THE WHITE HOUSE TRANSITION PROJECT
1997-2021

Smoothing the Peaceful Transfer of Democratic Power

Kinder Institute on Constitutional Democracy
University of Missouri

REPORT 2021—12

PLANNING FOR PRESIDENTIAL CONTINUITY:
SOME CONSTITUTIONAL, STATUTORY AND POLITICAL ISSUES

Joel K. Goldstein *Emeritus Faculty, Saint Louis University School of Law*

WHO WE ARE & WHAT WE DO

THE WHITE HOUSE TRANSITION PROJECT. Begun in 1998, the White House Transition Project provides information about individual offices for staff coming into the White House to help streamline the process of transition from one administration to the next. A nonpartisan, nonprofit group, the WHTP brings together political science scholars who study the presidency and White House operations to write analytical pieces on relevant topics about presidential transitions, presidential appointments, and crisis management. Since its creation, it has participated in the 2001, 2005, 2009, 2013, 2017, and now the 2021. WHTP coordinates with government agencies and other non-profit groups, e.g., the US National Archives or the Partnership for Public Service. It also consults with foreign governments and organizations interested in improving governmental transitions, worldwide. See the project at http://whitehousetransitionproject.org

The White House Transition Project produces a number of materials, including:

- **White House Office Essays:** Based on interviews with key personnel who have borne these unique responsibilities, including former White House Chiefs of Staff; Staff Secretaries; Counsels; Press Secretaries, etc. , WHTP produces briefing books for each of the critical White House offices. These briefs compile the best practices suggested by those who have carried out the duties of these office. With the permission of the interviewees, interviews are available on the National Archives website page dedicated to this project:
- **White House Organization Charts.** The charts cover administrations from Ronald Reagan to Barack Obama and help new White House staff understand what to expect when they arrive and how their offices changed over time or stayed the same.
- **Transition Essays.** These reports cover a number of topics suggested by White House staff, including analyses of the patterns of presidential appointments and the Senate confirmation process, White House and presidential working routine, and the patterns of presidential travel and crisis management. It also maintains ongoing reports on the patterns of interactions with reporters and the press in general as well as White House staffing.
- **International Component**. The WHTP consults with international governments and groups interested in transitions in their governments. In 2017 in conjunction with the Baker Institute, the WHTP hosted a conference with emerging Latin American leaders and in 2018 cosponsored a government transitions conference with the National Democratic Institute held in November 2018 in Montreal, Canada .

Earlier White House Transition Project funding has included grants from the Pew Charitable Trusts of Philadelphia, Pennsylvania and The Moody Foundation of Galveston, Texas.

THE KINDER INSTITUTE ON CONSTITUTIONAL DEMOCRACY. A central element of the University of Missouri's main campus in Columbia, Missouri, the Kinder Institute on Constitutional Democracy prepares students for lives of thoughtful and engaged citizenship by equipping them with knowledge of the ideas and events that have shaped our nation's history. See more information on the Institute at: https://democracy.missouri.edu .

TABLE OF CONTENTS

THE WHITE HOUSE TRANSITION PROJECT
1997-2021

Kinder Institute on Constitutional Democracy
University of Missouri

Smoothing the Peaceful Transfer of Democratic Power

REPORT 2021—12

PLANNING FOR PRESIDENTIAL CONTINUITY:
SOME CONSTITUTIONAL, STATUTORY AND POLITICAL ISSUES

Joel K. Goldstein *Emeritus Faculty, Saint Louis University School of Law*

EXECUTIVE SUMMARY

1. Because of the importance of presidential leadership, the difficult, varied and unpredictable circumstances under which presidential continuity crises arise, and the challenges in implementing procedures for unexpected transfers of presidential powers, it is critical that every new administration develop a Contingency Plan to ensure the continuity of presidential leadership during the transition and first weeks in office and familiarize key officials with applicable procedures.

2. The Twenty-Fifth Amendment to the Constitution, which was ratified in 1967, greatly enhances America's ability to deal with issues relating to presidential inability when there is both a president and a functioning vice president. It does so by providing a means to fill vice-presidential vacancies promptly and procedures for the transfer of presidential powers and duties to the vice president when the president is "unable" to discharge them.

3. America's ability to handle presidential continuity crises has been greatly enhanced by the development of the vice presidency as an integral part of the presidency and of White House operations, by the development of norms for transferring presidential powers and duties to the vice president when the president undergoes medical procedures under anesthesia, and by the development of Contingency Plans to anticipate troubling scenarios and provide a manual of procedures to follow in many situations.

4. The Contingency Plans which have become public to date from the Reagan, Bush and Clinton administrations, while providing generally useful documents, contain some mistaken interpretations and accordingly should be reviewed to consider changes to more accurately reflect the constitutional text and legislative record. Some weaknesses may trace to reliance on documents generated more than 40 years ago without a full review of the Twenty-Fifth Amendment and its legislative history. Such a review is important not only to assist a current administration in implementing the Twenty-Fifth Amendment and other provisions if needed, but also because the statements in the Contingency Plans help create norms for future administrations.

5. The Twenty-Fifth Amendment's formulation that it allows a transfer of presidential powers and duties when a president is "unable to discharge the powers and duties of [the presidency]" is meant to apply to a broad range of physical, mental, emotional and logistical conditions that might prevent the president from doing his or her job. It was not intended as a mechanism to express "no confidence" in a president, as a remedy for unpopular decisions, poor performance, or laziness, or as a vehicle to allow the president to avoid his or her constitutional responsibilities.

The Reagan-Bush-Clinton Contingency Plan is incorrect in questioning whether Section 3 and 4 were to apply to logistical situations that render a president "unable." They were.

6. The "principal officers of the executive departments" who are empowered to join with the vice president in determining that a president is unable are defined in the legislative record of the Twenty-Fifth Amendment to refer to specific officials designated by Congress in a specific statute. The phrase is not ambiguous and does not include officials invited to meet with the Cabinet. The Contingency Plan should be clarified accordingly.

7. Under Section 4 of the Amendment, after presidential powers and duties are transferred from a president based on his inability, he or she does not resume those powers and duties immediately based upon a declaration of fitness. Resumption depends on the response of the vice president and a majority of the principal officers. The vice president continues to act as president during the four-day challenge period unless the president's declaration of fitness receives appropriate acquiescence from the appropriate executive branch decision-makers. The legislative record makes clear that if the vice president and a majority of the principal officers of the executive branch or the vice president alone agree with the president's declaration that he or she is no longer incapacitated, the president may resume powers and duties within the four-day period. It is not clear whether a determination by a majority of the principal officers alone would be sufficient, a point the Department of Justice might clarify through interpretation. The vice president continues to act as president during the time Section 4 gives Congress to decide the disagreement until at least one house fails to sustain the vice president's position.

8. The Twenty-Fifth Amendment does not govern situations in which a vice president is incapacitated or in which a president becomes incapacitated when the vice presidency is vacant. The 1947 Presidential Succession Law identifies a line of presidential successors following the vice president for various contingencies affecting both the president and vice president including presidential and/or vice-presidential inability. It does not state how presidential and/or vice-presidential inabilities are decided, who decides them, or how their end is determined. If Congress does not legislate to address these subject, the executive branch should develop plans to deal with such situations involving vice presidential inability and presidential inability when the vice presidency is vacant.

INTRODUCTION

The singular importance of the presidency requires that presidential powers and duties always be entrusted to a chief executive able to discharge them. That imperative traces to the fact that the Constitution provides that "the executive power shall be vested in a President of the United States"[1] and some presidential powers and duties cannot be delegated. The president is the nation's leader, and history teaches that a gap in presidential leadership exposes the nation to security risks in a nuclear age and compromises an administration's efforts to advance its objectives.

The Twenty-Fifth Amendment to the United States Constitution responded to a realization that existing arrangements left presidential leadership jeopardized in critical respects which presented unacceptable risks. Its ratification in 1967 presented an enormous accomplishment but it was never envisioned as a total solution. Senator Birch Bayh and its other architects realized that a search for a comprehensive solution would preclude agreement on the most pressing problems relating to presidential continuity. Accordingly, they crafted a legislative compromise to address the most common threats while consciously deferring more remote gaps for later

[1] U.S. Constitution, article II, §1.

attention.[2] Moreover, the Amendment's procedures, like most, depend on the faithful performance of the authorized decision-makers in office when any presidential continuity threat arises. As former Attorney General Herbert Brownell repeatedly counselled, proper execution of constitutional procedures depends on officials performing their public trust consistent with a sense of "constitutional propriety" and citizens insisting on "constitutional morality."[3] That theme resonated through the discussions of the Twenty-Fifth Amendment.[4] This profound, yet basic, idea should inform the approach to the subject in order to best position the United States to address presidential continuity crises in the future.

Actual threats to presidential continuity present acute challenges. The unique importance of the American presidency, the variety of threats that might produce a crisis and the unexpected way in which many occur, and the personal and professional consequences for many, including the president, vice president, decision-makers, and other administration personnel, not to mention the citizens of the United States, are among the factors which make these crises so difficult and often traumatic.

Such threats to presidential continuity are, however, a recurring reality of American history. Nine presidents, roughly 20% of the total and almost 25% of those elected to the office, did not complete their term due to death or resignation. Significant presidential inabilities affected James Madison, James Garfield, Grover Cleveland, William McKinley, Woodrow Wilson, Franklin D. Roosevelt, Dwight D. Eisenhower, and Ronald Reagan among others. Presidential continuity crises have arisen during the administrations of relatively young presidents, such as Abraham Lincoln, Garfield and John F. Kennedy, and have resulted from infectious diseases as well as from organic illnesses and conditions. In 2000, a former White House physician reported that 9 of the 11 presidents from Franklin D. Roosevelt to Bill Clinton had a significant illness in office, five had illnesses or injuries requiring hospitalization, three had major surgery requiring general anesthesia and postoperative pain control, and five experienced six unsuccessful assassination attempts in addition to the Kennedy assassination.[5] An administration must be prepared to face these threats prior to inauguration day because they have arisen during the first weeks of a presidential term[6] and later on.

---

[2] Joel K. Goldstein, Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity, 79 *Fordham Law Review* 959, 1003-05 (2010).

[3] Herbert Brownell Jr. Presidential Disability: The Need for a Constitutional Amendment, 68 *Yale Law Journal* 193, 200 (1958) ("Ultimately, the operation of any constitutional arrangement depends on public opinion and upon the public's possessing a certain sense of what might be called "constitutional morality." Absent this feeling of responsibility on the part of the citizenry, there can be no guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists."). See also Presidential Inability: Hearings Before the Special Subcomm. On Study of Presidential Inability of the H. Comm. On the Judiciary, 85th Cong.31 (statement of Herbert Brownell Jr.); Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al Before the Subcomm. On Constitutional Amendments of the S. Comm. On the Judiciary, 88th Cong. 136 (1964) (statement of Brownell).

[4] S. Report No. 89-66, 13 (1965);H.R. Report No. 89-203, 13 (1965) S. Report No. 88-1382, 11-12 (1964) (incorporating Brownell's statement without attribution).

[5] Lawrence C. Mohr, M.D., "Medical Consideration in the Determination of Presidential Disability" in Robert Gilbert ed. *Managing Crisis: Presidential Disability and the 25th Amendment* 97-98 (2000).

[6] William Henry Harrison died within a month of becoming president, and Franklin Roosevelt died less than three months in to his final term. Abraham Lincoln was assassinated six weeks into his second term, James Garfield less than four months into his term, Grover Cleveland had two surgeries to remove a cancerous growth five months into his term in 1893. Lyndon B. Johnson was hospitalized within days of his inauguration in 1965. The assassination attempt on President Reagan occurred on March 30, 1981 when his administration was about ten

President Ronald Reagan's administration mishandled its first presidential continuity crisis occasioned by the assassination attempt on the president on March 30, 1981, only ten weeks in to the administration, in part because key officials were unfamiliar with the Twenty-Fifth Amendment and other provisions and had not considered and discussed the appropriate response to potential contingencies. [7] When White House counsel Fred Fielding reviewed the Twenty-Fifth Amendment with an ad hoc group of Reagan Cabinet officials and White House aides who had congregated in the Situation Room after President Reagan was shot, "their eyes glazed over."[8] That experience presents a cautionary tale of the perils of an administration unprepared to address a presidential continuity crisis. The Reagan administration later completed a manual regarding presidential continuity guidelines[9] and the George H.W. Bush administration engaged in more concerted planning and high-level discussions. President Bush, to his credit, held a meeting with Vice President Dan Quayle and other key officials to review arrangements.[10]

These considerations dictate that every presidential administration engage in presidential contingency planning during the presidential transition period and early days of the administration and that such planning should include principal White House personnel, including the president, vice president, their spouses, White House staff, the president's physician, and other central administration figures.[11] Presidential administrations may not be able to anticipate the form and timing of a presidential continuity crisis but it helps if decision-makers are familiar with the governing principles, can draw on some protocols in place, and understand the president's commitment to having a smooth transition to his or her vice president, if necessary, in order to serve the national interest and advance administration objectives. Careful planning for a presidential contingency crisis during the transition can maximize the likelihood that such an unwelcome possibility will be well-handled and can model appropriate presidential concern for the nation's security, thereby establishing helpful precedents for future behavior.

Effective Contingency Plans must, of course, consider a broad range of issues, involving security, medical, and logistical[12] issues that are beyond the expertise of this writer and the scope of this paper. The focus of this discussion is entirely on some constitutional, statutory and political issues that have arisen and should be considered and addressed by an incoming administration in crafting appropriate plans. This discussion also responds to a suspicion that the Contingency Plans which have existed in the executive branch for close to four decades and which address the issues considered here may rest on some misunderstandings of the Twenty-Fifth Amendment and may

---

weeks old. See generally Larry L. Simms, Memorandum for the Attorney General re Prior Presidential Disabilities, April 3, 1981.

[7] Goldstein, Taking From the Twenty Fifth Amendment, 977-79; Alexander M. Haig, Jr. *Caveat: Realism, Reagan, and Foreign Policy* 153 (1984) (describing lack of any advanced planning).

[8] Fred L. Fielding, An Eyewitness Account of Executive Inability," 79 *Fordham Law Review* 823, 827 (2010).

[9] *Ibid.* 828.

[10] Joel K. Goldstein, *The White House Vice Presidency: The Path to Significance, Mondale to Biden* 257-58 (2016).

[11] Birch Bayh, "Reflections on the Twenty-Fifth Amendment as We Enter a New Century" in Robert Gilbert ed. *Managing Crisis: Presidential Disability and the 25th Amendment* 63 (2000) ("each new administration should draft a detailed contingency plan to be followed in the event of presidential disability.").

[12] For instance, during the Reagan assassination attempt, Vice President George H.W. Bush was in Texas and lacked sufficient communications on Air Force II with the Situation Room. Twenty years later, during 9/11, President George W. Bush was unable to communicate reliably from Air Force I, Secretary of State Colin Powell and Secretary of Treasury Paul O'Neill were traveling internationally and Attorney General John Ashcroft was traveling domestically. Second Fordham University School of Law Clinic on Presidential Succession, Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System, 86 *Fordham Law Review* 917, 932 (2017). See also *Ibid.*, 958 (describing other logistical problems during on 9/11).

merit revisiting. The Contingency Plans used by the Ronald Reagan,[13] George H.W. Bush[14] and Bill Clinton [15]administrations, which apparently form the basis for Plans used by at least some later administrations, have been released in recent years pursuant to Freedom of Information Act requests. The original Contingency Plan was apparently completed by the White House Counsel's Office during the Reagan administration following the March, 1981 assassination attempt and passed on to the Bush administration. Fielding reported that when he returned as White House Counsel near the end of the administration of President George W. Bush the document in updated form remained, had been bound and distributed to various crucial locations.[16] Apparently, some Contingency Plan existed during the Obama administration[17] although I do not know whether it essentially followed the Reagan-Bush-Clinton Contingency Plans or not or what, if any, arrangements existed during the Trump administration.

Although the Reagan-Bush-Clinton plans provide a useful roadmap in many respects, they state mistaken interpretations of some key provisions of the Twenty-Fifth Amendment to the Constitution. It is important to correct such mistakes both to bring the Contingency Plans into alignment with the Twenty-Fifth Amendment and because the repetition of mistaken impressions may establish and entrench mistaken practices that may influence future conduct. It would be desirable that norms for proper behavior consistent with the Amendment develop and be transmitted from administration to administration to guide decision-making and make opportunistic behavior more difficult in the future. It is possible that the Reagan-Bush-Clinton Contingency Plans have been modified to correct misinterpretations addressed herein but lacking more recent disclosed versions, this discussion addresses them. Much public discussion of the inability provisions of the Amendment also misstates important components.[18] In addition, this paper identifies some norms which have developed from recurring practices of some recent administrations which should be followed.

