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Acting Cabinet Secretaries and the Twenty-Fifth Amendment

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ACTING CABINET SECRETARIES AND THE TWENTY-FIFTH AMENDMENT

James A. Heilpern *

ABSTRACT

The Twenty-Fifth Amendment of the United States Constitution contains a mechanism that enables the Vice President, with the support of a majority of the Cabinet, to temporarily relieve the President of the powers and duties of the Presidency. The provision has never been invoked, but was actively discussed by multiple Cabinet Secretaries in response to President Trump's actions on January 6, 2021. News reports indicate that at least two Cabinet Secretaries—Secretary of State Mike Pompeo and Treasury Secretary Steve Mnuchin—tabled these discussions in part due to uncertainties about how to operationalize the Amendment. Specifically, the Secretaries were concerned that the text of the Amendment did not specify whether Acting Cabinet Secretaries (of which there were three at the time) should be included in the vote.

This Article considers that question in light of both the common law and Supreme Court of the United States precedent, concluding that Acting Secretaries should indeed be counted. However, the Article also highlights the political risks caused by the text's ambiguity and proposes a legislative solution to sidestep the issue.

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INTRODUCTION

On January 6, 2021, tens of thousands of President Trump’s supporters from around the country converged on Washington, D.C., to attend the President’s “Save America Rally.”¹ The rally coincided with the date that Congress would convene and certify the results of the Electoral College vote for the 2020 presidential election.² That was deliberate. For months, the President had attacked the results of the election, alleging widespread voter fraud.³ By doing so, he convinced his most ardent supporters that he had actually won in a landslide and that the Democrats had stolen the election.⁴

At noon, President Trump spoke to the rally, giving a long, convoluted speech where he repeated his spurious claims of voter fraud: “We will never give up. We will never concede.”⁵ The speech was punctuated by chants from the audience, including calls to “Fight for Trump! Fight for Trump! Fight for Trump!”⁶ He called on the Vice President, as president of the Senate, to reject the electoral count and send the votes back to the states.⁷ The President knew that many in the crowd were armed—in fact, he had instructed the Secret Service to take away the metal detectors: “They’re not here to hurt me. Take the F-in’ mags away. Let my

1. Rebecca Shabad & Monica Alba, *Trump to Address D.C. Rally Where as Many as 30,000 People Are Expected*, live update to *Highlights and Analysis: Trump Commits to ‘Orderly Transition’ After Mob Storms Capitol*, NBC NEWS (Jan. 6, 2021, 6:56 AM), <https://www.nbcnews.com/politics/congress/blog/electoral-college-certification-updates-n1252864/ncrd1252964#blogHeader> [<https://perma.cc/RND2-2V2A>].

2. Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Chang, *A Timeline of How the Jan. 6 Attack Unfolded — Including Who Said What and When*, NPR (June 9, 2022, 9:11 AM), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> [<https://perma.cc/7ZJ8-ATY7>].

3. Steve Inskeep, *Timeline: What Trump Told Supporters for Months Before They Attacked*, NPR (Feb. 8, 2021, 2:32 PM), <https://www.npr.org/2021/02/08/965342252/timeline-what-trump-told-supporters-for-months-before-they-attacked> [<https://perma.cc/58E6-J7P9>].

4. Stephanie Coueignoux, *‘Save America’ Rally Participant Speaks About Jan. 6, 2021*, SPECTRUM NEWS 13 (Jan. 4, 2022, 5:01 PM), <https://www.mynews13.com/fl/orlando/news/2021/12/30/save-america-rally-participant-speaks-about-january-6th-2021> [<https://perma.cc/D6HX-2TGK>] (recounting the sentiments of a Save America Rally protestor who felt that “our Constitutional rights have been trampled on” after the election).

5. Lonsdorf et al., *supra* note 2.

6. Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/5UHE-QUNM>].

7. *See id.* (“All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people.”).

people in. They can march to the Capitol from here.”⁸ He concluded his speech encouraging the armed crowd to do just that: “[W]e fight. We fight like hell. And if you don’t fight like hell, you’re not going to have a country anymore.”⁹ He then urged his listeners to “walk down Pennsylvania Avenue” and “to try and give our Republicans, the weak ones because the strong ones don’t need any of our help. . . . the kind of pride and boldness that they need to take back our country.”¹⁰ Many in the audience did not need his encouragement. Crowds had begun surging towards the Capitol before the speech was even over.¹¹ According to reports, he would have joined them if his Secret Service detail had not forbidden it.¹²

Before the President’s speech, another group of Trump supporters had gathered on the east side of the Capitol building.¹³ By the time lawmakers gathered inside to officially count the Electoral College votes at 1:00 PM, a third group—formed in part from protestors leaving Trump’s speech—had formed on the west side.¹⁴ By 1:10 PM (around the time Trump was urging his listeners on the other side of the mall to “fight like hell”),¹⁵ they had breached the outer barricades.¹⁶ By 1:30 PM, this group of protestors had turned violent and broken through the metal fence surrounding the Capitol, clashing with police.¹⁷ The crowd—and violence—grew over the next hour, when the mob finally broke into the building.¹⁸

The President showed no remorse. Even as Senators and Members of Congress were being evacuated to a secure location to escape the mob, Trump doubled down in a tweet: “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving states a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which

8. H.R. REP. NO. 117-663, at 70 (2022).

9. Naylor, *supra* note 6.

10. *Id.*

11. Lonsdorf et al., *supra* note 2.

12. Samuel Benson, *Trump Says Secret Service Blocked Him from Joining Jan. 6 March to the Capitol*, POLITICO (Apr. 7, 2022), <https://www.politico.com/news/2022/04/07/trump-secret-service-capitol-riot-00023737> [<https://perma.cc/8TVS-GM2R>].

13. Lonsdorf et al., *supra* note 2.

14. *Id.*

15. Naylor, *supra* note 6.

16. Lonsdorf et al., *supra* note 2.

17. *Id.*

18. *Id.*

they were asked to previously certify. USA demands the truth!”¹⁹ As the riot raged on, the President resisted approving the deployment of the D.C. National Guard to help quell the rioting.²⁰ While he did call on the protestors to go home peacefully in subsequent social media posts, he did not condemn them.²¹ Instead he called the rioters “very special” and said that that they were “love[d].”²² Nor did he back away from his fraud claims, tweeting later that night that the events of the day were the natural outcome “when a sacred landslide election victory is so unceremoniously [and] viciously stripped away from great patriots who have been badly [and] unfairly treated for so long.”²³

In the days following the assault on Capitol Hill, pressure mounted for Vice President Pence to invoke Section 4 of the Twenty-Fifth Amendment,²⁴ a never-before-used provision that—if successful—would have allowed Pence to wrest control of the administration and become Acting President by declaring President Trump “unable to discharge the powers and duties of his office.”²⁵ The Amendment does not allow the Vice President to make this determination unilaterally, but requires him to marshal the support of “a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide”²⁶ and to transmit their collective determination in writing to Congressional leadership.²⁷ The Amendment allows the President to object to this determination.²⁸ In the case of a continued disagreement—between the President on the one hand and the Vice President and the Cabinet on the other—about the President’s

19. Brooke Singman, *Trump Slams His VP, Says Pence ‘Didn’t Have the Courage’ To Decertify Results of Presidential Election*, FOX NEWS (Jan. 6, 2021, 2:44 PM), <https://www.foxnews.com/politics/trump-slams-pence-says-he-didnt-have-the-courage-to-decertify-results-of-presidential-election> [https://perma.cc/HE3R-FVVS].

20. Joe Walsh, *Reports: Trump Resisted Sending National Guard to Quell Violent Mob at U.S. Capital*, FORBES, <https://www.forbes.com/sites/joewalsh/2021/01/06/reports-trump-resisted-sending-national-guard-to-quell-violent-mob-at-us-capitol/?sh=18c91b2d1e18> [https://perma.cc/THY2-YT2A] (Jan. 6, 2021, 9:51 PM).

21. Kevin Breuninger, *Trump Tells Capital Rioters to ‘Go Home’ But Repeatedly Pushes False Claim That Election Was Stolen*, CNBC, <https://www.cnbc.com/2021/01/06/trump-tells-capitol-rioters-to-go-home-now-but-still-calls-the-election-stolen.html> [https://perma.cc/5DLV-XRP8] (Jan. 6, 2021, 7:20 PM).

22. *Id.*

23. H.R. REP. NO. 117-663, at 580 (2022).

24. *See* H.R. Res. 21, 117th Cong. (2021).

25. U.S. CONST. amend. XXV, § 4.

26. U.S. CONST. amend. XXV, § 4.

27. U.S. CONST. amend. XXV, § 4.

28. U.S. CONST. amend. XXV, § 4.

ability, the decision is kicked to Congress, which must decide the matter within twenty-one days.²⁹

Multiple news outlets reported that at least three Cabinet Secretaries—Secretary of State Mike Pompeo, Secretary of the Treasury Stephen Mnuchin, and Secretary of Education Betsy DeVos—held informal discussions within their own agencies about the possibility of invoking the Twenty-Fifth Amendment.³⁰ Despite mounting pressure from Members of Congress, including Speaker of the House Nancy Pelosi, Senate Minority Leader Chuck Schumer, and several GOP Members of Congress, there appeared to be no appetite within the Cabinet to do so.³¹ According to reports, Pompeo and Mnuchin were both concerned about the legal uncertainty about “whether [the] secretaries serving in ‘acting’ roles would be able to participate in a vote to remove.”³² This problem was quickly compounded as Secretary DeVos and Secretary of Transportation Elaine Chao resigned in protest over the January 6 riot, bringing the total number of “Acting” Cabinet Secretaries to five.³³

This Article will tackle the open constitutional question of whether Acting Cabinet Secretaries have a role to play in the operationalization of Section 4. In Part I of this Article, I will survey the drafting history of Section 4 of the Twenty-Fifth Amendment, to show how the drafters settled on the relatively opaque language. Part II of this Article will then discuss moments during the Reagan, Trump, and Biden administrations when invocation of Section 4 has been discussed. Part III of this Article will then elaborate on the ambiguous nature of the language of the Twenty-Fifth Amendment and why it could prove problematic for a Vice President attempting to invoke Section 4. Part IV of this Article will

29. U.S. CONST. amend. XXV, § 4.

30. Kayla Tausche, *Pompeo, Mnuchin Among Cabinet Secretaries Who Discussed 25th Amendment with Staff, Sources Say*, CNBC, <https://www.cnbc.com/2021/01/07/mnuchin-pompeo-discussed-trump-removal-after-dc-riots.html> [<https://perma.cc/A9FF-H9G2>] (Jan. 8, 2021, 9:13 AM); Jordan Williams, *Pompeo, Mnuchin Among Trump Cabinet Members Who Discussed 25th Amendment: Report*, THE HILL (Jan 8, 2021, 9:21 AM), <https://thehill.com/homenews/administration/533303-pompeo-mnuchin-among-trump-cabinet-members-who-discussed-25th/> [<https://perma.cc/9Q3F-2FBB>].

31. Williams, *supra* note 30.

32. *Id.*

33. Kaitlan Collins, Jeremy Diamond, Kevin Uptak & Kate Bennett, *Second Cabinet Member Announces Resignation over Trump’s Response to Riot*, CNN, <https://www.cnn.com/2021/01/07/politics/elaine-chao-cabinet-resignation-trump/index.html> [<https://perma.cc/BA3Z-EZ6E>] (Jan. 8, 2021, 12:52 AM).

then show that, based on existing precedent of the Supreme Court of the United States, Acting Cabinet Secretaries should be considered “Officers of the United States” for purposes of the Twenty-Fifth Amendment. Finally, Part V will propose solutions for navigating around this ambiguity.

I. DRAFTING HISTORY OF THE TWENTY-FIFTH AMENDMENT

In many respects, the “Father of the Twenty-Fifth Amendment” was a young judge advocate general officer named John Feerick.³⁴ A recent graduate of Fordham University School of Law, Feerick became interested in the problem of continued presidential disability after reading a newspaper article on the subject.³⁵ At the time, the only mention of presidential succession in the U.S. Constitution was in the Succession Clause of Article II, which left much to be desired:

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.³⁶

But what constituted presidential “*Inability*”? And who got to decide when the President was unable to “discharge the Powers and Duties” of his office? The Constitution didn’t say.

Over the next two-and-a-half years, Feerick toiled away at what would become the seminal law review article on the topic: *The Problem of Presidential Inability—Will Congress Ever Solve It?*³⁷ In it, Feerick identified a number of constitutional questions left open by the Succession Clause; chronicled how those shortcomings had played out over the country’s first two centuries; compared the

34. See Fordham’s John Feerick, *Citizen Lawyer and Drafter of 25th Amendment, to Receive ABA’s Highest Honor*, AM. BAR ASS’N (June 16, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/06/fordham_s_john_feeri/ [https://perma.cc/U4JG-2WK9] (noting Feerick’s role in assisting with the drafting of the Twenty-Fifth Amendment).

35. See John D. Feerick, *The Twenty-Fifth Amendment: A Personal Remembrance*, 86 FORDHAM L. REV. 1075, 1075 (2017).

36. U.S. CONST. art. II, cl. 6.

37. John D. Feerick, *The Problem of Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).

Succession Clause to parallel provisions in state and foreign constitutions; and described various solutions proposed over the last century.³⁸ Then, in his conclusion, he proposed the following amendment to address the problem:

1. In cases of death, resignation or removal the Vice-President becomes President for the remainder of the term.
2. In cases of inability, the Vice-President exercises the powers and duties of the office for the duration of the inability.
3. The President may declare his own inability.
4. Where the President is unable to or does not declare his own inability, the Vice-President may make the determination of inability.
5. In either 3 or 4 above, the President can declare the cessation of the inability.
6. In making any determination, it is recommended that the Vice-President secure the opinions of the Heads of Executive Departments.
7. If an inability crisis should arise during a recess of Congress, the Vice-President may convene an extraordinary session thereof.³⁹

Feerick tried to “drum up support” for his amendment by sending reprints of his article to dozens of stakeholders including President John F. Kennedy, Vice President Lyndon B. Johnson, Attorney General Robert Kennedy, senators, scholars, the American Bar Association (“ABA”), and former Presidents and Vice Presidents.⁴⁰ The response was courteous but disinterested. The response from future Supreme Court Justice Lewis F. Powell Jr., then president-elect of the ABA, was telling: “The ABA is indeed interested in this question, and I am sure your article will be most helpful *if* we should be called upon again to testify.”⁴¹ It appeared that Feerick’s article was destined to gather dust and be forgotten.⁴² Despite the fact that four of the ten presidents of the twentieth century had had sustained periods of inability, the presence of “a young, able and healthy President” in the White House (John F. Kennedy) appeared to have banished the recurring problem from the minds of Congress and the public.⁴³

But everything changed on November 22, 1963—one month after Feerick’s article was first published—when President Kennedy was

38. *See generally id.*

39. *Id.* at 128.

40. Feerick, *supra* note 35, at 1076–77.

41. *Id.* at 1077 (emphasis added).

42. *Id.* at 1076–78 (discussing how Feerick’s analysis pertaining to presidential inability was largely theoretical and academic until the assassination of President Kennedy).

43. Feerick, *supra* note 37, at 76.

assassinated.⁴⁴ Although Kennedy passed away quickly, the media “discussed what might have happened if,” like several of his predecessors, he “had lived but was disabled.”⁴⁵ Overnight, Feerick’s article was suddenly taken very seriously. The day after the President was shot, *New York Times* reporter Arthur Krock discussed Feerick’s views in his column.⁴⁶ CBS News reached out to Feerick and requested copies to help it develop a program on presidential succession.⁴⁷ The ABA refocused their reform efforts and convened a conference to discuss “presidential inability and vice presidential vacancy.”⁴⁸ Feerick’s article was the “leadoff reading” assigned to each participant, which included senators, leading scholars, and Feerick.⁴⁹

After two days of discussion, the following consensus emerged for the content of a proposed amendment:

- (1) In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice-President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;
- (2) in the event of the death, resignation or removal of the President, the Vice-President or the person next in line of succession shall succeed to the office for the unexpired term;
- (3) the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice-President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide;
- (4) the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice-President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress; and
- (5) when a vacancy occurs in the office of the Vice-President the President shall nominate a person who, upon approval by a majority of the

44. Feerick, *supra* note 35, at 1075, 1078.

45. *Id.* at 1078.

46. *Id.* at 1078 & nn.20–21 (citing Arthur Krock, *Kennedy’s Death Points Up Orderly Progression in U.S. Government*, N.Y. TIMES, Nov. 23, 1963, at E9).

