

THE MENTAL STATE OF THE UNION: MENTAL COMPETENCY TESTING FOR POLITICIANS IN AMERICA'S GERONTOCRACY

Note

INTRODUCTION	206
I. STATE OF AFFAIRS.....	210
II. ALTERNATIVE PROPOSALS TO ADDRESS THE GERONTOCRACY	211
III. PROPOSALS FOR PRESIDENTIAL MENTAL COMPETENCY TESTING	213
IV. ARGUMENTS FOR CONGRESSIONAL MENTAL COMPETENCY TESTING	214
<i>A. Addressing Fears</i>	214
<i>B. Dispositive Differences Between Congress and the President</i>	218
CONCLUSION.....	221

THE MENTAL STATE OF THE UNION: MENTAL COMPETENCY TESTING FOR POLITICIANS IN AMERICA'S GERONTOCRACY

Note

INTRODUCTION

America is aging;¹ its politicians are too.² Per the 2020 census, about one in six Americans are over the age of sixty-four.³ But as of 1920, this was not yet one in twenty.⁴ According to a study by the Urban Institute, the population of adults aged eighty-five and older will quadruple between 2000 and 2040.⁵ In just over ten years, older adults will outnumber children for the first time in American history.⁶

Since the Baby Boom, journalists, economists, and scholars have predicted and lamented the alleged burden a large aging population will impose upon American society.⁷ Until recently, these predictions centered around the social and economic impacts of the aging population⁸—now the focus turns to politics.⁹ While the average age of individuals in the U.S. House of

1. *The US Population Is Aging*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/program-retirement-policy/projects/data-warehouse/what-future-holds/us-population-aging> [https://perma.cc/2QLY-47PY].

2. David Smith, *Gerontocracy: The Exceptionally Old Political Class that Governs the US*, THE GUARDIAN (Feb. 19, 2023, 2:00 AM), <https://www.theguardian.com/us-news/2023/feb/19/us-congress-presidency-gerontocracy> [https://perma.cc/5VTQ-GYT7].

3. Zoe Caplan, U.S. *Older Population Grew from 2010 to 2020 at Fastest Rate Since 1880 to 1890*, U.S. CENSUS BUREAU (May 25, 2023), <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html> [https://perma.cc/PFZ3-ZZZX].

4. *Id.*

5. URB. INST., *supra* note 1.

6. Jonathan Vespa, *The U.S. Joins Other Countries with Large Aging Populations*, U.S. CENSUS BUREAU (Mar. 13, 2018), <https://www.census.gov/library/stories/2018/03/graying-america.html> [https://perma.cc/D6ZF-9S3A].

7. *See, e.g.*, Anita Snow, *The U.S. Can't Handle the 'Silver Tsunami' of Millions of Baby Boomers Needing Housing in Their Retirement Years, Report Warns*, FORTUNE (Dec. 2, 2023, 6:00 AM), <https://fortune.com/2023/12/02/housing-baby-boomers-aging-homelessness-elderly/> [https://perma.cc/T36C-U23E]; James S. Richardson Sr., *Aging and Its Impact on Court Systems*, 55 FED. LAW. 3 (July 2008); The Aging Inmate Comm. of the MSBA Corr. Reform Council, *Aging Inmates: Correctional Issues and Initiatives*, 44 MD. BAR J. 22 (November/December 2011); Dean Baker, Executive Summary of *Defusing the Baby Boomer Time Bomb*, ECON. POL'Y INST. (June 1998), https://www.epi.org/publication/studies_sttb/ [https://perma.cc/36U7-J4X8].

8. *See* sources cited *supra* note 7.

9. *See, e.g.*, Smith, *supra* note 2; Monica Potts, *Aging Politicians Are Only Going to Get More Common*, ABC NEWS (Sept. 7, 2023, 5:00 AM), <https://abcnews.go.com/538/aging-politicians-common/story?id=103034576> [https://perma.cc/5JXV-78G7]; David Webber, *Aging in Politics Contributes to Political Stagnation*, COLUMBIA MISSOURIAN (Sept. 22, 2023), https://www.columbiamissourian.com/opinion/local_columnists/aging-in-politics-contributes-to-political-stagnation/article_7ce8e522-58a9-11ee-99e2-1fc8fa5362f3.html [https://perma.cc/FE25-HA6Z]; Josh Marcus, *The Danger of America's Aging Politicians*, INDEP. (May 12, 2023, 11:55 AM), <https://www.independent.co.uk/news/world/americas/us-politics/joe-biden-age-feinstein-2024-b2335042.html> [https://perma.cc/LTT6-A25U].

Representatives hovered around fifty-eight in recent years, the average age of U.S. senators is steadily rising.¹⁰ For the 118th Congress, the average age of senators was sixty-four.¹¹ The oldest representative, Grace Napolitano from California, was eighty-six years old at the session's start.¹² The oldest senator, Chuck Grassley from Iowa, was *eighty-nine*.¹³ To put that in context, Grassley was born before radar systems,¹⁴ trampolines,¹⁵ Tupperware,¹⁶ and interstate highways,¹⁷ just to name a few. Older politicians are nothing new; Strom Thurmond served as a senator well past his hundredth birthday.¹⁸ But perhaps it's not just the older age, but the increasing population beyond it that causes 76% of Americans to either strongly support or somewhat support mandatory mental competency tests for politicians over the age of seventy-five.¹⁹

At the center of this political frenzy is former presidential candidate Nikki Haley, who repeatedly advocated for term limits and mental competency tests for any politician over seventy-five years old.²⁰ She took to the social media platform formerly known as Twitter to tell voters that “America is not past its prime—our politicians are past theirs.”²¹ While her proposal has been met with

10. Carrie Blazina & Drew DeSilver, *House Gets Younger, Senate Gets Older: A Look at the Age and Generation of Lawmakers in the 118th Congress*, PEW RSCH. CTR. (Jan. 30, 2023), <https://www.pewresearch.org/s hort-reads/2023/01/30/house-gets-younger-senate-gets-older-a-look-at-the-age-and-generation-of-lawmak ers-in-the-118th-congress/> [https://perma.cc/DR7X-EYER]; Joe Murphy, *The 118th Congress Is the Third Oldest Since 1789*, NBC NEWS (Jan. 4, 2023, 10:08 AM), <https://www.nbcnews.com/data-graphics/118th-congress-age-third-oldest-1789-rcna64117> [https://perma.cc/F77Z-MJ6W]; Chris Cillizza, *2 Charts that Show Just How Old This Congress Actually Is*, CNN POLS. (Jan. 29, 2021, 4:06 PM), <https://www.cnn.com/2021/01/29/politics/congress-age/index.html> [https://perma.cc/U4ZA-CRVB].

