

THE INCUMBENCY “REQUIREMENT” IN THE PRESIDENTIAL SUCCESSION ACT OF 1947: POLICY AND CONSTITUTIONAL CONSIDERATIONS

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Much of what we do in studying the Succession Act¹ or anything with this issue is always done in a reactive sense: this happened, and so we react to it. Being able to do this in a proactive sense is certainly much needed and would be greatly appreciated. I’ll be talking today about the requirement for resignation under the line of succession statute.

If the Speaker of the House or Senate president pro tempore served as acting president, Article I, Section 6 of the Constitution would require them to resign their previous positions.² Now, the provision itself is not controversial. I haven’t heard any viable arguments that someone in Congress should be able to hold dual positions. The removal aspect of the statute with respect to lawmakers is really not under consideration here. What the issue presents is that it actually places the Speaker and Senate pro tempore in a position that I feel is unfair.

It is not so much hypothetical, because I’m going to use the example of the Reagan assassination attempt, but to place the Speaker and the Senate pro tempore in this position, the following would occur. One, let’s assume again a dual vacancy; there’s been some type of attack, health crisis, what have you, and the president and vice president, or both, are incapacitated. Now, I say incapacitated because had they died, that makes the decision a little easier for the Speaker or Senate pro tempore, notwithstanding, of course, the dangers of the bumping provision, which Rick Cinquegrana discussed.³

What if a president or vice president is disabled? Well, the Speaker of the House or Senate president pro tempore are then faced with a very difficult

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

2. U.S. CONST. art. I, § 6.

3. See generally Americo R. Cinquegrana, *The Bumping Provisions of the Presidential Succession Act of 1947: Policy and Constitutional Considerations*, 91 FORDHAM L. REV. ONLINE 33 (2022).

proposition. Do they choose to resign their position to assume the presidency? How long will they be assuming the presidency? We simply don't know. How long will the disability last? How long will the president or vice president be incapacitated?

You can imagine that if they are asked to resign their position to serve for a period of hours or something like that, most, if not all, would decline. As we also know with health crises, things can change very rapidly. What if later on a president or vice president who was assumed to be temporarily disabled turned out to have a prolonged disability? Certainly, that would change the lawmakers' calculus.

The other aspect this brings into play with the resignation requirement is that, along with placing the Speaker in an interim position, it also places the Senate president pro tempore in a very precarious political position. The Speaker would have to resign. Now a Speaker cannot merely return to the Speaker's chair after their time in office serving as acting president has ended. They would face the realization that they would have to run perhaps in a special election at some point, or for re-election, to return to their House seat and then potentially supplant a new Speaker, because, of course, a new Speaker would be selected. That's not to say it couldn't happen, but it is to say it's by no means a sure thing and it would place the former Speaker in a difficult position of having to accomplish those things.

Now, with the Senate president pro tempore it's a bit different. The president pro tempore's Senate seat can, under most states' laws, be filled by a state governor,⁴ so the assumption might be that the state's governor would merely appoint the senator who had resigned to serve as acting president in a time of national crisis. However, the impact of partisanship must be considered. What would occur if a governor and president pro tempore who had resigned are from different parties? This would then present that state governor with a chance to maybe swing the composition of the Senate. We need look no further than the Senate right now, with a fifty-fifty split. With any potential change, we would imagine any state governor, even if they chose to be bipartisan and maybe had it in their heart to just reappoint the Senator in question, we can imagine the pressure they would face from their party, and from party leaders in the state and in all fifty states, pressuring them to say: "No, here's our chance. Perhaps we can gain a majority."

It really places the Speaker of the House and the Senate president pro tempore in an unfair position. They have to act quickly. They may not have all the facts. They may not have a full understanding of what's going on. And they are being asked to make a monumental decision without any real chance for deliberation.

