

SYMPOSIUM: 50 YEARS WITH THE 25TH AMENDMENT

**CELEBRATING THE PRESIDENTIAL INABILITY
PROVISIONS OF THE TWENTY-FIFTH AMENDMENT**

*By Joel K. Goldstein**

Hearty congratulations to the Center for Constitutional Law and to the Ray C. Bliss Center for Applied Politics for convening this symposium on “Fifty Years with the Twenty-fifth Amendment: When a President is Unable to Discharge the Duties of Office.” The topic is timely due to the confluence of two, quite different events. Less than two years ago, the Twenty-fifth Amendment experienced its 50th anniversary as part of our Constitution. Golden jubilees furnish occasions to look back and forward and are certainly worth extending for a year or two, especially regarding an Amendment that addressed continuity of presidential leadership in an effective manner, thereby better protecting the functioning of one branch of our national government. Independent of the celebration, the presidential inability features of the Amendment have received an unprecedented amount of attention during the past two years as a range of government officials, academics, and pundits have considered whether they should be applied to President Donald J. Trump.¹

Not surprisingly, the latter issue, whether the 45th President is “unable to discharge the powers and duties of his office,” the standard the Amendment sets, has largely diverted most observers from a comprehensive study of the Amendment, an activity the 50th anniversary would have suggested. The natural tendency to focus on the immediate over the distant, the here-and-now over the past and future, the specific over the general, helps explain the relative prominence of the Trump-and-

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1. See Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 74, 79-87 (2018) (summarizing discussion of whether Section 4 applies to President Trump’s condition).

the-Twenty-fifth Amendment question over the more inclusive, but remote, Golden Jubilee project.

Obsession with current events often imposes costs, and it has in this instance. The rush to discuss whether President Trump is “unable” to discharge presidential powers has often obscured the context to which the Amendment responded, and distracted attention from the seminal contribution it made. The Trump focus has led many to form their initial perceptions of the Amendment based simply on their conclusion regarding whether, and how, it addresses the one specific scenario Trump’s presidency presents without considering its larger scope and operation.

This essay provides a broader perspective to the discussion of the Twenty-fifth Amendment. Consistent with this symposium’s focus on the presidential inability provisions of the Amendment, it addresses Section 3 and especially Section 4, rather than the presidential succession and vice-presidential vacancy features of the Amendment, although as will be seen, the latter provisions relate to the former.² This essay argues that the presidential inability provisions of the Twenty-fifth Amendment constituted a major contribution to ensuring presidential continuity. Sections 3 and 4 responded to important constitutional questions that made government officials unwilling to recognize presidential incapacities that arose. They did so by providing clear, workable, and reasonable procedures to allow government officials to deal with a range of different scenarios involving presidential incapacity, not simply the one some believe the Trump presidency presents. In doing so, they represented an impressive legislative achievement which overcame formidable historical and constitutional obstacles.

I. THE CONSTITUTIONAL PROBLEMS

To understand the historical context surrounding the Amendment, America’s beginning is the place to start. The Constitution, as proposed on September 17, 1787 by the Philadelphia Convention and ratified during the next few years by the 13 states, provided that in case of the death, resignation, removal, or “inability [of the President] to discharge the powers and duties of the said Office, the same shall devolve on the Vice President.”³ It also said that Congress could provide for the situation if some combination of those four contingencies struck both the President

2. See U.S. CONST. amend. XXV.

3. U.S. CONST. art. II, § 1, cl. 6.

and Vice President, “declaring what Officer shall then act as President” until the “[d]isability be removed, or a President shall be elected.”⁴ At the Constitutional Convention, delegate John Dickinson thought the clause was “too vague” and wondered, “What is the extent of the term ‘disability’ & who is to be the judge of it?”⁵ James Madison’s notes did not record further discussion of those subjects, if any occurred, and Dickinson’s two questions went unanswered.

The two gaps Dickinson identified –What’s disability? and Who’s the Judge? —were important questions, yet the creators of our Constitution understood that establishing a new constitutional republic was a bold undertaking which would fail if a quest for perfection diverted them from pursuing something very good. The framers recognized the need to accept some uncertainty and imperfection, and they left some issues to posterity in the faith that future generations would find resolutions. Dickinson’s two questions were among those postponed.

The lack of a constitutional definition for inability presented little practical problem during the first 180 years or so. The situations of presidential incapacity, which made an impression, were relatively clear. Yet the insight reflected in Dickinson’s “Who’s the Judge?” question anticipated a significant complication. The Constitution did not state who was to determine presidential inability or by what procedure. The lack of a designated decision-maker with clear authority to determine presidential inability impeded action. The constitutional silence implied that the Vice President was charged with determining whether the President was disabled since he assumed presidential responsibilities in that case.⁶ Yet his authority was unspecified, and Vice Presidents had reason not to act in order to avoid the appearance of self-promotion. Moreover, for most of American history Vice Presidents were not close presidential associates.⁷ They were chosen by party leaders, not presidential candidates, and often had no personal relationship with the President or sense of loyalty to him.⁸ Their selection often reflected a ticket-balancing strategy, and accordingly, they frequently came from a rival wing of the party or even

4. *Id.*

5. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 427 (Max Farrand, ed. 1966).

6. RUTH C. SILVA, PRESIDENTIAL SUCCESSION 100-02, 110 (1951) (concluding that the Constitution vests decision-making power in the successor).

7. JOEL K. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 18-19 (2016).

8. JOEL K. GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION 47 (1982); GOLDSTEIN, *supra* note 7, at 18, 22.

from a different party. They functioned in the legislative, not executive, branch.⁹

American history further complicated handling presidential inability by introducing a third question regarding presidential inability. Recall that the original Presidential Succession Clause provided that in case of the death, resignation, removal, or “inability [of the President] to discharge the powers and duties of the said Office, the same shall devolve on the Vice President.” But what devolved on the Vice President, the “Office” of the President, or simply “the powers and duties of the said Office?” In the former case, the Vice President became President; in the latter, he remained as Vice President but discharged presidential powers and duties.

When William Henry Harrison became the first President to die in office on April 4, 1841, his Vice President, John Tyler, claimed that he became President rather than simply discharging the powers and duties of the presidency from the second office. Although some others disagreed, Tyler enforced his interpretation by insisting on it.¹⁰ When other Presidents died in office, the Tyler Precedent was followed even though Tyler’s interpretation was probably wrong.¹¹ It made little difference in terms of the operation of government whether the Vice President became President or simply exercised the powers and duties of the office when a President died, resigned, or was removed, but his status introduced an additional complication regarding presidential inability, one in many respects more serious than those Dickinson identified. The Constitution may have been unclear whether what devolved on the Vice President was “the office” of the presidency or simply “the powers and duties of the office,” but the text provided that “the same [thing]” devolved in each of the four situations.¹² So if the Tyler Precedent correctly captured the meaning of the clause when a President died, as history (wrongly) ruled that it did, then the office, not simply its powers and duties, also passed when a President was disabled.

Yet that constitutional interpretation introduced a big complication. If the Vice President became President, the prior Chief Executive was

9. See generally GOLDSTEIN, *supra* note 7, at 15, 19, 21-22.

10. See JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 94-96 (1965) (discussing opposition to Tyler’s position that he had become President).

11. See Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons From the Vice Presidency*, 69 ARK. L. REV. 647, 673 (2016) (concluding that the Tyler Precedent was inconsistent with framers’ intent).

12. U.S. CONST., art. II, § 1, cl. 6 (“In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President. . .”).

ousted from office. After all, the Constitution envisions one President.¹³ Presidents and their associates would often be reluctant to acknowledge a presidential inability if so doing meant that the presidency, not simply its powers and duties, would then pass to the Vice President. If the President was under a general anesthesia, national security might require, especially in a nuclear age, transferring power, so there would be a functioning Commander-in-Chief while the President was indisposed. But should the President forever lose the office to which he was elected to undergo a routine colonoscopy? Should that be the consequence of transferring power while she recovered from a serious wound, injury, or illness? A transfer might be acceptable when the perpetual nature of a presidential inability was readily apparent, say, if the President was in a vegetative state kept alive by technology, but not when the period of incapacity was likely to be temporary, as often would be the case or at least the reasonable expectation or hope. The logical extension of the Tyler Precedent, based on a textual reading of the Constitution, suggested a permanent transfer of the presidency upon a presidential inability, a reading that ensured that presidential incapacities would not be recognized, or the occasion for shifting power.

These two problems (Who's the Judge? and Fear of the Permanent Goodbye) combined to prevent action when Presidents suffered significant incapacities. After James Garfield was shot in 1881, he performed almost no presidential functions for 80 days before dying.¹⁴ The Cabinet agreed that he was disabled but was divided over whether to ask Vice President Chester A. Arthur to act as President for fear that the Tyler Precedent might oust Garfield.¹⁵ Similarly, following a serious stroke, Woodrow Wilson clung to the presidency for the last 17 months of his term even though he was clearly disabled for at least several months, probably more.¹⁶ There is some evidence that the lack of a designated decision-maker and concern regarding the Tyler Precedent contributed to the problem.¹⁷ The three disabilities of President Dwight D. Eisenhower in 1955-1957 presented the first occasions of presidential inability during

13. See, e.g., U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States.") (emphasis added).

14. FEERICK, *supra* note 10, at 123-28 (describing Garfield's inactivity during the 80 days between the shooting and his death).

