

Donald Trump's Presidency and the Twenty-fifth Amendment to the United States Constitution

Prezydentura Donalda Trumpa i 25. poprawka do Konstytucji Stanów Zjednoczonych

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Abstract: Given the strong position of the President in the American political system, the issue of continuity of power is crucial for stability and safety not only of The United States but also of the global order. Among provisions regulating the president's succession, there is the Twenty-fifth Amendment, in which sections three and four regulate the situation in which the president is unable to fulfill his duties. Although section four has never been used, voices supporting the launching of the procedure did accompany Donald Trump's presidency from the beginning. The author puts forth a thesis that the 25th Amendment was not designed as an instrument for the president's removal and cannot be perceived as an alternative for impeachment procedure. The article presents circumstances surrounding the amendment's introduction, analyzes its content with special attention given to section four and presents arguments for and against using the amendment to remove D. Trump. Presented research combines theoretical considerations (analysis of the US Constitution and provisions regulating the issue of presidential succession) with a case study (D. Trump's presidency).

Keywords: USA, constitution, Twenty-fifth Amendment, president, succession

Streszczenie: Zważywszy na silną pozycję prezydenta w amerykańskim systemie ustrojowym, kwestia ciągłości władzy jest kluczowa dla stabilności i bezpieczeństwa nie tylko Stanów Zjednoczonych, lecz także globalnego porządku. Jednym z przepisów regulujących sukcesję głowy państwa jest 25. poprawka Konstytucji, regulująca w sekcji trzeciej i czwartej sytuację, w której prezydent nie jest zdolny do pełnienia swoich obowiązków. Choć sekcja czwarta nie została dotychczas użyta, to głosy dotyczące jej wykorzystania towarzyszyły prezydenturze Donalda Trumpa przez niemalże całą kadencję. Autorka stawia tezę, iż 25. poprawka, szczególnie jej czwarta sekcja, nie została stworzona jako narzędzie usunięcia prezydenta z urzędu i nie może być traktowana jako alternatywa dla procedury impeachmentu, jak miało to miejsce w przypadku prezydentury D. Trumpa, szczególnie po ataku na Kapitol w styczniu 2021 r. W artykule zaprezentowano okoliczności wprowadzenia poprawki, analizie poddano jej treść ze szczególnym zwróceniem uwagi na sekcję czwartą oraz zaprezentowano argumenty za oraz przeciw wykorzystaniu poprawki w celu usunięcia 45. prezydenta. Artykuł łączy w sobie rozważania teoretyczne

(analiza Konstytucji Stanów Zjednoczonych oraz aktów regulujących kwestię sukcesji w prawie amerykańskim) wraz ze studium przypadku prezydentury D. Trumpa.

Słowa kluczowe: USA, konstytucja, 25. poprawka, prezydent, sukcesja

The year 2017 was supposed to be a time when the 50th anniversary of the ratification of the 25th Amendment to the United States Constitution was supposed to be the reason for the attention given to it. Political events can be perverse, however. The swearing-in of Donald Trump as president in January of that year brought the amendment into the public's consciousness as a potential tool to remove an incumbent president from power. From the moment the controversial New York businessman, with no experience of elective office or military service, became the 45th President of the United States, his political opponents, academics and commentators on public life have listed reasons that, in their view, fulfilled the conditions needed to trigger the section four of the amendment that speaks of the succession of the vice-president when the president is unable to exercise the powers and tasks of his office.

Ross Douthat believes that it was "not crimes or wrongdoing or collusion with the Russians, but simple mental unfitness" that made the 45th president unable to perform his duties (Douthat 2017). "Moral unfitness," on the other hand, was alleged against D. Trump by Joe Biden, then the Democratic Party's presidential candidate for the 2020 election (Dorning 2019). The voices calling for removal came during the coronavirus pandemic when a group of mental health professionals called the president "manifestly unfit to lead" and called for his resignation or complete impeachment (World Mental Health Coalition 2020). However, the strongest voices for using the amendment resulting in the removal of the president from power came after the January 6, 2021 riots on Capitol Hill.

1. Presidential succession in American law

The question of succession of the American president is governed by Article 2, Section One, Clause 6 of the Constitution, and the 20th, 22nd, and 25th Amendments. Article 2 provides that in the event of the removal

of the president from office, his death, resignation, or inability to discharge his powers and duties, they shall pass to the vice president. The provision does not clarify, however, whether the vice president in such a situation becomes president or merely performs the duties of the president, although a precedent on this issue was set by Vice President John Tyler, who, upon the death of William H. Harrison while he was in office, assumed the duties of the office by indicating that he "shall" be president. In doing so, he set the precedent used when a president dies. On the other hand, this event became an obstacle in a situation of temporary incapacity of the president, for under the constitution the status of the vice president at the time of death is the same as in a situation of incapacity, resignation or removal (Forte and Spalding 2019: 249).

