

6-2012

Ensuring the Stability of Presidential Succession in the Modern Era: Report of the Fordham University School of Law Clinic on Presidential Succession

Fordham Law School Clinic on Presidential Succession

Follow this and additional works at: http://ir.lawnet.fordham.edu/twentyfifth_amendment_reports



Part of the [Law Commons](#)

Recommended Citation

Fordham Law School Clinic on Presidential Succession, "Ensuring the Stability of Presidential Succession in the Modern Era: Report of the Fordham University School of Law Clinic on Presidential Succession" (2012). *Reports*. 3.
http://ir.lawnet.fordham.edu/twentyfifth_amendment_reports/3

This Article is brought to you for free and open access by the Twenty-Fifth Amendment Archive at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Reports by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ENSURING THE STABILITY OF PRESIDENTIAL SUCCESSION IN THE MODERN ERA:

Report of the Fordham University School of Law
Clinic on Presidential Succession



This advance draft was prepared by students in the Fordham University School of Law
Clinic on Presidential Succession and is subject to revision before publication.

The official version of this report will be published in Volume 81 of the *Fordham Law Review*.



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

ENSURING THE STABILITY OF PRESIDENTIAL SUCCESSION IN THE MODERN ERA:

Report of the Fordham University
School of Law Clinic on
Presidential Succession

June 2012

This advance draft was prepared by students in the Fordham University School of Law Clinic on Presidential Succession and is subject to revision before publication.

The official version of this report will be published in Volume 81 of the *Fordham Law Review*.



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

SUMMARY OF CONTENTS

I. AN ACCOMPANYING LETTER	8
II. ACKNOWLEDGMENTS	9
III. FOREWORD	10
IV. EXECUTIVE SUMMARY	11
V. INABILITY AND PRESIDENTIAL SUCCESSION ISSUES	16
VI. LINE OF SUCCESSION ISSUES	27
VII. PRE-INAUGURATION SUCCESSION CONTINGENCIES	35
VIII. SUMMARY OF RECOMMENDATIONS	44

APPENDICES

A. CONSTITUTIONAL, STATUTORY, AND PARTY RULE PROVISIONS	46
B. EXECUTIVE DECLARATIONS OF INABILITY, LETTER AGREEMENTS & SECTION 3 LETTER PRECEDENTS	54
C. LEGISLATIVE HISTORY OF THE PRESIDENTIAL SUCCESSION ACTS	60
D. POST-9/11/2001 PROPOSALS AND PRESIDENTIAL SUCCESSION INITIATIVES	70
E. ACTING CABINET SECRETARIES AND ACTING LEGISLATIVE LEADERSHIP	78
F. CHARTS	81
G. STUDENT PROFILES	103
H. BIBLIOGRAPHY	105

TABLE OF CONTENTS

I.	AN ACCOMPANYING LETTER	8
II.	ACKNOWLEDGMENTS	9
III.	FOREWORD	10
IV.	EXECUTIVE SUMMARY	11
V.	INABILITY AND PRESIDENTIAL SUCCESSION ISSUES	16
	A. Introduction.....	16
	B. The Twenty-Fifth Amendment	16
	1. <i>History of the Twenty-Fifth Amendment</i>	16
	2. <i>Applications of the Twenty-Fifth Amendment</i>	17
	C. Contingencies Not Addressed by the Twenty-Fifth Amendment	17
	1. <i>Inability of the President in Certain Circumstances</i>	18
	2. <i>Inability of the Vice President in Certain Circumstances</i>	18
	3. <i>Inability of the Acting President in Certain Circumstances</i>	19
	D. Recommendations.....	19
	1. <i>Statute</i>	19
	a. Congressional Authority.....	20
	b. The Role of the Next in the Line of Succession in Determining Incapacity	21
	c. Summary.....	21
	2. <i>Executive Action</i>	22
	a. Historical Support for Executive Declarations of Inability.....	22
	b. Summary	23
	3. <i>Other Options</i>	23
	a. Vice-Presidential Inability.....	23
VI.	LINE OF SUCCESSION ISSUES	27
	A. Introduction.....	27
	B. Constitutional Concerns	27
	1. <i>Constitutionality of the Legislative Line of Succession</i>	27
	2. <i>Presidential Qualifications</i>	29
	3. <i>“Bumping” Provision</i>	30
	C. Uncertainty in Times of Presidential Succession.....	30
	1. <i>Acting Secretaries in the Line of Succession and Structural Issues Raised</i>	30
	D. Additional Concerns.....	31
	1. <i>Democratic Pedigree</i>	31
	2. <i>Party Continuity</i>	32
	3. <i>Historical Precedent</i>	32
	E. Recommendations For Future Action	32
	1. <i>Executive Line of Succession</i>	32
	2. <i>Binary Line of Succession</i>	32

TABLE OF CONTENTS

(continued)

F. Recommendations For Immediate Action	33
1. <i>Acting Secretaries</i>	33
VII. PRE-INAUGURATION SUCCESSION CONTINGENCIES	35
A. Introduction.....	35
B. Legal Framework.....	35
C. Succession Prior to the General Election.....	37
1. <i>Succession Prior to the National Party Convention</i>	37
2. <i>Succession After the National Party Convention</i>	38
3. <i>Recommendations</i>	38
D. Succession After General Election but Before the Meetings of Electoral College.....	38
1. <i>Recommendations</i>	40
E. Succession After the Electoral College Vote but Before the Counting and Declaration of Electoral Votes by Congress	40
1. <i>Recommendations</i>	40
F. Succession after Count and Declaration of Electoral Votes by Congress but before Inauguration Day	41
1. <i>Recommendations</i>	41
VIII. SUMMARY OF RECOMMENDATIONS	44
APPENDICES	
A. Constitutional, Statutory, and Party Rule Provisions	46
1. Article I, Section 2, Clause 1	46
2. Article I, Section 2, Clause 2	46
3. Article I, Section 2, Clause 3	46
4. Article I, Section 2, Clause 4	46
5. Article I, Section 2, Clause 5	46
6. Article I, Section 3, Clause 2	46
7. Article I, Section 3, Clause 3	46
8. Article I, Section 3, Clause 4	46
9. Article I, Section 3, Clause 5	46
10. Article I, Section 3, Clause 6	46
11. Article I, Section 3, Clause 7	47
12. Article I, Section 5, Clause 1	47
13. Article I, Section 5, Clause 2	47
14. Article I, Section 5, Clause 3	47

TABLE OF CONTENTS

(continued)

15. Article I, Section 5, Clause 4	47
16. Article II, Section 1, Clause 1.....	47
17. Article II, Section 1, Clause 2.....	47
18. Article II, Section 1, Clause 4.....	47
19. Article II, Section 1, Clause 5.....	47
20. Article II, Section 1, clause 6.....	47
21. Article II, Section 1, Clause 7.....	47
22. Article II, Section 1, Clause 8.....	48
23. Article II, Section 3.....	48
24. Article II, Section 4.....	48
25. Twelfth Amendment.....	48
26. Twentieth Amendment.....	48
27. Twenty-Fifth Amendment.....	49
28. Presidential Succession Act of 1792.....	49
29. Presidential Succession Act of 1886.....	51
30. Presidential Succession Act of 1947.....	52
31. Rule Number 9 of the Republican Party	52
32. Selected Sections of the Charter and Bylaws of the Democratic Party.....	53
B. Executive Declarations of Inability, Letter Agreements & Section 3 Letter Precedents.....	54
1. <i>Past Presidential Letter Agreements</i>	54
a. Letter Agreement During the Eisenhower Administration.....	54
b. Letter Agreement During the Kennedy Administration.....	55
c. Letter Agreement From President Johnson to Speaker John W. McCormack.....	56
d. Letter Declarations During the Reagan Administration	56
2. <i>Letters Pursuant to Section 3 of the Twenty-Fifth Amendment</i>	57
a. Letters During the George W. Bush Administration.....	57
3. <i>Sample Executive Declarations of Inability</i>	58
a. Sample Presidential Executive Declaration of Inability.....	58
b. Sample Vice-Presidential Executive Declaration of Inability.....	58
C. Legislative History of the Presidential Succession Acts.....	60
1. <i>The Presidential Succession Act of 1792</i>	60
2. <i>The Presidential Succession Act of 1886</i>	61
a. Debates Leading Up To the 1886 Act	61
3. <i>The Presidential Succession Act of 1947</i>	66

TABLE OF CONTENTS

(continued)

D. Post-9/11/2001 Proposals and Presidential Succession Initiatives	70
1. <i>Proposed Post-9/11/2001 Legislation</i>	70
a. Legislators.....	70
b. Bumping	70
c. Mandatory Resignation Provision.....	70
d. Acting Secretaries	71
e. Speaker of the House <i>Pro Tempore</i>	71
f. Successors Outside the Washington, D.C. Area.....	71
2. <i>Additional Post-9/11/2001 Proposals</i>	71
a. Introduction.....	71
b. Recommendations of The Continuity of Government Commission	71
i. Extend the Presidential Line of Succession Outside of Washington, D.C.	71
ii. Remove Legislators From the Line of Succession.....	72
iii. Provide for a Special Presidential Election	72
iv. Reorder the Line of Succession	72
v. Remove Acting Secretaries.....	72
vi. Supplement Inability Procedures.....	72
vii. Address Inaugural and Pre-Inaugural Contingencies	73
c. Proposals by Dr. John C. Fortier	73
i. Binary Line of Succession	73
ii. Remove the Bumping Provision.....	74
d. Proposal by Professor Akhil Reed Amar: New Position of Assistant Vice President.....	74
e. Proposals by Professor Howard Wasserman	74
i. Reorder the Line of Succession	75
ii. Create the Position of First Secretary	75
iii. Allow for Change in the Seat of Government.....	75
f. Proposals by Miller Baker.....	75
i. Reorder the Line of Succession.....	75
ii. Remove the Bumping Provision	76
iii. Create a Cabinet Bumping Provision.....	76
E. Acting Cabinet Secretaries and Acting Legislative Leadership	78
1. Acting Secretaries	78
2. The Speaker of the House <i>Pro Tempore</i> and The Acting President <i>Pro Tempore</i> of the Senate	79

TABLE OF CONTENTS

(continued)

F. Charts	81
1. Post-9/11 Legislative Proposals.....	81
2. List of Speakers of the House of Representatives	83
3. List of Presidents <i>Pro Tempore</i> of the Senate.....	87
4. Pre-Inauguration Day Contingencies	97
5. State Statutes Binding Electors.....	100
G. Student Profiles.....	103
H. Bibliography.....	105
1. Primary Sources	105
a. Constitutional Provisions	105
b. Federal Statutory Provisions.....	105
c. State Statutory Provisions	105
d. Proposed Legislation	105
e. Congressional Rules	106
f. Congressional Record.....	106
g. Administrative and Executive Materials	106
h. Presidential Papers.....	106
i. Cases	107
j. Congressional Committee Hearings	107
k. Congressional Committee Reports	108
l. Party Rules	108
m. Letters & Memoranda	108
2. Secondary Sources.....	108
a. Books	108
b. Pamphlets	109
c. Newspaper and Magazine Articles	109
d. Interviews and Speeches.....	109
e. Law Review Articles	109
f. Reports	111
g. Websites.....	112

I. AN ACCOMPANYING LETTER

We are of one mind in recommending for consideration the thoughtful report developed by the Presidential Succession Clinic of Fordham University Law School. We were pleased to participate in the *Fordham Law Review* program, a unique academic but highly practical undertaking, that preceded the establishment of the Clinic; the program led to the publication of an issue of the journal entitled “The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements,” 79 Fordham L. Rev. 775-1157 (2010). We each also participated in a class with the Clinic, sharing our experiences with the students and responding to their questions.

We are each aware from our own public service of the importance of anticipating and developing approaches to the handling of contingencies that, if they occurred, could endanger our nation. We have been reminded time and again that what may appear at one time to be remote does in fact occur. Luckily, we have met past challenges and have taken steps to improve our system, but we have not addressed every gap.

The accompanying Report, entitled “Ensuring the Stability of Presidential Succession in the Modern Era: Report of the Fordham University School of Law Clinic on Presidential Succession,” is important for many reasons. It provides a thorough history of our nation’s three succession statutes, examines the Twenty-Fifth Amendment that has served the nation well, and discusses political party rules and procedures for responding to succession contingencies in the pre-inaugural period. The three professors and nine students of Fordham Law School who have studied the system of presidential succession and developed this Report offer recommendations worthy of careful attention regardless of one’s point of view on the subject generally or on any particular recommendation. Fordham Law School has made valuable contributions in the field of presidential succession and this Report is the latest and possibly most immediately constructive.

We thank Fordham Law School, its deans, professors, and students, for inviting us to participate in this rich and vital endeavor. We have no doubt that this Report will be of enormous benefit to decision makers and citizens more broadly and urge decision makers in the federal government as well as our national party leadership to give it their most serious consideration.

Birch Bayh

Benton Becker

Fred F. Fielding

II. ACKNOWLEDGMENTS

The members of the Fordham University School of Law Presidential Succession Clinic express their gratitude to all the individuals who participated in its analysis of our system of presidential succession and continuity of government. The Clinic's recommendations for reform are shaped by in-depth study of legal, political, and practical complexities, which were especially enhanced by insights from the following presidential succession experts and practitioners:

SENATOR BIRCH BAYH

Senator Bayh served as a Democratic United States Senator from Indiana from 1963 to 1981. As the Chair of the Senate Subcommittee on Constitutional Amendments, Senator Bayh was the principal architect of the Twenty-Fifth and Twenty-Sixth Amendments to the Constitution.

BENTON BECKER

Professor Becker is a Visiting Professor of Law at St. Thomas University School of Law. He served as Counsel to President Gerald R. Ford during his confirmation to the vice presidency, elevation to the presidency, and in the White House.

JUSTIN COOPER

Mr. Cooper is a Senior Advisor to former President William J. Clinton and served in Oval Office Operations. He assisted President Clinton in editing and recounting his autobiography.

FRED F. FIELDING

Mr. Fielding served as Associate Counsel for President Richard M. Nixon before serving as White House Counsel to Presidents Ronald Reagan and George W. Bush.

JOHN C. FORTIER

Dr. Fortier is an American Enterprise Institute Research Fellow and the Executive Director of the Continuity of Government Commission. He has published extensively on continuity of government, elections, the presidency, and Congress.

JOEL K. GOLDSTEIN

Professor Goldstein is the Vincent C. Immel Professor of Law at Saint Louis University School of Law. He is a highly respected presidential succession scholar and has published widely on the presidency, vice presidency, and constitutional law.

FRANCES FRAGOS TOWNSEND

Ms. Townsend served as Homeland Security Advisor to President George W. Bush and as National Continuity Coordinator. She also served as the Director of the Office of International Affairs in the Department of Justice, Criminal Division, and as Counsel for Intelligence Policy in the Department of Justice.

In addition, the Clinic wishes to thank Laurence Abraham, Head of Instructional Services and Reference Librarian at the Fordham University School of Law Leo T. Kissam Memorial Library, Todd Melnick, Associate Librarian for Public Services also at the Law School's Library, and Derek Hackett, Administrative Assistant to Professor John Feerick and the Feerick Center for Social Justice, for their outstanding contributions in support of the Clinic's work.

Professors Feerick, Galacatos, and Gordon also thank the Fordham Law School students who served as research assistants and who assisted in the preparation of the Report: Alessandra Biaggi, Ashley Feasley, Richard Gage, Kaitlyn Kerrane, Jacqueline McMahon, Emily Muncy-Keller, Alexandra Ober, Amy Young, and Amanda Zifchak.

III. FOREWORD

In April 2010, Fordham University School of Law hosted a two-day symposium on the Adequacy of the Presidential Succession System in the 21st Century. The symposium included as speakers and panelists many of the foremost scholars who have addressed issues relating to the law and practicalities of transition in the case of temporary interruption of leadership by the President of the United States or, of far greater potential concern, national tragedy resulting in the death or inability of the President or Vice President or both.

The symposium was considered by those who attended and others in the field who reviewed the transcript to be an extraordinarily substantive and informative conference. As a result, William Michael Treanor, then Dean of Fordham University School of Law, suggested that a clinic be created to study and propose solutions for the many and challenging issues that remain unaddressed by the Constitution, the Twenty-Fifth Amendment, and current federal and state statutes.

A clinical seminar was thus established for the Fall 2010 and Spring 2011 terms, led by former Dean John D. Feerick, who has had a lifelong interest in these issues, has published books and articles on them, and worked closely together with Senator Birch Bayh and others in Congress on the drafting, passage, and ratification of the Twenty-Fifth Amendment. Dean Feerick was joined by Adjunct Professor Dora Galacatos of Fordham Law School and Senior Counsel for the Law School's Feerick Center for Social Justice and Adjunct Professor Nicole A. Gordon, a former chair of the New York State Bar Association Federal Constitution Committee. Nine students of different backgrounds were selected to participate in the clinic, which required a significant commitment and intensive work to master the literature and intricacies of the subjects raised by the topic.

Beyond their study, the students shaped this Report after determining subjects that it would address. The seminar examined the question of what true "gaps" exist in the current succession process (i.e., those for which there is no

clear direction in law), as opposed to possible gaps for which a solution does exist but is not ideal. The students ordered priorities among the true gaps and decided which are the most urgent and practical to address.

A further purpose of the seminar was to make a non-partisan, constitutionally sound, and practical contribution that could be recognized as worthy and within the immediate reach of the political process. There was an interest not simply in producing a Report, but in acting on it: presenting it to decision makers in Congress, in the executive branch, and in the political parties, and arguing the merits of the group's recommendations addressing this complex area to forestall the extraordinary challenges that could someday face this country if contingencies occur that so far are unaccounted for in the succession law.

The Clinic decided not to propose a constitutional amendment, understanding the extreme difficulty of instituting change in this manner. Instead, the students focused on suggestions for statutory change, exercise of executive (and personal) powers, amendment of political party and congressional rules, and practical plans that can be implemented in the absence of any change in the law, but that are consistent with the Constitution and existing succession law.

The Clinic's recommendations are summarized in the Executive Summary and Part VIII of the Report. These recommendations represent the consensus of the group and should not be attributed to any one person.

We are grateful for the assistance of numerous participants in our work who are named in the acknowledgements and without whose contributions we would not have understood the subject as well, as readily, or as deeply.

John D. Feerick
Dora Galacatos
Nicole A. Gordon

June 2012

IV. EXECUTIVE SUMMARY

The attempted assassination in January 2011 of United States Representative Gabrielle Giffords in Tucson, Arizona, highlights the fact that the safety of our political leaders is under constant threat. The President of the United States, more than any other individual, unites and strengthens the nation and serves as a source of stability in crisis situations. The gaps and contingencies that exist in the current system of presidential succession leave our country vulnerable to a vacuum in national leadership. It is easy to conclude that the unaddressed contingencies in the current system of presidential succession are remote, but the unexpected and unforeseen do occur. A catastrophic event can leave both the President and Vice President dead or unable at the same time.

The Presidential Succession Clinic at Fordham University School of Law, composed of three professors and nine students, undertook in July 2010 the task of analyzing the existing framework for succession and advancing recommendations to address these gaps and contingencies. The Symposium on Presidential Succession, sponsored by the *Fordham Law Review* in April 2010, highlighted these weaknesses.ⁱ Many of the nation's foremost public servants in past succession crises joined with other experts in academia, law, national security, public policy, and politics to discuss these issues. They encouraged continued work in this field leading to the establishment of the Clinic.

The work of a law school clinic may be seen by some as a largely academic endeavor; however, as former Dean William Michael Treanor noted at the symposium, “[g]iven the terrible frequency with which Presidents fail to complete their terms of office and the frequency with which they are disabled, any ambiguities concerning presidential succession and any flaws in the rules governing succession have the capacity to lead to national disaster.”ⁱⁱ We agree. The unforeseen and remote can occur, and advance contingency planning can prevent confusion or even chaos at a time of national distress.

The Clinic began by studying the system of presidential

succession as set forth in the text of the Constitution—Article II, Section 1, Clause 6, and the Twelfth, Twentieth, and Twenty-Fifth Amendments—the Presidential Succession Act of 1947, other federal and state statutes, political party rules, and documents such as “letter agreements” that provided for a transition process in certain circumstances. The Clinic examined a broad range of proposals regarding presidential succession and interviewed, among others, many of the experts who participated in the Fordham symposium.

In making recommendations for reform, we were guided by five values:

- Adherence to the Constitution;
- Certainty and predictability in the transition of leadership;
- Legitimacy of a presidential successor in the eyes of the public;
- Party continuity; and
- Depth in qualifications of a possible successor.

The Clinic studied three distinct areas: presidential and vice-presidential incapacities not provided for by the Twenty-Fifth Amendment; the line of succession; and the pre-inaugural period.

First, the Twenty-Fifth Amendment does not address certain instances of inability of a President or Vice President. These include:

- Inability of a President when there is a vacancy in the office of Vice President;
- Dual inability of a President and Vice President;
- Inability of a Vice President; and
- Inability of a statutory successor while acting as President.

Second, succession to the presidency is possible through a line including members of both the legislative and executive branches. The gaps and contingencies in this area include:

i Symposium, *The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangement*, 79 FORDHAM L. REV. 775 (2010).

ii *Id.* at 775-76.

- The questionable constitutionality of having legislative leaders in the line of succession;
- Concerns about the qualifications and presidential pedigree of executive officers in the line of succession;
- The effects of the “bumping” provision in the current succession law, which can result in multiple individuals exercising the powers of the President in a short period of time; and
- Lack of clarity whether Acting Cabinet Secretaries are in the line of succession.

Finally, each segment within the pre-inaugural period, running up to the start of the quadrennial presidential term on January 20, presents distinct gaps and contingencies. We address these with particular attention to democratic legitimacy and current political realities. They include:

- Party procedures that do not adequately address the death or resignation of a presidential or vice-presidential candidate prior to Inauguration Day;
- Lack of clarity about the duties of presidential electors and Congress with respect to the casting and counting of electoral votes in the event of the death or resignation of a presidential or vice-presidential nominee, or both; and
- Lack of an institutionalized process for nominating Cabinet members during the transition between presidential administrations.

• • •

The Clinic is aware of the political challenges to reform in this area. Although we have certain preferred recommendations, we recognize the obstacles to change and have made a range of proposals to offer decision makers different options to consider. We also note with respect to our recommendations for executive action that these will almost all require cooperation with the legislative branch and that some of the recommendations surely reflect actions already taken by recent administrations, but which are not necessarily known to the public.

A. PRESIDENTIAL AND VICE-PRESIDENTIAL INABILITY

The Twenty-Fifth Amendment to the Constitution establishes procedures for both the filling of a vacancy in the office of the Vice President and for addressing a case of a presidential inability. The Amendment’s availability in 1973 and 1974, when both the elected President and Vice President resigned from their offices, provided essential stability and continuity at a time of great national turmoil.

Although the Twenty-Fifth Amendment has dealt successfully with challenges encountered since its adoption in 1967, neither the Amendment nor the 1947 Act addresses several key threats to presidential continuity posed by a presidential or vice-presidential inability.

First, the Amendment is predicated on the availability of an able Vice President. In the event that the office of Vice President is vacant or the Vice President, due to his own inability, is unable to act with the Cabinet under Section 4 of the Twenty-Fifth Amendment, the Amendment does not provide an alternative means for making a declaration that the President is unable. History has shown that a vacancy or inability in the office of the Vice President is a contingency that cannot be ignored.

Second, the Amendment does not establish a procedure for declaring the inability of the Vice President. In the event that a President dies, resigns, or is removed from office, a situation may arise in which an unable Vice President would assume the presidency. In addition, a President anticipating a temporary inability or one who is unable but recognizes his own inability will likely be reluctant to transfer his powers even briefly to an unable Vice President. Furthermore, an unable Vice President may not be in a position to exercise his responsibility pursuant to Section 4 to declare a President unable to discharge the powers and duties of his office.

Third, neither the Amendment nor the 1947 Act establishes procedures for declaring the inability of an Acting President during a vice-presidential vacancy or inability.

*Presidential and Acting Presidential Inability**Recommendations:**Statutory Action:*

1. Acknowledge that the President or Acting President, upon declaration of his own inability, can transfer his powers voluntarily to the next in the line of succession in instances of vice-presidential inability or vacancy.
2. Authorize the person next in the line of succession after the Vice President, together with a majority of the Cabinet, to declare the inability of the President or Acting President in instances of vice-presidential inability or vacancy.

Executive Contingency Planning:

3. The President or Acting President should prepare a prospective executive declaration of inability at the beginning of his service, in which he would define the situations which in his view would render him unable to discharge the powers and duties of the presidency in the future and would provide that the declaration of his inability goes into effect based upon a review process set out by the President or Acting President.

*Vice-Presidential Inability Recommendation:**Executive Contingency Planning:*

4. The Vice President should prepare a prospective executive declaration of inability at the beginning of his service, in which he would define the situations which in his view would render him unable to discharge the powers and duties of the vice presidency in the future and would provide that the declaration of his inability goes into effect based upon a review process set out by the Vice President.

B. LINE OF SUCCESSION

Article II of the Constitution names the Vice President as the first person on whom the powers and duties of the presidency will devolve and authorizes Congress to establish a line of succession after the Vice President. The Presidential Succession Act of 1947 expands the line to include the Speaker of the House of Representatives, the President *pro tempore* of the Senate, and then the Cabinet Secretaries in the order in which their departments were created.

Debate about the constitutionality of including legislative leaders in the line of succession has remained a steady undercurrent in the legislative history of the Presidential Succession Acts of 1792, 1886, and 1947. There are two major criticisms of including legislative leaders in the line of succession. First, some argue that the Speaker of the House and President *pro tempore* of the Senate are not “Officers” within the meaning of Article II. Second, some maintain that the inclusion of legislative officers in the line of succession compromises the principle of separation of powers between the executive and legislative branches.

In the case of presidential inability, the Speaker and the President *pro tempore* can become Acting President in the absence of a Vice President. Including legislators for this purpose in the line of succession is especially problematic because they are required by statute to resign their roles and seats in Congress in order to act as President and cannot simply return to their previous positions when the inability of the President is removed. Thus, temporarily acting as President until an inability is removed could effectively end the political career of a legislative leader. This creates a disincentive for a legislative leader to act as President at a time when stable leadership is most urgent.

Moreover, the Speaker and the President *pro tempore* can “bump” members of the Cabinet who are acting as President, which can result in multiple successors serving as Acting President during a short period.

*Line of Succession Recommendations**Statutory Action:*

5. Establish an executive line of succession that runs exclusively through the Cabinet after the President and Vice President. In the case of removal, death, or resignation of the President, the Cabinet member assuming the powers and duties of the presidency should be required to resign from the Cabinet. In a case of inability, the Cabinet member assuming the powers and duties of the presidency should not be required to resign.
6. In the event an executive line of succession is not adopted, establish a binary line of succession that first runs through Congress, and then the Cabinet, in instances of death, resignation, and removal. Successors would be required to resign in these circumstances. The line of succession would run solely through the Cabinet in instances of presidential and vice-presidential inability or failure to qualify. Under this proposal, when a Cabinet member assumes the powers and duties of the presidency, that Cabinet member would not be required to resign.
7. Confirm whether Acting Secretaries are included in the line of succession, and, if so, either remove them from the line, or alternatively, amend the 1947 Act so that Acting Secretaries can assume the powers and duties of the presidency, in the order of the departments' creation, but only after succession has passed through all of the Cabinet Secretaries.

C. PRE-INAUGURATION PERIOD

The current system of pre-inauguration presidential succession is governed by a legal framework based on constitutional provisions, federal and state statutes, and political party rules. Contingencies that may occur during the period prior to a General Election are governed almost exclusively by party rules. The political parties are authorized by their rules to fill any vacancies in the nominations for the offices of President and Vice President.

The parties are similarly authorized to fill vacancies that may occur on their respective national tickets after the General Election, prior to the casting of the Electoral College votes in mid-December.

The Twelfth Amendment governs contingencies that may occur between the casting of the Electoral votes in mid-December and the counting of those votes by Congress on January 6. The Amendment is silent as to whether Congress can invalidate electoral votes cast for a presidential or vice-presidential nominee who dies after the meeting of the Electoral College and before Congress counts the electoral votes.

The Clinic has concluded that Congress is required to count these votes and that it must declare the winners even if they have both died since the meeting of the Electoral College. The Twentieth Amendment addresses the death of either a President-elect or Vice President-elect during the fourteen days between the congressional count of the electoral votes on January 6 and Inauguration Day on January 20. In the case of the death or resignation of the President-elect, the Vice President-elect becomes President on January 20. In the case of the death or resignation of the Vice President-elect, the new President is required to nominate a Vice President to be approved by a majority of both houses of Congress.

In the event of the double death of the successful presidential and vice-presidential candidates, the Speaker would become Acting President pursuant to the 1947 Act. Such a scenario may, however, result in a change in the party of the presidency contrary to the will of the electorate.

*Pre-Inaugural Period Recommendations:**Political Party Rules:*

8. In the event of the death or resignation of a presidential candidate before the political party conventions, require the parties to hold an open meeting to decide which replacement candidate(s) will receive the delegates' votes.
9. In the event of the death or resignation of a presidential nominee between the political party conventions and the General Election, require the parties to either hold an open meeting to select a replacement candidate or recall the convention delegates.
10. During the period between the General Election and the meeting of the Electoral College, provide that the vice-presidential candidate replaces a deceased or resigned presidential candidate of the same ticket and that the candidate's party issue recommendations to the presidential electors as to a new candidate for the office of Vice President.

Congressional Rules:

11. In the event of the death or resignation of a presidential or vice-presidential candidate between the meeting of the Electoral College and the counting and declaration of the Electoral College votes by Congress, require Congress to count votes cast for a candidate if he was alive at the time of the Electoral College vote.

Executive Contingency Planning:

12. During the period between the counting and declaration of Electoral College votes by Congress and Inauguration

Day, the outgoing President should consider promptly nominating any Cabinet nominees the President-elect submits to him, and Congress should confirm as many nominees as possible prior to Inauguration Day, consistent with the proper discharge of Congress's advice and consent responsibility. One or more newly confirmed Cabinet Secretaries should remain at a secure location outside of Washington, D.C. on Inauguration Day. This recommendation is particularly important in the case of an exclusively executive line of succession, as the Clinic recommends.

D. CONCLUSION

The work of the Constitution's Framers in creating a system for presidential succession has provided stability and continuity for the nation during many uncertain moments in its history. The Twenty-Fifth Amendment, adopted after the assassination of President John F. Kennedy, further buttressed the system of presidential succession by providing mechanisms for: the seamless succession of the Vice President to the presidency in the case of a vacancy in that office; the filling of a vacancy in the vice presidency; and addressing instances of presidential inability.

Our recommendations are designed to be consistent with the separation of powers and the framework of checks and balances, to protect the electorate's choice of President and Vice President and their party for a four-year term, and to ensure the stability and continuity of government in the modern era. We believe the adoption of the Clinic's recommendations will support these goals.

V. INABILITY AND PRESIDENTIAL SUCCESSION ISSUES

A. INTRODUCTION

The Framers of the Constitution constructed a succession provision that enabled the Vice President to assume the powers and duties of the President in the event of the death, resignation, removal, or inability of the President.¹ The succession provision, however, did not cover all possible contingencies. The adoption of the Twenty-Fifth Amendment in 1967 filled several important gaps, but it did not provide for every instance of presidential inability or address the case of a vice-presidential inability.² These open areas continue to present policy challenges, constitutional issues, and questions of construction of current statutes.

B. THE TWENTY-FIFTH AMENDMENT

1. HISTORY OF THE TWENTY-FIFTH AMENDMENT

The assassination of President John F. Kennedy in 1963 renewed Congress's interest in providing safeguards in the event of presidential inability.³ Senator Birch Bayh, as chairman of the Senate Subcommittee on Constitutional Amendments, largely led these efforts.⁴ After conducting extensive hearings and debates and considering the opinions of the American Bar Association and others on the topic, Congress completed work on what would become the Twenty-Fifth Amendment in July of 1965.⁵ The Amendment was ratified on February 10, 1967.⁶

Section 1 of the Twenty-Fifth Amendment codifies the precedent set by President John Tyler in 1841 when he assumed the office of the President rather than the position of Acting President upon President William Henry Harrison's death.⁷ Under Section 1, when the President dies, resigns, or is removed from office, the Vice President becomes President, rather than Acting President, and is no longer Vice President.⁸ This section is intended to ensure that there is never a vacancy in the office of President.⁹

Section 2 of the Twenty-Fifth Amendment deals with a vice-presidential vacancy. When there is a vice-presidential vacancy resulting either from the death, resignation, or removal of the Vice President or from the Vice President's succession to the presidency upon the death, resignation, or removal of the

President, the new President must nominate a Vice President, who is subject to confirmation by a majority of both houses of Congress.¹⁰ The term "vacancy" does not cover an inability of the President or Vice President.¹¹

Sections 3 and 4 of the Twenty-Fifth Amendment address presidential inability. Section 3 provides a mechanism by which the President can declare his own inability in a writing to the President *pro tempore* and the Speaker, which results in the Vice President serving as Acting President until the President declares that his inability has been removed.¹² Section 4 of the Twenty-Fifth Amendment sets forth the process by which the Vice President and a majority of the Cabinet, or another body as Congress may provide,ⁱ can act together to declare the President unable to perform the duties of his office when he cannot or will not do so himself.¹³ The Vice President and a majority of the Cabinet must transmit to the President *pro tempore* and the Speaker their written declaration that the President is unable to perform the duties of his office.¹⁴ In both instances, once presidential inability is declared, the Vice President becomes Acting President while also continuing as Vice President.¹⁵

Under Section 4, the President can dispute the determination of his inability by declaring in writing to the President *pro tempore* and the Speaker that no inability exists.¹⁶ The President then resumes his powers and duties at the end of a four-day period unless the Vice President and Cabinet majority object within four days of the President's written declaration.¹⁷ If within that four-day period the Vice President and the Cabinet majority transmit to the President *pro tempore* and the Speaker a written declaration that the President is unable to discharge the duties of his office, the issue is then given to Congress which can, by a vote of two-thirds in each house, declare the President unable.¹⁸ If Congress does not act within twenty-one days, or if either House supports the President, the President resumes his powers.¹⁹ In the interim, the Vice President remains the Acting President.²⁰

i Congress has never exercised its power to substitute a body for the Cabinet to work with the Vice President under Section 4 of the Twenty-Fifth Amendment.

2. APPLICATIONS OF THE TWENTY-FIFTH AMENDMENT

President Gerald R. Ford was the first and so far only person to become President under Section 1 of the Twenty-Fifth Amendment. In 1974, Vice President Ford became President when President Richard M. Nixon resigned from office.²¹

President Ford was also the first person to become Vice President under Section 2 of the Twenty-Fifth Amendment in 1973.²² After President Nixon's first Vice President, Spiro Agnew, resigned, Nixon nominated then-Representative Ford to be the new Vice President, and both houses of Congress confirmed him. Less than a year later, Vice President Ford became President upon President Nixon's resignation from the presidency, and President Ford nominated Nelson Rockefeller to be his Vice President. Rockefeller then became Vice President under Section 2 of the Twenty-Fifth Amendment after both houses of Congress confirmed him in 1974.²³

President Ronald Reagan underwent anesthesia in 1985. He followed the procedures of Section 3 of the Twenty-Fifth Amendment by submitting a letter to the President *pro tempore* of the Senate and the Speaker of the House, although he stated that he was not invoking Section 3 of the Twenty-Fifth Amendment because he did not want to set a precedent.²⁴ In his letter, President Reagan explained that he did "not believe that the drafters of this Amendment intended its application to situations such as the instant one."²⁵ President Reagan said he was following a "longstanding arrangement" with his Vice President rather than the constitutional provision created for inability.²⁶

President George W. Bush was the first President to formally invoke Section 3 of the Twenty-Fifth Amendment in 2002 in anticipation of undergoing sedation.²⁷ In 2007, President Bush again invoked Section 3 to transfer presidential powers and duties to Vice President Richard Cheney when he underwent a second procedure during his term in office.²⁸ In both instances, President Bush followed the process set forth in Section 3 by transmitting a written declaration of his own inability to perform the duties of his office to the President

pro tempore and the Speaker.²⁹ President Bush reclaimed the powers and duties of the presidency by issuing a letter to the President *pro tempore* and the Speaker on the same day in both instances.³⁰

Section 4 of the Twenty-Fifth Amendment has never been employed, but it arguably could have been in the wake of the attempted assassination of President Reagan on March 30, 1981.³¹ Although White House Counsel Fred Fielding had prepared draft documents prior to the assassination attempt providing for the invocation of either Section 3 or Section 4 of the Twenty-Fifth Amendment under such circumstances, no formal transfer of power occurred.³² The misstatement of Secretary of State Alexander Haig, who was the top Cabinet official in the line of succession, that until Vice President Bush's return to the White House he was in charge because "[c]onstitutionally . . . you have the President, the Vice President, and the Secretary of State, in that order," reflected confusion about the order of succession.³³ Chief of Staff James Baker and presidential counselor Edwin Meese III rejected a discussion of a transfer of presidential power "until they learned more from the doctors."³⁴ Vice President Bush made clear that he would not act as President in the absence of a formal transfer of power.³⁵

C. CONTINGENCIES NOT ADDRESSED BY THE TWENTY-FIFTH AMENDMENT

The Twenty-Fifth Amendment provides for many—but not all—contingencies in the event of presidential inability. Currently, there exists no legal mechanism to: declare a President unable to discharge the powers and duties of his office in the event of either a vice-presidential vacancy or inability; declare a Vice President unable to discharge the powers and duties of his office; or declare an Acting President unable to discharge the powers and duties of the presidency.

That the Twenty-Fifth Amendment does not address these contingencies, referred to generally as the "inability gaps," was not an oversight by its drafters.³⁶ At the time of the drafting, Representative Richard Poff asked John Feerick, then a member of the American Bar Association ("ABA") Conference on Presidential Inability and Succession, to suggest language for the Twenty-Fifth Amendment that would cover the case of simultaneous inability of the President and Vice President.³⁷ Professor Feerick identified

ii After he left office, President Reagan acknowledged invoking the Twenty-Fifth Amendment at this time. See *Ronald Reagan, An American Life 500* (1990).

the inability gaps referred to above and drafted language that would permit succession in the event of dual inability as well as in the event of a vice-presidential inability.³⁸

Professor Feerick proposed, in the case of a vice-presidential vacancy or inability, that “the person next in the line of succession shall act in lieu of the Vice-President” to determine presidential inability.³⁹ He also suggested that “[t]he inability of the Vice-President shall be determined in the same manner as that of the President except that the Vice-President shall have no right to participate in such determination.”⁴⁰ This language and the drafted contingencies were not included in the final amendment.

Furthermore, both an amendment proposed by a bipartisan majority of the Senate Judiciary Committee in 1958 and an amendment proposed by Senator Birch Bayh in 1963 had addressed these inability gaps in a similar manner.⁴¹ Herbert Brownell, Attorney General under President Eisenhower, explained that the proposed 1958 amendment provided that “if at any time there is no Vice President, the functions envisaged for the Vice President by the proposed new constitutional amendment ‘shall devolve upon the officer eligible to act as President next in the line of succession to the office of President, as provided by law.’”⁴² Thus, the next in the line of succession was to have the authority to act in concert with the Cabinet in determining presidential inability.⁴³ The ABA’s final proposal similarly contained a provision by which the next in the line of succession, if there were no able Vice President, could act with a majority of the Cabinet to determine presidential inability.ⁱⁱⁱ⁴⁴

When Congress did not include language in the Twenty-Fifth Amendment to address the inability gaps identified, Senator Samuel Ervin commented that attempting to fill every gap could jeopardize ratification of the Twenty-Fifth Amendment.⁴⁵ As Professor Feerick points out, “[i]t was believed at the time that an amendment providing for every possible scenario would be too complex and therefore unlikely to survive the difficult congressional and state ratification

processes.”⁴⁶ Nevertheless, the inability gaps that persist are serious and must be addressed because mass catastrophe, illness, or some other happenstance can occur at any time.

1. INABILITY OF THE PRESIDENT IN CERTAIN CIRCUMSTANCES

Sections 3 and 4 of the Twenty-Fifth Amendment, which permit the declaration of a presidential inability, are premised on the availability of an able Vice President.⁴⁷ Neither section comes into play if the office of the Vice President is vacant or its occupant is himself unable.⁴⁸ Section 3 of the Twenty-Fifth Amendment is unavailable to a President who wishes to transfer power temporarily if there is a vice-presidential vacancy because there is no Vice President to act as President.⁴⁹ Furthermore, although Section 3 may be available to the President during a vice-presidential inability, a President would be hard pressed to transfer authority to an unable Vice President. Similarly, Section 4 depends on the presence of an able Vice President to work with the Cabinet in declaring a presidential inability. Section 4 does not provide a substitute for the Vice President to make such a declaration if the vice presidency is vacant or the Vice President is himself unable and thus incapable of declaring a case of presidential inability.⁵⁰

2. INABILITY OF THE VICE PRESIDENT IN CERTAIN CIRCUMSTANCES

Currently, no mechanism exists by which a Vice President can be declared unable to perform the powers and duties of his office.⁵¹ As previously discussed in Part V.C.1, this gap results in a number of unaddressed issues if the Vice President is, in fact, unable. First, if the President dies, resigns, or is removed from office, the Vice President automatically becomes President under Section 1 of the Twenty-Fifth Amendment, even in a case of a Vice President’s undeclared inability.⁵² Second, if a President sought to transfer his powers temporarily to the Vice President under Section 3 of the Twenty-Fifth Amendment, he would be transferring powers to a Vice President unable to exercise them. Furthermore, Section 4 of the Twenty-Fifth Amendment cannot be invoked when the Vice President is unable because the Vice President is a necessary actor in the determination of presidential inability under Section 4.⁵³

iii The language of Senate Resolution 139 was very similar to Professor Feerick’s in his letter to Representative Poff. *John D. Feerick, The Twenty-Fifth Amendment: Its Complete History and Applications* 60 (2d ed.1992).

3. INABILITY OF THE ACTING PRESIDENT IN CERTAIN CIRCUMSTANCES

Current succession law provides no mechanism for dealing with an inability of an Acting President, whether a Vice President or statutory successor.^{iv}

D. RECOMMENDATIONS

Congress, following President Kennedy's assassination, acted wisely in proposing the Twenty-Fifth Amendment to eliminate major gaps in the system of presidential succession. We urge the President and Congress to move forward to address the remaining inability gaps.

The Clinic believes much can be done to anticipate and address these gaps with changes in the law and contingency planning. In 1988, participants of the Miller Center Commission on Presidential Disability and the Twenty-Fifth Amendment, including Senator Birch Bayh, Herbert Brownell, and Fred Fielding, advanced many helpful recommendations for contingency planning. Such planning has routinely taken place since at least 1980.⁵⁴ The exercise is of course confidential, and while we identify gaps and suggest responses to them, we well understand that others in positions of responsibility have already engaged in contingency planning and may find our recommendations duplicative of work already undertaken. Nonetheless we support continued planning, as is surely underway, recalling the wisdom of the writers of the Federalist Papers that "a wise nation . . . does not rashly preclude itself from any resource which may become essential to its safety."⁵⁵

iv The situation in which an Acting President is exercising the powers and duties of the presidency during a presidential inability and a vice-presidential vacancy raises issues beyond the scope of this Report. These include the question whether an Acting President can exercise presidential power under Section 2 of the Twenty-Fifth Amendment and nominate a new Vice President while the President is alive but unable. For further discussion of this issue, see generally William F. Baker & Beth A. Fitzpatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need for Reform*, 79 Fordham L. Rev. 835 (2010) and *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. (1975).

