YALE LAW & POLICY REVIEW

Presidential Inability and Subjective Meaning

*Adam R.F. Gustafson**

INTRODUCTION 460

I. THE PRESIDENCY IN JEOPARDY 462
A. *Univocal Constructions of Presidential Inability* 463
B. *The Inadequate Remedy of Congressional Review* 467

II. STRUCTURE 469
A. *Structure, Meaning, and Constitutional Construction* 470
B. *Section 3: Promoting Continuity Through Non-Reviewable Self-Diagnosis* 472
C. *Section 4: Preventing Usurpation Through a Presumption of Presidential Ability* 474
D. *The Structure of Executive Power in the Constitution* 475
E. *Prospective Inability* 476

III. LEGISLATIVE HISTORY 480
A. *Severity of Inability* 481
B. *Duration of Inability* 484
C. *Vagueness and Textual Preservation* 485

IV. APPLICATION HISTORY 487
A. *Application of Section 3: Elective Surgery* 487
B. *Inability During Impeachment or Criminal Proceedings* 491

V. PRESIDENTIAL INABILITY AND THE LIMITS OF INTRATEXTUALISM 493

CONCLUSION 495

* Yale Law School, J.D. expected 2009; University of Virginia, B.A. 2005. I am grateful to Akhil Amar for his guidance and for thought-provoking conversations on the Twenty-Fifth Amendment. I also thank Senator Birch Bayh, John Feerick, Lawrence Solum, Samuel Bray, and Seth Tillman for their insightful comments on early drafts; and Kaitlin Ainsworth for ably discharging the powers and duties of her editorial office.

Introduction

At the Constitutional Convention in 1787, Delegate John Dickinson of Delaware raised two questions that, in Madison's notes at least, met with an uncomfortable silence: "What is the extent of the term 'disability' & who is to be the judge of it?"[1] Dickinson was referring to what became the Presidential Succession Clause in Article II.[2] Debate on this provision was immediately postponed, and Dickinson's prescient questions went unanswered for almost two centuries. In 1967, a new generation of constitutional authors answered his second question in the Twenty-Fifth Amendment (the "Amendment"), which gives two sets of constitutional actors the power to declare presidential inability. Section 3 makes the President judge of his own inability:

> 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.[3]

In the event the President is unable or unwilling to declare himself unable, Section 4 gives that power to the Vice President and Cabinet with Congress as the court of appeal:

> 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.[4]

1. James Madison, Journal (Aug. 27, 1787), *reprinted in* 2 The Records of the Federal Convention of 1787, at 427 (Max Farrand ed., rev. ed. 1966), *available at* http://avalon.law.yale.edu/18th_century/debates_827.asp.

2. U.S. Const. art. II, § 1, cl. 6 ("In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, 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."), *amended by* U.S. Const. amend. XX, §§ 3-4; U.S. Const. amend. XXV.

3. U.S. Const. amend. XXV, § 3.

4. *Id.* § 4.

Section 4 makes Congress a court of appeal when the President disputes his subordinates' declaration of presidential inability.[5] Without a two-thirds vote of both Houses, the President regains his office.

No authority ever has directly and authoritatively answered Dickinson's first question—What is presidential inability? No matter which set of constitutional actors judges inability, the concept itself remains vague. In both cases, the Amendment describes presidential inability as the President's being "unable to discharge the powers and duties of his office."[6] That phrase is never defined, and the Constitution offers no measure of physical debility, mental infirmity, or emotional instability that would satisfy it.[7] The framers of the Twenty-Fifth Amendment intentionally declined to provide a clear constitutional rule in response to Dickinson's first question, but the structure and context of the Amendment they crafted and the legislative history they wrote in the process suggest two separate categories of presidential inability.

Previous expositors of the "unable to discharge" phrase have erroneously assumed that it has the same meaning whether invoked by the President or his subordinates.[8] In spite of the traditional presumption that identical phrases have the same meaning,[9] a careful reading of the Presidential Inability Clauses of the Twenty-Fifth Amendment, informed by constitutional structure and confirmed by legislative and application history, demands *different* constructions of the formally identical "unable to discharge" phrases. The President enjoys absolute discretion in construing the inability provision of Section 3: Structure demands, and history confirms, that as long as the President is able to make a rational decision to yield temporarily the powers of his office to the Vice President, he may do so no matter what underlying condition or circumstance

5. *Id.*

6. *Id.* §§ 3-4. Actually, the same phrase is used four times: once in Section 3 as the standard for the President's voluntary determination, twice in Section 4 as the standard for the Vice President's and Cabinet's determination, and yet again in Section 4 as the standard for Congress's determination in the event of a dispute between the President and his Vice President and Cabinet as to the President's ability. This Note treats all three instances of the phrase in Section 4 as equivalent since Congress is "decid[ing] the issue" of the initial diagnosis by the Vice President and the Cabinet and is thus bound by the same standard. *See infra* note 188.

7. Indeed, it would have been impossible to establish a comprehensive medical scheme, much less a constitutional scheme, for evaluating the full array of physical, mental, and emotional impairments that may render a President unable to discharge his duties. *See* 111 CONG. REC. 7938 (1965) (statement of Rep. Celler); David A. Drachman et al., *Subcommittee Report: Criteria for Disability and Impairment*, *in* PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES 276, 278 (James F. Toole & Robert J. Joynt eds., 2001) [hereinafter PRESIDENTIAL DISABILITY].

8. *See infra* Section I.A.

9. *See infra* Part V.

provokes that action.[10] Section 4, by contrast, demands a much narrower construction of its inability provision by the Vice President and Cabinet: Section 4 is only available when the President is so severely impaired that he is unable to make or communicate a rational decision to step down temporarily of his own accord.[11] Thus, although the linguistic overlap of the two inability phrases is complete, each phrase encompasses only disabilities that would not qualify under the other.[12] To counteract the prevailing confusion about presidential inability and the attendant risk that self-diagnoses under Section 3 will pave the way for permissive invocations of Section 4, Congress and the executive branch should clarify the distinct circumstances in which applications of each section are appropriate.[13]

I. The Presidency in Jeopardy

The present state of scholarly opinion on the meaning of Sections 3 and 4 of the Twenty-Fifth Amendment endangers the presidency because of its simplistic understanding of presidential inability. Since the "unable to discharge" phrase has the same semantic content in each section, its interpreters have assumed that the phrase is univocal, that it admits of only one legal meaning. If this were so, any legitimate construction of presidential inability in one section could apply to the other, and the history of presidential applications of Section 3 for minor, short-term impairments would create dangerous precedent that an ambitious Vice President and misguided Cabinet could use to oust the President under Section 4 for a critical period, or even permanently with the cooperation of Congress.[14]

10. *See infra* Sections II.A, II.D; Part III.

11. *See infra* Sections II.C-D; Part III.

12. *See* E-mail from John D. Feerick, Norris Professor of Law, Fordham Law Sch., to author (Apr. 11, 2008, 15:35 EST) (on file with the Yale Law & Policy Review, reprinted with permission) ("These sections serve different purposes so that what would be permitted use under Section 3 might not be appropriate at all under the language of Section 4. . . . [S]imilar expressions in the Constitution may have different interpretations depending on the context."). John Feerick was at the "nucleus" of a twelve-lawyer conference of the American Bar Association whose recommendation in 1964 to the Senate Subcommittee on Constitutional Amendments led ultimately to the adoption of the Twenty-Fifth Amendment. Birch Bayh, One Heartbeat Away: Presidential Disability and Succession 46, 49 (1968).

13. *See infra* Conclusion.

14. The risk this Note addresses is not that courts will misconstrue the Amendment, but rather that the Vice President, Cabinet, and Congress will misinterpret the President's absolute power to diagnose his own inability as an invitation to unseat the President under similar conditions using the identical language in Section 4. The political question doctrine should prevent a court from interfering in any application of either Section 3 or Section 4. *See* 111 Cong. Rec. 15,588 (1965) (state-

A. Univocal Constructions of Presidential Inability

The mistaken notion that the "unable to discharge" phrases in Sections 3 and 4 must be subject to the same construction has existed from the beginning. The Amendment's opponents in Congress warned that Section 4 would transfer too much executive power to the Vice President and Cabinet, risking a coup d'état in the White House.[15] Even proponents of the Amendment failed to distinguish explicitly between the "unable to discharge" phrases in Sections 3 and 4, although their section-specific definitions and hypothetical applications confirm that different constructions must apply in each section.[16] Instead, the Amendment's sponsors defended Section 4 with reference to the history of deferential Vice Presidents.[17]

Neither of the two major scholarly commissions on the Amendment suggested distinct constructions of the two "unable to discharge" phrases. The 1988 Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment (the "Commission") advised routine use of Section 3 for even "borderline cases" of transitory inability,[18] and restraint in application of Section 4; however, the Commission never offered a constitutional justification for

---

ment of Sen. Ervin). Both sections involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker v. Carr, 369 U.S. 186, 217 (1962); *see also* Nixon v. United States, 506 U.S. 224 (1993) (declining to interfere in the Senate's conviction of a federal judge because the Constitution gives the Senate the sole power to try impeachments and leaves evidentiary and procedural rules to that body).

15. Representative Henry B. González voted against the Twenty-Fifth Amendment and repeatedly sought to repeal it. *See* Joint Resolution Proposing an Amendment to the Constitution of the United States To Repeal the 25th Amendment to the Constitution, H.R.J. Res. 307, 103d Cong. (1994). His concern stemmed in part from the Amendment's failure to define presidential inability and the related risk that "a President might be wrongfully or mistakenly removed from office. . . ." 120 Cong. Rec. 32,803 (1974) (statement of Rep. González) (citation omitted). Similar fears slowed ratification in Colorado. *See* John D. Feerick, The Twenty-Fifth Amendment: Its Complete History and Applications 111-12 (1992).

16. *See infra* Part III.

17. *See* 111 Cong. Rec. 3284 (1965) (statement of Sen. Bayh); *id.* at 7941 (statement of Rep. Poff); *cf. infra* note 21 (arguing that this is an unstable defense of Section 4, because the Amendment shifted power to the Vice President).

18. Report of the Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment [hereinafter Miller Center Report], *in* 1 Papers on Presidential Disability and the Twenty-Fifth Amendment 147, 168-71 (Kenneth W. Thompson ed., 1988) [hereinafter Papers on Presidential Disability]. The Commission recommended "almost automatic[]" invocation of Section 3 for up to forty-eight hours after any use of general anesthetic, *id.*, but the drugs then in use had longer-lasting effects than some modern anesthesia medications. *See infra* text accompanying note 156.

this distinction or suggested that the Vice President and Cabinet are actually more limited in their construction of the phrase "unable to discharge" than the President is. The Commission dismissed the concern that a President's liberal use of Section 3 would encourage power grabs by broadening the definition of presidential inability in Section 4: "[T]he fear of a coup by a vice president is based on a false analogy with other political systems. Historically the defects of the American vice presidency have not been the temptation to seize power but the refusal to accept power inherent in the office."[19] However, the historical examples of vice-presidential modesty the Commission cites occurred before the Twenty-Fifth Amendment, and each Vice President had his own context-dependent reason for restraint.[20] Moreover, the office of the Vice President has acquired considerable political power since Vice President Thomas Marshall allowed the First Lady to govern in sick President Woodrow Wilson's stead. Indeed, the rate of expansion of vice-presidential power has increased because of the passage of the Twenty-Fifth Amendment.[21] The Miller Center Commission

19. MILLER CENTER REPORT, *supra* note 18, at 171.

20. Vice President Chester Arthur could hardly have seized power from President James Garfield on his deathbed given the embarrassing circumstances of the transition: Garfield's shooter had shouted "I am a Stalwart of the Stalwarts . . . . Arthur is president now!" GEORGE FREDERICK HOWE, CHESTER A. ARTHUR: A QUARTER-CENTURY OF MACHINE POLITICS 149 (photo. reprint 1957) (1935) (citation omitted). Vice President Thomas Marshall's refusal to take power as Acting President during President Wilson's incapacity is explicable given his fear of crossing Mrs. Wilson and the President's other protectors, especially since President Wilson forced Secretary of State Robert Lansing to resign for calling Cabinet meetings during Wilson's illness and suggesting that Marshall should assume the President's powers and duties. *See* S. REP. NO. 89-66, at 7 (1965) (Comm. Rep.), *reprinted in* STAFF OF H.R. COMM. ON THE JUDICIARY, 93D CONG., APPLICATION OF THE TWENTY-FIFTH AMENDMENT TO VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 417, 422-23 (Comm. Print 1973) [hereinafter APPLICATION]; JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 175-77 (1965). Vice President Richard Nixon was prudent to avoid seizing power after President Dwight Eisenhower's heart attack, given Nixon's political ambition, popularity, and relative youth. *See* EARL MAZO, RICHARD NIXON: A POLITICAL AND PERSONAL PORTRAIT 188 (1959) (describing President Eisenhower's approval of Nixon's good judgment after Eisenhower's heart attack); *id.* at 191 (suggesting that Nixon's understated management of the White House in Eisenhower's absence was politically motivated).

