Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: "If at First You Don't Succeed, Try, Try Again"

By AMERICO R. CINQUEGRANA*

Introduction

The attempted assassination of President Reagan in 1981 and his incapacity during surgery for intestinal disorders in 1985 and 1987 momentarily focused the attention of the public, the media, academia, and government officials on the question of the legal authority of a Vice President who succeeds a dead or disabled President.[1] Each occasion fostered a brief national spasm and a temporarily heightened interest in the generally unknown constitutional mechanism that would be activated should circumstance disable a President and require a transfer of authority to the Vice President.[2] These episodes represented a traumatic, but healthy, public reminder of the potential for sudden changes in the Presidency and resulted in more intensive planning to avoid the uncertainties that had arisen in dealing with such exigencies in the past.[3]

For example, a few months after the 1988 presidential inauguration, President George Bush and Vice President Dan Quayle met with their wives and the White House Counsel and White House Physician to dis-

* Former Deputy Counsel for Intelligence Policy, Office of Intelligence Policy and Review, U.S. Department of Justice. B.A. 1968, University of New Hampshire; J.D. 1973, University of Virginia. The author would like to express appreciation to Senior Articles Editor Jill Simeone, Articles Editor Emily Prescott, and Executive Editor Paul Carlson, whose thoughtful suggestions proved invaluable in the development of this Article. In addition, the author thanks his wife, Hope, and daughter, Faith, who patiently endured the long hours of revision during summer vacation. The views expressed in this Article are solely those of the author.

1. *See, e.g.*, *Questions Raised: Who Was in Charge?*, 39 CONG. Q. WKLY. REP. 580 (1981); George M. Boyd, *Reagan Transfers Power to Bush for 8-hour Period of Incapacity*, N.Y. TIMES, July 14, 1985, at A1; Walter V. Robinson, *Reagan Undergoes Surgery; Condition Called 'Excellent,'* BOSTON GLOBE, Jan. 6, 1987, at 1.

2. *See, e.g.*, WHITE BURKETT MILLER CENTER OF PUBLIC AFFAIRS, UNIVERSITY OF VIRGINIA, PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT (1989).

3. *See, e.g.*, JOHN D. FEERICK, FROM FAILING HANDS 264-79 (1965) (explaining early issues regarding the law of presidential disability).

cuss presidential succession under the Twenty-fifth Amendment to the United States Constitution.[4] As reported by the *Washington Post*:

> In what is believed to have been an unprecedented session, President and Barbara Bush met last week with Vice President and Marilyn Quayle . . . to determine the circumstances under which Quayle would take over as acting president [under the Twenty-fifth Amendment to the Constitution] if Bush became disabled . . . .
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> The White House had been strongly urged to convene the meeting by presidential scholars who cited the "chaos" that followed the attempted assassination of President Ronald Reagan . . . . Confusion within Reagan's cabinet . . . led, among other things, to then Secretary of State Alexander Haig Jr.'s informing the nation that he was in charge.
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> Former White House counsel Fred F. Fielding [explained that on the day of the attempt on Reagan] "when I mentioned the 25th Amendment I could see eyes glazing over . . . . They didn't even know about the 25th Amendment."
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> Former senator Birch Bayh . . . , an author . . . of the 25th Amendment, said . . . "We all hope and pray that the president will be healthy and successful and live to a ripe old age, but history has taught us we had better be prepared for all eventualities."[5]

The substance of the April 1989 meeting has never been made public. Nonetheless, by its mere occurrence, the meeting represented a significant increase in sensitivity to the need to clarify the operation of the Twenty-fifth Amendment. This is the mechanism that has been available under the Constitution since 1967 to bring order to a succession by the Vice President if a President should no longer be able to perform the functions of that office.[6]

Unfortunately, succession issues tend to return to the subconscious "unthinkable" category between crises and elections. In light of the recent presidential election, it can be expected that there will be a brief period of renewed attention to the uncertain prospects for succession in circumstances not yet adequately treated by the law.[7] There may even be

4. This meeting may have been a direct result of a report provided by former Presidents Ford and Carter to the President-elect and Vice President-elect in November 1988 urging that a plan be established for presidential succession and continuity in the event of a nuclear attack on the United States. *See* Maralee Schwartz & Bill McAllister, *Ford, Carter Urge Plans for Facing the Unthinkable*, WASH. POST, Nov. 29, 1988, at A23.

5. Judith Havermann & David Hoffman, *Presidential Disability Discussed; At Scholars' Urging, Bushes, Quayles Study Power-Transfer Issue*, WASH. POST, Apr. 28, 1989, at A1, A16.

6. *See infra* text accompanying notes 11-19.

7. *See, e.g.*, Al Kamen, *Pre-Inaugural Succession Law Murky; Congress Has Failed to Provide for the Unthinkable, Experts Say*, WASH. POST, Nov. 21, 1988, at A11 (discussing

some reference to the possibilities that exist for the assumption of the Presidency by an official who has neither campaigned for nor been elected to serve as President or Vice President.[8]

While the Twenty-fifth Amendment is tangible evidence of the increased attention that has been paid to the issue of vice-presidential succession to the Presidency, succession in the event the Vice Presidency is also vacant has not been discussed to any great extent. Yet the potential is real. Eight Presidents and seven Vice Presidents have died in office. The Vice Presidency has been vacant for a total of almost forty years, or twenty percent, of our constitutional history.[9]

It is at this level of succession—below the Vice President—that there remains substantial room for unexpected developments, intrigue, confusion, and ignorance of the relevant law at the highest levels of government if future circumstances leave *both* the President and Vice President dead or disabled. This almost unimaginable leadership crisis would be governed by a largely unknown and generally ignored statute that provides for succession to the Presidency by senior government officials other than the Vice President—3 U.S.C. § 19.[10]

This Article discusses that statutory provision and its constitutional context. Most importantly, the Article explains that—by envisioning the creation of an Acting President, drawn from the Cabinet, who would effectively be a hostage to the congressional leadership at a time when a national emergency may require the strongest executive action—the statute represents a fundamental breach in the separation of powers principle upon which our government is based.

Part I of this Article describes the various provisions of law that establish the succession process, particularly 3 U.S.C. § 19. Part II reviews the intent of the drafters of the constitutional provision that empowers Congress to enact a succession statute and how that intent reflects upon the constitutionality of a statute allowing removal of an Acting President without impeachment proceedings. Relevant separation of powers principles that have been developed by the Supreme Court are explained in Part III. Part IV then applies these principles to demon-

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issues if the President-elect or Vice President-elect should be rendered unable to serve before their inauguration).

8. *See, e.g.*, Bill McAllister, *A Tradition to Keep One Speechless; Cabinet Absentee is Would-Be Successor*, WASH. POST, Jan. 29, 1991, at A17 (discussing practice of excluding one member of the Cabinet from State of the Union addresses in the Capitol Building in order to ensure the survival of at least one potential successor in the event of a catastrophe there).

9. *See, e.g.*, 111 CONG. REC. 3250 (1965) (remarks of Sen. Bayh); *id.* at 3265 (remarks of Sen. Carlson).

10. *See infra* text accompanying note 34 for text of statute.

strate the constitutional infirmity of section 19. Finally, several courses of remedial action are proposed in Part V.

I. Provisions for Presidential Succession

A. Constitutional Succession Provisions

The Twenty-fifth Amendment to the United States Constitution[11] was ratified in 1967. This event culminated a lengthy effort, given impetus by the assassination of President Kennedy in 1963, to resolve various issues that had arisen over the years regarding vice-presidential succession to the Presidency.[12] The issues addressed in that Amendment include whether the Vice President becomes the *actual* or only the *acting* President in the case of presidential death or disability, how a vice-presidential vacancy shall be filled, and what can be done to displace a mentally or physically disabled president.[13]

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11. The Amendment provides:

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

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, e.g.*, S. REP. NO. 66, 89th Cong., 1st Sess. (1965) (explaining requirement for attention to succession problems).

13. These issues and whether they have been satisfactorily resolved by the Twenty-fifth Amendment are beyond the scope of this Article. *See* William F. Brown & Americo R. Cin-

In brief, the Amendment applies only to situations where there is a vacancy in the Presidency due to the death, resignation, or removal of a President, or where a President becomes disabled or is otherwise unable to serve as President, or where there is a President but the Vice Presidency is vacant. Under section 1 of the Amendment,[14] the Vice President would become President, not Acting President as had been asserted by some previously,[15] if a President should be removed, die, or resign.

Section 2 of the Amendment[16] provides authority for a President to nominate an individual to fill a vice-presidential vacancy, subject to approval by a majority vote in both Houses of Congress. Section 3[17] contemplates a voluntary presidential declaration to the Congress of a disability that requires the Vice President to become Acting President until the President declares the disability removed. Finally, section 4[18] authorizes the involuntary removal of a disabled President by agreement of the Vice President and a majority of the Cabinet or some other body designated for this purpose by Congress.[19] Thus, the Twenty-fifth Amendment to the Constitution now provides the framework for vice-presidential succession when there is a physical vacancy in the Presidency or the occupant suffers some personal incapacity.

One of the original provisions of Article II of the Constitution supplies Congress with authority to provide for presidential succession in a variety of other circumstances, specifically where neither the President nor Vice President is fit to serve.[20] This provision includes the original basis, clarified by the Twenty-fifth Amendment, for the Vice President to assume the Presidency if the President is unable to perform the duties of the office, and also empowers Congress to, "by law provide for the case of removal, death, resignation or inability, *both* of the President and Vice

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quegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389, 1393-1416 (1987) [hereinafter *Emperor*] (describing the origins and evolution of the Twenty-fifth Amendment and discussing several proposals to improve upon it).

14. U.S. CONST. amend. XXV, § 1.

15. *See* RICHARD H. HANSEN, THE YEAR WE HAD NO PRESIDENT 10-12 (1962) (discussing Secretary of State Daniel Webster's purported objection to Vice President John Tyler's adopting the title of President when he succeeded President William Harrison in 1841); *see also infra* note 21.

16. U.S. CONST. amend. XXV, § 2.

17. U.S. CONST. amend. XXV, § 3.

18. U.S. CONST. amend. XXV, § 4.

19. The complexities of these provisions, their history, and development are described in detail elsewhere. *See, e.g.*, BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION (1968) (authored by the principal Senate sponsor of the Twenty-fifth Amendment); MICHAEL DORMAN, THE SECOND MAN (1968). *See generally Emperor, supra* note 13, at 1393-1400.

