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INTRODUCTION

I am deeply honored that John D. Feerick invited me to come back to Fordham University School of Law and appear in this splendid conference. Yet I hasten to say that, when it comes to presidential succession, John Feerick and Joel K. Goldstein are tough acts to follow. Indeed, in an otherwise wonderfully organized conference, the line of succession here is flawed. I suppose I should declare myself unqualified to follow these experts on presidential succession! I shall bring the perspective of the constitutional theory generalist to bear on the questions framed for our panel.

In thinking about the adequacy of the presidential succession system in the twenty-first century, we might take either of two routes: (1) try to design an ideal system, given the kinds of problems we can imagine, and given our basic constitutional commitments and aspirations, or (2) attempt to work with the system we have, tweaking it in politically feasible ways to make it better, given an understanding of politics as the art of the possible. If I were to take the first approach, I could hardly do better than the Continuity of Government Commission has done in its Second Report.[1] I would simply move for the adoption of their recommendations. I suppose, though, that doing so would make for a boring paper—even if John C. Fortier and Norman J. Ornstein, both on the Commission and here at the conference, would find it gratifying.

Instead, I am going to take the second approach. I shall put on my political scientist hat and think about what is politically feasible from where we sit. In thinking about feasible reforms, we must begin with the sobering reality that a people who did not abolish or amend the Electoral College after the Bush-Gore presidential election controversy is not likely to adopt

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1. CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY (Second Report June 2009).

recommendations like those in the Continuity of Government Commission Report. We got the Twenty-Fifth Amendment only after the assassination of President John F. Kennedy, itself after a previous elderly President Dwight Eisenhower had serious medical problems while in office.[2] We got the Twenty-Second Amendment only after President Franklin Delano Roosevelt was elected to four terms.[3] We got the Presidential Succession Act of 1947 only after that same President died in office, early in his fourth term.[4] And only after his successor, Harry S. Truman, lost control of both houses of Congress in the 1946 elections.[5] And so, I fear that we are not likely to adopt sound and sensible recommendations like those in the Continuity of Government Commission Report until after a national catastrophe like those chillingly hypothesized in the opening pages of the Report.[6]

Our panel is to consider "the adequacy of current succession law in light of the Constitution and policy considerations." I interpret "current succession law" to include both the Twenty-Fifth Amendment and the Presidential Succession Act of 1947.[7] As for the Twenty-Fifth Amendment, which has been widely commended, I believe it is perfectly adequate in doing what it set out to do. It does not resolve every conceivable problem, nor does it purport to do so. But what it addresses, it handles quite well.

As for the Presidential Succession Act of 1947, which has been widely criticized, I am going to play devil's advocate and defend it. I hasten to add that I am going to give only one and a half cheers for it as of 2010, though I would have given two cheers for it in 1947. First, I shall defend it from a constitutional standpoint: both from a particular reading of who may be an "Officer" within the meaning of the Succession Clause of Article II, Section 1of the Constitution and from a general conception of separation of powers principles. Second, I shall defend it from the standpoint of policy. I shall present President Truman's policy arguments in support of the Act and acknowledge the good in them. But, like Goldstein, I will point to changes in our politics since 1947 that somewhat undercut the wisdom of Truman's arguments.[8]

I. ONE AND A HALF CHEERS FOR THE PRESIDENTIAL SUCCESSION ACT OF 1947

The literature on presidential succession has not been kind to the Presidential Succession Act of 1947: most commentators argue that it is

2. JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 17–23 (2d ed. 1992).

3. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 433–38 (2005).

4. JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 196–210 (1965).

5. *Id.* at 207–10.

6. CONTINUITY OF GOV'T COMM'N, *supra* note 1, at 17–24.

7. Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)).

8. *See* Joel K. Goldstein, *Taking from the 25th Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 965–68 (2010).

both unconstitutional and unwise as a matter of policy.[9] Before assessing the Act's constitutionality, I want to distinguish two competing general approaches to separation of powers questions. One is formalist, categorical, and hermetic.[10] The other is functionalist, flexible, and pragmatic.[11] In recent years, the former approach has been highly vocal, and we see it most clearly in Justice Scalia's separation of powers jurisprudence and that of his acolytes, including Professor Steven G. Calabresi.[12] Those who take this approach find the very idea of legislative succession to the Presidency repugnant to their formalist, hermetic vision.[13] It is also a pox on their grand conception of a unitary executive.[14]