11. JENNIFER E. MANNING, CONG. RSCH. SERV., R47470, MEMBERSHIP OF THE 118TH CONGRESS: A PROFILE 2 (Dec. 5, 2023), <https://crsreports.congress.gov/product/pdf/R/R47470/8> [https://perma.cc/T57E-W4TA].

12. *Id.*

13. *Id.*

14. *The Birth of Radar and the Second World War*, RAF AIR DEFENCE RADAR MUSEUM NEATISHEAD, <https://www.radarmuseum.co.uk/history/world-war-two/> [https://perma.cc/2TRX-XP93].

15. David Kindy, *How the Trampoline Came to Be*, SMITHSONIAN MAG. (Mar. 5, 2020), <https://www.smithsonianmag.com/innovation/how-trampoline-came-be-180974343/> [https://perma.cc/JGY6-B2BK].

16. *History*, TUPPERWAREBRANDS, <https://www.tupperwarebrands.com/pages/history> [https://perma.cc/Z7J2-YRS8].

17. Lee Lacy, *Dwight D. Eisenhower and the Birth of the Interstate Highway System*, U.S. ARMY (Feb. 20, 2018), <https://www.army.mil/article/198095> [https://perma.cc/N4C7-B8VV].

18. *Strom Thurmond: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Thurmond.htm [https://perma.cc/3XJL-C4VB].

19. YOU GOV, *THE ECONOMIST/YOU GOV POLL: SEPTEMBER 2 - 5, 2023 - 1500 U.S. ADULT CITIZENS 84*, <https://docs.cdn.yougov.com/ze05ewgo9y/econTabReport.pdf> [https://perma.cc/U866-M4S5].

20. Katherine Long, *Nikki Haley Re-ups Call for Competency Tests for Older Pols*, POLITICO (Sept. 3, 2023, 12:26 PM), <https://www.politico.com/news/2023/09/03/nikki-haley-competency-tests-older-pols-00113853> [https://perma.cc/ZFF6-9HZV].

21. Nikki Haley (@NikkiHaley), X (TWITTER) (Feb. 16, 2023, 4:44 PM), <https://twitter.com/NikkiHaley/status/1626351911048814593?lang=en> [https://perma.cc/9DRF-U2UC].

mixed reactions,²² news headlines are rife with justification for her cry.²³ Dianne Feinstein, who served as a senator until her death in 2023 at the age of ninety,²⁴ missed ninety-one floor votes during a three-month absence due to health problems.²⁵ Long before the bout of shingles pulled her from the debate floor, her peers described conversations in which she repeatedly introduced herself to the same conversant, struggled to recognize her “longtime colleagues,” and had trouble navigating the most basic small talk.²⁶ And while she resisted the calls for her resignation, her mid-term death forced California’s governor to scramble to refill the position.²⁷

Feinstein is not the only octogenarian politician making headlines for alleged age-related blunders—Mitch McConnell, the eighty-one-year-old former Senate Minority Leader, had his second episode in which he froze for more than thirty seconds, unable to respond to his surroundings.²⁸ Eighty-one-year-old President Joe Biden has also been the subject of much criticism for his age and cognitive blunders.²⁹ Journalists and voters alike have watched President Biden appear dazed or confused during public addresses and confuse names, words, and locations.³⁰ Doubts about President Biden’s mental

22. Lisa Kashinsky & Natalie Allison, *Older Voters Balk at Nikki Haley’s Competency Test*, POLITICO (Feb. 21, 2023, 5:22 PM), <https://www.politico.com/news/2023/02/21/older-voters-nikki-haley-comp-ency-test-00083859> [<https://perma.cc/43FG-YGTF>].

23. See, e.g., Susie Coen, *Freezing, Falling and Forgetting – Why America Is Governed by Its Oldest Politicians Ever*, THE TELEGRAPH (Aug. 31, 2023, 12:56 PM), <https://www.telegraph.co.uk/world-news/2023/08/31/us-congress-gerontocracy-old-age-biden-mcconnell-feinstein/> [<https://perma.cc/74HG-7QV9>]; Kevin Breuninger, *Mitch McConnell Freezes, Struggles to Speak in Second Incident This Summer*, CNBC (Aug. 30, 2023, 4:44 PM), <https://www.cnbc.com/2023/08/30/mitch-mcconnell-freezes-struggles-to-speak-in-second-incident-this-summer.html> [<https://perma.cc/U3GM-46C8>]; Nikki McCann Ramirez, *Feinstein Gives Bizarre Answer When Asked About Absence*, ROLLING STONE (May 16, 2023), <https://www.rollingstone.com/politics/politics-news/dianne-feinstein-bizarre-answers-questioned-senate-absence-1234736747/> [<https://perma.cc/3DSV-X3JL>].

24. Scott Shafer, *Dianne Feinstein, Longest Serving Woman in the Senate, Has Died at 90*, NPR (Sept. 29, 2023, 9:09 AM), <https://www.npr.org/2023/09/29/1125664267/dianne-feinstein-obituary> [<https://perma.cc/R6K4-AACK>].

25. Garrett Haake, *Dianne Feinstein Set to Return to Senate After Nearly 3-Month Absence*, NBC NEWS (May 9, 2023, 2:05 PM), <https://www.nbcnews.com/politics/congress/dianne-feinstein-set-return-senate-nearly-3-month-absence-due-health-i-rcna83434> [<https://perma.cc/YKW3-EGWU>].

26. Tal Kopan & Joe Garofoli, *Colleagues Worry Dianne Feinstein Is Now Mentally Unfit to Serve, Citing Recent Interactions*, S.F. CHRON. (Oct. 26, 2022, 5:26 PM), <https://www.sfchronicle.com/politics/article/dianne-feinstein-senate-17079487.php> [<https://perma.cc/7UN4-8VCL>].

27. Annie Karni & Shawn Hubler, *Death of Dianne Feinstein: Newsom Faces Pressure to Quickly Appoint a Replacement*, N.Y. TIMES (Oct. 5, 2023), <https://www.nytimes.com/live/2023/09/29/us/dianne-feinstein-dead-senate> [<https://perma.cc/2KFD-YDMS>].

