

THE EVIDENCE



Preserving Our Institutions

THE SECOND REPORT OF THE
CONTINUITY OF GOVERNMENT COMMISSION

EVIDENTIAL CONCERN

CONTINUITY OF PRESIDENCY

 Continuity of
Government
Commission

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The Continuity of Government September 11th dispelled the United States' naive attitude towards security of its homeland. The three airplanes that hit the World Trade Center towers and the Pentagon caused severe damage and a horrific loss of life. A fourth plane was downed in a field in Pennsylvania by brave passengers who stormed the cockpit. That fourth plane was headed toward Washington, likely towards the U.S. Capitol.

Al Qaeda targeted our top government leaders. A lesser-known fifth plane – probably headed for the White House – was likely prevented from its course by the arrest of Zacarias Moussaoui. Had this part of the plan been successfully executed, September 11th would have brought additional tragedy in loss of life and destruction of symbolic buildings. It would have hindered the ability of our government to respond to the attack. In short, Al Qaeda has shown interest in incapacitating the leadership of our government. And where Al Qaeda has failed in the past, such as in the 1993 World Trade Center bombing, it has returned to strike again.

The Continuity of Government. The Continuity of Government Commission is a private AEI-Brookings commission funded by the Carnegie, Hewlett,

Packard, and MacArthur Foundations. It is comprised of members with experience in various branches of government and expertise in the daily functioning of our government. It was founded in the fall of 2002 to consider how each of our three branches of government might reconstitute themselves after a catastrophic attack on Washington, D.C. and to make recommendations for statutory and constitutional changes that would improve the continuity of our basic institutions. In June of 2003, the commission issued its first report on the Continuity of Congress.¹ In that report the commission unanimously recommended a constitutional amendment that would provide for filling mass vacancies or mass incapacitations in the U.S. House and Senate through temporary appointments until special elections could be held to fill the vacancies. Without such an amendment, an attack might cause Congress to fall below the quorum requirement for conducting business and potentially disable Congress for many months until the numerous vacancies could be filled. The report spawned much debate in Congress, including many hearings and the introduction of a variety of amendments to address this problem.

¹ The Continuity of Government Commission. *The Continuity of Congress: A Report of the Continuity of Government Commission*, May 2003

T P This is the second report of the Continuity of Government Commission. This report addresses our system of Presidential succession and how we would replace a president after a catastrophic terrorist attack to ensure the proper functioning of our government. Unlike the current provisions for congressional continuity which do not include any institutional protections in the case of an attack causing mass vacancies or mass incapacitations, there is a Presidential succession system in place. However, it is the finding of this commission that the current system would be inadequate in the face of a catastrophic attack that would kill or incapacitate multiple individuals in the line of succession. The current system must be corrected to ensure continuity in the executive branch.

President Jimmy Carter
President Gerald R. Ford*

A. K. Simpson is a visiting lecturer at the University of Wyoming and a member of the Commission on Presidential Debates. Simpson served in the United States Senate from 1978 to 1997, acting as Minority Whip for ten of those years. He was an active force on the Judiciary Committee, Finance Committee, Environment and Public Works Committee, and the Special Committee on Aging. He also served as Chair of the Veteran Affairs Committee. Before his election to the U.S. Senate, Simpson was elected to the Wyoming House of Representatives in 1964 where he served as Majority Whip and later Majority Floor Leader. In 1977 he became Speaker of the Wyoming House of Representatives. Simpson served as Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government from 1998 to 2000 and was a member of the Iraq Study Group in 2006.

*Original honorary Co-chair of the commission, deceased December 2006.

David Pryor is the founding Dean of the Clinton School of Public Service at the University of Arkansas and Managing Director of Herrington, Inc. in Little Rock. In June 2006, Pryor was appointed to the Board of the Corporation for Public Broadcasting for a six year term. Pryor served in the United States House of Representatives from 1966 to 1973 and in the United States Senate from 1975 to 1997. He chaired the Special Committee on Aging and served as United States Senate Democratic Conference Secretary from 1989 to 1995. Before his election to the U.S. House of Representatives, Pryor was a member of the Arkansas House of Representatives from 1960 to 1966. He also served as Governor of Arkansas from 1975 to 1979, was a fellow at the Institute of Politics at Harvard University's John F. Kennedy School of Government, and later became Director of the Institute, serving for 2 years. Pryor served as Interim Chairman of the Arkansas Democratic Party and was recently named by Governor Mike Beebe to the 10-member University of Arkansas Board of Trustees.*

*Lloyd Cutler was the original Co-chair and Co-founder of the commission, deceased May 2005.

He was a member of the board of governors of the East-West Center and is currently a member of the Council on Foreign Relations. Before his appointment as Ambassador, he served as Chairman of the President's Foreign Intelligence Advisory Board.

journals. He is active in the American Bar Association and other legal organizations.

Richard A. Katzman is a United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit. After clerking on the U.S. Court of Appeals for the First Circuit, he joined the Brookings Institution's Governmental Studies Program, where from 1981 to 1999, he was a research associate, senior fellow, visiting fellow, and Acting Program Director. Katzman is a founder of the Governance Institute, a nonprofit organization concerned with exploring, explaining, and easing problems associated with both the separation and division of powers in the American federal system. He served as Walsh Professor of Government, Professor of Law, and Professor of Public Policy at Georgetown University, and has served as a Director of the American Judicature Society, Vice Chair of the Committee on Government Organization and Separation of Powers of the ABA Section on Administrative Law and Regulatory Practice, and a public member of the Administrative Conference of the United States. He has also been a consultant to the Federal Courts Study Committee. He served as co-chair of the FTC transition team, and as special counsel to Senator Moynihan on the confirmation of Justice Ruth Bader Ginsburg. His scholarly work has resulted in numerous books and articles, including *Classical Constitutionalism* (1997).*

Louise M. M... is Chair of Deloitte & Touche's Council on the Advancement of Women and is an advisor to the accounting firm. She was the Secretary of Labor under President George Bush. During her tenure as Secretary of Labor, one of her initiatives was to create a model

workplace program at the Department of Labor. Department employees received sexual harassment training and diversity training. The department also underwent its own glass ceiling review. Prior to serving as Secretary of Labor, Martin represented the 16th District of Illinois in the U.S. House of Representatives from 1981 to 1991. She was the first woman to achieve an elected leadership post when she was chosen as Vice Chair of the House Republican Conference, a position she held for four years. During her 10-year tenure, Martin served on the House Rules committee, the House Armed Services Committee, the House Budget Committee, the Committee on Public Works and Transportation, and the Committee on the District of Columbia.