By contrast, I take a pragmatic, flexible approach to separation of powers generally, and so I accord a great deal of deference to practical arrangements worked out by the President and Congress. I believe, with Richard E. Neustadt and most political scientists, that we do not have a system of pure "separation of powers," but instead a system of "separated institutions *sharing* powers."[15] I am opposed to importing grand normative theories of the formalist separation of powers and the unitary executive and imposing them upon such practical arrangements as presidential succession (or, for that matter, legislative vetoes,[16] line item vetoes,[17] and the like). In recent years, I believe, the formalist approach has done great damage to the workings of our political system, and it has underestimated the pragmatic complexities of the workings of the modern administrative state. This approach underpins many arguments against the constitutionality of the Presidential Succession Act of 1947.

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9. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995); John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2001).

10. See, for example, Justice Hugo L. Black's opinion of the U.S. Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Chief Justice Warren E. Burger's opinion of the Court in *INS v. Chadha*, 462 U.S. 919 (1983); Chief Justice Burger's opinion of the Court in *Bowsher v. Synar*, 478 U.S. 714 (1986); and Justice Scalia's dissenting opinions in *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) and *Mistretta v. United States*, 488 U.S. 361, 413–27 (1989).

11. See, for example, Justice Robert H. Jackson's concurring opinion in *Youngstown*, 343 U.S. at 634–55; Chief Justice Burger's opinion of the Court in *United States v. Nixon*, 418 U.S. 683 (1974); Justice Byron R. White's dissents in *Chadha*, 462 U.S. at 967–1013, and *Bowsher*, 478 U.S. at 759–76; Justice Harold A. Blackmun's opinion of the Court in *Mistretta*, 488 U.S. at 361; and Justice Breyer's dissent in *Clinton v. City of New York*, 524 U.S. 417, 469–97 (1998).

12. *See* Calabresi, *supra* note 9, at 163–66.

13. *Id.*

14. *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

15. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 29 (1990).

16. *Chadha*, 462 U.S. at 959 (declaring legislative veto unconstitutional).

17. Clinton v. City of New York, 524 U.S. 417, 446–49 (1998) (declaring line item veto unconstitutional).

By contrast, I develop my pragmatic, flexible approach to separation of powers from what our practice has been, not from grand, normative formalist conceptions from on high. And I accord considerable deference concerning the constitutionality of practices, like legislative succession, that have been in place since the early years of our constitutional system.[18] Therefore I see no constitutional infirmity in legislative succession. And I relish the fact that, contrary to the so-called originalists' arguments against the constitutionality of the Presidential Succession Act of 1947, as Goldstein pointed out, the better originalist arguments are in favor of the constitutionality of legislative succession.[19]

Let us turn to the question of the meaning of the word "Officer" in the Succession Clause of the Constitution.[20] Article II, Section 1 empowers Congress, in the absence of a functioning President or Vice President, to declare "what Officer" shall act as President.[21] I read this clause to mean simply that Congress is empowered to declare who shall act as President, that is, who shall succeed the President and Vice President. Whoever Congress designates shall, by virtue of that fact, be an officer. I realize that much ink has been spilled on the question of whether an "Officer" must be an "Officer of the United States," and whether an "Officer" is a term of art referring to executive or judicial officers rather than legislative officers or indeed to only executive officers.[22] I reject all of these arguments as driven by a misguided formalist conception of separation of powers.

I want to focus on the language of the Constitution and to interpret it in light of the pragmatic, flexible scheme of separation of powers, together with checks and balances, established in our constitutional scheme. We should read the Constitution to make sense as a matter of ordinary understanding. And, we should avoid readings that construe ordinary language like "Officers" as terms of art. If we take this pragmatic approach, we will not be driven to artificial conclusions like saying that "Officers" means only executive officers and that the Speaker of the House and the President Pro Tempore of the Senate are not "Officers" in a constitutional sense. An "Officer" is simply a person who holds an office. That would include the Speaker of the House and the President Pro Tempore of the Senate. Indeed, an "Officer" could include the Governor of the most populous state (even if an "Officer of the United States" would not). And it could include anyone named by the President to a group of advisors who would be in the line of succession (to be recommended below). The fact that both Goldstein[23] and John Feerick[24] raise doubts

18. *See* Presidential Succession Act of 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).
19. *See* Goldstein, *supra* note 8, at 1042–45.
20. U.S. CONST. art. II, § 1, cl. 6.
21. *Id.*
22. *See, e.g.*, Amar & Amar, *supra* note 9, at 114–17; Calabresi, *supra* note 9, at 156–67.
23. *See* Goldstein, *supra* note 8, at 1090–1113._
24. *See* John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 980–92 (2010).

about the conventional arguments against the Act's constitutionality bolsters my judgment that it is not unconstitutional.