1. STATUTE

The Clinic supports a statutory approach that mirrors the Twenty-Fifth Amendment to address the inability gaps. There is sufficient basis in the Constitution and law for doing so. We recommend that Congress enact legislation facilitating the President's ability to voluntarily transfer his powers to the next in the line of succession during a vice-presidential vacancy or inability. We also recommend conferring authority on the next in line in conjunction with the Cabinet to declare a presidential inability in the absence of an able Vice President.^v

A mechanism for the voluntary transfer of power by the President or Acting President to the next in line in the absence of an able Vice President would track the provisions in Section 3 of the Twenty-Fifth Amendment, requiring a record of the transfer by written declaration to the President *pro tempore* and the Speaker of the House or, if they are not available, by a filing in the Office of the Department of State.^{vi} For the more difficult case of an obviously unable President or Acting President who refuses or is unable to declare his own inability, a declaration by the next in line together with the Cabinet would assure responsible handling of the matter and would promote confidence among the public at large.⁵⁶

Reliance on the Cabinet members, who are close to the President and can evaluate the President's or Acting President's situation, together with the next immediate successor of either party, would minimize the risk of abuse of power and facilitate an appropriate transfer. A statutory approach could also, like the Twenty-Fifth Amendment, contain provisions for dealing with a disagreement between the unable President or Acting President and the person who is next in line acting together with the Cabinet.

Turning to a justification of this approach, we review the reach of Congress's power and the role of the next in line.

v See *infra* Part V.D.2

vi The Office of the Department of State is an appropriate repository as an alternative to filing with legislative leaders because those leaders might be the next in the line of succession, as would be the case under current law. This recommendation presents a potential problem, however, if the next in the line of succession is the Secretary of State.

a. Congressional Authority

Article II, Section 1, Clause 6 of the Constitution gives Congress the authority to decide who is to act as President in the event that both the President and the Vice President are unable to perform the duties of their offices, as well as in the event that the President is unable when the vice presidency is vacant.

Article II, Section 1, Clause 6 of the Constitution states:

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.⁵⁷

The 1792, 1886, and 1947 Acts, by which Congress created lines of succession beyond the Vice President, rest on this authority.⁵⁸ The statutes reflect the idea that a clear line of succession allows the government to continue to function in the case of simultaneous vacancies and/or incapacities by ensuring that there is always a qualified successor to carry out the powers and duties of the presidency.

However, when there is no able Vice President and the President is incapable of declaring his own inability, the 1947 Act has no mechanism for declaring presidential inability.⁵⁹ Thus, although Congress has the constitutional authority to create the line of succession, the 1947 Act does not exercise that authority to its full extent.

In addition to the language of Article II, Congress appears to have authority to address this gap pursuant to the Necessary and Proper Clause in Article I, Section 8, Clause 18 of the Constitution. The Necessary and Proper Clause provides that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁶⁰

The Supreme Court interpreted Congress’s power under the Necessary and Proper Clause broadly in its 1819 decision in *McCulloch v. Maryland*.⁶¹ Holding that Congress had the authority to charter a bank, even though the Constitution did not explicitly give Congress such power, Chief Justice John Marshall wrote:

[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁶²

While the Court has given the Clause an expansive reach, it has also stated that the Clause “is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned.”⁶³

Experts on presidential succession have suggested that a statute providing a mechanism by which the President or Acting President could be declared unable to perform the duties of his office would be sound under the Necessary and Proper Clause because it would be consistent with the express power of Congress under the Constitution to establish the line of succession.⁶⁴ One commentator writes that such a statute “would not appear to grant a new and independent power to Congress, [but] only a measure to ensure the legitimate end of providing for a successor beyond the Vice President in circumstances where additional process is deemed necessary as an effective use of power.”⁶⁵ Providing for the determination of presidential inability is “necessary to ensure that the executive power does not fall into abeyance . . . [and so this] power is clearly within the scope of the [Necessary and Proper Clause].”⁶⁶

Even those who oppose a broad reading of the Necessary and Proper Clause in terms of presidential succession agree that the clause allows for intervention where both the President and Vice President are incapacitated. Presidential succession scholar Ruth Silva, writing prior to the adoption of the

Twenty-Fifth Amendment, noted that the Constitution gives Congress the express power to provide for presidential succession only “when there is *neither* a functioning President nor a functioning Vice President.”⁶⁷ She argued that “[b]ecause enumeration in the Constitution of certain powers denies all others unless incident to an expressed power or necessary to its execution,” Congress does not have the authority to legislate regarding any scenario but that of a dual inability and/or vacancy.⁶⁸ Herbert Brownell agreed that “congressional action under the ‘necessary and proper’ clause would seem restricted to the uncommon situation in which both the President and Vice President are incapacitated.”⁶⁹

b. The Role of the Next in the Line of Succession in Determining Incapacity

Prior to the adoption of the Twenty-Fifth Amendment, many who wrote on the topic of presidential succession relied on the contingent grant of power theory to justify an authority in the next in the line of succession to determine presidential inability.⁷⁰ Professor Silva explained that, according to this theory, “it is a well-established rule of law that the one to whom the power is granted is to decide when the emergency has arisen.”⁷¹ Silva wrote,

[T]he Vice President, or the “officer” designated by law to act as President, is constituted the judge of a President’s inability The Constitution provides that the power of acting as President belongs to the Vice President or to the “Officer” while a President is disabled. Since the Constitution mentions only the successor, he is the judge of the facts.⁷²

Herbert Brownell agreed that “whenever any official by law . . . is designated to perform certain duties on the happening of certain contingencies, unless otherwise specified, that person who bears the responsibility for performing the duties must also determine when the contingency for the exercise of his powers arises.”⁷³ Attorney General Robert F. Kennedy issued an opinion in 1961 adopting this theory, stating that the “Vice President or [*an*]other ‘officer’ designated by law to act as President has the authority under the Constitution to decide when inability exists.”⁷⁴

Thus, the contingent grant of power theory supports the idea that the next in the line of succession should have a role in the determination of presidential inability. However, to permit the next in the line of succession alone to determine presidential inability would grant him more power than what is granted to the Vice President under the Twenty-Fifth Amendment, which does not permit the Vice President to act alone but requires him to act along with a majority of the Cabinet or other congressionally designated body.⁷⁵ As a result, reliance on the theory of a contingent grant of power might yield a result that is not consistent with the framework set forth in the Twenty-Fifth Amendment.

c. Summary

Some may argue that only a constitutional amendment can expand upon the existing mechanism for declaring a presidential inability. The Clinic, however, is persuaded that Congress has the power to enact a statute providing a mechanism for the determination of presidential inability during a vice-presidential inability or vacancy. Based on the Twenty-Fifth Amendment and a theory of contingent grants of power, accepted by scholars familiar with presidential succession issues, the Clinic believes Congress has the authority to legislate in this area. The Clinic recommends that such a statute be enacted on the basis that it is necessary and proper to implement Congress’s express power under Article II, Section 1, Clause 6 to provide for the line of succession and to ensure the continuation of effective government. We recommend the adoption of a statute that acknowledges that the next in the line of succession has the power to determine, with the Cabinet or another body that Congress may choose, the existence of an inability of the President or Acting President in the absence of an able Vice President. We recommend that this statute also confirm that a President or Acting President may voluntarily transfer his powers and duties to the next in the line of succession during a vice-presidential inability or vacancy.

2. EXECUTIVE ACTION

The Clinic believes congressional enactment of a statute addressing presidential inability gaps, in the absence of a constitutional amendment, presents a sound and feasible approach. However, the Clinic recognizes that enactment of a statute can be a lengthy process and that meanwhile national emergencies can occur at any time. In the absence of statutory reform, the Clinic is aware that executive branch officials have instituted comprehensive practices, procedures, and rules to ensure preparedness in the event of gaps in leadership. The Clinic endorses such anticipatory contingency planning and suggests that prospective executive declarations of inability^{vii} provide an effective way to address both presidential and vice-presidential inability even as congressional action is under consideration.

Article II, Section 1 permits Congress to provide for a line of succession only in the event of a dual inability and/or vacancy in the presidency and vice presidency.⁷⁶ An executive declaration of prospective inability would permit the President, Vice President, or Acting President to describe, in a formal writing, the situations in which he would consider himself unable to discharge the powers and duties of his office.^{viii} Executive declarations of prospective inability allow the President, Acting President, or Vice President to provide for future instances of inability and thereby permit timely implementation of the current succession law.

An executive declaration of inability permits the line of succession to be triggered during a vice-presidential vacancy or inability by giving the President or Acting President a way in which to declare himself unable to perform the powers and duties of his office prospectively, in the event that he becomes unable to declare his own inability in the future. An executive declaration of prospective inability by the Vice President similarly allows the succession law to go into effect as intended.

vii Executive declarations of inability are similar to letter agreements. See Appendix B for a compilation of letter agreements and declarations from various administrations.

viii The Clinic acknowledges that such a writing will require some person or persons to decide whether the conditions set forth in the executive declaration of prospective inability are present. The Clinic notes that an executive declaration of prospective inability could possibly authorize a designated party to resign on behalf of the President or Vice President in defined circumstances. See the Eisenhower-Nixon Letter Agreement in Appendix B. A sample Executive Declaration of Inability is also included in Appendix B.

a. Historical Support for Executive Declarations of Inability

Declarations for future contingencies are consistent with Section 3 of the Twenty-Fifth Amendment, which allows the President to temporarily transfer his powers when he “recognizes his inability—or the imminence of his inability.”⁷⁷ Although the President can transfer his power during foreseen periods of inability, he might be able to do so “even prospectively for unexpected yet contemplated future incidents.”⁷⁸ Former Attorney General Nicholas B. Katzenbach testified that “the President should be able to arrange for the Vice President to act . . . in the event of a certain contingency . . . which would be a self-executive [sic] provision.”⁷⁹

Others agree. Noting that President Bush signed a letter formally transferring his powers to Vice President Cheney prior to undergoing anesthesia, Adam Gustafson argues “there is no overwhelming constitutional reason why such a letter may not be sent further in advance.”⁸⁰ Indeed, some have suggested that the President and Vice President can “outlin[e] procedures for contingent cessions of executive power” for “unplanned future incapacities.”⁸¹ These procedures might extend as well to a statutory successor in contemplation of a possible vacancy in the vice presidency or an inability of the Vice President. Although prospective declarations of inability “would require a broad reading” of Section 3, a narrow reading of Section 3 that “discourages the President from taking present action for future contingencies . . . may undermine the Amendment’s purpose of promoting executive branch continuity.”⁸²

This cession of power is not unprecedented in American history. Prior to the adoption of the Twenty-Fifth Amendment, when no mechanism for the declaration of presidential inability existed, President Dwight D. Eisenhower recognized the urgency of addressing presidential succession issues.⁸³ In 1958, he presented to Vice President Nixon a “letter agreement,” setting forth certain procedures in the event of his future inability as President.⁸⁴ President Eisenhower wrote that he and Vice President Nixon “could do much to eliminate all these uncertainties by agreeing, in advance, as to the proper steps to be taken at any time when [he] might become unable to discharge the powers and

duties of the President.”⁸⁵ President Eisenhower stated that “this agreement would not in any way contravene the clear intention of the Constitution; on the contrary, it is rather a statement of our common intention to act completely according to the spirit of . . . the Constitution.”⁸⁶

Pursuant to the letter agreement, Vice President Nixon was to act as President if President Eisenhower determined himself to be unable or if Vice President Nixon determined President Eisenhower was unable; Eisenhower would resume his presidential duties upon his own declaration that the inability had ended.⁸⁷ Later administrations followed the Eisenhower-Nixon precedent by entering into letter agreements to provide for prospective inability, including President Kennedy and Vice President Lyndon B. Johnson;⁸⁸ and President Johnson and Speaker of the House John W. McCormack.⁸⁹ President Johnson and Vice President Hubert H. Humphrey apparently never entered into a written agreement.⁹⁰ There appears to be evidence that, even after the adoption of the Twenty-Fifth Amendment, Presidents George H.W. Bush and Clinton had executed letter agreements with their Vice Presidents indicating their intentions for the transfer of power in case of inability.⁹¹ One commentator noted that prior to the adoption of the Twenty-Fifth Amendment, letter agreements “did not have the force of law behind them and depended entirely on the good will of the incumbent President and Vice President.”⁹²

b. Summary

In case a presidential inability arises during a vice-presidential vacancy or inability, an executive declaration of prospective inability can fill the gap that is not addressed by the Twenty-Fifth Amendment by allowing the President to define a future inability. The declaration of a future inability, although not explicitly provided for in Section 3 of the Twenty-Fifth Amendment, is consistent with the purpose of Section 3 (and the Article II succession provision) to promote executive branch continuity and has historical precedent.

The Clinic believes vice-presidential inability is also best addressed through the use of executive declarations of prospective inability. An executive declaration of prospective inability would permit the Vice President to describe the situations that he considers would render him unable.

Upon the occurrence of one of these situations, if the Vice President has made a declaration of prospective inability, the next in the line of succession would then be in a position to declare the inability of the President or Acting President, as circumstances require.

Although the Vice President does not have the explicit authority under the Constitution to declare his own inability, the Clinic believes such authority is implicit. A mechanism by which vice-presidential inability can be declared is necessary for an effective system of presidential succession. Historical precedent supports this approach since past and current administrations have engaged in contingency planning to address issues arising from a vice-presidential inability.⁹³

3. OTHER OPTIONS

a. Vice-Presidential Inability

The Clinic considered various options to deal with vice-presidential inability and ultimately favored executive declarations of prospective inability, as described above. Below is a summary of other options we considered.

i. Statute

The Clinic considered congressional enactment of a statute providing a mechanism for a determination of vice-presidential inability. The Vice President plays a vital role in succession through his authority, with the Cabinet, to determine presidential inability under the Twenty-Fifth Amendment; thus, a statute providing for a determination of the Vice President’s inability could be seen as necessary and proper to enable the person next in the line of succession to play a vital role in the event of a Vice President’s inability. Ultimately, the Clinic did not believe such a statute would pass constitutional muster because the Constitution specifies that Congress can act in the event of a dual inability; it does not provide that Congress can act in the case of a vice-presidential inability alone.⁹⁴ Silva and Brownell, as indicated above, believed congressional authority was limited to circumstances in which both the President and Vice President were unable or absent.⁹⁵

ii. Impeachment

Impeachment would be a dubious and problematic route to address the problem of vice-presidential inability. The wrongdoing contemplated by the Constitution's requirement of "high crimes and misdemeanors" has been somewhat broadly construed, but, although impeachable conduct need not be criminal, inability still stands far apart from bribery, treason, and the other types of "political" crimes that constitute a willful abuse of office and that justify impeachment and removal.⁹⁶ Further, partisan considerations have frequently played a role in impeachment and removal. The impeachment and removal of a President or Vice President for inability is both unsupported by the language or any reasonable interpretation of the Constitution and could set a dangerous precedent for the use or threat of impeachment and removal as a partisan political weapon.⁹⁷

ENDNOTES

- 1 See U.S. CONST. art. II, § 1, cl. 6 (granting Congress the power to provide for succession only in the event of dual inability and/or vacancy).
- 2 See *id.* amend. XXV.
- 3 See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 59 (2d ed. 1992) [hereinafter FEERICK, *THE TWENTY-FIFTH AMENDMENT*].
- 4 See *id.*
- 5 See *id.* at 104–08.
- 6 *Id.* at 111.
- 7 See *id.* at 193; see also John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73, 92 (1963) (citing 10 *MEMOIRS OF JOHN QUINCY ADAMS* 463–64 (Charles Francis Adams ed., 1876) and *CONG. GLOBE*, 27TH CONG., 1ST SESS., 3 (1841)); Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 966 (2010).
- 8 U.S. CONST. amend. XXV, § 1.
- 9 See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 193.
- 10 U.S. CONST. amend. XXV, § 2.
- 11 See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 193.
- 12 See U.S. CONST. amend. XXV, § 3.
- 13 See *id.* amend. XXV, § 4.
- 14 See *id.*
- 15 See *id.*
- 16 See *id.*
- 17 See *id.*; see also FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 204 (“Once the President announces his recovery by transmitting an appropriate written declaration to the Speaker and the President pro tempore, he then must wait four days before resuming his powers and duties Either the Vice President alone or the Cabinet and Vice President can agree to the President’s taking over immediately or at any time short of the four days.”).
- 18 See U.S. CONST. amend. XXV, § 4.
- 19 See *id.*
- 20 See *id.*
- 21 See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 160; see also Goldstein, *supra* note 7, at 969.
- 22 See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 149–50; see also Goldstein, *supra* note 7, at 970.
- 23 See FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 184; see also Goldstein, *supra* note 7, at 972 (discussing the political confirmation process at length).
- 24 Letter from President Ronald Reagan to the President *Pro Tempore* of the Senate and the Speaker of the House on the Discharge of the President’s Powers and Duties During His Surgery, 2 *PUB. PAPERS* 919 (July 13, 1985) [hereinafter Reagan Letter], available at <http://www.reagan.utexas.edu/archives/speeches/1985/71385b.htm>; see HERBERT L. ABRAMS, *THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 199–200* (1992); see also Fred F. Fielding, Keynote Address at the Fordham Law Review Symposium: An Eyewitness Account of Executive “Inability” (Apr. 16, 2010), in 79 *FORDHAM L. REV.* 823, 830 (2010) (noting that President Reagan signed a letter which authorized the procedures of Section 3 without formally invoking it).
- 25 See Reagan Letter, *supra* note 24; see also Fielding, *supra* note 24, at 830 (discussing President Reagan’s concerns in writing the letter this way).
- 26 See Reagan Letter, *supra* note 24; see also Fielding, *supra* note 24, at 830.
- 27 See Fielding, *supra* note 24, at 833; Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 *YALE L. & POL’Y REV.* 459, 488 (2009).
- 28 See Fielding, *supra* note 24, at 833; see also Gustafson, *supra* note 27, at 489.
- 29 Letter from President George W. Bush to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States, 1 *PUB. PAPERS* 1083 (June 29, 2002), available at <http://www.presidency.ucsb.edu/ws/?pid=63676>; Letter from President George W. Bush to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States, 43 *WEEKLY COMP. PRES. DOC.* 1003 (July 21, 2007), available at <http://www.presidency.ucsb.edu/ws/?pid=75568>.
- 30 Letter from President George W. Bush to Congressional Leaders on Resuming the Powers and Duties of President of the United States, 1 *PUB. PAPERS* 1084 (June 29, 2002), available at <http://www.presidency.ucsb.edu/ws/?pid=73051>; Letter from President George W. Bush to Congressional Leaders on Resuming the Powers and Duties of the President of the United States, 43 *WEEKLY COMP. PRES. DOC.* 1004 (July 21, 2007), available at <http://www.presidency.ucsb.edu/ws/?pid=75573>.
- 31 See Fielding, *supra* note 24, at 824–25 (noting that some historians argue that the Twenty-Fifth Amendment should have been invoked at this time).
- 32 See *id.* at 827, 829.
- 33 *Id.* at 828.

- 34 DEL QUENTIN WILBER, *RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN* 131, 175, 181 (2011).
- 35 *See id.* at 178, 193; *see also* ABRAMS, *supra* note 24, at 185–89.
- 36 John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 907, 909 (2010) [hereinafter Feerick, *Presidential Succession and Inability*].
- 37 *See* Letter from John D. Feerick to Richard Poff (Feb. 7, 1965) (on file with authors).
- 38 *See id.*
- 39 *See id.*
- 40 *See id.*; *see also* Feerick, *Presidential Succession and Inability*, *supra* note 36, at 909 n.1.
- 41 *See* S. Res. 161, 85th Cong. (1958); *see also* S.J. Res. 139, 88th Cong. (1963).
- 42 Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 *YALE L.J.* 189, 210 (1958); *see also* S. Res. 19 (1961); H.J. Res. 529 (1961); S. Res. 161.
- 43 *See* S. Res. 161; *see also* AM. ENTER. INST. FOR PUB. POLICY RESEARCH, *PRESIDENTIAL DISABILITY AND VICE PRESIDENTIAL VACANCIES* 9 (1964).
- 44 *See* FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at 59–61. Two months after President Kennedy’s assassination, the American Bar Association convened a committee of twelve attorneys and released its consensus report in January of 1964. *See id.* The report contained guiding principles that largely tracked Senator Birch Bayh’s proposal, Senate Joint Resolution 139, and the eventual Twenty-Fifth Amendment. *Id.* at 60–61.
- The consensus expressed in the report, following the two-day conference on January 21 and January 22, 1964 was as follows:
1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.
 2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.
 3. The amendment should provide that in the event of the inability of the President the power and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.
 4. The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.
 5. The amendment should provide that the inability of the President to resume the power and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.

Id. at 60.

The Conference came to a consensus on presidential succession, as well, finding that:

1. The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in the line of succession shall succeed to the office for the unexpired term.
2. It is highly desirable that the office of the Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of the Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

See id. at 60–61 & n.3.

- 45 110 *CONG. REC.* 1391, 2292 (1964).
- 46 Feerick, *Presidential Succession and Inability*, *supra* note 36, at 936.
- 47 *See* U.S. CONST. amend. XXV, §§ 3 & 4.
- 48 *See id.*
- 49 *See id.* amend. XXV, § 3.
- 50 *See id.* amend. XXV, § 4.
- 51 *See* Feerick, *Presidential Succession and Inability*, *supra* note 36, at 934–36.
- 52 *See* U.S. CONST. amend. XXV, § 1 (stating that the Vice President becomes President upon the death, resignation or removal from the office of President).
- 53 *See id.* amend. XXV, § 4 (establishing that the Vice President is a necessary actor in the determination of presidential inability).
- 54 Fielding, *supra* note 24, at 825. Fred Fielding stated as follows:
- [O]ne of the first things I did when I became Counsel to President Reagan was to put my staff to work on preparing a book. It was going to be a comprehensive book. It was really kind of an emergency manual, which detailed every possible scenario that we could think of for presidential inability and even vice presidential inability.
- Id.* at 828. Fielding said this manual was passed on to the administration of George W. Bush and that copies were still stored in safe locations. *Id.* at 828–29. More generally, *see* Professor Feerick’s background information regarding the Miller Center Commission in his book on the Twenty-Fifth Amendment. *See* FEERICK, *THE TWENTY-FIFTH AMENDMENT*, *supra* note 3, at xx–xxi (“In 1985, a Commission on Presidential Disability was appointed by the White Burkett Miller Center of Public Affairs at the University of Virginia to review the country’s experience with the Twenty-Fifth Amendment and to examine important issues regarding presidential health. Included on the Commission were two principal authors of the Twenty-Fifth Amendment, former Attorney General Herbert Brownell and former Senator Birch Bayh.”). Following the Clinic’s work on this Report, former Vice President Dick Cheney published his memoir in which he reflected on presidential succession issues and, in particular, the implications of vice-presidential inability. *See* Dick Cheney, *IN MY TIME: A PERSONAL AND POLITICAL MEMOIR* 319–21 (2011).
- 55 *THE FEDERALIST* NO. 41 (James Madison).
- 56 *See* U.S. CONST. amend. XXV, §§ 3 & 4.
- 57 *Id.* art. II, § 1, cl. 6.

- 58 Presidential Succession Act of 1947, 3 U.S.C. § 19(d)(1) (2006); Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947); Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886).
- 59 See 3 U.S.C. § 19 (2006).
- 60 *Id.* art. I, § 8, cl. 18.
- 61 17 U.S. (4 Wheat.) 316 (1819).
- 62 *Id.* at 421.
- 63 *Kansas v. Colorado*, 206 U.S. 46, 88 (1907).
- 64 See Feerick, *Presidential Succession and Inability*, *supra* note 36, at 942–43; see generally Interview by Deborah Eltgroth & Daniel Hafetz with Birch Bayh, former Senator, in Easton, Md. (Oct. 2, 2009), in 79 FORDHAM L. REV. 781 (2010).
- 65 Feerick, *Presidential Succession and Inability*, *supra* note 36, at 942.
- 66 RUTH C. SILVA, PRESIDENTIAL SUCCESSION 106-07 (1951); see also 13 CONG. REC. 131 (1881); 14 CONG. REC. 915–16 (1883).
- 67 Ruth C. Silva, *Presidential Inability*, 35 U. DET. L.J. 139, 171 (1957).
- 68 *Id.*
- 69 Herbert Brownell, Jr., *supra* note 42, at 206.
- 70 See *Presidential Inability*, 42 Op. Att’y Gen. 69 (1961); see also SILVA, PRESIDENTIAL SUCCESSION, *supra* note 66, at 101.
- 71 See SILVA, PRESIDENTIAL SUCCESSION, *supra* note 66, at 101; see also Silva, *Presidential Inability*, *supra* note 67, at 156.
- 72 See SILVA, PRESIDENTIAL SUCCESSION, *supra* note 66, at 101.
- 73 Herbert Brownell, Jr., *supra* note 42, at 204.
- 74 *Presidential Inability*, *supra* note 70, at 88 (identifying this as the scholarly majority view) (emphasis added).
- 75 U.S. CONST. amend. XXV, § 2.
- 76 See *id.* art. II, § 1, cl. 6.
- 77 111 CONG. REC. 7941 (1965) (statement of Representative Richard Poff).
- 78 Gustafson, *supra* note 27, at 476.
- 79 *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. of the Judiciary*, 89th Cong. 21 (1963) (statement of Nicholas Katzenbach, Deputy Att’y Gen.).
- 80 Gustafson, *supra* note 27, at 476–77.
- 81 *Id.* at 477.
- 82 *Id.* at 479.
- 83 See Feerick, *Presidential Succession and Inability*, *supra* note 36, at 921.
- 84 See *id.* For a reproduction of the letter, see Appendix B.
- 85 Letter from President Dwight D. Eisenhower to Richard Milhous Nixon (Feb. 5, 1958), available at <http://www.eisenhowermemorial.org/presidential-papers/second-term/documents/566.cfm>.
- 86 *Id.*
- 87 See *id.*
- 88 See Feerick, *Presidential Succession and Inability*, *supra* note 36, at 922.
- 89 See *id.* The letter agreement was between President Johnson and Speaker McCormack due to the vice-presidential vacancy that resulted from Johnson’s ascension to the presidency when President John F. Kennedy was assassinated. For a reproduction of the letter, see Appendix B.
- 90 See Memorandum from Jack Valenti to President Lyndon Johnson, FG 1/The President 1/19/65 – 4/5/65, WHCF, LBJ Library (on file with authors). The memorandum indicates that a presidential disability paper was presented to President Johnson. However, a hand written note dated Jan. 29, 1965, initialed “JV” stated, “President did nothing in response to this memo.” *Id.*
- 91 See Gustafson, *supra* note 27, at 477 (citing David A. Drachman et al., *Subcommittee Report: Criteria for Disability and Impairment*, in PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY AND DISABILITY AMONG PRESIDENTS OF THE UNITED STATES 276 (James F. Toole & Robert J. Joynt eds., 2001)).
- 92 See Feerick, *Presidential Succession and Inability*, *supra* note 36, at 922.
- 93 See Fielding, *supra* note 24 at 828–29 (noting that he created a book “which detailed every possible scenario that we could think of for presidential inability or even vice presidential inability”).
- 94 See U.S. CONST. art. II, § 1, cl. 6.
- 95 See *supra* notes 67–69 and accompanying text.
- 96 MILLER CTR. COMM’N NO. 4, REPORT OF THE MILLER CENTER COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT 11 (1988).
- 97 Richard K. Neumann, Jr., *The Revival of Impeachment As a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 167 (2007) (suggesting that prior presidential impeachments were politically motivated).

VI. LINE OF SUCCESSION ISSUES

A. INTRODUCTION

Under Article II, Section I, Clause 6 of the Constitution, the Vice President is the first successor to the powers and duties of the presidency, and Congress is authorized to create a line of succession.¹ The line of succession beyond the vice presidency has taken three different forms over the past 220 years. The Presidential Succession Act of 1792 (“1792 Act”) included a line of succession that was strictly legislative in nature, running to the President *pro tempore* of the Senate and then to the Speaker of the House of Representatives.² Then, the Presidential Succession Act of 1886 (“1886 Act”) changed the line of succession to an entirely executive line, running through the Cabinet Secretaries.³ The Presidential Succession Act of 1947, as amended (“1947 Act”), changed the line of succession to include both legislators and executive officers, starting with the Speaker, followed by the President *pro tempore*, and then Cabinet Secretaries in the order of their departments’ creation: the “Secretary of State, Secretary of 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, and Secretary of Homeland Security.”⁴

The 1947 Act, like the 1792 Act, has been subject to criticism on constitutional grounds as well as on the basis of policy considerations. There is a serious question regarding both the constitutionality of including legislative members in the line of succession and the “bumping” provision that permits a Cabinet member, acting as President, to be replaced by the Speaker or President *pro tempore*.

As a matter of policy, the succession of legislative members presents numerous concerns, including violation of the doctrine of separation of powers, the possibility of a sudden and complete shift in party control of the executive branch, and conflicts of interest issues in instances of impeachment or removal of the President. On the other hand, inclusion of executive officers also raises questions about Cabinet members’ qualifications to serve as Acting President. The Clinic treats each of these issues in the sections that follow and advances a recommendation for returning to the executive line of succession as provided for in the 1886

Act. Failing adoption of this recommendation, the Clinic recommends an exclusively Cabinet line of succession for cases of presidential inability. This reform will facilitate a voluntary transfer of presidential power when circumstances require it and will reduce disruption in legislative leadership, but otherwise will preserve legislative succession.

B. CONSTITUTIONAL CONCERNS

1. CONSTITUTIONALITY OF THE LEGISLATIVE LINE OF SUCCESSION

The constitutionality of the 1947 Act and, more generally, of the legislative line of succession is questionable. The first constitutional question is whether the term “Officer,” as understood by the Framers and as it appears in Article II, Section 1, Clause 6, includes legislators. Article II, Section 1, Clause 6 provides in relevant part:

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 Congress may by Law . . . declar[e] what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.⁵

Congressional leaders and scholars have interpreted the term “Officer” to mean “Officer of the United States,”⁶ which refers only to executive branch officers who are nominated by the President and confirmed by the Senate. Thus, some argue that legislators are not qualified under the Constitution to act as President.⁷

It is also argued that, based on the description of the executive branch and the use of the term “Officer” elsewhere in the Constitution, the Framers did not anticipate legislators succeeding to the presidency. For example, in 1864, Senator James Bayard of Delaware referred to Article II, Section 1, Clause 2, which provides for the election of presidential electors, as an instance in which the term “Officer” is placed in opposition to those holding legislative positions.⁸ This clause distinguishes between Senators and Representatives, on the one hand, and persons “holding an Office of Trust or Profit under the United States,”⁹ on the other. Based on this distinction, Senator Bayard concluded that Senators and Representatives are not “Officers,” nor do they “hold office under the United States;” rather, they hold a position

of “trust,”¹⁰ and therefore are not qualified to succeed to the presidency under the Constitution. Furthermore, Senator Bayard argued that legislators are not “officers of the United States” because citizens from individual states or districts elect them, rather than citizens from throughout the country.¹¹

Similar arguments arise from the language in Article II, Section 1, Clause 1, which states in relevant part that “[the President] shall hold his Office during the Term of four Years.”¹² Moreover, Article I, Section 2, Clause 1, states, “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States”¹³ and Article I, Section 3, Clause 1, states, “[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years.”¹⁴ If the Framers intended legislative members to fill “Officer” positions, then they presumably would have used the same language in the Constitution for both the executive and legislative branches; however, the Framers refer to legislators as “chosen” for either two or six years, and they omitted the language “hold his Office.”¹⁵

Additionally, the 1947 Act may violate the Incompatibility Clause of Article I, Section 6, Clause 2.¹⁶ The Constitution makes clear that sitting members of Congress cannot hold “any civil Office under the Authority of the United States.”¹⁷ Therefore, the clause “civil Office under the Authority of the United States”¹⁸ must refer exclusively to the members of the executive and judicial branches because the Constitution does not say any “other” civil office. In language following in the same clause, the Constitution provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office[,]”¹⁹ again suggesting that a legislator is not an “Officer.” The language of Article I, Section 6 thus appears to exclude legislators from those who are “Officers.”²⁰

The constitutional provisions governing impeachment also raise issues related to the definition of “Officer.” Article II, Section 4 provides for the impeachment of the President, Vice President, and “all civil Officers of the United States.”²¹ Over time, the interpretation of the words “all civil Officers” has come to exclude legislators,ⁱ and thus supports the

argument that legislators are not “Officers” and are not eligible to succeed to the presidency. Other provisions of the Constitution also support this view. Specifically, Article II, Section 3 gives the President the authority to “Commission all the Officers of the United States.”²² However, members of Congress do not receive commissions to serve in the House of Representatives or the Senate, thus supporting the argument that legislators are not “Officers of the United States.”²³

On the other hand, some scholars note that the Framers used the term “Officers” in Article II, Section 1 instead of the term “Officers of the United States.”²⁴ Thus, it is argued that the ratifying states may have found the distinction unimportant because the Speaker and the President *pro tempore* are described as “Officers” of their houses elsewhere in the Constitution.²⁵

Yet, even if members of Congress are deemed “Officers” and are eligible to act as President, their inclusion in the line of succession raises issues about separation of powers. As President James Madison noted in 1792, an Acting President from the legislative branch would blur the lines of separation of powers.²⁶ In addition, the Speaker participates in the impeachment process, and the President *pro tempore* votes in removal proceedings, which presents an obvious conflict of interest since the 1947 Act places both in the line of succession. In fact, this conflict of interest was present in the 1868 effort to remove President Andrew Johnson for violating the Tenure of Office Act.²⁷ Johnson succeeded to the presidency after the assassination of President Abraham Lincoln and carried on as President with no Vice President.²⁸ When then President *pro tempore* Benjamin F. Wade voted in the removal trial of President Johnson, he effectively voted for his own succession to the presidency by voting “guilty” to remove President Johnson, because, under the 1792 Act, the President *pro tempore* was next in the line of succession after the Vice President.²⁹ Ultimately, the effort to remove President Johnson failed by one vote, but the incident cast light on the issue of potential conflicts of interest in the context of a legislative line of succession.³⁰

Moreover, the historical record reveals the political maneuvering that led to the insertion of legislators into the 1792 Act. The Federalists and anti-Federalists were engaged in a power struggle.³¹ The Federalists did not want the line of succession to run through the Cabinet because Thomas Jefferson, an

i See Appendix C for a discussion of this interpretation related to the impeachment trial of Senator William Blount.

anti-Federalist, was Secretary of State at the time.³² Alexander Hamilton, leader of the Federalist Party, persuaded his fellow Federalists in the Senate to overlook the constitutional questions about the 1792 Act in order to establish a legislative line of succession that would exclude Jefferson.³³

Although the arguments outlined above cast doubt on the constitutionality of the legislative line of succession, other arguments support its constitutionality. The primary support comes from the text of Article I, Sections 2 and 3,³⁴ which provides for the House of Representatives and the Senate to choose their “other Officers,” in addition to the two legislative positions referred to by name in the Constitution: Speaker and President *pro tempore*.³⁵ Thus, if the Speaker and President *pro tempore* are referred to as “Officers” in Article I, Sections 2 and 3,³⁶ and the word “Officer” in Article II, Section 1 refers to all “Officers,”³⁷ members of Congress are, arguably, constitutionally eligible to be included in the line of succession.

Furthermore, historical practice supports the constitutionality of the legislative line of succession. The Second Congress, which passed the 1792 Act placing legislators in the line of succession, included six membersⁱⁱ of the Constitutional Convention who approved the final language of the Constitution³⁸ and thus were uniquely qualified to interpret the Framers’ intent. However, four of the six membersⁱⁱⁱ present in the Second Congress voted against the 1792 Act,³⁹ including President James Madison, who at the time was a Representative from Virginia. As noted previously, President Madison believed that the inclusion of the President *pro tempore* and the Speaker in the line of succession was not constitutional because they were not “Officers” in the constitutional sense and that any other reading of the Constitution would violate the separation of powers.⁴⁰ Additionally, President Madison believed that the forced resignation of the President *pro tempore* or Speaker under the 1792 Act would remove any authority those individuals might previously have held in order to act as President.⁴¹

ii These members were Abraham Baldwin, Elbridge Gerry, Thomas Fitzsimons, Nicholas Gilman, James Madison, and Hugh Williamson. *See* 3 Annals of Cong. 417-18 (1791).

iii Those voting against the 1792 Act were Abraham Baldwin, Nicholas Gilman, James Madison, and Hugh Williamson. *Id.*

2. PRESIDENTIAL QUALIFICATIONS

Constitutional considerations also arise regarding other kinds of qualifications for those in the line of succession. Article II, Section 1, Clause 5 provides:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.⁴²

The 1947 Act confirmed that this provision would apply to those in the line of succession with the language, “this section shall apply only to such officers as are eligible to the office of President under the Constitution.”⁴³ While these requirements are clear, the question remains whether an individual who may be constitutionally qualified to act as President is “qualified” in the eyes of the national electorate. For example, notwithstanding that the President *pro tempore* is third in line of succession after the President, that position is traditionally filled by the Senator with “the longest record of continuous service,”⁴⁴ rather than by a Senator who is being evaluated as a possible successor to the President. If the Senate’s only criterion for nominating a President *pro tempore* is the length of a Senator’s service, we respectfully suggest that the Senate should change its practice or the position should be removed from the line of succession.

The qualifications of Cabinet members raise other issues. A number of departments have generated considerable controversy because those departments necessarily engage in practice and policy that at any given time may be under debate; in addition, Cabinet Secretaries may be unfamiliar to the electorate (as may be legislative leaders).^{iv} Therefore,

iv For example, a survey of 1,000 “likely voters” on April 1-2, 2011, discusses whether the American public is knowledgeable of the current Cabinet. For a more detailed explanation of the survey, see *Locke, Solis Are Least Known of Obama Cabinet Members*, Rasmussen Reports (Apr. 9, 2011), http://www.rasmussenreports.com/public_content/politics/obama_administration/april_2011/locke_solis_are_least_known_of_obama_cabinet_members. Similarly, on March 17-20, 2011, a Pew Research Center survey found that only forty-three percent of Americans know that John Boehner is the Speaker of the House. See Bruce Drake, *What Does John Boehner Do for a Living? Less Than Half in Poll Know*, POLL WATCH DAILY (Apr. 1, 2011), <http://www.pollwatchdaily.com/2011/04/01/what-does-john-boehner-do-for-a-living-less-than-half-in-poll-know/>.

when considering whether the legislative or executive line of succession is appropriate, the issue of qualifications in both the constitutional sense and as seen through the eyes of the electorate must be considered.

3. “BUMPING” PROVISION

“Bumping” is a term that has come to describe cases in which legislators—not the President or Vice President—replace a Cabinet member who is an Acting President. Under the 1947 Act, Cabinet members who have succeeded to the powers and duties of the office of President in the absence of a Speaker or President *pro tempore* may be displaced or bumped from the presidency once a Speaker or President *pro tempore* is elected or qualifies for office. This provision does not allow for Cabinet members to bump one another or for a Speaker to bump the President *pro tempore* or vice versa, but it does create a scenario for several officeholders to serve as President in a short time.

The possibility of multiple successors in a short period appears to violate Article II, Section 1, which authorizes Congress only to enact a law that would declare what “Officer” would act as President until “a President shall be elected,” and not a law that would allow others to bump Acting Presidents from office.⁴⁵ Furthermore, Article II, Section 1 states that the Acting President “shall act accordingly, until the Disability be removed, or a President shall be elected.”⁴⁶

The rationale behind inclusion of the bumping provision is not well documented in the legislative history of the 1947 Act. The debates on the 1886 Act, however, do include references to bumping.⁴⁷ In 1883, Senator George Edmunds of Vermont first proposed having the Secretary of State act as President, should no Speaker or President *pro tempore* be available, and then relinquishing the office once a Speaker or President *pro tempore* was available to act as President.⁴⁸ Senator George Hoar opposed this, stating that it is not within Congress’s power under the Constitution to provide for two or three officers in succession to act as President.⁴⁹ The 1886 Act did not provide for bumping.

C. UNCERTAINTY IN TIMES OF PRESIDENTIAL SUCCESSION^v

1. ACTING SECRETARIES IN THE LINE OF SUCCESSION AND STRUCTURAL ISSUES RAISED^{vi}

It is unclear whether the Acting Cabinet Secretaries are in the line of succession under the 1947 Act.^{vii} During congressional debates leading up to the 1947 Act the topic of their inclusion did not come up once.⁵⁰ Senator Kenneth Wherry, who introduced a Senate Bill, S. 564, which was later passed into law as the 1947 Act, said, “the bill accomplishes what I want to do, and that is to make the Speaker always the man that is to be the Acting President.”⁵¹ Senator Wherry thought that the Speaker was the closest official to the electorate.⁵² He stated:

My theory is that as long as they all are elected officers I would much rather it would go to the Speaker first; then to the President *pro tempore* as the next closest to the Speaker, maybe. But in the event neither one of them is available, then go down *through the line we have now*, and they act as President only until either the President, Vice President, the Speaker, or the President *pro tempore* qualifies. In that order they can supplant the Secretary of State.⁵³

v It is highly unlikely but not unquestionably clear that the Speaker of the House *pro tempore* and the Acting President *pro tempore* of the Senate are not currently included in the line of succession. See Appendix E. There have been two bills introduced by Congressman Brad Sherman since September 11, 2001 that specifically state that the Speaker of the House *pro tempore* is not considered the Speaker of the House for the purposes of presidential succession. Both of these bills are silent with regard to the Acting President *pro tempore* of the Senate. The Clinic, recognizing that this is a point that has not previously been discussed in the literature on presidential succession, does not find a convincing argument for the inclusion of these legislators in the current line of succession. For a discussion of Congressman Sherman’s bills see Appendix D. The Clinic, however, recommends that Congress explicitly clarify whether Acting Secretaries and substitute congressional leadership are included in the line of succession. We think it inappropriate to include the latter—interim legislative officials—in the line of succession.

vi An Acting Secretary is an officer who was not appointed as a Cabinet secretary by the President, but who nonetheless now holds the powers of a Cabinet secretary. By contrast, a Cabinet secretary is an individual who was appointed by the President with advice and consent of the Senate for the position of Cabinet Secretary. For a discussion of the bills introduced since September 11, 2001 see Appendix D.

vii “We have spoken to acting secretaries who told us they had been placed in the line of succession.” CONTINUITY OF GOV’T COMM’N, PRESERVING OUR INSTITUTIONS: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 34 (2009).

Thus, it is unlikely that Senator Wherry intended to include Acting Secretaries. They are more removed from the electorate than the Speaker, President *pro tempore*, and Cabinet Secretaries. Further, Senator Wherry advocated for succession to run, after the Speaker and President *pro tempore*, “through the line we have now,” which under the 1886 Act was only the Cabinet Secretaries confirmed as such, thus excluding Acting Secretaries.⁵⁴ However, the language of the 1947 Act itself is ambiguous.

The inclusion of Acting Secretaries in the line of succession is supported by comparison of the language of the 1947 Act and the 1886 Act.⁵⁵ The 1886 Act explicitly included only Cabinet Secretaries confirmed as such. After enumerating the list of Cabinet Secretaries who were included in the line of succession, Section 2 of the 1886 Act provided, “[t]hat the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to *the offices therein named.*”⁵⁶ In contrast, the language of the 1947 Act is less clear. Section 19(d)(1) of the 1947 Act provides that “the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President.”⁵⁷ The list that follows is a list of the Cabinet Secretaries. Section 19(e) goes on to state, “[s]ubsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate.”⁵⁸ The lack of language in the 1947 Act explicitly limiting succession to Cabinet Secretaries, “confirmed as such,” raises the question whether the Acting Secretaries are in the line of succession. However, the fact that the 1886 Act did not include the Acting Secretaries, that Senator Wherry’s statement quoted above likely did not contemplate inclusion of Acting Secretaries, and that there is a complete absence of discussion of Acting Secretaries in the legislative history of the 1947 Act weigh against any interpretation of the 1947 Act that would include Acting Secretaries in the line of succession.

