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Presidential and Vice Presidential Succession: Overview and Current Legislation

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Presidential and Vice Presidential Succession: Overview and Current Legislation

Updated September 27, 2004

Thomas H. Neale
Government and Finance Division

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Summary

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

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

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

This report will be updated as events warrant.

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Presidential and Vice Presidential Succession: Overview and Current Legislation

Constitutional Provisions and the Succession Act of 1792

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

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

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

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

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

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

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

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

Presidential Succession in 1841: Setting a Precedent

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

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

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

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

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

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

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

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

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

The Presidential Succession Act of 1947

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

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

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

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

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

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

The 25th Amendment and Current Procedures

The 1963 assassination of President John F. Kennedy helped set events in motion that culminated in the 25th Amendment to the Constitution, a key element in current succession procedures. Although Vice President Lyndon B. Johnson succeeded without incident after Kennedy’s death, it was noted at the time that Johnson’s potential immediate successor, House Speaker John W. McCormack, was 71 years old, and Senate President Pro Tempore Carl T. Hayden was 86 and visibly frail. In addition, many observers believed that a vice presidential vacancy for any length of time constituted a dangerous gap in the nation’s leadership during the Cold War, an era of international tensions and the threat of nuclear war.¹² It was widely argued that there should be a qualified Vice President ready to succeed to the presidency at all times. The 25th Amendment, providing for vice presidential vacancies and presidential disability, was proposed by the 89th Congress in 1965 and approved by the requisite number of states in 1967.¹³

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

¹⁰ This requirement was included because the Constitution (Article I, Section 6, clause 2) expressly states that “... no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

¹¹ 3 U.S.C. 19 (d)(2).

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

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

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

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

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

Presidential Succession in the Post-9/11 Era

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

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

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

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

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

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

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

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

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

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

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

¹⁹ *Ibid.*, pp. 60-61.

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

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

The Succession Clause [of the Constitution] provides that "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and the Vice President, declaring what Officer shall then act as President and such Officer shall act accordingly." ... This provision refers to "officers," unmodified by reference to any department or branch. Elsewhere, the Constitution refers to "Officers of the United States" or "Officers under the United States" or "civil officers" in contexts that limit the meaning of those terms only to executive branch officers, such as cabinet secretaries.

The issue is whether the unmodified "officer" of the Succession Clause has a broader meaning. On one hand, it may be synonymous with the modified uses of the word elsewhere, all referring solely to executive branch officials, in which case the Speaker and the President Pro Tem cannot constitutionally remain in the line of succession. On the other hand, the absence of a modifier in the Succession Clause may not have been inadvertent. The unmodified term may be broader and more comprehensive, covering not only executive-branch officers, but everyone holding a position under the Constitution who might be labeled an officer. This includes the Speaker and President Pro Tem, which are identified in Article I as officers of the House and Senate, respectively.²¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Bumping” or Supplantation. This question centers on the 1947 Succession Act provision that officers acting as President under the act do so only until the disability or failure to qualify of any officer higher in the order of succession is removed. If the disability is removed, the previously entitled officer can supplant (“bump”) the person then acting as President. For instance, assuming the death, disability, or failure to qualify of the President, Vice President, the Speaker, the President Pro Tempore, or a senior cabinet secretary²⁹ is acting as President. Supplantation could take place under any one of several scenarios.

- Death of the President, Vice President, Speaker and President Pro Tempore: the senior cabinet secretary is acting as President. The

²⁵ (...continued)

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

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

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

²⁸ Miller Baker, Testimony, p. 11.

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

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

- Disability of the President and Vice President: the Speaker is Acting President. Either the President or Vice President could supplant after recovering, but the Speaker, or the President Pro Tempore, should that officer be acting, would be out of a job, due to the requirements noted above.
- Failure to Qualify of the Speaker or President Pro Tempore: the President and Vice President are disabled, or the offices are vacant. The Speaker and the President Pro Tempore decline to resign their congressional membership and offices, and the acting presidency passes to the senior cabinet officer. At some point, the Speaker or the President Pro Tempore decides to claim the acting presidency, resigns, and “bumps” the serving cabinet secretary. The same scenario could occur to a President Pro Tem supplanted by the Speaker.

