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## **INVOKING THE TWENTY-FIFTH: Succession, Vacancy, Disability, and Uncertainty**

### **I – Amendment Force Twenty-Five**

Terrorists have taken over the president's plane. On board is the president of the United States as well as the First Family. Back in Washington, D.C. is the vice president and the Cabinet. The vice president takes charge of the Cabinet. Her authority is not really challenged but the Secretary of Defense interprets the Constitution to read he is in charge with the president in his current situation. That situation has the president disabled politically.

Trapped on the plane with terrorists, the president's power is compromised. The life of his family is in danger as are those of the other passengers. The president essentially has a gun to his head. There is no direct line of communication between the president and those back in Washington. The terrorists demand the president release a terrorist leader, responsible for the death of thousands, from prison. The Defense Secretary believes the president is not thinking straight and putting the safety of his family before national security. There is a constitutional option which would allow the power of the president to transfer from the incapacitated president, even if the president does not see himself as incapacitated, to the vice president as an acting president. This transfer of power would prevent the release of the terrorist leader from the prison.

The vice president just needs to sign a document with the majority of the Cabinet and she becomes acting president. With a stroke of a pen, power would transfer. Her pen approaches the

paper and then she holds back. No signature. She's still the vice president and the president is still held hostage on the presidential plane, Air Force One.<sup>1</sup>

That fictional scenario showed a use for the fourth section of the Twenty-Fifth Amendment. Spoiler alert! In the end, section 4 does not get used and the document to be signed was dramatically torn up by the vice president. Hollywood used it for a plot point in a movie, but even then, it was not used at all. Section 4 deals with presidential power when a president is unable to transfer power and is the only one of the three sections to not be used. Citizens of the United States would come to understand the amendment's fourth section through popular fiction like film, TV, and books. Without these entertaining options, high school U.S. History or American Government courses *might* have covered it. If covered, section 4 is glossed over. This section gets demanded invocation by the people in 2017 and the next four years, probably something the framers of the amendment never thought of when crafting it. The four sections of the 25<sup>th</sup> Amendment were written to correct and clarify presidential power in times of presidential disability. Section 4's design allowed for unseen scenarios which could potentially arise from a malignant presidency.

Historical precedents drove for the need for all four sections. The death of a president and succession, vacancy in the vice presidency, and disability and presidential power whether able or unable to transfer that power. Historical moments necessitated the Twenty-Fifth Amendment. While historical moments lead to the reasons for sections 1-3 and even 4, but there must be more to it than life threatening medical conditions. Section 4 was designed in mind for more than just mental inability.<sup>2</sup> The need to use sections one, two, and three have happened. The need to use

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<sup>1</sup> *Air Force One*, directed by Wolfgang Petersen, (1997; Culver City, CA: Columbia Pictures), Blu-ray.

<sup>2</sup> John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications* 3<sup>rd</sup> ed. (New York: Fordham University, 2014), 115.

section 4 has only been considered but never invoked. Section 4 was what people were meaning when they hashtagged the 25<sup>th</sup> Amendment on social media between 2017 and 2021.

Section 1 deals with the removal of the president and the vice president becomes the president. Section 2 fills the vacant second spot. Section 3 allows the president to transfer power to the vice president as an acting president and later reclaim that power. Section 4 allows the vice president and a majority of the Cabinet or some other body so designated by the Congress to transfer power from the president to the vice president, once again an acting president and the president can later reclaim it unless there is disapproval from the vice president and the Cabinet. Congress gets involved if they agree with the vice president, if they do not get involved the president is president again. Very simplified. Both sections 3 and 4 allow the president to reclaim their presidential powers, but it is simpler in the third section than in the fourth. Section 4 states:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.<sup>3</sup>

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<sup>3</sup> U.S. Constitution, amend. 25, sec. 4.

Those words were added to the Constitution in 1967. Section 4 was the last of the four and is in a way the last option when dealing with a president unable to transfer power because they do not understand that they are part of the problem or for some other reasons.

Since 1967's ratification of the amendment, outside of Hollywood, there have been three occasions when section 4 has been brought up. One for the moments immediately following an assassination attempt and later for a brief moment when that same president's mental faculties come into question. The other occasion spanned another president's entire term.

In 1994, Ronald Reagan shared with the country through a letter that he had Alzheimer's disease.<sup>4</sup> The former president left office in January of 1989. In 1980, he became the oldest president elected at 69 taking away the titled held by William Henry Harrison at age 67 in 1840. An assassination attempt put Reagan in surgery. Use of section 3 or 4 was brought up, even so far as having letters drafted up for each possible scenario. Questions of age were raised throughout both of Reagan's campaigns for the White House. Even leading to a joke at the second presidential debate, by then 73, in 1984 against former Vice President Walter Mondale, then age 56. "I will not make age an issue of this campaign. I am not going to exploit, for political purposes, my opponent's youth and inexperience."<sup>5</sup> By the second term midpoint, Reagan's mental capacities were of concern to those in the West Wing. The thought of invoking section 4 was raised but never followed through on even though section 3 had been invoked in 1985.<sup>6</sup> That concern came from within the White House, whereas it would come from without for the next chief executive, oldest then elected at 70 in 2016, to face calls for section 4.

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<sup>4</sup> Ronald Reagan to the American People, November 5, 1994, in Ronald Reagan Presidential Library & Museum, <https://www.reaganlibrary.gov/reagans/ronald-reagan/reagans-letter-announcing-his-alzheimers-diagnosis>.

<sup>5</sup> H.W. Brands, *Reagan: The Life* (New York: Doubleday, 2015), 456.

<sup>6</sup> Feerick, *The Twenty-Fifth Amendment*, 199.

Sections 1-3 have been invoked. Sections 3 and 4 were twice in the air of Reagan's White House but the American people were still mostly ignorant of the amendment and its sections. Film and television started using the amendment. Most Americans would learn about the amendment and its section through fictional means than by learning recent history on the presidency. That crash course in presidential power would help Americans understand there is an option other than impeachment when there is a problematic president in power. Warning as early as the nomination in the summer of 2016, Americans needed to learn up on the twenty-fifth Amendment, specifically section 4.<sup>7</sup> The election of Donald Trump brought calls from the people through social media to invoke section 4, even if most did not understand its function but seeing it only as an option to remove a president from power aside from impeachment.

