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From the Selected Works of Seth Barrett Tillman

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Seth Barrett Tillman

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Framed

AMERICA'S
FIFTY-ONE CONSTITUTIONS
AND THE
CRISIS OF GOVERNANCE

SANFORD LEVINSON

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There is also the practical point, emphasized by the Amars, that a speaker would have to resign from the House if he or she became president even for a day (while, say, the president underwent surgery). That surely makes little sense, but it is required by another arcane but important part of the Constitution of Settlement, the Incompatibility Clause that prevents members of Congress from service as officers of the United States. However, Seth B. Tillman has argued, counterintuitively, that the president and vice president are *not* such officers, precisely because “officers” are those who owe their office to presidential appointment. Presidents and vice presidents are *elected*, not self-appointed, at least save for a future Gerald Ford who is, like an ordinary “officer,” nominated by a sitting president to fill a vice-presidential vacancy.

These discussions, as with those surrounding the Twenty-fifth Amendment, might sound “academic” in the pejorative sense, but they point to possibilities that could certainly roil our politics should they occur. Tillman, for example, has suggested that placing succession only in cabinet officials would leave the United States vulnerable if something happened to both the president and vice president prior to the confirmation of a newly elected president’s cabinet. This is, to be sure, an extraordinarily unlikely possibility, but anyone who has lived through the last decade, with such events as September 11, Hurricane Katrina, major earthquakes, and two devastating tsunamis should be aware that low probability is not impossibility. One might well believe that a function of a well-designed Constitution is to provide firewalls against even very low-probability events.¹⁹ We shall have further opportunity to discuss problems posed by “continuity in government” in the final chapter on emergency powers.

One should mention a final conundrum with regard to the peculiar office of the vice presidency as constructed by the U.S. Constitution: in which branch is the vice president actually located? Vice President Cheney raised this mind-bending question during his own term of office, when he argued that he was either a member of both branches or, in some sense, of neither. After all, the one and only duty assigned to the vice president by the Constitution is to preside over the Senate (with a vote in case of a tie), which would suggest that the correct answer to the conundrum is “the legislature.” On the other hand, the vice president is selected by the very same electors charged with choosing the president. And, especially in recent

NOTES

- 5 • See, e.g., Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010).
- 6 • See, e.g., Barton Gellman, *Angler: The Cheney Vice Presidency* (New York: Penguin Books, 2008).
- 7 • http://topics.nytimes.com/top/reference/timestopics/people/c/hugo_chavez/index.html?scp=3&sq=recall%20elections&st=cse.
- 8 • See Anthony King, *The Founding Fathers v. the People: The Paradox of American Democracy* (Cambridge, MA: Harvard University Press, 2012).
- 9 • Michael Cooper, "Recall Campaigns Become a Hazard for Mayors," *New York Times*, September 22, 2010, available at http://www.nytimes.com/2010/09/23/us/23recall.html?_r=1&scp=1&sq=recall%20elections&st=cse.
- 10 • King, *The Founding Fathers*.
- 11 • Section 4: "Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President."
 "Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office."
- 12 • See Brian Kalt, *Constitutional Cliffhangers: A Legal Guide for Presidents and Their Enemies* (New Haven: Yale University Press, 2012), 64–82.
- 13 • See David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review* 67 (2000): 995.
- 14 • Philip B. Kurland and Ralph Lerner, eds. *The Founders' Constitution*, vol. 5 (Indianapolis, IN: Liberty Fund, 2000), 458.
- 15 • *Ibid.*, 459.
- 16 • *Ibid.*, 462.
- 17 • *Ibid.*, 466.
- 18 • See, for example, Seth Barrett Tillman, "Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause," *Duke Journal of Constitutional Law and Public Policy* 4 (2009): 107; *Duke Journal of Constitutional Law and Public Policy Sidebar* 4 (2008): 1, available at <http://tinyurl.com/2bjzkc8>. He argues that the historical record tells a more complicated tale that legitimizes placing succession in the Speaker and the president pro tempore.
- 19 • Again, see Kalt, *Constitutional Cliffhangers*.

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