

ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: THE PRESIDENCY

JOINT HEARING BEFORE THE COMMITTEE ON THE JUDICIARY AND COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE ONE HUNDRED EIGHTH CONGRESS

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TUESDAY, SEPTEMBER 16, 2003,

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committees met, pursuant to notice, at 9:30 a.m., in room SR-325, Russell Senate Office Building, Hon. Trent Lott and Hon. John Cornyn, presiding.

Present: Senators Lott, Cornyn, DeWine, Dodd, and Feingold.

OPENING STATEMENT OF HON. TRENT LOTT, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Chairman LOTT. The hearing will come to order.

Thank you all for being here this morning. I know that there are a number of people that are interested in this issue that have responsibilities on the floor of the Senate right now. Senator Feingold did leave to go down to do a statement and will be returning shortly, and we expect other Senators will be joining us as we go forward this morning.

This is a joint hearing, and I am really pleased to be able to co-chair this with the Senator from Texas, Senator Cornyn, who is Chairman of the Subcommittee with jurisdiction in this area, and who has really been focusing on continuity of Government and succession issues, and has brought a vigor and an interest in this that really has been very helpful.

As I have gotten into this subject myself, I have become more and more interested and more and more concerned about where we are today in terms of Presidential succession. And so I think it is appropriate we have these hearings. I want to thank our witnesses for being here today. I will give you an appropriate introduction in a few minutes, and we will look forward to hearing from you.

I want to begin with an interesting historical anecdote about the Senate Rules and Administration Committee and the issue of Presidential succession. After a major Senate reorganization in 1946, the Senate Rules Committee was merged with the Senate Privileges and Elections Committee, and the Senate Rules and Administration Committee was officially created in January 1947.

The first public hearings held by the newly created Committee were on the subject of Presidential succession and how the system should be remodeled to deal with the advent of the atomic bomb, interestingly enough, the death of President Franklin Roosevelt, and other issues that were related to this subject.

Since those 1947 hearings, no substantive legislation has been passed to deal with the gaps in the current Presidential succession system. So I think it is way past time for us to have these hearings, consider these matters, and hopefully even find a way to act. There are many areas where there is a gap in our planning for unexpected disasters, and this is obviously right at the top of that list.

I have long been interested in this subject. Earlier this year, the Rules and Administration Committee considered and reported out S. 148, a bill by Senator DeWine and others, which added the Department of Homeland Security Secretary Tom Ridge to the line of Presidential succession. As you can see from the chart—do we have our chart up here?—Table 1, Secretary Ridge would be eighth in line of succession after the Attorney General. This bill has already passed the full Senate and is awaiting action in the House.

Given the circumstances of the world today, it is vitally important that we have a system of Presidential succession that operates efficiently and effectively with minimal interruption. Since September 11, 2001, Congress has been studying all aspects of our Government's operations to ensure that we continue to function in the event of a catastrophe.

The current statutes governing the Presidential succession system, as we have already noted, have not been dealt with since 1947. President Harry Truman was very insistent on this area being considered, but as a result of what happened with Harry Truman becoming President, the Vice Presidency remained vacant from 1945 to 1949. After several years of work from President Truman, Congress finally amended the Presidential succession statutes. As a result, the Presidential Succession Act of 1947 was adopted, and it is still in force today.

Amazingly, the United States has been without a sitting Vice President on 18 separate occasions. As recently as 1963, when Lyndon Johnson ascended to the Presidency as a result of the assassination of President Kennedy, we did not have a Vice President from 1963 to 1965. And during Johnson's Presidency, many people worried about the situation. If a tragedy should befall President Johnson, what would happen? And we might have been faced with a difficult situation replacing the President as there was no Vice President and the sitting speaker, John McCormack, born in 1891, and President pro tem Carl Hayden, born in 1877, were certainly well advanced in years.

In 1965, as a result of Johnson's ascension to the Presidency with no Vice President waiting in the wings, the 89th Congress proposed the 25th Amendment to the Constitution. This amendment is a critical piece of the succession puzzle as we know it today, and we have used it twice already, when Jerry Ford was selected as Vice President and ultimately he became President, and then with the selection of Nelson Rockefeller. I was on the House Judiciary Committee at the time, Senator Cornyn, and was the first one to have an opportunity—on the Committee that had the first opportunity to deal with the confirmation process of a Vice President under the 25th Amendment.

While the issue of Presidential succession has just recently regained the national spotlight, this issue has been debated and discussed over the years. In fact, during those very first hearings in

1947, the Chairman of the Rules and Administration Committee, Senator Wayland Brooks of Illinois, proposed forming a joint committee to deal specifically with the issue of Presidential succession. And there have been a plethora of succession issues that have been proposed over the years but no actions taken.

When I have looked at the hearings on that, there are some very interesting quotes from the Senators that were involved in that, and they apply to today. Of course, in those days, they were worried just about the atom bomb. Well, you know, that is still a factor we have to consider, a dirty bomb or a nuclear bomb or some other travesty that could occur, and we could have a real mess on our hands.

Another problem with it, of course, is the bumping procedure that might be employed whereby, you know, the Speaker might become President for a while, but then once a Vice President would be selected, I guess the Speaker would be bumped back to the position he had previously held. There would be a problem with how an interim Speaker would be selected. A real musical chairs could occur.

I think the area that really is the most interesting is the fact that even though it was not always the case, we have Members of Congress in the line of succession. I understand from the readings that I have been doing that that issue was never really settled by our Founding Fathers and probably would pretty heatedly debated. But if you look back just in recent history where if something had happened to President Clinton and Vice President Gore, Newt Gingrich could have at one point become President. Then there would be a problem with selecting a new Speaker and what would you do with the Cabinet. It has been described as that sort of thing could cause not a succession but a revolution in a way. And we have got another chart up there that points out how many times—you know, what would have happened if this had occurred, both with Democrat and Republican administrations.

For the past 50 years, there have been many, many years where you had Congress controlled by one party and the Presidency the other. So this is an area that we need to think about.

I do not want to tell Senator Stevens this yet, but I really have come to the conclusion that congressional leaders should be taken out of the line of succession. We will have to make it prospective so that Denny Hastert and Ted Stevens will be happy with that. But I think it is a real problem, and I have for years.

[The prepared statement of Senator Lott appears as a submission for the record.]

So I am glad we are having this hearing. Again, I want to thank our panel of witnesses. But before I introduce them, let me call on Senator Cornyn, who has really been doing good work in this and other related issues, for his opening statement.

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM
THE STATE OF TEXAS**

Senator CORNYN. Well, thank you, Senator Lott, for those thorough introductory remarks, and thank you for your leadership on this important hearing.

As you recounted, the Senate Rules Committee has jurisdiction over the Presidential succession statute, and the Senate Judiciary Committee has jurisdiction over constitutional issues through the Subcommittee that I chair, the Senate Subcommittee on the Constitution, Civil Rights, and Property Rights. So today's joint hearing of the two Committees on the topic of Presidential succession is quite appropriate—and after 9/11, some 2 years later, quite important.

I want to thank Senator Hatch, the Chairman of the Judiciary Committee, who, shortly after I spoke on this subject on the Senate floor, invited me to chair the hearings for the full Judiciary Committee, which, of course, I gratefully accepted. And I want to thank him again today for his leadership and for giving these issues the serious consideration that they deserve.

Last Tuesday, I chaired the first in a series of hearings on continuity issues to examine serious weaknesses in our ability to ensure the continuity of Congress. Fortunately, with respect to today's hearing, the Constitution gives us ample authority to ensure the continuity of the Presidency, even as it may be inadequate with respect to Congress itself. Unfortunately, however, the current Presidential succession law, enacted, as you heard from Senator Lott, in 1947, has long troubled the Nation's top legal scholars, some of whom we have here today, across the political spectrum as both unconstitutional and unworkable.

This is an intolerable situation. We must have a system in place so that it is always clear and always beyond doubt who the President is, especially in times of national crisis.

Yet our current succession law fails badly under that standard. Imagine the following scenarios.

The President and Vice President are both killed. Under the current law, next in line to act as President is the Speaker of the House. Suppose, however, that the Speaker is a member of the party opposite of the now deceased President and that the Secretary of State, acting out of party loyalty, asserts a competing claim to the Presidency. The Secretary argues that Members of Congress are legislators and, thus, are not officers who are constitutionally eligible to serve as President. Believe it or not, the Secretary actually has a rather strong case, in my view. In fact, he can cite for support the views of James Madison, the father of our Constitution, who argued this precise point in 1792.

Who is the President? Whose orders should be followed by our armed forces, by our intelligence agencies, and by domestic law enforcement bureaus? If lawsuits are filed, will courts accept jurisdiction? How long will they take to rule? How will they rule? And how will their rulings be respected?

Or imagine, once again, the President and Vice President are killed, and the Speaker is a member of the opposite party. This time, however, the Speaker declines the opportunity to act as President in a public-minded effort to prevent a change in party control of the White House as a result of a terrorist attack. The Secretary of State thus becomes the Acting President. In subsequent weeks, however, the Secretary takes a series of actions that upset the Speaker. The Speaker responds by asserting his right under the statute to take over as Acting President.

The Secretary counters that he cannot constitutionally be removed from the White House by anyone other than the President or Vice President because under the Constitution he is entitled to act as President until the disability of the President or Vice President is removed or a President shall be elected. Confusion and litigation ensue. Again, who is President?

Or imagine that the President, Vice President, and Speaker are all killed, along with numerous Members of Congress, for example, as a result of an attack during the State of the Union address. The remaining Members of the House, a small fraction of the entire membership representing just a narrow geographic region of the country and a narrow portion of the ideological spectrum, claim that they can constitute a quorum and then attempt to elect a new Speaker. That new Speaker then argues that he is Acting President. The Senate President pro tem and the Secretary of State each assert competing claims of their own that they are President. Again, who is President?

Or, finally, notice that the President, Vice President, Speaker, Senate President pro tem, and the Members of the Cabinet all live and work in the greater Washington, D.C., area. Now imagine how easy it would be for a catastrophic terrorist attack in Washington to kill or incapacitate the entire line of succession to the Presidency as well as the President himself. Then who would be President?

In each of these scenarios, we do not know for sure who the President is. A chilling thought for all Americans. In an age of terrorism and a time of war, this is no longer mere fodder for Tom Clancy novels or episodes of "West Wing."

These nightmare scenarios are serious concerns after 9/11. On that terrible day, Federal officers ordered dramatic evacuations of the White House, even shouting at White House staffers, "Run." On that day, the Secret Service executed its emergency plan to protect and defend the line of Presidential succession for the first time ever in American history, according to some reports. In subsequent months, the President and Vice President were constantly kept separate for months and months after 9/11, precisely out of the fear that the continuity of the Presidency might otherwise be in serious jeopardy.

I believe we must fix the Presidential succession law, and fix it now, so that these nightmare scenarios will never come true and will never again be able to haunt the American people or our form of Government.

I look forward to the testimony, Mr. Chairman, of these exceptional witnesses and to learn what suggestions they might have for reforming the Presidential succession law. After all, we have had 2 years since 9/11 to do this. Two years is too long, and the time to plan for the unthinkable is now.

Thank you, Senator Lott.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman LOTT. Thank you, Senator Cornyn.

Senator DeWine, we already gave you credit for your interest in these succession issues, and I have noted that your legislation, S. 148, passed the Senate June 26th and is now pending before the

House. We would be glad to hear any opening statement you would like to make at this time.

**STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM
THE STATE OF OHIO**

Senator DEWINE. Mr. Chairman, I will be very, very brief. I just want to congratulate you and Senator Cornyn for holding this hearing.

As you both have said, there are almost unimaginable scenarios that are not unimaginable, that certainly could happen, that compel us to take action and to address these concerns. And 2 years is too long. It is time for this Congress to take action. It is time for this Congress to address the concerns that we have.

And so I am very, very happy that we are holding this hearing today. It is about time.

Thank you.

Chairman LOTT. Thank you, Senator DeWine.

Our first witness is Professor Akhil Amar. Mr. Amar has served as a distinguished law professor at Yale University for two decades and has been extensively published on the issues of Presidential succession and the U.S. Constitution. He is considered one of the foremost authorities on the subject of Presidential succession and the Constitution.

Dr. John Fortier—is that the correct pronunciation?—is an accomplished scholar at the American Enterprise Institute and serves as Executive Director for the Continuity of Government Commission. He has written and studied on these issues of governmental continuity as well as Presidential succession.

And Mr. Miller Baker is a partner in the law firm of McDermott Will & Emery. He previously served as counsel to the Senate Judiciary Committee as well as at the Justice Department. He is also a former intelligence officer for the U.S. military and has been recently published on Presidential succession issues by the Federalist Society.

Our final witness is Professor Howard Wasserman. Professor Wasserman teaches law at Florida International University College of Law and has studied and published on the subject of Presidential succession and the U.S. Constitution.

We look forward to hearing from all of you, and if you would give us your testimony in that order, and after you have testified, we will have perhaps other Senators here that would like to make statements, and then we have got a series of very interesting questions we would like to propound to you.

Professor?

**STATEMENT OF AKHIL AMAR, SOUTHMAYD PROFESSOR OF
LAW AND POLITICAL SCIENCE, YALE LAW SCHOOL, NEW
HAVEN, CONNECTICUT**

Mr. AMAR. Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale and have been writing about the topic of Presidential succession for over a decade. In February 1994, I offered testimony on this topic to the Senate Judiciary Subcommittee on the Constitution, and I am grateful for the opportunity to appear here today. As my testi-

mony draws upon several articles that I have written on the subject, I would respectfully request that these articles be made part of the record.

The current Presidential succession Act, 3 U.S.C. section 19, is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced. I will summarize its main problems and then outline my proposed alternative.

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

Second, the act's bumping provision, section 19(d)(2), constitutes an independent violation of the succession clause, which says that the "officer" named by Congress shall "act as President...until the [Presidential or Vice Presidential] Disability be removed, or a President shall be elected." section 19(d)(2) instead says, in effect, that the successor officer shall act as President until someone else wants the job. Bumping weakens the Presidency itself and increases instability and uncertainty at the very moment when the Nation is most in need of tranquility. And I think that the scenario that Senator Cornyn offered very vividly captured some of the problems with instability and how it weakens the Presidency in a variety of situations.

Now, even if I were wrong about these constitutional claims, they are nevertheless substantial ones. The first point, to repeat, comes directly from James Madison, father of the Constitution, who helped draft the specific words of the Succession Clause. Over the last decade, many citizens and scholars from across the ideological spectrum have told me that they agree with Madison about the constitutional questions involved. If, God forbid, America were ever to lose both her President and Vice President, even temporarily, the succession law in place should provide unquestioned legitimacy to the "officer" who must then act as President—in part to keep it out of the courts and to reassure the country. And, again, I think the scenarios that Senator Cornyn offered were very vivid and, to me, quite powerful. With so large a constitutional cloud hanging over it, section 19 fails to provide this desired level of legitimacy.

In addition to these constitutional objections, there are many policy problems with section 19. First, section 19's requirement that an Acting President resign his previous post makes this law an awkward instrument in situations of temporary disability. And, Senator Lott, I think that is partly what you were talking about with having to leave your House job and the instabilities that that would create. The House needs to get new leadership and all of that. section 19's rules also run counter to the approach of the 25th Amendment, Senator Lott, which you mentioned, which facilitates smooth handoffs of power back and forth in situations of short-term disability—scheduled surgery, for example.

Second, section 19 creates a variety of perverse incentives and conflicts of interest, warping the Congress's proper role in impeachments and in confirmations of Vice Presidential nominees under the 25th Amendment.

Third, section 19 can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B? Here, too, section 19 is in serious tension with the better approach embodied in the 25th Amendment, which enables a President to pick his successor and thereby promotes executive party continuity.

Fourth, section 19 provides no mechanism for addressing arguable Vice Presidential disabilities or for determining Presidential disability in the event the Vice President is dead or disabled. These are especially troubling omissions because of the indispensable role that the Vice President needs to play under the 25th Amendment.

Fifth, section 19 fails to deal with certain windows of special vulnerability immediately before and after Presidential elections.

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

The main argument against Cabinet succession is that Presidential powers should go to an elected leader, not an appointed underling. But the 25th Amendment offers an attractive alternative model of handpicked succession: from Richard Nixon to Gerald Ford to Nelson Rockefeller, for example, with a President naming the person who will fill in for him and complete his term if he is unable to do so himself. The 25th Amendment does not give a President *carte blanche*; it provides for a special confirmation process to vet the President's nominee, and confirmation in that special process confers added legitimacy upon the nominee. And, Senator Lott, it was very interesting to hear that even as a House Member, you were involved in the confirmation process, which ordinarily does not happen, but the 25th Amendment creates that special level of participation and legitimacy.

So if the 25th Amendment reflects the best approach to sequential double vacancy—when the top two positions, President and Vice President, become unavailable at slightly different times, first one, then the other—a closely analogous approach should be used in the event of simultaneous vacancy when they both become unavailable at the same instant. Congress could, if it wanted to, create a new Cabinet post—it could be called Assistant Vice President or Second Vice President or First Secretary; the name is not particularly important. But this new position would be one that would be nominated by the President and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a moment's notice, and to lie low until needed: in the line of succession but out of the line of fire, perhaps out of this city altogether in a location that would be very far removed from the President and Vice President in general.

The democratic mandate of this Assistant Vice President or First Secretary might be further enhanced if Presidential candidates announced their prospective nominees for this third-in-line job well before the November election. In casting ballots for their preferred

Presidential candidate, American voters would also be endorsing that candidate's announced succession team of Vice President and third in line. Cabinet officers should follow the Assistant Vice President in the longer line of succession, as is true in the current statute.

This solution solves the constitutional problems I identified. The new Assistant Vice President would clearly be an "officer"; bumping would be eliminated. The solution also solves the practical problems. No resignations would be required; power could flow smoothly back and forth in situations of temporary disability. Congressional conflicts of interest would be avoided. Party and policy continuity within the executive branch would be preserved. And the process by which the American electorate and then the Senate endorsed any individual Assistant Vice President would confer the desired democratic legitimacy on this officer, bolstering his or her mandate to lead in a crisis.

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

Thank you.

[The prepared statement of Mr. Amar appears as a submission for the record.]

Chairman LOTT. Thank you.

Mr. Fortier?

**STATEMENT OF JOHN C. FORTIER, EXECUTIVE DIRECTOR,
CONTINUITY OF GOVERNMENT COMMISSION, AND RE-
SEARCH ASSOCIATE, AMERICAN ENTERPRISE INSTITUTE,
WASHINGTON, D.C.**

Mr. FORTIER. I would like to thank the Rules and Judiciary Committees for holding this hearing on the important subject of Presidential succession.

Let me salute the Senate for already having begun this task. Senator Lott mentioned this morning S. 148, Senator DeWine's bill, which passed through the Rules Committee and the full Senate. I support the substance of the bill, putting the Secretary of Homeland Security in the line of succession, but also applaud the thinking behind it. Typically, when a new Cabinet position, we just lump them at the end of the line of succession without thinking about their relative importance. In this case, we did think about it, and we moved the Cabinet Secretary up to a place below the big four Cabinet members, but thinking about his relative importance with national security matters.

If you use this as a model to think through and not follow simply the status quo of the current Presidential succession Act, I think we will be moving in the right direction.

In my written testimony, I provide a number of areas that need improvement, but let me highlight three this morning.

First, everyone in the line of succession lives and works in the Washington, D.C., area. In the nightmare scenario of terrorists detonating a nuclear device, it is possible that everyone in the line of succession might be killed. Imagine the aftermath: a parade of generals, Governors, and Under Secretaries claiming to be in charge.

To fix this problem, I have a solution which is similar in some ways to the one that Professor Amar presented, but I suggest that we create four or five offices that would be lower down the line of succession that would be held by people outside of Washington. In particular, we can imagine that a President would nominate sitting Governors, if the State Constitution of that State did not forbid them to hold Federal office, which some States do and some States don't; or former public figures at a high level—former Presidents, former Vice Presidents, Cabinet members, or Members of Congress. These offices could be, through a regular nomination and confirmation process, put in place. We would ask them to generally stay outside of Washington, receive regular security briefings, and the office could be structured with some additional duties, such as regional coordination of homeland security issues. My proposal is to put them in the middle of the Cabinet, somewhere below the top five officers. They would serve as an ultimate backstop if the worst were to happen.

Second, consider the role of congressional leaders in the line of succession. I think it is fair to say that the dominant view of constitutional scholars is that it is unconstitutional to have Members of Congress in the line of succession, although, of course, practice has gone in the other direction for many years.

I share this view that at least the Framers did not intend to put Members in the line of succession, but in my testimony, I try to walk through the various scenarios that Congress might be called on to succeed to the Presidency congressional leaders and identify which of them makes sense for us and which of them don't. And if you come to the same conclusions that I do, you will find at least a way of reducing the role of Congress in the line of succession.

For example, Congress could potentially—or a Member of Congress could come to the Presidency based on the death, the incapacity, the resignation, the removal, or the failure to qualify of the President. And to take the incapacity issue, for example, do we want a Speaker of the House taking over temporarily for a President? It could be a Speaker of the House of the other party. It would be a case where the Speaker would have to resign his or her seat in Congress and as Speaker. If you have a scenario of a President who is fading in and out of capacity, has a condition that comes back into health, then displaces the Speaker of the House, potentially another Speaker of the House, newly elected, would then have to take over. It makes little sense for an incapacitation scenario to involve Congress. And several of the other scenarios I also find problematic.

The one case where I would recommend keeping Congress in the line—and I think this is consistent with the Constitution because it comes from a different provision in the 20th Amendment—is that of the failure to qualify of a President. In the case where an election controversy goes all the way up to January 20th and we have no President, or in the case of an attack that occurs shortly before the inauguration, there is no Cabinet from the incoming administration, and the only other option we would have would be to go back to the Cabinet of the prior administration.

Third, think of individual scenarios, and in particular, the inauguration scenario, which I referred to. This is perhaps the most

vulnerable time for Government when all of the people at the top of the line of succession gather together for a ceremony, and yet none of the people in the line of succession, the Cabinet members for the new administration, have been nominated. Consider for a moment what would happen if terrorists had set off a bomb during the inaugural ceremony. The President-elect, the Vice President-elect, Speaker, and pro tem are likely there and would have perished along with many Members of Congress and the Supreme Court. Who would succeed to the Presidency? Well, the Cabinet, but the Cabinet of the prior administration. Imagine such an attack had occurred in 2001. A country expecting Republican George W. Bush to take office would have found themselves with a Democratic President Larry Summers. As Secretary of the Treasury, Summers was the highest ranking Clinton Cabinet member eligible to serve as President.

But the scenario is actually even more complicated than that, as many Cabinet Secretaries typically resign before the inauguration, leaving Acting Secretaries in their place. And an Acting Secretary is in the line of succession as long as that person has been confirmed by the Senate for some position. So if it is a political appointee, a number 2 or a number 3 person at the State Department, that person will take over as Acting Secretary of State and be in the line as well.

I have a piece coming out entitled "President Michael Armacost?" who, if you know, the president of Brookings could have been the President of the United States in the scenario of the 1989 inaugural.

One of the difficulties here is that there is a gap between when the President can take office and can nominate his Cabinet and the Senate can come in to confirm them. At times, in cases of quick action, there is a gap of only 3 or 4 hours. But it has been up to 5 days in the case of 1989. And there are several changes in custom and law that would protect us from this scenario.

