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Vice Presidential Inability: Why It Matters and What to Do When It Occurs

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VICE PRESIDENTIAL INABILITY: WHY IT MATTERS AND WHAT TO DO WHEN IT OCCURS

*Roy E. Brownell II**

"Have you heard the news?" he said with a grin
"The Vice President's gone mad"
"Where?" "Downtown." "When?" "Last night"
"Hmm, say, that's too bad"
"Well, there's nothing we can do about it," said the neighbor.
"It's just something we're gonna have to forget"
"Yes, I guess so" said Ma
Then she asked me if the clothes was still wet.

Bob Dylan
"Clothes Line Saga"**

I. INTRODUCTION

United States public law has elaborate procedures in place governing presidential inability.[1] However, none exist regarding vice presidential

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1. For purposes of this Article, "inability" and "incapacity" will be used interchangeably. *Cf.* U.S. CONST. art. II, § 1, cl. 6 (using both "inability" and "disability"); *id.* amend. XXV, § 4 (using "inability"). Inability, as understood by the framers of the Twenty-Fifth Amendment, encompasses physical or mental inability or other circumstances sufficiently serious to prevent or greatly compromise an officeholder's ability to arrive at decisions or to convey them. *See, e.g.*, 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh); *see also id.* at 7941 (statement of Rep. Poff); *id.* at 15,381 (Bayh/Kennedy exchange); *cf.* JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 34 n.* (3d ed. 2014).

incapacity, a situation when the President is able to fulfill his duties but the Vice President is not.[2] There is nothing in the text of the Constitution or the U.S. Code that prescribes what should be done or by whom in these circumstances.[3] As Dean John Feerick—the preeminent authority on executive succession and inability—aptly notes, "[i]f the Vice President suffers an inability, current law offers no framework for determining that he is disabled."[4] Hitherto, lawmakers have largely taken the same position on potential vice presidential incapacity as the neighbor did in Bob Dylan's song: "It's just something we're gonna have to forget."[5]

This legal lacuna poses a serious threat to American governance as the Twenty-Fifth Amendment to the U.S. Constitution makes the Vice President central to the continuity of the executive branch.[6] Ideally, a constitutional amendment would be adopted that would cover a number of succession and inability gaps, including vice presidential incapacity.[7] Failing that, an ex ante statute would be the next best option.[8] But, absent such unlikely steps, this Article examines what concrete options are available to federal officials if a Vice President were to become incapacitated *right now*—a real-world concern as Vice President Mike Pence recently felt the need to be tested for the COVID-19 virus.[9]

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2. The Author has elsewhere written about what policymakers should do if both the President and Vice President are incapacitated at the same time. *See* Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck* Today, 86 FORDHAM L. REV. 1027 (2017).

3. *See, e.g.*, JAMES M. RONAN, LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION 156, 164-65 (2015); Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1033 (2010).

4. John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 935 (2010).

5. BOB DYLAN, CLOTHES LINE SAGA. Copyright © 1969 by Dwarf Music; renewed 1997 by Dwarf Music. All rights reserved. International copyright secured. Reprinted by permission.

6. *See* U.S. CONST. amend XXV.

7. *See, e.g.*, Michael Nelson, *Background Paper*, *in* A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 19, 99-100 (1988). For constructive suggestions on to how to solve problems in the executive branch succession and inability regime, see John D. Feerick, *Presidential Inability: Filling in the Gaps*, POL. & LIFE SCI., Fall 2014, at 11, 18-25; Fordham Univ. Sch. of Law Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 15-35 (2012) [hereinafter *First Fordham Report*]; Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 958-70 (2017) [hereinafter *Second Fordham Report*].

8. *See Second Fordham Report*, *supra* note 7, at 964-70.

9. *See* Adam Shaw, *Mike Pence Says He Will Be Tested for Coronavirus After Staffer Tested Positive*, FOX NEWS, (Mar. 21, 2020), https://www.foxnews.com/politics/pence-test-coronavirus-staffer-positive. There have been numerous instances of vice presidential incapacity. *See* Roy E. Brownell II, *Vice Presidential Inability: Historical Episodes That Highlight a Significant Constitutional Problem*, 46 PRESIDENTIAL STUD. Q. 434, 440-47 (2016). There also have been several

Much as there is no constitutional or statutory provision addressing how to determine vice presidential inability there has been little scholarship on the issue. The Reports of the First and Second Fordham University School of Law Clinics on Presidential Succession represent notable efforts in the vein, but given the broad scope of these undertakings, they were not able to discuss vice presidential incapacity in great detail.[10] Dean Feerick has written with his customary rigor on the subject of vice presidential inability in the context of a broader examination of presidential inability.[11] However, the two Clinics and Dean Feerick focused their attention on *prospective* legal arrangements.[12]

"near misses" where a Vice President could very easily have become incapacitated. *See id.* at 447-52. For example, Vice President Aaron Burr faced the possibility of assassination after he killed Alexander Hamilton in a duel. *See* RON CHERNOW, ALEXANDER HAMILTON 717 (2004). Vice President Martin Van Buren was threatened by Senator George Poindexter such that Van Buren took to carrying pistols into the Senate chamber when he presided. *See* LOUIS CLINTON HATCH & EARL L. SHOUP, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 76-77 (Greenwood Press 1970) (1934); Earl Leon Shoup, The Vice-Presidency of the United States 287 (Jan. 1, 1923) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard College Library). In November 1950, Puerto Rican terrorists tried to assassinate President Harry Truman at Blair House. *See* Carl Schoettler, *The Attempt to Assassinate Harry Truman*, CHI. TRIB. (Jan. 1, 2006), https://www.chicagotribune.com/news/ct-xpm-2006-01-01-0512310263-story.html. Vice President Alben Barkley later recalled that he too "was on the[ir] list" of targets though no overt attempt was made on his life. *See* Interview by Sidney Shallet with Alben W. Barkley, Vice President of the United States (Aug. 4, 1953), https://kentuckyoralhistory.org/ark:/16417/xt705q4rk486; *see also* Interview by Sidney Shallet with Alben W. Barkley, Vice President of the United States (June 25, 1953), https://kentuckyoralhistory.org/ark:/16417/xt712j684361. In 1960, Vice President Nixon developed a sepsis in his leg. *See* Raymond Scalettar, Commentary, *Presidential Candidate Disability*, 251 J. AM. MED. ASS'N 2811, 2811 (1984). He became sufficiently ill that he was hospitalized for several days. *See id.* During the first presidential debate in 1960, Nixon was seen on television as wan and pale as the effects of the infection had still not worn off. *See id.*; Petula Dvorak, *Like Hillary Clinton, Nixon Ignored His Doctor's Advice While Running for President. It Was a Disaster*, WASH. POST (Sept. 19, 2016), https://www.washingtonpost.com/local/like-hillary-clinton-nixon-ignored-his-doctors-advice-while-running-for-president-it-was-a-disaster/2016/09/17/fca27be4-7c41-11e6-beac-57a4a412e93a_story.html. That same year, a Secret Service agent stepped to the podium during a Nixon speech to alert him that overhead lights and electrical cables from the ceiling threatened to land on the Vice President and electrocute him. *See Guard Pulls Nixon to Safety as Overhead Lights Sag*, N.Y. TIMES, Oct. 17, 1960; *see also* Joel K. Goldstein, Presidential Succession and Inability: America's Inadequate Provisions 147 n.8 (1975) (unpublished senior thesis, Princeton University) (on file with Princeton University). In 1967, Vice President Hubert Humphrey represented the United States at the swearing in of South Vietnamese President Nguyen Van Thieu in Saigon. *See* PHILIP H. MELANSON & PETER F. STEVENS, THE SECRET SERVICE: THE HIDDEN HISTORY OF AN ENIGMATIC AGENCY 111 (2002). At a reception afterwards, Viet Cong agents lobbed mortars at the facility, causing Secret Service agents to close ranks around Humphrey. *See id.* In 1982, Vice President George H.W. Bush was tackled by Secret Service agents in Idaho during a dinner in what turned out to be a false alarm. *See* RONALD KESSLER, IN THE PRESIDENT'S SECRET SERVICE: BEHIND THE SCENES WITH AGENTS IN THE LINE OF FIRE AND THE PRESIDENTS THEY PROTECT 131-32 (2009).

10. *See First Fordham Report*, *supra* note 7, at 15-35; *Second Fordham Report*, *supra* note 7, at 958-70.

11. *See* Feerick, *supra* note 7, at 18-23; Feerick, *supra* note 4, at 935-43.

12. *See* Feerick, *supra* note 7, at 19, 24; Feerick, *supra* note 4, at 935-43; *First Fordham Report*,

They do not discuss what to do if the Vice President became incapacitated *at this very moment*, before legal reform has been adopted. As such, this work offers a different point of departure.

This Article addresses the here and now: No constitutional provision addresses what to do in case of vice presidential inability; no legislation has been enacted to determine when such an incapacity has occurred; and, if letter arrangements[13] or contingency plans are currently in place, they are confidential and it is unclear what they encompass. As Professor James Ronan has written, "in the event of total [vice presidential] disability .... what would ... take[ ] place remains a mystery."[14] As such, this Article reflects the first full-length attempt to consider what should be done if the Vice President became incapacitated *today*. In so

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supra note 7, at 15-35; *Second Fordham Report*, *supra* note 7, at 958-70; *see also* Goldstein, *supra* note 3, at 1033. For other treatment of the subject, see RONAN, *supra* note 3, at 156-57, 164-67.

13. In this Article, the term "letter agreement" or "letter arrangement" refers to a subset of executive branch contingency plans wherein a President and/or Vice President make an informal arrangement as to how to handle questions of succession and incapacity. Other than the letter arrangement that Vice President Dick Cheney crafted in 2001, see *infra* Part III.A.1, no other vice presidential incapacity contingency plan has been made known to the public. *See* KATE ANDERSEN BROWER, FIRST IN LINE: PRESIDENTS, VICE PRESIDENTS, AND THE PURSUIT OF POWER 21-22 (2018); DICK CHENEY ET AL., HEART: AN AMERICAN MEDICAL ODYSSEY 153-55 (2013); DICK CHENEY & LIZ CHENEY, IN MY TIME: A PERSONAL AND POLITICAL MEMOIR 319-22 (2011) [hereinafter CHENEY MEMOIR]. Cheney apparently was not aware of letter arrangements involving other vice presidents. *See* Douglas W. Kmiec, *Failure to Act and the Separation of Powers—The Vice Presidency and the Need to Surmount Divided Power in Pursuit of a Workable Government*, 44 PEPP. L. REV. 477, 489 n.74 (2017). The White House contingency plans that have been made public make no clear provision for what to do in a vice presidential inability context as defined in this article. *See, e.g.*, Office of the Counsel to the President, Contingency Plans—Death or Disability of the President (Mar. 16, 1993), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials [hereinafter Clinton Contingency Plans]; Office of the Counsel to the President, Contingency Plans—Death or Disability of the President (June 1, 1982) [hereinafter Reagan Contingency Plans] (on file with the George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, Folder ID No. 1823-005); *infra* notes 44, 322 and 325; *see also* Lawrence C. Mohr, *Medical Consideration in the Determination of Presidential Disability*, *in* MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 97, 104 (Robert E. Gilbert ed., 2000). For more on contingency planning involving the vice presidency, see John D. Feerick, *Presidential Succession and Impeachment: Historical Precedents, From Indiana and Beyond*, 52 IND. L. REV. 43 app. at 66-67 (2019); *First Fordham Report*, *supra* note 7, at 34-35, 62; *Second Fordham Report*, *supra* note 7, at 964-70.

As to whether any classified executive branch contingency is currently in existence that addresses vice presidential inability, this Article cannot improve upon the statement made by the First Fordham Clinic on Presidential Succession: presidential and vice presidential inability contingency planning "is ... confidential, and while [this effort] identif[ies] gaps and suggest[s] responses to them, [it is] well underst[oo]d that others in positions of responsibility have already engaged in contingency planning .... [However, in the words of] the Federalist Papers ... '[a] wise nation ... does not rashly preclude itself from any resource which may become essential to its safety.'" *First Fordham Report*, *supra* note 7, at 26-27.

14. RONAN, *supra* note 3, at 156; *see also* Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 526 n.118 (1995).

doing, this piece weighs the options available to policymakers and offers recommendations on how to solve this "mystery."

To arrive at a solution to an immediate case of vice presidential incapacity, a number of considerations must be analyzed, some of which exist in tension with one another. First, any proposed solution must pass constitutional muster. This requirement is important both as a matter of legality and of political legitimacy.[15] The former point strongly reinforces the latter. Solutions must also be *practical* under the circumstances. Whatever procedure is utilized cannot be protracted and ideally should be made public.[16] Similarly, the matter should not be drawn out in the courts, leaving the American public and its government in a state of uncertainty. These three themes—constitutionality, political legitimacy, and practicality—are fundamental to resolving the dilemma of vice presidential incapacity (and indeed to resolving executive succession and inability gaps in general) and will be returned to repeatedly in this discussion.

This Article will commence with a brief overview of the relevant constitutional provisions.[17] It will then examine the overriding constitutional need to ensure governmental continuity, which vice presidential inability could potentially undermine.[18] Next will follow analysis of the four potential approaches to handling an immediate case of vice presidential incapacity.[19] Failing a constitutional amendment or an ex ante statute, the options are, in descending order of desirability: (1) enacting legislation after the Vice President's inability becomes evident, (2) executing a letter arrangement or contingency plan (assuming one exists), (3) implementing what has been called the "contingent grant of power theory" ("CGOPT"), and (4) impeaching and removing the incapacitated Vice President. Each option has both strengths and weaknesses and each would be viable in a pinch.[20] Short of a constitutional

15. *See, e.g.*, YALE LAW SCHOOL RULE OF LAW CLINIC, THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER'S GUIDE 57 (2018) [hereinafter YALE GUIDE]; *cf. In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 650 (D.D.C. 2018) (emphasizing the importance of legitimacy in a presidential inability setting).

16. *See, e.g.*, BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT 181 (2019).

17. *See infra* Part I.A.

18. *See infra* Part I.B.

19. *See infra* Parts II–III.

20. A non-viable alternative to handling vice presidential incapacity would be to view de facto vice presidential inability as a vacancy in the office. *See* Goldstein, *supra* note 9, at 61; *cf.* WILLIAM MCKAY & CHARLES W. JOHNSON, PARLIAMENT AND CONGRESS: REPRESENTATION AND SCRUTINY IN THE TWENTY-FIRST CENTURY 122 (2010). If the position were deemed vacant, the argument could be made that the President could simply nominate a new Vice President under Section 2 of the Twenty-Fifth Amendment. Such an argument is highly dubious for several reasons.

First, the word "vacant" clearly denotes that no one is in office. *See, e.g.*, U.S. Airways v.

amendment, however, no flawless legal option exists for federal officials.[21] However, a post hoc statutory procedure would appear to be the "least worst" option.

A. *Constitutional Text and Why Addressing Vice Presidential Inability Matters*

The Twenty-Fifth Amendment provides two processes for addressing presidential inability.[22] Section 3 provides a mechanism for handling scenarios when the President recognizes or anticipates his own incapacity and is willing to take appropriate action.[23] In such a scenario, the President acknowledges his own incapacity and sends notice to the Speaker of the House of Representatives and the President pro tempore of the Senate; this notification converts the Vice President into the Acting

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Barnett, 535 U.S. 391, 409 (2002) (O'Connor, J., concurring). But, in an incapacity scenario, the Vice President clearly is in office, he simply has an incapacity. The only way to create a vacancy would be for the Vice President to be impeached and removed, to resign, to become President, or to die in office. So, on its face, this is a virtual nonstarter.

Second, the vacancy argument was clearly repudiated during consideration of the Twenty-Fifth Amendment. *See Presidential Inability: Hearings on Miscellaneous Proposals Relating to Presidential Inability Before the H. Comm. on the Judiciary*, 89th Cong. 87, 246 (1965) [hereinafter *1965 House Hearings*]; *see also* FEERICK, *supra* note 1, at 109, 365.

Third, there are even more challenging operational questions involved with determining a vice presidential vacancy than in determining vice presidential inability. Who decides? How? And under what authority? Section 2 of the Twenty-Fifth Amendment authorizes no vacancy process. *See* U.S. CONST. amend. XXV, § 2. Article II, Section 1, Clause 6 addresses death, removal, resignation, and inability but not vacancy. *See id.* art. II, § 1, cl. 6. A vacancy determination would have to be made up completely out of whole cloth. These operational shortcomings would almost certainly result in a time-consuming effort to create a process, one that could easily be vulnerable to litigation after the fact.

Fourth, whatever process that would be created to declare the office vacant would have the effect of removing the incapacitated Vice President from office. There is only one process under the Constitution for removing a Vice President outright (other than his own resignation) and that is through impeachment. Whatever novel vacancy determination process that would be created would seem to run afoul of the Impeachment Clause of Article II. *Cf.* Bowsher v. Synar, 478 U.S. 714, 726-27 (1986). Moreover, this process could result in terminating the incapacitated Vice President's salary and benefits. Since, absent a statute, pay and benefits are only provided for one Vice President, this could invite litigation as the Vice President and his family would be suffering a tangible harm.

Finally, there are serious practical concerns with such an approach. For example, suppose the Vice President appears permanently incapacitated and a vacancy is declared through some means. The President nominates and Congress confirms a replacement. Then the incapacitated Vice President recovers his capacity. There would appear to be two vice presidents. Who would be the real Vice President? *Cf.* YALE GUIDE, *supra* note 15, at 75 n.341.

For these reasons, the vacancy approach is fatally flawed.

21. *See, e.g.*, Feerick, *supra* note 7, at 18-19. An ex ante statute could be a possible solution although it is not altogether free of constitutional complications either. *See First Fordham Report*, *supra* note 7, at 34-35, 62. For a helpful model statute, see *Second Fordham Report*, *supra* note 7, at 964-65.

22. *See* U.S. CONST. amend. XXV, §§ 3, 4.

23. *See id.* § 3.

President.[24] The Vice President acts in this capacity until the President alerts the Speaker and President pro tempore that he is ready to resume his powers and duties.[25]

Section 4 provides for situations when the President is unable or unwilling to make an acknowledgment of inability.[26] In such a scenario, the Vice President and a majority of the principal officers of the executive departments (the Cabinet as defined by 5 U.S.C. § 101)[27] alert the Speaker and the President pro tempore of the President's incapacity.[28] This causes the Vice President to become Acting President.[29] If the President disagrees with the Vice President and the Cabinet's action, the matter is sent to Congress to decide, with a two-thirds vote in each house needed to prevent the President from resuming his powers and duties.[30] The Amendment, however, makes no mention of how situations involving *vice presidential* incapacity should be handled.[31] Nor is the matter addressed elsewhere in

24. *See id.*

25. *See id.*

26. *See id.* § 4.

27. *See* Freytag v. Comm'r, 501 U.S. 868, 886-87 (1991). The Cabinet can be replaced by statute with an entity of Congress' choosing. *See* U.S. CONST. amend. XXV, § 4.

28. *See* U.S. CONST. amend. XXV, § 4.

29. *See id.*

30. *See id.*

31. *See* Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 OP. O.L.C. 65, 66 (1985); 111 CONG. REC. 3263 (1965) (statement of Sen. Scott); JODY C. BAUMGARTNER & THOMAS F. CRUMBLIN, THE AMERICAN VICE PRESIDENCY: FROM THE SHADOW TO THE SPOTLIGHT 116 (2015); CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 41 (2009); FEERICK, *supra* note 1, at 245; SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 221 (2012); Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 20-22 (2010); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 139 (1995); Kenneth R. Crispell & Carlos F. Gomez, *The Twenty-Fifth Amendment's Provision for Dealing with Presidential Illness Is Inadequate*, *in* AMENDMENT XXV: PRESIDENTIAL DISABILITY AND SUCCESSION 115, 119 (Sylvia Engdahl ed., 2010); Feerick, *supra* note 7, at 21; Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV 67, 71-72 (2010); Nelson, *supra* note 7, at 90, 99-100; *First Fordham Report*, *supra* note 7, at 25; CHENEY ET AL., *supra* note 13, at 153-55; CHENEY MEMOIR, *supra* note 13, at 319-22; RONAN, *supra* note 3, at 156, 164-65; John Rogan, *Improving the White House Plans for Presidential Inability*, LAWFARE (May 9, 2018, 7:00 AM), https://www.lawfareblog.com/improving-white-house-plans-presidential-inability.

For brief legislative history on vice presidential incapacity in the context of the Twenty-Fifth Amendment, see *1965 House Hearings*, *supra* note 20, at 77-78 (Sen. Bayh-Rep. Poff exchange); *id.* at 86-87 (statement of Rep. Poff); 111 CONG. REC. 3253 (1965) (Sens. Bayh-Hruska exchange); *id.* at 3263 (statement of Sen. Scott); *id.* at 3266 (statement of Sen. Dirksen); *see also* FEERICK, *supra* note 1, at 87, 362 n.34; *cf. 1965 House Hearings*, *supra* note 20, at 56-57 (Sen. Bayh-Rep. Rodino exchange). For concerns expressed about vice presidential inability during the state ratification process of the Twenty-Fifth Amendment, see Rebecca C. Lubot, *"A* Dr. Strangelove *Situation": Nuclear Anxiety, Presidential Fallibility, and the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1175, 1194-95 (2017).

the Constitution.[32]

Article II, Section 1, Clause 6—which will be called the Original Inability Clause[33]—authorizes Congress to take action in the area of *joint* presidential and vice presidential inability.[34] It provides that "Congress may by law provide for the Case of Removal, Death, Resignation or Inability, *both* of the President and Vice President, declaring what Officer shall then act as President."[35] On its face, the provision would appear to address *only* situations when *both* the President and Vice President are unable to exercise their powers and duties, not when the Vice President alone is incapacitated.[36] Congress has never adopted legislation to explain how a vice presidential inability determination is to be made and by whom,[37] and the Clause in question offers no guidance of its own. Further compounding matters is that the President cannot simply remove an incapacitated Vice President from office.[38]

Providing procedures to handle vice presidential inability is important because the issue potentially affects the proper functioning of the national government. If the Vice President cannot carry out his duties, several serious problems could ensue.[39] First, the Twenty-Fifth-

32. *See* Nelson, *supra* note 7, at 90.

33. The provision has been referred to in a number of different ways including "the original vice presidential succession clause," Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 668 (2016), "[t]he original Constitution's presidential-disability provision," KALT, *supra* note 16, at 29, "the Succession Clause," *id.* at 31, and the "Article II's succession clause." Feerick, *supra* note 7, at 20. In addition, it is sometimes characterized as Clause 5, not 6. *See* KALT, *supra* note 16, at 29.

34. *See* U.S. CONST. art. II, § 1, cl. 6.

35. *Id.* (emphasis added). Congressional authority in the realm of vice presidential incapacity is also likely provided by the constitutional continuity-of-government principle, *see infra* Part I.B, and by the Necessary and Proper Clause. *See* U.S. CONST. art. I, § 8, cl. 18; *infra* Part II.A.2.b. The President Pro Tempore Clause, U.S. CONST. art. I, § 3, cl. 5, applies to vice presidential incapacity to the extent the Vice President is carrying out his legislative branch duties. In the eighteenth and nineteenth centuries, the President pro tempore took the gavel as Senate presiding officer when the Vice President became ill. *See* HENRY H. GILFRY, PRESIDENT OF THE SENATE PRO TEMPORE, S. DOC. NO. 104, at 10-12, 14, 17, 26, 44 (1st Sess. 1911); MITCH MCCONNELL & ROY E. BROWNELL II, THE U.S. SENATE AND THE COMMONWEALTH: KENTUCKY LAWMAKERS AND THE EVOLUTION OF LEGISLATIVE LEADERSHIP 288-89 n.139 (2019); *see also* 2 ANNALS OF CONG. 1864 (1791) (statement of Rep. Sherman); John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 149 n.46 (1995). These Senate tasks, of course, amount to only a small amount of a modern Vice President's time.

36. *See, e.g.*, *First Fordham Report*, *supra* note 7, at 29-30; *infra* note 125.

37. *See, e.g.*, SUMMARY OF PRO AND CON ARGUMENTS FROM LEGISLATIVE ANALYSIS: PRESIDENTIAL DISABILITY AND VICE-PRESIDENTIAL VACANCIES, S. REP. NO. 88-9, at 1 (1964) (quoting House Judiciary Committee Chairman Emanuel Celler).

38. *See* Meyer v. Bush, 981 F.2d 1288, 1295 (D.C. Cir. 1993); CHENEY ET AL., *supra* note 13, at 154; Memorandum from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, to Kenneth Lazarus, Assoc. Counsel to the President, Applicability of 3 C.F.R. Part 100 to the President and Vice President (Dec. 16, 1974), https://fas.org/irp/agency/doj/olc/121674.pdf.

39. The question could also arise, what should be done under a situation when the Vice

Amendment process for deciding *presidential* incapacity under section 4 could break down since the Vice President is essential to such a decision.[40] As Dean Feerick has noted, "[t]he Amendment is premised on there being an able, functioning Vice President."[41] If the Vice President is de facto incapacitated and the President is apparently unable to fulfill his own duties, the former cannot help make the determination with the Cabinet as to whether the President is truly and legally incapacitated.[42]

Second, an incapacitated Vice President—as next in line to the White House—could easily become an incapacitated President.[43] In a situation in which the Vice President cannot fulfill his duties and the chief executive leaves office through death, resignation, or removal, the incapacitated Vice President would then be elevated to the Oval Office pursuant to section 1 of the Twenty-Fifth Amendment.[44] At this point, there would be no Vice President, which means there would be no clear means by which to formally decide that the now-incapacitated President (the former Vice President) is unable to fulfill his duties.[45]

Third, problems could result even outside of a section 4 scenario. For instance, a President is likely to be hesitant to temporarily assign authority to an incapacitated Vice President pursuant to section 3 of the Twenty-Fifth Amendment, potentially hamstringing effective operations

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President is dealing with an anticipated incapacity as opposed to an unanticipated bout of inability? The Second Fordham Clinic Report provides a useful statutory approach in this regard as well. *See Second Fordham Report*, *supra* note 7, at 964-66; *cf.* Feerick, *supra* note 7, at 23-25.

40. *See* FEERICK, *supra* note 1, at 245-46; KALT, *supra* note 16, at 20; RONAN, *supra* note 3, at 156-57; Amar, *supra* note 31, at 20-22; Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, *in* MANAGING CRISIS, *supra* note 13, at 165, 188; *First Fordham Report*, *supra* note 7, at 26; Rogan, *supra* note 31; *see also* Feerick, *supra* note 4, at 935-36.

41. Feerick, *supra* note 7, at 18; *see also* Goldstein, *supra* note 14, at 527.

42. *See* U.S. CONST. amend. XXV, § 4; *see also* JOEL K. GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 263 (2016).

43. *See* Amar, *supra* note 31, at 22; Feerick, *supra* note 4, at 935; *First Fordham Report*, *supra* note 7, at 25-26; *cf.* GOLDSTEIN, *supra* note 42, at 263.

44. *See* U.S. CONST. amend. XXV, § 1; *see also* Amar, *supra* note 31, at 22; Feerick, *supra* note 4, at 935; *First Fordham Report*, *supra* note 7, at 25-26; *cf.* GOLDSTEIN, *supra* note 42, at 263. Under these circumstances, executive branch contingency plans during the Reagan-Bush-Clinton era required the incapacitated Vice President to take the oath of office in order to demonstrate his capacity. *See* Clinton Contingency Plans, *supra* note 13; Reagan Contingency Plans, *supra* note 13. This seems a prudent ad hoc approach to resolving this aspect of vice presidential incapacity. Such a situation, of course, is temporally distinct from the situation discussed in this Article in which the Vice President is incapacitated but the President remains in good health. Obviously, if the President died, was removed from office, or resigned, the scenario in this Article would become the one covered by the aforementioned contingency plans. For additional scenarios addressed in the contingency plans see *infra* note 325.

45. *See* GOLDSTEIN, *supra* note 42, at 263; Amar, *supra* note 31, at 22; Feerick, *supra* note 4, at 935.

in the executive branch during anticipated periods of de facto presidential inability.[46]

Fourth, an incapacitated Vice President could disrupt the legislative branch as a mentally-unbalanced President of the Senate could wreak havoc on the Senate by insisting on presiding over the chamber and not following Senate rules and practices.[47] One could well imagine a Vice President, for example, refusing to accord prior recognition to the Senate Majority Leader, which is one of the underpinnings of modern Senate practice and governance.[48] The Vice President's authority to recognize senators to speak is unreviewable by the Senate which could greatly hamper Senate business.[49] This could be especially the case in a politically polarized chamber.

Finally, the modern Vice President is a valued counselor and troubleshooter for the President.[50] He brings to these tasks a unique perspective as the only other nationally elected officeholder and the only Cabinet member not tethered to an agency.[51] If incapacitated, the President would lose the benefit of such assistance.

Thus, an incapacitated Vice President has the potential to greatly complicate the mechanics of both political branches of government. The likelihood of these scenarios may seem somewhat remote but there is a long history of vice presidential incapacity and "close shaves."[52] As one authority notes, only through "good fortune" has the nation avoided a situation involving an enduring vice presidential inability in the years since the Twenty-Fifth Amendment.[53] Moreover, the risks involved with vice presidential incapacity are enormous,[54] making the problem much in need of close examination.

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46. *See* RONAN, *supra* note 3, at 156; Feerick, *supra* note 7, at 19; Goldstein, *supra* note 3, at 1032-33; *cf. First Fordham Report*, *supra* note 7, at 26.

47. *See* Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 861-62 (2000); Goldstein, *supra* note 3, at 1033 n.392.

48. *See, e.g.*, MCCONNELL & BROWNELL, *supra* note 35, at 157, 162; MCKAY & JOHNSON, *supra* note 20, at 161; CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 501 (1989); *cf.* Goldstein, *supra* note 47, at 849-50, 861-62.

49. *See* TIEFER, *supra* note 48, at 501; *cf.* Goldstein, *supra* note 47, at 861-62.

50. *See* GOLDSTEIN, *supra* note 42, at 3, 6-7, 305.

51. *See id.* at 4-5, 61, 63, 304-05.

52. *See supra* note 9.

53. RONAN, *supra* note 3, at 164-65.

54. *See, e.g.*, *id.* at 165; Feerick, *supra* note 7, at 24; *cf.* RUTH C. SILVA, PRESIDENTIAL SUCCESSION 1, 73-77, 90 (Greenwood Press 1964) (1951).

B. *The Constitutional Requirement to Ensure Government Continuity*

Under the Constitution, there exists a clear structural principle that the federal government—including the executive branch—must be permitted to operate.[55] As has been seen, the Vice President is central to the executive branch's continuity efforts through the Twenty-Fifth Amendment.[56] It follows that interpreting the Constitution to allow an incapacitated Vice President to maintain his powers and duties conflicts with this structural necessity.[57]

The need for continuity of the executive branch is reflected in several other constitutional provisions. Article II states that "[t]he executive Power *shall* be vested in a President of the United States of America."[58] The word "shall" conveys that it is mandatory that executive power remain in place.[59] Article II further provides that the President "*shall* hold his Office during the Term of four Years," again conveying the expectation that an executive must be in office continuously until the end of the four-year term barring death, resignation or removal.[60] Section I, Clause 6 of Article II;[61] the Recess Appointments Clause;[62] the Twelfth Amendment;[63] and sections 1, 3, and 4 of the Twentieth Amendment[64] each underscore the constitutional principle of executive branch continuity. As noted by the Supreme Court, "the Constitution . . . is not a suicide pact."[65] It was meant to function, not to flounder amidst sterile

55. *See* NLRB v. Canning, 573 U.S. 513, 529-30 (2014) (citing with approval Executive Power—Recess Appointments, 33 Op. Atty. Gen. 20, 23 (1921)); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257-60 (2004); *Second Fordham Report*, *supra* note 7, at 966-67; *cf.* Silva, *supra* note 54, at 1, 73-77, 90; Edgar Aldrich, *The Power and Duty of the Federal Government to Protect Its Agents*, 173 N. AM. REV. 746, 746-50, 755 (1901).