An Overview of the Twenty-Fifth Amendment

The Twenty-Fifth Amendment to the Constitution is the starting point for a review of the relevant constitutional provisions. It emerged from a process that began in the mid-1950s when President Dwight D. Eisenhower suffered three serious illnesses during the Cold War and nuclear age. Although legislative efforts in both houses of Congress in the 1950s and early 1960s failed to produce agreement, Eisenhower entered into a letter agreement in 1958 with Vice President Richard M. Nixon setting forth procedures that would allow Nixon to act as, but not become, president during an Eisenhower inability, would allow either man to determine the existence of

---

[13] Office of the Counsel to the President, Contingency Plans—Death or Disability of the President, June 1, 1982. G.H.W.Bush Presidential Records,, Counsels Office, White House, Boyden Gray Files, Twenty-Fifth Amendment Files.

[14] *Ibid.* Although the document bears the June 1, 1982 date on its cover, it includes references to later events and documents apparently prepared in 1985 and 1987.

[15] Office of White House Counsel, "Contingency Plans: Death or Disability of the President" (1993). Executive Branch Materials. 10. https://ir.lawnet.fordham.edu/twentyfifth_amendment_executive_materials/10. See Roy E. Brownell II, What To Do If Simultaneous Presidential and Vice Presidential Inability Struck *Today*, 86 *Fordham Law Review* 1027, 1044-45 (2017).

[16] Fielding, Eyewitness, 828-29.

[17] Brownell, What To Do If Simultaneous Presidential and Vice Presidential Inability Struck *Today*, 1045.

[18] Joel K. Goldstein, Five myths about the 25th Amendment, Washington Post, October 9, 2020 https://www.washingtonpost.com/outlook/five-myths/five-myths-about-the-25th-amendment/2020/10/09/cfe6ceb0-08de-11eb-a166-dc429b380d10_story.html#comments-wrapper . See also Joel K. Goldstein, Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4, 21 *University of Pennsylvania Journal of Constitutional Law* 73 (2018).

the inability under circumstances set forth, and would allow Eisenhower to determine when he was able to resume presidential powers and duties. The agreement was deemed consistent with the Constitution by the Department of Justice and President John F. Kennedy and Lyndon B. Johnson adopted a similar procedure in August 1961 supported by an opinion letter from Attorney General Robert F. Kennedy regarding its constitutionality.[19]

Following the assassination of President Kennedy on November 22, 1963, Senator Birch Bayh and others proposed constitutional amendments to address major gaps in existing provisions regarding presidential continuity. After an intensive legislative process, Congress proposed a constitutional amendment in July 1965 which followed most of Bayh's basic recommendation and the required ¾ of the states ratified it as of February 1967 as the Twenty-Fifth Amendment. It had the following principal objectives: 1) to create a means to allow a vice-presidential vacancy to be filled which would produce a vice president compatible with the president whose confirmation by Congress would provide some democratic check; 2) to eliminate past uncertainty regarding whether a vice president could act as president during a period of presidential inability without permanently displacing the president by making clear that he or she could; 3) to create procedures whereby a president could transfer presidential powers and duties on a temporary basis to the vice president during or in anticipation of a presidential inability and reclaim them without obstruction; 4) to create procedures whereby the vice president and other authoritative decision-makers could act to transfer presidential powers and duties from a president who was unwilling or unable to recognize his or her inability to the vice president who would exercise them as Acting President, and to allow the president to resume those powers and duties subject to checks which would protect the nation from a still disabled president yet guard the president from having his or her powers and duties usurped or wrongfully transferred or withheld. The framers of the Amendment abandoned plans to change the line of succession following the vice president to run through the executive branch rather than to begin with legislative leaders and abandoned efforts to provide procedures to deal with vice-presidential incapacity or presidential inability absent a vice president. The principal authors determined that pursuing such a comprehensive solution would prevent efforts to achieve the principal objectives identified above which history suggested were the paramount needs.[20]

SECTION 1

Section 1 of the Twenty-Fifth Amendment states that if a president dies, resigns or is removed from office, the vice president becomes president.[21] The original Constitution provided that in case of the president's removal, death, resignation or "inability to discharge the Powers and Duties" of the presidency, "the same shall devolve on the vice president."[22] The formulation left unclear whether the powers and duties of the presidency or the presidency itself devolved.

---

[19] See generally John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications* 19-24, 50-55(3rd ed. 2014); Goldstein, Taking From the Twenty-Fifth Amendment, 963-66; Joel K. Goldstein, The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment, 86 *Fordham Law Review* 1137, 1141-46 (2017).

[20] John D. Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 79 *Fordham Law Review* 907, 909 & n.1, 936 (2010).

[21] U.S. Constitution, Amend XXV, §1 ("In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.").

[22] U.S. Constitution, art. II, §1 cl 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

Beginning with the death of President William Henry Harrison in 1841 and succession of Vice President John Tyler to the presidency, the understanding developed that the vice president became president following the death of his predecessor rather than simply discharging presidential powers and duties as vice president. Although the issue was initially controversial, Tyler's insistence that he became president and repetition of that practice on seven subsequent occasions through November 22, 1963 confirmed that understanding regarding the devolution of the office following a presidential death.

Since the constitutional language suggested that whatever devolved in case of death also did so in the other three contingencies, the Tyler Precedent inadvertently created confusion when later presidents such as James Garfield, Woodrow Wilson and Dwight Eisenhower suffered inabilities which, unlike the other three scenarios covered, might be temporary rather than permanent. Would a presidential inability trigger a presidential succession, too? [23]

Section 1 of the Twenty-Fifth Amendment a) simply confirms in the constitutional text the practice that had been followed that when a president dies the vice president becomes president, b) applies that rule also to the other two situations of permanent vacancy (removal and resignation), and c) distinguishes those three contingencies[24] from the different treatment regarding vice-presidential status amidst presidential inability, a topic Sections 3 and 4 of the Amendment address. In case of presidential inability, which is discussed below, a) the vice president simply acts as president during the period in which the president is unable to discharge presidential powers and duties but does not become president, b) the president retains the presidential office during the period in which presidential powers and duties are transferred to the vice president, c) and the president may resume the exercise of presidential powers and duties based upon the different procedures set forth in Sections 3 and 4 as discussed below. In the event of a presidential succession under Section 1 following the death, resignation or removal of a president, the new president must take the oath the United States Constitution prescribes: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[25]

SECTION 2

Section 2[26] of the Twenty-Fifth Amendment provides a means to fill a vice-presidential vacancy, whether caused a) by the vice president succeeding to the presidency, as occurred when Vice President Gerald R. Ford filled the presidential vacancy caused by President Richard M. Nixon's resignation in August 1974, or b) by a vice president dying, being removed or resigning from office as occurred when Vice President Spiro T. Agnew resigned from office in October 1973.[27] As will be seen below, when the vice president acts as president under Section 3 or 4 of the Twenty-Fifth Amendment, he or she remains as vice president and accordingly no vice-presidential vacancy is created and no occasion arises to use Section 2. Similarly, a vice-presidential

---

[23] Joel K. Goldstein, Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment, 10 *ConLawNow* 119, 122-24 (2019).

[24] H.R. Report No. 89-203, 13 (1965) ("It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the [original Constitution]"); S. Report No. 89-66, 12 (1965) (same).

[25] U.S. Constitution, art. II, §1, cl. 8.

[26] "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."

[27] See Feerick, *Twenty-Fifth Amendment*, 125-89.

inability provides no occasion to use Section 2 since the vice president remains as vice president and accordingly no vacancy exists.

Although the mechanics of Section 2 are beyond this discussion, it affects and informs the Amendment's other provisions. First, Section 2 reflected the belief that the vice presidency provided the best means to ensure presidential continuity when a president died, resigned, was removed or unable, and accordingly, for the first time in American history, Section 2 furnished a means to fill a vice-presidential vacancy during the four-year term so the second office would almost always be filled.[28] Whereas the office was vacant on 16 occasions during 15 presidencies for 37 of the 178 years of the republic before 1967 (21%), during the 53 years since then it has been vacant for only the six months following the Agnew resignation and Ford elevation,[29] less than 1%. Although the Constitution empowers Congress to provide for the exercise of presidential powers and duties absent a president and vice president,[30] Section 2 has greatly minimized, although not entirely eliminated, the chance that someone other than a president or vice president will ever act as president under that power. Second, Section 2 reflected a belief that the vice president should be familiar with, and closely involved in, the daily functioning of the executive branch in order to prepare to fulfill the constitutional function of first presidential successor if so required.[31] Indeed, this expectation has been realized especially since the administration of President Jimmy Carter as the vice president has been brought into the West Wing of the White House, given access to the president and White House decision-making and information, and has become an integral part of the presidency.[32] Third, Section 2 reflected a belief that the vice president should be politically and personally compatible with the president.[33]

These recognitions of the value and increasing significance of the vice presidency have received independent confirmation through the practice of presidential administrations of both parties in recent decades.[34] The vice presidency migrated to the executive branch with the

---

[28] H.R. Report No. 89-203, 15 (1965) ("Section 2 is intended to virtually assure us that the Nation will always possess 'a Vice President."); S. Report No. 89-66, 14 (1965) (same). See Joel K. Goldstein, The New Constitutional Vice Presidency, *30 Wake Forest Law Review* 505, 526-32, 536-40 (1995); Goldstein, Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity, 981-87.

[29] Agnew resigned on October 10, 1973, Ford was nominated two days later and confirmed and sworn in on December 6, 1973, creating a vacancy of a few days short of two months. Ford succeeded to the presidency on August 9, 1974. He nominated Rockefeller on August 20, 1974 and Rockefeller was confirmed and sworn in on December 19, 1974, creating a vacancy of four months and ten days. For vice presidential vacancies, see Feerick, *The Twenty-Fifth Amendment* ,314. For discussion of the Agnew resignation, Ford replacement, Ford succession and Rockefeller nomination and confirmation, see *Ibid.*, 125-89.

[30] U. S. Constitution, art. II, §1, cl. 6 ("…and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

[31] H.R. Report No. 89-203, 11 (1965) ("One of the principal reasons for filling the office of Vice President when it becomes vacant is to permit the person next in line to become familiar with the problems he will face should he be called upon to act as President…"); S. Report No. 89-66, 11-12 (1965) (same); see also Goldstein, The New Constitutional Vice Presidency, 538; Goldstein, Taking From the Twenty-Fifth Amendment, 982-83.

[32] Goldstein, *White House Vice Presidency*.

[33] H.R. Report No. 89-203, 15 (1965) ("It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President."); S. Report No. 89-66, 15 (1965) (same); Goldstein, The New Constitutional Vice Presidency, 534, 537; Goldstein, Taking From the Twenty-Fifth Amendment,983-84.

[34] Goldstein, *White House Vice Presidency*.

Eisenhower administration[35] and moved into the White House during the Carter presidency (1977-81)[36] and subsequent administrations have largely followed and built upon the model the Mondale vice presidency first created and implemented of the vice president as a close presidential adviser and troubleshooter.[37] This central White House role was not dictated by the vice president's status as first presidential successor but was entirely consistent with it.[38]

The development of the vice presidency beginning with the Carter-Mondale term consistent with the vision implicit in the Twenty-Fifth Amendment has enhanced America's ability to address problems of presidential continuity. It increases the likelihood that presidential succession or inability will not disrupt the basic policy approach of an administration. The vice president's participation in administration formation and regular engagement with key administration personnel beginning with Carter-Mondale would also likely minimize personnel turnover that might otherwise occur in the event of a presidential succession. Finally, the vice president's participation during normal times as a central presidential adviser and White House actor enhances the operation of the presidential inability provisions of the Twenty-Fifth Amendment in the event they become necessary. This conclusion flows from the increased likelihood of a compatible relationship between the president and vice president and between the vice president and other principal figures in the White House and executive branch.

THE INABILITY PROVISIONS: SECTIONS 3 AND 4

Sections 3 and 4 of the Twenty-Fifth Amendment provide means to transfer presidential powers and duties from the president to the vice president during a period when the president is "unable to discharge the powers and duties" of the presidency.[39] They are intended to provide procedures to allow authorized decision-makers to address every situation in which the president is "unable to discharge the powers and duties" of the presidency when there is both a president and vice president. It is worth emphasizing these last nine words; they each depend on the existence of a president and vice president. If either office is vacant or if the vice president is incapacitated, those provisions cannot be utilized to initiate a presidential inability transfer.[40] Even so, as will be discussed below, Sections 3 and 4 may provide helpful analogies for thinking about how some remaining contingencies should be handled.

Section 3 applies when a president recognizes a current or future inability and transfers presidential powers and duties to the vice president during the period of that inability. Section 4 addresses the situation in which a president is unable or unwilling to recognize a presidential inability and accordingly empowers others, the vice president and currently a majority of the 15 principal officers of the executive departments designated in 5 U.S.C. §101, to make that determination subject to checks discussed below.[41] In either case, the vice president is the

---

[35] Goldstein, *White House Vice Presidency*, 24-35; Joel K. Goldstein, *The Modern American Vice Presidency: The Transformation of a Political Institution* (1982).

[36] Goldstein, *White House Vice Presidency*, 52-92.

[37] Goldstein, *White House Vice Presidency*.

[38] Walter F. Mondale to Jimmy Carter, "The Role of the Vice President in the Carter Administration, December 9, 1976, 11 http://www2.mnhs.org/library/findaids/00697/pdf/Mondale-CarterMemo.pdf

[39] U.S. Constitution, Amend XXV, §§3,4.

[40] John D. Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 79 *Fordham Law Review* 907, 935 (2010) ("If the Vice President suffers an inability, current law offers no framework for determining that he is disabled. Further, if the Vice Presidency is vacant, or if the Vice President is disabled, the Section 4 procedures used to declare the President disabled are unavailable.").

[41] Section 4 empowers Congress to replace the "principal officers of the executive departments" as the vice president's co-decision-maker with "such other body as Congress may by law provide." Although such legislative

transferee of presidential powers and duties and, under Section 4, the vice president is also a necessary participant in the transfer decision. In either case, the president may resume presidential powers and duties when his or her presidential inability ends but the steps to determine that point are quite different as discussed below.

Sections 3 and 4 of the Twenty-Fifth Amendment each use the formulation "unable to discharge the powers and duties of" the presidency as the occasion for a transfer of such responsibilities. The Amendment intentionally does not define that phrase.[42] Instead, those words were left undefined due to a belief that they should have a broad, though not unlimited, application, that their meaning should be flexible to respond to future exigencies that the Amendment's authors may not have foreseen in the mid-1960s,[43] and that the authorized decision-makers in place when a future situation arose would be best positioned to determine whether a presidential inability existed and required a transfer of presidential powers and duties to the vice president.[44] The lack of a definition did not mean that the phrase had no limits. The legislative record made clear that it was not meant as a vehicle to transfer presidential powers and duties from a president based simply on his or her "unpopularity, incompetence, impeachable conduct, poor judgment, and laziness."[45] Nor does it furnish a means to express lack of confidence in a president or for a president to avoid difficult decisions[46] or "to step aside temporarily without justification."[47]

Although the same phrase ("unable to discharge the powers and duties of" the presidency) is used in both sections, it may lend itself to somewhat different applications since the two sections empower different decision-makers and that necessarily creates a somewhat different context. The president acts alone under Section 3 whereas the vice president and principal officers of the executive branch act under Section 4 subject to checks unless Congress replaces the principal officers with some "other body." As a practical matter, a president may declare himself or herself "unable" under Section 3 in circumstances in which his or her associates might be reluctant to do so under Section 4.[48] Similarly, Section 4 addresses a situation where a president is unable or unwilling to act. In many cases when he or she is "unable" to act, a hypothetical president would

---

action has been proposed, Congress has never adopted such legislation and accordingly this Memorandum precedes under the assumption that the original procedure set forth in the Amendment remains.

42 Feerick, *Twenty-Fifth Amendment,* 112 (stating that failure to define "unable' and "inability" was not an "oversight"); Joel K. Goldstein, Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment, ,132-33.

43 111 *Cong. Record* 7941 (Poff) ("It was decided that it would be unwise to attempt such a definition within the framework of the Constitution. To do so would give the definition adopted a rigidity which, in application, might sometimes be unrealistic."). See also John D. Feerick, "The Twenty-Fifth Amendment: Its Origins and History" in Robert E. Gilbert ed., *Managing Crisis: Presidential Disability and the 25th Amendment*15-16 (2000) (stating that it was feared any definition would "omit" situations that should be covered and might inhibit transfers of powers which were appropriate).

