

*SYMPOSIUM: 50 YEARS WITH THE 25TH AMENDMENT*

**SECTION FOUR OF THE TWENTY-FIFTH AMENDMENT:  
EASY CASES AND TOUGH CALLS**

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I have always liked the old joke about the professor attending a presentation on a cure for cancer. During the Q & A he raised his hand and said, “I am sure that will work perfectly in practice . . . but how would it work in theory?” I enjoy theoretical discussions as much as the next person, but I am very happy to be here discussing Section 4 of the Twenty-fifth Amendment, one of the most practical provisions in the Constitution. The potential practical effects of Section 4 loom so large that when people talk about “the Twenty-fifth Amendment” nowadays, they are generally referring only to Section 4, even though it is the only section of the amendment that has never been used.<sup>1</sup>

In most constitutional law cases, the question is, “Can the government do this thing?” For constitutional procedures like Section 4, though, the most consequential question is, “How would this actually play out—in practice?” That will be my focus today.

I begin with an analogy to another constitutional procedure: impeachment. Gerald Ford famously said, “an impeachable offense is whatever a majority of the House of Representatives considers [it] to be,”

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1. Section 1 confirms that if the President dies, resigns, or is removed, the Vice President becomes President, not just acting President. U.S. CONST. amend. XXV, § 1. It was used when President Ford succeeded President Nixon. Section 2 allows the President to nominate a Vice President to fill a vacancy in that office, to be confirmed by simple majorities in the House and Senate. U.S. CONST. amend. XXV, § 2. It was used when Vice President Agnew resigned and President Nixon nominated Gerald Ford to replace him, and again when President Ford succeeded to the presidency and nominated Nelson Rockefeller to replace himself. Section 3 allows the President to declare himself “unable to discharge the powers and duties of his office,” transferring power to the Vice President as acting President, and then to declare himself recovered and retake power immediately. U.S. CONST. amend. XXV, § 3. It was used once by President Reagan and twice by President George W. Bush while they were sedated briefly for medical procedures. *See* JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 197–98, 202–03* (3d ed. 2014) (describing these incidents).

and, “conviction results from whatever offense . . . two-thirds of the [Senate] considers to be sufficiently serious.”<sup>2</sup> To some, Ford’s formulation is lawless, substituting congressional whim for the Constitution’s specification of “high crimes and misdemeanors.”<sup>3</sup> But the legal bar for something to be a high crime or misdemeanor is actually quite low. Any history buffs here can probably identify an impeachable offense committed by almost any given President.

So why have only two Presidents (leaving Nixon aside) ever been impeached, with neither being convicted? Because an impeachable offense is only what a majority of the House is willing to say is one, and conviction occurs only when two-thirds of the Senate is willing to remove the President in the middle of his term. They have not been willing. By using this structure, the Constitution makes Presidential impeachment foremost a question of political reality and policy judgment, not one of legal interpretation. This limits removal to a small subset of the cases that the actual legal standard of “high crimes and misdemeanors” might permit.

Section 4’s framers did the same thing. We can and should debate the legal question of what Section 4’s key word, “unable,” can cover.<sup>4</sup> But Section 4’s defining characteristic is how simple the structure makes it to strip a President of his power when he cannot object, and how hard the structure makes it when he does object. In those hard cases, Section 4 becomes foremost a question of political reality and policy judgment, not one of legal interpretation, and the President will only be displaced in a small subset of the cases that the actual legal standard of “unable” might permit.

## I. EASY CASES

The easiest Section 4 cases would involve a President who is unconscious or unable to communicate coherently, and who will be for some time. These Presidents are indisputably “unable to discharge the powers and duties of [their] office.”<sup>5</sup> We can presume that the Vice President and Cabinet would invoke Section 4 promptly. The President would not contest the action, because he would not be able to. Section 4 wants these cases to be easy and they would be, transferring power quickly

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2. 116 CONG. REC. 11,913 (Apr. 15, 1970) (statement of Rep. Gerald R. Ford).

3. U.S. CONST. art. II, § 4.

4. U.S. CONST. amend. XXV, § 4.

5. *Id.*

and decisively. It would provide continuity and avoid dangerous uncertainty.

A reality check here: When President Reagan was shot, he was in surgery under general anesthesia for hours and was out of commission for some time afterward.<sup>6</sup> But his team dismissed any notions of invoking Section 4.<sup>7</sup> To project strength and steadiness, they downplayed the gravity of his condition, and they exaggerated his recovery.<sup>8</sup> In retrospect, they should have invoked Section 3 or 4 that day.<sup>9</sup> I think that later administrations would have invoked it in similar circumstances. But the point is that it might take a longer or more serious spell of inability than Reagan's to qualify as one of these "easy cases."

Turning to restoration, in the simplest case, the President never recovers, and the Vice President acts as President for the duration of the term. In the other type of easy case, the President recovers, and the Vice President and Cabinet agree that he is fit to return to power.

