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Essay

***113** IS THE PRESIDENTIAL SUCCESSION LAW CONSTITUTIONAL?

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In this essay, Akhil and Vikram Amar attack the constitutionality of the current presidential succession statute, which places the Speaker of the House and the Senate President pro tempore first and second in line, respectively, if there is neither a President nor a Vice President. Relying on the words of the Framers, the text and logic of the Constitution, and various practical and ethical concerns, the Amars conclude that federal legislators are not "Officers" under the Succession Clause and thus ineligible for the line of succession. Finally, the Amars suggest th

impeachment case in 1798, the Senate correctly rejected the idea that its members were "civil Officers" within the meaning of the Constitution, and thus subject to impeachment. [FN13] As future Supreme Court Justice James Iredell had put the point in constitutional ratification debates a decade earlier: "[W]ho ever heard of impeaching a member of the legislature?" [FN14] Thus, federal legislators are neither "Officers under the ***116** United States," nor (to the extent that there is any difference) "Officers of the United States." [FN15]

There is considerable historical evidence that the Constitution's drafters used the term "Officer" in the

Twenty-Fifth Amendment. [FN37] This quandary will not arise if the term "Officer" in the Succession Clause refers only to officials (like the Secretary of State or Attorney General) who can retain their posts

2. Logistics.

The "where" problem. Consider next the Constitution's concern with geography. "Geography preoccupied the founding generation . . . . [It] ramified in every direction, influencing virtually every major issue considered by the Philadelphia Convention . . . ." [FN77] Where to locate various government personnel and institutions obsessed those who wrote and ratified the Constitution, largely because location does affect (and did so much more in 1787) the smooth running of government. For example, impeachment trials -- suits that may tend to distract government actors from discharging their duties -- were explicitly located in the Senate, in the nation's capital, in part because that is where geographic disruption would be minimized. [FN78] Similarly, part of Article III's underlying logic is geographic: The requirement that suits involving ambassadors be tried in the original jurisdiction of the Supreme Court, in the nation's capital, reflected a concern over the disruption of ambassadors' official duties. [FN79]

Given all this, we must ask what kind of event would cause the single largest disruption in the smooth operation of the federal government? Clearly the answer is the kind of catastrophe that triggers the succession statute -- that is, ***126** an event that deprives the country of its two elected executive officials. In construing the scope of the Succession Clause, shouldn't we consider the geographic location of a would-be successor? At the Founding, high level executive officials, especially Cabinet members, were most likely to be in Washington during a time of national crisis. Diligent federal legislators, including the Speaker, tended to, and were supposed to, split their time between the capital and the people they represented. Indeed, in the early Republic, Americans expected that legislators would typically meet in short sessions and quickly return back home to live (like everyone else) under the laws just made. Article I's Arrest Clause explicitly focused on this geographic reality in its reference to federal legislators "going to and returning from" the capital. [FN80]

During the First Congress, in debates over presidential vacancy, Representative Carroll argued against legislative succession, and in favor of Cabinet succession, in geographical terms: "[T]he vacancy might happen in the recess of the Legislature, or in the absence of the President of the Senate; the Secretary of State would always be at the seat of Government." [FN81] Moments later, Representative Smith echoed the point: "[T]he office of Secretary of State and the duties of President were analogous. He was a kind of assistant to the Chief Magistrate, and would, therefore, very properly supply his place; besides, he was always at the seat of Government." [FN82]

Though geography looms less large today, it did inform the Founders' drafting and thus casts some light on what was the most sensible reading of the Succession Clause when enacted. Even in today's jet age, there remains an impulse that location counts -- an impulse thathelps explain Secretary of State Alexander Haig's attempt to reassure the country, in the wake of the assassination attempt on President Reagan in 1981, that someone was "in control here, in the White House." [FN83]

The "when" problem. A related structural argument concerns time. The President and the executive officers who serve beneath him are on duty -- in office -- without break or interruption, 365 days a year. Federal legislators, including the Speaker, do the people's business only while Congress is in session.

