

THE 1947 ACT AND THE JUDICIARY: WOULD THE COURTS DECIDE WHO IS PRESIDENT?

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It's a pleasure to be with you to discuss presidential succession issues today. I am addressing the topic of the justiciability of presidential succession issues under the 1947 Act¹: If we actually had a dispute over who was entitled to serve as acting president in the event of a dual vacancy or inability of the president and vice president, would the courts decide it?

Wind back the clock two years: you have Speaker Pelosi, and you have a Republican president and a Republican Cabinet. Had both President Trump and Vice President Pence been killed or incapacitated by COVID, it's not too hard to imagine a dispute over the Speaker succeeding to the presidency, particularly in the partisan environment of the time—a partisan environment we continue to have today. Speaker Pelosi the other day said, "I fear for our democracy if the Republicans were ever to get the gavel. We can't let that happen."² Both sides of the aisle hold this view that it is an existential risk to lose control. It's very easy to see a situation where the constitutional debate over whether legislative officers can be in the line of succession would result in litigation in the courts, with competing claims by the Speaker of the House and, say, Secretary of State Pompeo, and somebody goes to court.

While that litigation is pending, you can imagine what is playing out in the country. You have Speaker Pelosi claiming to be the legitimate president. She gets sworn in, say, by the head of the Judiciary Committee. We're used to seeing the chief justice do swearings in, but that's not constitutionally required. In the meantime, Secretary Pompeo gets sworn in, perhaps supported by an opinion produced by the Republican attorney general. You can see the real possibility of these competing claims.

Would the courts jump in to resolve it? Steven Calabresi and others have made the argument that the courts would and should perhaps stay out of this,

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1. Presidential Succession Act, 3 U.S.C. § 19.
2. Cristina Marcos, *Pelosi: 'I Fear for Our Democracy' if Republicans Win House*, HILL (Mar. 28, 2022, 9:15 PM), <https://thehill.com/homenews/house/600120-pelosi-i-fear-for-our-democracy-if-republicans-win-house/> [<https://perma.cc/YDQ3-3S56>].

that it is a political question.³ It is my own view that they both would and should jump into it and decide the question. I'm going to approach that first through my own lived experience with presidential-succession issues. As was mentioned, I served as counsel to Vice President Pence from March 2020, through the end of the administration and in the space of a week in January 2021, confronted two presidential-succession issues. First, we had January 6, when there were questions of the transition of power, whether objections could be made, whether electoral votes could be rejected in Congress, and who had the power to do that. These questions could determine control of the presidency. Second, the following week there was a call by the House of Representatives for Vice President Pence and the Cabinet to invoke the Twenty-Fifth Amendment.⁴

The Electoral Count Act⁵ and the Presidential Succession Act are in my view very similarly situated in terms of whether the courts would get involved in a dispute over who is the rightful president. The Electoral Count Act makes it very clear that the vice president's role is purely ministerial.⁶ It purports to say that the role of Congress is anything but ministerial and that Congress has the authority to reject electors.⁷ Then you have the underlying text of Article II, Section 1 of the Constitution,⁸ which John Eastman and others argued accorded the vice president a more aggrandized role to decide the validity of electoral votes.⁹ You had competing arguments that Article II, Section 1 doesn't allow Congress to decide objections to electoral votes either and that it had to be resolved by the states.

We actually were sued. The vice president was sued on December 28, 2020, by Representative Louis Gohmert and the would-be slate of Arizona electors for President Trump, who sought a declaration from the court that the vice president had the authority and should be compelled to exercise his authority to decide who the correct electors were, from the states that the lawsuit characterized as disputed.¹⁰ There were a number of problems with this lawsuit: the standing of a congressman to raise this; the standing of would-be electors to raise it; the fact that the lawsuit was actually brought against the vice president and the vice president alone, seeking to have him declared essentially emperor of the universe with respect to deciding the

3. See, e.g., Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 175 (1955).

4. U.S. CONST. amend. XXV; see H.R. Res. 21, 117th Cong. (2021).

5. 3 U.S.C. § 15.

6. See *id.*

7. See *id.*

8. U.S. CONST. art. II, § 1.

9. See Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), <https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html> [<https://perma.cc/6YYK-T89S>].

10. See Kyle Cheney, *Gohmert Suit May Force Pence's Hand in Effort to Overturn Trump's Defeat*, POLITICO (Dec. 28, 2020, 2:21 PM), <https://www.politico.com/news/2020/12/28/gohmert-suit-pence-overturn-trumps-defeat-451485> [<https://perma.cc/P7QK-55LR>].

validity of electoral votes and thus the presidency. Usually you don't sue the party that you're trying to empower.

We had all of those arguments, but many lawyers in the government thought we should argue political question doctrine as well. It was another available argument to just make this lawsuit go away and say: "Look, we have here a question, who has the authority between the vice president and Congress or the state to decide this thing? This is a question committed to the political branches. The friction between those branches should work it out." Now, if anybody takes a look at the briefs that were filed, political question doctrine was not argued. It was our very firm position in the vice president's office that it would have been a terrible idea for the United States government to commit itself to the position that this was a political question, and that it would indeed have been potentially disastrous for us to have done so. I think it's very public now that I had a debate with John Eastman about a week after that in January, and he expressed disappointment that nobody had argued that this was a political question that the courts wouldn't decide. That had been a very deliberate decision on our part. It was our view that the courts had to decide it.