If Acting Secretaries are in the line of succession, then Section 19(d)(1) of the 1947 Act means that an Acting Secretary in a higher-listed department may become Acting President ahead of the lower-listed Cabinet Secretaries.⁵⁹ Section 19(d)(1) states only that, “the officer of the United States who is highest on the following list . . . shall act as President.”⁶⁰ There is no distinction made between an Acting Secretary or a

Cabinet Secretary who was appointed and confirmed as such. Thus, under one interpretation, an Acting Secretary of State would have a valid claim to become Acting President ahead of the Secretary of the Treasury.⁶¹

Whatever Congress’s intent in passing the 1947 Act, the Clinic has grappled with the soundness of including the Acting Secretaries in the line of succession. Their inclusion greatly expands the line of succession, but it raises several concerns about the implementation of the line of succession and the qualifications of the individuals who could assume the powers and duties of the presidency.^{viii}

D. ADDITIONAL CONCERNS

1. DEMOCRATIC PEDIGREE

Commentators most often defend placing members of Congress in the line of succession before Cabinet members on the basis of democratic pedigree, arguing that members of Congress are elected officials and thus, most representative of the national electorate after the President and Vice President.⁶² It is argued that Cabinet members, on the other hand, are not elected, but are only appointed by the President.^{ix} Although they are not chosen by the electorate, Cabinet members do represent the electorate’s mandate as designees of the President, who is the most politically representative figure of the national constituency.^{x63} Furthermore, Cabinet members, other than interim appointments, are not only appointed by the President but also must be confirmed by the Senate, which places them in the unique position of having been confirmed by “two continental institutions,”⁶⁴ in contrast to the Speaker of the House and the President *pro tempore*, who are selected only by their local constituency and then by their respective houses.⁶⁵

viii For further discussion on the effect Acting Secretaries might have on implementing the line of succession, as well as the concerns regarding their presidential qualifications, see Appendix E.

ix President Truman, in his address to Congress, made the point—that with a Cabinet line of succession, the President has the ability to nominate the person who would be the “immediate successor in the event of [the President’s] own death or inability to act.” H.R. Doc. No.79-246, at 1 (1945).

x The President may be elected without a majority or even a plurality of the popular vote; however, the electorate of all the states still votes for the electors for President and Vice President.

2. PARTY CONTINUITY

The current line of succession can effectuate a change of party in the White House if the legislative leader who assumes the powers and duties of the presidency belongs to the party opposite to that of the elected President. Because a party shift could occur at any time during a presidential term and the 1947 Act does not provide for special elections, the party which was not elected to the presidency could control the office of the President for up to four years (should a dual inability and/or vacancy occur, for example, on or after Inauguration Day), contrary to the electorate's mandate. Such a shift may be viewed as illegitimate in the eyes of the electorate.

3. HISTORICAL PRECEDENT

There is historical precedent for a legislative line of succession. Scholars such as James E. Fleming argue that if the question of the constitutionality of a legislative line of succession were to come before the Supreme Court, the burden of proof would be on those arguing against the constitutionality of the 1792 Act and the 1947 Act.⁶⁶

E. RECOMMENDATIONS FOR FUTURE ACTION

1. EXECUTIVE LINE OF SUCCESSION^{x1}

The Clinic recommends an executive line of succession that would include all Cabinet Secretaries in the order in which their departments were established. Cabinet Secretaries

xi The Clinic also discussed maintaining the current legislative-Cabinet line of succession, but to modify it to maintain party continuity by placing the leaders of the President's party in the House of Representatives and the Senate in the line of succession rather than the Speaker and President *pro tempore* regardless of their party affiliation. The Clinic does not support this recommendation. First, the question remains unanswered as to whether the Speaker and President *pro tempore* are "Officers" in the constitutional sense. The creation of additional offices within the House of Representatives and the Senate would create positions that are even less clearly "Officers" because these new positions are not specifically enumerated in the Constitution. Second, because the proposed positions within Congress are not constitutionally mandated—unlike the Speaker and President *pro tempore*—they may be revoked based on a simple vote within each House, which would add to the uncertainty in the line of succession. For a thoughtful discussion and contrary recommendations on this subject see Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 1038-39 (2010).

should be required to resign from their positions if they act as President in cases of death, resignation, or removal, not because of a separation of powers issue, but so that their offices can be filled with a new Secretary and so that there will be a full Cabinet. As a matter of constitutional law, an executive line of succession cannot be challenged because Cabinet Secretaries, unlike legislative leaders, are clearly "Officers" under Article II, Section 1, Clause 6. Furthermore, Cabinet Secretaries, by virtue of their position in government and having day-to-day involvement in the administration of the executive branch, are more likely than legislators to run the executive branch consistent with the views held by the former or unable President.

Furthermore, an executive line of succession moots the bumping provision. If legislators are no longer in the line of succession, they cannot bump an executive officer acting as President.

2. BINARY LINE OF SUCCESSION

As an alternative to an executive line of succession, the Clinic proposes that, in cases of presidential inability and vice-presidential inability or vacancy, the line of succession should temporarily run through the Cabinet Secretaries. Under this proposal, Cabinet Secretaries should not be required to resign from their positions because no separation of powers issues are implicated and Cabinet Secretaries can return to their former offices without a second presidential nomination and subsequent Senate confirmation. This approach promotes party continuity during times of temporary presidential inability. In the event of a dual presidential and vice-presidential vacancy due to death, resignation, or removal from office, under this binary approach the line of succession would continue as it currently stands under the 1947 Act with successors running first to the legislative leaders and then to Cabinet Secretaries.^{xii}

xii See Appendix D for Congressman Brad Sherman's similar proposal.

F. RECOMMENDATIONS FOR IMMEDIATE ACTION

1. ACTING SECRETARIES

The Clinic recommends that Congress confirm whether Acting Secretaries are included in the line of succession, and, if so, either remove them from the line, or alternatively, amend the 1947 Act so that Acting Secretaries can assume the powers and duties of the presidency, in the order of their departments' creation, but only after succession has passed through all of the Cabinet Secretaries. Greater clarity is needed on the subject of their inclusion. We are aware that the Continuity in Government Commission and various legislative proposals^{xiii} suggest that Acting Secretaries be excluded altogether, reflecting to some extent a point of view as to their qualifications to serve in the highest office. However, we do not rush to this conclusion even in the face of this impressive authority, believing that a number of individuals who serve in these positions are highly qualified and have been confirmed by the Senate. Their inclusion in the line of succession does have the benefit of deepening the line of succession in the event of a catastrophe. Finally, if Acting Secretaries are included in the line of succession, then the departmental lines of succession need to be more carefully studied to determine the qualifications of the individuals in those lines of succession for possible presidential service. Either explicitly excluding Acting Secretaries from the line of succession, or allowing Acting Secretaries to assume the powers and duties of the presidency only after all succession has run through all of the Cabinet Secretaries, greatly reduces potential confusion were statutory succession to be triggered in the event of a mass catastrophe and, in particular, the succession of an unknown Acting Secretary of questionable presidential pedigree.

xiii For a more complete discussion of the Continuity of Government's proposal and the proposed legislation see Appendix D.

ENDNOTES

- 1 U.S. CONST. art. II, § 1, cl. 6.
- 2 Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886).
- 3 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).
- 4 Presidential Succession Act of 1947, 3 U.S.C. § 19(d)(1) (2006).
- 5 U.S. CONST. art. II, § 1, cl. 6.
- 6 Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 1020 (2010).
- 7 See CONG. GLOBE, 38TH CONG., 1ST SESS. app. 35–37 (1863–64).
- 8 13 CONG. REC. 128 (1881); see also U.S. CONST. art. II, §1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).
- 9 U.S. CONST. art. II, § 1, cl. 2.
- 10 13 CONG. REC. 128 (statement of Sen. James A. Bayard).
- 11 *Id.*
- 12 U.S. CONST. art. II, § 1, cl. 1.
- 13 *Id.* art. I, § 2, cl. 1.
- 14 *Id.* art. I, § 3, cl. 1.
- 15 Compare *id.* art. I, § 2, cl. 1, and *id.* art. I, § 3, cl. 1, with *id.* art. II, § 1, cl. 1.
- 16 U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 See 13 CONG. REC. 128 (1881) (statement of Sen. James A. Bayard) (arguing that these “Officers” are not included in the line of succession).
- 21 U.S. CONST. art. II, § 4 (stating in full that “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).
- 22 *Id.* art. II, § 3 (stating in relevant part that “[The President] shall Commission all the Officers of the United States.”).
- 23 See, e.g., 13 CONG. REC. 127–28 (1881) (statement of Sen. James A. Bayard).
- 24 Goldstein, *supra* note 6, at 1020–21.
- 25 *Id.*; see also U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 5.
- 26 Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 3 THE FOUNDERS’ CONSTITUTION (Philip Kurland & Ralph Lerner eds., 2000), available at http://press-pubs.uchicago.edu/founders/documents/a2_1_6s3.html.
- 27 See JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF RESIDENTIAL SUCCESSION 113–14 (Fordham U. Press, 1965).
- 28 See *id.* at 114.

- 29 *See id.*
- 30 *See id.*
- 31 *Id.* at 60–62.
- 32 *Id.* at 60–61.
- 33 *Id.* at 60–62.
- 34 *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 5.
- 35 *Id.* art. I, § 2, cl. 5 (stating in relevant part that “The House of Representatives shall chuse their Speaker and other Officers . . .”); *id.* art. I, § 3, cl. 5 (stating in relevant part that “The Senate shall chuse their other Officers, and also a President pro tempore . . .”).
- 36 *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 5.
- 37 *Id.* art. II, § 1.
- 38 FEERICK, *supra* note 27, at 60.
- 39 3 ANNALS OF CONG. 417 (1791).
- 40 *See* Letter from James Madison to Edmund Pendleton, *supra* note 26.
- 41 *See id.*
- 42 U.S. CONST. art. II, § 1, cl. 5.
- 43 Presidential Succession Act of 1947, 3 U.S.C. § 19(e) (2006).
- 44 Definition of *President Pro Tempore*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/president_pro_tempore.htm (last visited Aug. 25, 2011). In a recent article, Professor Amar also argues that “most Speakers are un-presidential.” Akhil Reed Amar, *Why Speakers of the House Should Never Be President*, THE NEW REPUBLIC, JAN. 12, 2012 (stating that “Speakers of both parties have typically been unfit for the presidency”), <http://www.tnr.com/print/article/politics/99509/presidential-succession-speaker-house>.
- 45 *See* U.S. CONST. art. II, § 1, cl. 6; *see also* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 135 (1995) (noting this discrepancy and discussing further the problems created by bumping).
- 46 U.S. CONST. art. II, § 1, cl. 6.
- 47 *See, e.g.*, 17 CONG. REC. 676–77 (1886) (statement of Sen. George Everett Adams); 17 CONG. REC. 220 (1885) (debate on Dec. 16, 1885); 14 CONG. REC. 880 (1883) (debate on Jan. 5, 1883).
- 48 14 CONG. REC. 880.
- 49 *Id.*
- 50 *See* *Succession to the Presidency: Hearing Before the Comm. on Rules and Admin.*, 80th Cong. (1947) [hereinafter *Succession to the Presidency*]; *To Determine Presidential Succession: Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. (1947); *Selection of an Acting President in the Case of Failure to Qualify of Both President-Elect and Vice-President Elect: Hearing Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. (1947); H.R. Rep. No. 80-80 (1947); H.R. Doc. No. 80–89 (1947); H.R. Rep. No. 80–817 (1947).
- 51 *Succession to the Presidency*, *supra* note 50, at 42 (statement of Sen. Kenneth S. Wherry).
- 52 *Id.* at 43.
- 53 *Id.* at 61 (emphasis added).
- 54 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1, § 1 (repealed 1947).
- 55 CONTINUITY OF GOV’T COMM’N, PRESERVING OUR INSTITUTIONS: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 34 (2009). The Continuity of Government Commission has confirmed with some acting secretaries that they were placed in the line of succession. *Id.*
- 56 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (emphasis added) (repealed 1947).
- 57 Presidential Succession Act of 1947, 3 U.S.C. § 19(d)(1) (2006).
- 58 *Id.* § 19(e).
- 59 *Id.* § 19(d)(1).
- 60 *Id.*
- 61 *Id.* § 19.
- 62 *See* Amar & Amar, *supra* note 45, at 130 (noting that this argument is often made).
- 63 *See id.*; *see also* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 172–73 (1995).
- 64 Amar & Amar, *supra* note 45, at 131.
- 65 *Id.* at 130–131.
- 66 James E. Fleming, *Presidential Succession: The Art of the Possible*, 79 FORDHAM L. REV. 951, 952–56 (2010).

VII. PRE-INAUGURATION SUCCESSION CONTINGENCIES

A. INTRODUCTION

The peaceful and orderly transfer of executive power, beginning with the popular election and culminating with the inauguration of the new President, is crucial to the continuity of a democratic government that is responsive and accountable to the electorate. Lack of clarity in the constitutional provisions, federal statutes, state laws, and party rules governing candidate succession during the pre-inaugural period threatens orderly transfers of presidential power.ⁱ The contingencies raised below therefore merit attention, are ripe for reform, and are no less important than post-inaugural contingencies.

B. LEGAL FRAMEWORK

Constitutional provisions, federal and state statutes, and political party rules govern the modern system of pre-inaugural presidential succession.ⁱⁱ This section identifies the sources of law that are applicable at specific junctures in the pre-inaugural period and the relationships among them.

Contingencies that may occur prior to a General Election, during which prospective candidates campaign for their parties' nominations in primaries, caucuses, and party conventions, are governed almost exclusively by party rules and state law. The Rules of the Republican Party, adopted by the 2008 Republican National Convention on September 1, 2008 and amended by the Republican National Committee on August 6, 2010, state:

The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which may occur by reason of death, declination, or otherwise of the Republican candidate for President of the United States or the Republican candidate for Vice President of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filling any such vacancies.¹

i This discussion is limited to death or resignation of a candidate or nominee. The possible contingencies arising from temporary or permanent inability, though worthy of prompt attention and scrutiny, are numerous and largely beyond the scope of this inquiry in the pre-inaugural period.

ii See Appendix A for the text of these constitutional provisions, federal statutes, and political party rules. See Appendix F, Chart 5 for the text of the state statutes.

Similarly, the Democratic National Committee has the responsibility of filling vacancies on the party's national ticket that occur prior to the General Election. The Charter & the Bylaws of the Democratic Party of the United States, as amended by the Democratic National Committee on August 20, 2010, provide that:

The Democratic National Committee shall have general responsibility for the affairs of the Democratic Party between National Conventions, subject to the provisions of this Charter and to the resolutions or other actions of the National Convention. This responsibility shall include . . . (c) filling vacancies in the nominations for the office of President and Vice President.²

The Democratic National Committee, in the *Call for the 2012 Democratic National Convention*, stipulates:

In the event of death, resignation or disability of a nominee of the Party for President or Vice President after the adjournment of the National Convention, the National Chairperson of the Democratic National Committee shall confer with the Democratic leadership of the United States Congress and the Democratic Governors Association and shall report to the Democratic National Committee, which is authorized to fill the vacancy or vacancies.³

The Constitution provides in Article II, Section 1, Clause 4 that “[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”⁴ In 1845, Congress established the date for the General Election in a presidential year to be the first Tuesday after the first Monday in November. The General Election involves the process whereby presidential electors are chosen by popular vote in each state.⁵ In the event of a mass catastrophe, such as a terrorist attack that prevents citizens from going to the polls or the death of a party's nominee in the period prior to the General Election, Congress is constitutionally authorized to delay the date of the election.⁶ Fortunately, Congress has never had to act on this authority.ⁱⁱⁱ

iii In contrast, local governments have postponed elections in emergency situations. The terrorist attack in New York City on Tuesday, September 11, 2001, resulted in the postponement of citywide primary elections scheduled that day and which were already underway at the time of the attack. A New York Supreme Court order canceling the election was followed by an executive order by Governor George E. Pataki temporarily suspending the election. Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 525-26 (2005).

Prior to the General Election, each state is responsible for selecting its presidential electors.⁷ Generally, candidates for presidential elector are nominated by the state political parties, which are responsible for filing the electors' names with the Secretary of State of their respective states.⁸ Article II, Section 1, Clause 2 provides the manner in which these selections are to be made:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.⁹

After the General Election, the electors are required to meet and are expected to cast their electoral votes for the candidates to whom they are pledged. Under current law, the presidential electors meet in their respective state capitals and in the District of Columbia forty-one days following the General Election.¹⁰ At these fifty-one separate meetings, the electors cast their electoral votes in the manner required by the Twelfth Amendment, which states:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.¹¹

Federal law does not require electors in each state to vote for any particular candidate.¹² Many states, however, mandate by statute that electors vote for candidates to whom they have pledged their votes.¹³ These statutory mandates create a potential crisis if a presidential or vice-presidential candidate dies between Election Day in November and the meeting of the Electoral College in mid-December. In such a case, “[t]heoretically, the electors would be free to vote for anyone they pleased. But the national party rules for the filling of vacancies by the national committees would still be in effect, and the electors would probably—but not necessarily—

respect the decision of their national committee on a new nominee.”¹⁴ The political parties, relying on the authority granted to them in their respective party rules and bylaws, likely would recommend a replacement candidate for whom the electors should vote.

After the electoral votes are cast by the electors and certified by the appropriate state official, the votes are sealed and transmitted to the President of the United States Senate, the Vice President.¹⁵ The Twelfth Amendment provides that “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”¹⁶ By federal statute, the joint session of Congress is required to take place at 1:00 p.m. on January 6 in the calendar year following the meetings of the Electoral College.¹⁷ The person receiving the greatest number of votes for President becomes President, provided he receives a majority of the electoral votes.¹⁸ Likewise, the person receiving the greatest number of votes for Vice President becomes Vice President, provided he receives a majority of the electoral votes.¹⁹

If no candidate for President receives a majority, the House of Representatives is required, pursuant to the Twelfth Amendment, to go into session and choose the President “from the persons having the highest numbers not exceeding three on the list of those voted for as President.”²⁰ The state delegations cast their votes for President “by states,” with each state having one vote; a candidate must receive the votes of an absolute majority of state delegations—twenty-six—in order to become President-elect.²¹

Similarly, if no candidate for Vice President receives a majority of the electoral votes, then, pursuant to the Twelfth Amendment, the Senate is required to go into session and choose the Vice President “from the two highest numbers on the list.”²² A candidate must receive the vote of the “majority of the whole number” of Senators—fifty-one—in order to become Vice President-elect.²³

Section 4 of the Twentieth Amendment provides that, in the event of the death of any of the candidates from whom the respective Houses may choose the President or Vice President, Congress retains the authority to provide for a possible solution:

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.²⁴

If the House of Representatives fails to choose a President-elect in time for the inauguration on January 20,²⁵ then Section 3 of the Twentieth Amendment specifies that the Vice President-elect becomes Acting President until the House chooses a President when the right of choice devolves upon it.²⁶ If the Senate has also failed to choose a Vice President-elect by Inauguration Day, then, under the 1947 Act, the next in the line of succession, currently the Speaker of the House, becomes Acting President until either the House selects a President or the Senate selects a Vice President.²⁷

If the President-elect dies between the counting of the electoral votes by Congress on January 6 and Inauguration Day on January 20, then under the Twentieth Amendment the Vice President-elect becomes President.²⁸ In the event of the death of the Vice President-elect during this period, the President, at the beginning of his term of office, must nominate a new Vice President for congressional confirmation pursuant to Section 2 of the Twenty-Fifth Amendment.²⁹ In the event that both the President-elect and Vice President-elect die during this same period, the statutory line of succession goes into effect on Inauguration Day, placing the Speaker, the President *pro tempore*, and then Cabinet Secretaries, in the order of their departments' creation, in the line for the presidency.³⁰ The Speaker then becomes the Acting President for the full presidential term; but, if neither a Speaker nor a President *pro tempore* is available, the Cabinet member next in line of succession would become Acting President until a Speaker or President *pro tempore* becomes available.³¹

C. SUCCESSION PRIOR TO THE GENERAL ELECTION

If death or resignation occurs prior to the General Election, the political party of the candidate can fill the vacancy in the ticket.³² As stated above, Congress can also delay the date of the presidential election.³³ In the rare instances, in which the vice-presidential candidate has died or resigned, the national party executive committees, usually in consultation with the presidential candidate, convened to select a replacement

candidate in accordance with the party rules. For example, President Taft's incumbent Vice President, James S. Sherman, died on October 30, 1912, just days before the national popular election of 1912.³⁴ Vice President Sherman's name remained on the ballot because his death occurred so close to the election.³⁵ On November 12, 1912, the Republican National Committee selected Columbia University President Nicholas Murray Butler as Sherman's replacement.³⁶ Electors for Sherman voted for Butler when the Electoral College met.³⁷

In 1972, Democratic presidential nominee George McGovern selected Senator Thomas Eagleton as his vice-presidential candidate, and the party subsequently nominated him at the national party convention.³⁸ Senator Eagleton withdrew his name from nomination on July 31, 1972 after he disclosed that he had been hospitalized three times for the treatment of depression.³⁹ The Democratic National Committee nominated McGovern's replacement choice for Vice President—Sargent Shriver—on August 8, 1972, in a meeting open to the press.⁴⁰

The rules of both major political parties delegate a great deal of discretion to their executive committees for selecting replacement candidates.⁴¹ In exercising this discretion, the parties should fulfill the electorate's expectations of transparency, process, and certainty by clarifying the procedure for selecting replacement candidates in the party rules and bylaws. As necessary, these changes should be adopted before the national party conventions.

1. SUCCESSION PRIOR TO THE NATIONAL PARTY CONVENTION

If the death or resignation of a presidential candidate occurs prior to the national party convention,^{iv} the party executive committee determines the obligation of the pledged delegates, if any, won through primary elections.⁴² Two possible amendments to party rules that should be considered are releasing the pledged delegates from their obligation to vote for certain candidates or awarding the pledged delegates won by the absent candidate to another candidate.

iv If the death or resignation of a candidate occurs before any primary elections are held, there may still be issues concerning state qualifying periods, names printed on ballots, early voting, and absentee voting. These merit attention but are outside the scope of this Clinic.

2. SUCCESSION AFTER THE NATIONAL PARTY CONVENTION

The death or resignation of a presidential or vice-presidential candidate after the national political party convention but prior to the General Election poses additional concerns. The national party executive committee has the authority to name a replacement candidate here as well.⁴³ The primary voters and the convention delegates have already fulfilled their duties. While not impossible, recalling the thousands of convention delegates would present an enormous financial and logistical burden and may not prove to be more transparent, democratic, or certain than a meeting of the national party executive committee.

3. RECOMMENDATIONS

The national party committees should examine the need for criteria and procedures to guide the selection process in the event of the death, resignation, or inability of a candidate prior to the General Election. For instance, in the case of vacancy caused by death or resignation, the party executive committee could meet to select a replacement candidate, in consultation with members of Congress and Governors from the same party,^v and together lay out criteria for replacement candidates. The criteria should vary to account for the many circumstances leading to the succession of a presidential candidate and might include national security experience, previous exposure to the electorate, or continuity of policy positions with the deceased or resigned candidate. The national party executive committee could also create expedited timelines for recalling convention delegates.

We would expect the presidential candidate to have a major role in the process if his running mate has died or withdrawn. Conversely, we would expect the vice-presidential running mate to receive every appropriate consideration as the replacement candidate for a presidential nominee who had died or resigned before the General Election. This

consideration would have different weight if the succession event occurred after the election when the electorate has expressed itself.

The value of transparency suggests that the meetings of the national party committees when considering replacement candidates should be open to the public and the press and should be televised. When a national party committee takes on the extraordinary role of selecting a replacement candidate, the privacy ordinarily afforded to internal party decisions should be sacrificed to ensure that the public confidence is served by the party's process and the results of its deliberations.^{vi}

D. SUCCESSION AFTER GENERAL ELECTION BUT BEFORE THE MEETINGS OF ELECTORAL COLLEGE

Replacement of a candidate who has died or resigned during the forty-one day period between the General Election on the first Tuesday after the first Monday in November and the casting of votes by the Electoral College in mid-December must respect the fact that the electorate has spoken through a national election. Historically, the national party committees have instructed the party's electors how to cast their electoral votes in the event of the death of a candidate.⁴⁴ However, whether there is a legal obligation for a presidential elector to vote according to party instructions, including a vote for a replacement nominee, is a question "that cannot be answered with any certainty."⁴⁵

v The national political party conventions are held in the summer, leaving anywhere from two to three months between the convention and the national popular election on the first Tuesday after the first Monday in November. Members of Congress and governors are usually granted unpledged delegate status and may vote as they wish for the party nominees during the party conventions. Therefore, consultation with these individuals will provide the parties with guidance similar to that given by the unpledged delegates at the party conventions.

vi The Charter and the Bylaws of the Democratic Party provide that "[a]ll meetings of the Democratic National Committee, the Executive Committee, and all other official Party committees, commissions and bodies shall be open to the public, and votes shall not be taken by secret ballot." DEMOCRATIC NAT'L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 7 (2010), available at http://www.democrats.org/files/misc/pdf/Charter_and_Bylaws_8_20_10.php (Article Nine, Section 12). The Rules of the Republican Party provide that "[a]ll meetings of the Republic National Committee and all of its committees shall be open meetings, except as provided for by *Robert's Rules of Order*," and that "[n]o votes (except elections to office when properly ordered pursuant to the provisions of *Robert's Rules of Order*) shall be taken by secret ballot in any open meeting of the Republic National Committee or of any committee thereof." REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 6, 7 (2008), available at http://www.gop.com/images/legal/2008_RULES_Adopted.pdf (amended by the Republican National Committee on August 6, 2010).

Speaking to this contingency, a 1932 House Report interpreting Article II, Section 3 and the Twelfth Amendment stated that electors are free agents: “[p]residential electors, and not the President, are chosen at the November election. The electors, under the present Constitution, would be free to choose a President, notwithstanding the death of a party nominee.”⁴⁶ Under this interpretation, electors cannot be compelled to vote for their party’s nominees.⁴⁷ Several historical instances of “unfaithful” electors have not stopped Congress from counting those electors’ votes,⁴⁸ supporting the view that presidential electors are free agents.⁴⁹

Yet, history and custom also indicate that Congress can invalidate electoral votes cast against party instructions in the case of a nominee’s death. Horace Greeley, the 1872 presidential nominee of the Democratic and Liberal Republican parties, died on November 29, 1872, a few weeks after the national popular election held on November 5, 1872. Sixty-three of the sixty-six presidential electors whom Greeley won voted for other candidates in accordance with party instructions. Congress declined to count the three votes from Georgia cast for Greeley against party instructions on the ground that electoral votes cast for a dead person⁵⁰ were invalid.⁵¹ Congress, however, grouped those three electoral votes with all other electoral votes cast for purposes of determining the number needed for an electoral majority.⁵²

According to the law of some states, presidential electors are held accountable if they do not vote as instructed by the party at the meeting of the Electoral College.^{vii} More than half the states and the District of Columbia have adopted laws aimed at deterring unfaithful electors.⁵³ In a majority of these states, an elector pledges to vote for his party’s nominee for President and Vice President when the Electoral College meets to cast its votes. In the other states, electors are obligated to vote for the winners of the states’ popular elections.⁵⁴ Although the courts have never addressed the

question whether state laws binding electors are enforceable, the courts have upheld the constitutionality of these laws. In *Ray v. Blair*, the Supreme Court held that it is constitutional for states to allow parties to require pledges from the electors⁵⁵ as the electors are actors on behalf of their respective states.⁵⁶ Moreover, the Court held that a state has the right to reject the appointment of an elector who refuses to take the pledge required by his party.⁵⁷

The result of a national popular election presumably cements in the minds of the voters the expectation that the successor to the incoming President will be the newly-elected Vice President. Of course, under the Twentieth Amendment, this would not occur until Inauguration Day.⁵⁸ Nevertheless, to fulfill voters’ expectations after a presidential election, the successful vice-presidential nominee should be assured of succession if the successful presidential nominee dies or resigns after Election Day, even if the electors have the power to cast their votes for someone else in the period before Inauguration Day, when the Twentieth Amendment would take effect.^{viii} Since voters would expect the electors to vote for the winners of each state’s popular vote, in such an instance, the party executive committees should exercise their discretion to instruct the electors to vote for the successful vice-presidential nominee to replace the deceased presidential nominee and to recommend, not instruct, a vote by the electors for a new vice-presidential nominee.

viii The nominees for President and Vice President, of course, are not “elected” on Election Day. Rather, voters elect electors on Election Day, and the electors in turn elect a President and Vice President when they meet in December to cast their electoral votes. Even at this point, the nominees for President and Vice President are not yet “elected” because Congress must validate and count the electoral votes. A presidential nominee becomes the President-elect and a vice-presidential nominee becomes the Vice President-elect upon the count and declaration of electoral votes by Congress. See generally NEALE, *supra* note 51, at 3-4. But see H.R. REP. NO. 72-345, at 4 (1932) (“[V]otes which were cast for a person, who was eligible at the time the votes were cast but who has died before the votes are counted by Congress . . . must be counted by Congress.”).

vii Six states have enacted civil and criminal penalties for faithless electors. See Appendix F, Chart 5 for the text of these states’ statutes.

1. RECOMMENDATIONS

In the event of the death of a successful presidential nominee after the General Election but before the meeting of the Electoral College, we urge the parties to adopt rules that automatically elevate the vice-presidential nominee to the position of presidential nominee.^{ix} In addition, the party should issue recommendations to the electors for whom they should vote for Vice President.^x To the extent that state laws binding presidential electors conflict with the above recommendation, state legislatures should amend those statutes and release electors from an obligation to cast an electoral vote for a dead nominee.^{xi}

E. SUCCESSION AFTER THE ELECTORAL COLLEGE VOTE BUT BEFORE THE COUNTING AND DECLARATION OF ELECTORAL VOTES BY CONGRESS

Congress is the ultimate arbiter of electoral votes in the event of the death or resignation of a successful presidential or vice-presidential nominee, or both, during the period between the meeting of the Electoral College and January 6, when

-
- ix The general notion of elevating the candidate for Vice President of the same party to the presidential spot has some support in Congress, although the means identified for effectuating this are different from the recommendation in this Report. *See* Presidential Succession Act of 2010, H.R. 6557, 111th Cong. § 3 (2010) (suggesting the elevation of the vice-presidential candidate of the same party to the presidential slot and the selection of the replacement vice-presidential candidate via predetermined contingent choices by presidential electors).
 - x Because it would be non-binding, this specific recommendation likely would play an important role in limiting the political jockeying by electors to put the election before Congress. If a sufficient number of electors feel forced to vote in a way with which they disagree, they may switch their electoral votes for President and thereby deny all of the candidates a majority of the electoral votes, throwing the election to the House of Representatives. While a non-binding suggestion carries the authoritative weight of the party, the ultimate election of the replacement Vice President should be left up to the individual electors. *See generally* Amar, *supra* note 49, at 219. Of course, in the event that the presidential election is thrown into the House or the vice-presidential election into the Senate, Congress would have the authority to disregard party recommendations or instructions. *See* U.S. CONST. amend XX, § 4.
 - xi Apparently, only Wisconsin's statute regarding presidential electors explicitly releases electors from their statutory obligation upon the death of the candidate to whom they are pledged. WIS. STAT. ANN. § 7.75 (LexisNexis 2011).

Congress counts the Electoral College votes.⁵⁹ The Twelfth Amendment states that “[t]he President of the Senate shall . . . open all the certificates and the votes shall then be counted.”⁶⁰ It is unclear whether Congress can invalidate electoral votes cast for a presidential or vice-presidential nominee who dies after the meeting of the Electoral College.⁶¹

As in other pre-inaugural periods, the death or resignation of a presidential or vice-presidential nominee poses less urgent problems than in the case of double death or double resignation.⁶² There are two outcomes if Congress counts the votes for a nominee who has won a majority of the electoral votes but dies or resigns after the votes have been cast. First, in the event of death or resignation of the presidential nominee, the vice-presidential nominee would become President upon taking the presidential oath of office on Inauguration Day.⁶³ Second, in the event of the death of the vice-presidential nominee, the President, after assuming office, must nominate a new Vice President pursuant to Section 2 of the Twenty-Fifth Amendment.⁶⁴

If Congress counts the electoral votes for the successful presidential and vice-presidential nominees who both had died after the meeting of the Electoral College, the next person in the line of succession would become Acting President upon taking the oath of office on January 20.⁶⁵ Thus, if the next in line is a member of a different party from that of the deceased President-elect and Vice President-elect, the result would be a change in the party of the President-elect, contrary to the expressed will of the electorate. This would present a politically difficult situation for members of Congress charged with determining the outcome of a presidential election. The alternative—the refusal of Congress to count votes cast for nominees living at the time of the Electoral College vote—would run afoul of the Twelfth Amendment.

1. RECOMMENDATION

Ultimately, in light of the constitutional mandate in the Twelfth Amendment to count all electoral votes and the statutory provision⁶⁶ disfavoring objections to electoral votes cast for living nominees, we believe that Congress lacks the authority to refuse to count electoral votes cast for nominees

who were living at the time of the meeting of the Electoral College. Congress must count those votes, regardless of subsequent death or resignation.^{xii}

F. SUCCESSION AFTER COUNT AND DECLARATION OF ELECTORAL VOTES BY CONGRESS BUT BEFORE INAUGURATION DAY

As noted previously, the death of either a President-elect or Vice President-elect during the fourteen days between the congressional count and declaration of the electoral votes on January 6 and the inauguration on January 20 is addressed by the Twentieth and Twenty-Fifth Amendments, respectively.

How to address the death or resignation or inability of both the President-elect and Vice President-elect during this period may present complications if there is no Speaker or President *pro tempore*. The 1947 Act contains the list of officers eligible to act as President in these circumstances, which would trigger the Cabinet line of succession.⁶⁷ However, there may not have been any Cabinet nominations made by the outgoing President for the Senate to confirm at the request of a newly-elected President.^{xiii} Thus, the outgoing President's Cabinet members would be in the line of succession to act as President if they had not yet resigned.

Recent practice has been for the President-elect to release the names of his Cabinet nominees and for Senate committees to hold confirmation hearings for uncontroversial nominees

before January 20. The term "confirmation hearing" is not fully accurate because there is no presidential nominee for the Senate committee to confirm prior to January 20. Rather, Senate committees hold such hearings to decide whether to recommend confirmation of the nominees to the full Senate, a vote which can only occur after the newly-inaugurated President officially nominates his Cabinet selections.⁶⁸

1. RECOMMENDATIONS

To ensure an orderly transition in a time of crisis, the Clinic recommends adopting the Continuity of Government Commission's recommendation⁶⁹ for cooperation between the outgoing and incoming presidential administrations to expedite the confirmation of incoming Cabinet members.^{xiv} The outgoing President and Congress have affirmative duties in this regard under the Presidential Transition Act of 1963.⁷⁰ The Clinic suggests that the outgoing President consider promptly nominating Cabinet nominees the President-elect submits to him prior to Inauguration Day.^{xv} Congress should confirm as many of these nominees as possible prior to Inauguration Day, consistent with the proper discharge of its advice and consent responsibility.⁷¹ As is now the practice, one or more of these individuals should not attend the presidential inauguration and should be located away from Washington, D.C. to ensure a line of succession that reflects the results of the most recent presidential election.^{xvi}

xii Furthermore, objections to electoral votes are prohibited by statute if those votes were "regularly given by electors whose appointment has been lawfully certified." 3 U.S.C. § 15 (2006). Although the Greeley precedent would invalidate electoral votes cast for candidates who died before the meeting of the Electoral College, this does not mean that Congress can invalidate electoral votes cast for qualified nominees who were alive at the time of the Electoral College vote. A "qualified" nominee is one who meets the Article II, Section 1 requirements to run for President: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States." U.S. CONST. art. II, § 1, cl. 5.

xiii The Constitution provides that only a President, not a President-elect, "shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . all other Officers of the United States . . ." U.S. CONST. art. II, § 2, cl. 2.

xiv The proposed cooperation between outgoing and incoming administrations to expedite the confirmation of Cabinet members and secure the continuity of government has support in Congress. See Presidential Succession Act of 2010, H.R. 6557, 111th Cong. § 4 (2010) (supporting the Continuity of Government Commission's seventh recommendation).

xv We believe that such an action by a sitting President would set a positive and powerful precedent to be followed by future Presidents. If this recommendation is not adopted, however, the current practice of holding hearings before Inauguration Day should continue.

xvi We recognize that under a Cabinet line of succession, the death, resignation, or failure to qualify of the President- and Vice President-elect before Cabinet nominations are submitted to the outgoing President is a gap that is not addressed by these recommendations. Under a legislative line of succession, the contingency does not create a gap because the Speaker becomes Acting President upon taking the oath of office on January 20. See H.R. Rep. No. 72-345, at 2 (1932). Because the Clinic recommends the adoption of a Cabinet line of succession, the Cabinet selection process should be expedited and should be one of the first items addressed by the President-elect and the presidential transition team.

ENDNOTES

- 1 REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 89 (2008), *available at* http://www.gop.com/images/legal/2008_RULES_Adopted.pdf (amended by the Republican National Committee on August 6, 2010).
- 2 DEMOCRATIC NAT'L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 3 (2010), *available at* http://www.democrats.org/files/misc/pdf/Charter_and_Bylaws_8_20_10.php (Article III, Section 1(c)).
- 3 DEMOCRATIC NAT'L COMM., CALL FOR THE 2012 DEMOCRATIC NATIONAL CONVENTION 18 (2012), *available at* http://www.thegreenpapers.com/P12/2010-08-20-DRAFT_2012_Call_for_Convention_8_19_10.pdf.
- 4 U.S. CONST. art. II, § 1, cl. 4.
- 5 Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (current version at 3 U.S.C. § 1 (2006)) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.").
- 6 U.S. CONST. art. II, § 1, cl. 4.
- 7 *See* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (current version at 3 U.S.C. § 1 (2006)). Under the Twenty-Third Amendment, the District of Columbia is also entitled to appoint electors. The Amendment provides: "The District . . . shall appoint . . . a number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state." U.S. CONST. amend. XXIII, § 1.
- 8 *See, e.g.*, FLA. STAT. § 103.021 (2010).
- 9 U.S. CONST. art. II, § 1, cl. 2.
- 10 Act of June 25, 1948, ch. 644, 62 Stat. 673 (current version at 3 U.S.C. § 7 (2006)) ("The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.").
- 11 U.S. CONST. amend. XII.
- 12 Beverly J. Ross & Michael Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 672 (1996).
- 13 *See* Appendix F, Chart 5 (setting out the text of these state statutes).
- 14 *On Presidential Candidate and President-Elect Death, Disability, or Resignation: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 103d Cong. (1994) (statement of Prof. Lawrence D. Longley).
- 15 U.S. CONST. amend. XII.
- 16 *Id.*; *see also* Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043, 1045 (2010) (discussing the ambiguity of the constitutional language with regard to who and how the count is conducted because of the constitutional provision's passive voice).
- 17 3 U.S.C. § 15 (2006).
- 18 U.S. CONST. amend. XII. Currently, a candidate must receive at least 270 of the 538 Electoral College votes in order to obtain a majority.
- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 U.S. CONST. amend. XX, § 4.
- 25 *Id.* amend. XX, § 1.
- 26 *Id.* amend. XX, § 3 ("If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified."). A section of the Twelfth Amendment confirms the elevation of the Vice President to Acting President if the House fails to select a President. *Id.* amend. XII ("And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them . . . then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.").
- 27 Presidential Succession Act of 1947, 3 U.S.C. § 19 (2006).
- 28 U.S. CONST. amend. XX, § 3 ("If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President.").
- 29 *Id.* amend. XXV, § 2.
- 30 3 U.S.C. § 19.
- 31 *Id.*
- 32 *See supra* notes 1–3 and accompanying text.
- 33 U.S. CONST. art. II, § 1, cl. 4.
- 34 *Sherman is Dead, Hurt by Speech*, N.Y. TIMES, Oct. 30, 1912, at 1.
- 35 *No Provision for Sherman's Successor*, N.Y. TRIBUNE, Oct. 31, 1912, at 2.
- 36 *See Hadley in the Lead for Sherman's Place*, N.Y. TIMES, Nov. 4, 1912, at 6.
- 37 *See* JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 161 (Fordham U. Press, 1965).
- 38 James N. Naughton, *Shriver Is Named for Second Place by the Democrats*, N.Y. TIMES, Aug. 9, 1972, at 1.
- 39 *Id.*; *see also* James N. Giglio, *The Eagleton Affair: Thomas Eagleton, George McGovern, and the 1972 Vice Presidential Nomination*, 39 PRESIDENTIAL STUD. Q. 647, 658, 669–71 (2009).
- 40 Naughton, *supra* note 38, at 1.
- 41 REPUBLICAN NAT'L COMM., *supra* note 1, at 9; DEMOCRATIC NAT'L COMM., *supra* note 2, at 19.
- 42 *But see* H.R. REP. NO. 72-345, at 5 (1932) ("A constitutional amendment is not necessary to provide for the case of the death of a party nominee before the November elections. Presidential electors, and not the President, are chosen at the November election. The electors, under the present Constitution, would be free to choose a President, notwithstanding the death of a party nominee.") (citation omitted).
- 43 *See supra* notes 34–41 and accompanying text.
- 44 *See supra* notes 38–40 and accompanying text.
- 45 Memorandum from John D. Feerick to Hon. Richard H. Poff on the "Legal Obligation" of a Presidential Elector to Vote for his Party Nominee 1 (Feb. 29, 1968) (on file with authors).
- 46 H.R. REP. NO. 72-345; *see also* U.S. CONST. art. II, § 3; *id.* amend. XII.
- 47 U.S. CONST. amend. XII.

- 48 Over the history of the United States, eighty-two electoral votes have been changed on the initiative of the individual elector. *See Faithless Electors*, FAIR VOTE ARCHIVES, <http://archive.fairvote.org/faithless.htm> (last visited Jan. 10, 2010).
- 49 *See* JOHN C. FORTIER ET AL., *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* 8 (John C. Fortier ed., AEI Press 3d ed. 2004); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 230 (1994).
- 50 As recounted in the congressional debates:
- “Mr. Hoar objects that the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot lawfully be counted because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes, and was not a “person” within the meaning of the Constitution, this being an historic fact of which the two Houses may properly take notice.”
- COUNTING ELECTORAL VOTES: PROCEEDINGS AND DEBATES OF CONGRESS RELATING TO COUNTING THE ELECTORAL VOTES FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, H.R. MISC. DOC. NO. 44-13, at 372 (1877) [hereinafter *COUNTING ELECTORAL VOTES*].
- 51 *Id.* at 363–80; *see also* THOMAS H. NEALE, CONG. RESEARCH SERV., RS 22992, *THE PRESIDENT-ELECT: SUCCESSION AND DISABILITY ISSUES DURING THE TRANSITION PERIOD* 3 (2008), *available at* <http://www.fas.org/sgp/crs/misc/RS22992.pdf>.
- 52 *COUNTING ELECTORAL VOTES*, *supra* note 50, at 407.
- 53 *See* Appendix F, Chart 5 for the text of these state statutes.
- 54 *See* Appendix A.
- 55 *Ray v. Blair*, 343 U.S. 214, 231 (1952).
- 56 *Id.* at 224.
- 57 *Id.* at 225.
- 58 U.S. CONST. amend. XX, § 3.
- 59 *Id.* amend. XII.
- 60 *Id.*; 3 U.S.C. § 15 (2006).
- 61 H.R. REP. NO. 72-345, at 4–5 (1932) (supporting the proposition that Congress must count electoral votes cast for nominees alive at the time of the meeting of the Electoral College); Amar, *supra* note 49, at 218.
- 62 *See* Amar, *supra* note 49, at 234.
- 63 3 U.S.C. § 19.
- 64 U.S. CONST. amend. XXV, § 2.
- 65 3 U.S.C. § 19.
- 66 *Id.* § 15.
- 67 *Id.* § 19.
- 68 *See* Nina Shen Rastogi, *Aren't These Confirmation Hearings a Bit Early?*, SLATE (Jan. 15, 2009, 6:31 PM), <http://www.slate.com/id/2208771>.
- 69 CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 49 (2009).
- 70 Act of Mar. 7, 1964, 78 Stat. 153 (current version at 3 U.S.C. § 102 (2006) (setting out the Presidential Transition Act of 1963 in the notes to 3 U.S.C. § 102)). The statute provides as follows:
- The Congress declares it to be the purpose of this Act to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President. The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign. Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption. In addition to the specific provisions contained in this Act directed toward that purpose, it is the intent of the Congress that all officers of the Government so conduct the affairs of the Government for which they exercise responsibility and authority as (1) to be mindful of problems occasioned by transitions in the office of President, (2) to take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power, and (3) otherwise to promote orderly transitions in the office of President.
- Id.*; *see also* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1276–80 (2006) (discussing the possibility that the Take Care Clause places affirmative duties on the outgoing President in relation to presidential transitions).
- 71 U.S. CONST. art. II, § 2, cl. 2.

