

A CONSTITUTION FOR THE AGE OF DEMAGOGUES: USING THE TWENTY-FIFTH AMENDMENT TO REMOVE AN UNFIT PRESIDENT

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“[O]f those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”

Federalist No. 1¹

ABSTRACT

This Article argues that, properly understood, the Twenty-Fifth Amendment is designed to allow the Executive and Legislative Branches, working together, to remove a president from office when it becomes evident that the person elevated to that office by the electoral process is manifestly unsuited for what can, without exaggeration, be described as the most important job in the world.

It argues further that the first two years of Donald Trump’s presidency have provided a great deal of evidence for the proposition that President Trump has, in fact, demonstrated the requisite level of fundamental unfitness for the office that would justify using the Twenty-Fifth Amendment to remove him. This Article also argues that the cultural conditions that brought President Trump to office make it far from unlikely that other occasions to use the Twenty-Fifth Amendment in this way will arise in the foreseeable future.

Our contemporary legal and political culture should embrace the Twenty-Fifth Amendment, suitably modified by congressional legislation, as an appropriately powerful tool to deal with the present and future forms of radical legal and political dysfunction. In short, the presidency of the United States is too important of a job not to allow for a process—beyond quadrennial elections and quasi-criminal impeachment trials—by which the American people can say to a president, through its elected representatives: You’re fired.

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INTRODUCTION

On February 27, 2019, the American public was transfixed by a fascinating and disturbing spectacle. In nationally televised testimony, Michael Cohen, the former personal attorney to the President of the United States, outlined how, in effect, the President operated much like the boss of a mafia family, with Cohen playing the role of consigliere. “I am ashamed because I know what Mr. Trump is. He is a racist. He is a conman. He is a cheat,” Cohen told the House Oversight Committee.²

Cohen testified that Donald Trump ordered him to threaten hundreds of people, reported that working for Trump meant lying became as natural as breathing, and that Cohen received instructions in a kind of mob-style code. For instance, he testified that, during the 2016 presidential campaign, Trump knew that his organization was pursuing a projected Moscow real-estate project and asked Cohen about the deal repeatedly—a deal from which Trump stood to gain, according to Cohen, “hundreds of millions of dollars”³ Cohen revealed that Trump had directed him to lie to Congress about the transaction:

In conversations we had during the campaign, at the same time I was actively negotiating in Russia for him, he would look me in the eye and tell [sic] me there’s no business in Russia and then go out and lie to the American people by saying the same thing.⁴

According to Cohen’s sworn testimony, the soon-to-be President of the United States suborned perjury before Congress to hide from the public that he was financially entangled with a nation that, according to the unanimous conclusion of the American intelligence community, meddled in the

2. Sabrina Siddiqui et al., *Michael Cohen Accuses ‘Racist, Conman’ Trump of Criminal Conspiracy*, *GUARDIAN* (Feb. 27, 2019), <https://www.theguardian.com/us-news/2019/feb/27/michael-cohen-donald-trump-testimony-latest-news>.

3. Matt Zapposky et al., *Michael Cohen Concludes His Testimony: ‘I Will Not Sit Back’*, *WASH. POST* (Feb. 27, 2019, 3:59 PM), https://www.washingtonpost.com/world/national-security/michael-cohen-testimony/2019/02/27/089664f0-39fb-11e9-a2ed-307b06d0257b_story.html?noredirect=on.

4. Erin Schaff, *Full Transcript: Michael Cohen’s Opening Statement to Congress*, *N.Y. TIMES* (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/politics/cohen-documents-testimony.html>.

2016 election on Donald Trump’s behalf.⁵ In the words of a declassified version of a highly classified document that was provided to the President in January of 2017 by the Central Intelligence Agency (CIA), the Federal Bureau of Investigations (FBI), and the National Security Administration (NSA):

We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia’s goals were to undermine public faith in the U.S. democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgments.⁶

Cohen also produced signed checks from President Trump, reimbursing Cohen in 2017 for payments he made to Stormy Daniels—a pornographic film actress. Daniels claims she was paid off by President Trump in the final weeks of the 2016 campaign to remain silent about a sexual encounter she had with the President a few months after the birth of his youngest child.⁷ Such undisclosed payments would constitute a violation of campaign finance laws.⁸

Testimony went on for many hours, and Cohen ended it with a chilling statement. President Trump’s personal “fixer”—the man who had been as close to Trump as anyone for more than a decade—had this to say about the possible consequences of next year’s presidential election: “Given my experience working for Mr. Trump, I fear that if he loses the election in 2020, that there will never be a peaceful transition of power.”⁹

Cohen’s prediction threw new light on a statement made less than two weeks earlier by Harvard Law Professor Emeritus Alan Dershowitz. Professor Dershowitz appeared on Fox News, and excoriated various federal Executive Branch officials who, according to several sources, had discussed the possibility of using the Twenty-Fifth Amendment of the U.S. Constitution to remove President Trump from office. Dershowitz remarked:

You know, these guys are watching ‘House of Cards’ instead of reading the Constitution The Constitution is clear as can be. The 25th

5. *Id.*; OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITY AND INTENTIONS IN RECENT U.S. ELECTIONS, at i–iii (2017).

6. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *supra* note 5, at ii.

7. Chris Mergerian et al., *Michael Cohen Showcases Check He Says Trump Wrote for Stormy Daniels Hush Money*, L.A. TIMES (Feb. 27, 2019, 8:20 AM), <https://www.latimes.com/nation/la-na-pol-cohen-testifies-implicates-trump-check-stormy-20190227-story.html>.

8. Peter Overby, *Trump and Campaign Finance Law: The Fundamentals Still Apply*, NPR (May 3, 2018, 1:29 PM), <https://www.npr.org/2018/05/03/608110757/trump-and-campaign-finance-law-the-fundamentals-still-apply>.

9. Sanjana Karanth, *Michael Cohen Worries There Won’t Be ‘Peaceful Transition of Power’ If Trump Loses in 2020*, HUFFPOST (Feb. 27, 2019, 5:56 PM), https://www.huffpost.com/entry/michael-cohen-testimony-2020-trump_n_5c7710b2e4b0d3a48b564439.

that brought President Trump to office make it far from unlikely that other occasions to use the Twenty-Fifth Amendment in this way will arise in the foreseeable future.

Our contemporary legal and political culture should embrace the Twenty-Fifth Amendment, suitably modified by congressional legislation, as an appropriately powerful tool to deal with present and future forms of radical legal and political dysfunction. In short, the Presidency of the United States is too important of a job not to allow for a process—beyond quadrennial elections and quasi-criminal impeachment trials—by which the American people can say to a president, through its elected representatives: “You’re fired.”

This Article has four parts. Part I outlines the history of the adoption of the Twenty-Fifth Amendment and explains why the Amendment’s plain text and legislative history make it clear that Section Four of the Amendment allows it to be used to remove an unfit office holder from the Presidency. Part II discusses several objections to reading the Twenty-Fifth Amendment in a way that allows a president to be removed for anything other than a narrowly defined concept of physical or mental incapacity. Part III discusses how Donald Trump’s election, and his subsequent Presidency, illustrate how imperative it is to interpret the Twenty-Fifth Amendment flexibly as the Amendment’s framers intended it to be interpreted. Part IV argues that the Trump Presidency should not be dismissed as a freakish incident in American presidential history and puts forth a proposal for using the constitutional mechanisms created by the Amendment itself to reform the process for employing it in the future.

I. LEGISLATIVE HISTORY

The Twenty-Fifth Amendment both clarifies and modifies Article II, Section One, Clause Six of the U.S. Constitution. That clause states that the powers and duties of the Presidency devolve to the Vice President in the case of the removal, death, resignation, or inability of the President, and that “Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President.”¹²

For 175 years, the American presidential system functioned with no legal provision for either replacing the Vice President when that office became vacant or for replacing a president who was unable, either temporarily or permanently, to exercise the powers and perform the duties of the office at a minimal level of competence.¹³

Indeed, when William Henry Harrison died just a month after his inauguration in 1841, it was not clear if Vice President John Tyler had simply become the new President or was merely the acting-President for

12. U.S. CONST. art. II, § 1, cl. 6.

13. Lawrence J. Trautman, *The Twenty-Fifth Amendment: Incapacity and Ability to Discharge the Powers and Duties of Office?*, 67 CLEV. ST. L. REV. 373, 384–86 (2019).

the remainder of what would have been Harrison's term of office.¹⁴ Tyler acted forcefully to claim the title of President of the United States by, among other things, refusing to sign documents which referred to him as the acting-President.¹⁵ Both houses of Congress subsequently passed resolutions declaring that Tyler was simply President of the United States.¹⁶

By the time of the adoption of the Twenty-Fifth Amendment, the Vice Presidency had been vacant sixteen times, either because the Vice President had succeeded to the Presidency or had died or resigned prior to the next presidential election.¹⁷ The Amendment's first Section formalizes the constitutional status of a vice president who succeeds to the Presidency.¹⁸ The second Section creates a mechanism for naming a new vice president when that office becomes vacant.¹⁹

The Amendment's third Section creates a procedure that allows a president to transfer the powers of the office temporarily to the Vice President, who becomes the acting-President, until the President is ready again to resume those powers.²⁰

Section Four of the Twenty-Fifth Amendment is the focus of this Article. It reads as follows:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President. Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department[s], or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds

14. *Id.* at 386.

