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## What to Do If Simultaneous Presidential and Vice Presidential Inability Struck *Today*

Roy E. Brownell II

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## What to Do If Simultaneous Presidential and Vice Presidential Inability Struck *Today*

### Erratum

Law; Constitutional Law; Law and Politics; Law and Society; President/Executive Department; Legislation

# WHAT TO DO IF SIMULTANEOUS PRESIDENTIAL AND VICE PRESIDENTIAL INABILITY STRUCK *TODAY*

Roy E. Brownell II\*

*Dual incapacity is one of three major inability scenarios involving the Vice President that threatens the continuity of the executive branch. The current state of the law in this area, unfortunately, leaves only imperfect options for policymakers. This Article proposes that, in the event of a dual inability, the Speaker, the President pro tempore of the Senate, and the Cabinet should meet and then jointly declare that the Speaker is Acting President until either the President or Vice President regains capacity. At the same time, the Speaker—as the new Acting President—the President pro tempore, and the Cabinet should request that Congress ratify their decision and the process they undertook to reach that determination.*

|  |      |
|--|------|
| INTRODUCTION.....  | 1028 |
| I. TWO CONSTITUTIONAL NORMS: THE NEED TO ENSURE THAT<br>EXECUTIVE POWER NEVER LAPSES AND THE EXISTENCE OF<br>PROCEDURAL GUIDELINES FOR REMOVING A PRESIDENT FOR<br>INCAPACITY..... | 1033 |
| II. THE LEGAL FRAMEWORK .....  | 1035 |
| III. ALTERNATE APPROACHES TO RESOLVING AN IMMEDIATE<br>OCCURRENCE OF DUAL INCAPACITY .....   | 1037 |
| A. <i>Letter Arrangements and Contingency Plans in General</i> .....   | 1037 |
| 1. Practicality .....  | 1037 |
| 2. Legality .....  | 1039 |
| a. <i>Pre-Twenty-Fifth Amendment Letter Agreements</i> .....   | 1039 |

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|  |      |
|--|------|
| <i>b. Post-Twenty-Fifth Amendment Agreements and Contingency Plans</i> .....   | 1043 |
| 3. Legitimacy .....  | 1045 |
| <i>B. The Contingent Grant-of-Power Theory</i> .....   | 1046 |
| 1. Advantages.....   | 1048 |
| 2. Drawbacks.....  | 1048 |
| <i>C. The Reagan-Bush-Clinton Contingency Plans</i> .....  | 1051 |
| <i>D. Congress Passes a Statute Before the Speaker Becomes Acting President</i> .....  | 1053 |
| <i>E. Impeachment</i> .....  | 1054 |
| IV. THE RECOMMENDED APPROACH: THE SPEAKER, PRESIDENT PRO TEMPORE, AND CABINET DETERMINE DUAL INCAPACITY AND REQUEST CONGRESSIONAL RATIFICATION ..... | 1055 |
| <i>A. Arguments in Favor of This Approach</i> .....  | 1056 |
| 1. Legality .....  | 1056 |
| <i>a. Inclusion of the Cabinet</i> .....   | 1056 |
| <i>b. Inclusion of the PPT</i> .....   | 1057 |
| <i>c. Inclusion of Congress</i> .....  | 1059 |
| 2. Legitimacy .....  | 1063 |
| 3. Practicality .....  | 1064 |
| V. POTENTIAL COUNTERARGUMENTS.....   | 1065 |
| <i>A. Legislative Succession Is Unconstitutional</i> .....   | 1065 |
| <i>B. The Approach Violates Separation of Powers</i> .....   | 1068 |
| <i>C. Requesting Authorization from Congress Is Too Risky</i> .....  | 1069 |
| <i>D. Potential Challenges from the Officeholders or Their Families</i> .....  | 1071 |
| CONCLUSION .....   | 1072 |

#### INTRODUCTION

The legal architecture governing presidential succession and inability leaves unaddressed a number of potential hazards that threaten the continuity of American governance.<sup>1</sup> Vice presidential incapacity is implicated in at least three of these scenarios.<sup>2</sup> These situations entail (1) when the President and Vice President are simultaneously unable to fulfill their duties—what will be called “dual incapacity,” (2) when there is a healthy President and an incapacitated Vice President, and (3) when a President leaves office abruptly

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1. See, e.g., Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 3 (2010); John D. Feerick, *Presidential Inability: Filling in the Gaps*, POL. & LIFE SCI., Fall 2014, at 11, 11; Fordham Univ. Sch. of Law’s Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 13 (2012) [hereinafter First Clinic Report].

2. In this Article, “incapacity” and “inability” are used interchangeably.

and an incapacitated Vice President is slated to succeed him.<sup>3</sup> This Article will focus on the first of these three perilous situations: dual incapacity.<sup>4</sup> Groundbreaking work has analyzed what policymakers should do *prospectively* to fix the problem of dual incapacity.<sup>5</sup> However, the literature has not examined what should be done if dual incapacity were to occur *right now*, before a public solution is put into place. As such, this Article addresses this gap in the literature and suggests necessary steps to be taken moving forward.<sup>6</sup>

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3. See Amar, *supra* note 1, at 20–23, 27–28; John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 907, 935–39 (2010); First Clinic Report, *supra* note 1, at 13–14, 25–26, 31.

4. This piece is intended to be the first in a series of three articles on how to address immediate instances of vice presidential incapacity, each focusing on a different scenario. See *infra* notes 43, 95. The nation has never experienced dual incapacity of any serious duration, though for a few moments in 1986 both President Ronald Reagan and Vice President George H.W. Bush were simultaneously unconscious. See Roy E. Brownell II, *Vice Presidential Inability: Historical Episodes That Highlight a Significant Constitutional Problem*, 46 *PRESIDENTIAL STUD. Q.* 434, 434–35 (2016). There have also been several occasions when dual incapacity could have occurred, including instances involving President James Madison and Vice President Elbridge Gerry in 1813, President Abraham Lincoln and Vice President Andrew Johnson in 1865, and President John F. Kennedy and Vice President Lyndon Johnson in 1963. See *id.* at 440–41, 448, 449; see also JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 4–5* (3d ed. 2014); GARRETT M. GRAFF, *RAVEN ROCK: THE STORY OF THE U.S. GOVERNMENT’S SECRET PLAN TO SAVE ITSELF—WHILE THE REST OF US DIE* 180 n.\* (2017).

5. See Amar, *supra* note 1, at 32–35; Feerick, *supra* note 1, at 19–20; First Clinic Report, *supra* note 1, at 28–35, 61–63; see also Feerick, *supra* note 3, at 942–43.

6. Presumably, with concern over dual incapacity at least partly in mind, the President and Vice President seldom travel on the same flight. See Juliet Lapidus, *Do Obama and Biden Always Fly in Separate Planes?*, *SLATE* (Apr. 13, 2010, 5:47 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2010/04/do\\_obama\\_and\\_biden\\_always\\_fly\\_in\\_separate\\_planes.html](http://www.slate.com/articles/news_and_politics/explainer/2010/04/do_obama_and_biden_always_fly_in_separate_planes.html) [<https://perma.cc/LBA4-7PQL>]. Prior to the jet age, a similar policy discouraged the President and Vice President from riding on the same train. *Both Roosevelt and Garner out of Country; Hull Is Chief in Unprecedented Situation*, *N.Y. TIMES*, Oct. 17, 1935, at A1 [hereinafter *Both Roosevelt and Garner*]. In the same vein, the two officeholders are rarely overseas simultaneously. See Juliet Eilperin, *With Obama and Biden Both Overseas, Who’s in Charge?*, *WASH. POST* (Mar. 19, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/03/19/with-obama-and-biden-both-overseas-whos-in-charge> [<https://perma.cc/F37P-ZLGM>]; Steve Holland, *In Rarity, Obama, VP Biden May Be out of U.S. at Same Time Next Week*, *REUTERS* (Mar. 14, 2013, 6:53 PM), <http://www.reuters.com/article/idUSBRE92D1D720130314> [<https://perma.cc/KG7P-ZKSK>]; Donovan Slack, *Obama and Biden Abroad at the Same Time?*, *POLITICO* (Mar. 14, 2013, 5:49 PM), <http://www.politico.com/blogs/politico44/2013/03/obama-and-biden-abroad-at-the-same-time-159371> [<https://perma.cc/8X9H-ZV4S>]. The policy of trying to ensure that one of the two officeholders remains on U.S. soil has been in place for some time. See Terence Smith, *For President, Trips Resume at Quick Pace*, *N.Y. TIMES*, July 7, 1980, at B11. The first time both were out of the country simultaneously was in 1935 when President Franklin D. Roosevelt and Vice President John Nance Garner were in office. See *Both Roosevelt and Garner, supra*, at A1; see also EDWARD SAMUEL CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1957*, at 346 n.49 (4th rev. ed. 1957). Questions about whether both officeholders being abroad at the same time constitutes dual incapacity arose as late as the 1940s. See Associated Press, *Trips of Roosevelt, Wallace Set Precedent; Experts Deny President Gives Up Office*, *N.Y. TIMES*, Apr. 21, 1943, at 10. Following President Kennedy’s assassination, newly elevated President Johnson did not travel outside the country until he had a Vice President. See GRAFF, *supra* note 4, at 184.

The legal problems surrounding dual incapacity derive from shortcomings in the 1947 presidential succession statute.<sup>7</sup> The 1947 law addresses dual incapacity, but it omits two essential considerations. The law provides that the Speaker of the House of Representatives becomes Acting President if the President and Vice President both become incapacitated and, if the Speaker is unable or unwilling to become Acting President, the line of succession then turns to the President pro tempore (PPT) of the Senate and after him to Cabinet officers in the order of their department's creation.<sup>8</sup> However, the statute says nothing about (1) how decisions as to dual incapacity are to be made or (2) who is to make them.<sup>9</sup> Thus, in a situation involving dual incapacity, there is no clear indication of who would do what to resolve the quandary. As a result, dual incapacity threatens to paralyze the executive branch at its highest levels.

The task at hand is further complicated by the fact that public knowledge is limited regarding what contingency plans are currently in place (if any) to address incapacity situations because such steps are confidential.<sup>10</sup> This Article has unearthed contingency plans that have not previously been made public, but it is unclear if they remain in force. These prior plans reflect that, given the failure of the executive branch and Congress to formulate a legislative solution, policymakers do not have good options and have been

7. See 3 U.S.C. § 19 (2012).

8. See *id.* There have long been questions as to the constitutionality of the 1947 statute. This doctrinal matter is beyond the scope of this Article and has been ably addressed by others. See generally Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995); Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67 (2010); John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995); see generally, e.g., BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 88–94 (2012); RUTH C. SILVA, PRESIDENTIAL SUCCESSION 131–42 (1951); 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 would in fact become Acting President during a dual-incapacity setting. See *infra* Part V.A.

9. See Amar, *supra* note 1, at 22; First Clinic Report, *supra* note 1, at 23; Goldstein, *supra* note 8, at 71. The statute's shortcomings in this regard reflect those of the original presidential inability provisions under Article II. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 427 (Max Farrand ed., 1937) (quoting John Dickinson as asking “What is the extent of the term ‘disability’ & who is to be the judge of it?”).

10. See First Clinic Report, *supra* note 1, at 26–27. As to whether this Article's analysis is redundant given existing and confidential executive branch plans, the words of the Fordham University School of Law's First Clinic on Presidential Succession are apt: it is understood that others in positions of responsibility have already engaged in contingency planning and may find [these] . . . recommendations duplicative . . . . Nonetheless [in the interests of] support[ing] continued planning, as is surely underway, . . . the wisdom of the writers of the Federalist Papers [is to be recalled] that “[a] wise nation . . . does not rashly preclude itself from any resource which may become essential to its safety.”

*Id.* at 27 (seventh and eighth alterations in original) (quoting THE FEDERALIST No. 41 (James Madison)).

forced to improvise.<sup>11</sup> The goal of this Article is to identify *the least bad option* under the circumstances.

Any attempt to provide policymakers with an “off-the-shelf” solution to an immediate case of dual incapacity must try to satisfy three *desiderata* as closely as possible: the proposal must be lawful, politically legitimate,<sup>12</sup> and practical. Consistent with these three requirements, this Article offers a solution that policymakers should consider if this difficult issue should arise (assuming there is not a public solution in place at the time).

The approach put forward in this Article is that, upon learning of an apparent dual incapacity, the Speaker (or officeholder who is next in the line of succession)<sup>13</sup> should consult with the PPT and the principal officers of the executive departments (i.e., the President’s Cabinet).<sup>14</sup> The Speaker, PPT, and a majority of the Cabinet should then decide whether the President and Vice President are, in fact, incapacitated.<sup>15</sup>

If the Speaker, PPT, and a majority of the Cabinet decide that dual incapacity has indeed occurred, they should instruct executive branch lawyers to craft a legal opinion articulating the legal basis upon which they have acted. Following the opinion’s completion, the Speaker, PPT, and Cabinet should make the dual incapacity determination and legal opinion public and announce that the Speaker will be assuming the role of Acting President until the incapacity of the President or Vice President has been lifted.

In this joint public statement, the Speaker-turned-Acting President, PPT, and Cabinet would announce that what has been done was consistent with the Presidential Succession Act of 1947. But, out of an abundance of caution, the Speaker, PPT, and Cabinet would state further that they are requesting

11. See *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 FORDHAM L. REV. 781, 807 (2010) [hereinafter *Interview with Sen. Bayh*] (addressing solutions to dual incapacity under current law); *id.* (statement of John D. Feerick) (“That’s a tough problem. I don’t know how that would play out. There are just a lot of possibilities.”); cf. Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1040 (2010).

12. See Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 934–36, 948–50, 955–56, 971–74, 977–80, 986, 988, 1006 (2017) [hereinafter *Second Clinic Report*]; cf. Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 200 (1958).

13. To avoid redundancy, unless otherwise stated, the term “the Speaker” will refer to the Speaker or the next in line of succession if the Speaker cannot, or will not, serve.

14. Cf. *Interview with Sen. Bayh*, *supra* note 11, at 807. Senator Bayh stated, regarding a dual-incapacity scenario, “If I were Speaker, I’d sure try to see if I could get the Cabinet to support me.” *Id.* John Feerick stated that the Speaker is not legally “bound by what the Cabinet says” in a dual-incapacity scenario, although “the Speaker would probably want to get some support from the Congress, I would think, as a practical matter . . .” *Id.*; see also Feerick, *supra* note 3, at 939.

15. As a practical matter, the majority of the Cabinet would almost have to include the Secretary of State or next eligible executive branch successor and the Attorney General (given the legal concerns involved). See *supra* note 8 and accompanying text (discussing possible constraints upon the Secretary challenging the legality of the Speaker’s elevation); *infra* Part V.A.

that Congress retroactively ratify the process followed by the group in making their decision.<sup>16</sup> The Acting President would then submit recommended legislative language that would propose a statutory process for how the President and Vice President could demonstrate that they have regained their capacity and that would include a clear dual incapacity determination procedure going forward. This recommended bill language would closely track Section 4 of the Twenty-Fifth Amendment.<sup>17</sup>

During the same ceremony, the Speaker would announce his resignation from Congress. The Speaker would additionally state that, if the President or Vice President at any point believe they have regained their capacity prior to the recommended bill's enactment, either officeholder could make a public declaration to that effect. If the Acting President, PPT, and Cabinet do not contest the matter, the formerly incapacitated officeholder (or officeholders) would then regain their positions.<sup>18</sup> If the Speaker, PPT, and a majority of the Cabinet disagree with the declaration,<sup>19</sup> Congress would decide the matter with legislative inaction resulting in the return of the President and Vice President to office.<sup>20</sup>

This Article begins by discussing two structural constitutional norms: (1) that executive power cannot be permitted to lapse and (2) that any solution to dual incapacity should be consistent with the Twenty-Fifth Amendment. Next is a brief overview of the legal considerations involved with dual incapacity. The Article then discusses possible options to address the problem, including (1) the use of letter arrangements and contingency plans in general, (2) the application of the contingent grant-of-power theory (CGOPT), (3) the contingency plans adopted during the Reagan, Bush, and Clinton administrations, (4) the adoption of a statute before the Speaker assumes the position of Acting President,<sup>21</sup> and (5) the initiation of impeachment proceedings.<sup>22</sup> The shortcomings of each of these options

16. Whether Congress would expressly sanction all of the Acting President's governing actions in the interim would be a matter to be worked out by the Acting President and Congress.

