NOTE:

CONVENTION VS. COHERENCE: AN ALTERNATIVE PERSPECTIVE ON PHILIPPINE PRESIDENTIAL SUCCESSION*

*Paolo O. Celeridad***

During a flood, two pots were carried down a river together;
One was a brass pot, the other an earthen pot;
The first urged the latter to keep to his side for their mutual protection.
"Thank you," said the earthen pot, "that is precisely what I fear.
If you will keep at a distance I may save myself,
But should we touch, I'll go to pieces."

-An ancient fable retold by Chief Justice Cesar Bengzon[1]

INTRODUCTION

The Philippines has just stridden past an important political crossroads reminiscent of the many previous ones the sovereign people and the members of the bench and bar have faced during pivotal moments in the country's constitutional history. The general elections last May 10, 2010 have given mandate to a new administration led by President Benigno Simeon C. Aquino III and Vice President Jejomar C. Binay, despite numerous warnings of a possible failure of elections because the newly acquired automated poll machines may not have been able to transmit the results for the national seats in time.[2] This would have left the Presidency, Vice Presidency, twelve seats in the Senate, and the seats for the party-list Representatives without any known winners to lawfully occupy them come the start of their terms last June 30.[3] Rumors were abound that since the

---

* Paper submitted in compliance with the requirements of the internship program of VOL. 84 of the PHILIPPINE LAW JOURNAL *Cite as* Paolo Celeridad, *Convention vs. Coherence: An Alternative Perspective on Philippine Presidential Succession,* 84 PHIL. L.J. 1077, (page cited) (2010).

** Intern, PHILIPPINE LAW JOURNAL (2009); J.D., University of the Philippines College of Law (2013 expected). A.B. Political Science, Ateneo de Manila University (2009).

[1] Sylvia Mendez Ventura, CHIEF JUSTICE CESAR BENGZON: A FILIPINO IN THE WORLD COURT 26 (1996).

[2] Maria Althea Teves, *Partial failure of elections can make Speaker Arroyo acting president*, NEWSBREAK, Mar. 9, 2010, ¶ 2, *available at* http://www.abs-cbnnews.com/nation/03/09/10/partial-failure-elections-can-make-speaker-arroyo-acting-president

[3] *Id.,* at ¶ 3.

seats in the House of Representatives for the congressional districts would not have been affected, their winners would be immediately known; thus they would have been able to elect a Speaker that may have acted as President for the time being until the "glitch" in the automated poll system will have been repaired. It was also rumored that since it was very likely that the incumbent President at the time, Gloria Macapagal-Arroyo, would win her bid to represent the second district of Pampanga in Congress, her allies in Congress would have elected her as Speaker and thus afford her another chance to extend her presidential term[4] by the inevitability of logical flow of the rumors just mentioned. Arroyo did win, and is now in a very strong position to vie for the Speakership once Congress starts its session this late July.

While this issue raises a number of constitutional questions, the question with the least, if not, no concern at all is the very basis of the issue itself, which in every Constitutional Law I class in every law school all over the country is simply memorized in preparation for the bar but never actually examined in detail. The line of succession to the Presidency has never been a contentious issue in Philippine constitutional law, but this paper demonstrates that even in the United States where our line of succession is based, their succession setup is also the subject of intense criticism with regard to the issues of practicality and the doctrine of separation of powers. This paper also points out how despite the known impracticality and definite conflict with the doctrine of republican government, the presidential succession scheme that includes the presiding officers of both chambers of the legislature still remains part of our constitutional setup. In the end, this paper recommends amending the Constitution to remedy such an anomalous situation that, despite not yet having done so, will very soon give birth to a controversy that will rock the country to its constitutional foundations in the months to come.

HISTORICAL BACKGROUND

I. INITIAL DISCUSSION OF THE SEPARATION OF POWERS

Some initial discussion must be made regarding the separation of powers as the basis of criticism for the current American and Philippine presidential succession schemes. The doctrine primarily comes from Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1689-1755), particularly in his classic magnum opus *De l'esprit de lois* published in

---

[4] *Id.,* at ¶ 4.

1748. Although at the time, the balance and/or separation of powers in the Constitution of England was a "myth"[5] since the constitutional setup of England was "not yet fully developed"[6] due to the "zenith"[7] of Parliamentary power at the time, Montesquieu had both foresight and insight to prescribe the ideal form of government necessary to preserve liberty. Liberty in this sense "consists in doing what is not prohibited by a law enacted by a government which realizes the separation of powers, where the law is made by a legislative body, administered by a separate executive, and applied against citizens only by an independent judiciary."[8] One great threat to liberty was "when the legislative and executive powers are united in the same person, or in the same body of magistrates."[9] The result of such a fusion of powers will be a form of tyranny that will enable either one person or an assembly to "enact tyrannical laws" and at the same time "execute them in a tyrannical manner"[10] (absolute tyranny being a fusion of all three powers in one person or assembly). Furthermore, the separation of powers comes from the basis of sound republican government, which according to Montesquieu is virtue,[11] and the entire setup is "virtuous" in the sense that it keeps a balance among the three powers by allowing each to check the other so that no one power prevails and brings the entire polity to ruin. Virtue is replaced by fear in a despotic government[12] because there is no other power strong enough to check a too powerful branch, nothing to stop its tyrannical rule of the polity. The judiciary alone may not last long against a struggle with the fused executive-legislative super-branch, and thus the liberty of the body politic will lie prostrate and defenseless to the advances of the despot.

