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An Anniversary Best Uncelebrated: The 75th Year of the Presidential Succession Act of 1947

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**AN ANNIVERSARY BEST UNCELEBRATED:
THE 75TH YEAR OF THE
PRESIDENTIAL SUCCESSION ACT OF 1947**

Roy E. Brownell II & John Rogan***

On July 18, 1947, President Harry Truman signed the Presidential Succession Act into law. The 1947 Act placed the Speaker of the House and the Senate president pro tempore in the presidential line of succession. Seventy-five years later, the statute needs major revision. Although the 1947 Act has not been used, the nation’s good fortune may change at any moment, especially given ever-present threats to the health and safety of the president and vice president.

This Article argues that Congress should revise the 1947 law in several ways, most notably by making Cabinet secretaries, in most circumstances, the immediate successors to the presidency after the vice president.

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INTRODUCTION

Seventy-five years ago, the Presidential Succession Act of 1947 (“1947 Act”) became law.¹ Unfortunately, this is not an anniversary to celebrate. The statute, which sets out the presidential line of succession following the vice president, needs major revision. Of late, threats to the president and vice president have come into sharp relief. President Joe Biden, Vice President Kamala Harris, and former President Donald Trump each became infected with COVID-19. An aggressive, nuclear-armed Russia as well as

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¹ See Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)). See generally *Presidential Succession Act*, U.S. SENATE, <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidential-succession-act.htm> [<https://perma.cc/7WMM-AJF7>] (last visited Oct. 23, 2022).

menacing phenomena such as Havana Syndrome² point to continuing threats on the horizon.³ And the fierce partisan division that currently characterizes American politics only heightens concerns over governmental stability under the current succession law. The shortcomings in the statute need to be addressed *now* to ensure continuous leadership in the executive branch and legitimate democratic governance.

Part I of this Article provides a brief overview of the succession system and analyzes how it falls short. Part II argues that Congress should revise the 1947 law in several ways, most notably by making Cabinet secretaries the immediate successors to the presidency after the vice president in most contexts. Ultimately, while no system can account for all possible contingencies, this Article contends that Cabinet succession—with some additional modifications—would greatly improve the state of presidential succession.

I. THE PRESIDENTIAL SUCCESSION ACT OF 1947: HISTORY AND SHORTCOMINGS

Should there be a dual vacancy or incapacity in both the presidency and vice presidency, the 1947 Act provides that the Speaker of the House of Representatives is next in line to become acting president.⁴ After the Speaker, the next up is the Senate president pro tempore, typically the member of the upper chamber's majority party with the most seniority. These two lawmakers are followed by Cabinet secretaries in the order of their position's creation.⁵ Pursuant to the statute, each successor would need to resign from their underlying post to become acting president.⁶ The current statute, however, is fraught with significant problems, as

² See, e.g., Scott Pelley, *Havana Syndrome: High-Level National Security Officials Stricken with Unexplained Illness on White House Grounds*, CBS NEWS (June 26, 2022, 6:55 PM), <https://www.cbsnews.com/news/havana-syndrome-white-house-cabinet-60-minutes-2022-06-26/> [<https://perma.cc/PD5U-JQES>].

³ See Erin Degregorio, *Fordham Law Symposium Explores the Presidential Succession Act at Its 75th Anniversary*, FORDHAM L. NEWS (Apr. 29, 2022), <https://news.law.fordham.edu/blog/2022/04/29/fordham-law-symposium-presidential-succession-act-75th-anniversary/> [<https://perma.cc/AW8S-ZXR2>] (remarks by Dr. Joseph J. Fins).

⁴ For discussion of what to do if a dual incapacity occurs prior to adoption of reforms, see Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027 (2017).

⁵ See William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: "The Emperor Has No Clones,"* 75 GEO. L.J. 1389, 1421 n.110 (1987).

⁶ See 3 U.S.C. § 19.

discussed at an April 2022 program at Fordham University School of Law.⁷

Providentially, the nation has never experienced simultaneous vacancies or incapacities in both the presidency and vice presidency. But there have been some close shaves, such as during the administrations of James Madison, John Tyler, Andrew Johnson, Harry Truman, and Ronald Reagan.⁸

One problem with having lawmakers as successors in dual vacancy and dual incapacity scenarios is the potential for a sudden switch in partisan control of the White House. Succession is challenging enough when the vice president is of the same party as the president. But, given today's partisan and ideological division, the prospect of an elected president and vice president being replaced by someone from the opposite party—and essentially overturning the results of the last national election—presents a deeply unsettling picture.⁹ Many Americans would likely view such a succession as illegitimate and undemocratic.

