

**Planning for Emerging Threats:
Rethinking the Presidential Line of Succession**
*Fordham Law School Rule of Law Clinic**
Gregory Ascher, Myrna Nakhla, & Colin Shea
August 2022

Executive Summary of Recommendations

The Clinic recommends the following reforms related to the presidential line of succession for post-inaugural and pre-inaugural succession scenarios:

(1) Post-Inaugural Succession

- (a) Creation of a hybrid presidential line of succession statute that places Cabinet secretaries in the first five positions followed by legislators: (1) secretary of state; (2) secretary of defense; (3) attorney general; (4) secretary of homeland security; (5) secretary of the treasury; (6) speaker of the House; (7) House leader of the president's party; (8) Senate leader of the president's party; and (9) United States ambassador to the United Nations.
- (b) Creation of a bipartisan, bicameral committee empowered to change the line of succession: 12 members selected by House and Senate leaders—six from each chamber and each party—who could reorder the line of succession by majority vote. The committee could not remove a member of the line of succession who was acting as president. The default line of succession listed above would remain in place if the committee took no action.
- (c) Clarification that acting Cabinet secretaries are placed at the end of the line of succession.

(2) Pre-Inaugural Succession

- (a) Creation of a line of succession for a scenario where a presidential election fails to produce a winner. If no candidate has won a presidential election, the line of succession cannot give preference to a particular party based on the outcome of the election. We propose a legislative line of succession as follows: (1) speaker of the House; (2) House majority leader; (3) House minority leader; (4) House majority whip; and (5) House minority whip.
- (b) Creation of a line of succession for a scenario where the winning presidential and vice presidential candidates die, become disabled, or otherwise fail to qualify. The winning presidential candidate's party should have bearing on the line of succession in this scenario. We propose a legislative line of succession as follows: (1) House leader of the president-elect's party; (2) House whip of the president-elect's party; (3) Senate leader of the president-elect's party; (4) chair or ranking member of the House Permanent Select Committee on Intelligence—whoever belongs to president-elect's party; (5) chair or vice chair of the Senate Select Committee on Intelligence—whoever belongs to president-elect's party; and (6) speaker of the House.

* The Rule of Law Clinic is supervised by Professors John D. Feerick (jfeerick@fordham.edu) and John Rogan (rogan@fordham.edu).

Introduction

From the COVID-19 pandemic to the Ukraine war, terrorist plots to targeted attacks against government officials, such as Havana Syndrome incidents, recent events have highlighted possible threats to the continuity of presidential leadership. If the president and vice president became unavailable or unable, the line of succession in the Presidential Succession Act of 1947 would be reached. For example, it is possible that both the president and vice president could fall ill with COVID-19, creating a dual-inability. Similarly, increased tensions stemming from Russia's invasion of Ukraine highlight the possibility of a nuclear attack, which could impact many officials in the line of succession. The last few years alone have demonstrated that our nation's approach to presidential succession must reflect the realities of current threats. The Presidential Succession Act, in its present form, designates successors who might be ill-suited to discharge the powers and duties of the presidency. Some of the Clinic's other concerns with the statute include its constitutionality, inappropriate incentives it might create, and the democratic legitimacy of outcomes it might produce. The succession statute in place today does not provide the level of preparedness the United States needs for a crisis in the executive branch, making it a timely moment for reform.

This report proposes several reforms to the line of succession. Section I explores the history and mechanics of past iterations of the line of succession and presents the framework of the current presidential succession system. Section II discusses the main critiques of the line of succession and the Clinic's proposed reforms. This section proposes removing legislators from the beginning of the line of succession and replacing them with select Cabinet members. Section II also addresses reforms for two succession scenarios that might occur between Election Day and the Inauguration: (1) a presidential election that does not produce a winner and (2) the death, declination, inability, or "failure to qualify" of the president-elect and vice president-elect.

I. Historical Analysis of the Presidential Line of Succession

Article II, Section 1, Clause 6 of the Constitution empowers Congress to "provide for the case of Removal, Death, Resignation or Inability, both of the President and Vice President."¹ This gives Congress the authority to establish a presidential line of succession beyond the vice president. Congress first used this grant of power in 1792 to enact legislation establishing a line of succession. It subsequently revised the line in 1886 and 1947. This section explores the history of these laws and gives an overview of the larger presidential succession system, including the 25th Amendment.

A. Presidential Succession from 1792 to 1947

1. Presidential Succession Act of 1792 (1792-1886)

The Presidential Succession Act of 1792 named two successors to the presidency after the vice president: the president pro tempore of the Senate followed by speaker of the House of Representatives. A successor would serve as acting president in the case of a vacancy or inability in the offices of the president and the vice president. To serve in the line of succession, the law

¹ U.S. CONST. art. II, § 1, cl. 6.

required potential successors to meet the constitutional requirements for the presidency, including the age, residence, and natural born citizenship requirements. The successor would only serve as acting president temporarily until a special election to fill the vacancy. If the vacancy occurred late in the last full year of the incumbent's term of office, however, the successor would serve for the remainder of the term.²

