

Amendment 2 to the Tennessee Constitution seeks to address situations involving devolution of the governor's authority upon an inability to carry out his or her constitutional duties. Provision in case of the governor's death is already covered in the Constitution.

The provisions of the amendment are modeled after those found in the United States Constitution via the Twenty-fifth Amendment. However, as proposed, the Amendment No. 2 seems to fall short of the provisions in the Twenty-fifth Amendment by failing to address what happens if the governor thinks he or she is still capable of carrying out the duties of the office and the Commissioners of the various departments established under that office (e.g. the state's version of a President's cabinet) disagree.

The Twenty-fifth Amendment addresses this potential conflict by providing that when the president's cabinet disagrees with the president about his or her ability/capacity to carry out the duties of the office, "Congress shall decide the issue."

Nothing in Amendment 2 addresses this possibility.

Moreover, by the present language, we have allowed a mere majority (not two-thirds) of the governor's "cabinet" to render him or her unauthorized to act.

That means we are required to presume good will would be intended by a mere majority of the members of the governor's "cabinet." But in this present age, presuming a mere majority might not want to affect a "coup" in favor of the Lt. Governor (who we do not elect) who would assume the governor's authority may not be wise.

For example, Trump certainly thought some people he appointed were not "loyal" to his administration, which does not bother me because the executive branch over which he was given authority is to serve as an independent branch of government intended to serve as a check on the other two branches.

Enough never remained in his cabinet to exercise the powers given them under the Twenty-fifth Amendment, but I seem (and I may be wrong) to remember some Democrats urging his cabinet to remove him. But I do believe some Republicans now taunt Democrats about not using the Twenty-fifth amendment to remove President Biden who they consider mentally incapable of performing his duties.

Moreover, some see the events of January 6th, not the same as here discussed, as an attempt at a coup. So, to my mind, these considerations are not specious.

I do not know why resolution of this conflict and presumption of good will by a governor's cabinet was not addressed in Amendment 2 during the two General Assemblies that considered it.

This omission presents a dilemma. Here are some of the questions that cross my mind:

1. Do we vote for an amendment that creates a potential conflict problem it does not resolve and hope the legislature sends another amendment to voters in 2026 that contains a provision addressing that conflict?
2. What if the legislature does not send us such an amendment for the reason they may have had for not putting such language in the present amendment?
3. What if we adopt the present amendment but then the subsequent remedial amendment fails, leaving us with an unresolved problem we created by adopting the present amendment.
4. Is adopting an amendment that creates but does not resolve a potential conflict better than having no constitutional provision that deals with the possibility that a governor has a debilitating stroke?
5. Do we vote against the amendment, sending the legislature back to the drawing board to send us an improved amendment in 2026, and hope nothing debilitating happens to our governor until then?

In light of this, I thought about what might happen if a governor has a stroke so debilitating that he or she not only cannot perform the duties of the office but is so incompetent as not able to offer a resignation? Are we stuck? No, but we have a bit of a mess.

The "cabinet" members can continue to carry out their duties. But all bills adopted by the General Assembly will become law ten days after being transmitted to the governor, because the governor is not competent to veto them. But, that is not so horrible, because even a veto can be overridden by a simple majority of the legislature (not 2/3 as with Congress and the President).

There is also the possibility that the governor has given someone a general power of attorney. I presume that person could submit a lawful resignation from public office even as the agent could submit a lawful resignation for other things like serving as trustee of a trust or member of a corporate board. Moreover, someone would have the authority under existing law to apply to a court for appointment of a legal guardian who, I presume, could resign the office. My presumption may be wrong, but that simply returns us to the situation described in the preceding paragraph.

In sum, we have made it more than 200 years without the need for such a provision in our Constitution, and because I believe a constitution should not be amended except when the need is clear and its language is clear, I think I would rather proceed when these questions have addressed and a new amendment has been offered.