17. *Cf.* Second Clinic Report, *supra* note 12, at 960–62.

18. *Cf.* U.S. CONST. amend. XXV, § 4.

19. An appeal of the incapacity determination could be undertaken by the President, the Vice President, or both together. If the Vice President alone were to successfully demonstrate his capacity, he would bump the former Speaker from the White House and become Acting President. *See* 3 U.S.C. § 19(c)(2) (2012).

20. *Cf.* U.S. CONST. amend. XXV, § 4. If the President and Vice President are simultaneously incapacitated but the President attempts to resume office before the Vice President, it is all the more important that the process for his recovery of office follow as closely as possible the provisions of Section 4 as such a situation would be very similar to a Section 4 scenario.

21. In this regard, the bill would need to be enacted without the incapacitated President's signature. *Id.* art. I, § 7. This occurred twenty-eight times during President Woodrow Wilson's illness. *See* FEERICK, *supra* note 4, at 16.

22. Yet another alternative to handling dual incapacity could be to view the incapacitated President and Vice President as having vacated their positions. The Speaker would then become Acting President. This approach is highly dubious, however, particularly on constitutional and legitimacy fronts. First, the word "vacant" clearly denotes that no one is in office. *See, e.g.,* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 409 (2002) (O'Connor, J., concurring) ("The word 'vacant' means 'not filled or occupied . . .'" (quoting *Vacant*,



require that another approach must be found. A discussion of this Article's recommended solution to dual incapacity follows. The Article then closes with analyses of potential counterarguments.

I. TWO CONSTITUTIONAL NORMS: THE NEED TO ENSURE THAT  
EXECUTIVE POWER NEVER LAPSES AND THE EXISTENCE OF PROCEDURAL  
GUIDELINES FOR REMOVING A PRESIDENT FOR INCAPACITY

There are two structural constitutional norms that are vital to understanding how best to address an immediate situation involving dual incapacity. The first is the structural principle that both continuity and stability of all three branches of government must be preserved.<sup>23</sup> The second is that there are procedural guidelines established by the Twenty-Fifth Amendment that should be observed in order to remove a President for incapacity.<sup>24</sup>

With respect to the overriding need for continuity of the executive branch, the constitutional norm is reflected in several constitutional provisions. Article II states that "the executive Power *shall* be vested in a President of the United States."<sup>25</sup> The word "shall" conveys that it is mandatory that executive power remain in place.<sup>26</sup> Article II also provides that the President "*shall* hold his Office during the Term of four Years,"<sup>27</sup> again conveying the expectation that a President must be in office continuously until the end of his term and another President takes over. Section I, Clause 6 of Article II,<sup>28</sup> the Twenty-Fifth Amendment,<sup>29</sup> the Recess Appointments Clause,<sup>30</sup> and Sections 3 and 4 of the Twentieth Amendment further underscore the

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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2527 (1976)). But, with an incapacitated President and Vice President, the two are still in office; they simply are suffering from an incapacity. Second, whatever process that is created to declare the office vacant would have the effect of removing the President and Vice President from office. However, there is only one means under the Constitution to permanently remove either officeholder, and that is through the impeachment process. U.S. CONST. art. II, § 4; *Presidential Inability*, 42 Op. Att'y Gen. 69, 81, 91 (1961). Third, the vacancy argument was clearly repudiated during consideration of the Twenty-Fifth Amendment. *See Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 87 (1965) (statements of Rep. Richard Poff and Sen. Birch Bayh); *id.* at 246 (statements of Rep. Richard Poff and Herbert Brownell, former Att'y Gen.); *see also* FEERICK, *supra* note 4, at 109, 365. As a result, this constitutional norm would counsel against declaring the offices vacant. Finally, the vacancy determination process would presumably result in ending the incapacitated President's and Vice President's salary and benefits since they would no longer be in office. This might invite litigation as the President and Vice President, and their families, would be suffering from a tangible harm through the deprivation of compensation and health-care benefits (both of which might be seriously needed if either of the incapacities was health related). For these reasons, the vacancy option is highly problematic and does not merit extended discussion.

23. *See* Second Clinic Report, *supra* note 12, at 936, 967–68.

24. U.S. CONST. amend. XXV.

25. *Id.* art. II, § 1, cl. 1 (emphasis added).

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

27. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

28. *Id.* art. II, § 1, cl. 6.

29. *Id.* amend. XXV.

30. *Id.* art. II, § 2, cl. 3; *see also* Second Clinic Report, *supra* note 12, at 967.

principle of an enduring executive.<sup>31</sup> Indeed, the very existence of the vice presidency manifests this constitutional precept.<sup>32</sup>

Moreover, as noted by the U.S. Supreme Court, the Constitution “is not a suicide pact.”<sup>33</sup> It was designed to function, not to flounder, amidst sterile abstractions.<sup>34</sup> The nation needs a President at the head of the executive branch at all times in order to ensure that the government continues to operate. To this end, a fundamental constitutional norm has been recognized that executive power should never lapse.<sup>35</sup> Under the Constitution, however, executive power is uniquely vulnerable to disruption since the executive is the only one of the three branches in which leadership is manifested in a single person.<sup>36</sup>

In this regard, there are certain presidential duties that are nondelegable.<sup>37</sup> Without a President, there is no Commander in Chief of the military,<sup>38</sup> no direction to American diplomacy, no one to veto improvident legislation,<sup>39</sup> no one to issue pardons,<sup>40</sup> and no one to nominate judges or senior executive branch officials.<sup>41</sup> The broad structural consideration that executive power may not be permitted to lapse 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.

31. U.S. CONST. amend. XX, §§ 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. LEGIS. 101 (2017). Given that the disputed election of 1800 threatened an interregnum of executive power, the Twelfth Amendment could arguably also be added to this list of constitutional provisions.

32. See Second Clinic Report, *supra* note 12, at 967–68.

33. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); see also *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

34. See, e.g., JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 185 (2007) (quoting Alexander Hamilton’s statement that “the Constitution must be construed so as to make its own survival possible” (footnote omitted)); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 32 (rev. ed. 1964) (“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.”) (quoting Charles E. Hughes, former U.S. Supreme Court Justice, War Powers Under the Constitution, Address Before the American Bar Association (Sept. 1917), in S. Doc. No. 65-105, at 3 (1917)).

35. See *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); 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 135–36 (Jonathan Elliot ed., 3d ed. 1937) (statement of Archibald Maclaine at the North Carolina Convention); Second Clinic Report, *supra* note 12, at 936, 967–68.

36. See *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866) (stating that “the President is the executive department”); see also *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring) (“[I]nterference with a President’s ability to carry out his public responsibilities is constitutionally equivalent to interference with the ability of the entirety of Congress, or the Judicial Branch, to carry out its public obligations.”).

37. See, e.g., *Presidential Succession & Delegation in Case of Disability*, 5 Op. O.L.C. 91, 93–99 (1981); *Presidential Inability*, 42 Op. Att’y Gen. 69, 84 (1961).

38. U.S. CONST. art. II, § 2.

39. *Id.* art. II, § 7.

40. *Id.* art. II, § 2.

41. *Id.* art. II, § 2, cl. 2.

The second structural principle stems from Section 4 of the Twenty-Fifth Amendment. Section 4 provides:

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

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.<sup>42</sup>

In essence, Section 4 provides a procedural floor when it comes to removing the President for incapacity. There are three key elements to this procedural norm: (1) participation by the successor in the inability determination, (2) participation by the Cabinet in the process, and (3) an opportunity for the President to appeal the decision. Any means of resolving dual incapacity, which includes determining presidential inability, should comply with this constitutional norm.

## II. THE LEGAL FRAMEWORK

Unlike the other two vice presidential incapacity scenarios—a healthy President and an incapacitated Vice President,<sup>43</sup> and a President leaving

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42. *Id.* amend. XXV, § 4.

43. As will be discussed in a later article, when addressing an immediate case of sole vice presidential inability, Congress could likely take action under Article II, Section 1, Clause 6 and the Necessary and Proper Clause by asserting authority to prevent *future* episodes of dual incapacity. See Feerick, *supra* note 3, at 942–43; Second Clinic Report, *supra* note 12, at 962–64. An 1853 statute authorizing the administration of the oath of office to the deathly ill Vice President-Elect William King while he was in Cuba could arguably be seen as an example of Congress acting to prevent vice presidential inability. See Act of March 2, 1853, ch. 93, 10 Stat. 180; CONG. GLOBE, 32nd Cong., 2d Sess. 787 (1853); Henry Barrett Learned, *The Vice-President's Oath of Office*, NATION, Mar. 1, 1917, at 248–50. Until the early twentieth century, in many circles, it was thought that if a President or Vice President were overseas then he was in fact incapacitated. See CORWIN, *supra* note 6, at 55, 346–47; GRAFF, *supra* note 4, at 164–65. In addressing vice presidential inability, judicial disability statutes might also

office with an incapacitated Vice President waiting in the wings—dual incapacity benefits from applicable constitutional provisions. Article II, Section 1, Clause 6, which will be called the Dual Inability Clause, authorizes Congress to take action in the area of joint presidential and vice presidential incapacity. It states 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 . . . .”<sup>44</sup>

In addition, the Necessary and Proper Clause reinforces the provisions of the Dual Inability Clause. It authorizes 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, or in any Department or Officer thereof.”<sup>45</sup> In essence, this Clause allows Congress to act to ensure the execution of other powers of the federal government.

The Necessary and Proper Clause has been construed broadly in historic rulings such as *McCulloch v. Maryland*.<sup>46</sup> Its broad mandate to “carry[] into Execution the foregoing Powers, and all other Powers vested by this Constitution” gives Congress authority to prevent a lapse in “executive power” because such authority is among the “other Powers vested by this

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provide useful analogous support. *See* 28 U.S.C § 3 (2012); 28 U.S.C § 372(b) (2012); *see also* Second Clinic Report, *supra* note 12, at 969. Incapacity involving vice presidents and incapacity involving judges share a common concern: the Constitution is silent on removal options other than the impeachment process. The author’s view that Congress might be able to legislate to prevent future episodes of dual incapacity has benefitted from conversations with Professors John Feerick, John Rogan, and Joel Goldstein.

44. U.S. CONST. art. II, § 1, cl. 6 (emphasis added). It could be argued that the Dual Inability Clause only authorizes the creation of a line of succession and nothing more. *See* Feerick, *supra* note 3, at 943. Given the overriding structural imperative of ensuring executive branch continuity and the fact that the succession acts have addressed matters beyond merely creating a line of succession, *see* Feerick, *supra* note 1, at 20, this would seem to be an overly cramped interpretation of the provision, *see* John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 995 (2004); Second Clinic Report, *supra* note 12, at 968. In this regard, the expression “provide for the case” would seem to include sufficient latitude for determining who decides dual incapacity, and how. Even if the Dual Inability Clause only provides authority for the creation of the line of succession, the Necessary and Proper Clause doubtlessly would supply Congress with the power to determine the means of effectuating the former clause. *See, e.g.,* *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution.”); THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 2003) (“No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”); *see also* 3 ALEXANDER HAMILTON, *Opinion as to the Constitutionality of the Bank of the United States*, in THE WORKS OF ALEXANDER HAMILTON 445, 445–95 (Henry Cabot Lodge ed., 1904) (1791); Feerick, *supra* note 3, at 942–43; Second Clinic Report, *supra* note 12, at 962–64, 968.

45. U.S. CONST. art. I, § 8, cl. 18. For more on the potential use of the Necessary and Proper Clause to address inability, *see* FEERICK, *supra* note 4, at 246; Feerick, *supra* note 1, at 20; Feerick, *supra* note 3, at 942–43; First Clinic Report, *supra* note 1, at 29–30.

46. 17 U.S. 316 (1819). For further discussion of the Necessary and Proper Clause in a dual incapacity setting, *see* Feerick, *supra* note 1, at 20; Feerick, *supra* note 3, at 942; First Clinic Report, *supra* note 1, at 29; Second Clinic Report, *supra* note 12, at 962–64.

Constitution.”<sup>47</sup> That is to say, use of the Necessary and Proper Clause in this context would be effectuating the overall purposes of Article II as well as, more specifically, the Executive Power and Dual Inability Clauses.

The Presidential Succession Act of 1947 was enacted under authority of the Dual Inability Clause and was likely reinforced by the Necessary and Proper Clause.<sup>48</sup> It states that

[i]f, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.<sup>49</sup>

As will be recalled, it provides no statutory explanation as to who decides that the two officeholders are incapacitated, nor does it provide a mechanism for such determination.

### III. ALTERNATE APPROACHES TO RESOLVING AN IMMEDIATE OCCURRENCE OF DUAL INCAPACITY

Before this Article turns to its recommended approach for addressing an immediate occurrence of dual incapacity, it will first analyze alternate solutions. These include (1) letter arrangements and contingency plans in general, (2) the CGOPT, (3) the Reagan-Bush-Clinton contingency plans, (4) *ex ante* legislation, and (5) impeachment. Each of these proposed solutions is reviewed to gauge its practicality, legality, and legitimacy. This Part concludes that each alternative has disqualifying flaws.

#### A. Letter Arrangements and Contingency Plans in General

##### 1. Practicality

One potential means of effectuating various approaches to dual incapacity is reliance on a preexisting secret letter arrangement or contingency plan.<sup>50</sup>

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47. U.S. CONST. art. 1, § 8, cl. 18; *see also McCulloch*, 17 U.S. at 413–14.

48. *See* H.R. REP. NO. 80-17, at 2, 4 (1947); 93 CONG. REC. 7766–67 (1947) (statement of Sen. Hatch); *id.* at 7694–96 (statement of Sen. Wherry); *id.* at 8634 (statement of Rep. Celler).

49. 3 U.S.C. § 19(a)(1) (2012).

50. The focus of this Article is on *unanticipated* dual incapacity—akin to a situation involving Section 4 of the Twenty-Fifth Amendment. An *anticipated* dual incapacity situation—similar to a situation involving Section 3 of the Twenty-Fifth Amendment (e.g., the Vice President is in a coma and the President has to have a routine surgical procedure)—could likely be addressed through a public letter arrangement between the President and the Speaker whereby the former temporarily delegates authority to the latter. This letter arrangement or contingency plan could articulate that it is promulgated under authority of the 1947 Presidential Succession Act and that it is consistent with the spirit of Section 3 of the Twenty-Fifth Amendment. From a constitutional standpoint, such a letter agreement might fare better than a *secret* letter agreement involving *unanticipated* dual incapacity. For example, assume the letter arrangement for unanticipated dual incapacity follows the CGOPT. As noted below, one of the major legal and legitimacy drawbacks to this approach is that the Speaker would be in the position of acting alone to determine the President’s inability. This is contrary to the constitutional norms established by Section 4 of the Twenty-Fifth Amendment, which provide that the next in line of succession should gain the approval of a majority of the Cabinet before

That assumes, of course, that such a plan is in place. One may not be. Since adoption of the Twenty-Fifth Amendment, the executive branch has never publicly disclosed the existence of a dual-incapacity agreement.<sup>51</sup> While a secret letter arrangement or contingency plan is essentially a vehicle through which to implement a specific inability determination process, the approach deserves to be evaluated on its own since its very existence over time could come to be seen as a constitutional process through past practice. This is problematic as the mechanism itself carries with it some inherent flaws.

If a secret letter arrangement or contingency plan does, in fact, currently exist, its implementation would arguably meet the practicality test. All that would need to be done would be for the designated person or persons to take whatever action is laid out in the letter and then cite (and better yet, publicly produce) the arrangement, and the inability issue would be “fixed” from a practical standpoint. Given the premium rightly placed on providing the executive branch with continuous leadership,<sup>52</sup> that is certainly a mark in favor of this alternative.

Assuming a secret letter arrangement or contingency plan is currently in place, the obvious question is “What does it say?” More precisely, what does the letter or plan purport to authorize, and based on what legal authority? Clearly, the constitutionality of a letter arrangement or contingency plan depends in large part on what is called for in the text of the letter. If, for example, the letter arrangement or contingency plan follows the CGOPT,<sup>53</sup> as argued in Part III.B, it may face serious constitutional or legitimacy difficulties. If it follows Section 4 of the Twenty-Fifth Amendment,<sup>54</sup> it is more likely to pass constitutional muster. Either way, however, the general contours of letter arrangements or contingency plans should be made public.<sup>55</sup> This is important from both a constitutional and a legitimacy standpoint.