15. Callie Hopkins, *John Tyler and Presidential Succession*, WHITE HOUSE HIST. ASS'N (Mar. 22, 2019), <https://www.whitehousehistory.org/john-tyler-and-presidential-succession>.

16. *Id.*

17. Trautman, *supra* note 13, at 385; *Succession: Presidential and Vice Presidential Fast Facts*, CNN (Sept. 19, 2018), <https://www.cnn.com/2013/08/27/us/succession-presidential-and-vice-presidential-fast-facts/>.

18. U.S. CONST. amend. XXV, § 1.

19. *Id.* § 2.

20. *Id.* § 3.

vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.²¹

Despite claims by some prominent legal commenters that certain procedural aspects of Section Four are ambiguous, a close examination of the legislative record at the time of the Amendment's adoption reveals that the procedure it lays out is straightforward.²²

First, “the majority of the principal officers of the executive departments” means the heads of the fifteen departments specified in 5 U.S.C. Section 101.²³ This, in turn, specifies that if eight of these officers agree with the Vice President that the President is “unable to discharge the powers and duties of his office,” the Vice President becomes the acting-President upon transmission to the relevant congressional officers of a declaration to that effect.

Second, the Vice President remains the acting-President unless and until the President transmits a message declaring that no inability exists.²⁴ If the President does so, then the Vice President and the principal officers have four days to transmit a second message to Congress contesting the President's assessment.²⁵ The Vice President remains the acting-President during this four-day period.²⁶ If the Vice President and the principal officers transmit this second message, then Congress must decide the matter within twenty-one days.²⁷ Congress has forty-eight hours to go into session if it is not in session when the second transmission is made.²⁸ The twenty-one day period then begins once Congress goes into session.²⁹

Third, the legislative history reveals the reason behind including the option for Congress to replace Executive Department principal officers with another body that would, by majority vote, authorize the Vice President to transmit a notice of inability to Congress. The framers were concerned with whether the principal officers would constitute an appropriate

21. *Id.* § 4. The text of the amendment contains a scrivener's error, as the second use of “executive departments” inadvertently omitted the “s” at the end of “departments.”

22. See, e.g., Laurence Tribe, *The Chaotic Aftermath of Invoking the 25th Amendment*, BOS. GLOBE (Sept. 11, 2018, 2:25 PM), <https://www.bostonglobe.com/opinion/2018/09/11/the-chaotic-aftermath-invoking-amendment/IW1Ym7ZgIYANML2BR05ipl/story.html> (arguing that the Amendment is ambiguous in regard to such questions as whether the Vice President retains the powers of an acting-President during the four-day period during which the President may contest the Vice President's and the principal officers' finding of inability).

23. H.R. REP. NO. 89-203, at 3 (1965).

24. Trautman, *supra* note 13, at 378.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

body for the purposes of employing the Amendment.³⁰ Those concerns were, as this Article argues below, well-warranted. Subsequent history has demonstrated the pressing need to create such a body.

The central interpretive issue regarding Section Four is not procedural; it is the substantive question of what meaning should be attributed to the phrase: “[U]nable to discharge the powers and duties of [the President’s] office.” Here, the legislative history reveals that the authors of the Twenty-Fifth Amendment chose that phrase to give great discretion to both the officers of the Executive Branch and Congress—who made the initial and final determination of presidential inability, respectively—to define that term in whatever way they believed specific circumstances warranted.³¹

This decision is reflected in the language of Section Four itself, which does not limit what can be considered presidential inability.³² That open-ended language is no accident; it reflects a conscious decision on the part of the Amendment’s framers to leave the determination of what should constitute grounds for invoking Section Four in the hands of future political actors.³³

Indeed, the level of discretion at the time was noted by legislators concerned that Section Four gave those permitted to employ the process near-complete authorization to remove a president. For example, Edward Hutchinson, the Republican representative who, a few years later, would be his party’s ranking member on the House Judiciary Committee that submitted articles of impeachment against President Nixon, objected to the language. Hutchinson objected on the grounds that Section Four’s failure to define inability could leave the Vice President and the principal officers with “complete power to treat any condition or circumstance they choose as a disability.”³⁴

Yet the Amendment’s principal drafter, John Feerick, argues the contrary. He points to the same semantic open-endedness to emphasize that the framers elected not to define what might constitute presidential inability that would warrant the Amendment’s use. Feerick has emphasized that “[n]o set of definitions could possibly deal with every contingency.”³⁵ Attempting to define inability in the Amendment itself would, he has argued, make it more difficult to actually use the Amendment as it was intended to be used. Such an attempt would lead inevitably to debates about whether a particular use of the Amendment was authorized by its terms. By leaving

30. 111 CONG. REC. 3283 (1965); *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 88th Cong. 136–37 (1964); see also *id.* at 92. (statement of Lewis J. Powell).

31. See John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 493–98 (1995).

32. *Id.* at 502.

33. *Id.*

34. H.R. REP. NO. 89–203, at 20 (1965).

35. Feerick, *supra* note 31, at 502.

the concept undefined, the framers intended to “allow[] for flexibility and discretion.”³⁶

In short, the meaning of “unable to discharge the powers and duties of [the President’s] office” is supposed to be determined, according to the Amendment’s own terms, by those who have occasion to use it, and not by the Amendment itself. Instead, it creates a process for giving that phrase a more concrete meaning within the context in which the political actors who are considering invoking it find themselves. The plain language of the Twenty-Fifth Amendment, the legislative history surrounding its enactment, and subsequent scholarly analysis lead to the conclusion that the Amendment covers “any imaginable circumstance[]” where the President “is unable to perform the powers and duties of that office.”³⁷

A recent, comprehensive scholarly examination of the history of the Twenty-Fifth Amendment’s creation and adoption comments on the interpretation of presidential ability:

[T]hose deciding whether a President is “unable to discharge the powers and duties of his office” should focus on the overall effects of the inability—whether the totality of the circumstances suggests that inability prevents him from discharging the powers and duties of the Presidency—rather than the specific characteristics of the inability itself.³⁸

Both the plain language of the Twenty-Fifth Amendment and the intention of those who drafted that language reveal that the Amendment’s purpose is to create a mechanism to deal with presidential inability in any form, rather than to define what specifically forms presidential inability might take.³⁹

A president who is unable to discharge the powers and duties of the office is, by definition, unfit to hold the office. By its terms, the Twenty-Fifth Amendment creates a process for removing a president whose unfitness for office is sufficiently severe enough that it renders the President, as a practical matter, unable to discharge the powers and duties of the office at a minimally acceptable level of competence.⁴⁰ And, there is nothing

36. *Id.*

37. Second Fordham University School of Law Clinic on Presidential Succession, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 *FORDHAM L. REV.* 917, 928 (2017) (quoting KENNETH R. CRISPELL & CARLOS F. GOMEZ, *HIDDEN ILLNESS IN THE WHITE HOUSE* 209–10 (1988)).

38. *YALE LAW SCHOOL RULE OF LAW CLINIC, THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER’S GUIDE* 20 (2018).

39. A discussion of the various modalities of constitutional interpretation in American law is far beyond the scope of this Article. Suffice it to say that the most widely recognized sources of constitutional meaning—text, structure, original public understanding, and the best understanding of the evolving meaning of the document—all point to the same conclusion: that the interpretation of the applicability of the Twenty-Fifth Amendment to future presidential crises of inability has been left intentionally to those political actors who will face those crises at the times they arise.