28. Frank Thorp V, *Sen. Mitch McConnell Appears to Freeze Again at a Kentucky Event*, NBC NEWS (Aug. 30, 2023, 3:48 PM), <https://www.nbcnews.com/politics/congress/sen-mitch-mcconnell-appears-freeze-kentucky-event-rcna102583> [<https://perma.cc/DR6E-3TAK>].

29. See, e.g., Melissa Koenig, *Biden Appears Confused While Standing with World Leaders After Struggling to Pronounce Names*, N.Y. POST (Nov. 17, 2023, 7:40 AM), <https://nypost.com/2023/11/17/news/biden-appears-confused-as-he-stands-next-to-world-leaders/> [<https://perma.cc/68L5-PXTC>].

30. See, e.g., Heather Timmons, *‘Where’s Jackie?’ Biden Seeks Lawmaker Walorski Who Died in August*, REUTERS (Sept. 28, 2022, 3:54 PM), <https://www.reuters.com/world/us/wheres-jackie-biden-seeks-lawmak-er-walorski-who-died-august-2022-09-28/> [<https://perma.cc/E99R-AE2F>]; Becket Adams, *We Need a Serious*

competency dominated discussions about the 2024 presidential race and bolstered the ultimately successful calls for him to drop out of the race.³¹ And former President Trump, who is nearly eighty himself, also has a slew of publicized gaffes leaving the public questioning his competency to lead.³² Facing realities like these, many Americans may find Haley's competency-testing proposal attractive. But despite being theoretically compelling, these tests raise a host of constitutional, legal, and practical considerations.

Much legal scholarship addresses *presidential* competency and regular testing of the President's mind.³³ But because America faces not only an aging President³⁴ but an older-than-ever Congress,³⁵ mental competency testing for *all* politicians—not just the President—is increasingly important. Until now, scholarship on the incapacitation of congresspeople has been sparse and largely focused on institution-wide incapacitation during times of national crisis.³⁶ To date, the only piece addressing individual incapacity among congresspeople is John Martin's proposal for a “congressional incapacity amendment.”³⁷ Using the Twenty-Fifth Amendment as a model, Martin describes how a new

Conversation About Joe Biden's Brain, THE HILL (July 3, 2023, 7:00 AM), <https://thehill.com/opinion/white-house/4075227-we-need-a-serious-conversation-about-joe-bidens-brain/> [https://perma.cc/AT38-3A8U]; Jeff Mason and Kanishka Singh, *Biden Mistakenly Refers to Zelenskij as Putin Before Correcting Himself*, REUTERS (July 12, 2024, 10:15 AM), <https://www.reuters.com/world/biden-corrects-himself-after-mistakenly-referring-ukraines-zelenskij-president-2024-07-11/> [https://perma.cc/86 CE-SVVJ].

31. See, e.g., Peter Nicholas, *'A Nightmare': Special Counsel's Assessment of Biden's Mental Fitness Triggers Democratic Panic*, NBC NEWS (Feb. 8, 2024, 5:28 PM), <https://www.nbcnews.com/politics/2024-election/-nightmare-special-counsels-assessment-bidens-mental-fitness-triggers-rcna137975> [https://perma.cc/23GM-CW2R]; Zeke Miller, Colleen Long & Darlene Superville, *Biden Drops Out of 2024 Race After Disastrous Debate Inflamed Age Concerns. VP Harris Gets the Nod*, ASSOCIATED PRESS, (July 21, 2024, 9:49 PM), <https://apnews.com/article/biden-drops-out-2024-election-ddffde72838370032bdcff946cfc2ce6> [https://perma.cc/R39P-KLSA].

32. Michael C. Bender & Michael Gold, *How Trump's Verbal Slips Could Weaken His Attacks on Biden's Age*, N.Y. TIMES (Nov. 1, 2023, 11:18 AM), <https://www.nytimes.com/2023/10/30/us/politics/trump-biden-age.html> [https://perma.cc/J3SP-9SLR].

33. See, e.g., Aaron Seth Kesselheim, *Privacy Versus the Public's Right to Know*, 23 J. LEGAL MED. 523 (2002); Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. PUB. INT. L.J. 373 (2000); Herbert L. Abrams, *Can the Twenty-Fifth Amendment Deal with a Disabled President? Preventing Future White House Cover-Ups*, 29 PRESIDENTIAL STUD. Q. 115, 115 (1999); BERT E. PARK, ALLING, AGED, ADDICTED: STUDIES OF COMPROMISED LEADERSHIP (2014); John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481 (1995).

34. Ken Tran, *How Old Are the 2024 Presidential Candidates? Full List of Ages for Biden, Trump and More*, USA TODAY (Nov. 27, 2023, 7:49 AM), <https://www.usatoday.com/story/news/politics/elections/2023/11/20/biden-trump-christie-how-old-2024-presidential-candidates/71654792007/> [https://perma.cc/Z6L B-FZHQ].

35. See MANNING, *supra* note 11; Geoffrey Skelley, *Congress Today Is Older than It's Ever Been*, FIVETHIRTYEIGHT (Apr. 3, 2023, 6:00 AM), <https://fivethirtyeight.com/features/aging-congress-boomers/> [https://perma.cc/KLF2-DPZ7].

36. See, e.g., Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 949 (2004); James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049 (2004).

37. John J. Martin, *A Congressional Incapacity Amendment to the United States Constitution*, 76 STAN. L. REV. ONLINE 45 (2023).

amendment could work to ensure the continuity of representation in the case of an incapacitated congressperson.³⁸

This Note adds to the conversation started by Martin surrounding individual congressional incapacity. While his work focuses on what should be done if a congressperson is found to be incapacitated, this Note will focus on how America should make that finding in the first place. First, this Note will show that mandatory mental competency testing is the strongest means to guarantee a mentally competent legislature. Next, this Note will survey the existing proposals for presidential mental competency tests that could be modified and applied to Congress. It will then survey potential issues with the disclosure of medical information, politicized decision making, and other arguments against competency testing. The Note will conclude by arguing that mandatory mental competency testing for all congresspeople is a viable way to protect the mental state of the union.