The Constitution requires only that "the Congress shall assemble at least once in every Year." [FN84] Beyond that, the length and frequency of congressional sessions ***127** are for Congress itself to determine by law. [FN85] Indeed, during the first hundred years following constitutional ratification, "there were frequent and lengthy vacancies in the offices of President pro tempore and Speaker." [FN86] Even today, the House is, strictly speaking, not a continuing body [FN87] and must elect new officers every two years. By its very nature, therefore, the Speakership is not a continuous office. [FN88] Yet, who would dispute the importance of filling a Presidential vacancy immediately after an event triggering section 19 occurs? When defining eligible "Officers" within the meaning of the Succession Clause, we should bear in mind that Speakers have never been continuously on the job like federal executive and judicial officers.

In sum, whether we consider the deep implications of the Constitution's separation of powers and its rejection of a Parliamentary/Prime Minister model or focus on the more mundane, practical issues of time and place, we reach the same conclusion: The Constitution's structure strongly suggests that legislators are simply not Succession Clause "Officers."

C. Subsequent Constitutional Developments

Thus far, we have looked at textual and structural arguments that could have been (and in many cases were) made in the Founding era. But do more recent changes to the Constitution reinforce or undermine these arguments?

1. The Twenty-Fifth Amendment.

The enactment of the Twenty-Fifth Amendment in 1967 makes our structural attack on section 19 even more forceful. The Twenty-Fifth Amendment provides, among other things, a means of filling a vice-presidential vacancy. As we have already noted, the original Constitution did not give a President any authority to replace a Vice President who died or left office. [FN89] The Twenty-Fifth Amendment now directs Presidents faced with a vice- presidential vacancy ***128** to "nominate a Vice President who

Convention: James Wilson and James Madison. In response to early proposals that put the Chief Senator next in line for a vacant Presidency and also gave the Senate a role in presidential selection, Wilson worried that the Senate "might have an interest in throwing dilatory obstacles in the way" of presidential selection. [FN93] Days later, Madison seconded the point: "[T]he Senate might retard the appointment of a [U.S.] President in order to carry points whilst the revisionary [veto] power was in the President of their own body." [FN94]

Here too, our concern that a conflict of interest may lead to harmful legislative foot-dragging reflects not abstract fanciful fears, but actual historical experience. It took a Democratically controlled Congress no less than 121 days to confirm Republican Nelson Rockefeller as Vice President in 1974. [FN95] Had something happened to Republican President Gerald Ford during this four month window, Democrat Speaker Carl Albert would have moved into the Oval Office under section 19.

Granted, Rockefeller's questionable financial dealings raised genuine issues about his fitness to serve as either Vice President or President. [FN96] But the 1947 Act created bad incentives for Congress to string things out, rather than deliberate with dispatch and then vote up or down on Rockefeller. [FN97] Even if the conflicts ***129** of interest created by the Act never actually affected congressional behavior here, and in fact did not slow things down one bit, the Act still contributed to the appearance of a self-dealing slowdown. In this respect, the 1947 Act repeated the mistake of the Act of 1792, which created the appearance of impropriety when Ben Wade voted to convict Andrew Johnson in 1868, even though Johnson had in fact done things that raised real doubts about his fitness for the Presidency.

Another section of the Twenty-Fifth Amendment creates further opportunity for legislative self-dealing, should legislators be permitted to succeed to the Presidency. Section 4 of the Amendment allows the Vice President, together with a majority of either the Cabinet or such other body as Congress designates, to certify to the Congress that the President is unable to discharge his duties. [FN98] This certification can effectively remove the President from office until the disability passes, making the Vice President Acting President. [FN99] Of course, a President alleged to be disabled might disagree, and the Twenty-Fifth Amendment allows him to communicate such disagreement to Congress. In such a case, Section 4 makes the two houses of Congress the ultimate judges of the President's fitness for service. [FN100] To the extent the legislative leaders rank high up in the succession line, their final arbitration of such executive department disputes may be infected by a direct and immediate conflict of interest. Here again, permitting legislative succession creates the possibility that legislators will judge their own cases. [FN101]

***130** 2. The populist Presidency.

Finally, we should take note of a powerful post-Foundingdevelopment in American constitutionalism: the rise of a populist, plebiscitarian Presidency. At first, this trend might seem to support legislative succession -- Representatives and Senators (after the Seventeenth Amendment) are directly elected by the people, but Cabinet officials are not. The People's President today, the argument runs, should be elected, not appointed; thus, legislators, not Cabinet officials, should head the succession lineup.