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a determination can be reached and, if the President contests the question, the matter should go to Congress for resolution. In an *anticipated* dual incapacity setting, however, the President would make the determination of his own inability in advance, which is fully in keeping with Section 3 of the Twenty-Fifth Amendment. Legitimacy concerns would also seem to be reduced in an anticipated setting rather than in an unanticipated context since (1) if precedent from Section 3 is followed, the President would *publicly* reveal the arrangement himself (as opposed to the Speaker unveiling a secret letter after announcing his own elevation) and (2) the inability is typically for a short duration wherein the Speaker would be unlikely to make significant executive branch decisions. Even if the inability became a long-term one, the Speaker would still be acting consistent with the norms of Section 3 and with the President’s prior public approval. That said, a statutory authorization prior to the inability would obviously be preferable.

51. In his memoirs, Dick Cheney disclosed that, as Vice President, he executed a presigned resignation letter. The document, however, did not address dual incapacity. *See* DICK CHENEY WITH LIZ CHENEY, *IN MY TIME: A PERSONAL AND POLITICAL MEMOIR* 319–22 (2011).

52. *See generally supra* Part I.

53. *See* Feerick, *supra* note 3, at 939; First Clinic Report, *supra* note 1, at 30–31.

54. *See infra* Part III.C.

55. *See* Second Clinic Report, *supra* note 12, at 934–35. This is not a universally held view. *See Interview with Sen. Bayh, supra* note 11, at 813 (expressing skepticism about the need for letter arrangements regarding presidential incapacity to be made public).

## 2. Legality

*a. Pre-Twenty-Fifth Amendment Letter Agreements*

On the constitutional front, letter agreements—at least the way they have been traditionally crafted—have not been thought to be legally binding.<sup>56</sup> Prior to the Twenty-Fifth Amendment, Presidents and Vice Presidents executed letter agreements in case the chief executive became incapacitated. President Dwight Eisenhower was the first to adopt such an approach when he signed a letter agreement with Vice President Richard Nixon in 1958.<sup>57</sup>

Nixon, however, viewed his letter agreement with Eisenhower as being morally but not legally binding on the parties. The Vice President later wrote that the “letter established historical precedent” but reflected “mere expressions of a President’s desires, [and did] not have the force of law.”<sup>58</sup> Letters, he contended, “are only as good as the will of the parties to keep them.”<sup>59</sup>

Other authorities have agreed.<sup>60</sup> Speaker of the House John McCormack, who had a comparable agreement with President Lyndon Johnson following

56. See, e.g., FEERICK, *supra* note 4, at 54.

57. See First Clinic Report, *supra* note 1, at 77–79. The first executive branch contingency plan arguably was put in place following the death of President James Garfield and the elevation of Vice President Chester Arthur in 1881. See John D. Feerick, *The Twenty-Fifth Amendment: Its Origins and History*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT* 1, 7 (Robert E. Gilbert ed., 2000); David A. Erhart, Note, “*I Am in Control Here*”: *Constitutional and Practical Questions Regarding Presidential Succession*, 51 U. LOUISVILLE L. REV. 323, 330–31 (2013). Under the succession law at the time, the PPT and the Speaker were the only successors. Congress, however, was out of session and had yet to fill either position, and Arthur, as the newly minted President, had to travel from New York to Washington. Ahead of his departure, Arthur mailed a confidential letter which would have called the Senate into session to elect a PPT if anything had happened to him on his way to the capital. He arrived safely and, in the usual manner, then proceeded to issue the proclamation for Congress to convene. See *Giving Voice to Sorrow: Words of Respect and Affection for Mr. Arthur*, N.Y. TIMES (Nov. 21, 1886), <http://query.nytimes.com/mem/archive-free/pdf?res=9A04E0D7123FE533A25752C2A9679D94679FD7CF> [<https://perma.cc/5QCY-EBG5>]; see also GEORGE FREDERICK HOWE, CHESTER A. ARTHUR, A QUARTER-CENTURY OF MACHINE POLITICS 154–55 (1957); Feerick, *supra*, at 7.

58. RICHARD M. NIXON, *SIX CRISES* 179–80 (1962). Eisenhower and Attorney General William Rogers believed that the agreement was not contrary to law but also conceded that the arrangement rested on the “mutual[] trust[]” that existed between the President and the Vice President. DWIGHT D. EISENHOWER, *THE WHITE HOUSE YEARS: WAGING PEACE, 1956–1961*, at 234–35 (1965).

59. NIXON, *supra* note 58, at 179.

60. See, e.g., 111 CONG. REC. H7937 (daily ed. Apr. 13, 1965) (statement of Rep. Celler); 111 CONG. REC. H3285 (daily ed. Feb. 19, 1965) (statement of Sen. Hruska); *Presidential Inability and Vacancies in the Office of Vice President: Hearing on S.J. Res 1 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 32 (1965) [hereinafter *1965 Senate Hearing*] (statement of Sen. Roman Hruska); GRAFF, *supra* note 4, at 183; Feerick, *supra* note 3, at 922; Michael Nelson, *Background Paper*, in *A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY* 79, 87 (1988); Memorandum from Bobbie Greene Kilberg, White House Assoc. Counsel, to the President Regarding the 25th Amendment (Aug. 21, 1975), [http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth\\_amendment\\_executive\\_materials](http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_executive_materials) [<https://perma.cc/M6EU-GJXB>]; see also FEERICK, *supra* note 4, at 343.

President John F. Kennedy's assassination, was of like mind. He was quoted as saying that their "written agreement . . . [was] outside the law" and constituted "an agreement between individuals."<sup>61</sup> McCormack's predecessor as Speaker, Sam Rayburn, went even further. He contended that the 1958 letter arrangement between Eisenhower and Nixon not only failed to bind the parties but was unconstitutional.<sup>62</sup> If a letter arrangement is not legally binding, that calls into question the lawfulness of all subsequent actions undertaken by the Acting President and could invite litigation.<sup>63</sup>

These pre-Twenty-Fifth Amendment letters did not speak to dual incapacity, however. They only addressed situations involving an incapacitated President. While the content of letter arrangements or contingency plans largely determines whether they are constitutional and legally binding, some authorities seem to question the viability of any type of letter agreement after the Twenty-Fifth Amendment.<sup>64</sup>

A letter arrangement that explicitly stated it was implementing the provisions of the Dual Inability and Necessary and Proper Clauses and the 1947 Presidential Succession Act, could be defensible. Were this to be done, the letter arrangement could be seen as being akin to an agency issuing regulations to implement a statute (even if the statute makes no explicit provision for rulemaking).<sup>65</sup> This broad statutory construction would seem warranted given the constitutional premium placed on ensuring executive continuity.

It could also be argued that a letter arrangement or a contingency plan involving dual incapacity, if prepared and made ready for use by multiple administrations, might acquire a constitutional status over time.<sup>66</sup> Certainly, in the realm of separation of powers, there have been a number of practices that were begun well after the formative years of the Constitution that later

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61. FEERICK, *supra* note 4, at 100 (quoting Speaker McCormack).

62. See 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, 17; see also Stephen W. Stathis, *Presidential Disability Agreements Prior to the 25th Amendment*, 12 PRESIDENTIAL STUD. Q. 208, 210 (1982).

63. See Nelson, *supra* note 60, at 87.

64. See MILLER CTR. COMM'N NO. 4, REPORT OF THE COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 10 (1988); cf. Presidential Succession & Delegation in Case of Disability, 5 Op. O.L.C. 91, 98 n.7 (1981); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389, 1405 n.61 (1987); Adam R.F. Gustafson, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 479 (2009).

65. See, e.g., 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 408 (5th ed. 2010); *A Guide to the Rulemaking Process*, OFF. FED. REG., [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) [<https://perma.cc/U9BM-2LCD>].

66. See Presidential Inability, 42 Op. Att'y Gen. 69, 94 (1961); Goldstein, *supra* note 8, at 71–72; Bruce Ackerman, *Take Your Paws off the Presidency!*, SLATE (July 15, 2008, 3:55 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2008/07/take\\_your\\_paws\\_off\\_the\\_presidency.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2008/07/take_your_paws_off_the_presidency.html) [<https://perma.cc/4X8D-PVX5>]. The author has benefited greatly from conversations with Professor Joel Goldstein on this subject.



came to be acknowledged as constitutional doctrine.<sup>67</sup> However, if they 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*,<sup>68</sup> famously observed that

[i]t is an inadmissibly narrow conception of American constitutional law to confine it to words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, 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.<sup>69</sup>

This formulation, which has been used as a guide for determining the constitutionality of longstanding political custom,<sup>70</sup> would seem *not* to apply to a secret dual incapacity letter arrangement or contingency plan. First, it seems highly unlikely that such a procedure would be seen as having been “pursued to the knowledge of the Congress and never before questioned.”<sup>71</sup> If such an agreement exists, it is confidential.<sup>72</sup> Perhaps some in Congress have been briefed on these plans (e.g., the Speaker and PPT) but certainly not Congress as a whole or, by extension, the public.<sup>73</sup> The fact that the existence and content of pre-Twenty-Fifth Amendment letters were made public would seem to inform how the “pursued to the knowledge of Congress” formulation should be interpreted in the context of presidential inability.<sup>74</sup> How could

67. See *NLRB v. Noel Canning*, 134 S. Ct. 2250, 2559 (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 Roy E. Brownell II, *Don Wallace, Jr.: Burkean Presidentialist*, in *A REVOLUTION IN THE INTERNATIONAL RULE OF LAW: ESSAYS IN HONOR OF DON WALLACE, JR.* 607, 615 n.64 (Borzu Sabahi et al. eds., 2014); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 115 (1984); Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 656 (2016).

68. 343 U.S. 579 (1952).

69. *Id.* at 610–11 (Frankfurter, J., concurring).

70. See, e.g., *Noel Canning*, 134 S. Ct. at 2559–60; *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

71. *Youngstown*, 343 U.S. at 610–11.

72. See First Clinic Report, *supra* note 1, at 26–27.

73. Vice President Dick Cheney, for instance, only informed his legal counsel and the President of his resigned resignation letter. See CHENEY WITH CHENEY, *supra* note 51, at 321–22. For more on the secret nature of contingency plans, see GRAFF, *supra* note 4, 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, 10:53 AM), <https://www.nbcnews.com/storyline/9-11-anniversary/secrets-9-11-new-details-chaos-nukes-emerge-n645711>

[<https://perma.cc/T64C-4864>]. See generally HOMELAND SEC. COUNCIL, NATIONAL CONTINUITY POLICY IMPLEMENTATION PLAN (2007), <https://www.fema.gov/media-library-data/1384886826028-729844d3fd23ff85d94d52186c85748f/NCPIP.pdf> [<https://perma.cc/33BQ-8HA5>]; Ackerman, *supra* note 66.

74. See, e.g., Stathis, *supra* note 62, at 210–12, 214; Dale, *supra* note 62, at 1, 17; *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. 5, 1963, at A1; Joseph A. Loftus, *Kennedy Provides That Johnson Will Act If He Is Incapacitated*, N.Y. TIMES, Aug. 11,

Congress sanction or “never before question[.]” something of which it has no knowledge (or, at least, very little)?<sup>75</sup>

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*,<sup>76</sup> 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.’”<sup>77</sup> Given the judiciary’s reasoning in this decision and others,<sup>78</sup> a key plank in Justice Frankfurter’s formulation in *Youngstown*—congressional knowledge—would seem inapplicable in the case of secret dual-incapacity 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 certainly made more difficult.

The argument in favor of past practice is further complicated by the fact that the authority for addressing dual incapacity has been clearly assigned to Congress by the Constitution.<sup>79</sup> Practice cannot change constitutional text, as Justice Frankfurter himself said in the very same opinion.<sup>80</sup> It is especially difficult to see how Congress could “lose,” or even come to share, its authority in the dual incapacity realm through an executive branch practice if the legislative branch were unaware, or almost wholly unaware, of that practice.<sup>81</sup>

Second, it is uncertain whether letter arrangements or contingency plans actually do constitute a “systematic, unbroken executive practice.”<sup>82</sup> The initial burst of letter arrangements under Presidents Eisenhower, Kennedy,

1961, at A1; 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.

75. See, e.g., Glennon, *supra* note 67, at 135–37.

76. 453 U.S. 654 (1981).

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

78. See, e.g., *Haig v. Agee*, 453 U.S. 280, 299 (1981) (“This history of administrative construction was repeatedly communicated to Congress, not only by routine promulgation of Executive Orders and regulations, but also by specific presentations . . .”); *Midwest Oil*, 236 U.S. at 481 (“Congress, with notice of this practice and of this claim of [executive branch] authority, received the report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.”); see also Glennon, *supra* note 67, at 135–37.

79. U.S. CONST. art. I, § 6, cl. 1.

80. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“Deeply imbedded traditional ways of conducting government cannot supplant the Constitution”); RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 98 (1974); see also *Powell v. McCormack*, 395 U.S. 486, 546–47 (1969); *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

81. See, e.g., Glennon, *supra* note 67, at 135–37. The breadth and scope of past congressional action in presidential succession acts further reaffirms congressional authority in this area and the willingness of Congress to exercise such power when it wishes. See Feerick, *supra* note 3, at 943.

82. *Youngstown*, 343 U.S. at 610–11.

and Johnson did not address dual incapacity. Moreover, the practice of public letter arrangements ended abruptly with adoption of the Twenty-Fifth Amendment. Therefore, these precedents would not seem to qualify as being part of longstanding practice regarding dual-incapacity plans. While it is not entirely clear when confidential arrangements about succession and inability began to be crafted after the Twenty-Fifth Amendment or to what extent they involve (or involved) dual incapacity,<sup>83</sup> it appears that the Reagan administration was the first to implement such plans.<sup>84</sup>

*b. Post-Twenty-Fifth Amendment Agreements  
and Contingency Plans*

Though President Johnson and Vice President Hubert Humphrey entered into an agreement of some sort prior to the Twenty-Fifth Amendment,<sup>85</sup> they do not seem to have done so following adoption of the Amendment.<sup>86</sup> Vice President Spiro Agnew revealed that he and President Richard Nixon never established an incapacity plan and never spoke about the matter.<sup>87</sup> Nor does it seem that Nixon established a contingency plan with Speaker of the House Carl Albert when the latter was next in line to the presidency after Agnew's departure.<sup>88</sup> Apparently, Nixon reached a verbal understanding with Vice President Ford.<sup>89</sup>

Members of the Ford White House staff advocated that the President enter into a letter arrangement with Vice President Nelson Rockefeller to effectuate the Twenty-Fifth Amendment.<sup>90</sup> The draft arrangement was never executed, however.<sup>91</sup> Moreover, it did not entail dual incapacity.<sup>92</sup> During the Carter

83. See Memorandum from Bobbie Greene Kilberg, *supra* note 60, at 4 (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 4, at 344.

84. See *infra* note 95.

85. See *supra* note 74 and accompanying text; see also FEERICK, *supra* note 4, at 359 n.17.

86. See Memorandum from Bobbie Greene Kilberg, *supra* note 60, at 2; see also FEERICK, *supra* note 4, at 342.

87. See Presidential Succession & Delegation in Case of Disability, 5 Op. O.L.C. 91, 103 (1981); see also FEERICK, *supra* note 4, at 344; Memorandum from Bobbie Greene Kilberg, *supra* note 60, at 4.

88. Albert had Ted Sorenson draft a “comprehensive contingency plan” for him in case the Speaker needed to become Acting President. See Memorandum from Theodore C. Sorenson to the Speaker of the House (Nov. 8, 1973) (on file with the University of Oklahoma, Carl Albert Center, Congressional and Political Collections, Carl Albert Collection, Legislative, Box 191, Folder 25); see also Ted Gup, *Speaker Albert Was Ready to Be President*, WASH. POST (Nov. 28, 1982), <https://www.washingtonpost.com/archive/politics/1982/11/28/speaker-albert-was-ready-to-be-president/84ebaa61-9cf1-4817-836e-a993e7e0e980/> [https://perma.cc/V9CR-PE8R]. One suspects that Albert would not have gone to this trouble if Nixon and he already had an arrangement in place.