44 Goldstein, Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment, 132-33.

45 Feerick, *Twenty-Fifth Amendment,* 117. See, e.g., 111 *Cong. Record* 3283 (1965 (statement by Sen. Bayh) (stating that formulation does not apply to "an unpopular decision that must be made in time of trial and which might render the President unpopular."); see also 111 *Cong. Record* 15, 381 (1965) (Bayh) (stating the standard did not apply simply because a president made an unpopular decision).

46 Goldstein, Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment, 133-34.

47 John D. Feerick, A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment,47 *Houston Law Review* 41, 55 (2010); Feerick, *Twenty-Fifth Amendment,* 113.

48 Joel K. Goldstein, The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships in Robert E. Gilbert ed., *Managing Crisis: Presidential Disability and the 25th Amendment* 196-98 (2000). I now believe that national security considerations dictate that Section 4 be routinely used in situations when the president is rendered unconscious if Section 3 has not been used.

surely agree with the decision of his or her executive branch associates to transfer power to the vice president. Since Section 4 also applies when the president is unwilling to transfer powers, perhaps because he or she is irrational or for other reasons, it also envisions circumstances in which executive branch officials must act to transfer powers and duties to the vice president notwithstanding a president's refusal to do so.[49]

The phrase "unable to discharge powers and duties" of the presidency encompasses a range of physical, mental, emotional, and logistical conditions or circumstances that might render a president "unable" to discharge the powers and duties of the presidency. This broad understanding is made clear by a letter from President Dwight D. Eisenhower to Vice President Richard M. Nixon of February 5, 1958 summarizing their agreement for handling presidential inability nine years before the Amendment was ratified. The Eisenhower-Nixon informal arrangement, of course, preceded the Amendment yet its thinking informed the Amendment. Eisenhower said that an "inability to discharge properly" presidential powers and duties could arise in "several ways." These might include "disease or accident" that would prevent decision-making, a "failure of communications" when the President traveled or uncertainty regarding the President's location among other possibilities. An inability "could be prolonged" or simply last for a matter of "hours" if a matter of "importance and urgency" required decision "without delay."[50]

The constitutional text broadly addressed circumstances that render the president "unable to discharge the powers and duties" of the presidency and the legislative record suggested that a broad range of physical, mental, or logistical conditions might prevent a president from discharging the powers and duties of his or her office. Feerick explained that the phrase covers "all cases in which some condition or circumstance prevents the President from discharging his powers and duties and the public business requires that the Vice President discharge them."[51] These might arise in a variety of ways. An inability might be permanent, lengthy or of uncertain or even short duration. The range of contingencies included physical or mental illness, whether temporary or permanent,[52] as well as logistical circumstances, such as if the president were to be out of communication for a time.[53] The text of the Amendment clearly included physical and mental conditions and the framers often spoke of presidential inabilities coming from mental,[54] as well as physical, conditions. Representative Poff, for instance, said Section 4 included cases "in which the President by reason of physical or mental debility, is unable to perform his duties but is unable or unwilling to make a rational decision to relinquish the powers of his office, even for a temporary period."[55] A president might retain some capacities and yet be "unable" if he or she had a condition "that would seriously impair the President's ability to perform the powers and duties of his office."[56]

---

[49] Feerick, A Response to Akhil Reed Amar's Address, 55 ("Section 4 of the Amendment covers the most difficult cases of inability—when the President cannot or refuses to declare his own inability.").

[50] Letter, Dwight D. Eisenhower to Richard M. Nixon, February 5, 1958, in XIX The Papers of Dwight D. Eisenhower (Louis Galambos and Daun Van EE eds.2001) 712. Eisenhower repeated this general formulation, including logistical situations, in a 1964 letter to Bayh included in the 1964 Senate Hearings, 232.

[51] Feerick, *Twenty-Fifth Amendment*, 112.

[52] *Ibid.*

[53] *Ibid.* at 113.

[54] Goldstein, Talking Trump and the Twenty-Fifth Amendment,98-103 (collecting numerous references to mental and emotional conditions rendering a president unable).

[55] 111 *Cong. Record* 7941 (1965).

[56] 111 *Cong. Record* 15, 381 (1965) (Bayh). See generally Goldstein, Talking Trump and the Twenty-Fifth Amendment, 104-117.

The Clinton Contingency Plan correctly reported that the legislative history regarding the Amendment pertinent to Section 3 and 4 "clearly envisions that this inability to govern might stem from either physical or mental disabilities of the President."[57] It then mistakenly concludes that the "legislative history gives no guidance" regarding whether the Amendment could apply to a presidential incapacity from "outside events" such as a kidnapped, incommunicado, or missing president.[58] Yet the text of the Constitution would clearly include those sorts of contingencies. A kidnapped, missing, or incommunicado president is "unable" to perform the powers and duties of the presidency and in some of those situations, the nation could be subject to the gravest national danger if his or her powers and duties were not transferred. The Amendment could easily have excluded such logistical situations but did not. Sufficient legislative history on that subject suggests that those sorts of cases could provide appropriate occasions to use Section 3 or more likely 4.[59]

Although some have written that Section 4 only applies when the president is comatose,[60] the history of the Amendment rebuts such misinterpretations. Such cases present easy cases for transfer of power but the Amendment was not limited to those obvious situations. Indeed, much of the discussion in both houses addressed the difficult and remote but real challenge posed by a conscious but irrational chief executive. Section 4 empowered the vice president and Cabinet officials partly because they would have information regarding the president's condition.[61] Such information would be unnecessary if Section 4 only applied when the president was unconscious or on life support so that his or her inability was beyond question. Similarly, the expressed expectation that medical experts familiar with the president's mental and physical condition would inform the decision would have been unnecessary if Section 4 applied only to such clear situations.[62] A president might be "unable" even though he or she could perform some functions of the presidency. Woodrow Wilson was not unconscious for most of the time following his

---

[57] Temporary Disability of the President: Threshold Considerations, 3.

[58] *Ibid.* ("The question arises, however, as to whether the incapacity of the President must necessarily be physical or mental or can it result from outside events. For example, what if the President is kidnapped, known to be alive, but held incommunicado? Or what if the President is simply missing as a result of an Air Force One mishap? The legislative history gives no guidance in such situations.").

[59] See Presidential Inability and Vacancies in the Office of Vice President: Hearing on S.J. Res.1 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 89th Cong., 20 (1965) [hereinafter *1965 Senate Hearings*] (statement of Sen. Birch Bayh) (referring to inabilities as including foreign travel, communications breakdowns, capture of the President, or "anything that is imaginable"); Presidential Inability: Hearings on H.R. 836 et al Before the Committee on the Judiciary of the House of Representatives, 89th Cong., 141-42 (1965) [hereinafter*1965 House Hearings*] (remarks of Rep. Emanuel Celler and others that such events were clearly included); *ibid.* at 240 (testimony of Brownell) ("Other situations that have been visualized are those where the President might be going to have an operation, or where he was going abroad an might be out of reliable communication with the White House for a short period."); Feerick, *Twenty-Fifth Amendment*, 117; Goldstein, Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment, 133.

[60] Some such claims others have made are presented and addressed in Goldstein, Talking Trump and the Twenty-Fifth Amendment, 104-12.

[61] H.R. Report No. 89-203, 13 (1965) ("It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition."); S. Report No. 89-66, 13 (1965) (same), See also 111 *Cong. Record* 7938-39 (Celler) (stating that president's executive family are knowledgeable regarding his health); Ibid. at 7965 (Celler) (stating that Cabinet members "know intimately well the President and a good deal about his mental and physical condition, usually…"); *1965 Senate Hearings*, 33-34 (statement of Sen. Hruska) ("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.").

[62] H.R. Report No. 89-203, 14 (1965) ("It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition."); S. Report No. 89-66, 13 (1965) (same).

September 1919 stroke yet a premise of the Amendment was that for some considerable period he suffered a presidential inability which precluded him from discharging the powers and duties of his office. Representative Cohelan suggested a president who could not carry out the full duties of office might, under some circumstances, trigger the Amendment.[63] The architects of the Amendment anticipated that there would be instances in which a president and those around him or her would differ regarding the existence of a presidential inability.[64]

SECTION 3: A CLOSER LOOK

Section 3 transfers powers and duties to the vice president "[w]henever 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 …" This formulation makes clear that the president has broad discretion when to exercise Section 3, that the transfer is triggered by his or her transmission to the named legislative officers, and is based on the president's determination that he or she "is unable to discharge the powers and duties of his office."

Although Section 3 refers to the president's written declaration that he or she "is" unable, the provision applies both when the president recognizes that a then existing condition makes him or her "unable" and/or when he or she anticipates one which will soon arise, one which is imminent.[65] Herbert Brownell, President Eisenhower's Attorney General and an architect of the provision, testified that Section 3 could apply to anticipated surgery.[66] The "classic example" of a Section 3 transfer would be "when the President expects to undergo an operation,"[67] Representative Poff, a House author stated.

Section 3 has been used on three occasions when presidents briefly transferred powers and duties to the vice president in anticipation of planned procedures under general anesthesia: President Reagan transferred power to Vice President George H.W. Bush on July 13, 1985 for just under nine hours when he underwent surgery under general anesthesia to remove a cancerous polyp from his intestines[68] and President George W. Bush twice transferred power to Vice President Dick Cheney in June 29, 2002 and July 21, 2007 for a little more than two hours on each occasion when he underwent a colonoscopy under general anesthesia. On at least three other

---

[63] 111 *Cong. Record* 7949 (1965) (referring to past presidents as disabled when they could not conduct full duties of office).

[64] H.R. Report No. 89-203, 14 (1965) ("If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling: to admit, then a critical dispute exists."); S. Report No. 89-66, 13 (1965) (same).

[65] 111 *Cong. Record* 7941 (1965) (Poff) (stating that Section 3 applies when "the President recognizes his inability-or the imminence of his inability-and wishes voluntarily to vacate his office for a temporary period"); *1965 Senate Hearings*, 9 (testimony of Nicholas deB. Katzenbach) (stating that under Section 3"a President who is sick, or about to undergo an operation which will temporarily incapacitate him, will not hesitate to announce his inability").

[66] *1965 House Hearings*, 240.

[67] 111 *Cong. Record* 7941. See also *1965 House Hear*ings, 92 (testimony of Bayh) (presenting a surgery as a classic case for using Section 3); Birch Bayh, "Reflections on the Twenty-Fifth Amendment as We Enter a New Century" in Gilbert ed., *Managing Crisis*, 57 (stating that Section 3 "is intended to be utilized in cases of anticipated disability, such as surgery that would require general anesthesia.").

[68] Although President Reagan initially contended that his action occurred under his agreement with Vice President Bush rather than under Section 3, he and Mrs. Reagan later conceded that Section 3 was, in fact, the basis for his action. Scholarly studies have concluded that Section 3 was the basis for the action. Feerick, *Twenty-Fifth Amendment,* 198-99; Goldstein, *White House Vice Presidency*, 254-55, 259.

occasions during the Carter, George H.W. Bush, and Clinton[69] administrations, the president was prepared to transfer powers to the vice president under Section 3 should general anesthesia be administered during medical procedures. These three transfers and other instances where transfer was planned but general anesthesia was not administered reveal a norm that has developed through at least five presidential administrations from both major parties that presidents will invoke Section 3 to transfer presidential powers and duties to the vice president prior to a planned procedure under general anesthesia.[70] This norm is consistent with the recommendation of the Miller Commission, co-chaired by former Senator Birch Bayh and former Attorney General Brownell, that Section 3 be used whenever a president was to undergo a procedure under a general anesthesia. Such a routine practice would cause an invocation of Section 3 to be viewed as a normal precaution, a pragmatic and prudent action in a dangerous world, rather than an extraordinary event.[71] The close relationships which have developed between presidents and vice presidents and other considerations make it highly unlikely that a vice president would use a Section 3 situation to exercise powers inappropriately.[72] More likely, in Clinton Rossiter's insightful phrase, he or she will simply "keep the shop."[73]

Elective procedure under general anesthesia is, not, of course, the only time when Section 3 could or should be invoked. The Miller Commission urged that "One situation involves elective surgery where general anesthesia, narcotics, or other drugs that alter cerebral function will be used. A similar case involves a debilitating disease or physical malfunction. Because anyone under anesthesia is unable to function both during the period of unconsciousness and afterwards while disoriented, presidents should accept the inevitability of temporarily transferring power to the vice president beyond the immediate hours in the operating room, or even in the hospital—perhaps 24 or 48 hours." [74] The Reagan White House was criticized for allowing the president to resume power shortly after he woke up from surgery rather than allowing more time to pass.[75]

Although the uses to date of Section 3 have all involved anticipated events, it also is designed to respond to situations or conditions that arise suddenly, unexpectedly and/or which already exist. If such a situation renders the president unable to discharge the powers and duties of his or her office, the president may transfer powers to the vice president if he or she is able to give

---

[69] Goldstein, *White House Vice Presidency,* 255, 258-59; Feerick, *Twenty-Fifth Amendment*, 200-02. See also Dr. E.Connie Mariano, M.D., "In Sickness and in Health: Medical Care for the President of the United States" in Gilbert ed. *Managing Crisis*93 (stating that she had advised key Clinton advisers that if general anesthesia was needed for his leg surgery that Section 3 should be invoked). During the Obama administration, a White House Press Release reporting on the president's annual physical which included a CT colonography specifically stated that "At no time was it necessary to temporarily transfer Presidential authority under Section 3 of the 25th Amendment." White House Press Release, Release of the President's Medical Exam, February 28, 2010. Presumably the administration avoided the use of Section 3 because the procedure used did not require general anesthesia.

[70] Goldstein, *White House Vice Presidency*, 259.

[71] Miller Center Commission No. 4; Brownell, Herbert; Bayh, Birch E. Jr.; Thompson, Kenneth W.; and Roberts, Chalmers M., "Final Report of the Commission on Presidential Disability and the Twenty-Fifth Amendment" (1988). Reports. 5 ("The Commission believes that any president receiving anesthesia should use Section 3 of the 25 Amendment. The Commission believes that this mechanism should be made part of a routine course of action so that its invocation carries no implications of instability or crisis. Each president will have to make the decision and circumstances will be different. However, the Commission believes that use rather than non-use will create the sense of routine.").

[72] Goldstein, The Vice Presidency and the Twenty-Fifth Amendment in Gilbert, ed. *Managing Crises*, 199-200.

[73] Clinton Rossiter, *The American Presidency*,214 (1960).

[74] Miller Commission, 6.

[75] Goldstein, *White House Vice Presidency*, 256.

knowing assent to transferring power and can sign or otherwise assent to transmission of a written declaration of inability to the legislative officers.

The transfer of presidential powers and duties to the vice president occurs upon transmission of the letter to the offices of the Senate president pro tempore and Speaker of the House. The transfer and vice president's authority is not contingent upon receipt.[76] Presumably, the vice president would be advised immediately so that he or she could take appropriate action, and the contents of the letters and their transmission would be announced although the transfer occurs upon transmission, not upon public dissemination.

Under Section 3, the vice president does not become president nor does the president relinquish that office. Instead, the vice president discharges presidential powers and duties "as Acting President" while remining as vice president.[77] The vice president continues to discharge those presidential powers and duties until the president transmits to the Senate president pro tempore and Speaker of the House a second written declaration reclaiming presidential powers and duties.[78]

A president who transfers presidential powers and duties to the vice president pursuant to Section 3 may resume presidential powers and duties immediately upon his or her transmittal of the declaration that the inability has ended.[79] The architects of the Amendment discussed this issue, expressed their belief that a president who uses Section 3 should be able to resume presidential powers and duties without any external check, and revised the proposed amendment to conform to that intention.[80] An earlier version of the proposed amendment seemingly made the president's resumption under Section 3 subject to the same checks that apply in Section 4. [81] The legislative record made clear that those checks were not to apply to a president's ability to resume under Section 3 when he or she voluntarily transferred power. The framers of the Amendment feared that imposing such checks on a president's resumption of presidential powers and duties when he or she had acted pursuant to Section 3 would introduce a disincentive against voluntary transfers. To remove that inhibiting condition, textual revisions were made to allow the president to resume immediately upon his transmittal of a no inability declaration under Section 3.[82]

---

[76] Ted Olson, Memorandum for the Attorney General, April 3, 1981, 4-5.