But the President is elected by a national electorate; Congressmen are not. They represent the parts, not the whole. [FN102] The narrow, local strategies by which Congressmen secure election in their states and districts, with promises of pork and parks, often do not reflect the national vision the People have historically wanted their Presidents to possess. On this score, Cabinet officials are more truly presidential: According to presidential scholar Steven Calabresi, the "President and [his] accountable subordinates" are the "only representatives of a national electoral constituency." [FN103]

In 200 years, at least nine elected Presidents previously served in the Cabinet (not counting the Vice Presidency) and six of the nine served as Secretary of State; but only one served as Speaker of the House. [FN104] To be sure, most of these Cabinet-officer Presidents are nineteenth century figures. But of the sixteen men elected President after 1900, five (the two Roosevelts, Taft, Hoover, and Bush) had held Cabinet or sub-Cabinet executive office; four others (Coolidge, Truman, Johnson, and Nixon) had served de facto in Cabinets as Vice Presidents; and one other (Eisenhower) had served as an executive department General. [FN105] Only five (Harding, Truman, Kennedy, Johnson, and Nixon) had served as Senators; while seven (both Roosevelts, Wilson, Coolidge, Carter, Reagan, and Clinton) came to the Oval Office as former state chief executives with no service in either the House or Senate. [FN106] Although four (Kennedy, Johnson, Nixon, and Bush) had served (typically) brief stints in the House early in their careers, none came directly from the House of Representatives to the Oval Office. Only one of the sixteen (Johnson) was a true congressional leader. [FN107]

Of course, the Speaker and the President pro tempore are chosen as leaders by their respective Houses, which do span the country; but a Cabinet official is ***131** appointed by the President and then confirmed by the Senate. Thus, in contrast to the Speaker or President pro tempore, a Cabinet official can claim selection by two continental institutions, and a mandate from the most truly national institution (the Presidency). Moreover, only he can claim apostolic succession from the very person whose presidential term ended prematurely.

This last idea -- handpicked succession -- is especially important. A modern Vice President who moves up to the Oval Office derives his mandate largely from the fact that he is the handpicked successor of the fallen President. [FN108] Because the People on Election Day are not given a chance to cast separate votes for the Vice President, he lacks a personal electoral mandate. Instead, the Vice President derives his mandate from the populist President who chose him as both running mate and heir apparent. [FN109] The Twenty-Fifth Amendment formalizes the notion of handpicked succession, empowering the President to nominate her chosen heir, subject to congressional approval. [FN110] Cabinet succession simply extends this modern model of handpicked succession to the next level of contingency: In the event of double death, the Oval Office will still pass to a person handpicked by the President as her (contingent) successor. (If none of the existing Cabinet offices is deemed appropriate for this ex officio role as contingent successor, a new executive office of "First Secretary" could be explicitly created with duties designed to provide the officer with suitable training for the Presidency,

House. Legislative succession, by contrast, can defy the People's presidential verdict, awarding the White House to the party that decisively lost the Presidency on Election Day. [FN112] This is an especially grave problem under current law, since statutory succession does not trigger an interim election. [FN113]

As we have seen, congressional elections cannot substitute for presidential ones. Even if they could, section 19 can defy the people's will on Congressional Election Day. A Speaker who loses his district in an off-year November election, and whose party goes down to defeat nationally, will still become President -- for more than two years! -- if the Oval Office becomes vacant in ***132** mid-November, December, or early January. Thus, when fully considered, the modern rise of political parties and a populist Presidency does not undercut, but in fact buttresses, the case against legislative succession.

