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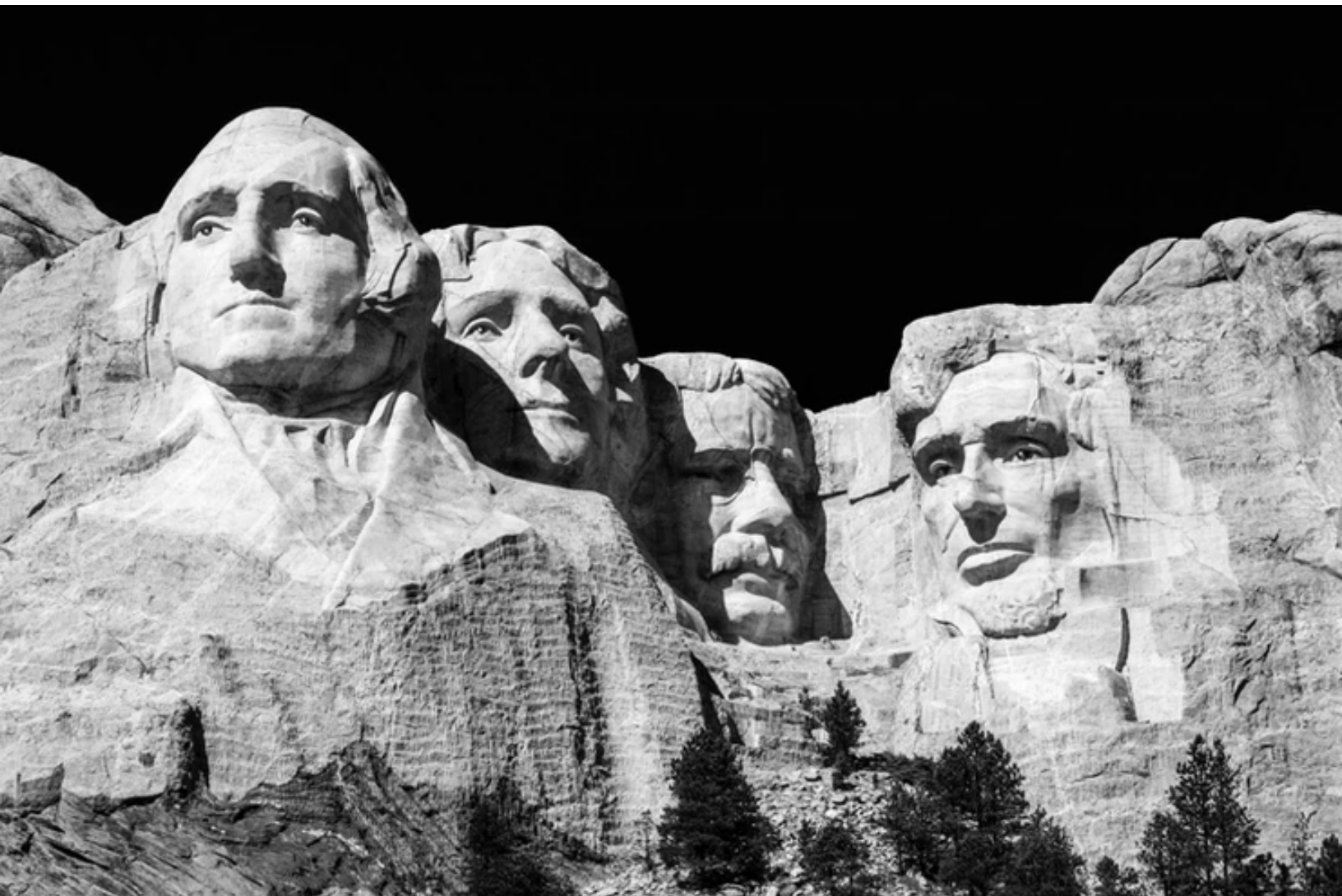
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Rethinking Presidential Succession After Covid-19

** By: Kevin Rizzo*



While the process of presidential succession is not typically high on the list of concerns most people have about the American government, presidential succession has risen in salience during the onset and continued spread of the coronavirus pandemic. For a brief period in early October 2020, presidential succession made its way close to the top of that list when President Donald Trump revealed[1] he tested positive for Covid-19—a potentially deadly virus—and also seemed to have exposed the vice president.[2] Although the worst fears of a succession crisis seem to have abated, the episode arguably brought the issue of succession to the forefront of public consciousness. If an actual succession crisis were to occur, however, looming constitutional problems in the current statute mapping the line of succession—combined with the current divided and highly polarized government—could spin a succession crisis out of control.

Article II of the Constitution and the Twenty-Fifth Amendment set forth a straightforward process for transferring power from the president to the vice president.[3] The Twenty-Fifth Amendment also created a way for the president to relinquish power to the vice president while temporarily incapacitated, and it enabled the vice president and the cabinet to temporarily declare the president unable to

discharge the duties of the office in the event of an emergency.[4] For the line of succession beyond the vice president, the Twenty-Fifth Amendment, and Article II authorize Congress to establish the procedures by law.[5] The law currently in effect, the Succession Act of 1947,[6] delineates the line of succession many Americans are familiar with from high school civics classes or popular culture. Following the vice president in the line of succession are two leading members of Congress, the speaker of the House and the president pro tempore of the Senate, followed by several executive branch officers nominated by the president and confirmed by the Senate.

