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Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4

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**TALKING TRUMP AND THE TWENTY-FIFTH AMENDMENT:
CORRECTING THE RECORD ON SECTION 4**

*Joel K. Goldstein**

ABSTRACT

The first year of the presidency of Donald J. Trump brought attention to Section 4 of the Twenty-fifth Amendment, the constitutional provision that allows the Vice President and a Cabinet majority to transfer presidential powers and duties from a President who is “unable to discharge the powers and duties” of his office. Although the ensuing media discussion included many thoughtful contributions, it also produced many mistaken assertions by scholars, journalists and other commentators regarding the importance, scope, operation, and effect of Section 4. These mistakes are troubling because they may produce enduring misunderstanding regarding a provision designed to handle some of the most challenging, traumatic and contentious contingencies that might arise involving an incapacitated President and the transfer of presidential powers and duties to the Vice President. The errors also might provide material for political actors and their supporters to cite and use opportunistically to frustrate the proper use of Section 4. This Article exposes and corrects some of the mistaken assertions that have recently appeared in media discussions. It explores a range of textual, originalist, structural, pragmatic, and other constitutional arguments to shed light on significant, but sometimes misunderstood, questions regarding the importance, scope, operation, and effect of Section 4.

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INTRODUCTION

It was anticipated that 2017 would bring attention to the Twenty-fifth Amendment to the Constitution. That provision, which addresses presidential succession and inability and filling vice-presidential vacancies, was ratified on February 10, 1967, which made 2017 its fiftieth anniversary. Golden jubilees invite retrospection. They present occasions to look back, to reflect on, sometimes to celebrate, past events, even those that generally receive little recognition, like obscure provisions of America's Constitution. The Twenty-fifth's fiftieth seemed likely to present an opportunity for a multi-purpose reflection—part nostalgia, part review of the legislative process and the people that produced the Amendment, part examination of the strengths and weaknesses of America's provisions regarding presidential succession and inability, and part public education regarding the Amendment's four sections and the constructive role three of them had already played in ensuring presidential continuity.¹

Life has a way of upsetting plans, and it did in this instance. Political events transformed the anniversary. The Twenty-fifth Amendment received much, much greater media attention than anyone could have imagined, but most of the discussion occurred for unanticipated reasons and with an unforeseen focus. Instead of addressing the three sections that had handled succession or inability contingencies or reform ideas, public conversation targeted the Amendment's Section 4, which provides for involuntarily separating a President from the powers and duties of his office.² Section 4

¹ See, e.g., Joel K. Goldstein, *Celebrating the 50th of the 25th Amendment!*, HUFFINGTON POST (Feb. 10, 2017, 3:31 PM), https://www.huffingtonpost.com/entry/celebrating-the-50th-of-the-25th-amendment_us_589e1bb7e4b080bf74f03bcc.

² Section 4 reads as follows:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body

will be discussed more specifically below but, in essence, it provides a means whereby the Vice President and a majority of the Cabinet (unless Congress replaces that group with a different body) can transfer presidential powers and duties (but not the presidency) to the Vice President upon finding that the President is unable to discharge them. Section 4 also contains provisions whereby the President can seek to reclaim his powers upon asserting that he is not disabled and his claim can be considered, initially by the Vice President and Cabinet, and, if they believe he remains disabled, by Congress, before he resumes power. What produced the recent preoccupation with Section 4 was neither an interest in exploring the Amendment's past nor an effort to improve it for the future, but a belief that present circumstances dictated that the unused provision should now be put to use.

This unforeseen development was due, of course, to recurring questions regarding whether President Donald J. Trump was "unable to discharge the powers and duties of his office," the standard Section 4 sets for its use. Those concerns were aired even before his election and escalated during the first year of his presidency as scholars, legislators, and journalists used information age platforms to expound on whether Section 4 applied and, if so, whether it should be invoked.

The unanticipated focus came at a cost. The preoccupation with the Amendment's one unused portion distracted from recalling the contributions the other three parts have made and from considering remaining gaps in America's provisions for ensuring presidential and governmental continuity. Section 1 had formalized the long-standing practice that the Vice President became President (not simply acting President) for the remainder of the term upon the death of the President and had extended that treatment to presidential resignations and removals following impeachment, situations involving permanent vacancies where the same logic applied.³ Section 2

as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. CONST. amend. XXV, § 4. Although Section 4 allows Congress to replace the "principal officers of the executive departments" (i.e., the Cabinet) with some "other body," Congress has not done so and accordingly this Article will generally discuss Section 4 as involving the Vice President and the "principal officers" as the decision-makers. *See infra* Section II.D.

³ See Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69

recognized the enhanced importance of the vice presidency and created an intra-term means to fill a vice-presidential vacancy rather than having to wait for the next quadrennial election.⁴ That provision had facilitated the impeachment process that led to the resignation of Richard M. Nixon in 1974 by providing a vehicle to fill the vacancy caused by Vice President Spiro T. Agnew's resignation in 1973 with a Republican, thereby preventing a shift in partisan control of the White House which would have otherwise occurred since the line of succession placed a Democratic Speaker of the House of Representatives next in line of succession.⁵ And Section 3 had provided a mechanism whereby presidents could voluntarily transfer presidential powers for finite periods of time prior to planned surgery or for other such incapacities. Two presidents had done so on three occasions,⁶ and four others had planned to do so if medical procedures required general anesthesia.⁷

Distracting attention from this record was not the only, or even the primary, cost of the Section 4 obsession during the first year or so of the Trump presidency. Although some media articles provided thoughtful discussions of whether Section 4 could or should be used to separate President Trump from presidential powers and duties, many made mistaken assertions about the Twenty-fifth Amendment, sometimes regarding rather basic matters.

By “mistaken assertions,” I am not talking about conclusions on the ultimate question, whether or not Section 4 should be invoked regarding President Trump. That topic is not the subject of this Article, and those

ARK. L. REV. 647, 679 (2016) (noting that the first section addresses “presidential death, resignation, and removal”).

⁴ Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 507 (1995). Section 2 provides: “Whenever there is a vacancy in the office of Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.” U.S. CONST. amend. XXV, § 2.

⁵ John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-fifth Amendment*, 79 FORDHAM L. REV. 907, 932–33 (2010).

⁶ JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN* 255–59 (2016) (discussing transfers of power by Presidents Ronald Reagan and George W. Bush). Section 3 provides:

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.

U.S. CONST. amend. XXV, § 3.

⁷ GOLDSTEIN, *supra* note 6 at 255, 258–59 (discussing plans to invoke Section 3 in Administrations of Presidents Jimmy Carter, George H.W. Bush, and Bill Clinton); Second Fordham University School of Law Clinic on Presidential Succession, *Report: Fifty Years After the Twenty-fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 926–27 (2017) (noting discussion of invoking Section 3 before medical procedures of Presidents Jimmy Carter, George H.W. Bush, Bill Clinton, and Barack Obama).

interested in that specific question might prefer to read elsewhere. The “mistaken assertions” rather related to misstatements regarding basic aspects about the history, scope, and operation of Section 4. The errors sometimes related to matters peripheral to an author’s focus, sometimes in otherwise thoughtful columns. Some errors may have been casualties of the tight deadlines and word limits journalism imposes, time and space constraints from which academics are often sheltered. Some mistakes may have occurred when commentators rushed a short piece to print without having fully reviewed the record that produced the Amendment or the surrounding literature.

The mistakes are troubling nonetheless. Some communicated confusing and inaccurate information and created an enduring source of erroneous data and ideas. Although this risk existed ever since the printing press allowed mass production of media and since old articles were available at newspaper and magazine morgues, at archives and on microfilm, the hazard has increased exponentially in the Internet age when information and misinformation is disseminated around the world quickly and when search engines can easily retrieve prior comments and columns in seconds. Such mistakes may mislead not only contemporary readers but those who may access, rely on, and repeat the errors in the future. The mistakes made by scholars are most troubling since journalists and readers may assume their assertions are based on expertise regarding the Twenty-fifth Amendment, and future decision-makers and their supporters may rely on, or opportunistically cite, inaccurate statements to support future behavior. The mistakes also reflected, and contributed to, a misunderstanding of the significance of the contribution the Twenty-fifth Amendment represented.

Worse still, the mistakes relate to the continuity of presidential leadership, a topic that clearly matters.⁸ The Twenty-fifth Amendment rested on a consensus that America must always have a functioning President in a nuclear age.⁹ The Section 4 procedures, though least likely to be used, cover situations that are most likely to arise in times of crisis and contention. Accordingly, the Amendment must be well understood. Incorrect information must be discredited during normal times so implementation of the Amendment can proceed appropriately when the need arises for its use in what are likely to be times of some national trauma.

8 YALE LAW SCHOOL RULE OF LAW CLINIC, *THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER’S GUIDE* 5 (2018) (stating that “issues of presidential inability raise questions of the utmost gravity”).

9 Joel K. Goldstein, *Taking from the Twenty-fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 964 (2010); Rebecca C. Lubot, “A Dr. Strangelove Situation”: *Nuclear Anxiety, Presidential Fallibility, and the Twenty-fifth Amendment*, 86 *FORDHAM L. REV.* 1175, 1176–77 (2017).

The mistaken assertions about Section 4 during recent discussions are significant. For instance, it has been suggested that the presidential inability provisions were peripheral to the Amendment. They were not. Sections 3 and 4 were of at least equal importance to the provisions dealing with presidential succession and vice-presidential vacancy. Some have said that mental illness was not a primary target of the presidential inability provisions. It was. The legislative record makes clear that the framers of the Amendment fully intended to cover that vexing problem, including mental illness that occurred independent of an attack or acute, physical event. Some have suggested that Section 4 only applies when a President is unable to transfer power voluntarily, not when he is unwilling to acknowledge a disability. In fact, the broad textual language and the legislative record make clear that Section 4 applies to situations where a disabled President is unwilling to recognize and declare his or her inability in addition to instances where the President is unable to do so. Some criticize Section 4 as ambiguous regarding who acts with the Vice President and in the standard it provides. In fact, the record resolves most issues regarding the identity of the “principal officers of the executive departments” and any ambiguity in the “unable to discharge the powers and duties of” the presidency standard was deliberate and represented a preference for flexibility and a faith in future decision-makers. Contrary to frequent mischaracterizations, Section 4 does not provide an instrument to remove the President from office, or to transfer his or her powers permanently (although that could be the *de facto* result if the President’s incapacity is permanent). And contrary to occasional suggestions, the Amendment’s text and legislative history make very clear that once a President is declared disabled under Section 4, the Vice President continues to act as President until some authoritative decision-maker (i.e. the Vice President, a majority of the Cabinet or “other body” empowered to act with him or her, or Congress), but not the President alone, determines that he or she is able to resume powers.

This Article corrects some recent misstatements about Section 4 that might have credibility based on the commentator who voiced them or the platform from which they were expressed. It does so by discussing the Amendment’s text, legislative record and surrounding history, and structural and pragmatic arguments. As such, this Article offers a resource to inform future considerations of Section 4 of the Twenty-fifth Amendment by furnishing not simply an interpretive guide to some important questions but a source of constitutional arguments and historical information.

This Article begins by outlining some of the discussion in the media regarding Section 4 of the Twenty-fifth Amendment in connection with President Trump. It then presents some common mistaken assertions about

Section 4 and uses textual and structural arguments and historical materials to correct the record. The final section offers conclusions.

I. MEDIA DISCUSSIONS OF DECLARING PRESIDENT TRUMP DISABLED

Section 4 of the Twenty-fifth Amendment received little discussion until recently. Although some scholarly works discussed it,¹⁰ the provision received virtually no consideration in constitutional law casebooks¹¹ and its scant media discussion generally occurred when it was under consideration or ratified. Occasionally, an ideological critic of a prior President would suggest invoking Section 4,¹² but those instances were exceptional and sporadic.

That has recently changed, thanks to perceptions in some circles regarding President Trump. Discussion of using Section 4 began even before the 2016 election. In August 2016, *The Hill* carried a column predicting that Americans would need to become familiar with Section 4 if Trump were elected.¹³ In another pre-election piece, former Senator Gordon Humphrey, a Republican conservative, argued that Section 4 applied to Trump and suggested that Republican electors abandon him.¹⁴ Only eight days after the 2016 popular vote election day, David Frum, a conservative former speechwriter for President George W. Bush, predicted that Section 4 would

¹⁰ See, e.g., JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (3d ed. 2014) (analyzing the sections of the Twenty-fifth Amendment); *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* (Robert E. Gilbert ed., 2000) (discussing the Twenty-fifth Amendment's history and the Amendment's strengths and weakness); JAMES M. RONAN, *LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION* (2015) (explaining why Section 4 was not invoked in certain administrations).

¹¹ See, e.g., PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 541 (6th ed. 2014) (including a one paragraph discussion of presidential inability in the context of discussing impeachment); JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS* 271–74 (12th ed. 2015) (discussing impeachment and removal but not presidential inability); NORMAN REDLICH, JOHN B. ATTANASIO & JOEL K. GOLDSTEIN, *CONSTITUTIONAL LAW* 323 (5th ed. 2008) (including two paragraphs on Twenty-fifth Amendment); GEOFFREY A. STONE ET AL., *CONSTITUTIONAL LAW* 1656, 1660 (8th ed. 2018) (including no Index entry for “Twenty-fifth Amendment” or “presidential inability”).

¹² See, e.g., Charles Hurt, Opinion, *Has the President Lost His Ability to Discharge the Powers and Duties of Office?*, WASH. TIMES (Dec. 1, 2015), <https://www.washingtontimes.com/news/2015/dec/1/charles-hurt-obama-loses-gift-of-speech-in-paris-t/> (criticizing President Barack Obama and calling for removal).

¹³ Ben Brenkert, *Better Brush up on the 25th Amendment if Trump Wins*, HILL (Aug. 3, 2016, 10:05 AM), <http://thehill.com/blogs/pundits-blog/presidential-campaign/290204-better-brush-up-on-the-25th-amendment-if-trump-wins>.

¹⁴ Gordon Humphrey, *Trump Is a Creep*, WKLY. STANDARD (Oct. 8, 2016, 2:08 PM), <https://www.weeklystandard.com/gordon-humphrey/trump-is-a-creep>.

become a topic of widespread discussion.¹⁵ Eleven days before Trump's inauguration, the *Washington Post's* liberal columnist Richard Cohen urged senators to question Trump's Cabinet nominees regarding their awareness of, and willingness to invoke, Section 4.¹⁶

The frequency and volume of such discussion increased in the Trump Administration's early days. Frum tweeted about the subject a few days after Trump's inauguration.¹⁷ The headline for a column by journalist Heather Digby Parton on January 25, 2017, advised that Trump could be "deposed" via the Twenty-fifth Amendment¹⁸ and one over a CBS News explanatory piece the next day referred to "[a]n obscure way to oust an American president," suggesting the novelty of the proposition.¹⁹ Eliot A. Cohen, a counselor in the George W. Bush state department, wrote during Trump's first ten days in office that "[i]t will not be surprising in the slightest if [Trump's] term ends not in four or in eight years, but sooner, with impeachment or removal under the 25th Amendment."²⁰ On February 10, 2017, the fiftieth anniversary of the ratification of the Amendment, the *Washington Post's* conservative columnist Kathleen Parker suggested that Section 4 could be used to separate Trump from presidential powers and

¹⁵ David Frum (@davidfrum), TWITTER (Nov. 16, 2016, 5:27 AM), <https://twitter.com/davidfrum/status/798880228923871233> (noting that "Twenty-Fifth Amendment to the Constitution. Article [sic] 4. We're all going to be talking a lot more about it in the months ahead."); see also Tim Marcin, *How to Keep Trump from Becoming President? 25th Amendment Could Declare Republican Mentally Unfit*, INT'L BUS. TIMES (Nov. 28, 2016, 11:37 AM), <http://www.ibtimes.com/how-keep-trump-becoming-president-25th-amendment-could-declare-republican-mentally-2451687> (noting that discussion had started about Section 4 shortly after President Trump's election).

¹⁶ Richard Cohen, *How to Remove Trump from Office*, WASH. POST (Jan. 9, 2017), https://www.washingtonpost.com/opinions/how-to-remove-trump-from-office/2017/01/09/e119cc36-d698-11e6-9a36-1d296534b31e_story.html?utm_term=.0aa71173d2b1; see also Lawrence M. Friedman & David M. Siegel, *The Most Important Qualification for a Post in President Trump's Cabinet*, NEW ENG. L. REV. FORUM (Feb. 15, 2017), <https://newengrev.com/tag/david-siegel> (discussing the importance of Cabinet members to be willing to fulfill responsibilities under the Twenty-fifth Amendment and the failure of senators to question Cabinet nominees on the subject).

¹⁷ David Frum (@davidfrum), TWITTER (JAN. 25, 2017, 8:46 AM), <https://twitter.com/davidfrum/status/824252174020517888> (stating "I wonder how Mike Pence's 25th amendment vote counting operation is going today.").

¹⁸ Heather Digby Parton, *Don't Look Now: It's President Pence! Donald Trump Can Be Deposed Even Without Impeachment*, SALON (Jan. 25, 2017, 1:01 PM), <https://www.salon.com/2017/01/25/dont-look-now-its-president-pence-donald-trump-can-be-deposed-even-without-impeachment/>.

¹⁹ Will Rahn, *Commentary: An Obscure Way to Oust an American President*, CBS NEWS (Jan. 26, 2017, 6:00 AM), <https://www.cbsnews.com/news/an-obscure-way-to-oust-an-american-president/>.

²⁰ Eliot A. Cohen, *A Clarifying Moment in American History*, ATLANTIC (Jan. 29, 2017), <https://www.theatlantic.com/politics/archive/2017/01/a-clarifying-moment-in-american-history/514868/>.

duties.²¹ A week later, MSNBC's Steve Benen reported on "scuttlebutt" in the media and on Capitol Hill about Trump's capacity but cautioned Trump's critics to "keep your expectations low."²² Conservative columnist Byron York summarized the discussion but dismissed Section 4 proponents as "The Resistance."²³

Just as some from the Republican right suggested applying Section 4 to Trump, some linked to the Democratic left debunked the idea. In late March 2017, Jeff Greenfield, a former aide to Senator Robert F. Kennedy and a prominent political commentator, dismissed the prospect of using Section 4 against Trump as "misguided" and a "liberal fantasy."²⁴ Greenfield argued that it was "beyond absurdity" to think that Vice President Mike Pence and Trump's Cabinet would deem the President unfit. Moreover, Section 4 was an emergency provision which would be used for a President who was "unable to communicate, or curled up in a fugue state" but would otherwise be relegated to Hollywood scripts and novels.²⁵ An explainer piece by journalist Evan Osnos suggested that absent an unconscious President, use of Section 4 could be viewed as a coup and accordingly impeachment was "a more promising tool for curtailing a defective Presidency."²⁶

Sometimes events intensified Section 4 discussion. Shortly after President Trump fired FBI director James Comey, *New York Times* conservative columnist Ross Douthat lamented Trump's unfitness but dismissed talk of Section 4 as "noise," since it was unrealistic to think that Pence or congressional Republicans would act to transfer powers.²⁷ But three days later, Trump's behavior caused Douthat to change his tune. A new column concluded that Trump lacked the characteristics needed in a President and

21 Kathleen Parker, *Trump's Two-year Presidency*, WASH. POST (Feb. 10, 2017), https://www.washingtonpost.com/opinions/trumps-two-year-presidency/2017/02/10/32c2e4ce-efd9-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.baa8e2e5f9fc.

22 Steve Benen, *Why the 25th Amendment Is Suddenly Getting So Much Attention*, MSNBC: MADDOWBLOG (Feb. 17, 2017, 4:02 PM), <http://www.msnbc.com/rachel-maddow-show/why-the-25th-amendment-suddenly-getting-so-much-attention>.

23 Byron York, Opinion, *25th Amendment Chatter: Dems, Pundits Mull Ways to Remove Trump*, WASH. EXAM'R (Feb. 17, 2017, 7:15 PM), <http://www.washingtonexaminer.com/byron-york-25th-amendment-chatter-dems-pundits-mull-ways-to-remove-trump/article/2615212>.

24 Jeff Greenfield, *A Liberal Fantasy Ripped from a Hollywood Script*, POLITICO (Mar. 29, 2017), <https://www.politico.com/magazine/story/2017/03/25th-amendment-trump-cabinet-remove-office-president-fantasy-214965>.

25 *Id.*

26 Evan Osnos, *How Trump Could Get Fired*, NEW YORKER (May 8, 2017), <https://www.newyorker.com/magazine/2017/05/08/how-trump-could-get-fired>.

27 Ross Douthat, Opinion, *Donald Trump Does Not Surprise*, N.Y. TIMES (May 13, 2017), <https://www.nytimes.com/2017/05/13/opinion/donald-trump-does-not-surprise.html>.

did not understand his office.²⁸ Douthat now recommended that Pence and Trump's Cabinet consider Section 4, although he acknowledged that the situation he described was not what the Amendment's framers envisioned.²⁹

Around the time of Douthat's columns, Professor Jamal Greene of Columbia Law School thought Trump's "complete lack of trustworthiness and his manifest incompetence" as reflected in the Comey firing "may be of constitutional significance."³⁰ The Amendment seemed to envision that Section 4 could apply to a "lucid" President and Greene argued that "a compulsively lying President" was unable to discharge presidential powers.³¹ Greene did not, however, expect Section 4 decision-makers to utilize that remedy,³² and others also thought its use was unlikely, impractical or improper. Dahlia Lithwick argued that Pence and the Cabinet would never declare Trump disabled and thought the real problem was that someone with his qualities could be elected President in the first place.³³ *National Review's* Ian Tuttle thought Trump was a "menace" but argued that removing him via Section 4 would be improper and counterproductive.³⁴ *Bloomberg's* Jonathan Bernstein believed Trump unfit to be President but thought that the "armchair diagnoses" of Trump's mental illness did not "clear the constitutional bar."³⁵ Impeachment and removal, not Section 4, was the appropriate remedy.³⁶ Jeffrey Rosen provided a lengthy explainer piece in which he concluded that Section 4 made presidential inability a political, not medical, question which was to apply to "presidents who were clearly and unequivocally incapacitated," "in other words, terminally ill, in a coma, near

²⁸ Ross Douthat, Opinion, *The 25th Amendment Solution for Removing Trump*, N.Y. TIMES (May 16, 2017), https://www.nytimes.com/2017/05/16/opinion/25th-amendment-trump.html?_r=0.

²⁹ *Id.*

³⁰ Jamal Greene, *Trump, Trust, and the 25th Amendment*, TAKE CARE (May 15, 2017), <https://takecareblog.com/blog/trump-trust-and-the-25th-amendment>.

³¹ *Id.*

³² *Id.*

³³ Dahlia Lithwick, *Is Donald Trump Too Incapacitated to be President?* SLATE (May 17, 2017, 6:17 PM), http://www.slate.com/articles/news_and_politics/politics/2017/05/no_the_25th_amendment_is_not_the_solution.html.

³⁴ Ian Tuttle, *Against the '25th Amendment Option,'* NAT'L REVIEW (May 18, 2017, 8:00 AM), <http://www.nationalreview.com/article/447731/25th-amendment-donald-trump-ross-douthats-argument-falls-short>; see also Richard Brodsky, *The '25th Amendment Solution' Is a Terrible, Dangerous Idea*, HUFFINGTON POST (May 17, 2017, 11:06 AM), https://www.huffingtonpost.com/entry/the-new-and-dangerous-republican-plan-to-remove-trump_us_591c66a7e4b0a8551f3f84be (arguing that Trump supporters knew of "his personality, his infinite capacity for lies and self-deception" when they elected him).

³⁵ Jonathan Bernstein, *No, the 25th Amendment Isn't the Way to Boot Trump*, BLOOMBERG (May 17, 2017, 7:39 AM), <https://www.bloomberg.com/view/articles/2017-05-17/no-the-25th-amendment-isnt-the-way-to-boot-trump>.

³⁶ *Id.*

death, or severely mentally incapacitated.”³⁷ Columnist (and former George W. Bush aide) Michael Gerson thought America might have “an unbalanced president” but concluded that invoking Section 4 was “a practical impossibility” because it would require participation of Trump’s Cabinet.³⁸ Conservative *Washington Post* columnist Jennifer Rubin thought Douthat’s suggestion inconsistent with the true purpose of the Amendment and warned against medicalizing “amoral, stupid and/or illegal behavior.”³⁹

Autumn 2017 brought a renewed burst of Section 4 discussion following reports that Senator Bob Corker, the Republican chair of the Senate Foreign Relations Committee, stood by earlier concerns about Trump’s stability and referred to the White House as “an adult day care center”⁴⁰ and that Secretary of State Rex Tillerson had called the President a “moron.”⁴¹ Jennifer Rubin thought Section 4 should not be invoked lightly and repeated the earlier admonition against medicalizing political disagreements but wondered whether President Trump’s behavior put the country “there yet” or “close.”⁴² Princeton historian Julian Zelizer expressed misgivings about using Section 4 to transfer powers from Trump but thought that further evidence that Trump was “psychologically unfit to handle the duties” of the presidency would oblige Pence and Cabinet officials to act to protect the nation.⁴³

37 Jeffrey Rosen, *The 25th Amendment Makes Presidential Disability a Political Question*, ATLANTIC (May 23, 2017), <https://www.theatlantic.com/politics/archive/2017/05/presidential-disability-is-a-political-question/527703/>.

