A DEFENSE OF THE LEGISLATIVE "OFFICER" SUCCESSION PROVISIONS

*Seth Barrett Tillman**

I am going to try to reframe the issue very slightly. One way of looking at the issue is: What were the Framers trying to fashion when they drafted the Presidential Succession Clause?[1] What were they hoping to achieve? Or, another way of looking at the question is: What should any of us want to achieve by a presidential succession regime?

It strikes me that a working presidential succession model has to have three characteristics: it has to produce a timely result; it has to have a clearly identifiable successor; and it has to be legally and recognizably valid, and in the sense used here, constitutionally valid is part of that. What we have *now*[2] is a statutory legislative officer succession regime, which was also part of what was the (presumptive) original legislative officer succession statutory regime.[3] The chief alternative was what we had in the 1886 statute,[4] and that is Cabinet officer succession. I would like to compare the two models.

Does Cabinet officer succession meet the three goals I outlined before? I would say the answer to that is "no." Cabinet succession is a fixed list. If the entire membership of that fixed list is decapitated by war, or a pandemic, or otherwise, then you do not have a successor, and that is the end of the whole ballgame. In such circumstances, you do not have anyone whose succession is constitutionally and otherwise legally valid.

The problem cannot be corrected once it occurs. A fixed list requires a fix or an amendment. That means a new statute. A statute requires a president and that is the whole problem we have. Ex hypothesi, we do not have a

* Associate Professor, Maynooth University School of Law and Criminology, Ireland, Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. I thank Dean Feerick, Professor Rogan, and Roy E. Brownell II for extending an invitation to participate in this program. These remarks were delivered as part of the program entitled *The Presidential Succession Act at 75: Praise It or Bury It?*, which was held on April 6, 2022 and hosted by the Fordham University School of Law. This transcript has been edited, primarily to conform with the *Fordham Law Review*'s publication requirements, and it represents the speaker's individual views alone.

1. U.S. CONST. art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what *Officer* shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected." (emphasis added)).
2. Presidential Succession Act, 3 U.S.C. § 19.
3. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239 (repealed 1886).
4. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

president. Cabinet succession risks the end of the system, and it puts the system beyond judicial resolution because there would not be a situation of competing heirs with competing claims—there would be no heir at all.

What about legislative officer succession? Does it meet the three goals I outlined before? The answer is, "yes," it does. It is not fixed. It can be expanded, not only expanded, but the list can be expanded without a statute and without a president. There is always a House and Senate in being, and if the presiding officer dies, then each of the two houses can just elect, by simple majority, a new presiding officer, and that solves the problem. If the entire membership were to be decapitated, then the Senate can be quickly reconstituted by gubernatorial appointments,[5] and the House can have speedy ad hoc by-elections under well-established rules.[6] Again, we could get a new presiding officer immediately or in fairly quick order. There is always going to be a legitimate heir with legislative officer succession, and if there is not one on hand, one can be quickly arranged.

Under legislative officer succession, although there might be more than one person with a claim on the presidency, such a claim is judicially resolvable. As I have explained, that might not be true with Cabinet officer succession. So the question has to be asked: Why do so many people in academia, and why do so many policy wonks come out against legislative officer succession? What is the reason? There are several. One is, and the truth is, we have lots of armchair generals who are fighting the last war. They imagine that the real risk to the system is the lone gunman, the lone bomber, and the mortality tables striking down the president or other heir in a succession crisis.

That is not where the real risk is, and that should be especially obvious, given that we have just gone through a global pandemic. The real risk to the system is not one that is so easily insurable against. Rather than looking to party continuity as the test of a good succession order, we should be making sure we have *some* successor at all, one that can be recognized by the wider public and by the judiciary as being legitimate.

Neither system, in fact, can guarantee party stability. That is another problem with this debate. The debate is always framed in regard to legislative officer succession, in that there is a risk that a different party will end up in control. But that is also the case for Cabinet officer succession. If the president (and vice president) or president-elect (and vice president elect) should die after the general election, anytime up until the inauguration, or even after the inauguration, but prior to the new president's appointing his first Cabinet member, then you are going to have a change in party control, because it will be a member of the outgoing Cabinet who would succeed under Cabinet officer succession. That Cabinet member may be from the

5. *See Filling Vacancies in the U.S. Senate*, BALLOTPEDIA, https://ballotpedia.org/Filling_vacancies_in_the_U.S._Senate [https://perma.cc/5WEF-DPT9] (last visited Nov. 3, 2022) (showing that, in thirty-seven states, vacancies in the Senate are temporarily filled by gubernatorial appointment).

6. *See* U.S. CONST. art. I, § 2, cl. 4.

administration that just lost at the polls, either at the general election or at the primaries. If the argument is going to be pushed forward that we ought to look at this second-tier benefit of party continuity, then there is no guarantee you will get that with Cabinet officer succession anyway. As a matter of fact, it simply makes no sense to point to party continuity as the only test of whether the system is working.

The other benefit of legislative officer succession is one that Truman pointed to.[7] At a time of national crisis, where the elected president and vice president are gone, we certainly want someone who carries real democratic bona fides, and that would certainly include the Speaker of the House.[8] It is true we often elect people who are quite elderly to be the Senate president pro tempore. That might very well change if we had real expectations that the Senate president pro tempore was expected to succeed.

In a national crisis, it is important that we have people to look to—that we have a successor. Now, the same is true for Cabinet succession. An upper-tier Cabinet member might be a person who had high political office, had been elected to other offices, and might very well be a good choice. But given the realities of Cabinet officer succession, we might very well have someone far down on the list succeed. Cabinet succession is no guarantee that we are really going to have the right sort of person when we need them.

