

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*Presidential Succession: An Overview with Analysis of
Legislation Proposed in the 109th Congress*

Thomas H. Neale, Government and Finance Division

March 22, 2007

Abstract. Legislation proposed in the 109th Congress fell into two basic categories: bills to expand the line of succession to incorporate the Secretary of Homeland Security (DHS) into the order of succession, and those that sought a more extensive overhaul of succession policies and procedures. The 109th Congress did not, however, pass a free standing presidential succession bill of either variety; instead, it incorporated the office of Secretary of Homeland Security into the line of succession in Title V of the USA Patriot Improvement and Reauthorization Act of 2005 (P.L. 109-177, 120 Stat. 192).

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CRS Report for Congress

Presidential Succession: An Overview with Analysis of Legislation Proposed in the 109th Congress

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Government and Finance Division

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Prepared for Members and
Committees of Congress

Presidential Succession: An Overview with Analysis of Legislation Proposed in the 109th Congress

Summary

When the office of President of the United States becomes vacant due to “removal ... death or resignation” of the chief executive, the Constitution provides that “the Vice President shall become President.” When the office of Vice President becomes vacant for any reason, the President nominates a successor, who must be confirmed by a majority vote of both houses of Congress. If both offices are vacant simultaneously, the Speaker of the House of Representatives becomes President, after resigning from the House and as Speaker. If the speakership is also vacant, the President Pro Tempore of the Senate becomes President, after resigning from the Senate and as President Pro Tempore. If both offices are vacant, then cabinet officers are eligible to succeed, in the order established by law. All potential successors must be duly sworn in their previous offices and meet the presidency’s constitutional requirements of 35 years of age, “natural born” citizenship, and 14 years residence “within the United States.” Presidential succession was widely considered a settled issue prior to the terrorist attacks of September 11, 2001. These events demonstrated the potential for a mass “decapitation” of both the legislative and executive branches of government, and raised the question of whether current arrangements are adequate to guarantee continuity in government under such circumstances.

Legislation proposed in the 109th Congress fell into two basic categories: bills to expand the line of succession to incorporate the Secretary of the Department of Homeland Security (DHS) into the order of succession, and those that proposed a more extensive overhaul of succession policies and procedures. The 109th Congress did not, however, pass a free-standing presidential succession bill of either variety; instead, it incorporated the Secretary of DHS as 18th in the line of succession, following the Secretary of Veterans Affairs. The legislative vehicle was Title V, Section 503, of the USA Patriot Improvement and Reauthorization Act of 2005 (H.R. 3199, (Representative James Sensenbrenner), P.L. 109-177, 120 Stat. 192).

Of proposed legislation that was not enacted, H.R. 1455, (Representative Tom Davis), and S. 442 (Senator Mike DeWine) fell into the first category, seeking to incorporate the Secretary of DHS into the line of succession, but as eighth in line, after the Attorney General. S. 442 passed in the Senate without amendment by unanimous consent on July 26, 2005; it was received in the House and referred on September 19 to the House Judiciary Committee’s Subcommittee on the Constitution. H.R. 1455 was referred to the Committee on Government Operations, which reported it favorably to the full House on October 20, 2005. No further action was taken on either bill during the 109th Congress.

H.R. 1943, (Representative Brad Sherman), and S. 920, (Senator John Cornyn) were of the second variety, seeking not only to incorporate the Secretary of DHS in the line of succession, but also to include provisions to ensure presidential continuity in the event of a catastrophic attack on the U.S. Government. No action beyond committee referral was taken on either bill during the 109th Congress.

This report will not be updated.

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Presidential Succession: An Overview with Analysis of Legislation Proposed in the 109th Congress

Introduction

While the Constitution, as amended by the 25th Amendment, provides that the Vice President will succeed to the nation's highest office on the death, resignation, or removal from office of the President, it delegates authority for succession beyond the Vice President to Congress. Over the past two centuries, Congress has exercised its authority in three succession acts, in 1792, 1886, and 1947. It has also added to, revised, and clarified the succession process by the 20th Amendment, proposed by Congress in 1932 and ratified by the states in 1933, and the 25th Amendment, proposed in 1965 and ratified in 1967. The Succession Act of 1947 (61 Stat. 380, 3 U.S.C. § 19) and the two amendments currently govern succession to the presidency.

Despite occasional discussions, presidential succession was widely considered a settled issue prior to the terrorist attacks of September 11, 2001. These events demonstrated the potential for a mass “decapitation” of both the legislative and executive branches of government, and raised questions as to whether current arrangements were adequate to guarantee continuity in Congress and the presidency under such circumstances. With respect to presidential succession, there has been a wide range of discussions in both Congress and the public policy community since that time, and Members of both houses have introduced legislation addressing this question in the contemporary context.¹

Legislation proposed in the 109th Congress fell into two basic categories: bills to expand the line of succession to incorporate the Secretary of Homeland Security (DHS) into the order of succession, and those that sought a more extensive overhaul of succession policies and procedures. The 109th Congress did not, however, pass a free standing presidential succession bill of either variety; instead, it incorporated the office of Secretary of Homeland Security into the line of succession in Title V of the USA Patriot Improvement and Reauthorization Act of 2005 (P.L. 109-177, 120 Stat. 192).

¹ For further information on continuity issues and planning, please consult: CRS Report RL31594, *Congressional Continuity of Operations (COOP): An Overview of Concepts and Challenges*, by R. Eric Petersen and Jeffrey W. Seifert; CRS Report RL31857, *Executive Branch Continuity of Operations (COOP): An Overview*, by R. Eric Petersen; and CRS Report RL32752, *Continuity of Operations in the Executive Branch: Issues in the 109th Congress*, by R. Eric Petersen.

Constitutional Provisions and Legislation, 1787-1967

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

In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.²

This language evolved during the Constitutional Convention of 1787. The two most important early drafts of the Constitution neither provided for a Vice President nor considered succession to the presidency, and it was only late in the convention proceedings that the office of Vice President emerged and the language quoted above was adopted.³ While the need for a Vice President was debated during the ratification process, the question of succession received little attention, meriting only one reference in the supporting Federalist papers: “the Vice-President may occasionally become a substitute for the President, in the supreme Executive magistracy.”⁴

The Succession Act of 1792. The Second Congress (1791-1793) exercised its constitutional authority to provide for presidential vacancy or inability in the Succession Act of 1792 (1 Stat. 240). After examining several options, including designating the Secretary of State or Chief Justice as successor, Congress settled on the President Pro Tempore of the Senate and the Speaker of the House of Representatives, in that order. These officials were to succeed if the presidency and vice presidency were both vacant. During House debate on the bill, there was considerable discussion of the question of whether the President Pro Tempore and the Speaker could be considered “officers” in the sense intended by the Constitution. If so, they were eligible to succeed, if not, they could not be included in the line of succession. The House expressed its institutional doubts when it voted to strike this provision, but the Senate insisted on it, and it became part of the bill enacted and signed by the President.⁵ Although the Speaker and President Pro Tempore were thus incorporated in the line of succession, they would serve only temporarily, however, since the act also provided for a special election to fill the vacancy, unless it occurred

² U.S. Constitution. Article II, Section 1, clause 6. This text was later changed and clarified by Section 1 of the 25th Amendment.