47. *Id.*

48. *Id.*

49. *Id.* at 1079–80.

elected members of Congress meeting in joint session, shall then become Vice-President for the unexpired term.⁵⁰

At approximately the same time, several senators introduced their own proposed amendments to deal with the problem of presidential disability and succession—including Senator Birch Bayh, the junior Senator from Indiana who served as chairman of the Subcommittee on Constitutional Amendments.⁵¹ His bill, Senate Joint Resolution 139, paralleled the ABA's proposal on a number of fronts, including a provision that would allow the Vice President—when acting in consort with other senior executive officers—to declare the President disabled and assume “the powers and duties of the office as Acting President.”⁵² But unlike the ABA's proposal, Bayh's bill did not explicitly mention “the Cabinet,” choosing instead the clunky phrase “heads of the executive departments” that had been used in Feerick's law review article.⁵³ That change was intentional. As Senator Bayh later explained, the drafters were reluctant to put “additional language in the Constitution that has no precedent.”⁵⁴ Instead, they “tried to remain as faithful as possible to the pre-existing language of the Constitution even while remedying its dangerously incomplete solution.”⁵⁵

Bayh's bill cleared committee with only minor modifications, and was eventually approved by a unanimous Senate by a voice vote.⁵⁶ The next day, however, Senator John Stennis of Mississippi insisted that the chamber reconsider its vote on the ground that only nine senators were present at the time of the vote: “[S]o small an attendance would give any proposed amendment to the Constitution a ‘limping start’ toward final passage in the [House] and approval by the States of the United States. . . . [T]he [CONGRESSIONAL] RECORD [should] show affirmatively that a quorum was actually present at that time and passed on the measure.”⁵⁷ A roll

50. *Id.*

51. *Id.* at 1080–81.

52. S.J. Res. 139, 88th Cong. (1964).

53. *Id.*; John D. Feerick, *The Twenty-Fifth Amendment—In the Words of Birch Bayh, Its Principal Author*, 89 *FORDHAM L. REV.* 31, 32, 42 (2020).

54. *Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 94, 60 (1965) [hereinafter *Presidential Inability Hearings*].

55. Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 *YALE L. & POLY REV.* 459, 486 (2009).

56. See S. Rep. 88-1382, at 1–2 (1964); 110 *CONG. REC.* 23001–02 (1964); see also John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 *FORDHAM L. REV.* 173, 186 (1965) (describing how the bill made its way through the Senate).

57. 110 *CONG. REC.* 23056–57 (1964).

call was taken, and the bill was approved a second time sixty-five to zero.⁵⁸ Sections 4 and 5—the relevant sections dealing with inability—read as follows:

Sec. 4. If the President does not so declare [his own disability], and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his 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.

Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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.⁵⁹

The House of Representatives, however, refused to act on the Senate's bill before the end of the year and the expiration of the 88th Congress.⁶⁰ But a national consensus was emerging, and momentum was building. In his State of the Union address in January 1965, President Lyndon B. Johnson vowed to “propose laws to ensure the necessary continuity of leadership should the president become disabled or die.”⁶¹ Congress acted immediately. Two days after the President's speech, Senator Bayh—along with over seventy co-sponsors—introduced Senate Joint Resolution 1, with identical wording to the bill passed by the Senate the previous year.⁶² Representative Emanuel Celler, a Democrat from New York and chair of the House Judiciary Committee, introduced an identical measure in the House.⁶³ Nearly thirty other competing proposals

58. *Id.* at 23060–61.

59. Feerick, *supra* note 56, at 204 (quoting S.J. Res. 139, 88th Cong. (1964)).

60. *Id.* at 186 (noting that it was the bill was reintroduced in the 89th Congress).

61. Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 8 (Jan. 4, 1965).

62. S.J. Res. 1, 89th Cong. (1965), H.R. REP. NO. 89-564, at 1–2 (1965) (Conf. Rep.); Feerick, *supra* note 56, at 186.

63. H.R.J. Res. 1, 89th Cong. (1965), *Presidential Inability Hearings*, *supra* note 54, at 10.

were introduced in the House more or less simultaneously.⁶⁴ A full history of the debate over these bills is beyond the scope of this Article.⁶⁵ Instead, the remainder of this Section will focus on the evolution of language describing the procedure by which the Vice President (1) may declare the President disabled and (2) challenge a President's assertion that his disability has passed.

The Senate made a number of changes to Bayh's original language including: requiring the Vice President to send his written declarations directly to the "President of the Senate and Speaker of the House of Representatives" rather than just "Congress" in order to assure that the legislature was immediately notified; changing the phrase "Congress shall immediately decide the issue" to "Congress shall immediately *proceed* to decide the issue," in order to allow Congress time to collect evidence, debate, and arrive at a reasoned decision about who to believe; and—most relevant for the purposes of this Article—changing "heads of the executive departments" to "*principal officers* of the executive departments" in order to parallel the terminology of Article II, Section 2 of the existing Constitution.⁶⁶ The Senate approved Senate Joint Resolution 1 as amended by a vote of seventy-two to zero.⁶⁷ The language of Section 4 and 5 was as follows:

Sec. 4. Whenever the Vice President, and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmit to the President 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.

Sec. 5. Whenever the President transmits to the President 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, with the written concurrence of a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmits within seven days to the President 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 immediately proceed to decide the issue. If

64. See *id.* at 186–94 (discussing various proposed amendments).

65. See generally JOHN FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (3d ed. 2014) for a full account.

66. *Presidential Inability Hearings*, *supra* note 54, at 10, 16, 36, 46, 55, 100 (emphasis added).

67. 111 CONG. REC. 3285–86 (1965).

the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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.⁶⁸

The debate in the House took longer, in part because it was considering thirty competing proposals in addition to House Joint Resolution 1.⁶⁹ Everything was on the table. In the end, though, the House approved a version of House Joint Resolution 1 that was substantially similar to the proposed Amendment passed by the Senate.⁷⁰ Among the most significant differences was the imposition of a time limit for Congress to resolve the Vice President's challenge to the President's declaration that no inability exists.⁷¹ Unlike the Senate version which simply required the Congress to "immediately proceed to decide the issue," the House bill forced Congress to vote "within ten days after the receipt of the [second] written declaration of the Vice President and a majority of the principal officers of the executive departments."⁷² The House version combined Sections 4 and 5, which read as follows:

Whenever the Vice President and a majority of the principal officers of the executive departments, or 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 the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two 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, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as

68. *Presidential Inability Hearings*, *supra* note 54, at 43.

69. *Id.* at III (discussing thirty-seven proposals in addition to H.R.J. Res. 1).

70. 111 CONG. REC. 7959–69 (1965) (discussing amendments to the resolution and its eventual passing).

71. *Id.* at 7940 (statement of Mr. Emanuel Celler).

72. H.R. REP. NO. 89-203, at 1–2 (1965).

Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the 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.⁷³

A conference committee was appointed to iron out differences between the House and Senate versions of the Amendment.⁷⁴ Among the many changes made,

[t]he expression “the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide” was changed to “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.”⁷⁵

The conference committee’s version was ultimately approved by Congress and sent to the states for ratification.⁷⁶ It became the Twenty-Fifth Amendment of the United States Constitution on February 10, 1967, after Nevada became the thirty-eighth state to ratify it.⁷⁷

II. CLOSE CALLS WITH SECTION 4

In popular culture, Section 4 of the Twenty-Fifth Amendment has been a rich source of inspiration for the screen writers of political dramas. For example, in episode twelve of season four of *Madam Secretary*, President Conrad Dalton becomes emotionally belligerent due to an unknown but fast-growing brain tumor.⁷⁸ The Vice President and the Cabinet convene and invoke Section 4 in order to prevent President Dalton from ordering a missile strike on Russia’s satellite system, an act that would have almost certainly triggered World War III.⁷⁹ Likewise, in the television miniseries *Political Animals*, Air Force One crashes into the ocean with the President on board.⁸⁰ Because the fate of the President is uncer-

73. *Id.*

74. Feerick, *supra* note 56, at 193.

75. *Id.* at 194 (first quoting H.R. REP. NO. 89-203, at 1–2 (1965); and then quoting H.R. REP. NO. 89-564, at 1–2 (1965) (Conf. Rep.)).

76. Proposed Amendment to the Constitution of the United States, 79 Stat. 1327 (1965) (ratified at U.S. CONST. amend. XXV); FEERICK, *supra* note 65, at 104.

77. S. DOC. NO. 112-9, at 42 n.17 (2017).

78. *Madam Secretary: Sound and Fury* (CBS television broadcast Jan. 14, 2018).

79. *Id.*

80. *Political Animals: Resignation Day* (USA Network television broadcast Aug. 19, 2012).

tain, the Cabinet debates whether they should simply swear in the Vice President as President—as would be proper if the President had died—or invoke Section 4.⁸¹

But in real life, Section 4 has never been invoked. That does not mean, however, that it has not been considered. Sources indicate that there were discussions about utilizing Section 4 during the Reagan, Trump, and Biden presidencies.⁸²

A. *Ronald Reagan*

Questions about President Ronald Reagan’s mental fitness arose during his second term in office.⁸³ In fact, in 1987 when Howard Baker was appointed White House Chief of Staff, he was told by his predecessor’s staff that Reagan was “inattentive,” “inept,” “lazy,” and that Baker “should be prepared to invoke the [Twenty-Fifth] Amendment to relieve him of his duties.”⁸⁴ As a result, Baker arranged a meeting to test the President’s mental competency.⁸⁵ According to Edmund Morris, Reagan’s official biographer:

The incoming Baker people all decided to have a meeting with [Reagan] on the Monday morning, their first official meeting with the president, and to cluster around the table in the Cabinet Room and watch him very, very closely to see how he behaved, to see if he was indeed losing his mental grip. They positioned themselves very strategically around the table so they could watch him from various angles, listen to him and check his movements, and listen to his words and look into his eyes. . . . And Reagan who was, of course, completely unaware that they were launching a death watch on him, came in stimulated by the press of all these new people and performed splendidly. At the end of the meeting they figuratively threw up their hands realizing he was in perfect command of himself.⁸⁶

Baker himself came away from the meeting convinced the President was perfectly competent: “Ladies and gentlemen, is this president fully in control of his presidency? Is he alert? Is he fully engaged? Is he in contact with the problems? And I’m telling ya, it’s

81. *Id.*

82. *See infra* Sections II.A–C.

83. *American Experience: Reagan (Part 2)* (PBS television broadcast Feb. 24, 1998).

84. *Id.*

85. Jack Nelson, *Aide’s ‘87 Memo Raised Question of Removing Reagan from Office*, WASH. POST (Sept. 15, 1988), <https://www.washingtonpost.com/archive/politics/1988/09/15/aides-87-memo-raised-question-of-removing-reagan-from-office/a9ec7c98-2783-4362-8d9c-a41664af057/> [<https://perma.cc/T9AB-VXBG>].

86. *American Experience: Reagan (Part 2)*, *supra* note 83.

just one day's experience and maybe that's not enough, but today he was superb."⁸⁷ The question of invoking the Twenty-Fifth Amendment was never raised again.

There was one other, earlier time during the Reagan presidency when Section 4 probably should have been invoked but was not. On March 30, 1981, Reagan was shot by John Hinckley, Jr.⁸⁸ He was thereafter rushed into surgery and put under general anesthesia.⁸⁹ Had Vice President George H.W. Bush not been in the air at the time of the shooting,⁹⁰ he probably would have invoked Section 4 and assumed the "powers and duties" of the office as Acting President. But by the time he landed, Reagan was already out of surgery.⁹¹

B. *Donald Trump*

The specter of Section 4 of the Twenty-Fifth Amendment dogged Donald Trump throughout his presidency. For example, after Trump fired James Comey as Director of the Federal Bureau of Investigation, reports indicated that Deputy Attorney General Rod Rosenstein had discussed the possibility of invoking the Twenty-Fifth Amendment with colleagues within the Department of Justice.⁹² Then, in September 2018, *The New York Times* ran an anonymous op-ed by a senior administration official—later identified as Miles Taylor, then Chief of Staff at the Department of Homeland Security⁹³—which indicated that several Cabinet members had considered utilizing Section 4 as a way to remove Trump from

87. *Id.* (airing Baker's conclusions on Reagan's competency); Nelson, *supra* note 85.

88. Del Quentin Wilber, *At 30,000 Feet, George H.W. Bush Confronted the Most Difficult Hours of His Vice Presidency*, L.A. TIMES (Dec. 1, 2018, 1:00 PM), <https://www.latimes.com/nation/la-na-pol-bush-reagan-assassination-attempt-20181201-story.html> [<https://perma.cc/MVQ6-MAN9>].

89. *Who's in Charge? The 25th Amendment and the Attempted Assassination of President Reagan*, REAGAN LIBR. EDUC. BLOG (Jan. 8, 2021), <https://reagan.blogs.archives.gov/2021/01/08/whos-in-charge-the-25th-amendment-and-president-reagans-assassination-attempt/> [<https://perma.cc/XZ8Z-AV4T>].

90. Wilber, *supra* note 88.

91. *Id.*

92. 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> [<https://perma.cc/UBE2-QPNE>].

93. Michael D. Shear, *Miles Taylor, A Former Homeland Security Official, Reveals He Was 'Anonymous'*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/politics/miles-taylor-anonymous-trump.html> [<https://perma.cc/W3PR-NE85>].

power.⁹⁴ There were even hints that his staff might have concerns about his mental faculties, as indicated by reports of Trump bragging about passing a test designed to test for dementia.⁹⁵

But the closest Trump came to being relieved of the powers and duties of his office came in the moments following the January 6 riot. As mentioned above, at least three Cabinet Secretaries considered invoking Section 4 to wrest Trump from power.⁹⁶ When Vice President Pence refused to consider such a course of action, Secretary of Education Betsy DeVos resigned in protest.⁹⁷ Cassidy Hutchinson—a former aide to White House Chief of Staff Mark Meadows—told the House Select Committee to Investigate the January 6th Attack on the United States Capitol that it was concerns over the possibility of the Twenty-Fifth Amendment being invoked that helped persuade the President to film and release a video statement condemning the attacks.⁹⁸

C. Joe Biden

At age eighty, President Joe Biden is the oldest man to ever hold the nation's highest office.⁹⁹ As a result, just as occurred with Ronald Reagan, questions about Biden's mental acuity have run rampant. In July 2022, *The New York Times* published a dossier on Biden's health, noting that he is “generally a five- or five-and-a-

94. Opinion, *I am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> [<https://perma.cc/46S7-YZF6>].

95. Ashley Parker & Josh Dawsey, *Trump Increasingly Preoccupied with Defending his Physical and Mental Health*, N.Y. TIMES (Jun. 22, 2020, 6:03 PM), https://www.washingtonpost.com/politics/trump-increasingly-preoccupied-with-defending-his-physical-and-mental-health/2020/06/22/c7e0a95c-b3ed-11ea-9b0f-c797548c1154_story.html [<https://perma.cc/P T3W-XYF4>].

96. See *supra* notes 30–33 and accompanying text.

97. Michael Stratford, *DeVos Resigned After Believing 25th Amendment Was off the Table*, POLITICO (Jan. 8, 2021, 2:01 PM), <https://www.politico.com/news/2021/01/08/devos-resignation-trump-rioters-456574> [<https://perma.cc/C525-8GGA>].

98. *Compilation of Hearings on the January 6th Investigation: Hearings Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. 788–90 (2022) (statement of Ms. Cassidy Hutchinson, witness).

99. Joe Biden was also the oldest person ever sworn in as president, at seventy-eight. See Johnny Diaz, *Biden Is the Oldest President to Take the Oath*, N.Y. TIMES, <https://www.nytimes.com/2021/01/18/us/politics/joe-biden-age-oldest-presidents.html> [<https://perma.cc/HKS6-JJVY>] (Jan. 20, 2021).

half-day-a-week president.”¹⁰⁰ Although there are no confirmed reports of senior administration officials actively considering invoking the Twenty-Fifth Amendment, there have been some calls from Republicans to take that step.¹⁰¹

Less than one year into the Biden presidency, controversial former Representative Madison Cawthorn tweeted: “Joe Biden does not simply have a pattern of poor decision-making, his mental decline is on full display. We must not allow this mentally unstable individual to direct our country one second longer.”¹⁰² He released a video announcing that he had “sent letters to each member of the president’s cabinet and to the vice president asking that they invoke the [Twenty-Fifth] Amendment . . . and remove Joe Biden from his office.”¹⁰³ A year later, Representative Troy E. Nehls sidetracked a House Transportation Committee hearing to ask Secretary Pete Buttigieg whether he had “spoken to Cabinet members about implementing the [Twenty-Fifth] Amendment on President Biden.”¹⁰⁴ Buttigieg dismissed the question as “insulting” and insisted that Biden “is as vigorous a colleague or boss as I have ever had the pleasure of working with.”¹⁰⁵

III. THE PROBLEMATIC MATH OF THE TWENTY-FIFTH AMENDMENT

Because Section 4 of the Twenty-Fifth Amendment has never been invoked, it is unclear exactly how it would be operationalized.¹⁰⁶ As mentioned above, Secretary Pompeo and Secretary

100. Peter Baker, *At 79, Biden Is Testing the Boundaries of Age and the Presidency*, N.Y. TIMES (July 9, 2022), <https://www.nytimes.com/2022/07/09/us/politics/biden-age-democrats.html> [https://perma.cc/49J2-VECM].

101. Piers Morgan, Opinion, *It May Soon Be Time to Invoke the 25th Amendment on Ailing, Failing Biden*, N.Y. POST, <https://nypost.com/2022/07/11/it-may-soon-be-time-to-invoke-the-25th-amendment-on-ailing-failing-biden/> [https://perma.cc/M5UP-NJMG] (July 11, 2022, 1:47 PM).