15. SILVA, *supra* note 6, at 55-56; FEERICK, *supra* note 10, at 135-38.

16. See Joel K. Goldstein, *Vice-presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, 33 POL. & LIFE SCI. 37, 37, 45 (Fall 2014).

17. SILVA, *supra* note 6, at 62-63, 65-67.

the atomic age and Cold War, circumstances which attached urgency to the issue.¹⁸

Although committees in both houses of Congress investigated the issue on several occasions from 1956 to 1963, neither chamber came close to reaching a solution.¹⁹ There was agreement that a problem existed, but not how to solve it.²⁰ Absent legislative progress, the executive branch, under President Eisenhower's leadership, devised an informal interim approach to the problem. In essence, Eisenhower and Vice President Richard M. Nixon agreed that if Eisenhower determined he was unable to discharge presidential powers and duties, he would so state and that Nixon would act in his stead. They also agreed that if Eisenhower was unable to declare his own disability, Nixon, after consultation that seemed appropriate to him, could determine Eisenhower was disabled and then act as President. In either case they agreed that Nixon would simply discharge presidential powers and duties temporarily, not assume the presidency, and that in either case, Eisenhower would determine when the disability had ended.²¹ The Eisenhower-Nixon agreement was made public and later adopted by John F. Kennedy and Lyndon B. Johnson and, after Kennedy's assassination, by Johnson and first Speaker of the House John McCormick and then Vice President Hubert H. Humphrey.²² Attorneys General Herbert Brownell and William Rogers under Eisenhower, and Robert F. Kennedy under John Kennedy concluded the arrangements were constitutional.²³

These agreements were a responsible and important effort to plug constitutional gaps absent congressional action, but they had shortcomings as a permanent solution. Although repetition could have fortified their legitimacy, they lacked the certainty of a constitutional amendment and could be challenged if relied upon by a President or Vice President. Their continued use depended on constitutional norms, not text, so a future President could abandon them. They allowed the Vice President, and especially the President, to make certain determinations unilaterally, which presented some risks. If, for instance, a mentally

18. Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1137, 1141 (2017) [hereinafter Goldstein, *The Bipartisan Bayh Amendment*].

19. FEERICK, *supra* note 10, at 238-44 (discussing legislative activity from 1956 to 1963).

20. *Id.* at 242.

21. Agreement Between the President and Vice President as to Procedures in the Event of Presidential Disability, 1 PUB. PAPERS 196 (MAR. 3, 1958).

22. Goldstein, *The Bipartisan Bayh Amendment*, *supra* note 18, at 1143.

23. *Presidential Inability*, 42 OP. ATT'Y GEN. 69, 70, 92-95 (1961).

unbalanced President reclaimed his powers and duties, the letter agreements provided no basis to challenge his or her action.²⁴

A fourth constitutional issue also presented itself; specifically, how could lawmakers address the problems Dickinson's questions identified and Tyler's Precedent created. Although some believed Congress could enact a statute regarding the problems,²⁵ others thought the Constitution denied it that power.²⁶ The second part of the Presidential Succession Clause empowered Congress to legislate to address a double vacancy in the presidency and vice presidency, and some thought this grant implicitly denied Congress that power regarding a single vacancy. The uncertainty regarding whether legislation would be sufficient argued in favor of a constitutional amendment.²⁷ Moreover, a constitutional amendment clearly was needed to make some other changes reformers sought, like providing a means to fill an intra-term vice-presidential vacancy.

The need to use a constitutional amendment made the reformer's task much more difficult. Instead of the simple majorities in the House of Representatives and Senate and presidential approval needed for ordinary legislation,²⁸ constitutional amendment, of course, imposes a triple supermajority vote requirement—a two-thirds vote in the House of Representatives, a two-thirds vote in the Senate, and ratification by three-fourths of the states.²⁹ That onerous burden minimized the prospects for success. The Constitution has been amended only 27 times over 230 years, and even the ratio of one amendment every 8.5 years greatly overstates their frequency since the first 12 amendments came in the first 15 years, three came following the Civil War, and four came during the progressive period between 1913 and 1920.

24. See generally H.R. REP. NO. 89-203, at 7-8 (1965); S. REP. NO. 89-66, at 7-8 (1965).

25. 111 CONG. REC. 3253-54, 3257 (1965) (statement of Sen. Allen Ellender); *id.* at 7944 (statement of Rep. Basil Whitener); *id.* at 7945-46 (statement of Rep. Edward Hutchinson); *id.* at 15,585 (statement of Sen. Eugene McCarthy).

26. H.R. REP. NO. 89-203, at 8-9 (1965); S. REP. NO. 89-66, at 8-9 (1965); S. REP. NO. 88-1382, at 7-8 (1964).

27. Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 999 (2010) [hereinafter Goldstein, *Taking from the Twenty-Fifth Amendment*]; S. REP. NO. 89-66, at 9 (1965); H.R. REP. NO. 89-203, at 9 (1965).

28. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it. . .").

29. See U.S. CONST., art. V.

II. POLITICAL IMPEDIMENTS, CONTEXT AND LEADERSHIP

These high requirements for a constitutional amendment alone did not make that endeavor a project for the casual legislator, yet political obstacles specific to presidential succession and inability made the challenge even more daunting. To begin with, presidential succession and inability was not an issue which promised political reward. Time invested on the issue was unlikely to pay an electoral dividend. It also was a somewhat delicate undertaking, especially in 1963-1964, because of the perception that the interest in providing a means to fill a vice-presidential vacancy was an implicit rebuke to Speaker of the House of Representatives John McCormick, who was first in line of succession while the second office was unfilled.³⁰ The House might reject a proposal, and a Senate advocate might alienate colleagues in the other body, whose cooperation might be needed on other matters. The rarity of constitutional amendments and their serious and permanent nature probably made legislators less disposed to accept proposals about which they had any doubts. Moreover, the multiplicity of proposals and lack of consensus had long prevented action regarding presidential succession and inability.³¹

Notwithstanding these obstacles, Congress proposed the Twenty-fifth Amendment in July 1965, and by February 1967, only 19 months later, the requisite 38 states had ratified it to make it part of the Constitution. Ultimately 47 states ratified the Amendment.³² That event represented a remarkable accomplishment.

In one sense, the Amendment was the culmination of work that occurred in Congress and the executive branch over a decade.³³ Committees in the House and Senate studied the problem extensively during the 1950s and 1960s, as did President Eisenhower and his department of justice, led by Attorneys General Brownell and Rogers, and to a lesser extent Presidents Kennedy and Johnson and Attorneys General Kennedy and Nicholas Katzenbach.³⁴ The American Bar Association committed extensive resources to studying the problem and worked

30. Goldstein, *The Bipartisan Bayh Amendment*, *supra* note 18, at 1148-49.

31. See *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. 150 (1964) [hereinafter *1964 Senate Hearings*] (statement of John D. Feerick).

32. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 104, 105-07 (3rd ed. 2014) [hereinafter FEERICK, *THE TWENTY-FIFTH AMENDMENT*]

33. See Goldstein, *The Bipartisan Bayh Amendment*, *supra* note 18, at 1141-43 (describing developments during the 1950s).

34. FEERICK, *supra* note 10, at 238-44; Goldstein, *The Bipartisan Bayh Amendment*, *supra* note 18, at 1141-44.

towards the passage of the Amendment.³⁵ Scholars contributed constructively, especially John D. Feerick who provided the leading scholarly studies of the subject. Feerick's articles considering ratification were disseminated to members of Congress and state legislators. In addition, he advised key legislators like Senator Birch Bayh and Representative Richard Poff, as well as ABA officials, and helped direct crucial activities of the ABA to promote ratification.³⁶

Events also propelled the effort.³⁷ The Eisenhower inabilities during the 1950s and the Kennedy assassination on November 22, 1963 raised the visibility and perceived importance of presidential continuity, especially since they occurred during the atomic age. Although the Kennedy assassination primarily focused attention on the problems of presidential succession and vice-presidential vacancy, it also brought presidential inability issues to the forefront. It was, after all, very reasonable to imagine a scenario in which the President was permanently disabled rather than killed, and many participants in the discussion raised that hypothetical.³⁸

The Amendment also advanced due to the skillful and persistent efforts of Senator Birch Bayh. As the new chair of the Senate Subcommittee on Constitutional Amendments, he embraced the issue. Bayh was committed to improving on the status quo, and he dedicated himself to the issue.³⁹

Though one of the most junior members of Congress, having been first elected in November 1962 at age 34, Bayh did a masterful job of steering the measure through the Senate. Bayh's decision to incorporate provisions from the Eisenhower-Brownell proposal of the mid-1950s helped secure support and make it a bipartisan effort.⁴⁰ He adopted an inclusive approach to colleagues, which helped win important backing from Majority Leader Mike Mansfield and Senators Sam Ervin and key

35. See John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 *FORDHAM L. REV.* 1075, 1079-85, 1086-1104 (2017) [hereinafter Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*]; FEERICK, *supra* note 10, at 244-54; Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 27, at 1009.