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

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

Moreover, as noted previously, any person who becomes acting President must resign his previous position, in the case of the Speaker and President Pro Tempore, or have his appointment vacated by the act of oath taking. It is certainly foreseeable that public officials might hesitate to forfeit their offices and end their careers before taking on the acting presidency, particularly if the prospect of supplantation loomed. The “bumping” question has been used by critics of legislative succession as an additional argument for removing the Speaker and President Pro Tempore from the

³⁰ 3 U.S.C. § 19 (b).

³¹ 3 U.S.C. § 19 (d)(3).

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

line of succession. Another suggested remedy would be to amend the Succession Act of 1947 to eliminate the right of “prior entitled” individuals to supplant an acting President who is acting due to a vacancy in the office of President and Vice President. Relatedly, other proposals would amend the law to permit cabinet officials to take a leave of absence from their departments while serving as acting President in cases of presidential and vice presidential disability. They could thus return to their prior duties on recovery of either the President and Vice President, and their services would not be lost to the nation, nor would there be the need to nominate and confirm a replacement.

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

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

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

Between the Electoral College Vote and the Electoral Vote Count by Congress. A third contingency would occur if there were a vacancy in a presidential ticket during the period between the time when the electoral votes are

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

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

cast (Monday after the second Wednesday in December) and when Congress counts and certifies the votes (January 6). The succession process for this contingency turns on when candidates who have received a majority of the electoral votes become President-elect and Vice President-elect. Some commentators doubt whether an official President- and Vice President-elect exist prior to the electoral votes being counted and announced by Congress on January 6, maintaining that this is a problematic contingency lacking clear constitutional or statutory direction.³⁵ Others assert that once a majority of electoral votes has been cast for one ticket, then the recipients of these votes become the President- and Vice President-elect, notwithstanding the fact that the votes are not counted and certified until the following January 6.³⁶ If so, then the succession procedures of the 20th Amendment, noted earlier in this report, would apply as soon as the electoral votes were cast; namely, if the President-elect dies, then the Vice President-elect becomes the President-elect. This point of view receives strong support from the language of the House committee report accompanying the 20th Amendment. Addressing the question of when there is a President elect, the report states:

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

Between the Electoral Vote Count and Inauguration. As noted previously, the 20th Amendment covers succession in the case of the President-elect, providing that in case of his death, the Vice President-elect becomes President-elect.³⁸ Further, a Vice President-elect succeeding under these circumstances and subsequently inaugurated President would nominate a Vice President under provisions of the 25th Amendment. A major concern that has risen about this period since the terrorist attacks of September 11, 2001, centers the order of succession under the Succession Act of 1947. What might happen in the event of a mass terrorist attack during or shortly after the presidential inaugural? While there would be a President, Vice President, Speaker, and President Pro Tempore during this period, who would step forward in the event an attack removed these officials? This question takes on additional importance since the Cabinet, an important element in the order of succession, is generally in a state of transition at this time. The previous administration’s officers have generally resigned, while the incoming administration’s designees are usually in the midst of the confirmation process. It is not impossible to envision a situation in which not a single cabinet officer will have been confirmed by the Senate under these circumstances, thus raising the prospect

³⁵ Ibid., pp. 39-40.

³⁶ Ibid., p. 12.

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

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

of a de facto decapitation of the executive branch. This concern has led to several proposals in the 108th Congress.

Proposed Legislation in the 108th Congress

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

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

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

³⁹ See 3 U.S.C. § 19 “Amendments” for examples.

⁴⁰ Sen. Dodd subsequently co-sponsored.

⁴¹ Rep. Platts cosponsored H.R. 1354.

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

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

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

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

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

H.R. 2319. This bill, introduced on June 4, 2003 by Representative Christopher Cox and others⁴⁴ would also place the Secretary of DHS in the order of succession after the Attorney General. Section 2 of H.R. 2319 goes beyond S. 148 and H.R. 1354 in several aspects. First, it would clarify existing language in the 1947 Act by changing the language concerning referring to succession from “the Speaker of the House of Representatives” and the “President pro tempore of the Senate” to “the person holding the office of Speaker of the House of Representatives at the time such event, inability, or failure occurs” and “the person holding the office of President pro tempore at such time.”

