AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Impeaching and Censuring the President

**Michael Pence, Letter on Twenty-Fifth Amendment** (2021)

*Throughout much of his presidency, Donald Trump was dogged by claims that he was not merely unfit or incompetent but unable to perform the duties of his office. The original Constitution provided but a single mechanism to remove a sitting president – impeachment by the House and conviction by the Senate for high crimes and misdemeanors. The Twenty-Fifth Amendment to the Constitution, which was ratified in 1967, provided an additional mechanism. Section Three of the Twenty-Fifth Amendment provides for the possibility that the president might voluntarily relinquish his powers when be believes that “he is unable to discharge the powers and duties of his office.” Section Four of the Twenty-Fifth Amendment lays out procedures for the more difficult case of involuntarily stripping the president of his powers and duties. If the vice president and a majority of the Cabinet were to inform Congress that the president is “unable to discharge the powers and duties of his office,” then the vice president would “immediately assume” those powers as acting president. If and when the president believed that he was able to resume his duties, Section Four lays out a process by which he could appeal to Congress and potentially overrule the judgment of the Cabinet regarding his incapacity.*

*Vice President Mike Pence was frequently urged to take action against President Trump under Section Four of the Twenty-Fifth Amendment. Critics argued that Trump was too incompetent, too ignorant, too foolhardy, or too inattentive to exercise the duties the presidency. Some asserted that the president was simply suffering from dementia, and that the American public were being shielded from the truth of his incapacity. Partly to counter such claims early in his presidency, Trump began to hold Cabinet meetings in public and engage in more impromptu exchanges with members of the media.*

*The demands on Pence to make use of Section Four became more intense in the aftermath of the assault on the Capitol on January 6, 2021. When supporters of President Trump stormed the halls of Congress, disrupting the counting of the votes in the presidential election and threatening the assembled members of Congress, the president himself was slow to respond. Indeed, many accused the president of instigating the attack and hoping that it would somehow succeed in altering the outcome the election that Trump had lost. On January 7, House Speaker Nancy Pelosi and Senate Democratic Leader Chuck Schumer issued a joint statement calling on Pence “to remove the President for his incitement of insurrection and the danger that he still poses.” The media reported that there were in fact discussions among Trump’s Cabinet members about the possibility of invoking the Twenty-Fifth Amendment. Days later, with a single Republican vote, the Democratic majority in the House of Representatives adopted a resolution calling on Pence to “immediately” remove Trump for failing in his duties to “respect the legitimate results of the Presidential election” and “to protect the people of the United States and their elected representatives against domestic insurrection, mob rule, and seditious violence.”*

*On the day of the House vote, Pence sent a letter to Pelosi explaining that he thought Section Four could not be appropriately invoked in these circumstances. The next day, the House voted to impeach the president. He was subsequently acquitted in a Senate trial held after the expiration of his presidential term.*

Dear Madam Speaker:

. . . .

[W]ith just eight days left in the President's term, you and the Democratic Caucus are demanding that the Cabinet and I invoke the 25th Amendment. I do not believe that such a course of action is in the best interest of our Nation or consistent with our Constitution. Last week, I did not yield to pressure to exert power beyond my constitutional authority to determine the outcome of the election, and I will not now yield to efforts in the House of Representatives to play political games at a time so serious in the life of our Nation.

As you know full well, the 25th Amendment was designed to address Presidential incapacity or disability. Just a few months ago, when you introduced legislation to create a 25th Amendment Commission, you said, "[a] President's fitness for office must be determined by science and facts." You said then that we must be "[v]ery respectful of not making a judgment on the basis of a comment or behavior that we don't like, but based on a medical decision." Madam Speaker, you were right. Under our Constitution, the 25th Amendment is not a means of punishment or usurpation. Invoking the 25th Amendment in such a manner would set a terrible precedent.

After the horrific events of this last week, our Administration's energy is directed to ensuring an orderly transition. The Bible says that "for everything there is a season, and a time for every purpose under heaven . . . a time to heal, . . . and a time to build up." That time is now. In the midst of a global pandemic, economic hardship for millions of Americans, and the tragic events of January 6th, now is the time for us to come together, now is the time to heal.

I urge you and every member of Congress to avoid actions that would further divide and inflame the passions of the moment. Work with us to lower the temperature and unite our country as we prepare to inaugurate President-elect Joe Biden as the next President of the United States. I pledge to you that I will continue to do my part to work in good faith with the incoming administration to ensure an orderly transition of power. So help me God.