

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

January, 2008

Legislative Officer Succession: Part I

Seth Barrett Tillman, *None*



Available at: https://works.bepress.com/seth_barrett_tillman/12/

Legislative Officer Succession to the Presidency

by Seth Barrett Tillman*

To be surprised, to wonder, is to begin to understand. Everything in the world is strange and marvelous to well-open eyes. Hence it was that the ancients gave Minerva her owl, the bird with ever-dazzled eyes.

JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 12 (1957) (trans. anon.).

I. Introduction

A trilogy of highly influential and frequently cited articles published by Professors Akhil Reed Amar, Vikram David Amar, John F. Manning, and Steven G. Calabresi in the *Stanford Law Review*¹ in 1995 generally took the position, with varying degrees of confidence, that as a matter of original public meaning, the Constitution precludes members of Congress and legislative officers from succeeding to the presidency under the Succession Clause. The Succession Clause provides:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office,

* Harvard Law School, J.D. (2000); University of Chicago, A.B. (1984). Member of the Delaware bar, the bar of the United States Court of Appeals for the Third Circuit, and the bar of the United States District Court for the District of Delaware. This article was written while clerking for the Honorable Jane R. Roth and afterwards while an associate at Richards, Layton & Finger, P.A. The views expressed do not necessarily represent the views of the firm or its clients. And the opinions herein are not intended to be a discussion of the facts or merits of any current or impending litigation. For reading preliminary drafts, I thank: Professors

¹ See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995) ("[W]e conclude that the best reading of the Constitution's text, history, and structure excludes federal legislators from the line of presidential succession."); John F. Manning, Response: *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 153 (1995) ("There is reason to doubt both sides of the proposition that Congress may constitutionally designate legislative 'Officers' to act as President."); Steven G. Calabresi, Response: *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 157 (1995) ("Amars are probably right that the current statute should at some point be repealed for both constitutional and public policy reasons."). I hereinafter refer to these three articles collectively as the *Stanford Trilogy* and the four authors as the *Stanford Trilogists*. See also Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 464 (1949) ("Since neither members of Congress nor the presiding legislative officers are 'officers of the United States' in the constitutional sense, they are ineligible for designation to act as President [through statutory succession].").

the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.²

In other words, the Succession Clause permits Congress to enact a statute (or statutory framework) controlling succession in the event of a double vacancy, i.e., when both the President and Vice President's offices go vacant. But the Succession Clause limits congressional discretion. Only an "officer" may succeed to the presidency under the aegis of this clause. The Amars ask whether the Speaker of the House and the Senate President pro tempore are officers "within the meaning of the Succession Clause."³ They answer the question in the negative. Looking to constitutional text, structure, and history, they argue that legislative officer succession is not permitted under the rubric of the Succession Clause.⁴

² U.S. CONST. art. II, § 1, cl. 6.

³ Amar & Amar, *supra* note 1, at 114.

⁴ The literature touching upon the Succession Clause and the Succession Statute (and its history) is quite extensive. See ALLAN P. SINDLER, UNCHOSEN PRESIDENTS: THE VICE-PRESIDENT AND OTHER FRUSTRATIONS OF PRESIDENTIAL SUCCESSION (1976); JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (1965); Richard Albert, *The Evolving Vice Presidency*, 78 TEMPLE L. REV. 811, 820 nn.48 & 51 (2005); Symposium, *The Continuity of Government: Opening Remarks*, 53 CATH. U. L. REV. 943 (2004) (Lloyd N. Cutler); Norman J. Ornstein, *The Continuity of Government: Introduction*, 53 CATH. U. L. REV. 945 (2004); John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004); 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 (2004); Symposium Colloquy, 53 CATH. U. L. REV. 1073 (2004); Howard W. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281 (2003); Howard W. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2001); Eric A. Richardson, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency when the President and Vice President are Gone?*, 30 WAKE FOREST L. REV. 617 (1995); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1994); 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 (1992); William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: 'The Emperor has no Clones'*, 75 GEO. L.J. 1389 (1987). For my preliminary and (intentionally) comically presented attempt at taking up related issues, see Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 607-611 & nn.29-33 (2003).