During the 1792 Act's drafting, there was considerable debate over the inclusion of legislators in the line of succession. Some members of Congress believed that including them violated the separation of powers between the executive and legislative branches.³ There was also disagreement over whether legislators could be considered "Officers" in the sense intended by the Constitution's Succession Clause. Some members of the House believed that "Officers" referred to officials nominated by the president and confirmed by the Senate.⁴ In February 1792, the House of Representatives even approved a version of the statute that listed the secretary of state first in the line of succession.⁵ This proposal was short-lived, however, as the Senate rejected the House's version. Members of the Senate instead interpreted the term "Officers" to be much more expansive, deciding that a legislator-only line of succession would better serve the will of the people.⁶ Treasury Secretary Alexander Hamilton, a Federalist, also pressured senators from his party to keep the secretary of state out of the line of succession. He wanted to prevent his rival, Secretary of State Thomas Jefferson, a Democratic-Republican, from achieving more prominence than him.⁷

It soon became clear that the first Presidential Succession Act did not adequately address the issues that the country would face over the next century. The first indication that the prevailing presidential succession framework was inadequate occurred with Vice President John Tyler's succession.⁸ Tyler succeeded to the presidency after President William Henry Harrison abruptly died on April 4, 1841, only a month into his presidency. After Tyler's succession, the vice presidency was vacant, which made it more likely that the statutory line of succession could have been reached. In 1844, Tyler was sailing on the Potomac River aboard the USS Princeton when the ship's cannon exploded, killing the secretary of state, secretary of the Navy, and five other people on board. Tyler was below deck at the time of the explosion and left unharmed. If Tyler had died, the Senate president pro tempore would have become acting president.⁹ In 1853, the line of succession was almost reached again when President Franklin Pierce suffered from a serious case of malaria. Because Vice President William King had died from tuberculosis earlier in the same year, the vice presidency was again vacant.

Only months after President James Garfield took office in 1881, he was shot, leaving him disabled for 80 days.¹⁰ Garfield was never replaced and remained president until he died in

² See Act of Mar. 1, 1792, ch. 8, §§ 9, 10, 1 Stat. 239, 240–41 (repealed 1886).

³ See THOMAS H. NEALE, CONG. RSCH. SERV., PRESIDENTIAL SUCCESSION: PERSPECTIVES AND CONTEMPORARY ISSUES FOR CONGRESS 3 (2020).

⁴ See *id.*

⁵ See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 58–60 (1965).

⁶ See NEALE, *supra* note 3, at 4.

⁷ See John D. Feerick, *Presidential Inability: Filling in the Gaps*, 33 POL. & LIFE SCI. 11, 12 (2014).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

September 1881. When Vice President Chester Arthur eventually became president after Garfield's death, there was no president pro tempore or speaker, as the Senate was unable to elect someone due to partisan strife and the House had not yet convened.¹¹ This left the country without a presidential successor for several months. The same issue occurred again when Vice President Thomas Hendricks died in 1885. This gap in the line of succession prompted Congress to pass the Presidential Succession Act of 1886.

2. Presidential Succession Act of 1886 and the 20th Amendment (1886-1947)

The Presidential Succession Act of 1886 replaced legislators with Cabinet secretaries in the order of the creation of their departments. The successor would "act as President until the disability of the President or Vice-President is removed or a President shall be elected." To be eligible successors, Cabinet members needed to be duly confirmed as Cabinet secretaries with the advice and consent of the Senate and could not be under impeachment by the House.¹² This meant that acting secretaries were not eligible to succeed to the presidency. Congress also removed the provision allowing for a special election. Instead, the successor would serve out the remainder of the president's term except when a disabled president recovered. Nonetheless, the statute specified that if Congress was not in session or due to meet within 20 days of the successor taking office, the acting president was required to convene a special session with at least 20 days' notice.

The changes implemented by the 1886 Act addressed the shortcomings of a legislator-only line of succession. By replacing legislators with Cabinet secretaries, the new statute nearly guaranteed that potential successors would be of the same party or endorse similar policies as the president. It also removed the concerns about the constitutional eligibility of lawmakers and aimed to prevent vacancies in the line of succession that would exist if the Senate failed to choose a president pro tempore and the House failed to choose a speaker.¹³

The 1886 Act was implicated when President Theodore Roosevelt experienced a health crisis in 1902.¹⁴ Roosevelt had succeeded to the presidency following President William McKinley's assassination. Roosevelt needed emergency surgery shortly into his presidency for injuries he suffered from being thrown from his horse-drawn carriage. At the time, Roosevelt did not have the power to name a new vice president. The 25th Amendment would not provide this power until its ratification in 1967. Accordingly, the country was once again left with a gap in the line of succession for an extended period of time. Further, the vice presidency was vacant numerous times between 1886 and 1947, which increased the risk that the line of succession could have been reached. Examples include the death of Vice President Garret Hobart in 1899, the death of Vice President James S. Sherman in 1912, and when Vice President Calvin Coolidge became president in 1923 after President Warren Harding's death.

¹¹ See John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 919, 920 (2010).

¹² Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

¹³ See Feerick, *supra* note 7, at 14.

