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Part I How Section 4 Works, 2 Correcting a Few Misconceptions

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Much simpler than that last flow chart is another version of Section 4 as seen in Figure 2.1. One can see it reflected many times a day on social media:

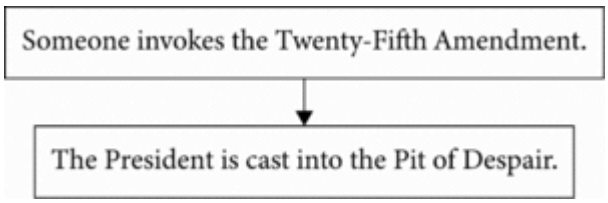

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Figure 2.1 Erroneous But Popular Version of Section 4.

That's not *quite* right . . .

This section will not catalog every misstatement about Section 4 one can find in public forums, but it will address some of the more common ones, which range from basic to complex.

Common Misconception #1:

Congress Is in Charge of Invoking Section 4.

[No, That's the Vice President and Cabinet's Job.]

From 2017 on, there has been no shortage of confused people on social media demanding that Congress "do its job" and invoke the Twenty-Fifth Amendment. To be fair, congressional support is crucial in *upholding* a contested Section 4 action. But under current law, only the Vice President and Cabinet can get the ball rolling in the first place. If

Congress wants to make the first move to displace a President, it must go through the impeachment process.

(p. 12) Common Misconception #2:

A Section 4 Action Removes the President from Office.

[No, It Doesn't!]

This is a very common but more subtle mistake. People often say that when Section 4 is invoked, the President is "removed from office" rather than something more precise like "stripped of power, provisionally." The only ways that a President can leave office are: (1) the expiration of the term, (2) death, (3) resignation, or (4) impeachment and removal. By contrast, a President against whom Section 4 is invoked is removed from *power* but remains in *office*. He is still the President, and he can use Section 4 to try to reclaim his powers.

That was the whole point of adding Section 4 to the Constitution. Many people had thought that, under the original Constitution, a disabled President would be removed from office permanently if his Vice President stepped up to act as President. As a result, if there was any possibility that the President might recover, Vice Presidents were skittish about stepping in and looking like usurpers. This left the presidency effectively empty any time a President was disabled. By making it clear that Vice Presidents were only temporary stand-ins for disabled Presidents, Section 4 ended this problem.[2]

The difference between displacement and removal is more than just lawyerly semantics. As a practical matter, the Acting President's power could be constrained if there is any possibility that the President will come back. Moreover, because the Acting President would still be Vice President, he would not be able to nominate a new Vice President.

Common Misconception #3:

Section 4 Is for Unfit Presidents: Lazy, Incompetent, Irresponsible, Screwy, Dishonest, in Violation of Constitutional Norms, Etc.

[Nope. Section 4 Is Designed for Presidents Who Are *Unable* To Function, Not Ones Who Are Really Bad People or Doing a Really Bad Job.]

This misconception is found mainly among overeager proponents of Section 4 action. Technically, it is not wrong. If the Vice President, (p. 13) Cabinet, and two-thirds of the House and Senate all agree to define "unable" to include Presidents like these, no court can properly stop them.

But Section 4 is not meant for such situations and would not work well in them. Jay Berman (a former aide to Senator Birch Bayh, the Twenty-Fifth Amendment's principal architect) aptly articulated this distinction in a *New York Times* article discussing Section 4 and President Trump:

> The defining characteristic of Section 4 was always the idea that there is a difference between unfit and unable. In the deepest recesses of my heart and my mind, I know that Donald Trump is unfit to be president—but he is not unable. In fact, he's very able to carry out all of the terrible things he promised he would do.[3]

Section 4's creators meant for bad Presidents to go through the impeachment process and not Section 4. Impeachment requires a simple majority in the House, and removal requires a two-thirds majority in the Senate. By contrast, Section 4 requires in a disputed case that the President lose by two-thirds majorities in *both* the House and Senate—seventy-two representatives more than are needed for impeachment. More importantly, Section 4 requires the Vice President and Cabinet to move against the President first. But the President chooses his Cabinet members and, on a moment's notice, can fire them. The Vice President is the President's hand-chosen deputy and needs to be wary of seeming like a usurper. Requiring that these people be arrayed against the President raises the bar much higher. It would be unreasonable for anyone contemplating impeachment to look at Section 4 and say, "Oh, that's so much easier! Let's do that instead."

Of course, impeachment requires "high crimes and misdemeanors"; serious misconduct. What if a President is an oaf who has not done anything impeachable but simply cannot handle the job ("unable," in a sense)? Might Section 4 properly fill the void? Again, if the Vice President, the Cabinet, and two-thirds majorities in both houses are willing to say so, there would be nothing to stop them. But that "if" is huge if the President is not actually incapacitated. Not only would the President's own team have to want to move against him, and not only (p. 14) would a bipartisan congressional supermajority need to agree, these people also would need to be willing to go against the clear intentions of Section 4's framers. As discussed in chapter 5, Section 4 was created to provide continuity of power, not "as an off-ramp for citizens who regret selecting an unfit or unqualified President."[4]

Common Misconception #4:

The President Retakes Power Immediately upon Declaring That He Is Not Disabled.

