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PROPOSALS TO REFORM THE 1947 ACT AND HOW REFORM COULD BE EFFECTUATED

*Dr. John C. Fortier**

Thank you to Fordham Law School, all the students and others who have been part of this conference, including John Rogan, Reb Brownell, and, of course, Dean Feerick, who not only is the former dean of Fordham Law School, but really is the dean of presidential succession studies. All of us have learned a lot from him and benefited from both his wisdom and practical experience.

I want to say my fellow panelists here may be the greatest collection of people who think about presidential succession since James Madison dined alone.¹ It may be a bad joke, but it also puts me on record as to where I stand: against including legislators in the line of succession, as James Madison was many years ago.² I know that most of the participants are probably on that side of the issue, but I very much appreciate Professor Tillman joining us and making some arguments in the other direction on the issue of legislative succession.³ I'm going to come back to those arguments a little bit later with some positive things to say about them.

The title of my remarks is supposed to be *Proposals to Reform the 1947 Act and How Reform Could be Effectuated*. I feel like I've been set up a little bit because it is a very difficult thing to effect change in this area. We, the Continuity of Government Commission, including a number of people here on this panel and conference, were also part of an earlier version of the Commission that issued a set of recommendations to Congress in the post-9/11 era. We're back doing some work now on continuity of Congress, which may be even a harder nut to crack.

I think the simplest point is that we haven't seen a lot of taking up of our recommendations. On some of the big issues, there has been a lot of interest, lots of talk, but it is hard to get things done. I don't want my remarks to be

* Senior Fellow, American Enterprise Institute; Executive Director, 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. See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 61–62 (1965).

2. See *id.*

3. See generally Seth Barrett Tillman, *A Defense of the Legislative "Officer" Succession Provisions*, 91 FORDHAM L. REV. ONLINE 23 (2022).

just a set of complaints about how hard it is, but maybe an elevated set of complaints, which look at some of the reasons why this has been hard to get done. Maybe we can think about some successes we had and some of the reactions that we saw in Congress to some of the things we were proposing. Again, I will not be too negative about prospects for legal change because Dean Feerick has been part of an effort to get a constitutional amendment enacted. If we can't get some legal changes done, or some legislative changes, maybe we're aiming too low here.

First, I think we should note how fortunate we've been that we have not had a death in the presidency in almost sixty years. It's the longest period of time we've had in our republic without a president dying in office. If you think about the period from when William Henry Harrison died in 1841, up to Kennedy's death in 1963, there was not a period of more than twenty-two years where we didn't have the death of a president plus many deaths of vice presidents. In some ways, we're living in an extraordinary time where the death of a president is thankfully not on the minds of people.

I don't want to say that every set of reforms has been driven by presidential deaths, but many have. Certainly, the Presidential Succession Act of 1947,⁴ our focus today, was driven by the death of Franklin Roosevelt and the succession of Harry Truman. The Twenty-Fifth Amendment⁵ had that dynamic with Kennedy's death, and the experience with Eisenhower's illnesses in the 1950s in the background, with many people remembering it very, very recently. Today, we have very few people who were adults and remembered very well the death of President Kennedy in 1963. I think that makes it difficult.

In thinking about reforms to the 1947 Act, there are many particulars that call out for reform. The biggest ones really have to do with mass-casualty situations. Maybe I'm thinking that because our Commission has been working on continuity-of-government issues; I'm thinking about these more extreme issues relating to mass attacks. Many things with the line of succession go fairly well if it's one president at a time: a death of a president, followed by perhaps later on another death of a president, in a sort of orderly way. But when we think about all the problems of multiple deaths, multiple deaths at a certain time, with the fog of war, changing circumstances, and the various institutions, that's where we really get into some of the difficulties.

This is where I'll say something about Professor Tillman's point. I don't think that it is just party continuity that is on people's minds when thinking about changing the Presidential Succession Act to take out congressional leaders. It is there, certainly. For the average person the idea of party continuity in presidential succession resonates. Why would we want a Democratic president out of the blue if we elected a Republican? More than just the party-succession idea, I do think that the prospect of mass vacancies and confusion around succession points to the problem of having members of Congress in the line of succession.

4. 3 U.S.C. § 19.

