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"ENSURING THE CONTINUITY OF THE PRESIDENCY"

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Mr. Chairmen, Ranking Members, and Members of the Committees:

Thank you for the invitation to testify here this morning on issues pertaining to presidential succession. It is an honor to be here. The views expressed here are mine alone.[1]

The terrorist attack on America on September 11, 2001, represents an epic event in American history, one that compares to the Japanese attack on Pearl Harbor on December

[1] I wish to thank my colleagues Michael S. Nadel and Richard B. Rogers for their comments on this testimony and its earlier iterations. This testimony builds upon a national security white paper that I wrote for the Federalist Society's "War on Terrorism" series in December 2001 and my testimony before the House Subcommittee on the Constitution on February 28, 2002.

7, 1941. September 11's parallel to Pearl Harbor, however, extends beyond strategic and tactical surprise and the loss of thousands of American lives a few hours after dawn.

But for chance and a critical loss of nerve by the Japanese commander, the attack on Pearl Harbor would have been far more devastating to America than it actually was. As fate would have it, the three U.S. Pacific Fleet aircraft carriers happened to be out of port that morning, and the Japanese fleet commander, Admiral Nagumo, failed to follow-up the initial strikes against warships and airfields with attacks on Pearl Harbor's fuel storage, ship repair, and dock facilities, which were left intact. Had the U.S. carriers been sunk in port, and had Admiral Nagumo achieved more complete destruction in follow-up strikes, as his fliers avidly requested, Hawaii itself would have been in immediate jeopardy, and the U.S. position in the Pacific would have been rendered untenable.

Similarly, as horrific and grievous as the events of September 11 were, that day very easily could have been an even greater catastrophe, one that could have produced, in addition to unprecedented civilian carnage, an unprecedented leadership crisis at the very moment that called for the most vigorous executive leadership, or in Alexander Hamilton's enduring phrase, "energy in the executive."[2]

For one thing, in planning and executing the September 11 attacks, the enemy does not appear to have made decapitating the U.S. government a primary objective. For another, one of the Washington-bound hijacked airliners, United Flight 93, was brought down in a field in Pennsylvania by the heroism of its passengers. But this was made possible only by the unexpected forty-minute delay of that flight's departure from Newark, which allowed the passengers to learn from cell phone calls that their hijackers were bent on a kamikaze mission. The hijacked airliner that did reach Washington, American Flight 77, crashed into the Washington area target singularly capable (as these matters go) of physically absorbing and surviving the blow—the Pentagon. And most important of all, the President—like the aircraft carriers absent from Pearl Harbor on the morning of December 7, 1941—happened to be out of Washington when the enemy struck on September 11.

Thus, the nation was spared an almost unimaginable leadership crisis that could have arisen had the enemy successfully struck the White House and the Capitol on a day when the President was in Washington. Unlike the redundant and relatively reliable mechanisms in place (dating from the Cold War) to ensure continuity in *military* command and control, the nation's legal arrangements for ensuring the continuity of the Presidency are inadequate and are most likely to fail at precisely the moment when the need for decisive executive authority is most urgent, and when its absence may prove fatal to American lives and interests.

In the event of a vacancy in the Presidency, the 25th Amendment (ratified in 1967 in response to Lyndon Johnson's succession to the Presidency in 1963 following the assassination of President Kennedy) is clear: the Vice-President "shall" become President,

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2 THE FEDERALIST NO. 70 (Clinton Rossiter ed. 1961).

and the new President "shall" appoint, subject to confirmation by a majority of both houses of Congress, a new Vice President. However, in the event of simultaneous vacancies in the Presidency and the Vice Presidency, or the simultaneous "inability" of these officers to exercise presidential duties, the nation's presidential succession mechanism is probably unconstitutional and is a sure formula for instability, hesitation, and partisan gamesmanship at the worst possible moment.

