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Presidential Disability Under the Twenty-Fifth Amendment: Constitutional Provisions and Perspectives for Congress

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SUMMARY

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Presidential Disability Under the Twenty-Fifth Amendment: Constitutional Provisions and Perspectives for Congress

Sections 3 and 4 of the Twenty-Fifth Amendment to the U.S. Constitution provide for presidential disability or inability.

Section 3 of the amendment sets the procedure whereby a President may declare himself or herself "unable to discharge the powers and duties" of the office by transmitting a written declaration to this effect to the President pro tempore of the Senate (President pro tem) and the Speaker of the House of Representatives (Speaker). For the duration of the disability, the Vice President discharges the President's powers and duties as Acting President. When the President transmits "a written declaration to the contrary" to the President pro tem and the Speaker, he or she resumes the powers and duties of the office. Section 3 is intended to cover either unanticipated disability, such as injury or illness, or anticipated disability, such as medical treatment. It has been activated three times under circumstances in which the President underwent general anesthesia for medical treatment. It was informally implemented by President Ronald Reagan in 1985 and was formally implemented twice by President George W. Bush, in 2002 and 2007, under similar circumstances.

Section 4 provides for instances of contingent presidential disability. It was intended by the Twenty-Fifth Amendment's authors to provide for cases in which a President was unable or unwilling to declare a disability. In these circumstances, the section authorizes the Vice President *and* a majority of *either* the Cabinet, *or* such other body established by law (a presidential disability review body), *acting jointly*, to declare the President to be disabled. When they transmit a written message to this effect to the President pro tem and the Speaker, the Vice President immediately assumes the powers and duties of the office as Acting President.

If the President, at a time of his choice, transmits a written message to the President pro tem and the Speaker that no disability exists, he or she resumes office. The Vice President and a majority of the Cabinet or disability review body may, however, contest this finding by a written declaration to the contrary to the aforementioned officers, delivered within four days of the President's declaration. Congress then decides the question, assembling within 48 hours if it is not in session. If Congress decides by a two-thirds vote of both houses that the President is unable to discharge the duties of the office, the Vice President continues as Acting President until the disability is resolved. If the two-thirds margin is not obtained, or if Congress is in session at the time but does not vote on the question within 21 days of receiving the requisite declaration, then the President resumes the powers and duties of the office. Similarly, if Congress is not in session at the time, and assembles as required by Section 4, but does not vote within 21 days of the day on which it is required to assemble, then the President resumes the powers and duties of the office.

Section 4's complexity and concern about its potential for misuse have raised questions among some observers that it could be implemented for political purposes. During debate on the amendment, its authors and proponents largely rejected such claims. They insisted the section was not intended to facilitate the removal of an unpopular or failed President, in support of which they cited checks and balances incorporated in the amendment that were designed to prevent abuse of the procedure. To date, Section 4 has not been implemented.

Two bills pending in the 115th Congress would establish a presidential disability review body as authorized by Section 4 of the Twenty-Fifth Amendment: H.R. 1987, introduced on April 6, 2017, and H.R. 2093, introduced on April 14 of the same year. H.R. 1987 has been referred to the House Committee on House Rules and the House Judiciary Committee's Subcommittee on the Constitution and Civil Justice, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. H.R. 2093 has been referred to Judiciary Committee's Subcommittee on the Constitution and Civil Justice.

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Introduction

The U.S. Constitution originally provided for the question of presidential disability or inability in Article II, Section 1, clause 6:

> In Case of the Removal of the President from Office, or of his Death, Resignation, *or Inability to discharge the Powers and Duties of the said Office*, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, death, Resignation or *Inability*, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, *until the Disability be removed*, or a President shall be elected [emphasis added].

This language designated the Vice President to exercise the powers and duties of the presidency if the President died, resigned, was removed from office, or was unable to discharge the position's powers and duties. It did not, however, provide any mechanism or procedure for determining presidential inability. The same clause authorized Congress to provide by law for instances of removal, death, resignation, or inability of *both* the President and Vice President, which it did with the Succession Act of 1792[1] and its subsequent revisions in 1886[2] and 1947.[3] Despite several instances of incapacitating presidential illness during the 19th and 20th centuries, however, it was not until ratification of the Twenty-Fifth Amendment in 1967 that procedures governing inability or disability of the President were established in the Constitution.

This report provides a description and analysis of Sections 3 and 4 of the amendment, which deal with presidential disability or inability.[4] It also reviews the history of presidential disability and earlier proposals to provide for such contingencies, provides a legislative history of the Twenty-Fifth Amendment and examines relevant legislative proposals pending in the 115th Congress.

The Twenty-Fifth Amendment—Sections 3 and 4: Constitutional Provisions for Presidential Disability

The Twenty-Fifth Amendment, proposed by Congress in 1965 and ratified by the states in 1967, provides for presidential succession, vice presidential vacancies, and presidential disability.[5] Presidential inability or disability is specifically covered in Section 3, whereby the President may declare a disability, and Section 4, whereby a disability is declared by the Vice President and a majority of the Cabinet or such other body as may be established by law.

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[1] Presidential Succession Act of 1792, 1 Stat. 240-241.

[2] Presidential Succession Act of 1886, 24 Stat. 1.

[3] Presidential Succession Act of 1947, 61 Stat. 380, as amended, codified at 3 U.S.C. §19.

[4] Did the founders intend that the words "Inability" and "Disability" in Article II, Section 1, clause 6 would apply to different conditions or circumstances? Arguably not: in his exegesis of the original succession clause, John D. Feerick, a scholar of presidential disability and succession, concluded that both words probably referred to the same condition, writing that "[the] words 'inability' and 'disability' appear to have been used almost interchangeably. The definitions of these words in Dr. Samuel Johnson's famous Dictionary of 1755 suggest that 'disability' was more restrictive in the situations it covered than 'inability.' 'Disability' was defined as a 'want of power to do anything.' 'Inability' was defined as 'want of power.'" See John D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York: Fordham University Press, 1965), p. 49. This report will refer to the condition provided for under Sections 3 and 4 of the Twenty-Fifth Amendment interchangeably as "disability" or "inability."

[5] Section 1 of the Twenty-Fifth Amendment specifies that the Vice President "shall become President" if the President dies, resigns, or is removed from office. Section 2 authorizes the President to nominate a Vice President whenever that office is vacant, subject to confirmation by majority vote of both houses of Congress.

Section 3: Constitutional Provisions and Analysis

The text of Section 3 of the Twenty-Fifth Amendment follows:

> 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.

Section 3 of the Twenty-Fifth Amendment provides the President with the authority to declare himself or herself unable to discharge the powers and duties of the office. By so doing, the President transfers authority of the office to the Vice President, who exercises it as Acting President until the President reclaims his authority by declaring the disability to be ended.

The vehicle for implementing Section 3 is described in the amendment as a written declaration, which the President "transmits" to the Speaker and the President pro tempore. The declaration would be delivered to the Speaker and President pro tempore and would take effect regardless of whether Congress was in session.[6] This language arguably allows for a variety of delivery options, including physical delivery or transmission by various electronic media. The amendment's language suggests, however, that these officers must receive the declaration before it can take effect. Given this requirement, it could be argued that the Speaker and the President pro tempore might appropriately issue an official acknowledgement of the declaration, either jointly or separately.

Section 3 can be invoked to cover either an unanticipated disability, such as a sudden injury or illness, or an anticipated disability, such as scheduled medical treatment that might leave the President less than fully aware or cognizant for some period of time. It may potentially cover other situations, such as absence from the country[7] or a period of "intense grief over the loss of a loved one."[8] Opinion among scholars as to whether a President could invoke Section 3 to concentrate on defense in a case of impeachment remains divided.[9]

The amendment's authors intended Section 3 to give the President broad discretion over the duration of any anticipated disability declaration. For an anticipated event, the President can set a specific time in the declaration of disability at which the Vice President will assume the powers and duties of the office. By setting a time and date certain for Section 3 to take effect, the President can determine the exact moment at which the Vice President becomes Acting President, while also ensuring that the Vice President has adequate preparation time to assume the powers and duties as chief executive.[10]

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[6] Sen. Leverett Saltonstall, Senate Debate, *Congressional Record*, vol. 111, part 3 (February 19, 1965), p. 3270.

[7] John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications*, 3rd edition (New York: Fordham University Press, 2014), p. 113.

[8] Robert E. Gilbert, "The Genius of the Twenty-Fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency," in *Managing Crisis: Presidential Disability and the Twenty-Fifth Amendment*, Robert E. Gilbert, ed. (New York: Fordham University Press, 2000), pp. 31-32.

[9] "Whether Section 3 is broad enough to cover the case of a President's deciding to step aside temporarily—as was suggested during President Richard M. Nixon's last year in office—in order to devote his full time to his defense against impeachment and removal is a debatable question. Although such a use of the Amendment was never mentioned by the Congress that proposed it, it would not be beyond the scope of Section 3, since the Section was intended to be broadly interpreted." Feerick, *The Twenty-Fifth Amendment*, p. 113.

[10] U.S. Congress, Senate, Committee on the Judiciary, *Presidential Inability and Vacancies in the Office of Vice President*, hearing on S.J.Res. 1 et al., 89th Cong., 1st sess., January 29, 1965 (Washington: GPO, 1965), pp. 20-21, 64-

The President could also issue a declaration of disability as a result of an unanticipated injury or diagnosis of serious illness. Such a contingent declaration could take effect immediately on transmission to the Speaker and the President pro tempore.

The President also enjoys broad discretion when declaring a disability to be ended. According to scholar John D. Feerick, under Section 3, "a President is permitted to declare himself disabled either for an indefinite or a specified period of time and to name the hour when the Vice President is to become Acting President."[11] The President would be free to declare any disability ended at his sole discretion at any time, without need for consultation with, or concurrence by, the Vice President, the Cabinet, or Congress.[12] The amendment's legislative history supports this interpretation:

> Under the terms of Section 3, a President who voluntarily transfers his duties and powers ... may resume these powers and duties by making a written declaration of his ability to perform [them].... This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.[13]

The chief executive would remain President for the duration of any disability declaration, but the powers and duties of the office would be transferred to the Vice President.

The question might arise as to whether the President's declaration that a disability no longer exists under Section 3 might be contested using Section 4's procedure authorizing the Vice President and the Cabinet or disability review body to dispute such a declaration. The record indicates that the amendment's authors considered the two sections to be separate, and that a President's actions under Section 3 would not in their view be subject to challenge using Section 4's authorization.[14]

Section 3 also affects the Vice President: the Twenty-Fifth Amendment created a new constitutional office with its provision that in the event of a declared presidential disability, the Vice President discharges the powers and duties of the office of chief executive as *Acting President*. During service as Acting President, however, the question might be raised whether the Vice President would lose the title of President of the Senate, and be succeeded for the duration of the declared disability by the President pro tempore. Support for this assertion could be inferred from the provisions of Article I, Section 3, clause 5 of the Constitution:

> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

Under such a scenario, the President pro tempore would exercise the powers and duties as President of the Senate for the duration of the disability. The Vice President would resume both the title and duties of President of the Senate once the President declared his disability to be ended.

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[11] Feerick, *The Twenty-Fifth Amendment*, p. 113.