102. Rep. Madison Cawthorn (@RepCawthorn), TWITTER (Aug. 26, 2021, 8:36 PM), <https://twitter.com/RepCawthorn/status/1431053017927856129> [https://perma.cc/32D4-Q9B2].

103. Brittany Whitehead, *Cawthorn Calls on U.S. Cabinet to Invoke 25th Amendment, Remove Biden from Office*, ABC 13 NEWS (Aug. 17, 2021), <https://wlos.com/amp/news/local/Madison-cawthorn-calls-on-us-cabinet-to-invoke-25th-amendment-remove-biden-from-office> [https://perma.cc/97WH-SSFF].

104. Andrew Jeong, *GOP Lawmaker Spars with Buttigieg Over Biden, 25th Amendment at Hearing*, WASH. POST (July 20, 2022, 2:48 AM), <https://www.washingtonpost.com/politics/2022/07/20/buttigieg-nehls-25th-amendment-biden-hearing/> [https://perma.cc/EH9L-DMZW].

105. *Id.*

106. Section 3, however, has been invoked on several occasions. See Gerhard Peters, *List of Vice-Presidents Who Served as Acting President Under the 25th Amendment*, THE

Mnuchin balked on January 6 in part because they were unclear whether Acting Cabinet Secretaries (of which there were three at the time) could participate in the vote to relieve a President of the powers and duties of his office.¹⁰⁷ This boils down to a math problem. Actually, *two* math problems. Section 4 of the Twenty-Fifth Amendment vests the decision to remove a President with the Vice President, who becomes acting President when he—acting in consort with “a majority of . . . the principal officers of the executive departments”—notifies congressional leadership of the president’s disability.¹⁰⁸ The word *majority* implies a fraction. But the presence of Acting Secretaries in the Cabinet complicates the calculation of both the numerator and the denominator of that fraction.

There are fifteen cabinet-level “executive departments”: the Department of State, the Department of the Treasury, the Department of Defense, the Department of Justice, the Department of the Interior, the Department of Agriculture, the Department of Commerce, the Department of Labor, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Transportation, the Department of Energy, the Department of Education, the Department of Veterans Affairs, and the Department of Homeland Security.¹⁰⁹ If each is headed by a Senate-confirmed Secretary (or Attorney General, in the case of the Department of Justice) the math is easy: a majority of fifteen means at least eight. But if some of these departments are led by Acting Secretaries, how much support would the Vice President need to invoke Section 4 of the Twenty-Fifth Amendment? If Acting Secretaries still qualify as “principal officers of the executive departments,” the math remains unchanged: eight. But if they do not, that changes both the numerator *and* the denominator of the fraction. If Acting Secretaries are not counted at all, there would be fewer principal officers serving as the heads of the executive departments, and thus a lower threshold would be needed to reach a majority. Thus, if there were three Acting Secretaries in the Cabinet—as was the case on January 6—the Vice

AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/list-vice-presidents-who-served-acting-president-under-the-25th-amendment> [<https://perma.cc/U8WM-HZEJ>] (Nov. 19, 2021) (listing all invocations of Section 3 of the Twenty-Fifth Amendment).

107. See *supra* notes 30–33 and accompanying text.

108. U.S. CONST. amend. XXV, § 4.

109. See *The Cabinet*, THE WHITE HOUSE, <https://www.whitehouse.gov/administrati-on/cabinet/> [<https://perma.cc/6PWR-QUVM>] (listing the fifteen executive departments in succession to the President).

President would only need the support of *seven* Senate-confirmed Cabinet officials. If there were ten Acting Secretaries (as frequently happens at the beginning and end of administrations), the Vice President would only need the support of *three*!

From a policy perspective, there are certainly horrific hypotheticals that can be spun regardless of which construction ultimately carries the day. If Acting Secretaries *do* count, an unstable President—perhaps one experiencing emotional volatility caused by a rapidly growing brain tumor—could circumvent the Twenty-Fifth Amendment by firing his entire Cabinet and installing yes-men as Acting Secretaries in an effort to cut the legs out from under a Vice President trying to steady the ship. Conversely, if Acting Secretaries *do not* count, a treasonous Vice President could seize control of the White House (and the nuclear codes) in the waning or early days of an administration with the support of just one or two co-conspirators who intentionally delayed their resignation from the Cabinet for this purpose. While these doomsday scenarios have provided Hollywood with a gold mine of scripts for political dramas, they do little to resolve the constitutional question. The answer to the constitutional question should be guided by the text of the Twenty-Fifth Amendment, its ratification history, and Supreme Court of the United States caselaw.

IV. WHO ARE THE “PRINCIPAL OFFICERS OF THE EXECUTIVE DEPARTMENTS?”

As shown above, the drafters of the Twenty-Fifth Amendment specifically refrained from introducing new language into the text that would complicate the ability to interpret the Constitution as a unified whole.¹¹⁰ Instead, they reused verbiage found elsewhere in the Constitution.¹¹¹ Article II, Section 2 of the Constitution speaks of officers in two places in reference to the powers of the chief executive.¹¹² First, it states that the President “may require the Opinion, in writing, of *the principal Officer in each of the executive Departments*, upon any Subject relating to the Duties of their respective Offices.”¹¹³ It also describes the President’s appointment power, granting him the authority “by and with the Advice and

110. See *supra* Part I.

111. See *supra* Part I.

112. U.S. CONST. art. II, § 2.

113. U.S. CONST. art. II, § 2 (emphasis added).

Consent of the Senate,” to “appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”¹¹⁴ This appointment power may be limited, however, by Congress with respect to “*inferior* Officers,” if they think it proper to “vest the Appointment” of a particular office “in the President alone, in the Courts of Law, or in the Heads of Departments.”¹¹⁵

Courts have generally held that identical words or phrases found in different sections of the same constitution should be typically interpreted to have the same meaning. For example, in *Eisner v. Macomber*, the Supreme Court determined that stock dividends were not taxable “income” under the Sixteenth Amendment.¹¹⁶ In that case, the Court emphasized that, “The Sixteenth Amendment *must be construed in connection with the taxing clauses of the original Constitution* and the effect attributed to them before the Amendment was adopted.”¹¹⁷ Accordingly, the Court ruled that Congress had written the Sixteenth Amendment in the backdrop of the Court’s decision in *Pollock v. Farmers’ Loan & Trust Co.*,¹¹⁸ which had determined that under Article I, Sections 2 and 9, taxes based on ownership could not be imposed by Congress without apportionment among the states according to population.¹¹⁹ Likewise, Justice Frankfurter—and in at least one instance, Justice Holmes—expressed skepticism that the Due Process Clauses of the Fifth and Fourteenth Amendments could have different meanings.¹²⁰

State courts have likewise endorsed the idea that constitutions should be interpreted as a unified whole.¹²¹ For example, the Su-

114. *Id.*

115. *Id.* (emphasis added).

116. 252 U.S. 189, 205, 219 (1920).

117. *Id.* at 205 (emphasis added).

118. 158 U.S. 601 (1895).

119. *Eisner*, 252 U.S. at 205.

120. *See, e.g., Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) (“To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.”); *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (“It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth.”); *Carroll v. Greenwich Ins. Co. of N.Y.*, 199 U.S. 401, 410 (1905) (Holmes, J.) (“While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth.”).

121. *Bobo v. Kulongoski*, 107 P.3d 18, 24 (Or. 2005) (“The people added subsection (2) to Article IV, section 25 [of the Oregon Constitution], in 1996, following a legislative referral,

preme Court of Massachusetts has held that its “Constitution and . . . amendments are also to be construed as an harmonious whole. Words occurring in different places in the Constitution and its amendments ordinarily should be given the same meaning unless manifestly used in different senses.”¹²² Likewise, the Supreme Court of Colorado has held:

It has been frequently held by this court and generally by all courts, that the Constitution, including all amendments thereto, must be construed as one instrument, and as a single enactment.

So that for the purposes of this case we most [sic] consider the two constitutional provisions under consideration, together with all other provisions of the fundamental law, as having been originally written therein,¹²³

This canon of constitutional interpretation is the key to determining whether Acting Secretaries should count as “principal officers of the executive departments.”¹²⁴ As a textual matter, there is nothing in the Amendment that specifically excludes Acting Secretaries unless: (1) an Acting Cabinet Secretary is not an “officer” at all; or (2) an Acting Cabinet Secretary is not a *principal* offi-

and nothing in the text or context of that subsection suggests that the phrase ‘bills for raising revenue’ in Article IV, section 25(2) has a different meaning than it has in Article IV, section 18.’); *Williamson v. City of High Point*, 195 S.E. 90, 96 (N.C. 1938) (“Since the word ‘debt’ as used in Art. VII, sec. 7, of the [North Carolina] Constitution has been so interpreted by the Court, proper interpretation will give to it the same meaning in a later amendment to the Constitution as in Art. V, sec. 4.”); *Hodgkin v. Ky. Chamber of Com.*, 246 S.W.2d 1014, 1016–17 (Ky. 1952) (“The general rule is, when an amendment is made to a provision in a constitution to which a certain construction has been given, it will be presumed its unchanged portions have the same meaning formerly given it by legislative or judicial construction.”); *Williams v. Wilson*, 972 S.W.2d 260, 273 (Ky. 1998) (“In readopting [a] provision [from Kentucky’s 1850 Constitution in its 1890 Constitution] verbatim and without debate, the delegates are presumed to have also adopted the construction given to it [by the Supreme Court of Kentucky between 1850 and 1890].”) (citation omitted).

122. *Raymer v. Trefry*, 132 N.E. 190, 191 (Mass. 1921). See also *In re Op. of the Justs.*, 197 N.E. 95, 99 (Mass. 1935) (finding the state constitution and its amendments “stand on the same footing” and thus should be interpreted to “form[] a single harmonious instrument”); *Op. of Justs. to House of Representatives*, 425 N.E.2d 750, 752 (Mass. 1981) (“We must construe a constitutional amendment as an harmonious whole”); *In re Op. of the Justs. to the Governor*, 964 N.E.2d 941, 946 (Mass. 2012) (quoting *In re Op. of the Justs.*, 197 N.E. at 99) (citing *Op. of Justs. to House*, 425 N.E.2d at 752).

123. *People v. Field*, 181 P. 526, 527 (Colo. 1919); see also *Dixon v. People*, 127 P. 930, 933 (Colo. 1912) (“This is true under the well established rule that the same meaning will be given to the same words occurring in different parts of the same constitution, unless it clearly appears therefrom that a different meaning was intended in some part alleged to be an exception.”).

124. U.S. CONST. amend. XXV, § 4; see also *Field*, 181 P. at 527 (articulating the canon of constitutional interpretation).

cer.¹²⁵ Here, we are on more familiar ground. The Supreme Court of the United States has been called upon on a number of occasions to draw lines between officers and non-officers and between principal officers and inferior ones¹²⁶—the very questions needed to answer the question of whether Acting Cabinet Secretaries can vote to relieve a sitting president of his powers and duties via the Twenty-Fifth Amendment.

A. *Acting Cabinet Secretaries are Officers of the United States*

For over 150 years, the Supreme Court has distinguished between federal *officers* on the one hand and government *employees* on the other.¹²⁷ Officers must be appointed through one of the approved appointment mechanisms specified in Article II, Section 2: presidential nomination with Senate confirmation, or appointment by the President alone, a department head, or court.¹²⁸ Employees, by contrast, may be hired any way Congress sees fit.¹²⁹ From an originalist perspective, this distinction between officers and employees is problematic and anachronistic, but it is an anachronism that has become deeply ingrained in the Court’s jurisprudence and one that the Court has shown no inclination to abandon. So, for our purposes, it makes sense to adopt when assessing whether Acting Cabinet Secretaries qualify as “officers” for purposes of the Twenty-Fifth Amendment.

The leading case for determining whether a particular government appointee is an “Officer[] of the United States” or a “mere employee[]” is *Lucia v. SEC*, a 2018 Supreme Court case that determined whether administrative law judges in the Securities and Exchange Commission qualified as “Officers.”¹³⁰ Justice Kagan wrote the majority opinion for the Court.¹³¹ Synthesizing past caselaw, she articulated a two-part test for conducting this analysis:

Two decisions set out this Court’s basic framework for distinguishing between officers and employees. [*United States v.*] *Germaine* held that

125. U.S. CONST. amend. XXV, § 4.

126. See *infra* Sections IV.A.3, IV.B.

127. See *infra* Sections IV.A.3, IV.B.

128. U.S. CONST. art. II, § 2, cl. 2.

129. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 & n.3 (2018).

130. *Id.* at 2050.

131. *Id.* at 2049.

“civil surgeons” (doctors hired to perform various physical exams) were mere employees because their duties were “occasional or temporary” rather than “continuing and permanent.” Stressing “ideas of tenure [and] duration,” the Court there made clear that an individual must occupy a “continuing” position established by law to qualify as an officer. *Buckley v. Valeo* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they “exercise[ed] significant authority pursuant to the laws of the United States.” The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.¹³²

The following Sections will show that an Acting Cabinet Secretary satisfies both prongs of the *Lucia* test and should therefore be considered an officer for purposes of both the Appointments Clause and the Twenty-Fifth Amendment. But first, there is a threshold question that must be answered: when the President appoints someone to serve as an Acting Cabinet Secretary, what office does she hold?

1. Acting Cabinet Secretaries are Separate, Distinct Offices

At the time of the January 6 riot, Jeffrey A. Rosen was serving as Acting Attorney General.¹³³ Was Rosen *the* Attorney General—holding the same office that had recently been vacated by William Barr? Or did he occupy some separate, distinct position called *Acting* Attorney General? Or did he remain Deputy Attorney General—the position he held prior to Attorney General William Barr’s resignation in December 2020—and simply take on extra duties without occupying a different office?

The Federal Vacancies Reform Act of 1998 suggests the latter: “[T]he President (and only the President) may direct an officer or employee of [an] Executive agency to perform *the functions and duties* of [a] vacant office temporarily in an acting capacity.”¹³⁴ Congress certainly could have used language which authorized the

132. *Id.* at 2051 (second and fourth alterations in original) (citations omitted) (first quoting *United States v. Germaine*, 99 U.S. 508, 508, 511–12 (1879); and then quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

133. See U.S. DEP’T OF JUST., OFF. OF PUB. AFFS., ACTING ATTORNEY GENERAL JEFFREY A. ROSEN REGARDING THE OVERRUNNING OF THE U.S. CAPITOL BUILDING (Jan. 6, 2021), <https://www.justice.gov/opa/pr/acting-attorney-general-jeffrey-rosen-regarding-overrunning-us-capitol-building> [<https://perma.cc/JM7Y-5UX5>] (referencing that Jeffrey A. Rosen was the Acting Attorney General on January 6, 2021).

134. Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, div. C, tit. I, § 151(b), 112 Stat. 2681, 2681–611 (codified at 5 U.S.C. § 3345(a)(3)) (emphasis added).

President to “appoint” an officer or employee to hold the vacant office or “appoint” the same to serve as an “acting officer.” But Congress appears to have intentionally avoided the language of appointment, and instead merely reallocated “the functions and duties of the vacant office.”¹³⁵

In 1792, the Second Congress—which included many of the delegates to Constitutional Convention—did the same when it passed the first piece of legislation to address the filling of vacancies:

[I]n case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.¹³⁶

Almost identical language was used in the second vacancies act passed by Congress in 1795.¹³⁷ Because of this, at least one scholar has concluded that the early “Congress[es] . . . viewed these [acting] officials as *not officers at all*”¹³⁸:

In drafting the text of [both vacancy acts], Congress seemed to take pains to avoid describing an acting officer as actually “holding” an office. Instead, these officials are “authorize[d] . . . to perform the duties of the said respective offices.” While such semantic distinctions should not necessarily make the difference between whether a statute is upheld or struck down, they do provide valuable insight into the *reasoning* of Congress when it passed the act[s]. And they strongly suggest that Congress viewed an “authorization” under the act[s] as an assignment to temporarily perform a set of duties for the express purpose of achieving a single project: that of caretaking. Congress most likely viewed such an assignment as distinct from holding an office.¹³⁹

135. *Id.*

136. Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

137. Act of February 13, 1795, ch. 21, 1 Stat. 415, 415 (amending the first vacancies act to replace “death, absence from the seat of government, or sickness” with “vacancy,” and to include an additional provision that “no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months”).

138. Thomas Berry, *Is Matthew Whitaker’s Appointment Constitutional? An Examination of the Early Vacancies Acts*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 26, 2018), <https://www.yalejreg.com/nc/is-matthew-whitakers-appointment-constitutional-an-examination-of-the-early-vacancies-acts-by-thomas-berry/> [<https://perma.cc/CSG6-B53G>].