89. See Memorandum from Bobbie Greene Kilberg, *supra* note 60, at 4; see also FEERICK, *supra* note 4, at 344.

90. See Memorandum from Bobbie Greene Kilberg, *supra* note 60, at 4, 6–9; see also FEERICK, *supra* note 4, at 344, 346–49.

91. Memorandum from Frank Wiggins to Mike Berman, Counsel to Vice President Walter Mondale [hereinafter Wiggins Memorandum] (on file with the George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, Folder ID No. 1823-005).

92. See *id.* at 1.

administration, White House staff again tried to execute a letter arrangement between the President and Vice President; they do not seem to have succeeded either.<sup>93</sup> President Ronald Reagan and Vice President George H.W. Bush entered into a verbal agreement about how to implement the terms of the Twenty-Fifth Amendment.<sup>94</sup> These efforts, however, did not entail dual incapacity.

In 1982, the White House Counsel's Office under President Reagan compiled a binder addressing a host of presidential succession and inability scenarios.<sup>95</sup> One of the contingency plans involved dual incapacity. The Reagan administration proposed to resolve the matter by "implement[ing] procedures which parallel the 25th Amendment."<sup>96</sup> In this regard, "[t]he determination . . . should be made by the Speaker of the House and the Cabinet. They should then transmit their written declaration of inability to the" PPT and House majority and minority leaders.<sup>97</sup> This effort appears to have been continued under Presidents George H.W. Bush and Bill Clinton.<sup>98</sup> Fred Fielding, who served as the White House Counsel under President Reagan, indicated that the binder he had worked on in the early 1980s was

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93. See Email from Jimmy Carter Presidential Library to author (Oct. 3, 2017) (on file with author); Memorandum from Robert Torricelli, Assoc. Counsel to the Vice President, to Mike Berman, Counsel to the Vice President 4–5 (Mar. 21, 1978) [hereinafter Torricelli Memorandum] (on file with the George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, Folder ID No. 1823-005); Wiggins Memorandum, *supra* note 91, at 1; see also FEERICK, *supra* note 4, at 224 (quoting Jimmy Carter as saying that while he was President there "was no ordinary way to ascertain whether or not [he] was incapacitated, or when the transfer of authority would be made").

94. See Memorandum from Dianna G. Holland, Admin. Assistant, Office of White House Counsel, to the file (July 11, 1986) (on file with author) ("[T]he reference to a long-standing arrangement between the President and Vice President [in Reagan's July 13, 1985 letter to Congress] is not an agreement that was ever put in writing; . . . the President and the Vice President reaffirmed a discussion that they had after the assassination attempt with regard to the transfer of power. This reaffirmation was done in [White House Counsel] Mr. Fielding's presence shortly before the July 13 event.").

95. See generally Office of Counsel to the President, Contingency Plans—Death or Disability of the President (June 1, 1982) [hereinafter Reagan Contingency Plans] (on file with George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, Folder ID No. 1823-005). The attempt on Reagan's life may have prompted this undertaking. See Second Clinic Report, *supra* note 12, at 933. The Reagan-Bush-Clinton contingency plans did not address how to handle a situation involving the Vice President alone becoming incapacitated, though the plans did discuss what to do regarding an incapacitated Vice President potentially becoming President (i.e., suggesting that, unless the Vice President can take the oath of office, he cannot become President). Reagan Contingency Plans, *supra*, tab G, at 2; Office of Counsel to the President, Contingency Plans—Death or Disability of the President tab G (Mar. 16, 1993) [hereinafter Clinton Contingency Plans] (on file with William J. Clinton Presidential Library, Bruce Lindsey Files, OA/ID No. 20652). The author plans to discuss these matters in a future article. See *supra* notes 4, 43.

96. Reagan Contingency Plans, *supra* note 95, tab G, at 2–3; see also Clinton Contingency Plans, *supra* note 95, tab G, at 2.

97. Reagan Contingency Plans, *supra* note 95, tab G, at 2–3; see also Clinton Contingency Plans, *supra* note 95, tab G, at 2.

98. Clinton Contingency Plans, *supra* note 95. The 1982 Reagan contingency plan is found in the Bush presidential archives in the papers of Bush's White House Counsel. The fact that the Reagan plans—and accompanying materials—appear in the Bush Counsel's file and that they seem to be identical to those found in the Clinton archives would indicate that the Bush administration simply adopted Reagan's plans as well.

still there when he returned to the Counsel's office twenty years later to work for President George W. Bush.<sup>99</sup> It is unclear whether the George W. Bush administration modified the plans.

There has been some public reporting about contingency plans being in place during the presidencies of George W. Bush and Barack Obama.<sup>100</sup> If true, and if those plans are similar to the Reagan-Bush-Clinton plans, and if they continue during the Trump administration, that would certainly demonstrate the existence of past practice.<sup>101</sup> Thus, such contingency plans may satisfy Justice Frankfurter's criterion that historic practice must be "systematic [and] unbroken," even if the other requirement—that they be public—has not been.

In sum, the viability of any current letter agreement or contingency plan governing dual incapacity is hard to assess since, if it exists, it is secret. Past arrangements that have been made public have not been thought to be legally binding. And, if a letter arrangement or contingency plan that addresses dual incapacity is in place—assuming it otherwise purports to create legal obligations—the secrecy surrounding the plan complicates the constitutional calculus and, as will be seen, casts doubt on its political legitimacy. It is also uncertain if such an agreement or plan has established the pedigree to demonstrate that the practice has in fact been "systematic [and] unbroken," factors that are also vital to determining its constitutional status.

### 3. Legitimacy

With respect to political legitimacy, confidential letter arrangements or contingency plans are on shakier ground.<sup>102</sup> Instances of presidential death have prompted great outpourings of public grief and unease. But, at least in these situations, vice presidential succession was a given. The public knew that the Vice President was there to serve this purpose. With dual incapacity, there would be the usual public grief and unease surrounding the officeholders' inability, but these sentiments would be greatly magnified by the unprecedented uncertainty as to who would be running the executive branch and how the dilemma would be resolved. An officeholder that suddenly emerges and claims the presidency by brandishing a letter

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99. FEERICK, *supra* note 4, at 293; First Clinic Report, *supra* note 1, at 26 n.20.

100. See FEERICK, *supra* note 4, at 224 n.†, 293; Feerick, *supra* note 1, at 24–25; see also CHENEY WITH CHENEY, *supra* note 51, at 319–22; First Clinic Report, *supra* note 1, at 26–27; cf. PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY ABOUT PRESIDENTS OF THE UNITED STATES 276 (James F. Toole & Robert J. Joynt eds., 2001).

101. See *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard, in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (quoting *State ex rel. Norwalk v. Town of South Norwalk*, 77 Conn. 257, 264 (1904))).

102. Cf. Torricelli Memorandum, *supra* note 93, at 4–5 (articulating the importance of reassuring the public in an inability scenario by making such agreements public ahead of time); Wiggins Memorandum, *supra* note 91, at 2 (same).

arrangement or contingency plan that no one (or virtually no one) in Congress—let alone the general public—had ever seen would almost certainly find himself in a situation that would be deeply unsettling to American citizens.<sup>103</sup>

In past situations involving presidential incapacity, rumors and conspiracy theories swirled with great intensity;<sup>104</sup> the age of the internet, social media, “fake news,” and twenty-four-hour cable networks would almost certainly compound these concerns. Thus, the public would likely greet an individual claiming to be Acting President based solely on a secret letter arrangement or contingency plan with deep skepticism. This would be all the more true if that individual was the Speaker and came from the opposite party of the President and Vice President. Though they meet the practicality requirement, secret letter arrangements and contingency plans have an uncertain legal status and would likely create serious legitimacy problems.

### B. *The Contingent Grant-of-Power Theory*

The CGOPT is one potential way to address dual incapacity.<sup>105</sup> The theory has its origins in the debates that occurred about how to resolve presidential incapacity prior to the Twenty-Fifth Amendment’s ratification.<sup>106</sup> The argument is that the individual receiving a grant of contingent authority should be the one to determine under what circumstances that power should be exercised.<sup>107</sup> Thus, in the context of presidential inability prior to the Twenty-Fifth Amendment, some thought that the Vice President had the sole authority to determine if the President was unable to fulfill his duties since the former was assigned by the Constitution to fill in for an incapacitated President.

The same principle might conceivably be applied today in the context of dual incapacity. Even though the 1947 statute does not clearly grant such discretion to the Speaker,<sup>108</sup> as next in line to the presidency, he might still be seen as having the discretion by himself to determine if the President and Vice President are incapacitated. Once that determination was made, the

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103. This, of course, counsels in favor of letter arrangements or contingency plans (or at least their contours) being made public as they essentially were prior to the Twenty-Fifth Amendment. See Second Clinic Report, *supra* note 12, at 934–35. For the public nature of earlier letter arrangements, see *supra* note 74 and accompanying text.

104. See, e.g., Feerick, *supra* note 3, 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; 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).

105. Indeed, like several options discussed in this Article, it could be implemented through a letter agreement or contingency plan.

106. See Presidential Inability, 42 Op. Att’y Gen. 69, 88–89 (1961); Brownell, *supra* note 12, at 203–06, 208; Feerick, *supra* note 3, at 912–14; Feerick, *supra* note 1, at 20–21; First Clinic Report, *supra* note 1, at 30.

107. See, e.g., *Presidential Inability*, 42 Op. Att’y Gen. at 88–89; SILVA, *supra* note 8, at 55, 100–03; Brownell, *supra* note 12, at 203–06; Feerick, *supra* note 3, at 938–42; cf. Martin v. Mott, 25 U.S. 19, 30–32 (1827);

108. See Feerick, *supra* note 1, at 21.

Speaker would become Acting President.<sup>109</sup> Viewed another way, the CGOPT could involve interpreting the presidential succession statute as implicitly delegating this decision-making authority to the Speaker. There is even some legislative history from 1947 that provides some modest support for this notion.<sup>110</sup>

The approach might be effectuated through a preexisting secret letter arrangement or contingency plan among the President, Vice President, and the Speaker (assuming such an arrangement exists), or perhaps carried out “on the fly” through an ad hoc legal decision by executive branch lawyers or the Speaker’s office.<sup>111</sup>

This proposed solution could also be seen to dovetail with Justice Robert Jackson’s reasoning in his famed concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>112</sup> Justice Jackson wrote that Presidents on occasion can take action in areas where Congress has not legislated:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>113</sup>

In keeping with Justice Jackson’s reasoning, courts have often read congressional silence to mean that the President is tacitly authorized to take action, or is at least not prohibited from doing so. This is particularly true when the nation’s security is implicated.<sup>114</sup> For reasons stated earlier,<sup>115</sup> the nation’s security would undoubtedly be at risk if it had no functioning

109. See Feerick, *supra* note 3, at 938–39.

110. It was widely acknowledged in the legislative history that the 1947 statute was purposefully silent on deciding who should determine executive inability and how such a determination should be carried out. See, e.g., S. REP. NO. 80-80, at 4 (1947); 93 CONG. REC. 7696–98 (1947) (statements of Sens. Wherry and Hatch); *id.* at 7706 (statement of Sen. Wherry); *id.* at 7711–12 (statement of Sen. Wherry); *id.* at 7775–76, 7779 (statements of Sens. Hatch, Wherry, Barkley, and Baldwin); *id.* at 7783 (statement of Sen. Green); *id.* at 8620, 8624, 8628–30 (statements of Reps. Michener, Celler, Kefauver, Walter, and Gwynne). That said, the Senate sponsor and chief advocate of the measure, Senator Kenneth Wherry, speculated that the Speaker or PPT would make the actual decision about executive inability if needed. *Id.* at 7697, 7779 (statement of Sen. Wherry); see also *id.* at 7775 (statement of Sen. Barkley). Neither the 1792 nor the 1886 succession laws addressed who decided dual incapacity and how. See *id.* at 7706, 7775 (statement of Sen. Wherry).

111. For a discussion of letter arrangements and contingency plans, see *supra* Part III.A.

112. 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The potential application of Justice Jackson’s concurrence to this discussion benefitted greatly from conversations with Professor Joel Goldstein.

113. *Id.*

114. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 677–79 (1981); *Haig v. Agee*, 453 U.S. 280, 291–92 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 321–22 (1936).

115. See *supra* notes 37–41 and accompanying text.

President. Since Congress in the 1947 presidential succession statute was silent as to who decides dual incapacity and how, Justice Jackson's legal reasoning might apply in this context.

In the context of implementing the CGOPT, the Speaker's status could be likened to that of the President in Justice Jackson's opinion. The rationale would be that the Speaker in this instance (1) would be trying to ensure presidential continuity consistent with the constitutional principle that executive branch leadership must be maintained and (2) would be acting as the heir apparent to the presidency. As a result, an argument might be fashioned that, through these links to the presidency, the Speaker would be stepping into the shoes of the executive and taking actions in the "zone of twilight" left by the 1947 law, even though the Speaker, in making the inability decision, would not yet be Acting President.<sup>116</sup>

### 1. Advantages

The primary advantage of applying the CGOPT to a dual-incapacity scenario is that it has the potential to be effectuated quickly. The Speaker could conceivably arrive at a determination in fairly short order.<sup>117</sup> The Speaker's office might hold a public ceremony announcing that he would be assuming the role of Acting President until such time as either the President or Vice President has regained capacity.<sup>118</sup> All of this could be carried out in an expeditious manner, thus minimizing any lengthy de facto interregnum. In this regard, the CGOPT has a potential practical benefit.

### 2. Drawbacks

The CGOPT faces a number of daunting challenges, however. First, 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.<sup>119</sup> Similarly, during the extended incapacity of President Woodrow Wilson, Vice President Thomas Marshall could have done the same. Tellingly, neither did so.<sup>120</sup> 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 presidential confidantes, not by the Vice

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116. Under the proposal recommended in this Article, the Speaker would have an even better claim to being treated like the President in Justice Jackson's formulation. *See infra* Part IV. This is because he would be gaining approval for his actions from a majority of the Cabinet, the remaining nonincapacitated leaders of the executive branch.

117. It is hard to imagine the Speaker taking any action unless the dual incapacity were fairly obvious.

118. The Speaker's legal opinion would presumably explain the CGOPT approach and the legislative history supporting his claim.

119. The CGOPT was articulated at the time of President Garfield's incapacity. *See* Ruth C. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 155 (1957).

120. *See* JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 117-39, 162-80 (1965); Goldstein, *supra* note 104, at 37.



President.<sup>121</sup> Clearly, to some degree, the theory lacked sufficient constitutional currency and legitimacy to be applied in a real-world setting.<sup>122</sup>

Moreover, although the CGOPT was embraced by three Attorneys General,<sup>123</sup> the validity of the theory was hotly disputed until the Twenty-Fifth Amendment was adopted.<sup>124</sup> Prior to the Amendment, some authorities maintained that the President and Vice President should jointly decide questions of presidential incapacity; others believed that Congress alone or the Vice President and Cabinet should make the determination. Still others argued that the courts should have the final say.<sup>125</sup> Nor were these the only options debated.<sup>126</sup>

Second, having the Speaker make the decision all by himself does not sit easily alongside the structural norms of Section 4 of the Twenty-Fifth Amendment.<sup>127</sup> It provides that the Vice President determine the President's incapacity *with the Cabinet* (or with a statutorily created body).<sup>128</sup> Then, if the President disputes the matter, it is referred to Congress to decide.<sup>129</sup> Thus, important checks and balances were built into Section 4 to prevent precipitate action by a power-hungry Vice President.<sup>130</sup> At the same time, Cabinet participation in the initial determination provides the Vice President with political cover.<sup>131</sup> 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.<sup>132</sup> In this respect, the checks and balances serve two worthy purposes: (1) deterring the overly ambitious and (2) encouraging the overly reticent.<sup>133</sup>

121. See SILVA, *supra* note 8, at 140–48; Brownell, *supra* note 12, at 193–95.

122. Concern about appearing to be overly anxious to assume the presidency while the chief executive was ailing was a major reason why Vice Presidents Arthur and Marshall did not try to determine presidential incapacity. See, e.g., Brownell, *supra* note 12, at 193–95. Constitutional questions over whether the Vice President had the authority to determine presidential inability in the first place—as well as concerns over permanently displacing the President—blended together with a wariness of being seen to be usurping high office to form a significant deterrent to vice presidential action. See Presidential Inability, 42 Op. Att'y Gen. 69, 86–87 (1961); FEERICK, *supra* note 120, at 134–35; FEERICK, *supra* note 4, at 8–10, 14–17; Brownell, *supra* note 12, at 193–95; Goldstein, *supra* note 104, at 43–47. Had the Vice President's authority been crystal clear, Arthur and Marshall would probably still 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 1965 Senate Hearing, *supra* note 60, at 67–68 (statement of American Bar Association); Goldstein, *supra* note 104, at 46–47.