II. THE STATUTORY EVOLUTION

Given the powerful textual, historical, and structural arguments identified above, how could Congress have ever enacted 3 U.S.C. section 19? To answer this question, and to understand the evolution of the federal succession statute, we must go back to the earliest version, enacted in 1792. [FN114] One major faction of the Second Congress wanted the Secretar

legislative debates of the 1886 Act, both in the House and the Senate, reflected: (1) widespread doubt as to the constitutionality of the 1792 Act, based in large part on the scope of the term "Officer"; (2) disenchantment with the conflict-of-interest shenanigans during Andrew Johnson's 1868 impeachment; and (3) concern that legislative succession could deliver the Oval Office keys to the party locked out of the White House by the People on Presidential Election Day. [FN128]

In 1947, Congress again revised the succession order by enacting section 19, which reinstates legislators atop the list, but this time with the President pro tempore following the Speaker. [FN129] Several members of Congress argued against the constitutionality of the 1947 law during the legislative debates, but the bill's supporters relied on an opinion by Acting Attorney General Douglas McGregor, who concluded that congressmen were "Officers"

Constitutionally, Congress' self-denial was a far, far better thing than its self-dealing.

III. THE BURDEN OF PERSUASION

In the end, the question is not just whose reading of the Succession Clause is best. We must bear in mind the factual contexts in which succession becomes an issue. Statutory succession provisions are triggered by events that rock the very foundations of the country's political and social stability. Constitutional faiths, too, are at stake during these periods of crisis. The need for a smooth, orderly, lawful, ethical, and uncontroversial transition of power is at its peak. Precisely because our nation needs to instill confidence in the constitutional rule of law, we establish succession schemes before the need to use them should arise. [FN141] We should devise and construe these schemes to minimize the self-dealing opportunities and logistical glitches that will threaten any successor President's legitimacy at home and abroad. In implementing the Succession Clause, we should steer wide of any sizeable constitutional or ethical challenges. Even a little uncertainty about the legitimacy or constitutionality of a presidential successor makes an already sad situation unacceptably worse. [FN142]

Thus, if our constitutional criticisms of section 19 merely inspire serious doubt about the current succession scheme, those criticisms become winners because of the stakes involved. In fact, as we have seen, these criticisms are more than substantial. The most straightforward reading of the Constitution's text, the clear implication of five related yet distinct structural themes, and the spirit of twentieth century developments all point to the same conclusion: Legislators are not "Officers" under the Succession Clause. [FN143] And if this is so, ***137** Congress should act now rather than risk a national crisis when tragedy suddenly strikes.

We also believe that a sensible modern day succession statute should provide for a prompt national election should events trigger statutory succession. On this point, we recommend reenactment of some form of the 1792 Act's ***138** special election device. If, God forbid, a bomb were to go off at the inaugural celebration, the People of the United States should not be stuck for four years with a President they did not elect -- a President who, indeed, may represent a party they decisively rejected on Election Day. [FN144] Provision for a special election should be fixed in advance in a succession statute, rather than left to congressional discretion after statutorO n

elect, whose death should trigger the same apostolic succession rules applicable in postInauguration scenarios. [FN146]

Second, Congress needs to create a statutory mechanism for determining and responding to disability in the White House under conditions where Section 4 of the Twenty-Fifth Amendment is unavailing. Section 4 currently pivots on the Vice President's power to certify the President's disability. But what if the Vice Presidency is temporarily vacant and an issue of presidential disability arises? Or if the Vice President assumes the reins as Acting President, and then her own disability comes into question? Or if the President is (for now) healthy and in control, but an issue of vice presidential disability arises? A sensible statute would address these problems by giving the next person in the succession line -- in our model, a Cabinet official like the Secretary of State -- the same kind of triggering role that Section 4 of the Twenty-Fifth Amendment gives the Vice President.

In light of our textual, structural, political, practical, and ethical concerns about section 19, we suggest that Speaker Gingrich might do well to consider adding one more item to his already crowded reform agenda: amendment of the problematic statute that might one day make him President, but might not make him legitimate or even constitutional. [FN147]

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We dedicate this essay to Professor Charles L. Black, Jr., whose pioneering work on structure and relationship in constitutional law has inspired the way we think about the Constitution, here and elsewhere.

[FN1]. Cf. Akhil Reed Amar & Vik Amar, President Quayle?, 78 Va. L. Rev . 913 (1992) (discussing the possibility of former Vice President Dan Quayle succeeding to the Presidency and advocating consideration of executive ticket splitting to allow Vice Presidents to be independently elected).