38 Michael Gerson, Opinion, *How to Handle an Unhinged President*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/opinions/how-to-handle-an-unhinged-president/2017/07/06/88b2ec38-628b-11e7-8adc-fea80e32bf47_story.html?utm_term=.c31e6fddaeae.

39 Jennifer Rubin, Opinion, *Let’s be Clear About What the 25th Amendment Does and Doesn’t Do*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/05/17/lets-be-clear-about-what-the-25th-amendment-does-and-doesnt-do/?utm_term=.11c2f640a157.

40 Philip Rucker & Karen Demirjian, *Corker Calls White House ‘an Adult Day Care Center’ in Response to Trump’s Latest Twitter Tirade*, WASH. POST (Oct. 8, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/08/trump-attacks-gop-sen-corker-didnt-have-the-guts-to-run-for-reelection/?utm_term=.fbf7fdafb0c3.

41 Gabriel Sherman, *“I Hate Everyone in the White House!?”: Trump Seethes as Advisers Fear the President Is “Unraveling,”* VANITY FAIR (Oct. 11, 2017, 2:40 PM), <https://www.vanityfair.com/news/2017/10/donald-trump-is-unraveling-white-house-advisers>.

42 Jennifer Rubin, Opinion, *When Do We Reach 25th Amendment Territory?*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/blogs/right-turn/wp/2017/10/12/when-do-we-reach-25th-amendment-territory/?utm_term=.a7e4a5ba0486.

43 Julian Zelizer, *Is It Time to Talk About the 25th Amendment?*, CNN, <https://www.cnn.com/2017/10/13/opinions/is-it-time-to-talk-the-25th-amendment-opinion-zelizer/index.html> (last updated Oct. 16, 2017, 10:02 AM).

Some concluded that conventional interpretations did not make Section 4 an instrument to use against Trump but favored its expansion to serve that purpose. For instance, Professor Eric Posner of the University of Chicago School of Law wrote that the Constitution is defective because under the “conventional understanding” of the Amendment, a President can be removed if “incapacitated by mental or physical illness” but not if he had lost public confidence due to “a failure of temperament, ideology or ability.”⁴⁴ Posner argued that its “broad language” deliberately transcends physical and mental incapacities and should be construed more broadly. Additionally, Posner argued that Congress should create a bipartisan Presidential Oversight Council to recommend removal for inability on political rather than medical grounds.⁴⁵

In mid-October Harvard Law professor Jeannie Suk Gersen described the activity of some medical health professionals who had organized “Duty to Warn,” an organization that claimed that Trump suffered from “incurable malignant narcissism” that rendered him unable to discharge presidential powers and duties. In view of this unusual activity, she thought “talk of Trump’s removal under the Twenty-fifth Amendment may not seem so crazy.”⁴⁶

Law professor Jonathan Turley responded to arguments such as those Douthat, Posner, and Duty to Warn participants had made in two overlapping columns. One argued that “removing Trump” through Section 4 “would be a disaster for our system.” Turley discounted claims that Trump should be removed for “incurable malignant narcissism,” since many public servants are narcissists, presidents should not be declared unfit without an examination, and Trump’s objectionable traits were evident before the November election.⁴⁷ Bad behavior is not the test under Section 4, Turley pointed out; inability to discharge presidential powers and duties is.

⁴⁴ Eric Posner, Opinion, *Trump Could Be Removed for Political Incompetence – Using the 25th Amendment*, WASH. POST (Sept. 12, 2017), https://www.washingtonpost.com/opinions/trump-could-be-removed-for-political-incompetence--using-the-25th-amendment/2017/09/12/b6c62380-9718-11e7-82e4-f1076f6d6152_story.html?utm_term=.0dbf9e5eeb66.

⁴⁵ *Id.*

⁴⁶ Jeannie Suk Gersen, *How Anti-Trump Psychiatrists Are Mobilizing Behind the Twenty-fifth Amendment*, NEW YORKER (Oct. 16, 2017), <https://www.newyorker.com/news/news-desk/how-anti-trump-psychiatrists-are-mobilizing-behind-the-twenty-fifth-amendment>.

⁴⁷ Jonathan Turley, *How Do You Get Rid of Trump? An Election, Not the 25th Amendment*, WASH. POST (Oct. 19, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/19/how-do-you-get-rid-of-trump-an-election-not-the-25th-amendment/?noredirect=on&utm_term=.6052a3d59ca9.

A second Turley column said the growing “25 and over” club saw Section 4 “as a way to prematurely . . . end” Trump’s Administration by declaring Trump mentally ill and “thus unfit to hold office.”⁴⁸ Turley derided the idea that Pence and a Cabinet majority would declare Trump disabled but his column mostly attacked the propriety, not the plausibility, of using Section 4.⁴⁹ Among other points, he observed that authoritarian regimes deploy allegations of mental illness as a political weapon and argued that mental illness should not be diagnosed without an examination, concluded that evidence of Trump’s mental illness was lacking, and noted that mental illness is not necessarily disabling nor is it a justification for “removal” under Section 4 which requires a finding that the President is unable to discharge presidential powers and duties.⁵⁰

The debate continued. The distinguished presidential historian, Robert Dallek, shared Posner’s belief that Section 4 should be construed to extend beyond the maladies that inspired its creation. He wrote in December 2017 that Trump should be declared unable to discharge the powers and duties of his office based on an expanded conception of Section 4 which looks to his level of competence rather than for a medical impairment. Dallek contended that Trump is untrustworthy, lies, and has credibly been accused of sexual misconduct.⁵¹ By December 2017, Section 4 was receiving so much attention that the *New York Times* ran an opinion piece recommending various books dealing with presidential inability as holiday gifts.⁵²

The publication in January 2018 of Michael Wolff’s *Fire and Fury: Inside the Trump White House*, with its report that Trump insiders discussed Trump’s fitness, triggered another round of Section 4 discussion. President Trump tweeted about his “mental stability” and termed himself a genius . . . and a very stable genius at that!⁵³ Jennifer Rubin now questioned the President’s fitness and declared that Pence, the Cabinet, and Congress “have a moral and constitutional obligation to bring this to a stop.”⁵⁴ In January 2018,

⁴⁸ Jonathan Turley, Opinion, *Sorry Folks, Trump Is Not Insane*, HILL (Oct. 24, 2017, 10:00 AM), <http://thehill.com/opinion/white-house/356842-trump-pales-in-comparison-to-our-history-of-mentally-ill-presidents>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Robert Dallek, *Is Trump Unfit for Office? The Constitution Says Yes*, NEWSWEEK (Dec. 16, 2017, 6:00 AM), <http://www.newsweek.com/trump-25th-amendment-constitution-750157>.

⁵² Sarah Vowell, Opinion, *Presidential Incapacity: A Holiday Gift Guide*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/opinion/trump-holiday-gift-guide.html>.

⁵³ Andrew Restuccia & Craig Howie, *Trump Defends Mental Health: ‘I’m a Stable Genius,’* POLITICO (Jan. 6, 2018, 7:42 AM), <https://www.politico.com/story/2018/01/06/trump-wolff-mental-health-327116>.

⁵⁴ Jennifer Rubin, Opinion, *The ‘Stable Genius’ Isn’t Even Functioning as President*, WASH. POST (Jan. 6,

CNN's Byron Wolf noted that the Amendment was "back in the news" but thought it "hard to imagine" that the decision-makers would invoke it against Trump.⁵⁵ But constitutional scholar Mark Graber argued that Trump was "constitutionally unfit" to serve as President, that Section 4 did not turn on physical or medical disability, that Trump was a "congenital liar and a bigot," and as such he was "unable to discharge the powers and duties of [the presidency]."⁵⁶ Law professor Michael Ramsey rejected Graber's analysis, which, he said, conflated "unfit" with "unable." Section 4 covered the latter, not the former, he argued.⁵⁷

Media discussion of Section 4 in connection with Trump subsided after Trump's White House physician, Dr. Ronny Jackson, issued a glowing report of Trump's physical and cognitive health in mid-January 2018.⁵⁸ Yet the topic returned to prominence in early September 2018 when an anonymous writer, who the New York Times identified as a "senior official in the Trump administration," contributed a commentary piece alleging that various officials, including the writer, had resisted Trump's "erratic behavior" and that the "instability" Trump's subordinates had witnessed had prompted "early whispers within the cabinet of invoking the 25th Amendment," a move that had not been pursued in order to avert a

2018), https://www.washingtonpost.com/blogs/right-turn/wp/2018/01/06/the-stable-genius-isnt-even-functioning-as-president/?utm_term=.3c440abbb611.

⁵⁵ Z. Byron Wolf, *Removing a President Using the 25th Amendment Would Require a Political Apocalypse*, CNN, <https://www.cnn.com/2018/01/08/politics/25th-amendment-would-require-a-political-apocalypse/index.html> (last updated Jan. 8, 2018, 1:12 PM); see also Will Rahn, *Commentary: Why the 25th Amendment Won't Be Used to Remove Trump*, CBS NEWS (Jan. 11, 2018, 5:59 AM), <https://www.cbsnews.com/news/why-the-25th-amendment-wont-be-used-to-remove-trump/> (arguing that use of Section 4 to transfer presidential powers and duties from Trump is unlikely); Editorial, *Is Mr. Trump Nuts?*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/opinion/is-mr-trump-nuts.html> (arguing that Trump was unfit to be President but rejecting Section 4 as the appropriate remedy).

⁵⁶ Mark Graber, *Taking the Text of the Twenty-fifth Amendment Seriously*, BALKINIZATION (Jan. 12, 2018), <https://balkin.blogspot.com/2018/01/taking-text-of-twenty-fifth-amendment.html>.

⁵⁷ Michael Ramsey, *Mark Graber on the Twenty Fifth Amendment*, ORIGINALISM BLOG (Jan. 15, 2018), <http://originalismblog.typepad.com/the-originalism-blog/2018/01/mark-graber-on-the-twenty-fifth-amendmentmichael-ramsey.html>.

⁵⁸ Dan Merica, *Dr. Ronny Jackson's Glowing Bill of Health for Trump*, CNN, <https://www.cnn.com/2018/01/16/politics/dr-ronny-jackson-donald-trump-clean-bill-of-health/index.html> (last updated Jan. 16, 2018, 11:03 PM). President Trump subsequently nominated Dr. Jackson to be Secretary of Veterans Affairs. *Veterans Affairs Pick Ronny Jackson Impressed Trump After He Gave Glowing Health Report*, CBSNEWS (Mar. 29, 2018, 7:40 AM), <https://www.cbsnews.com/news/veterans-affairs-pick-ronny-jackson-impressed-trump-after-he-gave-glowing-health-report/>. But Dr. Jackson withdrew after his nomination became controversial amidst allegations of improprieties. Jessica Taylor, *Ronny Jackson Withdraws as VA Nominee*, NPR (Apr. 26, 2018, 8:03 AM), <https://www.npr.org/2018/04/26/605471807/dr-ronny-jackson-withdraws-as-va-nominee>.

“constitutional crisis.”⁵⁹ Various senior officials in the Trump Administration denied authorship⁶⁰ and that any discussion of using Section 4 had occurred.⁶¹ Scholars and journalists produced another round of explainer and commentary pieces about the Twenty-fifth Amendment or Section 4.⁶²

II. SETTING THE RECORD STRAIGHT

Although the media treatments provided some astute insights, some also included mistakes regarding the history, scope, and operation of Section 4. The discussion below seeks to correct the record on some important points that may become relevant in the future.

Before presenting this discussion, it is worth saying something about the methodology used. Some of the mistaken statements addressed the behavior of the framers of the Twenty-fifth Amendment, whereas others made claims about the meaning of Section 4. The former group, which include the claims that the presidential inability provisions were peripheral and that the framers did not intend mental illness to be covered (although that assertion also goes to meaning), essentially involve statements regarding conduct and accordingly are addressed largely by presenting historical evidence of actions and words which demonstrate that the assertions are incorrect.

⁵⁹ Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

⁶⁰ Veronica Stracqualursi, Jeff Zeleny, & Jim Acosta, *Here Are the Administration Officials Who Deny They Wrote the New York Times Op-ed*, CNN, <https://www.cnn.com/2018/09/06/politics/trump-officials-denials-nyt-op-ed/index.html> (last updated Sept. 8, 2018, 5:01 PM).

⁶¹ Helena Bottemiller Evich, *Perdue Dismisses 25th Amendment Chatter*, POLITICO (Sept. 7, 2018, 6:00 PM), <https://www.politico.com/story/2018/09/07/perdue-trump-25th-amendment-talk-811253>; Quint Forgy, *Pence Denies 25th Amendment Talks to Oust Trump Following NYT Op-ed's Claim*, POLITICO (Sept. 8, 2018, 6:31 PM), <https://www.politico.com/story/2018/09/08/pence-trump-25th-amendment-op-ed-812295>.

⁶² See, e.g., Alan Blinder, *The Story of the 25th Amendment, According to the People Behind It*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/us/25th-amendment-trump.html> (describing creation of purposes of Amendment based on interviews with three participants); David Greenberg & Rebecca Lubot, *Stop Talking About the 25th Amendment. It Won't Work on Trump*, POLITICO (Sept. 8, 2018), <https://www.politico.com/magazine/story/2018/09/08/trump-25th-amendment-constitutional-crisis-219739> (arguing that Section 4 does not apply to current situation); John Hudak, *How Donald Trump Could Tweet His Way Out of a 25th Amendment Challenge*, BROOKINGS: FIXGOV (Sept. 7, 2018), <https://www.brookings.edu/blog/fixgov/2018/09/07/how-donald-trump-could-tweet-his-way-out-of-a-25th-amendment-challenge/>; Michael D. Shear, *The 25th Amendment: The Difficult Process to Remove a President*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/trump-25th-amendment-anonymous.html> (describing operation of Twenty-fifth Amendment).

Consideration of claims regarding the meaning of Section 4 requires making assumptions regarding proper methods of constitutional interpretation as well as regarding several related areas, such as the role of text and purpose in constitutional interpretation, how to perform originalist analysis, and the relevance of evidence of legislative history. The literature in each of these areas is massive and resists distillation even in writings about such subjects, much less in an article like this one about an entirely different topic.

The discussion below relating to assertions regarding the meaning of Section 4 draws from a range of modes of constitutional argument and justification including text, originalism, structure, consequentialism, ongoing history, and judicial precedent. These types of constitutional argument are among those that judges and other authoritative constitutional interpreters commonly use and enjoy widespread acceptance in the academic literature,⁶³ even though certain constitutional interpreters argue that some are entitled to priority over others.⁶⁴ Recourse to a variety of constitutional arguments often helps shed light on constitutional meaning especially when multiple paths lead to the same result.

The discussion regarding the meaning of Section 4 draws heavily on legislative history and accordingly implicates debates regarding the proper way to perform originalist argument, whether based on original intentions, original understandings, or original public meaning, and regarding the use of legislative history to shed light on texts. Legislative history can illuminate the context in which constitutional text is produced and accordingly offer insights regarding meaning.⁶⁵ Moreover, evidence regarding intent and purpose often helps discern meaning.⁶⁶ The use of legislative history that

⁶³ See, e.g., JOHN B. ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 9–21 (4th ed. 2012); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–9 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12 (1991); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 14–28 (1969); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987).

⁶⁴ See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 91–125 (2004) (advocating for an originalist textual interpretation); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 1–17 (1999) (advocating that original intent is the most appropriate mode of constitutional interpretation); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (advocating originalism as the only means consistent with judicial impartiality).

⁶⁵ See Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1761 (2015) (“Because meaning depends on context, in law as elsewhere, the history of the drafting and ratification of constitutional provisions often has vital importance.”).

⁶⁶ *Id.* at 1763–64 (“In nearly all contexts, the identifiable intentions or purposes of a speaker function as an important indicator of the meaning of the speaker’s utterances.”); *id.* at 1764–66 (“Even those who recurrently reject claims that legislatures can have intention analogous to those of individuals attach interpretive significance to the widely shared purposes that motivated the adoption of

follows is consistent not simply with arguments based on original intent, a method which largely defined originalism⁶⁷ until recently⁶⁸ and which continues to be used⁶⁹ although subject to some legitimate attacks in certain contexts.⁷⁰ The discussion of legislative history also speaks to original understanding or original public meaning of Section 4, methods which now attract a wider following than original intent⁷¹ even as originalism still takes many forms.⁷² In particular, legislative history illuminates Section 4 to the extent its meaning is under-determinate by providing evidence of how particular terms were understood by those who drafted and proposed the clause and by shedding light on what the language meant to reasonable persons in the mid-1960s. As such, the resolutions suggested below should be persuasive to those who emphasize text or originalism of various forms and to those who are receptive to more pluralistic assortments of constitutional arguments which consider text and originalism along with other conventionally practiced methods.

constitutional language.”).

- 67 See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971) (requiring consideration of “framers’ intent”); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (calling for “jurisprudence of original intention”).
- 68 See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004) (“[N]ew originalism is focused less on the concrete intentions of individual drafters . . . than on the public meaning of the text that was adopted.”)
- 69 See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2558 (2014) (citing the *Federalist* papers as evidence of the Founders’ intent); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2263–64 (2013) (Thomas, J., dissenting) (discussing Framers’ intent regarding the Voter Qualification Clause); *McDonald v. City of Chicago*, 561 U.S. 742, 768–69 (2010) (plurality opinion) (using original intent to show that the right to keep and bear arms was regarded as fundamental); *id.* at 772–77 (using evidence of original intent to show that right to keep and bear arms was viewed as a fundamental right for purposes of the Fourteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 636–37, 655–62 (2008) (Stevens, J., dissenting) (considering the drafting history of the Second Amendment in interpreting it).
- 70 See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 212–13 (1980) (discussing the difficulty in imputing an intent to a body whose members may have different intents); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087–89 (1989) (discussing the difficulty of determining the Framers’ intent since records were incomplete and some issues were not considered); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 138–41 (2011) (identifying as problems for originalism ascertaining meaning and translating it into distant time periods).
- 71 See, e.g., Whittington, *supra* note 68, at 609–10 (explaining reasons for shifting away from focus on original intent).
- 72 See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (describing disputes among originalists); Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 7 (2011) (“There are multiple strands of originalism, with additional versions proliferating as rapidly as law reviews can publish them.”).

Although some have questioned the value of legislative history especially regarding statutory interpretation, it continues to be used in constitutional interpretation.⁷³ At times, the Court explains its failure to offer legislative history from the drafting or ratification of the original Constitution based on the absence of evidence,⁷⁴ thereby suggesting its relevance where available.

The argument for considering legislative history regarding the Twenty-fifth Amendment is quite strong. The legislative history is extensive and preserved.⁷⁵ Principal architects reasonably understood that their expressions had weight⁷⁶ and expressed themselves publicly on important issues thereby communicating not simply their intent but their understanding of important terms. Their ultimate conclusions were largely consistent with each other and generally not contradicted by other participants. The legislative materials were accessible to ratifiers, as were summations which were sent to them. The legislative history provides a reliable source of insight regarding the meaning of Section 4 and other provisions of the Amendment.

A. *The Central Role of the Presidential Inability Provisions*

The misunderstanding of Section 4 began with misstatements of the events that produced it. In particular, some comments significantly understated the importance of the inability provisions to the Amendment or their applicability to mental illness.

⁷³ See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting) (citing the *Federalist* papers as evidence of original understanding); *id.* at 2099 (Thomas, J., concurring) (citing legislative history at ratification debates to show original understanding); *McDonald v. City of Chicago*, 561 U.S. 742, 768–9 (2010) (using legislative history to show that the Framers regarded the right to keep and bear arms as fundamental); *id.* at 825–27 (Thomas, J., concurring) (using legislative history to show an understanding that privileges and immunities of U.S. citizenship included rights set forth in the Constitution); *Freytag v. Comm’r*, 501 U.S. 868, 886–87 (1991) (relying on legislative report defining a constitutional term as “instructive” in “confirm[ing]” the term’s meaning).

⁷⁴ See e.g., *Zivotofsky*, 135 S. Ct. at 2085 (noting the failure to including extensive legislative history because “the Reception Clause received little attention at the Constitutional Convention.”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 517 (2010) (Breyer, J., dissenting) (explaining failure to cite legislative history since “[t]he President’s power to remove Executive Branch officers ‘was not discussed in the Constitutional Convention.’”).

⁷⁵ YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 10 (noting the Twenty-fifth Amendment’s “unusually robust and accessible drafting and legislative” history and absence of other interpretive aids).

⁷⁶ See, e.g., *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. 15 (1965) [hereinafter *1965 Senate Hearings*] (statement of Acting Att’y Gen. Nicholas Katzenbach) (advising that terms in proposed constitutional amendment could be clarified in legislative reports or debates); 111 CONG. REC. 15,384 (1965) (statement of Sen. Birch Bayh) (stating that constitutional interpretation would consider “interpretations placed upon the measure by the Senator in charge of the bill.”).

For instance, Jeff Greenfield wrote that the “core purpose” of the Amendment “was not aimed at presidential incapacity at all” but was to remedy the recurring problem of vice-presidential vacancy.⁷⁷ Greenfield treated presidential inability as simply “a second issue” to be addressed.⁷⁸ By minimizing the centrality of presidential inability to the Amendment, Greenfield invited readers to infer that the provisions received relatively little consideration.

The history reads quite differently. Although the assassination of President John F. Kennedy on November 22, 1963, created a vice-presidential vacancy and provided the immediate impetus for the Twenty-fifth Amendment, the roots of the Amendment preceded that tragedy, the relevant context which produced it was more complicated, and its focus was much wider than filling the second office. Far from being secondary, the presidential inability provisions were at the core of the Amendment.

The work towards fashioning a constitutional Amendment to ensure presidential continuity began in the mid-1950s after President Dwight D. Eisenhower suffered a heart attack on September 24, 1955. Eisenhower was hospitalized for about seven weeks, did not meet with his Cabinet until right before Thanksgiving, and was away from Washington, save for a few days, for nearly four months.⁷⁹ The executive branch, under the leadership of Attorney General Herbert Brownell, began to study presidential inability, as did Congress. Representative Emanuel Celler, chair of the House Committee on the Judiciary, prepared a questionnaire which elicited responses of seventeen scholars regarding how to address presidential inability.⁸⁰ A Celler-led House subcommittee held hearings on presidential inability in 1956⁸¹ and 1957,⁸² as did the Senate Subcommittee on Constitutional Amendments in 1958.⁸³ Eisenhower’s ileitis surgery on June 9, 1956, and his stroke on November 25, 1957, added urgency to the issue.⁸⁴

⁷⁷ Greenfield, *supra* note 24.

⁷⁸ *Id.*

⁷⁹ JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 213–21 (1965).

⁸⁰ H. COMM. ON THE JUDICIARY, 84th Cong., PRESIDENTIAL INABILITY 1–62 (Comm. Print 1956).

⁸¹ *Presidential Inability: Hearings Before the Special Subcomm. to Study Presidential Inability of the H. Comm. on the Judiciary*, 84th Cong. (1956).

⁸² *Presidential Inability: Hearings Before the Special Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary*, 85th Cong. (1957).

⁸³ *Presidential Inability: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 85th Cong. (1958).

⁸⁴ FEERICK, *supra* note 79, at 223–27.

When it became clear that institutional constraints, disagreement on the merits of competing approaches, and partisan considerations⁸⁵ would prevent Congress from acting quickly, Eisenhower entered into a letter agreement with Vice President Richard M. Nixon as a partial solution regarding presidential inability. It provided that if disabled, Eisenhower could, if able to do so, voluntarily transfer power temporarily to Nixon as acting President, that Nixon could effect such a transfer if Eisenhower was disabled but unable to act to shift presidential power, and that, in either case, Eisenhower could reclaim presidential powers when he determined the inability had ended.⁸⁶ Kennedy and Lyndon B. Johnson adopted essentially the same arrangement.⁸⁷ The Senate Subcommittee on Constitutional Amendments conducted further hearings on presidential inability in June 1963⁸⁸ and had reported Senate Joint Resolution 35 (“S.J. Res. 35”) to the Senate Committee on the Judiciary that summer,⁸⁹ a proposal quite different from that ultimately adopted, but the death in August of its principal Democratic sponsor, Senator Estes Kefauver, diminished its prospects.⁹⁰ The American Bar Association, which played a critical role in formulating and advocating for the proposed Twenty-fifth Amendment, had endorsed S.J. Res. 35.⁹¹ John D. Feerick, whose scholarship, legislative testimony and consulting, and ABA work helped produce and explain the Amendment, had published his first law review article in the area a month before the Kennedy assassination,⁹² and the *New York Times* ran Feerick’s letter on presidential continuity only a few days before Dallas.⁹³ Feerick’s article and letter dealt exclusively with presidential inability.

85 HERBERT BROWNELL & JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* 278 (1993) (citing misgivings of congressional Democrats to elevate the status of Nixon).

86 Agreement Between the President and Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196–97 (Mar. 3, 1958). Sarah Vowell’s criticism of Eisenhower’s action as “neither legal nor, in retrospect, judicious,” see Vowell, *supra* note 52, is unfair in that Eisenhower was acting to fill a gap pending legislative action. Subsequent administrations followed the Eisenhower-Nixon model, and Attorneys Generals Brownell, William Rogers, and Robert F. Kennedy all certified to its constitutionality.

87 White House Statement and Text of Agreement Between the President and Vice President on Procedures in the Event of Presidential Inability, PUB. PAPERS 561 (Aug. 10, 1961).

88 FEERICK, *supra* note 10, at 54–55.

89 *Id.* at 54.

90 *Id.* at 55.

91 *Id.* at 54–55.