123. *Presidential Inability*, 42 Op. Att'y Gen. at 88–89, 94.

124. *Id.* at 89–90; FEERICK, *supra* note 4, at 49–50.

125. See FEERICK, *supra* note 120, at 134–35. For conflicting proposals at the time of President's Garfield's incapacity, see *id.*; SILVA, *supra* note 8, at 100–11; Silva, *supra* note 119, at 155.

126. See *supra* note 125 and accompanying text.

127. See Feerick, *supra* note 1, at 21; First Clinic Report, *supra* note 1, at 30–31; *supra* Part I.

128. U.S. CONST. amend. XXV, § 4.

129. *Id.*

130. See Feerick, *supra* note 1, at 20–21.

131. See *id.* at 21; Second Clinic Report, *supra* note 12, at 964.

132. See Feerick, *supra* note 1, at 21; Second Clinic Report, *supra* note 12, at 964.

133. See Feerick, *supra* note 1, at 21; Second Clinic Report, *supra* note 12, at 964.

Thus, in addition to running afoul of Section 4 constitutional norms, as a practical matter, the Speaker would be placed in the same excruciating position as Vice Presidents Arthur and Marshall and could well hesitate to assume the reins of executive office when he should take them.<sup>134</sup> The Speaker's position would be all the more acute if he hailed from a different political party from the President and Vice President and his action would result in a switch in partisan control of the White House.<sup>135</sup>

The CGOPT is discordant for a third, and closely related, reason. It means that, when the President alone is incapacitated, there is an elaborate set of checks and balances that must be complied with before he can be removed from office for inability. But, when the President is incapacitated at the same time as the Vice President—an even more high-stakes situation—he can suddenly be removed from office for inability by one person with no checks and balances at all. That is deeply problematic.

A fourth shortcoming of the CGOPT is how the President and Vice President could regain their offices if they recovered their 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.<sup>136</sup> Thus, under the CGOPT, the President and Vice President would presumably make the decision to return to office all by themselves. Such a mechanism again lacks the formal checks and balances established under Section 4. The Amendment provides that the Vice President and Cabinet must tacitly agree that the President is in fact no longer incapacitated, and if there is a dispute, Congress decides the issue. These checks help ensure that the President has, in reality, regained his capacity. The CGOPT would include no such assurances; a mentally deranged President or Vice President, for example, could simply state he is ready to return to the Oval Office and that would be the end of it (assuming the Speaker does not trigger the inability process all over again). Once again, the CGOPT falls short of Section 4's constitutional norms.

Finally, the CGOPT is freighted by a major legitimacy concern: the Speaker determining dual incapacity all by himself. The CGOPT counsels that, since the Speaker is next in the line of succession, he would have the sole responsibility for determining that the President and Vice President are incapacitated.<sup>137</sup> He alone would then publicly proclaim himself Acting President. This is a jarring prospect and could unintentionally project coup-like overtones.

In sum, the CGOPT is a mixed bag as to practicality, and serious concerns exist regarding its legality and political legitimacy, making it a troubling proposition to embrace.

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134. See Feerick, *supra* note 1, at 19.

135. Concerns over a potential partisan shift in the White House if the President and Vice President cannot serve reflect one of the many drawbacks of the 1947 presidential succession statute. See, e.g., FEERICK, *supra* note 4, at 214, 287.

136. See Presidential Inability, 42 Op. Att'y Gen. 69, 89, 91 (1961).

137. See Feerick, *supra* note 1, at 20–21.

### C. *The Reagan-Bush-Clinton Contingency Plans*

It will be recalled that the Reagan administration contingency plan would have had the Speaker and the Cabinet determine dual incapacity and then alert party leaders in Congress.<sup>138</sup> The Bush and Clinton plans echoed this approach.<sup>139</sup> Putting to one side legal concerns about the secret nature of these efforts,<sup>140</sup> the substance of the Reagan-Bush-Clinton conception merits review as they are the only dual incapacity contingency plans that are publicly accessible.

Notably, the Reagan-Bush-Clinton administration contingency plans openly concede their legal shortcomings. They cautiously suggest that they are only providing “[o]ne way” to try to resolve the situation.<sup>141</sup> The documents state frankly that “no guidance can be given [regarding dual incapacity] with any legal certainty.”<sup>142</sup> Elsewhere, they admit that there “are serious difficulties” with their approach.<sup>143</sup>

While the memoranda do not fully spell out the approach’s legal shortcomings,<sup>144</sup> they do include the fact that the Presidential Succession Act

138. See Reagan Contingency Plans, *supra* note 95, tab G, at 2–3.

139. See Clinton Contingency Plans, *supra* note 95, tab G, at 2.

140. See *supra* Part III.A.2.a.

141. See Clinton Contingency Plans, *supra* note 95, tab G, at 2; Reagan Contingency Plans, *supra* note 95, tab G, at 2.

142. Clinton Contingency Plans, *supra* note 95, tab G, at 2; Reagan Contingency Plans, *supra* note 95, tab G, at 2.

143. See Clinton Contingency Plans, *supra* note 95, tab G, at 1; Reagan Contingency Plans, *supra* note 95, tab G, at 1. The Reagan-Bush-Clinton plans for addressing dual incapacity followed the contours of a proposal discussed but apparently never adopted during the Carter-Mondale administration. Members of the Vice President’s counsel’s office thought the Speaker and the Cabinet should work together to resolve matters but were concerned about the fragile legal justification undergirding such an approach. See Wiggins Memorandum, *supra* note 91, at 6, 8 (“What is to happen if both the President and the Vice President are unable to function? Though the enquiry was not lost on the Congress neither was there any attempt to deal with the problem. A very weak statutory response is available. [Under the 1947 statute,] . . . crushingly, there are no procedures articulated for the decision . . . I am persuaded—and [Deputy Counsel to the Vice President] Marilyn [Haft] concurs with this—that the Speaker and the Cabinet ought to make the decision to oust the Vice President.”).

144. The legal concerns raised by the White House Counsel’s Office muddy the waters a bit. The memoranda conflate analyses of two different inability situations: “[t]emporary disability of both the President and the Vice President simultaneously” and “[t]emporary disability of the President and the death of the Vice President.” Clinton Contingency Plans, *supra* note 95, tab G, at 1; Reagan Contingency Plans, *supra* note 95, tab G, at 1. This in turn leads to the memoranda somewhat blurring the lines between Section 4 of the Twenty-Fifth Amendment and the 1947 statute, which draws authority from Article II, Section 1, Clause 6. In reality, each law deals with a different scenario.

The memoranda read that regarding both a dual-incapacity scenario and a disabled-President-and-dead-Vice President scenario,

a determination of *Presidential* inability to govern would clearly be necessary before the Speaker could act as President. Whatever procedure is used to make this determination, since the Vice President by reason of his own inability or death could not participate in the decision, the [1947] Act necessarily contemplates a determination of Presidential inability that is at odds with the 25<sup>th</sup> Amendment procedure.

Clinton Contingency Plans, *supra* note 95, tab G, at 1; Reagan Contingency Plans, *supra* note 95, tab G, at 2. The problem with merging discussion of these two scenarios is that dual

is completely silent on how and by whom the inability determination should be effectuated. Essentially, the memoranda attempt to “fill in the blanks” of the statute by doing the work assigned to Congress under the Dual Inability and the Necessary and Proper Clauses. This secret “statutory rewrite” would therefore face serious hurdles.

The Reagan-Bush-Clinton plans also likely entail legitimacy concerns. For whatever reason, the memoranda do not place emphasis on the need for public awareness of the plan, as did the proposals under the Ford and Carter administrations.<sup>145</sup> The result would be that, under the Reagan-Bush-Clinton plans, an unprecedented crisis in government would be met by a secret agreement sprung for the first time on a public already reeling from political uncertainty.<sup>146</sup> Moreover, the Speaker and Cabinet’s decision would lack the imprimatur of Congress, which, in the context of succession and disability, has been seen as a proxy for the public.<sup>147</sup>

In theory, the Reagan-Bush-Clinton administration plans, due to the inclusion of the Cabinet in the decision-making, would seem to entail a slower process than the CGOPT approach since the latter only provides that the Speaker take action. In reality, the Reagan administration plan would almost certainly be effectuated more quickly than the CGOPT since it would provide cover for the Speaker by including the Cabinet in decision-making. As a result, the Speaker would be more apt to take action since he would be less likely to be tarred publicly as a usurper.<sup>148</sup>

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incapacity is addressed by the 1947 statute (and only informed by Section 4 norms), *cf. Interview with Sen. Bayh, supra* note 11, at 804 (quoting John Feerick); Second Clinic Report, *supra* note 12, at 959 n.256, whereas a disabled-President-and-dead-Vice President situation is addressed by the Twenty-Fifth Amendment (and only informed by the 1947 statute).

In the dual-incapacity scenario, because it involves the 1947 statute and not Section 4 *per se* (in which the Vice President is an essential actor), the fact the Vice President is not part of the inability determination process is beside the point. With dual incapacity, the issue is that constitutional norms established by Section 4 should be complied with even if they may not be legally required. Those norms, it will be recalled, are (1) participation by the successor in the inability determination, (2) participation by the Cabinet in the process, and (3) an opportunity for the President to appeal the decision. These constitutional norms would be all the more important if, in a dual-incapacity scenario, the President attempts to return to office prior to the Vice President, which would very closely approximate a Section 4 scenario in which only an incapacitated President is involved.

In a disabled-President-and-dead-Vice President scenario, on the other hand, the analysis would directly involve Section 4 as the situation involves the President *alone* being incapacitated. For this reason, the fact the Vice President would not be involved in the inability decision-making process would indeed be “at odds with the 25th Amendment procedure” as the Vice President is essential to such a determination under Section 4. Clinton Contingency Plans, *supra* note 95, tab G, at 1; Reagan Contingency Plans, *supra* note 95, tab G, at 2. In this situation, the memoranda essentially argue that the 1947 statute would inform application of this Section 4 situation. Clinton Contingency Plans, *supra* note 95, tab G, at 1; Reagan Contingency Plans, *supra* note 95, tab G, at 2–3.

145. See Memorandum from Bobbie Greene Kilberg, *supra* note 60, at 9 (advocating that any letter arrangement be made public); Torricelli Memorandum, *supra* note 93, at 4–5 (same).

146. *Cf.* Second Clinic Report, *supra* note 12, at 934–35.

147. *Id.* at 973.

148. The Reagan-Bush-Clinton contingency plans also suffer from practical problems. They omit the PPT, which might bruise the institutional pride of the Senate since the House—

The Reagan-Bush-Clinton administration plans also fare better than the CGOPT in meeting the constitutional norms established by Section 4 of the Twenty-Fifth Amendment. The plans include the Cabinet in the decision-making process, as does Section 4. However, the Reagan-Bush-Clinton plans still fall short of the bar set by the Twenty-Fifth Amendment. They provide no means for the President (or Vice President) to appeal the decision made by the Speaker and Cabinet. Section 4, of course, provides such a mechanism.

In sum, the Reagan-Bush-Clinton administration plans are preferable to the CGOPT on all three grounds. But, as will be seen, the proposal put forward in this Article is superior to the Reagan-Bush-Clinton plans because it rests on surer legal footing and would likely enjoy greater public legitimacy.

*D. Congress Passes a Statute Before the Speaker  
Becomes Acting President*

Yet another option would be for Congress to pass legislation clearly assigning responsibility for deciding presidential and vice presidential incapacity.<sup>149</sup> The measure would also lay out a postenactment process that the Speaker would need to follow to make this determination and a process for how the President and Vice President could regain office. Upon adoption of the bill, the Speaker (or other statutorily named designee) would follow the guidelines of the legislation and, upon the process's completion, the Speaker would become Acting President. Assuming the statute is otherwise constitutional, the measure has the benefit of being based upon reliable constitutional authority<sup>150</sup> and it would likely enjoy political legitimacy. The problem is that it is fatally flawed due to its impracticality.

Ex ante legislation has the obvious advantage of being based on solid constitutional footing. As the measure would address head-on how to deal with dual incapacity, it would draw authority from the Dual Inability and the Necessary and Proper Clauses. The bill would simply amend the 1947 succession statute.

Moreover, having Congress—as the people's representatives—determine the means for deciding presidential and vice presidential inability would help ensure that this approach would enjoy political legitimacy.<sup>151</sup> The determination would involve a public process undertaken by the nation's representatives, not a secret arrangement sprung suddenly on the citizenry.<sup>152</sup> Short of a special election, which would be wholly impracticable given the immediate need for a President, having Congress weigh in would seem the most democratic approach to installing an Acting President.

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as represented by the Speaker—would be included in decision-making but not the upper chamber.

149. See Feerick, *supra* note 3, at 939.

150. See *supra* Part II.

151. See Second Clinic Report, *supra* note 12, at 973.

152. See *id.* at 934–35, 973.

The advantages of constitutionality and legitimacy are easily overcome, however, by this approach's practical limitations. The reality is that this option would ensure a de facto lapse in executive authority. Passing a statute is not usually a brisk process. Moreover, even if Congress passed legislation on the very day that the dual incapacity began—a highly unlikely event—it would take at least eleven days before there would be a functioning chief executive.<sup>153</sup> That would be because, without a functioning President, legislation takes ten days to be enacted (not counting Sundays).<sup>154</sup> Eleven days without a functioning chief executive is far too long. And that does not even include the time it would take to implement the dual-incapacity mechanism created by the statute.

All of this, of course, assumes Congress would be in session. The House and Senate are often out of session, and it takes time for them to assemble. If Congress were out of session and the United States were involved in a crisis of some sort that required immediate presidential leadership, waiting for Congress to reconvene and legislate would not make sense. If one factors in the implementation of the inability process created by such a statute, the American public could be without a President for weeks. Thus, while an ex ante statute has the benefits of clear constitutionality and solid political legitimacy, it utterly fails as a practical matter.

#### *E. Impeachment*

A final alternative could be the impeachment process. With dual incapacity, both the President and Vice President would need to be impeached and removed. This approach would not work well for several reasons.

For one, much like the previous option, it would be a highly time-consuming exercise and the nation would need a chief executive immediately. Impeachments, requiring extensive fact finding and investigation, are typically time-consuming affairs.<sup>155</sup> Thus, as a practical matter, impeachment fails as an option for the same reason that passing an ex ante statute would also fall short.

Furthermore, this approach carries with it constitutional problems. Foremost among them is that removal from office for incapacity would seem to fall outside of the express language of “high crimes and misdemeanors.”<sup>156</sup> Moreover, while there was some support for use of the impeachment process in the public debates that preceded the Amendment in the 1950s and early 1960s,<sup>157</sup> the legislative history of the Twenty-Fifth Amendment is less

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153. See U.S. CONST. art. I, § 7, cl. 2.

154. See *id.*

155. See Brownell, *supra* note 12, at 201.

156. U.S. CONST. art. II, § 4. That said, impeachment proceedings against federal judges have involved mental incapacity and drunkenness on the bench, neither of which is intuitively a high crime or misdemeanor. See, e.g., Lynn W. Turner, *The Impeachment of John Pickering*, 54 AM. HIST. REV. 485 (1949).

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

favorable to impeachment as an inability option.<sup>158</sup> Indeed, had the impeachment process been thought sufficient to address inability, there would have been no need for the Amendment in the first place.

In addition, impeachment involves removing the President and Vice President permanently from their positions.<sup>159</sup> As such, it lacks the flexibility of the approach recommended in this Article. For example, what would happen if the President and Vice President both awoke from comas? Had they been impeached and removed, they would not be able to return to office.