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

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

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

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

This provision would address several of the issues cited earlier in this report that have been noted by critics of the Succession Act of 1947. First, by eliminating the displacement of a cabinet officer acting as President, except in cases of presidential or vice presidential inability, it would remove a potential source of instability: once installed as acting President, the cabinet officer would remain in this position for the balance of the presidential term, unless, as noted above, the officer is acting due to the presumably temporary inability of the President or Vice President. Further, under these circumstances it would almost certainly remove the possibility of a President and Vice President being succeeded by an acting President of a different party, which has proved to be an issue of continuing concern since passage of the Succession Act of 1947.⁴⁶ Finally, it would confer the acting presidency on a person whose most recent assignment has been executive and managerial, rather than legislative. This would, some suggest, provide a presumably experienced executive who would act as President. On the other hand, some might argue that continuing a cabinet officer as acting President *after* a Speaker or President Pro Tempore had qualified would violate the original intention of the Succession Act, which was to ensure that *elected* rather than *appointed* officers would succeed to the presidency. It can be further argued that experience as a Member of either house of Congress and service as Speaker or President Pro Tempore would not necessarily be inconsistent with executive experience and ability.

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

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

⁴⁵ See above at p. 4.

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

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

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

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

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

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

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

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

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

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

Related Measures.

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

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

⁴⁹ The question of "failure to qualify" relates generally to the presidential election process. In theory, it could mean that neither of the persons winning a majority of electoral votes for President and Vice President meets the constitutional qualifications of the two offices, i.e., natural born citizenship, 35 years of age, and 14 years of continual residence in the United States, but this contingency is extremely unlikely. The more likely, but still remote, situation would be in the event neither candidate wins a majority of electoral votes, and that the House and Senate are unable to assemble the majority of votes needed in the contingent election process to choose either a President or Vice President between the time they meet to count electoral votes (January 6, unless otherwise designated) and January 20, when the previous incumbents' terms expire. In such a case, there would be simultaneous vacancies in both offices due to a "failure to qualify." For further information on the contingent election process, please consult CRS Report RS20300, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

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

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

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

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

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

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

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

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

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

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

Other Options for Change

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

One proposal, suggested by John C. Fortier⁵⁰ at the joint Senate committee hearings, would have Congress establish a number⁵¹ of additional federal officers whose specific duties and function would be to be ready to assume the acting presidency if necessary. Fortier envisions that the President would appoint them, subject to Senate confirmation, and that obvious candidates would be governors, former presidents, vice presidents, cabinet officers, and Members of Congress, in other words, private citizens who have had broad experience in government. They would receive regular briefings, and would also serve as advisors to the President. A further crucial element is that they would be located outside the Washington, D.C. area, in order to be available in the event of a governmental “decapitation.” Fortier further suggested that these officers should be included ahead of cabinet officers

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

⁵¹ Fortier suggests four or five officers.

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

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

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

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

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

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

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

⁵⁴ John Fortier, Testimony, p. 13.

⁵⁵ *Ibid.*

⁵⁶ Akil Amar, Testimony, p. 2-3.

member of the cabinet, aware of and involved in the creation and execution of public policy.”⁵⁷

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

Concluding Observations

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

⁵⁷ Howard Wasserman, Testimony, p. 6.

⁵⁸ John Fortier, Testimony, p. 14

⁵⁹ Ibid.

Table 1. Presidential Successions by Vice Presidents

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

* Party Affiliation:

D = Democratic

R = Republican

W = Whig

** Cause of Vacancy:

1 = death by natural causes

2 = assassination

3 = resignation

Table 2. Vice Presidential Successions Under the 25th Amendment⁶⁰

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

* Party Affiliation: R = Republican

** Cause of Vacancy: 1 = resignation
2 = succession to the presidency

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

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

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