36. See generally Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, *supra* note 35 (describing Feerick's activities).

37. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 27, at 1000 (describing historical events that lent urgency to issue).

38. See Goldstein, *supra* note 1, at 97 & n.123 (citing some references to specter of Kennedy disability).

39. See Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 27, at 1006-07; BIRCH BAYH, *ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION* (1968) (describing Bayh's legislative efforts).

40. See Goldstein, *The Bipartisan Bayh Amendment*, *supra* note 18, at 1146, 1149-54.

Republicans like Everett Dirksen, Roman Hruska, and Jacob Javits. In the House of Representatives, he worked closely with judiciary committee chair Emanuel Celler and also with Republicans William McCulloch and Richard Poff, both of whom played important roles in securing passage of the measure.⁴¹

Congress addressed the issue with a problem-solving spirit in which members were willing to subordinate their preferences to achieve consensus. In testifying before the Senate, on February 28, 1964, Feerick had eloquently argued that the lack of such an attitude had prevented a solution and that such an approach would be crucial. He said:

Perhaps one of the main reasons for the continued failure to solve this problem has been the great diversity of proposals. All have some merit. None is completely without objection. Each proposal has its adherents. No proposal has ever commanded enough support to be adopted. I am convinced that this problem can be solved. However, I am equally convinced that the problem will never be solved if the trend persists whereby each of us stubbornly adheres to his own point of view. If this problem is ever to be solved men must agree and if they are to agree, they must actively work at it. The time has come for those who are genuinely interested in the safety of this Nation to stop emphasizing those points on which they differ and to start emphasizing those points on which they agree. It is urgent that the problem be solved now. To miss this opportunity and again leave unsolved one of the most serious problems ever to confront the Congress would be to trifle with the security of this great Nation. Therefore, we must make every human effort to agree on a workable solution.⁴²

Bayh embraced the attitude Feerick recommended, as did others, and the spread of this disposition encouraged accommodation.

Although Representative Emanuel Celler had been working on the problem since the mid-1950s, long before Bayh entered Congress, he put aside any feelings of ownership that his seniority and prior efforts might have aroused to introduce in the House the measure Bayh championed in the Senate. Bayh and Celler recognized that only a bipartisan effort would attract the super-majority support needed at multiple stages. Bayh enlisted the help of former President Eisenhower, former Vice President Richard M. Nixon, and former Attorney General Brownell, and worked closely with Republican senators like minority leader Dirksen, Hiram Fong and Roman Hruska.⁴³ Celler collaborated closely with McCulloch and Poff,

41. *Id.* at 1159-68 (describing contributions of Republican legislators).

42. *1964 Senate Hearings*, *supra* note 31, at 150.

43. Goldstein, *The Bipartisan Bayh Amendment*, *supra* note 18, at 1146-61.

both of whom made significant contributions.⁴⁴ In addition to the bipartisan efforts, Bayh worked hard to involve prominent endorsers whose support would influence others—President Johnson, Eisenhower, Nixon, Brownell, and Katzenbach, and esteemed Senate colleagues like Mansfield, Dirksen, Sam Ervin, Jacob Javits, Philip Hart, and others. Legislators demonstrated a willingness to compromise in order to achieve agreement.⁴⁵ Although accommodations were evident on a range of issues, the most crucial instance occurred at the end, which was regarding some of the time periods included in Section 4 in which the Senate's resistance to time limits on debate and the House's insistence on some required mutual adjustments.⁴⁶

III. THE CONTENT OF THE AMENDMENT

A. *Responding to the Problems History Presented*

The Amendment addressed the Dickinson-Tyler problems which had prevented transfers of presidential power during prior presidential inability situations. Section 1 confirmed that the Tyler precedent applied to the three contingencies which necessarily prevented a President from discharging presidential powers and duties on a permanent basis but not to presidential inability.⁴⁷ It made clear, that when a President died, resigned, or was removed from office (but not when he was simply unable to discharge the duties), the Vice President became President. In giving textual recognition to the Tyler Precedent in the three non-presidential inability contingencies, Section 1 had two important consequences. By separating presidential inability from the other contingencies, it suggested that no presidential succession occurred upon presidential inability, a point Sections 3 and 4 made explicit. Section 1 also confirmed that since the Vice President became President following a presidential death, resignation, or removal, a vice-presidential vacancy developed in those three situations, thereby triggering Section 2, which provided a means to provide a new Vice President before the pending presidential term ended. Since no vice-presidential vacancy occurred under Sections 3 and 4, presidential inability presented no occasion to use Section 2.

44. *Id.* at 1156, 1162-66.

45. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 27, at 1005-06

46. See BAYH, *supra* note 39, at 282-304; FEERICK THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 100-01.

47. U.S. CONST. amend. XXV, § 1 (“In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”).

Unlike most of the Twenty-fifth Amendment, Section 2's primary focus is not on presidential inability.⁴⁸ Its creation reflected the conclusion that the vice presidency provided the best means to fill a presidential vacancy.⁴⁹ By creating a new mechanism to fill the vice presidency, Section 2 greatly reduced the likelihood that anyone other than a Vice President would succeed to the presidency.⁵⁰ Prior to the ratification of the Twenty-fifth Amendment, the vice presidency had been vacant, and someone other than the Vice President had been first in line, on 16 occasions during 16 of the 44 presidential terms (36% of the presidential terms) for 37 years and 3 months (or 20% of the American presidency).⁵¹ Since then, the second office has been vacant only 6 months, or less than 1% of the time.⁵² Section 2 is not alone in being responsible for this improvement, but it reduced the vice-presidential vacancy period substantially. For instance, during the Nixon-Ford term Section 2 shrank that time from 39 months (the time remaining in the term after Vice President Spiro T. Agnew's resignation on October 10, 1973) to only six months (the time the office was vacant between Agnew's resignation and Gerald R. Ford's installation and between Ford's succession to the presidency and Nelson A. Rockefeller's installation as his Vice President).

Yet Section 2 also made an invaluable contribution to handling presidential inability. The presidential inability provisions of the Twenty-fifth Amendment depend on a functioning Vice President. The Vice President is the only transferee of presidential powers and duties during a presidential inability under Section 3 and 4 of the Amendment. They specify the Vice President and accordingly do not govern a transfer to any other officer. Under Section 4, the Vice President is also the crucial decision-maker. Section 2 facilitates those presidential inability provisions by creating a means to reduce substantially the time the second office is unfilled and accordingly increase the time that they are operational.

48. U.S. CONST. amend XXV, 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.").

49. See Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 27, at 969, 986-87.

50. *Id.* at 1018.

51. GOLDSTEIN, *supra* note 7, at 229

52. *Id.*

Sections 3⁵³ and 4⁵⁴ responded directly to the problems posed by Dickinson's "Who the Judge?" question and by the Tyler Precedent. Regarding the former, they identified decision-makers and procedures which outlined who decided a presidential inability, how the decision was communicated, who assumed presidential powers and duties during the presidential inability, and how and when the President could resume those powers and duties. Section 3 provided a relatively uncontroversial procedure for situations in which a President voluntarily recognized a future or existing inability. By transmitting the prescribed public correspondence to independent officials in the legislative branch, the President could transfer presidential power and then reclaim it. Section 4 addressed the more complicated situation where a disabled President could not or would not, recognize his incapacity. In that situation, the Vice President and a majority of either the principal officers of the executive departments or such other body as Congress might create, could declare by a public transmission to legislative leaders that the President was disabled, in which case the Vice President "immediately" assumed the powers and duties of the presidency. The President could reclaim his powers by a written declaration of his fitness to the same legislative leaders "unless" the Vice President and a majority of the Cabinet heads "transmit within four days" a new declaration stating that the President is unable. In such a situation, Congress must resolve the issue within roughly three weeks with a two-thirds vote in each house necessary for the Vice

53. 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.").

54. U.S. CONST. amend. XXV, § 4 ("Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration 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.").

President to continue acting as President. Section 4 made clear that the Vice President remained in power during the four day period he and others had to consider a challenge to the President's "no inability" assertion and, if they issued one, within the time allowed Congress to resolve the dispute.⁵⁵

Sections 3 and 4 also confirmed that the Tyler Precedent did not apply to presidential inability. Rather, in case of a presidential inability, the Vice President exercised presidential powers and duties, but did not succeed to the presidency, and could discharge those responsibilities temporarily. The President retained the presidency and could resume the exercise of presidential powers and duties once the inability ended.⁵⁶ This constitutional clarification prospectively remedied the confusion the Tyler Precedent introduced.

