

Presidential Succession: Perspectives and Contemporary Issues for Congress

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Presidential Succession: Perspectives and Contemporary Issues for Congress

Succession to the office of President of the United States is provided for by the Twenty-Fifth Amendment to the U.S. Constitution and Title 3, Section 19 of the U.S. Code (3 U.S.C. § 19).

The Twenty-Fifth Amendment states in Section 1 that when the office of President of the United States becomes vacant due to “removal... death or resignation” of the chief executive, “the Vice President shall become President.” In Section 2, it further provides that, when the office of Vice President becomes vacant for any reason, the President shall nominate a successor, who must be confirmed by a majority vote of both houses of Congress. Sections 3 and 4 of the amendment provide for cases of presidential disability; for further information on this issue, consult CRS Report R45394, *Presidential Disability Under the Twenty-Fifth Amendment: Constitutional Provisions and Perspectives for Congress*, by Thomas H. Neale.

Authority for succession beyond these two offices is provided in Article II, Section 1, clause 6 of the Constitution, which empowers Congress to “by Law provide for the case of Removal, Death, Resignation or Inability, both of the President and Vice President” The Succession Act of 1947 (61 Stat. 380), as amended, found at Title 3, Section 19 of the U.S. Code (3 U.S.C. § 19), governs this eventuality. The 1947 act provides that if the offices of President and Vice President are vacant simultaneously, the Speaker of the House of Representatives acts as President, after resigning from the House and from the office of Speaker. If the speakership is also vacant, the President pro tempore of the Senate acts as President, after resigning from the Senate and from the office of President pro tempore. If both offices are vacant, the Secretary of State, who heads the most senior executive department, acts as President. If that office is vacant, then the Secretary of the next most senior department succeeds, continuing through the executive departments, ranked in order of when they were established by law—from the Secretary of State, through the Secretary of Homeland Security. If they do assume the acting presidency, the law further states that taking the presidential oath of office constitutes an automatic resignation from their Cabinet position. All potential successors must have been duly sworn in to their previous offices and meet the presidency’s constitutional requirements of 35 years of age, “natural born” citizenship, and 14 years residence “within the United States,” as prescribed in Article II, Section 1, clause 5 of the Constitution. Anyone serving as acting President under the act can be supplanted or “bumped” if a person holding an office higher in the order of succession takes the position. Since 1947, the Succession Act has been updated regularly to include the heads of newly created executive departments.

Presidential succession was seemingly a settled issue prior to the terrorist attacks of September 11, 2001 (9/11). These events demonstrated the potential for a mass “decapitation” of both legislative and executive leadership and raised the question of whether current arrangements are adequate to guarantee continuity in government in such circumstances. Legislation was proposed to revise or expand the line of succession in several Congresses in the years following 9/11. Nongovernmental organizations also promoted similar plans during this period. The only legislative change enacted during that time, however, was inclusion of the Secretary of the Department of Homeland Security (DHS) as 18th in order of succession, a provision enacted in Title V, Section 503, of the USA Patriot Improvement and Reauthorization Act of 2005 (120 Stat. 192).

For some years prior to 9/11, and continuing since that event, observers and scholars of presidential succession have questioned certain aspects of existing succession law. Some of these center on the following issues. Do the Speaker and President pro tempore qualify as “officers” under the Constitution’s succession provisions? Are senior congressional leaders best qualified to serve as acting chief executive? Would the succession of a congressional leader of a different party than the departed incumbent overturn “the people’s choice” in the previous presidential election? Would the nation be well served by the “bumping” procedure described above? Has the nation taken adequate precautions in the event a candidate or candidates were to die or leave the ticket at any one of several stages between election day and the January 20 presidential inauguration? These and other related issues are examined in this report.

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Introduction

The Twenty-Fifth Amendment to the Constitution, proposed by Congress in 1965 and ratified in 1967, provides that the Vice President “shall become President” on the death, resignation, or removal from office of the President.¹ In Article II, Section 1, clause 6, the Constitution delegates authority for succession beyond the Vice President to Congress, authorizing it to “by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President.” The Twentieth Amendment, proposed by Congress in 1932 and ratified by the states in 1933, revised and clarified earlier succession procedures. Its most notable provision established January 20 as the date on which presidential terms of office begin. Since 1792, Congress has also exercised its authority through three acts providing for presidential succession: in 1792, 1886, and 1947. Today, the Succession Act of 1947 (61 Stat. 380, 3 U.S.C. §19) and the two aforementioned amendments govern succession to the presidency.

Although the issue was occasionally revisited by Congress with an eye to revision, presidential succession was generally considered to be a settled issue prior to the terrorist attacks of September 11, 2001 (9/11). These events, however, demonstrated the potential for a mass “decapitation” of both the legislative and executive branches of government, and raised questions among some observers as to whether current arrangements were adequate to guarantee continuity in Congress and continuity in and succession to the presidency under such circumstances. Wide-ranging discussions followed in both Congress and the public policy community on succession issues in the years after 9/11. Bills introduced addressed this question in the contemporary context, while nongovernmental organizations explored alternatives and suggested changes in presidential succession procedures. Of various bills introduced in Congress in the decade following 9/11, the only succession-related legislation to be enacted was Title V, Section 503, of the USA PATRIOT Improvement and Reauthorization Act of 2005 (P.L. 109-177, 120 Stat. 192), which incorporated the office of Secretary of Homeland Security into the line of succession.

Although no major succession-related legislation emerged from the activities following the terrorist attacks of 9/11, the body of research and proposals explored and developed in Congress and the public policy community during those years could serve as a resource for Congress should it consider alternative approaches to presidential succession or revision of existing succession procedures in the future.

Presidential Succession: Current Provisions in Brief

Succession to the office of President of the United States is provided for principally by the Twentieth and Twenty-Fifth Amendments to the Constitution and Title 3, Section 19 of the U.S. Code (3 U.S.C. §19).

- The Twenty-Fifth Amendment provides in Section 1 that, when the office of President of the United States becomes vacant due to “removal ... death or resignation” of the chief executive, “the Vice President shall become President.”

¹ The amendment revised and clarified original constitutional language of Article II, Section 1, clause 6, which had stated 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.” The Twenty-Fifth Amendment’s language, “the Vice President shall become President,” was designed to resolve the long-debated question as to whether a Vice President succeeding to the presidency was *acting* as President or whether they actually *were* President if the incumbent had died, resigned, or left office for other reasons.

- The amendment further provides in Section 2 that, when the office of Vice President becomes vacant for any reason, the President shall nominate a successor, who must be confirmed by a majority vote of both houses of Congress.
- Authority for determining succession beyond the President and Vice President is found in Article II, Section 1, clause 6 of the Constitution, which provides that, “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.”
- The Twentieth Amendment is perhaps best known for setting the current dates for the beginning of congressional and presidential terms of office.² In Section 3, it also clarifies a detail of presidential succession procedure. The section declares that if a President-elect dies before being inaugurated, the Vice President-elect becomes President-elect and is subsequently inaugurated. It also provides that if a President has not qualified by January 20, then the Vice President-elect serves as Acting President until a President qualifies. It further empowers Congress to provide by law for situations in which neither a President-elect nor Vice President-elect has qualified by inauguration day.
- The current legislation authorized by Article II, Section 1, clause 6 is the Succession Act of 1947, incorporated as Title 3, Section 19 of the U.S. Code. It provides that, if the offices of President and Vice President are vacant simultaneously, the Speaker of the House of Representatives acts as President, after resigning from the House and from the office of Speaker. If the speakership is also vacant, the President pro tempore of the Senate acts as President, after resigning from the Senate and from the office of President pro tempore. If both offices are vacant, then the heads of designated executive departments, “Cabinet officers,” are eligible to act as President, in the chronological order in which their departments were established by law.
- Under the Succession Act of 1947, all potential presidential successors must be duly sworn in their previous offices and meet the presidency’s constitutional requirements of 35 years of age, “natural born” citizenship, and 14 years residence “within the United States,” as prescribed in Article II, Section 1, clause 5 of the Constitution.

