Presidential and Vice Presidential Succession: Overview and Current Legislation

Summary

Whenever the office of President of the United States becomes vacant due to "removal ... death or resignation" of the chief executive, the Constitution provides that "the Vice President shall become President." When the office of Vice President becomes vacant for any reason, the President nominates a successor, who must be confirmed by a majority vote of both houses of Congress. If both of these offices are vacant simultaneously, then, under the Succession Act of 1947, the Speaker of the House of Representatives becomes President, after resigning from the House and as Speaker. If the speakership is also vacant, then the President Pro Tempore of the Senate becomes President, after resigning from the Senate and as President Pro Tempore. If both of these offices are vacant, or if the incumbents fail to qualify for any reason, then cabinet officers are eligible to succeed, in the order established by law (3 U.S.C. §19, see Table 3). In every case, a potential successor must be duly sworn in his or her previous office, and must meet other constitutional requirements for the presidency, i.e., be at least 35 years of age, a "natural born citizen," and for 14 years, a "resident within the United States." Succession-related provisions are

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Constitutional Provisions and the Succession Act of 1792

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

> In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disab023 Tc-0.06Fr49nTResilnb

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

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

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

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

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

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

[7]

Tempore because of partisan strife.[8] Congress subsequently passed the Succession Act of 1886 (24 Stat. 1) in order to insure the line of succession and guarantee that potential successors would be of the same party as the deceased incumbent. This legislation transferred succession after the Vice President from the President Pro Tempore and the Speaker to cabinet officers in the chronological order in which their departments were created, provided they had been duly confirmed by the Senate and were not under impeachment by the House. Further, it eliminated the requirement for a special election, thus ensuring that any future successor would serve the full balance of the presidential term. This act governed succession until 1947.

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

The Presidential Succession Act of 1947

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

The President renewed his call for legislation when the 80th Congress convened in 1947, and legislation was introduced in the Senate the same year. Debate on the Senate bill centered on familiar questions: whether the Speaker and President pro tempore were "officers" in the sense intended by the Constitution; whether legislators were well-qualified for the chief executive's position; whether requiring these two to resign their congressional membership and offices before assuming the acting presidency was fair.[9] In the event, the Senate and House passed legislation that embodied Truman's request, but again deleted the special election provisions.

Under the act (61 Stat. 380, 3 U.S.C.§19), if both the presidency and vice presidency are vacant, the Speaker succeeds (after resigning the speakership and his

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

[9] Feerick, *From Failing Hands*, pp. 207-208.

[10] This requirement was included because the Constitution (Article I, Section 6, clause2)

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

Section 2 of the 25th Amendment has been invoked twice since its ratification: in 1973, when Representative Gerald R. Ford was nominated and approved to

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

[16] The 1792 act specified this order of succession; the 1947 act reversed the order, placing the Speaker of the House first in line,

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of Franklin D. Roosevelt.[22] President Truman responded less than two months after succeeding to the presidency, when he proposed to Congress the revisions to succession procedures that, when amended, eventually were enacted as the Succession Act of 1947. The President explained his reasoning in his special message to Congress on the subject of succession to the presidency:

> ... by reason of the tragic death of the later President, it now lies within my power to nominate the person who would be my immediate successor in the event of my own death or inability to act. I do not believe that in a democracy this power should rest with the Chief Executive. In so far as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country. The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.[23]

Conversely, critics of this reasoning assert that the Speaker, while chosen by a majority of his peers in the House, has won approval by the *voters* only in his own congressional district. Further, although elected by the voters in his home state, the President Pro Tempore of the Senate serves as such by virtue of being the Senator of the majority party with the longest tenure.[24]

Against the case for democratic succession urged by President Truman, the value of party continuity is asserted by some observers. The argument here is that a person acting as President under these circumstances should be of the same political party as the previous incumbent, in order to assure continuity of the political affiliation, and, presumably, the policies, of the candidate chosen by the voters in the last election. According to this reasoning, succession by a Speaker or President Pro Tempore of a different party would be a reversal of the people's mandate that would be inherently undemocratic. Moreover, they note, this possibility is not remote: since passage of the Succession Act of 1947, the nation has experienced "divided government," that is, control of the presidency by one party and either or both housession ma

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[22] Feerick, *From Failing Hands*, pp. 204-205.