Even if impeachment were to be interpreted broadly and pragmatically to permit its use to resolve a dual-incapacity situation, it would prompt serious concerns regarding political legitimacy. This is because the public rightly associates impeachment with malfeasance.<sup>160</sup> To remove an incapacitated President and Vice President from office would almost certainly stigmatize them at a time when there would likely be a great outpouring of sympathy for the officeholders and their families.<sup>161</sup> Moreover, there has never been a simultaneous impeachment of a President and Vice President, which would add further confusion and disquiet to an already unprecedented and exceedingly difficult situation.<sup>162</sup> As with the four prior options, impeachment falls short in the context of addressing dual incapacity.

#### IV. THE RECOMMENDED APPROACH: THE SPEAKER, PRESIDENT PRO TEMPORE, AND CABINET DETERMINE DUAL INCAPACITY AND REQUEST CONGRESSIONAL RATIFICATION

This Article recommends that the Speaker formally initiate action. His first step would be to consult with the PPT and the Cabinet and for the group to come to a decision.<sup>163</sup> Following agreement by the Speaker, the PPT, and

Herbert Brownell, Att'y Gen.); Presidential Inability, 42 Op. Att'y Gen. 69, 91 (1961); FEERICK, *supra* note 4, at 51, 127 n.284, 365; The President's News Conference, PUB. PAPERS 241, 245 (Apr. 3, 1957); Brownell, *supra* note 12, at 197–98, 201, 204; John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 127 (1963).

158. See 1965 Senate Hearing, *supra* note 60, at 32 (statement of Sen. Roman Hruska); *id.* at 61 n.3 (statement of Lewis F. Powell, Jr., President-Elect, American Bar Association); see also *Presidential Inability and Vacancies in the Office of Vice President: Hearings on S.J. Res. 13 et al. Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 24 (1964) (statement of Sen. Kenneth Keating); *Presidential Inability: Hearings on S.J. Res. 28, S.J. Res. 35, and S.J. Res. 84 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 58–59 (1963) (statement of Sen. Roman Hruska).

159. See FEERICK, *supra* note 4, at 51.

160. See Brownell, *supra* note 12, at 201; see also Feerick, *supra* note 157, at 115.

161. Cf. Brownell, *supra* note 12, at 201.

162. The nation was faced with the prospect of dual impeachment in 1973 when both President Richard Nixon and Vice President Spiro Agnew were simultaneously under investigation for criminal wrongdoing. See JULES WITCOVER, *VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON AND SPIRO AGNEW* 297 (2007). Both resigned before impeachment and removal could take place.

163. Cf. Feerick, *supra* note 1, at 21; Second Clinic Report, *supra* note 12, at 965–66. The group would likely consult with others such as relatives of the President and Vice President, doctors, White House staff, and government attorneys. See, e.g., Feerick, *supra* note 1, at 21.

a majority of the Cabinet that the Speaker (or another successor) should become Acting President, the group would call for Congress to ratify the decision they made and the process they followed.

*A. Arguments in Favor of This Approach*

1. Legality

The group's position would be legally defensible but far from unassailable.<sup>164</sup> As will be discussed, the legal opinion should emphasize (1) the Speaker's authority, such as it is, under the CGOPT and the 1947 Act's legislative history, (2) the PPT's debatable authority under the CGOPT as it relates to the Vice President, and (3) compliance with Twenty-Fifth Amendment norms that provide for Cabinet participation in an executive branch inability determination. The group should then publicly announce its decision, articulate its legal position, and formally request legislation from Congress.<sup>165</sup>

The legislative request should include the following elements: (1) ratification of the process and the decision arrived at by the Speaker, PPT, and majority of the Cabinet, (2) adoption of a statutory process patterned after Section 4 of the Twenty-Fifth Amendment whereby the President and Vice President can regain their offices, and (3) establishment of a procedure for determining future cases of dual incapacity (including anticipated dual incapacity). The request should also include proposed internal rule changes in each chamber of Congress to require a two-thirds vote in each body to overturn a misguided declaration by either the President or Vice President as to their fitness to return to office. Thus, the proposed statute would continue the Twenty-Fifth Amendment presumptions that the two incapacitated officeholders may appeal the initial incapacity decision and should be able to return to their positions when they believe they are ready, subject to certain checks and balances.<sup>166</sup>

*a. Inclusion of the Cabinet*

As discussed earlier, in this setting the Speaker may well draw authority from the CGOPT, such as it is. But the question remains: why does the Cabinet need to participate in this process? There are several potential reasons. First, participation by Cabinet members would be justified on the grounds that, as members of the line of presidential succession, they too could conceivably need to act as successor and take action under the CGOPT. It is, after all, the *contingent* grant-of-power theory and each member of the group (unless otherwise disqualified) could become Acting President under certain circumstances. They would need to be kept apprised of such circumstances

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164. *See supra* Part III.

165. *Cf.* LUCIUS WILMERDING, JR., *THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES* 19, 101–02, 193 (1943) (discussing the occasional need of the President to transgress statutes during emergencies).

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



and be ready to act. The Speaker might also be seen as cloaking the other participants in his own contingent grant of power (CGOP).

Second, even though the Twenty-Fifth Amendment does not encompass dual incapacity,<sup>167</sup> structural factors from the Amendment should be imported into this decision-making process because presidential removal for incapacity is involved. These factors are that there should be (1) participation by the successor in the inability determination, (2) participation by the Cabinet, and (3) an opportunity for the President to appeal the decision. These constitutional norms should not be breached simply because the Vice President also happens to be incapacitated.<sup>168</sup> Having the Speaker, PPT, a majority of the Cabinet, and ultimately Congress decide satisfies these factors.

The final rationale for Cabinet inclusion stems from practical considerations.<sup>169</sup> The Speaker, the PPT, and Cabinet members each have a potential stake in the decision-making, which makes their inclusion important. For example, suppose the Secretary of State believes that legislative succession is unconstitutional and wishes to overturn the executive branch's longstanding position on the matter.<sup>170</sup> The Speaker, the PPT, and a majority of the Cabinet would need to resolve this matter in their deliberations.<sup>171</sup> Everyone with a stake in the outcome of that decision should be included.

#### *b. Inclusion of the PPT*

Inclusion of the Cabinet seems fairly intuitive given the provisions of Section 4 of the Twenty-Fifth Amendment and the fact they are the most senior, nonincapacitated members of the executive branch, but what about the PPT? Why would he be included? Perhaps the better question is why would he *not* be? First, as the next in the line of succession after the Speaker, the PPT has a potential link to the CGOPT, indeed a closer one than members of the Cabinet.<sup>172</sup> After all, if the Speaker is unable to serve as Acting President or does not otherwise qualify, the PPT would need to draw upon the very same CGOPT to initiate action to become Acting President.

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167. See, e.g., *Interview with Sen. Bayh*, *supra* note 11, at 804; *supra* Part I.

168. The high procedural hurdles in the impeachment process further reinforce the theory that there should be a procedural floor that should be factored in when considering removal of a President. See Brownell, *supra* note 12, at 209.

169. Another practical factor is simply that the Speaker can and should consult with whomever he wants while making the incapacity determination. *Cf.* Presidential Inability, 42 Op. Att'y Gen. 69, 93 (1961) (discussing the comparable right of the Vice President to make a determination of presidential inability); Brownell, *supra* note 12, at 203.

170. See *supra* note 8 and accompanying text; *infra* Part V.A.

171. It would be challenging for individuals outside of the Speaker, PPT, and Cabinet secretaries to mount a political or legal challenge to the Speaker becoming Acting President in favor of the Secretary of State if the latter had already conceded that the Speaker has the rightful authority.

172. This, of course, assumes that legislative succession is constitutional and, as a purely abstract legal matter, it may not be. See *supra* note 8 and accompanying text. That said, there are serious practical reasons why the PPT would not be easily excluded from the line of succession. See *infra* Part V.A.

A hypothetical helps illustrate this in more tangible terms. Assume the PPT is excluded from the Speaker's consultations with the Cabinet. During the deliberations, doctors inform the Speaker and the Cabinet that the President and Vice President are likely to regain their capacity within six weeks. The Speaker gets "cold feet" and announces he believes there is a need for an Acting President but that he does want to resign from the House as he would be required to do under the 1947 succession law.<sup>173</sup> He, therefore, decides that the succession should skip over him to the PPT.<sup>174</sup> At this point, the CGOP would rest with the PPT, but the PPT would not even be "in the room." At this stage, the group would have exhausted its legal authority to act further. Under Section 4 parallelism, the next in line of succession is legally essential to make the inability determination and the next in line would be the PPT. Therefore, as both a theoretical and a practical matter, this counsels in favor of having the PPT in the decision-making loop. Otherwise, the Speaker and Cabinet would need to track down the PPT and waste valuable time bringing him up to speed when he would otherwise be fully informed.

Second, the PPT may enjoy a form of CGOP in relation to the vice presidency since, under the Constitution, he takes the place of the Vice President when the latter is absent from the upper chamber.<sup>175</sup> The PPT's theoretical authority in this regard would bolster that of the Speaker and the Cabinet in their decision-making since the group is deciding not only presidential incapacity but also vice presidential incapacity.<sup>176</sup>

Third, from the Speaker's standpoint, having the PPT in the room might be helpful if questions over the lawfulness of legislative succession arise. Indeed, excluding the PPT from deliberations would implicitly discredit that very principle. If one believes in the constitutionality of legislative succession, it is difficult to explain the rationale for keeping the second in the line of succession out of the deliberations.

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173. 3 U.S.C. § 19(a)–(b) (2012). The Speaker and PPT are not compelled to serve as Acting President; they can decline the position. *See* Fortier & Ornstein, *supra* note 44, at 1003–05; Second Clinic Report, *supra* note 12, at 948.

174. This is not as outlandish as it may seem. The uncertain duration of their potential time as Acting President might lead the Speaker and PPT to conclude that it is not worth the risk of possibly ending their congressional careers. *See* Fortier & Ornstein, *supra* note 44, at 1003–05.

175. *See* U.S. CONST., art. I, § 3, cl. 5; Manning, *supra* note 8, at 149. This point benefitted from a fruitful discussion with Professor Brian Kalt. Underscoring the concept of the PPT as the Vice President's successor in certain settings is that during periods of vice presidential vacancies, PPTs have been routinely termed "Acting Vice President" in Congress and in the press. *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 1699 (1868) (statement of Sen. Dixon); *The Matthews Committee, Its Members Announced by Acting Vice-President Ferry*, N.Y. TIMES, June 9, 1878, at 1; *cf.* SILVA, *supra* note 8, at 23–24. In modern Senate practice, PPTs rarely preside over the Senate but the textual linkage between the Vice President and PPT remains very much in place.

176. In a sense, the PPT's CGOP might even be preferable to the Speaker's as the PPT's authority is constitutionally based and not vulnerable to legal challenge as is the Speaker's, which is based upon a statute that some believe is unconstitutional. *See supra* note 8 and accompanying text.

Finally, if every member in the line of succession but the PPT is consulted and helps decide that the Speaker should become Acting President, it invites public or private sniping from the PPT and his allies in the Senate majority. This would seem particularly likely if the Senate and House were controlled by different political parties. Criticism coming from the next in line of succession could prove highly corrosive to the legitimacy of the Acting President's ability to govern. Including all possible claimants to the presidency would likely lessen the possibility of criticism from other potential successors, making the group decision politically harder to oppose. Exclusion of the PPT might also offend the institutional pride of the Senate as a whole. In effect, the House—as represented by the Speaker—could be seen as having been included in the dual-inability deliberations, but not the Senate. Including the PPT would also likely help with the retroactive legislative effort. Excluding him might hinder such an undertaking.

*c. Inclusion of Congress*

The next step—retroactive congressional sanction of the process followed and decision rendered—has the benefit of enhancing both the legality and the legitimacy of the actions taken. As a constitutional matter, securing congressional approval of the Speaker, PPT, and Cabinet's actions would cure any constitutional defects. This is because the legislation would be based on the Dual Inability<sup>177</sup> and Necessary and Proper Clauses,<sup>178</sup> which authorize Congress to take action in this area. Ratification, which would include a proposed mechanism for the President and Vice President to regain their jobs, would also satisfy Section 4 constitutional norms.

The post hoc ratification of extraordinary presidential measures is firmly grounded in law and historical precedent. With respect to the law, post hoc congressional ratification has been sanctioned by the Supreme Court on several occasions and would give support to the actions of the Speaker, PPT, and a majority of the Cabinet.<sup>179</sup>

Regarding historical precedent, the actions taken and justifications given by two of the nation's foremost presidents and political thinkers reflect the viability of taking action in extraordinary circumstances and then seeking post hoc ratification. President Thomas Jefferson's effort to acquire the Louisiana Territory from France in 1803 is one such example.<sup>180</sup> In that instance, Jefferson took steps to commit the nation to purchase the French land even though there was no express constitutional provision granting the

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177. U.S. CONST. art. II, § 1, cl. 6.

178. *Id.* art. I, § 8, cl. 18.

179. *See, e.g.*, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119 (1947); *Brooks v. Dewar*, 313 U.S. 354, 357, 360–61 (1941); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937); *see also* Robert L. Borosage, *Para-Legal Authority and Its Perils*, 40 L. & CONTEMP. PROBS. 166, 177–78 (1976).

180. *See* BAILEY, *supra* note 34, at 176–94.

President (or indeed the nation) the authority to acquire territory from another country.<sup>181</sup>

Jefferson himself believed he was acting beyond the Constitution's writ. He conceded, "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution."<sup>182</sup>

Yet, Jefferson also recognized that time was of the essence given the French diplomatic posture.<sup>183</sup> He saw that adding the Louisiana Territory to the United States would double the size of the nation and resolve pivotal security and economic concerns for the United States by ensuring access to the Mississippi River and the Gulf of Mexico. The President was faced with extraordinary circumstances and he needed to act despite the seemingly extraconstitutional nature of the steps he took. He committed the nation and then sought congressional sanction.

In so doing, Jefferson pleaded with one lawmaker: "I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you."<sup>184</sup> The President advocated that the Senate sanction his actions through the proposed treaty with France he was submitting:

The Legislature is casting behind them metaphysical subtleties, and risking themselves like faithful servants, [who] must ratify & pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it.<sup>185</sup>

Ultimately, the Senate gave its approval to the treaty, and Congress as a whole implemented the Purchase through a number of measures, essentially curing any legal defects caused by Jefferson's unilateral actions.<sup>186</sup>

Another example from the Jefferson presidency is equally instructive. In 1807, an American vessel, the USS Chesapeake, was attacked by a British ship, signaling that hostilities were at hand.<sup>187</sup> Immediately afterward, Jefferson took steps on his own accord to prepare the nation for war, which

181. *Id.* Jefferson also may have exceeded his authority in committing taxpayer funds to buy the territory. See LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 74 (2014).

182. Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 407, 411 (Andrew A. Lipscomb ed., 1903). Others at the time disagreed with Jefferson's constitutional assessment. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS, THE JEFFERSONIANS, 1801–1829*, at 99–107 (2001).

183. See, e.g., CURRIE, *supra* note 182, at 98.

184. Letter from Thomas Jefferson to John Breckinridge, *supra* note 182, at 411. At the time, Jefferson said, "[T]he less we say about constitutional difficulties respecting Louisiana the better." Letter from Thomas Jefferson to James Madison (Aug. 18, 1803), <https://founders.archives.gov/documents/Madison/02-05-02-0343> [<https://perma.cc/P6X2-8H45>]; see also 1 ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER* 197 n.\* (1976).

185. Letter from Thomas Jefferson to John Breckinridge, *supra* note 182, at 411.

186. See BAILEY, *supra* note 34, at 186–91; CURRIE, *supra* note 182, at 95–114.

187. See SOFAER, *supra* note 184, at 172.

involved the commitment of federal funds without congressional appropriation.<sup>188</sup> As noted by one authority, Jefferson “made no effort to defend the purchases of supplies as being legally authorized.”<sup>189</sup>

At the time, Jefferson explained to Congress that

[t]he moment our peace was threatened, I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us; and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done, if then assembled.<sup>190</sup>

As with the Louisiana Purchase, Congress ratified Jefferson’s actions after the fact.<sup>191</sup>

Three years later, Jefferson justified his actions in a letter:

After the affair of the Chesapeake, we thought war a very possible result. Our magazines were ill[] provided with some necessary articles, nor had any appropriations been made for their purchase. We ventured, however, to provide them, and to place our country in safety; and stating the case to Congress, they sanctioned the act.