21. *See* 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 165, 167 (Robert E. Gilbert ed., 2000) [hereinafter MANAGING CRISIS]; Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 837, 859 (2005) (claiming that the Twentieth, Twenty-Second, and Twenty-Fifth Amendments "strengthened the office [of the Vice President] and ha[ve] driven the steady emergence of the office into its present structure and identity"). Senator Bayh admitted this history of vice-presidential submissiveness might have been different had the Vice President had a clear constitutional

ignored this evolving power dynamic. The proposals of the 1995 Working Group on Presidential Disability also failed to articulate a difference between legitimate constructions of Sections 3 and 4, though they did distinguish impairment (a medical judgment) from presidential inability (a political judgment).[22] A Subcommittee on Disability and Impairment listed "[c]onditions invariably producing complete incapacitation" that should trigger automatic consideration of either Section 3 or Section 4,[23] but did not distinguish between the types of inability proper to each section.

Many scholars independently have proposed guidelines for diagnosing presidential inability, but none has suggested that the "unable to discharge" phrase is subject to different constructions in Sections 3 and 4. Instead they have struggled to give it a single meaning that makes sense in both sections. Because they equate the two standards, some proposals would allow the Vice President to invoke Section 4 in circumstances where the legislative history of the Amendment expressly rejects its application, and which are inconsistent with constitutional structure. Herbert Abrams opines that "Section 4 may be utilized" any time the President fails to invoke Section 3 before undergoing general anesthesia, even for "[p]lanned, minor surgical procedures."[24] He also would allow the Vice President and Cabinet to oust a terminally ill President

---

mechanism for taking control from the President. *The Problem of Presidential Inability and Filling of Vacancies in the Office of the Vice President: Hearing on S.J. Res. 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 20 (1965) (statement of Sen. Bayh) [hereinafter *Hearing on S.J. Res. 1*].

22. Presidential Disability, *supra* note 7, at 531; *see also* Francis I. Kittredge, Jr. et al., *Subcommittee Report: Investigating Advantages and Disadvantages of Formalized, Standardized Contingency Plans for Administrations in Cases of Disability*, *in* Presidential Disability, *supra*, at 192, 193.

23. Presidential Disability, *supra* note 7, at 278-80. Two subcommittee members expressed reservations about pre-judging any medical condition as an automatic case for invoking Section 4, pointing out that even some of the conditions listed as "invariably producing complete incapacitation," such as a compound fracture or dementia, would require political judgment as well as medical judgment. Herbert L. Abrams et al., *Panel Discussion*, *in* Presidential Disability, *supra*, at 283, 288 (statement of Dr. Jerry M. Wiener); *id.* at 290 (statement of Prof. Frank B. Wood).

24. *Compare* Herbert L. Abrams, The President Has Been Shot: Confusion, Disability, and the Twenty-Fifth Amendment in the Aftermath of the Attempted Assassination of Ronald Reagan 222-23, 226 (1992) [hereinafter Abrams, President Has Been Shot], *and* Herbert L. Abrams, *The Vulnerable President and the Twenty-Fifth Amendment, with Observations on Guidelines, a Health Commission, and the Role of the President's Physician*, 30 Wake Forest L. Rev. 453, 464 (1995) [hereinafter Abrams, *Vulnerable President*], *with* 111 Cong. Rec. 15,381 (1965) (statement of Sen. Bayh) ("We are not talking about the kind of inability in which the President went to the dentist and was under anesthesia.").

who was not otherwise incapacitated.[25] Both possibilities contradict the legislative history and structure of the Amendment[26] but follow naturally from a univocal construction of the "unable to discharge" phrases: If a President may declare himself "unable" under Section 3 for a colonoscopy,[27] and if that phrase has the same meaning in both sections, then the Vice President and Cabinet may declare the President "unable" during the same procedure under Section 4.

Other scholars, starting from the same mistaken presumption of univocality but wary of endangering the presidency, would apply the strict standard for inability under Section 4 to both sections. These scholars caution against liberal use of Section 3 by the President for fear that such applications would create dangerous precedent for declaring inability under Section 4.[28] In an article advocating this watered-down approach to Section 3, Scott Gant states the univocal presumption explicitly:

> [T]he inability provisions of Sections 3 and 4 have the same meaning as one another . . . . [I]t seems apparent that circumstances enabling a President to invoke Section 3 would also permit the Vice President and the cabinet to employ Section 4. After all, the two provisions use identical language to describe the condition prompting the transfer of power from the President to the Vice President.[29]

Imposing the narrow standard of Section 4 inability upon the President's discretionary Section 3 power, however, may be as damaging as the reverse alterna-

25. *Compare* ABRAMS, PRESIDENT HAS BEEN SHOT, *supra* note 24, at 226, *and* Abrams, *Vulnerable President*, *supra* note 24, at 464, *with* 111 CONG. REC. 15,381 (1965) (statement of Sen. Bayh) (agreeing that Section 4 is limited to cases of "total disability").

26. *See infra* Sections II.C, III.A.

27. *See infra* Section IV.A.

28. *See* Scott E. Gant, *Presidential Inability and the Twenty-Fifth Amendment's Unexplored Removal Provisions*, 1999 L. REV. MICH. ST. U. DETROIT C.L. 791, 802 ("[M]y chief concern is that expansive constructions and applications of Section 3 would facilitate the use of Section 4 to redress perceived personal or political inabilities of a President."); *see also* Robert E. Gilbert, *The Genius of the Twenty-Fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency*, *in* MANAGING CRISIS, *supra* note 21, at 25, 46 ("Routine invocation of Section 3 would . . . trivialize the Amendment."); Alexander M. Bickel, *The Constitutional Tangle*, NEW REPUBLIC, Oct. 6, 1973, at 14, 15 (stating incorrectly "[t]hat the 25th Amendment applies only to physical disability" and remarking that "the amendment would be a dangerous instrument indeed if it were otherwise").

29. Gant, *supra* note 28, at 802.

tive.[30] Just such a misunderstanding of the meaning of Section 3 inability led President Reagan to disclaim its application to "brief and temporary periods of incapacity" instead of explicitly invoking it at the first occasion.[31] This approach undermines the purpose of Section 3—to promote continuity in the executive branch by encouraging the President to declare temporary inability even for short periods.[32] By failing to approach presidential inability with a nuanced theory of constitutional construction, each of these scholars has promoted either unhealthy avoidance of Section 3 or cavalier exploitation of Section 4.

B. The Inadequate Remedy of Congressional Review

Some scholars protest that even if the Vice President and Cabinet were to import a broad construction of "unable to discharge" from Section 3 into Section 4, the congressional check built into Section 4 would prevent any mischief.[33] This theory assumes incorrectly that since more members of Congress are needed to affirm a President's suspension under Section 4 than to impeach and convict him under Article II, Section 4, the Twenty-Fifth Amendment is necessarily more protective of presidential power than the impeachment process is.[34] While it is true that the double supermajority requirement of Section 4 protects the President more than the Article II impeachment and conviction process does, which requires only a majority of the House of Representatives,[35] this procedural hurdle is only one of several factors that make Section 4 different from impeachment. The double supermajority requirement does not eliminate the risk that a singular construction of the "unable to discharge" phrases creates.

---

30. Abrams seems to make both mistakes, imposing too broad a standard on Section 4 and too narrow a standard on Section 3. *See* ABRAMS, PRESIDENT HAS BEEN SHOT, *supra* note 24, at 225 (limiting Section 3 to "circumstances in which the president's ability to make or communicate rational decisions has been compromised").

31. *See infra* note 137 and accompanying text.

32. *See infra* Section II.B.

33. *See* Michael Nelson, *Background Paper*, *in* A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 19, 90 (1988).

34. *See* Birch E. Bayh, Jr., *The Twenty-Fifth Amendment: Its History and Meaning* [hereinafter Bayh, *History and Meaning*], *in* PAPERS ON PRESIDENTIAL DISABILITY, *supra* note 18, at 1, 11 ("[I]t is more difficult to declare a president disabled [under Section 4] than it is to impeach him . . . .").

35. *See* 111 CONG. REC. 3256 (1965) (statement of Sen. Bayh) ("That is more protection than is given to a President in the event of impeachment."). *Compare* U.S. CONST. art. I, § 2 (giving "the sole Power of Impeachment" to the House), *with id.* art. I, § 3 (giving "the sole Power to try all Impeachments" to the Senate, but requiring "the Concurrence of two thirds of the Members present" to convict).

First, the Twenty-Fifth Amendment and Article II impeachment exist to remedy different presidential defects, so not every President separated from his powers by Section 4 could also be impeached and convicted.[36] Unlike in an impeachment proceeding, Section 4 does not require Congress to find the President guilty of wrongdoing to find him "unable to discharge the powers and duties of his office."[37] Thus, if the Vice President, Cabinet, and Congress equate Section 4 inability with the flexible standard of Section 3, an unpopular President who has committed no crime is at greater risk of Congressional removal under the Twenty-Fifth Amendment than Article II impeachment, in spite of the double supermajority required by the former.

Second, Congress may be more likely to affirm the President's inability under the Twenty-Fifth Amendment than to impeach him under Article II because a finding of Section 4 inability is not necessarily permanent. While removal by impeachment is final, the President may appeal a declaration of Section 4 inability an unlimited number of times.[38] This difference may make inability seem to Congress less severe than impeachment. The distinction may be illusory, however, because Congress is unlikely to reinstate a President whom the executive and legislative branches have already declared incapable of serving in that office.[39]

Third, the damage of an improper declaration of inability under Section 4 is immediate. Unlike removal by impeachment and conviction, which takes effect only after both houses of Congress have voted against the President, removal by Section 4 of the Twenty-Fifth Amendment occurs before Congress even enters the scene. Congress only votes on the President's inability after the Vice President has already become Acting President, the President has transmitted "his written declaration that no inability exists," and the Vice President and Cabinet have transmitted a second declaration to the contrary.[40] Moreover, the Vice President and Cabinet are allowed four days from the time of the Presi-

36. *See* Paul B. Stephan III, *History, Background and Outstanding Problems of the Twenty-Fifth Amendment*, *in* PAPERS ON PRESIDENTIAL DISABILITY, *supra* note 18, at 63, 67-68.

37. *Compare* U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."), *with* U.S. CONST. amend. XXV, § 4.