Article II, Section 1, Clause 6 of the Constitution (the "Succession Clause") specifies that in the event of simultaneous vacancies in the Presidency and the Vice Presidency, or the simultaneous "inability" of those officers to act, Congress may by law specify what "Officer" shall "act as President . . . until the disability be removed, or a President shall be elected." Thus, unlike a Vice President who becomes President under the 25th Amendment (which constitutionalized the precedent set by Vice President John Tyler's assumption of the Presidency in 1841 following the death of President William Henry Harrison), a statutory successor under the Succession Clause may only "act" as President. If a statutory successor is serving as Acting President, Congress may—but is not required to—call a new presidential election.

Congress has exercised its power to designate statutory presidential successors three times in U.S. history, and on two of those occasions, partisan considerations were the overriding impetus for the result.[3] In 1792, during George Washington's first presidential term, the Federalist-controlled Second Congress designated two *congressional* officers as statutory presidential successors after the Vice President: first the President pro tempore of the Senate, and then the Speaker of the House. The 1792 Act provided that these officers were to "act" as President while retaining their congressional offices, pending a special presidential election, for which the 1792 Act also provided. Although Congressman James Madison voted against the 1792 Act and contended that it was unconstitutional because these congressional officers are not "Officers" within the meaning of the Succession Clause, partisan interests overrode constitutional principle. Alexander Hamilton, the leader of the Federalists and Secretary of the Treasury, directed the Federalist majority in Congress to defeat alternative legislation that would have placed his chief political rival, Secretary of State Thomas Jefferson, in the statutory line of succession in lieu of the President pro tempore and the Speaker.

During the impeachment and trial of President Andrew Johnson in 1868, when the office of Vice President was vacant, it was apparent that the 1792 Act's placement of the President pro tempore of the Senate and the Speaker of the House in the line of succession created serious problems, especially when the President and these congressional officers came from different parties. Such placement injected partisan tensions into what should be a smoothly-functioning succession mechanism, and it opened the door to a congressional cabal's seizure of the Presidency by elevating one of their own through impeachment and removal of the President in the event of a vacancy in the Vice Presidency.

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[3] For a detailed treatment of Congress's succession legislation in 1792, 1886, and 1947, see R. SILVA, PRESIDENTIAL SUCCESSION 112–31 (1951).

In the 1880s, when the painful experience of the Johnson impeachment and trial was still a recent memory, two other episodes jolted Congress into enacting a new statutory line of succession. First, in 1881, following the death of President James Garfield by an assassin's bullet, the succession of Vice President Chester Arthur to the Presidency meant that there was no statutory successor to President Arthur because Congress was out of session and there would be neither a President pro tempore nor a Speaker until Congress reconvened. That prompted discussion and the introduction of legislation, but nothing came of it.

Then, in 1885, Democratic President Grover Cleveland's Vice President, John Hendricks, died in office, and as Congress was out of session, once again there were no statutory successors to act as President in the event that the President died or was otherwise unable to discharge his duties. Upon the reconvening of Congress, Republican Senator George F. Hoar of Massachusetts introduced legislation providing that after the Vice President, the line of succession would begin with the Secretary of State and would continue through the cabinet department heads in the order of the departments' creation. Senator Hoar's legislation took the Republican President pro tempore (along with the House Speaker) out of the line of succession and replaced them with Cleveland's Democratic cabinet. This was a rare act of principled statesmanship regarding a subject, presidential succession, where partisan considerations have usually carried the day.

Senator Hoar persuaded his Republican Senate colleagues to pass his legislation, notwithstanding their partisan interests, on the basis that history demonstrated that the Secretary of State was more likely to be fit for executive responsibilities than the chief congressional officers, and that it violated the separation of powers for a congressional officer to act as President. Additionally, Senator Hoar contended that placing the President's cabinet officers in the line of succession would not result in a change of partisan control of the Presidency, whereas the 1792 Act created an incentive for anyone seeking to effect a change in policy to assassinate the President when the Vice Presidency was vacant and the Senate was controlled by the other party. The Democratic-controlled House passed this legislation, and Senator Hoar's bill was signed into law by President Cleveland as the Presidential Succession Act of 1886. The 1886 Act also provided that a statutory successor would immediately convene Congress, if it were not already in session, which could then decide whether to call a special presidential election.

The 1886 Act was the statutory regime in place in 1945 when President Franklin Roosevelt died and Vice President Harry Truman succeeded to the Presidency, leaving a vacancy in the office of Vice President.