139. *Id.*

But this view has never gained traction with the courts. Since at least 1851, the judiciary has regularly held that when an officer or employee temporarily assumes the duties of another office, he holds two offices simultaneously. For example, while riding the circuit, Chief Justice Roger Taney (of *Dred Scott* notoriety), faced *United States v. White*: a case that concerned whether a navy-agent who had been assigned by the Secretary of the Navy “to discharge the duties of the [vacant office of the] purser” of “the naval establishment at Annapolis” was entitled to the salary of the purser on top of his normal take-home.¹⁴⁰ Chief Justice Taney concluded that he was.¹⁴¹ After first acknowledging that the Secretary “had a [statutory] right to appoint a purser ad interim,” Taney concluded that exercising the duties of an office was tantamount to holding that office.¹⁴² As a result, an individual holding both the office of navy-agent and acting purser had a right to additional compensation *because* “[h]e performed all the duties of purser at the naval establishment; settled his accounts with the proper officer at Washington as such, and not as navy-agent; and was recognized as acting purser in the reports to congress concerning certain expenditures chargeable to that branch of the service.”¹⁴³ That he also “held the office of navy-agent at the same time [made] no difference; there is no law which prohibits a person from holding two offices at the same time.”¹⁴⁴

But does the same rationale hold for high-ranking Cabinet-level positions? The now-defunct¹⁴⁵ U.S. Court of Claims repeatedly held that it did. For example, from 1829 to 1833 Asbury Dickins served as Chief Clerk of the Department of the Treasury and from 1833 to 1836 as Chief Clerk of the Department of State.¹⁴⁶ President Andrew Jackson used the 1795 vacancy act on a number of occasions to “authoriz[e]” Dickins to perform the duties of the Secretary of the Treasury or the Secretary of State during this time period,

140. 28 F. Cas. 586, 587 (Taney, Circuit Justice, C.C.D. Md. 1851) (No. 16,684).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. The U.S. Court of Claims was created in 1855 as an Article I court. *See* 10 Stat. 612, ch. 122 (1855) (creating the court); *Williams v. United States*, 289 U.S. 553 (1933) (holding that the Court of Claims is an Article I court). It was abolished in 1982 and jurisdiction was transferred to the new U.S. Court of Federal Claims. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

146. CT. OF CLAIMS, *DICKINS V. UNITED STATES*, S. MISC. DOC. NO. 35-138, at 14–15 (1856).

whenever the actual Secretary was sick or traveling.¹⁴⁷ Like in *White*, Dickins sought extra compensation for this service, which the government sought to block under the theory that Congress had statutorily prohibited executive clerks from being granted extra compensation.¹⁴⁸ But in *Dickins v. United States*, the Court of Claims—relying heavily on Chief Justice Taney’s opinion in *White*—held that “at the times he performed the duties of Secretary of the Treasury, [Dickins] held an office separate from his office of chief clerk; and that he also held an office separate from that of chief clerk at the times he performed the duties of Secretary of State.”¹⁴⁹

The Court of Claims was faced with a nearly identical case the following year in *Boyle v. United States*.¹⁵⁰ John Boyle had served faithfully for “many years [as] chief clerk of the Department of the Navy of the United States, and during his continuance in that office he was, at various times” temporarily appointed to fill the office of “Acting Secretary of the Navy, and under those appointments . . . performed the duties of the Secretary of the Navy.”¹⁵¹ The opinion is a who’s who of early-American and early-British jurisprudence—citing Sir William Blackstone, Chancellor Francis Bacon, Judge St. George Tucker, and Chancellor James Kent—to support the finding that whenever someone performs public duties or employment, even in an acting capacity, he holds an office:

[W]hen the President, under the 8th section of the [vacancies] act of 1792, authorizes any person to perform the duties of [a Cabinet] Secretary . . . such person is thereby invested with an office, and becomes entitled, during his continuance therein, to the compensation provided by law for the services required of him¹⁵²

Based on these cases, it seems clear that when the President appoints someone to serve as an Acting Secretary or Attorney General, they assume a distinct office rather than simply taking on additional tasks or responsibilities. Whether they are the *actual* Cabinet Secretary or hold some distinct position called the “Acting Secretary” or “Acting Attorney General” is less clear, although the Court of Claims concluded the latter in *Boyle*:

147. *Id.* at 4–5 sched.A, 15–16.

148. *Id.* at 15 (citing Act of Apr. 29, 1818, ch. 87, § 9, 3 Stat. 445, 447).

149. *Id.* at 16–17.

150. CT. OF CLAIMS, *BOYLE V. UNITED STATES*, S. MISC. DOC. NO. 35-17, at 3 (1857).

151. *Id.*

152. *Id.* at 5.

It seems to us to be equally plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary, for it exists simultaneously with that office, and both may be full at the same time. We do not consider that the mere fact that the *duties* of both offices are the same makes the offices themselves identical.¹⁵³

That would appear to settle the matter, were it not for the fact that—historically—the government has distinguished between “acting” service, when the full-time secretary was in office but temporarily sick or traveling, and ‘*ad interim*’ service, when the temporary officer filled a gap between one permanent secretary leaving office and the next permanent secretary being confirmed.”¹⁵⁴ The cases mentioned above all deal with instances of the *prior*, rather than the latter.¹⁵⁵ It remains to be seen whether the Supreme Court would likewise consider a Secretary *ad interim* to be a separate office.

But the logic of *Boyle* remains unchanged. After all, if the logic is that Jeffrey Rosen was *the* Attorney General, there would be no question about whether he was an Officer of the United States (or a principal officer, for that matter), and no real debate about whether he “counted” for purposes of the Twenty-Fifth Amendment.

2. Acting Cabinet Secretaries Occupy a Permanent, Continuous Position

Having concluded that Rosen and the other Acting Cabinet Secretaries occupied “distinct and independent” offices on January 6 from their Senate-confirmed counterparts, it is necessary to turn back to *Lucia* to determine whether these acting positions qualify as *offices* under modern case law. As mentioned above, in *Lucia* the Supreme Court held that for a government employee to qualify as an officer, she must (1) perform *duties* which are “continuing and

153. *Id.* at 6.

154. Berry, *supra* note 138 (citing 1 GOV'T PRINTING OFF., TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS. 585–88 (1868) (listing all permanent, acting, and *ad interim* Secretaries serving from President Jackson through President Buchanan)).

155. See cases cited *supra* Section IV.B.1–3.

permanent”; and (2) “exercise[] significant authority pursuant to the laws of the United States.”¹⁵⁶

Some have argued that Acting Cabinet Secretaries fail the continuity test; after all, Rosen & Co. were simply pinch hitting until the President could appoint permanent replacements. The temporary nature of their appointment might lead a modern court to conclude that their duties were not “continuous and permanent.”¹⁵⁷ But a thorough investigation into the historical origins of the continuity requirement reveals that the term has undergone significant “linguistic drift”—the phenomenon that occurs when “language usage and meaning shifts over time.”¹⁵⁸ Founding-era and pre-Founding-era common law consistently used the term *office* to speak of “an *institution* distinct from the person holding it.”¹⁵⁹ In this original context, a position was considered “continuous” if it was “capable of persisting beyond [an individual’s] incumbency.”¹⁶⁰ The actual *length of time* the office existed was irrelevant.

This Founding-era understanding of the continuity requirement is exemplified by *United States v. Maurice*, a district court case penned by Chief Justice John Marshall while he was riding the circuit.¹⁶¹ The case concerned whether an “agent of fortifications” was an officer under the Appointments Clause.¹⁶² In deciding that it was, Chief Justice Marshall distinguished between those positions with duties defined by *law* and those with duties defined by *contract*:

An office is defined to be “a public charge or employment,” and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is “an employment,” it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an

156. *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (first quoting *United States v. Germaine*, 99 U.S. 508, 511 (1878); and then quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

157. See *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991) (finding a position that exists “on a temporary, episodic basis” is not an “office”).

158. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 265 (2019).

159. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 70 (N.Y. Univ. Press, Inc., 4th rev. ed. 1957) (1940); see also *Donaldson v. Beckett* (1774), 1 Eng. Rep. 837, 840; 2 Bro. P.C. 129, 134 (“An office is the work of civil policy, and [is a] being of positive institution, . . .”).

160. CORWIN, *supra* note 159, at 70.

161. 26 F. Cas. 1211 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747).

162. *Id.* at 1216.

officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, *if those duties continue, though the person be changed*; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.¹⁶³

The distinction makes sense. After all, a contract is individually negotiated.¹⁶⁴ If one party fails to fulfill his end of the bargain, the other party cannot simply designate a new appointee to complete the transaction under the same terms.¹⁶⁵ A completely new contract would need to be negotiated and agreed to, even if one party is the government.¹⁶⁶ The employment relationship is therefore an arrangement of *private law*.¹⁶⁷ By contrast, when a legislature defines the duties and emoluments of a position by statute, the incumbent might change a hundred times and the terms of the employment would never change.¹⁶⁸ The arrangement is a “positive institution” of *public law*.¹⁶⁹ There is no room for individual negotiation.¹⁷⁰

Offices are, therefore, not time-dependent. On the contrary, even temporary, short-lived assignments can be “continuous” as long as they are “capable of persisting beyond [an individual’s] incumbency,”¹⁷¹ and “permanent” if its duties and emoluments are

163. *Id.* at 1214 (emphasis added).

164. One scholar, who was a contemporary of Marshall, defined a contract as “a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other.” 1 JOHN JOSEPH POWELL, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS*, at vi–vii (Garland Publ’g 1978) (1790).

165. *See generally* 12 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 61.1 (Joseph M. Perillo, ed., rev. ed. 2022) (discussing potential remedies for a breach of contract); 1 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 1.3 (Timothy Murray, ed., rev. ed. 2022) (explaining the definition of “contract” and noting that a significant aspect of contract formation is the relationship established between the contracting parties); *RESTATEMENT (SECOND) OF CONTS.* §1 cmt. c (AM. L. INST. 1981) (describing a contract as a promise or set of promises between two or more parties).

166. *See supra* notes 164–65 and accompanying text.

167. *See supra* notes 164–65 and accompanying text.

168. *See Bd. of Educ. v. Moore*, 264 S.W.2d 292, 294 (Ky. 1953) (“Statutes imposing positive duties on public officers will ordinarily be construed as mandatory, particularly where such duties concern the public interest or the rights of individuals.”).

169. *Donaldson v. Beckett* (1774), 1 Eng. Rep. 837, 840; 2 Bro. P.C. 129, 134–35.

170. It should be noted that although this is not the only definition of continuous, courts are hesitant to adopt alternatives. *See United States v. Donziger*, 38 F.4th 290, 296–99 (2d Cir. 2022) (holding that special prosecutors are officers because “[t]he duties of the position extend beyond the person”).

171. CORWIN, *supra* note 159, at 70.

defined by public law.¹⁷² Presidents have clearly viewed such short-term assignments as offices since they have traditionally “sought Senate confirmation even when appointing individuals to” them.¹⁷³ This practice dates back to the Washington administration, when one of Washington’s Attorneys General—probably Edmund Randolph—penned a “written opinion” that stated “that the President had not power by the Constitution to appoint a Commissioner [to negotiate a treaty with a Native American tribe] without the advice and consent of the Senate.”¹⁷⁴ The office of commissioner had been created—and the emolument fixed—by the First Congress in 1789.¹⁷⁵ The statute did not envision a permanent position, but allowed for the appointment of commissioners to be made from time to time as the need arose who would be paid per diem.¹⁷⁶ Washington then sought Senate confirmation prior to appointing such commissioners throughout his two terms in office.¹⁷⁷ This included at least one occasion where the appointed commissioner held the office for only a single day!¹⁷⁸ His successors followed suit.¹⁷⁹

172. See *Moore*, 264 S.W.2d at 294.

173. James A. Heilpern, *Temporary Officers*, 26 GEO. MASON L. REV. 753, 757 (2019).

174. Letter from Robert Morris to George Washington (Aug. 25, 1796), in 20 THE PAPERS OF GEORGE WASHINGTON 619, 621 n.5 (Univ. of Va. Press, Rotunda ed., 2008).

175. Act of Aug. 20, 1789, ch. 10, § 2, 1 Stat. 54, 54 (providing for expenses arising from negotiations or treaties with Native American tribes and the appointment of commissioners for managing the same).

176. See *id.*

177. See Letter from George Washington to the U.S. Senate (Mar. 1, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON 246, 246 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005) (nominating Benjamin Lincoln, Beverly Randolph, and Timothy Pickering “to be Commissioners . . . for holding a Conference or Treaty with the hostile Indians [in the Northwest Territory]”); Letter from George Washington to the U.S. Senate (June 25, 1795), in 18 THE PAPERS OF GEORGE WASHINGTON 262, 263 (Univ. of Va. Press, Rotunda ed., 2008) (nominating Benjamin Hawkins, George Clymer, and Andrew Pickens as “Commissioners for holding the proposed treaty” with the Creek tribe).

178. Washington appointed his Secretary of War to serve as Commissioner to negotiate a treaty with the Creek Nation” on August 6, 1790. The terms of the treaty were already largely hammered out, and the treaty was signed the following day. Letter from George Washington to the U.S. Senate (Aug. 6, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON 202, 202 (Mark A. Mastromarino ed., 1996); see Letter from Henry Knox to George Washington (Aug. 7, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON 206, 206–09, 209 n.1 (Mark A. Mastromarino ed., 1996).

179. See, e.g. Letter from John Adams to the U.S. Senate (Jan. 8, 1798), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 225, 260 (James D. Richardson ed., 1896) (nominating Fisher Ames, Bushrod Washington, and Alfred Moore “to be commissioners of the United States with full powers to hold conferences and conclude a treaty with the Cherokee Nation”); Letter from Thomas Jefferson to the U.S. Senate (Jan. 6, 1802), in 36 THE PAPERS OF THOMAS JEFFERSON 322, 326 (Barbara B. Oberg ed., 2009) (nominating “commissioners to treat with the Cherokees, Chickasaw Choctaws[,] Creeks,” and Tuscaroras); see also Heilpern, *supra* note 177 (discussing President Adams’s

That such short-term assignments were continuous in the traditional sense is exemplified by one of the most bizarre vignettes in the history of American diplomacy: Washington's efforts to negotiate a treaty with the "Barbary States" of Algiers, Tunis, Tripoli, and Morocco.¹⁸⁰ The crisis began several years before the Constitution was even drafted, when two American shipping vessels were attacked off the coast of Africa by pirates and twenty-one American citizens taken hostage.¹⁸¹ John Adams and Thomas Jefferson—who at the time were serving as the American Ambassadors to England and France, respectively—attempted to negotiate the prisoners' release, but the Americans remained in captivity until well after Washington was sworn in as President, when the First Congress approved the payment of ransoms to the Barbary States on the condition that "a peace [should] be previously negotiated [sic]" between the United States and the relevant powers.¹⁸²

Yet, Washington's efforts to negotiate such a treaty was repeatedly thwarted by the untimely deaths of several of his appointees.¹⁸³ Washington's initial choice for a "Commissioner for treating with the Dey and government of Algiers on the subjects of peace and ransom of our captives" was Admiral John Paul Jones—yes *that* John Paul Jones¹⁸⁴—who he appointed via recess appointment since Congress was not in session.¹⁸⁵ Jones was living in Paris at

and President Jefferson's appointment of Indian Commissioners more fully); 1 DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979, at 177 (Vine Deloria, Jr. & Raymond J. DeMallie, eds., 1999) ("In almost every instance in which treaties and agreements were made [with Native Americans throughout American history], *Congress authorized a commission* to be sent to a specific tribe or group of tribes [T]he choice of commissioners became an opportunity for political appointment by the president." (emphasis added)).

180. *Barbary Wars, 1801–1805 and 1815–1816*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1801-1829/barbary-wars> [https://perma.cc/4YNG-W9RP].

181. Jessie Kratz, *Pirates: An Early Test for the New Country*, NAT'L ARCHIVES: PIECES OF HIST. (July 12, 2015), <https://prologue.blogs.archives.gov/2015/07/12/pirates-an-early-test-for-the-new-country/> [https://perma.cc/M72L-23ZG]; Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 169, 169 (1999).

182. See Letter from Thomas Jefferson to John Paul Jones (June 1, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 3, 5 (John Catanzariti ed., 1990).

183. See *id.* at 9 (noting death of John Paul Jones).

184. For those of you who do not know who John Paul Jones was, first of all, shame on you. John Paul Jones was a Revolutionary War hero who is known as the "Father of the American Navy." He was generally viewed as a pirate by the British. *John Paul Jones*, WIKIPEDIA, https://en.wikipedia.org/wiki/John_Paul_Jones [https://perma.cc/F58V-UCTE]. For a more scholarly account of Jones' life, see generally EVAN THOMAS, JOHN PAUL JONES: SAILOR, HERO, FATHER OF THE AMERICAN NAVY (2003).

185. See Letter from Thomas Jefferson to John Paul Jones, *supra* note 182, at 3, 8.

the time, having recently retired from the Russian navy.¹⁸⁶ But Washington had not heard from him in some time and worried that “in the event of any accident to [Jones], it might occasion an injurious delay, were the business to await new commissions from [the United States].”¹⁸⁷ Therefore, out of an abundance of caution, Washington appointed Thomas Barclay as a backup.¹⁸⁸ Washington instructed Thomas Pinckney—who was to carry Jones’ commission across the Atlantic—to deliver to Thomas Barclay should Pinckney find Jones indisposed.¹⁸⁹

Washington’s concerns proved prescient, but not quite prescient enough. Jones had “not yet begun to fight”¹⁹⁰ for the treaty when he died. In fact, he passed away before Thomas Pinckney was even able to locate him. Pinckney therefore followed Washington’s orders and forwarded to Barclay “all the papers addressed to Admiral Jones,” along with a letter signed by the President “giving [Barclay] authority on receipt of those papers to consider them as addressed to [him], and to proceed under them in every respect as if [Barclay’s] name stood in each of them in the place of that of John Paul Jones.”¹⁹¹ But Barclay died himself just a few months later in Portugal while attempting to secure the funds he needed for his mission to Algiers, leaving the office vacant once again and precipitating the very delay Washington had tried to avoid.¹⁹² But the office itself survived, and two years later Washington appointed

186. 2 AUGUSTUS C. BUELL, PAUL JONES: FOUNDER OF THE AMERICAN NAVY 264, 267 (1903).