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

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

[25] Akhil Amar, Testimony before the Senate Committees on the Judiciary and Rules and (continued...)

[25] (...continued)
Administration, Sept. 16, 2003, p. 2. Available at [http://judiciary.senate.gov/print_testimony.cfm?id=914&wit_id=2603], visited Feb. 25, 2004.

[26] Howard M. Wasserman, Testimony, p. 4.

[27] Most often cited is the example of Speaker John McCormick and President Pro Tempore Carl Hayden, who were first and second in line of presidential succession for 14 months following the assassination of President ble22w[(.25)5.9(d[(measur,n linve)laTJ-0.0128 Tw[elect10.9(5.57(d)ss,)7

House elects a new Speaker, w

[30] 3 U.S.C. § 19 (b).

[31] 3 U.S.C. § 19 (d)(3).

[32] Howard M. Wasserman, Testimony, p. 8.

line of succession. Another suggested remedy would be to amend the Succession Act of 1947 to eliminate the right of "prior entitled" individuals to supplant an acting President who is acting due to a vacancy in the office of President and Vice President. Relatedly, other proposals would amend the law to permit cabinet officials to take a leave of absence from their departments while serving as acting President in cases of presidential and vice presidential disability. They could thus return to their prior duties on recovery of either the President and Vice President, and their services would not be lost to the nation, nor would there be the need to nominate and confirm a replacement.

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

Between Nomination and Election. This first contingency would occur if there were a vacancy in a major party ticket before the presidential election. This possibility has been traditionally covered by political party rules, with both the Democrats and Republicans providing for replacement by their national committees.[33] For example, in 1972, the Democratic Party filled a vacancy when vice presidential nominee Senator Thomas Eagleton resigned at the end of July, and the Democratic National Committee met on August 8 of that year to nominate R. Sargent Shriver as the new vice presidential candidate.

Between the Election and the Meeting of the Electors. The second would occur in the event of a vacancy after the election, but before the electors meet to cast their votes in December. This contingency has been the subject of speculation and debate. Some commentators suggest that, the political parties, employing their rules providing for the filling of presidential and vice presidential vacancies, would designate a substitute nominee. The electors, who are predominantly party loyalists, would presumably vote for the substitute nominee. Given the unprecedented nature of such a situation, however, confusion, controversy, and a breakdown of party discipline among the members of the electoral college might also arise, leading to further disarray in what would already have become a problematical situation.[34]

Between the Electoral College Vote and the Electoral Vote Count by Congress. A third contingency would occur if there were a vacancy in a presidential ticket during the period between the time when the electoral votes are

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

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

[35] Ibid., pp. 39-40.

[36] Ibid., p. 12.

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[39] See 3 U.S.C. § 19 "Amendments" for examples.

[40] Sen. Dodd subsequently co-sponsored.

[41] Rep. Platts cosponsored H.R. 1354.

[42] They are, in order of departmental seniority, the Secretaries of State, the Treasury, and Defense, and the Attorney General. The Secretary of Defense supplanted the Secretary of War when the Department of Defense was established in 1947. All attorneys general served in the cabinet beginning in 1792, although the Department of Justice was not established until 1870.

This departure from tradition derives from heightened concern over the question of continuity of government.[43] It is argued that the proposed placement of the DHS secretary will have at least two advantages: first, the Department of Homeland Security will be one of the largest and most important executive departments, with many responsibilities directly affecting the security and preparedness of the nation. Both its size and crucial role are cited as arguments for placing the Secretary of DHS high in the order of succession. Second, the Secretary of Homeland Security will have critically important responsibilities in these areas, and may be expected to possess the relevant knowledge and expertise that arguably justify placing this official ahead of 10 secretaries of more senior departments, particularly in the event an unprecedented disaster were to befall the leadership of the executive branch.

