



Principal Officers and the Function of Section 4 of the 25th Amendment

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Section 4 of the 25th Amendment allows the “Vice President” and a majority of the “principal officers of the executive departments” to disempower a President who is “unable” to discharge the office’s powers and duties. Scholars and courts agree that “principal officers” means the members of the President’s Cabinet. Less clear is whether acting Cabinet members count as “principal officers.” The present scholarly consensus is that, while the issue is a close one, the Amendment’s text and legislative history suggest that acting members do count.

This Essay complicates that consensus. It suggests that, if text and history are ambiguous, function should inform our reading of the 25th Amendment. And the best functional argument is that acting Cabinet members should not count as “principal officers” who can vote in the Section 4 process. The standard reading, under which acting members are “principal officers,” allows an out-of-control President to easily short-circuit the very process designed to rein him in. Under that interpretation, a deranged President,

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suspecting Section 4 action against him, could simply fire his Cabinet and replace them with loyalist acting members who would vote in his favor. By contrast, as we explain, an interpretation excluding acting members from the category of “principal officers” makes Presidential manipulation of the Section 4 process harder. Our reading therefore best preserves Section 4’s function as an extraordinary tool, able to quickly curb Presidential malfeasance and thereby avert disaster, perhaps on a global scale.

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INTRODUCTION

Section 4 of the 25th Amendment to the U.S. Constitution, adopted in 1967, provides a way to check the authority of the President that involves the “Vice President” and “principal officers of the executive departments.”¹ Specifically, it states:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.²

Afterward, the President may communicate to the President pro tempore of the Senate and the Speaker of the House that “no inability exists.”³ The Vice President and a majority of the principal officers have four days to reaffirm that the President is “unable,” during which the Vice President retains control.⁴ If they do not so reaffirm, the President resumes his powers and duties. If they do so reaffirm, Congress then must decide the issue. They are to quickly convene and decide the issue. If both houses of Congress determine by two-thirds vote that the President is unable, then the Vice President continues as “Acting President.” If either house fails to reach the two-thirds vote threshold, then the President resumes his powers and duties.⁵

¹ U.S. CONST. amend. XXV, § 4. In theory, it could involve a majority of another congressionally created body, but Congress has not yet created any such body. See YALE LAW SCH. RULE OF LAW CLINIC, THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER’S GUIDE 14-15 (2018), https://law.yale.edu/sites/default/files/area/clinic/document/mn082208_ls_readerguide_interior_final.pdf [https://perma.cc/3NX4-6RFJ].

² U.S. CONST. amend. XXV, § 4.

³ BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT 9 (2019).

⁴ See *id.*; Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 74, 125-49 (2018).

⁵ See KALT, *supra* note 3, at 10. The rest of Section 4 reads in full:

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the

The first question — of some pressing concern⁶ — is who are these “principal officers of the executive departments.”⁷ As an initial matter, it seems that the term “principal officers of executive departments” refers to the members of the President’s Cabinet.⁸ Those members are enumerated in 5 U.S.C § 101. Currently, there are fifteen such members: Secretary of State; Secretary of the Treasury; Secretary of Defense; Attorney General; Secretary of the Interior; Secretary of Agriculture; Secretary of Commerce; Secretary of Labor; Secretary of Health and Human Services; Secretary of Housing and Urban Development; Secretary of Transportation; Secretary of Energy; Secretary of Education; Secretary of Veterans Affairs; and Secretary of Homeland Security.⁹ So that seems simple enough then, if the Vice President and a majority of these fifteen Cabinet members (that is, eight of these Cabinet members) transmit their relevant declaration, they can begin the process for a 25th Amendment, Section 4 (“25A4”) replacement of the President.

But what about acting Principal Officers who have not been confirmed by the Senate?¹⁰ Are they “principal officers” who get to vote?

Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. CONST. amend. XXV, § 4.