[FN2]. 3 U.S.C. s 19(a)(1) (1994). Section 19 goes on to provide that if the Speaker is unable to serve, the President pro tempore of the Senate shall act as President. Id. s 19(b). (The current President pro tempore -- three heartbeats away from the Oval Office -- is the nonagenarian South Carolina Senator Strom Thurmond.) The statute also ranks various Cabinet members (beginning with the Secretary of State) who would succeed if neither the Speaker nor the President pro tempore were able to serve. Id. s 19(d)(1).

[FN3]. U.S. Const. art. II, s 1, cl. 6 (emphasis added).

[FN4]. E.g., id. art. II, s 2, cl. 2 (Appointments Clause); id. art. II, s 3 (Commission Clause).

[FN5]. E.g., id. art. II, s 4 (Impeachment Clause).

[FN6]. E.g., id. art. I, s 6, cl. 2 (Emoluments Clause).

[FN7]. E.g., id. (Incompatibility Clause).

[FN8]. E.g., id. art. II, s 1, cl. 2 (Electoral College Clause); see also id. art. I, s 3, cl. 7 ("Office of honor, Trust or Profit under the United States") (Impeachment Sanctions Clause); id. art. VI, cl. 3 ("Office or public Trust under the United States") (No Religious Test Clause).

[FN9]. Id. art. I, s 6, cl. 2 (emphasis added). The full text reads: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." For extensive analysis of this clause and its importance as a repudiation of a parliamentary system of government, see generally Steven G. Calabresi & Joan L. Larsen, One Person, One Office: Separation of Powers or Separation of Personnel?, 79 Cornell L. Rev. 1045 (1994).

[FN10]. U.S. Const. art. II, s 3 (emphasis added).

[FN11]. See id. art. I, s 5, cl. 1 (vesting power in "Each House," and not in the President, to determine

(1965); Silva, supra note 13, at 457-58.

[FN21].

[FN28]. The distinction asserts itself yet again in a later amendment providing sanctions for violations of the Article VI Oath Clause. Id. amend. XIV, s 3 ("No person shall be a Senator or Representative in Congress ... or hold any office, civil or military, under the United States ... who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State ....") (emphasis added).

[FN29]. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[FN30]. U.S. Const. art. I, s 6, cl. 2.

[FN31]. For an outstanding general discussion, see Calabresi & Larsen, supra note 9.

[FN32]. See U.S. Const. art. I, s 3, cl. 5.

[FN33]. U.S. Const. art. II, s 1, cl. 6 (emphasis added).

[FN34]. See note 9 supra and accompanying text. Section 19 explicitly requires resignation from the legislature before assumption of the Presidency. 3 U.S.C. s 19(a)(1), (b) (1994).
A quibbler might try to argue that the President does not, strictly speaking, "hold[ ] ... Office under the United States," and is instead a sui generis figure. But Article II provides that the President shall "hold his Office" for a four-year term, U.S. Const. art. II, s 1, cl. 1 (emphasis added), prescribes an oath for "the Office of President of the United States ," id. art II, s 1, cl. 8 (emphasis added), and further provides that the President "shall be removed from Office on Impeachment ... and Conviction," id. art. II, s 4 (emphasis added). More importantly, the anti-Walpolian spirit underlying the Incompatibility Clause would have barred, for example, President George Washington from simultaneously serving as a Virginia Senator.

[FN35]. This is, of course, precisely the kind of spectacle the Framers explicitly rejected. See text accompanying note 32 supra; text accompanying notes 50-68 infra.

[FN36]. See U.S. Const. art. I, s 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); see also Brown & Cinquegrana, supra note 20, at 1395, 1436 -37 (discussing the dangers of s 19 successors resigning posts only to have the President recover and resume his duties). For a discussion of the Speaker's ability to resign his legislative seat but remain (a nonmember) Speaker, see note 48 infra.

[FN37]. U.S. Const . amend. XXV, s 2. For more discussion of this Amendment, see text accompanying notes 89-101 infra.