³ John D. Feerick, *From Failing Hands: The Story of Presidential Succession* (New York: Fordham University Press, 1965), pp. 42-43.

⁴ Alexander Hamilton, “Federalist No. 68,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, Benjamin F. Wright, ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1966), p. 433.

⁵ Feerick, *From Failing Hands*, pp. 58-60.

late in the last full year of the incumbent's term of office.⁶ Finally, this and both later succession acts required that designees meet the constitutional requirements of age, residence, and natural born citizenship.

Presidential Succession in 1841: Setting a Precedent. The first succession of a Vice President occurred when President William Henry Harrison died in 1841. Vice President John Tyler's succession set an important precedent and settled a constitutional question. Debate at the Constitutional Convention, and subsequent writing on succession, indicated that the founders intended the Vice President to serve as *acting* President in the event of a presidential vacancy or disability, assuming "the powers and duties" of the office, but not actually *becoming* President.⁷ Tyler's status was widely debated at the time, but the Vice President decided to take the presidential oath, and considered himself to have succeeded to Harrison's office, as well as to his powers and duties. After some discussion of the question, Congress implicitly ratified Tyler's decision by referring to him as "the President of the United States."⁸ This action set a precedent for succession that subsequently prevailed, and was later formally incorporated into the Constitution by Section 1 the 25th Amendment.

The Succession Act of 1886 and the 20th Amendment (1933). President James A. Garfield's death led to a major change in succession law. Shot by an assassin on July 2, 1881, the President struggled to survive for 79 days before succumbing to his wound on September 19. Vice President Chester A. Arthur took office without incident, but the offices of Speaker and President Pro Tempore were vacant throughout the President's illness, due to the fact that the House elected in 1880 had yet to convene, and the Senate had been unable to elect a President Pro Tempore because of partisan strife.⁹ Congress subsequently passed the Succession Act of 1886 (24 Stat. 1) in order to insure the line of succession and guarantee that potential successors would be of the same party as the deceased incumbent. This legislation transferred succession after the Vice President from the President Pro Tempore and the Speaker to cabinet officers in the chronological order in which their departments were created, provided they had been duly confirmed by the Senate and were not under impeachment by the House. Further, it eliminated the requirement for a special election, thus ensuring that any future successor would serve the full balance of the presidential term. This act governed succession until 1947.

⁶ It should be recalled that during this period presidential terms ended on March 4 of the year after the presidential election. Also, the act provided only for election of the President, since electors cast two votes for President during this period (prior to ratification of the 12th Amendment, which specified separate electoral votes for President and Vice President), with the electoral vote runner-up elected Vice President.

⁷ Ruth Silva, *Presidential Succession* (New York: Greenwood Press, 1968 (c. 1951)), p. 10; Feerick, *From Failing Hands*, p. 56.

⁸ *Congressional Globe*, vol. 10, May 31, June 1, 1841, pp. 3-5.

⁹ In accord with contemporary practice, the House of Representatives elected in November, 1880, did not convene in the 47th Congress until December 5, 1881. As was also customary, the Senate had convened on March 10, but primarily to consider President Garfield's cabinet and other nominations.

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

The Presidential Succession Act of 1947. In 1945, Vice President Harry S Truman succeeded as President on the death of Franklin D. Roosevelt. Later that year, he proposed that Congress revise the order of succession, placing the Speaker of the House and the President Pro Tempore of the Senate in line behind the Vice President and ahead of the cabinet. The incumbent would serve until a special election, scheduled for the next intervening congressional election, filled the presidency and vice presidency for the balance of the term. Truman argued that it was more appropriate to have popularly elected officials first in line to succeed, rather than appointed cabinet officers. A bill incorporating the President's proposal, minus the special election provision, passed the House in 1945, but no action was taken in the Senate during the balance of the 79th Congress.

The President renewed his call for legislation when the 80th Congress convened in 1947, and legislation was introduced in the Senate the same year. Debate on the Senate bill centered on familiar questions: whether the Speaker and President Pro Tempore were “officers” in the sense intended by the Constitution; whether legislators were well-qualified for the chief executive's position; whether requiring these two to resign their congressional membership and offices before assuming the acting presidency was fair.¹⁰ In the event, the Senate and House passed legislation that embodied Truman's request, but again deleted the special election provisions.

Under the act (61 Stat. 380, 3 U.S.C. §19), if both the presidency and vice presidency are vacant, the Speaker succeeds (after resigning the speakership and his House seat).¹¹ If there is no Speaker, or if he does not qualify, the President Pro Tempore succeeds, under the same requirements. If there is neither a Speaker nor President Pro Tempore, or if neither qualifies, then cabinet officers succeed, under the same conditions as applied in the 1886 act (see **Table 3** for departmental order in the line of succession). Any cabinet officer acting as President under the act may, however, be supplanted by a “qualified and prior-entitled individual” at any time.¹² This means that if a cabinet officer is serving due to lack of qualification, disability, or vacancy in the office of Speaker or President Pro Tempore, and, further, if a properly qualified Speaker or President Pro Tempore is elected, then they may assume the acting presidency, supplanting the cabinet officer. The Presidential Succession Act of 1947 has been regularly amended to incorporate new cabinet-level departments into the line of succession, and remains currently in force.

¹⁰ Feerick, *From Failing Hands*, pp. 207-208.

¹¹ This requirement was included because the Constitution (Article I, Section 6, clause 2) expressly states that “... no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

¹² 3 U.S.C. 19 (d)(2).

One anomaly remedied in the 109th Congress was the fact that the position of Secretary of Homeland Security was not included in the line of presidential succession when the Homeland Security Act of 2002 (P.L. 107-296, 116 Stat. 2135) established the Department of Homeland Security in November, 2002. Free standing legislation to remedy this omission was introduced in the 108th and 109th Congresses, but no action was taken on these bills.¹³ Instead, the 109th Congress updated the order of succession when it incorporated the office of Secretary of Homeland Security into the line of succession as a provision of Title V of the USA Patriot Authorization and Improvement Act of 2005 (P.L. 109-177, 120 Stat. 192).

