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## The Presidential Succession Act at 75 | Problems with the Legislative Succession Provisions of the Presidential Succession Act of 1947

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## PROBLEMS WITH THE LEGISLATIVE SUCCESSION PROVISIONS OF THE PRESIDENTIAL SUCCESSION ACT OF 1947

*Dr. Norm J. Ornstein\**

It's important to emphasize how difficult it is to make changes to the presidential line of succession. It took two assassinations and two periods where there was nobody in the line to finally jolt Congress to do something to pass the 1886 Act<sup>1</sup> to make sure that we did have some form of succession. When we created the first Continuity of Government Commission after 9/11, we did not get a lot of traction, even though changing the line of succession did not require constitutional change. We saw the 1947 law<sup>2</sup> as very deeply flawed given contemporary circumstances.<sup>3</sup> Now we're making another go at it and we'll see if we can do any better. Of course, it was quite remarkable that Harry Truman, working with what he called the "Do-Nothing Congress," was able to get the 1947 law done.

Among the things that we in our commission work after 2001 felt uneasy about with the 1947 law was the legislative succession provisions. Joel Goldstein is right that all these decades in which we've had legislative succession gives some powerful impetus to the idea that it's legitimate,<sup>4</sup> but that doesn't mean that it is. Just because the provisions are there in law doesn't mean they are either clearly constitutional or appropriate.

I, among others, am a Madisonian in this regard.<sup>5</sup> I believe that the term in the Constitution empowering Congress to create succession "Officers," which uses a capital "O," has a particular meaning: it refers to an executive

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\* Emeritus Scholar, American Enterprise Institute; Advisor, Continuity of Government Commission. 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. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

2. Presidential Succession Act, 3 U.S.C. § 19.

3. See generally CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY (2009), [https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1001&context=twentyfifth\\_amendment\\_reports](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1001&context=twentyfifth_amendment_reports) [<https://perma.cc/Q25L-QR3Q>].

4. See Joel K. Goldstein, *History of the Legislative Succession Provisions in the Presidential Succession Act of 1947*, 91 FORDHAM L. REV. ONLINE 13, 17 (2022).

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)).

branch officer. That doesn't suggest to me that legislative leaders would constitutionally be able to serve here, having one foot in the legislative branch and then another in the executive. Of course, the way the 1947 law dealt with that was to say that if the Speaker or the president pro tempore were to succeed in this set of circumstances, they would have to resign from the office first.<sup>6</sup>

There are a lot of reasons to be uneasy about having legislative leaders in the line of succession, and these leaders in particular. First, if you believe in continuity of representation, voters choose a president and the idea is anathema that an assassination or a death in office—a double death, including that of the vice president—could put into the presidency someone who does not represent the party that was chosen by voters in the presidential election. That ought to leave all of us uneasy. An acting president in that scenario would potentially serve a full four years, given that this act has no special election provision. It's not a particularly good way to operate.

The second reason is that the president pro tempore by tradition is the most senior member of the majority party in the Senate. I happened to have the privilege of knowing Strom Thurmond. I've known most of the presidents pro tempore in the fifty years I've been around the Senate. I knew Thurmond at a time when he was in the line, and, frankly, he was non compos mentis, as we say. Most of the work that he did in the Senate was being done by his staff. It's not the case that everybody who's an octogenarian is incapable of serving at the highest levels, but we're taking an enormous risk by having that position close to the start of the line of succession.

Finally, I would add on this front that obviously there are just all kinds of conflicts of interest. Joel Goldstein mentioned the Andrew Johnson impeachment trial.<sup>7</sup> Benjamin Wade, the president pro tempore of the Senate, who was then next in the line of succession, voted for the impeachment and removal of Andrew Johnson.<sup>8</sup> We know he was already picking his Cabinet when, with one vote that was actually changed at the last minute, Johnson escaped removal from office, just by that slender margin of one vote.<sup>9</sup> Obviously, Benjamin Wade had a direct conflict of interest. An impeachment that moves forward in the House of Representatives pushed by a Speaker of the House, an extraordinarily powerful figure, could be done with an eye towards succession. Those kinds of conflicts, along with the possibility of discontinuity in representation, make it highly questionable as to whether, even if we consider it constitutional, legislative leaders should be in the line of succession.

I also want to mention that, of course, when the Presidential Succession Act now in force was created in the 1940s, many things were very different

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6. 3 U.S.C. § 19(a)(1), (b).

7. See Goldstein, *supra* note 4, at 14–15.

8. See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 114 (1965).

9. See *id.*; see also JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 214 n.† (2d ed. 1992).

from where we are today. It's not only that everybody in the line of succession resides in Washington, which is why our original Continuity of Government Commission wanted to add successors who are not based in Washington, D.C., and strip down the list of Cabinet members to those who might have some basic qualifications upon choice to move up to be president if that horrible effect occurred. They put in a provision based on the nature of transportation and the fact that Congress wasn't in session all the time in 1947. There was a fear that if you lost the president and vice president, the Speaker—who was next in line—might not be available, might be incommunicado. We didn't have a cell phone back then, didn't have an ability to be reached. And so the provision was made that the Speaker could, at a subsequent point, if somebody else immediately stepped in, assume the position because of the prime position of the Speaker following the president and vice president in the line of succession. If you think about that bumping provision, which means that a Speaker now could basically say: "You know what? I'm not going to take that post right now." It would devolve to somebody else, perhaps a member of the Cabinet, and at any subsequent point the Speaker could say, "okay, now I will take that position." This provision creates itself a whole series of conflicts with enormous power of the Speaker over the then-acting president.

We ought to change many things about this act, in my view. We ought to make sure that there's some protection, that people outside of Washington are available in case some horrible event occurs that obliterates the District of Columbia while everybody is there. We need to make sure that the people in the line are "Officers" of the United States, and have the training and qualifications to be president. Many Cabinet members are picked, not because they could actually step up to be president, but for geographical or other political considerations.

We ought to make sure that we have protection for our country under terrible circumstances. We ought to seriously consider having some kind of special-election provision so that we don't have potentially four years without the public's choice being in place. And we ought to reconsider, what was a mistake in our view and in my view, having legislative officers at the top of the line of succession.