S. HRG. 108–928

ENSURING THE CONTINUITY OF THE UNITED STATES GOVERNMENT: THE PRESIDENCY

JOINT HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

AND

COMMITTEE ON RULES AND ADMINISTRATION

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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House. We would be glad to hear any opening statement you would like to make at this time.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, I will be very, very brief. I just want to congratulate you and Senator Cornyn for holding this hearing.

As you both have said, there are almost unimaginable scenarios that are not unimaginable, that certainly could happen, that compel us to take action and to address these concerns. And 2 years is too long. It is time for this Congress to take action. It is time for this Congress to address the concerns that we have.

And so I am very, very happy that we are holding this hearing today. It is about time.

Thank you.

Chairman LOTT. Thank you, Senator DeWine.

Our first witness is Professor Akhil Amar. Mr. Amar has served as a distinguished law professor at Yale University for two decades and has been extensively published on the issues of Presidential succession and the U.S. Constitution. He is considered one of the foremost authorities on the subject of Presidential succession and the Constitution.

Dr. John Fortier—is that the correct pronunciation?—is an accomplished scholar at the American Enterprise Institute and serves as Executive Director for the Continuity of Government Commission. He has written and studied on these issues of governmental continuity as well as Presidential succession.

And Mr. Miller Baker is a partner in the law firm of McDermott Will & Emery. He previously served as counsel to the Senate Judiciary Committee as well as at the Justice Department. He is also a former intelligence officer for the U.S. military and has been recently published on Presidential succession issues by the Federalist Society.

Our final witness is Professor Howard Wasserman. Professor Wasserman teaches law at Florida International University College of Law and has studied and published on the subject of Presidential succession and the U.S. Constitution.

We look forward to hearing from all of you, and if you would give us your testimony in that order, and after you have testified, we will have perhaps other Senators here that would like to make statements, and then we have got a series of very interesting questions we would like to propound to you.

Professor?

STATEMENT OF AKHIL AMAR, SOUTHMAYD PROFESSOR OF LAW AND POLITICAL SCIENCE, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. AMAR. Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale and have been writing about the topic of Presidential succession for over a decade. In February 1994, I offered testimony on this topic to the Senate Judiciary Subcommittee on the Constitution, and I am grateful for the opportunity to appear here today. As my testi-

mony draws upon several articles that I have written on the subject, I would respectfully request that these articles be made part of the record.

The current Presidential succession Act, 3 U.S.C. section 19, is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced. I will summarize its main problems and then outline my proposed alternative.

First, section 19 violates the Constitution's Succession Clause, Article II, section 1, paragraph 6, which authorizes Congress to name an "officer" to act as President in the event that both President and Vice President are unavailable. House and Senate leaders are not "officers" within the meaning of the Succession Clause. Rather, the Framers clearly contemplated that a Cabinet officer would be named as Acting President. This is not merely my personal reading of Article II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.

Second, the act's bumping provision, section 19(d)(2), constitutes an independent violation of the succession clause, which says that the "officer" named by Congress shall "act as President...until the [Presidential or Vice Presidential] Disability be removed, or a President shall be elected." section 19(d)(2) instead says, in effect, that the successor officer shall act as President until someone else wants the job. Bumping weakens the Presidency itself and increases instability and uncertainty at the very moment when the Nation is most in need of tranquility. And I think that the scenario that Senator Cornyn offered very vividly captured some of the problems with instability and how it weakens the Presidency in a variety of situations.

Now, even if I were wrong about these constitutional claims, they are nevertheless substantial ones. The first point, to repeat, comes directly from James Madison, father of the Constitution, who helped draft the specific words of the Succession Clause. Over the last decade, many citizens and scholars from across the ideological spectrum have told me that they agree with Madison about the constitutional questions involved. If, God forbid, America were ever to lose both her President and Vice President, even temporarily, the succession law in place should provide unquestioned legitimacy to the "officer" who must then act as President—in part to keep it out of the courts and to reassure the country. And, again, I think the scenarios that Senator Cornyn offered were very vivid and, to me, quite powerful. With so large a constitutional cloud hanging over it, section 19 fails to provide this desired level of legitimacy.