⁶ See, e.g., Jeff Stein, *Treasury Secretary Mnuchin Involved in Discussions About the 25th Amendment, but Is Unlikely to Pursue Trump’s Removal*, WASH. POST (Jan. 8, 2021, 3:18 PM), <https://www.washingtonpost.com/us-policy/2021/01/08/mnuching-25th-amendment/> [<https://perma.cc/GY4X-STB8>]; *These Are the Members Calling for Impeachment or the 25th Amendment to Be Invoked*, CNN (Jan. 8, 2021, 2:49 PM), <https://www.cnn.com/2021/01/07/politics/list-lawmakers-trump-removal-congress/index.html> [<https://perma.cc/HCP9-XUDB>].

⁷ As stated above, Congress has not provided that any such other body weigh in on this decision. See *supra* note 1.

⁸ See *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 887 (1991) (stating that the “principal officers of the executive departments” referred to in Section 4 are those listed in 5 U.S.C. § 101); *Operation of the Twenty-Fifth Amendment Respecting Presidential Succession*, 9 Op. O.L.C. 65, 69 (1985).

⁹ 5 U.S.C § 101 (2018).

¹⁰ Acting secretaries need not have been confirmed by the Senate for any post, and by hypothesis, they have not been confirmed as Principal Officers. See Joshua L. Stayn,

Several scholars have written about this question, with in-depth analyses into the congressional debates over the 25th Amendment, contemporaneous statements by certain legislators, and analogues to the meaning of “principal officer” in other contexts.¹¹ From these sources, there is support for both opposing answers.¹²

The present scholarly consensus, based mostly on readings of legislative history, is that acting Principal Officers may vote in a 25A4 proceeding.¹³ Here, we offer an argument, focusing on the function of the 25th Amendment, that acting Principal Officers should not count as “principal officers” for purposes of 25A4, nor be able to vote toward a “majority.” For those who regard, as many scholars seem to, the textual and historical issues as close calls, we think that this functional observation is particularly compelling.

I. THE FUNCTIONAL ARGUMENT

To begin, we understand that the purpose of 25A4 is to provide for an efficacious process to ensure that the Vice President may step in when the President is unable to discharge his powers and duties. By the nature of the 25A4 process, we think it is clear that this process is meant to operate — and thus should be efficacious — even when the President is unwilling to step aside.¹⁴ Thus, if the President were able to easily halt

Note, *Vacant Reform: Why the Federal Vacancies Reform Act of 1998 Is Unconstitutional*, 50 DUKE L.J. 1511, 1523 (2001) (citing 5 U.S.C. § 3345(a) (Supp. V 1999)). For more on acting secretaries, see Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

¹¹ See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 117-18 (3d ed. 2014) (recognizing the debate in the legislative history); KALT, *supra* note 3, at 174; YALE LAW SCH. RULE OF LAW Clinic, *supra* note 1, at 13; John D. Feerick, *The Twenty-Fifth Amendment: Its Crafting and Drafting Process*, 10 CONLAWNOW 161, 169 n.49 (2019).

¹² See sources cited *supra* note 11.

¹³ See, e.g., FEERICK, *supra* note 11, at 117-18; KALT, *supra* note 3, at 151 (suggesting reasons for allowing acting members to vote); Feerick, *supra* note 11; Mark Joseph Stern, *Is Invoking the 25th Amendment Actually a Better Option Than Impeaching Trump?*, SLATE (Jan. 7, 2020, 1:58 PM), <https://slate.com/news-and-politics/2021/01/25th-amendment-trump-impeachment-pence.html> [<https://perma.cc/7B64-NETZ>] (interviewing 25th Amendment Scholar Brian C. Kalt); Brian C. Kalt (@ProfBrianKalt), TWITTER (Oct. 18, 2019, 5:58 AM), <https://twitter.com/ProfBrianKalt/status/1185178352975523841> [<https://perma.cc/V7A3-BE6Y>] (characterizing “[t]he scholarly consensus” that acting secretaries can vote).

