

The 25th Amendment

Roman Mars [00:00:00] On July 7th, 1893, Dan Lamont sent a telegram to Walter Gresham, the secretary of state.

Elizabeth Joh [00:00:06] It read, "The president is laid up with rheumatism in his knee and foot but will be out in a day or two. No occasion for any uneasiness." Lamont was a secretary of war to President Grover Cleveland, as well as a close friend. And the telegram was a lie. Doctors had discovered a cancerous tumor in Cleveland's mouth. And news that the president of the United States was suffering from cancer would have caused a panic. And to avoid alarming the public, Cleveland and his aides decided that the president's tumor would be removed in secret on a yacht owned by Cleveland's friend, Benedict Elias.

Roman Mars [00:00:45] Everyone in on the secret would pretend that Cleveland would--as he had done many times before--board a yacht called the Oneida, in order to sail from New York City to his summer home in Buzzards Bay, Massachusetts.

Elizabeth Joh [00:00:57] And so on July 1st, 1893, a surgical team sworn to secrecy operated on President Cleveland, who sat nearly naked on a chair that had been tied to the mast in the yacht's small dark saloon. There was no operating table. At 1:14 that afternoon, surgeons began to remove the tumor from the nearly 300 lb patient who sat upright during the 90-minute surgery. As far as most Americans were concerned, the president was enjoying a nice summer boat ride with friends.

Roman Mars [00:01:32] And that included the vice president, Adlai Stevenson.

Elizabeth Joh [00:01:35] Never before had an American president submitted to such a major operation under anesthesia. Doctors removed not only the tumor from Cleveland's mouth but also part of his left jaw, his upper palate, and five teeth. Cleveland healed remarkably well and would go on to serve his second nonconsecutive term in office. The press eventually found out about the removal of the tumor. The leaker was probably a dentist on the surgical team named Ferdinand Hasbrouck. All of this secrecy was meant to avoid scandal, but it also raised a disturbing question. For 90 minutes while surgeons operated upon Grover Cleveland, the United States had no conscious president. Cleveland's vice president had no idea that any of this was going on, let alone be asked whether he was supposed to assume the president's responsibilities during that short period of time. What do you do when you have a disabled president, even if he's temporarily disabled? We didn't have a very good answer for this until the 1960s. That part of the Constitution, also known as the 25th Amendment, has never been brought up as frequently as it has during this particular presidency. What does the Constitution tell us about Presidential fitness, disability, and Trump?

Roman Mars [00:03:17] This is What Trump Can Teach Us About Con Law--an ongoing series of indefinite length and sporadic release, where we take the odd tweets of the 45th President of the United States and the tweets of his most intense critics and use them to examine our Constitution like we never have before. Our music is from Doomtree Records, our professor and neighbor is Elizabeth Joh, and I'm your fellow student and host, Roman Mars. Until the 25th Amendment was ratified, the Constitution provided for some emergency presidential situations.

Elizabeth Joh [00:03:54] Article II says that if the president is removed from office because he dies, resigns, or is unable to discharge his duties, the vice president should

take over the presidency. Only one American president has resigned--that's Nixon--and eight have died while in office. And their vice presidents became president without any serious problems. The reference to disability in Article II, though, is a bit vague. Who makes the decision about presidential disability? And how exactly does that happen? After the assassination of John F. Kennedy, it became clear that these questions needed clarification. Congress proposed amending the Constitution in 1965. The 25th Amendment officially became part of the Constitution in 1967, as soon as 38 states had provided the necessary ratification. So, the 25th Amendment has four sections. The first three aren't terribly controversial. The first section clarifies what happens if a president dies, resigns, or is removed. And the vice president becomes the president immediately. This was used in 1974 when Nixon resigned and his vice president, Gerald Ford, assumed the presidency. The second section of the 25th Amendment says that when there is a vacancy for vice president, the president can name a replacement who has to be approved of by Congress. This section was also used during that same time when now President Ford nominated Nelson Rockefeller to be his vice president. And the 25th Amendment's third section allows a president to voluntarily and temporarily have the vice president assume his duties until the president says, "Okay, I'm ready to take my powers back." This third section was sort of used by President Reagan in 1985 when he underwent brief colon cancer surgery. President Bush also temporarily transferred power to Vice President Cheney twice for medical procedures. And this is the part of the Constitution that President Cleveland should have relied upon for his surgery, had the 25th Amendment existed back then. The first three sections of the 25th Amendment seem quite orderly and sensible. And then there's Section 4. Section 4 of the 25th Amendment says that the vice president and a majority of the cabinet can declare that the president is "unable to discharge the powers and duties of his office," and then the vice president immediately becomes acting president. If though the president disagrees and informs Congress that, "No, actually I'm fine," then he can immediately reassume the presidency. But if the vice president and a majority of the cabinet tells Congress within four days, "No, we really mean it. The president is truly disabled," then Congress is supposed to meet within two days to decide what to do. If a supermajority--that's two thirds--of both the House and the Senate agree that the president is disabled, then the president is permanently removed from office and the vice president becomes president. If they can't agree, the president keeps his job.