....

. . . It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.<sup>192</sup>

Unilateral presidential actions, such as responding to the Chesapeake situation, were fully justified to Jefferson. To him, it

constituted a law of necessity and self-preservation, and rendered the *salus populi* supreme over the written law. The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the constitution, and his station makes it his duty to incur that risk. But those controlling powers, and his fellow citizens generally, are bound to judge according to the circumstances under which

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188. *See id.*

189. *Id.*

190. 17 ANNALS OF CONG. 14, 17 (1807); *see also* CURRIE, *supra* note 182, at 98–99; SOFAER, *supra* note 184, at 172.

191. *See* 17 ANNALS OF CONG. 825, 850, 852–53 (1807); *see also* SOFAER, *supra* note 184, at 172–73.

192. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 4 THE FOUNDERS’ CONSTITUTION 127, 127–28 (Philip B. Kurland & Ralph Lerner eds., 2000 ed.).

he acted. They are not to transfer the information of this place or moment to the time and place of his action; but to put themselves into his situation.<sup>193</sup>

Thus, Jefferson reasoned that extraordinary measures may place the President in a position where he believes he must act immediately and take legally questionable steps to protect the nation. In such circumstances, the third President believed it was incumbent on the chief executive to request that Congress ratify such executive actions.

Nor is this the only occasion when Congress has legally cured questionable executive branch action in a time of necessity.<sup>194</sup> At the beginning of the Civil War, President Abraham Lincoln unilaterally spent federal monies without appropriation, dramatically expanded the size of the Army and Navy, established a blockade against the South, and suspended habeas corpus.<sup>195</sup> Unilateral presidential actions in this vein—though necessary at the time—were highly suspect from a constitutional standpoint.<sup>196</sup> Lincoln recognized this. As such, he expressed in a message to Congress that

[t]hese measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress . . . .<sup>197</sup>

Ultimately, following his request, Congress legitimized his actions.<sup>198</sup>

Lincoln's actions with respect to the blockade against the South were subsequently litigated before the Supreme Court and Lincoln and Congress's

193. *Id.*

194. In the mid-1840s, John C. Fremont—then an Army officer—was ostensibly deployed on a mission of scientific discovery to California. *See* 2 HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 157 (1984). While he was in the region, he claimed certain Mexican territory to be part of the United States and performed “arguably . . . warlike act[s].” *Id.* at 157–61. Fremont's actions may or may not have been authorized by senior officials in the executive branch. *Id.* Nevertheless, Congress subsequently provided retroactive sanction for what he had done. *Id.* at 160–61. Similar retroactive approval took place regarding the American liberation of a Hungarian citizen, Martin Koszta, from an Austrian vessel in 1853, an act which could have prompted war. *See id.* at 163–64. In 1873, the Grant administration unilaterally expended funds beyond appropriated levels in anticipation of potential hostilities with Spain. WILMERDING, *supra* note 165, at 16–17. Congress later ratified these actions as well. *Id.* In 1926, President Calvin Coolidge reallocated monies designated specifically for combatting animal disease and provided them to assist impoverished farmers in the wake of major storms. *Id.* at 17–19. The next year, Congress ratified his actions. *Id.* at 18–19. Similarly, in 1906, 1913, 1922, and 1925, Congress ratified unilateral presidential actions that had also been taken in order to combat the effects of natural disasters. *Id.* at 17, 18–19 n.31.

195. *See, e.g.,* RANDALL, *supra* note 34, at 51–52; CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 224–30 (reprint ed. 1963).

196. *See, e.g.,* RANDALL, *supra* note 34, at 51–53; ROSSITER, *supra* note 195, at 224–30.

197. Abraham Lincoln, *Special Session Message, July 4, 1861*, in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3221, 3225–26 (James D. Richardson ed., 1897).

198. *See* Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326. Nine decades later, Justice Robert Jackson, in his concurrence in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), maintained that Lincoln's actions regarding the suspension of habeas corpus had also been cured by retroactive legislation. *Id.* at 637 n.3.

actions were vindicated in the *Prize Cases*<sup>199</sup> decision. The Court reasoned that

in 1861, we find Congress . . . “approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.”

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on [a] . . . well known principle of law . . . *this ratification has operated to perfectly cure the defect.*<sup>200</sup>

A situation involving simultaneous presidential-vice presidential incapacity would constitute a crisis in governance in its own right since the country would be without a functioning President. The circumstances would be even more dire if matters required the President’s immediate attention (e.g., how to respond to a military threat). As such, dual incapacity would warrant similar unilateral action because, in Jefferson’s words, “the safety of the nation [would be] . . . at stake.”<sup>201</sup>

In the case of dual incapacity, the Speaker, PPT, and Cabinet would be following Jefferson’s and Lincoln’s lead by taking legally debatable steps by naming the Speaker the Acting President. But, also like Jefferson and Lincoln, they would attempt to have their actions cured by sending a message to Congress requesting, among other things, subsequent legislative approval of their actions.

## 2. Legitimacy

The proposal in this Article would also have the benefit of being politically legitimate. Under this approach, PPT and Cabinet approval would be needed before the Speaker would become Acting President. In several ways, that adds political legitimacy to the proceedings.<sup>202</sup> First, this initial step essentially follows the model by which incapacity is determined if the President alone is thought to be unable to function in office. Section 4 of the Twenty-Fifth Amendment requires that the Vice President secure the Cabinet’s approval before the former can become Acting President, and, if the incapacity is contested, Congress then decides the matter.<sup>203</sup>

The approach outlined in this Article would do largely the same thing: it would provide for a joint Speaker-PPT-Cabinet decision. The difference is that this proposal would include even greater checks and balances than Section 4. It includes an additional actor in the review process—the PPT—

199. 67 U.S. (2 Black) 635 (1863); *see also* RANDALL, *supra* note 34, at 55–56.

200. *Prize Cases*, 67 U.S. at 670–71 (second emphasis added) (quoting Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326).

201. Letter from Thomas Jefferson to John B. Colvin, *supra* note 192, at 127.

202. *See* Feerick, *supra* note 1, at 20–21.

203. U.S. CONST. amend. XXV, § 4; *see also* Clinton Contingency Plans, *supra* note 95, at 2; Reagan Contingency Plans, *supra* note 95, at 2–3.

and provides a means for the President and Vice President to get their jobs back. Indeed, Congress would be brought into play even if the matter were uncontested by the President or Vice President. This enhanced parallelism should reassure the American public that, while the situation would essentially be without precedent, policymakers would be following a familiar path, one patterned after the Twenty-Fifth Amendment but with even more built-in precautions.

Further legitimacy would be added by Congress providing a statutory mechanism by which the President and Vice President could regain office. Ideally, this statutory process would also mimic Section 4 of the Twenty-Fifth Amendment.

Second, securing the PPT and the Cabinet's approval would signal that the Speaker was not engaged in a coup. It would demonstrate that a deliberative process had taken place regarding incapacity and that the decision had been made with the approval of presidential loyalists (i.e., the Cabinet)<sup>204</sup> who are themselves linked to the electorate through their Senate confirmations. The Senate would also be represented in the deliberations through the PPT.

Perhaps even more powerful from a political-legitimacy standpoint would be that the Speaker, PPT, and Cabinet's decision would be subsequently blessed by the nation's lawmakers, even if the President and Vice President did not contest their own incapacity. Members of Congress obviously represent the American people as a whole. Therefore, providing the legislative branch with such a key role in this process would be a way for the American public to participate through their elected representatives.<sup>205</sup>

### 3. Practicality

As demonstrated above,<sup>206</sup> in a dual-incapacity setting, the country simply cannot wait for Congress to pass a statute before an Acting President is named. Given the need to minimize any de facto interregnum, the executive branch would need an Acting President immediately.

On the other hand, if it were obvious to the public that both the President and the Vice President were incapacitated, the Speaker of the House—as the next in line to succession—would be able to act with dispatch. After the Speaker gained the approval of a majority of the Cabinet and the PPT and notified Congress, the Speaker would immediately step into the role of Acting President. In this way, the length of the de facto interregnum would be greatly minimized. Then Congress could take action to ratify what had taken place.

Moreover, as a practical matter, the chances of the Speaker taking timely action in this situation would be enhanced because he would have the political cover provided not only by the Cabinet but by the PPT.

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204. See *1965 Senate Hearing*, *supra* note 60, at 69 (statement of American Bar Association); Brownell, *supra* note 12, at 200.

205. See *Second Clinic Report*, *supra* note 12, at 973.

206. See *supra* Parts I, III.D.



## V. POTENTIAL COUNTERARGUMENTS

There is no ideal solution to an immediate occurrence of dual incapacity.<sup>207</sup> The executive branch has not taken public action to provide a mechanism for such a contingency and Congress has not addressed the matter by statute. This leaves policymakers with only imperfect options. Not surprisingly, there are several potential counterarguments that could be marshalled against the position advocated in this Article.

A. *Legislative Succession Is Unconstitutional*

One possible criticism is that having the Speaker as a central actor in the proposed solution to dual incapacity is misguided as the 1947 presidential succession statute may unconstitutionally place legislative officials in the line of succession.<sup>208</sup> This concern may be particularly acute if the Speaker belongs to a different political party from the President and Vice President. This in turn might encourage a challenge to the statute and unduly complicate resolution of a dual-incapacity situation. For several reasons this potential counterargument is flawed.

By having the Speaker, PPT, and Cabinet consult prior to any decision on dual incapacity, this Article's proposal provides a forum whereby the rival claimants can decide the question in a deliberative fashion. Indeed, the conclave might conclude for any number of reasons that the Secretary of State (or next eligible Cabinet secretary) should become Acting President rather than the Speaker or PPT.

That said, there are several *practical* reasons why it would be difficult for the Secretary to contest the legal claim of the Speaker to become Acting President. For one, the Secretary's claim would have to overturn the longstanding executive branch interpretation that legislative succession is in fact constitutional.<sup>209</sup> Legislative succession was first signed into law by President George Washington in 1792.<sup>210</sup> After removal of legislative branch officials from the line of succession in 1886, President Harry Truman proposed that they be put back in in what ultimately became the 1947 Act, the constitutionality of which was defended by the Acting Attorney General at the time.<sup>211</sup> As noted earlier, President Johnson entered into a letter arrangement with Speaker McCormack whereby the latter would have assumed the presidency if the former had become incapacitated.<sup>212</sup> In 2007,

207. See *supra* note 11 and accompanying text.

208. See *supra* note 8 and accompanying text. This segment benefitted from a thought-provoking discussion with Professor Akhil Amar.

209. Cf. Manning, *supra* note 8.

210. Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886); cf. Manning, *supra* note 8, at 150–53.

211. See 93 CONG. REC. 7692–93 (1947) (providing the text of President Truman's two messages to Congress in support of legislative succession); *id.* at 8621–22 (providing the text of a letter from Douglas W. McGregor, Acting Attorney General, to Earl C. Michener, Chairman, Committee on the Judiciary, House of Representatives, dated June 11, 1947).

212. *Johnson Provides for a Disability*, *supra* note 74 (quoting the letter agreement on presidential succession between President Lyndon Johnson and Speaker of the House John

President George W. Bush issued the *National Continuity Policy Implementation Plan*.<sup>213</sup> It makes clear that the executive branch views legislative succession as entirely lawful. The document emphasizes the importance of

[f]acilitat[ing] effective implementation of . . . the Presidential Succession Act of 1947 (3 U.S.C. § 19). The executive branch will ensure that appropriate support is available to the Vice President, the Speaker of the House, and the President Pro Tempore of the Senate. The Vice President, the Speaker of the House, and the President Pro Tempore should be prepared at all times to execute their role as a successor President.<sup>214</sup>

Elsewhere the document notes that with respect to succession, “[f]or the Presidency, the Constitution and statute establish the Order of Presidential Succession for officials who meet the constitutional requirements as follows: [t]he Vice President[,] Speaker of the House[,] President Pro Tempore of the Senate.”<sup>215</sup> In the years since the 1947 Act, other executive branch legal opinions and documents from both the Department of Justice and the Office of the Counsel to the Vice President have assumed the constitutionality of legislative succession.<sup>216</sup>

Indeed, the State Department’s own website states that “the Secretary of State is fourth in line of succession after the Vice President, the Speaker of the House, and the President pro tempore of the Senate.”<sup>217</sup> A State Department spokesperson recently reiterated that point.<sup>218</sup> It would be exceedingly difficult for a Secretary of State to claim that he should be the Acting President when decades of executive branch public statements and legal opinions and the State Department’s own website say otherwise.

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McCormack); *see also* FEERICK, *supra* note 4, at 323–33 (quoting a legal opinion by the Department of Justice defending the legality of the arrangement).

213. *See* HOMELAND SEC. COUNCIL, *supra* note 73, at iii.

214. *Id.* at 42.

215. *Id.* at 7.

216. *See* Memorandum from Ralph W. Tarr, Acting Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen. 69 (June 14, 1985), <https://www.justice.gov/file/23736/download> [<https://perma.cc/A2QX-ZJXT>] (referencing the Speaker and PPT as part of the statutory line of succession); Wiggins Memorandum, *supra* note 91, at 8 (proposing that the Speaker participate in determining vice presidential incapacity); *see also* U.S. DEP’T OF JUSTICE, 200<sup>TH</sup> ANNIVERSARY OF THE OFFICE OF THE ATTORNEY GENERAL 35 (1990) (“[T]he Attorney General ranked fourth . . . in the line of succession to the Presidency. . . . Congress [later] passed a law making the Speaker of the House and the president pro tempore of the Senate next in line of succession after the Vice-President.”).

217. *Who Is the Secretary of State?* DISCOVER DIPL., <https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/people/170354.htm> [<https://perma.cc/9RPX-C95D>] (last visited Nov. 19, 2017); *see also* *Contact Us*, U.S. DEP’T ST., <https://register.state.gov/contactus/> [<https://perma.cc/6FNV-RTUR>] (last visited Nov. 19, 2017) (“The Secretary of State [is] . . . fourth in line of presidential succession”).

218. Karen DeYoung, *Trump Contradicts Tillerson on North Korea, the Latest in a Series of Put-Downs*, WASH. POST (Oct. 1, 2017), [www.washingtonpost.com/world/national-security/trump-contradicts-tillerson-on-north-korea-the-latest-in-a-series-of-put-downs/2017/10/01/1f11f886-a6bb-11e7-92d1-58c702d2d975\\_story.html](http://www.washingtonpost.com/world/national-security/trump-contradicts-tillerson-on-north-korea-the-latest-in-a-series-of-put-downs/2017/10/01/1f11f886-a6bb-11e7-92d1-58c702d2d975_story.html) [<https://perma.cc/SFL8-5U3Z>] (quoting a State Department spokesperson as noting that the Secretary of State is “fourth in line to the presidency”).

Moreover, there have been executive branch protocols and contingency plans in place for some time that have grown up around the notion of legislative succession and have institutionalized it.<sup>219</sup> Indeed, the Reagan-Bush-Clinton contingency plans, formulated by the White House Counsel, state that “[t]he answer to the question of who would govern [in a dual incapacity scenario] . . . would appear to be . . . that the Speaker of the House would ‘act as President.’ . . . The goal in [that] situation[] would be to have the Speaker *act* as President.”<sup>220</sup> If the contents of these White House documents are still in place, once again, it would be very hard as a practical matter for the Secretary of State—in the midst of an unprecedented governing crisis—to repudiate them.