Another less obvious reason for the separation of powers would be the balanced division of labor for the purpose of ensuring utility and efficiency in the business of governance. Montesquieu opined that a "representative body" is "not so fit" for the exercise of executive powers, but are indeed fit "for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform."[13] Thus not only is the fusion of executive and legislative power contrary to the principles of liberty upon

---

[5] Franz Neumann, *Editor's Introduction*, *in* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS liii (Hafner Publishing Co. ed., 1949).

[6] *Id.*

[7] *Id.*

[8] *Id.,* at li-lii.

[9] *Id.,* at 151.

[10] *Id.,* at 152.

[11] *Id.,* at 20.

[12] *Id.,* at 26.

[13] *Id.,* at 155.

which the idea of proper government rests, it is also impractical to a government's proper functioning.

Montesquieu's ideal form of government soon became enshrined in the United States Constitution, where for the first time in history, a textually demonstrable delineation of the powers of the three coequal branches of government was promulgated and made effective, albeit the delineation was not detailed and needed subsequent interpretation by the United States Supreme Court. As the succeeding sections point out, the predicament of the United States and the Philippines regarding the practicality and consistency of their presidential succession schemes ultimately stem from a lack of detailed delineation in the American constitution regarding who really should act as President when both the Presidency and Vice Presidency are vacant.

II. PRESIDENTIAL SUCCESSION STATUTES IN THE UNITED STATES

Ruth Silva starts her book on American presidential succession with two admonitions: "[t]here should be no interruption in the exercise of executive power," and there should be "no doubt [as to] who may legally exercise the powers and discharge the duties of the presidential office at any given time."[14] Furthermore in Chapter III, she states that "executive power can never be dormant. The public welfare requires that there be someone at all times to exercise this power…[which] can never be allowed to lapse."[15] These admonitions are of greater significance in an age where the difficulties and dangers of modern governance make the gap or lull in the exercise of executive power an absolute evil that each state must avoid. The interconnectedness of local, national, and global communities, the means available to enemies of the state such as modern nuclear, biological, chemical, and electronic weaponry, as well as the speed with which these means can be deployed against the state and the rapid succession of events that stem from the introduction of these evils, must be met with a viable and stable system of succession in the executive branch that can ensure the swift and orderly action that the crises demand. As the Amar brothers have said, "[s]tatutory succession provisions are triggered by events that rock the very foundations of the country's political and social stability," and thus it is best to "steer wide of any sizeable constitutional or ethical challenges. Even a

---

[14] RUTH SILVA, PRESIDENTIAL SUCCESSION 1 (1951) (*hereinafter* SILVA).
[15] *Id.,* at 77.

little uncertainty about the legitimacy or constitutionality of a presidential successor makes an already sad situation unacceptably worse."[16]

But despite the admonitions and caveats mentioned above, the current system of American presidential succession is all the more being criticized as unconstitutional and impractical. The basis of American presidential succession lies in Article II, Section 1, Paragraph 6 of the United States Constitution, which states that

> In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice 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.[17]

There have been three statutes enacted precisely because of this constitutional grant of power to the U.S. Congress. The first[18] was enacted in 1792, which in Section 9[19] thereof assigned the President *pro tempore* of the Senate as acting President. In case he was not able to serve or there was no President *pro tempore*, the Speaker of the House of Representatives was next in line. This statute was put to the test during the impeachment of President Andrew Johnson in 1868. Johnson succeeded President Abraham Lincoln after the latter's assassination in 1865. At the time, there was no system in place yet for the filling of a vacancy in the office of the Vice President, and thus the first succession statute put the Senate President *pro tempore* Benjamin Wade next in line. The dangerous tendency of the first succession statute to be corrupted by ambitious interests of legislators aspiring for the Presidency was made manifest by Wade's "vigorous participation"[20] in Johnson's trial, and in fact Wade had already a list of people for his future Cabinet when he cast his vote to convict the President.[21] Quoting the analysis of the Amar brothers,

---

[16] Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 136 (1995) (*hereinafter* Amar).

[17] U.S. CONST. art. II, § 1, ¶ 6.

[18] 1 U.S. Stat. 240-241; Rev. Stat. (1878 ed.), §§ 146-150 (1792).

[19] § 9. "And it be further enacted, That in case of removal, death, resignation, or inability both of the President and the Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate [pro tempore?], then the Speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected."

[20] Amar, at 123.