Perspectives: Constitutional Origins, Amendments, and Legislation: 1787-1967

Article II of the Constitution, in its original form, 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

² The Twentieth Amendment set the congressional terms to end at noon on the third day of January in years following federal elections—in practice, January 3 of all odd-numbered years. Presidential terms were set to end at noon of the 20th day of January of the year following elections for President and Vice President.

shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.³

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.⁴ 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.”⁵

The Succession Act of 1792

The Second Congress (1791-1793) exercised its constitutional authority to provide for presidential vacancy or inability beyond the Vice President 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 discussion of the question of whether the President pro tempore and the Speaker could be considered “officers” in the sense intended by the Constitution. If so, it was argued, 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.⁶ 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.⁷ 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 on April 4, 1841, one month after his inauguration. Vice President John Tyler’s succession set an important precedent and suggested the settlement of 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.⁸

³ U.S. Constitution, Article II, Section 1, clause 6. This text was later changed and clarified by Section 1 of the Twenty-Fifth Amendment.

⁴ John D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York: Fordham University Press, 1965), pp. 42-43. (Hereinafter “Feerick, *From Failing Hands*.”)

⁵ 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.

⁶ Feerick, *From Failing Hands*, pp. 58-60.

⁷ 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 Twelfth Amendment, which specified separate electoral votes for President and Vice President), with the electoral vote runner-up elected Vice President.

⁸ Ruth Silva, *Presidential Succession* (New York: Greenwood Press, 1968 (c. 1951)), p. 10; Feerick, *From Failing*

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 in documents as "the President of the United States."⁹ This action set a precedent for succession that subsequently prevailed, and was later formally incorporated into the Constitution by Section 1 of the Twenty-Fifth Amendment.

The Succession Act of 1886 and the Twentieth Amendment (1933)

President James A. Garfield's death led to a major change in succession law. Shot by an assassin 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 tempore because of partisan strife.¹⁰ Congress subsequently passed the Succession Act of 1886¹¹ in order to ensure 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 Twentieth Amendment

The Twentieth Amendment, ratified in 1933, modernized various provisions governing congressional and presidential terms of office, among other things, setting January 20 of the years following presidential elections as the date on which presidential terms end and January 3 of the years following congressional elections as the date on which congressional terms end. Section 3 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. It also provided that if a President has not qualified by January 20, then the Vice President-elect serves as Acting President until a President qualifies. It further empowers Congress to provide by law for situations in which neither a President-elect nor Vice President-elect has qualified by inauguration day.

The Presidential Succession Act of 1947

On April 12, 1945, Vice President Harry S. Truman succeeded as President at 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. In his original proposal, the incumbent would serve until a special election, which would be held at the next intervening congressional election. The winner

Hands, p. 56.

⁹ *Congressional Globe*, vol. 10, May 31, June 1, 1841, pp. 3-5.

¹⁰ 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, following Garfield's inauguration, but traditionally confined its action at these sessions to consideration of the President's Cabinet and other nominations.

¹¹ 24 Stat. 1, 49th Congress, ch. 4.

would serve 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.¹² The Senate and House passed, and the President signed, legislation that embodied Truman's request, but again deleted the special election provisions.

Under the Presidential Succession Act of 1947 (61 Stat. 380, 3 U.S.C. §19), if both the presidency and vice presidency are vacant, the Speaker succeeds, acting as President (after resigning the speakership and House seat).¹³ If there is no Speaker, or if the Speaker does not qualify, the President pro tempore succeeds, acting as President under the same requirements. If there is neither a Speaker nor a 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.¹⁴ 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 a properly qualified Speaker or President pro tempore is subsequently elected, then they may assume the acting presidency, supplanting the Cabinet officer, provided the Speaker or President pro tempore resigns from both the offices. The Presidential Succession Act of 1947 has been regularly amended to incorporate new Cabinet-level departments into the line of succession, and remains in force.¹⁵

One succession-related anomaly remedied in the 109th Congress was the fact that the position of Secretary of Homeland Security was not included in the line of presidential succession when the

¹² Feerick, *From Failing Hands*, pp. 207-208.

¹³ This requirement was included because the Constitution (Article I, Section 6, clause 2) expressly states that "no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

¹⁴ 3 U.S.C. 19(d)(2).

¹⁵ The order of succession continued to change as the Cabinet evolved. Eight days after he signed the Succession Act, President Truman signed the National Security Act of 1947 (61 Stat. 495) into law. This legislation established the Department of Defense, headed by the Secretary of Defense, who was designated to replace the Secretary of War in the line of succession. The act also removed the office of Secretary of the Navy from the line of succession. At that time, the order of succession included the Secretaries of State, the Treasury, and Defense; the Attorney General; the Postmaster General; and the Secretaries of the Interior, Agriculture, Commerce, and Labor. In the years that followed, the Secretaries of Health Education, and Welfare (HEW, established in 1953) and Housing and Urban Development (HUD, established in 1965) were added, both in 1965. The HEW Secretary was added to the order of succession 12 years after the department had been established in 1953. The next change was the Secretary of Transportation, added in 1966. The Postmaster General was removed by the Postal Reorganization Act (84 Stat. 719) in 1970, when that department was reorganized. The Secretary of Energy was added in 1977. In 1979, some HEW functions and organizational units were reassigned to the newly created Department of Education (DOE), while others were retained in the successor department, renamed the Department of Health and Human Services (HHS). The Secretary of HHS retained the position formerly occupied by HEW in the line of succession, while the Secretary of Education was added following the Secretary of Energy. The Secretary of Veterans Affairs (VA) was added in 1988 (102 Stat. 2643) and, most recently, the Secretary of Homeland Security was included in 2006 (116 Stat. 2135).



The House of Representatives and Senate Explained

Congressional Procedure

A Practical Guide to the Legislative Process in the U.S. Congress

Richard A. Arenberg

Foreword by Alan S. Frumin

 **TheCapitolNet**

Homeland Security Act of 2002 (P.L. 107-296, 116 Stat. 2135) established the Department of Homeland Security (DHS) in November 2002. Free-standing legislation to remedy this omission was introduced in the 108th (2003-2004) and 109th (2005-2006) Congresses, but no action was taken on these bills. Instead, the 109th Congress updated the order of succession when it incorporated the office of Secretary of Homeland Security into the line of succession as a provision of Title V of the USA PATRIOT Authorization and Improvement Act of 2005 (P.L. 109-177, 120 Stat. 192).

The Twenty-Fifth Amendment and Current Procedures

The 1963 assassination of President John F. Kennedy helped set in motion events that culminated in the Twenty-Fifth Amendment to the Constitution, a key element in current succession procedures. Although Vice President Lyndon B. Johnson succeeded without incident after Kennedy's death, the vice presidency remained unfilled for almost 14 months, through January 20, 1965. This was due to the fact that the Constitution did not provide for filling vacancies in the "second office." The situation caused widespread concern, as observers asserted that, in an era of domestic and international turmoil and the threat of nuclear conflict, a vice presidential vacancy for any length of time constituted a dangerous gap in the nation's leadership.¹⁶ It was also noted that, with the death of President Kennedy, President Johnson's potential immediate successor, House Speaker John W. McCormack, was 71 years old, and Senate President pro tempore Carl T. Hayden, next in line under the Succession Act of 1947, was 86 years old.¹⁷ The 88th Congress (1963-1964) began hearings on reform within two months of President Kennedy's death, and the Twenty-Fifth Amendment, providing for the filling of vice presidential vacancies and addressing presidential disability, was proposed by the 89th Congress (1965-1966) in 1965 and approved by the requisite number of states in 1967.¹⁸

The Twenty-Fifth Amendment is the cornerstone of contemporary succession procedures. Section 1 of the amendment formalized traditional practice, and set aside recurrent doubts expressed since the accession of John Tyler, by declaring that, "the Vice President *shall become* President [emphasis added]" 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.¹⁹

Any Vice President who succeeds to the presidency serves the remainder of the previous incumbent's term. Constitutional eligibility to serve additional terms is governed by the Twenty-Second Amendment, which provides term limits for the presidency. Under that amendment, if the Vice President succeeds after *more than two full years* of the term have expired, that is, if he or she serves less than two years of a predecessor's term, the Vice President is eligible to be elected to two additional terms as President. If, however, the Vice President succeeds and serves more

¹⁶ Feerick, *From Failing Hands*, pp. 258-259.