92 See, e.g., John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73 (1963).

93 John D. Feerick, Letter to the Editor, *Fixing Presidential Succession*, N.Y. TIMES, Nov. 17, 1963, at E8.

To be sure, filling a vice-presidential vacancy was a central purpose of the Amendment. Senator Birch Bayh, who succeeded Kefauver as chair of the Senate Subcommittee on Constitutional Amendments, regarded vice-presidential vacancy as “[t]he most immediate problem” in December 1963 when he began to focus on the issue.⁹⁴ After all, the vice presidency was then vacant, as it had been on fifteen prior occasions for more than thirty-six years.⁹⁵ The Presidential Succession Act of 1947 placed the speaker of the House of Representatives and President Pro Tempore of the Senate next in line,⁹⁶ and many thought the current incumbents, John McCormack and Carl Hayden respectively, too old and not presidential timber, especially in a nuclear age.⁹⁷ The common alternative to legislative succession, placing Cabinet officials, beginning with the Secretary of State, atop the line of succession, also had drawbacks. Cabinet officials were unelected and often were area specialists, not the political generalists the presidency required.⁹⁸ The vice presidency had grown, especially beginning with the tenure of Richard M. Nixon,⁹⁹ and many saw filling a vice-presidential vacancy as the best means to provide for presidential succession.¹⁰⁰ Moreover, if the second office could be filled when vacant, America would be far less likely to ever need to call on a legislative or Cabinet successor.¹⁰¹

The immediacy of vice-presidential vacancy did not, however, render presidential inability a peripheral concern. Rather, the presidential inability provisions were central to the Amendment.¹⁰² The disability provisions of

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- ⁹⁴ BIRCH BAYH, *ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION* 32 (1968).
⁹⁵ FEERICK, *supra* note 79, at 244.
⁹⁶ 3 U.S.C. § 19(a)–(b) (2006).
⁹⁷ Goldstein, *supra* note 9, at 965.
⁹⁸ *Cf. id.* at 1027 (discussing lack of democratic pedigree of some Cabinet members).
⁹⁹ BAYH, *supra* note 94, at 23 (“President Eisenhower had since 1952 relied so heavily on Richard Nixon that the office of Vice President had soared to unprecedented importance.”); JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 137 (1982). *See generally* Roy E. Brownell, II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers Part II: Political Branch Interpretation and Counterarguments*, 24 KAN. J.L. & PUB. POL’Y 294, 342–48 (2015) (detailing the evolution of the vice presidency during Nixon’s tenure in it).
¹⁰⁰ *See, e.g.*, John D. Feerick, *The Vice-Presidency and the Problem of Presidential Succession and Inability*, 32 *FORDHAM L. REV.* 457, 489–90 (1964) (explaining that filling a vice-presidential vacancy would best provide for a qualified presidential successor).
¹⁰¹ *See* Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 *HOUS. L. REV.* 67, 71 (2010) (emphasizing that Section 2 minimizes the time in which the vice presidency is vacant).
¹⁰² *See, e.g.*, BAYH, *supra* note 94, at 32 (“It was important, too, to deal with the problem of Presidential disability”); *id.* at 47 (“The first part of the general problem, and the one that had been most thoroughly discussed, was the area of Presidential disability. . . . Then I turned to the other problem: how to fill vacancies in the office of Vice President.”); *id.* at 117 (criticizing a proposal that did not address vice-presidential vacancy and presidential inability).

what became the Twenty-fifth Amendment had been in the works for nearly a decade.¹⁰³ Sections 1, 3, and 4 of the Amendment, none of which addressed vice-presidential vacancy, were modified versions of proposals advanced by the Eisenhower Administration and by a bipartisan group of legislators during the 1950s.¹⁰⁴ Even Section 2, the one part of the Amendment that addressed vice-presidential vacancy, was related to the presidential inability provisions which required a Vice President to be operative.¹⁰⁵

Presidential inability was an integral, not incidental, target of the Amendment which addressed presidential succession, vice-presidential vacancy, and presidential inability. These three topics reflected a larger preoccupation with ensuring continuity of presidential leadership¹⁰⁶ during the Cold War and especially in a nuclear age.¹⁰⁷ Bayh stated the basic purpose of the reform effort in 1964, declaring that “the safety of the United States demands a President who is always capable of making rational decisions and rational determinations; and in the event the President is unable to make these determinations it demands that the Vice President be able to assume the powers and duties of the President, so that this country may always be in the hands of one who is able to make the necessary

¹⁰³ See FEERICK, *supra* note 10, at 50–53 (discussing reform efforts during the 1950s regarding presidential inability).

¹⁰⁴ See Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-fifth Amendment*, 86 FORDHAM L. REV. 1137, 1142–44, 1146 (2017) (outlining various legislative remedies introduced over the course of the 1950s which helped shape the Twenty-fifth Amendment).

¹⁰⁵ See, e.g., Goldstein, *supra* note 4, at 536–40 (describing connections between Vice President and presidential inability provisions).

¹⁰⁶ BAYH, *supra* note 94, at 8 (1968) (“During the first week of December, newspapers reflected the national concern over the problems related to executive continuity. . . . The problem was threefold.”); Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 1, 8 (Jan. 4, 1965) (“I will propose laws to insure the necessary continuity of leadership should the President become disabled or die.”); *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. 40–41 [hereinafter *1964 Senate Hearings*] (statement of Professor James C. Kirby, Jr.) (describing presidential inability as part of and interrelated to the problem of presidential succession); 110 CONG. REC. 22,983 (1964) (statement of Sen. Birch Bayh) (describing the issue as involving “the basic structure and the basic transfer of authority of executive power, the office of the President and the office of the Vice President of the United States of America.”).

¹⁰⁷ 110 CONG. REC. 22,990 (1964) (statement of Sen. Birch Bayh) (“However, in this day of nuclear power . . . the safety of the United States demands a President who is always capable”); Goldstein, *supra* note 9, at 964 (“[T]he advent of the nuclear age and of the Cold War . . . lent urgency to the subject of presidential succession and inability.”); see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 448 (2005) (“In a nuclear world where each side in the Cold War had the capability of striking the other in a manner of minutes, could America afford to be effectively leaderless for even a short interval? Could the nation risk the mere possibility of a shaky finger on the button?”).

decisions at the necessary time.”¹⁰⁸ Bayh and others wanted to address other gaps that threatened presidential continuity, including vice-presidential inability and the line of succession after the Vice President.¹⁰⁹ Ultimately, Bayh and others concluded that a holistic approach would be counterproductive.¹¹⁰ The more comprehensive the proposal, the more ambitious its targets, the less likely it was to succeed. Instead Bayh and others decided to address the two most pressing problems—vice-presidential vacancies and presidential inability—and defer other issues to the future. The report accompanying Senate Joint Resolution 1 (“S.J. Res. 1”)—in identifying the dual and related purposes of the proposal—recited:

The purpose of the proposed Senate Joint Resolution 1, as amended, is to provide for continuity in the office of the Chief Executive [in the event that the President becomes unable to exercise the powers and duties of the office] and further, to provide for the filling of vacancies in the office of the Vice President whenever such vacancies may occur.¹¹¹

The legislative discussions relating to Congress’s action in proposing the Amendment consistently emphasized the related nature of the problems and the centrality of presidential inability. Bayh described his initial proposal, Senate Joint Resolution 139 (“S.J. Res. 139”) as “an attempt to deal at one time with the closely related questions of Presidential succession and Presidential inability.”¹¹² He said that “[e]very reason and logic and sound organization calls upon us to deal simultaneously”¹¹³ with the contingencies which might present a challenge to presidential continuity. When the ABA convened a blue-ribbon working group to consider the issue in January 1964, its consensus statement, which both reflected S.J. Res. 139 and informed its further development, devoted most space to presidential inability.¹¹⁴ During hearings and floor debate, legislators and witnesses emphasized the dual

¹⁰⁸ 110 CONG. REC. 22,990 (1964) (statement of Sen. Birch Bayh).

¹⁰⁹ See FEERICK, *supra* note 10, at 71–75 (discussing other issues ABA and the original version of S.J. Res. 139 addressed which were eliminated to maximize support).

¹¹⁰ See BAYH, *supra* note 94, at 48 (describing decision to drop provision creating Cabinet line of succession after Vice President); *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 57, 77–78 (1965) [hereinafter *1965 House Hearings*] (statement of Sen. Birch Bayh) (explaining decision not to address simultaneous presidential and vice-presidential inability in proposed amendment); 111 CONG. REC. 3253 (1965) (statement of Sen. Birch Bayh) (explaining decision not to provide for vice-presidential inability); 110 CONG. REC. 22,991–92 (1964) (statement of Sen. Samuel Ervin) (describing considerations which led to minimizing issues covered in proposed amendment).

¹¹¹ S. REP. NO. 89-66, at 4 (1965)

¹¹² 109 CONG. REC. 24,420 (1963).

¹¹³ *Id.*

¹¹⁴ *Constitutional Amendment Urged on Presidential Inability and Succession*, 50 A.B.A.J. 237, 238 (1964).

purpose of the proposals,¹¹⁵ noted the interrelationship of the issues,¹¹⁶ referred to presidential inability as having greater¹¹⁷ or at least equal importance,¹¹⁸ or described presidential inability as the more difficult problem¹¹⁹ or emphasized the importance of addressing presidential inability.¹²⁰

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- 115 110 CONG. REC. 22,983 (1964) (statement of Sen. Birch Bayh) (describing “[t]he problems of vice-presidential vacancies and Presidential inability” as “complex and significant.”); *see also* 1964 Senate Hearings, *supra* note 106, at 1, 3 (statements of Sen. Birch Bayh) (discussing both issues).
- 116 1964 Senate Hearings, *supra* note 106, at 67 (statement of Sen. Edward V. Long) (stating that the problems of succession and inability “are so intertwined as to be inseparable.”); *id.* at 115 (statement of Professor James McGregor Burns) (referring to “the twin problems of Presidential inability and vice presidential vacancy.”); *id.* at 128 (statement of Professor Paul A. Freund) (stating that Presidential inability and succession were “two distinct problems, but they are interrelated.”); *id.* at 134 (statement of former Att’y Gen. Herbert Brownell) (referring to “[p]residential disability and the related question of presidential succession”).
- 117 1964 Senate Hearings, *supra* note 106, at 25–26 (statement of Sen. Kenneth Keating) (stating that “it is many times more imperative to act in the field of inability than in the distinct area of Presidential succession” since Congress had provided for a line of succession but had not addressed inability); *id.* at 150 (statement of John D. Feerick) (describing presidential inability as “the most important problem” facing Bayh’s subcommittee and Congress); *id.* at 156 (favoring dropping the provision changing the line of succession after Vice President, owing to importance of addressing presidential inability).
- 118 1964 Senate Hearings, *supra* note 106, at 93 (statement of Lewis F. Powell, Jr., President-elect of the American Bar Association) (describing the issues as of “equal importance”); Richard M. Nixon, *We Need a Vice President Now*, SATURDAY EVENING POST, Jan. 1, 1964, at 6, 10 (referring to “the equally important question of presidential disability.”); *see also* 1965 Senate Hearings, *supra* note 76, at 11 (statement of Acting Att’y Gen. Nicholas Katzenbach) (describing vice presidential vacancy as an “equally critical problem” as presidential inability).
- 119 1964 Senate Hearings, *supra* note 106, at 17 (statement of Sen. Samuel Ervin) (describing presidential inability as “a thornier problem”); *id.* at 82 (statement of Sen. Frank Church) (referring to the “vexatious problem of disability” which “is a more difficult problem to resolve than any other”); *id.* at 232 (letter from former President Dwight D. Eisenhower) (stating that handling presidential inability was “more complicated” than presidential succession or vice-presidential vacancy); 110 CONG. REC. 22,989 (1964) (statement of Sen. Birch Bayh) (referring to “the equally, if not more vexing problem of disability which may occur in the office of the Presidency.”); *id.* at 23,001 (statement of Sen. James B. Pearson) (“The disability of a living President poses a problem as difficult as that of succession.”).
- 120 110 CONG. REC. 22,987 (1964) (statement of Sen. Birch Bayh) (stating that “[o]ur obligation to deal also with the question of presidential inability is crystal clear” to remedy a “constitutional gap, or a blind spot. We must fill this gap if we are to protect our Nation from the possibility of floundering in the sea of public confusion and uncertainty.”); *id.* at 22,992 (statement of Sen. Leverett Saltonstall) (stating that provisions regarding presidential disability needed to be clarified because “so much depends upon the continued and uninterrupted functioning of our Government”); *id.* at 22,994 (statement of Sen. Alan Bible) (stating that “[t]he Government cannot afford the luxury of Executive inactivity because of illness or other inability in the Presidency”); *id.* at 22,997 (statement of Sen. Mike Monroney) (stating that the disability provisions were “vitaly necessary, more so each day”); *see also* Feerick, *supra* note 100, at 498 (“The problems of the succession and inability are now before Congress for action. Ideally, both should be solved, together if possible. However, if anything is going to be solved, the problem of inability should be. It has first claim for action. It has been left unsolved for almost two centuries.”); 1964 Senate Hearings, *supra* note 106, at 88 (report from the

The pertinent legislative reports in the Senate stated that “the purpose” of the proposed constitutional amendment “is to provide for continuity in the office of the Chief Executive [in the event that the President becomes unable to exercise the powers and duties of the office] and further, to provide for the filling of vacancies in the office of the Vice President whenever such vacancies may occur.”¹²¹ The reports accompanying the proposals in the Senate and House spent far more space on presidential inability than on vice-presidential vacancy.¹²² In the mid-1960s, some raised the specter that had Kennedy been incapacitated rather than killed, the constitutional system would have been ill-equipped to respond.¹²³ The frequency of that argument made evident the preoccupation with presidential inability. It surfaced even when addressing the traumatic, recent presidential assassination.

Far from being a secondary purpose, the presidential inability provisions were an integral part of the Twenty-fifth Amendment. In fact, the House was far more enthusiastic about addressing presidential inability than filling a vice-presidential vacancy which some members saw as an insult to the

American Bar Association) (describing its “first and perhaps . . . most important” proposal as making clear that during a presidential inability, presidential powers and duties, but not the presidency, passed to the Vice President); *id.* at 235 (statement of former Vice President Nixon) (calling presidential inability “the major problem, and the problem that needs most urgent attention”).

¹²¹ S. REP. NO. 89-66, at 4 (1965); *see also* S. REP. NO. 88-1382, at 2 (1964) (providing a similar purpose).

¹²² *See* S. REP. NO. 88-1382 (1964); S. REP. NO. 89-66 (1965); H.R. REP. NO. 89-203 (1965).

¹²³ *1964 Senate Hearings*, *supra* note 106, at 22 (statement of Sen. Kenneth Keating) (observing that “a matter of inches” could have converted Kennedy’s “painless death” into a “permanent incapacity”); *id.* at 61 (statement of Sen. Frank Moss) (speaking of a bullet “which wounds but does not kill”); *id.* at 67 (statement of Sen. Edward V. Long) (referring to the possibility that Kennedy were left alive but disabled); *id.* at 150 (statement of John D. Feerick) (“Had our late President lived, hovering unconsciously between life and death, there would have been no one clearly authorized either to say that the President was unable to make a major decision if one had to be made. The circumstances surrounding the death of President Kennedy should have taught us that we can no longer afford the uncertainty that presently exists regarding the critical problem of Presidential inability.”); *id.* at 101 (statement of Lewis F. Powell, Jr., President-elect of the American Bar Association) (“Had the President been disabled so that he could not continue to discharge his immense responsibilities, a series of questions would have arisen.”); Herbert Brownell, former Att’y Gen., *The History of the Problem, Remarks at the National Forum on Presidential Inability and Vice Presidential Vacancy* (May 25, 1964), in AMERICAN BAR ASSOCIATION, *PRESIDENTIAL INABILITY AND VICE PRESIDENTIAL VACANCY* (1964), at 2–5 (raising specter of Kennedy lingering disabled for weeks or months after shooting); FEERICK, *supra* note 79, at 20 (observing that “[o]ne wonders what would have happened if on November 22, 1963, President John F. Kennedy had not died—but had lingered on, unconscious for days or even weeks.”); James Reston, *Why America Weeps*, N.Y. TIMES, Nov. 23, 1963, at 1, 7 (“[I]t was not clear again what would have happened if the young President, instead of being mortally wounded, had lingered for a long time between life and death, strong enough to survive but too weak to govern.”).

speaker.¹²⁴ Both bodies spent extensive time on the presidential inability provisions, especially Section 4. Indeed, when Bayh's subcommittee reexamined the operation of the vice-presidential vacancy provision in 1975, Bayh and witness, Antonin Scalia, then the Assistant Attorney General for the Office of Legal Counsel, agreed that a decade earlier more attention had been given to presidential inability than to succession.¹²⁵ The legislative record confirms their conclusion. And most of the time on presidential inability related to Section 4.

B. Section 4 and Mental Incapacity

Some recent commentators have either questioned whether Section 4 applied to mental incapacity or suggested that its architects were primarily concerned with physical disability. For instance, the distinguished historian, Julian Zelizer, wrote that “the drafters [of the Twenty-fifth Amendment] had physical disability in mind” not mental competency.¹²⁶ Professor Zelizer complained of “considerable ambiguity in the language of the Amendment to challenge the circumstances under which it can be used (meaning to address the psychological rather than physical condition of a president),”¹²⁷ a statement that appears to reinforce Professor Zelizer's question regarding the extent to which the Amendment addressed mental incapacity. Ian Tuttle observed that “the [A]mendment arose as a response to specific, concrete episodes of physical incapacitation.”¹²⁸ Professor Turley was quoted as saying that the Amendment was added “largely for physical incapacity” but because its language was “ambiguous” it left room for arguments that it covered mental incapacity, too.¹²⁹ Professor Julia Azari acknowledged that mental inability was included, but wrote that “[t]he context” of the Amendment “was pretty clearly aimed at the kind of physical and mental

¹²⁴ John D. Feerick, *The Proposed Twenty-fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173, 186 n.55 (1965) (describing resentment among House members at the widespread questioning of its Speaker's ability to act as President).

¹²⁵ *Examination of the First Implementation of Section Two of the Twenty-fifth Amendment, Hearings on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong., 53–54 (1975) [hereinafter *Examination*]; see also *id.* at 55 (statement of Sen. Hiram Fong) (“[T]he thrust of that amendment really was on disability. We were looking to see how the President could regain his power once he was disabled, that was the thrust of that amendment.”).

¹²⁶ Zelizer, *supra* note 43.

¹²⁷ *Id.*

¹²⁸ Tuttle, *supra* note 34.

¹²⁹ Deena Zaru, *Constitutional Scholars: 25th Amendment Talk ‘Premature,’ Unrealistic*, CNN POLITICS (July 4, 2017, 12:34 AM), <https://www.cnn.com/2017/07/03/politics/what-is-the-25th-amendment-donald-trump/index.html>.

incapacities that come after strokes, heart attacks and bullets.”¹³⁰

Far from being an afterthought or a fortuitous beneficiary of allegedly ambiguous language, addressing a mentally incapacitated president was a prime objective. The Amendment’s very text suggests its wider coverage. Section 4 speaks of the President being “unable to discharge the powers and duties” of the presidency, language clearly broad enough to cover mental as well as physical incapacity. Had the framers intended a narrower focus, they could easily have made “physically unable” the trigger.

The legislative history confirms that mental incapacity was a primary concern of the Amendment. Its architects thought that most uses would involve planned operations or injuries or illnesses,¹³¹ but they consciously included mental inability as a principal target of Section 4.¹³² They recognized that the most challenging contingencies would involve mental incapacity and they spent a great deal of time discussing it. And the language they used made clear that they intended to include mental illness which occurred independent of an assassination attempt or acute medical episode.

President Johnson’s 1965 message to Congress in which he endorsed S.J. Res. 1 and its House counterpart, House Joint Resolution 1 (“H.R.J. Res. 1”) made their application to mental illness, including degenerative processes, explicit when he called for their adoption to protect against “a President’s incapacity by injury, illness, *senility* or other affliction.”¹³³ The legislative reports accompanying the proposals specified that Section 4 addressed disabilities relating to “the President’s physical and mental condition.”¹³⁴

¹³⁰ Julia Azari, *What Does Invoking the 25th Amendment Actually Look Like?*, FIVETHIRTYEIGHT (Apr. 19, 2018, 6:00 AM), <https://fivethirtyeight.com/features/what-does-invoking-the-25th-amendment-actually-look-like/>.

¹³¹ *1965 House Hearings*, *supra* note 110, at 92 (statement of Sen. Birch Bayh) (predicting that ninety percent of disability problems would either be handled under Section 3 or would involve clear instances where the president had suffered a serious illness, like a heart attack that placed him in intensive care at a time “the Russians move missiles into Cuba.”); *id.* at 240 (statement of former Att’y Gen. Herbert Brownell) (predicting that Section 3 would cover most situations of presidential inability and that Section 4 would cover “the rare but dangerous situations where the President is unable to declare his inability. Typical of these would be a situation where the President was unconscious, or where he was mentally ill.”).

¹³² *See, e.g.*, FEERICK, *supra* note 10, at 112 (stating that legislative discussions “most frequently mentioned cases” and “[s]ituations involving physical or mental illness” as rendering a President “unable to discharge the powers and duties of his office” or as constituting “inability”).

¹³³ *Special Message to the Congress on Presidential Disability and Related Matters*, 1 PUB. PAPERS 101–02 (Jan. 28, 1965) (emphasis added); *see also 1965 House Hearings*, *supra* note 110, at 7.

¹³⁴ S. REP. NO. 89-66, at 13 (1965) (stating assumption that Section 4 decision by Vice President and Cabinet would follow “adequate consultation with medical experts who were intricately familiar with the President’s physical and mental condition.”); H.R. REP. NO. 89-203, at 13 (1965) (same); S. REP. NO. 88-1382, at 12 (1964) (same).

During Senate hearings, various witnesses spoke of inability as including mental or physical incapacity.¹³⁵ President Eisenhower, for instance, wrote that “[a] disability could be of different kinds, one caused by physical or mental illness, or another by an absence from the seat of government of such a character that would preclude Presidential decisions and actions in time of emergency.”¹³⁶ He thought the only situation to be feared would involve a President who was “so mentally deranged.”¹³⁷ Bayh said his proposal was intended to “deal with any type of inability.”¹³⁸ Senator Roman Hruska repeatedly used formulations that communicated that the Amendment covered mental disability.¹³⁹

When Bayh testified before the House Judiciary Committee in February 1965, he repeatedly mentioned mental inability. He agreed that the problem was how to address a situation where the President became physically or mentally incompetent to handle the presidency.¹⁴⁰ He acknowledged that “[t]he problem of mental disability . . . is a tough one” since “the facts are difficult to nail down” and thought the provisions relating to intra-executive branch disputes “would be implemented” in such a situation.¹⁴¹ If the President were “mentally incompetent” it would be incumbent on the Vice President and Cabinet to act under Section 4.¹⁴²

When the Senate debated S.J. Res. 1, several senators who played instrumental roles in constructing the Amendment made clear that it applied to mental incapacities. Bayh referred to a situation involving a “deranged” President.¹⁴³ Senator Ervin observed that Congress might have to decide a

¹³⁵ See, e.g., *1964 Senate Hearings*, *supra* note 106, at 45 (statement of Professor James C. Kirby, Jr.) (stating that conflict between President and Vice President/Cabinet would “undoubtedly” involve “mental illness”); *id.* at 60 (statement of Sen. Frank Moss) (speaking of a need to have a President “who is physically and mentally able to conduct the duties of his office”); *id.* at 61 (speaking of President losing powers “through the unrelenting march of age”).

¹³⁶ *1964 Senate Hearings*, *supra* note 106, at 232.

¹³⁷ *Id.*

¹³⁸ *1965 Senate Hearings*, *supra* note 76, at 20.

¹³⁹ *Id.* at 22 (stating psychiatric examinations following involuntary removal might take longer than physical examinations); *id.* at 24 (referring to “insufficient mental or physical powers to continue in office”); *id.* at 25 (referring to “physical or mental capabilities”); *id.* at 33 (“The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his office.”); *id.* at 34 (referring to “physical or mental faculties”).

¹⁴⁰ *1965 House Hearings*, *supra* note 110, at 54.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 111 CONG. REC. 3257 (1965).

challenge involving alleged “mental disability” of the President¹⁴⁴ and thought a challenge regarding “mental disability” might require investigation¹⁴⁵ and testimony.¹⁴⁶ Senator Hruska foresaw questions relating to the “mental ability” or sanity of the President that would require psychiatric investigation whereby “psychiatrists” would need to report to Congress their observations and tests of the President.¹⁴⁷

The legislative record in the House of Representatives also made clear that Section 4 applied to mental inability. Numerous members of Congress referred to mental incapacity as part of the problem the proposals addressed during the 1965 House hearings, and the comments included many that explicitly referenced, or were broad enough to encompass, mental incapacities independent of attacks or physical illnesses.¹⁴⁸

When the House debated the measure, Representative Richard Poff, an important architect of the Amendment, identified the cases falling within Section 4 as those “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.”¹⁴⁹ Poff described these cases as including situations where the President was unconscious or otherwise unable to make or communicate a decision to relinquish presidential powers or when “the President, by reason of mental debility, is unable or unwilling to make any rational decision,

¹⁴⁴ *Id.* at 3278; *see also id.* at 3279 (statement of Sen. Samuel Ervin) (referring to President’s “physical state or mental state”).

