993 (rev. 2017), ch. IV, art. 53; CONSTITUTION OF UGANDA 1995 (rev. 2017), ch. VII, art. 107; CONSTITUTION OF VENEZUELA (BOLIVARIAN REPUBLIC OF) 1999 (rev. 2009), tit. V, ch. II, § 1, art. 233; CONST. OF ZAMBIA (1991) § 107.

[156] Additionally, because the purpose of Section Four is to remove the President for being incapable of performing the functions of office, the Commission should focus on the larger question presented rather than rigid medical classifications. The Commission need not diagnose the President with Creutzfeldt-Jakob disease to determine disability; evidence demonstrating advanced impairment in cognitive function may suffice. In addition to being a more practical approach, this macro-level focus also avoids the problems of "diagnos[ing] by committee" identified by Birch Bayh and former White House Physician Burton Lee. Second Fordham University, *supra* note 12, at 1003.

likely to broach the topic with the Cabinet. However, an unsure vice president can pose the issue to the Commission, be told that the president is capably performing his functions and continue serving the president without embarrassment. This feature also preserves the presidential power by not revealing to the public that the vice president was concerned about the president's capacity to lead.[157]

Second, any materials of the Commission must be kept highly classified. Naturally, this secrecy invites legitimate concern about potential abuse. Therefore, records should be maintained, and should be accessible to particular officials under specified circumstances. The public should not have ready access to investigatory materials under any purpose. Access should also be restricted for Cabinet officials, as they could too readily share the information with the public or the president. However, the Vice President would naturally have access—being as the investigation is conducted to his benefit—and the Vice President would be free to share investigatory information as he deems necessary and prudent. Beyond the Vice President, Congress can set reasonable restrictions and openings for access to the investigatory materials.[158]

[157] Critics may argue this secrecy to be anti-democratic. However, three countervailing arguments should mitigate this concern. First, secrecy should be permissible because Section Four's procedure, if executed, ultimately makes the result of the Commission's secret operations public. That is, even though the investigatory work is secret, the decision that the president is unfit to lead due to disability is required to be public—by notifying congressional leadership of Section Four's invocation, the world is notified of the Commission's decision on the issue. Second, this limitation of knowledge is fully within the norm for significant governmental issues. The U.S. Foreign Intelligence Surveillance Court, the Federal Bureau of Investigations, the Central Intelligence Agency, and numerous other agencies operate with immense secrecy despite impacting citizens' daily lives. Even high-profile congressional investigations are redacted to keep the public's knowledge limited. *See* SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM (2014), https://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf. Finally, the level of secrecy encouraged here is a step in the democratic direction. There is an extensive history of lying about the president's health; these lies have been extended to Congress, the vice president, the Cabinet, and—almost always—the public. While having the Commission operate in near-total secrecy may appear anti-democratic, it is actually a step away from blatantly lying to the public about the President's health. Although not ideal, this secrecy is similar to the Twenty-Fifth Amendment itself insomuch as the issue at hand is too significant to wait for a perfectly ideal procedure to be conceived.

[158] One option would be to permit the speaker of the House and the president pro tempore of the Senate to review these materials, on condition of keeping their contents confidential unless both agree that the materials form the basis of an investigation into a member of the Commission for purposes of impeachment. Another suggestion would be to keep access to the investigatory materials sealed, save for the vice president and the Commission, until such time as Section Four is invoked. With the public declaration that the president is too disabled to continue in office, Congress and the public will have a greater need and justification for accessing the materials of the investigation that spurred the use of Section Four's procedure.

Third, the Commission should not be given the power of subpoena or other legal compulsion associated with traditional legal investigations. While the Commission is left to determine its procedures and its preferred evidence, it cannot be granted authority to compel others to give evidence. Such authority would disrupt the functions of government and would damage the President's power. It would not take long for the public to learn that justices of the Supreme Court were compelling testimony from sources close to the president. Even if the Commission found the president to be fit, this publicized inquiry would do tremendous damage to the president's ability to lead. Moreover, it would defeat the overarching purpose of the Commission as a secret confidante and sounding board for the Vice President.

