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The Presidential Succession Act at 75 | Opening Address

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OPENING ADDRESS

*John D. Feerick**

The program today is both unique and timely in its focus on presidential line of succession scenarios. As you know, if a president were to die, resign, or be removed after an impeachment trial, the vice president would become president, as made clear by Section 1 of the U.S. Constitution's Twenty-Fifth Amendment, which codified historical precedents.¹ Article II of the Constitution provides that Congress may provide for the case of removal, death, resignation, and inability of both a president and vice president.²

Congress exercised this power in Article II during the presidency of Harry Truman. He signed into law on July 17, 1947, the Presidential Succession Act,³ which is the subject of this program. Concerns have been raised about the statute's adequacy at this time in history, and proposals have been advanced to change it. September 11, 2001, and the tragedies of that day, and the January 6, 2021, assault on the Capitol are reminders of the importance of having safeguards in place to deal with the unexpected. November 22, 1963, set a precedent and benchmark as the country joined as one upon the tragic death of President John F. Kennedy. From the time he took the presidential oath of office in the executive chamber of an airplane ninety minutes after the shooting, Vice President Lyndon Johnson made clear that stability was essential and that it was not a time for uncertainty and confusion.

I began my study of presidential succession a few years before this tragedy, influenced by the several disabilities President Dwight Eisenhower experienced in office. I threw myself into examining our executive succession foundations as they then appeared in the Constitution. There was hardly a month that went by when I did not spend time in the New York City Public Library researching the succession arrangements from colonial America and the early state constitutions that would have shaped the thinking of the Framers of the Constitution when they met in Philadelphia in 1787. I took some inspiration during this work from Cicero, who said, "if no use is

* Dean Emeritus and Sidney C. Norris Professor of Law, Fordham University School of Law. These remarks were delivered as part of the program entitled *The Presidential Succession Act at 75: Praise It or Bury It?*, which was held on April 6, 2022, and hosted by the Fordham University School of Law. This transcript has been edited, primarily to conform with the *Fordham Law Review's* publication requirements, and represents the speaker's individual views alone.

1. See U.S. CONST. amend. XXV, § 1.

2. U.S. CONST. art. II, § 1, cl. 6.

3. 3 U.S.C. § 19.

made of the labors of past ages, the world must remain always in the infancy of knowledge.”⁴

Suffice to say, as I detailed in the book I wrote at the time, *From Failing Hands: The Story of Presidential Succession*, “[t]he necessity of having someone available to act in the governor’s place should [the governor] become ill, be absent from the colony, die in office, be removed, . . . or be otherwise prevented from discharging his duties” was recognized throughout our colonial experience.⁵ In Jamestown, executive power was placed in the hands of an executive council.⁶ In the Virginia Charter of 1609, in the Plymouth Colony, it was given to a governor assisted by an advisory council.⁷ These developments subsequently were reflected in the charters granted to Massachusetts and Connecticut, which created annually elective officers of governor and deputy governor.⁸ In Dutch New York, governance was provided for through the appointment of a director and vice director who was to fill the director’s place “in the absence of the said Director” and was “to perform all that a good and faithful Vice Director is bound to do.”⁹ The Massachusetts Charter of 1691 gave expression to succession in the royal colonies by providing for the offices of governor and lieutenant governor and if the governor and lieutenant governor had died, resigned, or were absent, and no one else was commissioned to act, the governor’s council was empowered to administer the government or deputize someone to do so.¹⁰

“The history of the royal colonies is replete with examples of lieutenant governors and councilors acting as governor when governors were absent from the colony, resigned for reasons of health, were removed, or died in office.”¹¹ Unanticipated scenarios occurred and were dealt with successfully. In 1701, for example, when the governor of New York died and the lieutenant governor was absent from the colony and the eldest member of the council was unavailable, the councilors on hand issued a proclamation confirming all civil and military officers in their places, with the oldest councilor then present presiding until the lieutenant governor or the eldest councilor should arrive.¹² “[O]f the one-hundred-thirty governors whose service had ended before the beginning of the revolution, . . . one-third[] died in office.”¹³ Not surprisingly, all of the early state constitutions had executive succession provisions.¹⁴ The New York gubernatorial line of succession ran from the lieutenant governor, who was

4. JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 23 (1965).

5. *Id.* at 26.

6. *See id.*

7. *See id.* at 26–27.

8. *See id.* at 27–28.

9. *Id.* at 29.

10. *See id.* at 31–32.

11. *Id.* at 32.

12. *See id.* at 33.

13. *Id.* at 32.

14. *See id.* at 37.

elected at the same time as the governor, to the president pro tempore of the Senate, and then to the Speaker of the Assembly.¹⁵

The Framers, as noted, benefited from this 180-year history in crafting the succession provision of Article II of the Constitution. With strengths, weaknesses, and ambiguity of some of its wording, the provision has served the nation reasonably well throughout American history. Some of the ambiguities in the provision have been addressed by the Twenty-Fifth Amendment.¹⁶ Additionally, the power given to Congress to establish a presidential line of succession has been exercised several times, each time when the existing line of succession appeared in need of improvement. These enactments and other approaches will be at the center of the program. Issues as to the role of acting secretaries, how to handle the vacancies of president and vice president, and dual incapacities of both officers are among the subjects to be discussed by panels of scholars, former public servants, lawyers, and educators.

15. *See id.* at 37–38.

16. *See generally* JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (3d ed. 2014).