56. *See* U.S. CONST. amend. XXV; *see also* Clinton v. Jones, 520 U.S. 681, 698 (1997) ("In 1967, the Twenty-fifth Amendment to the Constitution was adopted to ensure continuity in the performance of the powers and duties of the [presidential] office."); Feerick, *supra* note 7, at 18; Goldstein, *supra* note 14, at 527; Goldstein, *supra* note 3, at 981-83, 986-87.

57. On the desirability of structural reasoning in constitutional exegesis, see generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

58. U.S. CONST. art. II, § 1, cl. 1 (emphasis added); *see also* SILVA, *supra* note 54, at 75-77, 170-71; Goldstein, *supra* note 3, at 981.

59. *See* Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 390-91 (2013) (discussing the mandatory nature of the word "shall").

60. U.S. CONST. art. II, § 1, cl. 1 (emphasis added); *see also* SILVA, *supra* note 54, at 75-77, 170-71.

61. *See* U.S. CONST. art. II, § 1, cl. 6.

62. *See id.* art. II, § 2, cl. 3; *see also Second Fordham Report*, *supra* note 7, at 967.

63. *See* U.S. CONST. amend. XII; *see also* Daniel J.T. Schuker, *Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment*, 30 J.L. & POL. 97, 118 (2014).

64. *See* U.S. CONST. amend. XX, §§ 1, 3–4. For more on the Twentieth Amendment, see generally Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 101 (2017).

65. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); *see also* Terminiello v. Chicago,

abstractions.[66] Charles Evans Hughes once commented that "the framers of the Constitution did not contrive an imposing spectacle of impotency. . . . Self-preservation is the first law of national life and the Constitution itself provides the necessary powers in order to defend and preserve the United States."[67] The nation needs a President at all times in order to ensure that the government continues to function,[68] and the Vice President, as evidenced by provisions such as the Twenty-Fifth Amendment, is closely tied to satisfying this requirement.

To this end, a fundamental constitutional precept exists that executive authority should not be permitted to expire.[69] In the vivid words of William Davie of the North Carolina Ratifying Convention, "[i]s not this government a nerveless mass, a dead carcase [sic], without the executive power?"[70]

The presidency is the only one of the three branches that, as a constitutional matter, is manifested in one person.[71] In addition, certain

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337 U.S. 1, 37 (1949) (Jackson, J., dissenting); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326-27 (1816); Paulsen, *supra* note 55, at 1268.

66. *Cf.* McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 415, 420-21 (1819); Goldstein, *supra* note 3, at 2015.

67. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 32 (rev. ed. 1964) (quoting Hughes); *see also* THE FEDERALIST NOS. 31, 36, 59 (Alexander Hamilton); THE FEDERALIST NOS. 40, 41 (James Madison).

68. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 713 (1997) (Breyer, J., concurring) (quoting Philip Kurland with approval and stating the President has been called the "sole indispensable man in government").

69. *See, e.g.*, President's Power to Fill Vacancies in Recess of the Senate, 12 Op. Att'y Gen. 32, 38 (1866); Power of President to Fill Vacancies, 3 Op. Att'y Gen. 673, 675-76 (1841); 2 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES; WITH NOTICES OF ITS PRINCIPAL FRAMERS 395 (1860); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 58 (William S. Hein & Co. 1996) (Jonathan Elliot ed., 2d ed. 1891) (statement of William Davie at the North Carolina Ratifying Convention); *id.* at 135 (statement of Archibald Maclaine at the North Carolina Convention); SILVA, *supra* note 54, at 1, 73-77, 90; Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J., 189, 195 (1958); Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 POL. SCI. Q. 475, 503 (1974) (quoting Martin Van Buren); Alexander M. Bickel, *The Constitutional Tangle*, NEW REP., Oct. 6, 1973, at 14, 15; Letter from Thomas Jefferson to George Hay (June 17, 1807) (emphasis added) (on file with the Founders Online, National Archives) ("[The e]xecutive branch, whose agency . . . is understood to be so constantly necessary, that it is the sole branch which the constitution *requires* to be always in function."), https://founders.archives.gov/documents/Jefferson/99-01-02-5769; *see also* William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 620 & n.63 (2009); *cf.* Paulsen, *supra* note 55, at 1266 & n.19; President Abraham Lincoln, First Inaugural Address (Mar. 4 1861), http://avalon.law.yale.edu/19th_century/lincoln1.asp.

70. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, *supra* note 69, at 58; *see also* SILVA, *supra* note 54, at 90.

71. *See* Rubin v. United States, 525 U.S. 990, 991 (1998) (Breyer, J., dissenting) ("The

presidential duties are nondelegable.[72] As a result, there must be a functioning President for a number of high-level executive branch duties to be fulfilled. Without an able President, there is no Commander in Chief of the military,[73] no direction to American diplomacy, no one to veto unwise legislation,[74] no one to issue pardons,[75] and no one to nominate judges or senior executive branch officials.[76] The broad constitutional principle that executive power may not be permitted to expire dictates that relevant constitutional and statutory law must be read broadly and pragmatically to ensure that the operations of the executive branch can continue so that these nondelegable, presidential duties may be carried out.[77] This overarching precept is vital to reaching a solution to vice presidential inability since the constitutionally-assigned functions of the executive branch could easily grind to a halt in a situation involving an incapacitated Vice President and a President who subsequently dies, leaves office, or is incapacitated.[78]

It could be argued that, just as the Constitution was not designed to right every wrong,[79] perhaps it does not account for resolving matters of

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Constitution vests the entire 'Power' of one branch of Government in that single human being, the 'President.'"), *denying cert. to* 148 F.3d 1073 (D.C. Cir. 1998); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("Executive power has the advantage of concentration in a single head . . . ."); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1866) ("[T]he President is the executive department."); Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 79 (1861) ("The President is a department of the government; and . . . the only department which consists of a single man . . . ."); DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF THE CONGRESS ENFORCING IT 346 (1878) ("[T]he President is . . . one branch of 'the Government' . . . ."); *see also Clinton*, 520 U.S. at 698-99 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982)) ("We have, in short, long recognized the 'unique position in the constitutional scheme' that this [presidential] office occupies."); Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982) (noting "the singular importance of the President's [powers and] duties"); Schuker, *supra* note 63, at 137; Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 413 & nn.40-41 (2012).

72. *See, e.g.*, Presidential Succession and Delegation in Case of Disability, 5 Op. O.L.C. 91, 93-99 (1981) [hereinafter Olson Legal Opinion]; Presidential Inability, 42 Op. Att'y Gen. 69, 84 (1961) [hereinafter Kennedy Legal Opinion]; Clinton Contingency Plan, *supra* note 13; *see also* SILVA, *supra* note 54, at 73-77.

73. *See* U.S. CONST. art. II, § 2, cl. 1.

74. *See id.* art. I, § 7, cl. 2.

75. *See id.* art. II, § 2, cl. 1.

76. *See id.* art. II, § 2, cl. 2; *see also* Olson Legal Opinion, *supra* note 72, at 93-95.

77. *Cf.* SILVA, *supra* note 54, at 1, 73-77, 90.

78. *See supra* notes 39-51 and accompanying text.

79. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting). Perhaps a variant of the maxim *fiat justitia ruatcaelum* (let justice be done though the heavens fall) might be seen to apply. *See* Crooker v. Transp. Sec. Admin., 323 F. Supp. 3d 148, 157 (D. Mass. 2018) (quoting Lord Mansfield in Somerset v. Stewart (1772) 98 Eng. Rep. 499, 509 (KB)). It bears noting, however, that the only federal appellate court to cite this principle made certain to qualify the notion with

vice presidential inability absent a constitutional amendment. For such advocates, the answer is, there is no answer. Yet, for the reasons stated above, the Constitution must provide a means for resolving vice presidential inability since, if it does not, it could easily result in a breakdown in executive authority and a major disruption in overall governmental operation.[80] Ensuring vigor and continuity in carrying out executive functions is one of the problems the original Constitution was designed to address[81] and subsequent amendments have sought to reaffirm.[82] Not only is the continuity-of-government norm embedded within constitutional structure, practical considerations of the kind the Supreme Court has long embraced reinforce the principle.[83] That is to say, it is simply inconceivable that the Constitution permits an entire branch of government to stop functioning at its most senior level. The power to fix the problem exists within the nation's charter.[84]

With this overriding premise established, it is time to turn attention to the various potential means of effectuating solutions to the problem of vice presidential incapacity.[85] As noted earlier, there are four potential approaches to addressing vice presidential inability. In descending order

important practical considerations. *See* Starski v. Kirzhnev, 682 F.3d 51, 56 (1st Cir. 2012) (former Supreme Court Justice Souter sitting by designation).

80. *Cf.* Rubin v. United States, 525 U.S. 990, 990-91 (1998) (Breyer, J., dissenting), *denying cert. to* 148 F.3d 1073 (D.C. Cir. 1998); *infra* note 84.

81. *See, e.g.*, THE FEDERALIST NO. 70 (Alexander Hamilton).

82. *See* U.S. CONST. amend. XX, §§ 3–4; *id.* at amend. XXV; *see also* Clinton v. Jones, 520 U.S. 681, 698 (1997).

83. *See, e.g.*, Rodriguez v. Popular Democratic Party, 457 U.S. 1, 12 (1982) ("The Constitution does not preclude [a] practical and widely accepted means of addressing an infrequent problem."); Ludecke v. Watkins, 335 U.S. 160, 172 (1948) (quoting Justice Iredell in Case of Fries, 9 F. Cas. 826, 836 (C.C.D. Pa. 1799) (No. 5126)) ("All systems of government suppose they are to be administered by men of common sense . . . ."); W. Union Tel. Co. v. Massachusetts, 125 U.S. 530, 550 (1888) (quoting R.R. Co. v. Peniston, 85 U.S. (18 Wall.) 5, 31 (1873)) ("[T]he federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution . . . contemplates . . . a workable government."); Smith v. Turner, 48 U.S. (7 How.) 283, 449 (1849) (Catron, J., concurring) ("The Constitution is a practical instrument, made by practical men . . . ."); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 858 (2007) (Breyer, J., dissenting) ("The Founders meant the Constitution as a practical document that would [be] . . . workable over time.").

84. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866) ("[T]he Constitution, has all the powers granted to it which are necessary to preserve its existence . . . ."); Lucius Wilmerding, Jr., *Presidential Inability*, 72 POL. SCI. Q. 161, 179 (1957) ("[T]here is no 'gap' in the Constitution. Its provisions covering presidential inability are entire; they cover every possible contingency. All that is needed, all that ever has been needed, is the will and the occasion to put them into effect."); *see also* Paulsen, *supra* note 55, at 1257-59; *cf.* United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888); THE FEDERALIST NO. 23 (Alexander Hamilton).

85. The constitutional continuity-of-government principle outlined herein supports each of the four approaches to vice presidential inability and does not favor one over the others.

of desirability, they are: (1) adoption of legislation after the vice presidential incapacity becomes apparent, (2) execution of a letter agreement (assuming one exists), (3) implementation of the CGOPT, and (4) use of the impeachment process. Each option has flaws but all would have viability in a pinch. Of the four alternatives, a post hoc statute emerges as the least objectionable option.

II. THE LEAST OBJECTIONABLE OPTION

A. *A Post Hoc Statute Transferring the Vice President's Twenty-Fifth Amendment Powers and Duties to the Next in the Line of Succession*

1. Proposed Solution

In the event of vice presidential incapacity, lawmakers would be well advised to consult and use as a template the model statute crafted by the Second Fordham Clinic on Presidential Succession.[86] The Fordham Clinic model statute would authorize the President to gain the approval of a majority of the Cabinet as to the Vice President's wellbeing.[87] If the President and a majority of the Cabinet believe the Vice President to be incapacitated, the President would notify congressional leaders whereupon, until further notice, the Vice President's Twenty-Fifth Amendment powers and duties would be reassigned.[88] His powers and duties in this regard would be transferred to the next in the line of succession (the Speaker under current law),[89] who would essentially

86. *See Second Fordham Report*, *supra* note 7, at 964-65. Dean Feerick has similarly argued for a statute that permits the next in the line of succession to step into the shoes of the Vice President for purposes of addressing presidential incapacity. *See* Feerick, *supra* note 7, at 20. Both the First and Second Fordham Clinics and Feerick seem to have in mind a *prospective* application of their statute, not a post hoc measure. For a more executive-branch-focused approach to resolving vice presidential incapacity, see RONAN, *supra* note 3, at 166-67.

87. *See Second Fordham Report*, *supra* note 7, at 964-65. The requirement of Cabinet approval and congressional appeal would help ensure that the President does not arbitrarily separate the Vice President from his powers and duties. *See id.* at 965.

88. *See id.* at 964-65.

89. The abstract doctrinal question of whether legislative succession is constitutional is beyond the scope of this Article and has been ably addressed by others. *See, e.g.*, Amar & Amar, *supra* note 31, at 114, 118; Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 158-60, 163-66, 170, 172 (1995); Goldstein, *supra* note 31, at 83-95; Manning, *supra* note 35, at 141-42. *See generally, e.g.*, BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 88-94 (2012); SILVA, *supra* note 54, at 131-42; Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz's* Impeachment & Assassination, 61 CLEV. ST. L. REV. 285, 338 n.81, 341 n.90 (2013). There are, however, important *practical* reasons to believe that the Speaker or the next in the line of succession would in fact be able to step into the shoes of the Vice President. That is in part because the executive branch has regularly and publicly confirmed the

become "Acting Vice President" for succession and inability purposes.[90] If the Vice President contests the President and the Cabinet's determination, Congress would resolve the matter and could uphold the President and the Cabinet's decision with a two-thirds vote in each house.[91] This process could be replicated as needed.

Given the post hoc nature of its enactment, some modifications to the Clinic's work would be advisable. First, the statute should include language making clear that it includes the sitting, incapacitated Vice President within its scope. This could be done with a retroactive date of application. Second, the statute should make explicit that the legislation transfers the incapacitated Vice President's powers and duties to the next in line but leaves the Vice President with full pay and benefits and ensures he keeps his title during his incapacity. By merely transferring the Vice President's powers and duties and continuing to compensate him, Congress would help ensure it was not effectuating impeachment through a simple statute and that the Vice President and his family would not suffer tangible harm.[92] Finally, the proposed legislation should make clear that the President pro tempore (or his designee) would preside over the Senate while the Vice President was incapacitated.

Under the proposed statute, the Speaker (or next in line) would undertake the presidential succession and inability-related powers and duties of the Vice President.[93] The Speaker would not assume the other executive branch responsibilities of the Vice President in deference to concerns over separation of powers.[94] Similarly, under the proposed

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view that the Speaker is in fact the next in the line of succession. *See* Brownell, *supra* note 2, at 1065-68; Roy E. Brownell II, The Executive Branch's Longstanding Embrace of Legislative Succession to the Presidency (unpublished manuscript) (on file with author).

90. The concept of an "Acting Vice President" has been acknowledged in some political branch practice and congressional debate even absent express constitutional or statutory authorization. *See* MCCONNELL & BROWNELL, *supra* note 35, at 55-58.

91. *See Second Fordham Report*, *supra* note 7, at 964-65; *cf.* Amar, *supra* note 31, at 21-23; *First Fordham Report*, *supra* note 7, at 27-31. The Fordham Clinic model statute follows the same timelines for action as the Twenty-Fifth Amendment. *See Second Fordham Report*, *supra* note 7, at 964-65. Adoption of a vice presidential inability statute might have the added advantage of norming in the provisions of section 4 of the Twenty-Fifth Amendment which of late have been inaccurately characterized in some circles as "coup" provisions. *See, e.g.*, Reis Thebault & Meagan Flynn, *Trump Suggests Rothstein, McCabe Are "Treasonous," Citing Fox News*, WASH. POST (Feb. 19, 2019, 10:16 AM), https://www.washingtonpost.com/politics/2019/02/18/illegal-treasonous-trump-says-rosenstein-was-part-coup-attempt.

92. *See* Courts – Judges – Compensation – Failure to Retire for Disability, 44 Comp. Gen. 544 (1965) (citing an Office of Legal Counsel opinion with approval). Federal law governing judicial inability permits incapacitated judges to continue to receive benefits during their incapacity. *See* 28 U.S.C. § 372(b) (2012); Porter v. Comm'r, 88 T.C. 548, 551 (1987), *overruled on other grounds*, 856 F.2d 1205 (8th Cir. 1988).

93. *See Second Fordham Report*, *supra* note 7, at 964-65.

94. *See id.* at 965-66. For this same reason, the 1947 presidential succession statute requires

statute, the Speaker would not be permitted to preside over the Senate.[95] If the Speaker were unable or unwilling to undertake the succession and inability-related powers and duties, the next eligible officer in the line of succession would fill the role.

Essentially the statute parallels the section 4 procedure found in the Twenty-Fifth Amendment.[96] Moreover, by permitting the Vice President to keep his title, pay, and benefits, it would reduce the possibility that the Vice President or his family would be able to claim injury and mount a compelling legal challenge to the statute.[97] By following the norms of the Twenty-Fifth Amendment (e.g., requiring joint presidential and Cabinet approval within the executive branch and a bicameral supermajority appeal in Congress), the statute would be defensible on the merits.[98] And by making clear the delegation of authority, a post hoc statute eliminates much of the legal uncertainty that surrounds competing approaches to vice presidential incapacity.[99]

Such a statute would draw authority from the aforementioned constitutional continuity-of-government principle, the Original Inability Clause and the Necessary and Proper Clause. It would also be reinforced by political branch precedent, including legislation that: (1) addressed Vice President-elect William King's incapacity in 1853, (2) authorizes Secret Service protection for the President and Vice President, (3) authorizes presidential and vice presidential resignation, and (4) provides procedures for managing judicial incapacity.

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that the Speaker resign were she to become Acting President. *See* 3 U.S.C. § 19(a)(1) (2018).

95. *Cf. Second Fordham Report*, *supra* note 7, at 965-66. Article I, Section 3, Clauses 4 and 5 provides that "[t]he Vice President of the United States shall be President of the Senate . . . [unless] he shall exercise the Office of President of the United States." U.S. CONST. art. I, § 3, cl. 4–5. The provision is clear that the Vice President can be President of the United States or President of the Senate, but not both. *See, e.g.*, Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1660 (1997); Goldstein, *supra* note 47, at 862-63. Presumably the same principle would apply to presiding over both houses of Congress at the same time.

96. *See Fordham Report*, *supra* note 7, at 964-65; Goldstein, *supra* note 3, at 1033.

97. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 475 (1977) (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)) (noting, in the context of a bill of attainder challenge, the importance of "put[ting an individual] in the same position monetarily as he would have occupied if his property had not been taken"). The loss of prestige from temporary transfer of powers and duties would not be sufficient to be deemed a punishment and hence a cognizable injury as the Vice President would retain his formal title. *See id.* at 470 n.32 (quoting United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring) ("The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.")); *see also id.* at 470-71.

98. *See* U.S. CONST. amend. XXV, § 4.

99. For example, the contingent grant power of authority ("CGOPT") involves only an implicit delegation of authority to the next in the line of succession. *See infra* Part III.B.

2. Textual Authority Under the Constitution

In addition to the constitutional continuity-of-government principle, a statute purporting to resolve a situation involving an incapacitated Vice President could draw textual authority from one of two constitutional provisions (or both): the Original Inability Clause of Article II, Section 1, Clause 6[100] and the Necessary and Proper Clause of Article I.[101] Neither source of authority is entirely flawless,[102] but together they form a second solid constitutional basis for congressional action.

a. The Original Inability Clause

As noted, the Original Inability Clause provides Congress with the authority to legislate regarding the inability of "both" the President and Vice President.[103] There are three ways this language can be interpreted as to vice presidential inability. The first makes the most sense. The Clause is simply silent as to vice presidential inability and therefore has no applicability.[104] The language speaks to dual incapacity but says nothing whatsoever about situations when the Vice President alone is incapacitated. This constitutional silence would place efforts to resolve

100. *See* Feerick, *supra* note 7, at 20; Goldstein, *supra* note 40, at 189; Goldstein, *supra* note 3, at 1033; *see also* Amar, *supra* note 31, at 22-23; *Second Fordham Report*, *supra* note 7, at 966.

101. *See* FEERICK, *supra* note 1, at 246; Feerick, *supra* note 7, at 20; Feerick, *supra* note 4, at 939; *Second Fordham Report*, *supra* note 7, at 967-68; *see also* Peter Frelinghuysen, Jr., *Presidential Disability*, 307 ANNALS AM. ACAD. POL. & SOC. SCI. 144, 149 (1956); Lyman Trumbull, Thomas M. Cooley, Benjamin F. Butler, & Theodore W. Dwight, *Presidential Inability*, 133 N. AM. REV. 422, 425-26 (1881) (Cooley); Wilmerding, *supra* note 84, at 171, 173, 177-78; *cf.* Trumbull, Cooley, Butler, & Dwight, *supra*, at 440, 446 (Dwight).

102. *See* SILVA, *supra* note 54, at 91-92 n.23, 105-07; Urban A. Lavery, *Presidential "Inability"*, 8 A.B.A. J. 13, 14-16 (1922); *President's Disability and Succession*, 32 ST. JOHN'S L. REV. 357, 360-61 (1958); Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 420-21 (Trumbull); *id.* at 432 (Butler); Statement by The Honorable William P. Rogers, Attorney General of the United States on Presidential Inability, Testimony Before Subcomm. on Const. Amendments of the Senate Judiciary Comm. 27 (Feb. 18, 1958) (on file with author).

103. It has been put forward that the Original Inability Clause authorizes the creation of a line of succession and nothing more. *See* 13 CONG. REC. 139 (1881) (statement of Sen. Garland); SILVA, *supra* note 54, at 91-92 n.23, 105-07; Ruth C. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 171 (1957). *But see* Feerick, *supra* note 7, at 20; Feerick, *supra* note 4, at 943. Yet, presidential succession acts have addressed matters beyond merely creating a line of succession. *See* Feerick, *supra* note 7, at 20 (noting that succession laws have included minutiae as to special elections if a presidential-vice presidential vacancy occurred, procedures for extraordinary legislative sessions in succession-related contexts and qualifications as to which official could act as President and when); *see also* Feerick, *supra* note 4, at 943; John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 995 (2004); Goldstein, *supra* note 3, at 1033; *Second Fordham Report*, *supra* note 7, at 966, 968; *infra* Part II.A.2.c.iii. This supports the notion that the Clause could be used to address vice presidential inability. *See* Feerick, *supra* note 7, at 19-21.

104. *Cf.* Feerick, *supra* note 7, at 20-21; Feerick, *supra* note 4, at 936, 939; Goldstein, *supra* note 3, at 999 n.215; Goldstein, *supra* note 40, at 189; *Second Fordham Report*, *supra* note 7, at 968; Wilmerding, *supra* note 84, at 172.

vice presidential inability on the very same footing as a host of venerable separation-of-powers principles—judicial review, presidential removal of Cabinet secretaries, executive agreements with foreign nations, presidential termination of treaties, congressional investigations, the Senate conditioning its approval of treaties, and executive privilege—none of which is mentioned expressly in text.[105] In this respect, textual silence plus the constitutional continuity-of-government principle would lead the Original Inability Clause to be seen as offering no roadblock to congressional action; regarding vice presidential incapacity, the Clause simply does not apply.[106]

A second way to interpret the Original Inability Clause would be that the Clause does indeed have applicability with respect to vice presidential inability, in fact, it *authorizes* Congress to take action.[107] As Dean Feerick has observed, the Original Inability Clause "gives Congress some freedom to legislate."[108] This is reflected in the 1792, 1886, and 1947 succession acts, which were not limited to the mere recitation of presidential successors.[109] Given that Congress has long demonstrated flexibility in legislating pursuant to the Original Inability Clause and given the grave importance of ensuring continuity in the executive branch, the Clause almost certainly could be read as permitting Congress to take action to resolve situations when the Vice President alone is incapacitated: that is to say *when it is necessary to prevent potential dual incapacity*.[110]

Constitutional framer Benjamin Franklin's axiom—"[a]n ounce of prevention is worth a pound of cure"—reflects a longstanding constitutional principle that almost certainly would apply in this context.[111] In *Cunningham v. Neagle*, the Supreme Court considered the lawfulness of preventive action taken by a U.S. marshal to save the life of a Supreme Court Justice.[112] In this setting, the marshal killed a potential

105. *See, e.g.*, Goldstein, *supra* note 47, at 864; *Second Fordham Report*, *supra* note 7, at 968.

106. *See supra* note 104.

107. *Cf.* Feerick, *supra* note 4, at 941-43.

108. Feerick, *supra* note 7, at 20; *see also* Fortier & Ornstein, *supra* note 103, at 995 ("There are few restrictions on [congressional] power" in Article II, Section 1, Clause 6); *supra* note 103; *infra* note 131.

109. *See* Feerick, *supra* note 4, at 943; *see also* Feerick, *supra* note 7, at 20; *supra* note 103.

110. *See Second Fordham Report*, *supra* note 7, at 966; *cf.* Feerick, *supra* note 7, at 20; Feerick, *supra* note 4, at 942-43. The author's views have benefitted from conversations with John Feerick, Joel Goldstein, and John Rogan on this subject.

111. *Ounce of Prevention, Pound of Cure*, U. CAMBRIDGE RES., https://www.cam.ac.uk/research/news/ounce-of-prevention-pound-of-cure (last visited Jan. 25, 2020) (quoting Benjamin Franklin); *cf.* MELANSON & STEVENS, *supra* note 9, at 240-41 ("The old adage 'prevention is the best defense' governs nearly as much of the [Secret] Service's attention as actual physical protection."). *But cf.* KALT, *supra* note 89, at 174-75.

112. *See* 135 U.S. 1, 5-6 (1890).

assailant, an action without a clear constitutional or statutory basis.[113] Nonetheless, the Court upheld the official's preventive actions.[114] The Court reasoned:

> It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and *preventive* means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to *prevent* crime [which] is more efficient than punishment of crimes after they have been committed.[115]

Thus, the Court believed that a preventive action taken to protect both an officeholder and a key part of the national government—the Supreme Court—was constitutional, even though it took place without congressional authorization. The *Neagle* scenario is related to preventing joint presidential-vice presidential incapacity in that both actions involve the intertwined issues of the personal wellbeing of federal officeholders and the continued operation of constitutional institutions.[116] The main differences between the preventive efforts in *Neagle* and those of a post hoc inability statute would be that the latter would be on much firmer legal ground since it would entail an express statutory authorization and would not involve the taking of the life of another. Interpreting the Original Inability Clause through the lens of *Neagle* would help prevent a dual incapacity situation from occurring. Using the *Neagle* reasoning in this way would reflect using "preventive means . . . [rather than] cur[ing the] disease after it has become fully developed."[117]

Other Supreme Court case law further demonstrates that, when faced with serious threats to the nation's stability and safety, the federal government—absent clear textual constitutional or statutory authority—may take action to prevent adverse occurrences from happening: situations akin to preventing presidential-vice presidential inability.[118] In

113. *See id.* at 58.

114. *See id.* at 58-59.

115. *Id.* at 59 (emphasis added); *see also id.* at 65-68, 74-76.

116. *See* Wood v. Moss, 572 U.S. 744, 745 (2014) (noting "the overwhelming importance of safeguarding the President . . . ."); Rubin v. United States, 525 U.S. 990, 990-91 (1998) (Breyer, J., dissenting) ("The physical security of the President of the United States has a special legal role to play in our constitutional system. The Constitution vests the entire 'Power' of one branch of Government in that single human being, the 'President' . . . . Thus . . . the law should take special account of the obvious fact that serious physical harm to the President is a national calamity . . . ."), *denying cert. to* 148 F.3d 1073 (D.C. Cir. 1998); Watts v. United States, 394 U.S. 705, 707 (1969) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence."); *see also* Schuker, *supra* note 63, at 102.

117. *Neagle*, 135 U.S. at 59.

118. *See* Haig v. Agee, 453 U.S. 283, 308-09 (1981) ("Restricting Agee's foreign travel,

In re Debs, the Court upheld the efforts of the federal government to enjoin labor leaders from disrupting postal delivery and interstate commerce through work stoppages even though such governmental action lacked an express statutory basis.[119] The Court reasoned that:

> [U]nder the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress, by virtue of such grant has assumed actual and direct control, it [therefore] follows that the national government may *prevent* any unlawful and forcible interference therewith . . . . [W]henever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the nation owes the duty to all the citizens of securing . . . them . . . the government . . . [is not] *prevent*[*ed*] from taking measures therein to fully discharge those constitutional duties.[120]

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although perhaps not certain to *prevent* all of Agee's harmful activities, is the only avenue open to the Government to limit these activities. . . . [W]hen there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States.") (emphasis added); Near v. Minnesota, 283 U.S. 697, 716 (1931) ("No one would question but that a government might *prevent* actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.") (emphasis added); *see also* United States v. Carrier, 672 F.2d 300, 304 (2d Cir. 1982) (quoting Rep. Webb with approval, 53 CONG. REC. 9378 (1916)) ("[A]n ounce of prevention is worth a pound of cure [and] we want to prevent the threats which often incite men to kill and murder [presidents]."); CONG. GLOBE, 27th Cong., 2d Sess. app. 541 (1842) (statement of Sen. Choate) ("[I]f you have power to interpose after judgment, you have power *to do so before*. If you can reverse a judgment, you can *anticipate* its rendition.") (emphasis added); *cf.* McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 415 (1819) ("It must have been the intention of those who gave these [constitutional] powers, to insure, so far as human prudence could insure, their beneficial execution."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 363 (1816) (Johnson, J., concurring) ("[T]he general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."); Paulsen, *supra* note 55, at 1275 ("[F]or *any* actor attempting to interpret and apply the Constitution faithfully, the idea that provisions of the Constitution should be construed, where possible, to avoid grave harm to the nation, is a useful and a valid principle for choosing between plausible readings of ambiguous constitutional commands."); *cf.* Snepp v. United States, 444 U.S. 507, 512-14, 516 (1980).

119. *See* 158 U.S. 564, 570, 577-79 (1895).

120. *Id.* at 581, 586 (emphasis added). There may be another related justification for Congress acting in this context. The Supreme Court in *Pittman v. Home Owners' Loan Corp.* stated that "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.'" 308 U.S. 21, 32-33 (1939) (quoting McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 426 (1819)). As Congress has the acknowledged authority to create a line of succession, under the Court's reasoning in *Pittman*, incidental to that power should be the power to "protect" and "'preserve'" the line of succession. Since the line of succession would be placed in jeopardy by vice presidential inability, it might well be argued that Congress could therefore legislate to address the vice presidential inability situation.

Thus, in *Debs*, the Court upheld preventive governmental action to ensure that the broader purpose of a constitutional clause would not be frustrated. Moreover, once again, the Court approved such preemptive action to avert significant harm to the public, even though—unlike the proposed solution in this Article—the steps had not been authorized by statute.[121]

A setting involving an incapacitated Vice President and a healthy President offers the very real possibility of morphing into a much more acute scenario such as an incapacitated President *and* Vice President or a situation involving an incapacitated President and no Vice President. Given the stakes involved—the effective functioning of the executive branch—utilizing an interpretation of the Original Inability Clause akin to the Court's reasoning in *Neagle* and *Debs* simply "make[s] sense."[122] Such an approach manifests the sage, Franklinesque principle about the importance of an "ounce of prevention."[123] *Indeed, it seems utterly illogical that Congress would have to wait until both the President and Vice President were incapacitated before it could take legislative action to resolve the crisis*.[124] Thus, the second interpretative method with respect to the Original Inability Clause also supports Congress adopting legislation to address vice presidential inability.

The third approach to the Clause follows the canon *expressio unius est exclusio alterius*, meaning that since the language authorizes Congress to take legislative action when "both" the President and Vice President are incapacitated and is silent on situations when only one of them is unable to perform his duties, that silence should be read as a prohibition. Under the *expressio* approach, the textual language should be seen as applying *only* to situations involving dual presidential and vice presidential incapacity and that the silence as to vice presidential inability alone consequently *prohibits* legislative action in this field.[125] Several reasons dictate why this interpretation is unpersuasive. For one, as

121. *See Debs*, 158 U.S. at 586.