¹⁷ Joel K. Goldstein, *The Modern American Vice Presidency: The Transformation of a Political Institution* (Princeton, NJ, Princeton U. Press: 1982), pp. 228-230.

¹⁸ Alan P. Grimes, *Democracy and the Amendments to the Constitution* (Lexington, MA, Lexington Books, D.C. Heath and Co.: 1978), pp. 136-141.

¹⁹ For additional information on these sections, see CRS Report R45394, *Presidential Disability Under the Twenty-Fifth Amendment: Constitutional Provisions and Perspectives for Congress*, by Thomas H. Neale.

than two full years of a predecessor's term, the constitutional eligibility is limited to election to one additional term.²⁰

Section 2 of the Twenty-Fifth Amendment has been invoked twice since its ratification. First, in 1973, Representative Gerald R. Ford was nominated and approved by Congress to succeed Vice President Spiro T. Agnew, who had resigned. Second, in 1974, the former governor of New York, Nelson A. Rockefeller, was nominated and approved by Congress to succeed Ford, who had become President when President Richard M. Nixon resigned (see **Table 2**). Although the Twenty-Fifth 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 less likely, except in the event of an unprecedented national catastrophe.

Perspectives: Recurrent Succession-Related Issues

Certain questions concerning both the Constitution's provisions governing presidential succession and the various succession acts passed by Congress since 1792 remain "hardy perennials," questions discussed and disputed by constitutional scholars of succeeding generations.

Constitutional Issues: Who Is an Officer for the Purposes of Succession?

The authority of Congress to provide for presidential succession beyond the Vice President is explicitly stated in Article II, Section 1, clause 6 of the Constitution, subsequently modified by the Twenty-Fifth Amendment, as noted earlier in this report.²¹ What the Constitution means by the word "Officer," however, has been a recurrent 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.²² Some observers assert, however, 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 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

²⁰ For instance, Lyndon B. Johnson became President on the death of President John F. Kennedy, on November 22, 1963. He served the remaining 13 months and 28 days of Kennedy's term after he became President, less than half the term. He would, therefore, have been eligible under the amendment to be elected to two terms as President. Conversely, Gerald R. Ford became President on the resignation of President Richard M. Nixon on August 9, 1974. He served two years, five months, and 11 days of Nixon's term, more than half the term. Ford, therefore, would have been eligible under the amendment to be elected to only one term.

²¹ "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."

²² 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.

during his Continuance in Office.” In other words, members of Congress by constitutional definition cannot be “Officers” of the United States.²³

This point was raised in congressional debate about the Succession Acts of both 1792 and 1947. In 1792, 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. Conversely, other Representatives who had also served as delegates to the Constitutional Convention maintained that officers of Congress were eligible to succeed.²⁴ In addition, political issues also contributed to the debate in 1792. Succession scholar 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 in the line of succession, and excluded the Secretary of State. This, Feerick suggests, was a political maneuver intended to forestall the possibility that Secretary of State Thomas Jefferson, leader of the Anti-Federalist opposition faction, might succeed to the presidency.²⁵

Questions as to 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, the longtime acceptance of the 1792 act, which had been passed by the Second Congress, some of whose Members had first-hand knowledge of the original debate on this question, was buttressed as an argument by the Supreme Court’s decision in *Lamar v. United States*.²⁶

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

²³ Testimony of W. Miller Baker, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p.8; at https://www.judiciary.senate.gov/imo/media/doc/baker_testimony_09_16_03.pdf. Baker’s testimony cites additional supporting arguments for his assertion at considerable length.

²⁴ Feerick, *From Failing Hands*, p. 59.

²⁵ Feerick, *From Failing Hands*, pp. 60-61.

²⁶ 241 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.

might be labeled an officer. This includes the Speaker and President Pro Tem, which are identified in Article I as officers of the House and Senate, respectively.²⁷

Given the diversity of opinion on this question, and the continuing relevance of historical practice and debate, the issue of constitutional legitimacy would arguably remain an issue for consideration in any congressional effort to amend or replace the Succession Act of 1947.

Political and Administrative Issues

A second category of succession issues includes political questions and administrative concerns. The latter have become increasingly urgent following the terrorist attacks of September 11, 2001.

Democratic Principle and Party Continuity

These interrelated issues collectively comprise what could be described as the political aspect of presidential succession. The first, democratic principle, was a major factor contributing to the passage of the 1947 succession act. Simply stated, it is the assertion that popularly elected officials should be first in the line of succession, rather than appointed Cabinet members, as was the case under the 1886 act. According to Feerick, the 1886 act's provisions had been questioned for decades; they aroused criticism not long after Vice President Harry Truman became President on the death of Franklin D. Roosevelt and may have influenced Truman's thinking on succession.²⁸ Truman responded less than two months after he took office on April 12, 1945, when he proposed to Congress 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 late 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.²⁹

Conversely, critics of this reasoning have asserted that the Speaker, while chosen for that office by a majority of the House of Representatives, was elected as a Representative only by the voters in the Speaker's congressional district. With respect to the President pro tempore, the argument suggests that, while elected by home-state voters, the President pro tempore customarily serves in that office by virtue of being the Senator of the majority party with the longest tenure.³⁰

²⁷ Testimony of Howard M. Wasserman, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 7, at https://www.judiciary.senate.gov/imo/media/doc/wasserman_testimony_09_16_03.pdf.

²⁸ Feerick, *From Failing Hands*, pp. 204-205.

²⁹ U.S. President, Truman, *Public Papers of the Presidents of the United States* [:] *Harry S Truman*, 1945 (Washington: GPO, 1961), p. 129.

³⁰ 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.

In addition to the case for succession by elected officials urged by President Truman, some observers assign an equal importance to political party continuity, as expressed by the voters in the previous election. The argument here is that a person acting as President under the provisions of the Succession Act should be of the same political party as the previous incumbent. The assertion is that an acting President of the same party as the prior incumbent would be necessary 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 could lead to a reversal of the people's mandate that they assert would be inherently undemocratic. Moreover, they note, this possibility is not remote: 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 42 of the 73 intervening years between the passage of the Succession Act of 1947 and the opening of the 116th Congress in 2019. 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?"³¹ At the same hearing, another witness argued that, "[t]his connection to the 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."³²

The President's Duties as Chief Executive

Some observers also question the potential effect on the conduct of the presidency if the Speaker or President pro tempore were to succeed. Would these persons, whose duties and experience are essentially legislative, be sufficiently prepared to assume and successfully discharge the duties of chief executive? Moreover, it has been noted that these offices have often been held by persons in late middle age, or even old age, whose health and energy levels might arguably be limited.³³ 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.³⁴

To the contrary, it could be argued that the Speaker has extensive executive duties, both as presiding officer in the House of Representatives and leader of its majority party, and as de facto head of the committees, staff, and physical installations that comprise the "corporate" structure of the House. It could also be noted that the speakership has often been held by men of widely

³¹ Testimony of Akhil Amar, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 2, at https://www.judiciary.senate.gov/imo/media/doc/amar_testimony_09_16_03.pdf.

³² Testimony of Howard M. Wasserman, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 4, at https://www.judiciary.senate.gov/imo/media/doc/wasserman_testimony_09_16_03.pdf.

³³ 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.

³⁴ Testimony of W. Miller Baker, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 11, at https://www.judiciary.senate.gov/imo/media/doc/baker_testimony_09_16_03.pdf.

recognized judgment and ability, for example, Speakers Sam Rayburn, Nicholas Longworth, Joseph Cannon, and Thomas Reed.

“Bumping” or Supplantation

This question centers on the 1947 Succession Act provision that officers who serve 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 higher-ranking officer replaces (supplants or bumps) the person acting as President who was lower in the order of succession. For instance, supplantation could take place under any one of several scenarios.