¹⁴⁵ *Id.* at 3278 (noting that “evidence would have to be adduced”).

¹⁴⁶ *Id.* at 3279.

¹⁴⁷ *Id.* at 3278.

¹⁴⁸ *1965 House Hearings*, *supra* note 110, at 53 (statement of Rep. Byron G. Rogers) (referring to Wilson incapacity as involving lack of “mental capacity”); *id.* at 54 (statement of Rep. Harold D. Donahue) (referring to “mentally incompetent” President); *id.* (stating that the “whole problem” under discussion was what should be done “when the President shall become physically or mentally incompetent to carry out the duties of the office”); *id.* at 57 (statement of Rep. Peter W. Rodino, Jr.) (referring to “mental competency”); *id.* at 58 (statement of Rep. Byron G. Rogers) (imagining commission with five psychiatrists); *id.* at 62 (imagining situation with “insane” President); *id.* at 141 (statement of Rep. Willard S. Curtin) (speaking of a President who was “insane”); *id.* at 142 (speaking of a President who became “mentally incapacitated for a week”); *id.* at 144 (speaking of President’s “mental condition”); *id.* at 147 (statement of Rep. Basil L. Whitener) (speaking of President being accused of “being mentally incompetent”); *id.* at 148 (statement of Rep. Willard S. Curtin) (speaking of mental illness); *id.* at 181 (statement of Rep. William S. Moorhead) (speaking of a President who had a “stroke, a coma, or mental disability”); *id.* at 252 (statement of Rep. John V. Lindsay) (speaking of President “in an acute state of depression over world affairs”); *id.* at 252 (speaking of President’s “mental capacity”); *id.* at 254–55 (statement of Rep. Charles McC. Mathias, Jr.) (speaking of possibility that same sort of “[mental] debility” that afflicted Secretary of Defense James Forrestal could affect a President); *id.* at 276 (statement of Rep. Jeffery Cohelan) (referring to senility).

¹⁴⁹ 111 CONG. REC. 7941 (1965).

including particularly the decision to stand aside.”¹⁵⁰

Other members of the House understood that Section 4 would apply to mental as well as physical inability. Representative Durward Hall, himself a physician, argued for the relevance of medical expertise and questioned whether Cabinet members were equipped to “determine when association pathways of the human brain and mind, or even the emotions, were bereft of ordinary and expected continuity on the part of the President to the point of constituting disability.”¹⁵¹ Representative Robert McClory specifically referenced “any mental or physical incapacity”¹⁵² and situations where the President is “physically or mentally disabled.”¹⁵³ Representative James Corman said “one of the things we are concerned about is mental incapacity of a President.”¹⁵⁴ Celler observed that “[t]he President may be as nutty as a fruitcake. He may be utterly insane.”¹⁵⁵ Corman, after observing that mental incapacity was a primary target of the Amendment, warned that “when a man is mentally incapable, he is the last one to realize it.”¹⁵⁶

The Senate debate on the Conference Report included numerous statements suggesting that mental illness was a primary target of Section 4. Bayh said that a President “might be physically able” but “might not possess the mental capacity to make a decision and perform the powers and duties of his office.”¹⁵⁷ When Senator Robert F. Kennedy said inability “involves physical or mental inability to make or communicate his decision regarding his capacity and physical or mental inability to exercise the powers and duties of his office,” Bayh agreed.¹⁵⁸ Senator Ervin imagined a President suffering from “a mental disease,” yet the loyal Cabinet unwilling to declare him disabled.¹⁵⁹ Senator Albert Gore, Sr. observed that “[d]isability may be psychiatric. It may be mental. It may be a sort on which people would honestly have differing opinions. A President might be physically fit—the picture of health; but to

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 7939.

¹⁵² *Id.* at 7946–47; *see also id.* at 7953 (statement of Rep. Jacob H. Gilbert) (referring to “President’s incapacity by injury, illness, or other affliction”).

¹⁵³ *Id.* at 7947; *see also id.* at 7956 (statement of Rep. William J. Randall) (referring to “physical or mental incapacity”); *id.* (“The further idea that a President might actually be forced to step down involuntarily from office because of physical or mental incapacity is fraught with unpleasant associations.”); *id.* at 7964 (statement of Rep. Chester E. Holifield) (hypothesizing a President suffering a “nervous breakdown” and referring to his “mental condition”).

¹⁵⁴ *Id.* at 7965.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 15,381.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 15,590.

those who work closely with him, there might be a conviction that he had lost his mental balance, that he had psychiatric problems.”¹⁶⁰ Bayh recognized that Section 4 could be used if the President “although physically able, is not the man, from a substantive point, who was previously elected to that office. Thus arises the difficult problem of mental disability.”¹⁶¹

The architects of the Amendment thought the rare disputes between the President and Vice President/Cabinet would usually involve questions regarding the President’s mental fitness. Bayh stated that Section 4 disputed situations would “usually” involve serious doubt about the President’s “mental capacity.”¹⁶² In preparing for the conference committee, Bayh told his staff that the Section 4 provisions regarding a conflict between the President and the Vice President/Cabinet would come into play only “if the President was as nutty as a fruit cake. Mental illness, pure and simple, is the only time this provision would be used.”¹⁶³ Not only did Section 4 apply to disabilities involving mental illness; these were the occasions when its challenge mechanisms were expected to be used.

Mental incapacity was clearly a primary, not incidental, target of Section 4. The text of Section 4 is broad enough to include it and the legislative record demonstrates that mental disability was a deliberate target. The Amendment’s architects and numerous others frequently referenced mental incapacity in contexts which indicated their concern with mental conditions, including those which were degenerative or otherwise independent of acute events, thereby confirming that their intent and understanding coincided with the inclusive meaning of the language of Section 4. Bayh and Feerick have subsequently confirmed the deliberate inclusion of mental incapacity.¹⁶⁴ Even if a mentally incapacitated president would be a rare occurrence, legislators regarded it as a particularly vexing problem and one which needed to be addressed. They discussed it extensively and provided for it.

¹⁶⁰ *Id.* at 15,592.

¹⁶¹ *Id.* at 15,593; *see also id.* at 15,594 (statement of Sen. Russell B. Long) (recognizing Section 4’s application to mental incapacity).

¹⁶² *Id.* at 3285 (1965).

¹⁶³ BAYH, *supra* note 94, at 283; *see also id.* at 285 (referring to President who was “completely off his rocker” reassuming power); *1964 Senate Hearings, supra* note 106, at 45 (statement of Professor James C. Kirby, Jr.) (stating that President who insisted on his ability against contrary views of the Vice President and Cabinet would “undoubtedly” involve “mental illness.”).

¹⁶⁴ *See, e.g.,* FEERICK, *supra* note 10, at 115; *Examination, supra* note 125, at 17 (statement of Sen. Birch Bayh) (stating that he introduced the Twenty-fifth Amendment in part to address “the potential problem of the temporary physical or mental incapacity of a President.”).

C. *The Scope of Section 4*

Recent discussion has raised questions about the scope of Section 4 in addition to its application to mental inability. Some commentators have complained that the presidential inability provisions of Section 4 are ambiguous in their coverage.¹⁶⁵ This conclusion has led writers to reach quite disparate views regarding its reach.

Some have suggested that Section 4 applies only when a President is unable to declare his inability, not when he is unwilling to recognize his inability to discharge the powers and duties of his office. For instance, Scott Bomboy has written that Section 4 was “designed to deal with a situation where an incapacitated President couldn’t tell Congress that the Vice President needed to act as President.”¹⁶⁶

Some have accepted this basic premise and applied it to constrict the use of Section 4. For instance, Professor Jonathan Zimmerman has asserted that the authors of the Amendment intended Section 4 to apply only if the President was “absolutely and unambiguously incapable—like John F. Kennedy was, in the hours between when he was shot and when he died.”¹⁶⁷ Jeff Greenfield argued that Section 4 would only be used for a President who was “unable to communicate, or curled up in a fugue state.”¹⁶⁸ Jeffrey Rosen wrote that

¹⁶⁵ See, e.g., Jessica Levinson, Opinion, *Will the 25th Amendment Save America from Trump? Not as Written*, NBC (Oct. 31, 2017, 4:10 AM), <https://www.nbcnews.com/think/opinion/will-25th-amendment-save-america-trump-not-written-ncna815851> (“It is vague and broad.”); Zaru, *supra* note 129 (quoting Jonathan Turley as referring to the “dangerous ambiguity” of the Amendment); Joshua Zeitz, *Why the 25th Amendment Doesn’t Apply to Trump—No Matter What He Tweets*, POLITICO (Jan. 10, 2018), <https://www.politico.com/magazine/story/2018/01/10/25th-amendment-trump-216267> (identifying several points on which Section 4 “is ambiguous”); Zelizer, *supra* note 43 (referring to “considerable ambiguity in the language”).

¹⁶⁶ Scott Bomboy, *Can the Cabinet “Remove” a President Using the 25th Amendment?*, CONST. CTR.: CONST. DAILY (Oct. 12, 2017), <https://constitutioncenter.org/blog/can-the-cabinet-remove-a-president-using-the-25th-amendment>; see Scott Bomboy, *Breaking Down the 25th Amendment: What You Need to Know*, CONST. CTR.: CONST. DAILY (May 19, 2017), <https://constitutioncenter.org/blog/breaking-down-the-25th-amendment-what-you-need-to-know> (“In theory, this clause was designed to deal with a situation where an incapacitated President couldn’t tell Congress that the Vice President needed to act as President.”); see also Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL’Y REV. 459, 462 (2009) (arguing Section 4 applies only when President is “unable to make or communicate a rational decision to step down temporarily of his own accord.”); Brian C. Kalt, *Letter to the Editor: The Twenty-fifth Amendment Reader’s Guide*, JUST SECURITY (May 18, 2018), <https://www.justsecurity.org/56280/letter-editor-twenty-fifth-amendment-readers-guide/> (“The bottom line is that while Section 4 can apply to all sorts of situations, it is only designed to work well when the president is unconscious or otherwise unable to communicate.”).

¹⁶⁷ Jonathan Zimmerman, *What Liberals Can Learn from Conservatism*, NEW REPUBLIC (Dec. 11, 2017), <https://newrepublic.com/article/146192/liberals-can-learn-conservatism>.

¹⁶⁸ Greenfield, *supra* note 24.

Section 4 applied to “presidents who were clearly and unequivocally incapacitated to the point of being unable to discharge their duties—in other words, terminally ill, in a coma, near death, or severely mentally incapacitated.”¹⁶⁹ Conversely, as previously noted, others like Greene, Posner, Dallek, and Graber argue for a broader understanding of Section 4 that would encompass certain character flaws or even incompetence.

Finally, some writers have suggested that Section 4 does not apply to a condition that pre-existed the most recent presidential election, at least if the electorate knew of it. Historian Joshua Zeitz, for instance, argued that the Amendment’s framers did not “expressly foresee” that Americans would elect as president “someone *already* unfit to serve” and suggested that the Amendment did not or should not provide a “reprieve from our own folly.”¹⁷⁰ Zelizer characterized using Section 4 regarding Trump as “a dramatic action overturning the election based on criteria that would be difficult to determine with any kind of certainty.”¹⁷¹

The decision not to define “unable” or “inability” in the Constitution was intentional, not inadvertent,¹⁷² and the lack of a definition is not proper ground for criticizing the Amendment or its framers. Representative Poff, a key actor in the House and conference deliberations,¹⁷³ explained during House debate that the ABA and the House Judiciary Committee had “struggled with the question of defining the word ‘inability’” but “decided that it would be unwise to attempt such a definition within the framework of the Constitution.¹⁷⁴ To do so would give the definition adopted a rigidity which, in application, might sometimes be unrealistic.”¹⁷⁵ Similarly, Feerick explained the decision not to define those terms “reflected a judgment that a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into such a definition.”¹⁷⁶ Feerick wrote that the terms “are intended to cover all cases in which some condition or circumstance prevents the President from discharging his powers and duties

¹⁶⁹ Rosen, *supra* note 37.

¹⁷⁰ Zeitz, *supra* note 165.

¹⁷¹ Zelizer, *supra* note 43.

¹⁷² See FEERICK, *supra* note 10, at 112 (stating that failure to define terms was not “the result of an oversight.”); Second Fordham University School of Law Clinic on Presidential Succession, *supra* note 7, at 928 (“The Twenty-Fifth Amendment’s framers purposely avoided a specific definition of inability.”).

¹⁷³ Goldstein, *supra* note 104, at 1162–67 (discussing Poff’s role in the development of the Amendment).

¹⁷⁴ 111 CONG. REC. 7941 (1965) (statement of Rep. Richard H. Poff).

¹⁷⁵ *Id.*

¹⁷⁶ FEERICK, *supra* note 10, at 112.

and the public business requires that the Vice President discharge them.”¹⁷⁷

The framers understood that they could not anticipate every contingency the future might present nor could they fashion a more workable definition than the standard in the Amendment. They sought to leave future decision-makers flexibility to handle situations that might not have been apparent in the mid-1960s. In a Constitution that protects “liberty” and “due process,” prohibits “cruel and unusual punishments” and “unreasonable searches and seizures,” vests “executive power,” and allows impeachment and removal from office for “other high Crimes and Misdemeanors,” the words Section 4 deploys are not uncommon. They are more appropriately described as “flexible” than disparaged as “ambiguous” or “vague.” The standard used reflected prudence and humility and was not ill-considered.

The text of Section 4 and its legislative history rebut efforts to limit it to situations where the President is unable to determine or communicate his inability. Section 4 makes clear that it extends to a President who is unwilling, as well as to one who is unable, to recognize his inability since it applies “Whenever” the Vice President and other decision-makers make the prescribed transmission that the President is “unable to discharge the powers and duties of his office.”¹⁷⁸ The broad language of the text makes the criteria turn on the President’s inability to perform his powers and duties, not whether the chief executive recognizes that condition. Far from limiting Section 4 to situations in which the President is unable to communicate or lacked the opportunity to act, the text adopts a more capacious formulation that invites much broader use.

The legislative record confirms that conclusion. The congressional reports which accompanied the relevant Senate and House measures made clear that Section 4 applied when the President could, but did not, declare his inability, not simply when circumstances denied him that option. They provided that under Section 4, “if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as

¹⁷⁷ *Id.* at 112; see also Feerick, *supra* note 124, at 197–98 n. 135 (noting that the term “inability” was intended to cover a wide range of events); John D. Feerick, *The Twenty-fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 502 (1995) (“[O]ne would be mistaken to attempt to define with specificity what constitutes an ‘inability.’ No set of definitions could possibly deal with every contingency, and the use of detailed language could create a situation where, during a time of national trauma, unnecessary debate occurs over whether or not the particular facts fit the definitions, or vice versa.”).

¹⁷⁸ U.S. CONST. amend. XXV, § 4.

Acting President upon the transmission of such declaration to the Congress.”¹⁷⁹ In other words, Section 4 could be appropriate if a disabled President did not use Section 3, not simply when he was unable to do so.¹⁸⁰ In introducing S.J. Res. 139, Bayh described Section 4 as applying to “the situation where the President is either unwilling or unable” to declare his own inability,¹⁸¹ a formulation others adopted during proceedings in the Senate¹⁸² and the House.¹⁸³

The legislative reports presented the undeclared disabilities of Presidents James Garfield, Woodrow Wilson, and Dwight Eisenhower as instructive instances in which presidential power should have been, but was not, transferred to the Vice President,¹⁸⁴ and legislators invoked those episodes in their own statements.¹⁸⁵ In some of those situations, the President was able,

¹⁷⁹ S. REP. NO. 89-66, at 13 (1965); S. REP. NO. 88-1382, at 11 (1964).

¹⁸⁰ See *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, 9 Op. O.L.C. 65, 66 (1985) (stating that Section 4 applies if the President is “unable or unwilling to transmit a declaration of his inability”); see also CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 141 (2017) (stating that Section 4 applies when President is unwilling to recognize incapacity). But see Gustafson, *supra* note 166 (arguing that Sections 3 and 4 are mutually exclusive).

¹⁸¹ 109 CONG. REC. 24,421 (1963).

¹⁸² 110 CONG. REC. 22,995 (1964) (statement of Sen. Alan Bible) (“What to do in the event a President is unable or unwilling to recognize his disability”); 1964 *Senate Hearings*, *supra* note 106, at 44 (statement of Professor James C. Kirby, Jr.) (describing Section 4 as addressing a situation where the President “was unable to communicate . . . or where the President suffered from an inability of which he was not aware or would not admit.”); *id.* at 151 (statement of John D. Feerick) (describing ABA consensus as empowering the Vice President and Cabinet “where a President is disabled but is unwilling or actually unable to make a determination.”); 111 CONG. REC. 3254 (1965) (statement of Sen. Birch Bayh) (stating that Section 4 “provides for the eventuality that the President is unable to make a declaration of his own inability, or for other reasons does not declare his own inability.”); *id.* at 3262 (statement of Sen. Hiram Fong) (explaining that Vice President and Cabinet could declare President disabled under Section 4 if he did not declare his inability under Section 3).

¹⁸³ 111 CONG. REC. 7938 (1965) (statement of Rep. Emanuel Celler) (stating that Section 4 applied to “a situation where the President is unwilling or unable to declare his inability.”); *id.* at 7947 (statement of Rep. Robert McClory) (referring to situation where disabled President “is unwilling or unable to relieve himself of the powers and duties” of the presidency); *id.* at 7955 (statement of Rep. Dante Fascell) (stating that Section 4 would apply if “the President were unable to determine his own inability, or if there were doubt or controversy about it”).

¹⁸⁴ S. REP. NO. 89-66, at 6–7 (1965); H.R. REP. NO. 89-203, at 6–7 (1965); S. REP. NO. 88-1382, at 4–6 (1964); see also Birch Bayh, *The Twenty-fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 441, 450 (1995) (stating that Amendment was intended to deal with “historic incidents” of presidential inability); SUNSTEIN, *supra* note 180, at 142–43 (recognizing significance of Garfield, Wilson, and Eisenhower disabilities as well as hypothetical in which Kennedy was disabled rather than killed).

¹⁸⁵ 111 CONG. REC. 7947 (1965) (statement of Rep. John V. Lindsay) (referring to Garfield and Wilson disabilities); *id.* at 7949 (statement of Rep. Jeffrey Cohelan) (referring to Garfield, Wilson and Eisenhower disabilities); *id.* at 7953 (statement of Rep. Charles E. Bennett) (referring to all three); *id.* at 7955 (statement of Rep. Peter W. Rodino, Jr.) (“[W]e have had Presidents disabled for long periods by assassins’ bullets or illness.”); *id.* at 3265 (statement of Sen. Frank Carlson) (referring to

but unwilling, to declare his inability for much of the relevant period.¹⁸⁶ For instance, Wilson was conscious and competent to declare his inability for much of its duration yet unwilling to do so.¹⁸⁷

During the 1965 Senate hearings, Bayh stated that his proposal was designed to address “any type of inability” including international travel, communications breakdown, capture, “or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability under the terms that we are discussing.”¹⁸⁸ Although the terms were intended to have broad scope, Bayh said during the 1965 House hearings that he did not anticipate the use of Section 4 by the Vice President and Cabinet unless the President was “in pretty bad shape” and his condition was “rather obvious.”¹⁸⁹

When the Senate considered S.J. Res. 1 on February 19, 1965, Bayh initially articulated his usual broad formulation that Section 4 applied when the President was “unable” to declare his inability or “for other reasons does not declare his own inability.”¹⁹⁰ Later that day he gave a narrower definition of “inability” and “unable” than he had during the 1965 Senate hearings. In particular, following discussion with Senator Robert F. Kennedy, Bayh said those words in Section 4 mean “an impairment of the President’s faculties” such that “he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office.” Bayh stated he intended that statement to clarify the statement given during the Senate hearings.¹⁹¹

Had the discussion ended there, Bayh’s statement would have suggested a narrower definition since, taken literally, his formulation would seem to limit “unable” and “inability” to the President’s ability to “make or communicate” his decisions regarding his competency, and not to encompass situations in which the President was simply unwilling to accept a judgment of his

Garfield, Wilson, and Eisenhower disabilities).

¹⁸⁶ See, e.g., FEERICK, *supra* note 79, at 123–28, 136–38 (describing Garfield’s condition during 80 days following shooting); Joel K. Goldstein, *Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, 33 POL. & LIFE SCI. 37, 41–45 (Fall 2014) (describing Wilson’s inability but unwillingness to declare disability).

¹⁸⁷ Goldstein, *supra* note 186, at 41–45; see JOHN MILTON COOPER, JR., WOODROW WILSON: A BIOGRAPHY 535–78 (2009) (describing Wilson’s activities during the period following his stroke).

¹⁸⁸ 1965 Senate Hearings, *supra* note 76, at 20; see also *id.* at 9 (statement of Acting Att’y Gen. Nicholas Katzenbach) (stating that Section 4 and 5 of S.J. Res. 1 applied to the “extraordinary situations—where the President cannot or does not declare his own inability . . .”).

¹⁸⁹ 1965 House Hearings, *supra* note 110, at 82.

¹⁹⁰ 111 CONG. REC. 3254 (1965); see also *id.* at 3262 (statement of Sen. Hiram Fong) (stating that Section 4 applies if President does not declare his own inability).

¹⁹¹ *Id.* at 3282.

incapacity even though apparent to others. The discussion did not end there, however, and its continuation clarified and expanded Bayh's explanation of the phrases. Later in the same debate, Bayh stated that "[w]e are talking about a President who is unable to perform the powers and duties of his office,"¹⁹² thereby reaffirming that the touchstone remained the President's ability "to perform the powers and duties of his office," not simply his ability to make and communicate decisions regarding his competency.

The terms were further clarified when the Senate considered the conference report on June 30, 1965. In a colloquy with Senator Robert F. Kennedy, Bayh resisted the suggestion that the proposed amendment addressed "total inability" since he said that a President "might be physically able" but "might not possess the mental capacity to make a decision and perform the powers and duties of his office. We are talking about inability to perform the constitutional duties of the office of President."¹⁹³ When Kennedy again suggested that what was meant was "total inability to perform the powers and duties of office," Bayh agreed but promptly qualified his answer by repeating that inability did not involve a President who made an "unpopular decision."¹⁹⁴ Bayh's qualification suggested that he was excluding a relatively narrow set of circumstances. Bayh later referred to an inability "that would seriously impair the President's ability to perform the powers and duties of his office,"¹⁹⁵ a reference that further rejected the "total inability" limitation for a "seriously impair" formulation. Bayh resisted the idea that inability was limited to "mental disability" since a President might, for instance, be unable to perform because he had been captured by an enemy.¹⁹⁶ When Kennedy said inability "involves physical or mental inability to make or communicate his decision regarding his capacity and physical or mental inability to exercise the powers and duties of his office" Bayh agreed and he and Kennedy described this statement as Bayh's February 19, 1965, definition.¹⁹⁷

¹⁹² *Id.* at 3282–83 (statements of Sen. Philip Hart and Sen. Birch Bayh).

¹⁹³ 111 CONG. REC. 15,381(1965); *see also* 1965 *House Hearings*, *supra* note 110, at 45–46 (statement of Sen. Birch Bayh) (imagining a situation where Vice President and Cabinet majority might tell a President who could "walk and talk" that "the best interest of the country" called for the Vice President to continue to act as President since the President was "not recovered."); 111 CONG. REC. 3254–55 (1965) (statement of Sen. Birch Bayh) (discussing the possibility that a President who can "walk and talk" is not "sufficiently recovered" and the "best interests" of the nation mandate the Vice President's continued action).

¹⁹⁴ 111 CONG. REC. 15,381(1965).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

But Kennedy's June 30, 1965, formulation which Bayh embraced was much broader than Bayh's February 1965 statement. The June 30 statement specifically included inability to exercise presidential powers and duties as well as to make or communicate a decision regarding the same. Bayh's reference to "seriously impair the President's ability to perform the powers and duties of his office" reinforced the broader definition and implicitly rejected the idea that a "total" inability was required. Indeed, Kennedy understood that the terms went beyond the February 1965 statement because he opened his discussion on June 30, 1965, by describing Section 4 as the provision that allowed others to decide that the President was disabled when he was "unwilling to make the declaration of inability himself."¹⁹⁸

During the House's deliberations on April 13, 1965, key representatives interpreted the terms broadly. Celler said Section 4 addressed the situation where the President was "unwilling or unable to declare his inability."¹⁹⁹ McCulloch described Section 4 as applying if "[the President] should fail to [declare his inability] or in the case where he is too ill to do so[.]"²⁰⁰ Poff defined the cases falling within Section 4 in way that was generally consistent with Bayh's June 30, 1965, formulation. He described them as those "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."²⁰¹ He offered "two illustrative examples" of the cases within Section 4 as ones where the President "by reason of some physical ailment or some sudden accident is unconscious or paralyzed and therefore unable to make or to communicate the decision to relinquish" presidential powers or when "the President, by reason of mental debility, is unable or unwilling to make any rational decision, including particularly the decision to stand aside."²⁰² Poff's definition, like the Bayh June 30, 1965, formulation, clearly applied to physical or mental disability to perform as well as to make or communicate a decision regarding inability. Two articles Feerick wrote, which were published shortly after Congress proposed the Amendment and were widely-circulated during the period in which states considered ratification, made clear that Section 4 applied in situations where the President either could not

¹⁹⁸ *Id.* at 15,380.

¹⁹⁹ *Id.* at 7938.

²⁰⁰ *Id.* at 7942.

²⁰¹ *Id.* at 7941.