122. *Cf.* BLACK, *supra* note 57, at 7, 22.

123. *Ounce of Prevention, Pound of Cure*, *supra* note 111.

124. *Cf. Debs*, 158 U.S. at 581, 586; LEVINSON, *supra* note 31, at 221.

125. *See, e.g., Defining Article II, Section 1, Clause 5, of the Constitution, Relative to Disability, Removal from Office, Etc., of the President of the United States: Hearings Before the H. Comm. on the Judiciary*, 66th Cong. 31-32 (1920) [hereinafter *1920 House Hearings*] ("Mr. Igoe. . . . Do you construe [the original Inability Clause] to mean that Congress may act in either case, or that they both must be disabled before Congress may provide the succession? Mr. Rogers. I think the latter is the view that is generally held and was apparently the view of Congress when it passed the presidential succession act in the middle [18]80's. Mr. Igoe. That is what I thought, that the power of Congress to provide for presidential succession related to cases of disability of both the President and Vice President."); *see also* 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh); SILVA, *supra* note 54, at 91-92 n.23. For criticism of use of the *expressio* canon in the context of Article II, Section 1, Clause 6, see Goldstein, *supra* note 3, at 999 n.215.

outlined below, it places far too much emphasis upon a mere canon of interpretation.[126] There are other competing principles that would contradict, and almost certainly override, the *expressio* canon (e.g., the *constitutional* continuity-of-government principle).[127] In addition, even were the Original Inability Clause to be read on its face as providing an ostensible prohibition to its use to resolve a vice presidential incapacity scenario, the Supreme Court has noted that otherwise clear constitutional provisions should be interpreted in their proper context.[128] Given the circumstances, such restrictions may not always be applicable. In *Balzac v. Porto Rico*, the Supreme Court observed that "[t]he Constitution . . . contains grants of power, and limitations which in the nature of things are not always and everywhere applicable."[129] Given the gravity of vice presidential incapacity, contextual factors would seem to be paramount and would likely lead the Original Inability Clause to be interpreted so as not to prevent a legislative fix.[130]

Moreover, the Clause has not been interpreted narrowly. On its face, it uses the term "Officer" in the singular, not the plural; therefore, the Clause would seem to permit Congress to name only a *single* successor, not an entire line of succession.[131] Yet, five years after the Constitution's drafting, Congress legislated for a line of succession and a line of succession has been in place (with certain modifications) ever since.

The broader intent behind the Original Inability Clause must also be considered. The purpose is obvious and it supports the construction recommended in this Article. The intent was to ensure that there is a

126. *See infra* notes 253-61 and accompanying text.

127. *See infra* notes 253-61 and accompanying text; *supra* Part I.B.

128. *See* Boumediene v. Bush, 553 U.S. 723, 759 (2008) (quoting Balzac v. Porto Rico, 258 U.S. 298, 312 (1922) ("[N]oting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere' . . . .")); *cf.* Amar & Amar, *supra* note 31, at 118 ("Within the Constitution inheres a structure, a set of themes and overarching principles that furnish backdrops against which any single provision must be interpreted."). Examples in this regard abound. For instance, despite the First Amendment's clear pronouncement that "Congress shall make *no* law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I (emphasis added), numerous exceptions have been carved out of both seemingly blanket prohibitions. *See, e.g.*, KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014).

129. *Balzac*, 258 U.S. at 312.

130. *See supra* Part II; *cf.* NLRB v. Canning, 573 U.S. 513, 538 (2014) (noting that "a national catastrophe" might change subsequent constitutional interpretation of the Recess Appointments Clause).

131. *See* U.S. Const. art. II, § 1, cl. 6 (emphasis added) ("Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such *Officer* shall act accordingly, until the Disability be removed, or a President shall be elected."); Goldstein, *supra* note 9, at 199-200; *see also supra* notes 103 and 108 and accompanying text.

functioning President at all times.[132] If need be, this principle counsels strongly in favor of drawing back the lens from the specific language of the Original Inability Clause and focusing on effectuating the larger purpose of the provision.[133] And, finally, as noted earlier, the *expressio* canon has often been ignored in constitutional interpretation.[134]

In sum, the two most plausible interpretations of the Original Inability Clause are supportive of Congress passing post hoc legislation to address vice presidential inability. Even the third approach, seen in proper context, does not pose an insurmountable obstacle to congressional action.

b. The Necessary and Proper Clause

Even if the Original Inability Clause were somehow to be seen as an impediment to addressing vice presidential incapacity, the Necessary and Proper Clause would likely provide the needed authority.[135] It provides authority for Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers* vested by this Constitution in the Government of the United States."[136] In essence, this Clause brings into execution the other powers of the federal government. This gives Congress great leeway to prevent a gap in executive authority since executive powers are, by definition,

132. *See* Clinton v. Jones, 520 U.S. 681, 698 (1997); SILVA, *supra* note 54, at 1-13, *see also* JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 23, 41-56 (1965); *cf.* YALE GUIDE, *supra* note 15, at 71.

133. *See* Trumbull, Cooley, Butler, & Dwight *supra* note 101, at 426 (Cooley) ("When Congress finds the Union without a head, its first duty is to provide for one; and if an impossibility exists in doing this, according to the very letter of the Constitution, no one need doubt that this is a case in which the spirit of the instrument is more imperative than the letter."); *cf.* THE FEDERALIST NO. 40 (James Madison) ("[W]here the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means."); Paulsen, *supra* note 55, at 1260 ("[W]hen push comes to shove, specific provisions of the document sometimes may need to yield to preservation and defense of the Constitution as a whole . . . .").

134. *See supra* note 105 and accompanying text; *infra* notes 254-55 and accompanying text.

135. *See* FEERICK, *supra* note 1, at 246; Feerick, *supra* note 7, at 20; *Second Fordham Report*, *supra* note 7, at 967-68; *cf.* Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 440 (Dwight). *But see* SILVA, *supra* note 54, at 91-92 n.23, 106-07. It could be argued that reliance upon the Necessary and Proper Clause might run afoul of the Twenty-Fifth Amendment's legislative history, which called into question its use for a statutory fix to presidential inability. *See 1965 House Hearings*, *supra* note 20, at 105 (quoting Attorney General Designate Nicholas deB. Katzenbach); 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh); *id.* at 3265-68 (statement of Sen. Dirksen); *cf. id.* (statement of Sen. Holland); SILVA, *supra* note 54, at 91-92, 106-07. *See infra* Part II.A.3.a.ii for a refutation of this argument.

136. U.S. CONST. art. I, § 8, cl. 18 (emphasis added). For more on this argument, see Feerick, *supra* note 7, at 20; Feerick, *supra* note 4, at 915-16; *First Fordham Report*, *supra* note 7, at 28-30.

among the "other Powers" vested by the Constitution.[137] After all, Article II's Executive Power Clause provides that "[t]he executive *Power* shall be *vested* in a President."[138] In this respect, the Necessary and Proper Clause would be carrying out the mandatory command that "[t]he executive Power *shall* be vested in a President."[139] It would also be helping to ensure that the President can act as Commander in Chief, can nominate officials, can sign or veto legislation, can negotiate treaties, can issue pardons, and the like.[140] In addition, the Clause would aid in effectuating the presidential inability determination procedures under the Twenty-Fifth Amendment. At its broadest level, the Necessary and Proper Clause helps ensure executive continuity by "carrying" the executive branch's powers "into Execution."[141] As to governmental operation, it is hard to see what could be more "necessary" than ensuring the functioning of an entire branch of government, especially the one branch that is designed to always be in operation. To this end, legislating to resolve vice presidential incapacity would help to ensure the continuity of the executive branch.

This interpretation is supported by the Court's traditionally broad construction of the Necessary and Proper Clause, beginning in *McCulloch v. Maryland*.[142] In *McCulloch*, Chief Justice John Marshall reasoned for

137. *Cf.* SILVA, *supra* note 54, at 91-92 n.23; Aldrich, *supra* note 55, at 746-48; Feerick, *supra* note 7, at 20. The Necessary and Proper Clause is often seen as the font of authority for congressional powers that lack a clear textual basis, such as the legislative oversight function. *See* MCKAY & JOHNSON, *supra* note 20, at 350. The Clause is also regularly seen as a means by which Congress can take action to meet a crisis. *See* Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 309 (2007) ("The power granted to Congress by the Sweeping Clause is larger in times of crisis than in times of normalcy because the set of 'necessary and proper' laws expands and contracts with circumstances."); L. ELAINE HALCHIN, CONG. RESEARCH SERV., 98-505, NATIONAL EMERGENCY POWERS 1 (2020) ("It may be argued . . . that the granting of emergency powers by Congress is implicit in . . . [among other things] the 'necessary and proper' clause."); Gerhard Casper, *On Emergency Powers of the President: Every Inch a King?*, OCCASIONAL PAPERS FROM U. CHI. L. SCHOOL, No. 6, at 7 (1973) ("Congress may, of course, in the exercise of its power to make all necessary and proper laws for executing powers vested in the Government of the United States, authorize the President to take certain measures in specified emergencies."); RON CHERNOW, WASHINGTON: A LIFE 649 (2010) (Hamilton's "exegesis of the 'necessary and proper' clause [regarding establishment of the Bank of the United States] . . . would enable the federal government to respond to emergencies throughout American history.").

138. U.S. CONST. art. I, § 1 (emphasis added).

139. *Id.* (emphasis added); *see id.* art. I, § 8, cl. 18.

140. *See* Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 426 (Cooley).

141. U.S. CONST. art. I, § 8, cl. 18; *see also* Feerick, *supra* note 7, at 20.

142. 17 U.S. (4 Wheat.) 316, 415 (1819) ("[A] constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs" mandates a broad interpretation of congressional powers); *see also* THE FEDERALIST NO. 44 (James Madison); Feerick, *supra* note 7, at 20; Feerick, *supra* note 4, at 942-43; *First Fordham Report*, *supra* note 7, at 29; *Second Fordham Report*, *supra* note 7, at 963, 967-68; Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States: 1791*, https://avalon.law.yale.edu/18th_century/bank-ah.asp.

the Court in a manner that has application regarding vice presidential incapacity:

> [I]t may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. *It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means* . . . . Can we adopt [a] construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? It is not denied, that *the powers given to the government imply the ordinary means of execution*. . . . The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and *those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception*.[143]

Interpreting the Necessary and Proper Clause to provide a solution to vice presidential incapacity would certainly be in "the interest of the nation to facilitate" as it would help ensure continuity in the presidency.[144] In this vein, preventing dual incapacity would ensure that the "ample powers" of the executive branch were "intrusted with ample means for their execution."[145] To do otherwise would, in the words of Chief Justice Marshall, "clog and embarrass" the "execution [of presidential power] by withholding the most appropriate means" of effectuating such authority.[146] Thus, interpreting the Necessary and Proper Clause to enable Congress to resolve vice presidential inability is wholly consistent with the reasoning of the Supreme Court in *McCulloch*.

Reliance on the Necessary and Proper Clause to help the nation head off a potential presidential succession crisis would also not be unprecedented. The statute that helped resolve the bitterly disputed

143. *McCulloch*, 17 U.S. (1 Wheat.) at 408-10 (emphasis added).

144. *Id.* at 408; *Second Fordham Report*, *supra* note 7, at 967-68; *see also* Feerick, *supra* note 7, at 20.

145. *McCulloch*, 17 U.S. (1 Wheat.) at 408; *Second Fordham Report*, *supra* note 7, at 967-68; *see also* Feerick, *supra* note 7, at 20.

146. *McCulloch*, 17 U.S. (1 Wheat.) at 408.

presidential election of 1876 was based in significant part on the Necessary and Proper Clause.[147]

c. Potential Precedents Supporting Congressional Action

In addition to theoretical legal arguments in favor of an after-the-fact statute resolving a vice presidential incapacity scenario, such an approach is supported by historical precedent and analogous actions taken over the years by Congress. Courts have long held that venerable constitutional interpretation by the political branches is entitled to significant weight even if the exegesis began years after the Constitution's framing.[148]

i. Legislation Addressing Vice President-Elect William King's Incapacity

In 1852, the Democratic Party chose Franklin Pierce and William King as their presidential and vice presidential candidates respectively. King, who was a U.S. Senator at the time of his election, was in ill health, however.[149] Following the victory of the Pierce-King ticket, but prior to their inauguration, King resigned from the Senate due to his infirmity.[150] The Vice President-elect decided to go to Cuba, believing that the climate might improve his health.[151] It did not.[152] Accordingly, it soon became apparent that King lacked the strength to make it back to the United States for his swearing-in.[153] Congress stepped in and in early 1853 adopted a statute that authorized the administration of the oath of office to the deathly ill Vice President-elect while he was in Cuba.[154]

147. *See* Act of Jan. 29, 1877, ch. 37, 19 Stat. 227, 229 (1877); 15 CONG. REC. 5461 (1884) (statement of Rep. Springer); 5 CONG. REC. 881 (1877) (statement of Sen. Bayard); *id.* at 891 (1877) (statement of Sen. Thurman); *id* at 939 (1877) (statement of Rep. Hunton); *id.* at 952 (1877) (statement of Rep. Caulfield); *see also* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 636 n.239 (2004); *cf.* 5 CONG. REC. 920-21 (statement of Sen. Bright); Charles R. Buckalew, *The Electoral Commission and Its Bearings*, 124 N. AM. REV. 161, 165-66 (1877); *supra* note 137.

148. *See, e.g.*, NLRB v. Canning, 573 U.S. 513, 516, 524 (2014); Mistretta v. United States, 488 U.S. 361, 400-01 (1989); Merriam v. Clinch, 17 F. Cas. 68, 70 (C.C.S.D.N.Y. 1867) (No. 9460); *see also* Goldstein, *supra* note 33, at 656-57; *cf.* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 128-34 (1984).

149. *See* MARK O. HATFIELD, VICE PRESIDENTS OF THE UNITED STATES 1789-1993, at 187 (1997); *see also* John Milton Martin, William Rufus King: Southern Moderate 355-60 (1955) (unpublished Ph.D. dissertation, University of North Carolina–Chapel Hill) (on file with the University of North Carolina—Chapel Hill).

150. *See* HATFIELD, *supra* note 149, at 187.

151. *See id.*

152. *See id.*

153. *See id.*

154. *See* Act of Mar. 2, 1853, ch. 93, 10 Stat. 180; CONG. GLOBE, 32d Cong., 2d Sess. 787, 824, 1010, 1020, 1033, 1035 (1853); *see also* SILVA, *supra* note 54, at 93 n.28; Henry Barrett Learned,

This statute should be seen as an example of Congress taking preventive action in the context of vice presidential inability since King was incapacitated but was not yet Vice President. Indeed, the question could well be asked: Why else would Congress have legislated in this case?[155] Not only was the future Vice President incapacitated due to ill health, he was also poised to be seen as politically incapacitated on inauguration day since he was outside of the United States. This was because, until the early twentieth century, it was widely thought that, if a President or Vice President was overseas, the officeholder was in fact incapacitated.[156] Modern communication and transportation have obviously rendered this interpretation obsolete but this view endured in many circles for over a century after the Constitution's drafting.[157]

Congressional debate surrounding the King legislation is meager and did not address questions of Congress's constitutional authority to act under these circumstances. But by passing the bill prior to the Vice President's inauguration Congress demonstrated its willingness—and by extension its authority—to take *preventive* action when the Vice President-elect alone was potentially incapacitated.

Since the bill's adoption took place before the Twentieth Amendment, which authorizes Congress to take action to secure the line of succession prior to inauguration day, Congress arguably had less authority in King's day than it would have today in addressing vice presidential incapacity, because King was not even Vice President at the time.[158] Moreover, the importance of the vice presidency then was far less than in the modern era as the officeholder did not clearly play a role in determining presidential incapacity. Thus, this statute should be seen as a

The Vice-President's Oath of Office, THE NATION, Mar. 1, 1917, at 248, 249-50.

155. *Cf.* Learned, *supra* note 154, at 249 ("King's is the single example of a Vice-President sworn into office on foreign soil. The ceremony *required* for its authorization a special statute.") (emphasis added). *But see* SILVA, *supra* note 54, at 93 n.28.

156. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, 61, 392-93 (5th rev. ed. 1984); FEERICK, *supra* note 132, at 49; GARRETT M. GRAFF, RAVEN ROCK: THE STORY OF THE U.S. GOVERNMENT'S SECRET PLAN TO SAVE ITSELF—WHILE THE REST OF US DIE 164-65 (2017); Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 428 (Butler); *see also* Rion McKissick, *Our Constitutional Fifth Wheel*, 3 VA. L. REV. 181, 184 (1915); *cf.* SILVA, *supra* note 54, at 92-98, 172; WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 50-51 (1916); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (Max Farrand ed., 1937).

157. *See, e.g.*, SILVA, *supra* note 54, at 92-98; TAFT, *supra* note 156, at 50. To this day, presidents and vice presidents are rarely outside of the country simultaneously. *See* Brownell, *supra* note 2, at 1029 n.6; *cf. Carrier Planes Swoop on Tokyo Area; B-29s Also Score, Some Go 3,960 Miles; Truman at Sea on Way to Big 3 Parley*, N.Y. TIMES, July 10, 1945, at 1 (discussing how President Truman and then-presidential successor Secretary of State Jimmy Byrnes took separate planes to reduce the chance of both men dying in a crash).

158. By contrast, with respect to addressing incapacity with a sitting Vice President, Congress has authority under the constitutional continuity-of-government principle, the Original Inability Clause and the Necessary and Proper Clause.

potential precedent for Congress acting to address vice presidential incapacity—an action that took place under legal conditions potentially less favorable to Congress than today.

ii. Legislation Authorizing Secret Service Protection

A second federal law provides analogous support for the view that Congress has the authority to address vice presidential incapacity. Section 3056(a) of Title 18 is part of the broader continuity of government legal regime which includes the Twenty-Fifth Amendment and the Original Inability Clause. The statute provides that "the United States Secret Service is authorized to protect the following persons . . . The President, the Vice President (or other officer next in the order of succession to the Office of President) . . . ."[159]

The legal regime authorizing secret service protection is closely related to that involving succession and incapacity.[160] A Secret Service detail protects executive continuity by trying to *prevent* a lethal or debilitating attack on the President, the Vice President or both. Failing that, if either officeholder is injured or both of them, the Secret Service is trained to take immediate steps to address the potential incapacity by getting the incapacitated principal immediate medical attention or, if that is impracticable, by addressing the medical issue themselves.[161] At the same time, the Twenty-Fifth Amendment and Original Inability Clause protect executive continuity by providing mechanisms for addressing presidential and vice presidential death and incapacity, ensuring that executive power continues without interruption.

It is unclear what the constitutional authorization is for 18 U.S.C. § 3056(a); it could be the continuity of government principle, the Original

159. 18 U.S.C. § 3056(a) (2012); *see* U.S. CONST. art. II, § 1, cl. 6; *id.* amend XXV.

160. *See* U.E. Baughman, Chief, U.S. Secret Serv., Treasury Dep't, Statement before Subcommittee No. 4 of the House Committee on the Judiciary 2 (May 10, 1961) [hereinafter Baughman Testimony] (stating that the bill that ultimately became 18 U.S.C. § 3056(a) "mak[es] the threat and protection provisions of law co-extensive with the possibilities of succession to the Presidency."). Much as the Garfield and Kennedy assassinations helped trigger efforts to strengthen executive continuity measures (e.g., the 1886 Presidential Succession Act, the Twenty-Fifth Amendment), the McKinley assassination and the Truman assassination attempt prompted legislative efforts to provide greater presidential security. *See* FEERICK, *supra* note 132, at 140-46; MELANSON & STEVENS, *supra* note 9, at 32, 53-54; Feerick, *supra* note 4, at 922; Frederick M. Kaiser, *Origins of the Secret Service Protection of the President: Personal, Interagency, and Institutional Conflict*, 18 PRESIDENTIAL STUD. Q. 101, 111-12, 114 (1988); Richard B. Sherman, *Presidential Protection During the Progressive Era: The Aftermath of the McKinley Assassination*, 46 THE HISTORIAN 1, 4-20 (1983).

161. *See* KESSLER, *supra* note 9, at 82, 108-10; MELANSON & STEVENS, *supra* note 9, at 184, 228, 231, 237-41.

Inability Clause, the Necessary and Proper Clause, or all three.[162] Either way, the constitutionality of protecting the President through the Secret Service seems beyond dispute.[163]

It is also important to note that the history preceding 18 U.S.C. § 3056(a) reflects that Secret Service protection was not limited solely to situations involving threats to *both* national officeholders as one might think given a cramped interpretation of the Original Inability Clause. Indeed, history reflects the *separate* treatment afforded the two officeholders. The first clear authorization for the Secret Service to provide protection for a national officeholder began in an appropriations bill in 1906 and was extended annually for four and a half decades thereafter.[164] This recurring measure provided protection *only for the President*.[165] When the first permanent legislative authorization for the Secret Service protective function was adopted in 1948, it too addressed *only* the President, his family, and those he selected.[166] Authorization for

162. *See* Sebastian, *Constitutionality of Presidential Protection*, SHALL NOT BE QUESTIONED (Aug. 20, 2009), https://www.pagunblog.com/2009/08/20/constitutionality-of-presidential-protection; *cf.* H.R. REP. NO. 57-433, at 1-2 (1902) (stating in the context of trying to deter presidential assassination through the criminal code that "Congress . . . has power to enact laws for the protection of the officers of the Government. . . . It is not unreasonable to contend, a constitutional government having been ordained and established (and it was intended to be permanent and to have the power of self-preservation), that the [Necessary and Proper Clause] empowers Congress to make laws protecting and preserving the lives and persons of the chosen officers of that government, the agencies through which only it can operate or exist as a government, at all times . . . . The provision [granting this authority] . . . is [the Necessary and Proper Clause]."); Note, *Threats to Take the Life of the President*, 32 HARV. L. REV. 724, 724 n.1 (1919). To the extent the Secret Service is protecting the President and Vice President within Washington, D.C., congressional authority could also be based on Article I, Section 8, Clause 17.

163. *See supra* note 116.

164. *See* Sundry Civil Appropriations Act, Pub. L. No. 59-383, 34 Stat. 696, 708 (1906); *see also* WALTER S. BOWEN & HARRY EDWARDS NEAL, THE UNITED STATES SECRET SERVICE 126-32, 131-32 (1960); KESSLER, *supra* note 9, at 8, 22, 255-56; MELANSON & STEVENS, *supra* note 9, at 27, 30-35, 39, 43, 44, 53-54, 136-37; Kaiser, *supra* note 160, at 108, 112-116; Sherman, *supra* note 160, at 16. There is no legislative history surrounding the 1906 legislation. *See* Kaiser, *supra* note 160, at 115-16. There appears to have been an implicit authorization for presidential protection during the Spanish-American War but it lapsed after the conflict. *See id.* at 112.

165. *See* Sundry Civil Appropriations Act, 34 Stat. at 708 (making an exception to a funding prohibition to permit "the protection of the person of the President of the United States").

166. *See* Act of June 25, 1948, Pub. L. No. 80-771, § 201, 62 Stat. 672, 680 (1948) ("The protection of the person of the President and the members of his immediate family and of the person chosen to be President of the United States is authorized."); *see also* H.R. REP. NO. 80-1898, at 17 (1948); Kaiser, *supra* note 160, at 118. Earlier unsuccessful efforts to protect the President by deterring assassination through criminal penalties also treated the Vice President differently. *See* H.R. REP. NO. 57-433, at 2 (1902) (listing the President's Article II duties and stating that "[c]harged with these and other duties which call for unremitting and constant attention, how can it be said that the President is not always engaged in the performance . . . of his official duties? . . . As to the Vice-President . . . no such claim can be made. The Vice-President can not act until Congress meets. His constitutional duty is to preside over the Senate."); *see also id.* at 12.

protection of the Vice President was added separately three years later,[167] but it was only provided at the discretion of the Vice President.[168] The Vice President was not treated in the same way as the President—being subject to a mandatory protective detail—until 1962.[169] Thus, the legislation which authorizes the Secret Service to perform its protective function—a task that fundamentally entails promoting executive continuity[170]—has not been seen to be restricted to situations involving "both" nationally elected officials as the Original Inability Clause might be read to suggest.[171] For nearly a half century, legislation authorized the Secret Service to protect *only* the President, not *both* the President and Vice President. Today, the President has his own Secret Service detail as does the Vice President.[172] They do not enjoy Secret Service protection

167. *See* Act of July 16, 1951, Pub. L. No. 82-79, § 4, 65 Stat. 121, 122 (1951) ("[T]he United States Secret Service . . . is authorized to protect the person of the President . . . and the Vice President at his request."); *see also* S. REP. NO. 82-467, at 2-4 (1951); H.R. REP. NO. 82-465, at 3, 5 (1951).

Not unlike the scenarios in *Neagle* and *Debs*, *see supra* notes 112-21 and accompanying text, early Secret Service protective details for the President and Vice President lacked statutory authorization. In the case of the President, the Secret Service began providing a protective detail for Grover Cleveland and his family in 1894 and continued to protect the President on and off for several years thereafter without statutory authority. *See* MELANSON & STEVENS, *supra* note 9, at 24, 26-36. As noted, not until 1906 was express legislative authority given to the Secret Service to protect the President, yet it had to be reenacted every year. *See id.* at 32, 35, 53-54.

Vice President Charles Curtis appears to have been the first Vice President to receive a protective detail. *See id.* at 43. Curtis requested that the Federal Bureau of Investigation—not the Secret Service—grant him a detail and the agency complied. *See id.* Curtis's successor as Vice President, John Nance Garner, declined a protective detail, believing "[t]here is not anybody crazy enough to shoot a Vice-President." BASCOM N. TIMMONS, GARNER OF TEXAS: A PERSONAL HISTORY 208 (1948); *see also* John Nance Garner, *This Job of Mine*, AM. MAG., June 1934, at 23, 96. Vice President Henry Wallace appears to have been the first Vice President to receive *Secret Service* protection. *See* Records of the United States Secret Service: 1933-1945, at 9 (on file with author). Vice President Harry Truman also enjoyed Secret Service protection before it was legislatively authorized in 1951. *See* KENNETH R. CRISPELL & CARLOS F. GOMEZ, HIDDEN ILLNESS IN THE WHITE HOUSE 148-49 (1988); MELANSON & STEVENS, *supra* note 9, at 298-99. For the episodic nature of Vice Presidents Barkley's, Nixon's and Johnson's Secret Service details, see Baughman Testimony, *supra* note 160, at 4-7; 1 THE PRESIDENTIAL RECORDINGS OF LYNDON B. JOHNSON 251-52 (Max Holland et al. eds, 2005).

168. *See* S. REP. NO. 87-836, at 1-3 (1961); H.R. REP. NO. 87-432, at 2 (1961); *see also* MELANSON & STEVENS, *supra* note 9, at 43.

169. Act of Oct. 18, 1962, Pub. L. No. 87-829, § 3, 76 Stat. 956, 956 (1962); *see also* S. REP. NO. 87-836, at 1-3; H.R. REP. NO. 87-432, at 2.

170. *See* KESSLER, *supra* note 9, at 118, 181, 244.

171. In the early twentieth century, lawmakers' views on how Congress might constitutionally authorize the President's protective function varied depending on the approach considered. For example, early proposed legislation would have had the President using the military to provide protective services under Congress's authority to regulate the military and the President's Commander-in-Chief authority. *See* MELANSON & STEVENS, *supra* note 9, at 30-31; *cf.* Kaiser, *supra* note 160, at 105.

172. *See The Protective Mission*, SECRET SERV., https://www.secretservice.gov/protection (last visited Jan. 25, 2020) ("Permanent protectees, such as the President and the Vice President, have special agents permanently assigned to them."); *see also* KESSLER, *supra* note 9, at 65, 125, 130, 131,

only when they are together or only when there are threats against both of them simultaneously. Each officeholder is individually protected against threats.[173]

Title 18 U.S.C. § 3056(a) and its predecessors authorize the Secret Service to react to threats against the President and Vice President when they occur or are about to occur. The statute also authorizes the Secret Service to *prevent* threats against the President and Vice President from happening in the first place—threats that could result in them being killed or incapacitated.[174] The Secret Service website states that "part of the Secret Service's mission [is] *preventing* an incident before it occurs."[175] Since, by statute, the Secret Service can and does take steps to prevent the President and Vice President from becoming incapacitated (either separately or at the same time), why would a vice presidential incapacity statute—authorized almost certainly under the same constitutional provisions and with exactly the same purpose of ensuring government continuity—be any less constitutional?

For these reasons, the federal statute authorizing Secret Service protection for the Vice President strongly reinforces the argument in favor of Congress having the authority to enact a law after the fact to resolve a vice presidential incapacity situation. That is because 18 U.S.C. § 3056(a): (1) addresses threats to the safety and capacity of the Vice President alone—not merely in tandem with the President; and (2) authorizes preventive action be taken to help ensure that, among other things, dual incapacity does not occur. These are two of the same rationales used to support use of the Original Inability Clause to authorize Congress to address vice presidential incapacity. Indeed, to oppose the constitutionality of a statutory solution to vice presidential incapacity would seem to mean that the legality of the Vice President's (and indeed the President's) Secret Service detail could also be called into question.

iii. Legislation Governing Presidential and Vice Presidential Resignation

A 1792 statute governing presidential and vice presidential resignation also lends support for the notion that Congress could adopt legislation to address vice presidential inability alone.[176] It will be recalled that Article II, Section 1, Clause 6 provides that "Congress may by Law

148, 152, 156, 206-07, 220, 225; MELANSON & STEVENS, *supra* note 9, at 68, 127, 327.

173. *See The Protective Mission*, *supra* note 172.

174. This has been true from the beginning of Secret Service protection of the President. *See* Kaiser, *supra* note 160, at 112-13, 119.

175. *The Protective Mission*, *supra* note 172 (emphasis added).

176. *Cf.* SILVA, *supra* note 54, at 106.

provide for the Case of Removal, Death, Resignation or Inability, *both* of the President and Vice President, declaring what Officer shall then act as President."[177] As such, it anticipates four general sets of contingencies: removal, death, resignation, and inability.[178] The original Constitution, however, provided procedures for only two of these scenarios.[179] The process for how to handle presidential or vice presidential removal is covered by the impeachment provisions of Articles I, II, and III.[180] The procedure for dealing with presidential or vice presidential death was addressed by Article II, Section 1, Clause 6 and was later superseded by Sections 1 and 2 of the Twenty-Fifth Amendment.[181] Under the original Constitution, however, there is no procedure mapped out that explains: (1) how a President or Vice President can resign from office or decline to serve, and how to determine whether such an event has occurred; and (2) how to determine whether an officeholder is incapacitated.[182] Presumably, the framers decided to have Congress provide the procedures for determining resignation and incapacity.[183]

The process regarding presidential and vice presidential resignation was outlined in the very same 1792 statute that provided for presidential succession.[184] It states that:

> [T]he only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.[185]

Notably, this 1792 statute seems to address not only how a President or Vice President can resign or decline office but also *whether* the President or Vice President has resigned or declined office (i.e., "the only

177. U.S. CONST. art. II, § 1, cl. 6.

178. *Cf.* Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 420-21 (Trumbull); Fortier & Ornstein, *supra* note 103, at 1000. These four contingencies (i.e., removal, death, resignation, and inability) are not hermetically sealed off from one another; a combination of events can overlap and thereby trigger the line of succession. For instance, if the President resigns and the Vice President dies immediately thereafter, the Speaker would become Acting President.

179. *Cf.* Feerick, *supra* note 7, at 20; Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 420-21 (Trumbull).

180. *See* U.S. CONST. art. I, §§ 2, 3; *id.* art. II, §§ 2, 4; *id.* art. III, § 2.

181. *See id.* art. II, § 1, cl. 6; *id.* amend. XXV, § 1; *id.* amend. XXV, § 2.

182. The latter issue was subsequently addressed for the President by section 4 of the Twenty-Fifth Amendment. *See id.* amend. XXV, § 4.

183. *See* SILVA, *supra* note 54, at 106-07; Feerick, *supra* note 7, at 20; Goldstein, *supra* note 3, at 999 n.215.