[No, He Doesn't! Saying That Is Dangerous! Don't Say That!]

This error is sometimes made by both proponents and opponents of Section 4 action. It is probably the least common of the misconceptions discussed here, but it also carries the most potential danger. After the President declares that he is not disabled, the Vice President and Cabinet have four days to disagree and send the issue to Congress. During those four days, the Vice President stays as Acting President. Chapter 10 explains this in great detail; a brief summary follows here.

Section 4 states that "when the President transmits . . . his written declaration that no inability exists, he shall resume the powers and duties of his office . . . ." But the sentence continues: ". . . unless the Vice President and a majority of [the Cabinet] . . . transmit within four days . . . their written declaration that the President is unable to discharge the powers and duties of his office." The President retakes power "unless" there is a redeclaration of his inability; if there *is* a redeclaration of the President's inability he *does not* retake power. It takes four days to know if there will be such a redeclaration. The President must wait for the Vice President and Cabinet before he can return.

Section 4's drafters could have made the text clearer here—indeed, previous drafts of Section 4 did—but the President-must-wait reading is still the only reasonable one. Moreover, the constitutional structure requires that the President must wait. Section 4's drafters were aware of these structural issues and were certain that their proposed verbiage addressed them. This spurred an attempt to edit Section 4 to allow the President to retake power immediately; that proposal was voted (p. 15) down. The text, structure, and legislative history all point to the same conclusion.

Common Misconception #5:

A Section 4 Action Would Be a Coup D'état.

[If Used Properly, It Should Not Come Across as Such.]

Unlike the other misconceptions, this one is found mainly among opponents of Section 4 action. The notion that a duly elected President can be cast aside is admittedly remarkable. But the idea that a Section 4 action would be a coup—an illegal seizure of power—is simply wrong. Section 4 does not subvert the Constitution, it *is* the Constitution.

To be sure, constitutional powers can be abused. In a corrupt plot to seize power, a scheming Vice President and Cabinet might use Section 4 to declare an able President unable. That would be a coup. But Section 4's creators were aware of this risk, which is why they designed Section 4 to be hard to use. As already discussed, Section 4 would allow the President to contest their action and would require two-thirds majorities in the House and Senate to sustain the plot. At a certain point, when a "conspiracy to seize power" requires the votes of the vast majority of the pre-existing power structure of the country, following a clearly prescribed constitutional procedure, it is not really a conspiracy to seize power anymore. Surely some in the country could perceive a Section 4 action to be illegitimate and unacceptable, but that is true of any government action.

One concern is that the plotters, aware that the President probably would retake power swiftly, might be content with being in control for a few days. That might be enough time for them to start a war, issue pardons, or whatever else they are seeking to do before they are stopped. But the inherently limited appeal of such a mini-coup makes it even less likely to occur.

Another possibility is a manipulative maneuver that will be discussed in chapter 11, through which the Vice President and Cabinet technically could displace the President more or less permanently without Congress being able to intervene. The discussion in chapter 11 (p. 16) will explain why this unlikely scheme would fail. For now, the important point is that the remote possibility of Section 4 being used for a coup does not mean that any and every use of Section 4 would be a coup.

Starting from the presumption that there has to be a mechanism for displacing an incapacitated President, the key question is what would make such an action legitimate. Requiring both the President's inner circle and huge majorities in Congress to be on board is enough to pass that test.[5]

The more people understand that these misconceptions are misconceptions, the better off the nation will be if and when Section 4 ever gets invoked.

Footnotes:

2. *See Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 55 (1965) [hereinafter *1965 House Hearings*] (citing Brownell); *Problem of Presidential Inability: Hearing Before the Spec. Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary*, 85th Cong. 19 (1957) [hereinafter *1957 Hearing*] (testimony of Herbert Brownell, Jr., Att'y Gen. of the United States); H. COMM. ON THE JUDICIARY, 84TH CONG., PRESIDENTIAL INABILITY 6, 9–10 (Comm. Print 1956) (reproducing article by Professors Everett S. Brown, University of Michigan, and Ruth C. Silva, Pennsylvania State College [hereinafter Brown & Silva]).

3. Alan Blinder, *Birth of the 25th Amendment, From Those Who Were There*, N.Y. TIMES, Sept. 8, 2018, at A16.

4. U.S. CONST. art. II, § 4; Laurence Tribe & Joshua Matz, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 221 (2018).

5. *See infra* text accompanying note 116 (discussing legitimacy).