

*SYMPOSIUM: 50 YEARS WITH THE 25<sup>TH</sup> AMENDMENT*

**INTERPRETING THE TWENTY-FIFTH AMENDMENT:  
MAJOR CONTROVERSIES**

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When I teach the amendments to the U.S. Constitution, I have rarely counted as far as 25. But after the 2016 election, my colleagues and I at Yale Law School founded the Peter Gruber Rule of Law Clinic, a practicum devoted to upholding the rule of law and human rights in our splintered country. It soon occurred to me that I—and everyone else in America—should know far, far more than we presently do about the Twenty-fifth Amendment.<sup>1</sup> A Clinic student who was an expert on

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\* Sterling Professor of International Law, Yale Law School; Co-Founder, Peter Gruber Rule of Law Clinic at Yale Law School. What follows is a lightly edited and footnoted version of remarks originally prepared for delivery at the symposium on *Fifty Years with the Twenty-fifth Amendment: When a President is Unable to Discharge the Duties of Office*, cosponsored on January 25, 2019 by the Center for Constitutional Law at Akron Law School and the Ray C. Bliss Institute of Applied Politics at the University of Akron. I am grateful to Professors Tracy A. Thomas, Brant Lee, and David B. Cohen for their kind hospitality, to the other participants for their instructive papers and comments, and to Michael Loughlin and Cara Newlon of Yale Law School for outstanding research assistance. As a relative newcomer to the Twenty-fifth Amendment, I am not accustomed to speaking at constitutional law conferences where historical questions are resolved by consulting James Madison. But I was honored to do that here, learning from the great John Feerick—the father of the Twenty-fifth Amendment—who has been an extraordinary friend and inspiration as I have delved into this material. I especially thank Professor Joel Goldstein—a dear friend of more than forty-five years—for introducing me to the intricacies of the Twenty-fifth Amendment, constantly instructing me in it, and graciously correcting my misunderstandings. Finally, I thank my partners in the Peter Gruber Rule of Law Clinic at Yale Law School Mike Wishnie, Phil Spector, Hope Metcalf; Fellow Matt Blumenthal; and the Yale Law School Clinic student contributors to the *25th Amendment Reader's Guide*: Varun Char, Colleen Culbertson, Sameer Jaywant, Chris Looney, Richard Medina, Aleksandr Sverdlik, Emily Wanger, Zoe Weinberg, and Nathaniel Zelinsky. We are especially grateful to the experts and friends who took the time to review drafts of the *Reader's Guide*: conference participants John Feerick, Joel Goldstein, and Norman Ornstein; Senators Birch Bayh and Russ Feingold; former executive branch officials Avril Haines, W. Neil Eggleston, Ted Olson, and John Podesta; journalists Linda Greenhouse, Jane Mayer, and Evan Osnos; Professors Akhil Reed Amar, Sarah Cleveland, Richard M. Pious and David Pozen; and Doctors David Goldbloom and Howard Zonana.

1. For present purposes, the most relevant part of the Twenty-fifth Amendment is Section Four, which states:

popular culture undertook an extensive survey of recent American television shows and discovered that a surprisingly large number of them had episodes discussing the Twenty-fifth Amendment.<sup>2</sup> But after taking some time to “research” those episodes myself, I came to the grim conclusion that in presenting the Twenty-fifth Amendment, every single show had made some form of legal error.

Although Section Four of the Twenty-fifth Amendment is more than fifty years old, it has never been invoked. If you haven’t reviewed the amendment recently, Section Four provides that just nine government officials—the Vice President plus eight executive department heads—can separate the President from his powers and duties by voting and transmitting to the Speaker of the House and President Pro Tempore of the Senate a written declaration that “the President is unable to discharge the powers and duties of his office.” Once that notification is sent, the Vice President would immediately become the Acting President. Should the President contest the claim, those charging his inability would have four days to challenge *his* claim, during which time the Vice President would act as President, and both houses of Congress would be called to assemble within forty-eight hours to debate and decide the issue. Within the three weeks that follow, Congress would be required to vote to resolve

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

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.” U.S. CONST. amend. XXV, § 4.

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

the question of inability. A two-thirds vote from each house is needed to transfer the President's powers permanently to the Vice President, and if either vote fails, he is permitted to resume his official duties.<sup>3</sup> Simply put, at any moment, a political crisis could unfold on a remarkably compressed constitutional timeline of less than 30 days. Nine sitting executive officials could separate a sitting President from his powers immediately, with the real possibility that he could permanently be separated from those powers in less than a month. And the stakes would be incredibly high. Yet this is a constitutional procedure that very few Americans understand and a text that even many trained lawyers regularly misconstrue.

