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President Trump and the 25th Amendment


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Early on in President Donald Trump's Administration, a variety of commentators, including *New York Times* columnist Nicholas Kristof and MSNBC's Lawrence O'Donnell, were pushing the idea that President Trump should be removed from office because he was "unstable," and thus "unfit" to serve.[1] Their proposal centered on a provision of the 25th Amendment to the U.S. Constitution, which permits the vice president and a majority of Cabinet secretaries to remove a president who is "unable to discharge the powers and duties of his office." Indeed, Kristof cited to constitutional scholar and Harvard Law School professor Laurence Tribe as supportive of their view. Now that the discussion has died down, a sober look at the legal issues is in order.

Any attempt to remove a sitting president is obviously an extraordinary and constitutionally fraught act—especially pursuant to a provision whose central term is so opaque. What does it mean to be "unable" to discharge one's duties? Does it refer to a physical or medical condition? Or perhaps an emotional or mental disposition? In this respect, the provision is not unlike the impeachment process—by which a president (or other civil officer) who is guilty of "treason,

[1] See, e.g., Nicholas Kristof, "How Can We Get Rid of Trump?" *The New York Times*, Feb. 18, 2017.

bribery, or other high crimes and misdemeanors" may be impeached by the House of Representatives and removed from office by the U.S. Senate. Although the terms "treason" and "bribery" are relatively clear, the meaning of "high crimes and misdemeanors" (language adapted from centuries-old English common law) has prompted considerable debate throughout our history. Perhaps this partially explains why only two presidents have been impeached and neither removed.[2]

Let's back up. For the uninitiated, the 25th Amendment, ratified in 1967, has four sections. The first codifies long-standing practice that a vice president actually becomes president when there is a vacancy; this has occurred nine times. The second requires a president to nominate a vice president when that position is vacant, and Congress gets to confirm the choice. This has occurred twice, when Vice President Spiro Agnew resigned and President Richard Nixon named then-Representative Gerald Ford. After Nixon resigned, Ford moved up and chose former New York Governor Nelson Rockefeller. The third and fourth sections relate to a president unable to carry out his duties. Section 3 of the Amendment permits the president to voluntarily cede the powers of his office to the vice president, who then becomes Acting President. (The president can take back his office at any time.) Section 4 enables the vice president and a majority of the cabinet to temporarily remove a president, also permitting the vice president to assume the role of Acting President. If this occurs, and the president balks, he may unilaterally reinstate himself.[3] A dispute requires Congress to act as final arbiter.

Whether or not one is a student of the Constitution, the immediate and obvious question arises: What standard is to be used? Of course, there is no ambiguity when a president decides he is unable to function and voluntarily turns over his post to the vice president. Presidents Ronald Reagan and George W. Bush did so when undergoing medical procedures that required general anesthesia or sedation. (The fictional president of the late, lamented *The West Wing*, Jed Bartlet, also temporarily stepped aside after his daughter was kidnapped by terrorists. After she had been found unharmed, he took back the reins of office.[4])

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[2] Andrew Johnson and Bill Clinton were impeached by the House of Representatives, but the Senate failed to convict and remove them; Richard Nixon resigned after the House Judiciary Committee voted in favor of three articles of impeachment.

[3] There are some who think that the displaced president cannot unilaterally reclaim his office without assent by the vice president and cabinet. See Brian C. Kalt, *CONSTITUTIONAL CLIFFHANGERS* (Yale Univ. Press 2012), Ch. 3.

[4] The *West Wing* example is not precisely what was contemplated by §3 of the Amendment because there was no sitting vice president to assume the post of Acting President. But it made for great drama nonetheless. See John Fortier, "The West Wing and Presidential Succession," Sept. 24, 2003, at http://www.aei.org/publication/the-west-wing-and-presidential-succession/.

On the other hand, §4 of the 25th Amendment has never been used in real life, though, here, too, there have been fictional portrayals.[5] Thus, it is difficult to ascertain what facts would pass muster for a vice president and majority of cabinet secretaries to take such a drastic step. The first obstacle is the ambiguous language of the Amendment. (The second is the political will to act—an issue that is beyond the scope of this article.) To be fair to the Amendment's framers, it was supposed to be ambiguous—or, to be fair, elastic. Former Dean of Fordham Law School John D. Feerick, one of the country's foremost scholars on the 25th Amendment, has explained that the language was intended to be "undefined … [because] a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into a definition."[6] Indeed, one need only read the congressional debates during 1964 and 1965 to conclude that "unpopularity, incompetence, impeachable conduct, poor judgment and laziness do not constitute an 'inability' within the meaning of the Amendment."[7] The Amendment's authors, then, like the framers of the original Constitution's provision relating to impeachment, relied upon the good faith judgment of future actors.

Nevertheless, Kristof and O'Donnell summarily asserted that President Trump was so obviously "unstable" and "unfit" that he should be removed.[8] It may be tempting for commentators or political opponents to creatively construe the Constitution in order to reach a desired goal, but our Republic's strength and longevity have depended on employing such drastic remedies sparingly. Indeed, even when there is a consensus that a president cannot properly function, ad hoc options might be preferable to mounting the kind of constitutional confrontation that the 25th Amendment requires. For instance, when President Nixon was under siege in 1974 and drinking heavily, his aides viewed him as emotionally unstable. Secretary of Defense James R. Schlesinger thus instructed the military to ignore Nixon's orders, and, instead, check with him or Secretary of State Henry A. Kissinger before taking any extraordinary action. No one questioned this arguably "extralegal [if not] mutinous" order,[9] and, significantly, neither Vice President Ford nor members of the Cabinet invoked the 25th Amendment.

This article raises only legal issues, and does not address the so-called merits of the Kristof-O'Donnell view. As it turns out, a legal analysis of the 25th Amendment will be aided by a forthcoming edition of the *Fordham Law Review*. In commemoration of the 50th anniversary of

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5 See ABC-TV's *Scandal*, Dec. 6, 2012, at http://abc.go.com/shows/scandal/episode-guide/season-02; Fox TV's *24* at http://24.wikia.com/wiki/25th_Amendment.

6 John D. Feerick, "Presidential Succession and Inability: Before and After the Twenty-fifth Amendment," 79 *Fordham L. Rev*. 907, 925.

7 Id. at 926.

8 Whether they or Professor Tribe would adhere to their analysis today is unclear; they seem to have shelved the idea.

9 William J. Broad and David E. Sanger, "Debate Over Trump's Fitness Raises Issue of Checks on Nuclear Power," *The New York Times*, Aug. 4, 2016.

the Amendment (and before the 2016 election), Dean Feerick, his Fordham Law colleague Professor John Rogan and about a dozen of their students embarked upon a year-long research project analyzing possible reforms related to this constitutional provision. Their results will be published at the end of this year, and will no doubt add significantly to an objective discourse on the subject.

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