²⁰² *Id.*; see also Richard H. Poff, *Presidential Inability and the Twenty-fifth Amendment*, 11 *STUDENT L.J.* 15, 16-17 (Dec. 1965) (discussing two categories to which Section 4 applies).

or would not declare his disability.²⁰³

As previously noted, the Garfield and Wilson inabilities helped inspire the Amendment's presidential inability provisions. A decade after Congress proposed the Amendment to the states, Bayh said Section 4 was supposed to address "a Woodrow Wilson situation, where the President may be at least partially impaired but doesn't realize it."²⁰⁴ More generally, framers of the Amendment, like Bayh²⁰⁵ and Feerick²⁰⁶ have continued to make clear that Section 4 was to apply when a President is unwilling to recognize a mental or physical disability.

The very structure of Section 4 further rebuts the suggestion that it is limited to situations when the President cannot make or communicate a decision regarding his inability. As will be discussed below, Section 4 includes procedures whereby after a President is declared disabled, the Vice President and a majority of the Cabinet can contest the President's declaration that he is able to resume discharging presidential powers and duties, subject to review by the houses of Congress. The procedures contemplate that, even though the President has declared himself fit to handle his responsibilities, he may be precluded from doing so in some cases for almost a month while first the executive branch and then Congress decide whether he is in fact able to resume. And if the constitutional decision-

²⁰³ See Feerick, *supra* note 124, at 199–200 (stating that Section 4 "covers the most difficult case, that is, where the President cannot or refuses to declare his own inability."); John D. Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 51 A.B.A.J. 915, 916 (1965) (stating that Section 4 was "intended to cover situations in which the President is unable to declare his own inability or in which he refuses to do so when disabled."); see also American Bar Association & John D. Feerick, *Presidential Inability and Vice Presidential Vacancy: With Questions and Answers* (1965) (stating that the President can be declared disabled if he "is unable to so declare . . . or if he refuses to declare his inability, as in case of mental infirmity.").

²⁰⁴ *Examination*, *supra* note 125, at 58.

²⁰⁵ Birch Bayh, *Reflections on the Twenty-fifth Amendment as We Enter a New Century*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 55, 58 (Robert E. Gilbert ed., 2000) (stating that Section 4 "provides for those occasions when the president is unable or unwilling to act voluntarily."); Bayh, *supra* note 184, at 441 ("Section 4, clause 1 provides for those instances when the President is unable or unwilling to act of his own volition.").

²⁰⁶ See, e.g., FEERICK, *supra* note 10, at 115 (stating that Section 4 covers situations when President "cannot or does not" declare himself disabled); Feerick, *supra* note 5, at 925 ("This section covers the most difficult cases of inability—when the President cannot or refuses to declare his own inability."); see also *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, *supra* note 180, at 66 (stating that Section 4 applies when President is unable or unwilling to declare his inability); ROSE MCDERMOTT, *PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING* 205 (2008) (stating that Section 4 applies to a President who is unwilling or unable to declare inability); Robert E. Gilbert, *The Genius of the Twenty-fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 25, 33 (Robert E. Gilbert ed., 2000) (stating that Section 4 applies when a disabled President is unable or unwilling to transfer presidential powers).

makers conclude that the conscious President is disabled, notwithstanding his insistence to the contrary, he can be precluded from exercising presidential powers and duties for a longer period, until at least one of the decision-makers changes its mind. That period could, theoretically, last for the rest of the presidential term. The inclusion of that mechanism makes clear that the Amendment envisions that a President could be conscious and able to communicate his decision—that he was fit to handle the responsibilities of his office—and yet be prevented from doing so because he is disabled.

Of course, those specific checks apply when the President has been previously determined through the Section 4 procedure to be unable to discharge the presidency, not before the initial determination. Yet that distinction is irrelevant to this discussion which focuses on the meaning of the Section 4 language. It would be ludicrous for the Amendment to preclude a previously declared disabled President from resuming the exercise of presidential powers and duties, notwithstanding his vigorous insistence on his fitness, but prevent the initial transfer of those same powers and duties from a disabled President simply because he was conscious and able to communicate. Such a bizarre statement should be rejected absent constitutional language compelling it.

This discussion provides some basis to address some of the claims regarding the alleged ambiguity or scope of the standard. The lack of definition represented a deliberate effort to preserve flexibility. Consistent with its text, Section 4 is available to address a wide range of mental and physical ailments and logistical impediments that could incapacitate a President. Bayh's definition on February 19, 1965, is the sole support in the legislative record for the proposition that Section 4 was "designed" for a situation where the President could not communicate his inability. But that single utterance was narrower than his many prior and subsequent statements, including those during the extensive discussion on June 30, 1965, of Section 4 immediately prior to the Senate's final action on the Amendment a week later. Its distinct outlier status, and the fact that Bayh returned to a much broader formulation during the Senate's later deliberation, counsels against giving the February 19, 1965, interpretation weight.²⁰⁷ Similarly, the House leaders most responsible for H.R.J. Res. 1, Celler, McCulloch and Poff, all articulated the broader standard as discussed above, including when the House gave its most extended floor consideration of the measure some two months after the Senate's February discussion. Moreover, the text and structure of the Amendment makes clear its wider application.

²⁰⁷ *But see* Gustafson, *supra* note 166, at 482–83 (relying on February 19, 1965, statement and minimizing importance of far broader Bayh statement on June 30, 1965).

A presidential inability under Section 4 should be one, as Bayh said, that “seriously” impairs the President and the evidence should be clear, but the President need not be “absolutely and unambiguously incapable—like John F. Kennedy was, in the hours between when he was shot and when he died” as Zimmerman contended.²⁰⁸ The period between Kennedy’s shooting and death did not last “hours”²⁰⁹ but, in any event, that example presented the extreme case. The framers of the Amendment thought that Garfield, Wilson, and Eisenhower were disabled and were appropriate candidates for Section 4 treatment had it existed during their terms yet none approached Kennedy’s condition during the moments between the shooting and his death. During most of the period following his September 1919 stroke through the last seventeen months of his presidency, Wilson made some decisions and even held Cabinet meetings beginning in spring 1920, yet legislative materials surrounding the creation and proposal of the Amendment were predicated on the conclusion that he was disabled at least during much of that time. The fact that a President could sign a paper (as did Garfield and Wilson),²¹⁰ meet with some congressmen and the Cabinet (Wilson),²¹¹ or fire a secretary of state (Wilson)²¹² or wave from the window did not render him able to discharge presidential powers and duties if he or she otherwise was not up to those demands.

The framers also assumed that presidential inability determinations would be based on facts regarding the President’s physical or mental condition and the needs of the country. When the inability involved a medical condition, the Amendment presumed that the Vice President and Cabinet would act based upon “adequate consultation with medical experts who were intricately familiar with the President’s physical and mental condition.”²¹³ Numerous comments during hearings and floor debates echoed the assumption that decision-makers at all stages would consult with appropriate medical authorities.

²⁰⁸ Zimmerman, *supra* note 167.

²⁰⁹ LARRY J. SABATO, *THE KENNEDY HALF CENTURY: THE PRESIDENCY, ASSASSINATION, AND LASTING LEGACY OF JOHN F. KENNEDY* 209 (2013).

²¹⁰ FEERICK, *supra* note 79, at 126 (regarding Garfield); *id.* at 173 (regarding Wilson).

²¹¹ *Id.* at 179–80.

²¹² *Id.* at 176–78.

²¹³ S. REP. NO. 89-66, at 13 (1965); *see also* H.R. REP. NO. 89-203, at 13 (1965) (same); S. REP. NO. 88-1382, at 12 (1964) (same); 111 CONG. REC. 7939 (1965) (statement of Rep. Richard H. Poff) (stating expectation that decision-makers would consult with medical experts); *id.* (statement of Rep. Clark MacGregor) (stating expectation that Vice President and Cabinet would consult with “the very finest medical brains . . . available”); Bayh, *supra* note 184, at 444 (calling for reliance on medical advice if disability involves physical or mental illness).

They also thought that the Vice President and Cabinet would have relevant information that would contribute to a decision in many circumstances. They would be “most familiar with [the president’s] condition.”²¹⁴ They would also be familiar with domestic and international events to gauge the potential need for presidential action.²¹⁵ In other words, the observations of presidential behavior of informed laypeople were also deemed relevant.

The record also suggests that presidential inability may be circumstantial. Section 4 might apply to a short inability if a President were briefly unconscious when missiles were deployed.²¹⁶ In essence, whether a President was “unable to perform the powers and duties” of the presidency was a contextual question that had to weigh the President’s condition and situation and the domestic and international stage. It often could not be determined based on predetermined specific formulas and Section 4 certainly was designed to be applied in some situations when a President was conscious and able to communicate yet not able to discharge the powers and duties of the presidency.

Those who have construed Section 4 narrowly overlook the fact that much of the limitation it provided came from procedural, not definitional, constraints. Unless Congress replaced the Cabinet, the initial decision-makers were presumed presidential loyalists who owed their positions to the chief executive. By the mid-1960s, the practice of Presidents choosing their running mates was entrenched²¹⁷ and the framers of the Amendment saw the Vice President as a close personal and political ally of the President.²¹⁸ Although they overstated the case at the time, subsequent history has developed consistent with their vision.²¹⁹ Historically Vice Presidents had been reluctant to act,²²⁰ a lesson which somewhat calmed anxiety over the

²¹⁴ H. R. Rep. No. 89-203, at 13 (1965); S. Rep. No. 89-66, at 13 (1965); S. Rep. No. 88-1382, at 11–12 (1964).

²¹⁵ *See, e.g.*, H. R. REP. NO. 89-203, at 13 (1965) (stating that the Vice President and the Cabinet would be “the most feasible formula” to make decisions about the President’s condition because of their familiarity with the President’s condition); S. REP. NO. 89-66, at 13 (1965) (same); S. REP. NO. 88-1382, at 11–12 (1964) (same); 111 CONG. REC. 7941 (1965) (statement of Rep. Richard H. Poff) (discussing knowledge of the Vice President and Cabinet regarding the President and his health); FEERICK, *supra* note 10, at 59 (summarizing advantages of including Cabinet in decision-making).

²¹⁶ 111 CONG. REC. 15,381(1965) (statement of Sen. Birch Bayh) (explaining that Section 4 might apply to a short inability if the President were unconscious during a missile attack on the country).

²¹⁷ GOLDSTEIN, *supra* note 6, at 24.

²¹⁸ Goldstein, *supra* note 4, at 530–36.

²¹⁹ GOLDSTEIN, *supra* note 6, at 27, 29–35, 293, 301.

²²⁰ *See* S. REP. NO. 89-66, at 6 (1965) (referring to two occasions when the Vice President failed to assume the duties of the President when the President was disabled); Poff, *supra* note 202, at 17

prospect of usurpation of power. The Cabinet was seen as a group that was also loyal to, and in regular contact with, the President.²²¹ Accordingly, the framers of the Amendment thought that the triggering procedures in Section 4 would protect the President from improper treatment. The requirement that the Vice President receive a two-thirds vote in both houses to sustain his position against a presidential “no disability” declaration provided further assurance that Section 4 would not be lightly used. Right after explaining the decision not to define the terms, Poff underscored the reliance on a procedural approach when he said “[i]t is highly unlikely that the responsible Government officials entrusted with this great power would abuse it by declaring a President elected by the people of this country disabled when in fact he was not, especially when the Congress is given the ultimate voice in this determination.”²²²

Poff’s statement discloses a premise inherent in the thinking of the framers of the Amendment. They expected the decision-makers in the executive and legislative branches to act as patriots, not partisans. The legislative record included many references to this expectation that responsible officials would rise to the occasion and discharge their duty.²²³ The common suppositions in recent discussions that co-partisans would not act against a President of their party may be accurate but, if they are, they reflect a more cynical view of human nature than that of the architects of the Twenty-fifth Amendment.

As a practical matter, decision-makers will probably hesitate to declare a President disabled when he could have, but did not, invoke Section 3.²²⁴ And declaring a conscious President disabled certainly presents challenges not

(noting that Vice Presidents had historically been reluctant to act); Goldstein, *supra* note 4, at 541 (discussing historic reluctance of Vice Presidents to act to address presidential inability and response of Twenty-fifth Amendment).

²²¹ See, e.g., Poff, *supra* note 202, at 17.

²²² 111 CONG. REC. 7941 (1965) (statement of Rep. Richard H. Poff).

²²³ See, e.g., S. REP. NO. 89-66, at 13 (1965) (presuming that “we shall always be dealing with ‘reasonable men’ at the highest governmental level.”); H. R. REP. NO. 89-203, at 13 (1965) (same); S. REP. NO. 88-1382, at 11 (1964) (same); see also 111 CONG. REC. 15,591–92 (1965) (statement of Sen. Everett Dirksen) (expressing faith that executive officials would declare President disabled in appropriate case); *id.* at 15,592 (statement of Sen. Birch Bayh) (stating that American people would not tolerate behavior by Vice President that was not in national interest); *id.* at 3254 (statement of Sen. Birch Bayh) (stating the Vice President has “constitutional obligation” to act when President is disabled and the nation’s welfare demands it); Feerick, *supra* note 124, at 202 (arguing that history suggests the Cabinet would recognize presidential inability where appropriate).

²²⁴ Joel K. Goldstein, *The Vice-Presidency and the Twenty-fifth Amendment: The Power of Reciprocal Relationships*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* 165, 196–98 (Robert E. Gilbert ed., 2000).

present when the President is unconscious. The factual evidence is likely to be less clear when the President is conscious, the political costs may be increased, and greater discretion is required since the President may retaliate if he learns of Section 4 deliberations before action is taken.²²⁵ Yet, these enhanced challenges should not lead to the conclusion that Section 4 was designed exclusively for an unconscious President. It was not. If Section 4 was only intended for such limited circumstances, the record would not contain so many references to medical consultations, psychiatrists, or the possibility of examining the President, in addition to the other discussions recounted above which make clear that Section 4 applied to a President who was unwilling to declare his inability as well as one who was unable to do so. The materials presented above make clear that Section 4 applies more broadly to serious impairments that disable a President, including those the President should, but is unwilling to, acknowledge.

It is also unlikely that the Vice President and Cabinet would base a disability determination on a condition fully known to voters at the prior election absent some worsening. The framers of the Amendment may have expected some deterioration in the President's condition as the normal predicate for a Section 4 decision,²²⁶ yet the text of Section 4 does not preclude its use in such circumstances.²²⁷ It applies "Whenever" the Vice President and Cabinet transmit the requisite communication based on a determination that the President is unable to discharge his powers and duties. Indeed, Section 4 is predicated on the belief that the Vice President and Cabinet, from working closely with the President, and in consultation with his doctors, might detect presidential incapacity that would not be visible to those lacking such unique access.

Hypotheticals based on historic events help illustrate circumstances when a Vice President and Cabinet might find a President disabled although the electorate had knowledge regarding a prior affliction. Eisenhower was re-elected in 1956 following his September 1955 heart attack that largely sidelined him for about four months,²²⁸ as well as his June 1956 emergency

²²⁵ *Id.*

²²⁶ *See, e.g.*, 111 CONG. REC. 15,593 (1965) (statement of Sen. Birch Bayh) (stating that Section 4 would address the situation where the President, "although physically able, is not the man, from a substantive point, who was previously elected to that office.").

²²⁷ *Cf.* YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 22 ("A President who cannot demonstrate the minimal competence to rationally perform the duties of the office might be deemed constitutionally unable, even if signs of that deficiency were clear at the time of the President's selection to the term in which he sits.").

²²⁸ IRWIN GELLMAN, *THE PRESIDENT AND THE APPRENTICE: EISENHOWER AND NIXON, 1952–1961* 272 (2015).

ileitis surgery. Unbeknownst to the public, two of Eisenhower's three doctors (and both of his cardiologists) had urged him not to seek re-election due to health concerns.²²⁹ During the campaign, Eisenhower's opponents publicly predicted that Eisenhower was unlikely to survive a second term and his re-election would result in Nixon succeeding to the presidency.²³⁰ In fact, Eisenhower completed his term, although he did experience a stroke that affected his speech and forced him to miss some commitments, as well as some other heart ailments during his second term that were largely unreported until after his presidency ended.²³¹

Yet imagine that Section 4 existed during Eisenhower's second term and that Nixon and the Cabinet had determined that Eisenhower's heart ailments rendered him unable to perform his duties. The fact that the public knew of his heart attack, yet re-elected him in 1956, presumably should not have precluded the invocation of Section 4 if otherwise appropriate.

Section 4 was not, however, intended as a mechanism to express no confidence in a President who makes unpopular decisions or who is deemed to lack sufficient talent. When Senator Philip Hart asked, "Is it clear that this means far more than disagreement with respect to a judgment he may make, a decision he may make with respect to incapacity and inability, or must it be based upon a judgment that is very far reaching?" Bayh replied "that we are not dealing with an unpopular decision that must be made in time of trial and which might render the President unpopular. We are talking about a President who is unable to perform the powers and duties of his office."²³² Bayh's response made clear that Section 4 was not a "no confidence" vehicle against a President whose popularity had plummeted. Feerick concluded that the legislative record "made clear that unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an 'inability' within the meaning of the Amendment."²³³ The apparent framers' intent would tend to cut against the sorts of extensions of Section 4 that Posner, Dallek, Graber, and others have suggested unless these qualities or misconduct were associated with a physical or mental disability.

²²⁹ ROBERT E. GILBERT, *THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE* 97 (1998).

²³⁰ *Id.* at 105.

²³¹ *Id.* at 106–16.

²³² 111 CONG. REC. 3282–83 (1965) (statements of Sen. Philip Hart and Sen. Birch Bayh); *see also id.* at 15,381 (statement of Sen. Birch Bayh) (stating Section 4 did not apply to President who made an unpopular decision).

²³³ FEERICK, *supra* note 10, at 117; *see also* SUNSTEIN, *supra* note 180, at 144, 148 (noting the same).

D. *Who Decides?*

Some writers have misstated the group Section 4 empowers to act with the Vice President absent congressional action. Historian Joshua Zeitz wrote that Section 4 was “ambiguous” on several points including who were the “principal officers of the executive departments” who are empowered to act with the Vice President. Zeitz said that phrase could mean Cabinet members, although he pointed out that some officials have Cabinet status without serving as department heads. He predicted that litigation would be inevitable.²³⁴ Professor David Pozen of Columbia Law School criticized the Amendment for failing to define “principal heads of the executive departments” and suggested controversy on the subject among its proponents.²³⁵

In fact, the group that acts with the Vice President is authoritatively defined in the legislative history and the Supreme Court has so recognized. A brief summary of this issue that received considerable attention²³⁶ reveals the clarity with which Section 4 resolved this issue generally.

The proposed Amendment, as introduced in the Senate and House in 1965, provided in Section 4 that “the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide” could declare the President disabled if he did not invoke Section 3.²³⁷ The Senate Subcommittee on Constitutional Amendments modified the language in S.J. Res. 1 on February 4, 1965, to replace “heads of the executive departments” with “principal officers of the executive departments.”²³⁸ Under questioning by several members of the judiciary committee of the House of Representatives,²³⁹ Bayh

²³⁴ Zeitz, *supra* note 165; *see also* Z. Byron Wolff, *Using the 25th Amendment to Depose Trump Would Require a Cabinet Mutiny*, CNN, <https://www.cnn.com/2017/10/12/politics/25th-amendment-donald-trump-steve-bannon-mike-pence/index.html> (last updated Oct. 30, 2017, 2:38 PM) (implying incorrectly that the White House Chief of Staff, U.S. Trade Representative, Director of National Intelligence, United Nations representative, Director of OMB, CIA, Administrator of EPA, and Small Business Administration are among the Section 4 decision-makers).

²³⁵ David Pozen, *The Deceptively Clear Twenty-fifth Amendment*, CONST. CTR. (July 11, 2018), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxv/the-deceptively-clear-twenty-fifth-amendment-by-david-pozen/interp/42> (questioning what are the “executive departments” and who are the “principal officers” of these departments).

²³⁶ FEERICK, *supra* note 10, at 117 (“Few subjects received as much attention as that of the composition of the Cabinet.”).

²³⁷ S.J. Res. 1, 89th Cong. (1965); H.R.J. Res. 1, 89th Cong. (1965).

²³⁸ *1965 House Hearings*, *supra* note 110, at 42–43.

²³⁹ *Id.* at 52–53 (questions by Rep. Basil L. Whitener); *id.* at 55–56 (questions by Rep. Byron G. Rogers); *id.* at 58–59 (questions by Rep. Basil L. Whitener); *id.* at 59–60 (questions by Rep. Arch A. Moore, Jr.); *id.* at 60–61 (questions by Rep. Charles McC. Mathias, Jr.); *id.* at 61 (questions by Rep. William M. McCulloch).

had testified on February 9, 1965, that the new formulation did not include the heads of the army, navy and air force, or of the atomic energy commission, the ambassador to the United Nations, or director of the poverty program,²⁴⁰ but rather referred to the Cabinet.²⁴¹ Chairman Celler suggested that the issue should be clarified and that Attorney General Katzenbach might enlighten the legislators when he appeared.²⁴² When Katzenbach followed Bayh to the stand, he advised that the term could be authoritatively defined in the committee report.²⁴³ The Senate report the following day stated the conclusion of the Senate Committee on the Judiciary that the new formulation “more adequately conveys the intended meaning of [S]ections 4 and 5, that only those members of the President’s official Cabinet were to participate in any decision of disability referred to under these [S]ections” and noted that the language was taken from the Opinions Clause in Article II.²⁴⁴ The following month, the House Judiciary Committee included in the report accompanying H.R.J. Res. 1 the statement that the term “principal officers of the executive departments” was limited to “the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, or any executive department established in the future, generally considered to comprise the President’s Cabinet”²⁴⁵ Representative Celler, the chair of the House Judiciary Committee and an author of the ultimate amendment, specifically referenced that statement from the legislative report in the April 13, 1965, House debate in response to a question,²⁴⁶ and McCulloch²⁴⁷ and Poff,²⁴⁸ the two principal Republican sponsors of H.R.J. Res. 1 as amended,²⁴⁹ echoed that interpretation. In the Senate, Senator Philip Hart specifically asked whether “the heads of the executive departments” referred to those identified in 5 U.S.C. 1 and 2; Bayh agreed that it did.²⁵⁰ In other words, the principal

²⁴⁰ *Id.* at 52, 59–61 (statements of Sen. Birch Bayh).

²⁴¹ *Id.* at 45, 52.

²⁴² *Id.* at 61–62 (statements of Rep. Emanuel Celler).

²⁴³ *Id.* at 103 (statements of Att’y Gen. Nicholas Katzenbach).

²⁴⁴ S. REP. NO. 89–66, at 2 (1965).

²⁴⁵ H.R. REP. NO. 89–203, at 3 (1965).

²⁴⁶ 111 CONG. REC. 7944 (1965) (statement of Rep. Emanuel Celler); *see also id.* at 7944–7945 (statements of Rep. Emanuel Celler and Rep. Basil L. Whitener); *id.* at 7946 (statements of Rep. Emanuel Celler and Rep. Edward Hutchinson).

²⁴⁷ *See id.* at 7945 (statement of Rep. William M. McCulloch) (agreeing with Rep. Celler’s definition of principal officers of the executive departments).

²⁴⁸ *See id.* at 7941 (statement of Rep. Richard H. Poff) (interpreting Section 4 to refer to the Vice President and the Cabinet); *see also* Poff, *supra* note 202, at 17 (relying on 5 U.S.C. § 1 to identify principal officers of the executive branch).

²⁴⁹ Goldstein, *supra* note 104, at 1162–66 (discussing the contributions of the two Republican sponsors).

²⁵⁰ 111 CONG. REC. 3283 (1965) (statement of Sen. Birch Bayh); *see also* 1965 House Hearings, *supra* note 110, at 52 (statement of Sen. Birch Bayh) (stating that Section 4 language refers to Cabinet members

proponents in each house articulated the same definition during floor debate preceding votes.

The Office of Legal Counsel in the Department of Justice reached the same conclusion when it studied the issue in 1985.²⁵¹ At that point, the pertinent code provision listed 13 such officials, beginning with the secretary of state and extending through the secretary of education.²⁵²

The Supreme Court has specifically recognized that “executive department” as used in Section 4 of the Twenty-fifth Amendment means “Cabinet-level entities.”²⁵³ It noted “the fact that the Amendment strictly limits the term ‘department’ to those departments named in 5 U.S.C. § 101”²⁵⁴ Justice Scalia (and the three justices who joined his dissent) agreed that, as used in Section 4, “the phrase ‘the principal officers of the executive departments’ is limited to members of the Cabinet” although different reasoning brought him to that conclusion.²⁵⁵

Unless Congress creates some “other body” to act with the Vice President,²⁵⁶ thereby supplanting the Cabinet,²⁵⁷ Section 4 refers to the “principal officers” of the (now) 15 executive departments beginning with the

only); *id.* at 55–56 (statement of Rep. Byron G. Rogers and Sen. Birch Bayh) (stating that Section 4 decision-makers are Vice President and Cabinet); *id.* at 58–60 (statement of Sen. Birch Bayh) (stating members of Cabinet were intended); *id.* at 60–62 (agreeing issue should be clarified by the Attorney General). The contemporaneous writings of John Feerick in 1965, which were widely circulated during the ratification period, confirm this meaning. Feerick, *supra* note 124, at 200 & n.144 (confirming that Section 4 language refers to specified officers who serve in Cabinet); Feerick, *supra* note 203, at 916 & n.7 (confirming that Section 4 language refers to specified officers who serve in Cabinet).

