

Five myths about the 25th Amendment

It's not just about physical incapacity, and it doesn't provide for removal of a president.

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President Trump's positive test for the coronavirus has focused attention on America's constitutional provision for dealing with presidential incapacity: the 25th Amendment, ratified in 1967. Section 1 governed the succession of Vice President Gerald Ford to the presidency when Richard Nixon resigned in 1974. Section 2 provided a mechanism to fill two vice-presidential vacancies in the mid-1970s. Section 3 allowed two presidents, Ronald Reagan and George W. Bush, to briefly transfer power to their vice presidents before undergoing medical procedures that involved general anesthesia. Yet Section 4, which allows the vice president and a Cabinet majority to transfer powers from a president who is unwilling or unable to recognize his or her inability, remains unused and the subject of enduring myths.

Myth No. 1

The 25th Amendment is about physical incapacity.

In 2017, Princeton University historian Julian Zelizer contended that "the drafters" of the amendment "had physical disability in mind," not mental deficiencies. Marquette University political scientist Julia Azari wrote that Section 4 "was pretty clearly aimed at the kind of physical and mental incapacities that come after strokes, heart attacks and bullets."

But mental illness, more generally, was also contemplated. In a special message to Congress in 1965 addressing the need for a constitutional amendment, President Lyndon B. Johnson stated, "While we are prepared for the possibility of a president's death, we are all but defenseless against the probability of a president's incapacity by injury, illness, senility or other affliction." During 1965 Senate deliberations, one of the amendment's architects, Sen. Birch Bayh (D-Ind.), mentioned the possibility of a "deranged" president. Rep. Richard Poff (R-Va.), a principal House author of the 25th Amendment, said it applied if a president, because of a "mental debility," was "unable or unwilling to make a rational decision."

Myth No. 2

Once the president declares she's fit, she retakes power.

In 2017, Roosevelt University political scientist David Faris wrote that if the president's powers are transferred, once the president tells congressional leaders that she's again able to carry out her duties, she "gets to be the president again." A recent NPR explainer stated that the president "resumes his duties" with such a declaration.

If it were that simple, under Section 4, a deranged president could resume presidential powers on her mere say-so and insulate herself from further challenges to her authority by dismissing Cabinet members who question her capacity. But the president doesn't resume power when she declares herself fit. She regains her authority "unless the Vice President and a majority of . . . the principal officers of the executive department" challenge that assertion "within four days." Rep. Emanuel Celler (D-N.Y.), another key 25th Amendment player, said that the vice president "is in the saddle" during the four-day challenge period. The legislative record overwhelmingly supports this view. Section 4 gives Congress 48 hours to assemble, if it isn't already in session, and then 21 days to decide the issue, with a two-thirds vote required in both houses to sustain the vice president's position.

Myth No. 3

Section 4 applies only when the president is totally disabled.

University of Pennsylvania historian Jonathan Zimmerman asserted that Section 4 applied only when the president was "absolutely and unambiguously incapable," as President John F. Kennedy was between the time he was shot and his death. Political commentator Jeff Greenfield suggested that Section 4 is relevant when the president is "unable to communicate, or curled up in a fugue state."

But Section 4 wasn't meant to be so limited. By its terms, it applies "whenever" the vice president and a majority of the Cabinet transmit a declaration of presidential inability. Bayh said Section 4 was appropriate when an inability would "seriously impair" the president's ability to discharge the powers and duties of the office, even for a brief time — a standard short of total incapacity. The amendment's drafters took into account President James Garfield, who died over a period of 80 days after being shot; President Woodrow Wilson, who suffered a stroke, leaving him incapacitated for months; and President Dwight Eisenhower, who had a heart attack in 1955, underwent surgery in 1956 and endured a stroke in 1957, as instances to which the amendment would have applied. Section 4 made the vice president and Cabinet members decision-makers partly because they would be in a position to evaluate if a president were unable to carry out the duties of the office. A 1965 report Bayh submitted to Congress explained that the proposal "would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition."

Myth No. 4

The amendment doesn't define 'principal officers' clearly.

Journalist Garrett Graff recently argued that Section 4 contains “ambiguity” about whether officials such as the ambassador to the United Nations, the director of national intelligence or others elevated to Cabinet-level status by a particular president would participate in a Section 4 decision. Former federal prosecutor Elie Honig cast doubt on whether the head of a newer department like Homeland Security would count.

It’s not ambiguous: The homeland security secretary would participate; the U.N. ambassador and the intelligence chief would not. A question does remain about whether acting Cabinet officials — those not confirmed by the Senate, as such — could participate, but there is no doubt that “principal officers” refers only to the heads of the 15 federal departments designated in 5 U.S.C. § 101. Congressional committee reports and debates, as well as a 1985 opinion of the Justice Department’s Office of Legal Counsel, affirm this interpretation.

Myth No. 5

The president can be removed via the 25th Amendment.

In 2018, Politico’s Josh Gerstein referred to the 25th Amendment as a “provision to remove a president from office.” In 2017, the Brookings Institution’s John Hudak described the provisions of Section 4 as a means of “permanent removal” of presidential powers.

The 25th Amendment doesn’t “remove” a president. Section 4 is a means to transfer presidential powers to the vice president, making her acting president for an indefinite period of time. Even if two-thirds of each house sustain the vice president’s position that the president is unable to serve, the president isn’t removed from office and the divestment of her powers may not be permanent. The president may repeatedly assert fitness and allow the process to repeat itself, perhaps with a different resolution. But presidents are removed only if they’re impeached in the House and then convicted in the Senate.

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