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PRESIDENTIAL SUCCESSION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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PRESIDENTIAL SUCCESSION ACT

WEDNESDAY, OCTOBER 6, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:40 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Subcommittee will come to order. This is the Subcommittee on the Constitution.

The purpose of this hearing is to explore the need for changes to the Presidential Succession Act, the Federal statute that governs the transfer of power in the event that there is a simultaneous vacancy in the office of the presidency and the vice presidency.

I would like to thank our witnesses for being here today. In particular, I would like to recognize our colleague, Mr. Sherman, who has remained steadfast in his pursuit to ensure that there is continuity in our Government should these offices become vacant.

The House has already acted to address vacancies in the House of Representatives by passing H.R. 2844, the "Continuity in Representation Act," which would require expedited special elections in the event that there were over 100 vacancies in the House. That legislation passed on an overwhelmingly bipartisan basis by a vote of 306 to 97 approximately 5 months ago. The Senate has not yet acted on the bill.

Today we turn our attention to our continuity in Government relative to the presidency.

Article II, section 1, clause 6 of the Constitution, the "Succession Clause," specifies that in the event of simultaneous vacancies in the presidency and the vice presidency, or the simultaneous "inability" of those officers to act, Congress may by law specify what "Officer" shall "act as President until the disability be removed or a President shall be elected." If a statutory successor is serving as acting President, Congress may, but is not required to, call a new presidential election.

Congress has exercised its power to designate statutory presidential successors three times in U.S. history.

First in 1792, Congress designated two congressional officers as statutory presidential successors after the Vice President: first the President pro tempore of the Senate, and then the Speaker of the House. The 1792 act provided that these officers would "act" as president pending a special presidential election, which the 1792 act provided for.

Then in 1885, Democratic President Grover Cleveland's Vice President, John Hendricks, died in office. Because Congress was out of session, there were no statutory successors to "act" as President in the event the President died or was otherwise able to discharge his duties. After Congress reconvened, the Presidential Succession Act was amended to provide that after the Vice President, the line of succession would begin with the Secretary of State and would continue through the Cabinet department heads in the order of departments' creation. The amendment took the President pro tem along with the House Speaker out of the line of succession and replaced them with the President's Cabinet. The 1886 Act provided that a statutory successor would immediately convene Congress, if it were not already in session, which could then decide whether to call a special presidential election.

Seventy years later, President Truman believed that if he and his Vice President were unable to complete Franklin Roosevelt's last term, an elected official rather than the unelected Secretary of State should act as President. Within a few months of taking office in 1945, Truman proposed legislation providing for the House Speaker and President Pro Tem of the Senate, in that order, to again be placed in the statutory line of succession, this time ahead of the Cabinet officers. The resulting Presidential Succession Act of 1947 is the governing law today.

In the event neither a House Speaker nor a President pro tem of the Senate decided to accept the acting presidency, section 19(d) of the act provides that the Cabinet member who is highest on the specified list shall act as President, provided that the Cabinet member has been confirmed by the Senate. The order of succession proceeds down this list in the event that a Cabinet position is vacant or its incumbent is unable or unwilling to assume the acting presidency.

Under the 1947 act, a Cabinet successor serving as acting President is subject to dismissal and replacement at will by either the Speaker or the President pro tem if at any time either one decides to assume the acting presidency themselves.

Commentators have pointed out that certain problems exist with the Presidential Succession Act in its current form should there ever be a simultaneous vacancy in the presidency and the vice presidency. For example, the act as currently written does not place anyone in the line of succession who is not based in the D.C. Metro area much of the time. The act as written also poses a risk of change in party control of the presidency should its provisions be triggered.

Similar to our consideration of the Continuity in Representation Act, I believe it is worth noting that one of the most effective ways we can fight back against terrorism is to demonstrate that our system of Government will continue, both consistently and legitimately. But we must be certain that the provisions in place to address such situations are consistent with our Constitution and our democratic principles.

The Subcommittee looks forward to exploring these issues, other questions, and potential remedies during the hearing today to ensure that our system of Government is prepared to continue on in

the unfortunate event that vacancies occur in the presidency and vice presidency.

We want to again thank the witnesses, and I would ask any other panel Members if they like to make an opening statement?

Both the Republican and the Democratic sides have conferences that are going on and we expect that Members will arrive as the time goes by, and of course, the written testimony of all the witnesses will be made available, and I am sure that each Member will studiously review that.

I would now like to introduce our witness panel. Our first witness today is Thomas H. Neale. Mr. Neale was appointed to the staff of the Library of Congress in 1970 and joined the Congressional Research Service, the CRS, in 1971, where he currently serves as Project Manager Coordinator for the Government and Finance Division. As Project Management Coordinator, he performs duties in the fields of administration, review and research and analysis. His research and analysis portfolio currently includes U.S. elections with concentration on the presidency and the Electoral College, U.S. presidential and vice presidential succession, qualifications, terms and tenure and disability, and U.S. constitutional history and theory. We welcome you here this morning, Mr. Neale.

Our second witness is Professor Akhil Reed Amar, the Southmayd Professor of Law at Yale Law School, where he teaches among other things constitutional law and American legal history. He has written extensively on the Presidential Succession Act. We welcome you here this morning, Professor.

Our third witness is M. Miller Baker, a partner at the law firm of McDermott Will & Emery, where he practices constitutional law. Previously, Mr. Baker served as counsel to Senator Orrin G. Hatch on the U.S. Senate Judiciary Committee, and as attorney advisor in the Office of Legal Policy, and later as special assistant to the Assistant Attorney General for Civil Rights at the Justice Department. And we welcome you here this morning, Mr. Baker.

Our final witness this morning will be the Hon. Brad Sherman, who represents the 27th District of California in the U.S. House of Representatives. Mr. Sherman serves on the Committee on International Relations, the Committee on Financial Services and the Committee on Science. He has spoken and frequently written about the Presidential Succession Act, and he has introduced a bill, H.R. 2749, the Presidential Succession Act of 2003 that would allow the President to choose between possible successors in the event there is neither a President nor Vice President to discharge the powers and duties of the presidency. We welcome you here as well, Congressman Sherman.

It is the practice of the Committee to swear in all witnesses who are appearing before it, so if each of you would please stand and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. Thank you very much.

We would also like to point out that we have a lighting system which there is one there and one there. We would request that you confine your testimony as closely as possible to 5 minutes, so we will be a little lenient on that on occasion. But when you have 1

minute to wrap up, the yellow light will come on and then the red light will mean that your 5 minutes is up, and we ask that you summarize at that time if possible.

If there is no further business, we will begin with Mr. Neale. Mr. Neale, you have 5 minutes.

TESTIMONY OF THOMAS H. NEALE, PROJECT MANAGEMENT COORDINATOR, GOVERNMENT AND FINANCE, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Mr. NEALE. Mr. Chairman, thank you for giving me the opportunity to appear before the Subcommittee this morning. I have prepared testimony in the form of my report, *Presidential and Vice Presidential Succession: Overview and Current Legislation,* which is available for inclusion in the record.

Mr. CHABOT. Could you pull the mike a bit closer to you, sir?

Mr. NEALE. Certainly.

The Presidential Succession Act, as modified by the 25th amendment to the Constitution, received its most recent major revision by Congress in 1947. Aside from lingering questions, the succession issue was largely regarded as a settled matter until after the terrorist attacks of 2001. This series of events, as many observers note, has changed everything. In the case of succession to the presidency it caused new or renewed awareness of the Succession Act's provisions and the lingering controversies surrounding them. It also raised concerns about the need for continuity in the Executive Branch in the event of a mass terrorist attack on the leadership of the United States.

I hope to highlight some of these concerns for you this morning from the hardy perennials to those that have been generated by the events of the past 3 years.

Among the Committee's oversight functions is what might be called the housekeeping function. First on the list is the fact that the Succession Act, as it currently stands, is one position short on the list of successors to the President and Vice President. The Office of the Secretary of Homeland Security has yet to be included in the act. Over the years, newly-created Cabinet level offices have been included in the line of succession by statute, sometimes in legislation creating the department, and sometimes at a later date. There is, however, an additional issue in the current situation. It has been customary for these newly-created Cabinet positions to be inserted at the end of the line of succession. The question now is, should the Office of Secretary of Homeland Security be inserted higher up in the line of succession? As Senate Bill S. 148, which has been referred to the Subcommittee, would place the Secretary of Homeland Security immediately behind the Attorney General, making this officer fifth in the Cabinet line of succession.

Next are the hardy perennials. First among these is whether the Speaker of the House and the President Pro Tem of the Senate are officers in the sense intended by article II of the Constitution. Are they therefore constitutionally eligible to succeed to the presidency? There has been a simmering controversy over this question for many years. A second question is more political or perhaps philosophical: should the officers in line to succeed the President and Vice President be elected Members of the House and Senate, as

currently provided, or should we return to the Succession Act of 1886 and put appointed Cabinet officers at the top of the list? Further, what is the role or value of party continuity in such circumstances? A third question concerns the supplantation of an acting President or bumping, to use the vernacular. Under the 1947 act any person serving as acting President can be supplanted or bumped from the acting presidency by an officer higher in the order of succession. Finally, the act requires that any Cabinet officer, by serving as acting President, automatically vacates his Cabinet position. What effect does this provision have on the willingness of Cabinet secretaries to serve temporarily as acting President?

In the post 9/11 era, new concerns about presidential succession have also arisen, mostly centered on asserted gaps or soft spots in our succession procedures. Many observers have speculated that a mass decapitation of the Congress and key officers of the Executive Branch would leave the Nation leaderless in a time of crisis. Many proposals have been offered to cover general and specific instances arising from such an attack. Some have urged legislation creating a number of standby officials, essentially secretaries without portfolio, who would be included in the line of succession, and whose sole purpose would be to be prepared and available to succeed in the event of a mass terrorist attack. Other proposals would seem to close the gaps that occur whenever we have a change of Administration. These would promote informal revisions in Cabinet nomination and proposal procedures so that a newly-inaugurated President would have a full or nearly full Cabinet in place when the President takes the oath.

Finally, there is the related question not covered directly under the Succession Act which concerns the question of succession of presidential and vice presidential candidates during our lengthy election process. One of the chief issues here is when do the winning candidates become President- and Vice President-elect?

I thank the Chairman and the Subcommittee Members for their attention and I would be happy to answer your questions.

[The prepared statement of Mr. Neale follows:]

PREPARED STATEMENT OF THOMAS H. NEALE

Mr. Chairman, thank you for giving me the opportunity to appear before the subcommittee this morning. I have prepared testimony in the form of my report, *Presidential and Vice Presidential Succession: Overview and Current Legislation,* which is available for inclusion in the record.

The Presidential Succession Act, as modified by the 25th Amendment to the Constitution, received its most recent major revision by Congress in 1947. Aside from lingering questions, the succession issue was largely regarded as a settled matter until after the terrorist attacks of 2001. This series of events, as many observers note, has "changed everything." In the case of succession to the presidency, it caused new, or renewed awareness of the Succession Act's provisions and the lingering controversies surrounding them. It also raised concerns about the need for continuity in the executive branch in the event of a mass terrorist attack on the leadership of the United States.

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Among the committee's oversight concerns is what might be called the "housekeeping" function. First on the list is the fact that the Succession Act, as it currently stands, is one position short on the list of successors to the President and Vice President: the office of Secretary of Homeland Security has yet to be included in the Act. Over the years, newly created cabinet-level offices have been included in the line

of succession by statute, sometimes in legislation creating the department, and sometimes at a later date. There is, however, an additional issue in the current situation: it has been customary for these newly cabinet positions to be inserted at the end of the line of succession. The question now is, should the office of Secretary of Homeland Security be inserted higher up in the line of succession. Senate bill S. 148, which has been referred to the subcommittee, would place the Secretary of Homeland Security immediately behind the Attorney General, making this officer fifth in the Cabinet line of succession.

Next are the "hardy perennials." First among these is whether the Speaker of the House of Representatives and the President Pro Tempore of the Senate are "officers" in the sense intended by Article II of the Constitution. Are they constitutionally eligible to succeed to the presidency? There has been a simmering controversy over this question for many years. A second question is more political, or perhaps philosophical: should the officers in line to succeed the President and Vice President be elected Members of the House and Senate, as currently provided, or should we return to the Succession Act of 1886, and put appointed Cabinet officers at the top of the list? Further, what is the role or value of party continuity in such circumstances. A third question concerns supplantation of an Acting President, or "bumping," to use the vernacular. Under the 1947 Act, any person serving as Acting President can be supplanted or bumped from the acting presidency by an officer higher in the order of succession. Finally, the Act requires that any Cabinet officer, by serving as Acting President, automatically vacates his Cabinet position. What effect does this provision have on the willingness of Cabinet secretaries to serve temporarily as Acting President?

In the post 9/11 era, new concerns about presidential succession have also arisen, mostly centered on asserted gaps or soft spots in our succession procedures. Many observers have speculated that a mass "decapitation" of the Congress and key officers of the executive branch would leave the nation leaderless in a time of crisis. Many proposals have been offered to cover general and specific instances arising from such an attack. Some have urged legislation creating a number of "standby" officials, essentially secretaries without portfolio who would be included in the line of succession, and whose sole purpose would be to be prepared and available to succeed in the event of a mass terrorist attack. Other proposals would seek to close the gaps that occur whenever we have a change of administration. These would promote informal revisions in Cabinet nomination and proposal procedures, so that a newly inaugurated President would have a full, or nearly full, Cabinet in place when the President takes the oath.

Finally, there is a related question, not covered directly under the Succession Act, which concerns the question of succession of presidential and vice presidential candidates during our lengthy election process. One of the chief issues here is when do the winning candidates become President- and Vice President-elect.

I thank the chairman and the subcommittee Members for their attention, and I would be happy to answer any questions.

ATTACHMENT

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CRS Report for Congress
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Presidential and Vice Presidential Succession: Overview and Current Legislation

Updated September 27, 2004

Thomas H. Neale
Government and Finance Division

Presidential and Vice Presidential Succession: Overview and Current Legislation

Summary

Whenever the office of President of the United States becomes vacant due to "removal ... death or resignation" of the chief executive, the Constitution provides that "the Vice President shall become President." When the office of Vice President becomes vacant for any reason, the President nominates a successor, who must be confirmed by a majority vote of both houses of Congress. If both of these offices are vacant simultaneously, then, under the Succession Act of 1947, the Speaker of the House of Representatives becomes President, after resigning from the House and as Speaker. If the speakership is also vacant, then the President Pro Tempore of the Senate becomes President, after resigning from the Senate and as President Pro Tempore. If both of these offices are vacant, or if the incumbents fail to qualify for any reason, then cabinet officers are eligible to succeed, in the order established by law (3 U.S.C. §19, see Table 3). In every case, a potential successor must be duly sworn in his or her previous office, and must meet other constitutional requirements for the presidency, i.e., be at least 35 years of age, a "natural born citizen," and for 14 years, a "resident within the United States." Succession-related provisions are derived from the Constitution, statutory law, and political precedents of the past two centuries. Since 1789, Vice Presidents have succeeded to the presidency on nine occasions, eight times due to the death of the incumbent, and once due to resignation (see Table 1). The vice presidency has become vacant on 18 occasions since 1789. Nine of these occurred when the Vice President succeeded to the presidency; seven resulted from the death of the incumbent; and two were due to resignation (see Table 2).

The events of September 11, 2001 raised concerns about continuity in the presidency and succession issues in general. Following establishment of the Department of Homeland Security (DHS), legislation to include the DHS secretary in the line of succession has been introduced in the 108th Congress: S. 148 , H.R. 1354, and H.R. 2319. All three would include the Secretary of Homeland Security in the line of succession following the Attorney General, while H.R. 2319 also makes further amendments to the Succession Act of 1947. Other measures would make major changes to existing succession law; these include H.R. 2749, S. 2073, S. Res. 419, or propose actions that would not require legislation (H. Res. 775 and S. Con. Res. 89). The Senate Committees on the Judiciary and Rules and Administration held a joint hearing September 16, 2003 to review the Succession Act of 1947 and the question of succession in general.

For additional related information, please consult CRS Report RS20827, *Presidential and Vice Presidential Terms and Tenure*, by Thomas H. Neale, and CRS Report RS20260, *Presidential Disability: An Overview*, by Thomas H. Neale.

This report will be updated as events warrant.

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Presidential and Vice Presidential Succession: Overview and Current Legislation

Constitutional Provisions and the Succession Act of 1792

Article II of the Constitution, as originally adopted, provided the most basic building block of succession procedures, stating that:

> In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.[1]

This language evolved during the Constitutional Convention of 1787. The two most important early drafts of the Constitution neither provided for a Vice President nor considered succession to the presidency, and it was only late in the convention proceedings that the office of Vice President emerged and the language quoted above was adopted.[2] While the need for a Vice President was debated during the ratification process, the question of succession received little attention, meriting only one reference in the supporting Federalist papers: "the Vice-President may occasionally become a substitute for the President, in the supreme Executive magistracy."[3]

The Second Congress (1791-1793) exercised its constitutional authority to provide for presidential vacancy or inability in the Succession Act of 1792 (1 Stat. 240). After examining several options, including designating the Secretary of State or Chief Justice as successor, Congress settled on the President Pro Tempore of the Senate and the Speaker of the House of Representatives, in that order. These officials were to succeed if the presidency and vice presidency were both vacant. During House debate on the bill, there was considerable debate on the question of

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[1] U.S. Constitution. Article II, Section 1, clause 6. This text was later changed and clarified by Section 1 of the 25th Amendment.

[2] John D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York: Fordham University Press, 1965), pp. 42-43.

[3] Alexander Hamilton, "Federalist No. 68," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, Benjamin F. Wright, ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1966), p. 433.

whether the President Pro Tempore and the Speaker could be considered "officers" in the sense intended by the Constitution. If so, they were eligible to succeed, if not, they could not be included in the line of succession. The House expressed its institutional doubts when it voted to strike this provision, but the Senate insisted on it, and it became part of the bill enacted and signed by the President.[4] Although the Speaker and President pro tempore were thus incorporated in the line of succession, they would serve only temporarily, however, since the act also provided for a special election to fill the vacancy, unless it occurred late in the last full year of the incumbent's term of office.[5] Finally, this and both later succession acts required that designees meet the constitutional requirements of age, residence, and natural born citizenship.