First would be to establish a custom of the outgoing President to nominate the new Cabinet coming in on the morning of January 20th. The Senate could come in, confirm the Cabinet before noon of January 20th, and you would have people in place in case the worst happened, and those people would not have to attend the inaugural scenario.

Second, the question of whether an Acting Secretary should be in the line of succession. I recommend that we take out that provision and just rely on those who were confirmed for the Cabinet post themselves.

And, finally, there are significant problems with the continuity of Congress itself in the case of an inaugural attack. Congress may have its own difficulties reconstituting itself and to the extent that we can address them, we come up with a more reasonable congressional leader coming out of a newly re-established Congress that might eventually take over.

[The prepared statement of Mr. Fortier appears as a submission for the record.]

Chairman LOTT. Thank you.
Mr. Baker?

**STATEMENT OF M. MILLER BAKER, ESQ., MCDERMOTT WILL &
EMERY, WASHINGTON, D.C.**

Mr. BAKER. Mr. Chairmen, Ranking Members, and Members of the Committees, thank you for the invitation to be here today to discuss issues pertaining to Presidential succession.

This issue, which has surfaced as a political and constitutional issue every several decades in American history, as Senator Lott noted, is of particular concern in the aftermath of September the 11th. It is very clear, for all the horror of that terrible day, it easily could have been even worse. It is apparent that had our enemies planned and executed a strike like September 11th for the principal purpose of decapitating the Government of the United States—and, in particular, the Presidency—that they very well might have succeeded.

Chairman LOTT. Mr. Baker, pull that microphone just a little bit closer, if you would, please.

Mr. BAKER. Certainly.

Chairman LOTT. Thank you.

Mr. BAKER. Any attempt by America's enemies to decapitate the U.S. Government unfortunately would be assisted, rather than thwarted, by the Presidential Succession Act of 1947. In my view, the 1947 Act is the single most poorly designed statute in the entire United States Code. I say this because the 1947 Act could deprive the Nation at the worst possible moment of what Alexander Hamilton in the Federalist No. 70 called "energy in the executive," with truly catastrophic consequences.

My written statement describes in detail my criticisms of the 1947 Act. I will briefly summarize my views here.

First, the 1947 Act gives the House Speaker and the President pro tem a special preference in the line of succession that enables them to bump or to displace a Cabinet officer serving as Acting President, even if the House Speaker doing the bumping was chosen only by a handful of Representatives in the aftermath of an attack that left most Members of the House dead.

Even if the Speaker and the President pro tem are to remain in the line of succession—and I do not believe that they should—this special privilege of bumping by a new Speaker or a President pro tem by one that chose not to assume the Acting Presidency when it became available should be eliminated from the law.

Second, the 1947 Act requires that a statutory successor resign his or her post as a condition of assuming the Acting Presidency even if the period of serving in this capacity is only for a few hours. This requirement could easily induce hesitation, especially if the fate of the President and the Vice President was unknown. This inducement to hesitation should be removed from the law. The law should induce action, not inaction. We need energy in the executive.

Third, the 1947 Act does not allow a more senior Cabinet successor that was temporarily unable to act to assume the Acting Presidency from a more junior Cabinet officer that assumed the Acting Presidency. This induces hesitation because a lower-ranking Cabinet officer may be fearful of being charged with usurpation. For example, on September the 11th, when Colin Powell was out of the country, if the President, Vice President, Speaker, and Presi-

dent pro tem had been killed or were missing in attacks on the White House and the Capitol building, then-Treasury Secretary Paul O'Neill would have had to have made an immediate decision about whether Colin Powell was unable to discharge Presidential duties because of his absence from the country. The military may have been on the phone requesting authority to shoot down airliners. In the meantime, the Treasury Secretary is trying to decide whether or not he has authority to become Acting President. In the meantime, the decision has to be made.

Under section 19, had O'Neill assumed Presidential duties, Powell would not have been able to displace O'Neill upon his return to Washington, which might have resulted in claims that O'Neill had wrongfully usurped the Presidency and in litigation over whether Powell, in fact, had been unable to discharge Presidential duties at the time of O'Neill's assumption of the Acting Presidency. The very fact that O'Neill might be exposed to charges of usurpation might cause him to hesitate before acting. A Cabinet officer in O'Neill's position on September the 11th would probably remember the ridicule that Alexander Haig suffered in 1981 from declaring that he was in charge pending the Vice President's return to Washington and doubtless would like to avoid a similar fate.

Fourth, I recommend that the Congress remove the Speaker, the President pro tem, and all the Cabinet officers from the line of succession save the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security. As has been noted before, placing the congressional leaders in the line of succession allows for the possibility of undoing the results of the last Presidential election. In addition, does anyone seriously believe, with all due respect to the incumbents of these offices, that the Secretary of Agriculture or the Secretary of Veterans Affairs should be catapulted into the Presidency, especially in the heat of a supreme crisis that could compare to December 7, 1941, and November 22, 1963, rolled into one?

Fifth, Congress should create special successor officers comprised of State Governors and others that the President would appoint by and with the advice and consent of the Senate or, as Professor Amar has suggested, possibly with the House involved as well.

Sixth, I believe Congress should submit a constitutional amendment to the States for ratification to cure the various deficiencies in the Presidential succession mechanism that cannot be corrected by statute and to validate other provisions in the succession law that may be unconstitutional.

Since it is clear that a constitutional amendment is necessary to ensure the continuity of Congress, the same amendment should also address issues of Presidential succession. By way of example of an issue that probably needs to be addressed by this amendment, it is unclear under existing law whether when the Acting President should nominate a Vice President under the 25th Amendment, when the new Vice President is confirmed by Congress, does the new Vice President then bump the Acting President who made the nomination of the Vice President under the 25th Amendment? That needs to be clarified by existing law, and that can probably only be clarified by a constitutional amendment.

Thank you very much.

[The prepared statement of Mr. Baker appears as a submission for the record.]

Chairman LOTT. Thank you.
Mr. Wasserman?

STATEMENT OF HOWARD M. WASSERMAN, ASSISTANT PROFESSOR OF LAW, FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, MIAMI, FLORIDA

Mr. WASSERMAN. Thank you. Mr. Chairman, Ranking Members, members of the Committee, my name is Howard Wasserman. I am Assistant Professor of Law at Florida International University College of Law.

My testimony this morning draws on a couple of articles that I have written on this subject. I ask unanimous consent that they be included in the record.

Chairman LOTT. Without objection, they will be included in the record at this point.

Mr. WASSERMAN. The consensus from the members of the Committee and the panelists that we have heard so far this morning seems to agree on two points: section 19 has serious, multiple flaws and has been flawed from the beginning, and that the events of September 11, 2001, drew those flaws into very specific relief. And I want to focus on a couple of areas from my submitted testimony as to those flaws.

First, I agree that Cabinet officers are and should be the primary and preferred statutory successors as a matter of partisan continuity, as a matter of democratic legitimacy, and as a matter of separation of powers. I also agree that we need to extend the line of succession by expanding the Cabinet, particularly by creating a single position—Assistant Vice President, First Secretary, Successor Secretary—whose sole job would be to sit as first in line of succession and to remain outside of Washington.

I believe, however, that the Speaker of the House and the President pro tempore of the Senate can and should remain in the line of succession as eligible successors, but at the end of the line, for this reason: September 11th raises the possibility of the worst-case scenario of the death or disability of the President, Vice President, and everybody we can imagine putting in the Cabinet, including a First Secretary or a panel of First Secretaries.

Now, our discussion of Presidential succession this morning is occurring in the context of a broader conversation about continuity in the Federal Government as a whole, including what steps can be taken to ensure that there always is a functioning Congress. If there is a functioning Congress, whether because Congress survived the terrorist attack intact or because Congress has somehow been reconstituted, under Article I the first and necessary step in each House will be to pick a Speaker and a President pro tem, respectively. Those two offices always will be filled, and if they always are filled and if those officers remain in the line of succession, then we have someplace for the executive power to devolve in that worst-case scenario. And I would suggest, in fact, that keeping them in the line is necessary because in their absence in the worst-case scenario, there is no one under the Constitution or statute

who would be able to assume the Executive power short of holding a new election.

Second, the other major change that needs to be made to section 19, in addition to reordering the line of succession, is to provide for special expedited elections whenever section 19 has been triggered by a permanent double vacancy. Now, the original 1792 statute provided for expedited elections. That provision has not been included in either of the two subsequent enactments.

Now, I agree that what we could call indirect or what Professor Amar has called "apostolic democratic legitimacy" attaches to an Acting President who had been a member of the Cabinet, who had been the hand-picked policy surrogate of the populist President. But I would suggest that that indirect democratic legitimate legitimacy only lasts for a short period of time. It lasts long enough to restore order, to calm the public, and to begin the recovery process. It does not for 3 years and 4 months, which is how long an Acting President, whether it had been Speaker Hastert, Secretary Powell, Secretary O'Neill, would have held the executive power had the tragedy of September 11th included the deaths of the President and Vice President.

This special election reasonably can occur within approximately 6 months. That is enough time to allow for national mourning, to allow the restoration of some public stability, and to allow the States to organize 51 simultaneous popular elections. And the election would bestow direct popular legitimacy on the occupant of the White House via deliberative selection by the national electoral constituency. Finally, and most importantly, that special election enables the Nation truly to move forward in the longer term behind a nationally popularly chosen President and Vice President.

I thank the Committee for the opportunity to address this joint hearing, and I wish this body every success in drawing the most workable and most structurally consistent Presidential succession process.

Thank you.

[The prepared statement of Mr. Wasserman appears as a submission for the record.]

Chairman LOTT. Thank you, Professor Wasserman.

Before we begin our questions, Senator Feingold has returned. If you would like to make a statement at this time, we would be glad to hear from you.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you very much, Mr. Chairman, and Chairman Cornyn as well, for holding this important hearing.

The topic of Presidential succession has occupied the Congress periodically since our Nation's founding. Usually a revival in interest in the topic occurs because of some event that leads us to dust off the statute and the Constitution and contemplate, "What if?" That happened when Andrew Johnson succeeded to the Presidency upon the assassination of Abraham Lincoln and then was impeached by the House of Representatives.

It happened again when Harry Truman became President after the death of Franklin Delano Roosevelt. He viewed the statutory

solution reached in 1886 as unsatisfactory and convinced Congress to pass a new succession statute.

The assassination of President Kennedy led to the adoption of the 25th Amendment as the country contemplated how a Vice President who becomes President should be replaced and what should happen if the President become disabled.

Now, as the witnesses have already indicated, of course, September 11th has revived interest in Presidential succession. The possibility of a terrorist attack that takes the life of both the President and the Vice President—[microphone out]—contemplate. But we have a duty to at least examine the question of whether the Constitution and the U.S. Code are adequate to preserve the Union and provide the country with the best possible leadership in such a crisis.

The issues raised by this topic are certainly interesting for anyone interested in our system of Government and our Constitution, and I have already enjoyed hearing from our witnesses about them. Should leaders of the legislative branch be in the line of succession? If so, how? And which leaders? Should the succession be different in the case of death as opposed to disability of the President, Vice President, and others in the line of succession? And if so, how should we provide for a person higher up the chain to move into the office when they are able to do so?

These are all questions worth exploring. I do not believe, however, and I know the Chairmen do not believe that we should obsess about them. Our most dedicated efforts should be devoted to preventing the next terrorist attack and making sure our first responders are prepared to deal with it if it happen. This is not to say that this hearing should not have been held, but only to caution that the time and resources of this Congress and this Government are finite, and we must not be distracted from the task at hand by too much attention to what will most likely be only theoretical questions. But I do think this is extremely interesting for any of us that have spent time in our lives looking at Government, and I thank again Chairman Lott and Chairman Cornyn for the opportunity to speak, and I look forward to the further testimony of our witnesses.

Thank you, Mr. Chairman.

Chairman LOTT. Thank you, Senator Feingold, for your interest in this issue and other related issues and your desire to see that we consider reforms in a variety of areas to try to make the Congress and the Government more efficient, and we appreciate your leadership.

Let me go back then and get into some questions. Since you have testified first, we will come back to you, Professor Amar. Why did Truman more or less insist that leaders of Congress be included in the line of succession? If you look back at the history of that, that had been debated. Madison, as you all referred to, did not think leaders of Congress should be included, and then I guess there was another action taken in 1886 and then finally in 1946 or 1947 when the last legislation was passed. But the history seems to indicate that Truman really was advocating that Members of Congress be included. Was this just a way of currying favor? Or was there some basis for it? Because it does not make sense to me.

Mr. AMAR. President Truman was a great man. He was not burdened with an extensive legal education. He actually had gone to law school but—and he did not present himself as a constitutional expert. He came from this body, and that was his biography, and I think he had real skepticism about the idea of someone unelected assuming the position. He had a certain phrase about people in the State Department, actually, that appears in McCullough's biography: "the striped pants boys." So he had a certain skepticism about people who had never run for anything in their life.

His proposal actually was not quite the same one that Congress adopted in 1947. For example, he wanted there to be a special election in the event of a successor Presidency that the bill that Congress passed did not include that provision, and he signed it anyway. So the stakes were lower, of course, if it is just a brief period.

I think that the 25th Amendment addresses some—that model addresses some of President Truman's concerns by creating a sort of special legitimacy through a special confirmation process. And if we created a new Cabinet position at the top whose only purpose was really to be next in line, it could even be someone who had been President in the past or a former office holder the country had a great degree of confidence in. Then if candidates announced their prospective nominees to the American people before the November election, there would be a kind of national endorsement of that next-in-line position, which I think would satisfy Truman himself.

Truman himself, of course, no one quite directly voted for him as Vice President, but when they voted for President Roosevelt, they voted for him as well. And so, too, I think an idea might be, well, if you vote for the candidate, you are voting for his Vice President, and also the third-in-line person that he has designated, and that would create a little bit more electoral responsibility.

A final point is he is, of course, thinking about all of this before there has been a President Ford, before there has been a Vice President Rockefeller under the 25th Amendment process, which is sort of a different one than the one he is imagining.

Chairman LOTT. Frankly, I am surprised that at least a couple of you, maybe three of you, have advocated an Assistant Vice President. I know some people who have in the past questioned the value of the current Vice Presidency, although I think over the years that position has grown in responsibility and visibility, too. But I don't know. An Assistant Vice President just seems like we are adding even more—I do not know—encumbrances in a way. I mean, why would you want to go off on a wing that way when you have got an order of succession that you could go with? So I would be interested if any of you want to defend that a little bit.

And the second thing is, though—because we are beginning to run out of time, and I will yield to the others for questions—can we do what we need to do in this area just with a statute? Or do you think we need a constitutional amendment?

Mr. AMAR. I think for congressional continuity, there may be constitutional amendment needs, but for this I think a statute could be pretty cleanly adopted. You do not have to go for the First Secretary idea. I think the biggest thing that all of us have suggested is to seriously rethink the legislative leaders at the top of the suc-

cession list if that does not work in a variety of ways, constitutional and policy.

The reason for the new office, there are about three or four thoughts: It enables you to have someone who is out of Washington, D.C., because he does not have a regular day job, which ordinarily you might think, well, why create another make-work job? But if you are concerned about these absolute worst-case, what-if scenarios, the fact that he or she is out of the line of fire is an affirmative advantage.

Chairman LOTT. I wonder if it isn't a simpler solution just to say that one of Cabinet Secretaries—frankly, maybe a lot of the Cabinet Secretaries—could be out of this city. I never have quite understood why the Secretary of Agriculture shouldn't be in St. Louis or Kansas City or whoever wants it.

Mr. AMAR. You could. A second thought is that the person who might be even the best Secretary of State might not necessarily be the best person in this very unusual double-death, double-disability situation. Maybe you want to just pick—I am a baseball purist. I do not much like the DH. But you might want to, you know, pick someone—maybe they are not a great fielder, but they are good at one very discrete function. They are great hitters. So one function, someone who in an absolute crisis would be the person that the American people have the most sense of comfort with, maybe even, again, someone who has held the position in the past.

Chairman LOTT. OK. Mr. Baker, I think I see you squirming like you would like to get into this discussion. Do you want to respond briefly to any of those questions I propounded? Then I will yield to Senator Cornyn.

Mr. BAKER. Thank you, Senator. I would say that a statute could solve most of these problems, but not all of them. And the one example I gave in my testimony was this uncertainty under the 15th Amendment. We have an Acting President, let's say a Cabinet officer or a Speaker who is serving as Acting President. One of their first duties under the 25th Amendment is to nominate a Vice President.

Now, under the 25th Amendment, a Vice President becomes President if there is no President. And when we have an Acting President, we do not have a President. We have an Acting President. That is a distinction with a difference. There are different views on this, but I think it is a close call. And certainly it is rife with uncertainty. So I think there are some issues that need to be addressed by an amendment.

In terms of having First Assistant Vice Presidents outside of Washington, one way to deal with this might be without establishing a formal office—but it would probably take an amendment to do this—is to allow the President to nominate, have the Senate confirm former prominent office holders that we would all have confidence in their ability to perform this function. Former President Bush, for example, could serve in the line of succession. One might imagine a Democratic President nominating former Vice President Gore or former Vice President Mondale. They would not have to receive any pay per se. They would not have to have an office. But in order to do that constitutionally, I think that it would

be probably necessary, if you are not going to create an office, to have a constitutional amendment to validate that process.

But there are ways of doing it, of creating successors outside of the Cabinet who are not going to hold an office per se. Of course, holding an office per se is, I think, actually a good idea, but you don't necessarily have to do that.

In sum, most of the problems can be addressed by amendments to the statute, but I think there are a few issues that have to be addressed by a constitutional amendment.

Chairman LOTT. Senator Cornyn?

Senator CORNYN. Thank you very much, Chairman Lott.

Gentlemen, we hear whenever constitutional amendments are proposed or even discussed in the Constitution Subcommittee, for example, or on the Judiciary Committee, about the reluctance that most people feel when it comes to amending the Constitution, although we have done it 27 times. And hopefully when it is necessary to do so, we will not show any hesitancy at discharging the duty that we have assumed as a Member of Congress when it comes to recommending those amendments that are necessary.

But besides the constitutional issues that have been raised about Members of Congress serving in the line of succession, I wonder if you might have some comments, and I will start with Dr. Fortier—am I pronouncing that correctly?—first.

But, for example, I am aware of the problems that occurred during the impeachment trial of President Andrew Johnson when the President pro tem, anticipating his Senate colleagues would vote to remove Johnson and install him in the White House, actually announced Cabinet appointments that he would make were he made President, thus, in essence, building a constituency, I guess, for that choice.

I am also aware of problems that occurred during the Vice Presidential confirmation proceedings of Gerald Ford when some tried to delay confirmation so that House Speaker Carl Albert would become President in the event Congress forced President Nixon to resign from office.

So do you see, in addition to constitutional issues, prudential concerns that would call for a constitutional amendment? Or do you think a statute would solve this? Please address that.

Mr. FORTIER. I think most of the problems can be dealt with by statute. I agree with Professor Amar on the continuity of Congress issue, which we were pleased that you held a hearing on last week, that involves more of a constitutional solution. Most can be dealt with by statute.

If we were redrafting the 25th Amendment, if we were at the stage where we had not put that in place, we might do it differently. The initial draft of the 25th Amendment which came before the Senate Judiciary Committee, while President Johnson was President, without a Vice President, took Congress out of the line of succession and made it clear that the Cabinet would step in for an incapacitated President in the same way that the Vice President is empowered to do so in the current Act. That was ultimately taken out because of some concerns of offending the Speaker at the time, John McCormack, and once it was enacted and ratified, it was done without that.

So at that stage in time, I think we could clarify that and would go with the original version. But there are enough things that we can do in law to even specify in a little bit more detail what the procedure would be for a Cabinet member taking over in an incapacitation situation.

You also mentioned the case of impeachment. I think it is worthwhile looking at each scenario that Congress is in the line of succession, and the impeachment and removal scenario is one where Congress has a real conflict of interest because it not only has to choose to remove the President, but it would put one of its own in place, and theoretically a party switch. You mentioned the two cases where we came very close to that.

Senator CORNYN. One other question I had was about other reforms over and above those that you have discussed in your prepared statements, each one of you here. I wonder if, as long as we are looking at trying to address these issues, whether we should look at these as well.

For example, I understand that the 25th Amendment addresses uncertainties in Presidential disability by allowing the Vice President and other officers to certify that the President is disabled. But the 25th Amendment does not address uncertainties in Vice Presidential disability. What happens if both the President and the Vice President are disabled? Do we need a statute to provide some objective standard, if that is possible, for determining a Vice Presidential disability? Or can we assume that if both the Vice President and the President are not well enough to assert their claims to the Presidency, the office will just automatically devolve on someone else according to the statute?

I wonder if we could perhaps—Professor Wasserman, do you have any thoughts in that regard?

Mr. WASSERMAN. My initial thought is that we at some level need some objective standards as to both the President controlled by—the 25th Amendment does not establish the standards for President—for determining the Presidential—when the President is disabled. But as to both, if both offices—or if there is a disability in both offices, then by the terms of section 19, it would just devolve. It would just devolved down. Again, the reason for the import of moving Cabinet officers up to the top to keep all that movement, because the disability could be temporary, to keep any movement within the executive branch and not bringing Members of Congress into the mix.

Senator CORNYN. Mr. Chairman, I have a lot of other areas of interest, as I know all of us do, and I know we will be able to submit any questions we have in writing as well as follow up. But at this time I would yield.

Thank you very much.

Chairman LOTT. Thank you, Senator Cornyn.

I believe—is it “For-teer” or “For-ti-ay”?

Mr. FORTIER. Well, you have raised a family dispute, but I say “For-ti-ay.”

[Laughter.]

Chairman LOTT. If it is in Louisiana and the Mississippi Gulf Coast, it is “For-ti-ay.” If it is here, I thought it was “For-teer.”

Mr. FORTIER. Well, for some reason, my Northeast family has picked up your Mississippi tradition of "For-ti-ay."

Chairman LOTT. All right. Well—

Mr. AMAR. It is "For-ti-air" in Connecticut.

[Laughter.]

Chairman LOTT. You say you think it is unconstitutional to have congressional leaders in the line of succession, I believe, in your testimony. Why? I believe that point was made by Senator Cornyn, but I want to get a clarification on that. And then, Senator Feingold, if you want to pick up with some questions after that?

Mr. FORTIER. I think there is a not universal but dominant position among constitutional scholars that it is for two reasons.

One, the word "officer" that appears in Article II, Members of Congress are not officers of the United States, and if you look at the Framers, they intended there to be officers of the United States in the line.

Second, the larger structural argument about separation of powers, that the Framers probably did not intend that.

My recommendation actually is to think through the policy consequences of each of the scenarios rather than simply rely on that. And I have one exception to that, and that, I mentioned earlier, is the case where a President fails to qualify. You have, as I say, an election controversy which is not resolved before January 20th. In 1876, we went up to just a couple of days before the March inauguration without a President. Or you have some sort of catastrophic attack where both the President and Vice President are killed just before the inauguration.

That scenario is guided by the 20th Amendment, and that language is different. It does not require an officer. It just refers to Congress being able to put the person that they choose in the line.

So that narrow case, I think, is not unconstitutional, but I would recommend you look at the policy consequences of each of the various scenarios that Congress would come into the line.

Chairman LOTT. Senator Dodd has joined us. Senator Dodd, if you would like to make a statement at this time and then pick up on the questioning, we would be glad to hear from you.