[77] U.S. Constitution, Amend. XXV, §3 ("such powers and duties shall be discharged by the Vice President as Acting President.").

[78] *Ibid.* ("until he transmits to them a written declaration to the contrary…").

[79] U.S. Constitution Amend. XXV, §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.") (emphasis provided).

[80] H.R. Report No. 89-203, 2 (1965) (describing change in proposed amendment to allow president who voluntarily declares his or her inability to resume powers based on own statement as opposed to when others declare that the president is incapacitated); *1965 House Hearings*, 264-65 (testimony of Rep. Frank Horton); S. Report No. 89-66, 3 (1965) ("Under the terms of section 3 a President who voluntarily transfers his powers and duties to the Vice President may resume these powers and duties by making a written declaration of his ability to perform the powers and duties of his office and transmitting such declaration to the President of the Senate and the Speaker of the House of Representatives.").

[81] *1965 House Hearings*, 96, 99 (testimony of Katzenbach) (stating his assumption that challenge procedure would not apply if president voluntarily transferred powers under Section 3).

[82] 111 *Cong. Record* 7938 (Celler), 7941 (Poff) ("When he chooses to do so, he may reclaim and re- occupy his office by sending another written declaration to Congress. Unlike the second category, his declaration of restoration is not subject to challenge by the Vice President and Cabinet."), 7943 (Rep. Frank Horton), 7956 (Gilbert); 111 *Cong. Record* 3271 (Bayh); 111 *Cong. Record* 15, 214 (Poff) ("The first major difference was in section 3. That is the section

SECTION 4: A CLOSER LOOK

INTRODUCTION

Section 4 applies when a president is unwilling or unable to declare his or her own inability.[83] Accordingly, Section 4 may be used when an inability prevents the president from determining that he or she is "unable to discharge" presidential powers and duties or transmitting such a declaration such as when the president is unconscious. It also applies when he or she refuses to recognize an inability that exists, i.e. in a situation where the president's assessment of his or her capacity differs from that of the other decision-makers.[84]

Section 4 empowers the "Vice President and a majority of either the principal officers of the executive departments or such other body as Congress may by law provide" to determine that the president is "unable to discharge the powers and duties of his office." The vice president is accordingly a necessary participant in a Section 4 inability determination.[85] Section 4 cannot be used if the vice president refuses to state in writing that the president is "unable" to discharge presidential powers and duties, if the vice presidency is vacant or if it is occupied by someone who is incapacitated.

Congress could legislatively replace the "principal officers of the executive departments" with some "other body" to act with the vice president.[86] That option was included in the Amendment to add flexibility to respond if subsequent experience showed the Cabinet to be an unworkable participant[87] and to appeal to those who favored some other decision-maker.[88] If Congress did create some "other body" it would replace the Cabinet, not provide an alternative body for the vice president to act with.[89] Congress has never created such "other body" and accordingly the relevant decision-makers under Section 4 are currently the vice president and "a majority of the principal officers of the executive departments." The remainder of this paper will

---

under which the President can voluntarily vacate his office and vest the Vice President as Acting President with the powers and duties of his office. The difference was in the mechanics of resumption of power by the President. Under the Senate version, the mechanics outlined in sections 4 and 5 would apply. Those mechanics involved first, a declaration of restoration by the President; second, an opportunity for a challenge by the Vice President transmitted to the Congress; and third, the possibility of congressional approval of the Vice President's challenge. The House version did not acuate the mechanics of sections 4 and 5. Rather, it was felt that a distinction should be made between section 3 authorizing voluntary withdrawal of the President and section 4 authorizing involuntary removal of the President by the Vice President. The House felt that the President would be reluctant to utilize section 3 if to do so exposed himself to the possibility of the Vice Presidential challenge and congressional action when he decided to resume the office. Accordingly, section 3 of the House version provided that the President who used the provisions of section 3 could promptly restore himself to his office simply by transmitting a written declaration to the two Houses of Congress. The conference report-after adding two words of clarification-accepted the House version.").

[83] 111 *Cong. Record* 7941 (1965) (Poff); *1965 Senate Hearings*, 9(testimony of Katzenbach) (stating that Section 4 applies "where the President cannot or does not declare his own inability").

[84] 111 *Cong. Record* 7955 (Rep. Peter W. Rodino) (stating that Section 4 deals with situations that may involve "controversy" between the president and vice president); *ibid.* at 7955 (Rep. Dante Fascell) (stating that Section 4 applies to situations where there may be "doubt or controversy").

[85] 111 *Cong. Record* 15,383-84 (Bayh).

[86] U.S. Constitution, amend XXV,§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,…").

[87] H.R. Report No. 89-203, 15 (1965) ("in the interest of providing flexibility for the future; the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.").

[88] Goldstein, Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment, 137.

[89] *1965 House Hearings*, 93 (testimony of Bayh); 111 *Cong. Record* 15, 382-83 (Bayh).

discuss simply the current arrangement, that the vice president acts with the "principal officers of the executive departments."

Section 4 has not yet been used although its application has been considered, and apparently quickly rejected, by administration officials on a few occasions.[90] The framers of Section 4 expected the situations it addressed, a president who was "unable to discharge" presidential powers and duties yet unwilling or unable to so acknowledge, as likely to arise infrequently. Nonetheless, they thought procedures were needed to allow the transfer of presidential powers and duties expeditiously and legitimately in such a potentially charged situation. They gave executive branch officials –the vice president and the "principal officers of the executive departments"—the responsibility for initiating a Section 4 transfer because they thought these decision-makers would most likely fulfill these imperatives.

The framers of Section 4 sought to balance several objectives. They wanted to provide a mechanism to transfer presidential powers and duties from a president who was unable to discharge those responsibilities but unwilling or unable to so acknowledge. They wanted to protect the president from having his or her power improperly usurped. They wanted to allow sufficient time for various decision-makers to make an informed decision. And they wanted to provide a procedure that would work efficiently and in a stable manner given these challenges. The Amendment sought to protect the president against being wrongfully deprived of the authority of his or her office or having a transfer continue once an inability had ended by including a procedure for the president to resume those powers and duties subject to checks against a premature resumption by a president still "unable" to discharge presidential functions. The checks, as will be discussed in more detail below, allowed the vice president and a majority of the principal officers of the executive departments a four-day period in which to contest the president's declaration of fitness. During that time, the vice president continues to act as president, at least until there is an appropriate acquiescence in the president's claim of fitness. In the event of an intra-executive branch dispute between the president on the one hand and the vice president and a majority of the "principal officers" on the other, Congress would be called to decide the issue within 21 days, if then in session, or within a slightly longer period if not then in session. During this roughly three-week period given Congress to decide, the vice president continues to exercise presidential powers and duties as acting President. Section 4 requires that unless a 2/3 majority in each of the House and the Senate sustains the position of the vice president regarding the president's inability to discharge presidential powers, the president resumes those powers. If either house votes in the president's favor within the 21-day period, i.e. less than 2/3 conclude that the president is unable, the president immediately resumes presidential powers and need not wait until the 21-day period is exhausted. This portion of Section 4 tilts the presumption in the president's favor by requiring that the House and the Senate each need to conclude by a 2/3 margin that the president is "unable" to sustain the vice president's position and allow him or her to continue to act as president.

The framers thought that the challenge procedure would be used even less often than Section 4.[91] In addition to the loyalty executive officials would otherwise feel towards the president, the

---

[90] For a discussion of the nonuse of Section following the Reagan assassination attempt, see Feerick, *Twenty-Fifth Amendment*,190-96; Yale Rule of Law Clinic, *Reader's Guide*, 26-29. Incoming chief of staff Howard Baker was advised that Section 4 might be in order in 1987 but determined it was not appropriate. Jane Mayer and Doyle McManus, *Landslide:The Unmaking of the President, 1984-1988*vii-xv (1988); Yale Rule of Law Clinic, *Reader's Guide*, 30-34. It was widely-reported that some high-ranking officials in the Trump administration discussed whether Section 4 should be invoked.

[91] *1965 House Hearings*, 41 (statement of Bayh) ("Although we consider as highly unlikely the possibility of a dispute between the Vice President and Cabinet on one hand and the President on the other as to the Chief Executive's

requirement of super-majority support from each house would provide further deterrence against improvident challenges to presidential capacity. They anticipated that on the rare occasions when Section 4 was used to transfer presidential powers and duties to the vice president as Acting President, the president's subsequent declaration of his or her fitness to resume presidential powers and duties would generally occur when the president's inability had been resolved and his capacity had actually been restored. Some expressed the view that the extremely rare occasions when a vice president and Cabinet would challenge such a resumption would likely signal an irrational or deranged president.[92]

Notwithstanding the expectation that Section 4 would be rarely invoked, its operation must be understood and subject to procedures that are agreed upon in advance of any possible invocation to maximize the likelihood of their legitimate use and minimize the prospect that opportunistic position-taking will occur. The circumstances of a possible use of Section 4 (a president who is unable or unwilling to acknowledge his or her own inability or one improperly so adjudged) include scenarios that are likely to be traumatic for the nation, the administration and the decision-makers. Some areas in the *Contingency Plan* need attention to bring statements into line with the Twenty-Fifth Amendment and provide norms for future conduct.

"PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS"

Following testimony by Attorney General Katzenbach that the "principal officers of the executive departments" could be defined in the legislative record,[93] the architects of the Amendment were careful to do so and their conclusion has been accepted by those who have studied the issue.[94] The legislative record made abundantly clear that the phrase Section 4 used referred to the heads of the executive departments listed in a particular statute, now 5 U.S.C. §101, as it existed at the time or was thereafter amended. [95] Accordingly, it did not include those to whom the president gave Cabinet status or those who headed various executive departments who sometimes were invited to Cabinet meetings, like the Director of the Environmental Protection Agency, Central Intelligence Agency or Ambassador to the United Nations, but were not included

ability to discharge the powers and duties of his office, we nonetheless strongly believe that we must provide for such a contingency in the Constitution.").

92 Goldstein, Talking Trump and the Twenty-Fifth Amendment, 103 & n. 163 (citing statements expressing this view).

93 *1965 House Hearings*, 103 (stating that phrase could be defined in committee report).

94 Feerick, *Twenty-Fifth Amendment*, 117; Goldstein, "Talking Trump and the Twenty-Fifth Amendment, 118-21; Yale Rule of Law Clinic, *Reader's Guide*, 11-13.

95 H.R. Report No. 89-203, 3 (1965) (stating that the "principal officers" are those Cabinet members designated in 5 U.S.C. §1 [now 5 U.S.C. §101] as later amended); see also 111 *Cong. Record* 7938 (Celler) (confirming that "principal officers" referred to the ten then existing Cabinet officials who headed departments and those late created); *ibid.* at 7944-45 (Celler) (same); *ibid.* at 7945 (Rep. William McCulloch) (same); see also Richard H. Poff, "Presidential Inability and the Twenty-Fifth Amendment, 11 *Student Law Journal* 15, 17 (Dec. 1965) (referring to statute to identify "principal officers of the executive departments"). For the Senate, see, 111 *Cong. Record* 3283 (1965) (colloquy between Sen. Philip Hart and Birch Bayh establishing that decision-makers in addition to the vice president were those listed in specified statute); S. Report No. 89-66, at 2 (1965) (identifying participants as members of president's official Cabinet).

in that statute. The Office of Legal Counsel of the Department of Justice has recognized the definition deliberately included in the legislative history[96] as has the Supreme Court.[97]

The 1993 Contingency Plan seemed to recognize that "principal officers" (i.e. "the Cabinet") meant the then 14 executive department heads but suggested that "to avoid any doubt regarding the sufficiency of any given declaration, it would be best to obtain the assent of all executive branch officials with Cabinet rank."[98] In fact, the authorities expressed above make clear that there is no doubt and any other officials a president gives Cabinet rank are not constitutional decision-makers.[99] It certainly may be helpful and prudent for the White House press office to disclose that others, especially those closely identified with a president politically or personally, concur in a particular Section 4 decision that a presidential inability necessitates a transfer of presidential power. Nonetheless, the procedures a Contingency Plan sets forth to comply with constitutional prescriptions, and formal decision-making behavior in any future Section 4 situation, should focus simply on the "principal officers" as Congress defined them, so long as they remain the operative decision-makers, along with the vice president.

There is some uncertainty regarding whether acting heads of executive departments should participate although the stronger view, from the legislative history[100] and from scholarly opinion,[101] would allow their participation. The Office of Legal Counsel has noted the conflict and that "the legislative history of the Twenty-Fifth Amendment suggests that, in the event of a vacancy in office or the absence or disability of a department head, the acting department head, at least at the level of undersecretary, principal deputy, or recess appointee might be entitled to participate in determinations of Presidential disability." [102] The 1993 Contingency Plan notes the "ambiguity" regarding the participation of "acting" heads of Cabinet departments and that the weight of the legislative history and Feerick suggest their participation.[103] Although the answer would only be significant if many executive departments were not headed by "principal officers" who had been confirmed by the Senate as such or if they were closely divided, this issue should be clarified, by O.L.C. or the White House Counsel's Office, to establish a definitive interpretation in advance of any application.

---

[96] Ralph W.Tarr, Office of Legal Counsel. Department of Justice. United States., "Operation of the Twenty-Fifth Amendment Respecting Presidential Succession" June 14, 1985, 69 (stating that heads of departments listed in 5 U.S.C. §101 are the "principal officers of the executive departments" for Section 4 of the Amendment at time when number listed equaled 13); Theodore B. Olson, Memorandum for the Attorney General re Presidential Succession and Delegation in Cases of Disability, April 3, 1981, 2 n.3 (concluding "principal officers" were 13 then existing heads of traditional Cabinet departments.

[97] Freytag v. Comm'r, 501 U.S. 868, 887& n.4 (1991); id at 991 (Scalia, J, concurring in part and concurring in the judgment).

[98] Clinton Contingency Plan, "Temporary Disability of the President Section 4 Procedure: The Vice President Becomes Acting President Pursuant to the United States Constitution, Amendment XXV, §, 1 #1.

[99] Yale Law School Rule of Law Clinic, *The Twenty-Fifth Amendment to the United States Constitution: A Reader's Guide*, 11-13 (2018).

[100] H. Report No. 89-203, 3 (1965); 111 Cong. Rec. 15380 (1965) (Sen. Kennedy — acting heads); id. at 3284 (Sen. Hart and Sen. Bayh — interim appointees); id. at 15382 (Sen. Robert Kennedy); id. at 15,385 (Sen. Javits).But see id. at 3284 (Bayh) (acting heads could not participate).

[101] Feerick, *Twenty-Fifth Amendment,*117-18. See also Yale Rule of Law Clinic, *Reader's Guide*, 13.

[102] Ralph W.Tarr, Office of Legal Counsel. Department of Justice. United States., "Operation of the Twenty-Fifth Amendment Respecting Presidential Succession" June 14, 1985, 69.

[103] Contingency Plan, "Temporary Disability of the President Section 4 Procedure: The Vice President Becomes Acting President Pursuant to the United States Constitution, Amendment XXV, §, 4 #1.

THE SECTION 4 DECLARATION, ITS TRANSMITTAL, AND WHEN EFFECTIVE

Under Section 4, the vice president and a majority of the principal officers of the executive departments may declare the president unable to discharge the powers and duties of his or her office. The declaration must be written[104] and transmitted to the President pro tempore of the Senate and Speaker of the House.[105] The vice president and Cabinet majority could send a single letter or separate letters to each. The letters need not be signed by all decision-makers but the assent of signatories must be reliably established.[106]

Transmittal of the letter(s),[107] not receipt, transfers presidential power and duties to the vice president immediately.[108] The text so states by making "transmit" the key moment. The O.L.C. has reached this conclusion as have others.[109] The fact that Section 4 in other instances uses the word "receipt" as an effective moment strengthens the conclusion that when the time of "receipt" is pivotal, that word is used.[110]

THE CONSEQUENCE OF A SECTION 4 TRANSFER

Upon transmittal of the aforesaid declaration, presidential powers and duties are "immediately" transferred to the vice president. The vice president discharges those powers and duties as "Acting President";[111] he or she remains as vice president and does not become president, the disabled president retaining that office. The president's and vice president's retention of their offices are among the features which distinguish Section 4 from the Constitution's impeachment and removal process. As a formal matter, the vice president can exercise any presidential power or duty while the president is incapacitated. As a practical matter,

---

[104] U.S. Constitution, Amend XXV, §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 …") (emphasis provided).