Some have criticized the Twenty-fifth Amendment for not defining "unable to discharge the powers and duties of his office," the relevant criteria set forth in Sections 3 and 4.⁵⁷ Such criticisms are curious. Just as the original Constitution did not define "inability" or "disability," the words the Presidential Succession Clause used, the Twenty-fifth Amendment did not define "unable to discharge the powers and duties of his office."⁵⁸ The absence of a constitutional definition was deliberate.⁵⁹ Historically, that lack of definition had not prevented action because the existence of presidential incapacities had been clear. The creators of the Twenty-fifth Amendment concluded that it would be a mistake to provide a constitutional definition of the term which might inadvertently exclude

55. See Goldstein, *supra* note 1, at 125-49.

56. See *Id.* at 121-24.

57. See, e.g., Julia Azari, *What Does Invoking The 25th Amendment Actually Look Like?* FIVETHIRTYEIGHT (Apr. 19, 2018), <https://fivethirtyeight.com/features/what-does-invoking-the-25th-amendment-actually-look-like/> [<https://perma.cc/N589-JH65>] (stating that Section 4 "has a number of ambiguous phrases that leave it open to a range of possibilities" including regarding meaning of "unable" to discharge presidential powers and duties); 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> [<https://perma.cc/Z8NC-ESW7>] (stating that the Amendment is "ambiguous" including on when President is disabled); David Pozen, *The Deceptively Clear Twenty-fifth Amendment*, CONST. CTR. (Jul. 11, 2018), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxv/the-deceptively-clear-twenty-fifth-amendment-by-david-pozen/interp/42> [<https://perma.cc/W79R-R6TU>] (complaining that the terms "unable" and "inability" are not defined in the Twenty-Fifth Amendment or elsewhere in the Constitution).

58. U.S. CONST. art. II, sec. § 1, cl. 6.

59. 111 CONG. REC. 7941 (1965) (statement of Rep. Richard H. Poff) (stating that drafters of Section 4 considered definitional issues and determined it would be "unwise" to provide definition in Constitution); FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 32, at 112 (stating that lack of a constitutional definition was not an "oversight"); Goldstein, *supra* note 1, at 105-06 (discussing decision not to define terms and considerations underlying it).

some situation later decision-makers might think merited a transfer.⁶⁰ Rather than being prescriptive for the future, they thought it prudent to trust in the ability of future decision-makers to act conscientiously within the broad parameters of the constitutional language.

Moreover, the criticisms are mistaken. The Amendment did not ignore Dickinson's request for greater clarity regarding the meaning of the term (or its synonyms). The authoritative legislative materials associated with the Twenty-fifth Amendment provided very extensive guidance, leaving little doubt regarding many of the sorts of conditions to which Sections 3 and 4 applied. The clauses include a wide range of physical and mental incapacities.⁶¹ These situations could be produced by trauma, attack, injury, illness, surgery (whether elective or not), or emotional factors or could result from a degenerative process.⁶² These included situations in which the President was conscious, as well as unconscious, and where he was unwilling to acknowledge a disability, as well as when he was unable to do so.⁶³ They could be permanent or transient. They included disabilities created by logistical problems, such as a missing Air Force One or a kidnapped chief executive or one lacking communication with government.⁶⁴ As John Feerick explained, the terms in Sections 3 and 4 "are intended to cover all cases in which some condition or circumstance prevents the President from discharging his powers and duties and the public business requires that the Vice President discharge them."⁶⁵ Sections 3 and 4 were not intended to provide a no-

60. FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 112 (stating that framers decided that a "rigid constitutional definition was undesirable").

61. *Id.* at 112 (stating that the legislative record indicates that "unable" and "inability" applied to "all cases in which some condition or circumstance prevents the President from discharging his powers and duties and the public business requires that the Vice President discharge them"); *id.* at 112-117 (providing further discussion); Goldstein, *supra* note 1, at 99-103 (discussing Section 4's application to mental as well as physical inability with references to legislative record).

62. *See generally* FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 113, 115. *See, also Special Message to the Congress on Presidential Disability and Related Matters*, 1 PUB. PAPERS 101-02 (Jan. 28, 1965) (referring to "incapacity by injury, illness, senility, or other affliction" as targets of Amendment).

63. *See* Goldstein, *supra* note 1, at 106-12.

64. *See Presidential Inability and Vacancies in the Office of Vice President: Hearing on S.J. Res.1 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong., 20 (1965) [hereinafter *1965 Senate Hearings*] (statement of Sen. Birch Bayh) (referring to incapacities as including foreign travel, communications breakdowns, capture of the President, or "anything that is imaginable").

65. FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 112.

confidence mechanism⁶⁶ or a means for a President to escape his or her obligations.⁶⁷

The Twenty-fifth Amendment generally addressed the most important gaps regarding presidential inability which history had revealed as of the mid-1960s. It answered Dickinson's "Who is the Judge" question specifically by providing designated decision-makers and a process. It responded to Dickinson's definitional inquiry by providing a broad and flexible term as well as a legislative history suggesting examples and parameters. And it confined the Tyler Precedent to the three situations where the prior President could not return and made it inapplicable to presidential inability. In doing so, it eliminated the mischief the Tyler Precedent had inadvertently introduced into inability determinations.

B. A Sensible Approach to Presidential Disability Determinations

In addition to addressing the historical problems Dickinson identified and Tyler magnified, the Amendment provided a sensible approach. No one disagreed that the President should be able to declare his own disability and accordingly transfer powers to the Vice President temporarily. Allowing a President who transferred powers voluntarily to resume the functions of the office unilaterally gave the President greater incentive to recognize a disability and transfer presidential responsibilities to the Vice President under Section 3. A President who was sufficiently aware and concerned to acknowledge his or her own disability would be more likely to be reliable enough to determine its end. Moreover, Section 4 still provided a check. Although a President who declared his inability pursuant to Section 3 could reclaim powers and duties without challenge, the Vice President and Cabinet could invoke Section 4 after the President reclaimed powers if they thought he was "unable to discharge" presidential powers and duties.

Section 4, which provided for others to declare the President disabled and transfer power from him, aroused greater controversy. Some thought the initial decision to transfer power from the President should be made in the executive branch, either by the Vice President alone, or the Vice President and the President's Cabinet. Others thought the decision should be made outside of the executive branch, either by Congress, a commission consisting of government officials, or of medical personnel

66. *Id.* at 117; Goldstein, *supra* note 1, at 117.

67. FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 32, at 113.

or of some combination of the two groups.⁶⁸ Two leading scholars of the presidency, Clinton Rossiter and Richard Neustadt, thought the informal letter agreements provided the best approach.⁶⁹ Another proposal which was popular in some circles would have simply rebutted the Tyler Precedent regarding presidential inability and empowered Congress to legislate regarding presidential inability without addressing vice-presidential vacancy or providing procedures to handle presidential inability.⁷⁰

Any approach would have advantages and disadvantages. The great American philosopher, Yogi Berra, once captured the mistaken conceit of many reformers when he said that the way to eliminate the close plays at first base was to move first base back a foot.⁷¹ Just as moving a base simply relocates the close calls from one place to another without producing any net gain, virtually any reform eliminates some problems but accepts or creates others.

Entrusting the decision to the Vice President and a majority of the Cabinet presented some clear advantages. The relationship between the President and these officials encouraged confidence that the decision-makers would be knowledgeable about the President's condition and about affairs of state and accordingly would be well-positioned to determine whether a presidential inability declaration was advisable. Executive branch officials would be less likely to act due to hostility to the President or to usurp his power. These were natural concerns among reformers since the President owed his or her position to the operation of American constitutional processes. The relationship these decision-makers had to the President would support the legitimacy of a transfer of presidential powers and duties. A determination by the President's political family that he or she was disabled would carry weight with other officials and the public. The executive branch officials would be able to act quickly. Empowering executive branch officials to declare a President disabled would make a President more willing to acknowledge his own inability because doing so would not expose himself to later action by

68. See FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 51-63 (describing some of the proposals and positions).

69. 1964 Senate Hearings, *supra* note 31, at 168-69 (testimony of Prof. Neustadt); *id.* at 214-16, 219-20 (testimony of Prof. Rossiter).

70. FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 54-55.

71. Quoted in HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 203 (1990).

non-loyal decision-makers. And this arrangement would provide political comfort to a Vice President who might otherwise be reticent to act.⁷²

Of course, the loyalty of executive branch officials might make them more reluctant than independent decision-makers to declare the disability of the President. They might conceal a presidential inability. That risk might be greatest when the particulars regarding the President's condition were not widely known.

On the other hand, a commission might use presidential inability to harass a President for partisan reasons. A commission's decision that the President was disabled would lack the legitimacy of a decision by the President's executive branch associates. In clear cases of presidential inability, a commission would be unnecessary and probably slower than an executive branch approach. A congressional process, especially if the President's political adversaries controlled Congress, might present similar problems to a disability commission as well as introduce a new check in Congress's favor that could alter the balance between the legislative and executive branches.