**STATEMENT OF HON. CHRISTOPHER J. DODD, A U.S. SENATOR
FROM THE STATE OF CONNECTICUT**

Senator DODD. Well, thank you very much, Mr. Chairmen, both of our Chairs, and I apologize for arriving a few minutes late here this morning, but let me thank our witnesses as well for their statements and their views on this important subject. And I thank both of our Chairs here and commend you both for calling this joint hearing. This is not a common experience, but I think it is a worthwhile one, when we are addressing an issue of this significance and importance. And, certainly, the events of 9/11 were a not so subtle reminder of the potential scenarios that could call into question, obviously, the procedures for establishing Presidential succession. And so I think this is a very timely and important subject matter. This is exactly the environment under which we ought to be considering those questions before a national catastrophe occurs and we are forced to act in haste or in response to a constitutional crisis.

As I know you have all heard, and those who have followed this subject matter know, Article II, section 1, obviously, of the Constitution and subsequent amendments establishes the foundation for Presidential succession, makes clear that the Framers' preference that the Vice President should succeed to a vacancy in the Presidency. In their wisdom, the Framers left to Congress the question of how to settle a double vacancy, as occurs if the Presidency and the Vice Presidency are both left vacant. The Congress did not hesitate to fill this void and passed the first Presidential Succession Act in 1792, as you all know.

It is noteworthy that in the 211-year history since that Act was adopted, Congress has only twice substantively or substantially revised it, which is rather unique considering how Congress usually likes to act in these matters, in both cases in response to circumstances related to the death of a sitting President. The history of the Succession Act and its progeny is a reflection, I think, of the 200-plus-year debate on the subject and the dilemma Congress faces when it considers a change only in response to a crisis. This history is also revealing in its consideration of the same issues that our witnesses have

raised here today. And if we are to avoid the mistakes of the past, then we only need to look at our own history.

The 1792 Act provided that in the case of a double vacancy, the order of succession would fall to the President pro tempore of the Senate and then the Speaker of the House. But the term of either of those legislative officers was to be temporary only since the Act provided for a special election to fill the Presidential vacancy, unless the vacancy occurred in the last full year of the term.

The placement of the legislative officers in the line of succession was not universally supported, as historians will note, and its critics included such constitutional authorities as James Madison. Representative Jonathan Sturgis of Connecticut observed at the time that if the Speaker were in the line of succession, there would be—and I am quoting him—“cabling and electioneering” in the choice of Speaker. However, the Act remained substantially unchanged for nearly a hundred years.

The Succession Act of 1886 followed the assassination of President James Garfield in 1881 and his incapacitation for a period of almost 80 days, and the untimely death of Vice President Thomas Andrews Hendricks in 1885, less than 9 months after his inauguration. Ironically, in both circumstances, both the office of the President pro tempore, then third in line to the Presidency, and the office of the Speaker, then fourth in line, were vacant at the time. Similarly, in both cases, there was a potential that least the position of the President pro tempore of the Senate would be filled by a member of the opposing party, thereby potentially leading to a switch in party should a double vacancy arise.

To ensure the line of succession reduced the risk that such succession would result in a change in party in the White House, Congress passed the Succession Act of 1886, which eliminated the President pro tempore and the Speaker from the line of succession and provided for succession through Cabinet officers. The 1886 Act also eliminated the requirement for a special election that had governed succession for more than 60 years.

It was yet another death of a sitting President, that of Franklin Delano Roosevelt in April 1945, less than 3 months into his fourth term, and the ascendancy of the Presidency of Harry Truman that precipitated the latest revisions in Presidential succession, the Succession Act of 1947. President Truman found himself ill-prepared for the vacancy he filled, noting in his memoirs that, "Under the present system, a Vice President cannot equip himself to become President merely by virtue of being second in rank. The voters should select him as a spare Chief Executive."

With the ensuing vacancy in the Vice Presidency, Truman was called upon to nominate his successor, a task he did not relish. In his special message to Congress on June 19, 1945, President Truman declared that he did not believe that in a democracy this power should rest with the Chief Executive. He recommended that Congress restore an elected officer to the line of succession, in this case the Speaker, whom Truman argued had a more recent mandate, having been elected every 2 years, as opposed to 6 in the case of the President pro tempore of the Senate. Truman also recommended that the requirement for a special election be restored. In response, Congress enacted the Succession Act, which provides for the Presidential succession in the case of a double vacancy, but does not require that a special election be held.

Many issues that faced the 2nd Congress in 1792 and the 49th Congress in 1886 and the 80th Congress in 1947 are before us again here today. But today, while it is both fortunate and opportune that Congress is not faced with an immediate crisis, we are faced with one of even greater magnitude than the one imagined by previous Congresses: the potential elimination of the entire line of succession by one terrorist act.

It is prudent that we act now to remove any constitutional questions or deficiencies in the Presidential succession procedures. The principles that must guide our deliberations, in my view, are the need to establish certainty, clarity, and the constitutionality of succession. The legitimacy of our democracy hangs obviously in the balance of what we do, and nowhere is the need for a nonpartisan/bipartisan approach more imperative than here.

So, again, I look forward to the testimony that you have already given, and thank you again for being here.

Let me ask all of you to sort of comment on the Truman commentary that he made in his speech to Congress in 1945. Did Harry Truman have it right in your views? Or did the Congress have it right based on the actions that the Congress took subsequent to his recommendations? Begin where you would like to begin. Who would like to start?

Mr. AMAR. Well, Chairman Lott asked about President Truman, and I did endorse, in response to Chairman Lott's question, the idea, which some other witnesses have, a special election might be a very good idea, and Truman proposed it, and Congress did not adopt that. And Truman might have been right on that.

Let me mention one other decision that Congress made, a subsequent Congress. The Congress that proposed the 25th Amendment after the assassination of President Kennedy, in effect, repudiated the basic premise under which Truman operated. It basically said that a President, in effect, should pick his successor as long as that

successor is validated by a special kind of democratic confirmation process. That is what the 25th Amendment does. It provides for an unelected President, someone who was not even on the Presidential ticket. It provides for President Gerald Ford. It provides for Vice President, could be President, Nelson Rockefeller. So that is a determination that Congress made after 1945, after 1947, that I think really undercuts in some ways Truman's vision. And if we wanted to rethink it now, we need to think about the 25th America, and as John has mentioned, the 20th Amendment as well, in terms of coming up with a statute that fits our modern constitutional sensibilities.

Let me mention one other amendment, which is the lame-duck amendment, the 22nd Amendment, which enables Congress to meet before the Presidential inauguration and creates the possibility of the outgoing President, in effect, nominating the incoming President's Cabinet and having all of that confirmed before Inauguration Day as a matter of transition courtesy, which would solve another special window of vulnerability that John has mentioned that I have previously testified on in 1994.

Senator DODD. John?

Mr. FORTIER. I, too, share some concerns with the larger tack that President Truman took about putting Congress in the line of succession. His concern was that we should have an elected person in the line. My concerns are partly constitutional, but mostly I think that in many cases it is bad policy to have congressional leaders in the line.

Senator DODD. The Speaker does not have to be elected either.

Mr. FORTIER. The Speaker does not have to be elected. That is true, although we have never had that scenario. But there are difficult separation-of-powers questions which force the Speaker or the pro tem or whoever takes office to more or less resign their office, even in a temporary situation. That is just one example of why having Congress in the line does not lead to the sort of stability that we would hope for in a case—it could be a case of a horrific attack where there are numbers of Members, people in the line of succession, dead or incapacitated, and forcing multiple Presidents or the Speaker to take over for a short period of time, only to then be displaced, and potentially another Speaker then later to take the Presidency would lead to the sort of confusion that we do not want to see after an attack.

Chairman LOTT. Senator Dodd, could I ask a question there?

Senator DODD. Sure.

Chairman LOTT. I wondered why they switched from the President pro tem being third to fourth. Was it just purely simply the argument that President Truman made that he wanted the one most recently who had faced election? Was that the only justification for it? Was there more to it than that?

Mr. FORTIER. The original Act had the pro tem, as you mentioned, and that was in the 2nd Congress. And the relative importance of the two offices, I think, was not as established. In fact, the tradition that we now have of electing the longest-serving member of the majority party the pro tem was not in place then. Truman made the point that the Speaker of the House was mostly truly representative of the American people in that he had been or she

had been elected to a district and then elected by a majority of the body.

Chairman LOTT. And the President pro tem position evolved into what it now is, which is that he is or she is the longest-serving Member of the Senate of the majority party. Earlier it had been based on something other than just longevity, right?

Mr. AMAR. And the speaker ship also suggests an inattention, putting that first in line, to some of the practical considerations that my friend John has really highlighted. If we look at American history, we are struck by the fact that for much of it, there is no Speaker of the House because the House is not a continuing body the way this body is. And so in 1857 and then again in 1859, there is not a Speaker for 11 months out of the 24-month cycle. So that is really not what you want if you focus again on some of these practical considerations about continuity.

So if you look at the founding vision of the executive branch, its energy, its unity, its vigor, its dispatch, but one of the central ideas is one person always there, 24/7/365, and that is why you have this constitutionally designated understudy of the Vice President, who immediately takes over. That is why you have a provision that if both of them are out of action, there needs to be someone at every instant.

In England, there is an idea of complete continuity: "The King is dead. Long live the King." At every instant, our system actually has to have a President, and we should be certain who that person is, and the Commander in Chief line of military chain of command needs to know exactly who the President is at every instant. And the Speaker of the House is actually quite unfortunately designed with that practical consideration in mind.

Mr. WASSERMAN. There was also a partisan concern that President Truman expressed to Congress that he wanted party continuity, if at all possible, and having settled on legislative succession, he acted on the belief that the House was more likely to be in party agreement, therefore the Speaker more likely to be in party agreement, than was the Senate. That has not been—

Chairman LOTT. If you see this chart over here, that has not been the case.

Mr. WASSERMAN. That has not proven to—

Chairman LOTT. The last 50 years.

Mr. WASSERMAN. But that is a product of the post—that type of divided Government I think is more of a product of the post-World War II society. I think prior to 1945, there was some validity or certainly more validity than there has been since the statute has been in place.

Senator DODD. Dr. Fortier, you raised the issue of certain Cabinet officers, junior status, may be ill-equipped to perform the functions of the Presidency. Isn't it, though, in a sense—I mean, given the fact that you would expect the sort of rallying around, on the assumption most Presidents have some fairly competent people around a Cabinet table, the fact that the line of succession may fall to someone who would be of more junior status, maybe less experienced—just think of this Cabinet, for instance. You look at Donald Rumsfeld or Colin Powell. You move on down the line. You could choose someone who may not have the same experience. And yet

having those individuals around would certainly minimize, wouldn't it—it is a question—the lack of experience that a more junior member of that Cabinet might have if, in fact, it fell to that individual?

Mr. FORTIER. My proposal is that the top five or top four—and we are talking about putting the Homeland Security Secretary in there as five Cabinet members—are always going to be very substantial figures that have some connection to national security, if we are talking about a catastrophic attack, which by definition we are if we are going down the line to people with those sort of qualifications.

My additional proposal is that we have some offices created around the country with some substantial figures in them—the eligible sitting Governors or former Presidents, former Vice Presidents, Cabinet members, Members of Congress—who are—if we can create a way for them to be tapped into the current administration as advisers and coordinators for their regions of homeland security, those people, I argue, may be more qualified or more—we would feel more comfortable with them assuming the Presidency in an extreme circumstance than a Cabinet member of other departments who were probably picked for more specific policy reasons—knowledge of the field of education, knowledge of the field of agriculture.

We could, by having these additional offices, make it a point that the main reason for having these people is to assume the Presidency in the worst case, and we are being explicit that that is why they are chosen rather than as a secondary reason.

Senator DODD. Mr. Baker suggests, obviously, using Governors as part of this, but I gather the rest of you would have some hesitancy about having a Governor be very high up in a line of succession. But yet you just suggest somehow that having Governors of part of some elongated list would make some sense. Is that correct?

Mr. FORTIER. I think that we are not too far off, Mr. Baker and I. I think—

Senator DODD. Make a case for me in light of the California case here pending now.

[Laughter.]

Senator DODD. Here is that large State and a California Governor I presume would be—that would be sort of a natural choice. In light of what is going on in California, would you really want this to—

Mr. BAKER. Senator, it depends upon the Governor. And that is why the President should have the discretion. I do not think the Congress should designate by State and say we will start off with California, New York, and Texas in that order. I think these kinds of questions are best left to the President's discretion and his judgment who is among the pool of Governors of his party who is best suited to serve him. So if the President were allowed to nominate a sitting Governor and have that person confirmed by the Senate to be in this contingent role, I think that would provide a successor outside of Washington.

Senator DODD. It would add a whole new dimension to the nomination process here, wouldn't it?

Mr. BAKER. It is always fun, Senator.

Chairman LOTT. Senator DeWine, thank you for being here for the entire hearing, and we would be glad to hear your questions.

Senator DEWINE. Chairman, thank you very much. Let me just thank our panelists. I think you have some absolutely excellent suggestions. There is only one suggestion, I think, that is a little troubling to me, and that is the idea of the special election. Harry Truman is one of my favorite Presidents, but I think it is just a bad idea, and let me tell you why.

I think the last thing in a time of crisis that we need is uncertainty, and what we do is certainty. And the idea on September 11th that, if something had happened to President Bush, that we would have faced with a new President the specter of a special election in, say, 6 months is to me frightening. What we would have needed at that time is certainty that that man or woman who was the new President would have been able to serve the full term. That person would have been the President of the United States, and everybody in the world would have known it. And the idea that we would have faced a special election in 6 months I think to me is chilling. And so I think it is a horrible idea. Just the day and age we live in today I think it is just not a good idea. I do not think it was a good idea in 1945. I think Harry Truman did real well from 1945 to 1948, and I think history shows that. So just my comment.

Thank you, Mr. Chairman.

Chairman LOTT. Senator Cornyn?

Senator CORNYN. Senator DeWine, I share your concerns about an election. As a matter of fact, last week, talking about the continuity of Congress, we have some competing proposals—one as a statutory fix, the other would be a constitutional amendment. And I guess perhaps again for the reason I stated earlier, because of the oft-stated concern about constitutional amendments and the difficulty in Article V in actually getting a constitutional amendment passed and ratified, the statutory fixes were proposed, including expedited elections.

But one of the concerns that I would have about a quick election is, number one, the disenfranchisement of military voters, for example, that is a concern, not to mention in the wake of a 9/11 or worse the kind of chaos that would reign while we were trying to conduct an election process.

So while obviously elections are important, ultimately there would be an election, but at least in the interim, I think stability and the need to provide some calm and clarity lest we get into more litigation or uncertainty is, I think, an initial process whereby it would devolve to another officer, as we have discussed earlier, it is far preferable to even an expedited election under those circumstances. But I would be glad to—Professor Amar, do you have any thoughts in that regard?

Mr. AMAR. In an earlier, pre-9/11 article, I did suggest that if the statute were revised, I added just in the paragraph that we should really think about providing for a special election 8 months later. I was not thinking about 9/11 in 1996, and my main suggestion was to cure the unconstitutionality by pulling the legislative leaders out of the line of succession, and not just the unconstitutionality but the impracticality in a variety of policy settings where

this might occur. The statute just does not quite work as a practical matter.

There is a tradeoff. To the extent that you get someone who is very highly validated by the American people as, say, the Vice President himself has never been, even in 1972, a provision for special election when Presidential power merely was transferred from President to Vice President, from Franklin Roosevelt to Harry Truman, partly under the idea perhaps that the American people already did vote for this person as their spare, as their next in line.

Now, if you were to create a new office and President as a matter of custom or to name that person—to tell the American people before the election whom they were going to name, whether it was whom they were going to name as their Secretary of State, who is first in line, or whom they are going to name as their First Secretary, then, again, the election itself might have validated that person to serve out the President's term, which, of course, is the 25th Amendment model, too. You vote for Nixon, and he had a 4-year term, and if he cannot serve it out, it will be Agnew, whom you voted for; and if not Agnew, Ford, whom he has designated and who has been confirmed by a special process; and if not Ford, then Rockefeller. And so, actually, that 25th Amendment model, which I suggested as a possible template in the event that these things become—the disability occurs simultaneously rather than sequentially, that is not a special election model.

The special election model might be more suitable if you are going to very far down the succession list. Then it is a little harder for the American—and if it is 3 years and 8 months or 3 years and 9 months, very early in a Presidential term, very low down on the succession list, then there is the anxiety. And I do not think we would want to have it 2 months later, 3 months later, maybe 8 months or 9 months. And then the question is: Is it worth the candle—if the disability, double disability occurred very early in a Presidential term, say a month in or at inauguration, it might be very different than if it occurs 3 years in or even 2 years in.

One final thought, since you talked about the military and people voting and voting in a crisis. Here is an amazing fact about our history, let's say, compared to the mother country, England. They do not have fixed and regular elections in their tradition. Parliament promised, try septennial elections—I mean triennial elections in the 1700s and then changed it. But during World War II, there was no election held in England between 1935 and 1945. Churchill gives up on Halloween 1944 and tells the House of Commons, "No one under 30"—the generation that is actually making the supreme sacrifice. "No one under 30 has ever voted in a general election or a bye election; whereas, we held regular elections on time, even during the Great Depression and World War II, because President Lincoln held an election, one that he actually thought he was going to lose for a long time, but he held it fair and square on time with votes coming, the decisive votes, from the field, actually.

So we have been able to run elections, although not special ones, even during moments of our greatest crises—the Civil War, the Great Depression, World War II—and, actually other countries have not always done it, even great democracies like Great Britain.

Senator CORNYN. Professor Amar, one last follow-up. You noted in your opening comments that you testified before the Subcommittee on the Constitution in 1994 on this very subject. Is that correct?

Mr. AMAR. On a very closely related subject.

Senator CORNYN. I do not recall what the context was.

Mr. AMAR. That was about special windows of vulnerability right around election time and inauguration time. If one of the candidates is knocked out the week before the Presidential election, we are in serious trouble. If the person who actually won the seeming vote is knocked out prior to the meeting of the Electoral College, there are some real areas of difficulty. It is all cited in the notes to my testimony. I have asked, actually, that that be added to the record. That was Senator Simon chairing that Subcommittee back on Groundhog Day 1994.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LOTT. Thank you again, Senator Cornyn, for your leadership, Senator Dodd, for coming, Senator DeWine, and the panel, thank you very much. We may have another hearing on this subject later on, but I hope we can find a way to actually act and get some results.

In the meantime, I will be talking to Speaker Hastert and President pro tem Ted Stevens about how we get this accomplished.

[Laughter.]

Chairman LOTT. The hearing is adjourned.

[Whereupon, at 11:02 a.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Testimony of
AKHIL REED AMAR
 Before The
**Committee on Rules and Administration and
 Committee on the Judiciary United States Senate**

September 16, 2003

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale University, and have been writing about the topic of presidential succession for over a decade. In February 1994, I offered testimony on this topic to the Senate Judiciary Subcommittee on the Constitution, and I am grateful for the opportunity to appear again today. As my testimony draws upon several articles that I have written on the subject, I respectfully request that these articles be made part of the record.¹

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

First, Section 19 violates the Constitution's succession clause, Article II, section 1, para. 6, which authorizes Congress to name an "Officer" to act as President in the event that both President and Vice President are unavailable. House and Senate leaders are not "Officers" within the meaning of the succession clause.² Rather, the Framers clearly contemplated that a cabinet officer would be named as Acting President. This is not merely my personal reading of Article II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.³

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

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

In addition to these constitutional objections, there are many policy problems with Section 19. First, Section 19's requirement that an Acting President resign his previous post makes this law an awkward instrument in situations of temporary disability. It rules run counter to the approach of the 25th Amendment, which facilitates smooth handoffs of power back and forth in situations of short-term disability—scheduled surgery, for example. Second, Section 19 creates a variety of perverse incentives and conflicts of interest, warping the Congress's proper role in impeachments and in confirmations of Vice Presidential nominees under the 25th Amendment. Third, Section 19 can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B? Here, too, Section 19 is in serious tension with the better approach embodied in the 25th

Amendment, which enables a President to pick his successor and thereby promotes executive party continuity. Fourth, Section 19 provides no mechanism for addressing arguable Vice Presidential disabilities, or for determining Presidential disability in the event the Vice President is dead or disabled. These are especially troubling omissions because of the indispensable role that the Vice President needs to play under the 25th Amendment. Fifth, Section 19 fails to deal with certain windows of special vulnerability immediately before and after presidential elections.⁴

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

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

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

This solution solves the constitutional problems I identified: The new Assistant VP would clearly be an "officer" and bumping would be eliminated. The solution also solves the practical problems. No resignations would be required—power could flow smoothly back and forth in situations of temporary disability. Congressional conflicts of interest would be avoided. Party and policy continuity within the executive branch would be preserved. And the process by which the American electorate and then the Senate endorsed any individual Assistant VP would confer the desired democratic legitimacy on this officer, bolstering his or her mandate to lead in a crisis.

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

1. These articles, in chronological order, are as follows:

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

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

Akhil Reed Amar, Dead President-Elect, Slate, Oct. 20, 2000 [link](#)

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

http://rules.senate.gov/hearings/2003/091603_amar.htm

11/8/2008

11, 2001 [link](#)

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

Akhil Reed Amar and Vikram David Amar, Constitutional Accidents Waiting to Happen—Again, Findlaw, Sept. 6, 2002 [link](#)

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

3. According to Madison, Congress “certainly err[ed]” when it placed the Senate President pro tempore and Speaker at the top of the line of succession. In Madison’s words, It may be questioned whether these are officers, in the constitutional sense. . . . Either they will retain their legislative stations, and their incompatible functions will be blended; or the incompatibility will supersede those stations, [and] then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Cong[ress] may declare what officers [etc.,] which seems to make it not an appointment or a translation; but an annexation of one office or trust to another office. The House of Rep[resentatives] proposed to substitute the Secretary of State, but the Senate disagreed, [and] there being much delicacy in the matter it was not pressed by the former. Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 Papers of James Madison 235 (R. Rutland et. al. eds. 1983). Several members of the First and Second Congresses voiced similar views, see John D. Feerick, From Failing Hands: The Story of Presidential Succession 57-59 (1965); Ruth C. Silva, The Presidential Succession Act of 1947, 47 Mich. L. Rev. 451, 457-58 (1949).

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

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

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**Testimony of
M. MILLER BAKER
Before The
Committee on Rules and Administration and
Committee on the Judiciary United States Senate**

September 16, 2003

Mr. Chairmen, Ranking Members, and Members of the Committees:
Thank you for the invitation to testify here this morning on issues pertaining to presidential succession. It is an honor to be here. The views expressed here are mine alone.¹

The terrorist attack on America on September 11, 2001, represents an epic event in American history, one that compares to the Japanese attack on Pearl Harbor on December 7, 1941. September 11's parallel to Pearl Harbor, however, extends beyond strategic and tactical surprise and the loss of thousands of American lives a few hours after dawn.

But for chance and a critical loss of nerve by the Japanese commander, the attack on Pearl Harbor would have been far more devastating to America than it actually was. As fate would have it, the three U.S. Pacific Fleet aircraft carriers happened to be out of port that morning, and the Japanese fleet commander, Admiral Nagumo, failed to follow-up the initial strikes against warships and airfields with attacks on Pearl Harbor's fuel storage, ship repair, and dock facilities, which were left intact. Had the U.S. carriers been sunk in port, and had Admiral Nagumo achieved more complete destruction in follow-up strikes, as his fliers avidly requested, Hawaii itself would have been in immediate jeopardy, and the U.S. position in the Pacific would have been rendered untenable.