The 25th Amendment and Current Procedures. The 1963 assassination of President John F. Kennedy helped set events in motion that culminated in the 25th Amendment to the Constitution, a key element in current succession procedures. Although Vice President Lyndon B. Johnson succeeded without incident after Kennedy's death, it was noted at the time that Johnson's potential immediate successor, House Speaker John W. McCormack, was 71 years old, and Senate President Pro Tempore Carl T. Hayden was 86 and visibly frail. In addition, many observers believed that a vice presidential vacancy for any length of time constituted a dangerous gap in the nation's leadership during the Cold War, an era of international tensions and the threat of nuclear war.¹⁴ It was widely argued that there should be a qualified Vice President ready to succeed to the presidency at all times. The 25th Amendment, providing for vice presidential vacancies and presidential disability, was proposed by the 89th Congress in 1965 and approved by the requisite number of states in 1967.¹⁵

The 25th Amendment is the cornerstone of contemporary succession procedures. Section 1 of the amendment formalized traditional practice by declaring that, "the Vice President *shall become* President [emphasis added]" if the President is removed from office, dies, or resigns. Section 2 empowered the President to nominate a Vice President whenever that office is vacant. This nomination must be approved by a simple majority of Members present and voting in both houses of Congress. Sections 3 and 4 established procedures for instances of presidential disability.¹⁶

Any Vice President who succeeds to the presidency serves the remainder of the term. Constitutional eligibility to serve additional terms is governed by the 22nd Amendment, which provides term limits for the presidency. Under the amendment, if the Vice President succeeds after *more than two full years* of the term have

¹³ Free-standing succession legislation introduced in the 109th Congress is discussed later in this report. For 108th Congress proposals, see CRS Report RL31761, *Presidential Succession, an Overview with Analysis of Legislation Proposed in the 108th Congress*, by Thomas H. Neale.

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

¹⁵ For additional information on presidential tenure, see CRS Report RS20827, *Presidential and Vice Presidential Terms and Tenure*, by Thomas H. Neale.

¹⁶ For additional information on presidential disability, see CRS Report RS20260, *Presidential Disability: An Overview*, by Thomas H. Neale.

expired, he is eligible to be elected to two additional terms as President. If, however, the Vice President succeeds after *fewer than two full years* of the term have expired, the constitutional eligibility is limited to election to one additional term.

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

Presidential Succession in the Post-9/11 Era

The events of September 11, 2001 and the prospect of a “decapitation” of the U.S. government by an act of mass terrorism have led to a reexamination of many previously long-settled elements of presidential succession and continuity of government on the federal level.¹⁷ A number of proposals to revise the Succession Act of 1947 were introduced in the 108th and 109th Congresses. Some of these were in the nature of “housekeeping” legislation; that is, they proposed to insert the office of Secretary of the Department of Homeland Security into the line of succession, as has been done in the past when new cabinet departments are created by Congress. Others proposed more complex changes in the legislation.

This growth of concern over succession issues in the wake of 9/11 was further reflected in the fact that the Senate Committees on Rules and Administration and the Judiciary held a joint informational hearing on September 16, 2003, and the House Judiciary Committee’s Subcommittee on the Constitution conducted a hearing on the succession question on October 6, 2004. On both occasions, witnesses offered a wide range of viewpoints and various legislative and other options.

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

Succession Issues — Constitutional. Several issues dominate current discussions over revising the order of presidential succession. Some are “hardy perennials,” constitutional questions that have risen in every debate on succession law, and have been cited earlier in this report.

¹⁷ For additional information on continuity of government issues, see CRS Report RS21089, *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

Constitutional Legitimacy. There is no question as to Congress's constitutional ability to provide for presidential succession. This power is directly granted by Article II, Section 1, clause 6, modified by the 25th Amendment, as noted earlier in this report. What the Constitution means by the word "Officer", however, has been perhaps the most durable element in the succession debate over time. The succession acts of both 1792 and 1947 assumed that the language was sufficiently broad as to include officers of Congress, the President Pro Tempore of the Senate and the Speaker of the House of Representatives.¹⁸ Some observers assert that these two congressional officials are *not* officers in the sense intended by the Constitution, and that the 1792 act was, and the 1947 act is, constitutionally questionable. Attorney Miller Baker explained this hypothesis in his testimony before hearings held jointly by the Senate Committees on the Judiciary Committee and on Rules and Administration in 2003:

The Constitution is emphatic that members of Congress are not "Officers of the United States." The Incompatibility Clause of Article I, Section 6, clause 2 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." In other words, members of Congress by constitutional definition cannot be "Officers" of the United States.¹⁹

This point was raised in congressional debate over both the Succession Act of 1792 and that of 1947. In the former case, opinion appears to have been divided: James Madison (arguably the single most formative influence on the Constitution, and a serving Representative when the 1792 act was debated) held that officers of Congress were not eligible to succeed. Other Representatives who had also served as delegates to the Constitutional Convention were convinced to the contrary.²⁰ In addition, political issues also contributed to the debate in 1792. Fordham University Law School Dean John D. Feerick, writing in *From Failing Hands: The Story of Presidential Succession*, noted that the Federalist-dominated Senate insisted on inclusion of the President Pro Tempore and the Speaker, and excluded the Secretary of State, largely because of its distrust of Thomas Jefferson, who was Secretary of State and leader of the Anti-Federalists, a group that later emerged as the Jeffersonian Republican, or Democratic Republican, Party.²¹

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

¹⁸ The 1792 act specified this order of succession; the 1947 act reversed the order, placing the Speaker of the House first in line, followed by the President Pro Tempore.

¹⁹ W. Miller Baker, Testimony before the Senate Committees on the Judiciary and Rules and Administration, Sept. 16, 2003, p.8; available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2606], visited March 20, 2007. Baker's testimony cites additional supporting arguments for his assertion at considerable length.

²⁰ Feerick, *From Failing Hands*, p. 59.