[12] U.S. Congress, House of Representatives, Committee on the Judiciary, *Presidential Inability*, hearings on H.R. 836 et al., 89th Cong., 1st sess., February 9, 10, 16, and 17, 1965 (Washington: GPO, 1965), pp. 106-108.

[13] U.S. Congress, Senate, Committee on the Judiciary, *Selected Materials on the Twenty-Fifth Amendment*, report of the subcommittee on constitutional amendments, 93rd Cong. 1st sess., S. Doc. No. 93-42 (Washington: GPO, 1973), p. 24.

[14] U.S. Congress, Senate, Committee on the Judiciary, *Presidential Inability and Vacancies in the Office of the Vice President, Report to Accompany S.J. Res. 1*, 89th Cong. 1st sess., Rept. No. 66 (Washington: GPO, 1965), p. 3.

Disability scholar John Feerick has questioned whether the Vice President would need to take the President's oath of office before becoming Acting President. He has suggested that "the duty of acting as President is encompassed by his vice-presidential oath to perform his duties faithfully," and that assuming the office of Acting President constitutes a duty to be so performed.[15]

If the President were to leave office during an activation of Section 3, the Acting President would succeed to the presidency under the provisions of the Twenty-Fifth Amendment's Section 1, which provides that "[i]n case of the removal of the President from office or of his death or resignation, the Vice President shall become President."

Section 3: Implementations to Date

Section 3 of the Twenty-Fifth Amendment has been informally implemented once, by President Ronald Reagan in 1985, and formally implemented twice, by President George W. Bush, in 2002 and 2007.

President Ronald Reagan—1985

On July 13, 1985, President Ronald Reagan underwent surgery at Bethesda Naval Medical Center to remove a cancerous polyp in his large intestine. During the surgery, which required several hours, the President was fully anesthetized and unconscious. At 11:28 a.m., he transmitted a letter to House Speaker Thomas P. O'Neill and Senate President pro tempore Strom Thurmond stating that he would be "briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President" during this procedure.[16] In the letter, the President designated Vice President George H.W. Bush to discharge the powers and duties of the presidency while Reagan was under anesthesia.

When the President emerged from anesthesia later that day, his Chief of Staff and counsel met with him in the hospital and asked whether he felt well enough to resume his authority as President. Reagan agreed that he did, and at 7:22 p.m. he issued a letter to the Speaker and President pro tempore reclaiming his powers and duties: "please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States."[17]

While President Reagan's actions arguably constituted the first implementation of Section 3 of the Twenty-Fifth Amendment, he claimed not to be doing so in his first letter, which declared his impending disability:

> After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant [present] one.[18]

[15] Feerick, *The Twenty-Fifth Amendment*, p. 114.

[16] Ronald Reagan, "Letter to the President Pro Tempore of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery," July 13, 1985, The American Presidency Project, at https://www.presidency.ucsb.edu/node/259885.

[17] Ronald Reagan, "Letter to the President Pro Tempore of the Senate and the Speaker of the House on the President's Resumption of His Powers and Duties Following Surgery," July 13, 1985, The American Presidency Project, at https://www.presidency.ucsb.edu/node/259886.

[18] Ronald Reagan, "Letter to the President Pro Tempore of the Senate and the Speaker of the House on the Discharge of

Fred Fielding, then White House counsel, later stated that Reagan was concerned with setting a precedent that would bind future successors, particularly for a procedure that he considered "a minor procedure of short duration."[19] While President Reagan may not have intended to invoke the Twenty-Fifth Amendment, the balance of opinion on this episode suggests that, notwithstanding the wording of his letter, he did implement Section 3. John Feerick notes that although he "declaimed any invocation of the Twenty-Fifth Amendment, he nevertheless must have used Section 3."[20] Senator Birch Bayh, "father" of the amendment, noted in 1991 that "... although President Reagan said he didn't think Congress intended a transfer of power by invoking the Twenty-Fifth Amendment under those circumstances, there was no other way it could have been done."[21] Feerick further notes that both the President and First Lady Nancy Reagan claimed in their memoirs that the Twenty-Fifth Amendment had been put into effect by his letter.[22]

President George W. Bush—2002 and 2007

President George W. Bush invoked Section 3 of the Twenty-Fifth Amendment twice during his presidency, when he was anesthetized for routine medical procedures. In contrast with President Reagan in 1985, on both occasions President Bush specifically cited the amendment when declaring his disability and reclaiming his authority.

On June 28, 2002, President Bush was sedated while undergoing a routine colonoscopy. The procedure was conducted at Camp David, near Thurmont, Maryland, by a medical team from Bethesda National Naval Medical Center. In his letter to Speaker Dennis Hastert and President pro tempore Robert Byrd, the President specifically cited the Twenty-Fifth Amendment in his transfer of constitutional powers:

> ... in accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of President of the United States. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties.[23]

The procedure was begun at 7:09 a.m., ended at 7:29 a.m., and the President was awakened two minutes later. He resumed his duties approximately two hours later, at 9:24 a.m., after attending physician Dr. Richard Tubb conducted an overall examination. A press account published prior to a later colonoscopy stated that in 2002 Dr. Tubb had "recommended the additional time to make sure the sedative had no aftereffects."[24] The President declared his disability ended, stating in his letter that it constituted his

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the President's Powers and Duties During His Surgery," July 13, 1985.

[19] *Papers on Presidential Disability and the Twenty-Fifth Amendment*, vol. IV, ed. Kenneth W. Thompson (Lanham, MD: Miller Center, University of Virginia, University Press of America, 1997), p. 148.

[20] Feerick, *The Twenty-Fifth Amendment*, p. 198.

[21] *Presidential Disability: Papers, Discussions, and Recommendations on the Twenty-Fifth Amendment*, James F. Toole and Robert J. Joynt, eds. (Rochester, NY: University of Rochester Press, 2001), p. 416.

[22] Ronald Reagan, *An American Life* (New York: Simon and Schuster, 1990), p. 500; and Nancy Reagan and William Novak, *My Turn: The Memoirs of Nancy Reagan* (New York: Random House, 1989), p. 274. Cited by Feerick, *The Twenty-Fifth Amendment*, p. 198.

[23] "Presidential Letter on Transfer of Constitutional Powers," July 22, 2002, The White House, George W. Bush, President, at https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-4.html.

[24] Deb Riechmann, "Bush to Have Colonoscopy at Camp David," *Washington Post*, July 20, 2007, at

> ... written declaration that I am presently able to resume the discharge of the Constitutional powers and duties of the office of President of the United States. With the transmittal of this letter, I am resuming those powers and duties effective immediately.[25]

The President's second activation of Section 3 followed similar procedures. On July 21, 2007, President Bush was again anesthetized while undergoing a routine colonoscopy. This procedure was also performed at Camp David by a medical team from Bethesda Naval Medical Center led by Dr. Tubb.[26] In a letter to Speaker Hastert and President pro tempore Byrd, effective at 7:09 a.m., the President again cited Section 3 of the Twenty-Fifth Amendment in transferring the powers and duties of his office to Vice President Cheney.[27] At 9:21 a.m. he reclaimed his authority in a letter to the Speaker and President pro tempore.[28]

During both these procedures, Vice President Richard Cheney served as Acting President of the United States. Neither President Bush nor the Vice President mentioned these episodes in their published memoirs,[29] and the only apparent reference to Cheney's performance as Acting President was a press report that during his two hours as Acting President in 2007, he wrote a letter to his grandchildren as "a souvenir for them to have down the road someday."[30]

Section 4: Constitutional Provisions and Analysis

The text of Section 4 of the Twenty-Fifth Amendment follows:

> Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
>
> Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body 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

http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001039.html.

[25] "Presidential Letter Resuming Constitutional Powers," July 22, 2002, The White House, George W. Bush, President, at https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020629-2.html.

[26] Riechmann, "Bush to Have Colonoscopy at Camp David," *Washington Post*, July 20, 2007.

[27] "Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate," The White House, President George W. Bush, July 21, 2007, at https://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070721-5.html.

[28] "Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate," The White House, President George W. Bush, July 21, 2007, at https://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070721-8.html.

[29] See George Bush, *Decision Points* (New York, Crown Publishers: 2010); and Dick Cheney with Liz Cheney, *In My Time: A Personal and Political Memoir* (New York, Simon and Schuster: 2011).

[30] Cheryl Gay Stolberg, "Cheney Pens Letter While Acting as POTUS," The Caucus: the Politics and Government Blog of the Times, *New York Times*, July 30, 2007, at https://thecaucus.blogs.nytimes.com/2007/07/30/cheney-pens-letter-while-acting-as-potus/.

> 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.

Section 4 provides for situations of presidential disability or inability that differ from and are arguably more potentially complex and arguably more problematic than those addressed in Section 3.

Some of the differences between the two sections should be noted. Most obviously, Section 3 can be activated only by the President, while the disability initiation element of Section 4 can be implemented only by the Vice President and either (1) a majority of the Cabinet or (2) a majority of "such other body as Congress may by law provide."

Section 3 was designed to be invoked either in anticipation of presidential inability, or as a response to a disability, while Section 4 was intended by the amendment's sponsors to be activated only in response to a presidential disability.

Section 3 assumes that the President is fully aware and competent, and capable of declaring his disability, while Section 4 assumes that the President, for whatever reason, is unable or unwilling to declare an obvious disability, and that he or she cannot or will not step aside for its duration. Reflecting on the gravity that would attend any implementation of Section 4, Senator Birch Bayh, architect of the Twenty-Fifth Amendment, and manager of its passage in the Senate, sought to clarify what the amendment meant in its language:

> ... I am fully aware of the complexity of the terms with which we are dealing, and feel that the word "inability" and the word "unable," as used in ... this article, which refer to an impairment of the President's faculties, mean that he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office.[31]

Representative Richard Poff, one of the amendment's framers, cited two of the more likely contingencies under which Section 4 might be invoked:

> One is the case where the President by reason of some physical ailment or sudden accident is unconscious or paralyzed and therefore unable to make or to communicate the decision to relinquish the powers of his Office. The other is the case when the President, by reason of mental debility, is unable or unwilling to make any rational decision, including particularly the decision to stand aside.[32]

A more recent commentator on Section 4 emphasizes the constitutional gravity associated with implementing this section, noting that "[t]he separation of a [P]resident of the United States from his powers and duties for any reason should be extraordinarily difficult and should not even be contemplated except under extraordinary circumstances. A stable and mature democracy demands no less."[33]

Section 4 includes the following four distinct possible procedures:

- a declaration of presidential disability by the Vice President acting in agreement with a majority of the Cabinet or such other body as Congress may establish by law (disability review body), followed by assumption of the powers and duties of the presidency by the Vice President as Acting President; and

[31] Sen. Birch Bayh, Senate Debate, *Congressional Record*, vol. 111, part 3 (February 19, 1965), p. 3287.

[32] Rep. Richard Poff, House Debate, *Congressional Record*, vol. 111, part 6 (April 13, 1965), p. 7941.

[33] Gilbert, "The Genius of the Twenty-Fifth Amendment," p. 45.