Kenneth M. Mfume currently serves on the Johns Hopkins University Board of Trustees, the Morgan State University Board of Regents, and the National Advisory Council of Boy Scouts of America. Mfume was President and Chief Executive officer of the National Association for the Advancement of Colored People (NAACP) from 1996 to 2004. He was a representative to Maryland's 7th Congressional District from 1987 to 1996, serving on the Banking and Financial Services Committee, the Committee on Education, as a senior member of the Small Business Committee, and holding the ranking seat on the General Oversight and Investigations Subcommittee. Mfume was chosen to serve on the Ethics Committee and the Joint Economic Committee of the House and Senate where he later became Chair. Mfume served as Chairman of the Congressional Black Caucus, and later as the Caucus' Chair of the Task Force on Affirmative Action. During his last term in

*Participating as a commissioner on matters relating to the judiciary only

Congress, he was appointed Vice-Chairman for Communications by the House Democratic Caucus. He has served on the Board of Visitors of the U.S. Naval Academy in Annapolis, the Advisory Board of the Schomburg Commission for the Preservation of Black Culture, and the Senior Advisory Committee of the Harvard University John F. Kennedy School of Government. He is currently a member of the Gamma Boulé Sigma Pi Phi Fraternity; the Most Worshipful Prince Hall Masons, and Big Brothers and Big Sisters.

Richard H. Michel is Senior Advisor for Corporate and Governmental Affairs at Hogan & Hartson LLP. He joined the firm in 1995 after serving 38 years in Congress as the United States Representative from the 18th Congressional District of Illinois, including 14 years as House Minority Leader. He was elected to his first leadership position as Chairman of the Congressional Campaign Committee in 1972, then served as Republican Party Whip from 1974 until he was elected House Minority Leader in 1980. Prior to becoming House Minority Leader, Michel served from 1959 to 1980 as a member of the House Appropriations Committee, including 12 years as the ranking Republican on the Labor, Health, Education and Welfare Subcommittee. Michel serves on the Boards of the Chicago Board of Trade, BNFL, Inc., the Public Broadcasting System, the Dirksen Leadership Center, Bradley University, Watchdogs of Treasury, Inc., and the Capitol Hill Club. In 1994, President Clinton awarded Michel the Presidential Medal of Freedom - our nation's highest civilian honor. He was presented with the Citizens Medal, our nation's second

highest Presidential Award, in 1989 by President Ronald Reagan.

Dorinda E. Shalala is President of the University of Miami, as well as a member of the faculty. She served as U.S. Secretary of Health and Human Services from 1993 to January 2001. She was the chancellor of the University of Wisconsin-Madison from 1987 to 1993. Shalala has also served as the President of Hunter College and as assistant secretary at the U.S. Department of Housing and Urban Development during the Carter administration. A distinguished political scientist, she has been a professor at Syracuse University, Columbia University, the City University of New York, and the University of Wisconsin. Shalala is a member of the Council on Foreign Relations, the National Academy of Public Administration, and the Institute of Medicine of the National Academy of Sciences.

Norman J. Ornstein is a resident scholar at the American Enterprise Institute. He serves as Senior Counselor to the Continuity of Government (COG) and is the director of

Campaign Legal Center, the U.S. Capitol Historical Society, the Center for U.S. Global Engagement, the Washington Tennis and Education Foundation, and UCB, a Belgium-based biopharmaceutical company. His many books include, *Democracy: How America Got It* (Crown Publishing Group, 1994) with John H. Makin, *How to Save the Republic* (Brookings Press, 1995), *The American Idea* (AEI Press, 2000), and *The Battle for the American Heart* (Oxford University Press, 2nd ed., 2008), all three with Thomas E. Mann.

Thomas E. Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at the Brookings Institution. He serves as a Senior Counselor to the Continuity of Government Commission and is Co-director of the AEI-Brookings Election Reform Project. Between 1987 and 1999, Mann was the Director of Governmental Studies at Brookings and before that was Executive Director of the American Political Science Association. He is a recipient of the American Political Science Association's Frank J. Goodnow and Charles E. Merriam Awards. His books include *Value and Choice* with Norman J. Ornstein and Michael Malbin (Brookings Press, 2008), *The Battle for the American Heart* with Norman J. Ornstein (Oxford University Press, 2nd ed., 2008), and *Partisanship: C*,

Partisanship: C, R edited with Bruce Cain (Brookings Press, 2005).

James C. Fortier is a research fellow at the American Enterprise Institute. He has served as Executive Director of the Continuity of Government Commission since its founding in 2002. Fortier is also the Principal Contributor to the AEI-Brookings Election Reform Project. He is Director of the Center for the Study of American Democracy at Kenyon College. A political scientist who has taught at the American and 3 rs Hi560mission-s7missio6.9(B Bost

Cornell University with a degree in Government and a concentration in Law and Society. She has held internships in the offices of Senator Joseph I. Lieberman (D-CT) and William K. Suter, the Clerk of the U.S. Supreme Court. Leval has published articles in *Roll Call*, *The Atlantic*, *The Christian Science Monitor*, *Washington Post*, *National Journal*, and on the AEI-Brookings Election Reform Project website.

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At 9:20 p.m., a passenger airliner takes off from

he could immediately resume his duties. On the other hand, if he were found alive, but incapacitated, the Secretary of Agriculture would, by law, act as president until the President were to recover.

Exactly how and when power would be trans-

that means that most states will send replacement Senators to Washington within a few days. Preplanning by Congress also ensures that the Senate will have an alternate location to meet either in Washington or somewhere else, since the Capitol building has been destroyed.