40. While it is true that all presidents who are unable to discharge the powers and duties of the office are, while the inability persists, unfit for office, it does not follow that all presidents who are

in either the text or the legislative history of the Amendment that limits such unfitness to that which has been caused by some acute physical or mental crisis or illness that strikes the President after taking office. Indeed, it is perfectly possible that the electoral process may elevate a radically unfit candidate—someone who is unable to discharge the powers and the duties of the office at a minimally acceptable level—to the Presidency itself. In such a circumstance, there is no legal barrier to using the Twenty-Fifth Amendment to remove such a radically unfit president from office, nor should there be:

[T]here is no support for the idea that the framers designed the Amendment only “to protect the government from random occurrences like sudden illness or a failed assassination attempt” or that a [p]resident “who already demonstrated [disabling] traits when the people . . . elected him to office” would somehow be immunized from the Amendment’s operation.⁴¹

Furthermore, while Section Four has yet to be employed, and there are, therefore, no judicial precedents regarding its interpretation. The U.S. Supreme Court’s precedent regarding the impeachment process make it abundantly clear that the substantive question of what should constitute a presidential inability that warrants employing the Twenty-Fifth Amendment is a textbook example of where the Court would likely invoke the Political Question Doctrine.⁴²

Because Section Four unquestionably represents a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” the Court would almost certainly treat any attempt to challenge either the Vice President’s and the principal officers’ or Congress’s interpretation of the meaning of “unable” under Section Four as raising a non-justiciable political question.⁴³

In sum, both the plain language of Section Four of the Twenty-Fifth Amendment and the intentions of the Amendment’s framers give wide discretion to the relevant political actors to determine what ought to constitute

unfit for the office are unable to discharge those powers and duties within the meaning of Section Four. This Article takes the position that the authors of Section Four intended the question of what level of presidential unfitness should be sufficient to trigger its provisions to be a matter of political judgment. The text of the Amendment empowers political actors to make those judgments in the future.

41. YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 38, at 22 n.67.

42. The leading case regarding the political question doctrine is *Baker v. Carr*, 369 U.S. 186, 217–18 (1962), in which the Court stated that it will not intervene in matters that involve a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”

43. *Id.*; see also *Nixon v. United States*, 506 U.S. 224, 226–28 (1993). On the other hand, Professor Laurence Tribe points out that “just because a constitutional line is non-justiciable doesn’t mean it’s non-existent.” Professor Tribe asserts that “there is a wide gap (with blurry boundaries) between an unacceptably narrow definition of unfitness, e.g., a definition regarding a sudden or random crisis like kidnapping or a stroke, and a definition as completely unbounded and open-ended as one based on notion of minimal presidential competence. Private correspondence with Professor Laurence Tribe (on file with the author).”

presidential inability and unfitness in any particular social context. Consequently, it is almost certain that the federal courts will not review the substantive decisions that those actors make as to that question.

While it is true that the Amendment's framers were particularly concerned with situations in which the need to use Section Four would be so obvious that the Amendment's use would be uncontroversial—such as, for example, if the President fell into a coma or were kidnapped⁴⁴—it is also true that they envisioned a wide range of controversial uses of Section Four.⁴⁵ This is reflected most obviously in the fact that they set up an elaborate process for resolving disputes within the government. The framers were farsighted enough to recognize that they could not envision all the possible scenarios of presidential incapacity or unfitness for which the Twenty-Fifth Amendment would be required.⁴⁶

It does not follow that all of the Amendment's framers, and the legislators who ratified it, would have approved of using the Amendment to transfer the powers of the Office of the President to the Vice President because of a judgment that the President had demonstrated a radical unfitness for the office by consistently failing to maintain a minimum level of competence. That is, by its nature, a politically controversial act, and some of them would no doubt have opposed, at least in the abstract, using the Amendment in this way.⁴⁷ But the key point is that they intentionally chose to draft the Twenty-Fifth Amendment in such a way that the Amendment's text leaves it for future political actors to decide for themselves if the Amendment should be used in this fashion.

None of which is to deny the possibility that Section Four could be interpreted in ways that everyone would agree violated the Amendment's plain text. It is universally acknowledged that it would be a misinterpretation of Section Four to use it to remove a president simply because of a policy dispute or because of a vice president's self-interested desire to replace his bureaucratic superior. Still, it is worth noting that such extremely improbable abuses of the Amendment would still be treated by the federal courts as raising nonjusticiable questions. Thus, the remedy for any such abuse would have to come at the ballot box.⁴⁸

But, the mere fact that a power can be abused does not mean the power does not exist. The Twenty-Fifth Amendment gives other political actors an essentially unreviewable legal power to remove the President of the United States from office should they conclude that the President is

44. YALE LAW SCHOOL RULE OF LAW CLINIC, *supra* note 38, at 21–24.

45. *Id.*

46. *Id.*; Feerick, *supra* note 31, at 502.

47. Whether these authors of the text would have continued to hold this position if they had been confronted with a sufficiently unfit president is a different question, and a counterfactual that goes to the heart of arguments about how to use original textual meaning in legal interpretation.

48. *See generally* Private Correspondence with Professor Laurence Tribe, *supra* note 43. To repeat Professor Tribe's point, the fact that an abuse of the Constitution does not produce a justiciable issue does not transform that abuse into a valid use of the powers granted by the document.

either temporarily or permanently unable to discharge the powers and duties of the office at a minimally acceptable level of competence.

Of course, the fact that the Twenty-Fifth Amendment, according to both its plain language and the intentions of its framers, creates a broad constitutional power to declare a sitting president unfit for the office does not tell us whether this power should be employed in any particular circumstance. As its framers recognized, whether or not Section Four's powers should be used is always going to be a highly contextual and prudential decision. The next Part of this Article begins to explore when it would be appropriate to use the Twenty-Fifth Amendment to remove an unfit president, by considering various objections to reading Section Four in anything but the narrowest sense.

II. OBJECTIONS TO USING THE TWENTY-FIFTH AMENDMENT

Objections to using the Twenty-Fifth Amendment to remove an unfit president include:

- (A) That interpreting “unable to discharge the powers and duties of [the President’s] office” more broadly than in the phrase’s most literal sense creates the possibility that a president will be removed for partisan rather than principled reasons.
- (B) That removing a president via Section Four would represent an undemocratic reversal of the electoral process.
- (C) That the Impeachment Clause is the sole, appropriate mechanism for removing an unfit president.

Let us consider these objections in turn.

A. *The Twenty-Fifth Amendment and Political Partisanship*

Some commenters argue that if the concept of presidential inability is interpreted in any way but a narrow, essentially literal sense (such as if the President is in a coma) it could be abused for partisan reasons. For example, George Washington University law professor, Jonathan Turley, stated recently that, while he agrees that the Amendment’s provisions for establishing a transfer of power represented a desirable reform, he sees the language of Section Four as containing “a dangerous ambiguity.”⁴⁹ In Turley’s view, “the framers [of the original Constitution] would have been leery of that type of language because it is so ambiguous. It lays the Presidency open to partisan attempts at removal.” Turley added that he believed talk of using Section Four to remove President Trump was “an example of exactly the danger created by the 25th Amendment.”⁵⁰

49. Deena Zaru, *Constitutional Scholars: 25th Amendment Talk ‘Premature,’ Unrealistic*, CNN (July 4, 2017, 12:34 AM) <https://www.cnn.com/2017/07/03/politics/what-is-the-25th-amendment-donald-trump/index.html>.

50. *Id.*

The problem with this argument is that—like all slippery-slope arguments—it can be applied to any legal rule whose application is in any sense indeterminate. For instance, it is equally applicable to the Impeachment Clause, which authorizes Congress to remove a president for committing “high crimes and misdemeanors.”⁵¹ This phrase is also ambiguous and could certainly be abused for partisan reasons. Yet, citing that interpretive fact does not, by itself, constitute an argument for reading the Impeachment Clause in an especially narrow way.⁵²

Furthermore, all slippery-slope arguments suffer from the pragmatic weakness that they can almost always be reversed. For example, reading Section Four in a narrow way makes it more likely that a radically unfit person will continue to hold the Presidency for years—while doing immense damage to the nation. In other words, when considering whether to read Section Four narrowly or broadly, the slippery slope runs in both directions.⁵³

Setting aside the pragmatic indeterminacy of slippery-slope arguments, the structure of Section Four makes no sense if we were to treat broad interpretations of presidential inability as per se illegitimate. The very fact that Section Four includes a procedure for resolving arguments about what degree of presidential inability is sufficient to justify transferring the President’s powers to the Vice President demonstrates that the Amendment was never intended to be limited to uncontroversial applications of the concept of inability.⁵⁴

In other words, a judgment of inability under Section Four can legitimately include a broader qualitative—and, therefore, potentially controversial—assessment of presidential ability, as opposed to being limited to relatively literal, uncontroversial applications. For example, consider the question of whether the Author of this Article has the ability to play Major League Baseball. If taken literally, the answer to this question is certainly “yes,” in that the Author has played baseball on many occasions and could, no doubt, participate in Major League Baseball games. Yet, the Author is completely incapable of playing Major League Baseball, if the judgment of his ability to do so includes any sort of qualitative judgment regarding his ability to do so at a minimally acceptable level. For the purposes of interpreting Section Four of the Twenty-Fifth Amendment, “ability” must mean “ability to discharge the powers and duties of the office at a minimally acceptable level of competence.” A more literal reading of Section Four makes no sense, given both the Amendment’s overall structure, and its practical purpose.