- an uncontested declaration by the President that no inability exists, followed by the President's resumption of the office's powers and duties; and
- a declaration by the Vice President and a majority of the Cabinet or the disability review body contesting the President's declaration and asserting that he or she remains disabled,[34] followed by
- a decision on the issue by Congress. If Congress, by a two-thirds vote of the Members of both chambers present and voting, taken within 21 days of assembling, "determines … 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." If Congress does not determine that the President is unable to discharge the powers and duties of the office, the President resumes the powers and duties of the office. Alternative outcomes or actions—which could be a decision by Congress not to vote on the question, or a decision to vote to sustain the President's declaration, or if the 21-day window closes without Congress having made a decision—would result in the chief executive resuming the powers and duties of the office.[35]

Section 4 Actors

The Twenty-Fifth Amendment delegates specific roles in Section 4 to two people and three institutions: the President; the Vice President, including in his role as Acting President; "the principal officers of the executive departments" (the Cabinet); "such other body as Congress may by law provide" (identified in this report as the "disability review body"); and Congress. A brief description of their specific roles follows.

The Vice President

The Vice President is listed here ahead of the President because he or she is the indispensable actor in implementing a Section 4 declaration of presidential disability: the amendment's provisions can be invoked only on his or her initiative or agreement. The Vice President's constitutional associates, the Cabinet or the disability review body, could pass a declaration or

[34] The inability of the responsible actors (the Vice President and a majority of the Cabinet or disability review body) to agree within four days that the President remains disabled, and to issue the appropriate declaration, would result in his or her resumption of the powers and duties of the office, presumably immediately. Section 4 does not address, nor does it prohibit, any other actions that might be available to the Vice President and the Cabinet or the disability review body. For instance, what if they sought to affirm the President's recovery declaration? Could they issue, jointly or separately, a declaration to that effect? The reassurance conferred by such a declaration could be useful in conveying a positive message to the public concerning the President's condition. Alternatively, the Vice President and Cabinet or disability review body could choose not to act—to do nothing—which would arguably have a similar effect of sustaining the President's recovery declaration, although a lack of action might not convey the same degree of approval implicit in the former procedure.

[35] Section 4 specifies that a super-majority vote in both houses of Congress by Members present and voting within 21 days of assembling is necessary to sustain the finding of continued presidential disability. Anything less is covered by the phrase, "otherwise, the President shall resume the powers and duties of his office." Here again, the question may be raised as to alternative actions available to Congress. Could Congress signal its agreement with the President's declaration by a positive decision, framed in a joint or concurrent resolution? Nothing in the amendment appears to prohibit such an action, nor does it appear to contemplate it. Alternatively, Congress could arguably decide to forgo action on the declaration, to take no action, which would arguably have the effect of sustaining the President's declaration, although it might not convey the same level of confidence implicit in a positive message. Here again, nothing in the amendment appears to prohibit this action, but neither does it appear to contemplate it. As noted later in this report, this possibility was cited by one of the amendment's framers during debate in the House of Representatives.

otherwise petition the Vice President to initiate the process, but barring his or her action, no implementation of Section 4 is possible.[36] The amendment's framers deliberately placed the Vice President at the center of the process, as the President's constitutionally designated successor, and, in modern practice, the officer most closely associated with the chief executive. The Senate Judiciary Committee explained this arrangement in its report on the amendment:

> The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to President, both politically and physically, and presumably familiarity with his condition.[37]

Representative Richard Poff reinforced this argument when he cited the modern Vice President's unique relationship with the chief executive during House debate on the proposed Twenty-Fifth Amendment:

> The Vice President, a man of the same political party, a man originally chosen by the President, a man familiar with the President's health, a man who knows what great decisions of state are waiting to be made, a man intended by the authors of the Constitution to be the President's heir at death or upon disability, surely should participate in a decision involving the transfer of presidential powers.[38]

Since the Twenty-Fifth Amendment was ratified, the Vice President's role has been sometimes criticized for its potential for abuse. As one study noted, "scenarios for endless mischief have been constructed and widely printed as both fact and fiction, horror stories of what the 25th [Amendment] might produce."[39] The balance of opinion, however, suggests that a Vice President would be unlikely to press a politically motivated activation of Section 4. As Professor Feerick notes, "[h]istorically, Vice Presidents have been very hesitant to exercise what power they may have or to appear disloyal to the President."[40] As another commentator put it,

> ... because of the Vice President's conflict of interest—the powers and duties transferred from the President would come to him—he was unlikely to move except in clear cases of disability. History had suggested that vice-presidential timidity was a greater problem than vice-presidential aggression. Logic would confirm that intuition. A politically ambitious Vice President would seem unlikely to risk his political future by seeming to supplant the President improvidently.[41]

The Twenty-Fifth Amendment's authors included an additional institutional restraint to any inappropriate action by the Vice President: mindful of the Constitution's many safety mechanisms and fallback procedures, the amendment requires that any activation of Section 4 must be agreed to jointly by the Vice President and a majority of either the Cabinet or "such other body as Congress by law may provide."

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[36] 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*, p. 195.

[37] U.S. Congress, Senate, Committee on the Judiciary, *Presidential Inability and Vacancies in the Office of the Vice President*, p. 13.

[38] Rep. Richard Poff, House debate, *Congressional Record*, vol. 111, part 6 (April 13, 1965), p. 7941.

[39] "Report of the Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment," in *Papers on Presidential Disability and the Twenty-Fifth Amendment by Six Medical, Legal and Political Authorities*, Kenneth W. Thompson, ed. (Charlottesville, VA, The Miller Center: 1988), vol. 1, p. 161.

[40] Feerick, *The Twenty-Fifth Amendment*, p. 281.

[41] Goldstein, "The Vice Presidency and the Twenty-Fifth Amendment," p. 194.

The President

The President's role under Section 4 is essentially reactive: the chief executive may at any time issue a declaration stating that he or she is no longer disabled. If the Acting President, together with a majority of the Cabinet or disability review body, does not contest this finding within four days, the President resumes the powers and duties of the office; if, as noted earlier in this report, they do contest the President's declaration, the issue is decided by Congress. The President, who retains the office of chief executive throughout a disability, can declare the disability to be ended at any time, and can do so any number of times.[42] Neither Section 3 nor Section 4 can affect the President's tenure in office or term of office—barring death, resignation, or impeachment, a chief executive who is disabled for any length of time under the amendment's provisions continues in office until the term expires.

The Cabinet

The Cabinet's role in determining presidential inability is one of the novel features of the Twenty-Fifth Amendment. A role for the Cabinet in assessing and declaring presidential disability had been discussed during the disabilities of Presidents Garfield and Wilson[43] and was suggested by author Ruth Silva in *Presidential Succession*, her 1951 study of the question.[44] Accounts of the amendment's legislative history reveal general support by Senators and Representatives active in the process, as well as by witnesses offering testimony during hearings on the proposal. As noted above, the Senate Judiciary Committee report on S.J.Res. 1 (89th Congress), the proposed amendment, stated that "the combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances.... It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately (sic) familiar with the President's physical and mental condition."[45] Professor Feerick echoed these findings, noting that, with some exceptions, there was consensus among witnesses at hearings that

> [t]he Cabinet was said to be the best possible body to assist the Vice President in making his determination because its members are close to the president and likely to be aware of any inability and to know whether the circumstances require that the Vice President act as President. Furthermore, the use of the Cabinet would be consistent with the principle of separation of powers and would inspire public confidence.[46]

The question of who constituted the Cabinet was decided during the course of committee hearings and congressional debate on the amendment: it was agreed that the Cabinet consisted of "the principal officers of the executive departments," the department secretaries only. Certain other officers who are customarily accorded "cabinet rank"—such as the U.S. Ambassador to the United Nations, the U.S. Trade Representative, secretaries of the individual armed services, and

[42] Rep. Richard Poff, House debate, *Congressional Record*, vol. 111, part 6 (April 13, 1965), p. 7941.

[43] The disabilities of Presidents James Garfield and Woodrow Wilson and other chief executives are examined later in this report, under "Selected Instances of Presidential Disability."

[44] Ruth Silva, *Presidential Succession* (New York, Greenwood Press: 1968, c. 1951, University of Michigan Press), pp. 107-109.

[45] *Presidential Inability and Vacancies in the Office of the Vice President, Report to Accompany S.J. Res.1*, p. 13.

[46] Feerick, *The Twenty-Fifth Amendment*, p. 59.

the President's personal staff members—were intended to be excluded from that definition.[47] At the present time, the following 15 officers would be eligible for inclusion in a discussion or finding of presidential disability under Section 4:[48]

- Secretary of State
- Secretary of the Treasury
- Secretary of Defense
- Attorney General
- Secretary of the Interior
- Secretary of Agriculture
- Secretary of Commerce
- Secretary of Labor
- Secretary of Health and Human Services
- Secretary of Housing and Urban Development
- Secretary of Transportation
- Secretary of Energy
- Secretary of Education
- Secretary of Veterans Affairs
- Secretary of Homeland Security

The Vice President would need the concurrence of at least 8 of the 15 officers listed above in order to activate a declaration of presidential disability.

Respecting details of the Cabinet's participation, the House Judiciary Committee's 1965 report on the proposed amendment stated that in the event of a vacancy in any of the Cabinet offices, "the acting head would be authorized to participate in a presidential disability determination,"[49] while Feerick notes that the amendment's supporters asserted that recess appointees to Cabinet offices would also be eligible to participate in a Section 4 deliberation.[50]

While the Cabinet has also figured in some of the "scenarios for endless mischief" cited above, the balance of opinion on this question at the time that the Miller Center Commission published its report in 1988 suggested that Cabinet would be likely to act with great caution in any implementation of Section 4:

> ... while the Cabinet members are apt to be loyal to the administration and have first hand awareness of the president's condition, they are also likely to be overly reluctant to acknowledge publicly that the president has any deficiencies.[51]

[47] U.S. Congress, House, Committee on the Judiciary, *Presidential Inability and Vacancies in the Office of Vice President*, report to accompany H.J. Res. 1, 89th Cong., 1st sess., H. Rept. 89-203 (Washington: GPO, 1964), p. 3.

[48] The Cabinet officers are listed by departmental seniority, the order in which their departments were established.

[49] U.S. Congress, House, Committee on the Judiciary, *Presidential Inability and Vacancies in the Office of Vice President*, p. 3.

[50] Feerick, *The Twenty-Fifth Amendment*, p. 118.

[51] "Report of the Miller Center Commission," p. 175.

"Such Other Body As Congress May by Law Provide"

Debate in Congress on the question of the alternative body was vigorous; the reports of both the Senate and House Judiciary Committees give credit to opponents of this proposal. Arguments in its favor appear to have been persuasive, even if the report was less than enthusiastic in its endorsement of a disability review body: "However, in the interest of providing flexibility for the future, the Amendment would authorize Congress to designate a different body if this were deemed desirable in light of subsequent experience."[52]

Congress is given a broad mandate to fashion the disability review body, including deciding its composition. According to Professor Feerick, the following options were mentioned during debate on the amendment: Congress could designate itself; it could retain the Cabinet but enlarge or shrink it; or it could include a mix of Members of Congress and distinguished public figures.[53] Others have suggested Justices of the Supreme Court, medical doctors,[54] and the Surgeon General as possible members of such a body.[55]

In the context of the checks and balances of the legislative process, Congress has broad authority over the lifespan of a disability panel. It could establish the body as a permanent institution.[56] Alternatively, it could require reauthorization at regular intervals—for instance, specifying renewal of its mandate with each change of presidential administration. A review panel established by law during a Section 4 disability could also be limited by Congress to the duration of the disability during which it was created. As Senator Jacob Javits noted during debate on the amendment,

> Congress has the right to provide for the exclusivity of that body in exercising this authority, as well as the way in which the body shall exercise that authority, and other pertinent details necessary to the creation of such a body, its continuance, its way of meeting, the rules of the procedure, and the way in which it shall exercise its power.[57]

As noted above, the amendment's framers placed a check on Congress's ability to create a disability review body by requiring that it be created "by law." Any bill or joint resolution to establish such an institution would thus be subject to the full range of the legislative process before it was enacted, up to and including the President's veto. Some observers have argued that any President might be reluctant to cooperate in establishing a disability review panel while she or he is in good health.[58] Here again, a deterrent factor might involve the "scenarios for endless mischief ... and horror stories of what the 25th [Amendment] might produce."[59] Barring a veto override, it could be effected only with the President's approval.