38. *See Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 94, 101 (1965) [hereinafter *Hearings on H.R. 836*] (statements of Sen. Bayh and Nicholas de B. Katzenbach, Att'y Gen. of the United States).

39. *See id.* at 94 (statement of Sen. Bayh); *see also* 111 CONG. REC. 7949 (1965) (statement of Rep. Moore) (opposing H.J. Res. 1 because it would put a President removed under Section 4 "in a position of coming here to the Congress and trying to lobby himself back into the job to which the people have elected him").

40. *See* Stephan, *supra* note 36, at 68.

dent's appeal to decide whether to transmit their second declaration.[41] Thus, the Acting President can enjoy at least four days of presidential power—four days to advance his own policy goals, to prove himself a capable executive, and to acclimate Congress and the public to his presence in the Oval Office. By the time Congress is allowed to vote, the deck may already be stacked against the President: The appellate posture of the case before Congress, doubts cast on the President's ability, popular interim leadership by the Acting President, and reluctance to upset the status quo again would all work in the Vice President's favor.

Finally, even if congressional action (or inaction) ultimately restores the President to his office, the four-day period—up to twenty-seven days if Congress is slow to assemble and cannot reach a decision[42]—may be enough for the Acting President to accomplish whatever goals led him to challenge the President's ability in the first place. Thus, the existence of legislative review is an insufficient protection against the risks of a univocal interpretation of presidential inability in Sections 3 and 4.

II. Structure

Because both inability provisions have the same text, any difference in meaning between them must originate outside the semantic content of the words themselves. Constitutional structure is one source of that meaning. The structure of the Twenty-Fifth Amendment—and of the constitutional presidency generally—requires the President and his subordinates to construct the inability provisions of Section 3 and Section 4 differently even though they look

41. Gregory Jacob misinterprets Section 4 to allow the President to regain his powers immediately upon transmitting his appeal. Gregory F. Jacob, 7 Green Bag 2d 23, at text following n.12 (2003). Instead, the President regains power "unless the Vice President and [Cabinet] transmit within four days" their second declaration. U.S. Const. amend. XXV, § 4. The drafters of the Amendment left the Vice President in the saddle during a period of disputed inability, because they wanted to prevent presidential power from bouncing back and forth between the Vice President and a President whose capacity to govern had been impugned. *See* S. Rep. No. 89-66, at 3, *in* Application, *supra* note 20, at 419; *Hearing on S.J. Res. 1*, *supra* note 21, at 17-18 (statement of Sen. Bayh); 111 Cong. Rec. 3284-85 (1965) (statement of Sen. Bayh); *id.* at 7939 (statement of Rep. Celler); *id.* at 7938. The Vice President may, however, voluntarily return power to the President in fewer than four days. *See infra* note 67.

42. The Vice President has four days in which to transmit his reply to the President's appeal. After receiving the Vice President's second declaration, Congress must assemble within two days. Then Congress has up to twenty-one days to deliberate "from the time that the Congress convenes" after which the powers and duties of office automatically revert to the President. U.S. Const. amend. XXV, § 4; Emanuel Celler et al., Statement of the Managers on the Part of the House, H.R. Rep. No. 89-564, at 2 (1965) (Conf. Rep.), *reprinted in* Application, *supra* note 20, at 441, 444.

alike. This difference results from the structure of the executive branch and the divergence of each section's decisionmakers and procedures. Sections 3 and 4 of the Twenty-Fifth Amendment set forth distinct mechanisms for declaring a president "unable," each fulfilling the Amendment's twin purposes—preserving executive continuity while protecting the President against politically motivated challenges to his power.[43] Structure demands that each section deal with a mutually exclusive set of presidential inabilities: Section 3 may apply in any circumstance as long as the President is able to make and communicate a rational decision to step down, whereas Section 4 may apply only when the President is unable to do so.

A. Structure, Meaning, and Constitutional Construction

Constitutional actors derive constitutional meaning in two ways. They discover it through interpretation, and—when interpretive meaning runs out—they develop it through construction.[44] The traditional tools of interpretation—text, history, and structure—clarify some of the Twenty-Fifth Amendment's linguistic ambiguities, but residual vagueness requires the relevant political actors to construct meaning by applying under-determinate standards to particular circumstances.[45]

---

43. *See* S. REP. NO. 89-66, *in* APPLICATION, *supra* note 20, at 417, 420, 424, 428-30; Gilbert, *supra* note 28, at 25 (noting that the "overriding objectives [of the Twenty-Fifth Amendment] are that presidential transitions will be smooth and orderly and that the powers of the presidency will always reside in a person physically and mentally capable of exercising them").

44. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 120 (2004) ("The more general or vague the term (determined historically), the more likely it is that uncertain applications will arise outside its core meaning. When this occurs, 'interpretation,' strictly speaking, will have run out and the meaning of the text must be *determined* rather than found. . . . [T]he ambit of a vague term is a matter of 'construction' rather than interpretation."); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 8 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] ("[Interpretive modalities] such as text and structure, framers' intent, and precedent . . . elucidate only a portion of the Constitution's meaning. Additional meaning . . . must be constructed from the political melding of the document with external interests and principles.") (citation omitted); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION] ("[The] precondition [of construction] is that parts of the constitutional text have no discoverable meaning. . . . The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation. . . . This additional step is the construction of meaning."). For an expansive view of the Constitution's amenability to construction, see Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 435 (2007).

45. The "unable to discharge" standard is *under-determinate* in Section 4, because the Vice President and Cabinet decide whether a given impairment renders the Presi-

Interpretation resolves the "unable to discharge" phrase's ambiguity (referring to mental as well as physical disability), but does not exhaust its capacity for meaning, because "unable" is not only ambiguous but vague.[46] This constitutional vagueness delegates to the President and his subordinates the power to construct constitutional meaning around instances of presidential impairment that the framers could not have anticipated.[47]

The Amendment's vagueness does not imply, however, that the Vice President and Cabinet share the President's unbounded discretion to define presidential inability. Constitutional structure, in addition to informing interpretation of ambiguous language, constrains the construction of practical standards from vague language.[48] Here, the structure of the executive branch and the review procedures of Section 4 require the Vice President and Cabinet to construct the "unable to discharge" phrase more narrowly than the President, who subjectively constructs the same phrase in Section 3.[49]

Since the semantic content of each inability phrase is the same, one might argue that a difference in procedure rather than meaning accounts for their different operations. But this approach injects a false distinction between meaning and structure in constitutional law, where structure informs meaning.[50] It also underestimates the effect present-day constructions of open-ended provisions

---

dent "unable" based on grounds other than the Amendment's language, yet the structure of Section 4 limits the range of legitimate applications. In Section 3, the phrase is *indeterminate*: It places no limit on the set of circumstances for which the President may invoke it. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

46. To be precise, the unable to discharge phrase is *imprecise* in that there is no clear demarcation between ability and inability; *incommensurable* in that it is impossible to calibrate the dimensions of physical and mental ability in a single scale of ability by which all Presidents, or even one President, may be measured in all circumstances; and *immensurate* in that the quality to be diagnosed—physical or mental ability—resists precise measurement. *See* TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 33-35, 41-43, 46 (2003).

47. *See* BARNETT, *supra* note 44, at 118 ("More often, a vague term is chosen because drafters realize that the resolution of a future problem will depend on specific factual circumstances that cannot be specified in advance and therefore must be decided by others."); Timothy Endicott, *The Value of Vagueness*, *in* VAGUENESS IN NORMATIVE TEXTS 27, 42-43 (Vijay K. Bhatia et al. eds., 2005); sources cited *infra* note 93.

48. *See* BARNETT, *supra* note 44, at 125 ("Most who engage in constitutional construction strive to take into account constitutional principles that underlie the text."); WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 44, at 10-11.

49. *See infra* Sections II.B-D.

50. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1985) (1969).

have on future constitutional understanding.[51] Both sections require construction to derive constitutional meaning from the same vague phrase, but the structure of each section sets wholly different boundaries on that construction.

B. Section 3: Promoting Continuity Through Non-Reviewable Self-Diagnosis

The procedures and checks in each section of the Amendment mitigate the risks associated with its respective decisionmaker. The greatest risk associated with the President's self-diagnosis is that he will cling to power even after he has lost the ability to wield it responsibly. Thus, Section 3 encourages a President to declare his own inability with the constitutional promise that he may resume his powers and duties at any time merely by declaring that his inability has ended.[52] A Vice President who considers the President's return to power premature has no recourse except to resort to Section 4 with the cooperation of the Cabinet.

Section 3 also encourages the President to declare himself temporarily "unable" by omitting any external check on that decision. Recognizing that the will to power is the greatest natural check on abdication, the drafters made the President's declaration under Section 3 effective with no outside input on the President's mental or physical state. The President is constitutionally unable whenever he so declares in writing to the leaders of Congress;[53] his prerogative to make that judgment is limited only by his own reading of the Inability Clause in Section 3 and his own conscience.[54]

---

51. *See* Balkin, *supra* note 44, at 490 ("[C]onstitutional constructions can have path dependent effects on how the constitutional system operates."). *But see* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 44, at 15 ("Constructions never leave the realm of politics; they do not become a higher law . . . .").

52. U.S. CONST. amend. XXV, § 3; *see also* S. REP. NO. 89-66, *in* APPLICATION, *supra* note 20, at 3, 419 ("This will reduce the reluctance of the President to utilize the provisions of [Section 3] in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them."); 111 CONG. REC. 15,378 (1965) (statement of Sen. Bayh); 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) ("A President would always hesitate to utilize the voluntary mechanism if he knew that a challenge could be lodged when he sought to recapture his office."); 111 CONG. REC. 7943 (1965) (statement of Rep. Horton); Bayh, *History and Meaning*, *supra* note 34, at 35.

53. *See* 111 CONG. REC. 7958 (1965) (statement of Rep. White) ("There is no requirement that a reason be given other than that the President is 'unable' to act . . . ."). *But see* FEERICK, *supra* note 15, at 198 ("Section 3 does not provide a mechanism for a President to step aside temporarily without justification, thereby neglecting his duties."). Past invocations of Section 3 have been accompanied by explanations, see *infra* Section IV.A, but the structure of the Amendment does not require a justification from the President or forbid temporary abdication short of an impeachable abuse of power.

54. *See* FEERICK, *supra* note 15, at 198.

The self-fulfilling and unreviewable nature of Section 3 inability makes any presidential declaration that complies with its procedure consistent with the open-ended structure of Section 3. On the other hand, arbitrary declarations that repeatedly endanger the country could provide grounds for impeachment. The phrase "other high Crimes and Misdemeanors"[55] probably encompasses non-indictable abuses of power.[56] For an application of Section 3 to rise to the level of an impeachable offense, though, it would have to endanger the country gravely and result from clearly corrupt motives. Mere bad judgment in applying Section 3 is not an impeachable offense,[57] and questionable impeachment cases stemming from misuse of Section 3 should be resolved in the President's favor. Furthermore, it is unlikely that impeachable invocations of Section 3 would occur absent a severe mental impairment that would justify removal under Section 4 if the President were to prematurely and irrationally declare his restored ability. In that case, Section 4 removal would be more expedient than impeachment.[58] But under ordinary circumstances, the Constitution allows the President to declare his own inability for any reason—ranging from minor impairment to severe disability, disclosed or undisclosed—without risking impeachment for abdication.