Similarly, as horrific and grievous as the events of September 11 were, that day very easily could have been an even greater catastrophe, one that could have produced, in addition to unprecedented civilian carnage, an unprecedented leadership crisis at the very moment that called for the most vigorous executive leadership, or in Alexander Hamilton's enduring phrase, "energy in the executive."²

For one thing, in planning and executing the September 11 attacks, the enemy does not appear to have made decapitating the U.S. government a primary objective. For another, one of the Washington-bound hijacked airliners, United Flight 93, was brought down in a field in Pennsylvania by the heroism of its passengers. But this was made possible only by the unexpected forty-minute delay of that flight's departure from Newark, which allowed the passengers to learn from cell phone calls that their hijackers were bent on a kamikaze mission. The hijacked airliner that did reach Washington, American Flight 77, crashed into the Washington area target singularly capable (as these matters go) of physically absorbing and surviving the blow—the Pentagon. And most important of all, the President—like the aircraft carriers absent from Pearl Harbor on the morning of December 7, 1941—happened to be out of Washington when the enemy struck on September 11.

Thus, the nation was spared an almost unimaginable leadership crisis that could have arisen had the enemy successfully struck the White House and the Capitol on a day when the President was in Washington. Unlike the redundant and relatively reliable mechanisms in place (dating from the Cold War) to ensure continuity in military command and control, the nation's legal arrangements for ensuring the continuity of the Presidency are inadequate and are most likely to fail at precisely the moment when the need for decisive executive authority is most urgent, and when its absence may prove fatal to American lives and interests.

http://rules.senate.gov/hearings/2003/091603_baker.htm

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In the event of a vacancy in the Presidency, the 25th Amendment (ratified in 1967 in response to Lyndon Johnson's succession to the Presidency in 1963 following the assassination of President Kennedy) is clear: the Vice-President "shall" become President, and the new President "shall" appoint, subject to confirmation by a majority of both houses of Congress, a new Vice President. However, in the event of simultaneous vacancies in the Presidency and the Vice Presidency, or the simultaneous "inability" of these officers to exercise presidential duties, the nation's presidential succession mechanism is probably unconstitutional and is a sure formula for instability, hesitation, and partisan gamesmanship at the worst possible moment.

Article II, Section 1, Clause 6 of the Constitution (the "Succession Clause") specifies that in the event of simultaneous vacancies in the Presidency and the Vice Presidency, or the simultaneous "inability" of those officers to act, Congress may by law specify what "Officer" shall "act as President . . . until the disability be removed, or a President shall be elected." Thus, unlike a Vice President who becomes President under the 25th Amendment (which constitutionalized the precedent set by Vice President John Tyler's assumption of the Presidency in 1841 following the death of President William Henry Harrison), a statutory successor under the Succession Clause may only "act" as President. If a statutory successor is serving as Acting President, Congress may—but is not required to—call a new presidential election.

Congress has exercised its power to designate statutory presidential successors three times in U.S. history, and on two of those occasions, partisan considerations were the overriding impetus for the result.³ In 1792, during George Washington's first presidential term, the Federalist-controlled Second Congress designated two congressional officers as statutory presidential successors after the Vice President: first the President pro tempore of the Senate, and then the Speaker of the House. The 1792 Act provided that these officers were to "act" as President while retaining their congressional offices, pending a special presidential election, for which the 1792 Act also provided. Although Congressman James Madison voted against the 1792 Act and contended that it was unconstitutional because these congressional officers are not "Officers" within the meaning of the Succession Clause, partisan interests overrode constitutional principle. Alexander Hamilton, the leader of the Federalists and Secretary of the Treasury, directed the Federalist majority in Congress to defeat alternative legislation that would have placed his chief political rival, Secretary of State Thomas Jefferson, in the statutory line of succession in lieu of the President pro tempore and the Speaker.

During the impeachment and trial of President Andrew Johnson in 1868, when the office of Vice President was vacant, it was apparent that the 1792 Act's placement of the President pro tempore of the Senate and the Speaker of the House in the line of succession created serious problems, especially when the President and these congressional officers came from different parties. Such placement injected partisan tensions into what should be a smoothly-functioning succession mechanism, and it opened the door to a congressional cabal's seizure of the Presidency by elevating one of their own through impeachment and removal of the President in the event of a vacancy in the Vice Presidency.

In the 1880s, when the painful experience of the Johnson impeachment and trial was still a recent memory, two other episodes jolted Congress into enacting a new statutory line of succession. First, in 1881, following the death of President James Garfield by an assassin's bullet, the succession of Vice President Chester Arthur to the Presidency meant that there was no statutory successor to President Arthur because Congress was out of session and there would be neither a President pro tempore nor a Speaker until Congress reconvened. That prompted discussion and the introduction of legislation, but nothing came of it.

Then, in 1885, Democratic President Grover Cleveland's Vice President, John Hendricks, died in office, and as Congress was out of session, once again there were no statutory successors to act as President in the event that the President died or was otherwise unable to discharge his duties. Upon the reconvening

of Congress, Republican Senator George F. Hoar of Massachusetts introduced legislation providing that after the Vice President, the line of succession would begin with the Secretary of State and would continue through the cabinet department heads in the order of the departments' creation. Senator Hoar's legislation took the Republican President pro tempore (along with the House Speaker) out of the line of succession and replaced them with Cleveland's Democratic cabinet. This was a rare act of principled statesmanship regarding a subject, presidential succession, where partisan considerations have usually carried the day.

Senator Hoar persuaded his Republican Senate colleagues to pass his legislation, notwithstanding their partisan interests, on the basis that history demonstrated that the Secretary of State was more likely to be fit for executive responsibilities than the chief congressional officers, and that it violated the separation of powers for a congressional officer to act as President. Additionally, Senator Hoar contended that placing the President's cabinet officers in the line of succession would not result in a change of partisan control of the Presidency, whereas the 1792 Act created an incentive for anyone seeking to effect a change in policy to assassinate the President when the Vice Presidency was vacant and the Senate was controlled by the other party. The Democratic-controlled House passed this legislation, and Senator Hoar's bill was signed into law by President Cleveland as the Presidential Succession Act of 1886. The 1886 Act also provided that a statutory successor would immediately convene Congress, if it were not already in session, which could then decide whether to call a special presidential election.

The 1886 Act was the statutory regime in place in 1945 when President Franklin Roosevelt died and Vice President Harry Truman succeeded to the Presidency, leaving a vacancy in the office of Vice President.

President Truman believed on populist principle that if he were unable to complete Franklin Roosevelt's last term, an elected official rather than the unelected Secretary of State should act as President. Curiously, he also thought it unwise for a President to have the power to choose his own successor, although Franklin Roosevelt effectively had done just that by naming Truman as his running mate in 1944. Within a few months of taking office in 1945, Truman proposed legislation providing for the House Speaker and President pro tempore of the Senate (in that order) again to be placed in the statutory line of succession, this time ahead of the cabinet officers. This proposal, which also provided for the calling of a special presidential election, also went nowhere when Truman's party controlled both the Congress and the White House.

After the Republicans won control of Congress in the mid-term elections of 1946, however, Truman renewed his request, and the Republican Congress was happy to oblige him, over the forceful objection of some, such as Democratic Senator Carl Hatch of New Mexico, who reiterated arguments previously voiced by James Madison in 1792 and Senator Hoar in 1886. While the Republican Congress was delighted to place its own officers in the line of succession after Truman, it was not prepared to provide for a special presidential election that might displace its own officer from the Acting Presidency. Thus, Truman's sincere but misplaced populism and Republican partisan opportunism combined to produce the Presidential Succession Act of 1947, a complicated statute found at Section 19 of Title 3 of the United States Code that, for better or worse, is still the applicable law today.⁴ In my view, when the gravity of the subject matter is considered, the Presidential Succession Act of 1947 is perhaps the most poorly designed statute in the entire United States Code.

Section 19(a)(1) of the 1947 Act provides that in the event that there is neither a President nor a Vice President, or in the event the incumbents of those offices are unable to discharge their duties, the Speaker of the House shall, upon his resignation as Speaker and as a representative in Congress, "act as President." Section 19(a)(2) provides that in the event there is no House Speaker, or if the Speaker fails to qualify, then the President pro tempore of the Senate shall, upon his resignation as President pro

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tempore and as senator, act as President. In the event that an incumbent President or Vice President's "inability" to discharge his duties is removed, Section 19 terminates the (by then) former Speaker or (by then) former President pro tempore's tenure as Acting President.

The requirement that the Speaker and President pro tempore resign their seats in Congress before assuming presidential duties is practically demanded by the separation of powers, but it could cause either or both of these officers to hesitate or decline to assume presidential duties, especially if either the House or Senate were as closely divided as they are today. For example, had fate presented then 98-year-old Senator Strom Thurmond with the opportunity to assume presidential duties while he was President pro tempore during the first half of 2001 (when the Senate was evenly divided prior to Senator Jeffords's switch of parties), he would have had to consider the fact that his resignation from the Senate would have resulted in a Democratic takeover of the Senate, because the (then) Democratic Governor of South Carolina presumably would have appointed a Democratic successor to Senator Thurmond's vacant Senate seat.

In the event that there is neither a House Speaker nor a President pro tempore of the Senate, or in the event that neither qualifies or is able to assume the position of Acting President, Section 19(d) specifies that the cabinet member who is highest on the following list shall act as President, provided that the cabinet member has been confirmed by the Senate prior to the vacancy in the President pro tempore's office or the failure of the President pro tempore to qualify as Acting President: 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, and Secretary of Veterans Affairs. (Legislation that would place the Secretary of Homeland Security fifth in this cabinet line, behind the Attorney General, has passed the Senate and is pending in the House.)

The order of succession advances down this list in the event that a cabinet position is vacant or its incumbent is unable or unwilling to assume the status of Acting President. Section 19 provides reasons why a cabinet officer might decline to assume the Acting Presidency, especially if his or her tenure as Acting President might only be for a few hours or days.

Under Section 19, the taking of the presidential oath by any cabinet officer is deemed to constitute the officer's resignation from his or her cabinet office. In our era of protracted and bruising Senate confirmation ordeals, this resignation requirement might cause the statutory successor to hesitate before assuming presidential duties or to decline to do so altogether, especially if the President or Vice President's fate was unknown and it appeared that one of them might recover the ability to discharge his duties after a temporary inability to do so.

This hesitation that Section 19 induces may prove disastrous if a presidential decision is urgently required. For example, on September 11, if planes had first crashed into the White House and Capitol rather than towers One and Two of the World Trade Center, leaving the President, Vice President, Speaker, and President pro tempore dead or missing, the military might have sought permission to shoot down other airliners that appeared to be hijacked. Any hesitation in giving such an order might have resulted in the loss of the opportunity to act, and thus even greater casualties.⁵

Section 19 imposes another important constraint on the assumption of the presidential duties by cabinet members. If the Speaker and the President pro tempore do not assume the duties of the Presidency, either because they are dead, because they are "unable" to act, or because they decline to assume presidential duties (perhaps because of an unwillingness to resign their own congressional office as is required by Section 19), a cabinet officer who does accept presidential duties (and thereby resigns from

his or her cabinet office) is subject thereafter to being displaced from the Acting Presidency by a Speaker or President pro tempore who changes his or her mind and decides to exercise presidential prerogatives, or recovers his or her ability to discharge presidential duties after a period of "inability" (e.g., after a return from foreign travel). In other words, a cabinet successor serving as Acting President is subject to dismissal and replacement at will by either the Speaker or the President pro tempore.

Perhaps most unsettling of all is the possibility that a cabinet officer acting as President could be displaced from the exercise of presidential duties by a newly-chosen Speaker or President pro tempore, even if the selection of the new Speaker or President pro tempore is made post-attack by a handful of surviving representatives or senators who happened to be out of Washington when the enemy struck. Thus, on September 11, if the President, Vice President, Speaker, President pro tempore, and most members of Congress had been killed in attacks on the White House and the Capitol Building, and with Secretary of State Powell out of the country and possibly unable immediately to discharge presidential duties, Treasury Secretary Paul O'Neill might have become Acting President, at the cost of his cabinet office (assuming that he survived the attack on the White House, which is adjacent to his own office in the Treasury Department building). If only a dozen members of the House had survived such a catastrophe, under the rules of the House they could have promptly selected any of their own as the new Speaker, who in turn could have promptly displaced O'Neill as Acting President. O'Neill, having resigned his cabinet office to assume the Acting Presidency, would then have had to return to the private sector rather than the Treasury Department.

The point that bears special emphasis is that if the nation suffers some catastrophe that results in the loss of the President, the Vice President, and most members of the House and Senate, the surviving members of Congress will inherit not only the full legislative powers of Congress, but also the Presidency itself, should a newly-chosen Speaker or President pro tempore choose to displace any surviving cabinet member who resigned his or her cabinet post to serve as Acting President. If Congress does nothing else, it should amend the 1947 Act to eliminate the ability of a newly-elected House Speaker or President pro tempore of the Senate to displace a cabinet officer serving as Acting President.

Notwithstanding President Truman's good intentions, in my opinion the 1947 Act placing congressional officers in the line of succession (and giving them a preference in the line of succession by empowering them to displace cabinet successors at will) is probably unconstitutional and is certainly unwise policy.

The 1947 Act is probably unconstitutional because it appears that the Speaker of the House and the President pro tempore of the Senate are not "Officers" eligible to act as President within the meaning of the Succession Clause.⁶ This is because in referring to an "Officer," the Succession Clause, taken in its context in Section 1 of Article II, probably refers to an "Officer of the United States," a term of art under the Constitution, rather than any officer, which would include legislative and state officers referred to in the Constitution (e.g., the reference to state militia officers found in Article I, Section 8). In the very next section of Article II, the President is empowered to "require the Opinion, in writing, of the principal Officer in each of the executive Departments" and to appoint, by and with the advice and consent of the Senate, "Officers of the United States." These are the "Officers" to whom the Succession Clause probably refers. This contextual reading is confirmed by Madison's notes from the Constitutional Convention, which reveal that the Convention's Committee of Style, which had no authority to make substantive changes, substituted "Officer" in the Succession Clause in place of "Officer of the United States," probably because the Committee considered the full phrase redundant.

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

words, members of Congress by constitutional definition cannot be "Officers of the United States." The Constitution further distinguishes between "Officers" and members of Congress in specifying qualifications for presidential electors: "no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector" (Article II, Section 1, clause 2). Similarly, in requiring oaths to support the Constitution, Article VI distinguishes between legislators and officers: "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

The understanding that "Officers of the United States" are distinct from members of Congress, including congressional officers, is supported by the Constitution's requirement that the President alone, subject to the advice and consent of the Senate, appoint (Article II, Section 2, clause 2) and commission (Article II, Section 3) "Officers of the United States" and that "all civil Officers of the United States" be subject to impeachment (Article II, Section 4). The President neither appoints nor commissions the Speaker and the President pro tempore, and neither the Speaker nor the President pro tempore is subject to impeachment.

There are some important practical consequences that follow from the principle that members of Congress are not "Officers of the United States." Under Article I, Section 3, Clause 7, an "Officer" who has been impeached by the House and removed from office by the Senate is disqualified "to hold and enjoy any Office of honor, Trust, or Profit under the United States." Such a person, however, is not disqualified from serving in Congress, because a member of Congress is not an "Officer" under the Constitution, and persons who have been impeached by the House and removed from federal office by the Senate have thereafter been elected to Congress.

The contextual argument that members of Congress are not "Officers" within the meaning of the Succession Clause is supported by an appreciation of the Constitution's structure. Under the structure of the Constitution, it is almost inconceivable that Congress may place its own officers in the line of presidential succession. It strains credulity to think that the Framers, who were especially concerned about the inherent legislative tendency to aggrandize power at the expense of the Executive Branch, would have permitted Congress to place its own officers in the line of succession, when they went out of their way to deny Congress any appointment power as to Executive and Judicial officials, not only as to Officers, but also as to lowly "inferior Officers" who do not even require Senate confirmation. It is hardly likely that the same Constitution that denies Congress the power to appoint local postmasters and federal court clerks provides Congress with the power to appoint an "Officer" who might be called upon to exercise presidential duties.

Finally, the Succession Clause appears to contemplate that the "Officer" shall keep his position and simultaneously "act" as President, a situation that would destroy the separation of powers if a member of Congress were simultaneously to act as President. (A cabinet officer could, however, simultaneously exercise his or her cabinet and presidential duties without violence to the separation of powers. Indeed, the 1947 Act's requirement that a cabinet successor resign his or her cabinet office is yet another probably unconstitutional feature of that Act.) In any event, even if the Speaker and President pro tempore were otherwise eligible to act as President under the Succession Clause, it would destroy the separation of powers to allow them, as Section 19 does, to displace at will a cabinet officer serving as Acting President, because under that arrangement the Acting President would serve at the sufferance of the Speaker and the President pro tempore.

Quite apart from these constitutional objections, there are compelling policy reasons against placing the Speaker and the President pro tempore in the line of presidential succession. First, it allows for the possibility that a terrorist attack or some other catastrophe could undo the results of the preceding

presidential election by suddenly transferring the Presidency from one party to another. Osama bin Laden should not be permitted to replace the Clinton Administration with the Gingrich Administration, or the Bush Administration with the Byrd Administration. Presidential succession is traumatic enough when the successor is from the President's own party, as in the case of the assassination of John Kennedy in 1963 or the resignation of Richard Nixon in 1974. The national trauma would be even greater if control of the Executive Branch also changed as a result of assassination or foreign attack. Indeed, the very possibility that a successful attack could result in a change of control of the Presidency (and hence a change in foreign policy) might in certain circumstances even induce foreign enemies to contemplate such an attack, especially if the attack could be passed off as the work of terrorists or domestic madmen.

That the placement of congressional officers in the succession mechanism might be manipulated for partisan purposes was evident during the impeachment of Andrew Johnson. Congress sought to eliminate this possibility with the 1886 Act, but Harry Truman's 1947 Act revived it by reinstating the Speaker and President pro tempore in the line of succession. More recently, after Vice President Spiro Agnew's resignation in 1973, some Democratic members of Congress sought to convince their colleagues to block the confirmation of Gerald Ford to the Vice Presidency, to which Ford had been nominated by President Nixon in the first use of the 25th Amendment, in the expectation that Nixon would ultimately be forced from office, and that the Presidency would then fall to the Democratic Speaker, Carl Albert, if the Vice Presidency were kept vacant. Fortunately, cooler heads prevailed, and the Democratic-controlled Congress confirmed Ford, but it illustrates the mischief possible under Section 19 in the event of a vacancy in the Vice Presidency.

Second, the placement of congressional officers in the line of succession injects partisan tensions into the succession mechanism in other, less obvious ways. For example, on March 30, 1981, while President Reagan was undergoing surgery after suffering a gunshot wound in an assassination attempt, and Vice President George H.W. Bush was aboard Air Force Two returning to Washington from Texas, most of the cabinet convened in the White House Situation Room. From all accounts that have been written of that day, it is clear (and frightening) that Vice President Bush's ability to communicate meaningfully with the White House Situation Room while aboard Air Force Two was marginal at best. Thus, on his own authority in the military chain of command, and to the consternation of Secretary of State Alexander Haig, Secretary of Defense Caspar Weinberger (prudently) ordered a heightened alert status for U.S. strategic forces, because it was unclear whether the attempt on President Reagan's life had any connection with the fact that Soviet ballistic missile submarines off the U.S. East Coast—which, because of minimal warning times, would have been a key instrument in any Soviet first strike—were operating unusually close to U.S. shores that day.

But most remarkable of all about the events of March 30, 1981, is that it does not appear to have even occurred to anyone in the White House Situation Room to invite the Democratic Speaker of the House, Thomas "Tip" O'Neill, to join the cabinet in the event that it became necessary to issue presidential orders and Vice President Bush could not effectively communicate with the cabinet (the classic instance of "inability" within the meaning of the Succession Clause and Section 19). Apparently it was inconceivable to the assembled cabinet members that the leader of the Democratic opposition should be prepared for the possibility of temporarily assuming presidential duties, even if the Vice President could not be reached and the President was fighting for his life in emergency surgery. On the other hand, it is far from clear whether Speaker O'Neill would have been willing to resign from the Speakership and the House so that he might serve as Acting President during the three hours that Vice President Bush was in transit back to Washington.

Third, as Senator Hoar observed in 1886, 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, especially in a crisis like September 11 where an Acting President might be called upon to act decisively and even ruthlessly to protect national security.

The Speaker and President pro tempore, however, are not the only statutory successors designated by Section 19 who might lack presidential attributes. In selecting their cabinets, Presidents simply do not exercise the same care that they might exercise in selecting a Vice President, even though under Section 19 any cabinet officer might find himself thrust into the role of Acting President at a moment of supreme crisis comparable to December 7, 1941, and November 22, 1963, rolled into one, which is what September 11, 2001, easily could have been had the President been in Washington and the terrorists been just a bit luckier.

Whether or not they possess presidential attributes, the total number of statutory presidential successors is, at most, seventeen—the Speaker of the House, the President pro tempore of the Senate, and the fifteen members of the cabinet (counting the Secretary of Homeland Security). At any given moment, this number might be reduced by vacancies in these offices, the “inability” of the officers to act, or the ineligibility of some of these officers to assume presidential duties. An example of cabinet officers who are unable to act are those absent from Washington and unable effectively to communicate with Washington, as when several members of John Kennedy’s cabinet were on board a jet over the Pacific en route to Japan on November 22, 1963. It is not unusual for cabinets to contain naturalized citizens who are ineligible to discharge presidential duties (e.g., Henry Kissinger in the Nixon and Ford Administrations, Madeleine Albright in the Clinton Administration, and Elaine Chao and Mel Martinez in the current Administration), which may further reduce the pool of potential statutory successors.

Finally, all of the statutory successors work in Washington, D.C., which means, as Norman J. Ornstein has observed, that a nuclear or biological attack on the nation’s capital could eliminate the entire line of succession (and the rest of the federal government) in one fell swoop.⁷ In that extreme situation, the Presidency would fall (after some period of vacancy) by default into the hands of the surviving representative who convinced his or her surviving colleagues to select him or her as Speaker, or the surviving senator who convinced his or her surviving colleagues to select him or her as President pro tempore.

September 11 also illustrates another weak link in the presidential succession mechanism. Under Section 19, the first cabinet successor to assume presidential duties may not thereafter be displaced by another, prior-entitled cabinet successor who was temporarily unable to do so. Thus, on September 11, when Colin Powell was out of the country, if the President, Vice President, Speaker, and President pro tempore had been killed or were missing in attacks on the White House and the Capitol Building, Treasury Secretary O’Neill would have had to make an immediate decision about whether Colin Powell was unable to discharge presidential duties because of his absence from the country. Under Section 19, had O’Neill assumed presidential duties, Powell would not have been able to displace O’Neill upon his return to Washington, which might have resulted in claims that O’Neill had wrongfully usurped the Presidency and in litigation (the last thing the nation would want or need at such a moment) over whether Powell in fact had been unable to discharge presidential duties at the time of O’Neill’s assumption of the Acting Presidency. The very fact that O’Neill might be exposed to charges of usurpation might cause him to hesitate before acting, leaving the world (and other foreign enemies in particular) to wonder who was running the government while the Secretary of State was abroad and the President, Vice President, Speaker, and President pro tempore dead or missing in the burning rubble of the White House and Capitol Building.

