

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is centered within the hourglass.

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February 2, 2009

Congressional Research Service

Report RL34692

*Presidential Succession: Perspectives, Contemporary
Analysis, and 110th Congress Proposed Legislation*

Thomas H. Neale, Government and Finance Division

October 3, 2008

Abstract. This report provides analytical perspective on presidential succession questions in U.S. history, identifies and assesses contemporary succession issues, and identifies and analyzes relevant legislation offered in the 110th Congress.

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CRS Report for Congress

Presidential Succession: Perspectives, Contemporary Analysis, and 110th Congress Proposed Legislation

October 3, 2008

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<http://wikileaks.org/wiki/CRS-RL34692>



Prepared for Members and
Committees of Congress

Presidential Succession: Perspectives, Contemporary Analysis, and 110th Congress Proposed Legislation

Summary

Presidential succession was widely considered to be a settled issue prior to the terrorist attacks of September 11, 2001. These events demonstrated the potential to disable 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. Members' concerns may be heightened as the 110th Congress prepares not only for its successor, but a change of administration, as well. Is the United States Government at greater risk of terrorist attack during this period of transition? Are present arrangements adequate to ensure continuity in the presidency in the event of a "worst-case" scenario? Some analysts and Members of Congress advocate modifications to existing laws to eliminate gaps and enhance procedures in the area of presidential succession.

Subsequent to the attacks on the World Trade Center and the Pentagon, a range of legislation relating to presidential succession has been introduced. To date, the change has been incremental: on March 9, 2006, the President signed the USA Patriot Improvement and Reauthorization Act of 2005 into law (H.R. 3199, Representative James Sensenbrenner, P.L. 109-177, 120 Stat. 192). Title V, Section 503 of this act revised the order of presidential succession to incorporate the Secretary of Homeland Security as 18th in the line, following the Secretary of Veterans Affairs.

In the 110th Congress, Representative Brad Sherman has introduced H.R. 540, which would: (1) expand the line of succession to include U.S. ambassadors to major foreign nations ; (2) make technical revisions to existing succession provisions in the U.S. Code; (3) declare the sense of Congress that the political parties should adopt procedures for the replacement of presidential and vice presidential candidates who die or are incapacitated before electoral votes are cast; and (4) declare the sense of Congress that outgoing Presidents should cooperate with Presidents-elect to insure that an incoming administration's cabinet officers should be nominated, approved and installed by inauguration. One other proposal, H.J.Res. 4, the Every Vote Counts Amendment, introduced by Representative Gene Green, deals with presidential succession within the broader context of electoral college reform.

This report will be updated as events warrant.

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Presidential Succession: Perspectives, Contemporary Analysis, and 110th Congress Proposed Legislation

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 through Sections 3 and 4 of 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, as amended, and the two constitutional amendments currently govern succession to the presidency.

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 chambers have introduced legislation addressing this question in the contemporary context.

Although the question of presidential succession has been considered both on Capitol Hill and in the public policy community, Congress has yet to consider a major revision of presidential succession procedures. In its most recent action, the 109th Congress 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).

This report provides analytical perspective on presidential succession questions in U.S. history, identifies and assesses contemporary succession issues, and identifies and analyzes relevant legislation offered in the 110th Congress. For additional 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.

Perspective: Presidential Succession in the Constitution and Federal Law, 1787-1967

Original Intent: Presidential Succession at the Constitutional Convention. Article II of the Constitution, as originally adopted, provided the most basic building block of succession procedures, stating that:

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

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

The 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

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

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

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

signed by the President.⁴ Although the Speaker and President Pro Tempore were thus incorporated in the line of succession, they would serve only temporarily, however, since the act also provided for a special election to fill the vacancy, unless it occurred late in the last full year of the incumbent's term of office.⁵ Finally, this and both later succession acts required that designees meet the constitutional requirements of age, residence, and natural born citizenship.

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

The Succession Act of 1886. 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 the same day 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.⁸ Congress subsequently passed the Succession Act of 1886 (24 Stat. 1) in order to insure the line of succession and guarantee that potential successors would be of the same party as the deceased incumbent. This legislation transferred succession after the Vice President from the President Pro Tempore and the Speaker to cabinet officers in the chronological order in which their departments were created, provided

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

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

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

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

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

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.