President Truman believed on populist principle that if he were unable to complete Franklin Roosevelt's last term, an elected official rather than the unelected Secretary of State should act as President. Curiously, he also thought it unwise for a President to have the power to choose his own successor, although Franklin Roosevelt effectively had done just that by naming Truman as his running mate in 1944. Within a few months of taking office in 1945, Truman proposed legislation providing for the House Speaker and President pro tempore of the Senate (in that order) again to be placed in the statutory line of

succession, this time ahead of the cabinet officers. This proposal, which also provided for the calling of a special presidential election, also went nowhere when Truman's party controlled both the Congress and the White House.

After the Republicans won control of Congress in the mid-term elections of 1946, however, Truman renewed his request, and the Republican Congress was happy to oblige him, over the forceful objection of some, such as Democratic Senator Carl Hatch of New Mexico, who reiterated arguments previously voiced by James Madison in 1792 and Senator Hoar in 1886. While the Republican Congress was delighted to place its own officers in the line of succession after Truman, it was not prepared to provide for a special presidential election that might displace its own officer from the Acting Presidency. Thus, Truman's sincere but misplaced populism and Republican partisan opportunism combined to produce the Presidential Succession Act of 1947, a complicated statute found at Section 19 of Title 3 of the United States Code that, for better or worse, is still the applicable law today.[4] In my view, when the gravity of the subject matter is considered, the Presidential Succession Act of 1947 is perhaps the most poorly designed statute in the entire United States Code.

Section 19(a)(1) of the 1947 Act provides that in the event that there is neither a President nor a Vice President, or in the event the incumbents of those offices are unable to discharge their duties, the Speaker of the House shall, upon his resignation as Speaker and as a representative in Congress, "act as President." Section 19(a)(2) provides that in the event there is no House Speaker, or if the Speaker fails to qualify, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as senator, act as President. In the event that an incumbent President or Vice President's "inability" to discharge his duties is removed, Section 19 terminates the (by then) former Speaker or (by then) former President pro tempore's tenure as Acting President.

The requirement that the Speaker and President pro tempore resign their seats in Congress before assuming presidential duties is practically demanded by the separation of powers, but it could cause either or both of these officers to hesitate or decline to assume presidential duties, especially if either the House or Senate were as closely divided as they are today. For example, had fate presented then 98-year-old Senator Strom Thurmond with the opportunity to assume presidential duties while he was President pro tempore during the first half of 2001 (when the Senate was evenly divided prior to Senator Jeffords's switch of parties), he would have had to consider the fact that his resignation from the Senate would have resulted in a Democratic takeover of the Senate, because the

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[4] The best scholarly treatments of the complexities of the 1947 Act (and its interaction, or lack thereof, with the 25th Amendment) are by William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: The Emperor Has No Clones*, 75 GEO. L.J. 1389 (1987), and Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 and the Separation of Powers: If at First You Don't Succeed, Try, Try Again*, 20 HASTINGS CONST. L.Q. 105 (1992).

(then) Democratic Governor of South Carolina presumably would have appointed a Democratic successor to Senator Thurmond's vacant Senate seat.

In the event that there is neither a House Speaker nor a President pro tempore of the Senate, or in the event that neither qualifies or is able to assume the position of Acting President, Section 19(d) specifies that the cabinet member who is highest on the following list shall act as President, provided that the cabinet member has been confirmed by the Senate prior to the vacancy in the President pro tempore's office or the failure of the President pro tempore to qualify as Acting 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, and Secretary of Veterans Affairs. (Legislation that would place the Secretary of Homeland Security fifth in this cabinet line, behind the Attorney General, has passed the Senate and is pending in the House.)

The order of succession advances down this list in the event that a cabinet position is vacant or its incumbent is unable or unwilling to assume the status of Acting President. Section 19 provides reasons why a cabinet officer might decline to assume the Acting Presidency, especially if his or her tenure as Acting President might only be for a few hours or days.

Under Section 19, the taking of the presidential oath by any cabinet officer is deemed to constitute the officer's resignation from his or her cabinet office. In our era of protracted and bruising Senate confirmation ordeals, this resignation requirement might cause the statutory successor to hesitate before assuming presidential duties or to decline to do so altogether, especially if the President or Vice President's fate was unknown and it appeared that one of them might recover the ability to discharge his duties after a temporary inability to do so.