Critics may point to this lack of authority and question how the Commission is to gather evidence to determine the issue before it. In response, it must be emphasized that the significance of the purpose underlying this limitation outweighs the handicaps in the investigative capabilities of the Commission. Additionally, because of the limited nature of the Commission, it should not be easy for the Commission to conclude that the President is disabled. The easier procedure for removal under Section Four should involve the Cabinet.[159] Furthermore, because the Commission convenes at the behest of the Vice President, the Vice President can assist the Commission in acquiring the information necessary to make its determination. For example, the Vice President can establish meetings between the Commission and key witnesses, can relay critical evidence—for example, reports from the president's physician—to the Commission, and can facilitate the logistics of the investigation.

One critical aspect of the scenario in which the Commission would be convoked should be kept in mind when considering this limitation on the Commission: if the President is truly too disabled to lead the nation, people will bring evidence—even if simply anecdotes—to those who may act upon it. When President Coolidge was wallowing in despair, unable to lead the nation, many around him knew of the apparent issue, but there were no procedures to be followed.[160] If it is difficult to obtain information leading to satisfy the Commission that the President is too disabled to lead, then the issue is likely unsuitable for Commission resolution. That is to say the disability may fall within a gray area in which reasonable minds could differ. The appropriate avenue for such circumstances is the Cabinet, and not the Commission recommended here. Hence, the Commission is a "fallback institution," or a floor, rather than a flexible institution.

Fourth, Congress should mandate a unique procedural requirement that, currently, only exists in Samoa's constitution. Samoa places immense power with its

[159] This is because the Twenty-Fifth Amendment was drafted to keep the issue largely within the executive branch. Gilbert, *supra* note 68, at 7. Thus, the Commission should not be an easy replacement for the Cabinet, but a fallback for Cabinet inaction.

[160] *See supra* note 35 and accompanying text.

chief justice, but conditions that power on the requirement that he be "satisfied by evidence, which shall include, where possible, the evidence of the wife and of at least two physicians[.]"[161] Congress must establish a similar substantive requirement; however, it should not take Samoa's version verbatim. Instead, Congress should require that the Commission make any decision to invoke Section Four "based on satisfactory medical evidence." The strength of this requirement is its ambiguity. The concerns raised in Part I regarding the inclusion of medical professionals in the Section Four process are circumvented by the inclusion of this broad requirement. The particular strength of this requirement manifests in two manners: first, it allows the Commission to consider whatever medical evidence it deems pertinent, allowing it to respond to an unlimited array of potential ailments and disabilities; second, it sets the standard outside the realm of unelected medical practitioners and within the discretion of justices who, as previously discussed, are prone to move with extreme caution in determining presidential disability.

One may question how the Commission is to obtain "satisfactory medical evidence" without the power to subpoena. There are two pertinent responses. First, the Commission may invite medical professionals to discuss their medical opinion. While this would not be as ideal as having the president undergo a medical evaluation, Part I discussed why that is not a viable option. However, the flexibility permitted by the "satisfactory medical evidence" standard allows the Commission to work creatively to approach the ideal as closely as possible. The second response is to reiterate that there can realistically be no medical certainty on the issue of presidential disability. Thus, the ability to subpoena medical professionals would likely not lead to the attainment of fully dispositive medical evidence.

Fifth, Congress must require that the Commission act collectively. In determining whether to execute Section Four, the Commission must vote on a simple majority basis; however, in submitting its declaration to the speaker and president pro tempore, the Commission must express its decision as a collective body. The Commission's members must not be permitted to individually comment on the decision of the Commission. This means there can be no dissenting opinions or public explanations. Naturally, the justices may disagree—as they should somewhat when debating an issue of such significance. However, to avoid damaging the President's power, it is imperative that the Commission present its conclusion as a collective body. This will also help avoid the appearance of partisanship if, for example, two justices appointed by Democratic presidents vote to invoke Section Four while the

[161] CONSTITUTION OF SAMOA 1962 (rev. 2013), pt. III, art. 23(2). A similar procedure is used by Tanzania, which grants its chief justice the authority to remove the president for disability "after considering the medical evidence." CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (rev. 2005), ch. 2, pt. I, art. 37(2).

justice appointed by a Republican president votes to refrain. To preserve the integrity of the system, to protect presidential power, and to prevent partisan gamesmanship, the Commission must present itself as a collective body.