¹⁴ The 25A4 process allows for the President to challenge the initial declaration by the Vice President and majority, which can then subsequently be countered by the Vice President and majority. This shows that the 25A4 process may operate when the President is unwilling to cede power. See KALT, *supra* note 3, at 8-9.

or obviate the 25A4 process, the efficacy would be lost. That, in turn, would be inconsistent with the function of 25A4 and be a reason to disfavor that reading.

Additionally, we think it is clear that 25A4 is supposed to operate quickly, compared to other ways of stripping the President of power (such as impeachment or election). Under the 25A4, the initial transfer of Presidential power to the Vice President requires essentially no process. Just the Vice President and a handful of high-ranking officials must agree. Divesting the President of authority under 25A4, however, requires a 2/3 vote in both houses of Congress.¹⁵ Notably, that is higher than the threshold of impeachment and conviction. For impeachment, only a majority of the House of Representatives is needed; and for conviction on those articles of impeachment, a 2/3 vote by Senate is required.¹⁶ Thus 25A4 is, as a mechanism for divesting authority from the President, inferior to impeachment. Rather, the advantage of the 25A4 process is quickness.

Now, suppose the President engages in some conduct that would, and reasonably should, precipitate a 25A4 scenario. For example, let's say the President deploys private militias to assassinate officials and interrupt an election. Or perhaps the President proposes starting an unprovoked nuclear war. These are serious violations, implicating both the President's moral and mental fitness for office. We would want the Vice President and a majority of the Principal Officers to be able to undertake the 25A4 process to stop these acts.¹⁷

Suppose further that the Vice President and all of the Cabinet members agree that the President is "unable to discharge the powers and duties of his office." And let us finally suppose that the President has eight cronies — not presently part of the Cabinet — that he can trust.

In a situation like this, should potential acting Cabinet members count as "principal officers" under 25A4? Note that this question about acting members is important almost exclusively in cases where the President may attempt to strategically meddle. In the mine run of 25A4

¹⁵ The text of the Amendment does not foreclose that the President may continue to declare himself able, and thus eligible to regain charge of his powers and duties, which in turn may require re-votes by Congress. *Id.* at 143-45. For simplicity, we assume that Congress would maintain stability in its voting disposition. We thank Brian Kalt for raising this point.

¹⁶ U.S. CONST. art. I, § 3, cl. 6-7.

¹⁷ *But see* KALT, *supra* note 3, at 12-14. Kalt suggests that moral fitness is out of bounds with respect to the scope of the Amendment. We disagree, as discussed *infra* note 32 and accompanying text. At the very least, we note that the line between severe moral failings and psychological disturbances will often be quite blurry.

cases — where, e.g., the President falls into a coma, the Vice President straightforwardly assumes power, and the President resumes it upon recovery — either answer is fine. In easy 25A4 cases, either group — the full Cabinet or permanent members only — will reach the same answer.¹⁸ Thus, it is primarily when the President is “unable” to discharge official duties, but able to, for example, fire Cabinet members, that this issue becomes crucial.

In these instances — where Presidential meddling threatens 25A4 — a rule treating acting Cabinet members as “principal officers” is worse than the alternative. Imagine that these acting Cabinet members are principal officers with 25A4 votes. Then, the President, recognizing that there may be a 25A4 process afoot, can fire any eight cabinet members and install his cronies in acting roles.¹⁹ Because Cabinet members serve at the pleasure of the President, firing the eight cabinet members can be done fairly easily.²⁰ Thus, in doing so, the President effectively blocks the 25A4 process. Because of the eight cronies, there will not be a majority of the Cabinet to go along with the Vice President. The 25A4 process is rendered a nullity by a simple act by the President.