20. U.S. CONST. art. II, § 1, cl. 6.

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."[21]

B. Statutory Succession Provisions

A statutory framework for succession below the Vice President, implementing the Article II authority, was considered by the First Congress and enacted in 1792 by the Second.[22] Congressional enemies of then-Secretary of State Thomas Jefferson prevailed to limit succession to the President pro tempore of the Senate and the Speaker of the House, in that order, with the Secretary of State relegated to calling a special presidential election within thirty-four days.[23] In 1886, the succession law was revised to substitute the seven cabinet officers then in existence for the congressional officers named in the earlier Act.[24] This change was motivated by the fact that the two congressional offices frequently had been unoccupied and by the concern, resulting from the impeachment proceedings against Andrew Johnson, that a Senate President pro tempore who was first in the line of succession would face a conflict of interest in considering whether to support any movement to impeach a President.[25]

Harry Truman became President in 1945 upon the death of Franklin Roosevelt and, with no Vice President for the remainder of his first term, became concerned that his selection of a Secretary of State would also constitute selection of his potential successor as President.[26] He believed this was inconsistent with democratic principles and that the Presidency should be occupied by elected officials insofar as possible.[27] Thus,

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21. *Id.* (emphasis added). The roots and development of this provision are discussed in Part II of this Article. The omitted initial portion of the provision states: "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, the same shall devolve on the Vice President, and the Congress may . . . ." *Id.*

There had been serious political and academic debate for several decades concerning whether a Vice President who assumed the Presidency under this provision actually became "President," thereby replacing an elected President who had become temporarily disabled, or only served as "Acting President" until the disabled President recovered. This matter was resolved by the Twenty-fifth Amendment which makes it clear that a disabled President may recover the office when the disability is removed. *See* U.S. CONST. amend. XXV; *see also supra* note 17 and accompanying text; *Emperor*, *supra* note 13, at 1397-98.

22. Succession Act of 1792, ch. 8, 1 Stat. 239-41.

23. *Id.* § 9; *see also* RUTH C. SILVA, PRESIDENTIAL SUCCESSION 113 (1951).

24. Succession Act of 1886, ch. 4, 24 Stat. 1 (repealing 13 Rev. Stat. §§ 146-50 (1873)).

25. *See, e.g.*, 91 CONG. REC. 7015 (1945); SILVA, *supra* note 23, at 25-27.

26. *See* 93 CONG. REC. 7692 (1947) (President Truman's Special Message to Congress on June 19, 1945).

27. *Id.*

he recommended that the Speaker of the House and the Senate President pro tempore once again be placed at the head of the line of succession, to be followed by the cabinet members.[28] Truman renewed this request in each of the next two years,[29] and the Congress finally adopted his suggestions—after debating whether succession by congressional officers is constitutional,[30] what constitutes a disability,[31] whether to extend succession below the Cabinet to include senior military officers,[32] and whether the Senate leadership should precede that of the House.[33]

The product of that debate, the current embodiment of the power entrusted to Congress by Article II, appears in 3 U.S.C. § 19:

> (a)(1) 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 a Representative in Congress, act as President.
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> (2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.
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> (b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.
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> (c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that -
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> (1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice President-elect to qualify, then he shall act only until a President or Vice President qualifies; and
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> (2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.
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> (d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is

28. *Id.*
29. *See* H.R. DOC. NO. 385, 79th Cong., 2d Sess. 21 (1946); 93 CONG. REC. 7693 (1947).
30. *See, e.g.*, 93 CONG. REC. 7766-70 (1947).
31. *See, e.g., id.* at 7796-98.
32. *See, e.g., id.* at 7598.
33. *See, e.g., id.* at 7780.

> not under disability to discharge the powers and duties of the office of President shall act as President: 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 Resources, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans' Affairs.
> (2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, *but not after a qualified and prior-entitled individual is able to act*, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.
> (3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualified to act as President.
> (e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.
> (f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.[34]

Under subsection (a)(1) of this statute, the Speaker of the House of Representatives is first in the line of succession to become Acting President if there is neither a President nor a Vice President who is able to serve.[35] If there is no Speaker, or the Speaker is unable or unwilling to act as President, subsection (b) empowers the President pro tempore of the Senate to succeed and become Acting President.[36] In order to become Acting President, because there is neither a functioning President nor Vice President, the Speaker of the House and the President pro tempore of the Senate are required by section 19 to resign from their

34. 3 U.S.C. § 19 (1988) (emphasis added). This provision, entitled "Vacancy in offices of both President and Vice President; officers eligible to act," was enacted in 1948 and was preceded by succession acts of 1792 and 1886. *See supra* notes 22-25 and accompanying text.

35. 3 U.S.C. § 19(a)(1). It is important to note that the statute uses the same term that appears in the Article II provision of the Constitution on which it is based and empowers the identified officials to "act" as President.

36. 3 U.S.C. § 19(b).

respective leadership positions and from the Congress.[37]

If neither a Speaker nor a President pro tempore is *able or willing* to do so, then the members of the Cabinet are eligible to succeed and become Acting President under subsection (d) in the following order of priority, corresponding to the order in which the positions were originally established:

Secretary of State,
Secretary of Treasury,
Secretary of Defense,
Attorney General,
Secretary of 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.[38]

Section 19 does not require that the congressional officers take the presidential oath of office, although it appears from the legislative history of the provision that this was expected to occur.[39] In any event, the statute explicitly refers to the taking of the presidential oath of office by a cabinet member in order to become Acting President and specifies that the oath-taking constitutes a resignation from the cabinet position.[40]

Either of the congressional officers is empowered to remain as Acting President, under subsection (c), until the end of the presidential term, or until the relevant disqualification or disability on the part of the President or Vice President is removed.[41] By contrast, however, a cabinet

37. 3 U.S.C. §§ 19(a)(1), (b). Prior to 1945, Congress clearly intended that an official who succeeded to the Presidency under Article II would retain the legislative or executive office that entitled the official to succeed in the first instance. This was because it was believed that a resignation from the office that was the basis for the succession would render the individual no longer eligible for the Presidency since the individual would no longer be an "officer of the United States" as required by Article II. *See, e.g.*, SILVA, *supra* note 23, at 138-42, 175.

38. 3 U.S.C. § 19(d)(1) (1988), as most recently amended by the Department of Veterans Affairs Act, Pub. L. No. 100-527, § 13(a), 102 Stat. 2643 (1988) (creating that Department and inserting the new Secretary into the succession statute). For a more complete discussion of the evolution of this line of succession, see *Emperor*, *supra* note 13, at 1431 n.143.

39. The explicit requirement may have been omitted as a result of a misconception regarding the contents of a House amendment to the succession proposal. *See* 93 CONG. REC. 7695 (1947) (remarks of Sen. Wherry).

40. 3 U.S.C. § 19(d)(3).

41. 3 U.S.C. § 19(c). The Constitution, by way of qualifications, requires that the President and Vice President be natural born citizens of the United States, at least thirty-five years

officer who succeeds to the Presidency may serve as Acting President under section 19 until the expiration of the presidential term *or* until any disability or disqualification on the part of a "prior-entitled" individual is removed.[42]

C. Congressional Supplantation

The reference to a "prior-entitled individual" specifically excludes another cabinet officer who might occupy a position higher in the succession list established by the statute but who was unable, unwilling, or unavailable to assume the position in the assigned order of succession.[43] The legislative history of the provision makes clear, however, that the reference was intended by Congress to empower not only a President or Vice President, but also a Speaker of the House or President pro tempore of the Senate to remove and replace a former cabinet officer who has become Acting President.[44] This discretionary supplantation authority remains despite the fact that these "prior-entitled" individuals initially might have been unable or, especially relevant in the case of the congressional officers, unwilling to function as Acting President.[45]

Under the provisions of section 19 requiring a resignation in order to succeed,[46] a refusal by these congressional officers to resign from the Congress and their leadership position as required by the statute would constitute a form of disqualification to act as President. These officers, however, may decline to assume the Presidency when the choice first becomes available, yet subsequently "remove" that disqualification and qualify to act as President by complying with the law and submitting the required resignation.[47] Removal of the disqualification then would enti-

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of age, residents of the United States for at least fourteen years, and inhabitants of different states. U.S. CONST. art. II, § 1, cl. 5; *see also id.* amend. XII. While the authority to provide for succession in the event of death, disability, removal, or resignation, appears in Article II, as explained earlier, *see supra* note 20 and accompanying text, the power of Congress to enact a law providing for succession where there is a failure to meet the specified qualifications was added to the Constitution in 1933 as part of the 20th Amendment. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 82, 92d Cong., 2d Sess. 1575 (1973).

42. 3 U.S.C. § 19(d)(2).

43. *Id.*

44. *See* 93 CONG. REC. 7705, 7774-76 (1947) (colloquies between Sens. Wherry and Barkley); *see also id.* at 7700 (remarks of Sen. Wherry); S. REP. NO. 34, 80th Cong., 1st Sess. 2 (1947) (explaining intent that the Speaker or President pro tempore could supplant a former cabinet officer who is acting as President at such time as the congressional officers are no longer disqualified); H.R. REP. NO. 817, 80th Cong., 1st Sess. 5-6 (1947) (describing ability of "prior entitled individuals" to replace cabinet officer as Acting President).

45. *See* 93 CONG. REC. 7705 (1947).

46. 3 U.S.C. §§ 19 (a)(1), (b)(1).

47. *See infra* note 53 and accompanying text.

tle either of the congressional officers, as "prior-entitled" individuals, to assert a claim to the acting Presidency that would be superior under the law to that of an individual who had resigned from a cabinet post and become Acting President previously.[48] Thus, a congressional officer would hold the power under section 19 to displace at any time a former cabinet member who had become Acting President.[49]

Furthermore, this option to replace an Acting President would be available to any individual who may subsequently be selected as Speaker of the House or President pro tempore of the Senate during the remainder of the presidential term.[50] Because of the absence of factual or temporal limitations in section 19, it would not matter whether the individual involved previously had declined to accept the position of Acting President, occupied either of the congressional leadership positions at the time the cabinet member became Acting President, or even had been a member of Congress when previous congressional officers originally had decided to refuse to accept the office.[51] And this threat of displacement would endure throughout the tenure, perhaps encompassing almost the entire four-year presidential term if the vacancies occurred early in the administration of an Acting President who had acceded to that position from the Cabinet.

The potential for displacing a cabinet officer acting as President, even with a newly elected congressional officer, was well within the intent of Congress when it enacted this provision.[52] This was made absolutely clear in an explanation provided by Senator Wherry, a leading proponent of the legislation, during the floor discussion of the bill that eventually became section 19:

> Mr. BARKLEY. [I]f the House should elect an unqualified Speaker, and if the Senate should elect an unqualified President pro tempore, neither of them could become President?
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> Mr. WHERRY. It would then go to the Secretary of State. This is exactly correct.
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> Mr. BARKLEY. Then the succession would finally pass to the Secretary, as the third in line?

48. *See infra* note 53 and accompanying text.

49. *See supra* note 45.

50. *See supra* note 45.

51. Strangely enough, the Constitution does not require that a Speaker of the House of Representatives be a member of that body. It simply empowers the House to "chuse their Speaker" but provides no standards or qualifications for being elected to that position. U.S. CONST. art. I, § 2, cl. 5; *see also* 93 CONG. REC. 7780 (1947) (remarks of Sen. Russell, arguing that the Senate President pro tempore should come before the Speaker of the House in the line of succession).

52. *See supra* note 45 and accompanying text; *infra* note 54 and accompanying text.

> Mr. WHERRY. Yes, [the cabinet officer could succeed] temporarily, only, because it would take but a very few minutes for the House to elect a new Speaker if the Speaker did not qualify or if he resigned. The Senate could do the same thing with the President pro tempore; or, if he did not qualify, then the Secretary of State could continue to act as President until the President pro tempore qualified.
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> . . . .
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> Mr. BARKLEY. He could be President, then, for a few minutes and then the House would unhorse him?
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> Mr. WHERRY. He would serve only for the emergency.[53]

It is patent from this exchange and other references in the legislative history of section 19[54] that Congress intended to preserve authority for its leaders to "unhorse" a cabinet member who becomes Acting President.

