Response to Professor Brian Kalt’s A better line to the Oval Office

Seth Barrett Tillman

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Response to Professor Brian Kalt’s *A better line to the Oval Office* (Jan. 11, 2015)

Our military schools endeavor to train young officers to face an unknown future, rather than fight the last war. Not so our precedent and history oriented law schools. I am afraid it is so with Professor Kalt’s recent opinion editorial which argued that putting legislative officials in the line of presidential succession is bad policy. It is not: the current statute reflects a deep policy judgment going back to the first two congresses which debated the 1792 Presidential Succession Act, the very first presidential succession act, President George Washington who signed that act, and a majority of the Framers who participated in passing that statute.

Kalt worries that an assassin can take out the President and Vice President, thereby putting the Speaker or Senate President Pro Tempore into the Oval Office, even if such a successor is of a party different from the President. The perceived risk is a lone or small group of amateur assassins or an act of God killing the President and Vice President. Admittedly, that risk is there, and it will always be there. But the more consequential risk to the nation *today* is a direct, wide scale atomic, biological, or chemical attack on Washington, DC. Such an attack could wipe out the entire cabinet line of succession or so much of it that those few who remain are not likely to be in deep or meaningful policy alignment with the dead President and his party anyway. More importantly, as bad as Speaker or Senate President Pro Tem succession is, at least it actually provides for a successor. But under a statutory regime like the former 1886 statute, using strict cabinet succession, as Kalt proposes—you may have no (constitutionally valid) successor at all. President Truman was our first President to live in the nuclear age, and the only President to ever order a nuclear strike on an enemy nation. Is it any wonder that it was Truman who successfully urged the country in 1947 to embrace statutory reforms providing for legislative officer succession?

Making succession depend on the choice of a house of Congress means that a successor, with some live democratic credentials, and the confidence of colleagues in Congress when such confidence is desperately needed, is always in reach. And even if the entire membership of the two Houses is dead too, temporary Senate appointments by state governors make possible for at least one of our two congressional houses to quickly reconstitute itself, and then the Senate can choose a Senate President Pro Tempore, who would become the acting President. That is a feature, not a bug.

A president-less United States is an evil, but it is a preventable evil. Legislative officer succession, as provided by the current Presidential Succession Act of 1947, is the surest way to prevent that evil.

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PS: I am an American national living in Europe.

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