Moreover, the Commission's declaration must be minimalistic, with no elaboration as to the particulars of the investigation. To accomplish this, the Commission and Vice President must submit the constitutionally required declaration, that they believe that the President is unable to perform the duties of office, and nothing more. This is for two purposes. First, this restriction will prevent partisan and public attacking of the evidence and its sources. If the Commission invoked Section Four based on the medical opinion of six prominent doctors, those individuals would come under immense public scrutiny, if not harassment, as well as unwarranted disparaging by presidential loyalists. Maintaining confidentiality of the doctors' information would permit fuller participation by these necessary sources. This restriction would also incentivize Congress to act as the drafters of the Twenty-Fifth Amendment intended. That is, Congress should consult additional evidence and professionals during its twenty-one-day window. Congress should not take the Commission's word as sufficient to devolve the President's power, as that defeats the purpose of placing final authority with the legislative power. By invoking Section Four, the Commission would send a signal that sufficient evidence exists. If the President contests that declaration, Congress would need to consult evidence to determine whether the Commission and vice president or the president is correct. That is Congress's job under Section Four.

However, Congress may need the information to assess the prudence of the Commission's invocation of Section Four. Here, Congress has the same broad options as with the previous requirement of confidentiality.[162]

F. Enactment

In enacting the foregoing, Congress should ensure that the enactment date follows the next inauguration. This is to ensure that the process is not viewed as an attempt to target the current president. The proposed Commission should serve as an institutional check on all presidents, not as a response to a particular president.

G. Separation of Powers

Constitutional scholars may shudder at the suggestion of having a body composed entirely of judges. Naturally, there may be concerns over the proper boundaries of the judicial power as well as the overall separation of powers. However, these concerns are not as troublesome as they may appear.

[162] For example, the speaker and president pro tempore may be granted in camera review privileges for the evidence at issue, or the Vice President may provide that information to Congress.

To begin, it is worth noting that the inclusion of justices in the determination of presidential disability has been suggested repeatedly throughout policy debates.[163] Indeed, President Eisenhower recommended that the chief justice be involved in the process.[164] Even Birch Bayh, the architect of the Twenty-Fifth Amendment, has acknowledged that "one could structure a scenario in which the Supreme Court has a role."[165] However, most discussions of involving the Supreme Court in Section Four have been fleeting mentions of separation of powers, without much analysis.[166] The most prominent pushback against the use of justices appears to have come from Chief Justice Warren and Chief Justice Burger.[167] However, the scholarly record is scarce as to the substance of their concern. One prominent insight into Chief Justice Warren's concern comes from a letter he sent to Representative Kenneth Keating in 1958, in which the Chief Justice stated:

> It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of controversy of this character coming to the Court, and the danger of disqualification which might result in a lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.[168]

These concerns are inapposite. As discussed in Part I, there is a strong likelihood that Section Four's procedures would fall within the "political question" doctrine. Thus, the chief justice's concerns about "the possibility of controversy of this character coming to the Court" are misplaced. Beyond the "political question" doctrine, there are several significant reasons why Chief Justice Warren's concerns should be put to rest.

First, even were the Court to determine that Section Four did not present a non-justiciable "political question," the President would lack standing to invoke the judicial power to challenge his removal. The Court's interpretation of the judicial power, under Article III of the Constitution, supports this conclusion. Article III states that "[t]he judicial power of the United States, shall be vested in one Supreme Court" and that this power "shall extend to all Cases" and "controversies" arising under the Constitution, federal law, and treaties.[169] This "case or controversy" clause is the origin and limitation of the judicial power. From this clause arose the doctrine

[163] Feerick, *supra* note 12, at 52; John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 490 n.60 (1995).

[164] Feerick, *supra* note 12, at 488, 490.

[165] Bayh, *supra* note 10, at 13.

[166] *See, e.g.*, Abrams, *supra* note 138, at 171; Bayh, *supra* note 10, at 13. Indeed, most discussion on issues of the separation of powers relating to the Twenty-Fifth Amendment focus instead on the Cabinet and Congress. Goldstein, *Presidential Continuity*, *supra* note 75.

[167] Bayh, *supra* note 10, at 13.

[168] Feerick, *supra* note 163, at 490 n.66.