In the event that presidential power needs to be transferred from the vice president to the speaker of the House, there are untested constitutional questions in the 1947 law that might turn a tragedy into a constitutional crisis. Chief among those questions is the meaning of the term “officer.” Article II specifies that Congress can designate by law the subsequent line of succession in the event both the president and vice president die, are removed from office, resign, or are incapable of discharging the duties of office.[7] But the text indicates that Congress can do so by “declaring what *Officer* shall then act as President.”[8] Scholars like Akhil and Vikram Amar have argued that “officer” is a short-form reference to formulations of the term “Officer of the United States,” which have a specific meaning and would exclude legislators from eligibility in the line of succession.[9] These scholars note that the Constitution’s Compatibility Clause[10] prohibits members of Congress from simultaneously holding “any Office of the United States,” which indicates legislators are not officers under the Succession Clause.[11] Finally, they make the structural policy argument that allowing legislators to be in the line of succession would create a conflict of interest in impeachment proceedings, as they would be incentivized to seek to remove the president from office to aggrandize themselves.[12]

Others have argued that although the Amars raise open constitutional questions, there is a plausible reading of the text of the Constitution and U.S. history that might allow the Succession Act of 1947 to withstand a court challenge.[13] John Manning argues that the use of the word “officer” in the Succession Clause, and nothing more, indicates that it can be read more broadly and is not necessarily confined to “Officers of the United States.”[14] The Incompatibility Clause, likewise, could be read to distinguish “holding” an office, which it prohibits, from “act[ing]” as president, which is what the Succession Clause calls for.[15] Manning also points to historical practice, dating back to the First and Second Congresses, as an indication that the founders contemplated having legislators in the line of succession.[16] Although it was subject to considerable debate, the Succession Act of 1792 included the president pro tempore of the Senate and the speaker of the House in the line of succession. Ultimately, however, Manning joins the Amars in their call to reform the statute. The exigency of having succession questions settled ahead of time, leads Manning to conclude that avoiding such challenges in the first place would clearly be preferable.[17]

Given the constitutional uncertainties surrounding the Succession Act of 1947, and the crisis scenario posed by the death or incapacitation of both the president and vice president, a succession fight in the midst of a crisis would amount to adding fuel to an already blazing fire. Today’s divided government, with a Republican president and executive branch and a Democratic speaker of the House, would provide ample incentive for a showdown. Were such a crisis to occur today, Speaker Nancy Pelosi would, by law, become the acting president, but Secretary of State Mike Pompeo—who is the first executive branch officer in the line of succession following the two legislative officeholders—could likely claim authority on constitutional grounds.[18] With high levels of polarization between the parties, the stakes involved in a fight to secure the presidency would be extremely high. Hypothetical scenarios abound. For example, Secretary Pompeo might credibly fear that a President Pelosi would withdraw the pending Supreme Court nominee and decide to challenge the constitutionality of her authority. Removing legislative branch officials from the line of succession, as Congress did in 1886,[19] may prove to be the best approach to avoiding an emergency situation, albeit an unlikely one, from spiraling further out of control.

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- [1] Donald Trump (@realDonaldTrump), Twitter (Oct. 2, 2020, 12:54 AM), <https://twitter.com/realDonaldTrump/status/1311892190680014849?s=20>.
- [2] See Betsy Klein & Daniella Diaz, *Pence tests negative and continues campaigning despite Trump diagnosis*, CNN (Oct. 4, 2020, 1:41 PM), <https://www.cnn.com/2020/10/03/politics/mike-pence-coronavirus-trump/index.html>.
- [3] U.S. Const. art. II, § 1, cl. 6; Sec. 1, U.S. Const. amend. XXV § 1.
- [4] U.S. Const. amend. XXV §§ 3–4.
- [5] U.S. Const. amend. XXV § 3; U.S. Const. art. II, § 1, cl. 6.
- [6] 3 U.S.C. § 19(a)(1), (b) (2006).
- [7] U.S. Const. art. II, § 1, cl. 6.
- [8] *Id.* (emphasis added).
- [9] Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113, 115 (1995).
- [10] U.S. Const. art. I, § 6, cl. 2.
- [11] *Id.*; Amar & Amar, *supra* note 9 at 115.
- [12] *Id.* at 115.
- [13] Jack Goldsmith & Ben Miller-Gootnick, *A Presidential Succession Nightmare*, Lawfare (March 25, 2020, 1:38 PM), <https://www.lawfareblog.com/presidential-succession-nightmare>.
- [14] John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141, 144 (1995).
- [15] *Id.* at 146.
- [16] *Id.* at 150–51.
- [17] *Id.* at 153.
- [18] See John Yoo, *A Winding Constitutional Path From Trump to Pence to Pompeo*, The Wall Street Journal (Oct. 2, 2020, 6:31 PM), <https://www.wsj.com/articles/a-winding-constitutional-path-from-trump-to-pence-to-pompeo-11601677891>.
- [19] Act of Jan. 19, 1886 ch. 4, § 1, 24 Stat. 1 (repealed 1947).