¹⁴ *Id.*

In 1933, the 20th Amendment was ratified to address issues that may arise during the pre-inaugural period.¹⁵ Under the amendment's Section 3, the vice president-elect becomes president on Inauguration Day if the president-elect dies before being inaugurated.¹⁶ Further, if the president-elect has not qualified for the presidency by Inauguration Day, then the vice president-elect serves as acting president until the president qualifies. The 20th Amendment further gives Congress the power to provide by law for situations in which neither a president-elect nor vice president-elect has qualified by Inauguration Day on January 20.¹⁷

B. Presidential Succession from 1947 to Present

1. Presidential Succession Act of 1947 (1947-Present)

Vice President Harry Truman's succession to the presidency in 1945 inspired new reform to the line of succession.¹⁸ Truman became president when President Franklin D. Roosevelt died just three months into his fourth term. As president, Truman raised concerns about the lack of a vice president for the rest of the term. Truman also argued that popularly elected officials should be first in line to succeed over appointed Cabinet officers. Accordingly, he proposed revising the line of succession. At Truman's behest, Congress adopted the Presidential Succession Act of 1947.

Legislators returned to the front of the line of succession under the 1947 Act.¹⁹ If both the presidency and vice presidency are vacant or both the president and vice president are unable to fulfill the duties of their respective offices, the speaker, followed by the president pro tempore, would act as president. These first two positions are followed by Cabinet secretaries in order of the creation of their departments. The statute also requires the speaker, president pro tempore, and Cabinet secretaries to resign from their positions before to succeed.

The 1947 Act also included a "bumping" provision.²⁰ Under the bumping provision, a Cabinet officer acting as president due to a lack of qualification, disability, or vacancy in the office of the speaker and president pro tempore can be supplanted by a qualified speaker or president pro tempore chosen at some later point. Cabinet secretaries, however, cannot bump other Cabinet secretaries.

The 1947 Act has since been amended to incorporate the creation of new Cabinet departments into the line of succession and remove departments that no longer exist. The current statutory line of succession, in order, includes: the speaker of the House, 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,

¹⁵ U.S. CONST. amend. XX.

¹⁶ U.S. CONST. amend. XX, § 3.

¹⁷ *Id.* ("Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected. . .").

¹⁸ See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 134, 135 (1995).

¹⁹ Presidential Succession Act of 1947, 3 U.S.C. § 19 (2006).

²⁰ 3 U.S.C. § 19(d)(2).

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, and the secretary of homeland security.²¹

Despite its attempts to address the concerns of the prior era, the current presidential succession statute is plagued with its own issues. The 1947 Act has never been invoked. However, concerns regarding presidential succession and vacancies in the vice presidency in this period were raised again after President John F. Kennedy's assassination in 1963.²² President Kennedy was shot while riding in a motorcade in Dallas, Texas, on November 22, 1963. Vice President Lyndon Johnson was riding in the same motorcade a few cars behind and could have suffered the same fate. After Johnson became president, the vice presidency remained vacant for 14 months. Johnson created a letter agreement with Speaker of the House John McCormack, allowing him to voluntarily transfer the powers and duties of the presidency to McCormack if Johnson became disabled.²³ Both the speaker and the president pro tempore at the time were of advanced age. McCormack was 70 years old and the president pro tempore was 86 years old. Kennedy's assassination, vacancies in the vice presidency, and concerns regarding the fitness of the speaker or president pro tempore to lead the nation highlighted the need for improvement to the succession system. In response, Congress adopted the 25th Amendment.²⁴

2. The 25th Amendment

The 25th Amendment was ratified in 1967 by three-fourths of the state legislatures. The amendment clarified the procedures for presidential disability. It also provided a method for filling a vacancy in the vice presidency.

Section 1 of the 25th Amendment provides that the vice president shall become president if the president dies, resigns, or is removed from office.²⁵ Section 2 empowers the president to nominate a vice president whenever that office is vacant.²⁶ A nomination must be approved by a simple majority of the members present and voting in both houses of Congress. Section 2 made it less likely that the statutory line of succession would be reached because it limits the amount of time that the vice presidency would be vacant. Section 3 allows the president to declare his own inability in a written declaration to the Senate president pro tempore and the speaker of the House.²⁷ Upon a declaration of inability, the vice president becomes acting president. The president can reclaim presidential authority by issuing another declaration to the same officials. Section 4 provides for a contingency where the president is unwilling or unable to declare an inability.²⁸ In such a scenario, the vice president acting with a majority of the Cabinet or an "other body" created by Congress can declare the president unable. If the president disagrees and

²¹ See *Presidents, Vice Presidents, and First Ladies of the United States*, USA.GOV (Jan. 31, 2022), <https://www.usa.gov/presidents>.

²² See John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004).

²³ See JEFFREY D. SCHULTZ, *PRESIDENTIAL SCANDALS* 386 (2000).

²⁴ U.S. CONST. amend. XXV.

²⁵ U.S. CONST. amend. XXV, § 1.

²⁶ U.S. CONST. amend. XXV, § 2.

²⁷ U.S. CONST. amend. XXV, § 3.

²⁸ U.S. CONST. amend. XXV, § 4.

the vice president and Cabinet or other body reassert their declaration, the president returns to power unless two-thirds of both houses agree within 21-days that the president is unable.

Since its ratification, the 25th Amendment has been invoked seven times. It saw its first uses during the Watergate Era.²⁹ In 1973, President Richard Nixon used Section 2 to nominate Gerald Ford to be vice president after Spiro Agnew's resignation. When Nixon resigned, Vice President Ford succeeded to the presidency under Section 1. Ford then used his power under Section 2 to nominate Nelson Rockefeller to be vice president. Significantly, the speaker at the time, Carl Albert, was a Democrat whose succession would have shifted control of the White House to a different political party.