A better solution would be to permit a lower-ranking cabinet officer such as Treasury Secretary O’Neill

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temporarily to assume presidential duties, without loss of his or her cabinet office, until a higher-ranking cabinet officer is able to do so. Thus, in the September 11 scenario discussed above, Secretary O'Neill could have announced to the nation and the world that he had temporarily assumed presidential duties pending Secretary of State Colin Powell's return to Washington. Thus, Secretary O'Neill could have temporarily acted as President to protect the nation's interests, without resigning his cabinet office, and without offense to higher-ranking Secretary of State Colin Powell, who would have assumed the Acting Presidency upon his return to the U.S.

September 11 aptly demonstrates Sir Winston Churchill's dictum that sometimes in war "the imagination is baffled by the facts." Sooner or later, and perhaps at the hour of maximum national peril, the nation's poorly-designed presidential succession mechanism may plunge the nation into unprecedented political turmoil or deliver the Presidency into the hands of some junior cabinet officer or member of Congress ill-equipped for such a role. The Bush Administration, apparently aware of the potential magnitude of the disaster that might result from simultaneous vacancies in the Presidency and Vice Presidency, took extraordinary steps in the immediate aftermath of September 11 to limit the occasions during which President Bush and Vice President Cheney might be found together, at the White House or elsewhere. Indeed, it appears that the Vice President was largely kept away from Washington at an undisclosed "secure location" for several months after September 11, at least when the President was in town.

Relocating the Vice President's office to a bunker in the Blue Ridge Mountains is not a permanent or satisfactory solution to the succession problem, especially when the Vice President has important duties of his own, including presiding over a closely-divided Senate where he might be called upon to cast the deciding vote. A better near-term solution is to amend Section 19 to reconstitute the line of succession with officers from those departments with the most important Executive Branch functions and with state governors selected by the President. The Speaker, President pro tempore, and the less important cabinet officers should be removed from the line of presidential succession.

The reconstituted line of succession after the Vice President should begin with the Secretary of State, and continue on with the Secretary of Defense, the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security (in that order). These officers should be permitted to exercise presidential duties without resigning their positions, and those officers higher on the list should be able to displace more junior successors only if they had been under a temporary disability at the time the more junior officer accepted presidential duties.

After these cabinet successors, Section 19 should designate as statutory successors those state governors whom the President chooses to "federalize" in their capacity as commanders-in-chief of their states' National Guard.⁸ Although the issue is not free from doubt, federalizing a governor in his or her capacity as commander-in-chief of a state's military forces would arguably have the effect of making such a governor an "Officer" of the United States eligible to act as President. (At least it would not be any more unconstitutional than the 1947 Act's placement of congressional officers in the line of succession.) Placing designated "federalized" governors in the line of succession would ensure continuity of the Presidency in the event that all of the cabinet successors were eliminated by an attack on Washington, D.C., with a weapon of mass destruction.

Another possibility is to amend Section 19 to allow the President to nominate, subject to Senate confirmation, a "First Assistant Vice President," "Second Assistant Vice President," and so forth, who would hold these offices and be placed in the line of succession after the principal cabinet officers (or perhaps ahead of them). Although appointment by the President and confirmation by the Senate does not by itself necessarily create the status of "Officer of the United States" for the official so appointed, see *Communications Satellite Corp.*, 42 Op. Atty. Gen. 165, 167 (1962), there is authority that an official

empowered by statute to act in the absence or inability of an "Officer of the United States" is necessarily also an "Officer of the United States." See Second Deputy Comptroller of the Currency-Appointment, 26 Op. Atty. Gen. 627, 629-30 (1908).

In the long run, the solution to the problem of the concentration of presidential successors in Washington is a constitutional amendment that allows the President to nominate, subject to Senate confirmation, statutory presidential successors (in addition to the cabinet) who are not "Officers" of the United States, but nevertheless are eminently qualified, to act as President in the extreme situation that the nation would face following the destruction of Washington, D.C., and the elimination of the President, the Vice President, and the statutory cabinet successors. For example, President 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.

Such a constitutional amendment, by eliminating the requirement that a statutory successor be an "Officer" of the United States, would also eliminate any doubts about placing state governors in the line of succession, and could provide for succession to the Presidency itself (as opposed to the Acting Presidency). Such a constitutional amendment is necessary to eliminate other uncertainties in the succession mechanism, such as whether the confirmation of a Vice President nominated under the 25th Amendment operates to displace a statutory Acting President who made the nomination.

In sum, I recommend that Congress take the following steps (in order of priority):

1. If the Speaker and President pro tempore are to remain in the line of succession, amend Section 19 to preclude them from displacing a cabinet officer serving as acting president if they previously declined to assume the Acting Presidency, or if they were chosen as Speaker or President pro tempore after the cabinet officer assumed the Acting Presidency.
2. Amend Section 19 to eliminate the requirement that statutory successors resign their posts before assuming the Acting Presidency.
3. Amend Section 19 to allow a senior cabinet officer under a temporary disability to assume the Acting Presidency from a more junior cabinet officer (the Colin Powell/Paul O'Neill situation on September 11).
4. Remove the Speaker and President pro tempore from the line of succession, along with the less important cabinet offices.
5. By statute, allow the President to appoint, with the advice and consent of the Senate, additional, non-cabinet statutory successors.
6. Submit a constitutional amendment to the states for ratification to cure the deficiencies in the presidential succession mechanism that cannot be corrected by statute, and to validate other provisions of the succession law that may be unconstitutional.

After the near-miss of September 11, there is no time to lose in ensuring that the presidential succession mechanism is stable, predictable, and seamless, even (and especially) during moments of supreme crisis such as a foreign attack upon the United States. I applaud the Rules Committee and the Judiciary Committee for taking up this very important issue.

I wish to thank my colleagues Michael S. Nadel and Richard B. Rogers for their comments on this testimony and its earlier iterations. This testimony builds upon a national security white paper that I wrote for the Federalist Society's "War on Terrorism" series in December 2001 and my testimony before the House Subcommittee on the Constitution on February 28, 2002.

2. THE FEDERALIST NO. 70 (Clinton Rossiter ed. 1961).

3. For a detailed treatment of Congress's succession legislation in 1792, 1886, and 1947, see R. SILVA, PRESIDENTIAL SUCCESSION 112-31 (1951).

4. The best scholarly treatments of the complexities of the 1947 Act (and its interaction, or lack thereof, with the 25th Amendment) are by William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: The Emperor Has No Clones*, 75 GEO. L.J. 1389 (1987), and Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: If at First You Don't Succeed, Try, Try Again*, 20 HASTINGS CONST. L.Q. 105 (1992).

5. It appears that this particular contingency has now been addressed through pre-delegated command arrangements, under which senior military commanders have the authority to shoot down hijacked airliners without first seeking presidential approval. Nevertheless, other threat contingencies are certain to arise where, as on September 11, there are no such specific predelegated command arrangements.

6. The argument to this effect by James Madison in 1792, Senator George Hoar in 1886, and Senator Carl Hatch in 1947 is further elaborated by SILVA, *supra* note 3, at 131-37, and by Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995). Professor John Manning, in response to the arguments advanced by the Amars (and Madison, Hoar, Hatch, and Silva before them), contends that the constitutional arguments against placement of congressional officers in the line of succession are not so strong as to overcome the presumption in favor of the constitutionality of acts of Congress. See John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995). Professor Calabresi concurs with the Amars' constitutional arguments, but concludes that the issue is a classic political question and hence non-justiciable by an Article III court. See Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

7. See Norman J. Ornstein, *Worst Case Scenarios Demand the House's Immediate Attention*, ROLL CALL, Nov. 8, 2001, found at <http://www.rollcall.com>.

8. Ornstein, *supra* note 7, suggests placing state governors in the line of succession.

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September 16, 2003

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STATEMENT OF SENATOR JOHN CORNYN
Chairman, Senate Subcommittee on the Constitution, Civil Rights and Property Rights

Committee on Rules and Administration and
Committee on the Judiciary
Joint Hearing on
Ensuring the Continuity of the United States Government: The Presidency

September 16, 2003

Thank you, Senator Lott, for your thorough introductory remarks, and for your leadership of this very important hearing. As you recounted, the Senate Rules Committee has jurisdiction over the Presidential succession statute. And the Senate Judiciary Committee has jurisdiction over constitutional issues, through the subcommittee I chair, the Senate Subcommittee on the Constitution, Civil Rights and Property Rights. So today's joint hearing of the two committees on the topic of Presidential succession is quite appropriate – and after 9/11, critically important.

I also want to thank Senator Hatch, chairman of the Judiciary Committee. Shortly after I spoke on the floor of the Senate to announce subcommittee hearings on continuity of government, Chairman Hatch invited me to hold these hearings in the full committee. Of course, I accepted that offer, and I want to thank him again today, for his leadership of the committee, and for giving these issues the serious attention and respect that they deserve.

Last Tuesday, I chaired the first in a series of hearings on continuity issues, to examine serious weaknesses in our ability to ensure continuity of the Congress. Fortunately, with respect to today's hearing, the Constitution gives us ample authority to ensure continuity of the Presidency – even as it may be inadequate with respect to Congress itself. Unfortunately, however, the current Presidential succession law, enacted in 1947, has long troubled the nation's top legal scholars across the political spectrum as both unconstitutional and unworkable.

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

* The President and Vice President are both killed. Under current law, next in line to act as President is the Speaker of the House. Suppose, however, that the Speaker is a member of the party opposite the now-deceased President, and that the Secretary of State, acting out of party loyalty, asserts a competing claim to the Presidency. The Secretary argues that members of Congress are legislators and, thus, are not "officer[s]" who are constitutionally eligible to act as President. Believe it or not, the Secretary has a strong case – in fact, he can cite for support the views of James Madison, the father of our Constitution, who argued this very point in 1792, as well as legal scholars on the left and right. Who is the President? Whose orders should be followed by our armed forces, by our intelligence agencies, and by our domestic law enforcement bureaus? If lawsuits are filed, will courts take the case? How long will they take to rule, how will they rule, and will their rulings be respected?

* Or imagine that, once again, the President and Vice President are killed, and the Speaker is a member of the opposite party. This time, however, the Speaker declines the opportunity to act as President – in a public-minded effort to prevent a change in party control of the White House as the result of a terrorist attack. And imagine that the President pro tempore of the Senate acts similarly. The Secretary of State thus becomes Acting President. In subsequent weeks, however, the Secretary takes a series of actions that upset the Speaker. The Speaker responds by asserting his right under the statute to take over as

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Acting President. The Secretary counters that he cannot constitutionally be removed from the White House by anyone other than a President or Vice President, because under the Constitution, he is entitled to act as President "until the disability [of the President or Vice President] be removed, or a President shall be elected." Confusion and litigation ensue. Who is the President?

* Or imagine that the President, Vice President, and Speaker are all killed, along with numerous members of Congress – for example, as the result of an attack during the State of the Union address. The remaining members of the House – a small fraction of the entire membership, representing just a narrow geographic region of the country and a narrow portion of the ideological spectrum – claim that they can constitute a quorum, and then attempt to elect a new Speaker. That new Speaker then argues that he is Acting President. The Senate President pro tempore and the Secretary of State each assert competing claims that they are President. Who is the President?

* Or finally, notice that the President, Vice President, Speaker, Senate President pro tempore, and the members of the Cabinet all live and work in the greater Washington, D.C. area. Now, imagine how easy it would be for a catastrophic terrorist attack on Washington to kill or incapacitate the entire line of succession to the Presidency, as well as the President himself. Who is the President?

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

We must fix the Presidential succession law – and fix it now – so that these nightmare scenarios will never come true, and will never again be able to haunt the American people. I look forward to the testimony of these exceptional witnesses, and to learn their suggestions for reforming the Presidential succession law. After all, we have had two years since 9/11 to do this. Two years is too long, and the time to plan for the unthinkable is now. Thank you, Senator Lott.

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**STATEMENT OF THE RANKING MEMBER
Christopher J. Dodd**

**Joint Hearing of
Committee on Rules and Administration and
Committee on the Judiciary
September 16, 2003**

Chairman Lott and chairman Cornyn: I commend you both for calling this joint hearing to address the issue of presidential succession.

The events of 9-11 were a not-so-subtle reminder of the potential scenarios that could call into question the procedures for establishing presidential succession. Now is the time to be considering those questions – before a national catastrophe occurs and we are forced to either act in haste, or in response to a constitutional crisis.

Article II, section 1 of the Constitution, and subsequent amendments, establishes the foundation for presidential succession and makes clear the framers preference that the Vice President should succeed to a vacancy in the presidency. In their wisdom, the framers left to Congress the question of how to settle a double vacancy, as occurs if the presidency and vice presidency are both left vacant.

The Congress did not hesitate to fill this void and passed the first presidential succession act in 1792. It is noteworthy that in the 211-year history since that act was adopted, Congress has only twice substantially revised it, in both cases in response to circumstances related to the death of a sitting President.

The history of the succession act, and its progeny, is a reflection of the 200-plus year debate on the subject and the dilemma Congress faces when it considers change only in response to crisis. This history is also revealing in its consideration of the same issues that our witnesses will raise today. If we are to avoid the mistakes of the past, we need only look to our history.

The 1792 Act provided that in the case of a double vacancy, the order of succession would fall to the President pro tempore of the Senate and then the Speaker of the House. But the term of either of these legislative "officers" was to be temporary only, since the Act provided for a special election to fill a presidential vacancy, unless the vacancy occurred in the last full year of the term.

The placement of legislative "officers" in the line of succession was not universally supported, and its critics included such constitutional authorities as James Madison. Representative Jonathan Sturges of Connecticut observed at the time that if the Speaker were in the line of succession, there would be "caballing" and "electioneering" in the choice of Speaker. However, the Act remained substantially unchanged for nearly 100 years.

The Succession Act of 1886 followed the assassination of President James Garfield in 1881 and his incapacitation for a period of 79 days, and the untimely death of Vice President Thomas Andrew Hendricks in 1885, less than 9 months after his inauguration.

Ironically, in both circumstances, both the office of the President pro tempore, then third in line to the presidency, and the office of the Speaker, then fourth in line, were vacant at the time. Similarly, in both cases there was a potential that at least the position of President pro tempore of the Senate would be filled by a member of the opposing party, thereby potentially leading to a switch in party should a

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double vacancy arise.

To ensure the line of succession and reduce the risk that such succession would result in a change in party in the White House, Congress passed the Succession Act of 1886 which eliminated the President pro tempore and the Speaker from the line of succession and provided for succession through cabinet officers. The 1886 act also eliminated the requirement for a special election. That Act governed succession for more than 60 years.

It was yet another death of a sitting president, that of Franklin D. Roosevelt on April 12, 1945, less than 3 months into his fourth term, and the ascendancy to the presidency of Harry Truman, that precipitated the latest revisions in presidential succession – the Succession Act of 1947.

President Truman found himself ill-prepared for the vacancy he filled, noting in his memoirs that "under the present system, a vice-president cannot equip himself to become president merely by virtue of being second in rank. The voters.....should select him as a spare chief executive."

With the ensuing vacancy in the vice presidency, Truman was called upon to nominate his successor – a task he did not relish. In a special message to Congress on June 19, 1945, President Truman declared that he "did not believe that in a democracy this power should rest with the chief executive."

He recommended that Congress restore an elective officer to the line of succession – in this case, the Speaker, who Truman argued had a more recent mandate, having been elected every two years as opposed to six in the case of the President pro tempore of the Senate. Truman also recommended that the requirement for a special election be restored.

In response, Congress enacted the Succession Act of 1947 which provides for presidential succession in the case of a double vacancy, but does not require that a special election be held.

Many of the issues that faced the second Congress in 1792, and the forty-ninth Congress in 1886, and the eightieth Congress in 1947, are before us again today.

But today, while it is both fortunate and opportune that Congress is not faced with an immediate crisis, we are faced with one of even greater magnitude than imagined by previous Congresses – the potential elimination of the entire line of succession by one terrorist act. It is prudent that we act now to remove any constitutional questions or deficiencies in the presidential succession procedures.

The principles that must guide our deliberations are the need to establish certainty, clarity, and the constitutionality of succession. The legitimacy of our democracy hangs in the balance of what we do and nowhere is the need for a non-partisan, bipartisan approach more imperative than here.

I look forward to the suggestions of our distinguished panelists and the opportunity to craft such a bipartisan response with my colleagues.

**STATEMENT OF
Senator Russell D. Feingold**

**Joint Hearing of
Committee on Rules and Administration and
Committee on the Judiciary
September 16, 2003**

Chairman Lott and Chairman Cornyn, thank you for holding this hearing.

The topic of presidential succession has occupied the Congress periodically since our nation's founding. Usually, a revival in interest in the topic occurs because of some event that leads us to dust off the statute and the Constitution and contemplate "what if?"

That happened when Andrew Johnson succeeded to the Presidency upon the assassination of Abraham Lincoln, and then was impeached by the House of Representatives. It happened again, when Harry Truman became President after the death of Franklin Delano Roosevelt. He viewed the statutory solution reached in the 1886 as unsatisfactory and convinced Congress to pass a new succession statute. The assassination of President Kennedy led to the adoption of the 25th Amendment as the country contemplated how a Vice President who becomes President should be replaced, and what should happen if the President becomes disabled.

Now September 11th has revived interest in presidential succession. The possibility of a terrorist attack that takes the life of both the President and the Vice President is almost too terrible to contemplate, but we have a duty to at least examine the question of whether the Constitution and the United States Code are adequate to preserve the union and provide the country with the best possible leadership in such a crisis.

The issues raised by this topic are certainly interesting for anyone interested in our system of government and our Constitution, and I look forward to hearing from our witnesses about them. Should leaders of the legislative branch be in the line of succession? If so, where? And which leaders? Should the succession be different in the case of death as opposed to disability of the President, Vice-President, and others in the line of succession, and if so, how should we provide for a person higher up the chain to move into the office when able?

These are all questions worth exploring. I do not believe, however, that we should obsess about them. Our most dedicated efforts should be devoted to preventing the next terrorist attack, and making sure our first responders are prepared to deal with it if happens. That is not to say that this hearing should not have been held, but only to caution that the time and resources of this Congress and this government are finite, and we must not be distracted from the task at hand by too much attention to what will mostly likely be only theoretical questions.

Thank you again Chairman Lott, and Chairman Cornyn, for the opportunity to speak, and I look forward to the testimony of our witnesses.

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**Testimony of
DR. JOHN C. FORTIER
Before The
Committee on Rules and Administration and
Committee on the Judiciary United States Senate**

September 16, 2003

I would like to thank the Senate Rules and Judiciary Committees for holding a hearing on the important subject of presidential succession. Just over two years have passed since September 11th. Our country is still dealing with the loss and sadness of that day. In the wake of that tragedy, it is important but necessary to consider the possibility that terrorists would target government leaders and institutions, hoping to sow the seeds of discord and confusion, just at a time we need strong leadership. It was almost so on September 11th, as the fourth plane, United Flight 93, was headed toward Washington, D.C., with its likely target the Capitol or the White House. It is only because of the bravery of the passengers of that flight that we did not suffer additional tragedy.

I am the executive director of the Continuity of Government Commission. The Commission's aim is to make recommendations to ensure the continuity of our three branches of government after a terrorist attack. It is a joint project between the American Enterprise Institute and the Brookings Institution. Lloyd Cutler, former White House Counsel to Presidents Carter and Clinton and former Senator Alan Simpson chair the commission. It includes former Speakers of the House Thomas Foley and Newt Gingrich, and other public officials who have served at the highest levels of government. The commission held public hearings and issued a report on the continuity of Congress issue, which I recommend to you. I would also like to thank the Judiciary Committee and Senator Cornyn who chaired a hearing on that subject last week. Our commission is in the process of holding hearings on presidential succession. As the commission has not yet issued recommendations on the subject, I will speak today on my own behalf. There are, however, intersections between the problems of the continuity of Congress and that of the executive branch because congressional leaders are part of the presidential line of succession. In those cases, I will bring in the official recommendations of the commission.

Today's hearing is an important step toward reforming our presidential succession system, but let me commend the Senate for having started this task earlier this year. In January, Senator DeWine introduced S. 148 placing the Secretary of Homeland Security in the presidential line of succession. Senator Dodd was the bill's lead co-sponsor. The Rules Committee considered the bill favorably, and the bill has passed the Senate.

I strongly support the substance of the bill, but even more I applaud the serious thinking that is behind it. Typically, when a new department is created, Congress has placed the secretary of that department at the bottom of the line of succession. No thought goes into the relative importance of the office. In this case, the office is different. The department is substantial and concerned with matters of national security. It would make no sense to blindly follow custom and place the secretary of homeland security last in the presidential line of succession. The bill sensibly places the secretary just below the big four cabinet officers: secretary of state, secretary of the Treasury, secretary of defense and attorney general.

It is this willingness to seriously think through the order of the line of succession that could serve as a model for considering other more substantial changes that I will suggest in my testimony. The main message I wish to convey today is: now is the time to rethink our system of presidential succession, not after a succession crisis. If you craft succession provisions that provide for clear, orderly, legitimate succession even after a terrorist attack, you will have won one battle in the war on terrorism. Let us hope that we never need these provisions, but also, let us show our enemies that our institutions of

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government will not be paralyzed.

In this statement, I will sketch out several large issues that Congress should address to improve the current presidential succession system.

I. Everyone in the line of succession lives and works in the Washington, D.C. area.

All of the officials in the line of succession live and work in near proximity to each other. We do take some precautions to ensure that everyone is not in the same place at the same time, e.g. at the State of the Union, one cabinet member is not present. But if, God forbid, terrorists detonated a nuclear device in Washington, everyone in the line of succession might be wiped out. We might then see a parade of generals, undersecretaries, governors and others claiming to be in charge.

How could we address this problem? The Constitution provides that Congress may specify by legislation "what Officer shall then act as President" if both the presidency and vice presidency are vacant. The answer is for Congress to create several additional offices outside of Washington, D.C. to place in the line of succession as a backstop against a catastrophic disaster. The president would nominate individuals to hold these offices, and the Senate would confirm them. Congress should not constrain the president's choice, but it might indicate that the kind of people a president should consider are sitting and former governors and former presidents¹, former vice presidents, former cabinet secretaries and former members of Congress. Sitting governors could hold these offices in addition to the office of governor, unless they were prohibited from doing so by state law. All of the other former officials would be private citizens who could be nominated to fill the offices. The creation of these offices would offer some assurance that we will always have someone in the line of succession survive an attack.

What duties would these officers perform? Being an officer of the United States implies that one has duties to fulfill. Congress should not simply create offices without function. There are a number of ways that Congress could structure these duties. My proposal is that these four or five offices would be regional security advisers, possibly with some responsibility for regional coordination of homeland security measures. The primary duties of these officers would be advisory. They would receive remote security briefings on a regular basis and convene by secure conference call with the president and other national security advisers to give input to the president. The president would hopefully choose individuals from different regions of the country. If officers in the line of succession had little involvement with the security policies of the administration, they would be woefully unprepared to take over after a terrorist attack, even if they had prior experience in government. The advisory role I propose would benefit the president and better prepare the officers to take over the presidency if necessary. In some ways the role I envision for these advisors parallels the role of the vice president as it has developed over the past thirty years. Starting with Vice President Mondale, vice presidents have become close confidants of presidents, especially on national security measures. We have come a long way from earlier this century when Harry Truman took office after the death of FDR and did not know that we had been working on an atomic bomb. As national security advisers, we would not expect the regional officers to have the same level of access as the vice president has to the president, but a significant role will better prepare the individuals and the country if a catastrophic attack killed many in the line of succession. These officers might also be given a role in coordinating homeland security regions in their regions, especially if sitting governors were chosen.