Roman Mars [00:07:08] So impeachment and the 25th Amendment provide two ways to reach one objective, and that's removing a sitting president. But these two methods focus on two very different kinds of reasons for doing so.

Elizabeth Joh [00:07:20] Impeachment is meant to apply to a president who has done something wrong. He has been accused of engaging in treason, bribery, or high crimes and misdemeanors. The 25th Amendment, however, applies to a president who is unable to discharge the powers and duties of his office. In other words, the 25th Amendment is really about a president who is disabled. Section 4 of the 25th Amendment has never once been used.

Roman Mars [00:07:48] So let's get to Trump.

Elizabeth Joh [00:07:49] Almost as soon as Trump assumed the presidency, a number of formerly pretty obscure parts of the Constitution entered public conversation. One notable one is the Emoluments Clause. The other is the 25th Amendment. And questions about Trump's mental fitness have appeared frequently after he became president, and the president has also responded to those questions. In October of 2017, Trump chatted with reporters before boarding Marine One, the presidential helicopter. Of reports that he

doesn't read, the president responded, "People don't understand. I went to an Ivy League college. I was a nice student. I did very well. I'm a very intelligent person." Later, pointing to his head, he said, "One of the great memories of all time." Michael Wolff's book, *Fire and Fury*, set off a presidential tweet storm on January 6th, 2018. Trump tweeted, "Now that Russian collusion, after one year of intense study, has proven to be a total hoax on the American public, the Democrats and their lap dogs, the fake news mainstream media are taking out the old Ronald Reagan playbook and screaming mental stability and intelligence. Actually, throughout my life, my two greatest assets have been mental stability and being, like, really smart. Crooked Hillary Clinton also played these cards very hard and, as everyone knows, went down in flames. I went from very successful businessman to top TV star to president of the United States on my first try. I think that would qualify as not smart but genius and a very stable genius at that." On September 5th, The New York Times published an anonymous opinion piece written by what the Times called "a senior official in the Trump administration." The essay stated, "Given the instability many witnessed, there were early whispers within the cabinet of invoking the 25th Amendment, which would start a complex process for removing the president. But no one wanted to precipitate a constitutional crisis." A few days later, a former White House staffer and former Apprentice contestant Omarosa Manigault Newman claimed that while she and others were in the White House, they would sometimes text each other with the hashtag "TFA" more than 100 times while in the White House. That's "25th Amendment." And on September 21st, The New York Times reported that in 2017, shortly after FBI Director James Comey had been fired, Deputy Attorney General Rod Rosenstein had made two suggestions. According to the Times, Rosenstein discussed secretly recording Trump at the White House. He also discussed the possibility of recruiting Cabinet members to invoke the 25th Amendment.

Roman Mars [00:10:46] So can Trump be removed with the 25th Amendment?

Elizabeth Joh [00:10:49] There are two big questions here. First is the practical one. The 25th Amendment does allow for a president who is disabled but unwilling to give up his powers to be removed. But it makes the removal very difficult. So, consider what would have to happen. Vice President Mike Pence and a majority of Trump's cabinet would have to agree that Trump was unable to discharge his presidential duties and then send that message to the president pro tempore of the Senate and to the Speaker of the House. Pence becomes President. But Trump could then immediately disagree--and of course he would--and send his own message to Hatch and Ryan that he was perfectly able to discharge his presidential duties. It would then require Pence and a majority of the Cabinet to tell Congress that--no--Trump really was disabled. And then both the House and the Senate would have to agree that this assessment of Trump was correct by a two thirds vote. Section 4 has a number of deliberately difficult obstacles to remove a president. It's very hard. It's even harder than removing a president by impeachment. Remember, impeachment requires a simple majority in the House to start the process and a two thirds vote in the Senate for removal. And no president has ever successfully been removed through impeachment. And second, there is a more abstract problem. The reason that the 25th Amendment has been used or talked about so often with Trump is because of his personality. He doesn't always tell the truth. He's mercurial. He says contradictory things. He says inflammatory, contradictory things. When Woodrow Wilson had a stroke in 1919, he never fully recovered while he was president. Wilson's diminished capabilities that were brought on by a physical problem was the kind of disability that I think most people would understand we would not want in a president. But is an alleged mental instability a disability under the 25th Amendment? And if so, what kind of mental instability? Any kind? And keep in mind that any time we do something for the first time under the Constitution, it

raises the possibility of a second time and a third. Once a president is removed for the first time under the Constitution for being considered mentally unfit--at least in a Trumpian way--it certainly raises the possibility that this reason could be used again. And that also raises the question about whether we'd want such a thing to happen again in the future. And then there's another issue. The vice president is a key player in Section 4. The vice president has to agree that the president is incapacitated, and the vice president then has to agree and try to override a president who disputes this claim of disability. Well, what if you had a dastardly, conniving vice president in cahoots with a willing cabinet who wanted to remove a normal, fit president? In a 1988 report, the Miller Center noted that Congress considered a number of possible horror story scenarios while considering the 25th Amendment. And political mischief is certainly one of those scary possibilities. All in all, one of the things that we can say is while the 25th Amendment has been brought up a lot, it's incredibly difficult to use. And it's one of those things that is an emergency measure under the Constitution. And it wouldn't just end an emergency. It would cause a crisis of its own.