The 25th Amendment's Section 3 has been invoked by Presidents Ronald Reagan, George W. Bush, and Joseph R. Biden to temporarily transfer their responsibilities to their vice presidents when they had medical procedures under general anesthesia.³⁰ In the modern era, the ambiguities and gaps in the presidential succession system continue to pose challenges. The attacks of September 11, 2001, for example, renewed the debate as to whether the current presidential succession framework would adequately safeguard the country in the event of a widespread catastrophe.³¹

II. Critiques and Proposed Reforms to the Presidential Line of Succession

The presidential line of succession set-out in the 1947 Act applies to succession scenarios that might occur before and after a president is sworn into office. The statute's provisions for both periods are flawed, and the Clinic recommends reforms to address those weaknesses.

A. Critiques of the Post-Inaugural Line of Succession

This subsection discusses the flaws in the line of succession's provisions for succession events that might occur after a president and vice president take their oaths of office on Inauguration Day until the end of their terms.

1. Cross-Party Succession

Because legislators are in the line of succession, a change in party control of the presidency is possible if there is neither an able president nor vice president.³² Since 1969, every president except President Carter, has spent at least some of his term with Congress controlled by the opposing party.³³ Furthermore, "the president's party has lost the national house popular vote in

²⁹ See Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 970 (2010).

³⁰ *Id.* at 975.

³¹ See Fortier & Ornstein, *supra* note 22, at 993.

³² See CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY (2009); Fordham Univ. Sch. of Law's Second Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917 (2017) [hereinafter Second Clinic Report].

³³ JAMES M. RONAN, LIVING DANGEROUSLY 123, 128 (2015).

six out of seven midterm elections” since 1994.³⁴ Cross-party succession could undermine the will of voters who elected the president to a four-year term.

2. Preparedness of Legislators

The speaker of the House and the president have distinct roles in our nation’s system of government, and the differences in their responsibilities could make the speaker ill-equipped to serve as acting president. Admittedly, though, the speaker is likely to have some relevant qualifications to discharge the presidency’s powers and duties. The speaker is a nationally and internationally recognized leader. Speakers are generally known around the world, including through foreign visits to key U.S. allies.³⁵ This is somewhat similar to the president’s role as a global leader. But the speaker will probably be focused on crafting legislation, pursuing her constituents’ interests, and ensuring that Congress functions. These duties might distract the speaker from focusing on international relations in the same way the president does.³⁶

The speaker does sit on the “Gang of Eight,” a group of congressional leaders who receive briefings from the intelligence community.³⁷ Under the Intelligence Oversight Act of 1980, the executive branch is mandated to keep some members of Congress fully informed of “any significant intelligence activity.”³⁸ These briefings probably provide key insights on global affairs and arguably prepare the speaker to serve as acting president. But these meetings may happen relatively infrequently, and, when they happen, a busy speaker could only be free for a few hours at a time. In contrast, the president typically receives intelligence briefings and engages with national security matters on a daily basis. Ultimately, the speaker may not necessarily be ready to act as president.

It may also be argued that the Senate president pro tempore is qualified to lead the executive branch given his extensive experience in government as the longest serving senator of the majority party.³⁹ However, the president pro tempore is likely less qualified than the speaker because he is not a member of the Gang of Eight,⁴⁰ meaning that he may not be exposed to the same level of international intelligence information as the speaker. Also, the president pro tempore tends to be of an advanced age. Voters sometimes believe age to be an important consideration in assessing potential presidents. For example, nearly half of Democrats in 2019

³⁴ See Geoffrey Skelley & Nathaniel Rakich, *Why the President’s Party Almost Always Has a Bad Midterm*, FIVETHIRTYEIGHT (Jan. 3, 2022), <https://fivethirtyeight.com/features/why-the-presidents-party-almost-always-has-a-bad-midterm/>.

³⁵ See, e.g., Jason Abbruzzese & Max Burman, *Pelosi Leads Congressional Delegation to Meet with Zelenskyy in Kyiv*, NBC NEWS (May 1, 2022), <https://www.nbcnews.com/news/world/pelosi-congressional-delegation-meet-zelenskyy-kyiv-rcna26806>; Dean McLaughlin, *Nancy Pelosi Visits Irish Border and Derry*, BBC NEWS (Apr. 18, 2019), <https://www.bbc.com/news/uk-northern-ireland-foyle-west-47973814>.

³⁶ See *The Executive Branch*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-executive-branch/>.

³⁷ See *Gang of Eight*, BALLOTPEDIA, https://ballotpedia.org/Gang_of_Eight.

³⁸ See *id.*

³⁹ See *President Pro Tempore*, U.S. SENATE, https://www.senate.gov/reference/Index/President_Pro_Tempore.htm.

⁴⁰ See BALLOTPEDIA, *supra* note 37.

told Pew Research that the best age for a new president is “in their 50s,”⁴¹ which is significantly younger than typical presidents pro tempore.