I. STATE OF AFFAIRS

The Constitution places only one age requirement on politicians: a minimum age. The Constitution mandates a minimum age of twenty-five years for representatives, thirty years for senators, and thirty-five years for the President.³⁹ The Constitution makes no mention of an upper age limit. However, the life expectancy during the time of the Constitution's drafting was a meager thirty-six-and-a-half years.⁴⁰ Granted, infant mortality played a role in shaping this number,⁴¹ and the expectancy was higher for those who surpassed the age of twenty—in fact, Benjamin Franklin himself was eighty-one years old at the Constitutional Convention.⁴² Nonetheless, the realities facing the Framers were far different from the realities facing politicians today like modern medicine and drastically higher life expectancies.⁴³

And constitutional silence by no means indicates constitutional unimportance. The Founding Fathers eschewed a presidential term limit, deferring instead to the social force of George Washington's declining a third

38. *Id.*

39. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 5.

40. J. David Hacker, *Decennial Life Tables for the White Population of the United States, 1790-1900*, 43 HIST. METHODS: J. OF QUANTITATIVE AND INTERDISC. HIST. 45, 47 (2010).

41. Pam Wasserman, *Life Span and Life Expectancy*, 25 SOC. STUD. YOUNG LEARNER, Jan./Feb. 2013, at P3, P3.

42. *The Age of Delegates in 1787*, TEACHING AM. HIST., <https://teachingamericanhistory.org/resource/the-constitutional-convention/delegates/age/> [<https://per.ma.cc/6M6T-ZQ9G>].

43. *Life Expectancy*, CDC, <https://www.cdc.gov/nchs/fastats/life-expectancy.htm> [<https://perma.cc/HNN5-3Z95>]; Morning Call, *In the America of 1787, Big Families Are the Norm and Life Expectancy Is 38*, THE MORNING CALL (Oct. 2, 2021, 3:45 PM), <https://www.mcall.com/1987/06/28/in-the-america-of-1787-big-families-are-the-norm-and-life-expectancy-is-38/> [<https://perma.cc/5JUF-SQD2>].

term.⁴⁴ But when Franklin Delano Roosevelt broke that tradition,⁴⁵ the American people codified Washington's precedent by formally amending the Constitution for the twenty-second time.⁴⁶ Sometimes, though, constitutional silence speaks volumes. The Articles of Confederation, the Constitution's precursor, provided for term limits.⁴⁷ By the time the Constitution was ratified, those term limits were notably absent—a fact that sparked much speculation.⁴⁸ Some posit that it was inconceivable to the Founders that an individual would win reelection that many times while others believe the delegates simply couldn't agree on an exact limit.⁴⁹

What the Founding Fathers *did* agree on, however, was that while the length of time in office may not directly correlate to competency, competency *was* and *is* important for America's leaders.⁵⁰ The pre-Twenty-Fifth Amendment language in Article II of the U.S. Constitution provided a procedure for the case of presidential incapacity.⁵¹ Incapacity of government leaders was important then, and it's still important now.

II. ALTERNATIVE PROPOSALS TO ADDRESS THE GERONTOCRACY

Growing attention on aging politicians inspired various proposals to address age-related incapacity. Before examining these proposals, it is important to note that older individuals play a vital role in both government and society. Far from bashing age, this Note recognizes the legitimacy and desirability of having older politicians in power because of their experience, wisdom, and perspective. However, aging is demonstrably associated with declined cognitive functioning⁵² that seriously undermines the cognition needed to effectively run a country. This Note seeks not to disparage aging individuals but to argue for a system ensuring mental competency in politicians of all ages. And a closer look

44. Letter from George Washington to Jonathan Trumbull (July 21, 1799), <https://www.gilderlehrman.org/sites/default/files/inline-pdfs/T-05787.pdf> [<https://perma.cc/8SDF-AZHX>]; NCC Staff, *FDR's Third-term Election and the 22nd Amendment*, NAT'L CONST. CTR. (Nov. 5, 2020), <https://constitutioncenter.org/blog/fdrs-third-term-decision-and-the-22nd-amendment> [<https://perma.cc/6XYW-6QE5>].

45. NCC Staff, *supra* note 44.

46. U.S. CONST. amend. XXII, § 1.

47. ARTICLES OF CONFEDERATION of 1781, art. V, para. 2.

48. See, e.g., John David Rausch, Jr., *When a Popular Idea Meets Congress: The History of the Term Limit Debate in Congress*, 1 POLS., BUREAUCRACY, & JUST. 34, 34 (2009).

49. *Id.* at 35.

50. Prior to the adoption of the Twenty-Fifth Amendment, Article II, Section 1, Clause 5 of the Constitution stated, "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Power and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

51. *Id.*

52. Daniel L. Murman, *The Impact of Age on Cognition*, 36 SEMINAR HEARING 111 (2015).

at the existing proposals affirms mental competency testing's superiority in addressing age-related incapacity.

Many disenchanted by career politicians but resistant to blame age look to congressional term limits.⁵³ The arguments for and against term limits are incredibly charged,⁵⁴ and the road to implementation is complicated.⁵⁵ Some claim that term limits “would bring new perspectives to Congress, mandate frequent legislative turnover, and diminish incentives for wasteful election-related federal spending that currently flourish in a careerist congressional culture.”⁵⁶ Though the exact limit still causes lively debate,⁵⁷ the proposals all suffer from the same defect: they don't keep power from the hands of those unfit to wield it. They remain silent on the issue of those suffering from serious mental defects that inhibit their ability to govern effectively.

For example, a 2019 resolution proposed by Senator Ted Cruz would have created a constitutional amendment for congressional term limits.⁵⁸ The resolution included a three-term limit for representatives and a two-term limit for senators.⁵⁹ This stops senators from serving for a thirteenth year or representatives from serving a seventh,⁶⁰ but it fails to address the possibility that one of these politicians might be mentally incompetent on the day she takes office. With congresspeople serving such a powerful and important role in America's government, one day is too many for one of these men or women to be mentally unable to perform the duties of office.

Some advocate for mandatory retirement ages for politicians,⁶¹ but this too lacks the important safeguards mental competency testing would provide. Like congressional term limits, the path to implementation is fraught with constitutional landmines, bureaucratic road bumps, and practical barriers.⁶² In

53. See, e.g., Ashley Oravetz, *Congressional Term Limits: The Right Idea, the Wrong Numbers. A Proposal in Favor of Increased Term Limits for Congress*, 46 U. DAYTON L. REV. 55 (2020); Richard A. Epstein, *Why We Need Term Limits for Congress: Four in the Senate, Ten in the House*, 78 TENN. L. REV. 849 (2011).