In addition to these constitutional objections, there are many policy problems with section 19. First, section 19's requirement that an Acting President resign his previous post makes this law an awkward instrument in situations of temporary disability. And, Senator Lott, I think that is partly what you were talking about with having to leave your House job and the instabilities that that would create. The House needs to get new leadership and all of that. section 19's rules also run counter to the approach of the 25th Amendment, Senator Lott, which you mentioned, which facilitates smooth handoffs of power back and forth in situations of short-term disability—scheduled surgery, for example.

Second, section 19 creates a variety of perverse incentives and conflicts of interest, warping the Congress's proper role in impeachments and in confirmations of Vice Presidential nominees under the 25th Amendment.

Third, section 19 can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B? Here, too, section 19 is in serious tension with the better approach embodied in the 25th Amendment, which enables a President to pick his successor and thereby promotes executive party continuity.

Fourth, section 19 provides no mechanism for addressing arguable Vice Presidential disabilities or for determining Presidential disability in the event the Vice President is dead or disabled. These are especially troubling omissions because of the indispensable role that the Vice President needs to play under the 25th Amendment.

Fifth, section 19 fails to deal with certain windows of special vulnerability immediately before and after Presidential elections.

In short, section 19 violates Article II and is out of sync with the basic spirit and structure of the 25th Amendment, which became part of our Constitution two decades after section 19 was enacted.

The main argument against Cabinet succession is that Presidential powers should go to an elected leader, not an appointed underling. But the 25th Amendment offers an attractive alternative model of handpicked succession: from Richard Nixon to Gerald Ford to Nelson Rockefeller, for example, with a President naming the person who will fill in for him and complete his term if he is unable to do so himself. The 25th Amendment does not give a President carte blanche; it provides for a special confirmation process to vet the President's nominee, and confirmation in that special process confers added legitimacy upon the nominee. And, Senator Lott, it was very interesting to hear that even as a House Member, you were involved in the confirmation process, which ordinarily does not happen, but the 25th Amendment creates that special level of participation and legitimacy.

So if the 25th Amendment reflects the best approach to sequential double vacancy—when the top two positions, President and Vice President, become unavailable at slightly different times, first one, then the other—a closely analogous approach should be used in the event of simultaneous vacancy when they both become unavailable at the same instant. Congress could, if it wanted to, create a new Cabinet post—it could be called Assistant Vice President or Second Vice President or First Secretary; the name is not particularly important. But this new position would be one that would be nominated by the President and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a moment's notice, and to lie low until needed: in the line of succession but out of the line of fire, perhaps out of this city altogether in a location that would be very far removed from the President and Vice President in general.

The democratic mandate of this Assistant Vice President or First Secretary might be further enhanced if Presidential candidates announced their prospective nominees for this third-in-line job well before the November election. In casting ballots for their preferred

Presidential candidate, American voters would also be endorsing that candidate's announced succession team of Vice President and third in line. Cabinet officers should follow the Assistant Vice President in the longer line of succession, as is true in the current statute.

This solution solves the constitutional problems I identified. The new Assistant Vice President would clearly be an "officer"; bumping would be eliminated. The solution also solves the practical problems. No resignations would be required; power could flow smoothly back and forth in situations of temporary disability. Congressional conflicts of interest would be avoided. Party and policy continuity within the executive branch would be preserved. And the process by which the American electorate and then the Senate endorsed any individual Assistant Vice President would confer the desired democratic legitimacy on this officer, bolstering his or her mandate to lead in a crisis.

The two additional issues I have raised today—Vice Presidential disability and windows of special vulnerability at election time—also have clean solutions, as explained in my 1994 testimony.

Thank you.

[The prepared statement of Mr. Amar appears as a submission for the record.]

Chairman LOTT. Thank you.

Mr. Fortier?

STATEMENT OF JOHN C. FORTIER, EXECUTIVE DIRECTOR, CONTINUITY OF GOVERNMENT COMMISSION, AND RESEARCH ASSOCIATE, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. FORTIER. I would like to thank the Rules and Judiciary Committees for holding this hearing on the important subject of Presidential succession.

Let me salute the Senate for already having begun this task. Senator Lott mentioned this morning S. 148, Senator DeWine's bill, which passed through the Rules Committee and the full Senate. I support the substance of the bill, putting the Secretary of Homeland Security in the line of succession, but also applaud the thinking behind it. Typically, when a new Cabinet position, we just lump them at the end of the line of succession without thinking about their relative importance. In this case, we did think about it, and we moved the Cabinet Secretary up to a place below the big four Cabinet members, but thinking about his relative importance with national security matters.