This hesitation that Section 19 induces may prove disastrous if a presidential decision is urgently required. For example, on September 11, if planes had first crashed into the White House and Capitol rather than towers One and Two of the World Trade Center, leaving the President, Vice President, Speaker, and President pro tempore dead or missing, the military might have sought permission to shoot down other airliners that appeared to be hijacked. Any hesitation in giving such an order might have resulted in the loss of the opportunity to act, and thus even greater casualties.[5]

Section 19 imposes another important constraint on the assumption of the presidential duties by cabinet members. If the Speaker and the President pro tempore do

[5] It appears that this particular contingency has now been addressed through pre-delegated command arrangements, under which senior military commanders have the authority to shoot down hijacked airliners without first seeking presidential approval. Nevertheless, other threat contingencies are certain to arise where, as on September 11, there are no such specific predelegated command arrangements.

not assume the duties of the Presidency, either because they are dead, because they are "unable" to act, or because they decline to assume presidential duties (perhaps because of an unwillingness to resign their own congressional office as is required by Section 19), a cabinet officer who does accept presidential duties (and thereby resigns from his or her cabinet office) is subject thereafter to being displaced from the Acting Presidency by a Speaker or President pro tempore who changes his or her mind and decides to exercise presidential prerogatives, or recovers his or her ability to discharge presidential duties after a period of "inability" (e.g., after a return from foreign travel). In other words, a cabinet successor serving as Acting President is subject to dismissal and replacement at will by either the Speaker or the President pro tempore.

Perhaps most unsettling of all is the possibility that a cabinet officer acting as President could be displaced from the exercise of presidential duties by a newly-chosen Speaker or President pro tempore, even if the selection of the new Speaker or President pro tempore is made post-attack by a handful of surviving representatives or senators who happened to be out of Washington when the enemy struck. Thus, on September 11, if the President, Vice President, Speaker, President pro tempore, and most members of Congress had been killed in attacks on the White House and the Capitol Building, and with Secretary of State Powell out of the country and possibly unable immediately to discharge presidential duties, Treasury Secretary Paul O'Neill might have become Acting President, at the cost of his cabinet office (assuming that he survived the attack on the White House, which is adjacent to his own office in the Treasury Department building). If only a dozen members of the House had survived such a catastrophe, under the rules of the House they could have promptly selected any of their own as the new Speaker, who in turn could have promptly displaced O'Neill as Acting President. O'Neill, having resigned his cabinet office to assume the Acting Presidency, would then have had to return to the private sector rather than the Treasury Department.

The point that bears special emphasis is that if the nation suffers some catastrophe that results in the loss of the President, the Vice President, and most members of the House and Senate, the surviving members of Congress will inherit not only the full legislative powers of Congress, but also the Presidency itself, should a newly-chosen Speaker or President pro tempore choose to displace any surviving cabinet member who resigned his or her cabinet post to serve as Acting President. If Congress does nothing else, it should amend the 1947 Act to eliminate the ability of a newly-elected House Speaker or President pro tempore of the Senate to displace a cabinet officer serving as Acting President.

Notwithstanding President Truman's good intentions, in my opinion the 1947 Act placing congressional officers in the line of succession (and giving them a preference in the line of succession by empowering them to displace cabinet successors at will) is probably unconstitutional and is certainly unwise policy.

The 1947 Act is probably unconstitutional because it appears that the Speaker of the House and the President pro tempore of the Senate are not "Officers" eligible to act as

President within the meaning of the Succession Clause.[6] This is because in referring to an "Officer," the Succession Clause, taken in its context in Section 1 of Article II, probably refers to an "Officer of the United States," a term of art under the Constitution, rather than *any* officer, which would include legislative and state officers referred to in the Constitution (e.g., the reference to state militia officers found in Article I, Section 8). In the very next section of Article II, the President is empowered to "require the Opinion, in writing, of the principal *Officer* in each of the executive Departments" and to appoint, by and with the advice and consent of the Senate, "Officers of the United States." These are the "Officers" to whom the Succession Clause probably refers. This contextual reading is confirmed by Madison's notes from the Constitutional Convention, which reveal that the Convention's Committee of Style, which had no authority to make substantive changes, substituted "Officer" in the Succession Clause in place of "Officer of the United States," probably because the Committee considered the full phrase redundant.

