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The Presidential Succession Act at 75 | Keynote Address

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KEYNOTE ADDRESS

*The Honorable Jeh C. Johnson**

Dean Emeritus Feerick, Dean Diller, Professor Greenberg, other members of the Fordham Law School faculty, students, concerned citizens: it's my honor to be your keynote speaker today. I speak not as an expert on the subject of presidential succession, but as a fact witness—someone who has actually been in the presidential line of succession.

Pursuant to the Presidential Succession Act,¹ amended numerous times and codified at Title 3, Section 19 of the United States Code, I was last in the presidential line of succession: president, vice president, Speaker, president pro tempore, the Cabinet in the order of the seniority of the departments they lead. This meant because the Department of Homeland Security is the newest Cabinet level department of our government, I was last. When I assumed that position, I had always thought that the presidential line of succession just kept going, deputy secretaries, undersecretaries, assistant secretaries, deputy assistant secretaries. It turned out I was last. I took that responsibility very seriously. There was nobody after me, except maybe the U.S. Army. I made sure to take my blood pressure medication, every single day, and my cholesterol medicine. I took my responsibilities very seriously.

I served as designated survivor, not once, but twice. For those of you who don't know, you cannot have in one place under one roof at one event, every person in the presidential line of succession, along with the president. In the event of a catastrophe, they'd all be wiped out. One of those people has to remove him or herself from the event and go off to a distant undisclosed location until the event is over for the safety and security of our democracy.

I got that responsibility twice. The first was the State of the Union in January 2016. I was a little disappointed. It's exciting going to the State of the Union. The president, the vice president, the Speaker, the House, the Senate, the Supreme Court, the joint chiefs, the diplomatic corps: they're all there. You're on C-SPAN 2 or 3. I get to wave to mom from the floor of the House of Representatives. It's exciting. Little known fact, if you're in the Cabinet, your job is to be the cheerleader. You stand up and applaud the

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1. 3 U.S.C. § 19.

president at the end of every single sentence of the State of the Union Address.

In January 2016, I was told: “You’re it. You’re the designated survivor.” So I had to go off to the undisclosed location. I can’t disclose it to you because it’s undisclosed. There’s not so much to being a designated survivor. There’s a TV show about the designated survivor. All you do is you sit around and you wait until the president is back in the White House residence and then you get to go home. It’s not very exciting.

The most exciting moment, the first time I served as designated survivor, came when I was watching television, waiting for the State of the Union. I was sitting in the undisclosed location and I thought my identity as the designated survivor was a secret. I was watching Chris Matthews on MSNBC, and he said on live TV: “We’ve just been handed a bulletin. Jeh Johnson is the designated survivor tonight.”² I fell off my chair. Without batting an eye, Chris Matthews said, “well, that makes sense since no presidency named Johnson begins well.”

The second time I was selected to be designated survivor was for Inauguration Day 2017. Being designated survivor during an inauguration is fundamentally different because the entire Cabinet is resigning and then a new Cabinet will come into existence upon confirmation by the Senate. It doesn’t happen right away when the president takes the oath. The outgoing president and the incoming president have to agree that the designated survivor stays on into the next administration. Which meant that I stayed into the Trump Administration. You’re looking at Donald Trump’s first Cabinet officer. For seven hours and twenty-eight minutes, I was the entirety of Donald Trump’s Cabinet.

Again, I was disappointed. For a year, I had a fantasy about how I was going to leave office. At exactly noon on January 20, 2017, when the entire Obama Administration would leave, the Obama Cabinet would leave. I was counting down the days. I had an app on my phone that counted down the days, hours, minutes, seconds, until January 20, 2017, at noon when the alarm was going to go off and I was going to get up from my desk at the headquarters of the Department of Homeland Security. I was going to push back, I was going to watch the oath of office, whoever it was. Then I was going to wave goodbye to my Secret Service detail, get in my own car behind the wheel, drive up the New Jersey Turnpike to my home in Montclair, New Jersey, and then wake up the next morning a normal person. That didn’t happen.