If you use this as a model to think through and not follow simply the status quo of the current Presidential succession Act, I think we will be moving in the right direction.

In my written testimony, I provide a number of areas that need improvement, but let me highlight three this morning.

First, everyone in the line of succession lives and works in the Washington, D.C., area. In the nightmare scenario of terrorists detonating a nuclear device, it is possible that everyone in the line of succession might be killed. Imagine the aftermath: a parade of generals, Governors, and Under Secretaries claiming to be in charge.

solution reached in 1886 as unsatisfactory and convinced Congress to pass a new succession statute.

The assassination of President Kennedy led to the adoption of the 25th Amendment as the country contemplated how a Vice President who becomes President should be replaced and what should happen if the President become disabled.

Now, as the witnesses have already indicated, of course, September 11th has revived interest in Presidential succession. The possibility of a terrorist attack that takes the life of both the President and the Vice President—[microphone out]—contemplate. But we have a duty to at least examine the question of whether the Constitution and the U.S. Code are adequate to preserve the Union and provide the country with the best possible leadership in such a crisis.

The issues raised by this topic are certainly interesting for anyone interested in our system of Government and our Constitution, and I have already enjoyed hearing from our witnesses about them. Should leaders of the legislative branch be in the line of succession? If so, how? And which leaders? Should the succession be different in the case of death as opposed to disability of the President, Vice President, and others in the line of succession? And if so, how should we provide for a person higher up the chain to move into the office when they are able to do so?

These are all questions worth exploring. I do not believe, however, and I know the Chairmen do not believe that we should obsess about them. Our most dedicated efforts should be devoted to preventing the next terrorist attack and making sure our first responders are prepared to deal with it if it happen. This is not to say that this hearing should not have been held, but only to caution that the time and resources of this Congress and this Government are finite, and we must not be distracted from the task at hand by too much attention to what will most likely be only theoretical questions. But I do think this is extremely interesting for any of us that have spent time in our lives looking at Government, and I thank again Chairman Lott and Chairman Cornyn for the opportunity to speak, and I look forward to the further testimony of our witnesses.

Thank you, Mr. Chairman.

Chairman LOTT. Thank you, Senator Feingold, for your interest in this issue and other related issues and your desire to see that we consider reforms in a variety of areas to try to make the Congress and the Government more efficient, and we appreciate your leadership.

Let me go back then and get into some questions. Since you have testified first, we will come back to you, Professor Amar. Why did Truman more or less insist that leaders of Congress be included in the line of succession? If you look back at the history of that, that had been debated. Madison, as you all referred to, did not think leaders of Congress should be included, and then I guess there was another action taken in 1886 and then finally in 1946 or 1947 when the last legislation was passed. But the history seems to indicate that Truman really was advocating that Members of Congress be included. Was this just a way of currying favor? Or was there some basis for it? Because it does not make sense to me.

Mr. AMAR. President Truman was a great man. He was not burdened with an extensive legal education. He actually had gone to law school but—and he did not present himself as a constitutional expert. He came from this body, and that was his biography, and I think he had real skepticism about the idea of someone unelected assuming the position. He had a certain phrase about people in the State Department, actually, that appears in McCullough's biography: "the striped pants boys." So he had a certain skepticism about people who had never run for anything in their life.

His proposal actually was not quite the same one that Congress adopted in 1947. For example, he wanted there to be a special election in the event of a successor Presidency that the bill that Congress passed did not include that provision, and he signed it anyway. So the stakes were lower, of course, if it is just a brief period.

I think that the 25th Amendment addresses some—that model addresses some of President Truman's concerns by creating a sort of special legitimacy through a special confirmation process. And if we created a new Cabinet position at the top whose only purpose was really to be next in line, it could even be someone who had been President in the past or a former office holder the country had a great degree of confidence in. Then if candidates announced their prospective nominees to the American people before the November election, there would be a kind of national endorsement of that next-in-line position, which I think would satisfy Truman himself.

Truman himself, of course, no one quite directly voted for him as Vice President, but when they voted for President Roosevelt, they voted for him as well. And so, too, I think an idea might be, well, if you vote for the candidate, you are voting for his Vice President, and also the third-in- line person that he has designated, and that would create a little bit more electoral responsibility.