The House of Representatives is another story, as the Constitution only allows vacancies to be filled by special elections, and these elections take on average four months to administer.⁵ The Constitution provides that a majority of each house is required for a quorum to conduct business.⁶ The twenty members of Congress who survived the attack are far short of the two hundred and eighteen member majority. Following the Constitution, there would be no Senate for several days, and no House of Representatives for several months, when special elections would fill the many vacant seats.

But some of the handful of living and able members of the House of Representatives have a different idea. They know that there is a line of precedents in the House of Representatives that defines the quorum as a majority of those living, sworn and chosen. This precedent was not established for emergency purposes, but merely to achieve a quorum when there were a couple of House vacancies and low attendance for a vote. Reading this precedent literally, if only twenty members of the House remained (which is the case) then only eleven of them would be needed to establish a quorum. In other words, a small number of members could function as the House.⁷

At first it seems that this precedent alone will not help the House, for though twenty members survive, only five are well enough to come to the chamber. But these House members know recent history. They know that the House codified the precedent in its rules and added a provision to allow for a quorum even with incapacitated members. According to this rule, which was viewed as extremely dubious by constitutional scholars, even the five remaining able members could act as the House of Representatives, as long as three of them came to the floor to form a "quorum."⁸

If this handful of House members chose to exercise such a course of action, the House of Representatives might exist in name, but it would be a strange, unrepresentative, and in the eyes of many, an illegitimate body. More troubling, it would also affect the line of succession, for this small handful of members could elect a new Speaker of the House, who would be in line to be president should a vacancy arise.

In all of this mess, the Supreme Court is also effectively disabled as five of its members are dead, and a federal statute requires that six members of the Court constitute a quorum for issuing a decision.⁹ The circuit and district courts are intact, but there is no court of final resort and no body to resolve conflicts among the circuits.

So the former Speaker continues to act as president with no Congress and no Supreme Court as checks on his power. That evening, he declares martial law to restore order and

5 The Continuity of Government Commission. *T C ... : P ... O I ... : T F R ... C ... G ... C ...*, May 2003

6 Article I, Section 5, United States Constitution; See appendix I

7 The Continuity of Government Commission. *T C ... : P ... O I ... : T F R ... C ... G ... C ...*, May 2003

8 See Williams, John Bryan. "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," *W ... a ... Ma ... La R ...*, Vol. 48:1025, pages 1066-1067

9 Title 28, Chapter 1, Section 1. Number of justices; quorum, United States Code; See appendix II



But neither is eligible to return. They hold no official position, and they are no longer in the line of succession. In fact, it is not clear if there is anyone left in the line of succession.

The unspoken concerns of the American people prove to be warranted, as later that afternoon, the President appears at a photo opportunity with the Prime Minister of Denmark, who was in the United States on the day of the attack and who has not yet returned due to the paralysis of the transportation system. At the photo-op, the President turns pale, collapses, and is rushed to a nearby hospital. Hours later, news comes that the President has slipped into a coma and is in critical condition.


Now, chaos reigns. Constitutional scholars appear on television programs, and the initial commentary suggests the worst. There is no one left in the line of succession. There is no one who can act as president. The President is in a coma. The Vice President is dead. The Speaker already served as

two. Bowing to this concern and public opinion, the Undersecretary resigns his position and takes the Presidential oath of office. Governors rush to make appointments to fill Senate vacancies. The new Acting President performs a significant function by invoking a 1794 law that allows the President to reconvene Congress in the case of an emergency that prevents it from meeting in its chambers.¹²

The five remaining members of the House of Representatives begin to suggest that they do not want the Senate to pick the new President. All of the senators will be appointed. The House is “the people’s house” and the remaining members have been elected by the people, albeit their districts represent just over one percent of the nation. If the House were to act first in choosing a new Speaker, (before the Senate can elect its leader) then that speaker may act as president. But if the House waits until the Senate constitutes itself, then the President e will become president.

Supreme Court is decimated. The Acting President could make appointments to the Court and the Senate could confirm them, but there are some questions as to whether an unelected president should appoint five Justices—for terms of “good behavior”—who would shape the direction of the court for many years to come.

The President’s condition does not improve. He dies two weeks later. Now the country knows that the Acting President will serve for the three years remaining in the presidential term. Four months later the House meets again, having filled its vacancies by special elections. America is finally on the road to recovering from the devastating attack on its leadership.



Our system of Presidential succession is governed by a number of constitutional and statutory provisions. The original Constitution authorizes Congress to write a Presidential succession act, and we have had three in our history. There are also provisions of the 12th, 20th, and 25th Amendments that affect succession. We are fortunate as a nation never to have had a simultaneous vacancy in the presidency and vice presidency, but, unfortunately, 9/11 underlined the fact that such vacancies are a very real possibility. If such a scenario were to occur, we would have to test our various succession provisions laid out in the Constitution and the Presidential Succession Act. This section lays out the constitutional and statutory basis of Presidential succession and provides a brief history of how the current system developed.

Article II, Section 1 of the Constitution contains the provision that undergirds most of our Presidential succession system. The relevant section reads:

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.¹⁴

This constitutional provision provides that the Vice President should assume the powers of the presidency if the presidency were to become vacant. But, it also delegates to Congress the power to specify a further line of succession if both offices were vacant.

The language in the constitutional provision is relatively clear, but a few details are worth noting.

First, the framers recognized that there were different ways that the office of the President could become vacant—through removal, death, resignation or inability. The first three involve the President permanently vacating the office, while the latter may involve a temporary vacancy. In all of these cases, the Vice President acts as president, and Congress may provide by law for further provisions related to each of these cases.