VIII. SUMMARY OF RECOMMENDATIONS

Presidential and Acting Presidential Inability Recommendations:

Statutory Action:

1. Acknowledge that the President or Acting President, upon declaration of his own inability, can transfer his powers voluntarily to the next in the line of succession in instances of vice-presidential inability or vacancy.
2. Authorize the person next in the line of succession after the Vice President, together with a majority of the Cabinet, to declare the inability of the President or Acting President in instances of vice-presidential inability or vacancy.

Executive Contingency Planning:

3. The President or Acting President should prepare a prospective executive declaration of inability at the beginning of his service, in which he would define the situations which in his view would render him unable to discharge the powers and duties of the presidency in the future and would provide that the declaration of his inability goes into effect based upon a review process set out by the President or Acting President.

Vice-Presidential Inability Recommendation:

Executive Contingency Planning:

4. The Vice President should prepare a prospective executive declaration of inability at the beginning of his service, in which he would define the situations which in his view would render him unable to discharge the powers and duties of the vice presidency in the future and would provide that the declaration of his inability goes into effect based upon a review process set out by the Vice President.

Line of Succession Recommendations

Statutory Action:

5. Establish an executive line of succession that runs exclusively through the Cabinet after the President and Vice President. In the case of removal, death, or resignation of the President, the Cabinet member assuming the powers and duties of the presidency should

be required to resign from the Cabinet. In a case of inability, the Cabinet member assuming the powers and duties of the presidency should not be required to resign.

6. In the event an executive line of succession is not adopted, establish a binary line of succession that first runs through Congress, and then the Cabinet, in instances of death, resignation, and removal. Successors would be required to resign in these circumstances. The line of succession would run solely through the Cabinet in instances of presidential and vice-presidential inability or failure to qualify. Under this proposal, when a Cabinet member assumes the powers and duties of the presidency, that Cabinet member would not be required to resign.
7. Confirm whether Acting Secretaries are included in the line of succession, and, if so, either remove them from the line, or alternatively, amend the 1947 Act so that Acting Secretaries can assume the powers and duties of the presidency, in the order of the departments' creation, only after succession has passed through all of the Cabinet Secretaries.

Pre-Inaugural Period Recommendations:

Political Party Rules:

8. In the event of the death or resignation of a presidential candidate before the political party conventions, require the parties to hold an open meeting to decide which replacement candidate(s) will receive the delegates' votes.
9. In the event of the death or resignation of a presidential nominee between the political party conventions and the General Election, require the parties to either hold an open meeting to select a replacement candidate or recall the convention delegates.
10. During the period between the General Election and the meeting of the Electoral College, provide that the vice-presidential candidate replaces a deceased or resigned presidential candidate of the same ticket and that the candidate's party issue recommendations to the presidential electors as to a new candidate for the office of Vice President.

Congressional Rules:

11. In the event of the death or resignation of a presidential or vice-presidential candidate between the meeting of the Electoral College and the counting and declaration of the Electoral College votes by Congress, require Congress to count votes cast for a candidate if he was alive at the time of the Electoral College vote.

Executive Contingency Planning:

12. During the period between the counting and declaration of Electoral College votes by Congress and Inauguration

Day, the outgoing President should consider promptly nominating any Cabinet nominees the President-elect submits to him, and Congress should confirm as many nominees as possible prior to Inauguration Day, consistent with the proper discharge of Congress's advice and consent responsibility. One or more newly confirmed Cabinet Secretaries should remain at a secure location outside of Washington, D.C. on Inauguration Day. This recommendation is particularly important in the case of an exclusively executive line of succession, as the Clinic recommends.

APPENDICES

A. CONSTITUTIONAL, STATUTORY, AND PARTY RULE PROVISIONSⁱ

1. ARTICLE I, SECTION 2, CLAUSE 1

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.¹

2. ARTICLE I, SECTION 2, CLAUSE 2

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.²

3. ARTICLE I, SECTION 2, CLAUSE 3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.³

4. ARTICLE I, SECTION 2, CLAUSE 4

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.⁴

5. ARTICLE I, SECTION 2, CLAUSE 5

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.⁵

6. ARTICLE I, SECTION 3, CLAUSE 2

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].⁶

7. ARTICLE I, SECTION 3, CLAUSE 3

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.⁷

8. ARTICLE I, SECTION 3, CLAUSE 4

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.⁸

9. ARTICLE I, SECTION 3, CLAUSE 5

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.⁹

10. ARTICLE I, SECTION 3, CLAUSE 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.¹⁰

ⁱ This Appendix contains constitutional provisions without noting whether the provision has been subsequently amended.

11. ARTICLE I, SECTION 3, CLAUSE 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.¹¹

12. ARTICLE I, SECTION 5, CLAUSE 1

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.¹²

13. ARTICLE I, SECTION 5, CLAUSE 2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.¹³

14. ARTICLE I, SECTION 5, CLAUSE 3

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.¹⁴

15. ARTICLE I, SECTION 5, CLAUSE 4

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.¹⁵

16. ARTICLE II, SECTION 1, CLAUSE 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:¹⁶

17. ARTICLE II, SECTION 1, CLAUSE 2

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.¹⁷

18. ARTICLE II, SECTION 1, CLAUSE 4

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.¹⁸

19. ARTICLE II, SECTION 1, CLAUSE 5

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.¹⁹

20. ARTICLE II, SECTION 1, CLAUSE 6

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.²⁰

21. ARTICLE II, SECTION 1, CLAUSE 7

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.²¹

22. ARTICLE II, SECTION 1, CLAUSE 8

Before he enter on the Execution of His Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."²²

23. ARTICLE II, SECTION 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.²³

24. ARTICLE II, SECTION 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.²⁴

25. TWELFTH AMENDMENT

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest

numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.²⁵

26. TWENTIETH AMENDMENT

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and 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.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.²⁶

27. TWENTY-FIFTH AMENDMENT

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a new Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to perform the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.²⁷

28. PRESIDENTIAL SUCCESSION ACT OF 1792

Chapter VIII. An act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case if Vacancies in the offices both of President and Vice President. (March 1, 1792)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except in case of an election of a President and Vice President of the United States, prior to the ordinary period as herein after specified, electors shall be appointed in each state for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December, one thousand seven hundred and ninety-two, and within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election, which electors shall be equal to the number of Senators and Representatives, to which the several states may by law be entitled at the time, when the President and Vice President, thus to be chosen, should come into office: Provided always, That where no apportionment of

Representatives shall have been made after any enumeration, at the time of choosing electors, then the number of electors shall be according to the existing apportionment of Senators and Representatives.

SECTION 2. And be it further enacted, That the electors shall meet and give their votes on the said first Wednesday in December, at such place in each state as shall be directed, by the legislature thereof; and the electors in each state shall make and sign three certificates of all the votes by them given, and shall seal up the same certifying on each that a list of the votes of such state for President and Vice President is contained therein, and shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of government, before the first Wednesday in January then next ensuing, one of the said certificates, and the said electors shall forthwith forward by the post-office to the President of the Senate, at the seat of government, one other of the said certificates, and shall forthwith cause the other of the said certificates to be delivered to the judge of that district in which the said electors shall assemble.

SECTION 3. And be it further enacted, That the executive authority of each state shall cause three lists of the names of the electors of such state to be made and certified and to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes.

SECTION 4. And be it further enacted, That if a list of votes, from any state, shall not have been received at the seat of government on the said first Wednesday in January, that then the Secretary of State shall send a special messenger to the district judge in whose custody such list shall have been lodged, who shall forthwith transmit the same to the seat of government.

SECTION 5. And be it further enacted, That Congress shall be in session on the second Wednesday in February, one thousand seven hundred and ninety-three, and on the second Wednesday in February succeeding every meeting of the electors, and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared, agreeably to the constitution.

SECTION. 6. And be it further enacted, That in case there shall be no President of the Senate at the seat of government on the arrival of the persons entrusted with the lists of the votes of the electors, then such persons shall deliver the lists of votes in their custody into the office of the Secretary of State, to be safely kept and delivered over as soon as may be, to the President of the Senate.

SECTION 7. And be it further enacted, That the persons appointed by the electors to deliver the lists of votes to the President of the Senate, shall be allowed on the delivery of the said lists twenty-five cents for every mile of the estimated distance by the most usual road, from the place of meeting of the electors, to the seat of government of the United States.

Section 8. And be it further enacted, That if any person appointed to deliver the votes of the electors to the President of the Senate, shall after accepting of his appointment neglect to perform the services required of him by this act, he shall forfeit the sum of one thousand dollars.

SECTION 9. And be it further enacted, That in case of removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected.

SECTION 10. And be it further enacted, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: Provided, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be

appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

SECTION 11. And be it further enacted, That the only evidence of refusal to accept or of a resignations of the Office of President and Vice President, shall be an instrument in writing declaring the same, and sub-scribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

SECTION 12. And be it further enacted, That the term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.²⁸

Chapter XVII – An Act to authorize the President of the United States in certain cases to alter the place for holding a session of Congress. (Approved April 3, 1794)

Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, That whenever the Congress shall be about to convene, and, from the prevalence of contagious sickness, or the existence of other circumstances, it would in the opinion of the President of the United States, be hazardous to the lives or health of the members to meet at the place to which the Congress shall then stand adjourned, or at which it shall be next by law to meet, the President shall be, and he hereby is authorized, by proclamation, to convene the Congress at such other place as he may judge proper.

29. PRESIDENTIAL SUCCESSION ACT OF 1886

Chapter 4. An act to provide for the performance of the duties of the office of President in case of the removal, death, resignation, or inability both of the President and Vice-President. - Jan 19, 1886.

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: Provided, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress 'in extraordinary session, giving twenty days' notice of the time of meeting.

SECTION 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

Section 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine and one hundred and fifty of the Revised Statutes are hereby repealed.²⁹

30. PRESIDENTIAL SUCCESSION ACT OF 1947

SECTION 19. Vacancy in offices of both President and Vice President; officers eligible to act (a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President *pro tempore* of the Senate shall, upon his resignation as President *pro tempore* and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that (1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and (2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President *pro tempore* to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education,

Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President *pro tempore*, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.³⁰

31. RULE NUMBER 9 OF THE REPUBLICAN PARTYⁱⁱ

Filling Vacancies in Nominations

(a) The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which may occur by reason of death, declination, or otherwise of the Republican candidate for President of the United States or the Republican candidate for Vice President of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filling any such vacancies.

ii As adopted by the 2008 Republican National Convention, September 1, 2008, and amended by the Republican National Committee on August 6, 2010.

(b) In voting under this rule, the Republican National Committee members representing any state shall be entitled to cast the same number of votes as said state was entitled to cast at the national convention.

(c) In the event that the members of the Republican National Committee from any state shall not be in agreement in the casting of votes hereunder, the votes of such state shall be divided equally, including fractional votes, among the members of the Republican National Committee present or voting by proxy.

(d) No candidate shall be chosen to fill any such vacancy except upon receiving a majority of the votes entitled to be cast in the election.³¹

32. SELECTED SECTIONS OF THE CHARTER AND BYLAWS OF THE DEMOCRATIC PARTY

The Charter

Article 3 – Democratic National Committee

SECTION 1. The Democratic National Committee shall have general responsibility for the affairs of the Democratic Party between National Conventions, subject to the provisions of this Charter and to the Resolutions or other actions of the National Convention. This responsibility shall include:

....

(c) filling vacancies in the nominations for the office of President and Vice President. . . .

Article 9 – General Provisions

SECTION 8. To assure that the Democratic nominee for the office of President of the United States is selected by a fair and equitable process, the Democratic National Committee may adopt such statements of policy as it deems appropriate with respect to the timing of Presidential nominating processes and shall work with state Parties to accomplish the objectives of such statements.

SECTION 12. All meetings of the Democratic National Committee, the Executive Committee, and all other official Party committees, commissions and bodies shall be open to the public, and votes shall not be taken by secret ballot.

The Bylaws

Article 2 – Democratic National Committee

SECTION 8. Attendance and Quorum and Voting.

...

(g) Proxy voting shall be permitted. Proxies may be either general or limited and either instructed or uninstructed. All proxies shall be in writing and transferable if so specified. No DNC member may at any one time hold or exercise proxies for more than one other DNC member; provided, however, that proxy voting shall not be permitted in voting to fill a vacancy on the National ticket.³²

ENDNOTES

1 U.S. CONST. art. I, § 2, cl. 1.

2 *Id.* art. I, § 2, cl. 2.

3 *Id.* art. I, § 2, cl. 3.

4 *Id.* art. I, § 2, cl. 4.

5 *Id.* art. I, § 2, cl. 5.

6 *Id.* art. I, § 3, cl. 2.

7 *Id.* art. I, § 3, cl. 3.

8 *Id.* art. I, § 3, cl. 4.

9 *Id.* art. I, § 3, cl. 5.

10 *Id.* art. I, § 3, cl. 6.

11 *Id.* art. I, § 3, cl. 7.

12 *Id.* art. I, § 5, cl. 1.

13 *Id.* art. I, § 5, cl. 2.

14 *Id.* art. I, § 5, cl. 3.

15 *Id.* art. I, § 5, cl. 4.

16 *Id.* art. II, § 1, cl. 1.

17 *Id.* art. II, § 1, cl. 2.

18 *Id.* art. II, § 1, cl. 4.

19 *Id.* art. II, § 1, cl. 5.

20 *Id.* art. II, § 1, cl. 6.

21 *Id.* art. II, § 1, cl. 7.

22 *Id.* art. II, § 1, cl. 8.

23 *Id.* art. II, § 3.

24 *Id.* art. II, § 4.

25 *Id.* amend. XII.

26 *Id.* amend. XX.

- 27 *Id.* amend. XXV.
- 28 Presidential Succession Act of 1792, ch. 8, 1 Stat. 239, 240 (repealed 1886).
- 29 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).
- 30 Presidential Succession Act of 1947 (codified as amended at 3 U.S.C. § 19 (2006)).
- 31 REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 89 (2008), *available at* http://www.gop.com/images/legal/2008_RULES_Adopted.pdf (amended by the Republican National Committee on August 6, 2010).
- 32 DEMOCRATIC NAT'L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 3 (2010), *available at* http://www.democrats.org/files/misc/pdf/Charter_and_Bylaws_8_20_10.php (Article III, Section 1(c)).

B. EXECUTIVE DECLARATIONS OF INABILITY, LETTER AGREEMENTS & SECTION 3 LETTER PRECEDENTS

1. PAST PRESIDENTIAL LETTER AGREEMENTS

President Dwight D. Eisenhower and Vice President Richard M. Nixon entered into a letter agreement that provided for President Eisenhower or Vice President Nixon to initiate a transfer of presidential powers to Vice President Nixon on a temporary basis.¹ President Eisenhower would retain the right to resume those powers upon a simple declaration that he was ready to do so.²

Later administrations followed President Eisenhower and Vice President Nixon's precedent by entering into letters providing for instances of presidential inability. They existed between: President John F. Kennedy and Vice President Lyndon B. Johnson;³ and President Johnson and Speaker of the House of Representatives John McCormack,⁴ because President Johnson's ascendancy to the presidency following President Kennedy's assassination left the vice presidency vacant. President Ronald Reagan and Vice President George H.W. Bush executed declarations of inability pursuant to section three of the Twenty-Fifth Amendment.⁵ Several of these letters appear below.

a. Letter Agreement During the Eisenhower Administration

Letter from President Eisenhower to then-Vice President Nixon, February 5, 1958

As both of us know, there are differences of opinion as to the exact meaning of that feature of the Constitution which provides that the Vice President will have the powers and the duties of the

President when the President is unable to discharge them. There is uncertainty expressed as to how there could be determined the degree of the President's disability that would justify transferring his powers and duties to the Vice President.

An inability to discharge properly the powers and duties of the Presidency could come about in several ways. One would be disease or accident that would prevent the President from making important decisions. Such periods of inability could be prolonged but, even if only the length of hours, could require action should there be any question of real importance and urgency to be decided without delay.

Another form of inability could come about through a failure of communications between the President and the Capital at any time that he might be absent therefrom. A somewhat similar case might be an uncertainty about the whereabouts of the President, occasioned by a forced landing of the Presidential airplane.

Other types of inability could unquestionably arise.

There have been many proposals for clarifying this situation, some by law, others by Constitutional Amendment. My own opinion is that it would be difficult to write any law or an Amendment in such fashion as to take care of every contingency that might possibly occur. While the great area of uncertainty now existing could and should be drastically reduced, I am not sure that even the most carefully devised plan, objectively arrived at, could remove doubt in every instance.

However, it seems to me that so far as you and I are concerned in the offices we now respectively hold, and particularly in view of our mutual confidence and friendship, we could do much to eliminate all these uncertainties by agreeing, in advance, as to the proper steps to be taken at any time when I might become unable to discharge the powers and duties of the President. Based upon my studies of the history of the Constitution and upon the advice of Constitutional authorities, I am of the opinion that this agreement would not in any way contravene the clear intention of the Constitution; on the contrary, it is rather a statement of our common intention to act completely according to the spirit of this portion of the Constitution.

Through such an agreement, we can assure that the best interests of the country would not be damaged by the doubts and indecisions that have at times existed in similar cases

in the past. Moreover with this advance agreement, you could without personal or official embarrassment, make any decisions that seemed to you proper in cases where my ability to discharge my powers and duties may be in serious question.

This note, which I have been planning for some time to write, is merely to confirm, in writing, the gist of the agreement that you and I have reached between ourselves.

It is simply stated:

In any instance in which I could clearly recognize my own inability to discharge the powers and duties of the Presidency I would, of course, so inform you and you would act accordingly.

With the exception of this one kind of case, you will be the individual explicitly and exclusively responsible for determining whether there is any inability of mine that makes it necessary for you to discharge the powers and duties of the Presidency, and you will decide the exact timing of the devolution of this responsibility on you. I would hope that you would consult with the Secretary of State, Governor Adams and General Heaton, and if feasible, with medical experts assembled by him, but the decision will be yours only.

I will be the one to determine if and when it is proper for me to resume the powers and duties of the Presidency.

I know, of course, that you would make any decision for taking over the presidential powers and duties only when you feel it necessary. I have no fear that you, for any fleeting or inconsequential purpose, would do so and thereby create confusion in the government. Circumstances would have to guide you, and if the imminence or occurrence of any world or domestic emergency demanded, you would have to act promptly.

There is always the possibility that, as in the cases of Garfield and Wilson, I might, without warning, become personally incapable of making a decision at the moment when it should be made. The existence of this agreement recognizing your clear and exclusive responsibility for deciding upon the inability of the President to perform his duties and exercise his powers will remove any necessity or desire on the part of friends and staffs to impede the right and authority of the Vice President in reaching his decision on the matter.

There is only one final thought I would like to add. If any

disability of mine should, in the judgment of any group of distinguished medical authorities that you might assemble, finally become of a permanent character, I would, of course, accept their decision and promptly resign my position. But if I were not able to do so, and the same group of consultants would so state, then you would take over not only the powers and duties but the perquisites of the Presidency, including the White House itself. In temporary cases of my “inability,” we agree that you should act for the necessary period in your capacity as Vice President and, additionally, as “Acting President.”

With warm regard, *As ever*⁶

Letter Agreement from President Eisenhower to then-Vice President Nixon

The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

- (1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.
- (2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.
- (3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.⁷

b. Letter Agreement During the Kennedy Administration

In August 1961 President Kennedy and Vice President Johnson agreed to follow the procedures set forth below:

- (1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice

President would serve as Acting President, exercising the power and duties of the office until the inability had ended.

(2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

(3) The President, in either event would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the office.⁸

c. Letter Agreement From President Johnson to Speaker John W. McCormack

President Lyndon Johnson sent a signed letter agreement to the Speaker of the House of Representatives John W. McCormack on December 23, 1963, which Speaker McCormack signed as well. It was accompanied by a fifteen-page explanatory memorandum. The letter and memorandum were not released publicly. The Clinic obtained a copy from the Lyndon Johnson Presidential Library.

December 23, 1963

Dear Mr. Speaker:

Confirming our oral agreement regarding the procedures to be followed in the event of my inability to exercise the powers and duties of the Presidency, I am reducing the agreement to writing and would appreciate your signing the original of this letter and returning it to me for safekeeping in the Presidential files. Enclosed for your use is a signed duplicate original. The terms of the agreement are as follows:

1. In the event of inability, the President would – if possible – so inform the Speaker of the House, and the Speaker of the House would serve as Acting President, exercising the powers and duties of the Office until the inability had ended.

2. In the event of an inability which would prevent the President from communicating with the Speaker of the House, the Speaker of the House, after such consultation as seemed to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

4. After being informed by the President of his inability or, in the event of an inability which would prevent the President from communicating with the Speaker of the House, after the latter satisfies himself that such inability exists, the Speaker of the House will resign as Speaker and as Representative in Congress before undertaking to act as President.

Sincerely,

President Johnson did not enter into a signed letter agreement with Vice President Hubert H. Humphrey, but instead had an oral agreement.⁹

d. Letter Declarations During the Reagan Administration

President Ronald Reagan signed a letter to the President *pro tempore* and the Speaker of the House in 1985, which transferred presidential power to Vice President Bush, pursuant to their longstanding agreement, for the duration of his intestinal surgery.

Letter to the President *Pro Tempore* of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery

July 13, 1985

Dear Mr. President: (Dear Mr. Speaker:)

I am about to undergo surgery during which time I will be briefly and temporarily incapable of discharging the Constitutional powers and duties of the Office of the President of the United States.

After consultation with my Counsel and the Attorney General, I am mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity. I do not believe that the drafters of this Amendment intended its application to situations such as the instant one.

Nevertheless, consistent with my longstanding arrangement with Vice President George Bush, and not intending to set a precedent binding anyone privileged to hold this Office in the

future, I have determined and it is my intention and direction that Vice President George Bush shall discharge those powers and duties in my stead commencing with the administration of anesthesia to me in this instance.

I shall advise you and the Vice President when I determine that I am able to resume the discharge of the Constitutional powers and duties of this Office.

May God bless this Nation and us all.

Sincerely,
RONALD REAGAN¹⁰

Upon resuming his powers and duties following surgery, President Reagan's letter to the President *pro tempore* of the Senate and the Speaker of the House was as follows:

Letter to the President Pro Tempore of the Senate and the Speaker of the House on the President's Resumption of His Powers and Duties Following Surgery

July 13, 1985

Dear Mr. President: (Dear Mr. Speaker:)

Following up on my letter to you of this date, please be advised I am able to resume the discharge of the Constitutional powers and duties of the Office of the President of the United States. I have informed the Vice President of my determination and my resumption of those powers and duties.

Sincerely,
RONALD REAGAN¹¹

2. LETTERS PURSUANT TO SECTION 3 OF THE TWENTY-FIFTH AMENDMENT

a. Letters During the George W. Bush Administration

President George W. Bush sent two letters to the President pro tempore and the Speaker of the House temporarily transferring his powers to Vice President Richard B. Cheney during his presidency, once in 2002 and again in 2007. The text of these letters were:

Letter to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States

June 29, 2002

Dear Mr. Speaker: (Dear Mr. President:)

As my staff has previously communicated to you, I will undergo this morning a routine medical procedure requiring sedation. In view of present circumstances, I have determined to transfer temporarily my Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery.

Accordingly, in accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of President of the United States. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties.

Sincerely,
GEORGE W. BUSH¹²

Letter to Congressional Leaders on Resuming the Powers and Duties of President of the United States

June 29, 2002

Dear Mr. Speaker: (Dear Mr. President:)

In accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am presently able to resume the discharge of the Constitutional powers and duties of the office of President of the United States. With the transmittal of this letter, I am resuming those powers and duties effective immediately.

Sincerely,
GEORGE W. BUSH¹³

Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States

July 21, 2007

Dear Madame Speaker: (Dear Mr. President:)

This morning I will undergo a routine medical procedure requiring sedation. In view of present circumstances, I have determined to transfer temporarily my Constitutional powers and duties to the Vice President during the brief period of the procedure and recovery.

In accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am unable to discharge the Constitutional powers and duties of the office of the President of the United States. Pursuant to Section 3, the Vice President shall discharge those powers and duties as Acting President until I transmit to you a written declaration that I am able to resume the discharge of those powers and duties.

Sincerely,
George W. Bush¹⁴

Letter to Congressional Leaders on Resuming the Powers and Duties of the President of the United States

July 21, 2007

Dear Madame Speaker: (Dear Mr. President:)

In accordance with the provisions of Section 3 of the Twenty-Fifth Amendment to the United States Constitution, this letter shall constitute my written declaration that I am presently able to resume the discharge of the Constitutional powers and duties of the office of the President of the United States. With the transmittal of this letter, I am resuming those powers and duties effective immediately.

Sincerely,
GEORGE W. BUSH¹⁵

3. SAMPLE EXECUTIVE DECLARATIONS OF INABILITY

The Clinic has prepared the following sample declarations of inability – a sample presidential executive declaration of inability and a sample vice-presidential executive declaration of inability.

a. Sample Presidential Executive Declaration of Inability

To the President *Pro Tempore* and the Speaker of the House:

As you are aware, there is currently no constitutional or legal provision by which my inability can be declared in the event of a vice-presidential vacancy or vice-presidential inability. Through this document I wish to express situations which, if they were to arise, would result in my view in a declaration of

my inability. This advance declaration, by providing for the declaration of my inability in described circumstances, will allow for the smooth transfer of presidential power.

An inability to properly discharge the powers and duties of my office could arise in several ways. One would be disease or accident that would prevent me from making important decisions. Another form of inability could arise through a breakdown of communications from me at a time of increased urgency, uncertainty as to my whereabouts, or any such similar scenarios involving a lapse or breakdown in communication.

Upon execution, this declaration will trigger the statutory line of succession pursuant to Article II of the Constitution, permitting the person next in the line of succession to act as President until my recovery or the earlier recovery of the Vice President, should he be disabled.

The individuals I authorize to make the determination as to my inability declaration are as follows:

[To be determined by the sitting President]

Sincerely,
President []

b. Sample Vice-Presidential Executive Declaration of Inability

To the *President Pro Tempore* and the Speaker of the House:

As you are aware, there is no specific constitutional or legal provision by which I can declare my own inability to perform the powers and duties of the vice presidency. I believe I have the right to do so and, indeed, the responsibility in circumstances where the President is disabled or a vacancy in the presidency has arisen.

Through this document I wish to express my view of situations, if they were to arise, that would constitute a basis for me to declare my own inability. An inability to properly discharge the powers and duties of my office could arise in several ways. One would be disease or accident that would prevent me from making important decisions. Another form of inability could arise through a breakdown of communications between the President and me at a time of increased urgency, uncertainty as to my whereabouts, or any such similar scenarios involving a lapse or breakdown in communication.

This prospective declaration of inability will allow for the smooth transition of power to the person next in line of succession were the President to become unable to discharge the powers and duties of his office, or died, resigned, or was removed, all contingencies appearing in Article II, Section 1, Clause 6 of the Constitution. Obviously, I hope none of these occasions occurs during our term in office but prudence dictates that I contemplate such possibilities and act accordingly.

The individuals I authorize to make the determination as to my inability declaration are as follows:

[To be determined by the sitting Vice President]

Sincerely,
Vice President []

ENDNOTES

- 1 Letter from Dwight D. Eisenhower to Richard Milhous Nixon (Feb. 5, 1958), *available at* <http://www.eisenhowermemorial.org/presidential-papers/second-term/documents/566.cfm>.
- 2 *Id.*
- 3 John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907, 922 (2010).
- 4 *See id.*
- 5 Letter to the President *Pro Tempore* of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery (July 13, 1985) [hereinafter Reagan Letter], *available at* <http://www.reagan.utexas.edu/archives/speeches/1985/71385b.htm>. *See supra* Part V, footnotes 24–26 and accompanying text.
- 6 Letter from President Dwight D. Eisenhower to Richard Milhous Nixon (Feb. 5, 1958), *available at* <http://www.eisenhowermemorial.org/presidential-papers/second-term/documents/566.cfm>; *see also* White House Statement on Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (March 3, 1958), *available at* <http://www.presidency.ucsb.edu/ws/?pid=11313>.
- 7 *See* JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 228 (Fordham U. Press, 1965). The letter agreement was made public on March 3, 1958. *Id.*
- 8 White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability, PUB. PAPERS 561 (August 10, 1961), *available at* <http://www.presidency.ucsb.edu/ws/?pid=8277>.
- 9 *See* Arthur Crock, *In the Nation: The Johnson-Humphrey Agreement Mystery*, N.Y. TIMES, Jan. 27, 1965, at 28 (noting a statement by the White House that some time before the Inauguration, President Johnson and Vice President Humphrey “reached a verbal understanding to extend the same arrangement for the continuity of executive government during President Johnson’s tenure that was first put in writing in the Eisenhower Administration.”); *see also* FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION, *supra* note 7, at 229 (noting that “[t]he oral nature of [President Johnson’s] agreement with Humphrey received some criticism”).
- 10 Letter from President Ronald Reagan to the President *Pro Tempore* of the Senate and the Speaker of the House on the Discharge of the President’s Powers and Duties During His Surgery, 2 PUB. PAPERS 919 (July 13, 1985), *available at* <http://www.presidency.ucsb.edu/ws/?pid=38883>. After he left office, President Reagan acknowledged invoking the Twenty-Fifth Amendment at this time. *See* RONALD REAGAN, AN AMERICAN LIFE 500 (1990).
- 11 Letter from President Ronald Reagan to the President *Pro Tempore* of the Senate and the Speaker of the House on the President’s Resumption of His Powers and Duties Following Surgery, 2 PUB. PAPERS 919 (July 13, 1985), *available at* <http://www.presidency.ucsb.edu/ws/?pid=38884>.
- 12 Letter from President George W. Bush to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States, 1 PUB. PAPERS 1083 (June 29, 2002), *available at* <http://www.presidency.ucsb.edu/ws/?pid=63676>.
- 13 Letter from President George W. Bush to Congressional Leaders on Resuming the Powers and Duties of President of the United States, 1 PUB. PAPERS 1084 (June 29, 2002), *available at* <http://www.presidency.ucsb.edu/ws/?pid=73051>.
- 14 Letter from President George W. Bush to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States, 43 WEEKLY COMP. PRES. DOC. 1003 (July 21, 2007), *available at* <http://www.presidency.ucsb.edu/ws/?pid=75568>.
- 15 Letter from President George W. Bush to Congressional Leaders on Resuming the Powers and Duties of the President of the United States, 43 WEEKLY COMP. PRES. DOC. 1004 (July 21, 2007), *available at* <http://www.presidency.ucsb.edu/ws/?pid=75573>.

C. LEGISLATIVE HISTORY OF THE PRESIDENTIAL SUCCESSION ACTS

1. THE PRESIDENTIAL SUCCESSION ACT OF 1792

On December 20, 1790, the First Congress addressed the issue of presidential succession.¹ A bill was presented to the House of Representatives providing that an “Officer” shall act as President when vacancies arise in both the offices of President and Vice President.² This bill was referred to the Committee of the Whole on the next day but was not considered until January 10, 1791.³ The debates reveal considerable controversy surrounding the question as to which “Officers” should be included in the line of succession. Suggestions ranged from the President *pro tempore* of the Senate to the Chief Justice of the United States Supreme Court.⁴ No consensus was reached.⁵

The Second Congress first addressed the matter of presidential succession on November 15, 1791.⁶ On November 30, 1791, the Senate passed a bill entitled “An act relative to the election of a President and Vice President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice President” and sent it to the House of Representatives for debate.⁷ The bill placed the President *pro tempore* ahead of the Speaker of the House in the line of succession. Representatives initially rejected the placement of legislative officers in the line of succession because it might lead to “caballing” and “electioneering” in the choice of a Speaker.⁸ Representative Hugh Williamson contended that an “extensive construction” of the word “Officer” would allow for any individual in the United States to be properly placed in the line of succession.⁹ While Representatives Theodore Sedgwick and Elbridge Gerry argued that the Speaker was an “Officer,”¹⁰ Representative Gerry argued that a legislative line of succession might violate separation of powers by blending the executive and legislative branches.¹¹

By February 9, 1792, the Committee of the Whole was considering placing the Secretary of State in the line of succession.¹² The House approved the proposal by a vote of 32 to 22, with five members of the Constitutional Convention voting with the majority¹³ and one voting against the proposal.¹⁴ Then-Representative James Madison, among others, supported placing the Secretary of State in the line of succession during times of a dual vacancy and/or inability for a number of reasons.¹⁵ Madison questioned the constitutionality of including the President *pro tempore* and the Speaker in the line of succession because they were not “Officers” within the meaning of the Constitution.¹⁶ Moreover, Madison believed that if the Framers had contemplated the President *pro tempore* and Speaker as possible successors to the presidency, then “they would probably have been there designated . . . instead of being left to Legislative selection.”¹⁷ Finally, Madison believed the inclusion of the President *pro tempore* and Speaker violated the incompatibility clause and separation of powers.¹⁸

The Senate subsequently rejected the bill because the Federalists successfully lobbied their supporters in order to prevent Thomas Jefferson, then Secretary of State, from becoming eligible to succeed to the presidency.¹⁹ As a result, on February 20, 1792, the Senate reinserted the President *pro tempore* and Speaker of the House in place of the Secretary of State into the line of succession.²⁰ Additionally, the Presidential Succession Act of 1792 (“1792 Act”) provided for a special election for President²¹ in the case of a dual vacancy, and called for the Secretary of State, in such an instance, to notify the executive of every state that electors for the President should be appointed within “thirty-four days preceding the first Wednesday in December,” provided that there were two months between the notification and the first Wednesday in December.²² The Senate then referred the bill to the House, and the following day, the House approved the amendment by a vote of 31 to 24.²³ The 1792 Act included a provision for holding a special election, and it appears that Congress contemplated a full four-year term for a new President and Vice-President selected under this statute.²⁴ The bill was signed into law on March 1, 1792.

2. THE PRESIDENTIAL SUCCESSION ACT OF 1886

Ninety-four years later, on January 19, 1886, Congress superseded the 1792 Act when President Grover Cleveland signed the Presidential Succession Act of 1886 (“1886 Act”).²⁵ Vice President Thomas Hendricks had died in Indianapolis in November 1885. President Cleveland’s message to Congress on December 8, 1885 regarding the death of the new Vice President called for a constitutional amendment to clarify the line of succession should both the President and Vice President die or become unable to serve. While the Presidential Succession Act that was proposed and passed shortly afterward was primarily the work of the Congress, President Cleveland supported the legislation and signed the bill into law.²⁶

The House Select Committee on the Election of President and Vice-President (“Select Committee”) submitted a report concluding, among other things, that legislators were not “Officers” as envisioned by the Framers and that an executive line of succession would remove many of the questions arising from a legislative line of succession. For instance, an executive line of succession would remove the possible violation of separation of powers and conflicts of interest in the event of impeachment proceedings and trials in the House and Senate.²⁷

Moreover, the drafters of the 1886 Act made it clear that they intended to supersede the special election provision of the 1792 Act. The Select Committee believed that in times of inability of the President, an Acting President was only to act as the “*locum tenens*,” or placeholder, until the inability terminated.²⁸ If the President died, the Acting President was to fill the position “for the remainder of the term of the removed President, and upon the occurring of the next regular quadrennial election for President and Vice-President and their inauguration on the succeeding 4th of March the term of the officer acting as President should end.”²⁹ Although the Select Committee’s Report clearly stated its intent to revoke the special election provision, the language of the 1886 Act is unclear. The 1886 Act contains the language “shall act as President until the disability of the President or Vice-President is removed or a President shall be elected,” and

“it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days’ notice of the time of the meeting.”³⁰ Thus, there is a lack of agreement as to whether the 1886 Act did in fact supersede the special election provision of the 1792 Act.^{ii 31}

The 1886 Act did not pass without dissent. Many members writing for the Minority of the Select Committee believed that the 1886 Act did not go far enough to address future issues pertaining to presidential succession.³² Specifically, those in the Minority identified three distinct periods in which a presidential vacancy might arise that remained unaddressed:³³

(1) Where the President-elect dies or becomes constitutionally disabled (for “inability” and “disability” are used interchangeably) before inauguration.

(2) Where there is a failure of election of both President and Vice-President, when the election is thrown in the House

(3) Where there is a failure to count the vote and declare the result “in the presence of the Senate and House of Representatives”; as, if one House or the other should fail, for any cause, to meet the other, and our recent history more than suggests the possibility of this contingency.³⁴

a. Debates Leading Up To the 1886 Act

Members of Congress proposed several changes to the 1792 Act during the 94 years before Congress ultimately amended the Act in 1886.³⁵ The first significant analysis of the constitutionality of the 1792 Act took place in 1856.³⁶ On June 26, 1856, Senator John Crittenden of Kentucky made a motion to investigate what would happen when “both the President and Vice President were dead, or unable to act” and to address the issue of what happens “when the President alone is either dead, removed from office, or from any cause is unable to act.”³⁷ On August 5, 1856, the Senate Judiciary Committee issued a report (the “Report”) on Senator Crittenden’s proposal affirming the view that Sections 9

i Ultimately, Congress revisited the issue of special elections, and they are no longer provided for in the 1947 Act.

and 10 of the 1792 Act,ⁱⁱ which provide for a legislative line of succession and a special election, were constitutional.³⁸ However, the Judiciary Committee was not convinced that the 1792 Act prevented “the mischief of confusion and anarchy.”³⁹ Specifically, the Report expressed concern regarding the potential absence of a President *pro tempore* and Speaker and the possibility that either the President *pro tempore* or the Speaker might not possess the “requisite qualifications, under the Constitution, to be invested with the duties and powers of an acting President.”⁴⁰

To remedy these potential problems, the Report analyzed a number of possible solutions.⁴¹ For example, to guard against the problem of vacancies in both the positions of President *pro tempore* and Speaker, a suggestion was made to extend the line of succession to the Cabinet.⁴² Although the Judiciary Committee believed an extension of the line of succession to the Cabinet would solve the problem of a dual vacancy in the offices of President *pro tempore* and the Speaker by including more individuals who would be eligible to qualify to act as President, the Judiciary Committee quickly found cause for rejecting the proposal.⁴³ The Report cites the potential issue of Cabinet members being implicated as

particeps criminis, or participants in a crime, if a President faced impeachment and removal.⁴⁴ Moreover, the Judiciary Committee questioned whether Cabinet members were truly “Officers” under the Constitution when their positions had terminated or were suspended.⁴⁵ For example, if an Acting President found a Cabinet member to be “obnoxious” or to be an individual he disagreed with, he might decide to replace the Cabinet member.⁴⁶ Ultimately, the Judiciary Committee recommended extending the line of succession to the Supreme Court.⁴⁷ The Report stated:

[A]nd if there be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected; and if there should be no President of the Senate nor Speaker of the House of Representatives for the time being, and it be not a case of vacancy caused by removal, the chief justice of the Supreme Court of the United States, or if there be no chief justice in office, or it be a case of vacancy caused by removal, then the associate justices of the said Supreme Court, successively, according to seniority of commission, shall act as President of the United States until the disability be removed or a President shall be elected.⁴⁸

Finally, the Report concluded that such a “provisional” President would only be invested with the executive functions until the “disability” was removed or the Electoral College chose a new President.⁴⁹ While the Judiciary Committee did a thorough analysis of the 1792 Act, no further legislative action was taken on the basis of the Report.

For the next twenty-five years, there was little or no discussion on presidential succession, until the assassination of President James Garfield,⁵⁰ which brought to the nation’s attention the need for reform. At the time of President Garfield’s death, there was neither a President *pro tempore* nor a Speaker of the House.⁵¹ Upon President Garfield’s death, Vice President Chester A. Arthur took the oath of office in the early morning of September 20, 1881 by New York State Supreme Court Justice, John R. Brady, and then again on September 22, 1881 by United States Supreme Court Justice Morrison R. Waite.⁵² President Arthur immediately called the Senate into special session in order to elect a President *pro tempore* and to take up the matter of presidential succession.⁵³ He wrote to the Senate:

ii Section 9 of the 1792 Act states:
And be it further enacted, That in case of removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected.

Section 10 of the 1792 Act states:
And be it further enacted, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: Provided, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

Questions which concern the very existence of the Government and the liberties of the people were suggested by the prolonged illness of the late President, and his consequent incapacity to perform the functions of his office. It is provided by the second article of the Constitution, . . . 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.'

What is the intendment of the Constitution in its specifications of 'inability to discharge the powers and duties of the said office' as one of the contingencies which calls the Vice-President to the exercise of Presidential functions?

Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import?

What must be its extent and duration?

How must its existence be established?

Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability, and how and by what tribunal or authority it should be ascertained?

If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office?

Does he continue as President for the remainder of the four years' term?

Or would the elected President, if his inability should cease in the interval, be empowered to resume his office?