A final point is he is, of course, thinking about all of this before there has been a President Ford, before there has been a Vice President Rockefeller under the 25th Amendment process, which is sort of a different one than the one he is imagining.

Chairman LOTT. Frankly, I am surprised that at least a couple of you, maybe three of you, have advocated an Assistant Vice President. I know some people who have in the past questioned the value of the current Vice Presidency, although I think over the years that position has grown in responsibility and visibility, too. But I don't know. An Assistant Vice President just seems like we are adding even more—I do not know—encumbrances in a way. I mean, why would you want to go off on a wing that way when you have got an order of succession that you could go with? So I would be interested if any of you want to defend that a little bit.

And the second thing is, though—because we are beginning to run out of time, and I will yield to the others for questions—can we do what we need to do in this area just with a statute? Or do you think we need a constitutional amendment?

Mr. AMAR. I think for congressional continuity, there may be constitutional amendment needs, but for this I think a statute could be pretty cleanly adopted. You do not have to go for the First Secretary idea. I think the biggest thing that all of us have suggested is to seriously rethink the legislative leaders at the top of the suc-

cession list if that does not work in a variety of ways, constitutional and policy.

The reason for the new office, there are about three or four thoughts: It enables you to have someone who is out of Washington, D.C., because he does not have a regular day job, which ordinarily you might think, well, why create another make-work job? But if you are concerned about these absolute worst-case, what-if scenarios, the fact that he or she is out of the line of fire is an affirmative advantage.

Chairman LOTT. I wonder if it isn't a simpler solution just to say that one of Cabinet Secretaries—frankly, maybe a lot of the Cabinet Secretaries—could be out of this city. I never have quite understood why the Secretary of Agriculture shouldn't be in St. Louis or Kansas City or whoever wants it.

Mr. AMAR. You could. A second thought is that the person who might be even the best Secretary of State might not necessarily be the best person in this very unusual double-death, double-disability situation. Maybe you want to just pick—I am a baseball purist. I do not much like the DH. But you might want to, you know, pick someone—maybe they are not a great fielder, but they are good at one very discrete function. They are great hitters. So one function, someone who in an absolute crisis would be the person that the American people have the most sense of comfort with, maybe even, again, someone who has held the position in the past.

Chairman LOTT. OK. Mr. Baker, I think I see you squirming like you would like to get into this discussion. Do you want to respond briefly to any of those questions I propounded? Then I will yield to Senator Cornyn.

Mr. BAKER. Thank you, Senator. I would say that a statute could solve most of these problems, but not all of them. And the one example I gave in my testimony was this uncertainty under the 15th Amendment. We have an Acting President, let's say a Cabinet officer or a Speaker who is serving as Acting President. One of their first duties under the 25th Amendment is to nominate a Vice President.

Now, under the 25th Amendment, a Vice President becomes President if there is no President. And when we have an Acting President, we do not have a President. We have an Acting President. That is a distinction with a difference. There are different views on this, but I think it is a close call. And certainly it is rife with uncertainty. So I think there are some issues that need to be addressed by an amendment.

In terms of having First Assistant Vice Presidents outside of Washington, one way to deal with this might be without establishing a formal office—but it would probably take an amendment to do this—is to allow the President to nominate, have the Senate confirm former prominent office holders that we would all have confidence in their ability to perform this function. Former President Bush, for example, could serve in the line of succession. One might imagine a Democratic President nominating former Vice President Gore or former Vice President Mondale. They would not have to receive any pay per se. They would not have to have an office. But in order to do that constitutionally, I think that it would

Chairman LOTT. Senator DeWine, thank you for being here for the entire hearing, and we would be glad to hear your questions.

Senator DEWINE. Chairman, thank you very much. Let me just thank our panelists. I think you have some absolutely excellent suggestions. There is only one suggestion, I think, that is a little troubling to me, and that is the idea of the special election. Harry Truman is one of my favorite Presidents, but I think it is just a bad idea, and let me tell you why.