54. See, e.g., Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83 (1997); Anthony E. Gay, *Congressional Term Limits: Good Government or Minority Vote Dilution?*, 141 U. PA. L. REV. 2311 (1993); Adrianna G. Threatt, *The Impact of Term Limits on the Congressional Committee System*, 6 GEO. MASON L. REV. 767 (1998).

55. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

56. Dan Greenberg, *Term Limits: The Only Way to Clean Up Congress*, THE HERITAGE FOUND. (Aug. 10, 1994), <https://www.heritage.org/political-process/report/term-limits-the-only-way-clean-congress> [<https://perma.cc/2CKF-UJDP>].

57. See, e.g., Oravetz, *supra* note 53.

58. S.J. Res. 1, 116th Cong. (2019).

59. *Id.*

60. *Id.*

61. Yana Peeva, *Age Limit for Politicians: Experience vs. Expertise*, THE GAZELLE (Dec. 11, 2023), <https://www.thegazelle.org/issue/254/politicians-age-limit> [<https://perma.cc/D85P-ZUJV>].

62. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34; Nicholas D. O'Conner, *Too Experienced for the Flight Deck? Why the Age 65 Rule Is Not Enough*, 17 ELDER L.J. 375 (2010) (surveying the long and storied history of mandatory retirement for pilots); Francis X. Shen, *Aging Judges*, 81 OHIO ST. L.J. 235 (2020) (discussing mandatory retirement for judges).

describing mandatory retirement for judges, one author argues that mandatory retirement ages are not an effective solution to age-related cognitive decline.⁶³ He questions the propriety of picking one bright-line age as the cutoff for competency because “at older ages there is *wider* individual variation in cognitive abilities”—some younger people perform poorly, and some older people perform well.⁶⁴ Nikki Haley’s call to test the mental competency of only those above seventy-five also doesn’t protect against pre-retirement cognitive decline. Only through mandatory mental competency testing of *all* congresspeople can age-related incapacity be addressed promptly and efficiently without unduly burdening competent politicians.

III. PROPOSALS FOR PRESIDENTIAL MENTAL COMPETENCY TESTING

There are two prominent proposals for presidential mental competency testing—that of Bert Park⁶⁵ and that of Herbert L. Abrams.⁶⁶ Bert Park rests his argument on the “such other body as Congress may by law provide” language found in the Twenty-Fifth Amendment.⁶⁷ Under this language, Congress could pass a resolution establishing a “Presidential Impairment Panel” to review the President’s mental competency.⁶⁸ Chosen by the President at the start of her administration, the panel would include physicians from all political parties with training in competency testing.⁶⁹ The panel would have no power to initiate proceedings, depose the President, or oust her from power.⁷⁰ Its sole task would be to gather mental-health information using professionally accepted testing and to send that information to the Vice President.⁷¹ To determine competency, the panel would annually rate the President’s impairment under the *Guides to the Evaluation of Permanent Impairment*, settling on a percentage of impairment.⁷²

63. Shen, *supra* note 62, at 283.

64. *Id.* at 281.

65. Bert Park, *Resuscitating the 25th Amendment: A Second Opinion Regarding Presidential Disability*, 16 POL. PSYCH. 821 (1995).

66. Abrams, *supra* note 33.

67. U.S. CONST. amend. XXV, § 4 (“Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of *such other body as Congress may by law provide*, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office.” (emphasis added)); Park, *supra* note 65, at 823.

68. Park, *supra* note 65, at 823.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 824.

Park explains that media exposure is *not* enough to keep those deemed mentally incompetent from hiding their ailments.⁷³ It is not enough for the “rendering of opinions on that data [to] be bandied about by laypersons in a public forum.”⁷⁴ Rather than having unskilled, untrained, and monetarily interested laypeople speculate about a politician’s health, Park advocates for a neutral panel to evaluate the President and advise the Vice President of the President’s mental failings.

Herbert Abrams, on the other hand, proposes a committee, created by statute or by congressional resolution, composed of two internists, two neurologists, a psychiatrist, and a surgeon.⁷⁵ The President of the National Academy of Medicine (formerly the Institute of Medicine of the National Academy of Science) would nominate candidates for each position, and the Surgeon General would then choose from those nominees.⁷⁶ After annually reviewing various data and completing an examination of the President, the panel would then prepare a report disseminated not only to the Vice President but also to the public.⁷⁷

A comprehensive review of these proposals is beyond the scope of this Note. Their inclusion illustrates just some of the extensive literature proposing presidential mental competency testing. With some tweaking, portions of various proposals could be modified and adopted to make a scheme suitable for testing the mental competency of all congresspeople.⁷⁸

IV. ARGUMENTS FOR CONGRESSIONAL MENTAL COMPETENCY TESTING

A. Addressing Fears

Though many fears about mental competency testing have theoretical merit, there are practical ways to address them. The idea of a “medical sanhedrin” tracking political actions and passing judgment on the nation’s most powerful leaders causes concern for many.⁷⁹ Some fear that history will evaluate decisions not for political savviness but through the lens of alleged mental

73. *Id.* at 830.

74. *Id.*

75. *See* Abrams, *supra* note 33, at 118.

76. *Id.*

77. *Id.*

78. For example, a larger panel might be appropriate to better facilitate efficient testing of the 500+ congresspeople. And perhaps the greater sample size has other advantages. Anonymous testing—assigning each congressperson a randomized number similar to those utilized in law schools—would be more feasible and would provide more of a safeguard against political weaponization by the doctor. Or perhaps a regular, randomized selection for testing of a small handful of congresspeople would be sufficient. The exact details of such testing would be for scholars like Abrams and Park to design—this Note merely hopes to begin the conversation surrounding the necessity of such testing.

79. Edwin M. Yoder Jr., *Determining Presidential Health Under the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 607, 614 (1995).

impairments.⁸⁰ One author states, “If pathobiography is to be believed, Sir Winston Churchill’s life might be perceived as a grim, relentless tale of disorders, pill-popping, alcoholic excess, and mood swings rather than of transcendent statecraft”⁸¹

Along the same lines, scholars point to the negative impact such disclosure could have on a politician’s image—it could weaken confidence in the politician’s leadership.⁸² And a politician’s reputation is her currency; without it, she cannot exert influence, be taken seriously, or appear in control of her administration.⁸³ A commission has the potential to harass politicians constantly, weakening their personal dignity and degrading their political offices.⁸⁴ So too could disclosure be used against the politician “in various venues by political enemies, political pundits, talk show hosts, comedians, etc. . . .”⁸⁵ But these fears need not control.

