

The Executive Branch's Longstanding Embrace of Legislative Succession to the Presidency

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*Let me get started here so you can understand it. There is a succession. That goes from the President to the Vice President, to the Speaker, to the President Pro Tem.*¹

Larry Speakes, Deputy White House Press Secretary,
March 30, 1981

1. George H.W. Bush, Vice President, Larry Speakes, & David Gergen, Press Briefing at the White House at 2 (Mar. 30, 1981), (transcript on file with Ronald Reagan Presidential Library & Museum, James S. Brady Files, Press Conferences and Press Releases—Assassination Attempt, 2 of 3 documents, Box: OA 16783) [hereinafter Bush/Speakes/Gergen Briefing].

I. INTRODUCTION

The years 2019 and 2020 each produced seemingly plausible scenarios in which the Speaker of the House of Representatives could have become Acting President.² In the fall of 2019, the impeachment effort against President Donald Trump was in full swing while, at the same time, controversy swirled around Vice President Mike Pence. This situation led to speculation in some circles that both the President and Vice President might be impeached and removed, which would have elevated Speaker Nancy Pelosi, the statutory successor and member of the opposite party, to the Oval Office. Indeed, #PresidentPelosi began to gain momentum on Twitter and the question was openly discussed in the media.³

2. See Allan Lichtman, *Could Nancy Pelosi Be the Next President of the United States?*, THE HILL (Jan. 15, 2019, 10:00 AM), <https://thehill.com/opinion/white-house/425344-could-nancy-pelosi-be-the-next-president-of-the-united-states>; Jesse Wegman, Opinion, *Nancy Pelosi Should Not Be President*, N.Y. TIMES (Nov. 3, 2019), <https://www.nytimes.com/2019/11/03/opinion/trump-impeachment-pelosi.html>; Matthew Yglesias, *9 Scenarios for How the Trump-Ukraine Impeachment Process Could End*, VOX (Oct. 7, 2019, 11:30 AM), <https://www.vox.com/2019/10/7/20898619/trump-impeachment-scenarios-pence-pelosi>; Emily Goodin, *White House Has No Plan for Donald Trump and Mike Pence Being Incapacitated by Coronavirus - and Experts Warn Nancy Pelosi and Mike Pompeo Could Be Sworn in as Rival 'Presidents'*, DAILY MAIL (May 14, 2020), <https://www.dailymail.co.uk/news/article-8320667/White-House-NO-plan-Donald-Trump-Mike-Pence-incapacitated.html>; Quint Forgy, *White House: No Plans for a President Pelosi if Trump, Pence Are Incapacitated by Coronavirus*, POLITICO (May 14, 2020, 12:19 PM), <https://www.politico.com/news/2020/05/14/trump-pence-coronavirus-258299>.

Following the violent, temporary disruption of the electoral vote certification on January 6, 2021, there was also some brief talk of legislative succession. See Alan Rappeport, *Congress Did Not Finish Certifying the Election Results. What Happens Next?*, N.Y. TIMES (Jan. 6, 2021); Andrew Prokop, *What Does the Storming of the Capitol Mean for the Electoral Vote Count?*, VOX (Jan. 6, 2021, 6:14 PM), <https://www.vox.com/2021/1/6/22217473/storming-capitol-trump-biden-electoral-votes>.

3. See Lichtman, *supra* note 2; see also Wegman, *supra* note 2; Robert Atkins & Adam P. Frankel, *President Pelosi? It Could Happen*, WASH. POST (Sept. 30, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/09/30/president-pelosi-it-could-happen/>; Merle Ginsberg, *#PresidentPelosi Trends on Twitter After Donald Trump's Latest Press Conference*, L.A. MAG. (Sept. 25, 2019), <https://www.lamag.com/citythinkblog/presidentpelosi/>.

In this context, journalist Matthew Yglesias teased out a number of succession possibilities which included the double impeachment and removal of the President and Vice President, leaving Speaker Pelosi poised to become Acting President.⁴ Nevertheless, Yglesias cautioned “[b]ut there’s a catch! Many scholars believe that the speaker (and the president pro temp [sic] of the Senate) . . . [are] not . . . ‘officer[s]’ under the . . . Constitution” and would therefore be ineligible to become Acting President.⁵ He further speculated that the issue might “be litigated in the middle of a huge national crisis [S]uffice it to say” that as a result “Secretary of State Mike Pompeo [might] become [acting] president” instead of Pelosi.⁶

In May 2020, it was the specter of both the President and Vice President becoming incapacitated that emerged. After staffers working alongside both officials contracted the Covid-19 virus, the White House indicated that the President and Vice President would begin conducting their duties separately to reduce the chances of either or both of them contracting the disease.⁷ Matters became sufficiently high-profile that White House Press Secretary Kayleigh McEnany was asked whether plans existed to address circumstances under which the Speaker would assume the powers and duties of the presidency.⁸

Once again, speculation about a potential Speaker/Secretary of State clash over the presidency ramped up.⁹ One headline blared “experts warn Nancy Pelosi AND Mike Pompeo could be sworn in as rival

4. See Yglesias, *supra* note 2.

5. *Id.*

6. *Id.*; see also Jack Goldsmith & Ben Miller-Gootnick, *A Presidential Succession Nightmare*, LAWFARE (Mar. 25, 2020, 1:38 PM), <https://www.lawfare-blog.com/presidential-succession-nightmare>.

7. See Brett Samuels, *Trump on Pence Keeping His Distance: “I Miss Him”*, THE HILL (May 13, 2020, 6:25 PM), <https://thehill.com/homenews/administration/497666-trump-on-pence-keeping-his-distance-i-miss-him>.

8. See, e.g., Brett Samuels, *McEnany: White House Not Addressing Plans Should Trump, Pence Fall Ill*, THE HILL (May 14, 2020, 12:13 PM), <https://thehill.com/homenews/administration/497775-mcenany-white-house-not-addressing-plans-should-trump-pence-fall-ill>. McEnany replied, “[t]hat’s not even something we’re addressing.” *Id.* Whether her words conveyed that no such contingency plans were actually *in existence* at the time is perhaps another matter. See *infra* notes 299–307 (discussing Reagan-Bush-Clinton era contingency plans that may or may not still be operative in some form).

9. See Goodin, *supra* note 2; see also Forgey, *supra* note 2.

‘presidents.’”¹⁰ Other news outlets speculated about the possibility of “a full-blown constitutional crisis with competing claims on the presidency.”¹¹

Discussion in news reports about Pompeo challenging Pelosi for the Oval Office coincided with what scholar Daniel Schuker had written some years earlier:

When the line of succession runs to officials of the opposite party, administrations possess a particularly strong incentive to circumvent the statutory stipulations and devise ad hoc solutions [T]he [1947 presidential succession] statute may discourage executive officials from allowing the office to pass to a member of Congress.¹²

Schuker’s thoughts seemed relevant in both the recent, potential dual impeachment and dual incapacity scenarios as interactions between the Trump administration and Speaker Pelosi marked one of the lowest ebbs of White House-Speaker relations in the nation’s annals.¹³

10. Goodin, *supra* note 2.

11. Joshua Green & Jennifer Jacobs, *If the President Tests Positive for the Virus, What Happens?*, BLOOMBERG BUSINESSWEEK (May 13, 2020, 10:38 AM), <https://www.bloomberg.com/news/articles/2020-05-13/what-happens-if-the-president-tests-positive-for-coronavirus>.

12. Daniel J.T. Schuker, *Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment*, 30 J.L. & POL. 97, 100, 120 (2014); *see also id.* at 104–05.

13. *See, e.g.*, SUSAN PAGE, MADAM SPEAKER: NANCY PELOSI AND THE LESSONS OF POWER 352 (2021). Prior to giving the 2020 State of the Union address, President Trump appeared to decline to shake Speaker Pelosi’s outstretched hand. *See* Heather Caygle, Sarah Ferris & Burgess Everett, *The Trump-Pelosi Feud Spirals Out of Control*, POLITICO (Feb. 5, 2020, 12:35 AM), <https://www.politico.com/news/2020/02/05/trump-pelosi-sotu-feud-110800>. Pelosi countered by tearing in half her copy of Trump’s speech in full view of the national television audience. *See id.*; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (May 12, 2020, 6:20 AM) (on file with author); Cristina Marcos & Mike Lillis, *Pelosi, Trump Slide Further into the Muck*, THE HILL (May 20, 2020, 6:00 AM), <https://thehill.com/home-news/house/498652-pelosi-trump-slide-further-into-the-muck>; Jacob Jarvis, *Trump Says Nancy Pelosi Becoming President Would Be A ‘Total Disaster’ If Both He And Pence Get Coronavirus*, NEWSWEEK (May 12, 2020, 8:38 AM), <https://www.newsweek.com/donald-trump-says-nancy-pelosi-becoming-president-would-disaster-1503375>; Cristina Marcos, *Pelosi Says ‘Morbidly Obese’ Trump Taking Hydroxychloroquine ‘Not a Good Idea’*, THE HILL (May 18, 2020, 9:54 PM), <https://thehill.com/homenews/house/498435-pelosi-says-that-trump-taking->

The prospect of the Speaker of the House of one party and the Secretary of State of another publicly vying for the White House under such circumstances paints a deeply unsettling picture.¹⁴ As two constitutional authorities recently noted, such a dispute could result in “a state of chaos . . . [as] [t]he speaker and the secretary of state . . . could both claim, with some legitimacy, to be the president. *Bush v. Gore* would be tame by comparison.”¹⁵ Any conflict between the two officials would ultimately turn on their trying to sway the public and the political branches through political discourse and, potentially, the courts through legal arguments.

hydroxychloroquine-is-not-a-good-idea. Given the raw relations between the Trump administration and Pelosi, if both the President and Vice President had left office or become incapacitated, a battle over legislative succession to the presidency would not have been unimaginable. See Green & Jacobs, *supra* note 11; see also Brian C. Kalt, *The Very Real Problem of Both Trump and Pence Getting COVID-19 at the Same Time*, THE ATL. (May 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/what-if-both-trump-and-pence-get-covid-19/611632/>.

14. Pompeo and Pelosi themselves had a contentious relationship. See Mike Lillis, *Pelosi Hammers Pompeo, Trump: ‘Scandalous’ to Dismiss IGs*, THE HILL (May 20, 2020, 1:11 PM), <https://thehill.com/homenews/house/498760-pelosi-hammers-pompeo-trump-scandalous-to-dismiss-igs>; Zack Budryk, *Pompeo Knocks Pelosi with ‘Simpsons’ Tweet After Trump Address*, THE HILL (Feb. 4, 2020, 11:57 PM), <https://thehill.com/homenews/administration/481556-pompeo-knocks-pelosi-with-simpsons-tweet-after-trump-address>. Nor are Pelosi and Pompeo the first Speaker and Secretary of State combination to be cool toward one another. See Scott Wong, *The Complicated History of Hillary and Boehner*, THE HILL (Sept. 2, 2015, 6:00 AM), <https://thehill.com/homenews/news/252495-the-complicated-history-of-hillary-and-boehner>.

15. Josh Blackman & Seth Barrett Tillman, *The Weird Scenario That Pits President Pelosi Against Citizen Trump in 2020*, THE ATL. (Nov. 20, 2019), <https://theatlantic.com/ideas/archive/2019/11/2020-election-could-pit-pelosi-against-trump/602308>; see also, e.g., AARON WILDAVSKY, *THE BELEAGUERED PRESIDENCY* 263 (1991) (“Untold mischief would result if there were two or more claimants for the [presidential] office, or if there was no one with an undisputed right to occupy it.”); cf. *supra* notes 13–14.

Legislative succession to the presidency has never transpired in U.S. history¹⁶ nor has it ever been litigated.¹⁷ But that does not mean

16. See, e.g., JOHN D. FEERICK, FROM FAILING HANDS 209–10 (1965). It has been alleged that Presidents pro tempore John Gaillard in 1821, and David Atchison in 1849, each served as President for a day. See MARGARET MIDDLETON RIVERS EASTMAN, RICHARD DONOHUE, & MAURICE EUGENIE HORNE THOMPSON, THE HUGUENOT CHURCH IN CHARLESTON 83 (2018); see also Henry Boyd Hall, *Bush Not First to Stand In*, WASH. POST (July 15, 1985), <https://www.washingtonpost.com/archive/politics/1985/07/15/bush-not-first-to-stand-in/a03bc99d-e779-4e50-a28f-b74c71d6a907/>; William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: 'The Emperor Has No Clones'*, 75 GEO. L.J. 1389, 1418–19, 1418 n.103, 1433 n.147 (1987). These episodes are almost certainly apocryphal. See, e.g., George H. Haynes, “President of the United States for a Single Day”, 30 AM. HIST. REV. 308, 308–10 (1925); RICHARD A. BAKER, 200 NOTABLE DAYS: SENATE STORIES, 1787 TO 2002, at 52 (2006); 2 ROBERT C. BYRD, THE SENATE, 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 177 (1991); 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 256 (Russell & Russell 1960) (1938).

The arguments against Gaillard’s and Atchison’s claims are that: (1) under the terms of the Constitution, James Monroe and Zachary Taylor became President at the appointed date (March 4), irrespective of whether they took the oath of office (though their exercise of the office’s powers and duties might have been complicated as a result); (2) the historical record makes no mention of Gaillard or Atchison acting in a presidential capacity (and indeed, neither appears to have taken the oath of office); (3) Gaillard never asserted he had been briefly chief executive and Atchison expressly denied he had so served; and (4) in Atchison’s case, his tenure as President pro tempore likely expired with the conclusion of the previous Congress. See U.S. CONST. art. II, § 1, cl. 1, 8; RUTH C. SILVA, PRESIDENTIAL SUCCESSION 38 n.103 (1951); WILLIAM E. PARRISH, DAVID RICE ATCHISON OF MISSOURI 83–84 (1961); EASTMAN, DONOHUE, & THOMPSON, *supra* at 83; 1 HAYNES, *supra* at 256; Haynes, *supra* at 308–10; BAKER, *supra*; 2 BYRD, *supra* at 177; *About the President Pro Tempore*, U.S. SENATE [hereinafter *President Pro Tempore*], https://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm (last visited Dec. 2, 2020); J. Gordon Hylton, *President for a Day*, MARQ. U. L. SCH.: FAC. BLOG (Mar. 4, 2010), <http://law.marquette.edu/facultyblog/2010/03/president-for-a-day/comment-page-1/>; Letter from D.R. Atchison, President pro tempore, to Jos. W. Howarth, (circa 1880), <https://www.shapell.org/manuscript/david-rice-atchison-polk-fillmore-taylor-president-for-five-minutes/#transcripts>.

Though speakers and presidents pro tempore are not required to be lawmakers under the Constitution, every person holding these positions has in fact been a member of Congress. See, e.g., Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 n.39 (1995); Gregory F. Jacob, 25 *Returns*, 10 GREEN BAG 177, 186–89 (2007), http://www.greenbag.org/v10n2/v10n2_articles_jacob.pdf; Brown & Cinquegrana, *supra* at 1429, 1429 n.136.

there has been no political branch practice or opinion.¹⁸ Indeed, there is a rich vein of executive branch materials to consult for guidance. These items, however, have been largely neglected in the academic literature. Since the constitutionality and legitimacy of legislative succession could very well turn on the views of the executive branch, questions arise as to what the executive department's historic position and practice have been. This article endeavors to answer this query, with particular emphasis on the years since 1947.

The U.S. Constitution has been in operation for more than 230 years. Over two-thirds of this time, a statute has been in place providing for legislative branch officials to be presidential successors.¹⁹ From 1792 until 1886, the line ran from the President to the Vice President to the President pro tempore of the Senate and then to the Speaker of the House of Representatives, ending abruptly there.²⁰ In 1886, Congress removed the two legislators and replaced them with Cabinet secretaries in the order of the Cabinet department's creation. The result

17. Courts in dicta have been supportive of legislative succession. *See infra* notes 507–19 and accompanying text.

18. Professor Steven Calabresi noted some of this past practice. *See Calabresi, supra* note 16, at 166; *infra* notes 450–51 and accompanying text; *see also* Brown & Cinquegrana, *supra* note 16, at 1448; Second Fordham Univ. Sch. of L. Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 958 (2017) [hereinafter Second Fordham Report]; *infra* Part V.A.

19. *See, e.g.*, Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 45 HOUS. L. REV. 67, 87 (2010); Calabresi, *supra* note 16, at 166; John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. L. REV. 993, 997–98 (2004).

20. *See* Presidential Succession Act of 1792, ch. 8, 1 Stat. 239 § 9 (repealed 1886). There was also a provision for a special election to choose a new President. *See id.*

For a brief period in January 1987, the President pro tempore was again second in line to the presidency since the House still needed to choose a Speaker. The officeholder at the time was Senator Strom Thurmond. *See* Maralee Schwartz, *2 Heartbeats Away From Presidency*, WASH. POST (Jan. 2, 1987), <https://www.washingtonpost.com/archive/politics/1987/01/02/2-heartbeats-away-from-presidency/ad6bfc78-1a66-44f1-aab0-4aa75eab6894/>; *see also* Brown & Cinquegrana, *supra* note 16, at 1430–31 n.140. Since 1947, the President pro tempore was also second in line during the first Truman administration, the first Johnson administration, the second Nixon administration, and the early part of the Ford administration, all times when the vice presidency was vacant. *See id.*

was that after the Vice President came the Secretary of State, the Secretary of Treasury, the Secretary of War, the Attorney General, the Secretary of the Navy, the Postmaster General, the Secretary of the Interior, and the Secretary of Agriculture.²¹ In 1947, legislation returned the Speaker and the President pro tempore to the line of succession and placed them in that order ahead of the Cabinet secretaries.²²

Since debate began over what became the first presidential succession statute, one school of thought has argued that including legislators in the line of succession is unconstitutional. James Madison appeared to have made this contention in 1792.²³ In the years since, a

21. See Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947). The Attorney General was listed fourth even though the position predated creation of the Department of Justice by eighty years. See Brown & Cinquegrana, *supra* note 16, at 1421 n.110.

22. See Presidential Succession Act of 1947, 3 U.S.C. § 19.

23. See Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 6 THE WRITINGS OF JAMES MADISON 95 (Gaillard Hunt ed., 1906), https://oll.libertyfund.org/titles/madison-the-writings-vol-6-1790-1802/simple#1f1356-06_head_028. For more on the 1792 letter, see Seth Barrett Tillman, *The 1792 Madison-to-Pendleton Letter: A Time for Reconsideration, Reflection, and Response?* (on file with author).

More than a quarter century after the enactment of the 1792 statute, which included legislative succession, Madison conceded the importance of past practice in determining the constitutionality of governmental actions. See Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908), *quoted with approval* in *NLRB v. Canning*, 573 U.S. 513, 525 (2014) (statement of James Madison) (“[It] ‘was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.’”); see also William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

Moreover, as President, Madison seems to have made no effort to urge that Congress amend or repeal the 1792 statute even though his presidency involved his own brush with death, the passing of two vice presidents, the British sack of Washington, D.C., and his own party enjoying huge majorities in both the House and Senate. See JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT 4–5 (3d ed. 2014); FEERICK, *supra* note 16, at 82–84; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Jan. 27, 2022); *Party Divisions of the House of Representatives 1789 to Present*, HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Jan. 27, 2022); CONTINUITY OF GOV’T. COMM’N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY 28 (2009) [hereinafter CONTINUITY OF GOV’T

host of prominent scholars have reached a similar conclusion.²⁴ Indeed, Professor Brian Kalt, one of the leading authorities on

COMM’N]. It could, therefore, perhaps be surmised that Madison deemed legislative succession to have been liquidated in favor of the constitutionality of the principle, not unlike his changed view regarding the legal status of the Bank of the United States. *Cf.* Baude, *supra*, at 21–29. Moreover, President Madison’s Secretary of State and close associate James Monroe seemed to accept the constitutionality of legislative succession as a matter of course. *See infra* notes 46–48 and accompanying text. The author would like to thank Professors Joel Goldstein and Seth Barrett Tillman for the benefit of their insights on this subject.

24. *See, e.g.*, SILVA, *supra* note 16, at 131–42; Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 457–64, 476 (1949); Joseph E. Kallenbach, *The New Presidential Succession Act*, 41 AM. POL. SCI. REV. 931, 938–39 (1947); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995); Fortier & Ornstein, *supra* note 19, at 994, 998; *Temporary Filling of House of Representatives Vacancies During National Emergencies: Hearing on H.J. Res. 67 Before the Subcomm. on Const. of the H. Comm. on the Judiciary*, 107th Cong. 69–72 (2002) (statement of M. Miller Baker, Partner, McDermott, Will & Emery); COMM. FOR ECON. DEV., PRESIDENTIAL SUCCESSION AND INABILITY 18 (1965); John Yoo, *A Winding Constitutional Path from Trump to Pence to Pompeo*, WALL ST. J. (Oct. 2, 2020, 6:31 PM), <https://www.wsj.com/articles/a-winding-constitutional-path-from-trump-to-pence-to-pompeo-11601677891>; *cf.* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 139–44, 275–81 (1997); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L. J. 345, 357–69 (2002); Goldsmith & Miller-Gootnick, *supra* note 6; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 381 (2002); Fordham Univ. Sch. of L. Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 36–40 (2012) [hereinafter First Fordham Report]; Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 508, 519–23 (2011).

Others have been more hesitant to conclude that the legislative succession provisions in the 1947 statute are unconstitutional or that they would be struck down in the courts. *See* Calabresi, *supra* note 16, at 156–71, 175; Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1019–27 (2010) [hereinafter Goldstein, *Taking*]; Goldstein, *supra* note 19, at 83–95; John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995); John D. Feerick, *Presidential Inability: Filling in the Gaps*, 33 POL. & LIFE SCI. 11, 21 (2014); James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 580 n.24 (2000); CONTINUITY OF GOV’T. COMM’N, *supra* note 23, at 39, 46; LAURENCE J. LEGERE & JUDITH E. CORSON, INST. FOR DEF. ANALYSES, RESEARCH PAPER P-537: PRESIDENTIAL SUCCESSION AND THE AUTHORITY TO RELEASE NUCLEAR WEAPONS 29, 32 (1969); Joel K. Goldstein, *Presidential*

presidential succession, has concluded that “the current scholarly consensus is that speaker succession is unconstitutional.”²⁵ The primary aspect of this line of thinking and the argument that Yglesias and other journalists have seized upon is the view that neither the Speaker nor the President pro tempore are “Officers” as required by Article II, Section I, Clause 6, often referred to as the Succession Clause.²⁶ Broader

Succession and Inability: America’s Inadequate Provisions 120–43, 194–205 (1975) (unpublished senior thesis, Princeton University) (on file with Princeton University); see also 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); BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS 88–94 (2012).

25. Brian Kalt, *Op-Ed: A Better Line to the Oval Office*, L.A. TIMES (Jan. 11, 2015, 4:00 PM), <https://www.latimes.com/opinion/op-ed/la-oe-kalt-presidential-succession-is-unconstitutional-20150112-story.html>; see also Goldstein, *Taking*, *supra* note 24, at 1019–20; Goldsmith & Miller-Gootnick, *supra* note 6.

26. See U.S. CONST. art. II, § 1, cl. 6 (“[C]ongress 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 . . .”) (emphasis added); see also *infra* notes 64, 94–100, 122–29, 152–55, 314–16 and accompanying text. For further articulation of opposition to legislative succession based on the term “Officer,” see, for example, SILVA, *supra* note 16, at 131–42; Amar & Amar, *supra* note 24, at 114–17.

Another related “Officer”-based argument against legislative succession contends that the Succession Clause requires that an Officer becoming Acting President must keep his or her underlying position (i.e., remain an “Officer”), an outcome not likely permitted for the Speaker and President pro tempore due to the Incompatibility Clause. See, e.g., U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . and no Person holding any Office under the United States, shall be a Member of either House during . . . Continuance in Office.”); see also SILVA, *supra* note 16, at 137–42; Kallenbach, *supra* note 24, at 939–40. For this reason, the 1947 Act compels their resignation. See 3 U.S.C. § 19(a)–(b); SILVA, *supra* note 16, at 137–42; Kallenbach, *supra* note 24, at 939–40.

Mandatory resignation is a potential problem not unique to legislative succession, however. See 3 U.S.C. § 19(d)(3); SILVA, *supra* note 16, at 137–42; Kallenbach, *supra* note 24, at 939–40. Under the 1947 statute, executive branch successors are also forced to leave their positions if they wish to become Acting President, which would lead to similar concerns that they would no longer be “Officer[s]” when poised to move into the White House. See 3 U.S.C. § 19(d)(3); JAMES M. RONAN, LIVING DANGEROUSLY: THE UNCERTAINTIES OF PRESIDENTIAL DISABILITY AND SUCCESSION 132 (2015); Silva, *supra* note 24, at 464–69, 476; CONTINUITY OF GOV’T COMM’N,

structural concerns are also raised in opposition to legislative succession, including that the arrangement violates separation of powers and contradicts the spirit of the Twenty-Fifth Amendment.²⁷ On the other hand, scholars who tend to be more disposed toward the constitutionality of legislative succession in the 1947 statute make a number of powerful arguments of their own, including the aforementioned point that legislative succession has governed the country for most of its history under the Constitution.²⁸

Despite the scholarly attention lavished on legislative succession since it was re-adopted in 1947, the question of how the executive branch has responded operationally to the principle has been largely neglected.²⁹ By the same token, no work has examined in detail the legal position taken by the executive branch toward legislative succession during this same period.³⁰ Attempting to fill these gaps in the scholarly literature, this article reveals that the 1947–2021 period demonstrates that the executive branch has actively and repeatedly taken steps to implement legislative succession. Indeed, during this period, no one in the executive branch has ever clearly and publicly rejected legislative succession. Moreover, it appears that only two prominent *former* executive branch officials have ever publicly questioned the constitutionality of legislative succession as found in the 1947 statute.

supra note 23, at 34; Manning, *supra* note 24, at 146 n.29; Kallenbach, *supra* note 24, at 939–40.

27. See Amar & Amar, *supra* note 24, at 118–25, 127–29; Wasserman, *supra* note 24, at 365–69; KALT, *supra* note 24, at 92–94.

28. See, e.g., Goldstein, *Taking*, *supra* note 24, at 1022; Goldstein, *supra* note 19, at 87; Feerick, *supra* note 24, at 21.

29. Professor Ruth Silva examined much of the pre-1947 history of the executive branch's position on legislative succession. See SILVA, *supra* note 16, at 112–30. How the 1947 statute has been operationalized has been touched upon here and there as part of broader political histories or as parts of larger discussions about succession but the subject has never been the focus on an entire work. See, e.g., GARRETT M. GRAFF, *RAVEN ROCK* (2017); Brown & Cinquegrana, *supra* note 16, at 1424–25 nn.121–22, 1448; FEERICK, *supra* note 23, at 32–37, 40–45; Calabresi, *supra* note 16, at 166; Second Fordham Report, *supra* note 18, at 958.

30. For a brief discussion, see Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Stuck Today*, 86 FORDHAM L. REV. 1027, 1065–68 (2017). Calabresi, *supra* note 16, at 166; Brown & Cinquegrana, *supra* note 16, at 1424–25 nn.121–22, 1448; Second Fordham Report, *supra* note 18, at 958.

This piece does not for a moment contend that legislative succession is prudent from a policy point of view. Indeed, the principle raises serious policy problems.³¹ The prospect of White House control falling to anyone of the opposite party is deeply troubling, particularly in the current era of heightened political polarization.³² Nor does this article conclude that legislative succession is necessarily constitutional as a matter of abstract doctrine. That issue is beyond the scope of this work. Instead, this article maintains that the repeated public and private statements by those in the executive branch about the lawfulness of legislative succession,³³ plus the numerous practical, operational outgrowths of the 1947 statute would and should pose significant obstacles to anyone—Cabinet Secretary or otherwise—seeking to challenge the constitutionality of legislative succession.³⁴

31. See, e.g., First Fordham Report, *supra* note 24, at 36, 45; Second Fordham Report, *supra* note 18, at 926 n.20, 948–50; 954; Feerick, *supra* note 24, at 19, 21–22; Goldsmith & Miller-Gootnick, *supra* note 6. At least one scholar disagrees, however. See Seth Barrett Tillman, *Why Strict Cabinet Succession Is Always Bad Policy: A Response to Professor Jack Goldsmith and Ben Miller-Gootnick*, HARV. NAT'L SEC. J. ONLINE (Apr. 8, 2020), https://harvardnsj.org/wp-content/uploads/sites/13/2020/04/Tillman_Why-Strict-Cabinet-Succession-Is-Always-Bad-Policy_FINAL.pdf.

32. See, e.g., Feerick, *supra* note 24, at 22; see also *supra* notes 11–15, 31 and accompanying text.

33. Executive branch officials are only included in this article for what they said or did while either working within the executive branch or afterward, but not beforehand. By definition, if individuals had not yet served in that capacity, they were not “executive branch officials.” Nonetheless, it may be worth noting that, as congressmen, both Richard Nixon and Lyndon Johnson voted for final passage of the 1947 Act which included the legislative succession provisions. John F. Kennedy did not vote on the measure. See 93 CONG. REC. 8634–35 (1947); see also FEERICK, *supra* note 16, at 208 n.*. Similarly, in 1965, future President Gerald Ford voted for the House version of the joint resolution that was subsequently modified to become the Twenty-Fifth Amendment. See 111 CONG. REC. 7968 (1965). The House of Representatives adopted what was to become the Twenty-Fifth Amendment by voice vote. See FEERICK, *supra* note 23, at 101. As Ford voted for a measure that did not change the legislative succession regime, arguably he implicitly voted for legislative succession. See *id.*

34. Cf. Manning, *supra* note 24, at 150–53; Brown & Cinquegrana, *supra* note 16, at 1424–25 nn.121–22, 1448. It is quite possible that in a legislative succession scenario some litigious citizen or group would consider filing suit to determine whether the Speaker or the President pro tempore should be Acting President. After all, a lawsuit was brought challenging Lyndon Johnson’s succession to the White

Simply put, executive branch legal interpretation matters, a lot. As one distinguished scholar has written, “the president [is] the nation’s most important interpreter of law.”³⁵ And presidents since 1947 have clearly and repeatedly accepted the constitutionality of legislative succession. For a Cabinet Secretary—during a double vacancy or double inability scenario—to try to overturn the longstanding executive branch view that legislative succession is constitutional would not only be highly destabilizing to the nation, it would also be exceedingly

House following President Kennedy’s assassination even though: (1) the era was far less litigious than today; and (2) Johnson had succeeded to the presidency in the same manner as had John Tyler, Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, and Harry Truman. See Petition for Writ of Quo Warranto, United States *ex rel.* Jones v. Johnson, No. 2004-64 (D.D.C. Aug. 14, 1964) (on file with author); see also Motion to Intervene and Motion to Withhold Service of Process, United States *ex rel.* Jones v. Johnson, No. 2004-64 (D.D.C. Aug. 25, 1964) (on file with author); Memorandum of Points and Authorities in Support of Motion to Dismiss, United States *ex rel.* Jones v. Johnson, No. 2004-64 (D.D.C. Aug. 25, 1964) [hereinafter Memorandum on Points and Authorities] (on file with author); *Lawyer to Keep Up U.S. Presidential Succession Battle*, ALBUQUERQUE J., Feb. 18, 1964, at A-11; Doyle Akers, *LBJ Illegally President, Espanola Lawyer Insists*, NEW MEXICAN (Santa Fe), June 10, 1964, at 1; *US Attorney Answers Contentions LBJ Not President*, NEW MEXICAN (Santa Fe), Sept. 30, 1964, at 10; Letter from David C. Acheson, U.S. Att’y, U.S. Dep’t of Just., to Leonard C. Jones (Apr. 8, 1964) (on file with author); Letter from John W. Douglas, Assistant Att’y Gen., U.S. Dep’t of Just., to Leonard C. Jones (Aug. 14, 1964) (on file with author); see also FEERICK, *supra* note 16, at 10 n*.

The U.S. Department of Justice argued that Jones did not have standing, that the court did not have jurisdiction over the issue, and that the filing did not state a claim upon which relief could be granted. See Motion to Dismiss, United States *ex rel.* Jones v. Johnson, No. 2004-64 (D.D.C. Aug. 25, 1964) (on file with the author); Memorandum of Points and Authorities, *supra*; see also FEERICK, *supra* note 16, at 10 n*. The court dismissed Johnson’s petition though it did not specify the exact grounds. See Order, United States *ex rel.* Jones v. Johnson, No. 2004-64 (D.D.C. Sept. 15, 1964) (on file with author); see also Letter from John W. Douglas, Assistant Att’y Gen., Dep’t of Just., to Leonard C. Jones, *supra*; FEERICK, *supra* note 16, at 10*. Subsequent efforts by Jones went nowhere. See Motion to Set Aside Order of Dismissal, United States *ex rel.* Jones v. Johnson, No. 2004-64 (D.D.C. Sept. 24, 1964) (on file with author) (bearing a mark stating “Motion Denied, Sept. 24, 1964”); see also FEERICK, *supra* note 16, at 10 n*. The takeaway was clear: the court would not involve itself in presidential succession matters.

35. HAROLD H. BRUFF, UNTRODDEN GROUND 1 (2015).

difficult to do successfully from both a legal and public relations perspective.³⁶

This article will explore the long-neglected history of executive branch support—either explicit or implicit—for the constitutionality of legislative succession, with particular emphasis on the period since 1947. This support has been bipartisan and has been demonstrated time and again by presidents, vice presidents, White House counsels, and White House spokesmen. It has also been displayed by the State Department (whose Secretary would displace lawmakers if legislative succession were to be found unconstitutional), the Justice Department (which is the lead agency in executive branch legal interpretation), the Secret Service (which is the lead agency in charge of the physical protection of the President and Vice President), and scores of other executive branch officials. Such iterative executive branch opinions and practices regarding legislative succession could (and hopefully would) help deter ambitious Cabinet secretaries from challenging the 1947 statute in court during a succession dispute. Ideally, this long history of active executive branch compliance with the 1947 measure might have the same effect on litigious private citizens and might help to legitimize legislative succession to the presidency, a circumstance in which legitimacy would be critically important.

This article begins by discussing the history of the executive branch's view of legislative succession, paying particular attention to the period since the 1947 Act. The piece explains why this record is vital to how a potential lawmaker-versus-Cabinet Secretary conflict over the presidency might play out, both from a political and a legal standpoint. Finally, the work addresses potential counterarguments. Ultimately, it concludes that history *overwhelmingly* supports the

36. As Professor Brian Kalt correctly notes, political context would play an important role in the relative political standing of the Speaker vis-à-vis the Secretary. See KALT, *supra* note 24, at 83–84, 88–89, 94, 97, 100–03; see also Goldsmith & Miller-Gootnick, *supra* note 6. If the Speaker could be seen as having delayed the filling of a vice-presidential vacancy under the Twenty-Fifth Amendment, or if someone assassinated the President and Vice President and exulted over the Speaker becoming Acting President—a situation similar to that of Vice President Chester Arthur becoming President—the circumstances might embolden the Secretary of State to take action. See KALT, *supra* note 24, at 83–84, 88–89, 94, 97, 100–03. On the other hand, if the lawmaker was of the same party as the President and Vice President and shared the same approach to policy and governance, legislative succession might go quite smoothly and establish a precedent with relatively little commotion. Cf. *id.* at 96, 103, 173–74; Feerick, *supra* note 24, at 19.

Speaker or President pro tempore becoming Acting President and that such past practice should play an important role in determining who should receive the keys to the White House.

II. THE YEARS BEFORE THE CURRENT PRESIDENTIAL SUCCESSION STATUTE: 1789–1947

The first legislative succession act was signed into law by President George Washington in 1792.³⁷ As noted, this law established the principle of legislative succession by placing the President pro tempore and then the Speaker after the Vice President. Washington, of course, had been the Constitutional Convention's presiding officer just five years before.³⁸ The nation's first President exercised his veto pen sparingly, but when he did, it was often due to his constitutional concerns with legislation.³⁹ Indeed, until Andrew Jackson's presidency, constitutional objections were the predominant reason for executive rejections of bills.⁴⁰ Presumably, as a former member of the Constitutional Convention and as President, if Washington had deemed the 1792 succession statute to be constitutionally flawed, he would have vetoed it.⁴¹ In fact, Washington's initial veto, which was based on constitutional concerns, took place just a few weeks after he had signed into law the presidential succession act.⁴²

Like Washington, Secretary of the Treasury Alexander Hamilton had also been a member of the Constitutional Convention. There, Hamilton had put forward his own draft Constitution which included

37. See Act of March 1, 1792, ch. 8, 1 Stat. 239 (repealed 1886).

38. See Goldstein, *supra* note 19, at 87; Goldstein, *Taking*, *supra* note 24, at 1021; Calabresi, *supra* note 16, at 166.

39. See, e.g., EDWARD CAMPBELL MASON, *THE VETO POWER* 129 (Albert Bushnell Hart ed., 1890); see also *THE FEDERALIST* No. 73 (Alexander Hamilton) (noting the potential use of the veto to protect the constitutional prerogatives of the presidency); Goldstein, *Taking*, *supra* note 24, at 1021.

40. See SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY* 127 (2d ed. 1994); see also MASON, *supra* note 39, at 129–30.

41. See Goldstein, *Taking*, *supra* note 24, at 1021; Goldstein, *supra* note 19, at 87; Calabresi, *supra* note 16, at 166. There is no reference to the statute in Washington's papers. See 9 *THE PAPERS OF GEORGE WASHINGTON* 611 (Philander D. Chase ed., 2000); 10 *THE PAPERS OF GEORGE WASHINGTON* 659–60 (Philander D. Chase ed., 2002).

42. See ROBERT J. SPITZER, *THE PRESIDENTIAL VETO* 28 (1988); see also MASON, *supra* note 39, at 129.

the first succession plan mentioned during the proceedings,⁴³ a plan which included legislative succession through the potential elevation of the President of the Senate.⁴⁴ Following the Constitution's drafting, Hamilton demonstrated his understanding of the document by co-authoring *The Federalist Papers*. He too was supportive of legislative succession in the 1792 Act.⁴⁵

The historical record of the executive branch's views on the constitutionality of legislative succession yields little more until the presidency of James Madison. In 1813, both President Madison and Vice President Elbridge Gerry suffered from ill health.⁴⁶ As a result, it was

43. See FEERICK, *supra* note 16, at 42–43.

44. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 292 (Max Farrand ed., reprinted 1966) (1911) [hereinafter 2 FARRAND]; see also 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (Max Farrand ed., reprinted 1966) (1911) [hereinafter 3 FARRAND]. For other support for legislative succession during the Convention, see 2 FARRAND, *supra*, at 146, 172, 186 (Committee of Detail); 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47 (Max Farrand ed., reprinted 1966) (1911); see also Manning, *supra* note 24, at 148–50. But see 2 FARRAND, *supra*, at 427, 532, 535, 573; SILVA, *supra* note 16, at 4–13; Silva, *supra* note 24, at 457, 464. For whether the Pinckney Plan also included the President of the Senate in its succession plan, see 3 FARRAND, *supra*, at 600; FEERICK, *supra* note 16, at 41–42; Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. 19 and the Separation of Powers: "If at First You Don't Succeed, Try, Try Again"*, 20 HASTINGS CONST. L.Q. 105, 122–23 (1992). For discussion of legislative succession provisions during the Convention, see FEERICK, *supra* note 16, at 39–51; SILVA, *supra* note 16, at 4–13; Cinquegrana, *supra*, at 119–30; Manning, *supra* note 24, at 144, 149–50.