The 20th Amendment (1933). 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 April, 1945, Vice President Harry S. Truman succeeded as President on the death of Franklin D. Roosevelt. In June of 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.⁹ 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 bill¹⁰ 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 legislation¹¹ 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 in the nation's best interest.¹² After spirited debate, the Senate passed the measure on June 27, 1947, while House action followed on July 10. The bill as passed embodied Truman's request, but again deleted the special election provisions. The President signed it into law on July 18.

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).¹³ If there is no Speaker, or if that person 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,

⁹ "Special Message to the Congress on the Succession to the Presidency," June 19, 1945, *Public Papers of the Presidents of the United States, Harry S. Truman, 1945* (Washington: GPO, 1961), pp. 128-131.

¹⁰ H.R. 3587, 79th Congress.

¹¹ S. 564, 80th Congress.

¹² Feerick, *From Failing Hands*, pp. 207-208.

¹³ 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."

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.¹⁴ 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.

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. Freestanding legislation to remedy this omission was introduced in the 108th and 109th Congresses, but no action was taken on these bills.¹⁵ 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 (1967) 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.¹⁶ 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 1967.¹⁷

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

¹⁴ 3 U.S.C. 19 (d)(2).

¹⁵ Freestanding 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.

¹⁶ Following President Kennedy’s death, the vice presidency remained vacant for 14 months, until Vice President Hubert H. Humphrey was sworn in on January 20, 1965.

¹⁷ For additional information on presidential tenure, see CRS Report RS20827, *Presidential and Vice Presidential Terms and Tenure*, by Thomas H. Neale.

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.¹⁸

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

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

Contemporary Analysis: 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.¹⁹ A number of proposals to revise the Succession Act of 1947 have been introduced in the 108th through 110th 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

¹⁸ For additional information on presidential disability, see CRS Report RS20260, *Presidential Disability: An Overview*, by Thomas H. Neale.

¹⁹ 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.

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. Others reflect more recent concerns.

Do the Speaker and the President Pro Tempore Qualify as “Officers” for the Purposes of Presidential Succession? 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 is in question here is what the Constitution means by the word “Officer.” The interpretation of this phrase, and, by extension, whether the Speaker and President pro-tempore are constitutionally eligible to succeed the President has been perhaps the most durable element in the succession debate over time. Are they “officers” in the sense as noted in Article II, or are their positions as *officers of the Congress*, established in Article I, Sections 2 and 3, so fundamentally different that they are ineligible to succeed. 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 (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).

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.²⁰

²⁰ W. Miller Baker, Testimony before the Senate Committees on the Judiciary and Rules and Administration, September 16, 2003, p.8; available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=914&wit_id=2606]. Baker’s testimony cites additional supporting (continued...)

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.²¹ In addition, political issues also contributed to the debate in 1792. Fordham University Law School Dean and succession scholar John D. Feerick notes that the Federalist-dominated Senate insisted on inclusion of the President Pro Tempore and the Speaker. He cites contemporary sources that the Senate sought to exclude the Secretary of State largely because the incumbent was Thomas Jefferson, who was locked in a bitter dispute with Alexander Hamilton and his Federalist supporters. Jefferson was the acknowledged leader of the Anti-Federalists, the group that later emerged as the Jeffersonian Republican, or Democratic Republican, Party.²² It thus may be inferred that the provisions of the Succession Act of 1792 may have been the result of political machinations and personal animosities.

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 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*.²³

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.

²⁰ (...continued)
arguments for his assertion at considerable length.

²¹ Feerick, *From Failing Hands*, p. 59.

²² *Ibid.*, pp. 60-61.

²³ 241 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.

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.²⁴

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.

Democratic Principle and Party Continuity. These two interrelated issues collectively comprise what might be termed the political aspect of presidential succession. Democratic principle was perhaps the dominant factor contributing to the passage of the 1947 succession act. Simply stated, it is the assertion that presidential and vice presidential succession should be settled first on popularly elected officials, rather than the appointed members of the Cabinet, as was the case under the 1886 act. According to Feerick, the 1886 act’s provisions aroused criticism not long after Vice President Harry Truman became President on the death of Franklin D. Roosevelt.²⁵ 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 late 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

²⁴ 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/hearings/testimony.cfm?id=914&wit_id=2605].

²⁵ Feerick, *From Failing Hands*, pp. 204-205.

Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.²⁶

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 longest-serving Senator of the majority party.²⁷

Against the case for democratic succession urged by President Truman, the value of party continuity, best assured by having a cabinet officer in the first place of succession, 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 36 of the 61 intervening years. As Yale University Professor Akhil Amar noted in his testimony at the 2003 joint Senate committee hearing, "... [the current succession provisions] can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B?"²⁸ 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."²⁹

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 to the office. 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.³⁰ As Miller

²⁶ *Public Papers of the Presidents of the United States, Harry S. Truman, 1945*, p. 129.

²⁷ 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.

²⁸ Akhil Amar, Testimony before the Senate Committees on the Judiciary and Rules and Administration, September 16, 2003, p. 2. Available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=914&wit_id=2603].

²⁹ Howard M. Wasserman, Testimony, p. 4.

³⁰ 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 (continued...)

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."³¹ 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 enabling infrastructure that comprises 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, the Vice President, the Speaker, the President Pro Tempore, or a senior cabinet secretary³² is acting as President. Supplantation could take place under any one of several scenarios.

- Death of the President, Vice President, Speaker and President Pro Tempore: the senior cabinet secretary is acting as President. The 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,³³ 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.”³⁴

³⁰ (...continued)

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.

³¹ Miller Baker, Testimony, p. 11.

³² “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.

³³ 3 U.S.C. § 19(b).

³⁴ 3 U.S.C. § 19(d)(3).

- 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.

Should these or similar scenarios occur, critics assert that the supplantation provisions could lead to dangerous instability in the presidency during a time of national crisis. For example, one witness testified as follows:

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.³⁵

Moreover, as noted previously, any person who becomes acting President must resign his previous position, in the case of the Speaker and President Pro Tempore, or have his appointment vacated by the act of oath taking. It is certainly foreseeable that public officials might hesitate to forfeit their offices and end their careers before taking on the acting presidency, particularly if the prospect of supplantation loomed. The “bumping” question has been used by critics of legislative succession as an additional argument for removing the Speaker and President Pro Tempore from the 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 (see H.R. 540, 110th Congress, examined later in this report) 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.

³⁵ Howard M. Wasserman, Testimony, p. 8.

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.³⁶ 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. A more problematic example of nominee replacement occurred following the death of Vice President James S. Sherman on October 30, 1912, just days before the November 5 election. Sherman was both incumbent and Republican nominee for Vice President.³⁷ The Republican National Committee met after election day and appointed Nicholas M. Butler to replace Sherman on the ticket, and the eight Republican electors duly cast their votes for Butler.³⁸

Between the Election and the Meeting of the Electors. The second contingency would occur in the event of a vacancy after the election, but before the electors meet to cast their votes in December. This eventuality has been the subject of speculation and debate. Some commentators suggest that the political parties would follow their rules to provide for the filling of presidential and vice presidential vacancies and designate a substitute nominee. It is assumed that the electors, who are predominantly party loyalists, would vote unanimously 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.³⁹ For instance, an individual elector or group of electors might justifiably argue that they were nominated and elected to vote for a

³⁶ See Republican Party Rules (2004), Rule No. 9, available at [<http://www.gop.com/About/Rules6-10.htm>]; The Charter and Bylaws of the Democratic Party of the U.S., February 3, 2007, Article Three, Section 1(c), available at [http://s3.amazonaws.com/apache.3cdn.net/58e635582dc516dd52_5wsmvyn09.pdf].

³⁷ The incumbent President and Republican presidential nominee was William Howard Taft.

³⁸ Michael Nelson, *A Heartbeat Away*, (New York, Priority Press: 1988: p. 58).

³⁹ 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., February 2, 1994 (Washington: GPO, 1995), pp. 12-13.

particular candidate, that the death or withdrawal of that candidate released them from any prior obligation, and that they were henceforth free agents, able to vote for any candidate they chose.

The historical record does not provide much guidance as to this situation. Horace Greeley, the 1872 presidential nominee of the Democratic and Liberal Republican Parties died on November 29, of that year, several weeks after the November 5 election day. As it happened, 63 of the 66 Greeley electors voted for other candidates, and Congress declined to count the three cast for Greeley on the grounds that electoral votes for a dead person were invalid.⁴⁰ Even so, the question as to the validity of the Greeley electoral votes was of little concern, since the “stalwart” or “regular” Republican nominee, Ulysses S. Grant, had won the election in a landslide, gaining 286 electoral votes.