First, social media already abounds with jokes about and reputation degradation of politicians.⁸⁶ Poor results on an official mental competency test are not the cause because we do not live in a world with such testing. It is not the binomial world assumed by those afraid of testing—politicians are not safe from hateful scrutiny in the absence of testing and only subjected to criticism when formally tested. And one could argue that accessible, thorough, and medically accurate health data could help quell rather than fuel the speculation over a politician’s incompetence. After all, without the requisite information, voters must “judge a candidate’s health on whether he jogs or eats hamburgers as represented in newspaper photo-ops.”⁸⁷ Substantive information from a panel could provide a better basis for such judgment. And such disclosure could have a *positive* impact by combating the stigma of mental disorders and promoting the benefits of getting help.⁸⁸

Second, some believe that today’s press is so insistent and thorough that it will find and report a politician’s disability.⁸⁹ But if that is so, harassment from a neutral, professional medical board is hardly the most dangerous harassment

80. *Id.* at 610.

81. *Id.* at 614.

82. Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by Psychological Illness*, 79 *FORDHAM L. REV.* 843, 867 (2011).

83. *Id.* at 867–77.

84. Feerick, *supra* note 33, at 499 (quoting *Presidential Inability: Hearings on S. 238 and S. 3113 Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 85th Cong. 14 (1958)).

85. Gilbert, *supra* note 82, at 877.

86. See, e.g., Sky News Australia, *Jabrack Jobriden: ‘Sniff Sleepy’ Joe Biden Mocked in ‘Genius’ Comedy Hit*, YOUTUBE (July 30, 2022), <https://www.youtube.com/watch?v=AetEyT3yll4> [<https://perma.cc/JP2T-RCZD>].

87. Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 *J. HEALTH CARE L. & POL’Y* 295, 299 (2008).

88. See *id.* at 362.

89. See, e.g., Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 *WAKE FOREST L. REV.* 437, 450 (1995).

potential. In our media-saturated world, the harassment isn't likely ever to go away completely. But the public would have less room for speculation—and thus, less motivation for vigorously prying—if it were given transparent, honest, and thorough information about its leaders. Still, others argue that voluntary disclosure sufficiently protects against politician disability.⁹⁰ Quoting a former Senate minority leader, one author ends his argument, “You’ve got to trust the system; you’ve got to have faith that honorable men will act honorably in a real crisis like this.”⁹¹ But the overwhelming weight of history disagrees that this is reality.⁹²

Additionally, some have concerns about medical confidentiality.⁹³ Confidentiality is a hallmark of the medical profession; should politicians’ test results be publicized, this hallmark could be eviscerated.⁹⁴ And some, like President Eisenhower, think presidential disability is inherently a political question, not a medical one.⁹⁵ But, the medical-information privilege has never been absolute.⁹⁶ The California Supreme Court once noted, “[t]he protective privilege ends where the public peril begins.”⁹⁷ One author contemplates using this public-safety exception as a basis for political mental-capacity disclosures, noting that doing so would not be inconsistent with past purpose and use of the exception.⁹⁸ And certain justifications for the privilege do not even attach when the relationship between physician and patient is one of mandatory screening and not one of voluntary treatment.⁹⁹ Therefore, some analogize mental-health disclosures to the financial disclosures required by state and federal election commissions.¹⁰⁰ Because the governmental interest in preventing corruption is so strong, candidates must disclose private financial information to ensure compliance with contribution limits.¹⁰¹ If public discussion about candidates’ qualifications is integral to our government, it should extend not only to financial disclosures but also to health-related ones—both are relevant in determining whether a candidate is fit to serve. Congress

90. See, e.g., Brown, *supra* note 87, at 352; Feerick, *supra* note 33, at 503.

91. Feerick, *supra* note 33, at 503.

92. See, e.g., Ryan T. Harding, *Preventing Presidential Disability Within the Existing Framework of the Twenty-Fifth Amendment*, 40 U. ARK. LITTLE ROCK L. REV. 1, 48 (2017) (“History shows that Vice Presidents and cabinet officials often lack the will or the ability to effectively check a President who has become incapacitated. Additionally, Presidents have historically held onto power despite the fact that they were incapacitated, in rapidly declining health, or disabled.”).

93. See, e.g., Kesselheim, *supra* note 33; Brown, *supra* note 87.

94. Yoder Jr., *supra* note 79.

95. Bayh, *supra* note 89, at 444 (citing *Presidential Inability and Vacancies in the Office of Vice President: Hearings before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 88th Cong. 232 (1964) (testimony by Dwight D. Eisenhower)).

96. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

97. *Id.*

98. Brown, *supra* note 87, at 324.

99. *Id.* at 299, 309.

100. *Id.* at 332.

101. *Id.* at 332–33.

could mandate health disclosure as a condition for receiving federal campaign funding.¹⁰² Doing so would give the public similar information of controlled depth for each candidate, which would also help level the playing field.¹⁰³

And the skepticism of medical accuracy fails to win the day. Congress already relies on advice from medical professionals when determining presidential disability under the Twenty-Fifth Amendment, and eight states provide for a panel of officials—some medical—to decide gubernatorial disability.¹⁰⁴ Yet some argue that medical training does not create infallibility and that even medical doctors are prone to bias.¹⁰⁵ The Illinois Bar Journal, however, states that medical testimony is “vital” to most personal injury cases.¹⁰⁶ If medical testimony is good enough to be found in our courts of law—supposedly our most sacred spaces—why is it not good enough for voters to have when deciding who will hold the power to declare war?

Finally, many other fields requiring mental competency testing for candidates have successfully navigated practical issues associated with the tests.¹⁰⁷ Notably, Air Force members working with nuclear weapons have to undergo regular evaluations for mental and physical fitness.¹⁰⁸ Pilots,¹⁰⁹ CIA agents,¹¹⁰ and police officers¹¹¹ are just a few of the many occupations that require some form of mental competency testing for employment. If the people most closely responsible for our safety are not immune from mental competency testing, then why should those most responsible for our national policy be?

102. *Id.* at 361.

103. *Id.* A fair point for pushback could be that exposing health information would dissuade some qualified candidates from running. Even if candidates accept that a political campaign brings public scrutiny, they may not accept that the scrutiny runs that far. America must decide whether mentally competent leadership sufficiently outweighs any deterrent effect the testing imposes.

