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## HISTORY OF THE LEGISLATIVE SUCCESSION PROVISIONS IN THE PRESIDENTIAL SUCCESSION ACT OF 1947

*Joel K. Goldstein\**

The Presidential Succession Act of 1947<sup>1</sup> was the third and most recent time Congress designated an officer to act as president following the vacancy or inability of both the president and vice president. Like other events that occurred in a historical context, in this case one which included the two prior acts and the remarkable contemporary events that led to it, the 1947 measure should be understood today in light of that context and of developments since that time.

The first Presidential Succession Act in 1792<sup>2</sup> placed the Senate's president pro tempore and then the Speaker of the House of Representatives in the line of presidential succession.<sup>3</sup> These leaders would act as president only until a special presidential election, unless the double vacancy occurred very late in the term.<sup>4</sup> A few founders, like Representative James Madison, thought that legislative leaders weren't officers as constitutionally required,<sup>5</sup> but others disagreed.<sup>6</sup> George Washington, who presided over the Constitutional Convention, signed the act, suggesting he thought it constitutional.<sup>7</sup>

The Senate had insisted on the legislative line. The House resisted before acquiescing. Some historians emphasize the polarizing impact of Secretary of State Thomas Jefferson, since Jefferson's friend Madison favored Cabinet succession, whereas Jefferson's foe, Alexander Hamilton, favored a

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1. 3 U.S.C. § 19.
2. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239 (repealed 1886).
3. *See id.* at 240.
4. *See id.* at 240–41.
5. *See* Ruth C. Silva, *Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 458–59 (1949) (noting that Madison believed the first presidential succession act was unconstitutional for several reasons, including because legislative officers may not be “officers in the Constitutional sense” (emphasis in original) (citation omitted)).
6. *See* Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOU. L. REV. 67, 86–87 (2010).
7. *Id.* at 87.

legislative line.<sup>8</sup> In 1792, the president pro tempore was a logical choice as the Constitutional Convention had designated the president of the Senate as the presidential successor before it created the vice presidency. The Senate was an elite body that would advise the president, so elevating the person those luminaries elected as president pro tempore made some sense.

The 1792 Act governed until 1886,<sup>9</sup> across twenty-two presidencies. Ten times during nine of those presidencies, a Senate president pro tempore stood first in line.<sup>10</sup> But as landmines surfaced and historical context changed, legislative succession lost appeal. Due to now-obsolete practices, when President James Garfield was assassinated in 1881, and when President Grover Cleveland's vice president, Thomas Hendricks, died only four years later, neither House was in session nor had elected its leaders.<sup>11</sup> There was no presidential successor and no way to choose one should a second vacancy occur before Congress reconvened. Both times when Congress reassembled, the Senate selected a president pro tempore who was not from the president's party.<sup>12</sup> The same party had almost always held the presidency and Senate during the first three quarters of the nineteenth century, but three of four Senates from 1879 to 1885 chose successors not from the president's party.<sup>13</sup> President Pro Tempore Ben Wade's conflict of interest during the 1868 Andrew Johnson impeachment trial showed another peril of legislative

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8. See, e.g., RUTH C. SILVA, PRESIDENTIAL SUCCESSION 113–14 (1951) (discussing the role that Jefferson's status played in various proposals); JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 57–62 (1965) (noting Madison's support for secretary of state as first successor and attributing Hamilton's opposition to his dislike of Jefferson); Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1021 (2010) (discussing the possible role of Madison and Hamilton's attitudes towards Jefferson in structure of law); Akhil Reed Amar & Vikram David Amar, Essay, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 132–33 (1995) (discussing the impact of rivalries on 1792 law).

9. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

10. From 1812 to 1886, there were ten vice presidential vacancies due to the deaths of five vice presidents and four presidents, and the resignation of one vice president. These ten vacancies existed during the presidencies of James Madison (twice), Andrew Jackson, John Tyler, Millard Fillmore, Franklin Pierce, Andrew Johnson, Ulysses S. Grant, Chester A. Arthur, and Grover Cleveland. On each occasion a president pro tempore was in place or was subsequently chosen and was next in line under the 1792 Act. See JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 314–15 (3d ed. 2014) (showing presidential deaths and vice presidential vacancies including during period in question).

11. See FEERICK, *supra* note 8, at 130–31, 141–42; Roy E. Brownell II, *The Executive Branch's Longstanding Embrace of Legislative Succession to the Presidency*, 52 U. MEM. L. REV. 281, 306–07 (2021).