184. *Cf.* Feerick, *supra* note 7, at 20; Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 420-21 (Trumbull).

185. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239, 241 (1792) (emphasis added).

evidence").[186] That is to say, it establishes a means of determining if in fact either officeholder has resigned or declined to serve.

Yet, even though the 1792 resignation statute is authorized (at least in part) by Article II, Section 1, Clause 6, which uses the language "*both* . . . the President and Vice President,"[187] the 1792 statute encompasses a resignation or refusal to assume office for the "President *or* Vice President."[188] Notably, the statute does not say *both* the President and Vice President. It says "or."

This early statutory procedure for determining whether someone has resigned or declined office further supports the notion that Congress can legislate to determine whether vice presidential inability *alone* exists as opposed to only being able to legislate regarding the incapacity of *both* the President and Vice President.[189] Since the 1792 statute essentially permits "both" to be treated as "or" in the context of determining whether an individual has resigned or refused office, it would certainly seem to follow that a future statute under the very same constitutional authority could do the same in the context of deciding vice presidential incapacity.[190] This would be all the more likely since these twin provisions of resignation and inability both get at determining a person's status in relation to an office: Is the individual still in office and, if so, is he able to exercise the powers and duties of the office? The fact that the resignation statute was adopted in 1792—a mere five years after the Constitution's drafting—would seem to give the statute's "President *or* Vice President" formulation an added gloss of constitutionality and bolster the case even further for a post hoc statute.[191]

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186. *Cf.* Feerick, *supra* note 7, at 20; Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 420-21 (Trumbull); Wilmerding, *supra* note 84, at 173.

187. *See* U.S. CONST. art. II, § 1, cl. 6. Article II, Section 1, Clause 6 is the only reference to executive resignation under the original Constitution and scholars have cited it as the constitutional authority for the President taking such action. *See* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 179 (2008); Edwin Brown Firmage & R. Collin Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L.J. 1023, 1089 & n.354 (1974); Fortier & Ornstein, *supra* note 103, at 1000 n.46; *cf.* Feerick, *supra* note 7, at 20. The Necessary and Proper Clause could be also cited as supporting this proposition.

188. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239, 241 (1792) (emphasis added).

189. *Cf.* SILVA, *supra* note 54, at 106-07; Feerick, *supra* note 7, at 20.

190. Indeed, interpreting "both" as "either" would not be unprecedented. *See* Gunn v. Reliance Standard Life Ins., 399 F. Appx. 147, 152 (9th Cir. 2010) ("[U]se of the word 'both' in these [medical] records could be interpreted as meaning . . . either . . . ."); *cf.* Boumediene v. Bush, 553 U.S. 723, 758-59 (2008); Balzac v. Porto Rico, 258 U.S. 298, 312 (1922).

191. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 412 (1928); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884); *see also* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842).

iv. Legislation Addressing Judicial Inability

In considering whether Congress could legislate a solution to vice presidential inability through the Necessary and Proper Clause, the example of judicial incapacity is also useful to consider.[192] Indeed, Congress has endeavored to address judicial incapacity even though there is no judicial equivalent to the Original Inability Clause.[193] The fact that Congress has had a statute on the books for decades regarding judicial incapacity further reflects by analogy the viability of the Necessary and Proper Clause in the realm of vice presidential inability.[194]

In essence, section 372(b) of Title 28 provides that a judicial council or the Chief Justice may make an initial determination about the capacity of a judge of retirement age to carry out his duties; the President then makes the final determination.[195] If it is decided that the judge is incapacitated, another judge is appointed through the advice and consent process to assume the incapacitated judge's docket.[196] The workload of the incapacitated judge is removed from him but the judge is not removed from office and continues to receive salary and benefits.[197] This measure is an offshoot of legislation initially proposed by Chief Justice Charles Evans Hughes in 1939.[198] It achieved recognizable form in 1957.[199] With some minor modifications, it has remained on the books for more than sixty years.[200]

The constitutionality of section 372(b) itself has never been litigated,[201] but its sister provision, section 372(c), which involved judicial

192. *See Second Fordham Report*, *supra* note 7, at 968.

193. The argument could be put forward that the congressional role in judicial incapacity is not wholly analogous to Congress taking action with respect to vice presidential incapacity because the Constitution is silent on the former issue whereas the Original Inability Clause's "both" language poses a potential hinderance to legislative attempts to fix the latter. However, properly understood, the Original Inability Clause is either silent as to vice presidential inability just as the Constitution is silent on judicial inability, *see supra* notes 103-06 and accompanying text, or it can be seen to authorize prevention of dual incapacity. *See supra* notes 107-24 and accompanying text. Thus, congressional efforts to resolve vice presidential incapacity—like judicial incapacity—would not be hindered.

194. *See supra* note 148.

195. *See* 28 U.S.C. § 372(b) (2012).

196. *See id.*

197. *See* Courts – Judges – Compensation – Failure to Retire for Disability, 44 Comp. Gen. 544-45 (1965) (citing favorably an OLC opinion reaching the same conclusion).

198. *See* Act of Aug. 5, 1939, Pub. L. No. 76-269, 53 Stat. 1204, 1204 (1939); Hastings v. Judicial Conference of the U.S., 593 F. Supp. 1371, 1373 (D.D.C. 1984).

199. *See* Act of Sept. 2, 1957, Pub. L. No. 85-261, 71 Stat. 586, 586 (1957); *see also* H.R. REP. NO. 84-985, at 4 (1955); 103 CONG. REC. 3968-69 (1957) (statement of Rep. Celler). For other modifications prior to 1957, see Act of Feb. 10, 1954, Pub. L. No. 83-294, 68 Stat. 8, 12-13 (1954); Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 869 (1948).

200. *Cf. Hastings*, 593 F. Supp. at 1373.

201. There are a few opinions that mention section 372(b) and they do not question its

disciplinary proceedings, was challenged and essentially upheld in the courts.[202] The authority Congress relied upon in enacting the sister provision to section 372(b) was the Necessary and Proper Clause coupled with the judicial power provided under Article III.[203] A few years after the statute's enactment, federal district court Judge Alcee Hastings was accused of malfeasance in office and faced disciplinary proceedings under the authority of section 372(c). He argued, among other things, that impeachment was the sole means of disciplining a federal judge, questioning the constitutionality of the statute.[204] A federal district court brushed aside the constitutional challenge, expressly upholding the disciplinary statute based on the Necessary and Proper Clause.[205]

As two authorities noted, "[e]very court that has adjudicated cases challenging the [judicial discipline] [a]ct has found that it passes constitutional muster."[206] One district court reasoned that "Congress's power to enact these and other limitations on the personal freedom of individual federal judges [is] pursuant to its power to make all laws 'necessary and proper for carrying into Execution' the powers vested by the Constitution."[207] The authority to legislate in this area "cannot any longer be seriously doubted."[208] Though that specific decision was

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constitutionality. *See* Chandler v. Judicial Council, 398 U.S. 74, 109-10 (1970) (Harlan, J., concurring); *In re* Certain Complaints Under Investigation, 783 F.2d 1488, 1504, 1508 (11th Cir. 1986); *see also In re* Complaint of Judicial Misconduct, 575 F.3d 279, 291 (3d Cir. 2009); *In re* Charges of Judicial Misconduct, 404 F.3d 688, 695 (2d Cir. 2005); Adams v. Comm'r, 841 F.2d 62, 64 (3d Cir. 1988); Porter v. Comm'r, 88 T.C. 548, 551 (1987).

202. For a closely related discussion, see *In re Certain Complaints*, 783 F.2d at 1501-16. Section 372(c) was repealed in 2002. The current statute can be found at 28 U.S.C. §§ 351-364 (2018).

203. *See* S. REP. NO. 96-362, at 7 (1979) ("The 'necessary and proper' clause provides an ample basis for congressional action to implement the inherent power of the courts. Just as the legislative and executive branches have the means to discipline their respective officials, it is imperative that the judiciary implement its own disciplinary procedure."); 126 CONG. REC. S13,859 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini) (stating in the context of legislating on judicial incapacity that "Congress has been granted the power to enact appropriate legislation by the necessary and proper clause of the Constitution."). The constitutional underpinnings of this statute have not escaped criticism, however. *See* Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1131-33 (1985).

204. *See Hastings*, 593 F. Supp. at 1373; *see also id.* at 1379-81.

205. The District Court noted that the 1980 measure "culminated nearly 50 years of consideration by Congress and the federal judiciary of the best means to assure responsible judicial conduct consistent with the constitutionally protected independence of the judicial branch." *Id.*; *cf. In re Certain Complaints*, 783 F.2d at 1504, *cert. denied*, 477 U.S. 904 (1986) ("Chief judges, circuit councils, court executives and clerks of court all hold, by law, specified management responsibilities, the exercise of which are presumably believed by Congress to be 'necessary and proper,' Art. I, § 8, in order to 'ordain and establish' those inferior courts sharing in the 'judicial power' under Article III.").

206. Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 775 (1988).

207. *Hastings*, 593 F. Supp. at 1380; Baker, *supra* note 203, at 1141.

208. *Hastings*, 593 F. Supp. at 1380. The court cited *Hanna v. Plumer*, 380 U.S. 460, 471-72

vacated as having been reached prematurely,[209] it was essentially later upheld in another related decision by the Eleventh Circuit.[210]

The historical record indicates that Congress has long regulated judicial incapacity. Though the current statute has never been litigated per se, its sister provision involving judicial discipline was challenged and was essentially upheld. Because Congress has taken action to legislate for judicial incapacity, it is all the more likely that it could do so for vice presidential incapacity. This conclusion would seem to follow, especially given that the consequences of vice presidential incapacity greatly exceed those of judicial inability. There is only one Vice President and his role is pivotal to executive branch continuity; no federal judge is so situated.[211]

d. Legitimacy and Practicality

The post hoc statutory option supported in this Article not only has a sound constitutional basis, it has the benefit of being politically legitimate. First, the mechanism essentially follows the model by which incapacity is determined if the President is thought to be unable to function in office: section 4 of the Twenty-Fifth Amendment, which requires that the Vice President secure the Cabinet's approval before the former can become Acting President, and, if the President contests his incapacity, Congress then decides the matter.[212] The approach outlined in this Article would do largely the same thing: It would provide for the President and Cabinet's approval to decide if the Vice President is incapacitated. If the President and the Cabinet make this determination, Congress would be notified. If the Vice President disputes this decision or later believes he is no longer de facto incapacitated, he can appeal to Congress. Unless two-thirds of both houses believe the Vice President to be incapacitated, his powers and duties would be returned to him.[213] Thus, the measure reflects the norms of section 4: an internal executive branch decision, with the legislative

(1965), which affirmed the authority of Congress to promulgate civil procedure rules under the Necessary and Proper Clause. *See Hastings*, 593 F. Supp. at 1380 n.21.

209. *See* Hastings v. Judicial Conference, 770 F.2d 1093, 1095 (D.C. Cir. 1985); *see also* Cty. of L.A. v. Davis, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority, if not the governing law of the . . . Circuit.") (citations omitted).

210. *See In re Certain Complaints*, 783 F.2d at 1501-16, 1525.

211. *See* Schuker, *supra* note 63, at 137; RONAN, *supra* note 3, at 3.

212. *See* U.S. CONST. amend. XXV, § 4; *see also* Clinton Contingency Plans, *supra* note 13; Reagan Contingency Plans, *supra* note 13.

213. *See Second Fordham Report*, *supra* note 7, at 965.

branch providing an appellate function, with a supermajority presumption in favor of the officeholder in question.[214]

Second, a post hoc statute would be legitimate because Congress would be acting as a proxy for the American public.[215] This was one of the principal rationales for including Congress in the section 4 process under the Twenty-Fifth Amendment.[216] Not only does Congress represent the American people in the process, the body is accountable to the public as well.[217] Furthermore, congressional deliberation over a contested vice presidential incapacity situation would add important transparency to the process which in turn would likely bring greater legitimacy.

Third, a post hoc statute would be legitimate because of the involvement of the Cabinet in the deliberations.[218] Cabinet secretaries administer the major executive departments and, after the President and Vice President, provide leadership for the executive branch. They also must receive Senate advice and consent which provides them with a link to the public through the upper chamber's review and approval of their nomination.[219]

For these reasons, the Cabinet's participation would lend further legitimacy to the process of determining vice presidential inability.

In addition, the approach would be practical. For one, the section 4 procedure would be (or should be) familiar to policymakers. The process would also be practical in that, by requiring the President to secure majority support in the Cabinet, it would provide a check on the President to help prevent him from either acting rashly or out of animus toward the Vice President. It would mean he would need the approval of accountable public officials before he took any action to declare the Vice President incapacitated.[220] Indeed, the Cabinet could disagree with the chief executive.[221] Moreover, by providing that the Vice President could go to Congress to resolve the matter, the statute would provide the Vice

214. *Cf.* Goldstein, *supra* note 3, at 980, 1025, 1027, 1040; Clinton Contingency Plans, *supra* note 13; Reagan Contingency Plans, *supra* note 13.

215. *See* Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 425-26 (Cooley) ("Congress, more directly than any other department or officer, represents public opinion and the public will, and is more likely . . . to give a decision which accords with the public judgment."); *see also* KALT, *supra* note 16, at 62; *Second Fordham Report*, *supra* note 7, at 973.

216. *See* BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 150 (1968); *Secord Fordham Report*, *supra* note 7, at 973; *cf.* FEERICK, *supra* note 1, at 64, 66; KALT, *supra* note 16, at 62.

217. *See* KALT, *supra* note 16, at 145.

218. *See id.* at 61-62; *cf. Second Fordham Report*, *supra* note 7, at 948.

219. *See* KALT, *supra* note 16, at 61-62; *Second Fordham Report*, *supra* note 7, at 948.

220. *Cf.* Feerick, *supra* note 7, at 21.

221. The President, of course, could sack the recalcitrant Cabinet members, *cf.* KALT, *supra* note 16, at 61-62, but doing so almost assuredly would entail major political costs for the President.

President with a means of appeal outside of the executive branch hierarchy—dominated as it is by the President.

A related hypothetical underscores the practical benefits of a post hoc statute as outlined in this Article. It is worth remembering that many presidents have not personally liked or trusted their vice presidents. It is not inconceivable that a de facto incapacitated President might try to preempt his Vice President from initiating proceedings under section 4 against him by claiming that the Vice President was himself incapacitated. That way, the Vice President would be incapacitated and unable to trigger the section 4 inability process against the President. Under the statute supported by this Article, the Vice President would be declared incapacitated by the President, but the President would not be immune from the section 4 presidential inability process. The Speaker (or next in the line of succession) would in essence become Acting Vice President for succession and inability determination purposes and be able to carry out the section 4 function unless and until the Vice President regained his capacity.[222]

A final practical benefit involves the fact that the Speaker would not have to be closely involved in the vice presidential determination process. Indeed, the Speaker might recuse herself from consideration of the underlying inability legislation as well any future vice presidential inability appeal to Congress. This might help ensure that a Speaker from the opposite party would not be put in the difficult spot of initiating (or not initiating) the vice presidential incapacity process as will be seen with the CGOPT approach.[223] Particularly in today's partisan environment, this is an immensely important practical benefit.

3. Potential Constitutional Defects

It is quite possible that, following adoption of a post hoc vice presidential incapacity statute, a lawsuit could be filed challenging the measure. Such litigation would face difficult obstacles even before arriving at the merits of the case. Assuming the plaintiffs could overcome the threshold challenges to their suit, there are several legal theories upon which they might base their case. The first is that Congress lacks authority to adopt such a statute. That question has been addressed earlier.[224] There are three additional legal theories, however, that could be pursued against

222. Under the proposed statutory solution, the Speaker would not need to step down from the House as she would not be delegated the Vice President's Senate duties or executive responsibilities outside of the Twenty-Fifth Amendment. *See Second Fordham Report*, *supra* note 7, at 965-66. By contrast, in becoming Acting President, the Speaker must resign from the House according to the 1947 presidential succession statute. *See id.;* 3 U.S.C. § 19 (a)(1) (2012).

223. *See infra* Part III.B.2.

224. *See supra* Parts I.B, II.A.2.

a post hoc statute: (1) that the Twenty-Fifth Amendment prohibits delegation of the Vice President's authority to the next in the line of succession; (2) that a constitutional amendment was adopted in the area of presidential inability which might counsel against a statutory option in a vice presidential context; and (3) that there are potential defects based on the nature of post hoc enactment (i.e., potential violations of the Bill of Attainder, Ex Post Facto and Due Process Clauses). Each of these issues (i.e., threshold matters and substantive legal theories) will be discussed in turn.

a. Threshold Considerations: Obstacles to Reaching the Merits of the Case

Legislation attempting to resolve an instance of vice presidential incapacity might well face litigation.[225] However, for a number of reasons, such litigation would face major hurdles before even reaching the merits of the case. First, it would be difficult for litigants to show standing.[226] A

225. *Cf.* 111 CONG. REC. 3255 (1965) (statement of Sen. Bayh); *id.* at 3265 (statement of Sen. Carlson); HERBERT BROWNELL & JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 278 (1993). *But cf.* Calabresi, *supra* note 89, at 156-57.

226. *Cf.* Barnett v. Obama, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *2-3, *19-20 (C.D. Cal. 2009). Indeed, litigation prior to the Twenty-Fifth Amendment involving presidential succession reaffirms this notion. In 1964, an attorney, Leonard Jones, brought suit against President Lyndon B. Johnson in U.S. District Court for the District of Columbia, claiming that he had not lawfully succeeded to the presidency following the assassination of John F. Kennedy. *See* Petition for Writ of Quo Warranto, United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64 (D.D.C. Aug. 14, 1964); *see also* Motion to Intervene and Motion to Withhold Service of Process, United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64 (D.D.C. Aug. 25, 1964); Memorandum of Points and Authorities in Support of Motion to Intervene and Motion to Withhold Service of Process, United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64 (D.D.C. Aug. 25, 1964); FEERICK, *supra* note 132, at 10 n.*; *Lawyer to Keep Up U.S. Presidential Succession Battle*, ALBUQUERQUE J., Feb. 18, 1964, at A-11; Doyle Akers, *LBJ Illegally President, Espanola Lawyer Insists,* SANTA FE NEW MEXICAN, June 10, 1964, at 1; *US Attorney Answers Contention LBJ Not President*, SANTA FE NEW MEXICAN, Sept. 30, 1964, at 10; Letter from David C. Acheson, U.S. Att'y, Dep't of Justice, to Leonard C. Jones (Apr. 8, 1964) (on file with author); Letter from John W. Douglas, Assistant Att'y Gen., Dep't of Justice, to Leonard C. Jones (Aug. 14, 1964) (on file with author).

The U.S. Department of Justice argued that Jones did not have standing, that the court did not have jurisdiction over the issue and that the filing did not state a claim upon which relief could be granted. *See* Motion to Dismiss, United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64 (D.D.C. Aug. 25, 1964); Memorandum of Points and Authorities in Support of Motion to Dismiss, United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64 (D.D.C. Aug. 25, 1964). The court dismissed Johnson's petition though it did not specify the exact grounds. *See* United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64, (D.D.C. Sept. 15, 1964); *see also* Letter from John W. Douglas, Assistant Att'y Gen., Dep't of Justice to Leonard C. Jones, *supra*. Subsequent efforts by Jones went nowhere. *See* Motion to Set Aside Order of Dismissal, United States (on relation of Leonard C. Jones) v. Johnson, Civil Action No. 2004-64 (D.D.C. Sept. 24, 1964) (bearing a mark stating "Motion Denied, Sept. 24, 1964"). The takeaway was clear: The court would not involve itself in presidential succession matters.

key element in establishing standing is to demonstrate that the person or persons bringing suit have suffered injury in fact.[227] The legislation proposed by this Article would not remove the Vice President's title, salary, or benefits, so it would seem difficult for the incapacitated Vice President or his family or staff to show that they have been harmed by the legislation. Moreover, the alleged injury might not be permanent. Upon resolution of the incapacity (within the vice presidential term of office), the powers and duties would return to the Vice President. Outside litigants would have even greater challenges in showing harm. They would have to demonstrate that transferring the powers and duties of an incapacitated Vice President would directly injure them. Thus, establishing standing to challenge the legislation would be a difficult climb.

Second, there would also be imposing justiciability and prudential hurdles for litigants to overcome. In *Baker v. Carr*, the Supreme Court laid out a multi-prong test for determining whether a matter constitutes a Political Question and is therefore outside of the judiciary's mandate.[228] Of note is the Court's concern about whether the issue at hand involves "an unusual need for unquestioning adherence to a political decision already made . . . ."[229] Resolving a case of vice presidential incapacity—a situation with the potential to gravely disrupt executive branch operations—would seem like a quintessential example of the need for the courts to defer to the political branches. During the time elapsed in litigation, the President could become de facto incapacitated or die, both outcomes that could result in a non-functioning President and which could place the nation in dire straits. Litigating the merits of a vice presidential inability statute could add even greater turmoil to an already exceedingly difficult situation.

Another prong of *Baker* that the judiciary has placed particular recent emphasis upon[230] involves whether the matter in question entails "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ."[231] In the case of preventing dual incapacity, Article II of the Constitution would seem to assign responsibility to a coordinate political branch: Congress.[232] Similarly, the

227. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

228. *See* Baker v. Carr, 369 U.S. 186, 210-17 (1962).

229. *Id.* at 217.

230. *See* Zivotofsky v. Clinton, 566 U.S. 189, 195-97 (2012); *see also* YALE GUIDE, *supra* note 15, at 66.

231. *Baker*, 369 U.S. at 217.

232. *See* U.S. CONST. art. II, § 1, cl. 6; *cf.* Barnett v. Obama, No. SACV 09-0082 DOC (ANx), 2009 WL 3861788, at *15 (C.D. Cal. 2009) ("[T]he Twenty-Fifth Amendment sets forth the line of succession . . . in case of [the President's] death, resignation, or inability to serve. The Amendment

responsibility for making laws ensuring the execution of the functions of the federal government is assigned to Congress under the Necessary and Proper Clause.

Moreover, there are no "judicially discoverable and manageable standards" for determining inability.[233] The Constitution says nothing about how inability is to be determined and it seems clear that in the context of executive incapacity, this decision is to be made by those accountable to the electorate.[234]

In addition, there are judicial dicta that support the view that matters of presidential inability are nonjusticiable.[235] Numerous authorities on the Twenty-Fifth Amendment concur.[236] It is difficult to see why vice presidential inability would be any different since addressing vice presidential inability is directly linked to ensuring *presidential* continuity and capacity. Given that resolving vice presidential inability is essential to helping ensure the vitality of the presidential succession and inability regime under the Twenty-Fifth Amendment, it would seem that a post hoc statute would also be outside of the scope of judicial review.

Furthermore, the judiciary's treatment of the analogous process of impeachment[237] would also counsel against the courts passing judgment on a post hoc vice presidential inability statute.[238] The courts have been clear that impeachment proceedings are not reviewable by the judiciary.[239] The Supreme Court's rationale for rejecting a judicial appellate role regarding impeachment is applicable to litigating a vice presidential

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specifies a role for Congress in this process, but no role for the judiciary. The combination of Article I and the Twenty-Fifth Amendment leads the Court to conclude that there is a textually demonstrable constitutional commitment of the issue of the removal of a sitting president to a coordinate political department—the Legislative branch.") (internal quotation omitted); *see also In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 650 (D.D.C. 2018); Rudy v. U.S. Patent & Trademark Office, No. 1:13cv000278 (LMB/TCB), 2013 WL 12097552, at *2 (E.D. Va. 2013); Grinols v. Electoral Coll., No. 12-cv-02997-MCE-DAD, 2013 WL 211135, at *3-4 (E.D. Cal. 2013).

233. *See* Calabresi, *supra* note 89, at 167-69.

234. *See* U.S. CONST. art. II, § 1, cl. 6; *id.* amend. XXV, § 4; *see also* KALT, *supra* note 16, at 145; *supra* notes 215-17 and accompanying text.

235. *See Rudy*, 2013 WL 12097552, at *2; *Grinols*, 2013 WL 211135 at *3-4; *Barnett*, 2009 WL 3861788, at *19.

236. *See* 111 CONG. REC. 15,588 (1965) (statement of Sen. Ervin); YALE GUIDE, *supra* note 15, at 64-71; *Second Fordham Report*, *supra* note 7, at 985; *Report of the Commission on Presidential Disability and the Twenty-Fifth Amendment*, MILLER CTR., http://web1.millercenter.org/commissions/comm_1988.pdf (last visited Jan. 25, 2020) [hereinafter *Miller Center Report*]; *cf.* Silva, *supra* note 103, at 159-60; KALT, *supra* note 16, at 25, 167.

237. *See* KALT, *supra* note 16, at 55.

238. *Cf. id.* at 25-26; *Second Fordham Report*, *supra* note 7, at 984-85; Calabresi, *supra* note 89, at 157-58, 169-71.

239. *See* Nixon v. United States, 506 U.S. 224, 228-29, 233 (1993); Ritter v. United States, 84 Ct. Cl. 293, 300 (1936); *see also* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 146 (2d ed. 2000).

inability statute: "[O]pening the door of judicial review to the procedures used by the Senate in trying impeachment would 'expose the political life of the country to months, or perhaps years, of chaos.'"[240] Impeachment, of course, also entails a permanent removal from office,[241] a far more severe burden on the officeholder than the transferal mechanism supported in this Article. It would seem illogical for the milder burden of transferring the Vice President's powers and duties—with its retention of title, pay, and benefits—to be reviewed in court while the more severe treatment imposed on officeholders by impeachment would involve no judicial review whatsoever.

For these reasons, it appears unlikely that litigation challenging the post hoc statute supported in this Article would ever reach the merits of the case.

b. Substantive Legal Theories Against a Post Hoc Statute

i. The Twenty-Fifth Amendment Prohibits Delegations to the Next in the Line of Succession

Assuming that litigation contesting the post hoc statute reached the merits of the case, one potential challenge could be based on the Twenty-Fifth Amendment. Under the Constitution, only the Vice President is expressly permitted to become Acting President under section 3 of the Twenty-Fifth Amendment,[242] and only the Vice President is explicitly authorized to trigger the presidential inability process under section 4.[243] Because of these potentially exclusive constitutional assignments to the Vice President, it could be contended that a statute could not skip over him to the next in the line of presidential succession.[244]

While the language of the Twenty-Fifth Amendment might at first appear like a daunting obstacle to adoption of legislation to transfer the powers and duties of an incapacitated Vice President, it is crucial to remember that the authority for addressing the situation derives from the constitutional continuity-of-government principle, the Original Inability Clause, and the Necessary and Proper Clause, *not the Twenty-Fifth*

240. *Nixon*, 506 U.S. at 236; *see also supra* notes 229-31 and accompanying text.

241. *See* John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 115 (1963); Paul A. Stephan III, *History, Background and Outstanding Problems of the Twenty-Fifth Amendment*, *in* PAPERS ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 63, 68 (Kenneth W. Thompson ed., 1988); Goldstein, *supra* note 9, at 91.

242. *See* U.S. CONST. amend. XXV, § 3; Goldstein, *supra* note 40, at 189.

243. *See* U.S. CONST. amend. XXV, § 4; *see also* Goldstein, *supra* note 9, at 98.

244. *See* RONAN, *supra* note 3, at 156; Goldstein, *supra* note 9, at 98; Goldstein, *supra* note 40, at 189.

Amendment.[245] While the Twenty-Fifth Amendment informs notions of how the vice presidential inability statute should be drafted, the Amendment itself does not encompass dual incapacity.[246] By contrast, in this Article, the proposed statutory fix to vice presidential incapacity is framed, in part,[247] under a dual incapacity theory pursuant to the Original Inability Clause—that is, taking steps to prevent simultaneous presidential and vice presidential inability.

Even if the Twenty-Fifth Amendment were somehow to be seen as applying directly in this setting, it would still not preclude Congress from adopting a post hoc statute. That is because the delegations to the Vice President under the Twenty-Fifth Amendment are not necessarily exclusive. In Supreme Court case law involving vital national concerns, the *absence* of unambiguously exclusive delegations has often been deemed to be an important consideration. In *McCulloch v. Maryland*,[248] perhaps "the most central case in our constitutional canon,"[249] Chief Justice John Marshall wrote for the Court and placed great emphasis on the lack of the word "expressly" in the Tenth Amendment as opposed to the Articles of Confederation:

> Among the enumerated powers . . . [,] there is no phrase in the instrument which, like the articles of confederation, *excludes* incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. . . . [T]he 10th Amendment . . . omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, *to depend on a fair construction of the whole instrument*. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code . . . . Its nature, therefore, requires, that only its great outlines should be marked, its important

245. *Cf.* Goldstein, *supra* note 40, at 189; Feerick, *supra* note 7, at 20-21.

246. *See* AKHIL REED AMAR, THE LAW OF THE LAND: A GRAND TOUR OF OUR CONSTITUTIONAL REPUBLIC 189 n.* (2015); *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 804 (2010) (quoting John Feerick); *Second Fordham Report*, *supra* note 7, at 959 n.256; *supra* notes 86-99, 103-34 and accompanying text; *cf.* FEERICK, *supra* note 1, at 115; Feerick, *supra* note 4, at 938. For analysis of how Twenty-Fifth Amendment *norms* may inform evaluation of vice-presidential inability options, see, e.g., *infra* notes 400-06 and accompanying text.

247. It will be recalled that the legislation advocated in this Article is also fashioned under the constitutional continuity-of-government principle and the Necessary and Proper Clause.

248. *See* 17 U.S. (1 Wheat.) 316 (1819).

249. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 749 (1999).

> objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[250]

The Court's reliance in *McCulloch* on the absence of the word "expressly" in the Tenth Amendment is analogous to the absence of similar terms in sections 3 and 4 with respect to delegations to or from the Vice President. For instance, the terms "solely"[251] and "exclusively" are nowhere to be found.[252] In light of *McCulloch*'s reasoning, opponents of a post hoc statutory option would be left once again to rely heavily on the *expressio* canon.[253] Reliance on this canon alone seems a woefully insufficient basis upon which to prevent Congress from passing a vice presidential inability statute and thereby attempt to ensure executive branch continuity. The *expressio* canon is just that, a canon. It is not an inviolate legal principle.[254] Indeed, the courts have routinely discarded it.[255] As Justice Antonin Scalia and Bryan Garner have written, "[n]o

250. *McCulloch*, 17 U.S. (1 Wheat.) at 406-07 (1819) (emphasis added); *see also id.* at 408, 411-12, 415.

251. The framers used the term "sole" in other contexts. It is applied with respect to the House of Representatives' authority to impeach officials and the Senate's authority to try impeachments. *See* U.S. CONST. art. I, §§ 2, 3; Nixon v. United States, 506 U.S. 224, 230-31 (1993). Thus, in the analogous situation of impeachment and removal, *see* KALT, *supra* note 16, at 55, the Constitution is clear when only one institution is to be involved in the procedure.

252. *Cf.* Goldstein, *supra* note 40, at 189. The framers also used "exclusive" and other comparable terms. For instance, the word "exclusive" appears in Article I, Section 8, Clauses 8 and 17. Similarly, the framers used restrictive terms elsewhere in the Constitution's text. *See id.* art. III, § 3 ("Treason against the United States, shall consist *only* in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason *unless* on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.") (emphasis added); *see also* Note, *The Scope of the Power to Impeach*, 84 YALE L.J. 1316, 1318 n.4 (1975).

253. *See President's Disability and Succession*, *supra* note 102, at 360-61; Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 432 (Butler).

254. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)) ("[C]anons are not mandatory rules. They are guides that 'need not be conclusive.'"); *Circuit City Stores, Inc.*, 532 U.S. at 115 ("Canons of construction . . . are often countered, of course, by some maxim pointing in a different direction."). For skepticism of the *expressio* canon, see Springer v. Philippine Islands, 277 U.S. 189, 206-07 (1928); *see also* Goldstein, *supra* note 47, at 864 (noting that application of the *expressio* canon would have precluded the establishment of fundamental constitutional interpretations such as those confirming judicial review and presidential authority to remove Cabinet secretaries); *cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950); Goldstein, *supra* note 47, at 864 n.58. The eminent scholar and originalist Raoul Berger observed that "[m]anifestly, *exclusio unius* was no fetish for the Founders." RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 145 (1974).

255. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983); Am. Trucking Ass'ns v. United States, 344 U.S. 298, 309-11 (1953); *In re* Am. Reserve Corp., 840 F.2d 487, 492 (7th Cir. 1988); Nat'l Petroleum Refiners Ass'n, Inc. v. FTC, 482 F.2d 672, 674-76 (D.C. Cir. 1973); *see also* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 638-39 (2d ed. 1995); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985).

canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions."[256]

In the context of vice presidential incapacity, the *expressio* canon would collide with a number of "different principles that point in other directions."[257] Foremost among them is the norm ensuring continuity of government, which is *constitutional in nature* thereby putting it on a higher plane than a mere canon. Moreover, application of the *expressio* canon would clash with common sense. Sections 3 and 4 of the Twenty-Fifth Amendment almost certainly presume the existence of a Vice President *who has capacity*, one who can actually carry out his responsibilities.[258] As the Court in *McCulloch* observed, "[i]t is not denied that the powers given to the government imply the ordinary means of execution."[259] The main point of the section 3 and 4 processes is to ensure a functioning presidency, not to make certain the Vice President enjoys pride of place under all succession and inability circumstances.[260] It would seem utterly ludicrous to read a constitutional provision whose overriding objective is to ensure executive capacity[261] in such a way that it could very easily result in executive *in*capacity.

Nor is that all. The *expressio* canon would have to overcome not one but two other interpretative canons. One is the canon reflecting the "presumption against ineffectiveness."[262] It means that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[263] As just noted, interpreting the Twenty-Fifth Amendment to hinder presidential continuity rather than effectuate it would clearly violate the "presumption against ineffectiveness" canon.[264]

The second competing canon would be that the Constitution cannot be read to reach absurd outcomes.[265] To permit an incapacitated Vice President to potentially jeopardize the functioning of the executive branch at its highest levels, and with it, much of the national government, would no doubt yield an absurd result. Thus, the *expressio* canon is a very

256. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 59 (2012); *see also* Llewellyn, *supra* note 254, at 401-06.

257. *See* SCALIA & GARNER, *supra* note 256, at 59.

258. *See* Feerick, *supra* note 7, at 18 ("The Amendment is premised on there being an able, functioning Vice President."); *see also* Goldstein, *supra* note 3, at 1033.

259. McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 409 (1819).

260. *See* Goldstein, *supra* note 3, at 1033.

261. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 698 (1997).

262. *See* SCALIA & GARNER, *supra* note 256, at 63.

263. *Id.*

264. *Cf. Clinton*, 520 U.S. at 698; Goldstein, *supra* note 3, at 1033; Feerick, *supra* note 7, at 18.

265. *See, e.g.*, United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868); *see also* BERGER, *supra* note 254, at 192; SCALIA & GARNER, *supra* note 256, at 234.

thin reed upon which to rely for opponents of vice presidential incapacity legislation.

At the end of the day, arguments against a post hoc statute based on pinched interpretations of section 3 and 4's delegations to the Vice President are likely to be overcome due to: (1) the statute being authorized by the constitutional continuity-of-government principle, the Original Inability Clause, and the Necessary and Proper Clause, and not the Twenty-Fifth Amendment; (2) the courts interpreting legal authorities governing other vital national concerns in an expansive fashion; and (3) the availability of other competing interpretative principles including the constitutional continuity-of-government norm and two canons of legal interpretation.

ii. Previous Adoption of a Constitutional Amendment in This Area Would Preclude a Statutory Fix

Another potential counterargument to a post hoc statutory fix could be that if legislation is the answer to fix vice presidential incapacity today, why was legislation *not* the answer in the mid-1960s with regard to presidential incapacity? Why did Congress not simply pass a statute in 1965 and save everyone the time and effort involved with adopting the Twenty-Fifth Amendment?

There are several reasons why that position is not persuasive. First, it is important to remember that presidential incapacity was only one of several problems Congress was trying to address with the Twenty-Fifth Amendment.[266] One issue was making clear that vice presidents became presidents in fact and not merely inheritors of the powers and duties of the presidential office; another involved authorizing the President to nominate a Vice President when there was a vacancy in the latter position.[267] Neither issue would have been satisfactorily resolved by statute.[268]

Second, a number of lawmakers did in fact believe that Congress possessed sufficient legislative authority to provide a presidential inability procedure.[269] The problem was that congressional opinion was split and lawmakers wanted to minimize the possibility of a subsequent

266. *See* Goldstein, *supra* note 3, at 998-99.

267. *See id.*; *see also 1965 House Hearings*, *supra* note 20, at 105 (quoting Attorney General Designate Nicholas deB. Katzenbach).

268. *See* 111 CONG. REC. 3253-54, 3257 (1965) (statement of Sen. Ellender); *id.* at 7944 (statement of Rep. Whitener); *id.* at 7945-46 (statement of Rep. Hutchinson); *see also* Goldstein, *supra* note 3, at 998-99.

269. *See* 111 CONG. REC. 3253-54, 3257 (statement of Sen. Ellender); *id.* at 7944 (statement of Rep. Whitener); *id.* at 7945-46 (statement of Rep. Hutchinson); *see also 1965 House Hearings*, *supra* note 20, at 105 (quoting Attorney General Designate Nicholas deB. Katzenbach); Goldstein, *supra* note 3, at 998-99.

constitutional challenge to their handiwork.[270] Professor Joel Goldstein, one of the leading authorities on the Twenty-Fifth Amendment, has observed that "[t]he framers of the Twenty-Fifth Amendment concluded that divided opinion" on matters such as how to determine presidential incapacity "counseled in favor of the more onerous course of amending the Constitution."[271] One major difference between consideration of the Twenty-Fifth Amendment and future deliberations involving a sudden case of vice presidential incapacity is that the framers of the Amendment had the luxury of time. Lawmakers operating in the context of an immediate case of vice presidential incapacity would lack such an advantage. Statutes can obviously be adopted far more quickly than constitutional amendments which require a two-thirds majority in each house of Congress and approval by three-quarters of the state legislatures.[272]

There is a third closely-related difference. As alluded to above, while many lawmakers thought Congress could act by statute to resolve the issue of presidential inability, many other authorities believed that the Vice President enjoyed exclusive constitutional authority in this realm.[273] Therefore, it was thought in some circles that because the Vice President's authority (such as it was) derived from constitutional text, it precluded any effort to craft a statutory presidential inability process.[274] Interpreted in this light, the matter had to be fixed by a constitutional amendment. This is unlike the Speaker's implicit authority today under the CGOPT to make a vice presidential inability determination; *the Speaker's authority in this regard (such as it is) is based on a statute*, the 1947 presidential succession act.[275] Thus, in the case of resolving vice presidential incapacity, a statute can fix a statutory issue whereas, under the views of many prior to the Twenty-Fifth Amendment, a statute could not resolve a *constitutional* question.

In sum, during consideration of the Twenty-Fifth Amendment, a statutory solution was rejected for a number of reasons unrelated to presidential incapacity and therefore the analogy with a possible vice presidential inability situation is largely inapposite.

Finally, this Article does not maintain that a post hoc statutory regime is the ideal solution, only that it would be the best solution in a pinch; that is, if the nation were suddenly confronted with an incapacitated

270. *See* Goldstein, *supra* note 3, at 998-99.

271. *Id.* at 999.

272. *See* U.S. CONST. art. V.

273. *See, e.g.*, SILVA, *supra* note 54, at 100-02; Silva, *supra* note 103, at 172.

274. *See* Silva, *supra* note 103, at 172; Goldstein, *supra* note 3, at 999 n.215.

275. For a discussion of the Speaker's implicit authority to make a determination of vice presidential inability under the CGOPT, see *infra* Part III.B.

Vice President. Had the nation never adopted the Twenty-Fifth Amendment and later been confronted with a situation involving an incapacitated President or an incapacitated Vice President on the brink of becoming President, one strongly suspects that the constitutional norm favoring continuity of government would have permitted Congress, if called upon, to take appropriate action to legislate a solution.[276] As the eminent jurist and legal commentator Thomas Cooley wrote: "How much wiser would such a notion be than that of [the British King] James II, who thought that, when he had cast the Great Seal [of the Realm] into the Thames, he had made the administration of government impossible?"[277]

iii. Defects Due to the Nature of Post Hoc Enactment

The very nature of after-the-fact legislation brings with it some added potential complications though they are far from insuperable. They include potential challenges based on the Bill of Attainder, the Ex Post Facto, and the Due Process Clauses.[278]

aa. The Bill of Attainder Clause

Were the Vice President, his family, or his staff to be disillusioned by the post hoc inability statute, it is conceivable a suit could be brought contending that the measure constitutes a bill of attainder. The Constitution states plainly that "[n]o Bill of Attainder . . . shall be

276. *See* 62 CONG. REC. 740 (1921) (statement of Rep. Mann) ("If the case ever arises where the Government would cease to function for lack of a President the gentleman will find that it will be determined very quickly by the Congress."); *see also 1920 House Hearings*, *supra* note 125, at 32 ("Mr. Rogers. . . . With that provision of Article I, section 8, staring us in the face, it does seem to me that Congress has the right *somehow*, to pass on who shall succeed [to the presidency], . . . and how . . . and when . . . .") (emphasis added); Wilmerding, *supra* note 84, at 172 (arguing with respect to presidential inability prior to the Twenty-Fifth Amendment "[o]n the question of mode the Constitution is silent, but this silence cannot be pleaded in justification of nonaction when action is called for"); Letter from Abraham Lincoln, President of the U.S., to Albert G. Hodges, U.S. Senator (Apr. 4, 1864), http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm ("[M]easures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."); NLRB v. Canning, 573 U.S. 513, 538 (2014) (noting that "a national catastrophe" might change subsequent constitutional interpretation of the Recess Appointments Clause); *cf.* Boumediene v. Bush, 553 U.S. 723, 758-59 (2008); Balzac v. Porto Rico, 258 U.S. 298, 312 (1922); Shoup, *supra* note 9, at 72-73, 78.

277. Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 426 (Cooley). For additional authorities prior to the Twenty-Fifth Amendment who believed that a statute was sufficient to address presidential inability, see FEERICK, *supra* note 132, at 134-35, 238, 246-47; Wilmerding, *supra* note 84, at 178-79; *cf.* BAYH, *supra* note 216, at 61 (noting the views of former President Harry Truman); 11 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4652, 4840 (James D. Richardson ed., 1897) (quoting President Chester A. Arthur).

278. A prospective statute would obviously be much less susceptible to legal challenge under the Bill of Attainder, Due Process, and Ex Post Facto Clauses.

passed."[279] Bills of attainder are typically defined as "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ."[280] Thus, a bill of attainder has four elements: (1) legislation, (2) involving certain individuals or groups, (3) that applies punishment, and does so (4) without a judicial proceeding.

For purposes of this Article, the key question is the third element: Whether post hoc legislation regarding the transferal of an incapacitated Vice President's Twenty-Fifth Amendment powers and duties would be considered punishment. In *Nixon v. Administration of General Services*, the High Court considered whether legislation instructing the federal government to take custody of former President Richard Nixon's presidential materials, despite his preexisting agreement with the National Archives and Records Administration, constituted a bill of attainder.[281] The Court concluded the measure did not, but in so doing the Court discussed and characterized earlier jurisprudence on the Bill of Attainder Clause.[282] The *Nixon* decision noted that "[m]andatory forfeiture of a job or office [has] long [been] deemed to be punishment within the contemplation of the Bill of Attainder Clause."[283]

Legislation removing an incapacitated Vice President from his position outright could be seen as a "mandatory forfeiture" of his "job or office."[284] Therefore, it might satisfy the key element of bill of attainder analysis, that the action constitutes punishment. For this reason, dicta counsel strongly in favor of a statutory transferal of the Vice President's powers and duties, as promoted in this Article, rather than outright removal from office. It is also consistent with the Twenty-Fifth Amendment which provides that the President does not lose his office when incapacitated; he simply has his powers and duties transferred from him. With the transferal mechanism, the Vice President is not losing his position, only being sidelined until he becomes able to carry out his constitutional responsibilities again. The Speaker would not displace the Vice President, she would only substitute for him regarding his constitutional responsibilities as to succession and inability

279. U.S. CONST. art I, § 9, cl. 3.

280. United States v. Brown, 381 U.S. 437, 448-49 (1965); *see also* United States v. Lovett, 328 U.S. 303, 315 (1946); *Bill of Attainder*, BLACK'S LAW DICTIONARY (11th ed. 2019).

281. *See* 433 U.S. 425, 431-32, 468 (1977).

282. *See id.* at 469-71, 473-78.

283. *Nixon*, 433 U.S. at 469. The Supreme Court in *Cummings v. Missouri* sounded the same themes as in *Nixon*, that being forced from one's job may be considered a punishment. *See* 71 U.S. (4 Wall.) 277, 317, 320, 327 (1866).

284. *Nixon*, 433 U.S. at 469. It could also be seen to violate the Impeachment Clause of Article II. *Cf.* Bowsher v. Synar, 478 U.S. 714, 726-27 (1986).

determination. The President pro tempore would preside over the Senate for him which is the norm in the modern era anyway. Upon regaining his capacity, the Vice President would regain his powers and duties. And all this time the Vice President would still retain his title and full pay and benefits.

It also bears noting that, despite the concerns raised by the Court in *Nixon*, it held *against* the former President in his challenge.[285] The Court placed greater emphasis on the needs of the public.[286] Such a rationale would have clear application in the case of an incapacitated Vice President suing to reclaim his powers and duties as the continuity of the executive branch would have been the animating reason for the legislation.[287]

In *United States v. Lovett*, the Supreme Court considered whether an appropriations bill zeroing out salaries for a handful of federal workers satisfied the punishment test and constituted a bill of attainder.[288] The Court decided in the affirmative, pronouncing that the appropriations provision "'operate[d] as a legislative decree of perpetual exclusion' from a chosen vocation."[289] The Court had little trouble concluding that "[t]his permanent proscription from any opportunity to serve the Government is punishment."[290] Accordingly, the Court struck down the measure as an unconstitutional bill of attainder.[291] Other Supreme Court decisions have followed similar reasoning.[292] This reflects yet again why the post hoc legislation advocated in this Article addresses only the transfer of powers and duties, ensuring the measure could not constitute removal and be deemed a "permanent prescription."[293]

Thus, while Supreme Court case law demonstrates that legislation *removing* someone from office outright might constitute a punishment

285. *See Nixon*, 433 U.S. at 484.

286. *See id.* at 452-54, 458-59, 462, 465, 477-79.

287. In reaching its decision, the Court in *Nixon* also placed some importance on the "imminent danger that" some of Nixon's materials could be destroyed. *Id.* at 472. This exigency factor would obviously be a primary consideration in adoption of vice presidential inability legislation under the circumstances envisioned in this Article. The Court in *Nixon* also put stock in the fact that the committee reports accompanying the legislation at issue "cast no aspersions on [Nixon's] personal conduct and contain[ed] no condemnation of his behavior as meriting the infliction of punishment." *Id.* at 479. These passages could additionally be used to defend a post hoc vice presidential inability statute because, as was the case in *Nixon*, Congress would not be condemning the officeholder's behavior.

288. *See* 328 U.S. 303, 316 (1946).

289. *Id.* at 316.

290. *Id.*

291. *See id.* at 316-18.

292. *See* Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 852 (1984) ("[T]he list of punishments forbidden by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or groups in specific employments or professions.").

293. *Lovett*, 328 U.S. at 316.

amounting to an unconstitutional bill of attainder, post hoc legislation transferring powers and duties would be highly unlikely to be seen as punishment. Moreover, the needs of the public would loom heavily over such a legal challenge and tend to support the statute's constitutionality.

bb. The Ex Post Facto Clause

A legal challenge could also possibly be undertaken arguing that a post hoc statute regarding vice presidential incapacity constitutes an impermissible ex post facto law.[294] This category of proscribed laws involves the retroactive application of criminal penalties or other punishments to individuals.[295] A post hoc vice presidential inability statute, of course, would not include criminal sanctions against an incapacitated Vice President.

In *Ex parte Garland*, the Court considered the constitutionality of a prohibition against lawyers representing clients in federal court.[296] Pursuant to the statute, attorneys could only appear in federal court if they swore an oath that they had not sided with the South in the Civil War.[297] Though not a criminal sanction per se, the Court viewed this professional prohibition based on past deeds to be a penalty and consequently an unconstitutional ex post facto law.[298]

The *Garland* precedent could conceivably be analogized to a post hoc vice presidential inability statute. In such a context, an individual would lose his official powers and duties—in theory a punishment—based on a consideration that preceded enactment of the statute (i.e., the occurrence of the inability). However, a situation involving an incapacitated Vice President would be far less harsh than the situation in *Garland*. The attorneys in *Garland* were limited in the jurisdictions in which they could practice law, no doubt restricting their ability to practice their profession and maximize their income. Under the statute advocated by this Article, however, the Vice President would be in an altogether different situation. He would be unable to exercise his powers and duties if incapacitated but could continue to draw his salary and benefits so that he would not be placed at an economic disadvantage. Moreover, *Garland* is an exception to the general rule that requires a criminal sanction before

294. *See* U.S. CONST. art. I, § 9, cl. 3.

295. *See, e.g.*, Calder v. Bull, 3 U.S. (1 Dall.) 386, 390-91 (1798); ERIKA K. LUNDER ET AL., CONG. RESEARCH SERV., R42791, CONSTITUTIONALITY OF RETROACTIVE TAX LEGISLATION 6 (2012).

296. *See* 71 U.S. 333, 335, 337 (1866); *see also* Cummings v. Missouri, 71 U.S. 277, 320, 327 (1866).

297. *See Ex parte Garland*, 71 U.S. at 374-76.

298. *See id.* at 377-78.

the Ex Post Facto Clause can be triggered.[299] Since the inability statute in no way applies punishment to the Vice President—it merely permits someone to substitute for him in his powers and duties while he is incapacitated—it is difficult to see how it could be construed as similar to a criminal statute. Therefore, the Ex Post Facto Clause would almost certainly not apply.

cc. The Due Process Clause

An additional potential challenge to an after-the-fact statute could be made on due process grounds. The Fifth Amendment to the Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[300] The Vice President's powers and duties could theoretically be seen as property—and their transfer could possibly be seen as a taking without an opportunity to be heard. For example, federal civil servants cannot be removed from their jobs without due process.[301]

Mathews v. Eldridge[302] is an important case in Due Process Clause interpretation. It involved a recipient of social security disability payments whose benefits had been discontinued.[303] In its decision, the Supreme Court detailed three concerns to be weighed in determining whether a Due Process Clause violation occurred in a civil setting.[304] The Court considered "[f]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved."[305]

In the case of the Vice President, the purported private interest would almost certainly be the office's powers and duties since he would still enjoy the vice presidential title and receive a salary and benefits.[306] It is

299. *See* LUNDER ET AL., *supra* note 295, at 6.

300. U.S. CONST. amend. V.

301. *See generally* U.S. MERIT SYSTEMS PROTECTION BD., WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT (2015) [hereinafter DUE PROCESS].

302. *See* 424 U.S. 319 (1976).

303. *See id.* at 323.

304. *See id.* at 334-35; *see also* MICHAEL J. GARCIA ET AL., CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1990-91 (2d Sess. 2017).

305. *Mathews*, 424 U.S. at 335.

306. The Court in *Mathews* noted that "a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income . . . ." *Id.* at 340. Under the statute supported by this Article, the Vice President would be receiving benefits in an uninterrupted fashion. The Court also stated that "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of

difficult to see how government powers and duties could be equated to a private interest.[307] Further, the risk of erroneous deprivation would be apt to be low. If Congress were to be sufficiently aroused to pass post hoc vice presidential incapacity legislation and the executive branch were to implement the measure, it would almost certainly be because the officeholder would in fact be incapacitated. Moreover, Congress would presumably deliberate in a public setting which would provide a check on inappropriate action. Finally, the government's interests would be profound, with the potential disruption to the operations of the presidency as the reason for the measure.

With regard specifically to Due Process Clause claims for federal government workers, the Supreme Court has concluded that if the federal employee is employed "at will," then the worker has a "property right" in his position and must be afforded due process protection.[308] That is to say, "the Constitution guarantees that if there must be cause to remove the individual from his or her job, then there is automatically a due process requirement to establish that the cause has been met."[309] Due process in this setting is typically regarded as notice and an opportunity to be heard.[310] The Court added that "the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood."[311]

Again, this set of circumstances manifestly would not apply to a Vice President under a post hoc statute. Though the Vice President is obviously an employee of the federal government, he would not be removed from office, he would have only his powers and duties transferred from him. Again, it bears repeating that he would retain his title, salary, and benefits and not be "depriv[ed] . . . of the means of livelihood." Furthermore, the Vice President is *not* a civil servant. He is a constitutional officer. As the Supreme Court has noted, "[p]roperty interests are not created by the Constitution."[312]

Finally, even if the Vice President's powers and duties were somehow seen as constituting a property interest in his office, this "property" would not be taken from him without due process of law. This

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those who are to be heard.'" *Id.* at 349 (quoting Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970)). In the case of the Vice President, the process would be appropriately tailored in that Congress would review his appeal from the decision of the President and the Cabinet.

307. *See, e.g.*, Charles Rembar, *How Much Due Process Is Due a President?*, N.Y. TIMES, July 21, 1974, at 22.

308. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985).

309. DUE PROCESS, *supra* note 301, at 11.

310. *See Loudermill*, 470 U.S. at 542, 546.

311. *Id.* at 543.

312. *Id.* at 538; *see also* Rembar, *supra* note 307; Shoup, *supra* note 9, at 75.

is because his "property" would only be removed following a formal *process* provided by statute (i.e., a presidential/Cabinet decision followed by a possible appeal to Congress with a two-thirds presumption in both houses in favor of the Vice President). Moreover, the transfer of powers and duties is not irrevocable as will be seen below in the case of impeachment.[313]

For all these reasons, post hoc legislation purporting to transfer the powers and duties of the vice presidential office would be unlikely to violate the Due Process Clause, just as it would be unlikely to transgress the Bill of Attainder and Ex Post Facto Clauses.

III. LESS DESIRABLE, YET STILL VIABLE, OPTIONS

While a post hoc statute is the preferred option, there are still three other approaches to addressing an immediate instance of vice presidential incapacity. All are viable and are in descending order of desirability: (1) letter arrangements, (2) the CGOPT, and (3) the impeachment process.

A. Letter Agreements

One possible alternative for handling vice presidential incapacity would be to use a pre-executed letter procedure along the lines of what was prepared by Vice President Dick Cheney.[314] As a preliminary matter, of course, this presupposes that there currently *is* a pre-signed letter. There has been no public indication whether former Vice President Joe Biden or Vice President Mike Pence have followed Cheney's lead[315] and there are no guarantees their successors will do so.[316] And, if there is no letter, it leads back to the same question posed at the outset of this Article: What if there is no mechanism in place? Putting that very real issue to one side for a moment, there are a host of reasons why a letter agreement *by itself* would nonetheless be viable and be the "least worst" solution that could be carried out by the Vice President *without Congress*. Nonetheless, a

313. *See infra* Part III.C.

314. *See* CHENEY MEMOIR, *supra* note 13, at 319-22. Distinguished scholars have endorsed use of letter agreements and similar contingency plans. *See* Feerick, *supra* note 7, at 19, 23-25; Goldstein, *supra* note 3, at 1033; *see also First Fordham Report*, *supra* note 7, at 31-35, 62, 84. For discussion of the CGOPT potentially being effectuated by letter arrangement, see *infra* Part III.B.3.

315. Cheney apparently intimated he was unaware if Biden had executed a letter arrangement. *See* Kmiec, *supra* note 13, at 489 n.74.

316. The Obama White House assured former Senator Birch Bayh that it had wide-ranging contingency plans in place. Bayh relayed, "I had a . . . conversation with Valerie Jarrett at the White House . . . who said I could announce . . . that the Obama Administration has a very comprehensive contingency plan." FEERICK, *supra* note 1, at 224 n.†.

unilateral vice presidential approach is not without a number of serious flaws and is less desirable than a post hoc statute.[317]

1. The Cheney Letter Model

In light of his previous health problems and experience with continuity of government matters, Cheney took the issue of vice presidential inability seriously, much more so than any of his predecessors.[318] As such, he took unilateral steps to try to address a scenario in which he might become incapacitated.[319] In his memoirs, Cheney recalled his preparation of a preemptive resignation letter:

> I took the extraordinary step of writing a letter of resignation as vice president shortly after I was sworn in. The resignation letter would be effective, as provided by federal law, upon its delivery to the secretary of state . . . . [As part of that effort,] I took out a piece of my official stationery with the words "The Vice President" written across the top. I wrote the date—March 28, 2001—and then this:
>
> *Dave Addington [Counsel to the Vice President]—You are to present the attached document to President George W. Bush if the need ever arises.*
>
> *—Richard B. Cheney*
>
> "Okay, David," . . . "I won't give specific instructions about when this letter should be triggered." . . . "But you need to understand something. This is not your decision to make. This is not [the Second Lady's] decision to make. The only thing you are to do, if I become incapacitated, is get this letter out and give it to the president. It's his decision, and his alone, whether he delivers it to the secretary of state." "Yes, sir, Mr. Vice President," David said.
>
> I did not want a situation where, should I become incapacitated and there was an effort to remove me from office, my family or my staff stood in the way. The only one who had the right to make that decision was the president . . . . And he was the only person other than Addington with whom I discussed the letter.[320]

317. If there currently is a secret letter arrangement, it might be a useful step for the administration to request that the arrangement be ratified by Congress, especially if it were to be fully carried out. This step, made out of an abundance of caution, would help bolster the legality and the legitimacy of the arrangement. *Cf.* Brownell, *supra* note 2, at 1059-63.

318. *See* PETER BAKER, DAYS OF FIRE: BUSH AND CHENEY IN THE WHITE HOUSE 97-98 (2013); BROWER, *supra* note 13, at 21; CHENEY ET AL., *supra* note 13, at 153-54; CHENEY MEMOIR, *supra* note 13, at 319-22; Rogan, *supra* note 31.

319. *See* CHENEY MEMOIR, *supra* note 13, at 319-22.

320. *Id.* at 319-22; *see* CHENEY ET AL., *supra* note 13, at 153-55; *see also* BAKER, *supra* note 318, at 97-98; BROWER, *supra* note 13, at 21-22. Bush was initially startled by the plan, but ultimately saw the wisdom of it. *See* BROWER, *supra* note 13, at 21.

a. Advantages

Cheney deserves great credit for being farsighted regarding vice presidential inability.[321] While post-Twenty-Fifth Amendment contingency plans seem to have been in place since early in the Reagan administration, prior to Cheney none appears to have directly addressed vice presidential incapacity.[322] There are several advantages to the Cheney plan. First, it has the potential to be effectuated quickly, more quickly than passing post hoc legislation or pursuing the impeachment process. Once the Vice President's incapacity becomes manifest all that needs to be done is for the staffer to hand the letter over to the President who can then relay it to the Secretary of State. Upon receipt of the letter, the Vice President has resigned, the office is vacant, and there is no longer an incapacitated Vice President. In theory, the process could be executed swiftly. Thus, the Cheney approach would solve the problem of an incapacitated Vice President potentially becoming President.[323]

Second, unlike the CGOPT,[324] the Cheney model has the practical benefit of not involving the Speaker in the inability-determination process. This eliminates the potential for a partisan rival determining the Vice President's capacity.[325]

Finally, the Cheney approach may also have some advantages in litigation. By drafting and pre-signing the letter of resignation himself, the Vice President would make it more difficult for future litigants—be they the Vice President himself, his family, or his staff—to claim injury. The simple response to a former Vice President suing to get his job back would be that he wrote and signed the letter himself. The Cheney-letter model, therefore, offers a number of important points in its favor.

321. *See, e.g.*, RONAN, *supra* note 3, at 157; *see also* GOLDSTEIN, *supra* note 42, at 263; Feerick, *supra* note 7, at 24.

322. *See* Brownell, *supra* note 2, at 1043-45. The Reagan and Clinton contingency binders made note of several contingency scenarios but not expressly the case of a healthy President and an incapacitated Vice President. *See* Clinton Contingency Plan, *supra* note 13; Reagan Contingency Plan, *supra* note 13. That is presumably why Cheney took the unilateral step of writing a resignation letter. *See supra* note 44.

323. *See* Clinton Contingency Plan, *supra* note 13; Reagan Contingency Plan, *supra* note 13. For other scenarios covered by the contingency plans, *see infra* note 325.

324. *See infra* Part III.B.2.

325. Under the Reagan and Clinton contingency plans, the Speaker was poised to take the Vice President's place in helping the Cabinet determine presidential inability if: (1) both the President and Vice President were de facto incapacitated; (2) the President was de facto incapacitated and the Vice President died; (3) the President was de facto incapacitated and then the Acting President became de facto incapacitated; and (4) the President was de facto incapacitated and then the Acting President died. *See* Clinton Contingency Plan, *supra* note 13; Reagan Contingency Plan, *supra* note 13. These scenarios are distinct from that discussed in this Article. *See supra* note 44; *see also supra* note 322.

b. Disadvantages

At the same time, there are simply inherent limitations with vice presidents taking unilateral steps to address their own incapacity much as there were for presidents reaching agreements with vice presidents prior to the Twenty-Fifth Amendment.[326]

i. Constitutional Concerns with the Cheney Approach

First, without more, letter agreements are likely without legal force or effect.[327] Prior to the ratification of the Twenty-Fifth Amendment, presidents and vice presidents executed letter agreements in case the President became incapacitated.[328] President Dwight D. Eisenhower was the first to adopt such an approach when he signed a letter agreement with Vice President Richard Nixon.[329] Nixon, however, viewed his letter agreement with Eisenhower as being morally but not legally binding on the parties in question.[330] Nixon wrote that the "letter established historical precedent" but reflected "mere expressions of a President's desires, [and did] not have the force of law."[331] Speaker of the House John McCormack, who had a comparable agreement with President Lyndon B. Johnson following President John F. Kennedy's assassination, felt the same way: Our "[written agreement was] outside the law. It [was] an agreement between individuals."[332] Other authorities agree.[333]

In the case of the Cheney letter, the problems are essentially the same: Under what legal authority did he act and are the vice presidential staffer and President bound to do as the Vice President instructed? The text of the Constitution is silent on such matters.[334] While the absence of express constitutional authorization is certainly not dispositive, it

326. *See* RONAN, *supra* note 3, at 156-57, 165; *Second Fordham Report*, *supra* note 7, at 969.

327. *See* Feerick, *supra* note 4, at 922; *Second Fordham Report*, *supra* note 7, at 969; *cf.* RONAN, *supra* note 3, at 157.

328. *See, e.g.*, Brownell, *supra* note 2, at 1039-43; Stephen W. Stathis, *Presidential Disability Agreements Prior to the 25th Amendment*, 12 PRESIDENTIAL STUD. Q. 208, 209-12 (1982).

329. *See, e.g.*, Brownell, *supra* note 2, at 1039.

330. *See, e.g.*, *id.*

331. RICHARD M. NIXON, SIX CRISES 179-80 (1962).

332. FEERICK, *supra* note 1, at 100 (quoting Speaker of the House John McCormack).

333. *See* PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT, S. REP. NO. 89-66, at 7 (1965); 111 CONG. REC. 3285 (1965) (statement of Sen. Hruska); *id.* at 7937 (statement of Rep. Celler); Feerick, *supra* note 4, at 922; Robert E. Gilbert, *Editor's Introduction*, *in* MANAGING CRISIS, *supra* note 13, at xi, xiv; Nelson, *supra* note 7, at 87; *cf.* RONAN, *supra* note 3, at 57, 156-57. For more on pre-Twenty-Fifth Amendment agreements, see Stathis, *supra* note 328, at 209-12.