Impeachment to the average American would probably mean to remove a president. There have been three presidents impeached and one of them was twice impeached. However, none of those presidents, Andrew Johnson, William Jefferson Clinton, and Donald Trump, the twice impeached one, were removed from office. Impeachment involves the House of Representatives drafting articles of impeachment which then need to be approved by the House Judiciary Committee and then if a simple majority of the full House votes to impeach the president, then that president is considered impeached. Not removed, the impeachment is just bringing up the question of removing the president from office. It is an official question that can only be answered by the Senate in a trial.

In the U.S. Senate, the Chief Justice of the United States presides over the impeachment trial with the Senators quietly sitting as jurors trying to determine if they will vote for acquittal or

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<sup>7</sup> Ben Brenkert, "Better Brush Up on the 25<sup>th</sup> Amendment If Trump Wins," The Hill, August 3, 2016, <https://thehill.com/blogs/pundits-blog/presidential-campaign/290204-better-brush-up-on-the-25th-amendment-if-trump-wins>.

conviction. Presidents Johnson 17, Clinton, and Trump survived their trials. If two-thirds of the Senate votes for conviction on just one article of impeachment, the president is to be removed from office. Since 1967, the removal of the president triggers the 25<sup>th</sup> Amendment.

Conviction would bring removal. Conviction coming from Article 1, section 3<sup>8</sup> and removal from Article 2, section 1.<sup>9</sup> The original Constitution stated that. Amendments were added on over time to amend any problems or add new ideas. Problems for the presidency included how electors cast their vote. New ideas for the presidency would be formalizing the role of an acting president when the president was unable to perform their role. Nine amendments directly or indirectly relate to the presidency. Indirectly would be the right to vote found in the 15<sup>th</sup> Amendment (1870) for men, 19<sup>th</sup> (1920) for women, and 26<sup>th</sup> (1971) for 18 years old and older. The 23<sup>rd</sup> Amendment (1961) gave citizens of the District of Columbia 3 electoral votes allowing voters in the nation's capital to cast a vote for a slate of electors during a presidential election. The 24<sup>th</sup> Amendment (1964) made paying a poll tax or any other kind of tax to vote illegal. Non-electoral related amendments started with the ratification in 1804 of the 12<sup>th</sup> Amendment which established that members of the Electoral College cast a vote for a president and one vote for a vice president, replacing the prior concept of first place becomes president and the runner-up became vice president. *See*: John Adams and Thomas Jefferson in 1796.

The 20<sup>th</sup> Amendment established when a presidential and vice-presidential term began as well as succession in the time following a general election and before the inauguration. The amendment was ratified in 1933, taking effect after that year. *See*: Herbert Hoover's Great Depression America at the end of 1932 having to wait oh so long for those happy days again until the start of Franklin Roosevelt's Great Depression America on March 4, 1933. Then in

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<sup>8</sup>U.S. Constitution, art. 1, sec. 3.

<sup>9</sup> U.S. Constitution, art. 2, sec. 1.

1951, the 22<sup>nd</sup> Amendment was ratified. That amendment defined a presidential term, limiting a president to George Washington's precedent of a two-term limit. *See*: Franklin D. Roosevelt's elections of 1932, 1936, 1940, and 1944. All of these amendments are not the answer to a conviction of a president in an impeachment trial. See the next paragraph.

Section 1 of the 25<sup>th</sup> Amendment kicks in upon the conviction of a president in an impeachment trial. The president is removed, so the vice president becomes the president. This was not the part of the amendment people were hashtagging about between 2017 and 2021. People, using their understanding of an alternative method outside of impeachment, used hashtags like #25thAmendmentNow or #InvokeThe25th to convey to their elected leaders to use the other constitutional remedy for removing an incapable president. Thanks to films like *Air Force One* and television series like *24*, the citizens of the United States knew there was an alternative regardless of their full understanding of the amendment and its uncertainty crisis section.<sup>10</sup> Section 4 adds drama. Between 1999 and 2019, seven different television series used the 25<sup>th</sup> Amendment somehow in their storytelling.<sup>11</sup> The 25<sup>th</sup> Amendment was ratified in 1967 and sections 1-3 have been invoked and only three times has section 4 been raised. The need to invoke a transfer of power to an acting president is rare in presidential history, both pre- and post- 25<sup>th</sup> Amendment. Section 4 was designed for broad interpretation but requires a vice president who does not feel like an usurper when invoking it but instead feels like a patriot.

## II – Sectional History

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<sup>10</sup> Feerick, *The Twenty-Fifth Amendment*, 258-260.

<sup>11</sup> Brian C. Kalt, *Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment* (New York, NY: Oxford University Press, 2019), 75-103.

To better understand the 25<sup>th</sup> Amendment, the original text of the Constitution should be examined as to why it needed amending. Article 2, section 1 of the governing document originally stated:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.<sup>12</sup>

There was no clarity with the meaning of “the Same shall devolve on the Vice President.”

Section 1 of the amendment would clarify the succession of power to the vice president. Making sure there is always a vice president for succession would justify section 2 of the amendment.

“The Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly” until the disability is removed or a new president elected.

This would be processed by sections 3 or 4. Presidential history would have to happen to provide a justification for amending the Constitution and clarifying presidential succession and disability.

The amendment was ratified in 1967, so that meant between 1789 and 1965<sup>13</sup>, when Congress passed the language that would be the 25<sup>th</sup> Amendment, moments occurred that required concern for what would be sections 1 through 4 of the amendment.

Article 2 of the Constitution details the role of the president. The presidency began when the Electoral College unanimously elected George Washington the first president of the United States under the Constitution. Or it began on April 30, 1789, when Washington took the oath of office in New York City. The presidency within the next fifty years went on with presidents

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<sup>12</sup> U.S. Constitution, art. 2, sec. 1.