In contemplating this scenario, I grew frightened imagining the cable television commentary that might accompany a real-life invocation of Section Four of the Twenty-fifth Amendment. In a moment of grave crisis, we could face the prospect that our country would be instructed on the amendment's operations by self-appointed "expert" talking heads on cable news, who had first read the text of the amendment just moments before.

Given the grave potential consequences of such public misunderstanding at a moment of crisis, our Clinic decided that the Constitution and the amendment—not to mention the American people—deserve better than this. So we convened an extraordinary group of students at Yale Law School to put together *The 25th Amendment to the United States Constitution: A Reader's Guide*,<sup>4</sup> a text designed to explain carefully the Twenty-fifth Amendment's text and operation to laypeople and lawyers alike. In developing this guide over many months, we consulted closely with leading experts and studied all of the available sources. We looked at all available text, legislative history, academic commentary, the limited number of existing relevant judicial analyses, and all significant past studies on the issue—including works by many of the scholars attending this conference. Through these efforts, we developed what we hoped would be a user-friendly "reader's guide" to the amendment that could function as a "one-stop shop"—a single, authoritative document to provide a fair and comprehensive reading of all interpretive issues relating to the Twenty-fifth Amendment.

I would urge all of you to read, or at least consult, our *Reader's Guide*. But realistically recognizing that it is a dense document of nearly

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3. U.S. CONST. amend. XXV.

4. YALE LAW SCH. RULE OF LAW CLINIC, *THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER'S GUIDE* (April 18, 2018), <https://law.yale.edu/system/files/area/clinic/document/mn082208.yls.const.fnl.pdf> [<https://perma.cc/SA24-9FXU>] [hereinafter *READER'S GUIDE*].

eighty single-spaced pages and 350 footnotes, I propose here to give it a mini-reader's guide of its own. Let me discuss the major interpretive controversies regarding Section Four of the Twenty-fifth Amendment. While the *Guide* discusses dozens of issues, the amendment's text raises essentially six core questions of interpretation:

1. *Activation*: Who may activate Section Four?
2. *Inability*: What condition qualifies as being “unable to discharge the powers and duties of the office?”
3. *Proof*: How or by what evidence would one prove that inability?
4. *Institutional Roles*: What roles should different institutional actors within the government—including the Vice President, Congress, and the courts—play in initiating and formally reviewing a controversy under Section Four?
5. *The “Morning After”*: What happens the morning after the conclusion of this compressed process?
6. *Regularizing Process*: If Congress wanted to make this process more regular, what kind of legislation could it enact?

Our best answer to each of these questions comprises a *de facto* primer on Section Four of the Twenty-fifth Amendment. If you still have questions on each issue, or for a more complete answer, please consult the relevant section of the *Reader's Guide* itself.

#### I. ACTIVATION: WHO MAY ACTIVATE SECTION FOUR?

Section Four may be activated in two ways. First, under the most straightforward option, the Vice President plus an eight-person majority of the fifteen principal officers of the executive departments can activate Section Four by taking a vote and finding the sitting President “unable to discharge the powers and duties of his office.”<sup>5</sup>

Notice that Section Four doesn't mention “the Cabinet.” The relevant vote here is to be taken by the fifteen heads of the “executive departments” that are specified in 5 U.S.C. § 101, and Congress can add new departments to that list at any time.<sup>6</sup> Thus, currently, nine officials are

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5. U.S. CONST. amend. XXV, § 4.

6. See also 111 CONG. REC. 7938 (1965) (statement of Rep. Waggoner); *id.* at 7941 (statement of Rep. Poff); *id.* at 7944-45 (statement of Rep. Whitener); *id.* at 7954 (statement of Rep. Gilbert); JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS (2014). See also *Freytag v. Comm'r*, 501 U.S. 868, 887 n.4 (1991) (noting in dicta that in interpreting the Appointments Clause, the Court is not bound by “the fact that the [Twenty-

needed to initiate the process of removal: the Vice President and eight principal officers.<sup>7</sup> Our best reading is that acting heads of the department may vote, a reading supported by then-Senator Robert F. Kennedy's statements in the 1965 floor debate, which was subsequently accepted by most other Senators.<sup>8</sup>