45. See Letter from Alexander Hamilton to Edward Carrington (May 26, 1792), in 11 THE PAPERS OF ALEXANDER HAMILTON 426, 441 (Harold C. Syrett ed., 1966); see also Goldstein, *Taking*, *supra* note 24, at 1021; FEERICK, *supra* note 16, at 60–61; SILVA, *supra* note 16, at 113–15. For discussions of congressional debate over the 1792 legislation, see FEERICK, *supra* note 16 at 57–62; SILVA, *supra* note 16, at 112–15, 131. While Hamilton's position on the legislation may have been influenced by political motives in order to block his nemesis, Secretary of State Thomas Jefferson, from becoming second in line to the presidency, the views of Madison and the other Jeffersonians are subject to criticism on the very same grounds. See, e.g., *supra* note 23 and accompanying text; 6 THE WORKS OF JOHN ADAMS 545–46 (Charles Francis Adams ed. 1851); Goldstein, *Taking*, *supra* note 24, at 113–14, 133; Calabresi, *supra* note 16, at 161–62 n.37; Silva, *supra* note 24, at 457–58.

46. See, e.g., Hilarie M. Hicks, "The President is Worse Today: Madison's 1813 Illness," MONTPELIER'S DIGIT. DOORWAY (Oct. 9, 2020), <https://digitaldoorway.montpelier.org/2020/10/09/the-president-is-worse-today-madisons-1813-illness/>.

reported that some senators began quietly jockeying to try to become President pro tempore in the hopes of potentially becoming Acting President. Secretary of State James Monroe—an attorney—described this sordid spectacle in a letter to former President Thomas Jefferson. “These men have begun, to make calculations, & plans, founded on the presum’d deaths of the President & Vice President.” To this end, the Secretary of State continued, “it has been suggested to me that [Senator William] Giles, is thought of to take the place of President of the senate [as President pro tempore], as soon as the Vice President with draws” from the chamber.⁴⁷ Despite his disapproval of the senators’ actions, Monroe did not question the constitutionality of legislative succession, the principle upon which the lawmakers were trying to act.⁴⁸

The next apparent episode occurred during the presidency of John Tyler. In 1841, Whig President William Henry Harrison died in office and was succeeded by Tyler, his Vice President, who had long been a Democrat.⁴⁹ Prior to the Twenty-Fifth Amendment, there had been no mechanism for installing a new Vice President before the next election, therefore, Tyler’s potential successors were the presiding officers in Congress.⁵⁰ As President, the Democrat Tyler and the Whig-led Congress clashed when the new executive eschewed many of the Whig party’s principles.⁵¹ Consequently, congressional Whig leaders pressured Tyler’s Cabinet members, who were Harrison holdovers, to

47. Letter from James Monroe to Thomas Jefferson (June 28, 1813), <https://founders.archives.gov/documents/Jefferson/03-06-02-0211>.

48. The 1792 Act provided only the President pro tempore and Speaker as presidential successors. *See* Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240. Consequently, the 1792 statute would seem to put opponents of legislative succession in the difficult position of either accepting the validity of the principle or embracing the notion that there would be a period of time when the nation would have no President. *See infra* note 59. The latter position would appear to violate the constitutional precept that the executive branch must remain in continuous operation. *See* Roy E. Brownell II, *Vice Presidential Inability: Why it Matters and What to Do When it Occurs*, 48 HOFSTRA L. REV. 291, 301–05 (2019).

49. For more on the Tyler succession and related constitutional issues, see *infra* notes 419–32 and accompanying text. For some background on the Harrison and Tyler pairing, see *infra* note 423.

50. *See* FEERICK, *supra* note 23, at 31–32; Amar & Amar, *supra* note 24, at 123.

51. *See, e.g.,* ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 523–34 (1997); GEORGE RAWLINGS POAGE, HENRY CLAY AND THE WHIG PARTY 79–106 (Peter Smith 1965) (1936).

resign.⁵² In so doing, the former persuaded all but Secretary of State Daniel Webster to leave office.⁵³ In Tyler's mind, Whig legislative leaders took this extraordinary step because, as a political matter, they believed having his entire Cabinet step down might have forced Tyler himself to do the same. In the absence of a Vice President, the effect of Tyler's resignation would have been that Whig Senator Samuel Southard, the President pro tempore and successor under the 1792 Act, would have become Acting President.⁵⁴

In 1844, President Tyler alluded to the incident and in so doing tacitly accepted legislative succession. "My resignation would [have] . . . devolve[d] the government on another [Senator Southard], the remotest probability of whose succession had not been looked to by the people during the elections, and who would therefore be more feeble and impotent in the exercise of an independent mind and judgment than a vice-president."⁵⁵

The next year President Tyler made the same point in a letter to a friend. He speculated that "Webster had been urged to join them [the rest of the Cabinet in stepping down]; and it was declared to him, that if he would resign I would necessarily have to vacate the government by Saturday night, and thus Whig rule be thoroughly re-established."⁵⁶ What Tyler meant by "Whig rule" becoming "re-established" was, again, that Senator Southard would have become Acting President if the President had stepped down.⁵⁷ Thus, Tyler—himself a former President pro tempore—accepted the principle of legislative succession.

In 1847, Webster, now a Senator and long a distinguished constitutional lawyer, dilated upon the position of President pro tempore.

52. See REMINI, *supra* note 51, at 523–34; POAGE, *supra* note 51, at 79–106.

53. See REMINI, *supra* note 51, at 523–34; POAGE, *supra* note 51, at 79–106.

54. See *President Pro Tempore*, *supra* note 16; see also MICHAEL BIRKNER, SAMUEL L. SOUTHARD: JEFFERSONIAN WHIG 195–96, 245 n.67 (1984); ROBERT SEAGER II, AND TYLER TOO 160–61 (1963); OLIVER PERRY CHITWOOD, JOHN TYLER: CHAMPION OF THE OLD SOUTH 276–77 (2015 ed.); FEERICK, *supra* note 16, at 96–97.

55. Letter from President John Tyler to the Norfolk Democratic Ass'n (Sept. 2, 1844), in 2 THE LETTERS AND TIMES OF THE TYLERS 95, 96 (Lyon G. Tyler ed., 1885) [hereinafter 2 LETTERS AND TIMES].

56. Letter from John Tyler to Alexander Gardiner (May 6, 1845), in 2 LETTERS AND TIMES, *supra* note 55, at 97; see also SEAGER, *supra* note 54, at 160–61; CHITWOOD, *supra* note 54, at 276–77; REMINI, *supra* note 51, at 529.

57. See *President Pro Tempore*, *supra* note 16; see also BIRKNER, *supra* note 54, at 195–96, 245 n.67; SEAGER, *supra* note 54, at 160–61; CHITWOOD, *supra* note 54, at 276–77; cf. FEERICK, *supra* note 16, at 96–97.

Having served as Secretary of State during the Harrison-Tyler transition, Webster's remarks deserve particular attention. During his speech, Webster reflected that in the past the Senate had occasionally failed to select a President pro tempore which posed a major potential problem. "[I]n the contemplation of law . . . there should be such an officer, who, in case of the death of the President and Vice President, [can] bec[o]me himself President."⁵⁸ Webster implicitly supported the constitutionality of legislative succession.

The next instance of the executive branch considering legislative succession appears to have involved the presidency of War Democrat Andrew Johnson.⁵⁹ In 1865, when Republican President Abraham Lincoln was killed by John Wilkes Booth, Johnson was elevated

58. CONG. GLOBE, 29th Cong., 2d Sess., 164 (1847).

59. See SILVA, *supra* note 16, at 112–17; KALT, *supra* note 24, at 86. For decades following the adoption of the 1792 statute, near the conclusion of congressional sessions, vice presidents often vacated the Senate presiding officer's chair to permit members to choose a President pro tempore. See HENRY H. GILFRY, PRESIDENT OF THE SENATE PRO TEMPORE, S. DOC. NO. 104, at 7–8, 11–12, 15–18, 20, 34–35, 50 (1911); Letter from Vice President Elbridge Gerry to Mrs. Gerry (Apr. 17, 1814), in *Letters of Elbridge Gerry, 1797–1814*, 47 PROC. MASS. HIST. SOC'Y 480, 502 (1913); see also SENATE HIST. OFF., PRO TEM: PRESIDENTS PRO TEMPORE OF THE UNITED STATES SENATE SINCE 1789, S. DOC. NO. 110–18, at 55 (2008). This practice helped ensure that there would be a successor during the congressional break. See SENATE HIST. OFF., *supra*, at 55. On occasion, however, vice presidents refused to vacate the chair and thereby prevented the election of a President pro tempore. This was done by Vice Presidents Elbridge Gerry, George Dallas, Chester Arthur, and Thomas Hendricks. See Walter Kravitz, The Presiding Officers, in *The United States Senate: A History* 54–55 (unpublished manuscript) (on file with author); RICHARD C. SACHS, THE PRESIDENT PRO TEMPORE OF THE SENATE 41 n.23 (2003); *supra* note 47. The custom of the Vice President vacating the presiding officer's chair so that the Senate could elect a President pro tempore—and indeed the less regular practice of the Vice President refusing to do so in order to frustrate election of a successor—could perhaps be seen to reflect that early vice presidents recognized legislative succession. However, for the first century and a quarter under the Constitution, the Vice President was widely seen to be more a part of the legislative branch than the executive. See 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, 56–64 (2014); Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers, Part II: Political Branch Interpretation and Counterarguments*, 24 KAN. J.L. & PUB. POL'Y 294, 297–374 (2015) [hereinafter Brownell II]. Therefore, making the argument that these actions by early vice presidents reflected the views of the executive branch during this period is perhaps a bit of a stretch.

to the White House.⁶⁰ Three years after assuming the nation's highest office, the House of Representatives impeached Johnson.⁶¹ As a result, during Johnson's Senate trial, the next in the line of succession was the Republican Senator and President pro tempore, Ben Wade, who was fiercely opposed to Johnson.⁶² Because of this scenario, many thought Wade's involvement in Johnson's impeachment trial represented a conflict of interest.⁶³ Either way, after his acquittal, Johnson urged Congress to remove lawmakers from the line of succession. In July 1868, the President conveyed the following message to Congress:

[When] a vacancy [occurs] in the office of President by the death, resignation, disability, or removal of both the President and the Vice President the duties of the office should devolve upon an officer of the executive department of the Government, rather than one connected with the legislative or judicial departments. The objections to designating either the President pro tempore of the Senate or the Chief Justice of the Supreme Court, especially in the event of a vacancy produced by removal, are so obvious and so unanswerable that they need not be stated in detail

Under such circumstances the impropriety of designating either of these officers to succeed the President so removed is palpable. The framers of the Constitution when they referred to Congress . . . [did] not, in an opinion, contemplate the designation of any other than an officer of the executive department, on whom, in such a contingency, the powers and duties of the President should devolve [There is a] manifest incongruity between the provisions of the Constitution on this subject and the act of Congress of 1792. Having, however, been brought almost face to face with this important question, it seems an eminently proper time for us to make the

60. See, e.g., KALT, *supra* note 24, at 86.

61. See, e.g., *id.*

62. See KALT, *supra* note 24, at 86; Amar & Amar, *supra* note 24, at 123, 129, 134; Calabresi, *supra* note 16, at 167.

63. See KALT, *supra* note 24, at 86; Amar & Amar, *supra* note 24, at 123, 129, 134; Calabresi, *supra* note 16, at 167; see also Silva, *supra* note 24, at 451–52. *But cf.* Watson v. Witkin, 22 A.2d 17, 23 (Pa. 1941) (noting without reservation that Wade would have been Johnson's successor).

legislation conform to the language, intent, and theory of the Constitution, and thus place the executive department beyond the reach of usurpation, and remove from the legislative and judicial departments every temptation to combine for the absorption of all the powers of government [During] a vacancy the duties of President would devolve most appropriately upon some one of the heads of the several Executive Departments and under this conviction I present for your consideration an amendment to the Constitution on this subject, with the recommendation that it be submitted to the people for their action.⁶⁴

64. 9 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 3840 (James D. Richardson ed., 1897); *see also id.* at 3841–43 (text of proposed amendment); *id.* at 3889; SILVA, *supra* note 16, at 117. Johnson’s constitutional argument against legislative succession was somewhat muddled. He argued that the Framers could only have provided for executive branch officials to serve in the line of succession. But the main, traditional constitutional argument in favor of Cabinet succession has been that only an “officer of the United States”—someone having received an appointment through White House nomination, Senate advice and consent, and presidential commission or appointment by “a court of law, or a head of [government] department”—can serve as Acting President. *See, e.g., Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044, 2051 (2018); *Buckley v. Valeo*, 424 U.S. 1, 126, 132 (1976); KALT, *supra* note 24, at 89–90; SILVA, *supra* note 16, at 113–15, 131–37. Since the Speaker and President pro tempore do not gain their position in this manner, the argument goes, they are not “officers of the United States” and hence are not permitted to be Acting President. *See* U.S. CONST. art II, § 2, cl. 2; *id.* art. VI, cl. 3; *id.* amend. XIV, § 3; Amar & Amar, *supra* note 24, at 117 nn.27–28; KALT, *supra* note 24, at 89–90; SILVA, *supra* note 16, at 113–15, 131–37.

Putting aside for the moment that Article II, Section 1, Clause 6 uses the term “Officer”—and not the more specific designation “Officer of the United States”—federal judges are clearly “Officers of the United States” since they are nominated by the President and must receive Senate advice and consent and a commission from the chief executive. *See, e.g., U.S. CONST.* art. II, § 2, cl. 2; *id.* art. V, cl. 3; *Lucia*, 138 S. Ct. at 2051; *Buckley*, 424 U.S. at 126, 132; Manning, *supra* note 24, at 142–45, 151 n.65. As a result, they would presumably be as eligible to become Acting President as Cabinet secretaries under the main, traditional “Officer”-based constitutional argument. *See* U.S. CONST. art II, § 2, cl. 2. *But cf.* Amar & Amar, *supra* note 24, at 122 n.59. Thus, Johnson’s constitutional theory that both legislative and judicial officers should be excluded from serving as Acting President is both inconsistent and dubious.

Thus, following his acquittal in mid-1868, Johnson professed that legislative succession was of doubtful constitutionality as well as imprudent from a policy standpoint.⁶⁵

However, the Johnson administration's posture toward legislative succession was far more nuanced than the President let on. In July 1865, President Johnson experienced a sudden bout of bad health and it was feared that the country might lose its second President in less than twelve weeks.⁶⁶ At the time, there was no Vice President and Republican Senator Lafayette Foster—the President pro tempore and first in line to the Executive Mansion—was in New Mexico conducting congressional oversight of U.S. treatment of Native-American tribes.⁶⁷ Given the distance and state of technology, communication with Senator Foster was difficult.⁶⁸ Demonstrating the Johnson Administration's full acceptance of legislative succession, Secretary of State William Seward and Secretary of War Edwin Stanton swung into action.⁶⁹ Sending Senator Foster an urgent message, the two Cabinet secretaries alerted the President pro tempore to the precariousness of Johnson's health and advised him to travel to Denver where better communication existed, to remain close to a telegraph office, and to prepare for a return to the nation's capital.⁷⁰ Obviously, Secretaries Seward and Stanton—both lawyers⁷¹—believed in the validity of legislative succession or they would not have gone to such lengths to reach Senator Foster.

65. Congress ignored Johnson's recommendation. *See* SILVA, *supra* note 16, at 117.

66. *See* 1 THE SALMON P. CHASE PAPERS, JOURNALS, 1829–1872, 584–85, 585 n.49 (John Niven ed. 1993) [hereinafter CHASE JOURNALS]; 13 CONG. REC. 133 (1881) (statement of Sen. Anthony).

67. *See* CHASE JOURNALS, *supra* note 66, at 584–85, 585 n.49; 13 CONG. REC. 133 (1881); THOMAS VOGT & DARLA SHAW, LAFAYETTE FOSTER, A HEARTBEAT AWAY FROM THE PRESIDENCY 103–04 (2006); MEMORIAL SKETCH OF LAFAYETTE S. FOSTER 40–44 (1881) [hereinafter MEMORIAL SKETCH], https://www.cga.ct.gov/hco/books/Lafayette_Foster_Memorial.pdf.

68. *See* 13 CONG. REC. 133 (1881); VOGT & SHAW, *supra* note 67, at 103–04; MEMORIAL SKETCH, *supra* note 67, at 43–44.

69. *See* 13 CONG. REC. 133 (1881); VOGT & SHAW, *supra* note 67, at 103–04; MEMORIAL SKETCH, *supra* note 67, at 43–44.

70. *See* 13 CONG. REC. 133 (1881); VOGT & SHAW, *supra* note 67, at 103–04; MEMORIAL SKETCH, *supra* note 67, at 43–44.

71. *See, e.g.,* Albert B. Lawrence, *The (Very) Abbreviated Supreme Court Career of Edwin M. Stanton*, 42 J. SUP. CT. HIST. 154, 159–60, 166–67 (2017). Stanton had served as U.S. Attorney General and was later nominated and confirmed to

Three years afterward, during the Johnson impeachment proceedings, the administration's legal position reflected once again its acceptance of legislative succession. During his Senate trial, Johnson's talented legal team—which included a former Supreme Court justice and two U.S. attorneys general (one former and one future)—never once questioned the constitutionality of legislative succession even though such an argument would have been compelling for the President's case.⁷² That is to say, Johnson's lawyers could have easily argued that, since legislative succession was unconstitutional, removing him from office would have left the nation without a chief executive and thrown the country into chaos. The President's attorneys did not raise this point even though Johnson himself worked closely with his lawyers on their legal arguments.⁷³

In fact, one of Johnson's counsels, William Evarts tacitly conceded the constitutionality of legislative succession during the proceedings.⁷⁴ He stated to the Senate:

[I]f the President . . . shall be removed from office . . . [t]he duties of the office will have been annexed to some other office, will be discharged *virtute officii* Under the legislation of the country early adopted, and a great puzzle to the Congress, that designation belongs to this Senate itself to determine, by an officer of its own gaining [the President pro tempore], the right under the legislation of 1792 to add to his office conferred by the Senate the performance of the duties of President of the United States⁷⁵

serve on the Supreme Court though he died before he could take a seat on the bench. *Id.* at 166–67.

72. See generally 1 TRIAL OF ANDREW JOHNSON (1868) [hereinafter 1 TRIAL]; 2 TRIAL OF ANDREW JOHNSON (1868) [hereinafter 2 TRIAL]; 3 TRIAL OF ANDREW JOHNSON (1868). In this capacity, Johnson's attorneys were not part of the executive branch per se, but they obviously represented the President and his legal position at the time.

73. See BRAINERD DYER, THE PUBLIC CAREER OF WILLIAM M. EVARTS 85 (1933); Gaillard Hunt, *The President's Defense*, 85 CENTURY MAG. 422, 433 (1912–1913).

74. See 2 TRIAL, *supra* note 72, at 271.

75. *Id.* Nearly twenty years later, Evarts took a different view as a Senator. See 17 CONG. REC. 249–50 (1885). Unlike the 1792 statute, under the 1947 act, lawmakers must resign their seat in Congress.

At a later juncture during the impeachment trial, Evarts proclaimed to the upper chamber that:

[T]he great office itself, if by your judgment it shall be taken from the elected head of this republic, is to be put in commission with a member of your own body chosen to-day [*sic*] and to-morrow [*sic*], at any time, by yourselves, and that you are taking the crown of the people's magistracy and of the people's glory to decorate the honor of the Senate. An officer who, by virtue of your favor, holds the place of President *pro tempore* of your body adds the Presidency to its duties by the way; and an officer changeable from day to day by you as you choose to have a new President *pro tempore*, who by the same title takes from day to day the discharge of the duties of President of the United States.⁷⁶

Clearly, Johnson's legal team, which the President closely supervised, did not question the constitutionality of legislative succession.

Moreover, during the impeachment trial, President Johnson's Secretary of the Interior, Orville Browning made clear that he believed Senator Wade was next in line. Following the impeachment vote, Browning confided to his diary, "Mr[.] Wade voted for conviction, by which, if accomplished he was himself to become acting President."⁷⁷

In sum, after his acquittal in his impeachment trial, President Johnson spoke out against legislative succession. While he certainly

76. 2 TRIAL, *supra* note 72, at 324; *see id.* at 275, 300; *see also* CHESTER L. BARROWS, WILLIAM M. EVARTS 150, 154, 158 (1941). During the later stages of the trial, Evarts wrote that "[t]he President will not be convicted [because of] . . . the preference of certain politicians for the present situation to the change proposed." DYER, *supra* note 73, at 89. Evarts meant that many Republican public officials thought it better to keep the lame-duck President Johnson in office and ensure the election of Republican U.S. Grant to the presidency in the fall of 1868 rather than replace the incumbent with President *pro tempore* Ben Wade. *See* BRENDA WINEAPPLE, THE IMPEACHERS 317 (2019).

Interestingly, Johnson's legal team's implicit approval of legislative succession came at the very same time that it emphasized that "[n]othing is plainer than the duty of the Executive to resist encroachments of the legislative department. If he submits tamely to one usurpation of his rightful powers he may lose all." 2 TRIAL, *supra* note 72, at 382 (statement of Henry Stanbery).

77. 2 THE DIARY OF ORVILLE HICKMAN BROWNING 198 (James G. Randall ed., 1933); *cf. id.* at 161.

voiced his views on the subject, when succession was a live issue, the Johnson administration assumed a different posture altogether and was clearly poised to fully ensure that the President pro tempore would become Acting President. Indeed, it is notable that, with the exception of his post-impeachment message to Congress, there is no further mention of President Johnson questioning legislative succession in his correspondence as chief executive.⁷⁸ As a result, Johnson's presidency paints a somewhat blurred picture with respect to the constitutionality of legislative succession.

In 1881, President James Garfield was shot and, following an extended period of incapacitation, died in office. Consequently, Vice President Chester Arthur became the nation's chief executive. However, at the time, there was no successor to Arthur because the two houses of Congress had not named presiding officers before adjourning, and the line of succession extended no further.⁷⁹

Upon hearing of Garfield's passing, the newly minted President recognized that he had to travel immediately to Washington. Ahead of his departure, President Arthur mailed a confidential letter which would have called the Senate into session to choose a President pro tempore if anything had happened to him on his way to the capital. He arrived without incident in Washington and then proceeded to issue a proclamation in the regular fashion for the upper chamber to meet.⁸⁰

78. See generally 7 THE PAPERS OF ANDREW JOHNSON, 1864–1865 (LeRoy P. Graf ed., 1986); 8 THE PAPERS OF ANDREW JOHNSON, MAY–AUGUST 1865 (Paul H. Bergeron ed., 1989); 9 THE PAPERS OF ANDREW JOHNSON, SEPTEMBER 1865–JANUARY 1866 (Paul H. Bergeron ed., 1991); 10 THE PAPERS OF ANDREW JOHNSON, FEBRUARY–JULY 1866 (Paul H. Bergeron ed., 1992); 11 THE PAPERS OF ANDREW JOHNSON, AUGUST 1866–JANUARY 1867 (Paul H. Bergeron ed., 1994); 12 THE PAPERS OF ANDREW JOHNSON, FEBRUARY–AUGUST 1867 (Paul H. Bergeron ed., 1995); 13 THE PAPERS OF ANDREW JOHNSON, SEPTEMBER 1867–MARCH 1868 (Paul H. Bergeron ed., 1996); 14 THE PAPERS OF ANDREW JOHNSON, APRIL–AUGUST 1868 (Paul H. Bergeron ed., 1997); 15 THE PAPERS OF ANDREW JOHNSON, SEPTEMBER 1868–APRIL 1869 (Paul H. Bergeron ed., 1999).

79. See, e.g., FEERICK, *supra* note 23, at 38; 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).

80. See *Giving Voice to Sorrow: Words of Respect and Affection for Mr. Arthur*, N.Y. TIMES, Nov. 21, 1886; see also GEORGE FREDERICK HOWE, CHESTER A. ARTHUR, A QUARTER-CENTURY OF MACHINE POLITICS 154–55 (1934); John D. Feerick, *The Twenty-Fifth Amendment: Its Origins and History*, in MANAGING CRISIS:

As was the case with the Andrew Johnson administration, the Arthur administration was fully prepared to implement legislative succession and took affirmative steps to help ensure that the principle would have been effectuated. Afterward, Arthur urged Congress to change the law to provide for a means of determining presidential inability, but he made no reference to modifying the legislative succession provisions of the 1792 statute.⁸¹

During the presidency of Arthur's successor, Grover Cleveland, Vice President Thomas Hendricks died. His passing occurred during a period when Congress had yet again not chosen its presiding officers, leaving the country without a presidential successor for almost two weeks.⁸² Cleveland urged the legislative branch to act on executive succession.⁸³ Writing to Congress, the President opined that:

The present condition of the law relating to the succession to the Presidency in the event of the death, disability, or removal of both the President and Vice President is such as to require immediate amendment The recent lamentable death of the Vice-President, and vacancies at the same time in all other offices the incumbents of which might immediately exercise the functions of the Presidential office, has caused public anxiety and a just demand that a recurrence of such a condition of affairs should not be permitted.⁸⁴

Cleveland did not appear to oppose having legislators act as President. Indeed, he noted the presence of lawmakers in the line of succession but did so without directing any criticism toward the arrangement (i.e., "the incumbents of which might immediately exercise the functions of the Presidential office"). Whatever qualms Cleveland had were essentially practical in nature; he believed there needed to be

PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 1, 7 (Robert E. Gilbert ed., 2000); Erhart, *supra* note 79, at 330–31.

81. See 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4652, 4734–35, 4774, 4840 (James D. Richardson ed., 1897).

82. See, e.g., FEERICK, *supra* note 23, at 38–40; FEERICK, *supra* note 16, at 140–43; SENATE HIST. OFF., *supra* note 59, at 56–57; Silva, *supra* note 24, at 452.

83. See 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 81, at 4950; see also FEERICK, *supra* note 16, at 140–43.

84. 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 81, at 4950.

successors in place at all times, a goal which could have been satisfied in several ways including the manner in which the line of succession was later formalized in the 1947 Act.

In 1886, Congress readdressed succession, passing a bill that removed legislative officials, and inserted Cabinet secretaries in the order of the department's creation.⁸⁵ Cleveland signed the measure into law.⁸⁶

III. THE EXECUTIVE BRANCH AND LEGISLATIVE SUCCESSION SINCE THE 1947 ACT

A. *The Truman Administration*

Until the end of World War II, Cabinet succession to the presidency was the law of the land.⁸⁷ In April 1945, Vice President Harry Truman was suddenly elevated to the Oval Office following the death of President Franklin D. Roosevelt. Not long afterwards, James Farley, who had served in the line of succession as Postmaster General under President Roosevelt, publicly made the case for presidential successors having a direct link to the electorate, implicitly pointing the way toward the restoration of legislative succession as lawmakers are directly elected unlike Cabinet secretaries.⁸⁸ Farley's rationale seemed to help persuade the new President of the wisdom of this approach and Truman

85. See Act of Jan. 19, 1886, ch. 4, 24 Stat. 1. A lawmaker apparently supportive of legislative succession was Representative William McKinley, who voted against the bill and who, a decade later, would be elected President. See 17 CONG. REC. 693–95 (1886); see also SILVA, *supra* note 16, at 122–23, 122 n.40; FEERICK, *supra* note 16, at 146; cf. *supra* note 33 and accompanying text.

86. In this context, Cleveland could be seen as having implicitly approved the removal of lawmakers from the line of succession, though he seemed to have tacitly supported their inclusion earlier.

87. The author found no executive branch references to legislative succession during the period from 1886 until World War II.

88. See 91 CONG. REC. A2276–78 (1945) (quoting Farley's speech); SILVA, *supra* note 24, at 452–53; SILVA, *supra* note 16, at 123–24; Robert S. Rankin, *Presidential Succession in the United States*, 8 J. POL. 44, 49–50 (1946); FEERICK, *supra* note 16, at 204. Upon Truman's elevation, the next in line to the White House was Secretary of State Edward Stettinius who, for a variety of reasons, was thought by many to be an inappropriate successor. See, e.g., FEERICK, *supra* note 16, at 204; SILVA, *supra* note 24, at 452–53; Kallenbach, *supra* note 24, at 933 n.8.

soon proposed that legislative officials be returned to the line of succession.

As noted, before the Twenty-Fifth Amendment, a vacancy in the vice presidency could not be addressed until the inauguration of a new officeholder following the next quadrennial election.⁸⁹ For his part, Truman felt uncomfortable about a President essentially being able to name a successor pursuant to the 1886 Act by choosing his own Cabinet members, subject only to Senate advice and consent.⁹⁰ Believing this to be an undemocratic practice, he proposed placing the Speaker and President pro tempore in the line of succession before Cabinet secretaries.⁹¹ To Truman, this ensured that an Acting President would have greater legitimacy.⁹² His argument was that the two lawmakers had been elected to Congress and then elected to their leadership posts by their fellow members who collectively represented the country as a whole, thus, in his mind, assuring them of greater democratic bona fides.⁹³

During subsequent public debate over what would become the 1947 statute, several former executive branch officials publicly expressed their approval of the principle of legislative succession. They included former Vice President John Nance Garner and former Attorney General Homer Cummings.⁹⁴ Former Solicitor General John W. Davis also lent his voice in support of the constitutionality of the principle.⁹⁵ He maintained that, since the Supreme Court had interpreted the term “Officer” to include federal lawmakers for purposes of a

89. See FEERICK, *supra* note 23, at 31–32; Amar & Amar, *supra* note 24, at 123.

90. See 93 CONG. REC. 7692–93 (1947) (providing the text of President Truman’s 1945 and 1947 messages to Congress in support of legislative succession); 92 CONG. REC. 142 (1946) (providing the text of President Truman’s 1946 message to Congress); see also HARRY S. TRUMAN, YEAR OF DECISIONS 22–23, 487 (1955).

91. See TRUMAN, *supra* note 90, at 22–23, 487.

92. See *id.*

93. See *id.*

94. See *Question of the Week*, U.S. NEWS & WORLD REP., June 13, 1945, at 34. In the case of Garner, it should be noted that by 1945 the vice presidency had become more of an executive branch position than it had been in the years prior to World War I. See Brownell II, *supra* note 59, at 331–42; *supra* note 59.

95. See Arthur Krock, *In the Nation: Succession List Now Suits the Politicos*, N.Y. TIMES, July 17, 1945, at 12.

criminal statute in the *Lamar v. United States* decisions,⁹⁶ the same logic could be applied to the term in Article II, Section I, Clause 6.⁹⁷

Implicit in Truman's rationale for legislative succession was that the arrangement was constitutional. It fell to Acting Attorney General Douglas W. McGregor to fully articulate the executive branch's legal case. In a letter to Congress, McGregor expressly supported the constitutionality of legislative succession, arguing that:

Opponents of the bill introduced in the Seventy-ninth Congress . . . contended that the Speaker of the House and the President pro tempore were not "officers" within the meaning of article II, section 1, clause 6, of the Constitution. In so doing, they relied heavily upon the Senate's decision in 1798 in the [Senator William] Blount impeachment case. In a plea to the jurisdiction of the senate, Senator Blount contended that since he held his commission from the State of Tennessee and not from the United States, he was not a "civil officer of the United States" within the meaning of the impeachment clause of the Constitution (art II, sec. 4). The Senate sustained the plea and dismissed the articles of impeachment [against Blount].

The proponents countered with *Lamar v. United States* . . . holding that a Member of Congress is an "officer acting under the authority of the United States" within the meaning of the impersonation statute In its opinion, the court noted that on another occasion the Senate, after considering the Blount case, concluded that a Member of Congress . . . is a civil officer within the meaning of article II, section 4. The issue is whether the Speaker of the House and the President pro tempore who, though they are Members of Congress, are chosen from those offices by their respective Houses and not by vote of their constituencies, are officers within the meaning of

96. See *Lamar v. United States*, 241 U.S. 103 (1916); *Lamar v. United States*, 240 U.S. 60 (1916).

97. See Krock, *supra* note 95; see also Rankin, *supra* note 88, at 54, 54 n.29. This reasoning is not entirely seamless. In the *Lamar* decisions, the Court noted that the issues at hand were not constitutional in nature. See *Lamar*, 241 U.S. at 112; *Lamar*, 240 U.S. at 256–57; see also SILVA, *supra* note 16, at 135; KALT, *supra* note 24, at 213 n.20; Amar & Amar, *supra* note 24, at 134 n.131.

article II, section 1. On this question, the Blount decision is of doubtful authority. The term is used in article II, section 1, *without qualification* and presumably includes not only officers of the executive branch of the Government but also officers of the judicial and legislative branches.

Further support for the view that the Speaker and President pro tempore are officers within the meaning of article II can be found in the fact that the law of 1792 designated the President pro tempore and the Speaker as successors to the Presidency. This law represents a construction of article II by an early Congress, whose views of the Constitution have long been regarded as authoritative, and reflects a long-continued acquiescence in such a construction

In conclusion, I wish to state that I am convinced of the need for a revision of the [1886] law relating to Presidential succession. Accordingly, I recommend favorable consideration of [legislative] proposal[s] [that would amend the 1886 statute]. . . .⁹⁸

Congress ultimately agreed with the Truman administration. In 1947, the two houses passed and Truman signed into law the bill returning legislative branch officials to the line of succession. The measure provided that:

If, 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 If . . . there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the

98. 93 CONG. REC. 8,621–22 (1947) (emphasis added) (providing the text of the letter from Douglas W. McGregor, Acting Attorney General, to Earl C. Michener, Chairman, Committee on the Judiciary, House of Representatives, dated June 11, 1947). For criticism of McGregor’s position, see Amar & Amar, *supra* note 24, at 134–36. See also SILVA, *supra* note 16, at 131–37.

Senate shall, upon his resignation as President pro tempore and as Senator, act as President.⁹⁹

The line of succession then proceeds to Cabinet secretaries in the order of the department's creation.¹⁰⁰

As a result of the 1947 Act and subsequent minor modifications, which included adding secretaries from newly created Cabinet departments, the current line of succession runs in this order:

The Vice President
The Speaker of the House
President pro tempore of the Senate
Secretary of State
Secretary of the Treasury
Secretary of Defense
Attorney General
Secretary of the Interior
Secretary of Agriculture
Secretary of Commerce
Secretary of Labor
Secretary of Health and Human Services
Secretary of Housing and Urban Development
Secretary of Transportation
Secretary of Energy
Secretary of Education
Secretary of Veterans Affairs; and
Secretary of Homeland Security.¹⁰¹

99. 3 U.S.C. § 19(a)–(b).

100. *See id.* § 19(d).

101. *See, e.g.*, National Security Act of 1947, Pub. L. No. 80-253, § 311, 61 Stat. 495, 509–10 (1947) (removing the Secretary of War and the Secretary of the Navy and adding the Secretary of Defense); Act of Sept. 9, 1965, Pub. L. No. 89-174, § 6(a), 79 Stat. 669 (1965) (adding the Secretary of Health, Education and Welfare and the Secretary of Housing and Urban Development); Act of Oct. 15, 1966, Pub. L. No. 89-670, § 10(a), 80 Stat. 937, 948 (1966) (adding the Secretary of Transportation); Act of Aug. 12, 1970, Pub. L. No. 91-375, § 6(b), 84 Stat. 719, 775 (1970) (removing the Postmaster General); Act of Aug. 4, 1977, Pub. L. No. 95-91, § 709(g), 91 Stat. 565, 609 (1977) (adding the Secretary of Energy); Act of Oct. 17, 1979, Pub. L. No. 96-88, § 508(a), 93 Stat. 668, 692 (1979) (changing the Secretary of Health, Education and Welfare to the Secretary of Health and Human Services and adding the Secretary of Education), Act of Oct. 25, 1988, Pub. L. No. 100-527, § 13(a), 102 Stat. 2635,

Thus, the push for legislative succession in the mid-1940s started at the very top of the executive branch: with the President himself. That carries with it no small significance with respect to constitutional interpretation.¹⁰² It is also noteworthy that the President's plan received public support from a former Vice President, a former Attorney General, and a former Solicitor General and it had been informed by a former Cabinet Secretary in Farley.

From day one, the executive branch has implemented the 1947 statute with alacrity. Following adoption of the bill, President Truman assigned a U.S. Secret Service detail to Joe Martin, Speaker of the House of Representatives and a Republican.¹⁰³ Martin requested that the detail be removed and Truman relented.¹⁰⁴ Nonetheless, the steps taken by the President and the Secret Service inaugurated a pattern of practice that reflects the executive branch's active approval of legislative succession, support manifested both by its repeated endorsements of legislative succession and its full operationalization of the principle.

2643 (1988) (adding the Secretary of Veterans Affairs); Act of Mar. 9, 2006, Pub. L. No. 109-177, § 503, 120 Stat. 192, 247 (2006) (adding the Secretary of Homeland Security); *see also* 93 CONG. REC. 8632, 8632–33 (1947) (statement of Rep. Kenneth Keating); Brown & Cinquegrana, *supra* note 16, at 1431–32 n.143.

102. *See* HAROLD H. BRUFF, *BAD ADVICE* 70 (2009) (“[T]he officer charged with final [executive branch] legal judgment is the president, not the attorney general.”); *cf.* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 128–29 (1996) [hereinafter *Separation of Powers Opinion*] (“[I]t is . . . the President’s ‘duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents.’ . . . Our constitutional analyses [at OLC] are informed by . . . [this] concern[.]”).

103. *See* JOE MARTIN, *MY FIRST FIFTY YEARS IN POLITICS* 187 (1960); *see also* William Albert Hasenfus, *Managing Partner: Joseph W. Martin, Jr., Republican Leader of the United States House of Representatives, 1939–1959*, at 198 (1986) (Ph.D. dissertation, Boston College) (on file with author); *cf.* Calabresi, *supra* note 16, at 166. Despite Truman’s decision to provide him with a protective security detail, Martin did note that, even as the next in line of succession, “Truman did not make the slightest attempt to keep me informed about the sensitive inner policies of the government in case I might suddenly become President [Of course] instead of being a member of the administration, I was the leader of the opposition.” MARTIN, *supra* at 187. Martin’s pique at being kept out of the loop on administration policy matters reflects one of the major practical disadvantages of the 1947 Act: when the presidency and House of Representatives are led by different parties, succession and inability issues are complicated greatly. *Cf. infra* note 349.