While a preference for elected officials in the line of succession is consistent with the wishes of President Harry Truman in 1945 when he proposed revision of the predecessor to section 19, the supplantation provision goes too far by providing the Congress with inordinate power over the tenure of an Acting President.[55] For example, so long as it remains unclear whether a disabled President and Vice President will recover, the Speaker of the House and President pro tempore may postpone their succession decisions in order to avoid the permanent loss of their legislative positions for what may be a temporary stay in the Oval Office. Rather than taking the likely irreversible step of resigning from their leadership and congressional positions, they would lose nothing by refusing the opportunity to serve as Acting President and allowing a cabinet officer to take the post while there is any question of longevity. Subsequently, if and when the disabled President and Vice President die or have been

53. 93 CONG. REC. 7705 (1947). This logic was premised on the presumption, apparently widely shared in the Senate and the House, that elected officials from the Congress have a superior claim to the Presidency than does any appointed, unelected cabinet official. *See, e.g.*, 93 CONG. REC. 7777-78 (1947) (Sen. Baldwin); *id.* at 8633 (Rep. Keating); *see also* S. REP. NO. 34, 80th Cong., 1st Sess. 2 (1947) (explaining intent that the Speaker or President pro tempore could supplant a former cabinet officer who is acting as President at such time as the congressional officers are no longer disqualified); H.R. REP. NO. 817, 80th Cong., 1st Sess. 5-6 (1947) (describing ability of "prior entitled individuals" to replace cabinet officer as Acting President); 93 CONG. REC. 7774-76 (1947) (colloquies between Sens. Wherry and Barkley); *id.* at 7700 (remarks of Sen. Wherry).

54. 93 CONG. REC. 7700 (1947).

55. The first version of successor legislation submitted by President Truman specifically authorized a cabinet officer to serve as Acting President only until a qualified legislative officer could take over or a new President could be elected during the next congressional election. See *Emperor, supra* note 13, at 1417-30 for a full discussion of the succession acts of 1792 and 1886 and the development of § 19 during the Truman Administration.

determined to be disabled permanently, the congressional leaders would retain unbridled discretion to determine whether, when, and on what political or other basis to remove and replace an Acting President who has been drawn from the Cabinet.[56]

D. Section 19 in Action: A Hypothetical

The insidious effects of these provisions can best be illustrated by utilizing real personalities and potential circumstances. Assume, hypothetically, that Vice President Quayle actually had given truth to the rumors that swirled around the nation during July 1992 and had resigned under pressure to enhance President Bush's chances for reelection. Also assume that later the same day, while in Kennebunkport preparing to announce the nomination of Ronald Reagan as interim Vice President under the Twenty-fifth Amendment, President Bush was seriously injured and rendered comatose while attempting a 180-degree turn in his cigarette speedboat.

Speaker of the House Thomas Foley would have the option of resigning from his office and the Congress in order to become Acting President. With an election approaching, however, Speaker Foley might reasonably decide that the loss of his hard-earned position in the House was not warranted for a four-month stint as Acting President in a Republican administration. Senate President pro tempore Robert Byrd would next be faced with the same decision. Again, it would not be unreasonable for the powerful chairman of the Senate Appropriations Committee to decide that his vow to bring a billion dollars worth of federal projects to his home state of West Virginia would be easier to satisfy if he remained in the Senate for the duration of his term.

Thus, the statutory line of cabinet member succession would be activated. Assume further that Secretary of State James Baker already had left that position to become Chief of Staff in the White House, that Treasury Secretary Nicholas Brady had resigned to devote full time to fundraising efforts for President Bush, and that Secretary of Defense

56. The only apparent constraint on this discretionary authority lies in the Acting President's ability to appoint an individual to fill the vice-presidential vacancy under § 2 of the 25th Amendment. Even as Acting President, the former cabinet officer would have this and all the powers of an actual President and would not be automatically displaced by the new Vice President. *See, e.g., Emperor, supra* note 13, at 1405 n.60. And the new Vice President, once nominated and confirmed by both houses of Congress as provided in that section, would be the primary successor to the Presidency if anything, such as "removal" by the congressional leadership, were to happen to the Acting President. *See id.* at 1442-43; *see also* U.S. CONST. amend. XXV, § 1. Of course, the congressional leadership could take steps, including a preemptive supplantation of the Acting President, to delay or avoid congressional confirmation of a vice-presidential nominee.

Richard Cheney was on a backpacking trip to the outermost reaches of the Wyoming wilderness and, by deliberate design on his part, could not be reached for twelve hours. Since it can be safely assumed that the Democratically-controlled Congress would have no intention of quickly approving an interim Vice President, this chain of events would bring the choice to Attorney General William Barr. Finally, assume the Attorney General chose not to wait for Secretary Cheney's return but eagerly accepted the opportunity to become the youngest Acting President in the nation's history in order, however briefly, to further protect and enhance the presidential prerogatives he had defended so vigorously at the Justice Department.

Shortly after taking the presidential oath of office, Acting President Barr is told that Secretary Cheney is on the telephone and wishes, at the urging of his staff and as a matter of duty to his country, to assert his more senior claim to the Presidency. Armed with the advice of the Justice Department, Mr. Barr explains to Mr. Cheney that "the train has left the station" and that there is no basis under section 19 for Mr. Barr to relinquish the position to Mr. Cheney. Mr. Cheney returns, perhaps only slightly disappointed, to the beauties of the outlands.

Soon, a second call is received by the Acting President. It is Congressman Henry B. Gonzalez who reports that he has prevailed upon Congressman Foley to step down from the Speakership for the few weeks remaining in the congressional session, based on assurances that Mr. Foley will be reelected to the Speakership of the new Congress if the Democrats maintain their control. Further, as part of these machinations, his Democratic colleagues have elected Congressman Gonzalez the new Speaker as a gesture of respect for his continuing badgering of the Bush Administration with regards to its policies toward Iraq.

Speaker Gonzalez politely reminds the Acting President of his refusal, while Attorney General, to provide additional classified information requested for the Congressman's investigation after the Congressman had been accused of disclosing such information in the Congressional Record.[57] The new Speaker also recalls the former Attorney General's previous decision not to appoint an independent counsel as requested by Democratic members of Congress to investigate allegations that Bush Administration officials had broken the law in authorizing ex-

57. *See, e.g.*, Press Release, House Committee on Banking, Finance, and Urban Affairs (July 30, 1992) (describing letters from the Central Intelligence Agency as having "all the appearance of warmed over versions of earlier complaints from Attorney General William P. Barr").

ports of American technology to Iraq.[58] The new Speaker then subtly refers to the supplantation provisions of section 19, suggests the Acting President "look it up," and invites the Acting President to the Speaker's office in the Capitol for a "frank discussion" of these two matters.

The Justice Department and White House Counsel's Office scurry to examine the law and confirm the new Speaker's authority to supplant the former Attorney General at the drop of a resignation from the Speakership. The Acting President begins to consider whether a few classified documents and a mere investigation by an independent counsel are really worth fighting over. Should Barr continue to refuse his "requests," Speaker Gonzalez could resign, become Acting President for the remainder of the presidential term, and direct the provision of all relevant documents to the Congress and the appointment of a particularly aggressive independent counsel to look into Bush Administration "wrongdoing" in the months leading up to the Fall election.

As this fanciful discourse illustrates, the unbridled discretion that section 19 places in the hands of the congressional leadership may affect the ability of an Acting President to base decisions on the best interests of the nation rather than what would be most pleasing to the Congress.[59] It also provides a statutory mechanism for the removal of a "President" that replaces the rigorous constitutional impeachment standards of a trial and two-thirds vote of the Senate[60] with the whimsy of a single member of Congress. Whether this arrangement is consistent with the Constitution requires an examination of the original intent of the Framers in drafting the constitutional provision that authorizes section 19 as well as evolving principles of separation of powers between the Congress and the Executive.

II. The Framer's Intent: The Constitutionality of Section 19 Under Article II

It is important to examine at the outset the constitutional framework within which Congress may enact a succession provision in the first place. The premise of the entire constitutional structure is the separation

58. *See, e.g.*, Sharon LaFraniere, *In Switch, Democrats to Seek Extension of Independent Counsel Statute*, WASH. POST, Aug. 15, 1992, at A5.

59. That this type of executive-legislative relationship was abhorrent to the Founders should be self-evident. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (including among the charges assigned to the King of Great Britain that "He has made judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."); THE FEDERALIST NO. 68 (Alexander Hamilton) (arguing that executive independence is essential).

60. *See* U.S. CONST. art. I, § 3, cl. 6.

of powers. The central role of this concept was described by James Madison, who, it will be seen, also played a large role in crafting the Article II language under which section 19 was enacted:

> It is agreed on all sides that the powers properly belonging to one of the [branches] ought not to be directly and completely administered by either of the other[s]. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers . . . .
>
> Will it be sufficient to mark, with precision, the boundaries of these [branches] in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?
>
> . . . [E]xperience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.[61]

The Founders' overriding concern with the potential for legislative domination, at the expense of what was viewed then as a "feeble" Executive, forms an essential backdrop for assessing the extent to which section 19 is consistent with the intent of Article II.

The constitutionality of the supplantation provision of section 19 as enacted by Congress under Article II depends upon the general intent of the drafters of that provision of the Constitution and the specific status they intended for an "officer," in this case a cabinet official, who succeeds to the position of Acting President established by the Constitution.[62] Since the only means provided in the Constitution for removing an *actual* President are impeachment or compliance with the complex disability removal provisions of the Twenty-fifth Amendment, a statute that contemplates removal by lesser means of an official who was intended to

61. *See* THE FEDERALIST NO. 48 (James Madison). The precise standards that have been adopted by the Supreme Court to resolve separation of powers disputes between the branches are explained in greater detail in Part III of this Article.

62. *See, e.g.*, SILVA, *supra* note 23, at 2. The question was posed in constitutional terms as "Must one actually become the President in order to 'exercise the Office of President of the United States' [U.S. CONST. art. I, § 3, cl. 5], or to 'act as President' [U.S. CONST. art. I, § 1, cl. 5], or to 'discharge the Powers and Duties of the said Office' [U.S. CONST. art. II, § 1, cl. 5]." The author of that book believed the answer to be that "generally, all agree that a designated officer under a succession statute does *not* actually become President as does the Vice President by practice." *Id.* (emphasis added); *see also id.* at 88 n.11. See *Emperor*, *supra* note 13, at 1397-98, for a discussion of how the latter "practice" developed. The 25th Amendment eliminated any doubt as to the presidential status of a Vice President who assumes the vacant office. *Id.* at 1401-02 n.48.

have the same status under the Constitution as an actual President would not be consistent with the constitutional framework.[63] On the other hand, if an Acting President under Article II and section 19 was intended to be treated as something less than an actual President, lesser means for removal may be constitutionally permissible.