And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?⁵⁴

On December 6, 1881, Senator James Beck and Senator Samuel Maxey sought to answer President Arthur's questions and proposed resolutions to reform the 1792 Act.⁵⁵ Senator Beck prepared a resolution asking that the Committee on the Judiciary examine the laws enacted pursuant to Article II, Section 1 concerning presidential succession so that "all doubts or defects which may

exist in our present laws on this subject may be remedied and future controversy prevented."⁵⁶ Similarly, Senator Maxey prepared a resolution stating:

Resolved, That the Committee on the Judiciary be, and is hereby, instructed to inquire what legislation, if any, is necessary to carry into effect the provision of the Constitution 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, as well as the provision in case of the removal, death, resignation, or inability of both the President and Vice-President; and said committee will report by bill or otherwise.⁵⁷

Two days later, on December 8, 1881, Senator Augustus Garland introduced a bill⁵⁸ "to provide for the performance of the duties of the Presidential office in case of the removal, death, resignation, or inability of the President and Vice-President" with no further details.⁵⁹

On December 14, 1881, Congress resumed discussion on presidential succession and Senator Beck noted numerous questions surrounding the 1792 Act, including: in the case of special elections the possibility of presidential terms beginning and expiring in the middle of congressional terms; the expiration of a President *pro tempore's* or Speaker's term of office while acting as President; the length of time that the Vice President would hold office, whether it would be for the remainder of the term or until an inability was removed; separation of powers if the President *pro tempore* or Speaker were to take the office; and the meaning of the term "Officer" in the Constitution.⁶⁰

Although all these questions arose in the course of Senator Beck's attempt to revise the 1792 Act, it was the constitutionality of the 1792 Act that emerged as the principal issue, specifically whether the President *pro tempore* and Speaker of the House are "Officers" under the Constitution.⁶¹ Senator Beck relied on an 1862 speech by Senator James A. Bayard to argue that legislators are not "Officers" under the Constitution able to succeed to the presidency.⁶² Senator Bayard had cited the example of Senator William Blount,⁶³ who, during his trial after impeachment, pled he was not a "civil officer of the United States"⁶⁴ and therefore, not liable to impeachment.⁶⁵ This plea was sustained in the Senate and the attempt to impeach Senator

Blount was abandoned.⁶⁶ Senator Bayard believed this decision made clear that legislative officers were not “Officers of the United States”⁶⁷ because the decision was made by the Senate “organized as a court, sitting under oath, after a public argument and hearing by the ablest counsel in the country on both sides,”⁶⁸ and should stand as precedent.⁶⁹

Senator Bayard had next looked to the difference in language between Article II, Section 1 regarding the presidential term of Office,⁷⁰ and Article I, Sections 2⁷¹ and 3,⁷² regarding the terms of Representatives and Senators. Senator Bayard suggested that if the positions of Representatives or Senators were those of “Officers,” the Framers would have used the same constitutional language as applied to the President, “shall hold his Office.”⁷³ Article I, Section 2, for example, could have read, with respect to Representatives: “who shall hold their office for the term of six years,”⁷⁴ rather than the language that was adopted, which reads, “The House of Representatives shall be composed of Members chosen every second Year . . .”⁷⁵ Additionally, Article I, Section 3, referring to Senators, states that “The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year . . .”⁷⁶ Senator Bayard suggested that if the Framers meant for these positions to be those of “Officers,” then the Framers would have written “[t]he term of office of Senators of the first class shall expire at the expiration of the second year.”⁷⁷ Furthermore, Senator Bayard noted the language of the Incompatibility Clause,⁷⁸ which prevents any Senator or Representative, during the time for which he is elected, from holding “any civil Office.”⁷⁹ It does not state that these individuals are prevented from holding any “*other*” civil Office, which implies that they do not already hold “civil Offices.” Senator Bayard then pointed to Article II, Section 1, providing for the election of electors⁸⁰ and the language distinguishing between Senators and Representatives and persons “holding an Office of Trust or Profit under the United States.”⁸¹ He concluded that Senators and Representatives are not “officers of the United States” nor do they hold “office under the United States”; rather they hold the position of a “station” or “trust.”⁸² In support of this view, Senator Bayard offered the fact that the people of the United States elect neither Senators nor Representatives; rather, state legislatures elected Senators and the people from state districts elect members of the House of Representatives.⁸³

Senator Beck agreed with these points and entered into the record additional support for addressing the question of presidential succession, including his correspondence with the Official Reporter, D.F. Murphy, in 1881.⁸⁴ The correspondence took place four days after President Garfield was shot and dealt with the history and issues surrounding presidential succession.⁸⁵ In his correspondence, Murphy pointed to a number of provisions of the 1792 Act that concerned him.⁸⁶ Specifically, Murphy noted that the President *pro tempore* can change on a daily basis, as provided for by a Senate resolution dated January 13, 1876, declaring, “[t]hat the office of President *pro tempore* of the Senate is held at the pleasure of the Senate.”⁸⁷ Under the 1792 Act the President *pro tempore* was not required to resign before becoming Acting President, and therefore it was unclear whether he would remain Acting President if the Senate changed his status as President *pro tempore*. This is no longer a concern because the 1947 Act requires both the Speaker and the President *pro tempore* to resign before taking the oath as Acting President.⁸⁸

Subsequently, Senator Garland of Arkansas introduced a bill repealing the legislative line of succession and replacing it with an executive line of succession. Senator Garland believed the line of succession should go through the Cabinet Departments “commencing with the Secretary of State and going down in the order in which they are generally recognized and named in our proceedings, our laws, and our correspondence.”⁸⁹ Senator Garland recommended the executive line of succession in order to maintain separation of powers within the government.⁹⁰ Just as then-Representative James Madison believed the extension of the line of succession to the judiciary would blur the lines of the separation of powers, Senator Garland believed the extension of the line of succession to the legislative branch would have the same effect.⁹¹ Specifically, Madison noted that by including the President *pro tempore* and the Speaker in the line of succession, these individuals would retain their legislative stations and “their incompatible functions will be blended; or the incompatibility will supersede those stations, and then those being the substratum of the adventitious functions, these must fail also.”⁹² Furthermore, Senator Garland believed that the executive line of succession enabled the President to hand over his duties confidently.⁹³ Senator Garland argued

that an executive line of succession would appeal to the will of the electorate because all Heads of Departments would have received the Senate's endorsement.⁹⁴ Finally, Senator Garland believed an executive line of succession would dispose of the "Officer" question.⁹⁵ In his opinion, the President *pro tempore* and Speaker were only "Officers" of their respective bodies.⁹⁶ In support of this argument, he offered Senator Blount's impeachment trial and the case of Senator John Smith from Ohio, who was punished by expulsion, not impeachment, because he was held not to be an "Officer" within the meaning of the Constitution.⁹⁷ This bolstered Senator Garland's position because if legislators are not impeachable, then they are not "Officers of the United States" under the Constitution.⁹⁸

Senator Garland next addressed objections to an executive line of succession. Specifically, in response to objections regarding presidential qualifications,⁹⁹ Senator Garland suggested a clause stating "each of such officers above named shall have the qualifications prescribed by the Constitution of the United States for President and Vice-President."¹⁰⁰ Other objections to the proposed executive line of succession were based on the possible implication of a Cabinet officer as *particeps criminis* in the impeachment of the President.¹⁰¹ Senator Garland suggested this issue could be eliminated by a clause providing "that neither of such officers above named shall have been implicated, directly or indirectly, in any matter for which the President may have been impeached."¹⁰² These two suggestions by Senator Garland were included in Section 2 of the 1886 Act as enacted.¹⁰³

Senator Hoar proposed an executive line of succession, which would last for the duration of the presidential term, eliminating any special election.¹⁰⁴ Included in this line of succession were all Heads of Departments, in the order in which the Departments had been created.¹⁰⁵ Senator Hoar appeared to firmly believe that the Secretary of State should be in the line of succession.¹⁰⁶ He described the Secretary of State as "usually the most conspicuous representative next to the President of the United States, of the same opinions and policies upon which the people put their stamp of approval in the Presidential election."¹⁰⁷ Thus, in his view, the inclusion of the Secretary of State and other Cabinet members in the line of succession would allow for party continuity and

the furtherance of the President's policies. In response to challenges concerning the confirmation process of Cabinet members, primarily that there is an "unwritten law" that causes the Senate to confirm the President's appointments for the Departments,¹⁰⁸ Senator Hoar noted that Senators will need to take into consideration "this new possibility" when advising and consenting as to the qualifications of a nominated individual, and thus take more seriously the nomination and confirmation process.¹⁰⁹ However, Senator Hoar did not believe that Acting Secretaries should be in the line of succession. He stated, "an officer holding *ad interim*, or an officer holding by Presidential appointment without the consent of the Senate, is not entitled under this bill to succeed, under any circumstances, to the Presidency."¹¹⁰

Furthermore, Senator Hoar, like his colleagues, believed constitutional questions regarding legislative officers and party continuity were decisive reasons to change the line of succession.¹¹¹ Senator Hoar also identified the issue regarding possible simultaneous vacancies in both the positions of the President *pro tempore* and the Speaker as important in his decision to propose an executive line of succession.¹¹² Senator Hoar reintroduced his bill,¹¹³ which the Senate passed and forwarded to the House,¹¹⁴ but the House again failed to take further action.¹¹⁵

The issue of presidential succession did not reemerge as a congressional concern until 1885, with the death of Vice President Thomas A. Hendricks and President Grover Cleveland's message to the Forty-Ninth Congress.¹¹⁶ In his message, President Cleveland stated:

The present condition of the law relating to the succession to the Presidency . . . is such as to require immediate amendment. This subject has repeatedly been considered by Congress, but no result has been reached. The recent lamentable death of the Vice President and vacancies at the same time in all other offices the incumbents of which might immediately exercise the functions of the Presidential office, have caused public anxiety and a just demand that a recurrence of such a condition of affairs should not be permitted.¹¹⁷

Thus, with President Cleveland's urging and on the basis of the previous exhaustive debates on the issue of presidential succession on the record, Senator Hoar reintroduced a

modified bill in the Senate.¹¹⁸ The Senate passed the bill on December 17, 1885,¹¹⁹ and upon review the House of Representatives also passed the bill.¹²⁰ The 1886 Act became law on January 19, 1886.¹²¹

3. THE PRESIDENTIAL SUCCESSION ACT OF 1947

After almost sixty years, the issues surrounding presidential succession were resurrected following the death of President Franklin D. Roosevelt and Vice President Harry S. Truman's subsequent ascension to the presidency in April 1945.¹²² Members of Congress became concerned at this time because of the perceived political inexperience of Secretary of State Edward R. Stettinius, Jr., who under the 1886 Act was the next in the line of succession.¹²³ Postmaster General James A. Farley raised the additional concern that under the 1886 Act, the President would be able to appoint his own successor by naming a new Secretary of State.¹²⁴ According to Postmaster General Farley this was undemocratic and should be immediately modified.¹²⁵ These concerns ultimately prompted Congress to reexamine presidential succession.¹²⁶

On June 19, 1945, President Truman delivered a special message to Congress, which echoed Postmaster General Farley's concerns and urged Congress to adopt new legislation to address presidential succession.¹²⁷ President Truman argued that his ability to name his own successor was contrary to democratic principles and should not be vested with the President.¹²⁸ President Truman believed that the next in the line of succession should come as close as possible to being nationally elected.¹²⁹ Thus, he recommended the Speaker of the House as next in the line of succession.¹³⁰ President Truman felt the Speaker was the individual who came closest to being nationally elected because not only is the Speaker elected as his district's congressional representative, but also by the House of Representatives as its Speaker.¹³¹

President Truman recommended that the Speaker be placed ahead of the President *pro tempore* in the line of succession because, in his view, the Speaker enjoyed a more democratic pedigree, since members of the House of Representatives are elected every two years, while Senators are elected every six years.¹³² Therefore, the Speaker is more likely to be reflective of the national political mandate at the time of succession. President Truman proposed that in times of a dual vacancy

and/or inability the individual succeeding to the presidency should serve only until the next congressional election, at which point a President would be elected or until a special election to replace the President and Vice President was held.¹³³

In sum, President Truman recommended that Congress enact a law providing: that the Speaker of the House should be first in the line of succession in the case of removal, death, resignation, or inability of the President and Vice President, and he should resign from the House before assuming the powers and duties of the office of President; that if there is no qualified Speaker, the President *pro tempore* should resign from the Senate and act as President only until a qualified Speaker is elected; that if there is neither a qualified Speaker nor a qualified President *pro tempore*, the Cabinet member next in the line of succession should act as President until either a qualified Speaker or a qualified President *pro tempore* is elected; and that if Congress decides to enact a special election provision, the election should be held as soon as practicable.¹³⁴

Initial responses to President Truman's proposal were favorable, but as time passed the terms stipulated in the plan were questioned on constitutional grounds.¹³⁵ On June 25, 1945, Representative Hatton W. Sumners of Texas introduced a bill that reflected all of President Truman's proposals,¹³⁶ and subsequently the Committee on the Judiciary found Representative Sumner's bill to be constitutional.¹³⁷ Sumner's bill provided that if concurrent presidential and vice-presidential vacancies occurred more than ninety days before the next congressional election, presidential electors would be chosen at the coming congressional election and if a simultaneous vacancy did not occur within that ninety-day period, no special election would take place.¹³⁸

The House debated this bill. Those in favor believed it was more democratic than the 1886 Act because the Speaker reflected the most recent mandate of the national electorate.¹³⁹ However, Representatives John Gwynne, Clarence E. Hancock, and Raymond Springer criticized the bill and argued that the Speaker and President *pro tempore* were not constitutional "Officers."¹⁴⁰ Others argued that the bill would inadvertently encourage the impeachment and removal of the President, constituting a legislative encroachment on the

executive.¹⁴¹ Representative John M. Robsion took particular issue with the special election provision, arguing it could lead to four different Presidents in one term and was bad policy.¹⁴² The House of Representatives ultimately removed the special election provision from the bill.¹⁴³ The House passed the modified Summers bill on June 29, 1945.¹⁴⁴

Once the bill reached the Senate, no further action was taken until 1947.¹⁴⁵ The fact that the Republicans took control of Congress in 1946 did not deter Truman, who still advocated for congressional consideration of the legislative line of succession.¹⁴⁶ The bill, which was introduced by Senator Kenneth S. Wherry, did not contain a provision for special elections and explicitly required the resignation of the Speaker and President *pro tempore* before either could act as President.¹⁴⁷ Compulsory resignation received much criticism, as many believed this would discourage a Speaker or President *pro tempore* from acting as President in the event of presidential inability.¹⁴⁸ Further, the issues regarding whether these legislative leaders were even “Officers” under the Constitution reemerged.¹⁴⁹ Senator Carl A. Hatch of New Mexico argued that “[t]he officer must continue to hold that office in order to continue to qualify to act as President.”¹⁵⁰ Thus, the person is no longer an “Officer” under the Constitution and cannot, having resigned his position, act as President.¹⁵¹ As these concerns mounted, the Committee on Rules and Administration submitted a report on March 24, 1947, which contained the “minority view” of various Senators and described the bill as “piecemeal legislation” while insisting that the relevant issues had not been thoroughly studied.¹⁵²

Representative Robsion submitted a report of the Committee on the Judiciary on July 9, 1947 recommending that the bill be enacted.¹⁵³ The report included a letter dated June 11, 1947 from then Attorney General, Douglas W. McGregor, in response to a request by the Committee on the Judiciary for review of the constitutionality of the bill.¹⁵⁴ Attorney General McGregor endorsed the bill and opined that members of Congress were “Officers” under the Constitution.ⁱⁱⁱ¹⁵⁵

iii Attorney General McGregor cited *Lamar v. United States*, 241 U.S. 102 (1916), which stands for the proposition that impersonating a member of the House of Representatives involved an “Officer” acting under the authority of the United States. However, Officer in this sense is construed according to its meaning in the penal code, not the Constitution. *Id.* at 112-17.

McGregor also cited the 1792 Act and the fact that it “represents a construction of article II by an early Congress, whose views of the Constitution have long been regarded as authoritative, and reflects a long-continued acquiescence in such a construction.”¹⁵⁶ Ultimately, the Senate passed the bill on June 27, 1947¹⁵⁷ and the House of Representatives followed suit on July 10, 1947.¹⁵⁸ On July 18, 1947, President Truman signed the Presidential Succession Act of 1947 into law.¹⁵⁹ The 1947 Act, which is still in effect, includes most of Truman’s proposals, with the notable exception of his recommendation to provide for a special election.¹⁶⁰

ENDNOTES

- 1 JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 57 (Fordham U. Press, 1965) [hereinafter FEERICK, FROM FAILING HANDS]; 2 ANNALS OF CONG. 1813 (1790).
- 2 FEERICK, FROM FAILING HANDS, *supra* note 1, at 57; 2 ANNALS OF CONG. 1813.
- 3 FEERICK, FROM FAILING HANDS, *supra* note 1, at 57.
- 4 *Id.*
- 5 *Id.* at 58.
- 6 *Id.*
- 7 3 ANNALS OF CONG. 36 (1791).
- 8 FEERICK, FROM FAILING HANDS, *supra* note 1, at 59.
- 9 3 ANNALS OF CONG. 282.
- 10 *Id.* at 281.
- 11 FEERICK, FROM FAILING HANDS, *supra* note 1, at 59.
- 12 3 ANNALS OF CONG. 401.
- 13 These members included: Abraham Baldwin of Georgia, Nicholas Gilman of New Hampshire, Thomas Fitzsimons of Pennsylvania, James Madison of Virginia, and Hugh Williamson of North Carolina. *Id.* at 402.
- 14 This member was Elbridge Gerry. *Id.*
- 15 Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 3 PHILIP KURLAND & RALPH LERNER, THE FOUNDERS’ CONSTITUTION 556 (2000), available at http://presspubs.uchicago.edu/founders/documents/a2_1_6s3.html.
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*
- 19 FEERICK, FROM FAILING HANDS, *supra* note 1, at 60.
- 20 3 ANNALS OF CONG. 90 (1792).
- 21 Presidential Succession Act of 1792, ch. 8, 1 Stat. 239 (repealed 1886). The special election provision applied only if “the term for which the President and Vice President last in office were elected [did] not expire on the third day of March next ensuing.” *Id.* § 10.
- 22 *Id.*

- 23 3 ANNALS OF CONG. 417–18.
- 24 See Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182, 183 (1905).
- 25 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).
- 26 FEERICK, FROM FAILING HANDS, *supra* note 1, at 140–43.
- 27 H.R. REP. NO. 49-26, pt. 1, at 2–3 (1886).
- 28 *Id.* at 4.
- 29 *Id.*
- 30 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 § 1.
- 31 See Hamlin, *supra* note 24, at 183, for a complete discussion regarding the proposed amendments of Senator Hoar regarding special elections and the adopted amendments included in the 1886 Act.
- 32 H.R. REP. NO. 49-26, pt. 2, at 1.
- 33 *Id.* at 3.
- 34 *Id.*
- 35 13 CONG. REC. 125 (1882). The Act of 1792 remained “entirely unaltered, except temporarily in 1877, as to some of the electoral provisions.” *Id.*
- 36 See *id.* at 121.
- 37 *Id.*
- 38 S. REP. NO. 34-260 (1856).
- 39 *Id.* at 3.
- 40 *Id.* at 3–4.
- 41 *Id.* at 4.
- 42 *Id.*
- 43 *Id.*
- 44 *Id.*
- 45 *Id.*
- 46 *Id.*
- 47 *Id.* at 4–6.
- 48 *Id.* at 6.
- 49 *Id.*
- 50 See *A Great Nation in Grief: President Garfield Shot by an Assassin*, N.Y. TIMES, Jul. 3, 1881, at 1. The *New York Times* reported that on July 2, 1881, Charles J. Guiteau shot and wounded President Garfield as he was boarding a train in the depot of the Baltimore and Potomac Railroad. Subsequently, he passed away on September 19, 1881, due to infections. See *James Garfield*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/about/presidents/jamesgarfield> (last visited August 3, 2011 4:45 PM).
- 51 FEERICK, FROM FAILING HANDS, *supra* note 1, at 130.
- 52 *Id.* at 129–130.
- 53 *Id.* at 130.
- 54 13 CONG. REC. 121 (1882) (citing a submission from President Arthur to the Senate).
- 55 See *id.* at 22–23.
- 56 *Id.* at 22.
- 57 *Id.*
- 58 *Id.* at 55.
- 59 *Id.*
- 60 See *id.* at 123.
- 61 *Id.*
- 62 *Id.*
- 63 CONG. GLOBE, 38TH CONG., 1ST SESS. app. 35 (1863–64).
- 64 *Id.*
- 65 *Id.*
- 66 *Id.*
- 67 U.S. CONST. art. II, § 2, cl. 2.
- 68 CONG. GLOBE, 38TH CONG., 1ST SESS. app. 35.
- 69 *Id.*
- 70 U.S. CONST. art. II, § I, cl. 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his *Office* during the term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows . . .”) (emphasis added).
- 71 *Id.* art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).
- 72 *Id.* art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”).
- 73 *Id.* art. II, § 1, cl. 1; 13 CONG. REC. 128 (1882).
- 74 13 CONG. REC. 128.
- 75 U.S. CONST. art. I, § 2, cl. 1.
- 76 *Id.* art. I, § 3, cl. 2.
- 77 13 CONG. REC. 128.
- 78 *Id.*
- 79 U.S. CONST. art. I § 6 cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).
- 80 13 CONG. REC. 128.
- 81 U.S. CONST. art. II § 1 cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”).
- 82 13 CONG. REC. 128.
- 83 *Id.*
- 84 *Id.* at 124–25.
- 85 *Id.* at 124.
- 86 *Id.* at 125–26.
- 87 *Id.* at 126.

- 88 Vacancy in offices of both President and Vice President; officers eligible to act, 3 U.S.C. §§ 19(a)(1)–(2) (2006).
- 89 13 CONG. REC. 137.
- 90 *Id.* at 138.
- 91 *Id.*
- 92 Letter from James Madison to Edmund Pendleton, *supra* note 15.
- 93 13 CONG. REC. 138.
- 94 *Id.*
- 95 *See id.*
- 96 *Id.*
- 97 U.S. CONST. art. II, § 1, cl. 6; 13 CONG. REC. 138.
- 98 *Id.* art. II, § 2, cl. 2; 13 CONG. REC. 138.
- 99 13 CONG. REC. 138.
- 100 *Id.*
- 101 *Id.*
- 102 *Id.*
- 103 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 §1 (repealed 1947).
- 104 13 CONG. REC. 4975.
- 105 *Id.*
- 106 14 CONG. REC. 689 (1883).
- 107 *Id.* Senator Hoar also noted some of the more prominent former Secretaries of State, including: Thomas Jefferson, Timothy Pickering, John Marshall, James Madison, John Quincy Adams, and Henry Clay. *Id.*
- 108 *Id.* at 690.
- 109 *Id.*
- 110 *Id.* at 689.
- 111 *Id.*
- 112 *Id.*
- 113 15 CONG. REC. 661 (1884).
- 114 *Id.*
- 115 FEERICK, FROM FAILING HANDS, *supra* note 1, at 143. It should be noted that the House of Representatives previously failed to take action in 1883, when Senator Hoar's bill was adopted by the Senate with amendments.
- 116 *Id.*
- 117 *Id.*
- 118 S. 471, 49th Cong. (1886); 17 CONG. REC. 16 (1886).
- 119 17 CONG. REC. 252 (1885).
- 120 17 CONG. REC. 614 (1886).
- 121 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).
- 122 FEERICK, FROM FAILING HANDS, *supra* note 1, at 204.
- 123 *Id.*
- 124 25 CONG. DIG. 87, 89 (1946).
- 125 *Id.* at 89.
- 126 Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 453 (1949).
- 127 H.R. DOC. NO. 79–246, at 1 (1945).
- 128 *Id.*
- 129 *Id.*
- 130 *Id.*
- 131 *Id.*
- 132 *Id.* at 2.
- 133 *Id.*
- 134 *Id.*
- 135 FEERICK, FROM FAILING HANDS, *supra* note 1, at 205.
- 136 H.R. 3587, 79th Cong. (1945).
- 137 H.R. REP. NO. 79-829, at 4 (1945).
- 138 *Id.* at 3.
- 139 91 CONG. REC. 7011–12, 7016 (1945).
- 140 *Id.* at 7014–15, 7017–18, 7022.
- 141 *Id.* at 7015. *See* Silva, *supra* note 126, at 454.
- 142 91 CONG. REC. 7010, 7024.
- 143 *Id.* at 7028.
- 144 *Id.*
- 145 FEERICK, FROM FAILING HANDS, *supra* note 1, at 207.
- 146 *Id.*
- 147 S. 564, 80th Cong. (1947).
- 148 *See* 93 CONG. REC. 7776 (1947).
- 149 *Id.* at 7767–70.
- 150 *Id.* at 7770.
- 151 *Id.*
- 152 S. REP. 80-80, at 4 (1947).
- 153 H.R. REP. 80-817 (1947).
- 154 *Id.* at 2–4.
- 155 *Id.* at 4.
- 156 *Id.*
- 157 93 CONG. REC. 7786 (1947).
- 158 *Id.* at 8634.
- 159 Vacancy in offices of both President and Vice President; officers eligible to act, 3 USC §19 (2006).
- 160 *Id.*

D. POST-9/11/2001 PROPOSALS AND PRESIDENTIAL SUCCESSION INITIATIVES

I. PROPOSED POST-9/11/2001 LEGISLATION

The majority of legislative proposals following the attacks of September 11, 2001 focus on the inclusion of legislative leaders in the line of succession, the bumping provision of the 1947 Act, and mandatory resignation.ⁱ

a. Legislators

Legislative proposals since 9/11 have sought to address the two principal issues regarding the inclusion of legislators in the line of succession: party continuity¹ and constitutionality.²

The potential for a disruption in party continuity is a matter of genuine and continuing concern.³ In the ten years since 9/11, the Speaker of the House of Representatives and the President have been members of opposing political parties for three years,ⁱⁱ and the President *pro tempore* of the Senate has been in the President's opposing party for four years.ⁱⁱⁱ

Four bills,⁴ all introduced by Congressman Brad Sherman of California, have proposed that the President have the power to designate which party leader in each House of Congress should be included in the line of succession.^{iv} In the House, the President could select among the Speaker, the Majority Leader, and the Minority Leader.⁵ In the Senate, the President could choose from among the President *pro tempore*, the Majority Leader, and the Minority Leader.⁶ The President would designate one of these legislators for the House and one for the Senate by notifying the Clerk of the House of Representatives and the Secretary of the Senate.⁷ Until the President submits a letter designating otherwise, the Speaker and Majority Leader of the Senate would be deemed successors.⁸

Other bills have sought to remove legislators from the line of succession. Senator John Cornyn of Texas proposed a

bill removing legislative officers from the line of succession altogether.⁹ In a separate bill, Representative Sherman proposed removing legislators from the line of succession unless there is neither a President nor a Vice President to take office on Inauguration Day.¹⁰ In such an instance, the Speaker of the House and the Majority Leader of the Senate would serve as next in line in that order.¹¹ However, this legislation explicitly states that the individual in this scenario acting as President “may not nominate any individual to serve as Vice President.”^{v,12}

Later proposals by Senator Cornyn and Representative Sherman did not remove legislators,¹³ but left the Speaker of the House and the President *pro tempore* in the line of succession.¹⁴ Senator Cornyn stated that this change was made because he hoped that “Congress [would] enact the Presidential Succession Act of 2005 quickly, and that the more controversial but nevertheless critical constitutional issues arising out of current law can be addressed as well through separate legislation.”¹⁵

b. Bumping

Legislators have attempted to remove the bumping provision in six bills.¹⁶ Some of these bills provide that the individual who first acts as President pursuant to the line of succession may serve for the rest of the presidential term “or until the disability of the President or the Vice President is removed.”¹⁷

c. Mandatory Resignation Provision

Under the 1947 Act, any individual who acts as the President is required to resign his current post, prohibiting him from resuming it later.¹⁸ As a result, potential successors may be unwilling to assume the powers of the presidency during a temporary inability. Only two of the post-9/11 bills would have continued the compulsory resignation for executive officers.¹⁹ In contrast, all but one bill provided for mandatory resignation for legislators.²⁰ The most recent proposed

i This overview is current as of May 2011, when the Clinic concluded its work.

ii See Appendix F, Chart 2, for a list of former Speakers of the House of Representatives and the Presidents during whose terms they served.

iii See Appendix F, Chart 3, for a list of former Presidents *pro tempore* of the Senate and the Presidents during whose terms they served.

iv The Presidential Succession Act of 2004 also included this provision for the President-elect. H.R. 5390, 108th Cong. (2004).

v The Clinic notes that this proposed restriction raises constitutional concerns that are not addressed in this Report. Specifically at issue is whether the Acting President has the authority to appoint a Vice President under the Twenty-Fifth Amendment. See *Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 94th Cong. (1975)*.

legislation would not require the resignation of either executive or legislative leaders.^{vi21}

d. Acting Secretaries

It is unclear whether the 1947 Act includes Acting Secretaries^{viii} in the line of succession.^{viii} One post-9/11 bill states that officers can only be in the line of succession if the President appointed them to their office.²² Five other post-9/11 bills state that, to be included in the line of succession, officers must have been appointed by the President and confirmed with the advice and consent of the Senate to a specific office listed. Therefore only Cabinet Secretaries confirmed as such would be in the line of succession.²³

e. Speaker of the House *Pro Tempore*

Representative Sherman has proposed two bills that would allow the President to choose among various House leaders in selecting a statutory successor, but the bills specifically provide that a person acting as Speaker *pro tempore* is not considered the Speaker of the House.²⁴

f. Successors Outside the Washington, D.C. Area

Many commentators suggest that the greatest threat to continuity in the presidency in the event of mass catastrophe stems from the concentration of individuals in the line of succession present within the Washington, D.C. metropolitan area.²⁵

Five bills have proposed adding the Ambassadors to the United Nations, Great Britain, Russia, China, and France to the end of the line of succession after the Secretary of Homeland Security.²⁶

vi This proposal raises constitutional issues not addressed in this Report, specifically whether a member of the legislature would be able to serve simultaneously in the executive branch. Currently, legislators must resign before becoming Acting President. 3 U.S.C. § 19 (2006). The necessity of that requirement has been debated throughout the history of the Succession Acts.

vii An “Acting Secretary” is an officer who was not appointed as a principal officer by the President but who nonetheless holds the powers of a Cabinet Secretary. By contrast a Cabinet Secretary is an individual who was appointed by the President to be part of his Cabinet and confirmed by the Senate. Both an Acting Secretary and a Cabinet Secretary would have been nominated by the President and confirmed by the Senate for the positions they were originally appointed to before they could become Acting President. See Presidential Succession Act of 1947, 3 U.S.C. § 19.

viii For a discussion of this issue see *supra* Part VI.C.

2. ADDITIONAL POST-9/11/2001 PROPOSALS

a. Introduction

Others besides legislators have made proposals since 9/11. The Continuity of Government Commission, a joint effort by the American Enterprise Institute and the Brookings Institute, has released an evaluation of the current system of presidential succession in the event of “a catastrophic attack that would kill or incapacitate multiple individuals in the line of succession.”²⁷ Other proposals have been advanced by various scholars, including Dr. John C. Fortier;²⁸ Professor Akhil Reed Amar;²⁹ Professor Howard Wasserman;³⁰ and Miller Baker, Esq.³¹ These proposals provide valuable perspectives on alternative solutions to the presidential succession deficiencies present in the current system.

b. Recommendations of The Continuity of Government Commission

The Continuity of Government Commission provides a detailed and thorough discussion culminating in seven recommendations addressing presidential succession deficiencies in the wake of the 9/11 terrorist attacks.³² Specifically, the Commission recommends: extending the line of succession to individuals living outside of the Washington, D.C. metropolitan area; removing legislative officers from the line of succession; providing for a special election in the event of a double vacancy occurring in the first two years of a presidential term; reordering the line of succession; removing Acting Secretaries from the line of succession; supplementing procedures for declaring a President unable to discharge the powers and duties of his office; and addressing the contingencies which may arise during the inaugural and pre-inaugural periods.³³

i. Extend the Presidential Line of Succession Outside of Washington, D.C.

The first recommendation made by the Commission is to extend the presidential line of succession to individuals living outside of the Washington, D.C. metropolitan area.³⁴ The reason for this recommendation is the concern that all the individuals in the current line of succession could be eliminated in a mass catastrophe targeting the nation’s Capital.³⁵ During the Cold War, a nuclear missile posed

the greatest threat to American security.³⁶ Officials in Washington, D.C. assumed they had the capability to retreat from the Capital prior to an impending attack.³⁷ With the advent of global terrorism and the portability of weapons of mass destruction, the potential threats have intensified.

To accomplish its goal of extending the line of succession to individuals living outside Washington, D.C., the Commission proposes two solutions. The first proposal would add Ambassadors or governors to the line of succession.^{ix38} The Commission ultimately recommends that Congress establish four or five new federal officer positions, requiring appointment by the President and confirmation by the Senate, each of which would be in the line of succession.³⁹ The Commission contemplates that the individuals nominated to these offices would primarily be high government officials,⁴⁰ such as former Presidents,^x former Cabinet members, or even current and former governors.^{xi41}

ii. Remove Legislators From the Line of Succession

The second recommendation is to remove legislators from the line of succession.⁴² Party continuity would thus be maintained.⁴³ The question whether legislators are “Officers” within the meaning of Article II, Section 1, Clause 6 would become moot. The bumping provision contained in 3 U.S.C. § 19(d)(2) would become ineffective and unnecessary.⁴⁴ Finally, this would address the concern that during times of temporary inability legislative leaders may not wish to resign their posts to act as President, as is currently required.⁴⁵

Recognizing that it would be difficult to obtain legislative

support for a bill that removes legislators, the Commission makes four additional recommendations in the event that they remain in the line of succession. First, to remove the bumping provision of 3 U.S.C. § 19(d)(2).⁴⁶ Second, to change the criteria for selecting the President *pro tempore* or replace the President *pro tempore* in the line of succession with the Majority Leader of the Senate.⁴⁷ Third, to allow legislative leaders to act only in the event of the death of a President and not during times of presidential inability.⁴⁸ Fourth, to address problems concerning the continuity of Congress within the House of Representatives.⁴⁹

iii. Provide for a Special Presidential Election

The Commission recommends that special presidential elections be held within five months if a double vacancy occurs in the first two years of a presidential term.⁵⁰

iv. Reorder the Line of Succession

The Commission recommends reordering the line of succession.⁵¹ The Commission argues that, in determining the order of succession, Congress should consider not only the year in which a Cabinet level position was created, but also the likely qualifications of a Secretary who serves a given department.⁵² The line of succession deemed appropriate by the Commission is: Secretary of State; Secretary of Defense; Attorney General; Secretary of the Treasury; and new officers created by Congress who are located outside of Washington, D.C. in accordance with the Commission’s first proposal.⁵³

v. Remove Acting Secretaries

The Commission recommends explicitly removing Acting Secretaries from the line of succession,⁵⁴ as was provided for in the 1886 Act.⁵⁵

vi. Supplement Inability Procedures

Another of the Commission’s recommendations is to supplement the procedures for determining presidential inability by officials who are in the line of succession after the Vice President.⁵⁶ The Twenty-Fifth Amendment establishes procedures both for filling a vacancy in the office of the Vice President as well as for addressing presidential inability, but does not address how this might be accomplished in the absence of an able Vice President. The Commission suggests that Congress create a procedural framework whereby an

ix The inclusion of governors in the line of succession raises some constitutional concerns that are not addressed in this Report. Specifically at issue is whether governors can be federalized under the Commander-in-Chief Clause and what federalism implications may arise from such an inclusion. *See infra* note xx.

x Former Presidents who have served two terms are not precluded from the line of succession by reason of the Constitution’s limitations on the length of service. A president cannot be *elected* to more than two terms of office, U.S. CONST. amend. XXII, § 1, but arguably could serve by virtue of appointment, ascending to the office through the line of succession. *See Ensuring the Continuity of the United States Government: The Presidency: Joint Hearing Before the S. Comm. on the Judiciary and S. Comm. on Rules and Admin.*, 108th Cong. 59 n.1 (2003) [hereinafter *The Presidency: Joint Hearing*] (testimony of John C. Fortier, Exec. Dir., Continuity of Gov’t Comm’n, and Research Assoc., Am. Enter. Inst.).

xi *See infra* note xx.

officer lower in the line of succession can declare the inability of an officer higher in the line⁵⁷ and that Congress could provide guidance on how a transfer might take place and how Congress is to be notified.⁵⁸ Additionally, the Commission recommends that Congress, using its authority under the Twenty-Fifth Amendment,⁵⁹ create an alternative body that the Vice President can convene in order to declare a presidential inability in the event that a majority of the Cabinet cannot convene.⁶⁰ Such a body could be comprised of a majority of governors or some other group of individuals from outside of Washington, D.C.⁶¹ If no alternative body is created and a majority of the Cabinet members is rendered unable by reason of a mass attack, then the possibility remains that a surviving Vice President will have no constitutional means for declaring the President unable to perform the duties of his office.^{xii}

vii. Address Inaugural and Pre-Inaugural Contingencies

The seventh and final recommendation made by the Commission is to address inaugural and pre-inaugural contingencies. The Commission recommends the adoption of three proposals.⁶²

First, Congress and the political parties would take care to secure the line of succession during these times.⁶³ This could be accomplished primarily with a change in custom.⁶⁴ The outgoing and incoming administrations could work together so that the outgoing President could nominate members of the President-elect's Cabinet.⁶⁵ Then, before the inauguration, the Senate could confirm the new nominees.⁶⁶ Second, the Commission recommends shortening the time between the casting and counting of the Electoral College votes in order to identify the President-elect as soon as possible.⁶⁷ Finally, the Commission recommends that the political parties plan for the possibility of the deaths of both the President-elect and Vice President-elect.⁶⁸

xii A majority of "the principal officers of the executive departments," as set out in the Twenty-Fifth Amendment, Section 4, was not thought of as a quorum but as a majority of the Cabinet positions. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 202-03 (Fordham U. Press 1976). Acting Secretaries were thought to be the members acting for their respective departments and, thus, would be among the principal officers to participate in declaring a President unable. *Id.* For a discussion of the departmental lines of succession, see Appendix E of this Report.

c. Proposals by Dr. John C. Fortier^{xiii}

Dr. John C. Fortier has made numerous thoughtful proposals concerning presidential succession, some of which overlap with the Commission's proposals.⁶⁹ Additional proposals include creating a binary line of succession and removing the bumping provision in 3 U.S.C. § 19(d)(2).⁷⁰ The latter suggestions are discussed below.

i. Binary Line of Succession

In his 2003 testimony before the Senate Committee on the Judiciary, Dr. Fortier proposed creating two lines of succession. First, in cases of presidential inability, impeachment and removal, and death and resignation, he recommends that presidential powers and duties should devolve upon the Cabinet members.⁷¹ Second, if a President and Vice President both fail to qualify, Dr. Fortier recommends that it is both constitutional and practical to have the presidential powers devolve upon qualified legislative officers.^{xiv}

According to Dr. Fortier, the powers of the President should also flow to the Cabinet in the event of a double vacancy. This recommendation addresses the conflicts of interest that may arise in cases of impeachment and removal.⁷²

In the case of death or resignation, Dr. Fortier also proposes removing legislative officers from the line of succession.⁷³ This section of his proposal, however, does not specifically address post-9/11 concerns. This proposal reflects Dr. Fortier's opinion on the question whether legislators qualify as

xiii Dr. John C. Fortier has been the Executive Director of the Continuity of Government Commission since 2002. He has testified before the House of Representatives and the Senate concerning the continuity of government. Dr. Fortier has held teaching positions at the University of Pennsylvania, University of Delaware, Boston College, and Harvard University.

xiv *The Presidency: Joint Hearing*, *supra* note 25, at 10, 52-53 (statement and testimony of John C. Fortier, Exec. Dir., Continuity of Gov't Comm'n, and Research Assoc., Am. Enter. Inst.). A legislator is arguably not an "Officer" within the meaning of Article II, but a legislative officer is a "person" as used in the Twentieth Amendment. U.S. CONST. art. II, § 1, cl. 6; *id.* amend. XX, § 3. The Twentieth Amendment states in part: "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." *Id.* amend. XX, § 3 (emphasis added). However, concerns about including a legislator in the line of succession through the Twentieth Amendment may still raise separation of powers concerns.

“Officers” within the meaning of Article II, Section 1, Clause 6 of the Constitution.^{xv}

According to Dr. Fortier, in the event that a President-elect or Vice President-elect fails to qualify, it would be appropriate for legislators to be in the line of succession.⁷⁴ This situation would most likely result from an election controversy or a terrorist attack resulting in the death of the President-elect and Vice President-elect shortly before the inauguration, leaving no one to qualify as President and Vice President.⁷⁵ Since members of the House of Representatives are elected in the same General Election as the President-elect and Vice President-elect, the Speaker of the House would arguably best reflect the political sentiment of the country as a whole as of Inauguration Day and is the best person to assume the presidency. If legislators were not included in the line of succession before Cabinet members in a failure-to-qualify scenario, the powers of the President would flow to the previous administration’s Cabinet or even to the previous administration’s Acting Secretaries.⁷⁶ This result would be unlikely to reflect the political will of the electorate.

ii. Remove the Bumping Provision

Dr. Fortier recommends removing the bumping provision of 3 U.S.C. § 19(d)(2).⁷⁷ He points out that a bumping provision, particularly in the event of a catastrophic attack, could create several negative consequences including: having multiple Presidents over a short period of time; the possession of potentially extortionary power by legislators to affect the policy decisions of an Acting President; and the election of a new Speaker of the House by a constitutionally questionable quorum in the event that a mass catastrophe kills or incapacitates a significant number of Representatives.⁷⁸

d. Proposal by Professor Akhil Reed Amar: New Position of Assistant Vice President^{xvi}

Professor Akhil Reed Amar has proposed creating a new Cabinet position of Assistant Vice President.⁷⁹ According to Professor Amar, the creation of this position would solve a

number of problems inherent in the current succession laws.⁸⁰

The primary responsibility of the Assistant Vice President would be “to receive regular briefings preparing him to serve at a moment’s notice, and to lie low until needed: in the line of succession but out of the line of fire”⁸¹ Professor Amar intends this office to be highly visible to the American people, proposing that the assistant vice-presidential nominee be announced well before the November election so that a vote for the presidential nominee would also signal an endorsement of the Assistant Vice President.⁸² The office would require Senate confirmation.⁸³ In addition, the line of succession following the Assistant Vice President would run directly to Cabinet members.⁸⁴ Finally, Professor Amar suggests that if creating a new office is not politically viable, Congress could name one of the current Cabinet members to be next in line after the Vice President in a purely executive line of succession.⁸⁵

Under this proposal, the bumping provision would become unnecessary, mandatory resignations would not be required, the Assistant Vice President would certainly be an “Officer” within the meaning of Article II, congressional conflicts of interest would be avoided, power transfers in times of inability would be seamless, party and policy continuity would be maintained, and democratic legitimacy would be ensured through the Senate confirmation process.⁸⁶

Professor Amar’s proposal is not without complications. First, the office of Assistant Vice President could erode the political status of the Vice President. Second, there is no guarantee that the assistant vice-presidential candidate, announced prior to an election, would assume that office, because the Senate could refuse to confirm him or the President could change his nominee after the election. Third, having to judge a third individual when evaluating a presidential ticket may confuse the electorate and complicate the selection of running mates.

e. Proposals by Professor Howard Wasserman^{xvii}

Professor Howard Wasserman, in addition to making proposals that overlap with those discussed above, has proposed a unique solution to the problem of presidential

xv For a discussion of this issue see *supra* Part VI.B.

xvi Professor Amar is the Sterling Professor of Law and Political Science at Yale University and has written extensively on presidential succession. See, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

xvii Professor Wasserman is an Associate Professor of Law at Florida International University and has written on presidential succession. See, e.g., Howard M. Wasserman, *The Trouble With the Shadow Government*, 52 EMORY L.J. 281 (2003); Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2001).

succession in the post-9/11 era that draws from the shadow government implemented by President George W. Bush.⁸⁷ Professor Wasserman's proposal lays out a framework defining the role and composition of a shadow government.⁸⁸

i. Reorder the Line of Succession

First, Professor Wasserman advocates reordering the line of succession.⁸⁹ He places Cabinet members immediately after the Vice President in the line of succession.⁹⁰ The Speaker of the House and the President *pro tempore* are not removed under this proposal but are placed at the end of the line of succession.⁹¹ Professor Wasserman would have the line run first through the Cabinet because an Acting President coming from the Cabinet would have been a top official in the executive, a member of the President's party, and chosen by the President to further his policies.⁹² Including legislative leaders at the end of the line of succession is a way to respond to possible catastrophic events. According to Professor Wasserman, one lesson of 9/11 "is that the line of succession should contain everyone who constitutionally may be an officer under the Succession Clause and who, as a normative policy matter, should be included in the line."⁹³ As long as a House of Congress is functioning, one of these legislative leaders can be elected and assume the presidency, should everyone else in the line be eliminated.⁹⁴

ii. Create the Position of First Secretary

Professor Wasserman suggests creating a new Cabinet member, the First Secretary, who would be nominated by the President and confirmed by the Senate to lead a shadow government.⁹⁵ The First Secretary is different from the Assistant Vice President suggested by Professor Amar. The First Secretary would play an important role in the daily operations of the government. While running the shadow government, the First Secretary would "be in contact with the President and the administration, as an active member of the Cabinet, aware of and involved in the creation and execution of public policy."⁹⁶ The shadow government would be comprised of high-ranking members of each executive agency and department, with the First Secretary at its head, and would function in a secure location outside of Washington, D.C.⁹⁷ Professor Wasserman's conception of a shadow

government would allow for continuity within the executive branch after a catastrophic attack.⁹⁸

Professor Wasserman identifies several benefits of a shadow government. The First Secretary would be intimately involved in the administration and in a position to assume power seamlessly in the event of a double vacancy or catastrophic attack.⁹⁸ In addition, Professor Wasserman's proposal for a shadow government ensures that the public knows the identity of the individual at its head.¹⁰⁰

iii. Allow for Change in the Seat of Government

Professor Wasserman proposes a statute that would allow the seat of government to function in a location other than Washington, D.C.¹⁰¹ The need for such a move could arise following a catastrophic attack, which renders the government unable to function in Washington, D.C.

f. Proposals by Miller Baker^{xviii}

Miller Baker has made several proposals overlapping with those discussed above but with modifications. These are: to reorder the line of succession; to remove the bumping provision; to provide for Cabinet bumping; and to allow the President to determine the order of succession for Cabinet members after those specifically enumerated in the Act.¹⁰²

i. Reorder the Line of Succession

Baker proposes reordering the line of succession by removing the lower listed Cabinet members, with the exception of the Secretary of Homeland Security.¹⁰³ He also proposes to amend the 1947 Act to allow the President, at his discretion, to nominate Cabinet members after those specifically enumerated in the line of succession.¹⁰⁴ Baker also suggests that the President should have the power to nominate individuals to be in the line of succession who are neither Cabinet members nor legislators, such as governors, subject to Senate confirmation.^{xix}¹⁰⁵ To address questions whether this proposal would be constitutional, Baker suggests that

xviii Mr. Baker is a partner at the law firm of McDermott Will & Emery LLP. Mr. Baker appeared before the House of Representatives and the Senate to testify about presidential succession after 9/11.

xix See *infra* note xx.

governors be “federalized” pursuant to the Commander-In-Chief Clause.^{xx} Under this proposal, the line would be as follows: Secretary of State; Secretary of the Treasury;^{xxi} Secretary of Defense; Attorney General; Secretary of Homeland Security; and other individuals as the President would nominate and who would be confirmed by the Senate.¹⁰⁶

ii. Remove the Bumping Provision

Baker proposes the removal of bumping when legislators decline to act as President or when legislators are appointed after another officer or individual has assumed the powers of the President.¹⁰⁷

iii. Create a Cabinet Bumping Provision

Finally, Baker proposes a Cabinet bumping provision. He suggests that a Cabinet member higher in the line of succession should have the ability to assume the powers of the President from a Cabinet member lower in the line of succession once the former recovers from an inability.¹⁰⁸ The purpose of a Cabinet bumping provision is to have the highest-ranking Cabinet member assume the powers of the President.¹⁰⁹

xx *The Presidency: Joint Hearing*, *supra* note 25, at 41 (testimony of M. Miller Baker, Partner, McDermott Will & Emery). The theory is that the Commander-In-Chief clause allows the President, as Commander-In-Chief of the “Army and Navy of the United States, and of the Militia of the several states, when called into actual Service of the United States,” U.S. CONST. art II, § 2, cl. 1, to “federalize” a governor who is the Commander-In-Chief of his state’s militia, since the President has the authority to call the militia into the service of the United States.

xxi Although in House hearings in 2004 Mr. Baker did not include the Secretary of Treasury in his proposed line of succession, he had done so at the Senate hearing in 2003. Compare *The Presidency: Joint Hearing*, *supra* note 25, at 41 (testimony of M. Miller Baker, Esq., McDermott Will & Emery), with *Presidential Succession Act: Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 39 (2004) (prepared statement of M. Miller Baker, Partner, McDermott Will & Emery).