Presidential Succession in 1841: Setting a Precedent

The first succession of a Vice President occurred when President William Henry Harrison died in 1841. Vice President John Tyler's succession set an important precedent and settled a constitutional question. Debate at the Constitutional Convention, and subsequent writing on succession, indicated that the founders intended the Vice President to serve as *acting* President in the event of a presidential vacancy or disability, assuming "the powers and duties" of the office, but not actually *becoming* President.[6] Tyler's status was widely debated at the time, but the Vice President decided to take the presidential oath, and considered himself to have succeeded to Harrison's office, as well as to his powers and duties. After some discussion of the question, Congress implicitly ratified Tyler's decision by referring to him as "the President of the United States."[7] This action set a precedent for succession that subsequently prevailed, and was later formally incorporated into the Constitution by Section 1 the 25th Amendment.

The Succession Act of 1886 and the 20th Amendment (1933)

President James A. Garfield's death led to a major change in succession law. Shot by an assassin on July 2, 1881, the President struggled to survive for 79 days before succumbing to his wound on September 19. Vice President Chester A. Arthur took office without incident, but the offices of Speaker and President Pro Tempore were vacant throughout the President's illness, due to the fact that the House elected in 1880 had yet to convene, and the Senate had been unable to elect a President Pro

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[4] Feerick, *From Failing Hands*, pp. 58-60.

[5] It should be recalled that during this period presidential terms ended on March 4 of the year after the presidential election. Also, the act provided only for election of the President, since electors cast two votes for President during this period (prior to ratification of the 12th Amendment, which specified separate electoral votes for President and Vice President), with the electoral vote runner-up elected Vice President.

[6] Ruth Silva, *Presidential Succession* (New York: Greenwood Press, 1968 (c. 1951)), p. 10; Feerick, *From Failing Hands*, p. 56.

[7] *Congressional Globe*, vol. 10, May 31, June 1, 1841, pp. 3-5.

Tempore because of partisan strife.[8] Congress subsequently passed the Succession Act of 1886 (24 Stat. 1) in order to insure the line of succession and guarantee that potential successors would be of the same party as the deceased incumbent. This legislation transferred succession after the Vice President from the President Pro Tempore and the Speaker to cabinet officers in the chronological order in which their departments were created, provided they had been duly confirmed by the Senate and were not under impeachment by the House. Further, it eliminated the requirement for a special election, thus ensuring that any future successor would serve the full balance of the presidential term. This act governed succession until 1947.

Section 3 of the 20th Amendment, ratified in 1933, clarified one detail of presidential succession procedure by declaring that, if a President-elect dies before being inaugurated, the Vice President-elect becomes President-elect and is subsequently inaugurated.

The Presidential Succession Act of 1947

In 1945, Vice President Harry S Truman succeeded as President on the death of Franklin D. Roosevelt. Later that year, he proposed that Congress revise the order of succession, placing the Speaker of the House and the President Pro Tempore of the Senate in line behind the Vice President and ahead of the cabinet. The incumbent would serve until a special election, scheduled for the next intervening congressional election, filled the presidency and vice presidency for the balance of the term. Truman argued that it was more appropriate to have popularly elected officials first in line to succeed, rather than appointed cabinet officers. A bill incorporating the President's proposal, minus the special election provision, passed the House in 1945, but no action was taken in the Senate during the balance of the 79th Congress.

The President renewed his call for legislation when the 80th Congress convened in 1947, and legislation was introduced in the Senate the same year. Debate on the Senate bill centered on familiar questions: whether the Speaker and President pro tempore were "officers" in the sense intended by the Constitution; whether legislators were well-qualified for the chief executive's position; whether requiring these two to resign their congressional membership and offices before assuming the acting presidency was fair.[9] In the event, the Senate and House passed legislation that embodied Truman's request, but again deleted the special election provisions.

Under the act (61 Stat. 380, 3 U.S.C.§19), if both the presidency and vice presidency are vacant, the Speaker succeeds (after resigning the speakership and his

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[8] In accord with contemporary practice, the House of Representatives elected in November, 1880, did not convene in the 47th Congress until December 5, 1881. As was also customary, the Senate had convened on March 10, but primarily to consider President Garfield's cabinet and other nominations.

[9] Feerick, *From Failing Hands*, pp. 207-208.

House seat).[10] If there is no Speaker, or if he does not qualify, the President Pro Tempore succeeds, under the same requirements. If there is neither a Speaker nor President Pro Tempore, or if neither qualifies, then cabinet officers succeed, under the same conditions as applied in the 1886 act (see Table 3 for departmental order in the line of succession). Any cabinet officer acting as President under the act may, however, be supplanted by a "qualified and prior-entitled individual" at any time.[11] This means that if a cabinet officer is serving due to lack of qualification, disability, or vacancy in the office of Speaker or President Pro Tempore, and, further, if a properly qualified Speaker or President Pro Tempore is elected, then they may assume the acting presidency, supplanting the cabinet officer. The Presidential Succession Act of 1947 has been regularly amended to incorporate new cabinet-level departments into the line of succession, and remains currently in force.

The 25th Amendment and Current Procedures

The 1963 assassination of President John F. Kennedy helped set events in motion that culminated in the 25th Amendment to the Constitution, a key element in current succession procedures. Although Vice President Lyndon B. Johnson succeeded without incident after Kennedy's death, it was noted at the time that Johnson's potential immediate successor, House Speaker John W. McCormack, was 71 years old, and Senate President Pro Tempore Carl T. Hayden was 86 and visibly frail. In addition, many observers believed that a vice presidential vacancy for any length of time constituted a dangerous gap in the nation's leadership during the Cold War, an era of international tensions and the threat of nuclear war.[12] It was widely argued that there should be a qualified Vice President ready to succeed to the presidency at all times. The 25th Amendment, providing for vice presidential vacancies and presidential disability, was proposed by the 89th Congress in 1965 and approved by the requisite number of states in 1967.[13]

The 25th Amendment is the cornerstone of contemporary succession procedures. Section 1 of the amendment formalized traditional practice by declaring that, "the Vice President shall become President" if the President is removed from office, dies, or resigns. Section 2 empowered the President to nominate a Vice President whenever that office is vacant. This nomination must be approved by a simple majority of Members present and voting in both houses of Congress. Sections 3 and 4 established procedures for instances of presidential disability.[14]

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[10] This requirement was included because the Constitution (Article I, Section 6, clause2) expressly states that " ... no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

[11] 3 U.S.C. 19 (d)(2).

[12] Following President Kennedy's death, the vice presidency remained vacant for 14 months, until Vice President Hubert H. Humphrey was sworn in on Jan. 20, 1965.

[13] For additional information on presidential tenure, see CRS Report RS20827, *Presidential and Vice Presidential Terms and Tenure*, by Thomas H. Neale.

[14] For additional information on presidential disability, see CRS Report RS20260, *Presidential Disability: An Overview*, by Thomas H. Neale.

Any Vice President who succeeds to the presidency serves the remainder of the term. Constitutional eligibility to serve additional terms is governed by the 22nd Amendment, which provides term limits for the presidency. Under the amendment, if the Vice President succeeds after *more than two full years* of the term have expired, he is eligible to be elected to two additional terms as President. If, however, the Vice President succeeds after *fewer than two full years* of the term have expired, the constitutional eligibility is limited to election to one additional term.

Section 2 of the 25th Amendment has been invoked twice since its ratification: in 1973, when Representative Gerald R. Ford was nominated and approved to succeed Vice President Spiro T. Agnew, who had resigned, and again in 1974, when the former Governor of New York, Nelson A. Rockefeller, was nominated and approved to succeed Ford, who had become President when President Richard M. Nixon resigned (see Table 2). While the 25th Amendment did not supplant the order of succession established by the Presidential Succession Act of 1947, its provision for filling vice presidential vacancies renders recourse to the Speaker, the President Pro Tempore, and the cabinet unlikely, except in the event of an unprecedented national catastrophe.

Presidential Succession in the Post-9/11 Era

The events of September 11, 2001 and the prospect of a "decapitation" of the U.S. government by an act of mass terrorism have led to a reexamination of many previously long-settled elements of presidential succession and continuity of government on the federal level.[15] A number of proposals to revise the Succession Act of 1947 have been introduced in the 108th Congress. Some of these are in the nature of "housekeeping" legislation; that is, they propose to insert the office of Secretary of the Department of Homeland Security into the line of succession, as has been done in the past when new cabinet departments are created by Congress. Others propose more complex changes in the legislation. The growth of concern over succession issues in the wake of 9/11 is further reflected in the fact that the Senate Committees on Rules and Administration and the Judiciary held a joint informational hearing on September 16, 2003, at which a wide range of points of view and legislative proposals was examined.

The question of continuity of government in the executive branch is also being addressed by a non-governmental organization, the Continuity of Government Commission, sponsored by the American Enterprise Institute of Washington, D.C. For additional information on the commission and its activities, consult: [http://www.continuityofgovernment.org].

Succession Issues. Several issues dominate current discussions over revising the order of presidential succession. Some are "hardy perennials" that have risen in every debate on succession law, and have been cited earlier in this report; others relate more directly to elevated concerns over continuity of government.

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[15] For additional information on continuity of government issues, se CRS Report RS21089, *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

Constitutional Legitimacy. There is no question as to Congress's constitutional ability to provide for presidential succession. This power is directly granted by Article II, Section 1, clause 6, as modified by the 25th Amendment, as noted earlier in this report. What the Constitution means by the word "Officer", however, has been perhaps the most durable element in the succession debate over time. The succession acts of both 1792 and 1947 assumed that the language was sufficiently broad as to include officers of Congress, the President Pro Tempore of the Senate and the Speaker of the House of Representatives.[16] Some observers assert that these two congressional officials are *not* officers in the sense intended by the Constitution, and that the 1792 act was, and the 1947 act is, constitutionally questionable. Attorney Miller Baker explained this hypothesis in his testimony before hearings held jointly by the Senate Committees on the Judiciary Committee and on Rules and Administration in 2003:

> The Constitution is emphatic that members of Congress are not "Officers of the United States." The Incompatibility Clause of Article I, Section 6, clause 2 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." In other words, members of Congress by constitutional definition cannot be "Officers" of the United States.[17]

This point was raised in congressional debate over both the Succession Act of 1792 and that of 1947. In the former case, opinion appears to have been divided: James Madison (arguably the single most formative influence on the Constitution, and a serving Representative when the 1792 act was debated) held that officers of Congress were not eligible to succeed. Other Representatives who had also served as delegates to the Constitutional Convention were convinced to the contrary.[18] In addition, political issues also contributed to the debate in 1792. Fordham University Law School Dean John D. Feerick, writing in *From Failing Hands: The Story of Presidential Succession*, noted that the Federalist-dominated Senate insisted on inclusion of the President Pro Tempore and the Speaker, and excluded the Secretary of State, largely because of its distrust of Thomas Jefferson, who was Secretary of State and leader of the Anti-Federalists, a group that later emerged as the Jeffersonian Republican, or Democratic Republican, Party.[19]

The constitutional legitimacy of the Speaker and the President Pro Tempore as potential successors to the President and Vice President recurred during debate on the 1947 succession act. At that time, Feerick notes, long acceptance of the 1792 act, passed by the Second Congress, which presumably had first-hand knowledge of

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[16] The 1792 act specified this order of succession; the 1947 act reversed the order, placing the Speaker of the House first in line, followed by the President Pro Tempore.

[17] W. Miller Baker, Testimony before the Senate Committees on the Judiciary and Rules and Administration, Sept. 16, 2003, p.8; available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2606], visited Feb. 25, 2004. Baker's testimony cites additional supporting arguments for his assertion at considerable length.

[18] Feerick, *From Failing Hands*, p. 59.

[19] Ibid., pp. 60-61.

original intent in this question, was buttressed as an argument by the Supreme Court's decision in *Lamar v. United States*.[20]

Professor Howard Wasserman, of the Florida International University School of Law, introduced another argument in support of the Speaker's and President Pro Tempore's inclusion in the order of succession in his testimony before the 2003 joint hearing held by the Senate Judiciary Committee and the Committee on Rules and Administration:

> The Succession Clause [of the Constitution] provides that "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and the Vice President, declaring what Officer shall then act as President and such Officer shall act accordingly." ... This provision refers to "officers," unmodified by reference to any department or branch. Elsewhere, the Constitution refers to "Officers of the United States" or "Officers under the United States" or "civil officers" in contexts that limit the meaning of those terms only to executive branch officers, such as cabinet secretaries.
>
> The issue is whether the unmodified "officer" of the Succession Clause has a broader meaning. On one hand, it may be synonymous with the modified uses of the word elsewhere, all referring solely to executive branch officials, in which case the Speaker and the President Pro Tem cannot constitutionally remain in the line of succession. On the other hand, the absence of a modifier in the Succession Clause may not have been inadvertent. The unmodified term may be broader and more comprehensive, covering not only executive-branch officers, but everyone holding a position under the Constitution who might be labeled an officer. This includes the Speaker and President Pro Tem, which are identified in Article 1 as officers of the House and Senate, respectively.[21]

Given the diversity of opinion on this question, and the continuing relevance of historical practice and debate, the issue of constitutional legitimacy remains an important element of any congressional effort to amend or supplant the Succession Act of 1947.

Democratic Principle and Party Continuity. These interrelated issues collectively comprise what might be termed the political aspect of presidential succession. The first, democratic principle, was perhaps the dominant factor contributing to the passage of the 1947 succession act. Simply stated, it is the assertion that presidential and vice presidential succession should be settled first on popularly elected officials, rather than the appointed members of the cabinet, as was the case under the 1886 act. According to Feerick, the 1886 act's provisions aroused criticism not long after Vice President Harry Truman became President on the death

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[20] 241 U.S. 103 (1916). According to Feerick, " ... the Supreme Court held that a member of the House of Representatives was an officer of the government within the meaning of a penal statute making it a crime for one to impersonate an officer of the government." Feerick, *From Failing Hands*, p. 206.

[21] Howard M. Wasserman, Testimony before the Senate Committees on the Judiciary and Rules and Administration, September 16, 2003, p. 7. Available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2605], visited February 25, 2004.

of Franklin D. Roosevelt.[22] President Truman responded less than two months after succeeding to the presidency, when he proposed to Congress the revisions to succession procedures that, when amended, eventually were enacted as the Succession Act of 1947. The President explained his reasoning in his special message to Congress on the subject of succession to the presidency:

> ... by reason of the tragic death of the later President, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act. I do not believe that in a democracy this power should rest with the Chief Executive. In so far as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country. The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.[23]

Conversely, critics of this reasoning assert that the Speaker, while chosen by a majority of his peers in the House, has won approval by the *voters* only in his own congressional district. Further, although elected by the voters in his home state, the President Pro Tempore of the Senate serves as such by virtue of being the Senator of the majority party with the longest tenure.[24]

Against the case for democratic succession urged by President Truman, the value of party continuity is asserted by some observers. The argument here is that a person acting as President under these circumstances should be of the same political party as the previous incumbent, in order to assure continuity of the political affiliation, and, presumably, the policies, of the candidate chosen by the voters in the last election. According to this reasoning, succession by a Speaker or President Pro Tempore of a different party would be a reversal of the people's mandate that would be inherently undemocratic. Moreover, they note, this possibility is not remote: since passage of the Succession Act of 1947, the nation has experienced "divided government," that is, control of the presidency by one party and either or both houses of Congress by another, for 35 of the 57 intervening years. As Yale University Professor Akhil Amar noted in his testimony at the 2003 joint Senate committee hearing, "... [the current succession provisions] can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B?"[25] At the same hearing, another witness argued that, "This connection to the

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[22] Feerick, *From Failing Hands*, pp. 204-205.

[23] U.S. President, Truman, *Public Papers of the Presidents of the United States* [:] *Harry S Truman*, 1945 (Washington: GPO, 1961), p. 129.

[24] The President Pro Tempore is elected by the whole Senate, but this office is customarily filled only by the Senator of the majority party who has served longest; thus, the act of election is arguably a formality.

[25] Akhil Amar, Testimony before the Senate Committees on the Judiciary and Rules and (continued...)

President ... provides a national base of legitimacy to a cabinet officer pressed to act as president. The link between cabinet officers and the President preserves some measure of the last presidential election, the most recent popular democratic statement on the direction of the executive branch."[26]

Efficient Conduct of the Presidency. Some observers also question the potential effect on conduct of the presidency if the Speaker or President Pro Tempore were to succeed. Would these persons, whose duties and experience are essentially legislative, have the skills necessary to serve as chief executive? Moreover, it is noted that these offices have often been held by persons in late middle age, or even old age, whose health and energy levels might be limited.[27] As Miller Baker noted in his testimony before the 2003 joint committee hearings, "... history shows that senior cabinet officers such as the Secretary of State and the Secretary of Defense are generally more likely to be better suited to the exercise of presidential duties than legislative officers. The President pro tempore, traditionally the senior member of the party in control of the Senate, may be particularly ill-suited to the exercise of presidential duties due to reasons of health and age."[28]

Conversely, it can be noted that the Speaker, particularly, has extensive executive duties, both as presiding officer of the House, and as de facto head of the extensive structure of committees, staff, and physical installations that comprise the larger entity of the House of Representatives. Moreover, it can be argued that the speakership has often been held by men of great judgment and ability, e.g., Sam Rayburn, Nicholas Longworth, Joseph Cannon, and Thomas Reed.

"Bumping" or Supplantation. This question centers on the 1947 Succession Act provision that officers acting as President under the act do so only until the disability or failure to qualify of any officer higher in the order of succession is removed. If the disability is removed, the previously entitled officer can supplant ("bump") the person then acting as President. For instance, assuming the death, disability, or failure to qualify of the President, Vice President, the Speaker, the President Pro Tempore, or a senior cabinet secretary[29] is acting as President. Supplantion could take place under any one of several scenarios.