The intent of the Framers as to both the scope of Congress's power and the status of a statutory successor is evidenced by the records of the debates at the Constitutional Convention that resulted in the language of Article II. A review of those discussions indicates a clear recognition of the desirability of an appropriate provision for succession in the event a President were to become incapable of functioning properly.[64] This desire was coupled with an apparent, albeit indirectly expressed, intention that a non-elected successor to the Presidency in such circumstances be temporary in nature and an *acting*, rather than an *actual*, President.[65] In addition, there was a pervasive insistence that the chief executive must be shielded from the overweening power of the Congress.[66] Thus, the debates intertwine explanations of the need for a proper mechanism for removing and replacing an incapable President with discussions concerning the dangers of having a President who is overly dependent upon the Congress for continued tenure.[67]

A. The Pinckney Plan

Several written proposals were submitted to the Constitutional Convention of 1787 for consideration at the outset of its efforts to fulfill its charge to revise the Articles of Confederation. Only the plan reported to have been prepared by Charles Pinckney included a provision for presidential succession.[68] Article I, section 8 of the Pinckney Plan stated with regard to the Chief Executive that:

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63. The impeachment power and the standards for its exercise are set out in Article II, § 4, while the congressional role in impeachment is described in Article I, § 2, clause 5, and Article I, § 3, clauses 6 & 7.

64. *See infra* notes 68-73, 86, 94, 96, 100-01 and accompanying text.

65. *See infra* notes 75, 86-87, 94, 96-98, 101 and accompanying text.

66. *See infra* notes 73, 76-84, 87, 89, 95, 102 and accompanying text.

67. *See, e.g., infra* notes 70, 75 and accompanying text.

68. *See* SILVA, *supra* note 23, at 4. The submission of this "Pinckney Plan" was claimed by Pinckney himself in a December 30, 1818 letter to Secretary of State John Quincy Adams. The authenticity of this claim has been the subject of some controversy, however. *See, e.g.*, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES: (Gaillard Hunt & James B. Scott eds., 1920) [hereinafter DEBATES]; *see also* CHARLES C. NOTT, THE MYSTERY OF THE PINCKNEY DRAUGHT (1908) (supporting Pinckney's claim); JOHN F. JAMESON, 1 ANNUAL REPORT OF THE HISTORICAL ASSOCIATION FOR THE YEAR 1902, at 89 (1903) (opposing Pinckney's claim).

> In case of his removal, death, resignation, or disability, the President of the Senate shall exercise the duties of his office until another President be chosen—and in case of the death of the President of the Senate the Speaker of the House of Delegates shall do so.[69]

This provision indicates early recognition of (1) the wisdom of providing for a vacancy in the Presidency, (2) the acceptability of a temporary successor to fill such a vacancy, and (3) the lack of conceptual difficulty with including congressional officers in the line of succession.

The first actual discussions of succession-related issues that appear in the records of the Convention occurred during its earliest days in June 1787.[70] On June 1, Gunning Bedford of Delaware opposed giving the President a seven-year term because of the problems that would result if, during such a lengthy period, the President should "not possess the qualifications ascribed to him, or should lose them after his appointment."[71] Impeachment, he explained, would not be available since it was intended to reach malfeasance, not incapacity.[72] The next day, George Mason of Virginia argued that an unfit President should be removable but opposed "making the Executive the mere creature of the Legislature as a violation of the fundamental principle of good Government."[73]

B. The Hamilton Plan

Alexander Hamilton of New York presented his now famous monarchical plan to establish a President-for-life on June 18.[74] Again, the concern for succession was illustrated by Hamilton's inclusion of a provision that "on the death, resignation or removal of the [President,] his authorities . . . be exercised by the President of the Senate till a Successor

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69. *See* SILVA, *supra* note 23, at 4 n.6 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 600 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]).

It is noteworthy that congressional officers were included in this seminal version of the succession provision. The original Succession Act of 1792, enacted by the second Congress which included many of the Framers of the Constitution, also provided for succession by the congressional leadership. *See* 24 Stat. 1 (1886). Thus, the constitutional issue is not the mere potential for congressional officers to succeed to the Presidency, but only their ability to supplant or exert undue influence over an Acting President. *See Emperor*, *supra* note 13, at 1424-26 and accompanying footnotes for a full discussion of the issues concerning the constitutionality of congressional succession to the Presidency; *see also* SILVA, *supra* note 23, at 133-37; Marsh v. Chambers, 463 U.S. 783, 790 (1983) (according substantial weight to constitutional interpretations of the early Congresses).

70. *See* DEBATES, *supra* note 68, at 40-41.

71. *Id.*

72. *Id.*

73. *Id.* at 46.

74. *Id.* at 116-18.

be appointed."[75]

C. The Morris-Madison Dialogue

No further discussion of the questions of succession and overreaching by the legislature is recorded until July 17. Gouverneur Morris of Pennsylvania expressed his strong opposition on that date to any arrangement that would allow the legislature to select the President:

> He will be the mere creature of the Legislature: if appointed and impeachable by that body. . . . If the Legislature elect, it will be the work of intrigue, of cabal, and of faction; it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment.
>
> . . . .
>
> . . . If the Executive be chosen by the National Legislature, he will not be independent [of] it; and if not independent, usurpation and tyranny on the part of the Legislature will be the consequence.[76]

James Madison concurred, emphasizing that it was essential to the separation of powers principle, which he and the other delegates believed in so firmly, that the branches of the new government should be truly independent.[77] They already had agreed, he reminded the delegates, that judges should be life-tenured in order that they would not be dependent on the legislature for reappointment and "thus render the Legislature the virtual expositor, as well as the maker of the laws."[78] It was even more important, he later urged, that the Executive and the congressional powers be kept separate and independent.[79]

On July 19, Gouverneur Morris again focused on the potential dangers of the impeachment power, arguing that it would hold the President "in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest [but] will be the tool of a faction, of some leading demagogue in the Legislature."[80] Madison answered the next day, insisting that any proposal to create a "chief Magistrate" who would play a significant role in the new government must be coupled with some means for protecting the nation against the continuation in that office of an individual who was incapacitated, negligent, or dishonest.[81] Charles Pinckney responded that impeach-

75. DEBATES, *supra* note 68, at 119.
76. *Id.* at 267, 269.
77. *Id.* at 271-72.
78. *Id.* at 272.
79. *Id.*
80. *Id.* at 283.
81. *Id.* at 291.

ment was unnecessary and should not issue from the legislature since it would be used "as a rod over the Executive and by that means effectively destroy his independence."[82]

Again on the twenty-first, twenty-fourth, and twenty-fifth of July, Morris and Madison turned the debates to the dangers of a weak executive who would hold office at the sufferance of the legislature. Madison noted that the experience of "all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex" and suggested that this was "the real source of danger" to an American constitution.[83] Morris hammered at the theme of a sinister legislature that would engulf the executive if not sufficiently bounded:

> Much has been said of the intrigues that will be practiced by the Executive to get into office. Nothing has been said on the other side of the intrigues to get him out of office. Some leader of [a] party will always covet his seat, will perplex his administration, will cabal with the Legislature till he succeeds in supplanting him.[84]

Clearly, the image of a President overly beholden to the Congress was a constant source of concern to these delegates.

D. Committee of Detail Draft

The first fruit of the debates was returned to the delegates in early August as a draft constitution prepared by the Committee of Detail.[85] Article X, section 2 of that draft provided that the President could be removed from office on impeachment by the House and conviction in the Supreme Court and that,

> In case of his removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed.[86]

The draft provided for legislative selection of the President. Delegate James Wilson of Pennsylvania argued in favor of a joint ballot involving both Houses of Congress since "[d]isputes between the two Houses during and concerning the vacancy of the Executive might have

82. *Id. But see id.* at 293 (remarks of Gouverneur Morris on July 20, 1787).

83. DEBATES, *supra* note 68, at 295-96.

84. *Id.* at 315-16; *see also id.* at 318-24 (concerning the potential for foreign powers to influence the selection of a President if the selection power were to be vested in the legislature).

85. *Id.* at 337-46.

86. *Id.* at 343. Article V, § 4 of the Committee of Detail draft provided the Senate with the power to "chuse" its own President and other officers. *Id.* at 339.

dangerous consequences."[87] Gouverneur Morris continued to argue against an overly powerful legislature and for electors from the several states instead:

> If the Legislature have the Executive dependent on them, they can perpetuate and support their usurpations . . . . Cabal and corruption are attached to that mode of election . . . . Hence the Executive is interested in Courting popularity in the Legislature by sacrificing his Executive Rights . . . . [R]ivals would be continually intriguing to oust the President from his place.[88]

James Madison also was troubled by the prospects for intrigue that might follow from entrusting the Senate with both the responsibility for choosing a new President and the power to designate successors. This would tempt the Senate to delay appointing a new President while one of their number, the President of the Senate, held the Presidency and thus controlled the veto power.[89] He believed that executive powers should be exercised during any presidential vacancy by a Council to the President that would consist of the President of the Senate, Speaker of the House, Chief Justice of the Supreme Court, and the members of the Cabinet.[90]

Hugh Williamson of North Carolina concluded that the legislature should have the power to decide who would be successors to the President and moved that consideration of the last clause of the provision—specifying that the President of the Senate would assume those duties—be postponed.[91] This motion was seconded by John Dickinson of Delaware who believed the language of the draft was too vague because it did not define the term "disability" or indicate who would be responsible for determining when it existed.[92]

E. The Committee of Eleven Revision

The decisions of the delegates concerning the Committee of Detail draft were entrusted to the Committee of Eleven which reported a further draft on September 4, 1787.[93] The first and third sections of Article X of that draft provided for a four-year presidential term, an electoral college, and a Vice President who would preside over the Senate except during trials on impeachment of the President. The second section contained a revised succession provision:

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87. DEBATES, *supra* note 68, at 347.

88. *Id.* at 463; *see also id.* at 472 (On August 27, Morris objected to the President of the Senate being identified as the President's successor and suggested the Chief Justice instead.).

89. *Id.* at 472.

90. *Id.*

91. *Id.*; *see also* 2 RECORDS, *supra* note 69, at 535.

92. DEBATES, *supra* note 68, at 472.

93. *Id.* at 506-08.

> [The President] . . . shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for Treason, or bribery, and in case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers and duties of his office, the vice-president shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.[94]

These alterations did not allay the fears regarding an executive whose fate was tied too closely to the Congress. James Wilson of Pennsylvania, for example, believed that empowering the Senate to select a President from the electoral college candidates was very dangerous and that the individual selected would "not be the man of the people as he ought to be, but the Minion of the Senate."[95]

Others also were dissatisfied with the new succession language. Edmund Randolph of Virginia moved to separate it from the impeachment power and substitute a provision that proved to be very close to the final version: "The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly until the time of electing a President shall arrive."[96]

F. Madison Molds the Succession

James Madison pointed out that the last clause of Randolph's proposal would empower an Acting President to serve until the end of an unexpired presidential term and would preclude the possibility of an intermediate special election of a new President.[97] Accordingly, he moved to revise the clause to empower the successor to serve "until such disability be removed, or a President shall be elected."[98] Gouverneur Morris seconded the motion and the amended section was approved by the delegates.[99]

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94. DEBATES, *supra* note 68, at 508.

95. *Id.* at 519.

96. *Id.* at 525.