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." The Constitution further distinguishes between "Officers" and members of Congress in specifying qualifications for presidential electors: "no Senator or Representative, *or* Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector" (Article II, Section 1, clause 2). Similarly, in requiring oaths to support the Constitution, Article VI distinguishes between legislators and officers: "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

The understanding that "Officers of the United States" are distinct from members of Congress, including congressional officers, is supported by the Constitution's requirement that the President alone, subject to the advice and consent of the Senate, appoint (Article II, Section 2, clause 2) and commission (Article II, Section 3) "Officers of

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[6] The argument to this effect by James Madison in 1792, Senator George Hoar in 1886, and Senator Carl Hatch in 1947 is further elaborated by SILVA, *supra* note 3, at 131–37, and by Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995). Professor John Manning, in response to the arguments advanced by the Amars (and Madison, Hoar, Hatch, and Silva before them), contends that the constitutional arguments against placement of congressional officers in the line of succession are not so strong as to overcome the presumption in favor of the constitutionality of acts of Congress. *See* John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141 (1995). Professor Calabresi concurs with the Amars' constitutional arguments, but concludes that the issue is a classic political question and hence non-justiciable by an Article III court. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155 (1995).

the United States" and that "all civil Officers of the United States" be subject to impeachment (Article II, Section 4). The President neither appoints nor commissions the Speaker and the President pro tempore, and neither the Speaker nor the President pro tempore is subject to impeachment.

There are some important practical consequences that follow from the principle that members of Congress are not "Officers of the United States." Under Article I, Section 3, Clause 7, an "Officer" who has been impeached by the House and removed from office by the Senate is disqualified "to hold and enjoy any Office of honor, Trust, or Profit under the United States." Such a person, however, is *not* disqualified from serving in Congress, because a member of Congress is not an "Officer" under the Constitution, and persons who have been impeached by the House and removed from federal office by the Senate have thereafter been elected to Congress.

The contextual argument that members of Congress are not "Officers" within the meaning of the Succession Clause is supported by an appreciation of the Constitution's structure. Under the structure of the Constitution, it is almost inconceivable that Congress may place its own officers in the line of presidential succession. It strains credulity to think that the Framers, who were especially concerned about the inherent legislative tendency to aggrandize power at the expense of the Executive Branch, would have permitted Congress to place its own officers in the line of succession, when they went out of their way to deny Congress *any* appointment power as to Executive and Judicial officials, not only as to Officers, but also as to lowly "inferior Officers" who do not even require Senate confirmation. It is hardly likely that the same Constitution that denies Congress the power to appoint local postmasters and federal court clerks provides Congress with the power to appoint an "Officer" who might be called upon to exercise presidential duties.

Finally, the Succession Clause appears to contemplate that the "Officer" shall keep his position and simultaneously "act" as President, a situation that would destroy the separation of powers if a member of Congress were simultaneously to act as President. (A cabinet officer could, however, simultaneously exercise his or her cabinet and presidential duties without violence to the separation of powers. Indeed, the 1947 Act's requirement that a cabinet successor resign his or her cabinet office is yet another probably unconstitutional feature of that Act.) In any event, even if the Speaker and President pro tempore were otherwise eligible to act as President under the Succession Clause, it would destroy the separation of powers to allow them, as Section 19 does, to displace at will a cabinet officer serving as Acting President, because under that arrangement the Acting President would serve at the sufferance of the Speaker and the President pro tempore.