²⁵¹ *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, *supra* note 180, at 69 (explaining that the heads of departments listed in 5 U.S.C. § 101 are the “principal officers of the executive departments” for the purposes of the Twenty-fifth Amendment).

²⁵² *Id.*

²⁵³ *See Freytag v. Comm’r*, 501 U.S. 868, 887 (1991) (stating that “it is instructive that the hearings on the Twenty-fifth Amendment confirm that the term ‘department’ refers to Cabinet-level entities . . .”).

²⁵⁴ *Id.* at 887 n.4.

²⁵⁵ *See id.* at 917 (Scalia, J., concurring in part and concurring in the judgment) (accepting that “the phrase ‘principal officers of the of the executive departments’ is limited to members of the Cabinet” because of the structural composition of the phrase).

²⁵⁶ The text and legislative record make clear that the Vice President is an indispensable party to a Section 4 presidential inability determination. *See, e.g., FEERICK*, *supra* note 10, at 121 (stating that Congress cannot remove the Vice President from the process); Goldstein, *supra* note 4, at 527 (describing the Vice President as the “indispensable participant” in Section 4 determinations).

²⁵⁷ The legislative record makes clear that if Congress creates “such other body” it supplants the Cabinet; the Vice President does not have the luxury of shopping between them for a party. *See, e.g., FEERICK*, *supra* note 10, at 121 (stating that the legislative history “clearly shows” that if Congress creates an “other body” that body “replaces the Cabinet” as the body that acts with the Vice President).

department of state and extending to the department of homeland security.²⁵⁸ There is some uncertainty regarding whether an under secretary can act if the top job is vacant since different views were expressed²⁵⁹ or whether a recess appointee could serve.²⁶⁰ There is none, however, regarding who are the “principal heads of the executive departments.”

E. *The Consequence of Section 4*

Some scholars and other commentators have erroneously described Section 4 as a means to permanently remove a President. Josh Gerstein of *Politico* referred to the Twenty-fifth Amendment as a “provision to remove a president from office.”²⁶¹ Law professor Mark Graber wrote that Trump “plainly meets the standards for removal from office under the Twenty-Fifth Amendment.”²⁶² Ian Tuttle of the *National Review* spoke of Section 4 as a means to remove Trump from office.²⁶³ Professor Turley characterized Section 4 as providing for “permanent . . . removal from power”²⁶⁴ and as a means to “end . . . the Trump administration.”²⁶⁵ John Hudak of the Brookings Institution properly distinguished between removing the President’s powers and removing him from office but mischaracterized the two-thirds vote of the House and Senate as one “to permanently strip the powers of the presidency away from the president and transfer them to the vice president.”²⁶⁶ Later, he repeated the claim that a two-thirds vote of each

²⁵⁸ 5 U.S.C. § 101 (2012).

²⁵⁹ Compare H.R. REP. NO. 89-203, at 3 (1965) (expressing view that under secretaries could participate) with 111 CONG. REC. 3284 (1965) (statement of Sen. Bayh) (stating his opinion that they could not). Feerick summarizes the arguments and states persuasively that the House Judiciary Committee’s view is preferable. It also appears to have been the predominant view of those who expressed an opinion. FEERICK, *supra* note 10, at 117–18; see also *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, *supra* note 180, at 69 (stating that under secretary, principal deputy, or recess appointee “might” be able to act in absence of department head).

²⁶⁰ *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, *supra* note 180, at 69 (stating that recess appointee “might” be able to act in absence of department head).

²⁶¹ Josh Gerstein, *25th Amendment Unlikely to Be Invoked over Trump’s Mental Health*, POLITICO (Jan. 7, 2018, 8:08 PM), <https://www.politico.com/story/2018/01/07/trump-25th-amendment-mental-health-327503>; see *id.* (referring to “amendment’s language on what could lead a president to be involuntarily removed from office . . .”).

²⁶² Graber, *supra* note 56.

²⁶³ Tuttle, *supra* note 34.

²⁶⁴ Turley, *supra* note 47.

²⁶⁵ Turley, *supra* note 48; see also Shear, *supra* note 62 (incorrectly stating that if two-thirds in each house voted that Trump was disabled Trump would be “stripped permanently” of the presidency and Pence would “become president.”).

²⁶⁶ John Hudak, *The 25th Amendment*, BROOKINGS: UNPACKED (June 9, 2017), <https://www.brookings.edu/blog/unpacked/2017/06/09/the-25th-amendment/>; see also Hudak,

house would effect “permanent removal” of presidential powers from the President.²⁶⁷

Two points merit noting. First, on their face, the inability provisions of the Amendment do not remove the President from office. They simply transfer presidential powers and duties to the Vice President while the President retains his office. They separate presidential powers and duties from the President, but the President remains President and may reclaim the powers and duties of the office under Sections 3 and 4.²⁶⁸ Indeed, the concept that a disabled President should simply lose presidential powers and duties, not the presidency, was a central premise of the Twenty-fifth Amendment. Historically, handling presidential inability had been complicated by the fear that if the Vice President exercised presidential powers and duties he would become President, thereby displacing the incumbent.²⁶⁹ The concern related to the fact that the original vice-presidential succession clause was textually ambiguous. It provided that upon the President’s removal, death, resignation “or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President.”²⁷⁰ The clause was unclear whether “the Same” which devolved on the Vice President was the presidency or simply the “Powers and Duties” of the presidency. Notwithstanding this ambiguity, the text mandated that the same thing devolved in all four contingencies. Practice had led to the belief that upon a presidential death, the Vice President became President

supra note 62 (stating that vote of two-thirds of each house of Congress “permanently” makes Vice President acting President); *id.* (referring to all Democrats voting “to remove the president from office permanently.”).

²⁶⁷ Hudak, *supra* note 266. *But see* Jon Meacham, *Could the 25th Amendment Be Trump’s Downfall? Here’s How It Works*, TIME (Jan. 11, 2018), <http://time.com/5098402/could-the-25th-amendment-be-trumps-downfall/> (last updated Jan. 26, 2018, 12:37 PM) (noting correctly that the President could make repeated challenges to restore presidential powers to him); Andrew Prokop, *The 25th Amendment, Explained: How a President can Be Declared Unfit to Serve*, VOX, <https://www.vox.com/policy-and-politics/2017/2/9/14488980/25th-amendment-trump-pence> (last updated Jan. 12, 2018, 10:32 AM) (explaining, in a different context, that the President only loses his powers, not his office).

²⁶⁸ *See 1965 House Hearings*, *supra* note 110, at 78 (statement of Sen. Birch Bayh) (stating that “we hope and pray to God that the disability will be removed. With this amendment, the President can reassume his powers and duties, and if he is replaced by the Vice President, that the Vice President can resume the powers and duties of his own office.”).

²⁶⁹ *See, e.g.*, FEERICK, *supra* note 79, at 133–34, 237–38 (explaining concern before the Twenty-fifth Amendment that if a Vice President acted as President during a presidential inability the Vice President would supplant the President for the remainder of the presidential term); RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 52, 55–57 (1951) (explaining that the Vice President was not called upon to act as President during the Garfield and Wilson disabilities due to fear that such action would displace the incapacitated President).

²⁷⁰ U.S. CONST. art. II, § 1, cl. 6.

and since the Constitution treated death and disability symmetrically vis-à-vis the Vice President, some argued that a presidential inability would lead to the displacement of the President by the Vice President. That had inhibited Vice Presidents from acting when Presidents were disabled and had deterred presidential associates from encouraging them to do so.²⁷¹

The Twenty-fifth Amendment proceeded on the assumption that much of the problem regarding presidential inability could be solved by clarifying that the Vice President could simply act as, not become, President, and that she could do so for a time limited to the period during which the President was disabled. Indeed, three of the four clauses of the Amendment reflected this idea. Whereas the Vice President became President under Section 1 following a presidential death, resignation or removal, she simply acted as President while remaining Vice President during a presidential inability. Under Section 3 or 4 the Vice President assumes presidential powers and duties, not the “office,” as “Acting President.”²⁷² Section 3 and 4 emphasize that the President remains President by describing how he can resume presidential powers and duties and by referring to the presidency as “his” office even when the Vice President exercises its powers and duties. Even if each house of Congress votes by the requisite two-thirds majority that “the President is unable to discharge the powers and duties of his office,” the “Vice President” continues to discharge those powers and duties (not the office) as “Acting President.” The Vice President can never become President under Section 4.

These textual clues lead to the second point. Section 4 does not “permanently” remove presidential powers from the President. Even if Congress supports the conclusion of the Vice President and Cabinet that the President is disabled, the President can make repeated declarations that “no inability exists” and can “resume the powers and duties of his office” either upon subsequent acquiescence by the Vice President and Cabinet or if less than two-thirds of either House vote her disabled within twenty-one days.²⁷³

²⁷¹ See FEERICK, *supra* note 79, at 135–36 (explaining the decision of Garfield’s Cabinet not to ask Vice President Chester A. Arthur to act as President owing to concerns that such action might supplant Garfield); SILVA, *supra* note 269, at 52, 55–57 (discussing the Cabinet’s concerns of dispossessing Garfield of presidential authority); Goldstein, *supra* note 3, at 674–76 (“The uncertainty prevented the Cabinet from inviting Arthur to act as President although its members all thought that desirable.”).

²⁷² See *1965 House Hearings*, *supra* note 110, at 65 (statement of Sen. Birch Bayh) (stating that under Sections 3 and 4, the Vice President does not “have the office of President but that of Acting President.”); *id.* at 65 (statement of Rep. Richard H. Poff) (same); *cf.* 111 CONG. REC. 3252–53 (1965) (statement of Sen. Birch Bayh) (stating that the Vice President only assumes powers and duties of the presidency, not the office itself pursuant to Section 3).

²⁷³ See FEERICK, *supra* note 10, at 120 (“Since an inability decision does not result in the President’s removal from office, there is nothing to prevent him, after an adverse congressional decision, from

Section 4 does not limit the President to only one “no inability” declaration. Although it does not explicitly authorize the President to repeat the process, it does not prohibit her from doing so and it strongly implies that she would be able to repeat the process. Why else would the President remain “President?” If the President only had one comeback chance, the Amendment would have displaced her from office after an adverse vote by the houses of Congress. Since a premise of Section 4 is that the President should discharge presidential powers and duties unless there is reason to think she is unable to discharge them, she retains office with the prospect of recovering the powers and duties if her inability ends.

The legislative history supports this conclusion. Bayh stated that a President who Congress found to be disabled could raise the issue again although the “degree of frequency” of her appeals might affect Congress’s disposition.²⁷⁴ Katzenbach,²⁷⁵ Representative John Lindsay,²⁷⁶ and Brownell all opined that the President could raise multiple challenges.²⁷⁷

A corollary of the foregoing is that neither Section 3 nor 4 trigger a vice-presidential vacancy as some have incorrectly suggested.²⁷⁸ Even if the President’s inability becomes permanent, unless he dies, resigns, or is removed following impeachment, he remains President, the Vice President acts as President and there is no vice-presidential vacancy to be filled under Section 2.²⁷⁹

issuing another recovery declaration, thereby activating the process again.”); Gustafson, *supra* note 166, at 468 (noting that a Congressional “finding of Section 4 inability is not necessarily permanent” since the President may “appeal” such a declaration “an unlimited number of times.”); YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 70 (stating that President can repeat his “no inability” declaration following adverse decision of Congress).

²⁷⁴ *1965 House Hearings*, *supra* note 110, at 94.

²⁷⁵ *Id.* at 101; *see also id.* at 101–02 (discussing Lindsay’s proposal which would allow Congress to later restore power to the President).

²⁷⁶ *Id.* at 101 (stating his view, and establishing in colloquy with Katzenbach, that H.R.J. Res. 1 would allow President to issue repeated “no inability” declarations).

²⁷⁷ *Id.* at 251; *see also 1964 Senate Hearings*, *supra* note 106, at 45 (statement of Professor James C. Kirby, Jr.) (distinguishing involuntary disability proceeding from impeachment partly because under the latter the President can resume powers and duties of office).

²⁷⁸ *See, e.g.*, Mark Tushnet, *The 25th Amendment Option: Law and Politics*, BALKINIZATION (Feb. 14, 2017, 5:02 PM), <https://balkin.blogspot.com/2017/02/the-25th-amendment-option-law-and.html> (suggesting that use of Section 4 might lead to a vice-presidential vacancy while recognizing that conclusion is not inevitable from the Amendment’s text).

²⁷⁹ *See 1965 House Hearings*, *supra* note 110, at 87 (statements of Sen. Birch Bayh and Rep. Richard H. Poff) (stating that presidential inability provisions do not create vice-presidential vacancy); *see also* FEERICK, *supra* note 10, at 109 (stating that legislative history makes clear that vice-presidential vacancy does not arise when the Vice President acts as President under Section 3 or 4); YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 72 (“[T]he Vice President’s assumption of the powers and duties as Acting President does not create such a ‘vacancy’ in the office of the Vice

E. Can the President Reclaim Powers Immediately Upon His Declaration of Fitness?

One of the more troubling mistakes in the literature relates to the locus of presidential power during the four-day period under Section 4 between the time a President, who had previously had presidential powers transferred from him under that Section due to his inability, declares his fitness and the Vice President and Cabinet contest that declaration. Some, though fortunately not many, recent writers have mistakenly concluded that the President can resume power immediately upon transmitting his declaration. The text of Section 4,²⁸⁰ its history, structure, and logic clearly provide that the Vice President retains presidential power during this period (unless he acquiesces in the President's position).

Various scholarly treatments that have addressed the question have concluded that the Vice President remains in power during the four-day period unless he agrees that the President has regained his capacity.²⁸¹ A few writers of shorter pieces have, however, raised the possibility that the

President.”).

²⁸⁰ The text of Section 4 reads:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. CONST. amend XXV, § 4.

²⁸¹ See, e.g., FEERICK, *supra* note 10, at 118–19 (explaining that the President must wait the full four-day period absent a conclusion by the Vice President and Cabinet to the contrary); BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 64, 82 (2012) (concluding that better legal arguments leave Vice President in power but denying that President can resume power before four days expire even with the Vice President's agreement); Gustafson, *supra* note 166, at 468–69, 469 n.41 (noting that the Acting President can retain authority for four days); YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 8, 48–50 (concluding that Congress always intended the Acting President retains authority during the four day period although less conclusive regarding whether the President can return earlier with acquiescence).

President could resume based simply on his declaration. Professor David Faris reached that mistaken conclusion in August 2017. He imagined that Pence became acting President under Section 4 only to have Trump respond with a declaration of his fitness. At that point, Professor Faris explained, “the president gets to be the president again (boo!)” unless Pence and a Cabinet majority repeat their declaration that the President is unable within four days in which case Pence is “once again” acting President subject to Congress’s ultimate decision.²⁸² Professor Faris claimed that the Amendment created, rather than solved, “ambiguities and problems” since Section 4 “could be interpreted” to allow the presidency to “change hands *four times in the span of a month*. Who wrote this thing, anyway?”²⁸³ Professor Faris repeatedly conveyed his understanding that the President would briefly resume powers until the Vice President and Cabinet responded with a second disability declaration. He so stated before the “boo!” comment. He stated that upon reassertion of the Vice President and Cabinet majority of presidential inability during the four-day period the Vice President is “once again” acting president, signaling that he thinks the President’s assertion temporarily displaced the Vice President. And the reference to “four” changes in a month assumes that after the Vice President initially acts as President (change 1) the President retakes power upon his declaration (change 2) and then loses it again when the Vice President and Cabinet contest his claim within four days (change 3) only to resume presidential power based on favorable congressional action (change 4). In fact, power changes at most twice since changes 2 and 3 do not occur.

Jon Meacham, the distinguished Pulitzer Prize winning biographer, initially made the same mistake on January 11, 2018.²⁸⁴ In an otherwise thoughtful piece in *Time*, he mistakenly wrote that after the Vice President became acting President under Section 4, the President could “immediately reassume office” upon sending the prescribed writing but that “the Vice President again becomes acting President” if he and the Cabinet majority

²⁸² David Faris, Opinion, *Could the 25th Amendment Really Remove Trump from Office?*, WEEK (Aug. 17, 2017), <http://theweek.com/articles/718950/could-25th-amendment-really-remove-trump-from-office>.

²⁸³ *Id.*; see also Shear, *supra* note 62 (incorrectly suggesting that Trump would return to his duties upon issuing a “no inability” letter but that Pence “would take over again” if Pence and the Cabinet reasserted their view that the President was disabled). *But see* Prokop, *supra* note 267 (explaining that the Vice President continues to hold presidential power during the four-day period for the Vice President and Cabinet to contest the President’s declaration); Second Fordham University School of Law Clinic on Presidential Succession, *supra* note 7, at 927–28 (explaining that the President does not immediately resume power).

²⁸⁴ See Jon Meacham, *Could the 25th Amendment Be Trump’s Downfall? Here’s How It Works*, TIME (Jan. 11, 2018), available at <https://perma.cc/PK7Z-QCPU>.

reassert their disagreement within four days.²⁸⁵ To his credit, Meacham acknowledged and corrected the earlier error so the version that now appears online accurately states that the Vice President continues to act as President during the period Section 4 provides for him and the other decision-makers to contest the President's declaration.²⁸⁶

Professor Brian Kalt, who has written extensively about this issue, agrees that the Vice President remains in control during the four-day period. He has, however, described the relevant portion of Section 4 as “poorly drafted”²⁸⁷ and as “unclear”²⁸⁸ and has reported that commentators “have frequently misread it” as authorizing the President to resume power pending the Vice President/Cabinet response.²⁸⁹ Professor Kalt devoted a chapter in his fine book, *Constitutional Cliffhangers*,²⁹⁰ to this misreading which he rejects as “wrong.”²⁹¹ Although Professor Kalt points out the portion of Section 4 could have been drafted better, he correctly concludes that the Vice President retains power during the four-day period. Even though a few learned people have misconstrued Section 4 after apparently focusing on the most immediately relevant textual fragment, on further examination the

²⁸⁵ *Id.*

²⁸⁶ See Meacham, *supra* note 267 (acknowledging that the article initially had incorrectly characterized Section 4 and explaining that Vice President remains as acting President under Section 4 during the four day period “if sustained by a majority of the Cabinet (or the designated ‘other such body’) as the matter moves to its congressional phase.”).

²⁸⁷ Brian C. Kalt, *The Unusual, Imperfect, Excellent Twenty-fifth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxv/the-unusual-imperfect-excellent-twenty-fifth-amendment-by-brian-kalt/interp/42> (last visited Sept. 21, 2018).

²⁸⁸ KALT, *supra* note 281, at 63–64; see also *id.* at 67 (referring to the “poor drafting” of the four-day provision as “serious”).

²⁸⁹ Brian Kalt, *The Case Against Using the 25th Amendment to Get Rid of Trump*, N.Y. MAG. (Oct. 14, 2017, 9:24 AM), <http://nymag.com/daily/intelligencer/2017/10/the-case-against-using-25th-amendment-to-get-rid-of-trump.html>; see also Julia L. Ernst, *John F. Kennedy and Constitutional Aspects of Presidential Succession*, 76 U. PITT. L. REV. 63, 82 n.116 (2014) (arguing that the Section 4 language “contains sufficient ambiguity” that “a plausible argument” could be made that it supports the conclusion that the President resumes power on his declaration); Michael Walsh, *What Is the 25th Amendment, and Could It Be Used to Remove Trump?*, YAHOO NEWS (May 17, 2017), <https://www.yahoo.com/news/25th-amendment-used-remove-trump-215814401.html> (explaining that, according to Kalt’s reading of the Amendment, “if the president were to say he is not disabled, he would not retake power immediately – because of the four-day waiting period”).

²⁹⁰ See generally KALT, *supra* note 281, at 61–82.

²⁹¹ Kalt, *supra* note 289; see also KALT, *supra* note 281, at 64 (stating that evidence is “indisputable” that architects of Section 4 intended the Vice President to exercise presidential powers during the four day “waiting period” and finding “ample evidence that Section 4 so provides.”); *id.* at 66 (stating that Section 4 creators intended the Vice President to continue to exercise presidential power) Kalt, *supra* note 289 (arguing that “best reading” of text and “clear message” of the legislative history is that Vice President retains power during the four-day period).

issue does not really present a close call. The far better textual reading is that the Vice President remains in power,²⁹² and when Section 4 is read in context and its full text is analyzed, when the record is considered for the light it sheds on the original public meaning, understanding and intent, and when structural arguments are considered, the only plausible reading is that the Vice President continues to act as President until he relinquishes presidential power to the President or Congress rules against him.

Start with the text. Section 4 provides that “when the President” using proper procedures “transmits . . . his written declaration that no inability exists, he shall resume the powers and duties of his office unless” the Vice President and Cabinet contest it within four days.²⁹³ The language makes the President’s resumption contingent upon the lack of a challenge within four days. Those who infer that the President regains power at least temporarily read the text to allow him to “resume . . . unless [and until]” the Vice President and Cabinet majority dispute the President’s statement.²⁹⁴ But Section 4 does not provide that upon his “no inability” declaration the President “shall resume” power “unless and until” the Vice President and Cabinet contest his declaration.²⁹⁵ The omission of “until” is significant,

²⁹² Cf. KALT, *supra* note 281, at 68 (concluding that a reading that leaves the Vice President in power is more “natural” but an opposite reading is “possible.”); *id.* at 69 (concluding that the textual argument that leaves the Vice President in power during the four-day period is stronger).

²⁹³ U.S. CONST. amend XXV, § 4.

²⁹⁴ KALT, *supra* note 281, at 68 (acknowledging that this conclusion rests on reading “unless” to mean “unless and until” but viewing that reading as plausible but not most “natural” reading).

²⁹⁵ See also YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 48–49 (describing the argument as “tenuous” and pointing out that “unless” does not mean ““unless and until””). In canvassing the possible arguments that a President might make that he immediately resumes power based on his “no inability” declaration, Professor Kalt suggests that he might contend that if Section 4 meant for the Vice President to continue acting as President during the four-day period the Amendment should refer to him as the acting president since “every other time that the Twenty-Fifth Amendment assigns the powers of the presidency to the vice president, it calls him the acting president.” KALT, *supra* note 281, at 68. That argument is not persuasive. The Vice President remains Vice President even when he is Acting President. Although the Amendment states that when the President is declared disabled under Section 3 or 4, the Vice President performs as “Acting President,” it consistently refers to him as “Vice President” throughout the Amendment since that remains the office he fills. The Amendment never uses “Acting President” as a subject. Moreover, in the use here in question, the Constitution is not “assign[ing]” presidential powers to the Vice President because it has already done so for the period in question when he “immediately assume[d]” those powers and duties. The term “Acting President” is used simply as a title with respect to the Vice President’s discharge of presidential powers and duties. The power and duty to determine, with the Cabinet (or “other body”), whether the President remains disabled notwithstanding his “no inability” declaration is not a presidential power and duty since the President can never exercise it. It is uniquely a vice-presidential power and duty that can be exercised only in this situation by the Vice President during the four-day period. Finally, use of “Acting President” might have introduced confusion since elsewhere the Constitution allows

especially since the Amendment uses that very word in Section 3 to terminate the Vice President's service as acting President when the President transfers power voluntarily.²⁹⁶ If the Amendment envisioned the President resuming power immediately "until" being divested of that power by the Vice President's challenge, it would have so provided. It did not. The use simply of "unless" signals that the President's resumption depends on the nonoccurrence of the condition and is accordingly deferred.

That conclusion is reinforced by the contrasting language Section 4 uses in connection with the initial declaration by the Vice President and Cabinet that the President is disabled as opposed to that following the President's "no inability" statement. The Vice President's assumption of power occurs "immediately" upon transmission of the required declaration of the President's inability.²⁹⁷ Conversely, the President's resumption does not happen "immediately."²⁹⁸ It is contingent on the absence of an appropriate challenge during the four-day period. If Section 4 envisioned the President resuming presidential powers "immediately," it would have so stated just as it did in connection with the Vice President's assumption under Section 4. The omitted adverb signals that the President's resumption is not immediate but is contingent on the Vice President and Cabinet not challenging him within four days.

The argument that the President resumes power immediately, yet temporarily, encounters yet another textual problem. Section 4 states that the Vice President "immediately" becomes acting President upon transmitting the initial declaration and later it provides that he "shall continue" in that role if (after an intra-executive branch dispute is presented to Congress) each house votes that the President is disabled within twenty-

Congress to designate another "officer" to act as President in case of a double vacancy or inability in the presidency or vice presidency, yet such an acting President is not intended to be a beneficiary of, or participant in, Section 3 or 4.

²⁹⁶ See U.S. CONST. 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 added)).

²⁹⁷ *Id.* § 4 ("Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall *immediately* assume the powers and duties of the office as Acting President." (emphasis added)).