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 the issue of 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.⁴¹ 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 6.⁴² 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.⁴³

⁴⁰ U.S. Congress, House of Representatives, *Counting Electoral Votes. Proceedings and Debates of Congress Relating to Counting the Electoral Votes for President and Vice President of the United States*, 44th Cong. 2nd sess., Misc. Doc. No. 13 (Washington: GPO, 1877), pp. 363-380.

⁴¹ *Ibid.*, pp. 39-40.

⁴² *Ibid.*, p. 12.

⁴³ U.S. Congress, House, *Proposing an Amendment to the Constitution of the United States*, (continued...)

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.⁴⁴ 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 administration's designees are usually in the midst of the confirmation process. It is possible 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, at least for the purposes of presidential succession.

110th Congress: Proposed Legislation

After considerable activity in recent years, only two succession-related measures have been introduced to date in the 110th Congress. One, H.R. 540, the Presidential Succession Act of 2007, addresses several familiar issues in post-9/11 succession, while the second, H.J.Res. 5, the Every Vote Counts Amendment, deals with succession tangentially, within the context of presidential election reform.

H.R. 540, the Presidential Succession Act of 2007

This bill was introduced in the 110th Congress on January 17, 2007, by Representative Brad Sherman. It has been referred to the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Committee on the Judiciary. For the purposes of examination and analysis, H.R. 540 may be divided into three segments. The first, Section 2(a)(1) of the bill (Section 1 states the short title) would comprise a major revision of the order of presidential succession by extending it to five additional officers. The second, Section 2(a)(2-4) and (2)(b)(1-4) makes various technical changes and clarifications to the code, while also eliminating "bumping," and making it possible for cabinet secretaries to serve as acting President without leaving their existing appointment. The final part, comprising Sections 3 and 4, would address two specific succession-related problem areas not covered by law.

⁴³ (...continued)

report to accompany S.J.Res. 14, 72nd Cong., 1st sess., Rept. 345 (Washington, GPO: 1932), p. 6.

⁴⁴ Whether this provision would also cover disability or resignation is a question that merits further study.

At the time of this writing, no action has been taken on H.R. 540 beyond committee referral.

Expanding the Line of Succession — Section 2 (a)(1). This section would set a new precedent in the established order of presidential succession, extending it for the first time beyond the Vice President, congressional leadership and the Cabinet. It would amend Title 3, Section 19 (d) of the United States Code, as amended by the USA Patriot Improvement and Reauthorization Act of 2005 (120 Stat. 247) by expanding the lineup of potential presidential successors to include the U.S. ambassadors to the following five nations or organizations, in the following order:

- the United Nations;
- Great Britain (the United Kingdom);
- Russia (the Russian Federation);
- China; and
- France

These positions would be added to the end of the current order of succession, and would expand the number of designated potential successors from 18 to 23, beginning with the Vice President and ending with the U.S. Ambassador to France. The intent here is to add high-ranking federal officers to the succession list who are normally *not* physically present in the Washington area at any given time. Thus, in the event of a worst case scenario, the mass “decapitation” of the U.S. Government’s political leadership, there would almost certainly be an appropriate official available to assume the acting presidency.

While some observers might note that any of the five ambassadors are very unlikely to ever accede to the acting presidency, this provision does provide, they may argue, a useful “fail safe” procedure. The ambassadors concept might not be above criticism, however. Appointees to major embassies have not always been drawn from the top ranks of the U.S. diplomatic corps. Some ambassadors, particularly those appointed to posts in the United Kingdom and France, have occasionally been major contributors to the incumbent President’s campaign, or longtime friends and supporters who may have had limited experience in either diplomacy or public service. On the other hand, the passage of this legislation might confer a sense of the enhanced importance of these posts, which could itself assure the appointment of highly qualified and experienced ambassadors to the relevant nations.

Eliminating Supplantation or “Bumping” — Section 2(a)(2)(B). This section would end the practice by which an acting President could be “bumped” or supplanted by another officer higher on the order of succession, unless he or she was serving due to the disability of the President or Vice President. This would eliminate the uncertainties inherent under the current law. For example, under the provisions of H.R. 540, a cabinet officer serving as acting President due to the death of the President, Vice President, Speaker, and President Pro Tempore would not be

supplanted if the House of Representatives elected a new Speaker.⁴⁵ The acting President would continue to serve out the balance of the term. The bumping phenomenon is examined in greater detail earlier in this report, under the heading “‘Bumping’ or Supplantation.”