Death of the President, Vice President, Speaker, and President pro tempore

In this scenario, 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. If the President pro tempore were serving as Acting President, he or she could be similarly bumped by a newly elected Speaker. All the persons involved would lose their previous positions under this scenario: the Speaker, by having resigned as Speaker and Representative in Congress; the President pro tempore, by virtue of having resigned as Senator and officer of Congress in order to become Acting President;³⁵ or the senior Cabinet Secretary, by virtue of the fact that, under the act, “[t]he taking of 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.”³⁶

Disability and Recovery of the President and Vice President

Another case might be an occasion in which the President and Vice President were disabled, and either the Speaker, the President pro tempore, or a Cabinet officer was acting as President. If either the President or Vice President recovered from the disability, they would supplant whichever of these officers was acting as President. The officer previously acting as President would not, however, recover their prior position, having been required to resign from Congress to serve as Acting President, in the case of the Speaker and President pro tempore, or because, in the case of a Cabinet officer, their assumption of the duties of acting President, as noted above, constitutes resignation of their Cabinet position.³⁷

The Speaker or President pro tempore Fail to Qualify Due to Declination

If the President and Vice President were disabled, or the offices were vacant, but the Speaker and the President pro tempore declined to resign as Members or from their leadership positions, the acting presidency would pass to the senior Cabinet officer. If, at some point, however, either the Speaker or the President pro tempore were to reconsider, he or she could resign and supplant the serving Cabinet Secretary. The same scenario could occur if the President pro tempore were to resign to serve as acting President and were later supplanted by the Speaker who reconsidered his or her original declination.

³⁵ 3 U.S.C. §19(b).

³⁶ 3 U.S.C. §19(d)(3).

³⁷ 3 U.S.C. §19(d)(3).

Critics assert that such scenarios, which are possible due to the current succession act's supplantation provisions, could lead to instability in the presidency during a time of national crisis. As one observer noted:

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 tempore, that new leader may "bump" the secretary of state. The result would be three presidents within a short span of time.³⁸

Moreover, as noted previously, any person who becomes acting President must resign their previous position. In the case of the Speaker and President pro tempore, or in the case of a Cabinet officer, his or her appointment would be vacated by the act of oath taking. It is arguable that public officials might hesitate to serve as Acting President under these circumstances, if doing so requires them to forfeit the office they hold and potentially ends their public service career, particularly if there is the prospect of their own supplantation by a higher-ranking officer.

Critics of succession by the Speaker and President pro tempore could offer the issue of bumping or supplantation as an additional argument for removing those officials from the line of succession.³⁹

Another suggested remedy to bumping might 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, rather than disabilities in the offices of President and Vice President. For instance, under these circumstances, if a Cabinet officer was acting as President because of vacancy, disability, or declination (refusal to serve) of the Speaker or President pro tempore, the Cabinet officer would not be supplanted should the disability be removed or should either the speakership or presidency pro tempore be filled. The intent here would arguably be to prevent a succession of multiple acting Presidents under these circumstances.

Related proposals have suggested amending the succession law to permit Cabinet officers 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/or the Vice President, while at the same time, there would be no need to nominate and confirm a replacement.

The Continuity of Government Commission also questioned bumping on constitutional grounds in its 2009 report on presidential succession. Referring to the original language, found in Article II, Section 1, clause 4 of the Constitution, the report stated that

the Constitution allows Congress to write a succession act "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." Under the key constitutional provision, once selected to act as president, the officer will continue to act until the President's disability is removed, or, in the case of death or continuing disability, until a presidential election (either the next general election or a special election for president). The Constitution on its

³⁸ Testimony of Howard M. Wasserman, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 8, at https://www.judiciary.senate.gov/imo/media/doc/wasserman_testimony_09_16_03.pdf.

³⁹ For instance, the Continuity of Government Commission's 2009 report on continuity in the presidency questioned whether bumping might lead to instability and confusion "that would arise if the presidency were transferred to several different individuals in a short period of time." Continuity of Government Commission, *Preserving Our Institutions, Presidential Succession* (Washington: Continuity of Government Commission, 2009), pp. 33-34.

face seems to stipulate that once a person is deemed to be acting president by the Presidential Succession Act, he or she cannot be replaced by a different person.⁴⁰

Succession During Presidential Campaigns and Transitions

The related issue of succession during presidential campaigns and during the transition period between elections and the inauguration was the subject of renewed interest following the terrorist attacks of September 11, 2001.

Between Nomination and Election Day

The Democratic and Republican parties have traditionally authorized their national committees to fill vacancies in the presidential and vice presidential tickets after their national conventions.⁴¹

If an incumbent President or Vice President who has been nominated for a second term leaves office any time between the party national conventions and inauguration day, then the Twenty-Fifth Amendment would apply with respect to their *office*. With respect to their *candidacy*, the party rules would apply, at least in principle. No President or Vice President nominated for reelection has ever left their party's ticket since the Twenty-Fifth Amendment took effect in 1967.⁴²

With respect to candidates who are not incumbent in the presidency or vice presidency, here again, the party national committees are authorized to nominate a replacement, but this event has occurred only once in modern times for a vice presidential candidate, and never for a presidential candidate. In 1972, the Democratic Party vice presidential nominee, Senator Thomas Eagleton, resigned from the ticket in July, after the national convention. The Democratic National Committee was authorized by the party's charter to nominate a successor, and Senator George McGovern, the presidential nominee, proposed Ambassador R. Sargent Shriver as his replacement, exercising the nominee's traditional prerogative of choosing a running mate. The committee met on August 8 of that year to approve Shriver as the new vice presidential candidate.

A key question is whether a vice presidential nominee would be chosen by their party's national committee to replace the head of the ticket if such a vacancy occurred. Although the vice presidential nominee could arguably make a strong case to the national committee that he or she should be elevated to the first position, neither party provides for mandated succession by the vice presidential candidate.⁴³

⁴⁰ Continuity of Government Commission, *Preserving Our Institutions, Presidential Succession* (Washington: Continuity of Government Commission, 2009), p. 33.

⁴¹ For the Republican Party, see *Rules of the Republican Party*, amended July 20, 2018, "Rule No. 9 Filling Vacancies in Nominations," at https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf. For the Democratic Party, see *Charter and the Bylaws of the Democratic Party of the United States*, 2018, "Article 3, Democratic National Committee, Section 1(c)," at <https://democrats.org/wp-content/uploads/2018/10/DNC-Charter-Bylaws-8.25.18-with-Amendments.pdf>.

⁴² Vice President James S. Sherman, running mate of President William Howard Taft, died on October 30, 1912, less than a week before the election. The Republican National Committee appointed a replacement candidate who received his electoral votes. Since Taft was defeated for reelection, Sherman's replacement proved to be uncontroversial.

⁴³ For further information, see CRS Report R44648, *Presidential Elections: Vacancies in Major-Party Candidacies and the Position of President-Elect*, by Thomas H. Neale, Presidential Elections: Vacancies in Major Party Candidacies and the Position of President-Elect, by Thomas H. Neale.

Between the Election and the Meetings of Electors

The second contingency would occur in the event of a vacancy after the election, but before the electors meet to cast their votes in December. This possibility has been the subject of speculation and debate. Some commentators suggest that the political parties, applying their internal procedures for filling presidential and vice presidential vacancies, would designate a substitute nominee to receive the votes of the departed candidate's electors. Here again, the vice presidential candidate would be an obvious potential choice, but the national committee might select a different candidate. If the vice presidential nominee were to leave the ticket for any reason, the committee could rely on precedent and defer to the presidential nominee, as occurred in 1972. Alternatively, the committee might propose its own choice as successor nominee. The electors, selected for their loyalty to the party, would be expected to vote for the substitute nominee. Given the unprecedented nature of such a situation, however, party discipline among the members of the electoral college might also break down, particularly in the event of intraparty differences over the choice of a successor candidate. This might lead to further disarray in an already fraught situation.⁴⁴ Another factor to be considered here is the amount of time between election day and the electors' meetings in the states: election day falls 41 days before the day on which the electors meet.⁴⁵ If the vacancy occurs shortly after election day, the intervening period could provide time to negotiate the succession; it might also provide the opportunity for the "cabal" and political mischief that concerned the founders. Conversely, a vacancy on the ticket close to the electoral college vote sessions could introduce an element of uncertainty to the process.