3. Geographic Vulnerability

The current line of succession has a serious geographic vulnerability. Most, if not all, of the individuals in the current line are frequently located in Washington, D.C., at the same time. In the event of a catastrophic incident, such as a nuclear or biological attack on the city, the line of succession could be wiped out.⁴²

4. Democratic Legitimacy

One may argue that it is more democratic to have elected lawmakers in the line of succession as opposed to unelected Cabinet secretaries. In fact, President Truman called on Congress to pass the current line of succession statute because he did not believe that he should choose his successor.⁴³ But appointment by the president does confer significant democratic legitimacy on Cabinet secretaries. Unlike legislators, the president is chosen in a national election.⁴⁴ The American people probably know what type of political predilections possible Cabinet members will have when they vote for a certain presidential candidate. This is in contrast to the speaker and president pro tempore, who are both elected by their own local constituencies.⁴⁵ Additionally, all Cabinet appointments are subject to Senate confirmation, which adds more legitimacy.⁴⁶ The speaker is chosen by a majority of the House, which provides some democratic legitimacy. But the president pro tempore automatically receives their position based on their seniority in their political party and the Senate.

Furthermore, it is important to note that President Truman only advocated for including legislators with an assumption that a special election would be held in a timely manner after a legislator’s succession in the event of death, resignation, or removal of the president.⁴⁷

5. Inappropriate Incentives

Inappropriate incentives exist that could influence legislators to act in a way that could lead to their succession to the presidency. For example, a legislator might support a president’s impeachment if the legislator is a potential successor. This could have theoretically happened

⁴¹ *Nearly Half of Democrats Say the Best Age for a President Is “In Their 50s,”* PEW RSCH. CNTR. (May 23, 2019), <https://www.pewresearch.org/politics/2019/05/23/nearly-half-of-democrats-say-the-best-age-for-a-president-is-in-their-50s/>.

⁴² See CONTINUITY OF GOV’T COMM’N, *supra* note 32.

⁴³ See Second Clinic Report, *supra* note 32.

⁴⁴ Granted, there have been five times in which the electoral vote outweighed the national vote. See *5 of 46 Presidents Came into Office Without Winning the National Popular Vote*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/5-46-presidents-came-office-without-winning-national-popular-vote>.

⁴⁵ U.S. CONST. art. I, § 2, cl. 5.

⁴⁶ See U.S. CONST. art. II, § 2, cl. 2.

⁴⁷ See Harry S. Truman, Special Message to the Congress on Succession to the Presidency (June 19, 1945), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-succession-the-presidency>; Second Clinic Report, *supra* note 32.

after Spiro Agnew resigned from the vice presidency in 1973.⁴⁸ If President Richard Nixon had not subsequently resigned, he almost certainly would have faced impeachment, and the Democratic speaker would have been able to cast a vote. Another conflict of interest could arise if a president tried to use the 25th Amendment to fill a vacancy in the vice presidency. A speaker, particularly one who did not belong to the president's party, might attempt to slow or block House approval of the pick in order to keep themselves next in line to the presidency.

The line of succession statute could discourage lawmakers from acting as president when the statute is triggered. The Constitution's Incompatibility Clause and the succession statute both require that a legislator resign from Congress before assuming the role of acting president.⁴⁹ A passionate legislator may be so invested in their position that they might be hesitant to resign from Congress. A lawmaker may also not want to be distracted in her role as a legislator for a temporary role as acting president, especially during a busy election season. Also, in a case of temporary presidential disability, the speaker or the president pro tempore may not be willing to resign to assume the role of acting president. Her role as acting president would likely last for a short time and she would not be able to return to her original position when the president recovers.

6. Bumping Provision

The Succession Act's "bumping" provision could further disrupt continuity of leadership and raise constitutional concerns. This provision prevents a Cabinet member who is acting as president from continuing in that role if a speaker or president pro tempore becomes able to serve. For example, if the secretary of state becomes acting president because the president and top three officials in the line of succession are unavailable, and the House subsequently elects a new speaker, then the new speaker "bumps" the secretary of state out of the acting president position.⁵⁰

In a national crisis, like a nuclear strike on Washington, D.C., that killed or disabled many executive and legislative branch officials, the nation may not know who its leader is on a permanent basis. The bumping provision could lead to multiple leaders in a short period of time if individuals in the succession line recovered or new officials were chosen. This could cause significant instability in the executive branch. Legislators could choose an acting president in a crisis by electing a new speaker or president pro tempore, potentially leading to a party change in the executive branch. Furthermore, only a small number of members of Congress would be selecting the next leader of the country in a crisis where many members had been killed.

This provision is also constitutionally suspect. It could be argued that the Constitution grants Congress the power to name only a single "Officer,"⁵¹ not multiple officers, even in times of national crisis.

⁴⁸ See *Vice President Agnew Resigns*, HISTORY (Nov. 30, 2021), <https://www.history.com/this-day-in-history/vice-president-agnew-resigns>.

⁴⁹ See U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either Houser during his Continuance in Office."); 3 U.S.C. § 19(a)-(b) (2012).

⁵⁰ See Brad Sherman, *Serious Flaws Exist in Our Presidential Succession Laws*, ROLL CALL (Jan. 31, 2011), <https://sherman.house.gov/media-center/opinion-editorials/serious-flaws-exist-in-our-presidential-succession-laws>.

⁵¹ See U.S. CONST. art. II, § 2.

But there is a potential advantage to the bumping provision. If a lower-ranking or ill-equipped Cabinet secretary became acting president, it might make sense for a much more experienced lawmaker to take over as president, even if that lawmaker is not from the president's party.

