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The Twenty-Fifth Amendment to the United States Constitution: A Reader's Guide

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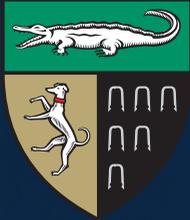


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Yale Law School
RULE OF LAW CLINIC*

The Twenty-Fifth Amendment to the United States Constitution

A READER'S GUIDE

“A well-conceived Reader’s Guide to the never before invoked Section 4 of the Twenty-Fifth Amendment.”

–Birch Bayh, former U.S. Senator from Indiana and Chairman of the Senate Subcommittee on the Constitution, 1963-1981.

* The Yale Law School Rule of Law Clinic is a nonprofit law firm at Yale Law School, 127 Wall Street, New Haven, CT. 06520-8215. Yale Law School students and clinic members Varun Char '19, Colleen Culbertson '19, Sameer Jaywant '18, Chris Looney '19, Richard Medina '18, Aleksandr Sverdlik '18, Emily Wanger '18, Zoe Weinberg '19, and Nathaniel Zelinsky '18 contributed to this Guide. The Clinic students were led on this matter by Sterling Professor of International Law and former Dean Harold Hongju Koh and William O. Douglas Clinical Professor of Law and former Deputy Dean for Experiential Education Michael J. Wishnie '93, Lecturer in Law Hope Metcalf, Visiting Clinical Lecturer of Law Phil Spector '00, and Fellow Matthew Blumenthal '15. We are grateful to Professors Akhil Reed Amar, John Feerick, Russ Feingold, Joel Goldstein, Linda Greenhouse, Avril Haines, Norman Ornstein, David Pozen and Drs. David Goldbloom and Howard Zonana for reviewing an earlier draft. Any questions should be directed to Harold Hongju Koh at harold.koh@ylsclinics.org or 203-432-4932. | April 18, 2018

“Yale’s Reader’s Guide to the 25th Amendment is, quite simply, indispensable. There is no better single resource on this crucial, and widely misunderstood, corner of American law and politics.” – *Evan Osnos, The New Yorker*

“The text of the 25th Amendment seems clear on its face, but its provisions raise many questions. The authors of this indispensable reader’s guide have performed a great public service for members of the executive departments who might trigger its provisions, for legislators who would then vote on their decision, for members of the media who would have to report on what was happening, and for citizens who would eventually cast their verdict in the next election.”

– *Richard M. Pious, Professor of Political Science, Barnard College & Columbia University, Author of The President, Congress and the Constitution (1984) and Why Presidents Fail (2008).*

“The Twenty-Fifth Amendment to the United States Constitution: A Reader’s Guide,” provides a clear-eyed roadmap to navigate one of the most controversial, and unexpected, political issues the country faces. The Reader’s Guide is not only a critical scholarly contribution but is also an invaluable tool for political and policy experts looking for actionable analysis at a moment when the executive branch consistently tests the constitution’s resilience.” – *John Podesta, White House Chief of Staff, 1998-2001; Counselor to the President, 2014-2015*

“The Twenty-Fifth Amendment is an extraordinarily important and little understood part of our Constitution. This guide explains all of its nuances in a lively and readable fashion.” – *Norman Ornstein, The American Enterprise Institute*

“Section 4 of the Twenty-Fifth Amendment is silent or vague on a variety of pertinent issues. This ‘reader’s guide’ provides an important public service by systematically laying out those issues and proposing practical resolutions. Should Section 4 ever be invoked, it will quickly become a prominent ‘user’s guide’ as well.”

– *David Pozen, Professor of Law, Columbia Law School*

“This ‘Reader’s Guide’ presents a thoughtful and comprehensive discussion of Section 4 of the Twenty-Fifth Amendment to the Constitution. It should prove a very valuable resource for government officials seeking to implement the provision correctly, for scholars and journalists seeking to explain it, and for citizens committed to the rule of law and accountable government.”

– *Joel K. Goldstein, Vincent C. Immel Professor of Law, Saint Louis University School of Law.*

“At some future time we will probably need to invoke the Twenty-Fifth Amendment’s provisions on presidential removal. When that time comes, we will all be grateful for this comprehensive and thought-provoking analysis of every aspect of the Amendment. This work is absolutely indispensable and should be widely studied.” – *Larry Sabato, Director of the Center for Politics and University Professor of Politics, University of Virginia.*

“This is a first-rate primer about the 25th Amendment. A valuable study for all citizens who are interested in understanding how the 25th Amendment works and its history.” – *Julian E. Zelizer, Malcolm Stevenson Forbes, Class of 1941 Professor of History and Public Affairs, Princeton.*

THE TWENTY-FIFTH AMENDMENT *to the* UNITED STATES CONSTITUTION

A READER'S GUIDE

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EXECUTIVE SUMMARY

The Twenty-Fifth Amendment to the United States Constitution addresses what happens if the President or Vice President of the United States is removed, dies, resigns, or in the case of the President, is unable to discharge the powers and duties of the office.

In particular, the Amendment addresses:

- filling a vacancy in the office of the President in case of removal, death, or resignation of the President (**Section 1**);
- filling a vacancy in the office of the Vice President (**Section 2**);
- the transfer of presidential powers and duties to the Vice President where the President has declared himself unable to discharge the powers and duties of the office (**Section 3**);
- the transfer of presidential powers and duties to the Vice President where the Vice President and either a majority of the Principal Officers of the Executive Departments or “such other body as Congress may by law provide” have determined that the President is unable to discharge the powers and duties of the office (**Section 4**).

The Twenty-Fifth Amendment has been largely overlooked by history, but in recent months has drawn increased attention in the media and popular culture.¹ While its potential for human drama has been explored in detail, its legal requirements and implications remain poorly understood, and have been misstated even by experienced legal commentators.² This is in part because the Amendment has received little judicial and scholarly attention. The relative sparseness of the Amendment’s interpretive development is especially striking given the gravity of its subject: the removal from power of the elected head of the Executive Branch.

Among the provisions of the Twenty-Fifth Amendment, Section 4—which provides for situations where the President cannot or will not recognize his own inability—is particularly momentous and little understood. In the more than 50 years since the Amendment’s ratification, Section 4 has never been invoked. There are no judicial or other authoritative opinions directly evaluating its proper implementation. Unlike other constitutional processes involving the office of the President, such as impeachment or even other sections of the Twenty-Fifth Amendment, there is no historical practice to guide its employment. As a result, uncertainty persists about such basic questions as when Section 4 can or should be invoked, who would make important decisions, and how Section 4’s processes should be implemented.

¹ See, e.g., *Homeland: Clarity* (Showtime television broadcast Apr. 15, 2018); *Madam Secretary: Sound and Fury* (CBS television broadcast Jan. 14, 2018); *Designated Survivor: Warriors* (ABC television broadcast Mar. 8, 2017); *House of Cards: Chapter 43*, NETFLIX (Mar. 4, 2016), <https://www.netflix.com/watch/80049215>; *Madam Secretary: The Show Must Go On* (CBS television broadcast Oct. 4, 2015); *The West Wing: Twenty-Five* (NBC television broadcast May 14, 2003); *24: Day 2: 4:00 a.m. – 5:00 a.m.*; (Fox television broadcast Apr. 29, 2003).

² See, e.g., *infra* notes 68, 187.

This “Reader’s Guide” seeks to provide guidance on these critical interpretive questions. Drawing on the constitutional text, legislative debates, and scholarly analyses, it seeks to provide a road map for the faithful application of Section 4 of the Twenty-Fifth Amendment. In preparing this Guide, we have relied heavily on several critical sources: (1) the Final Report of the Miller Commission on Presidential Disability and the Twenty-Fifth Amendment; (2) the work of the Fordham University School of Law’s Clinic on Presidential Succession, most recently reflected in a Symposium issue on the fiftieth anniversary of the Twenty-Fifth Amendment entitled “Continuity in the Presidency: Gaps and Solutions,” 86 Fordham Law Review 907 (Vol. 3 December 2017); and (3) the lifetime’s work of Professor John D. Feerick, past Dean of the Fordham University School of Law, who was a principal drafter of the Twenty-Fifth Amendment and continues to be its preeminent commentator.

To several of the questions addressed in this document, we find no single, unequivocal answer. In such cases, the Guide sets out what we believe to be the prevailing view. Where we find no prevailing view, we offer our best reading of the principles that should guide the Twenty-Fifth Amendment’s faithful implementation. To be clear, we offer no opinion on the merits of any particular decision to exercise—or not to exercise—the Amendment’s provisions. Our purpose is only to provide clarity to those who may be confronted with a potential question of implementation as to how best to make their decisions following the spirit and letter of the Amendment.

Throughout, this Reader’s Guide is motivated by the recognition that issues of presidential inability raise questions of the utmost gravity. Particularly at moments of constitutional stress, fidelity to the rule of law and its principles of consistent and faithful interpretation become all the more essential. This requires a conscientious adherence—and careful attention—to the Amendment’s text, drafting and legislative history, and other sources of constitutional meaning.

With these precepts in mind, we provide the following analysis of this little-understood, often misinterpreted, and highly important constitutional provision.

TEXT OF THE TWENTY-FIFTH AMENDMENT

SECTION 1

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

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 his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

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 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[s]³ 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.

³ This word was meant to read “departments”; the missing “s” was a scrivener’s error that escaped timely detection. See John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 *FORDHAM L. REV.* 1075, 1101 (2017).

SUMMARY OF FINDINGS

- **Section 4 of the Twenty-Fifth Amendment may be “activated” by the Vice President along with a majority vote of one of two groups: either (1) the Principal Officers of the executive departments, or (2) an “other body” enacted by Congress through bicameralism and presentment.**
 - If Congress creates an “other body,” that body supplants the Principal Officers as the entity that, together with the Vice President, may trigger the Section 4 process. The choice is “either/or,” not “both/and.”
 - The Principal Officers of the Executive Departments are not what is colloquially known as the President’s “Cabinet.” Rather, they are the heads of the fifteen departments named in 5 U.S.C. § 101, not all cabinet officers. Thus, a majority of the Principal Officers would be eight. This means that, including the Vice President, nine U.S. officials acting in concert could declare the President unable to discharge the powers and duties of his office under Section 4 of the Twenty-Fifth Amendment.
 - Acting heads of departments may vote on presidential inability as Principal Officers of Executive Departments.
 - If Congress chooses to create the “other body” mentioned in Section 4, Congress may compose that body however it likes, subject to constitutional limitations. However, the framers of the Amendment indicated a strong preference *against* the “other body” being composed exclusively of medical experts.
- **There is no specific threshold—medical or otherwise—for the “inability” contemplated in Section 4.**
 - The framers specifically rejected any definition of the term, prioritizing flexibility. Those implementing Section 4 should focus on whether—in an objective sense taking all of the circumstances into account—the President is “unable to discharge the powers and duties” of the office.
- **The Amendment does not require that any particular type or amount of evidence be submitted to determine that the President is unable to perform his duties.**
 - While the framers did imagine that medical evidence would be helpful to the determination of whether the President is unable, neither medical expertise nor diagnosis is required for a determination of inability.
 - The “Goldwater Rule,” which suggests that psychiatrists may not opine on the mental health of a patient they have not examined, is unlikely to present a significant obstacle to the implementation of the Amendment. (We offer no opinion on the merits of the Goldwater Rule itself.)

- **While the Vice President serves as Acting President, as a legal matter, the Vice President wields all the powers of the Presidency.**
 - Once an initial transmission of “inability” is made by the Vice President and the Principal Officers or “other body,” the Vice President immediately becomes Acting President. The Vice President remains Acting President during the four-day period following a President’s declaration of “no inability” and throughout the period of congressional convening and deliberation on the matter, which may last another twenty-one days.
 - During this time, the machinery of the Executive Branch—including the White House Counsel and the Department of Justice—serves the Acting President, not the President.
 - If the Section 4 process concludes with the President being declared unable, the Vice President remains Acting President, but does not assume the Office of the Presidency or the title of “President.”
- **Congress is not required to adhere to any specific set of procedures or burden of proof during its deliberations.**
 - The vote required by the Amendment is a two-thirds vote of *each* House of Congress—not two-thirds of the total members of both Houses.
 - Congress may exercise compulsory process over the President. Medical privacy laws such as the federal Health Insurance Portability and Accountability Act (HIPAA), the constitutional doctrine of executive privilege, and state law doctrines of attorney-client privilege are unlikely to present significant obstacles to the gathering of evidence needed for implementation of the Amendment.
 - The President may make his case to Congress that he is able to resume his powers and duties.
 - Depending on the circumstances, actions taken by the President or other officials to frustrate the Twenty-Fifth Amendment process may constitute an impeachable offense.
- **Almost all challenges to any element of an implementation of Section 4 of the Twenty-Fifth Amendment are highly likely to be considered unreviewable by the courts.**
 - A challenge to the merits of a determination of presidential inability is most likely to be deemed unreviewable as a nonjusticiable political question.
 - Almost all challenges to the *procedures* used in an implementation of Section 4 of the Twenty-Fifth Amendment are likely to be unreviewable as nonjusticiable political questions; for prudential reasons, the judicial branch is highly unlikely to intervene absent patent and material departures from the procedures expressly specified by the text of the Amendment.

- **There is no limit to the number of times Section 4 of the Twenty-Fifth Amendment may be implemented.**
 - The President may resume the powers and duties of the Presidency if he is found to be able to discharge them.
 - If the Section 4 process concludes with the President being declared unable, the President may still be impeached.
 - If the President regains the powers and duties of the Presidency, the President may dismiss cabinet officials for declaring him unable.

ANALYSIS

The Twenty-Fifth Amendment was adopted on February 10, 1967. It superseded and augmented Article II, Section 1, Clause 6 of the U.S. Constitution. That clause had provided that the powers and duties of the presidency devolve to the Vice President in the case of the removal, death, resignation, or inability of the President, and that “Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President.” It did not, however, indicate by what procedures or standards that devolution would take place, or precisely how official inability would be determined.

By supplementing this prior constitutional provision, the Twenty-Fifth Amendment was meant to settle long-disputed questions related to presidential succession, and to provide a constitutional mechanism that would ensure the orderly transition of power in the cases of presidential removal, death, resignation, or inability. During previous episodes of presidential incapacity, the absence of a constitutional mechanism for effecting the transfer of the powers and duties of the Presidency had resulted either in the failure to exercise that transfer, or in such a transfer being arranged informally in a manner not constitutionally endorsed.⁴

In the sections that follow, we provide an analysis of a number of questions regarding the Twenty-Fifth Amendment’s proper implementation. We do so with a particular focus on Section 4 of the Amendment, which has not been invoked since its ratification.

A note on interpretive methods regarding the U.S. Constitution: American constitutional practice is commonly acknowledged to be pluralistic in nature.⁵ Scholars continue to debate the merits and proper role of various interpretive methods, especially originalism.⁶ However, the Twenty-Fifth Amendment, in several respects, is a rare constitutional provision. First, there has been virtually no judicial doctrine interpreting or government practice applying it. Second, outside Congress, there was little recorded public debate of numerous questions to which this Reader’s Guide is addressed. Third, and helpfully, the Amendment has unusually accessible and robust drafting and legislative histories. For all of these reasons, this Reader’s Guide relies particularly on the text, drafting and legislative history of the Amendment in evaluating its proper implementation. We believe these are the best available sources of evidence for the Amendment’s meaning, and that based on this evidence, our conclusions are reliable interpretations.

⁴ See discussion *infra* Section II.A.2 for examples.

⁵ See *generally*, PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

⁶ See *e.g.*, JACK BALKIN, *LIVING ORIGINALISM* (2011); Jamal Greene, *Rule Originalism*, 116 *COLUM. L. REV.* 1639 (2016); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094 (2015); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 *VA. L. REV.* 669 (1991).

I. Who Can Activate Section 4 of the Twenty-Fifth Amendment?

The Twenty-Fifth Amendment describes two methods by which Section 4 may be set into motion. First, Section 4 empowers the Vice President and a majority of the “principal officers of the executive departments” (“Principal Officers”)—at present, a minimum of *nine* (Vice President plus eight) executive officials acting together—to declare the President unable to discharge his powers and duties. A second, alternative method would require the approval of the Vice President and any “such other body as Congress may by law provide” (“other body”).⁷

Significantly, under either scenario—Principal Officers or “other body”—the Vice President is the indispensable actor in the activation of the Twenty-Fifth Amendment. It is not only that the Vice President’s participation is required for either method of activation, whether with the Principal Officers or the “other body.” The Vice President must also be prepared to assume the role and responsibility of Acting President. The Vice President is also highly likely to be indispensable to coordinating the collective action of the Principal Officers, as discussed in Part I.C.

A. Action by the Vice President and “Principal Officers of the Executive Department”

1. What is an Executive Department?

While the Twenty-Fifth Amendment does not define “executive department,” the legislative history makes clear that the language refers to those departments named in 5 U.S.C. § 101. The U.S. Supreme Court has endorsed this conclusion in dicta.⁸ The legislative debates show that ten officials were originally intended—the Secretaries of State; Treasury; Defense, Interior; Agriculture; Commerce; Labor; and Health, Education and Welfare; the Attorney General, and the Postmaster General—along with the head of any executive department established after July 1965.⁹ The House Report accompanying the joint resolution proposing the Amendment stated the same conclusion:

⁷ U.S. CONST. amend. XXV, §4. Some have suggested this section was structured to mirror Article II, Section 1, Clause 6 which states that “the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President.” BERT E. PARK, AILING, AGING, ADDICTED: STUDIES OF COMPROMISED LEADERSHIP 204 (1993) (emphasis added). The Principal Officers were chosen as the default group for initiating Section 4’s implementation out of special concern for the separation of powers. See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 251 (1965) (discussing the ABA drafting committee’s rejection of the Supreme Court or Congress as the default group and its selection of the Executive Officers in part because their “involvement would be consistent with the principle of separation of powers”); see also James C. Kirby, Jr., *A Breakthrough on Presidential Inability: The ABA Conference Consensus*, 17 VAND. L. REV. 463, 477 (1964) (explaining that the ABA’s choice of the Executive Officers as the default group “reflect[ed] a widely held opinion that this decision should be within the executive branch, respecting the separation of powers and insuring that the decision is made by persons in close proximity to the President and presumably loyal to him”).

⁸ *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 887 n.4 (1991) (noting that in interpreting the Appointments Clause, the Court is not bound by “the fact that the [Twenty-Fifth] Amendment strictly limits the term ‘department’ to those departments named in 5 U.S.C. § 101”).

⁹ 111 CONG. REC. 7938 (1965) (statement of Rep. Waggoner); *id.* at 7941 (Statement of Rep. Poff); *id.* at 7944-45 (Statement of Rep. Whitener); *id.* at 7954 (Statement of Rep. Gilbert); JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 117 (2014).

The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, *or any executive department established in the future*, generally considered to comprise the President's Cabinet, would participate, with the Vice President, in determining inability.¹⁰

As of February 2018, 5 U.S.C. § 101 provides that there are fifteen executive departments,¹¹ making eight a majority of the Principal Officers:

- The Department of State
- The Department of the Treasury
- The Department of Defense
- The Department of Justice
- The Department of the Interior
- The Department of Agriculture
- The Department of Commerce
- The Department of Labor
- The Department of Health and Human Services
- The Department of Housing and Urban Development
- The Department of Transportation
- The Department of Energy
- The Department of Education
- The Department of Veterans Affairs
- The Department of Homeland Security

Despite the legislative history's references to the "President's Cabinet," the Principal Officers of the Executive Departments and the Cabinet are not necessarily the same. For the purposes of the Twenty-Fifth Amendment, it is specifically the executive departments—not the Cabinet status of an official—that matter.¹²

Senator Birch Bayh, one of the principal drafters of the Amendment, drew this distinction during hearings before the House Judiciary Committee. For example, one questioner noted that within the Department of Defense, "we have the Department of the Navy, the Department of the Air Force, the Department of the Army," and asked whether the Principal Officers of these departments—that is, the Secretaries of the Army, Navy, and the Air Force—would be Principal Officers for the purpose of the Twenty-Fifth Amendment. In response, Senator Bayh explained

¹⁰ H.R. REP. NO. 89-203, at 3 (1965) (emphasis added).

¹¹ See *also* Pub. L. 89-554, 80 Stat. 378 (1966); Pub. L. 89-670, § 10(b), 80 Stat. 948 (1966); Pub. L. 91-375, § 6(c)(1), 84 Stat. 775 (1970); Pub. L. 95-91, § 710(a), 91 Stat. 609 (1977); Pub. L. 96-88, § 508(b), 93 Stat. 692 (1979); Pub. L. 100-527, § 13(b), 102 Stat. 2643 (1988); Pub. L. 109-241, § 902(a)(1), 120 Stat. 566 (2006).

¹² For this reason, throughout this Reader's Guide we will refer to "the principal officers of the executive departments" as "the Principal Officers"—not "the Cabinet"—except when reproducing a quotation.

that they would not.¹³ Another questioner noted that, at the time of the hearing—and as is still the case today— “the Ambassador [to] the United Nations sits with and as a member of the Cabinet.” “I understand,” the questioner continued, that “some other executive officers, including the head of the poverty program, Mr. Shriver, is also sitting as a member of the Cabinet,” before questioning whether these individuals should be included in the Twenty-Fifth Amendment process.¹⁴ In response, Senator Bayh said that while the “Cabinet . . . could very well be interpreted to include” officials like the U.S. Representative to the United Nations and the Director of the Poverty Program, these officials were *not* intended to be included among the “principal officers of the executive departments.”¹⁵

2. Can acting heads of Executive Departments participate?

Yes. The “principal officers” of the executive departments are understood from the legislative history to be the Presidential appointees who direct the executive departments named in 5 U.S.C. § 101.¹⁶ Congressional debates regarding the Twenty-Fifth Amendment indicate that a recess appointee to a principal officer position would be able to participate in the determination of inability.¹⁷

Congressional debates regarding the Twenty-Fifth Amendment indicate that a recess appointee to a principal officer position would be able to participate in the determination of inability.

However, leading up to the passage of the Twenty-Fifth Amendment, there was some debate as to whether the acting heads of the executive departments should participate in the process created by the Amendment. The House Judiciary Committee report established that they should, noting, “In the case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.”¹⁸ This view was later echoed by then-Senator Robert F. Kennedy in a floor debate on June 30, 1965,¹⁹ and assumed by other senators during subsequent discussions concerning the firing and replacement of Cabinet members.²⁰

¹³ *Presidential Inability: Hearings Before the H. Comm. on the Judiciary*, 89th Cong. 52 (1965) [hereinafter *1965 House Judiciary Hearings*].

¹⁴ *Id.* at 60-61.

¹⁵ *Id.* at 61.

¹⁶ H.R. REP. NO. 89-203, at 3 (1965) (emphasis added).

¹⁷ 111 CONG. REC. 15,380 (1965) (statement of Sen. Kennedy); *id.* at 15,382 (statement of Sen. Kennedy); *id.* at 15,385 (statement of Sen. Javits).

¹⁸ H.R. REP. NO. 89-203, at 3 (1965).

¹⁹ 111 CONG. REC. 15,380 (1965).

²⁰ *Id.* at 15,382 (statement of Sen. Kennedy), 15,385 (statement of Sen. Javits). In Senate debates on February 19, 1965, Sen. Bayh stated that, in the event of a vacancy in the office of the Secretary, an Under Secretary would not be “empowered as would the Secretary himself, in participating in the decision with respect to ability or disability.” 111 CONG. REC. 3284 (1965) (statement of Sen. Hart; statement of Sen. Bayh). However, this statement was made during a colloquy about which officers are “heads of executive departments” – not a discussion about vacancies. *Id.* A memorandum from the Library of Congress Legislative Reference Service was introduced into the Senate record to clarify that subdivision and bureau heads are *not* “heads of executive departments.” *Id.* at 3283. Dean Feerick has written that he believes the view of the House Judiciary Committee to be the correct one. FEERICK, *supra* note 9, at 118.

3. Can the Vice President trigger Section 4 with a simple majority of the Principal Officers?

Yes. It is clear on the face of the Amendment that the Vice President may trigger Section 4 if supported by a simple majority of the Principal Officers. In some situations, the Vice President might seek a consensus of the Principal Officers, or at least a number greater than a bare majority. In other circumstances, however, the Vice President might not. Where there might be dissenters who would warn a potentially disabled President, triggering dismissals of Principal Officers and thereby short-circuiting the Section 4 process, the Vice President might act with more secrecy until a majority of Principal Officers is obtained and the first declaration is transmitted. It is also noteworthy that the Amendment specifies no role for the White House Chief of Staff, although that individual would likely play an important role in attesting to the President's inability and/or organizing the Principal Officers.

B. Action by the Vice President and “Such Other Body as Congress May by Law Provide”

As noted, Section 4 provides that Congress can create an alternative “other body” in lieu of the “principal officers of the executive departments” for setting into motion the Twenty-Fifth Amendment. This alternative maintains the Vice President as the indispensable actor, but requires him instead to act with any “such other body as Congress may by law provide”²¹ (the “other body”).