²¹ *Ibid.*, pp. 60-61.

first-hand knowledge of original intent in this question, was buttressed as an argument by the Supreme Court's decision in *Lamar v. United States*.²²

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

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

The issue is whether the unmodified "officer" of the Succession Clause has a broader meaning. On one hand, it may be synonymous with the modified uses of the word elsewhere, all referring solely to executive branch officials, in which case the Speaker and the President Pro Tem cannot constitutionally remain in the line of succession. On the other hand, the absence of a modifier in the Succession Clause may not have been inadvertent. The unmodified term may be broader and more comprehensive, covering not only executive-branch officers, but everyone holding a position under the Constitution who might be labeled an officer. This includes the Speaker and President Pro Tem, which are identified in Article I as officers of the House and Senate, respectively.²³

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

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

Democratic Principle and Party Continuity. These interrelated issues collectively comprise what might be termed the political aspect of presidential succession. The first, democratic principle, was perhaps the dominant factor

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

²³ Howard M. Wasserman, Testimony before the Senate Committees on the Judiciary and Rules and Administration, September 16, 2003, p. 7. Available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2605], visited March 20, 2007.

contributing to the passage of the 1947 succession act. Simply stated, it is the assertion that presidential and vice presidential succession should be settled first on popularly elected officials, rather than the appointed members of the Cabinet, as was the case under the 1886 act. According to Feerick, the 1886 act's provisions aroused criticism not long after Vice President Harry Truman became President on the death of Franklin D. Roosevelt.²⁴ President Truman responded less than two months after succeeding to the presidency, when he proposed to Congress the revisions to succession procedures that, when amended, eventually were enacted as the Succession Act of 1947. The President explained his reasoning in his special message to Congress on the subject of succession to the presidency:

... by reason of the tragic death of the later President, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act. I do not believe that in a democracy this power should rest with the Chief Executive. In so far as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country. The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.²⁵

Conversely, critics of this reasoning assert that the Speaker, while chosen by a majority of his peers in the House, has won approval by the *voters* only in his own congressional district. Further, although elected by the voters in his home state, the President Pro Tempore of the Senate serves as such by virtue of being the Senator of the majority party with the longest tenure.²⁶

Against the case for democratic succession urged by President Truman, the value of party continuity is asserted by some observers. The argument here is that a person acting as President under these circumstances should be of the same political party as the previous incumbent, in order to assure continuity of the political affiliation, and, presumably, the policies, of the candidate chosen by the voters in the last election. According to this reasoning, succession by a Speaker or President Pro Tempore of a different party would be a reversal of the people's mandate that would be inherently undemocratic. Moreover, they note, this possibility is not remote: since passage of the Succession Act of 1947, the nation has experienced "divided government," that is, control of the presidency by one party and either or both houses of Congress by another, for 34 of the 58 intervening years. As Yale University Professor Akhil Amar noted in his testimony at the 2003 joint Senate committee hearing, "... [the current succession provisions] can upend the results of a Presidential

²⁴ Feerick, *From Failing Hands*, pp. 204-205.

²⁵ U.S. President, Truman, *Public Papers of the Presidents of the United States* [:] *Harry S Truman*, 1945 (Washington: GPO, 1961), p. 129.

²⁶ The President Pro Tempore is elected by the whole Senate, but this office is customarily filled only by the Senator of the majority party who has served longest; thus, the act of election is arguably a formality.

election. If Americans elect party A to the White House, why should we end up with party B?”²⁷ At the same hearing, another witness argued that, “This connection to the President ... provides a national base of legitimacy to a cabinet officer pressed to act as President. The link between cabinet officers and the President preserves some measure of the last presidential election, the most recent popular democratic statement on the direction of the executive branch.”²⁸

Efficient Conduct of the Presidency. Some observers also question the potential effect on conduct of the presidency if the Speaker or President Pro Tempore were to succeed. Would these persons, whose duties and experience are essentially legislative, have the skills necessary to serve as chief executive? Moreover, it is noted that these offices have often been held by persons in late middle age, or even old age, whose health and energy levels might be limited.²⁹ As Miller Baker noted in his testimony before the 2003 joint committee hearings, “... history shows that senior cabinet officers such as the Secretary of State and the Secretary of Defense are generally more likely to be better suited to the exercise of presidential duties than legislative officers. The President pro tempore, traditionally the senior member of the party in control of the Senate, may be particularly ill-suited to the exercise of presidential duties due to reasons of health and age.”³⁰

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

“Bumping” or Supplantation. This question centers on the 1947 Succession Act provision that officers acting as President under the act do so only until the disability or failure to qualify of any officer higher in the order of succession is removed. If the disability is removed, the previously entitled officer can supplant (“bump”) the person then acting as President. For instance, assuming the death, disability, or failure to qualify of the President, Vice President, the Speaker, the President Pro Tempore, or a senior cabinet secretary³¹ is acting as President. Supplantation could take place under any one of several scenarios.

²⁷ Akhil Amar, Testimony before the Senate Committees on the Judiciary and Rules and Administration, Sept. 16, 2003, p. 2. Available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2603], visited March 20, 2007.

²⁸ Howard M. Wasserman, Testimony, p. 4.

²⁹ Most often cited is the example of Speaker John McCormick and President Pro Tempore Carl Hayden, who were first and second in line of presidential succession for 14 months following the assassination of President John Kennedy in 1963. Rep. McCormick was 71 at the time of the assassination, and Sen. Hayden was 86, and visibly frail.

³⁰ Miller Baker, Testimony, p. 11.

³¹ “Senior cabinet secretary” or “officer” in this section refers to the secretary of the senior executive department, under the Succession Act of 1947, as amended.

- Death of the President, Vice President, Speaker and President Pro Tempore: the senior cabinet secretary is acting as President. The House elects a new Speaker, who, upon meeting the requirements, i.e., resigning as a House Member and as Speaker, then “bumps” the cabinet secretary, and assumes the office of Acting President. If the President Pro Tempore were serving as Acting President, he or she could be similarly bumped by a newly-elected Speaker. Both persons would be out of a job under this scenario: the President Pro Tempore, by virtue of having resigned as Member and officer of Congress in order to become Acting President,³² and the senior cabinet secretary, by virtue of the fact that, under the act, “The taking the oath of office ... [by a cabinet secretary] shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.”³³
- Disability of the President and Vice President: the Speaker is Acting President. Either the President or Vice President could supplant after recovering, but the Speaker, or the President Pro Tempore, should that officer be acting, would be out of a job, due to the requirements noted above.
- Failure to Qualify of the Speaker or President Pro Tempore: the President and Vice President are disabled, or the offices are vacant. The Speaker and the President Pro Tempore decline to resign their congressional membership and offices, and the acting presidency passes to the senior cabinet officer. At some point, the Speaker or the President Pro Tempore decides to claim the acting presidency, resigns, and “bumps” the serving cabinet secretary. The same scenario could occur to a President Pro Tem supplanted by the Speaker.