As an example of this, I want to take a look at the uncertainty surrounding the Reagan assassination attempt on March 30, 1981. Now at the time, of

4. *Filling Vacancies in the U.S. Senate*, BALLOTPEDIA, https://ballotpedia.org/Filling_vacancies_in_the_U.S._Senate [https://perma.cc/5WEF-DPT9] (last visited Nov. 3, 2022) (showing that, in thirty-seven states, vacancies in the Senate are temporarily filled by gubernatorial appointment).

course, as fate would have it, Vice President George H.W. Bush was on Air Force Two.⁵ The communications were very spotty.⁶ There was a problem reaching him.⁷ Logically, the next in the line of succession was Speaker Thomas “Tip” O’Neill and Senate President Pro Tempore Strom Thurmond. Now, we really don’t see any evidence that this was considered, but you can imagine the complete lack of appeal to Speaker O’Neill if someone went to him and said: “Would you care to resign to serve essentially in a caretaker position perhaps for an hour or two until Vice President Bush returns and, if needed, assume the presidency?” Again, it’s hard to believe a Speaker would resign their position, in particular one as powerful as Tip O’Neill, or any contemporary Speaker, just merely to assume the presidency for a period of a few hours.

Let’s go to the Senate president pro tempore. There’s no evidence that Strom Thurmond was approached, but had he acted as president, the governor of South Carolina at that time was a Democrat. Potentially, you would have had the chance of a governor choosing to improve their party’s fortunes, perhaps nominating a Democrat. What would that have meant for Strom Thurmond’s career in the Senate? Again, there’s no evidence that took place, but that lack of evidence doesn’t preclude the problems presented.

The problem that did manifest itself during the aftermath of the Reagan assassination attempt obviously involved Secretary of State Alexander Haig going to the podium and declaring, “I am in [charge] here,” and misstating the line of succession.⁸ To give Haig a little bit of, not excuse, but maybe a little bit of cover for that, Haig mentioned, and others in the Situation Room that day remarked as well, about Larry Speakes’s remarks to the press.⁹ Speakes, the acting press secretary, was thrust into duty because of the injury to James Brady during the attack on Reagan. He appeared very unsure of his answers and was not clear on who was in charge.¹⁰ Haig took it upon himself to say, look, the nation, the world needs to know someone is in charge here: “I am in [charge] here, in the White House, pending return of the vice president . . .”¹¹ We have the very infamous quote. In Haig’s defense, he really was placed in a position of no one being quite sure who was in charge.

Again, there is no evidence that the Speaker and the president pro tempore were approached, and, even if they were, it is impossible to imagine they would’ve taken the opportunity to serve as acting president. That creates that period of instability and danger that we can see with both a legislative line of succession and also this resignation requirement. There’s simply no recourse for a temporary change, as we would see with Section 3 of the Twenty-Fifth

5. See DEL QUINTIN WILBUR, RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN 131 (2011).

6. See *id.*

7. See *id.*

8. *Id.* at 173–75.

9. See *id.* at 171–73.

10. See *id.* at 171–74.

11. *Id.* at 175.

Amendment, for a Speaker to perhaps step aside from their position to serve and then return to the speakership or as a president pro tempore later on.¹²

Presidents have faced divided government. Every president since Richard Nixon, with the exception of Jimmy Carter throughout his term and Joe Biden of course with the midterm election still pending, has faced not only an opposition of Congress but an opposition Speaker. This is not just a scenario where five or ten different things would have to happen for such an event to take place. This is a scenario that is likely to happen. The numbers bear that out. There is much more of a likelihood of a president facing a Speaker of a different party.

We also run into an issue with any potential health crisis. Of course, we may have seen instances of this with President Trump and the COVID diagnosis back in 2020.¹³ How forthcoming is any presidential administration going to be with a potential health crisis? Now, add to that fact the potentiality of perhaps a Speaker of the House from the opposition party assuming the presidency. There almost appears to be more of a benefit, for lack of a better term, for a president or an administration to attempt to cover up, or perhaps not be as forthcoming as we would like about, their medical conditions.

To conclude, the 1947 Act certainly has a number of provisions that are beneficial, but the resignation requirement is one that presents a danger: one, for the shift in party control, which several of the other speakers have done a great job of mentioning; also, the resignation requirement that, with an incapacitated president and vice president, a Speaker or president pro tempore might refuse to serve as the acting president. Then imagine things change—perhaps that's not going to be a brief period of dual incapacity and maybe their calculus changes. It's not to say the Cabinet line of succession is perfect by any stretch, but it is certainly safer in this regard.

12. See U.S. CONST. amend. XXV, § 3.

13. See Peter Baker & Maggie Haberman, *Trump Tests Positive for the Coronavirus*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/trump-covid.html> [https://perma.cc/8Q6G-T9UM] (Dec. 31, 2020).