Legislative succession has also been reiterated by the current administration. In 2017, President Donald Trump asked PPT Orrin Hatch to serve as designated survivor and not attend that year’s inauguration.<sup>221</sup>

For all of these reasons, the Secretary could very well face a major legitimacy problem if he claims to be Acting President. To the general public, the Speaker—and not the Secretary—would likely be seen as the next in line.<sup>222</sup> That reality manifested itself in 1981 following the attempted assassination of President Reagan. During a White House press conference, Secretary of State Alexander Haig appeared to assert that he was next in the line of succession after the Vice President.<sup>223</sup> This created a media firestorm and has since become synonymous (fairly or unfairly) with an official attempting to seize authority he does not possess.<sup>224</sup> The specter of Haig’s

219. The Federal Emergency Management Agency, which bears important responsibility in contingency planning, has long included legislative officials in its efforts. Letter from the White House Comm’n’s Agency to James O. Eastland, President Pro Tempore, U.S. Senate (Sept. 6, 1972), <https://www.archives.gov/files/declassification/iscap/pdf/2010-081-umissdoc28.pdf> [<https://perma.cc/RX8D-JJYE>] (providing a means of White House coordination among those in the line of succession, including both the Speaker and the President pro tempore); see also Second Clinic Report, *supra* note 12, at 958.

220. Clinton Contingency Plans, *supra* note 95, tab G, at 2; Reagan Contingency Plans, *supra* note 95, tab G, at 2–3.

221. Press Release, Sen. Orrin G. Hatch, At the Request of President Trump, Hatch Serves as Designated Survivor During Inauguration (Jan. 20, 2017), <https://www.hatch.senate.gov/public/index.cfm/2017/1/at-the-request-of-president-trump-hatch-serves-as-designated-survivor-during-inauguration> [<https://perma.cc/F7SF-H7CF>].

222. See, e.g., KALT, *supra* note 8, at 84. For typical press treatment of succession, see, e.g., Mike Allen, *Rice Is Named Secretary of State*, WASH. POST (Nov. 17, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A53673-2004Nov16.html> [<https://perma.cc/B56P-KHKA>] (“Rice . . . will be fourth in line of succession to the presidency . . .”).

223. Richard V. Allen, *When Reagan Was Shot, Who Was ‘In Control’ at the White House?*, WASH. POST (Mar. 25, 2011), [https://www.washingtonpost.com/opinions/when-reagan-was-shot-who-was-in-control-at-the-white-house/2011/03/23/AFJlrfYB\\_story.html](https://www.washingtonpost.com/opinions/when-reagan-was-shot-who-was-in-control-at-the-white-house/2011/03/23/AFJlrfYB_story.html) [<https://perma.cc/4CGS-CU3N>] (“Constitutionally, gentlemen, you have the president, the vice president and the secretary of state, in that order . . .”).

224. Cf. KALT, *supra* note 8, at 96; see also HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT”: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 97 (1992) (discussing White House Counsel Fred Fielding having to correct Haig on the order of succession immediately after the press conference); Bill McGown, *The Al Haig Communication Lesson*, HUFFINGTON POST (Apr. 28, 2010, 5:12 AM), <https://www.huffingtonpost.com/bill-mcgowan/the-al-haig-communication>

assertion would likely hang over any Secretary contending that he—and not the Speaker—is the lawful successor.

That said, the legitimacy issue may ultimately turn on political context. For example, if the presidency and Congress were in different partisan hands and a modern-day Charles Guiteau incapacitated both the President and Vice President in the name of reversing partisan control of the White House, the Speaker and PPT might deem it prudent to stand down and defer to the Secretary of State.<sup>225</sup> This is all the more reason why this Article recommends that all the claimants meet in person to discuss and decide matters.

### B. *The Approach Violates Separation of Powers*

A second possible counterargument might be made that including the Speaker and PPT in the decision-making process violates separation of powers.<sup>226</sup> Including the Speaker and the PPT in the initial determination process, as this Article proposes, certainly does violate abstract notions of separation of powers. But that is only because the 1947 statute does so.<sup>227</sup> In a perfect world, the line of succession would stay completely within the executive branch and run from the Vice President to members of the Cabinet. It does not, however, and the Speaker and PPT *are* included.

At the same time, it bears remembering that the text of the Constitution itself does not reflect an airtight application of separation of powers.<sup>228</sup> This is certainly true in the incapacity realm as Congress is the ultimate arbiter of presidential incapacity under Section 4 of the Twenty-Fifth Amendment. Similarly, the Vice President, who is essential to the Section 4 process, is part of both political branches with his exact constitutional locus varying depending upon the circumstances.<sup>229</sup> The Speaker enjoys the CGOP in relation to the President by statute, and the PPT would seem to have a

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\_b\_478775.html [https://perma.cc/YH86-47JG] (“What Haig failed to comprehend in the heat of the moment was the average person’s contempt for someone seemingly using a moment of crisis for personal gain. At a time when the American people needed to be calmed and reassured, Haig’s actions achieved the opposite effect. [It] became an indelible black mark on Haig’s record that no reputation management expert could erase.”); *see also* Baker & FitzPatrick, *supra* note 104, at 841.

225. *See* KALT, *supra* note 8, at 83–105.

226. *Cf.* Brownell, *supra* note 12, at 199–201; Silva, *supra* note 119, at 162, 168.

227. The original presidential succession statute from 1792 also violated this theoretical principle. *See* Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886); *cf.* Manning, *supra* note 8, at 150–53.

228. *See, e.g.,* Roy E. Brownell II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers, Part I: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL’Y 1, 6–15 (2014).

229. *See id.* at 1; Roy E. Brownell II, *A Constitutional Chameleon: The Vice President’s Place Within the American System of Separation of Powers, Part II: Political Branch Interpretations and Counterarguments*, 24 KAN. J.L. & PUB. POL’Y 294, 294 (2015). The Vice President is not an executive branch official all of the time; as President of the Senate, he has a foot in the legislative branch as well. Therefore, having the Speaker and PPT—as legislative branch officials—involved in the executive branch inability-determination process is somewhat less troubling than it might at first seem. *See* Manning, *supra* note 8, at 147–50.

constitutionally based form of CGOP in relation to the vice presidency. As such, they need to be included in the inability determination process.

The only other official who could realistically contest this state of affairs would be the Secretary of State (or next in the line of succession) under the legal theory that the Speaker is not the lawful successor.<sup>230</sup> As noted, under such a scenario, the Speaker and the Secretary would be able to pursue their competing claims when the Speaker, PPT, and Cabinet consult to render the dual-incapacity decision. The decision of the group should essentially resolve this constitutional question one way or another.<sup>231</sup>

### C. *Requesting Authorization from Congress Is Too Risky*

A third potential counterargument would be that seeking congressional ratification is gilding the constitutional lily. Why potentially invite constitutional and legitimacy challenges by requesting congressional ratification? With the heightened partisan tensions of today, what if Congress were unable or unwilling to act?

This concern is misplaced for several reasons. First, as was seen before, both the CGOPT and the Reagan-Bush-Clinton plans are far from airtight from both constitutional and legitimacy standpoints.<sup>232</sup> Indeed, the Reagan-Bush-Clinton plans openly conceded the shaky legal footing upon which they were based. Further, if there were any question at all about the constitutionality and legitimacy of the actions of the Acting President (especially given the heightened public concern that would precede and accompany his assumption of office), that doubt would need to be eliminated. Taking that doubt off the table is what post hoc ratification does. The rationale is similar to that used in 2009 when President Barack Obama retook the oath of office after he and Chief Justice John Roberts fumbled the wording of the oath the first time: to remove any doubt of legality and legitimacy.<sup>233</sup> At the end of the day, Congress has the authority in this realm and, therefore, only Congress can ratify the group's actions.

Second, the legislative lift would likely not be as formidable as might be thought. Presumably, the Speaker would have little problem assembling a majority in the House since he would have commanded a majority in the body immediately before the crisis. The Cabinet and the House acting together in a crisis atmosphere would likely be able to persuade the Senate, especially with a venerable member of the majority party of the upper chamber—the PPT—assisting in the advocacy.

Moreover, Congress would need to legislate anyway to provide a clear and reliable method for the President and Vice President to regain office.<sup>234</sup>

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230. See *supra* note 8 and accompanying text.

231. Cf. Calabresi, *supra* note 8; see also *supra* Part V.A.

232. See *supra* Parts III.B–C.

233. Associated Press, *Obama Retakes Oath of Office After Flub*, NBC NEWS (July 22, 2009, 12:54 PM), [http://www.nbcnews.com/id/28780417/ns/politics-white\\_house/t/obama-retakes-oath-office-after-flub/#.WUuBRGjyvIU](http://www.nbcnews.com/id/28780417/ns/politics-white_house/t/obama-retakes-oath-office-after-flub/#.WUuBRGjyvIU) [https://perma.cc/SB72-YRVJ].

234. It will be remembered that this Article proposes that, in their joint public announcement, the Acting President, PPT, and Cabinet provide an ad hoc path for the

Indeed, it would be in the interests of lawmakers supporting the President and Vice President's return to establish such a statutory process. Legislative language ratifying the Speaker, PPT, and Cabinet's actions would be part of this vital legislation.

From a public advocacy standpoint, the Speaker, PPT, and the Cabinet would likely hold the upper hand over Congress. They could rightly point out the reality that someone needs to temporarily lead the executive branch *and no one else is in a position to do so*. The group might also emphasize that the 1947 presidential succession statute makes the Speaker the Acting President if there is dual incapacity<sup>235</sup> and that there is currently a dual incapacity. Arguably, Congress has already implicitly delegated this authority to the Speaker; now the Speaker-turned-Acting President—in conjunction with the PPT and the Cabinet—wishes to make the process explicit.

In addition, it is uncertain who the rival claimants would be for congressional opponents to rally behind. Indeed, those with a potential interest in the presidency—the PPT and Cabinet members—are central to the decision-making process and would be supporting the Speaker's position. The PPT would need to agree in order for the decision to go forward, and it is difficult to imagine a Cabinet majority forming in favor of the Speaker if the Secretary of State—as the next in line of Cabinet succession—did not concur in judgment.

Furthermore, it would be difficult for Congress to oppose the Speaker-turned-Acting President, PPT, and Cabinet to essentially take the position that there should be no one to carry out the presidential duties and that there should remain an uncertain means by which the President and Vice President could regain office.

It seems hard to imagine that the Speaker, PPT, and Cabinet would move forward to temporarily replace the President and Vice President unless their dual incapacity were truly manifest. Members of Congress would not be blind to the exigency surrounding their actions and would feel tremendous public pressure to resolve the crisis by supporting the Speaker, PPT, and Cabinet's decision.<sup>236</sup>

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President and Vice President to use to return to office until Congress takes action. If the President and Vice President wish to contest their inability and Congress had not yet provided a process for them to regain their offices, the President and Vice President could simply declare that they have regained capacity. If the Acting President, PPT, and Cabinet contest their declaration, the matter should be sent to Congress with the understanding that Congress would decide, with any legislative inaction favoring the displaced officeholders. Again, this would follow Twenty-Fifth Amendment norms. As with Section 4 of the Twenty-Fifth Amendment, the presumption favors the President and Vice President returning to office, but would subject their declarations to some checks and balances. This proposed process would be on much firmer ground, however, if it were provided by statute under authority of the Dual Inability and Necessary and Proper Clauses.

235. 3 U.S.C. § 19 (2012).

236. A recent example of Congress responding to exigent circumstances involved the response to the financial crisis in the fall of 2008. Just weeks prior to the election, Congress took action to try to avert a potential economic freefall even though the solution—temporarily “bailing out” financial institutions—was wildly unpopular. *See* David M. Herszenhorn,

If, however, for whatever reason, Congress ultimately did not ratify the group's joint decision and provided no method by which the President and Vice President could return to office, the Speaker would simply remain as Acting President until either the President or Vice President recovered. The Acting President's public posture would remain that he, the PPT, and the Cabinet acted lawfully and that they had only requested Congress to legislate out of an abundance of caution.

Indeed, if Congress did not ratify the group's procedure and incapacity decision, the Acting President, PPT, and Cabinet could use the failure to their advantage. The group could assert that this failure to act reflects congressional acquiescence. In this regard, they could claim this tacitly demonstrates legislative branch approval of their action.<sup>237</sup> Of course, unlike with secret contingency plans, the group's actions in this context in the "zone of twilight" would be public and done with the explicit knowledge of Congress and the public. Moreover, congressional enactments, such as the appropriation bill funding White House operations, could be seen as providing implicit retroactive sanction to what the group had decided.<sup>238</sup> Furthermore, the longer the Acting President remains in office, the more legitimacy he likely stands to gain as the public's anxiety begins to wane and the citizenry grows accustomed to him in the White House.

#### *D. Potential Challenges from the Officeholders or Their Families*

Another potential counterargument is that a post hoc statute—retroactive by its very nature—might conceivably be challenged by the family or staff of the President or Vice President for violating the Bill of Attainder,<sup>239</sup> Ex Post Facto,<sup>240</sup> or Due Process Clauses.<sup>241</sup>

Such constitutional challenges, assuming they clear prudential hurdles (no small task under the circumstances),<sup>242</sup> would be dubious for several reasons. For one, Congress would be acting based on clear constitutional authority: the Dual Inability and the Necessary and Proper Clauses. These Clauses exist alongside the Bill of Attainder, the Ex Post Facto, and the Due Process Clauses, and must be read in conjunction with them.<sup>243</sup> When the

*Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES (Oct. 3, 2008), <http://www.nytimes.com/2008/10/04/business/economy/04bailout.html>

[<https://perma.cc/DP9N-MH9U>]; Ben Rooney, *Bailout Foes Hold Day of Protests*, CNN (Sept. 25, 2008), [http://money.cnn.com/2008/09/25/news/economy/bailout\\_protests/](http://money.cnn.com/2008/09/25/news/economy/bailout_protests/) [<https://perma.cc/7LNW-QD5Z>].

237. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

238. In situations where the President is allegedly acting without express ex ante legislative authorization, some federal appellate decisions have indicated that legal defects can be cured by subsequent implicit legislative action. See, e.g., *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971).

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

240. See *id.*

241. See *id.* amend. V.

242. The issue would seem unlikely to be successfully litigated on the merits. See Calabresi, *supra* note 8, at 175.

243. See, e.g., *Presidential Inability*, 42 Op. Att'y Gen. 69, 85 (1961).

constitutional principle that executive power should never lapse is layered on top of this analysis, legal challenges based on the Bill of Attainder, Due Process, and Ex Post Facto Clauses would face serious hurdles.

Furthermore, with dual incapacity, neither the President nor Vice President would suffer a real harm. The Speaker, as proposed in this Article, would only become Acting President; he would not displace either officeholder. Thus, neither the President nor Vice President would lose their status, compensation, or benefits. If the President or Vice President wanted to regain their capacity, they need only publicly declare it. Congress would decide the matter if the Acting President, PPT, and Cabinet majority opposed the declaration, with inaction favoring the disabled officeholders.

Finally, this lack of a tangible harm would be fatal to the Bill of Attainder and Ex Post Facto challenges, as the former requires a legislative punishment<sup>244</sup> and the latter a criminal penalty to be retroactively enhanced.<sup>245</sup> Neither a punishment nor a criminal penalty is involved with an incapacity determination. Furthermore, Due Process Clause protections in a public employment context apply only to those holding statutorily created positions with civil-service protections; they do not extend to constitutional officers.<sup>246</sup> Such considerations have nothing to do with deciding inability for the President and Vice President.

#### CONCLUSION

Dual incapacity is one of three major inability scenarios involving the Vice President that threatens the continuity of the executive branch. The current state of the law in this area, unfortunately, leaves only imperfect options for policymakers. Ideally, policymakers would take public action to resolve this matter proactively, in a manner that satisfies legality, legitimacy, and practicality concerns. But since this has yet to happen, an examination of the different immediate choices is overdue.

Were a dual incapacity situation to arise suddenly, to resolve this problem, the Speaker should consult with, and gain the blessing of, the PPT and a majority of the Cabinet. The group should then jointly authorize executive branch attorneys to expeditiously craft a legal opinion. With the legal opinion in hand, the Speaker, the PPT, and the Cabinet should declare that the Speaker is Acting President until either the President or Vice President regains capacity. At the same time, the Speaker—as the new Acting President—the PPT, and the Cabinet should request that Congress ratify the process the group followed and the decision that they made. They should also request legislation detailing how the President and Vice President could reclaim their offices. While imperfect, the solution proposed in this Article does a better job of satisfying the three key criteria—legality, legitimacy, and

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244. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 315 (1946).

245. *See, e.g.*, *Calder v. Bull*, 3 U.S. 386, 390–91 (1798).

246. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Second Clinic Report*, *supra* note 12, at 986–87.



practicality—than competing approaches, and should be considered by policymakers “in a pinch.”