[21] *Id.*

> The problem in 1868 was not just that Ben Wade sat as a judge, and, in effect, ruled for himself; it was that the entire Senate and the party Wade led all sat as judges, and many ruled for their own leader—ruled, in effect, to anoint themselves presidential electors. By making Wade, a legislator, eligible to succeed to the Presidency, the 1792 Act corrupted the entire judicial proceeding. The Act tempted the whole Senate to act in a personal, partisan, and political—rather than judicial—manner.[22]

This was also clearly against the intent of the Constitution, which provides for a method independent of the influence of Congress in the election of the President (the Electoral College Model), as evidenced by Article II, Section 2, which bars Senators and Members of the House of Representatives from being appointed as state electors.[23] This system was adopted to ensure that "[a] person [w]ould not become President merely by currying favor with the legislature."[24] Other shortcomings of the law were pointed out by Silva, such as the possibility that during the vacancies in both offices of the President and Vice President, there may not be any presiding officer in either chamber due to a suspension of session.[25] This is bolstered by the fact that the presiding officers of each chamber are not by their nature continuing offices, the fact that the House of Representatives most especially was not a continuing body and needed to elect new officers biannually, and the fact that during the early years of America, "there were frequent and lengthy vacancies in the offices of President *pro tempore* and Speaker."[26] Another was the possibility that the presiding officers would not belong to the party of the President. All these inconsistencies and difficulties provided the basis for the enactment of the second succession statute.

The second succession statute,[27] enacted in 1886, replaced the legislative presiding officers with Cabinet officers in the line of succession according to the dates when their respective departments were created.[28] A

---

[22] *Id.,* at 124.
[23] U.S. CONST. art. II, § 2.
[24] Amar, at 124.
[25] SILVA, at 117.
[26] Amar, at 127.
[27] 24 U.S. Stat. 1; U.S.C.A. (1940 ed.) Title 3, §§ 21-22 (1886).
[28] § 1: "Be it enacted, etc., That in case of removal, death, resignation, or inability of both the President and Vice President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice President is removed or a President shall be elected…"

further caveat was added to make Cabinet officials ineligible to succeed if their appointments to their respective Cabinet posts were without the consent of the Senate, if they were subject to impeachment, and if they did not possess the qualifications prescribed by the U.S. Constitution for the office.[29] Senator George Hoar pointed out during the deliberations that the proposal would erase the defect in the 1792 law, which was that the President *pro tempore* could be changed by the Senate at will.[30] Moreover, according to him, members of the Cabinet, especially the Secretary of State, had so far been greater and more able leaders than the legislative officers in the line of succession.[31]

But some were not enthusiastic about the idea that the President will be in a position to pick his or her own successor, this being a circumvention of the democratic process. President Harry Truman, in a special message to Congress before leaving for the Potsdam Conference, suggested a return to the old system of succession because of its being more "democratic,"[32] since members of Congress were at least popularly elected, while Cabinet officials were merely appointees. President Truman's suggestions resulted in the Presidential Succession Act of 1947,[33] the third and currently effective

---

[29] § 2: " That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively."

[30] SILVA, at 121, *citing* 17 U.S. Cong. Rec. 180-182.

[31] *Id.*

[32] *Id.* at 124, *citing* 91 U.S. Cong. Rec. 6272, 6280.

[33] 61 U.S. Stat. 380; 3 U.S.C.A. § 19 (1947) as amended.

"Be it enacted, etc., That (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 Representative in Congress, act as President.

"(2) The same rule shall apply in case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

"(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.

(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--

(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

(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.

(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 not under disability to discharge the powers and du- ties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary

succession statute that provides for a mix of the first two, with precedence given to the presiding officers of the legislature. After the Vice President, the Speaker of the House is put next in line, followed by the President of the Senate *pro tempore*, then the Secretary of State and the rest of the Cabinet in the order provided in the Succession Act of 1886.

III. CRITICISM OF THE THIRD SUCCESSION STATUTE

Akhil and Vikram Amar vehemently question the constitutionality of the Presidential Succession Law of 1947 in their *Stanford Law Review* article.[34] Their first argument is based on a textual consideration of the phrase "officers of the United States" as written in Article II, Section 1, Paragraph 6 of the U.S. Constitution (the Succession Clause).[35] A proper identification of who these officers are should limit the statutory designation of those in the line of succession. Referring to other constitutional provisions, the Amar brothers point out that there is in fact a distinction between "officers of the United States" and officers of the legislature, let alone the members of the legislature themselves.[36] Firstly, Article I, Section 6, Paragraph 2 (known as the Incompatibility Clause) states that "[n]o Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the Authority of the United States…and no officer under the United States shall be a member of either House during

---

of Defense, Attorney General, Secretary of the 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, Secretary of Homeland Security.

(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 qualifies 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] Amar, at 136.

[35] "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 by law provide for the case of removal, death, resignation, or inability, both of the President and Vice 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."

[36] Amar, at 115-16.

his continuance in office." Secondly, Article II, Section 4 (known as the Impeachment Clause) renders "all civil officers of the United States" removable from office in impeachment, and clearly impeachment cannot apply to legislators. It is thus the Amar brothers' conclusion that the proper officers to be designated as part of the line of presidential succession are Cabinet officials.