51. U.S. CONST. art II, § 4.

52. On slippery slope arguments in law generally, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1065–66 (2003).

53. Alan Hajek, *Philosophical Heuristics and Philosophical Methodology*, in THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY 358, 360 (Herman Cappelen et al. eds., 2016).

54. See Private Correspondence with Professor Laurence Tribe, *supra* note 43.

In addition, the Amendment's structure makes partisan abuse highly unlikely to be realized. In its current form, Section Four can only be put into effect if the Vice President and a majority of the principal officers agree to do so. All, or almost all, of these persons will be members of the same political party as the President, and are, therefore, almost certain to be at least broadly sympathetic to the President's overall political orientation.⁵⁵ And, even if Congress were to create an alternative body to aid the Vice President in performing this function, as Section Four authorizes it to do, the composition of such an alternative body would surely take into account concerns about potential partisan abuse of the Section Four process.

Beyond all this, replacing the President for a level of inability that makes the President unfit for office is something that might draw more support from within the President's own party, or even from inside his own administration, rather than from political opponents.⁵⁶ For example, many progressives have commented that the only good thing they have to say about President Trump is that his general unfitness for the Office of the Presidency makes him far less effective at advancing his party's agenda.⁵⁷ In such instances, partisan opposition to the President may well, as a practical matter, cut against invoking the Twenty-Fifth Amendment.

B. The Twenty-Fifth Amendment and Democratic Values

Another objection to potentially using Section Four to remove a president from office is that doing so would obviate the results of the democratic process by canceling the outcome of a presidential election. This objection warrants several responses.

First, the American system of constitutional governance was intentionally designed to be full of undemocratic features. These include, among other things, the makeup of the Senate; selection of federal judges and their employment of life tenure; the numerous procedural barriers to passing even quite popular legislations; and, most notably in this context, the role of the electoral college in the election of presidents.⁵⁸

President Trump, after all, fell nearly three million votes short of receiving a plurality—let alone a majority of votes—cast in the election that

55. As of September 4, 2019, no member of President Trump's current cabinet was member of the Democratic party. See *The Cabinet*, WHITE HOUSE, <https://www.whitehouse.gov/the-trump-administration/the-cabinet/> (last visited Oct. 7, 2019).

56. See, e.g., *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018, 5:58 PM), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> (an essay published by an anonymous senior official in the Trump Administration).

57. For example, Harvard political science professor, Steven Levitsky, co-author of *HOW DEMOCRACIES DIE*, commented recently that "Trump's incompetence is a good thing for democracy. He has authoritarian inclinations, but he hasn't been able to put them into practice." Doyle McManus, *The Good News: Trump's Ineptitude*, L.A. TIMES (Jan. 13, 2019, 5:00 AM), <https://www.latimes.com/nation/la-na-pol-mcmanus-column-20190111-story.html>.

58. Jeffrey Rosen, *America is Living James Madison's Nightmare*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/>.

elevated him to the Presidency. Indeed, this was the second time in the last five presidential elections that the winning candidate received less votes than the candidate from the other major party.⁵⁹

In short, the existing system for electing presidents in the United States is hardly an advertisement for anything resembling pure democracy, even without taking into account the potential use of Section Four of the Twenty-Fifth Amendment.

Furthermore, using Section Four to elevate the Vice President to the role of acting-President does not come close to reversing the results of an election. Rather, it modifies those results in a way that still leaves the party that won the presidential election in control of the office. Voters choose the President with the knowledge that they are also voting for the President's selection of a running mate, who may become President under various circumstances.⁶⁰ In this way, replacing a president via Section Four is considerably less undemocratic than the Electoral College (the institution that was originally intended as a bulwark against demagoguery and incompetence), which makes it possible for a candidate to lose the national popular vote, yet still become President. In addition, removing a president via Section Four is itself an exercise in representative democracy, as doing so requires super majorities in both houses of Congress.

Ultimately, Section Four reflects a judgment found throughout the American constitutional system that, while direct democracy is a core value of that system, it should sometimes give way to other important values.⁶¹ The elevation of someone who the system decides subsequently is unfit for the office is one of those occasions, and the Twenty-Fifth Amendment was created for precisely that reason.

Besides its purely practical function, the Twenty-Fifth Amendment plays an important role in recalibrating the delicate balance of power in the American system of government. As the political scientist, Juan Linz, noted in his highly influential work on what he called "the perils of presidentialism," presidential systems based on the model created by the U.S. Constitution suffer from a potentially debilitating weakness: the problem of dual-democratic legitimacy, whereby both the Legislative and the Executive Branches can claim to plausibly represent the "will of the people."⁶²

Properly understood, the Twenty-Fifth Amendment should work as an important ameliorative force against the threat of an imperial Presidency, because it gives the Legislative Branch the right to remove the chief executive for reasons that go well beyond the relatively narrow grounds

59. George W. Bush received less votes than Al Gore in the 2000 presidential election.

60. Mark Hiller & Douglas Kriner, *Institutional Change and the Dynamics of Vice Presidential Selection*, 38 PRESIDENTIAL STUD. Q. 401, 407–08 (2008).

61. Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294–96 (2007).

62. Juan Linz, *The Perils of Presidentialism*, 1 J. OF DEMOCRACY 51, 63 (1990).

that constitute what are currently considered legitimate reasons to remove a president under the Impeachment Clause.⁶³

In this sense, Section Four is not so much antidemocratic, as it is a rebalancing of democratic legitimacy between the Legislature and the President; a balancing act that, as Linz emphasizes, must always be performed in presidential systems based on the American model.⁶⁴

C. The Twenty-Fifth Amendment as a Substitute for Impeachment

The argument is sometimes made that Section Four of the Twenty-Fifth Amendment should not be a substitute for the process of impeaching and removing a president. In this light, Section Four should be read narrowly to encompass only noncontroversial instances of disability, while more controversial forms of presidential unfitness should be dealt with via the impeachment process.⁶⁵

This argument fails to acknowledge that the Twenty-Fifth Amendment, both by its plain language and the intention of its framers, is clearly supposed to cover instances of presidential unfitness that do not fit into the broad definition of “treason, bribery, and other high crimes and misdemeanors.”⁶⁶

While it is true that as a matter of eighteenth-century English practice, the phrase “high crimes and misdemeanors,” could include various non-criminal forms of official negligence and dereliction of duty. By the time the Twenty-Fifth Amendment was enacted it was clear that the historical practice in America was to limit the use of the impeachment process to at least quasi-criminal matters that fell under the rubric of serious official corruption.⁶⁷

Impeachment, in practice, has become something intended solely to remove a corrupt president, rather than a president fundamentally unfit to hold office or for other reasons. An impeachment proceeding in the House, and especially a subsequent trial in the Senate, are parts of what the public understandably considers something akin to a criminal proceeding.⁶⁸ The idea of using impeachment to remove a president who is merely grossly unfit for office seems as counterintuitive as convicting someone of a crime for merely being terrible at their job.

63. *Id.* at 52–53.

64. *Id.*

65. *See, e.g., supra* text accompanying notes 10–11.

66. *See supra* Part I.

67. *See generally* LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY* (2018).

68. *See* T.J. HALSTEAD, *CONG. RESEARCH SERV.*, 98–806, *AN OVERVIEW OF THE IMPEACHMENT PROCESS*, at 5 (2005).

Given the historical context of the American presidential system, impeachment is also a process that is considered the epitome of partisan political conflict.⁶⁹ By sharp contrast, while Section Four has yet to be formally put to use, the occasions on which the possibility of using it has been raised informally have been marked by a fundamentally different political dynamic. In these instances, powerful members of a President Reagan's own Administration have considered invoking Section Four to deal with the President's perceived inability to do a minimally adequate job, while still holding the most important office in the government.⁷⁰

This is exactly what the framers of the Twenty-Fifth Amendment intended.⁷¹ It is almost impossible to imagine members of a president's own administration working to impeach them, given what is, in the context of American political history, the fundamentally partisan nature of the impeachment process. But, it is not only possible to imagine key members of a presidential administration considering whether to try to use the Constitution to remove an arguably unfit president via Section Four; we already have several examples of this happening. And, for reasons that will be discussed below, we are likely to see more such incidents in the future.

Furthermore, Section Four of the Twenty-Fifth Amendment has a feature which makes it, under certain circumstances, vastly superior to impeachment as a method for removing an unfit president from office. Section Four, when invoked, immediately transfers all the powers of the presidential office to the Vice President at the moment the message of transfer is transmitted to the relevant congressional officers.⁷² The impeachment process, by contrast, leaves the President in full command of all of the powers of the office during the time—which could easily stretch out for months—when an impeachment action is working its way through the

69. The three substantial impeachment proceedings in American presidential history, against Andrew Johnson, Richard Nixon, and Bill Clinton, were all bitterly partisan affairs. See Carlos Lozada, *What it Would Take: Can Impeachment Appear Legitimate in a Hyper-Partisan Universe?*, WASH. POST (Jan. 25, 2019), <https://www.washingtonpost.com/news/book-party/wp/2019/01/25/feature/can-impeachment-appear-legitimate-in-a-hyper-partisan-universe/>.