[FN38]. It is an interesting question whether, under incompatibility principles, judges would have to resign judicial appointments before succeeding to the post of Acting President. The Incompatibility Clause prevents simultaneous service as legislator and judge, or legislator and executive official, but it does not explicitly prohibit simultaneous executive and judicial officeholding. Calabresi & Larsen, supra note 9, at 1047. In the First Congress, Madison objected to the Chief Justice succeeding to a vacant Presidency on the ground that it would be "blending the Judiciary and Executive." 2 Annals of Cong . 1904 (Jan. 10, 1791); see also id. at 1912- 13 (Jan. 13, 1791) (recording the similar views of Reps. Baldwin and Smith).

[FN39]

[FN44]. See Silva, supra note 13, at 465 - 66.

[FN45]. U.S. Const. art. II, s 1, cl. 6

improbably, corrupt his integrity.").

[FN51]. U.S. Const. art. I, s 6, cl. 2. For a fun general discussion, see Michael Stokes Paulsen, Is Lloyd Bentsen Unconstitutional?, 46 Stan. L. Rev. 907 (1994) (contending that the appointment of Sen. Bentsen as Treasury Secretary violated the Emoluments Clause).

[FN52]. The Emoluments Clause speaks of "Office[s]" and thus does not address the conflict-of-interest issues raised by Congressmen voting themselves pay increases as legislators. To address this

[FN63]. Act of Mar. 1, 1792, ch. 8, s 9, 1 Stat. 239, 240 (repealed 1886).

[FN64]. Feerick , supra note 20, at 114; Brown & Cinquegrana, supra note 20, at 1420 & n.107; Silva, supra note 13, at 451-52.

[FN65]

[FN73]. See generally Michael J. Glennon, When No Majority Rules: The Electoral College and Presidential Succession 8 (1992) (reporting that "most in Philadelphia opposed congressional selection [of the President]"); The Federalist No. 68 (Alexander Hamilton) (discussing the need to keep the President independent of the legislature).

[FN74]. See Ruth C. Silva, Presidential Succession 155 -56 (Greenwood 1968) (1951). In effect, legislative succession threatens to transform the American impeachment model -- featuring a judicial proceeding focused on presidential misconduct -- into a British-style political vote of parliamentary no confidence.

[FN75]. U.S. Const. amend. XXV, s 2; see text accompanying notes 89-92 infra.

[FN76]. See text accompanying notes 102-103 infra (observing that congressional members lack a national electoral mandate, having been voted into office only by the people of a single state or district).

[FN82]. Id. at 1913 -14 (Jan. 13, 1791).

[FN83]. Questions Raised: Who Was In Charge?, 39 Cong. Q. Wkly. Rep. 580 (1981) (emphasis added). Haig further remarked "Constitutionally, gentlemen, you have the president, the vice president and the secretary of state in that order ...." Id. He was widely mocked at the time for ignoring the Speaker and President pro tempore, but, "constitutionally" speaking, Haig was dead right. If federal legislators are constitutionally ineligible, as we argue in this article, the Secretary of State is indeed next in line under the succession act. See note 2 supra. Could it be that with these words Haig was staking out his constitutional claim?

[FN84]. U.S. Const. art. I, s 4, cl. 2.

[FN85]. The President may, of course, convene Congress in emergencies. Id. art. II, s 3. But what happens when the Presidency is vacant? For an argument that presidential and vice-presidential vacancies occurring when neither House is in session creates the possibility of no existing successor and no constitutional means of selecting one, see Silva, supra note 13, at 452, 472 n.83. See also Brown & Cinquegrana, supra note 20, at 1419 n.106 (discussing how President Arthur, who had no Vice President immediately after he replaced President Garfield, drafted a proclamation calling Congress into special session if, and only if, he died).

[FN86]. Brown & Cinquegrana, supra note 20, at 1419; see also Feerick , supra note 20, at 90 n.) (describing "lame duck" sessions of Congress between election and commencement of the new term and the long gap between the beginning of the new term and the seating of the new Congress); Hamlin, supra note 43, at 183 (noting historical reality that at times both offices of Speaker and President pro tempore have been vacant); Silva, supra note 13, at 452 n.4 (describing nine-month lapses in congressional sessions).