Nor does the act contain a definition of *inability*. Moreover, the Constitution does not indicate in what mode the procedure should be launched, by whom and for how long, if the inability ceases to exist (Silva 1968: 85–110). In light of the provision, Congress was given the power to determine the next persons for succession after the vice president. According to the Presidential Succession Act of 1947, in the event of the Vice President's inability to succeed to the office, the position is assumed by: Speaker of the House of Representatives, next in line is the President *pro tempore* of the Senate¹ (in such a situation, each must resign the presidency of the chamber). If both of these positions are vacant or the persons occupying them are for any reason ineligible for the office of head of state, then a member of the cabinet becomes president. In this case, the order of succession is as follows: Secretary of State, Secretary of the Treasury, Secretary of Defense, and Attorney General.² In each of these cases, the candidate must have been duly sworn in to his or her previous position and must meet the criteria to become president.³

¹ Under the Constitution, the President of the Senate is the Vice President. However, he is not a member of it and casts his vote only as a result of an equal division of votes.

² Cabinet members are appointed by the President. The Speaker of the House of Representatives and the President *pro tempore* of the Senate are elective. Although not a formal requirement, to date every Speaker of the House of Representatives has sat in the House. In this situation, the Senate elects its own President *pro tempore*. Since 1943, this position has been held by the most senior Senator from the party holding the majority in the chamber.

³ Must be at least 35 years of age, cannot be a naturalized citizen, and have resided in the United States for 14 years.

The 25th Amendment replaces and expands Article 2, Section One, Clause 6 of the Constitution. Its insertion was intended to provide a constitutional mechanism that would allow for an orderly transfer of power in a situation of removal, death, resignation or incapacity of the President. In the past, in a situation of presidential incapacity, the absence of a constitutional mechanism meant that power was not transferred to the Vice President or such transfer took place informally or in a manner that lacked constitutional justification.

2. The circumstances surrounding the adoption of the 25th Amendment to the United States Constitution

There were 178 years between the adoption of the Constitution and the passage of the 25th Amendment. In that time, eight U.S. presidents have died, four of them by assassination. In each case, the vice president assumed office, and the transition of power took place without much controversy. At the same time, many presidents suffered from various illnesses that prevented them from carrying out their duties. Under these circumstances, no vice president became the incumbent president.⁴ The creation of the amendment was therefore the result of a history of presidential incapacities that translated into confusion about executive power (Feerick 2010–2011: 45). Dwight Eisenhower's illnesses and the assassination of President John F. Kennedy in 1963 helped create the conditions for the passage of the constitutional amendment.

The main purpose of the regulation was to ensure that, when a president becomes incapable of making decisions when he is ill or seriously injured, he will be temporarily relieved of his duties, so that a person whose cognitive abilities remain unimpaired becomes the head of state. The second goal was to prevent the president's inefficiency from being concealed by transferring power to the vice president. The president would return to his duties once the impediment ceased. The principal originator of

⁴ President George Washington in 1790 contracted flu that kept him out of office for a month. James A. Garfield fought for his life for 79 days after being shot. Despite various suggestions sent to Vice President Chester A. Arthur, no action was taken. In 1893, Grover Cleveland secretly underwent two operations, after which he spent two months in Massachusetts recovering.

the 25th Amendment was Birch Bayh, Chairman of the Senate Subcommittee on the Constitution and the Judiciary.⁵ On January 6, 1965, the amendment was presented in the House of Representatives and the Senate. Three weeks later it was supported by President Lyndon B. Johnson. The final version was approved in July 1965. On February 10, 1967, the amendment was ratified by the 38th state. Thus, the formal requirements for the amendment to take effect were met. On February 23, 1967, it was proclaimed as the 25th Amendment to the U.S. Constitution.

3. Content of the 25th Amendment

The amendment consists of four sections. The first formalizes the Vice President's assumption of power in the event of the President's removal from office, death, or resignation. This was a formalization of the "Tyler precedent." Section two refers to a vacancy in the office of the vice president. In such a situation, it is the president who nominates his successor, who must be approved by a majority vote of both houses of Congress.⁶ Sections three and four create procedures in the event of the president's inability to serve. In the case of section three, the president shall personally declare to the speaker of the House of Representatives and the president *pro tempore* of the Senate that he is unable to exercise the powers and duties of the office. Until such time as a written declaration is made to the same persons that the impediment has ceased, the powers and duties shall be exercised by the Vice President as Acting President.