1. What are the procedural requirements for the creation of the “other body”?

There are only two clear requirements for the creation of the other body mentioned in Section 4. First, the act creating the body must be approved like any other statute, meeting the requirements of bicameralism and presentment. Section 4 clearly states that the body must be created “by law,”²² and the legislative history makes it clear that the President has a veto power over the statute creating the body.²³

Second, the other body, once created, must act as the *exclusive* mechanism—acting along with the Vice President—for initiating Section 4. This conclusion finds support in the legislative history. During congressional debates, some worried that creating an exclusive body would be unconstitutional because it would encroach on the Principal Officers’ constitutionally appointed power to ascertain the President’s fitness. Senator Jacob Javits, however, rejected this concern and stated that, under the Amendment, Congress definitely possesses the plenary power to replace the Principal Officers with another body.²⁴ Moreover, Senators Bayh and Javits, and Dean John D. Feerick, a principal architect of the Amendment, all asserted that

²¹ U.S. CONST. amend. XXV, § 4.

²² *Id.*

²³ FEERICK, *supra* note 9, at 121; see also, Miller Center Comm’n No. 4, *Report of the Commission on Presidential Disability and the Twenty-Fifth Amendment*, WHITE BURKETT MILLER CTR. PUB. AFF. 13 (1988), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_reports (“Such congressional action would be subject to presidential veto as any other legislation, and a veto could be overridden by a two-thirds vote of both houses”).

²⁴ 111 CONG. REC. 15,385-86 (1965) (responding to concerns that Congress cannot enact a law that conflicts with a Constitutional provision giving the Cabinet certain powers, Javits affirms that “Congress has the right to provide for the exclusivity of that body in exercising this authority . . . [W]ould it not be completely contrary to create the two bodies which could compete with one another. . . [I]f the Congress were to exercise the authority that the amendment would give, the courts would hold that such a body has exclusivity to its action.”).

whenever Congress designates such a body, it replaces the Principal Officers.²⁵ When asked whether a Vice President has a choice between the other body and the Principal Officers, Senator Bayh stated:

I would think not. In the first place, the Congress has a choice of either providing another body or permitting the Cabinet to continue to function. This is abundantly clear in the language as I read it. If Congress finds that the Cabinet cannot adequately fill this role, then it provides an alternative body which will function. This is the way we intended it. This is the way most all of us look at it and the way I would like to read in the record.²⁶

Under this reading, once Congress creates another body, the Principal Officers no longer play a role in the Amendment process,²⁷ assuming the Principal Officers are not part of the body created by Congress. It also appears that Congress, if it so chooses, can create a temporary “other body” that exercises Section 4 powers for a limited period of time unless reauthorized.”²⁸

The framers of the Twenty-Fifth Amendment intended to provide Congress the ability to create an “other body” in the event that the Principal Officers proved to be dysfunctional.²⁹ Dysfunction could arise in a number of circumstances; for instance, if the Principal Officers deadlocked in a tie vote.³⁰ Congress might also want to create an “other body” if the President chose to fire all of the Principal Officers to prevent them from declaring him unable.³¹ However, while framers like Senator Bayh believed Congress should only create another body when absolutely necessary,³² nothing in the Constitution’s text itself requires that Congress only create an “other body” in dire circumstances.

²⁵ *Id.* at 15,383-86; FEERICK, *supra* note 9, at 121.

²⁶ 1965 House Judiciary Hearings, *supra* note 13, at 93.

²⁷ Miller Center Comm’n No. 4, *supra* note 23, at 12; Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 446 (1995) (“The language of the amendment clearly requires that the ‘other body’ will replace the Cabinet. Specifically, either the Cabinet or the ‘other body,’ together with the Vice President, will decide upon presidential disability.”); Feerick, *supra* note 3, at 1100-1101 (discussing research and correspondence with framers regarding “either/or” formulation ensuring this result).

²⁸ Miller Center Comm’n No. 4, *supra* note 23, at 13 (The Commission first considers whether to propose that Congress create a permanent body to replace the Cabinet and concludes that the Cabinet would be a better default advisory body than any other body created by Congress. The Commission also considers the alternative option of creating a temporary body: “Even if Congress does not create a permanent body of this sort, this provision in Section 4 is salutary in that it gives Congress power to act if, in a particular situation, the Cabinet fails to act when it is clear that the president is unable to carry out his duties. Congress could create another body to take action in that special situation. Such congressional action would be subject to presidential veto as any other legislation, and a veto could be overridden by a two-thirds vote of both houses. Such a body would be temporary and created to deal specifically with one assignment, leaving the Cabinet in place to address situations thereafter.”).

²⁹ FEERICK, *supra* note 9, at 120; see also, HERBERT L. ABRAMS, *THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY, AND THE TWENTY-FIFTH AMENDMENT IN THE AFTERMATH OF ATTEMPTED ASSASSINATION OF RONALD REAGAN* 175 (1992); BIRCH BAYH, *ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION* 50 (1968) (“[I]n the event of Presidential disability, [Section 4] would enable Congress to provide by law for some other body to replace the Cabinet as the group responsible for verifying the action of the Vice President in the event the Cabinet’s presence in the disability provision proved unworkable.”). For additional recommendations for improving Section 4’s function, see Fordham University School of Law Second Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917 (2017).

³⁰ 111 CONG. REC. 7941 (1965) (statement of Rep. Poff).

³¹ FEERICK, *supra* note 9, at 121.

³² Bayh, *supra* note 27, at 446 (“The legislative history is clear. Congress intended that ‘the other body’ should be designated only if the Cabinet, for political reasons or otherwise, becomes a roadblock to resolving a presidential disability.”); see also 1965 House Judiciary Hearings, *supra* note 13, at 45 (statement of Sen. Bayh) (By including the

2. What limits, if any, are there on the powers and composition of the “other body”?

The Amendment affords Congress considerable flexibility in designing the body’s powers, procedures, and composition.³³ Congress may prescribe the body’s rules and procedures, subject only to constitutional restraint.³⁴ Congressional debate suggests that Congress could even designate itself as a whole the “body” in question.³⁵ The body could also consist of Cabinet members.³⁶ During the ratification debate, some suggested including particular members of the judiciary or senior congressional figures such as the Chief Justice or majority and minority leaders.³⁷ Some have even proposed that the “other body” consist of “medical doctors, either appointed for terms or designated by office (e.g. the surgeon general).”³⁸ Indeed, according to one commission studying the Twenty Fifth Amendment, only “[t]he realities of American politics and public opinion, and [a] sense of ‘constitutional morality’ . . .” limit who Congress may designate as the “other body.”³⁹

In addition, there are two concrete constitutional limits on the other body’s composition and actions: (1) the body’s declaration that the President is unable to discharge his or her duties has no legal effect without the Vice President’s approval, and (2) at least a majority of the other body must approve of such a declaration for it to trigger a transfer of power.⁴⁰ This means that

“other body” option, “[w]e also provide for the unforeseen contingency that the Cabinet may not prove to be the best body to determine presidential inability in conjunction with the Vice President.”)

³³ FEERICK, *supra* note 9, at 121. (“The debates make clear that Congress’s power with respect to the creation of ‘another body’ is vast. It can designate itself, expand or restrict the membership of the Cabinet, combine the Cabinet with other officials, require a unanimous vote of the body established by law, and prescribe rules of procedure to be followed by that body.”); see also ABRAMS, *supra* note 29, at 175 (1991); BAYH, *supra* note 29, at 50 (“Some scholars and members of Congress had felt that the only body which could make an impartial decision concerning the President’s disability was a blue-ribbon commission. According to some, this commission ought to be composed of doctors; according to others, it should contain doctors, members of the Supreme Court, and legislative leaders from Congress. This minor change in the language would leave the way open for Congress to establish such a commission to replace the Cabinet at a later date if necessary.”)

³⁴ 111 CONG. REC. 15,386 (1965) (statement of Sen. Javits) (“Congress has the right to provide for . . . the way in which the body shall exercise that authority, and other pertinent details necessary to the creation of such a body, its continuance, its way of meeting, the rules of the procedure, and the way in which it shall exercise its power”). For further discussion of constitutional restraints on Congress’ freedom to prescribe the procedures of the “other body,” see *infra* note 40.

³⁵ 111 CONG. REC. 7957 (1965) (statement of Rep. Tenzer) (“[I]t would vest the Congress with the power to require concurrence by a body other than the Cabinet. In fact, the Congress could designate itself as the body to grant or withhold concurrence.”).

³⁶ 111 CONG. REC. 15,385 (1965) (Statement of Sen. Bayh); *id.* at 7941 (Statement of Rep. Poff) (“Congress may sometime find it necessary to name some ‘other body’ which of course it could do simply by adding to the Cabinet as the decision-making body one non-Cabinet member.”).

³⁷ 111 CONG. REC. 7,957 (1965) (statement of Rep. Tenzer) (“In fact, the Congress could designate itself as the body to grant or withhold concurrence.”); *id.* at 15,382 (statement of Sen. Bayh) (“This would not preclude Congress, in its wisdom, from establishing another panel, perhaps of the majority and minority leaders of both Houses, the Chief Justice of the Supreme Court.”); *id.* at 7,942 (statement of Rep. McCulloch) (“[T]he suggestion has been made that a commission be created which might be composed of Supreme Court jurists, elected leaders of Congress, and members of the Cabinet.”); see also, Miller Center Commission No. 4, *supra* note 23 at 13.

³⁸ Miller Center Comm’n No. 4, *supra* note 23, at 13; see also Bayh, *supra* note 27, at 447 (noting but critiquing the notion that a panel of medical experts should comprise the other body); PARK, *supra* note 7, at 206 (calling for “a Presidential Disability Commission” enacted as the “other body” to advise the Vice President and the Cabinet on presidential disability); ABRAMS, *supra* note 29, at 246-48 (suggesting that medical experts might serve on the other body).

³⁹ Miller Center Comm’n No. 4, *supra* note 23, at 13.

⁴⁰ *Id.* at 14. There is some evidence in the early legislative history indicating that the Amendment’s framers contemplated allowing Congress to change the “majority . . . of” textual requirement as applied to the other body. See, e.g., 1965 House Judiciary Hearings, *supra* note 13, at 254 (former Attorney General Brownell is asked whether unanimity or only a majority would be required if Congress creates an other body. He responds: “I think in such case

the other body substitutes only for the role of the “Principal Officers”; the body cannot replace the *Vice President’s* constitutionally mandated role in the process.⁴¹

Additionally, the ordinary meaning of the word “body”—a word that connotes “a group of persons”—strongly suggests that the other body must consist of more than one individual.⁴² While it does not seem that Congress discussed this particular requirement during the drafting process, legislators typically discussed the body as being composed of at least two individuals.⁴³

Similarly, the word “majority” implies that a tie vote between equally divided members of the other body would *not* suffice to provide the necessary majority needed to trigger Section 4. Although the legislators do not seem to have contemplated a tie vote of the other body, one Senator suggested that the other body could be created for the purpose of breaking a tie vote of the Principal Officers.⁴⁴ This statement in turn implies that Congress considered a tie vote of either the Principal Officers or the other body not to constitute a majority. Additionally, the ordinary legal usage of the word “majority” suggests that it is a “number more than half of a total.”⁴⁵

Nonetheless, some scholars have questioned whether it is appropriate for certain individuals to serve on the other body. For example, the University of Virginia’s Miller Center Commission’s Report on Presidential Disability strongly recommended against involving members of the Judiciary in what is, by nature, a political process.⁴⁶

the Congress could by law provide for it either way.” But crucially, this was asked at a time when the House Joint Resolution was differently worded and ambiguous as to whether “the majority” referred to the other body). However, the Amendment’s final text makes clear that if an other body is created, the Vice President must act with a majority of that body to trigger Section 4. Furthermore, interpreting the Amendment to preclude Congress from changing the majority requirement for the other body would ensure the constitutionality of its application. If Congress were to create an “other body,” that body would supplant the Principal Officers as the only group that can act with the Vice President to trigger the Amendment. Thus, allowing Congress to change the majority requirement could potentially allow it to frustrate the basic purposes of the Amendment—e.g., by creating a large body and then mandating unanimity, making Section 4 almost impossible to initiate, or by lowering the threshold for action to .0001 percent, thereby essentially giving the Vice President the power to act alone.

⁴¹ FEERICK, *supra* note 9, at 121; see also 111 CONG. REC. 15,379, 15,383-86, 15,586-96 (1965) (statements of Senator Bayh) (noting the necessity of the Vice President’s involvement in the Section 4 process).

⁴² *Body*, MERRIAM-WEBSTER’S DICTIONARY (2017), <https://www.merriam-webster.com/dictionary/body> (“a group of persons or things: such as . . . a group of individuals organized for some purpose”); see also *Body*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “body” in the non-corporate-law context as “[a]n aggregate of individuals or groups,” “[a] deliberative assembly,” and “[a]n aggregate of individuals or groups”).

⁴³ See, e.g., 111 CONG. REC. 7,942 (1965); *id.* at 7,957; *id.* at 15,342; *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 52 (1965) [hereinafter *1965 Senate Subcomm. Hearings*].

⁴⁴ 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) (“Presently, the Cabinet as defined in title 5, United States Code, section 1 consists of 10 members. It is possible that an even-numbered Cabinet might divide evenly, thus effectively stultifying the system erected in section 4. For this reason, or some other good reason, Congress may sometime find it necessary to name some ‘other body’ which of course it could do simply by adding to the Cabinet as the decision-making body one non-Cabinet member.”).

⁴⁵ *Majority*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “majority” in the voting context as “[a] number that is more than half of a total; a group of more than 50 percent . . . A majority always refers to more than half of some defined or assumed set.”)

⁴⁶ Miller Center Comm’n No. 4, *supra* note 23, at 13 (“The Commission strongly believes that the chief justice and other members of the Supreme Court should have no role in any such body or in any other fashion under the terms of the Twenty-Fifth Amendment. The late Chief Justice Earl Warren advised strongly against any such role during deliberations in Congress on the Amendment, and former Chief Justice Warren Burger took the same position in speaking to the Commission. The Commission considers it essential to keep the judicial role separate lest, in a situation perhaps now unimaginable, the Supreme Court might be called to rule on some application of the Twenty-Fifth Amendment.”). In fact, regarding similar proposals made in the late 1950s, Chief Justice Warren suggested that

Senator Bayh doubted the effectiveness of such a medical panel. He took the view that a body composed of medical professionals would not necessarily be less political, because political enemies would inevitably take advantage of dissenting medical judgment in the case of any non-unanimous outcome.

Similarly, despite calls for Congress to create a medical panel to advise the Vice President,⁴⁷ there exists considerable opposition to the “other body” being comprised entirely of medical professionals.⁴⁸ For instance, in a 1995 law review article, Senator Bayh doubted the effectiveness of such a medical panel.⁴⁹ He took the view that a body composed of medical professionals would not necessarily be less political, because political enemies would inevitably take advantage of dissenting medical judgment in the case of any non-unanimous outcome; that such a medical commission could lack political legitimacy and accountability; that it might not have consistent enough exposure to the President to form a professionally reliable diagnosis; and last and most important, that it would not be well suited to consider the various political factors relevant to the decision, including assessing alternatives and the gravity of the governmental circumstances at the time.⁵⁰ Still, even Senator Bayh

admitted that Congress *could* create a medical panel, although he noted that inevitably, its responsibilities would not be confined to medical judgment, but would need to extend to the other considerations inherent in the Section 4 framework.⁵¹ Finally, it should be noted that a bipartisan hybrid panel, with some medical expert and some non-medical members, is another possibility, as some current members of Congress have recently proposed.⁵²

the Supreme Court’s involvement in determining presidential inability would violate separation of powers. *Presidential Inability: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 85th Cong. 14 (1958) [hereinafter *1958 Senate Subcomm. Hearings*] (letter from Chief Justice Warren) (“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 a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.”).

⁴⁷ See *supra* note 38 and accompanying text.

⁴⁸ See, e.g., Robert E. Gilbert, *The Twenty-Fifth Amendment and the Establishment of Medical Impairment Panels: Are the Two Safely Compatible?*, 86 *FORDHAM L. REV.* 1111, 1118 (2017) (arguing that an other body composed of medical experts would “undermine [the President’s] overall professional reputation and make it much more difficult for him to lead or, in other words, to exert influence.”); *id.* at 1125 (arguing that an ‘other body’ composed of medical experts could provide Congress “at least two competing, divergent, and eminently ‘respectable’ psychiatric opinions upon which to hang their votes,” permitting congressmen “to” subscribe rather easily to whatever opinion supported their normal partisan proclivities, while insisting that their votes were based on the proffered medical advice and nothing else.”).

⁴⁹ Bayh, *supra* note 27, at 447-8 (“Unlike the members of a panel, the White House physician, the Vice President, and the members of the Cabinet, those who work with and observe the President day in and day out, are in the best position to notice character traits and changes which impact on the President’s ability to perform the powers and duties of his office.”)

⁵⁰ *Id.* at 447-48.

⁵¹ *Id.* at 446-47 (“Under the terms of the amendment, Congress could designate a panel. However, the panel would replace the Cabinet and its role would not be confined to medical judgment.”).

⁵² In May 2017, Congressman Jamin Raskin (MD-08) and twenty co-sponsors introduced H.R. 1987 to establish a permanent independent nonpartisan “other body” authorized to declare that the President is “unable to discharge the powers and duties of his office.” Oversight Commission on Presidential Capacity Act, H.R. 1987, 115th Cong. (2017). Congressional leadership of each party would choose several medical professionals and at least one elder statesperson who has served in a senior role in the executive branch or as Surgeon General. The Commission’s members would then choose an eleventh member to act as chair. *Id.* We take no opinion on the specific composition

C. When should Congress create an “other body”?

In a situation where the President will contest whether he is unable to fulfill his duties, activating Section 4 of the Amendment through the Principal Officers will be exceedingly difficult unless the Vice President already knows that a majority of the Principal Officers supports invoking the Amendment—and who those officers are.⁵³ In theory, any single Principal Officer or other White House insider who disagrees that the President is rendered unable could short-circuit the process by informing the President, potentially triggering a cascade of firings of those Principal Officers who favor Section 4’s invocation.⁵⁴ Presidents generally choose Cabinet members at least in part on the basis of perceived loyalty.⁵⁵ This could potentially preclude meaningful informed deliberation by Principal Officers regarding initiating the Twenty-Fifth Amendment process.

Some commentators accept this as a feature of the system: having received the democratic mantle of election by the voters, the President should receive every advantage in a contested invocation of the Twenty-Fifth Amendment.⁵⁶ But the framers of the Twenty-Fifth Amendment required only that a simple majority of the Principal Officers or other body agree that the President is unable to discharge the powers and duties of the Presidency. The primary intent of the Amendment was to ensure continuity of leadership and avoid dysfunction. The framers did not intend to require that any one person—perhaps not even a Principal Officer—be able to short-circuit the process.

The framers of the Amendment created the “other body” option to account for this possibility. The President would not have the ability to dismiss the members of the other body at will, unlike the Principal Officers. As a result, the other body would be better able to conduct informed deliberations regarding a potential inability that will be contested by the President. The other body could still seek advice and evidence from the Principal Officers. The President would still be protected by the necessity of the Vice President’s participation and the two-thirds majority required in both Houses of Congress.

of the Commission proposed in H.R. 1987, noting only that a hybrid medical/nonmedical body might allay some of the framers’ concerns about the problems regarding purely medical panels.

⁵³ Indeed, commentators contend that even “had the Twenty-fifth Amendment existed during the illnesses of Woodrow Wilson and Franklin D. Roosevelt, the informal power of the President’s private staff or spouse was such that the requirements of the amendment could have been avoided.” Katy J. Harriger, *Who Should Decide? Constitutional and Political Issues Regarding Section 4 of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 563, 567 (1995) (citing PARK, *supra* note 7, at 200).

⁵⁴ See *infra* Section VII.G.

⁵⁵ See, e.g., 111 CONG. REC. 3262 (1965) (statement of Sen. Fong) (“It is reasonable to assume that persons the President selects as Cabinet officers are the President’s most devoted and loyal supporters who would naturally wish his continuance as president.”).

⁵⁶ See, e.g., 111 CONG. REC. 7938 (1965) (statement of Rep. Celler) (“The [Amendment] shall . . . be in favor of the President because he is the elected representative of the people, the first officer of the land, and he shall be favored without doubt.”).

For the reasons discussed in Part I.B of this Reader’s Guide, there are strong arguments why this other body should be bipartisan and composed primarily of “statespersons” with government experience, rather than medical experts.

For the reasons discussed in Part I.B of this Reader’s Guide, there are strong arguments why this other body should be bipartisan and composed primarily of “statespersons” with government experience, rather than medical experts. But to provide for necessary medical expertise, if Congress chooses to enact legislation to create an “other body,” it might also choose to create a standing Twenty-Fifth Amendment medical and political advisory board. In a time of emergency, it would be preferable for the Vice President and either the Principal Officers or the “other body” to have such a standing advisory board, to avoid needing to scramble to find trusted expert advice, particularly on the medical questions regarding whether the President is unable to discharge the powers and duties of the office.

II. The Determination of Presidential Inability Under Section 4 of the Twenty-Fifth Amendment

The critical determination to be made in the various transmissions envisioned by Section 4 is one of *presidential inability*: whether “the President is unable to discharge the powers and duties of his office.” This section reviews the general theory of presidential inability and the specific historical precedents.

A. What constitutes presidential inability?

In general, authorities on the Twenty-Fifth Amendment agree that the term “inability” has no specific definition. The original drafters and subsequent commentators provided some examples of what the term encompasses and what would fall outside its ambit, but did not attempt to provide a comprehensive definition of the term itself. To be sure, foremost in their minds at the time of drafting was a physical or mental impairment that would prevent the President from performing his constitutional duties. But the text of Section 4 sets forth a flexible standard intentionally designed to apply to a wide variety of unforeseen emergencies. As a result, those deciding whether a President is “unable to discharge the powers and duties of his office” should focus on the overall effects of the inability—whether the totality of the circumstances suggests that inability prevents him from discharging the powers and duties of the presidency—rather than the specific characteristics of the inability itself. Absent some inability, however, Section 4 is not a vehicle for separating the President from his powers and duties based solely on political disagreement, however intense it might be.

In general, authorities on the Twenty-Fifth Amendment agree that the term “inability” has no specific definition.

1. Text and legislative history

Prior to the adoption of the Twenty-Fifth Amendment, the Constitution provided for presidential succession in Article II, Section I, Clause 6. This clause referenced “Inability to discharge the Powers and Duties of [the presidency]” as one of the cases in which the Vice President should assume those powers and duties. The records of the Constitutional

Convention contain only one reference to “inability” as mentioned in this clause: John Dickinson of Delaware asked on August 27, 1787, “What is the extent of the term ‘disability’ and who is to be the judge of it?”⁵⁷ That crucial question was not answered in any other part of the records of the Constitutional Convention.⁵⁸ The rest of the debates say little about either the substantive meaning of the term “inability,” or the procedural question of who should determine its existence and termination.⁵⁹

The consensus view is that the determination of a President’s inability under the Twenty-Fifth Amendment is ultimately a matter of *political judgment* based on accurate and adequate medical or other evidentiary input.⁶⁰ Indeed, while they listed a number of potential examples of presidential inability, the framers of the Amendment scrupulously avoided placing specific limits on the term. In the Senate debates of February 19, 1965, Senator Bayh stated that “the word ‘inability’ and the word ‘unable’ as used in [Section 4] . . . , which refer to an impairment of the President’s faculties, mean that he is unable either to make, or communicate his decisions as to his own competency to execute the powers and duties of his office.”⁶¹ A colloquy between Senator Bayh and Senator Robert F. Kennedy in the Senate debates of June 30, 1965 further illuminates Senator Bayh’s opinion of the meaning of “inability.” In response to a question from Senator Kennedy, he clarified his belief that “inability” should not be limited to mental inability, but rather must extend to any “inability to perform the constitutional duties of the office of President.”⁶²

In 1988, Mortimer Caplin, vice-chairman of the Miller Center Commission on Presidential Disability, stated that “inability” encompasses physical conditions, mental illnesses, chronic diseases, and unforeseen emergencies—including political emergencies⁶³—that render the President unable to act. Several other accounts reference a presidential kidnapping as constituting presidential inability.⁶⁴ Various statements in the debates and hearings of 1964

⁵⁷ S. REP. NO. 88-1382 at 3 (1964).

⁵⁸ *Id.*

⁵⁹ FEERICK, *supra* note 9, at 3.

⁶⁰ Memorandum from Daniel J. Meador to Professors Kenneth Crispell, Kenneth Thompson, and Paul Stephan (Nov. 5, 1985), in 4 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES 71, 74, (Kenneth W. Thompson ed., 1997); Kenneth R. Crispell, *The Physician to the President*, in 4 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES 93, 100 (Kenneth W. Thompson ed., 1997).

⁶¹ 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh).

⁶² *Id.* at 15,381.

⁶³ Mortimer Caplin, *Revisiting the Twenty-Fifth Amendment*, in 2 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES 9, 14 (Kenneth W. Thompson ed., 1991). Depending on the circumstances, this could perhaps include a political emergency: commentators have suggested that impeachment proceedings might give rise to a President choosing to step away from office under Section 3. See FEERICK, *supra* note 9, at 198; Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 979 n.109 (2010). In fact, before he resigned, President Nixon considered temporarily stepping away from the Presidency under Section 3 while he fought impeachment. See BOB WOODWARD, SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE 126 (2012). Conceivably, a political emergency could also affect the President in a manner that would justify an exercise of Section 4. In the days leading up to Nixon’s resignation, Secretary of Defense James R. Schlesinger, deeply concerned about the President’s stability, instructed the military not to follow Nixon’s orders—especially those related to nuclear weapons—unless confirmed by either Schlesinger or Secretary of State Henry A. Kissinger. See Robert D. McFadden, *James R. Schlesinger, Willful Aide to Three Presidents, Is Dead at 85*, N.Y. TIMES (Mar. 27, 2014), <https://www.nytimes.com/2014/03/28/us/politics/james-r-schlesinger-cold-war-hard-liner-dies-at-85.html>. As with any other Section 4 inquiry, the touchstone would not be the particular inciting circumstance, but rather whether the President was unable to discharge the powers and duties of the office.