I got to be the designated survivor. I can tell you my location. I got to just go home to my permanent home in Montclair, New Jersey, a day early and sat in my own home and watched the inauguration and served into the Trump Administration for seven hours and twenty-eight minutes until my successor, John Kelly, was confirmed by the Senate. Quite a remarkable thing. It

2. See generally *And the Designated Survivor Is . . .*, NBC NEWS (Jan. 12, 2016, 8:34 PM), <https://www.nbcnews.com/politics/barack-obama/designated-survivor-n495226> [<https://perma.cc/8DHE-FDVE>].

doesn't happen to too many people, to go from being second or third in the presidential line of succession, with a lot of security surrounding me, to being a private citizen in an instant. It was a wonderful liberation, which I will never forget.

On a serious note, I note that on the vital issue of presidential succession, the statute that governs it is just 631 words.³ The Twenty-Fifth Amendment is just 396 words.⁴ On the vital issue of presidential election, another form of presidential succession, the Electoral Count Act⁵ is just 809 words.⁶ The U.S. Constitution, said to be the shortest constitution of any major country in the world, is just 4,543 words, exclusive of amendments.

What is my point? Experience teaches that when dealing with honorable, reasonable people, a simply worded, single-page document can form a government, effectuate the sale of a business, the lease of an apartment, a will, or even a divorce. On the other hand, when dealing among people who are not to be trusted, you need expensive lawyers to conduct due diligence, draft contracts and closing documents that reach into the thousands of pages to eliminate all risk, all uncertainty, and provide for every conceivable contingency.

For most of American history, our democracy has survived on elegant simplicity and leaders who cared more about their oath than their political fortunes. Following the bitter election contest of 1860, Stephen Douglas told Abraham Lincoln: "Partisan feeling must yield to patriotism. I am with you, Mr. President, and God bless you."⁷ Though many urged him to continue the fight to keep counting votes in the hotly contested 2000 election, Al Gore said to George W. Bush: "[W]hat remains of partisan rancor must now be put aside [The election] must be resolved, through the honored institutions of our democracy."⁸ In the razor-thin election of 1960, despite claims that the election had been stolen from him, Richard Nixon knew he had to concede to Kennedy for the sake of our democracy.⁹ In 1974, though he paid a huge political price, Gerald Ford pardoned Richard Nixon for his crimes to end the national divisions created by the Watergate scandal.¹⁰

Today, for far too many in public life, the acquisition and retention of power has become more important than the oath of office to support and

3. 3 U.S.C. § 19.

4. U.S. CONST. amend. XXV.

5. 3 U.S.C. § 15.

6. *Id.*

7. DAVID HERBERT DONALD, *LINCOLN* 280 (1995).

8. Vice President Al Gore, Address Conceding the Presidential Election of 2000 (Dec. 13, 2000), <https://abcnews.go.com/Politics/story?id=122220&page=1> [<https://perma.cc/F2CM-42FL>].

9. See Vice President Richard Nixon, Remarks Conceding the Presidential Election in Los Angeles, California (Nov. 9, 1960), <https://www.presidency.ucsb.edu/documents/remarks-conceding-the-presidential-election-los-angeles-california> [<https://perma.cc/5MMZ-BAMP>].

10. See Andrew Glass, *President Ford Pardons Nixon, Sept. 8, 1974*, POLITICO (Sept. 8, 2018, 7:10 AM), <https://www.politico.com/story/2018/09/08/president-ford-pardons-richard-nixon-sept-8-1974-806451> [<https://perma.cc/E3XC-D9QJ>].

defend the Constitution and the preservation of our democracy. This was on vivid display fifteen months ago today. Our forty-fifth president, frankly a man dangerously ill-suited for the job, lacking any respect for constitutional norms, encouraged by bad legal advice, sought to exploit the gray areas in our Constitution and laws to cling to office beyond his term and, along the way, incited a violent insurrection on the U.S. Capitol.

The United States of America can no longer boast we are a democracy characterized by peaceful transfers of power. January 6 was our wake-up call. We were stress tested and barely survived. It turns out our democracy is fragile, and on January 6, came close to breaking. We are a nation of laws, but this nation of laws still depends upon people of goodwill with a sense of history and love of country who will take seriously the oath to support and defend the Constitution.

At this conference and others like it, the question we must ask is this: Do we go on as we have and trust that in times of crisis, there will be enough adults in the room to do the right thing to save our democracy? More than one historian has noted that we have survived constitutional crises before. Or do we conclude that we are different now and that we must tighten our laws and constitutional provisions to stave off a descent into something un-American? Our democracy depends upon the answer to this question.