According to Herbert L. Abrams,⁷ section three can be used when the president is before a major operation or surgery that requires

⁵ Birch Bayh was also a co-author of the 26th Amendment to the US Constitution, which lowered the voting age to 18. The politician also led the work on the Equal Rights Amendment, which was passed by both the House and Senate, but lacked the votes of three states to be ratified. To this day, B. Bayh remains the only politician outside of the founding fathers to have authored two adopted amendments to the Constitution.

⁶ Section Two of the Amendment was used twice. First in 1973, when Gerald R. Ford replaced Spiro T. Agnew, who resigned, and again in 1974, when Nelson A. Rockefeller was nominated to replace G.R. Ford, who became president after Richard M. Nixon resigned.

⁷ Herbert L. Adams was a professor of radiology at Stanford University and a peace activist. In his writings on the 25th Amendment, he argued that members of the administration,

anesthesia or the use of psychoactive drugs in significant amounts, is struggling with a serious illness, has been diagnosed with Alzheimer's disease or another progressive mentally disabling disease, in situations where the president or his physician believes that his illness, injury, or emotional conditions are affecting his judgment or ability to govern and during any foreseeable situation in which the president is unable to communicate with his government (Abrams 1992). To this day there is a dispute as to whether section three was ever used.⁸ The question is also raised by "political" incapacity, which must be distinguished from health reasons, both physical and mental.

Section four deals with the most difficult cases where the president cannot or refuses to declare his own incapacity (Feerick 1992: 200). Under it, the vice president, together with a majority of the department heads (or other body determined by Congress), makes a written declaration to the president *pro tempore* of the Senate and the speaker of the House of Representatives that the president is unable to exercise his powers. The Vice President shall immediately assume the powers and duties of the President. If the president makes a declaration to the same persons that the inability no longer exists, then he again assumes the powers and duties of the president, unless the vice president and a majority of the department heads make a declaration within four days that the president nevertheless cannot fulfill the powers and duties. The decisive body in this situation is Congress.⁹ During these four days and the maximum of twenty-one that Congress has to decide, it is the vice-president who carries out the presidential duties. If, by a resolution passed by a two-thirds majority of each chamber, it determines that the president cannot exercise the powers and tasks of the office, then the vice president continues to exercise them. Otherwise, the president assumes power again. Section four was thus also created for the situation in which the president refuses or is unable to assert his incapacity for office (White Burkett Miller Center 1988: 16). Herbert L. Abrams (1992), quoted earlier, believes that the use of section four

primarily the president, vice president, and presidential physician, should establish guidelines for triggering the amendment in advance.

⁸ In July 1985, President Ronald Reagan transferred power to Vice President George Bush for the duration of the operation. Although he took the steps outlined in the 25th Amendment, he refrained from invoking the amendment and setting a precedent.

⁹ If Congress is not in session, it must then meet within 48 hours. It has 21 days from receipt of the statement to make a decision, or if it is not in session, 21 days from the time it meets.

is complex and delicate. It applies to situations such as loss of consciousness, significant changes in cognitive ability or inability to communicate, serious impairment resulting from an accident or attack, terminal illness, or progressive impairment of mental conditions.

4. Doubts about the 25th Amendment

Despite the amendment, the question of who decides that the president is unable to perform his duties remains unresolved. Section three is clear in that it says that it is the president himself who informs of the president's inability to perform his duties. The situation looks more complicated with section four. Ideally, presidents should voluntarily resign temporarily. However, there is a tendency to delay scrutiny of the president's condition and trigger the amendment. Heads of state fear that information about their poor condition may translate into their political career or their turning into a "lame duck"¹⁰ (Abrams 1999: 122).

Birch Bayh himself felt that the amendment needed some procedural streamlining. First, presidential administrations are not usually prepared for a crisis, so even before the inauguration, the president-elect, vice president-elect, their spouses, the White House chief of staff, and other key figures – including the president's personal physician – should create a plan for the possible incapacity of the president to hold office. Second, the president's doctor should have more contact with the president. The responsibility of such a physician is twofold: the welfare of the patient and the best interests of the nation. His role should be more clearly delineated by Congress so that he can quickly inform the chief of staff and the vice president of concerns about the president's fitness for office. Third, Congress should also consider establishing a broader law against distorting information about presidential incapacity (Bayh 1995).