One element left unclear by the elimination of the bumping provision, and by this legislation in general, is how it would relate to the 25th Amendment. Would an acting President have the same authority as the President to nominate a Vice President to fill the vacancy in that office?⁴⁶ The 25th Amendment refers specifically to “the *President* [who] shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress (emphasis added).” Is this language sufficiently broad that it could be interpreted to confer the power to nominate a Vice President on the acting President, as well? Moreover, what would be the succession status of a newly confirmed Vice President be to the acting President who appointed him or her? Would the new Vice President’s *non-acting* status confer the ability to succeed an acting President? The proposed legislation is silent on this question.

Allowing Cabinet Officers to Serve as acting President Without Vacating Their Prior Appointment — Section (2)(a)(3)(A). Under current law, a cabinet officer acting as President under the Succession Act of 1947 automatically loses his job upon assuming the acting presidency. The law is clear and decisive on this matter: the cabinet officer does not need to tender his or her resignation, because “[t]he taking of the oath of office ... shall be held to constitute resignation of the office by virtue of the holding of which he qualifies to act as President.”⁴⁷

Section 2(a)(3)(A) of H.R. 540 would eliminate this requirement, substituting the following language:

The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection *shall not require* (emphasis added) his resignation from the office by virtue of the holding of which he qualifies to serve as acting President.⁴⁸

This change would eliminate one of the problematic elements in the existing provisions of the Succession Act of 1947. As noted previously, the automatic resignation requirement of the current language could arguably deter a distinguished

⁴⁵ Alternatively, if the incumbent Speaker temporarily resigned as Speaker to avoid serving as acting President, but then resumed the speakership, he or she would be able to “bump” the acting President at a later time. This possibility or option could arguably cast a shadow over the authority of the acting President. Eliminating bumping under these circumstances is intended to reduce the potential for uncertainty and confusion as to the authority of the acting President, as well as the possibility of “revolving door” acting Presidents.

⁴⁶ Recall that there could be an acting President only if the presidency *and* vice presidency were vacant due to the death or disability of the incumbents.

⁴⁷ 3 U.S.C. 19(d)(3).

⁴⁸ 3 U.S.C. 19(d)(3), as proposed to be amended by H.R. 540, 110th Congress.

and capable cabinet officer from accepting the acting presidency for a limited period of time, if, by doing so, he or she would forfeit his appointment as secretary of one of the executive departments. Under the proposed revision, the affected officer could serve as acting President for however long a period required, and still have the option of returning to the original position.

It should be noted, however, that while H.R. 540 would eliminate the automatic resignation provision, it does not contain language that would specifically authorize a cabinet officer serving as acting President to take a leave of absence from his or her permanent position, nor does it provide any of the detailed procedures that such a contingency might arguably require.

The section concludes by revising the language governing requirements for cabinet officers serving as acting President. The changes do not, however, alter the current requirements in Section 19. In order to serve as acting President, the cabinet officer must be: (1) “eligible to the office of President under the Constitution,” (2) must have been appointed to the office “by and with the advice and consent of the Senate, (3) prior to the time the powers and duties of the President devolve to such officer ... and ...(4) not [be] under impeachment by the House of Representatives at the time the powers and duties of the office of the President devolve upon them.”

Various Subsections — Conforming Amendments to Change Nomenclature: Establishing the Position of Acting President in Law.

A number of subsections scattered throughout the bill as conforming amendments would change the title and actions of persons substituting for the President from the formula currently found in the Title 3, Section 19 of the U.S. Code. The current law refers to persons “acting as President,” or describes who shall “act as President,” or who is “acting as President.” This formula would be changed to identify such persons as “acting President,” or persons who “serve as acting President,” or are “serving as acting President.” The purpose here is to establish the title of acting President in law, clarify various references to the position, and arguably to confer greater distinction on it.

Succession Procedures for Presidential Candidates — Section 3.

Sections 3 and 4 of H.R. 540 might be described as “aspirational” provisions, since they would promote changes in existing political arrangements through non-legislative means. Both sections would express the “sense of Congress” on succession and continuity of government questions that are not currently covered in the Constitution or the U.S. Code.