I think the last thing in a time of crisis that we need is uncertainty, and what we do is certainty. And the idea on September 11th that, if something had happened to President Bush, that we would have faced with a new President the specter of a special election in, say, 6 months is to me frightening. What we would have needed at that time is certainty that that man or woman who was the new President would have been able to serve the full term. That person would have been the President of the United States, and everybody in the world would have known it. And the idea that we would have faced a special election in 6 months I think to me is chilling. And so I think it is a horrible idea. Just the day and age we live in today I think it is just not a good idea. I do not think it was a good idea in 1945. I think Harry Truman did real well from 1945 to 1948, and I think history shows that. So just my comment.

Thank you, Mr. Chairman.

Chairman LOTT. Senator Cornyn?

Senator CORNYN. Senator DeWine, I share your concerns about an election. As a matter of fact, last week, talking about the continuity of Congress, we have some competing proposals—one as a statutory fix, the other would be a constitutional amendment. And I guess perhaps again for the reason I stated earlier, because of the oft-stated concern about constitutional amendments and the difficulty in Article V in actually getting a constitutional amendment passed and ratified, the statutory fixes were proposed, including expedited elections.

But one of the concerns that I would have about a quick election is, number one, the disenfranchisement of military voters, for example, that is a concern, not to mention in the wake of a 9/11 or worse the kind of chaos that would reign while we were trying to conduct an election process.

So while obviously elections are important, ultimately there would be an election, but at least in the interim, I think stability and the need to provide some calm and clarity lest we get into more litigation or uncertainty is, I think, an initial process whereby it would devolve to another officer, as we have discussed earlier, it is far preferable to even an expedited election under those circumstances. But I would be glad to—Professor Amar, do you have any thoughts in that regard?

Mr. AMAR. In an earlier, pre-9/11 article, I did suggest that if the statute were revised, I added just in the paragraph that we should really think about providing for a special election 8 months later. I was not thinking about 9/11 in 1996, and my main suggestion was to cure the unconstitutionality by pulling the legislative leaders out of the line of succession, and not just the unconstitutionality but the impracticality in a variety of policy settings where

this might occur. The statute just does not quite work as a practical matter.

There is a tradeoff. To the extent that you get someone who is very highly validated by the American people as, say, the Vice President himself has never been, even in 1972, a provision for special election when Presidential power merely was transferred from President to Vice President, from Franklin Roosevelt to Harry Truman, partly under the idea perhaps that the American people already did vote for this person as their spare, as their next in line.

Now, if you were to create a new office and President as a matter of custom or to name that person—to tell the American people before the election whom they were going to name, whether it was whom they were going to name as their Secretary of State, who is first in line, or whom they are going to name as their First Secretary, then, again, the election itself might have validated that person to serve out the President's term, which, of course, is the 25th Amendment model, too. You vote for Nixon, and he had a 4-year term, and if he cannot serve it out, it will be Agnew, whom you voted for; and if not Agnew, Ford, whom he has designated and who has been confirmed by a special process; and if not Ford, then Rockefeller. And so, actually, that 25th Amendment model, which I suggested as a possible template in the event that these things become—the disability occurs simultaneously rather than sequentially, that is not a special election model.

The special election model might be more suitable if you are going to very far down the succession list. Then it is a little harder for the American—and if it is 3 years and 8 months or 3 years and 9 months, very early in a Presidential term, very low down on the succession list, then there is the anxiety. And I do not think we would want to have it 2 months later, 3 months later, maybe 8 months or 9 months. And then the question is: Is it worth the candle—if the disability, double disability occurred very early in a Presidential term, say a month in or at inauguration, it might be very different than if it occurs 3 years in or even 2 years in.

One final thought, since you talked about the military and people voting and voting in a crisis. Here is an amazing fact about our history, let's say, compared to the mother country, England. They do not have fixed and regular elections in their tradition. Parliament promised, try septennial elections—I mean triennial elections in the 1700s and then changed it. But during World War II, there was no election held in England between 1935 and 1945. Churchill gives up on Halloween 1944 and tells the House of Commons, "No one under 30"—the generation that is actually making the supreme sacrifice. "No one under 30 has ever voted in a general election or a bye election; whereas, we held regular elections on time, even during the Great Depression and World War II, because President Lincoln held an election, one that he actually thought he was going to lose for a long time, but he held it fair and square on time with votes coming, the decisive votes, from the field, actually.

So we have been able to run elections, although not special ones, even during moments of our greatest crises—the Civil War, the Great Depression, World War II—and, actually other countries have not always done it, even great democracies like Great Britain.