Where in the line of succession would these four or five regional officers be placed? Given the substantial functions of the big four cabinet secretaries and the secretary of homeland security, these five positions should precede the regional officers. But I believe that these regional officers should precede or possibly replace the cabinet officers lower in the line of succession. In most cases, a president does

not select a secretary of education or agriculture for his or her ability to lead the country in a time of crisis. In these instances, the main concern is the ability to function in a particular policy area. The regional advisers, on the other hand, would be picked almost exclusively for their ability to assume the presidency if necessary. And hopefully, the regional council of advisers would be made up of people who had already served in public life at a high level or are sitting governors. One other, added benefit would be that each time we elect a new president, we would have a series of Senate confirmation hearings that would emphasize to the American people that there is a conscious effort to put high quality people in the line of succession. It would send a signal that we are prepared to rebound from the worst-case scenario.

II. The Role of Congress in the Line of Succession

One of the thorniest set of questions that should be addressed relates to the role of Congress in the line of presidential succession. Under which circumstances, if at all, should congressional leaders be placed in the line of succession?

The dominant position among constitutional scholars today is that it is unconstitutional for congressional leaders to be in the line of succession.² The most explicit reason is found in the language of Article II. Congress shall specify "what Officer" shall appear in the line of succession. It is fairly clear that the framers of the Constitution meant that "Officer" refers to an officer of the United States, who must be a member of the executive branch. Congressional members and leaders are not officers of the United States. In addition, a larger structural argument is that bringing congressional leaders into the line of succession violates separation of powers' principles. If we were a parliamentary system, a president (or prime minister) chosen by a majority of the legislature would be the norm, but the framers were clear in rejecting that model. James Madison made these arguments during the debate over the first presidential succession act. Akhil Amar is the most forceful proponent of this argument today.

As a pure matter of the intent of the framers, I share the view that Congress was not intended to be part of the line of succession. Historically, Congress has gone back and forth on this question, with the first succession act (1792-1886) including only congressional leaders, the second act (1886-1947) taking congressional leaders out and including only the cabinet, and our current act (1947-present), which includes congressional leaders followed by the cabinet. Given this history, I encourage you to approach the question in a practical way. When does it make sense to have Congress in the line? Presidential succession covers a number of scenarios, the death, incapacity, resignation, removal and failure to qualify of the president. In considering each of these scenarios, you may come to the conclusion, as I have, that Congress's role in the line of succession might be significantly reduced in many of these areas.

Presidential incapacitation. If the president is incapacitated and the vice presidency is vacant, then the Presidential Succession Act calls on the Speaker of the House to stand in as acting president. To do so, the Speaker must resign from the speakership and from his or her seat in Congress. It is hard to imagine a Speaker resigning his or her post in order to take over for a president who goes under anesthesia for minor surgery and might resume the duties of the presidency within hours. One might also imagine a scenario whereby a president fades in and out of capacity. A president after a heart attack or stroke recovers sufficiently to resume the office and displaces the Speaker who had assumed the role of acting president. Then the president suffers a setback, at which time a new Speaker of the House, recently elected upon the departure of the old Speaker, would then be called upon to act as president.

In addition, incapacitation magnifies the issue of the presidency switching parties. Whether or not you believe that it is appropriate for the presidency to switch parties upon the death of the president and vice president if the Speaker is of the opposite party, it makes little sense in the case of incapacitation. What

if an attack killed the vice president and wounded the president? Let's posit that the president's wounds are severe enough to keep him from performing his duties for two or three weeks. Should a Speaker of the House of the opposite party take over for that period of time? Would that person keep the staff or the cabinet of the disabled president? Would he have access to sensitive policy and national security information for this brief period? In all but the most extreme case of incapacitation, where a president is likely never to recover, it makes no sense for an interloper from the other branch of government, and perhaps from the opposing party, to take over temporarily. The logical choice for succession for incapacitation is the cabinet. Congress could rewrite the succession act to take Congress out of the line in these instances.

Impeachment and Removal: The line of succession also applies to the case when the vice presidency is vacant and the president is removed from office. We have had two instances in our history that approached this scenario in the presidencies of Andrew Johnson and Richard Nixon. After the assassination of Abraham Lincoln, Andrew Johnson assumed the presidency, leaving the vice presidency vacant. Before the ratification of the Twenty-fifth Amendment in 1967, there was no mechanism for filling the vice presidency. Johnson was impeached and came within one vote of being removed from office. Johnson had run with Lincoln as a Republican, but was viewed as a member of the opposition party by the radical Republicans in Congress. Had Congress removed Johnson, the Senate president pro tem, who voted for Johnson's removal, would have succeeded him. In Nixon's case, Vice President Agnew had resigned, and some in Congress foresaw the demise of Nixon himself. A group of representatives encouraged Carl Albert, then Speaker of the House, to hold up the confirmation of Gerald Ford for Vice President, so that Congress could then remove Nixon and elevate the democrat Albert to the presidency. While Albert does not seem to have seriously entertained such a strategy, there were many who did. The seriousness of the effort is evidenced by the fact that Ted Sorensen, former aide to Kennedy and Johnson, was tasked to write memos planning for the transition into office of an Albert administration.

Having congressional leaders in the line of succession in the case of the removal of the president might in extreme cases encourage Congress to remove a president of the other party just so the presidency would switch parties. If a president is truly deserving of removal from office, Congress would be less self-interested if the cabinet were next in the line of succession. Congress would then limit itself to determining when the president is to be removed without the prospect of partisan gain from the removal. Again, cabinet succession is more appropriate in this case. If others in the cabinet share in the corruption of the president, Congress could remove as many cabinet members as it sees fit.

Failure to Qualify. The Twentieth Amendment gives Congress the power to specify who shall serve as president in the case where no one qualifies to be president when a new presidential term begins on January 20th. The most likely scenario for a failure to qualify is an election controversy. The 1876 election, for example, was not fully resolved until just a few days before the presidential term was about to begin (then in March). One might also contemplate a situation where no one receives a majority of the electoral college, throwing the election to Congress, and Congress deadlocking on a choice. Finally, one should consider the case of a terrorist attack that kills the president and vice-president-elect shortly before taking office. In all of these cases, cabinet succession is not possible. A new cabinet cannot be officially nominated and confirmed until after a new president takes office. The terms of the exiting president and vice president end at noon on January 20th. If congressional leaders were not in the line of succession, this would leave only the cabinet of the previous administration in the line of succession. It would lead to a perverse result that an election controversy or terrorist attack would give the presidency to the secretary of state of the prior administration. The old cabinet would reflect an earlier political reality. The secretary of state of the previous administration might have been nominated and confirmed eight years before. The prior administration might have been discredited, and the president may have decided not to run for office, and the election controversy or pre-inauguration attack would then return a

member of that administration to office. Or a president might have been soundly defeated for office by a challenger, but if an attack killed the president-elect and vice president-elect, the secretary of state of the defeated president might become president.

In the case of no president able to qualify for office on January 20th, it makes sense to have Congress in the line of succession. Much of Congress would have been elected at the same election as the deceased president-elect, and its leaders appointed by a majority of the House and Senate respectively. While not a perfect solution to the problems of a failure to qualify or a pre-inauguration terrorist attack, including congressional leaders in the line of succession for this purpose is superior to having the previous cabinet take over.

As a constitutional matter, it is also defensible to include Congress in the line of succession for this purpose. The Twentieth Amendment that authorizes Congress to specify who will be president if no one qualifies does not use the term "Officer" found in Article II. It reads: "...Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified..." This language does not in any way limit the person that Congress may specify to act as president.

Death or Resignation. If the president and vice president have died or resigned from office, current law calls for the Speaker of the House to be the next in the line of succession followed by the president pro tem of the Senate. Should congressional leaders remain in the line of succession for death and resignation or would we be better off with a cabinet succession arrangement? There are good policy reasons to support either case. In the end, I have come to the conclusion that it would be better to take Congress out of the line in the case of death or resignation, but this is a close call, and you should weigh carefully the pluses and minuses of both arrangements.

On the positive side for having members of Congress in the line of succession—they are elected. When President Truman assumed the presidency, the succession act included only cabinet members, not members of Congress. Truman proposed putting congressional leaders back in the line of succession. His main argument was that a person who succeeds to the presidency should be elected. The Speaker of the House is elected by the people of his or her district and then again elected to lead the House by a majority of members. The Speaker has a claim to having been democratically elected by a majority of the country, albeit indirectly. This of course is less true of the president pro tem of the Senate. The pro tem is elected by the people of his or her state and again chosen by a majority of the Senate, but the pro tem is not selected to lead the majority. Rather, he or she is selected on the basis of seniority in the majority party, an honor for long service rather than a vote of confidence to lead a majority.

On the opposite side of the argument, having congressional leaders in the line of succession opens up the possibility of the presidency switching parties in the middle of a term. Imagine a terrorist attack in 1997 that killed President Bill Clinton and Vice President Gore and elevated Speaker Gingrich to the presidency. Or conversely, had a terrorist attack in 1982 killed President Reagan and Vice President Bush, Speaker Tip O'Neill would have become president. Cabinet succession would preserve greater continuity in the policy of the administration. In addition, cabinet members are major figures, who have been given the stamp of approval of the Senate, a democratically elected body.

The Bumping or Supplantation Procedure

One provision of presidential succession act that you should reconsider is the 'bumping procedure'. If the presidency passes to a cabinet member, then a newly elected Speaker of the House or a new president pro tem of the Senate can replace a cabinet member who has been serving as president. This provision was put into the 1947 succession act because of Truman's belief that elected officials should

take priority over non-elected officials in the line of succession. Imagine a catastrophic attack kills the president, vice-president and congressional leadership. The secretary of state assumes the duties of the presidency. But whenever Congress elects a new Speaker or president pro tem, that new leader may 'bump' the secretary of state. The result would be three presidents within a short span of time. Even more problematic, the act does not specify that the Speaker or president pro tem needs to 'bump' a cabinet member immediately. You might then have the case of a cabinet member acting as president, but the secretary would live under the threat of being bumped from the office by congressional leaders at any time, a scenario that would completely undermine our system of separation of powers.

Finally, there is the extreme case that intersects with the problem of the continuity of Congress. Imagine a scenario where the president, vice president and most of the Congress were killed (say at a State of the Union address). The secretary of state would act as president, but only until a new Speaker of the House or new president pro tempore of the Senate were elected. But in such an extreme scenario Congress would have trouble operating in a normal fashion. If most of Congress had been wiped out, the House of Representatives in particular would have had difficulty reconstituting itself. Because the House of Representatives fills its vacancies only by special election, it could be many months until the vacancies were filled. In recent years, it has taken over four months on average to fill House vacancies. After a catastrophic attack, the House would face one of two scenarios. First, it might not be able to meet at all because the constitution defines a quorum as a majority of the body. This would mean that no new Speaker could be elected for months. The secretary of state would remain president until either a new Speaker or new pro tem took the office (A new pro tem might be elected more quickly as gubernatorial appointments would replenish the Senate quickly). The alternative is more troubling. The House has defined its quorum more leniently than the Constitution's majority of the body. The current House precedents hold that a quorum is a majority of those "chosen, sworn and living." In the extreme scenario when only five members of Congress survived an attack, three of them might convene and elect a new Speaker who could then bump the secretary of state and become president for the remainder of the term. While this is an unlikely scenario, would we feel secure in a president who had been elected by 20 members of the House, or 50, or 100 or even 200?

To avoid these scenarios, I urge you to consider removing the 'bumping procedure' and fixing the continuity of Congress problem by ensuring that the House and Senate are returned to near full membership as quickly as possible. The Continuity of Government Commission has recommended that a constitutional amendment providing for emergency interim representatives to be appointed to fill House vacancies and stand in for incapacitated members if there were an attack killing significant fraction of Congress.³

The President Pro Tempore. If Congress leaves congressional leaders in the line of succession, it must seriously consider whether to include the Senate president pro tempore in the line of succession. There are many individual presidents pro tempore of the Senate who could have ably acted as president had they been called to do so. The problem lies not in individuals, but the criterion by which the president pro tem is selected. For many years, the custom of the Senate has been to select the longest serving senator of the majority party as the president pro tem. While experience in the Senate would be a plus, in general the criteria for selection are not the best predictors of fitness to hold the presidency.

First, the pro tem does not represent a majority of senators in the same way as the majority leader. A pro tem may be of the same party as the majority, but he or she might represent a small wing of the party. Second, a president pro tem will likely be one of the oldest senators. Some will be in excellent health, but others may not be.

Congress could consider including the majority leader in the line of succession instead of the pro tem. But Congress might also improve the status quo with a better selection of and larger role for the

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president pro tem. Congress could simply indicate that it will not necessarily follow the custom of electing the longest serving senator of the majority party as president pro tem. It should indicate that the holder of the office will be selected based on his or her fitness to hold the office of president in an emergency. The same person who is the longest serving senator of the majority party might very well also be an excellent choice to serve in the line of succession. But if the Senate were merely to indicate that it had changed its criteria even though the holder of the office might not change, it would send a signal to the American people that we care about presidential succession.

Second, the president pro tem of the Senate, if he or she is to remain in the line of succession, should receive regular executive branch security and other briefings. Just as in the case of regional homeland security officers mentioned earlier in this testimony, the pro tem and the president would gain from such briefings. It would also better prepare the pro tem for the presidency if the need should arise.

III. Incapacitation

The problem of incapacitation of the president plagued our nation for many years before the ratification of the Twenty-fifth amendment in 1967. The most famous example of incapacitation in the presidency was the end of the Wilson presidency, where the president was unable to function, and presidential decisions were apparently made by his wife and close advisers. The Twenty-fifth amendment provides a significant amount of protection against this scenario. It has detailed procedures for the transfer of power from a president to a vice president and back again. It provides for both voluntary and involuntary transfers of power. But it has one weakness. It does not at all address the problem of an incapacitated presidency when the vice presidency is vacant. In this case, presidential incapacitation is not covered by the Constitution, but by the succession act of 1947, which is vague about the details. The original version of the Twenty-fifth amendment that came before the Senate Judiciary committee in 1963 provided for members of the cabinet to take over for the president if the vice presidency was vacant, and it included the same detailed procedures that apply to the vice president. However, these provisions were taken out for politic reasons. If we were redrafting the Twenty-fifth amendment, I would recommend to you the original version that provides for cabinet members taking over for incapacitation. But given the current circumstances, I recommend that you try to provide more guidance in the presidential succession act for presidential incapacitation when the vice presidency is vacant.

IV. The Immediate Need for a President.

After an attack, there may be a need for a new president to act immediately. One can of course think of the most pressing case if a president needs to consider launching a nuclear attack. But short of this ultimate scenario, a president may have to send troops into action, enter into delicate negotiations with allies and adversaries, or increase intelligence surveillance within hours of an attack.

Unfortunately, in the aftermath of an attack, it is unlikely that there will be immediate clarity as to who is alive, who is incapacitated, and where all of the members of the line of succession are. Our presidential succession act does not adequately account for the confusion that would undoubtedly follow an attack.

Take for example the case of an attack that seems to have killed the president, vice president, the Speaker, pro tem and the secretary of state. Let us say that circumstances require immediate decisions that only the president could legitimately make. In our scenario, the secretary of the Treasury assumes the duties of the president, orders the bombing of enemy targets, rounds up thousands of foreign nationals, and threatens the launch of nuclear missiles. Thirty-six hours after the attack, the secretary of state is located. He had been trapped in a bunker, and his communications systems had failed. By all

rights the secretary of state should have been sworn in as president, as he is ahead of the secretary of the Treasury in the line of succession. But now the secretary of the Treasury has acted in a significant way as president of the United States. Should the secretary of the Treasury stand aside for the secretary of state or not? The law itself is vague about this subject.

First, there is a significant amount of complexity of the law. If the president or vice president is incapacitated and then later recovers, they may bump out a congressional leader or cabinet member who is acting as president. If the Speaker or pro tem is incapacitated and recovers, he or she might bump a cabinet member who is acting as president. However, a cabinet member cannot bump another cabinet member higher in the line of succession. So if the attorney general were acting as president and the secretary of defense (who is higher in the line of succession) recovers from an injury that had incapacitated him, the attorney general would remain president.

But in our scenario, the secretary of state was not incapacitated, just incommunicado. Thus the law gives no guidance on how to proceed. Because in reality, we might need to have someone designated as president within minutes of an attack, there is the real possibility that the legitimate acting president will be passed over for reasons of expediency. But the later appearance of a cabinet member who should have been acting president would create confusion at the time we need clarity. It might also precipitate a struggle for the office that would seriously undermine our political system.

There is no easy answer to this problem, except that the law should recognize that the aftermath of an attack will not be orderly and it should provide for different contingencies. In our scenario, Congress could structure the law so that the secretary of the Treasury continues to act as president with the rationale that important decisions would likely be made and that the presidency should not change hands frequently. Or it could empower the secretary of state to take over. Either course is reasonable, but Congress should be clear about how we ensure that we have a president in the very short term (minutes or hours after an attack) and provide guidance as to who should be president for the longer term after the fog of a catastrophic attack clears.

V. A Special Election.

What if a significant attack occurred early in a term and left a successor of questionable ability in office? Congress should consider holding a special election to fill the remainder of the term of the presidency in certain cases.

Congress has the power to pass legislation to require a special election for the presidency to fill the remainder of an unexpired term. Just as special elections are held for vacant House and Senate seats, a special election for the presidency is possible. It was, in fact, included in the first presidential succession act. Under that law, if the presidency and vice presidency became vacant, the president pro tem of the Senate would have taken over the presidency or the Speaker of the House would have if there were no president pro tem. Under either of those circumstances, if the vacancies did not occur late in a presidential term, the congressional leader would act as president only until a special election could be held. James Madison had been an advocate of such a special election during the constitutional convention.

I propose that if both the presidency and vice presidency become vacant in the first two years of a term, then a successor shall act as president, but a special election for president shall be called six to twelve months after the vacancies. This special election would provide two benefits. First, it would allow the people to elect a president they trust to handle significant security matters. If the line of succession puts the presidency in the hands of someone the people do not support, then a special election would allow

the people to elect another. Second, a special election might give needed legitimacy to a successor. If the next president is a relatively obscure cabinet official or a newly elected Speaker of the House or president pro tem, then a special election would put a stamp of legitimacy on the acting president.

Our current presidential system of electing presidents is lengthy, and it would not make sense to have a severely truncated election. But if the vacancy occurred within the first two years of a term, an election could be set to fill the remainder of the term with enough time for candidates to run in primaries and a general election, possibly as soon as six months after a vacancy, but more likely closer to a year.

VI. Fix the Inauguration Scenario.

The inauguration of a new president is the most vulnerable time for the government, when the mechanisms for providing an orderly transfer of power to a presidential successor threaten to break down. Not only do most of the figures in the line of succession gather together for a public ceremony, but also there are often gaps between when the line of successors of the old administration leaves office and the new one is put in place.

At noon on January 20th following an presidential election year, the term of the outgoing president ends and the new president's term begins. The president-elect, vice president-elect, the Speaker of the House and the president pro tem of the Senate all typically attend the swearing-in ceremony, as do most Supreme Court justices and members of Congress. With all of these figures present, a catastrophic attack at the inauguration would kill the top four in the line of succession. Who would succeed to the presidency? The cabinet. But which cabinet? As the president-elect would not have had time to get his cabinet secretaries confirmed, the cabinet of the previous administration would be next in line. Terms of cabinet members are not constitutionally limited. Unlike the outgoing president and vice president, the terms of the cabinet members from the prior administration would continue until they submit resignation letters. So a catastrophic attack at an inauguration would be followed by a mad scramble to determine which cabinet secretaries of the previous administration were still alive and had not submitted resignation letters. If the secretary of state of the previous administration were alive and had not yet resigned, he or she would be next in line to be president.

There is, however, one additional wrinkle in the succession procedure. Acting secretaries are in the line of succession as long as they were confirmed by the Senate for some position. By custom, an outgoing secretary of a department resigns by noon of January 20th, even though they are not constitutionally required to do so. The department then is run by an acting secretary, who might have been the number two or three person at the department. Unless that person is a career official, he or she would have required Senate confirmation for their lower level posts. So in the case of an attack on the inauguration, it is likely that the number two or three person at the state department of the previous administration would be next in line for president!⁴

The aftermath of the inauguration scenario would also be confusing. If a somewhat obscure subcabinet official assumed the presidency, he or she would remain in that post until Congress could elect a new Speaker of the House or president pro tempore. As noted earlier, Congress has its own problems reconstituting itself, so it is possible that this presidency would last for some time. Or alternatively, it is possible that this president would be displaced by a Speaker of the House elected by a few remaining members of Congress.

An attack at an inauguration could lead to a parade of horrible scenarios that would demoralize rather than reassure the nation. Congress should act to fix this problem. I propose three changes in inaugural custom that would greatly improve the succession system and one other change in law that would be

beneficial as well.

The central difficulty with presidential succession after an inauguration is that the new president would not have a cabinet in place. It is common for a president-elect to announce the names of cabinet nominations in advance of January 20th so that the Senate can begin confirmation hearings. After the inauguration ceremony, the Senate will come into session to consider most of the nominees. Sometimes the nominees are confirmed three or four hours after the term begins, although in recent years there have been cases of a day passing before the confirmations take place, and even one case, in 1988 where five days passed. During some window of time (possibly only three or four hours), the new president does not have a cabinet and the line of succession is populated with secretaries or acting secretaries of the prior administration.

Establish a Custom that the Outgoing President Nominates the Incoming Cabinet on the morning of January 20th. If the outgoing president would nominate the cabinet chosen by the incoming president, say at 9:00 a.m. on January 20th, the Senate could then come into session to confirm the non-controversial nominees. The advantage of such a system is that the cabinet would be in place just before the president-elect takes office, and several members of the cabinet could stay away from the inauguration ceremony to ensure some continuity of administration after an attack.

Hold the public ceremony for the inaugural swearing-in on January 21st. If it is not possible to establish a custom of the outgoing president making nominations for the president-elect, it might also be possible to move the time of the public ceremony. There is precedent for such a move. If January 20th occurs on a Sunday, the public inaugural ceremony is held the next day. Instead of the current arrangement, the president could be sworn in privately at noon on January 20th. The president could then nominate cabinet members, and the Senate could confirm them. The following day at the public inauguration ceremony, some of the members of the confirmed cabinet would avoid the ceremony.

Secretaries of Departments of a prior administration should stay in their posts until their replacements are confirmed by the Senate. It is important that some of the cabinet secretaries remain in place until their successors are confirmed. It would lessen the possibility of an acting secretary ascending to the presidency.

Remove Acting Secretaries from the Line of Succession. Congress should amend the presidential succession act so that acting secretaries are not part of the line of succession. It would be a particularly helpful change for the inauguration, but it would be a sensible change at all times. It makes little sense, for example, that an acting secretary of state would outrank the confirmed secretary of the Treasury in the line of succession.