⁶⁴ See, e.g., FEERICK, *supra* note 9, at 115.

and 1965 declare that “inability” under the Amendment was not generally intended to include such conditions as unpopularity, incompetence, impeachable conduct, poor judgment, or laziness.⁶⁵ *However, to the extent that any of these phenomena (or a combination of them) rose to a level where they prevented the President from carrying out his or her constitutional duties, they still might constitute an inability, even in the absence of a formal medical diagnosis.* Representative Richard Poff of Virginia, another key framer of the Amendment, defined inability as the inability to make a rational decision.⁶⁶ A President who cannot demonstrate the minimal competence to rationally perform the duties of the office might be deemed constitutionally unable, even if signs of that deficiency were clear at the time of the President’s election to the term in which he sits.⁶⁷

However, to the extent that any of these phenomena (or a combination of them) rose to a level where they prevented the President from carrying out his or her constitutional duties, they still might constitute an inability, even in the absence of a formal medical diagnosis.

The legislative history illustrates that a determination of presidential inability would depend on the circumstances in which it arose. Specifically, depending on the circumstances, in certain cases even a very short-lived disability might constitute “inability” under Section 4:

A President who was unconscious for 30 minutes when missiles were flying toward this country might only be disabled temporarily, but it would be of severe consequence when viewed in the light of the problems facing the country. So at that time, even for that short duration, someone would have to make a decision. But a disability which has persisted for only a short time would ordinarily be excluded. If a President were unable to make an Executive decision which might have severe consequences for the country, I think we would be better under the conditions of the amendment [i.e. treating the President as unable to perform his duties].⁶⁸

Decision-makers considering implementation of the Amendment should recognize that the Amendment was motivated by the framers’ anxieties about the possibility of nuclear war resulting from presidential inability. Indeed, anxiety about the implications of the nuclear age animated every stage of the Amendment’s enactment, including the initial impetus for adopting the Amendment during President Kennedy’s term, and the congressional debates and

⁶⁵ 111 CONG. REC. 3282-83 (statement of Sen. Hart); *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 25 (1964) [hereinafter *1964 Senate Subcomm. Hearings*] (statement of Sen. Keating).

⁶⁶ FEERICK, *supra* note 9, at 117 (“[Section 4 provides for cases] when the President, by reason of mental debility[,] is unable or unwilling to make any rational decision, including particularly the decision to stand aside.”).

⁶⁷ Contrary to some recent writing, there is no support for the idea that the framers designed the Amendment only “to protect the government from random occurrences like sudden illness or a failed assassination attempt” or that a President “who already demonstrated [disabling] traits when the people . . . elected him to office” would somehow be immunized from the Amendment’s operation. See, e.g., Joshua Zeitz, *Why the 25th Amendment Doesn’t Apply to Trump—No Matter What He Tweets*, POLITICO MAG. (Jan. 10, 2018), <https://www.politico.com/magazine/story/2018/01/10/25th-amendment-trump-216267> (making those claims).

⁶⁸ 111 CONG. REC. 15,381 (1965) (statement of Sen. Bayh).

state ratifying conventions during President Johnson's.⁶⁹ The Cuban Missile Crisis was at the front of the framers' minds.⁷⁰ They knew that, without the Amendment, the world could be plunged into the "nightmare of nuclear holocaust or other national catastrophe" by "normal human frailties . . . at any time."⁷¹

While some view the absence of a definition for "inability" as a failing of the Twenty-Fifth Amendment, others laud it as providing flexibility essential to the Amendment's functionality. For instance, Representative Edward Hutchinson criticized the resolution that eventually became the Amendment on the grounds that the resolution's failure to define "inability" or "disability" leaves the Vice President and the majority of the Principal Officers in Section 4 with "complete power to treat any condition or circumstance they choose as a disability."⁷²

By contrast, Dean Feerick argues that it would be a mistake to attempt to define with specificity what constitutes inability.⁷³ He believes that "[n]o set of definitions could possibly deal with every contingency" and detailed language could force unnecessary debate over whether or not the Amendment applies during a time of national crisis.⁷⁴ In his view, defining inability in broad terms is an advantage in that it "allows for flexibility and discretion."⁷⁵ Dean Feerick does, however, provide a few indicative examples of inability: situations in which the President is kidnapped or captured, or under an oxygen tent, or bereft of speech or sight at a time of enemy attack, could all constitute incidents of presidential inability falling under Section 4.⁷⁶

As a result, those deciding whether a President is "unable to discharge the powers and duties of his office" should focus on the overall effects of the inability – whether the totality of the circumstances suggests that inability prevents him from discharging the powers and duties of the presidency – rather than the specific characteristics of the inability itself.

In refusing to define "inability," the drafters of the Twenty-Fifth Amendment emphasized that the term's meaning should be considered flexible and context-dependent; they firmly rejected formalism. Moreover, there is no indication that the examples of inability that they specifically imagined were meant to be exhaustive. The overwhelming consensus is that the drafters intended that the Amendment cover "any imaginable circumstance[]" in which the President "is unable to perform the powers and duties of that office."⁷⁷ *As a result, those deciding whether a President is "unable to discharge the powers and duties of his office" should focus on the overall effects of the inability – whether the totality of the circumstances*

⁶⁹ Rebecca C. Lubot, *A Dr. Strangelove Situation: Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1175 (2017) (tracing nuclear anxiety's importance throughout the Twenty-Fifth Amendment's historical, legislative, and ratifying record).

⁷⁰ *Id.* at 1179–80.

⁷¹ *Id.* at 1188 (quoting President Johnson's 1965 State of the Union at 111 CONG. REC. 1547 (1965)).

⁷² H. REP. NO. 89-203 at 20 (1965).

⁷³ John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 502 (1995).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ FEERICK, *supra* note 9, at 115.

⁷⁷ Fordham University School of Law Second Clinic on Presidential Succession, *supra* note 29, at 928 (quoting KENNETH R. CRISPELL & CARLOS F. GOMEZ, HIDDEN ILLNESS IN THE WHITE HOUSE 209–10 (1988)).

suggests that inability prevents him from discharging the powers and duties of the presidency—rather than the specific characteristics of the inability itself.

2. Executive Practice: Historical Examples by Presidencies⁷⁸

As Justice Frankfurter famously noted in the *Steel Seizure Case*, a “gloss on ‘executive Power’ vested in the President by § 1 of Art. II” may stem from “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, which over time, become “part of the structure of our government.”⁷⁹ Likewise, it is well-established that legislatures make law in light of previous precedents of which they are aware.⁸⁰ What follows is a discussion of historical examples of presidential inability that formed some of the historical background for the adoption of the Twenty-Fifth Amendment.

a. President Madison

In 1813, President James Madison suffered an illness that left him unable to conduct the responsibilities of the presidency for three weeks. President Madison was widely rumored to be seriously ill, and sixty-eight-year-old Vice President Elbridge Gerry became the focus of speculation regarding succession. This incident gave rise both to speculation that the President might not survive, and concern over Gerry’s ability to serve as President. Congress became obsessed with the question of succession.

Madison ultimately recovered. On July 2, First Lady Dolley Madison wrote that the President’s fever had subsided and he was improving. On July 7, it was announced that the President had resumed the most urgent public business, meeting with a Senate committee a week later. Madison spent time in his Montpelier home in August where his health continued to improve, and when he returned to Washington in October of 1813, it became clear that his physical recovery was complete.

b. President Tyler

On April 4, 1841, President William Henry Harrison, then the oldest President at the time of inauguration, died of pneumonia. When news reached Vice President John Tyler, he immediately headed to Washington, where he took the presidential oath of office.

This was the first known dispute regarding the distinction between actually becoming President—assuming the office of the presidency—and “acting as President,” i.e., assuming the powers and duties of the President, without actually assuming the office. Tyler made clear his belief that by taking the oath, he had ascended to the Office of the President itself and was not merely an Acting President. However, some Whig Party leaders referred to Tyler as the “Acting President.” Congress debated the issue, ultimately passing resolutions that labeled Tyler as the “President.”

c. President Garfield

⁷⁸ This section, and the examples included in it are largely excerpted, with thanks, from the work of Dean Feerick. See FEERICK, *supra* note 9, at 1-24, 190-204 and John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907 (2011).

⁷⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); see also *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“[I]n a separation-of-powers case . . . the longstanding practice of the government can inform our determination of what the law is.” (internal citations omitted)).

⁸⁰ See, e.g., C. Lawrence Evans, *Legislative Structure: Rules, Precedents, and Jurisdictions*, 24 LEGIS. STUD. Q. 605 (1999).

On July 2, 1881, the nation was faced with its first prolonged case of presidential inability when President Garfield was shot by a disappointed office-seeker and wavered between life and death for the next eighty days.

During this period of inability, the President's visitors were restricted to family and physicians, with only occasional visits from members of his Cabinet. Garfield's doctors determined that he needed rest to have any chance at recovery and prevented him from discharging his powers and duties. His only official act during this time was the signing of an extradition paper on August 10. Though the Cabinet tried to keep the wheels of government turning, there was much the members could not do, particularly in the arena of foreign affairs.

In late August, Secretary of State James Blaine prepared a paper on presidential inability, arguing that since the Constitution at the time contained no directions for replacing a disabled President, Vice President Chester A. Arthur should be called to Washington to assume the presidency. Only a few members of the Cabinet agreed, with a majority arguing that under the "Tyler Precedent," Vice President Arthur would succeed the presidency for the entire remainder of the term. Arthur, however, fearful of being labeled a usurper, made it clear that he would not assume presidential responsibility.

Following President Garfield's death on September 19, 1881, the debate over the meaning of the Succession Clause continued in the press, legal journals, and Congress. When Vice President Arthur finally succeeded to the presidency, there was no Vice President, no president pro tempore of the Senate, and no speaker of the House of Representatives—in short, no constitutional successor to the Presidency after Arthur. Newly-elevated President Arthur recognized this problem, and in several messages to Congress, he expressed concern over the ambiguities of the existing succession provisions. The Garfield-Arthur episode became one of several historical touchstones that animated the eventual adoption of the Twenty-Fifth Amendment.

d. President Wilson

On October 2, 1919, President Wilson suffered a stroke that paralyzed the left side of his body. The President's close friend and physician, Dr. Cary Grayson, released a bulletin stating, "The President is a very sick man." From that time until the inauguration of President Warren G. Harding on March 4, 1921, the country lacked an able President. In the days and weeks following President Wilson's stroke, there were repeated demands for Vice President Thomas Marshall to act as President. However, because of confusion surrounding the succession provision, resistance from President Wilson and his inner circle, and Vice President Marshall's reluctance to appear a usurper, these demands never were fulfilled.⁸¹

⁸¹ See Joel K. Goldstein, *Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, 33 POL. & LIFE SCI. 37 (2014) (noting the many practical constraints that prevented Vice President Marshall from taking a more active role during Wilson's illness).

e. President Eisenhower

On September 24, 1955, President Eisenhower suffered a heart attack while vacationing in Colorado. That evening, Vice President Richard M. Nixon met with members of the Cabinet to discuss arrangements for operation of the executive branch during President Eisenhower's recovery in Denver. It was decided that the Cabinet and White House should continue the administration of the government. The Cabinet agreed on the following procedure: First, on actions that Cabinet members would normally take without consulting either the Cabinet or the President, there would be no change from the normal. Second, questions that would normally be brought before the Cabinet for discussion before any decision would continue to be discussed there. Third, decisions requiring consultation with the President should first go to the Cabinet or the National Security Council for thorough discussion and possible recommendation before going to President Eisenhower in Denver for his consideration. This procedure continued until the President fully recovered.

On June 8, 1956, the President suffered an attack of ileitis (inflammation of the ileum, part of the small intestine) and was taken to Walter Reed Hospital. The following day, he underwent a two-hour operation for the removal of an obstruction of the small intestine, during which he was unconscious. The President was up and walking by June 10 and deemed "fully recovered" by August 27.

On November 25, 1957, President Eisenhower suffered a stroke affecting his ability to speak. The next day, members of his staff met to discuss President Eisenhower's condition. However, medical bulletins indicated that his health had improved, and by December 2, the President returned to work in the White House.

Understandably, all of these episodes made President Eisenhower very concerned about the question of presidential inability. He drafted a "letter agreement" with Vice President Richard Nixon outlining steps to take should future events render Eisenhower incapacitated. This was the first substantive step towards addressing the issue of inability and succession that ultimately led to the Twenty-Fifth Amendment.

f. President Kennedy

On November 22, 1963, the nation experienced one of its most shocking tragedies when President Kennedy was assassinated in Dallas, Texas. Efforts made to save the President, though unsuccessful in this case because of the gross severity of his wounds, underscored again the absence of constitutional procedures to account for the case in which a President might linger unconscious, either for days or for a more extended period of time. Succession beyond the Vice Presidency also came into focus as rumors circulated that Vice President Johnson had suffered a heart attack shortly after President Kennedy had been shot. Fortunately, there was no truth to these rumors, and the nation did not have to test the adequacy of succession mechanisms beyond the Vice Presidency. The Kennedy Assassination was the most immediate impetus for the adoption of the Twenty-Fifth Amendment in 1967.

g. President Reagan

i. Assassination Attempt

On March 30, 1981, John W. Hinckley, Jr. shot President Ronald Reagan as he exited the Washington Hilton Hotel after delivering a speech. Vice President George H.W. Bush was en

route from Fort Worth to Austin, Texas, for a speech. Upon hearing the news, Vice President Bush traveled immediately to Washington, D.C. There, members of the Cabinet and staff gathered in the White House Situation Room. President Reagan's Secretary of State, Alexander M. Haig, Jr., noted in his memoirs that the officials handling the crisis were "an ad hoc group; no plan existed, we possessed no list of guidelines, no chart that established rank or function. Our work was a matter of calling on experience and exercising judgment."⁸²

Significantly, although the Twenty-Fifth Amendment procedures were available, the Reagan administration did not invoke the Amendment during the crisis surrounding the attempted assassination of the President. Accounts vary, but "it seems clear that the issue was resolved by a handful of officials without the kind of formal action by the Cabinet and Vice President that the Amendment contemplated" under Section 4.⁸³ Still, Fred Fielding, the White House Counsel at the time, recalled drafting letters to Congress invoking Section 3 and Section 4 of the Twenty-Fifth Amendment. According to an account by Del Quentin Wilber in *Rawhide Down*, Fielding had even prepared a binder around the 1981 inauguration outlining the procedures to follow should the President be killed or incapacitated.⁸⁴ Additionally, shortly after the assassination attempt, the Office of Legal Counsel, led by Assistant Attorney General Theodore B. Olson, prepared a memo outlining both the operation of the Twenty-Fifth Amendment and the President's ability to delegate authority to subordinates without invoking the Twenty-Fifth Amendment.⁸⁵ But President Reagan recovered relatively quickly, and the question of succession was not considered at length.

Although Section 4 of the Twenty-Fifth Amendment was not invoked after the Reagan assassination attempt it clearly should have been. President Reagan suffered from significant loss of blood and a collapsed lung, and subsequently developed pneumonia.⁸⁶ His staff decided not to invoke the Twenty-Fifth Amendment for several reasons: they were unfamiliar with its provisions, they did not want to "alarm" the public, and Vice President George H.W. Bush was wary of appearing to seize power.⁸⁷

During and following Reagan's incapacitation, it remained ambiguous who maintained authority to make executive decisions. But legally, there was no uncertainty: "Reagan maintained formal presidential power throughout the entire period. The thinking of the president's men on temporary replacement was emphatically and repeatedly stated."⁸⁸ When his staff was asked about Vice President Bush's technical status, they stressed that Bush remained the Vice President, not "the stand-in president," and that President Reagan "will make

⁸² ALEXANDER M. HAIG, JR., *CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY* 153 (1984).

⁸³ FEERICK, *supra* note 9, at 195.

⁸⁴ See DEL QUENTIN WILBER, *RAWHIDE DOWN*, 166-67 (2011).

⁸⁵ See Memorandum Opinion for the Attorney Gen. from Theodore B. Olson, Assistant Attorney Gen., Office of Legal Counsel, Re: Presidential Succession and Delegation in Case of Disability (April 3, 1981). In 1985, O.L.C. authored an even more detailed memo on the operation of the Twenty-Fifth Amendment. See Memorandum Opinion for the Attorney Gen. from Ralph W. Tarr, Acting Assistant Attorney Gen., Office of Legal Counsel, Re: Operation of the Twenty-Fifth Amendment Respecting Presidential Succession (June 14, 1985). For a discussion of that memo's conclusions, which correspond with this Reader's Guide, see note 140. Although outside of the scope of this Reader's Guide, the President's ability to delegate authority remains an avenue for a wounded President to remain constitutionally in control while also removing some day-to-day responsibilities from his or her direct supervision. Those interested in a detailed account on delegation should consult Mr. Olson's 1981 OLC memo.

⁸⁶ ABRAMS, *supra* note 29, at 138-44.

⁸⁷ *Id.* at 182-9.

⁸⁸ *Id.* at 185.

all of the decisions, as he always has.” It would be “just as if the president were here in the Oval Office,” said White House Deputy Chief of Staff Michael Deaver.⁸⁹

Vice President Bush affirmed this message, stating to the press that “[t]he power of decision has remained with President Reagan.”⁹⁰ But Bush was somewhat unclear in articulating exactly what his role would be as Reagan recuperated, perhaps reflecting the lack of clarity within the administration. He reportedly said that “[Reagan] is not incapacitated and I am not going to be a substitute President. I’m here to sit in for him while he recuperates. But he’s going to call the shots.”⁹¹ Bush was firm that he never planned to pursue major policy initiatives or make decisions independently. He said, “I didn’t have any major solitary decisions to make . . . I made decisions on what I’m going to do with my time, on how to project my role, not decisions in terms of should we make a new move on this type of bill or should we send this signal up on the spending cuts.”⁹² However, Bush also noted that the restrictions on his decision-making arose partly because he was still officially Vice President, which was “different from making Presidential decisions or surrogate Presidential decisions.”⁹³ The plain implication is that *if* Bush had formally become Acting President, he would have been empowered to make “Presidential decisions.” But he refrained from doing so, given the temporary nature of Reagan’s immobilization and the decision not to invoke the Twenty-Fifth Amendment.

Significantly, while the Administration was adamant in its public messaging that President Reagan always remained in charge, the history of what unfolded suggests otherwise. The historical record shows that during that time, Vice President Bush and a few key White House advisors shared *de facto* executive decision-making power. When Reagan first went into surgery hours after the shooting, Vice President Bush was flying back from Texas with bad communications; Secretary of State Alexander Haig incorrectly asserted that he was in charge, telling reporters that “[a]s of now, I am in control here.”⁹⁴ The staff of the White House quickly contradicted Haig, and agreed that Bush would be responsible for any critical decision-making in the case of a crisis; some believed that Bush was “clearly acting for the president.”⁹⁵ White House spokesman Larry Speakes said at a news conference that Bush had “automatically inherited ‘national command authorities,’” and in the following days had led cabinet meetings and met with congressional leadership and heads of state.⁹⁶ However, though Bush’s activities

⁸⁹ *Id.*

⁹⁰ Hedrick Smith, *Bush Says He Sought To Avoid Acting Like Surrogate President*, N.Y. TIMES (Apr. 12, 1981), <http://www.nytimes.com/1981/04/12/us/bush-says-he-sought-to-avoid-acting-like-surrogate-president.html>.

⁹¹ Hedrick Smith, *Starting as an Outsider, Bush Is Now a Star Among Team Players*, N.Y. TIMES (Apr. 5, 1981), <http://www.nytimes.com/1981/04/05/weekinreview/starting-as-an-outsider-bush-is-now-a-star-among-team-players.html>.

⁹² Smith, *supra* note 90.

⁹³ *Id.*

⁹⁴ In the White House Press Room, Haig told reporters: “Constitutionally, gentlemen, you have the president, the vice president and the secretary of state, in that order, and should the president decide he wants to transfer the helm to the vice president, he will do so . . . As of now, I am in control here, in the White House.” He apparently had forgotten that the House speaker and the Senate’s president pro tempore come before the secretary of state in the line of succession. Richard V. Allen, *When Reagan Was Shot, Who Was ‘In Control’ at the White House?*, WASH. POST (Mar. 25, 2011), https://www.washingtonpost.com/opinions/when-reagan-was-shot-who-was-in-control-at-the-white-house/2011/03/23/AFJlrfYB_story.html.

⁹⁵ Walter S. Mossberg, *Confusion Over Who Was in Charge Arose Following Reagan Shooting*, WALL ST. J., Apr. 1, 1981, at 31; ABRAMS, *supra* note 29, at 186.

⁹⁶ ABRAMS, *supra* note 29, at 186-87. As noted elsewhere in this Reader’s Guide, this outcome—a group of unelected officials taking over the powers and duties of the President, rather than the Amendment being exercised—was exactly the one the Amendment was intended to avoid.

might have appeared presidential in nature, “there is no evidence that he was any more closely involved in the decision-making process.”⁹⁷

In practice, it was White House Chief of Staff James Baker, Counselor to the President Edwin Meese, and White House Deputy Chief of Staff Michael Deaver who ran the show during this critical time. Professor Herbert Abrams described the allocation of duties during the recovery period:

In the absence of an acting president, their daily meetings covered the range of foreign and domestic policy decisions. Meese was considered the “heavyweight” through his work with the cabinet, the National Security Council, and the domestic policy group. In the formulation of policy, he seemed to articulate the president’s view as well as anyone. Baker played a critical role as the supervisor of other White House operations and the channel by which virtually all documentation reached the president (although there was little enough of that) ... During the period of trauma and convalescence, *they were the president of the United States*.⁹⁸

For the next few weeks, President Reagan continued to be unable to work for more than a few hours per week. The unresolved issues for presidential decision began to pile up. The “sheer volume of president-only decisions” could not be handled by Baker, Meese, and Deaver alone.⁹⁹ The difficulty of attempting to conduct business-as-usual with a severely handicapped head of state led a number of those aides to admit retrospectively that the Twenty-Fifth Amendment should have been invoked, at least for the period in which Reagan was in critical condition and undergoing surgery.¹⁰⁰ The President’s physician, Dr. Daniel Ruge, also agreed that the Twenty-Fifth Amendment should have been triggered.¹⁰¹

The immense power wielded by presidential aides Baker, Meese, and Deaver during this episode suggests that even if Vice President Bush had formally become Acting President through an invocation of Section 4, he would have been significantly constrained in his decision-making by Reagan’s own staff. Bush was also limited by his own stated concern about exercising an abundance of caution not to appear to be grabbing power opportunistically. Bush “took pains to keep his conduct loyal, dutiful, and unassuming” throughout the period.¹⁰² Bush’s caution may have been influenced by his awareness that Reagan was expected to recover and resume his duties as President. The assassination attempt occurred early in Reagan’s term, while White House lines of control were still new. If Reagan’s condition had worsened over time, Bush may have begun to act more authoritatively as *de facto* Acting President. The temporariness of the inability in this episode makes it difficult to extrapolate to a situation in which the President’s inability is longer-lived, or impacts more time-sensitive decisions that can be made only by the President.

⁹⁷ *Id.* at 187.

⁹⁸ *Id.* at 188.

⁹⁹ *Id.* at 191.

¹⁰⁰ Looking back on the event, Meese said he believes that “the president should relieve himself of authority under Section 3 before going into surgery, or should be relieved of authority under Section 4 if unconscious. But he maintained that Reagan was not disabled during the recovery period, and that it would have been improper to have Bush act as president during that time.” *Id.* at 195.

¹⁰¹ *Id.* at 192.

¹⁰² *Id.* at 187.

ii. Cancer Surgery

On July 12, 1985, President Reagan entered Bethesda Naval Hospital for a surgical procedure to remove a polyp from his colon. While avoiding specific invocation of the Twenty-Fifth Amendment, Reagan basically followed the procedure outlined in Section 3. Dean Feerick has speculated that at the time, Reagan chose this course because he did not want to appear weak or set a harmful precedent for the presidency. Before undergoing anesthesia, Reagan signed a document addressed to the Speaker of the House of Representatives and the President Pro Tempore of the Senate transferring power to Vice President Bush as Acting President, while again disclaiming any formal use of the Twenty-Fifth Amendment. He cited a “longstanding arrangement” with Bush and intent not to set a “binding precedent.”

The letter, reproduced in full in the Appendix, states:

After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the Twenty-Fifth Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my longstanding arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office. (emphasis added).

