

THE BUMPING PROVISIONS OF THE PRESIDENTIAL SUCCESSION ACT OF 1947: POLICY AND CONSTITUTIONAL CONSIDERATIONS

*Americo Cinquegrana**

My job, my focus is on the potential for the so-called bumping provisions of current statutory law to lead to uncertain succession and to infringement on the functions of the presidency. This danger is aggravated because it would manifest itself in a time of crisis when the need for stability and predictability is at its highest.

It's important to set a framework for the operation of the succession statute. The current version of the presidential succession statute, in place since 1947, expresses a clear preference for elected officials from Congress to fill a presidential vacancy.¹ Thus, the Speaker of the House and the president pro tempore of the Senate, in that order, may become acting president if they were to resign from their congressional offices. If they're unable or unwilling to do so, the statute then lists the fifteen Cabinet positions in order of their creation, and provides that the occupants of those positions may become acting president if they resign from their positions.²

However, the statute takes the preference for elected officials to an extreme level. A Speaker or a president pro tempore who is unable or unwilling to resign and become acting president is empowered to change his or her mind and displace any Cabinet officer who has resigned from the Cabinet and become acting president.³ Even a subsequent Speaker or president pro tempore will have this power, regardless of the decision of their predecessors to refuse to become acting president. This arrangement clearly sets the stage for uncertainty and an unbalancing of the separation-of-powers principles that protect the presidency from overbearing legislative influence. In addition, it is obvious that extremely rapid and decisive action is necessary

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1. *See* Presidential Succession Act, 3 U.S.C. § 19.

2. *See id.* § 19(d)(1).

3. *See id.* § 19(d)(2).

to fill a leadership vacuum at the highest levels of the executive branch. Unfortunately, the statutory succession process allows for just the opposite: delay, confusion, and even chaos.

You can all read the statute. My time is limited. Thus, I'm not going to refer to specific sections and subsections of the law. Thank goodness. Instead, I'll use a not-too-unrealistic scenario to illustrate how the statutory process might play out and what damaging effects it might have in a crisis, so bring your imaginations into operation here. Bear with me.

Assume it is July 2024, and the Republican Party controls both the House and the Senate. The 2024 presidential campaign involving almost thirty candidates has been underway for months and will culminate in November. The guerilla war in Ukraine is into its third year. Inflation is approaching 25 percent. The great recession of 2022 continues. The six-millionth undocumented migrant has crossed the southern border. The first cases of the Omega variant of COVID have been identified in Arizona. And Communist China is threatening a naval blockade of Taiwan.

The burden on the president of the United States is crushing. To make matters worse, Vice President Harris resigned from the vice presidency a few weeks earlier to become ambassador to the United Nations and bolster her foreign policy credentials during her run for the presidency. President Biden has defied his advisors and has been working tirelessly to nominate former Speaker Pelosi as interim vice president. Tragically, the stress of the moment causes him to suffer a massive stroke and lapse into a deep coma.

Since there is no vice president in office, both of the highest executive branch offices now stand empty. The only way to fill those positions until the presidential election is for one of the officials identified in the statute to agree to become acting president, and then to nominate a vice president under the Twenty-Fifth Amendment.⁴ But no one is responsible for central management and coordination of the statutory succession process. As a result, each of the individuals involved, each official, is left to make critical decisions in a very personal, uninformed, and uncoordinated way.

House Speaker Kevin McCarthy considers resigning to become acting president. After a two-day delay, he declines to give up the congressional office he has waited years to occupy in exchange for only five months as acting president. Senator Charles Grassley, who finally has achieved his dream of becoming president pro tempore, is next to face the decision of whether to become acting president. After another two days, he bows to the cautions of his wife regarding the stress of the presidency at age ninety-one, and also declines.

As a result, the action moves to the Cabinet. Secretary of State Blinken has only recently left that position to become ambassador to an expanded NATO. Secretary of Treasury Yellen has also left to become head of the World Bank. And, as Secretary Johnson noted in his keynote address, acting

4. *See* U.S. CONST. amend. XXV.

secretaries are not eligible to become acting president.⁵ Next on the list, Secretary of Defense Austin, who is camping in Moldova, has a malfunctioning cell phone and cannot be reached by helicopter for six hours.

Several days have passed already and there's still a leadership void in the White House. The urgency is building and the decision falls to number four on the list: Attorney General Garland. Still smarting at being denied a U.S. Supreme Court seat, he looks at the chance to make history, resigns, and is sworn in as acting president by Chief Justice Roberts. The crisis has abated. Stability has been restored. The country breathes a sigh of relief. However, this is Washington, D.C., and political considerations begin to creep onto the stage.

Speaker McCarthy is persuaded to resign temporarily to allow Jim Jordan to be elected Speaker by the Republican majority in the House. McCarthy does this on the condition that Jordan will step down and McCarthy will return as Speaker. Since Jordan faces no opposition to reelection, he is assured of returning to his House seat after the election. Jordan's first action as Speaker is to call Acting President Garland. Jordan subtly reminds the acting president of the power of the Speaker to become acting president in his place and asks for an urgent one-on-one meeting at the White House later that day.

At that meeting, Speaker Jordan reminds Acting President Garland of the former attorney general's inaction on House Judiciary Committee requests for classified documents relating to Chinese Communist Party corrupt influence in the United States. He also recalls Garland's failure to honor a request from the House Freedom Caucus led by Jordan for the appointment of a special counsel to investigate the allegations against the Biden family that have resulted from the contents of Hunter Biden's laptop.

Summing up, Jordan explains that Acting President Garland has a choice. He may order that these two actions be taken immediately and remain acting president, or else Jordan will supplant him as acting president and do it himself. Garland asks for a few days to consider his options. Jordan gives him one hour—for two reasons. First, he's been informed that President Pro Tempore Grassley is reconsidering and may decide to race Speaker Jordan to the acting presidency. Since the congressional officers cannot supplant one another, the Speaker will lose his claim to the presidency if that happens. Second, he fears that Garland may ask the Supreme Court for an emergency order that will bar unseating the acting president pending a full hearing on the constitutionality of the statute. Meanwhile, the nation and the world are watching and waiting apprehensively.

Certainly, the various elements of this scenario are unlikely to occur in exactly this way. To quote John Lennon: "You may say that I'm a dreamer, but I'm not the only one."⁶ Whether it's likely or not is beside the point. Arguing the hypothetical does not resolve the real issues it reveals. This

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

6. JOHN LENNON, *Imagine*, on *IMAGINE*, at 1:31 (Apple Records 1971).

illustration is intended to demonstrate that the succession statute clearly has the potential for institutional chaos and for legislative officers to exert existential influence over an acting president.

This seems to be exactly what the Framers sought to avoid by embodying specific separation-of-powers principles in the Constitution. Thus, if there is time for Supreme Court review in such a case, the statute may not survive. The harm is that, in an extreme emergency, neither may the country.