<sup>13</sup> Feerick, *The Twenty-Fifth Amendment*, 104.



giving up power after two terms<sup>14</sup>, leaving office when one lost<sup>15</sup>, peaceful transfer from one political party to another<sup>16</sup>, and two elections decided by the House of Representatives.<sup>17</sup> Then 52 years into the presidency, a president died<sup>18</sup> bringing up the meaning of the words “In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President.”<sup>19</sup>

Vice President John Tyler would be the one interpreting “the Same shall devolve on” wording as he took over from the then oldest president elected and first to die in office, William Henry Harrison. Tyler believed he was president upon Harrison’s death, but he took the oath of office on April 6.<sup>20</sup> The first paper submitted for Tyler’s signature above the words “Acting President” upset Tyler. Striking the word “acting” and he signed as John Tyler, President.<sup>21</sup> Just as Washington established a two-term limit precedent and eventually an amendment, see the 22<sup>nd</sup> Amendment and Franklin D. Roosevelt. John Tyler’s assumption of power established what would eventually become the first section of the 25<sup>th</sup> Amendment, the Tyler precedent.<sup>22</sup>

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<sup>14</sup> Washington in 1796, Jefferson in 1808, Madison in 1816, Monroe in 1824, Jackson in 1836

<sup>15</sup> Adams 2 in 1800, Adams 6 in 1828

<sup>16</sup> Federalists to Republicans in 1800, National Republican to Democratic in 1828, Democratic to Whig in 1840

<sup>17</sup> 1800 and 1824

<sup>18</sup> William Henry Harrison had lost the presidency in 1836 thanks to his splintered Whig Party. Harrison would run in 1840 modeling Andrew Jackson’s run for the presidency, when he ran on his military background. In the first presidential campaign with a slogan, it was “Tippecanoe and Tyler, Too” in 1840. Tippecanoe because of Harrison’s success at the Battle of Tippecanoe and Tyler was his running-mate’s last name. Harrison was considered the oldest elected at 67. To prove he was fit for the job, he took off his overcoat and gave the longest inaugural address at noon on March 4, 1841. That cold day leads to Harrison’s death on April 4, 1841.

<sup>19</sup> U.S. Constitution, art. 2, sec. 1.

<sup>20</sup> Feerick, *The Twenty-Fifth Amendment*, 5.

<sup>21</sup> Sylvia Engdahl, ed. *Amendment XXV Presidential Disability and Succession*, (Detroit: Greenhaven Press, 2010), 49.

<sup>22</sup> Until 1967, what would be section 1 was followed in 1850 when Millard Fillmore took over after the death of Zachary Taylor, Whig general number 2 and war hero from Mexico. The assassination of Abraham Lincoln thrust Andrew Johnson into the Civil War ending reconstruction mindset presidency in 1865. Two more assassinations follow, putting novice Chester Arthur into James Garfield’s term in 1881 and in 1901 six months into the second term William McKinley died 8 days after taking a bullet from an assassin elevating the newly elected vice president Theodore Roosevelt, youngest person sworn-in to the presidency at 42, to finish out the term. Warren G. Harding dying in 1923 put Calvin Coolidge quietly into the presidency. In 1945, Franklin D. Roosevelt’s death put Harry S. Truman behind the Oval Office desk giving hell.

The last use of the Tyler precedent was an assassination in Dallas, Texas at the height of the Cold War, a year after the Cuban Missile Crisis. The threat of nuclear annihilation raised concerns of presidential succession and power. The assassination of John F. Kennedy on November 22, 1963 made Lyndon Johnson the president of the United States. In the mutually assured destruction world of the Cold War, presidential succession became ever more important. By 1964, the Tyler precedent was becoming the first section of what would become the 25<sup>th</sup> Amendment. The ascension which Tyler established in 1841 became the norm to Americans. While people in Tyler's time debated the title, Tyler's interpretation of the Constitution became constitutional in 1967. "[T]he Same shall devolve on the Vice President" shall confuse no more.

Section 1 of the 25<sup>th</sup> Amendment states: "In case of the removal of the President from office or of his death or resignation, the Vice President shall become President."<sup>23</sup> No president has been removed, but eight died in office and one resigned. Eight vice presidents became president because of the death of a president. One V.P. became president because of a resignation. The second time the 25<sup>th</sup> was invoked since 1967 was also the first official use of the amendment's section 1. Nixon resigned the presidency on August 9, 1974. Vice President Gerald Ford became the 38<sup>th</sup> president. Now that Ford was no longer vice president, there was a vacancy. Section 1 has not been used since 1974. There have been assassination attempts, calls for resignation, impeachments, and simply chance of life, which are all things needed to invoke section 1.

If section 1 is invoked, section 2 will automatically be needed. No one in the presidential line of succession moves up a slot. The speaker of the House does not become the vice president if there is a vacancy. The speaker remains in the line of succession second slot, but next in line

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<sup>23</sup> U.S. Constitution, amend. 25, sec. 1.

until a vice president is appointed. To ensure continuity of government, laws of succession would be established because there would be a total of thirty-seven years where there would be no vice president even though there could have been deaths of presidents, and there were attempted assassinations, and an impeachment trial in a near but no conviction outcome in the 178 years without the 25<sup>th</sup> Amendment.<sup>24</sup> The presidential succession acts began in 1792, revised in 1886, and again in 1947 to what it is today in 2021. Regardless, it just makes that individual an “acting president.” For sections 1, 3, and 4, a vice president is needed. The second section of the amendment deals with vacancy in the vice presidency.

No more would there be a vacancy in the vice presidency.<sup>25</sup> In 1973, Spiro Agnew became the second vice president to resign. That resignation became the first event to invoke the 25<sup>th</sup> Amendment. The vacancy created by the resignation allowed the president to appoint a replacement per section two of the amendment. Gerald Ford became the first person appointed to the vice presidency. When Richard Nixon became the first president to resign the presidency in 1974, Ford became president per section 1 and then had to appoint a vice president<sup>26</sup> per section 2 which states “Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”<sup>27</sup> The president and vice president from 1974 to 1977 were appointed to their position after the ticket which had won in a landslide in 1972 resigned before the end of the term they were elected to. Section 2 is needed to invoke sections 1, 3, or 4. The president has the ability to invoke section 2 when there’s a vacancy in the vice presidency.

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<sup>24</sup> Kalt, *Unable*, 20.

<sup>25</sup> The first death of a vice president occurred in 1812 and the most recent death of an incumbent vice president was in 1912. Five other vice presidents died in office between those years. One vice president resigned to become a U.S. senator. Eight vice presidents got a better job as presidents of the United States.

<sup>26</sup> Nelson Rockefeller

<sup>27</sup> U.S. Constitution, amend. 25, sec. 2.

Inability of the president is mentioned in the original text of the Constitution. The ability to successfully transfer power from president to vice president and back was not so clear in the original document. The goal of sections 3 and 4 are to clarify that transfer. Sections 3 and 4 are similar but different. With the third section, it is a president requesting the temporary transfer of power to the vice president as an acting president while the fourth section is a vice president and a majority of the Cabinet or some other congressionally designated body that believe the president is unfit for the office and transfer power, but the president can challenge it.