Five hours after surgery, Reagan signed a letter to congressional leaders informing them that he was resuming his powers and duties. His later accounts, along with those of First Lady Nancy Reagan, did mention invoking the amendment.¹⁰³

iii. Alleged Incapacity in 1987

When Senator Howard Baker became Chief of Staff in 1987, his transition team was allegedly told by the staff of the outgoing Chief of Staff Donald Regan that President Reagan had become “inattentive, inept,” and “lazy,” and that as Chief of Staff, Baker should be prepared to invoke the Twenty-Fifth Amendment if necessary, to relieve him of his duties. Reagan’s biographer Edmund Morris stated in an interview aired on PBS that The incoming Baker people all decided to have a meeting with him on Monday, their first official meeting with the President, and to cluster around the table in the Cabinet room and watch him very, very closely to see how he behaved, to see if he was indeed losing his mental grip. . . . Reagan who was, of course, completely unaware that they were launching a death watch on him, came in stimulated by the press of all

¹⁰³ Feerick, *supra* note 78, at 930.

these new people and performed splendidly. At the end of the meeting, they figuratively threw up their hands realizing he was in perfect command of himself.¹⁰⁴

h. President George W. Bush

On both June 29, 2002, and July 21, 2007, President George W. Bush invoked Section 3 of the Twenty-Fifth Amendment when undergoing medical procedures requiring sedation, thereby temporarily transferring his powers and duties to Vice President Dick Cheney as the Acting President. In contrast to President Reagan's letters, President Bush's letters to congressional leaders specifically cited Section 3 of the Amendment, marking the first times this section was invoked explicitly. The letter, reproduced in full in the Appendix, states in relevant part:

This morning I will undergo a routine medical procedure requiring sedation. In view of present circumstances, I have determined to transfer temporarily my Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery.

In accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of the President of the United States. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties. (emphasis added).

B. How to Assess Presidential Inability

These varied historical scenarios suggest a range of possible presidential incapacities that might lead to triggering of the Twenty-Fifth Amendment. On its face, the Amendment imposes no requirement as to the type or quantity of evidence required for either "Transmission 1"—the initial determination of presidential incapacity by the Vice President and the Principal Officers (or such other body as Congress may by law provide) or for the "Second Declaration of Incapacity"—Congress's subsequent determination of presidential incapacity in the event of disagreement between the President, on the one hand, and the Vice President and the Principal Officers on the other, as to the President's fitness to resume the powers and duties of his office.

1. What evidence should be relied upon in determining incapacity?

The decision to locate in the Executive Branch the initial power to declare the President unable reflects not only the calculation that doing so would best comply with separation of powers principles, but also that the Vice President and the Principal Officers (acting as part of the Cabinet) are the most likely actors to have the information required to make the determination. During the Senate Hearings in 1965, Senator Roman Hruska articulated this reasoning:

¹⁰⁴ *American Experience: Reagan*, (PBS television broadcast Feb. 23, 1998), <http://www.pbs.org/wgbh/americanexperience/films/reagan/>; see also JANE MAYER & DOYLE MCMANUS, *LANDSLIDE: THE UNMAKING OF THE PRESIDENT, 1984-1988*, at x (1988) (describing James Cannon's suggestion to Chief of Staff Howard Baker on March 1, 1987 "Consider the possibility that section four of the 25th amendment might be applied"); J. JACKSON OWENSBY, *THE UNITED STATES CONSTITUTION (REVISITED)* 116-17 (2011); Jane Mayer, *Worrying about Reagan*, *NEW YORKER* (Feb. 24, 2011), <https://www.newyorker.com/news/news-desk/worrying-about-reagan>.

The determination of presidential inability and its termination is obviously a factual matter. No policy is involved. The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his office. . . . Obviously, such a decision must rest on the relevant and reliable facts regarding the President's physical or mental faculties. It must be divorced from any thoughts of political advantage, personal prejudice, or other extraneous factors. Those possessing such firsthand information about the Chief Executive, or most accessible to it on a personal basis, are found within the executive branch and not elsewhere.¹⁰⁵

Testimony by former Attorney General Brownell notes that the Bill did not provide for a specially constituted fact-finding body (other than the Principal Officers) to determine presidential inability. But it recognized the risk of the Principal Officers "coming out with a split decision" and thus putting either the President or the Vice President in an "awkward, completely untenable and impotent position."¹⁰⁶ It was in part for that reason that the Amendment provides the alternative option: for Congress to create "by law" another body to make this determination, with the Vice President, "if this were deemed desirable in light of subsequent experience."¹⁰⁷

Should the President contest the Vice President and Principal Officers' determination of inability and should those officials then make a "Second Declaration of Inability," the ultimate determination regarding presidential inability shifts to Congress. The hearings and debates on the Amendment reflect the intent to give Congress wide latitude to determine what evidence it should consider in making that ultimate determination. The Committee report notes that the timeline for Congress to decide whether the President is fit to resume his powers and duties in the face of opposition from the Vice President and the Principal Officers was designed to ensure that Congress "act[s] swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination."¹⁰⁸ The obvious implication is that the Amendment's drafters did not intend to dictate what evidence would be required to make such a determination; instead, they expected *Congress* to decide what evidence it needs when such an occasion arises. The testimony of Senator Roman Hruska confirms this reading: "The language . . . leaves to Congress the determination of what, in light of the circumstances then existing, must be examined in deciding the issue. Thus, the matter will be examined on the evidence available."¹⁰⁹

Some had concerns regarding the Amendment's language's refusal to specify precisely what evidence the Vice President and the Principal Officers (or such other body as Congress may by law provide), or Congress must consider in making the determination of presidential inability. The committee reports specifically stated an expectation that medical input would inform Congress' judgment.¹¹⁰ Representative Edward Hutchinson worried that this lack of specificity

¹⁰⁵ 1965 Senate Subcomm. Hearings, *supra* note 43, at 33-34 (statement of Sen. Hruska) (emphasis added).

¹⁰⁶ 1964 Senate Subcomm. Hearings, *supra* note 65, at 136-37.

¹⁰⁷ *Id.* at 92 (Statement of Lewis J. Powell).

¹⁰⁸ S. REP. NO. 89-66 at 3 (1965).

¹⁰⁹ *Id.* at 24.

¹¹⁰ See, e.g., *id.* at 13.

could allow the Amendment to become a purely political tool for ousting a President.¹¹¹ Hutchinson warned that because the resolution “offers no hint that the determination of inability shall be based on medical or psychiatric evidence . . . instead, the determination will be a political one; and here lies a danger in the proposal.”¹¹² In spite of these objections, no language was added to the resolution to clarify the nature of the evidence required. The rejection of Hutchinson’s concerns suggests that the Amendment’s intent is to prioritize flexibility in implementation of both the initial and final inability determinations.

The congressional debates over the Amendment also reveal minimal discussion regarding what measures the Vice President and Principal Officers or Congress can use to obtain evidence, or what the President could do to avoid disclosure of such evidence. Before the first transmission is made, it seems unlikely that the Vice President or the Principal Officers would be able to compel the President to disclose evidence for the same reason they would be unlikely to alert him to the fact that they are considering invoking Section 4 of the Twenty-Fifth Amendment: the President has the power to fire members of his Cabinet. After the first transmission—at which point the Vice President would have assumed the powers and duties of office as Acting President—it appears that the debates surrounding the Amendment focused on Congress’s power to assemble evidence.¹¹³ This suggests that the Amendment’s drafters did not contemplate that the Vice President and Principal Officers or other body would continue to investigate, once they have made their initial determination of inability.

Congress’s power to compel evidence from the President in a later stage of this process—in its role as ultimate adjudicator of presidential inability—is discussed below, in Part V.E of this Reader’s Guide.

2. What role should medical expertise play in the determination?

During the hearings and debates surrounding the adoption of the Amendment, the drafters generally seemed to contemplate some sort of medical evaluation being involved in both the executive branch and Congressional determinations of inability. Virtually every proposal submitted for congressional consideration expected that the body determining presidential inability would seek and obtain independent medical advice.¹¹⁴ However, there is no consensus as to what sort of medical information would suffice, or how that information would best be gathered. Indeed, there is no requirement that a determination of inability be based on a medical diagnosis, or even medical evidence, at all. However, there is a general consensus that while medical evidence may inform the inability determination, *the determination of inability is not a medical decision, and non-office-holding medical professionals should not be the sole ultimate decisionmakers* as to whether or not the President is disabled under the Twenty-Fifth Amendment.

The determination of inability is not a medical decision, and non-office-holding medical professionals should not be the sole ultimate decisionmakers as to whether or not the President is disabled under the Twenty-Fifth Amendment.

¹¹¹ H. REP. NO. 89-203 at 19 (1965).

¹¹² *Id.*

¹¹³ See, e.g., S. REP. NO. 89-66 at 3 (1965); 1965 Senate Subcomm. Hearings, *supra* note 43, at 35.

¹¹⁴ Feerick, *supra* note 73, at 499.

In referencing a scenario “where the president’s ability to perform is being contested,” Senator Bayh suggested that Congress, “sitting in judgment,” would hear from medical experts and constitutional authorities while “examin[ing] the particular kind of illness in the abstract and . . . talk[ing] to the specific physicians that are dealing with the specific case.”¹¹⁵ In the event of this kind of dispute, Senator Bayh imagined a public debate in Congress during which “the cabinet and the vice president would all want to have as many medical witnesses as possible to show why their actions were well founded,” while “[t]he President . . . would want to try to get people to support his contentions.”¹¹⁶ Attorney General-designate Nicholas deB. Katzenbach testified that the timeline must be such that Congress is able to engage in reasonable debate and to inquire of physicians (including psychiatrists) as well as members of the President’s family and of the Cabinet.¹¹⁷

However, there is broad consensus that the drafters did not intend that independent medical professionals be the sole ultimate decisionmakers regarding whether the President was disabled. Dean Feerick comments that “[t]he drafters of the amendment were acutely aware of the idea of an independent medical panel determining presidential inability [but] they rejected the idea in favor of an advisory role for doctors.”¹¹⁸ Feerick himself testified before the Senate Subcommittee on Constitutional Amendments in 1964 that he opposed the creation of a commission of unelected and un-appointed medical professionals because “[i]nability is more than a medical question.”¹¹⁹

The idea of an independent panel of doctors charged with deciding whether a President is unable was extensively considered and discussed during the hearings that led to the adoption of the Twenty-Fifth Amendment.¹²⁰ For example, Attorney General William P. Rogers testified before the Senate Subcommittee that he opposed this idea because it would “give a hostile commission power to harass the President constantly,” which would “be an affront to the President’s personal dignity” and “degrade the presidential office itself.”¹²¹ He also expressed the opinion that it would be “ill advised to establish complicated procedures which would prevent immediate action in case of an emergency” because doing so would undermine “the need for continuity in the exercise of Executive power and leadership” in times of crisis.¹²² This line of argument suggests that the Twenty-Fifth Amendment is intentionally vague on what evidence will suffice for a determination of presidential inability so as to preserve the procedure’s flexibility in emergency situations.

The Committee Report accompanying the Senate bill that eventually became the Amendment stated that “[i]t is assumed that [the initial determination, i.e. Transmission 1] be made only after adequate consultation with medical experts who were intricately familiar with the President’s physical and mental condition.”¹²³ Lawrence Conrad, chief counsel to the Senate for Constitutional Amendments during the 1960s and chief of staff on Senator Bayh’s committee

¹¹⁵ Birch E. Bayh, Jr., *The Twenty-Fifth Amendment: Its History and Meaning*, in 1 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES 1, 17 (Kenneth W. Thompson ed., 1988).

¹¹⁶ *Id.* at 20–21.

¹¹⁷ *1965 Senate Subcomm. Hearings*, *supra* note 43, at 22–23, 29–30.

¹¹⁸ Feerick, *supra* note 73, at 500.

¹¹⁹ *Id.* at 500 n.125 (emphasis added).

¹²⁰ *Id.* at 499–500.

¹²¹ *1958 Senate Subcomm. Hearings*, *supra* note 46, at 165.

¹²² *Id.*

¹²³ S. REP. NO. 89-66 at 13 (1965).

on the Twenty-Fifth Amendment, noted that “[t]he only situation in which . . . the Twenty-fifth Amendment is completely defective is in cases involving psychiatric impairment” because it would be impossible to remove the President from office while he was having psychotic episodes not severe enough or consistent enough for any one person in the Cabinet to gather enough data to make the determination of inability.¹²⁴

This statement suggests that the drafters of the Twenty-Fifth Amendment were counting on the Vice President and Principal Officers’ ability, based on their personal interactions with the President, to accumulate on their own sufficient evidence of the President’s mental inability to discharge the official duties of the office. In other parts of the United States government, co-workers similarly accumulate evidence of an official employee’s fitness for duty. Mental health standards and periodic “fitness-for-duty” testing for (and surveillance of) conditions related to mental health and reliability may be more rigorous for persons in positions of grave responsibility, such as military personnel with responsibility related to nuclear weapons.¹²⁵ In 1988, a conference held at the Miller Center for Public Affairs at the University of Virginia and chaired by former Attorney General Herbert Brownell and former Senator Birch Bayh, revisited the subject of a medical panel determining presidential inability.¹²⁶ Many of the speakers expressed reservations about the idea of a panel of physicians determining presidential inability.¹²⁷ For example, Dr. Kenneth Crispell, Dean and Vice President for Health Affairs at the University of Virginia Medical School, expressed the opinion that “the question is really one of judgment and it is difficult for anyone to decide about his [the President’s] judgment.”¹²⁸ The report that resulted from the conference (the “Miller Report”) ultimately recommended *against* creating a medical body to determine presidential inability.¹²⁹

¹²⁴ Memorandum from Dr. Carlos Gomez to Dr. Kenneth Crispell (Mar. 26, 1984), in 4 PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT BY SIX MEDICAL, LEGAL AND POLITICAL AUTHORITIES 153, 156 (Kenneth W. Thompson ed., 1997). This is at best a debatable proposition, as doctors may be capable of advising political actors as to whether the President is experiencing psychiatric impairment, physical impairment, or both rising to a level of inability to perform his official duties.

¹²⁵ While not derived from the Constitution, the standards for fitness-for-duty examinations in certain professions may provide a helpful point of reference. Federal regulations provide that for an employee to be forced to undergo a fitness-for-duty examination, the employer must have a “reasonable belief” based on “objective evidence” that the employee’s ability to fulfill critical job functions will be impaired, or that the employee poses a “direct threat.” See U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (July 27, 2000). A “direct threat” is a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. See *id.*; 29 C.F.R. § 1630.2(r) (1998). The actual examination may employ a variety of objective personality, cognitive, and memory tests. Gary L. Fischler, *Psychological Fitness-For-Duty Examinations: Practical Considerations for Public Safety Departments*, 1 ILL. L. ENFORCEMENT EXECUTIVE F. 77-92 (2001). It is recommended that the examiner rely on multiple methods and data sources where possible, including clinical interviews and third-party interviews, and make the evaluation with a view to the essential job functions of the employee being evaluated. See, e.g., IACP POLICE PSYCHOLOGICAL SERVICES SECTION, PSYCHOLOGICAL FITNESS-FOR-DUTY EVALUATION GUIDELINES (2013). Standards for (and surveillance of) mental health conditions and other conditions relevant to reliability may be more rigorous for persons with positions of serious responsibility, like military personnel with responsibility related to nuclear weapons. See, e.g., DEP’T OF DEFENSE, DIRECTIVE NO. 5210.42: NUCLEAR WEAPONS PERSONNEL RELIABILITY PROGRAM (PRP) (Jan. 8, 2001) (Only those personnel who are “emotionally stable and physically capable,” and who “have demonstrated the highest degree of individual reliability for allegiance, trustworthiness, conduct, behavior, and responsibility shall be allowed to perform duties associated with nuclear weapons, and they shall be continuously evaluated for adherence to PRP standards.”).

¹²⁶ Feerick, *supra* note 73, at 500.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 501.

Feerick has gone on to advocate against establishing a more formal role for the White House physician in the Twenty-Fifth Amendment process, on the grounds that doing so could undermine the President's confidence in those who serve him medically, which is necessary to ensure the full exchange of information necessary for proper medical care.¹³⁰ He also notes that the White House physician may be particularly unable to offer useful advice if his or her medical specialty is not applicable to the particular circumstances of a President's medical condition, or if the inability stemmed from non-medical circumstances, such as a kidnapping that prevented a President from communicating with the White House.¹³¹

In conclusion, the Amendment's drafters clearly anticipated that medical evidence would likely be useful to—and an important input in—determining the President's ability or inability. Just as clearly, however, they did *not* intend that an independent medical panel should be the ultimate decision-maker as to the broader question whether, under the Section 4 of the Twenty-Fifth Amendment, the President was unable to discharge the powers and duties of his office.

3. Psychiatric Evidence of Mental Inability and “The Goldwater Rule”

Section 7.3 of the American Psychiatric Association's Principles of Medical Ethics, known commonly as “The Goldwater Rule,” has been the subject of recent controversy in connection with the Twenty-Fifth Amendment.¹³² Section 7.3 provides that with regard to public figures, “a psychiatrist may share with the public his or her expertise about psychiatric issues in general,” but that “it is unethical for a psychiatrist to offer a professional opinion unless he or she has conducted an examination and has been granted proper authorization for such a statement.”¹³³ We make no comment on the contours or the wisdom of Section 7.3. But in light of the special attention Section 7.3 has recently received in the media, we briefly touch on it here to explain why we do not believe that the Goldwater Rule poses a significant obstacle to the proper implementation of the Twenty-Fifth Amendment.

¹³⁰ *Id.* at 502.

¹³¹ *Id.*

¹³² See, e.g., Jeffrey A. Lieberman, *Correspondence: Psychiatrists Diagnosing the President—Moral Imperative or Ethical Violation?*, *NEW ENG. J. MED.* (Dec. 27, 2017), <http://www.nejm.org/doi/full/10.1056/NEJMc1716751>; Claire Pouncey, *Perspective: President Trump's Mental Health—Is It Morally Permissible for Psychiatrists to Comment?*, *N. ENGL. J. MED.* (Dec. 27, 2017), <http://www.nejm.org/doi/full/10.1056/NEJMp1714828>; Melissa Healy, *Do Psychiatrists Have any Business Talking About President Trump's Mental Health?*, *L.A. TIMES* (Dec. 30, 2017), <http://www.latimes.com/science/sciencenow/la-sci-sn-psychiatrists-trump-book-20171230-story.html>. Our analysis should not be interpreted as offering any opinion on the merits of any of the medical ethics provisions discussed in this section.

¹³³ AM. PSYCHIATRIC ASS'N, *THE PRINCIPLES OF MEDICAL ETHICS*, § 7.3. Section 7.3 was enacted in the wake of the 1964 presidential election. In 1964, *Fact Magazine* surveyed over 12,000 psychiatrists about one question: “Do you believe Barry Goldwater is psychologically fit to serve as president of the United States?” Most did not respond, but 1,189 responded “no,” with many describing Goldwater with such terms such as “paranoid” and “a dangerous lunatic.” Maggie Koerth-Baker, *Psychiatrists Can't Tell Us What They Think About Trump*, *FIVETHIRTYEIGHT* (Jun. 6, 2016), <https://fivethirtyeight.com/features/psychiatrists-cant-tell-us-what-they-think-about-trump/>. Goldwater ultimately sued *Fact* for libel and won. *Goldwater v. Ginzburg*, 414 F.2d 324 (2nd Cir. 1969). The magazine went bankrupt, and the APA sought to prevent similar scenarios in the future by enacting the Goldwater Rule. See Koerth-Baker, *supra*. In 2017, the American Medical Association's Council on Ethical and Judicial Affairs recommended amending its Code of Medical Ethics to state that “physicians should refrain from making clinical diagnoses about individuals (e.g., public officials, celebrities, persons in the news) they have not had the opportunity to personally examine.” Dennis S. Agliano, *Report of the Council on Ethical and Judicial Affairs (CEJA Rep. 2-I-17)*, *AM. MED. ASS'N* 6 (2017).

First, as already noted, the Amendment does not require medical diagnosis or expertise at all. While medical evidence may prove helpful to establishing whether a President is disabled, a mental-illness diagnosis is neither a necessary nor a sufficient condition for that determination. A President may be found to be “unable to discharge the powers and duties of his office” without any diagnosis of mental illness.¹³⁴ Likewise, a President with a diagnosable mental illness may be perfectly able to discharge the powers and duties of his office.¹³⁵

Second, Section 7.3 is not law, but the internal rule of a professional association. As a result, Section 7.3 presents no formal legal obstacle to any aspect of the Twenty-Fifth Amendment process. The rule’s existence is relevant to the Twenty-Fifth Amendment only to the extent that it may, in some cases, make it more difficult to procure the psychiatric evaluation or testimony necessary to making a finding of presidential inability.

Third, if a disabled President were to refuse to be examined or insisted upon being examined only by a doctor or doctors of his own choosing, the Goldwater Rule could theoretically make it more difficult to obtain psychiatric evidence relevant to a finding of presidential inability under Section 4 of the Twenty-Fifth Amendment. But in such a circumstance, Congress could still continue with implementation of the Amendment. Congress would need to exercise compulsory process, including requiring a medical examination, to obtain direct medical evidence regarding whether the President is unable to discharge the powers and duties of his office.¹³⁶

III. The Transmission of the Declaration of Presidential Inability

By its own terms, Section 4 envisions three “declarations” and “transmi[ssions].”

1. The initial transmission [“Initial Declaration of Inability”] is made when the Vice President and a majority of either the Principal Officers of the Executive Departments or of the ‘other body’ designated by law “*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.”
2. In response, the President may “*transmit*[] to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists” (“Responsive Presidential Declaration of No Inability”).
3. The President would then resume the powers and duties of his office unless, within four days, 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 [“Second Declaration of Inability”] that the President is unable

¹³⁴ See generally *supra* Sections II.A and II.B.1-2.

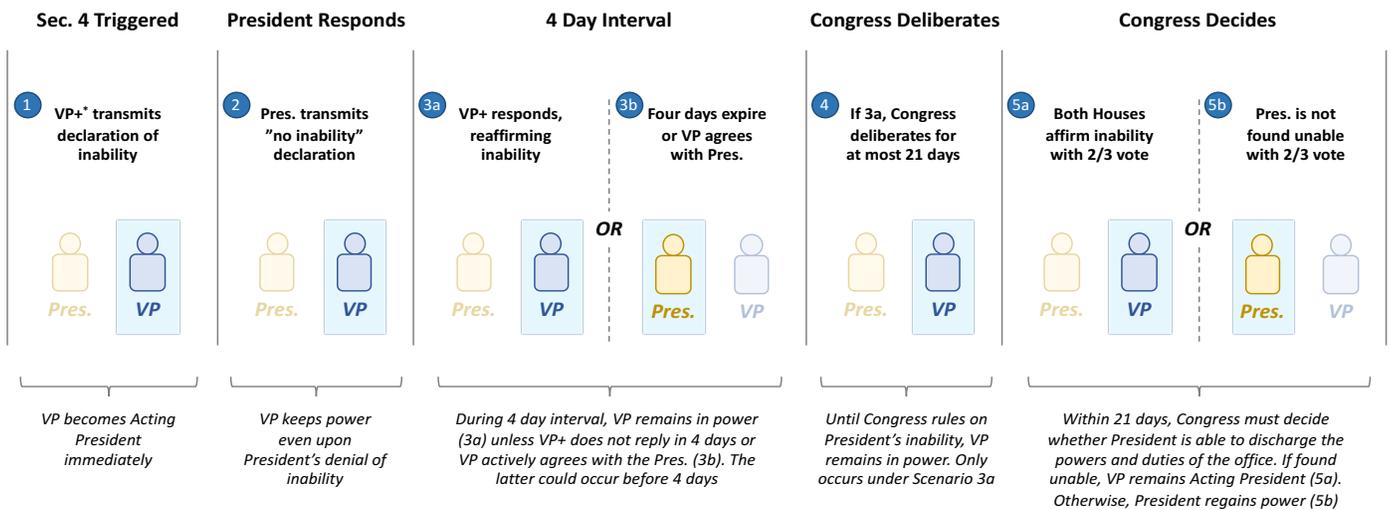
¹³⁵ See, e.g., Jonathan R. T. Davidson et al., *Mental Illness in U.S. Presidents between 1776 and 1974: A Review of Biographical Sources*, 194 J. NERVOUS & MENTAL DISEASE 47, 47-51 (Jan. 2006) (finding that 18 (49%) U.S. presidents between 1776 and 1974 had a diagnosable psychiatric disorder, including 10 (27%) for whom that disorder was evident during their time in presidential office and probably impaired job performance).

¹³⁶ See *infra* Section V.E.

to discharge the powers and duties of his office.”¹³⁷ Congress is then given 21 days to decide the dispute.

This section gives our best reading of what this language was intended to signify, and how the various transmissions it describes should be executed. The following graphic presents the chronology of events in pictorial form:¹³⁸

Transfer of Power under Section 4



* VP+ refers to 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; VP refers only to the Vice President

A. What form should a Section 4 declaration take?

Each Section 4 declaration of the President's inability must come from both the Vice President *and* the Principal Officers or other body, although either may initiate the declaration.¹³⁹ In form, a Section 4 declaration would resemble those submitted under Section 3, where the President declares his own pending inability (the three existing historical examples may be found in Appendix I below). These declarations are short but provide a brief explanation of the temporary inability. They state clearly that the President will be unable to discharge his powers and duties (in all of the listed examples, because of a planned medical procedure), and that the Vice President shall discharge those powers and duties as Acting President until another declaration is transmitted. Using President George W. Bush's 2007 Section 3 letter as a model, a Section 4 letter would likely look like this:

Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States (Date of Transmission)

¹³⁷ If a second declaration of inability has not been properly transmitted at the end of those four days, the President resumes his powers and duties.

¹³⁸ Graphic developed by Varun Char, YLS '19.