²⁹⁸ See also KALT, *supra* note 281, at 68–69 (observing the possibility that the failure of Section 4 to provide that President "immediately" resumes exercise of presidential powers upon declaring her fitness suggests that Vice President retains power).

one days, or, alternatively, that the President “shall resume” presidential powers if either house does not cast a two-thirds vote against the President during the specified time period.²⁹⁹ If the Vice President is to “continue” if Congress votes in his favor or the President is to “resume” if Congress does not, the Vice President has to be acting as President during the roughly three-week period Section 4 allows Congress to consider the issue. But between the Vice President’s “immediate” assumption of presidential powers and duties when he and the Cabinet majority first declare the President “unable” and his later continuation (or the President’s resumption) after Congress votes, Section 4 nowhere provides that the Vice President commences or resumes acting as President. If the President’s “no disability” declaration shifted power back to the President immediately, the Amendment would need to return power to the Vice President before the twenty-one-day period Congress has to decide so that the Vice President can “continue” if Congress votes against the President or, so the President can “resume” if either house supports her position. After all, a transfer of presidential power is a rather consequential event and the Amendment does not leave such a transition to inference. Yet, Section 4 nowhere provides for power to return to the Vice President during that time period. That omission is no coincidence; it confirms what is otherwise apparent, that the Vice President continues to act as President during the four-day period. The Vice President has to continue exercising presidential power during the four-day period or else he would not be holding it during the twenty-one-day period as the language contemplates.

Finally, the existence of the twenty-one-day period for Congress to decide further impeaches the interpretation that the President could return to power immediately on his own “no inability” declaration. No one doubts that the Vice President acts as President during the twenty-one-day period, a conclusion cemented by the “continues” or “resume[s]” formulation. Yet, only the most bizarre interpretation of Section 4 would make the President wait for twenty-one days for Congress to decide whether he can “resume,” but would allow him to “resume” immediately upon his mere declaration and before an executive branch response is possible without an explicit textual statement to that effect. Considering the entire clause, not just a fragment, makes clear that unless the Vice President and Cabinet majority fail to contest the President’s “no inability” declaration within the four day period the Vice President continues to exercise presidential powers and duties from the time he initially assumes them until Congress fails to sustain his position within twenty-one days.

²⁹⁹ U.S. CONST. amend. XXV, § 4.

The legislative history provides even stronger evidence of the drafters' intent, and of the understanding and public meaning of the provision.³⁰⁰ Indeed, it is so overwhelming that it leads inexorably to the conclusion that the Vice President remains in power during the four-day period, and accordingly it is recounted here more fully than it has previously been presented.

To be sure, the original text of S.J. Res. 139 did a better job of conveying that the President could not immediately resume presidential powers upon his mere declaration. It used language largely taken from H.R.J. Res. 161 which a bipartisan group of legislators had introduced in 1958.³⁰¹ It provided that "Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine."³⁰² It further provided that if the Vice President, with the concurrence of the majority of the heads of the executive departments "in office at the time of such announcement [by the president],"³⁰³ transmitted a declaration to Congress denying that the President's inability had ended, Congress would "consider the issue."³⁰⁴ That formulation delayed the President's resumption for seven days absent the Vice President's agreement to an earlier return but it presented a different problem. As written, however, if Congress took longer than seven days to resolve the intra-executive branch dispute the President would return to power, thereby presenting the risk that a disabled President might exercise presidential power.

³⁰⁰ See KALT, *supra* note 281, at 69 (concluding that legislative history makes it "abundantly clear" that creators of Section 4 intended the Vice President to continue exercising presidential powers); *id.* at 70 (stating that intended meaning that the Vice President continue to exercise presidential powers "was completely clear" to Bayh and to Congress.); *id.* at 71 (recognizing that the House "understood completely" that the Vice President remained in power); *id.* (stating that as "evidence of legislative intent goes," evidence that Vice President remains in power during the four day period is "as clear and definitive as it gets.").

³⁰¹ H.R.J. Res. 161, 85th Cong. (1958).

³⁰² *1964 Senate Hearings*, *supra* note 106, at 11–12 (presenting text of original version of S.J. Res. 139, section 5).

³⁰³ Professor Kalt suggests that this phrase would have prevented a President from "stacking the cabinet." KALT, *supra* note 281, at 69. Yet, the purpose of the limitation seems to have been to prevent the Vice President from using Cabinet changes to entrench himself in power since he, not the President, would have exercised presidential powers and duties during the seven-day waiting period.

³⁰⁴ *1964 Senate Hearings*, *supra* note 106, at 11–12 (presenting text of original version of S.J. Res. 139, section 5).

The ABA consensus that developed in January 1964, the month after Bayh introduced S.J. Res. 139, deviated from Bayh's initial formulation in some respects, including its rejection of the possibility that the President could retake power after the waiting period if Congress had not acted. During his February 25, 1964, testimony, Paul Freund, a member of the ABA panel, stated that the Vice President would continue to serve as acting President if the President and Vice President/Cabinet disagreed about his fitness since "the office ought not to be at the hazard of an incapable President."³⁰⁵ John Feerick, another key member of the ABA group also expressed this conclusion in his testimony three days later. He explained:

Fifth, the panel recommended that the President should be able to resume his powers and duties upon his own declaration in writing. Because of the possibility that a President might say he was able when he was not, it was the panel's consensus that the Vice President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case.

In a case where the Vice President and a majority of the Cabinet disagree with the President's declaration of recovery, review by Congress would be required. The Vice President would continue to act in the interim, however. It would take a two-thirds vote of both Houses of Congress to keep the President from resuming his powers and duties.³⁰⁶

Eisenhower's March 1964 letter to Bayh also assumed that the Vice President would continue to act as President during any period when the President's capacity was disputed by the Vice President and the Cabinet.³⁰⁷

Those hearings produced an amended version of S.J. Res. 139 which included language in its Section 5 which closely resembled that which was later moved to the end of Section 4 in the ultimate Amendment. The major differences pertinent here between the version of S.J. Res. 139 that passed the Senate in September 1964 and the eventual Amendment were that the S.J. Res. 139 version allowed the Vice President and Cabinet only two, rather than four, days to contest the President's declaration of fitness, and it

³⁰⁵ *Id.* at 130.

³⁰⁶ *Id.* at 152; *see also* Feerick, *supra* note 100, at 495 ("Because of the possibility that a President might say he was able when he was not, it was the panel's consensus that the Vice-President, subject to approval by a majority of the Cabinet, should have the power to prevent him from acting in such a case."); John D. Feerick, *Presidential Inability: The Problem and a Solution*, 50 A.B.A.J. 321, 324 (1964) (explaining that ABA consensus allowed the Vice President and Cabinet to "prevent" the President from reclaiming power based simply on his declaration and the Vice President would continue to act as President so the presidency "would not be filled by one whose capacity was seriously challenged.").

³⁰⁷ *See 1964 Senate Hearings, supra* note 106, 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.").

required Congress to “immediately decide” the dispute rather than impose a twenty-one-day deadline. The new version of S.J. Res. 139 replaced the original language that the President would “resume the discharge of the powers and duties of his office on the seventh day” with the current “he shall resume . . . unless” formulation and made clear that the Vice President, not the President, would exercise presidential powers and duties during the period in which Congress could decide in part by replacing the prior language with the “Vice President shall continue” or the “President shall resume” alternatives.³⁰⁸ In addition to following the ABA approach, the drafters apparently sought concision³⁰⁹ for they worried about the length of the Amendment.

The new language in S.J. Res. 139 was not intended to allow the President to resume merely upon his statement. To the contrary, its apparent purpose was to make sure that he could not retake presidential powers and duties even during the longer period given Congress to act until it confirmed his ability (unless the Vice President acquiesced). The Senate Report which accompanied S.J. Res. 139 made clear that the President could resume presidential power only after the process was completed in his favor, not upon his declaration. Although it explained that Section 5 allowed the President “to resume the powers and duties of the office” upon transmission to Congress of the no inability declaration, it quickly stated that resumption was subject to the Vice President and Cabinet sharing that conclusion.³¹⁰ It provided: “However, should the Vice President and a majority of the heads of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the Congress within 2 days.”³¹¹ The use of “prevent,” a term from Feerick’s 1964 testimony,³¹² made clear that the President does not resume, but then lose, presidential powers and duties during the two-day waiting period that version of S.J. Res. 139 allowed. The President does not resume at all during the period the Vice President has to consider the issue. Instead, the Vice President continues to act as President during the (then) two-day period. The report continued by

³⁰⁸ See S. REP. NO. 88-1382, at 2 (1964) (presenting amended version of S.J. Res. 139).

³⁰⁹ See, e.g., KALT, *supra* note 281, at 70 (attributing the editing to an effort “to make the amendment more concise”); YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 8, at 49 (concluding that edits in the Senate version were intended to shorten the Amendment rather than alter its meaning).

³¹⁰ S. REP. NO. 88-1382, at 12 (1964).

³¹¹ *Id.*

³¹² See 1964 Senate Hearings, *supra* note 106, at 152 (“Because of the possibility that a President might say he was able when he was not . . . the Vice President, subject to approval by a majority of the Cabinet, should have the power to *prevent* him from acting in such a case.” (emphasis added)).

using language that confirmed that the Vice President remained as acting President during the congressional decision period.³¹³

S.J. Res. 1, which Bayh introduced in January 1965, tracked the final version of S.J. Res. 139 in this respect. In testimony on the constitutional meaning of S.J. Res. 1 on January 29, 1965, Katzenbach stated his understanding that its provisions contemplated that except where the President had declared his own disability the Vice President would continue acting as President notwithstanding the President's "no inability" declaration. Initially he stated his assumption that the Section 5 procedure whereby the Vice President and Cabinet could challenge the President's resumption only applied when the President had been declared disabled without his consent. When he had declared his own inability, "he could restore himself immediately to the powers and duties" of the presidency by his written statement to that effect.³¹⁴ Katzenbach's testimony rested on his implicit understanding that the two-day waiting period of Section 5 precluded a president from resuming presidential powers "immediately." Katzenbach stated his further assumption "that even where disability was established originally pursuant to 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 two-day period mentioned in section 5."³¹⁵ Katzenbach's conclusion on that point also showed his implicit understanding that unless the Vice President was earlier convinced of the President's fitness, the Vice President continued as acting President during the (then) two-day period. Katzenbach referred to the Vice President as acting President and said the Vice President "presumably is continuing to act" until Congress decides.³¹⁶ He said the Amendment envisioned the Vice President continuing to act as President until Congress declined to support him rather than allowing the President to resume powers upon his declaration unless both the Cabinet majority and two-thirds of Congress vote against him.³¹⁷

³¹³ S. REP. NO. 88-1382, at 12 (1964) (making clear that Vice President continues to act as President during the period in which Congress considers an intra-executive branch dispute on the President's inability); see also *1964 Senate Hearings*, *supra* note 106, at 152 (testimony of John D. Feerick) ("In a case where the Vice President and a majority of the Cabinet disagree with the President's declaration of recovery, review by Congress would be required. The Vice President would continue to act in the interim, however.")

³¹⁴ *1965 Senate Hearings*, *supra* note 76, at 10.

³¹⁵ *Id.*; see also *1965 House Hearings*, *supra* note 110, at 99, 107 (statement of Att'y Gen. Nicholas Katzenbach).

³¹⁶ *1965 Senate Hearings*, *supra* note 76, at 16.

³¹⁷ *Id.* at 17.

In discussion with Katzenbach during the Senate hearings, Bayh explained that the Amendment was striving to achieve two things—to prevent a disabled President from acting as President for even a short time and to keep the process as simple as possible.³¹⁸ Bayh thought to minimize transfers it was better not to allow the President to resume power upon his simple declaration in a situation where a challenge might occur.³¹⁹

Feerick was troubled that the language in Section 5 of H.R.J. Res. 1 was not sufficiently “clear” regarding who exercised presidential powers during the period between the President’s “no inability” declaration and the Vice President’s communication of his disagreement. In a letter of February 7, 1965, to Representative Richard Poff on the eve of the House Judiciary Committee hearings, Feerick raised this issue. He wrote that “[t]he Vice-President is intended to act in the period, I am sure, but it can be forceably [sic] argued that the language does not and will not permit him to do so.”³²⁰ Since Section 5 addressed “an extraordinary case such as that of an insane President” Feerick thought clarification desirable to preclude such a disabled President from reclaiming presidential powers and firing Cabinet members to avert use of the provision.³²¹ As a scholar of presidential inability, Feerick raised this issue out of an abundance of caution “because I am only too mindful of what the words ‘the same’ did”³²² in creating a problem that the proposed Amendment was, in part, designed to resolve.

The process of writing an illuminating legislative history had only just begun, and what followed made clear the widespread intent and understanding that under the proposal the Vice President remained in power during the waiting period. In issuing the Report which accompanied S.J. Res. 1 on February 10, 1965, the Senate Committee on the Judiciary went out of its way to address the circumstances in which the President could reclaim his or her power³²³ and to clarify that when presidential powers and duties were transferred to the Vice President under Sections 4 and 5 of S.J.

³¹⁸ *Id.*

³¹⁹ *Id.* at 17–18.

³²⁰ Letter from John D. Feerick to Hon. Richard Poff, U.S. House of Representatives (Feb. 7, 1965) (on file with the Fordham Law Archive of Scholarship and History), available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1031&context=twentyfifth_amendment_correspondence.

³²¹ *Id.*

³²² *Id.*

³²³ See S. REP. NO. 89-66, at 3 (1965) (“In its discussion of the ramifications of section 5, the committee considered it important to add additional stress to the interpretation of two questions which might arise: (1) Who has the powers and duties of the office of the President while the provisions of section 5 are being implemented? (2) Under what sense of urgency is Congress required to act in carrying out provisions of this section?”).

Res. 1, the Vice President retained power until Congress decided in the President's favor. Addressing the point which Katzenbach had suggested in his recent testimony, the Report distinguished the provisions regarding presidential resumption of power depending on whether the initial transfer occurred under Section 3 or 4. A President who transferred power under Section 3 could immediately reclaim powers by simple declaration in part to encourage such voluntary transfers where appropriate.³²⁴ Yet, when power was transferred under Sections 4 and 5, the Vice President would continue to act as President until Congress decided adversely to him.³²⁵ Although the President could resume his powers if the Vice President and Cabinet majority agreed that he had regained capacity, the Report made it clear that this group could "prevent the President from resuming" those powers if they objected within two days.³²⁶

When Bayh testified before the House Judiciary Committee on February 9, 1965, he stated that Section 5 of S.J. Res. 1 allowed the Vice President to divest himself of presidential powers immediately but that he would otherwise continue to act as President during the two-day period allowed for a challenge.³²⁷ Bayh stated that under Section 5, notwithstanding a presidential "no inability" declaration, "[t]he Vice President continues to act as President until the Congress decides the issue. We have given this a considerable amount of study and we have tried to arrive at a situation where there is a minimum amount of change back and forth."³²⁸

³²⁴ *Id.* ("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. This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.").

³²⁵ *Id.* ("However, 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. It is also the intention of the committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination.").

³²⁶ *Id.* at 14 ("Section 5 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the President of the Senate and the Speaker of the House of Representatives of his written declaration that no inability existed. However, should the Vice President and a majority of the principal officers of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the President of the Senate and the Speaker of the House of Representatives within 2 days.").

³²⁷ See *1965 House Hearings*, *supra* note 110, at 41 ("[T]he Vice President—if he has the support of a majority of the Cabinet—could retain the powers and duties for 2 days following the President's declaration.").

³²⁸ *Id.* at 58; see also *id.* at 63 (statement of Sen. Birch Bayh) (stating that Vice President "can continue

When the Senate debated the proposal ten days later, the Republican leader, Senator Everett Dirksen, questioned whether Section 5 of S.J. Res. 1 would force the President to wait two days before recovering presidential powers “even though he had voluntarily relinquished it[.]”³²⁹ Significantly, Dirksen understood that under S.J. Res. 1 the Vice President normally retained power during the challenge period but thought that practice should not apply when the President voluntarily made the disability decision under Section 3. Bayh assured him that under Section 3 the President could reassume presidential powers by his declaration, implicitly distinguishing it from a Section 4 situation.³³⁰

When Senator Frank Lausche asked whether, after the President’s incapacity had been declared by the Vice President and Cabinet, the President would remain in office pending a determination by the Vice President, Cabinet, and Congress, Bayh replied that he would not, but that, on the contrary, “whenever” the Vice President and Cabinet majority declare the president disabled, “the Vice President would assume the powers and duties of the office while the issue was being tried.”³³¹ Bayh explained that the Amendment sought “to try to prevent a back-and-forth ping-pong sort of situation.”³³² The proposal would limit the number of transfers and promote continuity which “should be basic.”³³³

During Senate debate on February 19, 1965, Bayh accepted Hruska’s amendment to extend from two to seven days the period the Vice President and Cabinet had to contest the President’s “no inability” declaration. When Senator Gordon Allott asked who would act as President during the seven-day period, Bayh replied “The Vice President, the Acting President.”³³⁴ Bayh explained that whenever the Vice President and Cabinet declared the President disabled, there would be sufficient question about the President’s mental capacity so that the Vice President should continue acting until Congress decided.³³⁵ Moreover, leaving the Vice President as acting President would reduce the number of transfers of presidential power.³³⁶ If the President issued a “no inability” declaration, he could not resume office

to act beyond a reasonable period” only with support of two-thirds of Congress); *id.* at 69 (imagining a hypothetical premised on Vice President acting through entire challenge and decision time).

³²⁹ 111 CONG. REC. 3268 (1965).

³³⁰ *Id.* at 3271.

³³¹ *Id.* at 3284.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 3285.

³³⁵ *Id.*

³³⁶ *Id.*

until the expiration of the time for the Vice President and Cabinet to contest that declaration, then seven days,³³⁷ unless the Vice President and President agreed to a quicker return.³³⁸

In House hearings, in addition to Bayh's testimony described above, other principal architects of the measure also confirmed the understanding that the Vice President remained in power during the period permitted him to challenge the President's "no inability" declaration. Katzenbach reiterated that S.J. Res. 1 and H.R.J. Res. 1 left the Vice President as acting President after the President issued a "no inability" declaration unless either the Vice President agreed with his position or two days expired without the Vice President and Cabinet challenging the President's position.³³⁹ He understood Section 5, which then gave the Vice President two days to contest the President's "no inability" declaration, as imposing "a 48-hour, in effect, delay" during which the Vice President continued to act as President.³⁴⁰ So did former Attorney General Brownell. When Representative John V. Lindsay asked Brownell why H.R.J. Res. 1 provided that once the Vice President took over as acting President he would remain so until Congress reversed him,³⁴¹ Brownell stated that he preferred the H.R.J. Res. 1 approach because it left the Vice President as acting President for the "very brief period" until there was an independent determination that "the President was able to come back . . ."³⁴² Brownell also thought leaving the Vice President in power would minimize "jumping back and forth."³⁴³ Brownell's testimony confirmed his (and Lindsay's) understanding that the Vice President remained in power as well as repeated the logic Bayh had earlier given.

The report of the House Judiciary Committee on H.R.J. Res. 1 on March 24, 1965, expressed a consistent interpretation. In explaining revisions made following hearings, the report provided in part that when the President transferred power voluntarily under Section 3, his "no inability" declaration terminated the vice president's exercise of presidential powers. "The right of challenge would be reserved for cases" when the Vice President assumed

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *1965 House Hearings, supra* note 110, at 99–100; *see also id.* at 107 (stating that with the concurrence of the Vice President, the President could resume presidential powers during the two-day period provided under Section 5 of H.R.J. Res. 1)

³⁴⁰ *Id.* at 99.

³⁴¹ *Id.* at 248, 250.

³⁴² *Id.* at 250; *see also id.* at 243 (statement of former Att'y Gen. Herbert Brownell) (stating that the Vice President would remain in power during the two-day period unless he agreed to an earlier resumption of power by the President).

³⁴³ *Id.* at 252.

power under Section 4.³⁴⁴ The House combined former Section 5 with Section 4 to emphasize that the “challenge” procedure only applied to Section 4.³⁴⁵ The committee understood that the Vice President’s right to contest the President’s “no inability” declaration carried with it the right to remain in office during the period in which the contest could be raised and, if it were, during the subsequent decision period.³⁴⁶

The House Judiciary Committee had provided that the Vice President and Cabinet majority must lodge a challenge to the President’s declaration of his ability within two days and added a ten-day period for Congress to decide any intra-executive branch dispute. “Otherwise,” it said, “the President, having declared himself able, will resume his powers and duties.”³⁴⁷ The use of “[o]therwise” made clear that the President did not resume based upon his mere declaration but had to wait to see whether his executive branch associates challenged him and, if they did, whether Congress ruled in his favor or the ten days passed with no ruling adverse to him. In explaining the operation of Section 4 once the Vice President and Cabinet majority challenged the President’s statement, the Report stated that:

[T]he language of former Section 5 is further amended by providing that in such event the President shall resume the powers and duties of his office unless the Congress within 10 days after receipt of such declaration of Presidential inability determines by two-thirds vote of both Houses that the President is in fact unable to discharge the powers and duties of his office.³⁴⁸

It is telling that the Report used virtually the same formulation (“shall resume . . . unless”) as the Amendment used regarding the earlier intra-executive branch contest period. It was understood that the Vice President would act as President during the ten-day period for Congress to decide, and the use of the same formulation signaled that he would also act under the contest period in H.R.J. Res. 1.

During the floor debates in the House, various architects of the Amendment made clear that the Vice President acted as President during the decision period.³⁴⁹ When Celler was specifically asked who would

³⁴⁴ H.R. REP. NO. 89-203, at 2 (1965); *see id.* at 3 (explaining that the committee intended “that the procedure provided by [Section 4] relate[] only to cases in which Presidential inability has been declared by others than the President.”).

³⁴⁵ *Id.* at 2–3.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 3.

³⁴⁸ *Id.*

³⁴⁹ *See* 111 CONG. REC. 7938 (1965) (statement of Rep. Emanuel Celler) (“In other words, if there is a dispute, as I stated, in the interest of continuity of executive power and stability, the Vice President takes over and remains in the office as Acting President until Congress acts. . . . Thus we escape the danger of a disabled President carrying on for even a short while.”).

discharge presidential powers and duties during the period when the Vice President and Cabinet were deciding whether to contest the President's no inability claim, he stated that the Vice President would continue to serve as acting President during this period and quoted Katzenbach to that effect.³⁵⁰ When pressed, Celler said that the Vice President as acting President would "be in the saddle unless he agrees the President is fully restored."³⁵¹ Representative Robert Duncan, Celler's interlocutor, confirmed the substance of their exchange when he summarized that unless the Vice President acquiesced in the President's no inability claim, the Vice President "would continue as Acting President during all intervals of time necessary for the Cabinet and the President to transmit their letter and the Congress to take such action as may be necessary."³⁵²

Lindsay, a member of the House Judiciary Committee, stated his understanding that the Vice President retained power until Congress decided adverse to his position. Lindsay recognized that "that word 'unless' is the key. It is very significant."³⁵³ He disclosed that in committee deliberations he preferred a formulation that would have allowed the President to hold power unless Congress reversed him by a two-thirds vote but that H.R.J. Res. 1 "provides just the reverse, that the Vice President, on his declaration, backed by a majority of the Cabinet, retain power unless he is reversed by the Congress."³⁵⁴ Lindsay had offered an amendment in committee to flip the procedure but was defeated.³⁵⁵ Representative Arch Moore of the House Judiciary Committee also understood that Section 4 allowed the Vice President to remain in power until Congress ruled against him, a resolution he opposed.³⁵⁶ Moore thought that the President should be able "to simply state he is capable of reassuming his office" and "that he shall then reassume" presidential powers.³⁵⁷

Moore, in fact, offered a floor amendment to change Section 4 to provide that the President would immediately resume presidential powers and duties upon issuing his "no inability" declaration. The Vice President and Cabinet

³⁵⁰ *Id.* at 7939.

³⁵¹ *Id.*

³⁵² *Id.* at 7939–40; *see also id.* at 7941–42 (statement of Rep. Richard H. Poff) (explaining that the initial declaration by the Vice President and Cabinet shifts powers to the Vice President with the President's remedy being to seek Congressional review to restore him).

³⁵³ *Id.* at 7948.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 7949.

³⁵⁷ *Id.*; *see also id.* at 7956 (statement of Rep. William J. Randall) (stating that Section 4 prevented two people from simultaneously asserting presidential powers); *id.* at 7958–59 (statement of Rep. Rodney M. Love) (arguing that Section 4 as revised deferred President's resumption of powers until after Vice President and Cabinet failed to respond).

could contest the President's declaration, and Congress would resolve it, but during those time periods, the President, not the Vice President, would discharge presidential powers, under Moore's proposal.

Moore, of course, would not have offered this proposal unless he understood that Section 4 allowed the Vice President to act as President notwithstanding the President's "no inability" assertion. Not a single representative contradicted Moore's understanding of Section 4 during the debate on his proposal. Some reiterated the acknowledged interpretation that the Vice President retained presidential powers during the period in which the Vice President and Cabinet could decide whether or not to challenge the President's "no inability" declaration and during the period Congress took to decide, and beyond if Congress ruled against the President.³⁵⁸ Moore's motion was defeated, 58 to 122.³⁵⁹

Representative James Corman explained the reasoning behind H.R.J. Res. 1's approach of deferring presidential resumption of powers. It would guard against the risk that the President's "no inability" declaration was unfounded and that the President was, in fact, mentally unsound.³⁶⁰ It would prevent a situation in which there was uncertainty as to who was entitled to discharge presidential powers.³⁶¹ It would obviate the danger that the President, having resumed power, could discharge Cabinet members and accordingly prevent further action by Congress to determine whether the President was disabled.³⁶² Finally, the framers wanted to reduce the transfers of presidential powers. By allowing the Vice President to continue to act, they minimized the number of such transfers.³⁶³

The Conference Committee chose a four-day period as a compromise between the two-day period in the House version and the seven-day period in the Senate version. Poff, too, stated during the final House debate that the four-day period was "an outside limitation" and that "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."³⁶⁴ Implicit in Poff's statement was the

³⁵⁸ See, e.g., *id.* at 7965 (statement of Rep. James C. Corman) ("[W]hen we get into a dispute between the President . . . and the Vice President and the Cabinet . . . the Vice President will retain power for 2 days. If the dispute continues beyond 2 days, Congress must act within 10 days.").