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

Imagine a catastrophic attack kills the president, vice-president and congressional leadership. The secretary of state assumes the duties of the presidency. But whenever Congress elects a new Speaker or president pro tem, that new leader may ‘bump’ the secretary of state. The result would be three presidents within a short span of time.³⁴

Moreover, as noted previously, any person who becomes acting President must resign his previous position, in the case of the Speaker and President Pro Tempore, or have his appointment vacated by the act of oath taking. It is certainly foreseeable that public officials might hesitate to forfeit their offices and end their careers before taking on the acting presidency, particularly if the prospect of supplantation loomed.

³² 3 U.S.C. § 19 (b).

³³ 3 U.S.C. § 19 (d)(3).

³⁴ Howard M. Wasserman, Testimony, p. 8.

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

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

Between Nomination and Election. This first contingency would occur if there were a vacancy in a major party ticket before the presidential election. This possibility has been traditionally covered by political party rules, with both the Democrats and Republicans providing for replacement by their national committees.³⁵ For example, in 1972, the Democratic Party filled a vacancy when vice presidential nominee Senator Thomas Eagleton resigned at the end of July, and the Democratic National Committee met on August 8 of that year to nominate R. Sargent Shriver as the new vice presidential candidate.

Between the Election and the Meeting of the Electors. The second would occur in the event of a vacancy after the election, but before the electors meet to cast their votes in December. This contingency has been the subject of speculation and debate. Some commentators suggest that, the political parties, employing their rules providing for the filling of presidential and vice presidential vacancies, would designate a substitute nominee. The electors, who are predominantly party loyalists, would presumably vote for the substitute nominee. Given the unprecedented nature of such a situation, however, confusion, controversy, and a breakdown of party discipline among the members of the electoral college might also arise, leading to further disarray in what would already have become a problematical situation.³⁶

³⁵ See The Republican National Committee Rules, 2000, Rule No. 9; The Charter and ByLaws of the Democratic Party of the U.S., Sept. 25, 1999, Art. III, § 1(c).

³⁶ U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Presidential Succession Between the Popular Election and the Inauguration*, hearing, 103rd Cong., 2nd sess., Feb. 2, 1994 (Washington: GPO, 1995), pp. 12-13.

Between the Electoral College Vote and the Electoral Vote Count by Congress. A third contingency would occur if there were a vacancy in a presidential ticket during the period between the time when the electoral votes are cast (Monday after the second Wednesday in December) and when Congress counts and certifies the votes (January 6). The succession process for this contingency turns on when candidates who have received a majority of the electoral votes become President-elect and Vice President-elect. Some commentators doubt whether an official President- and Vice President-elect exist prior to the electoral votes being counted and announced by Congress on January 6, maintaining that this is a problematic contingency lacking clear constitutional or statutory direction.³⁷ Others assert that once a majority of electoral votes has been cast for one ticket, then the recipients of these votes become the President- and Vice President-elect, notwithstanding the fact that the votes are not counted and certified until the following January 6.³⁸ If so, then the succession procedures of the 20th Amendment, noted earlier in this report, would apply as soon as the electoral votes were cast; namely, if the President-elect dies, then the Vice President-elect becomes the President-elect. This point of view receives strong support from the language of the House committee report accompanying the 20th Amendment. Addressing the question of when there is a President-elect, the report states:

It will be noted that the committee uses the term “President elect” in its generally accepted sense, as meaning the person who has received the majority of electoral votes, or the person who has been chosen by the House of Representatives in the event that the election is thrown into the House. It is immaterial whether or not the votes have been counted, for the person becomes the President elect as soon as the votes are cast.³⁹

Between the Electoral Vote Count and Inauguration. As noted previously, the 20th Amendment covers succession in the case of the President-elect, providing that in case of his death, the Vice President-elect becomes President-elect.⁴⁰ Further, a Vice President-elect succeeding under these circumstances and subsequently inaugurated President would nominate a Vice President under provisions of the 25th Amendment. A major concern that has risen about this period since the terrorist attacks of September 11, 2001, centers on the order of succession under the Succession Act of 1947. What might happen in the event of a mass terrorist attack during or shortly after the presidential inaugural? While there would be a President, Vice President, Speaker, and President Pro Tempore during this period, who would step forward in the event an attack removed these officials? This question takes on additional importance since the Cabinet, an important element in the order of succession, is generally in a state of transition at this time. The previous administration’s officers have generally resigned, while the incoming

³⁷ Ibid., pp. 39-40.

³⁸ Ibid., p. 12.

³⁹ U.S. Congress, House, *Proposing an Amendment to the Constitution of the United States*, report to accompany S.J.Res. 14, 72nd Cong., 1st sess., Rept. 345 (Washington, GPO: 1932), p. 6.

⁴⁰ Whether this provision would also cover disability or resignation is a question that merits further study.

administration's designees are usually in the midst of the confirmation process. It is not impossible to envision a situation in which not a single cabinet officer will have been confirmed by the Senate under these circumstances, thus raising the prospect of a de facto decapitation of the executive branch. This concern has led to several proposals in the 108th and 109th Congresses.⁴¹

Legislation in the 109th Congress

Succession-related legislative proposals introduced in the 109th Congress fell into two basic categories. First was "perfecting" legislation that sought to include the Secretary of the Department of Homeland Security (DHS) in the existing order of succession, but would not otherwise have provided major changes in the Succession Act of 1947. Second were proposals that sought broader changes to the existing law. Both categories are analyzed later in this section. While both the House and Senate considered free-standing bills that provided for inclusion of the Secretary of DHS, this action was incorporated into comprehensive legislation to enhance and reauthorize the USA Patriot Act.

The 109th Congress Acts: The USA Patriot Improvement and Reauthorization Act of 2005 — P.L. 109-177. Two bills to incorporate the Secretary of Homeland Security in the line of succession, S. 422 and H.R. 1455, were introduced in the 109th Congress and received action in their respective chambers. Both are analyzed in detail later in this report.

At the same time the House and Senate considered these free-standing bills in autumn, 2005, both chambers were also moving toward enactment of comprehensive legislation revising and extending the USA Patriot Act of 2001 (P.L. 107-56, 115 Stat. 272). The vehicle for legislation was H.R. 3199 (Representative James Sensenbrenner), which the House passed on July 21, 2005 and the Senate on July 29. The two chambers voted on different versions of the bill, so a conference committee was convened to arrive at a final version of the bill. Neither the House nor Senate versions passed in July included any provisions relating to presidential succession, but language inserting the Secretary of DHS was included as Title V, Section 503, in the report filed by the conferees on December 8. The House agreed to the report on December 14, while the Senate took longer to concur, agreeing to the report on March 2, 2006. President Bush signed the bill into law on March 9.