¹³⁹ 1965 House Judiciary Hearings, *supra* note 13, at 79–80; FEERICK, *supra* note 9, at 118.

Dear Mr. Speaker: (Dear Mr. President:)

In accordance with the provisions of Section 4 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that the Vice President and a majority of the principal officers of the executive departments [or of such other body as Congress may by law provide] have determined that the President is unable to discharge the Constitutional powers and duties of the office of the President of the United States. Pursuant to Section 4, and as specified by that provision, I shall discharge those powers and duties as Acting President until further notice.

Sincerely,

[Signature of Vice President]

Vice President of the United States

B. When does the Vice President become Acting President?

The Vice President becomes Acting President as soon as the initial transmission is made to (and not from the moment of receipt by) the House Speaker and Senate President *pro tempore*.¹⁴⁰ The four-day period that would follow the initial transmission and the transition of power to the Acting President is intended to give the Vice President and Principal Officers time to make a determination about whether the President has recovered from his or her inability.¹⁴¹ The second transmission could therefore potentially describe these additional steps taken. However, there is no indication that it would be required to do so.

The second transmission could either declare the President able again, in which case, the President would resume his powers and duties as soon as Second Declaration is sent. Alternatively, the second transmission could declare that the President is still unable to discharge the powers and duties of his office, in which case the next stage, in which Congress becomes the decisionmaker, would commence. If the Vice President and Principal Officers (or other body) do not respond to the President's assertion of No Inability by sending a Second Declaration of Inability within four days, the President resumes the powers and duties of the office.

¹⁴⁰ A 1985 O.L.C. Memorandum Opinion also concludes that the transfer of power to the Vice President occurs at the moment the initial transmission is made. Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 69 (1985) (concluding that “we believe that under both §§ 3 and 4 of the Amendment, the transfer of authority to the Vice President takes effect ‘immediately’ when the declaration is transmitted or sent, *and is not delayed until receipt of the document by the President pro tempore of the Senate and the Speaker of the House*. Although the question is not free from doubt, the language and the history of the Amendment tend to support this conclusion”) (emphasis added). In addition, the Amendment’s later stipulation that Congress act “within twenty-one days after *receipt* of the latter written declaration” further supports the notion that transmission in this context is the operative legal event, which is distinct from and does not require, receipt. See also *1965 House Judiciary Hearings*, *supra* note 13, at 46 (statement of Sen. Bayh) (“It was the feeling of the committee—and our report so states—that *transmittal to the offices of the presiding officers of each House shall be sufficient constructive notice* for the transferral [sic] of power, and that the time lapse involved in transmitting this notice from 1600 Pennsylvania Avenue to Capitol Hill is sufficiently short that it would not be something to concern ourselves with and would guarantee public notice for the entire country.”) (emphasis added).

¹⁴¹ FEERICK, *supra* note 9, at 86.

C. What role should the Department of Justice and the White House Counsel play in this process?

The Department of Justice would presumably represent the Vice President and Principal Officers in most cases, at least in the initial stage of the proceedings, presumably assisted by the Vice President's staff (including any legal counsel). According to former Attorney General Herbert Brownell's testimony in the House hearings on the Amendment, "Undoubtedly the Justice Department would prepare the papers [regarding transmission of inability], and the action would be taken at a joint meeting of the Vice President and the Cabinet members."¹⁴²

After transmission occurs, the White House Counsel will represent the Vice President as Acting President. As noted above, immediately after the transmission of the determination to the Speaker and President *pro tempore*, the Vice President assumes the powers and duties of the office as Acting President. The House Judiciary Committee hearings on the Amendment indicated that the Vice President, as Acting President, would assume the "benefits and privileges of the office of President," including the White House staff.¹⁴³ Because the White House Counsel serves the "Office of the Presidency" rather than the president in his individual capacity,¹⁴⁴ the White House Counsel would thus represent whomever held the powers and duties of the presidency at any particular time. Thus, *after* the Vice President became the Acting President, the White House Counsel would most likely report to the Acting President as his or her principal client, and would do so at any point in the process where there was an Acting President.

What is less clear, however, is precisely who the White House Counsel would represent during the period *before* the Vice President and Principal Officers made their initial declaration of inability. In theory, the sitting President would have the first claim on the Counsel's service during this time. Under some circumstances, however, the President might choose instead during this period to work with outside counsel, while the White House Counsel could continue to represent the Office of the Presidency on continuing matters of state. In general, however, the White House Counsel's duty of representation would be to the sitting President before the sending of an initial Section 4 transmission.

D. Who would represent the President during the period when he is no longer exercises his official duties?

We believe that under the best reading of the Amendment, the Department of Justice and the White House Counsel would serve the Acting President. Commentators have generally not discussed who would represent the President during a period when he or she is removed from exercising his or her formal powers and duties. It could be expected that the selection of counsel for the President and Vice President during this process might be somewhat *ad hoc*.¹⁴⁵

¹⁴² 1965 House Judiciary Hearings, *supra* note 13, at 247. Depending on the circumstances, however, the Department of Justice may not become involved. For example, if the Vice President thinks that the Attorney General will oppose the Principal Officers' determination that the President is unable and alert a hostile President of the potentially impending Section 4 invocation, the Vice President is unlikely to seek the Attorney General's (or the Department of Justice's) assistance in preparing the transmission.

¹⁴³ *But see* 1965 House Judiciary Hearings, *supra* note 13, at 88 (noting that a concurrent resolution may be required "authorizing [the Vice President] to have the salary and use the benefits of the White House.").

¹⁴⁴ See generally Bob Bauer, *Thoughts on the Proper Role of the White House Counsel*, LAWFARE (Feb. 21, 2017 9:02 AM), <https://www.lawfareblog.com/thoughts-proper-role-white-house-counsel>.

¹⁴⁵ Conversation with Joel K. Goldstein, Professor of Law, St. Louis Univ. Sch. of Law (Oct. 26, 2017).

The White House Counsel has represented the president in past impeachment proceedings.¹⁴⁶ However, impeachment proceedings are different from an exercise of the Twenty-Fifth Amendment in an important way: the President retains his “powers and duties” during impeachment proceedings. During an impeachment, there is no separate Acting President whose interests were potentially adverse to those of the President.

E. Section 4 refers to a transmission to be made “within four days” in the case of a contested determination of ineligibility (and a determination to be made “within twenty-one days” of the transmission). Are these calendar days or business days?

These “days” are calendar days.

This interpretation is consistent with the meaning of the word “days” elsewhere in the Constitution. Article I, Section 7 states:

If any Bill shall not be returned by the President within *ten Days (Sundays excepted)* after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.¹⁴⁷

If “days” in Article I, Section 7 meant “business days,” there would be no need to exclude Sundays. By analogy, the absence of any qualification to the word “days” in the Twenty Fifth Amendment strongly implies that these are calendar days.

At various points in the legislative history, the timeline for this process was debated and the number of days allocated changed.¹⁴⁸ But at no point during these discussions was the use of business days or the exception of Sundays discussed, implying that the days referred to are calendar days. In addition, drafters justified one change to a draft of the Amendment—extending the Vice President and Principal Officers’ response time from two to three days—on the grounds that Congress would not be in session over the weekend, and a declaration submitted on Friday should wait until Monday for a response.¹⁴⁹ Taken as a whole, all of this evidence strongly suggests that the drafters intended “days” to refer to calendar days.

This interpretation is consistent with the fact that “twenty-one days” is exactly three weeks, a natural division of time when dealing with calendar days, but an arbitrary period when considered in business days. This interpretation of the word “days” is also consistent with the other provisions of the Amendment that require Congress to act with great expediency.

¹⁴⁶ For example, during the Clinton impeachment proceedings, Associate White House Counsel Cheryl Mills, White House Counsel Charles Ruff, and Special Counsel to the White House Gregory Craig led President Bill Clinton’s defense team. See *Defense Who’s Who*, WASH. POST (Jan. 19, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/defense.htm>.

¹⁴⁷ U.S. CONST. art. I, §7 (emphasis added).

¹⁴⁸ See FEERICK, *supra* note 9, at 86 (noting that an initial draft of the Amendment provided for a two-day period in which the Vice President and Cabinet could challenge a President’s claimed recovery); *id.* at 100 (noting that the twenty-one day timeline for Congress emerged from a compromise in the Conference Committee between a ten-day timeline suggested by the House, and the omission of a timeline entirely by the Senate); Feerick, *supra* note 3, at 1094–99 (offering a firsthand account of the evolution of the time limit during the drafting process).

¹⁴⁹ See *1965 House Judiciary Hearings*, *supra* note 13, at 149.

Section 4 mandates Congress to assemble within forty-eight hours. This is the only instance where the word “hours” is used in the Constitution, and suggests that the framers wanted to prioritize expediency in such situations, without reference to days of the week. The legislative history explicitly emphasizes the need for great expediency in general. When debating the timeline within which Congress should make its determination, the Senate emphasized the need to determine as quickly as possible who was President. They discussed, among other things, whether or not Congress should be allowed to conduct any other business before reaching a determination. Rhode Island Senator John O. Pastore stated “we must stay here until we decide that question, even if we must sit around the clock, or around the calendar, because this problem involves the Presidency of the United States.”¹⁵⁰

F. Could a Twenty-Fifth Amendment proceeding overlap two sessions of Congress?

Probably yes. There is a very real possibility that proceedings under the Amendment could begin under one session of Congress and continue into another (with a different composition of membership). A similar “lame-duck scenario” occurred when the House impeached President Clinton in 1998, but the trial in the Senate did not take place until January 1999, under a new Congress.

Some scholars had argued that the Constitution does not allow the old House to impeach and the new Senate to convict, because if the current House approves an ordinary bill which the Senate does not approve by the time the current Congress ends, then the bill dies.¹⁵¹ Arguably, this reasoning could apply in the Twenty-Fifth Amendment context, as well. However, this theory has largely been rejected, even in the context of impeachment, on the basis that impeachment is an adjudicative, rather than legislative, procedure.¹⁵² There have been several occasions, documented by the Library of Congress, in which a lame-duck House impeached a federal judge and a subsequent Senate held the trial.¹⁵³ Congress’s Section 4 role is, similarly, more adjudicative than legislative. In any event, because the Twenty-Fifth Amendment nowhere requires that proceedings under it must be completed in one Congress, while a “lame-duck” implementation of the Twenty-Fifth Amendment might have political implications, it is unlikely to violate any legal stricture.

¹⁵⁰ 111 CONG. REC. 3276 (1965).

¹⁵¹ See, e.g., *Impeachment Inquiry, William Jefferson Clinton, President of the United States, Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 37–38 (1998) (statement of Prof. Bruce Ackerman) (arguing, by analogy to the legislative process, that a bill of impeachment should lapse when the Congress that enacted it expires).

¹⁵² See also RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 128–29 (1999); Susan Low Bloch, *Assessing the Impeachment of President Bill Clinton from a Post 9/11 Perspective*, in *THE CLINTON PRESIDENCY AND THE CONSTITUTIONAL SYSTEM* 206–207 (Rosanna Perotti ed. 2012).

¹⁵³ *Can a Lame Duck House Impeach the President?* SLATE: EXPLAINER (Dec. 10, 1998), http://www.slate.com/articles/news_and_politics/explainer/1998/12/can_a_lame_duck_house_impeach_the_president.html.

IV. The Powers and Duties of the Vice President as “Acting President” After the Initial Declaration of Presidential Inability

Once an initial determination of inability is transmitted, the Vice President “shall immediately assume the powers and duties of the office as Acting President.” One important question is what the precise role and responsibilities of the Acting President are while the President is deemed unable. As noted above (in the case of President Tyler), there is an important distinction between the Vice President actually assuming the *office* of the presidency (as is envisioned in Section 1 of the Amendment) and assuming the *powers and duties* of the office as Acting President during a period of presidential inability.

Prior to the Twenty-Fifth Amendment, there was persistent uncertainty about “whether a vice president acting in place of a disabled president had ousted him from office.”¹⁵⁴ Without a mechanism for deeming a President disabled, the inclination—illustrated in several of the historical cases discussed above—was to neglect or conceal any inability on the part of the President. The Twenty-Fifth Amendment created a mechanism for the Vice President to assume temporarily but openly the responsibilities of the presidency, without explicitly replacing the President. But the relatively untested nature of the Twenty-Fifth Amendment, particularly Section 4, leaves open questions about whether there are any limitations or restrictions on the Acting President, as well as when precisely the Acting President is exercising control under Section 4.

While the Acting President may be legally permitted to exercise the full powers of the office of the President, he or she is limited in practice by the structure of the executive branch, political norms, and the expectation that the President will return to the office.

Historians and scholars of the Twenty-Fifth Amendment, as well as the drafting history of the Amendment itself, have clarified several points. First, while the Acting President may be legally permitted to exercise the full powers of the office of the President, he or she is limited in practice by the structure of the executive branch, political norms, and the expectation that the President will return to the office. If, however, the Vice President’s installation as Acting President is believed to be permanent, those restrictions are likely to relax. Second, while some have argued for a possible reading of Section 4 that would allow the President to regain control during the crucial four days following his or her responsive transmission of a declaration that no inability exists, the legislative history clearly demonstrates

that the Acting President would remain in control during that four-day period following the Initial Declaration of Inability. While Section 4 of the Twenty-Fifth Amendment has never been invoked, President Reagan’s functional delegation of authority following an assassination attempt in 1981 (see above) provides a useful case study for envisioning how the Vice President may fulfill the role of Acting President—and how he is constrained in doing so—in the case of an unexpected presidential inability.

¹⁵⁴ Herbert L. Abrams, *Shielding the President from the Constitution: Disability and the Twenty-Fifth Amendment*, 23 PRESIDENTIAL STUD. Q. 533, 535 (Summer 1993); see also FEERICK, *supra* note 7, at 92-96.

A. Are the powers and duties of the Acting President coextensive with those of the office of the President?

In a purely legal sense, as Acting President, the Vice President can employ all the powers and tools of the office of the president.¹⁵⁵ Historians have characterized the Acting President as playing “a critical role as decisionmaker,”¹⁵⁶ and “tak[ing] care of the day-to-day business”¹⁵⁷ of the White House. The Acting President has the constitutional authority to “move the troops, report on the State of the Union, propose a new budget, send judicial nominees to the Senate for confirmation, remove the secretary of the treasury, do virtually all the things that presidents do. He might even prepare to control his national party apparatus and to secure its presidential nomination.”¹⁵⁸

While the breadth of the Acting President’s legal powers might appear to create a temptation to arrogate power through Section 4, the Miller Center Commission on Presidential Disability dismissed that risk on the basis that such behavior would be at odds with the historical and practical role of the Vice President in the White House. The Commission noted that, historically, “the defects of the American vice presidency have not included the temptation to seize power, but the refusal to accept the power inherent in the office.”¹⁵⁹ Professor Joel Goldstein, an expert on both the Vice-Presidency and the Twenty-Fifth Amendment has argued along similar lines that “[h]istory had suggested that vice-presidential timidity was a greater problem than vice-presidential aggression,” and that “[a] politically ambitious vice president would seem unlikely to risk his political future by seeking to supplant the president improvidently.”¹⁶⁰ In the case of an invocation of Section 4, political pressure to appear to act modestly and incrementally would

¹⁵⁵ Less well-explored is the question whether the Acting President’s powers are *limited* to those of the President: some legislative history indicates that, when the Vice President becomes Acting President he or she might no longer exercise all of the powers of the Vice Presidency. In particular, Senator Bayh briefly indicated that the Acting President would not preside as President of the Senate, with that office falling instead to the President *pro tempore*. See 111 CONG. REC. 3270 (1965). There are also structural and separation-of-powers reasons why the Acting President would lose the ability to preside over the Senate. See Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1660–61 (1997) (explaining the structural reasons, based on the distinctions between presidential and parliamentary systems and norms about judging one’s own case, why the Constitution would not allow the Acting President to preside over the Senate). The Constitution’s text, however, remains silent on this issue, and the Constitution does not permit the Acting President to appoint a Vice President. See *infra* Section VII.F. In any event, the Acting President will likely face political pressure *not* to preside over the Senate, particularly while the Senate debates the President’s inability. Should the Acting President preside as President of the Senate, the Acting President risks appearing to judge the validity of his or her own determination that the President of the United States cannot discharge the powers and duties of that office.

¹⁵⁶ Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 191 (Robert E. Gilbert ed., 2000).

¹⁵⁷ Miller Center Comm’n No. 4, *supra* note 23, at 8.

¹⁵⁸ Goldstein, *supra* note 156, at 198. While Goldstein is here discussing the actions of a potential acting president who has replaced a permanently disabled president, he makes clear that such actions are coextensive with acting presidents’ full legal authority.

¹⁵⁹ Miller Center Comm’n No. 4, *supra* note 23, at 8–9 (“Examples are Vice President Chester Arthur during President James Garfield’s long illness after an assassin shot him, and Vice President Thomas Marshall during President Woodrow Wilson’s grave illness. After President Eisenhower’s 1955 heart attack, Vice President Nixon scrupulously avoided any act not clearly authorized by the president. In Nixon’s case, and ever since, the tempo of modern communications has assured wide and swift public disclosure of the least sign of a ‘power grab.’”).

¹⁶⁰ Goldstein, *supra* note 156, at 194. Then-Vice President Bush’s refusal to invoke Section 4 of the Twenty-Fifth Amendment after President Reagan was shot, which resulted in government by an ad-hoc committee of unelected aides to the President, represents a prime illustration of this vice-presidential reluctance to assume the Presidency. See *supra* Section II.A.2.g.i.

restrain the Acting President in his or her ability to wield power independently, much less consolidate power.

While the Acting President's power may be equal to the President's in legal terms, he is functionally limited by informal, structural, normative, and political constraints. First, because the Acting President does not have an independent electoral mandate, there are limits "imposed in part by the knowledge that the president, not the vice president, was elected to do the job."¹⁶¹ Professor Goldstein argues that as "the vice president is his hand-picked associate, . . . [t]he president need anticipate no political self-dealing or other shenanigans while he is incapacitated."¹⁶² Social expectations of propriety will also limit the Acting President. For example, even an Acting President who is expected to serve for an extended period would lack "the title and some of the trappings" of the presidency.¹⁶³ Although there are no formal guidelines, Goldstein has argued, it would be "imprudent" for the Vice President to move into the White House, or use the Oval Office, Air Force One, or Camp David.¹⁶⁴

While the Acting President's power may be equal to the President's in legal terms, he is functionally limited by informal, structural, normative, and political constraints.

More importantly, the Acting President is limited by virtue of the fact that he is working within the existing personnel structure of the sitting President's White House. The White House Chief of Staff, the presidential advisors, and the President's family (still presumably occupying the residence) would all serve as checks on the actions of the Acting President, who would be unlikely to bring in the vice-presidential staff to replace the President's. The very concept of the "Acting President" assumes that it is a mechanism to *maintain* the existing organization and priorities of the sitting President's administration.

This view is consistent with the notion that the presidency is not a single individual, but rather, in the words of presidential advisor Martin Anderson, a "pyramid of individuals who are built up under him."¹⁶⁵ When the Vice President assumes the *office* of the President, he might substitute or introduce members of his own staff, resulting in a "radically different pyramid."¹⁶⁶ But in the case of a temporary inability, the Acting President would ordinarily be expected to leave the President's standing pyramid alone, "rather than risk the disorder from a group not aware of all the nuances of the problems confronting the country."¹⁶⁷

In addition, because the Vice President has presumably worked closely with the President and his advisors, he would be expected to govern consistent with current administration policy.¹⁶⁸

¹⁶¹ *Id.* at 198.

¹⁶² *Id.* at 189.

¹⁶³ *Id.* at 198-99.

¹⁶⁴ *Id.* On the other hand, in the Letter Agreement between President Eisenhower and Vice President Nixon, Eisenhower specifically indicated his intention that the Vice President would assume the "perquisites of the Presidency, including the White House itself." Fordham University School of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 77-79 (2012) (quoting Letter from Pres. Dwight D. Eisenhower to Vice Pres. Richard Milhous Nixon (Feb. 5, 1958)).

¹⁶⁵ Abrams, *supra* note 154, at 541 (quoting Martin Anderson).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 542 (quoting Martin Anderson).

¹⁶⁸ Goldstein, *supra* note 156, at 189.

The Acting President's ability to shift course would likely be impeded by staff who are loyal to the President. For example, the spouse of the President, the Chief of Staff, or other advisors could easily undermine the status of a defiant Acting President "with a public rebuke or a few whispered comments to [insider journalists like] Geraldo [Rivera] or Bob Woodward."¹⁶⁹

Plainly, the most powerful check on the Acting President's ability to exercise control is the understanding and expectation that his role is temporary. Political scientist Clinton Rossiter has argued that there is little ambiguity in such a case: "[T]he only thing a Vice President can do, so long as there is the slightest chance that the President will recover, is to keep shop."¹⁷⁰ Most scholars of the Twenty-Fifth Amendment contend that the Acting President's duties should not vary greatly from the Vice President's ordinary responsibilities. According to Professor Goldstein, in a situation where the President will likely return soon and no emergent matter requires urgent presidential decision, the Acting President "would not take any other action as acting president that she could not take as vice president."¹⁷¹ While the Acting President "might receive a head of state or preside over a White House meeting," "she could (and does) do these things as vice president. . . . Her power, as a practical matter, is much reduced under these circumstances."¹⁷² Goldstein argues that if time is of the essence or there is an emergency, the Acting President will be compelled to act for the President, for example, in responding to a nuclear attack or signing a bill that may be set to expire imminently.

However, if the inability is only temporary, it is "virtually inconceivable" that the Acting President would take actions that could practically await the return of the President, including the naming of a nominee to the Supreme Court, issuing executive orders, or firing the chief of staff.¹⁷³ In addition, the Vice President would have little to gain from striking out on his own during his tenure as Acting President. Credit for sound, decisive action during this period will likely go to the President—or as likely, his team—while blame for any failure would almost certainly be directed at the Vice President.¹⁷⁴

The possible exception to these constraints is if the presidential inability appears to be permanent. If, for example, the President lapses into a prolonged coma, then the Acting President effectively (if not officially) assumes not only the powers and duties, but also the office of the president. President John Tyler's full assumption of the presidency following the death of President William Henry Harrison provided the blueprint for such a reallocation of power, later codified in the Twenty-Fifth Amendment. When Tyler received his first communications addressed to the Acting President, he "took one look and without hesitation struck the word *acting*. It was clear that John Tyler fully intended to be President for the remainder of [the late] Harrison's term."¹⁷⁵ This came to be known as the "Tyler Precedent," and when a President died in the future, it was presumed that the Vice President would assume "the full office as well as its powers and duties."¹⁷⁶ However, it was agreed during the first hearings in 1955 on presidential inability that such protocol needed to be clarified.¹⁷⁷ Section 1 of the

¹⁶⁹ *Id.* at 191.

¹⁷⁰ *Id.* at 200.

¹⁷¹ *Id.* at 199.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 200.

¹⁷⁵ BAYH, *supra* note 29, at 14.

¹⁷⁶ *Id.*

¹⁷⁷ Abrams, *supra* note 154, at 535.

Twenty-Fifth Amendment did just that by specifying that the Vice President would become President—not merely Acting President—in the case of the President’s death, resignation, or removal from office.¹⁷⁸

The Tyler Precedent raised questions in the 27th Congress about whether or not it created an opening for a Vice President to also assume the presidency in the case of *disability*, not death. “Under Tyler’s precedent, would a temporarily disabled President be permitted to return to office once he recovered, if the Vice President were to insist on keeping the office for himself?”¹⁷⁹ Members of Congress were concerned that if the Tyler Precedent applied to disability, then a president who recovers might have trouble regaining his office. Congress continued to debate the question for over a century, but never reached a consensus.¹⁸⁰ This was one of the chief concerns animating the drafting of Sections 3 and 4 of the Amendment.

Nevertheless, the Acting President has the full legal powers of the President. If there is an expectation that the President will never return, then even if he retains the legal title, the Vice President would be freed from many of the informal constraints that come with being only a temporary Acting President, and would likely feel at liberty to exert the full range of presidential powers. Professor Goldstein writes that “[a]s a practical matter, the common realization that the president is not coming back frees the vice president to act across a wide range. He need not feel inhibited by the specter that the president will return and second-guess his actions.”¹⁸¹ This view is compatible with the vision of Senator Bayh, who wrote that in the case of a clear permanent removal of the President—for example, by death or resignation—whether the Vice President serves as President or Acting President “is really a matter of semantics.”¹⁸² While the Vice President’s official status may not have changed, where the President is permanently disabled, the Acting President will likely be much less encumbered and may have significantly greater latitude to install his own staff members in the West Wing and shape the administration’s agenda.

If there is an expectation that the President will never return, then even if he retains the legal title, the Vice President would be freed from many of the informal constraints that come with being only a temporary Acting President, and would likely feel at liberty to exert the full range of presidential powers.

B. What are the powers of the Vice President during the four days after a President’s responsive declaration of “No Inability”?

He serves as Acting President. The President may contest an initial Section 4 determination that he is “unable to discharge the powers and duties of his office” by submitting a responsive, written declaration to the Senate pro tempore and the Speaker of the House asserting that “no

¹⁷⁸ *Id.* at 537.

¹⁷⁹ BAYH, *supra* note 29, at 14.

¹⁸⁰ RUTH SILVA, PRESIDENTIAL SUCCESSION 87 (1968).

¹⁸¹ Goldstein, *supra* note 156, at 198.

¹⁸² BAYH, *supra* note 29, at 15.