In contrast to the beneficial speed we saw at invocation, Section 4 offers the possibility of a beneficial slowness for restoration. A recovering President might be able to meet the bare minimum requirements of the job early on—things like signing papers and meeting with people—but Section 4 allows him to wait. There is no power vacuum to fill; the reins are in good hands. So even though he meets the legal definition of ability, he could wait, and I think would wait, until he is recovered enough to warrant displacing the fully capable Vice President.

Before Section 4, as we heard earlier this afternoon, there was no good way to do these things. But Section 4 makes it easy to transfer power to the Vice President when the President cannot object, and it makes it easy for the President to retake his powers in an orderly manner when he has truly recovered.<sup>10</sup>

## II. TOUGH CALLS

By contrast, Section 4's framers wanted it to be *possible* to displace an unwilling President, but they also wanted it to be *hard*. The framers

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6. See FEERICK, *supra* note 1, at 191.

7. See *id.* at 195.

8. See *id.* at 192–95.

9. See Lawrence K. Altman, *Presidential Power: Reagan Doctor Says He Erred*, N.Y. TIMES (Feb. 20, 1989), <https://www.nytimes.com/1989/02/20/us/Presidential-power-reagan-doctor-says-he-erred.html> (quoting Reagan's White House physician, Daniel Ruge, as saying that "Reagan's need for general anesthesia for emergency surgery and intensive care afterward should have made those in charge invoke Section 3 of the 25th Amendment to the Constitution to transfer executive power to Mr. Bush for a day or two.").

10. U.S. CONST. amend. XXV, § 4.

presumed that Cabinets would be aligned with their Presidents and, all other things being equal, would be slow to displace them—but they understood that reluctance to be a feature, not a bug.<sup>11</sup>

If there is a disagreement about the President’s disability, Section 4’s structure makes it relatively easy for Presidents to win. This structure thereby discourages the Vice President and Cabinet from invoking Section 4 in the first place in all but the most extreme cases.

#### A. *Tough Call 1: Partial Incapacity*

Imagine that the President has some less-than-total incapacity. It could be dementia, mental illness, physical disability, or any combination. A President might be *less* able to discharge his powers and duties without being “unable” as Section 4 requires. Drawing that line might be tough. Ideally, if the Vice President and a majority of the Cabinet believe that the President is unable, they would be able to persuade the President to invoke Section 3 or to resign.

But it is easy to imagine a President being unwilling to confront the extent of his incapacity, or simply having a different view of his capabilities. That could be a problem. If the President gets wind of the Section 4 talk ahead of time, he can fire Cabinet members for their disloyalty (“Look at me, ably discharging the powers of my office! You’re fired, suckers!”). Now we have an impaired President and a decimated Cabinet.

But assume that the Vice President and Cabinet pull it off; they invoke Section 4. Because the President, in this scenario, feels able, he would likely contest the action. The case would go to Congress, where Section 4 stacks the deck, heavily, in the President’s favor. As Ralph Waldo Emerson said, “When you strike at a king, you must *kill* him.”<sup>12</sup> Do not miss. Whatever problems the President’s impairment was causing, an unsuccessful Section 4 attempt would be worse because the President would be back, in no better condition, and probably would feel betrayed and vengeful. As such, before acting, the Vice President and Cabinet

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11. See, e.g., S. REP. NO. 89-66, at 13 (1965) (expressing this sentiment); H.R. REP. NO. 89-203, at 13 (1965) (same); S. REP. NO. 88-1382, at 11–12 (1964) (same); 111 CONG. REC. 7,941 (Apr. 13, 1965) (comments of Rep. Richard Harding Poff) (arguing that the Cabinet should have this role because its members “were appointed by the President and are closest to him physically and most loyal to him politically”).

12. LAWRENCE BUELL, EMERSON 154 (2003).

would want to be confident that they would win the requisite two-thirds majorities in the House and Senate.<sup>13</sup> Call that the Emerson Rule.

What would give them that confidence? Consensus, for starters. A unanimous or nearly unanimous Cabinet vote would presumably fare much better in Congress than an eight-to-seven vote.<sup>14</sup> Clear, objective medical evidence would help too. “Clear and objective” might not sound like much, but it could be a high bar. Diagnosis can be subjective and contestable. How impaired is the President, exactly? What can and can’t he do? Says who? What will he be able to do tomorrow? Does he just need his meds tweaked? These conditions are also spinnable; even if the President’s being unwell is impossible to *deny*, it might still be easy for him and his staff to *obscure*.

A final factor would be the actual effect the President’s lapses were having. If the administration’s work was being accomplished well enough even as the President bumbled around, that would reduce the pressure and weaken the case for using Section 4. By contrast, in a fast-developing crisis requiring robust Presidential leadership, invoking Section 4 might make more sense. The more that is at stake, the less slack the Cabinet and Congress will be willing to cut a doddering President.<sup>15</sup>

Regardless, the ultimate decision would be foremost a question of policy judgment, not law. Imagine a Venn Diagram. The first circle is all the cases in which the President is “unable” under some definition of the term. Inside that is a smaller circle in which the Vice President and almost all of the Cabinet agree the President is unable and also agree that displacing him right now would be beneficial. Inside *that* is a yet smaller circle in which they think they can satisfy the Emerson Rule by actually proving, to the satisfaction of two-thirds majorities in both houses, that the President is unable and should be stripped of his powers.