[105] *Ibid.*

[106] Tarr, Office of Legal Counsel. Department of Justice. United States., "Operation of the Twenty-Fifth Amendment Respecting Presidential Succession" June 14, 1985, 69; Theodore B. Olson, Memorandum for the Attorney General, April 3, 1981, 5; Olson, Memorandum for the Attorney General re Presidential Succession and Delegation in Cases of Disability, 3n.4.

[107] U.S. Constitution, Amend XXV, §4 ("Whenever the Vice President and a majority of … the principal officers of the executive departments … *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.") (emphasis provided). See Tarr, Office of Legal Counsel. Department of Justice. United States., "Operation of the Twenty-Fifth Amendment Respecting Presidential Succession" June 14, 1985, 69-70 (confirming that transfer of power occurs upon transmission of letter); Theodore B. Olson, Memorandum for the Attorney General, April 3, 1981, 4-5.

[108] U.S. Constitution, Amend XXV, §4 ("Whenever the Vice President and a majority of … the principal officers of the executive departments … 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.") (emphasis provided).

[109] Yale Rule of Law Clinic, *Reader's Guide,* 39.

[110] U.S. Constitution, amend. XXV§4 ("If the Congress, within twenty-one days after receipt of the latter written declaration…").

[111] U.S. Constitution, Amend XXV, §4 ("Whenever the Vice President and a majority of … the principal officers of the executive departments … 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.*"). (emphasis provided).

what, if any, actions the vice president will take as Acting President is likely to depend on circumstances, including, but not limited to, if and when the president is expected to recover, the nature of crises or challenges presented, the existence of deadlines for action, and the advice of other administration personnel.[112] The vice president, as Acting President, cannot nominate a vice president pursuant to Section 2 since there is no vice-presidential vacancy[113] nor can he or she use Section 3 of the Amendment to transfer those powers and duties or be subject to a Section 4 transfer since both sections contemplate transfer to the "vice president" and Section 4 empowers the vice president as a necessary decision-maker.

When the vice president acts as President, under Section 3 or 4, he or she remains as vice president but loses his or her title as President of the Senate and the ability to break ties in that body.[114] Since the vice president is discharging a constitutional duty of his or her office, i.e. acting as President during a presidential inability as determined under Section 3 or 4, he or she does not take the presidential oath but is bound by the oath taken upon becoming vice president.

THE PRESIDENT'S RESUMPTION OF POWER: THE FOUR DAYS

Unlike Section 3, the president's resumption of presidential powers and duties under Section 4 does not follow simply from his transmittal of a declaration of his ability and intent to resume them. On the contrary, the vice president and principal officers have four days to consider the president's declaration of his or her fitness. During this time, the vice president continues to act as President unless the appropriate decision-makers decide that the president should resume powers and duties before the four-day period expires.

Although the text, legislative record, and structural and pragmatic considerations each independently make clear that the president does not resume presidential powers and duties upon his or her statement under Section 4, this issue has generated some lack of clarity. The *Contingency Plans* used during the Reagan, George H.W. Bush and William J. Clinton presidencies find that the "more persuasive" authority leaves presidential powers and duties in the vice president for the four-day period and err in stating that the matter is "unclear." In fact, it is not simply the "more persuasive" authority but all of the evidence that supports this conclusion. There is no unclarity on this matter and study of the materials makes the case as close to 100% as possible that presidential powers remain with the vice president during the four-day period unless an authoritative decision is made that the president's inability has ended. The mistaken assessment in the *Contingency Plan* appears to trace from misreading or reliance on some incomplete studies more than forty years ago by persons who were not part of O.L.C. or in most cases part of the White House Counsel's office and from a confusion of two different issues, i.e. 1)whether the vice president remains in power during the four-day period while he/she and the Cabinet consider how to respond to the president's "no disability" declaration and the different question 2) whether a president can resume powers and duties during that four-day period if the vice president and/or Cabinet majority acquiesce. Adding another troubling wrinkle to the situation, the draft letter in the Clinton Plan for President Clinton's resumption of presidential powers and duties under

---

[112] Goldstein, The Vice Presidency and the Twenty-Fifth Amendment, 198-201.

[113] U.S. Constitution, amend XXV§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.") (emphasis provided).

[114] U.S. Constitution, article I, § 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States."). See Ralph W.Tarr, Office of Legal Counsel. Department of Justice. United States., "Operation of the Twenty-Fifth Amendment Respecting Presidential Succession" June 14, 1985, 70.

Section 4 seems to envision an immediate resumption [115] which is contrary to the position the text of the Plan expresses. That approach is consistent with the corresponding letter in the Reagan Contingency Plan manual but both are at odds with the conclusion in the Contingency Plan and with the clear meaning of Section 4.

Although a dispute over the president's resumption of powers and duties under Section 4 is highly unlikely to arise, such a situation could prove extraordinarily disruptive if it did. And the consequences could be enormous. If a deranged president could resume powers and duties immediately, he or she could totally undermine Section 4 from operating by discharging Cabinet members who questioned his or her fitness, thereby preventing the Section 4 constitutional checks from operating. Preventing such action by a demagogic or unstable president will always present challenges but at least he or she should not be able to draw benefit from incorrect statements in a Contingency Plan to claim that the correct constitutional understanding is ambiguous or in line with his or her position. Having presidential documents present accurate interpretations and procedures would help establish norms that would provide some help against such a bad faith use by some future president or his or her supporters.

The text of Section 4 makes clear that notwithstanding the president's transmission of a written statement to the Congressional leaders of the nonexistence of an inability, the president's resumption of presidential powers and duties is contingent upon the absence of a contest from the vice president and principal officers within the four days.[116] The argument that the president resumes immediately subject to ouster should the vice president and Cabinet members contest his or her fitness is inconsistent with the language of Section 4. The text does not provide that the president "shall resume …unless [and until]" the vice president and principal officers transmit their written objection, the formulation that would be needed to sustain that interpretation. Significantly, "until" is omitted here although in the analogous context in Section 3 it was inserted to end the vice president's service as Acting President.[117] Similarly, whereas Section 4 provides that the vice president's exercise of presidential powers and duties begins "immediately" upon the transmittal of the original vice president-Cabinet declaration that the president is "unable," the president's resumption does not occur "immediately" but is subject to review by other executive branch officials. If the president's declaration of fitness under Section 4 allowed him or her to resume power immediately subject to being ousted by a renewed assertion of the vice president and Cabinet officials within four days, one would have expected Section 4 to provide for the president's "immediate" resumption "unless and until" the counter-declaration was transmitted within the four-day period.

The legislative history is even more compelling in supporting the conclusion that the vice president remains in power during the four-day period absent some earlier executive branch action acknowledging the president's fitness. Indeed, the legislative record is uncontradicted on this point. It contains many statements that the vice president acts as president during the challenge

---

[115] Appendix 10, Written Declarations Reassuming Authority for the President (Section 4).

[116] U.S. Constitution, Amend. XXV, §4 ("…Thereafter, When the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office *unless* the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office….") (emphasis provided).

[117] U.S Constitution, Amend XXV, §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.") (emphasis provided).

period and none expressing a contrary interpretation, leaving no doubt regarding Section 4's meaning or the understanding and intent of those who promulgated it in this respect. Witnesses including Feerick,[118] Harvard law professor Paul A. Freund,[119] Attorney General Katzenbach[120] and former Attorney General Brownell[121] testified to that understanding. Their interpretations carried weight because Brownell, Freund and Feerick were part of an American Bar Association group which generated principles that were consistent with the content of the Amendment and Katzenbach, as the attorney general, was looked to for authoritative interpretations. It was evident in material included in the record from Eisenhower.[122] Bayh, the principal author, also expressed that interpretation during hearings in both the Senate[123] and House.[124]

This clear understanding was also articulated during floor debates, including by the principal authors. Although the length of the challenge period varied in different versions of the proposal between two and seven days until the Senate and House compromised at conference on four days in the ultimate Amendment, during debates in the Senate, Bayh repeatedly stated that the vice president would continue to exercise powers and duties.[125] Similarly, during floor debates in the House, the principal House author, Representative Emanuel Celler,[126] stated that the vice president would continue to serve as acting President during the period given the vice president and Cabinet to consider the president's statement that he was not incapacitated. Other House members made similar statements.[127] Indeed, in the House a proposed change to what became the Twenty-Fifth Amendment to allow the president to resume immediately[128] was defeated on the floor.[129] The proposal would not have been offered had it not been understood that the measure before the House allowed the vice president to retain power during the period in which he or she had to respond.[130]

The legislative reports associated with the Twenty-Fifth Amendment also reflected the understanding and intent that the vice president would continue in power during the period the vice president and Cabinet could consider the president's statement that he was fit to resume. For instance, the 1964 Senate Report stated that in response to the president's declaration "should the Vice President and a majority of the heads of the executive departments feel that the President is

---

118 Presidential Inability and Vacancies in the Office of the Vice President: Hearings on S.J. Res. Etc. Before the Subcomm. On Constitutional Amendments of the Senate Comm. On the Judiciary, 88th Cong., 152 (1964) [hereinafter *1964 Senate Hearings*].

119 *Ibid.* 130.

120 *1965 Senate Hearings,*10 (stating that except when president voluntarily declared his or her own inability, the vice president would continue acting as president notwithstanding the president's declaration); *ibid* at 16, 17; *1965 House Hearings*, 99, 100.

121 *1965 House Hearings,* 248, 250.

122 *Ibid.* at 232 ("Should there be any dispute between the President and the Vice President as to whether the former is ready to resume his duties and the Cabinet should agree with the Vice President, then the Vice President should continue to serve for the time being.").

123 *1965 Senate Hearings,*17, 18.

124 *1965 House Hearings,* 41, 58, 63, 69.

125 111 *Cong. Re*cord 3284 (colloquy between Bayh and Sen. Frank Lausche); 111 *Cong. Record* 3285 (colloquy between Bayh and Sen. Gordon Allott).

126 111 *Cong. Record* 7938, 7939 (1965).

127 111 *Cong. Record* 7939-40 (Rep. Robert Duncan); *ibid.* at 7948 (Rep. John V. Lindsay); *ibid.* at 7958-59 (Rep. Rodney M. Love); *ibid.* at 7965 (Rep. James Corman); *ibid.* at 7966 (Rep. Robert McClory).

128 111 *Cong. Record* 7964 (Rep. Arch Moore).

129 *Ibid.* at 7966.

130 See, Goldstein, Talking Trump and the Twenty-fifth Amendment: Correcting the Record on Section *4,*140-41.

unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating" within the period allowed.[131] Significantly, the Senate Report did not state that the vice president-Cabinet transmission challenging the president's statement of fitness allowed the vice president to reclaim presidential powers and duties but that such a transmission would "prevent" the president's resumption. That formulation, of course, would not have been used if the president had already returned to power based on his or her declaration since prevention would then be impossible. In early 1965, at a time what later became the second paragraph of Section 4 was included in a Section 5, the Senate Report stated that the Section 5 challenge procedure only applied to a transfer of presidential powers and duties by the vice president and Cabinet under Section 4, not to a Section 3 transfer by the president. Although a president who transferred power under Section 3 could resume by a mere declaration, under Section 4 the vice president would continue to exercise presidential powers and duties as acting President[132] and the vice president and Cabinet majority could "prevent" the president from resuming those powers by transmitting their counter-declaration within the challenge period.[133] The House's 1965 Report also made clear that the vice president remained in power during the period allowed to respond to the president's declaration of fitness.[134]

Compelling structural and pragmatic arguments also confirm that the vice president continues to act as president during the challenge period. These arguments were expressed repeatedly in the legislative record. The Amendment reflected the framers' commitment to having a well-functioning president always discharging presidential powers and duties. Once the president's capacity had been questioned by the vice president and Cabinet majority, he or she should not return to power until those decision-makers or Congress confirmed his or her fitness to do so. Leaving the vice president in power contributed to stability by minimizing the number of changes that would take place if the president could resume power based on his or her declaration only to lose it by an adverse statement from his or her executive branch colleagues. Moreover, leaving power with the vice president would avoid the risk that a deranged president could return and work irreparable damage before Congress could even consider the issue.[135]

Scholarly studies overwhelmingly reach the conclusion that the vice president continues to act as president during the four-day period. Feerick's writings, which were widely disseminated

---

131 S. Report No. 88-1382, 12 (1964).

132 S. Report No. 89-66, 3 (1965) ("the intent of section 5 is that the Vice President is to continue to exercise the powers and duties of the office of Acting President until a determination on the President's inability is made by Congress."); *see ibid.* at *14*.

133 *Ibid.* at 14.

134 H.R. Report No, 89-203, 3 (1965). See Goldstein, Talking Trump and the Twenty-Fifth Amendment*,* 139 (discussing House report).

135 Birch Bayh, *One Heartbeat Away,* 272-73. *1965 Senate Hearings*, 17-18 (statement of Bayh) (stating that Amendment sought to prevent disabled president from exercising presidential powers and duties and sought to minimize transfers); *1965 House Hearings*, 58 (statement of Bayh) (expressing desire to minimize transfers); *ibid* at 252 (testimony of Brownell) (pointing to advantage in minimizing transfers as supporting leaving power with vice president); 111 *Cong. Record* 3284 (Bayh) (stating that Amendment seeks to minimize transfers and promote continuity); *ibid* at 3285 (Bayh) (stating that concern regarding president's ability and interest in minimizing transfers compelled leaving power with vice president); 111 *Cong. Record* 7938 (Celler) (pointing to danger of disabled president exercising presidential powers); *ibid* at 7965 (Rep. James Corman) (pointing to need to keep president from resuming power if he was mentally unsound); *ibid* (Celler) (expressing concern regarding resumption by president who was "nutty as a fruitcake" or "utterly insane"); *ibid* (Corman) (reduce uncertainty regarding who was acting as President); *ibid* (Rep. Peter W. Rodino, Jr. and Corman) (expressing concern that disabled president might discharge Cabinet members and prevent Congressional consideration of issue); *ibid* at 7966 (Rep. Robert McClory) (stating interest in minimizing transfers).

during the time Congress considered the measures[136] and during the ratification period,[137] conveyed this understanding that the vice president continued to discharge presidential powers and duties during the period allowed for the vice president and Cabinet to consider the president's declaration. These writings, based on Feerick's study of the record, provide not only the conclusions of a careful scholar but also suggest the contemporaneous understanding of participants and ratifiers. More recent scholarly studies reach the same conclusion.[138]

The Office of Legal Counsel has also recognized that a vice president to whom presidential powers and duties are transferred under Section 4 continues to act as president. In an April 3, 1981 Memorandum for the Attorney General a few days after the Reagan assassination attempt, Assistant Attorney General Theodore B. Olson reported that whereas the president resumed presidential powers and duties based on his declaration under Section 3, under Section 4 "the vice president remains acting president until the issue is resolved." [139] A later O.L.C. report states that if the vice president and Cabinet majority reassert their position that the president is disabled "[t]he Vice President would remain Acting President until the congressional vote,"[140] a formulation that makes clear that the vice president does not reassume power but continues to exercise the power he or she acquired with the initial declaration.

The Reagan-Bush-Clinton *Contingency Plans* recognize that the interpretation stated above is the more compelling conclusion but suggest that there is some uncertainty. But there is no uncertainty and the *Contingency Plan* offers absolutely no evidence to doubt that the vice president continues to act as president during the four-day challenge period. The erroneous suggestion of uncertainty traces entirely to two mistakes in the preparation and analysis of the *Contingency Plans*. First, the *Contingency Plan* apparently relied on three letters it cites which were prepared during the Ford and Carter administrations regarding the operation of the Amendment. None provides any legitimate basis to support the conclusion that the vice president acts as president during the four days while he or she and the Cabinet consider the merits of the president's declaration of fitness.

The first, a Memorandum on the Amendment of August 21, 1975 prepared by Ms. Bobbie Greene Kilberg correctly states that "[t]he legislative history of the Amendment indicates that the Vice President continues to exercise the powers and duties of the office of the President during the 4-day period for transmittal of an objection to resumption of power by the President and during the 21-day period in which Congress must act."[141] It goes on to state that "during both

---

[136] John D. Feerick, *The Vice Presidency and the Problem of Presidential Succession and Inability*, 32 Fordham Law Review 457, 495 (1964)(explaining that under the ABA Consensus the vice president and Cabinet majority could "prevent" the president from reclaiming power); John D. Feerick, *Presidential Inability: The Problem and A Solution*, 50 American Bar Association Journal 321, 324 (1964) (stating that the ABA consensus was that the vice president continued to exercise presidential powers and duties).