[such] inability exists”¹⁸³ (the President’s responsive declaration of “no inability”). The Vice President, along with either the majority of the Principal Officers or of the duly appointed “other body,” then has four days to challenge the President’s responsive declaration. If they decide to do so, they must submit another declaration (Second Declaration of Inability) reaffirming that the President is unfit for office. It would then fall to “Congress . . . [to] decide the issue” of fitness for duty.¹⁸⁴

Although the Twenty-Fifth Amendment is clear that the Acting President is in charge during a period of presidential inability, there has been some debate regarding the four days *after* the President transmits a declaration attesting to a lack of inability, prior to the Vice President and the Principal Officers’ formal contest. In relevant part, Section 4 states:

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[s] 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.¹⁸⁵

The most natural reading of Section 4 is that the Acting President remains in control during the four days after the President’s declaration of “no inability.”

The most natural reading of Section 4 is that the Acting President remains in control during the four days after the President’s declaration of “no inability.” However, some legal experts have interpreted the sentence to reinstate the President during that period.¹⁸⁶ The variance revolves around the word “unless.” According to Professor Brian Kalt, the word “unless” has unnecessarily led to divergent readings: “unless” could potentially be read to mean “unless and until,” in which case the president would resume power until he was contested.¹⁸⁷ Someone defending the President might

also argue that if the Vice President were meant to retain presidential powers and duties during those four days, he would be referred to in this text as the “Acting President,” because all other references to the Vice President when he is assigned the powers and duties of the presidency so refer to him. But these textual arguments in favor of the President resuming the duties of the office seem tenuous, and do not accord with the plain meaning of Section 4’s text. “Unless,”

¹⁸³ U.S. CONST. amend. XXV, § 4.

¹⁸⁴ *Id.*

¹⁸⁵ U.S. CONST. amend. XXV, § 4 (emphasis added).

¹⁸⁶ Professor Brian C. Kalt discusses two legal experts’ misstatement of the law in their critiques of the way that § 4 was portrayed on the television drama *24*. Professor Peter Shane insisted that the president can reclaim the office by providing certification to Congress of no disability, and that it was only after that transmission that the vice president could “re-oust the President.” Legal expert Gregory Jacob wrote that the President “could nullify the Cabinet’s decision and reinstate himself simply by declaring himself fit to resume his duties.” BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 72 (2012).

¹⁸⁷ *Id.* at 68.

after all, is not commonly understood to mean “unless or until”—it is purely conditional, and has no temporal component.¹⁸⁸

Moreover, the Amendment’s legislative history shows clearly that Congress intended for the Vice President, as Acting President, to remain in charge during those four days. The number of days changed several times during the course of drafting the Amendment, but the intention of keeping the Vice President in charge as Acting President remained the same.¹⁸⁹ It was understood that the Vice President would remain in control during that entire period.¹⁹⁰ Indeed, an earlier version of the Amendment explicitly put the Vice President in charge during the waiting period, which in that particular draft lasted seven days.¹⁹¹

The subsequent edits made to the language of Twenty-Fifth Amendment as it moved through the Senate were meant to make the Amendment more concise, but not to alter its meaning. Kalt writes that “[e]ven as the phrasing changed between drafts, that intention did not.”¹⁹² When the Amendment was debated on the Senate floor, the issue was expressly raised. Senator Allott inquired: “[S]o the issue will be clear, if a Vice President had assumed the duties of acting President, and the elected President then decided that he wished to state that there is no inability any longer, it would be 7 days before he could possibly resume the office of President.” Senator Bayh responded: “That is correct.” Allott then affirmed Bayh’s answer, stating, “There is no question about that. That is the intent.”¹⁹³

The legislative record makes clear that Congress was in part concerned about a structural issue: that if power shifted back to the President during those four days, the President might attempt to use those official powers to prevent the Vice President and Principal Officers from countering his “no inability” declaration. In fact, when a representative in the House suggested changing the language to put the President in charge during the waiting period, the proposal failed due to concerns that, during that period, the President might fire his entire Cabinet to keep the Principal Officers from contesting his declaration.¹⁹⁴ Senator Bayh affirmed that the drafters sought to keep to a minimum “the number of times the power of the Presidency would change” hands.¹⁹⁵

¹⁸⁸ See *Unless*, MERRIAM-WEBSTER’S DICTIONARY (2017), <https://www.merriam-webster.com/dictionary/unless> (defining “unless” as “except on the condition that: under any other circumstance than” and “without the accompanying circumstance or condition that”).

¹⁸⁹ BAYH, *supra* note 29, at 283. The House originally called for a two-day window; Sen. Roman Hruska advocated for ten days, and the Senate then compromised at seven days, and later at four.

¹⁹⁰ Even Kalt admits that as far as evidence of legislative intent goes, “this is as clear and definitive as it gets.” KALT, *supra* note 186, at 71.

¹⁹¹ Draft language introduced in the Senate in 1963 and 1964 stated: “Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President’s inability has not terminated, the Congress shall thereupon consider the issue.” FEERICK, *supra* note 9, at 72.

¹⁹² KALT, *supra* note 186, at 69.

¹⁹³ KALT, *supra* note 186, at 70 (quoting 111 CONG. REC. 3,285).

¹⁹⁴ 111 CONG. REC. 7963-66 (1965) (rejecting by a 122 to 58 vote a proposal from Rep. Moore that would have permitted the President to resume the powers and duties of the office during the waiting period); see also KALT, *supra* note 186, at 71 (citing 111 CONG. REC. 7963-66 (1965)).

¹⁹⁵ 111 CONG. REC. 3285 (1965); see also KALT, *supra* note 186, at 70 (citing 111 CONG. REC. 3285 (1965)).

There is no clear consensus about whether and under what circumstances the President's powers and duties may be restored *before* the four-day period has elapsed. Based on the legislative history, Dean Feerick argues that either the Vice President alone or the Vice President and a majority of the Principal Officers can agree to allow the President to resume his powers and duties before the four-day period expires.¹⁹⁶ However, in a prior draft of the Amendment, there was a waiver provision that allowed the Vice President to return power to the President immediately, but the waiver was removed.¹⁹⁷ Kalt suggests that the only way to shorten the waiting period in practice would be for the Vice President and Principal Officers to immediately challenge the President's assertion that an inability no longer exists, sending it directly to Congress where the Vice President could then ask Congress to promptly vote in the President's favor, swiftly ending the period of uncertainty.¹⁹⁸ As a practical matter, however, it may be just as likely that the Vice President and the Principal Officers would simply allow the President to resume his official functions, with any congressional vote merely confirming the return to the status quo ante.

C. What are the powers and duties of the Vice President during the 21-day period in which Congress deliberates regarding the President's ability or inability?

The Vice President serves as Acting President. The Amendment's text clearly indicates that should the Vice President and either the Principal Officers or the "other body" transmit a second declaration of inability to Congress following the President's responsive declaration of no inability, the Vice President remains Acting President during the period allotted for Congressional deliberation. Further, the Amendment states that where Congress returns the required two-thirds vote "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" after the 21-day period (in which he serves as Acting President).¹⁹⁹

V. Congressional Process in the Event that Presidential Inability is Contested

If, after an initial declaration of inability, (1) the President transmits a responsive declaration of "no inability," and (2) the Vice President and a majority of either the Principal Officers of the executive departments or members of the "other body" then replies with a second declaration of inability, it falls to Congress to resolve the dispute. The Amendment states:

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

¹⁹⁶ FEERICK, *supra* note 9, at 119 (citing *1965 House Judiciary Hearings*, *supra* note 13, at 99, 107, 243; 111 CONG. REC. 3285 (1965) (statement of Sen. Bayh); *id.* at 15,214 (statement of Rep. Poff))

¹⁹⁷ KALT, *supra* note 186, at 73.

¹⁹⁸ *Id.*

¹⁹⁹ U.S. CONST. amend. XXV, § 4 (emphasis added).

as Acting President; otherwise, the President shall resume the powers and duties of his office.

This Part discusses how the Congressional process would unfold in the event of a contested determination of inability.

A. When does the 21-day “clock” commence?

By its terms, the Amendment provides for two possibilities. If Congress is in session at the moment of “receipt of the latter written declaration” from the Vice President and Principal Officers or body,²⁰⁰ the 21-day period begins immediately. But if Congress is “not in session” at the moment the Speaker and president pro tempore receive the declaration, Congress must then “assembl[e] within forty-eight hours for [the] purpose” of deciding the question of whether the President is still disabled.²⁰¹ In that case, the 21-day clock then begins at the moment that “Congress is required to assemble” by the Vice President—no more than 48 hours after receipt of the second declaration.²⁰² Although the choice of 21 days was somewhat arbitrary, the congressional record leaves no doubt that there were two overarching reasons for mandating such a precise timeline—to induce Congress to act quickly while simultaneously giving it sufficient time to deliberate and collect evidence pertaining to the disability.

1. When does “receipt” of the declaration occur?

“[R]eceipt” of the declaration takes place when both the Speaker of the House and the Senate President pro tempore have received a written declaration from both the Vice President and either the majority of the Principal Officers or the majority of the body created by Congress that the President is still disabled.²⁰³ While the legislative history of the Amendment presumes that this declaration would be made jointly by the Vice President and the majority of the Principal Officers or duly appointed body, it is possible that they may “choose to send separate declarations.”²⁰⁴ In that case, the requirement that the Speaker and pro tempore receive declarations from both the Vice President *and* the majority of the Principal Officers or other body would mean that the 21-day timeline (or 21 days plus 48 hours) would not be triggered until the receipt of the second of the two declarations.²⁰⁵

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*; John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 *FORDHAM L. REV.* 173, 201 (1965). Senator Bayh would later say the 21-day deadline was chosen as a compromise because it “was half-way between the time the House wanted and the time the Senate wanted.” Bayh, *supra* note 115, at 19.

²⁰³ Presumably, this second declaration by the Vice President must be made in conjunction with the same group with which he made the initial declaration. For instance, if the first was made with the majority of a body created by Congress, it is unlikely that the Vice President could then turn to the Principal Officers to make the second declaration.

²⁰⁴ See FEERICK, *supra* note 9, at 118 (citing 111 *CONG. REC.* 15385 (1965) (statements of Sen. Bayh, Sen. Javits)).

²⁰⁵ This is of course more likely to occur with the initial Section 4 declaration in the case of a national emergency where the President is incapacitated but known to be alive.

Even if the position of Speaker or President pro tempore were vacant, sending the second declaration of inability—by the Vice President and either a majority of the Principal Officers or of the other body—to Congress as a whole for its deliberation on the question of inability would probably suffice.

Under certain circumstances, the declaration could be delivered to either the Speaker or the President pro tempore but not both. This would most likely occur if one of these positions were vacant. A strict reading of the Amendment would seem to indicate that both the Speaker and the President pro tempore are indispensable as well; but if either position were vacant, no declaration could ever be received by the appropriate people, and thus no obligation could ever attach to Congress. We think it highly doubtful that the process was intended to be read so formalistically. The most straightforward reading would appear to be that the Amendment specified transmissions to the Speaker and President pro tempore as proxies for the requirement that Congress as a whole be notified of the declarations. Thus, even if the position of Speaker or President pro tempore were vacant, *sending the second*

declaration of inability—by the Vice President and either a majority of the Principal Officers or of the other body—to Congress as a whole for its deliberation on the question of inability would probably suffice.

2. When is Congress “in session”?

Congress is in session when it says it is, provided that, under its own rules, it retains the capacity to transact official business. While it is clear that Congress is “in session on any particular day when it is meeting,” there are situations where this determination is more complex.²⁰⁶ Both Article I of the Constitution and the 20th Amendment mandate that Congress must “assemble at least once in every year.”²⁰⁷ As a result, each biennial Congress traditionally has held two formal sessions, each spanning a calendar year and beginning in early January and adjourning in late December.²⁰⁸ However, Congress often breaks for recesses in the midst of these sessions. The most prominent example of this is the August recess, which usually lasts longer than a month and has been a mainstay of the congressional calendar since the 1970 Legislative Reorganization Act.²⁰⁹ So while it is clear that Congress is not in session between adjournment and the start of its next session,²¹⁰ whether or not it remains “in session” during intra-session recesses is a more difficult question.

In 2014, the Supreme Court addressed this issue in *NLRB v. Noel Canning*, a case interpreting the Recess Appointments Clause of the Constitution. In doing so, it laid out a definition of “in session” that would logically seem to apply in the context of the Twenty-Fifth Amendment. Writing for a majority, Justice Breyer held that “the Senate is in session when it says it is,

²⁰⁶ *Sessions of Congress*, U.S. SENATE (Nov. 11, 2017), <https://www.senate.gov/reference/Index/Sessions.htm>.

²⁰⁷ U.S. CONST. amend. XX, § 2; U.S. CONST. art. 1, § 4, cl. 2.

²⁰⁸ For the exact dates that each Congress was formally in session, see *Dates of Sessions of the Congress*, U.S. SENATE (Nov. 11, 2017), <https://www.senate.gov/reference/Sessions/sessionDates.htm>.

²⁰⁹ *The August Recess*, U. S. SENATE (Nov. 11, 2017), https://www.senate.gov/artandhistory/history/common/generic/News_August_Recess.htm.

²¹⁰ It is important to note that often there is no break between the adjournment of one session and the start of the next. See *Dates of Sessions of the Congress*, *supra* note 208. It is also possible for Congress to remain in session by holding *pro forma* sessions during an adjournment.

provided that, under its own rules, it retains the capacity to transact Senate business.”²¹¹ Under this definition, Congress would remain in session if it continued to hold *pro forma* sessions at least every three days, even during a lengthy intra-session recess.²¹² This is because during these sessions “the Senate retained the power to conduct business . . . simply by passing a unanimous consent agreement.”²¹³

Applying this standard to the 2017 congressional schedule, it appears that Congress was continually in session from January 3, 2017 to January 3, 2018. (It held *pro forma* sessions every Tuesday and Friday during the August recess.²¹⁴) In modern practice, it is common for Congress not to adjourn between sessions until the start of the next session.²¹⁵ In that case, any declaration sent by the Vice President and the Principal Officers or other body would likely be considered to have been received while Congress was in session, thus immediately starting the 21-day clock.

If Congress is *not* in session when it receives the declaration, the Amendment mandates two things: first, that Congress convene within 48 hours, and second, that the 21-day clock begin once it “is required to assemble.” Fortunately, the legislative history is quite clear on how this timeline would work. Because the Vice President would, at this time, be Acting President, he would be expected to immediately exercise his Article II, Section 3 constitutional power to “convene both Houses” as quickly as possible given the circumstances.²¹⁶ The 21-day timeframe would then begin at the time he instructed Congress to assemble. Alternatively, if the Vice President did not act, the 21-day clock would begin either when the Speaker and the President *pro tempore* call their houses into session or at the end of the 48-hour period, whichever came first.²¹⁷

To summarize, there are three key events that determine the timeline that Congress must follow if it is forced to decide the question of Presidential inability. First, the timeline is triggered upon “receipt” of a second declaration by the Vice President and the Principal Officers or other body proclaiming the President unfit for office. Second, whether the 21-day clock is immediately triggered depends on whether or not Congress is “in session.” If it is, this three-week deliberative period begins from the moment of receipt. Third, if Congress is not in session at the time, the three-week clock begins when Congress “is required to assemble,” by the Vice President, the Speaker and President *pro tempore*, or the text of the Amendment itself. In any event, once Congress is back in session and in receipt of the second declaration, it should then turn to the question of the President’s ability to “discharge the powers and duties of his office.”²¹⁸

²¹¹ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014). While the court was clear in its stipulation that this was only for the purposes of the Recess Appointments Clause, this is still the fullest definition of what “in session” means that the court has given.

²¹² *Id.* at 2557 (stating that for the purposes of the Recess Appointments Clause, “we cannot ignore these *pro forma* sessions” to hold that Congress was not in session).

²¹³ *Id.* at 2575.

²¹⁴ *Days in Session of the U.S. Congress: 115th Congress, 1st Session*, CONGRESS.GOV (Nov. 11, 2017), <https://www.congress.gov/days-in-session>.

²¹⁵ See *Dates of Sessions of the Congress*, *supra* note 208.

²¹⁶ U.S. CONST. art. II, § 3.

²¹⁷ For a fuller account of this process, see FEERICK, *supra* note 9, at 119.

²¹⁸ U.S. CONST. amend. XXV, § 4.

B. Must two-thirds of each House vote separately, or is two-thirds of the combined vote of both Houses sufficient to sustain a determination of presidential inability?

“A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office.”

The two houses vote separately. The joint conference report stated, “A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office.”²¹⁹ In addition, the then-Attorney General interpreted the text to mandate “a two-thirds vote . . . of those Members in each House present and voting, a quorum being present.”²²⁰ The White House

Counsel’s office supported the theory that the vote does not require that all members be present, writing “Both the House and Senate Committee Reports support that view. . . both Reports note that this vote is in conformity with the Constitutional provision on impeachments. That provision provides for a two-thirds vote in the Senate of those members present.”²²¹ Finally, the House report stated, “The committee contemplates that votes taken pursuant to the provisions of the proposed constitutional amendment will be conducted in accordance with the rules of the House and Senate, respectively, and that record votes may be taken when in conformity with such rules.”²²² If the two-thirds vote does not take place within the required 21-day period, power reverts to the President.²²³

C. Are the two Houses of Congress required to adhere to any particular burden of proof in deciding inability?

No. There is no particular burden of proof to which Congress is required to adhere in adjudicating the President’s inability. The Framers of the Twenty-Fifth Amendment deliberately gave the two houses of Congress wide latitude in how to arrive at their determination. The original Senate report stated, “The discussion of the committee made it abundantly clear that the proceedings in the Congress prescribed in section [4] would be pursued under rules prescribed, or to be prescribed, by the Congress itself.”²²⁴

There is no particular burden of proof to which Congress is required to adhere in adjudicating the President’s inability. The Framers of the Twenty-Fifth Amendment deliberately gave the two houses of Congress wide latitude in how to arrive at their determination.

²¹⁹ H.R. REP. NO. 89-564 (1965).

²²⁰ S. REP. NO. 89-66 at 20 (1965).

²²¹ Memorandum from Associate White House Counsel Bobbie Greene Kilberg to President Gerald Ford, through Deputy White House Counsel Roderick M. Hills (Aug. 21, 1975), <https://www.fordlibrarymuseum.gov/library/document/0019/4520859.pdf>.

²²² H.R. REP. NO. 89-203 at 14 (1965).

²²³ See FEERICK, *supra* note 9 at 119–120. Congress also has the option of settling the issue in this manner; that is, choosing not to have a vote. *Id.*

²²⁴ S. REP. NO. 89-66 at 3 (1965).

While there is no minimum level of deliberation required, Senator Bayh elaborated on how the debate might unfold. “Congress is sitting in judgment. You bring in the medical experts and constitutional authorities and . . . talk to the specific physicians that are dealing with the specific case. You can come to a more learned decision than would normally be the case.”²²⁵ He further said, “Oh yes, there would be a public debate I think [they] would call witnesses.”²²⁶ In describing the Senate report, he stated, “The Senate wanted a little more time because they felt they ought to make sure there was ample time to get all the evidence and to have hearings and have everybody operate on the basis of good, sound fact, not supposition.”²²⁷ Referring to the unregulated nature of the congressional proceedings, Senator Bayh said, “I must confess I am not completely comfortable with what would be going on in Congress during a debate like that. That is a horrible situation to try to envisage.”²²⁸

In addition, there appears to be no burden of proof to justify a Congressional finding of presidential inability. The Senate Judiciary Committee report stated, “It is also the contention of this committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence *it determined necessary* to make such a final determination.”²²⁹ Rep. Edward Hutchinson, who worked on the drafting process, stated, “the decision will be a political one. There is no suggestion that medical or psychiatric evidence even be considered.”²³⁰ Senator Roman Hruska, a leading conservative involved in the amendment’s drafting, stated, “It would require no specific charge. It would not define the proof which is required. It would be a determination of facts with no guidelines against which to measure them.”²³¹

D. What procedures *should* Congress use to determine presidential inability?

The Twenty-Fifth Amendment creates no legal requirements for the procedures to be followed by Congress. Any dispute about Congress’s internal procedures for adjudicating presidential inability would almost certainly constitute a nonjusticiable political question.²³² However, the procedures Congress uses to deliberate and decide whether the President is disabled under the Twenty-Fifth Amendment have the potential either to enhance or diminish significantly both the actual and perceived legitimacy of its decision. At a moment of unprecedented public attention and controversy, such legitimacy will be of paramount importance, and would likely be hotly contested.²³³

With this in mind, the Presidential Succession Clinic at Fordham Law School examined potential congressional procedures and made recommendations that would enhance the process. We largely agree with that Clinic’s analysis and recommendations. To begin with, the Clinic listed five principles it believed should guide the procedures chosen for congressional deliberations:

²²⁵ Bayh, *supra* note 115, at 17.

²²⁶ *Id.* at 20.

²²⁷ *Id.* at 31-32.

²²⁸ *Id.* at 20.

²²⁹ S. REP. NO. 89-66 (1965) at 3 (emphasis added).

²³⁰ H.R. REP. NO. 89-203 at 19 (1965) (supplemental views of Rep. Edward Hutchinson).

²³¹ 1965 Senate Subcomm. Hearings, *supra* note 43, at 33 (statement of Sen. Hruska).

²³² See *infra* Part VI.

²³³ At the time of the Clinton impeachment, for instance, there was substantial criticism of the laxness of the impeachment rules of evidence and other procedural guarantees in Senate impeachment trials. See, e.g., POSNER, *supra* note 152, at 120-32.

maximizing (1) informed deliberations, (2) urgency and efficiency, (3) democratic and procedural legitimacy, (4) fairness to the President, and (5) a spirit of “constitutional morality” free from partisanship and self-interest.²³⁴

In order to maximize legitimacy and avoid the unnecessary expenditure of parts of Congress’s 21 days on procedural matters, the Fordham Clinic recommended that the procedures be formalized beforehand.²³⁵ In terms of the format for the proceedings, the Fordham Clinic recommended a bipartisan joint committee, composed of members of the Senate Rules and House Judiciary committees, and working under expedited procedures.²³⁶

This format has a number of advantages. Although joint committees are not the norm, they have been utilized to great effect in investigations of national importance, including those of the attack on Pearl Harbor and the Iran-Contra Affair.²³⁷ A joint committee would avoid duplicative procedures, which would maximize efficiency and legitimacy, ensure that both Houses make their determination based on the same set of facts, and eliminate potential unfairness to the President from having to make his case twice.²³⁸

Because the Senate Rules and House Judiciary Committees have jurisdiction over presidential succession, drawing members at least largely from those committees would ensure that the procedures were guided by legislators and staff members with expertise in the area.²³⁹ Making the committee bipartisan would enhance both the perception—and the actual likelihood—that the proceedings would be guided by a spirit of “constitutional morality.”²⁴⁰ Legislators who are not members of the Joint Committee should be able to submit questions for the Joint Committee to pose to witnesses.²⁴¹ And while documents and hearings should generally be public, certain evidence may be adduced behind closed doors, based on a majority vote of the Committee, for reasons of national security, presidential privacy, or presidential public image.²⁴²

Finally, both the Committee’s deliberations and the debate and vote in each House should be governed by expedited procedures. The Clinic suggests that the Joint Committee should finish its investigation within the first sixteen days, leaving five days for each House to debate and vote on the issue.²⁴³ While the actual allotment of days is negotiable, we believe that another of the Clinic’s recommendations is of paramount importance: that during the debate-vote period, the filibuster be suspended in the Senate, so that all delaying tactics are discouraged in both Houses.²⁴⁴

²³⁴ Fordham University School of Law Second Clinic on Presidential Succession, *supra* note 29, at 972–73.

²³⁵ *Id.* at 971.

²³⁶ *Id.* at 975–78.

²³⁷ *Id.* at 975.

²³⁸ *Id.* at 976.

²³⁹ *Id.* at 976–77.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 977.

²⁴² *Id.* at 980–81.

²⁴³ *Id.* at 977.

²⁴⁴ *Id.* at 977–78.

E. What congressional powers are available to obtain or coerce evidence?

Congress has the same powers as in regular order. The Senate Judiciary Committee concluded that “Congress should be permitted to collect all necessary evidence and to participate in the debate needed to make a considered judgment.”²⁴⁵ The use of the words “should” and “permitted” suggest that the framers of the Amendment expected that relevant parties would be responsive to congressional requests for evidence, but did not intend automatically to expand Congress’s power to gather evidence. One of Congress’s key powers is its power to convene hearings and issue subpoenas for witnesses. As Senator Hruska noted, Congress “would want evidence. They would be entitled to it. They would be entitled to have members of the Cabinet come before it to express their opinions and their report on observations of the President’s condition, health, and so on.”²⁴⁶ None of this suggests that Congress’s investigative powers are instantly enlarged during Twenty-Fifth Amendment proceedings.