The first time the question of presidential incapacitation occurred was during James Madison's presidency in 1813, the start of his second term and the War of 1812 not going so great.<sup>28</sup> Madison was in convalescence and his situation according to Dolley Madison was "precarious."<sup>29</sup> The main concern there, politically, was who would be next in line if something were to happen to both the ill Madison and the elderly Vice President Elbridge Gerry.<sup>30</sup> Madison survived and Gerry did not, so concern for an acting-president per the Presidential Succession Act of 1792 stopped being an urgent need of clarification. On April 14, 1865, the night Lincoln was shot, had he survived how would have a transfer of power taken place. Lincoln died the next morning and Vice President Johnson followed precedent and took the oath of office to become the next president. Sixteen years later when the next presidential assassination occurred, James Garfield lingered for days in the summer of 1881 and raised concern of presidential inability.

For 80 days, President Garfield's doctors believed isolation would help him recover from the attack on his life, from the wound and the care. The president was unable to discharge his

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<sup>28</sup> Madison's first term vice president was the first V.P. to die in office in the first half of an election year. He was replaced with someone who would become the second.

<sup>29</sup> Henry Barrett Learned, "Gerry and the Presidential Succession in 1813," *The American Historical Review* 22, no. 1 (1916): 96, <https://www.jstor.org/stable/1836200>.

<sup>30</sup> The "Gerry" in gerrymandering.

powers per Article 2, section 1 of the Constitution, but there was no process and Garfield was in no shape to construct a process of transferring power to a vice president. Around sixty days after the attack, James G. Blaine, the secretary of state, suggested Vice President Chester Arthur become acting president, but only a few members of the Cabinet supported the idea. Arthur rejected the idea for fear of looking like an usurper.<sup>31</sup> This was a pre-25<sup>th</sup> Amendment, section 4-like attempt at following Article 2, section 1's wording on inability of a president. The fear of usurpation would be a silent precedent followed by other vice presidents in similar situations.

In 1893, the nation suffered through an economic depression at the start of Grover Cleveland's second non-consecutive term. That summer, he secretly had surgery to remove a tumor from his mouth. Cleveland hid everything from the media and his would-be successor, Adlai Stevenson,<sup>32</sup> and made every effort to keep him away. This secret surgery moment is why there is now a section 3 of the 25<sup>th</sup> Amendment, but in the pre-25<sup>th</sup> Amendment U.S., there was no process to establish a transfer of power. Cleveland did not seem interested in establishing a transfer of power for such a surgery.<sup>33</sup> Neither did the next president in a different situation.

Woodrow Wilson returned from the peace conference which ended the Great War in Europe. He then traveled around the United States to rally support for the ratification of the Treaty of Versailles. The president collapsed after delivering more than thirty speeches. Wilson returned to the White House where Edith Wilson, the First Lady, kept the seriousness of the president's illness from him. A few days later a stroke hit Wilson, paralyzing his left side. Once again, it was a secretary of state, Robert Lansing, proposing the idea of the vice president

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<sup>31</sup> John D. Feerick, "Presidential Inability: Filling in the Gaps," *Politics and the Life Sciences* 33, no. 2 (2014): 13, <https://www.jstor.org/stable/24893592>.

<sup>32</sup> Grandfather to the Democratic Party candidate for president in 1952 and 1956 with the same name.

<sup>33</sup> Matthew Algeo, *The President Is a Sick Man: Wherein the Supposedly Virtuous Grover Cleveland Survives A Secret Surgery at Sea and Vilifies the Courageous Newspaperman Who Dared Expose the Truth* (Chicago: Chicago Review Press, 2011), 110-111.

becoming an acting president.<sup>34</sup> Discussion among the Cabinet about whether to make Thomas Marshall, the vice president, an acting president, went on but without a clear process in place, speculation reigned. Marshall feared looking as if he were “seizing the place” and later be accused of usurpation by a recovered Wilson.<sup>35</sup> These historical precedents will influence the next president in terms of presidential inability.

Dwight D. Eisenhower, the grandfatherly sixty-two year old, elected twice in the 1950s against Adlai Stevenson the second. Eisenhower suffered three major medical incidents in his two terms as president. Eisenhower urged the clarification of presidential inability. When Congress failed to act on the issue, Eisenhower and his vice president, Richard Nixon, worked out an agreement in 1958 transferring power just as would be done if there were a 25<sup>th</sup> Amendment, section 3.<sup>36</sup> This agreement would be followed by Eisenhower’s successors until the ratification of the 25<sup>th</sup> Amendment in 1967.

Eisenhower left the presidency on January 20, 1961, the end of the second term. While Theodore Roosevelt was the youngest at forty-two years old to assume the presidency after the assassination of William McKinley in 1901, John F. Kennedy was the youngest elected president at the age of forty-three. Now that there was a young president in office, the drive for clarification of presidential inability or incapacitation dropped. Dealing with the clarification in the Congress were senators Estes Kefauver and Kenneth Keating. After Senator Kefauver’s death in August of 1963, Senator Birch Bayh took over what would eventually become the legislative process that would produce the 25<sup>th</sup> Amendment and its four sections.<sup>37</sup>

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<sup>34</sup> Joel K. Goldstein, “Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall,” *Politics and the Life Sciences* 33, no. 2 (2014): 40, <https://www.jstor.org/stable/24893593>.

<sup>35</sup> Goldstein, “Vice-Presidential Behavior in a Disability Crisis,” 43.

<sup>36</sup> Engdahl, ed., *Amendment XXV*, 62.

<sup>37</sup> Feerick, *The Twenty-Fifth Amendment*, 54-56.

After the assassination of President John F. Kennedy in November of 1963, clarity in presidential power and succession in the Cold War era needed to be a top priority for the government of the United States. The year before in October, the United States came to the brink of nuclear war with their geopolitical opponent the Soviet Union in what has become known as the Cuban Missile Crisis. The Crisis pressed the need for clarification in the continuity of government in a nuclear age. While Kennedy died almost instantaneously, the question of presidential power would have come to concern if he lingered as Garfield had in 1881. Next president, Lyndon Johnson, encouraged clarification in his 1965 State of the Union address.<sup>38</sup> Pre-25<sup>th</sup> Amendment, there were no remedies in place for dealing with presidential inability even though the original wording in Article 2, section 1 mentioned inability, it did not explain how to deal with it. Remedies would be established in sections 3 and 4 of the 25<sup>th</sup> Amendment.