There may be some question about whether the President can find eight cronies to serve as acting members. Given statutory restrictions on who can replace a Cabinet member, it is not enough for the President

¹⁸ One can imagine cases where, by chance, counting only permanent Cabinet members results in a tie, so 25A4 is not invoked, while the acting officers would curb the President. However, if such a tie arises without Presidential meddling — because of good-faith disagreement in the Cabinet — this might be the right result. Moreover, the opposite situation could also arise. In some cases, counting both acting and permanent members might fail to curb the President, while counting only the latter would succeed. Here too, if this is a chance result, not precipitated by the President himself, we cannot see why one outcome is better than the other.

¹⁹ Kalt briefly discusses this possibility in his book. See KALT *supra* note 3, at 150; see also Josh Blackman, *A Timely Primer on Section 4 of the 25th Amendment*, VOLOKH CONSPIRACY (Jan. 6, 2021, 10:26 PM), <https://reason.com/volokh/2021/01/06/a-timely-primer-on-section-4-of-the-25th-amendment/> [<https://perma.cc/X68G-4B94>] (“Trump could preemptively fire everyone in his cabinet who does not pledge fealty, and then use the Vacancies Reform Act to install loyalists as acting cabinet heads. That could deprive Pence of a majority.”). As we discuss below, Kalt does not give a clear answer here to the functional question. See *infra* note 35 and accompanying text. That is, he does not resolve whether a rule counting acting officers as “principal officers” best protects the 25A4 mechanism. This Essay is intended to fill that gap.

²⁰ We have assumed, with some offerings of support, that the President will be able to replace the fired Cabinet members with cronies. See *supra* note 19. But we do not mean to be doctrinaire about this. If it is the case that the President is sufficiently constrained in replacing fired Cabinet members such that he cannot appoint cronies to the Cabinet positions, then our functional argument carries less force. But we remain skeptical that the President is so constrained.

to have eight loyalists — the President must have eight loyalists appropriately placed in the government to take over as acting members of the Cabinet. On this point, currently, the Federal Vacancies Reform Act of 1998 governs. This Act states that the President can only replace a vacant Cabinet-level office with:

- (1) the Senate-confirmed first assistant to the vacant office;
- (2) a Senate-confirmed officer who currently works in an executive agency; or
- (3) a career civil servant, paid at or above the GS-15 rate, who has worked in the agency in which the vacancy exists for at least 90 of the past 365 days.²¹

These requirements cover lot of people and we think that the President would be able to find — and indeed place beforehand — eight loyal cronies to take over a 25A4 vote.

Prior to the Federal Vacancies Reform Act of 1998, the Vacancies Act of 1868 governed alongside statutes which allowed for temporary fillings of some departments and agencies.²² Under that regime, we certainly think that the President would be able to find a sufficient number of loyal cronies to blunt a 25A4 vote — indeed, President Nixon’s own behavior during the Saturday Night Massacre suggests as much.²³

Notably, there are reasonable questions about the constitutionality of the Vacancies Reform Act of 1998.²⁴ If the Act is unconstitutional, then the President’s ability to appoint cronies is enhanced. If the President were to make replacements that challenged the Act, how that would be resolved is unclear.²⁵ It might take us very deep into constitutional-crisis territory, where the force of law itself is uncertain. All things considered then, the risk of the President being able to obviate the 25A4 process by firing and replacing remains substantial.

Of course, the Vice President and Cabinet members could try to avoid this outcome by being surreptitious. They might be able to make the requisite declaration to the President *pro tempore* of the Senate and the

²¹ Stayn, *supra* note 10, at 1523; *see also* 5 U.S.C. § 3345(a) (2018).

²² *See* Stayn, *supra* note 10, at 1518 (“In 1973, President Richard Nixon asserted that the Vacancies Act was only one possible means of temporarily filling advice and consent positions and that the enabling statutes of some departments and agencies, including the Justice Department, were equally legitimate means of temporarily filling such positions.”).

²³ *See, e.g.*, Ron Elving, *A Brief History of Nixon’s ‘Saturday Night Massacre,’* NPR (Oct. 21, 2018, 8:12 AM), <https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre> [<https://perma.cc/SXT2-HZ9L>].