Beyond avoiding impeachment, commentators have cautioned that the President's interest in maintaining his own personal power and the power of his office should discourage him from any "frivolous invocation of Section 3—as, for example, when the president undergoes a medical procedure that does not affect his cognitive functions or his ability to communicate . . . ."[59] All things are lawful, but all things are not expedient.[60] The practical wisdom of invoking Sec-

55. U.S. Const. art. II, § 4.

56. *See* Staff of the Senate Judiciary Comm. Impeachment Inquiry, Constitutional Grounds for Presidential Impeachment 18-20 (1974) [hereinafter Impeachment Staff Report]; Raoul Berger, Impeachment: The Constitutional Problems 59-67 (1973); Charles L. Black, Impeachment: A Handbook 37-40 (2d ed. 1998); Laurence H. Tribe, American Constitutional Law § 4-17, at 294 (2d ed. 1988); John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 Fordham L. Rev. 1, 54-55 (1971).

57. *See infra* note 115 and accompanying text.

58. A President who misused the powers of his office because of insanity would not even be eligible for impeachment if "high Crimes and Misdemeanors" are understood to have a mens rea requirement. *See* Michael J. Gerhardt, *Chancellor Kent and the Search for the Elements of Impeachable Offenses*, 74 Chi.-Kent L. Rev. 91, 122-26 (1998).

59. Gilbert, *supra* note 28, at 47; *see also id.* at 46 ("Routine invocation of Section 3 would not only trivialize the Amendment but also damage the president's 'presidentiality' and thereby his ability to lead.").

60. *See, e.g.*, Akhil Reed Amar, *Clinton-Obama, Obama-Clinton: How They Could Run Together and Take Turns Being President*, Slate, Mar. 21, 2008, http://www.slate.com/id/2187034/pagenum/all/ (proposing Section 3 as a back-up mechanism for

tion 3 only in justifiably serious cases, however, should not be confused with a constitutional requirement of total inability.

Once a President is absolutely unable to make or communicate rational decisions, Section 3 is no longer available to him because it requires his self-diagnosis and written declaration.[61] Thus, the structure of Section 3 requires that its inability phrase mean something short of total disability. To relinquish power under Section 3, the President must be capable of making a rational decision and of transmitting a written document. Beyond that, the structure of Section 3 allows the President to invoke it in any circumstance and for any reason, thereby promoting executive branch continuity.

C. Section 4: Preventing Usurpation Through a Presumption of Presidential Ability

Section 4 was the most vociferously debated section of the Amendment because its critics in Congress perceived in it the potential for abuse by a conniving Vice President and a disenchanted Cabinet.[62] Anticipating these concerns, the drafters of Section 4 included institutional checks on the Vice President in Section 4 that place a heavy burden of proof on the President's challengers, whereas in Section 3 the President bears no such burden.

Unlike Section 3, Section 4 includes several layers of external review to prevent the President's political rivals from illegitimately deposing him. The requirement that a majority of the President's (presumably loyal) Cabinet concur in the Vice President's determination of presidential inability discourages the Vice President from seizing the reins of office.[63] Requiring a supermajority of both houses of Congress to agree that the President is unable, when the President has challenged the initial diagnosis, further discourages the Vice President and Cabinet from ousting the President.[64] The Vice President and Cabinet members who voted a sane President out of power during all but the most dras-

effecting a premeditated, mid-term presidential transition but acknowledging the unlikelihood of ticket-flipping after a bruising primary campaign).

61. *See Hearings on H.R. 836*, *supra* note 38, at 54 (statements of Rep. Donoghue and Sen. Bayh); 111 CONG. REC. 3271 (1965) (statement of Sen. Bayh) ("[I]f we had a President unable to write his name, the matter would not be considered under section 3 . . . but rather it would be considered under section 4."); MILLER CENTER REPORT, *supra* note 18, at 170 ("[Section 3] could be used, of course, only in cases where the president remained conscious and competent at the time he signed the letter.").

62. *See infra* Part IV.

63. *See* U.S. CONST. amend. XXV, § 4; *see also* 111 CONG. REC. 3262-63 (1965) (statement of Sen. Fong) ("It is reasonable to assume that persons the President selects as Cabinet officers are the President's most devoted and loyal supporters who would naturally wish his continuance as president.").

64. *See* U.S. CONST. amend. XXV, § 4.

tic cases of inability would place themselves at risk of impeachment or political exile if the President were to successfully challenge a fraudulent or even careless diagnosis.[65]

The prescribed timeline of its review procedure suggests that Section 4 was designed for prolonged or indefinite periods of inability. The Amendment does not explicitly provide a mechanism for the Vice President to return power voluntarily to the President who regains his ability sooner than four days after the Vice President and Cabinet declare him unable. A rigidly textualist reading of Section 4 seems to require both that the President declare in writing "that no inability exists," and that four days elapse during which the Vice President and a majority of the Cabinet have the option to declare otherwise, thereby triggering congressional review.[66] The Amendment's legislative history does indicate, however, that the President and Vice President could agree to restore the President to his office before the four days elapsed.[67] Still, this gap in the text demonstrates that Section 4 does not apply to short-term inabilities. The structure of Section 4 leverages multi-layered review procedures, the long-term self-interest of political actors, and the expectation of a four-day minimum to discourage seizures of presidential power during minor presidential impairments.

D. The Structure of Executive Power in the Constitution

The constitutional design of the executive branch requires both that the President enjoy broad latitude to define and diagnose his own inability under Section 3, and that he maintain a strong presumption of ability under Section 4. Unlike Congress and the judiciary, the President is an individual possessed of one mind and self-knowledge. Thus, when the President passes judgment on presidential ability he is "taking his own pulse" in a way that is impossible for his subordinates to replicate. The executive is also unique among the branches in being constantly "in session."[68] Preserving these two features of the constitutional executive, the Amendment makes it relatively easy for the President to declare himself "unable" and cede his powers to the Vice President whenever he

65. *See* 111 Cong. Rec. 3284 (1965) (statement of Sen. Bayh) (claiming that the Vice President's "political future would be ruined if he attempted to usurp the office"); *id.* at 7942 (statement of Rep. Poff).

66. *See* U.S. Const. amend. XXV, § 4.

67. *Hearing on S.J. Res. 1*, *supra* note 21, at 10 (statement of Nicholas deB. Katzenbach, Att'y Gen.-Designate of the United States); *Hearings on H.R. 836*, *supra* note 38, at 99-100 (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States); 111 Cong. Rec. 3285 (1965) (statement of Sen. Bayh); 111 Cong. Rec. 7939-40 (1965) (statement of Rep. Celler); *see also* Feerick, *supra* note 15, at 204 (citing *Hearings on H.R. 836*, *supra* note 38, at 99, 107, 243); 111 Cong. Rec. 15,214 (1965) (statement of Rep. Poff)); 111 Cong. Rec. 3267 (1965) (statement of Sen. Dirksen) (quoting *Hearing on S.J. Res. 1*, *supra*).

68. *See* Akhil Reed Amar, America's Constitution: A Biography 132 (2005).

sees fit. The power Section 4 grants to the Vice President and Cabinet, by contrast, is an exception to the Constitution's otherwise nearly exclusive grant of executive power to the President.[69] The exceptional nature of the Vice President's exercise under Section 4 of that otherwise unitary power suggests that "unable" should be construed narrowly in that section.[70]

That Section 3 empowers the President to step down temporarily whenever he is able to do so implies that the Vice President may not use Section 4 when the President rationally decides not to relinquish authority. For the Vice President to invoke Section 4 after the President has made a rational decision to remain in power (or before he has a chance to do so) would impermissibly substitute the Vice President's judgment for the President's.

E. Prospective Inability

One of the greatest strengths of Section 3 is that it allows the President to transfer power to the Vice President during foreseen periods of inability,[71] and perhaps even prospectively for unexpected yet contemplated future incidents. Advance planning for presidential inability promotes a smooth and unquestioned transfer of power. All invocations of Section 3 to date have been for brief, scheduled surgeries involving anesthetic or sedative drugs. President George W. Bush last invoked the Amendment in 2007 with a letter to the leaders of Congress stating his determination to "transfer temporarily [his] Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery."[72] The declaration was arguably prospective, so that if President Bush had never undergone his procedure, the legal inability would never have begun.[73] The President's Office faxed the letter immediately before his surgery, but there is no overwhelming constitutional reason why such a letter may

69. *See* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 98 n.231 (1994) ("Nothing in the Constitution commits any part of the executive power to the President's subordinates, except in two cases: when Congress vests the appointment of inferior officers in the heads of departments, and [Section 4 of the Twenty-Fifth Amendment].") (citing U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. amend. XXV, § 4, cl. 1; Morrison v. Olson, 487 U.S. 654 (1988)).

70. *See* 111 CONG. REC. 7938 (1965) (statement of Rep. Celler).

71. *See id.* at 7941 (statement of Rep. Poff) (describing the category of impairments covered by Section 3 as that "in which the President recognizes his inability—*or the imminence of his inability*") (emphasis added).

72. Peter Baker, *Growths in Bush's Colon Not Suspicious, Doctor Says*, WASH. POST, July 22, 2007, at A3.

73. President Reagan's invocation of Section 3 was also arguably prospective. *See infra* note 138 and accompanying text.

not be sent further in advance, setting the hour at which the inability would begin, and perhaps, as I suggest below, even the hour at which it would end.[74]

Some have suggested that Section 3 also be used for unplanned future inabilities by arrangement of the President and Vice President, outlining procedures for contingent cessions of executive power.[75] According to John Feerick, "[t]he declaration could even be conditional and prospective in nature, stating, for example: '[I]f in the event I am under anesthesia or similarly unable, I wish you to assume those duties.'"[76] Then when the Vice President acts on the agreement, he is merely effectuating the President's prejudgment about his own inability—not acting unilaterally under Section 4. From the President's perspective, applying Section 3 prospectively may be preferable to a Section 4 declaration by the Vice President and Cabinet, because, once the President recovers, he can immediately regain power without approval from the Vice President or Congress. The Vice President might prefer prospective agreements to avoid needing the Cabinet's concurrence in a Section 4 diagnosis of presidential inability.

Experts have recommended that each new administration craft formal contingency plans before inauguration.[77] Along these lines, "secret letters of understanding are known to have been written by Presidents Bush and Clinton to their vice presidents indicating their intentions for transfer of power in case of illness."[78] To make such an agreement operative under Section 3, though, the

74. *See infra* note 83 and accompanying text.

75. *Hearing on S.J. Res. 1*, *supra* note 21, at 20 (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States); *Hearings on H.R. 836*, *supra* note 38, at 97-99 (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States).

76. Feerick, *supra* note 15, at 198 (quoting *Hearings on H.R. 836*, *supra* note 38, at 99 (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States)); *see also* 111 Cong. Rec. 7941 (1965) (statement of Rep. Poff) (stating that the President could invoke Section 3 when he recognizes "the imminence of his inability").

77. The Working Group on Disability in U.S. Presidents recommended that "[a] formal contingency plan for the implementation of the Amendment should be in place before the inauguration of every president." Presidential Disability, *supra* note 7, at 529. The contingency plan would "delineate those situations and medical conditions which would normally warrant a voluntary transfer of power under the provisions of Section 3 or an involuntary transfer of power under the provisions of Section 4." *Id.*

78. Drachman et al., *supra* note 7, at 276. Before the Twenty-Fifth Amendment, President Eisenhower had an informal agreement with Vice President Nixon permitting Nixon to act as President in the event of Eisenhower's future inability, but allowing Eisenhower to resume his duties by declaring the inability ended. Press Release, Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability (Mar. 3, 1958), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=11313. Similar letters were written from President Kennedy to Vice President Johnson, and from President Johnson

President would have to send it to the Speaker of the House and the President pro tempore of the Senate before becoming totally disabled,[79] and that transmission should be public.[80] Mere agreements between the President and Vice President may be useful in subsequent diagnoses of Section 4 inability,[81] but they would not constitute presidential declarations under Section 3 unless the President himself sends them to Congress.