Since the ratification of the twenty-fifth in 1967, section 3 of the 25<sup>th</sup> Amendment has been invoked three times. However, it had been considered at other times. It was considered during Richard Nixon's handling of the Watergate crisis.<sup>39</sup> The reason for invocation in that scenario was the president's preoccupation with the Watergate scandal rather than on the duties of the office. Section 3 was considered after the Reagan assassination attempt in 1981. The first use of it came in 1985, Reagan, diagnosed with bowel cancer, had to have it removed immediately. Reagan feared setting a precedent in using Section 3 for surgery he believed the framers of the amendment did not intend when drafting the amendment.<sup>40</sup> Just as section 4 has unseen scenarios, so too does section 3. Vice President George H. W. Bush (later 41<sup>st</sup> president)

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<sup>38</sup> Lyndon Johnson, "Annual Message to the Congress on the State of the Union," (speech, Washington, D.C., January 4, 1965), The American Presidency Project, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-26>.

<sup>39</sup> Feerick, *The Twenty-Fifth Amendment*, 113.

<sup>40</sup> Ronald Reagan to Thomas P. O'Neill, Jr., July 13, 1985, in *The Reagan Library Education Blog*, <https://reagan.blogs.archives.gov/2017/07/24/the-25th-amendment-section-3-and-july-13-1985/>.

became the first acting president until Reagan wrote another letter stating he was back in charge. Reagan did not want it to happen but he set a precedent, because George W. Bush (43<sup>rd</sup> president) in 2002 and 2007 invoked section 3 because of a colonoscopy. When section 3 was first considered in the Reagan presidency, after the assassination attempt, there was a fear of looking weak in invoking the 25<sup>th</sup> Amendment. Bush 43 normalized it, but the stigma of looking weak came back into fashion when considered next. Section 3 was most recently considered, but not invoked, in October of 2020<sup>41</sup>, after President Trump tested positive for COVID-19.<sup>42</sup> That was not the first or last time the 25<sup>th</sup> Amendment would be associated with Donald Trump.

Historical precedents like Garfield and Wilson have offered up situations where cabinets acted in considering making the vice president an acting president while the president was incapacitated in some way. Those are just some of the reasons why section 4 was written. John Feerick, one of the authors of the 25<sup>th</sup> Amendment, wrote about scenarios where a president would be unable to declare their own inability. Scenarios included a kidnapped president or a captured president. In committee debates in 1965, Senator Bayh and Senator Robert Kennedy discussed potential scenarios. Kennedy said, “Is it limited to mental inability to make or communicate his decision regarding his capacity and mental inability to perform the powers and duties prescribed by law?” Bayh replied, “I do not believe that we should limit it to mental disability. It is conceivable that the President might fall into the hands of the enemy, for example.” Kennedy responded, “It involves physical or mental inability to make or communicate his decision regarding his capacity and physical or mental inability to exercise the powers and

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<sup>41</sup> Reuters Staff, “Explainer: How Mike Pence could temporarily assume control if Trump becomes incapacitated,” Reuters, October 2, 2020, <https://www.reuters.com/article/us-health-coronavirus-usa-trump-incapacitatedUSKBN26N198>.

<sup>42</sup> Dartunorro Clark et al., “Trump experiencing ‘mild symptoms’ after testing positive for Covid-19,” NBC News, October 1, 2020, <https://www.nbcnews.com/politics/donald-trump/trump-first-lady-test-positive-covid-19-n1241769>.



duties of his office.”<sup>43</sup> The intent of section 4 is broad and not limited to repeat scenarios provided by Garfield or Wilson. The framers allowed for the unpredictable when drafting section 4.

The first real consideration of section 4 came after the assassination attempt on Ronald Reagan’s life in March of 1981, just months into his presidency. White House Counsel drafted documents ready to invoke either section 3 or section 4 of the 25<sup>th</sup> Amendment. However, talk on invoking the amendment quickly faded. Talk of it was hushed as not to evoke weakness on the geopolitical stage of Cold War politics.<sup>44</sup> Later in the presidency in 1987, new chief of staff, Howard Baker, learned from the outgoing staff that the president was “inattentive,” “inept,” and “lazy.” Section 4 was suggested by the outgoing staff to be considered. The chief of staff has no role in the process, but as someone who works closely with the president, the chief of staff is one of the best to gauge if the president is alert and engaged. Baker and his team observed the president and determined Reagan to be in “superb” condition.<sup>45</sup> That was determined on one single observation. No more talk of section 4, until Trump’s presidency.

### **III – Section Forty-Five**

Both times section 4 was considered during the Reagan administration, it was a matter considered within the administration. It was not something the American people were demanding to be invoked. Most Americans were probably unaware of section 4 in the 1980s even though the amendment would be about twenty years old when suggested the second time in the Reagan presidency by the outgoing staff to Howard Baker in 1987. Since the Reagan years, Hollywood

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<sup>43</sup> Feerick, *The Twenty-Fifth Amendment*, 116.

<sup>44</sup> Kalt, *Unable*, 68-69.

<sup>45</sup> Kalt, *Unable*, 72-74.

and novelists have continued to speculate on potential scenarios where section 4 might be used, just as Bayh, Kennedy, and Feerick did when debating, drafting, and crafting the amendment.

Brian Kalt, a law professor, broke down the use of section 4 into two categories when used in fiction in his book *Unable: The Law, Politics, and Limits of Section 4 of the Twenty-Fifth Amendment*. The first category of section 4 in popular entertainment is it is just a part of the story, like in the motion picture *Dave* (1993) or season 4 of the television series *24* from 2005. The second category is where section 4 becomes part of the plot of the story, like in the films *Air Force One* (1997) and *White House Down* (2013) or from the television series *Madam Secretary* in 2018. Characters struggle with invoking section 4 because the president might not be truly “unable” to discharge their power like in *Air Force One*. Other scenarios put the demand for immediate reaction to a president who might kill millions like in seasons 2 and 6 of *24*, from 2002-03 and 2007. There was also a villainous use of the section as seen in the series *Homeland* from 2018.<sup>46</sup>

Multiple viewings through reruns on basic cable and binge watching via streaming platforms, Americans got an education on section 4 over the years. There was an alternative to impeaching. Impeachment was confusing to Americans; it means to remove a president but those who have been impeached have not been removed from office?! Section 4 offers an alternative to punishing an unruly president, but like impeachment it is not so simple. Even at times the screenwriters in Hollywood do not get the 25<sup>th</sup> Amendment correct. *The West Wing*, in its second season opener from 2000, referenced the 25<sup>th</sup> Amendment but somehow ignored section 4 as if it did not exist, on accident or for dramatic reasons it is unknown.<sup>47</sup> Regardless of its accuracy, section 4 is an opportunity for drama in television or film.