187. Letter from George Washington to Thomas Barclay (June 11, 1792), in 10 THE PAPERS OF GEORGE WASHINGTON, 450, 450 (Robert F. Haggard & Mark A. Mastromarino eds., 2002).

188. *Id.*

189. *Id.*

190. When asked by a British captain if Jones and his crew would surrender during the naval Battle of Flamborough Head in 1779, Jones is believed to have given this infamous reply. See Charles Lee Lewis, “*I Have Not Yet Begun To Fight*”, 29 MISS. VALLEY HIST. REV. 229, 229 (1942).

191. Letter from George Washington to Thomas Barclay, *supra* note 187, at 450.

192. Gary E. Wilson, *American Hostages in Moslem Nations, 1784–1796: The Public Response*, 2 J. EARLY REPUBLIC 123, 129 (1982); see also FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 73 (2005); Patrick Nartey Teye, *Barbary Pirates: Thomas Jefferson, William Eaton, and the Evolution of U.S. Diplomacy in the Mediterranean* 43 (Aug. 2013) (M.A. thesis, East Tennessee State University) (Digital Commons, East Tennessee State University) (explaining Barclay’s prior service as Consul to Morocco).

David Humphreys commissioner,¹⁹³ who finally succeeded in concluding treaties with Algiers, Morocco, and Tripoli.¹⁹⁴

Recent history likewise demonstrates that the office of an “Acting Secretary” is certainly capable of “persisting beyond an [individual’s] incumbency.”¹⁹⁵ For example, the three Acting Cabinet Secretaries in place on January 6, 2021 were each succeeded by *another* Acting Secretary before the Senate got around to confirming permanent replacements: Jeffrey Rosen was succeeded by Monty Wilkinson as Acting Attorney General;¹⁹⁶ Christopher C. Miller was succeeded by David Norquist as Acting Secretary of Defense;¹⁹⁷ and Chad Wolf was succeeded by Pete Gaynor as Acting Secretary of Homeland Security.¹⁹⁸ This last example is particularly instructive since the Department of Homeland Security was led by *four* Acting Secretaries in a row.¹⁹⁹ When Kirstjen Nielson resigned as Secretary of Homeland Security on April 10, 2019, President Trump appointed Kevin McAleenan—who at the time was serving as Customs and Border Patrol Commissioner—as Acting Secretary.²⁰⁰ He served for seven months before resigning and was replaced by Chad Wolf, the Under Secretary of Homeland Security for Strategy, Policy, and Plans, who served for another two.²⁰¹ When Wolf resigned in the aftermath of the January 6 riot, Gaynor took over for nine days before turning the reins over to David Pekoske, who led the Department until the Senate confirmed

193. Letter from George Washington to the Dey of Algiers (Mar. 21, 1793), in 12 THE PAPERS OF GEORGE WASHINGTON 356, 356 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005); Circular from George Washington to the Barbary Powers (Mar. 30, 1795), in 17 THE PAPERS OF GEORGE WASHINGTON 702, 702 (David R. Hoth & Carol S. Ebel eds., 2013). It is worth noting that Humphreys was appointed via a recess appointment. It is unclear whether Washington ever submitted his name to the Senate, although it seems likely given that in Secretary of State Thomas Jefferson’s original letter to John Paul Jones, he explained the nature of recess appointments: “their renewal . . . is so much a matter of course, and of necessity” that Jones should “consider that as certain, and proceed without interruption.” See Letter from Thomas Jefferson to John Paul Jones, *supra* note 182, at 8.

194. 2 TREATIES AND OTHER ACTS OF THE UNITED STATES OF AMERICA 279, 349, 386 (Hunter Miller ed., 1931).

195. CORWIN, *supra* note 159, at 70.

196. See *infra* Appendix A.

197. See *infra* Appendix A.

198. See *infra* Appendix A.

199. See *infra* Appendix A.

200. See *infra* Appendix A; see also Paula Reid, *DHS Secretary Kirstjen Nielsen Speaks for First Time Since Resignation Announcement*, CBS NEWS, <https://www.cbsnews.com/news/kirstjen-nielsen-resigning-dhs-secretary-expected-to-offer-resignation-today-live-updates-2019-04-07/> [<https://perma.cc/FT4K-GLJB>] (Apr. 8, 2019) (stating McAleenan’s position as Commissioner).

201. See *infra* note 382 and accompanying text.

Alejandro Mayorkas as Secretary.²⁰² Earlier in his administration, President Trump also had three Acting Secretaries of Defense in row, two Acting Attorneys General in a row, and two Acting Secretaries of Health and Human Services in row.²⁰³

This practice is not unique to the Trump administration, either. As Appendix A demonstrates, there have been almost two dozen examples of back-to-back Acting Cabinet Secretaries in our nation's history, most of which have taken place since the passage of the Twenty-Fifth Amendment.²⁰⁴ President Carter, for example, had five Acting Secretaries of State in a row.²⁰⁵ President Clinton had back-to-back Acting Secretaries leading his Department of State and Department of Veterans Affairs at different points in his administration.²⁰⁶ President Bush had back-to-back Acting Attorneys General, and President Obama had back-to-back Acting Secretaries of Commerce.²⁰⁷ The fact that in all of these cases the duties and emoluments for all of these positions remained fixed—having been set by statute—underscores their continuous nature.

3. Acting Cabinet Secretaries Exercise “Significant Authority”

While a lesson on historical practices may be necessary to determine whether the office of an Acting Secretary is continuous, determining whether an Acting Secretary exercises “significant authority pursuant to the laws of the United States” is much, much more straightforward. Even though the Supreme Court has never provided a clear test for determining how much power is necessary to qualify as “significant authority,” they *have* held that administrative law judges,²⁰⁸ military judges,²⁰⁹ tax judges,²¹⁰ members of the Federal Election Commission,²¹¹ the general counsel for the National Labor Relations Board,²¹² postmasters,²¹³ and even law

202. See *infra* Appendix A.

203. See *infra* Appendix A.

204. See *infra* Appendix A.

205. See *infra* Appendix A.

206. See *infra* Appendix A.

207. See *infra* Appendix A.

208. *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018).

209. *Weiss v. United States*, 510 U.S. 163, 169–70 (1994).

210. *Freytag v. Comm’r*, 501 U.S. 868, 881 (1991).

211. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

212. *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 314 (2017).

213. *Myers v. United States*, 272 U.S. 52, 158 (1926).

clerks all fall on the “significant” side of the line.²¹⁴ The Supreme Court’s reasoning in *Buckley v. Valeo* is therefore applicable: “[i]f a Postmaster first class and the clerk of a district court are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely” there can be no question that an Acting Secretary—wielding the full power of a cabinet department—is “at the very least” an inferior officer as well.²¹⁵

B. *Acting Secretaries are Principal Officers*

Having concluded that Acting Cabinet Secretaries are “Officers of the United States” under current Supreme Court precedent, we turn our attention to the question of whether they qualify as “principal officers of the executive departments.” That is, after all, the crucial question for application of Section 4 of the Twenty-Fifth Amendment.

Unfortunately, the Supreme Court’s jurisprudence is less developed with respect to the dividing line between principal and inferior officers than it is with respect to the line between officers and employees. The two cases directly on point—*Morrison v. Olson*²¹⁶ and *Edmond v. United States*²¹⁷—articulate slightly different tests for making the distinction. The following Subsections will discuss both cases before applying them to Acting Cabinet Secretaries. Then they will turn to certain lower court cases that have come out the other way and explain where the opinions have erred.

1. *Morrison v. Olson*

Morrison considered whether the Special Division of the D.C. Circuit’s appointment of a special prosecutor pursuant to the Ethics in Government Act was constitutional.²¹⁸ The Court declined “to decide exactly where the line falls between the two types of officers,”²¹⁹ but identified four factors that should be part of the equation: (1) whether the officer “is subject to removal by a higher Executive Branch official”; (2) whether the officer’s authority consists

214. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

215. 424 U.S. at 126 (citations omitted).

216. 487 U.S. 654 (1988).

217. 520 U.S. 651 (1997).

218. *Morrison*, 487 U.S. at 659.

219. *Id.* at 671.

of “only certain, limited duties”; (3) whether the “office is limited in jurisdiction”; and (4) whether the officer has “ongoing responsibilities that extend beyond the accomplishment of” a single mission or task.²²⁰ Based on these factors, the Court concluded it was obvious that the independent counsel “[fell] on the ‘inferior officer’ side of that line”²²¹: the Attorney General had the power to remove the independent counsel for good cause; the independent counsel’s authority was restricted to investigating and prosecuting a narrow set of federal crimes; its jurisdiction was limited to only that “granted by the Special Division pursuant to a request by the Attorney General”; and it was “appointed essentially to accomplish a single task.”²²²

Writing in dissent, Justice Scalia took umbrage with the Court’s approach, arguing that it was “not clear from the Court’s opinion why the factors it discusses . . . are determinative of the question of inferior officer status.”²²³ Instead, he argued for a textual approach, rather than theoretical:

I think it preferable to look to the text of the Constitution and the division of power that it establishes. These demonstrate, I think, that the independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch (indeed, not even to the President). Dictionaries in use at the time of the Constitutional Convention gave the word “inferiour” two meanings which it still bears today: (1) “[l]ower in place, . . . station, . . . rank of life, . . . value or excellency,” and (2) “[s]ubordinate.” In a document dealing with the structure (the constitution) of a government, one would naturally expect the word to bear the latter meaning—indeed, in such a context it would be unpardonably careless to use the word *unless* a relationship of subordination was intended. If what was meant was merely “lower in station or rank,” one would use instead a term such as “lesser officers.”²²⁴

Justice Scalia acknowledged that, like his colleagues in the majority, he had not articulated a complete test for distinguishing between principal and inferior officers.²²⁵ By his own admission, his focus on subordination wasn’t the full picture: “it is not a *sufficient*

220. *Id.* at 671–72.

221. *Id.* at 671.

222. *Id.* at 671–72, 685.

223. *Id.* at 719 (Scalia, J., dissenting).

224. *Id.* at 719 (alterations in original) (omissions in original) (citation omitted).

225. *Id.* at 722 (conceding that focusing on subordination alone does not sufficiently distinguish principal and inferior officers).

condition for ‘inferior’ officer status that one be subordinate to a principal officer” but it is “surely a *necessary* condition.”²²⁶

2. *Edmond v. United States*

Nine years later—after a number of important changes to the composition of the Court—the Justices returned their attention to the fuzzy line dividing principal officers and inferior officers. *Edmond* centered on the status of the judges of the Coast Guard Court of Criminal Appeals.²²⁷ By statute, these judges were appointed by the Secretary of Transportation—an arrangement that would be clearly unconstitutional should those judges be deemed “principal officers.”²²⁸ Justice Scalia, this time commanding a majority, upheld the statute.²²⁹ Picking up where he left off in *Morrison*, he articulated for the first time what appears to be a bright-line rule for distinguishing between principal and inferior officers:

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase “lesser officer.” Rather in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with advice and consent of the Senate.²³⁰

Under this rule, the judges on the Coast Guard Court of Criminal Appeals were clearly inferior officers. Their work was “supervised” by both “the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces.”²³¹ Among other things, this “supervision” included the task of “prescrib[ing] uniform rules of procedure’ for the court,” as well as the authority to “remove a

226. *Id.* at 720–22 (providing the historical context and Founding-era interpretation of “inferior”).

227. *Edmond v. United States*, 520 U.S. 651, 653 (1997).

228. *Id.* at 653–54, 658–60.

229. *Id.* at 666.

230. *Id.* at 662–63.

231. *Id.* at 664.

Court of Criminal Appeals judge from his judicial assignment without cause.”²³²

But *Edmond* leaves many questions unanswered. In his dissent in *Morrison*, Justice Scalia noted specifically that subordination to a superior officer was “not a *sufficient* condition for ‘inferior’ officer status,”²³³ yet he did not enumerate any additional criteria in *Edmond*.²³⁴ Nor is it clear what the status of the four *Morrison* factors is. *Edmond* does not explicitly overturn *Morrison*, in fact Scalia cites it favorably while acknowledging that two of the *Morrison* factors—narrow jurisdiction and limited tenure—cut against the Coast Guard judges being inferior officers.²³⁵ The upshot seems to be that an inferior officer is always subordinate to a principal officer, but a subordinate officer may still be nonetheless deemed a “principal officer” after performing a balancing test of an unspecified set of other factors.

* * *

Applying the *Edmond* test here, it is obvious that an Acting Cabinet Secretary or Acting Attorney General is a principal officer: without a “superior” who has been “appointed by presidential nomination with the advice and consent of the Senate,” they cannot be an inferior officer.²³⁶ Full stop. They report directly to the President, and no one else.

Likewise, all of the factors enumerated under the *Morrison* balancing test point to the same conclusion.²³⁷ First, no one other than the President has the power to remove an Acting Cabinet Secretary.²³⁸ Second, it would be ridiculous to describe an Acting Secretary’s authority as limited to “only certain, limited duties.”²³⁹ Each runs an entire government department with tens of thousands of

232. *Id.* (quoting 10 U.S.C. § 866(h) (previously enacted at 10 U.S.C. § 866(f))).

233. *Morrison*, 487 U.S. at 722.

234. *See Edmond*, 520 U.S. at 661–63 (noting that the cases decided by the Supreme Court are not an exhaustive criteria).

235. *Id.* at 661–62.

236. *Id.* at 662–63.

237. 487 U.S. at 671–72 (listing the factors to differentiate between principal and inferior officers).

238. *Cf. id.* at 671 (describing the first factor as whether the officer “is subject to removal by a higher Executive Branch official”).

239. *Cf. id.* (describing the second factor as whether the officer’s authority consists of “only certain, limited duties”).

subordinates.²⁴⁰ An Acting Secretary of State has the power to “negotiate[], interpret[], and terminate[] treaties” with foreign states.²⁴¹ An Acting Attorney General oversees all federal prosecutions.²⁴² These are not small potatoes. Third, it would likewise strain credulity to suggest an Acting Secretary’s jurisdiction is “limited.”²⁴³ Each is capable of promulgating major rulemakings that shape national policy.²⁴⁴ Finally, these powers are “ongoing,” and certainly “extend beyond the accomplishment of” a single task.²⁴⁵ Given this, it seems obvious that an Acting Secretary “falls on the ‘[principal] officer’ side of that line.”²⁴⁶

3. Lower Court Decisions and *Eaton*

Nevertheless, during the Trump administration, a handful of lower courts reached the opposite conclusion in a series of lawsuits arising out of President Trump’s appointment of Matthew Whitaker to serve as Acting Attorney General. In late 2018, President Trump fired Attorney General Jeff Sessions and appointed Matthew Whitaker—who at the time was serving as Session’s Chief of Staff—to serve in his stead in an acting capacity.²⁴⁷ The appointment was controversial from the start.²⁴⁸ Because Whitaker did not

240. For example, the Department of Transportation—of which an Acting Secretary was appointed following Elaine Chao’s January 6-related resignation—employs almost 55,000 people across the United States. *U.S. Department of Transportation Administrations*, U.S. DEPT OF TRANSP., <https://www.transportation.gov/administrations> [<http://perma.cc/V4FJ-DKZA>].

241. *Duties of the Secretary of State*, U.S. DEPT OF STATE, <https://www.state.gov/duties-of-the-secretary-of-state/> [<https://perma.cc/Z8ZF-R42S>] (Aug. 18, 2022).

242. *See* 28 C.F.R. § 0.5 (2022).

243. *Cf. Morrison*, 487 U.S. at 672 (describing the third factor as whether the “office is limited in jurisdiction”).

244. For example, Acting Secretary of Homeland Security Chad Wolf sought to expand the Department’s regulatory authority to collect and use biometric data for immigration enforcement purposes. *See* *Collection and Use of Biometrics by U.S. Citizenship and Immigration Services*, 85 Fed. Reg. 56,338 (Sept. 11, 2020).

245. *Cf. Morrison*, 487 U.S. at 672 (describing the fourth factor as whether the officer has “ongoing responsibilities that extend beyond the accomplishment of” a single mission or task).

246. *Id.* at 671.

247. Laura Jarrett & Eli Watkins, *Jeff Sessions Out as Attorney General*, CNN, <https://www.cnn.com/2018/11/07/politics/sessions-resign> [<https://perma.cc/6X2Y-ZNBT>] (Nov. 7, 2018, 7:15 PM).

