

The Weird Scenario That Pits President Pelosi Against Citizen Trump in 2020

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Assume that President Donald Trump is impeached and removed from office. At that point, Mike Pence would become president. The position of vice president would remain vacant until Congress confirmed a replacement, nominated by the president.

This shift in positions could result in a very unlikely possibility: If, prior to the confirmation of a new vice president, President Pence were to become unable to discharge the office, then Nancy Pelosi, the speaker of the House, would assume the office of the president under the Presidential Succession Act of 1947.

Or would she? Two prominent constitutional-law professors contended in 1995 that the Succession Act now in force is unconstitutional. And a recent *New York Times* op-ed agreed: Legislators, such as the speaker of the House, cannot be elevated to the presidency, the thinking goes.

This theory, if correct, risks throwing the United States and the entire free world into a state of chaos. The speaker and the secretary of state (the next-in-line, nonlegislative officer) could both claim, with some legitimacy, to be president. *Bush v. Gore* would be tame by comparison.

A better reading of the Constitution, however, gives Congress the power to place Nancy Pelosi second in line for the presidency. But, as we'll get to below, that same reading has an unexpected implication: Contrary to common belief, after removing the president from office, the Senate cannot disqualify him from being elected to the White House a second time.

Our analysis starts with the succession clause in Article II of the Constitution. The Constitution specifies that the vice president serves when the presidency goes vacant. But what happens if both positions go vacant, a so-called double vacancy? The Constitution's succession clause states: "Congress may by Law ... [declare] what Officer shall then act as President." And Congress has done just that: The Presidential Succession Act places the speaker of the House next in line after the vice president. If the speaker is an officer, then there is no problem, because the Constitution clearly states that Congress may place officers in the line of succession.

That's where the law professors (and brothers) Akhil Reed Amar and Vikram David Amar take issue. They wrote in a 1995 article that the speaker, a member of the legislative branch, cannot be characterized as an officer.

The Constitution uses different phrases in reference to different types of offices and officers, such as “officers of the United States” and “office under the United States.” The Amars write that each of these phrasings, as well as the phrase *officer* in the succession clause, “seemingly describes the same stations.”

As evidence, the Amars point to the fact that in an early draft of the Constitution, the succession clause expressly extended to “officers of the United States,” but a style committee changed this language to “officers.” Finding nothing in the Philadelphia Convention’s records that indicates the committee intended to make a substantive change, the Amars assume that *officer* was “shorthand” for the longer phrase. For this reason and others, they conclude that all these variations on *office* and *officer* have the same scope, and that all these phrases refer only to positions in the judicial and executive branches, including the presidency. Officials in the legislative branch, however, are not officers, they say. As a result, members of Congress fall outside the scope of the succession clause; therefore, the Amars would conclude that Pelosi cannot succeed to the presidency. Their position treats the Framers’ carefully chosen textual variations as irrelevant.

We disagree. The Framers used each of these different phrasings to accomplish different purposes. Presumptively, when different language is used, different meanings are intended. The phrase *officers of the United States* was the only phrase the Framers chose to refer to appointed executive- and judicial-branch officers; it did not extend to appointed officers in the legislative branch, such as the secretary of the Senate and the clerk of the House. When they wanted to refer to elected positions, generally, the Framers named them, such as president, vice president, senators, and representatives. Where the Framers chose other language, such as *office under the United States*, they drew the line not between the branches, but between appointed officers and elected officials in all three branches of government. In short, *office under the United States* encompasses appointed officers in all three branches, but not any elected officials.

Consider the Constitution’s impeachment clause. It provides that “the President, Vice President and all civil *Officers of the United States*” can be impeached (emphasis added). In his *Commentaries on the Constitution* (1833), Justice Joseph Story discussed the meaning of the impeachment clause: If *officers of the United States* included the presidency, an elected position, then the Framers should have written the clause differently: “the president, vice president, and all *other* civil officers of the United States.” In that situation, the president would be an officer of the United States. But the Framers did not write the provision that way. This choice indicates that the elected president is *not* an officer of the United States. Our counterintuitive position is not novel. Justice Story articulated it nearly two centuries ago.

Under this reading, who can be impeached? Unlike the succession clause, which only refers to an “officer,” the impeachment clause uses the modified phrase *officer of the United States*. The phrase *officers of the United States* does not apply to elected officials; rather, it applies only to appointed officers. Thus, Mike Pompeo, the secretary of state, who is appointed to the executive branch, can be impeached. But elected members of the Senate and House cannot be impeached, because they are not appointed, nor are they officers of the United States. That includes Representative Adam Schiff. (Sorry, President Trump.)

The term *officer* in the succession clause, standing by itself, is broader than the modified phrase *officer of the United States*. This category of positions includes the speaker of the House and the president pro tempore of the Senate. Both are elected officials whose positions are expressly created by the Constitution, as opposed to appointed officers created by mere federal statute.

This understanding of the Constitution's divergent language relating to *office* and *officer* has two important—and surprising—implications. First, if President Trump is removed from office, the disqualification clause allows the Senate to preclude him from “hold[ing] and enjoy[ing] any Office . . . under the United States.” It is generally assumed that this provision means that the Senate can thus bar an ejected first-term president from being elected to a second term. Indeed, many “explainers” published on the impeachment process take this outcome for granted, without any skepticism, even in the absence of any on-point judicial authority. But, the phrase *office under the United States* (much like *officer of the United States* in the impeachment clause) prevents Trump only from being appointed to an office in any of the three branches. Senate disqualification would not prevent Trump from being elected to the House, the Senate, or even a second term as president. That outcome makes sense: Let the voters decide.

Second, the Constitution's foreign-emoluments clause applies only to a “person holding any Office . . . under” the United States. Again, this language prevents only appointed federal officers, not elected officials, from accepting foreign-state gifts and some forms of compensation from foreign states. As a constitutional matter, the president and members of Congress can accept foreign-state gifts. We have previously written that President George Washington received, accepted, and kept valuable gifts from the French government, and he did not seek congressional consent.

Recently, however, a federal court concluded that the president was subject to the foreign-emoluments clause. This ruling, which is on appeal, unintentionally casts doubt on the validity of the Presidential Succession Act. That decision rejected the careful textual distinctions the Framers drew: Much of the “officer” language in the different clauses distinguishes between appointed officers and elected officials in all three branches. Abandoning this textual dichotomy is a reading akin to that put forward by the Amars. The logical consequence of that position is that elected legislative-branch officials, such as the speaker, are not officers. Under this court's approach, the Presidential Succession Act, which places the speaker in the line of succession, would be unconstitutional.

That result is very dangerous. The Supreme Court, should it eventually consider the emoluments-clause cases, would be wise to reverse course, and recognize that the Constitution's text draws a distinction between appointed officers and elected officials in the federal government. Or, at least, the Court should decline to decide the question. Otherwise, the justices may very well usher in political and legal chaos should a double vacancy arise.

The process prescribed by the Constitution and the Presidential Succession Act is much simpler. If Trump and Pence are out of the picture, then Pelosi becomes president. Full stop. But the Senate, even if it removes and disqualifies Trump, could not prevent him from being elected to a

second term as president. Moreover, even while he is president, Trump-affiliated commercial properties could continue catering to foreign governments without creating any constitutional problems.

We realize these results are counterintuitive by modern sentiments, and for some undesirable. Still, each of these outcomes is far better than the genuine constitutional calamity that might emerge if the courts abandon the Constitution's vital textual distinction between appointed officers and elected officials. We would much rather have one unpopular, term-limited president than two dueling senior federal officeholders laying claim to the presidency.

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