²⁴ *See generally, e.g.*, Stayn, *supra* note 10.

²⁵ We thank Mark Tushnet for this insight.

Speaker of the House without alerting the President. But in the most dire cases, the President will not need to be apprised. The President's conduct itself — for example, election interference — will make it plain that there is a 25A4 risk.

On the other hand, suppose acting Cabinet members are not “principal officers” under 25A4. Suppose only those who have received Senate confirmation for their Cabinet positions count in the 25A4 majority. Then, the President's calculus becomes more complex, and it is not clear that he can fire his way out of Dodge.

Let's again say that the Vice President and all fifteen Senate-confirmed Cabinet members want to initiate the 25A4 process. Again, the President fires any eight Cabinet members and installs cronies. Now the number of non-acting, Senate-confirmed Cabinet members is seven. This then becomes the new denominator for the “majority” calculus. Unlike in the previous scenario, the cronies are excluded. Then, if the Vice President and four of the non-crony members agree — in this example, all seven do — the 25A4 process can move forward.

What if the President simply fires all of the Cabinet members and installs cronies in each of those vacancies? Then, in our view, there are zero remaining non-acting, Senate-confirmed Cabinet members. Under this scenario, we contend that zero votes should be understood to constitute a majority of the Cabinet with zero members, and thus the Vice President can unilaterally initiate the process. While perhaps surprising,²⁶ this is the only interpretation that preserves the 25A4

²⁶ As a purely textual matter, this issue is ambiguous. Mathematically, zero out of zero is not a majority, if “majority” means “a number or percentage equaling more than half of a total.” *Majority*, MERRIAM-WEBSTER'S DICTIONARY, <https://www.merriam-webster.com/dictionary/majority> (last visited Feb. 24, 2021) [<https://perma.cc/HH56-USCE>]. But neither is it the opposite — a minority — if “minority” means “the smaller in number of two groups constituting a whole.” *Minority*, MERRIAM-WEBSTER'S DICTIONARY, <https://www.merriam-webster.com/dictionary/minority> (last visited Feb. 24, 2021) [<https://perma.cc/8YYW-CT4R>]. Zero divided by zero is neither; it is undefined.

An alternative framing is that, since there are zero Cabinet members, all of the (zero) Cabinet members will make the requisite 25A4 certification. Thus, a “majority” of the (zero) Cabinet members will too, because if something is true of “all” of the members of a set, then it is true of the “majority” of the members of a set. Of course, this framing, too, can be inverted by replacing “majority” with “minority” and “all” with “none.”

Here, as with our broader argument in this Essay, we think that functional considerations could break the textual tie. This has been the favored approach for other ambiguous constitutional clauses requiring majorities. For example, Civil-War-era concerns about Southern states' ability to hobble Congress directly influenced modern interpretation of the majority requirement of the Quorum Clause. See John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1056-67 (2006); see also U.S. CONST. art. I, § 5.

function in contested cases. Otherwise, the President could always circumvent 25A4 by firing everyone.²⁷ Notably, this serious problem arises whether or not acting Cabinet members are “principal officers” under 25A4. Even if they are, the President could similarly obviate 25A4 without even having to bother installing cronies. The President could instead simply fire everyone and hold vacant seats open, resulting in zero Principal Officers — acting or otherwise — being eligible to vote.²⁸ This easy circumvention is avoided only if there is someone with 25A4 power — namely the Vice President — whom the president cannot fire.

What if fewer than all of the Cabinet members wanted to disable the President? What could the President do then? If the President knew who enough of the offending Cabinet members were, the President could fire enough to deny them a majority. With eight of fifteen Cabinet members adverse, the President could fire any one the eight and

²⁷ If a number of Cabinet members resign for other reasons, it may allow for an unexpected initiation of the 25A4 process. But that is guarded against, since Congress can nix the 25A4 process, and if it is reinitiated, the Congress can take action against the Vice President. *See supra* notes 3–5 and accompanying text. Moreover, we think that Cabinet members should consider the 25A4 process in determining whether they should resign.