The congressional enabling proposal also encountered serious objections. Congress might legislate in a way that would intrude on presidential prerogatives. More likely, Congress would take no action, and the nation would remain without procedures to transfer power from a disabled President. It seemed unfortunate to waste the momentum the Kennedy assassination had provided to do nothing more than to rebut the Tyler Precedent. And the states might have resisted ratifying an Amendment which essentially gave Congress a blank check to legislate on the topic rather than outlining some specific procedures.⁷³

In essence, both an executive branch and a commission approach had advantages and disadvantages. Neither approach would handle all imaginable circumstances equally well. Ultimately, the architects of Section 4 decided that the judgment should be made in the executive branch. They concluded that an executive branch arrangement would best handle the situations most likely to arise, without the perils of a disability commission.

But they hedged their bets by introducing some flexibility into the arrangement. Section 4 authorized Congress to replace the "principal

72. See, e.g., H.R. Rep. No. 89-203, at 13 (1965); S. Rep. No. 89-66, at 13 (1965). See also Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT* 165, 191-95 (Robert E. Gilbert, ed. 2000) (discussing considerations favoring inclusion of Vice President and Cabinet officers) [hereinafter Goldstein, *The Vice Presidency*].

73. See BAYH, *supra* note 39, at 55, 65, 67.

officers of the executive branch” as the Vice President’s partners in the decision with “such other body as Congress may by law provide.” The ABA blue-ribbon committee had suggested this innovation at its January 1964 meeting,⁷⁴ Bayh added it to his revised proposal (S. J. Res. 139) that spring⁷⁵ and the Senate Judiciary Committee approved it that summer.⁷⁶ Although the Vice President remained as a necessary participant in a Section 4 decision, the Amendment gave Congress power to legislatively modify the Vice President’s co-decision-maker to accommodate the lessons from future experience.

The inclusion of the “such other body” feature had both constitutional and political significance. Constitutionally, it avoided a future problem the framers of the Amendment had faced, the uncertainty regarding whether Congress could legislatively address presidential inability. The “such other body” provision authorized Congress not only to legislate, but to modify Section 4 by replacing the Cabinet with some other body to act in addition to the Vice President. Politically, the addition probably helped placate some who preferred an arrangement outside of the executive branch by leaving open the possibility of reverting to a partial non-executive decision-making body (or a different executive branch decision-maker) to act in the future with the Vice President.

Section 4 provided a mechanism whereby a President could reclaim presidential powers and duties when his incapacity ended but where other authorized decision-makers could prevent that from occurring if they disagreed with the President’s assessment of his condition. The framers sought to balance the desire that the President resume the powers and duties of his office if his inability had ended against the desirability of ascertaining that the circumstances which had precipitated the disability decision had been resolved. In essence, the Vice President and a majority of his fellow decision-makers could preclude the President from resuming power by contesting his declaration within four days, in which case Congress would referee the dispute. The President would return to power if either house failed to produce a two-thirds vote against his position within 21 days. The framers believed that such intra-executive disputes would rarely, if ever happen, and then only if the President was mentally unbalanced.⁷⁷

74. See FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 57-58 (reprinting ABA consensus statement including #4 with “such other body” innovation).

75. *Id.* at 71-75.

76. *Id.* at 75.

77. Goldstein, *supra* note 1, at 103.

IV. POST-RATIFICATIONS ENHANCEMENTS OF THE INABILITY PROVISIONS

Although the words of the Constitution, including its amendments, are fixed (until changed), they operate in a dynamic context. Institutional behavior and relationships, practices, and expectations change, and constitutional provisions must be implemented in conditions that differ from those in which they were created. In important respects, events during the fifty-plus years since the ratification of the Twenty-fifth Amendment have strengthened its presidential inability provisions.

In particular, the stunning development of the vice presidency during the last five decades should increase the likelihood that presidential inability will be recognized and addressed when it exists. The Amendment was based upon the premise that the office had grown, that it provided the optimal means of handling presidential succession and inability, and that it should be filled at all times.⁷⁸ Though accurate, the framers exaggerated the development of the vice presidency as of 1965. Yet beginning in 1977, the office did become an integral part of the President's inner circle, and since then, the Vice President has functioned as not simply a member of the executive branch, but as a close political and professional ally of the President who routinely works with the President's Cabinet and personal staff.⁷⁹ This development should make Presidents more willing to transfer power to their Vice President under Section 3 and should make other administration officials more comfortable contemplating such a move when presented with a presidential inability that exists but which the President does not or cannot declare.

Some constructive practices have developed to facilitate the use of the presidential inability provisions. Presidents have invoked Section 3 on three occasions when they underwent medical procedures during the Ronald Reagan and George W. Bush administrations and were prepared to use it on at least four other occasions during the Jimmy Carter, George H.W. Bush, Bill Clinton, and Barack Obama administrations.⁸⁰ These actions and preparations have established an expectation that a President

78. Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 526-40 (1995).

79. GOLDSTEIN, *supra* note 7, at 301-03.

80. *Id.* at 255-59 (discussing Section 3 transfers under Reagan and Bush and planning under Carter, Bush, and 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) (discussing consideration of using Section 3 before medical procedures of Presidents Carter, Bush, Clinton and Obama).

will transfer powers and duties to the Vice President in advance of a planned medical procedure involving general anesthesia.

To be sure, the record is not perfect. The Reagan administration failed to invoke Section 3 once, when it should have, when President Reagan was shot on March 30, 1981⁸¹ and botched the execution of Section 3 in 1985.⁸² The neglect during the assassination attempt might be explained by the fact that the administration was new and unprepared to deal with a presidential inability, and relations between principal officials had not yet been developed. Moreover, Vice President Bush was in Texas and communications between his plane and the White House were problematic.⁸³ On the latter occasion, President Reagan initially signed a letter suggesting that Section 3 was not the basis of his action and questioned whether it applied and later resumed presidential powers and duties prematurely. Regarding the former mistake, Reagan later said he used Section 3, he followed its procedures precisely, and it furnished the only basis to transfer powers to the Vice President and reclaim them. Regarding the early resumption, one hopes future administrations learn from this experience. Nonetheless, the use, and near-use, of Section 3 has developed a practice of invoking it when the President has surgery under general anesthesia.⁸⁴ History, both subsequent⁸⁵ and prior,⁸⁶ suggests some other scenarios where Section 3 would be appropriate as has popular culture.⁸⁷

Section 4 has not yet been used, yet some positive developments have occurred. The White House Counsel's office had not yet completed preparing a volume regarding the Amendment to cover contingency

81. See, e.g., Nancy Kassop, "The Law": *When Law and Politics Collide: Presidents and the Use of the Twenty-Fifth Amendment*, 35 PRESIDENTIAL STUD. Q. 147, 155-57 (2005) (describing events and decision-making following shooting of Reagan).

82. Goldstein, *Taking from the Twenty-Fifth Amendment*, *supra* note 27, at 977-80.

83. See GOLDSTEIN, *supra* note 7, at 253-54 (discussing impediments to transfer following Reagan assassination attempt).

84. See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 32, at 196-99.

85. Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 99-102 (2010) (suggesting that Section 3 might be used by a President recovering from substance abuse, bereavement, or preoccupied with impeachment proceedings) [hereinafter Goldstein, *Akhil Reed Amar and Presidential Continuity*]

86. *Id.* at 99-100 (suggesting that Section 3 would apply to a President recuperating from illness or injury or experiencing bereavement).

87. *Id.* at 100-01 (suggesting that President Jed Bartlett properly declared himself unable to discharge presidential powers and duties in episode of *The West Wing* where terrorists kidnapped his daughter and ought to negotiate with him, although absence of Vice President took this example out of Section 3).

planning at the time of the Reagan assassination attempt,⁸⁸ but it subsequently did.⁸⁹ The Office of Legal Counsel issued some useful memoranda regarding the operation of Sections 3 and 4.⁹⁰ President George H.W. Bush held a meeting to discuss its use with his Vice President, Dan Quayle, and other interested parties, in April 1989.⁹¹ The contingency books have been transmitted from administration to administration. Although they contain some imperfections, which I plan to discuss in a future article, they represent a positive development. Officials in the Trump Administration have apparently discussed Section 4 and whether it should be invoked.⁹² Various outside groups have studied the presidential inability provisions and have made some constructive suggestions.⁹³

The process of implementing constitutional procedures often occurs over protracted periods of time as officials learn from and react to their own acts and omissions and those of their predecessors. There is no reason to believe that such a process will not occur regarding presidential inability.

Even as we expect such a process to occur, it is important to keep in mind some inherent limitations of any arrangement to deal with the transfer of presidential powers and duties during a period of presidential inability. First, any such presidential inability is likely to subject decision-makers, implementers, other government officials, and citizens to situations that are unique and unusually stressful. The novelty and stress would vary with the range of scenarios, extending from a routine planned procedure to a shooting, acute serious illness, or deranged President. Second, although Section 3 and 4 transfer presidential powers and duties to the Vice President, government will not function normally under either a Section 3 or 4 situation. The person exercising presidential powers and duties will not be the President, he or she will have a different political status and reputation and will be dealing with and relying on associates

88. Fred F. Fielding, *Keynote Address: An Eyewitness Account of Executive "Inability,"* 79 *FORDHAM L. REV.* 823, 828 (2010)

89. *Id.*

90. *See* GOLDSTEIN, *supra* note 7, at 252-53 (describing OLC memoranda).