The advantages of planning for future contingencies in this fashion are obvious, but this situation does force the Vice President to diagnose the President's inability when the time comes, or at least to confirm that the President's current condition fits within the description of inability provided in the President's prospective declaration. Prospective, conditional declarations risk uncertainty about whether the Vice President is Acting President during an ambiguous state of presidential impairment. Still, the risks of misuse are minimal, since the President can resume his duties following the activation of a conditional Section 3 declaration merely by announcing his ability restored.[82]

If Section 3 permits prospective declarations of inability, there is no reason why prospective declarations of restored ability should not be permitted as well. Thus it would be possible for a President to transmit a single declaration stating that he will be unable to discharge the powers of his office during a scheduled surgery and that he will be able again at the end of the surgery or after a specified recovery period.[83] The same document could serve as both the declaration of inability and the declaration "to the contrary."[84] If, when the powers of office reverted to him, the President remained totally unable to discharge them, his

---

to Vice President Humphrey. *See* ROBERT E. GILBERT, THE MORTAL PRESIDENCY: ILLNESS AND ANGUISH IN THE WHITE HOUSE 131 (2d ed. 1998).

79. *See* U.S. CONST. amend. XXV, § 3.

80. *See* S. REP. NO. 89-66, *in* APPLICATION, *supra* note 20, at 2, 418 ("It is the intention of the [Senate Judiciary C]ommittee that for the best interests of the country to be served, notice by all parties [under Sections 3 and 4] should be public notice.").

81. *But see* MILLER CENTER REPORT, *supra* note 18, at 173 (tentatively rejecting contingent pre-authorizations principally because "Section 4 provides the exclusive means for determining a presidential inability once the president loses the capacity to make that determination for himself").

82. It is clear from the text and purpose of Section 3 that the President could not be prevented from reclaiming the powers and duties of his office by strict adherence to his earlier prospective descriptions of restored ability.

83. *See Hearing on S.J. Res. 1*, *supra* note 21, at 65 (statement of Herbert Brownell, Att'y Gen. of the United States) (approving a declaration of the beginning and end of Section 3 inability by a single letter); *id.* at 20 (statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States) (permitting a single letter as suitable under Section 3); FEERICK, *supra* note 15, at 198 ("Under Section 3 a President is permitted to declare himself disabled either for an indefinite or a specified period of time.").

84. U.S. CONST. amend. XXV, § 3.

subordinates could decide to invoke Section 4, but the original period of legal inability would end as predetermined by the President's declaration.

Prospective declarations of inability would require a broad reading of the present tense text of Section 3, which says the President must transmit a "declaration that he *is* unable . . . ."[85] Prospective declarations must also overcome the textual implication that the phrases "[w]henever the President transmits" and "until he transmits" contemplate transmission—not the occurrence of an external condition—as the trigger for legal recognition of inability and restored ability,[86] and thus foreclose the delayed fuse of a prospective declaration. This narrow reading arguably conflicts with the President's broad powers of construction under Section 3,[87] and to the extent that it discourages the President from taking present action for future contingencies, this reading may undermine the Amendment's purpose of promoting executive branch continuity. In the interest of national stability, it is unlikely that a prospective declaration once activated would be seriously challenged as long as the President's inability were publicly confirmed. These textual ambiguities, however, may be enough to discourage some Presidents from making prospective declarations under Section 3.

Prospective application of Section 4 is outside the narrow zone of construction available to the Vice President and Cabinet under Section 4 and would do violence to the Constitution and the office of the President. Declarations of contingent inability under Section 4 would allow the Vice President and Cabinet to threaten the President with ouster from office conditioned on his future official or unofficial acts, without requiring the political commitment inherent in a public declaration of current inability. A prospective declaration by the Vice President and Cabinet would violate the constitutional structure that gives the President sole control over executive power,[88] and it would short circuit the Amendment's presumption that the President is the best judge of his own inability and deserves the first chance to recognize and declare it. As with short-term and minor impairments, the structure of the Amendment in its constitutional context grants the President discretion to construct presidential inability prospectively, but it prohibits comparable constructions of the identical, vague phrase in Section 4.

85. *Id.* (emphasis added); *cf.* Costello v. INS, 376 U.S. 120, 125 (1964) (holding in a statutory context that "the tense of the verb 'be' is not, considered alone, dispositive").

86. U.S. Const. amend. XXV, § 3.

87. *See* Feerick, *supra* note 15, at 198 (noting that Section 3 "was intended to be broadly interpreted"); *supra* Section II.B.

88. *See* Stephen G. Calabresi & Christopher S. Yoo, The Unitary Executive 428 (2008) ("[W]hatever executive power may exist must be exercised subject to presidential control.").

III. Legislative History

The legislative history of the Twenty-Fifth Amendment confirms a congressional intent—in keeping with the Amendment's structure—that the Vice President's and Cabinet's construction of presidential inability must be more narrowly delimited than the President's construction of the same phrase. Although legislative history cannot override the language and structure of the Amendment itself,[89] statements by the Amendment's sponsors, especially Senator Bayh who sponsored the Amendment and defended it in both Houses,[90] help to elucidate this striking example of textual vagueness. This history confirms that the President enjoys broad discretion to invoke Section 3 during minor, short-term, and even unexplained impairments, and that his subordinates may only apply Section 4 when the President is totally unable to decide rationally whether to step down, or unable physically to communicate that decision.

Although they did not discuss the meaning of the "unable to discharge" phrase in terms of constitutional construction, the Amendment's sponsors sometimes spoke of "the word 'unable' *as used in*" one section or the other,[91] recognizing implicitly that the structure of the executive branch they were amending and of the Amendment itself would shape the meaning of that phrase differently in each section. Likewise, in discussing hypothetical applications of Sections 3 and 4, sponsors referred to two distinct "categories of cases" that the Amendment addressed.[92] This sort of deliberate distinction suggests that the

89. *See* 111 Cong. Rec. 15,384 (1965) (statement of Sen. Gore) ("The Congress is asked to adopt language . . . . That is what is before the Senate. Undoubtedly there have been many conferences and colloquies, but the language should be explicit when it becomes a part of the U.S. Constitution."). *But see* John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 Const. Comment. 371, 371 (2007) ("[T]he expected applications can be strong evidence of the original meaning.").

90. *See* 111 Cong. Rec. 15,384 (1965) (statement of Sen. Cooper) ("The reason I directed questions to the Senator from Indiana [Mr. Bayh], was that his answers as the Senator in charge of the bill are important in the interpretation of the amendment. . . . From a legal standpoint . . . [t]he Senator's statements bear upon the intent of the Senate to a greater degree than our statements would."); *see also* 111 Cong. Rec. 15,380 (1965) (statement of Sen. Kennedy) (noting that Senator Bayh "is more responsible [for the Amendment] than anyone else").

91. 111 Cong. Rec. 3282 (1965) (statement of Sen. Bayh) ("[T]he word 'inability' and the word 'unable' *as used in* [Section 4] . . . , which refer to an impairment of the President's faculties, mean that he is unable to make or communicate his decisions as to his own competency to execute the powers and duties of his office.") (emphasis added); *see also* 111 Cong. Rec. 7943 (1965) (statement of Rep. Horton) (making "a clear distinction between disability of the President declared by himself and a disability involuntarily established as provided for in section 4").

92. 111 Cong. Rec. 7941 (1965) (statement of Rep. Poff); *see* 111 Cong. Rec. 7938 (1965) (statement of Rep. Celler) ("[S]ection 4, *as distinguished from* section 3. This is a

framers of the Amendment intended "unable to discharge the powers and duties of his office" to apply to a different set of conditions in each section.

The framers of the Twenty-Fifth Amendment opted against a specific constitutional definition of the "unable to discharge" phrase in either section. Understanding that it would be impossible to anticipate all the possible forms of presidential inability, the drafters chose a more flexible inability provision that the relevant constitutional actors could apply in all appropriate cases.[93] Nevertheless, the legislative record of the Twenty-Fifth Amendment reveals important differences in meaning between the twin inability provisions in terms of the severity and duration of the presidential impairments covered in each section.

A. Severity of Inability

As members of Congress debated the Twenty-Fifth Amendment, they described different categories of inability that could implicate Section 3 and Section 4. The Amendment's sponsors emphasized that under Section 3, the President may choose to step down even for relatively minor inabilities. During the House hearings, former Attorney General Brownell, who chaired the American Bar Association (ABA) committee that drafted an early blueprint of the Amendment, gave a representative description of the expected applications of Section 3:

> A typical situation that is covered by *this section* is one in which the President is physically ill and his doctors recommend temporary suspension of his normal governmental activities, to facilitate his recovery. Other situations that have been visualized are those where the President might be going to have an operation, or where he was going abroad and might be out of reliable communication with the White House for a short period.[94]

Congressmen mentioned each of these situations—illness,[95] surgery,[96] and international travel[97]—repeatedly as possible occasions for invoking Section 3. In

situation where the President is unwilling or unable to declare his inability.") (emphasis added).

93. *See* 111 Cong. Rec. 7941 (1965) (statement of Rep. Poff) ("It was decided that it would be unwise to attempt such a definition [of 'inability' in Section 4] within the framework of the Constitution. To do so would give the definition adopted a rigidity which, in application, might sometimes be unrealistic."); *id.* at 7938 (statement of Rep. Celler).

94. *Hearings on H.R. 836*, *supra* note 38, at 240 (statement of Herbert Brownell, Chairman of the American Bar Association's Special Committee on Presidential Inability and Vice-Presidential Vacancy) (emphasis added).

95. *See* 111 Cong. Rec. 3265 (1965)(statement of Sen. Carlson); *id.* at 7956 (statement of Rep. Randall).

96. *See id.* at 7941 (statement of Rep. Poff).

97. *See id.* at 7947 (statement of Rep. McClory).

each case the President would be justified in declaring himself unable, though the Amendment would not require it.

None of these situations, however, would constitute inability under Section 4, because that section was intended to remedy a more extreme set of conditions. Congressman Poff gave examples of the limited circumstances in which application of Section 4 would be appropriate:

> One is the case when the President by reason of some physical ailment or some 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.[98]

The legislative record reveals that only severe disabilities—whether physical,[99] mental,[100] or as a result of capture[101]—that render the President totally unable to communicate a rational decision comprised the expected applications of Section 4.

Members of Congress restricted Section 4 to severe cases of inability, with increasing rigor and specificity leading up to the Amendment's adoption. On the day that S.J. Res. 1 passed the Senate and before it went to conference, Senator Bayh provided the following strict, if somewhat circular, definition of inability: "[T]he word 'inability' and the word 'unable' as used in [Section 4] . . . mean that [the President] is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office."[102] This definition came as a "clarification" of Senator Bayh's earlier, more expansive statement that "the intention of this legislation is to deal with *any type of inability*, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy, or *anything that is imaginable*."[103] The earlier statement is true of Sections 3 and 4 considered together but misleading as applied to Section 4 alone. Senator Bayh's subsequent defini-

98. 111 CONG. REC. 7941 (1965) (statement of Rep. Poff); *see also id.* at 7938 (statement of Rep. Celler) ("This is a situation where the President is unwilling or unable to declare his inability."); *id.* at 3265 (statement of Sen. Carlson); FEERICK, *supra* note 15, at 200.

99. *See* 111 CONG. REC. 7947 (1965)(statement of Rep. McClory); *id.* at 7941 (statement of Rep. Poff); *id.* at 7938 (statement of Rep. Celler).

100. *See id.* at 15,593 (statement of Sen. Bayh); *id.* at 7947 (statement of Rep. McClory); *id.* at 7941 (statement of Rep. Poff); *id.* at 7938 (statement of Rep. Celler).

101. *See Hearings on H.R. 836*, *supra* note 38, at 141.