In addition to concerns regarding partisan control over the presidency switching hands, questions exist about the constitutionality of legislators serving as successors. Article II of the Constitution provides that Congress may legislate what “Officer” shall serve as acting president.¹⁰ The key question is what constitutes an “Officer” under the Clause. Scholars disagree as to whether the term includes the Speaker or president pro tempore. Many believe “Officer” means the exact same thing as “Officer of the United States,” which denotes officials within the executive and judicial branches and would therefore preclude legislative officers from presidential succession.¹¹ Those who defend the constitutionality of lawmaker succession note that the Framers chose the more expansive word “Officer” and rejected “Officer of

⁷ See generally Degregorio, *supra* note 3. Notably, Fordham University School of Law has a deep history of promoting solutions to the flaws in the presidential succession system—beginning with Dean Emeritus John D. Feerick's October 1963 article in the *Fordham Law Review*. See John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).

⁸ See Degregorio, *supra* note 3 (remarks by Roy E. Brownell II).

⁹ See, e.g., Josh Blackman & Seth Barrett Tillman, *The Weird Scenario That Pits President Pelosi Against Citizen Trump*, ATLANTIC (Nov. 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/2020-election-could-pit-pelosi-against-trump/602308/> [<https://perma.cc/54YS-XHS9>]; Jack Goldsmith & Ben Miller-Gootnick, *A Presidential Succession Nightmare*, LAWFARE (Mar. 25, 2020, 1:38 PM), <https://www.lawfareblog.com/presidential-succession-nightmare> [<https://perma.cc/AE23-H9JG>].

¹⁰ See U.S. CONST. art. II, § 1, cl. 6.

¹¹ See, e.g., Ruth. C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 457-64 (1949); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114-17 (1995).

the United States,” reflecting a meaning which therefore encompasses legislative officers.¹²

The very fact that good faith disagreement exists among legal experts about the validity of lawmaker succession is reason enough to remove them from the line of succession. Any legal doubt could prompt litigation and cast a pall of illegitimacy over an acting president.

The requirement that any successor resign from his or her underlying position presents its own problems. In a situation involving a de facto incapacitated president and vice president, this provision might deter potential presidential successors from choosing to become acting president when they otherwise should. Successors might believe they would serve only for a brief period before being displaced by the recovered president or vice president and ending up without a job.¹³ Mandatory resignation also raises constitutional questions, as some believe that holding an underlying office is essential to being an “Officer” and thereby remaining eligible to serve as acting president.¹⁴

Under the 1947 Act, if the resignation requirement or some other consideration discouraged the Speaker or the president pro tempore from serving as acting president, a member of the Cabinet would assume the role.¹⁵ But the statute provides that the legislative officers could still decide later to take over as acting president. The upshot of this scenario is that there could be multiple successors within a matter of weeks or months, which could prove destabilizing to the nation.¹⁶

Even if a lawmaker never utilized the Act’s “bumping” (or “supplantation”) provision to oust the acting president, the potential for its use could place the Speaker and president pro tempore in the position of compromising the independence of the executive branch by placing the threat of removal over the occupant of the Oval Office.¹⁷ This hobbling of the presidency is a recipe for unstable and ineffective governance.¹⁸

¹² See, e.g., Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 1021 (2010).

¹³ See Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: If at First You Don’t Succeed, Try, Try Again*, 20 *HASTINGS CONST. L. Q.* 105, 116-17 (1992); THOMAS H. NEALE, *CONG. RSCH. SERV.*, R46450, *PRESIDENTIAL SUCCESSION: PERSPECTIVES AND CONTEMPORARY ISSUES FOR CONGRESS 12* (2020).

¹⁴ See RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 137-42, 150, 175 (1951).

¹⁵ See 3 U.S.C. § 19(d)(1) (2006).

¹⁶ See Cinquegrana, *supra* note 13, at 114-19; NEALE, *supra* note 13, at 12; CONTINUITY OF GOV’T COMM’N, BROOKINGS INST. & AM. ENTER. INST., *PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY* 33-34 (2009) [hereinafter COGC].

¹⁷ See Cinquegrana, *supra* note 13, at 115-17.