Section 3 would declare the sense of Congress with respect to succession arrangements for presidential and vice presidential party nominees. It recommends that the political parties (and, presumably, independent candidacy organizations) adopt the following specific procedures:

- each party's presidential and vice presidential nominees should announce the names of replacement candidates for both offices at the party's national convention;
- in the event the presidential nominee is deceased or permanently incapacitated prior to date on which presidential electors convene in the states, the electors would instead vote for the vice presidential nominee as President;
- in the event the vice presidential nominee is deceased or permanently incapacitated under the aforementioned circumstances, the electors would instead vote for the stand-by vice presidential candidate designated by the nominees at the convention;
- in the event both candidates are deceased or permanently incapacitated under the aforementioned circumstances, then the electors would vote for the stand-by candidates for both offices designated by the nominees at the convention; and
- the parties should establish new rules and procedures that would incorporate the procedures recommended in the legislation.

The purpose of Section 3 is 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 be compelled to accept these recommendations, they (the recommendations) would carry considerable weight as the expressed sense of Congress. It may be argued that their apparent prudence and common sense might persuade the national committees of the major parties to consider them seriously or to adopt them. In this sense, the section might be considered as providing a template or "model legislation" for the parties.

Critics, however, might assert that such a "sense of Congress" recommendation constitutes unprecedented government intervention in the internal governance of the political parties. It could, they might argue, be used in the future to justify further intrusions into the activities of the political parties and other non-governmental organizations which have been historically regarded as private associations that perform quasi-public functions, but have traditionally been subject to minimal intrusion by the federal government.

Guaranteeing Cabinet Continuity During Presidential Transitions
— Section 4. This section also expresses the sense of Congress, in this case on "the continuity of government and the smooth transition of executive power," in a series of findings. The findings would declare the sense of Congress that continuity of leadership in the federal government should be assured during periods of presidential transition and inauguration. They urge the incumbent president and President-elect to "work together ... with the Senate to the extent determined appropriate by the Senate, to ensure a smooth transition of executive power...." The findings further cite the Presidential Transition Act of 1963 (3 U.S.C. 102), which

seeks to avoid disruption of the functions of the federal government during these periods, and also note 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 to national security officials.

After stating these findings, the bill, if enacted, would express the sense of Congress in the following specific recommendations:

- the incumbent president should “consider” submitting the President-elect’s nominees for offices in the line of succession during the post-election transition period;
- the Senate should consider completing the confirmation process, conduct hearings, and vote on the nominees between January 3 and Inauguration Day, January 20;
- the incumbent President should consider signing and delivering “commissions for all approved nominations on January 20, before the Inauguration, to ensure continuity of Government.”

The bill’s intention here is 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 transfer of power, 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 other observers view this gap, particularly in the confirmation and swearing-in of cabinet officers included in the line of succession, as a threat to continuity in both the presidency and in executive branch management. While the President-elect cannot submit his cabinet nominations until he assumes office, there is no legal impediment to prevent the outgoing incumbent from submitting any or all of his successor’s nominations to the Senate after it reconvenes on January 3.

One advantage conferred by this proposal would center on the fact 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. 540 arguably offers 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 be 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 could provide an impetus to streamlining the sometimes lengthy and contentious transition and appointments process faced by all incoming administrations. The speedy transfer of executive leadership is a well-documented feature of most parliamentary democracies. In the United Kingdom, for instance, the party out of power appoints a “shadow secretary” for every department. It is publicly understood that the shadow secretary (or minister) will be appointed head of the department if there is a change of party control of the government. Adoption of advance cabinet planning would, however, be a major innovation in current U.S. political practices; at least part of a candidate’s future Cabinet would need to be selected and “vetted” if not publicly announced, prior to the presidential election.

A related alternative requiring no legislative action would be for cabinet secretaries of the outgoing administration to retain their offices until the nominations of their successors have been consented to by the Senate.

Both pre-inaugural nomination and confirmation of some or all cabinet secretaries, and retention of incumbent secretaries pending Senate confirmation would, however, face substantial obstacles, since 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 impose a sizeable volume of confirmation-related business on both the lame duck and newly-sworn Congresses during the 10 weeks following a presidential election. During this period, the expiring Congress traditionally adjourns sine die, while the new Congress generally performs only internal business and counts the electoral votes between its own installation on January 3 and the presidential inauguration. If the election, like the presidential contest of 2000, remained undecided for any length of time after election day, this would introduce still further complicating factors.