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[25] (...continued)
Administration, Sept. 16, 2003, p. 2. Available at [http://judiciary/senate.gov/print_testimony.cfm?id=914&wit_id=2603], visited Feb. 25, 2004.

[26] Howard M. Wasserman, Testimony, p. 4.

[27] Most often cited is the example of Speaker John McCormick and President Pro Tempore Carl Hayden, who were first and second in line of presidential succession for 14 months following the assassination of President John Kennedy in 1963. Rep. McCormick was 71 at the time of the assassination, and Sen. Hayden was 86, and visibly frail.

[28] Miller Baker, Testimony, p. 11.

[29] "Senior cabinet secretary" or "officer" in this section refers to the secretary of the senior executive department, under the Succession Act of 1947, as amended.

- Death of the President, Vice President, Speaker and President Pro Tempore: the senior cabinet secretary is acting as President. The House elects a new Speaker, who, upon meeting the requirements, i.e., resigning as a House Member and as Speaker, then "bumps" the cabinet secretary, and assumes the office of Acting President. The President Pro Tempore serving as Acting President could be similarly bumped by a newly-elected Speaker. Both persons would be out of a job under this scenario: the President Pro Tempore, by virtue of having resigned as Member and officer of Congress in order to become Acting President,[30] and the senior cabinet secretary, by virtue of the fact that, under the act, "The taking the oath of office ... [by a cabinet secretary] shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President."[31]

- Disability of the President and Vice President: the Speaker is Acting President. Either the President or Vice President could supplant after recovering, but the Speaker, or the President Pro Tempore, should that officer be acting, would be out of a job, due to the requirements noted above.

- Failure to Qualify of the Speaker or President Pro Tempore: the President and Vice President are disabled, or the offices are vacant. The Speaker and the President Pro Tempore decline to resign their congressional membership and offices, and the acting presidency passes to the senior cabinet officer. At some point, the Speaker or the President Pro Tempore decides to claim the acting presidency, resigns, and "bumps" the serving cabinet secretary. The same scenario could occur to a President Pro Tem supplanted by the Speaker.

Critics assert that the supplantation provisions could lead to dangerous instability in the presidency during a time of national crisis:

> Imagine a catastrophic attack kills the president, vice-president and congressional leadership. The secretary of state assumes the duties of the presidency. But whenever Congress elects a new Speaker or president pro tem, that new leader may 'bump' the secretary of state. The result would be three presidents within a short span of time.[32]

Moreover, as noted previously, any person who becomes acting President must resign his previous position, in the case of the Speaker and President Pro Tempore, or have his appointment vacated by the act of oath taking. It is certainly foreseeable that public officials might hesitate to forfeit their offices and end their careers before taking on the acting presidency, particularly if the prospect of supplantation loomed.

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[30] 3 U.S.C. 19 (b).

[31] 3 U.S.C. 19 (d)(3).

[32] Howard M. Wasserman, Testimony, p. 8.

The "bumping" question has been used by critics of legislative succession as an additional argument for removing the Speaker and President Pro Tempore from the line of succession. Another suggested remedy would be to amend the Succession Act of 1947 to eliminate the right of "prior entitled" individuals to supplant an acting President who is acting due to a vacancy in the office of President and Vice President. Relatedly, other proposals would amend the law to permit cabinet officials to take a leave of absence from their departments while serving as acting President in cases of presidential and vice presidential disability. They could thus return to their prior duties on recovery of either the President and Vice President, and their services would not be lost to the nation, nor would there be the need to nominate and confirm a replacement.

Succession During Presidential Campaigns and Transitions. The related issue of succession during presidential campaigns and during the transition period between elections and the inauguration has been the subject of renewed interest since the terrorist attacks of September 11, 2001. The salient elements of this issue come into play only during elections when an incumbent President is retiring, or has been defeated, and the prospect of a transition between administrations looms, but uncertainties about succession arrangements during such a period have been cause for concern among some observers. Procedures governing these eventualities depend on when a vacancy would occur.

Between Nomination and Election. This first contingency would occur if there were a vacancy in a major party ticket before the presidential election. This possibility has been traditionally covered by political party rules, with both the Democrats and Republicans providing for replacement by their national committees.[33] For example, in 1972, the Democratic Party filled a vacancy when vice presidential nominee Senator Thomas Eagleton resigned at the end of July, and the Democratic National Committee met on August 8 of that year to nominate R. Sargent Shriver as the new vice presidential candidate.

Between the Election and the Meeting of the Electors. The second would occur in the event of a vacancy after the election, but before the electors meet to cast their votes in December. This contingency has been the subject of speculation and debate. Some commentators suggest that, the political parties, employing their rules providing for the filling of presidential and vice presidential vacancies, would designate a substitute nominee. The electors, who are predominantly party loyalists, would presumably vote for the substitute nominee. Given the unprecedented nature of such a situation, however, confusion, controversy, and a breakdown of party discipline among the members of the electoral college might also arise, leading to further disarray in what would already have become a problematical situation.[34]

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[33] *See* The Republican National Committee Rules, 2000, Rule No. 9; The Charter and ByLaws of the Democratic Party of the U.S., Sept. 25, 1999, Art. III, § 1(c).

[34] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Presidential Succession Between the Popular Election and the Inauguration*, hearing, 103rd Cong., 2nd sess., Feb. 2, 1994 (Washington: GPO, 1995), pp. 12-13.

Between the Electoral College Vote and the Electoral Vote Count by Congress. A third contingency would occur if there were a vacancy in a presidential ticket during the period between the time when the electoral votes are cast (Monday after the second Wednesday in December) and when Congress counts and certifies the votes (January 6). The succession process for this contingency turns on when candidates who have received a majority of the electoral votes become President-elect and Vice President-elect. Some commentators doubt whether an official President- and Vice President-elect exist prior to the electoral votes being counted and announced by Congress on January 6, maintaining that this is a problematic contingency lacking clear constitutional or statutory direction.[35] Others assert that once a majority of electoral votes has been cast for one ticket, then the recipients of these votes become the President- and Vice President-elect, notwithstanding the fact that the votes are not counted and certified until the following January 6.[36] If so, then the succession procedures of the 20th Amendment, noted earlier in this report, would apply as soon as the electoral votes were cast; namely, if the President-elect dies, then the Vice President-elect becomes the President-elect. This point of view receives strong support from the language of the House committee report accompanying the 20th Amendment. Addressing the question of when there is a President elect, the report states:

> It will be noted that the committee uses the term "President elect" in its generally accepted sense, as meaning the person who has received the majority of electoral votes, or the person who has been chosen by the House of Representatives in the event that the election is thrown into the House. It is immaterial whether or not the votes have been counted, for the person becomes the President elect as soon as the votes are cast.[37]

Between the Electoral Vote Count and Inauguration. As noted previously, the 20th Amendment covers succession in the case of the President-elect, providing that in case of his death, the Vice President-elect becomes President-elect.[38] Further, a Vice President-elect succeeding under these circumstances and subsequently inaugurated President would nominate a Vice President under provisions of the 25th Amendment. A major concern that has risen about this period since the terrorist attacks of September 11, 2001, centers the order of succession under the Succession Act of 1947. What might happen in the event of a mass terrorist attack during or shortly after the presidential inaugural? While there would be a President, Vice President, Speaker, and President Pro Tempore during this period, who would step forward in the event an attack removed these officials? This question takes on additional importance since the Cabinet, an important element in the order of succession, is generally in a state of transition at this time. The previous administration's officers have generally resigned, while the incoming

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[35] Ibid., pp. 39-40.

[36] Ibid., p. 12.

[37] U.S. Congress, House, *Proposing an Amendment to the Constitution of the United States*, report to accompany S.J. Res. 14, 72nd Cong., 1st sess., Rept. 345 (Washington?, GPO?: 1932), p. 6.

[38] Whether this provision would also cover disability or resignation is a question that merits further study.

administration's designees are usually in the midst of the confirmation process. It is not impossible to envision a situation in which not a single cabinet officer will have been confirmed by the Senate under these circumstances, thus raising the prospect of a de facto decapitation of the executive branch. This concern has led to several proposals in the 108th Congress.

Proposed Legislation in the 108th Congress

Succession-related legislation introduced to date in the 108th Congress has fallen into two basic categories. First, "perfecting" legislation would include the Secretary of Homeland Security in the existing order of succession, but would not otherwise provide major changes in the Succession Act of 1947. Second are proposals that make broader changes to the existing law.

Revising the Order of Succession to Include the Secretary of Homeland Security. Perhaps of most immediate interest in the case of presidential succession was the establishment in 2002 of the Department of Homeland Security (DHS). The secretaries of newly-created cabinet-level departments are not automatically included in the order of succession; this is normally accomplished by an appropriate provision in the legislation authorizing the new department.[39] In some instances, however, the secretary's inclusion has been omitted from the authorizing act, but is accomplished later in "perfecting" legislation. This occurred in the act establishing the DHS in the 107th Congress (P.L. 107-296), which did not incorporate the secretary of the new department in the line of presidential succession.

S. 148 and H.R. 1354. These two 108th Congress bills have a direct purpose: to include the Secretary of DHS in the line of presidential succession. S. 148 was introduced on January 13, 2003, by Senator Michael DeWine,[40] and a companion bill, H.R. 1354, was introduced in the House on March 19, 2003, by Representative Tom Davis.[41] Both bills depart from tradition, however, by proposing to place the Secretary of Homeland Security in the line of succession directly following the Attorney General. In this position, the secretary would be eighth in line to succeed the President, rather than 18th, at the end of the order, following the Secretary of Veterans Affairs. This realignment would have historical significance, as the four offices that would immediately precede the Secretary of Homeland Security constitute the original cabinet, as established between 1789 and 1792 during the presidency of George Washington, sometimes referred to as the "big four."[42]

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[39] See 3 U.S.C. 19 "Amendments" for examples.

[40] Sen. Dodd subsequently co-sponsored.

[41] Rep. Platts cosponsored H.R. 1354.

[42] They are, in order of departmental seniority, the Secretaries of State, the Treasury, and Defense, and the Attorney General. The Secretary of Defense supplanted the Secretary of War when the Department of Defense was established in 1947. All attorneys general served in the cabinet beginning in 1792, although the Department of Justice was not established until 1870.

This departure from tradition derives from heightened concern over the question of continuity of government.[43] It is argued that the proposed placement of the DHS secretary will have at least two advantages: first, the Department of Homeland Security will be one of the largest and most important executive departments, with many responsibilities directly affecting the security and preparedness of the nation. Both its size and crucial role are cited as arguments for placing the Secretary of DHS high in the order of succession. Second, the Secretary of Homeland Security will have critically important responsibilities in these areas, and may be expected to possess the relevant knowledge and expertise that arguably justify placing this official ahead of 10 secretaries of more senior departments, particularly in the event an unprecedented disaster were to befall the leadership of the executive branch.

On the other hand, the bill might be open to criticism on the argument that it is an exercise in undue alarmism, and that placing the Secretary of Homeland Security ahead of the secretaries of more senior departments might set a questionable precedent, by seeming to elevate the office to a sort of "super cabinet" level that would arguably be inconsistent with its legal status.

S. 148 is the apparent choice for bicameral action for these companion bills. Introduced on January 13, 2003, at the time of this writing it has passed the Senate (on June 27, 2003, without amendment, by unanimous consent), been received in the House, and referred to Subcommittee on the Constitution of the House Judiciary Committee. H.R. 1354 was referred to the same House committee and subcommittee, but no subsequent action had been taken by the time of this writing.

Revisiting the Succession Act of 1947. Several other bills introduced in the 108th Congress call for substantive changes in the order of succession beyond the Vice President. Some of the concerns expressed by critics of the 1947 Act are reflected in these proposals, which are listed by chamber and in order of introduction, and are examined below.

H.R. 2319. This bill, introduced on June 4, 2003 by Representative Christopher Cox and others[44] would also place the Secretary of DHS in the order of succession after the Attorney General. Section 2 of the bill goes beyond S. 148 and H.R. 1354 in several aspects. First, it would clarify existing language in the 1947 Act by changing the language concerning referring to succession from "the Speaker of the House of Representatives" and the "President pro tempore of the Senate" to "the person holding the office of Speaker of the House of Representatives at the time such event, inability, or failure occurs" and "the person holding the office of President pro tempore at such time."

Second, it would amend 3 U.S.C. §19 (d)(2) to remove the requirement that a cabinet officer acting as President would be "bumped" or supplanted "by a qualified

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[43] For additional information on the issue of continuity of government, please consult CRS Report RS21089, *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

[44] Cosponsors include Reps. Baird, Camp, Chabot, Frost, Jackson-Lee of Texas, Shadegg, and Vitter.

and prior entitled official,"[45] except in cases in which the person is acting as President due to the inability of the President or Vice President. In other words, a cabinet officer acting as President would not be displaced by a newly qualified Speaker of the House, or a newly qualified President Pro Tempore. If, however, the officer's service is based on the inability of the President or Vice President, then the officer would be superseded by the removal of the disability of the President or Vice President.

This provision would address several of the issues cited earlier in this report that have been noted by critics of the Succession Act of 1947. First, by eliminating the displacement of a cabinet officer acting as President, except in cases of presidential or vice presidential inability, it would remove a potential source of instability: once installed as acting President, the cabinet officer would remain in this position for the balance of the presidential term, unless, as noted above, the officer is acting due to the presumably temporary inability of the President or Vice President. Further, under these circumstances it would almost certainly remove the possibility of a President and Vice President being succeeded by an acting President of a different party, which has proved to be an issue of continuing concern since passage of the Succession Act of 1947.[46] Finally, it would confer the acting presidency on a person whose most recent assignment has been executive and managerial, rather than legislative. This would, some suggest, provide a presumably experienced executive who would act as President. On the other hand, some might argue that continuing a cabinet officer as acting President *after* a Speaker or President Pro Tempore had qualified would violate the original intention of the Succession Act, which was to ensure that *elected* rather than *appointed* officers would succeed to the presidency. It can be further argued that experience as a Member of either house of Congress and service as Speaker or President Pro Tempore would not necessarily be inconsistent with executive experience and ability.

Section 3 would change the current provisions of 3 U.S.C. § 19(d)(3), which currently specifies that any cabinet officer who acts as President automatically resigns from the cabinet upon taking the presidential oath of office. Instead, such officers would not automatically resign if they were acting due "in whole or in part" to the "inability of the President or the Vice President." This would obviate the automatic resignation of individuals serving during temporary incapacity of the President or Vice President, and permit a cabinet officer serving under such circumstances to return to the Cabinet.

Section 4 is a technical adjustment to 3 U.S.C. § 19(e) which clarifies the act by requiring that cabinet officers, in order to be eligible to succeed, must have been confirmed in their position with the advice and consent of the Senate, thus eliminating acting cabinet officers from eligibility under the act.

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[45] See above at p. 4.

[46] This assumption is grounded in the tradition that Presidents almost always choose members or supporters of their own political party for cabinet positions. There have been exceptions to this practice; for instance, Secretary of Transportation Norman Mineta served as a Democratic Representative in the 94th through 104th Congresses (1975 - 1996), and as Secretary of Commerce in the Clinton Administration (2000-2001).

H.R. 2319 was referred to the House Judiciary Committee on June 4, 2003, and to its Subcommittee on the Constitution on June 25. No further action has been taken to date.

H.R. 2749, The Presidential Succession Act of 2003. This bill, introduced, on July 15, 2003, by Representative Brad Sherman and others,[47] would constitute a major change in provisions relating to presidential succession. It would empower the President to choose an officer among specified congressional leadership positions who would be designated to succeed in case of simultaneous vacancies, disqualifications, or inability in the offices of President and Vice President. This would have the effect of eliminating the possibility that a President and Vice President would be succeeded by congressional leaders of a different party than their own. At the same time, the bill would continue the tradition established by the Succession Act of 1947 that elected, rather than appointed officials, i.e., the Cabinet, would continue to be first in line to succeed, following the Vice President.

Under the bill's provisions, the President would submit to the Clerk of the House of Representatives his choice of either the office of the Speaker, or the office of the minority leader as designated primary office of succession. Similarly, the President would submit to the Secretary of the Senate his designation of the office of majority or minority leader of the Senate as the secondary successor under the act. Thus, the President would have the option of choosing a member of his own political party as his potential successor under such circumstances.

This section of the bill dealing with the Senate contains a further significant change from existing procedures in that it would establish the person holding the office of majority or minority leader of the Senate, rather than the president pro tempore of the Senate, as secondary successor. The intention here is arguably that this change would place a younger and perhaps more vigorous Senator of the President's party in line of succession, rather than the president pro tempore, who is customarily the senior Senator of the majority party. In common with the bill's House-related provisions, it would also ensure that the President and Vice President would be succeeded temporarily or permanently, depending on conditions, by a member of the political party of their choosing. This would safeguard party continuity in the presidency, but would not assure it, since a President would be free to choose from among both parties. It is arguable that a President might choose a House or Senate officer from a party other than his own as a demonstration of bipartisanship.

A question could be raised, however, as to the constitutional status of the House minority leader and the majority and minority leaders of the Senate. Are these officials "officers" of Congress? While a change in House and Senate rules to establish these positions as offices would appear to eliminate this hurdle, the perennial question would remain as to whether *any* officers of Congress are eligible to succeed under the Constitution.[48]

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[47] Cosponsors include Reps. Baird, Conyers, and Fatah.

[48] See discussion of this question earlier in this report under "constitutional legitimacy."

In common with H.R. 2319, H.R. 2749 would make the succession of these officers permanent, for the balance of the presidential term, unless they were founded on the disability or failure to qualify of a President or Vice President. In case of the former, then the acting President would serve only until the disability of the President or Vice President is removed. In case of the latter contingency, he would serve until a President or Vice President qualifies.[49]

H.R. 2479 was referred to the House Judiciary Committee's Subcommittee on the Constitution on September 4, 2003. No further action had been taken by the time of this writing.