7. Questionable Constitutionality

There are arguments that legislators are not among the “Officer[s]” whom the Constitution allows Congress to appoint as presidential successors.⁵² Some believe the term “Officer” is short for “Officer of the United States,” which refers to executive and judicial branch officers nominated by the president and confirmed by the Senate.⁵³ Yet scholars, like Joel Goldstein, believe that the legislative history is too “inconclusive” to say that the Constitution bars legislators from the line of succession.⁵⁴ Furthermore, Goldstein believes that it has been such a long period of time in which legislators have been in the line of succession—169 years—that they are not necessarily barred from the line of succession.⁵⁵

B. Clinic Reform Proposal for the Post-Inaugural Line of Succession

To address the flaws in the current line of succession, the Clinic recommends changing the composition of the line of succession and creating a process for reordering the line as required by circumstances.

1. Hybrid Line of Succession

The Clinic recommends making Cabinet members the first five individuals in the line of succession, followed by legislators and the U.S. ambassador to the United Nations. This reform would move legislators further down in the order of succession. Rather than ordering Cabinet secretaries based on the age of their departments, as the 1947 Acts does, we propose ordering the line based on the inherent qualities and qualifications of each Cabinet position.

The Clinic recommends that the default order for the presidential line of succession be: (1) secretary of state, (2) secretary of defense, (3) attorney general, (4) secretary of homeland security, (5) secretary of the treasury, (6) speaker of the House, (7) House leader of the president's party, (8) Senate leader of the president's party, and (9) U.N. ambassador.

As discussed, legislators may not be well-equipped to act as president and their constitutional eligibility is questionable. Nevertheless, completely removing legislators might make the politics of passing a reformed line of succession harder. A hybrid Cabinet-lawmaker line would also help account for a scenario where many or all of the officials in the line of succession were dead or disabled. A disaster could kill or disable the president, vice president, and a wide swath of officials in the line of succession within a short period of time. Cabinet secretaries must be

⁵² Fordham Univ. Sch. of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1 (2012).

⁵³ *See id.*

⁵⁴ *See* Goldstein, *supra* note 29, at 1021.

⁵⁵ *See id.*

appointed by the president and confirmed by the Senate, which may be impossible to do quickly during a crisis. But Congress can elect new leadership even if many legislators have been killed or incapacitated. As Seth Barrett Tillman suggests, by keeping lawmakers in the line of succession, Congress could appoint replacements for those positions if the Cabinet secretaries in the line were unable to serve.⁵⁶

The lawmakers we propose including in the line of succession belong to the “Gang of Eight.” As discussed, this group is briefed on classified intelligence matters by the executive branch.⁵⁷ Accordingly, these officials will have information that may prove crucial in a crisis that they might need to manage as acting president.

Finally, to account for the geographic vulnerability caused by most members of the proposed line of succession being primarily located and based in Washington, D.C., the Clinic recommends including the U.S. ambassador to the United Nations as the final member of the line. The U.N. ambassador is based in New York, and, as Roy Brownell observes, their inclusion could help address the geographic vulnerability.⁵⁸

The end of the line of succession would most likely be reached if a catastrophic event caused mass casualties in the executive and legislative branches. Recent history has illustrated a range of dire threats facing the nation. Pandemics, advanced warfare, increased likelihood and severity of natural disasters, as well as other potentially calamitous events necessitate that the succession line contain fallback provisions.

2. Assessing Qualifications of the Cabinet Positions

A situation that might require the line of succession’s use will most likely be one of great crisis. As such, the Clinic considered the qualifications of Cabinet secretaries based on the level of their interactions with the president, the information they are furnished with on a regular basis, and other qualities inherent to their jobs that would give them the greatest potential to act as president in a time of crisis. We also evaluated each Cabinet position’s required knowledge in economics, military issues, foreign relations, and domestic security.

The default-hybrid line of succession is arranged so that the United States has the best chance of inheriting a qualified and knowledgeable person as its leader if disaster strikes. Yet, the Clinic understands that the individuals occupying these different Cabinet positions and roles as legislators have a wide variety of qualities that might make them better suited to ascend to the presidency than others. As such, we also propose a bipartisan congressional committee that can rearrange the order of the first five positions in the line of succession.

⁵⁶ See Seth Barrett Tillman, *Why Strict Cabinet Succession Is Always Bad Policy: A Response to Professor Jack Goldsmith and Ben Miller-Gootnick*, HARV. NAT’L. SEC. J. ONLINE (Apr. 8, 2020), <https://harvardnsj.org/2020/04/why-strict-cabinet-succession-is-always-bad-policy-a-response-to-professor-jack-goldsmith-and-ben-miller-gootnick/>.

⁵⁷ See BALLOTPEdia, *supra* note 37.

⁵⁸ Video Interview with Roy E. Brownell II, Member, Continuity of Government Commission (Mar. 30, 2022).

3. Bipartisan, Bicameral Committee to Reorganize Line of Succession

The most novel element of the Clinic's proposal is the creation of a bipartisan, bicameral congressional committee that can reorder the succession line based on its judgments regarding the preparedness of Cabinet secretaries in the line of succession. The committee should consist of legislators picked by House and Senate leaders. Given its small size, the committee should be able to convene quickly and make reshuffling decisions throughout a presidency as the need arises. But this committee would not have the authority to remove a Cabinet secretary who was serving as acting president, only to adjust the order prior to the succession statute's invocation.