[137] John D. Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy,* 51 American Bar Association Journal 915, 917 (1965) (stating that president would need to wait four days before resuming power while vice president and Cabinet considered issue); John D. Feerick, *The Proposed Twenty-fifth Amendment to the Constitution*, 34 Fordham Law Review 173,200-01 (1965) (stating that vice president continued to act as President during the four day period unless the vice president and Cabinet agreed to the president's earlier resumption). See also American Bar Association and John D. Feerick, *Presidential Inability and Vice Presidential Vacancy: With Questions and Answers* 4 (1965) (stating that president resumes presidential powers and duties only if vice president and Cabinet do not contest his declaration of fitness).

[138] See, e.g., Feerick, *Twenty-Fifth Amendment,* 118-19; Goldstein, Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4, 125-46; Yale Rule of Law Clinic, *Reader's Guide*, 48-49.

[139] Theodore B. Olson, Memorandum for the Attorney General, April 3, 1981, 2.

[140] Ralph Tarr, Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, June 14, 1985, 67.

[141] Memorandum, 25th Amendment, August 21, 1975, 5. The Memorandum is Appendix 16 in the Clinton Contingency Plan. It was Appendix 14 in the Bush Contingency Plan and apparently in the Reagan Plan.. Ms.

those periods of time, it would be very difficult to avoid a feeling of serious uncertainty and this atmosphere could be debilitating to the exercise of executive leadership."[142] It is important to note that the latter comment, while certainly a correct assessment of a period in which the president and vice president had conflicting or possibly conflicting assessments of the president's fitness, was not a negative reflection on the clarity of the Amendment but one regarding the inherent nature of such a unique historical contingency.

A March 21, 1978 memorandum from Robert Torricelli, then a junior political aide to Vice President Mondale,[143] does not specifically address who exercises presidential powers and duties during the four-day period but makes the erroneous statement that the "actual language" of Section 4 "does not reveal" who discharges presidential powers during the 21-day period given Congress to resolve an executive branch dispute.[144] In fact, the last sentence of Section 4 makes clear that the vice president discharges those powers and duties by stating that if a 2/3 vote of each house determines that the president is unable to discharge presidential powers and duties "the Vice President shall *continue* to discharge the same as Acting President; otherwise, the President shall *resume* the powers and duties of his office."[145] The formulation that the vice president will continue or the president will resume, discharging presidential powers and duties makes clear that the vice president is acting President during the 21-day period Congress has to consider the issue. Torricelli does state that the legislative history "strongly suggests" the vice president continues as acting President but worries about a "period of uncertainty as to the nation's leadership…until the matter was litigated."[146] The legislative history is overwhelming on this point and the "period of uncertainty" traces from the circumstances necessarily involved anytime the president and vice president contest before Congress the president's fitness, not from the meaning of Section 4 which is clear.

The third memorandum, from a Frank Wiggins, rightly concludes that, contrary to Torricelli's memorandum, there is no question that the vice president remains in power during the 21-day period[147] but finds that the "matter of the four days is less clear." [148] Although Wiggins is "fairly confident" that the correct answer is that the vice president remains in power during that time the uncertainty he finds is based on his apparent misunderstanding[149] of fragments of the

---

Kilberg's authorship of it is apparent from Feerick, *Twenty-Fifth Amendment*, 340-49 which presents the entire "Memorandum" as Appendix J, making clear that the Contingency Plan omits the last three pages.

142 *Ibid.*

143 Clinton Contingency Plan, Appendix 17. The Torricelli Memorandum was Appendix 15 in the Bush and apparently in the Reagan Plans.

144 *Ibid.*, 3.

145 U.S. Constitution, Amend. XXV, §4 (emphasis provided).

146 Torricelli Memorandum, 3. In addition to the rather startling mistake regarding who acts as president during the 21-day period, Torricelli's Memorandum makes some other assertions that also reflect negatively on the overall quality of his Memorandum. He states there were "five documented instances" of signed written agreements regarding presidential inability while listing four (1-2); he states that "[t]here is even a question as to whether mental or emotional illnesses were contemplated" (4) which is clearly incorrect as discussed earlier in this paper; and he asserts that "[t]he Twenty-Fifth Amendment seems to have created almost as many questions as it has answered" (5) which reflects a misunderstanding of its historical context, purpose or legislative obstacles.

147 Frank Wiggins to Mike Berman re The 25th Amendment and Beyond, [undated], Clinton Contingency Plan, Appendix 18, 3A ("The matter of the 21 days…does not seem doubtful at all."). The Wiggins Memorandum was Appendix 16 in the Reagan and Bush Plans.

148 *Ibid.* 4.

149 Wiggins refers to Senator Dirksen's "wondering on the question" but Senator Dirksen's focus was on whether the challenge procedure, which was included in Section 5 of an earlier version of the Amendment, applied to Section 3, when the president voluntarily transferred power, as well as Section 4. See Dirksen's comments at 111

legislative history. He acknowledged that his review of the legislative history "has not been exhaustive"[150] and as demonstrated in the preceding footnote the sources he cited raise no uncertainty.

In essence, Kilberg's Memorandum correctly concluded that the vice president continues to act during the four-day period, Torricelli did not address that subject but botched a related subject, and Wiggins pointed out that Torricelli was wrong regarding the 21-day period, agreed with Kilberg's conclusion but found "uncertainty" based on a misreading of snippets of legislative history after acknowledging that his review was incomplete.

In addition to the failure of the *Contingency Plan* to rest its "uncertainty" characterization on any foundation in the text or record, its erroneous conclusion also rests on a second confusion. The Plan's discussion focuses not so much on whether the president could resume immediately based upon his declaration alone but on the different issue of whether the president must wait four days to resume even if his or her resumption is not opposed by the other executive branch decision-makers.[151] In other words, the authors of the *Contingency Plan* seem preoccupied by the question of whether a recovered president would have to wait four days even if the vice president and Cabinet agreed that the inability had ended and the president was fully capable of discharging presidential powers. The *Contingency Plan* seems to imagine only two possible interpretations of the constitutional language—a) "an immediate but defeasible resumption of authority by the President" or b) "to provide for resumption of authority only after the four-day period has elapsed."[152] The discussion of this Memorandum demonstrates that the first interpretation is clearly incorrect, a conclusion the Contingency Plan shares although less equivocally. Based on the binary choice the Contingency Plan identifies, it concludes that the "legislative history tends to support the latter interpretation,"[153]i.e., that the president must wait four days. That conclusion is basically correct but subject to two critical qualifications. First, as shown above, the statement badly understates the legislative history; it does not "tend" to support the idea that the vice president remains in power during the four-day period, it unequivocally does so. Second, rather than presenting a binary choice, the *Contingency Plan* totally ignores a third option which not only exists but which the architects of the Twenty-Fifth Amendment embraced—that the president may resume during the four-day period with, and only with, appropriate acquiescence from the Section 4 executive branch decision-makers.

Cong. Record 3268 (1965). The intent that it did not was initially expressed in S. Report No. 89-66 and then by folding what had been Section 5 into Section 4 to underscore that the challenge period did not apply to Section 3. Far from raising uncertainty regarding who held power during the challenge period, Senator Dirksen's question assumed that the vice president did so and was bothered by the possibility that that would be true in a Section 3 situation, too, under the earlier version. Wiggins also refers to a "confusing exchange" relating to Senator Hruska's amendment. Wiggins to Berman, 4, but there was nothing confusing about the exchange. Hruska.s amendment simply changed the two days the proposal then gave the vice president and Cabinet to consider a presidential declaration of fitness to a seven-day period. 111 *Cong. Record* 3274 (1965). Hruska said nothing to suggest that the change in the number of days affected who would act as president during that time period. After some discussion by others regarding other issues relating to the proposed amendment, Bayh accepted Hruska's proposal as a friendly amendment. 111 *Cong. Record* 3276 (1965). At the conference, the conferees compromised on a four-day period (between the seven-day Senate period and two-day House period).

150 Wiggins to Berman, 11 n. 2.

151 *Contingency Plans, Temporary Disability of the President: Resumption of Authority By the President* 3-4 ("Putting aside the prospect of a disagreement between the President and Vice President and a majority of the Cabinet as to the President's ability to govern, a situation which also would raise difficult questions, the question remains as to who governs during the four-day period following the President's declaration that he again is able to perform the duties of his office.").

152 *Ibid.*, 4.

153 *Ibid.*

The text of Section 4 does not negative this possibility and the legislative history unequivocally makes clear that the provision was understood to allow the president to resume presidential powers and duties during the challenge period with acquiescence.[154] During the House debate, its principal author, Celler, stated that during the challenge period the " Acting President would …be in the saddle unless he agrees the President is fully restored."[155] Poff, a key author and member of the Conference Committee, echoed Celler's understanding in explaining to the House the Amendment as it emerged from the House-Senate conference. Poff explained "The conferees intend that the 4-day period be interpreted as an outside limitation on the time in which the Vice President may consider making a challenge; it is not necessary that the President wait 4 days to resume his office if he and the Vice President mutually agree that he do so earlier."[156] Similarly, in the Senate, Bayh stated that the challenge period "would not prevent the Vice President and the President agreeing to a lesser period of time" for the president to resume.[157]

The conclusion that the challenge period can be shortened by agreement between the president and vice president finds support in an analogous feature of Section 4, the 21-day period given Congress to consider a dispute between the president and vice president/Cabinet regarding the president's fitness to resume powers. Section 4 provides that unless each house of Congress supports the vice president's position by a 2/3 margin, the president resumes power. The legislative history is clear, though, that if either house votes against the vice president's position during the 21-day period for action, the president resumes presidential powers and duties immediately.[158] Just as the president can resume powers before the 21-day period for Congress to act with the support of a house, so, too, may he or she resume early during the four- day challenge period with the appropriate acquiescence.

---

154 *1965 Senate* Hearings, 10 (testimony of Katzenbach) (stating the interpretation of Section 4 that under Section 4, "the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the [challenge] period"); *ibid.* at 15 (Katzenbach) ("I think that people would agree that if the President determines his inability has ceased and the Vice President agrees with that, there should be an immediate resumption by the President of his powers as President. "); *1965 House Hear*ings, 41 (statement of Bayh) ("The language of the section would permit tile Vice President to divest himself of the powers and duties of the Presidency immediately."); *Ibid*., 99, 107 (testimony of Katzenbach) (president would resume during the challenge period with the acquiescence of the vice president); *ibid* at 243 (testimony of Brownell) (stating that president and vice president could agree to president's resumption before the challenge period expired); 111 *Cong. Record* 7939 (Celler) (stating that vice president would remain in power during the challenge period unless he agreed the president was "fully restored"); *ibid* at 7939-40 (Rep. Robert Duncan);*ibid.* at 15, 214 (statement of Rep. Richard H. Poff) (stating that the four day period was "an outside limitation" and vice president could agree to earlier resumption).

155 111 *Cong. Record* 7939 (1965).

156 111 *Cong. Record* 15,214 (1965).

157 111 *Cong. Record* 3285 (1965).

158 H.R. Report No. 89-564, 4 (1965) ("A Yote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office."); 111 *Cong. Record* 15, 215 (1965) (statement of Poff) (stating that vote of either house during the 21 day period which fails to support vice president's position "shall have the effect of restoring the President immediately to his office, even though the other House has not yet acted."); 111 *Cong. Record* 15,379 (1965) (statement of Bayh) ("It should be made clear that if during the 21-day limit one House of Congress, either the Senate or the House of Representatives, voted on the issue as to whether the President was unable to per- form his powers and duties, but failed to obtain the necessary two-thirds majority to sustain the position of the Vice President and the Cabinet, or whatever other body Congress in its wisdom might prescribe at some future date, the issue would be decided in favor of the President. In other words, if one House voted but failed to get the necessary two thirds majority, the other House would be precluded from using the 21 days and the President would immediately re- assume the powers and duties of his office.").

This resolution makes sense. The *Contingency Plan* seems, inaccurately, to view the four-day challenge period as time when the president is absolutely precluded from resuming power. Yet the four-day period was intended to give the vice president and Cabinet an opportunity to collect information regarding the president's fitness and to determine whether he or she was ready to resume powers and duties, not as a period during which the president absolutely had to remain sidelined. If within the four days the appropriate executive branch decision-makers determine that they acquiesce in the president's declaration of fitness, there is no reason to defer the president's resumption. And since the Amendment rests on the theory that the president should exercise presidential powers and duties except when there has been an authoritative determination that he or she is "unable," once the cloud from the prior determination is removed there is no reason to withhold presidential powers and duties from the president and every reason for him or her to resume them.

Although the legislative record and logic make clear that the president may resume powers and duties during the four-day period with, and only with, the appropriate acquiescence from the executive branch, there is some uncertainty regarding what constitutes that appropriate acquiescence. Most references in the legislative record spoke of the vice president's concurrence with the president resuming during the challenge period.[159] John Feerick suggested in some of his contemporaneous scholarship that the president might resume during the challenge period with the agreement of the vice president and Cabinet[160] although he did not specifically address the question whether a resumption could occur if only one of those decision-makers concurred. Feerick's book, *The Twenty-Fifth Amendment*, states that the vice president alone or in conjunction with the Cabinet could agree to an earlier resumption.[161] Since the vote by either house adverse to the vice president within the 21 days would immediately return presidential powers and duties to the president, by analogy an argument could be made that a definitive statement by either the vice president or the Cabinet majority within the four days might have the same effect.[162]

Although the record leaves some uncertainty regarding who would need to acquiesce in the president's resumption, there should be no question that the president can resume presidential powers and duties with appropriate acquiescence. Quite clearly there would be no question that the president could resume within the four days if the vice president and a majority of the principal officers stated their agreement with the president's no inability declaration. The legislative record also supports the idea that the president could resume within the challenge period with the vice president's acquiescence.

---

[159] See, e.g., *1965 Senate Hearings*, 10 (testimony of Katzenbach) (stating the interpretation of Section 4 that under Section 4, "the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the [challenge] period"); *ibid.* at 15 (Katzenbach) ("I think that people would agree that if the President determines his inability has ceased and the Vice President agrees with that, there should be an immediate resumption by the President of his powers as President. "); *1965 House Hearings*, 99, 107 (testimony of Katzenbach) (president would resume during the challenge period with the acquiescence of the vice president); id at 243 (testimony of Brownell) (stating that president and vice president could agree to president's resumption before the challenge period expired); 111 *Cong. Record* 7939 (Celler) (stating that vice president would remain in power during the challenge period unless he agreed the president was "fully restored"); *ibid.* at 7939-40 (Rep. Robert Duncan);*ibid* at 15, 214 (statement of Rep. Richard H. Poff) (stating that the four day period was "an outside limitation" and vice president could agree to earlier resumption)

[160] Feerick, The Proposed Twenty-Fifth Amendment, 200; Feerick, Proposed Amendment on Presidential Inability, 917.

[161] Feerick, *The Twenty-Fifth Amendment*, 119.

[162] See Goldstein, Talking Trump and the Twenty-Fifth Amendment, 148.

The Contingency Plan should be revised to reflect that the president can resume powers and duties immediately within the four-day period if and only if he or she receives appropriate acquiescence in his or her declaration of fitness, and that appropriate acquiescence exists if the vice president and a majority of the principal officers agree within the four-day period that the president is no longer "unable" or if the vice president agrees that the president is no longer "unable." The only remaining question is whether the president could do so with the acquiescence of the Cabinet over the vice president's objection. My own view is that the analogy to the 21-day situation would suggest Cabinet agreement would be sufficient. This scenario also seems extremely remote. This matter might be addressed by an opinion of Office of Legal Counsel or White House Counsel resolving this very narrow remaining question.

Section 4 does not prescribe how a vice president and Cabinet might acquiesce in a president's determination that he or she is ready to resume presidential powers and duties. Yet the use of a declaration transmitted to the Senate president pro tempore and Speaker for other declarations in Section 3 and 4 would seem to provide precedent for the use of a similar transmission in that case.

SECTION 4: REVIEW BY CONGRESS

Section Four further provides that if the vice president and majority of the principal officers transmit a timely written declaration contesting the president's no inability written declaration, Congress shall decide the issue. As previously stated, the vice president continues to act as President during this period.[163] The text of Section 4 makes this conclusion clear by stating that depending on the outcome of the votes in the Senate and House, either the "Vice President shall continue to discharge" presidential powers and duties or "the President shall resume" them, formulations that clearly communicate that at that time, the vice president is acting as president.[164] The legislative record confirms this conclusion.[165] Congress must reassemble within 48 hours "for that purpose" if not in session. If Congress was in session, it must resolve the dispute regarding presidential inability within 21 days of its "receipt" of the declaration from the vice president and principal officers contesting the president's own written declaration of fitness[166]; if Congress was not in session, it must resolve the issue within 21 days after it is "required to assemble." [167]

---

[163] Feerick, *Twenty-Fifth Amendment*, 119.