H.J.Res. 4 — The Every Vote Counts Amendment

This measure, introduced on January 4, 2007 by Representative Gene Green,⁴⁹ is a proposed constitutional amendment which has as its primary goal the establishment of direct popular election of the President and Vice President.⁵⁰

⁴⁹ Representatives Brian Baird and William Delahunt are cosponsors.

⁵⁰ For a detailed analysis of H.J.Res. 4 and more information on the question of electoral college reform in the 110th Congress, consult CRS Report RL34604, *Electoral College Reform: 110th Congress Proposals, the National Popular Vote Campaign and Other Alternative Developments*, by Thomas H. Neale.

Section 5 of the resolution would empower Congress to provide by law “for the case of the death of any candidate for President or Vice President” before election day. This section would accomplish much the same goal as Section 3 of H.R. 540, except that rather than express the sense of Congress as to the value of making such arrangements, it would actually give Congress the power to enact statutory provisions governing such contingencies.

Other Options for Change

Additional succession-related proposals, discussed by analysts, have been offered that have not been introduced as current 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. Fortier⁵¹ at joint Senate committee hearings held in September, 2003, would have Congress establish a number⁵² 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.”⁵³ 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 and the Attorney General.

Another proposal by Dr. 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”

⁵¹ Dr. Fortier is executive director of the Continuity of Government Commission at the American Enterprise Institute, a non-governmental study commission. For additional information, please consult the commission website at [<http://www.continuityofgovernment.org/>].

⁵² Fortier suggests four or five officers.

⁵³ John Fortier, Testimony before the Senate Committees on the Judiciary and Rules and Administration, September 16, 2003, p. 7. Available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=914&wit_id=2604].

personnel: their primary function would be to be informed, prepared, and physically safe, ready to serve as acting President, should that be required.⁵⁴

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.⁵⁵ 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.⁵⁶

Professor Akhil Amar offered a proposal similar to that of Dr. Fortier. He suggested that a cabinet position of assistant vice president be established by law. The assistant vice president would be nominated by the President and subject to confirmation by the Senate. The primary duty of this officer would be to be prepared to assume office as chief executive in the event of a succession catastrophe. In his testimony before the September, 2003, joint Senate committee hearings, Dr. Amar 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 consideration or factor in their voting decisions.⁵⁷

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."⁵⁸

Finally, Dr. 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

⁵⁴ John Fortier, Testimony, p. 13.

⁵⁵ U.S. Constitution, Article II, Section 2, clause 1.

⁵⁶ Miller Baker, Testimony, p. 10. Baker also urged the removal of the Speaker of the House and the President pro tempore from the line of succession, in favor of cabinet officers. He also proposed that these officers be able to serve temporarily as acting President. For instance, if the Secretary of State were outside the United States in the event of a succession catastrophe, the Secretary of the Treasury could serve as acting President until the Secretary of State returned and assumed those duties.

⁵⁷ Akhil Amar, Testimony, p. 2-3.

⁵⁸ Howard Wasserman, Testimony, p. 6.

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).⁵⁹ 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.”⁶⁰

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

Although a number of wide-ranging reforms have been proposed in successive Congresses since then, the only legislative action taken to date occurred when 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).

The joint hearings conducted in the 108th Congress by the Senate Committees on the Judiciary and Rules and Administration in September 2003 and by the House Committee on the Judiciary’s Subcommittee on the Constitution in October 2004 established a basis for prospective measures, should future Congresses choose to revisit the succession issue. These hearings provided a forum for public discussion of current succession provisions and their alleged shortcomings; they also provided a venue for the presentation and discussion of airing a wide range of proposals for change. While a foundation has thus been laid, in the final analysis, future congressional action in the area of presidential succession will arguably depend on such factors as strong and consistent support from congressional leadership, the pressure of an aroused public, or the threat of a succession catastrophe.

⁵⁹ John Fortier, Testimony, p. 14.

⁶⁰ Ibid.

Appendix: Presidential and Vice Presidential Successions

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

Source: Compiled by Congressional Research Service.

* 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 Amendment⁶¹**

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

Source: Compiled by Congressional Research Service.

* Party Affiliation:
R = Republican

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

⁶¹ 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

Source: 3 U.S.C. 19, (d)(1).