102. 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh). Representative Poff offered a similar definition in the House debate on April 13, 1965. 111 CONG. REC. 7941 (1965) (statement of Rep. Poff).

103. *Hearing on S.J. Res. 1*, *supra* note 21, at 20 (statement of Sen. Bayh) (emphasis added), *quoted in* 111 CONG. REC. 3282 (1965) (statement of Sen. Pastore).

tion was suggested to him off the record by Senator Robert Kennedy,[104] whose support Senator Bayh saw as critical for the Amendment's success.[105] The definition suggests, as previously argued from constitutional structure,[106] that Section 4 is available only where the application of Section 3 is impossible. Immediately before it passed the Senate, Senator Hruska indicated his support for S.J. Res. 1 but warned that "caution and restraint will be demanded should this inability measure be called into application."[107] The senators recognized that the flexibility of meaning that is an asset in Section 3 would be a terrible liability in Section 4.

One week before Congress passed the recommended Amendment in its final form, Senator Kennedy engaged Senator Bayh in a colloquy in which the latter agreed that the inability phrase in Section 4 means "*total* disability to perform the powers and duties of office."[108] Total inability in the President may take the form of either "physical or mental inability to make or communicate his decision regarding his capacity" or "physical or mental inability to exercise the powers and duties of his office."[109] The purpose of enunciating such a high standard for inability under Section 4 was to prevent a broad reading whereby "when a President makes an unpopular decision, he would immediately be rendered unable to perform the duties of his office."[110] Members of Congress voted for the Twenty-Fifth Amendment with the understanding that Section 4 applied only to states of total inability in which the President would be unable to step down of his own volition.

Although no congressman explicitly stated that Section 3 inability is mutually exclusive of Section 4 inability, that principle is evident from the hypothetical examples of each type offered in debate. Short-term surgery, for example, was the paradigm case of Section 3 inability,[111] but Senator Bayh explicitly rejected it as a basis for invoking Section 4.[112] Conversely, the President would be

104. BAYH, *supra* note 12, at 271.

105. *Id.* at 256. Kennedy was concerned that an expansive definition of inability could give rise to a coup, especially when, as in his brother's administration, the President may not personally know members of his Cabinet. *Id.* at 263.

106. *See supra* Part II.

107. 111 CONG. REC. 3285 (1965) (statement of Sen. Hruska).

108. 111 CONG. REC. 15,381 (1965) (statement of Sen. Kennedy) (emphasis added).

109. *Id.*

110. *Id.*

111. *See supra* notes 94, 96, and accompanying text. Indeed, all three applications of Section 3 to date have been for planned minor medical procedures. *See infra* Section IV.A.

112. 111 CONG. REC. 15,381 (1965) (statement of Sen. Bayh) (insisting that in Section 4 "[w]e are not talking about the kind of inability in which the President went to the dentist and was under anesthesia").

unable to invoke Section 3 were he paralyzed by a sudden accident,[113] but Section 4 was designed to address precisely this sort of impairment.[114] To prevent misuse of Section 4, congressmen described conditions that would not qualify as inability under that section. "[I]t was made clear that unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an 'inability' within the meaning of [Section 4]."[115] It seems equally clear, however, that under Section 3 a President *could* declare his own inability based on loss of public confidence, incompetence, or even mildly impaired judgment, because he need not justify his declaration of inability at all.[116] These hypothetical inabilities suggest that the senators and representatives who voted to adopt the Twenty-Fifth Amendment understood that the "unable to discharge" phrases would apply to entirely different classes of impairment in each section, and that only total disability would qualify under Section 4.

B. Duration of Inability

The question of how long a presidential disability must persist before warranting a vice-presidential seizure of power predated the Twenty-Fifth Amendment, and it remains a matter for constitutional construction.[117] The Twenty-Fifth Amendment imperfectly addresses the problem, and discretion is necessary under both sections. Nevertheless, the legislative history demonstrates that the framers generally expected Section 3 to apply most often to short-term disabilities, especially medical operations, while Section 4, on the other hand, generally contemplates longer periods of presidential inability.

The Amendment's sponsors stopped short of declaring that Section 4 would only apply to prolonged inabilities. When Senator Kennedy asked Sena-

113. *See supra* note 61.

114. *See supra* notes 61, 98-99.

115. FEERICK, *supra* note 15, at 202 (citing 111 CONG. REC. 3282-83 (1965) (statement of Sen. Hart)); *see also Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 139 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 25 (1964) [hereinafter *Hearing on S.J. Res. 139*] (statement of Sen. Keating); 111 CONG. REC. 3282-83 (1965) (statement of Sen. Bayh) ("[W]e are not dealing with . . . [a] decision . . . which might render the President unpopular. We are talking about a President who is unable to perform the powers and duties of his office."); *id.* at 15,386 (statement of Sen. Bayh).

116. *See supra* note 53 and accompanying text.

117. Chester Arthur succeeded to the presidency upon the death of President Garfield, after waiting eighty days while Garfield lay on his deathbed. Vice President Arthur asked Congress about the Article II inability provision on December 6, 1881: "Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import? What must be its extent and duration?" 8 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1902, at 65 (1907).

tor Bayh: "Is it not true that the inability referred to [in Section 4] must be expected to be of long duration or at least one whose duration is uncertain and might persist?",[118] Senator Bayh did not rule out the possibility of invoking Section 4 during a short-term inability in a national crisis, but he acknowledged that short-term application of Section 4 would rarely be appropriate:

> A President who was unconscious for 30 minutes when missiles were flying toward this country might only be disabled temporarily, but it would be of severe consequence when viewed in the light of the problems facing the country.
>
> So at that time, even for that short duration, someone would have to make a decision. *But a disability which has persisted for only a short time would ordinarily be excluded.* If a President were unable to make an Executive decision which might have severe consequences for the country, I think we would be better off under the conditions of the amendment.[119]

Senators frequently raised the scenario of a severe disability afflicting the President during an international emergency as one appropriate for Section 4.[120] The recurring hypothetical suggests that context is critical in the decision to remove the President involuntarily for an impairment that is likely to be brief. Responsible evaluation of presidential inability under Section 4 must weigh the form, severity, and duration of that inability in relation to the exigencies of national and international affairs. The same symptoms that merit invocation of Section 4 in an emergency may not under normal circumstances. By contrast, transitory disabilities in peacetime were the core expected applications of Section 3.[121] While leaving room for exigencies, the legislative history supports the Amendment's structure by encouraging short-term applications of Section 3[122] and generally disapproving short-term applications of Section 4.[123]

C. Vagueness and Textual Preservation

If Sections 3 and 4 require their constitutional actors to construe presidential inability so differently, why did the drafters use the same phrase in both? The phrase "unable to discharge the powers and duties of his office" was not

118. 111 CONG. REC. 15,381 (1965) (statement of Sen. Kennedy).

119. *Id.* (statement of Sen. Bayh) (emphasis added).

120. 111 CONG. REC. 15,593 (1965) (statement of Sen. Bayh); *id.* at 3271 (statement of Sen. Bayh); *id.* at 3265 (statement of Sen. Carlson).

121. *See supra* note 94.

122. *See supra* Section II.B.

123. *See supra* Section II.C.

fashioned ex nihilo.[124] Instead the Amendment's authors looked to the constitutional text they were amending: Article II provided for the Vice President's accession to the office of President in the case of the President's "[i]nability to discharge the Powers and Duties of the said Office."[125] The legislative history reveals a reluctance to put "additional language in the Constitution that has no precedent."[126] The drafters tried to remain as faithful as possible to the preexisting language of the Constitution even while remedying its dangerously incomplete solution to the problem of presidential inability.

This textual conservatism resulted in unnecessary ambiguity in at least one other phrase. To refer to the Cabinet, the Amendment adopted the phrase "the principal officers of the executive departments"[127] with all the attendant ambiguity[128] and capacity for evolution[129] inherent in that language, simply because a similar phrase appears in Article II,[130] and "Cabinet" does not appear in the Constitution.[131] The sponsors retained their "principal officers" phrase over

124. The phrase remained unchanged from the Amendment's first draft. S.J. Res. 139, 88th Cong. (1963). That draft adapted a similar phrase from an earlier proposed amendment: "inability of the President to discharge the powers and duties of the said office." S.J. Res. 35, 88th Cong. (1963); FEERICK, *supra* note 15, at 56 n.†.

125. U.S. CONST. art. II, § 1, cl. 6.

126. *Hearings on H.R. 836*, *supra* note 38, at 60 (statement of Sen. Bayh).

127. U.S. CONST. amend. XXV, § 4.

128. *See Hearings on H.R. 836*, *supra* note 38, at 52 (statement of Rep. Whitener) (suggesting that the Secretary of the Navy is the principal officer of an executive department); *id.* at 61 (statement of Rep. McCulloch) (suggesting that the head of the Atomic Energy Commission is the principal officer of an executive department).

129. Senator Bayh agreed with Representative Rogers that, "[i]f in the future we should create an office of Cabinet of Humanities as an example . . . , [he] would be a member of the Cabinet who would be in a position to act." *Hearings on H.R. 836*, *supra* note 38, at 55 (statement of Rep. Rogers).

130. U.S. CONST. art. II, § 2 ("[The President] may require the Opinion, in writing, of *the principal Officer in each of the executive Departments*, upon any subject relating to the Duties of their respective Offices . . . .") (emphasis added); S. REP. NO. 89-66, *supra* note 20, at 2418 (explaining that "principal officers" refers to the Cabinet, and citing the corresponding language in Article II).

131. *See* 111 CONG. REC. 7938 (1965) (statement of Rep. Celler) ("We name them executive departments rather than Cabinet for safety's sake, because the word 'Cabinet' is never used in the Constitution."); *Hearings on H.R. 836*, *supra* note 38, at 40 (statement of Sen. Bayh); *id.* at 60 (statement of Sen. Bayh) ("The reason [the 'principal officers' language] was put in [the Amendment is that] the word 'Cabinet' was not used in the Constitution. The words 'members of the executive department' are."); *id.* at 53.

numerous objections,[132] to import "the general interpretation put on [the original] language" into the new context of presidential succession,[133] even at the cost of textual clarity.

This desire to retain pre-existing constitutional verbiage and to avoid linguistic innovation may explain why—again adapting language from Article II—the authors of the Twenty-Fifth Amendment used the same phrase in both sections even though each necessarily addresses different types of inability. Rather than reinvent the wheel, the drafters borrowed familiar language from the 1787 Constitution to convey related—though not identical—meanings in Sections 3 and 4 of the Twenty-Fifth Amendment.

IV. Application History

The application history of the Twenty-Fifth Amendment confirms the distinction between inability under Sections 3 and 4 demonstrated by the structure and legislative history of the Amendment. All three invocations of Section 3 to date have been for non-emergency elective surgery, occasions which would not justify a declaration of presidential inability under Section 4.[134] While some scholars have suggested using the Amendment to remove a President temporarily during impeachment or criminal proceedings, no constitutional actor has done so, and invoking Section 4 on such an occasion would violate the Amendment's structure and legislative history.

A. Application of Section 3: Elective Surgery

The White House and the American public have gradually warmed to the idea of the President voluntarily relinquishing power for a brief time. President Reagan's initial, ambivalent invocation of Section 3 has been rectified by two more confident applications that firmly fixed short-term, non-emergency surgeries at the core of an ongoing construction of Section 3 inability.

On July 13, 1985, President Reagan first made use of Section 3[135]—though disclaiming its application—for eight hours during and after surgery to remove a cancerous polyp from his colon.[136] He signed a letter to the leaders of Congress that purported not to make use of the Twenty-Fifth Amendment because of "the uncertainties of its application to such brief and temporary periods of

132. Questions about this phrase recurred throughout the hearing. *See Hearings on H.R. 836*, *supra* note 38, at 52-53, 55-56, 58-61, 68.