[FN87]. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 512 (1975) (citing Gojack v. United States, 384 U.S. 702, 706 n.4 (1966); McGrain v. Daugherty, 273 U.S. 135, 181 (1927)).

[FN88]. See 3 Annals of Cong. 281 (Dec. 22, 1791) (remarks of Rep. White) ("[T]he Speaker was not a permanent officer, if he could be considered as one in any point of view."); id. (remarks of Rep. Giles) ("[T]he Constitution refers to some permanent officer to be created pursuant to the provisions therein contained. [The Speaker and President pro tempore] are not permanent ... the subject was not to be left to any casualty, if it could possibly be prevented.").

[FN89]. See text accompanying note 62 supra.

[FN90]. U.S. Const amend. XXV, s 2 (emphasis added).

[FN91]

[FN101]. Given Cabinet officers' own place in the line of succession, one might worry that conflicts of interest will infect their judgments about presidential disability. But the Twenty-Fifth Amendment gives the Cabinet only the first, not the last, word on presidential disability. And even here, if Congress is concerned about possible self-dealing it may displace the Cabinet's role altogether by substituting, for example, a panel of disinterested medical experts. See Brown & Cinquegrana, supra note 20, at 1415 -16. While the House, in impeachment, acts as a kind of grand jury, the Cabinet members here act more like qui tam plaintiffs than judicial officers: They make no findings of misconduct, and may be replaced by any body Congress chooses.

Moreover, Cabinet officials face very different strategic incentives than do legislators. Consider a bad-faith Cabinet official cynically considering whether to deem an able President disabled to push himself one notch higher on the succession chain. If the able President can convince a mere one-third-plus-one of either House of her fitness, she will resume the reins and can immediately dismiss the bad-faith official. Under the Amendment, by contrast, cynical legislators face neither this uncertainty about whether the President will prevail (since they rule at the end), nor the prospect of immediate dismissal.

Also, in ruling against a disabled President, the collective Cabinet does not anoint itself an electoral college: As a group, it may not designate its favorite Cabinet member "Secretary of State" and thus next in line in the same way that each House may pick its favorite as the section 19 "Officer." Finally, Cabinet officers, unlike Congress members, are typically handpicked by and work closely with the President whose fitness is now in question; thus they are likely to be both loyal and knowledgeable about any possible disability. Silva , supra note 74, at 108. The Cabinet's special access to and knowledge of the President's true status may be crucial in many disability cases. In the end, this unique knowledge may outweigh any indirect self-dealing concerns raised by Cabinet succession.

[FN102]. See McCulloch v. Maryland, 17 U.S. (4gW9 Tc-w(. SeeE aes than do legislatorz(. Sey6004 Tw(. See)T3

any decision that would give umbrage to any officer of the Government. The Secretary of State and the Secretary of the Treasury were equally entitled to the public notice.").

[FN118]. Act of Mar. 1, 1792, ch. 8, s 9, 1 Stat. 239, 240 (repealed 1886).

[FN119]. Two other (ultimately unsatisfactory) notions may have made it seem natural or appropriate to

House passed a motion to strike the Speaker by a vote of 26 to 25. Five days later, a motion to strike both carried 32 to 22. Only after the Senate (acting behind closed doors) refused to yield the point did the House give in by a vote of 31 to 24. Feerick, supra note 20, at 59 - 60. For a more general discussion of the perils of overreliance on early Congresses' constructions of the Constitution, see Calabresi & Prakash, supra note 43, at 551-59.

[FN121]. Act of Mar. 1, 1792, ch. 8, s 10, 1 Stat. 239, 240 - 41 (repealed 1886).

[FN122]. U.S. Const . art. II, s 1, cl. 6.

[FN123]. Records , supra note 16, at 535; see also id. at 599 & n.23, 626 (detailing variations in Succession Clause language about "chusing" another President).

[FN124]. 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia, in 1787, 487- 88 (Jonathan Elliot ed.) (2d ed. Washington 1836).