70. The first time in American history that the use of Section Four was considered seriously was in the latter days of President Reagan's second term. Some of Reagan's closest aides were concerned by, what seemed to them, significant cognitive deterioration. When Howard Baker took over as White House Chief of Staff in 1987, he was told by several aides that President Reagan was "lazy; he wasn't interested in the job. They said he wouldn't read the papers they gave him—even short position papers and documents. They said he wouldn't come over to work—all he wanted to do was watch movies and television at the residence." Aides were routinely initialing documents in Reagan's name, apparently without his knowledge. The situation was so dire that several aides discussed among themselves the possibility of invoking Section Four of the Twenty-Fifth Amendment. The recent discussions among Executive Branch officials regarding the possibility of invoking Section Four to remove presidential power from President Trump are discussed below in Part III of this Article. Jane Meyer, *Worrying About Reagan*, NEW YORKER (Feb. 24, 2011), <https://www.newyorker.com/news/news-desk/worrying-about-reagan>.

71. Feerick, *supra* note 31, at 502.

72. Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 69 (1985).

House and Senate.⁷³ If a president is engaging in ongoing, flagrant abuse of the office—by, for example, refusing to step down after losing an election—the Twenty-Fifth Amendment provides a far more practical remedy to such a (currently, all too easy to envision)⁷⁴ constitutional crisis.

In sum, the Twenty-Fifth Amendment provides a crucial alternative to the impeachment process. A process that allows the American political system to remove a fundamentally unfit person from the Oval Office through a mechanism other than a quadrennial election on the one hand or a quasi-criminal trial on the other. Given that, as is now becoming increasingly evident, the electoral process can lead to the elevation of someone to the Presidency who should be removed for compelling reasons that have nothing to do with—or more precisely, should be considered independently of—criminality and corruption per se, the foresight of the framers of Section Four is something that should be recognized and embraced; rather than cabined in by unhistorical interpretations of their work.

The next Part of this Article explores how using Section Four of the Twenty-Fifth Amendment to remove an unfit president has, in the last two years, been transformed from an esoteric question of constitutional law theory into a pressing, practical concern for the American political system.

III. MODERN, PRACTICAL APPLICATIONS OF THE TWENTY-FIFTH AMENDMENT

When Donald Trump announced in June of 2015 that he was running for the Republican nomination for President, many people dismissed the event as nothing more than a publicity stunt.⁷⁵ For several months afterward, much political commentary continued to treat Trump's campaign as a kind of joke.⁷⁶ Trump, after all, was by all traditional criteria grotesquely unqualified to become President of the United States.⁷⁷ Nearly seventy years old, he had never run for public office, let alone held an elected position.⁷⁸ Beyond this, he had never engaged in public service of any kind—something that could not be said of any previous president in the nation's

73. See David A. Fahrethold, *Five Things to Know About Impeachment*, WASH. POST (April 20, 2019, 4:08 PM), https://www.washingtonpost.com/politics/five-things-to-know-about-impeachment/2019/04/20/627674d4-6394-11e9-bfad-36a7eb36cb60_story.html?noredirect=on.

74. See *supra* note 9 and accompanying text.

75. Christian Datoc, *WATCH: Three Years Ago, Trump Stepped Off His Golden Escalator and Made His Announcement. The Rest is History*, WASH. EXAMINER (June 16, 2018, 11:51 AM), <https://www.washingtonexaminer.com/news/watch-3-years-ago-trump-stepped-off-a-golden-escalator-and-made-his-announcement-the-rest-is-history> (“Trump had flirted with running for political office in the past, and almost everyone watching . . . considered this to be some type of publicity stunt.”).

76. Will Kenton, *President Donald Trump: The Road to Victory*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/111615/current-probabilities-donald-trump-president.asp> (last updated June 25, 2019).

77. Benjamin Bathke, *Donald Trump is manifestly unqualified to be president*, *Biographer Says*, DW (Nov. 18, 2016), <https://www.dw.com/en/donald-trump-is-manifestly-unqualified-to-be-president-biographer-says/a-36433941>.

78. Zachary Crockett, *Donald Trump is the Only US President Ever with No Political or Military Experience*, VOX (Jan. 23, 2017, 10:07 AM), <https://www.vox.com/policy-and-politics/2016/11/11/13587532/donald-trump-no-experience>.

history.⁷⁹ Even the claim that Trump was qualified for the office because he was a successful businessman—leaving aside that this standing alone is a remarkably weak justification for making someone President of the United States—was, at best, highly questionable.⁸⁰

In the summer of 2015, Donald Trump was merely a reality-television star whose checkered business career included a long string of bankruptcies, as well as various dubious ventures, which bore strong resemblances to outright scams.⁸¹ He had evinced no interest in, let alone deep knowledge of, almost any public policy matter.⁸² In fact, Trump's contribution to national political debate has been limited to becoming the most famous proponent of a preposterous and self-evidently racist conspiracy theory: that Barack Obama was not born in the United States and was, therefore, constitutionally ineligible to serve as President.⁸³

The idea that this unfit figure—a 1980s celebrity, who revived his flagging career by starring in a reality television show—could become President thanks to his status as a minor-television star. Trump used his status to publicize his demagogic appeals to the Republican Party's increasingly ethnonationalist base—something most political commentators refused to take seriously.⁸⁴

The Author of this Article was not among them. The following was written in the weeks immediately after Trump's announcement:

Ronald Reagan was consistently and radically underestimated as a potential political force by the national media, public intellectuals, DC insiders, etc., until practically up to the moment he was on the edge of winning the GOP nomination in 1976. [A poll showing Trump leading in the race for the nomination] makes me at least begin to wonder if something similar might not be happening with Donald Trump. Now obviously there are enormous differences between the backgrounds, the careers, and the personalities of the two men, but there are also some striking similarities:

- (1) Both mastered the art of manipulating their contemporary media environments.

79. The four Presidents before Trump who had never previously held elective office included three famous generals—Zachary Taylor, Ulysses Grant, and Dwight Eisenhower—as well as Herbert Hoover, who had a very extensive record of government service by the time he was elected to the office. *Id.*

80. Russ Buettner, Susanne Craig & David Barstow, *11 Takeaways From the Times's Investigation into Trump's Wealth*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/donald-trump-wealth-fred-trump.html>.

81. See John Cassidy, *Trump University: It's Worse Than You Think*, NEW YORKER (June 2, 2016), <https://www.newyorker.com/news/john-cassidy/trump-university-its-worse-than-you-think>.

82. See David A. Graham, *The Education of Donald J. Trump*, ATLANTIC (Apr. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/04/the-education-of-donald-j-trump/522900/>.

83. Ashley Parker & Steve Eder, *Inside the Six Weeks Donald Trump Was a Non-Stop 'Birther'*, N.Y. TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html>.

84. See Kenton, *supra* note 76.

(2) Both manifested a fine understanding of how to make outrageous statements in a way that ingratiated them with their political bases, precisely because the national media reaction to those statements allowed them to pose as victims of supposed media and/or elite bias.

(3) Both spent a good part of their lives as at least putatively wishy-washy Democrats, before discovering that selling racial demagoguery to the contemporary Republican party base was about as hard as selling beer at a baseball game on a 90-degree day.

(4) Both spent most of their careers being dismissed as clownish lightweights.

In a GOP presidential field that isn't exactly stacked with political talent, the notion that Trump can't win the nomination is at least premature. As is the idea that he can't be elected [P]resident.⁸⁵

A few weeks later, the same Author observed:

Trump's campaign started as a publicity stunt, but has since spun out of control. It's the plot of *The Producers*, but increasingly, the joke's on the GOP. And, now that Trump's bottomless narcissism is being fed by the spectacle of his transformation into a "serious" candidate, it's hard to predict where all this will ultimately end up.⁸⁶

While Ronald Reagan was in some ways an important precursor to Donald Trump, it is also important to emphasize that, in terms of actual qualifications for the office, the two men were in no way comparable. Reagan was the two-term governor of the nation's largest state, and he had been deeply involved in every aspect of national Republican Party politics for more than two decades by the time he won the party's nomination.⁸⁷

Reagan, in other words, was a professional politician who more or less subtly employed racially coded messages to pander to an increasingly ethnonationalist Republican Party base. By contrast, Donald Trump is a classic demagogue, who was completely unconnected from formal American political life in any way prior to his sudden takeover of the Republican Party. He employs openly racist messages to gain the favor of the white ethnonationalists and their fellow travelers at the core of the contemporary American conservative movement.⁸⁸

Coincidentally, Reagan is the only President prior to Donald Trump whose behavior led members of his own Administration to contemplate

85. Paul Campos, *It Can't Happen Here, Until It Does*, LAWYERS, GUNS & MONEY (July 9, 2015, 4:09 PM), www.lawyersgunsmoneyblog.com/2015/07/it-cant-happen-here-until-it-does.