5. U.S. CONST. amend. XXV.

To Professor Tillman's credit, his proposal—which I'm not sure I endorse completely—putting the legislative people at the very end of whatever line of succession, is worth considering.⁶ I think we have all sorts of ways of improving the line of succession, but legislative leaders as an ultimate backstop is an argument that is reasonable in many ways, but also, would remove some difficulties, most of which arise because the current arrangement of legislative leaders in the line of succession can cause confusion. The difficulties with legislators in the line of succession come from the fact that there are situations, like many disability scenarios, when it's very complicated to think about the Speaker or the president pro tempore coming over to take the White House in the middle of a crisis. We think also of the so-called bumping provision, where one could imagine scenarios where there are presidents coming and going at various times. Having legislators in the line of succession in these scenarios adds confusion rather than clarity to the line of succession. But having legislators at the end of the line of succession, as an ultimate backstop if everyone in the line had been killed, would not cause the kind of confusion that our current law could invite.

One other side note on the issue of legislative leaders in the line of succession and how the current setup might be problematic, which is in the case of the impeachment and removal of a president. And here I would like to reference Dr. Fins's account of the Carl Albert speakership with some additional information.⁷

There was Ted Sorensen's role in this, which was part of a very partisan effort. There was a group of liberal Democrats, a smaller group, certainly not the majority of the caucus. One of the leaders was Representative Bella Abzug. At this point, we had the Twenty-Fifth Amendment in place, so there was a mechanism for Nixon to appoint a new vice president with the confirmation of both houses. What Abzug and others were arguing for was for the House to leave the vice presidency vacant, impeach and remove Nixon, and therefore ensure that Democratic Speaker Albert would become president. There is some reporting on this and I probably don't know the full account, but Speaker Albert was approached by Abzug and she said, “[g]et off your goddamned ass, and we can take this presidency.”⁸

There was an effort going on, and ultimately with Tip O'Neill's help and Albert himself, this pressure was resisted.⁹ I guess one other part of the story is that I actually, before 9/11 and before working on these issues, had run a project on transition memos, or presidential transitions. There is a whole history of transition memos, a famous set by the political scientist Richard

6. See Tillman, *supra* note 3, at 27.

7. See Joseph J. Fins, *Carl Albert, Bipartisanship, and Presidential Succession: Lessons from Watergate*, 91 *FORDHAM L. REV. ONLINE* 59, 60–63 (2022).

8. Ted Gup, *Speaker Albert Was Ready to Be President*, *WASH. POST* (Nov. 28, 1982), <https://www.washingtonpost.com/archive/politics/1982/11/28/speaker-albert-was-ready-to-be-president/84ebaa61-9cf1-4817-836e-a993e7e0e980/> [<https://perma.cc/J9EA-MFUT>].

9. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 47 (2d ed. 1992).

Neustadt, who wrote several for John F. Kennedy and some others for some losing candidates.¹⁰ There were some other people like Donald Rumsfeld and others who wrote them, but this is how we ran across the memos.

I actually remember them being longer than the nineteen pages,¹¹ so I'm going to have to go back to my files, but they were quite extensive. They were thinking through from a PR standpoint of how you would present the Carl Albert presidency to the nation; a person from another party taking over in the aftermath of impeaching and removing a president.¹² There was a real battle with Carl Albert and Tip O'Neil on the one side, who wanted to be more nonpartisan and ensure that the successor to Nixon would be of the same party, and others like Abzug who were pushing for the Democratic Speaker to take the presidency.¹³

Back to my point about what we should be thinking about in terms of why reform is so difficult. We've experienced the death of individual presidents. Very fortunately, we've not had a mass-death scenario, with multiple figures in the line of succession killed in an attack. We've not had this terrible, terrible thing happen, so we have a hard time even conceiving of it. I think that's one of the difficulties of members of Congress and others thinking about dealing with this issue. They see it as an interesting Tom Clancy scenario, but it's not real to them in a certain way, and once you start thinking about some of the trade-offs of this solution or that solution, they might want to talk about it, but to get them to really act in that way is difficult.

Again, I'm not going to spend my whole time complaining. Although, I do think that we have also seen some very pedestrian concerns about reform, people worried about offending the president pro tempore, wanting to take them out of the line of succession. My wife worked for a president pro tempore for quite a while in the Senate—not the favorite subject to bring up with the boss. You don't want to say, "well, why don't we take you out of the line of succession?" The Speaker even more so. Why would a House member really advocate that the Speaker or the Speaker of the other party be taken out?