Quite apart from these constitutional objections, there are compelling policy reasons against placing the Speaker and the President pro tempore in the line of presidential succession. First, it allows for the possibility that a terrorist attack or some other catastrophe could undo the results of the preceding presidential election by suddenly transferring the Presidency from one party to another. Osama bin Laden should not be permitted to replace the Clinton Administration with the Gingrich Administration, or the

Bush Administration with the Byrd Administration. Presidential succession is traumatic enough when the successor is from the President's own party, as in the case of the assassination of John Kennedy in 1963 or the resignation of Richard Nixon in 1974. The national trauma would be even greater if control of the Executive Branch also changed as a result of assassination or foreign attack. Indeed, the very possibility that a successful attack could result in a change of control of the Presidency (and hence a change in foreign policy) might in certain circumstances even induce foreign enemies to contemplate such an attack, especially if the attack could be passed off as the work of terrorists or domestic madmen.

That the placement of congressional officers in the succession mechanism might be manipulated for partisan purposes was evident during the impeachment of Andrew Johnson. Congress sought to eliminate this possibility with the 1886 Act, but Harry Truman's 1947 Act revived it by reinstating the Speaker and President pro tempore in the line of succession. More recently, after Vice President Spiro Agnew's resignation in 1973, some Democratic members of Congress sought to convince their colleagues to block the confirmation of Gerald Ford to the Vice Presidency, to which Ford had been nominated by President Nixon in the first use of the 25th Amendment, in the expectation that Nixon would ultimately be forced from office, and that the Presidency would then fall to the Democratic Speaker, Carl Albert, if the Vice Presidency were kept vacant. Fortunately, cooler heads prevailed, and the Democratic-controlled Congress confirmed Ford, but it illustrates the mischief possible under Section 19 in the event of a vacancy in the Vice Presidency.

Second, the placement of congressional officers in the line of succession injects partisan tensions into the succession mechanism in other, less obvious ways. For example, on March 30, 1981, while President Reagan was undergoing surgery after suffering a gunshot wound in an assassination attempt, and Vice President George H.W. Bush was aboard Air Force Two returning to Washington from Texas, most of the cabinet convened in the White House Situation Room. From all accounts that have been written of that day, it is clear (and frightening) that Vice President Bush's ability to communicate meaningfully with the White House Situation Room while aboard Air Force Two was marginal at best. Thus, on his own authority in the military chain of command, and to the consternation of Secretary of State Alexander Haig, Secretary of Defense Caspar Weinberger (prudently) ordered a heightened alert status for U.S. strategic forces, because it was unclear whether the attempt on President Reagan's life had any connection with the fact that Soviet ballistic missile submarines off the U.S. East Coast—which, because of minimal warning times, would have been a key instrument in any Soviet first strike—were operating unusually close to U.S. shores that day.

But most remarkable of all about the events of March 30, 1981, is that it does not appear to have even occurred to anyone in the White House Situation Room to invite the Democratic Speaker of the House, Thomas "Tip" O'Neill, to join the cabinet in the event that it became necessary to issue presidential orders and Vice President Bush could not effectively communicate with the cabinet (the classic instance of "inability" within the meaning of the Succession Clause and Section 19). Apparently it was inconceivable to the

assembled cabinet members that the leader of the Democratic opposition should be prepared for the possibility of temporarily assuming presidential duties, even if the Vice President could not be reached and the President was fighting for his life in emergency surgery. On the other hand, it is far from clear whether Speaker O'Neill would have been willing to resign from the Speakership and the House so that he might serve as Acting President during the three hours that Vice President Bush was in transit back to Washington.

Third, as Senator Hoar observed in 1886, 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, especially in a crisis like September 11 where an Acting President might be called upon to act decisively and even ruthlessly to protect national security.

The Speaker and President pro tempore, however, are not the only statutory successors designated by Section 19 who might lack presidential attributes. In selecting their cabinets, Presidents simply do not exercise the same care that they might exercise in selecting a Vice President, even though under Section 19 any cabinet officer might find himself thrust into the role of Acting President at a moment of supreme crisis comparable to December 7, 1941, and November 22, 1963, rolled into one, which is what September 11, 2001, easily could have been had the President been in Washington and the terrorists been just a bit luckier.