86. Paul Campos, *Springtime For Donald*, LAWYERS, GUNS & MONEY (Aug. 30, 2015, 7:08 PM), www.lawyersgunsmoneyblog.com/2015/08/springtime-for-donald.

87. RICK PERLSTEIN, THE INVISIBLE BRIDGE 408–19 (2015).

88. See David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html>.

whether invoking Section Four of the Twenty-Fifth Amendment might be warranted. However, in his case, the elderly President was showing signs of mental deterioration toward the end of his second term and would be diagnosed with Alzheimer's disease not long afterwards. Another fundamental distinction is that, at the time he was elected few, if any, prominent commentators ever suggested that Reagan was fundamentally unfit for office—no matter how bitterly various critics may have opposed his political agenda.⁸⁹

The same cannot be said of Donald Trump. In the weeks after President Trump's inauguration, the nation was treated to the mordant spectacle of various elite political and media figures seeking frantically for signs that somehow the Office of the Presidency would, by some essentially magical political alchemy, transform the President into a fundamentally different person—one who possessed the minimum fitness to hold the most important political office in the world.

For example, in March of 2017, Trump honored the widow of a Navy SEAL during an address to a joint session of Congress.⁹⁰ Commenting on what was, in fact, a completely routine piece of political theater, CNN's Van Jones stated that Trump "became President of the United States in that moment, period. That was one of the most extraordinary moments you have ever seen in American politics," Jones said that same evening.⁹¹

A month later, after Trump ordered a missile strike on targets in Syria, Jones's colleague, Fareed Zakaria, opined:

I think Donald Trump became [P]resident of the United States last night. I think this was actually a big moment. For the first time really as [P]resident, he talked about international norms, international rules, about America's role in enforcing justice in the world.⁹²

In fact, the desperate search for "the moment when Donald Trump became [P]resident," soon became so absurdly futile that the phrase was quickly transformed into a sarcastic punchline among critics of the Administration.⁹³

Indeed, Donald Trump's evident unfitness to hold the office was so flagrant that, just four months into his Presidency, a prominent conserva-

89. See *supra* note 70 and accompanying text.

90. Nicholas Fandos, *With Nation Watching, Widow of Fallen SEAL Becomes a Face of Bravery*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/us/politics/william-ryan-carryn-owens-navy-seal-yemen.html>.

91. Jason Kurtz, *Van Jones on Trump: 'He became President of the United States in That Moment, Period'*, CNN, <https://www.cnn.com/2017/03/01/politics/van-jones-trump-congress-speech-became-the-president-in-that-moment-cnnv/index.html> (last updated Mar. 1, 2017, 7:13 AM).

92. Mark Hensch, *CNN Host: 'Donald Trump Became President' Last Night*, HILL (Apr. 7, 2017, 10:38 AM), <https://thehill.com/homenews/administration/327779-cnn-host-donald-trump-became-president-last-night>.

93. See JOHN BELLAMY FOSTER, *TRUMP IN THE WHITE HOUSE: TRAGEDY & FARCE* 75 (2017).

tive political commentators used the nation's highest-profile opinion editorial newspaper page to advocate for removing President Trump from office via Section Four of the Twenty-Fifth Amendment:

[A child] cannot have the nuclear codes.

But a child also cannot really commit "high crimes and misdemeanors" in any usual meaning of the term. There will be more talk of impeachment now, more talk of a special prosecutor for the Russia business; well and good. But ultimately I do not believe that our [P]resident sufficiently understands the nature of the office that he holds, the nature of the legal constraints that are supposed to bind him, perhaps even the nature of normal human interactions, to be guilty of obstruction of justice in the Nixonian or even Clintonian sense of the phrase. I do not believe he is really capable of the behind-the-scenes conspiring that the darker Russia theories envision. And it is hard to betray an oath of office whose obligations you evince no sign of really understanding or respecting.

Which is not an argument for allowing him to occupy that office. It is an argument, instead, for using a constitutional mechanism more appropriate to this strange situation than impeachment: the 25th Amendment to the Constitution, which allows for the removal of the president if a majority of the cabinet informs the Congress that he is "unable to discharge the powers and duties of his office" and (should the president contest his own removal) a two-thirds vote by Congress confirms the cabinet's judgment.

The Trump situation is not exactly the sort that the [A]mendment's Cold War-era designers were envisioning. He has not endured an assassination attempt or suffered a stroke or fallen prey to Alzheimer's. But his incapacity to really govern, to truly execute the serious duties that fall to him to carry out, is nevertheless testified to daily—not by his enemies or external critics, but by precisely the men and women whom the Constitution asks to stand in judgment on him, the men and women who serve around him in the White House and the cabinet.

Read the things that these people, members of his inner circle, his personally selected appointees, say daily through anonymous quotations to the press. (And I assure you they say worse off the record.) They have no respect for him, indeed they seem to palpate with contempt for him, and to regard their mission as equivalent to being stewards for a syphilitic emperor.

It is not squishy *New York Times* conservatives who regard the [P]resident as a child, an intellectual void, a hopeless case, a threat to national security; it is people who are self-selected loyalists, who supported him in the campaign, who daily go to work for him. And all this, in the fourth month of his administration.

This will not get better. It could easily get worse. And as hard and controversial as a 25th Amendment remedy would be, there are ways

in which Trump's removal today should be less painful for conservatives than abandoning him in the campaign would have been -- since Hillary Clinton will not be retroactively elected if Trump is removed, nor will Neil Gorsuch be unseated. Any cost to Republicans will be counted in internal divisions and future primary challenges, not in immediate policy defeats.

Meanwhile, from the perspective of the Republican leadership's duty to their country, and indeed to the world that our imperium bestrides, leaving a man this witless and unmastered in an office with these powers and responsibilities is an act of gross negligence, which no objective on the near-term political horizon seems remotely significant enough to justify.⁹⁴

What is most striking about the views Ross Douthat expressed in May of 2017 is the copious evidence that continues to be shared so widely—and not merely among President Trump's ideological opponents. But this view is also shared among the conservative intelligentsia, in general, and Republican party elites, in particular.⁹⁵ Most remarkably, as Douthat suggested, these same views are apparently still commonplace among various high-ranking officials within the Trump Administration itself.⁹⁶

For example, in September of 2018, the *New York Times* took the extraordinary step of publishing an anonymous article from a senior official in the Trump Administration that, among other things, discussed both the President's erratic behavior, and cabinet-level conversations about potentially employing the Twenty-Fifth Amendment:

From the White House to executive branch departments and agencies, senior officials will privately admit their daily disbelief at the commander in chief's comments and actions. Most are working to insulate their operations from his whims.

Meetings with him veer off topic and off the rails, he engages in repetitive rants, and his impulsiveness results in half-baked, ill-informed and occasionally reckless decisions that have to be walked back.

"There is literally no telling whether he might change his mind from one minute to the next," a top official complained to me recently, exasperated by an Oval Office meeting at which the [P]resident flip-flopped on a major policy decision he'd made only a week earlier . . .

94. Ross Douthat, *The 25th Amendment Solution For Removing Trump*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/opinion/25th-amendment-trump.html>.

95. Kenneth P. Vogel, *Concerned By Trump, Some Republicans Quietly Align With Democrats*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/us/politics/republicans-democrats-coalition-trump.html>.

96. Jessica Kwong, *More Republicans Now Think Donald Trump is 'Unfit to be President of the United States,' Watergate Reporter Claims*, NEWSWEEK (Dec. 24, 2018, 3:57 PM), <https://www.newsweek.com/republicans-donald-trump-unfit-president-watergate-1270913>.

Given the instability many witnessed, there were early whispers within the cabinet of invoking the 25th Amendment, which would start a complex process for removing the [P]resident. But no one wanted to precipitate a constitutional crisis. So we will do what we can to steer the administration in the right direction until—one way or another—it's over.⁹⁷

The most startling evidence of willingness of high officials in the Trump Administration to consider invoking the Twenty-Fifth Amendment has been provided by former-Deputy Director of the FBI, Andrew McCabe. According to McCabe, in the tumultuous days immediately after President Trump fired FBI Director James Comey, top officials at both the FBI and the Department of Justice (DOJ) considered how to move forward.⁹⁸ The President had fired Comey after asking him to drop an investigation into National Security Advisor Michael Flynn's statements to investigators about Russia.⁹⁹ Amazingly, President Trump stated in an interview with *NBC News* that his concerns about the Russia probe were part of the reason he had fired Comey.¹⁰⁰ This admission would seem to be a textbook example of an admission on the President's own part that he obstructed justice.