Any litigator can tell you there is a big difference between knowing something and being able to prove it in court. That little circle in the

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13. See *Presidential Inability and Vacancies in the Office of Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 25–27 (1965) (testimony of Nicholas DeB. Katzenbach, Att’y General-Designate of the United States) (noting that the Vice President and Cabinet would not act without being “absolutely assured” of “overwhelming support in the House and Senate”); *id.* at 100 (comments of Sen. Birch Bayh) (surmising that the Vice President and Cabinet would not contest a Presidential declaration of fitness “unless they were pretty well sure of the support of Congress”).

14. A lopsided Cabinet vote would also stand a better chance of dissuading the President from contesting things in the first place.

15. See *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 83 (1965) (comments of Sen. Birch Bayh) (noting that invoking Section 4 would require some combination of the President being in “sufficient condition” and “the problems facing our Nation of such gravity”).

middle is when Section 4 would be invoked, and it is just a small subset of the first circle—all the cases in which the President is actually unable as the legal standard might have it.

*B. Tough Call 2: Averting an Irreversible Catastrophe*

Playing off of the notion that a crisis would lower the bar, consider a President who is unhinged and issues capricious, life-threatening orders—an ill-advised invasion, or perhaps even a nuclear strike.

The Vice President and Cabinet could conclude that the President had taken leave of his senses—a kind of inability—or they could be unsure about that but be eager to prevent an irreversible catastrophe. Either way, Section 4 might be the only legal way to countermand the President's mad order quickly enough.

This would be high-stakes poker. It would have to be clear that stopping the President was the right thing to do, even though he was not “unable” to exercise his powers so much as he was too able. The President would respond and, if Congress voted in his favor, he would return to power with a vengeance, so to speak. A congressional vote against the President seems unlikely in the capricious nuclear strike scenario, but in a milder case, in a deeply divided Congress, who knows? Still, two-thirds majorities in both chambers is a high bar. Losing the congressional vote would certainly be one of the possible outcomes that the Vice President and Cabinet would want to consider before they invoked Section 4, and that might stop them from invoking it.

*C. Tough Call 3: Don't Just Sit There, Do Something!*

Finally, imagine a President who is narcissistic, impulsive, reckless, and mentally unstable, and as a result is wreaking havoc up and down the government. Under some definitions, he might be considered “unable.” In an average workplace, the boss might fire someone like that because he “can't do his job.” That is unable, right? The President's opponents might well think so, and they might like to employ any mechanism they could to remove such a President. But add another factor here: this President has a solid base of political support. Not a national majority, but enough to swing elections in a fair number of states and districts.

Barring an imminent catastrophe like in Tough Call 2, Section 4 would not be useful here. Simply put, Section 4 was not designed to displace merely unfit Presidents. It cannot be used as an end run around impeachment, because the congressional vote for Section 4 is harder to win—on the House side, a two-thirds majority is needed instead of a

simple majority.<sup>16</sup> So if the President is arguably unable but is definitely doing bad things, impeachment is the way to go. There would be few members of Congress willing to support a Section 4 action in a case like that but unwilling to remove the President through impeachment. And politically speaking, if they had the votes for impeachment and removal, why wait until they also had the Vice President, the Cabinet, and the 72 additional representatives needed in the House on board? The only real use for Section 4 in this situation would be alongside impeachment, to effectively suspend the President and prevent him from doing harm while the impeachment process proceeded.

### III. THE BOTTOM LINE

So the bottom line is, again, that while Section 4's legal standard of inability can be construed fairly broadly to include all sorts of cases, including ones in which the President is conscious and resistant, its structure dictates that it is likely to be used in only a small subset of those cases:

1. When the President is unconscious or otherwise unable to communicate.

2. Short of that, when the Vice President and Cabinet are so sure that the President is unable to function adequately that they agree—unanimously or close to it—both that the President must be pushed aside, and that they can be certain of winning the congressional vote if the President resists.

3. When the President is arguably unable but definitely about to do something irreversibly catastrophic.

4. When the President is arguably unable, is being impeached, and needs to be sidelined in the meantime.

Given that Section 4 has never been used before, we can really only speculate, but it seems clear to me that Section 4's structure constrains its use more than its legal standard does.

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16. U.S. CONST. amend. XXV, § 4. Some important, earlier proposals had tracked impeachment by requiring only a simple majority in the House. See *Presidential Inability: Hearings on S.J. Res. 100 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 85th Cong. 184–85 (1958) (testimony of William P. Rogers, Att'y Gen. of the United States) (noting intention of a 1958 proposal to make congressional deliberations procedurally equivalent to impeachment). Senator Sam Ervin had made a similar proposal, but he admitted that upping the requirement in the House to a two-thirds majority was a “vast improvement” over his own proposal, because it makes the disability determination less partisan. 110 CONG. REC. 22,989 (Sept. 28, 1964) (comments of Sen. Samuel J. Ervin).