

PRESIDENTIAL SUCCESSION ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
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Mr. CHABOT. Thank you very much.
Professor Amar?

**TESTIMONY OF AKHIL REED AMAR, SOUTHMAYD PROFESSOR
OF LAW AND POLITICAL SCIENCE, YALE LAW SCHOOL**

Mr. AMAR. Thank you, Mr. Chair.

The current Presidential Succession Act is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced.

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 the President and the Vice President are unavailable, as the Chair has quoted from the Constitution. The House and Senate leaders are not officers within the meaning of the Succession Clause. Rather, the framers clearly contemplated that the 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, which has just been referred to, section (d)(2), constitutes an independent violation of the Succession Clause, which says that an officer named by Congress shall "act as President . . . until the Disability be removed, or a President shall be elected." The bumping clause 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're nevertheless substantial ones. The first point comes directly from James Madison, Father of the Constitution, who helped draft the 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 their President and Vice President, even temporarily, the succession law should provide for unquestioned legitimacy to the officer who must then act as President. With so large a constitutional cloud hanging over it, the current law fails that test, the legitimacy test.

In addition to these constitutional objections, there are some real policy problems. First, the requirement that the acting President resign his previous post makes this law a very awkward instrument in situations of temporary disability. It runs counter to the approach of the 25th amendment, which facilitates smooth hand-offs back and forth in situations of short-term disability, such as, say, scheduled surgery. Second, it creates a variety of the current law—it creates a variety of perverse incentives and conflicts of interest, warping Congress's proper role in impeachment and confirmation of Vice Presidential nominees under the 25th amendment. It can upend—and this is a third point—the results of a presidential election. Americans vote for Party A to control their White House and they end up with Party B. Here too, the current law is in real tension with the later 25th amendment, which enables a President to basically hand pick his successor, and thereby

promote a certain party continuity. Additionally, the current law provides no mechanisms for addressing a arguable vice presidential disability, and that's especially key because under the 25th amendment the Vice President is really the pivot point for determining presidential disability questions. Fifth, as mentioned, the current law fails to deal with certain windows of special vulnerability immediately before and after the presidential election.

In short, the current law violates article II and is out of synch with the basic spirit and structure of the 25th amendment, which became part of the Constitution two decades after this statute.

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 this alternative attractive model of handpicked succession: from Nixon to Ford to Rockefeller, with the President naming the person who will fill in for him and complete the term that he was elected to discharge if he's unable to do it himself. The 25th amendment, of course, doesn't give the President *carte blanche*. There has to be a confirmation process in which this House is involved along with the Senate in a special process that confers legitimacy upon the nominee.

So if this is the model for sequential double vacancy when the vice presidency and the presidency become vacant at slightly different times, we should use an analogous approach if the two offices become simultaneously vacant. There are basically two approaches that I would suggest that the Committee consider.

Under one, Congress could create a new Cabinet post of Assistant Vice President for a Secretary, something like that, named by the President, confirmed by the Senate, a very high-visibility process. Presidential nominees would in effect tell the American people, even as they are running, who not only their Vice President, who their running mate is, but who they plan to name for this second in line, and the election itself would confer some legitimacy on that person.

If the Committee were disinclined to go that option, it could name a Cabinet officer, the Secretary of State or any other, to be first in line.

Either of these solutions cure the problems I've identified, and here I'll just conclude. They would clearly be officers so there's no constitutional problem. Bumping could be eliminated. There would be no resignation that would need to be required, and so you could have smooth handoffs back and forth in temporary disability situations. Congressional conflicts of interest can be avoided, and continuity in the Executive Branch would be preserved, and legitimacy enhanced.

Thank you.

[The prepared statement of Mr. Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR

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. On two previous occasions—in February 1994, and in September 2003—I have offered testimony on this topic before the Senate Judiciary Committee. I am grateful for the opportunity to appear today before this body. As my formal 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 alternatives.

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.

¹These 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)

<http://islandia.law.yale.edu/amar/lawreview/1995Presidents.pdf>

Akhil Reed Amar and Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 Stan. L. Rev. 113 (1995)

<http://islandia.law.yale.edu/amar/lawreview/1995Succession.pdf>

Akhil Reed Amar, Dead President-Elect, Slate, Oct. 20, 2000

<http://slate.msn.com/?id=91839>

Akhil Reed Amar, This is One Terrorist Threat We Can Thwart Now, Washington Post Outlook, Nov. 11, 2001

<http://islandia.law.yale.edu/amar/oped/2001Terrorist.pdf>

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

<http://writ.news.findlaw.com/amar/20020726.html>

Akhil Reed Amar and Vikram David Amar, Constitutional Accidents Waiting to Happen-Again, Findlaw, Sept. 6, 2002

<http://writ.news.findlaw.com/amar/20020906.html>

My written testimony today largely recapitulates my formal testimony of September 16, 2003 before the Senate Committee on Rules and Administration and the Senate Judiciary Committee.

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

³According 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, Congress] 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).

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. Its 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. Essentially, there are two plausible options. Under one option, 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. If this option were deemed undesirable, Congress could avoid creating a new position of Assistant Vice President, and instead simply designate the Secretary of State, or any other top Cabinet position, first in the line of succession after the Vice President.

Either one of these solutions would cure the constitutional problems I have identified: Cabinet officers and/or a newly-created Assistant VP would clearly be "officers" and bumping would be eliminated. My proposals would also solve the practical problems that afflict the current statute. Under these proposals, 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 or Cabinet head 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.

⁴For 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*.

⁵See 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*.