The fact that voting power is allocated to the heads of executive departments—and not to cabinet members—is relevant because it restricts voting to a group of executive officials that is ordinarily both named and confirmed by the Senate.<sup>9</sup> But the belief that Twenty-fifth Amendment participation is limited to Senate-confirmed cabinet members may be a common misconception. In one episode of *Madam Secretary*, for example, the Vice President tells an acting Cabinet Secretary, “you’re Acting Secretary, so you can’t vote,” which is wrong; just minutes later, the Secretary of State announces that “the *Cabinet* voted tonight to invoke Section Four of the Twenty-fifth Amendment,”<sup>10</sup> another legally erroneous statement.<sup>11</sup>

The second possibility for activation, which Dean Feerick has discussed, is for Congress to create by law a different deliberative body—in the words of the amendment, “such other body as Congress may by law provide”—to determine whether or not to invoke Section Four.<sup>12</sup> In the landmark separation of powers case *INS v. Chadha*, the Supreme Court held that all duly enacted “laws” require bicameralism and presentment: a majority of both houses must pass a piece of legislation and present it to the President for signature or a veto.<sup>13</sup> As Dean Feerick points out, if Congress has sufficient votes, it can pass a law creating a new deliberative body. In this scenario, the new congressional body would replace the role

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fifth] Amendment strictly limits the term ‘department’ to those departments named in 5 U.S.C. § 101”).

7. Currently, the fifteen principal officers for purposes of Twenty-fifth Amendment are the principal officers of the following departments: State, Treasury, Defense, Justice, the Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security. 5 U.S.C. § 101 (2018).

8. See READER’S GUIDE, *supra* note 4, at 12-13; 111 CONG. REC. 15,380 (1965) (statement of Sen. Kennedy); *id.* at 15,382 (statement of Sen. Kennedy); *id.* at 15,385 (statement of Sen. Javits).

9. At this writing, for example, President Trump’s Cabinet includes the White House Acting Chief of Staff and six additional agency heads beyond the fifteen identified in 5 U.S.C. § 101 (2018). *The Cabinet*, THE WHITE HOUSE, <https://www.whitehouse.gov/the-trump-administration/the-cabinet> [<https://perma.cc/Q6SS-BSNC>].

10. *Madam Secretary: Sound and Fury* (CBS television broadcast Jan. 14, 2018).

11. See READER’S GUIDE, *supra* note 4, at 11-12.

12. FEERICK, *supra* note 6, at 121.

13. 462 U.S. 919 (1983).

of the department heads, and become the relevant voting actor, along with the Vice President.<sup>14</sup>

Note also that these two modes of activation are “either/or,” not “both/and”: the relevant vote can come either from the Vice President plus a majority of the executive department heads (a purely executive form of initiating transfer of powers), *or* the Vice President plus a majority of the other body (which may be largely or entirely drawn from the legislative branch).

Little has been said or written about the limitations surrounding the creation of this “other body” by Congress, beyond the requirement that it be created by law, through bicameralism and presentment, not internal House or Senate rule. Presumably, other constitutional limitations might come into play. Consider first, for example, the separation of powers concerns that would arise if judges and justices were placed onto such a deliberative body—an idea considered and rejected by Congress in 1965.<sup>15</sup> Second, the text of the Twenty-fifth Amendment highlights an apparent preference *against* the new body’s being composed exclusively of medical experts, because the inability decision is considered fundamentally *political*, not medical.<sup>16</sup>

Upon transmission by the Vice President and the majority of whichever of these two entities has authority—executive department heads or a new legislatively created body—the President is separated immediately from the exercise of the powers and duties of his or her office.<sup>17</sup> The Vice President assumes presidential responsibilities and duties under the title of “Acting President.”<sup>18</sup>

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14. FEERICK, *supra* note 6, at 121. While the “other body” may be legislatively created, it need not include legislative officials. For example, Congress could decide to make it the top seven Cabinet members, or all confirmed Cabinet members, including acting heads, or some other assortment of executive officials.

15. For examples from the debate over the earlier proposal, *see, e.g.*, 111 CONG. REC. 15,382 (1965) (statement of Sen. Bayh) (“This would not preclude Congress, in its wisdom, from establishing another panel, perhaps of the majority and minority leaders of both Houses, the Chief Justice of the Supreme Court.”); *id.* at 7,942 (statement of Rep. McCulloch) (“[T]he suggestion has been made that a commission be created which might be composed of Supreme Court jurists, elected leaders of Congress, and members of the Cabinet.”); *see also* Miller Center Comm’n No. 4, *Report of the Commission on Presidential Disability and the Twenty-Fifth Amendment*, WHITE BURKETT MILLER CTR. PUB. AFF. 13 (1988), [http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth\\_amendment\\_reports](http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_reports) [https://perma.cc/6XBM-4ZWD].