12. See FEERICK, *supra* note 8, at 131–32 (describing election as Senate president pro tempore of Democrat Thomas F. Bayard and then-Independent David Davis to follow Republican Arthur in 1881); *id.* at 141 (describing election of Republican John Sherman as Senate president pro tempore to follow Democrat Cleveland).

13. *About the President Pro Tempore | Presidents Pro Tempore*, U.S. SENATE <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm> [<https://perma.cc/68LA-S2LD>] (last visited Nov. 3, 2022) (showing that the Senate elected presidents pro tempore who were not from the president's party during the Forty-Sixth, Forty-Seventh, and Forty-Ninth Congresses prior to enactment of 1886 law).

succession.<sup>14</sup> In 1886, secretaries of state seemed more presidential since six had been elected president whereas only one Speaker had.<sup>15</sup> Some also argued that the 1792 Act including the special election feature was unconstitutional.<sup>16</sup>

Congress enacted the 1886 law, placing the seven Cabinet officers after the vice president and requiring Congress to reconvene shortly after a Cabinet officer began to act as president, presumably to consider a special election.<sup>17</sup> So matters stood for fifty-nine years, until June 19, 1945, when new President Harry S. Truman proposed reinserting legislative leaders right after the vice president, but with the Speaker first, retaining Cabinet members after the legislative leaders, and with a special election to complete an unexpired presidential term.<sup>18</sup>

Truman had become president only two months earlier, upon Franklin D. Roosevelt's death, so the vice presidency would be vacant for 94 percent of his term, and the 1886 Act allowed him to nominate his successor. "I do not believe that in a democracy this power should rest with the chief executive," he said.<sup>19</sup> Truman thought the Speaker, who was elected to and by the House every two years, was closer to the people than the Senate president pro tempore.<sup>20</sup>

Truman acted in extraordinary times. America had just prevailed in a three-and-a-half-year war against Nazi Germany in May. Truman was taking a crash course on the U.S.S.R.'s authoritarian dictator, Joseph Stalin, and trying to end the war against Japan. Democracy, elections, and freedom were very much on his mind and in his heart. Truman's inherited secretary of state, Edward Stettinius, was a business executive without political pedigree. Moreover, presidential air and international travel were novel, esoteric, and a bit frightening in 1945. But, in the new world, presidents would be expected to travel overseas, as Truman would do to Potsdam in July, and they would often want the secretary of state alongside.

These new circumstances revealed a downside of the 1886 Act. Legislative succession didn't seem to pose much threat to party continuity, since the same party had controlled the presidency and the House almost 90

14. See FEERICK, *supra* note 8, at 114 (describing objections to Wade participating in President Johnson's impeachment trial when he was the "would-be successor" if Johnson were impeached).

15. The six former secretaries of state who were later elected president as of 1886 were Thomas Jefferson, James Madison, James Monroe, John Quincy Adams, Martin Van Buren, and James Buchanan. The one former Speaker of the House later elected president was James Polk.

16. See FEERICK, *supra* note 8, at 144–45 (summarizing constitutional objections raised to 1792 law in debates leading up to 1886 law).

17. See Act of Jan. 19, 1886, ch. 4, 24 Stat. 1, 1–2 (repealed 1947).

18. See Special Message to the Congress on the Succession to the Presidency, 1 PUB. PAPERS 128, 129–31 (June 19, 1945).

19. *Id.* at 129.

20. *Id.* at 129–30.

percent of the time since 1898.<sup>21</sup> Moreover, the parties and their leaders were less ideologically distinct than they've since become. Truman's proposal without the special election feature passed the House quickly but stalled in the Senate.<sup>22</sup> Truman had named former Senator James Byrnes secretary of state, which calmed Congress.

In November 1946, Republicans won control of both Houses of Congress, but three months later, Truman publicly repeated that, "in a democracy, [the power to pick the successor] should not rest with the Chief Executive."<sup>23</sup> He had favored putting the Speaker first when it was Democrat Sam Rayburn. He still did when it was Republican Joe Martin. The Senate considered legislation along the lines Truman proposed, but without the special election feature.<sup>24</sup> The proposal required a legislative leader or a Cabinet officer to resign to act as president and allowed a legislative leader to supplant the Cabinet officer as acting president.<sup>25</sup>