Whether or not they possess presidential attributes, the total number of statutory presidential successors is, at most, seventeen—the Speaker of the House, the President pro tempore of the Senate, and the fifteen members of the cabinet (counting the Secretary of Homeland Security). At any given moment, this number might be reduced by vacancies in these offices, the "inability" of the officers to act, or the ineligibility of some of these officers to assume presidential duties. An example of cabinet officers who are unable to act are those absent from Washington and unable effectively to communicate with Washington, as when several members of John Kennedy's cabinet were on board a jet over the Pacific en route to Japan on November 22, 1963. It is not unusual for cabinets to contain naturalized citizens who are ineligible to discharge presidential duties (e.g., Henry Kissinger in the Nixon and Ford Administrations, Madeleine Albright in the Clinton Administration, and Elaine Chao and Mel Martinez in the current Administration), which may further reduce the pool of potential statutory successors.

Finally, all of the statutory successors work in Washington, D.C., which means, as Norman J. Ornstein has observed, that a nuclear or biological attack on the nation's capital could eliminate the entire line of succession (and the rest of the federal government) in one fell swoop.[7] In that extreme situation, the Presidency would fall (after some period of

[7] See Norman J. Ornstein, *Worst Case Scenarios Demand the House's Immediate Attention*, ROLL CALL, Nov. 8, 2001, found at http://www.rollcall.com.

vacancy) by default into the hands of the surviving representative who convinced his or her surviving colleagues to select him or her as Speaker, or the surviving senator who convinced his or her surviving colleagues to select him or her as President pro tempore.

September 11 also illustrates another weak link in the presidential succession mechanism. Under Section 19, the first cabinet successor to assume presidential duties may not thereafter be displaced by another, prior-entitled cabinet successor who was temporarily unable to do so. Thus, on September 11, when Colin Powell was out of the country, if the President, Vice President, Speaker, and President pro tempore had been killed or were missing in attacks on the White House and the Capitol Building, Treasury Secretary O'Neill would have had to make an immediate decision about whether Colin Powell was unable to discharge presidential duties because of his absence from the country. Under Section 19, had O'Neill assumed presidential duties, Powell would not have been able to displace O'Neill upon his return to Washington, which might have resulted in claims that O'Neill had wrongfully usurped the Presidency and in litigation (the last thing the nation would want or need at such a moment) over whether Powell in fact had been unable to discharge presidential duties at the time of O'Neill's assumption of the Acting Presidency. The very fact that O'Neill might be exposed to charges of usurpation might cause him to hesitate before acting, leaving the world (and other foreign enemies in particular) to wonder who was running the government while the Secretary of State was abroad and the President, Vice President, Speaker, and President pro tempore dead or missing in the burning rubble of the White House and Capitol Building.

A better solution would be to permit a lower-ranking cabinet officer such as Treasury Secretary O'Neill temporarily to assume presidential duties, without loss of his or her cabinet office, until a higher-ranking cabinet officer is able to do so. Thus, in the September 11 scenario discussed above, Secretary O'Neill could have announced to the nation and the world that he had temporarily assumed presidential duties pending Secretary of State Colin Powell's return to Washington. Thus, Secretary O'Neill could have temporarily acted as President to protect the nation's interests, without resigning his cabinet office, and without offense to higher-ranking Secretary of State Colin Powell, who would have assumed the Acting Presidency upon his return to the U.S.

September 11 aptly demonstrates Sir Winston Churchill's dictum that sometimes in war "the imagination is baffled by the facts." Sooner or later, and perhaps at the hour of maximum national peril, the nation's poorly-designed presidential succession mechanism may plunge the nation into unprecedented political turmoil or deliver the Presidency into the hands of some junior cabinet officer or member of Congress ill-equipped for such a role. The Bush Administration, apparently aware of the potential magnitude of the disaster that might result from simultaneous vacancies in the Presidency and Vice Presidency, took extraordinary steps in the immediate aftermath of September 11 to limit the occasions during which President Bush and Vice President Cheney might be found together, at the White House or elsewhere. Indeed, it appears that the Vice President was largely kept away from Washington at an undisclosed "secure location" for several months after September 11, at least when the President was in town.

Relocating the Vice President's office to a bunker in the Blue Ridge Mountains is not a permanent or satisfactory solution to the succession problem, especially when the Vice President has important duties of his own, including presiding over a closely-divided Senate where he might be called upon to cast the deciding vote. A better near-term solution is to amend Section 19 to reconstitute the line of succession with officers from those departments with the most important Executive Branch functions and with state governors selected by the President. The Speaker, President pro tempore, and the less important cabinet officers should be removed from the line of presidential succession.