16. *See, e.g.*, Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 446-47 (1995) (discussing the need for a removal decision to have political legitimacy).

17. U.S. CONST. amend. XXV, § 4.

18. *Id.*; *see* READER’S GUIDE, *supra* note 4, at 43.

This entire process would rapidly generate an extraordinary moment: once the initial “inability” letter is received by the Speaker of the House and the President Pro Tempore of the Senate, the President is forced to decide whether or not to contest the letter by declaring that he is, in fact, able. And if he does contest the letter, the decision is thrown into the House and Senate, which are required to assemble within 48 hours for votes to be held in both houses in 21 calendar (not business or legislative) days.<sup>19</sup>

## II. INABILITY: THE “UNABLE TO DISCHARGE THE POWERS AND DUTIES OF THE OFFICE” STANDARD

From the beginning of the process, all decision-makers acting under Section Four will be forced to address the next, and most important, question: how to determine whether the president is “unable” under Section Four? It is important to note that the constitutional term used is “unable,” and that no references are made to medical terms or diagnoses. Obviously, Section Four covers mental or physical incapacitation, but as Professor Goldstein has aptly pointed out, there is no formal definition of inability.<sup>20</sup> Instead, inability is designed deliberately in Section Four to be a flexible standard that can apply to a wide variety of unforeseen emergencies. For example, inability could arise if the presidential plane goes missing, if the President becomes unconscious, or if—as portrayed in *The West Wing*—the President’s daughter is kidnapped, thereby generating a conflict of interest.<sup>21</sup>

Section Four’s question is *whether* the President is unable to discharge the powers and duties of the office, not *why* he or she is unable. Inability is determined by a “totality of the circumstances” test, and decision-makers must focus on the President’s actual state, rather than on the causes of that state.<sup>22</sup> Thus, the scholarly consensus is that the drafters intended that the amendment cover “any imaginable circumstance[]” that might render the President unfit to perform the duties of office.<sup>23</sup>

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19. U.S. CONST. amend. XXV, § 4; see READER’S GUIDE, *supra* note 4, at 43.

20. See Joel K. Goldstein, *Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment: Dealing with Presidential Disability*, 10 CONLAWNOW 119, 132-33 (2019); see generally READER’S GUIDE, *supra* note 4, at 21 (discussing the relevant scholarship on the role of medical opinions in the removal process).

21. *The West Wing: Twenty-Five* (NBC television broadcast May 14, 2003).

22. READER’S GUIDE, *supra* note 4, at 23-24.

23. Fordham University School of Law Second Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917 (2017) (quoting KENNETH R. CRISPELL & CARLOS F. GOMEZ, HIDDEN ILLNESS IN THE WHITE HOUSE 209-10 (1988)).

Decision-makers should focus less on the specific characteristics of the inability, and more on the overall *effects* of the inability: i.e. whether the totality of the circumstances suggests that inability prevents the President from discharging the powers and duties of his office. For that reason, many pages of the *Reader's Guide* are devoted to reviewing every historically known case of presidential inability. In 1965, Congressman Richard Poff, then a leading Republican member of the House and an architect of the amendment, argued that being unable to make a rational decision would constitute inability.<sup>24</sup> In other words, if the President fails to demonstrate that he can act rationally, he fails to demonstrate the minimum competence needed to fulfill his official duties. A President may be found “unable” if he is unconscious, irrational, or on perpetual life support. He is not removed from his office; his powers are simply transferred to the Vice President because of a serious, but hopefully transitory situation.

Recent speculation surrounding President Donald Trump’s mental health and its relevance to the Twenty-fifth Amendment have highlighted the importance of this distinction.<sup>25</sup> Some pundits have incorrectly argued that a President is essentially immunized from Twenty-fifth Amendment removal if he previously demonstrated an inability to act rationally on the campaign trail, but was elected anyway.<sup>26</sup> If a President demonstrated an inability to act rationally while campaigning and was elected regardless—the argument goes—it should be presumed that the people have taken these deficiencies into account yet voted for the candidate anyway, thereby “washing out” this objection. But there is no evidence that these commentators are correct; nothing in the historical record supports this speculation. A democratic vote does not nullify constitutional authority. If, for whatever reason, a sitting President were ever unable to make a rational decision, the Twenty-fifth Amendment allows for him to be

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24. FEERICK, *supra* note 6, at 117 (Section 4 provides for cases “when the President, by reason of mental disability[,] is unable or unwilling to make any rational decision, including particularly the decision to stand aside.”).