As for the wisdom of the Presidential Succession Act of 1947, I accord a considerable amount of deference to the judgment of pragmatic presidents (and former senators) like Harry Truman over the judgment of formalist law professors. What is there to be said for the Presidential Succession Act of 1947? Truman said two things. One, Truman did not believe that the President should have the power to choose his own successor, and therefore favored legislative succession over cabinet succession.[25] That sounds sensible, to a point, though perhaps it sounds less sensible to us now than it seemed to him in 1947. Nowadays, people are more enamored with the unitary executive and the imperial presidency than they were back in 1947. That may make people more comfortable today with the idea that the President should be able to choose his successor, and less comfortable with the idea of legislative succession. And nowadays, the President to a greater degree chooses her own successor to begin with in selecting a vice presidential running mate; and so, perhaps, people would worry less about the fact that a President would be naming her own successor farther down the line through nominating a cabinet. But, of course, the presidential nominee's choice as a vice presidential running mate has to be confirmed by the delegates to the nominating convention and by the voters in the election.

Two, Truman thought that the successors should be people who had been elected, rather than merely appointed, which argued for legislative succession over cabinet succession.[26] Indeed, Truman argued that the Speaker of the House had a superior electoral pedigree to everyone other than the President and Vice President.[27] Unlike many constitutional law scholars, I believe that there is eminent practical wisdom here. Just as there is practical wisdom in the anecdote that when then-Vice President Lyndon Johnson boasted to Speaker Samuel T. Rayburn about President John Kennedy's choosing "the best and the brightest" for his Cabinet, Rayburn supposedly said he would feel more comfortable "if just one of them had run for sheriff once."[28] Remarkably, some constitutional law scholars of today, like Calabresi, Akhil R. Amar, and Vikram D. Amar,[29] suggest that cabinet officers have a greater democratic pedigree than do the leaders of the House and Senate! They emphasize that the President is elected, and that the Senate advises and consents on presidential nominations for cabinet posts. But I daresay that only a few law professors and champions of the unitary executive would say that this denotes that the Secretary of the

25. Special Message from President Harry S. Truman to the Congress on the Succession to the Presidency (June 19, 1945) [hereinafter Truman's Special Message] (on file with the Fordham Law Review).

26. *Id.*

27. *Id.*

28. DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST 39, 41 (1972).

29. Amar & Amar, *supra* note 9, at 130; Calabresi, *supra* note 14, at 23, 31–33, 58–70.

Treasury enjoys a superior democratic pedigree to the Speaker of the House!

I acknowledge that people today are more dubious about legislative succession because of the increasing prevalence of divided government, making more likely the prospect of a change in party control of the Presidency through legislative succession. I also believe that people today are more dubious about legislative succession because they are more disparaging toward legislatures and legislators' capabilities in general. I have studied the disparagement of legislatures, and even organized a conference entitled *The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*.[30] I have never seen such disparagement of Congress as in the literature on presidential succession! Except perhaps at the Tea Party gatherings! The only criticism I have of the Continuity of Government Commission Report is that it unfairly disparages the capacities of members of the House and Senate.

Truman had a third idea—special elections—with the consequence that legislative succession would be only an interim measure, to be followed by the election of a President.[31] Unfortunately, the Presidential Succession Act of 1947 did not adopt that proposal. I advocate special elections below.

Thus, I conclude that legislative succession under the Presidential Succession Act of 1947 is not unconstitutional and that the policy arguments in support of it are not as bad as is commonly thought. Now I turn to minor, feasible changes I would propose.