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<sup>46</sup> Kalt, *Unable*, 75.

<sup>47</sup> Kalt, *Unable*, 91.

The fictional scenarios offered examples of what section 4 could do. These fictional scenarios educated Americans on the 25<sup>th</sup> Amendment's last section. Donald Trump's nomination prompted a refresher on the amendment, just in case. That refresher was needed not because section 3 could have potentially been invoked during COVID-19, but Trump of course is not the kind to willingly transfer power. The refresher was probably more so toward section 4. However, section 4 requires the vice president and the majority of either the Cabinet or some other body designated by the Congress to determine if the president is unfit to serve. Hollywood showed the amendment as a tool to easily access in a time of presidential crisis. Americans hashtagged and demanded the invocation of the 25<sup>th</sup> Amendment from the beginning of the Trump presidency in 2017 right through until the end. However, the person doing the invoking would have to be the vice president who is loyal to President Trump. The amendment is loyal to the Trump presidency.

Trump fired James Comey. Comey was the FBI Director who infamously announced an investigation into Hillary Clinton eleven days before the 2016 general election. Comey's firing in May of 2017, triggered the deputy attorney general, Rod Rosenstein, to consider surveying the Cabinet in the possibility of having to invoke section 4.<sup>48</sup> A month before the 2020 general election, Speaker Nancy Pelosi launched a commission per the 25<sup>th</sup> Amendment's section 4's wording "of such other body as Congress may by law provide" to investigate the fitness of the president.<sup>49</sup> In between those two moments, the public called for the invocation of the 25<sup>th</sup> Amendment whenever Trump did something showing how unfit he was for the job. In the past,

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<sup>48</sup> Grace Segers, "What Andrew McCabe told '60 Minutes' about Trump and the 25<sup>th</sup> Amendment," CBS News, February 17, 2019, <https://www.cbsnews.com/news/what-andrew-mccabe-told-60-minutes-about-trump-and-the-25th-amendment/> (accessed May 10, 2021).

<sup>49</sup> Lindsey McPherson, "Why is Pelosi suddenly talking about the 25<sup>th</sup> Amendment?" Roll Call, October 9, 2020, <https://www.rollcall.com/2020/10/09/why-is-pelosi-suddenly-talking-about-the-25th-amendment/> (accessed May 10, 2021).

Americans have called for the impeachment of their president. George W. Bush had calls of impeachment for launching the war in Iraq. So, it is not unheard of to have the electorate call for the removal of the president. But in a world after films like *Air Force One* or *White House Down* and with multiple shows like *24* or *Homeland* with plots involving section 4, calls for the invocation of the 25<sup>th</sup> Amendment would be heard like never before.

Throughout the Trump presidency, each year articles and opinion pieces can be found mentioning the use of the 25<sup>th</sup> Amendment. Headlines like “How Can We Get Rid of Trump?”<sup>50</sup> or “Talk of the 25<sup>th</sup> Amendment Underscores a Volatile Presidency”<sup>51</sup> spanned the term for the twice impeached president discussing the use of the 25<sup>th</sup> Amendment. People, both publicly and privately, spent four years talking about and hoping the amendment would be used. Exposure to the amendment through popular entertainment, made the amendment a constant presence on social media and the traditional media. The edutainment experience must have made the impression that the 25<sup>th</sup> Amendment was the best alternative to impeachment.

People invoked the amendment as they would with impeachment. Trump received both calls for impeachment and invoking of the 25<sup>th</sup> Amendment. Both calls were made and received but with different responses. December 18, 2019, the House of Representatives voted to impeach Trump for high crimes and misdemeanors presented as two articles of impeachment. The first was “abuse of power by soliciting the interference of Ukraine in the [upcoming] 2020 U.S. presidential election,” and the second, “obstruction of Congress by directing defiance of certain subpoenas issued by the House of Representatives.” Then on February 5, 2020, the Senate

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<sup>50</sup> Nicholas Kristof, “How Can We Get Rid of Trump?” *New York Times*, February 18, 2017, <https://www.nytimes.com/2017/02/18/opinion/sunday/how-can-we-get-rid-of-trump.html?searchResultPosition=15> (accessed May 10, 2021).

<sup>51</sup> Peter Baker, “Talk of the 25<sup>th</sup> Amendment Underscores a Volatile Presidency,” *New York Times*, September 22, 2018, <https://www.nytimes.com/2018/09/22/us/politics/trump-25th-amendment.html?searchResultPosition=1> (accessed May 10, 2021).

acquitted Trump on both articles.<sup>52</sup> The votes were party line, except for the 2012 Republican presidential candidate and senator from Utah, former Massachusetts governor, Mitt Romney. Romney voted guilty on the first article becoming the first senator to vote to convict and be from the same political party as the president.<sup>53</sup> Acquitted by the U.S. Senate, Donald Trump became an impeached president and remained in office.

The framers of the amendment wrote section four because a president unable to discharge the duties of the office should not remain in office. The interpretation allows for other reasons to invoke section 4 outside of mental incapacitation or historical precedents like Garfield and Wilson. Senator Birch Bayh spoke of a president falling into the hands of the enemy<sup>54</sup>, which could then be extrapolated to consider that a president could be a traitor. Hollywood has brainstormed plenty of scenarios which have made it to the big and small screens. From that the people believe this to be the remedy to a president who is unfit for the job. That was why it dominated 2017-2021. Asking members of Congress to invoke the 25<sup>th</sup> Amendment does not work. Even if the Congress created a body of people to determine if the president is able to perform their duty, the vice president is needed. The vice president and the Cabinet, the other option from the congressional body of people, had a loyalty to President Trump first and foremost. The Constitution was secondary to fidelity to Trump in their eyes and hearts.

A loyalist like Vice President Mike Pence would not be able to see the need for section 4 in regards to President Trump. The average person educated by popular entertainment calling for

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<sup>52</sup> U.S. Congress, House, *Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors*, H Res. 755, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., introduced in House December 10, 2019, <https://www.congress.gov/bills/116/congress/house-resolution/755>.

<sup>53</sup> “Roll Call Vote 116<sup>th</sup> Congress – 2<sup>nd</sup> Session: A resolution impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors,” U.S. Senate, February 5, 2020, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=116&session=2&vote=000](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=000)

<sup>54</sup> Feerick, *The Twenty-Fifth Amendment*, 116.

the 25<sup>th</sup> Amendment to be used saw Trump as dangerous. The designers of section 4 allowed for this kind of broad interpretation. With Pence oblivious to the danger Trump posed to the republic, time went on to show how dangerous he was.