Other problematic scenarios before inauguration day. An attack on inauguration day would threaten an orderly transfer of power. But other scenarios also merit your attention. Some scenarios will require laws to fix, and others might require change in the rules of the political parties. Let me simply list the problematic scenarios in reverse chronological order. If terrorists were to target the president-elect and vice president-elect or candidates for president and vice-president, they might create great confusion. What if the president-elect and vice president-elect were killed after the electoral votes were counted in Congress but before inauguration? What if no one secures a majority of the Electoral College and the election goes to the House of Representatives and the Senate to choose the president and vice president and terrorists kill several of the candidates? What if the president-elect and vice president-elect were killed after the members of the Electoral College cast their votes but before Congress counts the votes? What if those on the winning ticket in the November election were killed before the meeting of the Electoral College? What if a candidate died shortly before the November election? What if a candidate who received a majority of delegates in party primaries dies before the convention nomination?

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Each of these scenarios is complex in its own way. It is worthwhile at a legislative and party level to try to devise procedures that would be acceptable to the American people if a crisis arose.

1. Even for former presidents who had served two terms and were ineligible to be elected president under the twenty second amendment would be eligible to become president again through the line of succession. The Twenty Second amendment only prohibits the election of a two-term president to an additional term, not succession to the presidency. See Scott Gant and Bruce Peabody, "The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment," Minnesota Law Review 83, no. 3. February 1999: 565-635.
2. Akhil Reed Amar & Vikram David Amar, "Is the Presidential Succession Law Constitutional?," 48 Stanford Law Review 113 (1995); M. Miller Baker testimony before the House Committee on the Judiciary Subcommittee on the Constitution, February 28, 2002. Steven G. Calabresi, "The Political Question of Presidential Succession," 48 Stanford L. Rev. 155 (1995); Howard Wasserman, "Structural Principles and Presidential Succession" 90 KY L.J. 345 (2002). On the other side of the argument is John Manning, "Not Proved Some Lingering Questions About Legislative Succession to the Presidency," 48 Stanford L. Rev 141 (1995)
3. Preserving Our Institutions: The Continuity of Congress: The First Report of the Continuity of Government Commission, American Enterprise Institute and Brookings Institution (June 2003)
4. See my "President Michael Armacost? The Continuity of Government after September 11th", Brookings Review (forthcoming fall 2003).

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The Election Center

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September 9, 2003

**Testimony for U.S. Senate Hearings
On Disasters and Special Elections
Senate Judiciary Committee
Subcommittee on Constitution**

By

R. Doug Lewis, Executive Director, CERA

Senators and Distinguished Guests:

Thank you for providing an opportunity for the nation's elections administrators to have input into these hearings about how Congress would fill vacancies in the Congress should a national disaster occur.

It is sobering indeed to have to contemplate a situation that would require the use of any special provisions, whether natural disasters or human caused disasters. In a climate where, for some, it is acceptable to use violence rather than votes to achieve their goals, the planning is made necessary about how to react and replenish our democracy's representatives. This planning process can even have the positive attribute of covering all manners of disasters which would otherwise might not have received careful review and planning necessitated by either natural or human disasters.

The Election Center is a national non-partisan, nonprofit organization that represents since 1985 the nation's voter registration and elections officials and administrators at the city, township, county and state levels. Our members voluntarily join from both the local and state levels, and it is the largest elections organization in America. We specialize in voter registration and elections administration issues and we are the only organization in the U.S. to specialize exclusively in these issues. The Election Center is principally a training and resource organization to assist elections professionals in making democracy work better for America's voters. In addition, to extensive training seminars, the Election Center partners with Auburn University to certify America's elections administrators in an academically oriented program of courses to improve professional competence which can lead to this nation's highest designation for the elections profession, the designation of Certified Elections Registration Administrator (CERA).

Additionally, the Election Center serves as the administrative management body for the National Association of State Election Directors (NASED) in running its Voting Systems Qualification program, where voting systems in America are tested to the Federal Voting Systems Standards to assure qualified hardware and software is used in American elections.

The Election Center has long been a resource for both the Congress and for Federal government agencies including the Senate Rules Committee, the House Administration Committee, the Federal Election Commission and its Office of Election Administration; the U. S. Justice Department; the Federal Voting Assistance Program; the General Accounting Office; and U.S. Health and Human Services, as well as scores of state government agencies and legislative bodies. The Center has also been a consultant to international governments for elections and has done training of international elections administrators.

Election Center Testimony

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To get directly to the matter at hand, we were asked for input on whether national elections to replace Congressional Representatives could be held within 21 days and what impact such a 21-day requirement would have on the democratic process.

First let me tell you that elections administrators don't want to complicate the process in any time of national emergency. We get the message that this would be a "dire emergency" and that unusual occurrences or events would create the need for immediate response.

To respond, however, in a manner that gives you policy-makers a full range of things to consider before passing any legislation related to reacting to national disasters and/or provide for methods of Congressional successors to be put in place as quickly as possible, it is incumbent upon us to raise issues that can be too easily glossed over.

The underlying assumption for ordering a quick election would be to assure that the nation's business is attended to and that it is done with the people's elected representatives.

But that presents the first question: What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a "process" that includes time for the identification of candidates, the ability of the candidates to mount a campaign, to raise funds, to attract supporters, to inform the voters of what their choices are between individual contestants, and then going to the polls to make that choice?

The point is that if it is only an event, then we can structure an event in a short time-frame and carry off the event as flawlessly as possible. If, however, you define it in the broader "process" terms, then you have to allow the process time to work.

It has been mentioned that many who are looking at this issue do not want to break with the tradition of having House members being elected rather than being appointed -- even for a short duration. We have no quarrel with that viewpoint. At the same time, it seems to us that the tradition of our form of democracy must weigh in equally on tradition that allows us the time to know our candidates, the issues, the choices and the selection by voters of their choices.

The genius of American democracy is that it creates fundamental faith in voters that it is fair, free, and has great integrity. But sometimes it is terribly inefficient and cumbersome and time consuming and maddeningly frustrating in its complexities, and yet it works.

So before we can have a "general or special election" there has to be some thinking allotted to our primary election process. Do we just abrogate the primary selection and jump to the general or special election? Do we allow political parties to get together to choose nominees and eliminate the process that most states use in allowing the primary voters of those parties to select candidates? What about the opportunities for independent candidates and minor party candidates? Or do we do like California did recently and just have a minimum number of low threshold requirements and allow all who can meet the low threshold apply for a ballot position? Are we prepared for 50 or a 100 candidates or more for each of these openings?

Additionally, what does Congress set as a threshold for what constitutes a “national emergency”? Is it the loss of 25 members? 50 members? 100 members? A quorum?

Lessons that we learned in New York when 9/11 happened (because an election was also set in NY for that time period) is that you need a few days just to assess what kind of disaster happened to you and what resources are even available to you. Is transportation available, can the usual delivery trucks run, can traffic flow, are offices available, is electricity available, etc.

We don’t have a preconceived notion here about what are the right policy answers, only an administrative viewpoint that you need to consider these questions before deciding the general election question. And the states, which have traditionally set the processes and qualifications for these choices, have a variety of answers and solutions here. Presumably, the Congress is going to say that a national emergency needs to take precedence and that national interests are superior to states’ interests...and that is even probably the correct viewpoint, but deciding that issue alone is not without its impact on “tradition”. Federal law here will definitely have to vacate all of the state laws concerning these practices in order to stay on the Federal timetable. And the states and locales will have to create new policies and procedures that will apply to this election only.

Currently, under “special election” situations, we allow for a period of time for the primary process to work but in a limited fashion. The difference in the situation here is that we are filling usually one or two Representative slots at any given time and that the election, while important, does not have the same sense of importance that a national election to fill numerous vacancies would presumably have in a case of national emergency.

We polled selected members from around the country to get a representative sample of what elections administrators would want to conduct an election with integrity, with fairness to the voters and the candidates, and which would result in serving the interests of democracy – all within a heightened environment of a national emergency.

While the responses indicated a variety of dates ranging from the shortest time period of 35 days (after determination of who the candidates will be) to a period of four months, it appears that elections administrators feel that they can conduct an election with as few as 45 days but would be far more confident that the interest of democracy would be best served by having up to 60 days to get the elections held an organized.

Why do we need that much time especially in face of a national emergency? There has to be some process for the filing and qualification of candidates and most of our folks believe that bare minimums of 7 days is the shortest period and the largest number believe 10 days is necessary. There then has to be a period of ballot preparation, either printing paper ballots or programming electronic voting devices. In today’s technology world those are both specialized functions and cannot be purchased or produced at every local printer or with local technology specialists in the vast majority of cases. In the most extreme instance of total cooperation with nothing going wrong anywhere, we can accomplish most of this within seven to 10 days.

Voter registration needs new considerations. What is the period to be allowed for registration cutoff in this kind of election, and when do elections offices need to have the voter registration cards to voters in a shortened time frame?

You can now begin preparation of Absentee Ballots for the disabled, permanent absentee voters (depending on state laws), and military and overseas voters. We need "transit" time for those voters to be mailed a ballot, delivery of the ballot to them, a reasonable amount of time to complete the ballot, and then to return the ballot to us. Some of these we can receive and count even after Election Day, so we can pick up some days within the election countdown of 45 to 60 days, but not all of that time. Actually condensing the time here is probably the wrong way to do this; if we had more time on the front end of the process to allow us to get those ballots to the voters we could then require all of them to be in by Election Day so that the results are known shortly after Election Day.

Somewhere in here has to be time for voters to find out who is officially on the ballot and to discover information about them. Do we just trust that the news media can do this job for us? What if the entire nation's electricity is crippled or even significant portions of it? Will the law allow some flexibility for instances of when best laid plans hadn't anticipated the kind of disasters confronting us?

Next, if using electronic or optical scan voting devices, we have to prepare that equipment and make it ready and test it before we press it into service. In a "special" election situation we can accomplish this because we generally know the limited turnout that will show for a "special" election, which is generally significantly less than we get in a general election. But in this instance, the presumption is that for all purposes we have to anticipate that this is a larger general election and that means preparing significantly higher numbers of voting devices for use than in special elections.

We can normally staff a special election quickly with office staff and key volunteers and key election week workers because it is a manageable size; in this instance we are talking about being overwhelmed with an election the size of a normal general election but now with only a limited number of days to do what it takes us months to do in preparation for a general election. Perhaps Congress can give election officials the ability to commandeer the services of county and city employees to serve as poll workers and election workers during a national emergency and waive any labor laws contradicting such uses.

While there may be only a handful of candidates on the ballot (one race in most jurisdictions in America) but within our urban centers there will be multiple Congressional candidates races. And the preparation is the same regardless of how many offices are on the ballots. We still have to find the appropriate number of polling sites (many of which will NOT be available to us in this kind of election), staff it with poll workers, machines, ballots, and information – all of which takes months normally. The simple act of ordering ballot paper involves ordering months in advance for jurisdictions and is purchased in some by the boxcar load. Notifying voters of their polling sites all by itself can take a considerable amount of time especially if it is different for this election than normal elections (because the same facilities may not be available to us).

Election official and precinct worker training has to come somewhere in this process and it can only come after time to recruit enough people to serve (and enough reserves when the traditional 10 percent and higher do not show up).

One item to consider is that it may be necessary to do such an election by U. S. Mail rather than through polling sites, although most American jurisdictions don't have enough experience with massive vote by mail programs such as Oregon and Washington have. It would, however, allow us to eliminate the time spent on polling place sites (and making sure they are accessible) and poll workers. Of course this assumes that the U.S. Postal Service is functional during such a national emergency.

Now, rather than saying that all of that negates the ability to run an election under emergency circumstances, we want you to know that a Can-Do attitude means that we can and will overcome most of these limitations. But to offer an overly ambitious 21-day time period is very likely to court an election disaster on top of a national disaster.

Our best answer and best advice is to give us a minimum of 45 days and every day you can grant that gets us closer to 60 days increases the likelihood that the election will mean more to the candidates and the voters and allow us to build in the kinds of quality assurance and integrity processes that have been the hallmark of elections in America. It is our understanding that one of the House bills indicates that if such an emergency occurs 51 days in advance of a regularly scheduled election, then we wait until the regularly scheduled election. If so, then shouldn't that be the minimum number of days before any election is scheduled?

None of this anticipates what courts will do within this environment. But as policy makers, you may have to consider what kind of legal challenges will be recognized in a time of national emergency and what latitude judges will have in delaying or ordering additional candidates on ballots, or the many other examples we can give you as to how courts can obviate the best intentions of elections planners.

We have skipped any cost considerations in the hopes that a true national emergency means that costs at each level are ignored, but this may or may not be a valid assumption.

One last note of caution: When Election Day is over, there will still not be any seated members of Congress. It takes a period of days after the election to do the "vote canvass," whereby we roll in the absentee votes coming in from military and overseas voters and we will still have to qualify all of the provisional ballots that are cast in such an election. In most states we can accomplish that effort in 5 to 10 days, but in some even 15 days is going to be an extreme limitation due the high numbers they have to resolve. So you need to take into consideration that whatever number you set for the election process leading to Election Day, that we still will have some back-end processes that are necessary and vital to a valid election. And one of the large considerations is the question: do you eliminate provisional voting in such an emergency? Or eliminate all absentee votes that cannot or do not arrive prior to Election Day?

There are probably easier solutions than elections but any process which looks at appointing or selecting replacements also needs to consider the public's willingness to accept the succession

plan. As long as other governmental bodies are involved in the succession plan and elected governmental representatives are providing successors, then perhaps it will be accepted. But if there is a choice of appointment rather than general public election, it may be wise to consider letting state legislators elect members from their chambers to replace lost officials so that experienced legislators can serve in the interim and will not lose time learning the legislative process while trying to react to the national emergency.

Elections administrators in America are used to doing the impossible and doing so on less money and resources than they should. They will perform well in any national emergency. All we ask is that you not structure it in such a way to place the process in an overly risky, overly ambitious timetable which courts an additional disaster. Remember clearly that for the public to have faith in the government, they first have to have faith in the process that elected the government.

September 16, 2003

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STATEMENT OF THE CHAIRMAN**Committee on Rules and Administration and
Committee on the Judiciary
Hearing on****Ensuring the Continuity of the United States Government: The Presidency****September 16, 2003**

The hearing will come to order. Thank you all for being here this morning. This joint hearing will examine the current system of Presidential succession. I first want to thank Senator Cornyn for serving as the co-chair of this very important hearing. I know he has been interested in these issues, as I have, since his arrival in the Senate. I also want to thank our witnesses who have traveled to be here today to give us their expert opinions on this subject.

I want to begin with an interesting historical anecdote about the Senate Rules and Administration Committee and the issue of Presidential succession. After a major Senate reorganization in 1946, the Senate Rules Committee was merged with the Senate Privileges and Elections Committee, and the Senate Rules and Administration Committee was officially created on January 2, 1947. The very first public hearings held by the newly created committee were on the subject of Presidential succession and how the system should be amended to deal with the advent of the atomic bomb, the death of President Franklin Roosevelt and other issues. Since those 1947 hearings, no substantive legislation has been passed to deal with the gaps in the current Presidential succession system.

As I stated earlier, this is an issue I've been interested in for quite some time. Earlier this year, the Rules and Administration Committee considered and reported out S.148, a bill by Senator DeWine, which added Department of Homeland Security Secretary Tom Ridge to the line of Presidential succession. As you can see from the chart [DISPLAY CHART – TABLE 1], Secretary Ridge would be 8th in line of succession after the Attorney General. This bill has already been passed unanimously by the full Senate and is awaiting action in the House.

Given the circumstances of the world today, it is vitally important that we have a system of Presidential succession that operates efficiently and effectively with minimal interruption. Since September 11, 2001, Congress has been studying all aspects of our government's operations to ensure that we continue to function in the event of a catastrophe. Not since the cold war, have we had to think seriously about the scenarios that might threaten the continuity and the very fabric of our governmental structure.

The current statutes governing the presidential succession system have not been substantively amended since 1947, when Harry Truman was President. When President Franklin Roosevelt died in 1945 and Harry Truman ascended to the Presidency, there was no constitutional or statutory provision for replacing the Vice-President. As a result, the Vice-Presidency under Harry Truman remained vacant from 1945 until 1949. After several years of lobbying from President Truman, Congress finally amended the Presidential Succession statutes. As a result, the Presidential Succession Act of 1947 was adopted and is still in force today and governs the process by which individuals succeed to the Presidency.

Amazingly, the United States has been without a sitting Vice-President on 18 separate occasions. As recently as 1963, when Lyndon Johnson ascended to the Presidency as a result of the assassination of John F. Kennedy, the United States was without a Vice-President from 1963-1965. During Johnson's presidency, many people worried that if tragedy befell President Johnson and he were killed or incapacitated, we might be faced with a difficult situation of replacing the President as there was no

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Vice-President and the sitting House Speaker, John McCormack (born in 1891) and President Pro Tempore, Carl Hayden (born in 1877) were well-advanced in years.

In 1965, as a result of Johnson's ascension to the Presidency with no Vice-President waiting in the wings, the 89th Congress proposed the 25th Amendment to the Constitution. The 25th Amendment is a crucial piece to the succession puzzle as we know it today and empowers the President to nominate a Vice-President whenever that office is vacant. The 25th Amendment sprung to action on two separate occasions in the early 1970's when President Nixon resigned and Gerald Ford became Vice-President and ultimately the President. And then again when Nelson Rockefeller was nominated to replace Ford as the Vice-President. While the issue of Presidential succession has just recently regained the national spotlight, -- [in fact, I believe next week's Season premiere of the show "The West Wing" (although I've personally never watched the show) is focusing exclusively on the issue of Presidential Succession] -- this issue has been significantly debated and discussed over the years. In fact, during those very first hearings back in March 1947, the Chairman of the Rules and Administration Committee, Senator C. Wayland Brooks of Illinois, proposed forming a special joint committee to deal specifically with the issue of Presidential Succession. Although a plethora of succession issues were discussed, the Succession Act of 1947, as passed, did not cover all of the eventualities we as a nation, face today.

We are not the only generation of elected officials and citizens who have been forced to think about the possibilities of a national catastrophe due to an era of ultra-modernized weaponry and its affect on our Presidential succession system. As one Rules committee member discussed during the 1947 hearings: "There always has been [a lot at stake] throughout our history but there is more now than ever before. This Nation is the greatest nation in the world, and yet a combination of circumstances may arise under which we would have no head, no President, and we are just trusting to luck, and it is an awful gamble with fate. Now you may say that it is taken care of by the present succession [act] that was adopted in 1886. However, at that time it might have been considered comprehensive as there was no likelihood of all the members of the Cabinet dying before the Government had been reorganized. But nowadays anything may happen, in the day of the atom bomb. If an ordinary bomb should strike the White House at a time when the cabinet was in session, they might all be wiped out. If no Cabinet meeting were being held, and all its members were in Washington, and if an atom bomb were dropped on Washington they might all be wiped out."

Likewise, the 1947 Act, which may have been considered comprehensive at the time, is clearly outdated. The "atom bomb" scenario raised more than 50 years ago, still rings true to this day -- perhaps now so more than before. For example, if Washington, DC is attacked and the entire line of succession is wiped out, there is no provision to deal with such a scenario. I believe that we should study the possibility of adding some individuals to the line of succession who reside outside the DC metro area. Another issue is the incongruous bumping procedure that occurs when there are simultaneous vacancies in the top succession posts (the President, VP, Speaker and PPT)? For example, if the top four posts are vacant, the Secretary of State becomes the acting President -- but only until the House selects a new Speaker or until the Senate selects a new President Pro Tempore? Once a new Speaker or Pro Tem is chosen, that individual "bumps" out the Secretary of State who has already resigned his Cabinet post to act as President and is then forced to return to the private sector (or go through the entire confirmation process again). This "bumping" procedure adds logistical complications at a time when the country needs to be emanating a message of readiness and preparedness -- NOT a message of Presidential "musical chairs." Once an individual ascends to the presidency through the succession process, that individual should remain acting as President until the expiration of the term. Or alternatively, I believe that Congress should provide for a special election (as was the case with the 1792 succession act) if the vacancy occurs early in the President's term. A special election provision was also included in the original 1947 Succession Act but was later dropped from the final bill.

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And finally, an even more fundamental question we need to ask is -- should members of Congress be in the Presidential line of succession at all? There has been disagreement on this matter since the founding of our country. Madison, Hamilton and Jefferson sparred vigorously on this point, and as some of the material I've read on this topic points out, this issue was never fully resolved during the finalization of our Constitution. Members of Congress have been brought into and taken out of the line of succession several times over the last 200 years. In 1792, Members of Congress were in the line of succession; although the Pro Tem was first behind the Vice-President and the Speaker was second. [See Ted, if you'd only been around back then, you'd have been a heartbeat closer]. Then, in 1886, Congress removed themselves from the line of succession citing possible conflicts of interest that may arise in the event of an impeachment proceeding -- and in fact, such a conflict of interest occurred during the impeachment trial of President Andrew Johnson. Then again, in 1947 at the urging of Harry Truman, Members of Congress placed themselves back into the line of succession. Having Members of Congress in the line of succession presents a troubling scenario -- if the Speaker or the Pro Tem succeed to the Presidency, there is a very high likelihood that they will be of the opposite political party of the deceased President and Vice-President. [DISPLAY CHARTS -- TABLES 2 & 3] As these two charts show, since the late 1960's the political party in control of the White House would have flip-flopped more than 80 percent of the time if Members of Congress would have succeeded to the Presidency. There have been very few times in recent history when one political party controlled the White House and both chambers of Congress. I believe this potential "party switching" scenario is problematic. If, God forbid, we are in a situation where the United States is forced to exercise the succession statutes, the country will be in need of stability and strength. I believe that the upheaval of the political control of the White House would seriously jeopardize the stability of the government. Can you imagine if Speaker Gingrich had been catapulted to the Presidency during Bill Clinton's term? Or if Speaker Tom Foley or Senator Byrd had ascended during the Presidency of George H.W. Bush? There surely would have been governmental chaos. This would be especially true if the party switch occurred early in a Presidential term. For example, the new acting President, would likely replace the entire cabinet with new appointments thereby possibly upsetting international negotiations among world leaders. I believe we ought to examine whether or not Members of Congress should be included in the line of Presidential succession.

Other problems also exist under our current Presidential succession system such as: 1) what happens if the nominees of a major party are killed in close proximity to the general election and there is not sufficient time to re-nominate? 2) what happens if the President-elect and VP-elect are killed after election day but before the Inauguration?

I don't believe that we can address every possible scenario but I do believe that there are some obvious situations that are not now covered by our current system and we should take pains to address those situations. I look forward to hearing your testimony.

Senator Cornyn, do you have an opening statement?

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**Testimony of
HOWARD M. WASSERMAN
Before The
Committee on Rules and Administration and
Committee on the Judiciary United States Senate**

September 16, 2003

Chairman Lott, Chairman Cornyn, Senator Dodd, Senator Feingold, and members of the Committee on Rules and Administration and the Committee on the Judiciary: Thank you for the opportunity to address this joint hearing on the important issue of presidential succession and continuity in the executive branch of the federal government.

I am an Assistant Professor of Law at Florida International University College of Law and I appear today in my personal capacity as a legal scholar. I approach this topic having spent a great deal of time during the past three years studying, writing, and speaking about the question of presidential succession—initially focusing on creating the best, most structurally consistent double-vacancy succession procedure, then considering the specific context of the new reality created by the terrorist attacks of September 11, 2001.