Although the *Stanford Trilogy* (and the *Stanford Trilogists* too) are now some thirteen years older,⁵ there are two very good reasons to be interested in these somewhat dated articles. First, the underlying question is still of great import as Congress has chosen to put both the aforementioned legislative officers at the head of the line of succession.⁶ In other words, our current succession law calls for the presidency to devolve on persons who, at least according to prominent commentators, are flatly ineligible as a matter of constitutional law. And, in our post 9/11 world, succession questions are, arguably, more important now than they were when the *Stanford Trilogy* was first published in 1995.

There is a second reason to be interested in the *Stanford Trilogy*. The *Stanford Trilogy* is the very exemplar of modern originalism. It is widely cited. But it is more than that. It is warmly praised and widely admired. It is admired as principled professionally-presented text-centered, structure-oriented, and historically-competent originalism by both right-of-center (including libertarian) commentators and left-of-center (including communitarian) commentators. Indeed, it is more than admired, it has passed out of time itself into the very stuff of legend⁷ so much so that when a post-1995 commentator restates the particular position for

⁵ Professor Akhil Amar revisited the issue of legislative succession in his recently published *AMERICA'S CONSTITUTION: A BIOGRAPHY* (Random House 2005). His views regarding the unconstitutionality of legislative officer succession have remained unchanged since his 1995 joint publication. *See id.* at 170-73, 340-41, 452-53, 556-57, 598, and 625. Indeed, his 2005 publication was not the only time he has revisited the issue since he first addressed it in 1995. *See, e.g.,* Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657, 1660 (1997). The same can be said of Professor Vikram Amar; he too has revisited this issue. *See, e.g.,* Vikram David Amar, *Essay: Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 *CALIF. L. REV.* 927, 944 (2004). His views have remained equally unchanged.

⁶ *See generally* 3 U.S.C. § 19. At the head of the line of succession is the Speaker of the House. *Id.* § 19(a). Next is the Senate President pro tempore. *Id.* § 19(b). These legislative officers are followed by cabinet officers. *Id.* § 19(d).

⁷ *See, e.g.,* Vasan Kesavan, *The Three Tiers of Federal Law*, 100 *NW. U. L. REV.* 1479, 1633-34 n.771 (2006) ("For my *all-time favorite* example of recovering the Constitution's original meaning, see (Continued)

which the *Stanford Trilogy* stands, *i.e.*, that legislative officer succession is unconstitutional, it is no longer necessary even to cite the articles from which the commentator drew his view.⁸ And why should he? Among educated originalists, it is *de rigeur*.

Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) (arguing that legislative succession to the Presidency, though adopted by statute in 1792, is unconstitutional)") (emphasis added); Kevin Jon Heller, Comment: *The Rhetoric of Necessity (Or, Sanford Levinson's Pinteresque Conversation)*, 40 GA. L. REV. 779, 786 n.37 (2006) (noting "that the Amars have *famously* questioned the constitutionality of the statute") (emphasis added); Sanford Levinson, Symposium: *Transitions*, 108 YALE L.J. 2215, 2233 (1999) (finding the Amars' paper a "*brilliant* demonstration that the Presidential Succession Act of 1947 is unconstitutional") (emphasis added); Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and 'Headless Monsters'?*, 14 CONST. COMMENT. 83, 88 n.16 (1997) ("A *compelling* argument has been made [by the Amars] that the succession statute is unconstitutional.") (emphasis added); *see also generally* Sanford Levinson, *An Opportunity for Genuine (and Selfless) Leadership by Nancy Pelosi and Robert Byrd*, in THE NEW REPUBLIC ONLINE -- OPEN UNIVERSITY (Nov. 20, 2006), available at <http://www.tnr.com/blog/openuniversity?pid=59024>; John Harrison, Essay: *Time, Change, and the Constitution*, 90 VA. L. REV. 1601, 1611 n.28 (2004); M. Miller Baker, The Federalist Society National Security White Paper: *Fools, Drunkards, & Presidential Succession*, at n.5 (2003), available at <http://www.fed-soc.org/Publications/Terrorism/presidentialsuccession.htm>; James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 580 n.24 (2000).