Related Measures.

H. Res. 775 and S. Con. Res. 89. These resolutions, introduced respectively by Representative Brad Sherman, on September 14, 2004, and Senators John Cornyn and Trent Lott on February 12, 2004, address the desirability, from the standpoint of continuity of government, of having the officers comprising a President-elect's line of succession confirmed and in place by the time of the inauguration. They recommend that a President whose term is coming to an end, and who will not succeed himself, should submit his successor's nominations for offices that fall within the line of succession to the Senate for its consideration *before* his term ends. They further recommend that the confirmation process for such officers should be completed by the Senate, insofar as possible, between January 3, the date on which the new Congress assembles, unless otherwise arranged, and January 20, the date on which the incumbent President's term ends. Finally they urge the incumbent President to sign and deliver commissions for those officers whose nominations have been approved on January 20, so that they will be in place when the President-elect is nominated.

Traditionally, Presidents-elect announce their Cabinet choices during the transition period that normally takes place between election day and January 20 of the following year, when the newly-elected President actually assumes office. Also during this period, incumbent Presidents' cabinet officers traditionally submit their resignations, generally effective on inauguration day. Although investigations of and hearings on cabinet nominees for an incoming administration are often under way before the changeover, official nominations by a new President, and subsequent

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[49] The question of "failure to qualify" relates generally to the presidential election process. In theory, it could mean that neither of the persons winning a majority of electoral votes for President and Vice President meets the constitutional qualifications of the two offices, i.e., natural born citizenship, 35 years of age, and14 years of continual residence in the United States, but this contingency is extremely unlikely. The more likely, but still remote, situation would be in the event neither candidate wins a majority of electoral votes, and that the House and Senate are unable to assemble the majority of votes needed in the contingent election process to choose either a President or Vice President between the time they meet to count electoral votes (January 6, unless otherwise designated) and January 20, when the previous incumbents' terms expire. In such a case, there would be simultaneous vacancies in both offices due to a "failure to qualify." For further information on the contingent election process, please consult CRS Report RS20300, *Election of the President and Vice President by Congress: Contingent Election,* by Thomas H. Neale.

advice and consent by the Senate, cannot occur until after the new President has assumed office. Frequently, this process continues for some weeks, or longer in the case of controversial or contested nominations, so that the full Cabinet may not be sworn until well after the inauguration. Representative Sherman, Senators Cornyn and Lott and other observers view this gap, particularly in the confirmation and swearing-in of cabinet officers included in the line of succession, as a threat to continuity in both the presidency and in executive branch management.

One advantage conferred by this proposal is that cabinet secretaries, unlike elected officials, do not serve set terms of office which expire on a date certain. If the level of interpersonal and bipartisan cooperation envisaged in the resolution could be attained, an incoming President might assume office on January 20 with a full Cabinet already sworn and installed, thus reducing the potential for disruption of the executive branch by a terrorist attack. The process recommended by H. Res. 775 and S. Con. Res. 89 has the additional advantage of being able to be implemented without legislation or a constitutional amendment. They would make it more likely that every incoming President would have a cabinet nominated, vetted, and sworn on January 20. In addition to the national security-related advantage this would confer, it would arguably provide an impetus to streamlining the sometimes lengthy and contentious transition and appointments process faced by all incoming administrations. It would also, however, face substantial obstacles. It would require high levels of good will and cooperation between incumbent Presidents and their successors. Moreover, it would impose a sizeable volume of confirmation-related business on both the lame duck and newly-sworn Congresses during the 10 weeks following a presidential election. During this period, the expiring Congress traditionally adjourns sine die, while the new Congress generally performs only internal business and counts the electoral votes between its own installation on January 3 and the presidential inauguration.

H. Res.775 has been referred to the House Committee on the Judiciary, and S. Con. Res. 89 was referred to the Senate Committee on Rules and Administration on February 12, 2004. No further action has been taken on either resolution to date.

S. Res. 419. This resolution, introduced by Senator John Cornyn on July 22, 2004, is an expanded version of S. Con. Res. 89, incorporating a preamble which sets forth the arguments in favor of the resolution and cites statutory precedents which arguably support its adoption.

S. Res. 419 has been referred to the Committee on Rules and Administration. No further action has been taken on it to date.

S. 2073, The Presidential Succession Act of 2004. This bill, which was introduced by Senators Cornyn and Lott on February 12, 2004, essentially restores the status quo ante the Succession Act of 1947, by placing the Cabinet in first line of succession and eliminating officers of both houses of Congress from the order of succession.

Section 1 establishes the title. Section 2 (a) repeals subsections (a), (b), and (c) of Section 19 of Title 3 of the U.S. Code. This eliminates any role for the Speaker and President Pro Tempore in presidential succession. Succession in cases of the

death, resignation, removal from office, inability, or failure to qualify would pass directly to cabinet officers in the order in which their departments were created. Section 2 (b) inserts the Secretary of Homeland Security in the order of succession directly following the Attorney General. It also repeals the "bumping" or supplantation procedure, except in cases of disability of both the President and Vice President, and states that service as acting President by a cabinet officer does not require the officer's resignation from his departmental post. Section 2 (c) provides for succession in the event that an Acting President "shall die, resign, or be removed ...." or is incapacitated. It also confirms potential Acting Presidents must: (1) meet constitutional qualifications for the presidency; (2) have been confirmed by the Senate in their cabinet position; and (3) not be under impeachment by the House of Representatives at the time they accede to the office.

This bill meets many of the objections to the Succession Act of 1947 offered by the acts's critics by providing for cabinet succession, and eliminating both bumping (except in cases of presidential and vice presidential disability) and the automatic resignation provision imposed by current law on any cabinet officer who assumes the acting presidency. It could, however, be open to criticism on some of the same grounds; i.e., it removes democratically-elected officials from the line of succession in favor of appointed cabinet secretaries.

S. 2073 was referred to the Committee on Rules and Administration. No further action has been taken on it to date.

Other Options for Change

Additional succession-related proposals have been offered that have not been introduced as legislation. They seek particularly to address post-9/11 concerns over the prospect of a "decapitation" of the U.S. government by a terrorist attack or attacks, possibly involving the use of weapons of mass destruction.

One proposal, suggested by John C. Fortier[50] at the joint Senate committee hearings, would have Congress establish a number[51] of additional federal officers whose specific duties and function would be to be ready to assume the acting presidency if necessary. Fortier envisions that the President would appoint them, subject to Senate confirmation, and that obvious candidates would be governors, former presidents, vice presidents, cabinet officers, and Members of Congress, in other words, private citizens who have had broad experience in government. They would receive regular briefings, and would also serve as advisors to the President. A further crucial element is that they would be located outside the Washington, D.C. area, in order to be available in the event of a governmental "decapitation." Fortier further suggested that these officers should be included ahead of cabinet officers

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[50] Dr. Fortier is executive director of the Continuity of Government Commission at the American Enterprise Institute, non-governmental study commission identified earlier in this report.

[51] Fortier suggests four or five officers.

"lower in the line of succession."[52] Although he was not more specific in his testimony, it could be argued that these officers might be inserted after the "big four", i.e., the Secretaries of State, the Treasury, and Defense, the Attorney General, and, possibly the Secretary of Homeland Security, should that officer be included at that place, as proposed in pending legislation.

Miller Baker offered other proposals during his testimony at the September, 2003, hearings, all of which would require amending the Succession Act of 1947. Under one, the President would be empowered to name an unspecified number of state governors as potential successors. The constitutional mechanism here would be the President's ability to call state militias (the National Guard) into federal service.[53] Fortier argues that, by virtue of their positions as commanders-in-chief of their state contingents of the National Guard, governors could, in effect be transformed into federal "officers" by the federalization of the Guard.[54]

A second proposal by Fortier would amend the Succession Act to establish a series of assistant vice presidents, nominated by the President, and subject to approval by advice and consent of the Senate. These officers would be included in the order of succession at an appropriate place. They would be classic "stand-by" equipment: their primary function would be to be informed, prepared, and physically safe, ready to serve as acting president, should that be required.[55]

Akil Amar proposed a similar measure, that the cabinet position of assistant vice president established by law, again, nominated by the President and subject to confirmation by the Senate. In his testimony before the September, 2003, joint Senate committee hearings, he suggested that presidential candidates should announce their choices for this office during the presidential campaign. This would presumably enhance the electoral legitimacy of the assistant vice president, as voters would be fully aware of the candidates' choices for this potentially important office, and include this in their voting decisions.[56]

A further variant was offered by Howard Wasserman during his joint Senate committee hearing testimony. He suggested establishment of the cabinet office of first secretary, nominated by the President and confirmed by the Senate. The first secretary's duties would be the same as those of the offices proposed above, with special emphasis on full inclusion and participation in administration policies, "This officer must be in contact with the President and the administration, as an active

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[52] John Fortier, Testimony before the Senate Committees on the Judiciary and Rules and Administration, Sept. 16, 2003, p. 7. Available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2604], visited Feb. 25, 2004.

[53] U.S. Constitution, Article II, Section 2, clause 1.

[54] John Fortier, Testimony, p. 13.

[55] Ibid.

[56] Akil Amar, Testimony, p. 2-3.

member of the cabinet, aware of and involved in the creation and execution of public policy."[57]

Finally, Fortier proposed a constitutional amendment that would eliminate the requirement that successors be officers of the United States, empowering the President to nominate potential successors beyond the cabinet, subject to advice and consent by the Senate. Such an amendment, he argues, would "... eliminate any doubts about placing state governors in the line of succession, and could provide for succession to the Presidency itself (as opposed to the acting Presidency)."[58] Fortier envisions that these persons would be "eminently qualified" to serve. As examples, he suggested that President George W. Bush might nominate, "... former President George H.W. Bush and former Vice President Dan Quayle, both of whom no longer live in Washington, to serve in the line of succession. Similarly, a future Democratic President might nominate former Vice Presidents Al Gore and Walter Mondale to serve in the statutory line of succession."[59]

Concluding Observations

Seemingly a long-settled legislative and constitutional question, the issue of presidential and vice presidential succession in the United States has gained a degree of urgency following the events of September 11, 2001. Old issues have been revisited, and new questions have been asked in light of concerns over a potentially disastrous "decapitation" of the U.S. Government as the result of a terrorist attack, possibly by use of weapons of mass destruction. The 108th Congress may well act to insert the office of Secretary of Homeland Security into the current line of succession. Major revisions to current succession legislation are less likely in the short run, although the foundations for future consideration have been laid. In the private sector, the American Enterprise Institute's Continuity of Government Commission is scheduled to address continuity in the presidency, having completed studies on continuity of the Congress. Further, the hearings conducted in September, 2003 by the Senate Committees on the Judiciary and Rules and Administration provided a forum for public discussions of current succession provisions, their alleged shortcomings, and a wide range of proposals for change.

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[57] Howard Wasserman, Testimony, p. 6.

[58] John Fortier, Testimony, p. 14

[59] Ibid.

Table 1. Presidential Successions by Vice Presidents

Year	President	Party*	Cause of Vacancy**	Successor
1841	William Henry Harrison	W	1	John Tyler
1850	Zachary Taylor	W	1	Millard Fillmore
1865	Abraham Lincoln	R	2	Andrew Johnson
1881	James A. Garfield	R	2	Chester A. Arthur
1901	William McKinley	R	2	Theodore Roosevelt
1923	Warren G. Harding	R	1	Calvin Coolidge
1945	Franklin D. Roosevelt	D	1	Harry S Truman
1963	John F. Kennedy	D	2	Lyndon B. Johnson
1974	Richard M. Nixon	R	3	Gerald R. Ford

* Party Affiliation:
D = Democratic
R = Republican
W = Whig

** Cause of Vacancy:
1 = death by natural causes
2 = assassination
3 = resignation

Table 2. Vice Presidential Successions Under the 25th Amendment[60]

Year	Vice President	Party*	Cause**	Successor
1973	Spiro T. Agnew	R	1	Gerald R. Ford
1974	Gerald R. Ford	R	2	Nelson A. Rockefeller

* Party Affiliation: R = Republican
** Cause of Vacancy: 1 = resignation
2 = succession to the presidency

[60] Prior to ratification of the 25th Amendment, the vice presidency was vacant on 16 occasions. Eight resulted when the Vice President succeeded to the presidency (see Table 1). Seven resulted from the Vice President's death: George Clinton (Democratic Republican—DR), 1812; Elbridge Gerry (DR), 1814; William R. King (D), 1853; Henry Wilson (R), 1875; Thomas A. Hendricks (D), 1885; Garret A. Hobart (R) 1899; and James S. Sherman (R), 1912. One Vice President resigned: John C. Calhoun (D), in 1832.

Table 3. The Order of Presidential Succession (under the Succession Act of 1947)

President
Vice President
Speaker of the House of Representatives
President Pro Tempore of the Senate
Secretary of State
Secretary of the Treasury
Secretary of Defense
Attorney General
Secretary of the Interior
Secretary of Agriculture
Secretary of Commerce
Secretary of Labor
Secretary of Health and Human Services
Secretary of Housing and Urban Development
Secretary of Transportation
Secretary of Energy
Secretary of Education
Secretary of Veterans Affairs

Mr. CHABOT. Thank you very much.

Professor Amar?

TESTIMONY OF AKHIL REED AMAR, SOUTHMAYD PROFESSOR OF LAW AND POLITICAL SCIENCE, YALE LAW SCHOOL

Mr. AMAR. Thank you, Mr. Chair.

The current Presidential Succession Act is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced.

First, section 19 violates the Constitution's Succession Clause, article II, section 1, paragraph 6, which authorizes Congress to name an officer to act as President in the event that both the President and the Vice President are unavailable, as the Chair has quoted from the Constitution. The House and Senate leaders are not officers within the meaning of the Succession Clause. Rather, the framers clearly contemplated that the Cabinet officer would be named as acting President. This is not merely my personal reading of article II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.

Second, the act's bumping provision, which has just been referred to, section (d)(2), constitutes an independent violation of the Succession Clause, which says that an officer named by Congress shall "act as President . . . until the Disability be removed, or a President shall be elected." The bumping clause instead says, in effect, that the successor officer shall act as President until some other suitor wants the job. Bumping weakens the presidency itself and increases instability and uncertainty at the very moment when the Nation is most in need of tranquility.

Even if I were wrong about these constitutional claims, they're nevertheless substantial ones. The first point comes directly from James Madison, Father of the Constitution, who helped draft the clause. Over the last decade many citizens and scholars from across the ideological spectrum have told me that they agree with Madison about the constitutional questions involved. If, God forbid, America were ever to lose both their President and Vice President, even temporarily, the succession law should provide for unquestioned legitimacy to the officer who must then act as President. With so large a constitutional cloud hanging over it, the current law fails that test, the legitimacy test.

In addition to these constitutional objections, there are some real policy problems. First, the requirement that the acting President resign his previous post makes this law a very awkward instrument in situations of temporary disability. It runs counter to the approach of the 25th amendment, which facilitates smooth handoffs back and forth in situations of short-term disability, such as, say, scheduled surgery. Second, it creates a variety of the current law—it creates a variety of perverse incentives and conflicts of interest, warping Congress's proper role in impeachment and confirmation of Vice Presidential nominees under the 25th amendment. It can upend—and this is a third point—the results of a presidential election. Americans vote for Party A to control their White House and they end up with Party B. Here too, the current law is in real tension with the later 25th amendment, which enables a President to basically hand pick his successor, and thereby

promote a certain party continuity. Additionally, the current law provides no mechanisms for addressing a arguable vice presidential disability, and that's especially key because under the 25th amendment the Vice President is really the pivot point for determining presidential disability questions. Fifth, as mentioned, the current law fails to deal with certain windows of special vulnerability immediately before and after the presidential election.

In short, the current law violates article II and is out of synch with the basic spirit and structure of the 25th amendment, which became part of the Constitution two decades after this statute.

The main argument against Cabinet succession is that presidential powers should go to an elected leader, not an appointed underling. But the 25th amendment offers this alternative attractive model of handpicked succession: from Nixon to Ford to Rockefeller, with the President naming the person who will fill in for him and complete the term that he was elected to discharge if he's unable to do it himself. The 25th amendment, of course, doesn't give the President carte blanche. There has to be a confirmation process in which this House is involved along with the Senate in a special process that confers legitimacy upon the nominee.

So if this is the model for sequential double vacancy when the vice presidency and the presidency become vacant at slightly different times, we should use an analogous approach if the two offices become simultaneously vacant. There are basically two approaches that I would suggest that the Committee consider.

Under one, Congress could create a new Cabinet post of Assistant Vice President for a Secretary, something like that, named by the President, confirmed by the Senate, a very high-visibility process. Presidential nominees would in effect tell the American people, even as they are running, who not only their Vice President, who their running mate is, but who they plan to name for this second in line, and the election itself would confer some legitimacy on that person.

It the Committee were disinclined to go that option, it could name a Cabinet officer, the Secretary of State or any other, to be first in line.

Either of these solutions cure the problems I've identified, and here I'll just conclude. They would clearly be officers so there's no constitutional problem. Bumping could be eliminated. There would be no resignation that would need to be required, and so you could have smooth handoffs back and forth in temporary disability situations. Congressional conflicts of interest can be avoided, and continuity in the Executive Branch would be preserved, and legitimacy enhanced.

Thank you.

[The prepared statement of Mr. Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale University, and have been writing about the topic of presidential succession for over a decade. On two previous occasions—in February 1994, and in September 2003—I have offered testimony on this topic before the Senate Judiciary Committee. I am grateful for the opportunity to appear today before this body. As my formal testimony draws upon several articles that I

have written on the subject, I respectfully request that these articles be made part of the record.[1]

The current presidential succession act, 3 USC section 19, is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced. I will summarize its main problems and then outline my proposed alternatives.