¹⁸ See *id.* at 114-19.

Finally, the 1947 Act suffers from a troubling and often overlooked omission. While it provides that the Speaker would become acting president if the president and vice president are both incapacitated, the statute provides no procedure to determine whether a dual incapacity exists.¹⁹

Recently declassified documents reveal that during the presidencies of Ronald Reagan, George H.W. Bush, and Bill Clinton, the White House counsel's office suggested that the Speaker would need to work with the Cabinet to make this decision in a process akin to the Twenty-Fifth Amendment's Section 4 mechanism.²⁰ It is unclear if this approach from the Reagan-Bush-Clinton presidencies remains in effect or if it has been replaced, as documents from subsequent administrations have not yet been publicly released. Either way, there is no statutory basis for determining whether the two nationally elected officials are unable to perform their official responsibilities or how they might subsequently regain their powers and duties.

In an era when conspiracy theories run amok and controversy is the coin of the realm, the idea that the Speaker and Cabinet would carry out an undisclosed, ad hoc process to strip the president and vice president of their authority—even temporarily—is not a recipe for an acting president to enter the White House with much legitimacy. And this suggestion, of course, presupposes that the Speaker and Cabinet would be able to work together to make such a determination in the first place. If the Speaker were not from the president's party, this task could be infinitely more difficult.²¹

II. LEGISLATIVE ROADBLOCKS AND RECOMMENDATIONS FOR REFORM

In light of these deficiencies in the 1947 statute, Congress should revise the law by making Cabinet secretaries the immediate successors to the presidency after the vice president, as the law required from 1886 until 1947.²² While no legal regime can account

¹⁹ See Brownell, *supra* note 4, at 1030-31. Cf. John Feerick, *Presidential Inability: Filling in the Gaps*, 33 POL. & LIFE SCI. 11, 18-21 (2014). Relatedly, there is no statutory procedure for declaring a dual incapacity of the president-elect and vice president-elect during the preinaugural period. See John Rogan, *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*, 90 FORDHAM L. REV. 583, 601-04 (2021); Marcello Figueroa, *Revisiting § 3 of the Twentieth Amendment 21-22* (Dec. 2019) (unpublished manuscript) (on file with authors).

²⁰ See Office of White House Counsel, *Contingency Plans: Death or Disability of the President* (Mar. 16, 1993), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1009&context=twentyfifth_amendment_executive_materials [<https://perma.cc/9AA4-QN4B>].

²¹ Cf. Feerick, *supra* note 19, at 19.

²² See Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).

for all possible contingencies, the return of Cabinet succession, with some additional modifications in law, would vastly improve the state of presidential succession.

One additional reform would be the inclusion of ambassadors at the end of the line of succession to help make sure that a mass catastrophe in Washington, D.C., would not eliminate all potential acting presidents.²³ Because most non-political ambassadors remain at their overseas posts before and after presidential inaugurations,²⁴ their inclusion in the line would have an added benefit. If a large-scale calamity occurred during the January 20 swearing-in ceremony and killed all would-be acting presidents in the Capitol,²⁵ there would be a successor to the Oval Office already in place.

Another complementary step would involve the period before Inauguration Day. Reforms for this period should aim to ensure that the party that wins the presidency in the national election actually controls the White House on January 20. Under current law, if both the president-elect and vice president-elect die or neither can qualify, the Speaker—who might be a member of the party whose presidential candidate was recently defeated—would take the oath as acting president on Inauguration Day.²⁶ To avoid the nullification of the recent national election, an alternate line of succession could be created with respect to the period from mid-December until January 20.²⁷

The Twentieth Amendment provides that Congress can identify a “person” who can replace the president-elect if both

²³ See COGC, *supra* note 16, at 45.

²⁴ See, e.g., Todd Prince, *U.S. Ambassadors: Who Might Stay and Who Might Go Under Biden*, RADIOFREEEUROPE (Nov. 9 2020), <https://www.rferl.org/a/u-s-ambassadors-who-might-stay-go-under-biden/30938395.html> [<https://perma.cc/N6WE-HPRF>].

²⁵ See Rogan, *supra* note 19, at 606-08.

²⁶ See Fordham Univ. Sch. of Law’s Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 17 (2012) [hereinafter *Ensuring*]; Goldstein, *supra* note 12, at 1035.