104. *See* Hasenfus, *supra* note 103, at 198–99.

This dual pattern has remained unbroken—or at the very least almost completely unbroken—to this very day.

Since Truman did not have a Vice President until 1949, Martin perhaps came closer to becoming Acting President under the 1947 Act than any other Speaker. Not long after the bill's adoption, President Truman was on a trip to Brazil when his motorcade almost drove over the edge of a precipice.¹⁰⁵

On Inauguration Day 1953, lame-duck President Truman and Speaker Martin were waiting on President-elect Dwight Eisenhower to begin the swearing-in ceremony.¹⁰⁶ The departing President saw that 12:00 noon had come and gone, which is the constitutionally designated time for the President to take the oath of office.¹⁰⁷ Truman quipped to the Speaker, “[w]ell, you’re President now, Joe.”¹⁰⁸

B. The Eisenhower Administration

President Eisenhower seemed to accept the constitutionality of legislative succession despite his adamant opposition to the arrangement as a matter of policy. In the first volume of his memoirs, the thirty-fourth President recollected that, following his 1955 heart attack, “[t]here was much interest expressed in the possibility of modifying the 1947 law relating to presidential succession. That legislation had made

105. See MARTIN, *supra* note 103, at 187; see also C.P. Trussell, *Truman Safe as Auto Skids on Brazilian Mountain Road*, N.Y. TIMES, Sept. 7, 1947, at 1 (“An Associated Press correspondent in the President’s party stated that when he and other reporters saw the automobile, the wheel was over the retaining-wall curb with two feet to spare from the precipitous cliff.”); Ernest B. Vaccaro, *Truman Narrowly Escapes Wreck*, CORSICANA DAILY SUN, Sept. 6, 1947, at 1. Lieutenant Commander W.M. Rigdon, who wrote the official log of the President’s voyage, downplayed the episode, commenting that, “the incident [was] greatly exaggerated and sensationalized in our press as a dangerous incident.” *Log of the President Harry S. Truman’s Trip to Rio de Janeiro, Brazil*, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.gov/library/personal-papers/subject-file-1943-1980/president-trumans-travel-logs-1947?documentid=2&pagenumber=41> (last visited Jan. 27, 2021) (Rose A. Conway Papers collection).

106. See Hasenfus, *supra* note 103, at 330.

107. See U.S. CONST., amend. XX, § 1; see also Hasenfus, *supra* note 103, at 330.

108. Hasenfus, *supra* note 103, at 330.

the Speaker of the House next in line after the Vice President.”¹⁰⁹ Notably, Ike discussed “modifying” the 1947 statute, but he did not call into question its constitutionality. In the second volume of his memoirs, Eisenhower reaffirmed his implicit view that legislative succession was unwise, but constitutional. He wrote of the possibility that “the Vice President [could] die[] and [be] succeeded under present law by the Speaker of the House who is of another party.”¹¹⁰

Eisenhower’s Chief of Staff, Sherman Adams, recalled a Cabinet debate in 1957 over whether the administration should recommend that Congress remove lawmakers from the line of succession as part of a broader proposed constitutional amendment:

The President noted that he and [Attorney General Herbert] Brownell disagreed on the question of succession beyond the Vice President; he was against the present law that puts the Speaker of the House next in line, but Brownell did not want to change that rule. Eisenhower felt that the presidency should be handed down to members of the same political party as that of the President and he favored putting senior members of the Cabinet next to the Vice President in succession, as had been the law in past years. Brownell pointed out to the President that to add a change in the present order of succession to the proposed [presidential] disability [constitutional] amendment would only provoke a loud political wrangle in Congress, and the important objective of providing for an Acting President might be buried in the resulting controversy. [Vice President Richard] Nixon agreed with the Attorney General. The Cabinet unanimously favored further efforts to get the disability amendment considered by Congress.¹¹¹

109. DWIGHT D. EISENHOWER, *MANDATE FOR CHANGE: 1953–1956*, at 545 (1963).

110. DWIGHT D. EISENHOWER, *WAGING PEACE: 1956–1961*, at 233 n.3 (1965).

111. SHERMAN ADAMS, *FIRSTHAND REPORT: THE STORY OF THE EISENHOWER ADMINISTRATION* 200 (1961). The minutes from the Cabinet meeting track Adams’s recollection. They state:

Two points stand out in this excerpt. The first is the President's clear antipathy to the 1947 Act, which invited all measure of criticism of the statute from his advisors. Yet no one at the Cabinet meeting suggested the measure was unconstitutional, which in effect would have solved the problem for the President. Second, the Attorney General—the Cabinet officer with primary responsibility for executive branch legal interpretation—in effect led the administration's effort to preserve legislative succession. Ultimately, the Eisenhower Justice Department prepared a draft constitutional amendment regarding succession and inability that did not include an override of the legislative succession provisions in the 1947 measure.¹¹²

In late 1963, as former President, Eisenhower penned an article for the *Saturday Evening Post*.¹¹³ In it he laid out a strong case for changing the line of succession to exclude lawmakers.¹¹⁴ At no point

Presidential Disability – The President asked the Attorney General to make a brief presentation of his study on this matter, but he pointed out that he differed from the Attorney General by believing that the line of succession after the Vice President should remain within the Party instead of being established as of now. The Attorney General pointed out that there is currently no provision of law covering a Presidential disability situation and the return of a President to office following a disability after the Vice President has taken over in the meantime. He said that the President had concluded that these uncertainties were sufficiently serious to make it his duty to recommend corrective action.

Minutes of Cabinet Meeting, at 1–2 (Feb. 8, 1957) (on file with the Dwight D. Eisenhower Presidential Library & Museum, National Archives); *see also* EISENHOWER, *supra* note 109, at 545–46 (“Any attempt to change the law would have caused bitter reaction.”); ARTHUR BERNON TOURTELLOT, *THE PRESIDENTS ON THE PRESIDENCY* 393, 465 n.56 (Russell & Russell 1970) (1964) (quoting former President Dwight Eisenhower on *CBS Reports*) (“I think [legislative succession] is wrong I never brought it up as a matter of legislation for the simple reason that I had, by the time I had studied these things and was ready to make things [different], I had an opposition Congress, and I knew they were not going to make that change, so that’s that.”).

112. *See* Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 *YALE L.J.* 189, 196–97 (1958).

113. *See* Dwight D. Eisenhower, *When the Highest Office Changes Hands*, *SATURDAY EVENING POST*, Dec. 14, 1963, at 15.

114. *See id.*

in his discussion, however, did he intimate that the principle of legislative succession might be unconstitutional.¹¹⁵

In early 1964, *CBS Reports* featured the views of former Presidents Eisenhower and Truman on the policy merits of legislative succession.¹¹⁶ Without apparently descending into legal minutiae, Truman defended legislative succession and, once again, Eisenhower opposed it.¹¹⁷ Later in the year, Eisenhower submitted his own personal proposal to the relevant Senate Judiciary Subcommittee on how to fix the presidential succession and inability processes.¹¹⁸ Though he remained opposed to the 1947 statute, he again did not suggest that legislative succession was unconstitutional.¹¹⁹ Indeed, Eisenhower proposed that, in situations in which presidential capacity remained uncertain, a commission should be established which would include, among others, the Speaker, the President pro tempore, and the minority leaders of both houses of Congress.¹²⁰ Thus, despite his firmly-held views as to the unwisdom of legislative succession, former President Eisenhower had few qualms about the legislative branch's involvement in determining executive inability, again presumably reflecting his acceptance of its constitutionality.

In 1956, during Eisenhower's presidency, former president Herbert Hoover submitted testimony for the record to a special subcommittee of the House Judiciary Committee which was examining executive incapacity issues. He commented:

The question of inability of the Vice President at the same time as the President seems to me rather remote. In any event, the only assurance of continuity of the party in power would require a revision of the present law as to succession. The whole question would be solved by

115. *See id.*

116. *See Ike, Truman Differ on Line of Succession*, CHI. TRIB., Jan. 9, 1964, at 17; Thomas P. Ronan, *Eisenhower, Truman and Nixon Weigh Presidential Succession*, N.Y. TIMES, Jan. 9, 1964, at 19.

117. *See Ike, Truman Differ on Line of Succession*, *supra* note 116; Ronan, *supra* note 116; *see also* TOURTELLOT, *supra* note 111, at 393, 465 n.56.

118. *See Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 88th Cong. 232–33 (1964) (Sen. Bayh's submission of Eisenhower's letter for the record).

119. *See id.* at 233.

120. *See id.*; *see also* Goldstein, *Taking*, *supra* note 24, at 992 n.180.

returning to the act of 1886 which established the succession within the Cabinet¹²¹

As was the case with Eisenhower, Hoover questioned the prudence of legislative succession due to the potential transfer of partisan control of the White House. But he did not question the statute's constitutionality.

At some point during the Eisenhower administration, an attorney in the Department of Justice's Office of Legal Counsel (OLC) undertook an analysis of the constitutionality of the 1947 measure.¹²² In discussing the familiar "Officer" arguments, the memorandum expressed misgivings about the constitutionality of legislative succession. At various points, the memorandum opined that, with respect to the measure's constitutionality, "the doubts are fairly substantial," "[t]he weight of authority seems" arrayed against the statute, "there is serious doubt" about its lawfulness, and the legal question "is debatable."¹²³

At the same time, the memorandum noted a number of arguments in the favor of legislative succession including that "it may be said that both the Speaker and the President pro tempore are officers [entitled] to act [as Acting President] if the term is not given a narrow construction."¹²⁴ The memorandum reasoned that the fact that legislative succession was adopted in the 1792 statute was a consideration that "is certainly entitled to considerable weight."¹²⁵ Moreover, the document mentioned that the Twentieth Amendment's use of a broader term "person" in the context of vacancies involving the President-elect and Vice President-elect could prompt a broader interpretation of the term "Officer" in the Succession Clause, which would support the claims of a Speaker and President pro tempore.¹²⁶

121. *Problem of Presidential Inability: Hearings Before Special Subcomm. to Study Presidential Inability of the H. Comm. on the Judiciary*, 84th Cong. 2 (1956).

122. See Memorandum from the Office of Legal Counsel on Presidential Succession, unsigned, undated document [hereinafter Unsigned OLC Memo] (on file with Dwight D. Eisenhower Presidential Library & Museum, Herbert Brownell papers, Presidential Succession Materials, File No. 4). It is certainly possible that other memoranda involving legislative succession exist somewhere in government archives, but the ones outlined in this article are the only ones the author has been able to find.

123. *Id.* at 8, 15.

124. *Id.* at 10.

125. *Id.* at 12.

126. *Id.* at 14 n.18.

Despite the skeptical tone of the memorandum toward legislative succession, the author was careful to note that “we are not prepared to conclude at this time that corrective legislation should be sought, particularly in view of the unlikelihood of favorable Congressional action.”¹²⁷ Moreover, the memorandum concluded that “it would seem doubtful, should a tragedy occur whereby there was neither a President nor Vice President, that any public official would, for personal or other reasons, attempt to engender a conflict over succession to the detriment of the nation.”¹²⁸

While the tenor of the document cannot be ignored, there are numerous reasons why it should not be given undue weight. First, unlike the numerous other executive branch legal memoranda outlined later in this article, this document does not reach a clear position on the legal validity of legislative succession. That the President himself was strongly opposed to the principle of legislative succession makes it all the more noteworthy that the memorandum failed to conclude that the measure was unconstitutional.

Second, the memorandum was not drafted with the intent of providing a definitive executive branch legal position. It was essentially a memorandum for the file, written so that the relevant arguments “will be readily available” should they need to be consulted during a dual vacancy or dual incapacity scenario.¹²⁹ To that end, it does not purport to overturn the memorandum drafted by Acting Attorney General McGregor in 1947. The nonbinding nature of this inconclusive memorandum is underscored by the fact that it is undated and unsigned and was never made public.

Finally, even if this opinion could somehow be seen as establishing an official executive branch legal position against the constitutionality of legislative succession, as will be seen, it has been clearly superseded on numerous occasions by opinions from OLC and the Office of White House counsel.

C. The Kennedy Administration

In 1961, Attorney General Robert Kennedy presented a memorandum to Eisenhower’s successor, President John F. Kennedy, about how to address presidential inability. In the document, the Attorney

127. *Id.* at 8.

128. *Id.* at 15.

129. *Id.* at 8.

General indicated that “the Vice President or other ‘officer’ designated by law to act as President has the authority under the Constitution to decide when [presidential] inability exists.”¹³⁰ Nowhere in the opinion did the Attorney General qualify his “other ‘officer’ designated by law” formulation to exclude the Speaker or President pro tempore, lending implicit support for legislative succession.¹³¹

That same year, the Kennedy administration embraced legislative succession even more clearly. The President requested legislation to provide Secret Service protection for any individual after the Vice President in the line of succession.¹³² The administration’s proposed measure provided that “[t]he phrase ‘other officer next in the order of succession to the office of the President’ as used in this section shall mean the person next in the order of succession to act as President in accordance with title 3, United States Code, sections 19 and 20.”¹³³ Section 19 of Title 3 reflects the legislative succession provisions of the 1947 Act. Notably, the administration specifically defined the term “Officer” to include legislators, going to perhaps the central constitutional question of the Succession Clause.

U.E. Baughman, the chief of the U.S. Secret Service, testified before the House Judiciary Committee and defended the Kennedy administration’s legislative request. In his prepared opening statement, Baughman made clear that the proposal specifically entailed the protection of lawmakers:

As to the first purpose of the bill, the Speaker of the House of Representatives would become [Acting] President in the case of the death of both the President and the Vice President After the Speaker would come the President pro tempore [T]he Speaker . . . would be next in line to the Presidency in the event either the President or Vice President should die in office [Under the Administration’s proposed bill,] the person next in line to the Presidency would be in the same position as

130. Robert F. Kennedy, *Presidential Inability*, 42 U.S. Op. Att’y Gen. 69, 88 (1961), 1961 WL 4912 [hereinafter *Kennedy Legal Opinion*].

131. Cf. Feerick, *supra* note 24, at 28 n.114.

132. See H.R. REP. No. 87-432, at 2, 4 (1961).

133. *Id.* at 4.

the Vice President ordinarily is as to succession to Presidential office.¹³⁴

During his testimony, Baughman made clear that the President himself supported this measure. “[T]he President said that he personally wanted to introduce the bill . . . rather than have the Secretary introduce [it] The President is behind it 100 per cent.”¹³⁵

The ultimate bill, the origin of which began in the executive branch and which clearly reaffirmed the principle of legislative succession, was passed by Congress and signed into law by President Kennedy on October 16, 1962.¹³⁶ It was codified as 18 U.S.C. § 871(a).

134. *To Amend Title 18, U.S. Code Sections 871 and 3056, To Provide Penalties for Threats Against the Successors to the Presidency and to Authorize Their Protection by the Secret Service: Hearing on H.R. 6691 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary, 87th Cong. 1–2 (1961) [hereinafter *Secret Service Hearing*]* (statement by U.E. Baughman, Chief, U.S. Secret Service); *see also id.* at 3 (stating that the measure would “protect the President . . . [and] the other gentlemen who would follow in succession. For instance, the Speaker of the House, the [President] pro tempore of the Senate, and the Secretary of State, Treasury, and on down the line through the Cabinet officers”); *id.* at 20–21 (quoting the exchange between Rep. Forrester and Baughman) (“Mr. Forrester. All right, Mr. Baughman, if the Vice President should succeed to the Presidency, under this legislation, this would automatically mean this protection would automatically be extended to the Speaker of the House; would it not? Mr. Baughman. That is correct, Mr. Chairman.”).

135. *Secret Service Hearing, supra* note 134, at 24 (testimony of U.E. Baughman).

136. *See* Act of Oct. 16, 1962, Pub. L. No. 87-829, 76 Stat. 956; *see also Secret Service Headache—McCormack Doesn’t Want Protection*, BOS. GLOBE, Mar. 1, 1964, at 20 [hereinafter *Secret Service Headache*]. The statute makes it a crime to make a “threat to take the life of, to kidnap, or to inflict bodily harm upon the President” or his or her successors. *See* 18 U.S.C. § 871(a). It does not appear that 18 U.S.C. § 871(a) is often used to prosecute those threatening or trying to kill the Speaker or President pro tempore. *See, e.g.,* Superseding Indictment, United States v. Martis, No. CR-21-08043 (D. Ariz. June 1, 2021) (on file with author) (bringing charges against a defendant for making threats against Speaker Pelosi under 18 U.S.C. §§ 875(c), 981, 982; 21 U.S.C. §§ 853, 881; and 28 U.S.C. § 2461(c), but *not* under 18 U.S.C. § 871(a)); Indictment, United States v. Meredith, No. 21-MJ-017 (D.D.C. January 7, 2021) (bringing charges against a defendant for making threats against Speaker Pelosi under 18 U.S.C. § 875(c), but *not* under 18 U.S.C. § 871(a)); Amended Complaint, United States v. Giusti, No. 3-10-70260 (N.D. Cal. Aug. 8, 2010) (on file with author); Superseding Indictment, United States v. Giusti, No. CR 10-0302 (N.D. Cal. Aug. 12, 2010) (on file with author) (bringing charges against a defendant for making threats against Speaker Nancy Pelosi under 47 U.S.C. § 223(a)(1)(C) and 18

In 1963, Baughman's successor as Secret Service chief, James J. Rowley, appeared as a witness at a hearing of the House Appropriations Committee.¹³⁷ At the hearing, Representative Otto Passman inquired whether "[i]n the event of the death of the Vice President, you would have to move that protection to the Speaker of the House and give him the same type of protection you would the Vice President because, in fact, under the law he would be the next in line for the presidency?"¹³⁸ The Secret Service chief answered "[y]es, sir."¹³⁹

On November 22, 1963, President Kennedy was shot in Dallas. He was immediately rushed to Parkland Hospital where he passed away.¹⁴⁰ Word soon began to leak out to the public that Kennedy had

U.S.C. § 2261A(2), *not* under 18 U.S.C. § 871(a)). A prosecution under 18 U.S.C. § 871(a) might conceivably be a way that legislative succession could be determined in the courts outside of the context of a presidential succession dispute. Someone prosecuted for trying to assassinate the Speaker or President *pro tempore* under this provision could try to challenge the constitutionality of the legislative succession principle embedded within Section 871(a); this would be unlikely to be a political question or to involve a prudential doctrine as it could entail a criminal conviction. Americo Cinquegrana has suggested other means of testing legislative succession in the courts outside of a dispute over the White House. *See* Cinquegrana, *supra* note 44, at 142–46.

137. *See Secret Service Headache*, *supra* note 136, at 20.

138. *Id.*

139. *Id.* In the years since Baughman's and Rowley's testimony, numerous Secret Service agents have implicitly acknowledged the constitutionality of legislative succession in their memoirs. *See* CLINT HILL WITH LISA McCUBBIN, *FIVE PRESIDENTS* 417, 419 (2016) ("[W]e had to provide protection for the person next in the line of succession to the president, Carl Albert, Speaker of the House of Representatives [When Nelson Rockefeller became Vice President,] [w]e were then able to discontinue protection for Speaker Albert."); RUFUS W. YOUNGBLOOD, *20 YEARS IN THE SECRET SERVICE* 108, 123 (2d ed. 2018) (noting that after Kennedy's assassination "House Speaker John W. McCormack . . . was now the next man in line of succession to the presidency McCormack . . . was now first in line of succession to the presidency"); JOSEPH PETRO WITH JEFFREY ROBINSON, *STANDING NEXT TO HISTORY* 108 (2005) ("I was sent to the detail protecting Carl Albert, who was Speaker of the House, and therefore next in line to succeed [President] Ford."); JERRY PARR WITH CAROLYN PARR, *IN THE SECRET SERVICE* 144 (2013) ("Carl Albert . . . was next in line until a vice president could be confirmed . . .").

140. There was great confusion in the immediate aftermath of the Kennedy assassination. In 1968, author Jim Bishop wrote that "[o]fficials at the Pentagon were calling the White House switchboard at the Dallas-Sheraton Hotel asking who was now in command. An officer grabbed the phone and assured the Pentagon that

died, prompting White House press aide, Malcolm Kilduff, to approach the new President, Lyndon Johnson, and ask whether he could confirm the former President's death to the media.¹⁴¹ Johnson replied:

No, Mac, I think we had better wait for a few minutes. I think I had better get out of here and get back to the plane before you announce it. We don't know whether this [is] a worldwide communist conspiracy, whether they are after me as well as they were after President Kennedy, or whether they are after Speaker [John W.] McCormack or Senator [Carl] Hayden.¹⁴²

By including Speaker McCormack and President pro tempore Hayden in his calculus, Johnson clearly viewed legislative succession as valid. Notably, he did so at a time when the succession regime was under tremendous stress, only minutes after Kennedy had passed away and before Johnson had even taken the oath of office.

In his memoir, President Kennedy's speechwriter and confidante, Ted Sorensen, looked back on the grim moments immediately following the assassination of the President.¹⁴³ He recalled that "[t]he attorney general asked me to notify House speaker John McCormack who, upon the swearing-in of the new president, Lyndon Johnson,

Secretary of Defense Robert McNamara and the Joint Chiefs of Staff 'are now the President.'" JIM BISHOP, *THE DAY KENNEDY WAS SHOT* 271 (1968). It should be noted that these ambiguous remarks by an unnamed White House official do not go to matters of *legislative* succession. They involved regular President-to-Vice President succession. Moreover, the question came from the Pentagon and went to the issue of "who was . . . in command." *Id.* From context, this question would seem like a matter of command authority over the military—and not presidential succession. *Cf. infra* notes 255–63 and 274–78 and accompanying text (discussing similar confusion over these concepts after the Reagan assassination attempt). Had the White House interlocutor meant to convey that legislative succession was unconstitutional (and that the Vice President was somehow out of the picture), he would presumably have said that the Secretary of State was in charge as the Secretary of State and Secretary of Treasury come before the Secretary of Defense in the line of succession. *See supra* note 101 and accompanying text.

141. *See* STEVEN M. GILLON, *THE KENNEDY ASSASSINATION—24 HOURS AFTER* 92–93 (2009).

142. *Id.* at 93; *see also* FEERICK, *supra* note 16, at 9.

143. *See* TED SORESENSEN, *COUNSELOR: A LIFE AT THE EDGE OF HISTORY* 362 (2008).

would become second [sic] in line for the presidency.”¹⁴⁴ Clearly, by giving these instructions, the Attorney General believed that legislative succession was constitutional. Similarly, Sorensen—himself an attorney—did not question the Speaker’s lawful status as a possible successor. Nor would this be the last time that Sorensen would communicate with a Speaker about such matters during tense times for the succession.

D. The Johnson Administration

As mentioned earlier, prior to adoption of the Twenty-Fifth Amendment, a vacancy in the vice presidency could not be addressed until the inauguration of a new officeholder following the next quadrennial election.¹⁴⁵ As such, following the Kennedy assassination, for the first fourteen months of Lyndon Johnson’s tenure in the Oval Office, the Texan’s potential successors were fellow partisans Speaker McCormack and President pro tempore Hayden.

During the Johnson years, the most obvious manifestation of the executive branch’s acceptance of the constitutionality of legislative succession occurred when the President entered into a letter arrangement with Speaker McCormack a few weeks after Kennedy’s assassination. Through this letter the Speaker would have become Acting President had the President been unable to execute his powers and duties. Moreover, the Speaker would have helped determine whether the President had become incapacitated.¹⁴⁶ This letter arrangement followed earlier precedent from the Eisenhower and Kennedy administrations in which both presidents had entered into similar arrangements with their vice presidents.¹⁴⁷ The pact also provided for McCormack’s resignation if he became Acting President which brought the measure into conformity with the 1947 Act.¹⁴⁸

144. *Id.* The Speaker actually became first in line. *See supra* note 101 and accompanying text.

145. *See, e.g.,* FEERICK, *supra* note 23, at 31–32; Amar & Amar, *supra* note 24, at 123.

146. *See Johnson Provides for a Disability*, N.Y. TIMES, Dec. 6, 1963, at A1 [hereinafter *Johnson Provides*].

147. *See* FEERICK, *supra* note 23, at 53–54, 320–37.

148. The author would like to thank Professor Joel Goldstein for raising this point.

White House counsel Lee White drafted the Johnson-McCormack document and ensured that both men signed it.¹⁴⁹ At no point in his memoirs did White express any misgivings—constitutional or otherwise—about the Speaker playing a central role in determining presidential incapacity.¹⁵⁰

The letter arrangement between the President and the Speaker was undergirded by a confidential legal opinion from OLC, the entity tasked with providing legal advice for the executive branch.¹⁵¹ In December 1963, the Assistant Attorney General for OLC, Norbert Schlei, wrote that:

The question has been asked whether President Johnson and Speaker of the House McCormack may enter into an understanding on presidential inability similar to the agreements entered into by President Eisenhower and Vice President Nixon . . . and by the late President Kennedy and then Vice President Johnson [I]t is concluded that *such an agreement would be consistent with the Constitution* and the Presidential Succession Act of 1947

. . . .

When [the 1947 legislation] was before the Congress, the then Acting Attorney General, Douglas W. McGregor, expressed the opinion that it was constitutional, and the House Committee on the Judiciary concurred in this conclusion Apparently, Congress in

149. See LEE C. WHITE, *GOVERNMENT FOR THE PEOPLE* 118–19 (2008).

150. See *id.*

151. See 28 U.S.C. §§ 511–12. Former assistant Attorney General for OLC, Randy Moss wrote that:

When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch. The legal advice of the Office [of Legal Counsel], often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General.

Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000).

enacting this proposal into law accepted those views as a proper construction of Article II, section 1, clause 6 of the Constitution. *Those views seem to me to be clearly correct.*¹⁵²

In discussing the letter itself, which involved the Speaker playing a role in determining presidential incapacity, Schlei reasoned that since:

[Neither] the Constitution nor the Succession Act specifies who shall determine when a Presidential inability begins and ends . . . it seems entirely appropriate, until the matter is clarified by constitutional amendment or otherwise, for an agreement . . . to be entered into between the President and the Speaker of the House *Clearly nothing in the Constitution or the Succession Act requires a different interpretation as to who shall determine the existence or termination of inability when the Speaker is involved rather than the Vice President.* Therefore, except for the reference to the Speaker rather than to the Vice President, an understanding embodying such a commitment by the Speaker could incorporate *all* of the terms and use language *identical* to that contained in the Eisenhower-Nixon and Kennedy-Johnson agreements.¹⁵³

By essentially substituting the Speaker for the Vice President in his letter arrangement, Johnson and his Department of Justice came down firmly on the side of the constitutionality of legislative succession. Notably, nowhere did Schlei mention the unsigned and undated OLC memorandum for the file from the Eisenhower years.

Johnson himself implicitly reaffirmed his support for legislative succession in an interview in 1964.¹⁵⁴ He remarked that following Kennedy's assassination:

152. Memorandum from Norbert A. Schlei, Assistant Att'y Gen., Office of Legal Counsel, Agreement Between the President and the Speaker of the House as to Procedures in the Event of Presidential Inability (Dec. 4, 1963), in FEERICK, *supra* note 23, at 323, 325–26 [hereinafter Schlei Memo] (emphases added).

153. *Id.* at 328 (emphases added).

154. See *Transcript of Television and Radio Interview Conducted by Representatives of Major Broadcast Services. March 15, 1964*, in PUBLIC PAPERS OF THE

I made it clear to the Cabinet . . . that when the President and the next in line of succession [the Speaker] were out of town, that we wanted most of the Cabinet here. And the President since that time has not been out of town with any appreciable number of Cabinet officers absent.

. . . .

I participated in passing the [1947] measure that establishes the line of succession now, and I think that that's very good.

. . . .

[O]ne of the first things I did [after becoming President] was to ask the distinguished Speaker of the House to come to my office, and I made an agreement with him [akin to the Eisenhower-Nixon and Kennedy-Johnson pacts] . . . if I should become disabled.¹⁵⁵

Yet again, legislative succession was publicly embraced by the executive branch at the highest level. Moreover, acceptance of the principle had important ramifications for governance in that a majority of the members of the Cabinet were directed to stay in the Washington area if Johnson and McCormack were away from the nation's capital. Doubtless, this decision affected the way each Cabinet department was administered.

Other practical manifestations of the Speaker's status as presidential successor were quickly put into place as well. As the next in the line of succession, Speaker McCormack was granted special access to foreign policy information by the Johnson administration. On December 3, 1963, the White House announced the following:

PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1963–64, at 361 (1965) [hereinafter JOHNSON PUBLIC PAPERS].

155. *Id.* at 362–64. Johnson's anxiety about becoming incapacitated in office was real and almost certainly played a role in his executing the letter arrangement with McCormack. LBJ had had a heart attack almost a decade prior and was deeply concerned about whether his constitution could endure multiple years in the White House. See LYNDON BAINES JOHNSON, *THE VANTAGE POINT* 93 (1971); Robert E. Gilbert, *The Political Effects of Presidential Illness: The Case of Lyndon B. Johnson*, 16 *POL. PSYCH.* 761, 761–62 (1995). Moreover, the state of Johnson's heart was a matter of public interest at the time. Indeed, inaccurate reports spread quickly that Johnson had experienced cardiac arrest immediately following the assassination of Kennedy. See FEERICK, *supra* note 23, at 24.

To assure the continuity of the Government in the event of any contingency, the President has given instructions that the Speaker of the House, who now succeeds him as next in line to the Presidency, be kept continuously and appropriately informed on national security matters and be invited to those N.S.C. [National Security Council] or other key decision-making meetings where the Speaker's presence would be consistent with this objective and in no way inconsistent with his legislative responsibilities.¹⁵⁶

A reporter described the implementation of this policy: "At [President] Johnson's direction, [Speaker McCormack] now routinely attends meetings of the top-secret National Security Council, and daily briefings by the State Department."¹⁵⁷ In his memoirs, Johnson recalled that "from the time I became President until a new Vice President had been elected in November 1964, I invited Speaker of the House McCormack . . . to attend NSC meetings."¹⁵⁸ The President explained that he had done so because the Speaker "would have been my legal successor."¹⁵⁹

Another journalist revealed that "[b]esides today's measures to keep Mr. McCormack more fully informed of executive decisions, the Administration is groping for a broad plan to 'train' the Speaker against the possibility that [h]e may assume the reins of government."¹⁶⁰ Moreover, as occurred with Speaker Martin, McCormack received an

156. Nan Robertson, *McCormack Asked to Join in Key Meetings on Policy*, N.Y. TIMES, Dec. 4, 1963, at 1 (emphasis added); see also FEERICK, *supra* note 16, at 268 n.†.

157. Don Oberdorfer, *The Job John McCormack Dreads*, SATURDAY EVENING POST, Mar. 21, 1964, at 66; see also Schlei Memo, *supra* note 152; *Johnson Provides, supra* note 146; *McCormack for Succession Law but Would Not Obstruct Change*, N.Y. TIMES, Dec. 9, 1963, at 1 [hereinafter *McCormack for Succession Law*]; *McCormack to Sit as LBJ Understudy: He Will Attend All Key Talks*, BOS. GLOBE, December 3, 1963.

158. JOHNSON, *supra* note 155, at 65 n*.

159. *Id.*

160. Robertson, *supra* note 156.

executive branch security detail.¹⁶¹ As was also the case with Martin, McCormack shooed the protective personnel away.¹⁶²

That same month, it was revealed by the press that “Carl Hayden, President Pro Tempore of the Senate, who follows Mr. McCormack in line of succession to the Presidency, would attend weekly meetings of Congressional leaders at the White House Now . . . it is deemed necessary to keep him more fully briefed.”¹⁶³ Thus, like the Speaker, the President pro tempore enjoyed enhanced status at the time, revealing in yet another way that the executive branch was “all in” regarding the constitutionality of legislative succession by fully operationalizing the principle.

During this same period, President Johnson and Secretary of State Dean Rusk attended a gathering of State Department employees. The President made clear to those assembled the individual whom he believed to be his successor. Johnson explained, “Mr. Secretary—First of all I should like to introduce to you one of the great Americans . . . the next in the line of succession, the very able Speaker of the House of Representatives, John McCormack.”¹⁶⁴ This episode is striking as it involved the sitting President, in a public setting, confirming the Speaker’s place in the line of succession in front of the executive branch official—the Secretary of State—who would himself be next in line if the relevant provisions of the 1947 Act were deemed unconstitutional. The fact that these remarks were made in the presence of State Department personnel—some of whom may have preferred the head of their own department to be the direct presidential successor—made the remarks all the more noteworthy.

Johnson also implicitly expressed his acknowledgement of legislative succession in several private conversations. Immediately following the Kennedy assassination, and prior to his election and

161. See GARRISON NELSON, JOHN WILLIAM MCCORMACK: A POLITICAL BIOGRAPHY 655–57 (2017) (noting the Secret Service’s and the FBI’s efforts to protect McCormack); *Secret Service Headache*, *supra* note 136; Jules Witcover, *Men Who Might Be President Unguarded*, DAILY INDEP. J. (San Rafael), Sept. 9, 1964, at 44; BISHOP, *supra* note 140, at 336–37; Jim Bishop, *Heartbreak, Confusion, Planning, Arrest—All One Sad 24 Hour Day*, COSHOCTON TRIB., Dec. 1, 1968, at 2.

162. See NELSON, *supra* note 161, at 655–57; *Secret Service Headache*, *supra* note 136.

163. Robertson, *supra* note 156.

164. *Remarks to Employees of the Department of State. December 5, 1963*, in JOHNSON PUBLIC PAPERS, *supra* note 154, at 27, 29.

inauguration as President in his own right, Johnson expressed his unwillingness to travel overseas due to concerns over the advanced age and feebleness of McCormack and Hayden.¹⁶⁵ A few days after taking over for Kennedy, Johnson spoke to a joint session of Congress. Seated behind the President at the rostrum were the Speaker and President pro tempore. Both men were not only old—they looked old—and their presence as potential successors was on full display for all to see.¹⁶⁶ Their senectitude and seeming frailty unnerved the public.¹⁶⁷

Not long afterward, in a private January 1964 conversation with Senator Richard Russell, Johnson discussed the French government's expectation that President Johnson would fly to Paris to meet with President Charles de Gaulle.¹⁶⁸ During their talk, the President never questioned the constitutionality of legislative succession, but he made clear that public concern over the age and health of McCormack and Hayden ensured he had no intentions of going overseas. "I've got John McCormack and Carl Hayden, and I don't want to travel anyway."¹⁶⁹ Johnson echoed the same sentiment to Senate Majority Leader Mike Mansfield when recalling his recent joint address to Congress. "I looked back [at the rostrum] and saw John McCormack [and] Carl Hayden . . . and I just decided that I wasn't going to be leaving this country going anywhere."¹⁷⁰

He gave several reasons to *New York Times* columnist James Reston as to why he was not going overseas. One of them was that "we have no vice president," a point he raised in the context of

165. See 3 THE PRESIDENTIAL RECORDINGS: LYNDON B. JOHNSON—THE KENNEDY ASSASSINATION AND THE TRANSFER OF POWER, NOVEMBER 1963–JANUARY 1964, at 311–12, 319, 335, 340 (Kent B. Germany & Robert David Johnson eds., 2005) [hereinafter JOHNSON RECORDINGS]. Ultimately, Johnson did briefly cross the U.S.–Canadian border for part of a one-day visit to Vancouver, Canada in September 1964. See *Foreign Travel Schedule of President Lyndon B. Johnson*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN [hereinafter OFF. OF THE HISTORIAN], <https://history.state.gov/departments/history/travels/president/johnson-lyndon-b> (last visited Jan. 30, 2022).

166. See Goldstein, *Taking*, *supra* note 24, at 965.

167. See NELSON, *supra* note 161, at 659–60; see also BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 8–10 (1968); *Two Old Timers Next in Line for Presidency of U.S.*, CHI. TRIB., Dec. 1, 1963, at 30.

168. See JOHNSON RECORDINGS, *supra* note 165, at 311–12.

169. *Id.* at 312.

170. *Id.* at 319.

McCormack's and Hayden's age.¹⁷¹ In a conversation with confidante Jim Rowe around the same time, he said that with "McCormack and . . . Hayden back there in the chair, and no vice president . . . we didn't think we better be traveling his year . . . out of the United States."¹⁷² Johnson emphasized the point a second time in their conversation that "we [have] had an unusual situation, no vice president."¹⁷³

A few months later, Johnson conveyed the same message to *New York Times* columnist C.L. Sulzberger:¹⁷⁴

I don't have any plans to see . . . [President Charles de Gaulle] as of now. But after the elections, when there is a vice president and I can travel, I am not averse to meeting anyone But many people are alarmed whenever I walk across the street. You can't take any chances with the thought of a man like . . . McCormack moving into the White House.¹⁷⁵

Despite his obvious concern and dissatisfaction with the age and health of the legislators in the line of succession and the clear disruption it caused both him and his Cabinet secretaries, Johnson did not conclude that, under the Constitution, the Secretary of State was the next rightful successor, even in private discussions with confidantes. He took the constitutionality of legislative succession to be a given.

Moreover, much like his directive restricting Cabinet travel, Johnson's decision not to conduct any overseas travel for the first fourteen months of his presidency had important, real-world ramifications for his first administration. For a president, foreign trips are widely thought to be a valuable tool in the conduct of American foreign policy.¹⁷⁶ Presidential visits often have the benefit of improving relations with foreign leaders, enhancing support for the United States and its policies in the host country, and boosting American prestige

171. *Id.* at 335.

172. *Id.* at 340.

173. *Id.*

174. *See* C.L. SULZBERGER, AN AGE OF MEDIOCRITY 105 (1973).

175. *Id.*; *see also* SEBASTIAN REYN, ATLANTIS LOST 441 n.31 (2010).

176. *See, e.g.*, ELMER PLISCHKE, CONDUCT OF AMERICAN DIPLOMACY 49–55 (2d ed. 1962); RICHARD J. ELLIS, PRESIDENTIAL TRAVEL 197, 203 (2008); KENNETH T. WALSH, AIR FORCE ONE 3, 13, 41, 71, 225 (2003).

worldwide.¹⁷⁷ In the case of France and the United States, the relationship was important and in need of shoring up. De Gaulle was expecting Johnson to meet with him overseas and Johnson's refusal did not help matters with France, as the ties between the two nations were becoming increasingly frayed.¹⁷⁸ In sum, the President's choice to limit his own travel constituted an important foreign policy decision in and of itself, one that was dictated to a great extent by concern over legislative succession.¹⁷⁹

The Johnson administration's support for legislative succession was manifested in other ways. Attorney Lawrence O'Brien served as White House legislative liaison for both Presidents Kennedy and Johnson and later as Postmaster General under Johnson. In an oral history recorded in 1986, O'Brien discussed McCormack's place in the line of succession following Kennedy's assassination. He recalled that "[n]obody ever imagines anything happening that would bring you to the speaker."¹⁸⁰ In that same vein, he also was concerned at the time about McCormack's and Hayden's advanced age.¹⁸¹ Both comments clearly reflect that O'Brien—who had himself been in the line of succession—saw legislators to be lawful successors to the presidency.