Section 4 does not place a time constraint on creation of a disability review panel. A panel could be established at any time—at the beginning of a presidential administration, or in connection with a declared presidential disability. Some studies of the Twenty-Fifth Amendment considered this option, suggesting the prospective establishment of a standing review body—"standby

[52] "Report of the Miller Center Commission," p. 175.

[53] Feerick, *The Twenty-Fifth Amendment*, p. 120.

[54] Gilbert, "The Genius of the Twenty-Fifth Amendment," p. 35.

[55] "Report of the Miller Center Commission," p. 175.

[56] The body would be subject to being disestablished by subsequent repeal legislation, or a terminating date could be provided in the authorizing legislation.

[57] Sen. Jacob Javits, Senate debate, *Congressional Record*, volume 111, part 11 (June 30, 1965), p. 15386.

[58] Gilbert, "The Genius of the Twenty-Fifth Amendment," pp. 38-40.

[59] "Report of the Miller Center Commission," p. 161.

equipment"—that would supplant the Cabinet and join with the Vice President in declaring a Section 4 presidential disability.[60] Establishing a disability review body on a contingent basis—that is, during the actual implementation of a Section 4 disability—would, however, face a considerable obstacle in the timetable set by Section 4. No more than 21 calendar days would be available to Congress for the consideration of legislation establishing such an entity.

Congress

The scope of Congress's action in a Section 4 disability declaration is potentially varied. It could be minimal, or it could be a role of profound constitutional gravity.

Assuming an uncontroversial activation of Section 4 followed by the President's eventual recovery and reclamation of powers and duties, the only congressional certainty would be that the Speaker of the House of Representatives and the President pro tempore of the Senate would receive any initial declaration of disability from the Vice President and Cabinet (or disability review body) and the President's subsequent undisputed declaration that the disability was ended.

The creation by law of a disability review body, as provided in Section 4 and discussed in detail earlier in this report, would place considerable additional responsibility on Congress. The legislative procedures necessary to establish such a body could present demands for what could involve complex action, potentially under strict time constraints. First, as discussed previously, the Constitution offers no guidance on composition of a review body: Congress would work from a blank slate should it decide to draft and consider the relevant legislation. Second, although a standing disability review body could be established prospectively under Section 4, it is also possible that Congress would decide to legislate in this area during a Section 4 disability, which would add an element of extreme urgency to such a task.

Finally, the most significant element of Congress's role during a Section 4 disability would be if it were called on to decide the issue during an instance in which

- the President has declared that his or her disability, as declared by the Vice President and the Cabinet or disability review body, is ended and that he or she is fit to resume the powers and duties of office; and
- this declaration is disputed by the Vice President and the Cabinet or disability review body.

Under these circumstances, in the words of the amendment, "Congress shall decide the issue ..." The amendment further directs Congress to convene within 48 hours if it is not in session, and to vote to decide whether or not the President is still disabled within 21 days.

Section 4 Actions

Declaring a Presidential Disability

The first component of Section 4 is the declaration by the Vice President, acting in agreement with either a majority of Cabinet officers *or* a majority of the members of "such other body as Congress may by law provide" (the disability review body), that "the President is unable to discharge the powers and duties of his office...." This constitutes a contingent, or unanticipated,

[60] Goldstein, "The Vice Presidency and the Twenty-Fifth Amendment," pp. 202-204. A panel of physicians was the most frequently suggested composition of a standing disability review body.

implementation of the amendment, a process that could be invoked if the President were unable for any reason, or unwilling, to declare a disability.

The vehicle for activating this component of Section 4 is the same as that for Section 3: a "written declaration," which presumes a document jointly agreed to by the Vice President and his or her associates and transmitted to the Speaker and the President pro tempore. Although nothing in the amendment appears to prohibit the Cabinet or disability review body from acting independently to issue a declaration of presidential disability, such action would not be implemented without the Vice President's concurrence. It could be argued from this practical effect and the language in Section 4, which refers to the Vice President first and then the Cabinet or disability review body, that the amendment's framers intended the Vice President to take the lead in activating Section 4. Certainly, no action can be taken unless or until the Vice President issues a declaration.[61] As with Section 3, the amendment's language arguably allows for a variety of delivery options, including physical delivery or transmission by various electronic media. It also suggests, however, that (1) these officers must receive the declaration before it can take effect; and (2) as with a declaration issued under Section 3, it would take effect immediately upon transmission to the Speaker and President pro tempore, regardless of whether Congress is in session.[62]

Given the constitutional gravity of such a declaration, it could be argued that, as with Section 3, the Speaker and the President pro tempore might appropriately issue an official acknowledgement of the declaration, either jointly or separately. Presidential disability scholar John Feerick reports that the amendment's sponsors envisioned a single document, a joint declaration by the Vice President and his or her constitutionally designated associates.[63]

Upon delivery of the declaration, the Vice President would "immediately" assume the powers and duties of the office as Acting President.

Declaring a Disability to Be Ended

Section 4 authorizes the President to declare his disability ended, again by transmitting to the Speaker and President pro tempore "a declaration that no inability exists." It should be noted that the amendment does not authorize the Vice President and the Cabinet or disability review body to declare a disability to be ended—that responsibility is vested exclusively in the chief executive.

Following the declaration, the President would automatically resume the powers and duties of office unless the Vice President and a majority of the Cabinet or disability review body were to contest the declaration within four days. The language in the amendment thus arguably prescribes a waiting period of not less than four days between the President's declaration of recovery and resumption of the powers and duties of office.

Contesting a Declaration That a Disability Is Ended

If, after the President has declared the disability to be ended, the Vice President/Acting President and a majority of the Cabinet or the disability review body determine that the President remains unable to resume the powers and duties of office, Section 4 empowers them to issue a written declaration, delivered to the Speaker and the President pro tempore, that the chief executive continues to be "unable to discharge the powers and duties of his office." This counter-declaration

[61] Goldstein, "The Vice Presidency and the Twenty-Fifth Amendment," p. 195.

[62] Sen. Leverett Saltonstall, Senate Debate, *Congressional Record*, vol. 111, part 3, (February 19, 1965), p. 3270.

[63] Feerick, *The Twenty-Fifth Amendment*, p. 118.

must be issued within four days of the President's assertion that the disability is over. The question of the disability is then decided by Congress.

Congress Decides the Issue

In the event the President and the Vice President and Cabinet or disability review body disagree on the continuation of the chief executive's disability, Congress decides the issue. Once the finding of continued disability is transmitted to the Speaker and President pro tempore, Congress is called on to act expeditiously to resolve the impasse.

The amendment imposes two time constraints on Congress when it is called on to make this decision. First, Congress has 21 days to consider the question of the President's disability if it is in session when the Speaker and President pro tempore receive the joint declaration. If it is not in session, Congress must assemble within 48 hours, after which it then has 21 days to consider the question, a theoretical maximum of 23 days.

If Congress determines by a two-thirds vote of the Members of both houses present and voting that "the President is unable to discharge the powers and duties of his office," the state of disability continues and "the Vice President shall continue to discharge the same as Acting President." If the required two-thirds majority is not obtained within the specified time period, "the President shall resume the powers and duties of his office[,]" presumably in most cases immediately following a failed vote in the House and Senate. The amendment does not address the question of appropriate procedures when Congress considers a disagreement on Section 4 presidential disability, but some of the elements might be discerned in the supporting congressional documents and original debate in Congress on the amendment.

- For instance, the Senate's report on the amendment emphasized that "congressional action [on a question of presidential disability] ... should be taken under the greatest sense of urgency."[64]
- Congress would be able to proceed in considering the question in whatever manner it chooses: "[t]he discussion of the committee made it abundantly clear that the proceedings in the Congress ... would be pursued under rules prescribed, or to be prescribed, by the Congress itself."[65]
- The language requiring a "two-thirds vote of both Houses" to confirm a finding of continued presidential disability was interpreted by the amendment's framers as meaning a two-thirds vote of Members present and voting, the same requirement as for proposal of a constitutional amendment.[66]
- In addition, during debate on the amendment in the House of Representatives, Representative Richard Poff suggested that Congress had a de facto third option to its two choices of voting with the Vice President and Cabinet to confirm the disability or to agree with the President when considering a declaration—it could decide to take no action at all on continuation of the disability: "Circumstances may be such that the Congress by tacit agreement may want to uphold the President in some manner that will not amount to a public rebuke of the Vice

[64] *Presidential Inability and Vacancies in the Office of the Vice President, Report to Accompany S.J. Res. 1*, p. 3.

[65] *Presidential Inability and Vacancies in the Office of the Vice President, Report to Accompany S.J. Res. 1*, p. 3.

[66] *Presidential Inability and Vacancies in the Office of the Vice President, Report to Accompany S.J. Res. 1*, p. 20.

President who is then Acting President.... [This] option furnishes the graceful vehicle."[67]

- Disability scholar John Feerick also notes that "[s]ince an inability decision does not result in the President's removal from office, there is nothing to prevent him, after an adverse congressional decision[,] from issuing another recovery declaration, thereby activating the process again."[68]
- Feerick further suggests that debates on the amendment indicate that "a congressional decision supporting either the President or Vice President is not subject to judicial review," on the grounds that this would be a "political question" of the sort that the Supreme Court and lower courts have traditionally avoided.[69]

Section 4 Implementation Considered—President Ronald Reagan, 1981, 1987

As noted earlier in this report, Section 3 of the Twenty-Fifth Amendment has been implemented on several occasions. In contrast, Section 4 has not been activated since the amendment was ratified in 1967. According to contemporary accounts, however, the possibility of declaring a presidential disability under Section 4 was considered twice during the Administration of President Ronald Reagan (1981-1989).

On March 30, 1981, President Reagan was shot and seriously wounded while leaving a speaking engagement in Washington. When the extent of his injuries became known, the President was rushed to George Washington University Hospital for emergency surgery, for which he was anesthetized.

During and after the surgery, Cabinet members and presidential advisors met at the White House to consider the situation, at which time Fred Fielding, a presidential counsel, briefed the principals on the disability provisions of the Twenty-Fifth Amendment, using a draft position paper he had prepared in anticipation of such an event.[70] According to Fielding, the group discussed implementing Section 4 of the amendment, until it was learned that the President's surgery had been successful and that his medical team predicted a full recovery.[71]

Presidential succession and disability scholar John D. Feerick further noted in *The Twenty-Fifth Amendment: Its Complete History and Applications* that James A. Baker (the Chief of Staff), Michael Deaver (his deputy), and Edwin Meese (counselor to the President) discussed implementing Section 4 of the amendment while they were at the hospital, during the President's surgery. When they learned that the President's condition was stable and a full recovery was anticipated, they decided not to consider Section 4.[72] Feerick notes that these discussions took place while Vice President George H. W. Bush, whose action would have been required to

[67] Rep. Richard Poff, House debate, *Congressional Record*, vol. 111, part 6 (April 13, 1965), p. 7941.