334. *See generally* U.S. CONST. art. I, II; *id.* amend. XXV.

underscores the need for any future letters to at least cite their legal basis.[335]

Still, an argument could be put forward that vice presidential letter arrangements, prepared and made ready for use by multiple administrations, might acquire a constitutional status over time.[336] Certainly, in the realm of separation of powers, there have been a number of practices which began well after the formative years of the Constitution that the courts later recognized as constitutional doctrine.[337] However, if vice presidential letter agreements currently exist, the secret nature of these contingency arrangements complicates this argument.

Justice Felix Frankfurter, in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[338] famously observed that:

> [A] systemic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[339]

This formulation, which has been used as a guide for determining the constitutionality of longstanding political custom,[340] would seem *not* to apply to a secret vice presidential incapacity letter, however. This is because such a procedure would not have been "long pursued to the knowledge of the Congress and never before questioned . . . ."[341] If such an agreement is currently in place, it is confidential.[342] Perhaps some in Congress have been briefed on these plans (possibly the Speaker and the President pro tempore) but certainly not Congress as a whole or, by extension, the public.[343] In the case of Vice President Cheney, he only

335. *Cf.* RONAN, *supra* note 3, at 157.

336. *See* Kennedy Legal Opinion, *supra* note 72, at 94; Goldstein, *supra* note 31, at 71-72; Goldstein, *supra* note 40, at 189, 212 n.81; Bruce Ackerman, *Take Your Paws off the Presidency!*, SLATE (July 15, 2008, 3:35 PM), http:www.slate.com/articles/news_andpolitics/jurisprudence/2008/07/take_your_paws_off_the_presidency.html; *see also* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412, 415, 445-46, 455, 460, 484 (2012). The Author has benefited greatly from conversations with Professor Joel Goldstein on this subject.

337. *See supra* note 148.

338. *See* 343 U.S. 579 (1952).

339. *Id.* at 610-11 (Frankfurter, J., concurring).

340. *See, e.g.*, NLRB v. Canning, 573 U.S. 513, 525 (2014); Medellin v. Texas, 552 U.S. 491, 530-31 (2008); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); *see also* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1337 (2016) (Roberts, C.J., dissenting).

341. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

342. *See First Fordham Report*, *supra* note 7, at 26-27.

343. *See* CHENEY MEMOIR, *supra* note 13, at 321-22. For more on the secret nature of

informed his legal counsel and the President of his pre-signed resignation letter. The fact that the existence and content of pre-Twenty-Fifth Amendment letters were made public near the time of their execution would seem to inform how the "pursued to the knowledge of Congress" formulation should be interpreted in the context of executive inability.[344] How could Congress sanction or "never before question[]" something of which it has no knowledge (or, at best, very little)?[345]

The Supreme Court has frequently emphasized the importance of notice in political-branch disputes over the constitutionality of executive branch practice. For instance, in *Dames & Moore v. Regan*,[346] the Court reasoned that "[p]ast practice does not, by itself, create power, but 'long-continued practice, *known to and acquiesced in by Congress*, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'"[347] Given the judiciary's reasoning in this decision and others,[348] a key plank in Justice Frankfurter's formulation in

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contingency plans, see GRAFF, *supra* note 156, at 317, 371-72, 375-76, 384-86; William M. Arkin & Robert Windrem, *Secrets of 9/11: New Details of Chaos, Nukes Emerge*, NBC NEWS (Sept. 11, 2016, 5:00 AM), https://www.nbcnews.com/storyline/9-11-new-details-chaos-nukes-emerge-n645711; *see generally* HOMELAND SEC. COUNCIL, NATIONAL CONTINUITY POLICY IMPLEMENTATION PLAN (2007); Ackerman, *supra* note 336. The details of contingency plans for the Reagan, Bush, and Clinton presidencies were not fully revealed until 2017. *See* Brownell, *supra* note 2, at 1043-45; *see generally* Memorandum from the Office of the Counsel to the President, Contingency Plans—Death or Disability of the President (Mar. 16, 1993), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials (last accessed Jan. 25, 2020).

344. *See, e.g.*, Stathis, *supra* note 328, at 209-12, 214 nn.16-27; Edwin L. Dale, Jr., *Eisenhower Disability Pact Calls for 'Acting President': Terms of the Agreement Made Public—Nixon Would Take Over Duties Until President Had Recovered*, N.Y. TIMES, Mar. 4, 1958, at 1; *Disability Text*, N.Y. TIMES, Nov. 14, 1966, at 26; *Johnson Provides for a Disability: Agrees with McCormack on Temporary Succession*, N.Y. TIMES, Dec. 6, 1963, at 1; Joseph A. Loftus, *Kennedy Provides That Johnson Will Act If He Is Incapacitated*, N.Y. TIMES, Aug. 11, 1961, at 1; Charles Mohr, *Johnson Reaches Disability Accord*, N.Y. TIMES, Jan. 28, 1965, at 3; *Text of the Kennedy-Johnson Accord on Succession*, N.Y. TIMES, Dec. 6, 1963, at 19. The Kennedy-Johnson agreement noted that "[p]rior to the Eisenhower-Nixon arrangement, there were no similar understandings of a public nature." *Text of the Kennedy-Johnson Accord on Succession*, N.Y. TIMES, Dec. 6, 1963, at 19; *cf.* PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT, *supra* note 333, at 2 ("It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country.").

345. *See, e.g.*, MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 112-13 (2008); Glennon, *supra* note 148, at 135-37; *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1499-1500 (2010) ("[S]pecial precedential force of prior opinions in th[e] area [of executive power] also requires disclosure, especially to Congress. . . . Assertions of executive power that are kept secret from Congress constitute evasions of [the] checking mechanism, and for that reason cannot claim special precedential weight. . . . [The] theory of [congressional] acquiescence obviously requires notice.").

346. *See* 453 U.S. 654 (1981).

347. *Id.* at 686 (emphasis added) (quoting United States v. Midwest Oil, 236 U.S. 459, 474 (1915)).

348. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 299 (1981); *Midwest Oil*, 236 U.S. at 474, 481;

Youngstown—congressional knowledge—would seem inapplicable in the case of vice presidential letter arrangements or contingency plans. Since the congressional notice requirement is not satisfied, the case that a letter or contingency plan would achieve the status of a constitutional gloss on executive power due solely to past practice is made more difficult. This is a problem that is easily solvable, however. Vice presidents could simply make their letters known to the public when they pre-execute them as did Presidents Eisenhower, Kennedy, and Johnson or, at least, do so after they leave office as did Cheney.[349]

Moreover, it is uncertain whether vice presidential letter arrangements or contingency plans actually do constitute a "systematic, unbroken executive practice."[350] The initial burst of letter arrangements under Presidents Eisenhower, Kennedy, and Johnson did not address vice presidential incapacity. Further, the practice of public letter arrangements ended abruptly with the adoption of the Twenty-Fifth Amendment. Therefore, these precedents would not seem to qualify as being part of longstanding practice regarding vice presidential incapacity plans. While it is not entirely clear when confidential arrangements about succession and inability began to be crafted after the Twenty-Fifth Amendment,[351] the Reagan administration apparently was the first to implement such plans.[352] And it seems there had been no plan in place specifically addressing vice presidential inability until Cheney's tenure.[353] Indeed, it is uncertain if Cheney's model has been followed. Based on what has been made public—going back only to the Clinton administration as plans of the George W. Bush, Obama and Trump presidencies are still confidential—there does not appear to be a constitutional practice that has developed regarding vice presidential incapacity. Though not fatal, this undercuts another potential prong of support for the constitutionality of the letter approach.

Glennon, *supra* note 148, at 135-37; *see also* Morrison, *supra* note 345, at 1499-501.

349. Making the letter public might also deter the President from improperly threatening the Vice President with execution of his pre-signed resignation letter.

350. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Indeed, it has been maintained that "[t]he history of the [Twenty-Fifth] Amendment indicates that its framers intended to create a mechanism that would supersede those prior [letter arrangement] strategies." *Miller Center Report*, *supra* note 236.

351. *See* Memorandum from Bobbie Greene Kilberg, Assoc. Counsel, Office of White House Counsel, to President Ford 4 (Aug. 21, 1975), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_executive_materials (writing in 1975 that "[s]ince the ratification of the 25th Amendment, there is no record of written agreements between a President and a Vice President."); *see also* FEERICK, *supra* note 1, at 344.

352. *See* Brownell, *supra* note 2, at 1043-45.

353. *See generally* CHENEY ET AL., *supra* note 13, at 153-55; Clinton Contingency Plans, *supra* note 13; Reagan Contingency Plans, *supra* note 13.

Second, the pre-execution of a resignation letter could be seen to run afoul of the constitutional principle that the President cannot remove the Vice President from office.[354] The Vice President is chosen by the American people through the Electoral College.[355] Because of the Vice President's tie to the electorate, he can only be removed through the impeachment process in Congress, which includes a two-thirds supermajority threshold in the Senate.[356] In the letter scenario outlined by Cheney, the President was tasked with making the legally operative decision about whether to remove the Vice President—that is, delivery of the letter to the Secretary of State.[357] Cheney was very clear on this point to Addington.[358] He stated that "[t]he only one who had the right to make that [vice presidential removal] decision [is] the president of the United States" and that "it's [the President's] decision, and his alone, whether he delivers it to the secretary of state."[359] Because the Constitution precludes the President from removing the Vice President from office and because the President is given the authority through the Cheney letter to make the operative decision about whether to remove the Vice President—in apparent contradiction to that legal principle—this delegation is potentially problematic from a constitutional standpoint.[360]

Third, the Cheney procedure potentially conflicts with federal law, which requires that the Vice President's resignation be submitted to the Secretary of State. It will be recalled that federal law provides that:

> The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or

354. *See supra* note 38; *see also* Roy E. Brownell II, *The Independence of the Vice Presidency*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 297, 305-11 (2014); *cf.* RONAN, *supra* note 3, at 166.

355. *See* U.S. CONST. art. XII.

356. *See id.* art. I, § 3, cl. 6. No other constitutional officer may be unilaterally removed by another. Removal of constitutional officers requires a two-thirds, supermajority vote in at least one house of Congress. This is manifested in the two-thirds threshold for expulsion of lawmakers in their respective chambers and the majority requirement in the House coupled with the two-thirds threshold in the Senate for removal of executive branch officials and federal judges through the impeachment process.

357. *See* CHENEY MEMOIR, *supra* note 13, at 321.

358. *See id.* at 321-22.

359. *Id.*

360. *See supra* note 38. It could be countered that the Vice President is acting voluntarily in providing the letter. But, unlike Fifth Amendment rights which can be waived by individuals, the constitutional prohibition against the President firing the Vice President is institutional and not personal in nature. Such an action undoes the will of the electorate, reflecting that much more is at stake than the personal fortunes of the immediate officeholder.

The question could also be looked at from a different separation-of-powers perspective: Could the President lawfully remove the Senate's presiding officer? That would be the effect of the President executing such a letter agreement.

> resigning, as the case may be, and delivered into the office of the Secretary of State.[361]

If the President is essentially given the authority to dismiss the Vice President by submitting a vice presidential resignation letter at the chief executive's discretion (as opposed to someone submitting a resignation letter ministerially pursuant to the Vice President's immediate direction as occurred with Spiro Agnew),[362] that could contradict the spirit, if not the letter, of the statute.[363] After all, a resignation is a voluntary act made by the individual resigning. Being removed from office reflects a decision made by another. Through the letter, the Vice President would be transferring the actual decision-making authority from himself to the President. As Cheney made clear to Addington, the President should have the ultimate discretion over whether and when the letter should be given to the Secretary.[364] The effect of this option therefore is that the Vice President is taking a decision that is his by statute and outsourcing it, at least in part, to the President.[365]

Fourth, there is the potential problem of a Vice President becoming compromised in the performance of his section 4 duties with a President holding or potentially holding his pre-signed resignation letter. The Vice President's independence is central to the integrity of the section 4 process.[366] If the President has the power to fire the Vice President, that could undermine the independence of the Vice President to make a proper decision as to the President's capacity.[367] The members of the President's

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361. 3 U.S.C. § 20 (2018).

362. *See* RICHARD M. COHEN & JULES WITCOVER, A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW 341-42 (1974); *see also* Rogan, *supra* note 31.

363. *See Second Fordham Report*, *supra* note 7, at 969; *see also* Rogan, *supra* note 31.

364. *See* CHENEY MEMOIR, *supra* note 13, at 321; *Second Fordham Report*, *supra* note 7, at 969.

365. As noted, the Constitution provides only one explicit means of government actors removing a Vice President: through the congressional impeachment process, a mechanism in which the President plays no role. The President's significant role in the Vice President's resignation therefore could be seen to be in some tension with the impeachment process as well.

366. *See* Brownell, *supra* note 354, at 308-10.

367. It could be contended that, were the Cheney model to be reinstituted, it would make this scenario unlikely because the Cheney approach involved a vice presidential staffer being in possession of the pre-signed resignation letter. *See supra* note 320 and accompanying text. In theory, a vice presidential staffer could provide a check on presidential mischief in that the staffer would have to make the initial decision as to whether to turn the letter over to the chief executive. *Cf. infra* notes 378-79 and accompanying text. However, Cheney's instructions to Addington were clear that Bush was to be the decisionmaker, not Addington. *See supra* note 320 and accompanying text. If the President had instructed Addington to hand over the letter and he refused, Addington would likely have been violating Cheney's instructions. And, of course, all of this shines a light on the reality that the Vice President's instructions may not be legally binding on the staffer and the President. *Cf.* RONAN, *supra* note 3, at 157. Further complicating matters in the case of Addington was that he was not only a vice presidential staffer, he later became dual-hatted as an Assistant to the President. That

Cabinet who share in this section 4 power lack insulation from the President's removal power, making the Vice President's independence all the more important to maintaining the proper operation of that part of the Twenty-Fifth Amendment. One could well imagine an objectively healthy Vice President triggering the section 4 mechanism against a mentally unstable President. The mentally ill President could respond by asserting that the Vice President is the one who is deranged and then cashier the Vice President by sending his pre-signed letter to the Secretary of State. Until confirmation of a new Vice President, this could mean that *no* inability proceedings could proceed against the President.[368] Thus, the entire section 4 process could be compromised by such a letter.

ii. Legitimacy and Practicality Concerns

With respect to political legitimacy, confidential vice presidential letter arrangements or contingency plans are on even shakier ground than purely legal considerations.[369] In past situations involving presidential succession or inability, rumors and conspiracy theories swirled with great

would have made it even more difficult for him to resist presidential pressure to turn over the letter.

If future vice presidents follow the Cheney model, one could imagine other scenarios in which the President could possibly use the letter to his advantage. For instance, the vice presidential staffer might legitimately believe the Vice President to be incapacitated and give the letter to the President. The President could hold the letter, perhaps initially out of an abundance of caution, and then keep it after the Vice President's inability had been removed. In this manner, the President might hold onto the letter as an insurance policy (e.g., to encourage loyalty). Another possibility might present itself if a future Vice President decided to give the letter to more than one individual. *See infra* note 378 (providing reasons why there should be more than one copy of the resignation letter). Perhaps a White House staffer or the President himself would receive a copy. In such a scenario, the letter might be available for the President to wield inappropriately. The Author would like to thank Professor Joel Goldstein for his thoughts on this subject.

368. Such a step, of course, could prompt impeachment proceedings against the President for many of the same pragmatic reasons that impeachment could be used against an incapacitated Vice President. *See infra* Part III.C. In the absence of a Vice President, the Reagan and Clinton contingency plans would have the Speaker stepping in for the Vice President to help determine the President's inability. But, if the President took the drastic step of forcing the Vice President's resignation, he might presumably feel free to disregard the contingency plans of his own White House Counsel's office, especially if the Speaker hailed from the opposite party. *See, e.g.*, Clinton Contingency Plan, *supra* note 13; Reagan Contingency Plan, *supra* note 13.

369. *Cf.* PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT, *supra* note 333, at 2; STEPHEN E. AMBROSE, NIXON: THE EDUCATION OF A POLITICIAN, 1913-1962, at 453-54 (1987) ("Eisenhower intended to keep his agreement with Nixon a secret. . . . But the Presidency cannot be handed over in secret."); Memorandum from Frank Wiggins to Mike Berman, Counsel to Vice President Walter Mondale 4-5 (on file with the George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, Folder ID No. 1823-005) (articulating the importance of reassuring the American people in an inability scenario by making such agreements public ahead of time); Memorandum from Robert Torricelli, Assoc. Counsel to the Vice President, to Mike Berman, Counsel to the Vice President 4-5 (Mar. 21, 1978) (on file with the George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, Folder ID No. 1823-005) (same).

intensity.[370] In the age of the internet, social media, "fake news," and twenty-four-hour cable networks, a secret vice presidential resignation letter could very easily cause legitimacy problems, especially if the next person in the line of succession were from the opposite party (i.e., the Speaker or President pro tempore).[371] As noted, this problem could be easily solved by making the letter public (as well as the other executive branch contingency plans for that matter). Though he did not announce the letter during his time in office, Cheney did make it public two years after leaving the vice presidency and ten years after its formulation.

A secret letter arrangement, such as Cheney's, carries with it a number of other practical concerns. One is that Cheney's approach lacks flexibility and is irrevocable. Assuming arguendo that the letter procedure is legally binding, once it had been executed it would be final. The letter process also does not take into account the possibility that the Vice President's incapacity might prove temporary. For example, the Vice President might recover his health, be released by kidnappers, or reestablish communication with the government. In these instances, short of being elected to office all over again or being nominated and confirmed under section 2 of the Twenty-Fifth Amendment—both lengthy undertakings with no guarantee of success—a Vice President who has resigned from office (or been removed by the President) but regained his capacity could not return to office. This is not the case with the statute proposed in this Article in which the Vice President's powers and duties are transferred to the next in the line of succession pending resumption of his capacity.

An additional practical issue is that the Cheney letter was given to and held by a vice presidential staffer.[372] As such, the Vice President's staffer was put in the "unenviable position" of possibly making the initial inability determination regarding the Vice President.[373] Despite Cheney's instructions that the President would have to make the decision as to the

370. *See, e.g.*, Feerick, *supra* note 4, at 922; Joel K. Goldstein, *Vice-Presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, POL. & LIFE SCI., Fall 2014, at 37, 43 (2014); *cf.* William F. Baker & Beth A. FitzPatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need for Reform*, 79 FORDHAM L. REV. 835, 841 (2010).

371. *See, e.g.*, Goldstein, *supra* note 3, at 1028-29; *cf.* KALT, *supra* note 16, at 181. Indeed, concern over the legitimacy of elected presidents has become an unfortunate trend in recent years. *See, e.g.*, David A. Graham, *What Happens When a President is Declared Illegitimate?*, THE ATLANTIC (Jan. 18, 2017), https://www.theatlantic.com/politics/archive/2017/01/what-happens-when-a-president-is-declared-illegitimate/513473; Andrés Martinez, *Americans Have Seen the Last Four Presidents as Illegitimate. Here's Why*, WASH. POST (Jan. 20, 2017, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2017/01/20/americans-have-seen-the-last-four-presidents-as-illegitimate-heres-why.

372. *See* RONAN, *supra* note 3, at 157.

373. *See id.*

Vice President's inability, the Vice President also instructed Addington to take action "*if* the need ever arises."[374] Unless the incapacity were absolutely manifest, the "if" condition would likely have meant that Addington would have had at least some discretion in the matter.[375] It also assumes that the staffer would even have been aware of the inability.[376] That might not be the case.[377] For example, the staffer could be away on vacation when the de facto incapacity occurs.[378]

Furthermore, it is possible the staffer could refuse to hand over the letter to the President, underscoring the question of whether the letter procedure would be legally binding. A staffer who works solely for the Vice President might defy the President or delay carrying out presidential wishes (as he might not be subject to presidential removal). Given that the vice presidential staffer's livelihood and that of his fellow vice presidential employees may depend on the Vice President remaining in office, turning over the resignation letter could be a difficult decision to make.

More broadly, having a staffer—someone not elected nor subject to Senate advice and consent—making an initial decision of this magnitude all by himself is unsettling from the standpoint of democratic norms.[379] By contrast, in the case of determining vice presidential inability under the statute proposed in this Article, the democratically-elected President and Senate-confirmed Cabinet secretaries would make the initial decision with the democratically-elected members of Congress having the final say in the case of a dispute, the latter part of the process in full public view.

Vice President Cheney should be commended for being the first Vice President to take vice presidential incapacity seriously. If his approach has been followed by his successors, future vice presidents should make such letters public as has Cheney; this would help the cause they are trying to advance by bolstering the legality of the letter practice and enhancing its legitimacy. Either way, a letter arrangement reflects about the best that can be done by the Vice President alone and as a result it constitutes a viable, albeit imperfect, option.

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374. *Id.* (emphasis added).

375. *See id.*

376. *See* Rogan, *supra* note 31.

377. *See id.*

378. *See id.* Another important question is what if the staffer became incapacitated simultaneously with the President and Vice President? The Author would like to thank Louis Fisher for noting this concern.

Addington's home burned down while he was in possession of the Cheney letter; it was one of only a handful of objects he was able to salvage. *See* CHENEY MEMOIR, *supra* note 13, at 322.

379. *See* RONAN, *supra* note 3, at 157; *Second Fordham Report*, *supra* note 7, at 970.

Nonetheless, a post hoc legislative approach reflects a preferable option. First, it provides a less problematic legal basis. Unlike with a letter, the statutory approach prompts no concerns about the President firing the Vice President. Nor would it compromise the Vice President's role in the section 4 procedure. And it would not involve the President and Vice President possibly acting contrary to the spirit of the resignation statute. In addition, the mechanics of a statutory approach would be legally binding which is much less certain with a letter arrangement. Second, as a public law, a statute offers greater legitimacy than a secret letter agreement. A post hoc statute would be debated openly in Congress and be adopted through the regular lawmaking process. Moreover, the statute would ensure that the inability determination process is conducted by publicly-accountable actors (i.e., the President, the Cabinet, and Congress). This is in contrast to a letter arrangement which includes only a staffer participating in the initial determination followed by a presidential decision. This entire process could very easily take place behind closed doors. Finally, a post hoc statute is a more flexible approach. While the letter arrangement would result in the Vice President's irrevocable resignation, the post hoc statute would provide a means for the Vice President to regain his powers and duties.

B. The Contingent Grant of Power Theory: Action Taken by the Next in the Line of Succession

A third approach could be taken according to the CGOPT.[380] This concept derives from pre-Twenty-Fifth Amendment debates over presidential inability.[381] Its most compelling advocate was Professor Ruth Silva, who argued that the individual receiving a grant of contingent authority should be the one to determine when and under what circumstances to exercise that authority.[382] In the context of presidential incapacity prior to the Twenty-Fifth Amendment, it meant that the Vice President ultimately was the official who had the authority to decide whether the chief executive was unable to perform his duties since the

380. *See* Feerick, *supra* note 7, at 20-21; Feerick, *supra* note 4, at 938, 940-42.

381. *See* Feerick, *supra* note 7, at 913-14; Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 433 (Butler).

382. *See* SILVA, *supra* note 54, at 55, 100-02; *see also* Brownell, *supra* note 69, at 204. The primary judicial support for this argument derives from *Martin v. Mott*. *See* 25 U.S. (12 Wheat.) 19, 31-32 (1827) ("Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. . . . It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse."); *see also* SILVA, *supra* note 54, at 101-02; Feerick, *supra* note 7, at 21.

Vice President was implicitly assigned by the Constitution a contingent grant of power as presidential successor.[383]

This theory could be applied in different ways in the context of vice presidential incapacity. One would be for the next in the line of presidential succession to simply take action on her own.[384] Still another would be through a letter arrangement or contingency plan, perhaps not unlike President Johnson's letter agreement with Speaker McCormack.[385] Under the CGOPT and existing law, the Speaker of the House would make the decision regarding the Vice President's incapacity.[386] The authority for the Speaker taking action under the CGOPT would be implicitly derived from the Original Inability Clause and the 1947 presidential succession

383. *See* SILVA, *supra* note 54, at 55, 100-02.

384. The theory could also be effectuated pursuant to statute. *See infra* note 412; Part III.B.3. An additional variation of the CGOPT could conceivably be applied with respect to the President pro tempore. Under the original Constitution, the Vice President's only constitutional responsibility was to preside over the Senate. The Vice President's failure to appear in the Senate meant for a century that the Senate needed to elect a President pro tempore who would then take the Vice President's place as presiding officer. *See, e.g.*, MCCONNELL & BROWNELL, *supra* note 35, at 45. In this capacity, the President pro tempore was the successor to the Vice President. Perhaps, given his role as constitutional successor to the Vice President in his Senate capacity, the President pro tempore could determine whether the Vice President is incapacitated. This argument could be bolstered by the constitutional bond the Vice President enjoys with the Senate as well as the President pro tempore's place immediately following the Speaker in the line of succession. For the Senate's tacit, if uneven, treatment of the President pro tempore as "Acting Vice President," see *id.* at 55-58.

However, there are serious shortcomings to the argument. First, it would be based on an obsolete model of the vice presidency. The President pro tempore is the successor to the vice presidency only in his capacity as President of the Senate, while the modern Vice President is much more of an executive branch personage. *See* GOLDSTEIN, *supra* note 42, at 20-24; Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers: Part II: Political Branch Interpretation and Counterarguments*, 24 KAN. J.L. & PUB. POL'Y 294 (2015); Goldstein, *supra* note 14, at 530-33; Memorandum from William R. Tansill, Gov't Div., Legislative Reference Serv., Library of Cong. (June 27, 1955) (on file with author).

Second, this interpretation in a sense would require that federal officials informally rewrite the 1947 Presidential Succession Act by skipping over the Speaker. By statute, if the President and Vice President are out of office or incapacitated, it is the Speaker—not the President pro tempore—who succeeds to the presidency. If the President pro tempore became in effect the Acting Vice President, presumably he would become Acting President if the President died, resigned, was removed, or became unable to fulfill his duties.

Finally, this concept leads to a legal conundrum. If the President pro tempore is seen as having sole constitutional authority to determine vice presidential inability under a variation of the CGOPT, that would mean a single member of Congress enjoys the same or perhaps greater power than all of Congress. *Cf.* SILVA, *supra* note 54, at 23 n.46; Manning, *supra* note 35, at 148-49. For these reasons, the view that the President pro tempore can decide vice presidential incapacity faces serious obstacles. A fruitful discussion with Brian Kalt prompted this hypothetical.

385. *See, e.g.*, Feerick, *supra* note 7, at 15-16, 23-25, 34; *cf. First Fordham Report*, *supra* note 7, at 30-34. For a model letter arrangement, see Feerick, *supra* note 7, at 34. For consideration of the CGOPT combined with a letter arrangement see *infra* Part III.B.3.

386. For questions about the constitutionality of legislative succession, see *supra* note 89.

statute, not the Twenty-Fifth Amendment.[387] Thus, the Speaker of the House would have the discretion to determine if the Vice President is incapacitated, and once that decision is made, the Speaker would simply fill in for the Vice President in his succession and inability determination functions.[388]

1. Advantages

The primary advantage of applying the CGOPT to a vice presidential incapacity scenario is that it theoretically has the potential to be effectuated quickly, indeed possibly more quickly than a post hoc statute and possibly as quickly as a resignation letter. The Speaker could conceivably arrive at a determination in fairly short order. Thereafter the Speaker's office might hold a public ceremony—presumably with the President or with his blessing—announcing that she would be assuming the succession and inability determination duties of the Vice President until such time as the Vice President regained capacity. In this regard, the CGOPT would appear to have an important practical benefit. Yet, as will be seen, this practical advantage may prove more apparent than real.

2. Disadvantages

While it has the potential practical benefit of being executed quickly, the CGOPT faces a number of daunting challenges. First, the theory has never been applied despite past opportunities for its use. Prior to the enactment of the Twenty-Fifth Amendment, no Vice President adopted the CGOPT to determine presidential inability. During the lengthy incapacity of President James Garfield, Vice President Chester Arthur could have applied some form of this theory.[389] Similarly, during the extended incapacity of President Woodrow Wilson, Vice President Thomas Marshall could have done the same. Tellingly, neither did so.[390] In fact, to the extent that steps were taken to try to manage these instances of executive inability, they were taken by the Cabinet and by presidential

387. The framers of the Twenty-Fifth Amendment purposely chose to exclude the Speaker from assuming a role in determining the Vice President's incapacity—a role akin to the Vice President's role under section 4 with respect to the President. *See* 111 CONG. REC. 3253 (1965) (statements by Sens. Bayh and Hruska); *see also* Letter from John D. Feerick, to Richard Poff, Representative, U.S. House of Representatives 4 (Feb. 7, 1965), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1031&context=twentyfifth_amendment_correspondence; *cf.* 111 CONG. REC. 7937 (1965) (statement by Rep. Celler); *1965 House Hearings*, *supra* note 20, at 78, 85-87; FEERICK, *supra* note 1, at 57-58, 74-75, 93; Feerick, *supra* note 4, at 909 n.1, 934 n.147.

388. *Cf.* Feerick, *supra* note 7, at 20-21; Feerick, *supra* note 4, at 938-39.

389. The CGOPT was articulated at the time of President James Garfield's inability. *See* Silva, *supra* note 103, at 155.

390. *See* FEERICK, *supra* note 100, at 117-39, 162-80; SILVA, *supra* note 54, at 52-82; Goldstein, *supra* note 370, at 37-57. Vice President Nixon played no role in determining Eisenhower's inability.

confidantes, not by the Vice President.[391] Though not clearly confronted with presidential inability during their time in office, former Vice Presidents Henry Wallace and Alben Barkley both indicated that they would not have presumed on their own to determine whether the President was incapacitated.[392] Clearly, to some degree, the CGOPT lacked sufficient constitutional currency and legitimacy to be applied in a real-world setting.[393]

Moreover, while the CGOPT was embraced by three Attorneys General,[394] the validity of the theory was hotly disputed until the Twenty-Fifth Amendment was adopted.[395] Partly this was because there was no clear constitutional delegation of such authority to the Vice President at the time just as there is no clear delegation now with respect to the Speaker or other presidential successor.[396] Prior to the Amendment, some authorities maintained that the President and Vice President should jointly decide questions of presidential incapacity, some believed that Congress alone or the Vice President and Cabinet in tandem should make the determination.[397] Still, others argued that the courts should have the final say.[398] Nor were these the only options debated.[399] The bottom line is that the CGOPT was far from universally recognized.

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391. *See* SILVA, *supra* note 54, at 52-55, 60-62; Brownell, *supra* note 69, at 193-95.

392. *See* Frelinghuysen, *supra* note 101, at 148; *see also* NIXON, *supra* note 331, at 139 ("[The Constitution] does not say who shall decide when a President is disabled . . . .").

393. Concern about appearing to be overly anxious to assume the presidency was a major reason why Vice Presidents Arthur and Marshall did not try to determine presidential incapacity. *See, e.g.*, RONAN, *supra* note 3, at 18; SILVA, *supra* note 54, at 102; Goldstein, *supra* note 370, at 45; *cf.* Brownell, *supra* note 69, at 193-95. Constitutional questions over whether a Vice President had the authority to decide the question of presidential inability in the first place—as well as concerns over displacing the President for good—blended with a wariness of being seen to be usurping high office to form a significant deterrent to vice presidents taking action. *See* Kennedy Legal Opinion, *supra* note 72, at 86-87; FEERICK, *supra* note 132, at 135-38; FEERICK, *supra* note 1, at 8-10, 14-16; RONAN, *supra* note 3, at 18; SILVA, *supra* note 54, at 63-65; Brownell, *supra* note 69, at 193-95; Goldstein, *supra* note 370, at 43-50, 52. Had the Vice President's authority been crystal clear, Arthur and Marshall would still probably have been hesitant to take any action, but they certainly would have been more likely to take such steps with clear authority than without it. *See Presidential Inability and Vacancies in the Office of Vice President: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 67-68 (1965) (statement of the American Bar Association); Goldstein, *supra* note 370, at 46-47.

394. *See* Kennedy Legal Opinion, *supra* note 72, at 88-89, 94.

395. *See id.* at 89-90; FEERICK, *supra* note 1, at 49-50; Wilmerding, *supra* note 84, at 174-79.