ENDNOTES

- 1 CONTINUITY OF GOV’T COMM’N, PRESERVING OUR INSTITUTIONS: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 33 (2009).
- 2 *Id.*
- 3 *Id.* at 39.
- 4 Presidential Succession Act of 2010, H.R. 6557, 111th Cong. (2010); Presidential Succession Act of 2004, H.R. 5390, 108th Cong. (2004); Presidential Succession Act of 2003, H.R. 2749, 108th Cong. (2003); Presidential Succession Act of 2002, H.R. 3816, 107th Cong. (2002).
- 5 See H.R. 6557; H.R. 5390; H.R. 2749; H.R. 3816.
- 6 See H.R. 6557; H.R. 5390; H.R. 2749; H.R. 3816.
- 7 H.R. 6557; H.R. 5390; H.R. 2749; H.R. 3816.
- 8 H.R. 6557; H.R. 2749; H.R. 3816.
- 9 Presidential Succession Act of 2004, S. 2073, 108th Cong. (2004).
- 10 H.R. 5390.
- 11 *Id.*
- 12 *Id.*
- 13 See Presidential Succession Act of 2005, H.R. 1943, 109th Cong. (2005); Presidential Succession Act of 2005, S. 920, 109th Cong. (2005).
- 14 Presidential Succession Act of 2007, H.R. 540, 110th Cong. (2007); S. 920.
- 15 151 CONG. REC. S4,409 (daily ed. Apr. 27, 2005).
- 16 Presidential Succession Act of 2010, H.R. 6557, 111th Cong. (2010); H.R. 540; S. 920; H.R. 1943; Presidential Succession Act of 2004, S. 2073, 108th Cong. (2004); H.R. 5390.
- 17 H.R. 540; H.R. 1943; S. 920; S. 2073.
- 18 Presidential Succession Act of 1947, 3 U.S.C. § 19 (2006).
- 19 Presidential Succession Act of 2004, H.R. 5390, 108th Cong. (2004); Presidential Succession Act of 2003, H.R. 2749, 108th Cong. (2003).
- 20 H.R. 540; S. 920; H.R. 1943; Presidential Succession Act of 2002, H.R. 3816, 107th Cong. (2002).
- 21 H.R. 6557.
- 22 H.R. 5390.
- 23 H.R. 6557; H.R. 540; S. 920; H.R. 1943; Presidential Succession Act of 2004, S. 2073, 108th Cong. (2004).
- 24 H.R. 6557; Presidential Succession Act of 2003, H.R. 2749, 108th Cong. (2003).
- 25 *Ensuring the Continuity of the United States Government: The Presidency: Joint Hearing Before the S. Comm. on the Judiciary and S. Comm. on Rules and Admin.*, 108th Cong. 9–10, 50–51 (2003) [hereinafter *The Presidency: Joint Hearing*] (statement and testimony of John C. Fortier, Exec. Dir., Continuity of Gov’t Comm’n, and Research Assoc., Am. Enter. Inst.); CONTINUITY OF GOV’T COMM’N, *supra* note 1, at 45.
- 26 H.R. 6557; H.R. 540; S. 920; H.R. 1943; H.R. 5390.
- 27 CONTINUITY OF GOV’T COMM’N, *supra* note 1, at 6.
- 28 *The Presidency: Joint Hearing*, *supra* note 1, at 9–11, 49–59 (statement and testimony of John C. Fortier, Exec. Dir., Continuity of Gov’t Comm’n, and Research Assoc., Am. Enterprise Inst.).
- 29 *Presidential Succession Act: Hearing Before the H. Subcomm. on the*

- 30 *Constitution of the H. Comm. on the Judiciary*, 108th Cong. 33–36 (2004) [hereinafter *Hearing Before the H. Subcomm.*] (testimony and prepared statement of Akhil Reed Amar, Southmayd Professor of Law and Political Sci., Yale Law School); *The Presidency: Joint Hearing*, *supra* note 25, at 6–9, 30–32 (statement and testimony of Akhil Amar, Southmayd Professor of Law and Political Sci., Yale Law School).
- 31 *The Presidency: Joint Hearing*, *supra* note 25, at 14–15, 69–77 (statement and testimony of Howard M. Wasserman, Assistant Professor of Law, Florida International University College of Law); Howard M. Wasserman, *The Trouble With Shadow Government*, 52 EMORY L.J. 281 (2003) [hereinafter Wasserman, *Shadow Government*].
- 32 *Hearing Before the H. Subcomm.*, *supra* note 29, at 37–43 (testimony and prepared statement of M. Miller Baker, Partner, McDermott Will & Emery); *The Presidency: Joint Hearing*, *supra* note 25, at 12–14, 33–43 (statement and testimony of M. Miller Baker, Partner, McDermott Will & Emery).
- 33 CONTINUITY OF GOV'T COMM'N, *supra* note 1, at 45–49.
- 34 *Id.*
- 35 *Id.* at 45.
- 36 *Id.*
- 37 *See* CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION 17 (2003) (“The concerns of that era were similar to today, but with some important differences. The primary fear then was of a massive nuclear attack from the Soviet Union.”).
- 38 *See id.* at 11 (“The secret creation of a bomb and radiation-proof bunker for Congress at the Greenbrier resort in West Virginia during the Cold War was based on the assumption that a nuclear attack on Washington would kill, not incapacitate, most members of Congress. The objective then was assuring, with the notice available from the time missiles were launched in Siberia until they arrived in Washington, that Congress could evacuate the 200 miles or so to the Greenbrier.”).
- 39 CONTINUITY OF GOV'T COMM'N, *supra* note 1, at 45.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.* at 46.
- 43 *Id.*
- 44 *Id.*
- 45 *Id.*
- 46 *Id.*
- 47 *Id.* at 47.
- 48 *Id.*
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.* at 47–48.
- 53 *Id.* at 45, 48.
- 54 *Id.* at 48.
- 55 *Id.*; *see also* Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).
- 56 CONTINUITY OF GOV'T COMM'N, *supra* note 1, at 48.
- 57 *Id.*
- 58 *Id.*
- 59 U.S. Const. amend. XXV, § 4.
- 60 CONTINUITY OF GOV'T COMM'N, *supra* note 1, at 48.
- 61 *Id.*
- 62 *Id.* at 49.
- 63 *Id.*
- 64 *Id.*
- 65 *Id.*
- 66 *Id.*
- 67 *Id.*
- 68 *Id.* This proposal from the Commission would implicate the Twentieth Amendment. U.S. CONST. amend. XX, § 3.
- 69 *The Presidency: Joint Hearing*, *supra* note 25, at 9–11, 49–59 (statement and testimony of John C. Fortier, Exec. Dir., Continuity of Gov't Comm'n, and Research Assoc., Am. Enter. Inst.).
- 70 *Id.*
- 71 *Id.* at 10, 51–53.
- 72 *Id.* at 52.
- 73 *Id.* at 53.
- 74 *Id.* at 10, 52–53.
- 75 *Id.*
- 76 *Id.*
- 77 *Id.* at 53–54.
- 78 *Id.*
- 79 *Id.* at 6, 31 (statement and testimony of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale Law School).
- 80 *Id.* at 9, 31.
- 81 *Id.* at 8, 31.
- 82 *Id.* at 8–9, 31.
- 83 *Id.* at 8, 31.
- 84 *Id.* at 9, 31.
- 85 *Hearing Before the H. Subcomm.*, *supra* note 29, at 34, 36 (testimony and prepared statement of Akhil Reed Amar, Southmayd Professor of Law and Political Sci., Yale Law School).
- 86 *Id.* at 34, 36; *The Presidency: Joint Hearing*, *supra* note 25, at 9, 31 (statement and testimony of Akhil Amar, Southmayd Professor of Law and Political Sci., Yale Law School).
- 87 *See* Francie Grace, *The Shadow Government*, CBS News (Mar. 1, 2002), <http://www.cbsnews.com/stories/2002/03/02/attack/main502695.shtml>.

- 88 See *Hearing Before the H. Subcomm.*, *supra* note 29, at 33–36 (testimony and prepared statement of Akhil Reed Amar, Southmayd Professor of Law and Political Sci., Yale Law School); *The Presidency: Joint Hearing*, *supra* note 25, at 6–9, 30–32 (statement and testimony of Akhil Amar, Southmayd Professor of Law and Political Sci., Yale Law School); Wasserman, *Shadow Government*, *supra* note 30.
- 89 *The Presidency: Joint Hearing*, *supra* note 25, at 72 (testimony of Howard M. Wasserman, Assistant Professor of Law, Florida International University College of Law).
- 90 See *id.*
- 91 See *id.*
- 92 See *id.*
- 93 See *id.*
- 94 See *id.* at 73.
- 95 See *id.* at 72, 75.
- 96 *Id.* at 72.
- 97 *Id.* at 14, 72, 75.
- 98 *Id.* at 72.
- 99 *Id.*
- 100 See *id.* The public would know who is heading the shadow government because the First Secretary would be a position in the Cabinet with the specific task of assuming the presidency in the case of a double vacancy.
- 101 Wasserman, *Shadow Government*, *supra* note 30, at 321–22.
- 102 *Hearing Before the H. Subcomm.*, *supra* note 29, at 37–43 (testimony and prepared statement of M. Miller Baker, Partner, McDermott Will & Emery); *The Presidency: Joint Hearing*, *supra* note 25, at 12–14, 33–43 (statement and testimony of M. Miller Baker, Partner, McDermott Will & Emery).
- 103 *Hearing Before the H. Subcomm.*, *supra* note 29, at 37, 39 (testimony and prepared statement of M. Miller Baker, Partner, McDermott Will & Emery); *The Presidency: Joint Hearing*, *supra* note 25, at 13, 41 (statement and testimony of M. Miller Baker, Partner, McDermott Will & Emery).
- 104 *Hearing Before the H. Subcomm.*, *supra* note 29, at 37, 39–40 (testimony and prepared statement of M. Miller Baker, Partner, McDermott Will & Emery).
- 105 *The Presidency: Joint Hearing*, *supra* note 25, at 41, 42 (testimony of M. Miller Baker, Partner, McDermott Will & Emery).
- 106 *Hearing Before the H. Subcomm.*, *supra* note 29, at 39 (prepared statement of M. Miller Baker, Partner, McDermott Will & Emery).
- 107 *Id.* at 40 (prepared statement of M. Miller Baker, Partner, McDermott Will & Emery); *The Presidency: Joint Hearing*, *supra* note 25, at 42 (testimony of M. Miller Baker, Partner, McDermott Will & Emery).
- 108 *Hearing Before the H. Subcomm.*, *supra* note 29, at 40–42 (prepared statement of M. Miller Baker, Partner, McDermott Will & Emery); *The Presidency: Joint Hearing*, *supra* note 25, at 12–13, 42 (statement and testimony of M. Miller Baker, Partner, McDermott Will & Emery).
- 109 *Hearing Before the H. Subcomm.*, *supra* note 29, at 40 (prepared statement of M. Miller Baker, Partner, McDermott Will & Emery) (“In my view, the overriding goal of the Succession Clause is the smooth and seamless transfer of Executive authority to the most senior successor authorized and available to exercise such power.”).

E. ACTING CABINET SECRETARIES AND ACTING LEGISLATIVE LEADERSHIP

1. ACTING SECRETARIES

The manner through which staff may rise through a given executive department to become an Acting Secretary is not consistent within the various departments. Departmental lines of succession are established through statutes, executive orders, and in some instances at the discretion of the current Cabinet Secretary. Major complications of including Acting Secretaries in the line of succession arise from the length of the line and the differences and inconsistencies in the order of the line within agencies and the fact that the order within any agency can be changed at any moment.

The Federal Vacancies Reform Act of 1998 establishes the order in which an individual working in a Cabinet department becomes Acting Secretary.¹ In addition to setting time and other limitations for service of Acting Secretaries, the Federal Vacancies Reform Act allows the President to direct who shall serve as Acting Secretary for most of his Cabinet positions.² Presidents have done this through executive orders, which in some instances operate in conjunction with statutes creating the lines of succession.³ Currently, executive orders and statutes establish the lines of succession for all Cabinet positions except the Department of Energy and the Department of Education.⁴ In total, there are over 400 positions from which an individual can become an Acting Secretary and, by virtue of having been confirmed by the Senate, become the Acting President if the 1947 Act is interpreted to include Acting Secretaries.⁵ Most notably, over 200 officers are eligible to become the Acting Secretary of State alone.⁶

Since Presidents can easily issue, revoke, or amend executive orders, the lines of succession within most departments are flexible and can change dramatically in an instant. For example, on December 18, 2001, President George W. Bush issued seven executive orders changing the internal lines of succession for the Departments of State, Treasury, Interior, Agriculture, Commerce, Labor, and Veterans Affairs.⁷ Thus, if a catastrophic attack were to occur on the same day as such a vast restructuring, uncertainty would surely ensue. With so many officers in the line eligible to become Acting Secretaries,

it would be difficult to establish just who is properly in the line of succession and in what order. The nation may be faced with an Acting Secretary, far down a departmental line of succession, who becomes Acting President, but who in fact was not authorized to do so.ⁱ

Aside from problems in implementing the line of succession, an additional consideration is the qualifications of the individuals who could become the Acting President by virtue of serving as an Acting Secretary. This is not to say that an Acting Secretary will never be qualified to become Acting President. Certainly, there may be instances in which an Acting Secretary, because of the nature of his position or individual talents, will be better suited to become Acting President than other individuals in the line of succession.

i Departmental lines of succession vary from one department to the next, both in depth and order. First, the number of individuals eligible to become an Acting Secretary varies by department. Second, the order of succession within the departments is established through various means including an enumerated list, the order in which an individual was appointed to office, the order in which an individual took his oath of office, or a combination of these three systems. Having various methods to determine who becomes an Acting Secretary may not typically pose problems. However, in a time of national catastrophe, relying on multiple systems to determine who becomes an Acting Secretary might lead to confusion. This is especially so when a combination of these three systems is used within the same department. For example, the Department of State first lists officers to become Acting Secretary in the order they are listed, but after succession has passed through these officers, it runs through another list of officers, but this time according to the order in which they have taken the oath of office. *See infra* notes 2-4.

2. THE SPEAKER OF THE HOUSE *PRO TEMPORE* AND THE ACTING PRESIDENT *PRO TEMPORE* OF THE SENATEⁱⁱ

Although it has been posited that Acting Secretaries may be in the line of succession, no parallel argument has been made that individuals acting as the Speaker (the “Speaker *pro tempore*”)⁸ or as the President *pro tempore* (the “Acting President *pro tempore*”)⁹ might be in the line as well.

The language of the 1947 Act does not specifically address this possibility. The 1947 Act states “[i]f . . . there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.”¹⁰ The 1947 Act also states “[i]f . . . there is no Speaker, or the Speaker fails to qualify as Acting President, then the President *pro tempore* of the Senate shall, upon his resignation as President *pro tempore* and as Senator, act as President.”¹¹

Bills recently introduced by Congressman Sherman have explicitly stated that the Speaker of the House *pro tempore* is not included in the line of succession.¹² As this is the only indication that any authority has considered that the Speaker *pro tempore* might be in the line of succession, the Clinic finds no indication that the Speaker *pro tempore* or the Acting President *pro tempore* is or was ever intended to be in the line of succession in any of the Succession Acts. Additionally, the Clinic would not support their inclusion on policy grounds.

ii The Speaker *pro tempore* is an individual who is named to “act as Speaker *pro tempore*.” RULES OF THE HOUSE OF REPRESENTATIVES, 112th Cong., R. I(8). The Acting President *pro tempore* may include the Secretary of the Senate, the Assistant Secretary of the Senate, or a Senator appointed by the President *pro tempore*. Each of these individuals can perform the “duties of the Chair” according to RULES OF THE SENATE, 112th Cong., R. I(2)–(3). Apart from the lack of statutory basis for inclusion of the Speaker *pro tempore* and the Acting President *pro tempore* in the line of succession, public policy considerations also militate strongly against their inclusion. Many legislators can take these temporary positions—as many as the legislators themselves decide—and they might be persuaded to do so in order to allow a Speaker or President *pro tempore* to avoid having to resign his position and thereby shield himself from having to serve only briefly as Acting President in the case of a temporary presidential inability. The Clinic does not believe that such contingent legislative leaders are in the line of succession or should be for the policy reasons outlined above.

ENDNOTES

- 1 The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3348, 3349, 3349d (2006).
- 2 The Secretaries of the Department of Justice, 28 U.S.C. § 508 (2006), Department of Energy, 42 U.S.C. § 7132 (2006), and Department of Education, 20 U.S.C. § 3412 (2006), have authority to set up their own line of succession with officers in their own departments. The President, however, if he desires, still has authority to write an executive order creating a deeper line of succession than the department heads have chosen. 5 U.S.C. § 3345 (2006).
- 3 The following Departments have had their orders of succession set by Executive Order:

Dep't of State: Exec Order No. 13,251, 67 Fed. Reg. 1599 (Dec. 28, 2001) (as amended by Exec. Order No. 13,261, § 4(i), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).

Dep't of Treasury: Exec Order No. 13,246, 66 Fed. Reg. 66,270 (Dec. 18, 2001) (as amended by Exec Order No. 13,261, § 4(f), 67 Fed. Reg. 13,244 (Mar. 19, 2002)).

Dep't of Defense: Exec. Order No. 13,533, 75 Fed. Reg. 10,163 (Mar. 1, 2010).

Dep't of Justice: Exec Order No. 13,557, 75 Fed. Reg. 68,679 (Nov. 4, 2010); see also 28 U.S.C. § 508 (2006); Authority of the President to Name an Acting Attorney General, 2007 WL 5334854 (Op. O.L.C. Sept. 17, 2007).

Dep't of Interior: Exec Order No. 13,244, 66 Fed. Reg. 66,267 (Dec. 18, 2001) (as amended by Exec Order No. 13,261, § 4(d), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).

Dep't of Agriculture: Exec. Order No. 13,542, 75 Fed. Reg. 27,921 (May 13, 2010).

Dep't of Commerce: Exec. Order No. 13,242, 66 Fed. Reg. 66,260 (Dec. 18, 2001) (as amended by Exec Order No. 13,261 § 4(b), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).

Dep't of Labor: Exec Order No. 13,245, 66 Fed. Reg. 66,268 (Dec. 18, 2001) (as amended by Exec Order No. 13,261, § 4(e), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).

Dep't of Health & Human Servs.: Exec Order No. 13, 461, 73 Fed. Reg. 9437 (Feb. 15, 2008).

Dep't of Hous. & Urban Dev.: Exec Order No. 13,243, 66 Fed. Reg. 66,262 (Dec. 18, 2001) (amended by Exec Order No. 13,261, § 4(c), 67 Fed. Reg. 13,244 (Mar. 19, 2002)).
- 4 The Secretary of Energy set the Departments order of succession by order. *See* Secretarial Succession, Threat Level Notification, and Successor Tracking, DOE O 100 (Apr. 20, 2007), *available at* <https://www.directives.doe.gov/directives/current-directives/100.1-BOrder-1d> (acting pursuant to authority granted by 42 U.S.C. § 7132(a) (2006)). The Secretary of Education has the authority to designate the Department's order of succession. 20 U.S.C. § 3412(a)(1) (2006). The current order of succession is available at http://www2.ed.gov/about/offices/list/om/fs_po/osods/intro.html#3.
- 5 Positions requiring Senate confirmation were established by comparing the current Congressional Research Service (CRS) publication declaring which positions require Senate confirmation, HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., RL 30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS (2008), the officers listed in the various lines of succession, *supra* notes 2–4, and the current officers listed in the lines of succession who have been confirmed by the Senate despite not being listed by the CRS report on thomas.loc.gov/home/nomis.html.
- 6 *See supra* note 3. The line of succession includes over 200 officers who need to be nominated by the President and who are confirmed by and with advice and consent of the Senate. This means over 200 potential officers, if meeting the other Presidential qualifications, could have sequential claims to become Acting President from within the Department of State alone.
- 7 *See supra* note 3.
- 8 RULES OF THE HOUSE OF REPRESENTATIVES, 112th Cong., R. I(8).
- 9 RULES OF THE SENATE, 112th Cong., R. I(2)–(3).
- 10 Presidential Succession Act of 1947, 3 U.S.C. § 19(a)(1) (2006).
- 11 *Id.* § 19(b).
- 12 H.R. 6557, 111th Cong. (2010); H.R. 2749, 108th Cong. (2003).

F. CHARTS

1. POST-9/11 LEGISLATIVE PROPOSALS

Proposal	Year	Order of Succession	Legislators in the Line of Succession	Mandatory Resignation	Bumping Provision	Acting Secretaries	Speaker Pro Tempore	Miscellaneous
House of Representatives								
107 H.R. 3816	2002	Speaker/Minority Leader of the House then Majority/Minority Leader of the Senate.	Yes	Yes	Yes	Unclear	N/A	N/A
108 H.R. 2749	2003	Speaker/Minority Leader of the House then Majority/Minority Leader of Senate; Secretary of Homeland Security moved directly after the Attorney General.	Yes	Yes	No	Unclear	Explicitly not in the line of succession.	Acting President nominates Vice President upon any vacancy in the office of Vice President.
108 H.R. 5390	2004	Generally the Cabinet then Ambassadors to the United Nations, Great Britain, France, Russia, and China. But, if no President or Vice President is elected prior to the beginning of the term, then Speaker and Majority Leader of Senate, respectively. But, if there is no President or Vice President or Cabinet member or Ambassador named in the succession list, then the Speaker or Minority Leader of the House as designated by the President. And if none above (President, VP, Cabinet & Speaker House/Minority house) then Majority or Minority Leader of the Senate as designated by the President shall act as President.	Generally no. But, yes if no President or Vice President has been elected or failed to qualify, or if there is no Cabinet member or named Ambassador to act as President.	Yes	No	No	N/A	Individual acting as President because no President or Vice President has been elected cannot nominate a Vice President; determination of an individual being unable to serve as President must be certified by the Supreme Court.
109 H.R. 1943	2005	Adds the Secretary of Homeland Security and the Ambassadors to the United Nations, Great Britain, Russia, China, and France at the end of the line of succession.	Yes	Only for legislators.	No	No	N/A	N/A
110 H.R. 540	2007	Adds the Ambassadors to the United Nations, Great Britain, Russia, China, and France at the end of the line of succession.	Yes	Only for legislators.	No	No	N/A	N/A

1. POST-9/11 LEGISLATIVE PROPOSALS (CONTINUED)

Proposal	Year	Order of Succession	Legislators in the Line of Succession	Mandatory Resignation	Bumping Provision	Acting Secretaries	Speaker Pro Tempore	Miscellaneous
111 H.R. 6557	2010	The Speaker, Majority Leader, or Minority Leader of the House as designated by the President, then the Majority Leader, President pro tempore, or Minority Leader of the Senate as designated by the President, then the Cabinet, then the Ambassadors to the United Nations, Great Britain, Russia, China, and France.	Yes	No	No	No	Explicitly not in the line of succession.	N/A
Senate								
108 S. 2073	2004	Adds the Secretary of Homeland Security after the Attorney General.	No	No	No	No	N/A	N/A
109 S. 920	2005	Adds the Secretary of Homeland Security and the Ambassadors to the United Nations, Great Britain, Russia, China, and France to the end of the line of succession.	Yes	Only for legislators.	No	No	N/A	N/A

2. LIST OF SPEAKERS OF THE HOUSE OF REPRESENTATIVES

Speaker*	District*	Congress *	Date Elected*	Party**	President***	Presidential Party****
Frederick A.C. Muhlenberg	Pennsylvania	1st	April 1, 1789	Pro-Administration	George Washington	Federalist
Jonathan Trumbull	Connecticut	2nd	October 24, 1791	Federalist	George Washington	Federalist
Frederick A.C. Muhlenberg	Pennsylvania	3rd	December 2, 1793	Anti-Administration	George Washington	Federalist
Jonathan Dayton	New Jersey	4th	December 7, 1795	Federalist	George Washington	Federalist
Jonathan Dayton	New Jersey	5th	May 15, 1797	Federalist	John Adams	Federalist
Theodore Sedgwick	Massachusetts	6th	December 2, 1799	Federalist	John Adams	Federalist
Nathaniel Macon	North Carolina	7th	December 7, 1801	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Nathaniel Macon	North Carolina	8th	October 17, 1803	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Nathaniel Macon	North Carolina	9th	December 2, 1805	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Joseph B. Varnum	Massachusetts	10th	October 26, 1807	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Joseph B. Varnum	Massachusetts	11th	May 22, 1809	Democratic-Republican	James Madison	Democratic-Republican
Henry Clay	Kentucky	12th	November 4, 1811	Democratic-Republican	James Madison	Democratic-Republican
Henry Clay	Kentucky	13th	May 24, 1813	Democratic-Republican	James Madison	Democratic-Republican
Langdon Cheves	South Carolina	13th	January 19, 1814	Republican	James Madison	Democratic-Republican
Henry Clay	Kentucky	14th	December 4, 1815	Democratic-Republican	James Madison	Democratic-Republican
Henry Clay	Kentucky	15th	December 1, 1817	Democratic-Republican	James Monroe	Democratic-Republican
Henry Clay	Kentucky	16th	December 6, 1819	Democratic-Republican	James Monroe	Democratic-Republican
John W. Taylor	New York	16th	November 15, 1820	Republican	James Monroe	Democratic-Republican
Philip P. Barbour	Virginia	17th	December 4, 1821	Republican	James Monroe	Democratic-Republican
Henry Clay	Kentucky	18th	December 1, 1823	Democratic-Republican	James Monroe	Democratic-Republican
John W. Taylor	New York	19th	December 5, 1825	Republican	John Quincy Adams	Federalist, Democratic-Republican, Whig
Andrew Stevenson	Virginia	20th	December 3, 1827	Jacksonian	John Quincy Adams	Federalist, Democratic-Republican, Whig
Andrew Stevenson	Virginia	21st	December 7, 1829	Jacksonian	Andrew Jackson	Democratic
Andrew Stevenson	Virginia	22nd	December 5, 1831	Jacksonian	Andrew Jackson	Democratic
John Bell	Tennessee	23rd	June 2, 1834	Democratic	Andrew Jackson	Democratic
James K. Polk	Tennessee	24th	December 7, 1835	Jacksonian/Democratic	Andrew Jackson	Democratic
James K. Polk	Tennessee	25th	September 4, 1837	Jacksonian/Democratic	Martin Van Buren	Democratic
Robert M. T. Hunter	Virginia	26th	December 16, 1839	Democratic	Martin Van Buren	Democratic
John White	Kentucky	27th	May 31, 1841	Whig	William Henry Harrison/ John Tyler	Whig

* Denotes information obtained from the Office of the Clerk of the United States House of Representatives Historical Archives. See House History, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://artandhistory.house.gov/house_history/speakers.aspx (last visited Sept. 16, 2011).

** Denotes information obtained from Encyclopedia Britannica online. See Speaker of the U.S. House of Representatives, ENCYCLOPAEDIA.COM, <http://www.britannica.com/EBchecked/topic/558470/Speaker-of-the-US-House-of-Representatives.house> (last visited Sept. 16, 2011).

*** Denotes information obtained from the Library of Congress archives. See Chronological List of Presidents, First Ladies, and Vice Presidents of the United States, LIBRARY OF CONGRESS, http://loc.gov/rr/print/list/057_chron.html (last visited Sept. 16, 2011).

**** Denotes information obtained from the University of Virginia's Miller Center. See American President: A Reference Resource, THE MILLER CENTER, <http://millercenter.org/president> (last visited Sept. 16, 2011).

Speaker	District	Congress	Date Elected	Party	President	Presidential Party
---------	----------	----------	--------------	-------	-----------	--------------------

2. LIST OF SPEAKERS OF THE HOUSE OF REPRESENTATIVES (CONTINUED)

John W. Jones	Virginia	28th	December 4, 1843	Democratic	John Tyler	Democrat, Whig
John W. Davis	Indiana	29th	December 1, 1845	Democratic	James K. Polk	Democratic
Robert C. Winthrop	Massachusetts	30th	December 6, 1847	Whig	James K. Polk	Democratic
Howell Cobb	Georgia	31st	December 22, 1849	Democratic	Zachary Taylor/Millard Fillmore	Whig
Linn Boyd	Kentucky	32nd	December 1, 1851	Democratic	Millard Fillmore	Whig
Linn Boyd	Kentucky	33rd	December 5, 1853	Democratic	Franklin Pierce	Democratic
Nathaniel P. Banks	Massachusetts	34th	February 2, 1856	American	Franklin Pierce	Democratic
James L. Orr	South Carolina	35th	December 7, 1857	Democratic	James Buchanan	Democratic
William Pennington	New Jersey	36th	February 1, 1860	Republican	James Buchanan	Democratic
Galusha A. Grow	Pennsylvania	37th	July 4, 1861	Republican	Abraham Lincoln	Whig, Republican
Schuyler Colfax	Indiana	38th	December 7, 1863	Republican	Abraham Lincoln	Whig, Republican
Schuyler Colfax	Indiana	39th	December 4, 1865	Republican	Andrew Johnson	Democratic
Schuyler Colfax	Indiana	40th	March 4, 1867	Republican	Andrew Johnson	Democratic
Theodore M. Pomeroy	New York	40th	March 3, 1869	Republican	Ulysses S. Grant	Republican
James G. Blaine	Maine	41st	March 4, 1869	Republican	Ulysses S. Grant	Republican
James G. Blaine	Maine	42nd	March 4, 1871	Republican	Ulysses S. Grant	Republican
James G. Blaine	Maine	43rd	December 1, 1873	Republican	Ulysses S. Grant	Republican
Michael C. Kerr	Indiana	44th	December 6, 1875	Democratic	Ulysses S. Grant	Republican
Samuel J. Randall	Pennsylvania	44th	December 4, 1876	Democratic	Ulysses S. Grant	Republican
Samuel J. Randall	Pennsylvania	45th	December 4, 1876	Democratic	Rutherford B. Hayes	Republican
Samuel J. Randall	Pennsylvania	46th	March 18, 1879	Democratic	Rutherford B. Hayes	Republican
J. Warren Keifer	Ohio	47th	December 5, 1881	Republican	James A. Garfield/ Chester A. Arthur	Republican
John G. Carlisle	Kentucky	48th	December 3, 1883	Democratic	Chester A. Arthur	Republican
John G. Carlisle	Kentucky	49th	December 7, 1885	Democratic	Grover Cleveland	Democratic
John G. Carlisle	Kentucky	50th	December 5, 1887	Democratic	Grover Cleveland	Democratic
Thomas B. Reed	Maine	51st	December 2, 1889	Republican	Benjamin Harrison	Republican
Charles F. Crisp	Georgia	52nd	December 8, 1891	Democratic	Benjamin Harrison	Republican
Charles F. Crisp	Georgia	53rd	August 7, 1893	Democratic	Grover Cleveland	Democratic
Thomas B. Reed	Maine	54th	December 2, 1895	Republican	Grover Cleveland	Democratic
Thomas B. Reed	Maine	55th	March 15, 1897	Republican	William McKinley	Republican
David B. Henderson	Iowa	56th	December 4, 1899	Republican	William McKinley	Republican
David B. Henderson	Iowa	57th	December 2, 1901	Republican	Theodore Roosevelt	Republican
Joseph G. Cannon	Illinois	58th	November 9, 1903	Republican	Theodore Roosevelt	Republican
Joseph G. Cannon	Illinois	59th	December 4, 1905	Republican	Theodore Roosevelt	Republican
Joseph G. Cannon	Illinois	60th	December 2, 1907	Republican	Theodore Roosevelt	Republican
Joseph G. Cannon	Illinois	61st	March 15, 1909	Republican	William H. Taft	Republican
James Beauchamp Clark	Missouri	62nd	April 4, 1911	Democratic	William H. Taft	Republican
Speaker	District	Congress	Date Elected	Party	President	Presidential Party

2. LIST OF SPEAKERS OF THE HOUSE OF REPRESENTATIVES (CONTINUED)

James Beauchamp Clark	Missouri	63rd	April 7, 1913	Democratic	Woodrow Wilson	Democratic
James Beauchamp Clark	Missouri	64th	December 6, 1915	Democratic	Woodrow Wilson	Democratic
James Beauchamp Clark	Missouri	65th	April 2, 1917	Democratic	Woodrow Wilson	Democratic
Frederick H. Gillett	Massachusetts	66th	May 19, 1919	Republican	Woodrow Wilson	Democratic
Frederick H. Gillett	Massachusetts	67th	April 11, 1921	Republican	Warren G. Harding	Republican
Frederick H. Gillett	Massachusetts	68th	December 3, 1923	Republican	Calvin Coolidge	Republican
Nicholas Longworth	Ohio	69th	December 7, 1925	Republican	Calvin Coolidge	Republican
Nicholas Longworth	Ohio	70th	December 5, 1927	Republican	Calvin Coolidge	Republican
Nicholas Longworth	Ohio	71st	April 15, 1929	Republican	Herbert Hoover	Republican
John N. Garner	Texas	72nd	December 7, 1931	Democratic	Herbert Hoover	Republican
Henry T. Rainey	Illinois	73rd	March 9, 1933	Democratic	Franklin D. Roosevelt	Democratic
Joseph Wellington Byrns	Tennessee	74th	January 3, 1935	Democratic	Franklin D. Roosevelt	Democratic
William B. Bankhead	Alabama	74th	June 4, 1936	Democratic	Franklin D. Roosevelt	Democratic
William B. Bankhead	Alabama	75th	January 5, 1937	Democratic	Franklin D. Roosevelt	Democratic
William B. Bankhead	Alabama	76th	January 3, 1939	Democratic	Franklin D. Roosevelt	Democratic
Sam Rayburn	Texas	76th	September 16, 1940	Democratic	Franklin D. Roosevelt	Democratic
Sam Rayburn	Texas	77th	January 3, 1941	Democratic	Franklin D. Roosevelt	Democratic
Sam Rayburn	Texas	78th	January 6, 1943	Democratic	Franklin D. Roosevelt	Democratic
Sam Rayburn	Texas	79th	January 3, 1945	Democratic	Franklin D. Roosevelt/ Harry Truman	Democratic
Joseph W. Martin, Jr.	Massachusetts	80th	January 3, 1947	Republican	Harry S. Truman	Democratic
Sam Rayburn	Texas	81st	January 3, 1949	Democratic	Harry S. Truman	Democratic
Sam Rayburn	Texas	82nd	January 3, 1951	Democratic	Harry S. Truman	Democratic
Joseph W. Martin, Jr.	Massachusetts	83rd	January 3, 1953	Republican	Dwight D. Eisenhower	Republican
Sam Rayburn	Texas	84th	January 5, 1955	Democratic	Dwight D. Eisenhower	Republican
Sam Rayburn	Texas	85th	January 3, 1957	Democratic	Dwight D. Eisenhower	Republican
Sam Rayburn	Texas	86th	January 7, 1959	Democratic	Dwight D. Eisenhower	Republican
Sam Rayburn	Texas	87th	January 3, 1961	Democratic	John F. Kennedy	Democratic
John W. McCormack	Massachusetts	87th	January 10, 1962	Democratic	John F. Kennedy	Democratic
John W. McCormack	Massachusetts	88th	January 9, 1963	Democratic	John F. Kennedy/Lyndon B. Johnson	Democratic
John W. McCormack	Massachusetts	89th	January 4, 1965	Democratic	Lyndon B. Johnson	Democratic
John W. McCormack	Massachusetts	90th	January 10, 1967	Democratic	Lyndon B. Johnson	Democratic
John W. McCormack	Massachusetts	91st	January 3, 1969	Democratic	Richard M. Nixon	Republican
Carl B. Albert	Oklahoma	92nd	January 21, 1971	Democratic	Richard M. Nixon	Republican
Carl B. Albert	Oklahoma	93rd	January 3, 1973	Democratic	Richard M. Nixon/Gerald Ford	Republican
Carl B. Albert	Oklahoma	94th	January 14, 1975	Democratic	Gerald Ford	Republican
Speaker	District	Congress	Date Elected	Party	President	Presidential Party
Thomas P. O'Neill, Jr.	Massachusetts	95th	January 4, 1977	Democratic	Jimmy Carter	Democratic
Thomas P. O'Neill, Jr.	Massachusetts	96th	January 15, 1979	Democratic	Jimmy Carter	Democratic

2. LIST OF SPEAKERS OF THE HOUSE OF REPRESENTATIVES (CONTINUED)

Thomas P. O'Neill, Jr.	Massachusetts	97th	January 5, 1981	Democratic	Ronald Reagan	Republican
Thomas P. O'Neill, Jr.	Massachusetts	98th	January 3, 1983	Democratic	Ronald Reagan	Republican
Thomas P. O'Neill, Jr.	Massachusetts	99th	January 3, 1985	Democratic	Ronald Reagan	Republican
James C. Wright, Jr.	Texas	100th	January 6, 1987	Democratic	Ronald Reagan	Republican
James C. Wright, Jr.	Texas	101st	January 3, 1989	Democratic	George H.W. Bush	Republican
Thomas S. Foley	Washington	101st	June 6, 1989	Democratic	George H.W. Bush	Republican
Thomas S. Foley	Washington	102nd	January 3, 1991	Democratic	George H.W. Bush	Republican
Thomas S. Foley	Washington	103rd	January 5, 1993	Democratic	Bill Clinton	Democratic
Newt Gingrich	Georgia	104th	January 4, 1995	Republican	Bill Clinton	Democratic
Newt Gingrich	Georgia	105th	January 7, 1997	Republican	Bill Clinton	Democratic
J. Dennis Hastert	Illinois	106th	January 6, 1999	Republican	Bill Clinton	Democratic
J. Dennis Hastert	Illinois	107th	January 3, 2001	Republican	George W. Bush	Republican
J. Dennis Hastert	Illinois	108th	January 7, 2003	Republican	George W. Bush	Republican
J. Dennis Hastert	Illinois	109th	January 4, 2005	Republican	George W. Bush	Republican
Nancy Pelosi	California	110th	January 4, 2007	Democratic	George W. Bush	Republican
Nancy Pelosi	California	111th	January 6, 2009	Democratic	Barack Obama	Democratic
John Boehner	Ohio	112th	January 5, 2011	Republican	Barack Obama	Democratic

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE

President <i>Pro Tempore</i> *	State	Congress	Tenure	Party**	President***	Presidential Party****
--------------------------------	-------	----------	--------	---------	--------------	------------------------

John Langdon	New Hampshire	1st	Apr. 6, 1789 - Apr. 21, 1789; Aug. 7, 1789 - Aug. 9, 1789	Democratic-Republican	George Washington	Federalist
Richard Henry Lee	Virginia	2nd	Apr. 18, 1792 - Oct. 8, 1792	Anti-Administration	George Washington	Federalist
John Langdon	New Hampshire	2nd	Nov. 5, 1792 - Dec. 4, 1792; Mar. 1, 1793 - Mar. 3, 1793	Democratic-Republican	George Washington	Federalist
John Langdon	New Hampshire	3rd	Mar. 4, 1793 - Dec. 2, 1793	Democratic-Republican	George Washington	Federalist
Ralph Izard	South Carolina	3rd	May 31, 1794 - Nov. 9, 1794	Pro-Administration	George Washington	Federalist
Henry Tazewell	Virginia	3rd	Feb. 20, 1795 - Jun. 7, 1795	Democratic-Republican	George Washington	Federalist
Henry Tazewell	Virginia	4th	Dec. 7, 1795 - Dec. 8, 1795	Democratic-Republican	George Washington	Federalist
Samuel Livermore	New Hampshire	4th	May 6, 1796 - Dec. 4, 1796	Federalist	George Washington	Federalist
William Bingham	Pennsylvania	4th	Feb. 16, 1797 - Mar. 3, 1797	Federalist	George Washington	Federalist
William Bradford	Rhode Island	5th	Jul. 6, 1797 - Oct. 1797	Federalist	George Washington	Federalist
Jacob Read	South Carolina	5th	Nov. 22, 1797 - Dec. 12, 1797	Federalist	George Washington	Federalist
Theodore Sedgwick	Massachusetts	5th	Jun. 27, 1798 - Dec. 5, 1798	Federalist	George Washington	Federalist
John Laurence	New York	5th	Dec. 6, 1798 - Dec. 27, 1798	Federalist	George Washington	Federalist
James Ross	Pennsylvania	5th	Mar. 1, 1799 - Dec. 1, 1799	Federalist	John Adams	Federalist
Samuel Livermore	New Hampshire	6th	Dec. 2, 1799 - Dec. 29, 1799	Federalist	John Adams	Federalist
Uriah Tracy	Connecticut	6th	May 14, 1800 - Nov. 16, 1800	Federalist	John Adams	Federalist
John E. Howard	Maryland	6th	Nov. 21, 1800 - Nov. 27, 1800	Federalist	John Adams	Federalist
James Hillhouse	Connecticut	6th	Feb. 28, 1801 - Mar. 3, 1801	Federalist	John Adams	Federalist
Abraham Baldwin	Georgia	7th	Dec. 7, 1801 - Jan. 14, 1802; Apr. 17, 1802 - Dec. 13, 1802	Democratic-Republican	John Adams	Federalist
President Pro Tempore	State	Congress	Tenure	Party	President	Presidential Party

* Information regarding the President's name, home state, Congress and tenure was obtained from the United States Senate website. See President Pro Tempore, UNITED STATES SENATE, [HTTP://WWW.SENATE.GOV/ARTANDHISTORY/HISTORY/COMMON/BRIEFING/PRESIDENT_PRO_TEMPORE.HTM#5](http://www.senate.gov/artandhistory/history/common/briefing/PRESIDENT_PRO_TEMPORE.HTM#5) (LAST VISITED DEC. 3, 2011).