[68] Feerick, *The Twenty-Fifth Amendment*, p. 120.

[69] Sen. Sam Ervin, Senate debate, *Congressional Record*, vol. 111, part 11 (July 6, 1965), p. 1558.

[70] Fred F. Fielding, "An Eyewitness Account of Executive 'Inability,'" *Fordham Law Review*, vol. 79, no. 3 (December 2010), pp. 828-829, at http://fordhamlawreview.org/issuescategory/december-2010-vol-79-no-3/.

[71] Fielding, "An Eyewitness Account of Executive 'Inability.'"

[72] Feerick, *The Twenty-Fifth Amendment*, p. 195, quoting Michael Deaver and Mickey Herskowitz, *Behind the Scenes: In Which the Author Talks About Ronald and Nancy Reagan ... and Himself* (New York: Morrow, 1987), p. 22.

implement Section 4, was not present, and that "it seems clear that the issue was resolved by a handful of officials without the kind of formal action by the Cabinet and Vice President that the Amendments contemplated."[73] Presidential counsel Fielding later recalled that when Vice President Bush arrived at the White House, he conferred with Fielding, Attorney General William French Smith, Chief of Staff Baker, and Defense Secretary Caspar Weinberger, at which time they confirmed the earlier decision not to proceed to invoke Section 4.[74]

Six years later, early in 1987, former Senator Howard Baker, President Reagan's newly appointed Chief of Staff, reportedly received a memorandum from an aide that claimed the President was "inattentive and inept." The memorandum went on to urge Baker to "consider the possibility that section four of the 25th Amendment might be applied." Chief of Staff Baker, however, found the President to be "attentive and alert" at a March 2 meeting and dismissed the report as inaccurate.[75] He later said that when he observed President Reagan, "[i]t did not take me a day to figure out that this man was sharp, well organized, fully capable, and the same person that I knew from previous years."[76]

Section 4 of the Twenty-Fifth Amendment has been questioned because of the arguable complexity of its provisions, and its potential for misuse, as discussed earlier in this report. In its 1965 report on the amendment, the Senate Judiciary Committee reasoned that "[t]he final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of 'constitutional morality.'"[77] Another commentator noted the following:

> Because the Amendment deals with unpredictable human frailties, it is not a perfect solution, but few exist in constitutional history. The task is to make the most of what the Amendment encompasses. Success depends on the good judgment and good sense of our leaders and the citizenry.[78]

Sections 3 and 4—Disability Contingency Planning

As noted in the previous section, presidential counsel Fred Fielding had begun to prepare a contingency planning notebook on presidential succession in 1981, early in the Reagan Administration. According to Fielding, the book "was really a kind of emergency manual, which detailed every possible scenario that we could think of for presidential inability or even vice presidential inability."[79] Although it was in draft form at the time, Fielding and various senior

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[73] Feerick, *The Twenty-Fifth Amendment*, p. 195, quoting Deaver and Herskowitz, *Behind the Scenes*, p. 22. Vice President George H. W. Bush, who was in Texas to deliver a speech, returned to Washington when the extent of the President's injuries was learned.

[74] Fielding, "An Eyewitness Account of Executive 'Inability,'" p. 829.

[75] Jack Nelson, "Aide's '87 Memo Raised Question of Removing Reagan from Office," *Washington Post*, September 15, 1988, at https://www.washingtonpost.com/archive/politics/1988/09/15/aides-87-memo-raised-question-of-removing-reagan-from-office/a9ec7c98-2783-4362-8d9c-af41664af057/?utm_term=.c8e4ebe5e82e. The article also quotes Jane Mayer and Doyle McManus, *Landslide: The Unmaking of a President*, 1984-1988 (Boston: Houghton-Mifflin, 1988), p. ix.

[76] Lawrence K. Altman, "While Known for Being Forgetful, Reagan Was Mentally Sound in Office, Doctors Say," *New York Times*, October 5, 1997, at https://www.nytimes.com/1997/10/05/us/while-known-for-being-forgetful-reagan-was-mentally-sound-in-office-doctors-say.html.

[77] *Presidential Inability and Vacancies in the Office of the Vice President, Report to Accompany S.J. Res. 1*, p. 13.

[78] Kenneth W. Thompson, "Succession and the Twenty-Fifth Amendment," in *The Presidency in Transition* (New York: Center for the Study of the Presidency, 1989), *Proceedings*, volume VI, number 1 (1989), p. 443.

[79] Fielding, "An Eyewitness Account of Executive 'Inability,'" p. 829.

members of the President's staff consulted it on March 30, 1981, after the President had been shot by a would-be assassin. The disability briefing manual was subsequently formalized and was available for consultation throughout the Reagan Administration.

Various study groups and conferences on presidential disability and succession since that time have urged advance contingency planning by the President's staff. Although little or no information on these plans has been made available to the public, subsequent Presidents may have followed a course similar to that of the Reagan White House. For instance, several sources claimed that President George H. W. Bush (1989-1993) commissioned a "mostly secret" contingency planning document that was also adopted by President Bill Clinton (1993-2001) during his tenure in office.[80] A 2010 *Fordham Law Review* article suggests that subsequent administrations may have adopted the same procedures: "Whether the same plan was adopted by the administrations of Presidents George W. Bush [2001-1009] and Barack Obama [2009-2017] is unclear, but it is known that both had comprehensive contingency plans."[81]

Legislative Proposals in the 115th Congress

Two bills that would establish the "other body" contemplated in Section 4 of the Twenty-Fifth Amendment have been introduced to date in the 115th Congress. Both would create a disability review panel as a potential partner with the Vice President in the presidential disability process. As noted earlier in this report, congressional authority to establish a body as an alternative to the Cabinet in determinations of Section 4 presidential disability is balanced both by the internal procedural requirements any bill would face in the legislative process, and the fact that it is subject to the President's approval, unless Congress were able to override a presidential veto.

H.R. 1987—Oversight Commission on Presidential Capacity Act

This measure was introduced by Representative Jamie Raskin on April 6, 2017. He has since been joined by 67 cosponsors at the time of this writing.[82] H.R. 1987 has been referred to the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary and to the Committee on House Rules for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdictions of the committees concerned. No further action had been taken at the time of this writing.

H.R. 1987 would establish a legislative branch commission that would supplant the Cabinet in determining presidential disability under Section 4 of the Twenty-Fifth Amendment. The 11 commission members would include eight physicians, four of whom would be psychiatrists, appointed by the following officers of Congress:

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[80] *Presidential Disability: Papers, Discussions, and Recommendations on the Twenty-Fifth Amendment*, pp. 102-103, quoting Sen. Birch Bayh: "Both Presidents George Herbert Walker Bush and Clinton made arrangements with their vice presidents in the event of illness. These contingency plans were never invoked and remain secret." "What Is the 25th Amendment and When Has It Been Invoked," *History News Network*, George Washington University, at https://historynewsnetwork.org/article/812.

[81] Second Fordham University School of Law Clinic on Presidential Succession, "Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System," *Fordham Law Review*, vol. 86, issue 3, p. 934, at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5454&context=flr.

[82] For cosponsors, see H.R. 1987, 115th Congress, at https://www.congress.gov/bill/115th-congress/house-bill/1987/cosponsors?r=1.

- two members appointed by the majority leader of the Senate;
- two members appointed by the minority leader of the Senate;
- two members appointed by the Speaker of the House of Representatives; and
- two members appointed by the minority leader of the House of Representatives.

The commission would also include the following additional members:

- two members, one appointed jointly by Democratic leadership of the Senate and House of Representatives, and the other appointed jointly by the Republican leadership of the Senate and House of Representatives. The majority party "leader" in the House of Representatives for the purposes of this legislation is the Speaker. Each of these members shall have served in one of the following offices: President, Vice President, Secretary of State, Attorney General, or as Secretary of State, Defense, or as Surgeon General; and
- one member, to serve as Chair of the Commission, appointed by a simple majority vote by the aforementioned 10 appointed commission members.

Commission members would serve a four-year term, and would be appointed during a 30-day period following every presidential election. Member vacancies would be "filled in the manner in which the original appointment was made," not later than 30 days after the vacancy occurred.

The commission would be activated by the adoption of a concurrent resolution of Congress under expedited procedures; within 72 hours of the resolution's adoption, it would conduct "an examination of the President to determine whether the President is incapacitated, either mentally or physically...." The commission would be directed to take any "refusal by the President to undergo such examination" into account in its report to Congress. Not later than 72 hours after completing its examination of the President, it would be required to submit a report to the Speaker and the President pro tempore "describing the findings and conclusions of the examination."

Discussion

H.R. 1987 may be considered an example of a "medical professionals" model for a disability review body, as discussed in congressional debate on the Twenty-Fifth Amendment and reported by Robert E. Gilbert and the Miller Center in its *Report on Presidential Disability and the Twenty Fifth Amendment*.[83] This bill would replace the Cabinet, vesting the authority to join the Vice President in making a Section 4 declaration of disability in a body (the Oversight Commission on Presidential Capacity) composed largely, but not exclusively, of physicians. In addition to offering professional expertise, a review panel on this model would arguably be capable of rendering a dispassionate, clinical decision in the event of a disability. As one scholar noted, "cabinet members also owe their high political positions to the president. They are members of the president's official family and understandably would be reluctant to appear disloyal to him."[84] And, as the Miller Center suggested in its 1988 study, Cabinet members might be "overly reluctant to acknowledge that the President has any deficiencies."[85] Conversely, Gilbert noted potential drawbacks to the medical professionals model, arguing that such a body might itself be

[83] Gilbert, "The Genius of the Twenty-Fifth Amendment," pp. 35-40; "Report of the Miller Center Commission," p. 175.

[84] Gilbert, "The Genius of the Twenty-Fifth Amendment," p. 34.

[85] "Report of the Miller Center Commission," p. 175.

unable to reach definitive resolution to a question of disability: "the President would find himself badly compromised by any adverse or ambiguous medical 'reports' it [the impairment review body] issued.... Indeed, conflicting medical opinions might well make it considerably more difficult for the vice president ... to act."[86]

It may also be noted that H.R. 1987 establishes an internal schedule for action by the panel: when directed by Congress to assemble and conduct an examination of the President, the commission would have 72 hours for this purpose, and another 72 hours to report its findings to the Speaker and President pro tempore. These requirements would be subordinate to the timeline established in the amendment for congressional consideration.

The bill takes into consideration the fact that the President might not agree to a physical examination by the panel, directing it to take the President's refusal "into consideration" in reaching its conclusions concerning the President's condition.

Although the bill does not refer to the primacy of the Vice President under Section 4, it may be noted that any finding of disability by an Oversight Commission on Presidential Capacity established by H.R. 1987 would be advisory absent the Vice President's participation in the presidential disability process.

H.R. 2093—Strengthening and Clarifying the 25th Amendment Act of 2017

This measure was introduced by Representative Earl Blumenauer on April 14, 2017. He has since been joined by five cosponsors at the time of this writing.[87] H.R. 2093 has been referred to the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary. No further action had been taken at the time of this writing.