²⁷ See Rogan, *supra* note 19, at 602-03; Gregory Ascher et al., *Planning for Emerging Threats: Rethinking the Presidential Line of Succession*, Fordham Law School Rule of Law Clinic, 15-17, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1002&context=rule_of_law_clinic [<https://perma.cc/5XMN-S3YE>]. Cf. Feerick, *supra* note 19, at 19. The Twentieth Amendment applies once the “President elect” is chosen. Though the Amendment is silent on the exact date, it appears from legislative history that it means the day when state electors vote “on the first Monday after the second Wednesday in December” as opposed to January 6, when Congress counts the electoral votes. See 3 U.S.C. §§ 7, 15. See also H.R. REP. NO. 72-345, at 6 (1932) (supporting the earlier date); Rogan, *supra* note 19, at 601 (same). But cf. *Ensuring*, *supra* note 26, at 17 (implying that January 6 is the appropriate date); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 ARK. L. REV. 215, 217-18 (1995) (same).

nationally elected candidates die²⁸ or neither can qualify for office prior to the swearing-in.²⁹ This language is more expansive than Article II's "Officer" requirement and would mean that the succession statute could be amended to include lawmakers. A possible approach is to name the House and Senate leaders whose party had just won the presidency as the top two successors (i.e., the Speaker, House minority leader, Senate majority leader or Senate minority leader as the case may be).³⁰ Using this alternate line of succession for the death or failure to qualify of the two victorious national candidates would help ensure that the will of the voters is not nullified.³¹

Congress should also consider the merits of codifying the approach suggested in the Reagan-Bush-Clinton White House contingency plans—and recommended by Fordham Law's Second Presidential Succession Clinic—to formally authorize the individual next in the line of succession to work with the Cabinet to determine if the president and vice president are incapacitated.³² This

²⁸ See H.R. REP. NO. 72-345, at 2 ("Congress is given power to provide for the case where neither a President nor a Vice President has qualified before the time fixed for the beginning of the term, whether the failure of both to qualify is occasioned by the death of both . . . or by any other cause . . .") (emphasis added). See also GEORGE W. NORRIS, *FIGHTING LIBERAL* 342 (1992 ed.); Rogan, *supra* note 19, at 601; Goldstein, *supra* note 12, at 1023. See also BRIAN KALT, *CONSTITUTIONAL CLIFFHANGERS* 90 n.* (2012).

²⁹ U.S. CONST. amend. XX, § 3.

³⁰ See Rogan, *supra* note 19, at 602-03; Ascher et al., *supra* note 27, at 15-17. Cf. Feerick, *supra* note 19, at 19. Removing the Speaker from the traditional line of succession only to place the Speaker, House minority leader, Senate majority leader or Senate minority leader (as the case may be) in a new alternate line of succession seems at first blush to be contradictory. It is not. Article II requires that presidential successors be "Officers" which may call into question whether the Speaker is eligible. See *supra* note 11. The Twentieth Amendment, however, limits those eligible only to "persons," which obviously permits lawmakers to serve. Moreover, the current line of succession includes the Speaker, whether or not the lawmaker is of the same party as the president-elect. The alternate line of succession proposed herein, which would govern preinaugural scenarios, would be expressly linked to the party that won the White House, thus removing concern about negating the recent national election results.

³¹ See Rogan, *supra* note 19, at 602-03; Ascher et al., *supra* note 27, at 15-17. Cf. Feerick, *supra* note 19, at 19.

³² See Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 958-64 (2017) [hereinafter Fordham Second Report]. See also Feerick, *supra* note 19, at 19-21. Congress might also expand the provision to authorize the next ranking successor to fill in for the vice president in the context of Sections 3 and 4 of the Twenty-Fifth Amendment in cases where the vice president is de facto incapacitated, or the office is vacant. See Fordham Second Report, *supra*, at 958-68; Feerick, *supra* note 19, at 20-21. See also Roy E. Brownell II, *Vice Presidential Inability: Why It Matters and What To Do When It Occurs*, 48 HOFSTRA L. REV. 291 (2019).

codification should also include a means for the latter two officeholders to regain their powers and duties consistent with the process in Section 4 of the Twenty-Fifth Amendment.³³ Eliminating the “bumping” provision and narrowing the resignation requirement to include only lawmakers would also greatly strengthen the presidential succession regime.³⁴

Of course, if removing lawmakers from the line of succession were easy, it would have been done long ago. Doing so presents a legislative Gordian Knot. Concern over which party would stand to gain from changes to the presidential succession law is an impediment that has bedeviled reform efforts dating back to the very first such statute in 1792.³⁵ However, as some have suggested,³⁶ this concern might be alleviated by instituting a multi-year delay in implementation. That way, Democrats and Republicans could try to address matters without making political calculations as to which party would benefit in the immediate term.