Ruth Silva in her criticism also indicates that there is even a distinction between officers of the Senate and the President of the Senate *pro tempore* because of the phrase "[t]he Senate shall chuse their other officers, and also a President *pro tempore*,"[37] thus "the Constitution does not even recognize a President *pro tempore* as an officer of the Senate, and it recognizes a Speaker only as an officer of the House, not as an officer of the United States."[38] Although the United States Supreme Court did decide in *Lamar v. United States*[39] that a member of Congress is in fact an officer of the United States, this interpretation with regard to presidential succession will be contrary to the intent of the Constitution. As pointed out by Silva,

> After the theory of separation of powers was adopted and provision was made for an independently elected President, it was pointed out that a legislative officer should not be allowed to succeed to the executive powers. Such an arrangement, it was argued, was repugnant to the independence of the two branches.[40]

The Amar brothers' second argument is based on structural considerations with regard to the Constitutional setup itself, particularly the issue of sheer impracticability because of the doctrine of separation of powers.[41] One crucial provision is Article I, Section 3, Paragraph 5, which disallows the Vice President from presiding over the Senate whenever he or she is exercising the duties and powers of the Presidency (in the United States, the Vice President is *ex officio* the President of the Senate). This means that any presiding officer of any chamber of Congress cannot exercise executive power while being officers of the legislature, let alone members of the same. The inevitable conclusion would be that for a member of the legislature to act as President, he or she has to resign his or her seat first, in accordance with the Incompatibility Clause and especially with the provision just mentioned if the legislator is a presiding officer of his or her chamber. This, according to Silva, stems from a wrong assumption in President

---

[37] U.S. CONST. art. I, § 3, ¶ 5.
[38] SILVA, at 136.
[39] 240 U.S. 60, and 241 U.S. 103 (1916).
[40] SILVA, at 137.
[41] Amar, at 118.

Truman's proposal that the designated officer under the 1947 succession statute will actually become President.[42] Thus it was irrelevant whether or not the designated officer kept his or her post. But Silva devotes an entire chapter,[43] if not one of the main themes of her book, explaining in detail that the intent of the U.S. Constitution was to provide for a person to merely exercise presidential authority *ad interim* (or more appropriately during the *interregnum*), because one only became President through election. The authority to exercise the powers and duties of the Presidency, according to Silva, is merely annexed by law to such designated offices,[44] and thus to require a person to resign from his or her post to act as President would in fact erase the very basis of his or her eligibility for the Presidency, and render the law self-contradictory and nugatory. The point is made clearer by the Amar brothers when they noted that "the moment an officer resigns, he becomes a mere citizen and is thus ineligible to succeed to or remain in the Oval Office."[45]

The inherent difficulty in complying with the present American presidential succession setup is manifest. For the presiding officers to exercise the powers and duties of the Presidency, they must resign their seats in their respective chambers in accordance with the Incompatibility Clause, only to be President in all probability for a very short time. They cannot automatically go back to their seats in their respective chambers and must wait until the next polls to get reelected. To allow the legislative presiding officer to keep his office or his seat most especially would be to create a fusion of the executive and legislative branches into one person, realizing Montesquieu's fear and what the Amar brothers call a "Walpolian Prime Minister our Constitution's text, history, and structure self-consciously reject."[46] This impractical setup, exacerbated by the conflict of interest whenever the President is subjected to trial after impeachment, and the non-continuity of the functions and offices of Congress due to the limitations of Congressional sessions, betray the need of the United States for a more viable and more stable system of ensuring the continuity of the executive branch, where the public safety and security of the state are not compromised for petty, narrow, and selfish reasons such as ambition, transient party interest and legislative inertia.

---

[42] SILVA, at 139-140.
[43] *Id.,* at 1-13.
[44] *Id.,* at 150.
[45] Amar, at 120.
[46] *Id.* at 118.

IV. CABINET MEMBERS IN THE LINE OF SUCCESSION

Both the Amar brothers and Silva suggest that the officer/s to be designated to act as President when both the President and Vice President cannot fulfill their constitutional roles should be members of the President's Cabinet. Turning first to considerations of utility, cabinet officials, according to Silva, "are likely to represent principles and policies for which the people voted in a national election,"[47] thereby ensuring the continuity of policies of the executive branch in a time where the death, disability, or removal of an elected President will in fact constitute a national crisis where the non-interruption of government is crucial to national security and public safety. She further opines that "[d]epartment heads presumably are appointed because they agree with the President on national policy, and, like the President, reflect national points of view,"[48] thereby ensuring that the will of at least the majority of the population who voted for the President is demonstrated and preserved by an official who has had the trust and confidence of the Chief Executive bearing the people's mandate. His or her ascension "is likely to be more in harmony with popular government than the succession of a legislative officer."[49] Moreover, there will be less constitutional friction because there will be no need of resignation of a legislative officer in order to act as President. The Amar brothers explain that the "quandary"[50] of resignation does not bother Cabinet officials who need not resign their posts when acting as President, since "it is of the nature of Executive power to be transferable to subordinate officers."[51]

The most consequential argument against this proposal is the fact that Cabinet officials are unelected and thus have no popular mandate with which to properly govern a democratic state, the same reason used by President Truman in his message to Congress that led to the current succession setup. But the question begs to be asked: do members of Congress actually have the required mandate for exercising the powers and duties of the Presidency? In answering this question, Silva shares the following:

> What can be said of this contention? Under the most favorable conditions a member of Congress is the choice of his constituents as regards national policy… Still, a Senator has been chosen in only one state, and a Representative is the choice of only one district.