H.R. 2093 would establish an "alternative body to transmit a written declaration that the President is unable to discharge the powers and duties of his office in accordance with Section 4 of the 25th Amendment to the Constitution."

The members of the body would include all former Presidents and Vice Presidents who had not been impeached by the House of Representatives and convicted by the Senate. The size of the body would therefore vary according to the number of persons who were qualified to be members.[88]

Members would serve for life, unless removed by vote of a majority of the other members.

The body's existence would depend on there being at least two qualified members (i.e., former Presidents or Vice Presidents who had not been impeached by the House and convicted by the Senate) alive at any time. Otherwise, the body would be terminated until there were two people meeting the membership criteria, at which time it would be reestablished.

[86] Gilbert, "The Genius of the Twenty-Fifth Amendment," p. 37.

[87] In order of their sponsorship, Reps. Dwight Evans, Alan S. Lowenthal, Zoe Lofgren, Anna G. Eshoo, and Jamie Raskin.

[88] For instance, at the time of this writing, there are five living former Presidents who would qualify for membership: James E. "Jimmy" Carter, George H. W. Bush, William J. "Bill" Clinton, George W. Bush, and Barack H. Obama; and five living former Vice Presidents: Walter F. Mondale, J. Danforth "Dan" Quayle, Albert "Al" Gore, Jr., Richard B. "Dick" Cheney, and Joseph R. "Joe" Biden.

The powers and duties of the body would be limited to transmitting a written declaration that the President is unable to discharge the powers and duties of his office in accordance with Section 4 of the Twenty-Fifth Amendment to the Constitution.

Discussion

H.R. 2093 could be considered as a "distinguished statesmen" model for a disability review body. It would have an exclusive membership: only living former Presidents and Vice Presidents would be eligible. The principal argument for this approach suggests that with their accumulated experience, perspective, and wisdom, the former Presidents and Vice Presidents would be able to reach a balanced judgment in the case of a presidential disability. Proponents might further note that nothing in the bill's language appears to prohibit a distinguished statesmen panel from requesting information, advice, and counsel from the same sort of medical professionals who would comprise a review body under H.R. 1987. Under the act, the body would have the theoretical authority to initiate a finding of presidential disability under Section 4, or to join a Vice President who had initiated such action in declaring a President to be disabled. The bill, however, would not change the constitutional requirement that both the Vice President and the disability review body must agree, either on an initial finding of disability, or on disputing a President's declaration that his or her inability no longer existed.

Perspectives on Presidential Disability

Original Intent: Presidential Disability in the Constitution

Article II, Section 1, clause 6 of the Constitution governed presidential succession and inability from 1789 until the Twenty-Fifth Amendment was ratified in 1967. Throughout these years, however, it was never invoked to cover an instance of presidential disability, although several Presidents were arguably incapacitated, in some cases for weeks or months, during this period.

Neither presidential succession nor the related question of disability was included in the original detailed plans of government—the New Jersey and Virginia Plans of Union—submitted to the Constitutional Convention when it convened in late May of 1787. Although they were included by Alexander Hamilton and Charles Pinckney in their less-well-known government outlines,[89] these issues were first addressed in the Report of the Committee on Detail, on August 6, 1787. They continued to evolve until late in the Convention, when the following language was settled on:

> In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice president, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability of both the President and Vice President....[90]

While the designation of the Vice President was clear, clause 6 was short on definitions and procedures. During the convention, John Dickinson of Pennsylvania noted this silence when he raised the issue in what was, perhaps, a rhetorical question. While seconding a postponement of the question on August 27, he was recorded in Madison's notes as follows: "Mr. Dickinson 2ded

[89] Silva, *Presidential Succession*, pp. 4-5.

[90] U.S. Constitution, Article II, Section 1, clause 6. The evolution of succession and inability provisions is traced by *The Founders Constitution* (Chicago: University of Chicago Press), web edition, at http://press-pubs.uchicago.edu/founders/documents/a2_1_6s1.html.

[seconded] the postponement[,] remarking that it was too vague. What is the extent of the term 'disability' & who is to be the judge of it?"[91]

The Second Congress (1791-1793) exercised its constitutional authority to provide for instances of the simultaneous vacancy or disability of both the President and Vice President in the Succession Act of 1792. Enacted as part of a larger bill that also set procedures for the impending 1792 presidential election, it did not provide any definition of disability and did not address the question of how a presidential disability would be treated:

> Sec. 9 That in case of death, resignation, removal or inability of both the President and Vice President of the United States, the President pro tempore of the Senate, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected. [92]

Thus, the latter of Dickinson's questions was to remain unanswered until ratification of the Twenty-Fifth Amendment in 1967, while the former, a clear-cut definition of what constitutes presidential inability or disability, arguably remains at issue today.

Selected Instances of Presidential Disability

The ambiguities inherent in clause 6 may have contributed to its dormancy over the long period between adoption of the Constitution and ratification of the Twenty-Fifth Amendment. During these 178 years, eight Presidents died in office[93] and were succeeded largely without serious incident, notwithstanding controversy as to whether the Vice President *acted* as President or *became* the President under such circumstances.[94]

Presidential disability, however, presented a more difficult issue. In an era when sanitation was poor, the practice of medicine problematic at best, and germ theory unknown, it is not surprising that many Presidents suffered from disabling illnesses at some point of their tenure. For instance, George Washington contracted pneumonia in 1790 and lay near death for two weeks. James Madison suffered from a disabling fever during his presidency.[95] Andrew Jackson lived with the after-effects of smallpox and malaria, and for much of his life carried two bullets in his body, which may have caused long-term lead poisoning.[96]

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[91] U.S. Constitutional Convention, 1787, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Athens, OH: Ohio University Press, 1966), p. 536. See also at *The Founders Constitution*, web edition, at http://press-pubs.uchicago.edu/founders/documents/a2_1_6s1.html.

[92] 1 Stat. 240.

[93] During the same period (1789-1967), seven Vice Presidents died in office and one resigned, in each case leaving the Vice Presidency vacant until the next election. Vice Presidents who died in office: George Clinton, 1812; Elbridge Gerry, 1814; William Rufus King, 1853; Henry Wilson, 1875; Thomas A. Hendricks, 1885; Garret A. Hobart, 1899; and James S. Sherman, 1912. Vice President who resigned: John C. Calhoun, 1832.

[94] William Henry Harrison, the first President to die in office, was succeeded by Vice President John Tyler in 1841. Tyler asserted that he was neither "Acting President" nor "acting as President," but *President* of the United States, assuming not only the duties and powers of the office, but also its title and dignity. Despite assertions to the contrary, Congress recognized his position when the House of Representatives rejected language referring to Tyler as "Vice President now exercising the office of President," and voted to send a committee to "wait on the *President of the United States* and inform him that a quorum of the two Houses had assembled...." [emphasis added]. See U.S. Congress, *Congressional Globe*, vol. 10, May 31, 1841, pp. 3-5. This issue continued to be the subject of occasional controversy until the Twenty-Fifth Amendment explicitly stated in Section 1, "In case of the removal of the President from office or of his death or resignation, the Vice President *shall become President*" [emphasis added].

[95] Feerick, *The Twenty-Fifth Amendment*, pp. 4-5.

[96] Robert V. Remini, *The Life of Andrew Jackson* (New York: Penguin, 1990), p. 54.

James A. Garfield, 1881

President James A. Garfield's assassination in 1881 was the first instance in which officials of the federal government were confronted with the situation of a President who was disabled to the extent that he was incapable of carrying out his duties over an extended period. President Garfield was shot by a disappointed office-seeker in Washington on July 2, 1881, four months after his inauguration. One of two bullets fired by the assassin lodged in his spine, but physicians were unable to locate it. As the summer passed, his condition fluctuated, although in September he was well enough to be transported to the New Jersey shore, where it was believed his health would benefit from the ocean air. Within a week, however, his condition began to deteriorate, and on September 19, the President died from complications of blood poisoning and pneumonia.

Throughout Garfield's long ordeal, several succession-related questions were privately raised among executive branch officers and Members of Congress. One concerned the issue of disability—should the constitutional provision covering presidential inability be implemented? Was clause 6 intended to cover mental or physical disability, or both? If it were implemented, who or what body had the authority to do so? If the President were declared to be disabled, would the Vice President continue to act as President for the balance of the term? How and by whom could a disability declaration be rescinded?[97] The Cabinet unanimously favored Vice President Chester A. Arthur assuming the President's duties, but was split on whether the President could reclaim his authority should he recover. In the final analysis, the Cabinet deferred action on the grounds that the President was too weak to discuss the question and that it could not act without consulting him.[98]

The President was reported to be lucid and conscious for much of the time between his wounding and death, but he had only a few visits with individual Cabinet officers, and official business was not discussed at these meetings. He signed only one official paper after he had been shot.[99] Throughout this period, the Cabinet directed the executive departments, and the federal government essentially ran on "autopilot." Vice President Arthur paid one brief call on the Cabinet when he came to Washington early in July, but was never invited to see the President. Seeking to avoid the appearance of usurping the President's authority, Arthur returned to his home in New York on July 13 and went into virtual seclusion until he received notice of Garfield's death on September 19.[100]

Grover Cleveland, 1893

Another instance of presidential inability or disability occurred in 1893, when President Grover Cleveland (1885-1889, 1893-1897) twice underwent major surgery for oral cancer aboard a private yacht followed by a lengthy recovery, both of which events were kept secret for more than 20 years. The President's illness, surgery, and recovery took place in the context of the Panic of 1893, a collapse of financial markets that led to bank failures, widespread unemployment, and a prolonged business depression that lasted through 1897. It was feared by the President and his advisors that news of his illness might exacerbate the economic crisis. On June 30, 1893, and again in July, the President underwent surgery to remove a tumor from the roof of his mouth. The successful procedures were conducted by a team of doctors aboard a private yacht cruising in

[97] Silva, *Presidential Succession*, pp. 54-55.

[98] Silva, *Presidential Succession*, p. 56.

[99] Feerick, *From Failing Hands*, pp. 126-127.

[100] Feerick, *From Failing Hands*, pp. 122-123, 128-129.

Long Island Sound. The press were informed that the President was on a fishing trip, followed by a vacation.[101] The President recuperated at Gray Gables, his Massachusetts seaside home, for the month of July; during his recovery, he was fitted with an oral prosthesis, which made it possible for him to speak, and on August 5, he returned to Washington. According to disability and succession scholar John Feerick, Vice President Adlai Stevenson was never told of the operation, and only one Cabinet member was informed in advance.[102] Other than contemporary rumors that were widely dismissed as sensational journalism, the operation remained a secret until 1917, nine years after Cleveland's death, when a member of the surgical team reported the event in *The Saturday Evening Post*.[103]

Woodrow Wilson, 1919-1921

During the autumn of 1919, President Woodrow Wilson (1913-1921) campaigned across the country to build support for the Covenant of the League of Nations, a politically contentious component of the Treaty of Versailles, the post-World War I settlement that he had submitted for ratification by the Senate.[104] On September 25, exhausted from a demanding schedule, Wilson suffered an apparent stroke in Pueblo, Colorado. The balance of his speaking tour was canceled, and the President returned to Washington, where he suffered a second stroke on October 2. This one was disabling: his left side was paralyzed, and his vision, speech, and emotions were affected.[105]

Wilson never fully recovered. First Lady Edith Galt Wilson, Admiral Cary Grayson, the President's physician, and Joseph Tumulty, his private secretary, screened all visitors and were reported to have made numerous policy decisions on the President's behalf.[106] At the same time, other official business went unattended: one source notes that 28 bills became law without the President's signature during the period of his most severe disability.[107]

Between October 2, 1919, and February 7, 1920, Secretary of State Robert Lansing called the Cabinet into session on 21 occasions to transact routine government business, evidently without Wilson's knowledge.[108] At one meeting, Cabinet members discussed whether Vice President Thomas Marshall might assume the duties of office, but Admiral Grayson and Tumulty personally intervened to end the discussion.[109] When President Wilson eventually learned about the

[101] Matthew Algeo, *The President Is a Sick Man: Wherein the Supposedly Virtuous Grover Cleveland Survives a Secret Surgery at Sea* (Chicago: Chicago Review Press, 2011), pp. 85-96, 101-107.