[164] United States Constitution, amend XXV§4 (emphasis provided).

[165] *1965 House Hearings*, 58 (testimony of Bayh) ("The Vice President continues to act as President until the Congress decides the issue."); *ibid.*,250 (testimony of Brownell) ("I am inclined to think the reasoning back of the present language of House Joint Resolution 1, and certainly was in our thinking, is there is a presumption that the Vice President should continue during that period because it has been proved beyond a shadow of a doubt that the President was unable to act up to that point, and I would think that the country would want to have some definitive act occur to be sure that the President was able to come back, so that I think it is perfectly reasonable to leave the Vice President in that very brief period."), *ibid.*,253 ("During the period while Congress had the matter under consideration, I would be inclined, on balance, to let the Vice President continue during that time because it is always within the power of the Cong0ress to restore the President to the full exercise of the powers and duties of his office."); 111 *Cong. Record* 3284-85 (Bayh); 111 *Cong. Record* 7939 (Celler).

[166] United States Constitution, amend XXV§4. See also H.R. Report No. 9-564 4 (2965) ("The 21-day period., if the Congress is in session, runs from the date of receipt of the letter."). Presumably, the 21-day period begins to run when the last of the declarations from the vice president and majority of the principal officers are received by the Speaker and Senate president pro tempore. Yale Rules of Law Clinic, *Reader's Guide*, 51.

[167] United States Constitution, amend XXV§4.

The House and Senate vote separately.[168] Each house must determine by a 2/3 majority that the president is "unable to discharge" presidential powers and duties for the vice president to continue acting as President. If either house fails to meet that super-majority threshold, the president resumes power regardless of the vote in the other house. In fact, once one house votes and fails to conclude by a 2/3 majority that the president is "unable" he or she immediately resumes presidential powers and duties without the need to wait for the other house to vote or for the 21 days to expire.[169]

SECTION FOUR: CONSEQUENCES IF CONGRESS VOTES THAT PRESIDENT IS "UNABLE"

If Congress determines by a 2/3 vote in each house that the president remains "unable to discharge the powers and duties" of the presidency, the vice president continues to discharge those powers as "Acting President." Unlike the process for impeachment and removal, the president is not removed from office. He or she remains as president. [170] Moreover, the president may initiate subsequent attempts to reclaim presidential powers and duties by triggering the Section 4 process again by transmitting a subsequent transmission to the Senate president pro tempore and Speaker asserting his or her fitness.[171]

PRESIDENTIAL SUCCESSION AND INABILITY BEYOND THE VICE PRESIDENT

INTRODUCTION

No one other than a president or vice president has ever been called upon to hold the presidency or act as president. On the one occasion when the elected president and vice president failed to complete their terms, the second Nixon-Agnew term, Section 2 of the Twenty-Fifth Amendment twice during a 14-month period provided a new vice president, the first of whom (Gerald Ford) succeeded to the presidency upon President Nixon's resignation. On other occasions, the death or inability of both national officials could easily have occurred. For instance, Vice President Andrew Johnson was a target of the assassination plot that killed President Lincoln and Vice President Lyndon Johnson rode two cars behind the presidential limousine when President Kennedy was assassinated. On several occasions, two of the nation's national officers died within a four-year period: Vice Presidents George Clinton and Elbridge Gerry died within four years of each other during the Madison presidency; President Zachary Taylor's death was followed less than three years later by the death of Vice President William King; Vice President Garret Hobart's death during President William McKinley's first term occurred less than two years before President McKinley was assassinated during the first half year of his second term. And during Madison's second term, the president suffered a serious illness which raised concerns regarding his survival, only to recover a little more than a year before Gerry's death.[172]

---

[168] H. R. Report No. 89-564, 4 (1965) ("A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office."); *1965 House Hearings*, 95-96 (testimony of Katzenbach) Yale Rule of Law Clinic, *Reader's Guide*, 54.

[169] H.R. Report No. 89-564, 4 ("A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office.").

[170] Goldstein, Talking Trump and the Twenty-Fifth Amendment, 122-23.

[171] *1965 House Hearings*, 94 (testimony of Bayh); *ibid.*,101, (testimony of Katzenbach); *ibid.* ,251 (testimony of Brownell); Feerick, *Twenty-Fifth Amendment,* 120; Goldstein, Talking Trump and the Twenty-Fifth Amendment, 121-24; Yale Rule of Law Clinic, *Reader's Guide* 70.

[172] John D. Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 79 *Fordham Law Review* 907, 918 (2010).

Although the addition of Section 2 of the Twenty-Fifth Amendment to the Constitution significantly reduces the chance of a gap in presidential leadership that would cause recourse to the line of succession following the vice president, it does not eliminate that risk. A presidential death or inability could occur before a vice presidential vacancy was filled or some event or combination of events could cause simultaneous vacancies or inabilities in the two offices. Concern regarding such an event prompted Vice President Dick Cheney to work often at an "undisclosed location" after 9/11.

All such scenarios would be harrowing but those involving one or more incapacities present unique challenges. As previously stated, Sections 3 and 4 of the Twenty-Fifth Amendment require a functioning vice president. They cannot be used when the vice presidency is vacant. Neither the Constitution nor federal statutes provide procedures to determine that a vice president is unable to discharge his or her duties nor do they provide a means to declare the president unable absent the vice president's participation. The architects of the Twenty-Fifth Amendment recognized these gaps but determined that trying to address them would prevent achieving the super-majority consensus needed to propose a constitutional amendment. Although further legislation would be appropriate, until it occurs some executive branch planning needs to consider some troubling scenarios and issues.

A BRIEF OVERVIEW OF SOME CONSTITUTIONAL ISSUES

The Constitution empowers Congress to identify an "officer" to act as president in case of the death, removal, resignation or inability of the president and vice president.[173] It also empowers Congress to identify a "person" to act as president in case the electoral system fails to produce a president or vice president who qualifies.[174] Congress, in the Presidential Succession Act of 1947, has created a line of succession beginning with the Speaker of the House of Representatives, then the President pro tempore of the Senate, and then the 15 heads of the executive departments beginning with the Secretary of State and extending based on date of creation to the Secretary of Homeland Security.[175] The creation of a long line of successors and the practice of designating one of those in the line of succession to absent himself or herself from events like the State of the Union constitute official recognitions that securing presidential continuity requires more than simply a vice president.

Without providing here a full consideration of constitutional issues relating to the current line of succession, some discussion of those issues is important in considering options for dealing with contingencies that might arise involving either an incapacitated vice president or a double vacancy/incapacity. Some have suggested that a double vacancy/incapacity might produce competing claims to act as president from the Speaker of the House and Secretary of State, the latter's claim being based on the argument that legislative leaders cannot constitutionally be placed

---

[173] U.S. Constitution, art. II, §1, cl.6 ("…the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.").

[174] U.S. Constitution, amend XX. §3 ("If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.").

[175] 3 U.S.C. §19 (a), (b), (d) (1).

in the line of succession. [176] Although some respected academics[177] have argued that legislative leaders cannot constitutionally be included in the line of succession and have also attacked as unconstitutional various provisions of the 1947 law,[178] significantly for most of American history the line of succession Congress created with the president's approval placed the Speaker and Senate president pro tempore atop the line of succession immediately after the vice president. From 1792 until 1886, the president pro tempore of the Senate preceded the Speaker.[179] From 1886 to 1947, the legislative leaders were excluded and a Cabinet line was adopted.[180] From 1947 to the present, the Speaker, then the Senate president pro tempore have led the line. Thus, for 165 of the last 228 years, Congress and presidents have placed legislative leaders atop the line. Senator Bayh's original proposed constitutional amendment would have changed from legislative to Cabinet succession[181] yet he dropped those provisions because of perceived resistance, especially in the House of Representatives.[182]

This longstanding practice supports the constitutionality of legislative succession. The fact that the second Congress adopted a mode of legislative succession and that George Washington, who presided over the Constitutional Convention, signed the measure offers some support that the practice is consistent with the framers' intent.[183] Some scholars claim that legislative leaders are not "officers of the United States" as the Constitution uses that term.[184] Although an earlier draft at the Constitutional Convention used the formulation "officers of the United States," significantly the document as approved by the Convention and ratified by the states uses the simpler phrase "officer" in the relevant Officer Succession Clause[185] which might be construed

---

[176] See, e.g., Brian Kalt, The law is clear about handling presidential illness — but it can get murky fast, *Washington Post*, October 2, 2020.

[177] See, e.g., Akhil Reed Amar & Vikram David Amar, Is the Presidential Succession Law Constitutional? 48 *Stanford Law Review* 113 (1995); Ruth C. Silva, The Presidential Succession Act of 1947, 47 *Michigan Law Review* 451 (1949); Continuity of Government Commission, Preserving Our Institutions: The Continuity of the Presidency, 39 (June 2009).

[178] Amar and Amar, Is the Presidential Succession Law Constitutional?, 135-36 (arguing that provisions allowing bumping of Cabinet officers and requiring officials to resign are unconstitutional).

[179] See generally John D. Feerick, *From Failing Hands: The Sory of Presidential Succession* 57-63 (1965); Feerick, *Twenty-Fifth Amendment*, 35-38.

[180] Feerick*, From Failing Hands*, 140-151, 204-10; Feerick, *Twenty-Fifth Amendment*,38-40.

[181] Feerick, *Twenty-Fifth Amendment*, 71-75.

[182] Feerick, *Twenty-Fifth Amendment*,71.

[183] Goldstein, Akhil Reed Amar and Presidential Continuity, 87.

[184] For instance, the Incompatibility Clause, United States Constitution, art. I, §6, cl. 2 ("no Person holding any office under the United States, shall be a Member of either House during his Continuance in Office.") does not apply to the Speaker or the President pro tempore of the Senate. Nor are they commissioned by the President although Article II, §3 provides that "The President shall Commission all the Officers of the United States." Although the Impeachment Clause (Article II, §4) provides that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors" the Speaker of the House and President pro tempore of the Senate are not subject to impeachment and removal.

[185] United States Constitution, art. II, §1, cl. 6 ("and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what *officer* shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.") (emphasis provided).

to include legislative officers.[186] The Speaker,[187] and perhaps the president pro tempore of the Senate,[188] seem to be designated as "officers" by the Constitution. The executive branch has long accepted the conclusion that legislative leaders can be placed in the line of succession.[189] As mentioned Washington signed the 1792 law and Harry S. Truman proposed returning to a legislative line in 1945 and signed the 1947 law. Indeed, President Lyndon B. Johnson entered into a letter agreement with Speaker of the House John McCormack in late December, 1963 providing procedures and terms for the Speaker's service as acting President in the event Johnson became incapacitated.[190] The agreement was based on the conclusion that the Constitution permitted the inclusion of the Speaker and Senate president pro tempore as presidential successors and was supported by an opinion letter from the Department of Justice so stating.[191] The Reagan-Bush-Clinton Contingency Plans implicitly do so by including the Speaker as a possible acting president.[192] The National Continuity Policy Implementation Plan which President George W. Bush issued in 2007 committed the executive branch to support the legislative leaders as well as the vice president in their role as "a successor President."[193] The longstanding executive branch acceptance of the constitutionality of legislative succession would impeach a contrary position.[194]

Although critics of legislative succession have argued that the most compelling arguments come from the Constitution's structure, not its text,[195] the structural arguments they raise[196] would apply equally against the constitutionality of placing the Speaker in the line of succession when the electoral system fails to produce a president-elect and vice-president-elect. In that context, since the only Cabinet is associated with the outgoing president who, perhaps has been repudiated at the polls, legislative succession is not a viable option. It is hard to imagine a more plausible alternative with a stronger democratic pedigree than the newly-elected Speaker in a

---

186 John Manning, Not Proved: Some Lingering Questions About Legislative Succession to the Presidency, 48 *Stanford Law Review* 141, 143-45 (1995).

187 United States Constitution, art. I, §2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers;…").

188 Ibid, §3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States"). Dean Manning points out that when the vice presidency is vacant, the president pro tempore of the Senate is the president of the Senate. Manning, Not Proved, 143n.16.

189 Roy E. Brownell II, The Executive Branch's Longstanding Embrace of Legislative Succession to the Presidency, *Notre Dame Journal of Legislation* (forthcoming, 2021).

190 Letter Agreement between President Lyndon B. Johnson and Speaker John McCormack reprinted in Feerick, *Twenty-Fifth Amendment*, 321-22.

191 Memorandum, Norman A. Schlei, Assistant Attorney General, Office of Legal Counsel re Agreement Between the President and the Speaker of the House as to Procedures in the Event of Presidential Inability, December 4, 1963 reprinted in Feerick, *Twenty-Fifth Amendment*, 323-37.

192 Contingency Plans, Various Other Succession Questions 1-2 (identifying Speaker as next in line in case offices of both president and vice president are vacant are under inability).

193 Homeland Security Council, National Continuity Policy Implementation Plan, 42.

194 Brownell, What To Do If Simultaneous Presidential and Vice Presidential Inability Struck *Today*, 1066 ("It would be exceedingly difficult for a Secretary of State to claim that he should be Acting President when decades of executive branch public statements and legal opinions and the State Department's own website say otherwise.").

195 Amar and Amar, Presidential Succession Law, 114 ("Our most important reasoning is structural…"). See also *ibid.* at 116 (characterizing the textual argument as "forceful …[but]not quite a slam dunk.").

196 The Amars argue that succession of legislative leaders violates separation of powers principles, creates a conflict of interest by giving legislators incentive to impeach and remove a president and vice president to elevate the Speaker, and violates the idea that Congress should not choose the president. Amar and Amar, Presidential Succession Law, 118-21, 124, 135-36.

situation where the electoral system fails to produce a president-elect or vice-president-elect. That pragmatic realization should count heavily against according those structural arguments dispositive weight in any context.[197] After all, as Chief Justice John Marshall counselled more than 200 years ago, the Constitution should be interpreted to make it work.[198]

SOME GOVERNING CONSIDERATIONS REGARDING CURRENT ARRANGEMENTS

Even if legislative succession is constitutional, it can, of course, create challenges if, as has often been the case, the executive branch and one or both houses of Congress are controlled by opposite parties. In fact, for 36 of the last 52 years since 1969, or 69% of that time, the president and Speaker have come from different political parties.[199] Succession of the Speaker would often reverse partisan control of the executive branch in mid-term with no transition period. Presidential inability determinations are complicated when the next-in-line is a partisan adversary of the president. Moreover, the inclusion of the Speaker, who is the elected leader of the House, stands on different footing than that of the president pro tempore of the Senate which typically honors the member of the Senate majority party with greatest seniority. This recognition of long service is quite different from election as president or Speaker and does not necessarily attest to his or her current leadership capacity.

The use of legislative leaders even from the president's party creates some tension with ideas implicit in the Twenty-Fifth Amendment. The fact that the president chose the vice president and the latter worked in the administration as an understudy encouraged the expectation that the two officers would be compatible and committed to similar policies in a way that might not be true of a legislative leader.[200] The development of the vice presidency especially beginning with the Carter-Mondale term has given life to those ideas.[201] The use of Cabinet members in the line also presents some difficulties. Cabinet members may not have a democratic pedigree and a Cabinet member who expressed concerns regarding presidential capacity would be vulnerable to presidential retribution in a way a vice president or Speaker would not be.[202] These matters might merit legislative consideration and are relevant in contingency planning absent a functioning vice president.

The Presidential Succession Act of 1947 provides that if the president and vice president die, resign, are both removed from office, fail to qualify or are unable, the Speaker acts as president.[203] The statute requires that the Speaker resign as Speaker and as a member of the House prior to acting as president,[204] no doubt to avoid separation of powers concerns and conflict with the spirit of the Incompatibility Clause.[205] The Speaker does not become president but simply acts as

---

[197] Goldstein, Akhil Reed Amar and Presidential Continuity, 90-93; Goldstein, Taking From the Twenty-Fifth Amendment, 1024-25.

[198] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408-09 (1819).

[199] Feerick, *Twenty-Fifth Amendment*, 315-16; Goldstein, Taking From the Twenty-Fifth Amendment, 1027-28.

[200] Goldstein, Taking From the Twenty-Fifth Amendment,1025-26.

[201] Goldstein, *White House Vice Presidency*.

[202] Goldstein, Taking From the Twenty-Fifth Amendment,1026-27.