396. *See* U.S. CONST. art. II, §1, cl. 6; 3 U.S.C. § 19(a)(1) (2018); *see also* Feerick, *supra* note 7, at 21; Feerick, *supra* note 4, at 941; *First Fordham Report*, *supra* note 7, at 34.

397. *See* FEERICK, *supra* note 1, at 49-50.

398. *See id.* at 50. For more on conflicting proposals to resolve presidential incapacity prior to the Twenty-Fifth Amendment, see *id.* at 49-50; SILVA, *supra* note 54, at 100-10; Silva, *supra* note 103, at 155.

399. *See supra* note 398.

Second, having the Speaker make the decision all by herself as to vice presidential incapacity does not sit easily alongside the structural norms of section 4 of the Twenty-Fifth Amendment.[400] It will be recalled that section 4 provides that the Vice President is to determine the President's incapacity *with the Cabinet*.[401] Then, if the President disputes the matter, the matter is referred to Congress to decide.[402] Thus, important checks and balances are built into section 4 to prevent precipitate action by a power-hungry Vice President.[403]

At the same time, Cabinet participation in the initial determination provides the Vice President with political cover.[404] To this end, it permits the Vice President to act in the public interest by doing what needs to be done regarding presidential incapacity while protecting him against charges of trying to usurp the highest office in the land.[405] In this respect, the checks and balances serve two worthy purposes: (1) deterring the overly ambitious, and (2) encouraging the overly reticent.[406]

These important formal checks and incentives would be largely missing for a Speaker applying the CGOPT in a vice presidential incapacity setting. Under the CGOPT, the Speaker would be making the decision all by herself. The Speaker's position in this regard would be all the more delicate if she hailed from a different political party from the President and Vice President, which would result in the increased likelihood of a change in partisan control of the White House.[407] (As a practical manner, it would be prudent for the Speaker to secure the President's public assent and that of the Vice President's family).

Recent relations between vice presidents and speakers of the opposite party have often been cool.[408] These practical drawbacks call into question the supposed advantage that the CGOPT would provide: expeditious action to address incapacity. These practical concerns would

400. *See* Feerick, *supra* note 7, at 21; *First Fordham Report*, *supra* note 7, at 30-31. Moreover, the Speaker, by herself, would be exercising authority that Congress as a whole presumably could not. *See supra* note 384 (discussing similar concerns if the President pro tempore were permitted to act on his own to decide vice presidential inability).

401. *See* U.S. CONST. amend XXV, § 4.

402. *See id.*

403. *See* Goldstein, *supra* note 40, at 190-95; *cf.* Feerick, *supra* note 7, at 21.

404. *See* Goldstein, *supra* note 40, at 194-95; *Second Fordham Report*, *supra* note 7, at 964; *cf.* Feerick, *supra* note 7, at 21.

405. *See* Feerick, *supra* note 7, at 21; Goldstein, *supra* note 40, at 194-95; *Second Fordham Report*, *supra* note 7, at 964.

406. *See* Goldstein, *supra* note 40, at 190-95; *Second Fordham Report*, *supra* note 7, at 964; *cf.* KALT, *supra* note 16, at 64-66; Feerick, *supra* note 7, at 21.

407. *Cf.* Goldstein, *supra* note 3, at 1028-29. Concerns over a potential partisan shift in White House control if the President and Vice President cannot serve reflect one of the many serious drawbacks of the 1947 presidential succession statute. *See, e.g.*, FEERICK, *supra* note 1, at 214, 287.

408. *See infra* note 422.

likely make a Speaker—especially one from the opposite party—cautious about taking what might be perceived as precipitate action. Certainly, vice presidents have been hesitant to fill in for de facto incapacitated presidents and they have been on the same national ticket with the President and hailed from the same party.[409] Thus, the CGOPT is less preferable than the statutory approach or a letter arrangement in large part because it entails someone from outside the executive branch and potentially outside the Vice President's party making the inability determination.

A third shortcoming of the CGOPT relates to how the Vice President could regain his powers and duties if he recovered his capacity. Prior to the Twenty-Fifth Amendment, three Attorneys General concluded that an incapacitated President could return to office simply by asserting that he had regained capacity.[410] Thus, under the CGOPT, the Vice President would presumably make the decision to return to office all by himself. Such a mechanism again lacks the formal checks and balances established under section 4 of the Twenty-Fifth Amendment with respect to a President attempting to regain his powers and duties. The Amendment provides that, if the President believes he has regained his capacity, either the Vice President or the Cabinet must agree with him or, if they do not, Congress decides the issue.[411] These checks help ensure that the President has, in reality, regained his capacity. The CGOPT would include no such assurances; a mentally deranged Vice President, for example, could simply state he is ready to return to the job and that would be the end of it (assuming the Speaker does not wind up contesting his capacity all over again).[412] Once again, the CGOPT falls short of section 4's norms.

Fourth, the CGOPT is freighted with legitimacy concerns. The Speaker would ostensibly be determining vice presidential incapacity all by herself.[413] The CGOPT counsels that, since the Speaker is next in line to the presidency, she would have the sole responsibility for determining

409. *See supra* notes 389-93 and accompanying text.

410. *See* Kennedy Legal Opinion, *supra* note 72, at 89, 91.

411. *See* U.S. CONST. amend. XXV, § 4; KALT, *supra* note 16, at 8-10; Feerick, *supra* note 7, at 17-18.

412. *Cf.* Feerick, *supra* note 7, at 20-21. Some have argued that the CGOPT could be implemented by statute. *See id.* at 19-21; Feerick, *supra* note 4, at 938-39. But if a statute were to try to resolve the issue of vice presidential inability it would make more sense simply to follow the Fordham Clinic approach and have the executive branch initiate matters on its own and thus avoid a Speaker—especially one from the opposite party—becoming involved in the initial determination.

413. *Cf.* Feerick, *supra* note 7, at 20-21. A letter arrangement could be crafted which could require or encourage the Speaker to work with the President and the Cabinet to determine vice presidential incapacity. *Cf. id.*; *First Fordham Report*, *supra* note 7, at 31-35, 62, 84. Another possibility would be a post hoc statute that retroactively confirms what the Speaker did and then provides a formal process going forward. *Cf.* Brownell, *supra* note 2, at 1055-64.

that the Vice President is incapacitated.[414] She alone could then publicly proclaim herself in effect Acting Vice President for succession and inability determination purposes. The CGOPT would therefore give the Speaker greater authority to determine incapacity than the Vice President himself exercises in a presidential inability setting.[415] And, unlike the Speaker's actions, the Vice President's role is expressly provided in the Twenty-Fifth Amendment.[416] Thus, having an individual—with an interest in the outcome—making this important decision all by herself with no means of appeal and no document to detail the process would pose serious legitimacy challenges. The post hoc statutory solution suffers from no such drawback in that it requires a presidential/Cabinet decision with the possibility of an appeal to Congress.

Thus, past practice, Twenty-Fifth Amendment norms, and a host of legitimacy and practical concerns all complicate the case for the next in the line of succession taking action based on the CGOPT alone.[417]

3. Implementing the CGOPT by Letter Arrangement

The CGOPT could also be implemented by letter arrangement. This would certainly be preferable to trying to implement the CGOPT "on the fly." For one, committing the CGOPT to writing would provide an important element of legitimacy that an ad hoc exercise of the CGOPT would lack. Second, the CGOPT in letter form would likely ensure ex ante vice presidential agreement with the notion of the Speaker determining his incapacity (or helping to determine his incapacity).[418] It could also provide a process to ensure the Speaker would work with executive branch officials such as the President and Cabinet secretaries before rendering such a decision.[419] Moreover, a CGOPT letter could provide a process by which the Vice President could regain his powers and duties,

414. *See* Feerick, *supra* note 7, at 14, 19-21.

415. *See id.* at 17, 19-21; *see also supra* note 400.

416. *See* Feerick, *supra* note 4, at 949; *see also id.* at 938-39; *First Fordham Report*, *supra* note 7, at 30-31. The Author has elsewhere argued for the Speaker to take an ostensibly similar action in a case of simultaneous presidential and vice presidential incapacity. *See* Brownell, *supra* note 2, at 1055-64. However, in that scenario, the Author calls for the Speaker to gain the agreement of the President pro tempore and the Cabinet before proclaiming herself Acting President. *See id.* Once she makes this public declaration the Author argues that she should then request that Congress validate her actions after the fact. *See id.*

417. This Article does not criticize the *outcome* reached by application of the CGOPT—the Speaker assuming the Vice President's Twenty-Fifth Amendment responsibilities. This Article criticizes the *process*. This Article maintains that such an approach should be clearly authorized by Congress and grounded in the constitutional continuity-of-government principle, the Original Inability Clause, and the Necessary and Proper Clause, not based on unilateral Speaker action under authority implicitly granted by the 1947 presidential succession statute.

418. *Cf.* Feerick, *supra* note 7, at 20-21, 34.

419. *Cf. id.*; *First Fordham Report*, *supra* note 7, at 31-35, 62, 84.

ideally subject to some checks and balances akin to those found in section 4 of the Twenty-Fifth Amendment.[420]

Nonetheless, the CGOPT in letter form still has significant practical drawbacks. Section 4 of the Twenty-Fifth Amendment is predicated on the modern notion that the President and Vice President are usually politically allied with one another.[421] That assumption is much more dubious for a Vice President and Speaker, particularly if they are of the opposite party. Indeed, the Vice President might decline to entrust the Speaker with his political future in the first place. As noted, since World War II, the relationship between vice presidents and speakers of the opposite party have often been strained if not openly hostile.[422] Indeed, in at least one instance, presidential succession and inability efforts ground to a halt precisely because of poor Vice President-Speaker relations.[423] In the 1950s, Democratic Speaker Sam Rayburn spurned the Republican Eisenhower administration's efforts to try to adopt a constitutional amendment regarding presidential succession and inability because, in the words of the Attorney General at the time, Rayburn thought "the plan might [have] enhance[d] the political stature of vice-president, Richard M. Nixon."[424] Thus, there are serious practical obstacles to the CGOPT being agreed to by letter in the first place. In fact, there is no public record of a Vice President and Speaker ever having done so.[425]

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420. *Cf.* Feerick, *supra* note 7, at 21; *First Fordham Report*, *supra* note 7, at 31-35, 62, 84.

421. *See, e.g.*, Goldstein, *supra* note 40, at 181, 190.

422. *See* Quint Forgey, *"An Attitude of Disrespect": Pence Flays Pelosi for Ripping up Trump's Speech*, POLITICO, (Feb. 5, 2020), https://www.politico.com/news/2020/02/05/mike-pence-attacks-pelosi-ripping-trumps-speech-110804; Paul Kane, *For All Their Political Differences, Biden and Ryan Share Striking Similarities*, WASH. POST (Jan. 11, 2016), https://www.washingtonpost.com/politics/for-all-their-political-differences-biden-and-ryan-share-striking-similarities/2016/01/11/948e27a6-b621-11e5-a8420feb51d1d124_story.html?utm_term=.2a72a5017d8e ("Biden . . . and Ryan . . . do not have a close relationship."); Rory Carroll, *CIA Torture Report: Nancy Pelosi Blames Dick Cheney*, THE GUARDIAN (Apr. 6, 2014, 1:47 PM), https://www.theguardian.com/world/2014/apr/06/cia-tortur-nancy-pelosi-blames-dick-cheney; *Cheney Won't Back Down from Pelosi Criticism*, NBC NEWS (Feb. 23, 2007), http://www.nbcnews.com/id/17295904/ns/politics/t/cheney-wont-back-down-pelosi-criticism/#.XK55tZhKiUk ("Vice President Dick Cheney refused Friday to take back his charge that House Speaker Nancy Pelosi's opposition to President Bush's Iraq war buildup is playing into the hands of the al-Qaida terrorist network. . . .[Pelosi replied] 'I hope the president will repudiate and distance himself from the vice president's remarks.'"); John Heilemann, *The Making of the President 2000*, WIRED (Dec. 1, 1995, 12:00 PM), https://www.wired.com/1995/12/gorenewt (discussing tension between Speaker Gingrich and Vice President Gore); *see also* D.B. HARDEMAN & DONALD C. BACON, RAYBURN: A BIOGRAPHY 381-82, 423, 434, 442 (1987) (describing Speaker Rayburn's loathing of Vice President Nixon); ALFRED STEINBERG, SAM RAYBURN: A BIOGRAPHY 279-80, 288, 310, 331 (1975) (same).

423. *See* BROWNELL, *supra* note 225, at 278.

424. *Id.*

425. President Johnson and Speaker McCormack entered into a letter arrangement with respect to presidential inability but the two were of the same party. *See supra* note 332.

Even were such an agreement to be made, there are further practical obstacles. For example, it is uncertain how the Speaker would know if the Vice President was incapacitated.[426] Even if the two officeholders got along well, as a practical matter they may not necessarily work closely together.[427] And even with a letter, the Speaker might still prove hesitant to take action for fear of looking like a usurper.[428]

Assuming a CGOPT letter agreement exists, it would be viable but still be less attractive than the type of statute advocated in this Article. First, a statute would have the benefit of a clear authorization as opposed to a CGOPT letter arrangement which at best has only an implicit statutory basis[429] and therefore a less certain legal status.[430] Indeed, Speaker McCormack made clear that he viewed his own letter agreement with President Johnson as not legally binding.[431]

Second, a statute is a public document adopted after public debate by the people's elected representatives. In short, it has built-in legitimacy. By contrast, a delegation letter, if it exists today, is secret and would suffer serious legitimacy and practical concerns as a result (especially if the Speaker is of the opposite party).[432] Moreover, its secret nature undermines the case to be made that such letters have established (or could establish) their constitutionality through past practice.[433]

Third, the post hoc statute keeps the decision making within the executive branch. This dynamic likely improves the efficiency of the process in that the President and the Cabinet—as the initial decisionmakers—would likely be aware more quickly of a vice presidential incapacity than a House Speaker, especially one from a different political party. Furthermore, they would not be inhibited from taking action out of concern about being seen as overly ambitious.

426. *Cf.* AMAR, *supra* note 246, at 191-92.

427. *See supra* note 422.

428. *See supra* notes 389-93, 400-09 and accompanying text.

429. *See* 3 U.S.C. § 19(a), (b) (2018) ("[T]o discharge the powers and duties of the office of President . . . the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President. . . . The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection. . . . If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.").

430. *See supra* notes 99, 275, 396, 417, 429, and accompanying text.

431. *See* PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT, *supra* note 333, at 7.

432. *See supra* Part III.A.1.b.i; *cf.* Carroll, *supra* note 422; Kane, *supra* note 422; Heilemann, *supra* note 422.

433. *See supra* notes 336-49 and accompanying text.

Finally, the political precedent for a Vice President attempting on his own to delegate his constitutional powers to another official is not favorable. In the nineteenth century, when a Vice President was absent from the Senate, a President pro tempore had to be named to replace him, the President pro tempore not being a permanent position at the time.[434] More than once, a Vice President attempted to name which Senator should take his place in the presiding officer's chair.[435] With one apparent exception, the Senate rebuffed these vice presidential efforts.[436] To this day, the President pro tempore can name his temporary replacement in the chair, but the Vice President cannot.[437] A Vice President making a delegation of his constitutional powers to another official is therefore not supported by historical practice.[438]

While implementation of the CGOPT through a letter arrangement is preferable to an impromptu exercise of the CGOPT, there are still challenges to the approach. It remains a viable option but is inferior to a post hoc statute or a vice presidential resignation letter.[439]

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434. *See, e.g.*, CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE 3 (2015).

435. *See* Gerald Gamm & Steven S. Smith, *Last Among Equals: The Senate's Presiding Officer*, *in* ESTEEMED COLLEAGUES: CIVILITY AND DELIBERATION IN THE U.S. SENATE 105, 108-10 (Burdett A. Loomis ed., 2000).

436. *See id.* at 108-10; Shoup, *supra* note 9, at 370-78.

437. *See* U.S. Senate Rule I, §3, S. DOC. NO. 113-18, at 1 (1st Sess. 2013) ("The President pro tempore shall have the right to name in open Senate or, if absent, in writing, a Senator to perform the duties of the Chair."); DAVIS, *supra* note 434, at 8 ("Historically, the powers and prerogatives of the President pro tempore as a presiding officer have differed little from those of the Vice President. One notable exception involves the privilege of appointing a substitute to perform the duties of the chair."); *see also* Walter Kravitz, The United States Senate: A History 63-64 (unpublished manuscript) (on file with author); Shoup, *supra* note 9, at 370–78.

438. *See* FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 1021-22 (2d Sess. Alan S. Frumin ed., rev. 1992).

439. A CGOPT letter arrangement would not only be preferable to an extemporaneous application of the CGOPT but it would also offer two advantages over a pre-signed resignation letter à la Vice President Cheney. First, the CGOPT letter arrangement would not permanently remove the Vice President from office, making it a more flexible tool than the pre-signed letter model. Second, the former would appear not to pose some of the potential legal problems of a resignation letter (e.g., essentially granting the President the power to remove the Vice President, potentially violating the spirit of the resignation statute by having the President make the key operative decision to deliver the letter). Nonetheless, ultimately, the pre-signed resignation letter approach offers more advantages than the CGOPT-by-letter arrangement. First, the Cheney-letter model has actually been executed before and has been made public. These two factors give it greater familiarity and legitimacy. Second, the Cheney approach also does not involve the Speaker in the inability determination process, which almost certainly eliminates concerns over someone from another branch of government (to say nothing of someone from the opposite party) playing a major role in such a weighty executive branch decision. Third, the Cheney-letter approach would likely be executed more quickly as the Speaker would almost assuredly be less knowledgeable of the Vice President's capacity than would the President and a vice presidential staffer. *Cf.* AMAR, *supra* note 246, at 191-92. Moreover, a Speaker from the opposite party would be particularly wary of being seen to be overly ambitious by taking steps to place herself one step closer to the Oval Office. Finally, the CGOPT carries its own potential

C. *Use of the Impeachment Process*

A final potential means of handling a situation involving vice presidential incapacity could be through the impeachment process.[440] Use of the impeachment process to try to resolve a situation involving a federal official's incapacity has only been discussed in passing by authorities.[441]

Article II, Section 4, of the Constitution provides that "[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[442] Arguments could be

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legal shortcomings (e.g., lack of express statutory authorization to determine vice presidential inability).

440. No Vice President has ever been impeached. *See* 3 DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at 1939-2273 (2d Sess. 1994); 6 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 743-95 (1935); 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 307-1034 (1907); *List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://history.house.gov/Institution/Impeachment/Impeachment-List (last visited Jan. 25, 2020) [hereinafter *List of Individuals*]. However, impeachment resolutions have been introduced against a handful of vice presidents in the House, though none has ever been brought before the full chamber. *See, e.g.*, H.R. RES. 799, 110th Cong. (2007) (Rep. Kucinich) (offering articles of impeachment against Vice President Dick Cheney); H.R. RES. 333, 110th Cong. (2007) (Rep. Kucinich) (same); 119 CONG. REC. 31,368 (1973) (Speaker Albert) (providing a letter from Vice President Agnew requesting his own investigation); *id.* at 31,506 (Rep. Findley) (offering a resolution to begin an impeachment investigation into the actions of Vice President Agnew); *id.* at 31,761 (Rep. Hutchinson) (offering a resolution calling for an investigation of Vice President Agnew); *id.* at 32,457 (Rep. McCloskey) (offering a resolution calling for an investigation of Vice President Agnew); CONG. GLOBE, 42d Cong., 3d Sess. 1544-45 (1873) (Rep. Wood) (offering a resolution that impeachment proceedings be undertaken by the Judiciary Committee against Vice President Schuyler Colfax).

441. *See, e.g.*, RONAN, *supra* note 3, at 156, 165; 2 JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION 712 (Henry St. George Tucker ed., 1899); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones"*, 75 GEO. L.J. 1389, 1444 n.184 (1987); William Lasser, *A Heartbeat Away*, HOUGHTON MIFFLIN, http://college.cengage.com/polisci/resources/first_100_days/articles/heartbeat.html (last visited Jan. 25, 2020); *infra* notes 450-62 and accompanying text. Many authorities are skeptical of using impeachment for inability purposes. *See Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 88th Cong. 45 (1964) (statement of Professor James Kirby); CHARLES E. MORGANSTON, THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. 70-172, at 99 (2d Sess. 1929); Robert E. Gilbert, *The Genius of the Twenty-Fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency*, *in* MANAGING CRISIS, *supra* note 13, at 25, 33; Stephan, *supra* note 241, at 67-68; *see also* FEERICK, *supra* note 132, at 241; FEERICK, *supra* note 1, at 51; *First Fordham Report*, *supra* note 7, at 35; *Second Fordham Report*, *supra* note 7, at 969-70.

442. U.S. CONST. art. II, § 4. There is some support from the Founding Era for the notion that impeachment could be interpreted broadly to include addressing incapacity. *See* Feerick, *supra* note 241, at 127. At the Constitutional Convention, during early consideration of how to define impeachment, James Madison thought impeachment to be "indispensable . . . for defending the Community agst the *incapacity*, negligence or perfidy of the chief Magistrate. . . . He might lose his

made that impeachment is a sufficiently supple mechanism to encompass matters such as vice presidential incapacity. These arguments could be based on the Vice President violating his oath of office, pragmatic interpretations of the impeachment power throughout American history, political branch precedent, judicial precedent emphasizing the finality of impeachment, and practical factors. In the end, however, daunting textual and structural hurdles, and the stigma attached to the procedure would make it exceedingly difficult—though not impossible—to implement in a vice presidential inability scenario. These factors make a post hoc statute as well as letter arrangements and the CGOPT preferable alternatives.

1. Arguments in Favor of the Impeachment Process

a. Violation of the Vice Presidential Oath

An argument could be made in favor of using the impeachment process to address a scenario involving a healthy President and an incapacitated Vice President. Such a position would be that, by being incapacitated and neglecting his duties, the Vice President would be

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capacity after his appointment." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1966) (emphasis added). Also during the Convention, Gouverneur Morris maintained that "incapacity [was a] cause[] of impeachment." *Id.* at 69. The constitutional impeachment language was modified following the Madison/Morris remarks, however. *See, e.g.*, *id.* at 550-52. For those who disagreed with the Madison/Morris view, see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 68-69 (Max Farrand ed., 1966) (Bedford); *see also* BERGER, *supra* note 254, at 194. *But cf.* FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 107-09 (2019).

Writing about the American experience with impeachment prior to 1787, Professors Peter Charles Hoffer and N.E.H. Hull observed that "no one was impeached without evidence of intentional neglect or total incapacity to perform official duties." PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 85 (1984); *cf.* BERGER, *supra* note 254, at 73-74, 346; BOWMAN, *supra*, at 107-09. Professors Hoffer and Hull conclude that "the common understanding of 'high crimes and misdemeanors' [at the dawn of the nineteenth century] (includ[ed] blatant incapacity, neglect, or indifference to duty)." HOFFER & HULL, *supra*, at 199; *see also* Feerick, *supra* note 241, at 127; *cf.* BOWMAN, *supra*, at 140. Such a position could draw some support from Alexander Hamilton. In *The Federalist No. 65*, Hamilton opined that the impeachment process must be flexible in order to address the unforeseen. *See* THE FEDERALIST NO. 65 (Alexander Hamilton). The mechanism "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases [which] serve to limit the discretion of the courts . . . ." *Id.* To Hamilton, impeachable acts were "political . . . [and] relate chiefly to injuries done immediately to the society itself." *Id.* For reasons noted above, *see supra* Part I.A., vice presidential incapacity could conceivably be seen to be a grave injury to society. In *The Federalist No. 79*, which included discussion of impeachment, Hamilton wrote further that insanity "without any formal or express provision, may be safely pronounced to be a virtual disqualification." THE FEDERALIST NO. 79 (Alexander Hamilton); *see also* 1 ANNALS OF CONG. 508 (1789) (statement of Rep. Smith); BERGER, *supra* note 254, at 145. *But cf.* 1 ANNALS OF CONG. 375 (statement of Rep. Boudinot).

violating his oath of office. By statute, the Vice President must attest the following:

> I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.[443]

If the Vice President were incapacitated, it might be contended he is not "support[ing] and defend[ing] the Constitution."[444] The language could be seen as an imposing affirmative obligation—"support[ing] and defend[ing]"[445]—the opposite of doing nothing due to inability. Moreover, vice presidential incapacity is worse than doing nothing; for the reasons outlined earlier, the situation threatens the very operation of "the presidency [which] embodie[s] the continuity and indestructibility of the state."[446] This would have the very opposite effect of defending the Constitution; it would be undermining it, albeit unintentionally. Furthermore, the Vice President would not be "faithfully discharging the duties of the office" if he were incapacitated.[447] The word "faithfully" conveys a mental state that the Vice President is aware and affirmatively and conscientiously discharging his duties. A comatose Vice President, for instance, would lack such a commitment. While laboring under an incapacity, the Vice President would not be willfully violating his oath, but it could be argued that his oath would be violated just the same. And violating one's pledge has routinely been cited as a cause for impeachment.[448]

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443. 5 U.S.C. § 3331 (2018).

444. *Id.*

445. *Id.*; *see infra* note 471 and accompanying text.

446. Bickel, *supra* note 69, at 15.

447. *See* 5 U.S.C. § 3331.

448. *See* H.R. RES. 611, 105th Cong. (1998) (providing the articles of impeachment that passed the House with respect to President Bill Clinton); CONG. GLOBE, 40th Cong., 2d Sess. 1616-18 (1868) (providing the articles of impeachment that passed the House with respect to President Andrew Johnson); CONG. GLOBE, 40th Cong., 2d Sess. 379, 383 (Supp. 1868) (closing argument of Representative John Bingham, chair of the House managers for President Andrew Johnson's impeachment); *see also* MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS 121 n.54 (1999); EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 228-38, 245, 252 (1999); Frank O. Bowman III & Stephen L. Sepinuck, *"High Crimes & Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1563 (1999); Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17, 27 n.25 (1995); *cf.* Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U. L. REV. COLLOQUY 12, 21 (2009).

Thus, an incapacitated Vice President could be violating his oath of office, which might make him subject to impeachment.

b. Pragmatic Interpretations of Impeachment

In addition to the Vice President possibly violating his oath, there are pragmatic reasons to interpret impeachment broadly that might justify removing an incapacitated officeholder. In fact, a number of authorities have interpreted the "Treason, Bribery, or other high Crimes and Misdemeanors" formulation as sufficiently broad to encompass incapacity (vice presidential or otherwise).[449] In his insightful book on the Twenty-Fifth Amendment, Professor Ronan briefly discusses the options for addressing vice presidential incapacity.[450] He writes that "if [Vice President Richard] Cheney [had become] incapacitated, the only recourse for removal would [have] be[en] impeachment or resignation."[451] At another juncture, Ronan opines that "if the [Israeli Prime Minister Ariel] Sharon [inability] example [involving a debilitating stroke] had befallen Dick Cheney . . . . Cheney would have remained as vice president . . . unless he resigned or was impeached."[452]

It will be recalled that, prior to the adoption of the Twenty-Fifth Amendment, the presidency was in some ways in the same position as the vice presidency is today: lacking a clear way for determining incapacity. President Dwight D. Eisenhower, due to his own health troubles in office, studied presidential inability options closely.[453] He was an early supporter of the adoption of a constitutional amendment on executive inability.[454] In 1957, Eisenhower stated with respect to presidential incapacity:

> [B]ehind this whole thing is the ability and the power in the Congress to impeach a President. Presumably, if a President got in such shape that he was just acting wildly and unconstitutionally, that would happen. That is the final protection of the people against a President who is absolutely unable to discharge the functions of his office but doesn't know it.[455]

449. *See supra* notes 441 and 442; *infra* notes 450-62 and accompanying text.

450. *See* RONAN, *supra* note 3, at 156-57.

451. *Id.* at 156.

452. *Id.* at 165. Professor William Lasser has written similarly that, "[i]n the worst-case scenario . . . a disabled vice president would remain in office until he resigned or was impeached and removed from office by Congress." Lasser, *supra* note 441.

453. *See* FEERICK, *supra* note 1, at 23.

454. *See id.* at 23-24.

455. The President's News Conference of April 3, 1957, 1 PUB. PAPERS 245 (1957); *see also* Feerick, *supra* note 241, at 127 n.284.

One of the fathers of the Twenty-Fifth Amendment, Attorney General Herbert Brownell, when testifying before the House Judiciary Committee on presidential inability that same year, made a comparable point.[456] He hypothesized about an

> extreme situation [in which] a President, obviously unable to act, still determined to do so, and in a reckless situation of that kind, or one where he really was not able to make a rational decision, if the time of crisis was such that action was needed, you could bring in your impeachment proceeding.[457]

Also writing prior to the Twenty-Fifth Amendment, John Feerick opined that "impeachment[] . . . is the remedy for presidential insanity. . . . Given the case of an *insane* President, with the attendant danger to the Nation's security, it is submitted that Congress could act to meet the crisis."[458]

The House managers for the impeachment trial of President Andrew Johnson adopted a similar argument in a brief submitted by Representative William Lawrence, a former judge.[459] Lawrence reasoned that "by no means [is] the power of impeachment . . . limited to technical crimes or misdemeanors only. It may reach officers who, from incapacity or other cause, are absolutely unfit for the performance of their duties, when no other remedy exists, and where the public interests imperatively demand it."[460] In effect, these interpretations based explicitly or otherwise on national interest are premised on the same constitutional continuity-of-government principle as discussed earlier.[461]

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456. *See Presidential Inability: Hearing Before the Special Subcomm. on Study of Presidential Inability of the Comm. on the Judiciary*, 85th Cong. 29-30 (1957).

457. *Id.* at 30; *see also* FEERICK, *supra* note 1, at 99, 364; *infra* note 524. Brownell's successor as Attorney General concurred. *See* Rogers, *supra* note 102, at 14-15 ("[T]he sole remedy is impeachment where there is a wrongful assertion of authority to exercise the powers and duties of the [presidential] Office. The attempt of a President to perform his duties when he was in fact clearly unable to perform might be classed as a wrongful assertion of authority.").

458. Feerick, *supra* note 241, at 127. Others have concurred. *See The Scope of the Power to Impeach*, *supra* note 252, at 1324-25; *cf.* 1 ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: HISTORICAL AND JUDICIAL 599 (1895). The Miller Commission's Report was ambivalent on use of impeachment regarding presidential incapacity prior to the Twenty-Fifth Amendment. It stated that "[b]efore the 25th Amendment, there was no mechanism other than impeachment for dealing with an unfit president who would not resign, or who was not mentally capable of resigning his office. Impeachment, however, was designed to deal with high crimes and misdemeanors, not health problems." *Miller Center Report*, *supra* note 236, at 11.

459. *See* 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 123, 147 (1868).

460. *Id.*; *cf.* 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES 858 (1960 ed.) (quoting Senator Benjamin Butler during the Andrew Johnson trial: "[A]n impeachable [offense is] in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest; and this may consist of . . . an act committed or omitted . . . .").

461. *See supra* Part I.B.

Key lawmakers during the Twenty-Fifth Amendment debate concluded that impeachment could be interpreted to encompass a Vice President's failure to properly execute his duties under what would ultimately become section 4 of the Twenty-Fifth Amendment.[462] Longtime Chairman of the House Judiciary Committee, Congressman Emanuel Celler, stated:

> We have the power of impeachment. We can impeach for high crimes and misdemeanors, and these high crimes and misdemeanors, *can mean anything that this Congress wants it to mean*. . . . We are in power and we can make the words 'high crimes and misdemeanors' mean anything we wish and apply it to some roguish, usurping Vice President.[463]

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462. The idea that the Vice President may be subject to impeachment for any improper Section 4 actions is consistent with the opinions of a number of authorities who generally take a broad view of the impeachment power, including its use to address inability. For more on impeachment for presidential incapacity, see, e.g., RONAN, *supra* note 3, at 29-31; TUCKER, *supra* note 441, at 712; Trumbull, Cooley, Butler, & Dwight, *supra* note 101, at 432 (Butler); C.M. Ellis, *The Causes for Which a President Can Be Impeached*, THE ATLANTIC (Jan. 1867), https://www.theatlantic.com/magazine/archive/1867/01/the-causes-for-which-a-president-can-be-impeached/548144; *cf.* A.B. Winter, *The Problem of Determining Presidential Disability: A Solution*, 33 SOC. SCI. 98, 99 (1958).