In 1964, during congressional debate over what would become the Twenty-Fifth Amendment, former Attorney General Brownell advocated that any constitutional amendment should return presidential succession to the Cabinet secretaries.¹⁸² Such an approach, he testified, "has the advantage over the post-1947 succession plan of not involving the contemporaneous disruption of leadership of the legislative branch

177. See *supra* note 176.

178. See James Reston, *The President's Polite 'No' to de Gaulle*, N.Y. TIMES, Jan. 10, 1964, at 42.

179. See, e.g., *id.* Legislative succession would later have similar ramifications for future Speaker Carl Albert when he was next in line to the presidency. See Carl Albert, *The Most Dramatic Events of My Life*, OKLA. STATE UNIV. OUTREACH, Mar. 1974, at 4, 6 (noting that the Secret Service "would have had to go with me if I left Washington, so I never left the city [while I was the presidential successor]").

180. Oral History Interview No. VII by Michael L. Gillette, LBJ Presidential Library, with Lawrence F. O'Brien, in N.Y.C., N.Y., at 5–6 (Feb. 12, 1986) (interview transcript on file with the LBJ Presidential Library).

181. See *id.* at 6.

182. See *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Const. Amendments of the S. Comm. on the Judiciary*, 88th Cong. 138 (1964) (statement of Herbert Brownell, President, New York City Bar Association).

of the Government at a time when there is disruption in the leadership in the executive branch.”¹⁸³ Even though Brownell was out of government and deemed the statute imprudent, he did not question its constitutionality.

In January 1965, President Johnson submitted the administration’s proposed constitutional amendment regarding presidential succession and inability, which in modified form, would ultimately become the Twenty-Fifth Amendment.¹⁸⁴ Despite a golden opportunity to urge repeal of the legislative succession provisions of the 1947 Act, the administration made no mention of doing so.¹⁸⁵ As such, the administration could be seen as tacitly accepting the principle yet again.¹⁸⁶

Thus, the first fourteen months of the Johnson presidency afford repeated examples of executive branch practice that prepared all concerned for implementation of legislative succession, a very real possibility during this period.

E. The Nixon Administration

In early 1964, former Vice President and attorney Richard Nixon published an article in the *Saturday Evening Post* in which he implicitly acknowledged the constitutionality of legislative succession. He observed that “since 1947 . . . the line of succession to the Presidency has run: Vice President, Speaker of the House of

183. *Id.*

184. See Special Message to the Congress on Presidential Disability and Related Matters (Jan. 28, 1965), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 100 (1966).

185. See *id.* at 100–03.

186. See BAYH, *supra* note 167, at 93–95. An early draft of Senate Joint Resolution 139, which was drafted by the Senate Judiciary Committee and which would later be modified to become the Twenty-Fifth Amendment, did include removal of the Speaker and President pro tempore from the line of succession. See Draft of S.J. Res. 139, 88th Cong. § 6(a)(1) (1963), in Herbert Brownell Papers, Dwight D. Eisenhower Presidential Library & Museum, Presidential Succession Materials, File No. 4, (on file with author); Feerick, *supra* note 24, at 17. That language was later dropped due to concerns over antagonizing McCormack and Hayden. See BAYH, *supra* note 167, at 40–42, 47–50, 93–95, 100; Feerick, *supra* note 24, at 17; see also Brown & Cinquegrana, *supra* note 16, at 1400. The author would like to thank Dean John Feerick and Professor Joel Goldstein for their thoughts in this vein.

Representatives, President pro tempore of the Senate, the Secretary of State.”¹⁸⁷ Later that year, during testimony before the Senate Judiciary Committee, Nixon once again noted his tacit acceptance of legislative succession. The former Vice President commented matter-of-factly that “Speaker McCormack . . . is the next in line in succession.”¹⁸⁸ Several years earlier, it will be recalled that Nixon had opposed President Eisenhower’s suggestion that the administration urge repeal of the 1947 Act’s legislative succession provisions.¹⁸⁹

The question of legislative succession also came up on numerous occasions during Nixon’s presidency. The issue emerged because the Republican President was threatened with impeachment due to disclosure of his role in the Watergate scandal and due to the Department of Justice’s simultaneous criminal investigation of Vice President Spiro Agnew. Both investigations ultimately resulted in resignations. In the summer of 1973, Attorney General Elliot Richardson informed White House Chief of Staff Alexander Haig that Vice President Agnew was under investigation for accepting bribes.¹⁹⁰ Given Nixon’s ongoing legal woes stemming from the concurrent Watergate scandal, Haig became deeply concerned that both the President and Vice President might be impeached or removed.¹⁹¹ At this juncture, the Speaker was Democrat Carl Albert.

Haig immediately relayed news about Agnew to White House special counsel Fred Buzhardt.¹⁹² Astonished, Buzhardt remarked that, with both Nixon and Agnew in legal jeopardy, “[y]ou could have a coup d’état with the Legislative Branch taking over the Executive Branch under the cover of the Constitution. The Speaker of the House would become [Acting] President.”¹⁹³ In exasperation, Haig replied “[b]ut he’s a Democrat. That would reverse the results of the election. We’ve got to find a way to decouple these two situations and deal with

187. S. SUBCOMM. ON CONST. AMENDMENTS, 93D CONG., SELECTED MATERIALS ON THE TWENTY-FIFTH AMENDMENT, S. DOC. NO. 93-42, 93 (Comm. Print 1973) (including for the record Richard M. Nixon, *We Need a Vice President Now*, SATURDAY EVENING POST, Jan. 1, 1964).

188. *Id.* at 92.

189. *See supra* note 111 and accompanying text.

190. *See* ALEXANDER M. HAIG, JR. WITH CHARLES MCCARRY, *INNER CIRCLES* 350–53 (1992).

191. *See id.* at 350–51.

192. *See id.*

193. *Id.* at 351.

them one at a time. Otherwise, they'll go down together and the country will go with them.”¹⁹⁴

In mid-June, the Vice President met with Nixon and Haig to urge their assistance with respect to the Justice Department probe.¹⁹⁵ Agnew brought up legislative succession during the conversation in an attempt to sway Nixon and Haig over to his side.¹⁹⁶ The Vice President commented in the meeting that “[t]hey’re trying to get both of us at the same time and get Carl Albert to be [Acting] president . . . that’s what it really is.”¹⁹⁷

In September, with the Agnew matter coming to a head, Robert Dixon, the Assistant Attorney General for OLC, completed a legal opinion about whether a sitting Vice President could be subject to federal criminal prosecution.¹⁹⁸ While objecting to criminal immunity for a sitting Vice President, Dixon noted that “[i]f a Vice President is under indictment or sentence of imprisonment, it could be claimed that he is incapacitated to succeed to the Presidency, and that the Speaker of the House of Representatives is next in line of succession.”¹⁹⁹ For the remainder of his brief discussion on what to do in the context of vice-presidential inability, Dixon gave no hint that he questioned the validity of legislative succession.²⁰⁰

In a memoir of his tenure as Solicitor General during the same period, Robert Bork looked back on the period surrounding Agnew’s investigation. A firm believer in executive power,²⁰¹ Bork observed that “[n]o one wanted the presidency to be passed to Carl Albert . . . then-speaker of the House.”²⁰² Despite this widespread sentiment

194. *Id.*

195. *See* RAY LOCKER, HAIG’S COUP 101–04 (2019).

196. *See id.* at 103, 147.

197. *Id.* at 103; *see also id.* at 147.

198. Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Off. of Legal Couns., Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973), <https://fas.org/irp/agency/doj/olc/092473.pdf>.

199. *Id.* at 38.

200. *See id.* For more on vice-presidential incapacity, *see generally* Brownell, *supra* note 57; Roy E. Brownell II, *Vice Presidential Inability: Historical Episodes That Highlight a Significant Constitutional Problem*, 46 PRESIDENTIAL STUD. Q. 434 (2016).

201. *See, e.g.,* Michael Ratner & Margaret Ratner, *Bork Would Rubber-Stamp the Imperial Presidency*, L.A. TIMES, (Sept. 14, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-09-14-me-4919-story.html>.

202. ROBERT H. BORK, SAVING JUSTICE 54 (2013).

within the administration, like Dixon, Bork accepted the constitutionality of legislative succession.

This was made clear in a filing he made as Solicitor General. During the Agnew investigation, the Vice President raised his claim that he was constitutionally immune from prosecution while in office. Bork wrote and submitted a memorandum in federal district court arguing against Agnew's position.²⁰³ In the memorandum, DOJ—under Bork's signature—noted “that the successor to [the presidential] office would be the Speaker of the House of Representatives.”²⁰⁴ Thus, in a filing in federal court, DOJ demonstrated once again its acceptance of legislative succession.

Following Agnew's resignation, the threat of impeachment began to loom ever more ominously over Nixon after the President's dismissal of Special Prosecutor Archibald Cox. With no Vice President in office, senior members of the administration grew increasingly distressed about the possibility of the Speaker succeeding Nixon. During a conversation with Nixon on October 23, 1973, Secretary of State Henry Kissinger made dismissive comments about Speaker Albert as a potential successor. Referring to recent U.S. efforts to end the Yom Kippur War, the Secretary groused to Nixon, “Can you see Carl Albert in this crisis[?]”²⁰⁵ The next day it was Nixon's turn to belittle Albert to Kissinger. The President remarked that “if Albert had been faced with” the Yom Kippur War he would not have been able to address the

203. See Memorandum from Robert H. Bork for the U.S. Concerning the Vice President's Claim of Const. Immunity (Oct. 5, 1973), *In re Proc. of the Grand Jury Impaneled Dec. 5, 1972: Application of Spiro T. Agnew*, Vice President of the U.S. (D. Md. 1973) (No. 73-965).

204. *Id.* at 20.

205. Telephone Conversation between Richard Nixon, President of the U.S., and Henry Kissinger, Secretary of State (Oct. 24, 1973), https://findit.library.yale.edu/images_layout/view?parentoid=12480680&increment=76; see also Schuker, *supra* note 12, at 108; ROBERT DALLEK, NIXON AND KISSINGER 531–32 (2007). It bears noting that by making these disparaging remarks about Speaker Albert, Secretary Kissinger was not eyeing the Oval Office for himself. Having been born overseas, he was not next in line after Speaker Albert and President pro tempore James Eastland. See U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President[.]”); see also *United States v. Sun-Diamond Growers*, 138 F.3d 961, 976 n.16 (D.C. Cir. 1998) (“Secretary of State Madeleine Albright, having been born abroad, is ineligible [to become Acting President].”). At this juncture, the next eligible individual in the executive branch would have been Secretary of the Treasury George Shultz.

situation.²⁰⁶ In his memoirs, Kissinger recalled a similar exchange, referring to Speaker Albert as the “next in line to the Presidency.”²⁰⁷

In November 1973, Haig met with White House lawyers Buzhardt and Leonard Garment and Press Secretary Ron Zeigler to discuss the President’s perilous political and legal situation.²⁰⁸ The two attorneys proposed that Nixon resign from the presidency due to Watergate.²⁰⁹ Haig responded with frustration, “We don’t even have a Vice-President.”²¹⁰ Journalists Bob Woodward and Carl Bernstein described the ensuing discussion: “Several disparaging comments followed about the prospect of House Speaker Carl Albert succeeding to the presidency. He was next in line until the vice-presidency was filled, and he was a Democrat.”²¹¹ Notably, even with two White House lawyers in the room, no one suggested that legislative succession was unconstitutional. This was the case even though such a legal position would have alleviated the staff’s concerns about a change in partisan control of the executive branch.

That same month, former Kennedy aide Ted Sorensen began taking steps that would have confirmed the White House’s worst fears. At the behest of Albert, Sorensen drafted a “comprehensive contingency plan” for the Speaker in case he became Acting President.²¹²

206. See Telephone Conversation between Richard Nixon, President of the U.S., and Henry Kissinger, Secretary of State (Oct. 25, 1973), https://findit.library.yale.edu/images_layout/view?parentoid=12480682&increment=72; see also Schuker, *supra* note 12, at 116–17.

207. HENRY KISSINGER, *YEARS OF UPHEAVAL* 598 (1982).

208. See BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 21, 27–28 (1976).

209. See *id.* at 27.

210. *Id.* at 28. Haig was deeply concerned about partisan control of the White House changing hands. See, e.g., LOCKER, *supra* note 195, at 101, 147.

211. WOODWARD & BERNSTEIN, *supra* note 208, at 28. One of Nixon’s top White House aides was John Ehrlichman. In his memoirs, Ehrlichman seemed to acknowledge the Speaker’s place in the line of succession. He referred to Speaker Albert as the “third-ranking Constitutional officer[.]” which appears to have been a loose way of referring to the line of succession. JOHN EHRLICHMAN, *WITNESS TO POWER* 197 (1982).

212. 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/84ebaa61-9cfl-4817-836e-a993e7e0e980/>; see Memorandum from Theodore C. Sorensen to Hon. Carl Albert, Speaker of the House of Reps. (Nov. 8, 1973) [hereinafter Sorensen Memo] (on

Sorensen proposed that, if the Speaker became Acting President, Albert should issue a public statement along the following lines:

At no time did I seek this awesome burden; but I cannot shrink from my responsibility. Under the statute long ago considered with care and lawfully enacted by the representatives of the people convened in Congress, my election by the House of Representatives as Speaker placed me next in line for the high office to which I have now succeeded.²¹³

Clearly, the former White House official would not have undertaken this effort if he had believed legislative succession to be unconstitutional.

Finally, during the Nixon administration (if not earlier), the executive branch began taking steps to ensure that those in the line of succession could be contacted quickly in case of an emergency. In 1972 and 1973 (if not before), the White House Office of Emergency Preparedness included both the Speaker and President pro tempore in its coordination efforts.²¹⁴ The White House circulated a *Communications Handbook for Central Locator System* to presidential successors.²¹⁵ In the *Handbook* given to President pro tempore James Eastland in 1972 and an updated *Handbook* given to him in 1973, the

file with the University of Oklahoma, Carl Albert Center, Congressional and Political Collections, Legislative Box 191, Folder 25).

213. Sorensen Memorandum, *supra* note 212, at 4.

214. See Letter from G.A. Lincoln, Director, Exec. Off. of the President, Off. of Emergency Preparedness, to the Hon. James O. Eastland, President Pro Tempore, U.S. Senate, and Communications Handbook for Cent. Locator System 7 (Sept. 6, 1972), <https://www.archives.gov/files/declassification/iscap/pdf/2010-081-umissdoc28.pdf> [hereinafter Lincoln Letter and Handbook]; Letter from Darrell M. Trent, Acting Dir., Exec. Off. of the President, Off. of Emergency Preparedness, to the Hon. James O. Eastland, President Pro Tempore, U.S. Senate, and Communications Handbook for Central Locator System 7 (May 4, 1973) [hereinafter Trent Letter and Handbook] (on file with author); see also Second Fordham Report, *supra* note 18, at 958. For more on Eastland's changed status during the two vice-presidential vacancies of the 1970s, see LEE ANNIS JR., BIG JIM EASTLAND 276–77 (2016).

215. See Lincoln Letter and Handbook, *supra* note 214; Trent Letter and Handbook, *supra* note 214.

list of presidential successors included legislators pursuant to the 1947 statute.²¹⁶

Eastland was given explicit instructions that “[s]hould you leave the Washington Metropolitan Area, you should submit your itinerary to” the White House.²¹⁷ Similarly, “[d]uring periods of emergency, you must keep the Central Locator informed of your whereabouts within the Washington Metropolitan Area as well as elsewhere.”²¹⁸ If the President pro tempore could not reach the White House communications agency through normal channels, he was told to “[c]all [his] local operator for assistance, and then state: ‘This is a FLASH EMERGENCY call.’ Then give your name and title and the number you are calling.”²¹⁹ In addition, each presidential successor was given a code name.²²⁰ Albert was assigned “Flagday” and Eastland “Four-finger.”²²¹ Once again, the executive branch had gone to considerable lengths to try to ensure that legislative succession would be implemented as smoothly as possible in a crisis.

F. The Ford Administration

Agnew’s successor as Nixon’s Vice President was Gerald Ford, who had taken office pursuant to Section two of the Twenty-Fifth Amendment. In early 1974, Ford—an attorney—humorously touched on the principle of legislative succession. Speaking at an event at the Washington Press Club, the Vice President good naturedly gestured to

216. See Lincoln Letter and handbook, *supra* note 214, at 7; Trent Letter and Handbook, *supra* note 214, at 7. Attorney General Richard Kleindienst referred to Eastland as having served as “president pro tem of the Senate and twice acting vice president of the United States.” RICHARD G. KLEINDIENST, JUSTICE 124 (1985). Kleindienst’s allusions to Eastland’s service as “acting vice president” during the vice-presidential vacancies of the Nixon and Ford administrations imply that he saw the President pro tempore as part of the line of succession. *Id.*

217. Lincoln Letter and Handbook, *supra* note 214, at 2; Trent Letter and Handbook, *supra* note 214, at 2.

218. Lincoln Letter and Handbook, *supra* note 214, at 2; Trent Letter and Handbook, *supra* note 214, at 2.

219. Lincoln Letter and Handbook, *supra* note 214, at 3; Trent Letter and Handbook, *supra* note 214, at 3.

220. Lincoln Letter and Handbook, *supra* note 214, at 7; Trent Letter and Handbook, *supra* note 214, at 7.

221. Lincoln Letter and Handbook, *supra* note 214, at 7; Trent Letter and Handbook, *supra* note 214, at 7.

Speaker Albert, “You and I, Carl, are probably the only two people at this table who would rather be right than President. I don’t want to suggest that the thought has ever crossed my mind.”²²²

Following Nixon’s resignation due to the Watergate scandal, the ensuing Ford administration also had occasion to evaluate legislative succession. This was because Ford did not have a Vice President for the first four months of his presidency. Not until December 19, 1974, did Nelson Rockefeller assume the vice presidency under the terms of the Twenty-Fifth Amendment.²²³

During the period when the Ford administration had no Vice President, the President stated publicly that “the next constitutional successor [is] presently the Speaker of the House of Representatives.”²²⁴ In his memoirs, President Ford described his frustration at Congress seeming to drag its feet in taking action on the Rockefeller nomination. The vacancy in the vice presidency meant that Albert remained the next in the line of succession. Recalled Ford, “I was not comfortable with the thought that House Speaker Carl Albert would become [Acting] President automatically should something happen to me, nor was Carl happy to have that possibility hanging over his head.”²²⁵ Ford’s remarks reflected his dissatisfaction with the prospect of partisan control of the presidency switching. Yet, there is no evidence that he promoted or supported the idea that legislative succession was unconstitutional even though such an approach would have addressed his immediate concerns. Twenty years later, Ford had not

222. ROBERT T. HARTMANN, *PALACE POLITICS: AN INSIDE ACCOUNT OF THE FORD YEARS* 110 (1980).

223. See *The Establishment and First Uses of the 25th Amendment*, GERALD R. FORD PRESIDENTIAL LIBR. & MUSEUM [hereinafter *First Uses of the 25th Amendment*], <https://www.fordlibrarymuseum.gov/library/exhibits/amendment25/25thamendment.asp> (last visited Feb. 2, 2022).

224. *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Const. Amends. of the Comm. on the Judiciary*, 94th Cong. 181 (1975) [hereinafter *Examination Hearing*] (Remarks of Gerald Ford, President of the United States, and Question and Answer Session at the Society of Professional Journalists).

225. GERALD R. FORD, *A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD* 223 (1979). In his memoirs, Ford’s senior aide Robert Hartmann discussed the possibility of Speaker Albert becoming Acting President without betraying any hint that he harbored constitutional doubts about legislative succession. See HARTMANN, *supra* note 222, at 172 (noting after Ford’s swearing in as President that “Speaker Carl Albert [was] once again number one in succession to the Presidency”).

changed his views. He noted that “after Vice President Agnew resigned, the Speaker of the House, Carl Albert, was next in line.”²²⁶ Indeed, he reiterated at another juncture that “as Speaker of the House [he was] . . . next in line to the presidency.”²²⁷

Looking back on the early months of Ford’s tenure four decades later, his Chief of Staff Donald Rumsfeld reflected on presidential succession. Rumsfeld, who himself twice served in the line of succession as Secretary of Defense and was actively involved in continuity-of-government exercises during the 1980s,²²⁸ noted that “Ford’s successor as President would have been Carl Albert[,] . . . the Speaker of the U.S. House of Representatives.”²²⁹

As was the case with Speakers Martin and McCormack, Speaker Albert received a Secret Service detail when he became the statutory successor. Albert was protected by the Secret Service twice: (1) between the time of Vice President Agnew’s October 10, 1973, resignation and Ford’s taking the oath as Vice President on December 6, 1973; and (2) after Vice President Ford’s accession to the Oval Office on August 9, 1974, and lasting until Rockefeller’s elevation to the second office on December 19 of that same year.²³⁰ Unlike his predecessors, Albert did not decline the protective detail. Recalled the Speaker, “36 men and women from the Secret Service [were] assigned to me for protective purposes. They guarded me around the clock and went with me wherever I went.”²³¹

In addition to the agents assigned to his person, the Speaker remembered that the Secret Service “installed a hot line by my bed to

226. Panel Discussion, *in* PRESIDENTIAL DISABILITY: PAPERS AND DISCUSSION ON INABILITY AND DISABILITY AMONG U.S. PRESIDENTS 249 (James F. Toole & Robert J. Joynt eds. 2001) (quoting Ford).

227. *Id.*

228. *See* JAMES MANN, *RISE OF THE VULCANS: THE HISTORY OF BUSH’S WAR CABINET* 138, 140, 143, 145 (2004).

229. DONALD RUMSFELD, *WHEN THE CENTER HELD: GERALD FORD AND THE RESCUE OF THE AMERICAN PRESIDENCY* 90 (2018).

230. *See* CARL ALBERT WITH DANNEY GOBLE, *LITTLE GIANT: THE LIFE AND TIMES OF SPEAKER CARL ALBERT* 360–61, 366–67 (1990); *see also* JAMES CANNON, *GERALD R. FORD: AN HONORABLE LIFE* 128 (2013); JAMES CANNON, *TIME AND CHANCE: GERALD FORD’S APPOINTMENT WITH HISTORY* 219–20 (1994); HARTMANN *supra* note 222, at 16; *First Uses of the 25th Amendment*, *supra* note 223; HILL WITH MCCUBBIN, *supra* note 139, at 417, 419; PETRO WITH ROBINSON, *supra* note 139, at 108; PARR WITH PARR, *supra* note 139, at 144.

231. Albert, *supra* note 179, at 6.

connect me directly to the White House in the event of a national emergency.”²³² In his words, the Secret Service also “X-rayed everything that entered” his dwelling.²³³ In yet another sign of how seriously the executive branch took Albert’s status as presidential successor, the Central Intelligence Agency (CIA) began giving the Speaker intelligence briefings.²³⁴

Members of the Ford Justice Department did not contest the constitutionality of legislative succession either. Antonin Scalia, who served as Assistant Attorney General for OLC during the Ford years, appeared at a 1975 Senate Judiciary Subcommittee hearing about the Twenty-Fifth Amendment. There, in a wide-ranging discussion of the legal ambiguities surrounding succession, the future Justice had an opportunity to discuss the role of the Speaker on a number of occasions.²³⁵ Notably, Scalia—never a shrinking violet about the unity and powers of the executive branch²³⁶—did not once question the constitutionality of legislative succession.²³⁷ Indeed, he took it for granted, at one point simply noting that the “order of succession . . . consists of the Speaker of the House, the President pro tempore of the Senate and then Cabinet officers beginning with the Secretary of State.”²³⁸

G. The Carter Administration

The administration of Jimmy Carter reaffirmed legislative succession, both formally and informally. The Carter White House undertook preliminary work on trying to establish executive branch protocols to address various contingencies (e.g., the death or incapacity of both the President and Vice President).²³⁹ A memorandum provided to Vice

232. ALBERT WITH GOBLE, *supra* note 230, at 360; *see also id.* at 366–67.

233. *Id.* at 360.

234. *See* Gup, *supra* note 212.

235. *See Examination Hearing*, *supra* note 224, at 47, 50–57.

236. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

237. *See Examination Hearing*, *supra* note 224, at 47, 50–57.

238. *Id.* at 51.

239. *See* Memorandum from Frank Wiggins to Mike Berman, Couns. to Vice President Walter Mondale, Re: the 25th Amendment and Beyond, at 8 (1993), *in* OFF. OF WHITE HOUSE COUNS., CONTINGENCY PLANS: DEATH OR DISABILITY OF THE PRESIDENT (Mar. 16, 1993), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials.

President Walter Mondale’s counsel demonstrated clear acceptance of legislative succession. This document proposed that the Speaker play a role in determining whether the Vice President was incapacitated:

What is to happen if both the President and the Vice President are unable to function . . . ? [Under the 1947 statute,] there are no procedures articulated for the decision [But] 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.²⁴⁰

On St. Patrick’s Day 1980, President Carter held a public event, which included the Speaker of the House Tip O’Neill. Carter noted the Speaker’s presence to the assembled guests and observed that O’Neill was “the third [sic] in line of succession to the Presidency itself.”²⁴¹

Joseph Califano, an attorney who served as a White House staffer under President Johnson and in the line of succession as Secretary of Health and Human Services under President Carter, remarked on succession in his memoirs. He noted that the “Speaker of the House . . . was next in line to succeed to the presidency”²⁴²

H. The Reagan Administration

Events during the administration of Ronald Reagan triggered a great deal of discussion about legislative succession. Indeed, Reagan’s presidency marks the only occasion since 1947 when someone within an administration publicly seemed to imply that an executive branch official—and not a senior legislator—was the next in line to the Oval Office.

On March 30, 1981, John Hinckley attempted to shoot and kill Reagan. A bullet struck the President and he was rushed to George Washington University Hospital, where he was soon under anesthesia

240. *Id.* at 6–8.

241. JIMMY CARTER, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1980–81, at 501 (1981). The Speaker is actually second, though in some scenarios such as the case with Carter’s remarks, the Speaker is mistakenly referred to as third, which would incorrectly include the President himself in the line of succession. *See supra* note 101 and accompanying text.

242. JOSEPH A. CALIFANO, JR., INSIDE: A PUBLIC AND PRIVATE LIFE 296 (2004).

as surgeons battled to save his life. At the time, Vice President George H.W. Bush was on a plane to Texas with communication difficult to establish.²⁴³ Members of the Cabinet and senior White House aides began to assemble in the Situation Room at the White House to help address the crisis.²⁴⁴ Senior White House aides James Baker, Ed Meese, Larry Speakes, and Lyn Nofziger headed to the hospital to join fellow staffer Michael Deaver to be near Reagan; the decision was made that Alexander Haig—at this point the Secretary of State—would serve as the five staffers’ “contact point” at 1600 Pennsylvania Avenue.²⁴⁵

During the confused deliberations in the Situation Room, Haig asserted his primacy in a matter that seemed to encompass the line of succession. In the conclave, Haig stated to the assembled Cabinet secretaries and White House aides that the President is “on the operating table So the helm is right here. And that means right here in this chair for now, constitutionally, until the vice president gets here.”²⁴⁶

Author Del Quentin Wilber characterized the setting immediately following Haig’s assertion:

For a moment, the room grew quiet. [White House counsel Fred] Fielding turned to his right and glanced at [National Security Advisor] Richard Allen; catching Allen’s eye, Fielding shook his head. Both men wondered the same thing: could it be true that the secretary of state did not understand presidential succession . . . ? [H]ow could he not know that after the vice president the

243. See DEL QUENTIN WILBER, *RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN* 131–32, 148 (2011); HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT” 84, 87 (1992); LAURENCE I. BARRETT, *GAMBLING WITH HISTORY: RONALD REAGAN IN THE WHITE HOUSE* 113, 115 (1983).

244. See WILBER, *supra* note 243, at 148–51; ABRAMS, *supra* note 243, at 84, 87–88; BARRETT, *supra* note 243, at 113–15; Fred F. Fielding, Speech at Fordham University School of Law 12–13 (Apr. 16, 2010) [hereinafter Fielding Speech] (on file with author). For the White House counsel’s first-hand recollection, see Fielding Speech, *supra* at 10–22.

245. See, e.g., WILBER, *supra* note 243, at 112, 131; ABRAMS, *supra* note 243, at 85–86, 88, 108, 110–11, 116; BARRETT, *supra* note 243, at 112–18; Fielding Speech, *supra* note 244, at 12–14; LARRY SPEAKES WITH ROBERT PACK, *SPEAKING OUT: THE REAGAN PRESIDENCY FROM INSIDE THE WHITE HOUSE* 5–6 (1988).

246. WILBER, *supra* note 243, at 167. For Haig’s ambition, see LOCKER, *supra* note 195, at 305, 307–08, 337, 346, 357.

Speaker of the House, not the secretary of state, was next in line to succeed the president . . . ?

. . . .

But at this difficult moment, the last thing Allen or Fielding wanted was a confrontation with the combustible secretary of state over his authority. The best course of action, they believed, would be to simply ignore Haig's bluster and try to work around him.²⁴⁷

Not long afterward, Deputy White House Press Secretary Speakes departed the hospital and proceeded straightaway to meet with the press corps at the White House, completely in the dark as to the ongoing Situation Room meeting.²⁴⁸ Speakes then took questions about the assassination attempt and the government's response but had little new to provide; as a result, the session quickly spiraled downhill.²⁴⁹ Viewing on television Speakes' fumbling responses to reporters' questions, Haig was overcome with anger and raced over to the press conference.²⁵⁰ Once the Secretary reached the White House pressroom, in Fielding's words, Haig unsuccessfully attempted to provide "reassurance to the nation."²⁵¹ Breathing heavily and sweating profusely after having raced up several flights of stairs, Haig took the podium and began to answer questions.²⁵² One reporter asked "[w]ho

247. WILBER, *supra* note 243, at 167–68; *see also id.* at 159.

248. *See* BARRETT, *supra* note 243, at 117; SPEAKES WITH PACK, *supra* note 245, at 7; ABRAMS, *supra* note 243, at 95, 105.

249. *See* Larry Speakes, Press Briefing at The White House at 1–2 (Mar. 30, 1981) (transcript on file with Ronald Reagan Presidential Library & Museum, James S. Brady Files, Press Conferences and Press Releases—Assassination Attempt, 1 of 3 documents, Box: OA 16783); *see also* ABRAMS, *supra* note 243, at 105–06; BARRETT, *supra* note 243, at 117. For selected video footage of the day's press events, *see* David Gergen, Larry Speakes, Alexander Haig (video problem), Vice President Bush's Remarks regarding Assassination Attempt, Press Room, Master Tape #34Bbcd, Ronald Reagan Presidential Library, "White House Staff Remarks in Press Room after Assassination Attempt," March 30, 1981, <https://www.youtube.com/watch?v=UGr-wUEDAqSQ&t=10s>.

250. *See* WILBER, *supra* note 243, at 171–74; *see also* ABRAMS, *supra* note 243, at 96, 106–07; BARRETT, *supra* note 243, at 117.

251. Fielding Speech, *supra* note 244, at 17; *see also* WILBER, *supra* note 243, at 173–75; ABRAMS, *supra* note 243, at 96, 107.

252. *See* WILBER, *supra* note 243, at 173–74; ABRAMS, *supra* note 243, at 107; BARRETT, *supra* note 243, at 117–18; Fielding Speech, *supra* note 244, at 16–17.

is making the decisions for the government right now?”²⁵³ Haig’s reply would forever tarnish his legacy.²⁵⁴

253. Alexander Haig, U.S. Sec’y of State, Press Briefing at The White House at 1–2 (Mar. 30, 1981) [hereinafter Haig Press Briefing] (transcript on file with Ronald Reagan Presidential Library & Museum, James S. Brady Files, Press Conferences and Press Releases—Assassination Attempt, 1 of 3 documents, box: OA 16783).

254. See, e.g., MICHAEL K. DEAVER WITH MICKEY HERSKOWITZ, BEHIND THE SCENES 30–31 (1987) (“*I am in control here*. Those words would haunt Haig [H]e never did regain the stature he had won earlier as the man who held together Richard Nixon’s faltering White House during Watergate.”); DAVID GERGEN, EYEWITNESS TO POWER: THE ESSENCE OF LEADERSHIP NIXON TO CLINTON 175 (2000) (“Haig paid dearly for his mistake. That phrase, ‘I am in control here,’ hung like an albatross, destroying whatever hopes he had to be elected president One slip of the tongue offset nearly three decades of meritorious service. That was a cruel price.”); PETER BAKER & SUSAN GLASSER, THE MAN WHO RAN WASHINGTON: THE LIFE AND TIMES OF JAMES A. BAKER III 155 (2020) (“Haig looked like an unstable and power-hungry fool.”); WILBER, *supra* note 243, at 222 (“For the rest of his life . . . [Haig] was most often remembered as the official who, on the day of the assassination attempt, asserted on national television that he was ‘in control’ and then provided a mangled version of presidential succession.”); 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 (“[Haig’s] blurted declaration has become a classic Washington moment—and one that would end Haig’s own presidential suitability. A powerful Cabinet secretary had made a shocking mistake during a national crisis.”); Alan Peppard, *Command and Control: Tested Under Fire*, DALL. MORNING NEWS (May 13, 2015), <http://res.dallasnews.com/interactives/reagan-bush/> (quoting Richard Allen: “I was astounded that he would say something so eminently stupid”); KALT, *supra* note 24, at 96 (“[B]y using the word ‘constitutionally,’ and ignoring the Speaker and PPT, Haig came across as a power grabber at a very inopportune moment.”); Peppard, *supra* (“Haig’s well-known dream of eventually becoming president was crushed by the weight of his own words.”); CHARLES DENYER, TEXAS TITANS: GEORGE H.W. BUSH AND JAMES A. BAKER, III: A FRIENDSHIP FORGED IN POWER 67 (2020) (“[A] blunder of epic proportions made by Haig that sent the completely wrong message to the country.”); William F. Baker & Beth A. FitzPatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need for Reform*, 79 FORDHAM L. REV. 835, 842 (2010) (“[W]ith the Reagan assassination attempt, the nation understandably reacted violently to even the perceived possibility of anybody unlawfully seizing power.”); Wasserman, *supra* note 24, at 345 (likening Haig’s actions to “a bloodless coup”); Liz Dee, *Al Haig and the Reagan Assassination Attempt—“I’m in Control Here”*, ASS’N. FOR DIPLOMATIC STUD. & TRAINING (Mar. 21, 2014) [hereinafter Gammon], <https://adst.org/2014/03/al-haig-and-the-reagan-assassination-attempt-im-in-charge-here/> (quoting Samuel Gammon, the Executive Assistant in the State Department’s

Constitutionally, gentlemen, you have the President, the Vice President, and the Secretary of State in that order and should the President decide he wants to transfer the helm to the Vice President, he will do so. He has not done that. As of now, I am in control here, in the White House, pending the return of the Vice President and in close touch with him. If something came up, I would check with him, of course.²⁵⁵

Haig's comments were as jarring as they were ambiguous, blurring a number of related matters: presidential succession, national command authority over the military, Cabinet officer seniority, and operational control over the situation room.²⁵⁶

The Secretary's words floored other senior Reagan administration officials,²⁵⁷ who interpreted his comments as at least partly implicating the line of succession.²⁵⁸ The reaction in the Situation Room

Management Bureau: Haig's words "sounded like a putsch!"); LOCKER, *supra* note 195, at xiv ("That brief moment in the White House . . . marked Haig forever as impulsive and unstable as he grabbed for power and attempted to fill Reagan's vacuum."); Bill McGowan, *The Al Haig Communication Lesson*, HUFFPOST (Apr. 28, 2010, 5:12 AM), https://www.huffingtonpost.com/bill-mcgowan/hte-al-haig-communication_b_478775.html ("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."); SPEAKES WITH PACK, *supra* note 245, at xi, 11 ("Haig didn't realize it, but from a political standpoint he had just become history . . . Haig's image never recovered from the events of March 30."); MARTIN ANDERSON, *REVOLUTION: THE REAGAN LEGACY* 315 (1990) ("Haig's words sounded ominously like a veiled grasp for power."); *see also* Baker & FitzPatrick, *supra* at 841; BARRETT, *supra* note 243, at 118; CALIFANO, *supra* note 242, at 389; ABRAMS, *supra* note 243, at 108; *infra* note 292.

255. Haig Press Briefing, *supra* note 253.

256. *See* ABRAMS, *supra* note 243, at 116.

257. *See, e.g.*, Wasserman, *supra* note 24, at 345.

258. Whatever his actual intentions, many authorities believe that Haig's remarks did indeed, to some degree, involve succession matters. *See, e.g.*, Amar & Amar, *supra* note 24, at 126 n.83, 136 n.142; Brown & Cinquegrana, *supra* note 16, at 1392 n.4; KALT, *supra*, note 24, at 96; Baker & FitzPatrick, *supra* note 254, at 841; Gammon, *supra* note 254; *infra* notes 269 and 271 (quoting former Attorney General Meese); *see also* ABRAMS, *supra* note 243, at 97, 114–16. Perhaps of note is that Haig phoned Speaker O'Neill at 3:55 PM and began his infamous presser at 4:14 PM. *See He Was Checked, O'Neill Says*, N.Y. TIMES, Apr. 1, 1981, at A23; Haig Press Briefing,

was one of shock and bewilderment.²⁵⁹ Secretary of the Treasury Donald Regan recalled great consternation at Secretary Haig's remarks, including the comments of Director of Central Intelligence William Casey who exclaimed, "[h]e's all wrong—this is unbelievable."²⁶⁰ Another yelled, "[t]hat's a mistake."²⁶¹ Regan himself bellowed, "What's this all about? Is he mad?"²⁶² According to Regan, Secretary of Defense Weinberger roared, "I can't believe this. He's wrong: he doesn't have any such authority."²⁶³

Weinberger, Haig's rival in the situation room and also an attorney, later noted that "the succession devolves, not upon the Secretary of State, but on the Speaker of the House and then the President Pro Tem of the Senate."²⁶⁴ Reagan's National Security Advisor Richard Allen commented thirty years later:

Haig repeatedly insisted—wrongly—that he was in charge of the federal government Haig . . . apparently forg[ot] that the House speaker and the Senate's president pro tempore come before the secretary of state in the line of succession Haig . . . repeatedly insisted—eventually and erroneously in front of the cameras . . . that he was "next in line" in the order of presidential succession.²⁶⁵

Back at George Washington Hospital, Baker and Meese also viewed the press conference.²⁶⁶ In the words of one authority, Haig's

supra note 253. Whether O'Neill was called because he was seen to be the next in line to the presidency, because he was the leader of the House, or because he was the most prominent elected Democrat (or some or all of these factors), is unclear.