Section 503 reads as follows, "Section 19(d)(1) of Title 3, United States Code, is amended by inserting ' , Secretary of Homeland Security' after 'Secretary of Veterans Affairs.'"⁴² The record does not reveal any information about the decision to include the DHS Secretary, but it should be noted that the conference report honored tradition by including the secretary at the end of the line of succession, rather

⁴¹ For information on proposed legislation in the 108th Congress, please consult CRS Report RL31761, *Presidential and Vice Presidential Succession: An Overview and Current Legislation*, by Thomas H. Neale.

⁴² U.S. Congress, Conference Committees, 2005, *USA Patriot Improvement and Reauthorization Act of 2005*, conference report to accompany H.R. 3199, H.Rept. 109-333, 105th Cong. 1st sess. (Washington: GPO, 2006), p. 56.

than after the Attorney General, as was proposed in both S. 422 and H.R. 1455. The report's joint explanatory text is similarly economical: "section 503 of the Conference Report is a new section and fills a gap in the Presidential line of succession by including the Secretary of Homeland Security."⁴³

Free-Standing Proposals to Revise the Order of Succession to Include the Secretary of Homeland Security. Perhaps of most immediate interest in the case of presidential succession was the establishment in 2002 of the Department of Homeland Security (DHS). The secretaries of newly-created cabinet-level departments are not automatically included in the order of succession; this is normally accomplished by an appropriate provision in the legislation authorizing the new department.⁴⁴ In some instances, however, the secretary's inclusion has been omitted from the authorizing act, and has been accomplished later in "perfecting" legislation. The act establishing the DHS in the 107th Congress (P.L. 107-296), did not incorporate the secretary of the new department in the line of presidential succession, leading to the introduction of proposals for the secretary's inclusion in the 108th and 109th Congresses.

S. 422 and H.R. 1455. The primary purpose of these two 109th Congress bills was to include the Secretary of Homeland Security in the line of presidential succession. S. 442 was introduced on February 17, 2005, by Senator Michael DeWine, and was cosponsored by Senator Herb Kohl. The companion bill, H.R. 1455, was introduced in the House on April 5, 2005, by Representative Tom Davis, and was co-sponsored by Representative Todd Platts. Both bills departed from tradition, however, by proposing to place the Secretary of Homeland Security in the line of succession directly following the Attorney General. In this position, the secretary would have been eighth in line to succeed the President, rather than 18th, at the end of the order, following the Secretary of Veterans Affairs. Had it passed, this realignment would have had historical significance, as the four offices that would immediately precede the Secretary of Homeland Security constitute the original Cabinet, as established between 1789 and 1792 during the presidency of George Washington — the Secretaries of State, the Treasury, Defense, and the Attorney General. They are sometimes referred to as the "big four."⁴⁵

This departure from tradition derived from heightened concern over the question of continuity of government.⁴⁶ It was argued that the proposed placement of the DHS secretary will have at least two advantages: first, the Department of Homeland Security is one of the largest and most important executive departments, with many responsibilities directly affecting the security and preparedness of the nation. Both

⁴³ Ibid., p. 109.

⁴⁴ See 3 U.S.C. § 19 "Amendments" for examples.

⁴⁵ The Secretary of Defense supplanted the Secretary of War in 1947 when the Department of Defense was established in 1947. Attorneys general served in the Cabinet beginning in 1792, although the Department of Justice was not established until 1870.

⁴⁶ For additional information on the issue of continuity of government, please consult CRS Report RS21089, *Continuity of Government: Current Federal Arrangements and the Future*, by Harold C. Relyea.

its size and crucial role were cited as arguments for placing the Secretary of DHS high in the order of succession. Second, the Secretary of Homeland Security is charged with critically important responsibilities in these areas, and may be expected to possess the relevant knowledge and expertise that arguably justify placing this official ahead of 10 secretaries of more senior departments, particularly in the event an unprecedented disaster were to befall the leadership of the executive branch.

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

S. 442 was read twice and referred to the Senate Committee on Rules and Administration on February 17, 2005. On July 26, the committee was discharged by unanimous consent, and the bill passed the Senate without amendment by unanimous consent the same day. S. 442 was received in the House on July 27; it was referred to the House Judiciary Committee and on September 19 further referred to the Subcommittee on the Constitution. No further action was taken during the balance of the 109th Congress.

On April 5, 2005, H.R. 1455 was referred to the House Committee on Government Reform, and in addition, to the House Committee on the Judiciary for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fell within the jurisdiction of the committee concerned. In Judiciary, the bill was subsequently referred to the Subcommittee on the Constitution (on May 10). On October 20, the bill was considered in the Committee on Government Reform, and was reported favorably to the full House by voice vote. No further action was taken during the balance of the 109th Congress.

Proposals for Substantive Revisions to the Succession Act of 1947.

Other bills introduced in the 109th Congress called for substantive changes in the order of succession beyond the Vice President. Some of the concerns expressed by critics of the 1947 act were reflected in these proposals, which are examined below.

H.R. 1943 and S. 920, the Presidential Succession Act of 2005.

These similar bills were both introduced on April 27, 2005, by Representative Brad Sherman and Senator John Cornyn, respectively. Both would also have added the Secretary of Homeland Security to the order of succession, but they went beyond S. 422 and H.R. 1455 in several respects, addressing various “post-9/11” concerns. The bills would not only have amended the Succession Act, they also expressed the “sense of Congress” on succession contingencies that could occur between a presidential campaign and the inauguration of an incoming President.

Section 1 identified each bill’s short title, as noted above. Section 2 in each case sought to revise the Succession Act (3 U.S.C. 19) in several respects. First, it would have incorporated the DHS Secretary in the line of succession, but directly following the Secretary of Veterans Affairs, rather than following the Attorney General. It also added the following United States Ambassadors to order of succession, following the DHS Secretary: (1) the United Nations, (2) the United Kingdom (Great Britain), (3)

Russia, (4) China, and (5) France. The intent here was to add high-ranking federal officers to the succession list who are normally *not* physically present in Washington at any given time, thus assuring there would be a President in the event of a worst case scenario, the mass “decapitation” of the U.S. Government’s political leadership by a successful attack on the capital.

Section 2 in H.R. 1943 would also have revised existing language to establish the use of the term “Acting President” throughout the section. Although the phrase “act as” or “acting as” President appears frequently throughout the section, this language sought to establish the term and the position more solidly in law.