I. DEFECTS IN THE DOUBLE VACANCY SUCCESSION STATUTE

The current version of the double-vacancy succession statute, 3 U.S.C. § 19, was proposed in 1945 by President Harry S. Truman and enacted into law in 1947. This law is the third exercise of congressional power under Article II, Section 1, Clause 6 to provide by law for the case of simultaneous vacancies in the offices of President and Vice President. The law in place from 1868 until 1947 had established cabinet succession, beginning with the Secretary of State. In proposing the change from cabinet to legislative succession, President Truman accepted the faulty premise that legislative succession is more democratic and that a Speaker acting as president has greater national democratic legitimacy than would an acting president drawn from the cabinet.

It generally is believed that intended targets of the coordinated terrorist attacks of September 11, 2001 included President Bush aboard Air Force One and Vice President Cheney at the White House. These history-changing events, and the ever-present concern for future worst-case scenarios, raise the specter of the invocation of § 19 in a way that the nation really has not experienced since the impeachment and trial of President Andrew Johnson in 1868. The post-9/11 scenarios place the statute's flaws in specific focus.

This Congress now possesses a unique legislative opportunity—the opportunity to revise a flawed law, a law whose flaws become most clear in a real or threatened crisis. Yet this body has the time for reasoned and deliberative exploration of the issue.

A. Faulty Premises of 3 U.S.C. § 19

In 1945, President Truman proposed the change from cabinet to legislative succession. Truman, who had succeeded to the White House upon the death of President Roosevelt in 1945, served his first term without a Vice President in those pre-Twenty-Fifth Amendment days. In nominating George Marshall to be Secretary of State, Truman recognized that he was, under then-existing law, appointing his immediate potential successor. He did not believe, however, that the chief executive in a democracy should possess the power to appoint his own successor. Rather, greater national democratic legitimacy would attach to

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an acting president who was an elective official, someone who had stood for election at some level. That most-democratic official, Truman declared, would be the Speaker of the House, the leading officer of, in James Madison's words, the department of government having an "immediate dependence on, and intimate sympathy with, the people." The Speaker is elected every two years by voters in a congressional district and gains national democratic legitimacy by being placed in the speakership by a majority of the members of the House, themselves similarly elected.

Truman simultaneously recognized the risk that § 19 might precipitate a change of political party control, and thus policy direction, in the executive branch; he thus sought to establish a procedure that would ensure party retention of the White House. Truman urged Speaker succession as the solution. This followed inevitably from his initial conclusion that legislative, rather than cabinet, succession was the correct course. Having so concluded, the only question was whether the first officer in line would be the President Pro Tempore of the Senate (as under the original 1792 statute) or the Speaker of the House. Truman settled on the latter, arguing that the House was more likely than the Senate to be controlled by the same party as the White House, meaning the Speaker would be a member of the same party as the President.

Both of the premises on which President Truman relied have proven factually and theoretically incorrect over time. The period since 1947 has been characterized by long stretches in which the President's party is not in the majority party in one or both. More importantly there is nothing inherently undemocratic about the President appointing a potential successor; it is, in fact, a common part of our political system.

The President may appoint an immediate potential successor in two circumstances. One is the express presidential power under the Twenty-fifth Amendment, ratified in 1967, to appoint a Vice President when there is a vacancy in that office. The other occurs at the outset of the election process, when a presidential candidate hand-selects a running mate, the person who will be Vice President and the proverbial "one heart beat away" from the presidency. Selection of a running mate can be understood as the practical equivalent of an appointment, because the President and his running mate are, in essence, a package deal. Although the Vice President formally stands for popular election in 51 jurisdictions and for distinct election in the Electoral College, the outcome of the vice presidential election inevitably tracks the outcome of the presidential election. The presidential and vice presidential candidates appear on the ballot in tandem as a single ticket and voters cast their ballots for that ticket. Electoral laws in all states currently prohibit voters from splitting their executive tickets, i.e., from voting for electors committed to one presidential candidate and a different vice presidential candidate. Many states then formally or informally bind electors to vote in accord with their commitment and with the statewide popular vote. A vote for one presidential candidate automatically functions as a vote for that candidate's hand-picked running mate.

Appointing a contingent successor is a proper executive function in a democracy, so long as that appointment is not unilateral. Rather, democratic principles require that the appointment be made with some outside approval of the selection, particularly an approval that reflects, even indirectly, the support of a national constituency. Thus, both houses of Congress must confirm a vice presidential appointee under the Twenty-fifth Amendment. And, at least formalistically, voters approve a vice presidential candidate by voting for a presidential ticket. Indeed, at least theoretically voters could reject a presidential candidate because of the candidate's choice of running mate.

The point is that the President essentially hand-picks his Vice President, the immediate contingent successor, without complaints as to the democratic legitimacy of that process or the democratic legitimacy of the Vice President succeeding as President. There likewise should be no complaints as to the democratic legitimacy of a cabinet officer, hand-picked by the President, being at the head of the line of double-vacancy succession. National democratic legitimacy is provided by the confirmation of all

cabinet appointees by the Senate, a popularly elected body. In fact, despite President Truman's insistence that the elevation of a member of the House to the speakership grants that person greater popular legitimacy, it is worth nothing that both the Speaker and cabinet officers derive national democratic legitimacy from approval by one popularly elected house of Congress--the Speaker by the House of Representatives, cabinet secretaries by the Senate.

Cabinet officers acting as president possess what Akhil Amar and Vikram Amar call "apostolic legitimacy," national democratic legitimacy by virtue of having served as the chosen policy surrogate of the nationally elected President. Cabinet secretaries are hand-selected by the President to represent the same national electoral constituency and to help the President exercise the executive power and carry out a national policy agenda. This connection to the President, and to that national constituency, 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.

Moreover, as between cabinet and legislative succession, the former better assures party continuity in the White House. As long as the possibility of divided government--of legislative and executive departments controlled by different parties--exists in the constitutional structure, the possibility of a change in party control and policy direction exists if legislative officers occupy the top of the line of succession. Cabinet officers generally will be members of the President's party and likely will be committed to the same policy agenda as the President. As acting president, the Secretary of State, for example, likely will continue to pursue those policies upon succession, which may not be true of a legislative officer from a different political party carrying a different policy agenda.

B. What the Events of September 11 Tell Us About The Faulty Premises of § 19

The events of September 11 shed light on the mistaken premises underlying § 19. Had the attacks succeeded in assassinating President Bush and Vice President Cheney, it is likely that Secretary of State Colin Powell would have been well-situated to lead the nation. He would have brought the experience of his position as one of the delegates of the late President's foreign affairs and military powers. He would have been more knowledgeable of the military and international landscape and better able to lead and guide the ensuing military, political, and diplomatic efforts. His national profile would have provided nationwide public confidence and support in the role of national healer during the time of mourning. This confidence comes not only from the person of the cabinet officer (Secretary Powell brings an especially high national profile and reputation), but also from that personal and political connection to the nationally elected President and the national constituency he represented.

As to the problematic matter of party change, consider that on September 11, 2001, the Senate was under Democratic control, meaning that the third person in the line of succession, the President Pro Tempore, was of a different political party than the Republican President. The only way to ensure party and policy continuity is by placing cabinet members at the front of the line of succession. Such continuity by an acting president is essential in the wake of the type of catastrophic attack directed against the structure of government itself that 9/11 suggests may be possible.

II. WHAT SEPTEMBER 11 CHANGES ABOUT THE STATUTORY NEEDS

Prior to September 11, it would have been possible to argue for the simple policy change of removing legislative officers from the line altogether and relying solely on cabinet succession. Cabinet officers in the line of succession would have seemed sufficient on the assumption (similar to the assumption that likely drove President Truman and Congress in 1945) that an attack killing every single member of the

cabinet was unlikely. September 11 changed this assumption by raising the specter of a series of surprise coordinated terrorist attacks striking down several executive branch officers in multiple locations simultaneously. The risk of a more comprehensive attack inflicting more comprehensive damage on the structure of the federal government demands more comprehensive changes to § 19.

A. Cabinet Succession

The primary change, as discussed, would re-establish primary cabinet succession, as existed under the law from 1868 until 1947, removing the Speaker and President Pro Tempore from the head of the line. This guarantees an acting president who, prior to acting as president, was a top official in the executive branch of the national government, a member of the President's political party, and hand-picked by the President to exercise a delegated portion of the executive power in furtherance of the President's national agenda. This officer also is confirmed by a Senate acting with knowledge of amended § 19 and the fact that this individual, if confirmed, will be high in the line of presidential succession.

But the new mass-destruction scenarios demand a related change of a longer line of succession. Given my inclination towards cabinet succession, one way to extend the line is to create new cabinet-level positions. One such office that should be created is that of First Secretary, a designated second successor, one officer whose official job is to become acting president in the event of a double vacancy. This individual must satisfy the constitutional presidential eligibility requirements and, most importantly, his selection and Senate confirmation would focus on this specific and unique role of being a contingent presidential successor and the suitability and qualifications of this nominee for that role.

The First Secretary's primary duty would be to remain in a secure location outside Washington, D.C. and away from the President and Vice President. This officer must also 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. The benefits of having the President's hand-picked policy surrogate assume the executive power derive from that surrogate knowing and continuing current policies, which in turn assumes that the individual had, in fact, been working on behalf of the President and those policies. It is not enough for a successor to previously have been placed in office by presidential nomination and Senate confirmation; he must actually have been in the loop of presidential policymaking prior to the attack that created the vacancy.

The creation of this specialized cabinet office also dovetails with President Bush's "shadow government" plan. The notion underlying the shadow government is to have members of every executive department and agency working in a secure location, preparing to continue the executive branch in the event of a mass-attack on the federal government. A shadow government scheme, headed by a single proper statutory successor, is effective in avoiding the most catastrophic scenario by ensuring that one statutory successor and some portion of the executive branch is secure at all times and will survive the attack. The primary function of the First Secretary would be to lead this contingency body, both while working in the shadows and as the new executive branch in the wake of an attack.

B. Continued Relevancy of Legislative Succession

The Speaker and President Pro Tempore should not be at the head of the line of succession; immediate succession by either raises the structural difficulties already discussed. Nevertheless, both legislative officers should remain in the succession order, but at the end of the line. The second lesson of 9/11 is that the line of succession should contain everyone who constitutionally may be an officer under the Succession Clause and who, as a normative policy matter, should be included in the line. Legislators are not favored successors, but having two additional officers in line provides additional flexibility to handle

the mass-destruction scenario, by providing two more individuals who legally may assume the executive power in the wake of a destructive attack.

This warrants a brief mention of congressional continuity, a subject that the Judiciary Committee has considered separately. A plan to ensure continuity in Congress ensures the continued presence of a Speaker and President Pro Tem, since the first step in each house will be to choose those officers. So long as there is a working Congress, there will be a Speaker and President Pro Tem, either of whom would be statutorily eligible to act as president upon resignation of his legislative seat. Maintaining these legislative officers in the line of succession thus ensures a proper statutory successor in the event of the worst-case scenario of the President, Vice President, and all cabinet secretaries (including the First Secretary somewhere outside of Washington) being killed in an attack.

This raises the question of whether legislative officers such as the Speaker and President Pro Tempore are eligible under the Succession Clause; my answer is yes, they are eligible. The Succession Clause 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." U.S. CONST. Art. II, § 1, cl.6. 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 President Pro Tem cannot constitutionally remain in the line of succession. On the other hand, the absence of a modifier in the Succession Clause may not have been inadvertent. The unmodified term may be broader and more comprehensive, covering not only executive-branch officers, but everyone holding a position under the Constitution who might be labeled an officer. This includes the Speaker and President Pro Tem, which are identified in Article I as officers of the House and Senate, respectively. The definitive meaning is not historically or structurally certain, as suggested by the fact that Congress on two occasions—1792 and 1947—has placed legislative officers in the line of succession. The broader reading of the Succession Clause is, at the very least, a reasonable one. Thus there is no basis to jump to the conclusion that including legislative officers in the statutory line is somehow inconsistent with the letter or spirit of the Constitution.

Finally, to the extent that legislative officers remain in the line of succession, even if at the bottom, such that either's actual assumption of the executive power will occur only in the most extreme circumstances, two practical concerns remain. First, having legislative officers in line continues the possibility of a change in party control in the frequent times of divided government. Second, the structural reality in the Senate is that the President Pro Tempore does not wield primary responsibility for the direction and control of the legislative or partisan agenda. The President Pro Tempore is the senior-most member of the Senate majority party and the presiding officer for debate in the absence of the Vice President, but true control over the Senate's agenda rests with the party caucus leaders, particularly the majority leader.

In February 2002, H.R. 3816 was introduced in the House of Representatives, that would have amended § 19 to address those two problems. First, the bill would have replaced the President Pro Tem in the line of succession with the Senate Majority Leader, recognizing that this is the legislator with power over the Senate policy agenda. Second, it would have empowered the President to designate the legislative officer who will be in the line depending on whether the President's party is in the majority or minority in that house of Congress—Speaker or House Minority Leader, Senate Majority or Minority Leader.

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The President could change that designation at any time if there were a change in party control of one or both houses. To the extent legislative officers remain anywhere in the line of succession, these changes ensure that there would be no change in party control, and thus in policy direction, in the (now more remote) event of succession by a legislator. It further ensures that whomever assumes the executive power is someone who has been active in setting the public agenda, whether in the executive branch or in Congress.

But note two new problems the proposal would create. First, it is not clear whether legislative party caucus leaders are legislative officers under the Constitution. An argument that they are not comes from the fact that party leaders are not chosen by the whole of a particular house, but only by the members of that party caucus. In any event, party leaders are not legislative officers whose existence is constitutionally mandated, as are the Speaker and the President Pro Tempore; the Constitution does not require formal party caucuses or leaders of those caucuses and does not require that control of the house be determined according to party divisions and lines. The party structure and the party leadership offices are a product of an organizational decision by each house, established unilaterally pursuant to the Article I powers of each house to determine the rules of its proceedings. This means, of course, that party leadership offices could be eliminated unilaterally, if one house wished to move to a non-partisan structure. Given that the line of succession is established by statute, passed pursuant to the bicameralism and presentment requirements of Article I, § 7, it is structurally troubling to have the succession order include an officer whose office may be eliminated by the unilateral decision of one house.

Having legislators in the line of succession may leave Congress with a choice between two problematic ideas. On one hand is the clear risk of party change in the event of legislative succession; on the other hand is the inclusion in the statutory line of two legislators who, because of the manner of their selection and the nature of their office, do not obviously attain the same status as legislative officers. The question of which of these policy choices is preferable is something I expect to investigate more fully and something Congress must consider in any revisions to § 19.

C. Unworkability of a Different Extension of the Line of Succession

Another idea that has been floated, although never formally proposed, since September 11 would extend the line of succession to include state governors. Governors indeed are appealing additions to § 19. They are chief officers of the executive branches in their states. They are popularly elected by a statewide constituency, the same statewide constituency that selects Senators, as well as Representatives in some less-populous states. Many governors of larger states have national visibility that might provide some degree of national democratic legitimacy.

But there is no constitutional basis for including state officials in the line of succession. Even assuming, as I do, that the unmodified word "officer" in the Succession Clause is more comprehensive than only executive branch officers, it still can include only officers of the national government, officers who hold a position created by and drawing authority from the Constitution or laws of the United States. The word cannot include those whose office or power derives entirely from the law of a distinct sovereign political entity, such as a State. This reading is supported historically by the Framers' intent to create a stronger, more national, and more independent central government, a purpose that would be undermined if the national executive power could devolve to an individual whose office and authority are drawn entirely from the law of a particular state and whose loyalties perhaps lie more with state than national interests.

Proponents of this extension likely would respond that Congress could establish by law that every governorship is, automatically, an office of the national executive branch; the President would present, or nominate, the individual elected by the voters of each State to the Senate and the Senate would confirm that individual to this national office. Having been made an officer in the national executive

branch, the governor now is an eligible successor under Article II, § 1. Nothing in the Constitution specifically forbids state officers from holding federal offices, although most state constitutions specifically preclude federal officers from jointly holding significant state offices, presumably including the governorship. This plan thus may run afoul of the basic structural rules of State governments. It also raises a Tenth Amendment issue. If, under *Printz v. United States*, 521 U.S. 898 (1997), Congress cannot compel state officials to enforce federal law, it is hard to see how Congress could compel state officials to assume a leadership role in the national government under the direct authority of the United States.

There also is the difficulty of ordering among governors. It is not clear how Congress, in enacting framework legislation of general prospective applicability, could decide neutrally whether the governor of California or Florida or Arkansas should be higher in the line of succession. Making any such choice invites the very geographic and regional divisions, conflicts, and favoritism that the Framers sought to minimize by creating a national government in 1789. One answer might be to draft § 19 to enumerate an order among cabinet officers, then expressly delegate to the President the discretion to establish an order among the fifty governors. Presumably each President, not bound by the need to speak in neutral terms of prospective general applicability, would establish an order based on the current occupants of each governorship, looking to party affiliation and perhaps size and influence of each state. However, the sectional and regional favoritism remains; the choice of determining what region is favored simply has been shifted from Congress to the President.

I mention this idea only for purposes of rejecting it as an unworkable extension. To call governors (even if formally nominated by the President and confirmed by the Senate under the plan I have discussed) officers of the national executive branch is to elevate form over substance. They would have no true function within the national executive branch. They do not exercise any of the President's delegated executive power or act as the President's hand-picked policy surrogate or help the President represent his national constituency. They never attain the apostolic legitimacy that enables a cabinet secretary forced to act as president to do so with some level of national support and democratic legitimacy. Senate confirmation alone does not render an individual a nationally legitimate successor; that legitimacy comes from the link to the populist President and to the individual's work within that administration.

D. Conclusion

The unworkability of the extension to governors exemplifies a basic, but important, point. There are no possible extensions of the line of succession in § 19 beyond the cabinet and those special legislators who, through the additional credential of selection by a majority of one house of Congress, have been elevated to the status of legislative officers.

Congress can, and should, amend § 19 to create the best possible order of successors, which means cabinet officers at the head of the line. And it can establish a position such as First Secretary, an officer who, by staying out of harm's way and leading the shadow government outside Washington, lessens the likelihood of ever descending too far down the line of succession.

But this exhausts the officers who constitutionally or practically can act as president. The current line of succession, reordered, must be the starting point for a presidential succession process geared to the new mass-destruction scenario.

III. SPECIAL PRESIDENTIAL ELECTION

The single imperative change to double-vacancy succession procedure is to amend § 19 to provide for a

special presidential election whenever an acting president is in the White House—that is, whenever someone other than the Vice President has assumed the executive power. Voters elect a new President and Vice President, under established Electoral College procedures, and place a President, rather than an acting president, in the Oval Office. This person would serve the remainder of the extant four-year presidential term and the next regular quadrennial election will take place as planned.

The 1792 statute required the Secretary of State, when the double vacancy occurred, to call on every state to act within 34 days to appoint presidential electors who would meet and choose a new President and Vice President. That provision was removed when the law was amended in 1886 and there has been no provision for special presidential elections since then. In 1945, President Truman recommended that the amended statute provide for selecting a new President and Vice President, either in a special election or at the next congressional election after the double vacancy; Congress did not include that provision in the final version.

Any double-vacancy succession statute places in the White House someone who never stood before the national electoral constituency. A succeeding officer below the Vice President, whether pulled from the cabinet or Congress, was not on the minds of individual voters as a holder of the “executive Power” under the Constitution when they cast their votes for any federal office. It is, of course, unavoidable that some such officer must act as president in the wake of an attack that creates a double vacancy. It is necessary, therefore, to limit the term of this acting president in favor of a duly and constitutionally selected President.

A special election places the direct popular imprimatur of the national electoral constituency on the occupant of the White House. There is a symbolic benefit to having a President who has stood for election before the entire nation at the head of the executive branch, for the benefit of both the officer holder and the People. A President (as opposed to an “acting president”) will be better able to establish a program and agenda, direct military and diplomatic activities, and lead the national recovery from the tragedy. The role of an acting president should be far more limited—restoring order, providing emergency relief, and leading the national mourning in the immediate aftermath of the attack—before giving way to a duly elected President.

This election should occur within six or seven months of the double vacancy. The longer period is a product of the fact that every state utilizes popular election as the means of choosing presidential electors. This means, of course, that the law must allow sufficient time for States to organize and carry out 51 simultaneous state-controlled popular elections. Six months seems sufficient lead time for the states, especially if Congress also required every state to prepare detailed contingency plans for a quick cold-start to the state election machinery.

Moreover, a six-month period should be sufficient to allow for national mourning and for the restoration of public stability and normalcy that will allow the People to participate intelligently in a popular election. A shorter period than this is not workable; one cannot imagine gearing up for, and a carrying out, a presidential election 60 days after a 9/11-type attack that killed both the President and Vice President and destroyed large pieces of the national government. Nor can one expect candidates and the people to engage in truly reasoned democratic deliberation in a shorter period of time. Finally, the special election should be unnecessary if one year or less remains on the existing presidential term, since the wheels of the regular quadrennial election already are in motion. The presidential election also may be incorporated into a mid-term congressional election.

Consider that on September 11, 2001, President Bush and his administration had been in power for less than eight months. Had that attack killed both the President and Vice President, an acting president would have controlled the White House for more than three years, until an election in November 2004

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and presidential Inauguration in January 2005. It is irrelevant for present purposes whether the acting president had been the Speaker (Dennis Hastert under the current statute) or the Secretary of State. The gravest problem in terms of democratic legitimacy arises simply from the White House being occupied for almost a full presidential term by anyone not elected by the voters of the national constituency according to established procedures.

A special election also enables Congress to eliminate the current provision for supplantation, or bumping, of a lower statutory officer by a "prior-entitled" statutory successor. Bumping has been widely criticized by legal scholars who point out that the mechanism does little beyond fostering partisan gamesmanship and confusion as to who is, and should be, acting as president. The apparent purpose of bumping is to ensure that the most favored statutory officer (under the current statute, a former legislative officer rather than a cabinet officer) assumes the executive power for the remainder of the presidential term, a possibly substantial period of time.

A special election eliminates the concern that motivates the bumping provision. Because any acting president generally will serve approximately six months and at most one year, having the acting president be the highest possible individual in the line is less important than it otherwise might be. The amount of time in which an acting president holds the executive power will be sharply and clearly limited. Whether the Secretary of State or the Secretary of Veterans' Affairs or the Speaker of the House is a more favored acting president, given the shortened period in which the acting president is in office, it is not worth the confusion as to who is properly acting as president that bumping creates.

IV. CONCLUSION

Section 19 has been the target of criticism, both as a matter of constitutional law and sub-constitutional public policy. The events of September 11, 2001, and the scenarios of broader attacks on government itself, highlight the defects in the law and provide an impetus for Congress to effect statutory change. The events of two years ago demonstrate two important things. First, that officers at the top of the President's cabinet, those with high national profiles and reputations, are the preferred acting presidents, the preferred successors in the event of a double vacancy. Second, the term of any acting president should last no longer than six or seven months, only long enough to restore order and begin the national recovery. A President, chosen in a special election, must then assume the executive power as quickly as the realities of the electoral process and the will of the electorate allow.

I thank both Committees for providing me the opportunity to speak with you today. I wish this body every success in its efforts to create the most workable presidential succession process.

Respectfully submitted,
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