

The “25th Amendment solution” to replace President Trump is nuts

Gene Healy

September 22, 2017

On Sunday morning, the president of the United States took time out from mulling the North Korean nuclear crisis to retweet a gag GIF from a fan with the Twitter handle “@fuctupmind.” In such circumstances, you can hardly blame people for worrying about the condition of the president’s mind.

Prompted by President Donald Trump’s repeated outbursts of “Twitter Tourette’s” and erratic public appearances, a growing number of legislators advocate using the 25th Amendment to remove the president on the grounds that he’s mentally “unable to discharge the powers and duties of his office.” Rep. Zoe Lofgren, D-Calif., recently introduced a resolution calling for Trump’s examination by “psychiatric professionals” and “immediate action” by Vice President Mike Pence and the cabinet. A similar measure, the “Oversight Commission on Presidential Capacity Act,” from Rep. Jamie Raskin, D-Md., now has 28 co-sponsors, including more than half of the Democrats on the House Judiciary Committee.

Granted, there’s ample reason to worry about a president who drifts from ranting at Boy Scouts to making off-the-cuff nuclear threats. But declaring Trump mentally disabled is constitutionally dubious and wildly impractical. In their quest to “stop the madness,” the 25th Amendment brigade might create a situation more bizarre and destabilizing than the Trump presidency itself.

That’s because the convoluted process Section 4 of the amendment sets up for replacing the president could stick us with two presidents and two cabinets jockeying for recognition as the “real” government. The term “constitutional crisis” gets thrown around far too loosely, but the “25th Amendment solution” might just deliver the genuine article.

Back in 2012, when Trump was best known as the host of “Celebrity Apprentice,” law professor Brian Kalt published a book, “Constitutional Cliffhangers,” that identified the 25th Amendment as a “constitutional weak spot” that could crack, if put to the test. To illustrate the danger, here’s an updated version of the scenario Kalt sketches.

Imagine Vice President Mike Pence is privately more Machiavellian than he lets on; and he’s begun plotting with his colleagues at the Cabinet’s weekly Bible Study meeting. Pence and company decide to pull the trigger, activating Section 4 with a declaration to the Speaker of the House and the president pro tem of the Senate.

Here's how it might play out from there: Trump, enraged, sends a counter-declaration to Congress contesting the charge. Then he summons the cabinet, and unleashes his signature line from the Apprentice: "You're fired!"

Trump then replaces his rebellious "team of rivals" with reliable subordinates. Pence and the original cabinet counter with an additional, "no, really, he's nuts" declaration to Congress. When Trump orders the Secret Service to frogmarch the "fake Cabinet" out of the building, how do they respond? Who's in charge here?

Section 4's language is less than lucid on this point. It specifies that, upon sending the initial declaration, "the Vice President shall immediately assume the powers and duties of the office as Acting President," but "when the President transmits ... his written declaration that no inability exists, he shall resume the powers and duties of his office unless," within four days, the VP and a majority of the cabinet reaffirm that the president is incapacitated.

Whether Trump had the right to sack his cabinet turns on whether it was "his" when he gave the order. Under Section 4, does Pence hold the reins, pending Congress' resolution of the issue — as much as three weeks later — or does the president get his powers back as soon as he informs Congress he's up to the job? Will Congress make the call, or will it be settled by the Supreme Court, in a case that would make *Bush v. Gore* seem low-stakes by comparison?

"It is indisputable," Kalt writes, "that Section 4's creators intended for the vice president to remain in charge during this waiting period." But since the text is murky on this point, "if push ever comes to shove, things could go very badly." Indeed, as Kalt notes, the provision is more likely to be used when things are already going badly, in "an external crisis," like the outbreak of a major war.

Drafted in the wake of President John F. Kennedy's assassination, the 25th Amendment aimed at situations of near-total disability. It wasn't designed to be an "eject" button for presidents who are impulsive, reckless or otherwise spectacularly bad at the job.

Impeachment is the proper constitutional remedy for that sort of presidential incapacity. And, while a majority in the House and two-thirds of the Senate is a heavy lift, the double-supermajority the 25th Amendment requires to finalize the switch is a nearly insurmountable bar. As the amendment's principal architect, then-Sen. Birch Bayh, D-Ind., explained, "We were concerned about the politics of the palace coup," and deliberately made it harder to remove a president via Section 4 than it is to impeach him.

Still, the disability amendment has one advantage over the old-fashioned method: If you think politics hasn't been quite entertaining enough lately, the "25th Amendment solution" could really kick this reality show up a notch.

Gene Healy is a vice president at the Cato Institute and author of "The Cult of the Presidency."