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,⁴⁶ and when Congress counts and certifies the votes on January 6. The succession process for this contingency focuses on when candidates who have received a majority of the electoral votes actually become President-elect and Vice President-elect. Some commentators maintain that there is no President- or Vice President-elect until the electoral votes are counted and the results declared by Congress on January 6. They maintain that this is a contingency lacking clear constitutional or statutory direction.⁴⁷ Others, however, 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 by Congress until the following January 6.⁴⁸ If so, then the succession procedures of the Twentieth Amendment, noted earlier in this report, would apply as soon as the electoral votes

⁴⁴ 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. Democratic presidential nominee Horace Greeley died on November 29, 1872, three weeks after the election, and a week before the electors met. The party issued no guidance, and most electors cast their votes for the deceased nominee, but those votes were rejected by Congress at the electoral vote count session. (Hereinafter "*Presidential Succession Between the Popular Election and the Inauguration*", hearing, 103rd Cong., 2nd sess., Feb. 2, 1994.")

⁴⁵ Election day falls on Tuesday after the first Monday in November; the electors meet on Monday following the second Wednesday in December, 41 days later.

⁴⁶ The date on which electoral votes are cast can be as early as December 13, or as late as December 19.

⁴⁷ *Presidential Succession Between the Popular Election and the Inauguration*, hearing, 103rd Cong., 2nd sess., Feb. 2, 1994, pp. 39-40.

⁴⁸ *Presidential Succession Between the Popular Election and the Inauguration*, hearing, 103rd Cong., 2nd sess., Feb. 2, 1994, p. 12.

were cast. That is, 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 Twentieth 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.⁴⁹

Between Electoral Vote Count and Inauguration

As noted previously, Section 3 of the Twentieth Amendment covers succession if the President-elect dies, providing that the Vice President-elect “shall become President” under these circumstances.⁵⁰ Further, a Vice President-elect succeeding under these circumstances and subsequently inaugurated President would nominate a Vice President under provisions in Section 2 of the Twenty-Fifth Amendment.

A concern expressed about this period since the terrorist attacks of September 11, 2001, centers on 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 ceremony at which a newly elected President and Vice President are installed? 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 because 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 Administration’s designees are usually still in the process of being confirmed. In 2017, for instance, no Cabinet member in the line of succession was in office from the time President Donald Trump was inaugurated at approximately noon, January 20, until Defense Secretary James Mattis was confirmed by the Senate and sworn in late in the day. A worst-case scenario might envision a situation in which not a single Cabinet officer will have been confirmed by the Senate and duly installed in office, thus raising the prospect of a de facto decapitation of the executive branch. This concern and others were addressed by various legislative proposals introduced in the 108th through 111th Congresses.⁵¹

Succession Issues Since 9/11

The events of September 11, 2001, and the prospect of a “decapitation” of the U.S. government by an act of mass terrorism led to a reexamination of many previously long-settled elements of presidential succession and continuity of government on the federal level. A number of proposals to revise the Succession Act of 1947 were introduced in the 108th through 111th Congresses. Perhaps the most basic (and urgent) response was inclusion of the Secretary of the Department of

⁴⁹ 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.

⁵⁰ Whether this provision would also cover disability or resignation of a President-elect is a question that arguably merits further study.

⁵¹ For additional information on succession provisions governing the period during presidential elections through inauguration of a new President, please consult CRS Report R44648, *Presidential Elections: Vacancies in Major-Party Candidacies and the Position of President-Elect*, by Thomas H. Neale, *Presidential Elections: Vacancies in Major Party Candidacies and the Position of President-elect*, by Thomas H. Neale.

Homeland Security in the line of succession, whereas other proposals extended well beyond this action, offering both a range of comprehensive revisions of succession procedures and an expanded line of succession.

Growing concern over succession issues in the wake of 9/11 was further reflected by congressional hearings: a joint informational hearing held by the Senate Committees on Rules and Administration and on the Judiciary on September 16, 2003, and the House Judiciary Committee's Subcommittee on the Constitution's hearing on the succession issue held on October 6, 2004.⁵² On both occasions, witnesses offered a wide range of viewpoints and various legislative and other options.

The question of continuity of government in the executive branch was also addressed by a nongovernmental organization, the Continuity of Government Commission, sponsored by the American Enterprise Institute and the Brookings Institution, nongovernmental public policy research organizations based in Washington, DC. Between 2003 and 2011, the commission conducted studies and published reports on continuity in the legislative, executive, and judicial branches of the United States government in the contemporary context.⁵³

Homeland Security Act of 2002: Establishing the Department of Homeland Security (DHS) by Law

Arguably the most pressing challenge facing Congress following the attacks of September 11, 2001, was the realignment of federal agencies and functions to enhance prevention of, and better coordinate the U.S. response to, terrorist attacks on the United States, and on U.S. interests abroad. The establishment of the Department of Homeland Security (DHS) and the office of Secretary of Homeland Security in 2002 marked a major legislative response to the terrorist attacks.⁵⁴ The Secretaries of newly established executive departments are customarily incorporated in the line of presidential succession, an action that is sometimes accomplished by an appropriate provision in the legislation authorizing the new department,⁵⁵ but in other instances, a Secretary's inclusion has been omitted from the authorizing act, and was accomplished at a later time by "perfecting" legislation. This was the situation with the Homeland Security Act of 2002, which established the DHS and the office of Secretary of Homeland Security (DHS Secretary) in the 107th Congress.⁵⁶ The act did not, however, contain language including the Secretary of the new department in the line of presidential succession.

Following enactment of the Homeland Security Act of 2002, a range of related bills were introduced in succeeding Congresses that proposed incorporation of the DHS Secretary in the line of succession. Some sought only to revise presidential succession to include the Secretary, while others included proposals to effect additional changes in succession policy. Both are examined later in this report. Examples include S. 442, offered by Senator Mike DeWine and H.R. 1455,

⁵² See joint Senate committees hearing record at https://fas.org/irp/congress/2003_hr/cog.pdf; and House committee hearing at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1001&context=twentyfifth_amendment_congressional_materials.

⁵³ For additional information on the AEI/Brookings Continuity of Government Commission publications, see <https://www.aei.org/profile/continuity-of-government-commission/>.

⁵⁴ The department was established by law in 2002 and began operations in 2003; the first Secretary of Homeland Security, Governor Tom Ridge of Pennsylvania, was confirmed by the Senate and took office in 2003.

⁵⁵ See 3 U.S.C. §19 "Amendments" for examples.

⁵⁶ Homeland Security Act of 2002, H.R. 5005, 107th Congress, P.L. 107-296, 116 Stat. 2135.

offered by Representative Tom Davis. These bills, both introduced in the 109th Congress, would have incorporated the Secretary of Homeland Security in the line of succession directly following the Attorney General.