Senator Richard Russell moved to place the Senate president pro tempore ahead of the Speaker late in the Senate's deliberations.<sup>26</sup> Senator Russell was presumably lobbing a stink bomb, trying to kill the bill by tempting Republican senators to favor Republican President Pro Tempore Arthur Vandenberg over Speaker Martin. But Vandenberg opposed Russell's motion, echoing Truman's argument that the Speaker was closest to the people.<sup>27</sup> Freed by Vandenberg's statesmanship, Russell's motion was defeated<sup>28</sup> and all forty-seven Republican senators favored the measure, while thirty-five of thirty-eight Democrats opposed it,<sup>29</sup> a division that suggested the bipartisan allure of partisan thinking. The House passed the measure with few dissents<sup>30</sup> and Truman signed the bill in mid-July 1947.<sup>31</sup>

Seventy-five years later, the Presidential Succession Act of 1947 remains, but its history has not stood still. In 1967, the Twenty-Fifth Amendment created a means to fill a vice presidential vacancy, thereby reducing the likelihood that someone two heartbeats away will act as president.<sup>32</sup> Before then, a congressionally designated officer had been first successor sixteen times during fifteen of the thirty-six presidents, for 21 percent of our

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21. See FEERICK, *supra* note 10, at 316 (showing the parties of presidents and Speakers of the House from 1898 to 1945).

22. See FEERICK, *supra* note 8, at 207.

23. Letter to the President of the Senate and to the Speaker of the House on Succession to the Presidency, 1 PUB. PAPERS 122, 122 (Feb. 5, 1947).

24. See FEERICK, *supra* note 8, at 207.

25. See *id.* at 207–09.

26. 93 CONG. REC. 7780 (1947).

27. See *id.* at 7780–81.

28. See *id.*

29. See *id.* at 7786.

30. *Id.* at 8634–35 (recording vote of 365 to 11 in favor of the measure).

31. FEERICK, *supra* note 8, at 208.

32. See U.S. CONST. amend. XXV.

history.<sup>33</sup> In the fifty-five years since, a Speaker was first in line less than 1 percent of the time. Even so, who is two or three or four heartbeats away matters because a mass-casualty situation can happen and because the possibility of cross-party succession invites unscrupulous conduct and other problems.<sup>34</sup>

Legislative succession has governed for 169 of 230 years, a longevity that counts heavily for its constitutionality.<sup>35</sup> That doesn't mean it's still a good idea. Unlike our past, the president and Speaker now routinely represent opposing political parties. That's been true for thirty-six of the fifty-three years since 1969, more than two-thirds of the time. You elect Ronald Reagan, but could get Tip O'Neill. You elect Bill Clinton, but could get Newt Gingrich and so on. How many presidents pro tempore during that time were presidential, especially at that stage of their career?<sup>36</sup>

It's time to take another look at the 1947 Act, at least regarding most contingencies.<sup>37</sup> Yet history suggests change won't come easily. That's part of what Senator Birch Bayh discovered when his proposed Twenty-Fifth Amendment initially included a provision for Cabinet succession. He dropped that section upon realizing it would prevent Congress from addressing the more pressing gaps.<sup>38</sup> And Cabinet succession presents problems too.<sup>39</sup>

The 1947 law now needs review, but that doesn't make it a mistake in the context of the mid-1940s. It certainly shouldn't minimize our admiration for President Truman, who proposed a version of it and signed it. One might quibble that Truman might have taken a more nuanced view here and there, but how wonderful to have had a president whose guiding star truly was democracy with the humility to believe he shouldn't name his successor; someone who respected the coordinate political branches and elections, who experienced politics and saw it as an honorable vocation, who regarded legislative leaders in a positive light, and who stuck to basic principle, even when it hurt his own side.

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33. See FEERICK, *supra* note 10, at 314 (showing sixteen vice presidential vacancies prior to 1967 for more than 37 of 178 years, but for only six months since its ratification). Vacancies occurred during both four-year terms to which President James Madison was elected due to the deaths of his two vice presidents.

34. See Goldstein, *supra* note 6, at 84, 93–94; Goldstein, *supra* note 8, at 1027–32.

35. See Goldstein, *supra* note 6, at 87; Goldstein, *supra* note 8, at 1021–22 (arguing for relevance of long-standing practice in constitutional interpretation). See generally Brownell II, *supra* note 11 (providing extensive documentation of acts of executive branch during American history accepting and relying on legality of legislative succession).

36. See Goldstein, *supra* note 8, at 1029–31.

37. Cf. Goldstein, *supra* note 8, at 1024–27, 1036–40 (pointing out problems of Cabinet succession regarding pre-inaugural contingencies).

38. See Joel K. Goldstein, *Birch Bayh and the Twenty-Fifth Amendment: Lessons in Leadership*, 89 *FORDHAM L. REV.* 51, 69 (2020).

39. See Goldstein, *supra* note 8, at 1024–27, 1036–40.