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Why Strict Cabinet Succession Is Always Bad Policy: A Response to Professor Jack Goldsmith and Ben Miller-Gootnick

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In their *Lawfare* post,¹ Professor Jack Goldsmith and Ben Miller-Gootnick put forward the traditional argument that legislative-officer succession, as permitted by the Presidential Succession Act of 1947 (1947 Act),² leads to undesirable and destabilizing changes in party control. Quoting a report of the Continuity in Government Commission, Goldsmith and Miller-Gootnick write:

[A] “political zealot might seek to change the party in the executive branch with a single attack,” or a “freak accident might lead to a sudden change in party” that controlled the presidency. [The report] added that “if a Congressional leader not from the President’s party were to assume the presidency, it could lead to a destabilizing change of party for the federal government.” As a result of these factors, the commission recommended (among other things) removing congressional leaders from the statutory line of succession.³

This is the long-standing policy objection which is put forward against both the 1947 Act and its 1792 predecessor.⁴ My limited goal here is to illustrate why that policy objection is wrong; in fact, it is dangerously misguided.

If the substantial risk policymakers were preparing against was the lone gunman or bomber, then legislative-officer succession is a mistake. It incentivizes criminals and terrorists seeking to change party control. But that is *not* the substantial risk we face, and it was *not* the substantial risk that (I believe) animated President Truman’s recommendation to Congress to shift from cabinet succession, under the then in-force Presidential Succession Act of 1886 (1886 Act),⁵ to legislative-officer succession, under the 1947 Act. *Truman was and remains the only President to launch a nuclear attack on an enemy nation during wartime.* For that reason, and because of the major geopolitical reality confronting his administration, i.e., an expansionist Soviet Union and world communism, I believe Truman’s concern was to prepare the United States for a decapitating attack by a state (or state-like actor) with nuclear weapons—i.e., an attack wiping out the entire line of cabinet succession under the 1886 Act. And if that was not in fact Truman’s actual subjective concern in 1947, then that type of risk ought to be our primary policy concern today when we tinker with the line of presidential succession. Indeed, I might add, the consequential political risk of decapitation by pandemic is in many ways substantially similar to the risk of a nuclear attack. Goldsmith and Miller-Gootnick worry that a lawsuit among rival claimants might be destabilizing. As bad as such a result is, the rival claimants will have some non-frivolous legal claim to the presidency, and one of the claimants will (one expects) eventually prevail in the courts. But with cabinet succession, once the entire line of succession is wiped out, there will be no claimants with any legitimacy, and intervention by the courts (if it could be had at all) will satisfy no one but the winners.

¹ See Jack Goldsmith & Ben Miller-Gootnick, *A Presidential Succession Nightmare*, LAWFARE (Mar. 25, 2020, 1:38 PM), <https://www.lawfareblog.com/presidential-succession-nightmare> [<https://perma.cc/43CQ-YSSK>].

² Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2018)).

³ Goldsmith & Miller-Gootnick, *supra* note 1 (quoting CONTINUITY OF GOV’T COMM’N, THE CONTINUITY OF THE PRESIDENCY 39, 46 (2009)).

⁴ See Act of Mar. 1, 1792, ch. 18, §§ 9–10, 1 Stat. 239, 240–41.

⁵ Act of Jan. 19, 1886, ch. 4, 24 Stat. 1.

Legislative-officer succession is entirely different.⁶

If the presiding legislative officers in the line of succession were killed, new ones could be chosen by the two Houses of Congress—by simple majority action. If the two Houses were wiped out, their membership could be reconstituted reasonably quickly, and then the newly reconstituted membership could choose new presiding officers, who would have legitimate claims to the presidency. The Senate could be speedily reconstituted by gubernatorial appointments, and vacant House seats could be filled by by-elections held under extant state laws.⁷ Indeed, as long as there is a rump House after a decapitating attack on the United States, the reduced body could choose a new presiding officer because, under established precedents, a quorum of the House is not a majority of all *authorized* seats, but a majority of all *living* members.⁸ Legislative-officer succession is flexible. It permits the future to care for itself. Cabinet succession is attractive until it fails—and, when such a catastrophic failure occurs, recovery by lawful means is not possible. Congress cannot amend the succession regime except by statute, and to amend statutes you need a President.

Again, the argument for strict cabinet succession is that it preserves party continuity. But that position simply does not, and never could, withstand serious scrutiny. Strict cabinet succession fails to preserve party continuity in the event that the incoming President and Vice President are killed (or otherwise unable to qualify for any reason) any time between the general popular election and the confirmation of the new President’s first cabinet officer. That is more than several months. In such a situation, the acting presidency will fall to the first cabinet officer in the line of succession from the outgoing administration. Such an officer may be part of an administration and party that have been thoroughly rejected at the polls—in primaries or in the general election.

But wait, it gets worse. Much worse. If the President and Vice President were killed any time between the incoming President’s inauguration and the confirmation of the new President’s first cabinet officer, then there would be no officers in the line of succession because the cabinet officers from the prior administration will either have resigned or have been removed for refusing to resign (by the outgoing President) prior to inauguration day.⁹ Alternatively, if one or more

⁶ I have made these arguments on prior occasions; indeed, several paragraphs or substantial parts of paragraphs of this Essay were first made in my 2013 publication in the *Cleveland State Law Review*. See 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 (2013).

