Freshman Maryland Congressman Jamie Raskin Introduces "Oversight Commission on Presidential Capacity Act" As Permitted By The 25th Amendment

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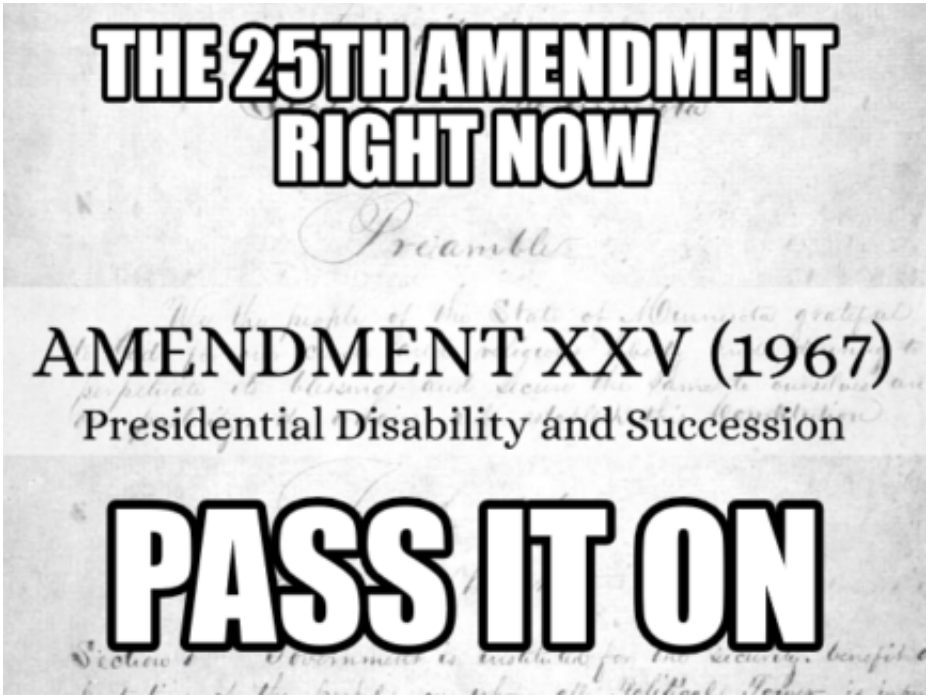


Michael J. Matheron, July 8, 2017

"In case of emergency, break glass,"
[Maryland freshman Congressman Jamie] Raskin
told Yahoo News in an interview,
"If you look at the record of things that have happened
since January, it is truly a bizarre litany of events and outbursts."
-Yahoo News, Michael Isikoff, June 30, 2017

Events, outbursts; outbursts, events. Given our present Un-Presidented Trump would it surprise you if a House member introduced a bill to start creating a legislative commission thus far

left undone in the Constitution's 25th Amendment? No? Me either. Reasons for this abound. Let's leave it at that, and with a tip of the hat to Congressman Jamie Raskin, proceed to look at his bill (thus far with 21 co-sponsors, all Democrats).

[boxright] **Section 4**. Whenever the Vice President and a majority of either the principal officers of the executive departments ***or of such other body as Congress may by law provide,*** transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office.

Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office. [/boxright]

As the Constitution now stands, the 25th Amendment permits, among other things, a legislatively created commission to report to the House Speaker and the Senate President Pro Tem the results of its medical and psychological examination [see sidebar] and, if they determine it, their "written declaration that the President is unable to discharge the powers and duties of his office . . " In that case, "the Vice President shall immediately assume [or continue to assume] the powers and duties of the office as Acting President." [Note: text in brackets added to combine same language in two subsections]

On April 6, 2017, Maryland's 8th District freshman Congressman Jamie Raskin introduced H.R. 1987, the "Oversight Commission on Presidential Capacity Act" by which Congress would establish the legislative body called for in the 25th Amendment's Section 4 ("*such other body as Congress may by law provide*").

From Section four of Mr. Raskin's H.R. 1987, regarding commission structure and membership qualifications:

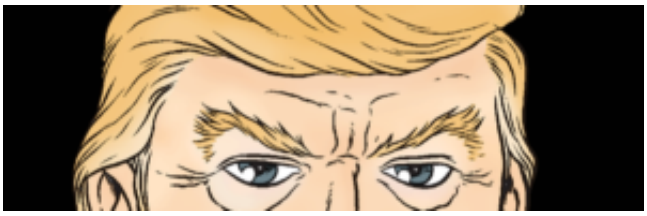
> "(a) Number And Appointment.—The Commission shall be composed of 11 members, appointed as follows:
> (1) Two members appointed by the majority leader of the Senate.
> (2) Two members appointed by the minority leader of the Senate.
> (3) Two members appointed by the Speaker of the House of Representatives.
> (4) Two members appointed by the minority leader of the House of Representatives.
> (5) Two members—
>
> (A) one of whom is appointed jointly by the two appointing individuals under paragraphs (1) through (4) who are members of, or caucus with, the

> Democratic party;
> (B) one of whom is appointed jointly by the two appointing individuals under paragraphs (1) through (4) who are members of, or caucus with, the Republican party; and
> (C) each of whom has served as President, Vice President, Secretary of State, Attorney General, Secretary of the Treasury, Secretary of Defense, or Surgeon General.
> (6) One member, to serve as Chair of the Commission, appointed by simple majority vote of the 10 members appointed under paragraphs (1) through (5)."
>
> Importantly, each of the two members appointed in Subsection (a) (1) through (4) "shall be a physician," and one of each physician pair shall be a physician with a specialty in psychiatry.

Putting some practical meaning to section four may raise constitutional separation of powers questions, though, because the applicable clauses throughout section four are either/or statements. "**Whenever the Vice President and a majority of either the principal officers of the executive departments *or of such other body as Congress may by law provide,*** transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office . . ." Read in certain ways, these clauses may conflict, pitting the executive against the legislative branch.

First, does the first clause intend that the primary body that declares a president "unable to discharge the powers and duties of his office" be the principal officers of the executive branch,

and who are “principal officers”? Does the first clause, in other words, prohibit the legislative branch commission described by Mr. Raskin's bill to form or operate unless the executive officers named refuse to act? The placement of clauses in an act of Congress is of great importance to the later understanding of the full meaning of the law, particularly in courts that seem especially tuned in to the pushme-pullyou of language. When considering a use of a constitutional amendment their radar is set on the widest radius, as decades of 14th Amendment cases prove.

Let's suppose that a reasonable reading of the clauses we're looking at means that *either* of the two groups “**the principal officers of the executive departments**” or “ ***such other body as Congress may by law provide***” may weigh in without any mandated order of precedence, in other words, that the commission proposed by Mr. Raskin, if it surprisingly passes into law, may act immediately upon its effective date and invoke the 25th Amendment's features in full without “active” or “passive” consent by the executive branch. If it is read that way the ability to at least temporarily remove a president from office is put into the hands of the legislative branch alone, like impeachment, but with lesser impact.

Yet the consequences of this “lesser impact” may be large depending upon who is the Vice President, and the politics of this situation is frightening. Perhaps some clarification of this is in play here. Whichever body, the executive or the legislative, feels most passionately about this would bring about, potentially, a true constitutional crisis, when a President goes mentally belly up. And finally if both groups may act independently of each other what occurs if they differ in their findings? Perhaps another Long Parliament? Not likely, but it would be a long season fraught with partisanship with real-time complications immeasurable in impact.