²⁸ The President might accomplish this by stating his intention to hold the seat open, appointing an ineligible person in the seat, or by firing all eligible people who could take the seat. *See Batalla Vidal v. Wolf*, 16-cv-4756, 2020 WL 6695076, at *8-9 (E.D.N.Y. Nov. 14, 2020); Stayn, *supra* note 10, at 1523 (stating the conditions for eligibility for an acting Cabinet position under the relevant acts); Josh Gerstein, *Judge: Trump Appointee Lacked Authority to Rein in DACA*, POLITICO, <https://www.politico.com/news/2020/11/14/judge-dhs-head-suspend-daca-436527> (last updated Nov. 15, 2020, 9:22 AM) [<https://perma.cc/KL8R-SP4G>] (stating that decisions by Acting Homeland Security Secretary Chad Wolf lacked authority because of his wrongful appointment).

One might argue that there is always an acting Cabinet member, who could supply a vote if acting members were allowed. But that’s not true — because of the Federal Vacancies Reform Act of 1998 (and its precursor regimes, too). *See supra* notes 21–22 and accompanying text. There are strict conditions on who can be an acting Cabinet member, and if the President gets rid of them, then there’s nobody to vote on 25A4. Of course, that would be an extreme ploy by the President. But that is what we must contemplate, because 25A4 is a tool for an extreme scenario.

Nevertheless, if one adheres to the interpretation of “majority” wherein there must be at least one Cabinet member to proceed on 25A4, then the right functional rule may flip. If the President fires all Cabinet members, but allows some acting members, we might want them to be eligible to vote, so that there is a possible majority to make the 25A4 certification. However, we maintain that our interpretation of 25A4 is practically no worse than the competing interpretation — that allows acting Cabinet members to participate — because the competing interpretation would only be functionally better if the scheming President made the mistake of allowing some acting members to remain who would also vote against the President, which we assess to be relatively unlikely.

deadlock the vote at 7–7, insufficient under 25A4. With eleven adverse Cabinet members, the President would need to fire seven of them.

Nothing can stop this parrying move by the President. However, it is only effective if the President knows how these Cabinet members are inclined to vote. If the Cabinet members are taciturn or genuinely undecided, this strategy is unlikely to work. If the President fires a random Cabinet member, the President could be firing a favorable vote. Moreover, undecided members might be swayed by such a firing to vote against the President. The tactic is a dice roll at best and counterproductive at worst. This informational hurdle bolsters the functional argument for our reading of 25A4. If acting Cabinet members are “principal officers,” the President does not need to know anyone’s vote, nor worry about angering the undecided, to circumvent 25A4. It is sufficient to fire a random majority and replace them with known loyalists. Thus, while not invulnerable to Presidential interference, our interpretation of 25A4 is substantially less so than the alternative.

II. OBJECTIONS AND ANSWERS

First, one might object that we are endowing the 25A4 process with more bite than intended. After all, under 25A4, removing the President requires 2/3 approval of each of the Houses of Congress. So, even if acting Cabinet members are allowed to vote, the question will ultimately be decided by the Congress. And, if the President engages in the obvious ploy of firing everyone, Congress has additional prerogative to act on its own through the impeachment process. Thus, the objector might say our focus on the President’s ability to circumvent the 25A4 process is too myopic — if the 25A4 engages in such circumvention, that will strengthen the case for impeachment by Congress.²⁹

²⁹ We observe that the 25A4 process does not seem to formally require Congress’s action. Suppose the Vice President and majority make the requisite declaration about the President’s inability, the President challenges, the Vice President and majority reaffirm the President’s inability, and the inquiry goes to Congress. During this period, the President has been divested of power, with the Vice President serving as “Acting President.” Regardless of how Congress acts — that is, whether they muster 2/3 votes to find the President unable to discharge his duties or not — the Vice President could simply repeat the process with the majority of Cabinet members. And in that way, the Vice President can continue to hold effective power, as “Acting President.”