133. *Hearings on H.R. 836*, *supra* note 38, at 52 (statement of Sen. Bayh).

134. *See* 111 Cong. Rec. 15,381 (1965) (statement of Sen. Bayh).

135. An unattributed comment notes that when President Carter was undergoing minor surgery, "[t]hey had the Twenty-fifth Amendment ready." Bayh, *History and Meaning*, *supra* note 34, at 41. But no President invoked the Twenty-Fifth Amendment before President Reagan. *Id.*; Feerick, *supra* note 15, at xv.

136. Feerick, *supra* note 15, at xv.

incapacity,"[137] yet he followed its procedures in directing "Vice President George Bush [to] discharge those powers and duties in [his] stead commencing with the administration of anesthesia to [him] in this instance."[138] Five hours after his surgery was completed, President Reagan signed a two-sentence letter declaring himself "able to resume the discharge of [his] powers and duties."[139] Yet even this letter was ambiguous about its own efficacy, implying that the President *already* had resumed power independent of his second declaration.[140] Despite Reagan's claim not to have used Section 3, this event was clearly its first application.[141] President Reagan later acknowledged as much,[142] and Fred Fielding, who drafted the letter, described it as "a piece that would accomplish the activation of the 25th Amendment, but was more consistent with what [he] perceived to be the President's concerns."[143]

President George W. Bush invoked Section 3 on July 29, 2002—the first forthright invocation of the temporary inability provision—for two hours and fifteen minutes during and after a twenty-minute colorectal screening.[144] The President transmitted two separate letters, one initiating the inability period[145] and the other terminating it,[146] by fax to the leaders of Congress.[147] President

137. Letter from President Ronald Reagan to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 2 PUB. PAPERS 919 (July 13, 1985) ("I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.").

138. *Id.*

139. *Id.*

140. *Id.* at 919-20 (stating that he had *already* "informed the Vice President of [his] determination and [his] resumption of those powers and duties."). *Cf.* U.S. CONST. amend XXV, § 3 ("[U]ntil [the President] transmits . . . a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.").

141. *See* FEERICK, *supra* note 15, at xvi; Birch Bayh, *Reflections on the Twenty-Fifth Amendment as We Enter a New Century*, *in* MANAGING CRISIS, *supra* note 21, at 55, 59 ("[F]rom a constitutional perspective, the only basis for the president's action was, in fact, Section 3.").

142. RONALD REAGAN, AN AMERICAN LIFE: THE AUTOBIOGRAPHY 500 (1990) ("Before they wheeled me into the operating room, I signed a letter invoking the Twenty-fifth Amendment, making George Bush acting president . . . .").

143. MILLER CENTER REPORT, *supra* note 18, at 166.

144. Mike Allen, *Bush Resumes Power After Test; President's Routine Colon Exam Showed No Abnormalities*, WASH. POST, June 30, 2002, at A13.

145. Letter from President George W. Bush to the Speaker of the House of Representatives, 1 PUB. PAPERS 1083 (June 29, 2002).

146. Letter from President George W. Bush to the President Pro Tempore of the Senate, 1 PUB. PAPERS 1084 (June 29, 2002).

147. Allen, *supra* note 144.

Bush had announced his decision to invoke Section 3 one day in advance of the operation.[148] During the declared inability, Acting President Cheney took "no recorded actions."[149] As if in response to Reagan's fears about setting dangerous precedent, Bush's staff emphasized that no future President would be bound to invoke Section 3 in a similar situation.[150] His action was completely discretionary and was based on the relevant circumstances—the nature of the procedure, national and international threats, and his trust in the Vice President.[151] Nevertheless, the example of a smooth and temporary transition of power paved the way for future applications of Section 3.

The third and most recent invocation of Section 3 seemed almost routine in comparison to Reagan's faltering first use. On July 21, 2007, President George W. Bush transferred power to Vice President Cheney for two hours and five minutes while having benign polyps removed from his large intestine.[152] The surgery itself lasted just thirty-one minutes.[153] The period of inability was initiated by one letter[154] and terminated by another.[155] During the operation, the President was anesthetized with a sedative that "wears off considerably faster than the standard agents."[156] The President was awake three minutes after doctors stopped administering the drug,[157] and suffered no major post-operative effects on his faculties.[158] Under sedation, the President was in a state similar to natural sleep, and presumably he could have been awakened prematurely in the event of a crisis. During the declared inability, Acting President Cheney re-

148. *Id.*

149. *Id.*

150. *Id.* ("'I don't think that you can glean from this that every time there will be a minor or even a more serious procedure, that the president is going to invoke Section 3,' [White House Counsel Alberto] Gonzales said.").

151. *Id.*

152. Deb Riechmann, *5 Polyps Removed from Bush's Colon*, WASH. POST, July 21, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/21/AR2007072101103.html.

153. *Id.*

154. Letter from President George W. Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 43 WKLY. COMP. PRES. DOC. 1003 (July 21, 2007).

155. Letter from President George W. Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 43 WKLY. COMP. PRES. DOC. 1004 (July 21, 2007) ("With the transmittal of this letter, I am resuming those powers and duties effective immediately.").

156. Riechmann, *supra* note 152.

157. Baker, *supra* note 72.

158. *Id.*

mained at his home,[159] writing a letter to his grandchildren.[160] The two most recent applications received scant attention in the press.

Section 3 has proven well-suited to such short-term inabilities. The type and extent of presidential inability in each of these cases was relatively minor, yet no one questioned the reasonableness of the Presidents' decisions to invoke Section 3. Scholars have criticized President Reagan, not for invoking Section 3, but for disingenuously disclaiming its applicability.[161] President Bush was praised for planning with the Twenty-Fifth Amendment in mind,[162] and for invoking it.[163] His example will encourage future Presidents to consider declaring inability during brief impairments, thereby promoting executive continuity.[164]

While setting an example of liberal invocation of Section 3, President Bush avoided binding himself or his successors to that precedent. The polyps removed from Bush's colon in 2007 had been found earlier during a "routine" screening[165] that had not prompted another invocation of Section 3, but the failure to cede power during that screening received no attention. Apparently the public accepted the White House's admonition after the 2002 screening that one invocation of Section 3 does not require future invocations for similar procedures.[166] Whether that precedent will be misinterpreted as an invitation to apply Section 4 in similar circumstances is a separate question with even higher stakes. Between 1985 and 2007, the attitude of the presidency toward Section 3 shifted from perceiving it as a threat to presidential power to embracing it as a tool for executive continuity. But unless a properly nuanced conception of the two classes of presidential inability replaces the univocal understanding, that progress also increases the risk that Section 4 will be used to remove a President who is not totally unable.

159. Riechmann, *supra* note 152.

160. *What (Acting) President Cheney Did*, WKLY. STANDARD, Aug. 6, 2007, at 4.

161. By failing explicitly to invoke Section 4 when President Reagan was shot in 1981 and Section 3 when he underwent surgery in 1987, the administration missed "opportunities . . . to demonstrate to the world that the United States could function responsibly even though the president was disabled . . . ." Bayh, *supra* note 141, at 59.

162. *See* FEERICK, *supra* note 15, at xxvi ("By adopting specific guidelines, the Bush Administration properly recognized the need to prepare for cases of presidential inability. This is a healthy precedent for future Presidents.").

163. Allen, *supra* note 144 ("'There's so much uncertainty on every level, so why not do the incredibly prudent thing?' a senior official said.").

164. *See* FEERICK, *supra* note 15, at xxvi ("It is to be hoped that in the future the Amendment will not be treated as an unusual solution to unusual circumstances."); MILLER CENTER REPORT, *supra* note 18, at 147, 168-71. *But see* sources cited *supra* note 28 (discouraging routine invocations of Section 3).

165. Riechmann, *supra* note 152.

166. Allen, *supra* note 144.

B. Inability During Impeachment or Criminal Proceedings

As important as the applications of Section 3 are for confirming the broad construction of that provision, some of the occasions on which neither section was applied are equally revealing. During two presidential scandals, scholars suggested Sections 3 and 4 of the Twenty-Fifth Amendment as means by which an embattled President could temporarily step aside during impeachment proceedings. On neither occasion did the chief executive take the suggestion to invoke Section 3, and both situations resolved without even a rumor that the Vice President or Cabinet considered declaring presidential inability under Section 4.[167]

As Watergate evidence piled up against President Nixon and Vice President Agnew, former Secretary of Defense Clark Clifford suggested that public loss of confidence in Nixon rendered the executive branch ineffectual.[168] After Agnew resigned and Vice President Ford had been confirmed, White House insiders prepared for Nixon to invoke Section 3 and temporarily relinquish power to Ford during the investigation.[169] John Feerick, a lawyer instrumental in drafting the Amendment,[170] notes that Section 3 "offered [Nixon] an opportunity to step aside temporarily during an impeachment inquiry. In fact, several members of Congress . . . suggested that he consider standing aside under the Twenty-Fifth Amendment on the ground that he was unable to discharge the duties of his office because of the constitutional controversies attending Watergate."[171] Nixon called this a "fatuous suggestion"[172] and apparently never seriously considered invoking Section 3. During another presidential scandal, Akhil Amar suggested that invoking Section 3 during his impeachment trial would have offered Presi-

167. *But see* Bob Woodward & Carl Bernstein, The Final Days 325 (1976) (reporting that some of Nixon's advisors advocated this possibility).

168. Clark Clifford, *A Government of National Unity*, N.Y. Times, June 4, 1973, at 35. In addition to public loss of confidence, Watergate took a toll on Nixon's mental health. Before Agnew's resignation, Attorney General Elliot Richardson reportedly expressed worry that Nixon was "not in the best psychological condition." James M. Naughton, *How Agnew Bartered His Office To Keep from Going to Prison*, N.Y. Times, Oct. 23, 1973, at 1.

169. "[D]uring Watergate, lawyers for both the White House and the Special Prosecutor planned for the possibility of President Nixon making use of Section 3 if he wished to step aside temporarily while fighting legal battles." Eric M. Freedman, *On Protecting Accountability*, 27 Hofstra L. Rev. 677, 710 (1999) (citing Woodward & Bernstein, *supra* note 167, at 325).

170. *See supra* note 12.

171. Feerick, *supra* note 15, at 155; *see also* John D. Feerick, *The Way of the 25th*, N.Y. Times, Dec. 13, 1973, at 47; C. Dickerman Williams, *An Alternative: Taking the Twenty-Fifth*, Nat'l Rev., Apr. 26, 1974, at 476-77.

172. James J. Kilpatrick, *Private Talk with Nixon*, S.F. Chron., May 17, 1974, at 1.

dent Clinton "recovery of his honor and a shot at redemption."[173] Although neither President accepted the invitation, these events revealed a consensus that Section 3 is broad enough to allow a President to cede power and dedicate himself to his own defense in an impeachment proceeding, or even to concede that the loss of his popular mandate rendered him ineffectual. Such a use would conform to the President's broad, unreviewable discretion under Section 3.[174]

More controversially, some have suggested that Section 4 might "authoriz[e] a Vice President and Cabinet to suspend, so to speak, a President during the period of an impeachment trial" or proceedings before Congress.[175] Others have similarly suggested that Section 4 could be used to remove a President from power during criminal proceedings[176] or imprisonment.[177] However, the structure and legislative history of the Amendment reveal a more limited scope for Section 4 inability.[178] Impeachment does not render a President totally un-

173. Akhil Reed Amar, *Take Five*, NEW REPUBLIC, Feb. 8, 1999, at 15. *But see* Gilbert, *supra* note 28, at 47 (noting that Clinton did well to refrain from stepping down and instead strengthened his position by "retain[ing] and us[ing] the prestige of his office as well as its powers—delivering a State of the Union Address, proposing new laws to Congress, traveling abroad on diplomatic missions, ordering air strikes against Iraq—to successfully mobilize the support of the public and his party behind him").