[FN125]. Some doubt congressional power to call a special election. Hamlin, supra note 43, at 193 - 94;

63; Sindler, supra note 110, at 346.

[FN129]. 3 U.S.C. s 19(a)(1), (b) (1994). The belief that legislative leaders, unlike Cabinet members (or federal judges), enjoyed an "electoral mandate" spurred President Truman to ask Congress to reinstate the President pro tempore and Speaker atop the succession list. Feerick , supra note 20, at 205 - 06; Brown & Cinquegrana, supra note 20, at 1421-30 & n.111; Sindler, supra note 110, at 353; Silva, supra note 13, at 454 -55. But see text accompanying notes 102-113 supra (arguing that Cabinet members possess a greater national electoral mandate than legislators).

[FN130]. 93 Cong. Rec. 8621-22 (1947) (reprinting Letter from Acting Attorney General Douglas W. McGregor to Hon. Earl C. Michener, Chairman, House Comm. on the Judiciary).

[FN131]. McGregor leaned heavily on the early Congress' interpretation of the Succession Clause, as reflected in the Act of 1792. Such strong reliance on early congressional interpretations, infected by political self-dealing, is misplaced. See note 120 supra and accompanying text. Moreover, the 1792 and the 1947 Acts differed in key ways. The 1947 Act explicitly required an ascending legislator to resign his legislative leadership, but the 1792 Act maintained a pointed silence on this. Several lawmakers who voted for the 1792 Act apparently thought that resignation was not required. This judgment is obviously unconstitutional, see text accompanying notes 34-35 supra, and thus provides little comfort to supporters of the 1947 Act. Other early legislators may have believed that the Constitution did indeed require resignation, but they failed to come to grips with the unique practical and constitutional problems created by resignation. See notes 30-49 supra and accompanying text. In short, by failing to explicitly address the resignation dilemma that Madison posed, see note 143 infra, the Second Congress simply evaded the key analytic issue, and thus the Act is entitled to little weight as a considered constitutional judgment. (And, of course, no statutory succession ever took place under the 1792 Act -- or has yet to take place under the 1947 Act -- and so the practical slate remains relatively clean.)

McGregor also stressed the breadth of the word "Officer" in the Succession Clause, but he failed to address the textual and structural criticisms of that construction raised in this article. Finally, McGregor waved in the direction of Lamar v. United States, in which the Court decided that an imposter Congressman had falsely portrayed himself as an "officer acting under the authority of the United States" within the meaning of a 1909 fraud statute. Lamar v. United States, 241 U.S. 103, 112-15 (1916)

[FN143]. Some of the most important constitutional arguments against legislative succession were flagged by James Madison in his letter to Edmund Pendleton lamenting the "err[or]" Congress made in enacting the Succession Act of 1792 placing the President pro tempore and Speaker on the list:

1. It may be questioned whether these are officers, in the constitutional sense. 2. If officers whether both could be introduced. 3. As they are created by the Constitution, they would probably have been there designated if contemplated for such a service, instead of being left to Legislative selection. 4. Either they will retain their legislative stations, and their incompatible functions will be blended; or the incompatibility will supersede those stations, [and] then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Cong[ress] may declare what officers [etc.,] which seems to make it not an appointment or a translation; but an annexation of one office or trust to

To support this radical Prime Ministerialization of America, Manning points to the Vice Presidency. Manning, supra , at 148-50. But the plain language of the Constitution prevents a Vice President/Acting President from blending executive and legislative leadership by simultaneously presiding at both ends of Pennsylvania Avenue. See note 48 supra; text accompanying notes 32 & 56 supra. And unlike Manning's Speaker, the Vice President/Acting President cannot be ousted merely because a bare House majority decides at any point that they don't like him; instead, he is removable only if impeached and convicted of "high crimes and misdemeanors." Manning also ignores other key differences between Vice President and Senators. See note 119 supra. Thus, he is left in the awkward position of (properly) admitting that a Virginia governor may not act as President, but (oddly) suggesting that a Virginia Senator may so act, even though the Senator may have to win reelection in Virginia to remain in the Oval Office.

Manning also leans heavily on the self-dealing Act of 1792, but early Acts cannot repeal clear