Roman Mars [00:14:35] Here's a little addendum.

Elizabeth Joh [00:14:36] Although Cleveland surgery was a success, he needed a prosthesis to substitute for the upper part of his jaw that he'd had removed. A dentist named Kasson Gibson made the president's prosthesis and--in doing so--somehow received the president's tumor. It remained in a small glass jar filled with preservatives until he donated it to the College of Physicians of Philadelphia. If you visit the Mutter Museum today, you can still see Grover Cleveland's tumor alongside a piece of thorax from John Wilkes Booth, the assassin of President Lincoln, and the bladder stones of Chief Justice John Marshall.

Roman Mars [00:15:15] I love that place.

Elizabeth Joh [00:15:17] Have you been?

Roman Mars [00:15:18] Oh, yeah. It's the greatest. So, you said that the assassination of JFK led to the adoption of the 25th Amendment. But with that event, the line of succession was pretty clear. So why didn't any of the previous three assassinations lead to something like this?

Elizabeth Joh [00:15:36] So I think the short answer is that there had always been questions about presidential succession and what to do if the president was shot or, you know, killed or otherwise disabled, going back a long time. But I think there was a realization with Kennedy's assassination that when LBJ took over as president, there wasn't temporarily a vice president at all. So, there was this kind of hole, right? And so, what would happen if we couldn't nominate a vice president in time? And what was supposed to occur in that period? So, it wasn't so much the fact of Kennedy's actual assassination. But it was clear to people that there were all these kind of contingency plans that were not firm enough in the event of one of these succession issues.

Roman Mars [00:16:19] Were they more scared? I mean, constitutionally more scared of Kennedy living, but being incapacitated? Is that what they were worried about?

Elizabeth Joh [00:16:29] I think it was much more having to do with the vice presidency. I mean, going back all the way to Tyler, you know? President Tyler's time--there were all these questions about, well, literally, what happens when a president dies? You know, the

vice president--does he become acting president? Does he become president? And it sounds like just a mere formality, but it actually is meaningful, right? If you're an acting president, then the acting president should probably be immediately replaced with a real president. But the 25th Amendment makes clear that in the event that, let's say, a president, unfortunately is assassinated, then the vice president becomes the President with a capital P. So, it does a lot of these useful, clarifying things. And then it raises this new situation in Section 4, which isn't raised by Kennedy's particular issue so much as, well, it was clear to Congress that we don't have these plans for what to do when the president--sort of lingering on--can't really say or won't say that "I have to be replaced." This is kind of a break the glass moment in the Constitution. But, of course, I don't think that at the time, you know, this was considered. We think of a president who was not considered mentally unfit through an unexpected event during his presidency, but rather because someone who was elected--with those who elected him knowing that he was impulsive and unlike any other president, perhaps, that we've ever had--and just continued in exactly the same way that we had known. That doesn't feel exactly like the kind of unusual accident that was characteristic of all these other problem presidencies before.

Roman Mars [00:18:15] Right. This is extremely hard. This is not something that you just, like, talk about on Twitter. And it's impossible to consider, to me, because, you know, Trump surrounds himself with people who believe in him. And so, they're not the type of people who would invoke this.

Elizabeth Joh [00:18:33] I think that's right. And I think one of the things is that, you know, people are frustrated with the Constitution in many ways because it's short--it's vague. But if you think about it, it's a remarkably solid, long-lasting document. Part of it is the things that would prompt a kind of a national emergency are really hard to put into place. It's really hard to change the Constitution. It's really hard to remove a president. The 25th Amendment is much harder than removing a president through impeachment. And we've never even successfully impeached and removed a president ever. We've started the process--on one hand, you can count the number of times. We've never actually been successful. So, what you see on Twitter and social media is that those terms in the 25th Amendment--like "treason," for instance--they're kind of like a Rorschach test for what the public is feeling. It's kind of a sense of angst. And we're projecting our sense of anxiety onto these words, which actually aren't that meaningful because they're not that easy to use and probably don't apply in many of these situations.

Roman Mars [00:19:48] This show is produced by Elizabeth Joh and me, Roman Mars. You can find us online at trumpconlaw.com. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip Hop collective. You can find out all about Doomtree Records, get merch, and learn about current tours at doomtree.net. We are a proud member of Radiotopia from PRX, supported by listeners just like you.