91. *Id.* at 257-58 (describing Bush contingency planning); Kassop, *supra* note 81, at 154.

92. Devan Cole, *McCabe confirms talks held at Justice Dept. about removing Trump*, CNN (Feb. 14, 2019) <https://www.cnn.com/2019/02/14/politics/andrew-mccabe-obstruction-of-justice/index.html> [<https://perma.cc/KAR6-XHYH>].

93. *See, e.g.*, YALE LAW SCHOOL RULE OF LAW CLINIC, *THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER'S GUIDE* (2018); Second Fordham University School of Law Clinic on Presidential Succession, *supra* note 80.

who were commissioned by the incapacitated leader.⁹⁴ The circumstances will further constrain the Vice President's behavior as Acting President.⁹⁵ When the President invokes Section 3 before a routine procedure or any situation in which she is expected to recover in a few days or weeks, the transfer to the Vice President is largely designed to make sure that a functional constitutionally authorized person is positioned to take emergency action to defend the United States or its interests. Otherwise, the Vice President in such a situation will do little that she could not normally do.⁹⁶ Her primary role, in Clinton Rossiter's memorable phrase, is to "keep the shop."⁹⁷ Where the President is temporarily unconscious or conscious but not at his best, a Vice President, as Acting President, is likely to defer any significant action that can be postponed for later presidential decision so as to avoid the awkwardness of a later presidential reversal or second-guessing.⁹⁸ A Vice President acting in a situation in which the unconscious President is maintained by technological life support which doctors agree he will never escape would occupy a quite different situation in which his actual powers would approximate those the Constitution confers.⁹⁹ There are a range of possibilities, but in most the Vice President as Acting President would be likely to act in a far more restrained manner than would the President.

The presidential inability provisions make an important contribution to ensuring presidential continuity. They should be invoked when a President is "unable to discharge the powers and duties of" the presidency. In many situations, however, the Vice President as Acting President is likely to do very little different than what he or she would have done simply as Vice President.

V. GAPS IN, AND CRITICISMS OF, PRESIDENTIAL INABILITY PROVISIONS

It is worth saying a bit in response to some recent criticisms of the presidential inability provisions of the Twenty-fifth Amendment. Much of the negative comment is either improperly directed at the Amendment or based on mistaken readings of the Amendment or its record. Whereas the preceding discussion implicitly responds to some complaints, the

94. GOLDSTEIN, *supra* note 7, at 225 (describing some limits on Vice President acting as President).

95. Goldstein, *The Vice Presidency*, *supra* note 72, at 198.

96. *Id.* at 199-200.

97. CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 214 (1960).

98. Goldstein, *The Vice Presidency*, *supra* note 72, at 198-200.

99. *Id.* at 198-99. An Acting President in that situation would not be able to fill a vice-presidential vacancy since none would exist.

remainder of this section answers some criticisms that have recently appeared.

A. *Vice-Presidential Inability*

To be sure, the inability provisions of the Twenty-fifth Amendment left some gaps. They only apply when there is a functioning Vice President. They accordingly cannot operate when the second office is vacant or when the Vice President is disabled.¹⁰⁰ They do not provide a means to declare a Vice President disabled, whether he is functioning in his normal governmental capacity as Vice President, or additionally as Acting President. This gap could create significant problems.¹⁰¹ For this reason, Vice President Dick Cheney, to his credit, prepared a letter of resignation to be delivered to President George W. Bush if Cheney became disabled.¹⁰² Cheney had suffered four heart attacks before he became Vice President, and another shortly after leaving office, and he recognized that his incapacity due to a heart or other issue could compromise America's inability provisions.¹⁰³

Although these, and other gaps reflect deficiencies in America's system for handling presidential succession and inability, they cannot be attributed to the Twenty-fifth Amendment, nor can its architects be blamed for not addressing them. The framers of the Twenty-fifth Amendment recognized these¹⁰⁴ and other deficiencies¹⁰⁵ in provisions for handling presidential succession and inability but made a strategic decision not to address them in that provision. They concluded that an effort to solve all problems would substantially decrease the likelihood of

100. Goldstein, *Akhil Reed Amar and Presidential Continuity*, *supra* note 85, at 71-72.

101. See generally Roy E. Brownell II, *Vice-Presidential Inability: Historical Episodes That Highlight a Significant Constitutional Problem*, 46 *PRESIDENTIAL. STUD. Q.* 434 (2016) (presenting comprehensive historical discussion and analysis of problem). See also Roy E. Brownell II, *What to do if Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 *FORDHAM L. REV.* 1027 (2017) (discussing ways to deal with problem under current legal regime).

102. DICK CHENEY WITH LIZ CHENEY, *IN MY TIME* 320-22 (2011).

103. *Id.* at 320 (discussing concern regarding consequences regarding presidential continuity of vice-presidential inability).

104. See, e.g., *Presidential Inability: Hearings on H.R. 836 et al Before the H. Comm. on the Judiciary*, 89th Cong., 5(1965) [hereinafter *1965 House Hearings*] (statement of Rep. William McCulloch) (recognizing that proposed Amendment did not address simultaneous presidential and vice-presidential inability or presidential inability absent a *Vice President*); 111 *CONG. REC.* 3253 (1965) (statement of Sen. Bayh and Hruska) (recognizing Amendment's failure to address vice-presidential disability).

105. *1965 House Hearings*, *supra* note 104, at 5 (statement of Rep. William McCulloch) (recognizing lack of provisions regarding deaths of successful presidential and vice-presidential candidates between popular vote and inauguration).

solving any problems. Amending the Constitution presented an arduous and daunting task. The major challenges regarding presidential inability had resisted solution for 180 years in large part due to a failure to reach consensus regarding the proper remedies. The framers of the Twenty-fifth Amendment found that broadening the scope of the Amendment made success less likely. For instance, in the absence of a functioning Vice President, the American Bar Association's initial proposal called for the person next-in-line after the Vice President to be able to discharge presidential powers and duties or participate in a disability determination.¹⁰⁶ Yet addressing that issue jeopardized the entire project. Some senators, including Bayh, wanted to remove legislative leaders from the line of succession and place the Secretary of State and other Cabinet officials after the Vice President. Many in the House of Representatives saw that proposal as an affront to the Speaker of the House of Representatives, both the institution and particularly its then occupant, and strenuously opposed it. Any attempt to extend the disability provisions beyond the Vice President necessarily engaged that intractable issue. Rather than pursue an issue that threatened to kill any chance of progress, Bayh and his colleagues decided to narrow their focus. Whereas history indicated that the lack of a designated decision-maker and the Tyler Precedent presented recurring presidential inability problems, those relating to a disabled Vice President had not occurred and seemed more remote. The framers prudently thought it better to address the most important and likely problems rather than allow the pursuit of a perfect fix to prevent any headway.

The challenges are greater if the Vice President is disabled than if the office is vacant, although both situations offer some complexity.¹⁰⁷ If the vice presidency is vacant, the person next-in-line, currently the Speaker of the House of Representatives, would be a potential transferee of presidential powers and duties. The Tyler Precedent would not be a concern because the Constitution clearly provides that an "officer" Congress designates to follow the Vice President only acts as President and only until the disability ends.¹⁰⁸ But the absence of procedures presents a gap in a situation where the President was unable or unwilling

106. See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 32, at 57-58 (quoting ABA consensus which includes "person next in line of succession" as potential transferee and decision-maker).

107. Goldstein, *Akhil Reed Amar and Presidential Continuity*, *supra* note 85, at 71-72.

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

to declare his inability. Could the Speaker of the House, as the person next in line, make the determination alone, or would she or he need the support of a majority of the heads of the executive departments as under Section 4? Some believe the law designating the Speaker as next-in-line of succession is unconstitutional, either on textual or structural grounds, although the constitutional argument is subject to some powerful counterarguments.¹⁰⁹ Yet the possibility of a change in partisan control of presidential powers and duties does raise some troubling issues.

The larger problem arises if the vice presidency is occupied but its occupant is disabled. It is more difficult to see the way forward in that situation. The disabled Vice President could not be an effective transferee of presidential powers and duties under Section 3 or 4. Yet there is no mechanism in such a situation for the President to transfer powers and duties voluntarily to the next in line since that person's standing depends on the inability of the Vice President yet law provides no clear means to determine that incapacity. And it is not clear how the next-in-line could determine that the President was disabled because there are no procedures to declare the Vice President disabled, and accordingly, the Vice President would retain the disability declaring powers Section 4 confers.

It is certainly unfortunate that these gaps remain 52 years later. But that is not an indictment of the Twenty-fifth Amendment or those who produced it. It and they accomplished a lot and as much as could be done in one effort. It is unfortunate that Congress has not addressed these other issues relating to vice-presidential inability during the last five decades. It should.

B. *Alleged Ambiguities*

Unlike these criticisms which address clear gaps, other negative assessments of the disability provisions of the Twenty-fifth Amendment target perceived ambiguities. They are no more persuasive.