One other specific matter we had proposed is the problem of an attack on Inauguration Day. We proposed to have some of the Cabinet members of the incoming administration nominated by the outgoing president shortly before or maybe even a few days before the inauguration, to sit in place as a backstop so that a new administration would have someone in place. The opposition

10. See, e.g., Memorandum from Richard E. Neustadt, Professor of Gov't, Columbia Univ., to John F. Kennedy, President-Elect (Oct. 30, 1960), <https://www.jfklibrary.org/asset-viewer/archives/JFKNSF/322/JFKNSF-322-019> [<https://perma.cc/82M8-ZJG3?type=image>].

11. See Memorandum from Theodore C. Sorenson, to Carl Albert, Speaker, House of Reps. (Nov. 8, 1973), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1004&context=twentyfifth_amendment_watergate_era [<https://perma.cc/H7YN-RBMX>].

12. See generally *id.*

13. See Mike Cathey, *During Nixon Impeachment, Speaker Albert Considers Resignation in Support of Bipartisanship*, MCALESTER NEWS-CAPITAL (Feb. 1, 2020), https://www.mcalesternews.com/news/local_news/cathey-during-nixon-impeachment-speaker-albert-considered-resignation-in-support-of-bipartisanship/article_33a1aa13-0292-542a-8707-83802bb6c6d8.html [<https://perma.cc/T2A2-PLDP>].

we got often was that nobody wants to have their commission signed by the previous president, especially if it's a president of the other party. Not the highest concern, but one that you certainly hear.

Again, I think that there are some reasons why this type of reform is difficult. I won't go through all of the reforms that our Continuity of Government Commission proposed in the post-9/11 period. We are reconstituted and doing some new work now: dealing with the issue of legislators in the line of succession and the question of not even the order but the quality of the line of succession—we propose having only the top Cabinet members be in that line. But at the same time, we are dealing with another issue, which is having members of the line of succession outside of Washington—we propose new offices be created so that there would be more protection against a more comprehensive attack that would affect many, many people.

We did propose a special election. That tends to get some uncomfortable laughs from members of Congress. I think there's real benefit, especially when one thinks about the possibility of a successor far down the line becoming president. Because of an attack or because of a problematic resolution of an election, perhaps a person is going to be put in the White House for four years and that person might not be seen as legitimate by the American people. So you have to go back to the people with a special election if the acting president is someone far down the line of succession.

Obviously, we run more complicated elections than we used to, but it still is worth thinking about that. That's the backstop for all the problems that we have, and all the imperfections that we might have in the line of succession. We might be able to just live with an imperfect successor for a while, until we have an election when the people could speak again and fill that term for maybe another three, three-and-a-half years. Then, finally, the inauguration scenario, which I think is a difficult one.

I do think one other strategy is to think about some very discrete reforms. I think the inauguration is one. And I will give Norm Ornstein credit for engaging in talks with some outgoing administrations to think about things that they might do, even nonlegislatively, in terms of what Secretary Johnson mentioned: having a Cabinet secretary or someone step away, or at least thinking about what the transition between administrations is going to look like with regard to this.¹⁴

Also, scenario planning: A.B. Culvahouse, who will be with us on a later panel and is co-chair of our government continuity Commission, stresses rightly that there's a lot of planning that goes on in the Executive Branch at the White House, and all through the Executive Branch, but not so much in Congress.¹⁵ Getting into that planning and having the people think a little bit more about some of the difficulties of the Succession Act is worthwhile. Many of them are aware of that and they're not policymakers per se. I still

14. See Jeh C. Johnson, *Keynote Address*, 91 FORDHAM L. REV. ONLINE 5, 6–7 (2022).

15. See Arthur B. Culvahouse Jr., *A White House Counsel's Perspective on Presidential Health and the Line of Succession*, 91 FORDHAM L. REV. ONLINE 79, 79–81 (2022).

think that a worthwhile strategy is going at some of these questions more directly and legislatively at the conference.

Finally, I would like to say that we always learn things at these conferences, and again, we have John Feerick to thank for not only his work on these issues, but for convening us at various times over the years. Many of us have seen each other before, some of us are new, but you always learn things. So the good work of these conferences is a way to push forward the scholarly debate on presidential succession, but might also spur us on to find new ways to get some of these reforms into place.