Senator CORNYN. Professor Amar, one last follow-up. You noted in your opening comments that you testified before the Subcommittee on the Constitution in 1994 on this very subject. Is that correct?

Mr. AMAR. On a very closely related subject.

Senator CORNYN. I do not recall what the context was.

Mr. AMAR. That was about special windows of vulnerability right around election time and inauguration time. If one of the candidates is knocked out the week before the Presidential election, we are in serious trouble. If the person who actually won the seeming vote is knocked out prior to the meeting of the Electoral College, there are some real areas of difficulty. It is all cited in the notes to my testimony. I have asked, actually, that that be added to the record. That was Senator Simon chairing that Subcommittee back on Groundhog Day 1994.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LOTT. Thank you again, Senator Cornyn, for your leadership, Senator Dodd, for coming, Senator DeWine, and the panel, thank you very much. We may have another hearing on this subject later on, but I hope we can find a way to actually act and get some results.

In the meantime, I will be talking to Speaker Hastert and President pro tem Ted Stevens about how we get this accomplished.

[Laughter.]

Chairman LOTT. The hearing is adjourned.

[Whereupon, at 11:02 a.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Testimony of
AKHIL REED AMAR
Before The
Committee on Rules and Administration and
Committee on the Judiciary United States Senate

September 16, 2003

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale University, and have been writing about the topic of presidential succession for over a decade. In February 1994, I offered testimony on this topic to the Senate Judiciary Subcommittee on the Constitution, and I am grateful for the opportunity to appear again today. As my testimony draws upon several articles that I have written on the subject, I respectfully request that these articles be made part of the record.1

The current presidential succession act, 3 USC section 19, is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced. I will summarize its main problems and then outline my proposed alternative.

First, Section 19 violates the Constitution's succession clause, Article II, section 1, para. 6, which authorizes Congress to name an "Officer" to act as President in the event that both President and Vice President are unavailable. House and Senate leaders are not "Officers" within the meaning of the succession clause.2 Rather, the Framers clearly contemplated that a cabinet officer would be named as Acting President. This is not merely my personal reading of Article II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.3

Second, the Act's bumping provision, Section 19 (d)(2), constitutes an independent violation of the succession clause, which says that the "officer" named by Congress shall "act as President . . . until the [presidential or vice presidential] Disability be removed, or a President shall be elected." Section 19 (d)(2) instead says, in effect, that the successor officer shall act as President until some other suitor wants the job. Bumping weakens the Presidency itself, and increases instability and uncertainty at the very moment when the nation is most in need of tranquility.

Even if I were wrong about these constitutional claims, they are nevertheless substantial ones. The first point, to repeat, comes directly from James Madison, father of the Constitution, who helped draft the succession clause. Over the last decade, many citizens and scholars from across the ideological spectrum have told me that they agree with Madison, and with me, about the constitutional questions involved. If, God forbid, America were ever to lose both her President and Vice President, even temporarily, the succession law in place should provide unquestioned legitimacy to the "officer" who must then act as President. With so large a constitutional cloud hanging over it, Section 19 fails to provide this desired level of legitimacy.

In addition to these constitutional objections, there are many policy problems with Section 19. First, Section 19's requirement that an Acting President resign his previous post makes this law an awkward instrument in situations of temporary disability. It rules run counter to the approach of the 25th Amendment, which facilitates smooth handoffs of power back and forth in situations of short-term disability—scheduled surgery, for example. Second, Section 19 creates a variety of perverse incentives and conflicts of interest, warping the Congress's proper role in impeachments and in confirmations of Vice Presidential nominees under the 25th Amendment. Third, Section 19 can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B? Here, too, Section 19 is in serious tension with the better approach embodied in the 25th

Amendment, which enables a President to pick his successor and thereby promotes executive party continuity. Fourth, Section 19 provides no mechanism for addressing arguable Vice Presidential disabilities, or for determining Presidential disability in the event the Vice President is dead or disabled. These are especially troubling omissions because of the indispensable role that the Vice President needs to play under the 25th Amendment. Fifth, Section 19 fails to deal with certain windows of special vulnerability immediately before and after presidential elections.4

In short, Section 19 violates Article II and is out of sync with the basic spirit and structure of the 25th Amendment, which became part of our Constitution two decades after Section 19 was enacted.