104. Bellamy, *supra* note 33, at 391.

105. Gilbert, *supra* note 82, at 873, 879.

106. Terrence J. Lavin, *Getting the Most from Medical Witness Treeters and Experts: A Trial Lawyer's Guide*, 93 ILL. BAR J. 246, 246 (2005).

107. See, e.g., *Pilot Mental Fitness*, FED. AVIATION ADMIN. (Aug. 22, 2024), <https://www.faa.gov/pilot-mental-fitness> [<https://perma.cc/C7NH-29R2>]; *Careers—CIA Requirements*, CIA, <https://www.cia.gov/careers/cia-requirements/> [<https://perma.cc/6DYR-T5FW>].

108. U.S. DEP'T OF DEF., NO. 5210.42, NUCLEAR WEAPONS PERSONNEL RELIABILITY PROGRAM 226–32 (2015).

109. *Pilot Mental Fitness*, FED. AVIATION ADMIN., <https://www.faa.gov/pilot-mental-fitness> [<https://perma.cc/C7NH-29R2>].

110. *Careers—CIA Requirements*, CIA, <https://www.cia.gov/careers/cia-requirements/> [<https://perma.cc/6DYR-T5FW>].

111. INT'L ASS'N OF CHIEFS OF POLICE, POLICE PSYCHOLOGICAL SERVICES SECTION PREEMPLOYMENT PSYCHOLOGICAL EVALUATION GUIDELINES, <https://www.theiacp.org/sites/default/files/all/p-t/Psych-PreemploymentPsychEval1.pdf> [<https://perma.cc/D94J-G4LC>].

B. *Dispositive Differences Between Congress and the President*

The specific arguments against presidential mental competency testing also come tumbling down in the congressional context because of the many dispositive differences between the executive and legislative branches. First, the President is limited to only two terms.¹¹² Members of Congress have no such term limit.¹¹³ One journalist argues that the presidential term limit already protects against incompetent career politicians becoming President.¹¹⁴ Voters can elect an elderly President with certainty that after the (potentially) eight years end, the President will not once again inhabit the Oval Office.¹¹⁵ Voters do not have the same assurance when it comes to members of Congress. This is because of “the power of incumbency”¹¹⁶ that creates hard-to-break inertia meaning a candidate in office remains in office. And unlike the President’s four-year term, senators serve six-year terms.¹¹⁷ This means that senators whose cognitive decline, whether age-related or not, impairs their ability to effectively govern remain in office for 50% longer than a comparably impaired President.¹¹⁸

Another important difference is the Twenty-Fifth Amendment; there is no comparable procedure for Congress.¹¹⁹ Many believe that the Twenty-Fifth Amendment sufficiently guards against a mental-incompetency catastrophe.¹²⁰ So, what of Congress, which has no similar amendment and no similar safeguards? If Americans are to find solace in the Twenty-Fifth Amendment when it comes to presidential mental incompetency, where shall we find that solace when it comes to Congress? Those who have attacked presidential mental competency testing have offered no such answer. They would argue that solace comes from the congressional expulsion power allotted by the

112. U.S. CONST. amend. XXII, § 1.

113. Nick Mourtopalas et al., *Term Limits Would Upend Congress as We Know It*, WASH. POST (Sept. 16, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/09/16/term-limits-congress-senate-house/> [https://perma.cc/5XZC-974M]. *But see* Richie Angel, *Do Term Limits Make a Difference?*, FEDERALIST SOC’Y: FEDSOC BLOG (Oct. 8, 2020), <https://fedsoc.org/commentary/fedsoc-blog/do-term-limits-make-a-difference> [https://perma.cc/8676-GR6N].

114. Christopher Rhodes, Opinion, *The US Doesn’t Need Age Limits – It Needs Term Limits*, ALJAZEERA (July 7, 2023), <https://www.aljazeera.com/opinions/2023/7/7/the-us-doesnt-need-age-limits-it-needs-term-limits> [https://perma.cc/C4SS-AFYH].

115. U.S. CONST. amend. XXII, § 1.

116. Grayce McCormick, *The Power of Incumbency: Why Voters Reelect Elderly Politicians*, UPNORTHLIVE (Aug. 11, 2023, 4:47 PM), <https://upnorthlive.com/news/nation-world/the-power-of-incumbency-why-voters-re-elect-elderly-politicians-mcconnell-feinstein-age-elderly-incumbent-senator-grassley-pelosi-schumer-biden-old> [https://perma.cc/7LWX-AVN7].

117. U.S. CONST. art. I, § 3, cl. 1.

118. Unless, of course, they are expelled from the Senate. *See* U.S. CONST. art. I, § 5, cl. 2.

119. *See* Martin, *supra* note 37, at 59 (proposing a “congressional incapacity amendment” to the Constitution).

120. *See, e.g.*, Feerick, *supra* note 33, at 503 (arguing that the Twenty-Fifth Amendment is sufficient as is to protect against “all cases of presidential inability”).

Constitution.¹²¹ But if that is to be the source of solace, why does the impeachment structure not similarly provide sufficient solace about the President's mental health? Clearly, those scholars believed—as did most of America when it ratified the Twenty-Fifth Amendment—that something more was required to check mental competency than the possibility of removal by fellow politicians.

Another operative difference between Congress and the President, perhaps the most compelling, is the process for filling a vacancy. When voters elect an elderly President, unaware of some mental incapacity that later removes her from office, the replacement—the Vice President—is another duly elected official chosen by the voters.¹²² In contrast, when voters are deprived of competency information and elect an incapacitated senator, the vacancy is filled by an *appointed* successor the voters never chose.¹²³ With appointments filling vacancies rather than voters choosing a replacement, the need to be fully informed of candidates' fitness exponentially increases. Some might argue that if the voters are unhappy with the governor's replacement, they can simply vote against the governor and senator in the next election cycle, but this "solution" is hardly immediate or acceptable when mental competency testing could help limit the risk of vacancies like this altogether.