One obvious question is whether Congress can exercise compulsory process over the President, and in particular, his medical records. The legislative history on this issue is relatively sparse and somewhat ambiguous. Some of the language used by individual Senators seems to imply vague limits on its coercive power.²⁴⁷ Yet a more prevalent belief appears to have been that either house of Congress would have some degree of power to compel the President to comply or, faced with his refusal, could use that refusal as circumstantial evidence of his inability or at least, intransigence. In its report, the Senate Judiciary Committee made clear its feelings “that Congress should be permitted to collect *all* necessary evidence” to arrive at an appropriate conclusion.²⁴⁸ While it was “abundantly clear that the proceedings in Congress . . . would be pursued under rules prescribed, or to be prescribed, by the Congress itself,” the House hearings raised the possibility that these rules—and any legislation hindering its ability to collect the necessary evidence—could be lawfully amended during the 21-day period to facilitate its investigation.²⁴⁹

Possible mechanisms for obtaining medical information have been discussed above. Specific to medical privacy, the House debates appear to be the only time the issue was raised. Congressman Rogers did raise his concern that “there is a confidential relationship between doctor and patient.”²⁵⁰ In response, Congressman Curtin proposed a workaround, where the President’s doctor would not be authorized to reveal “any previous history, but . . . [could] conduct an examination at this particular time on this particular question and testify to the court his findings. He could have been the doctor for the last 10 years, but he can still do it.”²⁵¹ Curtin implied that if the President’s personal doctor were too politically or emotionally

²⁴⁵ S. REP. NO. 89-66 (1965) at 3.

²⁴⁶ 1964 Senate Subcomm. Hearings, *supra* note 65, at 35 (statement of Sen. Hruska).

²⁴⁷ S. REP. NO. 89-66 (1965) at (individual views of Sen. Hruska) (noting that while the Amendment “leaves to Congress the determination of what, in light of the circumstances then existing, must be examined . . . the matter will be examined on the evidence *available*. It is desirable that the matter be examined with a sympathetic eye toward the President who, after all, is the choice of the electorate”) (emphasis added).

²⁴⁸ *Id.* at 3. Note the difference in opinion between the committee report (interpreting the Amendment to give Congress a broad power to collect all *necessary* evidence), versus that of Senator Hruska (saying it only has the power to collect *available* evidence).

²⁴⁹ See 1965 House Judiciary Hearings, *supra* note 13, at 140 (statement of Rep. Basil Whitener) (interpreting the proposed Amendment a “leav[ing] the Congress in position to . . . implement or do other things which may be necessary to carry out the amendment”).

²⁵⁰ *Id.* at 143.

²⁵¹ *Id.*

attached to the President to make an objective judgment, Congress would have the power to send other medical experts to examine the President, by force if necessary.²⁵² Thus, at least some of the Amendment's framers plainly intended to give Congress the power to compel contemporary medical evidence from the President, based either on the substance of the Amendment alone or on Congress' ability to pass legislation and amend its rules during the 21-day period.

1. HIPAA and Congressional Process

Today, the Health Insurance Portability and Accountability Act (HIPAA)²⁵³ provides specific privacy protections for individual medical records. However, it is unlikely that the President could invoke HIPAA protections to prevent Congress from compelling him to undergo a medical examination. First, HIPAA is a statute, and most of its substantive protections and exceptions were enacted by regulation.²⁵⁴ As a result, Congress could pass legislation waiving any restriction for the purposes of carrying out its investigation. And it would presumably not require a veto-proof majority to do so, since the Vice President would be Acting President exercising the power of the veto during this period. Attorney General Katzenbach anticipated this issue during hearings on the Amendment, speculating that Congress "might quite legislatively want medical examinations. You might even legislatively want those medical examinations, those opinions, before the Congress, before either House, before it acted."²⁵⁵

2. Executive Privilege

More generally, presidents are usually exempt from congressional subpoenas under the constitutional doctrine of executive privilege. Thomas Jefferson wrote that, "To comply with such [congressional] calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function."²⁵⁶ Citing executive privilege, presidents have refused to comply with requests to testify before congressional committees.²⁵⁷

However, executive privilege has been pierced on numerous occasions, and likely would be unavailing during an implementation of the Twenty-Fifth Amendment. The Supreme Court famously addressed the scope of executive privilege in *United States v. Nixon*. The Court formally recognized the privilege, but found that Nixon's blanket invocation of it would place an "impediment . . . in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions [that] would plainly conflict with the function of the courts under Art[icle] III," and that "the legitimate needs of the judicial process may outweigh

²⁵² *Id.* at 140. The discussion consisted of the following colloquy: Mr. Whitener: "Suppose the President says, 'I am not going to have any doctor down here looking at me, I am President of the United States,' then what happens?" . . . Mr. Curtin: "Now, in those circumstances, somebody has to be able to go in and forcibly examine the President, and I think—" Mr. Whitener: "Forcibly?" Mr. Curtin: "I think this Commission should have the power to compel an examination, yes." See also, *id.*, at 144. While this conversation took place in the context of discussing the separate body Congress could set up to determine Presidential disability, it is safe to assume that the same powers and limitations discussed here would continue to apply during the 21-day period.

²⁵³ Pub. L. 104-191 (1996).

²⁵⁴ See generally 45 C.F.R. pt. 164.

²⁵⁵ 1965 Senate Subcomm. Hearings, *supra* note 43, at 21-22 (statement of Att'y Gen. Katzenbach).

²⁵⁶ Letter from Thomas Jefferson to George Hay (June 17, 1807), in 10 THE WORKS OF THOMAS JEFFERSON 400, 401 (Paul Leicester Ford ed., 1905).

²⁵⁷ See, Todd Garvey, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, CONG. RES. SERV. (Dec. 15, 2014), <https://fas.org/sgp/crs/secretcy/R42670.pdf>.

Presidential privilege.”²⁵⁸ It held that executive privilege did not shield President Nixon from compliance with the relevant subpoena because a “generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”²⁵⁹

Executive privilege would likely not prevent Congress from compelling the President to divulge information in service of an effort to implement the Twenty-Fifth Amendment.

United States v. Nixon clearly indicates that executive privilege is not absolute. On the other hand, it does not directly determine the case of a president recalcitrant in the face of Congressional process in the Twenty-Fifth Amendment context: the subpoena at issue in *Nixon* was a judicial, rather than Congressional, subpoena. Lower court opinions, however, suggest that executive privilege would likely not prevent Congress from compelling the President to divulge information in service of an effort to implement the Twenty-Fifth Amendment.

Executive privilege is governed by a balancing test. The privilege has two components, each with different scope: the deliberative process privilege and the presidential communications privilege.²⁶⁰ The deliberative process privilege protects “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”²⁶¹ The balancing test for the deliberative process privilege is “more ad hoc” and includes factors like whether the government is a party to the litigation, and “the privilege disappears altogether when there is any reason to believe government misconduct occurred.”²⁶²

The presidential communications privilege protects materials that reflect “presidential decision-making” and which the President believes should remain confidential; such materials are “presumptively privileged.”²⁶³ The presidential communications privilege is generally considered “more difficult to surmount.”²⁶⁴ However, even that “privilege is qualified, not absolute, and can be overcome by an adequate showing of need.”²⁶⁵

Because compelling the President to be examined or otherwise provide certain evidence about his ability to discharge the powers and duties of the presidency would be unlikely to implicate a need for confidentiality, it seems unlikely either component of the privilege would apply. This is especially true in the context of the Twenty-Fifth Amendment process, where a showing of extraordinary necessity would apply to such information. (Additionally, as any compulsory process in service of the Twenty-Fifth Amendment would only take place when the President was relieved of his powers and duties, many of the rationales for protecting the President from

²⁵⁸ *United States v. Nixon*, 418 U.S. 683, 707 (1974).

²⁵⁹ *Id.* at 713.

²⁶⁰ *In re Sealed Case*, 121 F.3d 729, 762 (D.C. Cir. 1997) (holding that executive privilege “extends to communications authored by or solicited and received by presidential advisers and that a specified demonstration of need must be made even in regard to a grand jury subpoena”).

²⁶¹ *Id.* at 737 (“Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.”) (collecting cases).

²⁶² *Id.* at 746.

²⁶³ *Id.* at 744.

²⁶⁴ *Id.* at 746.

²⁶⁵ *Id.* at 745.

being forced to appear before Congress would not apply.) Nevertheless, we analyze below various instances in which executive privilege was asserted and adjudicated.

In *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, the D.C. Circuit refused to enforce a subpoena on certain White House tapes.²⁶⁶ However, the Court based its decision largely on the finding that enforcing the subpoena would be “merely cumulative”—the House Judiciary Committee already had possession of the relevant tapes—and that, in contrast to the House Judiciary Committee, which was constitutionally tasked with judging impeachments, obtaining the tapes was insufficiently “critical to the performance of [the Select Committee’s] legislative functions.”²⁶⁷

In 2007, President George W. Bush invoked executive privilege during a congressional investigation into the removal of nine United States Attorneys. The House Judiciary Committee challenged the privilege claims, and the D.C. district court held that senior presidential advisers do not enjoy absolute immunity from compelled testimony or production of documents pursuant to a congressional subpoena.²⁶⁸

In 2012, President Obama invoked executive privilege in response to a subpoena from the House Oversight Committee seeking information from Attorney General Eric Holder regarding DOJ’s response to the committee’s investigation into Operation Fast and Furious. Similar to the U.S. Attorneys controversy, a civil suit was filed to compel the executive branch to comply with the committee subpoena. The D.C. district court ultimately held that while the subpoenaed documents were covered by the deliberative process component of executive privilege, the Department of Justice’s previous disclosure of many of the same documents waived its protections.²⁶⁹

Finally, in *Clinton v. Jones*, the U.S. Supreme Court held that a sitting President “is subject to judicial process in appropriate circumstances,” including court-ordered testimony in civil and criminal proceedings involving conduct that occurred when the defendant was not President.²⁷⁰ Like *United States v. Nixon*, *Clinton v. Jones* dealt with judicial rather than congressional process. However, if a sitting active President may be subject to compulsory process from the judicial branch regarding a private civil matter based on his private conduct, it seems likely that a potentially disabled President would be similarly subject to compulsory process from Congress on a public matter as important as the implementation of the Twenty-Fifth Amendment.

The doctrine of executive privilege has not been tested in the context of compelling a President to appear before a Congressional hearing. But if the issue arose, its resolution would likely require a court’s intervention, as in the civil cases just discussed. In the end, the President would most likely be deemed lawfully subject to a congressional subpoena issued in service of the Twenty-Fifth Amendment process.

²⁶⁶ 498 F.2d 725, 732 (D.C. Cir. 1974).

²⁶⁷ *Id.* at 731–32.

²⁶⁸ *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

²⁶⁹ *Comm. on Oversight & Gov’t Reform v. Lynch*, 156 F. Supp. 3d 101, 112–15 (D.D.C. 2016).

²⁷⁰ 520 U.S. 681, 704–705 (1997) (discussing long history of sitting presidents responding to judicial process to provide testimony in both civil and criminal proceedings).

3. Attorney-Client Privilege

A narrower category of evidence may give rise to a dispute about attorney-client privilege: communications between the President and White House attorneys. There is some disagreement as to whether and under what circumstances attorney-client privilege should apply to congressional proceedings. Two cases arguing for disclosure arose out of the Whitewater controversy.

In *In re Grand Jury Subpoena Duces Tecum*, the Eighth Circuit held that the independent counsel may access the notes of White House attorneys related to the investigation.²⁷¹ It argued that “the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.”²⁷²

Likewise, in *In re Lindsay*, the D.C. Circuit held that the independent counsel could compel grand jury testimony from a Deputy White House Counsel.²⁷³ It reasoned that “it would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel.”²⁷⁴ For similar reasons, the Seventh Circuit held that a state official could not invoke the privilege to prevent government counsel from testifying in a grand jury investigation.²⁷⁵

On the other hand, the Second Circuit has held that a governor may invoke attorney-client privilege regarding his communications with government attorneys in connection with a criminal investigation.²⁷⁶ The Court reasoned that “if anything, the traditional rationale for the privilege applies with special force in the government context.”²⁷⁷

It is worth noting that each of these cases was decided in the context of a criminal, rather than legislative, investigation. Additionally, the courts that have ruled in favor of disclosure seem to have been significantly preoccupied with the government lawyer’s second, higher duty to the public interest, especially when the privilege would prevent the revelation of official misconduct.²⁷⁸

²⁷¹ 112 F.3d 910, 921 (8th Cir. 1997).

²⁷² *Id.*

²⁷³ 158 F.3d 1263, 1278 (D.C. Cir. 1998) (*per curiam*).

²⁷⁴ *Id.* The Court also noted, however, that the privilege attaches to the President’s communications to his private counsel to the same extent as any other person, and that a government lawyer could under some circumstances be covered by the privilege where that attorney acted merely as an intermediary with the President’s private counsel. *Id.* at 1279.

²⁷⁵ *In re Witness Before Special Grand Jury 2000-2 (Ryan)*, 288 F.3d 289, 294 (7th Cir. 2002) (Wood, J.) (noting that “the privilege with which we are concerned today runs to the office, not to the employees in that office. . . . a government attorney should have no privilege to shield relevant information from the public citizens to whom she owes ultimate allegiance, as represented by the grand jury.”).

²⁷⁶ *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005).

²⁷⁷ *Id.* at 534.

²⁷⁸ See *Ryan*, 288 F.3d at 293 (noting that unlike private counsel, “government lawyers have a higher, competing duty to act in the public interest” and that “[i]t would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power”); *Lindsey*, 158 F.3d at 1273 (“This view of the proper allegiance of the government lawyer is complemented by the public’s interest in uncovering illegality among its elected and appointed officials.”); *In re Grand Jury Subpoena*, 112 F.3d at 921 (“We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.”).

We think that a court would generally be reticent to compel the disclosure of material otherwise covered by attorney-client privilege. However, if there is a demonstrated level of compelling need for the material or it would potentially reveal misconduct or criminal activity, a court could well find that material to be unprivileged.²⁷⁹

F. How may the President make the case for his or her ability to serve?

The President possesses a number of avenues for stating his or her ability to serve: First, the President may, broadly speaking, comply with all of Congress's requests during its deliberation. Second, the President will almost certainly strive to influence public opinion outside of these formal proceedings. This might take the form of speeches, pronouncements, interviews, the release of information pertaining to his health, and other public statements from those close to him who could attest to his ability.²⁸⁰ Third, in theory, the President could even appear before Congress,²⁸¹ although Congress, not the President, would control the formal proceedings, and the President's influence over the proceedings would be limited.

President Clinton's impeachment trial provides a useful analogy for how the President might resist a Section 4 determination. The Clinton White House largely complied with the Senate process while seeking to use every tool at its disposal—including its allies in Congress—to defend the President.²⁸² However, as noted in Part III.D of this Reader's Guide, we believe that the Department of Justice and the White House Counsel should serve the Acting President, rather than the President, during this period.

G. Would frustrating this congressional process constitute an impeachable offense?

Depending on the circumstances, frustrating the Twenty-Fifth Amendment process could constitute an impeachable offense. In the words of Professor Tribe, impeachable "high crimes and misdemeanors" "constitute major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted (as in the case of a public official who accepts a bribe in order to turn his official powers to personal or otherwise corrupt ends), or grave wrongs in pursuit of governmental power."²⁸³ Thus, if a President were to interfere with the congressional proceedings through abuse of authority or some other official misconduct, Congress could use those actions as a basis for impeachment proceedings.

²⁷⁹ Cf. Fordham University School of Law Second Clinic on Presidential Succession, *supra* note 29, at 983 ("Based on the sparse precedent, a court is unlikely to override attorney-client privilege in a Section 4 proceeding absent an extremely high showing of need.")

²⁸⁰ See Bayh, *supra* note 115, at 20.

²⁸¹ See 1965 *House Judiciary Hearings*, *supra* note 13, at 145 (statement of Rep. Willard S. Curtin) (saying he would "certainly . . . have no objection to the President being heard . . . under those circumstances," and while there is no requirement that he speak, assuming that "he certainly would not stand mute during this whole proceeding unless he was in real bad shape").

²⁸² For a full account of White House activities during this period, see PETER BAKER, *THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* (2000).

²⁸³ See Laurence H. Tribe, *Defining 'High Crimes and Misdemeanors': Basic Principles*, 67 *GEO. WASH. L. REV.* 712, 718 (1999). The misconduct would have to be of a serious nature. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 90 (1973) (concluding that the Constitution does not contemplate "resort[ing] to impeachment of the President for petty misconduct.")

VI. Judicial Review of a Determination of Inability

The political question doctrine likely precludes any judicial review of the Vice President, Principal Officers, and Congress’s *substantive* determination of presidential inability under Section 4 of the Twenty-Fifth Amendment. As with other situations in which the political question doctrine applies, Section 4 contains a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”²⁸⁴

For prudential reasons, we think it highly unlikely that a court would get involved absent a patent and material departure from the Amendment’s clear procedures. But the political question doctrine in its current form does not altogether foreclose such review.

Although it is highly unlikely that any court would do so, there are doctrinal avenues available for a court to adjudicate the merits of certain *procedural* challenges to an invocation of Section 4. Although the Court invoked the political question doctrine in *Nixon v. United States* in declining to evaluate the Senate’s procedure for convicting an impeached federal judge,²⁸⁵ that reasoning might not apply in the Twenty-Fifth Amendment context. The legislative history of the Twenty-Fifth Amendment also gives some indication that the framers of that Amendment contemplated that a court might one day need to interpret at least

some of its procedural requirements. For prudential reasons, we think it highly unlikely that a court would get involved absent a patent and material departure from the amendment’s clear procedures. But the political question doctrine in its current form does not altogether foreclose such review.

A. Is judicial review available for the substantive determination of presidential inability?

No. The Amendment’s text strongly suggests that the determination of presidential inability is a political question, committed to the political branches.

The modern political question doctrine has its origins in Justice Brennan’s plurality opinion in *Baker v. Carr*. In that case, the Court held that the federal courts could exercise jurisdiction over challenges to legislative apportionment and that such questions were not non-justiciable “political questions.” According to the plurality, the political question doctrine is “essentially a function of the separation of powers,” and is triggered by:

“a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for

²⁸⁴ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁸⁵ 506 U.S. 224 (1993).

unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”²⁸⁶

The recent decision in *Zivotofsky v. Clinton* arguably narrows the *Baker* test to the first two, textual factors (as opposed to the last four, prudential factors).²⁸⁷ Section 4 of the Twenty-Fifth Amendment clearly commits the initial determination of presidential inability to political actors: “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.”²⁸⁸ Moreover, the Amendment contains a built-in mechanism for appeal that excludes the judicial branch. If there is disagreement between the President on one hand, and the Vice President and a majority of either the Principal Officers or “such other body as Congress may by law provide” on the other, then “Congress shall decide the issue.”²⁸⁹ Congress, not the judiciary, is to be the ultimate arbiter of presidential inability.

Moreover, under the second *Baker* prong, the issue of presidential inability lacks “judicially discoverable and manageable standards for resolving it.”²⁹⁰ As the court later noted in *Nixon v. United States*, “the concept of a textual commitment to a coordinate political department is not completely separable from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”²⁹¹ As discussed above in Part II of this report, the framers of the Amendment purposefully avoided providing a precise substantive definition of inability, and the text of the Amendment provides no guidance on that issue.²⁹² On its face, the question whether the President is or is not “unable to discharge the powers and duties of his office” appears to be a political determination, and not a judicially manageable standard. . Thus, a judicial challenge to invocation or operation of the Twenty-Fifth Amendment could well be dismissed even under the *Zivotofsky* Court’s recently narrowed “textual factors” test for determining political questions.

The history of the Amendment’s enactment and public statements by its principal drafters also suggest that the determination of inability was meant to be a political question. For instance, in a colloquy with Senator Kennedy on the definition of inability, Senator Bayh readily admitted that the Amendment provided “leeway with respect to Congress and the committees and the Cabinet.”²⁹³ When Senator Kennedy raised the concern that the Principal Officers might exploit the flexible inability standard to remove a President pretextually because of political disagreement, Senator Bayh countered that the absence of a mechanism to declare a President unable posed “considerably more” danger than did the flexible standard.²⁹⁴ That one of the

²⁸⁶ *Id.* (emphasis added).

²⁸⁷ *Zivotofsky v. Clinton*, 566 U.S. 189 (2012); see also *id.* at 204-06 (Sotomayor, J., concurring) (defending the importance of prudential factors); Rachel Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267 (2002) (describing judicial narrowing of the prudential political question doctrine).

²⁸⁸ U.S. CONST. amend. XXV, § 4.

²⁸⁹ *Id.*

²⁹⁰ *Baker*, 369 U.S. at 217.

²⁹¹ 506 U.S. at 228-29.

²⁹² See *supra* Part II.

²⁹³ 111 CONG. REC. 15,381 (1965) (statement of Sen. Bayh).

²⁹⁴ *Id.*; see also Birch Bayh, *The White House Safety Net*, N.Y. TIMES (Apr. 8, 1995), <http://www.nytimes.com/1995/04/08/opinion/the-white-house-safety-net.html> (“as Dwight D. Eisenhower said,

Amendment’s key framers defended the flexible inability standard strongly suggests that drafters sought to provide great discretion to the political process.

The larger historical context similarly suggests that inability is a political question. The drafters of the Twenty-Fifth Amendment sought to solve ambiguities in the Constitution’s existing inability provision, Article II, Section 1, Clause 5. Article II did not clearly establish “who has the authority to determine what inability is, when it commences, and when it terminates.”²⁹⁵ The drafters of the Twenty-Fifth Amendment provided a clear answer to these questions: the determination is made by the Vice President acting in concert with the Principal Officers (or such other body as Congress may provide), with Congress being the ultimate arbiter. To unsettle this textually clear delegation of authority by inserting the judiciary into the process would significantly undermine Congress’s goal of remedying this uncertainty.

Finally, the political realities of presidential succession—including “an unusual need for unquestioning adherence to a political decision already made”—make it unlikely that a court would intervene.²⁹⁶ In a floor colloquy immediately preceding the Senate vote on the Amendment, Senator Albert Gore, Sr. of Tennessee predicted that “it is entirely conceivable that while the courts are in the process of making a final determination there might be two individuals claiming the power of the Presidency.”²⁹⁷ Such a state of affairs would clearly run counter to the Amendment’s purpose of avoiding “the catastrophe of disputed succession or the chaos of uncertain command.”²⁹⁸ As a purely prudential matter, the lower courts and the Supreme Court would likely be hesitant to enter a deeply fraught political and constitutional controversy over which the judges would have little competency and control.²⁹⁹

B. Is judicial review available for procedural challenges to the determination of inability?

Perhaps yes, but only if limited to certain procedural requirements clearly specified in the text of the Amendment itself—and, even then, a court would likely refrain from exercising jurisdiction.

the ‘determination of Presidential disability is really a political question.’ The Vice President and Cabinet are uniquely able to determine when it is in the nation’s best interests for the Vice President to take the reins”). It was President Eisenhower’s disability that helped make clear the need for the Twenty-Fifth Amendment when he suffered a minor stroke while in office. Jeffrey Rosen, *The Twenty-Fifth Amendment Makes Presidential Disability a Political Question*, THE ATLANTIC (May 23, 2017), <https://www.theatlantic.com/politics/archive/2017/05/presidential-disability-is-a-political-question/527703/>.

²⁹⁵ S. REP. NO. 88-1382, at 11 (1964).

²⁹⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁹⁷ 111 CONG. REC. 15,588 (1965) (statement of Sen. Gore).

²⁹⁸ Letter from President Lyndon B. Johnson to the Congress of the United States (Jan. 28, 1965), reprinted in SELECTED MATERIALS ON THE TWENTY-FIFTH AMENDMENT, S. DOC. NO. 93-42, at 114 (1973); see also 1964 Senate Subcomm. Hearings, *supra* note 65 at 85 (statement of Walter Craig, President of the American Bar Association) (“Congressional leaders, constitutional scholars, and many others are in complete agreement that something must be done to eliminate the possibility of chaos in the event of the President’s disability.”).

²⁹⁹ See generally Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT 335 (2001) (arguing that the Court’s ruling in *Bush v. Gore* was unnecessary and threatened to diminish public trust and confidence in the Court as well as its institutional standing and overall effectiveness); Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001) (describing the effects of the controversial decision in *Bush v. Gore* on public perceptions of the Supreme Court’s legitimacy as modest, but measurable); but see BERGER, *supra* note 283, at 119 (“I would urge that judicial review of impeachment is required to protect the other branches from Congress’ arbitrary will.”).

The history of the drafting suggests that some framers of the Twenty-Fifth Amendment did intend for courts to interpret the provision. In floor debates immediately before the Amendment's passage, Senator Gore expressed concern that "the Court might someday of necessity have to rule upon" certain ambiguous provisions of the Amendment.³⁰⁰ Specifically, Senator Gore found it ambiguous whether Congress's creation of an "other body" would necessarily eliminate the Principal Officers from the equation.³⁰¹ In other words, according to Senator Gore, the Supreme Court might one day face a situation in which it would need to decide whether the Principal Officers or "such other body" should prevail if their views of the president's inability conflicted.

Senator Bayh, the principal drafter and proponent of the Amendment, engaged with Senator Gore's concerns directly, pointing to judicial interpretations of Article V as "evidence about what the courts have indicated in this respect."³⁰² Senator Bayh went on to note that, in case there should be any ambiguity, the Court would look to legislative intent and "[a]s a result of the insight and the perseverance of the Senator [Gore] from Tennessee, we have now written a record of legislative intent . . ."³⁰³ Senator Bayh's statements seemed to assume that a court called upon to interpret the procedures prescribed by the Amendment would reach the merits of the question.