25. See, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/X6NA6N>]; Annie Karni, *Washington's Growing Obsession: The Twenty-Fifth Amendment*, POLITICO (Jan. 3, 2018 09:09 PM), <https://www.politico.com/story/2018/01/03/trump-25th-amendment-mental-health-322625> [<https://perma.cc/54FN-QURZ>].

26. See, e.g., Joshua Zeitz, *Why the 25th Amendment Doesn't Apply to Trump—No Matter What He Tweets*, POLITICO MAGAZINE (Jan. 10, 2018), <https://www.politico.com/magazine/story/2018/01/10/25th-amendment-trump-216267> [<https://perma.cc/KD7G-FXV5>] (arguing that the amendment does not apply to “a president who already demonstrated those traits when the people, in their wisdom, elected him to office.”).

deemed “unable” to discharge the powers and duties of the office, whether or not the signs of that inability were visible or even glaring earlier.

During the Trump Presidency, it has become commonplace to hear political analysts say that former Secretary of Defense Jim Mattis, former Chief of Staff John Kelly, or former White House counsel Don McGahn each at various times played the “adult in the room” to discourage irrational behavior from President Trump.<sup>27</sup> These discussions are striking—and deeply troubling—because the Constitution assumes that *the President* will be the adult in the room. After all, all three of these officials are now back in the private sector. If at any time the President is unable to function, unassisted, as the adult in the room capable of making rational decisions, it is time to question his ability to discharge the powers and duties of the office. Irrespective of a President’s actions or tendencies that may have been evidenced as a candidate, a demonstrated current inability to discharge his official duties rationally can render him unable to serve under Section Four.

### III. PROOF: HOW DO YOU PROVE AN INABILITY TO DISCHARGE THE POWERS AND DUTIES OF THE OFFICE?

Once Congress comes to an understanding about what constitutes “unable,” it is forced to grapple with the issue of how to prove or disprove that the President is in fact unable. This is an evidentiary question: a question of fact. As Professor Goldstein’s superb article in the *University of Pennsylvania Journal of Constitutional Law* makes clear, the Framers of the Twenty-fifth Amendment thought that mental, as well as physical, illness could render a President “unable to discharge” his presidential powers and duties.<sup>28</sup> So medical evidence can unquestionably inform the inability determination. Still, there is no statement or suggestion in the Constitution that medical expertise or diagnosis is required or necessary to make the inability determination. In fact, scholars have expressed concern that if doctors were to become overly involved in the removal determination, their attempts to make medical assessments might invade

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27. See, e.g., Matthew Yglesias, *There never were any “adults in the room,”* VOX (Dec. 21, 2018 10:30 AM), <https://www.vox.com/policy-and-politics/2018/12/21/18151079/mattis-adults-in-the-room> [<https://perma.cc/7WGU-87BL>].

28. Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 73, 78 (2018).

the President's space, thereby further impeding his ability to carry out the office's duties.<sup>29</sup>

A President with no mental illness or disability could still be unfit to serve if his erratic behavior indicates that he is incapable of making a rational decision. At the same time, it is easy to imagine that nearly all the time, a President with a medical condition could still discharge the powers and duties in a highly effective manner. For example, an individual who suffers from seizures, but could sense a seizure coming on, would have an identifiable medical condition. But if that person were responsible and competent, he would still be able to carry out his duties and discharge the functions of the office at times that he was not afflicted by his medical conditions. These thought experiments highlight why the determination of inability should not be based exclusively on medical evaluations.