First, Section 19 violates the Constitution's succession clause, Article II, section 1, para. 6, which authorizes Congress to name an "Officer" to act as President in the event that both President and Vice President are unavailable. House and Senate leaders are not "Officers" *within the meaning of the succession clause.*[2] Rather, the Framers clearly contemplated that a cabinet officer would be named as Acting President. This is not merely my personal reading of Article II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.[3]

Second, the Act's bumping provision, Section 19 (d)(2), constitutes an independent violation of the succession clause, which says that the "officer" named by Congress shall "act as President . . . *until the* [presidential or vice presidential] Disability be removed, or a President shall be elected." Section 19 (d) (2) instead says, in effect, that the successor officer shall act as President *until some other suitor wants the job.* Bumping weakens the Presidency itself, and increases instability and uncertainty at the very moment when the nation is most in need of tranquility.

Even if I were wrong about these constitutional claims, they are nevertheless substantial ones. The first point, to repeat, comes directly from James Madison, father of the Constitution, who helped draft the succession clause. Over the last decade, many citizens and scholars from across the ideological spectrum have told me that they agree with Madison, and with me, about the constitutional questions involved. If, God forbid, America were ever to lose both her President and Vice President, even temporarily, the succession law in place should provide unquestioned legitimacy to the "officer" who must then act as President. With so large a constitutional cloud hanging over it, Section 19 fails to provide this desired level of legitimacy.

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[1] These articles, in chronological order, are as follows:

Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing The Constitution's Succession Gap, 48 Ark. L. Rev. 215 (1995) (based on Senate testimony of 2/2/94)

http://islandia.law.yale.edu/amar/lawreview/1995Presidents.pdf

Akhil Reed Amar and Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 Stan. L. Rev. 113 (1995)

http://islandia.law.yale.edu/amar/lawreview/1995Succession.pdf

Akhil Reed Amar, Dead President-Elect, Slate, Oct. 20, 2000

http://slate.msn.com/?id=91839

Akhil Reed Amar, This is One Terrorist Threat We Can Thwart Now, Washington Post Outlook, Nov. 11, 2001

http://islandia.law.yale.edu/amar/oped/2001Terrorist.pdf

Akhil Reed Amar and Vikram David Amar, Constitutional Vices : Some Gaps in the System of Presidential Succession and Transfer of Executive Power, Findlaw, July 26, 2002

http://writ.news.findlaw.com/amar/20020726.html

Akhil Reed Amar and Vikram David Amar, Constitutional Accidents Waiting to Happen-Again, Findlaw, Sept. 6, 2002

http://writ.news.findlaw.com/amar/20020906.html

My written testimony today largely recapitulates my formal testimony of September 16, 2003 before the Senate Committee on Rules and Administration and the Senate Judiciary Committee.

[2] For more discussion and analysis, see Amar and Amar, Presidential Succession Law, 48 Stan. L. Rev. at 114–27.

[3] According to Madison, Congress "certainly err[ed]" when it placed the Senate President pro tempore and Speaker at the top of the line of succession. In Madison's words,

> It may be questioned whether these are *officers,* in the constitutional sense. . . . Either they will retain their legislative stations, and their incompatible functions will be blended; or the incompatibility will supersede those stations, [and] then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Cong[ress] may declare *what officers* [etc.,] which seems to make it not an appointment or a translation; but an annexation of one office or trust to another office. The House of Rep[resentatives] proposed to substitute the Secretary of State, but the Senate disagreed, [and] there being much delicacy in the matter it was not pressed by the former.

Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 Papers of James Madison 235 (R. Rutland et. al. eds. 1983). Several members of the First and Second Congresses voiced similar views, see John D. Feerick, From Failing Hands: The Story of Presidential Succession 57–59 (1965); Ruth C. Silva, The Presidential Succession Act of 1947, 47 Mich. L. Rev. 451, 457–58 (1949).

In addition to these constitutional objections, there are many policy problems with Section 19. First, Section 19's requirement that an Acting President resign his previous post makes this law an awkward instrument in situations of temporary disability. Its rules run counter to the approach of the 25th Amendment, which facilitates smooth handoffs of power back and forth in situations of short-term disability-scheduled surgery, for example. Second, Section 19 creates a variety of perverse incentives and conflicts of interest, warping the Congress's proper role in impeachments and in confirmations of Vice Presidential nominees under the 25th Amendment. Third, Section 19 can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B? Here, too, Section 19 is in serious tension with the better approach embodied in the 25th Amendment, which enables a President to pick his successor and thereby promotes executive party continuity. Fourth, Section 19 provides no mechanism for addressing arguable Vice Presidential disabilities, or for determining Presidential disability in the event the Vice President is dead or disabled. These are especially troubling omissions because of the indispensable role that the Vice President needs to play under the 25th Amendment. Fifth, Section 19 fails to deal with certain windows of special vulnerability immediately before and after presidential elections.[4]

In short, Section 19 violates Article II and is out of sync with the basic spirit and structure of the 25th Amendment, which became part of our Constitution two decades after Section 19 was enacted.

The main argument against cabinet succession is that presidential powers should go to an elected leader, not an appointed underling. But the 25th Amendment offers an attractive alternative model of handpicked succession: from Nixon to Ford to Rockefeller, with a President naming the person who will fill in for him and complete his term if he is unable to do so himself. The 25th Amendment does not give a President carte blanche; it provides for a special confirmation process to vet the President's nominee, and confirmation in that special process confers added legitimacy upon that nominee.

If the 25th Amendment reflects the best approach to sequential double vacancy—where first one of the top two officers becomes unavailable, and then the other—a closely analogous approach should be used in the event of a simultaneous double vacancy. Essentially, there are two plausible options. Under one option, Congress could create a new cabinet post of Assistant Vice President, to be nominated by the President and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a moment's notice, and to lie low until needed: in the line of succession but out of the line of fire. The democratic mandate of this Assistant Vice President might be further enhanced if presidential candidates announced their prospective nominees for this third-in-line job well before the November election. In casting ballots for their preferred presidential candidate, American voters would also be endorsing that candidate's announced succession team of Vice President and Assistant Vice President. Cabinet officers should follow the Assistant Vice President in the longer line of succession. If this option were deemed undesirable, Congress could avoid creating a new position of Assistant Vice President, and instead simply designate the Secretary of State, or any other top Cabinet position, first in the line of succession after the Vice President.

Either one of these solutions would cure the constitutional problems I have identified: Cabinet officers and/or a newly-created Assistant VP would clearly be "officers" and bumping would be eliminated. My proposals would also solve the practical problems that afflict the current statute. Under these proposals, no resignations would be required-power could flow smoothly back and forth in situations of temporary disability. Congressional conflicts of interest would be avoided. Party and policy continuity within the executive branch would be preserved. And the process by which the American electorate and then the Senate endorsed any individual Assistant VP or Cabinet head would confer the desired democratic legitimacy on this officer, bolstering his or her mandate to lead in a crisis.

The two additional issues I have raised today—Vice Presidential disability and windows of special vulnerability at election time—also have clean solutions, as explained in my 1994 testimony.[5] Thank you.

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[4] For more analysis of the first three problems, see Amar and Amar, Presidential Succession Law, 48 Stan. L. Rev. at 118–29. For more discussion of the fourth problem, see Amar and Amar , Constitutional Accidents. For more discussion of the fifth problem see Amar, Presidents; Amar, Amar Dead President-Elect; Amar, One Terrorist Threat.

[5] See generally Amar, Presidents. For additional elaboration, see Amar and Amar, Presidential Succession, 48 Stan. L. Rev. at 139; Amar, Dead President-Elect; Amar, One Terrorist Threat; Amar and Amar, Constitutional Accidents.

Mr. CHABOT. Thank you, Professor.

Mr. Baker, you're recognized for 5 minutes.

TESTIMONY OF M. MILLER BAKER, PARTNER, McDERMOTT WILL & EMERY

Mr. BAKER. Mr. Chairman, thank you for the invitation to be here today. This is a subject of profound national importance and I'm happy to offer my thoughts any way I can to assist you.

Mr. CHABOT. Could you pull that mike just a little closer? The whole thing will move.

Mr. BAKER. Yes, sir.

I would refer the Subcommittee to my prior testimony before this Subcommittee and before the Senate for a detailed treatment of the myriad constitutional and operational problems associated with the Presidential Succession Act of 1947. Suffice it to say here that the 1947 act is almost unquestionably the single most dangerous statute in the United States Code. That's because the 1947 act threatens to deprive the United States of clear Executive authority at the precise moment when the need for what Alexander Hamilton called "energy in the Executive" may be most urgent, and when the absence of such clear Executive authority may be fatal to American lives and fatal to American vital interests.

I'll briefly summarize my recommendations on the major statutory changes that I think Congress should enact as soon as possible.

First, the House Speaker and the President Pro Tem should be completely removed from the line of succession for a host of constitutional and policy reasons set forth in my prior testimony and in the outstanding scholarship of Professor Akil Amar and Professor Ruth Silva before him. This is not a radical or unprecedented proposal. It merely returns the Nation to the state that existed between 1886 and 1947. In 1886 Congress confronted many of the same issues that we're discussing here today, and it wisely concluded that congressional officers should not be placed in the line of succession. Unfortunately, Congress reverted back to the pre-1886 in 1947, but I submit that Congress got it right in 1886.

Second, the statutory line of succession should be reconstituted to include the most important Cabinet officers: the Secretary of State, Secretary of Defense, the Attorney General, and the Homeland Security Secretary, in that order, plus those other persons in and outside of the Cabinet, nominated by the President and confirmed by the Senate, specifically for the purpose of serving in the line of succession.

Now, whether a particular Cabinet Secretary, take the Secretary of HHS, should be placed in the line of succession should be left to the President's discretion. Frankly, some Cabinet officers are stronger than others. We all know that. And ultimately it's a question within the President's judgment and discretion as to which members of his Cabinet outside of the principal offices should be placed in the line of succession. What should be beyond reasonable dispute is that the mere holding of Cabinet office alone does not qualify the office holder for assuming the acting presidency.

Now, by allowing the President the discretion to nominate persons outside of the Cabinet, and indeed outside of Government, to

serve in the line of succession, this problem would solve the problem of the concentration of successors in the Washington area. Those persons outside of Government and nominated by the President and confirmed by the Senate to serve in the line of succession could receive nominal compensation, regular updates of intelligence, and appropriate security. Former Presidents, former Vice Presidents, former Cabinet officers and retired Members of Congress come to mind as persons who might be nominated to serve in the line of succession, take Senator Sam Nunn, for example. The Senate's advice and consent function would serve to check any abuse by the President in making such nominations.

Third, Congress should eliminate the requirement that statutory successors serving in the Cabinet resign their Cabinet post before assuming the acting presidency. This requirement is counterintuitive and might cause a Cabinet officer to hesitate before acting or even to decline to act, especially if the acting presidency might be limited to a few hours or a few days. Recall March 30, 1981, when President Reagan was on the operating table, Vice President Bush was in Texas, in transit back to Washington. We had a few hours where there was no clear Executive authority within the United States. We had a Cabinet that was assembled in the White House Situation Room, and a disagreement within the Cabinet as to who possessed Executive authority, and we also had a disagreement between the Secretary of State and the Secretary of Defense over whether the strategic alert status of American forces should be heightened. That's exactly the situation where you need certainty in who is actually running the Government.

Fourth, Congress should modify but not entirely eliminate the bumping or displacement provisions of the 1947 act. To put the matter in simplistic terms, there is bad bumping and there is good bumping. It's very simplistic, but Congress should eliminate the former but provide for the latter. Congress should eliminate the ability of any newly-selected prior-entitled office holder, such as a new House Speaker or a President Pro Tem, if they're going to stay in, from displacing a lower ranked successor who is serving as acting President. This would preclude the scenario outlined in my prior testimony made possible under existing law and the rules of the House of a handful of surviving Members of the House convening, selecting a new Speaker, who would then in turn would displace a Secretary of State or other Cabinet officer serving as acting President. It's essentially a coup d'etat built into the law. That should be eliminated forthright.

Congress should also provide that if a more senior and otherwise capable statutory successor voluntarily chooses not to assume the acting presidency, that person permanently waives their right to claim the office in the future. You shouldn't be able to sit back and say, well, I'll wait and see how circumstances develop before taking the office.

However, in one respect, and this is a crucial point and essentially the only area where I disagree with my distinguished colleague, Professor Amar. In one respect bumping is both salutary and constitutional, and that is a situation where a more senior successor is temporarily unavailable to serve as acting President, but thereafter recovers the ability to do so. In my view, the overriding

goal of the Succession Clause is to provide the smooth and seamless transfer of power to the most senior successor authorized and available to assert that power. The problem is if you don't allow bumping in that situation between Cabinet officers, you may have a situation where in a fluke situation, where the first available Cabinet officer is the Secretary of Agriculture or the Secretary of Veterans Affairs, and thereafter, the Secretary of State or the Secretary of Defense, who would be a much more plausible President, just happened to be out of the country and was unavailable, but because the more junior guy got there first, he would be precluded from the senior person from assuming the office.

That is the state of the law today. We have a situation in which if the Secretary of Agriculture gets there first because he happens to be the only person available, he's there. That should be changed immediately so that a more senior Cabinet officer could replace him when he becomes available.

I see my time is up, and my prepared testimony is in the record. Thank you, Mr. Chairman.

[The prepared statement of Mr. Baker follows:]

PREPARED STATEMENT OF M. MILLER BAKER

Mr. Chairman, Ranking Member, and Members of the Subcommittee:

Thank you for the invitation to offer my views at this oversight hearing on the Presidential Succession Act of 1947, which is found at 3 U.S.C. § 19. This is a subject of profound national importance, and I am pleased to do whatever I can to assist the Congress in correcting the many deficiencies of the 1947 Act.

In December 2001, I wrote a white paper for the Federalist Society entitled "Fools, Drunkards, and Presidential Succession" in which I provided detailed criticism of the 1947 Act. On February 28, 2002, I gave detailed testimony to this subcommittee that substantially drew on my Federalist Society article. I also testified on this subject before a joint hearing of the Senate Judiciary and Rules Committees on September 16, 2003. Thus, I would refer the subcommittee to my prior testimony before this subcommittee and the Senate for a detailed treatment of the myriad constitutional and operational problems associated with the Presidential Succession Act of 1947.

Suffice it to say here that the 1947 Act is almost certainly the most dangerous statute to be found in the United States Code. The 1947 Act is extremely dangerous because it threatens to deprive the United States of clear Executive authority at the precise moment when the need for what Alexander Hamilton called "energy in the Executive" may be most urgent, and when the absence of such clear Executive authority may be fatal to American lives-possibly very many American lives-and vital American interests.

I will briefly summarize my recommendations on major statutory changes that Congress should enact as soon as possible.

First, the House Speaker and President pro tempore should be completely removed from the line of succession for a host of constitutional and policy reasons set forth my in prior testimony to this subcommittee and in the outstanding scholarship of Professor Akil Amar and Professor Ruth Silva before him. This is not a radical or unprecedented proposal. It merely returns the nation to the situation that existed from 1886 until 1947. In 1886 Congress confronted many of the same issues that we will discuss today, and it wisely concluded that congressional officers should not be placed in the line of succession for both constitutional and policy reasons. Unfortunately Congress reverted back to the pre-1886 regime in 1947, but I respectfully submit that Congress got it right in 1886.

Second, the statutory line of succession should be reconstituted to include the Secretary of State, the Secretary of Defense, the Attorney General, and the Homeland Security Secretary (in that order) plus those other persons (in and outside of the cabinet) nominated by the President and confirmed by the Senate specifically for the purpose of serving in the line of succession. (Nomination by the President and confirmation by the Senate for the purpose of serving in the line of succession should make such a person an "Officer of the United States.") Whether the Secretary of the Treasury or the Secretary of Health and Human Services should be placed in

the line of succession should be left to the President's discretion, subject to the advice and consent of the Senate. What should be beyond reasonable dispute is that the mere holding of cabinet office does not by itself qualify the officeholder for assuming the Acting Presidency. Does anyone seriously believe that the Secretary of Agriculture should be catapulted into the Presidency, especially in extreme circumstances that might resemble 9/11 and the assassination of President Kennedy rolled into one?

By allowing the President to nominate persons outside of the cabinet and indeed out of government to serve in the line of succession, this amendment would also allow for the dispersal of presidential successors outside of the Washington, D.C., metropolitan area, an area that must be a primary target for any weapon of mass destruction targeted by America's enemies. Those persons outside of government nominated by the President and confirmed by the Senate to serve in the line of succession could receive nominal compensation, regular intelligence updates, and appropriate security. This would avoid the political problem of the well-paid, do-nothing sinecure. Former Presidents, former Vice Presidents, former cabinet officers, and retired members of Congress come to mind as persons who might be nominated to serve in the line of succession. The Senate's advice and consent function would serve to check any abuse by the President in making such nominations.

Third, Congress should eliminate the requirement that statutory successors serving in the cabinet resign their cabinet posts before assuming the Acting Presidency. This requirement is counterintuitive and might cause a cabinet officer to hesitate before acting, or even to decline to act, especially if the "Acting Presidency" might be limited to a few hours or days. A rational succession mechanism would induce *action* by potential successors, but the 1947 Act has the perverse effect of potentially inducing hesitation and inaction by statutory successors.

Fourth, Congress should modify, but not entirely *eliminate,* the "bumping" or displacement provisions of the 1947 Act. To put the matter in simplistic terms, there is "bad bumping" and then there is "good bumping." Congress should eliminate the former, but expressly provide for the latter.

Congress should eliminate the ability of any *newly selected* prior-entitled officeholder, such as a new House Speaker, President pro tempore, or Secretary of State, to displace a lower-ranking statutory successor from the Acting Presidency. This would preclude the scenario outlined in my prior testimony, made possible under the 1947 Act and the rules of the House, of a handful of surviving members of the House of Representatives selecting a new speaker in the wake of an attack, who in turn could oust the Secretary of State or other cabinet officer serving as Acting President.[1]

Congress should also provide that if a more senior and otherwise capable statutory successor voluntarily *chooses* not to assume the Acting Presidency, that person thereby permanently waives his right to claim the office in the future. Under the 1947 Act, a Speaker or President pro tempore (but not a cabinet officer) may choose not to assume the Acting Presidency, but then later reassert those rights. That right of "re-assumption" should be eliminated.