Finally, both bills made major changes with respect to succession by cabinet officers. The present mechanisms of succession by the Speaker of the House of Representatives or the President Pro Tempore of the Senate would not change. If, however, a cabinet officer became Acting President, then he or she would continue to serve the balance of the presidential term of office, *unless* the service was due to disability of the incumbent. In that case, the President or Vice President would resume office once the disability was removed. This provision would have eliminated supplantation or “bumping” of cabinet officers serving as Acting President, thus reducing the potential for executive instability or “revolving door” Presidents, as discussed earlier in this report.

In addition, another change to the act proposed to eliminate the provision that acceptance of the acting presidency by a cabinet officer constitutes an automatic resignation from his or her office. This change would have had the effect of allowing a cabinet officer to take a de facto leave of absence to serve as Acting President, particularly if the succession were connected with a disability on the part of the Vice President.

This provision addressed several issues cited earlier in this report that have been noted by critics of the Succession Act of 1947. First, by eliminating the displacement of a cabinet officer acting as President, except in cases of presidential or vice presidential inability, it would have removed a potential source of instability: once installed as acting President, the Cabinet officer would remain in this position for the balance of the presidential term, unless, as noted above, the officer were acting due to the presumably temporary inability of the President or Vice President. Further, under these circumstances it would almost certainly have removed the possibility of a President and Vice President being succeeded by an Acting President of a different party, which has proved to be an issue of continuing concern since passage of the Succession Act of 1947.⁴⁷

The section concluded by recasting the requirement that any cabinet officer serving as Acting President must hold his or her permanent office “by and with the

⁴⁷ This assumption is grounded in the tradition that Presidents almost always choose members or supporters of their own political party for cabinet positions. There have been exceptions to this practice; for instance, Secretary of Transportation Norman Mineta served as a Democratic Representative in the 94th through 104th Congresses (1975-1996), and as Secretary of Commerce in the Clinton Administration (2000-2001).

advice and consent of the Senate, prior to the time the powers and duties of the President devolve to such officer ... and ... not under impeachment by the House of Representatives at the time the powers and duties of the office of the President devolve upon them.” Section 2 of both bills proposed routine conforming amendments to the Succession Act’s language in the *U.S. Code*.

Section 3 of both bills declared the sense of Congress concerning electoral college procedures in the event a presidential or vice presidential nominee should die or be permanently incapacitated. First, it advised the presidential and vice presidential nominees of political parties to designate substitute candidates who would receive the electoral votes otherwise cast for them if they were to die or be permanently incapacitated. Second, it advised electors pledged to vote for a presidential nominee to cast their electoral votes for the vice presidential nominee if the presidential nominee had died or was permanently incapacitated. Third, if the vice presidential nominee suffered the same circumstances, then the electors were advised to vote for the substitute vice presidential nominee. Finally, if both candidates died or were permanently incapacitated, then the electors were advised to vote for both substitute nominees for President and Vice President. The section concluded by advising the political parties to establish rules and procedures consistent with these practices.

The purpose of Section 3 was to eliminate the uncertainties that would surround the death or permanent incapacity of a presidential or vice presidential nominee at any time between the nomination and casting of electoral votes. These issues have been discussed previously in this report under “Succession During Presidential Campaigns and Transitions.” Although the political parties would not have been compelled to accept Section 3’s recommendations, they (the recommendations) would carry considerable weight as the expressed sense of Congress, while their apparent prudence and common sense might have persuaded the national committees of the major parties to consider them seriously or to adopt them. In this sense, the section provided a template or “model legislation” for the parties.

Section 4 declared the sense of Congress that continuity of leadership in the federal government should be assured during periods of presidential transition and inauguration. Section 4 of H.R. 1943 included a preamble that cited the Presidential Transition Act of 1963 (3 U.S.C. 102), which seeks to avoid disruption in the U.S. Government’s functions during these periods, and also noted that the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) made specific recommendations concerning continuity of government during the transition from an outgoing presidential administration to an incoming one, particularly with respect national security officials.

The remainder of Section 4 was identical in both bills. It specifically suggested that outgoing Presidents should submit nominations proposed by the President-elect for appointed offices in the line of succession during the transition period. It further urged that the Senate conduct and finalize its confirmation proceedings for these nominations between January 3, the date on which new Congresses convene, and January 20, when new presidential terms begin. Finally, outgoing Presidents were urged to sign and deliver the commissions for these officials before leaving office on January 20. The intention here was to address the contingency identified earlier in

this report: the awkward period around the inauguration when the outgoing Cabinet has resigned, but the newly nominated cabinet officers have yet to be approved, and are not yet eligible to succeed to the presidency.

Traditionally, Presidents-elect announce their cabinet choices during the transition period that normally takes place between election day and January 20 of the following year, when the newly-elected President actually assumes office. Also during this period, the outgoing President's cabinet officers traditionally submit their resignations, generally effective on or before inauguration day. Although investigations of and hearings on cabinet nominees for an incoming administration are often under way before the changeover, official nominations by an incoming President, and subsequent advice and consent by the Senate, cannot occur until after the new President has assumed office. Frequently, this process continues for some weeks, or longer in the case of controversial or contested nominations, so that the full Cabinet may not be sworn until well after the inauguration. Representative Sherman and Senator Cornyn, sponsors of H.R. 1943 and S. 920, respectively, and other observers, viewed this gap, particularly in the confirmation and swearing-in of cabinet officers included in the line of succession, as a threat to continuity in both the presidency and in executive branch management.

One advantage conferred by this proposal would be that cabinet secretaries, unlike elected officials, do not serve set terms of office which expire on a date certain. Further, the process recommended by H.R. 1943 and S. 920 had the additional advantage of being able to be implemented without legislation or a constitutional amendment. If the level of interpersonal and bipartisan cooperation envisaged in these bills could have been attained, an incoming President might assume office on January 20 with a full Cabinet, or at least key officers in the line of succession (e.g., the Secretaries of State, the Treasury, Defense, and the Attorney General) already sworn and installed, thus reducing the potential for disruption of the executive branch by a terrorist attack. In addition to the national security-related advantage this would confer, it arguably provided an impetus to streamlining the sometimes lengthy and contentious transition and appointments process faced by all incoming administrations. It would also, however, have faced substantial obstacles, since its success would be dependent on high levels of good will and cooperation between incumbent Presidents and their successors, and between the political parties in the Senate. Moreover, it would have imposed a sizeable volume of confirmation-related business on both the lame duck and newly-sworn Congresses during the 10 weeks following a presidential election. During this period, the expiring Congress traditionally adjourns sine die, while the new Congress generally performs only internal business and counts the electoral votes between its own installation on January 3 and the presidential inauguration.