Second, the Constitution specifies that Congress may declare “what Officer shall then act as President.” The key is word “Officer,” capitalized in the Constitution. The term probably means “Officer of the United States,” which would mean officials in the executive, but not the legislative, branch of government would be eligible to be in the line of succession. But the term has been controversial, and at various times in our history, including today, the Presidential succession act has included congressional leaders in the line. A line of

thought running from James Madison to Akhil Amar holds that it is unconstitutional to have congressional leaders in the line of succession.¹⁵

Third, the constitutional provision allows for Congress to make a provision for a special election to fill the presidential vacancy. There was debate at the constitutional convention over this provision, and the final language was agreed upon that would allow a successor to the President to serve either until the next general election at the end of a term or until the completion of a special election provided for by law. In fact, the first Presidential Succession Act explicitly provided for a special presidential election if both the presidency and vice presidency were vacant and the vacancies occurred early in the term.

The framers recognized the importance of passing a succession act, but they could not agree on a specific statute in the first Congress. It was the second Congress that passed the first Presidential Succession Act. The most divisive issue in the debate was the question of whether congressional leaders could be included in the line of succession. As a matter

¹⁵ See Amar, Akhil Reed and Amar, Vikram David. “Is the Presidential Succession Law Constitutional?” 48 *Stan. L. Rev.* 1995-1996. Pages 118-123

¹⁴ Article II, Section 1, United States Constitution; See appendix I



of principle, the debate broke down into two camps, one of which believed the word “Officer” clearly meant “Officer of the United States” and thus expressly forbade leaders of Congress. The other camp argued that the term was more expansive and included other “officers,” and the President . . . of the Senate and Speaker of the House are clearly officers of the Congress. It was in this debate that James Madison made an impassioned argument that the Constitution did not allow Congress to include Congressional leaders in the line.¹⁶

But in truth, the real argument was not over principle but politics. An anti-Jefferson fac-

met until December. There might truly have been no president for a long period of time.

In 1880, James Garfield was elected president. The Republicans had been split into factions of “Stalwarts” and “Half-breeds.” Garfield was a “Half-breed,” but he selected the “Stalwart” Chester Arthur as his running mate to mend party differences. In September of 1881, after only six months in office, Garfield was shot in Buffalo by a disgruntled office seeker. The assassin yelled, “I did it and will go to jail for it.

the realization that there might not be anyone in the line of succession at a given time.

Ultimately, the Congress decided to take congressional leaders out of the line of succession altogether and instead to rely solely on cabinet succession. The 1886 Presidential Succession Act turned the presidency over to cabinet members in the order of the creation of their respective departments, which were Secretary of State, Secretary of Treasury, Secretary of War, Attorney-General, Postmaster-General, Secretary of the Navy, and Secretary of the Interior.

The law included several other minor provisions. The 1886 Act did not require a special election when a statutory successor to the President takes office as did the first succession act. It did, however, require the statutory President (the Secretary of State or lower cabinet official who takes over as president) to call Congress into session within twenty days so that Congress would have the opportunity to provide for a special election by law if it so chose.²⁴

The switch to cabinet succession also stipulated that a cabinet member would be eligible for the presidency only if he or she had been appointed by the President and confirmed by the Senate for the relevant position. (In other words, no recess appointments or acting secretaries were in the line of succession). The Cabinet member could also not be under impeachment by the House at the time of the vacancy. And finally, the Cabinet member must meet the constitutional qualifications to be president (to be a naturally born citizen, to be thirty-five years of age and to have resided

for fourteen years in the United States) to succeed to the presidency.

The Second Presidential Succession Act remained in effect for over eighty years, until 1947, during which there were several succession crises. Grover Cleveland had major surgery to remove his cancerous jaw and, unbeknownst to the country, was temporarily disabled. William McKinley was shot, and Vice President Teddy Roosevelt took over. (This was months after one pundit said that “there is only an assassin’s bullet between this madman and the presidency.”)

The most troubling succession crisis, however, was that of the extended disability of President Woodrow Wilson at the end of his second term. Wilson had a stroke in October of 1919. For the remaining seventeen months of his term, he was hidden from view and, by most accounts, incapacitated. His wife and a close adviser effectively ran the government, as they were the only ones who would “communicate” with Wilson and report back on his wishes. Vice President Thomas Marshall clearly indicated that he would not challenge the capacity of the President. And thus America existed for seventeen months with a presidency that was effectively vacant.²⁵

In subsequent years, Warren Harding died in office, leaving Calvin Coolidge acting as president. A number of scholars believe that Coolidge was incapacitated for significant periods of his second term due to serious bouts of depression.²⁶

25 Feerick, John D. *The Presidency: A History of the Office*. Fordham University Press, New York, 1992, Pages 12-15.

26 See Feerick, John D. *Franklin D. Roosevelt: A Biography*. Fordham University Press, New York, 1965. Pages 184-186.

24 Presidential Succession Act of 1886; See appendix II

In 1933, just before Franklin D. Roosevelt's first inauguration, the 20th Amendment was ratified. The Amendment called for a new inauguration date and a new meeting date of Congress so that Congress would come into session to count electoral votes before the inauguration. The amendment also included two sections relating to Presidential succession.

Section 3 makes it clear that if the President-elect dies prior to the inauguration, then the Vice President-elect will be sworn in as president at the inauguration. It reads:

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 3 also stipulates that Congress might specify who will succeed to the presidency if the President-elect and the Vice President-elect shall not have qualified for office. This allows Congress to provide for scenarios whereby an election dispute prevents the election of

either a president or vice president; the President-elect and Vice President-elect are killed before inauguration day; or, the more unlikely case, if both have some other disqualifying reason such as they are not yet thirty-five years old. In the Third Presidential Succession Act (1947), Congress added the case of "failure to qualify" as a possible condition for Presidential succession.

Section 4 of the 20th Amendment reads:

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

Section 4 allows Congress to provide for the special case where Congress must select the President because no one has received a majority of the Electoral College.²⁷ Even though authorized to do so by the Amendment, Congress has never passed legislation to deal with such a scenario.