There has recently been a lot of discussion in the context of the Twenty-fifth Amendment of the "Goldwater Rule," which states that a "psychiatrist may share with the public his or her expertise about [a public figure's] psychiatric issues in general," but that "it is unethical for a psychiatrist to offer a professional opinion unless he or she has conducted an examination and has been granted proper authorization for such a statement."<sup>30</sup> This rule emerged after the 1964 election, when psychiatrists began to express concerns regarding Senator and presidential candidate Barry Goldwater's mental state.<sup>31</sup> The American Psychiatric Association's *Principles of Medical Ethics* stated at the time—and still states—that a psychiatrist cannot opine on the mental health of a patient unless she has personally examined that patient.<sup>32</sup>

The "Goldwater Rule" has prompted a flurry of discussion regarding Section Four. Does it mean that if the President simply barred any competent, unbiased doctor from ever examining him, he could never be declared unable to perform the powers and duties of the office and removed under the Twenty-fifth Amendment? Upon considering this question, the *Reader's Guide* concluded that the APA's principle does not function as a complete bar to the constitutional remedy of Twenty-fifth Amendment removal.<sup>33</sup> First, as explained earlier, the amendment does not in fact require a medical assessment, examination, or justification for

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29. See READER'S GUIDE, *supra* note 4, at 26; John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 502 (1995) (discussing a conference where multiple scholars expressed this opinion).

30. AM. PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS, § 7.3.

31. READER'S GUIDE, *supra* note 4, at 37.

32. AM. PSYCHIATRIC ASS'N, *supra* note 30.

33. READER'S GUIDE, *supra* note 4, at 37.

removal. Second, the APA's principle is not law—it is merely an internal rule of a professional association. At most, the APA's rule makes it harder to implement the amendment. Third, it is quite clear from reading the relevant scholarship and historical records that Congress could use its compulsory powers if necessary, to require the President to undergo a medical examination that would provide the desired direct medical evidence on presidential inability.<sup>34</sup> For these reasons, the issue of the “Goldwater Rule” has likely been overplayed in discussions of the Twenty-fifth Amendment.

#### IV. INSTITUTIONAL ROLES: THE ROLE OF THE VICE PRESIDENT, CONGRESS, AND THE COURTS

##### A. *The Role of the Vice President*

If the Vice President assumes the role of acting President, he can then exercise all the powers of the presidency without becoming President.<sup>35</sup> The original President is sidelined and incapacitated from acting as the Chief Executive, but is still the only elected President that we have. However, once the Vice President becomes the Acting President, the entire machinery of the executive branch—including the Justice Department, the White House Counsel, and all White House staff—shift to serve the Acting President in the same manner as they would serve anyone exercising the powers and duties of the President himself.<sup>36</sup>

As noted above, if this were to happen, the constitutional action taken would be a “power transfer,” not removal from office. Thus, it may be temporary, the President can seek to regain power if he becomes able again, and the decision is not a judgment on his or her morality or place in history. Rather, the final decision should reflect his or her capacity or ability to discharge the powers and duties of his office, for whatever reason.

What prevents the Vice President from abusing his powers during this “acting” period? As a threshold matter, the period of time he serves as Acting President is likely to be quite limited. But more fundamentally, the limitation on vice presidential action is political. Especially in circumstances of medical incapacitation, the Vice President will be

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34. See READER'S GUIDE, *supra* note 4, at 37-38, 58; see also S. REP. NO. 89-66, at 3 (1965) (explaining “that Congress should be permitted to collect *all* necessary evidence” (emphasis added)).

35. See READER'S GUIDE, *supra* note 4, at 45; Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 191 (Robert E. Gilbert ed., 2000).

36. See READER'S GUIDE, *supra* note 4, at 48.

hesitant to exceed his mandate by doing too much. When President Ronald Reagan was incapacitated by shooting, for example, Vice President George H. W. Bush acted diffidently, expecting that President Reagan would eventually return to office and not want too many critical decisions to have been made during his absence.<sup>37</sup>

This process will generally conclude with either the President returning to service, as President Reagan did, or the President being declared unable. In that case, the Vice President remains as Acting President, but never technically assumes the Office of the Presidency or the title of “President.” Because there is never a vice presidential vacancy, an Acting President under Section Four does not have authority to nominate a Vice President to take office upon congressional confirmation under Section Two of the amendment.

### *B. The Role of Congress*

The Twenty-fifth Amendment does not provide a specific set of procedures or guidance on burdens of proof for Congress to follow during deliberations regarding a President’s charged inability to discharge the powers and duties of the office. The only statement in the amendment is that Congress must “determine[] by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office . . . .”<sup>38</sup>

A careful reading of the amendment highlights that each house must independently vote for a finding of presidential inability by a two-thirds supermajority. Congress therefore cannot add up the pro-inability senators and Members of the House and say that it constitutes two-thirds of the total. One could imagine a situation in which 100% of one body thinks the President is unable, but only half of the other body votes for removal. That would not be enough to give the requisite two-thirds in each house for removal; accordingly, the President would be restored to office.