The joint committee proposal is designed to respond to the reality that some Cabinet members in the line might be better suited to serve as acting president than someone who might be slotted ahead of them in the default line. The reasons that a Cabinet secretary could be deemed preferable to someone ranked higher are numerous. A given Cabinet member may suffer from health issues, be in the midst of political scandal, or not belong to the current president's party. Additionally, the circumstances the nation faces, such as a national security or financial crisis, might cause one member to be preferable over another. Furthermore, individuals in the line will have a variety of qualities and experience that can serve to make them more or less appealing for the presidency. The committee would be tasked with acting prospectively to best position the succession line to provide the most effective acting president.

In recent presidential administrations, there have been instances where the proposed committee might have proven useful, had the succession line we propose been in place. For example, Janet Reno, the attorney general under President Clinton, was diagnosed with Parkinson's disease in 1996, which might have been a concern for someone acting as president.⁵⁹ Various Cabinet secretaries in recent administrations have been the subject of political scandal.⁶⁰ Currently, Attorney General Merrick Garland and Defense Secretary Lloyd Austin are political independents, which might be a concern for the committee based on ensuring party continuity in the White House.⁶¹

Some Cabinet secretaries might not be eligible to serve as president, such as secretaries who are not natural born citizens. In those cases, the line of succession passes over them. Additionally, Cabinet secretaries are subject to removal throughout a given administration and might resign. These contingencies may provide additional reasons for the proposed committee to reorganize the line of succession.

The choice to institute a bipartisan committee rather than a committee only of members in the president's party is based on many considerations. The opposition party's input would serve to promote democratic legitimacy and fairness. Furthermore, the committee's bipartisanship could

⁵⁹ See *Bill Clinton - Administration*, MILLER CTR., <https://millercenter.org/president/clinton/bill-clinton-administration>.

⁶⁰ See, e.g., Alison Durkee, *The Mike Pompeo Scandals Keep Piling Up*, VANITY FAIR (May 21, 2020), <https://www.vanityfair.com/news/2020/05/mike-pompeo-scandals-visited-donors-on-official-state-trips>; Hans A. von Spakovsky, *Obama's 'Scandal Free Administration' is a Myth*, HERITAGE FOUND. (Jan. 16, 2017), <https://www.heritage.org/political-process/commentary/obamas-scandal-free-administration-myth>.

⁶¹ See *The Cabinet*, WHITE HOUSE, <https://www.whitehouse.gov/administration/cabinet/>.

help prevent an especially polarizing or divisive official from serving as acting president. This could be important in a time of likely crisis that would require more unity between the parties.

The proposal is not without its potential drawbacks. The committee could be abused for partisan purposes to cast poor light on members of the president's Cabinet. It is easy to imagine in today's political climate a group of legislators from the party opposite the president's misusing the joint committee's power. The media could construe a reassignment to a lower position in the line as a vote of no confidence in an individual's ability to lead, something that could have serious implications for a Cabinet member who aspires to higher office. Another complication the Clinic has considered is the public's perception and understanding of the line of succession. If the public expects that one person will act as president but someone else steps into that role based on actions taken by the committee, it is hard to determine the possible consequences or negative public reaction that could ensue.⁶²

While the Clinic acknowledges potential shortcomings, it appreciates that flexibility in the order of presidential successors is important to ensure the best possible outcome if dual inability or vacancy arises at the top of the executive branch. By having a malleable line of succession that is subject to legislative adjustment and oversight, the U.S. will have an additional safeguard against potentially unfit leadership in a time of crisis.

4. Composition of the Committee

Our proposed joint committee would consist of 12 members, with equal representation from each party and chamber of Congress. The Clinic believes that the proposed joint committee should embody a similar spirit inherent to the House Select Committee on the Modernization of Congress—a committee with an equal number of members from both parties that is working to improve how Congress functions.⁶³ Ideally, this committee would understand that its powers could be used against presidents of both parties and would accordingly act in the interest of efficiency and preparedness, not partisanship. Furthermore, the size of this committee would allow it to address issues quickly.

The members of this group would be selected by the speaker and minority leader in the House and majority and minority leaders in the Senate. Each leader would choose three members from their respective chamber.

The speaker and House minority leader would select two members from the House Committee on Rules, two from the Permanent Select House Committee on Intelligence, and two from the House Joint Economic Committee. The Senate majority and minority leaders would select two members from the Senate Committee on Rules and Administration, two members from the Select Senate Committee on Intelligence, and two members from Senate Joint Economic Committee.⁶⁴

⁶² Video Interview with Roy E. Brownell II, *supra* note 58 (raising many important critiques of the proposed committee).

⁶³ See *History*, SELECT COMM. ON THE MODERNIZATION OF CONGRESS, <https://modernizecongress.house.gov/about/history>.

⁶⁴ See *Committees*, U.S. SENATE, <https://www.senate.gov/committees/>.

5. Voting Mechanism for the Committee

The Clinic recommends that, to reassign a Cabinet secretary to a different position in the line, the committee must possess a majority vote. If a majority vote cannot be reached to create a revised ordering, then it will remain as designated by the default order.

A simple majority vote is appropriate for the circumstances under which this joint committee would be convened. In the interest of preparedness and considering the potential for the committee to meet multiple times in an administration, this committee needs to be properly reactive. A higher threshold would render the committee toothless. In moments where there is an even split, the logic of the default ordering serves as a responsible fallback order.