---

[47] SILVA, at 158.
[48] *Id.*
[49] *Id.*
[50] Amar, at 119.
[51] *Id.*

> Representatives often, and Senators frequently, are elected on local issues. The representative character of the Speaker or of a President *pro tempore* may be even less imposing if he is chosen in an area where suffrage is restricted and where political apathy prevails.
>
> Election to the Speakership or to the Presidency *pro tempore* of the Senate is largely dependent on seniority, factional combinations, and personal popularity among the legislators. Seniority in turn depends on a Representative's paying a great deal of attention to local affairs or on his coming from a "safe" constituency. This means that a Representative with seniority is likely not to represent the nation as a whole.[52]

One can also say that Senators and Representatives are elected for a specific position and that their election to the Senate or to the House is not because their constituents believe that they are capable of serving temporarily as President, but precisely because they are elected to serve only as Senators and Representatives. Their constituents did not elect them just so that they would give up their seat to serve as President for a very limited period and thereby deprive their district or constituency from representation. Besides, the lack of mandate is only for a short period until a President with a fresh mandate is elected. Thus, it is unnecessary for the acting President to be one with a popular mandate, when precisely he or she is to act until popular mandate is given to a new President in a special election. (All these arguments can also work in the Philippine setup against the logic that, since Philippine Senators are elected by the country at-large, Senate Presidents sufficiently have a nationwide mandate with which to govern as acting President of the Philippines.)

A further contention against the proposal is the danger presented under Section 4 of Amendment XXV to the U.S. Constitution,[53] which

---

[52] SILVA, at 157-58.

[53] "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

provides that the Vice President and a majority of the "principal officers of the executive departments" can declare the sitting President to be "unable to discharge the powers and duties of his office" by transmitting their written declaration to the presiding officers of both chambers of the legislature. A majority of the Cabinet can participate in the elevation of one of its members to the Presidency, the same way the Senate can elevate its presiding officer to the same during a trial to convict an impeached Chief Executive. Another problem with the 25th Amendment will be the fact that the Congress is to decide on the fitness of the President deposed. As per the Amar brothers, "[t]o the extent the legislative leaders rank high up in the succession line, their final arbitration of such executive department disputes may be infected by a direct and immediate conflict of interest. Here again, permitting legislative succession creates the possibility that legislators will judge their own cases."[54] To this quandary, there is no immediate solution provided in the U.S. Constitution, but a possible alternative available only by constitutional amendment will be to clothe the Supreme Court with jurisdiction to decide on the fitness of the incumbent President, but this is another constitutional issue of great scope that cannot be fully discussed in this paper.

This section has demonstrated that even the United States needs to reexamine its succession setup in order to achieve constitutional coherence in terms of the proper separation of powers and to attain a level of utility in terms of efficient operation among the three branches of government after decades of nearly unquestioned convention and tradition. The problem now lies in transplanting this novel idea to the Philippine constitutional setup where more perplexing quandaries are in store.

PRESIDENTIAL SUCCESSION IN THE PHILIPPINES

I. SUCCESSION UNDER THE 1935 & 1973 CONSTITUTIONS

The 1935 Constitution of the Philippines also provided for Congressional determination of the officers in the line of presidential succession after the Vice President, exactly like the Constitution of the United States. Indeed, it used the same word "officer", which poses the same problems with the construction of the word.[55] But the deliberations of

---

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."

[54] Amar, at 129.

[55] CONST. (1935), art. VII, § 6: "If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have

the Constitutional Convention of 1934-35 reveal much about how the Congress already had a preference for their presiding officers to be in the line of succession. On December 15, 1934, the intent "to separate as far as possible the President from the National Assembly, so as not to give a chance to the National Assembly to have a hand in the selection of the President" was mentioned two times, the first time was by Delegate Bueno who said that this intent was rooted in the "basic philosophy" of the "separation of powers,"[56] and the second time was by Delegate Sevilla who suggested that the provision where the President is elected by the National Assembly be amended to provide for the succession of a Vice President to assume the duties of the Presidency,[57] following the same "basic philosophy" of Delegate Bueno. However, Delegate Bueno's "basic philosophy" was somehow warped by Delegate Ventura's remarks, which are as follows:

> But following the philosophy of your reasoning, you [Mr. Bueno] stated that you want to remove the possibility of a person not elected by the people directly to hold the office of President in case the President and the Vice President die before the beginning of the term. Now, we have to eliminate from our consideration the order of succession that you have mentioned, for the reason that these heads of departments do not represent the people…[58]

An amendment by Delegate Osias providing for Cabinet officials to be in the line of succession was rejected three days later,[59] and the body in the end decided to let Congress settle the appropriate succession scheme in the future.

Such legislation came in June 21, 1947, when Republic Act No. 181[60] was approved, uncannily a month before the U.S. Presidential

---

been chosen before the time fixed for the beginning of his term or if the President shall have failed to qualify, then the Vice-President shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified."

[56] V PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION 209-10 (1934-35).

[57] *Id.,* at 223.

[58] *Id.,* at 211.

[59] *Id.,* at 311-12.