Very briefly, what is the political question doctrine? The foundational case, *Baker v. Carr*¹¹ in 1962, suggests that it is not for the faint of heart to try to define what exactly the political question doctrine is. The Court there said, "attributes of the doctrine . . . in various settings, diverge, combine, appear, and disappear in seeming disorderliness."¹² That probably does accurately describe the jurisprudence here. Generally, it's a doctrine of judicial humility: the idea that somebody else is supposed to be deciding this question, not us, the courts.

For example, take *Nixon v. United States*,¹³ which dealt not with President Nixon, but rather with Judge Nixon, who was impeached by the House and then tried by the Senate. The judge didn't think he had gotten fair trial procedures and sued to have the Supreme Court declare that the procedures had been improper.¹⁴ The Supreme Court said, "no, the manner of the trial is committed to the Senate to decide. We are not going to get behind it."¹⁵ Similarly, in *Luther v. Borden*¹⁶ in the 1840s, there were actually two competing state governments in Rhode Island.¹⁷ The Supreme Court decided that question had been committed to the President and Congress to work out, at least in the particular context of that lawsuit.¹⁸

11. 369 U.S. 186 (1962).

12. *Id.* at 210.

13. 506 U.S. 224 (1992).

14. *Id.* at 228.

15. *See id.* at 230–34 (paraphrasing the Court's holding that the word "sole" in Article I, Section 3, Clause 6 of the Constitution indicates the delegation of impeachment authority to Congress alone to the exclusion of the Court).

16. 48 U.S. (1 How.) 1 (1849).

17. *See id.* at 33.

18. *See id.* at 42–43.

The existence of some designated decider other than the courts is the basic idea of the political question doctrine. This arises both with respect to the Electoral Count Act and these Presidential Succession Act issues. The courts look to whether there is a demonstrable constitutional commitment of this question to some actor other than the judiciary. Are there judicially manageable standards here? Would deciding this require us to make a policy determination?

What I would submit is that both in the case of the Electoral Count Act and in the case of the Presidential Succession Act, the courts would and should intervene, because if they don't, there is no other actor to decide this question. It is not a situation where there is a demonstrable constitutional commitment to someone else to decide in either instance.

With respect to the Electoral Count Act, you have the possibility of a standoff between the vice president and the Congress. Imagine in a counterfactual universe that a less committed constitutionalist was vice president, and he got up and said, either, "I am hereby unilaterally rejecting the electors from all of these states and declaring that Donald Trump is the next president." Or he got up and said, "I'm hereby suspending the joint session so that the state legislatures can reexamine and recertify the electoral votes," and Congress vociferously disagrees. Congress is jumping up and saying, "you don't get to decide that question." Essentially, what we have is that the two actors who are involved in this completely disagree, and there is no neutral arbiter to decide. The way that we frequently talked about it was, if it is not going to be the courts to decide in that scenario, it's going to be decided in the streets. I think that the courts would very much realize that was the case and that they needed to jump in. It is not demonstrably committed to anyone else to decide *who* the decider of the validity of electoral votes is. If you got into a different question of whether or not a particular electoral vote should or should not be rejected, that might well be viewed as a political question, but not the antecedent question of who the decider of electoral votes is.

There are very clear discernible standards in the Constitution that govern that question. You have a statute that says one thing, you've got arguments that Article II, Section 1 says something else. The same thing is true in the Presidential Succession Act scenarios. Here you're talking about Speaker Pelosi and Secretary Pompeo both claiming to be the legitimate acting president of the United States. One of them because the Succession Act says so, and the other because they are the next listed officer in the Succession Act that has a constitutional claim to the presidency if legislative officers can't validly be included. If the courts don't resolve that question, who is going to?

You could imagine a declaratory judgment action being brought by somebody in the government essentially saying, "I need to know whose command I am supposed to follow, Pelosi's or Pompeo's." I think the courts will decide that question. Now, I will give a caveat there, which is one could imagine a scenario where no potential candidate for the presidency has actually brought a constitutional challenge. Let's say the Speaker stands up,

says, “I’m acting president.” Pompeo says: “You know what? In this moment, in light of settled expectations, in light of the costs to the Republic of having a dispute over this, I get that there are constitutional arguments, but I’m going to just lay down on those and not fight it out.” You could still, in theory, have somebody who’s committed to one camp or the other bring a lawsuit to try to have it declared that no, Pompeo must be the acting president. This would be somewhat equivalent to our situation with the Gohmert lawsuit.¹⁹

I think if the political actors involved had seemingly settled the question and it seemed to be worked out, and then somebody brought the lawsuit, even though they might have standing, claiming that they need to know whether they should follow a command given by the acting president or not—I think there the courts might well stay out of it and say it appears to us that this has been settled by the political branches and we’re not going to unsettle the question. We don’t need to resolve this right now. But I think in an actual scenario when there were two competing claimants to the throne, as it were, the courts would and should intervene.

19. *See* Cheney, *supra* note 10.