⁷ See *id.* at 340 & n.85.

⁸ See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, r. XX, cl. 5(c)(7)(B), reprinted in H.R. DOC. NO. 115-177, at 859 (2019) (“The term ‘whole number of the House’ means the number of Representatives *chosen, sworn, and living* whose membership in the House has not been terminated by resignation or by the action of the House.” (emphasis added)). The position of the Senate is less clear. See STANDING RULES OF THE SENATE, r. VI(1), reprinted in S. DOC. NO. 113-18, at 4 (2013) (“A quorum shall consist of a majority of the Senators duly chosen and sworn.”).

⁹ See Tillman, *supra* note 6, at 339. The modern tradition is that cabinet officers resign prior to the start of a new administration. A President might leave an officer in office when requested by the incoming administration, particularly where the two Presidents (i.e., the incumbent and the President-elect) are of the same party. See, e.g., Ann Compton, *Do Cabinet Secretaries Get the Boot at Term’s End?*, ABC NEWS (Nov. 8, 2012), <https://abcnews.go.com/blogs/politics/2012/11/do-cabinet-secretaries-get-the-boot-at-terms-end> [<https://perma.cc/YT23-YRQR>] (“In recent memory, only one cabinet official remained in office from one president

cabinet officers from the prior President’s cabinet have remained in office, then again, that officer may be from a party different from the newly elected President.

In short, the argument that strict cabinet succession avoids destabilizing changes in party control is a pig in a poke. It is madness to pretend otherwise—particularly where the stakes are so high.

The chief purpose of legislative-officer succession is a Burkean effort to enlist the surviving institutions of government—the House and Senate—in recreating those institutions that have failed (i.e., the presidency).¹⁰ And even if the House and Senate chambers were destroyed and all their members killed in a natural catastrophe or act of war, the membership could be replaced in a reasonable time under well-established legal rules. This is not so for a strict cabinet-succession regime: once the cabinet, the President, and Vice President are gone, it is beyond our ability to effect timely, clearly recognizable, and legally valid repair.¹¹

I offer this as a compromise and partial solution: keep legislative-officer succession—but append it to the end of the line of succession, following cabinet succession. Furthermore, cabinet members should only succeed and be allowed to retain the presidency during the term of the President who appointed them. I suggest that would capture the best of both succession regimes: cabinet-officer succession and legislative-officer succession. I am not the first person to suggest a solution along these lines. In 2004, in testimony before a House of Representatives committee, Professor Akhil Amar, who is the nation’s most prominent academic *opponent* of legislative-officer succession, stated:

I do think in very, very highly unusual situations where you really try to have Cabinet succession, officer succession, and everyone’s gone, I think only a real constitutional zealot, maybe without good judgment, would say you can’t have

to the next: Former Defense Secretary Robert Gates was managing two wars at the end of the Bush administration and he remained at the Pentagon at President Obama’s request.”). If an officer refuses to resign, an outgoing President may threaten to remove the officer in order to elicit the expected response. *See, e.g., id.* (reporting that at the end of President’s George W. Bush’s second term, cabinet secretaries “were requested” to submit pro forma letters of resignation, but some of them “had to be prodded to comply”); *see also* Gerald M. Boyd, *Reagan Asks the Cabinet to Resign to Give Bush Flexibility in Choice*, N.Y. TIMES (Nov. 11, 1988), <https://www.nytimes.com/1988/11/11/us/reagan-asks-the-cabinet-to-resign-to-give-bush-flexibility-in-choice.html> [https://perma.cc/7PU7-P7KN] (“President Reagan requested the resignations of all the members of his Cabinet and of all top political appointees today, in a move that will allow President-elect Bush the flexibility to decide which officials to retain.”). The continuity problem is not solved by leaving one or a few holdover cabinet members in office during the transition. Should the holdovers die (or be impeached, or otherwise become disabled), there is no way to appoint other officers into the line of succession absent a President or acting President. The problem inheres in cabinet succession itself: would-be successors must be appointed by a President, who *ex hypothesi* no longer exists.

¹⁰ *Cf.* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 29–30 (London, J. Dodsley 1790) (observing that during “the two critical periods of the Restoration and Revolution, when England found itself without a king [the nation] regenerated the deficient part of the old constitution through the parts which were not impaired”).

¹¹ *See* Tillman, *supra* note 6, at 340 & n.84.

congressional leaders in that circumstance because the Constitution really isn't a suicide pact, and so I think I appreciate sort of the prudence involved there.¹²

I agree with Professor Amar. The only difference between Professor Amar's position and my own is that what he characterizes as "highly unusual situations" is, in my view, the world that we live in. That is the world which should animate our policymakers. And that has been our world since Hiroshima, 9/11, and COVID-19.

¹² *Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 52 (2004); see also John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 1006 (2004) ("[In] the case of a terrorist attack that kills the President-elect and Vice President-elect shortly before they take office . . . Cabinet succession is impossible, because the new Cabinet (that of the President-elect) is officially nominated and confirmed only after the new President takes office."); Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 90 (2010) ("If there is no President-elect or Vice President-elect, there is no incoming Cabinet. The only Cabinet is the outgoing one, which may be associated with an administration just rejected at the polls. It would make no sense to designate an outgoing Cabinet officer as acting President.").