In an eerie coincidence, just days after the ratification of this amendment, President-elect Roosevelt was riding in a car in Miami with the Mayor of Chicago and others. An assassin shot at the car, killing the Mayor. Roosevelt was unhurt.²⁸ Had Roosevelt been killed, the 20th Amendment clarified that Vice President-elect

²⁷ Amendment XX, United States Constitution; See appendix I

²⁸ See Feerick, John D. *Fa. Ha. : T. S. . P. a. S. . .*. Fordham University Press, New York, 1965. Page 190

John Nance Garner would have become president.



heads of cabinet departments that had been added since 1886. Subsequently, there has been a tradition of amending the Act each time that a new department is created to add the head of that department to the end of the line of succession. These small amendments to the 1947 Act are the only changes that have been made to it since its passage.

ers could bump the Secretary of State and become president.

There is no provision for bumping a cabinet member by another cabinet member, so if the Secretary of Defense becomes President, a newly appointed Secretary of State may not bump him. Also, there is no provision for a new Speaker to bump the President³⁵

The bumping procedure is controversial. A

In addition to preferring congressional leaders to cabinet members, Truman not only advocated that these leaders be placed above cabinet members in the line of succession, but also that newly elected congressional leaders be eligible to bump cabinet members from the presidency.

The Act makes it clear that a president or vice president who recovers from a disability or qualifies for office (say a president elected after a long election dispute with a Speaker of the House serving as president for a time) may “bump” out a congressional leader or cabinet member who is acting as president.

But the Act also provides for the case where a cabinet member acts as president because the congressional leaders are dead or unable to serve. Newly elected congressional leaders may bump cabinet members who are serving as president. For example, if the President, Vice President, Speaker, and President are killed, the Secretary of State would act as president. But the Presidential Succession Act of 1947 provides that if the House of Representatives were to elect a new Speaker or the Senate a new president, then one of those congressional lead-

ent individuals in a short period of time. It would also seemingly prevent Congress from exercising influence on the executive branch by threatening to replace a cabinet member acting as president with a newly elected Speaker of the House.



Several other minor provisions of the Presidential succession act are worth noting.

Speaker of the House or president of the Senate must resign from his or her office and from Congress in order to act as president. This applies not only in the case of the death of a president, but also in the case of a short term incapacitation. The Constitution requires that congressional leaders step down from their posts in order to assume any office in the executive branch. The Presidential Succession Act reiterates this requirement. After acting as president, they cannot go back to their old congressional posts.

Similarly, a cabinet member, in order to assume the presidency, must resign from office. This is not required by the Constitution, only by the statute. Under the Constitution, a member of the executive branch can hold two offices; a Secretary of State could also hold the office of Vice President. But the statute expressly requires a resignation by the Cabinet member.

Any person in the line of succession must meet the constitutional eligibility requirements for president (e.g., natural born citizenship) to assume the presidency.

Cabinet members in the line of succession must have been confirmed by the Senate. This means that recess appointees who head cabinet departments are not eligible to serve as president. The language in the current Presidential Succession Act is less clear than that of the 1886 Act with respect to Senate confirmation. The 1886 Act refers to “such officers as shall have been appointed by the advice and consent of the Senate to the officer therein named...”³⁸ The current act merely refers to “officers appointed, by and with the advice and consent of the Senate.”³⁹ Read literally, this means that the current act allows for acting secretaries to be in the line of succession as long as they are confirmed by the Senate for a post (even for example, the second or third in command within a department). It is not uncommon for a second in command to become acting secretary when the secretary leaves office. Though there is some dispute over this provision, the language clearly permits acting secretaries to be placed in the line of succession. (We have spoken to acting secretaries who told us they had been placed in the line of succession.)

No cabinet member under impeachment of the House of Representatives could serve as president.

³⁸ Presidential Succession Act of 1886; See appendix II

³⁹ Presidential Succession Act of 1947; See appendix II



After the passage of the 1947 Succession Act, Eisenhower's illnesses and President Kennedy's assassination spurred the enactment of the 25th Amendment, which deals primarily with presidential incapacitation.

President Eisenhower's several serious illnesses sparked a renewed interest in the question of presidential disability and succession. In particular, after a heart attack, Eisenhower drafted a memorandum of understanding laying out in significant detail how Vice President Nixon should act, how power might be transferred to the Vice President and back to the President.⁴⁰ This practice of issuing such memos was continued under the Kennedy and Johnson presidency and had some effect on the language of the 25th Amendment, which was ratified in 1967, and which provided for Presidential succession.

Congress wrestled with the issue of a constitutional amendment for presidential incapacitation in the early 1960s. In particular, the issue became a serious one for Senator Estes Kefauver, and later Senator Birch Bayh, who chaired the Subcommittee on the Constitution, a division of the Senate Judiciary Committee which had constitutional amendments in its jurisdiction. The assassination of President Kennedy hastened work on the Amendment. In the immediate aftermath of Kennedy's assassination, there were rumors that Vice President Johnson had been killed or had suffered a heart attack. The death

of Kennedy highlighted the problem that there was no way to appoint a new vice president in the case of the death of the President. And with Johnson's prior heart difficulties and Eisenhower's illnesses, the issue of how a president might transfer power in the case of an incapacitation was rightly understood as significant.⁴¹

Ultimately, after several attempts, Congress passed and the states ratified the 25th Amendment. It reads:

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

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

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and

⁴⁰ Feerick, John D. *The 25th Amendment: A History*. New York: Fordham University Press, 1992, Page 53

transmit to the President . . . of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President . . . of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President . . . of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.⁴²

In a nutshell, the 25th Amendment achieves two major objectives: First, it provides a mech-

anism for appointing a vice president if the office is vacant. Second, it clarifies and provides specific procedures for the transfer of power relating to presidential incapacity.

The vacant vice presidency had been a major problem prior to 1967. Eight presidents and seven vice presidents died in office, in each case leaving a vacancy in the vice presidency. In the 178 years under the Constitution before the 25th Amendment was ratified, we had more than 37 years without a vice president.⁴³ Though the United States would have faced problems of Presidential succession had something happened to the President, during all of those years without vice presidents, the Presidents did not die, and the successors listed in the Presidential Succession Act were therefore not needed.

However, Congress saw that the United States might not always be so fortunate in the future. The 25th Amendment was for the President to appoint a new vice president, and for the Senate and the House of Representatives to confirm the selection. It is the only office that requires the confirmation of both Houses of Congress.