During the twenty-one days Congress has to determine inability, it can exercise compulsory process over the President to get relevant information. A President being challenged could, and likely would, assert various privileges to prevent Congress from gaining information—whether statutory (e.g., the Health Insurance Portability and

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37. Formal Twenty-fifth Amendment procedures were not invoked after the 1981 shooting of President Reagan, in part because Vice President Bush was wary of appearing to engage in a power-grab. See *READER’S GUIDE*, *supra* note 4, at 28-30.

38. U.S. CONST. amend. XXV, § 4.

Accountability Act (HIPAA),<sup>39</sup> the medical privacy act that all of us encounter when we go to the doctor), state common law (e.g., attorney-client privilege), or federal constitutional law (e.g., executive privilege). Even so, Congress's capacity to seek and obtain the relevant information would likely overcome these privileges under most circumstances.<sup>40</sup> The President would, of course, have a chance to make his case to Congress that he is in fact able to resume his official duties.<sup>41</sup> But if the President were to frustrate the constitutional process, such actions could constitute a high crime or misdemeanor that could count as an impeachable offense.<sup>42</sup> Additionally, it is possible that a President's attempts to interfere with the process could be characterized as an obstruction of justice, prosecutable whenever the President is not deemed immune from criminal prosecution.

### C. *The Role of the Courts*

On the fundamental question of a President's ability or inability to remain in office, the substance of the determination appears textually committed to the legislative branch, and not to the courts.<sup>43</sup> Based on the Supreme Court's opinions in *Baker v. Carr*<sup>44</sup> and more recently *Zivotofsky v. Clinton*,<sup>45</sup> the Court would be unlikely to reexamine Congress's determination of a president's ability or inability under Section Four. The merits of the substance of the determination of presidential ability would therefore likely be a nonjusticiable political question.

Some might argue that the Court would be similarly unlikely to reexamine issues of congressional *procedure* regarding a transfer of presidential powers under the Twenty-fifth Amendment. But the 1993 impeachment case of *Nixon v. United States* (which concerned Judge Walter, not President Richard, Nixon) suggests that an obvious departure

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39. Pub. L. 104-191 (1996).

40. See READER'S GUIDE, *supra* note 4, at 60.

41. *Id.* at 63-64

42. *Id.* at 64; see also Laurence H. Tribe, *Defining 'High Crimes and Misdemeanors': Basic Principles*, 67 GEO. WASH. L. REV. 712, 718 (1999) (defining "high crimes and misdemeanors" as actions that "constitute major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted (as in the case of a public official who accepts a bribe in order to turn his official powers to personal or otherwise corrupt ends), or grave wrongs in pursuit of governmental power.").

43. U.S. CONST. amend. XXV, § 4.

44. 369 U.S. 186, 217 (1962) (holding that certain Congressional or executive decisions which have "an unusual need for unquestioning adherence" qualify as political questions that are non-reviewable by the courts).

45. 566 U.S. 189, 195 (2012) (significantly narrowing the "political question" doctrine).

from the procedural rules in the text of Section Four could be reviewed by a court to ensure that the constitutionally outlined process is being followed.<sup>46</sup> Still, absent patent and material departures from the text specified in the Twenty-fifth Amendment, for prudential reasons, the court would still likely treat most procedural challenges to the application of the amendment as a nonjusticiable political question.

#### V. “THE MORNING AFTER”: AFTER INVOCATION OF THE TWENTY-FIFTH AMENDMENT

It is certainly possible that after the roughly one-month-long process to investigate inability, Congress could vote *not* to permanently separate the President from his powers. If this should occur, and the President’s inability grows more and more apparent, there is no bar to Section Four being invoked again. But while there are no legal limitations on the ability to reassert Section Four, there are obvious political constraints against doing so.<sup>47</sup> For example, the President could dismiss the eight executive heads who had declared him unable for doing so. So as a practical matter, one shot might be all the removal advocates get.