In the event of a tie vote, Congress might consider allowing the president to cast a deciding vote. This would add further executive input into its own contingency planning and could add another layer of perceived legitimacy in the public eye.

6. Procedure for Cabinet Vacancies

In the event of a vacancy in a Cabinet position named in the line of succession, that position should be temporarily placed at the end of the default order. The acting secretary for that Cabinet department will be the person to occupy that spot until a new Cabinet secretary is confirmed. At that time, the Cabinet secretary should be placed back into their designated slot within the line. Whenever a Cabinet member within the proposed line is confirmed, the joint congressional committee should be required to convene within 21 days to conduct a reordering vote of the line or decide to take no action.

C. Pre-Inaugural Succession

The Clinic recommends separate lines of succession for two pre-inaugural scenarios: (1) the failure of a presidential election to produce a winner and (2) death, inability, or “failure to qualify” of the winning presidential and vice-presidential candidates. This varied approach is necessary because the scenarios are significantly different. In one instance, no party has won the White House for the next term. In the other situation, the country has voted on a presidential ticket from one of the two parties, and the party alignment of the winners must be considered.

1. Scenario 1: Failed Presidential Election

Two of the last five elections involved major controversies over the outcomes: the 2000 Florida recount and the aftermath of 2020 election that culminated with the January 6 Capitol attack. On top of election controversies, it is also possible that a terrorist attack or natural disaster could interfere with holding an election to the extent that it may not be possible to choose a president according to plan.

Under the 20th Amendment and Presidential Succession Act of 1947, if there was no president-elect or vice president-elect by Inauguration Day, it would be a dual “failure to qualify” and the current line of succession would take effect. It would not be especially problematic for the

speaker of the House to act as president in this situation. But the rest of the line of succession is not appropriate for a failed election scenario. For the reasons previously discussed, the Senate president pro tempore is likely to be ill-equipped to serve as acting president. And the Cabinet secretaries would have highly questionable claims to the presidency given that they would have been appointed by a president who had not won reelection for the new term.

a. Reform Proposal

In the event that a presidential election has failed to produce a winner, the Clinic proposes a legislative line of succession consisting of leaders in the House of Representatives. The reasoning behind choosing the succession line from the House is simple: its close connection to the American public. The House's full membership is elected more frequently than the Senate's membership and, as a result, it is a better indication as to the preferences of the nation at any given time. House leaders will also have been selected more recently to reflect national political leanings and be closer to the public altogether. For these reasons, the Clinic recommends looking to leadership in what has been affectionately referred to as the "People's House."

If the electoral process fails to produce neither a president-elect nor vice president-elect by Inauguration Day, we recommend using the following line of succession: (1) speaker of the House, (2) House majority leader, (3) House minority leader, (4) House majority whip, and (5) House minority whip.

2. Scenario 2: Vacancy or Inability in the President-Elect and Vice President-Elect Positions before or at Inauguration

What happens if there is a dual-inability or dual-vacancy before or even at the Inauguration? As with the failed election scenario, power in the executive branch could be given to the speaker, president pro tempore, or even Cabinet secretaries under the current succession statute. But Cabinet succession raises more concerns in this scenario. First, if the dual-inability or dual-vacancy occurred late in the pre-inaugural period, such as at the Inauguration, most Cabinet secretaries probably would have resigned. Second, all of the members of the current line of succession might not be from the president-elect's party.

a. Reform Proposal

An instance where the president-elect and vice president-elect have both died or are otherwise unable to take office on Inauguration Day is addressed by the 20th Amendment. Section Three of the amendment states that "the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified."⁶⁵ The Presidential Succession Act applies the same line of succession for post-inaugural contingencies to pre-inaugural failure to qualify situations. Accordingly, the speaker of the House would become acting president on Inauguration Day if both the president-elect and vice president-elect were unable take office. Because the speaker might not be from the president-elect's party, the current

⁶⁵ U.S. CONST. amend. XX, § 4.

line of succession could lead to the party that lost the presidential election taking the White House. With this in mind, the Clinic recommends that Congress enact a statute that looks to congressional leaders from the president-elect's party to serve as acting president. The democratic will of the voters must be reflected. A line of succession that consists of congressional leaders in the winning candidate's party would respect the electorate's preferences.

The line of succession for this scenario should be as follows: (1) House leader of president-elect's party, (2) House whip of president-elect's party, (3) Senate leader of president-elect's party, (4) chairman or ranking member of the House Permanent Select Committee on Intelligence (whoever belongs to the president-elect's party), (5) chair (or vice-chair) of the Senate Select Committee on Intelligence (whoever belongs to president-elect's party), and (6) speaker of the House, if the speaker is not of the president's party.

b. What if the Inability to be Inaugurated is Permanent?

For a situation where it became clear that neither the president-elect nor vice president-elect would ever take office, such as due to death, permanent disability, or refusal to take office, it might be sensible to provide for holding another presidential election at the next midterm congressional election. This would ensure that there is a democratically elected president for at least part of the term. Unfortunately, the prospect of a new election and the surrounding circumstances leading to its need could invite any number of subversive actions from domestic and foreign actors because the U.S. would be in an especially precarious position. Beyond that, the nation would have to take the necessary steps to coordinate an election. The host of logistical and security questions surrounding this process is a problem that cannot be answered by this report.