The 2016 election finally came to an end when the 2020 election results were finally announced four days after the election held on November 3. History was made. The first woman elected vice president, Kamala Harris. Also, the first woman of color elected vice president, the oldest male elected at 77 years old, Joe Biden, and the first time an incumbent president, Trump, lost reelection since 1992.<sup>55</sup> The Biden/Harris ticket won 81 million votes to Trump/Pence's 74 million in the popular vote. The Electoral College projection on election night matched it on the night in 2016 when Trump called it a landslide. He was not using that language in 2020. When the Electoral College met in 2016, Trump lost 2 votes. In 2020, Biden did not lose a single electoral vote, neither did Trump for that matter.<sup>56</sup> Biden claimed victory and Trump has never conceded.

Instead, the outgoing president used his position to push the narrative that the election win by Joe Bide was a lie, the big lie. Just as he was pushing the lie of the big lie, the lame duck president was tweeting at the end of December about a rally to be held in Washington on January 6, 2021.<sup>57</sup> That was the day the Congress would meet in joint session to count the Electoral College votes. The 117<sup>th</sup> Congress began its term on January 3<sup>rd</sup> per the 20<sup>th</sup> Amendment. Three days later in a joint session, President of the Senate Mike Pence presided over the counting with

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<sup>55</sup> George H.W. Bush lost reelection to William Jefferson Clinton in 1992.

<sup>56</sup> Dave Leip, "2020 Presidential General Election Results," Dave Leip's Atlas of U.S. Presidential Elections, accessed May 11, 2021, <https://uselectionatlas.org/RESULTS/index.html>.

<sup>57</sup> Dan Barry and Sheera Frenkel, "'Be There. Will Be Wild!': Trump All but Circled the Date," *New York Times*, January 6, 2021, <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html>.

Speaker of the House Nancy Pelosi. Presiding over the vote counting is a very scripted affair. Trump rewrote the script without telling anyone but shared it with his followers.

The rally on January 6, 2021 was not a sunny and happy event. The main attraction believed the 2020 election to have been fraudulent and his crowd agreed with him. President Trump throughout his rant guilt tripped the vice president into making sure the outcome was nothing but Trump/Pence and not Biden/Harris. The Congress began the vote count but it was stopped early at Arizona as Representative Paul Gosar of Arizona and U.S. Senator from Texas, Ted Cruz, objected to the certification of the state's electoral votes. That adjourned the joint session back to two separate chambers.

Just as that was going on, the rally goers were making their way to the Capitol per Trump's decree.<sup>58</sup> The Capitol was being stormed by a mob of Trump followers who believed his big lie about the election. Their goal was to prevent the certification of the Electoral College votes. They wanted Mike Pence and Nancy Pelosi. Democracy was in danger. The proceedings were halted and the Capitol overrun by misinformed citizens. By the end of the night the tide had turned. The Capitol was liberated from the lost cause effort and the Congress was certifying the 2020 presidential election results. Vice President Pence declared Joe Biden and Kamala Harris the next president and vice president of the United States. Democracy survived the day.

That infamous day, alongside December 7 and September 11, January 6 challenged the resolve of the United States. Those actions instigated by the president demanded a response from the people's voices in government. Those actions were moments for which cries of impeachment and the 25<sup>th</sup> Amendment were made. Americans against Trump cried either impeachment or invoke the 25<sup>th</sup>! It did not seem to matter in their minds. Impeachment, if convicted, would

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<sup>58</sup> Barry and Frenkel, "Be There. Will Be Wild!"

remove the president from office. The 25<sup>th</sup> Amendment, section 4 would leave him as president but without the powers and he could challenge it. The high bar of needing 2/3 of Congress to prevent the president from resuming their powers is a testament to the seriousness the situation demands. A president encouraged a riot on the Capitol to prevent the certification of a lawful election. Americans believed this was an impeachable offense and a reason to invoke section 4 of the 25<sup>th</sup> Amendment, they know there are no real limits for either.

Whether impacted by cries from social media or not, Speaker Pelosi offered the 25<sup>th</sup> Amendment as the first response to the January 6 insurrection. The speaker's only role in the amendment process is receiving letters in both sections 3 or 4. By January 10, the House was ready to impeach Donald Trump, again. But before they did that, they offered a patriotic olive branch to the vice president of the United States. The House Resolution asked Pence to invoke section 4 of the 25<sup>th</sup> Amendment, if not then the House would move to impeach.<sup>59</sup> Here Speaker Pelosi was appealing to the ego of the outgoing president. The 25<sup>th</sup> Amendment allowed him to remain president while Pence simply would be an acting president. Impeachment could mean removal right before the finish line. Going the amendment route was not as disgraceful, but how can that be considered disgraceful when compared to inciting an insurrection on the U.S. Capitol.

The 25<sup>th</sup> Amendment cannot be used as a partisan tool, unless the vice president is of the other political party. Whereas impeachment can be used as a partisan weapon, see the Johnson 17 and Clinton impeachments, the 25<sup>th</sup> Amendment has to come from a political ally or allies. Presidential candidates have a say in who their running-mate will be, the most undemocratic part

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<sup>59</sup> U.S. Congress, House, *Calling on Vice President Michael R. Pence to convene and mobilize the principal officers of the executive departments of the Cabinet to activate section 4 of the 25<sup>th</sup> Amendment to declare President Donald J. Trump incapable of executing the duties of his office and to immediately exercise powers as acting President*, HR 21, 117<sup>th</sup> Cong., 1<sup>st</sup> Sess., *Congressional Record* 167., <https://www.congress.gov/bill/117th-congress/house-resolution/21?q=%7B%22search%22%3A%5B%22h.+res.+25th+amendment%22%5D%7D&r=2&s=2>



of the whole election process. The president appoints the members of the Cabinet. Even if the Congress chose to create a body to circumvent using the Cabinet, the vice president would still have to agree. Speaker Pelosi would accept a letter from him.