At this point, McCabe had every reason to fear that President Trump was engaging in a coverup of his Administration's dealings with Russia. McCabe, therefore, started two investigations into obstruction of justice, and whether Trump himself was personally compromised by Russia.¹⁰¹ To this point, the FBI's investigation of the Administration's Russia connection had been focused on various advisors to the Trump campaign, rather than on the President himself.¹⁰²

At about the same time, McCabe met with Deputy Attorney General, Rod Rosenstein, who was overseeing the DOJ's Russia investigation, because Attorney General Jeff Sessions had recused himself from doing so. According to McCabe, Rosenstein suggested that he could surreptitiously wear a recording device (a wire) when meeting with the President, because he was not searched when he went to the White House. The point of this, apparently, would be to gather evidence for the probes into President

97. See *I Am Part of the Resistance Inside the Trump Administration*, *supra* note 56.

98. Byron Tau, Sadie Gurman & Aruna Viswanatha, *Ex-FBI Official McCabe Says He Approved Trump Probe After James Comey Firing*, WALL ST. J., <https://www.wsj.com/articles/ex-fbi-deputy-mccabe-says-he-approved-trump-probe-after-james-comey-was-fired-11550162396?ns=prod/accounts-wsj> (last updated Feb. 14, 2019, 7:55 PM).

99. McCabe tells his version of this story in ANDREW MCCABE, *THE THREAT: HOW THE FBI PROTECTS AMERICA IN THE AGE OF TERROR AND TRUMP* 7–11 (2019).

100. Ali Vitali & Corky Siemaszko, *Trump Interview with Lester Holt: President Asked Comey If He Was Under Investigation*, NBC NEWS (May 11, 2017, 10:59 AM), <https://www.nbcnews.com/news/us-news/trump-reveals-he-asked-comey-whether-he-was-under-investigation-n757821>.

101. Tau, Gurman & Viswanatha, *supra* note 98.

102. MCCABE, *supra* note 99, at 20–22.

Trump's Russia connections, and the potential obstruction of justice when he fired James Comey.¹⁰³

According to McCabe—who memorialized these conversations at the time—Rosenstein also brought up the possibility of using Section Four of the Twenty-Fifth Amendment to transfer Trump's presidential powers to Vice President Mike Pence. As McCabe told the news program *60 Minutes* in February of 2019:

Discussion of the 25th Amendment was simply, Rod raised the issue and discussed it with me in the context of thinking about how many other cabinet officials might support such an effort. I didn't have much to contribute, to be perfectly honest, in that – conversation. So I listened to what he had to say. But, to be fair, it was an unbelievably stressful time. I can't even describe for you how many things must have been coursing through the deputy attorney general's mind at that point. So it was really something he kinda threw out in a very frenzied chaotic conversation about where we were and what we needed to do next.¹⁰⁴

When questioned about the matter, Rosenstein did not deny that this conversation took place.¹⁰⁵

It would be comforting to assume that the election of someone as manifestly unfit to hold the office as President Trump is nothing but a freakish historical accident, and that discussions of employing the Twenty-Fifth Amendment to remove an unfit president can soon return to the realm of esoteric constitutional theory. Such an assumption is dangerously optimistic. The Trump Presidency is revealing both the tremendous potential value of Section Four to the American political system and the weakness of the Twenty-Fifth Amendment to deal with an unfit president—as long as it remains in its present form.

Fortunately, the framers of the Amendment had enough foresight to include a mechanism within the Amendment to aid in dealing with future issues of presidential inability and unfitness—including those that the framers could not foresee. The final Part of this Article argues for such a

103. See Adam Goldman & Michael S. Schmidt, *Rod Rosenstein Suggested Secretly Recording Trump and Discussed 25th Amendment*, N.Y. TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/us/politics/rod-rosenstein-wear-wire-25th-amendment.html>.

104. *Andrew McCabe: The Full Sixty Minutes Interview*, CBS NEWS (Feb. 17, 2019), <https://www.cbsnews.com/video/andrew-mccabe-60-minutes-interview-full-video-watch-acting-fbi-director-trump-investigation-james-comey-russia-investigation-2019-02-17/>.

105. McCabe's *60 Minutes* interview is what elicited President Trump's furious Twitter message on February 14, 2019, quoted at the beginning of this Article. When asked about reports that he discussed invoking the Twenty-Fifth Amendment, Rosenstein responded, "Based on my personal dealings with the president, there is no basis for invoking the 25th Amendment." This is what is known in legal circles as a "non-denial denial." See Jack Goldsmith, *Quick Notes on the Rosenstein Revelations*, LAWFARE (Sept. 21, 2018, 4:46 PM), <https://www.lawfareblog.com/quick-notes-rosenstein-revelations>.

reform that could make the Twenty-Fifth Amendment a potentially powerful tool for ameliorating the damage done to the American political system by the election of an unfit demagogue to the Presidency.

IV. THE TWENTY-FIFTH AMENDMENT AS A TOOL FOR DEFEATING DEMAGOGUES

From their beginnings in ancient Athens, democratic political systems have always been vulnerable to exploitation by demagogues. A demagogue is a political leader who uses rhetoric to inflame the passions and prejudices of the public, thereby making reasoned debate on political issues difficult or impossible. According to James Fenimore Cooper's definition, "a demagogue, in the strict signification of the word, is a 'leader of the rabble'"¹⁰⁶ The peculiar office of a demagogue is to advance his own interests, by affecting a deep devotion to the interests of the people."¹⁰⁷ Building on Cooper's description, the political theorist, Michael Singer, in his recent study of demagogues, identifies four key features of the political type they represent.

First, demagogues present themselves as representatives of the common people and opponents of corrupt elites.¹⁰⁸ Second, they cultivate a visceral, even cult-like connection with their followers that allows them to develop particularly intense devotion among their supporters.¹⁰⁹ Third, they exploit this connection to advance and enrich their own careers.¹¹⁰ Fourth, they display contempt for ordinary rules of social conduct, and ultimately for the law itself.¹¹¹

The perpetual possibility that democracies will come to be dominated by demagogues is one reason why, historically speaking, democratic systems have been at serious risk of devolving into tyrannies. Indeed, more than two thousand years ago Aristotle noted in his treatise, *The Politics*, that "revolutions in democracies are generally caused by the intemperance of demagogues."¹¹²

It is fair to say that the founders of the American constitutional system were obsessed with the possibility that the legal order they were attempting to create would be undermined by demagogues.¹¹³ *The Federalist Papers* begin and end with warnings from Alexander Hamilton about

106. J. FENIMORE COOPER, *THE AMERICAN DEMOCRAT* 91 (1838).

107. *Id.* at 92.

108. MICHAEL SINGER, *DEMAGOGUE THE FIGHT TO SAVE DEMOCRACY FROM ITS WORST ENEMIES* 35 (2009).

109. *Id.* at 109.

110. *Id.*

111. *Id.*

112. 5 ARISTOTLE, *POLITICS* (Benjamin Jowett trans., 350 B.C.E.).

113. See generally GREG WEINER, *MADISON'S METRONOME: THE CONSTITUTION, MAJORITY RULE, AND THE TEMPO OF AMERICAN POLITICS* (2012).

the threat they pose.¹¹⁴ Many of the founders, and in particular Hamilton and James Madison, were familiar with classical political theorists such as Plato, Aristotle, and Cicero, whose works are filled with dark warnings about how democracy is so easily corrupted by self-interested wielders of powerful demagogic rhetoric. For example, Madison wrote: “Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”¹¹⁵

Fears of democracy being corrupted by demagoguery led the founders to construct a system full of features designed to combat the exploitation of majoritarian passions by insidious rhetoricians.¹¹⁶ For example, the separation of powers would help guard against the leader of any one branch of the government claiming that it, and he or she, alone, represented the will of the people.¹¹⁷ While the House would be a democratic body—in the very limited sense of the term current at the time—the Senate would be an elite institution, full of natural aristocrats chosen by state legislators, rather than elected directly by the people. More crucial still was the role the founders envisioned for the Electoral College, which would help ensure that the unruly passions of the people did not result in the elevation of an unfit demagogue to the head of the Executive Branch.¹¹⁸

Federalism, too, would limit the threat of demagogic capture of the government, by distributing political power across federal, state, and local governments, rather than concentrating it in the hands of a potentially imperious president.¹¹⁹

These features were designed in an attempt to deal with the paradox at the heart of democratic governance: that, if they were manipulated by a sufficiently talented demagogue, the people could choose to abjure self-rule, by handing political power over to an aspiring tyrant.¹²⁰

Perhaps not surprisingly, after more than two centuries of American constitutional history, very little of the founders’ original vision remains in place. The deliberative function of the Electoral College soon became a legal fiction. Senators came to be chosen by direct election. Federalism was swamped by the imperatives of the national administrative state, and as a result, presidents arrogated more and more power to themselves.¹²¹

114. THE FEDERALIST NO. 1 (Alexander Hamilton) (“Of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”). THE FEDERALIST NO. 85 (Alexander Hamilton) (“These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them on their guard against hazarding anarchy, civil war, a perpetual alienation of states from each other, and perhaps the military despotism of a victorious demagoguery . . .”).