97. *Id.*

98. *Id.*

99. *Id.* at 324. Some delegates objected, without effect, to the difficulty of holding a special election or to limiting the legislature to temporary appointments, while others believed the range of potential successors should not be limited to federal officers. *Id.* at 525-26. In further discussion of the third section of the Article, Morris objected to the Vice President presiding over the Senate since, in his view, this would be tantamount to giving the Executive the power to control the Senate. *Id.* at 527. Roger Sherman of Connecticut assured Morris that there was no danger from this arrangement. Further, if the Vice President was not given this function, he would be "without employment" and a member of the Senate would be required to give up his vote to be the presiding officer. *Id.*

G. The Final Version

The final draft of the now rapidly emerging Constitution was returned to the delegates in the Report of the Committee of Stile and Arrangement which had been charged with ensuring that the text was accurate and consistent with the decisions of the delegates. The relevant provision of this draft was essentially the same as the current Article II, section 1, clause 6, except that the final clause stated that a presidential successor could serve until a disability was removed or "the period for choosing another President arrive." [100] Presumably through the efforts of James Madison, who had raised the desirability of special elections previously, the clause was altered to read "or a president shall be elected" before the final version of the Constitution was produced and offered to the states for ratification.[101]

A further illustration of the sensitivity of the drafters to the problem of creating a President who is too dependent upon the Congress appeared near the end of the Convention in reaction to a motion by John Rutledge of South Carolina and Gouverneur Morris to add a provision that would suspend impeached officials from their positions until after they had been tried and acquitted. James Madison objected that the impeachment power requiring action by the two houses already threatened to make the President too dependent upon Congress. Allowing the House to effect the President's suspension merely by voting for impeachment would place him at the mercy of Congress, which could remove him temporarily "in order to make way for the functions of another who will be more favorable to their views."[102] The motion was defeated.

This examination of the records of the Constitutional Convention distills several points within the succession framework. First, the Framers intended that any successor, whether a Vice President or another offi-

100. *Id.* at 550.

101. The issue of succession appears to have been discussed further only in the Virginia Ratification Convention. There, George Mason, one of the few delegates to the Constitutional Convention who refused to sign the final version, raised an objection because the proposed constitution included no provision for speedy election of a new President in the event of an unexpected vacancy. James Madison responded by underscoring the temporary status intended for an Acting President and explaining that he expected an immediate election would be called if both the President and Vice President were to die. In any event, Congress could only provide for a successor to serve until the next regularly scheduled election. *See* SILVA, *supra* note 23, at 11.

The Federalist Papers, produced to promote the proposed constitution and inform the ratification process, also mention succession only once in passing by describing the Vice President as a potential "substitute for the President." THE FEDERALIST NO. 68 (Alexander Hamilton).

102. DEBATES, *supra* note 68, at 561.

cial designated by Congress, should "act" as President temporarily until the elected President was again able to serve or a special election could be held to select a new President.[103] John Tyler established by practice, and the Twenty-fifth Amendment now establishes by law, that the Vice President actually becomes President when the Presidency is vacant.[104] Neither practice nor law, however, has altered the constitutionally temporary status of a congressional or cabinet official who has become Acting President under a statute—currently 3 U.S.C § 19—enacted by the Congress under Article II.[105]

Since such an official who becomes Acting President is merely exercising the powers and performing the duties of the office and is not actually President, it can reasonably be argued that removal of an Acting President by means other than impeachment would not violate the Constitution.[106] This conclusion as to the lesser status of an Acting President is supported by the fact that the Constitution continues to leave room in Article II for the calling of a special election to select a new President. This, of course, would not be permitted in the case of an actual President. Thus, the provision empowering senior legislative officers to displace a cabinet officer who has become Acting President does not violate the constitutional framework for succession intended under Article II, section 1, clause 6.

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103. *See, e.g.*, SILVA, *supra* note 23, at 8-9.

104. *See Emperor, supra* note 13, at 1397-98, 1402; *see also* SILVA, *supra* note 23, at 30-31; (stating that the acceptance of a succeeding Vice President as an actual, not Acting, President (prior to the Twenty-fifth Amendment) was "doubtless contrary" to the intent of the Framers).

105. See, e.g., the extreme view of the Senate Judiciary Committee in 1856 in S. REP. NO. 260, 34th Cong., 1st Sess. 3-5 (1856). ("Such an official is only a contingent functionary, with presidential authority of a provisional character confined to a sphere of limited and prescribed duties. The acting officer has not devolved upon him the powers and duties of an elected President, according to the provisions of the Constitution, but can only serve for a limited term and with a prescribed purpose."); *see also* 13 CONG. REC. 192 (1881). Others, however, argue that Congress does not have the power to subject such an acting official to the instability of calling a special election before the end of the unexpired term. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 336-37 (1st ed. 1833); *see also* CONG. GLOBE, 39th Cong., 2d Sess. 691-92 (remarks of Rep. Boutwell).

106. *See, e.g.*, SILVA, *supra* note 23, at 150. *But see id.* at 175 (doubtful that Article II empowers Congress to designate more than one qualified successor at any given time). For example, the language of Article II, § 1, clause 6 continues to allow for the calling of a special election to elect a new President. Whether such an election would result in a full four year term and alteration of the schedule for presidential elections thereafter remains to be determined. *But see id.* at 50 (explaining that the Constitution requires that both the President and Vice President be elected at the same time and that any newly elected President and Vice President must serve for a full four year term, not merely the remainder of the unexpired term).

Second, however, the records of the Constitutional Convention present vivid evidence of the Framers' abhorrence of any process that would cleave the fine lines of separated powers they crafted and create a chief executive officer whose continued tenure in office would be wholly and directly dependent upon the sufferance of the legislature. Their experience with the flaws of human character necessitated their tolerance for a carefully structured impeachment process. Principles of good government compelled them to allow for special elections to select a new President. Nonetheless, it remains doubtful that even the specter of simultaneous vacancies in the Presidency and the Vice Presidency would have moved them to accept a legal framework where the congressional leadership could so clearly impinge upon the independent judgment and tenure of a person acting as President.[107]

As already explained, the delegates agreed to allow an Acting President to be replaced by special election and thereby be denied the same protection from abrupt removal that the Constitution provides an elected President. While Madison and others acquiesced in this electoral exception to executive stability, their express concerns at the Convention indicate they clearly would have seen the threat to independence inherent in the congressional supplantation power of section 19.[108] It would be difficult to believe that they would not agree that the integrity of the constitutional system itself may be so threatened by the potential consequences of

107. The exigencies presented by a crisis of this nature may, of course, lead some to accept measures that would otherwise be unpalatable. For example, the potential devastation of the District of Columbia by a nuclear attack led the Senate at least to discuss the option of extending the line of succession through the ranks of the military as well. *See* 93 CONG. REC. 7598, 7784-85 (1947) (remarks of Sen. Wiley).

108. The general concession to electoral decision-making is also fundamental to our system of government. *See, e.g., infra* text accompanying note 132. There is no separation of power issue when the voters, as opposed to single members of Congress, possess the authority to decide who should become President. Thus, the potential for Congress to end an Acting President's tenure by calling for a special election as provided in Article II, § 1, clause 6 is consistent with the constitutional principles under discussion here and provides for a more orderly and publicly acceptable means to effect change in the Presidency.

Sensitivity to the erosion of presidential independence is reflected in Madison's statements during the 1789 debate in the First Congress regarding a proposal that would require Senate advice and consent for the President to remove the Secretary of State:

> Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the executive and legislative branches of the Government in one body. It has been objected that the Senate have too much of the executive power even by having a control over the President in the appointment to office. Now, shall we extend this connection between the Legislative and executive departments, which will strengthen the objection, and diminish the responsibility we have in the head of the Executive?

1 ANNALS OF CONG. 380 (Joseph Gales ed., 1789).

this congressional power to remove an Acting President by means other than special election or impeachment that such a power cannot be tolerated as a matter of constitutional law.[109] This conclusion is confirmed by applying the principles of separation of powers analysis that have been elaborated by the Supreme Court since the ratification of the Constitution.

III. Maintaining the Separation of Powers

A. General Precepts

In explaining the concept of separated powers, the Supreme Court has written:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[110]

James Madison, in arguing for the ratification of the proposed constitution following the end of the Constitutional Convention, wrote concerning the importance of maintaining the separation of powers, "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."[111] At the same time, however, he recognized that this principle, upon which so much of the vitality of our system of government rests, did not require that the branches "have no *partial agency* in, or no *control* over the acts of each other."[112] Instead, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[113]

The Supreme Court has restated these bedrock principles by holding that, while there is no basis for mandating the branches to be entirely

109. *See, e.g.*, THE FEDERALIST NO. 68 (Alexander Hamilton) ("Another and no less important desideratum was, that the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence.")

110. INS v. Chadha, 462 U.S. 919, 951 (1983).

111. THE FEDERALIST NO. 47 (James Madison).

112. *Id.*

113. *Id.*

separate and distinct from one another,[114] the Constitution requires the three branches to be "entirely free from the control or coercive influence, direct or indirect, of either of the others."[115] The practical dictates of government demand that power be shared, not wholly separated, yet there remains a point beyond which the branches cannot tread without upsetting the balance, even in the name of good government.[116]

Madison, who keenly observed that the legislature has a tendency to dominate a republican form of government, also wrote that the greatest protection against "a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[117] This tendency toward encroachment has moved the Supreme Court to resist the tendency of each branch to expand its power.[118]

Separation of powers issues are subject to judicial scrutiny under two tests that have been developed by the Supreme Court.[119] The first test is whether the questioned action by one branch usurps the power or responsibilities of another branch to such an extent that it reduces the appropriate powers of one or inappropriately increases the powers of the

114. *See, e.g.*, Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443-44 (1977) (stating that such a position would be "archaic" and upholding congressional vesting of control of former Presidents' papers in the General Services Administrator).

115. Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (not unconstitutional for Congress to limit President's authority to remove Federal Trade Commission members to instances of inefficiency, neglect of duty, or malfeasance).

116. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 958-59 (1983). While it could, of course, be argued that § 19 is not inconsistent with relevant separation of powers principles, the inhibiting effect that the congressional Sword of Damocles could have on an Acting President strongly suggests otherwise. *See* Humphrey's Ex'r, 295 U.S. at 631-32 (referring to the "Damocles' sword" of potential removal of lesser officials by the President).

117. THE FEDERALIST NO. 51 (James Madison); *see also* THE FEDERALIST NOS. 71, 73 (Alexander Hamilton) (legislature has tendency to absorb other government functions). It is difficult to see what other checks and balances under the Constitution would come into play to deter a congressional officer from seizing the Presidency if a cabinet officer proved to be uncompliant as Acting President. There are no veto opportunities relating to a succession decision that will be presented to an Acting President who may be threatened with such a supplantation. Further, as illustrated in Part V of this Article, the prospects for judicial intervention in what may be reasonably characterized as a political dispute are by no means certain.

118. Buckley v. Valeo, 424 U.S. 1, 122-23 (1976) (unconstitutional for Congress to grant itself authority to appoint members of the Federal Election Commission).

119. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring). *But see* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 111-27 (1984) (arguing that the separation of powers decisions of the Court rest not on a distinct analytical doctrine but on more traditional sources, i.e., the constitutional text, the intent of the Framers, custom, and practice).

other.[120] The second test is whether the action interferes with the performance of the constitutional functions of another branch and, if so, whether the governmental objective sought to be achieved by the action justifies the interference.[121] Applying these tests to the legislative supplantation provisions of 3 U.S.C. § 19 indicates apparent violations of constitutional standards under both tests.[122]

B. Aggrandizement or Encroachment

The reasoning in *Bowsher v. Synar*[123] regarding the application of the first test—erosion or aggrandizement of the powers of another branch—to the statutory succession provisions is instructive. *Bowsher* involved the question whether the Balanced Budget and Emergency Deficit Control Act of 1985, also known as the "Gramm-Rudman-Hollings Act,"[124] violated separation of powers principles by empowering the Comptroller General, who was removable by a joint resolution of Congress, to specify to the President the portions of the federal budget that must be reduced to achieve spending ceilings.[125]

The statute established a maximum deficit amount for federal spending for fiscal years 1986 through 1991 and was intended to eliminate the deficit over that period.[126] If a fiscal year deficit exceeded the maximum allowable amount, across-the-board spending cuts would be required to meet the target levels.[127] The directors of the Office of Management and Budget and the Congressional Budget Office would submit estimates of the federal deficit to the Comptroller General to be reported to the President who would be bound to order the reductions specified in the Comp-

120. Examples of cases where this aggrandizement or encroachment standard has been invoked include Bowsher v. Synar, 478 U.S. 714, 726 (1986); INS v. Chadha, 462 U.S. at 951-52; Buckley v. Valeo, 424 U.S. at 119; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928). *See* Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 284-91 (1990) (further dividing these cases into "active" or "passive" encroachment situations).

121. Examples of cases involving this undue interference test include Morrison v. Olson, 487 U.S. 654, 689 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 711-12 (1974).

122. Both tests were applied in Mistretta v. United States, 488 U.S. 361, 382-84 (1989) (congressional vesting in the President of power to appoint and remove U.S. Sentencing Commission members does not impermissibly increase executive power or interfere with functions of the judiciary).

123. 478 U.S. 714 (1986).

124. Pub. L. 99-177, 99 Stat. 1038 (1985).

125. Bowsher v. Synar, 478 U.S. at 720.

126. *Id.* at 717.

127. *Id.* at 717-18.

troller General's report.[128] Several members of Congress and members of the National Treasury Employees Union challenged the constitutionality of this process.[129]

The Supreme Court, quoting the district court, noted that the Comptroller General had been assigned "executive functions," not legislative powers, under the Act.[130] It then affirmed the district court's decision that Congress constitutionally was barred from exercising the general power to remove officials who perform "executive functions, except by impeachment."[131] The Court quoted Madison and Montesquieu to the effect that "there can be no liberty where the legislative and executive powers are united in the same . . . body of magistrates," and observed that this principle is embodied in our system where the President is responsible to the people rather than the Congress, subject only to the impeachment process.[132] The Constitution, said the Court, "does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[133] Apart from impeachment by the House and conviction by the Senate, any direct congressional removal power over such officers is inconsistent with separation of powers.[134] More specifically,

> In light of [the Court's] precedents, we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws, except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed, "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[135]

Allowing a different result, said the Court, would effectively grant Congress a legislative veto over matters within the scope of an executive

128. *Id.* at 718.

129. *Id.* at 719.

130. *Id.* at 720. The statute permitted direct appeal of the issue from the District Court to the Supreme Court.

131. *Id.* at 726-27.

132. *Id.* at 721-22. And, of course, subject to the disability removal power of the 25th Amendment. *See supra* text accompanying note 18.

133. *Id.* at 722.

134. *Id.* at 724 (citing Myers v. United States, 272 U.S. 52, 161 (1926), which declared unconstitutional a statute requiring Senate advice and consent for the removal of certain postmasters by the President). *But see* Springer v. Philippine Islands, 277 U.S. 189 (1928) (ruling several officials performing executive functions but appointed by Philippine legislative officers to be improper under the Philippine Organic Act).

135. *Id.* at 726 (citation omitted).

officer's duties.[136] In *INS v. Chadha*, the Court had previously invalidated a provision of the Immigration and Nationality Act that authorized either House of Congress to adopt a one-House, concurrent resolution and overrule an executive branch decision under the statute to allow a deportable alien to remain in the United States.[137] The Court had concluded that the constitutional requirements for both Houses to act on laws, for presenting them to the President for approval, and for the President to have a veto opportunity demanded that "the carefully defined limits on the power of each Branch must not be eroded" in order to maintain the separation of powers.[138]

Applying these principles in *Bowsher*, the Court found that the harm of allowing congressional removal of executive officials flows from the executive official's subservient position and "presumed desire" to avoid removal by acting in ways pleasing to Congress.[139] Thus, it was unreasonable to argue that a provision for removal cannot be challenged until it is actually used.[140] Accordingly, the National Treasury Employee's Union, which had filed a companion suit to that brought by members of Congress and whose members would be denied a scheduled increase in employment benefits by proposed budget cuts, had standing to bring a constitutional challenge to the Act.[141] It is important to note that the *prospect* of harm that *could* result from the *potential* reticence of the official performing executive functions was sufficient in *Bowsher* to support the initiation and successful prosecution of a suit for corrective judicial intervention to invalidate the offending provisions of the law.

C. Impermissible Interference

The second test—balancing impermissible interference against legitimate objectives—applies where there is no express increase in the authority of one branch at the expense of another, but there is some intrusion into the constitutional functions of another branch. Its application is illustrated by the Supreme Court's decision in *Morrison v. Olson*.[142] *Mor-*

136. *Id.* (citing INS v. Chadha, 462 U.S. 919, 954-55 (1983)).
137. INS v. Chadha, 462 U.S. at 923, 959.
138. *Id.* at 957-58.
139. Bowsher v. Synar, 478 U.S. at 727 n.5.
140. *Id.*
141. *Id.* at 721.
142. 487 U.S. 654, 689 (1988); *see* Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 109, 116, 127, 129-35 (1988) (discussing the extent to which the Court in *Morrison* may have abandoned its previous insistence on ignoring policy and efficiency concerns in separation of powers decisions and arguing that *Morrison* is a logical extension of Myers v. United States, 272 U.S. 52 (1926), and the Court's toleration of independent regulatory agencies).

rison addressed the constitutionality of the independent counsel provisions of the Ethics In Government Act, specifically the limitation that an independent counsel may be removed by the Attorney General only for good cause.[143]

Title VI of the Ethics in Government Act of 1978[144] authorizes the appointment of an "independent counsel" to investigate and prosecute specified senior executive branch officials who may have violated federal criminal law.[145] The Attorney General, upon receipt of sufficiently specific and credible information, is required to conduct a preliminary inquiry and report to a special court within ninety days.[146] If the Attorney General's findings indicate reasonable grounds exist, the special court appoints an independent counsel and defines that official's jurisdiction to investigate.[147]

The independent counsel has almost all the investigative and prosecutive functions and powers of the Attorney General and Justice Department attorneys and must comply, generally, with all Justice Department policies.[148] An independent counsel is removable by Congress through impeachment and conviction or by the Attorney General for good cause, disability, incapacity, or other condition substantially impairing the performance of duties.[149] Members of Congress are authorized to request that the Attorney General appoint an independent counsel.[150]

In *Morrison*, the Chairman of the House Judiciary Committee requested in 1985 that the Attorney General appoint an independent counsel to investigate potential false statements and obstruction of justice by several former senior Justice Department officials.[151] The Attorney General concluded that an independent counsel appointment was warranted as to one official's testimony to Congress.[152] Subsequently, the Attorney General refused an independent counsel request for referral of the allegations against the other officials as matters related to the investigation, but the special court ruled that the jurisdiction granted the independent counsel was broad enough to cover these matters also.[153]

143. Morrison v. Olson, 487 U.S. at 659-60; *see also* 28 U.S.C. § 591 (1988).
144. 28 U.S.C. §§ 49, 591-99.
145. Morrison v. Olson, 487 U.S. at 660.
146. 28 U.S.C. § 591(c)(1).
147. 28 U.S.C. §§ 591(c)(1), 593(b)(1).
148. 28 U.S.C. § 594(a), (f).
149. 28 U.S.C. § 596(a)(1).
150. 28 U.S.C. § 596.
151. Morrison v. Olson, 487 U.S. at 666.
152. *Id.* at 666-67.
153. *Id.* at 667-68.

The former senior officials moved to quash subpoenas issued to them by the independent counsel, arguing that the statute was unconstitutional.[154] The district court upheld the statute, but the court of appeals reversed.[155] The Supreme Court reversed that decision and ruled the statute to be constitutional.[156]

The *Morrison* case differed from *Bowsher* in that it did not involve an attempt by Congress to enhance its own power to remove officials at the expense of executive power. Thus, the aggrandizement or encroachment test was not applicable or helpful in deciding this case. However, the congressional action embodied in the statute imposed a limit on the Executive's claimed constitutional power to decide when and whether to investigate and prosecute. This illustrated the need for an alternative test to determine whether the statutory limitation impermissibly interfered with the performance of presidential functions or reduced the Executive's control over prosecutorial decisions.[157]

In examining the question of general interference with presidential functions, the Court in *Morrison* drew upon earlier precedents involving limitations on the President's removal authority and explained that the judicial role in such cases is to ensure that there is no unacceptable impingement upon the exercise of "the executive power" and the constitutional responsibility of the President to "take care that the laws be faithfully executed."[158] The role of Congress in the Act was limited to requesting appointment of an independent counsel, receiving reports, and generally overseeing an independent counsel's activities.[159] Nor was the role assigned to the courts under the Act—appointing a counsel at the request of the Attorney General and reviewing any decision to remove a counsel—an usurpation of executive functions.[160]

Examining the functions assigned to an independent counsel, the Court noted that the counsel is an "inferior" officer with "limited jurisdiction and tenure" and no significant policymaking or administrative authority.[161] Accordingly, control of an independent counsel was not "central to the functioning of the Executive Branch," and there was no

154. *Id.* at 668.

155. *In re* Sealed Case, 838 F.2d 476, 478 (D.C. Cir.), *rev'd*, Morrison v. Olson, 487 U.S. 654 (1988).

156. 487 U.S. 654 (1988).

157. *Id.* at 689-90.

158. *Id.* at 690 (citing Wiener v. United States, 357 U.S. 349 (1958) (holding that it was not unconstitutional for Congress to limit presidential authority to remove members of the War Crimes Commission), and Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

159. Morrison v. Olson, 487 U.S. at 694.

160. *Id.* at 695.

161. *Id.* at 691.

reason as a matter of constitutional law "that the counsel should be terminable at the will of the President."[162]

The Act clearly reduced the degree of control over investigative and prosecutorial decisions otherwise exercised by the President and the Attorney General.[163] However, the Attorney General was empowered to limit the jurisdiction of a counsel, supervise a counsel's work, and remove a counsel "for good cause."[164] The Act also required a counsel to conform to Department of Justice policies whenever possible.[165] Given these qualifications and conditions, the Court ruled that the Act did not impermissibly interfere with the constitutional power or functions of the Executive.[166] Because *Morrison* involved no impermissible interference in executive functions by another branch, the Court did not proceed to the second stage of determining whether there was an overriding need to tolerate such interference in order to promote other legitimate governmental objectives that were sought to be achieved.

