

THE TWENTIETH AMENDMENT, THE PRESIDENTIAL SUCCESSION ACT OF 1947, AND PRE-INAUGURAL PROBLEMS

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I'm going to say a little bit about how the 1947 Succession Act¹ interacts with the Twentieth Amendment with regard to succession issues that might arise before inauguration.² The Twentieth Amendment was conceived in the 1920s, mainly to shorten the lame-duck period between Election Day in November and the start of the new congressional and presidential terms.³

While Congress was rewiring the transition period, it also did something remarkably proactive. Congress reached out, particularly the House, to identify and fix some related problems with the transition, even though they were purely hypothetical.⁴ One of those hypothetical problems was a dead president-elect. So Section 1 of the Twentieth Amendment declared definitively that if the president-elect dies, then the vice president elect swears in as president on January 20.⁵

They also recognized that the president-elect and vice president elect might both die before being inaugurated or that the election might not have been resolved for either of them by Inauguration Day. Section 3 of the amendment authorized Congress to legislate a solution to that situation. Section 3 says, “the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.”⁶ The wording here is somewhat ambiguous, but this phrase “failure to qualify” was intended to cover both a

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1. 3 U.S.C. § 19.

2. See U.S. CONST. amend. XX.

3. See Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. LEGIS. 101, 113 (2017).

4. Cf. *id.* at 114–17.

5. See U.S. CONST. amend. XX, § 1.

6. *Id.* § 3.

double death and an unresolved election—both of those would constitute failure to qualify.

Now, the key feature of Section 3 is that it gives Congress a lot more leeway in providing for pre-inaugural succession than the Constitution does for the regular line of succession. First, Section 3 opens up succession to “persons,” not just “officers.”⁷ This allows for a much wider range of possible candidates, and it sidesteps entirely the constitutional questions raised about legislative succession.

A second important source of additional leeway is that Section 3 gives Congress two options for pre-inaugural succession. It can declare a predetermined line of succession the way Article II allows.⁸ But alternatively, Congress is empowered to provide a selection process which would make a choice on the fly.⁹

The sad truth, though, is that Congress has never actually taken advantage of the flexibility Section 3 gives it. By the time the Twentieth Amendment was ratified in 1933, the proactive 1920s energy that animated provisions like Section 3 and Section 4 had dissipated.¹⁰

Now, in Congress’s defense, the Great Depression represented pretty pressing business compared to hypothetical succession issues. Then we had World War II. But whatever the reason, the reality is that no Section 3 legislation passed between 1933 and 1947. Then, when the 1947 Act was written, Congress just tacked Section 3 issues onto regular succession.¹¹ It provided the same one-size-fits-all solution for everything: Speaker of the House, Senate president pro tempore, Cabinet.¹² This was a missed opportunity, and it’s bad policy. In my view, it’s one of the things about the 1947 Act that needs fixing.

There are multiple reasons why pre-inauguration succession should be distinct from the middle-of-the-term succession rather than one-size-fits-all. One reason is that in the middle of the term, the officers are typically well settled. But, on January 20, we don’t have the new Cabinet in place yet—we just have a bunch of acting secretaries and one designated survivor holding over from the previous administration. As for the Speaker and president pro tempore, if there’s some disruption with the presidential election that leaves it still unsettled on January 20, that disruption might also extend to congressional elections and prevent, or at least distort, the selection of the Speaker and president pro tempore too.

There are other differences. Continuity means something very different in the middle of the term than it does right as a new term starts. Similarly, it’s critically important to have an immediate replacement in the middle of the

7. *Id.*

8. *See id.*

9. *See id.*

10. *See* Kalt, *supra* note 3, at 145.

11. *See* Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19).

12. *See id.*

term, but a double death in December or early January would leave us with more time to work things out—to have a process. On that note, we might want different solutions for a disputed presidential election and for when a president-elect and vice president elect both die. A disputed election would be a very tense situation, but ideally a short-term one. We might want a short-term caretaker with no ambition to stay in office, but at the same time, who has the experience and gravitas needed to keep things cool during what would assuredly be a volatile time. Contrast that to a double-death situation where we need someone to assume the office for the entire four years, and we just had an election and ideally should have an acting president who aligns with a relatively clear choice that voters had made.

I have a few preliminary ideas for proposals that take stock of some of these differences. For instance, in the election-dispute scenario, the temporary caretakers, the ones with gravitas but not ambition: we might draw those from a pool of former presidents, vice presidents, secretaries of state—people who can step into the job on a moment's notice in a way that few others could. Although, as an aside, I think we would want to rule out allowing the sitting president or vice president simply to remain in office for reasons I hope are obvious.

Of course, in our current polarized partisan climate, one person's elder statesman is another person's devil incarnate. That's where Section 3's ability to designate a process rather than a person would come in handy. We could ensure consensus by designating a pool of possible candidates and requiring some sort of bipartisan agreement among congressional leaders to sign off on a choice. Maybe they wouldn't be able to, but we would have a backstop, a clear default provision, and a strict time limit, but ideally have a choice, consensus, and a process.

For a permanent replacement, I think we should have serious consideration given to a new election. A Section 3 law could designate a caretaker while a new national campaign is held. Alternatively, the House could choose the new president, similar to the way it would if there were a double death in the middle of the term and the Speaker stepped in. Here, their choice would be purpose built, and it could be drawn from a much wider pool. At the same time, the law could restrict the choices to members of the dead president-elect and vice president elect's party, or require a supermajority, again, to ensure consensus.

All of these are only suggestions of course. The point is that Congress is empowered by Section 3 to have a much more nuanced system for pre-inaugural succession than the one the 1947 Act provides. There are a lot of good reasons for Congress to use its Section 3 power instead of completely neglecting it, as it has for the last eighty-nine years.