259. See ABRAMS, *supra* note 243, at 96–97; WILBER, *supra* note 243, at 175–77; Allen, *supra* note 254; see also HELENE VON DAMM, AT REAGAN'S SIDE 193–94 (1989) (recalling that "Al Haig went to the pressroom to announce that he was in charge. When we in the Situation Room saw him on the TV monitor, Weinberger looked taken aback. Many [in the Situation Room] doubted that Haig was constitutionally correct (he wasn't)").

260. DONALD T. REGAN, FOR THE RECORD 167 (1988).

261. WILBER, *supra* note 243, at 175.

262. REGAN, *supra* note 260, at 167.

263. *Id.*

264. CASPAR W. WEINBERGER, FIGHTING FOR PEACE 90 (1990).

265. Allen, *supra* note 254, at 96.

266. See ABRAMS, *supra* note 243, at 96.

remarks left both men “flabbergasted.”²⁶⁷ Indeed, Baker, a lawyer by training who would later serve in the line of succession as both Secretary of the Treasury and Secretary of State, recalled that Haig “famously misstated the line of presidential succession. Under legislation passed in 1947, the speaker of the House and president pro tempore of the Senate follow the vice president. The secretary of state follows them.”²⁶⁸ Meese, yet another lawyer and later Attorney General, indicated that Haig’s remarks “suggest[ed] a misunderstanding about the presidential line of succession (which actually goes from the President to the Vice President to the Speaker of the House to the President Pro Tempore of the Senate, and only then to the cabinet).”²⁶⁹ Meese, a believer in a strong and unified executive branch,²⁷⁰ reiterated his position three and a half decades later.²⁷¹

Reagan staffer Deaver, who was also at the hospital, expressed the same sentiments. Haig “was dead wrong. The speaker of the House, Tip O’Neill, and the president pro tempore of the Senate were next in line.”²⁷² David Gergen, Reagan’s communications director, echoed those views. An attorney himself, Gergen observed in retrospect that Haig “had . . . mangled the legal line of succession.”²⁷³

Once the Secretary of State got back to the Situation Room, Haig and the Secretary of Defense reportedly exchanged words over constitutional succession and command authority over the military.²⁷⁴ He bellowed to the Secretary of Defense, “[y]ou’d better read the

267. *See id.*

268. JAMES A. BAKER, III WITH STEVE FIFFER, “WORK HARD, STUDY . . . AND KEEP OUT OF POLITICS!” 148 (2006).

269. EDWIN MEESE III, WITH REAGAN: THE INSIDE STORY 83 (1992).

270. *See, e.g.,* Edwin Meese III, *Who Is Responsible for America’s Security*, THE HERITAGE FOUND. (Aug. 19, 2011), <https://www.heritage.org/the-constitution/report/who-responsible-americas-security>.

271. *See* Richard B. Cheney, Edwin Meese III, & Douglas W. Kmiec, *The Vice President—More than an Afterthought?*, 44 PEPP. L. REV. 535, 551 (2017) (“Kmiec: ‘There is the statutory line of succession, as you know. Thanks to Alexander Haig—we will always have a vibrant memory of him invoking the line . . . as he understood it.’ Meese: ‘Well, he was wrong.’”).

272. DEAVER WITH HERSKOWITZ, *supra* note 254, at 30.

273. GERGEN, *supra* note 254, at 174.

274. *See* WILBER, *supra* note 243, at 176–77; ABRAMS, *supra* note 243, at 97; BARRETT, *supra* note 243, at 118–19. Weinberger later disputed that he and Haig had gotten into “‘a violent quarrel’ . . . about who had the authority or anything of the kind.” WEINBERGER, *supra* note 264, at 97.

Constitution.”²⁷⁵ Looking to White House Counsel Fielding for affirmation, Haig inquired whether what he had just said about the line of succession was accurate.²⁷⁶ The White House Counsel answered, “[n]o, Al, it isn’t.”²⁷⁷ Haig simmered but offered no response.²⁷⁸

It is significant that, in this setting in front of several Cabinet secretaries with succession matters very much a live issue, the White House counsel essentially advised the Secretary of State that legislative officials came before him in the line of succession. Fielding’s views were unchanged nearly three decades later. In 2010, he described Haig’s performance as “infamous.”²⁷⁹

Far away from Washington, D.C., Vice President Bush saw Haig’s remarks on television. Though he held his tongue, Bush disapproved of the Secretary’s comments. The Vice President’s executive assistant, Chase Untermeyer, was with Bush when Haig made his assertion. Bush had “a facial reaction. It was the jaw not so much dropping but closing in reaction to what he heard. He didn’t say anything. He didn’t need to.”²⁸⁰ Untermeyer wrote in his diary that night that “[n]either presidential succession nor the national security command structure puts the SecState immediately after the VP.”²⁸¹

Vice President Bush’s daughter, Doro Bush Koch, wrote a memoir of her father’s life.²⁸² In it, she recalled the hours after the assassination attempt on President Reagan when her father, the Vice President, flew back to Washington.²⁸³ According to Koch, her father’s recollection was that:

275. WILBER, *supra* note 243, at 177; *see also* ABRAMS, *supra* note 243, at 97.

276. *See* ABRAMS, *supra* note 243, at 97; BARRETT, *supra* note 243, at 119.

277. ABRAMS, *supra* note 243, at 97; BARRETT, *supra* note 243, at 119. Though the conversation began about command authority, Haig brought the discussion back around to succession.

278. *See* BARRETT, *supra* note 243, at 119.

279. Fielding Speech, *supra* note 244, at 16; *see also id.* at 17 (indicating that the Speaker and President pro tempore come before Cabinet secretaries in the line of succession).

280. Peppard, *supra* note 254.

281. CHASE UNTERMAYER, *WHEN THINGS WENT RIGHT: THE DAWN OF THE REAGAN-BUSH ADMINISTRATION* 42 (2013).

282. *See* DORO BUSH KOCH, *MY FATHER MY PRESIDENT: A PERSONAL ACCOUNT OF THE LIFE OF GEORGE H.W. BUSH* (2d ed. 2014).

283. *See id.* at 192–95.

“I was next in charge. Al Haig had come up to the press room and said he was in charge here, and it was important to get back and keep regular order”—which is Dad’s nice way of saying that . . . the “regular order” for succession would be vice president, then Speaker of the House.²⁸⁴

Conspicuously, in the immediate aftermath of the crisis, the Reagan administration did not publicly endorse Haig’s “claim” that he was the next in line to the presidency. During a press briefing a few hours after the Secretary’s remarks, White House spokesman Speakes explained the difference between presidential succession and command authority over the military. Standing next to Vice President Bush, who had just returned from Texas, the Deputy Press Secretary repudiated Haig’s ostensible succession claim. “Let me get started here so you can understand it. There is a succession. That goes from the President to the Vice President, to the Speaker, to the President Pro Tem.”²⁸⁵ Nevertheless, the White House press corps remained bewildered and deeply concerned by Haig’s remarks, one correspondent going so far as to ask Speakes: “[w]hat precautions are being taken that Haig is not going to try a coup d’[é]tat?”²⁸⁶

That same day, Reagan spokesman Lyn Nofziger was asked by a reporter at a press conference at the hospital, “[w]ould you say that while the President was incapacitated here during the operation that the

284. *Id.* at 193.

285. Bush/Speakes/Gergen Briefing, *supra* note 1, at 2; *cf.* Larry Speakes, Dennis O’Leary, & Daniel Ruge, Press Briefing at The White House at 15–16 (Mar. 31, 1981) (transcript on file with Ronald Reagan Presidential Library & Museum, James S. Brady Files, Press Conferences and Press Releases—Assassination Attempt, 2 of 3 documents, Box: OA 16783) (“Q Was there contact with Speaker O’Neill? MR. SPEAKES: I’m sure there was some contact with Speaker O’Neill, but not anything specific.”). Speakes reiterated his support for legislative succession after he left the White House. *See* SPEAKES WITH PACK, *supra* note 245, at xi (“[T]he line of succession proceed[s] from the Vice President to the Speaker of the House to the President Pro Tempore of the Senate to the Secretary of State.”).

286. Bush/Speakes/Gergen Briefing, *supra* note 1, at 9; *see also* PETER PRINGLE & WILLIAM ARKIN, S.I.O.P. THE SECRET U.S. PLAN FOR NUCLEAR WAR 205–06 (1983) (“Curtis Wilkie, a veteran White House reporter attending Haig’s press conference, was heard to remark ‘Oh, my God, I’ve just witnessed my first American coup.’”); *cf.* Bush/Speakes/Gergen Briefing, *supra* note 1, at 4–5 (quoting an exchange between a reporter and Speakes: “Did [Haig] misspeak himself when he said he was in command of the White House? MR. SPEAKES: I’m just not going to discuss it any more. I’ve made a statement”).

Vice President was in charge? There was a report from the White House, I believe that General Haig said that he was in charge? (Laughter).²⁸⁷ Nofziger replied “I don’t think I want to comment on that.”²⁸⁸

The next day, White House chief of staff Baker was questioned closely by the media about Haig’s role as the point of contact in the Situation Room and about his comments at the previous day’s press conference. Subtly distancing himself from the Secretary’s comments, Baker commented to the media, “[T]he White House Staff is not displeased at all with the Secretary’s performance yesterday We *particularly* think he functioned well yesterday here as the [point of] contact in the Situation Room.”²⁸⁹

Years later, in his autobiography, President Reagan offered his own view of Haig’s actions. He recalled that:

On the day I was shot, George Bush was out of town and Haig immediately came to the White House and claimed he was in charge of the country I didn’t know about this when it was going on. But I heard later that the rest of the cabinet was furious. They said he acted as if he thought he had the right to sit in the Oval Office and believed it was his constitutional right to take over—a position without any legal basis.²⁹⁰

Clearly, Reagan did not believe Haig to have been immediately behind Bush in the line of succession.

At least one former Cabinet Secretary concurred with the views of the Reagan administration regarding Haig’s remarks. Joseph Califano reflected that “Haig was in error. The actual line of succession

287. Lyn Nofziger, Dennis O’Leary, & Sheila Patton, Press Briefing at The White House at 14 (Mar. 30, 1981), (transcript on file with Ronald Reagan Presidential Library & Museum, James S. Brady Files, Press Conferences and Press Releases—Assassination Attempt, 1 of 3 documents, Box: OA 16783).

288. *Id.*

289. James Baker & David Gergen, Press Briefing at The White House, at L (Mar. 31, 1981) (transcript on file with Ronald Reagan Presidential Library & Museum, James S. Brady Files, Press Conferences and Press Releases—Assassination Attempt, 2 of 3 documents, Box: OA 16783) (emphasis added); *see also id.* at A–C (quoting Baker). Several years later, Baker was much less charitable. Haig “did such a shitty job.” BAKER & GLASSER, *supra* note 254, at 608.

290. RONALD REAGAN, AN AMERICAN LIFE 271 (1990).

after the president is the vice president, Speaker of the House, president pro tempore of the Senate, and then secretary of state.”²⁹¹

Haig was very much alone in his view that he was next in line to the presidency—if in fact that had even been his position. In one volume of his memoirs, Haig disputed that he had claimed to be ahead of the Speaker and President pro tempore in the line of succession. He issued a denial:

Certainly I was guilty of a poor choice of words, and optimistic if I imagined that I would be forgiven the imprecision out of respect for the tragedy of the occasion. My remark that I was “in control . . . pending the return of the Vice President” was a statement of the fact that I was the senior Cabinet officer present. I was talking about the arrangements we had made in the situation room for the three-or-four-hour period in which we awaited the return of the Vice President Less precise, though in the same context, was my statement that “*constitutionally* . . . you have the President, the Vice President, and the Secretary of State, in that order.” I ought to have said “traditionally” or “administratively” instead of “constitutionally.” If, at the time, anyone had suggested to me that I believed that the Secretary of State was third in order of succession to the President, the press would have had the pleasure of even more vivid quotes. For many months, in this same house, I had lived hourly with the question of succession in case of the removal first of a Vice President and then of a President; I knew the Constitution by heart on the subject.²⁹²

291. CALIFANO, *supra* note 242, at 389.

292. ALEXANDER M. HAIG, JR., CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 164 (1984). *But see supra* notes 243–91 and accompanying text. Even with the benefit of hindsight, Haig’s memoirs reflect a lack of understanding about succession by implying that the line of succession after the Vice President is laid out in the Constitution as opposed to by statute. Interestingly, when Haig placed calls to various lawmakers to give them updates about the assassination effort, he did not seem to call President pro tempore Strom Thurmond, who was immediately in front of him in the line of succession. *See id.* at 155. Nonetheless, the White House Legislative Affairs office may have reached out to the Senator. *See* WEINBERGER, *supra* note 264, at 96.

Sometime after March 30, 1981, Haig conceded his mistake about the line of succession in a conversation with Fielding.²⁹³

In a second memoir spanning his career prior to his time with the Reagan administration, Haig was more clear in his recognition of legislative succession. Writing in the context of his tenure as Chief of Staff to President Nixon, Haig commented about concerns over Vice President Agnew's pending resignation. "If Agnew resigned, Carl Albert would be next in line of succession to the presidency after Richard Nixon; if Nixon went, Albert would be [Acting] President."²⁹⁴ In the same manner, the former Chief of Staff wrote that "Speaker Albert [was] the man next in line of presidential succession."²⁹⁵ Haig recalled his concern about Nixon being impeached and removed before Gerald Ford could be confirmed as Vice President. In such circumstances, "Carl Albert would [have] become [Acting] President of the United States."²⁹⁶ This "would [have] mean[t] handing over the presidency to the other party"²⁹⁷ In sum, even Al Haig—the man who had ostensibly asserted that succession ran from the Vice President to the Secretary of State—did not stand by his "claim" that he was in front of the Speaker and President *pro tempore*. Indeed, he backed far away from that position, if in fact that is what his stance had been in the first place.

On Capitol Hill, the executive branch's operational support for legislative succession was carried out irrespective of Haig's remarks. Speaker O'Neill recalled the day of the Reagan assassination attempt:

I learned about the shooting [of Reagan] from a television bulletin A few minutes later, my office received a call from . . . the Federal Emergency Management Agency. Because the Speaker is third [sic] in the line of succession (after the vice president), it was

293. See Fielding Speech, *supra* note 244, at 17 ("[Haig] would later acknowledge—although not at that moment—to me that his legal premise was inaccurate.").

294. HAIG, *supra* note 190, at 365.

295. *Id.* at 420.

296. *Id.* at 427.

297. *Id.* at 353.

FEMA's responsibility to make sure they knew where I was and what my immediate plans were.²⁹⁸

Not long after the Reagan assassination attempt, the White House counsel's office established executive branch protocols and contingency plans to more clearly address succession and inability matters, completing an effort apparently begun during the Carter years.²⁹⁹ These protocols accepted the constitutionality of legislative succession and further institutionalized the principle within the White House. On June 1, 1982, the Reagan White House completed these documents. They dealt with a myriad of scenarios. With respect to situations involving both presidential and vice-presidential deaths, the White House counsel's office clearly embraced legislative succession. The memorandum provided that the Speaker should become Acting President.³⁰⁰ The Office specifically advised that the Speaker should take the following oath:

I, Thomas P. O'Neill, Jr., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties o[f] the office on which I am about to enter. So help me God.³⁰¹

The contingency plan added that:

If the Speaker is away from the country, he can simply swear the oath in the presence of a witness The taking of the above oath by the Speaker will be held to constitute his resignation as Speaker and as a member of

298. TIP O'NEILL WITH WILLIAM NOVAK, *MAN OF THE HOUSE* 335–36 (1987); *see also He Was Checked, O'Neill Says*, *supra* note 258. O'Neill was not assigned additional security following the shooting. *See id.*

299. *See* OFF. OF COUNS. TO THE PRESIDENT, *Deaths of Both the President and the Vice President & Various Other Succession Questions*, in CONTINGENCY PLANS: DEATH OR DISABILITY OF THE PRESIDENT, at Tabs F, G (June 1, 1982) (on file with George H.W. Bush Presidential Library Center, C. Boyden Gray Files, OA/ID No. CF01823, folder ID No. 1823–005).

300. *See id.* at Tab F.

301. *Id.*

Congress, which is a prerequisite to his assuming the powers and duties of the office of President The Speaker does not become President; instead, he becomes “Acting President” for the remainder of the current Presidential term The Speaker, as Acting President, will be compensated at the rate of pay provided by law for the President.³⁰²

The memorandum concluded by stating that “[i]f, upon the deaths of both the President and the Vice President, there is no Speaker of the House, the Acting President would be the President pro tempore of the Senate or the appropriate Cabinet officer”³⁰³

Regarding a situation in which both the President and Vice President became de facto incapacitated, the Reagan White House counsel’s contingency plans stated that the “answer to the question of who would govern [in this 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.”³⁰⁴ The memorandum continues that “[t]he determination of Presidential and Vice Presidential inability should be made by the Speaker of the House and the Cabinet.”³⁰⁵

The contents of these Reagan-era White House documents essentially remained in place throughout the George H.W. Bush presidency and both Clinton terms³⁰⁶ and may continue to provide guidance for these scenarios.³⁰⁷ These previously confidential plans prepared by the White House counsel’s office are unequivocal in their support for

302. *Id.* (citations omitted).

303. *Id.*

304. *Id.* at Tab G, 1–2.

305. *Id.* at 2–3.

306. See OFF. OF COUNS. TO THE PRESIDENT, *Deaths of Both the President and the Vice President & Various Other Succession Questions*, in CONTINGENCY PLANS—DEATH OR DISABILITY OF THE PRESIDENT (Mar. 16, 1993), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials [hereinafter Clinton Contingency Plans].

307. The George W. Bush Library has not yet authorized release of its contingency plan documents. President Trump’s spokesperson made a somewhat ambiguous statement about whether the Trump administration had a contingency plan in place in case the President and Vice President became simultaneously unable to fulfill their duties. See Goodin, *supra* note 2. She remarked “that’s not even something that we’re addressing.” *Id.*

legislative succession; indeed, during the Reagan years they mentioned Speaker O'Neill by name.

Assuming the substance of these earlier plans remains in place today, it would seem hard as a practical matter for the Secretary of State—in the midst of an unprecedented governing crisis—to repudiate these protocols. The specter of Haig's assertion would also likely hang over any Secretary contending that he—and not the Speaker—would be the lawful successor.³⁰⁸

During the Reagan administration, OLC issued four new legal opinions about presidential succession. As was the case with the protocols prepared by the White House counsel's office, these OLC opinions clearly accepted the constitutionality of legislative succession.³⁰⁹ In the first opinion dated April 3, 1981, the Assistant Attorney General for OLC, Ted Olson, wrote to Attorney General William French Smith: "Section 19 of Title 3 of the U.S. Code" provides that "if there is no Vice President" the powers and duties of the presidency "devolve first

308. See *supra* notes 128, 254, 285–88 and accompanying text. Bill McGowan wrote:

If you ever doubted the damage one ill-advised and poorly-executed public statement can make, just read some of Alexander Haig's recent obits. Years ago, Ronald Reagan's former advisor Lyn Nofziger predicted that the third paragraph of Haig's obituary one day would detail the 'I am in control here' communications blunder that forever tainted Haig's image as a leader. Nofziger was prescient, but in last week's coverage, the now-famous faux pas frequently dominated paragraphs one and two as well.

McGowan, *supra* note 254; see also notes 36, 381–84, 388 and accompanying text.

309. See Memorandum from Theodore B. Olson, Assistant Att'y Gen., Off. of Legal Couns. on Disability of the President and Succession to His Duties to William French Smith, U.S. Att'y Gen. (Apr. 3, 1981) [hereinafter Olson Memo I]; Theodore B. Olson, Assistant Att'y Gen., Off. of Legal Couns., *Presidential Succession and Delegation in Case of Disability* (1981) [hereinafter Olson II Memo], https://www.justice.gov/sites/default/files/olc/opinions/1981/04/31/op-olc-v005-p0091_0.pdf; Ralph W. Tarr, Acting Ass't Att'y Gen., Off. of Legal Couns., *Operation of the Twenty-Fifth Amendment Respecting Presidential Succession* (1985) [hereinafter Tarr Memo I], https://www.justice.gov/sites/default/files/olc/opinions/1985/06/31/op-olc-v009-p0065_0.pdf; Memorandum from Ralph W. Tarr, Acting Assistant Att'y Gen., Off. of Legal Couns. on Presidential Succession Under 3 U.S.C. § 19 to Edwin Meese, Att'y Gen. (Aug. 9, 1985) [Tarr Memo II] (on file with author); see also Brown & Cinquegrana, *supra* note 16, at 1425 n.122.

upon the Speaker of the House of Representatives, upon the President pro tempore of the Senate, then . . . upon the Secretary of State . . . ”³¹⁰ Olson took the constitutionality of legislative succession to be a given.

He did the same in a closely related opinion dated that same day that discussed the delegation of presidential duties in the context of succession and inability.³¹¹ In the memorandum, Olson mentioned the line of succession but did not in any way call into question the constitutionality of lawmakers becoming Acting President.³¹²

Four years later, the Acting Assistant Attorney General for OLC, Ralph Tarr, completed another memorandum on the subject, this one about the Twenty-Fifth Amendment. Tarr observed that “the list of statutory Presidential successors under 3 U.S.C. § 19 . . . include[s] the Speaker of the House of Representatives [and] . . . the President *pro tempore* of the Senate.”³¹³

That very same year, this time in an unpublished OLC memorandum for the Attorney General, Tarr examined the applicability of legislative succession under the 1947 Act.³¹⁴ OLC came down explicitly in favor of the Speaker and President pro tempore having valid claims to the White House. Tarr wrote:

Both prior and subsequent to passage of section 19 in 1947, questions have been raised as to whether the Speaker and President pro tempore are “Officers” within the meaning of this provision [Article II, § 1, cl. 6], and therefore eligible to be placed in the presidential line of succession.

We believe that, consistent with its power under Art. II, § 1, cl. 6 of the Constitution to “provide for the Case of Removal, Death, Resignation or Inability both of the President and Vice President” . . . Congress may, as it has done, place legislators in the line of succession. This is the position that Acting Attorney General Douglas W. McGregor expressed in a written opinion when the Presidential Succession Act of 1947 was before Congress.

310. Olson Memo I, *supra* note 309, at 3.

311. See Olson Memo II, *supra* note 309, at 91.

312. See *id.*

313. Tarr Memo I, *supra* note 309, at 69.

314. See Tarr Memo II, *supra* note 309; see also Brown & Cinquegrana, *supra* note 16, at 1425 n.122.

The House Committee on the Judiciary concurred in this conclusion . . . and Congress acted on it. This Office revisited the question in 1963 and adhered to the position taken in 1947. See Memorandum from Assistant Attorney General Schlei As set forth in the McGregor Opinion and the Schlei Memorandum, the designation of the Speaker and the President *pro tempore* as presidential successors in the first succession law, passed in 1792, is persuasive evidence of the Framers' understanding of the term "Officers" as that term is used in Art. II, § 1, cl. 6. "This law [of 1792] represents a construction of Article II by an early Congress, whose views of the Constitution have long been regarded as authoritative, and reflects a long-continued acquiescence in such a construction." H. Rep. No. 817, at 4; Schlei Memorandum at 4 n.6.³¹⁵

Throughout the memorandum, Tarr emphasized the lawful claims of the Speaker and President *pro tempore*. He concluded the memorandum by stating:

In the absence of the President and Vice President, a Speaker of the House may assume the office of President at any time in place of any Cabinet officer who may have assumed the Presidency.

In the absence of the President, Vice President, and Speaker, the President *pro tempore* may assume the Presidency at any time in place of any Cabinet officer who may have assumed the Presidency.³¹⁶

For the fourth time during the Reagan administration, OLC endorsed the constitutionality of legislative succession, this time expressly and in some detail. If any questions remained as to OLC's commitment to the principle in light of the Eisenhower-era memorandum for the file, those concerns had now been completely dispelled. The Schlei opinion was clear in its endorsement of legislative succession. The Dixon memorandum on vice-presidential immunity, the two Olson opinions, and the first Tarr opinion added tacit support for the notion. The second Tarr opinion was clearly in favor. None of these OLC

315. Tarr Memo II, *supra* note 309, at 3.

316. *Id.* at 7.

opinions even deigned to mention the Eisenhower-era memorandum for the file.

In 1985, President Reagan underwent surgery to remove polyps from his intestine.³¹⁷ Prior to his being anaesthetized, Reagan transferred his powers and duties to Vice President Bush under Section 3 of the Twenty-Fifth Amendment.³¹⁸ While Acting President, Bush decided to unwind and play some tennis.³¹⁹ However, during his match, the Acting President backpedaled to try to retrieve a lob, tripped, fell, smashed his head on the ground, and was knocked briefly unconscious.³²⁰ Several years later, the Vice President's military aide, Sean Coffey, remarked about the incident that "[w]e figured out later that at least for a few seconds, Tip O'Neill was in charge. But we decided not to tell him."³²¹ While the comment was flippant, it provides yet another example of how engrained legislative succession is within the executive branch.

The Reagan administration experienced a flurry of activity involving presidential succession and inability. With the arguable exception of Haig's statement—which he himself later disclaimed—all of that activity clearly and repeatedly pointed toward the constitutionality of legislative succession.

I. The George H.W. Bush Administration

In May 1991, during the presidency of Republican George H.W. Bush, there was some question as to whether the President might declare himself briefly incapacitated due to a heart condition that initially seemed to require treatment under anesthesia.³²² During this time of

317. See, e.g., GEORGE W. BUSH, 41: PORTRAIT OF MY FATHER 148 (2014).

318. See *id.* At the time, Reagan denied relying on the Twenty-Fifth Amendment, but later he and others confirmed that the amendment was indeed the authority upon which he had relied for the delegation. See FEERICK, *supra* note 23, at 197–99; Goldstein, *Taking*, *supra* note 24, at 976–77; cf. RONAN, *supra* note 26, at 107.

319. See BUSH, *supra* note 317, at 148; MARLIN FITZWATER, CALL THE BRIEFING! 285 (1995); KOCH, *supra* note 282, at 223–24; Brownell, *supra* note 200.

320. See BUSH, *supra* note 317, at 148; FITZWATER, *supra* note 319, at 285; KOCH, *supra* note 282, at 223–23.

321. Monte Burke, *George H.W. Bush's Sporting Life*, FORBES (Mar. 25, 2010), <https://www.forbes.com/forbes/2010/0412/life-fishing-tennis-baseball-sky-diving-george-bush-sporting-life.html?sh=74d9e6147c15>.

322. See JON MEACHAM, DESTINY AND POWER 472–76 (2015); FITZWATER, *supra* note 319, at 274–95.

uncertainty, the Secret Service took steps to protect the line of succession by working with Speaker Tom Foley, a Democrat. The Speaker had an exercise routine in which he regularly rode his bicycle to a fitness facility.³²³ A *New York Times* article noted that the Speaker's:

[B]ike routine was interrupted one day in 1991 when President George Bush had a minor heart problem and it seemed that the Presidential powers might be transferred to Vice President Dan Quayle. The Secret Service, mindful that Mr. Foley was third [sic] in line of succession, blanched at his bicycle riding and whisked him to the gym in a limo.³²⁴

Vice President Dan Quayle recalled the same period. “[W]hen the [heart] . . . procedure was being considered [for President Bush] and there was thought of invoking the 25th Amendment, the Speaker was briefly given Secret Service protection, since in such a situation he would be next in line for the presidency.”³²⁵ Notably, Quayle—an attorney—referred to the Speaker's role in the line of succession without mentioning any constitutional concerns.

This episode reflects, for the fifth time, the Secret Service acting quickly to assume protection over the Speaker. It evinces yet again the tangible, proactive aspects of the executive branch's embrace of legislative succession.³²⁶

That same year, Senator Robert Byrd, the President pro tempore, published a book in which he touched on some of the executive branch's efforts to support the Senate position in its succession and inability duties. He noted that “[b]ecause the president pro tempore stands in the line of presidential succession, he is given a direct-access telephone to the White House and would receive special evacuation assistance from Washington in the case of a national emergency.”³²⁷

323. See Katharine Q. Seelye, *Working Out with Thomas S. Foley: A Veteran Logroller Works on His Triceps*, N.Y. TIMES, June 1, 1994, at C1; see also JEFFREY R. BIGGS & THOMAS S. FOLEY, *HONOR IN THE HOUSE* 129 (1999).

324. Seelye, *supra* note 323; see also BIGGS & FOLEY, *supra* note 323, at 129.

325. DAN QUAYLE, *STANDING FIRM* 256 (1994).

326. The other four instances involved Speakers Martin, McCormack, and Albert (twice).

327. 2 ROBERT C. BYRD, *THE SENATE 1789–1989*, at 182 (1991).

At another juncture during the Bush presidency, DOJ issued a commemorative document to celebrate the Office of the Attorney General entering its third century. The Department observed that “the Attorney General ranked fourth . . . in the line of succession to the Presidency [from 1886 to 1947] . . . until Congress 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.”³²⁸ Here again, DOJ implicitly acknowledged the constitutionality of legislative succession.

J. The Clinton Administration

In March, 1993, the Clinton White House counsel’s office updated the Reagan-Bush contingency plans regarding legislative succession.³²⁹ Even with the change in partisan control of the White House, the Clinton legal team’s analysis followed almost identically that of the Reagan-Bush years regarding legislative succession. The only minor change as to succession was replacing O’Neill’s name with that of Foley regarding who would take the oath of office as Acting President if both the presidency and vice presidency were vacant.³³⁰

As a former President, Clinton made reference to the line of succession. He coauthored a thriller with author James Patterson entitled *The President is Missing*.³³¹ In the novel, Clinton and Patterson made references to the Speaker serving as second in line to the presidency.³³²

William Perry was President Clinton’s second Secretary of Defense. In a book he later coauthored about nuclear weapons and the presidency, he noted that “if the vice president is . . . unreachable [nuclear] launch authority moves down the chain of succession to the Speaker of the House, the President Pro Tempore of the Senate, the Secretary of State” and so on.³³³ He added that “[i]t is notable that the Defense Secretary is sixth in line.”³³⁴ Perry’s admission reflects that

328. U.S. DEP’T OF JUSTICE, 200TH ANNIVERSARY OF THE OFFICE OF THE ATTORNEY GENERAL 35 (1990).

329. Clinton Contingency Plans, *supra* note 306.

330. *See id.*

331. *See* BILL CLINTON AND JAMES PATTERSON, *THE PRESIDENT IS MISSING* (2019 ed.).

332. *See id.* at 347, 349.

333. WILLIAM J. PERRY & TOM Z. COLLINA, *THE BUTTON* 17 (2020).

334. *Id.*

the executive branch has apparently integrated lawmakers into the most grave aspects of military planning: whether to use nuclear weaponry.

Perry was not the only Clinton administration Cabinet Secretary to express support for legislative succession. In 1997, during a fiftieth-anniversary discussion of the presidential succession statute on C-SPAN, Secretary of Agriculture Dan Glickman, an attorney, defended the measure.³³⁵

The 2000 presidential race took place toward the very end of the Clinton administration. The contest was close, and the outcome remained undecided for several weeks following Election Day. As matters dragged on, with neither Governor George W. Bush nor Vice President Al Gore emerging as the clear winner, concern grew that the nation might not have a president identified by January 20, 2001.³³⁶ As a result, as was the case with Speaker Albert, Speaker Dennis Hastert began to receive briefings from the CIA as it was thought he might have to assume the powers and duties of the presidency on Inauguration Day.³³⁷ Yet again, the executive branch triggered mechanisms which reflected its active embrace of the constitutionality of legislative succession.

K. The George W. Bush Administration

Bush was ultimately elected President along with Dick Cheney as Vice President. Cheney was one of the most knowledgeable and experienced public figures in matters of succession, having taken part (along with Secretary Rumsfeld) in secret continuity-of-government exercises in the 1980s and having served in the line of succession as Secretary of Defense.³³⁸

On September 11, 2001, the terrorist group al Qaeda mounted a multi-pronged attack on the United States. That effort included an

335. See *Presidential Succession*, C-SPAN (July 18, 1997), <https://www.c-span.org/video/?87900-1/presidential-succession> (note discussion at 12:59–14:00) (interview with Glickman).

336. See PETER BAKER, *DAYS OF FIRE* 76 (2013).

337. See *id.*; see also Gup, *supra* note 212. For Hastert's thoughts about potentially becoming Acting President, see DENNY HASTERT, *SPEAKER* 213–17 (2004).

338. See James Mann, *The Armageddon Plan*, *THE ATL.*, March 2004, <https://www.theatlantic.com/magazine/archive/2004/03/the-armageddon-plan/302902/>; see also *infra* Section IV.C.

attempted decapitation strike on the U.S. government.³³⁹ When the attack took place, President Bush was out of Washington. Cheney was at the White House trying to coordinate the government's response. In recalling the terrorist attack, Cheney reflected that "guaranteeing the continuity of a functioning United States government" was at the top of his list of priorities.³⁴⁰ To that end, Cheney commented in his memoirs that on September 11th he briefed Speaker Hastert on two occasions.³⁴¹ The former Vice President recollected that "[i]t was crucial that he know what was happening since he was second in line to succeed to the presidency."³⁴² According to the Speaker, Cheney told him that "[t]here's a real danger . . . I want you to go to a secure location."³⁴³ The Vice President's clear acceptance of legislative succession is even more striking because he firmly believed in the unity and power of the executive branch.³⁴⁴

Major Robert Darling was the White House military officer who staffed the Vice President and the National Security Advisor in the Presidential Emergency Operations Center (PEOC) on the day of the terrorist attack. He confirmed the priority that was placed on contacting the Speaker and ensuring that the lawmaker was at his secure location. Darling notes that "[t]he Speaker of the House is third [sic] in the line of succession to the presidency Clearly, in a national crisis, such as 9/11, it's essential to track and know exactly where each leader

339. See CONTINUITY OF GOV'T COMM'N, *supra* note 23, at 5.

340. DICK CHENEY WITH LIZ CHENEY, *IN MY TIME* 6 (2011).

341. See *id.* Speaker Hastert confirmed Cheney's multiple efforts to contact him. See HASTERT, *supra* note 337, at 6, 8–9.

342. CHENEY WITH CHENEY, *supra* note 340, at 6. New protective measures for the Speaker were adopted after the September 11th attack granting the Speaker regular access to a government plane. See MOLLY BALL, PELOSI 120–22 (2020). The executive branch did not explicitly link this change in access to military aircraft to the Speaker's status as potential Acting President but did acknowledge the Speaker's succession role in this context. See Sharyl Attkisson, *Pelosi's Speaker Shuttle: The Inside Story*, CBS NEWS (Oct. 27, 2010), <https://www.cbsnews.com/news/pelosi-speaker-shuttle-the-inside-story/> (quoting a 2007 letter from Assistant Secretary of Defense Robert Wilkie to Speaker Pelosi: "the plan for continuity of the Presidency does not include routine use of military airlift for the Speaker of the House, this support is provided without any specific basis to your standing as Presidential successor or position in the line of succession").

343. HASTERT, *supra* note 337, at 9.

344. See, e.g., CHARLIE SAVAGE, TAKEOVER 182–83, 202 (2007).

is at all times.”³⁴⁵ He recalled the laser-like focus of National Security Advisor Condoleezza Rice on ensuring that Speaker Hastert had reached his assigned destination.³⁴⁶

It was midmorning when Dr. Rice approached me. “Major, do you know where the Speaker of the House is supposed to be evacuated?”

“Yes, ma’am, I do,” I answered.

“Well, he’s not there,” she replied, sounding a bit irritated. “Can you find out where he is and let me know ASAP?”

“Yes, ma’am.”

. . . .

I moved around the room, looking for an available phone and wondering how I was going to contact the unit responsible for moving the Speaker of the House. It wasn’t as if I knew the phone number. Abruptly turning around, I was shocked to see Dr. Rice standing right behind me, following me in my circuitous walk around the room.

“Well?” she asked—probably wondering what the hell I was doing.

“Yes, ma’am,” I said as I immediately picked up the only phone that was not in use and called the White House switchboard. “This is Major Darling in the PEOC.” I asked that they connect me to the commanding officer of the responsible military unit.

. . . .

[A few moments later] the satellite communications radio loudly announced, “The Speaker of the House has arrived; the Speaker of the House has arrived.”

The mounting pressure evaporated with those seven words. Clearly as relieved as I was, Dr. Rice graciously thanked me and moved on to her next task.³⁴⁷

345. ROBERT J. DARLING, 24 HOURS INSIDE THE PRESIDENT’S BUNKER 67 (2010).

346. *See id.* at 67–68.

347. *Id.*

As had been the case with the Reagan assassination attempt, the executive branch once again made it a high priority to contact and locate the Speaker during a time of crisis. On that tragic day, Bush's White House counsel Alberto Gonzales had been away from the White House at the time of the attack. In short order, he returned to the White House and entered the PEOC. Once there, Gonzales recalled that Vice President Cheney's counsel "David [Addington] confirmed . . . that congressional leaders and cabinet secretaries in the line of presidential succession were accounted for and had been moved to secure locations."³⁴⁸ Gonzales betrayed no misgivings about the constitutionality of legislative succession. Neither apparently did Addington, another strong advocate for executive power.

Almost six years later, on May 9, 2007, the Bush administration issued a National Security and Homeland Security Directive.³⁴⁹ In it, the President instructed that "[t]his directive shall be implemented in a manner that is consistent with, and facilitates effective implementation of . . . the Presidential Succession Act of 1947"³⁵⁰ Three months later, President Bush issued the comprehensive *National Continuity Policy Implementation Plan*.³⁵¹ The document made perfectly clear that the executive branch viewed legislative succession to be constitutional. It emphasized the importance of:

Facilitat[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,

348. ALBERTO R. GONZALES, TRUE FAITH AND ALLEGIANCE 10 (2016).

349. See George W. Bush, *National Security and Homeland Security Presidential Directive: National Security Presidential Directive/NSPD 51 and Homeland Security Presidential Directive/HSPD 20*, WHITE HOUSE ARCHIVES (May 9, 2007) [hereinafter *Presidential Directive*], <https://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070509-12.html>.