[60] AN ACT PRESCRIBING THE ORDER OF PRESIDENTIAL SUCCESSION

Be it enacted by the Senate and the House of Representatives of the Philippines in Congress assembled:

Section 1. When neither the President-elect nor the Vice President-elect shall have qualified, or in the event of the removal, death, or resignation of both the President and the Vice President, or of the inability of both of them to discharge the powers and duties of the office of President, the President of the Senate, or if there be none, or in the event of his removal, death, resignation, or of his inability to act as President, the Speaker of the House of Representatives, or if there be none, or in the event of his removal, death,

Succession Act of 1947 became law in July 18 of the same year. Republic Act No. 181 puts the President of the Senate in the line of succession after the Vice President, followed by the Speaker of the House of Representatives, and finally followed by "the Senator or Representative elected by the Members of the Congress in joint session." The law repealed Commonwealth Act No. 68 which provides that when both the Presidency and Vice Presidency are vacant, the National Assembly shall vote to elect "a person or an officer"[61] as the acting President, or if the vacancies be permanent, to vote on whether to hold a special election to fill the same, and "pending the election of an acting President by the National Assembly, a Department Secretary, in the order of rank established in the Administrative Code, will perform the duties of temporary President."[62] Commonwealth Act No. 68 in turn repealed Section 60 of Act No. 2711 (an amendment to the Administrative Code), which is quoted here in full:

> SECTION 60. *Designation of Department Head as acting (Governor-General) President of the Philippines.* — The President may designate the Head of an Executive Department of the Philippine Government to act as Governor-General in the case of a vacancy, the temporary removal, resignation, or disability of the Governor-General and of the Vice-Governor, or their temporary absence, and the Head of the Department thus designated shall exercise all the powers and perform all the duties of the Governor-General during such vacancy, disability, or absence.[63]

How the First Congress of the Republic in 1947 enacted a statute of doubtful constitutionality barely a month before the U.S. Congress passed its similarly flawed but currently subsisting succession statute is a fantastic coincidence beyond imagination. Understandably, the line of succession needed to be immediately secured for the security of the infant republic at the time, but the unapparent implications of such half-baked legislation are until now regrettably made more manifest and set in constitutional stone.

---

resignation, or of his inability to act as President, the Senator or Representative elected by the Members of the Congress in joint session shall act as President of the Philippines until the President or President-elect or the Vice President or Vice President-elect shall have qualified, or until their disability shall be removed, or a President shall have been elected and shall have qualified.

Section 2. Commonwealth Act Numbered Sixty-eight and Executive Order Numbered Three hundred and ninety are repealed.

Section 3. This Act shall take effect upon its approval.

Approved, June 21, 1947.

[61] Com. Act No. 68 (1936), § 1.

[62] *Id.*, § 2.

[63] Act No. 2711 (1917), § 60.

As one tries to go behind the statute and examine the Congressional deliberations when Republic Act No. 181 was still House Bill No. 1051, the sentiments of the legislators then reveal an ignorance of the blatant violation of the separation of powers the bill intended to implement. Congressman Enrique Medina's explanatory note uses Truman's arguments calling for a line of succession that is "more democratic and more in consonance with the spirit of our institutions, because while department secretaries are not elected by the people, the officials authorized by this measure to succeed the President are so elected."[64] Such measure was "more responsive to our democratic institutions and to the principles of government under which our Republic operates."[65] But on the floor debates, much discussion revealed the inadequacies of the bill. Responding to Congressman Laurel's clarification that the legislative presiding officer "automatically forfeits his seat in the corresponding House of Congress,"[66] Congressman Serrano opined that

> I do not think any member of Congress would, under such circumstances, accept the position of President, knowing that he would have to stay there only for one week or two days and to be definitively out for the rest of his term as member of Congress. That is precisely the reason why I suppose the Revised Administrative Code provided for a presidential succession among members of the Cabinet because there is a constitutional prohibition regarding any member of Congress from accepting any office without first forfeiting his seat.[67]

Still, Congressman Laurel was adamant in pushing for the bill's approval despite the foreseen difficulty. In justifying why there was a need to "choose them to act temporarily and deprive them of their elective office,"[68] Congressman Laurel simply said that "the person who should occupy the position should be as representative as possible."[69] In response to the problem presented by Congressman Nietes regarding the practicality of the legislative presiding officers vacating their seats only to become President for a short period of time, Congressman Laurel, as adamant as he was to the similar inquiry posed by Congressman Serrano, simply said that "a Senator or a Representative who assumes the offices of President in the absence of the President or the Vice President should be happy to assume the office even for a day."[70] Despite the inherent flaws of the proposal, the bill was

---

[64] II H. CONG. REC. 921 (1st Cong., 2nd Sess., 1947).
[65] *Id.*
[66] *Id.,* at 922.
[67] *Id.,* at 924.
[68] *Id.,* at 940.
[69] *Id.*
[70] *Id.*

passed on third reading with 51 votes in the affirmative and none in the negative, with Congressman Nietes voting in the affirmative in the end, and Congressman Serrano absent when the vote was called.[71] The Senate passed the bill on the following day at the insistence of Senator Arranz for its immediate consideration and approval.[72]

There is no apparent need for any discussion of presidential succession under the 1973 Constitution, since it provided for a parliamentary system of government where both the President and the Vice President were members of the National Assembly or the *Batasang Pambansa*.[73] Thus the active fusion of the executive and legislative branches from 1973 to the end of the Marcos dictatorship in 1986 negates any further need of discussion of succession in terms of the republican concept of the separation of powers, which at the time was non-existent. It is only worth noting that the fusion of powers that this paper warns about did actually happen in Philippine history.