Of course, there is a question about whether the authors of 25A4 would have intended this repetition. If the authors understood this possibility and intended for its viability, then 25A4 is a truly distinct process from impeachment. That in turn strongly suggests that acting members should not be entrusted with a vote, because that would allow for an easy circumvention by the President.

However, as discussed above, 25A4 allows for quicker curbing of presidential overreach than impeachment, which may be necessary in some circumstances. True, to divest the President of power, the same steps — votes in the House and Senate — are required. But in the face of an emergency, like a President calling for insurrection, 25A4 allows just a handful of high-ranking executive officers to act swiftly. No articles of impeachment need be drawn up, no evidence presented, no House vote taken, no transmission to the Senate, and so on. If the President could unilaterally foreclose swift, albeit temporary, disempowerment under 25A4, the Amendment's primary advantage over impeachment would be lost.

Objectors may argue that the Amendment's term "unable" limits its use to cases of true mental or physical disability, rather than broader conditions that sound in the wisdom or the President's actions. Thus, in such situations, we are not concerned with the President's ability to manipulate the 25A4 process — if the President can do so, then the President is not subject to a condition of disability. For all other conditions, the impeachment process remains available. This reading of 25A4 is arguably bolstered by the language "unable to discharge the powers and duties of his office" and the fact that the 25A4 process requires similar congressional approval as impeachment.

This is a plausible interpretation. If it is correct, then there would be some reasons to allow acting Cabinet members to vote. On a determination like that, it may be better to have more voices weighing in, for epistemic, power distribution, and legitimacy reasons.³⁰ As an initial response, 25A4 allows for a process for the Vice President and majority to reaffirm the President's inability. That suggests that the

This kind of formal action, however, may violate norms, as a species of constitutional hardball. If it is a norm violation, Congress has a potential remedy in impeaching the Vice President. But we acknowledge that might not happen, due to congressional gridlock. Nevertheless, if the authors of 25A4 would not have intended this repetition, and we therefore set aside its possibility, we maintain that our reading of the 25A4 process is the one that better preserves the function of the 25A4 process.

For more on this, see KALT, *supra* note 3, at 146-48. Kalt observes that the President may be able to block the Vice President's repetitious move by immediately firing the Cabinet members who voted adversely. This may be a proverbial "race" to Congress, because if the Vice President and majority certify first, then the President's power is divested again. Moreover, if the Vice President makes the re-certification before Congress votes, that may trigger another four-day waiting period, during which the President is again divested of power. How all this will be received is beyond our immediate ken.

³⁰ See Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CON. L. 1201, 1224-25 (2020) (discussing conditions, pursuant to the Condorcet Jury Theorem, in which adding voters increases epistemic success).

authors envisioned 25A4 actions even against an actively recalcitrant President.

Moreover, we think that the language “unable to discharge the powers and duties of his office” seems capacious. If the authors wanted to delimit the operation of 25A4 to physical and medical disability, they could have easily conveyed that.³¹ Their choice not to limit the language in that manner seems sensible. Sometimes, the line between a deeply misguided Presidential action and an action evincing mental illness or psychological disturbance will be blurry. Capacious language ensures that, when the Vice President and Cabinet — all usually a President’s allies — agree that removal is warranted, such distinctions do not matter.³²

Additionally, limiting 25A4 to cases of true disability would again undermine haste — the major advantage over impeachment. Suppose, as suggested above, the President is urging an interruption to the election or an unjustified nuclear war. These acts could be undertaken quickly, with little or no notice to Congress. That arises because of, and indeed is part and parcel of, separation of powers. In such cases, it may be the case that only the Vice President and Cabinet members are aware of these impending acts. As discussed above, one advantage of 25A4 is that it is relatively quick and nimble, compared to impeachment. But under the confined view of 25A4, that remedy is unavailable in these instances. Thus, we are left with impeachment, which may not be up to the task. Our reading of 25A4 — which is both more capacious about when the 25A4 process can be undertaken and better apt to function when undertaken — is better suited to deal with crisis moments caused by a competent but malevolent President.³³

Finally, Professor Brian Kalt recently suggested, in an informal setting,³⁴ that acting Principal Officers must be able to vote because “structurally, it would’ve made no sense for the 25th Amendment’s framers to empower presidents to shut down 25A4 simply by firing people.”³⁵ We are not sure exactly what scenario he had in mind.