USA PATRIOT Improvement and Reauthorization Act: Secretary of Homeland Security Incorporated in the Line of Succession

At the same time proposals like those cited above were introduced, the House and Senate in the 109th Congress were also moving toward enactment of comprehensive legislation to revise and reauthorize the USA PATRIOT Act of 2001.⁵⁷ The vehicle for legislation was H.R. 3199 (Representative James Sensenbrenner), which the House passed on July 21, 2005, and the Senate on July 29. The two chambers voted on different versions of the bill, so a conference committee was convened to arrive at a final version. Neither the House nor the Senate version passed in July included any provisions relating to presidential succession, but language inserting the DHS Secretary was included as Title V, Section 503, in the report filed by the conferees on December 8. The House agreed to the report on December 14, while the Senate took longer to concur, agreeing to the report on March 2, 2006. President George W. Bush signed the USA PATRIOT Improvement and Reauthorization Act into law on March 9.⁵⁸

Section 503 reads as follows, “Section 19(d)(1) of Title 3, United States Code, is amended by inserting ‘Secretary of Homeland Security’ after ‘Secretary of Veterans Affairs.’”⁵⁹ The record does not include information about the decision to include the DHS Secretary, but it should be noted that the conference report honored tradition by including the Secretary at the end of the line of succession, rather than after the Attorney General, as was proposed in both S. 442 and H.R. 1455. The report’s joint explanatory text is similarly economical: “section 503 of the Conference Report is a new section and fills a gap in the Presidential line of succession by including the Secretary of Homeland Security.”⁶⁰

Revising Succession Procedures: Legislative Proposals

To date, action by the USA PATRIOT Improvement and Reauthorization Act to include the DHS Secretary in the line of succession after the Secretary of Veterans Affairs is the only succession-related legislation enacted since 9/11. For nearly a decade, however, bills that embodied revisions to existing succession law were introduced in the 107th through 111th Congresses (2001-2010). In scope, they ranged from adding the Secretary of Homeland Security to the order of succession, as was done by the act noted above, to changing the order in which Cabinet Secretaries would succeed to the presidency, and to comprehensive revisions of the Succession Act of 1947 that sought to anticipate some of the challenges to presidential succession and continuity in the executive branch that emerged following the terrorist attacks of 9/11. The various revision proposals that appeared in succession-related bills introduced during that period are identified and analyzed in this section.

⁵⁷ USA PATRIOT Act of 2001, H.R. 3162, 107th Congress, P.L. 107-56, 115 Stat. 272.

⁵⁸ USA PATRIOT Improvement and Reauthorization Act of 2005, 109th Congress, P.L. 109-177, 120 Stat. 192.

⁵⁹ USA PATRIOT Improvement and Reauthorization Act of 2005, Sec. 503, 109th Congress, P.L. 109-177, 120 Stat. 247.

⁶⁰ U.S. Congress, Conference Committees, 2005, *USA PATRIOT Improvement and Reauthorization Act of 2005*, conference report to accompany H.R. 3199, H.Rept. 109-333, 109th Cong., 1st sess. (Washington: GPO, 2006), p. 109.

Include the DHS Secretary in the Line of Succession Following the Secretary of Veterans Affairs

As noted previously, Congress incorporated the DHS Secretary in the line of succession in the USA PATRIOT Improvement and Reauthorization Act of 2005. The Secretary was placed as 18th in line, directly following the Secretary of Veterans Affairs, the next most junior department by date of creation.⁶¹ With this action, Congress followed established precedent dating to the Succession Act of 1886,⁶² in which the positions of the various Cabinet Secretaries were ranked for purposes of inclusion in the line of presidential succession according to the seniority of their departments. The executive departments were included in the order of succession as they existed when the Succession Act of 1947 became law.⁶³ As codified, the act lists as amendments the various departments added to or removed from the order since 1947.⁶⁴

Include the DHS Secretary in the Line of Succession Following the Attorney General

Bills were introduced to incorporate the Secretary of DHS in the line of succession beginning in the 107th Congress. Several of these bills proposed adding the DHS Secretary to the existing order of succession, but would not otherwise have provided major changes in the Succession Act of 1947. In the 108th Congress, H.R. 1354 and S. 148, and in the 109th Congress, S. 442 and H.R. 1455, contained no provision other than incorporating the DHS Secretary in the line of succession.

These bills departed from tradition, however, by proposing to place the in the line of succession directly following the Attorney General. In this position, the Secretary would have been 8th in line to succeed the President, rather than 18th, last in line, following the Secretary of Veterans Affairs. Had it passed, this realignment would have had 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—the Secretaries of State, the Treasury, and Defense, and the Attorney General. They are sometimes referred to as the “big four.”⁶⁵

⁶¹ 102 Stat. 2643. The Secretary of Veterans Affairs was included in the line of presidential succession under Section 13a, “Conforming Amendments,” of The Department of Veterans Affairs Act, 102 Stat. 2635, P.L. 100-527. It should be noted that all Cabinet officers must meet constitutional and statutory requirements in order to act as President.

⁶² 24 Stat. 1. The 1886 act listed the Secretaries of State, the Treasury, and War; the Attorney General; the Postmaster General; and the Secretaries of the Navy and the Interior.

⁶³ 61 Stat. 380, 3 U.S.C. § 19(d)(1). Shortly after the Succession Act was signed, President Truman signed the National Security Act of 1947, 61 Stat. 495, into law. The National Security Act established the Department of Defense, headed by the Secretary of Defense, who was designated to replace the Secretary of War in the line of succession. The office of Secretary of the Navy was removed from the line of succession by the same act.

⁶⁴ As noted above, the Secretaries of seven departments have been added to the line of succession since 1947: Health, Education, and Welfare; Housing and Urban Development; Transportation; Energy; Education; Veterans Affairs; and Homeland Security. One position, that of the Postmaster General, was removed by the Postal Reorganization Act (84 Stat. 719). With the establishment of the Department of Education in 1979, the name of the Department of Health, Education, and Welfare (HEW) was changed to Health and Human Services (HHS). The Secretary of HHS retained the predecessor agency’s place in the order of succession, while the Secretary of Education was added at the end of the order (93 Stat. 692).

⁶⁵ The Secretary of Defense supplanted the Secretary of War when the Department of Defense was established in 1947. Attorneys General served in the Cabinet beginning in 1792, although the Department of Justice was not established until 1870.

This departure from tradition derived from heightened concern over the question of continuity of government.⁶⁶ It was argued that the proposed placement of the DHS Secretary would have at least two advantages: first, the Department of Homeland Security, from the time of its establishment, immediately became one of the largest of the executive departments, with many responsibilities directly affecting the security and preparedness of the nation. Both its size and its crucial role were cited as arguments for placing the head of DHS high in the order of succession. It was argued that the Secretary would be expected to possess the relevant knowledge and expertise that arguably justified placing this official ahead of 10 heads of more senior departments, particularly in the event an unprecedented disaster were to befall the leadership of the executive branch.⁶⁷

In the 108th Congress, S. 148 was passed by the Senate without amendment by unanimous consent on June 27, 2003, but was not considered in the House.⁶⁸ No action was taken on H.R. 1354 beyond committee referral. In the 109th Congress, S. 442 was passed by the Senate by unanimous consent without amendment on July 26, 2005; it was not considered in the House.⁶⁹ H.R. 1455 was ordered to be reported by the House Judiciary Committee; no further action was taken.

Authorize the President to Designate Congressional Successors to Ensure Party Continuity

Several bills introduced following the terrorist attacks of 9/11 addressed the long-standing question of party continuity in the presidency. As noted earlier, concern was occasionally expressed that the Succession Act of 1947, under conditions of divided government, contemplated succession of a President and Vice President of one party by a House Speaker or President pro tempore who was a member of the opposite party. In an era when “divided government” has more often been the norm than unified party control of the presidency and both houses of Congress, this possibility might be considered a reversal of the mandate bestowed by the previous presidential election.⁷⁰ Legislation to remedy that eventuality proposed to authorize a newly inaugurated President to designate either the holder of the office of Speaker of the House of Representatives or the House Minority Leader and the holder of the office of Majority Leader or Minority Leader of the Senate for the purpose of succession under Section 19, title 3 of the act. Under this procedure, the President would have the option of designating officials of the same political party as successors, notwithstanding differences in partisan control of the presidency and Congress.⁷¹

⁶⁶ Testimony of Dr. John C. Fortier, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the United States Government: The Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, at https://www.judiciary.senate.gov/imo/media/doc/fortier_testimony_09_16_03.pdf.

⁶⁷ Richard Albert, “The Constitutional Politics of Presidential Succession,” *Hofstra Law Review*, vol. 39, no. 3, spring 2011, pp. 517-518.

⁶⁸ *Congressional Record*, House, 108th Congress, 1st session, vol. 149, no 97, daily ed., June 27, 2003, p. S8846.