In the debate over the 25th Amendment, some proponents believed that there should be a time-frame for the appointment and confirmation. Six weeks from the date of the vacancy was commonly suggested as an appropriate amount of time to appoint and confirm a replacement. In the end, the authors did not include such a time-frame in the amendment, though many agreed that six weeks was reasonable, given the need for a robust line of succession.⁴⁴

43 See appendix VII

44 Feerick, John D. *The 25th Amendment: A History*. New York: Basic Books, 1992, Page 68-70

42 Amendment XXV, United States Constitution; See appendix I

commonly, this scenario arises when a president undergoes medical procedures that require general anesthesia. Interestingly, there was some reluctance on the part of several presidents to directly invoke section 3 of the 25th Amendment, although there was a written declaration of inability. The formal invocation of

*I. A F L S
L a d a , D.C.*

The line of succession was built primarily to deal with the death of a president, not a catastrophic attack on Washington. As such, with the possibility of nuclear, biological or chemical terrorist attacks, the whole line of succession

multiple presidents in a short period of time. And the problem of a party shift would only be magnified if the new Congressional leaders are of a different party than before the attack, and these leaders might be of a different party than the President.

In addition, the bumping procedure could allow Congress to have undue sway over the executive after an attack. For example, if the Secretary of State were to become president, Congress could threaten to replace him with its own leaders unless he complies with Congress's demands. This would essentially eviscerate the separation of powers.

3. T O d S

The line of succession has a certain order to it, with the Cabinet officials from the oldest departments earlier in the line of succession, at least after Congressional leaders. But for years we have simply relied on this formula without critically analyzing the logic behind the order itself.

First, it makes little sense to include the President

attack, this provision might cause even greater confusion as departments have their own internal lines of succession, and the death of the head of a department might result in the automatic ascension of an acting secretary. The acting secretary might then claim to be in the line of succession ahead of cabinet officers from other departments lower in the overall Presidential succession provisions.

Finally, the confusion over the status of acting secretaries as opposed to original secretaries would inevitably become an issue should an attack take place around a presidential inauguration. Traditionally, heads of departments resign just in advance of the inauguration of the incoming President, leaving their department in the hands of an acting secretary. In this case, an attack around the inauguration would leave the acting secretaries of the outgoing administration in place as the successors for the incoming President.

5. I a a a

The 25th Amendment covers many details of how an incapacitated president transfers power to a vice president. The amendment does not, however, cover the case of a transfer of power from an incapacitated president to other figures in the line of succession if the Vice President is not able to act. Though the Constitution gives Congress the authority to enact legislation dealing with these circumstances, Congress has not chosen to do so. The lack of guidelines could

The first and second periods are more difficult to address because arguably there is no president-elect. In both the first and second periods, the electoral votes have not been certified. There is an official president-elect only when Congress counts and certifies the electoral votes.

In the first period, if the President-elect dies before the electors vote, the matter would likely fall into the hands of the winning political party. The Presidential electors tend to be obscure but loyal partisans appointed as rewards for their service to the political party. If the President-elect were to die, the political party would likely instruct its electors to vote for the Vice President-elect. Alternatively, the electors could vote for the deceased President-elect – and hope that Congress would count the votes and declare the deceased President-elect to be the winner with the Vice President-elect succeeding to the presidency. However, there is a possibility that Congress would not count votes cast for a deceased candidate, and the presidency could then end up in the hands of the other party that had actually lost the election.

If both the President-elect and the Vice President-elect were to die before the electors cast their votes, the political parties would likely have to instruct their electors to cast

their votes for a new candidate. In this case, the Presidential electors would end up voting for someone who was not on the winning ticket in the November election. While constitutionally legitimate, the country would face the unpalatable reality that the President would be someone who was not on the ballot and who was picked by party insiders on a moment's notice.

The second period between the casting and counting of the electoral votes is the most confusing. The candidates are not yet formally the President-elect and Vice President-elect, because Congress could choose to challenge or discard votes or to find a result other than expected. Yet since the electors have already voted, the electors cannot revote for a party-determined replacement for the deceased President-elect. Congress might be faced with a difficult choice. If it counts votes for the deceased candidates, then it might be effectively electing its Speaker of the House to be president, as the Presidential Succession Act would kick in. Alternatively, if they chose not to count votes cast for the winning, but now deceased ticket, then the House would have to choose the new president, only choosing from the losing party candidates.



*1. T P d a L S
S d E d O d a , D.C.*

Given the possibility of an attack with weapons of mass destruction, it is essential that the line of Presidential succession include at least some individuals who live and work outside of the Washington, D.C. area.

There are several ways to achieve this objective. For instance, federal officials such as ambassadors and governors, perhaps in the order of the size of their state or the creation of the states, could be included in the line of succession as a last resort. The Commission's preferred solution, however, is to create four or five new federal offices. The President would appoint important figures to these offices, and they would be confirmed by the Senate. The Commission envisions these individuals would largely be former high government officials that the President felt comfortable appointing such as former presidents, former secretaries of state, former members of Congress, or even sitting governors all located outside of Washington, D.C. Though the Constitution prevents presidents from seeking third terms in office, former presidents are, indeed, eligible to be selected in the Presidential line of succession. Some states prohibit state

officeholders from holding federal office, but other states allow it. Sitting governors from the states that allow dual office-holding could also be considered by the President and the Senate. These new offices would sit at the end of the line of succession as a failsafe if a catastrophic attack on Washington wiped out others in the line of succession.

The Commission also recommends that only the top four cabinet members be included in the line of succession [See recommendation 4], with the officers outside of Washington as last in the line of succession instead of the lower profile cabinet members under the current law.

It is important to keep these new officers informed of matters that would be relevant if they were suddenly thrust into the presidency following a catastrophic attack. Lower profile cabinet members are not as a matter of course briefed regularly and thoroughly on national security matters. However, these newly created officers would presumably have high levels of past experience that would help them in the position of President. But in addition, the White House should strive to include these officers in regular (at least monthly) national security briefings, as a part of their duties as Officers of the United States.