248. Concerns were heightened because Whitaker was a frequent critic of Special Counsel Robert Mueller, who at the time was investigating ties between Russia and the Trump campaign. Sessions was fired, in part, because he recused himself from the Russia investigation. There was real concern that Whitaker might use his new office to fire Mueller. *See id.*

hold a Senate-confirmed position at the time, scholars—including prominent conservative scholars like John Yoo²⁴⁹—argued that the appointment was unconstitutional.²⁵⁰ The day after the appointment was made, two prominent attorneys—former Acting Solicitor General Neal Katyal and George Conway, the husband of one of the President’s closest advisers, Kellyanne Conway—published an op-ed: “Mr. Trump’s installation of Matthew Whitaker as acting attorney general of the United States . . . is unconstitutional. It’s illegal. And it means that anything Mr. Whitaker does, or tries to do, in that position is invalid.”²⁵¹

Legal challenges followed. In three criminal prosecutions, defendants argued that their indictments should be dismissed because Whitaker—having been unconstitutionally appointed—lacked authority to press charges.²⁵² In a separate lawsuit, gun rights advocates challenged a rule issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives during Whitaker’s tenure banning “bump stocks” on the same theory.²⁵³ In all four cases, the lower courts concluded that Whitaker’s appointment was *not* unconstitutional because he was *not* a principal officer.²⁵⁴ In reaching this conclusion, the lower courts depended less on the reasoning of *Edmond* and *Morrison*, but instead relied on the 1898 Supreme

249. John Yoo, *Whitaker’s Appointment is Unconstitutional*, THE ATLANTIC (Nov. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/whitaker-cant-take-officeand-tha-t-helps-mueller/575770/> [<https://perma.cc/LA6J-WKJF>] (“[T]he Constitution prohibits filling the position of attorney general with a series of officials who never received Senate consent. Deputy Attorney General Rod Rosenstein, Solicitor General Noel Francisco, the several assistant attorney generals, even any of the ninety-three U.S. attorneys in the nation’s major cities could all temporarily fill in for Sessions, as they received senatorial advice and consent. Whitaker . . . cannot.”).

250. *Prominent National Constitutional Scholars File Brief Calling President Trump’s Appointment of Matt Whitaker as Acting Attorney General “Unconstitutional”*, AM. CONST. SOC’Y (Nov. 27, 2018), https://www.acslaw.org/press_release/prominent-national-constitutional-scholars-file-brief-calling-president-trumps-appointment-of-matt-whitaker-as-acting-attorney-general-unconstitutional/ [<https://perma.cc/TGC9-7SQ2>].

251. Neal K. Katyal & George T. Conway III, Opinion, *Trump’s Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/trump-attorney-general-sessions-unconstitutional.html> [<https://perma.cc/AH6E-ZS5B>].

252. See *United States v. Smith*, No. 1:18-cr-00115-MR-WCM, 2018 U.S. Dist. LEXIS 217377, at *2 (W.D.N.C. Dec. 28, 2018), *aff’d*, 962 F.3d 755 (4th Cir. 2020); *United States v. Peters*, No. 6:17-CR-55-REW-HAI-2, 2018 U.S. Dist. LEXIS 204067, at *1–2 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, No. 5:17-CR-882-DAE (1) (2), 2018 U.S. Dist. LEXIS 200564, at *3 (W.D. Tex. Nov. 27, 2018).

253. *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 356 F. Supp. 3d 109, 121 (D.D.C. 2019).

254. *Smith*, 2018 U.S. Dist. LEXIS 217377 at *7; *Peters*, 2018 U.S. Dist. LEXIS 204067 at *8–9; *Valencia*, 2018 U.S. Dist. LEXIS 200564 at *9–10; *Guedes*, 356 F. Supp. 3d at 153).

Court opinion, *United States v. Eaton*.²⁵⁵ In *Eaton*, the Court stated that just “[b]ecause the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.”²⁵⁶

But this line is plucked out of its historical context: law office history at its worst. In *Eaton*, the Court considered whether the office of “vice-consul” was a principal officer under Article II of the Constitution.²⁵⁷ The Appointments Clause specifically states that the President, and only the President, may “nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . *Consuls*.”²⁵⁸ But a statute on the books at the time authorized the President “to provide for the appointment of vice-consuls . . . in such manner and under such regulations as he shall deem proper.”²⁵⁹ The office of vice-consul was *not* a permanent position.²⁶⁰ Vice-consuls were “consular officers, who [were] substituted, temporarily, to fill the places of consuls-general . . . when they shall be temporarily absent or relieved from duty.”²⁶¹ Their salary was to be paid for out of the salary of the consul.²⁶² The regulations stated that vice-consuls were usually to be appointed by the Secretary of State, but in an emergency could be appointed by the United States’ “diplomatic representative” in the country.²⁶³

Sempronius Boyd was Minister Resident and Consul General of the United States in Siam.²⁶⁴ In June 1892, he became so sick that he was no longer able to carry out the duties of his office.²⁶⁵ The doctors of Siam advised him that the illness would probably be fatal.²⁶⁶ The State Department granted Boyd a four month leave of absence.²⁶⁷ Before leaving Bangkok, Boyd appointed Lewis Eaton

255. See, e.g., *Peters*, 2018 U.S. Dist. LEXIS 204067 at *7 n.10 (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)).

256. *Eaton*, 169 U.S. at 343.

257. See *id.* at 335–36.

258. U.S. CONST., art. II, § 2 (emphasis added).

259. *Eaton*, 169 U.S. at 336 (quoting 18 Rev. Stat. § 1695).

260. *Id.* at 343.

261. *Id.* at 336.

262. *Id.* (quoting 18 Rev. Stat. § 1703).

263. *Id.* at 337–38 (quoting U.S. DEP’T OF STATE, REGULATIONS PRESCRIBED FOR THE USE OF THE CONSULAR SERVICE OF THE UNITED STATES (1888)).

264. *Id.* at 331.

265. *Id.*

266. *Id.*

267. See *id.* at 331–32.

(who may or may not have been a government employee at the time) to be vice-consul.²⁶⁸ Boyd stayed in Siam for three weeks and then returned to the United States.²⁶⁹ His illness prevented him from returning to his post at the conclusion of his leave of absence.²⁷⁰ He died at his home in Missouri in June 1894.²⁷¹

Eaton ran the consulate for almost a year until Boyd's replacement relieved him of duty in May 1893.²⁷² During this time, he was not actually the acting consul.²⁷³ He occupied a different position—vice-consul—which had been established by Congress specifically for such contingencies.²⁷⁴ Eaton then sought payment for his services.²⁷⁵ As vice-consul, his salary was to be deducted from that allotted by Congress for the consul.²⁷⁶ But Boyd—and later Boyd's estate—claimed he was still entitled to his entire salary even though he had left Siam.²⁷⁷ Both Eaton and Boyd sued, and the cases were consolidated.²⁷⁸

Boyd's estate argued that Eaton could not receive a portion of his salary because he had been unconstitutionally appointed.²⁷⁹ The argument was that because Eaton was carrying out the duties of the consul, he must have needed Senate confirmation.²⁸⁰ The Supreme Court rejected this view, concluding that the term "consul" as used in Article II

does not embrace a subordinate and temporary officer like that of vice-consul Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.²⁸¹

The lower courts seized on this language to hold that, as an inferior officer, Matthew Whitaker could perform the duties of a prin-

268. *Id.*

269. *See id.*

270. *Id.* at 332–33.

271. *Id.* at 333.

272. *Id.*

273. *Id.* at 349.

274. *Id.* at 343.

275. *Id.* at 333–35.

276. *Id.* at 336–37 (quoting 18 Rev. Stat. § 1695).

277. *Id.* at 334–35.

278. *Id.* at 335.

279. *Id.* at 335–36.

280. *Id.* at 343.

281. *Id.*

cipal officer for a limited time and under special and temporary conditions without transforming his office into one for which Senate confirmation is required.²⁸² But a careful analysis of more than a century of caselaw reveals that the Court has consistently circumscribed those “special and temporary conditions” to circumstances when the incumbent remained in office but for one reason or another was temporarily out of commission, and *someone* needed to pick up the slack.²⁸³ In other words, it was limited to acting officers, not officers *ad interim*.

In *Eaton*, Boyd continued to serve, at least in name, as Consul General even after he left Siam.²⁸⁴ After all, Boyd left Siam on a State Department-approved “leave of absence.”²⁸⁵ He never resigned.²⁸⁶ Eaton’s salary—per statute—was to be deducted *from* Boyd’s salary.²⁸⁷ Boyd clearly felt he was still consul, or he would not have sued for a year’s worth of compensation for the time he was lying on his deathbed in Missouri thousands of miles away from his post.²⁸⁸ Eaton’s authority seems to be derived from Boyd’s continuing authority, as well.²⁸⁹

The same cannot be said for Acting Cabinet Secretaries, which as mentioned above, should really be referred to as Secretaries *ad interim*. These are not officials who are pinch hitting while the Senate-approved Secretary is away on holiday or sick. These are officials who have been appointed by the President to head an entire department of government.²⁹⁰ Their authority flows directly from the President’s power and is not derivative of another executive official.²⁹¹ As a result, *Eaton* is distinguishable, and *Edmond* and *Morrison* should still apply.

282. See, e.g., *United States v. Smith*, No. 1:18-cr-00115-MR-WCM, 2018 U.S. Dist. LEXIS 217377, at *2 (W.D.N.C. Dec. 28, 2018), *aff’d*, 962 F.3d 755 (4th Cir. 2020).

283. See *Eaton*, 169 U.S. at 343–44.

284. *Id.* at 340–41.

285. *Id.* at 340.

286. See *id.* at 332–33, 340.

287. *Id.* at 336–37, 345 (citing 18 Rev. Stat. § 1703).

288. See *id.* at 335–36.

289. See *id.* at 340–44 (explaining the validity of Eaton’s appointment based in part on the fact of Boyd’s conferred duty to Eaton).

290. See U.S. CONST. art. II, § 2, cl. 2.

291. See U.S. CONST. art. II, § 2, cl. 2.

V. FIXING THE PROBLEM

Having shown that under modern caselaw, Acting Secretaries and Acting Attorneys General satisfy all of the conditions to be considered “principal officers of the executive departments,”²⁹² it is tempting to consider the matter resolved. And for a Vice President and Cabinet considering invoking Section 4 of Twenty-Fifth Amendment in response to a *medical* disability, such as a President in emergency surgery or struggling with Alzheimer’s (like Ronald Reagan),²⁹³ it might. But if Section 4 of the Twenty-Fifth Amendment is on the table due to a political crisis—such as January 6—there are additional political considerations. Secretaries Pompeo and Mnuchin appear to have been concerned about the fact that the role of Acting Secretaries was an *open question*.²⁹⁴ They had legal teams—stocked full of brilliant, talented attorneys—who could have puzzled through the same precedents and facts described above and arrived at a reasonable conclusion. But even if they knew the “right” answer, the fact that there was no *established* answer still posed its own set of problems. This is especially so in light of the lower court opinions mentioned above upholding the constitutionality of the Whitaker appointment.²⁹⁵

First, the lack of an established answer opens the door for a hostile President to argue that the Vice President and Cabinet’s actions are illegitimate based on a procedural technicality. A President might argue that including an Acting Secretary’s signature rendered the Vice President’s action procedurally defunct, even if the Acting Secretary’s support was unnecessary to reach a majority. It doesn’t matter if the President’s argument is ridiculous: damage will be inflicted on the Republic as long as his argument sounds reasonable to even a small percentage of Americans. Hundreds of Trump supporters stormed the Capitol in response to President Trump’s calls to “stop the steal.”²⁹⁶ Imagine what a President’s most ardent supporters might do if the President had a reasonable-sounding argument that he had been ousted unconstitutionally?

292. See *supra* Part IV.

293. See *supra* Section II.A.

294. See *supra* notes 30–32 and accompanying text (discussing the uncertainty surrounding a potential invocation of the Twenty-Fifth Amendment on January 6).

295. See cases cited *supra* Sections IV.B.1–3.

296. See *supra* notes 1–4 and accompanying text.

History may provide a way around this minefield if the votes of the Acting Secretaries would not change the outcome of the vote, especially if the Cabinet were completely united on the ultimate question of whether the President is “unable to discharge the powers and duties of his office.”²⁹⁷ The 1820 presidential election occurred following intense debate over the admission of Missouri into the Union as a new state.²⁹⁸ The citizens of Missouri had held a convention and adopted a new constitution which contained a provision that prohibited free Black people from entering the state.²⁹⁹ This outraged Northerners, who interpreted the provision as an affront to the Federal Constitution’s guarantee that citizens of each state be accorded the rights of citizens in *all* states.³⁰⁰ The great Henry Clay, then a lame duck Congressman, negotiated a compromise—largely cosmetic in nature—that would admit Missouri into the Union, but on the condition that its legislature never adopted a law barring any class of citizens from other states from entering Missouri.³⁰¹ The compromise was all but agreed to when Missouri threw a wrench in Clay’s plans by submitting Electoral College votes in the presidential election.³⁰² The state argued that having adopted a constitution, it was already a state.³⁰³

The votes would not impact the outcome of the election.³⁰⁴ After all, James Monroe was running for reelection unopposed.³⁰⁵ But Congress still had to count the Electoral College votes; its decision

297. U.S. CONST. amend. XXV, § 3.

298. The Missouri Compromise became law on March 6, 1820, but Missouri was not admitted into the Union by Congress until March 2, 1821. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545; Resolution of Mar. 2, 1821, 3 Stat. 645; *see also* FLOYD CALVIN SHOEMAKER, MISSOURI’S STRUGGLE FOR STATEHOOD 1804-1821, at 37 (Russell & Russell 1969) (1916) (covering the congressional debate and eventual compromise).

299. MO. CONST. of 1820, art. III, § 26.

300. *See* 37 ANNALS OF CONG. 102–06 (1821) (statement of Sen. David Lawrence Morril).

301. Clay’s condition provided that Missouri should be admitted only “upon the fundamental condition, that the said State shall never pass any law preventing any description of persons from coming to and settling in the said State, who now are or hereafter may become citizens of any of the States of this Union” 37 ANNALS OF CONG. 1080 (1821); *see also* H.W. BRANDS, HEIRS OF THE FOUNDERS: THE EPIC RIVALRY OF HENRY CLAY, JOHN CALHOUN AND DANIEL WEBSTER, THE SECOND GENERATION OF AMERICAN GIANTS 90 (2018) (providing a historical account of Clay’s outsized influence on Congress during this period).

302. 37 ANNALS OF CONG. 1147 (1821) (beginning of congressional debate over Missouri’s electoral votes).

303. SHOEMAKER, *supra* note 298, at 296–99 (quoting Missouri newspaper editorials from the time).

304. *See* 37 ANNALS OF CONG. 1148 (1821) (“[T]he state of the votes for President and Vice President was well known, though unofficially, and, as the votes of Missouri could not affect the result . . .”).

305. BRANDS, *supra* note 301, at 90.

on whether to include Missouri's votes in the final tally could have major implications on future debates over westward expansion and slavery, and it could derail the hard-won compromise over Missouri specifically.³⁰⁶ Once again, Henry Clay entered the breach with a solution:

He refused to let the House get distracted by a lengthy debate over counting the electoral votes. He proposed an unprecedented solution. Two counts would be taken, one with Missouri's votes, the other without. If the discrepancy did not affect the identity of the winner, both results would be reported to the president of the Senate, who would then announce the winner.³⁰⁷

A Vice President and Cabinet trying to sideline an out-of-control President could adopt a similar tactic. They could send two letters to congressional leadership: one that included the signatures of the Acting Secretaries and one that did not.³⁰⁸ The former would allow the Vice President to disregard the constitutional status of Acting Secretaries and clearly establish his place as Acting President. Alternatively, if the Vice President has the support of at least eight Senate-confirmed Secretaries, the letter sent to congressional leadership could include only those signatures and exclude the signatures of any Acting Secretaries, regardless of whether they support the proposal or not.

The problem becomes more difficult if the votes of the Acting Secretaries are needed to reach the constitutionally required "majority" of principal officers. Whether the requirements of Section 4 have been satisfied is probably a "political question"—meaning

306. *See id.* at 90–91.

307. *Id.* Clay's proposal and subsequent congressional debate is reported in the *Annals of Congress*, and the following was announced by the President of the Senate after the two counts were taken:

Were the votes of Missouri to be counted, the result would be—For JAMES MONROE, of Virginia, for President of the United States, 231 votes: if not counted, for JAMES MONROE, of Virginia, 228 votes:—for DANIEL D. TOMPKINS, of New York, for Vice President of the United States, 218 votes: if not counted, for DANIEL D. TOMPKINS, of New York, for Vice President of the United States, 215 votes. But in either event, JAMES MONROE, of Virginia, has a majority of the votes of the whole number of Electors for President, and DANIEL D. TOMPKINS, of New York, has a majority of the votes of the whole number of Electors for Vice President of the United States.

.
I therefore declare that JAMES MONROE, of Virginia, is duly elected President of the United States, for four years, to commence on the fourth day of March, 1821

See 37 ANNALS OF CONG. 1147–66 (1821).