** Information from this column was obtained from Biographical Directory of the United States Congress. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774 - PRESENT, [HTTP://BIOGUIDE.CONGRESS.GOV/BIOSEARCH/BIOSEARCH.ASP](http://bioguide.congress.gov/biosearch/biosearch.asp) (LAST VISITED DEC. 10, 2011).

*** Information from this column was obtained from the Library of Congress archives. See Chronological List of Presidents, First Ladies, and Vice Presidents of the United States, LIBRARY OF CONGRESS, [HTTP://LOC.GOV/RR/PRINT/LIST/057_CHRON.HTML](http://loc.gov/rr/print/list/057_CHRON.HTML) (LAST VISITED SEPT. 16, 2011).

**** Information from this column was obtained from the University of Virginia's Miller Center. See American President: A Reference Resource, THE MILLER CENTER, [HTTP://MILLERCENTER.ORG/PRESIDENT](http://millercenter.org/president) (LAST VISITED SEPT. 16, 2011).

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

Stephen R. Bradley	Vermont	7th	Dec. 14, 1802 - Jan. 18, 1803; Feb. 25, 1803 - Feb. 25, 1803; Mar. 2, 1803 - Oct. 16, 1803	Democratic-Republican	Thomas Jefferson	Democratic-Republican
John Brown	Kentucky	8th	Oct. 17, 1803 - Dec. 6, 1803; Jan. 23, 1804 - Feb. 26, 1804	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Jesse Franklin	North Carolina	8th	Mar. 10, 1804 - Nov. 4, 1804	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Joseph Anderson	Tennessee	8th	Jan. 15, 1805 - Feb. 3, 1805; Feb. 28, 1805 - Mar. 2, 1805; Mar. 2, 1805 - Dec. 1, 1805	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Samuel Smith	Maryland	9th	Dec. 2, 1805 - Dec. 15, 1805; Mar. 18, 1806 - Nov. 30, 1806; Mar. 2, 1807 - Oct. 25, 1807	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Samuel Smith	Maryland	10th	Apr. 16, 1808 - Nov. 6, 1808	Democratic-Republican	Thomas Jefferson	Democratic-Republican
Stephen R. Bradley	Vermont	10th	Dec. 28, 1808 - Jan. 8, 1809	Democratic-Republican	Thomas Jefferson	Democratic-Republican
John Milledge	Georgia	10th	Jan. 30, 1809 - Mar. 3, 1809	Democratic-Republican	Thomas Jefferson	Democratic-Republican
John Milledge	Georgia	11th	Mar. 4, 1809 - May 21, 1809	Democratic-Republican	James Madison	Democratic-Republican
Andrew Gregg	Pennsylvania	11th	Jun. 26, 1809 - Dec. 18, 1809	Democratic-Republican	James Madison	Democratic-Republican
John Gaillard	South Carolina	11th	Feb. 28, 1810 - Mar. 2, 1810; Apr. 17, 1810 - Dec. 11, 1810	Democratic-Republican	James Madison	Democratic-Republican
John Pope	Kentucky	11th	Feb. 23, 1811 - Nov. 3, 1811	Democratic-Republican	James Madison	Democratic-Republican
William Crawford	Georgia	12th	Mar. 24, 1812 - Mar. 23, 1813	Democratic-Republican	James Madison	Democratic-Republican
Joseph B. Varnum	Massachusetts	13th	Dec. 6, 1813 - Feb. 3, 1814	Democratic-Republican	James Madison	Democratic-Republican
John Gaillard	South Carolina	13th	Apr. 18, 1814 - Nov. 25, 1814; Nov. 25, 1814 - Dec. 3, 1815	Democratic-Republican	James Madison	Democratic-Republican
John Gaillard	South Carolina	14th	Dec. 4, 1815 - Mar. 3, 1817	Democratic-Republican	James Madison	Democratic-Republican
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

John Gaillard	South Carolina	15th	Mar. 4, 1817 - Mar. 4, 1817; Mar. 6, 1817 - Feb. 18, 1818; Mar. 31, 1818 - Jan. 5, 1819	Democratic-Republican	James Monroe	Democratic-Republican
James Barbour	Virginia	15th	Feb. 15, 1819 - Dec. 5, 1819	Anti-Democratic	James Monroe	Democratic-Republican
James Barbour	Virginia	16th	Dec. 6, 1819 - Dec. 26, 1819	Anti-Democratic	James Monroe	Democratic-Republican
John Gaillard	South Carolina	16th	Jan. 25, 1820 - Dec. 2, 1821	Democratic-Republican	James Monroe	Democratic-Republican
John Gaillard	South Carolina	17th	Dec. 3, 1821 - Dec. 27, 1821; Feb. 1, 1822 - Dec. 2, 1822; Feb. 19, 1823 - Nov. 30, 1823	Democratic-Republican	James Monroe	Democratic-Republican
John Gaillard	South Carolina	18th	Dec. 1, 1823 - Jan. 20, 1824; May 21, 1824 - Mar. 3, 1825	Crawford Republican	James Monroe	Democratic-Republican
John Gaillard	South Carolina	19th	Mar. 9, 1825 - Dec. 4, 1825	Jacksonian	John Quincy Adams	Democratic-Republican
Nathaniel Macon	North Carolina	19th	May 20, 1826 - Dec. 3, 1826; Jan. 2, 1827 - Feb. 13, 1827; Mar. 2, 1827 - Dec. 2, 1827	Jacksonian	John Quincy Adams	Democratic-Republican
Samuel Smith	Maryland	20th	May 15, 1828 - Dec. 18, 1828	Jacksonian	John Quincy Adams	Democratic-Republican
Samuel Smith	Maryland	21st	Mar. 13, 1829 - Dec. 10, 1829; May 29, 1830 - Dec. 31, 1830; Mar. 1, 1831 - Dec. 4, 1831	Jacksonian	Andrew Jackson	Democratic
Samuel Smith	Maryland	22nd	Dec. 5, 1831 - Dec. 11, 1831	Jacksonian	Andrew Jackson	Democratic
Littleton Tazewell	Virginia	22nd	Jul. 9, 1832 - Jul. 16, 1832	Jackson Republican	Andrew Jackson	Democratic
Hugh L. White	Tennessee	22nd	Dec. 3, 1832 - Dec. 1, 1833	Jacksonian	Andrew Jackson	Democratic
Hugh L. White	Tennessee	23rd	Dec. 2, 1833 - Dec. 15, 1833	Jacksonian	Andrew Jackson	Democratic
George Poindexter	Mississippi	23rd	Jun. 28, 1834 - Nov. 30, 1834	Anti-Jacksonian	Andrew Jackson	Democratic
John Tyler	Virginia	23rd	Mar. 3, 1835 - Dec. 6, 1835	Anti-Jacksonian	Andrew Jackson	Democratic
William R. King	Alabama	24th	Jul. 1, 1836 - Dec. 4, 1836; Jan. 28, 1837 - Mar. 3, 1837	Jacksonian	Andrew Jackson	Democratic
William R. King	Alabama	25th	Mar. 7, 1837 - Sep 3, 1837; Oct. 13, 1837 - Dec. 3, 1837; Jul. 2, 1838 - Dec. 18, 1838; Feb. 25, 1839 - Dec. 1, 1839	Democratic	Martin Van Buren	Democratic
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

William R. King	Alabama	26th	Dec. 2, 1839 - Dec. 26, 1839; Jul. 3, 1840 - Dec. 15, 1840; Mar. 3, 1841 - Mar. 3, 1841	Democratic	Martin Van Buren	Democratic
William R. King	Alabama	27th	Mar. 4, 1841 - Mar. 4, 1841	Democratic	William Henry Harrison/ John Tyler	Whig
Samuel Southard	New Jersey	27th	Mar. 11, 1841 - May 31, 1842	Whig	William Henry Harrison/ John Tyler	Whig
Willie P. Mangum	North Carolina	27th	May 31, 1842 - Dec. 3, 1843	Whig	William Henry Harrison/ John Tyler	Whig
Willie P. Mangum	North Carolina	28th	Dec. 4, 1843 - Mar. 3, 1845	Whig	John Tyler	Democratic, Whig
Willie P. Mangum	North Carolina	29th	Mar. 4, 1845 - Mar. 4, 1845	Whig	James K. Polk	Democratic
Ambrose H. Sevier	Arkansas	29th	Dec. 27, 1845 - Dec. 27, 1845	Democratic	James K. Polk	Democratic
David R. Atchison	Missouri	29th	Aug. 8, 1846 - Dec. 6, 1846; Jan. 11, 1847 - Jan. 13, 1847; Mar. 3, 1847 - Dec. 5, 1847	Democratic	James K. Polk	Democratic
David R. Atchison	Missouri	30th	Feb. 2, 1848 - Feb. 8, 1848; Jun. 1, 1848 - Jun. 14, 1848; Jun. 26, 1848 - Jun. 29, 1848; Jul. 29, 1848 - Dec. 4, 1848; Dec. 26, 1848 - Jan. 1, 1849; Mar. 2, 1849 - Mar. 4, 1849	Democratic	James K. Polk	Democratic
David R. Atchison	Missouri	31st	Mar. 5, 1849 - Mar. 5, 1849; Mar. 16, 1849 - Dec. 2, 1849	Democratic	Zachary Taylor/Millard Fillmore	Whig
William R. King	Alabama	31st	May 6, 1850 - May 19, 1850; Jul. 11, 1850 - Mar. 3, 1851	Democratic	Zachary Taylor/Millard Fillmore	Whig
William R. King	Alabama	32nd	Mar. 4, 1851 - Dec. 20, 1852	Democratic	Millard Fillmore	Whig
David R. Atchison	Missouri	32nd	Dec. 20, 1852 - Mar. 3, 1853	Democratic	Millard Fillmore	Whig
David R. Atchison	Missouri	33rd	Mar. 4, 1853 - Dec. 4, 1854	Democratic	Franklin Pierce	Democratic
Lewis Cass	Michigan	33rd	Dec. 4, 1854 - Dec. 4, 1854	Democratic	Franklin Pierce	Democratic
Jesse D. Bright	Indiana	33rd	Dec. 5, 1854 - Dec. 2, 1855	Democratic	Franklin Pierce	Democratic
Jesse D. Bright	Indiana	34th	Dec. 3, 1855 - Jun. 9, 1856	Democratic	Franklin Pierce	Democratic
Charles E. Stuart	Michigan	34th	Jun. 9, 1856 - Jun. 10, 1856	Democratic	Franklin Pierce	Democratic
Jesse D. Bright	Indiana	34th	Jun. 11, 1856 - Jan. 6, 1857	Democratic	Franklin Pierce	Democratic
James M. Mason	Virginia	34th	Jan. 6, 1857 - Mar. 3, 1857	Democratic	Franklin Pierce	Democratic
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party
James M. Mason	Virginia	35th	Mar. 4, 1857 - Mar. 4, 1857	Democratic	James Buchanan	Democratic

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

Thomas J. Rusk	Texas	35th	Mar. 14, 1857 - Jul. 29, 1857	Democratic	James Buchanan	Democratic
Benjamin Fitzpatrick	Alabama	35th	Dec. 7, 1857 - Dec. 20, 1857; Mar. 29, 1858 - May 2, 1858; Jun. 14, 1858 - Dec. 5, 1858; Jan. 19, 1859 - Jan. 19, 1859; Jan. 25, 1859 - Feb. 9, 1859	Democratic	James Buchanan	Democratic
Benjamin Fitzpatrick	Alabama	36th	Mar. 9, 1859 - Dec. 4, 1859; Dec. 19, 1859 - Jan. 15, 1860; Feb. 20, 1860 - Feb. 26, 1860	Democratic	James Buchanan	Democratic
Jesse D. Bright	Indiana	36th	Jun. 12, 1860 - Jun. 13, 1860	Democratic	James Buchanan	Democratic
Benjamin Fitzpatrick	Alabama	36th	Jun. 26, 1860 - Dec. 2, 1860	Democratic	James Buchanan	Democratic
Solomon Foot	Vermont	36th	Feb. 16, 1861 - Feb. 17, 1861	Republican	James Buchanan	Democratic
Solomon Foot	Vermont	37th	Mar. 23, 1861 - Jul. 3, 1861; Jul. 18, 1861 - Dec. 1, 1861; Jan. 15, 1862 - Jan. 15, 1862; Mar. 31, 1862 - May 21, 1862; Jun. 19, 1862 - Dec. 12, 1862; Feb. 18, 1863 - Mar. 3, 1863	Republican	Abraham Lincoln	Republican
Solomon Foot	Vermont	38th	Mar. 4, 1863 - Dec. 6, 1863; Dec. 18, 1863 - Dec. 20, 1863; Feb. 23, 1864 - Feb. 23, 1864; Mar. 11, 1864 - Mar. 13, 1864; Apr. 11, 1864 - Apr. 13, 1864	Republican	Abraham Lincoln	Republican
Daniel Clark	New Hampshire	38th	Apr. 26, 1864 - Jan. 4, 1865; Feb. 9, 1865 - Feb. 19, 1865	Republican	Abraham Lincoln	Republican
Lafayette S. Foster	Connecticut	39th	Mar. 7, 1865 - Mar. 2, 1867	Opposition	Andrew Johnson	Democratic
Benjamin F. Wade	Ohio	39th	Mar. 2, 1867 - Mar. 3, 1867	Republican	Andrew Johnson	Democratic
Benjamin F. Wade	Ohio	40th	Mar. 4, 1867 - Mar. 3, 1869	Republican	Andrew Johnson	Democratic
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

Henry B. Anthony	Rhode Island	41st	Mar. 23, 1869 - Mar. 28, 1869; Apr. 9, 1869 - Dec. 5, 1869; May 28, 1870 - Jun. 2, 1870; Jul. 1, 1870 - July 5, 1870; Jul. 14, 1870 - Dec. 4, 1870	Republican	Ulysses S. Grant	Republican
Henry B. Anthony	Rhode Island	42nd	Mar. 10, 1871 - Mar. 12, 1871; Apr. 17, 1871 - May 9, 1871; May 23, 1871 - Dec. 3, 1871; Dec. 21, 1871 - Jan. 7, 1872; Feb. 23, 1872 - Feb. 25, 1872; Jun. 8, 1872 - Dec. 1, 1872; Dec. 4, 1872 - Dec. 8, 1872; Dec. 13, 1872 - Dec. 15, 1872; Dec. 20, 1872 - Jan. 5, 1873; Jan. 24, 1873 - Jan. 24, 1873	Republican	Ulysses S. Grant	Republican
Matthew H. Carpenter	Wisconsin	43rd	Mar. 12, 1873 - Mar. 13, 1873; Mar. 26, 1873 - Nov. 30, 1873; Dec. 11, 1873 - Dec. 6, 1874; Dec. 23, 1874 - Jan. 4, 1875	Republican	Ulysses S. Grant	Republican
Henry B. Anthony	Rhode Island	43rd	Jan. 25, 1875 - Jan. 31, 1875; Feb. 15, 1875 - Feb. 17, 1875	Republican	Ulysses S. Grant	Republican
Thomas W. Ferry	Michigan	44th	Mar. 9, 1875 - Mar. 10, 1875; Mar. 19, 1875 - Dec. 20, 1875; Dec. 20, 1875 - Mar. 4, 1877	Republican	Ulysses S. Grant	Republican
Thomas W. Ferry	Michigan	45th	Mar. 5, 1877 - Mar. 5, 1877; Feb. 26, 1878 - Mar. 3, 1878; Apr. 17, 1878 - Dec. 1, 1878; Mar. 3, 1879 - Mar. 17, 1879	Republican	Rutherford B. Hayes	Republican
Allen G. Thurman	Ohio	46th	Apr. 15, 1879 - Nov. 30, 1879; Apr. 7, 1880 - Apr. 14, 1880; May 6, 1880 - Dec. 5, 1880	Democratic	Rutherford B. Hayes	Republican
Thomas F. Bayard	Delaware	47th	Oct. 10, 1881 - Oct. 13, 1881	Democratic	James A. Garfield/Chester A. Arthur	Republican
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

David Davis	Illinois	47th	Oct. 13, 1881 - Mar. 3, 1883	Independent	James A. Garfield/Chester A. Arthur	Republican
George F. Edmunds	Vermont	47th	Mar. 3, 1883 - Dec. 2, 1883	Republican	James A. Garfield/Chester A. Arthur	Republican
George F. Edmunds	Vermont	48th	Dec. 3, 1883 - Jan. 14, 1884; Jan. 14, 1884 - Mar. 3, 1885	Republican	Chester A. Arthur	Republican
John Sherman	Ohio	49th	Dec. 7, 1885 - Feb. 26, 1887	Republican	Grover Cleveland	Democratic
John J. Ingalls	Kansas	49th	Feb. 26, 1887 - Dec. 4, 1887	Republican	Grover Cleveland	Democratic
John J. Ingalls	Kansas	50th	Dec. 5, 1887 - Mar. 3, 1889	Republican	Grover Cleveland	Democratic
John J. Ingalls	Kansas	51st	Mar. 7, 1889 - Mar. 17, 1889; Apr. 2, 1889 - Dec. 1, 1889; Dec. 5, 1889 - Dec. 10, 1889; Feb. 28, 1890 - Mar. 18, 1890; Apr. 3, 1890 - Mar. 2, 1891	Republican	Benjamin Harrison	Republican
Charles F. Manderson	Nebraska	51st	Mar. 2, 1891 - Dec. 6, 1891	Republican	Benjamin Harrison	Republican
Charles F. Manderson	Nebraska	52nd	Dec. 7, 1891 - Mar. 3, 1893	Republican	Benjamin Harrison	Republican
Charles F. Manderson	Nebraska	53rd	Mar. 4, 1893 - Mar. 22, 1893	Republican	Grover Cleveland	Democratic
Isham G. Harris	Tennessee	53rd	Mar. 22, 1893 - Jan. 7, 1895	Democratic	Grover Cleveland	Democratic
Matt W. Ransom	North Carolina	53rd	Jan. 7, 1895 - Jan. 10, 1895	Democratic	Grover Cleveland	Democratic
Isham G. Harris	Tennessee	53rd	Jan. 10, 1895 - Mar. 3, 1895	Democratic	Grover Cleveland	Democratic
William P. Frye	Maine	54th	Feb. 7, 1896 - Mar. 3, 1897	Republican	Grover Cleveland	Democratic
William P. Frye	Maine	55th	Mar. 4, 1897 - Dec. 3, 1899	Republican	William McKinley	Republican
William P. Frye	Maine	56th	Dec. 4, 1899 - Mar. 3, 1901	Republican	William McKinley	Republican
William P. Frye	Maine	57th	Mar. 7, 1901 - Mar. 4, 1903	Republican	Theodore Roosevelt	Republican
William P. Frye	Maine	58th	Mar. 5, 1903 - Mar. 3, 1905	Republican	Theodore Roosevelt	Republican
William P. Frye	Maine	59th	Mar. 4, 1905 - Mar. 3, 1907	Republican	Theodore Roosevelt	Republican
William P. Frye	Maine	60th	Dec. 5, 1907 - Mar. 3, 1909	Republican	Theodore Roosevelt	Republican
William P. Frye	Maine	61st	Mar. 4, 1909 - Apr. 3, 1911	Republican	William H. Taft	Republican
William P. Frye	Maine	62nd	Apr. 4, 1911 - Apr. 27, 1911	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Aug. 14, 1911 - Aug. 14, 1911	Democratic	William H. Taft	Republican
Charles Curtis	Kansas	62nd	Dec. 4, 1911 - Dec. 12, 1911	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Jan. 15, 1912 - Jan. 17, 1912	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Feb. 12, 1912 - Feb. 14, 1912	Republican	William H. Taft	Republican
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party
Augustus O. Bacon	Georgia	62nd	Mar. 11, 1912 - Mar. 12, 1912	Democratic	William H. Taft	Republican

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

Frank B. Brandegee	Connecticut	62nd	Mar. 25, 1912 - Mar. 26, 1912	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Apr. 8, 1912 - Apr. 8, 1912	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Apr. 26, 1912 - Apr. 27, 1912; May 7, 1912 - May 7, 1912	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	May 10, 1912 - May 10, 1912	Democratic	William H. Taft	Republican
Henry Cabot Lodge	Massachusetts	62nd	May 25, 1912 - May 25, 1912	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	May 30, 1912 - Jun. 3, 1912; Jun. 13, 1912 - Jul. 5, 1912	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Jul. 6, 1912 - Jul. 31, 1912	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Aug. 1, 1912 - Aug. 10, 1912	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Aug. 12, 1912 - Aug. 26, 1912	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Aug. 27, 1912 - Dec. 15, 1912	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Dec. 16, 1912 - Jan. 4, 1913	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Jan. 5, 1913 - Jan. 18, 1913	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Jan. 19, 1913 - Feb. 1, 1913	Republican	William H. Taft	Republican
Augustus O. Bacon	Georgia	62nd	Feb. 2, 1913 - Feb. 15, 1913	Democratic	William H. Taft	Republican
Jacob H. Gallinger	New Hampshire	62nd	Feb. 16, 1913 - Mar. 3, 1913	Republican	William H. Taft	Republican
James P. Clarke	Arkansas	63rd	Mar. 13, 1913 - Mar. 3, 1915	Democratic	Woodrow Wilson	Democratic
James P. Clarke	Arkansas	64th	Dec. 6, 1915 - Oct. 1, 1916	Democratic	Woodrow Wilson	Democratic
Willard Saulsbury	Delaware	64th	Dec. 14, 1916 - Mar. 4, 1917	Democratic	Woodrow Wilson	Democratic
Willard Saulsbury	Delaware	65th	Mar. 5, 1917 - Mar. 3, 1919	Democratic	Woodrow Wilson	Democratic
Albert B. Cummings	Iowa	66th	May 19, 1919 - Mar. 3, 1921	Republican	Woodrow Wilson	Democratic
Albert B. Cummings	Iowa	67th	Mar. 7, 1921 - Dec. 2, 1923	Republican	Warren G. Harding	Republican
Albert B. Cummings	Iowa	68th	Dec. 3, 1923 - Mar. 3, 1925	Republican	Calvin Coolidge	Republican
Albert B. Cummings	Iowa	69th	Mar. 4, 1925 - Mar. 6, 1925	Republican	Calvin Coolidge	Republican
George H. Moses	New Hampshire	69th	Mar. 6, 1925 - Mar. 4, 1927	Republican	Calvin Coolidge	Republican
George H. Moses	New Hampshire	70th	Dec. 15, 1927 - Mar. 3, 1929	Republican	Calvin Coolidge	Republican
George H. Moses	New Hampshire	71st	Mar. 4, 1929 - Dec. 6, 1931	Republican	Herbert Hoover	Republican
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party
George H. Moses	New Hampshire	72nd	Dec. 7, 1931 - Mar. 3, 1933	Republican	Herbert Hoover	Republican
Key Pittman	Nevada	73rd	Mar. 9, 1933 - Jan. 2, 1935	Democratic	Franklin D. Roosevelt	Democratic

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

Key Pittman	Nevada	74th	Jan. 7, 1935 - Jan. 4, 1937	Democratic	Franklin D. Roosevelt	Democratic
Key Pittman	Nevada	75th	Jan. 5, 1937 - Jan. 2, 1939	Democratic	Franklin D. Roosevelt	Democratic
Key Pittman	Nevada	76th	Jan. 3, 1939 - Nov. 10, 1940	Democratic	Franklin D. Roosevelt	Democratic
William H. King	Utah	76th	Nov. 19, 1940 - Jan. 3, 1941	Democratic	Franklin D. Roosevelt	Democratic
Pat Harrison	Mississippi	77th	Jan. 5, 1937 - Jan. 2, 1939	Democratic	Franklin D. Roosevelt	Democratic
Carter Glass	Virginia	77th	Jul. 10, 1941 - Jan. 5, 1943	Democratic	Franklin D. Roosevelt	Democratic
Carter Glass	Virginia	78th	Jan. 14, 1943 - Jan. 2, 1945	Democratic	Franklin D. Roosevelt	Democratic
Kenneth McKellar	Tennessee	79th		Democratic	Franklin D. Roosevelt/Harry Truman	Democratic
Arthur H. Vandenberg	Michigan	80th	Jan. 4, 1947 - Jan. 2, 1949	Republican	Harry Truman	Democratic
Kenneth McKellar	Tennessee	81st	Jan. 3, 1949 - Jan. 2, 1951	Democratic	Harry Truman	Democratic
Kenneth McKellar	Tennessee	82nd	Jan. 3, 1951 - Jan. 2, 1953	Democratic	Harry Truman	Democratic
Styles Bridges	New Hampshire	83rd	Jan. 3, 1953 - Jan. 4, 1955	Republican	Dwight D. Eisenhower	Republican
Walter F. George	Georgia	84th	Jan. 5, 1955 - Jan. 2, 1957	Democratic	Dwight D. Eisenhower	Republican
Carl T. Hayden	Arizona	85th	Jan. 3, 1957 - Jan. 6, 1959	Democratic	Dwight D. Eisenhower	Republican
Carl T. Hayden	Arizona	86th	Jan. 7, 1959 - Jan. 2, 1961	Democratic	Dwight D. Eisenhower	Republican
Carl T. Hayden	Arizona	87th	Jan. 3, 1961 - Jan. 8, 1963	Democratic	John F. Kennedy	Democratic
Carl T. Hayden	Arizona	88th	Jan. 9, 1963 - Jan. 3, 1965	Democratic	John F. Kennedy/Lyndon B. Johnson	Democratic
Carl T. Hayden	Arizona	89th	Jan. 4, 1965 - Jan. 9, 1967	Democratic	Lyndon B. Johnson	Democratic
Carl T. Hayden	Arizona	90th	Jan. 10, 1967 - Jan. 2, 1969	Democratic	Lyndon B. Johnson	Democratic
Richard B. Russell	Georgia	91st	Jan. 3, 1969 - Jan. 20, 1971	Democratic	Richard Nixon	Republican
Richard B. Russell	Georgia	92nd	Jan. 21, 1971 - Jan. 21, 1971	Democratic	Richard Nixon	Republican
Allen J. Ellender	Louisiana	92nd	Jan. 22, 1971 - Jul. 27, 1972	Democratic	Richard Nixon	Republican
James O. Eastland	Mississippi	92nd	Jul. 28, 1972 - Jan. 2, 1973	Democratic	Richard Nixon	Republican
James O. Eastland	Mississippi	93rd	Jan. 3, 1973 - Jan. 13, 1975	Democratic	Richard Nixon/Gerald Ford	Republican
James O. Eastland	Mississippi	94th	Jan. 14, 1975 - Jan. 3, 1977	Democratic	Gerald Ford	Republican
James O. Eastland	Mississippi	95th	Jan. 4, 1977 - Dec. 27, 1978	Democratic	Jimmy Carter	Democratic
Warren G. Magnuson	Washington	96th	Jan. 15, 1979 - Dec. 4, 1980	Democratic	Jimmy Carter	Democratic
Milton R. Young	North Dakota	96th	Dec. 5, 1980 - Dec. 5, 1980	Republican	Jimmy Carter	Democratic
Warren G. Magnuson	Washington	96th	Dec. 6, 1980 - Jan. 4, 1981	Democratic	Jimmy Carter	Democratic
President <i>Pro Tempore</i>	State	Congress	Tenure	Party	President	Presidential Party
Strom Thurmond	South Carolina	97th	Jan. 5, 1981 - Jan. 2, 1983	Republican	Ronald Reagan	Republican
Strom Thurmond	South Carolina	98th	Jan. 3, 1983 - Jan. 2, 1985	Republican	Ronald Reagan	Republican
Strom Thurmond	South Carolina	99th	Jan. 3, 1985 - Jan. 5, 1987	Republican	Ronald Reagan	Republican
John C. Stennis	Mississippi	100th	Jan. 6, 1987 - Jan. 2, 1989	Democratic	Ronald Reagan	Republican

3. LIST OF PRESIDENTS *PRO TEMPORE* OF THE SENATE (CONTINUED)

Robert C. Byrd	West Virginia	101st	Jan. 3, 1989 - Jan. 2, 1991	Democratic	George H.W. Bush	Republican
Robert C. Byrd	West Virginia	102nd	Jan. 3, 1991 - Jan. 4, 1993	Democratic	George H.W. Bush	Republican
Robert C. Byrd	West Virginia	103rd	Jan. 5, 1993 - Jan. 3, 1995	Democratic	Bill Clinton	Democratic
Strom Thurmond	South Carolina	104th	Jan. 4, 1995 - Jan. 6, 1997	Republican	Bill Clinton	Democratic
Strom Thurmond	South Carolina	105th	Jan. 7, 1997 - Jan. 6, 1999	Republican	Bill Clinton	Democratic
Strom Thurmond	South Carolina	106th	Jan. 7, 1999 - Jan. 3, 2001	Republican	Bill Clinton	Democratic
Robert C. Byrd	West Virginia	107th	Jan. 3, 2001 - Jan. 20, 2001	Democratic	George W. Bush	Republican
Strom Thurmond	South Carolina	107th	Jan. 20, 2001 - Jun. 6, 2001	Republican	George W. Bush	Republican
Robert C. Byrd	West Virginia	107th	Jun. 6, 2001 - Jan. 3, 2003	Democratic	George W. Bush	Republican
Theodore (Ted) Stevens	Alaska	108th	Jan. 3, 2003 - Jan. 3, 2005	Republican	George W. Bush	Republican
Theodore (Ted) Stevens	Alaska	109th	Jan. 4, 2005 - Jan. 4, 2007	Republican	George W. Bush	Republican
Robert C. Byrd	West Virginia	110th	Jan. 4, 2007 - Jan. 3, 2009	Democratic	George W. Bush	Republican
Robert C. Byrd	West Virginia	111th	Jan. 3, 2009-Jun. 28, 2010	Democratic	Barack Obama	Democratic
Daniel K. Inouye	Hawaii	111th	Jun. 28, 2010-Jan. 5, 2011	Democratic	Barack Obama	Democratic
Daniel K. Inouye	Hawaii	112th	Jan. 5, 2011-	Democratic	Barack Obama	Democratic

4. PRE-INAUGURATION DAY CONTINGENCIES

Time Period	Contingency	Constitutional/Statutory/Party Rule Governing Contingency
Primary Season through National Party Conventions	Death of a Presidential Candidate	H.R. REP. NO. 72-345 (1932): "A constitutional amendment is not necessary to provide for the case of the death of a party nominee before the November elections. Presidential electors, and not the President, are chosen at the November election. The electors, under the present Constitution, would be free to choose a President, notwithstanding the death of a party nominee."
National Party Conventions through November General Election	Death of a Presidential Candidate Death of a Vice-Presidential Candidate Death of both Presidential and Vice-Presidential Candidates	<i>Republican Party</i> Republican Nat'l Comm., The Rules of the Republican Party (2008), Rule No. 9: "(a) The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which may occur by reason of death, declination, or otherwise of the Republican candidate for President of the United States or the Republican candidate for Vice President of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filling any such vacancies. (b) In voting under this rule, the Republican National Committee members representing any state shall be entitled to cast the same number of votes as said state was entitled to cast at the national convention. (c) In the event that the members of the Republican National Committee from any state shall not be in agreement in the casting of votes hereunder, the votes of such state shall be divided equally, including fractional votes, among the members of the Republican National Committee present or voting by proxy. (d) No candidate shall be chosen to fill any such vacancy except upon receiving a majority of the votes entitled to be cast in the election."
National Party Conventions through November General Election	Death of a Presidential Candidate Death of a Vice-Presidential Candidate Death of both Presidential and Vice-Presidential Candidates	<i>Democratic Party</i> Democratic Nat'l Comm., The Charter & Bylaws of the Democratic Party of the United States (2010) Article Three, Section 1: "The Democratic National Committee shall have general responsibility for the affairs of the Democratic Party between National Conventions, subject to the provisions of this Charter and to the resolutions or other actions of the National Convention. This responsibility shall include: . . . (c) filling vacancies in the nominations for the office of President and Vice President;" Democratic Nat'l Comm., Call for the 2012 Democratic National Convention (2011) Section VIII(G): "Filling a Vacancy on the National Ticket: In the event of the death, resignation or disability of a nominee of the Party for President or Vice President after the adjournment of the National Convention, the National Chairperson of the Democratic National Committee shall confer with the Democratic leadership of the United States Congress and the Democratic Governors Association and shall report to the Democratic National Committee, which is authorized to fill the vacancy or vacancies."
Post-November General Election through the Meeting of the Electoral College on the First Monday After the Second Wednesday in December	Death of a Presidential Candidate Death of a Vice-Presidential Candidate Death of both Presidential and Vice-Presidential Candidates	H.R. REP. NO. 72-345 (1932): "Inasmuch as the electors would be free to choose a President, a constitutional amendment is not necessary to provide for the case of the death of a party nominee after the November elections and before the electors vote. The problem in such a case would be a political one, for if the political party did not in some manner designate a person, the electors representing that political party would probably so scatter their votes that the election would be thrown into the House."
Post-November General Election through the Meeting of the Electoral College on the First Monday After the Second Wednesday in December	Death of a Presidential Candidate Death of a Vice-Presidential Candidate Death of both Presidential and Vice-Presidential Candidates	<i>On Presidential Candidate and President-Elect Death, Disability, or Resignation: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 103d Cong. (1994) (statement of Prof. Lawrence D. Longley):</i> "Theoretically, the electors would be free to vote for anyone they pleased. But the national party rules for the filling of vacancies by the national committees would still be in effect, and the electors would probably respect the decision of their national committee on a new nominee. Again, the elevation of the vice presidential candidate to the presidential slot would be likely but not certain."

4. PRE-INAUGURATION DAY CONTINGENCIES (CONTINUED)

Time Period	Contingency	Constitutional/Statutory/Party Rule Governing Contingency
<p>Post-Meeting of the Electoral College on the First Monday After the Second Wednesday in December through the January 6th Counting of Electoral College Votes in Congress</p>	<p>Death of the President-elect <i>(Presidential Candidate that Garnered Majority of Electoral Votes)</i>¹</p>	<p><i>On Presidential Candidate and President-Elect Death, Disability, or Resignation: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 103d Cong. (1994) (statement of Prof. Lawrence D. Longley):</i> “There would likely be a debate about whether the votes cast for a dead man could be counted, but most constitutional experts believe that the language of the 12th Amendment gives Congress no choice but to count all the electoral votes cast, providing the ‘person’ voted for was alive when the ballots were cast. (The 1873 precedent, in which Congress refused to count the Greeley votes, would not be binding, because Greeley was already dead when the electors cast their votes.)”</p>
<p>Post-Meeting of the Electoral College on the First Monday After the Second Wednesday in December through the January 6th Counting of Electoral College Votes in Congress</p>	<p>Death of both the President-elect and the Vice President-elect and Resulting Failure to Qualify <i>(Presidential Candidate and Vice-Presidential Candidate that Garnered Majority of Electoral Votes)</i></p>	<p>According to the House Committee report for the 20th Amendment, Congress would have “no discretion” in the matter and “would declare that the deceased candidate had received a majority of the votes.”²</p> <p>“The operative law would then be section 3 of the 20th Amendment, which states: ‘If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President.’ And when the Vice President-elect took office as President, he would be authorized under the 25th Amendment to nominate a new Vice President. Similarly, if the Vice President-elect should die before the count in Congress, he would still be declared the winner, and the new President would be able to nominate a replacement.”</p> <p>H.R. REP. NO. 72-345 (1932): “There is no immediate emergency presented if a candidate for Vice President, or if the Vice President elect, should die, if the President elect qualifies upon the day fixed for the beginning of his term.”</p> <p>H.R. REP. NO. 72-345 (1932): “Section 3 of the [20th A]mendment . . . gives to Congress the power to provide for the case.” Section 3 of the 20th Amendment states in relevant part: “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.”³</p>

1 H.R. REP. NO. 72-345 (1932) (“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 the 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.”).

2 H.R. REP. NO. 72-345 (1932).

3 U.S. Const. Amend. XX, § 3.

4. PRE-INAUGURATION DAY CONTINGENCIES (CONTINUED)

Time Period	Contingency	Constitutional/Statutory/Party Rule Governing Contingency
<p>Post-Meeting of the Electoral College on the First Monday After the Second Wednesday in December through the January 6th Counting of Electoral College Votes in Congress</p>	<p>Death of one or more of the three highest vote getters where the election for President is thrown into the House</p> <p>Death of one or more of the two highest vote getters where the election for Vice President is thrown into the Senate</p>	<p>H.R. REP. NO. 72-345 (1932): "If the election of the President is thrown into the House, the House, under the twelfth amendment, must proceed immediately to choose a President 'from the persons having the highest numbers not exceeding three on the list of those voted for as President.' If one of these persons had died, the political party which he represents would be practically disenfranchised. It seems certain that votes cast for a [man who was dead prior to the casting of the Electoral College votes] could not legally be counted . . . Section 4 of the [20th A]mendment . . . specifically gives Congress the power to provide for this case. . . . Under some circumstances, for example, it might be advisable to provide for a substitution of a name for the name of the deceased candidate and to permit the election by the House to proceed as it otherwise would; under other circumstances it might be advisable to provide for a reconvening of the Electoral College; again it might be necessary to provide that a designated officer shall act temporarily as President until a President can be chosen in the manner prescribed by the law; and other methods might be selected by the Congress."</p> <p>H.R. REP. NO. 72-345 (1932): "If the election of the Vice President is thrown into the Senate, the Senate, under the twelfth amendment, must proceed to choose the Vice President 'from the two highest numbers on the list.' If one of these persons has died, a situation is presented similar to that discussed . . . in the case of the death of one of the three highest where the election is thrown into the House. Section 4 of the [20th A]mendment . . . also gives Congress power to provide for this case."</p>
<p>Post-January 6th Counting of Electoral College Votes in Congress through January 20th Inauguration Day</p>	<p>Death of the President-elect</p> <p>Death of the Vice President-elect</p> <p>Death of both the President-elect and Vice President-elect</p>	<p><i>On Presidential Candidate and President-Elect Death, Disability, or Resignation: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 103d Cong. (1994) (statement of Prof. Lawrence D. Longley):</i> A contingency "may be caused by the death of either the President- or Vice President-elect between the day the votes are counted in Congress and Inauguration Day. If the President-elect died, . . . [Section 3] of the 20th Amendment would elevate the Vice President-elect to the presidency. In the event of the death of the Vice President-elect, the 25th Amendment would similarly authorize the new President to nominate a Vice President, subject to the approval of Congress . . . In the event that neither a President nor a Vice President qualified on Inauguration Day, January 20, then the Automatic Succession Act of 1947 would go into effect, placing the Speaker of the House, the President Pro-Tempore of the Senate, and then the various Cabinet officials in line for the presidency."</p>

5. STATE STATUTES BINDING ELECTORS¹

State	Statute	Relevant Provision
Alabama	ALA. CODE 1975 § 17-14-31(c) (LexisNexis 2011)	"Each certificate of nomination and nominating petition must be accompanied by a list of the names and addresses of persons, who shall be qualified voters of this state, equal in number to the number of presidential electors to be chosen. Each person so listed shall execute the following statement which shall be attached to the certificate or petition when the same is filed with the Secretary of State: "I do hereby consent and do hereby agree to serve as elector for President and Vice President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such elector for _____ for President and _____ for Vice President of the United States" (inserting in the blank spaces the respective names of the persons named as nominees for the respective offices in the certificate to which this statement is attached)."
Alaska	ALASKA STAT. § 15.30.040 (LexisNexis 2012)	"The party shall require from each candidate for elector a pledge that as an elector the person will vote for the candidates nominated by the party of which the person is a candidate."
California	CAL. ELEC. CODE § 6906 (LexisNexis 2012)	"The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this state."
Colorado	COLO. REV. STAT. ANN. § 1-4-304(5) (LexisNexis 2011)	"Each presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state."
Connecticut	CONN. GEN. STAT. ANN. § 9-176 (LexisNexis 2012)	"Each such elector shall cast his ballots for the candidates under whose names he ran on the official election ballot"
District of Columbia	D.C. CODE ANN. § 1-1001.08(g)(2) (LexisNexis 2012)	"Each person elected as elector of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he or she will vote for the candidates of the party he or she has been nominated to represent, and it shall be his or her duty to vote in such manner in the electoral college."
Florida	FLA. STAT. ANN. § 103.021(1) (LexisNexis 2012)	"Each such elector shall be a qualified elector of the party he or she represents who has taken an oath that he or she will vote for the candidates of the party that he or she is nominated to represent."
Hawaii	HAW. REV. STAT. § 14-28 (LexisNexis 2011)	"The electors, when convened, if both candidates are alive, shall vote by ballot for that person for president and that person for vice president of the United States, who are, respectively, the candidates of the political party or group which they represent, one of whom, at least, is not an inhabitant of this State."
Maine	ME. REV. STAT. ANN. tit. 21-A, § 805(2) (LexisNexis 2011)	"The presidential electors at large shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in the State. The presidential electors of each congressional district shall cast their ballots for the presidential and vice-presidential candidates who received the largest number of votes in each respective congressional district."
Maryland	MD. CODE ANN., ELEC. LAW § 8-505(c) (LexisNexis 2012)	"After taking the oath prescribed by Article I, § 9 of the Maryland Constitution before the Clerk of the Court of Appeals or, in the Clerk's absence, before one of the Clerk's deputies, the presidential electors shall cast their votes for the candidates for President and Vice President who received a plurality of the votes cast in the State of Maryland."
Massachusetts	MASS. GEN. LAWS. ANN. ch. 53, § 8 (LexisNexis 2011)	"Such surnames and a list of the persons nominated for presidential electors, together with an acceptance in writing signed by each candidate for presidential elector on a form to be provided by the state secretary, shall be filed by the state chairmen of the respective political parties not later than the second Tuesday of September. Said acceptance form shall include a pledge by the presidential elector to vote for the candidate named in the filing."
Michigan	MICH. COMP. LAWS ANN. § 168.47 (LexisNexis 2012)	"At any time before receipt of the certificate of the governor or within 48 hours thereafter, an elector may resign by submitting his written and verified resignation to the governor. Failure to so resign signifies consent to serve and to cast his vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated him. Refusal or failure to vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated the elector constitutes a resignation from the office of elector, his vote shall not be recorded and the remaining electors shall forthwith fill the vacancy."
Mississippi	Miss. Code Ann. § 23-15-785(3) (LexisNexis 2012)	"Each person so listed shall execute the following statement which shall be attached to the certificate or petition when it is filed with the State Board of Election Commissioners: 'I do hereby consent and do hereby agree to serve as elector for _____ President and _____ Vice President of the United States, if elected to that position, and do hereby agree that, if so elected, I shall cast my ballot as such for President and for Vice President of the United States' (inserting in said blank spaces the respective names of the persons named as nominees for said respective offices in the certificate to which this statement is attached)."