⁶⁹ *Congressional Record*, House, 109th Congress, 1st session, vol. 151, no 103, daily ed., June 6, 2005, p. S9057.

⁷⁰ For instance, between 1981 and 2021, barring unforeseen circumstances, the House, Senate, and presidency will have been controlled by the same party for 10 years and 5 months (1993-1995, January-May of 2001, 2003-2007, 2009-2011, and 2017-2019), whereas divided government will have prevailed for 29 years and 7 months (1981-1993, 1995-2001, May 2001-2003, 2007-2009, 2011-2017, and 2019-2021).

⁷¹ See, for instance, H.R. 3816, 107th Congress, “Presidential Succession Act of 2002,” §2.

Expand the Line of Succession

Several bills introduced in the years following the attacks of 9/11 proposed that the order of presidential succession be expanded by the addition of United States Ambassadors. In the 109th Congress (2005-2006), H.R. 1943, introduced by Representative Brad Sherman, and S. 920, introduced by Senator John Cornyn, would have incorporated the offices of the following U.S. Ambassadors to the existing line of succession:⁷²

- the United Nations;
- the United Kingdom (Great Britain);
- Russia;
- China; and
- France.

The intent of these bills was to add high-ranking federal officers to the succession list who are normally *not* physically present in Washington, DC, at any given time, thus assuring there would be an experienced public official available to serve as President in the event of a worst-case scenario, the mass “decapitation” of the U.S. government’s political leadership by a successful attack on the capital.

Eliminate Bumping/Supplantation Provision in U.S. Code (3 U.S.C. 19)

Another proposal, included in 109th Congress bills H.R. 1943 and S. 920, would have revised procedures governing succession by Cabinet officers. These bills proposed no change to existing provisions of Section 19 governing succession by the Speaker of the House of Representatives or the President pro tempore of the Senate. Both, however, provided that if a Cabinet officer became “Acting President,” then he or she would continue to serve the balance of the presidential term of office, unless their tenure in that position was due to temporary disability of the incumbent. In that case, the President or Vice President would resume office once the disability was removed, but otherwise, the Cabinet officer would continue as Acting President until the next President was elected. This provision would have eliminated supplantation or “bumping” of Cabinet officers serving as Acting President, thus reducing the potential for executive instability or “revolving door” Presidents, as discussed earlier in this report.⁷³

Eliminate Automatic Resignation by Cabinet Officers Serving as Acting President Provision in U.S. Code (3 U.S.C. 19)

Another change to the Succession Act included in post-9/11 succession proposals was elimination of the provision that service by a Cabinet officer as Acting President constitutes an automatic resignation from his or her office.⁷⁴ This change would have had the effect of allowing a Cabinet officer to take a de facto leave of absence to serve as Acting President, particularly if the succession were connected with a disability on the part of either the President or the Vice President.

This provision addressed several 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

⁷² See also H.R. 5390, 108th Congress, H.R. 540, 110th Congress, and H.R. 6557, 111th Congress.

⁷³ See also H.R. 2319, 108th Congress, §2(d).

⁷⁴ See, for instance, H.R. 1943, 109th Congress, “Presidential Succession Act of 2005,” Sec. 2, and H.R. 2319, 108th Congress, §3.

as President, except in cases of presidential or vice presidential disability, it would have removed 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 were acting due to the temporary disability of the President or Vice President. Further, under these circumstances, this provision would likely have reduced 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 1947.⁷⁵ Finally, Cabinet officers acting as President under this provision would have the option of returning to their original position in the event the President or Vice President recovered from a disability.

Replace Members of Congress in the Line of Succession by Cabinet Members

Another legislative approach involved a repeal of the central succession provision of the 1947 act by removing the Speaker of the House of Representatives and the President pro tempore of the Senate from the order of presidential succession. The bill, S. 2073, introduced by Senator John Cornyn in the 108th Congress, would have amended the line of succession to include duly confirmed and installed Cabinet members who were not under impeachment, and who met constitutional requirements for the presidency, in the order in which their departments were created.⁷⁶ In so doing, this bill would have restored presidential succession to the status quo under the 1886 act. Proponents could argue that it would generally remove two issues identified earlier in this report from the debate on presidential succession. It would ensure that a presidential successor would almost certainly be of the same political party as the prior incumbent, and it would resolve the long-standing question of whether the Speaker and the President pro tempore were “officers” eligible to succeed to the presidency under the Constitution.⁷⁷

“Sense of Congress” Provisions Relating to Succession During Election Campaigns

Several provisions included in proposed post-9/11 succession-related bills declared the sense of Congress concerning electoral college procedures in the event a presidential or vice presidential nominee should die or be permanently incapacitated.⁷⁸

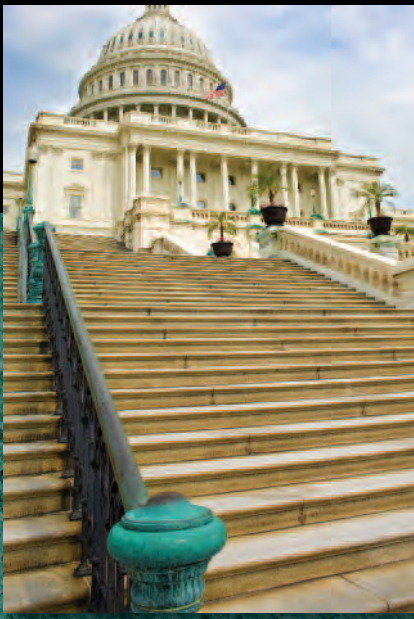
Among various elements, they included advice to the presidential and vice presidential nominees of political parties to designate substitute candidates who would receive the electoral votes otherwise cast for them if they were to die or be permanently incapacitated. They also advised electors pledged to vote for a presidential nominee to cast their electoral votes for the vice presidential nominee if the presidential nominee had died or was permanently incapacitated. Further, they proposed to express the sense of Congress that if the vice presidential nominee suffered the same circumstances, then the electors were advised to vote for the substitute vice presidential nominee. If both candidates died or were permanently incapacitated, then the electors

⁷⁵ 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 Transportation in the George W. Bush Administration (2001-2006).

⁷⁶ S. 2073 would also have included the Secretary of DHS in the line of succession immediately following the Attorney General. It also provided that the person acting as President would continue to do so for the balance of the term, unless their tenure was based on the recovery from a disability of the President and/or Vice President.

⁷⁷ A variation of this proposal was advanced by the American Enterprise Institute’s Continuity of Government Commission, which proposed that state governors also be included in the line of succession. See later in this report under “Non-Congressional Succession Initiatives Since 9/11.”

⁷⁸ See, for instance, H.R. 6557, 111th Congress, “Presidential Succession Act of 2010,” §3.



A Practical Guide to Preparing and Delivering
Testimony Before Congress and Congressional
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By William N. LaForge

Testifying Before Congress



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were advised to vote for substitute nominees for both President and Vice President. These proposals generally included advice to the political parties to establish rules and procedures consistent with these practices.

These proposals sought to eliminate uncertainties that might result from the death or permanent incapacity of a presidential or vice presidential nominee at any time in the election process between the nomination and the casting of electoral votes. These issues were discussed earlier in this report under “Succession During Presidential Campaigns and Transitions.” Although the political parties would not have been compelled to accept such recommendations, the recommendations might carry considerable weight as the expressed sense of Congress, and therefore might have persuaded the national committees of the major parties to consider them seriously or to adopt them. In this sense, these proposals arguably provided a template or “model legislation” for the parties.

“Sense of Congress” Provisions Concerning Continuity in the Cabinet During Presidential Transitions

Several provisions included in proposed post-9/11 succession-related bills declared the sense of Congress concerning Cabinet continuity during presidential transitions. Specifically, it was recommended that outgoing Presidents should submit nominations proposed by the President-elect for Cabinet officers in the line of succession during the transition period. It was further urged that the Senate conduct and finalize its confirmation proceedings for these nominations between January 3, the date on which new Congresses convene, and January 20, when new presidential terms begin. Finally, outgoing Presidents were urged to sign and deliver the commissions for these officials before leaving office on January 20.⁷⁹ The intention here was to address the contingency identified earlier in this report: the period around the inauguration when the outgoing Cabinet has resigned, but the newly nominated Cabinet officers have yet to be approved, and are not yet eligible to succeed to the presidency.