Still, the President cannot dismiss the Vice President simply for being “disloyal.” As Professor Goldstein has pointed out, one of the Vice President’s strongest constitutional assets is the simple fact that he cannot be fired by his boss.<sup>48</sup> And regardless of whether the President is declared able or unable, the Twenty-fifth Amendment in no way functions as a bar to traditional presidential impeachment. So the Twenty-fifth Amendment and traditional presidential impeachment—as well as legislative investigation and criminal prosecution—could all work together interactively and synergistically over a period of time to achieve a President’s removal.<sup>49</sup>

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46. 506 U.S. 224, 245 (1993). In the *Nixon* case, the Supreme Court held that the Senate impeachment of Judge Nixon for federal crimes was nonjusticiable, but noted that “judicial review would ensure that the Senate adhered to a minimum set of procedural standards in conducting impeachment trials.” *Id.*

47. See READER’S GUIDE, *supra* note 4, at 72-73.

48. U.S. CONST. art. 2, § 4; see generally JOEL K. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN (2016).

49. For a discussion of how this might unfold in the present setting, see *Zucked, SKULLDUGGERY* (Feb. 8, 2019) <https://www.stitcher.com/podcast/skulduggery/e/58662799?autoplay=true> [https://perma.cc/CK6X-HLNB] (interview with Harold Hongju Koh).

## VI. REGULARIZING PROCESS: CONGRESSIONAL POLICY PRESCRIPTIONS

Finally, there is little doubt that Congress is remarkably unprepared to deal with the prospect of a Twenty-fifth Amendment, Section Four scenario. To prepare the country better for the time-compressed, high-stakes crisis envisioned under the Twenty-fifth Amendment, the *Reader's Guide* proposes a number of congressional actions.

First, Congress should pass standing rules, clarify which committees have jurisdiction over these proposals, adopt formal standing rules and procedures, and establish a standing advisory committee of reliable constitutional experts who could be asked for advice on how a Twenty-fifth Amendment process should operate if it should ever become necessary. Second, Congress should establish procedures to clarify some of the nuances surrounding the transition of power. To this end, in a joint resolution, Congress could simply affirm some of the aforementioned agreed-upon interpretive conclusions about the meaning of the text of the Twenty-fifth Amendment.

Once the joint resolution passes Congress, it would be sent to the President for presentment. If the President were to veto it, a two-thirds vote of both houses would be needed to override the veto. This is a very high bar. Particularly if a President presented with such a bill were rumored to be “unable,” he or she would almost certainly veto any resolution of this sort. Meanwhile, when a stable President is in office, Congress will be unlikely to view legislation relating to the Twenty-fifth Amendment as a high legislative priority. This, of course, illustrates a fundamental paradox of government: when you need action, people will be reluctant to act; but until a crisis arises, people won't want to create a fuss by acting to head off an obvious looming problem.

Once the shadow of Section Four appears, it almost inevitably becomes too late for a political solution regarding the country's preparedness for a forced transition. Therefore, it is unlikely that more nuanced procedures to regularize the operation of the amendment will be developed in the near future. But this inability to develop a standing political solution only highlights the need to strengthen our shared understandings of the Twenty-fifth Amendment's terms and processes *now*, in order to minimize the role of partisan advocates in the public discourse surrounding potential removal whenever the moment of crisis should come.

## CONCLUSION

In closing, we should not forget that, almost by definition, Section Four will be invoked only in a moment of great stress for our country. Once the idea of separating a president from his powers is being actively discussed, we are already on shaky ground. But it is precisely at those challenging moments that all Americans who love their Constitution—and the rule of law for which it stands—must take care that the law be faithfully interpreted. This will require each of us, particularly in a future moment of political turmoil, to retain fidelity to the rule of law and stick to principles of consistent and faithful constitutional interpretation.

In writing our *Reader's Guide* on the Twenty-fifth Amendment, a primary goal of Yale Law School's Peter Gruber Rule of Law Clinic was civic education. I find it amazing that I didn't learn about the intricacies of the amendment when I was in school, but many decades later, more than thirty years after becoming a professor who happens on occasion to teach constitutional law. But only a few people in my field, nearly all of whom happen to be at this Symposium, really know anything about this subject at all.

For that reason, my parting message is "Teach your children well." You can give them—and your law students and colleagues—our *Reader's Guide* as a present: it is free and there is an executive summary in case they want to get the short version. Teachers should educate their students about the Twenty-fifth Amendment, reviewing the entire history of previous physical and mental situations that have—or should have—triggered the amendment. This analysis would connect the Twenty-fifth Amendment, and our current political moment, to basic lessons in American history.

When I was in grade school, we learned to type by memorizing and repeating that famous phrase, attributed to Patrick Henry: "Now is the time for all good Americans to come to the aid of their country." If and when a debate under Section Four of the Twenty-fifth Amendment ever arrives, we will be at precisely such an historical moment. We should be ready for that challenge whenever it may face us, by arming ourselves with a thorough knowledge of how this vitally important, yet so little-understood, corner of our Constitution should function in a moment of high national stress.