1. Who are the "Principal Officers of the Executive Departments"?

Some have criticized Section 4 as ambiguous regarding who acts with the Vice President.¹¹⁰ These criticisms are misguided. Historian

109. Goldstein, *Akhil Reed Amar and Presidential Continuity*, *supra* note 85, at 83-94 (discussing constitutional and other objections to legislative succession).

110. See, e.g., 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> [<https://perma.cc/5R9Z-64K4>] (claiming that Section 4 is "ambiguous" regarding who are the 'principal officers of the executive departments,' and would prompt litigation);

Joshua Zeitz has suggested that the phrase could include those given the status of Cabinet members, although they do not head an executive department. Yet the text of the Amendment rebuts this suggestion. It does not empower the Cabinet, but only those Cabinet members who are “principal officers of the executive departments” which, for instance, the chief of staff and other non-department heads, who sometimes are given Cabinet status, clearly are not. Indeed, the framers of Section 4 spent considerable time discussing this issue¹¹¹ and specifically rebutted the suggestion that such figures were included.¹¹² They repeatedly made clear that the phrase refers to the presidential appointees who direct the executive departments identified in 5 U.S.C. 1 or any such departments established in the future.¹¹³ The Office of Legal Counsel for the Department of Justice, which often renders constitutional interpretations the executive branch views as authoritative, has shared this conclusion for 34 years.¹¹⁴ The Supreme Court reached that conclusion in dicta in 1991.¹¹⁵ It is less certain whether an undersecretary or acting head could participate, but that is an issue that arises at the margins. It is hard to imagine how, realistically speaking, the identity of the basic decision-makers could have been made much clearer.

David Pozen, *The Deceptively Clear Twenty-fifth Amendment*, CONST. CTR. (Jul. 11, 2018), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxv/the-deceptively-clear-twenty-fifth-amendment-by-david-pozen/interp/42> [<https://perma.cc/V9QY-ZJEC>] (stating that phrases “principal officers” and “executive departments” are ambiguous).

111. FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 32, at 117 (stating that few subjects received such extensive treatment in the legislative record as the identification of the Section 4 decision-makers who acted with the Vice President).

112. Goldstein, *supra* note 1, at 118-21 (describing the legislative history on this subject).

113. H.R. REP. 89-203, at 3 (1965) (stating that term was limited to “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”); 111 CONG. REC. 3283 (statement of Sen. Birch Bayh) (confirming that “heads of the executive departments” referred to those identified in 5 U.S.C. 1 and 2); *id.* at 7941 (statement of Rep. Richard H. Poff) (identifying Section 4 decision-makers as Vice President and Cabinet members who headed executive departments and were identified in specific statute); *id.* at 7944 (statement of Rep. Emanuel Celler) (same); *id.* at 7944-45 (statements of Rep. Celler and Rep. Basil L. Whitener) (same); *id.* at 7946 (statements of Rep. Celler and Rep. Edward Hutchinson) (same); *id.* at 7945 (statement of Rep. William McCulloch) (agreeing with Rep. Celler’s definition).

114. *Operation of the Twenty-fifth Amendment Respecting Presidential Succession*, 9 Op. O.L.C. 65, 69 (1985).

115. *Freytag v. Comm’r*, 501 U.S. 868, 887 (1991) (stating that the department heads listed in 5 U.S.C. 101 are the “principal officers of the executive departments” referred to in Section 4).

2. Section 4 and the Unwilling But Conscious Disabled President

Some have argued that Section 4 of the Amendment is limited to situations where the President is unable to declare his own inability.¹¹⁶ Consistent with this narrow reading, some recent writers would confine Section 4 to situations like President Kennedy's condition between his shooting and death,¹¹⁷ or when a President was "unable to communicate, or curled up in a fugue state,"¹¹⁸ or to Presidents who were "terminally ill, in a coma, near death, or severely mentally incapacitated."¹¹⁹ These situations clearly constitute situations in which a President is "unable to discharge the powers and duties" of the office, yet they rest on a mistaken premise that excludes situations where a disabled President is able but unwilling to recognize his incapacity. They do not provide an exhaustive list.

To begin with, such dramatic limitations are inconsistent with the text of Section 3 and 4. Section 4 is not limited to situations in which the President cannot communicate that he is unable. Rather, its text adopts the far broader formulation that presidential powers and duties are transferred "Whenever" the designated decision-makers transmit the prescribed written declaration that "the President is unable to discharge the powers and duties of his office." Three points are worth noting. First, the test is the President's inability to discharge presidential powers and duties, not his inability to make or communicate or even to do so rationally. Second, the determination of presidential inability is committed to decision-makers, initially designated by the Constitution but potentially determined in part by Congress. Accordingly, the power to determine when the President is "unable" is committed to the designated decision-makers.

116. See, e.g., Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 462 (2009) (arguing that Section 4 only applies when President "is so severely impaired that he is unable to make or communicate a rational decision to step down temporarily of his own accord"); 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> [<https://perma.cc/LB27-EEGZ>] (stating 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").

117. Jonathan Zimmerman, *What Liberals Can Learn from Conservatism*, NEW REPUBLIC (Dec. 11, 2017), <https://newrepublic.com/article/146192/liberals-can-learn-conservatism> [<https://perma.cc/8PY4-WZRE>].

118. 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> [<https://perma.cc/ZC94-VKQT>].

119. 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/> [<https://perma.cc/89JA-82ES>].

That is not to say that they are free agents, but they must interpret the standards in accordance with the text, legislative and other relevant history, structural arguments, and facts. Finally, the transfer occurs “Whenever” the decision-makers determine the President is “unable,” not simply on extreme cases when he or she cannot so communicate.

The context surrounding the adoption of Sections 3 and 4 reveal their breadth. They responded not simply to the Kennedy assassination scenario but to Eisenhower’s three disabilities and to the earlier Garfield and Wilson disabilities. The Garfield, Wilson, and Eisenhower disabilities involved few moments where the President was unconscious or near death yet were frequently referenced as situations in which presidential inabilities existed and in which power should have been transferred.

The legislative history reinforces the text’s breadth. The legislative record is replete with references that confirm that Section 4 was to apply when a disabled President was unwilling to declare his incapacity, as well as when he was unable to do so.¹²⁰ To be sure, in one colloquy Bayh gave a narrower definition of “unable” to refer to “an impairment of the President’s faculties” which made him “unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office.”¹²¹ Yet later in the same day’s discussion, Bayh stated a broader formulation,¹²² and when the Senate debated the Conference Report which contained the final version of the Amendment, he made clear that inability addressed the “physical or mental inability to exercise the powers and duties” of the presidency, not simply the inability to make or communicate such a decision.¹²³ Similarly, the leaders of the effort in the House made clear that Section 4 referred to situations where the President was unwilling, as well as those where he was unable to declare an inability.¹²⁴ As states considered ratification, proponents of the Amendment widely circulated articles Feerick wrote after Congress proposed the Twenty-fifth Amendment, which stated that Section 4 applied when the President was unwilling or unable to declare his own

120. See generally Goldstein, *supra* note 1, at 106-11 (describing legislative history showing broader understanding of scope of Section 4).

121. 111 CONG. REC. 3282 (1965).

122. *Id.* at 3282-83.

123. 111 CONG. REC. 15,381 (1965) (statements by Sen. Robert F. Kennedy and Sen. Bayh).

124. 111 CONG. REC. 7938 (1965) (statement of Rep. Emanuel Celler) (Section 4 addressed situations where the President was “unwilling or unable to declare his inability”); *id.* at 7942 (statement of Rep. William McCulloch) (stating that Section 4 applied when the President “should fail to” declare an inability or was “too ill to do so”); *id.* at 7941 (statement of Rep. Richard H. Poff) (stating that Section 4 applies when 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”)

inability.¹²⁵ Framers, like Bayh and Feerick, have stated in subsequent writings that Section 4 applies when a President refuses to recognize an inability, as well as when he is unable to do so.¹²⁶

A review of Section 4 in its entirety confirms these conclusions from the text and legislative record.¹²⁷ Section 4 allows the Vice President and majority of the principal officers of the executive departments to challenge a President's declaration that "no inability exists," even though such a President must obviously be conscious enough to sign and dispatch such a statement. The Amendment recognizes that although such a President is obviously not in a coma, a fugue state, unconscious, or in anything approaching the condition JFK was in between the shooting and his death, his ability to exercise presidential powers and duties still might be compromised and subject to challenge. The Amendment provides that such a President can be prohibited from resuming the powers and duties of the office for close to a month unless the Vice President, 50% of the Cabinet, or a house of Congress agree with his position. Can one really make a straight-faced argument that the same Amendment, which would impose so many hurdles to a conscious President resuming power for so long, would prevent the President's associates from declaring such a President disabled in the first place?