[102] Feerick, *The Twenty-Fifth Amendment*, p. 12.

[103] William W. Keene, "The Surgical Operations on President Cleveland in 1893," *Saturday Evening Post*, September 22, 1917, p. 55. Cited in Feerick, *The Twenty-Fifth Amendment*. Cleveland and Vice President Stevenson also held antagonistic positions on the role of silver as a reserve currency, a hostility that reportedly provided further justification for keeping the procedure and the President's recovery secret.

[104] The Covenant, which established the League of Nations as an international organization similar in some aspects to the contemporary United Nations, was conceived and vigorously supported by Wilson. Opponents claimed that U.S. membership in the League as constituted would infringe on national sovereignty and possibly require U.S. participation in war without approval by Congress.

[105] Gene Smith, *When the Cheering Stopped: The Last Years of Woodrow Wilson* (New York: Morrow, 1964), pp. 81-85.

[106] Kenneth R. Crispell and Carlos Gomez, *Hidden Illness in the White House* (Durham, NC: Duke University Press, 1988), pp. 69-74.

[107] Feerick, *The Twenty-Fifth Amendment*, p. 16; Smith, *When the Cheering Stopped*, p. 125.

[108] Silva, *Presidential Succession*, p. 58.

[109] Feerick, *The Twenty-Fifth Amendment*, p. 15.

meetings, he accused Lansing of attempting to usurp presidential authority and asked for, and received, his resignation.[110] Lansing's dismissal generated public questions concerning the President's disability, and several bills to provide for instances of future presidential disabilities were introduced in the House of Representatives, but no further action was taken beyond hearings in the House Judiciary Committee.[111] By the time his term ended on March 4, 1921, Wilson had regained sufficient strength to walk and conduct routine business, but he never fully recovered. As one observer noted, "[i]n this depressed and semiparalyzed state, the President of the United States would wait out the rest of his term...."[112]

Franklin D. Roosevelt, 1944-1945

President Franklin Roosevelt's lower body had been paralyzed by an attack of polio in 1921, but he remained otherwise physically and intellectually vigorous throughout most of his 12 years in office (1933-1945). While he never experienced a sudden and dramatic disability comparable to that which afflicted Wilson, some observers maintain that Roosevelt's health began to decline rapidly during the last year of his life, hampering his ability to discharge the powers and duties of the presidency.[113] By many accounts, Roosevelt's physical condition deteriorated during World War II.[114] As the war progressed, he coped daily with the strain of managing the U.S. war effort, undertook long and fatiguing trips to overseas conferences on war planning and postwar arrangements,[115] and conducted a physically demanding reelection campaign for his fourth term as President in 1944. As the President continued to weaken, his schedule was curtailed, and specialists in cardiology examined him in March 1944. According to one account, "all laboratory and functional data ... pointed to congestive heart failure."[116] Although Roosevelt rebounded later in the year, apparently energized by his successful reelection campaign, his blood pressure remained "alarmingly high." Following the campaign, the President's health resumed its decline.[117]

After his inauguration to a fourth term on January 20, 1945, the President left Washington on January 23 for a long and what has been described as an exhausting trip to the U.S.S.R. to attend the February 4-11 Yalta Conference, a "summit" meeting of Allied leaders to settle postwar arrangements.[118] Following the conference, the President flew to Egypt for additional deliberations before boarding the USS *Quincy* for the voyage home. Roosevelt docked at Newport News, Virginia, on February 27, returned to Washington, and made a report on the

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[110] Smith, *When the Cheering Stopped*, p. 143.

[111] Silva, *Presidential Succession*, pp. 63-64.

[112] Crispell and Gomez, *Hidden Illness in the White House*, p. 74.

[113] In particular, critics of the President claimed that his illness was the reason for alleged concessions to the Soviet Union at the 1945 Yalta Conference. See Crispell and Gomez, *Hidden Illness in the White House*, pp. 122-125.

[114] Steven Lomazow and Eric Fettman, *FDR's Deadly Secret* (New York: Public Affairs Press, 2009), pp. 129-155; Crispell and Gomez, *Hidden Illness in the White House*, pp. 96-106; Feerick, *From Failing Hands*, pp. 194-196.

[115] The locations of major wartime summit conferences attended by President Roosevelt included Ottawa and Quebec, Canada; Cairo, Egypt; Tehran, Iran; Monterrey, Mexico; Casablanca, Morocco; and Yalta, U.S.S.R. The President also made use of frequent aircraft refueling stops enroute to, and returning from, these major conferences to schedule additional meetings in Algeria, Brazil, Gambia, Italy, Liberia, Malta, Senegal, Trinidad, and Tunisia. See "Presidential and Secretaries' Travel Abroad, Franklin D. Roosevelt," U.S. Department of State, Office of the Historian, at https://history.state.gov/departmenthistory/travels/president/roosevelt-franklin-d.

[116] Crispell and Gomez, *Hidden Illness in the White House*, pp. 80-81.

[117] Crispell and Gomez, *Hidden Illness in the White House*, pp. 114-115.

[118] Crispell and Gomez, *Hidden Illness in the White House*, pp. 124-125.

conference before a joint session of Congress on March 1. On March 29, on the advice of his medical team, the President left Washington for a vacation at his Georgia retreat at Warm Springs, where he died of a likely cerebral hemorrhage on April 12.[119]

The inability or unwillingness of the President and his advisors to anticipate his disability or death led to the succession of Harry Truman, who had 10 years' prior experience in the Senate before assuming "the second office," but who, even following his inauguration as Vice President, was seen by some as largely uninformed on major issues and not fully prepared to assume the presidency. Between the opening of the presidential campaign in September 1944 and the President's death in April, the two men conferred in person infrequently: Truman met with Roosevelt on just eight occasions. During his short time as Vice President, Truman was neither briefed on major war issues, nor included in confidential policy discussions. For instance, he was informed about the Manhattan Project and the development of the atomic bomb by the Secretary of War only after he took office as President.[120]

As with Wilson, some said the President's medical team concealed his declining condition; his primary physician's "few appearances before the White House scribes were occasions for prepared statements about [what he characterized as] the president's generally robust health, with only infrequent reference to a 'cold or sinusitis.'"[121] Succession scholar John D. Feerick notes that, in the final analysis, "[t]he extent to which President Franklin D. Roosevelt was disabled, if at all, during the last year of his life is unclear.... What is clear is that the President refused to acknowledge his medical condition lest his goals of ending World War II and of establishing an organization for world peace be thwarted."[122]

Two principal issues associated with the Wilson inability could also be cited as factors in the physical decline of President Franklin Roosevelt during the last year of his life. As noted above, news of the President's condition was denied by his inner circle of advisors, and the Vice President was never informed of the President's condition or briefed on pending issues, and was excluded from any role in, or information on, policy determination and decisionmaking.

Dwight D. Eisenhower, 1955-1957

The attention of Congress and the nation focused to perhaps a greater extent in the 1950s on the question of presidential disability. The three illnesses suffered by President Dwight Eisenhower during his tenure in office (1953-1961) that left him hospitalized or physically disabled for varying periods while he convalesced were a major contributing factor to this attention. There was, however, a departure from official reporting practices associated with the earlier illnesses and disabilities suffered by Presidents Wilson and Roosevelt, which had been concealed from the public. In contrast, President Eisenhower and his staff decided that his illnesses should be reported through regular White House announcements that were then published in the press and reported on radio and TV. In further contrast to these earlier presidential disabilities, Vice President Richard Nixon was kept informed of the President's condition throughout his illnesses. In a change from previous Vice Presidents, he had been informed from the beginning on policy

[119] Crispell and Gomez, *Hidden Illness in the White House*, pp. 152-157. The diagnosis of a cerebral hemorrhage was speculative because no autopsy was performed. Another theory maintains that undiagnosed metastatic cancer was a contributing factor in the President's death. See Lomazow and Fettman, *FDR's Deadly Secret*.

[120] Marie D. Natoli, "American Prince, American Pauper: The Contemporary Vice Presidency in Perspective," in *Contributions in Political Science*, no. 134 (Westport, CT: Greenwood Press, 1985), pp. 72-73.

[121] Crispell and Gomez, *Hidden Illness in the White House*, pp. 84-85. See also "Hiding the Illness: Roosevelt, the Press, and the F.B.I.," pp. 114-120.

[122] Crispell and Gomez, *Hidden Illness in the White House*, pp. 205-207.

questions and given a previously unprecedented level of participation in administration policy consideration. During the President's illnesses, he was further briefed by the President's closest advisors and was authorized to discharge routine executive duties during Eisenhower's recuperation.

During his first term, President Eisenhower suffered a heart attack while on vacation in Colorado and was hospitalized between September 24 and November 11, 1955. After a further two-month convalescence, he returned to the White House, resuming a full schedule of duties on January 16, 1956. Less than a year later, on June 9, 1956, the President underwent surgery for a partial intestinal blockage resulting from what was later diagnosed as Crohn's disease.[123] On November 25 of the same year, he suffered a mild stroke, from which he apparently recovered in little more than a week.[124] During his illnesses, the President arrived at an informal understanding with Vice President Nixon whereby the latter represented him at official functions and presided over Cabinet meetings. On March 3, 1958, the disability agreement was formalized when President Eisenhower released a document outlining the Vice President's role in the event of his incapacitation any time during the balance of his term:

> The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section I, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.
>
> (1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the Office until the inability had ended.
>
> (2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.
>
> (3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.[125]

The Eisenhower-Nixon arrangement closely prefigured Sections 3 and 4 of the Twenty-Fifth Amendment in its general order and the procedures it established. It also set a precedent for later presidencies: Presidents John F. Kennedy (1961-1963) and Lyndon B. Johnson (1963-1969) implemented similar agreements with their Vice Presidents.[126]

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[123] Barron H. Lerner, "An M.D.'s Guide to Ike's Heart and Health," *New York Times*, January 13, 2004, at https://www.nytimes.com/2004/01/13/health/an-md-s-guide-to-ike-s-heart-and-hearth.html.

[124] Feerick, *From Failing Hands*, pp. 213-227.

[125] "Agreement Between the President and the Vice President as to Procedures in the Event of a Presidential Disability," *Public Papers of the Presidents of the United States, Dwight D. Eisenhower, 1958* (Washington: GPO, 1959), pp. 196-197. Also available from "Dwight D. Eisenhower," *The American Presidency Project*, at http://www.presidency.ucsb.edu/ws/index.php?pid=11313.