[169] U.S. CONST. art. III §§ 1–2.

of standing, which was formalized by the Court in *Lujan v. Defenders of Wildlife.*[170] To establish standing, which is required for a case to be justiciable by a United States court, a petitioner to the court must establish that they (1) have experienced an injury in fact, (2) which was caused by the actions of the other party in the litigation, and (3) which can be redressed by the remedy sought by the petitioners. An "injury in fact" is broadly defined as "an invasion of a legally protected interest[.]"[171] Thus, to invoke the judicial power of the United States, a petitioner must present an allegation of an invasion of a legally protected interested or their individual rights.[172]

Without the presence of a legally protected interest or an individual right, there can be no invocation of the judicial power of the United States. The significance of this requirement is apparent when combined with the Court's consistent holdings that elected officials do not have a legal interest in maintaining their offices under the Due Process Clause.[173] Scholars are confident that these holdings will remain fundamentally unchanged for the foreseeable future.[174] Additionally, it is significant that under Section Four's procedure, the President does not lose her office; her powers and duties devolve to the Vice President, who functions explicitly as "Acting President." For the President to challenge the devolution of these powers, then, she would have to allege a "legally protected interest" or an "individual right" in the *powers* of the presidency; such an argument would lose traction faster than a claim based on loss of office. Because the President lacks a "legally protected interest" or an "individual right" in the powers of the presidency, there can be no unlawful invasion that is necessary to produce standing; therefore, there can be no standing for the President to challenge the execution of Section Four. So even were the Court to not find the issue to be a non-justiciable "political question," the Court would dismiss any challenge by the president for lack of standing.

These two doctrines—political question and standing—would be applied to dismiss any challenge by the president first at the district court level because any challenge to Section Four would be outside the limited categories of the Supreme

[170] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

[171] *Id.*

[172] *Id.* at 577 ("But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.") (quoting Stark v. Wickard, 321 U.S. 288, 310 (1944)). For a further delineation of the judicial power by the Court, see Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 213 (1995).

[173] Second Fordham University, *supra* note 12, at 985–86 ("[I]t is well settled that an elected office is not property for purposes of the Due Process Clause.") (citing Snowden v. Hughes, 321 U.S. 1, 7 (1944) and Taylor v. Beckham, 178 U.S. 548, 577 (1900)).

[174] *Id.* at 986.

Court's original jurisdiction.[175] Even after appeal, the Supreme Court could refuse to grant certiorari and such would circumvent Chief Justice Warren's concerns about disqualification and failing to meet quorum.

One can respond to the foregoing by nonetheless questioning the suitability of the justices for the task of determining disability under Section Four. While the practical concern of the president seeking judicial review may be allayed, there nonetheless may remain a general concern about whether the use of justices on a Commission is a prudent use of their offices. There are three arguments that mitigate this concern.

First, the Constitution provides no specific guidance, requirements, or details as to the actual tasks of members of the Supreme Court. The Chief Justice is mentioned only once, and only to identify that he "shall preside" over any impeachment trials of the president.[176] Other justices are mentioned only twice, to identify the procedure for their appointment[177] and to identify that they maintain office "during good [b]ehaviour" and cannot have their salaries "diminished during their [c]ontinuance in [o]ffice."[178] Judicial review, the most meaningful tool of the judicial power, is not granted by the Constitution. The procedures and substantive guidelines by which the Court operates is similarly missing. Constitutionally, the only requirements of the Court, beyond those pertaining to jurisdiction, are that the Chief Justice and some number of other justices exist. Thus, there is no express constitutional limit on the use of justices for other significant purposes. Indeed, Chief Justice Warren headed the Warren Commission in its investigation of the assassination of President Kennedy while retaining his position on the Court.[179]

Beyond the openness of the Constitution on the issue, the lack of the functions traditionally associated with the judicial power should also mitigate concern about the propriety of using justices on the Commission. In determining whether sufficient medical evidence substantiates the Vice President's concern regarding the president's mental health, the Justices will be completely removed from the traditional context, duties, and tools of their judicial functions. Just as Chief Justice Warren's participation on the Warren Commission did not require him to adjudicate disputes

[175] U.S. CONST. art. III § 2 ("In all Cases affecting ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

[176] *Id.* at art. I § 3.

[177] *Id.* at art. II § 2.

[178] *Id.* at art. III § 1.