³¹ Nor is this a product of archaic language, as the Amendment was authored by Congress in 1965.

³² See *supra* note 17 and accompanying text.

³³ See Brian C. Kalt, *Section Four of the Twenty-Fifth Amendment: Easy Cases and Tough Calls*, 10 CONLAWNOW 153, 158 (2019) (recognizing the potential of these crisis scenarios and stating that “Section 4 might be the only legal way to countermand the President’s mad order quickly enough”).

³⁴ A Twitter-based explainer of his 25th Amendment Scholarship. See Kalt, *supra* note 13; see also KALT, *supra* note 3, at 151.

³⁵ See Kalt, *supra* note 13. We focus on Kalt’s social media here, rather than his book, because the former takes a clearer stance on which way the firing-power cuts. The

However, for all the reasons discussed above, allowing acting Principal Officers to vote makes that structural problem worse, not better. The President can always fire any Cabinet member he wishes, effectively cancelling out one antagonistic vote. Allowing acting members to vote only strengthens the President's position, permitting the removal of an antagonist and the installation of a loyalist.³⁶ Nor does allowing acting Cabinet members to vote ensure that there will always be at least one "Principal Officer" available to vote in a 25A4 action. As we have already argued, the President could fire the entire Cabinet and hold open the empty seats. This, we contend, is why the Amendment's text should be read to permit unilateral action by the Vice President when the number of Principal Officers is zero.

CONCLUSION

Section 4 of the 25th Amendment provides a way to strip power from a President "unable to discharge the powers and duties of [the] office." It is an extraordinary tool, designed for an exceptional circumstance — where fast action may be necessary to avert disaster, perhaps on a global scale. Therefore, we contend that, to ensure the Amendment's proper functioning, acting Cabinet members should not count in the 25A4 procedure. Counting acting Cabinet members would allow the President easy ways to circumvent the Section 4 process and any divestment of power, thus frustrating the Section's very purpose. Make no mistake, the conditions that may allow for a Section 4 divestment of the President's power are decidedly and happily rare. But it should still

book treats the subject in greater depth. KALT, *supra* note 3, at 148-52. But on our reading of Kalt's discussion there, it is ambiguous as to whether functional considerations favor or disfavor a rule treating acting members as principal officers. His discussion simply lays out the different scenarios, observing how they would resolve under the two opposing rules, intimating that the functional impact of the two rules is at best a wash. *Id.* Ultimately, he seems to put more faith in the hope that the acting Cabinet member question not be dispositive. *Id.* at 152. However, Kalt's Twitter explainer seems to us to clearly treat function as a consideration favoring the rule treating acting members as principal officers.

³⁶ In fairness, Kalt considers this point in his book. KALT, *supra* note 3, at 150-51. But he goes on to argue that not all acting Cabinet secretaries are Presidential cronies. Sometimes, he supposes, a Secretary may resign, and the President may allow their deputy to ascend automatically to an acting role. Such independent-minded acting officers might just as well vote to restrain the President as to empower them.

This, we think, is small comfort in the kinds of scenarios we are discussing here. When 25A4 is on the table because of unhinged Presidential action, the President will cast a careful eye on the entire Cabinet, acting or otherwise. (Or at least, we must so assume.) Deputies, who are disloyal acting officers, are just as likely to be fired and replaced as those that were Senate-confirmed.

be a tool in our toolbox in case, for example, the President directs an angry mob to take over the Capitol and holds the government hostage during the certification of an unseating election.