[126] President Kennedy's agreement with Vice President Lyndon Johnson was published in his presidential papers: "White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability," in *Public Papers of the Presidents of the United States, John F. Kennedy, 1961* (Washington: GPO, 1962), pp. 561-652. See also at "John F. Kennedy, White House Statement and Text of Agreement Between the President and Vice President on Procedures in the Event of Presidential Inability," *The American Presidency Project*, August 10, 1961, at http://www.presidency.ucsb.edu/ws/index.php?pid=8277. The agreement between President Johnson and Vice President Hubert H. Humphrey apparently remained informal. See Charles Mohr, "Johnson Reaches Disability Accord," *New York Times*, January 28, 1965, p. 13. He had implemented a similar

A House Judiciary Committee staff study had addressed the question of disability in 1955, even before the President's first illness. Hearings on alternative vehicles to provide for instances of presidential disability, which included a draft constitutional amendment offered by the Administration, were held in the House Judiciary Committee in 1956. The Senate Judiciary Committee's Subcommittee on Constitutional Amendments convened hearings in 1958, and voted to report amendments on presidential disability in both the 85th (S.J.Res.61) and 86th (S.J.Res. 40) Congresses, but the full Judiciary Committee did not act on either proposal.[127] In fact, no floor action was taken in either chamber on the question during this period.[128] According to several accounts, congressional leadership was unwilling to go beyond committee hearings on the disability question or on the disability agreement in order to avoid the appearance of partisan interest or congressional interference in executive branch prerogatives.[129]

The Twenty-Fifth Amendment

Concerns about presidential disability among the general public arguably eased following the election in 1960 of John F. Kennedy. When President Eisenhower left office at 70, he was the oldest person to have served as President up to that time,[130] while Kennedy, at 43, was the youngest elected President in the nation's history.[131]

The issue continued to be of interest to many in Congress, however. In 1963, Senators Estes Kefauver and Kenneth Keating introduced a resolution, S.J.Res. 35 (88th Congress) that proposed a constitutional amendment to establish procedures in the event of presidential disability. As Chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, Kefauver convened hearings on the amendment in June 1963, with the support of the Kennedy Administration.[132] The proposal was reported favorably to the full Judiciary Committee on June 25, but Kefauver's unanticipated death on August 10 brought an end to further legislative activity.[133]

Assassination of President Kennedy

The situation was dramatically transformed by the assassination of President Kennedy on November 22, 1963. News of his death astonished and saddened the nation, and while the President succumbed to his wounds within an hour of being shot, the issue of disability, which had been so recently before Congress, was soon raised again: "[s]uppose President Kennedy, following the shooting had lingered in a coma? Who could declare him unable to perform the

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informal agreement with House Speaker John McCormack during the period of vacancy in the office of Vice President following President Kennedy's death. See "Johnson Provides for a Disability," *New York Times*, December 6, 1963, p. 1.

[127] Feerick, *From Failing Hands*, pp. 238-242.

[128] John D. Feerick, *The Twenty-Fifth Amendment*, pp. 52-55.

[129] Sherman Adams, *Firsthand Report: The Story of the Eisenhower Administration* (New York: Harper, 1961), pp. 200-201; Richard Nixon, *Six Crises* (Garden City, NY: Doubleday, 1962), p. 177.

[130] Ronald Reagan surpassed Eisenhower in 1981; he was 69 when inaugurated, and served until just before his 78th birthday.

[131] Theodore Roosevelt was 17 months younger than Kennedy when he assumed the presidency on the assassination of William McKinley in 1901, but he had not been elected.

[132] President Kennedy and Vice President Johnson had implemented a disability agreement on August 10, 1961. See above at footnote 126.

[133] Feerick, *From Failing Hands*, p. 243.

duties of his office?"[134] To this, the question of succession was now also added: Vice President Johnson was sworn in as President the same day, but under the Constitution, the vice presidency would remain vacant for 14 months, until the President and Vice President to be elected were inaugurated on January 20, 1965. During that period, the Speaker of the House of Representatives and the President pro tempore of the Senate were first and second in line to succeed the President.

Among the compelling images of the period were those of President Johnson when he appeared before a televised joint session of Congress on November 27, 1963. House Speaker John McCormack and Senate President pro tempore Carl Hayden were seated directly behind him on the dais in the House chamber. Press accounts of the period noted that McCormack was 71 years old, while Hayden was 86 and visibly frail. Against this backdrop, according to John Feerick, "[t]he ability of both to act as President should it become necessary was seriously questioned, and it was suggested that they resign their positions so that persons more suitable in the line of succession could replace them."[135]

Legislative History of the Amendment

Before the end of 1963, Senator Birch Bayh, new chairman of the Subcommittee on Constitutional Amendments, introduced an amendment proposal, S.J.Res. 139 in the 88th Congress. After amendments in the subcommittee, the measure as reported to the full Judiciary Committee incorporated provisions that were substantially identical to the amendment as it was eventually ratified. It settled the long-standing question of presidential succession,[136] provided for the filling of vice presidential vacancies,[137] and established provisions governing presidential disabilities substantially identical to those found in Sections 3 and 4 of the Twenty-Fifth Amendment. The Senate approved S.J.Res. 139 on September 29, 1964, but the House took no action on the proposal before the 88th Congress adjourned sine die. Feerick attributes this at least in part to a protective reaction by House Members to questions raised about Speaker McCormack's fitness to serve as President during the 14-month period between the Kennedy assassination and the inauguration of Vice President Humphrey in January 1965. As Senator Bayh wrote, "[a]fter the next election, there would be a Vice President, and such a legislative proposal could no longer be interpreted as an affront to the Speaker of the House, or, to a lesser extent, to Senator Hayden."[138]

The proposed amendment was introduced early in the 90th Congress as S.J.Res. 1 by Senator Bayh, with a companion measure, introduced in the House as H.J.Res. 1, by Representative Emanuel Celler of New York, the House Judiciary Committee chairman.

In the Senate, the measure was reported favorably by the Subcommittee on Constitutional Amendments on February 1, 1965, and by the full Judiciary Committee on February 10. The primary focus of debate on the Senate floor concerned Section 4, particularly the procedures for resolving presidential disability disputes. Some Senators questioned the wisdom of including

[134] Alan P. Grimes, *Democracy and the Amendments to the Constitution* (Lexington, MA: Lexington Books, 1978), p 136.

[135] Feerick, *From Failing Hands*, p. 264.

[136] The Vice President would *become* the President should the chief executive be removed from office, resign, or die. This provision settled the argument that was ongoing since the Tyler succession of 1841.

[137] Vacancies in the office of Vice President would be filled by the President's nominee, subject to confirmation by a majority vote of both houses of Congress.

[138] Birch Bayh, *One Heartbeat Away, Presidential Disability and Succession* (Indianapolis: Bobbs-Merrill, 1968), p. 93.

such a level of detail within the amendment, preferring that Congress be authorized to provide these arrangements by statute. Supporters of the Bayh proposal as reported prevailed, however, and the resolution was adopted by the Senate on February 19, with only minor technical amendments.[139]

The House of Representatives began consideration of H.J.Res. 1 with hearings before the full Judiciary Committee in early 1965. Here, again, debate centered on procedures by which a President could be declared to be disabled, and on subsequent disputes that might arise as to whether—and when—the period of disability was over. The committee reported its version, which incorporated changes indicated by these concerns, on March 24. The full House passed its own amended version of the proposal April 13, by a vote of 368 to 29, voting to substitute it for the Senate resolution. Conferees required two months to resolve differences between the competing amendments before the House approved the conference report by a voice vote on June 30, with which the Senate concurred on July 6 by a vote of 68 to 5.[140]

The proposed amendment was circulated to the states on July 7, 1965. Although it enjoyed widespread support, most state legislatures were not able to begin ratification proceedings immediately, since many had adjourned for the year by the time the proposal was transmitted. Ratification by the necessary 38 states (three-fourths, as provided by the Constitution) required 19 months, and was completed on February 10, 1967, at which time the Twenty-Fifth Amendment became an operative part of the Constitution.

Concluding Observations

The provisions of Article II, Section 1, clause 6 of the Constitution created uncertainties concerning aspects of (1) presidential succession, (2) vacancies in the vice presidency, and (3) presidential disability that remained unresolved from the time government under the Constitution was established in 1789 until ratification of the Twenty-Fifth Amendment in 1967.

The Twenty-Fifth Amendment benefited from the alignment of factors that are shared by amendments that have met the stringent requirements imposed by Article V of the Constitution.[141] Most successful constitutional amendments have emerged as responses to the stimulus of sudden transformative events, or have benefited from the "ripeness" of an idea that has been before the public for many years. Both factors contributed to the successful proposal and ratification of the Twenty-Fifth Amendment. A decade of congressional investigation of the issue of presidential disability, combined with the shock President Kennedy's assassination, provided a galvanizing impetus to congressional action on issues—presidential succession and disability—that had been discussed and debated for decades. A final element was the committed approval and active leadership support from senior Members of both chambers, including House Judiciary Committee Chairman Emanuel Celler and Senator Birch Bayh, chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments.

Of the amendment's two sections concerned with presidential disability, Section 3 has been explicitly implemented twice since ratification, during the George W. Bush presidency, and implicitly once, during the Ronald Reagan presidency. On all three occasions, the President

[139] For a more detailed account of actions in both chambers, see "Presidential Disability: The 25th Amendment," in *Congress and the Nation, Volume II, 1965-1968* (Washington: Congressional Quarterly, Inc., 1969), pp. 645-648; and Grimes, *Democracy and the Amendments to the Constitution*, pp. 136-141.

[140] "Presidential Disability: The 25th Amendment," and Grimes, *Democracy and the Amendments to the Constitution*, pp. 136-141.

[141] These include approval by two-thirds vote in both houses of Congress and approval by three-fourths of the states.

implemented and rescinded declarations of disability in connection with routine medical procedures that presented no complications and generated little comment. To date, it has arguably met its framers' expectations with little controversy or criticism.

Section 4's comparative complexity, particularly its potential for declaring a President to be disabled without his or her concurrence, has troubled some observers. The section, they have argued, provides opportunities for political mischief and the potential usurpation of the President's authority. It might be further suggested that Section 4, like the impeachment process, is a procedure so powerful and fraught with constitutional and political implications that it would likely be used only in the most compelling circumstances, since its invocation might arguably precipitate a constitutional crisis. In response to these concerns, however, it may be noted from the record that Senator Bayh and the framers of the Twenty-Fifth Amendment gave these issues serious consideration and included powerful checks to deter abuse. These include the President's ability to challenge a Section 4 declaration of disability; the requirement of a timely decision by Congress; and, ultimately, the need for a two-thirds vote in both houses to sustain a contested Section 4 finding of disability by the Vice President and the Cabinet or disability review body. As one commentator quoted earlier in this report concluded, "[b]ecause the Amendment deals with unpredictable human frailties, it is not a perfect solution, but few exist in constitutional history. The task is to make the most of what the Amendment encompasses. Success depends on the good judgment and good sense of our leaders and the citizenry."[142]

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[142] Thompson, "Succession and the Twenty-Fifth Amendment," in *The Presidency in Transition*, p. 443.