II. SUCCESSION UNDER THE CURRENT CONSTITUTION

Sections 7 and 8 of Article VII of the 1987 Constitution[74] provide for the succession of the President of the Republic of the Philippines. In Section 7 where the vacancy occurs before the presidential term starts,

---

[71] *Id.,* at 1282-83.

[72] II S. CONG. REC. 914 (1st Cong., 2nd Sess., 1947).

[73] CONST. (1973), art. VII, § 2, ¶ 4.

[74] "Section 7. The President-elect and the Vice President-elect shall assume office at the beginning of their terms.

If the President-elect fails to qualify, the Vice President-elect shall act as President until the President-elect shall have qualified.

If a President shall not have been chosen, the Vice President-elect shall act as President until a President shall have been chosen and qualified.

If at the beginning of the term of the President, the President-elect shall have died or shall have become permanently disabled, the Vice President-elect shall become President.

Where no President and Vice-President shall have been chosen or shall have qualified, or where both shall have died or become permanently disabled, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives, shall act as President until a President or a Vice-President shall have been chosen and qualified.

The Congress shall, by law, provide for the manner in which one who is to act as President shall be selected until a President or a Vice-President shall have qualified, in case of death, permanent disability, or inability of the officials mentioned in the next preceding paragraph.

Section 8. In case of death, permanent disability, removal from office, or resignation of the President, the Vice-President shall become the President to serve the unexpired term. In case of death, permanent disability, removal from office, or resignation of both the President and Vice-President, the President of the Senate or, in case of his inability, the Speaker of the House of Representatives, shall then act as President until the President or Vice-President shall have been elected and qualified.

The Congress shall, by law, provide who shall serve as President in case of death, permanent disability, or resignation of the Acting President. He shall serve until the President or the Vice-President shall have been elected and qualified, and be subject to the same restrictions of powers and disqualifications as the Acting President."

where both the President and Vice President shall not have been elected or shall have failed to qualify, or shall have died or become permanently disabled, the President of the Senate shall be acting President, followed by the Speaker of the House of Representatives in case of the inability of the former. The same happens when the scenario in Section 8 happens, which is a vacancy during the presidential term. This is reminiscent of our own Presidential Succession Act of 1947 without the provision that enables the Congress in joint session to elect the acting President. But the line of succession downwards from the Speaker of the House is left to the determination of Congress, and until today no law has been passed regarding the same.

Exploring the deliberations of the 1986 Constitutional Commission, one finds certain surprising comments by some of the commissioners. For example, Commissioner Nolledo actually proposed for Congress in joint session to elect the acting President, similar to the 1947 (Philippine) succession act but doing away with the line of succession entirely.[75] It is also evident that the intention of the committee that drafted the provision was "to the effect that the Acting President should come from the Members of Congress."[76] The opinion of Commissioner Regalado, a member of the concerned committee, is the most notable, and his discourses with Commissioner Rodrigo are quoted here for purposes of emphasis:

> MR. RODRIGO: Madam President, just a few questions for the record for clarification.
>
> If the Senate President takes over because of the death or disability of both the President and the Vice President, does he lose his position as Senate President?
>
> MR. REGALADO: While he is acting as President.
>
> MR. RODRIGO: And he does not lose his position as Senator either?
>
> MR. REGALADO: I think he does not because he is only acting as President.
>
> MR. RODRIGO: So, after a President or a Vice President shall have been elected and qualified, the Senate President goes back to the Senate as, first of all, a member of the Senate and secondly, as Senate

---

[75] II RECORD OF THE CONSTITUTIONAL COMMISSION 391 (1986).
[76] *Id.,* at 421.

President, unless the Senate had elected somebody else. Am I correct?

MR. REGALADO: That is my interpretation, Madam President.

MR. RODRIGO: And the same is true of the Speaker of the House of Representatives?

MR. REGALADO: The same interpretation.

MR. RODRIGO: Thank you.[77]

x x x

MR. RODRIGO: May I ask some questions for clarification. In the case of the temporary disability of the President and Vice President, I asked yesterday whether or not the Senate President, who acts as President, would lose his position as Senate President and also as Senator, and the answer was "No, he does not lose it." So, after he is through as Acting President, he goes back as Senate President and as Senator. And the same is true of the Speaker.

Section 9 deals with permanent disability. So, if both the President and Vice President die, become permanently disabled or are removed from office, the Senate President becomes permanent President.

MR. REGALADO: No, he is only in an acting capacity.

MR. RODRIGO: He is only Acting President until the end of the term or until a President is elected?

MR. REGALADO: Until a President shall have been elected under the circumstances envisioned in Section 10.

MR. RODRIGO: So, the Senate President and the Speaker, in the same way, do not lose their positions as Senate President and Speaker and as Member of the Senate and of the House, respectively?