The main argument against cabinet succession is that presidential powers should go to an elected leader, not an appointed underling. But the 25th Amendment offers an attractive alternative model of handpicked succession: from Nixon to Ford to Rockefeller, with a President naming the person who will fill in for him and complete his term if he is unable to do so himself. The 25th Amendment does not give a President carte blanche; it provides for a special confirmation process to vet the President's nominee, and confirmation in that special process confers added legitimacy upon that nominee.

If the 25th Amendment reflects the best approach to sequential double vacancy—where first one of the top two officers becomes unavailable, and then the other—a closely analogous approach should be used in the event of a simultaneous double vacancy. Congress could create a new cabinet post of Assistant Vice President, to be nominated by the President and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a moment's notice, and to lie low until needed: in the line of succession but out of the line of fire. The democratic mandate of this Assistant Vice President might be further enhanced if presidential candidates announced their prospective nominees for this third-in-line job well before the November election. In casting ballots for their preferred presidential candidate, American voters would also be endorsing that candidate's announced succession team of Vice President and Assistant Vice President. Cabinet officers should follow the Assistant Vice President in the longer line of succession.

This solution solves the constitutional problems I identified: The new Assistant VP would clearly be an "officer" and bumping would be eliminated. The solution also solves the practical problems. No resignations would be required—power could flow smoothly back and forth in situations of temporary disability. Congressional conflicts of interest would be avoided. Party and policy continuity within the executive branch would be preserved. And the process by which the American electorate and then the Senate endorsed any individual Assistant VP would confer the desired democratic legitimacy on this officer, bolstering his or her mandate to lead in a crisis.

The two additional issues I have raised today—Vice Presidential disability and windows of special vulnerability at election time—also have clean solutions, as explained in my 1994 testimony.5 Thank you.

1. These articles, in chronological order, are as follows:
Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing The Constitution's Succession Gap, 48 Ark. L. Rev. 215 (1995) (based on Senate testimony of 2/2/94)

Akhil Reed Amar and Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 Stan. L. Rev. 113 (1995) link
Akhil Reed Amar, Dead President-Elect, Slate, Oct. 20, 2000 link
Akhil Reed Amar, This is One Terrorist Threat We Can Thwart Now, Washington Post Outlook, Nov.

11, 2001 link
Akhil Reed Amar and Vikram David Amar, Constitutional Vices : Some Gaps in the System of Presidential Succession and Transfer of Executive Power, Findlaw, July 26, 2002 link
Akhil Reed Amar and Vikram David Amar, Constitutional Accidents Waiting to Happen—Again, Findlaw, Sept. 6, 2002 link

2. For more discussion and analysis, see Amar and Amar, Presidential Succession Law, 48 Stan. L. Rev. at 114-27.

3. According to Madison, Congress "certainly err[ed]" when it placed the Senate President pro tempore and Speaker at the top of the line of succession. In Madison's words,
It may be questioned whether these are officers, in the constitutional sense. . . . . Either they will retain their legislative stations, and their incompatible functions will be blended; or the incompatibility will supersede those stations, [and] then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Cong[ress] may declare what officers [etc.,] which seems to make it not an appointment or a translation; but an annexation of one office or trust to another office. The House of Rep[resentatives] proposed to substitute the Secretary of State, but the Senate disagreed, [and] there being much delicacy in the matter it was not pressed by the former.
Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 Papers of James Madison 235 (R. Rutland et. al. eds. 1983). Several members of the First and Second Congresses voiced similar views, see John D. Feerick, From Failing Hands: The Story of Presidential Succession 57-59 (1965); Ruth C. Silva, The Presidential Succession Act of 1947, 47 Mich. L. Rev. 451, 457-58 (1949).

4. For more analysis of the first three problems, see Amar and Amar, Presidential Succession Law, 48 Stan. L. Rev. at 118-29. For more discussion of the fourth problem, see Amar and Amar , Constitutional Accidents. For more discussion of the fifth problem see Amar, Presidents; Amar, Amar Dead President-Elect, Amar, One Terrorist Threat.

5. See generally Amar, Presidents. For additional elaboration, see Amar and Amar, Presidential Succession, 48 Stan. L. Rev. at 139; Amar, Dead President-Elect; Amar, One Terrorist Threat; Amar and Amar, Constitutional Accidents.

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