[203] 3 U.S.C. §19 (a)(1) ("If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.").

[204] 3 U.S.C.. §19(a)(1).

[205] U.S. Constitution, art. I, §6, cl. 2 ("…no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

President as both the Constitution[206] and the 1947 law[207] provide. If the Speakership is vacant or if the Speaker fails to qualify, the president pro tempore of the Senate would act as president,[208] but if vacant or if he or she failed to qualify, the highest qualified Cabinet member would do so.[209] A Cabinet member's service as acting President would be terminated should one of the legislative leaders be qualified to act.[210]

DOUBLE OFFICER CONTINGENCIES WITH INABILITY COMPONENT

Situations in which both the president and vice president die, resign or are removed are procedurally much simpler than those in which at least one of the two national officers is "unable." The 1947 law provides that the Speaker, and then the others in the succession line it creates, acts as president if some combination of contingencies. including one or more presidential or vice-presidential "inability," leaves the nation with "neither a President nor a Vice President to discharge the powers and duties of the office of President."[211] Absent a functioning vice president, neither the Twenty-Fifth Amendment nor the 1947 law prescribes how the presidential inability is determined, how a vice-presidential inability is determined, and what procedures govern a resumption of power by a formerly unable president or the assumption of presidential powers and duties by a formerly unable vice president. Congress would seem to have constitutional power to clarify these matters but has never done so. Until it does, some consideration should be given to how such contingencies would be handled.

Vice President Dick Cheney, who had suffered four heart attacks prior to becoming vice president, prepared a letter of resignation which he directed his Counsel to deliver to President Bush for handling as the president deemed appropriate in case Cheney became incapacitated. Cheney apparently acted so Bush could replace him with a new vice president if need be and ensure that Sections 3 and 4 of the Twenty-Fifth Amendment would be available.[212] Cheney's

---

[206] United States Constitution, art.II,§1, cl. 6 ("and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then *act as President*, and such officer shall *act* accordingly, until the disability be removed, or a President shall be elected.") (emphasis provided).

[207] 3 U.S.C. §19 (a)(1) ("If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, *act as President*.") (emphasis provided).

[208] 3 U.S.C. §19 (b) ("If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.").

[209] 3 U.S.C. §19 (d) (1).

[210] 3 U.S.C. §19 (d) (2).

[211] See, e.g., 3 U.S.C. §19 (a)(1) ("If, by reason of death, resignation, removal from office, *inability*, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.") (emphasis provided); 3 U.S.C. §19 (b) ("If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.").

[212] Dick Cheney and Liz Cheney, *In My Time: A Personal and Political Memoir* 319-22 (2011); Goldstein, *White House Vice Presidency*, 263. Though praising Cheney.s action, Reb Brownell discusses advantages and disadvantages of this approach. Roy E. Brownell, II, Vice Presidential Inability: Why It Matters and What To Do When It Occurs, 48 *Hofstra Law Review* 291, 347-57 (2019).

response addressed some, but not all, potential problems that would arise from an incapacitated vice president. No other vice president is known to have taken the precaution Cheney took.

Presidential Inability when Vice Presidency is Vacant

Since Section 3 and 4 of the Twenty-Fifth Amendment specifically envision the vice president as the transferee of presidential powers and duties and a necessary decision-maker under Section 4, those provisions do not govern when the vice presidency is vacant. The 1947 Presidential Succession Law provides a line of "officers" to act as President under that contingency. The Constitution[213] and 1947 law[214] both make clear that the "officer" acts as president only until the inability ends so no issue exists regarding displacing a president from office, a concern the Tyler precedent had created regarding the vice presidency prior to the Twenty-Fifth Amendment. The 1947 law does not, however, state who would decide that the president is "unable," how that decision would be made, or how the end of a presidential inability would be determined.

Prior to the Twenty-Fifth Amendment, President Johnson and Speaker McCormack adopted[215] a slightly revised[216] version of the letter agreements that President Eisenhower and Vice President Nixon and President Kennedy and Vice President Johnson had used. That action provides a precedent for using a letter agreement to set forth procedures when the Speaker is next in line.[217] The Johnson-McCormack agreement provided that the president could voluntarily transfer powers to the Speaker by informing him of the situation and then reclaim powers. These provisions essentially anticipated the Section 3 procedure except that they did not provide for transmittal of letters to authoritative third parties as a means of authenticating the president's action. The Johnson-McCormack agreement, like the two prior agreements between presidents and vice presidents, empowered the next in line to determine the president's inability himself, after such consultation as he deemed appropriate, in "the event of an inability which would prevent the President from communicating with the Speaker of the House"[218] with the president again retaining the power to determine when to resume powers. In addition to not having constitutional or statutory status and applying only to the signatories, the arrangement was narrower than that set out in Section 4 in at least three basic ways. First, it only applied to situations which "prevent" the president from communicating his or her inability to the vice president so accordingly would seem not to cover Section 4 situations where an incapacitated president was capable of notifying the Speaker of his or her condition yet unwilling to transfer powers. Second, in the situations covered, the Speaker had unilateral power to determine the president was unable

---

213 United States Constitution, art.II,§1, cl. 6 ("and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as Presiden*t*, and such officer shall act accordingly, *until the disability be removed*, or a President shall be elected.") (emphasis provided).

214 3 U.S.C. §19(c) (2) ("if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.").

215 See The President's News Conference of December 18, 1963, 1 Public Papers of Presidents Lyndon B. Johnson 65-66 (December 18, 1963) (announcing the agreement between Johnson and McCormack). The Agreement was actually signed shortly later. Letter, Johnson to McCormack, December 23, 1963 in Feerick, *Twenty-Fifth Amendment* 321-22.

216 The Johnson-McCormack agreement provided that the Speaker would resign as Speaker and as a Representative before beginning to act as President. Feerick, *Twenty-Fifth Amendment* ,322.

217 Goldstein, Akhil Reed Amar and Presidential Continuity, 71-72. See also Goldstein, Taking From the Twenty-Fifth Amendment, 1033.

218 Feerick, *Twenty-Fifth Amendment* 321.

and need not get the approval of the "principal officers" although as a practical matter he or she might want some support. Third, the president's resumption was not subject to any checks to make certain he or she had recovered before resuming powers but was within the president's sole discretion, a factor that among other things mitigated the Speaker's autonomy in determining when to act.

If the vice presidency is vacant, the president could transfer presidential powers and duties to the Speaker and reclaim them, with or without an advance agreement since the 1947 law designates the Speaker to "act as president" in such a case and the Constitution and 1947 law limit that action to the period of the inability. [219] Feerick, the leading scholar on the subject, has suggested that since the 1947 Succession Law imposes the duty on the Speaker to act as president if the president is unable, he or she would be empowered to determine the existence of the inability if a disabled president failed to transfer presidential powers and duties. The argument would be that under general legal principles a contingent grant of legal power carries with it the power to determine whether the contingency has arisen. Indeed, prior to the Twenty-Fifth Amendment, the Department of Justice had concluded that the vice president could unilaterally make that determination.[220] That approach would give the Speaker greater autonomy than a vice president would have under Section 4 of the Amendment since under Section 4 the vice president would need to act in concert with a majority of the principal officers of the executive departments.[221] Section 4 clearly limits any autonomy the vice president previously had but it does not, of course, specifically limit any "officer" Congress might designate. On the other hand, it might be read to impose a structural limitation on the ability of a successor to make a presidential inability determination unilaterally to avoid the anomaly of the Speaker having greater latitude than the vice president. This contingent grant approach could pose some troubling scenarios when the Speaker and president belong to opposing political parties. An alternative would be to use Section 4 as an analogy and to empower the Speaker to act with a majority of the principal officers, an approach the Contingency Plan adopts.[222] The Contingency Plan does not, however, address how the president would resume the exercise of presidential powers and duties and whether any checks might limit such a determination.

Vice-presidential Inability Scenarios

More difficult scenarios arise when the vice president is incapacitated rather than vacant. For instance, a vice president might become de facto incapacitated and then the president might die. The incapacitated vice president would presumably become president under Section 1 of the Twenty-Fifth Amendment[223]although his or her exercise of presidential powers and duties might depend upon taking the oath[224] as well as recovering. There would be no vice president so Sections 3 and 4 would be unavailable to determine the new president's inability. At the point the

---

[219] Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 937-38; John D. Feerick, A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment, 47 *Houston Law Review* 41, 60-61 (2010).

[220] Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 938-42.

[221] Feerick, Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment, 939. (acknowledging this point); Brownell, What To Do If Simultaneous Presidential and Vice Presidential Inability Struck *Today*, 1049.

[222] Contingency Plan, Various Other Succession Questions, 2.

[223] United States Constitution, amend XXV§1("In case of the removal of the President from office or of his death or resignation, the Vice President shall become President."). See Roy E. Brownell, II, Vice Presidential Inability: Why It Matters and What To Do When It Occurs, 48 *Hofstra Law Review* 291, 299 (2019).

[224] United States Constitution, art. II, §8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation…"). See Contingency Plan, Various Other Succession Questions, 2.

incapacitated vice president becomes president, this scenario would seem to resemble that just discussed in the immediately preceding section of this paper except the prospect of an agreement between the de facto incapacitated president and the Speaker would be remote unless created with the Speaker (or person next in line) before the vice president became disabled and while he or she was still vice president. If the incapacity prevented the new president from transferring power voluntarily pursuant to a pre-existing agreement the Speaker would need to proceed either alone or with a majority of the principal officers.

Alternatively, the president and vice president might be incapacitated simultaneously. If the double incapacity was anticipated, the president, vice president and Speaker might provide for it by an advance letter agreement and announce the transfer prospectively.[225] More likely, such a situation would arise unexpectedly. Since the Constitution places the vice president first in line[226] and since Section 4 gives the vice president the constitutional power to participate in a determination of presidential inability some action would need to be taken to declare the vice president's incapacity to allow such a determination of presidential inability to proceed without vice-presidential participation. Although the Speaker is next in line, some procedure is needed to determine the vice president's inability and, having done so, to determine the president's as well. In addition, some procedure is needed to determine the end of either inability and the assumption or resumption of presidential powers and duties by the vice president and/or president respectively. Roy E. Brownell has suggested that in such a situation 1) the Speaker, in consultation with the Senate president pro tempore and the principal officers of the executive departments should determine if a double incapacity exists; 2) upon agreement that a double incapacity exists, the Speaker, president pro tempore and majority of the principal officers should solicit a legal opinion from the executive branch explaining the legal basis of their action and upon its completion, should announce that the Speaker would act as president until the capacity of the president or vice president ended; 3) the Speaker et al would ask Congress to ratify this process retroactively.[227] In some situations, more expeditious executive action might be desirable which would argue in favor of a simpler, more stream-lined process, either recognizing contingent decision-making power in the hands of the next in line or use of advance agreements with the next in line perhaps implicitly ratified by congressional leaders.

Another scenario would envision a president being declared unable and then the vice president, as Acting President, becoming incapacitated. Since the president's incapacity has already been determined pursuant to Section 3 or 4, this scenario might seem simpler than one in which the two officers become incapacitated simultaneously or without a determination of presidential inability. There still would need to be a means to declare the vice president/Acting President unable and to have some mechanism to provide for the resumption of presidential powers by the president or vice president when fit to do so.

The Clinton Contingency Plan concludes that the simplest case for the Speaker assuming presidential powers would be if the president were declared unable and then the vice president/Acting President died. This situation would seem to avoid the problem of needing procedures to determine the president's inability but procedures regarding the president's resumption of power would be needed. Absent a vice president, there would be no way to challenge a president's declaration of fitness under Section 4 if he or she sought to resume presidential power before the incapacity had ended. Although the Clinton Plan concludes that

---

225 Brownell, What To Do if Simultaneous Presidential and Vice Presidential Inability Struck *Today*, 1037-38 n. 50.

226 United States Constitution, amend XXV§§3,4; art. II, §1, cl. 6.

227 Brownell, What To Do if Simultaneous Presidential and Vice Presidential Inability Struck *Today*, 1031-32,1055-64.

under law the Speaker should act as president in the other situations, it concludes that legal uncertainty exists regarding implementation and suggests adopting "procedures which parallel the 25th Amendment."[228]

The Contingency Plan should provide for some means to declare the president unable in the absence of a vice president or when the vice president is disabled, and the latter situation requires a means to determine the vice president's incapacity. Absent Congressional clarification, the next in line would seem to be the decision-maker and his or her action should parallel Sections 3 and 4 unless the contingent grant approach is accepted. It seems more difficult to impose any formal limitation on the power of a president or vice president to reassert his or her capacity in situations where Section 4 does not govern and impose the limit by constitutional text. Although ideally it would be desirable to address the scenario where a disabled president, vice president or other acting president tried to resume exercising presidential powers and duties before his or her inability had been resolved, the risk from such a situation is more remote than the prospect that at some point in the future someone other than a vice president will need to act as president during a presidential incapacity. It seems more important to provide a means for the temporary transfer of presidential powers and duties to the person next in line following the vice president or in his or her incapacity than to defer such action until legal action can be taken to protect against the risk of a premature resumption.

CONCLUSION

A double vacancy would be a traumatic event yet the designation of the Speaker to act as president is advisable when the electoral system fails to produce a president-elect and vice president-elect and defensible when the succession of the Speaker would not shift control of the executive branch from one party to the other. When, as has often recently been the case, legislative succession would shift party control of the executive branch, it becomes problematic. It would be disruptive and arguably undemocratic in case of a double vacancy and would complicate presidential inability determinations.

Congress might consider revising the line of succession by either reverting to a Cabinet line or doing so where necessary to avoid a shift in partisan control of the executive branch. Such an examination might also consider which legislators and Cabinet members should be in the line of succession. Although it is prudent to have a long line of successors, following a catastrophic event which eliminated multiple national leaders it seems ill-advised to entrust presidential powers and duties to a Cabinet member whose responsibilities have been limited to a narrow domestic portfolio.[229] All in the current line also work in Washington, D.C.[230] Similarly, the designated survivor practice is prudent yet is somewhat undercut by generally selecting a low-level Cabinet member as the absentee. Inauguration Day presents special challenges, especially with a new administration, because of the presence of the incoming president, vice president, speaker and Senate president pro tempore at the ceremonies or in Washington and the lack of confirmed Cabinet members.[231]

---

[228] Clinton Contingency Plan, Various Other Succession Questions, 2.

[229] The Second Fordham University School of Law Clinic on Presidential Succession concluded that the heads of the departments of state, defense, justice, treasury and homeland security were best suited to be in the line of presidential succession. See Fifty Years After the Twenty-Fifth Amendment, 951.

[230] Second Fordham University School of Law Clinic on Presidential Succession, Fifty Years After the Twenty-Fifth Amendment, 951-52.

[231] Second Fordham University School of Law Clinic on Presidential Succession, Fifty Years After the Twenty-Fifth Amendment, 956-58; Continuity of Government Commission, Preserving Our Institutions: The Continuity of the Presidency, 41-42.

Congress could also pass legislation addressing scenarios involving vice-presidential inability and presidential inability without a functioning vice president. Such a statute might be modeled on Section 3 and 4, with the appropriate statutory successor as the transferee of power and the decision-maker along with the principal officers of the executive branch in a situation where the president and/or vice president were unable or unwilling to recognize their own inabilities.[232] Whether the statutory successor would be delegated powers under Section 3 and 4, as some have suggested or be deemed to operate based on a statutory formulation resembling Sections 3 and 4 should be considered. Of course, once one moves beyond the president and vice president, the relationship between the principals involved would differ somewhat from those involved in Sections 3 and 4 of the Amendment so they do not provide perfect analogies when applied to transferring presidential power to a Speaker or declaring a vice president incapacitated. Yet the question needing attention is whether such arrangements would be lawful, legitimate and practical[233] and an improvement on the current gap, not whether they are perfect. The existing gaps leave the continuity of presidential leadership at risk. It is more important for Congress to pass some law providing for a means to transfer power temporarily to the next in line when the vice presidency is vacant or its occupant is incapacitated (and to determine that vice-presidential incapacity) than to defer action until it can agree on safeguards against premature resumption.

Until Congress acts, the executive branch should make arrangements to provide for contingencies involving presidential inability in the absence of a vice president and situations in which a vice president might become incapacitated.

---

[232] See, e.g., Second Fordham University School of Law Clinic on Presidential Succession, Fifty Years After the Twenty-Fifth Amendment, 958-70.

[233] Roy E. Brownell, II, Vice Presidential Inability: Why It Matters and What To Do When It Occurs, 48 *Hofstra Law Review* 291, 295 (2019).