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## The Presidential Succession Act at 75 | The Relationship Between the Presidential Succession Act of 1947 and the Twenty-Fifth Amendment

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## THE RELATIONSHIP BETWEEN THE PRESIDENTIAL SUCCESSION ACT OF 1947 AND THE TWENTY-FIFTH AMENDMENT

*John Rogan\**

The Presidential Succession Act of 1947<sup>1</sup> and the Constitution's Twenty-Fifth Amendment<sup>2</sup> are at the core of the presidential succession framework. Their relationship is complementary in some respects, but in other ways the provisions are at tension.

The Twenty-Fifth Amendment, like the Constitution's original succession provision,<sup>3</sup> identifies the vice president as the first successor to the presidency.<sup>4</sup> The successors after the vice president are set out by the Presidential Succession Act of 1947. The successors in this statutory line are the Speaker of the House and the Senate president pro tempore, followed by the Cabinet secretaries in the order of the creation of their respective departments.<sup>5</sup>

In addition to making the vice president first in line to the presidency, the Twenty-Fifth Amendment addresses the vice president's status when she discharges the powers and duties of the presidency. When the president has died, resigned, or been removed from office, the vice president becomes president for the rest of the term.<sup>6</sup> However, if the president is alive but unable to serve, the vice president serves as acting president.<sup>7</sup> The "acting president" designation is a recognition that the president—who maintains his title during an inability—can return to power.

If an official succeeded to the Oval Office under the Presidential Succession Act, they would also serve as acting president, regardless of the cause of their succession.<sup>8</sup> But the acting president title does not place any

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\* Senior Fellow, 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. 3 U.S.C. § 19.

2. U.S. CONST. amend. XXV.

3. U.S. CONST. art. II, § 1, cl. 6.

4. *See* U.S. CONST. amend. XXV, § 1.

5. *See* 3 U.S.C. § 19(a)–(b), (d).

6. *See* U.S. CONST. amend. XXV, § 1.

7. *See id.* § 3.

8. *See* 3 U.S.C. § 19(a)(1), (b), (d)(1).

limitation on the powers the official would hold. An acting president would have all of the powers and duties of the presidency.

Another important provision of the Twenty-Fifth Amendment is its process for filling a vacancy in the vice presidency. When there is no vice president, the Amendment's Section 2 lets the president name a replacement with approval from majorities of both houses of Congress.<sup>9</sup>

By creating a way to fill vice presidential vacancies, the Twenty-Fifth Amendment made it much less likely that the line of succession in the Presidential Succession Act would be needed. Before the Twenty-Fifth Amendment's ratification in 1967, there was no vice president for a total of thirty-seven years and three months.<sup>10</sup> The statutory line of succession was never reached in those nearly four decades, but it was only a heartbeat, resignation, disability, or impeachment conviction away. After the Twenty-Fifth Amendment's addition to the Constitution, the vice presidency has been vacant for only six months.<sup>11</sup>

The vice presidential replacement process was used efficiently during its two invocations in the 1970s. Following Vice President Spiro Agnew's 1973 resignation, it took less than two months for Congress to confirm Gerald Ford as vice president.<sup>12</sup> Ford soon succeeded to the presidency due to Richard Nixon's resignation. To fill the resulting vice presidential vacancy, Ford nominated and Congress confirmed Nelson Rockefeller in a process that took about four-and-a-half months.<sup>13</sup>

Through these uses, the Twenty-Fifth Amendment showed its value almost immediately after its ratification. If Nixon hadn't been able to name another Republican to the vice presidency, the next successor under the Presidential Succession Act would have been the Speaker of the House—who, at the time, was a Democrat, Carl Albert.<sup>14</sup> The guarantee—made possible by the Twenty-Fifth Amendment—that the White House would stay in the hands of Nixon's party could have impacted his decision to resign.

Yet the need for a vice presidential replacement process was not the main impetus for the Twenty-Fifth Amendment's development. Rather, it was the absence of a way to declare the president disabled. Congress's attention was focused on the problem by President John F. Kennedy's assassination—and the possibility that a small difference in the trajectory of the sniper's bullet might have left Kennedy alive but disabled.<sup>15</sup>

The Constitution's original succession provision in Article II, Section 1 identified inability as a cause for succession but didn't define inability or

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9. See U.S. CONST. amend. XXV, § 2.

10. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 314 (3d ed. 2014).

11. See *id.*

12. See *id.* at 268.

13. See *id.*

14. See *id.* at 44–45.

15. See, e.g., *id.* at 55 (quoting Senator Kenneth Keating's observation that "a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land").

provide a way to declare its existence.<sup>16</sup> To address that ambiguity, the Twenty-Fifth Amendment gave the president the power to voluntarily declare himself unable.<sup>17</sup> It also created a process for an involuntary inability declaration to be used when the president is unable or unwilling to make the declaration himself.<sup>18</sup> That process empowers the vice president acting with either a majority of the Cabinet or an “other body” created by Congress to declare the president unable.<sup>19</sup>

The Twenty-Fifth Amendment’s inability provisions closed a major gap in the succession system. But another gap remains to this day. There is currently no process to declare the existence of a dual inability of the president and vice president. The Twenty-Fifth Amendment deals only with sole incapacities of the president. If both the president and vice president became unable, there is no explicit process for letting an official in the statutory line of succession serve as acting president.

The lack of a way to declare a dual inability would not necessarily prevent the next person in the line of succession from serving as acting president. But it could diminish the official’s legitimacy. And, in borderline cases of inability, it could invite competing claims to the presidency.

The framers of the Twenty-Fifth Amendment were aware of the dual-inability gap. But they excluded a dual-inability process out of concern that it would make the amendment too complex to win approval.<sup>20</sup>

Ideally, Congress will take action to close the dual-inability gap. Reports issued by Fordham Law School’s Presidential Succession Clinics in 2012 and 2017 argued that Congress has the authority to pass a law creating a process for declaring a dual inability of the president and the vice president.<sup>21</sup>

The clinics recommended a process mirroring the Twenty-Fifth Amendment’s presidential-inability process.<sup>22</sup> They called for a law authorizing the next person in the line of succession after the vice president to act with a majority of the Cabinet to declare a dual inability.<sup>23</sup> The declaration would allow the next person in the line of succession to serve as acting president with a clear legal claim to the position.

16. See U.S. CONST. art. II, § 1.

17. See *id.* amend. XXV, § 3.

18. See *id.* § 4.

19. *Id.*

20. See FEERICK, *supra* note 10, at 74–75.

21. See generally 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 (2017); 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. 1 (2012).

22. See Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, *supra* note 21, at 964; Fordham Univ. Sch. of Law’s Clinic on Presidential Succession, *supra* note 21, at 27.

23. See Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, *supra* note 21, at 960; Fordham Univ. Sch. Of Law’s Clinic on Presidential Succession, *supra* note 21, at 61.

Allowing the person next in line to act as president to participate in an inability determination would very sensibly follow the Twenty-Fifth Amendment's model. But this reform might be flawed from its inception if Congress did not remove legislators from the start of the line of succession.

Empowering the next person in the line to declare a dual inability would typically mean giving the role to the Speaker of the House. This would be problematic when the Speaker and president were from different parties. The possibility of a change in party control of the White House could give the president and vice president an added incentive to cover up incapacities. And it could lead the Cabinet—presumably allies of the president—to resist participating in a dual-inability declaration even when it was necessary.

The bad incentives that might exist if the Twenty-Fifth Amendment's inability-declaration model was used for dual-inability scenarios is an example of the tension between the Amendment and the Presidential Succession Act of 1947. That tension stems from a more significant inconsistency: the provisions' emphasis of different principles for identifying successors. By authorizing the president to nominate a replacement vice president, the Twenty-Fifth Amendment embraces the principle that presidential successors should be allies of the president. In contrast, the Succession Act allows for political opponents of the president—lawmakers from the other party—to be successors.

The seventy-fifth anniversary of the Presidential Succession Act is a time to discuss reforming the statute. The imperfect relationship between the Act and the Twenty-Fifth Amendment deserves consideration in those conversations.