In this extended colloquy over whether the language of the amendment was sufficiently clear to allow for definitive *judicial* interpretation, only Senator Ervin directly raised the justiciability question. Ervin, a proponent of the bill, disagreed with Senator Gore's prediction that uncertainty on that point might lead to a "court contest."³⁰⁴ Ervin noted that "[i]n [his] view [the question of whether or not the President is capable of performing the duties of his office] would be a political question and for that reason the Court would not be called upon to pass upon it."³⁰⁵

In 1988, the Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment, which included Senator Bayh, noted in its final report that "the chief justice and other members of the Supreme Court should have no role in any such body or in any other fashion under the terms of the 25th Amendment" because "in a situation perhaps now unimaginable, the Supreme Court might be called to rule on some application of the [Twenty-Fifth] Amendment."³⁰⁶ That is, the Commission foresaw that the justices might one day have to

³⁰⁰ 111 CONG. REC. 15,588 (1965) (statement of Sen. Gore).

³⁰¹ *Id.*

³⁰² *Id.* at 15,593 (statement of Sen. Bayh). Senator Bayh saw, in the constitutional amendment process prescribed in Article V, an analogy to Senator Gore's objection to the proposed Amendment in that Article V also offers a choice between two procedures. *Id.* at 15,594 ("In dealing with the fifth article, courts have held in those cases to which I have referred—which are as close to being on the point as any I have been able to find—that Congress has full and plenary power to decide which method should be used, and once the choice is made, the other method is precluded.").

³⁰³ *Id.* at 15,594 (statement of Sen. Bayh).

³⁰⁴ *Id.* at 15,589 (statement of Sen. Ervin) ("I do not understand how there would be a court contest, because the amendment provides that the Vice President, acting with either the Cabinet or another body established by Congress, would raise the question.") Senator Ervin seemed to view Congress as the ultimate arbiter of presidential inability. *Id.* ("They [the Vice President and either the Cabinet or another body established by Congress] would make a temporary decision, and that temporary decision would be immediately transmitted to the Congress for its decision. . . . Congress would decide the question before it would ever reach the courts.").

³⁰⁵ *Id.* at 15,588 (statement of Sen. Ervin). It should also be noted that Senator Gore was one of only five senators to vote against the amendment, while Senator Ervin was one of its supporters. *Id.* at 15,596 (giving the results of the Senate vote on the amendment).

³⁰⁶ Miller Center Comm'n No. 4, *supra* note 23, at 13.

rule on the application of the Amendment, and for that reason, they should not serve on the “other body” because this would produce a conflict. This position was held by Chief Justice Warren during the congressional deliberations on the Amendment, and was reiterated by Chief Justice Burger in speaking to the Miller Center Commission.³⁰⁷

Other legislative history of the Amendment indicates that certain challenges to its implementation would not be justiciable. An earlier version of the Amendment provided that Congress would “immediately” decide the issue of presidential inability.³⁰⁸ In a hearing on that early draft, Senator Hruska expressed concern that this vague language would allow Congress to delay its determination.³⁰⁹ More specifically, Senator Hruska wondered whether Congress may legislatively define the word “immediately” to mean a specific time frame, and whether the Supreme Court would approve of such a definition.³¹⁰ In response to Sen. Hruska’s questioning, Attorney General Nicholas Katzenbach opined that “in probability, the Supreme Court would accept any judgment Congress made on that.”³¹¹ More to the point, the Attorney General “[found] it difficult to find any context in which this would go before the Supreme Court, and I expect they would defer to any judgment the Congress made.”³¹²

Nor does the Supreme Court’s decision in *Nixon v. United States* necessarily foreclose all judicial review. Indeed, it suggests that a narrow range of Twenty-Fifth Amendment questions—those involving matters of procedure—might potentially be justiciable. In *Nixon*, a federal judge who had been impeached by the House and convicted by the Senate challenged his conviction on what were essentially procedural grounds.³¹³ Pursuant to Senate Rule XI, a committee of Senators heard the evidence against Judge Nixon and reported that evidence to the full Senate, which then voted to impeach him. Judge Nixon contended that the procedure violated the Impeachment Trial Clause, which provides that the “Senate shall have the sole Power to try all Impeachments.”³¹⁴ The judge argued that “Senate Rule XI violates the constitutional grant of authority to the Senate to ‘try’ all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings.”³¹⁵

The Court held that “the word ‘try’ in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate,” and that Nixon’s claim was thus non-justiciable.”³¹⁶ The *Nixon* Court’s textual and structural argument proceeded from two main observations: (1) the Impeachment Trial Clause “is a grant of authority to the Senate, and the word ‘sole’ indicates that this authority is reposed in the Senate and nowhere else,”³¹⁷ and (2) “[t]he next two sentences specify requirements to which the Senate proceedings shall conform: The Senate shall be on oath or affirmation, a two-thirds vote is required to convict, and when the President is tried the Chief Justice shall preside.”³¹⁸

³⁰⁷ *Id.*

³⁰⁸ S.J. Res. 1, 89th Cong. § 5 (1965).

³⁰⁹ 1965 Senate Subcomm. Hearings, *supra* note 43, at 21 (statement of Sen. Hruska).

³¹⁰ *Id.* at 22.

³¹¹ *Id.* (statement of Att’y Gen. Katzenbach).

³¹² *Id.*

³¹³ 506 U.S. 224 (1993).

³¹⁴ U.S. CONST. art I, § 3, cl. 6.

³¹⁵ *Nixon*, 506 U.S. at 228.

³¹⁶ *Id.* at 238.

³¹⁷ *Id.* at 229

³¹⁸ *Id.*

Chief Justice Rehnquist, writing for the majority, rejected Nixon's argument that the word "try" in the first sentence imposed the additional procedural requirement that the proceedings must be "in the nature of a judicial trial."³¹⁹ On a textual level, the Chief Justice pointed out that there were various definitions of the word "try," both in contemporary usage and at the time of the founding, and concluded that the word "lacks sufficient precision to afford any judicially manageable standard of review."³²⁰ This position was "fortified by the existence of three very specific requirements that the Constitution does impose on the Senate when trying impeachments."³²¹ The "precision" of these requirements "suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try' in the first sentence."³²²

Thus, on the face of its holding, *Nixon* would appear to indicate that any dispute about the internal procedures Congress, or the Vice President and either the Principal Officers or the "other body," use to determine whether a President is disabled would be a nonjusticiable political question.

However, the *Nixon* Court did not directly address the question whether it might rule on questions pertaining to the other "very specific requirements" that might provide "an identifiable textual limit on the authority which is committed to the Senate."³²³ for example, whether a court might overturn a conviction that was done (1) without a two-thirds vote, or (2) without the Senate being "on oath or affirmation." In comparison to the Impeachment Trial Clause, the Twenty-Fifth Amendment lays out an even more detailed procedure, with more "specific requirements" and "identifiable textual limits on the authority." As a result, a court confronted with a suit related to the Twenty-Fifth Amendment might be tempted to pass on similar, textually delineated and limited procedural questions.

But if a court passes on the merits of a procedural question in the Twenty-Fifth Amendment context, the court would quickly run up against another problem: it likely will be unable to provide an effective, immediate remedy. The *Nixon* Court noted that "the lack of finality and the difficulty of fashioning relief counsel against justiciability."³²⁴ The Chief Justice expressed agreement with the Court of Appeals that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos."³²⁵

A judicial challenge to the implementation of the Twenty-Fifth Amendment poses an even greater risk of "constitutional chaos." As one contemporary observer noted, one of the principal arguments for a constitutional amendment on presidential inability, as opposed to a legislative solution, was a consensus based on "a fundamental policy understanding that delay by challenge in the courts or elsewhere would shatter the continuity of executive leadership and thereby endanger the nation."³²⁶ In order to avoid such a challenge, "[t]he procedures, it was

³¹⁹ *Id.*

³²⁰ *Id.* at 230.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 238.

³²⁴ *Id.* at 236.

³²⁵ *Id.*

³²⁶ Richard P. Longaker, *Presidential Continuity: The Twenty-Fifth Amendment*, 13 UCLA L. REV. 532, 545 (1966).

finally concluded, were to be enumerated as distinctly as possible in an amendment to the Constitution.”³²⁷

Judicial involvement in the interpretation of the Amendment’s procedural requirements, no less than judicial review of a determination of inability, would arguably also run counter to the purpose and goals of the Amendment—namely, to ensure continuity in the executive branch.

Judicial involvement in the interpretation of the Amendment’s procedural requirements, no less than judicial review of a determination of inability, would arguably also run counter to the purpose and goals of the Amendment—namely, to ensure continuity in the executive branch. It would also run counter to the goal of ensuring a swift resolution of inability issues—a goal apparent from the Amendment’s strict timing requirements providing Congress only twenty-one days to make a determination of Presidential inability.³²⁸ In short, although judicial review is not entirely foreclosed by current doctrine, we believe that prudential considerations make it highly unlikely that a court would undertake judicial review of the procedural elements of any invocation of the Twenty-Fifth Amendment.

In conclusion, a challenge related to “very specific requirements” of the Twenty-Fifth Amendment procedure that provide “an identifiable textual limit on the authority which is committed to” the relevant political branches *may* be justiciable.³²⁹ However, the scope of justiciable challenges to Twenty-Fifth Amendment procedures would likely be very narrow, and in practice, the judicial branch would be unlikely to intervene absent patent and material departures from the expressly prescribed textual procedures.

VII. The Morning(s) After a Congressional Determination Regarding Inability

A. Once Congress has declared that an inability exists, can a President previously determined to have an inability become President again?

Yes. A president previously determined under Section 4 to have an inability may become president again. Discussing an earlier version of the Amendment, Attorney General Katzenbach testified to the House that if the President and the Vice President (as the Acting President) agree that the President is no longer disabled, the President can immediately resume the powers and duties of the office.³³⁰ This view was echoed by (among others) former Attorney

³²⁷ *Id.*

³²⁸ U.S. CONST. amend. XXV, § 4.

³²⁹ *Nixon*, 506 U.S. at 238.

³³⁰ *1965 House Judiciary Hearings*, *supra* note 13, at 99-100 (discussing an earlier draft of the Amendment and stating that “even where the President’s inability was established originally pursuant to section 4, rather than declared voluntarily by him, the President could resume the powers and duties of his office immediately with the concurrence of the Acting President I think the language will bear that instruction that he doesn’t have to wait if the Vice President immediately agrees with him.”) Though the Attorney General was speaking in the context of a situation where the Vice President concurred with the President that the latter was no longer disabled *before* Congress

General Herbert Brownell, Chairman of the American Bar Association's Special Committee on Presidential Inability and Vice Presidential Vacancy.³³¹

B. Once Congress has determined that an inability exists, can the President resubmit his declaration of no inability at a later date?

After Congress has determined that an inability exists, the President may again submit his declaration of no inability at a later date. The text of the Amendment is silent on whether the President may resubmit his transmittal of no inability once Congress has determined that an inability exists. However, the legislative history strongly suggests that, in the event Congress chooses not to reinstate the President, the President can repeat the Section 4 process again at a later date. According to Senator Bayh's testimony in front of the House:

It is my impression or intent that [the President] would have more than one chance [to convince Congress that he is not disabled] but, having utilized the one chance, I think he would be very careful in making a second appeal to the Congress because the degree of frequency with which he appealed to Congress would certainly reflect the attitude with which Congress would look on his mental capacity.³³²

Similarly, before ratification, Attorney General Katzenbach testified that he, too, interpreted the Twenty-Fifth Amendment to permit the President to repeat the Section 4 process.³³³

C. If the Section 4 process is triggered but does not conclude with transfer of the President's powers and duties to the Vice President, may it be employed again later against the same President?

As a legal matter, yes. The Amendment's text nowhere suggests that the Section 4 process could not be triggered more than once with respect to the same President. However, as discussed below, the President can fire department heads who unsuccessfully trigger the Section 4 process, and Congress can impeach the Vice President for wrongfully declaring a presidential inability. In practice, therefore, it seems unlikely that Section 4 would be triggered more than once by the same collection of individuals against the same President.

D. If the Section 4 process concludes with the Vice President as Acting President, does that Vice President assume the Office of the Presidency?

No. The Vice President does not assume the *office* of the presidency when he assumes the powers and duties of the office under Section 4. However, as discussed in detail in Part IV of this

decided the issue, we believe that the same logic would hold even after Congress determined that the President was disabled; namely, that he could return to office if he and the Acting President determined he was again fit to carry out the powers and duties of the presidency.

³³¹ *Id.* at 243 ("Of course, if it was agreed upon by the President and the Vice President, it could take effect at any earlier time specified therein."); FEERICK, *supra* note 9, at 120; see also Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. POL'Y REV. 459, 475 (2009) (collecting more sources of legislative history supporting this view).

³³² 1965 House Judiciary Hearings, *supra* note 13, at 94 (statement of Sen. Bayh).

³³³ *Id.* at 101 ("[T]he only other possible interpretation would be that having been done once, [the President] can never get back in [via the Section 4 process], and I would not think that was the intention."). For a similar analysis of both Bayh and Katzenbach's statements, see Gustafson, *supra* note 331, at 468.

Reader's Guide the Acting President exercises all of the authority of the presidency as a purely legal matter. It is for that reason that Section 1 of the Twenty-Fifth Amendment clarifies those circumstances under which the Vice President actually “becomes” the President, providing: “In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”

None of these three Section 1 circumstances encompasses the Vice President declaring a President disabled under Section 4. When Section 4 is triggered, the President does not die or resign his office; he simply ceases to exercise the attendant powers and duties. And while it might appear that the President is *de facto* removed from office when he is declared disabled, Section 4 does not refer to removal, and other portions of the Constitution use the term specifically in reference to impeachment. These facts strongly imply that the word “removal” in Section 1 similarly refers to situations in which the President is impeached, not merely separated from his powers and duties for reason of inability.

The legislative history of the Twenty-Fifth Amendment confirms that the Acting President does not occupy the “office” of the presidency, though he performs all of the “powers and duties” of the office. As a practical matter, this distinction will have little effect on the Acting President’s legal authority. But as Part IV explains there is an important symbolic difference—and a perceived difference in legitimacy—between an Acting President and a President. In an exchange during Senator Bayh’s House testimony, Congressman Poff noted that:

I am not sure we want him [the Vice President] to have any title to the powers and duties. Speaking for myself, I am jealous of the powers and duties for the sake of the President who has been elected by the people. *I want the Vice President to have only the right to discharge the powers and duties.* I say the distinction may be a small one, but I think it is important in dramatizing our first concern for the protection of the duties and powers of the President.³³⁴

Senator Bayh responded by noting that the Vice President does “not have the office of President but that of Acting President. He does not get the full powers and duties of the office of President unabated. He is Acting President.”³³⁵

Setting this symbolic distinction aside, the Acting President would be constitutionally empowered to conduct the same acts as the President. In the floor debate in the Senate, for instance, Senator Bayh expressed his belief that the Vice President acting as President would be able to fire and appoint cabinet officials. When Senator Hart expressed concern that a Vice President acting as President would remove cabinet members to “consolidate[] his position” as Acting President, Senator Bayh admitted that this concern was legitimate, but declared, “we do not want a Vice President who is acting in good cause, say, for example, in a 3-year term of office, being unable to reappoint Cabinet members who may have died or resigned.”³³⁶

³³⁴ 1965 House Judiciary Hearings, *supra* note 13, at 65 (emphasis added).

³³⁵ *Id.*; see also *id.* at 196 (statement of Martin Taylor, Chairman, Comm. on Fed. Constitution, N.Y. State Bar Ass’n) (“It is the power and duties that are taken over, not the office.”); FEERICK, *supra* note 9, at 112 (“This Section [3] is designed to make clear that in a case of presidential inability the Vice President simply discharges the powers and duties of the presidency; he assumes neither the office nor the title of President. Rather, he remains the Vice President, exercising presidential power, under the title of Acting President.”).

³³⁶ 111 CONG. REC. 3284 (1965) (statement of Sen. Bayh).

For a fuller discussion of the Acting President’s legal powers and the practical political limits on those powers, see Part IV of this Reader’s Guide.

E. Can the President be impeached after the Section 4 process concludes?

Yes. The President may be impeached after the conclusion of the Section 4 process. Given that, as discussed above, the President remains in office even if Congress determines that a presidential inability exists, a disabled President could still be subject to “remov[al] from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”³³⁷

F. May the Acting President appoint a new Vice President?

No. The Twenty-Fifth Amendment does not permit the Acting President to appoint a new Vice President. Under Section 2, “[w]henever there is a vacancy in the office of the Vice President,” the President may appoint a Vice President, with the consent of a majority of both houses of Congress. However, the Vice President’s assumption of the powers and duties as Acting President does not create such a “vacancy” in the office of the Vice President.

The final version included the word “vacancy” in Section 2,³³⁸ did not intend to change the Amendment’s substance and only sought to “simplify the language or bring it into harmony with other provisions of the Constitution.”³³⁹

This definition of vacancy was confirmed during Senator Bayh’s testimony in front of the House, during which he unequivocally agreed with Representative Poff’s definition of “vacancy” as occurring only when the “Vice President is no longer occupying the office by reason of death, resignation, or removal.”³⁴⁰ In the course of their exchange, neither legislator mentioned that a Vice President becoming Acting President creates a vacancy in the office of the Vice President. On the floor of the Senate, Senator Bayh also maintained that the Acting President would have no ability to appoint either a new Vice President or an Acting Vice President.³⁴¹

³³⁷ Commentators have noted impeachment and the Twenty-Fifth Amendment are different, complementary processes. See BERGER, *supra* note 283, at 181-82 (concluding that the President may not be impeached on account of illness or disability, and that the proper recourse in such circumstances is through the Twenty-Fifth Amendment).

³³⁸ See *generally* Feerick, *supra* note 3, 1093-94 (2017). One enduring gap in the Amendment is its failure to provide for a situation where both the President and the Vice President are disabled, or the vice presidency is vacant. See *id.*; Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 20 (2010). In those situations, “the [Twenty-Fifth] Amendment’s elaborate machinery for determining *presidential* disability will seize up.” *Id.* at 20.

³³⁹ FEERICK, *supra* note 9, at 74.

³⁴⁰ 1965 House Judiciary Hearings, *supra* note 13, at 87.

³⁴¹ 111 CONG. REC. 3253 (1965) (statement of Sen. Bayh). As a structural matter, permitting the Acting President to appoint a new Vice President could potentially lead to the constitutionally bizarre scenario where two people simultaneously occupied the office of the Vice Presidency. This would occur if (1) an Acting President appoints a Vice President with Congress’s consent; (2) the President resumes the powers and duties of his office at a later date; thus (3) returning the once Acting President to his status as the mere Vice President; while also (4) leaving the newly appointed Vice President in office. In part to avoid such confusion, Dean Feerick similarly concludes that “[t]he legislative history is clear that an ‘inability’ of the President resulting in the Vice President’s having to act as President is not a situation involving a vacancy in the vice presidency.” FEERICK, *supra* note 9, at 109.

Finally, it is worth noting two potential gaps that could arise from the fact that the Amendment does not provide the Acting President the capacity to appoint a new Vice President: If (1) Congress declares the President unable and (2) the Vice President subsequently leaves office, through death, resignation or removal, the unable President cannot appoint a new Vice President to become Acting President. In such a “dual vacancy” scenario, a statute passed pursuant to Congress’s authority under the Succession Clause empowers a chain of officers beginning with the Speaker of the House to “act as President.”³⁴² The second potential gap would occur if the President were disabled and, either simultaneously or subsequently, the Vice President became disabled, as well. No constitutional or statutory mechanism currently exists for declaring the Vice President unable and ensuring succession under such circumstances.³⁴³

G. Can the President remove cabinet officers for their participation in the 25th Amendment process?

Yes. It is possible that, should the Vice President and a majority of the Principal Officers trigger Section 4 but fail to secure the necessary vote of Congress to sustain their declaration of presidential inability, the President could fire members of the cabinet and/or the two Houses of Congress could act to impeach the participants for their activities.

As a background matter, the Supreme Court has held that the President possesses broad constitutional authority to fire Principal Officers, such as cabinet-level officials, at will.³⁴⁴ On its face, the Twenty-Fifth Amendment does not modify this presidential authority, which was well established at the time of the adoption of the Twenty Fifth Amendment.

According to Dean Feerick, the legislative history “is replete with suggestions that irresponsible behavior [with regard to Section 4] also might subject a Vice President to impeachment.”³⁴⁵ For instance, answering questions on the floor of the Senate, Senator Bayh responded to concerns that a Vice President might “usurp the office” of the Presidency by noting that, should he do so, the Vice President’s “political future would be ruined.”³⁴⁶ In his testimony to the House, Senator Bayh concluded that Congress could impeach a Vice President for abusing the Section 4 process, though he also suggested that this possibility was slim. Instead, Senator Bayh hoped, “the great weight of public opinion would compel the Vice President to act judicially.”³⁴⁷

³⁴² 3 U.S.C. § 19 (2012). *But see* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) (arguing that the current presidential succession statute is unconstitutional because neither the Speaker of the House nor the President pro-tempore of the Senate, second and third in line for the presidency, are “Officer[s]” as required by the Succession Clause).

³⁴³ See Roy E. Brownell II, *What to Do if Simultaneous Presidential and Vice-Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027 (2017).

³⁴⁴ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.”). In some circumstances, Congress may limit the President’s power to remove principal officers. See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (upholding a statute prohibiting the removal of an FTC commissioner, except for good cause); *Wiener v. United States*, 357 U.S. 349 (1958) (same, but for member of the War Claims Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (same, but for independent counsel). However, Congress has not provided that protection to the heads of the executive departments. And, even if Congress did provide such a protection at a future date, a court would likely find that protection unconstitutionally “interfere[s] with the President’s exercise of the ‘executive power.’” *Morrison*, 487 U.S. at 690.

³⁴⁵ FEERICK, *supra* note 9, at 121.

³⁴⁶ 111 CONG. REC. 3284 (1965) (statement of Sen. Bayh).

³⁴⁷ 1965 *House Judiciary Hearings*, *supra* note 13, at 88. However, immediately after Senator Bayh’s comment, Representative Mathias noted that “I would feel that the use of impeachment proceedings where there is a

Taken as a whole, the fact that Congress anticipated the possibility that the department heads and the Vice President would be subject to political pressure when deciding whether to invoke Section 4 strongly indicates that the President could politically retaliate against department heads who he thinks have abused the Section 4 process to seek his removal from office.

CONCLUSION

This Reader's Guide provides a detailed examination of many important, but never definitively answered questions, surrounding the Twenty-Fifth Amendment. Over the course of half a century, Section 4 of the Twenty-Fifth Amendment has never been triggered, and other parts of the Amendment have been only sparingly invoked.

Were the issue of presidential inability to be contested among the sitting President and other political actors, faithful adherence to the rule of law would require careful parsing of and conscientious adherence to the text, legislative history, structural considerations, and practice of the Amendment. Even—perhaps especially—in a time of constitutional crisis, we hope that this Reader's Guide could serve as a helpful road map to ensure that the Amendment is properly implemented in accordance with the rule of law.

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subjective question of the President's health or tin President's physical abilities would be inappropriate. It wouldn't fall within high crimes or misdemeanors." *Id.* at 89.

APPENDIX

A. Section 3 Letters

Ronald Reagan: Letter to the President Pro Tempore of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery (July 13, 1985)

Dear Mr. President: (Dear Mr. Speaker:)

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the Twenty-Fifth Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my longstanding arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all.

Sincerely,

RONALD REAGAN

Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=38883>

George W. Bush: Letter to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States (June 29, 2002)

Dear Mr. Speaker: (Dear Mr. President:)

As my staff has previously communicated to you, I will undergo this morning a routine medical procedure requiring sedation. In view of present circumstances, I have determined to transfer temporarily my Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery.

Accordingly, in accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of President of the United States. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties.

Sincerely,

GEORGE W. BUSH

Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=63676>

George W. Bush: Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States (July 21, 2007)

Dear Madam Speaker: (Dear Mr. President:)

This morning I will undergo a routine medical procedure requiring sedation. In view of present circumstances, I have determined to transfer temporarily my Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery.

In accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of the President of the United States. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties.

Sincerely,

GEORGE W. BUSH

Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=75568>

“Every citizen should read this as surely as knowing where the EXIT signs are in case of emergency.” – *Jane Mayer, The New Yorker*

“The Yale Rule of Law Clinic’s ‘Reader’s Guide to the Twenty-Fifth Amendment’ provides an extensive and thoughtful analysis of the Amendment’s provisions. This highly readable work is an important contribution to the scholarship on the 25th Amendment, and a valuable resource for the general public, experts, and government officials. Crises involving presidential succession and inability have caught the nation off guard and unprepared on several occasions. By navigating the amendment’s nuances before another crisis might implicate the Amendment, the clinic exemplifies how law students and their professors can strengthen our government by advancing understanding of the Constitution. I commend them on their excellent, public minded work.” – *John Feerick, Former Dean, Fordham Law School and a principal framer of the Twenty-Fifth Amendment*

“A meticulous and comprehensive analysis of the history and procedural workings of the Twenty-Fifth Amendment – an invaluable resource for anyone faced with the occasion to consider invoking and implementing its provisions.”

– *Theodore B. Olson, Solicitor General of the United States, 2001-2004; United States Assistant Attorney General for the Office of Legal Counsel, 1981-1984*

“An authoritative, thoughtful, indispensable guide to a little understood constitutional provision, this Reader’s Guide should be widely read and absorbed, across the country, but especially inside the Beltway and the West Wing.”

– *W. Neil Eggleston, White House Counsel, 2014-2017*