Interestingly, Professor Michael Stokes Paulsen once appears to have expressed some tentative doubts about the *Stanford Trilogy*. *See* Paulsen, *But cf: Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217 (1996):

There is at least some question of whether the presidential succession statute is itself unconstitutional. *See* Akhil Reed Amar and Vikram Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995). The brothers Amar make a clever, even strong, argument (and one they *apparently intend to be taken seriously*) that Congress' constitutional power to prescribe which 'Officer' shall serve as President in the event both the President and Vice President die, resign, or are impeached does not permit them to designate a member of Congress to become President.

Id. at 221 n.10 (emphasis added). But Professor Paulsen eventually came round to the majority view, perhaps under the influence of his frequent co-author. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1170 n.252 (2003) ("For a strong and persuasive claim that [the legislative officer] mode of Presidential succession is unconstitutional, *see* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 124-25 (1995).").

⁸ *See, e.g.*, Norman Ornstein, *A Better Way on Presidential Succession*, WASH. POST, Mar. 3, 2007, at A15 ("The Constitution says Congress can create a line of succession from among 'Officers' of the United States, *clearly* meaning executive branch officials.") (emphasis added), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/02/AR2007030201141.html>; Jack Balkin, *Time to Amend the Presidential Succession Act*, in Balkinization (Mar. 3, 2007) ("Norman Ornstein outlines the reasons why our Presidential Succession Act is unconstitutional. The succession should flow to officers of the United States, -- in this case, executive branch officials -- and not to members of Congress, who may often be members of the opposite party from the President."), available at (Continued)

Here, in this Article, I too intend to focus on text, structure, and history⁹ -- but mostly on text. I do not defend Congress' statutory craftsmanship in toto, and I recognize that Congress' Succession Statute, 3 U.S.C. § 19, suffers from a variety of defects both from a normative or policy perspective and several possible constitutional infirmities. Nevertheless, in the remainder of this Article, I will take a position *contra* the authors of the *Stanford Trilogy*, and argue that legislative officer succession, standing alone, is not among the statute's constitutional defects. I intend to put forward a very different view than that put forward by the Amars and the other *Stanford Trilogists*. And, although I find this alternative view compelling, I acknowledge that not all readers will. But if you too find this alternative view compelling, you might also wonder why the *Stanford Trilogy* went largely unchallenged for thirteen long years and what that says about mainstream American constitutional scholarship, particularly originalism. I will have

<http://balkin.blogspot.com/2007/03/time-to-amend-presidential-succession.html>; Mike Rappaport, *Fixing Presidential Succession*, in THE RIGHT COAST: THOUGHTS FROM SAN DIEGO ON LAW, POLITICS, AND CULTURE (Nov. 23, 2006) ("I don't usually agree with Sandy Levinson, but his post on this important subject is an exception. After the Vice President, the next in line for the presidency should be the cabinet, not congressional officials. The Constitution requires this, as does good policy."), available at http://rightcoast.typepad.com/rightcoast/2006/11/fixing_presiden.html. My guess is that all these commentators were relying on the *Stanford Trilogy*, although it is conceivable that any number of them came to their own independent views of the matter.

⁹ Not all commentators agree that text, structure, and history is or should be the focus of our common efforts at constitutional interpretation. See, e.g., James E. Fleming, Symposium: *Fidelity in Constitutional Theory: Fidelity as Integrity: Fidelity to our Imperfect Constitution*, 65 FORDHAM L. REV. 1335 (1997):

[M]ore generally, these liberals and progressives aim to ground their arguments in the text, history, and structure of the Constitution, and they believe that a broad originalism is more promising along these lines than is the moral reading. Some recite this trilogy of sources of constitutional meaning as if it were a litany.

Id. at 1345 (citing Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114 (1995)) (footnote omitted). See also SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007) (suggesting a refined or clarified Dworkinian approach). I take no position in this article on these methodological questions. My immediate goal is merely to show that the *Stanford Trilogists* offered too narrow a range of correct answers (if not the wrong answer) even taking their methodological position as a given.

some comments on that too at the end of this Article. Of course, nonoriginalists -- sitting ringside -- might enjoy the show.