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

S. 148 is the apparent choice for bicameral action for these companion bills. Introduced on January 13, 2003, at the time of this writing it has passed the Senate (on June 27, 2003, without amendment, by unanimous consent), been received in the House, and referred to Subcommittee on the Constitution of the House Judiciary Committee. H.R. 1354 was referred to the same House committee and subcommittee, but no subsequent action had been taken by the time of this writing.

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

[44] Cosponsors include Reps. Baird, Camp, Chabot, Frost, Jackson-Lee of Texas, Shadegg, and Vitter.

[47] Cosponsors include Reps.

"lower in the line of succession."[52] Although he was not more specific in his testimony, it could be argued that these officers might be inserted after the "big four", i.e., the Secretaries of State, the Treasury, and Defense, the Attorney General, and, possibly the Secretary of Homeland Security, should that officer be included at that place, as proposed in pending legislation.

Miller Baker offered other proposals during his testimony at the September, 2003, hearings, all of which would require amending the Succession Act of 1947. Under one, the President would be empowered to name an unspecified number of state governors as potential successors. The constitutional mechanism here would be the President's ability to call state militias (the National Guard) into federal service.[53] Fortier argues that, by virtue of their positions as commanders-in-chief of their state contingents of the National Guard, governors could, in effect be transformed into federal "officers" by the federalization of the Guard.[54]

A second proposal by Fortier would amend the Succession Act to establish a series of assistant vice presidents, nominated by the President, and subject to approval by advice and consent of the Senate. These officers would be included in the order of succession at an appropriate place. They would be classic "stand-by" equipment: their primary function would be to be informed, prepared, and physically safe, ready to serve as acting president, should that be required.[55]

Akil Amar proposed a similar measure, that the cabinet position of assistant vice president established by law, again, nominated by the President and subject to confirmation by the Senate. In his testimony before the September, 2003, joint Senate committee hearings, he suggested that presidential candidates should announce their choices for this office during the presidential campaign. This would presumably enhance the electoral legitimacy of the assistant vice president, as voters would be fully aware of the candidates' choices for this potentially important office, and include this in their voting decisions.[56]

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

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

[53] U.S. Constitution, Article II, Section 2, clause 1.

[54] John Fortier, Testimony, p. 13.

[55] Ibid.

[56] Akil Amar, Testimony, p. 2-3.

member of the cabinet, aware of and involved in the creation and execution of public policy."[57]

Finally, Fortier proposed a constitutional amendment that would eliminate the requirement that successors be officers of the United States, empowering the President to nominate potential successors beyond the cabinet, subject to advice and consent by the Senate. Such an amendment, he argues, would "... eliminate any doubts about placing state governors in the line of succession, and could provide for succession to the Presidency itself (as opposed to the acting Presidency)."[58] Fortier envisions that these persons would be "eminently qualified" to serve. As examples, he suggested that President George W. Bush might nominate, "... former President George H.W. Bush and former Vice President Dan Quayle, both of whom no longer live in Washington, to serve in the line of succession. Similarly, a future Democratic President might nominate former Vice Presidents Al Gore and Walter Mondale to serve in the statutory line of succession."[59]

Concluding Observations

Seemingly a long-settled legislative and constitutional question, the issue of presidential and vice presidential succession in the United States has gained a degree of urgency following the events of September 11, 2001. Old issues have been revisited, and new questions have been asked in light of concerns over a potentially disastrous "decapitation" of the U.S. Government as the result of a terrorist attack, possibly by use of weapons of mass destruction. The 108th Congress may well act to insert the office of Secretary of Homeland Security into the current line of succession. Major revisions to current succession legislation are less likely in the short run, although the foundations for future consideration have been laid. In the private sector, the American Enterprise Institute's Continuity of Government Commission is scheduled to address continuity in the presidency, having completed studies on continuity of the Congress. Further, the hearings conducted in September, 2003 by the Senate Committees on the Judiciary and Rules and Administration provided a forum for public discussions of current succession provisions, their alleged shortcomings, and a wide range of proposals for change.

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[57] Howard Wasserman, Testimony, p. 6.

[58] John Fortier, Testimony, p. 14

[59] Ibid.