In one respect, however, "bumping" is both salutary and constitutional. That is the situation where a more senior statutory successor is *temporarily* unable to serve as Acting President, but thereafter recovers the ability to do so.

In my view, the overriding goal of the Succession Clause is the smooth and seamless transfer of Executive authority to the most senior successor authorized and available to exercise such power. The Succession Clause provides that to the extent the President is unable to "discharge the powers and duties of the said office, the same shall devolve on the Vice President." The implication of this phrase is that when the President recovers his ability to discharge the duties of his office after a period of temporary disability, Executive authority necessarily reverts back to the President.

Although this seamless transfer of authority between the President and Vice President during the former's "period of inability" has been somewhat (and probably unduly) complicated by the cumbersome transfer procedures established by the 25th Amendment, the same general principle governs, I believe, the transfer of authority between "Officers" designated by Congress to serve as Acting President in the event of a double vacancy. Thus, if the most senior successor in Congress's designated statutory line of succession is temporarily unable to serve (e.g., Secretary of State

[1] Likewise, a more senior cabinet successor (e.g., the Secretary of State) who is appointed by a more junior cabinet successor (e.g., the Secretary of Defense) serving as Acting President should not displace or "bump" the appointing successor. However, the law should allow newly appointed officials to take their place in the line of succession, so that statutory successors to the Acting President could be replenished.

Colin Powell was arguably unable immediately to serve as Acting President on the morning of September 11, 2001, because he was in South America), Executive authority should revert to that successor when he or she is able to act.

I understand that Professor Amar argues that under the Succession Clause, a statutory successor serving at Acting President may be not be "bumped" by a more senior statutory successor who was previously unable to act. As I understand it, Professor Amar's argument is based on the text, which provides that the statutory Officer designated by Congress "shall act accordingly, *until the Disability be removed*, or a new President shall be elected." (emphasis added). According to Professor Amar, a statutory Acting President cannot be removed until the disability of the *President or Vice President* is removed, or a new President is elected.[2]

Although Professor Amar's inference from the text is a fair one, I do not think that it is the *only* fair inference that one may draw from the text. The Succession Clause, in its entirety, provides:

> 2In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, *and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President,* declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

U.S. Constitution Art. II, § 1, Cl. 6 (emphasis supplied). The Clause authorizes Congress to provide "by law" for the "case" of a double vacancy or inability, declaring what Officer shall as act as President, and such Officer shall act *"accordingly."* The Officer designated by Congress is to assume Executive Authority "according" to the "law" enacted by Congress to "provide for the case" of a double vacancy or inability. Thus, if Congress provides for multiple successor Officers in a descending order of priority, Congress may stipulate that a temporarily unavailable higher-ranked Officer may assume Executive authority from a lower-ranked Officer upon recovering the capacity to act. The exercise of Executive authority *according to the law enacted by Congress* terminates when "the Disability [of the President or Vice President] be removed, or a President shall be elected."

This understanding of Congress's power to provide for the exercise of Executive authority by a hierarchy of successors is consistent with the Clause's treatment of the exercise of Executive authority by the Vice President: when the President is unable to exercise his duties, the Vice President may do so, until the President recovers his capacity. It would be odd for the Clause to prohibit Congress from employing the same practical, flexible approach to the temporary "inability" of a more senior Officer in a *statutory* hierarchy of successors.

Moreover, to the extent that the Clause allows for two alternative inferences, in choosing between inferences the tie-breaker should be considerations of practical governance and the possibility of absurd results. Because "law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities." *Newman-Green, Inc.* v. *Alfonzo-Larrain,* 490 U.S. 826, 837 (1989). If Professor Amar is correct, when a successor at or near the very bottom of the statutory hierarchy of successors (e.g., the Secretary of Veterans Affairs or the Secretary of Education) happens to be the first available statutory successor able to assume Executive authority, then a more senior and patently more fit successor who was under a temporary disability, such as the Secretary of State, would not thereafter be able to assume the duties of Acting President. Professor Amar's construction thus has the effect of penalizing Congress for prudently providing for an extended line of succession by creating a possible trap in which Congress's last choice of potential successors could become Acting President under fluke circumstances, and thereafter not subject to replacement by more senior successors who were temporarily unavailable.

In addition to allowing for the possibility of such unfortunate results, Professor Amar's construction-which as noted above is already reflected in the 1947 Act insofar as it applies to the rights of cabinet officers *inter se*-has other destabilizing effects. It could induce hesitation on the part of available, but lower-ranked, statutory

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[2] It should be noted that the Presidential Succession Act of 1947 reflects Professor Amar's views on this issue, insofar as it governs the succession rights of cabinet officers *inter se.* Under the 1947 Act, if by happenstance the Secretary of Veterans Affairs happens to the first available cabinet available to assume Executive authority, no member of the cabinet may thereafter displace him or her, even if the senior members of the cabinet recover the ability to act. The 1947 Act, however, does allow the Speaker or the President pro tempore, including a newly chosen Speaker or President pro tempore, to displace cabinet officers for any reason. *See* 3 U.S.C. § 19.

successors fearful of the charge of usurpation.[3] Such lower-ranked successors may be hesitant to act until the unavailability or status of other, higher-ranked successors can be definitively confirmed, which hesitation might prove disastrous to the national interest. The succession mechanism should induce *action*, not hesitation, by the first available statutory successor. Thus, the first available statutory successor should be able to act decisively, on the basis of incomplete information as to the definitive status of more senior successors, with the knowledge that if a more senior successor is later to be able to act, Executive authority will automatically revert back to that more senior successor.

Finally, Congress should not provide for a new presidential election in the event of a double vacancy, even if the double vacancy occurs relatively early in the presidential term. The principal objective of the succession mechanism should be *stability.* Once a new President and Vice President take office, the nation and the world should know and understand that in the event of a double vacancy, there will be continuity of policy because the President's designated successor confirmed by the Senate will serve as Acting President until the expiration of the President's term. If federal law specifically provided for a special election in the event of a double vacancy, foreign enemies (governments as well as terrorists) and domestic madmen might be tempted to plot a double assassination for the specific purpose of forcing a new election, and thereby possibly effecting a change in policy. Recent events in Spain demonstrate that terrorists can very well attempt to manipulate the outcome of elections; the same mindset could certainly contemplate a terrorist attack with the goal of forcing a special election. The succession mechanism should not provide any incentive to those who might to seek to effect a change in policy by assassination, and unfortunately, a provision for a special election would do exactly that.

Mr. CHABOT. Thank you very much.

I'd ask unanimous consent to recognize out of order the distinguished Ranking Member of the full Judiciary Committee, Mr. Conyers, for a minute or two.

Mr. CONYERS. Thank you, Chairman Steve Chabot.

I'm intrigued by the depth of this discussion, the analysis that has gone on. The one Member that's on this Committee, Brad Sherman of California, has been working on this longer than any other Member I know in the House, and I wanted him to know that that observation is in my opening statement, which Chairman Chabot has already included in the record. And we are very aware of your second piece of legislation on this subject, which goes outside and around the usual Cabinet officers. And so I am intrigued that of the two witnesses that I heard, I think I hear elements of what you have been proposing, and I want to commend everyone on this panel, but Brad Sherman, we continue to look to you for the direction that we should go.

I had no idea that this was as serious a challenge to us. This is not academic. This is in real time, and I commend the Committee for taking this up as far ahead of time as they could, and I thank you so much.

Mr. CHABOT. Thank you.

We're going to now recognize out of order for the purpose of making an opening statement for the minority side, the gentleman from New York, the Ranking Member of this Committee, Mr. Nadler.

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[3] In some future crisis, when a statutory successor may be called upon to act in circumstances where it is unclear whether there are any surviving senior successors, the successor may recall the ridicule that Secretary of State Alexander Haig suffered for his famous "I'm in charge here" statement to the world on March 30, 1981. What is often overlooked about that episode is what prompted Haig's remark. The White House press spokesman had just stated on live television, broadcast worldwide, that he did not know who was running the government. Although Secretary Haig's demeanor in this famous episode was less than reassuring, his essential judgment was sound: it was necessary to assure the world (and foreign enemies in particular) that the continuity of Executive authority was not affected by the attempt on President Reagan's life and the possible inability of the Vice President to discharge presidential duties.

Mr. NADLER. Thank you, Mr. Chairman. I won't use the full 5 minutes.

First let me welcome our colleague, the gentleman from California, Mr. Sherman, and our other distinguished witnesses who are here to present their insights on this very important and timely issue, and I particularly want to thank the gentleman from California for his leadership in insisting that we should face this issue which a lot of people would rather sort of pretend we don't have to face.

I also want to thank you, Mr. Chairman, for holding this hearing.

As we consider the recommendations of the 9/11 Commission this week—I should say since it was taken off the agenda today—if we consider the—whether or not we consider the recommendations of the 9/11 Commission this week, in any event, it makes good sense to look at the frightening prospect that a catastrophic attack on our Government could create a leadership vacuum. I agree with our colleague that in addition to functional continuity, our planning must ensure that our Government continues to have and be seen to have the legitimacy needed to govern. In a time of crisis, this legitimacy would be all the more necessary.

Many people describe a catastrophic attack on our Government as unthinkable. It is unfortunately all too thinkable, as we should have learned 3 years ago. It is indeed a daunting prospect. However, we have an obligation to think about it, to think about it carefully, and to act with thought and careful deliberation before we are presented, God forbid, with an imminent emergency.

I look forward to the testimony. I welcome our witnesses, and I thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much.

We'll go back to the panel. We now recognize the gentleman from California, Mr. Sherman.

TESTIMONY OF THE HONORABLE BRAD SHERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. SHERMAN. Mr. Chairman, Mr. Nadler, thank you for holding these hearings here today. Thank you for letting me speak last so that more Members can be present.

I have been working on this since December of 2000, and I'm glad to see that it is being addressed in a serious and a bipartisan manner. This is one issue that we can resolve without amending the Constitution. We should have two objectives. First, continuity. When the voters select a philosophy to govern the Executive Branch of Government, that philosophy should govern that branch for the 4-year period. Second, legitimacy. We should always have one President who has undisputed rights to that office.

Addressing continuity, current law could lead terrorists to believe that they could kill the President and the Vice President and radically alter U.S. policy by installing in the White House an individual who may share nothing with the elected President in the way of philosophy, was not selected by the elected President and may well be of the other party.

In 1865, John Wilkes Booth organized a conspiracy, not just to kill Lincoln, but attempted to kill Vice President Andrew Johnson,

and wounded the Secretary of State. Are we to assume that Osama bin Laden will not be just as ambitious?

Perhaps worse than a shift in policy is the mere fear of that shift. Would a President take a leave of absence for an operation if doing so would vest the presidency temporarily in the other party? Had Gerald Ford not been promptly confirmed as Vice President, who's to say whether Richard Nixon would have resigned when he did, because doing so would have turned the presidency over to Democratic Speaker Carl Albert. If instead Nixon had clung to power, he might have been impeached, but would the Senate have tried him in a nonpartisan manner knowing that Speaker Albert was next in line?

Second, legitimacy. We need a single undisputed President. As has been pointed out, we have the simplest possible—or one of the more simple circumstances could lead to a constitutional crisis. We lose a President and a Vice President, the Speaker is sworn in, and immediately perhaps a majority of constitutional scholars are there to say that that Speaker is not a legitimate President of the United States at a time when we have perhaps just lost a President and a Vice President due to assassination.

There are even more complicated scenarios, and I'll deal with one. Excuse me for being morbid, but that's what seems to be required by this subject. Imagine the President, Vice President, Speaker of the House and the President Pro Tem of the Senate are all killed. Under current law the Secretary of State becomes President. But if the Senate acts quickly to name a new President pro tempore, then that Senator bumps the Secretary of State. But then if the House meets and elects a new Speaker, that Speaker bumps the former Senator and becomes President. And then let's say that House Member who had been Speaker for a day and now is inaugurated as President, that Speaker is supposed to nominate a new Vice President under the 25th amendment, but would probably refuse to do so since the new Vice President would bump the person who had appointed the new Vice President.

Not only do we have that level of confusion with a rotating series of acting Presidents, but any one of the bumpees could cling to the White House, and if I understand Professor Amar's testimony, he'd be there on behalf of the bumpee. So we would have not only a series of Presidents, but a series of conflicts and a division among our constitutional scholars. When it comes to Presidents, one is good, more is not better.

Last year I introduced H.R. 2749, which is one approach to this. I'm now working on other legislation. Nothing would thrill me more—and I plan to introduce this legislation when we reconvene in November—nothing would thrill me more than if Members of this panel would join me in introducing that new legislation, or even work with me in crafting legislation that they would introduce. Let me identify what the principles of this new legislation would be.

First, the line of succession should run through the Cabinet officers, not through the congressional leadership. As has been pointed out, this was the law of this country from 1886 to 1947. And of course, we would provide that there is no bumping by a later appointed officer. So that if a Secretary of State becomes President,

that person is not bumped by someone who is later appointed Vice President through the 25th amendment. I would point out that this same philosophy is included in a bill introduced by Senator Cornyn in the other body.

This philosophy ensures—this approach ensures that we have the same philosophy governing the Administration for a 4-year period. It eliminates the risk that a Speaker of the House would resign a House seat just to serve as President for a few hours, and it allows a President to take a leave of absence with peace of mind, knowing the other party would not take over. Finally, it eliminates a conflict of interest as a Speaker of the House guides our House through either an impeachment process or through the confirmation of a replacement Vice President under the 25th amendment.

Second, the legislation would provide that at the end of the list of Cabinet officers, we put five top ambassadors. They are the most senior Administration officials who reside outside the Washington area and should be included in the list in case all of us here in Washington are killed.

Now, we face a unique period of vulnerability during what I call the transition period, and that is the period from when the parties hold their convention until inauguration day and even until the new President has a few Cabinet officers who are confirmed. And let's deal with the different phases of that transition period.

The first phase is between the party nomination and when the Electoral College meets. Let's say the presidential nominee of one of the parties is killed. Now, party rules have called for a meeting of executive committees. It could be this person's killed the day before the election. The public needs to know that the vice presidential nominee will be the person that the electors of that party will vote for when the Electoral College meets. We need to establish that, both by law and by calling upon the parties to do it through party rule. Only in that way could we prevent the electors from splitting because some of them would say, well, we're not going to vote for the vice presidential nominee for President. We barely thought he was qualified to be Vice President. We need instead to urge the parties to provide that their electors will vote for the vice presidential nominee if the presidential nominee is killed, and provide a list of the third, fourth, fifth in line in case both their nominees are killed.

Now, most scholars believe that the Electoral College——

Mr. CHABOT. Could the gentleman summarize? And I'll tell you what, I know I said I'd give you a little leeway, but we're at 8 minutes now. And what I'm going to do is I'm going to give you some additional time in my questioning time, so if you could summarize in a sentence or two.

Mr. SHERMAN. In a sentence or two, in a nuclear age, in an age of terrorism, we must have a single undisputed President and we cannot invite terrorists to change our national policy through a bullet.

[The prepared statement of Mr. Sherman follows:]

PREPARED STATEMENT OF THE HONORABLE BRAD SHERMAN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Mr. Chairman, Good Morning. I would like thank you and Ranking Member Nadler for conducting these hearings today. As I'm sure they and their staffs can attest,

I have spent a great deal of time pushing for Congress to address the issue of Presidential succession, beginning with a Special Order in December, 2000. I am happy to see it is being taken seriously today and more importantly that it is being addressed in a bipartisan manner. There is no Democratic or Republican platform plank on Presidential succession. It is not an issue we discuss with swing voters in Ohio. It is an issue that requires careful study and good policy. Although we may have different opinions and solutions, those differences are not partisan.

I would also like to thank all the experts who have come here today. These are some of the premier minds in the country on constitutional and succession issues, and it is important we hear their insights on how to best solve the problems of Presidential succession.

One thing to emphasize is this is a problem we can address *without amending the Constitution.* Article II, Section 1 provides: "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President . . ." However, Congress has not substantially legislated on this matter since the Presidential Succession Act of 1947.

Currently, if the President dies, the Vice President becomes President. If the Vice President's office is vacant, than the Speaker of the House ascends to the Presidency. After that is the Speaker Pro Tempore, and following that are the members of the Cabinet in the order of department creation, excluding the Secretary of Homeland Security who has not yet been added to the list. This same order applies when the Presidency is temporarily vacant under the 25th Amendment.

What is most important here is continuity and legitimacy: continuity of the policy program selected quadrennially by the voters, and the unambiguous right of a single person to serve as our legitimate president. Unfortunately, our current law falls far short of achieving these objectives.

CONTINUITY OF POLICY

The will of the people would be subverted if a Congressional leader of a different party ascended to the Presidency, and completely reversed the course of government set by the elected administration. Current law could mislead terrorists into believing that by killing the President and Vice President, they could alter US policy.

In 1865, John Wilkes Booth organized a conspiracy which not only killed Lincoln, but attempted to kill Vice President Andrew Johnson and wounded Secretary of State William Seward. Can we be certain that Osama Bin Laden would be less ambitious?

Perhaps worse than a shift in policy is the *fear* of such a shift. If the office of the Vice President is vacant and the President is disabled, the Cabinet may fear exercising the 25th Amendment because the Speaker of the House could alter policy in a way that the President disagrees with. Would a President take a leave, say for an operation, vesting the Presidency temporarily in the other party?

Had Gerald Ford not been promptly confirmed as Vice President, who is to say that President Nixon would have resigned his office when he did, turning the Presidency over to Speaker Albert, a Democrat. If President Nixon had been impeached, would the Senate have tried him in a non-partisan manner, knowing Speaker Albert was next in line?

Speaker Albert could have used his power to slow down the confirmation of Mr. Ford, believing that eventually Mr. Nixon would be removed from office, giving him the Presidency. We were fortunate to have a man of integrity serving as Speaker—we should always be so lucky, but we cannot count on that fortune.