The public call from Pelosi to the vice president was the grandest use of the 25<sup>th</sup> Amendment, section 4. Section 1 is always going to be the grandest, but no one ever needs to really invoke it as it just happens. Section 2 has its excitement as it is the appointment of the second most powerful person in the country and first in line for the most powerful job in the world. Section 3 is brief and quick. One can sleep through an acting presidency. Section 4 up to that point had been quietly talked about behind closed doors. Now, the 25<sup>th</sup> Amendment was being called from by the public through social media hashtags and those behind closed doors of executive branch law enforcement offices like Rosenstein and McCabe in 2017. This House resolution was nothing more than a courteous gesture before moving to impeachment. It was a House resolution and not a joint resolution as the Senate was still controlled by the Republicans.

The vice president responded. Through a letter to the speaker, he lets everyone know he was “shocked and saddened” by the attack on the Capitol. No real condemnation but he went on to write that Democrats were playing “political games at a time so serious in the life of our Nation.” “Serious” moment was believing the big lie pushed by President Trump and the storming of the Capitol where rioters chanted “Hang Mike Pence!” as the Secret Service rushed the Second Family to safety. The V.P. went on writing his understanding of the 25<sup>th</sup> Amendment necessitated a mental inability which he believed did not exist and instead the amendment was being used for political purposes to punish the president. Pence also mentioned “usurpation” before stating the terrible precedent it would set by invoking the amendment. He believed the Democrats would further divide the nation with efforts like section 4 or impeachment. Pence

believed deciding against invoking section 4 would be in the best interests of the country.<sup>60</sup> So, for the first time in presidential history, a president would be impeached for a second time. Trump would be out of office by the time the Senate acquitted him of engaging “in high Crimes and Misdemeanors by inciting violence against the Government of the United States” on January 6, 2021.<sup>61</sup> Impeachment failed and so did section 4.

With Pence’s rejection of using section 4 brought an end to the calls which had been yelling since before the inauguration in 2017. Today in a post-Trump presidency, the political right on social media use talk of the 25<sup>th</sup> Amendment in a political world that exists in a Fox News created reality and President Joe Biden will suffer some mental incapacitation leading to the 25<sup>th</sup> Amendment and put Kamala Harris in charge. That kind of talk is only that of the people online, just as it was when Trump was in office. The only time the 25<sup>th</sup> Amendment was seriously considered was on January 11, 2021, offering Pence the opportunity to take power away from the president who sent the mob to hang him if the election count did not end with Trump as president. The 25<sup>th</sup> Amendment’s section 4 will probably not fully go away, as now Americans when disappointed in their president will either call for impeachment or the 25<sup>th</sup> Amendment, or both.

#### **IV – Invoking a Section Break**

Popular entertainment like *Air Force One* and others informed a population with short attention spans about a constitutional process involving presidential power. Hollywood has successfully mined the source material, the 25<sup>th</sup> Amendment, and will probably continue to pull

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<sup>60</sup> Michael R. Pence, January 12, 2021, in *Trump White House Archives*, <https://trumpwhitehouse.archives.gov/briefings-statements/letter-speaker-nancy-pelosi-25th-amendment-resolution/>.

<sup>61</sup> U.S. Congress, House, *Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors*, H Res. 24, 117<sup>th</sup> Cong., 1<sup>st</sup> sess., introduced in House January 11, 2021, <https://assets.documentcloud.org/documents/20449065/house-impeachment-resolution-final.pdf>.

from it, especially section 4. Presidents transferring power was inferred in the Constitution under Article 2, section 1, clause 6, but never happened until Reagan did so in 1985. When given the chance in 1981 following the assassination attempt, invoking 3 or 4 would show weakness to their Cold War opponents. By 1985, after a landslide reelection, maybe it was all right to transfer power and in the letter state why the president disagrees with invoking it for such purposes as his colonoscopy. Bush 43 normalized it in the 21<sup>st</sup> Century by invoking section 3 twice. The idea of President Trump possibly needing to invoke it because of COVID-19 brought back the fear of looking weak when invoking section 3. For Trump there was no geopolitical opponent, but rather maintaining a wannabe strongman appearance which section 3 would diminish. Presidents rarely transfer power, three brief moments since 1967 and never before.

The framers of the amendment crafted section 4 to be broad enough to include having to reign in an unruly president when they fall out of the definition of “treason, bribery, or other high Crimes and Misdemeanors,” what it is supposed to take to impeach a president. Section 4 requires the vice president to take action. In the pre-25<sup>th</sup> Amendment world of Garfield and Wilson, the secretaries of state pushed for making their vice presidents acting presidents. Both, Arthur and Marshall, declined for fear of being looked upon as usurpers. A fear of using section 4 after the Reagan assassination attempt, was that it would look like a coup by former Republican primary opponent turned vice president, Bush and his best friend, Reagan’s White House Chief of State, James Baker.

When Howard Baker was the Chief of Staff, section 4 was waved off with an observation of a president in superb condition. Outside of popular entertainment, section 4 was not heard of again until Donald Trump became an option for the presidency. His is the only presidency to have an amendment be constantly referenced. It was referenced as much as impeachment was

used against him, and other presidents impeached or not like Bush 43, Clinton, Reagan, Nixon, and Johnson 36. None of those presidents, all living in the 25<sup>th</sup> Amendment era, never had public calls for invoking the 25<sup>th</sup> Amendment. Those public calls came from watching films and TV shows with story elements and plot points involving the amendment. Those viewings translated to political participation calling for invoking what should be an easy remedy to a troublesome president, so went the thinking. However, removing a president from power is not an easy task.

A vice president has to be on board with invoking section 4. In 1981, it was feared to look like a coup, and in 2021 it was fear that it would divide the nation. Those both come down to the fear of usurpation of power, just as it was a fear in 1881 and 1919 and even in the film *Air Force One*.<sup>62</sup> Fear of looking like an usurper seems to be what prevents the invocation of the 25<sup>th</sup> Amendment's section 4, just as looking weak was a reason not to invoke section 3. Even in the days before the amendment, when given the option, vice presidents declined to become an acting president. In 2021, a mob sent by the president went after the vice president, and afterward the vice president did not think transferring power away from the president to the vice president was the best course of action for the nation in the divisive time, which was created by Trump.

The 25<sup>th</sup> Amendment was ratified to the Constitution in 1967 to correct errors, add features, and clarify the process on transference of presidential power, especially in times of uncertainty. Section 4 covers that uncertainty. It is broad enough to deal with a Garfield-like situation and a president who is a threat to the republic. The people are informed and entertained on the amendment's options for dealing with an unfit president. However, for section 4 to work a vice president needs to put the Constitution before the president and not fear being called an usurper but should in the end expect to be called a patriot.

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<sup>62</sup> Those moments are almost one hundred years apart, 1881-1981 and 1919-2021.

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