2. R C a L ad
L S

There is reason to believe that including congressional leaders in the line of succession may be unconstitutional. If a Congressional leader not from the President's party were to assume the presidency, it could lead to a destabilizing change of party for the federal government. Additionally, as outlined above, the inclusion of Congressional leaders could lead to multiple successors in a short period of time. American constitutional structure makes the most sense if Article I gives Congress the power to specify which branch figures should be in the line of succession.

Harry Truman felt that successors should be elected officials and that a president should not be able to appoint his own successors.

While it is true that Congressional leaders are leaders in thei034 2 -1.2857 TDtgg Our Instituti(line od3s

Second, if Congressional leaders remain, the current system of selecting the President should be changed. The most sensible system would be for the Majority Leader to take this place in the line. But the Leader is not an officer of Congress the way a Speaker is. Nonetheless, Congress could give its Majority Leader the title of president pro tempore. Or it could choose the President pro tempore on some basis other than seniority in the majority party, with an eye to who would be the best successor to the President in a crisis.

Third, short of removing the leaders, Congress should change the line of succession so that the congressional leaders will only be in the line of succession for the death of a president, but not for the incapacitation, a scenario in which their assumption would cause much confusion. Congress could also choose to prevent congressional leaders from taking charge in the case of impeachment of the President, a situation in which some leaders might stand to gain.

Finally, Congress should fix congressional continuity. As outlined in our earlier report, Congress would face its own formidable problems in the event of an attack that killed a large number of its members. In this context, the reconstitution of Congress is also important because the congressional leaders chosen after the attack might succeed the presidency. Congress should allow the appointment of temporary officials to fill vacancies in the House of Representative so that Congress can continue functioning after an attack. Also, the House should clarify the processes through which vacancies in the speakership are filled, keeping in mind that a new speaker could automatically

assume the presidency. If the speakership were to automatically devolve onto minor members of the House, America could see a relatively insignificant political figure elevated to the presidency. The House should ensure that no individual will assume the presidency without a vote in the full House of Representatives, not by fiat or by the vote of an unrepresentative handful of surviving lawmakers.

3. Special Presidential Election

The Constitution allows for a special presidential election if the President and the Vice President are killed. Similarly, the first Presidential Succession Act allowed for such an election. But subsequent succession acts have not included such a provision. Congress should reform our current law to provide for a special election within five months if a simultaneous vacancy of the presidency and vice presidency occurs in the first two years of a presidential term. Were such an election not to occur, the interim successor should serve until the end of the term.

4. Reconsider the Line of Succession

The order of the line of succession should be reconsidered. Since the line of succession was established by the 1947 Presidential Succession Act, the only changes have been to add the secretaries of the newly created departments to the end of the line. In fact, all of the Cabinet

order of succession is, especially considering the emergence of the real possibility of a catastrophic attack on Washington.

The “Big Four” departments should then be examined and reordered to best address a catastrophic attack. It is unlikely that both the President and the Vice President would die simultaneously except in the event of an outside attack. The commission therefore recommends that the order of succession start with the Secretary of State to be followed by the Secretary of Defense, Attorney General and the Secretary of Treasury.

The commission also recommends that the lower profile cabinet members be replaced by the offices created for figures outside of Washington [see recommendation #1]. The lower profile cabinet officials are often picked for their expertise in a particular policy area, are less well known than the “Big Four” cabinet members, and are less intimately involved in matters of national security that would be paramount at the time of an attack.

**5. C S d R A
S a L S**

The Second Presidential Succession Act (in place from 1877 to 1947) explicitly stated that only department heads confirmed by the Senate for the position of department head were in the line of succession. The current act, however, can easily cause confusion as it allows for acting secretaries who were confirmed by the Senate for lower level posts to be in the line of succession. The current line of succession is also particularly ambiguous around the inauguration when a number of departments are briefly headed by acting secretaries pending the con-

firmation of cabinet secretaries in the new administration.

**6. C a P d I a a a ,
E a L P O a
L S**

A catastrophic attack may involve serious injury to the President and the deaths of others in the line of succession. While procedures for a vice president taking over for an incapacitated president are well laid out by the 25th Amendment, procedures for succession by lower officials are not. Congress has the authority to legally prescribe the exact procedure for a lesser cabinet official taking over for an incapacitated president. The law probably could not require the lower level official to obtain the consent of other cabinet members, as this is a constitutional provision of the 25th Amendment provided for the Vice President. But it could provide guidance as to how the transfer might take place and how Congress is to be notified.

Further, Congress should clarify what would happen if a majority of the cabinet were unavailable for the Vice President to consult with when a president is incapacitated. Under a provision of the 25th Amendment, Congress could specify an alternative body with which the Vice President could consult and obtain a majority in order to take over the presidency. For example, Congress could indicate that in case the Vice President is unable to secure a majority of the cabinet due to death or incapacity, the Vice President shall secure a majority of governors or another body outside of Washington.⁵²

⁵² Fortier, John C. “President Michael Armacost?: The Continuity of Government after September 11,” The Brookings Institution, Fall 2003 and Fortier, John C. and Ornstein, Norman J. “If Terrorists Attacked Our Presidential Elections,” *Executive Journal*, Winter 2004, 3(4): 597-612.

7. F I a a a d P - a a S a

Congress and the political parties should take preventative measures to secure the line of succession in the very dangerous times both during and before the inauguration. Congress must not allow a gap of even several hours during which the line of succession for an incoming president has not yet been established and the outgoing president's cabinet has resigned.


This could be accomplished simply through cooperation between the outgoing president and the incoming president – representing a mere change in custom, rather than a change in law. The outgoing president could submit the names of several of the incoming president's cabinet nominees to the Senate and the Senate could then convene and confirm these nominees on the day before the inauguration or the morning of January 20th. This way there would be an established line of succession at the inaugural ceremony. Additionally, several members of the line might be sent out of town for the ceremony. If recommendation #1, the appointment of officers in the line of succession who would live outside of Washington were adopted, the Senate

could also confirm these figures before the inauguration, as the congressional hearings presumably would have been completed in early January.