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, the outgoing President’s Cabinet officers traditionally submit their resignations, generally effective on or before inauguration day. Although investigations of and hearings on Cabinet nominees for an incoming Administration are often under way before the changeover, official nominations by an incoming President, and subsequent advice and consent by the Senate, cannot occur until after the new President has assumed office, when the nominations are formally submitted. 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 in until well after the inauguration. Proponents of “sense of Congress” provisions concerning Cabinet continuity viewed 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 executive branch management.

One advantage conferred by this approach would have been that Cabinet Secretaries, unlike elected officials, do not serve set terms of office which expire on a date certain. Further, the process in some of the proposals offered in these measures could be implemented without legislation or a constitutional amendment. If the level of interpersonal and bipartisan cooperation envisaged in these bills could be attained, an incoming President might assume office on January 20 with a full Cabinet, or at least key officers in the line of succession, already approved by the

⁷⁹ See, for instance, H.R. 6557, 111th Congress, “Presidential Succession Act of 2010,” §4.

Senate and sworn in to their positions, thus reducing the potential for disruption of the executive branch by a terrorist attack.

In addition to the national security-related advantage this would confer, it arguably would provide an impetus to streamlining the sometimes lengthy and contentious transition and appointments process faced by all incoming Administrations. It would also, however, have faced substantial obstacles, because its success would be dependent on high levels of good will and cooperation between incumbent Presidents and their successors, and between the political parties in the Senate. 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.

Cabinet continuity “sense of Congress” proposals were included in H.R. 1943 and S. 920 in the 109th Congress. Notably, Section 4 of H.R. 1943 included a preamble that cited the Presidential Transition Act of 1963 (3 U.S.C. 102), the provisions of which were designed to prevent disruption in the U.S. government’s functions during these periods; it also noted that the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) made specific recommendations concerning continuity of government during the transition from an outgoing presidential administration to an incoming one, particularly with respect to national security officials.

H.R. 1943 was referred to the House Committee on the Judiciary on April 27, 2005, while S. 920 was referred to the Senate Committee on Rules and Administration on the same day. No further action was taken on either bill for the balance of the 109th Congress.

Noncongressional Succession Initiatives Since 9/11

Additional succession-related proposals were conceived and put forward by nongovernmental entities in the decade following the terrorist attacks of 2001, but were not introduced as legislation. They sought 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 at joint Senate committee hearings held in September 2003, proposed that Congress establish a number of additional federal officers whose specific duties and function would be to be ready to assume the acting presidency if necessary.⁸⁰ Fortier envisioned that the President would appoint them, subject to Senate confirmation, and that obvious candidates would be governors and former Presidents, Vice Presidents, Cabinet officers, and Members of Congress—in other words, private citizens who had broad experience in government. They were to receive regular briefings, and would also serve as advisors to the President. A further crucial element was that they would be located outside the Washington, DC, 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 “lower in the line of succession.”⁸¹ Although he was not more specific in his testimony, it could be argued that these officers might be inserted after the “big four”, that is, the Secretaries of State, the Treasury, and

⁸⁰ Dr. Fortier was executive director of the Continuity of Government Commission at the American Enterprise Institute, a nongovernmental study commission identified earlier in this report. Fortier suggested four or five officers.

⁸¹ Testimony of Dr. John C. Fortier, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the United States Government: The Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 7, at https://www.judiciary.senate.gov/imo/media/doc/fortier_testimony_09_16_03.pdf.

Defense, the Attorney General, and, possibly the Secretary of Homeland Security, should that officer be included at that place, as was proposed in some then-pending legislation.

Miller Baker offered other proposals during his testimony at the September 2003 hearings, all of which would have required 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.⁸² Baker argued 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.⁸³

Another proposal by Fortier proposed amendment of 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, physically safe, and ready to serve as Acting President should that be required.⁸⁴

Professor Akhil Amar proposed a similar measure that the Cabinet position of assistant vice president be 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.⁸⁵

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. As Wasserman noted in his testimony, "[t]his officer must be in contact with the President and the administration, as an active member of the cabinet, aware of and involved in the creation and execution of public policy."⁸⁶

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 argued, would "eliminate any doubts about placing state governors in the line of succession,

⁸² U.S. Constitution, Article II, Section 2, clause 1.

⁸³ Testimony of W. Miller Baker, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p.10, at https://www.judiciary.senate.gov/imo/media/doc/baker_testimony_09_16_03.pdf.

⁸⁴ Testimony of Dr. John C. Fortier, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the United States Government: The Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 13, at https://www.judiciary.senate.gov/imo/media/doc/fortier_testimony_09_16_03.pdf.

⁸⁵ Testimony of Akhil Amar, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, pp. 2-3, at https://www.judiciary.senate.gov/imo/media/doc/amar_testimony_09_16_03.pdf.

⁸⁶ Testimony of Howard M. Wasserman, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 6, at https://www.judiciary.senate.gov/imo/media/doc/wasserman_testimony_09_16_03.pdf.

and could provide for succession to the Presidency itself (as opposed to the acting Presidency).”⁸⁷ Fortier envisioned that these persons would be “eminently qualified” to serve. In the contemporary context, he suggested, as examples 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.”⁸⁸

Concluding Observations

Seemingly a long-settled legislative and constitutional question, the issue of presidential and vice presidential succession in the United States gained a degree of urgency following the events of September 11, 2001. Old issues were revisited, and new questions were 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 109th Congress acted to insert the office of Secretary of Homeland Security into the current line of succession—remedying an oversight in the legislation that created the department in 2002—in Title V of the USA PATRIOT Improvement and Reauthorization Act of 2005 (P.L. 109-177, 120 Stat. 192).

Since that time, interest in succession-related legislation has declined: no bill proposing a revision to the existing arrangements has been introduced since the 111th Congress. The work of Congress and nongovernmental organizations in the first decade of the 21st century did, however, produce a body of research and analysis that would be available to scholars and lawmakers in the future. The American Enterprise Institute and Brookings Institution’s Continuity of Government Commission issued reports and recommendations on continuity in Congress, the presidency, and the Supreme Court between 2003 and 2011. In addition, the hearings conducted in September 2003 by the Senate Committees on the Judiciary and Rules and Administration and in October 2004 by the House Committee on the Judiciary’s Subcommittee on the Constitution provided forums for public discussions of current succession provisions, their alleged shortcomings, and a wide range of proposals for change. The record of these studies and deliberations provides a heritage of information and analysis that would be readily available to Congress should it revisit this question in the future.

Table 1. Presidential Successions by Vice Presidents

Year	President	Party ^a	Cause of Vacancy ^b	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

⁸⁷ Testimony of Dr. John C. Fortier, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the United States Government: The Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 14, at https://www.judiciary.senate.gov/imo/media/doc/fortier_testimony_09_16_03.pdf.

⁸⁸ Testimony of Dr. John C. Fortier, in U.S. Congress, Senate Committees on the Judiciary and Rules and Administration, *Ensuring the Continuity of the United States Government: The Presidency*, hearings, 108th Cong., 1st sess., September 16, 2003, p. 14, at https://www.judiciary.senate.gov/imo/media/doc/fortier_testimony_09_16_03.pdf.

Year	President	Party ^a	Cause of Vacancy ^b	Successor
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

- a. Party Affiliation: D = Democratic, R = Republican, and W = Whig
b. Cause of Vacancy: 1 = death by natural causes, 2 = assassination, and 3 = resignation

Table 2. Vice Presidential Successions Under the Twenty-Fifth Amendment

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

Note: Prior to ratification of the Twenty-Fifth 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.

- a. Party Affiliation: R = Republican
b. Cause of Vacancy: 1 = resignation; 2 = succession to the presidency

**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

Secretary of Homeland Security

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