The reconstituted line of succession after the Vice President should begin with the Secretary of State, and continue on with the Secretary of Defense, the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security (in that order). These officers should be permitted to exercise presidential duties without resigning their positions, and those officers higher on the list should be able to displace more junior successors only if they had been under a temporary disability at the time the more junior officer accepted presidential duties.

After these cabinet successors, Section 19 should designate as statutory successors those state governors whom the President chooses to "federalize" in their capacity as commanders-in-chief of their states' National Guard.[8] Although the issue is not free from doubt, federalizing a governor in his or her capacity as commander-in-chief of a state's military forces would arguably have the effect of making such a governor an "Officer" of the United States eligible to act as President. (At least it would not be any more unconstitutional than the 1947 Act's placement of congressional officers in the line of succession.) Placing designated "federalized" governors in the line of succession would ensure continuity of the Presidency in the event that all of the cabinet successors were eliminated by an attack on Washington, D.C., with a weapon of mass destruction.

Another possibility is to amend Section 19 to allow the President to nominate, subject to Senate confirmation, a "First Assistant Vice President," "Second Assistant Vice President," and so forth, who would hold these offices and be placed in the line of succession after the principal cabinet officers (or perhaps ahead of them). Although appointment by the President and confirmation by the Senate does not by itself necessarily create the status of "Officer of the United States" for the official so appointed, *see Communications Satellite Corp*., 42 Op. Atty. Gen. 165, 167 (1962), there is authority that an official empowered by statute to act in the absence or inability of an "Officer of the United States" is necessarily also an "Officer of the United States." *See Second Deputy Comptroller of the Currency-Appointment*, 26 Op. Atty. Gen. 627, 629–30 (1908).

In the long run, the solution to the problem of the concentration of presidential successors in Washington is a constitutional amendment that allows the President to nominate, subject to Senate confirmation, statutory presidential successors (in addition to the cabinet) who are not "Officers" of the United States, but nevertheless are eminently qualified, to act as President in the extreme situation that the nation would face following

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[8] Ornstein, *supra* note 7, suggests placing state governors in the line of succession.

the destruction of Washington, D.C., and the elimination of the President, the Vice President, and the statutory cabinet successors. For example, President 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.

Such a constitutional amendment, by eliminating the requirement that a statutory successor be an "Officer" of the United States, would also eliminate any doubts about placing state governors in the line of succession, and could provide for succession to the Presidency itself (as opposed to the Acting Presidency). Such a constitutional amendment is necessary to eliminate other uncertainties in the succession mechanism, such as whether the confirmation of a Vice President nominated under the 25th Amendment operates to displace a statutory Acting President who made the nomination.

In sum, I recommend that Congress take the following steps (in order of priority):

1. If the Speaker and President pro tempore are to remain in the line of succession, amend Section 19 to preclude them from displacing a cabinet officer serving as acting president if they previously declined to assume the Acting Presidency, or if they were chosen as Speaker or President pro tempore after the cabinet officer assumed the Acting Presidency.

2. Amend Section 19 to eliminate the requirement that statutory successors resign their posts before assuming the Acting Presidency.

3. Amend Section 19 to allow a senior cabinet officer under a temporary disability to assume the Acting Presidency from a more junior cabinet officer (the Colin Powell/Paul O'Neill situation on September 11).

4. Remove the Speaker and President pro tempore from the line of succession, along with the less important cabinet offices.

5. By statute, allow the President to appoint, with the advice and consent of the Senate, additional, non-cabinet statutory successors.

6. Submit a constitutional amendment to the states for ratification to cure the deficiencies in the presidential succession mechanism that cannot be corrected by statute, and to validate other provisions of the succession law that may be unconstitutional.

After the near-miss of September 11, there is no time to lose in ensuring that the presidential succession mechanism is stable, predictable, and seamless, even (and especially) during moments of supreme crisis such as a foreign attack upon the United States. I applaud the Rules Committee and the Judiciary Committee for taking up this very important issue.