Let me summarize: between legislative officer succession and Cabinet succession, we have a choice. Legislative officer succession is flexible, and in effect, it is expandable in an emergency. The line of succession is future oriented, and it could be governed and reestablished by simple single-house votes. Cabinet succession by contrast is inflexible. It is a fixed line. It is retrospectively oriented. It is governed by statutes, which in an emergency, ex hypothesi, we do not have an opportunity to amend, because we will not have a president on hand.

There are a few other reasons why legislative officer succession is opposed by so many. I am just going to mention them in passing. One is that there are people who simply do not believe that it is constitutional.[9] This is really a very surprising story. If one looks to the debates in 1792, on the first Succession Act, one cannot easily find *any* record of *anyone* pointing to a lack of constitutionality, except for maybe one Congressman.[10] Certainly James Madison did *not* squarely say that the 1792 succession statute's using legislative officer succession was unconstitutional. He merely wrote a

7. *See* Special Message to the Congress on the Succession to the Presidency, 1 PUB. PAPERS 128, 129–30 (June 19, 1945).

8. *Id.*

9. *See generally, e.g.*, Akhil Reed Amar & Vikram David Amar, Essay, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

10. Seth Barrett Tillman, *The 1792 Madison-to-Pendleton Letter: A Time for Reconsideration, Reflection, and Response?* 14–18 (Feb. 14, 2020), https://ssrn.com/abstract=3531075 [https://perma.cc/KB6T-GQ4E] (reporting on comments by Congressman Giles questioning the 1792 statute's constitutionality).

private letter where he said the statute "errs."[11] Many people have latched onto that letter, and they have assumed Madison meant the statute was unconstitutional,[12] but Madison did not actually say that. He might have simply meant that the choice was a poor one, it was an impolitic choice, or that the policy result was bad or impractical. We do not know that Madison thought it was unconstitutional.[13] We certainly have no record of his saying that on the House floor when he was a member. Likewise, we have no record of his telling President George Washington not to sign the bill for that reason. He was one of Washington's advisors and confidantes, although he was not in Washington's Cabinet.

Another reason not to rely on Madison is in that very same letter he indicated that he lacked confidence in the views he put forward. He merely said the choice of Congress "may be questioned."[14] He did not flatly say he thought it was unconstitutional.[15] On the other side of the issue, in 1792, as also in 1947, we have: (1) both a majority of the members of the House and a majority of the members of the Senate (including any number of ratifiers and any number of members of the Philadelphia Convention) who voted on those bills in preliminary stages, and who voted to enact them into law on the final vote, and (2) President George Washington who signed the statute into law. That ought to count for something.

The argument against legislative officer succession also rests on the use of the word "Officer," which appears in the Presidential Succession Clause.[16] It seems to be assumed by some that that word must mean executive officers.[17] The Constitution does not come with a glossary. The word "Officer" is quite capacious and might very well include presiding legislative officers. I think it does, and certainly the Second Congress and President Washington thought it did. The idea that we have to wait for judicial resolution before we could have confidence on this point is certainly a practical argument against legislative officer succession, but it is not one that is customarily made for other bills and for other similarly important acts.

There is one final reason legislative officer succession is opposed. It is simply for this reason. We have a tradition in our legal culture that sees Congress, as it was described in *The Federalist Papers*, as a "vortex,"[18] as something that is aggrandizing and dangerous, and therefore perhaps it is

11. Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), *in* 14 THE PAPERS OF JAMES MADISON 235, 235 (Robert A. Rutland et al. eds., 1983).

12. *See, e.g.*, Amar & Amar, *supra* note 9, at 116.

13. *See supra* text accompanying notes 10–11.

14. *See* Letter from James Madison to Edmund Pendleton, *supra* note 11, at 235.

15. *See generally id.*

16. U.S. CONST. art. II, § 1, cl. 6.

17. *See, e.g.*, Amar & Amar, *supra* note 9, at 114–18.

18. THE FEDERALIST NO. 48, at 268 (James Madison) (J.R. Pole ed., 2005) ("But experience assures us, that the efficacy of the provision has been greatly over-rated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous *vortex*." (emphasis added)).

dangerous to choose its presiding officers.[19] I think that is just an ancient prejudice, and it simply does not make sense to embrace this prejudice when we have so many firm contrary precedents from the past, including from the 1792 Act. It is simply mistaken to rely on what really appears little more than guesswork based upon Madison's purported views expressed exclusively in a private letter, to adopt the position that the word "officer" standing alone cannot include legislative officers.

In any event, I would like to propose a partial solution that I think captures the best of both worlds. Legislative officer succession, I think should be maintained, but put at the bottom of the otherwise inflexible list of Cabinet officers. It should be there as a backup. In addition, when Cabinet officers succeed, they should not succeed or act as president past the term of the president who appointed them. That is when their ability to succeed and to maintain their office ought to time out. If that only leaves legislative officer succession in those circumstances, then that is a positive and democratic feature, not a bug.

19. For U.S. Supreme Court authority quoting Madison's "vortex" language from *The Federalist No. 48*, see Bank Markazi v. Peterson, 578 U.S. 212, 252 (2016) (Roberts, C.J., dissenting); United States v. Windsor, 570 U.S. 744, 788 (2013) (Scalia, J., dissenting); National Federation of Independent Business v. Sebelius, 567 U.S. 519, 554–55 (2012) (Roberts, C.J.); *id.* at 614 (Ginsburg, J., concurring in part and dissenting in part); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221–22 (1995) (Scalia, J.). There is much other judicial authority from other federal courts and from state courts of record. *See, e.g.*, Bush v. Schiavo, 885 So. 2d 321, 330 (Fla. 2004) (Pariente, C.J.) (quoting *Plaut*, 514 U.S. at 221–22).