115. THE FEDERALIST NO. 55 (Alexander Hamilton or James Madison).

116. Rosen, *supra* note 58.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Most crucially, the rise of political parties, with their slow but inevitable transformation into ideologically coherent institutions, and the accompanying pressure for the parties themselves to function according to democratic norms—by, for example, choosing their presidential candidates via primaries—was a development the founders failed to foresee. Nor could they have foreseen the rise of modern information technology, which makes it possible for an aspiring or successful demagogue to reach tens-of-millions of voters instantaneously, at any time he chooses, with his latest rhetorical blandishments. In turn, this causes those voters to remain increasingly within their self-chosen epistemic bubbles, inside of which passion and prejudice flourish, and reasoned discourse is difficult to find.¹²²

Indeed, given the deterioration of America's institutional defenses against demagogues, the rise of someone like Donald Trump to the Presidency was almost surely inevitable. And, if anything, has come surprisingly late in our political system's history. During the 2016 presidential campaign, the conservative political theorist Matthew Franck put it this way:

Two centuries after the founders attempted to tame executive power, bridle ambition, and open up a distance between presidents and the public, the present system has closed that gap, rewarded raw ambition, and unleashed executive power . . . [T]he only surprise about Donald Trump's so-far-successful campaign is that it has taken four decades for something like it to emerge. The institutional conditions have long been in place, and could have been exploited by, say, Ross Perot if a timely opportunity to make his run inside one of the parties rather than outside them had presented itself. For the parties have thrust away control of their own fates with both hands, as vigorously as possible, by the empowerment of primary voters.

The question is not "Why Trump now?" but rather "Why not a Trump before now?"¹²³

This, in turn, raises another question: how long will we have to wait before another Trump, of whatever ideological persuasion, seizes control of one of our major parties? Given the cultural forces and institutional failures that brought Donald Trump to power, the answer may well be: not long.

Of course, there is no guarantee that future presidential demagogues will be as obviously unfit to hold the Presidency as Donald Trump. The question of what mixture of defective character and demagogic ambition—to the extent the two factors can ever be wholly separated—should

122. *Id.*

123. Matthew J. Franck, *Presidential Elections, Party Establishments, and Demagogues*, PUBLIC DISCOURSE (Feb. 22, 2016), <https://www.thepublicdiscourse.com/2016/02/16498/>.

be sufficient to justify removing a president is one for future political leaders to decide.

To make those decisions, the Twenty-Fifth Amendment, in its present form, is a less than ideal instrument. The most obvious defect in the current structure of Section Four is that all the individuals who are charged with making the initial determination of presidential inability serve, with the exception of the Vice President, at the pleasure of the President and can be dismissed from office by him at any time.¹²⁴ This, unfortunately, makes any attempt to remove an unfit president something that would need to be organized covertly. And this would give all such attempts, no matter how justified, the uncomfortable appearance of a kind of coup, carried out from within the Executive Branch.¹²⁵

Fortunately, Section Four of the Twenty-Fifth Amendment itself provides the solution to this dilemma. The framers of the Amendment wisely foresaw that it might be necessary to create an alternative mechanism to trigger a transfer of power from the President to the Vice President. Hence, Section Four provides that this decision can be made by “such other body as Congress may by law provide.”¹²⁶ Congress can, via the normal legislative process, replace the principal officers of the Executive Departments with another set of decision makers, who, with the Vice President, can by majority vote transfer presidential power to the Vice President, subject to eventual congressional confirmation or reversal.¹²⁷

In an age of presidential demagoguery, both present and potential, the need for such an alternative decision-making body to consider the use of Section Four’s initial finding of presidential inability is becoming increasingly evident. What follows is a suggestion for how such a body might be constituted.

First, the most crucial characteristic for such a body is that the large majority of its membership could not be fired by the President. Second, the membership should reflect a high level of both democratic and bipartisan legitimacy. Third, its membership should include some direct input from the Executive Branch from someone other than the Vice President, because those within that branch will be in the best position to witness first-hand evidence of presidential inability and unfitness. Fourth, the membership should not be too large, so as to minimize problems of bureaucratic coordination.

124. Mathew Kahn, *The Hurdles to Removing a President Under the 25th Amendment*, LAWFARE (Sept. 22, 2018, 3:23 PM), <https://www.lawfareblog.com/hurdles-removing-president-under-25th-amendment>.

125. Julia Azari, *What Does Invoking The 25th Amendment Actually Look Like?*, FIVETHIRTYEIGHT (Apr. 19, 2018, 6:00 AM), <https://fivethirtyeight.com/features/what-does-invoking-the-25th-amendment-actually-look-like/>; Tribe, *supra* note 22.

126. U.S. CONST. amend. XXV, § 4.

127. *Id.*

With these criteria in mind, Congress could create a Standing Commission on Presidential Inability and Unfitness, whose membership would stand ready to assemble, either physically or electronically, at the request of the Vice President. The membership could include:

The Vice President

The Secretary of Defense

The Secretary of State

The Majority and Minority Leaders of the Senate

The Speaker of the House, and the House Minority Leader

The Chairs of the Senate and House Judiciary Committees

Note that this structure would guarantee majority representation on the Committee for the party in control of the Presidency. This would be a critical feature in any system that seeks to avoid the appearance that the party that lost the previous presidential election is unilaterally reversing the results of that process. Even though the structure of Section Four ensures that the acting-President will be from the President's own party. It is crucial from the standpoint of maintaining democratic legitimacy to make sure that, to the extent reasonably possible, the Section Four process is not perceived by the public as a kind of soft coup.

It will also be crucial, while passing any legislation of this kind, to make sure the public understands that Section Four is being modified to make it possible for the political system to act appropriately in sufficiently extreme circumstances. Removing a president via Section Four would obviously be a radical step; but it would be less radical than allowing a blatantly unfit president, who has nevertheless not committed any provably and unambiguously impeachable offenses, to remain in office for, potentially, years on end.

In the end, the precise details of any proposed modification of Section Four from its present form are not as important as the pressing need for a national debate about how to do so appropriately. The end of the Trump Presidency could well provide an ideal time for such a debate, as the nation comes to grips with the consequences of having elected a radically unqualified demagogue to the nation's highest office.

Indeed, one great advantage of modifying Section Four through appropriate legislation is the potentially powerful prophylactic effect that both national debate and the legislation it eventually produces may have on future presidents. Aspiring demagogues, no matter how intemperate and erratic, would be on notice that the American political system stands ready to remove them if their behavior becomes sufficiently egregious. Such would be the case where the system could conclude that they had become unfit to hold the office, and not only for committing impeachable

offenses. A modified Section Four could work as an important counterforce against the various trends in modern American politics and culture that are making it increasingly easy for unfit demagogues such as Donald Trump to seize power.

CONCLUSION

Imagine the following scenario: On November 3, 2020, Donald Trump suffers a crushing defeat at the polls. A blue wave made up of Democrats, Independents, and Republicans who can no longer tolerate someone like Trump at the head of their party votes to remove him from office.

If this were to happen, seventy-seven days would pass before the inauguration of the new President. Those seventy-seven days would present countless opportunities for various abuses of presidential power. Given Donald Trump's history of reckless behavior and contempt for both customary and legal restraints on presidential behavior, the possibility that he would employ the transition period to loot the treasury; pardon himself and all of his cronies; use the powers of his office to punish his political opponents; or, as his former personal attorney suggested in his testimony before Congress, even attempt to overturn the results of the elections itself is far from merely a theoretical concern.¹²⁸

This kind of situation is precisely the sort of constitutional crisis that Section Four of the Twenty-Fifth Amendment was designed to address—even in its present, suboptimal form. We can only hope that Republican elites can, under such circumstances, overcome their present obsequious attitude toward the demagogue who has taken over their party and vigorously support the use of Section Four to forestall such abuse of the powers of the Presidency.

Should anything like this scenario come to pass, it will only make it more evident why legislative modification of Section Four is imperative. Certainly, no such reform can take place until the government is in the hands of a president and a party that has less to fear from a process that will make it easier, as a practical matter, to remove an obviously unfit demagogue from the Presidency.

When the United States of America is once again in that circumstance, such a reform should be undertaken as soon as possible. Even after Donald Trump is, one way or another, removed from office, we will continue to navigate a political world in which the threat to democracy and the rule of law from aspiring presidential demagogues will still be very much with us.

128. See *supra* Part I.