CLEAR LEGITIMACY OF A SINGLE PERSON TO SERVE AS PRESIDENT

Nothing is more important than making sure that whoever succeeds to the Presidency is seen as the legitimate leader of this country. Under current law, there are scenarios where one catastrophe could result in as many as four claimants to the Presidency.

Unfortunately, a discussion of Presidential Succession requires us to assume morbid events. So, please bear with me. Imagine that the President and Vice-President are at the Capitol for an official event. A disaster occurs resulting in the death of the President, Vice President, Speaker of the House and President Pro Tem of the Senate.

Under current law, the Secretary of State would become the President. However, if the Senate acted quickly to name a new President Pro Tempore, she would "bump" the Secretary of State to become President. Once the House elects a new Speaker, the new Speaker would "bump" the Senate President Pro Tempore, who would then become a private citizen, having given up her Senate seat to serve as President for just a few days.

The new President—the former Speaker of the House—might not nominate a Vice-President under the 25th Amendment. Because, once confirmed, the new Vice President, now a "prior-entitled individual" would "bump" the former Speaker and become the President. Needless to say four Presidents resulting from one catastrophe would lead to a great deal of confusion. That confusion would only be amplified should one of these figures not abide by the law or challenge the succession laws in court. All of the outcomes outlined above represent the leading interpretation of the current statutory scheme. However, each of the temporary Presidents could make a credible claim to retaining the Presidency.

When it comes to Presidents—one is good; more than one is not better. Especially not at a time of national discord or international challenge.

OTHER AREAS

There are a few other problems that I will briefly highlight here that should be considered.

The current line of succession does not include anyone who resides primarily outside of Washington, DC. Should the worst happen in our capital city, there would be no civilian leader to become commander in chief.

If a party nominee dies the day before the general election—will the people know who they are voting for? What if the winner of the Electoral College dies before the counting of the votes in early January—will the Vice President-elect become the President-elect? What if the President-elect and Vice-President elect both die after the Electoral College meets, but before the inauguration?

These are just a few short examples. In a post 9/11 world, our presidential succession system should be as solid as the barriers around the Capitol.

SHERMAN BILL

Last year, I introduced a Presidential Succession Act, H.R. 2749, which was my first step in solving these problems. Since then, I have been working with Members of both parties and both chambers, as well as academic experts, to improve my legislation and I am now prepared to introduce a new bill that I believe can rectify virtually all of the current problems, without amending our constitution. My hopes is that members of this subcommittee will either join me in introducing the new bill and/or would work with me on a bill they might introduce.

First, the line of succession should run through the Cabinet Officers, not through the Congressional leadership. This is included in my draft and in a bill introduced by Senator Cornyn in the Senate. This insures that the philosophy selected by the electorate governs for four years: it also avoids the bizarre situation where a Speaker would have to resign from the House to serve as temporary President for only a few hours, perhaps while the President undergoes surgery. It allows a President to take a leave of absence with peace of mind—knowing the opposing party will not "take over." Finally, it eliminates any conflict of interest as a Speaker guides the House, either through an impeachments, or through the confirmation of a replacement Vice President under the 25th Amendment.

Second, my new legislation adds five ambassadors to the end of the succession list. In my view, the best ambassadors for this are the United Nations Ambassador (who in some Administrations has "cabinet rank"), followed by the ambassadors to the four other permanent members of the United Nations Security Council. These five ambassadors are probably the five top executive branch officials who do not reside in the Washington, DC area.

DEALING WITH THE TRANSITION PERIOD

We face unique vulnerabilities between the day the political parties select their respective nominees and the day we have sworn in a new President, and Vice President, and at least several new Cabinet secretaries. New legislation should deal with each phase of this transition period.

First, there is the period between the conventions and the day the Electoral College meets in early December. Voters should know, and electors should pledge, that if the Presidential Nominee dies, the party's electors will vote for its vice presidential nominee for President. Likewise, each party should have a third and fourth person on the list, publicly announced by the Presidential Nominee so that voters will know, and electors will feel themselves bound. Anything less would lead to voter confusion if there was one or two assassinations just before Election Day, or might lead a party's electors to split their votes if there were assassinations, just after Election Day. A section of my proposed legislation urges the parties to list their third and fourth and fifth in line; preferably such announcement will be made at or before the convention by the Presidential nominee.

Many scholars believe that the Electoral College cannot meet a second time, thus leaving us vulnerable between the date it meets and the date the new President is sworn in, and even until a good number of the new President's Cabinet officers are confirmed. A resolution introduced by Senators Cornyn and Feinstein in the other body, a similar resolution I introduced in the House, and a section of the proposed legislation would urge the President-elect to name, and the Senate to act on, many Cabinet nominations soon after the election. Under my legislation, these new Cabinet members, named by the President-elect and confirmed by the Senate, would then stand in the line of succession. They would succeed to the Presidency if the President-elect, and Vice President-elect, died before, on or after Inauguration Day.

Ideally, just after the Electoral College meets, the President-elect would transmit to the outgoing President names of individuals that he or she is planning on appointing to at least some Cabinet posts. Those the outgoing President finds acceptable would be sent to the Senate for confirmation. At least one of these figures could be confirmed prior to the inauguration and kept in a secure location during the ceremony as is done with the State of the Union.

There is of course the risk that the outgoing and incoming President, or the Senate, are not obliging so that there are no Cabinet officers to succeed to the Presidency. In this case only, we should turn to Congressional Leadership. But, to ensure continuity of policy, the Congressional leaders at the end of the presidential succession list, would be designated by the President-elect prior to taking office. After the casting of the Electoral votes, the President Elect would file with the Clerk of the House and the Secretary of the Senate which House leader, Speaker or Minority Leader, and which Senate Leader, Majority or Minority Leader, they want to succeed them should the worst happen. This notification would be effective at Noon on inauguration day. The President-elect (or President after Inauguration) could change the designation by filing replacement documents; this might occur if a Minority Leader became Speaker due to a change in majority.

CONCLUSION

I have been reaching out to scholars, some of whom are with us today, to discuss my bill and make sure it is the strongest piece of legislation possible. I would like to submit two letters of support I have received into the record.

The foregoing scenarios can seem far-fetched and macabre. But the nuclear age and the age of terrorism have thrust them upon us.

Again Mr. Chairman, thank you for holding this hearing.

Mr. CHABOT. Thank you very much. And I'll thank all the witnesses for their testimony.

I'd ask unanimous consent to include in the record some materials that Senator Cornyn, who is the Chairman in the Senate of the Subcommittee on the Constitution, we'll include those items in the record.

[The prepared statement of Mr. Cornyn follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

I want to congratulate Chairman Sensenbrenner, Chairman Chabot, and Representative Sherman for today's important hearing on the Presidential Succession Act. Thank you for the opportunity to submit these written remarks.

On Tuesday, September 16, 2003, Senator Lott and I co-chaired a joint hearing of the Senate Judiciary Committee and the Senate Rules Committee to explore problems with the current Presidential succession law. I have also chaired a number of other hearings to discuss the continuity problems facing the institution of Congress. I convened these hearings because I am deeply concerned that, years after the terrorist attacks of September 11, 2001, Congress still has not taken the steps necessary to ensure that the vital institutions of our government will continue to operate on behalf of the American people even in the wake of a catastrophic terrorist attack.

REFORM OF THE PRESIDENTIAL SUCCESSION ACT OF 1947

Constitutional scholars across the political spectrum—including distinguished Yale Law Professor Akhil Amar, who appears before your committee today—have condemned the current Presidential succession law as one of the worst-drafted laws

on the books today. They have repeatedly expressed that current law is unconstitutional, unclear, and incapable of ensuring continuity of the Presidency at all times.

Everyone should agree that terrorists should not have the ability to choose our government. They should not be able to shut down our government, or to give control of the government to a different political party, by conducting a terrorist attack. Yet under current law, we are faced with precisely that possibility.

This situation is dangerous and intolerable. We must have a system in place, so that it is always clear—and beyond all doubt—who the President is, especially in times of national crisis. Yet our current succession law badly fails that standard. Imagine the following scenarios:

- The President and Vice President are both killed. Under current law, next in line to act as President is the Speaker of the House. Suppose, however, that the Speaker is a member of the party opposite the now-deceased President, and that the Secretary of State, acting out of party loyalty, asserts a competing claim to the Presidency. The Secretary argues that members of Congress are legislators and, thus, are not "officer[s]" who are constitutionally eligible to act as President. Believe it or not, the Secretary has a strong case—in fact, he can cite for support the views of James Madison, the father of our Constitution, who argued this very point in 1792, as well as legal scholars on the left and right. Who is the President? Whose orders should be followed by our armed forces, by our intelligence agencies, and by our domestic law enforcement bureaus? If lawsuits are filed, will courts take the case? How long will they take to rule, how will they rule, and will their rulings be respected?
- Or imagine that, once again, the President and Vice President are killed, and the Speaker is a member of the opposite party. This time, however, the Speaker declines the opportunity to act as President—in a public-minded effort to prevent a change in party control of the White House as the result of a terrorist attack. And imagine that the President pro tempore of the Senate acts similarly. The Secretary of State thus becomes Acting President. In subsequent weeks, however, the Secretary takes a series of actions that upset the Speaker. The Speaker responds by asserting his right under the statute to take over as Acting President. The Secretary counters that he cannot constitutionally be removed from the White House by anyone other than a President or Vice President, because under the Constitution, he is entitled to act as President "until the disability [of the President or Vice President] be removed, or a President shall be elected." Confusion and litigation ensue. Who is the President?
- Or imagine that the President, Vice President, and Speaker are all killed, along with numerous members of Congress—for example, as the result of an attack during the State of the Union address. The remaining members of the House—a small fraction of the entire membership, representing just a narrow geographic region of the country and a narrow portion of the ideological spectrum—claim that they can constitute a quorum, and then attempt to elect a new Speaker. That new Speaker then argues that he is Acting President. The Senate President pro tempore and the Secretary of State each assert competing claims that they are President. Who is the President?
- Or finally, notice that the President, Vice President, Speaker, Senate President pro tempore, and the members of the Cabinet all live and work in the greater Washington, D.C. area. Now, imagine how easy it would be for a catastrophic terrorist attack on Washington to kill or incapacitate the entire line of succession to the Presidency, as well as the President himself. Who is the President?

In every one of these scenarios, we do not know for sure who the President is—a chilling thought for all Americans. In an age of terrorism and a time of war, this is no longer mere fodder for Tom Clancy novels and episodes of "The West Wing." These nightmare scenarios are serious concerns after 9/11. On that terrible day, federal officers ordered a dramatic evacuation of the White House, even shouting at White House staffers: "Run!" On that day, the Secret Service executed its emergency plan to protect and defend the line of Presidential succession—for the first time ever in American history, according to some reports. And in subsequent months, the President and Vice President were constantly kept separate, for months and months after 9/11, precisely out of the fear that continuity of the Presidency might otherwise be in serious jeopardy.

Senator Lott and I have introduced legislation (S. 2073) to reform our Presidential succession system, to help ensure that we have answers to these disturbing questions, and to prevent any of these nightmare scenarios from ever coming true. Like-

wise, Representatives Sherman, Cox, and others have introduced proposals to reform the Presidential Succession Act. It is time for Congress to debate and vote on these bills.

RESOLUTION TO ENSURE SMOOTH PRESIDENTIAL TRANSITIONS

I have also introduced a resolution (S. Res. 419) to deal with the special problems of Presidential succession that could arise during a particular window of vulnerability—the period of time surrounding the inauguration of a new President. And I am especially pleased that Senator Feinstein and Representative Sherman have lent their names and support to this effort. After all, members of both parties should agree that terrorists should never be able to determine, by launching a terrorist strike, which party controls the White House.

Imagine that it is January 20, the inauguration date for a new incoming President. The sun is shining, and the American people are watching. The new President and Vice President sit on the center platform just steps away from the Capitol Rotunda, joined by American and foreign dignitaries, including leaders of both Houses of Congress. It is a beautiful day—but as national security and continuity of government experts have long recognized, it is also a window of vulnerability. If terrorists launched a successful strike on Inauguration Day, it could wipe out not only our new President, but also the first three people who are in the line of Presidential succession under our current Presidential succession statute—the Vice President, the Speaker of the House, and the President pro tempore of the Senate.

What happens next?

Well, imagine that the election of the prior year had resulted in a change of political party control of the White House. During previous Presidential transition periods, a new incoming President has had to serve with Cabinet members from the prior Administration—including sub-Cabinet officials from the prior Administration acting as Cabinet members—for at least some period of time. That means that, in the event of a successful inaugural day attack, the official who could rise to become Acting President, perhaps serving for four full years, could very well be a member of the outgoing Administration—indeed, a member of the political party that the American people expelled from office at the most recent election. In effect, terrorists have successfully determined the political party that controls the White House.

There is a solution. An incoming President cannot exercise the constitutional powers of the President, in order to ensure a smooth transition of Government, until noon on the 20th day of January, pursuant to the terms of the Twentieth Amendment of the Constitution. Accordingly, cooperation between the incoming and the outgoing President is the only way to ensure a smooth transition of government. Whenever control of the White House shall change from one political party to another, the outgoing President and the incoming President should work together, and with the Senate to the extent deemed appropriate by the Senate, to ensure a smooth transition of executive power, in the interest of the American people. Accordingly, the resolution establishes a non-binding protocol—a protocol with three parts.

First, the resolution states that an outgoing President should consider submitting the nominations of individuals to the Senate who are selected by the President-elect for offices that fall within the line of succession. Under the current Presidential succession statute (3 U.S.C. § 19), that means the members of the Cabinet, defined as the heads of the statutory executive departments (5 U.S.C. § 101).

Second, the resolution provides that the Senate should consider conducting confirmation proceedings and votes on Cabinet nominations, to the extent deemed appropriate by the Senate, between January 3 and January 20 before the Inauguration. Of course, nothing in the resolution purports to alter the constitutional powers of either the President or the Senate, and indeed, nothing in this resolution could constitutionally do so.

And third, the resolution encourages the outgoing President to consider agreeing to sign and deliver commissions for all approved nominations on January 20 before the Inauguration—all to ensure continuity of government.

This resolution has received strong support amongst experts in the fields of continuity of government and constitutional law. This is a truly nonpartisan effort, so I am particularly pleased that the resolution is so enthusiastically supported by constitutional legal experts like Walter Dellinger, Cass Sunstein, Laurence Tribe, Michael Gerhardt, and Howard Wasserman.

Throughout history, Congress has acted consistently and in a bipartisan fashion to encourage measures to ensure the smooth transition of Executive power from one President to another. Think, for example, of the Presidential Transition Act of 1963, and its subsequent amendments. In that Act, Congress concluded that "[t]he national interest requires" that "the orderly transfer of the executive power in connec-

tion with the expiration of the term of office of a President and the inauguration of a new President . . . be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign." Congress further concluded that "[a]ny disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people." Accordingly, Congress expressed its intent "that appropriate actions be authorized and taken to avoid or minimize any disruption" and "that all officers of the Government so conduct the affairs of the Government for which they exercise responsibility and authority as (1) to be mindful of problems occasioned by transitions in the office of President, (2) to take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power, and (3) otherwise to promote orderly transitions in the office of President." This resolution embodies the same spirit expressed in the Presidential Transition Act.

I hope that today's hearing will prove to be an integral step in a longer process in both Houses of Congress of ensuring that our more than 200-year experiment in self-government will never perish from this earth. In an age of terrorism and a time of war, few things could be more important than ensuring that the United States government—the nation's most vital instrument of national security—is failsafe and foolproof, against even the most devious and destructive of terrorist plots. Nobody likes to plan for their demise, but failure to do so is foolish and dangerous. We must begin the process of sending the message to terrorists that there is nothing they can do to stop the American government from securing freedom here and around the globe. Twenty years ago, after nearly killing Prime Minister Margaret Thatcher and leading members of her government, I.R.A. terrorists issued a chilling threat: "Remember, we only have to be lucky once. You have to be lucky always." The American people should not have to rely on luck. The terrorist attacks of September 11 did not succeed in decapitating our government. But we may not be so lucky the next time.

Mr. CHABOT. I now recognize myself for 5 minutes for the purpose of asking questions.

Mr. Sherman, I'm going to give you 2 of my first 5 minutes right here to continue what you would like to—whatever points you'd like to make that you didn't have an opportunity to make in your statement.

Mr. SHERMAN. Thank you for your graciousness, Mr. Chairman.

Most scholars believe that the electoral college cannot meet a second time, thus, creating a unique vulnerability between when the Electoral College meets and when the new President is sworn in and when the new President has some Cabinet officers who are confirmed. A resolution introduced by Senators Cornyn and Feinstein, a similar resolution I introduced in the House, and a section of the proposed legislation, would urge the President-elect, right when—right after the Electoral College meets, to transmit to the then-serving President the names of individuals that he or she is planning to appoint to at least some of the Cabinet offices. Those that the then-serving President finds acceptable would be sent to the Senate for confirmation, and these new Cabinet officers would be in line of succession. At least one of these new Cabinet officers would be held in a secure area during the inauguration ceremony just as we hold a Cabinet officer in a secure area during the State of the Union address.

There is of course the risk that the outgoing President, the incoming President and the Senate will not cooperate, and there will be no Cabinet officers available on January 20th when the new presidency begins. In that case alone we should turn to congressional leadership. I realize that might be subject to some challenge, but this is a highly unlikely circumstance. But even then, the con-

gressional leader called upon should be one designated by the President-elect. After the casting of the Electoral College votes, the President-elect could file with the Clerk of the House and the Secretary of the Senate, a document indicating which House leader, the Speaker or the minority leader, which Senate leader, the majority leader or the minority leader, would succeed if the worst could happen.

Thank you for the time.

Mr. CHABOT. Thank you. Thank you very much.