MR. REGALADO: Yes, Madam President, that is correct.

MR. RODRIGO: Thank you.[78]

---

[77] *Id.,* at 448.
[78] *Id.,* at 492.

There seems to be no apparent explanation why the non-resignation of the legislative presiding officers in order to act as the Chief Executive was not for the Constitutional Commission an issue of conformity with a constitutional principle, more specifically an issue of separation of powers. The issue of practicality was not even thoroughly discussed in detail. Once again, the haste characteristic of reorganizing a country recently beset by profound societal and historical changes may have had a hand in half-baking the constitutional provision in question, just as it did to the First Congress in 1947. At any rate, the deliberations resulted in the enshrinement of a constitutional quandary where the separation of executive and legislative powers is blurred; and despite the absence of any case or controversy concerning the setup, the dangerous tendency of the legislature, in this case the "sleeping two-headed giant," of interfering with the process of choosing the Chief Executive will continue to haunt our Republic until such an anomalous situation is remedied by proper constitutional amendment.

RECOMMENDATIONS AND CONCLUSION

The proper constitutional amendment espoused by this paper is obvious: the inclusion of members of the President's Cabinet into and the exclusion of the presiding officers of both chambers of the legislature from the line of succession after the Vice President. The Executive Secretary should be first in line, followed by the Secretaries of Foreign Affairs, National Defense, and the Interior and Local Government. It is to be reiterated that these officials have to have the same constitutional qualifications for the Presidency, as well as confirmation of their appointments by the Commission on Appointments before they can be eligible to succeed. But it must be pointed out that being subject to impeachment or a criminal or administrative case should not be a bar to succession because of the obvious danger that anyone can file any charge against all the Cabinet officials in the line of succession and paralyze the executive department from its proper functioning. However, conviction on grounds of impeachment (for his Cabinet post), or for an offense having a penalty higher than six years, or an administrative offense with penalty of removal from public office should be a bar to succession.

The rationale behind this entire scheme is to limit the line of succession to Cabinet members whose portfolios are crucial to national security and public safety (especially and specifically during the *interregnum*), and who are thus more privy to the President's policies and directives regarding the same. The line of succession should neither be too short as to unnecessarily require future amendatory action to expand the same to a

reasonable minimum "length," nor too long as to have officials whose inclusion in the line is either unnecessary or dangerous because of their lack of qualifications, both constitutional and qualitative. Nevertheless, Congress should still be given the power to determine the officers who may act as President in the event all Cabinet officials mentioned become incapacitated, removed from office, die, resign, or in the extreme cases, fail to qualify for the Presidency or fail to get confirmation to their posts from the Commission on Appointments. The officers of course should be within the limits demonstrated and explained by this paper.

A major limitation on this proposed presidential succession scheme should be the prohibition on the acting President from seeking election to the same office in the special election called for by Congress. This is to prevent the acting President from possibly abusing the powers of his temporary office to benefit his ambitions for a full six-year term as President, or the remainder of his predecessor's term. The Constitution already provides for some limitations on the powers of the acting President, especially when it comes to "midnight" appointments.[79] But a lacuna exists with regard to the military powers of the acting President. This author believes that the acting President should be constitutionally barred from declaring martial law or suspending the writ of *habeas corpus* during his term, and that the decision to declare martial law or suspend the writ of *habeas corpus* should be left to the President with a popular mandate. The point can be made that the public safety and national security may need such declaration or suspension during the *interregnum*, but there is a greater danger for the acting President to abuse such power like others before him yet again, and thus the special election for a President with a popular mandate may be held in a questionable atmosphere under the shadow of martial law or the suspension of the writ, or not happen at all, or be postponed indefinitely until such crisis has abated. The acting President's military powers should be limited only to the "calling out powers" as provided in the first sentence of Article VII, Section 18.[80] In fact, it is his duty to ensure that the special elections for the next President will be held in an orderly, honest, and clean manner, despite the difficulty presented by lawless violence, invasion, or rebellion. The *interregnum* is a critical moment for the country where the actions of the institutions charged with the country's protection

[79] CONST. art. VII, § 15: "Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety."

[80] § 18: "The President shall be the Commander-in Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion…"

and welfare should be geared towards the defense and preservation of democracy, not towards its destruction.

Presidential succession from now on should occupy the minds of lawyers and laymen alike, especially during this period of preparation and vigilance as the Fifteenth Congress starts its work soon. This newfound doubt as to the utility and consistency of our line of succession should all the more make everyone wary, since we have adopted the usage of automated polls for our general elections, a system still in the throes of birth but definitely there to stay as the primary vehicle of our country's democratic transitions from now on. The need for changing our current succession scheme in the constitution is manifest. The dangerous tendency of potential abuse by glory-seeking individuals in Congress for their selfish ambitions is clear. Presidential succession is a tool of democracy, a means by which the smooth and orderly transfer of executive power is facilitated for the successor to readily respond to the emergent needs of the body politic, not an instrument to further selfish political interests. The choice between tradition and utility, between convention and coherence, must be categorically and correctly made soon, lest this "little" aberration in our Constitution ultimately deter Philippine democracy from realizing its supposedly implacable destiny.

-o0o-