Fears arise if the President is required to submit to involuntary testing whose results are submitted to Congress—the body with power to remove the President from office.¹²⁴ But a congressional testing mandate (as Abrams proposed) imposed on Congress itself does not raise the same separation-of-powers concerns. The Constitution gives each congressional house the power to "be the Judge of the Elections, Returns and Qualifications of its own Members . . ."¹²⁵ What could fall more squarely in this constitutionally entrusted power than determining whether a congressional candidate was mentally competent to serve?¹²⁶

Another distinction is the custom of appointing a White House physician who closely monitors the President's health and provides the public periodic updates.¹²⁷ To be sure, nothing more than precedent and a desire to appear

121. U.S. CONST. art. I, § 5, cl. 2.

122. U.S. CONST. amend. XXV.

123. See Adam Edelman & Amanda Terkel, *Gov. Gavin Newsom Chooses Laphonza Butler to Fill Dianne Feinstein's Senate Seat*, NBC NEWS (Oct. 2, 2023, 2:21 PM), <https://www.nbcnews.com/politics/2024-election/gavin-newsom-laphonza-butler-fill-dianne-feinstein-senate-seat-rcna118052> [https://perma.cc/2U52-UV7L].

124. Feerick, *supra* note 33, at 503 ("The creation of such a panel is contrary to . . . the principle of separation of powers . . .").

125. U.S. CONST. art. I, § 5, cl. 1.

126. Importantly, Congress has power to expel members but not to exclude them. *Powell v. McCormack*, 395 U.S. 486, 547–48 (1969). Congress itself could not use the test results to exclude members but could use them to expel members if elected and unable to perform their jobs. See *id.*

127. See, e.g., Shannon Pettypiece & Rebecca Shabad, *Biden Replaces White House Doctor with His Longtime Physician*, NBC NEWS (Jan. 25, 2021, 6:52 AM), <https://www.nbcnews.com/politics/white-house/biden->

transparent mandate this.¹²⁸ And some presidents have been accused of manipulating for their advantage the precedent's malleability.¹²⁹ Nonetheless, the precedent still stands. This means that even if the President is not entirely transparent with her medical status, the public is at least assured that the President is being monitored by a physician. There is no such precedent for congresspeople. Members of Congress could forgo regular check-ups for their entire tenures, and the American people would have no clue. This is particularly concerning when nearly 40% of Americans avoided medical treatment in 2022 because of the cost.¹³⁰ Some might argue that the fear is overblown because congressional salaries make it unlikely that congresspeople will fall prey to this statistic. However, because of the diversity of lifestyles, family situations, and medical needs, congresspeople are just as likely to fall in this category as anyone else. And unlike the President, their jobs don't come with a built-in doctor. There are numerous mental ailments, such as rapidly advancing dementia, that would severely impair a congressperson's ability to fulfill his duties. But barring an unexpected press release or something comparable, the voters will find out when the votes are already in, and the only recourse is to wait it out. The argument that a presidential physician is enough to prevent a mentally incompetent President has no basis when transferred to Congress. Regular mental competency testing for all congresspeople fills that gap.

Finally, much of the concern about disclosing presidential medical information comes from the desire to maintain a powerful public image of America's leader. No doubt, this is an important consideration whether it is the President or congresspeople. However, the situation is different when the conversation shifts from talking about the only person who can fulfill the President's role versus 535 congresspeople who can fill theirs. If the rest of the world sees America with an incompetent or medically vulnerable President, America appears to be without a strong leader, and it begs the question, "Who is leading the country?" But should the results reveal that an American congressperson is mentally unable to execute her duties, the world can still answer that question with a resounding "534 other capable people." While each congressperson is vital to efficient governance, their absence is hardly as

replaces-white-house-doctor-his-longtime-physician-n1255504 [https://perma.cc/TR7F-MN5Q]; see also Memorandum from Kevin C. O'Connor, D.O., FFAFP, Physician to the President to Karine Jean-Pierre, Assistant to the President and White House Press Sec'y (Feb. 16, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/02/Health-Summary-2.16.pdf> [https://perma.cc/75KR-RPGZ].

128. Brown, *supra* note 87, at 304 ("There is no law that requires candidates for the presidency, or the presidents themselves, to disclose anything *at all* about their health. If they choose to disclose their health information, they can decide exactly what is disclosed, who discloses it, and when and how it is disclosed.")

129. Dylan Scott, *How Trump Is Using HIPAA to Pick Which Medical Details Are Released to the Public*, VOX (Oct. 5, 2020, 5:00 PM), <https://www.vox.com/2020/10/5/21502981/what-is-hipaa-privacy-law-president-trump-covid-19> [https://perma.cc/U63K-RQD2].

130. Megan Brenan, *Record High in U.S. Put Off Medical Care Due to Cost in 2022*, GALLUP: NEWS (Jan. 17, 2023), <https://news.gallup.com/poll/468053/record-high-put-off-medical-care-due-cost-2022.aspx> [https://perma.cc/YBR2-BSJR].

disruptive as the President's. The sheer numbers of the respective bodies—one President versus 535 congresspeople—soften the attack on institutional respect and legitimacy that opponents of competency testing fear. Legal scholarship confirms this difference. The Twenty-Fifth Amendment and presidential succession drum up far more debate and preemptive planning than congressional competency.

While the arguments against presidential mental competency testing have proven a hill too high to climb, congressional mental competency testing soars high above these arguments for many reasons. Whether it is the governmental structure, the other safeguards in place, or increased scrutiny aimed at the President, Congress is in a place of both greater need for and greater amenability to mandatory mental competency testing.

CONCLUSION

As America continues to age and its politicians do too, the question of ensuring fitness for office will become more complex and ever-increasingly crucial. There is not just one simple solution, but an amalgamation of many. This Note cannot resolve the entirety of questions raised by such a complex problem, but it hopes to start the conversation. While testing the mental competency of the President has been repeatedly rejected for many reasons, these reasons do not apply with equal force to those in Congress. Rather than a bright-line mandatory retirement age or term limits that may unjustly exclude the competent while permitting the mentally incompetent to rule, regular, mandatory mental competency testing can strengthen the legitimacy and the efficiency of American democracy. If America shall have a gerontocracy, at least let her have a mentally competent one.

*Natalie L. Simon**

* J.D. Candidate, The University of Alabama School of Law, 2025. Thank you to Dr. Barry Simon for the title and for the endless insight. Thank you also to Cooper Moran, Lauren Boyd, and Kenneth Rosen for bringing my nascent idea to a workable framework. Thank you to Harold Hoffler for sharing his experience in a beloved job with a mandatory retirement age. And thank you finally to the editors of the *Alabama Law Review* for their diligent work on this Note.