II. PROPOSED MINOR, FEASIBLE CHANGES TO THE PRESIDENTIAL SUCCESSION ACT OF 1947

I would tweak the Presidential Succession Act of 1947 with three minor, feasible changes, all of which would leave legislative succession in place, since I am assuming that Congress is unlikely to repeal this feature of the current arrangement. One, I would change the legislative succession in a way that would avoid the potential transfer of power from one party to another: (1) instead of the Speaker of the House, the successor would be the leader of the President's party in the House (whether it be the Speaker of the House, the House Majority Leader, or the House Minority Leader) and (2) instead of President Pro Tempore of the Senate, the successor would be the leader of the President's party in the Senate (whether it be the Senate Majority Leader or the Senate Minority Leader). Both of these changes are more feasible than changing legislative succession to cabinet succession. And, both avoid a transfer of power from one party to another through legislative succession.

Two, I would institute a vice Vice President or a body of successors appointed by the President and confirmed by the Senate. I think most commentators have given too short shrift to the idea of a vice Vice

30. *See generally* Symposium, *The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 B.U. L. REV. 331 (2009).

31. Truman's Special Message, *supra* note 25.

President. For a time, it was hard even to get highly capable people interested in the Vice Presidency. For example, John Nance Garner, Vice President under Franklin Delano Roosevelt from 1933–1941, famously said the Vice Presidency was "not worth a pitcher of warm piss."[32] That has certainly changed,[33] but it still might be difficult to get highly qualified people interested in a vice Vice Presidency.

Who, you may ask, would want that office? Well, for starters, any former President or Vice President who is physically and mentally capable of serving. For example, William J. Clinton and Albert A. Gore could stand in the line of succession after Vice President Joseph R. Biden. And George W. Bush and Richard B. Cheney could do so under a Republican Presidency. I realize that questions of disability might arise with very senior former presidents and vice presidents (e.g., George H.W. Bush in advanced years or Ronald W. Reagan while he was alive but had Alzheimer's). I also acknowledge that questions of competence might arise in some instances, for example, some might worry about having Dan Quayle in the line of succession. I also think it would be good for these successors to be interim or acting presidents, with a special election to follow soon.

In my ideal line of succession, former presidents and vice presidents should come before either legislative leaders or cabinet members. They have considerable relevant experience and knowledge. They typically have not returned to elective office. And some of them live and work in places outside Washington, D.C. In my second-best line of succession, given the unlikelihood that Congress will give up legislative succession, former presidents and vice presidents would come after legislative leaders and before cabinet members.

Another possibility I would embrace is an idea put forward by Goldstein, for Congress to "create a number of new 'officers'" whose responsibility would be "simply [to] serve as wise men and women who would be briefed, who would be available to advise the President and serve as contingent successors."[34] The Continuity of Government Commission makes a similar recommendation.[35] Both Goldstein and the Commission would place them after cabinet members in the line of succession. I would place them before. I note that Goldstein and the Commission implicitly are assuming, as I do, that an "Officer" does not have to be a sitting federal executive or judicial officer. I also would observe that Goldstein gives as examples not only former presidents and vice presidents but also elder statesmen like William W. Bradley, John C. Danforth, and Colin L. Powell. Such people, I daresay, would be willing to serve as vice Vice President in this sense, or as officers in a body of contingent successors.

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32. JEAN EDWARD SMITH, FDR 178 (2007) (citing Elliot A. Rosen, *"Not Worth a Pitcher of Warm Piss": John Nance Garner as Vice President*, *in* AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY 45, 45 (Timothy Walch ed., 1997)).

33. *See generally* Goldstein, *supra* note 8.

34. *Id.* at 1069.

35. CONTINUITY OF GOV'T COMM'N, *supra* note 1, at 45.

If we want people with executive experience in the line of succession, let us put the governors of the most populous five states in the line of succession, provided that they are of the same party as the President. They also would have the benefit of living and working outside Washington, D.C. Here, I should note that I disagree with the Amars that "Officers" must be "Officers of the United States," which excludes state officials. In any case, the President could name these governors to this body and as such they would be "Officers."

Finally, I would institute special elections, thus making all forms of succession (whether legislative, cabinet, or vice vice presidential) temporary. This was the practice in the original statute, the Presidential Succession Act of 1792.[36] Truman argued for special elections,[37] as does the Continuity of Government Commission,[38] and just about everyone else who has thought about the matter. Everybody, that is, except the ones who have mattered thus far: the Republican Congress that adopted the Presidential Succession Act of 1947.

36. Presidential Succession Act of 1792, ch. 8, §10, 1 Stat. 239, 240–41 (repealed 1886).
37. Truman's Special Message, *supra* note 25.
38. CONTINUITY OF GOV'T COMMIS'N, *supra* note 1, at 47.