I've got 3 minutes left of my questioning. Let me just go to a couple other issues real quick. Would any of the Members like to comment on—I had heard the speculation or possibility of including governors in the line of succession. Would any of the Members like to address what they might think about that idea? Mr. Baker?

Mr. BAKER. There are constitutional problems associated with that. I believe under the current system without a constitutional amendment and assuming that State law permits it, because there are some State law issues that might prevent it, there may be a way for a President to federalize a State governor, as the commander in chief of the State's National Guard, as a Federal officer. That would then make that person an officer of the United States. You would have to amend the statute to provide for it, so I think it could be worked out. It's not free from constitutional doubt, but at a minimum it's at least as constitutional as the present set of arrangements.

Mr. CHABOT. Any other thoughts on that that anybody would like to share? Yes, Mr. Amar?

Mr. AMAR. If one of the ideas is geographic, that this, the Capitol is a special target and that it's useful to have someone sort of, as it were, in the line of succession but very much out of the line of fire, the idea of an Assistant Vice President, someone just designated to be in the line of succession but out of the line of fire, perhaps a former President. Think of it as the succession version of the designated hitter, who doesn't basically—who's not actually out there on the field most of the time, but is basically held back in reserve to do one and only one thing, which is to provide the American people a real sense of assurance and security, and maybe even familiarity in this highly-unusual event, including even the past President.

Mr. CHABOT. Thank you. I've got about a minute left.

Let me ask the three panel members here. I don't know if you've all had a chance to read Mr. Sherman's proposal, but do any of you have—are there any things that concern you about that or any changes that you all think should be made in that?

Mr. AMAR. I think the Congressman has really done a lot of very fine work, and I want to thank him and commend him for helping to bring visibility to it. And I do think in very, very highly unusual situations where you really try to have Cabinet succession, officer succession, and everyone's gone, I think only a real constitutional zealot, maybe without good judgment, would say you can't have congressional leaders in that circumstance because the Constitution really isn't a suicide pact, and so I think I appreciate sort of the prudence involved there.

Of course, there are other constitutional scholars, so there might be questions raised, but we'd be in such an unusual situation, who's going to even be around to raise the questions if we've gone through that many people?

Mr. CHABOT. Mr. Neale, did I see you going for your button there?

Mr. NEALE. Right. There are so many options and so many possibilities and what-ifs involved in this process, and I think that Mr. Sherman has exhaustively reviewed them, and I think has provided for almost any conceivable contingency in his proposed legislation.

Mr. CHABOT. Mr. Baker?

Mr. BAKER. I have not read it closely, and I intend to do it, but I'm in substantial agreement from everything that I've seen. It's certainly a huge step in the right direction, and I applaud the Congressman for doing it.

There's one issue that I think is very important, and it's also where I and Professor Amar disagree, but it's an issue I mentioned of the good bumping versus the bad bumping. I do think that it is necessary to provide in the case of Cabinet succession, to allow a more senior Cabinet officer, who is temporarily unavailable. On September the 11th Colin Powell was in South America. If we had had to make instant command decisions within 10 minutes, somebody had to give the order, do we shoot down this other airliner, and the military had gone to Treasury Secretary Paul O'Neill and he had made that decision, he would be acting President. My view is in that kind of extreme situation, the more senior this person who is authorized and contemplated by Congress as becoming acting President should do so when they become available.

So with that one qualification, that I think we need to provide for bumping by a pre-existing more senior officer who's not available at the time, I'm in general agreement with what Congressman Sherman has proposed.

Mr. AMAR. I'm not sure we disagree actually on that for the same prudential reason, that's, you know, very unusual, and only a purist might say——

Mr. CHABOT. Thank you very much.

Mr. SHERMAN. Mr. Chairman, if I could just quickly comment on that.

Mr. CHABOT. Yes.

Mr. SHERMAN. I think the legislation will conform to Mr. Baker's objective, and the one idea put forward by the panel that is not in my legislation is the creation of a new officer, whether Second Vice President or Minister, I think it's a fine idea. I'm just not sure—I don't know whether it would sell with the Committee or not. If you want to create new officers, I'm all for it.

Mr. CHABOT. All right. We just created some additional judges in the 9th Circuit. [Laughter.]

The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you.

Let me start by commending Congressman Sherman for giving it all of this thought and coming up with some very interesting ideas, and also expressing my satisfaction at hearing two members of the panel express the view that in a time of crisis there would be no

people with a lack of judgment who would come forward despite the situation. I'm not so sure that's true. I think you have to anticipate that there will always be people with lack of good judgment who may be purists or whatever, and nail things down.

Let me ask—I'm not sure who this question is directed to, so anybody take it. In talking about the Cabinet officer or the person in line of succession who's, quote, "not available," who's out of Washington, let's say.

Why would being away from Washington preclude a statutory officer from assuming the presidency, especially in this world of modern communications? Even almost 40 years ago, Vice President Johnson was sworn in in an airplane in Dallas. Now, yes, if someone were in Antarctica or incommunicado in Vienna or something—I don't know why he'd be incommunicado—be out of the country, yeah, but in most circumstances doesn't have to be in Washington.

Mr. BAKER. Congressman, if I can respond to that because I've dealt with that.

Mr. NADLER. Please.

Mr. BAKER. I agree in principle, but circumstances change. And what's striking, if you look at the accounts of what happened on the day President Reagan was shot—and this is only 25 years ago—we had a Vice President who was in transit back to Washington, and there was no really effective communication between him and the members of the Cabinet at the time. And essentially they were making decisions in the Situation Room without the Vice President, apparently because they couldn't effectively communicate. So there may be situations where the military in particular has a time urgent requirement to make a decision for an order——

Mr. NADLER. Do you shoot down the plane?

Mr. BAKER. Do you shoot down the plane? And the Secretary of the Treasury—the Secretary of State, Colin Powell, who may be in South America in a meeting, they can't get to him right away, you need authority immediately. But the Treasury Secretary is down the street. We've got him on the phone. He makes that decision, under the existing statute he becomes the President——

Mr. NADLER. But then the question becomes—I understand that, and that makes sense. And then the question becomes, okay, Colin Powell is in South Africa, you can't get hold of him right away. The Treasury Secretary is supposed to be giving a speech at some college in New Jersey at 10 o'clock, but you're not exactly sure where he is at the moment, maybe in his former law partner's office shooting the breeze before he gives a speech. Who makes the decision whether to get in touch with him, or jump to the next guy who's standing in the next room?

Mr. BAKER. I think that has to be, you know, a good faith decision made by the people in the Executive Branch, in the White House, if there is a White House left. I mean I understand that FEMA has procedures in place to deal exactly with this kind of situation, but you go down the line. We try to—and I understand that the Office of Legal Counsel has issued advisory opinions within the Administration about how to deal with this kind of situation. I think there must be a good faith effort made to reach the first person, the most senior person available, but there are going to be sit-

uations where the more senior person is simply not available at the time.

Mr. NADLER. I understand. My question was, who makes the decision that that person is or is not available, and therefore jumping to the next guy, and what happens if someone questions that decision?

Mr. AMAR. I have one thought about this, that—which is—and it maybe avoids any constitutional problem. The Secretary of State in that scenario is the acting President, and until he is actually—whether we can't reach him or not, until we know that he's dead or he's turned it down, he's the acting President, and so we don't even have bumping. But he may have predesignated—and it would be a requirement in effect that he predesignate someone to act by proxy. This body understands the idea of proxy, and presumably——

Mr. NADLER. We pretend that it doesn't usually, but okay.

Mr. AMAR. And there's still pairing and other things or maybe not. But you could imagine basically the other person isn't really quite technically acting President but he is the proxy delegatee of the person who's first in line.

Mr. NADLER. Thank you.

I yield back.

Mr. CHABOT. The gentleman yields back.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I'd like to thank all the witnesses for your testimony. This is an intriguing subject matter, and I particularly appreciate Representative Sherman's look into this and how it's intrigued you all.

Some of these questions intrigue me as well, and I'll maybe work backwards through some of this testimony and direct my first question to Mr. Sherman. And that is, the direction of how the electors might vote in the event of a disaster in the case of a Vice President, and this is a case that you referenced. Do we have a statutory or constitutional direction for electors today when they vote for the President?

Mr. SHERMAN. At the present time there are a number of States who have statutes of questionable constitutionality, requiring the electors to be faithful. Just in our last election one elector from the District of Columbia, I believe, abstained rather than voting for the Democratic nominee, to which he or she was pledged, and I'm not sure that any new statute should change the freedom of electors. What controls them and makes them faithful for the most part is they are representatives of a party that has given them widely-accepted direction. You can go to any Democrat and say, "Who's your nominee for President?" and they know who it is, and Vice President. Likewise in the Republican Party.

If—I think you maximize the likelihood of electors being faithful to a plan if they know what the plan is.

Mr. KING. But in those events that electors have broken from that tradition have been extraordinarily rare.

Mr. SHERMAN. Very rare.

Mr. KING. And if we set even a Federal directive out there that was a recommendation potentially, that would also be unprecedented from a Federal perspective, although not from a State?

Mr. SHERMAN. It would be perhaps unprecedented, but I think that generally as a Nation we expect Electoral College members to be faithful.

Mr. KING. Then going to another subject matter about how the succession might work, and without going through the sequences, how the President might—someone might succeed to the presidency and then be bumped by someone of a higher standard. Can he—I have a little trouble getting to that. Once someone is sworn in as the President of the United States, I would think the stature of the presidency would be enough to resist any attempt to bump no matter the circumstances. Have you considered that down through, and really, do you think that plays out?

Mr. SHERMAN. Well, I know my fellow colleagues in Congress. We don't get here without being ambitious. And if Professor Amar came to one of us and said that he and most scholars felt that we had the right to live in the White House, who amongst us would choose more humble accommodations? [Laughter.]

I don't know what we would do under those circumstances, but certainly a letter signed by 100 law professors saying that you had the right to move in the White House would be very hard to resist, and a letter signed by them saying: "Every day you wake up is a day you have a right to move into the White House, should you choose," would cause some consternation. People wouldn't know what the relevant person would do.

Mr. KING. Thank you, Mr. Sherman.

Mr. Baker?

Mr. BAKER. Congressman, I'd just like to respond. There's one important distinction to keep in mind, to respond to your question. Under the Succession Clause, we're dealing with statutory successors, not the Vice President to the presidency. Under the Succession Clause, a person does not become the President. That's a huge distinction. You become the acting President. And that's why, I mean the bumping, the displacement by a more senior officer would be constitutionally permissible. So it's not as if you become the President, although I'm sure if we have a Speaker or Secretary of State, they may go ahead and try to follow the precedent of 1841 when John Tyler said, "Well, I'm the President."

The Succession Clause originally contemplated that the Vice President would be the acting President. That's been changed. The 25th amendment constitutionalized the Vice President becoming the President, but as far as statutory successors, they only become the acting President, not the President, and therefore, that's why bumping is constitutionally permissible I think in certain circumstances.

Mr. KING. Thanks for that distinction.

And I'm going to have a question for Professor Amar, and I think he also has some input he would like to make, but into your response, and watching our time tick down here, I'd like to also hear something about your philosophy as to why you would avoid the elected officials of Congress in preference for the appointed Cabinet members. I would think the legitimacy would reside with those who had actually stood for election rather than those who have been confirmed by the Senate and appointed by the President.

Mr. AMAR. And that's, I think, what Harry Truman's philosophy was when he signed that bill into law in 1947. Since then the country, when it's really thought about it very carefully, which it did after John Kennedy was assassinated and the 25th amendment opted for a different model, the 25th amendment model, which to repeat, was not on the books when the '47 statute was adopted, is Nixon, then to Agnew, or if not Agnew, Ford, and if not Ford, Rockefeller, and it's to the handpicked successor of the person who was elected by the American people to do the job for 4 years, with extra legitimacy conferred basically by a special confirmation process, which you could have by signalling with an Assistant Vice President, that says this is something very special, and even having the American people know who that name was before they voted for a candidate.

So the 25th amendment model is actually not one of quite elected officials. Gerald Ford wasn't elected, and yet, there's, you know, a building here in his honor, and I saw his statue yesterday in this building, in this complex, and so that's actually the new constitutional model. And it facilitates back and forth between a President and Vice President, that you can't have—as long as you require—if you have legislative leaders, they have to resign because they can't be at both ends of Pennsylvania Avenue at once. This system is just not going to work for temporary back and forth things, which was after the Soviet Union got the bomb, which again was after '47, a real redefinition of vice presidency as at least someone who works very closely with the President rather than the presiding officer of the Senate.

Mr. CHABOT. The gentleman's time is expired.

Mr. KING. Thank you very much.

Mr. SHERMAN. If I could just comment on that?

Mr. CHABOT. Very briefly.

Mr. SHERMAN. Ford and Rockefeller both became President and Vice President through an appointment process. They happened to have been current politicians, but they could have been anybody.

The present system puts in line the President Pro Tem of the Senate. While he's elected by a State or she is elected by a State, that's hardly a person chosen for national leadership, and had two bullets flown in 1998, we would have had a 98-year-old elected person serving as President, Mr. Strom Thurmond, who had been elected but was rather old.

Mr. CHABOT. The gentleman's time is expired.

The gentleman from Indiana is recognized for 5 minutes.

Mr. HOSTETTLER. Let me follow up. I just have—I would like to speak to an issue that's I think very fundamental in this discussion, and I don't want to come across as naive in my understanding of how the political process works these days. But as we are the Constitution Subcommittee, I think it's important for us to recognize when we talk about a line of succession with regard to the Executive Branch, we are talking about an Executive officer. We are not talking about a legislative officer. And therefore, given that article I, section 1 of the Constitution states that all legislative power should be vested in a congress, and therefore, by definition the term "all" meaning fairly exclusive, that no legislative authority vests in the Executive Branch, that in fact, what we are after in

a line of succession for the Executive is an executive, not a prime minister, not a leader of a party with a particular philosophy by which will be continued at the absence of one particular leader of—well, not a leader of a party. We do not have a parliamentary system. We have a system by which an executive is elected by electors through the Electoral College, and we have popular elections for the legislature.

And so when we talk about a particular philosophy being extended in the succession process, granted I don't—once again, I don't want to come off as naive given what we are seeing in the debates by Executives suggesting what they will do legislatively if they are elected by the people in front of whom they are debating, even though the electors put them in office. I do want—I would hope that this Subcommittee, as we deliberate on this very important issue, would bring us back to the Constitution and the fact that regardless of who is in the line of succession with regard to the President—and I'll ask a question about constitutionally recognized, quote, "officers," end quote, in just a moment—but that we are looking for an executive, not a prime minister, not a supreme legislator, but an executive, that according to article I—excuse me—article II of the Constitution, shall, quote, take care to faithfully, to execute the laws of the United States. That's what they are to do. They are not to do anything other than to be faithful to that execution.

So when we talk about a philosophy being consistent, then we continue that, I think, unconstitutional dialog that says that for some reason we are actually electing—the people are electing a supreme legislator, that once we get a person into the White House, that person will, will give everyone prescription drugs, or will do whatever it is that—or will return school prayer or whatever it is, that we are—that hopefully we would say we are talking about an executive. And so regardless of their philosophy they are to faithfully execute the laws of the United States.

And so given that, the—would you all agree with that, that the Constitution requires that an Executive really be fairly free of a philosophy, any philosophy that rules the faithful execution of the laws of the United States? Would you agree to that?

Mr. SHERMAN. I'm not sure I would agree. When people voted for Richard Nixon for President, Nixon had chosen Agnew. They were getting Nixon-Agnew. They didn't really want George McGovern, contrary to my efforts. Nixon chose Agnew. Then Nixon chose Ford. Then Ford chose Rockefeller, and we ended that presidential term with Ford-Rockefeller, having started it with Nixon-Agnew. That was consistent with what people voted for.

Now, you can talk, maybe it's party or maybe it's they wanted people who were on the Nixon team, which is not party, but just that individual who they elected. If they had voted overwhelmingly for Nixon-Agnew and had gotten Carl Albert, I think that would have been a breach of democracy, because although Mr. Albert was elected Speaker of this House, he certainly was not reflective of who people voted for in the presidential election.

Mr. HOSTETTLER. Let me follow up with one question. What laws do you think Speaker Albert would have executed outside of the statutory regime, or what would he have executed that was unlaw-

ful and outside of the statutory regime at the time or constitutional regime?

Mr. SHERMAN. I am not an expert on Carl Albert. I know that he was to the right of George Mcgovern. But it matters who's President. It's not just competency. It's also about the philosophy, and he might have—there are people here who know far better than I. But I think this election we're having now is not just about who's a competent executive. I mean we've got people running major corporations who are very competent executives. There's a difference between Albert and Nixon.

Mr. CHABOT. The gentleman's time has expired.

There are no other questions from the Committee at this time, and I want to thank very much the members of the panel for giving us, I think, really very good, very helpful testimony here this morning. Each Member will have five additional days to submit information for the record. And we will follow this very closely and look forward to discussing this with Members of the Committee who might not have had the opportunity to be here today and other Members of the Judiciary Committee. So thank you very much for giving us the information today.

And if there's no further business to come before the Committee, we're adjourned. Thank you.

[Whereupon, at 10:45 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Thank you, Mr. Chairman, for holding this hearing today to discuss the effectiveness of our current procedure for selecting the person who will serve as our president in the event something happens simultaneously to our president and vice president.

The American President holds perhaps the most important position in the world. He is commander-in-chief of the world's greatest military. He serves as the leader of the world's only remaining superpower. He is also one of the greatest targets for those who seek to hurt our nation, to destroy the freedom we represent.

The horrors of September 11, 2001, highlighted the need for focus on the issue before us today. Many speculate that the heroic passengers of United Flight 93 saved all of us from the fate many Americans suffered on that tragic day.

The legislation before us on the floor this week demonstrates how hard we are working to save our nation from another tragedy like September 11. Despite all our efforts, however, we need to be cognizant of the fact that destroying America is still the number one terrorist objective. We need to ensure that the policy we have set in place is the appropriate one, should we, Heaven forbid, face another national emergency in our future.

Thank you, Mr. Chairman.