308. *See supra* Part III.

that courts will consider it a controversy outside of their jurisdiction and leave it to the political branches to decide.³⁰⁹ As a practical matter, that decision will fall to the Speaker of the House and the President pro tempore of the Senate—the figures the Constitution requires the Vice President to notify.³¹⁰ But what if those individuals disagree? Loyalty to a sitting President of the same party is a powerful force among Members of Congress. As shown in Appendix B, it is not uncommon for the Senate and the House of Representatives to be controlled by separate parties.³¹¹ If the leaders of Congress do not agree on whether the Vice President’s invocation of Section 4 is valid, who has the right to exercise the “powers and duties” of the Presidency? Who do the Joint Chiefs of Staff listen to? Who carries the nuclear football? Similar problems arise if the courts do decide to step in. The case would almost certainly be fast-tracked to the Supreme Court. Regardless of the outcome of the case, a large portion of the country would assume that the Court had made a political rather than a legal decision. The blow to the Court’s legitimacy would be more severe than after *Bush v. Gore*.³¹² And in the interim, who’s in charge?

As a result, it is critical that Congress step in. The Twenty-Fifth Amendment contains a safety valve. While the default is that the Vice President can only “assume the powers and duties” of the Presidency “as Acting President” with the support of the “majority of . . . the principal officers of the executive department[s]” as discussed above, the framers of the Twenty-Fifth Amendment authorized Congress to designate “by law” a different “body” to work in tandem with the Vice President in making this determination.³¹³ Thus Congress can clear up this ambiguity legislatively, without needing to pass through the difficulty of amending the Constitution again.³¹⁴ Unfortunately, Congress has never attempted to do

309. *Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring) (“The political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable—that is, whether the dispute is appropriate for resolution by courts.”).

310. U.S. CONST. amend. XXV, § 4.

311. See *infra* Appendix B.

312. 531 U.S. 98 (2000) (per curiam); see also John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 UNIV. OF CHI. L. REV. 775, 775 (2001) (“Even as it brought the 2000 presidential election to conclusion, *Bush v. Gore* gave rise to a flurry of attacks on the legitimacy of the Supreme Court. Many scholars criticized the Court for its creation of a new Equal Protection Clause claim never before seen . . .”).

313. U.S. CONST. amend. XXV, § 4.

314. U.S. CONST. amend. XXV, § 4.

this. It needs to do so now *before* another crisis occurs to prevent future Cabinet Secretaries from being paralyzed the same way that Mnuchin and Pompeo were on January 6.³¹⁵

Congress’s authority to provide an alternative means of relieving the President of the powers and duties of his office to the default spelled out in the Twenty-Fifth Amendment is not unlimited. The text of the Amendment—specifically the clauses “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”³¹⁶—constrains its options.

First, it is clear that the Vice President must always be involved in the determination of presidential inability.³¹⁷ Just as a unanimous Cabinet could not install the Vice President as Acting President without the Vice President’s support under the default mechanism, Congress cannot legislate an alternative means that would cut the Vice President out of the determination either.³¹⁸

Second, the parallel structure of this provision, which contrasts “of the executive departments” with “of such other body as Congress may by law provide”³¹⁹ suggests that should Congress exercise its authority to designate an alternative, it must designate a body—i.e., an *organization* rather than, say, a single individual such as the Surgeon General—to make the decision alongside the Vice President.

Third, the body so designated must have at least three principal officers.³²⁰ Again, the parallel structure makes this clear. A President may be relieved of the power and duties of his office when either “the Vice President and a majority of . . . the principal officers of the executive departments” or “the Vice President and a majority of . . . the principal officers . . . of such other body as Congress may by law provide” notify Congressional leadership of the President’s disability.³²¹ It is fundamentally impossible to have a *major-*

315. See *supra* notes 30–33 and accompanying text.

316. U.S. CONST. amend. XXV, § 4 (emphasis added).

317. See U.S. CONST. amend. XXV, § 4 (specifying the Vice President’s role in the event the President is compromised).

318. *Id.*

319. *Id.*

320. See *id.* (noting that a majority is needed).

321. *Id.*

ity of principal officers if the organization has less than three of them.³²²

Fourth, the organization selected by Congress must be a *governmental* body.³²³ While this is not explicitly stated in the text, it is implied by the reference to principal officers.³²⁴ While it is not unusual to talk about the principal officers of non-government organizations—such as C-suite executives of a corporation—it is presumed that the Constitution should be read as a whole. As noted above, the term “officer” and “principal officers” are terms of art when read in the context of the Constitution. The prior implies a government employee whose duties and emoluments are established by law, while the latter implies—at a minimum—that those officers be appointed by the President with the advice and consent of the Senate.³²⁵ As a result, it would be inappropriate for Congress to designate, say, the Chicago Cubs or the ABA.

Within these limitations, however, Congress has broad discretion. Nothing else in the text limits the nature or composition of the body.³²⁶ Congress could choose among any number of models: a panel of judges, a medical board, a subset of the Cabinet, etc. For example, during the early debates on presidential inability, some in Congress suggested a team of doctors who could assess the President’s physical and mental capacity and exercise their professional judgement in determining the presence or absence of a disability.³²⁷ Congress could certainly establish such a board and designate it as the alternative body, so long as the doctors serving on the board were appointed by the President and confirmed by the Senate and reported directly to the President.³²⁸

However, there are strong policy reasons for *wanting* the Cabinet to be the body that operates with the Vice President in making

322. “A number that is more than half of a total; a group of more than [fifty] percent A majority always refers to more than half of some defined or assumed set.” *Majority*, BLACK’S LAW DICTIONARY (11th ed. 2019).

323. See U.S. CONST. amend. XXV, § 4. (specifying that either a majority of “principal officers of the executive departments *or such other body*” as Congress specifies by law is needed (emphasis added)).

324. See U.S. CONST. amend. XXV, § 4.

325. See U.S. CONST. amend. XXV, § 4; see also *id.* art. II, § 2, cl. 2 (providing the President’s authority to appoint principal officers, leaving the appointment of inferior officers to congressional discretion).

326. See U.S. CONST. amend. XXV, § 4.

327. See Feerick, *supra* note 37, at 110, 112, 117–18.

328. See U.S. CONST. amend. XXV, § 4.

this determination. They are the officers responsible for running most of the executive branch of government, allowing the transition of power between the President and Vice President to happen smoothly. Furthermore, they meet regularly with the President both as a group and one-on-one, which allows them to assess the President's capacity in a way that other government officials might not. Therefore, it seems most prudent for Congress to exercise its authority given to them by the Twenty-Fifth Amendment to simply: (1) *reaffirm* that the Cabinet acts with the Vice President to determine Presidential inability; and (2) *clarify* whether Acting Cabinet Secretaries should or should not have a vote in those deliberations. As mentioned above, there are nightmare scenarios conceivable regardless of whether Acting Secretaries have a say or not—it makes sense to defer to Congress to make that policy judgment.

Some may object that such a clarification would be unconstitutional on grounds that the Twenty-Fifth Amendment limits Congress to choosing “such other body” (i.e., *not* the Cabinet) when exercising its discretionary authority to set up an alternative removal mechanism. But this critique misses the point. The Amendment does not specifically mention the Cabinet.³²⁹ In fact, while Justice Scalia in his dissent in *Morrison* suggested that the term “principal officers[s] of the executive departments” was essentially synonymous with “Cabinet officials,”³³⁰ no majority opinion has ever held that. In fact, the Supreme Court has acknowledged that some non-Cabinet posts—such as the Solicitor General—may indeed qualify as “principal officers” as well.³³¹ Thus, the Cabinet *would* be “such other body.”³³²

However, out of an abundance of caution, Congress could also create a separate body that happens to be coterminous with the Cabinet. Having Cabinet Secretaries serve on interagency committees of this sort is not uncommon. For example, in 2020, President Trump utilized an executive order to establish a committee to review foreign participation in the U.S. telecommunications sec-

329. U.S. CONST. amend. XXV.

330. *Morrison v. Olson*, 487 U.S. 654, 718–19 (1988) (Scalia, J., dissenting) (comparing the independent prosecutor's tenure as “at least as long as many Cabinet officials” and her powers as more than that of the Attorney General).

331. *Edmond v. United States*, 520 U.S. 651, 668 (1997) (Souter, J., concurring).

332. U.S. CONST. amend. XXV, § 4.

tor.³³³ The Attorney General served as chair of the committee, and the Secretaries of Homeland Security and Defense served as members.³³⁴

This organization, which I shall call the Presidential Disability Commission, would be charged exclusively with the duty to determine whether the President was incapacitated. Provisions could be made to also ensure that an Acting Secretary hand-picked for loyalty by the President, such as Whitaker, would not be a member of the Commission. The following is a proposed bill that would do just that:

WHEREAS, Section 4 of Twenty-Fifth Amendment of the United States Constitution does not provide an enumerated list of the “principal officers of the executive departments,”³³⁵ and

WHEREAS, this omission may cause confusion and delay in the event of an emergency—medical or otherwise—necessitating the President be relieved of “the powers and duties of his office”;³³⁶

THEREFORE, pursuant to the authority given to Congress by Section 4 of the Twenty-Fifth Amendment of the United States Constitution to provide an alternative body to determine with the Vice President the presence of presidential disability;³³⁷

IT IS RESOLVED that there shall be established a Presidential Disability Commission within the executive branch. And that Congress designates the Presidential Disability Commission to be the “other body” mentioned in all relevant provisions of the Twenty-Fifth Amendment of the United States Constitution.³³⁸

Composition—The Presidential Disability Commission shall consist of the head of each of the executive departments enumerated in 5 U.S.C. § 101, provided that the department head has been appointed to that position by the President with the advice and consent of the Senate.

Vacancies—A vacancy in the office of Attorney General or the office of a Secretary of one of the other executive departments enumerated in 5 U.S.C. § 101 shall not result in a vacancy on the Presidential Disability Commission. Instead, the department’s first assistant as defined by law shall be added to the

333. Exec. Order No. 13,913, 3 C.F.R. 324, 324–25 (2021).

334. *Id.* at 325.

335. See U.S. CONST. amend. XXV, § 4.

336. U.S. CONST. amend. XXV, § 3.

337. U.S. CONST. amend. XXV, § 4.

338. U.S. CONST. amend. XXV.

Commission until the vacancy in the office of Attorney General or Secretary shall be filled through presidential confirmation with the advice and consent of the Senate. Attorneys General *ad interim* and Secretaries *ad interim* shall not serve on the Commission unless they are also the First Assistant of the Department.

Definitions—For purposes of this section and the Twenty-Fifth Amendment, a department head does not include Acting Secretaries, Acting Attorneys General, Secretaries *ad interim*, or Attorneys General *ad interim*. Nor does it include executive officers who are not the head of an executive department enumerated in 5 U.S.C. § 101.

CONCLUSION

Section 4 of the Twenty-Fifth Amendment is an imperfect solution to a problem that has dogged the Republic since the Founding: what to do when the President is no longer fit—for one reason or another—to exercise the awesome powers of the Oval Office? The Amendment allows the Vice President—acting in tandem with a majority of the Cabinet—to remove the President from the “powers and duties of his office” and install the Vice President as “Acting President.” But the text is silent about whether *Acting* Cabinet Secretaries—or to be more precise, Secretaries *ad interim*—qualify as “principal officers of the executive departments.” This caused at least two Cabinet Secretaries to hesitate about invoking the Twenty-Fifth Amendment on January 6.

As a legal matter, this should have been an easy question to answer. In light of existing Supreme Court precedent, an Acting Secretary clearly meets all of the requirements to be both an “officer” and a “principal officer” and therefore should have a vote in determining whether to invoke the Twenty-Fifth Amendment. But the fact that it is an open constitutional question still presents political risks. Congress should therefore invoke its constitutional authority to establish another body—which can and probably should be comprised of the Cabinet heads who have been confirmed by the Senate—to take the uncertainty out of the operationalization of Section 4. Doing so just might save the Republic.

APPENDIX A

Instances of Back-to-Back Acting or *ad interim* Cabinet Secretaries

Year	President	Acting Position	Acting Secretaries
1815	James Madison	Secretary of War	James Monroe (March 1, 1815–March 14, 1815); ³³⁹ Alexander J. Dallas (March 14, 1815–August 8, 1815) ³⁴⁰
1817	James Monroe	Secretary of State	John Graham (March 4, 1817–March 10, 1817); ³⁴¹ Richard Rush (March 10, 1817–September 22, 1817) ³⁴²
1836–1837	Andrew Jackson	Secretary of War	Carey A. Harris (October 5, 1836–October 26, 1836); ³⁴³ Benjamin F. Butler (October 26, 1836–March 2, 1837) ³⁴⁴
1843	John Tyler	Secretary of State	Hugh S. Legaré (May 9, 1843–June 21, 1843); ³⁴⁵ William S. Derrick (June 21, 1843–June 24, 1843); ³⁴⁶ Abel P. Upshur (June 24, 1843–July 23, 1843) ³⁴⁷

339. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 5 (2005).

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 6.

344. *Id.* at 6.

345. *Id.* at 7.

346. *Id.*

347. *Id.*

Year	President	Acting Position	Acting Secretaries
1850	Millard Fillmore	Secretary of War	Samuel J. Anderson (July 23, 1850); ³⁴⁸ Winfield Scott (July 24, 1850–August 14, 1850) ³⁴⁹
1884	Chester A. Arthur	Secretary of Treasury	Charles E. Coon (September 4, 1884 – September 8, 1884); ³⁵⁰ Henry F. French (September 8, 1881–September 15, 1884); ³⁵¹ Charles E. Coon (September 15, 1884–September 24, 1884); ³⁵² Walter Q. Gresham (September 24, 1884–October 29, 1884); ³⁵³ Henry F. French (October 29, 1884–October 31, 1884) ³⁵⁴
1895	Grover Cleveland	Secretary of State	Edwin F. Uhl (May 28, 1895–May 31, 1895); ³⁵⁵ Alvey A. Adee (May 31, 1895– June 1, 1895); ³⁵⁶ Edwin F. Uhl (June 1, 1895–June 8, 1895) ³⁵⁷

348. *Id.* at 8.349. *Id.* at 8.350. *Id.* at 13.351. *Id.*352. *Id.*353. *Id.*354. *Id.*355. *Id.* at 14.356. *Id.*357. *Id.*

Year	President	Acting Position	Acting Secretaries
1980	Jimmy Carter	Secretary of State	Warren Christopher (April 28, 1980–May 2, 1980); ³⁵⁸ David Newsom (May 2, 1980–May 3, 1980); ³⁵⁹ Richard N. Cooper (May 3, 1980); ³⁶⁰ David Newsom (May 3, 1980–May 4, 1980); ³⁶¹ Warren Christopher (May 4, 1980–May 8, 1980) ³⁶²
1993	Bill Clinton	Secretary of State	Arnold Kanter (January 20, 1993); ³⁶³ Frank G. Wisner (January 20, 1993) ³⁶⁴
1997–1998	Bill Clinton	Secretary of Veteran Affairs	Hershel W. Gober (July 3, 1997–January 2, 1998); ³⁶⁵ Togo D. West (January 2, 1998–May 5, 1998) ³⁶⁶

358. RICHARDSON DOUGALL & MARY PATRICIA CHAPMAN, UNITED STATES CHIEFS OF MISSION 1778-1882, at 280 (Evan M. Duncan ed., 2d ed. 1982).

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. Thomas L. Friedman, *Clinton Rounds Out State Dept. Team*, N.Y. TIMES, Jan. 20, 1993, at A12.

364. *Frank G. Wisner II*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/departmenthistory/people/wisner-frank-g> [<https://perma.cc/CYM4-M6YP>].

365. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, *supra* note 339, at 29; William H. Pruden III, *Hershel Wayne Gober*, ENCYCLOPEDIA OF ARK., <https://encyclopediaofarkansas.net/entries/hershel-wayne-gober-4877/> [<https://perma.cc/9XVN-VH9M>] (Nov. 30, 2020); *President Clinton Names Togo D. West, Jr. as Acting Secretary of the Department of Veterans' Affairs*, WHITE HOUSE: OFF. OF THE PRESS SEC'Y, <https://web.archive.org/web/20061005221525/http://clinton6.nara.gov/1997/12/1997-12-02-togo-west-named-acting-secretary-at-veterans-affairs.html> [<https://perma.cc/A6RF-C3HQ>].

366. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, *supra* note 339, at 29; *President Clinton Names Togo D. West Jr. as Acting Secretary of the Department of Veterans' Affairs*, *supra* note 365.

Year	President	Acting Position	Acting Secretaries
2007	George W. Bush	Attorney General	Paul Clement (September 17, 2007–September 18, 2007); ³⁶⁷ Peter Keisler (September 18, 2007–November 9, 2007) ³⁶⁸
2009	Barack Obama	Secretary of Labor	Howard Radzely (January 20, 2009–February 2, 2009); ³⁶⁹ Edward C. Hugler (February 2, 2009–February 24, 2009) ³⁷⁰
2013	Barack Obama	Secretary of Commerce	Rebecca Blank (June 11, 2012–June 1, 2013); ³⁷¹ Cameron Kerry (June 1, 2013–June 26, 2013) ³⁷²

367. Dan Eggen & Elizabeth Williamson, *Democrats May Tie Confirmation to Gonzales Papers*, WASH. POST (Sept. 19, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091801379.html?nav=rss_politics [<https://perma.cc/AN63-8X6N>] (“While Mukasey’s nomination is pending, the Justice Department will be run by former civil division chief Peter D. Keisler . . . a surprise replacement in that role for Solicitor General Paul D. Clement . . . [who] wound up officially taking the helm at 12:01 a.m. Monday and relinquishing it 24 hours later.”);

368. *Id.*; Sara Gandy, *Mukasey Sworn in as Attorney General*, 9NEWS (Nov. 9, 2007, 9:36 AM), <https://www.9news.com/article/news/mukasey-sworn-in-as-attorney-general/73-343193599> [<https://perma.cc/LR58-TY9Y>] (noting Keisler’s end date).