¹ Statutes in twenty-six states and the District of Columbia bind presidential electors to cast Electoral College Votes for the nominees of the political party which nominated them or the winner of the statewide popular vote. "Party pledge" statutes, so called because eight jurisdictions proscribe a pledge to be recited by the elector, bind the elector to cast his electoral vote for his respective party's presidential and vice-presidential nominees. Nineteen jurisdictions have adopted statutes instructing electors to cast their electoral votes for candidates who garnered the most votes in the state's popular election. Of the combined twenty-seven jurisdictions that regulate the vote of presidential electors, a mere six states provide penalties for violating the statute. Only one jurisdiction, Wisconsin, releases electors from their statutory obligation in the event the candidate to whom they are bound is deceased at the time of the meeting of the Electoral College.

5. STATE STATUTES BINDING ELECTORS¹ (CONTINUED)

State	Statute	Relevant Provision
Montana	Mont. Code Ann. § 13-25-304 (LexisNexis 2011) Mont. Code Ann. § 13-25-307(3) (LexisNexis 2011)	“Each elector nominated by a political party under 13-25-101 or by an unaffiliated presidential candidate shall execute the following pledge: “If selected for the position of elector, I agree to serve and to mark my ballots for president and vice president for the nominees of the political party that nominated me.” “Except as otherwise provided by law, the secretary of state may not accept and may not count either an elector’s presidential or vice presidential ballot if the elector has not marked both ballots or has marked a ballot in violation of the elector’s pledge.”
Nebraska	Neb. Rev. Stat. § 32-714 (LexisNexis 2012)	“Each at-large presidential elector shall cast his or her ballot for the presidential and vice-presidential candidates who received the highest number of votes in the state. Each congressional district presidential elector shall cast his or her ballot for the presidential and vice-presidential candidates who received the highest number of votes in his or her congressional district.”
Nevada	Nev. Rev. Stat. § 298.050 (LexisNexis 2011)	“The presidential electors shall vote only for the nominees for President and Vice President of the party or the independent candidates that prevailed in this State in the preceding general election.
New Mexico	N.M. Stat. Ann. § 1-15-9(A)-(B) (LexisNexis 2012)	“A. All presidential electors shall cast their ballots in the electoral college for the candidates of the political party which nominated them as presidential electors. B. Any presidential elector who casts his ballot in violation of the provisions contained in Subsection A of this section is guilty of a fourth degree felony.”
North Carolina	N.C. Gen. Stat. Ann. § 163-212 (LexisNexis 2012)	“Any presidential elector having previously signified his consent to serve as such, who fails to attend and vote for the candidate of the political party which nominated such elector, for President and Vice-President of the United States at the time and place directed in G.S. 163-210 (except in case of sickness or other unavoidable accident) shall forfeit and pay to the State five hundred dollars (\$500.00), to be recovered by the Attorney General in the Superior Court of Wake County. In addition to such forfeiture, refusal or failure to vote for the candidates of the political party which nominated such elector shall constitute a resignation from the office of elector, his vote shall not be recorded, and the remaining electors shall forthwith fill such vacancy as hereinbefore provided.”
Ohio	Ohio Rev. Code Ann. § 3505.40 (LexisNexis 2012)	“A presidential elector elected at a general election or appointed pursuant to section 3505.39 of the Revised Code shall, when discharging the duties enjoined upon him by the constitution or laws of the United States, cast his electoral vote for the nominees for president and vice-president of the political party which certified him to the secretary of state as a presidential elector pursuant to law.”
Oklahoma	Okla. Stat. tit. 26, § 10-102 (LexisNexis 2012) Okla. Stat. tit. 26, § 10-109 (LexisNexis 2012)	“Every party nominee for Presidential Elector shall subscribe to an oath, stating that said nominee, if elected, will cast his ballot for the persons nominated for the offices of President and Vice President by the national convention of his party. . . . Failure of any party nominee to take and file said oath by said date shall automatically vacate his nomination and a substitute nominee shall be selected by the state central committee of the appropriate political party.” “Any Presidential Elector who violates his oath as a Presidential Elector shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00).”
Oregon	Or. Rev. Stat. § 248.355(2) (LexisNexis 2009)	“A candidate for elector when selected shall sign a pledge that, if elected, the candidate will vote in the electoral college for the candidates of the party for President and Vice President. The Secretary of State shall prescribe the form of the pledge.”
South Carolina	S.C. Code Ann. § 7-19-80 (LexisNexis 2011)	“Each candidate for presidential and vice-presidential elector shall declare which candidate for president and vice-president he will vote for if elected. Those elected shall vote for the president and vice-president candidates for whom they declared. Any person selected to fill a vacancy in the electoral college shall vote for the candidates the elector whose place he is taking had declared for. The declaration shall be made to the Secretary of State on such form as he may require not later than sixty days prior to the general election for electors. No candidate for president and vice-president elector shall have his name placed on the ballot who fails to make such declaration by the prescribed time. Any elector who votes contrary to the provisions of this section shall be deemed guilty of violating the election laws of this State and upon conviction shall be punished according to law. Any registered elector shall have the right to institute proper action to require compliance with the provisions of this section. The Attorney General shall institute criminal action for any violation of the provision of this section. Provided, the executive committee of the party from which an elector of the electoral college was elected may relieve the elector from the obligation to vote for a specific candidate when, in its judgment, circumstances shall have arisen which, in the opinion of the committee, it would not be in the best interest of the State for the elector to cast his ballot for such a candidate.”
Vermont	Vt. STAT. ANN. tit. 17, § 2732 (LexisNexis 2012)	“The electors must vote for the candidates for president and vice-president who received the greatest number of votes at the general election.”
Virginia	VA. CODE ANN. § 24.2-203 (LexisNexis 2012)	“Electors selected by the state convention of any political party as defined in § 24.2-101 shall be required to vote for the nominees of the national convention to which the state convention elects delegates. Electors named in any petition of qualified voters as provided in § 24.2-543 shall be required to vote for the persons named for President and for Vice President in the petition.”
Washington	WASH. REV. CODE ANN. § 29A.56.320 (LexisNexis 2012) WASH. REV. CODE ANN. § 29A.56.340 (LexisNexis 2012)	“Each presidential elector shall execute and file with the secretary of state a pledge that, as an elector, he or she will vote for the candidates nominated by that party.” “ Any elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars.”

5. STATE STATUTES BINDING ELECTORS¹ (CONTINUED)

State	Statute	Relevant Provision
Wisconsin	Wis. STAT. ANN. § 7.75(2) (LexisNexis 2011)	"The presidential electors, when convened, shall vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them under s. 8.18, the candidates whose names appeared on the nomination papers filed under s. 8.20, or the candidate or candidates who filed their names under s. 8.185(2), except that at least one of the persons for whom the electors vote may not be an inhabitant of this state. A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting."
Wyoming	WYO. STAT. ANN. § 22-19-108 (LexisNexis 2012)	"All Wyoming electors shall vote for the candidates for the office of president and vice-president receiving the highest number of votes in the Wyoming general election."

G. STUDENT PROFILES

CARINA BERGAL

Carina Bergal graduated from Fordham University School of Law in 2011 and has a bachelor of arts in philosophy and legal studies from Brandeis University. During her time as an undergraduate, she worked in the Civil Rights Division of the Massachusetts Attorney General's office. Upon graduation, she worked as a litigation legal assistant for Sullivan & Cromwell LLP. During law school, Carina served as a legal intern in the Office of General Counsel of the Office of Administration in the Executive Office of the President of the United States, where she worked closely with White House Counsel and OA General Counsels on diverse government legal issues. Carina served as the Managing Editor of the *Fordham Environmental Law Review* and published a Note on the proper classification of the Mexican drug war as a non-international armed conflict. (See Carina Bergal, Note, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 *Fordham Int'l L.J.* 1042 (2011).) Most recently, an abridged essay of Carina's Note was featured in the National Security Law Report, a publication of the American Bar Association's Standing Committee on Law and National Security. (See Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 32(3) *ABA Nat'l Security Law Rep.* 15 (2012)).

ROSANA ESCOBAR BROWN

Rosana Escobar Brown graduated from Fordham University School of Law in 2012 and visited The George Washington University School of Law for the 2011-2012 academic year. She entered law school after obtaining a bachelor of arts magna cum laude in political science from American University, where she concentrated her studies in lobbying and constitutional law. Rosana's experience includes a long career in management where, as a licensed optician she operated several high-volume optical retail locations before deciding to pursue a college degree and later, a second career in the law. While at American University, Rosana was an executive board member for the pre-law chapter of Phi Alpha Delta, Law Fraternity International, and she studied abroad in Dublin, Ireland, working with Fine Gael, the former minority political party in Irish Parliament which gained a majority in the 2011 elections. After her first year in law school, Rosana interned in prosecution with the Special Victims Unit at the Albany County District Attorney's

Office. Later Rosana gained exposure to national security law and information privacy as an intern with National Security Counselors, a non-profit group based in Arlington, Virginia. She also worked as a law clerk for solo practitioner Mirriam Seddiq in Maryland criminal defense and immigration law, and for the last year has been employed with Price Benowitz, LLP, a Washington, D.C. based criminal defense and personal injury law firm who maintains attorneys throughout the tri-state area.

CHRISTOPHER FELL

Christopher Fell graduated from Fordham University School of Law in 2012. Christopher grew up in Brooklyn, New York. While studying history at Boston College, he worked for several political campaigns and interned at the 2004 Republican National Convention. After college, he joined Teach for America and taught in the South Bronx. In the summer of 2011 Chris interned at the Manhattan District Attorney's office.

FRANCISCO PARDO

Francisco A. Pardo graduated from Fordham University School of Law in 2012. Francisco has a bachelor of arts summa cum laude in political science with a minor in applied ethics from George Washington University. He was a GW scholar at the University of Oxford in the fields of politics, law, and history. Francisco's experience includes a New York County Lawyer's Association summer fellowship with the Honorable Robert Patterson, Jr., Senior Judge of the Southern District of New York and a half-year legal internship with the ACLU Racial Justice Project. Additionally, as a former Executive Board member of the Miami-Dade Election Reform Coalition, a non-partisan elections watchdog and voting rights organization, his knowledge of election administration and best practices enabled him to offer in-depth analysis and practical solutions to the contingencies surrounding presidential succession during the pre-inaugural period. Francisco is also a member of the Board of Directors of Equal Justice Works, a national organization dedicated to mobilizing the next generation of public interest lawyers. He will begin a career in public service with the New York City Campaign Finance Board as a Special Compliance Analyst, working to safeguard public matching funds and to ensure the compliance of outside corporate and organizational political expenditures in campaigns for city office.

ERIN SULLIVAN

Erin M. Sullivan graduated from Fordham University School of Law in 2011 and received a bachelor of science in industrial and labor relations from Cornell University in 2007. Her past work experience includes an internship at Fox News, where she worked closely with Judge Andrew Napolitano in researching and drafting the substantive content for his book *It Is Dangerous to Be Right When the Government Is Wrong: The Case for Personal Freedom*, which analyzes the evolution of select U.S. constitutional rights. Additionally, as a second-year law student she wrote an independent study paper on the constitutionality of the Patriot Act, as seen through the eyes of the authors of the Federalist Papers, and took a class on the language of the Constitution. Erin joined Cahill Gordon & Reindel llp as an associate in the fall of 2011.

PATRICK SWEENEY

Patrick Sweeney graduated from Fordham University School of Law in 2012 and graduated cum laude from Villanova University in 2007 with a bachelor of science in mechanical engineering and a business minor. After graduation, Patrick worked for the Department of Defense as an artillery engineer at the Armament Research and Development Engineering Center at Picatinny Arsenal. While there he primarily worked on the M119, M198, and M102 weapon systems. Patrick currently works at a financial firm in New York City. During the summer of 2011 he interned at Fox News working for Judge Andrew Napolitano in researching and drafting the substantive content of an upcoming book. Patrick will be joining the Army as part of the Army JAG Corps.

JENNIE R. TRICOMI

Jennie R. Tricomi graduated from Fordham University School of Law in 2011. She graduated from the University of Virginia with a bachelor of arts in history in 2006. During her last year at UVA, Jennie wrote her thesis on the efforts of Virginian women in support of ratification of the Nineteenth Amendment. During her second year at Fordham, Jennie studied the Constitution, its framers, and origins in a course taught by Professor John D. Feerick. Jennie joined Milbank, Tweed, Hadley & McCloy as an associate in the fall of 2011.

DANIEL TYRRELL

Daniel J. Tyrrell graduated from Fordham University School of Law in 2011. After graduating from the University of Pennsylvania in 2005 with a bachelor of arts degree in philosophy, politics & economics, Daniel served as Deputy Director of Absentee Ballot and Early Voting for the Republican National Committee during the 2006 election cycle. From 2007 to 2008, he served as Deputy Regional Political Director for the Rudy Giuliani Presidential Committee, where he was responsible for developing and implementing campaign strategy in fifteen states and five U.S. territories. His past work experience includes judicial internships with the Honorable John W. Bissell, then-Chief Judge of the United States District Court for the District of New Jersey, the Honorable Samuel A. Alito, then-Judge of the United States Court of Appeals for the Third Circuit, Justice James R. Zazzali, then-Justice of the Supreme Court of the State of New Jersey, and the Honorable Susan D. Wigenton, Judge of the United States District Court for the District of New Jersey. Daniel served as a Notes & Article Editor for the *Fordham Journal of Corporate & Financial Law*, President of the Fordham Law Republicans, and Vice President of the Fordham University School of Law Chapter of the Federalist Society. He currently works in Washington, D.C. for the House Energy and Commerce Subcommittee on Oversight and Investigations.

ELNAZ ZARRINI

Elnaz Zarrini graduated from Fordham University School of Law in 2011 and has a bachelor of arts from Brandeis University in both political science and international globalization studies. As a second-year law student she wrote a Note on the Commercial Activity exception to the Foreign Sovereign Immunity Act for Nazi art expropriation claims for the *Fordham Journal of Corporate and Financial Law*, on which she served as Associate Editor. Her past work experience includes internships at the United States Court of International Trade with the Honorable Donald Pogue, where she drafted opinions for district court cases heard by designation, including tobacco litigation and constitutional law issues, the New York City Bar Ethics Clearinghouse Subcommittee, and the Prisoners' Rights Project, where she drafted letters to New York State prisoners on constitutional law issues. She took a course on the Language of the Constitution taught by Professor John D. Feerick and joined Brown Rudnick LLP as a litigation and restructuring associate in the fall of 2011.

H. BIBLIOGRAPHY

1. PRIMARY SOURCES

a. Constitutional Provisions

U.S. CONST. art I, §§ 2, 3, 5, 6, 8.
 U.S. CONST. art II, §§ 1, 2, 3, 4.
 U.S. CONST. amend. XII.
 U.S. CONST. amend. XVII.
 U.S. CONST. amend. XX.
 U.S. CONST. amend. XXII.
 U.S. CONST. amend. XXIII.
 U.S. CONST. amend. XXV.

b. Federal Statutory Provisions

Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (current version at 3 U.S.C. § 1 (2006)).
 Act of June 25, 1948, ch. 644, 62 Stat. 673 (current version at 3 U.S.C. § 7 (2006))
 3 U.S.C. § 15 (2006).
 Act of Mar. 7, 1964, 78 Stat. 153 (current version at 3 U.S.C. § 102 (2006))
 Presidential Succession Act of 1947, 3 U.S.C. § 19 (2006).
 The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349, 3349d (2006).
 20 U.S.C. § 3412 (2006).
 28 U.S.C. § 508 (2006).
 42 U.S.C. § 7132 (2006).
 49 U.S.C. § 102(e) (2006).
 Presidential Succession Act of 1886, ch. 4, 24 Stat. 1 (repealed 1947).
 Presidential Succession Act of 1792, ch. 8, 1 Stat. 239 (repealed 1886).

c. State Statutory Provisions

ALA. CODE 1975 § 17-14-31(c) (LexisNexis 2011).
 ALASKA STAT. § 15.30.040 (LexisNexis 2012).
 CAL. ELEC. CODE § 6906 (LexisNexis 2012).
 COLO. REV. STAT. ANN. § 1-4-304(5) (LexisNexis 2011).
 CONN. GEN. STAT. ANN. § 9-176 (LexisNexis 2012).
 D.C. CODE § 1-1001.08(g)(2) (LexisNexis 2012).
 FLA. STAT. § 103.021 (LexisNexis 2012).
 HAW. REV. STAT. § 14-28 (LexisNexis 2011).

ME. REV. STAT. ANN. tit. 21-A, § 805(2) (LexisNexis 2011).
 MD. CODE ANN., ELEC. LAW § 8-505(c) (LexisNexis 2012).
 MASS. GEN. LAWS. ANN. ch. 53, § 8 (LexisNexis 2011).
 MICH. COMP. LAWS ANN. § 168.47 (LexisNexis 2012).
 MISS. CODE ANN. § 23-15-785(3) (LexisNexis 2012).
 MONT. CODE ANN. § 13-25-304(3) (LexisNexis 2011).
 MONT. CODE ANN. § 13-25-307(3) (LexisNexis 2011).
 NEB. REV. STAT. § 32-714 (LexisNexis 2012).
 NEV. REV. STAT. § 298.050 (LexisNexis 2011).
 N.M. STAT. ANN. § 1-15-9(A)-(B) (LexisNexis 2012).
 N.C. GEN. STAT. ANN. § 163-212 (LexisNexis 2012).
 OHIO REV. CODE ANN. § 3505.40 (LexisNexis 2012).
 OKLA. STAT. tit. 26, § 10-102 (LexisNexis 2012).
 OKLA. STAT. tit. 26, § 10-109 (LexisNexis 2012).
 OR. REV. STAT. § 248.355(2) (LexisNexis 2009).
 S.C. CODE ANN. § 7-19-80 (LexisNexis 2011).
 VT. STAT. ANN. tit. 17, § 2732 (LexisNexis 2012).
 VA. CODE ANN. § 24.2-203 (LexisNexis 2012).
 WASH. REV. CODE ANN. § 29A.56.320 (LexisNexis 2012).
 WASH. REV. CODE ANN. § 29A.56.340 (LexisNexis 2012).
 WIS. STAT. ANN. § 7.75(2) (LexisNexis 2011).
 WYO. STAT. ANN. § 22-19-108 (LexisNexis 2012).

d. Proposed Legislation

Presidential Succession Act of 2010, H.R. 6557, 111th Cong.
 Presidential Succession Act of 2007, H.R. 540, 110th Cong.
 Presidential Succession Act of 2005, H.R. 1943, 109th Cong.
 Presidential Succession Act of 2005, S. 920, 109th Cong.
 Presidential Succession Act of 2004, H.R. 5390, 108th Cong.
 Presidential Succession Act of 2004, S. 2073, 108th Cong.
 Presidential Succession Act of 2003, H.R. 2749, 108th Cong.
 S.J. Res. 23, 108th Cong. (2003).
 Presidential Succession Act of 2002, H.R. 3816, 107th Cong.
 H.R.J. Res. 67, 107th Cong. (2001).
 H.R.J. Res. 77, 107th Cong. (2001).
 H.R. 3481, 107th Cong. (2001).

S.J. Res. 30, 107th Cong. (2001).
 Presidential Succession Clarification Act of 1996, S. 1997, 104th Cong.
 Presidential Succession Clarification Act of 1994, S. 2562, 103d Cong.
 S.J. Res. 139, 88th Cong. (1963).
 S. Res. 161, 85th Cong. (1958).
 S. 564, 80th Cong. (1947).
 H.R. 3587, 79th Cong. (1945).
 S. 471, 49th Cong. (1886).

e. Congressional Rules

RULES OF THE HOUSE OF REPRESENTATIVES, 112th Cong.
 RULES OF THE SENATE, 112th Cong.

f. Congressional Record

111 CONG. REC. 7941 (1965).
 110 CONG. REC. 1391, 2292 (1964).
 93 CONG. REC. 7767-70, 7776, 7786, 8634 (1947).
 25 CONG. DIG. 87, 89 (1946).
 91 CONG. REC. 7010-12, 7014-18, 7022, 7024, 7028 (1945).
 17 CONG. REC. 16, 220, 252, 614, 676-77 (1885-86).
 15 CONG. REC. 661 (1884).
 14 CONG. REC. 689-90, 880, 915-16 (1883).
 13 CONG. REC. 22-23, 55, 121, 123-28, 128, 131, 137-38 (1881).
 CONG. GLOBE, 38TH CONG., 1ST SESS. app. 35 (1863-64).
 CONG. GLOBE, 27TH CONG., 1ST SESS., 3 (1841).
 3 Annals of Cong. 36, 90, 281-82, 401, 417-18 (1791-92).
 2 ANNALS OF CONG. 1813 (1790).

g. Administrative and Executive Materials

Exec Order. No. 13,557, 75 Fed. Reg. 68,679 (Nov. 4, 2010).
 Exec. Order No. 13,542, 75 Fed. Reg. 27,921 (May 13, 2010).
 Exec. Order No. 13,533, 75 Fed. Reg. 10,163 (Mar. 1, 2010).
 Exec. Order No. 13,485, 74 Fed. Reg. 2287 (Jan. 9, 2009).
 Exec Order. No. 13, 461, 73 Fed. Reg. 9437 (Feb. 15, 2008).
 Exec Order. No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003) (as amended by Exec Order No. 13, 442, 72 Fed. Reg.

45,877 (Aug. 13, 2007)).
 Exec Order. No. 13,251, 67 Fed. Reg. 1599 (Dec. 28, 2001) (as amended by Exec. Order No. 13,261, § 4(i), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).
 Exec Order. No. 13,247, 66 Fed. Reg. 66,271 (Dec. 18, 2001) (amended by Exec Order No. 13,261 § 4(g), 67 Fed. Reg. 13,244 (Mar. 19, 2002)).
 Exec Order. No. 13,246, 66 Fed. Reg. 66,270 (Dec. 18, 2001) (as amended by Exec Order No. 13,261, § 4(f), 67 Fed. Reg. 13,244 (Mar. 19, 2002)).
 Exec Order. No. 13,245, 66 Fed. Reg. 66,268 (Dec. 18, 2001) (as amended by Exec Order No. 13,261, § 4(e), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).
 Exec Order. No. 13,244, 66 Fed. Reg. 66,267 (Dec. 18, 2001) (as amended by Exec Order No. 13,261, § 4(d), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).
 Exec Order. No. 13,243, 66 Fed. Reg. 66,262 (Dec. 18, 2001) (amended by Exec Order No. 13,261, § 4(c), 67 Fed. Reg. 13,244 (Mar. 19, 2002)).
 Exec. Order No. 13,242, 66 Fed. Reg. 66,260 (Dec. 18, 2001) (as amended by Exec Order No. 13,261 § 4(b), 67 Fed. Reg. 13,243 (Mar. 19, 2002)).
 Presidential Inability, 42 Op. Att'y Gen. 69 (1961) (Robert F. Kennedy).
 Authority of the President to Name an Acting Attorney General, 2007 WL 5334854 (Op. O.L.C. Sept. 17, 2007).
 Secretarial Succession, Threat Level Notification, and Successor Tracking, DOE O 100 (Apr. 20, 2007), *available at* <https://www.directives.doe.gov/directives/current-directives/100.1-BOrder-1d>

h. Presidential Papers

Letter from President George W. Bush to Congressional Leaders on Resuming the Powers and Duties of the President of the United States, 43 WEEKLY COMP. PRES. DOC. 1004 (July 21, 2007), *available at* <http://www.presidency.ucsb.edu/ws/?pid=75573>.
 Letter from President George W. Bush to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States, 43 WEEKLY COMP. PRES. DOC. 1003 (July 21, 2007), *available at* <http://www.presidency.ucsb.edu/ws/?pid=75568>.
 Memorandum on Designation of Officers of the Department of Veterans Affairs to Act As Secretary of Veterans Affairs, 39 WEEKLY COMP. PRES. DOC. 195 (Feb. 13, 2003).

Letter from President George W. Bush to Congressional Leaders on Resuming the Powers and Duties of President of the United States, 1 PUB. PAPERS 1084 (June 29, 2002), *available at* <http://www.presidency.ucsb.edu/ws/?pid=73051>.

Letter from President George W. Bush to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States, 1 PUB. PAPERS 1083 (June 29, 2002), *available at* <http://www.presidency.ucsb.edu/ws/?pid=63676>.

Letter from President Ronald Reagan to the President *Pro Tempore* of the Senate and the Speaker of the House on the President's Resumption of His Powers and Duties Following Surgery, 2 PUB. PAPERS 919 (July 13, 1985), *available at* <http://www.presidency.ucsb.edu/ws/?pid=38884>.

Letter from President Ronald Reagan to the President *Pro Tempore* of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery, 2 PUB. PAPERS 919 (July 13, 1985), *available at* <http://www.presidency.ucsb.edu/ws/?pid=38883>.

Statement of Procedures for Use in the Event of Presidential Inability, 2 PUB. PAPERS 1044 (Oct. 5, 1965).

Statement by the President Announcing that He Would Undergo Surgery, 2 PUB. PAPERS 1043 (Oct. 5, 1965).

Special Message to Congress on Presidential Disability and Related Matters, 1 PUB. PAPERS 100 (Jan. 28, 1965).

The President's News Conference, 1 PUB. PAPERS 65 (Dec. 18, 1963).

White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability, PUB. PAPERS 561 (Aug. 10, 1961).

Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196 (Mar. 3, 1958), *available at* <http://www.presidency.ucsb.edu/ws/?pid=11313>.

Letter from Dwight D. Eisenhower to Richard Milhous Nixon (Feb. 5, 1958), *available at* <http://www.eisenhowermemorial.org/presidential-papers/second-term/documents/566.cfm>.

i. Cases

Medill v. Texas, 552 U.S. 491 (2008).

Clinton v. City of New York, 524 U.S. 417 (1998).

Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

Ray v. Blair, 343 U.S. 214 (1952).

Lamar v. United States, 241 U.S. 102 (1916).

Kansas v. Colorado, 206 U.S. 46 (1907).

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

City of Albuquerque v. U.S. Dep't of Interior, 379 F.3d 901 (10th Cir. 2004).

Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28 (D.C. Cir. 2002).

W. Watersheds Project v. BLM, 629 F. Supp.2d (D. Ariz. 2009).

Singh v. Gantner, 503 F. Supp.2d 592 (E.D.N.Y. 2007).

Canadian Lumber Trade Alliance v. United States, 30 Ct. Int'l Trade 391, 425 F.Supp.2d 1321 (2006).

Utah Ass'n of Cnty.s v. Bush, 316 F. Supp.2d 1172 (D. Utah 2004).

Blak Invs. v. C.I.R., 133 T.C. 19 (2009).

j. Congressional Committee Hearings

Continuity of Congress in the Wake of a Catastrophic Attack: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. (2009).

Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. (2004) (statement of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale University).

Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. (2004) (statement of M. Miller Baker, Partner, McDermott, Will & Emery).

Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. (2004) (statement of Rep. Brad Sherman).

Ensuring the Continuity of the United States Government: The Presidency: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Rules and Admin., 108th Cong. (2003).

Continuity of the U.S. Government: Hearing Before the S. Judiciary Comm., 108th Cong. (2003) (statement of John C. Fortier, Executive Director, Continuity of Gov't Comm'n).

Temporary Filling of House of Representatives Vacancies During National Emergencies: Hearing on H.J. Res. 67 Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. (2002).

On Presidential Candidate and President-Elect Death, Disability, or Resignation: Hearing Before the Subcomm. on the Constitution of the S. Comm on the Judiciary, 103d Cong. (1994) (statement of Prof. Lawrence D. Longley).

On Presidential Candidate and President-Elect Death, Disability, or Resignation: Hearing Before the Subcomm. on the Constitution of the S. Comm on the Judiciary, 103d Cong. (1994) (statement of Walter Dellinger, Asst. Attorney General).

Examination of the First Implementation of Section Two of the Twenty-Fifth Amendment: Hearing on S.J. Res. 26 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 94th Cong. (1975).

Presidential Inability and Vacancies in the Office of the President: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 88th Cong. (1964) (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments).

Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. of the Judiciary, 89th Cong. (1963).

Selection of an Acting President in the Case of Failure to Qualify of Both President-Elect and Vice-President Elect: Hearing Before Subcomm. No. 1 of the H. Comm. on the Judiciary, 80th Cong. (1947).

Succession to the Presidency: Hearing Before the Comm. on Rules and Admin., 80th Cong. (1947).

To Determine Presidential Succession: Before Subcomm. No. 1 of the H. Comm. on the Judiciary, 80th Cong. (1947).

COUNTING ELECTORAL VOTES: PROCEEDINGS AND DEBATES OF CONGRESS RELATING TO COUNTING THE ELECTORAL VOTES FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, H.R. MISC. DOC. No. 44-13 (1877)

k. Congressional Committee Reports

H.R. REP. NO. 89-564 (1965).

H.R. REP. NO. 89-554 (1965).

H.R. REP. NO. 89-203 (1965).

S. REP. NO. 89-66 (1965).

S. REP. NO. 88-1382 (1964).

S. REP. NO. 88-9 (1964).

H.R. REP. NO. 80-817 (1947).

H.R. REP. NO. 80-80 (1947).

H.R. DOC. NO. 80-89 (1947).

S. REP. 80-80 (1947).

H.R. REP. NO. 79-829 (1945).

H.R. DOC. NO. 79-246 (1945).

H.R. REP. NO. 72-345 (1932).

S. REP. NO. 72-26 (1932).

H.R. REP. NO. 49-26, pt. 1 (1886).

S. REP. NO. 34-260 (1856).

l. Party Rules

DEMOCRATIC NAT'L COMM., CALL FOR THE 2012 DEMOCRATIC NATIONAL CONVENTION (2012).

DEMOCRATIC NAT'L COMM., CALL FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION (2007).

DEMOCRATIC NAT'L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES (2010).

DEMOCRATIC NAT'L COMM., THE CHARTER & BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES (2005).

REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY (2008).

m. Letters & Memoranda

Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 3 THE FOUNDERS' CONSTITUTION (Philip Kurland & Ralph Lerner eds., 2000), available at http://presspubs.uchicago.edu/founders/documents/a2_1_6s3.html.

Memorandum from John D. Feerick to Hon. Richard H. Poff, *The "Legal Obligation" of a Presidential Elector to Vote for his Party Nominee* (Feb. 29, 1968) (on file with authors).

Letter from John D. Feerick to Richard Poff (Feb. 7, 1965) (on file with authors).

2. SECONDARY SOURCES

a. Books

HERBERT L. ABRAMS, *THE PRESIDENT HAS BEEN SHOT: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN* (1992).

AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2006).

BIRCH BAYH, *ONE HEARTBEAT AWAY* (1968).

DICK CHENEY, *IN MY TIME: A PERSONAL AND POLITICAL MEMOIR* (2011).

MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913).

THE FEDERALIST No. 41 (James Madison).

JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* (1965).

JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (2d ed. 1992).

JOHN C. FORTIER ET AL., *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* (John C. Fortier ed., AEI Press 3d ed. 2004).

ROBERT E. GILBERT, *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT* (2000).

JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* (Princeton U. Press, 1982).

CANDICE MILLARD, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE, AND THE MURDER OF A PRESIDENT* (2011).

RONALD REAGAN, *AN AMERICAN LIFE* (1990).

CLINTON ROSSITER, *1787: THE GRAND CONVENTION* (1966).

RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* (1951).

DEL QUENTIN WILBER, *RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN* (2011).

b. Pamphlets

OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., *THE 2008 PRESIDENTIAL ELECTION: PROVISIONS OF THE CONSTITUTION AND UNITED STATES CODE* (2008).

c. Newspaper and Magazine Articles

Akhil Reed Amar, *Why Speakers of the House Should Never Be President*, *THE NEW REPUBLIC*, JAN. 12, 2012, available at <http://www.tnr.com/print/article/politics/99509/presidential-succession-speaker-house>.

A Great Nation in Grief: President Garfield Shot by an Assassin, *N.Y. TIMES*, Jul. 3, 1881, at 1.

Arthur Crock, *In the Nation: The Johnson-Humphrey Agreement Mystery*, *N.Y. TIMES*, Jan. 27, 1965, at 28.

Francie Grace, *The Shadow Government*, *CBS NEWS*, Mar. 1, 2002, available at <http://www.cbsnews.com/stories/2002/03/02/attack/main502695.shtml>.

Hadley in the Lead for Sherman's Place, *N.Y. TIMES*, Nov. 4, 1912.

David Herszenhorn & Helene Cooper, *2 Confirmed for Economy and for National Security*, *N.Y. TIMES*, Jan. 21,

2009, at P14.

Mark Landler, *Clinton Pledges Tough Diplomacy and a Fast Start*, *N.Y. TIMES*, Jan. 14, 2009, at A1.

Charles Mohr, *Johnson Reaches Disability Accord*, *N.Y. TIMES*, Jan. 28, 1965, at 13.

James N. Naughton, *Shriver is Named for Second Place by the Democrats*, *N.Y. TIMES*, Aug. 9, 1972, at 1.

No Provision for Sherman's Successor, *N.Y. TRIBUNE*, Oct. 31, 1912, at 2.

Sherman is Dead, Hurt by Speech, *N.Y. TIMES*, Oct. 31, 1912, at 1.

Sheryl Stolberg, *On First Day, Obama Quickly Sets a New Tone*, *N.Y. TIMES*, Jan. 22, 2009, at A1.

d. Interviews and Speeches

Akhil Reed Amar, *"Houston, We Have a Problem"*, Address at the University of Houston School of Law Frankel Lecture Program (Nov. 6, 2009).

Interview by Deborah Eltgroth & Daniel Hafetz with Birch Bayh, former Senator, in Easton, Md. (Oct. 2, 2009), in 79 *FORDHAM L. REV.* 781 (2010).

Fred F. Fielding, Keynote Address at the Fordham Law Review Symposium: An Eyewitness Account of Executive "Inability" (Apr. 16, 2010), in 79 *FORDHAM L. REV.* 823, 830 (2010).

e. Law Review Articles

Richard Albert, *The Evolving Vice Presidency*, 78 *TEMP. L. REV.* 811 (2005).

Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 *HOUS. L. REV.* 1 (2010).

Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 *ARK. L. REV.* 215 (1994).

Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *STAN. L. REV.* 113 (1995).

William F. Baker & Beth A. Fitzpatrick, *Presidential Succession Scenarios in Popular Culture and History and the Need for Reform*, 79 *FORDHAM L. REV.* 835 (2010).

Jack M. Beerermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 *N.C. L. REV.* 1253 (2006).

Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *MICH. L. REV.* 545 (2004).

William F. Brown & Americo R. Cinquegrana, *The Realities*

- of Presidential Succession: 'The Emperor Has No Clones'*, 75 GEO. L.J. 1389 (1987).
- Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L. J. 189 (1958).
- Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).
- Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043, 1045 (2010).
- Lloyd N. Cutler, *Symposium: The Continuity of Government—Opening Remarks*, 53 CATH. U. L. REV. 943 (2004).
- John D. Feerick, *A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment*, 47 Hous. L. REV. 41 (2010).
- John D. Feerick, *Presidential Inability: The Problem and a Solution*, 50 A.B.A. J. 321 (1964).
- John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 FORDHAM L. REV. 907 (2010).
- John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73 (1963).
- John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173 (1965).
- John D. Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 FORDHAM L. REV. 457 (1964).
- James E. Fleming, *Presidential Succession: The Art of the Possible*, 79 FORDHAM L. REV. 951, 952-56 (2010).
- John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 *Election L.J.* 597 (2004).
- John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004).
- Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703 (1988).
- Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).
- Robert E. Gilbert, *Presidential Disability and the Twenty-Fifth Amendment: The Difficulties Posed by Psychological Illness*, 79 FORDHAM L. REV. 843 (2010).
- James N. Giglio, *The Eagleton Affair: Thomas Eagleton, George McCovern, and the 1972 Vice Presidential Nomination*, 39 *Presidential Stud. Q.* 647 (2009).
- Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523 (2005).
- Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959 (2010).
- Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505 (1995).
- Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459 (2009).
- Charles S. Hamlin, *The Presidential Succession Act of 1886*, 18 HARV. L. REV. 182 (1905).
- William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597 (2009).
- James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495 (1962).
- Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008).
- Sanford Levinson, Comment, *Assuring Continuity of Government*, 4 PIERCE L. REV. 201 (2006).
- William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008).
- Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L. J. 2480 (2006).
- Rose McDermott, *Extensions on the Twenty-Fifth Amendment: The Influence of Biological Factors on Assessments of Impairment*, 79 FORDHAM L. REV. 881 (2010).
- James D. Myers, *Bringing the Vice President Into the Fold: Executive Immunity and the Vice Presidency*, 50 B.C. L. REV. 897 (2009).
- Richard K. Neumann, Jr., *The Revival of Impeachment As a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161 (2007).
- Eric A. Richardson, *Of Presumed Presidential Quality: Who Should Succeed to the Presidency When the President and Vice President Are Gone?*, 30 WAKE FOREST L. REV. 617 (1995).
- Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL'Y 665 (1996).
- Ruth C. Silva, *Presidential Inability*, 35 U. DET. L.J. 139 (1957).
- Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451 (1949).
- Seth Barrett Tillman, *Model Continuity of Congress Statute*, 4

PIERCE L. REV. 191 (2006).

Seth Barrett Tillman, *Overruling INS v. Chadha: Advice on Choreography*, 4 PIERCE L. REV. 207 (2006).

Symposium, *The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements*, 79 FORDHAM L. REV. 775 (2010).

Former Governor Thomas J. Vilsack, *Reflections of a Participant on American Democracy and the Constitution*, 55 DRAKE L. REV. 887 (2007).

Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 949 (2004).

Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345 (2001).

Howard M. Wasserman, *The Trouble With Shadow Government*, 52 EMORY L.J. 281 (2003).

John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421 (2008).

Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499 (2008).

f. Reports

AM. ENTER. INST. FOR PUB. POLICY RESEARCH, PRESIDENTIAL DISABILITY AND VICE PRESIDENTIAL VACANCIES (1964).

THE CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION (2009).

THE CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION (2003).

JOHN C. FORTIER, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, DANGEROUS LINE OF SUCCESSION (2007).

HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., RL 30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS (2008).

JENNIFER MARSICO, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, THE '2012' SCENARIO AND THE FAILURE OF U.S. SUCCESSION (2009).

MILLER CTR. COMM'N NO. 4, REPORT OF THE MILLER CENTER COMMISSION ON PRESIDENTIAL DISABILITY AND THE TWENTY-FIFTH AMENDMENT (1988).

THOMAS H. NEALE, CONG. RESEARCH SERV., RL34692, PRESIDENTIAL SUCCESSION: PERSPECTIVES, CONTEMPORARY ANALYSIS, AND THE 110TH

CONGRESS PROPOSED LEGISLATION (2008), available at <http://www.fas.org/sgp/crs/misc/RL34692.pdf>.

THOMAS H. NEALE, CONG. RESEARCH SERV., RS22992, THE PRESIDENT-ELECT: SUCCESSION AND DISABILITY ISSUES DURING THE TRANSITION PERIOD (2008), available at <http://www.fas.org/sgp/crs/misc/RS22992.pdf>.

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, A BETTER WAY ON PRESIDENTIAL SUCCESSION (2007).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, A POST-9/11 REPORT CARD FOR CONGRESS SHOWS TOO LITTLE PROGRESS (2004).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, AS WE REMEMBER 9/11, WE SHOULD ACT NOW TO ENSURE CONTINUITY (2006).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, DEMOCRATS NEED TO GET MOVING ON CONTINUITY ISSUES (2007).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, IT'S ARMAGEDDON (2004).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, PREPARING FOR THE UNTHINKABLE (2002).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, PRESIDENTIAL TRANSITION PROCESS IS IN NEED OF A MAJOR UPGRADE (2008).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, WANT A SCARY SCENARIO FOR PRESIDENTIAL CHAOS? (2004).

NORMAN J. ORNSTEIN, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, WORST-CASE SCENARIOS DEMAND THE HOUSE'S IMMEDIATE ACTION (2001).

RESEARCH AND POLICY COMM., COMM. FOR ECON. DEV., PRESIDENTIAL SUCCESSION AND INABILITY (1965).

WILLIAM SCHNEIDER, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, INSURANCE AGAINST THE ONCE UNTHINKABLE (2001).

g. Websites

American President: A Reference Resource, THE MILLER CENTER, <http://millercenter.org/president> (last visited Sept. 16, 2011).

BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: 1774 – PRESENT, <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Dec. 10, 2011).

Chronological List of Presidents, First Ladies, and Vice Presidents of the United States, LIBRARY OF CONGRESS, http://loc.gov/rr/print/list/057_chron.html (last visited Sept. 16, 2011).

Definition of *President Pro Tempore*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/president_pro_tempore.htm (last visited Aug. 25, 2011).

Bruce Drake, *What Does John Boehner Do for a Living? Less Than Half in Poll Know*, POLL WATCH DAILY (Apr. 1, 2011), <http://www.pollwatchdaily.com/2011/04/01/what-does-john-boehner-do-for-a-living-less-than-half-in-poll-know/>.

Faithless Electors, FAIRVOTE, http://archive.fairvote.org/e_college/faithless.htm (last visited Jan. 10, 2010).

James Garfield, WHITEHOUSE.GOV, <http://www.whitehouse.gov/about/presidents/jamesgarfield> (last visited August 3, 2011 4:45 PM).

House History: Speakers of the House, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://artandhistory.house.gov/house_history/speakers.aspx (last visited Sept. 16, 2011).

Locke, Solis Are Least Known of Obama Cabinet Members, RASMUSSEN REPORTS (Apr. 9, 2011), http://www.rasmussenreports.com/public_content/politics/obama_administration/april_2011/locke_solis_are_least_known_of_obama_cabinet_members.

Nina Shen Rastogi, *Aren't These Confirmation Hearings a Bit Early?*, SLATE (Jan. 15, 2009, 6:31 PM), <http://www.slate.com/id/2208771>.

OSODS Function Statements—Introduction, U.S. DEPARTMENT OF EDUCATION, http://www2.ed.gov/about/offices/list/om/fs_po/osods/intro.html#3 (last modified July 24, 2007).

Speaker of the U.S. House of Representatives, ENCYCLOPAEDIA.COM, <http://www.britannica.com/EBchecked/topic/558470/Speaker-of-the-US-House-of-Representatives> (last visited Sept. 16, 2011)

President Pro Tempore, UNITED STATES SENATE, http://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm#5 (last visited Dec. 3, 2011).

FORDHAM UNIVERSITY SCHOOL OF LAW

140 West 62nd Street

New York, New York 10023

Attention: Professor John D. Feerick