An example of this latter type of balancing was provided in *Nixon v. Administrator of General Services*, involving a challenge by the former President to provisions of law that required presidential records to be preserved and reviewed by personnel from the National Archives.[167] The *Nixon* Court found that the limited intrusion into the confidentiality of presidential communications posed by the required National Archives review was justified by the purposes of the Act.[168] These purposes included the preservation of accurate records to meet legitimate historical and governmental needs, including the restoration of public confidence in the political process; the need for Congress to understand the functioning of the process in order to legislate properly; and the availability of such materials in the event of relevant civil or criminal litigation.[169]

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162. *Id.* at 691-92.

163. *Id.* at 695-96.

164. *Morrison*, 487 U.S. at 696.

165. *Id.*

166. *Id.* at 696-97. More recently, the Court has ruled that the power granted the President under the Sentencing Reform Act of 1984, 28 U.S.C. § 991(a), to appoint and remove members of a commission to develop sentencing guidelines did not constitute authority to interfere in the judicial or nonjudicial functions of the Judicial Branch. Mistretta v. United States, 488 U.S. 361, 409-11 (1989).

167. 433 U.S. 425, 429-30 (1977). *See* Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, §§ 101-106, 88 Stat. 1695 (1974).

168. *Nixon*, 433 U.S. at 454.

169. *Id.* at 453. A further example of balancing can be found in United States v. Nixon, 418 U.S. 683, 711-13 (1974), where the Court ruled that the requirements of fundamental due process of law concerning the fair administration of the criminal justice system override a generalized assertion of executive privilege to protect the confidentiality of a limited range of presidential communications having demonstrated bearing upon a pending criminal case.

D. Independence—Not Isolation

The Court in *Morrison* pointed out the importance, in adjudging separation of powers disputes, of being mindful that it had "never" held the Constitution to require the three branches of government to "operate with absolute independence."[170] A statement years earlier to this effect by Justice Robert H. Jackson was quoted to emphasize the point: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[171] While collaboration and cooperation are, therefore, acceptable and necessary features of our constitutional government, usurpation and overdependence are impermissible.

IV. Applying Separation of Powers Principles to Section 19

Applying the tests and standards elaborated in these cases to the statutory succession system reveals serious separation of power problems that extend well beyond the permissible scope of cooperation and interaction. The image of Acting President Barr arriving, hat in hand, at the door to new Speaker Gonzalez's office in order to avoid supplantation should clearly illustrate this problem.

In *Bowsher*, the Supreme Court concluded that Congress cannot enhance its own powers at the expense of the executive branch by exercising general authority to remove government officials who perform executive functions.[172] If this is true with regard to a lesser executive official performing lesser executive functions, as was the case with the Comptroller General in *Bowsher*, how much more severely would the Court view a provision that authorizes congressional officers so arbitrarily to remove the very Chief Executive? Further, the Court stressed in *Bowsher* that an official, once appointed, obviously can be expected to fear the entity that has removal power more greatly than the authority that was responsible for the appointment.[173] Under 3 U.S.C § 19, Congress has combined both the appointive and the removal authorities in itself under a single statute.

170. Morrison v. Olson, 487 U.S. at 654, 693-94 (citing United States v. Nixon, 418 U.S. at 707, and Nixon v. Administrator of Gen. Servs., 433 U.S. at 425, 442).

171. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

172. Bowsher v. Synar, 478 U.S. 714 (1986); *see supra* notes 123-41 and accompanying text.

173. 478 U.S. at 726.

In *Morrison*, the separation of powers measure was whether the action in question interfered impermissibly with the performance of presidential functions, including the exercise of executive power and seeing to the faithful execution of the laws.[174] The looming omnipresence of a congressional power to supplant an Acting President would so clearly prevent the uninhibited performance of those functions as to require no further elaboration.[175] The statute in question in *Morrison* was saved from constitutional infirmity because the roles it assigned to the other branches and the functions of the independent counsel were so limited.[176] With regard to 3 U.S.C. § 19, however, the congressional role is unquestionably pivotal and open-ended and the Acting President's functions are the essence of executive authority.

While it could be argued that the exigencies of a succession crisis require direct congressional action, the scope of permissible action would be limited to the enactment of a succession statute, with or without inclusion of the congressional officers in the line. By going further and including the unlimited supplantation provision in section 19, the statute moves beyond the limits of permissibility. This feature is not necessary to deal with the exigency and places the central function of the Executive, the Presidency itself, at risk of undue congressional control. As the Supreme Court noted in *Chadha*, constitutionally required burdens—here the separation of powers between the Executive and the Congress—are not always efficient or expeditious but must always be observed to avoid arbitrary governmental action.[177]

The interference with executive prerogatives caused by Congress's action in *Nixon v. Administrator of General Services* was justified by the overriding objective of restoring public confidence in the political process and legitimate congressional and judicial interests in preserving and obtaining access to information required to perform their functions prop-

174. Morrison v. Olson, 487 U.S. 654, 685 (1988); *see supra* note 142 and accompanying text.

175. The Court's jurisprudence in separation of powers cases can also be classified into a formalistic and a functional approach. *See, e.g.*, Michael L. Yoder, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173 (1990). The formalistic approach envisions a line drawn by the Framers between the three branches, while functionalism allows balancing the competing interests involved against the relevant constitutional provisions. *Id.* The former can be criticized as too inflexible, the latter as overly uncertain. *Id.* A new hybrid approach, relying on explicit grants of power or divining a proper balance between the branches where there are no explicit grants, may have been signalled by Justice Kennedy's concurrence in Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 486-87 (1989) (Federal Advisory Committee Act does not apply to American Bar Association committee evaluating judicial nominees). *Id.* at 174, 184-85.

176. Morrison v. Olson, 487 U.S. at 693-97; *see also* notes 159-166.

177. INS v. Chadha, 462 U.S. 919, 959 (1983).

erly.[178] The supplantation provisions in 3 U.S.C. § 19, by contrast, have no legitimate relationship to the legislative functions of Congress. There is no legitimate lawmaking function to be served by creating a supplicant Acting President who can be supplanted by a congressional officer at any moment of disapproval or disagreement. Acting President Barr should be basing decisions regarding the release of classified information and the appointment of independent counsels upon the best interests of the nation and relevant law and not whether keeping Speaker Gonzalez out of the White House is the lesser of the available evils.

The persistence of such a precarious relationship would serve only to undermine public confidence in the political process by generating fears of impermanence and suspicions of intrigue and undue congressional influence over the Acting President. The instability of this situation would be exacerbated by the fact that the President pro tempore of the Senate need not consult with the Speaker before making a supplantation decision once the Speaker has initially declined to become Acting President.[179] In our hypothetical, the potential for Senator Byrd to change his mind and decide that the road to retirement in West Virginia should indeed run through the Oval Office might cause Speaker Gonzalez to act precipitously rather than risk losing a race to the Rose Garden.

This state of suspended political animation would surely aggravate the institutional crisis that could be expected to pervade the public consciousness following the sequential or simultaneous loss of an elected President and Vice President. Following the initial shock, there would appear as Acting President a dimly known and wholly unelected former cabinet official—in our hypothetical, Attorney General Barr. That official would announce to an astonished public that he had assumed the Presidency under the authority of obscure constitutional and statutory provisions that have never been used before.[180]

The media would quickly begin to focus public attention on the legal possibilities for further change involving only slightly less obscure congressional figures. The potential for maneuvering and personal advance-

178. 433 U.S. 425, 452-53 (1977); *see supra* notes 167-69 and accompanying text.

179. *See, e.g.*, *Emperor*, *supra* note 13, at 1438.

180. The international dimension in such a situation is illustrated by a cable sent by former National Security Adviser Robert McFarlane to his successor Admiral John Poindexter expressing frustration in dealing with the Iranian Government after the fall of the Shah: "[It was as if] after a nuclear attack a surviving tailor became Vice President, a recent graduate student became Secretary of State, and a bookie became interlocutor for all discourse with foreign countries." Denise Brown, Book Review, FRIDAY REV. DEFENSE LITERATURE (1989) (reviewing SAMUEL SEGEV, THE IRANIAN TRIANGLE: THE UNTOLD STORY OF ISRAEL'S ROLE IN THE IRAN-CONTRA AFFAIR (1988)) (on file with the *Hastings Constitutional Law Quarterly*).

ment would have the effect of making every decision and every action by the Acting President, Speaker, and President pro tempore suspect and subject to the most intense scrutiny for its true motivation. Factions for and against supplantation would grow on all sides. In a time of great peril to its institutions, the country would likely be reluctant to unite behind an Acting President who would not reasonably be expected to complete the term. The government would pause while all eyes watched the drama play itself out and enemies at home and abroad could be expected to take full advantage of the breakdown of orderly decision-making in Washington. Such a situation should not be allowed to develop in fact and the supplantation provision of section 19 should therefore be removed or revised.

V. Remedial Possibilities

The Supreme Court has recognized that certain constitutional provisions may be overcome by other constitutional powers in a national emergency where necessary to the preservation of the nation and the fulfillment of other constitutional responsibilities.[181] Nonetheless, it appears doubtful from the evolving separation of powers principles the Court has developed that the existence of even the most extreme emergency situation could justify so direct a threat to bedrock principles of separation of powers as is contained in the congressional supplantation authority of section 19.[182] Congress has provided a means of ensuring succession if there are vacancies in both the Presidency and the Vice Presidency as authorized by Article II, and no compelling constitutional

181. *See, e.g.*, Selective Draft Law Cases, 245 U.S. 366 (1918) (constitutional provisions establishing the war power and power to raise and support armies override Militia Training Clause).

182. The Supreme Court has held statutes and executive decisions unconstitutional on separation of powers grounds even when they have been instituted in response to pressing national crises. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1980) (crisis of the increasing federal deficit); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (crisis of steel workers' strike during wartime). Of course, a statute is not insulated from a finding of unconstitutionality merely because a President has signed it into law. *See, e.g.*, Bowsher v. Synar, 478 U.S. at 719 n.1. Neither does approval by the Congress preserve a statute from constitutional review. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part). Nor is the argument that the law is "efficient, convenient and useful" in facilitating a government function, such as preferring succession by elected officials, sufficient to protect it from a finding of unconstitutionality. *See, e.g.*, Bowsher v. Synar, 478 U.S. at 736 (citing INS v. Chada, 462 U.S. 919, 944 (1983)).

As one commentator has observed, "The principle of separation of powers, the Court [has] explained . . . , cannot yield to claimed gains in efficiency, for the constitutional rule that is subverted one day with the best intentions can just as easily be evaded the next day with the worst." Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 105 (1988).

imperative justifies the continual potential for supplantation of the Acting President. No proper governmental purpose can be served by maintaining this situation. Any interest in congressional primacy and any preference for succession by an elected official would be fulfilled by allowing the congressional leadership to have a single, final opportunity to become Acting President.

Accordingly, Congress should repeal or revise the supplantation provision of section 19(d)(2). The congressional officers should be placed on the same footing as cabinet officers and have no further entitlement to the office if they are unable or unwilling to become the Acting President when vacancies occur in the Presidency and Vice Presidency. An alternative, preserving the preference for elected officials, would be to limit the congressional officers' power to supplant to a short period of a few days after the cabinet officer has assumed the office of Acting President.[183] If deemed absolutely necessary to preserve congressional preference in extreme situations, a similar, short period could be allowed for a supplantation decision by any new Speaker or President pro tempore who is elected to fill one of the congressional leadership positions that may have been vacant at the time the cabinet member exercised the option. It would not be prudent, however, to go further and allow each new congressional officer elected during the term of an Acting President to exercise such an option since this would result in the same perpetual uncertainty that exists under the current provision of section 19. Appropriate changes in the statute will preserve congressional prerogatives while respecting the separation of powers and promoting bold action by an Acting President in the furtherance of the functions of that office.