The main criticism of the amendment was that it did not specify the role of doctors in determining the president's fitness for office (Batchelor 1994: 54). There were claims that the president's unfitness should be decided by

¹⁰ In the original "lame duck." A term used in Anglo-Saxon countries, it refers to a politician who is about to leave office but holds office until a successor is elected. The term is usually used to emphasize the lack of political prowess.

a panel of doctors.¹¹ However, according to B. Bayh (1955), it is the president's personal physician who is in a position to advise the vice president and the cabinet in emergencies, for it is he who observes the president on a daily basis. An outside panel of doctors would not have similar insight. In the case of a personal physician, there is an obvious conflict of interest because he should protect the president's health information. The basis of the doctor-patient relationship is a level of trust with respect for the interests of the patient, except in circumstances where disclosure of such information is mandatory (Abrams 1995: 465–469). In such a situation, the doctor would have to choose between the patient's expectations and his duty to the country. On the other hand, the opponents of the decision-making by a medical council referred to the historian and political scientist Clinton Rossiter, who already in 1960 wrote that the removal of the president from power is a political act, and therefore the decision should not be made by anyone except the president and the vice-president (Rossiter 1960: 210). There were also claims that physicians who are part of the council are in no way accountable to the voters, thus such a solution should be excluded (Harriger 1995: 563–583). It should be added, however, that in light of the amendment, the council would still remain an advisory body, whose decisions would not be binding for the vice-president and members of the cabinet.

Much attention has also been paid to the section of the provision stating that the activation of the amendment is handled by the Vice President. Since it is the Vice President who would assume power in a situation of Presidential impotence, it has been suggested that the amendment may become a tool for a usurper to seize power. On the other hand, the decision should be made within the executive. This is an issue that is too politicized to be decided by the Supreme Court. The lack of definition in the third and fourth sections of the terms 'unfit' and 'incapacity' may also be a problem. Yet this is not an oversight. "Rigid" definition is undesirable in a situation where "incapacity" can take a variety of forms that do not necessarily fall within the definition (Feerick 1992). The discussions surrounding the 25th Amendment make it clear that the term is intended to apply to all situations in which conditions or circumstances prevent the president from performing his or her duties, and it is in the national interest that the vice president takes over (Feerick 1992).

¹¹ This is the opinion expressed by Jimmy Carter, among others.

5. Donald Trump and the controversy over his use of the amendment

As indicated above, D. Trump's presidency has been overshadowed by talk of activating the 25th Amendment from the start. Already the presidential campaign foreshadowed the "unorthodox" presidency of the 45th White House host. Donald Trump and Hillary Clinton accused each other of being "unfit" for the presidential seat. The campaign broke the 'Goldwater rule', which prohibits psychiatrists from forming diagnoses and opinions towards public office holders without direct examination (Kroll, Pouncey 2016: 226–235), and commented on the mental health of both candidates.

The controversy over the president's condition came to a head in the first half of 2017, when D. Trump as newly elected president provided information that completely failed to reflect reality, such as that the crowd gathered at his inauguration was the largest in history, that Barack Obama ordered the installation of wiretaps at Trump Tower, and that getting fewer votes than H. Clinton in the popular vote was due to undocumented immigrants casting ballots. Mental health experts have signalled that D. Trump suffers from a narcissistic personality disorder that could limit his ability to govern. And while the disorder is not uncommon in leaders, it has previously been diagnosed in dictators (Barber 2016). John Gartner went further and in his book wrote that the 45th President of the United States suffers from *malignant narcissism* (Gartner 2018: 29). Allen Frances, who is the author of the criteria defining narcissistic personality disorder, disagreed with this opinion. In his opinion, although the 45th president may have been a narcissist, this did not make him a mentally ill person (Frances 2017).

Throughout D. Trump's presidency, the charge of his lack of truthfulness has been raised just as often. During his four-year term, The Washington Post calculated that the president has 30,573 false or deceptive statements to his credit (The Washington Post 2021). Jamal Greene believes that the problem with a president who constantly lies is that there are behaviors that require a certain degree of credibility – "a president whose words don't matter cannot skillfully conduct foreign policy." He can't negotiate deals, nor is he likely to form productive relationships with other leaders. He cannot present "state of the union" information to Congress. While such behavior does not necessarily constitute a violation of the law, there are doubts about the reliability with which the law is enforced. In summary, a compulsively lying president "cannot exercise the powers and tasks of his office" (Greene 2017).