According to one Bush administration official, after Democrats regained control of Congress, practical complications emerged regarding the executive branch's efforts to try to coordinate with Congress to provide support for legislative branch continuity. See Am. Enter. Inst., *Symposium on Presidential Succession*, C-SPAN (July 2, 2009) [hereinafter AEI Symposium], <https://www.c-span.org/video/?287421-1/presidential-succession> (note discussion at 14:05–16:05 by Frances Townsend).

350. *Id.*

351. HOMELAND SEC. COUNCIL, NATIONAL CONTINUITY POLICY IMPLEMENTATION PLAN (2007).

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 to the President.³⁵²

Elsewhere the document states 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.”³⁵³ This statement reflects yet another executive branch endorsement of the constitutionality of legislative succession. The document was circulated to all agency heads by the Assistant to the President for Homeland Security and Counterterrorism, Frances Townsend.³⁵⁴

Consistent with his actions as president, in his memoir about his father, former President George W. Bush referred to Tip O’Neill as “the Speaker of the House and next in the line of presidential succession.”³⁵⁵ In a similar vein, Speaker Pelosi looked back at her tenure during the George W. Bush administration. The President, she recalled, “would jovially call me Number Three. He’s number one. The Vice President was number two. I was number three.”³⁵⁶ Again, Bush implicitly recognized the Speaker’s place as statutory successor.

Bush’s second Secretary of State, Condoleezza Rice, who was at Cheney’s side as National Security Advisor helping to respond to the September 11th terrorist attacks, made mention of the line of succession in her memoirs. She noted that “the secretary of state is fourth in the line of presidential succession after the Vice President, speaker of the House, and president pro tempore of the Senate.”³⁵⁷

352. *Id.* at 42.

353. *Id.* at 7.

354. *See id.* at 22; Memorandum from Frances Townsend, Assistant to the President for Homeland Sec. & Counterterrorism, to the Dep’t & Agency Heads, National Continuity Policy Implementation Plan (Sept. 27, 2007) [hereinafter Townsend Memo].

355. BUSH, *supra* note 317, at 148–49.

356. *Pelosi Remarks at Press Availability as House Democrats Vote to Nominate Her for Speaker of the House*, Press Release, OFF. OF CONGRESSWOMAN NANCY PELOSI (Nov. 28, 2018), <https://pelosi.house.gov/news/press-releases/pelosi-remarks-at-press-availability-as-house-democrats-vote-to-nominate-her-for>; *see also* Goodin, *supra* note 2.

357. CONDOLEEZZA RICE, *NO HIGHER HONOR* 318 (2011).

In 2009, following the conclusion of the George W. Bush administration, Frances Townsend, the former Homeland Security Advisor and an attorney, spoke at a symposium at the American Enterprise Institute. There, in a break with the Bush administration's position, Townsend expressed misgivings about the constitutionality of legislative succession. "I, like many, . . . believe[] [that] the Presidential Succession Act of '47 as regards the Speaker and the President pro tem of the Senate in the line of succession is unconstitutional."³⁵⁸ In the nearly seventy-five-year history of the 1947 Act, Townsend's remarks seem to reflect the first clear public repudiation of the constitutionality of legislative succession by a former senior executive branch official. John Yoo, former Deputy Assistant Attorney General at OLC during the George W. Bush administration, followed suit in 2020.³⁵⁹

While Townsend's words are certainly entitled to respect, they clearly conflict with the opinions expressed and actions taken by the Bush administration in which she served. Moreover, they conflict with the homeland security document sent out to all agency heads under her name. In the case of Yoo, his words also merit attention. At the same time, it bears noting that, on his watch, there is no indication that OLC took action to repudiate its longstanding approval of legislative succession.

L. The Obama Administration

During the presidency of Barack Obama, Hillary Clinton succeeded Rice as Secretary of State. In her memoir, the former First Lady commented that in this capacity she was "fourth in the line of succession to the presidency."³⁶⁰

In January 2017, in anticipation of the inauguration of President-elect Donald Trump, the Obama administration named Secretary of

358. AEI Symposium, *supra* note 349. The AEI Symposium was an outgrowth of the work of the First Continuity of Government Commission. The Commission concluded that "[t]here are serious policy and constitutional objections to having Congressional leaders in the line of succession." CONTINUITY OF GOV'T COMM'N, *supra* note 23, at 39. Of the twenty-two participants on the Commission, several were former high-ranking executive branch officials. It bears noting that, while skeptical of the measure, the report did not expressly conclude that the arrangement was unconstitutional. The author would like to convey his thanks to Professor John Rogan for alerting him to this symposium.

359. See Yoo, *supra* note 24.

360. HILLARY RODHAM CLINTON, *HARD CHOICES* 15 (2014).

Homeland Security Jeh Johnson to be its designated survivor during the swearing-in and the Secretary departed for a secure location.³⁶¹ By the morning of January 20, all of the Obama-era Cabinet secretaries, except Johnson, had stepped down in anticipation of the new administration. Johnson later reflected on his status. He remarked that for a brief period “I [was] . . . the designated survivor, fourth in line to the presidency.”³⁶² Implicit in Johnson’s formulation was that the Speaker was second and the President pro tempore third.³⁶³ Once again, the validity of legislative succession was affirmed by a former executive branch official.

M. The Trump Administration

The incoming Trump administration named its own designated survivor for the 2017 inaugural ceremony since the Senate had not confirmed any of its nominees, leaving only Johnson—an Obama administration holdover—in place as a Cabinet Secretary.³⁶⁴ Presumably in an attempt to ensure that the results of the election were not essentially reversed in case of a catastrophe, the Trump administration named a fellow Republican, President pro tempore Orrin Hatch, as its designated survivor and the Senator also went to a secure facility rather than the inauguration.³⁶⁵ Later that same year, Senator Hatch was asked if, based on his status in the line of succession, he was kept abreast of

361. See Second Fordham Report, *supra* note 18, at 957.

362. Meghan Keneally, *Tales from Past ‘Designated Survivors’ Who Had to Miss the State of the Union*, ABC NEWS (Feb. 5, 2019, 9:36 AM), <https://abcnews.go.com/Politics/tales-past-designated-survivors-miss-state-union/story?id=52681358>.

363. See *supra* note 101 and accompanying text.

364. See Hilary Hanson, *Here’s Who Could Have Become President If Disaster Hit the Inauguration*, HUFF. POST (Jan. 20, 2017, 5:05 PM), https://www.huffpost.com/entry/trump-inauguration-designated-survivor_n_58827d82e4b096b4a231b658.

365. See Tad Walch, *As ‘Designated Survivor,’ Hatch Was Far from Trump Inauguration*, DESERET NEWS (Jan. 20, 2017, 1:25 PM), <https://deseret.com/2017/1/20/20604425/as-designated-survivor-hatch-was-far-from-trump-inauguration>; see also Hanson, *supra* note 364. For why there were two designated survivors, see Hanson, *supra* note 364.

matters of state by the executive branch. He replied, “yeah, they do that.”³⁶⁶

During the Trump presidency, the Department of State spelled out in two places on its website that the Secretary of State follows the Speaker and President *pro tempore* in the line of succession. The website read 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.”³⁶⁷ Elsewhere, it noted that “[t]he Secretary of State [is] . . . fourth in line of presidential succession.”³⁶⁸ In 2017, a State Department spokesperson publicly reiterated this position.³⁶⁹

On May 12, 2020, President Trump responded to a tweet about Speaker Pelosi becoming Acting President if he and Vice President Pence were unable to perform their duties.³⁷⁰ In his reply, Trump clearly accepted the premise that the Speaker was next in line. “Then we must be very careful. Crazy Nancy would be a total disaster”³⁷¹ Later that same week, he commented that Pelosi “would be a disaster” in the White House.³⁷² “Never going to happen. We’ll keep our vice president very healthy, and I’ll stay healthy. Never going to happen.”³⁷³ Despite the venom of his remarks, the President did not dispute that the Speaker was a valid successor.

366. *Sen. Hatch on President Trump’s Address to Congress*, C-SPAN (Feb. 27, 2017), <https://www.c-span.org/video/?424628-3/senator-hatch-president-trumps-address-congress>.

367. *Who Is the Secretary of State?*, NAT’L MUSEUM OF AM. DIPLOMACY, <https://diplomacy.state.gov/diplomacy/who-is-the-secretary-of-state/>.

368. *What Are the Duties of the Secretary of State*, U.S. DEP’T OF STATE (on file with author).

369. Karen DeYoung, *Trump Contradicts Tillerson on North Korea, the Latest in a Series of Put-downs*, WASH. POST (Oct. 1, 2017), https://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 (noting that the Secretary of State is “fourth in line to the presidency”).

370. *See* Donald J. Trump (@realDonaldTrump), TWITTER (May 12, 2020, 6:20 AM) (on file with author).

371. *Id.*

372. Forgy, *supra* note 2.

373. *Id.* During the Trump administration, OLC issued an opinion that discussed the 1947 Act. Legislative succession was outside the scope of the discussion and was not mentioned, however. *See Designating an Acting Director of National*

He echoed these sentiments in August 2020. Speaking about the possibility of a disputed election, he noted that “[t]here’s a theory that, if you don’t have it [an acknowledged President] by the end of the year, crazy Nancy Pelosi would become [Acting] [P]resident.”³⁷⁴ While a disputed election would not have resulted in the Speaker serving as Acting President until January 20 of the following year, Trump’s assertion reflected yet again a sitting President’s acceptance of legislative succession.

In October 2020, President Trump was diagnosed with the Covid-19 virus.³⁷⁵ During this period, a journalist inquired of Speaker Pelosi if presidential staff had “contacted [her] . . . about the continuity of government?”³⁷⁶ The Speaker replied, “[n]o, they haven’t. But that is an ongoing [thing]—not with the White House but with the military, quite frankly, in terms of some officials in the government.”³⁷⁷ Pelosi’s words reflect that, while the White House staff may not have kept her abreast of succession and inability matters, other officials within the executive branch did so on a regular basis, reflecting yet again the executive branch’s active embrace of legislative succession.

The reintroduction of legislative succession in the 1947 Act has prompted great skepticism in scholarly circles as to the constitutionality of the principle. One place where the constitutionality of legislative succession has not generally been viewed as suspect, however, is in the

Intelligence, 43 Op. O.L.C. 1 (Nov. 15, 2019), <https://www.justice.gov/olc/file/1220586/download>.

374. Pete Williams, *Trump’s Off Base About What Happens if There’s No Clear Election Winner. Here’s the Deal.*, NBC NEWS (Aug. 24, 2020, 4:00 AM), <https://www.nbcnews.com/politics/2020-election/trump-s-base-about-what-happens-if-there-s-no-n1237783>.

375. Joseph A. Wulfsohn, *MSNBC Host Asks Pelosi if She’s Been Contacted About ‘Continuity of Government’ After Trump’s COVID Diagnosis*, FOX NEWS (Oct. 2, 2020), <https://www.foxnews.com/media/msnbc-stephanie-ruhle-nancy-pelosi>.

376. *Id.*

377. *Id.*; see also Mica Soellner, ‘Second in Line’ Nancy Pelosi: Trump May Have to Be ‘Fumigated’ Out of the White House, WASH. EXAM. (July 20, 2020), <https://www.washingtonexaminer.com/news/second-in-line-nancy-pelosi-trump-may-have-to-be-fumigated-out-of-the-white-house> (quoting Speaker Pelosi) (“I’m second in line to the presidency, and just last week, I had my regular continuation of government briefing.”).

executive branch. The history of the executive branch's views on legislative succession since 1947 offers only one arguable public exception to its pattern of support for the principle (i.e., Haig) and one arguable non-public exception (i.e., the Eisenhower OLC memorandum for the file). Similarly, only two *former* high-level officials have seen fit to publicly question the constitutionality of the current statutory regime. In one case, it contradicted work she had completed in her official capacity (i.e., Townsend). In the other, the former DOJ attorney appears not to have reversed OLC's longstanding posture on the issue (i.e., Yoo). Each of the numerous official executive branch legal opinions during this period concluded explicitly or implicitly that legislative succession was constitutional.

For the past seven-and-a-half decades, legislative succession has been embraced by administrations of both parties and during periods when the succession regime was under great stress. This legal position has also been accepted by executive branch officials who have had strong philosophic beliefs in the power and unity of the executive branch. Such endorsement of the constitutionality of legislative succession has been manifested in legal theory and opinion at DOJ and the White House counsel's office and has been fully operationalized at the Secret Service, the CIA, FEMA, and the Department of Defense (DOD). This legal position has been reiterated through public statements as well as confidential comments and writings. These views have been expressed in one fashion or another by presidents, vice presidents, secretaries of state, attorneys general, a solicitor general, assistant attorneys general for OLC, and White House counsels.

For the one executive branch official who appeared to publicly question legislative succession—Alexander Haig—matters ended badly. His remarks were repudiated by the White House and later by President Reagan himself. His peers within the administration roundly rejected his alleged assertion, and his reputation has been forever sullied. Indeed, Haig himself later denied that he had even questioned the statutory line of succession.

IV. WHY THE HISTORY OF THE EXECUTIVE BRANCH'S EMBRACE OF LEGISLATIVE SUCCESSION MATTERS

After reviewing the long historical record of executive branch interpretation and practice regarding legislative succession the question arises, so what? Why does any of it matter? It matters for two reasons: (1) from a political and public relations standpoint; and (2) from a legal

and institutional perspective. Winning on both fronts would be required for the Secretary of State (or the next eligible Cabinet Secretary) to successfully claim the White House over the Speaker and President pro tempore and to emerge with any legitimacy.

A. The Political and Public Relations Challenge

First, with respect to political and public relations considerations, imagine for a moment that a Secretary of State or other Cabinet Secretary decided to challenge a Speaker's claim to be Acting President.³⁷⁸ Barring extraordinary circumstances,³⁷⁹ the Secretary would have to overcome the odium that continues to surround the "claim" made by his or her predecessor Al Haig.³⁸⁰ As one reporter crisply put it, legislative succession "has been fixed in the popular mind."³⁸¹ Depictions of executive succession in popular culture reaffirm this view, routinely placing the Speaker in the position of becoming Acting President.³⁸²

Even though Haig never clearly articulated he was next in line to the presidency, his assertion that he was "[c]onstitutionally . . . in

378. See KALT, *supra* note 24, at 83–105.

379. See *id.* at 83–84, 88–89, 94, 97.

380. See Goodin, *supra* note 2; *supra* notes 254, 285–88, 308; *infra* notes 381–84 and accompanying text; *cf. supra* note 128.

381. Goodin, *supra* note 2; see also KALT, *supra* note 24, at 96, 100. The 2021 ABA Survey of Civic Literacy found that seventy-two percent of the American people recognized the Speaker as the presidential successor after the Vice President and that sixty-five percent had recognized the Speaker as such the year before. See AM. BAR ASS'N, ABA SURVEY OF CIVIC LITERACY (2021), https://www.americanbar.org/content/dam/aba/administrative/public_education/aba-civic-literacy-report-2021.pdf. Public expectations are also clearly reflected by the numerous non-lawyers within the executive branch who have repeatedly confirmed legislative succession over the decades. See *supra* Part III.

382. See FEERICK, *supra* note 23, at 255–57, 260–61 (referencing episodes of the television shows *The West Wing* and *Commander in Chief*, the novel *Full Disclosure*, and the movie *White House Down*, each of which involves the Speaker either becoming Acting President or on the brink of assuming the President's powers and duties); CLINTON & PATTERSON, *supra* note 331, at 347, 349; *Madam Secretary: The Show Must Go On* (HBO television broadcast 2015), https://www.imdb.com/title/tt4417118/plotsummary?ref_=tt_ov_pl; see also KALT, *supra* note 24, at 84 ("Fictional portrayals of presidential disasters often draw on [the] [legislative succession] rule . . ."); *cf. Baker & FitzPatrick, supra* note 254, at 838.

control” caused him to be pilloried for having appeared to try to seize the reins of government.³⁸³ One journalist at the time even asked the White House if it was taking steps to prevent Haig from staging a “coup d’[é]tat.” Professor Kalt rightly concludes that “Haig came across as a power grabber at a very inopportune moment. If, [however] . . . Haig had said, ‘Constitutionally, gentlemen, you have the president, the vice president and the secretary of state in that order, *because the law putting the Speaker of the House and president pro tempore of the Senate in line is unconstitutional,*’ he would have seemed even worse.”³⁸⁴

Putting the Haig legacy to one side for a moment, any secretary trying to dislodge the Speaker and President pro tempore from the line of succession would still need to explain why he or she was entitled to become Acting President *when no one in the executive branch has ever clearly and publicly rejected legislative succession since adoption of the 1947 Act*. To the contrary, administrations of both parties have unequivocally and repeatedly and actively embraced the principle. As two prominent scholars have written in the context of separation of powers and custom, “the greatest weight should probably be reserved for *bipartisan* institutional acceptance [of custom] over time. In those circumstances, the practice is most justifiably attributed to the executive branch as such, not simply to certain temporary occupants of it.”³⁸⁵

More specifically, to stake a claim to the White House, the Secretary would have to contradict the explicit or implicit legal position of: (1) *every* administration since the Act’s adoption; (2) ten presidents

383. See Goodin, *supra* note 2; *supra* notes 254, 285–88, 308, 375–84 and accompanying text; *cf. supra* note 128.

384. KALT, *supra* note 24, at 96.

385. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 455 (2012); *see also id.* at 415, 452–55, 460; *cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (“[A]n individual President [may find] advantages to tying his own hands. But the separation of powers does not depend on the views of individual Presidents.”); Separation of Powers Opinion, *supra* note 102, at 128–29. For a similar view by another prominent authority, see Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 133 (1984) (“If an act has been performed by a number of different Congresses or presidents, greater reason exists to regard it as [constitutional] custom. Normalcy ensures that the act was not an aberration attributable to the personality of certain presidents or congressional leaders, or to other unique historical circumstances.”). *Cf. MICHAEL J. GERHARDT, THE POWER OF PRECEDENT* 113 (2008). For other relevant factors that legislative succession satisfies with respect to constitutional custom, see *infra* note 445.

(Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, George W. Bush, Trump);³⁸⁶ (3) four vice presidents (Nixon, Agnew, Quayle, Cheney); (4) the Justice Department from eight administrations (Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Reagan, George H.W. Bush);³⁸⁷ (5) the Secret Service of five administrations (Truman, Kennedy, Johnson, Nixon, George H.W. Bush); (6) the White House emergency coordinator or FEMA of three administrations (Nixon, Reagan, George W. Bush); (7) White House counsels from six administrations (Johnson, Nixon, Reagan, George H.W. Bush, Clinton and George W. Bush); (8) vice-presidential counsels from two administrations (Carter, George W. Bush); (9) senior White House aides of six administrations (Kennedy, Nixon, Ford, Carter, Reagan, George W. Bush); (10) secretaries of state from four administrations (Nixon, George H.W. Bush, George W. Bush, Obama); (11) the State Department's very own website; and (12) assorted other Cabinet secretaries (Ford, Carter, Reagan, Clinton, Obama). It would be a tall order indeed to articulate a crisp and compelling public rationale as to why the incumbent Secretary of State was casting aside almost three-quarter-of-a-century's worth of bipartisan, high-level executive branch legal interpretation—all during a major succession crisis. For a Cabinet Secretary to discard such deeply entrenched past practice and opinion could very easily look to the public as being motivated by little more than self-interest and ambition.

For all of these reasons, the Secretary could very well face a profound legitimacy problem if he or she claims to be Acting President.

386. Former President Hoover also implicitly accepted the measure's constitutionality in the 1950s. *See supra* note 121. It will be remembered that ultimately presidents put forward the executive branch's definitive legal position. *See* BRUFF, *supra* note 102, at 70; Separation of Powers Opinion, *supra* note 102, at 128–29.

387. With one exception, former DOJ attorneys, who have written in their own private capacities about legislative succession, have not concluded that the relevant provisions should be struck down in the courts. *See* Calabresi, *supra* note 16, at 156–71, 175 (arguing that presidential succession is a political question); Manning, *supra* note 24, at 150–53 (arguing that, given the longstanding history of the provision, it should be upheld); Cinquegrana, *supra* note 44, at 147 (questioning the constitutionality of the bumping provision of the 1947 statute but not questioning the constitutionality of legislative succession *per se*); Brown & Cinquegrana, *supra* note 16, at 1445 n.186; *cf.* Ho, *supra* note 24, at 80 n.24 (raising constitutional concerns about legislative succession but declining to conclude the 1947 statute is unconstitutional). John Yoo is the only outlier. *See* Yoo, *supra* note 24.

To the general public, the Speaker—and not the Secretary—would almost assuredly be seen as the next in line.³⁸⁸

B. The Legal and Institutional Challenge

1. The Legal and Institutional Importance of Constitutional Custom

In addition to the significant political and public relations challenges facing a Cabinet Secretary claiming the presidency over a Speaker or President pro tempore, legal and institutional considerations would also weigh heavily against such action. In this regard, the executive branch's nearly seventy-five-years-worth of acceptance of legislative succession proves vitally important,³⁸⁹ and courts often defer to

388. See, e.g., Goodin, *supra* note 2; *supra* notes 2, 128, 254, 285–88, 308, 381–84; cf. KALT, *supra* note 24, at 84, 96; FEERICK, *supra* note 23, at 255–57, 260–61; Baker & FitzPatrick, *supra* note 254, at 838. For press treatment of succession, see, for example, BARRETT, *supra* note 243, at 119 (“Current legislation takes the line from . . . the Speaker of the House of Representatives and then to the President Pro Tempore of the Senate. Only after that does the cabinet, starting with the Secretary of State, come into play. . . .”); Mike Allen, *Rice is Named Secretary of State*, WASH. POST (Nov. 17, 2004), <https://www.washingtonpost.com/wp-dyn/articles/A53673-2004Nov16.html> (“Rice . . . will be fourth in line of succession to the presidency”); Mark Knoller, *One Night Spent A Heartbeat Away*, CBS NEWS (Jan. 30, 2007, 11:22 AM), <https://www.cbsnews.com/news/one-night-spent-a-heartbeat-away/> (“The Presidential Succession Act of 1947 lists the Attorney General as 7th in line to the presidency.”).

389. See, e.g., *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) (“[A] practice of at least twenty years duration [by the political branches] . . . 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 v. South Norwalk*, 77 Conn. 257, 264, 58 A. 759, 761 (Conn. 1904); see also *NLRB v. Canning*, 573 U.S. 513, 524 (2014); *Myers v. United States*, 272 U.S. 52, 163 (1926) (“[F]rom 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this court at variance with the declaration of the First Congress; but there was, as we have seen, clear affirmative recognition of it by each branch of the Government.”); 2 TRIAL, *supra* note 72, at 206 (“A long and uniform interpretation, say for seventy years, of a doubtful question under the Constitution, would remove the doubt.”) (quoting William Groesbeck, Counsel for President Andrew Johnson); see also *id.* at 201.

the constitutional interpretation that the political branches give to their respective powers.³⁹⁰

Further, courts often rely on originalist arguments to interpret the Constitution. Legislative succession could very easily be considered practice dating from the early implementation of the Constitution, a custom that was revived at the behest of the executive branch in 1947.³⁹¹ The courts have regularly emphasized the importance placed on custom from the first years under the Constitution, which constitutes a form of originalist materials.³⁹²

Even if the practice is dated only from 1947 it should still receive judicial deference. This is because the courts place a premium on constitutional custom reached by both political branches, even if that

390. See, e.g., *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (“[N]oting the heavy presumption of constitutionality to which a ‘carefully considered decision of a coequal and representative branch of our Government’ is entitled.”) (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985)); *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the constitution, and the interpretation of its powers by any branch is due *great respect* from the others.”) (emphasis added); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“When any Branch [of the federal government] acts, it is presumptively exercising the power the Constitution has delegated to it.”); cf. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (noting that there is “[n]o doubt [that] the political branches have a role in interpreting and applying the Constitution”); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (concluding that the Supreme Court must have “due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government”); Manning, *supra* note 24, at 141–42, 151.

391. See, e.g., KALT, *supra* note 24, at 95. The custom of legislative succession began in 1792—five years after the Constitution’s framing, which suggests it was consistent with original understanding—and lasted for more than ninety years before being interrupted for six decades. See *Myers v. United States*, 272 U.S. 52, 163 (1926) (“[F]rom 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this court at variance with the declaration of the First Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government.”); see also Bradley & Morrison, *supra* note 385, at 479. For brief discussion of some Framers’ views toward legislative succession see *supra* notes 23, 37–45, and accompanying text; see also SILVA, *supra* note 16, at 4–13, 131–34.

392. See *infra* note 502.

custom did not originate at the time of the Constitution's framing.³⁹³ The Supreme Court has noted that its own "precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era."³⁹⁴

Courts are not alone in relying heavily on past practice. Executive branch lawyers place great stock in executive branch precedents—whether they are executive branch actions or legal opinions.³⁹⁵ As the

393. See, e.g., *Canning*, 573 U.S. at 525; *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *The Pocket Veto Case*, 279 U.S. at 688–90; *Ex parte Grossman*, 267 U.S. 87, 118–19 (1925); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 571, 610–11 (1952) (Frankfurter, J., concurring); *Merriam v. Clinch*, 17 F. Cas. 68, 70 (C.C.S.D.N.Y. 1867) (No. 9,460) (opinion delivered by future Supreme Court Justice Blatchford); WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 135–36 (1916); cf. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56 (Columbia Paperback ed. 1961); see also Glennon, *supra* note 385, at 115–16; Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 656–57 (2016). In the context of the 1947 Act, Professor Brian Kalt has written that the statute “has acquired a patina of legitimacy over the decades.” KALT, *supra* note 24, at 95.

394. *Canning*, 573 U.S. at 525.

395. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 36 (2007) (“When OLC writes its legal opinions . . . they cite executive branch precedents (including Attorney General and OLC opinions) as often as court opinions. These executive branch precedents are ‘law’ for the executive branch even though they are never scrutinized or approved by courts.”). OLC documents echo this view:

Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of the Government, precedent and historical practice are often of special relevance OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions

Memorandum from David J. Barron, Acting Assistant Att’y Gen., Off. of Legal Couns., to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010) [hereinafter 2010 Best Practices Memorandum], <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>; see also Memorandum from Steven G. Bradbury, Principal Deputy

former head of DOJ's OLC, Randy Moss, wrote, "the executive branch lawyer . . . must . . . provide the office's best view of the law, which in turn requires consideration of relevant office precedents, executive practice, and statements of the law from other executive branch officials, including, most notably, the President."³⁹⁶ And, as others have observed, OLC precedents involving the President's constitutional authority are granted particular respect by executive branch lawyers.³⁹⁷

Because of DOJ's respect for precedent, the Department is generally loath to reverse itself.³⁹⁸ A Secretary of State or other Cabinet

Assistant Att'y Gen., Off. of Legal Couns., to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions (May 16, 2005), <https://fas.org/irp/agency/doj/olc/best-practices.pdf> ("Where the question relates to the authorities of the President or other executive officers or the separation of powers between the Branches of the Government, past precedents and historical practice are often highly relevant."); Walter E. Dellinger III et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004) [hereinafter *Principles to Guide*], https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship ("OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch."); Separation of Powers Opinion, *supra* note 102, at 128 ("[I]t is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and to what seems to us to be the import of the Constitution's text, history, and structure."); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1497–98 (2010) ("OLC precedents on executive power and the separation of powers merit especially great deference.").

396. Moss, *supra* note 151, at 1324.

397. See Morrison, *supra* note 395, at 1505 ("OLC precedents on issues of executive power merit special deference by OLC, especially when accompanied by executive branch practice adhering to the precedents."); see also 2010 Best Practices Memorandum, *supra* note 395; cf. *infra* notes 402–03. Supreme Court justices have at various times: (1) treated OLC opinions as persuasive authority; (2) deemed them worthy of some degree of deference; (3) viewed them as at least indicative of past practice; and (4) not considered them worthy of any deference at all. See Sonia Mittal, *OLC's Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL'Y REV. 211, 212–25, 239 (2015).

398. See *Principles to Guide*, *supra* note 395, at 5 ("OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties."); GOLDSMITH, *supra* note 395, at 145 (noting the "powerful [OLC] tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong[]"). One close observer of OLC has noted that:

officer challenging the 1947 Act would likely need to persuade the Attorney General or OLC to overturn the executive branch's legal position on legislative succession, a position that has been affirmed in one way or another by every administration since 1947.³⁹⁹ Otherwise, the Secretary/White House claimant would be forced to ignore DOJ's legal advice. As the Supreme Court itself has observed, "Presidents tend to follow the legal advice of their chief legal officers."⁴⁰⁰ When they do

The data suggest that OLC does not often overrule itself [I]f OLC or the Attorney General had long opined that the Constitution does not grant the President a particular power . . . those long-settled views would merit the same precedential treatment as if they had gone the other way precisely because they would represent part of the historically developed understanding of the law.

Morrison, *supra* note 395, at 1458, 1503; *see also* Moss, *supra* note 151, at 1325 ("[T]he executive branch lawyer . . . should not lightly cast aside 'the secure foundation of [legal interpretation] laid by others who have gone before him.'") (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring and quoting Benjamin Cardozo)).

399. Among sitting presidents before 1947, only Andrew Johnson appears to have questioned the constitutionality of legislative succession, but, as noted, when push came to shove, his administration was fully prepared to implement the principle. *See supra* notes 66–78. Presidents Washington and Tyler apparently recognized the validity of the principle. President Cleveland could be seen as having both accepted and doubted the lawfulness of legislative succession. *See supra* notes 37–42, 48–57, 82–86 and accompanying text.

400. *NLRB v. Canning*, 573 U.S. 513, 545 (2014); *see also* GRIFFIN B. BELL WITH RONALD J. OSTROW, *TAKING CARE OF THE LAW* 27 (1982) (noting that it is an "extraordinary step [for a president] . . . to overrul[e] the opinion of the attorney general []"); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1577–78 (2007) ("OLC's legal interpretations typically are considered binding within the executive branch, unless overruled by the attorney general or the President (an exceedingly rare occurrence)."); Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 73 (2011) ("OLC does not have the power to impose conclusive, binding legal obligations on the President, but by longstanding tradition its opinions are treated as presumptively binding and are virtually never overruled by the President or Attorney General."); Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <https://www.nytimes.com/2011/06/18/world/africa/18powers.html> ("Presidents have the legal authority to override the legal conclusions of the Office of Legal Counsel and to act in a manner that is contrary to its advice, but it is extraordinarily rare for that to happen.").

not, they can expect to pay a steep political price.⁴⁰¹ One would hope that a Secretary of State (or other Cabinet Secretary)—even one with presidential aspirations—would be mindful of those considerations. Thus, breaking with this tradition and ignoring the executive branch’s longstanding legal opinion would likely come with a hefty political price for the Secretary/would-be Acting President.

DOJ not only rarely reverses itself, it is particularly aggressive in asserting and defending executive branch powers and practices from perceived legislative branch encroachment.⁴⁰² Indeed, as OLC itself

401. See GEORGE W. BUSH, *DECISION POINTS* 173–74 (2010); JACK GOLDSMITH, *IN HOFFA’S SHADOW* 148–49 (2019); PETER BAKER, *DAYS OF FIRE* 317–19 (2013). One of the rare instances when a President did reject his Attorney General’s views on a legal issue occurred when President Franklin D. Roosevelt declined to follow Attorney General Robert Jackson’s advice on the lawfulness of wiretapping. See GOLDSMITH, *supra* at 125–26, 149–50. Likely because of the political sensitivity involved, Roosevelt conveyed his decision through a confidential letter. See *id.* Decades later, President George W. Bush was confronted with the option of reauthorizing the Terrorist Surveillance Program and overruling DOJ on its legal validity or recalibrating the program to accommodate DOJ’s concerns; he chose the latter course. See *id.* at 147–49; BUSH, *supra* at 173–74. Had he done otherwise, the President would have faced numerous high-level resignations and enormous political fallout. See GOLDSMITH, *supra* at 147–49; BUSH, *supra* at 173–74.

It would be a *much* taller order for a Secretary of State or other Cabinet Secretary to overturn DOJ’s views on legislative succession to “confirm” his or her own status as Acting President. Hesitation to act contrary to the legal views of DOJ was demonstrated by Presidents Roosevelt and Bush who had both been duly and lawfully elected. Moreover, when Roosevelt decided to disregard Jackson’s advice, he did so confidentially to avoid paying a major political cost. See GOLDSMITH, *supra* at 125–26, 149–50. In the case of a Secretary of State or another Cabinet Secretary, the very authority upon which he or she would be relying to overturn DOJ’s interpretation would be at issue (i.e., whether he or she is Acting President). Furthermore, the overruling of DOJ’s longstanding view would almost certainly be public and would likely create a political furor. Cf. *id.* at 149 (“[W]hile the President has the legal authority to overrule his attorney general on a matter of law . . . his ability to effectuate his legal interpretation depends on the willingness of subordinates to carry out his wishes.”).

402. Professor Jack Goldsmith, former Assistant Attorney General at OLC, wrote:

OLC writes its legal opinions supporting broad presidential authority [something] OLCs of both parties have consistently done OLCs of both parties have always held robust conceptions of presidential power OLC lawyers and Attorneys General over many decades . . . assert more robust presidential powers . . . than

has stated, “[e]xecutive branch lawyers . . . have a constitutional *obligation* . . . to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion.”⁴⁰³

White House counsels, though typically more focused on the immediate concerns of the incumbent than DOJ,⁴⁰⁴ also place an emphasis on defending the traditional powers of the executive branch.⁴⁰⁵

had been officially approved by the Supreme Court The [OLC] office [has a] pro-President disposition.

GOLDSMITH, *supra* note 395, at 36–37; *see also* BRUFF, *supra* note 102, at 68 (“Career lawyers in OLC are especially apt to see themselves as protectors of the long-run interests of the executive branch, whatever the desires of its temporary leaders.”); Morrison, *supra* note 395, at 1501–03 (“OLC’s written opinions are generally quite friendly to executive power [They are] generally pro-executive [in their] tenor OLC [has] special sensitivity to incursions on executive power OLC [demonstrates a] general inclination in favor of executive power.”); *infra* note 448.

403. Separation of Powers Opinion, *supra* note 102, at 126 (emphasis added); *cf.* Bradley & Morrison, *supra* note 385, at 452–55.

404. *See* Jeremy Rabkin, *At the President’s Side: The Role of the White House Counsel in Constitutional Policy*, 56 L. & CONTEMP. PROBS. 63, 64–65, 90, 94 (1993).

405. *See* Darby A. Morrisroe, *First Lawyer: The Institutionalization of the Office of White House Counsel, 1943–1989*, at 3 (2007) (unpublished Ph.D. dissertation, University of Virginia, 2007) (on file with author) (“Though often considered the ‘President’s lawyer,’ the White House Counsel would more accurately be described as representing the institution of the presidency, for among its duties is the responsibility for defending the institutional and constitutional prerogatives of the presidency.”); *see also id.* at 4 (stating that the White House counsel is “the last and in some cases only protector of the President’s constitutional privileges[]”) (quoting former White House counsel A.B. Culvahouse); Nelson Lund, *Lawyers and Defense of the Presidency*, 1995 BYU L. REV. 17, 18 (quoting former White House counsel C. Boyden Gray about then-incumbent White House counsel Bernard Nussbaum: “He confused his fiduciary role as a temporary occupant of that office with the no-holds-barred role a private litigant would have. He is not [the Clintons’] private lawyer. He is the lawyer for the Oval Office[]”); *id.* (quoting two-time White House counsel Lloyd Cutler: “The [White House] Counsel is supposed to be counsel for the President in office and for the Office of the Presidency, as many people have said[]”); Charlie Savage, *Departing White House Counsel Held Powerful Sway*, N.Y. TIMES (April 6, 2014), <https://www.nytimes.com/2014/04/07/us/politics/departing-white-house-counsel-held-powerful-sway.html> (quoting President Obama’s chief of staff regarding White House counsel Kathryn Ruemmler: “she takes a particular interest in . . .

In his memoirs, Alberto Gonzales, counsel to President George W. Bush, commented that, “[w]hen I . . . served as White House counsel, I . . . fought fiercely to protect the institution of the presidency.”⁴⁰⁶ At another juncture, Gonzales reasserted that it was his “job [in that capacity] . . . to protect the institution of the presidency.”⁴⁰⁷

By any measure, permitting the presiding officer of either house of Congress to become acting head of the executive branch would constitute a major intrusion into executive branch autonomy. Yet, no Justice Department official since adoption of the 1947 statute has publicly questioned legislative succession. In fact, DOJ has publicly *affirmed* the constitutionality of the principle time and again. It has even done so in official OLC opinions in unpublished form,⁴⁰⁸ where one might expect the most candor to be expressed.⁴⁰⁹ Likewise, White House counsels have repeatedly signaled their acceptance of legislative succession.

Moreover, executive branch deference to legislative branch assertions of authority, such as in the realm of presidential succession, should be granted greater respect than legislative acquiescence to executive branch views given the latter’s unity, institutional resources, and greater ability to combat encroachment.⁴¹⁰ As noted, the executive branch is not shy about conveying its views about the constitutionality of a measure, especially those having an impact on the presidency itself.⁴¹¹ It frequently issues signing statements to notify the public about the executive branch’s constitutional reservations about legislation.⁴¹² DOJ can either support or oppose private litigation about constitutional matters. The Department may decline to defend statutes it deems

defending the president’s equities—obviously for this president, but for the institution and the next president, too[]”).

406. GONZALES, *supra* note 348, at 375–80; *see also id.* at 337–38, 369–70; Rabkin, *supra* note 404, at 91.

407. GONZALES, *supra* note 348, at 337.

408. *See* Schlei Memo, *supra* note 152, at 323–37; Tarr Memo II, *supra* note 309, at 7.

409. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.”).

410. *See* Bradley & Morrison, *supra* note 385, at 415, 452–55, 461.

411. *See supra* notes 402–07.

412. *See, e.g.,* Bradley & Morrison, *supra* note 385, at 452–53.

unconstitutional.⁴¹³ In extreme circumstances, the President may even assert that he will defy statutes he views as patently unconstitutional.⁴¹⁴ In the case of legislative succession, any of the twelve presidents since Truman could have requested that Congress remove the Speaker and President pro tempore from the line of succession for constitutional reasons. The time was potentially ripe during the major public debate over presidential succession in the decade preceding adoption of the Twenty-Fifth Amendment and after the September 11, 2001, attacks, when government continuity was widely discussed. Yet, no administration took such action.⁴¹⁵

It is also important to add that numerous executive branch endorsements of legislative succession have taken place *during times when the succession regime was under tremendous stress*. This includes the periods following the Kennedy assassination, the Agnew resignation, the Nixon resignation, the Reagan assassination attempt, the George H.W. Bush heart scare, the disputed 2000 election, and the September 11, 2001, attempted decapitation strike. This history demonstrates that the executive branch has not passively accepted legislative succession as some remote abstract principle; it has been fully prepared in times of crisis to implement the arrangement and indeed it

413. See, e.g., *id.* at 453.

414. See *id.*; *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in judgment) (concluding that when statutes invade the executive domain, the President might “disregard them when they are unconstitutional[]”); *cf.* *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 787 F.2d 875, 889 n.11 (3d Cir. 1986) (implying that the President may have the power or duty to refuse to execute, “a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals . . .”); see also *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (1994); CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE* 102, 120 (1998). Publicly declining to comply with a garden-variety statute is tricky business for elected presidents. It would presumably be *much* more challenging for a mere Cabinet Secretary purporting to be Acting President to defy a statute that goes to the very heart of whether he or she can lawfully assume presidential powers and duties in the first place.