If Congress cannot be persuaded to repeal or revise the provision, a party with a demonstrable interest, such as the President—under his general responsibility to "preserve, protect and defend" the Constitution[184]—or the Secretary of State—as the senior cabinet member in the line of succession—should consider a judicial challenge to section 19.[185]

183. Section 4 of the 25th Amendment limits the Vice President to a four-day period to decide whether to contest a presidential declaration that a pre-existing disability has been removed. U.S. CONST. amend. XXV, § 4.

184. U.S. CONST. art. II, § 1, cl. 8.

185. The increase in separation of powers litigation in recent years has been attributed principally to growing congressional inability or unwillingness to make difficult policy choices; to heightened executive branch willingness, even eagerness, to claim that any action touching its constitutional prerogatives constitutes undue interference; and to Congress' failure to anticipate adequately separation of powers issues as it legislates. *See, e.g.*, Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 306-10 (1990). The § 19 supplantation power would appear to fall within the latter category and any action by the Executive to cure it should not be viewed as a "hair trigger" response to a perceived slight. *Id.* at 308.

Such an action would be based upon a claim against the Congress of unconstitutionally enhancing its own powers at the expense of the Executive as well as impermissibly interfering with the conduct of executive functions.

It may be argued that such a challenge should await an actual attempt by a congressional officer to exercise the power reserved in section 19 to remove an Acting President.[186] This argument is undermined, however, by the majority holding of the Supreme Court in *Bowsher* recognizing that the damage from such a removal provision arises from its mere existence and its potential effect upon the conduct of an executive officer.[187] Thus, a judicial examination of the constitutionality of the removal provision in section 19 need not await an actual effort to remove the Acting President.[188]

Initiating litigation against congressional officers as potential presidential successors to remedy the constitutional flaw in section 19 would be unprecedented. The viability of an attempt to resolve competing claims to the Presidency in advance may be viewed by some as too speculative and not "ripe," or as a "political question" not fit for judicial resolution.[189] *Bowsher*, however, made such a preemptive action available where there is the type of presumed, persistent damage to the official's freedom of action that attends an overreaching removal statute.[190] Also, the textual and prudential bases for the political question doctrine would not apply to justify judicial avoidance of this issue. The matter requires constitutional interpretation of a nature that is committed to the courts and there are clear judicial standards—*i.e.*, the separation of powers principles applied in *Bowsher*—that are available for its resolution.[191] Further, there are specific legal and judicial grounds to satisfy the standing and other federal jurisdictional requirements that would have to be met in order to proceed to the merits.

One possible basis for such an action would be a Justice Department request for a writ of *quo warranto* (by what authority). This writ has its

186. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 778 n.1 (1986) (Blackmun, J., dissenting).

187. *Id.* at 727 n.5.

188. *Id.*

189. *See generally* Baker v. Carr, 369 U.S. 186, 217 (1962) (explaining the basis and measures for determining when a political question is before the Court).

190. Bowsher v. Synar, 478 U.S. at 727 n.5.

191. *Compare* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959) *with* Alexander Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75-76 (1961) (arguing conversely that the true reason for the political question doctrine is that determination of the issue has been assigned to another branch of government, which requires an interpretation, or that some discretionary functions of political institutions are better done without rules).

roots in the common law and is a means by which the state can act to protect itself and the public welfare generally against false claims to office.[192] While this is an extraordinary writ whose use against the sovereign was not contemplated by the common law,[193] the situation in which its use is here envisioned would itself involve an extraordinary threat against the sovereign itself. A District of Columbia statute authorizes the Attorney General and the United States Attorney for the District to bring a federal district court *quo warranto* action against any individual who "usurps, intrudes into, or unlawfully holds or exercises . . . a public office of the United States . . . ."[194] Actions, albeit unsuccessful, have been brought under this statute and it would appear on its face to be a highly appropriate means to contest section 19 within the District of Columbia federal courts as an unconstitutional intrusion into the Presidency.[195]

In addition, the Supreme Court has found that state laws requiring government officials to resign before announcing an intent to seek higher office present a legitimate case and controversy involving real, not speculative, harm.[196] The officials involved could not be forced to resign from office to announce their candidacy before suing for relief from the requirement to resign.[197] Thus, the fact that a particular action necessary to trigger a statute has not yet occurred does not preclude a party whose political activities could be affected by that action from contesting the validity of the statute. This principle can be readily adapted to support an action by a cabinet member, such as the Secretary of State, whose actions as Acting President, or even whose decision as to whether to be-

192. *See, e.g.*, Superior Oil Co. v. City of Port Arthur, 726 F.2d 203, 204-05 n.1 (5th Cir. 1984). *See generally* FORREST G. FERRIS & FORREST G. FERRIS JR., THE LAW OF EXTRAORDINARY REMEDIES §§ 101-06 (1926). While some courts have held that such a writ is not available in a federal court absent a statutory basis for the claim, *see, e.g.*, United States *ex rel.* Wisconsin v. First Fed. Sav. & Loan Ass'n, 248 F.2d 804, 809 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958). *But see* Barany v. Buller, 670 F.2d 726, 735 (7th Cir. 1982) (important federal interests support limited availability of *quo warranto* proceedings). Others have found such authority under Federal Rule of Civil Procedure 81(a)(2) when the action is brought by a U.S. Government official such as a U.S. Attorney. *See, e.g.*, United States v. Lemke, 310 F. Supp. 1298, 1300 (N.D. Cal. 1969), *rev'd*, 439 F.2d 762 (9th Cir. 1971); Blackburn v. O'Brien, 289 F. Supp. 289, 292-93 (W.D. Va. 1968) (dictum).

193. *See, e.g.*, JAMES HIGH, EXTRAORDINARY LEGAL REMEDIES § 593 (3d ed. 1896).

194. D.C. CODE ANN. § 16-3501-3502 (1981).

195. *See, e.g.*, United States v. Smith, 286 U.S. 6 (1932) (Senate effort to establish FCC Chairman's lack of authority to hold office, under predecessor statute); Newman v. United States *ex rel.* Frizzell, 238 U.S. 537, 547 (1915) (only a claimant to office can bring such a suit, under predecessor statute).

196. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 961-62 (1982).

197. *Id.*

come Acting President should the need arise, would be affected by the potential for supplantation under section 19.

The "standing" of such an official to bring an action in this regard is further supported by the precedent of allowing members of Congress to sue the congressional leadership based upon an alleged violation of the requirement in Article I of the Constitution that all revenue bills originate in the House.[198] The suit was allowed to proceed based on the finding that it related to a "cognizable" legal interest the members shared in a definable constitutional process.[199] This condition applies equally to a cabinet member who shares a cognizable legal interest in the proper working of the constitutional process of presidential succession.

Finally, a United States Senator has been adjudged to be a proper party to bring an action challenging the use of a presidential "pocket veto" under Article I, section 7 of the Constitution providing that a bill enacted by Congress will not become law if the President does not return it within ten days due to the adjournment of Congress.[200] The court noted that standing to sue requires a sufficient personal stake in the outcome of a judicially recognized controversy.[201] One traditional approach requires a "logical nexus" between the litigant's status and the claim to be adjudicated.[202] Such a nexus was found because the disposition of the matter would "determine the effectiveness *vel non* of [the Senator's] actions as a legislator . . . ."[203] Similarly, the effectiveness of a potential presidential succession should prove sufficient to support an action contesting the statute.

Another approach requires the litigant to show injury in fact and an interest arguably within the zone to be protected by the statute or constitutional provision in question.[204] In this regard, the court found the pocket veto provision of the Constitution to be "one of several which implement the 'separation of powers' doctrine"[205] and that,

> Taken together, these provisions define the prerogatives of each governmental branch in a manner which prevents overreaching by any one of them. The provision under discussion allocates

198. Moore v. United States House of Representatives, 733 F.2d 946, 950-53 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (just because a dispute arises under the Origination Clause of the Constitution does not mean it is a nonjustifiable political question).

199. *Id.* at 951.

200. Kennedy v. Sampson, 511 F.2d 430, 436 (D.C. Cir. 1974) (pocket veto of the Family Practice of Medicine Act).

201. *Id.* at 433.

202. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 102 (1968)).

203. *Id.*

204. *Id.*

205. *Id.* at 434.

> to the executive and legislative branches their respective roles . . . . When either branch perceives an intrusion upon its legislative power by the other, this clause is appropriately invoked. The gist of [the] complaint is that such an intrusion has occurred as a result of the President's misinterpretation of this clause . . . .[206]

It was significant to the court that "over the long term," the Executive's broad application of the pocket veto power threatened to diminish congressional influence in the legislative process and "axiomatic" that this would diminish the role of each individual participant in it.[207]

It was sufficient for standing purposes to allege that conduct by executive branch officials amounted to an unlawful nullification of the institutional and individual exercise of their assigned powers under the Constitution.[208] Thus, standing was established where the official in question represented an institutional interest in ensuring that the powers of the two branches remain in balance.[209] Participants in the succession process can demonstrate a logical nexus by claiming that section 19 will diminish their effectiveness to act as President. They may also claim a recognizable interest in maintaining the constitutional balance by contesting the nullification of their assigned powers as Acting President under the Constitution.

A further consideration for any court before which such an action is brought is that the damage from leaving the statute in place, especially in light of the extreme circumstances that would breed a supplantation decision under section 19, are so evident and potentially extreme as to justify judicial review in advance. The Supreme Court has recognized the significance of such circumstances by reviewing a variety of challenges to provisions relating to removal of government officials.[210] If the matter is left to a time when an Acting President is in office and can be threatened with removal or until an actual attempt at removal occurs, the resulting dispute over the validity of the provision could paralyze the leadership of the nation and undermine public confidence at the very moment when sure and swift decision-making is most urgently required for national survival.

As the Supreme Court itself put it, albeit in the reverse context of congressional fears of presidential removal power, "Congress did not wish to have hang over the [War Claims] Commission the Damocles'

206. *Id.*
207. *Id.* at 435-36.
208. *Id.* at 436.
209. *See id.*
210. *See* Morrison v. Olson, 487 U.S. 654 (1988); Bowsher v. Synar, 478 U.S. 714 (1986); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), and Wiener v. United States, 357 U.S. 349 (1958).

sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."[211]

Conclusion

The supplantation provision of 3 U.S.C. § 19 represents a dangerous and pernicious breach of the separation of powers framework that has been created to prevent the Legislature from accruing excessive control over the actions and motivations of the Executive. In a moment of maximum national distress, the strongest leadership is required. Unless Congress, or the courts if necessary, devise a remedy, the nation will sooner or later suffer the spectacle of a little known and uncertain former cabinet officer attempting to steer the ship of state with the encumbering fetters of the Speaker of the House and the President pro tempore of the Senate on the tiller.

211. Wiener v. United States, 357 U.S. 349, 356 (1958); *see also* 295 U.S. at 356.