³⁵⁹ *Id.* at 7966.

³⁶⁰ *Id.* at 7965; see also *id.* (statement of Rep. Emanuel Celler) (opposing Moore's amendment because it might allow a President who was "nutty as a fruitcake" or "utterly insane" to resume presidential powers during the two-day period).

³⁶¹ *Id.* (statement of Rep. James C. Corman).

³⁶² *Id.* (statements of Rep. Peter W. Rodino, Jr. and Rep. James C. Corman).

³⁶³ *Id.* at 7966 (statement of Rep. Robert McClory).

³⁶⁴ *Id.* at 15,214 (statement of Rep. Richard H. Poff).

understanding that absent a vice-presidential agreement, the Vice President continues to act as President during the four-day period.

When Bayh presented the Conference Report to the Senate, he noted that it changed the proposed Amendment from that the Senate approved earlier that year by making specific that a President who declared his inability voluntarily under Section 3 could reclaim powers by a simple declaration.³⁶⁵ The absence of any similar comment regarding an involuntary transfer under Section 4 signaled that no such resumption accompanied a simple “no inability” declaration in that context. Significantly, Bayh twice described the four-day period in which the Vice President and Cabinet could contest a presidential “no inability” declaration as a “waiting period” before the President could resume presidential powers and duties.³⁶⁶

Feerick articulated the same understanding in two articles that were widely circulated during the ratification period. In the *A.B.A. Journal*, he wrote that if the President, having been declared disabled under Section 4, announced his recovery, “he then would have to wait four days before he could resume his powers and duties” while the Vice President and Cabinet assessed the situation.³⁶⁷ He might assume his powers and duties before the four days ended if the Vice President and Cabinet agreed.³⁶⁸ Feerick explained that the Vice President would continue to act as President during any period in which the President’s ability was challenged “so that the powers and duties of President would never be in the hands of a person whose capacity had been seriously challenged.”³⁶⁹ In a December 1965 law review article, Feerick wrote that “the President could announce his own recovery but he would then have to wait four days before resuming his powers and duties.”³⁷⁰ Unless the Vice President and Cabinet agreed to the President’s earlier resumption,³⁷¹ “[t]he Vice-President would continue to act as President, pending the decision of Congress, so that the powers and duties of President would never be in the hands of a person whose capacity had been seriously challenged,” Feerick explained.³⁷²

In addition to the textual arguments, the legislative history confirms in overwhelming fashion that the Vice President possesses presidential powers

³⁶⁵ *Id.* at 15,378.

³⁶⁶ *Id.*

³⁶⁷ Feerick, *supra* note 203, at 917.

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ Feerick, *supra* note 124, at 200.

³⁷¹ *Id.* at 200–01.

³⁷² *Id.* at 201; *see also* American Bar Association & John D. Feerick, *supra* note 203, at 4 (explaining that under Section 4 President resumes powers only if his declaration is not contested in four days by the Vice President and majority of the Cabinet).

and duties during the four-day period. Committee reports expressed that intent as did statements by the chief proponents of the measure in both the Senate (Bayh) and the House (Celler), a past (Brownell) and current (Katzenbach) attorney general to whom legislators looked for legal guidance, and key witnesses (Eisenhower, Freund, Feerick), as well as others. The legislative history also illuminates that the provision was understood in a manner consistent with the intent and provides evidence regarding the meaning a reasonable person in the mid-1960s would have given the words. In addition to the evidence recounted above, no one suggested during legislative discussions that the provision allowed the President to return to power immediately upon his mere “no inability” declaration alone rather than await the response of the Vice President and Cabinet.³⁷³ On the contrary, two proponents of immediate presidential resumption (Moore and Lindsay) complained that H.R.J. Res. 1 made the President wait and sought at different junctures, unsuccessfully, to amend the proposal. The record and various articles explaining that the Vice President remained in power were widely circulated during the ratification period.

The legislative record also articulated the structural considerations that informed the decision to make the President wait before resuming power. The presidential inability provisions reflect an interest in having a functioning person discharging presidential powers at all times. Until an authoritative decision-maker (like the Vice President, Cabinet, or Congress) blessed the President’s return, the safest course and the one consistent with that objective required the Vice President to continue. Moreover, an interest in stability argued for minimizing change. Bayh later wrote that the committee had considered the “touchy” issue of whether the President or Vice President would discharge presidential powers during a period in which the President’s capacity was unresolved. Bayh and the committee had concluded that “from the time the Vice President assumed the powers and duties of the President until Congress decided the issue, the Vice President should continue to act.”³⁷⁴ That resolution would minimize uncertainty regarding the locus of presidential power and ensure that “a President gone berserk could not reclaim his powers and duties even for a few hours, thus doing irreparable damage before Congress was able to decide on his

³⁷³ Questions to Bayh, Celler, or other Amendment architects during legislative hearings and debates regarding the meaning of Section 4 cannot, of course, be taken as indicating ambiguity or confusion unless the questioner so states since often such questions are designed to make legislative history, to educate the questioner or others regarding the operation of a provision, to set a foundation for further discussion of a topic, or simply to restate what is already clear.

³⁷⁴ BAYH, *supra* note 94, at 272–73.

inability.”³⁷⁵ Bayh’s statement demonstrated the compelling logic behind making the President wait until some authoritative voice confirmed his capacity, and that logic was consistent with the better reading of the text and the legislative history.

Finally, leaving the Vice President in power accords with common sense, which is not simply a guide to living but an instrument of constitutional interpretation. So Chief Justice John Marshall taught nearly two centuries ago in *McCulloch v. Maryland*.³⁷⁶ Marshall reasoned that absent a clear constitutional statement to the contrary, the Constitution should be interpreted reasonably in a manner to facilitate, not to frustrate, the realization of its purposes.³⁷⁷

The interpretation that would allow the President to resume immediately invites the following nightmarish hypothetical situation which would frustrate the entire purpose of Section 4. Imagine that a moment after the Vice President and Cabinet act under Section 4 to transfer presidential powers and duties from a deranged and delusional President, that same apparently compromised President resumes power by transmitting his simple declaration. Possessed again with presidential powers and duties absent any meaningful check, he fires the Cabinet, evicts the Vice President from the West Wing of the White House, and orders American troops to attack Great Britain and Canada. The absurdity of this situation on several levels impeaches the interpretation that would allow the President to resume immediately on his own determination. Not only would it return to power a President just declared deranged, it would allow him to circumvent the very checks Section 4 imposes against a President who seeks to reclaim power while disabled, namely the review of the Vice President and Cabinet and two-thirds of each house of Congress, the ultimate check. Absent unequivocal constitutional language mandating that the President could return with no review, *McCulloch* teaches that the Constitution should always favor a result that would advance, not destroy, its purposes.

³⁷⁵ *Id.* at 273.

³⁷⁶ 17 U.S. (4 Wheat.) 316 (1819).

³⁷⁷ *See id.* at 408–09 (“Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.”); *id.* at 415 (“It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution.”).

On at least two occasions, the Department of Justice³⁷⁸ has issued opinions that confirm that the Vice President remains in power during the four-day period. A few days after the attempt to assassinate President Reagan, Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, issued a memorandum for the Attorney General in which he referred to Section 4's "mechanism" which allowed the Vice President, Cabinet, and Congress "to override the President" in resuming the powers and duties of his office.³⁷⁹ "Under Section 4, the Vice President remains Acting President until the issue is resolved," Olson wrote.³⁸⁰ Four years later, after describing Section 4, an OLC opinion stated that the President could resume his powers and duties upon his declaration "unless, within four days" the Vice President and Cabinet contest his declaration, thereby requiring Congress to resolve the issue.³⁸¹ "The Vice President would remain Acting President until the congressional vote."³⁸²

After this article was largely complete, a copy of the "Contingency Plans" issued early during the Administration of William J. Clinton was made available.³⁸³ The Plan, which appears largely to have been prepared during the Reagan years and forwarded onward to subsequent administrations,³⁸⁴ concludes that "the more persuasive legal arguments would leave authority in the Vice President until the four-day period had elapsed" although it prefaces that conclusion by terming it "uncertain" regarding who governs during the four-day period.³⁸⁵ Some of the uncertainty the Plan finds seems

³⁷⁸ See KALT, *supra* note 281, at 81 (suggesting that the Office of Legal Counsel of the justice department could help settle the issue with a public opinion confirming that the Vice President remains in power).

³⁷⁹ Memorandum from Theodore C. Olson, Assistant Att'y Gen., to the Att'y Gen. 2 (Apr. 3, 1981) (on file with the Office of Legal Counsel), available at <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/whormsubject/fg017/40-654-198419-fg017-177000-180999-2017.pdf>.

³⁸⁰ *Id.*

³⁸¹ *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, *supra* note 180, at 67.

³⁸² *Id.*

³⁸³ OFFICE OF THE COUNSEL TO THE PRESIDENT, CONTINGENCY PLANS—DEATH OR DISABILITY OF THE PRESIDENT (Mar. 16, 1993) [hereinafter CONTINGENCY PLANS], available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials. Thanks to Reb Brownell and John Rogan for obtaining this document and making it available. See also KALT, *supra* note 281, at 81 (suggesting the Contingency Plan could clarify the situation by stating that the Vice President continues in power during the four-day period).

³⁸⁴ See Fred F. Fielding, Fordham Law Review Symposium Keynote Address, *An Eyewitness Account of Executive "Inability"*, 79 FORDHAM L. REV. 823, 828–29 (2010) (describing Fielding's work preparing the Contingency Plan during the Reagan administration and reporting his finding the Plan was still in use during the George W. Bush administration when he returned as White House counsel late in the second term).

³⁸⁵ See *Temporary Disability of the President: Threshold Considerations*, at 3, in CONTINGENCY PLANS (outlining procedures for temporarily transferring power from the President to Vice President when the President is unable to exercise the powers and duties of office).

to relate to whether the President could resume during the four-day period even if the Vice President and Cabinet indicated they did not contest the President's "no inability" declaration.³⁸⁶ Memoranda from the Ford and Carter Administrations support the conclusion that the Vice President remains in power during the four-day period but find some uncertainty.³⁸⁷ These executive branch documents tend to provide support for the proposition asserted here that the Vice President remains in power during the four-day period although stronger statements would be helpful and merited. The Plan and some of the underlying documents are often conclusory and do not consider all of the pertinent arguments or evidence.

Although the text, legislative record, and structural arguments make clear that the President does not resume power simply based on his "no inability" declaration, the President might resume before the four-day period is exhausted with, and only with, the appropriate acquiescence from the relevant executive branch officials. The legislative history is overwhelming on this point³⁸⁸ and the

³⁸⁶ See, e.g., *Temporary Disability of the President: Resumption of Authority by the President*, at 3–4, in CONTINGENCY PLANS (stating that even without considering a disagreement situation between the President, the Vice President/Cabinet majority as to the President's ability to govern, "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," and focusing its discussion on whether the President could resume during the four day period with the acquiescence of the Vice President/Cabinet).

³⁸⁷ See, e.g., *25th Amendment, August 21, 1975*, at 5, in CONTINGENCY PLANS (concluding that "[t]he legislative history . . . indicates" the Vice President exercises presidential powers during four-day period but foresees "a feeling of serious uncertainty" which could be "debilitating"); *Memorandum from Frank Wiggins to Mike Berman*, at 4, in CONTINGENCY PLANS (stating that he was "fairly confident" a court would conclude that the Vice President remained in power during four-day period after having acknowledged some "uncertainty"). The uncertainties in the 1975 document relate to the national mood given the unique circumstances, not the legal analysis, and would be inherent in the situation. Those in the Wiggins memorandum seem to rest on some misreading of the legislative record. The author also states that his review of the congressional history was not "exhaustive." *Id.* at n.2. A third memorandum from a political aide to Vice President Walter F. Mondale does not address the four-day issue but contains other mistakes. *Memorandum from Robert Torricelli to Michael Berman*, March 21, 1978, in CONTINGENCY PLANS. I plan to discuss the Contingency Plan and some of the flaws in it and in the analysis of this and other points in a subsequent article.

³⁸⁸ See, e.g., *1965 Senate Hearings*, *supra* note 76, at 10 (statement of Acting Att'y Gen. Nicholas Katzenbach) (stating assumption that President could resume presidential powers immediately with concurrence of Vice President); *1965 House Hearings*, *supra* note 110, at 99–100, 107 (statement of Att'y Gen. Nicholas Katzenbach) (reiterating assumption that President could immediately resume powers if Vice President agrees); *id.* at 243 (statement of former Att'y Gen. Herbert Brownell) (stating that President and Vice President could agree to the President resuming power before the waiting period expires); 111 CONG. REC. 3285 (1965) (statement of Sen. Birch Bayh) (stating that President and Vice President could agree to a shorter period of time); *id.* at 7939–40 (statement of Rep. Emanuel Celler) (explaining that the Vice President could agree that the President is no longer disabled and that therefore the President may resume his powers); *id.* (statement of Rep. Robert B. Duncan) (confirming, in exchange with Rep. Celler, that the Vice President could allow the President to resume the powers of his office); *id.* at 15,214 (statement of Rep. Richard H. Poff) ("[I]t

logic of this conclusion is compelling.³⁸⁹ Section 4 prevents a previously-declared disabled President from resuming power for four days, to allow the Vice President and Cabinet an opportunity to respond so as to preclude frustration of the Section 4 process and to minimize transfers. These purposes do not apply once an authoritative determination independent of the President finds the President is fit to return to power. The legislative history makes clear that the President does not have to wait the entire twenty-one-day period if Congress makes an earlier decision in his favor.³⁹⁰ That analogy would also support allowing the President to resume during the four-day period with the appropriate acquiescence from the appropriate executive branch officials.

There is some uncertainty as to whether both the Vice President and Cabinet must agree with the President's "no inability" declaration in order for the President to resume before the four days expire, or whether a decision by either the Vice President or the Cabinet majority to that effect would suffice. Most of the comments in the legislative history suggested that the Vice President's determination alone would be sufficient.³⁹¹ Some of John Feerick's writings at the time suggested that the President might resume earlier if she, the Vice President and Cabinet all agreed,³⁹² although he did not discuss whether such an earlier presidential resumption might occur based on action by just the Vice President or Cabinet majority. Feerick's classic book on the subject states that "Either the Vice President alone or the Cabinet and Vice President can agree to the President's taking over

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."); *see also* Feerick, *supra* note 124, at 200 (stating that President could resume before the four-day period upon agreement of President, Vice President and Cabinet); Feerick, *supra* note 203, at 917 ("[I]f [the Vice President and Cabinet] agreed with the President, the President would assume his powers and duties at the end of four days, or earlier if all agreed."); Gustafson, *supra* note 166, at 469 n.41, 475 (stating that Vice President could return power during the four-day period to the President).

³⁸⁹ *But see* KALT, *supra* note 281, at 73 (arguing that allowing the President to resume powers and duties before the four-day period ends is "inconsistent with the whole idea of the mandatory waiting period.").

³⁹⁰ *See* H.R. REP. NO. 89-564 at 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."); 111 CONG. REC. 15,379 (1965) (statement of Sen. Birch Bayh) (explaining that "[t]he 21 days need not always be used" and that earlier action in favor of the President would restore him to power immediately); *see also* FEERICK, *supra* note 10, at 120 (describing the twenty-one day limit as "an outside limitation" and identifying the Amendment's intent as calling for as prompt action as possible with understanding that President would resume immediately upon action in his favor).

³⁹¹ *See supra* note 388.

³⁹² *See e.g.*, Feerick, *supra* note 124, at 200 (stating that President could resume before the four-day period upon agreement of the President, Vice President and Cabinet); Feerick, *supra* note 203, at 917 ("[I]f [the Vice President and Cabinet] agreed with the President, the President would assume his powers and duties at the end of four days, or earlier if all agreed.").

immediately or at any time short of four days.”³⁹³ The legislative history specifically recognizes that a vote by either the House of Representatives or Senate in support of the President’s position before the twenty-one days expire would result in the President’s immediate resumption.³⁹⁴ That analogy might suggest that if either the Vice President or a Cabinet majority acquiesced in the President’s “no inability” determination during the four days he would resume power. The Amendment does not state how the acquiescence of the Vice President and/or the Cabinet might be shown, but the use of public letters to the President pro tempore of the Senate and Speaker of the House of Representatives for other Section 4 communications implies that this vehicle would also be appropriate for this application.

Although the legislative record, structural considerations, and logic dictate that the President could resume before the four-day period elapsed with appropriate independent consent, the precise content of the necessary acquiescence is admittedly less certain. Clearly acquiescence of both the Vice President and Cabinet majority would be sufficient and the legislative history overwhelmingly suggests that the Vice President’s agreement alone would suffice. The twenty-one-day analogy suggests that Cabinet agreement alone would also work. Fortunately, this area involves an extremely remote contingency—a disagreement between the Vice President and the Cabinet regarding whether the President is able to resume after they had previously determined her to be unable.

The text, legislative record, and structural considerations leave no ambiguity that the Vice President continues to act as President a) during the four-day period allowed for the Vice President and Cabinet to respond to the President’s “no disability” declaration and, if they reassert their view that he is disabled, b) during the twenty-one-day period allowed for Congress to decide unless one house decides against the Vice President sooner but that c) the President can resume earlier with the appropriate acquiescence. The structural reasoning behind this interpretation makes it even more compelling. To construe the clause otherwise would allow a President who authoritative decision-makers had declared disabled to unilaterally return without any independent confirmation of his fitness, would allow him to disrupt the Section 4 procedure by discharging Cabinet members, and would increase the number of transfers of authority, thereby interfering with presidential continuity. Many who have carefully studied this issue have

³⁹³ FEERICK, *supra* note 10, at 119.

³⁹⁴ *See supra* note 390.

reached this same conclusion.³⁹⁵

III. CONCLUSION

The first fifty years of its history confirm what the framers of the Twenty-fifth Amendment suspected. Section 4 is likely to be used rarely. Some potential uses may not be controversial when, for instance, a President is unconscious for a prolonged period of time.³⁹⁶ Yet, Section 4 was also created to address the most challenging instances of presidential inability, both contingencies its framers could foresee and those they could not anticipate. They devised it to allow the transfer of presidential power and duties to the Vice President when a physical, mental, or other circumstance rendered the President incapacitated. They recognized that some prospective uses of Section 4 might invite conflict, if, for instance, a President suffers from a mental illness that makes him or her “unable to discharge the powers and duties” of the presidency yet refuses to acknowledge that debility.

Section 4 exists to help ensure continuous presidential leadership during perilous times by a legitimate President or Vice President who is able to discharge the powers and duties of the presidency. It is, accordingly, important that government officials and the public have a clear sense regarding Section 4 to inform their thinking when occasion arises for its use, especially if the circumstances present a contingency which invites conflict. To the extent commentary and explainer articles improperly depict Section 4 they may contribute to a misinformed public and government and even provide material for demagogic leaders and their acolytes to misuse in the future to complicate the process.

³⁹⁵ See, e.g., FEERICK, *supra* note 10, at 118–19; Gustafson, *supra* note 166, at 468–69 (stating that Vice President remains in power during the four-day period); Second Fordham University School of Law Clinic, *supra* note 7, at 925; RAYMOND J. CELADA, LIBRARY OF CONG. LEGISLATIVE REFERENCE SERV., PRESIDENTIAL CONTINUITY AND VICE PRESIDENTIAL VACANCY AMENDMENT LRS-9 (1965) (“However, if the Vice President and a majority of the Cabinet felt that the President was unable, they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the Congress.”); *id.* at LRS-23 (“Pending the decision [by Congress], the Vice President is to continue as Acting President.”); Joel Goldstein, *Trump Opponents Have Rediscovered the 25th Amendment. Here Is What You Should Know About It*, WASH. POST (June 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/07/5-things-you-should-know-about-the-25th-amendment/?utm_term=.6eb478ccd9c0 (“The amendment and its history make clear that the vice president continues to act as president during both the four-day waiting period and the 21-day deliberation period” unless either the appropriate executive officials or at least a house of Congress sooner supports the President’s position); cf. KALT, *supra* note 281, at 74 (concluding that Vice President is to remain in power during the four-day period).

³⁹⁶ See, e.g., Goldstein, *supra* note 224, at 196.

The Twenty-fifth Amendment, including Section 4, was the product of a lengthy effort to address gaps in America's provisions to ensure presidential continuity.³⁹⁷ The Amendment, especially Section 4, cannot be properly appraised or grasped through a quick consideration. In addition to its text, the historical context, legislative record and structural considerations must be studied to appreciate its design, the purposes animating its provisions, the way in which it is to operate, and the contribution it can make.

The Amendment, its architects conceded, is imperfect. They pursued it nonetheless because they correctly concluded that it was an enormous improvement on the status quo which, among other problems, impeded action when a President was disabled. Its adoption represented an enormous step forward. That becomes evident when its history and record are studied.

It is easy, as some have done, to disparage Section 4 as "ambiguous." Yet, greater precision would have made adoption less likely by inviting complaints that its treatment of marginal matters was over-inclusive or under-inclusive. Such a result would have left constitutional provisions in the unsatisfactory state they were in, a status quo that was even less palatable during a nuclear age. Of course, predictability has its appeal where possible, but life is full of uncertainty and sometimes flexible formulations present the wiser course in order to allow future decision-makers the ability to respond to problems that may arise with unanticipated twists. The Amendment's architects recognized that defining presidential disability with a bright-line standard would inevitably be too rigid to address unforeseen contingencies the future would present. Rather than attempt an approach they suspected would prove under-inclusive, they provided a standard with intended flexibility. On other occasions, they deliberately fashioned extensive legislative history to clarify various terms and procedures in the reasonable understanding that later generations would consult and rely upon the purposes, understandings, and meanings their preserved discussions disclosed.

Not all of the mistakes about Section 4 in journalistic literature are of equal consequence. Some may be due to inelegant phrasing in short commentary or explainer pieces or to word constraints that provide inadequate space to cover a complicated subject rather than to substantive misunderstanding. Those which misstate the scope of Section 4, by suggesting that it does not apply to mental disabilities or that it only applies when the President is unable to communicate an inability, are more serious distortions. Although the

³⁹⁷ See, e.g., FEERICK, *supra* note 10, at 49–121 (providing historical discussion of development of the Amendment); Goldstein, *supra* note 9, at 963–68, 998–1013 (discussing context and legislative efforts that gave rise to the Amendment); Goldstein, *supra* note 104, at 1138–40 (discussing Amendment as example of bipartisan legislative achievement).

provision was not intended as a means to declare no confidence in a President simply because his policies were unpopular, it was intended to cover a wide variety of situations in which the constitutional decision-makers found him unable to discharge presidential powers and duties given the context presented. Similarly, mischaracterizations regarding who exercises power during the four-day period are potentially serious. The text, the legislative record and structural arguments together make clear that the Vice President exercises powers during the four-day period. Nonetheless, an unprincipled politician might attempt that argument and he or she and their journalistic acolytes might draw from mistakes previously made on the Internet.

A careful study of the legislative record would avoid many mistakes regarding Section 4. That is certainly true of the statements that diminished the role of presidential inability in the Amendment, suggested that mental inability was not a focus, excluded from coverage situations where a conscious President was unwilling to declare her inability, questioned who were the “principal heads of the executive departments,” or concluded that the President would resume power immediately based on his or her “no inability” declaration.

Of course, it is a rare journalist who has the time to study the three sets of legislative hearings and the Senate and House debates (not to mention the relevant history before 1964) before writing a 750-word commentary or explainer piece about whether Section 4 could be invoked against President Trump or any other President. They might fairly rely on scholarly experts on the subject to provide background regarding the Amendment.

And it is surely too much to expect every academic to study the full legislative materials before producing his or her own commentary piece, much less responding to a journalist’s phone call or e-mail. Experts on the presidency, on American politics or history or constitutional law, or other subjects may enhance public discussion of the applicability of Section 4 by the insights their scholarship in related fields allows them to contribute even if they have not written or taught about the Twenty-fifth Amendment. Many who have contributed to the discussion have accordingly deepened the discussion. Yet, most of the mistakes addressed here could have been avoided by anyone who read the pertinent pages of either John Feerick’s *The Twenty-fifth Amendment: Its Complete History and Applications* or his 1965 *Fordham Law Review* article explaining the Amendment. It does not seem too much to expect someone writing or commenting on the Amendment to have at least consulted that classic work before offering expert analysis.

When mistakes are made, it is worth correcting them to avoid later confusion. Some articles regarding Section 4 acknowledge having made mistakes and have corrected them. Although initial readers may be

misinformed, one advantage of modern technology is that the permanent digital version can carry a correction with the article in question. Whereas mistakes in printed media remained forever and the subsequent corrections were often hard to connect, error can now be acknowledged and eliminated so that only the corrected version endures. Scholars can play a constructive role by calling these mistakes to the attention of the author or platform. My few efforts in this regard suggest that sometimes they are appreciated (and other times ignored).

Ultimately, Section 4 may present some difficult questions, including instances where people in good faith reach different conclusions. That is inevitable. It is hoped, however, that such discussions will proceed with an appreciation of the contribution Section 4 and the rest of the Twenty-fifth Amendment have made and the challenges its architects faced, and an understanding of Section 4's history, scope, and operation. That, after all, should be among the takeaways of its golden jubilee.