Another potential legislative roadblock is that introducing such a measure might antagonize the Speaker and president pro tempore. It is important to emphasize that criticism of lawmaker succession should not be confused with criticism of Speakers or presidents pro tempore themselves. Indeed, several of our nation’s most talented and accomplished public figures have held these positions.

Few measures become law without the approval of the Speaker. By the same token, the president pro tempore can complicate passage of such a measure in the Senate. Perhaps the best way to reform the 1947 Act would be for both the Speaker and president pro tempore to simultaneously introduce legislation to remove themselves from the line of succession (outside of a preinaugural context for the Speaker when he or she is of the same

³³ U.S. CONST. amend. XXV, § 4.

³⁴ In a preinaugural context involving the death or failure to qualify of both the president-elect and vice president-elect, this Article argues that the House and Senate leaders of the party that won the recent national election should be in line to become acting president. *See supra* notes 26-31 and accompanying text. Given the Constitution’s prohibition against lawmakers serving in the executive branch, the statutory resignation requirement should remain in place for the House and Senate leaders, but not for executive branch officials. *See* U.S. CONST. art. I, § 6, cl. 2 (“no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”). Because the preinaugural situation involves the Twentieth Amendment and its “person” language—not Article II’s narrower “Officer” requirement—there is no concern that the acting president (former lawmaker) must remain in his or her underlying legislative position to remain eligible to serve. As discussed in Part I, some argue that Article II requires that an acting president continue to hold his or her underlying “Office” to remain eligible to serve as acting president. *See* SILVA, *supra* note 14, at 137-42, 150, 175.

³⁵ *See* Presidential Succession Act of 1792, ch. 8, 1 Stat. 239 § 9 (repealed 1886).

³⁶ *See* Goldsmith & Miller-Gootnick, *supra* note 9.

party as the incoming president).³⁷ This act of selflessness and statesmanship would offer a clear signal that other lawmakers should support the measure.

Moreover, the two presiding officers could make it known that taking lawmakers out of the line of succession would also add greater stability to Congress. As noted by Senator Ted Moss during debate over the Twenty-Fifth Amendment,³⁸ the Speaker's elevation to the presidency during a crisis would leave the House in disarray by plunging the chamber into a leadership contest at a moment when institutional stability would be at a premium, and when the House might need to respond to a national emergency.

The Speaker and president pro tempore jointly requesting reform of the 1947 Act would serve as a worthy capstone to the legislative careers of the two presiding officers, whomever they may be at the time. Voluntarily walking away from potential political power—particularly when it involves the presidency—is a rare thing, but it comes with a rich reward in our nation. Those who do so tend to be remembered well by history.³⁹

CONCLUSION

Although the Presidential Succession Act of 1947 has not been used in its first seventy-five years, the nation's good fortune could change at any moment. Threats to national security and the presidency are ever-present. Reform of the 1947 Act is needed now.

³⁷ See Brian Kalt, Opinion, *A Better Line to the Oval Office*, L.A. TIMES (Jan. 11, 2015, 4:00 PM), <https://www.latimes.com/opinion/op-ed/la-oe-kalt-presidential-succession-is-unconstitutional-20150112-story.html> [<https://perma.cc/T3A5-WZ8R>].

³⁸ See *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 88th Cong. 65 (1964), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1006&context=twentyfifth_amendment_congressional_materials [<https://perma.cc/E2ER-C85L>].

³⁹ See RON CHERNOW, WASHINGTON: A LIFE 444, 454-58, 757, 770-71, 812 (2010) (noting that a significant part of George Washington's legacy involves his having resigned his military commission at the end of the Revolutionary War and his having chosen to serve only two terms as president); Matthew Gault, *Al Gore—Greatest American Hero?*, REUTERS (Nov. 7, 2016), <https://www.reuters.com/article/us-al-gore-hero-commentary/commentary-al-gore-greatest-american-hero-idUSKBN1322DY> [<https://perma.cc/8HZQ-E9TE>] (touting Al Gore and Samuel Tilden for conceding controversial presidential elections and not throwing the nation into chaos).