3. Can the President Immediately Resume Presidential Powers

Finally, some argue that the Section 4 procedures are ambiguous in arguably allowing a President to resume presidential powers and duties immediately upon his "no inability" declaration without waiting for the

125. See John D. Feerick, *The Proposed Twenty-fifth Amendment to the Constitution*, 34 *FORDHAM L. REV.* 173, 199-200 (1965) (stating that Section 4 applies when "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 applies when "the President is unable to declare his own inability or . . .refuses to do so when disabled."); American Bar Association and John D. Feerick, *Presidential inability and Vice Presidential Vacancy: With Questions and Answers* (1965) (stating that Section 4 applies when the President "is unable. . .or. . .refuses to declare his inability").

126. See, e.g., 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 applies when the President "is unable or unwilling" to declare his own disability); Birch Bayh, *The Twenty-fifth Amendment: Dealing with Presidential Disability*, 30 *WAKE FOREST L. REV.* 437, 441 (1995)(stating that Section 4 applies "when the President is unable or unwilling to act"); FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 32, at 115 (stating that Section 4 applies when the President "cannot or does not" declare his own inability); John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-fifth Amendment*, 79 *FORDHAM L. REV.* 907, 925 (2010) (stating that Section 4 applies when the President "cannot or refuses" to declare his disability).

127. See Goldstein, *supra* note 1, at 111-12.

passage of the four days the Amendment gives the Vice President and Cabinet to respond.¹²⁸ In fact, the text, legislative history, and structure of Section 4 make clear that notwithstanding the President's declaration of his fitness, the Vice President continues to exercise presidential powers and duties during the four day period unless the Vice President and/or a majority of the Cabinet acquiesce in the President's determination.

It is, of course, true that some scholars have either misunderstood the provision or concluded that it was unclear. It is also true that the clause might have been formulated more clearly. A proposal by Poff, for instance, provided that following the President's "no inability" declaration, he would "resume" presidential powers and duties "on the second day of making such announcement, or at such earlier time" as the President and Vice President agreed, unless the Vice President and a majority of the Cabinet challenged the President's "no inability" declaration, in which case the Vice President would continue acting as President pending Congressional action within ten days.¹²⁹

Yet a clause does not become ambiguous simply because some have misconstrued it or because it might have been better stated. Section 4 would only be ambiguous if a review of it in its entirety and surrounding evidence allowed an alternative reasonable interpretation regarding who exercises presidential power during the four day period. A reading of Section 4 in its entirety, the legislative record, and consideration of structural considerations makes clear that there is only one possible reasonable conclusion.

The text of Section 4 provides that if the President transmits a "no inability" declaration, he "shall resume the powers and duties" of the presidency "unless the Vice President" and a Cabinet majority transmit a contesting statement "within four days." The better reading of this textual fragment understands that the President's resumption does not occur immediately but is contingent upon the nonoccurrence of the condition, i.e. the contesting letter from the Vice President and a majority of the

128. See, e.g., David Faris, *Could the 25th Amendment Really Remove Trump from Office?*, THE WEEK (Aug. 17, 2017), <https://theweek.com/articles/718950/could-25th-amendment-really-remove-trump-from-office> [<https://perma.cc/67UF-V6AT>]; Julia L. Ernst, *John F. Kennedy and Constitutional Aspects of Presidential Succession*, 76 U. PITT. L. REV. 63, 82 n.116 (2014) (arguing that Section 4 is sufficiently ambiguous to support a "plausible" argument that President resumes power following his "no inability" assertion). See also 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 including problem as a "constitutional cliffhanger").

129. H.R.J. Res. 3 (1965).

principal officers.¹³⁰ That reading becomes inevitable, as a textual matter, when other textual clues are considered. To begin with, the text does not provide that the President resumes power “immediately” as the proposed alternative concludes. The omission is significant because Section 4 uses that precise adverb in the preceding sentence when the Vice President initially takes power. If Section 4 intended the President resume power “immediately,” it would have used that word.

Moreover, for the President to resume and then be divested of power, the clause would need to provide that he “shall resume unless and until” the Vice President and Cabinet majority dispatch the contesting letter. Yet the text does not include “until” in Section 4, an omission that becomes more significant because the Amendment includes that very word in Section 3 to end the Vice President’s discharge of presidential powers. Indeed, “until” was added in Section 3 to make clear that a President who voluntarily transferred power under that provision would not be subject to the challenge process applicable to Section 4. Instead, he would return immediately upon his “no inability” declaration. If Section 4 intended the President to resume power and then be divested if and when the Vice President and Cabinet majority challenged his “no inability” declaration, it would have said that the President “immediately resumes” presidential powers and duties “unless and until” the Vice President et al transmit the contesting letter. It did not.

Finally, the text makes it clear that if the Vice President and Cabinet majority challenge the President’s “no inability” declaration the Vice President remains in power while Congress considers the challenge. Yet the language of Section 4 nowhere provides that the Vice President returns to power once she and the majority of the principal officers issue their letter challenging the President’s “no inability” declaration. If the President resumes power upon his declaration, how does the Vice President return so she can be acting President while the houses of Congress deliberate? Section 4 in its entirety is consistent with the conclusion that the Vice President remains in power during the four-day period and is inconsistent with the contrary interpretation that the President resumes power until the challenging declaration because it nowhere provides for the Vice President to return after being divested.¹³¹

The textual argument when read in context is simply overpowering. As strong as it is, the legislative history is even more one-sided.¹³² It

130. Goldstein, *supra* note 1, at 128-30.

131. Goldstein, *supra* note 1, at 128-31.

132. *Id.* at 130-44.

supports the conclusion that the Vice President continues to exercise powers during the four day period. During Congressional hearings and debates, important framers of the Amendment including Bayh, Celler, Brownell, Katzenbach, Professor Paul A. Freund, and Feerick all stated that the Vice President remained in power during the period the Vice President and Cabinet were given to decide on their response to the President's "no inability" declaration.¹³³ So did other congressmen who expressed a position on the subject.¹³⁴ The Committee Reports echoed that interpretation.¹³⁵ The House of Representatives even considered, and rejected, an amendment that would have allowed the President to act during the period, a proposal that would not have been offered if anyone thought Section 4 as written did that.¹³⁶ No one in congressional debates or hearings expressed the interpretation that the language in Section 4 allowed the President to resume power and then be divested. Feerick's articles which were circulated during the ratification period expressed the same interpretation, that the Vice President continued to discharge presidential powers and duties.¹³⁷

It requires no imagination to appreciate the considerations behind this universal interpretation, especially because the legislative record repeated them on multiple occasions. An interpretation that left the Vice President in power, pending the response to the President's assertion, gave greater certainty that the person discharging presidential powers and duties was able to discharge those powers and duties and minimized the number of transfers and accordingly contributed to stability.¹³⁸ Moreover, an interpretation that would allow the President to resume immediately, pending a decision regarding his fitness, would undermine the operation of the entire procedure by allowing the President to remove Cabinet officials who questioned his capacity, thereby preventing the procedure from functioning.¹³⁹ It is, of course, a basic principle of constitutional interpretation that the Constitution should be interpreted in a manner to allow the "beneficial execution" of its provisions absent a clear textual

133. Goldstein, *supra* note 1, at 132-40, 141-44.

134. *Id.* at 139-41.

135. S. Rep. No. 88-1382, at 12 (1964); S. Rep. No. 89-66, at 3, 14 (1965); H.R. Rep. No. 89-203, at 2-3 (1965). *See generally* Goldstein, *supra* note 1, at 132-33, 135-36, 138-39.

136. 111 CONG. REC. 7966 (1965).

137. Feerick, *Proposed Amendment*, *supra* note 125, at 917; Feerick, *Proposed Twenty-fifth Amendment*, *supra* note 125, at, 200-01; American Bar Association & Feerick, *supra* note 125, at 4 (stating that President only resumes power if his declaration is not contested by Vice President and Cabinet majority within four days).

138. Goldstein, *supra* note 1, at 143-44.

139. *Id.* at 144.

command to the contrary.¹⁴⁰ Chief Justice John Marshall expressed that precept in *McCulloch v. Maryland*, and it remains if anything more compelling two centuries later in this, its bicentennial year.¹⁴¹

VI. CONCLUSION

The presidential inability provisions of the Twenty-fifth Amendment represented an important contribution to ensuring presidential inability. They addressed constitutional gaps which history exposed and which put the nation at risk, especially as the world became smaller and the absence of effective executive leadership more threatening. The Amendment required a major legislative effort in which the challenges of constitutional amendment limited the issues that could be addressed. It dealt with the major issues regarding presidential inability and succession and it did so in a thoughtful, constructive, and clear way. It is odd that some complain that the Amendment did not define its terms. The Constitution doesn't. To do so would run counter to its nature as an outline to endure for centuries, rather than as a highly prescriptive code. Yet the Amendment and its legislative history provided ample direction on significant issues for those willing to engage them.

The presidential inability provisions, of course, are not self-executing. They provide procedures for government officials to implement. They depend on conscientious performance by governors, and on engaged citizenship by the governed.

Yet they offer a set of procedures that rescue the United States from some of the gaps of the original Constitution and some of the problems history introduced. They enable America to better ensure that it will have functioning executive leadership. That is something to celebrate in the Amendment's Golden Jubilee.

140. 17 U.S. (4 Wheat.) 316, 415 (1819)

141. *Id.* at 408-09.