369. *Hon. Howard M. Radzely*, THE FEDERALIST SOC’Y, <https://fedsoc.org/contributors/howard-radzely-1> [<https://perma.cc/P2XU-J64H>].

370. Michael A. Fletcher, *After Delay, Panel to Vote on Solis Nomination*, WASH. POST, Feb. 5, 2009, at A04 (noting Hugler’s start date); The Associated Press, *Senate Confirms Solis as Labor Secretary*, N.Y. TIMES (Feb. 24, 2009), <https://www.nytimes.com/2009/02/25/us/politics/25solis.html> [<https://perma.cc/FH4Q-JKBX>].

371. *See* MJ Lee, *John Bryson Takes Medical Leave*, POLITICO (June 11, 2012, 10:28 PM), <https://www.politico.com/story/2012/06/john-bryson-takes-medical-leave-077312> [<https://perma.cc/NUX5-MCSG>] (noting Blank’s start date); *Cameron F. Kerry, Acting Secretary of Commerce and General Counsel*, U.S. DEPT OF COM., <https://2010-2014.commerce.gov/about-commerce/commerce-leadership/cameron-kerry.html> [<https://perma.cc/6E4B-CTPM>] (noting Blank’s end date).

372. *Cameron F. Kerry, Acting Secretary of Commerce and General Counsel*, *supra* note 371.

Year	President	Acting Position	Acting Secretaries
2017	Barack Obama, Donald Trump	Secretary of Agriculture	Michael Scuse (January 13, 2017–January 20, 2017); ³⁷³ Mike Young (January 20, 2017–April 25, 2017) ³⁷⁴
2017	Donald Trump	Attorney General	Sally Yates (January 20, 2017–January 30, 2017); ³⁷⁵ Dana J. Boente (January 30, 2017–February 9, 2017) ³⁷⁶
2017–2018	Donald Trump	Secretary of Health and Human Services	Don Wright (September 30, 2017–October 10, 2017); ³⁷⁷ Eric Hargan (October 10, 2017–January 29, 2018) ³⁷⁸
2018	Donald Trump	Secretary of Veteran Affairs	Robert Wilkie (March 28, 2018–May 29, 2018); ³⁷⁹ Peter O'Rourke (May 29, 2018–July 30, 2018) ³⁸⁰

373. See The Hagstrom Report, *Vilsack Leaves Secretary of Agriculture Position a Week Early*, THE FENCE POST (Jan. 17, 2017), <https://www.thefencepost.com/news/vilsack-leaves-secretary-of/> [<https://perma.cc/PS2E-RZ83>] (noting Scuse's start date); Jerry Hagstrom, *USDA Acting Secretary and Candidates for Deputy Secretary*, PROGRESSIVE FARMER: AG POLICY BLOG (Jan. 21, 2017, 8:35 PM), <https://www.dtnpf.com/agriculture/web/ag/blogs/ag-policy-blog/blog-post/2017/01/22/usda-acting-secretary-candidates> [<https://perma.cc/XXB2-FZFJ>] (noting Young's start date).

374. Hagstrom, *supra* note 373.

375. MICHAEL C. LEMAY, *HOMELAND SECURITY: A REFERENCE HANDBOOK* 238 (2018).

376. *Former Acting Assistant Attorney General Dana J. Boente*, U.S. DEP'T OF JUST. ARCHIVES, <https://www.justice.gov/archives/nsd/staff-profile/former-acting-assistant-attorney-general-dana-j-boente> [<https://perma.cc/HAY7-6Q75>] (Jan. 30, 2018).

377. Designating an Acting Attorney Gen., 42 Op. O.L.C. 1, 24 n.15 (Nov. 14, 2018) (slip op.).

378. See CNN Wire, *Trump Announces Eric Hargan as Acting HHS Secretary*, KTLA, <https://ktla.com/news/nexstar-media-wire/nationworld/trump-announces-eric-hargan-as-acting-hhs-secretary/> [<https://perma.cc/>] (Oct. 10, 2017, 7:42 PM) (noting Hargan's start date); STAFF OF J. COMM. ON PRINTING, 115TH CONG., OFFICIAL CONGRESSIONAL DIRECTORY 733 (2018) (noting date that the Senate-confirmed Secretary assumed the office).

379. *Secretary of Veterans Affairs*, U.S. DEP'T OF VETERANS AFF. OFF. OF PUB. & INTER-GOVERNMENTAL AFFS., <https://www.va.gov/opa/bios/secva.asp> [<https://perma.cc/A8NL-MS8Q>] (Feb. 6, 2019).

380. 42 Op. O.L.C. at 24 n.15.

Year	President	Acting Position	Acting Secretaries
2019	Donald Trump	Secretary of Defense	Patrick M. Shanahan (January 1, 2019–June 23, 2019); ³⁸¹ Mark Esper (June 24, 2019–July 15, 2019); ³⁸² Richard V. Spencer (July 15, 2019–July 23, 2019) ³⁸³
2019–2020	Donald Trump, Joe Biden	Secretary of Homeland Security	Kevin K. McAleenan (April 8, 2019–November 13, 2019); ³⁸⁴ Chad F. Wolf (November 13, 2019–January 11, 2021); ³⁸⁵ Peter T. Gaynor (January 11, 2021–January 20, 2021); ³⁸⁶ David P. Pekoske (January 20, 2021–February 2, 2021) ³⁸⁷

381. *Patrick M. Shanahan, Former Deputy Secretary of Defense*, U.S. DEP'T OF DEF., <https://www.defense.gov/About/Biographies/Biography/Article/1252116/patrick-m-shanahan/> [<https://perma.cc/VVX5-HCVG>].

382. *Dr. Mark T. Esper, Former Secretary of Defense*, U.S. DEP'T OF DEF., <https://www.defense.gov/About/Biographies/Biography/Article/1378166/dr-mark-t-esper/> [<https://perma.cc/K46W-P4ET>].

383. *Richard V. Spencer, Former Secretary of the Navy*, U.S. DEP'T OF DEF., <https://www.defense.gov/About/Biographies/Biography/article/1887215/richard-v-spencer/> [<https://perma.cc/VQ4W-FKZX>].

384. *Kevin K. McAleenan*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/person/kevin-k-mcaleenan> [<https://perma.cc/4PKC-JB4W>] (Nov. 13, 2019).

385. *Chad F. Wolf*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/person/chad-f-wolf> [<https://perma.cc/B88P-THJ5>] (Jan. 22, 2021).

386. *Peter T. Gaynor*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/person/peter-t-gaynor> [<https://perma.cc/XA8E-5KGA>] (Jan. 20, 2021).

387. *Administrator David P. Pekoske*, U.S. TRANSP. SEC. ADMIN., <https://www.tsa.gov/leader-bios/administrator> [<https://perma.cc/2HRF-NA4T>].

Year	President	Acting Position	Acting Secretaries
2020–2021	Donald Trump, Joe Biden	Secretary of Defense	Christopher C. Miller (November 9, 2020–January 20, 2021); ³⁸⁸ David Norquist (January 20, 2021–January 22, 2021) ³⁸⁹
2020–2021	Donald Trump, Joe Biden	Attorney General	Jeffrey A. Rosen (December 24, 2020–January 20, 2021); ³⁹⁰ Monty Wilkinson (January 20, 2021–March 11, 2021) ³⁹¹
2021	Donald Trump, Joe Biden	Secretary of Education	Mick Zais (January 8, 2021–January 20, 2021); ³⁹² Philip Rosenfelt (January 20, 2021–March 2, 2021) ³⁹³

388. Christopher C. Miller, *Former Acting Secretary of Defense*, U.S. DEP'T OF DEF., <https://www.defense.gov/About/Biographies/Biography/Article/2111192/christopher-c-miller/> [<https://perma.cc/66E4-UL7K>].

389. See Lara Seligman, *Biden Taps Trump Appointee Norquist to be His Temporary Defense Secretary*, POLITICO, <https://www.politico.com/news/2021/01/14/biden-defense-secretary-austin-norquist-459321> [<https://perma.cc/NE62-UASG>] (Jan. 14, 2021, 1:08 PM) (noting Norquist's start date); Clare Foran, *Senate Confirms Lloyd Austin to be First Black Defense Secretary*, CNN, <https://www.cnn.com/2021/01/22/politics/lloyd-austin-senate-vote-confirmation/index.html> [<https://perma.cc/LUP2-WBUL>] (Jan. 22, 2021) (noting date that the Senate-confirmed Secretary assumed the office).

390. *Meet the Acting Attorney General*, U.S. DEP'T OF JUST., <https://web.archive.org/web/20210117131036/https://www.justice.gov/ag/staff-profile/meet-acting-attorney-general> [<https://perma.cc/S7S8-97WX>].

391. Evan Perez, *Trump's Acting Attorney General Leaves Without Creating Controversial Special Counsels*, CNN, <https://www.cnn.com/2021/01/20/politics/justice-department-special-counsel-rosen-wilkinson/index.html> [<https://perma.cc/9YNV-W3GD>] (Jan. 20, 2021, 10:37 AM); *Attorney General Merrick B. Garland*, U.S. DEP'T OF JUST., <https://www.justice.gov/ag/staff-profile/meet-attorney-general> [<https://perma.cc/L7SB-E2WR>] (noting date that the Senate-confirmed Secretary assumed the office).

392. Andy Husk, *Zais Is Acting Education Secretary*, NEWBERRY OBSERVER (Jan. 14, 2021), <https://www.newberryobserver.com/news/33116/zais-is-acting-education-secretary> [<https://perma.cc/X55L-BGDK>].

393. Charles Hendrix, *Biden Administration Names Acting Education Secretary*, DIST. ADMIN. (Jan. 21, 2021), <https://districtadministration.com/biden-administration-names-acting-education-secretary/> [<https://perma.cc/MK5S-2QK3>] (noting Rosenfelt's start date); see Dr. Miguel Cardona, *Secretary of Education—Biography*, U.S. DEP'T OF EDUC., <https://www.2.ed.gov/news/staff/bios/cardona.html> [<https://perma.cc/ZP88-XQAW>] (noting date that the Senate-confirmed Secretary assumed the office).

Year	President	Acting Position	Acting Secretaries
2021	Donald Trump, Joe Biden	Secretary of Transportation	Steven G. Bradbury (January 12, 2021–January 20, 2021); ³⁹⁴ Lana Hurdle (January 20, 2021–February 2, 2021) ³⁹⁵

394. *Acting Secretary of Transportation*, U.S. DEP'T OF TRANSP., <https://web.archive.org/web/20210116020152/https://www.transportation.gov/administrations/office-general-counsel/steven-g-bradbury> [<https://perma.cc/3YQ6-VM4Z>] (Jan. 12, 2021).

395. *Secretary of Transportation*, GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/fedv-acancy/21153> [<https://perma.cc/3R82-GHUT>].

APPENDIX B

Instances Where the Speaker of the House and President Pro Tempore of the Senate were from Different Parties

Congress (Years)	Speaker	Speaker's Party	President Pro Tempore ("PPT")	PPT's Party
44th (1875–1877)	Michael C. Kerr; ³⁹⁶ Samuel J. Randall ³⁹⁷	Democrat	Thomas W. Ferry ³⁹⁸	Republican
45th (1877–1879)	Samuel J. Randall ³⁹⁹	Democrat	Thomas W. Ferry ⁴⁰⁰	Republican
48th (1883–1885)	John G. Carlisle ⁴⁰¹	Democrat	George F. Edmonds ⁴⁰²	Republican
49th (1885–1887)	John G. Carlisle ⁴⁰³	Democrat	John Sherman; ⁴⁰⁴ John J. Ingalls ⁴⁰⁵	Republican

396. VALERIE HEITSHUSEN, CONG. RSCH. SERV., 97-780, THE SPEAKER OF THE HOUSE: HOUSE OFFICER, PARTY LEADER, AND REPRESENTATIVE 9 (2017).

397. *Id.* at 10.

398. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE 19 (2015).

399. HEITSHUSEN, *supra* note 396, at 10.

400. DAVIS, *supra* note 398, at 19.

401. HEITSHUSEN, *supra* note 396, at 10.

402. DAVIS, *supra* note 398, at 19.

403. HEITSHUSEN, *supra* note 396, at 10.

404. DAVIS, *supra* note 398, at 19.

405. *Id.*

Congress (Years)	Speaker	Speaker's Party	President Pro Tempore ("PPT")	PPT's Party
50th (1887–1889)	John G. Carlisle ⁴⁰⁶	Democrat	John J. Ingalls ⁴⁰⁷	Republican
52nd (1891–1893)	Charles F. Crisp ⁴⁰⁸	Democrat	Charles F. Manderson ⁴⁰⁹	Republican
62nd (1911–1913)	James B. ("Champ") Clark ⁴¹⁰	Democrat	various ⁴¹¹	Republican
72nd (1931–1933)	John Nance Garner ⁴¹²	Democrat	George H. Moses ⁴¹³	Republican
97th (1981–1983)	Thomas P. ("Tip") O'Neill, Jr. ⁴¹⁴	Democrat	Strom Thurmond ⁴¹⁵	Republican

406. HEITSHUSEN, *supra* note 396, at 10.

407. DAVIS, *supra* note 398, at 19.

408. HEITSHUSEN, *supra* note 396, at 10.

409. DAVIS, *supra* note 398, at 19.

410. HEITSHUSEN, *supra* note 396, at 10.

411. William P. Frye, a Republican, served as President pro tempore of the Senate from February 7, 1896 (54th Congress) until he resigned the position on April 27, 1911 (62nd Congress). DAVIS, *supra* note 398, at 20; 47 CONG. REC. 659 (1911). Due to factions within the Republican Senate delegation at the time, electing Frye's replacement required a compromise: several Senators—Augustus O. Bacon (Democrat); Frank B. Brandegee (Republican); Charles Curtis (Republican); Jacob H. Gallinger (Republican); and Henry Cabot Lodge (Republican)—would alternate as President pro tempore for the remainder of the 62nd Congress. DAVIS, *supra* note 398, at 6, 20.

412. HEITSHUSEN, *supra* note 396, at 10.

413. DAVIS, *supra* note 398, at 20.

414. HEITSHUSEN, *supra* note 396, at 10.

415. DAVIS, *supra* note 398, at 20.

Congress (Years)	Speaker	Speaker's Party	President Pro Tempore ("PPT")	PPT's Party
98th (1983–1985)	Thomas P. ("Tip") O'Neill, Jr. ⁴¹⁶	Democrat	Strom Thurmond ⁴¹⁷	Republican
99th (1985–1987)	Thomas P. ("Tip") O'Neill, Jr. ⁴¹⁸	Democrat	Strom Thurmond ⁴¹⁹	Republican
107th (2001–2003)	J. Dennis Hastert ⁴²⁰	Republican	Robert C. Byrd ⁴²¹	Democrat
112th (2011–2013)	John A. Boehner ⁴²²	Republican	Daniel Iouye ⁴²³	Democrat
113th (2013–2015)	John A. Boehner ⁴²⁴	Republican	Patrick Leahy ⁴²⁵	Democrat
116th (2019–2021)	Nancy Pelosi ⁴²⁶	Democrat	Chuck Grassley ⁴²⁷	Republican

416. HEITSHUSEN, *supra* note 396, at 10.

417. DAVIS, *supra* note 398, at 20.

418. HEITSHUSEN, *supra* note 396, at 10.

419. DAVIS, *supra* note 398, at 20.

420. HEITSHUSEN, *supra* note 396, at 10.

421. Because the Senate was evenly split between parties at the start of the 107th Congress, Senator Robert C. Byrd held the position until Republicans gained tie-breaking power upon the inauguration of Vice President Dick Cheney on January 20, 2001. Senator Byrd was reelected President pro tempore on June 6, 2001, when Senator James Jeffords of Vermont left the Republican party. DAVIS, *supra* note 398, at 7, 21.

422. HEITSHUSEN, *supra* note 396, at 10.

423. DAVIS, *supra* note 398, at 21.

424. HEITSHUSEN, *supra* note 396, at 10.

425. DAVIS, *supra* note 398, at 21.

426. *Speakers of the House by Congress*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/People/Office/Speakers-List/> [https://perma.cc/UP2P-25ZN].

427. *About the President Pro Tempore | Presidents Pro Tempore*, U.S. SENATE, <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm> [https://perma.cc/7S3K-95FW].

Congress (Years)	Speaker	Speaker's Party	President Pro Tempore ("PPT")	PPT's Party
118th (2023–2025)	Kevin McCarthy ⁴²⁸	Republican	Patty Murray ⁴²⁹	Democrat

428. *Speakers of the House by Congress*, *supra* note 426.

429. *About the President Pro Tempore* | *Presidents Pro Tempore*, *supra* note 427.