Former President William Howard Taft, during his tenure at Yale Law School, took an expansive view of "high crimes and misdemeanors," at least as the formulation involved the judiciary. *See* BERGER, *supra* note 254, at 61 n.16 (quoting Taft). Taft's perception of the congressional impeachment power regarding "a judge"—that it would render him impeachable "for any reason that shows him unfit"—if applied to the Vice President would obviously encompass incapacity. *See id.*; *but cf.* Gregory v. Ashcroft, 501 U.S. 452, 472 (1991) ("Voluntary [judicial] retirement will not always be sufficient [as a mechanism for judicial inability]. Nor may impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary.").

In the context of judicial impeachment, House Minority Leader and future President Gerald Ford famously stated:

> [A]n impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. . . . [T]he historical context and political climate are important; there are few fixed principles among the handful of precedents.

116 CONG. REC. 11,913 (1970); *see also* BERGER, *supra* note 254, at 56 n.1; THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 205 (4th ed. 1931); GERHARDT, *supra* note 239, at 103.

Arguing that incapacity does not fall within the strict definition of "Treason, Bribery, high Crimes and Misdemeanors" could possibly be misplaced for other reasons. Such an interpretation assumes that the *expressio* canon applies to the Impeachment Clause of Article II. Some have argued that the framers may not have embraced this canon in the context of impeachment. *See, e.g.*, *The Scope of the Power to Impeach*, *supra* note 252, at 1317-22; *cf.* David Y. Thomas, *The Law of Impeachment in the United States*, 2 AM. POL. SCI. REV. 376, 384 (1908).

463. 111 CONG. REC. 7965 (1965); *see also 1965 House Hearings*, *supra* note 20, at 62 (statement of Rep. Celler); FEERICK, *supra* note 1, at 99, 121, 364; *cf.* KALT, *supra* note 89, at 31-32; Feerick, *supra* note 7, at 21.

Senator Birch Bayh seemed to concur with Celler that vice presidential misbehavior in the realm of a presidential inability determination could subject the Vice President to impeachment.[464]

In 1974, the Committee on the Judiciary of the U.S. House of Representatives issued a staff report on impeachment in anticipation of proceedings against President Richard Nixon.[465] The Committee reasoned that: "The framers did not write a fixed standard. . . . [T]hey adopted . . . a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee."[466] In that same vein, the Committee wrote that "[t]he purpose of impeachment . . . is primarily to maintain constitutional government. . . . Impeachment is a constitutional safety valve; to fulfill its function, it must be flexible enough to cope with exigencies not now foreseeable."[467] More specifically, the Committee concluded that "[i]mpeachable conduct . . . may include the serious failure to discharge the affirmative duties imposed . . . by the Constitution."[468] Impeachment could "reach conduct that might adversely affect the system of government."[469] Such a formulation could be broad enough to include vice presidential incapacity since an incapacitated Vice President might require use of "a constitutional safety valve" since an officeholder's inability could jeopardize the functioning of the executive branch.[470] Furthermore, an incapacitated Vice President would, by definition, not be "discharg[ing] the affirmative duties imposed [on him] . . . by the Constitution."[471]

In sum, there is a body of opinion that could be marshaled to support the notion that, in a pinch, the Constitution's impeachment power could be interpreted pragmatically to address vice presidential incapacity.

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464. *See 1965 House Hearings*, *supra* note 20, at 80-81. *But cf. id.* at 89; *1920 House Hearings*, *supra* note 125, at 31.

465. *See* STAFF OF THE IMPEACHMENT INQUIRY, H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 1-2 (Comm. Print 1974) [hereinafter 1974 JUDICIARY COMMITTEE REPORT].

466. *Id.* at 2.

467. *Id.* at 24-25.

468. *Id.* at 24.

469. *Id.* One noted authority on impeachment, Professor Charles Black, defined grounds for impeachment to include offenses "which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of the perpetrator." CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 39-40 (1974). As Professor Eleanore Bushell has written, "the public trust is as effectively betrayed by a disabled officer as it is by a crooked one." ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 54 (1992). *But see id.* at 53-55.

470. *See* 1974 JUDICIARY COMMITTEE REPORT, *supra* note 465, at 25.

471. *Id.* at 24.

c. Precedents

There is also some relevant political precedent that could be brought to bear on the question of using the impeachment process to resolve vice presidential inability. It bears noting that Congress—the sole interpreter of the impeachment power—has construed high crimes and misdemeanors broadly.[472] The very first successful impeachment under the Constitution involved an incapacitated officeholder.[473] In 1803, Judge John Pickering was impeached and removed because he had shown himself to be mentally unbalanced and an alcoholic, which led to erratic behavior on the bench.[474] This led to a debate over whether mental incapacity was in fact an impeachable offense.[475]

Partisanship played a role in the impeachment effort as the Jeffersonians were looking to remove Federalist judges such as Pickering; nonetheless, the judge's incapacity was undeniable.[476] Indeed, it was confirmed by his own son.[477] Pro-Pickering Federalists actually pressed the insanity point, arguing that, because he was mentally unbalanced he lacked the scienter required to commit impeachable acts.[478] Ultimately the Senate avoided the awkward specifics of what Pickering's impeachable offenses actually constituted and simply voted Pickering "guilty as charged" and removed him from office.[479] Factors such as this reflect why the impeachment trial of Pickering has faced heavy criticism.[480]

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472. *See supra* Part III.C.1.b.

473. *See* GERHARDT, *supra* note 239, at 55, 183; HOFFER & HULL, *supra* note 442, at 289, 255, 262.

474. *See* WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803-1807, at 100 (Everett Somerville Brown ed., 1923); *see also* HOFFER & HULL, *supra* note 442, at 212. For more on the reasons for Pickering's removal, see BOWMAN, *supra* note 442, at 137-40; GERHARDT, *supra* note 239, at 55, 183; HOFFER & HULL, *supra* note 442, at 218; VAN TASSEL & FINKELMAN, *supra* note 448, at 85-86; Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485, 487-88 (1949).

475. For criticism of the impeachment effort, see, for example, BUSHNELL, *supra* note 469, at 46-52. The charges against Pickering were not explicitly that of incapacity. *See* HOFFER & HULL, *supra* note 442, at 208; *cf. The Scope of the Power to Impeach*, *supra* note 252, at 1334 & n.92.

476. *See* BOWMAN, *supra* note 442, at 137-40; HOFFER & HULL, *supra* note 442, at 189, 209; *see also* VAN TASSEL & FINKELMAN, *supra* note 448, at 10. Three doctors attested to Pickering's insanity. *See* Turner, *supra* note 474, at 501.

477. *See* 13 ANNALS OF CONG. 328-29 (1804) (quoting Jacob Pickering, son of the judge).

478. *See, e.g.*, BOWMAN, *supra* note 442, at 138-39.

479. The full grounds were whether Pickering was "guilty, as charged in the article of impeachment. . . . against him by the House of Representatives?" 13 ANNALS OF CONG. 364-67 (1803) (statement of Sen. Anderson); *see also* VAN TASSEL & FINKELMAN, *supra* note 448, at 92, 96-100; Turner, *supra* note 474, at 504.

480. *See, e.g.*, Ritter v. United States, 84 Ct. Cl. 293, 299 (1936); H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT 41 (2010); Turner, *supra* note 474, at 487, 505, 507. Other authorities have been somewhat ambivalent about the precedent. *See* HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS

Yet, for all of its imperfections and untidiness, the Pickering impeachment and removal took place a mere fourteen years after initial implementation of the Constitution.[481] As such, it reflects "the first impeachment to run its full course under the federal Constitution . . . ."[482] Indeed, more than seven decades later, when considering the impeachment of Vice President Schuyler Colfax, the House Committee on the Judiciary concluded the following about the Pickering impeachment:

> [I]n the case of Judge Pickering . . . impeached for habitual intoxication, the officer was condemned because he became *incapacitated* for the performance of the duties of his office, and *we find that impeachment is the only means known to our Constitution by which a civil officer of the United States, elected by the people,* or a judge appointed by the Executive, *can be removed from office*. And certainly habitual intoxication, while it may not be a crime at common law or by statute, in a private person, may readily enough seem to be a very high crime and misdemeanor in a high civil officer, wholly *incapacitating* him from performing all his duties . . . .[483]

Thus, the House Committee on the Judiciary concluded that the Pickering precedent was a legitimate means of addressing incapacity at a time when it was weighing impeachment of a Vice President.[484]

In 1873, an effort was undertaken to impeach Judge Mark Delahay for alcoholism.[485] The grounds for his impeachment were in keeping with the Pickering precedent: that considerations of mental lucidity and stability are fair game in the exercise of Congress's impeachment power, at least regarding judges. The Chairman of the House Judiciary Committee noted that the preparation of an impeachment resolution against Delahay was based on "[t]he most grievous

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JEFFERSON 406-08 (1986); BERGER, *supra* note 254, at 192-94; BUSHNELL, *supra* note 469, at 53-55.

481. *See Ritter*, 84 Ct. Cl. at 299; Turner, *supra* note 474, at 486; *see also* IRVING BRANT, IMPEACHMENT: TRIALS AND ERRORS 46-57 (1972); HOFFER & HULL, *supra* note 442, at 208, 214, 218-19. Supreme Court Justice Samuel Chase was impeached the year after Pickering. *See* Turner, *supra* note 474, at 486. His defense counsel discussed the Pickering impeachment and took it very seriously. *See* 3 HINDS, *supra* note 440, at 767. In trying to distinguish his client's situation from Pickering's, he argued that "by finding the defendant guilty, [the Senate] gave their sanction to the charge that his insanity proceeded from habitual drunkenness. This case therefore proves nothing further than that habitual drunkenness is an impeachable offense." *Id.*

482. Turner, *supra* note 474, at 486; *see also* BOWMAN, *supra* note 442, at 137; BUSHNELL, *supra* note 469, at 53.

483. 3 HINDS, *supra* note 440, at 1018 (emphases added).

484. Other authorities have also concluded that incapacity is a legitimate means of impeaching officials "at least in the case of judges." *See* BOWMAN, *supra* note 442, at 140; *supra* note 462.

485. *See* BOWMAN, *supra* note 442, at 138; VAN TASSEL & FINKELMAN, *supra* note 448, at 119-23.

charge . . . which . . . was that his personal habits unfitted him for the judicial office, that he was intoxicated off the bench as well as on the bench."[486] While on the bench, Delahay was at times essentially incapacitated.[487] The Committee received testimony that revealed as much.[488] Relying expressly on the Pickering precedent,[489] the House voted to impeach Delahay, who stepped down from the bench before he could be tried in the Senate.[490]

Other impeachment efforts have also involved charges of chronic alcoholism. In 1808, a judge, Peter B. Bruin, of the Mississippi Territory was accused by the territorial legislature of "neglect of duty and drunkenness on the bench."[491] The territorial legislature referred these charges to the House of Representatives.[492] A committee was created to investigate, but Congress adjourned soon thereafter without taking action; Bruin left the bench not long afterwards.[493] In 1873, a House committee was charged with investigating Judge E.H. Durell of Louisiana.[494] The allegations against Durell included "drunkenness."[495] The panel considered evidence as to this charge but dismissed the allegations as unsupported.[496] The committee did not, however, dismiss the drunkenness charge as failing to meet the constitutional threshold for impeachment.[497] In 1912, Representative Victor Berger accused federal Judge Cornelius Hanford of a number of charges and called for his impeachment.[498] Among them was being "an habitual drunkard."[499] The House Judiciary Committee investigated these charges but essentially concluded its efforts after Hanford resigned from the bench.[500] Again, drunkenness was apparently not treated as out of bounds for impeachment purposes.

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486. CONG. GLOBE, 42d Cong., 3d Sess. 1900 (1873) (statement of Rep. Butler); *see also* CONG. GLOBE, 42d Cong., 2d Sess. 1808 (1872). For more on the Delahay impeachment effort, see 1974 JUDICIARY COMMITTEE REPORT, *supra* note 465, at 49; BOWMAN, *supra* note 442, at 138; VAN TASSEL & FINKELMAN, *supra* note 448, at 119-23.

487. *See* BOWMAN, *supra* note 442, at 138.

488. *See id.*

489. *See* CONG. GLOBE, 42d Cong., 3d Sess. 1900.

490. *See* 1974 JUDICIARY COMMITTEE REPORT, *supra* note 465, at 49; *List of Individuals*, *supra* note 440.

491. 3 HINDS, *supra* note 440, at 983.

492. *See id.*

493. *See id.* at 984.

494. *See id.* at 1012.

495. *See id.*

496. *See id.*

497. *See id.*

498. *See* 6 CANNON, *supra* note 440, at 745-46.

499. *Id.* at 746.

500. *See id.* at 746-48.

These episodes reflect that chronic alcoholism has been seen as a viable reason for judicial impeachment though only one such effort ended in formal Senate removal.[501] Being regularly inebriated on the job goes directly to questions of mental lucidity and competence, not too far removed from questions of mental incapacity.

That the Pickering and Delahay precedents and their progeny have been seen as viable approaches was reflected yet again in 1926. That year, the House of Representatives, in considering the impeachment of Judge George English, approved a report, which concluded that:

> [I]mpeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also . . . to those which affect the public welfare. Thus an official may be impeached for offenses of a political character . . . for inexcusable negligence of duty, . . . [and] "conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute . . . ."[502]

Again, the House went on record as interpreting the scope of the impeachment power to include alcoholism as legitimate grounds for removal.[503] Ultimately, English stepped down from the bench and the Senate did not pursue the impeachment.[504]

If removing insane or alcoholic lower federal court judges was considered important enough to the proper functioning of the judiciary to warrant their impeachment, the importance of removing an incapacitated Vice President would be greater still. The logic and pressing need for impeaching an incapacitated Vice President is much more pronounced than for judicial impeachment for the simple reason that the federal judiciary is made up of scores of federal judges.[505] There is only one Vice

501. *See* BOWMAN, *supra* note 442, at 137-40.

502. 67 CONG. REC. 6283 (1926) (citing to H.R. REP. NO. 69-653 (1925)); *see also* VAN TASSEL & FINKELMAN, *supra* note 448, at 158-59; *The Scope of the Power to Impeach*, *supra* note 252, at 1322 n.20.

503. *See* 67 CONG. REC. 6283 (citing to H.R. REP. NO. 69-653).

504. *See* VAN TASSEL & FINKELMAN, *supra* note 448, at 159.

505. *Cf.* Rubin v. United States, 525 U.S. 990, 991 (1998) (Breyer, J., dissenting) ("[The President] is responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch or the *entire* Judiciary for those of the Judicial Branch."), *denying cert. to* 148 F.3d 1073 (D.C. Cir. 1998) (emphasis added); Schuker, *supra* note 63, at 137; RONAN, *supra* note 3, at 3 ("Unlike the incapacitation or death of a member of Congress or the Supreme Court, instability in the presidency presents an immediate danger given the occupant's responsibilities when it comes to national security."); *but cf.* Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).

President and he has unique responsibilities that are essential to ensuring the continuity of the executive branch.[506]

Moreover, since both the Vice President and federal judges are subject to impeachment, the precedents demonstrate at least the theoretical availability of the mechanism as an option for an incapacitated Vice President. Nonetheless, applying a precedent from judicial impeachment to one involving the Vice President is not seamless. After all, judges enjoy life tenure and "hold their Offices" as long as they display "good Behaviour,"[507] which some have argued holds judges to a higher standard of conduct than elected officeholders, in effect making judges somewhat less difficult to impeach and remove.[508]

All in all, there is political precedent involving judges that lends some support for the potential use of the impeachment process to remove an incapacitated Vice President.

d. Judicial Authority for Deferring to the Political Branches in an Impeachment Setting

A legislative branch decision to impeach and remove an incapacitated Vice President would almost assuredly be left to stand by the courts.[509] Were the House to decide that a Vice President should be removed for inability, there is considerable legal authority to support its judgment as being a judicially unreviewable constitutional determination, subject only to the Senate's disposition of the impeachment.[510]

In *Nixon v. United States*, the Supreme Court considered whether the judiciary had the authority to review the manner in which the Senate carried out the impeachment trial of Judge Walter Nixon.[511] In the case,

506. *See* U.S. CONST. amend XXV; *cf.* RONAN, *supra* note 3, at 3.

507. U.S. CONST. art. III, § 1.

508. *See* VAN TASSEL & FINKELMAN, *supra* note 448, at 132, 158; Mark R. Slusar, Comment, *The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment*, 49 CASE WESTERN RES. L. REV. 869, 882-84 (1999). *But see The Scope of the Power to Impeach*, *supra* note 252, at 1322 n.20. The view that "good behavior" requires a higher level of conduct for judges and reciprocally makes judicial impeachment less difficult is a fairly recent one. *See, e.g.*, 1974 JUDICIARY COMMITTEE REPORT, *supra* note 465, at 17; GERHARDT, *supra* note 239, at 183; Slusar, *supra*, at 882-84.

509. The impeachment process does *not* raise concerns with respect to the Bill of Attainder Clause. This is because impeachment was specifically designed by the framers to remove officials from office; it exists alongside the Bill of Attainder Clause in the Constitution's text. Moreover, the Due Process Clause would not appear to have application with regard to impeachment proceedings either. *See* GERHARDT, *supra* note 239, at 139-41; ALEX SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 66 (1916). The Ex Post Facto Clause would not apply regarding impeachment since impeachment in the United States does not carry criminal penalties.

510. *See* GERHARDT, *supra* note 239, at xi, 132, 146; VAN TASSEL & FINKELMAN, *supra* note 448, at 9.

511. *See* 506 U.S. 224, 226 (1993).

the full Senate had delegated to a committee the fact-finding responsibilities of the trial.[512] The Supreme Court determined that the way the Senate conducted the trial was up to the Senate alone.[513] The *Nixon* decision was consistent with prior judicial pronouncements on the subject.[514] The Court in *Nixon* placed great stock in the Constitution's reference to the Senate enjoying "*sole* Power to try all Impeachments."[515] The Court pronounced that this "sentence is a grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else."[516] As will be recalled, the Court was concerned that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.'"[517]

There is every reason to think the Court would be equally deferential to the House's impeachment prerogatives.[518] After all, the House is similarly granted the "sole" power of initiating impeachment proceedings.[519] As the Court in *Nixon* observed, "the word 'sole' is of considerable significance. Indeed, the word 'sole' appears only one other time in the Constitution—with respect to the House of Representatives' 'sole' Power of Impeachment."[520]

Given the Supreme Court's linkage of the two provisions, it would be difficult to contend that the term "sole" should be interpreted one way in a Senate context but another way in a House setting.[521] Thus, an

512. *See id.* at 226-27.

513. *See id.* at 231, 238.

514. *See* Ritter v. United States, 84 Ct. Cl. 293, 300 (1936), *cert. denied*, 300 U.S. 668 (1937); *cf.* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866). Interestingly, the court in *Ritter* expressly raised the Pickering impeachment:

> The action of the Senate [in the Pickering impeachment] was characterized by the historian [John Bach] McMaster as "arbitrary", "illegal", and "infamous." [sic] We need not consider whether this language was justified. It is sufficient to say that notwithstanding the peculiar circumstances of the case no one at the time or since has suggested that the conviction of Judge Pickering might have been reviewed by the courts.

Ritter, 84 Ct. Cl. at 299. Thus, the court in *Ritter* essentially indicated that the judiciary would not interfere in a situation involving a federal judge being impeached for mental incapacity. *Cf. The Scope of the Power to Impeach*, *supra* note 252, at 1322 n.20 (noting that the impeachment provision in the Constitution "applies not only to high crimes and misdemeanors" but also misbehavior and acts that may "affect the public welfare.").

515. *Nixon*, 506 U.S. at 230 (emphasis added).

516. *Id.* at 229.

517. *Id.* at 236.

518. *See, e.g.*, KALT, *supra* note 89, at 130.

519. U.S. CONST. art. I, § 2, cl. 5.

520. *Nixon*, 506 U.S. at 230-31.

521. *Cf.* United States v. Atl. Research Corp., 551 U.S. 128, 135 (2007) (noting that parts of a statute that "are adjacent and have remarkably similar structures" therefore "can be understood only with reference to" one another); Amar, *supra* note 249, at 791-92 (arguing in favor of using constitutional text as a dictionary to define constitutional terms).

argument based on the House and Senate enjoying unreviewable constitutional authority in how they pursue impeachment supports use of the mechanism in a vice presidential inability context. This is all the more the case since finality in a vice presidential incapacity setting is vitally important. It is closely related to the Supreme Court's concerns about the unedifying prospect of presidential impeachment being reviewed by the judiciary.

e. Practical Benefits

Finally, impeachment offers three practical benefits. First, unlike secret letter arrangements, impeachment is a public process. Congress undertakes the procedure openly which adds an element of legitimacy to resolving the question. Second, unlike secret letter arrangements or the CGOPT, impeachment is a process with which public officials and the American people are familiar. Again, this helps bolster the case for impeachment. Finally, the Speaker's involvement in the impeachment decision could be much less than under the CGOPT. Indeed, one could imagine a Speaker recusing herself from the impeachment proceedings given her role in the line of succession, something that could not be done under the CGOPT.

2. Downsides to Use of the Impeachment Process

There are several reasons, however, to be skeptical of the impeachment approach. Impeachment carries with it daunting textual, structural, and practical challenges to its use in an incapacity setting.

a. Inability Is Not a High Crime or Misdemeanor

The most compelling problem with the impeachment approach is that, on its face, incapacity does not fall within the scope of "Treason, Bribery, or other high Crimes and Misdemeanors."[522] The framers took specific steps to cabin the authority of Congress in the impeachment context since they were troubled by the expansive use of the process by

522. U.S. CONST., art. II, § 4; *see also* SILVA, *supra* note 54, at 105 n.79; Stephan, *supra* note 241, at 67-68; *First Fordham Report*, *supra* note 7, at 35; *cf.* BOWMAN, *supra* note 442, at 287; FEERICK, *supra* note 132, at 241; KALT, *supra* note 16, at 156. For the contention that the treason, bribery, and high crimes and misdemeanors formulation may not be exhaustive, see *The Scope of the Power to Impeach*, *supra* note 252, at 1317-22.

Impeaching a mentally incapacitated Vice President could bring with it the added complication that the officeholder might attempt to preside at his own impeachment trial in the Senate. The constitutionality of such an approach is an open question. *See* Goldstein, *supra* note 47, at 859-65; Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245, 245 (1997).

the British Parliament.[523] The result was that the framers limited the impeachment process in several ways. The mechanism can only be used to remove individuals from office, and it cannot otherwise punish them (e.g., imprison, fine, or execute them). The impeachment process involves procedural safeguards such as a majority vote in the House and a two-thirds vote in the Senate. It requires the Chief Justice to preside when the President is on trial in the Senate. It mandates that senators take a specific oath when weighing a potential removal. And it limits the offenses for which one can be impeached to "Treason, Bribery, or other high Crimes and Misdemeanors."[524]

High crimes and misdemeanors are generally thought to be limited to criminal offenses or closely related malfeasance with a harmful impact on the country as a whole.[525] Because incapacity is not a crime and because it does not fall within the outer orbit of what would be considered a crime or abuse of power, it can be argued with much force that it is not a "high crime" or "misdemeanor" and therefore not an impeachable offense.[526]

In short, the impeachment approach faces a significant textual hurdle. This is much less the case than with the post hoc statutory option. Even assuming that the Original Inability Clause's "both" language is as big an obstacle to addressing vice presidential inability as the "high crimes and misdemeanors" wording of Article II (and there are several reasons to believe that that is not the case),[527] the statutory method can always fall

523. *See, e.g.*, BERGER, *supra* note 254, at 7; GERHARDT, *supra* note 239, at 10-11.

524. On the other hand, one could imagine a situation involving a de facto mentally incapacitated President who is declared incapacitated under section 4 early in his presidency but continues to challenge the determination again and again under section 4 with intermittent success. Under this scenario, the nation is put through great uncertainty and trauma over a long period of time as the Vice President (the now and again Acting President), the Cabinet and Congress go through the section 4 process repeatedly. Meanwhile, public business languishes during this power struggle. It is hard to believe that Congress could not at some point end matters once and for all by impeaching and removing the recalcitrant and de facto deranged President. *Cf.* GERHARDT, *supra* note 239, at 194. If Congress could not do this, the country would be left with no means of ridding itself permanently of a deranged chief executive for years on end. *See supra* notes 455-60 and accompanying text and note 462.

525. *See, e.g.*, VAN TASSEL & FINKELMAN, *supra* note 448, at 293-302 (President Clinton's Memorandum Regarding Standards for Impeachment, Oct. 3, 1998).

526. *See First Fordham Report*, *supra* note 7, at 35; *Second Fordham Report*, *supra* note 7, at 969-70. Given that impeachment rhetoric and efforts to undertake impeachment have become an increasingly regular part of political discourse in recent decades, *see generally* DAVID E. KYVIG, THE AGE OF IMPEACHMENT (2008), expanding the permissible bounds of impeachable offenses by using it for incapacity could lead to negative ramifications down the road, raising the possibility of the mechanism becoming dangerously dislodged from its constitutional foundations. In this regard, promiscuous public discourse could be wedded to broad legal interpretation to permit impeachment to be wielded recklessly. *Cf. First Fordham Report*, *supra* note 7, at 35.

527. *See supra* Part II.A.2.a.

back on the Necessary and Proper Clause for support. The impeachment approach can draw upon no such textual reinforcement.

b. Impeachment Was Designed for One Purpose, the Original Inability Clause for Another

Putting the Necessary and Proper Clause to one side for a moment, it could be argued that there is one express textual authorization for addressing vice presidential incapacity and it is when Congress takes action under Article II, Section 1, Clause 6.[528] Impeachment, on the other hand, goes specifically to issues of treason, bribery, high crimes and misdemeanors.[529] Each constitutional provision was meant to address an entirely separate matter: one for inability and the other for bad behavior.[530] These clauses, the argument would go, were never intended to overlap and they should not be blurred together in the modern era.

c. Practical Drawbacks

Not only are there serious constitutional drawbacks to using impeachment for incapacity purposes, practical concerns exist that are equally formidable. One potential drawback with impeaching and removing an incapacitated Vice President while the President remains healthy is that such an action would likely remove the individual from office.[531] As examined in the context of the pre-signed resignation letter option, with impeachment and removal, if the Vice President later recovered his health or was freed from kidnappers, he would be unable to return to his position without a tremendous exertion of time and resources and a healthy dose of good fortune; the effect would be to cost the American public the officeholder they chose. This is unlike the statutory mechanism whereby, if the Vice President recovers his capacity, he can regain his powers and duties. In this respect, the impeachment mechanism is much less flexible and much harsher than the post hoc statute advocated in this Article.

Moreover, impeaching an incapacitated Vice President involves stigma. Simply put, impeachment in the public mind is essentially

528. *See supra* Part II.A.2.a.

529. *See* BERGER, *supra* note 239, at 189-91.

530. *See id.* at 59, 190-91; *cf.* KALT, *supra* note 16, at 55; Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 468 (2009). The vote thresholds are different for the two processes which reflect that, while the mechanisms are similar, they are not interchangeable. For impeachment and removal there must be a majority vote in the House of Representatives and a two-thirds vote in the Senate. A section 4 process entails a two-thirds vote in both houses. *Cf.* KALT, *supra* note 16, at 13; Gustafson, *supra*, at 467.

531. *See* Feerick, *supra* note 241, at 115; Stephan, *supra* note 241, at 68.

reserved for bad behavior. It would likely take a significant "public education" campaign to persuade American citizens that the mechanism could or should be used for addressing inability. This effort to convince the public would no doubt be greatly complicated by the textual considerations discussed earlier: the phrase "high crimes and misdemeanors" does not lend itself easily to including incapacity. For these reasons, removal through the impeachment process typically applies a stigma to the individual in question.[532] The impeachment process clearly implies impropriety and wrongdoing, and in the case of vice presidential inability, such opprobrium could very likely be unwarranted. (One could, of course, imagine a Vice President who is comatose because he performed some reckless act, which might bring with it a stigma).

During a vice presidential incapacity scenario, public sympathy toward the family would almost certainly run high. For example, the Vice President could be kidnapped or have suffered a stroke. For Congress then to remove the Vice President from office through impeachment and in the process eliminate his pay and benefits would be a truly jarring prospect for the public, making Congress's task extraordinarily difficult. This would be especially true if the Vice President's family opposed the effort (overtly or otherwise). It seems doubtful that members of Congress would vote to impeach a hospitalized or kidnapped Vice President and oppose a tearful Second Family. By contrast, the post hoc statutory approach would be narrowly tailored to specifically address incapacity without stigmatizing the Vice President and without eliminating his title, salary, and benefits.

All things considered, a set of arguments could be marshalled in favor of using impeachment to resolve a vice presidential incapacity situation, but these arguments run up against formidable textual, structural, and practical obstacles. Compared with a post hoc statute, impeachment comes up short. A statutory approach offers distinct advantages over impeachment in that: (1) it enjoys a stronger textual basis, (2) it is more flexible because it does not involve irrevocable removal of the Vice President, and (3) it lacks stigma.[533]

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532. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 472 (1991); *In re* Certain Complaints Under Investigation, 783 F.2d 1488, 1508 n.17 (11th Cir. 1986) (citing with approval 126 Cong. Rec. S13,859 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini)); *The Judicial Tenure Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th Cong. 60 (1977) (statement of Sen. Nunn); Brownell, *supra* note 69, at 201; Goldstein, *supra* note 9, at 91; Thomas, *supra* note 462, at 387; Winter, *supra* note 462, at 98; *see also* Feerick, *supra* note 241.

533. Impeachment could also prove to be a slower process than an ad hoc statute and its subsequent implementation. *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 472 (1991); KALT, *supra* note 16, at 122.

The previous four Parts have each discussed potential approaches to handling an immediate case of vice presidential inability: (1) through post hoc legislation, (2) through a letter arrangement, (3) through the CGOPT, and (4) through the impeachment process. Each raises concerns. Each situation poses different constitutional, legitimacy, and logistical challenges. The post hoc statutory approach, however, comes closest to satisfying these criteria and, in the end, addresses the dilemma of vice presidential inability in the least objectionable way.

IV. CONCLUSION

When it comes to addressing vice presidential incapacity, lawmakers have long taken the approach of the neighbor in Bob Dylan's song—"[i]t's just something we're gonna have to forget."[534] It, therefore, seems evident that a constitutional amendment or an ex ante statute to address vice presidential incapacity is unlikely to materialize anytime soon. Nonetheless, forgetting about the problem does not mean that the problem goes away. Vice presidential inability poses serious potential dilemmas for U.S. policymakers. The vice presidency has established itself as a vital American political institution;[535] indeed, the office is essential to the operation of sections 3 and 4 of the Twenty-Fifth Amendment. This indispensable role in the operation of the executive branch means that, when coupled with the lack of clear constitutional or statutory guidance on what to do about vice presidential inability, if the officeholder were to be stricken with an incapacity, his inability could result in paralysis in the upper reaches of the executive branch.

Without a constitutional amendment or the next best thing—an ex ante statute—governmental officials will have to make do the best they can if a vice presidential inability scenario arises. This Article has attempted to evaluate the various possible ways of addressing vice presidential incapacity and to provide the least objectionable approach if federal officials find themselves in this difficult spot. A Cheneyesque letter arrangement, the CGOPT, and the impeachment process each would be viable in a pinch, but each also has a number of flaws that make them less desirable than a post hoc statute.

Given the overriding need for the response to vice presidential inability to be constitutionally-sound, politically legitimate, and practical, a post hoc statute would appear to be the least troubling legal "band aid"

534. DYLAN, *supra* note 5.

535. *See, e.g.*, JOEL K. GOLDSTEIN, THE MODERN VICE PRESIDENCY: THE TRANSFORMATION OF AN AMERICAN POLITICAL INSTITUTION 3 (1982).

to place over this constitutional wound were such an unfortunate situation to arise.

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