In light of the interpretation of the circumstances that would qualify under section four, there were cases of mental incapacity of the president, being kidnapped or captured, being under oxygen apparatus during an enemy attack, or loss of speech or sight (Feerick 1992: 200). The debates that took place during the creation of the amendment made it clear that unpopularity, lack of competence, an act qualifying for impeachment, poor judgment, or laziness did not qualify as “unfitness” under the amendment (Congressional Record 1965). A personality disorder or even some form of mental illness¹² does not necessarily mean that a president is unfit for office. The argument against presidential lying can just as easily be addressed. Richard M. Nixon said he was not a crook, and committed an extremely brazen act as president that caused him to resign the presidency. Ronald Reagan claimed that he was not aware of the Iran-Contra agreement, but historians have evidence that he knew about the entire operation. Bill Clinton, on the other hand, asserted in front of millions that he did not have a sexual relationship with Monica Lewinsky. Today it is known that this was untrue.

It should also be noted that in the case of Section Four, the necessary actor is the Vice President, without whom it cannot be invoked. Mike Pence has denied ever hearing discussions regarding the use of the 25th Amendment, stressing that he does not expect the topic to come up during discussions between cabinet members (Abrams 2019). During his tenure, the vice president and cabinet members may not have chosen to take such a step for fear of retribution from the president, especially since there was nothing preventing the president from removing such individuals in a “return to duty” situation, especially since President D. Trump removed individuals from their positions who harmed¹³ him in any way. Voices calling for the use of the 25th Amendment came after he was hospitalized as a result of the COVID-19 infection (sporadic) and after the January 6, 2021 riots on Capitol Hill (escalated).

Voices calling for the activation of the 25th Amendment took hold after the riots on Capitol Hill on January 6, 2021. The president was accused

¹² President Abraham Lincoln suffered from depression.

¹³ Shortly after the impeachment proceedings concluded, he removed Gordon Sondland from his post as ambassador to the European Union. A few hours earlier, Lt. Col. Alexander Vindman, a member of the National Security Council, had been led out of the White House. The two men were linked by the fact that they were witnesses in the proceedings that led to the launch of the procedure. Fears of retribution are therefore well-founded in this case.

that his rhetoric about losing the presidential election provoked a riot that put the lives of those in the line of succession at risk: Vice President Mike Pence, House of Representatives Speaker Nancy Pelosi, and Senate President *pro tempore* Chuck Grassley. This time, the voices calling for the use of the 25th Amendment also came from the Republican side. The first Grand Old Party congressman to call for the procedure was Adam Kinzinger of Illinois (Reuters 2021). John Kelly, a former White House chief of staff, stated that if he were still a cabinet member, he would vote to use the 25th Amendment to remove the president from power (Cole 2021). On the Democratic side, N. Pelosi said that if the vice president and the Cabinet do not take steps, the chamber would initiate a second impeachment proceeding. In turn, she described the president as “dangerous” (Associated Press 2021). These discussions were unequivocally cut short by the Vice President himself, who stated that triggering the 25th Amendment procedure was not only not in the Nation’s interest, but was also unconstitutional (Beech, Shalal 2021). In this situation, it was also difficult to ignore the sentiments of Republican voters, more than half of whom blamed the riots on movements on the left side of the political spectrum (Thrush 2021). Thus, a second impeachment procedure was initiated against President D. Trump, which is a topic for a separate analysis.

In summary, from the moment the amendment was created, it was realized that it was not perfect and that its use would be rare. However, a flexible provision was created while providing quite a few sources of legislative history to help future generations understand the purpose of creating the provision and its meaning. Given the historical context, the documents created during the amendment’s creation, and its structure, it seems clear that using the mechanism of the Fourth Section – for the first time in U.S. history – especially in the case of a president who is not ill and still has the support of a segment of the population, could lead to a constitutional crisis. Thus, the amendment joined the group of provisions that normalize the implementation of power, which can be used as tools in political struggle.

The process described in section four creates such powerful constitutional and political effects that its use can only occur in the most justifiable cases (Neal 1999: 5). The purpose of the provision is not to remove from power a person whose behavior the public perceives to be outside the canons of conduct for a head of state or whose communication style is considered controversial. The amendment was designed to ensure that the American government is headed by an informed and communicative

person. Moreover, Section Four does not remove the president from office, much less make it permanent. Under the provision, power is temporarily transferred to the vice president. Although calls to trigger the 25th Amendment came from politicians, constitutionalists, and voters alike, President D. Trump's strong position in the Republican Party reflected in the loyalty of cabinet members, most notably Vice President M. Pence, meant that the amendment was not used. However, even if the president had been removed from office using the mechanism in question after the attack on Capitol Hill, it would not mean that he could not run again in 2024.

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