The commission also recommends shortening as much as possible the period between the casting of electoral votes and their counting by Congress. These dates are relics of an earlier era when communications were slower and less reliable than they are today. Congress should move the date on which the electors meet to cast their votes closer to January 6th, leaving at most a gap of one or two days. This interim period breeds confusion because there is no formal president-elect, even though the electors' choices are now obvious.

Finally, political parties should plan for the possibility of the death of their president-elect and vice president-elect. They should reexamine their procedures for selecting a new nominee to send to the electors in the event of the death of a nominee. Such procedures should be designed so as to make the selection of nominees as broadly acceptable as possible to prepare for the extreme possibility that both nominees are killed.





It is our earnest hope that events never transpire that would put the presidency to the extreme tests considered above. But, however unlikely some of the scenarios we outline may be, the paramount importance of the American chief executive makes it incumbent upon us to ensure

the office's functionality even in the most dire of circumstances. Leaving the American government vulnerable in the face of a catastrophic attack – no matter how improbable a scenario – is irresponsible. We hope our recommendations will be weighed with care.



American
Congress

U.S.

Section 5. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

American
Congress

U.S.

Section 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective

number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate - The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted - the person having the greatest number of votes for president, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as president, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as vice-president, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineli-

gible to the office of president shall be eligible to that of vice-president of the United States.

Article II

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Section 1

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

Section 2. The Congress shall assemble at least once in every year, and such meeting shall

begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as president until a president shall have qualified; and the Congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

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

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

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

Art. 2

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

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

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

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

Thereafter, when the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority

of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon ya 6 cs 1 1 1 scnuallatios

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deliver to the President of the Senate, at the seat of government, before the first Wednesday in January then next ensuing, one of the said certificates, and the said electors shall forthwith forward by the post-office to the President of the Senate, at the seat of government, one other of the said certificates, and shall forthwith cause the other of the said certificates to be delivered to the judge of that district in which the said electors shall assemble.

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

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

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

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

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

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

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

SEC. 10. And be it further enacted, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also

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

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

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

CHAPT. II
P **A** **U**
S
C **A** **A** **3, 1794**

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

P **S** **A** **1886**

- 1) Vice President
- 2) Secretary of State
- 3) Secretary of Treasury
- 4) Secretary of War
- 5) Attorney-General
- 6) Postmaster-General
- 7) Secretary of the Navy
- 8) Secretary of the Interior

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of

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

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

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

P. S. A. 1947 (2002)

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

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that-

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

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

Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

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

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

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

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

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...if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

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the same time as the President and Vice President. Usually it is in agreement politically with the Chief Executive.

Only one third of the Senate, however, is elected with the President and Vice President. The Senate might, therefore, have a majority hostile to the policies of the President, and might conceivably fill the Presidential office with one not in sympathy with the will of the majority of the people.

Some of the events in the impeachment proceedings of President Johnson suggested the possibility of a hostile Congress in the future seeking to oust a Vice President who had become President, in order to have the President Pro Tempore of the Senate become the President. This was one of the considerations, among several others, which led to the change in 1886.

No matter who succeeds to the Presidency after the death of the elected President and Vice President, it is my opinion he should not serve any longer than until the next Congressional election or until a special election called for the purpose of electing a new President and Vice President. This period the Congress should fix. The individuals elected at such general or special election should then serve only to fill the unexpired term of the deceased President and Vice President. In this way there would be no interference with the normal four-year interval of general national elections.

I recommend, therefore, that the Congress enact legislation placing the Speaker of the House of

Representatives first in order of succession in case of the removal, death, resignation or inability to act of the President and Vice President. Of course, the Speaker should resign as a Representative in the Congress as well as Speaker of the House before he assumes the office of President.

If there is no qualified Speaker, or if the Speaker fails to qualify, then I recommend that the succession pass to the President Pro Tempore of the Senate, who should hold office until a duly qualified Speaker is elected.

If there be neither Speaker nor President Pro Tempore qualified to succeed on the creation of the vacancy, then the succession might pass to the members of the Cabinet as now provided, until a duly qualified Speaker is elected.


If the Congress decides that a special election should be held, then I recommend that it provide for such election to be held as soon after the death or disqualification of the President and Vice President as practicable. The method and procedure for holding such special election should be provided now by law, so that the election can be held as expeditiously as possible should the contingency arise.

In the interest of orderly, democratic government, I urge the Congress to give its early consideration to this most important subject.

HARRY S. TRUMAN

President	Term	Duration	Predecessor	Death	Resignation
William H. Harrison	March 4, 1841-1845	April 4, 1841	John Tyler	April 6, 1841	3 years, 11 months
Zachary Taylor	March 4, 1849-1853	July 9, 1850	Millard Fillmore	July 10, 1850	2 years, 7 months, 23 days
Abraham Lincoln	March 4, 1865-1869	April 15, 1865	Andrew Johnson	April 15, 1865	3 years, 10 months, 17 days
James A. Garfield	March 4, 1881-1885	September 19, 1881	Chester A. Arthur	September 20 and 22, 1881	3 years, 5 months, 13 days
William McKinley	March 4, 1901-1905	September 14, 1901	Theodore Roosevelt	September 14, 1901	3 years, 5 months, 18 days
Warren G. Harding	March 4, 1921-1925	August 2, 1923	Calvin Coolidge	August 3 and 21, 1923	1 year, 7 months, 2 days
Franklin D. Roosevelt	January 20, 1945-1949	April 12, 1945	Harry S. Truman	April 15, 1945	3 years, 9 months, 29 days
John F. Kennedy	January 20, 1961-1965	November 22, 1963	Lyndon B. Johnson	November 22, 1963	1 year, 1 month, 29 days

Source: Feerick, John D. *Fact, Fiction, and Fantasy: The Presidents Who Shaped America*, Fordham University Press, New York, 1965 (Reprinted with slight modifications with permission from the author).



PROBLEM: The current constitutional and legal provisions fail to take into account the possibility of a catastrophic attack on

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