174. *See supra* Section II.B. Gilbert assumes this is constitutional, but says it "typically should be avoided by a politically astute leader." Gilbert, *supra* note 28, at 47. Feerick considers it a "debatable question" "[w]hether Section 3 is broad enough to cover the case of a President's deciding to step aside temporarily . . . to devote his full time to his defense against impeachment and removal." FEERICK, *supra* note 15, at 198.

175. FEERICK, *supra* note 15, at xxxv; *see also* WOODWARD & BERNSTEIN, *supra* note 167, at 215-16 (recounting that some of Nixon's advisors thought it would be appropriate to invoke Section 4 in the days before his resignation).

176. *See* Freedman, *supra* note 169, at 711-12 ("Section 4 could prove equally valuable if an incumbent President were to be indicted. There could, for example, be a form of plea bargain, under which the President, rather than be impeached, agreed not to contest a Section 4 suspension from office during the pendency of criminal proceedings. But even without the President's consent, the use of Section 4 to accomplish such a suspension would be perfectly appropriate, and might under some circumstances be preferable to impeachment.") (citation omitted). *But see* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 714 (1995). This question of Section 4 removal during criminal proceedings may be academic, because the structure of the constitutional presidency suggests that a sitting President enjoys temporary criminal immunity. *See* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997).

177. *See* Daniel E. Troy, *When To Indict a President*, WASH. TIMES, Mar. 9, 1998, at A15 ("Section 4 . . . could also be used to address the remote possibility that a sitting president, sentenced to prison, would refuse to give up the office.").

178. *See supra* Section II.C; *supra* note 98 and accompanying text.

able to govern, as President Clinton demonstrated after he was impeached,[179] so Section 4 has no application where an impeached President rationally decides to remain in office while defending against conviction. Even if a President were serving a jail sentence or bedridden, he might retain the ability to govern if he could communicate with his staff. Only Section 3 would allow such a broad standard of inability because in Section 3 the President alone judges his own ability.

V. Presidential Inability and the Limits of Intratextualism

The difference in meaning, required by structure and confirmed by history, between the "unable to discharge" phrase in Section 3 and the same phrase in Section 4 rebuts a strong presumption that like phrases in the same legal document should be read alike.[180] Akhil Amar coined the term "intratextualism" to describe the holistic interpretive practice that seeks out similar words and phrases in separate parts of the constitutional text and presumes that a phrase's meaning in one place is consistent with its meaning in another.[181] One can think of intratextualism as the constitutional version of the canon that a word is presumed to have the same meaning throughout a statute. The inability provisions of the Twenty-Fifth Amendment help define some limitations of intratextualism. As with the statutory canon,[182] intratextualism is a rebuttable presumption, not an inflexible rule. Amar himself acknowledges that similar words and phrases in the Constitution sometimes carry dissimilar meanings.[183] The presi-

179. *See supra* note 173.

180. *See generally* Patton v. United States, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions [the right to trial by jury in Article III, Section 2 and the Sixth Amendment] mean substantially the same thing.").

181. Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).

182. In Karl Llewellyn's famous list of dueling canons of statutory construction, the canon that "the same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute," is parried by the counter-canon that "[t]his presumption will be disregarded where it is necessary to assign different meanings to make the statute consistent." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Constructed*, 3 Vand. L. Rev. 395, 404 (1950). As in the statutory context, a "good sense of the situation" is necessary to avoid mechanical application of the intratextualist presumption in the Constitution. *See id.* at 401; *infra* note 183.

183. *See* Amar, *supra* note 181, at 799 ("As is apparent when we consult ordinary dictionaries, the same words sometimes sensibly mean different things in different contexts. . . . [I]ntratextualism can become a mechanical exercise that blunts good judgment and leads to outlandish outcomes. Given that sensible use of intratextu-

dential inability provisions of the Twenty-Fifth Amendment offer a striking example of this phenomenon.

It is surprising that these two instances of the phrase "unable to discharge the powers and duties of his office" would not share a single meaning, because the length, level of detail, proximity,[184] common purpose,[185] and perfect textual overlap of the two phrases,[186] and their shared reflection and modification of the presidential succession provision in Article II[187] are all factors that would ordinarily support the intratextualist presumption. The intratextualist presumes, in what Amar labels "Intratextualism as Principle-Interpolation," that two phrases as closely related as the presidential inability standards in Sections 3 and 4 should be read *in pari materia*. This strong presumption applies where "we are dealing not merely with a recurring word, or even a recurring word-cluster, but with *a complete, carefully elaborated command that appears in identical language* . . . ."[188] If the presumption of "Intratextualism as Principle-

---

alism will require us to consider the limits of the technique, the technique will not so much dictate results as suggest possible readings.").

184. The intratextualist presumption is intuitively stronger within shorter passages where the drafters could not help but be aware of the relationships between neighboring words. *See* United States v. Atl. Research Corp., 127 S. Ct. 2331, 2336 (2007) (noting that two statutory provisions that "are adjacent and have remarkably similar structures" "can be understood only with reference to" each other); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1150 (2003) ("As a matter of conventional English usage, it seems far more likely that a word or phrase has the same meaning throughout a single clause or sentence than that a word or phrase used in two or more different contexts in a document has the same meaning in each context."); *see also* Amar, *supra* note 181, at 796 ("Even if adjoining clauses have no linguistic overlap, they often deal with related subjects, and each is often illuminated by careful comparison with its neighbors.").

185. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1178-79 (1992) ("[N]o one has argued for different interpretative approaches to the same word ['vested'] when it appears in analogous clauses [the Vesting Clauses] of both Article II and Article III, and for good reason—such an argument cannot be sustained.") (footnotes omitted).

186. *See* Amar, *supra* note 180, at 762 ("From [a] difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred.").

187. U.S. Const. art. II, § 1, cl. 6 (emphasis added); *see also supra* Section III.C.

188. Amar, *supra* note 181, at 794-95 (emphasis added). Notably, "Intratextualism as Principle-Interpolation" *does* apply to the three identical inability phrases within Section 4, because there are no "sound constitutional reasons not to treat the individual commands as *in pari materia*." *Id.* at 795. Structure and history support the intratextualist presumption within Section 4: Since Congress is merely affirming a diagnosis already made by the Vice President and Cabinet, both sets of constitutional actors within Section 4 must apply identical standards of presidential inability. *See generally* Part II.

Interpolation" ever holds true, one might think it should apply to the identical instances of the "unable to discharge" phrases in adjoining sentences of the Twenty-Fifth Amendment. Instead, recognition of the intratextual relationship between the twin Presidential Inability Clauses highlights the important structural differences between them. Generally, "intratextual argument works best when it coheres with other types of constitutional argument and is part of a larger constitutional vision,"[189] but in this instance the intratextualist presumption conflicts with a structural vision. Here, large-scale constitutional structure—not only of the Amendment but of the executive branch generally—trumps the phrase-level insights of intratextualism, constraining in different ways the range of viable constructions of each identical inability provision.[190]

While it is prudent to begin with the presumption that identical phrases are subject to the same construction, this presumption can and should be overruled by powerful structural and historical evidence to the contrary.[191] The structure, legislative history, and application history of the Twenty-Fifth Amendment demand a more nuanced approach to presidential inability.

Conclusion

What should be done to protect the office of the President from others' misuse of Section 4 while still encouraging him to invoke Section 3? The most drastic approach would be a new constitutional amendment. A clarifying amendment could replace the inability phrase in Section 3 with something like "unable *or unwilling* to discharge the powers and duties of his office" or "*impeded* in the exercise of the powers and duties of his office."[192] Or, the revision could add "totally" before the inability provision in Section 4. Either change would make textually apparent the distinction that is already required by structure and history. But trying to amend the Constitution is unnecessary and probably counterproductive. Such an amendment would be unlikely to pass,[193]

189. Amar, *supra* note 181, at 776.

190. *See supra* Part II.

191. "Because such a metacommand clause [telling us to construe parallel commands in parallel fashion] does not in fact exist, this form of interpolation must remain open to the possibility that, upon reflection, there are sound constitutional reasons not to treat the individual commands as *in pari materia*." Amar, *supra* note 181, at 795; *see also* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 Harv. L. Rev. 730, 736 (2000) ("While weak intratextualism is usually inoffensive, its use should always be accompanied by a candid assessment of its liabilities.").

192. *See, e.g.*, Ill. Const. art. V, § 6(c) ("Whenever the Governor determines that he may be seriously impeded in the exercise of his powers, he shall so notify the Secretary of State and the officer next in line of succession.").

193. First, an amendment that changes an existing constitutional process in such a small way would be unlikely to garner the broad popular support that Article V demands. Second, the Article V process allows "Congress to obstruct institutional

and its failure might suggest—incorrectly—that the "unable to discharge" phrases are equivalent as they exist now.

Legislation would be a more realistic means of concretizing the Amendment's distinct categories of presidential inability, though like a constitutional amendment, clarifying legislation could be unpopular if Congress perceived it as constraining congressional power under Section 4.[194] If Congress ever decides to nominate some "other body" to replace the Cabinet in evaluating presidential inability,[195] Congress could use that opportunity to clarify that past and future applications of Section 3 have no bearing on the appropriateness of Section 4 determinations. Legislation could reinforce the legislative history of the Amendment and the structure of the executive branch by specifying that the Vice President and the "other body" should consider resorting to Section 4 only when the President is "unable to make or communicate" a rational decision whether to invoke Section 3.[196]

The Office of Legal Counsel (OLC) in the U.S. Department of Justice should take up the matter and issue a public opinion distinguishing presidential inability under Section 3 from its parallel in Section 4. This is superior to the legislative approach because it is more likely to succeed, and the OLC is uniquely positioned to guide executive branch constitutional construction. The opinion should explain that the President enjoys broad discretion in constructing Section 3 inability but that his subordinates may only declare the President "unable" when he is totally unable to make or communicate his own rational decision whether to step down. Issuing the opinion early in a new administration would deflect suspicion about illness or distrust in the White House. Unlike secret agreements between Presidents and Vice Presidents,[197] a public OLC opinion would guard against usurpation by providing a public standard by which voters would scrutinize future Vice Presidents and Cabinet members who declared the President "unable." It would also provide a starting point for congressional evaluation of any invocation of Section 4, should the President appeal it. Perhaps most importantly, an OLC opinion that clearly distinguished between Section 3 inability and Section 4 inability would facilitate smooth and frequent transfers of power under Section 3 without risking an unconstitutional expansion of Section 4 inability.

The prevailing confusion about how to construe the Twenty-Fifth Amendment's Inability Clauses can be remedied if Congress and the executive

---

reforms that threaten the inherent interests of its sitting members." Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1976 (1994). Insofar as Section 4 expanded congressional power by giving Congress an adjudicatory role in executive branch power struggles, a clarifying amendment would necessarily limit that role.

194. *See id.*

195. U.S. CONST. amend. XXV, § 4.

196. *See* 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh).

197. *See supra* note 78 and accompanying text.

branch commit themselves to detaching their construction of Section 4 from the President's more expansive construction of Section 3. Coming to grips with this unusual contravention of the intratextualist presumption will advance both purposes of the Twenty-Fifth Amendment: The President will be encouraged to transfer power to the Vice President any time his ability to govern may be diminished, and the President will act without fear that his voluntary invocation of the Amendment will be used against him or his successors. Continued equivocation endangers the Oval Office. "Let us stop playing Presidential inability roulette."[198]

198. 111 CONG. REC. 7936 (1965) (statement of Rep. Celler).