415. Moreover, the line of succession has not been completely inviolate since 1947. Congress and the President have made numerous minor alterations. See *supra* note 101.

has repeatedly taken tangible steps to do so.⁴¹⁶ Actual practice strongly reinforces the importance of repeated executive branch legal opinions.

Furthermore, executive branch affirmations of legislative succession have taken place when partisan control of the White House was a serious possibility. If anything would have prompted the executive branch to consider calling into question the constitutionality of the Speaker assuming power under the 1947 statute, the immediate prospect of a Speaker from the opposite party taking over the White House would seem to fit the bill. Yet precisely such a scenario was in place when President Truman's successor was Republican Speaker Joe Martin. Nonetheless, Truman pushed for legislative succession to be enacted and assigned Martin a Secret Service detail following the measure's adoption.

It was also in place when Presidents Nixon and Ford both faced the possibility of being succeeded by Democratic Speaker Carl Albert. Even as Nixon and White House aides gnashed their teeth in private over the prospect of Albert becoming Acting President, the Speaker received a Secret Service detail, had all manner of items x-rayed when they came into his residence, had a special phone line put in place, and received CIA briefings.

Matters were little different when the Reagan administration took steps to ensure Democratic Speaker Tip O'Neill was located following the 1981 assassination attempt on the President. Pursuant to the White House counsel's contingency plans completed the next year, the Reagan administration took confidential steps to ensure that O'Neill could quickly be sworn in as Acting President if both Reagan and Bush died or became incapacitated. The George H.W. Bush administration assigned Democratic Speaker Tom Foley Secret Service protection when the President endured heart trouble. During the Trump administration, Democratic Speaker Nancy Pelosi noted that she received "ongoing" communication from the executive branch on succession and inability matters.

At no point did these presidents raise the idea that the Speaker might not lawfully be next in line to the Oval Office; not even President Trump who had openly hostile relations with Speaker Pelosi and who demonstrated few qualms about recklessly embracing legal theories

416. Cf. *Boumediene v. Bush*, 553 U.S. 723, 806 (2008) (Roberts, C.J., dissenting) ("A principle applied only when unimportant is not much of a principle . . .").

that clearly served his own interests.⁴¹⁷ To the contrary, these presidents all *confirmed* the Speaker's status through their actions and statements. Thus, legislative succession has been repeatedly embraced by the executive branch even under the most politically acute scenario: facing a potential partisan shift in White House control.⁴¹⁸

Nor can it be forgotten that legislative succession has been expressly supported and put into operation by some of the most ardent advocates of executive branch unity and authority. Dick Cheney, Robert Bork, Ed Meese, and Antonin Scalia each accepted the principle.

Anyone doubting the importance of longstanding executive branch interpretation of Article II, Section 1, Clause 6—the main constitutional provision authorizing the 1947 statute—should examine the “Tyler precedent.”⁴¹⁹ As will be recalled, in 1841, President William Henry Harrison died and was succeeded by Vice President John Tyler. Many believed at the time that, following the death, resignation, or removal of the chief executive, the relevant constitutional provisions meant that the Vice President would only inherit the power and duties of the presidency; that he would become *Acting* President, not President in fact.⁴²⁰ This legal interpretation echoed that of the Constitution's Framers.⁴²¹ Tyler, however, viewed the Constitution to mean that he actually *became* President when his predecessor died.⁴²² He prevailed in his interpretation at the time and it was adopted in turn by Vice Presidents Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, Harry Truman, and Lyndon

417. See, e.g., Pete Williams & Nicole Via y Rada, *Trump's Election Fight Includes Over 50 Lawsuits. It's Not Going Well.*, NBC NEWS, <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289> (last updated Dec. 10, 2020, 11:42 AM); *supra* notes 13, 367–74, and accompanying text.

418. Cf. Bradley & Morrison, *supra* note 385, at 415, 452–55, 460.

419. See CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 209 (2d ed. 1960); KALT, *supra* note 24, at 96. For discussion of the Tyler precedent, see, for example, BRIAN C. KALT, *UNABLE* 30–32 (2019); SILVA, *supra* note 16, at 14–51; FEERICK, *supra* note 16, at 89–98. The Twentieth Amendment provides authorization for the 1947 act as well as Article II. See 93 CONG. REC. 8634 (1947); CONTINUITY OF GOV'T COMM'N, *supra* note 23, at 31.

420. See SILVA, *supra* note 16, at 14–25; FEERICK, *supra* note 16, at 94–96.

421. See SILVA, *supra* note 16, at 5–13, 35; cf. HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 60–63 (Kennikat Press 1969) (1925); ROSSITER, *supra* note 419, at 209.

422. See SILVA, *supra* note 16, at 14–21; FEERICK, *supra* note 16, at 89–96.

Johnson when the presidents they served with passed from the scene.⁴²³ This exegesis remained in place until Section 1 of the Twenty-Fifth Amendment formally embraced the notion.⁴²⁴ The “Tyler precedent” even withstood a court challenge following the assassination of President John F. Kennedy.⁴²⁵

Moreover, the “Tyler precedent” endured despite the fact that it created grave difficulties during times of de facto presidential inability.⁴²⁶ At the time of the de facto incapacities of Presidents James Garfield and Woodrow Wilson, there were serious concerns on the part of Vice Presidents Arthur and Thomas Marshall and many others that, if the second officer tried to substitute himself for the incapacitated President, the Vice President would actually become President as was the case when presidents died.⁴²⁷ Such an interpretation would have meant that the Vice President would have permanently unseated the ailing chief executive.⁴²⁸ The theory was that, if the Vice President became

423. See SILVA, *supra* note 16, at 24–31, 47; FEERICK, *supra* note 23, at 5–8; AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 519 n.2 (2012). In many ways, Tyler’s rise to the presidency involved a partisan shift in White House control in its own right, which could add further support for the legitimacy of legislative succession since a partisan shift in executive branch control is regularly cited as a major policy reason against the principle. President Harrison was a Whig and the Whig Convention picked Tyler to be Harrison’s running mate even though Tyler was a long-time Democrat. Upon taking office, Tyler quickly demonstrated he was no Whig and soon alienated the Whig-controlled Congress. See WILFRED E. BINKLEY, *PRESIDENT AND CONGRESS* 90–99 (1947). The same could be said about Andrew Johnson’s ascension to the presidency after Lincoln was assassinated. Johnson joined the Republican Lincoln on a ticket of national unity but had long been a Democrat. Like Tyler, he reverted to his earlier partisan principles upon becoming President and clashed with a Congress controlled by the other party. See *id.* at 94–95, 128–44.

424. See KALT, *supra* note 419, at 31; FEERICK, *supra* note 23, at 108.

425. See *supra* note 34; see also *Merriam v. Clinch*, 17 F. Cas. 68, 70 (C.C.S.D.N.Y. 1867) (No. 9,460).

426. See, e.g., FEERICK, *supra* note 23, at 8; SILVA, *supra* note 16, at 63–67; Kennedy Legal Opinion, *supra* note 130, at 86–87; Joel K. Goldstein, *Vice-presidential Behavior in a Disability Crisis: The Case of Thomas R. Marshall*, 33 POL. & LIFE SCI. 37, 46–47 (2014).

427. See Kennedy Legal Opinion, *supra* note 130, at 86–87; FEERICK, *supra* note 16, at 133–39; FEERICK, *supra* note 23, at 8–10, 14–16; Brownell, *supra* note 112, at 193–95; Goldstein, *supra* note 426, at 46–47; RONAN, *supra* note 26, at 18; SILVA, *supra* note 16, at 63–67.

428. See FEERICK, *supra* note 16, at 133–34; Kennedy Legal Opinion, *supra* note 130, at 86; FEERICK, *supra* note 23, at 8–10, 14–16; Brownell, *supra* note 112, at

the actual President upon the death, resignation, or removal of the President, then the Vice President would become actual President upon a determination of presidential incapacity as well, thus displacing the elected chief executive for good.⁴²⁹

In sum, the “Tyler precedent” served as the binding constitutional interpretation of Article II, Section 1, Clause 6 for more than a century and a quarter.⁴³⁰ What the Tyler interpretation teaches is that constitutional construction by the executive branch about presidential succession is very likely to be legally binding—even if it does not comport with originalist materials.⁴³¹ And in the case of legislative succession, a strong originalist case can be made in favor of the principle.⁴³²

193–95; Goldstein, *supra* note 426, at 46–47; RONAN, *supra* note 26, at 18; SILVA, *supra* note 16, at 63–67. Former President Truman took this position. *See Ike, Truman Differ*, *supra* note 116.

429. *See* FEERICK, *supra* note 16, at 133–34; Kennedy Legal Opinion, *supra* note 130, at 86; FEERICK, *supra* note 23, at 8–10, 14–16; Brownell, *supra* note 112, at 193–95; Goldstein, *supra* note 426, at 46–47; RONAN, *supra* note 26, at 18; SILVA, *supra* note 16, at 63–67.

430. *See, e.g.*, Kennedy Legal Opinion, *supra* note 130, at 79 n.20 (“‘[C]onstitutional custom’ has undoubtedly modified this original interpretation in the event of the President’s death . . .”).

One future Supreme Court justice reached a similar conclusion. Writing as a federal district court judge at the time, future Justice Samuel Blatchford reasoned that:

Three times, since the adoption of the constitution, the president has died, and, under the provision referred to [Article II, Section 1, Clause 6], the powers and duties of the office of president have devolved upon the vice president. All branches of the government have, under such circumstances, recognized the vice president as holding the office of president, as authorized to assume its title, and as entitled to its emoluments. The vice president holds the office of president until a successor to the deceased president comes to assume the office, at the expiration of the term for which the deceased president and the vice president were elected.

Merriam, 17 F. Cas. at 70. Other prominent scholars have reached a similar conclusion. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 54 (4th rev. ed. 1957) (“Tyler’s exploit[,] . . . having been repeated six times, must today be regarded as having become law of the land.”); *see also* KALT, *supra* note 419, at 31; FEERICK, *supra* note 23, at 5–7; *cf.* SILVA, *supra* note 16, at 47–49.

431. *See supra* notes 389, 393–94, and accompanying text.

432. *See supra* notes 23, 37–45, and accompanying text; FEERICK, *supra* note 16, at 37–38 (observing that legislative succession provisions existed in state

Accordingly, this is all the more reason that the executive branch's longstanding embrace of legislative succession should enjoy deference along the lines of the "Tyler precedent."

2. Judicial Skepticism of the Executive Branch's Sudden Reversal on an Issue

Of course, not only would an ambitious Cabinet Secretary have to persuade the public why nearly seventy-five years of bipartisan, executive branch practice and opinion should be summarily discarded, he or she would also need to do the same in court if the matter were litigated. There is some reason to believe that the judiciary might be skeptical of such a sudden reversal of the executive branch's deeply rooted legal stance.⁴³³ Indeed, there are notable Supreme Court opinions that have sided against the executive branch in part because the executive branch reversed its longstanding legal position.⁴³⁴

constitutions prior to 1787 including in New York, Delaware, North Carolina, New Hampshire, and New Jersey).

433. See Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1354 (2008) ("[D]epart too often or too far from what executive officials have said the law requires, and executive officials are likely to find relevant audiences increasingly skeptical about their claims . . .").

434. For instance, in *Clinton v. New York*, the Supreme Court struck down the Line Item Veto Act. See 524 U.S. 417 (1998). In so doing, the Court dismissed the executive branch's support for the statute, noting that it had reversed its longstanding position on line item vetoes. The Court observed that "[o]ur first President [George Washington] understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.'" *Id.* at 440. It further noted that former President William Howard Taft similarly wrote that the executive "'has no power to veto part of a bill and let the rest become a law.'" *Id.* at 440 n.30. On the other hand, the Court reasoned that "[w]hat has emerged in these cases from . . . President [Clinton]'s exercise of his statutory . . . [line item veto] powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the 'finely wrought' procedure that the Framers designed[]" and must therefore be invalidated. *Id.* at 440.

In *Immigration and Naturalization Services v. Chadha*, the Court ruled in favor of the executive branch's position by striking down the use of legislative vetoes. See 462 U.S. 919 (1983). However, Justice Byron White penned a strong dissent that placed significant weight on the fact that the executive branch was breaking from its long-held position on the issue. He commented that for "[o]ver the quarter century following World War II, presidents continued to accept legislative vetoes by one or both Houses as constitutional." *Id.* at 969. He observed further that:

All of this is not to say that a future court could not strike down legislative succession.⁴³⁵ Courts have, on occasion, overturned longstanding political branch practice.⁴³⁶ Yet, when courts do they sometimes have seen their legitimacy undermined.⁴³⁷ And, when

Presidents Kennedy and Johnson proposed enactment of statutes with legislative veto provisions The administration of President Kennedy submitted a memorandum supporting the constitutionality of the legislative veto During the administration of President Johnson, the Department of Justice again defended the constitutionality of the legislative veto provision of the Reorganization Act, as contrasted with provisions for a committee veto.

Id. at 969 n.5.

Justice White concluded that “[t]his very construction . . . which the Executive Branch now rejects was the basis upon which the Executive Branch defended the constitutionality of [legislation adopted decades earlier] This also represents the position of the Attorney General . . .” only six years previous. *Id.* at 995.

In the analogous context of statutory interpretation, courts have often placed a premium on the consistency of an agency’s legal interpretation in determining how much weight to assign it. *See United States v. Mead*, 533 U.S. 218, 235 (2001); *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). Two scholars, Connor Raso and William Eskridge, have concluded that:

[W]e find a statistically significant correlation between a longstanding agency policy and the Justices’ willingness to apply deference regimes and to go along with the agency’s interpretation This finding is consistent with Supreme Court precedent holding that recently altered agency policies should sometimes receive less deferential treatment.

Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1781–82 (2010) (footnotes omitted); *see also* Mittal, *supra* note 397, at 232 (“[C]ourts have taken note when OLC opinions depart significantly from prior interpretations.”).

435. *But cf.* Calabresi, *supra* note 16, at 156–71, 175.

436. *See Chadha*, 462 U.S. at 967 (White, J., dissenting) (“Today the Court not only invalidates § 224(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”).

437. *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288–92 (1993) (citing numerous occasions in which Congress has adopted legislative vetoes in spite of the *Chadha* decision which declared them unconstitutional); Bradley & Morrison, *supra* note 385, at 485

members of the judiciary have injected themselves into questions of who shall be the next President—which they would be doing in particularly jarring fashion by striking down legislative succession during a potential crisis as opposed to merely upholding the statutory provision—the Court and the individual justices have come in for heavy criticism, often later from the members of the Court itself.⁴³⁸

(“[D]ismantling longstanding institutional practices could jeopardize [the courts’] own legitimacy.”).

438. In his dissent in *Bush v. Gore*, Justice Stephen Breyer expressed disapproval of the role of Supreme Court justices in the 1877 electoral commission which decided the outcome of the 1876 presidential race:

[T]he participation in the work of the [1877] electoral commission by five [Supreme Court] Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

531 U.S. 98, 157 (2000). Others have concurred. See EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 356 (1977) (“[T]he service of five Justices on the Hayes-Tilden Commission . . . demeaned” the Court); Earl Leon Shoup, The Vice-Presidency of the United States 76 (1923) (unpublished Ph.D. dissertation, Harvard University) (on file with author) (noting “[t]he diminished prestige of the [Supreme] [C]ourt after its participation in the Electoral Commission . . .”); see also WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION 335–36 (1907); 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 305 (reprt. ed. 1991).

Justice Sandra Day O’Connor expressed similar misgivings about the Supreme Court’s role in *Bush v. Gore*. She made public remarks several years later about the decision:

[The Supreme Court] took the [*Bush v. Gore*] case and decided it at a time when it was still a big election issue Maybe the court should have said, “We’re not going to take it, goodbye.” [The case] . . . stirred up the public [and] gave the court a less-than-perfect reputation.

Obviously the court did reach a decision and thought it had to reach a decision It turned out the election authorities in Florida hadn’t done a real good job there and kind of messed it up. And probably the Supreme Court added to the problem at the end of the day.

V. POTENTIAL COUNTERARGUMENTS

This piece has argued that, for nearly seventy-five years, the executive branch has consistently embraced legislative succession, that its acceptance of the principle is meaningful both politically and legally, and that these points should discourage anyone including ambitious Cabinet secretaries and outside litigants from challenging the 1947 Act in court during a succession dispute. Despite the striking consistency of the executive branch on this issue, there are several potential counterarguments that could be marshaled against this article's thesis. They include: (1) that there has been no historical practice as legislative succession has never actually occurred; (2) that the executive branch has only taken the steps it has for pragmatic, non-legal reasons; (3) that the existence of secret "Doomsday" plans during the Cold War indicates the executive branch has not in fact uniformly supported legislative succession; (4) that the executive branch has either ignored or been unfamiliar with the scholarly case against legislative succession; and (5) that, at the end of the day, the executive branch's longstanding position amounts to no more than "garden variety" past

Dahleen Glanton, *O'Connor Questions Court's Decision to Take Bush v. Gore*, CHI. TRIB., (Apr. 27, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-04-27-ct-met-sandra-day-oconnor-edit-board-20130427-story.html> (quoting former Justice O'Connor).

Justice Antonin Scalia indicated that he too thought the *Bush v. Gore* decision was not great for the Court's prestige:

Mr. Gore brought it into the courts. So if you don't like the courts getting involved talk to Mr. Gore I have no regrets about taking the case and I think our decision in the case was absolutely right. But if you ask me "Am I sorry it all happened?" Of course I am sorry it happened there was no way that we were going to come out of it smelling like a rose. I mean, one side or the other was going to feel that was a politicised [sic] decision but that goes with the territory.

Toby Hamden, *Justice Antonin Scalia: Al Gore to Blame for 2000 US Election Mess*, THE TELEGRAPH (June 26, 2008), <https://www.telegraph.co.uk/news/world-news/northamerica/usa/2200495/Justice-Antonin-Scalia-Al-Gore-to-blame-for-2000-US-election-mess.html> (quoting Justice Scalia); see also JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 360, 374 (2019); DAVID A. KAPLAN, THE ACCIDENTAL PRESIDENT 239–43, 277, 292–96 (2001).

practice that could very easily be overturned by the courts. None of these counterarguments are persuasive.

A. There Has Been No Actual Historical Practice

No Speaker or President pro tempore has ever become Acting President. Accordingly, some scholars contend that because there has been no actual legislative succession no relevant practice has taken place. This position was articulated in two articles in 1995, one co-authored by Professors Akhil and Vikram Amar and the other by Professor Steven Calabresi, three of the nation's most distinguished constitutional scholars.⁴³⁹ In fairness to these three authorities, there existed no compilation and assessment of past practice for them to consult when they undertook their writings. As such there was no sense of how deeply and widely ingrained this constitutional custom had become.

Keeping that important caveat in mind, the Amar brothers asserted in 1995 that “no statutory succession ever . . . [has taken] place . . . under the 1947 Act . . . so the practical slate remains relatively clean.”⁴⁴⁰ Unbeknownst at the time, the slate was *far* from clean and it has become even less so in the quarter century since publication of the Amars' article. A long and continuous history of practice has been in existence since 1947, manifesting many different forms at many different levels of the executive branch.

The executive branch has taken tangible action in many ways. It has done so by assigning protective security details to Speakers

439. See Amar & Amar, *supra* note 24, at 134 n.131; Calabresi, *supra* note 16, at 166–67.

440. Amar & Amar, *supra* note 24, at 134 n.131; *cf.* Myers v. United States, 272 U.S. 52, 171 (1926) (“When instances which actually involve the question are rare or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time as showing general acquiescence in the legislative assertion of a questioned power is minimized.”). Professor Calabresi made a similar point:

[Past practice] fails to persuade . . . [N]one of the three Presidential Succession Acts has ever been invoked because there has never been a simultaneous dual vacancy in both the presidential and vice presidential offices. It is thus more than a little misleading to talk about a settled practice because in one very important sense there has not been *any* practice at all.

Calabresi, *supra* note 16, at 166–67 (emphasis added).

Martin, McCormack, Albert (twice), and Foley.⁴⁴¹ For decades, the Speaker and the President pro tempore have been looped into the executive branch's Central Locator System whose "purpose," one authority notes, "is to make it easy to find a new and legal president if we lose the one we have."⁴⁴² In 1981 and 2001, during potential succession crises, the executive branch made it a high priority to contact the Speaker. Lyndon Johnson went to great lengths to ensure that Speaker McCormack was included in NSC deliberations and included President pro tempore Hayden in White House meetings with legislative leaders. The Johnson administration also drafted and issued a letter arrangement between the President and the Speaker as to procedures for the Speaker to follow in helping determine a possible presidential incapacity. During Albert's two tenures as successor, he received a Secret Service detail, an emergency phone line was placed in his home, an x-ray machine was set up to scan anything brought to his residence, and he received regular CIA briefings. By the late 1980s, the executive branch had placed a hotline in the office of the President pro tempore and drawn up plans for removing the Senate presiding officer from Washington during a crisis. During the drawn-out *Bush v. Gore* legal proceedings, the CIA conducted briefings for Speaker Hastert. DOD includes lawmakers as successors to the President and Vice President in the context of authority to launch nuclear weapons. The Trump administration named Senator Hatch as its designated survivor at its inauguration and kept Speaker Pelosi regularly briefed on succession matters.

On the purely legal front, there are two Attorney General opinions (McGregor, Kennedy), one Solicitor General brief (Bork), and no less than six OLC opinions (one by Schlei, one by Dixon, two by Olson, and two by Tarr) that explicitly or implicitly support legislative succession. This string of opinions began in 1947 and reflects DOJ's views under both parties.⁴⁴³ As one scholar has observed, "the Court has

441. Both Martin and McCormack rejected the details but executive branch resources were still expended in both cases.

442. EDWARD ZUCKERMAN, *THE DAY AFTER WORLD WAR III* 55–56 (1984); *supra* notes 214–21 and accompanying text. Under authority of the 1792 succession statute, President Andrew Johnson's Cabinet devoted serious effort to contacting President pro tempore Lafayette Foster during the former's serious illness in 1865. *See supra* notes 66–71 and accompanying text.

443. As noted, the OLC memorandum for the file during the Eisenhower era never reached a definitive conclusion as to legislative succession's constitutionality. Neither did it purport to provide the official position of OLC. *See supra* notes 122–29 and accompanying text.

consistently relied on OLC opinions as evidence of historical practice—a traditional basis for evaluating the scope of presidential power.”⁴⁴⁴ To this end, OLC’s legal interpretations have manifested the executive branch’s efforts to implement legislative succession.

Similarly, the White House counsel’s office under Presidents Reagan, George H.W. Bush, and Clinton took steps to establish contingency plans to fully operationalize legislative succession, actions that only recently have been made public. The George W. Bush administration issued two government-wide homeland security planning documents that clearly reaffirmed legislative succession. Reagan’s White House counsel, Fred Fielding, expressly advised Secretary of State Haig that he was not the direct successor to Vice President Bush during a potential succession crisis. Accordingly, these eight DOJ opinions, one DOJ brief, multiple executive branch contingency plans, and Fielding’s legal advice following Reagan’s shooting constitute important past practice. And, of course, presidents, vice presidents, secretaries of state, attorneys general, and White House staffers have each expressed support for legislative succession time and time again.

Each of these episodes—as well as the preparation and the planning for them—is instructive, reflecting the executive branch repeatedly committing significant government resources in the form of time, funding, and manpower to ensure that the two lawmakers are ready to become Acting President. This recurring dedication of resources involved individuals at the highest levels of the executive branch. This pattern also encompassed the work of DOJ attorneys by the score, Secret Service agents, officials at FEMA, and military detailees. These efforts functionally cut across the executive branch, entailing questions of law, logistics, interagency and interbranch coordination, protective function, and communications. And these efforts have been taken regularly over nearly a seventy-five-year period.⁴⁴⁵

444. Mittal, *supra* note 397, at 216; cf. Bradley & Morrison, *supra* note 385, at 454 (“[B]ecause OLC and other executive offices understand that failure to object to legislative limits on executive authority may be treated as accepting their constitutionality, it is sensible for a court or other interpreter to treat such failures that way.”).

445. See also *supra* notes 66–71 and accompanying text (discussing a comparable effort under authority of the 1792 statute).

In his incisive study of constitutional custom, Professor Michael Glennon concluded that “[i]n most cases, the act constituting a custom must be repeated more than once, and obviously, the greater the number of times the act has been repeated, the more probative the custom.” Glennon, *supra* note 385, at 130.

This sizeable and long-term allocation of federal resources to effectuate legislative succession can only be seen as a sustained and high-level historical practice.⁴⁴⁶ Indeed, planning for legislative succession is in many ways central to broader continuity-of-government efforts for the executive branch.⁴⁴⁷

Admittedly, there has never been an instance in American history in which a Speaker or President *pro tempore* has become Acting President. *Of course, the opposite is equally true.* There has never been an instance of a Cabinet Secretary vaulting over the two lawmakers to become Acting President. One is therefore left to consider practice short of actual dual vacancy and dual incapacity, which since 1947 has been decidedly and uniformly (or almost uniformly) favorable to legislative succession. The real question is where are the examples—let alone the full-fledged pattern of behavior—involving the executive branch clearly *opposing* the constitutionality of lawmaker succession,

Professor Glennon also notes that “[t]he longer the time period, the more reason to view the repetition as having authority as custom.” *Id.* Another consideration observed by this noted scholar is “the regularity with which the act has been repeated over its duration.” *Id.* at 132. The executive branch’s embrace of legislative succession through actions, public statements, and legal opinions satisfies each of the factors cited by Professor Glennon to establish a constitutional custom (i.e., the number of times an occurrence has taken place, the duration of the practice, and the regularity of the actions).

In a sense, repeated examples of a custom’s acceptance, such as the case with legislative succession, might even be seen as a form of political branch “super precedent.” *Cf.* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) (“Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time. Super precedents are deeply embedded into our law and lives through the subsequent activities of the other branches.”); *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376–77 (4th Cir. 2000); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976).

446. *Cf.* Second Fordham Report, *supra* note 18, at 958 (referencing former CIA Director John Brennan’s comments that immense time and energy have been devoted to continuity-of-government efforts); Bradley & Morrison, *supra* note 385, at 454 (“[I]nquiries into executive acquiescence should focus on repeated executive compliance with legislative restrictions over time.”).

447. *See* Second Fordham Report, *supra* note 18, at 958. Indeed, one suspects that imperiling legislative succession could very easily disrupt much of the broader continuity-of-government effort.

by any measure a major legislative branch incursion into the executive domain.⁴⁴⁸

It could also be argued that this longstanding executive branch past practice merely reflects *implicit* support for the measure's constitutionality. This view is equally unpersuasive. For one, much of the executive branch's support is in fact quite *explicit* in the form of DOJ legal opinions from McGregor, Schlei, and Tarr that clearly address the constitutionality of legislative succession. Fielding's verbal advice to Haig and the Reagan-Bush-Clinton contingency plans could be seen in this very same light. Furthermore, even if all of this executive branch support could somehow be seen as merely providing tacit legal support for legislative succession, it is still *far more* implicit executive branch support than opponents of the principle can muster.

In addition, it is instructive that the episodes described in this article took place during times when the succession regime was under intense pressure. These include a presidential assassination, a failed assassination attempt, an attempted decapitation strike against the U.S. government, a presidential resignation, a vice-presidential resignation, a disputed presidential election, and a potential presidential medical procedure. Each of these incidents involved serious threats or potential threats to the continuity of American government and immediate tangible steps were taken by the executive branch to try to ensure the Speaker could become Acting President. *In each of these situations the executive branch was fully prepared to implement legislative succession.* Only the nation's good fortune prevented the executive branch from actually having to do so. Based on information that is publicly available over the past seven and a half decades, there is little reason to believe that, if left to follow regular, orderly governmental procedures and protocols, the executive branch would *not* have implemented legislative succession.

448. In this regard, the contrast between the executive branch's approach toward the constitutionality of legislative succession as found in the 1947 Presidential Succession Act and that of the 1973 War Powers Resolution could not be more striking. As the Congressional Research Service notes, "the central features of the War Powers Resolution . . . have been deemed unconstitutional by *every President since the law's enactment.*" CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE, at Summary (Mar. 8, 2019) (emphasis added); *see also* Michael John Garcia, CONG. RSCH. SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 2 (Feb. 17, 2012); *supra* notes 402–07.

Furthermore, the executive branch's embrace of legislative succession has manifested itself in important matters of state. For example, during the first fourteen months of Lyndon Johnson's presidency, aside from a brief trip across the border to Canada, Johnson declined to travel abroad in large part because of concerns that the Speaker and President pro tempore were aged. This decision had foreign policy ramifications for the United States (i.e., potentially hindering improved bilateral relations with France). Similarly, Cabinet secretaries were limited in their travel outside of Washington. Accommodating legislative succession was an important part of how the first year and a half of the Johnson administration operated at its very highest levels.

It also bears noting that a third of the life of the 1947 statute has elapsed since publication of the articles by Professors Amar, Amar, and Calabresi. Numerous important episodes have taken place during the presidencies of Clinton, George W. Bush, Obama, and Trump that reflect that, within the executive branch, acceptance of legislative succession has only deepened.⁴⁴⁹ Moreover, materials from the pre-1995 era have been made public that further reveal the widespread acceptance of this longstanding practice (e.g., the Schlei memorandum, the memorandum written by Vice President Mondale's staff, the White House counsel contingency plans.).

For his part, Professor Calabresi was willing to acknowledge the existence of some past practice and, to a degree, accept its importance. He conceded that:

Harry Truman . . . signed the current Succession Act. Moreover, recent presidents have taken official actions that implicitly affirm the constitutionality of putting the Speaker of the House in the line of succession, such as occasionally extending him secret service protection on the presumption that he is validly in the line of succession. The argument from practice is *strong* here both because the textual and structural case [regarding legislative succession] is close and because the practice is *unusually uniform and reflects to some degree the concurrence or acquiescence* of all three branches of the federal government.⁴⁵⁰

449. See Second Fordham Report, *supra* note 18; *supra* Parts III.J–M.

450. Calabresi, *supra* note 16, at 166 (emphasis added).

Still, Professor Calabresi believed that assigning legislative succession the status of constitutional custom was premature. “It is . . . too early to say this matter has been settled by practice when as far as ‘We the People’ are concerned there has been *no publicly visible practice* at all.”⁴⁵¹

451. *Id.* at 166–67 (emphasis added). *But cf.* *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982) (“The Constitution does not preclude [a] practical and widely accepted means of addressing an infrequent problem.”).

Professor Calabresi raised another argument against past practice. Due to potential conflicts of interests, he questioned the legitimacy of two of the “near misses” associated with legislative succession. *See* Calabresi, *supra* note 16, at 167. The first entailed Senator Ben Wade, the President pro tempore, who was first in line to the presidency and sat in judgment of President Johnson during the latter’s Senate impeachment trial. *See id.* The second example involved Democratic Speaker Carl Albert, who became the first successor after Gerald Ford was elevated to the Oval Office following President Nixon’s resignation. *See id.* While Albert was Speaker, the House appeared to drag its feet in confirming Republican Nelson Rockefeller as Vice President. *See id.*; *cf.* Amar & Amar, *supra* note 24, at 121–24, 128–29 (raising similar concerns about the Wade and Albert episodes though not specifically in the context of an argument related to past practice); AMAR, *supra* note 423, at 3–21; Goldsmith & Miller-Gootnick, *supra* note 6.

There are several problems with this argument, however. First, it seems much more like a policy concern than a constitutional issue. Conflicts of interest are, of course, not a good thing from a policy perspective but that hardly means they are unconstitutional. As Justice Antonin Scalia wrote in his famed dissent in *Morrison v. Olson*:

Is it unthinkable that the President should have such exclusive power [to conduct criminal investigations], even when alleged crimes by him or his close associates are at issue? No more so than Congress [having] . . . the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. *See* Civil Rights Act of 1964 No more so than this Court [having] . . . the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. *See United States v. Will* A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused.

487 U.S. 654, 710 (1988) (Scalia, J., dissenting). Indeed, the constitutional provisions involving succession and inability are themselves host to a major conflict of interest. *See* U.S. CONST., amend. XXV, § 4 (requiring the Vice President to play a role in

determining whether he will become Acting President); *see also* Manning, *supra* note 24, at 145–46 n.27.

Second, the historical context surrounding the Wade and Albert scenarios contradicts Professor Calabresi's contention. Wade was *not* barred from taking part in the Johnson impeachment trial. To the contrary, he was permitted to fully participate as was Speaker of the House Schuyler Colfax, who was second in line to the presidency. *See* CONG. GLOBE, 40th Cong., 2d Sess. 411, 414, 415 (1868) (Supplement to *The Congressional Globe*) (Senator Wade voting in favor of impeachment articles against President Johnson); H.L. TREFOUSSE, BENJAMIN FRANKLIN WADE: RADICAL REPUBLICAN FROM OHIO 302–04 (1963) (discussing Wade's public refusal to recuse himself); CONG. GLOBE, 40th Cong., 2d Sess. 1616, 1618 (1868) (Speaker Colfax presiding over impeachment proceedings involving President Johnson); *see also* 1 TRIAL, *supra* note 72, at 5–10 (Wade presiding over impeachment preliminaries); AMAR, *supra* note 423, at 3–21; *cf.* JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 423–24 (1995) (discussing the Chief Justice's presidential ambitions involving his own possible conflict of interest during the Johnson impeachment trial); DAVID O. STEWART, IMPEACHED 178–79 (2009) (same); MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 136–37 (1999 ed.) (same); Amar & Amar, *supra* note 24, at 122, 122 n.59; AMAR, *supra* note 423, at 3–4.

Indeed, after Professor Calabresi's article was published, Speaker Newt Gingrich and President pro tempore Strom Thurmond participated in the impeachment effort undertaken against President Bill Clinton. *See* 144 CONG. REC. 28,110–12 (1998) (Speaker Gingrich voting in favor of impeachment articles); 145 CONG. REC. 2,376–77 (1999) (Senator Thurmond voting in favor of the impeachment articles). The same was true of Speaker Nancy Pelosi in both impeachment efforts against President Donald Trump. *See* 167 CONG. REC. H191 (daily ed. Jan. 13, 2021) (Speaker Pelosi voting in favor of impeachment article); 165 CONG. REC. H12205–06 (daily ed. Dec. 18, 2019) (Speaker Pelosi voting in favor of impeachment articles). Similarly, President pro tempore Chuck Grassley also participated in the first Senate trial of Trump. *See* 166 CONG. REC. S937–38 (daily ed. Feb. 5, 2020) (Senator Grassley voting against impeachment articles). (The second impeachment trial of Trump took place after the President had left office; therefore, legislative succession no longer involved a potential conflict of interest).

With respect to the Albert situation, it should be recalled that the 1947 statute *preceded* the Twenty-Fifth Amendment. As such, the Framers of the Amendment understood that the Speaker would remain in the line of succession following the Amendment's adoption (during impeachment proceedings or otherwise). *See, e.g., Presidential Inability: Hearings Before the H. Comm. on the Judiciary*, 89th Cong. 48 (1965) (exchange between Rep. Celler and Sen. Bayh). For these reasons, the mere fact that a conflict of interest exists should hardly lead to the conclusion that a matter—especially a succession matter—would necessarily be unconstitutional.

The key element seems to be his contention that past practice was hidden from public view.⁴⁵²

However, most of the episodes collected in this piece have been publicly available in newspaper articles and books though they have never been assembled and analyzed systematically. Professor Calabresi pointed to the Speaker being assigned a protective detail, a step that was itself hardly a secret at the time or in the years that followed.⁴⁵³ Of course, the Speaker receiving secret service protection is only the “tip of the iceberg” of executive branch practice. Furthermore, a lack of citizen awareness about publicly available information—assuming this is in fact the case—would seem to have little direct bearing on the legal issues involved. Were a dual vacancy or dual incapacity scenario to occur, these episodes would likely be brought to light in a major way for the public’s consumption and consideration as is typically the case when an esoteric legal issue becomes politically salient. The deluge of public discussion about impeachment and the Twenty-Fifth Amendment during the Trump presidency reflects this phenomenon.⁴⁵⁴

Of course, public awareness *is* vital to a practice’s legitimacy. But even then, this criticism is unconvincing. Haig’s remarks implying he was the presidential successor created a major news story and have left an indelible imprint on the public consciousness.⁴⁵⁵ The video footage of his controversial press conference would almost certainly be replayed endlessly on television and social media—to a Secretary’s disadvantage—if one of Haig’s successors ever challenged a Speaker or a

452. See Calabresi, *supra* note 16, at 167. It is also somewhat unclear what Professor Calabresi meant regarding the practice of legislative succession being premature. He wrote “[i]t is . . . too early to say this matter has been settled by practice There is not yet a clearly enough established” custom in this area. See *id.* He could have meant that there has yet to be a dual vacancy or dual incapacity scenario. For discussion of that point, see *supra* notes 439–49 and accompanying text. Or Professor Calabresi could have meant that, given what was known in 1995, he did not believe there had been sufficient practice short of actual dual vacancy or dual incapacity. For discussion of this viewpoint, see *supra* Part III. It is also worth recalling that since publication of his article a quarter century ago, examples of executive branch practice have continued to pile up at an impressive rate.

453. See Calabresi, *supra* note 16, at 166; HARTMANN, *supra* note 222, at 16; see also *supra* notes 103–05, 161–62, 233–34, 322–26.

454. See, e.g., Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 73, 79–87 (2018) (discussing the media’s treatment of the Twenty-Fifth Amendment).

455. See *supra* notes 254, 308, 384, 388.

President pro tempore for the White House.⁴⁵⁶ Other aspects of legislative succession were also well publicized at the time and would likely be “dusted off” and reexamined during a disputed succession or inability scenario. One such example might be President Johnson’s agreement with Speaker McCormack about determining presidential inability, which received significant news coverage in 1963.⁴⁵⁷

Finally, legislative succession itself seems to be engrained in the public consciousness.⁴⁵⁸ The universal (or nearly universal) acceptance of the principle by non-lawyers within the executive branch since 1947 reflects this reality.⁴⁵⁹ While context would no doubt play an important role in a dual vacancy or dual inability scenario,⁴⁶⁰ it would likely be a challenge to overcome the strong “default” position that the Speaker and President pro tempore follow the Vice President in succession.