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

Other Options for Change

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

One proposal, suggested by John C. Fortier⁴⁸ at joint Senate committee hearings held in September, 2003, would have Congress establish a number⁴⁹ of additional federal officers whose specific duties and function would be to be ready to assume the acting presidency if necessary. Fortier envisions that the President would appoint them, subject to Senate confirmation, and that obvious candidates would be governors, former presidents, vice presidents, cabinet officers, and Members of Congress, in other words, private citizens who have had broad experience in government. They would receive regular briefings, and would also serve as advisors to the President. A further crucial element is that they would be located outside the Washington, D.C. area, in order to be available in the event of a governmental “decapitation.” Fortier further suggested that these officers should be included ahead of cabinet officers “lower in the line of succession.”⁵⁰ Although he was not more specific in his testimony, it could be argued that these officers might be inserted after the “big four”, i.e., the Secretaries of State, the Treasury, and Defense, the Attorney General, and, possibly the Secretary of Homeland Security, should that officer be included at that place, as proposed in some pending legislation.

Miller Baker offered other proposals during his testimony at the September, 2003, hearings, all of which would require amending the Succession Act of 1947. Under one, the President would be empowered to name an unspecified number of state governors as potential successors. The constitutional mechanism here would be the President’s ability to call state militias (the National Guard) into federal service.⁵¹ Baker argues that, by virtue of their positions as commanders-in-chief of their state contingents of the National Guard, governors could, in effect be transformed into federal “officers” by the federalization of the Guard.⁵²

Another proposal by Fortier would amend the Succession Act to establish a series of assistant vice presidents, nominated by the President, and subject to approval by advice and consent of the Senate. These officers would be included in the order of succession at an appropriate place. They would be classic “stand-by”

⁴⁸ Dr. Fortier is executive director of the Continuity of Government Commission at the American Enterprise Institute, a non-governmental study commission identified earlier in this report.

⁴⁹ Fortier suggests four or five officers.

⁵⁰ John Fortier, Testimony before the Senate Committees on the Judiciary and Rules and Administration, Sept. 16, 2003, p. 7. Available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2604], visited Feb. 25, 2004.

⁵¹ U.S. Constitution, Article II, Section 2, clause 1.

⁵² Miller Baker, Testimony, p. 10.

equipment: their primary function would be to be informed, prepared, and physically safe, ready to serve as Acting President, should that be required.⁵³

Professor Akhil Amar proposed a similar measure, that the cabinet position of assistant vice president established by law, again, nominated by the President and subject to confirmation by the Senate. In his testimony before the September, 2003, joint Senate committee hearings, he suggested that presidential candidates should announce their choices for this office during the presidential campaign. This would presumably enhance the electoral legitimacy of the assistant vice president, as voters would be fully aware of the candidates' choices for this potentially important office, and include this in their voting decisions.⁵⁴

A further variant was offered by Howard Wasserman during his joint Senate committee hearing testimony. He suggested establishment of the cabinet office of first secretary, nominated by the President and confirmed by the Senate. The first secretary's duties would be the same as those of the offices proposed above, with special emphasis on full inclusion and participation in administration policies, "This officer must be in contact with the President and the administration, as an active member of the cabinet, aware of and involved in the creation and execution of public policy."⁵⁵

Finally, Fortier proposed a constitutional amendment that would eliminate the requirement that successors be officers of the United States, empowering the President to nominate potential successors beyond the Cabinet, subject to advice and consent by the Senate. Such an amendment, he argues, would "... eliminate any doubts about placing state governors in the line of succession, and could provide for succession to the Presidency itself (as opposed to the acting Presidency)."⁵⁶ Fortier envisions that these persons would be "eminently qualified" to serve. As examples, he suggested that President George W. Bush might nominate, "... former President George H.W. Bush and former Vice President Dan Quayle, both of whom no longer live in Washington, to serve in the line of succession. Similarly, a future Democratic President might nominate former Vice Presidents Al Gore and Walter Mondale to serve in the statutory line of succession."⁵⁷

Concluding Observations

Seemingly a long-settled legislative and constitutional question, the issue of presidential and vice presidential succession in the United States gained a degree of urgency following the events of September 11, 2001. Old issues have been revisited, and new questions have been asked in light of concerns over a potentially disastrous

⁵³ John Fortier, Testimony, p. 13.

⁵⁴ Akhil Amar, Testimony, p. 2-3.

⁵⁵ Howard Wasserman, Testimony, p. 6.

⁵⁶ John Fortier, Testimony, p. 14

⁵⁷ Ibid.

“decapitation” of the U.S. Government as the result of a terrorist attack, possibly by use of weapons of mass destruction.

The 109th Congress acted to insert the office of Secretary of Homeland Security into the current line of succession — remedying an oversight in the legislation that created the department in 2002 — in Title V of the USA Patriot Improvement and Reauthorization Act of 2005 (P.L. 109-177, 120 Stat. 192).

Further revisions to current succession legislation, especially substantive changes, are less likely in the short run, however, although the foundations for future consideration have been laid. In the private sector, the American Enterprise Institute’s Continuity of Government Commission is scheduled to address continuity in the presidency, having completed studies on continuity of the Congress. Further, the hearings conducted in September, 2003 by the Senate Committees on the Judiciary and Rules and Administration and by the House Committee on the Judiciary’s Subcommittee on the Constitution in October, 2004, provided a forum for public discussions of current succession provisions, their alleged shortcomings, and a wide range of proposals for change. In the final analysis, however, it could require strong and consistent support from congressional leadership, the pressure of an aroused public, or a galvanizing event in the form of some disaster, or threat of disaster, to move the question of presidential succession in the post 9/11 era to the legislative front burner.

Table 1. Presidential Successions by Vice Presidents

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

* Party Affiliation:

D = Democratic

R = Republican

W = Whig

** Cause of Vacancy:

1 = death by natural causes

2 = assassination

3 = resignation

Table 2. Vice Presidential Successions Under the 25th Amendment⁵⁸

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

* Party Affiliation:

R = Republican

** Cause of Vacancy:

1 = resignation

2 = succession to the presidency

⁵⁸ Prior to ratification of the 25th Amendment, the vice presidency was vacant on 16 occasions. Eight resulted when the Vice President succeeded to the presidency (see Table 1). Seven resulted from the Vice President's death: George Clinton (Democratic Republican — DR), 1812; Elbridge Gerry (DR), 1814; William R. King (D), 1853; Henry Wilson (R), 1875; Thomas A. Hendricks (D), 1885; Garret A. Hobart (R), 1899; and James S. Sherman (R), 1912. One Vice President resigned: John C. Calhoun (D), in 1832.

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

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