[179] Chief Justice Warren is not the only Justice who took on additional high-level duties based on his position on the Supreme Court. Justice Robert Jackson was appointed as the United States Chief Prosecutor for the Nuremburg Trials in 1945–46, although Jackson took a leave of absence from the Court during that period.

between parties based on evidence and law, participation by justices on the Commission would not resemble the traditional exercising of the judicial power. Thus, the judicial power should rest comfortably outside the scope of the Commission, and the separation of powers remain properly preserved.

Another significant reason why the inclusion of justices on the proposed Commission should not offend the separation of powers pertains to the specific delegation of the judicial power within the Constitution. Article III states "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[180] The judicial power is not attached to the office of justice of the Supreme Court, but to the Court itself. This differs from the investiture of the executive power, which is vested directly in the President.[181] This distinction is why the President has authority regardless of where he is or what he is doing. Conversely, justices of the Supreme Court wield the judicial power only when composed as the Court. Justices Ginsberg or Thomas—even the full gathering of justices—cannot adjudicate cases outside the confines of a formal proceeding of the Court to which they belong. Thus, in removing their robes to conduct the work of the Commission, they shed their claim and association with the judicial power. This is similar to the *Ex Parte Young* fiction,[182] although the foregoing is less fictional than that doctrine. The justices are selected to serve on the Commission for the integrity, solemnity, and competence to handle matters of constitutional and national importance; they are not selected to use their judicial prowess in the adjudication of a justiciable dispute centered on individual rights.

[180] U.S. CONST. art. III § 1. The ruling of the Court in *Plaut* that "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies" similarly supports this conception of the judicial power. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995).

[181] U.S. CONST. art. II § 1.

[182] The *Ex Parte Young* fiction, pronounced by the U.S. Supreme Court in *Ex Parte* Young, 209 U.S. 123 (1908) states that a private individual may sue a state official, notwithstanding the prohibition of the Eleventh Amendment, when the official's conduct violates the private individual's federal rights. Essentially, the Court held that the authority of the state official does not extend to unconstitutional acts and, thus, sovereign state immunity does not cover such conduct. This holding has been labelled a "fiction" largely because litigation using the doctrine is predicated on the state official losing his authority by violating constitutional rights, while the only reason the official was able to violate those rights was his status as a state official. Thus, an act made possible by state authority results in a loss of state authority sufficient to circumvent the Eleventh Amendment, which allows an individual to sue the state official in their official capacity.

CONCLUSION

This Note has covered immense ground. Part I identified the history of presidential disability within the United States and identified significant applications, consequences, and problems of Section Four of the Twenty-Fifth Amendment.

Part II examined 126 constitutions from across the world. This examination highlighted broad trends in the use of governmental powers in removal processes and added to modern scholarship a comprehensive analysis of the arrangement of governmental powers, medical professionals, constituents, and organs of state as used by nations around the world to determine and act upon head of state disability.

Part III answered the broad question that began this Note: what is the prudent arrangement of governmental powers to address head of state disability? Although myriad nuances exist, the data examined in Part II reveal a fairly cohesive image. This image is dominated by the legislative power, followed by a rigorous use of the judicial power, a fairly diminished role for the executive power, and a paltry use of the constituent power. Part III further discussed how Section Four comports with this picture and how its non-use of the judicial power bucks international trends. This Section further delineated a novel recommendation for Congress to establish an "other body" composed of three justices of the Supreme Court. Part III detailed why using justices in this manner is a good idea, and further explained the logistics of the Commission's composition, purpose, and functions. Significantly, Part III also argued that the use of justices as recommended would not violate the separation of powers.

The United States is a unique nation, with an idiosyncratic constitutional structure. However, its chief executive is bound to the same mortal fallibilities that can befall the chief executive of any nation. The executive leaders of the globe are unified in their need for preparation in light of this risk. The governments of the world are linked by their need for clear constitutional procedures to handle these potential national crises. And the people of the world are connected by the consequences that can manifest from a lack of constitutional preparation. There are few fields in constitutional law in which the possibilities for addressing a problem of such significance can be so varied, creative, and idiosyncratic. There are few problems that necessitate consideration of a vast universe of approaches. Going forward, this Note gives scholars and policymakers some lodestars with which they may plan a future of greater constitutional stability.