For all of these reasons, the attempts a quarter century ago by these noted scholars to diminish the importance of past practice in the area of legislative succession are ultimately unpersuasive.

B. The Executive Branch’s Embrace of Legislative Succession is Purely Pragmatic

Another possible counter to affirming the longstanding executive branch support for the constitutionality of legislative succession is that officials may only have been paying lip service to the principle. It could be contended that over the years the executive branch has only gone along with legislative succession for two reasons, neither of which is wholly legal in nature.

1. The Executive Branch Does Not Want to Offend the Speaker and President Pro Tempore

One of these reasons could be that, by and large, the executive branch does not want to antagonize the Speaker and the President pro tempore; typically, two of Capitol Hill’s most powerful figures. This

456. Cf. *supra* notes 254, 308, 381–84, 388.

457. See *supra* notes 145–53 and accompanying text.

458. See Goodin, *supra* note 2; *supra* notes 128, 254, 285–88, 308, 375–84, 388, and accompanying text.

459. See *supra* Part III.

460. See KALT, *supra* note 24, at 83–84, 88–89, 94, 97; Goldsmith & Miller-Gootnick, *supra* note 6.

critique has an intuitive appeal. Indeed, the executive branch under both President Eisenhower and President Lyndon Johnson *was* sensitive to avoid antagonizing the Speaker when considering what would become the Twenty-Fifth Amendment.⁴⁶¹ And neither administration recommended that the legislative succession provisions be repealed.⁴⁶² This unsigned OLC memorandum from the Eisenhower years specifically commented that “we are not prepared to conclude at this time that corrective legislation should be sought, particularly in view of the unlikelihood of favorable Congressional action.”⁴⁶³

The decision by the Eisenhower and Johnson administrations (and the apparent decision by the George W. Bush administration) not to pursue repeal of legislative succession actually reaffirms the argument in favor of its constitutionality. It would have been far easier for an administration simply to have had DOJ issue an opinion concluding that the principle was unconstitutional; that would have essentially solved the problem for the executive branch. That this was never done reflects more broadly the executive branch’s acceptance of legislative succession’s constitutionality.⁴⁶⁴

Yet concern over bruised feelings on Capitol Hill would not explain a number of the episodes outlined in this article. Such considerations played no part in the statements made by numerous *former* executive branch officials affirming legislative succession. Eisenhower, Lyndon Johnson, Ford, Reagan, Quayle, Cheney, Califano, Baker, Meese, Deaver, Gergen, Weinberger, Regan, Perry, Rumsfeld, Rice, Hillary Clinton—and even Haig—each accepted legislative succession in their memoirs when their public careers were well behind them and any fear of reprisals from a Speaker or President *pro tempore* would have been all but a distant memory. Indeed, for that very reason, the memoirs of elder statesmen would seem the ideal forum to raise constitutional questions involving succession.⁴⁶⁵

461. See *supra* notes 111, 185–86, and accompanying text; see also Unsigned OLC Memo, *supra* note 127.

462. See ADAMS, *supra* note 111, at 200; see also BAYH, *supra* note 167, at 93–95; *supra* notes 111, 184–86, and accompanying text.

463. Unsigned OLC Memo, *supra* note 122, at 8.

464. The author would like to thank Professor Joel Goldstein for his thoughts on this issue.

465. Cheney took the opportunity to discuss his efforts to address vice-presidential incapacity in two books he wrote in retirement. See CHENEY WITH CHENEY,

Moreover, the private comments and opinions by senior executive branch officials quoted in this piece were expressed far from the ears of senior legislators. These included the confidential remarks made by Presidents Johnson and Nixon to advisors and friends; by Vice President George H.W. Bush to family members; by Attorney General Kennedy to a White House aide; and by Nixon's White House counsels to Chief of Staff Haig. Yet these private remarks did not call into question the constitutionality of legislative succession.⁴⁶⁶

In addition, the need to avoid breaking china in Congress would have had nothing to do with the confidential executive branch legal opinions about legislative succession that have been completed throughout the years. These include a memorandum to Vice President Walter Mondale's counsel during the Carter administration; White House counsel Fielding's verbal advice to Haig during the Reagan assassination crisis; the unpublished Schleier and Tarr OLC opinions; and the contingency plans under the Reagan, George H.W. Bush, and Clinton administrations. These were confidential legal opinions and executive branch officials would have had no reason to pull punches regarding the constitutionality of legislative succession. Tellingly, none raised constitutional concerns about the principle.

Finally, concern over upsetting the Speaker or President pro tempore is not necessarily a given in a succession setting. President Trump accepted legislative succession while, at the very same time, publicly questioning Speaker Pelosi's fitness for the White House. His remarks underscore that offending the Speaker is perhaps not always the foremost consideration of the executive branch.

In sum, executive branch officials have embraced legislative succession in numerous settings in which the Speaker and President pro tempore would have been highly unlikely to have known what was expressed. Similarly, concern over hurting the feelings of the Speaker and President pro tempore would have been irrelevant to

supra note 340, at 319–22; DICK CHENEY & JONATHAN REINER WITH LIZ CHENEY, HEART: AN AMERICAN MEDICAL ODYSSEY 153–55 (2013).

466. There are certainly some instances of the executive branch publicly noting the Speaker's place in the line of succession in ways that could be seen as blandishments (e.g., Johnson's comments about McCormack at the State Department, Carter's comments about O'Neill at a St. Patrick's Day event, and Bush's remarks about Pelosi being "Number Three"). But they number only a handful of examples. Moreover, they are consistent with the private views of executive branch officials that have subsequently been made public.

pronouncements made by retired executive branch officials, or, indeed, by at least one sitting President. These incidents reflect that executive branch support for legislative succession involves much more than mere concern over upsetting the Speaker and President pro tempore.

2. Questioning Legislative Succession Would Be Destabilizing in a Succession Crisis

Another potential concern with the thesis of this article could be that the executive branch's longstanding inclusion of legislative branch officials in its contingency plans is less a legal determination than a pragmatic decision not to "rock the boat" in case of a future succession crisis. That is to say, the executive branch could be seen as having essentially decided that, when the stakes are at their highest for the country, it is not the time to parse constitutional arcana; therefore, the executive branch will not call legislative succession into question. Relatedly, it could be asserted that implicit in the executive branch's reasoning is the notion that worse than a partisan switch in White House control would be a partisan switch in White House control that is *politically and legally disputed*. According to this view, from the executive branch's standpoint, the important thing is to plan to proceed according to what is deeply embedded in American political culture and tradition: the Speaker and the President pro tempore follow the Vice President in the line of succession.

First, there is no available evidence to support the notion that the executive branch *has* embraced legislative succession for precisely this pragmatic reason.⁴⁶⁷ Indeed, with the exception of the Eisenhower-era OLC memorandum for the file, private conversations and memoranda among senior executive branch personages—to the extent they have been made public—make no mention of the constitutional difficulties of legislative succession, still less looking past those difficulties to base constitutional conclusions on purely pragmatic rationales.⁴⁶⁸ These conversations and memoranda suggest that senior executive branch officials either concluded that the principle was constitutional

467. Cf. Unsigned OLC Memo, *supra* note 122. To the contrary, the executive branch has done its "homework" when researching the legal questions involved with succession and inability. See *infra* Part V.D.

468. The Eisenhower-era OLC memorandum for the file discusses pragmatic factors but ultimately never reaches a legal conclusion. See *supra* notes 127–28 and accompanying text.

or were simply resigned to legislative succession and did what they could to effectuate the principle.

Second, if the executive branch in its legal deliberations has *not* placed a premium on trying to ensure that presidential succession in a dual vacancy or dual inability setting is as smooth as possible, *it certainly should have*. Such pragmatic reasoning is to be applauded—not ridiculed—as a public fight for the presidency would be an exceedingly perilous time for the Republic, especially given the contemporary polarization in American political culture.⁴⁶⁹ Why would something as consequential as presidential succession *not* lend itself to practical considerations? Not only should the executive branch give pragmatic factors a great deal of weight, but courts often do so when considering constitutional issues.⁴⁷⁰

C. Secret Executive Branch “Doomsday” Plans

It could be contended that a potential exception to the executive branch’s longstanding embrace of legislative succession could be found in the executive branch’s secret Cold War “doomsday” plans. With the possible exception of Haig’s public comments after the Reagan shooting, which were themselves ambiguous, and the inconclusive OLC memorandum for the file during the Eisenhower years,

469. See *supra* note 15 and accompanying text.

470. See, e.g., *W. Union Tel. Co. v. Massachusetts*, 125 U.S. 530, 550 (1888) (“[T]he Federal Constitution must receive a practical construction.”) (quoting *Union Pacific R.R. Co. v. Peniston*, 85 U.S. 5, 31 (1873)); *Knowlton v. Moore*, 178 U.S. 41, 56 (1900) (noting the importance of “giving a practical construction to the Constitution”); *Ludecke v. Watkins*, 335 U.S. 160, 172 (1948) (“All systems of government suppose they are to be administered by men of common sense . . .”) (quoting *Case of Fries*, 9 F. Cas. 826, 836 (1799) (No. 5,126)); *Smith v. Turner*, 48 U.S. 283, 449 (1849) (Catron, J., concurring) (“The Constitution is a practical instrument, made by practical men . . .”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution . . . contemplates . . . a workable government.”); *Parents Involved in Cmty. Schs. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 858 (2007) (Breyer, J., dissenting) (“The Founders meant the Constitution as a practical document that would [be] . . . workable over time.”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157–58 (1833) (“Constitutions . . . are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings . . . [T]he people must be supposed to read them, with the help of common sense . . .”); cf. *United States v. Midwest Oil Co.*, 236 U.S. 459, 472 (1915) (“[G]overnment is a practical affair intended for practical men.”).

the doomsday protocols might prove to be the only potential instance of the executive branch flouting legislative succession. The procedures, known as the Presidential Successor Support System (PS3), involved individuals with earlier high-level governmental experience being tapped to take the place of incumbent, high-level executive branch officials if the nation's political leadership were wiped out in a nuclear attack.⁴⁷¹ If these measures did indeed conflict with legislative succession, they could potentially be seen as undermining the case that the executive branch has uniformly (or almost uniformly) embraced legislative succession.

There are several reasons why this position is dubious. First, the specifics of PS3 have never been made public, so it is not clear that the program *did* in fact conflict with the principle of legislative succession.⁴⁷² The public reporting done on the program indicates that the plans apparently would not have taken effect unless the entire line of succession had been wiped out.⁴⁷³ More than one authority on the doomsday plans has asserted that the principle of legislative succession would have been observed during an emergency scenario.⁴⁷⁴

Second, from what has been made public about PS3, the planning initiative appears to have been more akin to a potential exercise in extraconstitutional *raison d'état*⁴⁷⁵ or “state of exception.”⁴⁷⁶ The program does not appear to have been an exercise in valid lawmaking. Garrett Graff, who has done vast research in this area, has written that

471. See GRAFF, *supra* note 29, at 92–94, 314–16, 384–86; Eric Schmitt, *Presidents' Plan to Name Successors Skirted Law*, N.Y. TIMES (Nov. 18, 1991), <https://www.nytimes.com/1991/11/18/us/presidents-plan-to-name-successors-skirted-law.html>.

472. See Bruce Ackerman, *Take Your Paws Off the Presidency!*, SLATE, (July 15, 2008; 3:35 PM), <https://slate.com/news-and-politics/2008/07/is-there-a-secret-presidential-succession-plan.html>; Schmitt, *supra* note 471; E-mail from Garrett M. Graff to Roy E. Brownell II (Jan. 11, 2020, 10:14 AM) [hereinafter E-mail exchange with Graff] (on file with author).

473. See Schmitt, *supra* note 471.

474. See ZUCKERMAN, *supra* note 442, at 64–65, 230; E-mail exchange with Graff, *supra* note 472; cf. GRAFF, *supra* note 29, at 315 (quoting William Arkin); Schmitt, *supra* note 471. *But cf.* MANN, *supra* note 228, at 141.

475. See, e.g., C.J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE (1957); CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP (Harcourt, Brace & World 1963) (1948).

476. See GEORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005).

the plans “had no clear constitutional grounding.”⁴⁷⁷ Author James Mann wrote that the program was “outside and beyond the specifications of the U.S. Constitution.”⁴⁷⁸ Another authority on these programs commented that “[a]s long as we have nuclear weapons, we’re going to have to fudge on the Constitution.”⁴⁷⁹ The *New York Times* reported on the programs in 1991 and indicated that they involved “[a]cting outside the Constitution.”⁴⁸⁰

Thus, these sets of contingency plans seem to have been put in place under the theory that, following a nuclear holocaust, practical considerations would need to prevail over constitutional requirements; *someone* would need to run the country if the members of American national political leadership were all killed or incapacitated. Under such horrific circumstances, these plans may make sense, but they do not find any clear sanction in public law. To the extent the doomsday plans ignored the Constitution itself (if indeed they did), they can hardly be seen as a constitutional practice that would have overcome the legislative succession provisions in the 1947 Act.

Finally, if the doomsday plans did not comport with the principle of legislative succession, their secret nature would virtually ensure that they would not have been entitled to the constitutional “gloss” enjoyed by political branch past practice.⁴⁸¹ This is because Congress was apparently unaware of these actions and therefore could not have tacitly endorsed them.⁴⁸² Since this past practice was unlikely to have

477. GRAFF, *supra* note 29, at 314; *see also* E-mail exchange with Graff, *supra* note 472. One U.S. general commented during the Carter administration about the related Presidential Emergency Action Documents that “[t]he emergency decrees which the President carries in the ‘Football’ for the event of war are . . . [likely] illegal.” GRAFF, *supra* note 29, at 251.

478. MANN, *supra* note 228, at 138; *see also id.* at 141.

479. GRAFF, *supra* note 29, at 315 (quoting William Arkin); *see also id.* at 384–86.

480. Schmitt, *supra* note 471.

481. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *see also* Glennon, *supra* note 385, at 134; Bradley & Morrison, *supra* note 385, at 432 n.86; *cf.* Schmitt, *supra* note 471.

482. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (“[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.”) (emphasis added); *see also* Glennon, *supra* note 385, at 135–37;

achieved the constitutional status of “a gloss on ‘executive Power,’”⁴⁸³ these doomsday plans could not have supplanted legislative succession as found in the 1947 measure.

D. The Executive Branch Has Ignored or Been Unfamiliar with the Case Against Legislative Succession

Of course, it could also be argued that the executive branch has never seriously weighed the constitutional issues involved with legislative succession and that its unwillingness to do so reflects inertia more than its alleged “acceptance” of the principle. There certainly exists a significant gap between academic writing on the subject—much of which argues against legislative succession—and the executive branch’s consistent support for the proposition.

This view, however, is not convincing. First of all, opposing legislative succession on constitutional grounds is hardly a recent phenomenon, even though novel arguments have been developed over the years. In fact, such opposition was present at the dawn of the Constitution’s implementation during the 1792 debates over presidential succession.

Second, there is a fair amount of evidence to suggest that government lawyers have indeed been exposed to academic arguments against legislative succession and have considered them. Attorney General Herbert Brownell, who was active in formulating President Eisenhower’s approach to succession and inability issues, noted in his memoirs that he “had engaged Dr. Ruth Silva, an expert in the field, to

Brownell, *supra* note 30, at 1041–42. Justice Frankfurter’s formulation—with its emphasis on congressional awareness of executive action—has been embraced on several occasions. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 531 (2008); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *NLRB v. Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring); *Bank Markazi v. Peterson*, 578 U.S. 212, 250–51 (2016) (Roberts, C.J., dissenting). For comparable authority, see, for example, *Holtzman v. Schlesinger*, 484 F.2d 1307, 1316–17 (2d Cir. 1973) (Oakes, J., dissenting); HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 66 (2006); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 880 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWERS* (1995)); Bradley & Morrison, *supra* note 385, at 432 n.86.

483. *Youngstown*, 343 U.S. at 611 (Frankfurter, J., concurring).

research and help develop a plan” for the administration.”⁴⁸⁴ Silva was a vigorous opponent of legislative succession, believing it to be unconstitutional.⁴⁸⁵ Brownell also consulted Dr. Edward Corwin, another skeptic of the principle.⁴⁸⁶ Finally, he met with Erwin Griswold, the Dean of Harvard Law School and John W. Davis, former Solicitor General and a proponent of legislative succession’s validity.⁴⁸⁷ In 1958, Brownell published an article in the *Yale Law Journal* about presidential succession and inability which demonstrated a great breadth of knowledge and familiarity with the academic literature.⁴⁸⁸ In fact, the piece is still cited today.⁴⁸⁹ It would be difficult to say that Brownell was not conversant with the legal scholarship of the time. Given Silva’s and Corwin’s views on legislative succession, it seems hard to believe that the matter would not have been broached, especially given Eisenhower’s personal qualms with the principle. And, of course, OLC drafted a memorandum for the file that discussed both the pros and cons of legislative succession. Included in the document was a discussion of the “Officer” issue, the primary constitutional concern with legislative succession.

The same could be said of Attorney General Robert Kennedy and his team at DOJ. In his 1961 opinion on presidential inability, the

484. HERBERT BROWNELL WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 277 (1993). The author is not a close relation of the former Attorney General.

485. See SILVA, *supra* note 16, at 131–42; Silva, *supra* note 24, at 457–64, 476.

486. See BROWNELL WITH BURKE, *supra* note 484, at 277; CORWIN, *supra* note 430, at 56–57.

487. See BROWNELL WITH BURKE, *supra* note 484, at 277; see *supra* notes 95–97 and accompanying text. DOJ’s preparation of its proposal to Congress was also supported in part by the work of Professor Louis Hatch. See Herbert Brownell Papers, Dwight D. Eisenhower Presidential Library, Box No. 56, File No. 9 (citing excerpts from LOUIS CLINTON HATCH, A HISTORY OF THE VICE PRESIDENCY (Earl Leon Shoup ed., 1934)).

488. See Brownell, *supra* note 112, at 190 n.1, 191 n.4, 192 nn.5–7, 193 nn.9, 11–12, 194 nn.13–17, 195 nn.18–20, 206 nn.28–29, and accompanying text (citing Ruth Silva on numerous occasions, as well as Irving Williams and Edgar Waugh).

489. See, e.g., Second Fordham Report, *supra* note 18, at 963 n.280; Joel K. Goldstein, *The Bipartisan Bayh Amendment: Republican Contributions to the Twenty-Fifth Amendment*, 86 FORDHAM L. REV. 1137, 1141 n.25, 1142 nn.32–33, 36–38, 1152 n.139 (2017).

Attorney General also drew heavily on the secondary literature.⁴⁹⁰ Ted Olson’s OLC opinion in 1981 about presidential succession and delegation in the context of inability cited Dean John Feerick’s work.⁴⁹¹ Ralph Tarr’s 1985 opinion about the Twenty-Fifth Amendment, which implicitly affirmed the 1947 Act, cited Professors Silva and Corwin.⁴⁹² Even the McGregor, Schlei, and Tarr legislative succession opinions, which did not delve into academic writing, each discussed the central issue raised by critics of legislative succession: whether the Speaker and President *pro tempore* are “Officers” for purposes of presidential succession.⁴⁹³ Tarr’s second memorandum expressly noted that “[b]oth prior and subsequent to passage of section 19 in 1947, questions have been raised as to whether the Speaker and President *pro tempore* are ‘Officers.’”⁴⁹⁴

In the years since, at its highest levels, the executive branch has drawn lessons from the scholarly community in the realm of succession and inability. Less than 100 days into his presidency, George H.W. Bush met with Vice President Dan Quayle, the First Lady, and a number of senior White House staffers to discuss how a presidential inability scenario should best be handled.⁴⁹⁵ This step was triggered by a proposal made the year before by a number of academic and former governmental experts through the National Commission on Presidential Disability and the Twenty-Fifth Amendment at the Miller Center of Public Affairs at the University of Virginia.⁴⁹⁶ In 2010, Fred Fielding—White House counsel on two occasions—acknowledged the

490. See Kennedy Legal Opinion, *supra* note 130, at 73 n.7, 74 n.10, 75 n.11, 76 n.12, 77 nn.13–15, 78 nn.16–17, 19, 79 n.20, 80 nn.21–23, 83 nn.28–31, 84 nn.32–34, 85 nn.37–39, 88 n.44, 89 nn.46–47, 90 nn.48, 53 (quoting or citing Ruth Silva, Charles Warren, Henry Davis, Richard Hansen, Joseph Kallenbach, Theodore Dwight, Edward Corwin, Sidney Hyman, C. Herman Pritchett, and Thomas Cooley).

491. See Olson Memo II, *supra* note 309, at 91 n.1, 92 nn.2–4.

492. See Tarr Memo I, *supra* note 309, at 69.

493. See, e.g., Silva, *supra* note 24, at 457–64; Amar & Amar, *supra* note 24, at 114–17.

494. Tarr Memo II, *supra* note 309, at 3.

495. See John D. Feerick, *Remarks: Presidential Succession and Impeachment: Historical Precedents, From Indiana and Beyond*, 52 IND. L. REV. 43, 66–68 (2019) (quoting Dean Feerick’s interview with former Vice President Quayle).

496. See Sheila Dresser, *Bush-Quayle Meeting on Power Transferred Confirmed*, BALTIMORE SUN, Apr. 29, 1989, at 3A; Editorial, *When a President Is Disabled*, WASHINGTON POST, Apr. 30, 1989, at C6.

importance of outside scholarship in the context of presidential succession and inability.⁴⁹⁷

These examples demonstrate that the executive branch has in fact consulted academic views on succession and inability.⁴⁹⁸ This was especially the case in the 1950s and 1960s when the 1947 Act was both still new and beginning to be implemented, and when there was some internal debate over whether a constitutional amendment should essentially repeal the statutory legislative succession provisions. Thus, it is difficult to dismiss longstanding executive branch practice on legislative succession as having operated in a bubble, free from outside academic opinion.

E. The Examples are Merely Past Practice and Could Be Overturned in Court

Finally, it could be contended that, at bottom, this past practice amounts only to custom, which courts have been known to overturn from time to time. As the Supreme Court reasoned in *New York v. United States*:

The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, [even if] . . . that unit is the Executive Branch.⁴⁹⁹

497. See Fielding Speech, *supra* note 244, at 33–34.

498. Fielding remarked at Fordham Law School:

[Y]our continuing efforts to identify these ambiguities and gaps in current constitutional and statutory provisions for continuity are tremendously important to the country [I]t's important for us to engage in these discussions so that we do have recommendations that have been scholarly in their evaluation, in the calm of debate, not the turmoil of crisis.

Id.

499. 505 U.S. 144, 182 (1992) (citing *Buckley v. Valeo*, 424 U.S. 1, 118–37 (1976)).

A counterargument based on this *New York* passage is misleading, however. First, the Supreme Court has also said just the opposite. In *Nixon v. Administrator*, which involved former President Nixon's challenge to the constitutionality of a statute that ensured governmental control of his presidential records and documents, the Supreme Court emphasized the importance of the executive branch supporting the statutory effort.⁵⁰⁰

We reject . . . [the] argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality.⁵⁰¹

Indeed, *Nixon* would seem to have greater applicability than *New York* in that the former decision involved a question of separation of powers while the latter concerned matters of federalism.

Second, contrary to the impression left by the Court in *New York*, the judiciary often does defer to longstanding custom in the realm of separation of powers.⁵⁰² This is especially so with respect to presidential succession and inability. As examination of the Tyler precedent demonstrates, past practice regarding Article II, Section 1, Clause 6 has been highly respected within the American political system, even when

500. 433 U.S. 425, 429–30, 441 (1977).

501. *Id.* at 441. Courts have not only given deference to political branch interpretation when one branch has affirmatively *conceded* contested authority to the other. The judiciary has also deferred to political branch interpretation when one branch has merely *acquiesced* in the other branch's claim to such a power. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 684 (1981); *Haig v. Agee*, 453 U.S. 280, 291–92 (1981); *United States v. Midwest Oil*, 236 U.S. 459, 473–74 (1915); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 571, 610–11 (1952) (Frankfurter, J., concurring).

502. *See, e.g., Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928); *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819); *see also Myers v. United States*, 272 U.S. 52, 174–75 (1926) (citing with approval numerous other cases supporting the principle).

it caused significant difficulties in determining presidential inability.⁵⁰³ And when the Tyler precedent was finally challenged in the courts, the judiciary declined to intervene, permitting the custom to stand.⁵⁰⁴

Even if the judiciary were to take up the question of legislative succession on the merits, opponents of the 1947 Act cannot bank on success.⁵⁰⁵ In several cases, courts have been tacitly supportive of legislative succession. The U.S. Court of Appeals for the District of Columbia—often described as the second highest court in the land—is the only federal appellate court to opine on legislative succession and it has done so twice. In the 1998 case *United States v. Sun-Diamond Growers of California*, the district court considered whether the Secretary of Agriculture’s inclusion in the line of succession was relevant to whether a defendant accused of bribing such an official should receive an enhanced penalty under federal sentencing guidelines.⁵⁰⁶ In this vein, the district court stated that “the Secretary of Agriculture . . . is tenth [sic] in the order of succession to the Office of the Presidency.”⁵⁰⁷ The court made note of succession because Sun-Diamond had specifically raised the issue.⁵⁰⁸

503. See *supra* notes 419–32 and accompanying text; *cf.* KALT, *supra* note 24, at 96.

504. See *supra* note 34; *cf.* Merriam v. Clinch, 17 F. Cas. 68, 70 (C.C.S.D.N.Y. 1867) (No. 9,460).

505. Litigants could very well encounter justiciability and prudential hurdles in challenging legislative succession. *Cf.* Baker v. Carr, 369 U.S. 186 (1962); Barnett v. Obama, No. SACV 09-0082 (ANx), 2009 WL 3861788 (C.D. Cal. Oct. 29, 2009); Rudy v. U.S. Pat. & Trade Off., 13cv00278, 2013 WL 12097552 (E.D. Va. Aug. 29, 2013); Grinols v. Electoral Coll., No. 12-CV-02997, 2013 WL 211135 (E.D. Cal. Jan. 16, 2013); *In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 650 (D.D.C. 2018); *supra* note 34; Calabresi, *supra* note 16, at 156–71, 175; KALT, *supra* note 419, at 136–37, 145, 167; 111 CONG. REC. 15,588 (1965) (comments of Sen. Ervin); Second Fordham Report, *supra* note 18, at 985; YALE L. SCH. RULE OF L. CLINIC, THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER’S GUIDE 63–69 (2018); SILVA, *supra* note 16, at 159–60. *But cf.* Cinquegrana, *supra* note 44, at 143–47. Without knowing the political context of the conflict, the judiciary’s possible deference to the political branches would not automatically favor the Speaker. It would depend on which claimant is viewed as the legitimate, default Acting President; under certain political circumstances that could be the Secretary of State or other Cabinet Secretary. *Cf.* KALT, *supra* note 24, at 83–84, 88–89, 94, 97.

506. See 138 F.3d 961, 975–76 (D.C. Cir. 1998).

507. *Id.* at 975.

508. See *id.* at 976 (“Sun-Diamond points out that the Speaker of the House is second in line to the presidency after the Vice President.”).

In its opinion, the D.C. Circuit corrected the lower court, noting that “[t]he Secretary of Agriculture is in fact ninth in the line of succession,” though it hastened to add that “[t]he current Secretary of Agriculture, however, is in practical effect eighth in line, since Secretary of State Madeleine Albright, having been born abroad, is ineligible.”⁵⁰⁹ Warming to the subject, the court added that “the Attorney General [is] seventh in line to the presidency The Secretary of Health and Human Services [is] at number twelve in the queue . . . [and] the Secretary of Veterans Affairs [is] at seventeen.”⁵¹⁰ Ranking the Attorney General seventh, the Secretary of Agriculture ninth, the Secretary of Health and Human Services twelfth, and the Secretary of Veteran Affairs seventeenth meant that the court necessarily included the Speaker and President pro tempore in the line of succession.⁵¹¹ That the subject was discussed by the lower court and was raised by one of the litigants could mean that these passages should be categorized as “considered dicta” rather than garden-variety “obiter dicta.”⁵¹²

Two decades later, the D.C. Circuit again implicitly blessed legislative succession in dicta, this time clearly “obiter dicta.” The Court cited with approval 3 U.S.C. § 19(d)(1). That statutory provision defines which individual will become Acting President “[i]f . . . there is no President pro tempore to act as President.”⁵¹³ Another federal appellate court has mentioned legislative succession in passing without betraying any disapproval. The Federal Circuit simply observed the existence of “academic . . . discussions of legislative succession.”⁵¹⁴

Another federal district court tacitly confirmed the Speaker’s lawful place in the line of succession in dictum. In *United States v. Richards*, a case involving a criminal prosecution for a threat to assassinate then-Senator Hillary Rodham Clinton, the court noted the

509. *Id.* at 976 n.16.

510. *Id.* at 976.

511. *See supra* note 101 and accompanying text.

512. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 225–26 nn.36–37 (2010).

513. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 107 (D.C. Cir. 2018); 3 U.S.C. § 19 (d)(1); *see also* *Senate of P.R. v. Gov’t of P.R.*, 203 D.P.R. 62, 99 n.3 (2019), 2019 WL 3848756 (P.R.) (Rodriguez, J., conformity opinion) (quoting the 1947 act with approval).

514. *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1371 n.6 (Fed. Cir. 2006); *see also* Albert, *supra* note 24, at 519 n.139.

existence of 18 U.S.C. § 871(a).⁵¹⁵ It stated that section 871 “includes threats against the President-elect, Vice President, Vice President-elect, and the officers next in the order of succession to the office of President, which would include the Speaker of the House and others.”⁵¹⁶ The district court cast no doubt whatsoever on the validity of legislative succession.⁵¹⁷

Likewise, the only state court to discuss legislative succession at the federal level was supportive of the notion in dicta. The Pennsylvania Supreme Court observed that:

If John Tyler, who on April 4, 1841, succeeded President William Henry Harrison, had died in office a short time after he became President (as Harrison did), his successor as President would have been the then President pro tem of the United States Senate, Samuel L. Southard, and he would have served as President nearly four years. If one more adverse vote had been cast against Andrew Johnson on May 26, 1868, in the impeachment proceedings in the United States Senate, the then President pro tem of the Senate, Ben Wade, would have become President.⁵¹⁸

To be sure, these judicial reflections on legislative succession are dicta. Nonetheless, they are the only judicial pronouncements on the subject, and, as is the case with executive branch practice and opinion, it is notable they are consistently supportive of legislative succession.⁵¹⁹ It can, therefore, be said, to an extent, that the executive,

515. For a discussion of the origin of this statutory provision, see *supra* notes 132–36 and accompanying text.

516. *United States v. Richards*, 415 F. Supp. 2d 547, 554 n.4 (E.D. Pa. 2005); see also *United States v. Wilson*, 671 F.2d 1291, 1293 n.1 (11th Cir. 1982) (citing 18 U.S.C. § 871(a) which references the 1947 act).

517. The district court’s decision was later overturned on other grounds. See *United States v. Richards*, 271 Fed. App’x. 174 (3d Cir. 2008).

518. *Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941).

519. See, e.g., *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010) (“Dicta can, of course, have persuasive value.”); *New Port Largo, Inc. v. Monroe Cnty.*, 985 F.2d 1488, 1500 n.7 (11th Cir. 1993) (Edmonson, J., concurring) (“We are not necessarily bound by [the dictum of this court] . . . although we may be persuaded by [it.]”); cf. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821); *F.E.B. Corp. v. United States*, 818 F.3d 681, 690 n.10 (11th Cir. 2016).

legislative, and judicial branches have each embraced lawmaker succession.⁵²⁰

In sum, none of the aforementioned counterarguments against giving serious political and legal weight to past executive branch endorsements of legislative succession is persuasive.

VI. CONCLUSION

The question of the constitutionality of legislative succession has long prompted vigorous debate. Abstract constitutional concerns about legislative succession are worrisome, as, ideally, there would not be any legal ambiguity about who should become Acting President.⁵²¹ However, since its latest manifestation in the 1947 presidential succession statute, the one place where legislative succession has not prompted serious, public constitutional opposition is within the executive branch, where one would expect to find the most unease. Since 1947, with two arguable exceptions, the executive branch has uniformly and vigorously supported the principle through its words and actions. This support has been manifested in public statements, legal opinions, and executive branch operations. Even when it would have been very much in the President's immediate political and partisan interests to oppose legislative succession—when facing the prospect of a change in party control of the White House—no President has done so. The same is true of Cabinet secretaries whose support for legislative succession ensured that they would remain that much farther down the line of succession. Indeed, since 1947, every administration of every political stripe has actively signaled its support for legislative succession in one way or another, often on multiple occasions and from multiple perspectives within the executive branch.

Moreover, the executive branch has supported legislative succession during periods when the succession regime has been under tremendous strain in times involving an assassination, a failed assassination attempt, an attempted government decapitation strike, a disputed presidential election, a presidential resignation, a vice-presidential resignation, and a potential presidential medical procedure. It even did so on more than one occasion before 1947 under authority of the 1792 statute. Thus, the executive branch's longstanding embrace of legislative succession is of great importance. This decades-old custom should

520. See Calabresi, *supra* note 16, at 166.

521. See, e.g., KALT, *supra* note 24, at 84–85.

play a major, if not dispositive, role in judicial, political, and public deliberations when weighing whether a Speaker or President pro tempore should become Acting President.

In a perfect world, Congress and the President would have the foresight and the political will to fix the problems found in the 1947 statute.⁵²² But until this is done, were tragedy to befall both the

522. The Speaker and President pro tempore could also both decline to serve as Acting President. See Goldsmith & Miller-Gootnick, *supra* note 6; cf. James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049, 1071 (2004). Indeed, such an approach could establish a salutary precedent by potentially removing lawmakers from the line of succession as a practical matter and bringing greater clarity to executive succession and inability matters. Cf. Goldsmith & Miller-Gootnick, *supra* note 6; KALT, *supra* note 24; Brown & Cinquegrana, *supra* note 16, at 1438–39.

The closest any lawmaker has apparently come to indicating he or she might not serve as Acting President was Senator Carl Hayden. Looking back on his tenure, the former President pro tempore recalled that, had he been elevated to the Oval Office, he would have taken the following steps: “I’d call Congress together, have the House elect a new Speaker, then I’d resign and let him become President.” ROSS R. RICE, CARL HAYDEN 220 (1994). Interestingly, Hayden’s act of self-denial did not involve his declining the job altogether and allowing it pass to the Secretary of State. Hayden decided to ensure that the presidency stayed within the legislative branch by orchestrating a scenario whereby the new Speaker would become Acting President.

Speakers have typically not been eager to lose the prestige and potential power of being second in line to the presidency and have seemed unwilling to pass on the chance of becoming Acting President. Speaker John McCormack, for instance, was openly in favor of maintaining legislative succession in the debate surrounding the Twenty-Fifth Amendment. See *Ike, Truman Differ*, *supra* note 116; *McCormack for Succession Law*, *supra* note 157; *Change Doubted in Succession Law*, N.Y. TIMES, Mar. 15, 1964, at 40; see also Goldstein, *Taking*, *supra* note 24, at 1010 n.288; cf. 111 CONG. REC. 7,967 (1965) (statement of Rep. McCormack).

Speaker Dennis Hastert conceded that, while he did not want to become Acting President, he would have accepted the responsibility:

I really didn’t want to be President, temporary or permanent. And [my wife] Jean, who wasn’t thrilled with my present job, would not be happy with this The opt-out provision [in the 1947 statute] might have seemed attractive, but I understood that it wasn’t really an option because if you had a constitutional crisis and you were Speaker, you couldn’t pass it up. You had to accept it, and then, when you did, you had to know what the consequences were going to be.

President and Vice President, the legislative succession provisions should continue to be honored by the executive branch and in turn by the nation. Indeed, the specter of the horrific January 6, 2021, assault on the U.S. Capitol by President Trump's followers offered a taste of

HASTERT, *supra* note 337, at 213–14.

Speaker Joe Martin admitted that he had considered whom he might have named as Secretary of State:

I never gave systematic thought to what I would have done or whom I would have appointed to my cabinet if it had fallen to my lot suddenly to be President, the idea lurked in my mind that I might ask Herbert Hoover to return to Washington as Secretary of State. His great experience both as cabinet officer and President would have been almost indispensable to me.

MARTIN, *supra* note 103, at 187.

During the vice-presidential vacancies of the early 1970s, Speaker Carl Albert apparently pledged to resign as Acting President as soon as he had a Republican Vice President confirmed under Section 2 of the Twenty-Fifth Amendment. *See* Sorensen Memo, *supra* note 212, at 18; Joseph J. Fins, *Secret Memo Shows Bipartisanship During Watergate Succession Crisis*, THE CONVERSATION (Jan. 22, 2018), <https://theconversation.com/secret-memo-shows-bipartisanship-during-watergate-succession-crisis-90211>; KALT, *supra* note 24, at 100, 216 n.40. Nonetheless, Albert struck a somewhat different tone in retirement. “I was ready to take the job. I wouldn’t have run from it. I’d have grabbed it if the circumstances were right.” Gup, *supra* note 212; *cf.* Fins, *supra*. Indeed, the Speaker had already chosen a “Kitchen Cabinet” of sorts which included not only Sorenson, but Tommy Corcoran, Joe Califano, Bill Moyers, Dean Rusk, and Clark Clifford. *See* Gup, *supra* note 212. Albert also conceded that Henry Kissinger would have remained Secretary of State “for a while.” *Id.*

During the Andrew Johnson impeachment effort, then next-in-line President pro tempore Ben Wade evidently considered who would be in his future Cabinet. *See* ADAM BADEAU, GRANT IN PEACE: FROM APPOMATTOX TO MOUNT MCGREGOR—A PERSONAL MEMOIR 136–37 (1887); TREFOUSSE, *supra* note 451, at 299–301; LATELY THOMAS, THE FIRST PRESIDENT JOHNSON: THE THREE LIVES OF THE SEVENTEENTH PRESIDENT OF THE UNITED STATES OF AMERICA 586, 595 (1968); *see also* JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT 214 n.‡ (2d ed. 1992); Amar & Amar, *supra* note 24, at 123. He huddled with Republican presidential nominee Ulysses Grant on the matter. *See* BADEAU, *supra* at 136–37; THOMAS, *supra* at 595; TREFOUSSE, *supra* note 451, at 301. Apparently, Wade even went so far as to offer someone the post of Secretary of the Interior and to make arrangements for the distribution of patronage in one state. *See* CLAUDE G. BOWERS, THE TRAGIC ERA 188 (1929); STEWART, *supra* note 451, at 247.

the perils that may await the country when long-accepted procedures for determining who will occupy the Oval Office are challenged.