2004

Presidential Succession and Congressional Leaders

John C. Fortier

Norman J. Ornstein

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol53/iss4/5

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
PRESIDENTIAL SUCCESSION AND CONGRESSIONAL LEADERS

John C. Fortier* and Norman J. Ornstein**

After September 11, the United States has been forced to consider the possibility that terrorists might strike at the top leadership of our government. United Flight 93, the fourth plane on September 11, was likely headed for the Capitol building or the White House before it was downed by the brave passengers who stormed the cockpit. If terrorists were to execute such an attack and kill or incapacitate the President and Vice President, our country would, for the first time in our history, have to resort to the Presidential Succession Act, which is a statute that many have argued is of dubious constitutionality and unwise policy.

* A research fellow at the American Enterprise Institute. M.A., Ph.D., Boston College. Dr. Fortier is the executive director of the Continuity of Government Commission and a member of the Presidency Research Career Award Committee. His writings include: After the People Vote, ed. and numerous law review and newspaper articles. He has taught at Boston College, Harvard University, and currently teaches at the University of Pennsylvania.

** An American Enterprise Institute resident scholar. M.A., Ph.D., University of Michigan. Dr. Ornstein is a senior counselor to the Continuity of Government Commission and has served on numerous Presidential commissions. His most recent books include Lessons and Legacies: Farewell Addresses from the US Senate. Mr. Ornstein also serves as an election analyst for CBS News and writes regularly for USA Today and Roll Call.

1. News accounts of a media interview and later interrogation of Khalid Sheik Mohammed, who was involved in the planning of the 9/11 attacks, indicate that the Capitol was the most likely target; the White House was also considered as a target in earlier planning. CONTINUITY OF GOV'T COMM'N, THE CONGRESS 2, app. II at 34 (2003) (referencing several interviews following the September 11 attacks), available at http://www.continuityofgovernment.org/pdfs/FirstReport.pdf.


The main difficulties in the Act involve the inclusion of the Speaker of the House and the President pro tempore of the Senate in the line of succession. Many argue this provision is unconstitutional on its face, and might produce confusion by elevating a legislative branch figure, perhaps not of the same political party as the President, to the Presidency in a time of crisis.4 We share the constitutional and policy concerns raised by others, and we favor, among other reforms, removing congressional leaders from the line of succession. This paper, however, pursues a different tack from others in that it explores the problems of the Presidential Succession Act under the different scenarios for succession laid out by the Constitution.

The Constitution not only gives Congress the power to deal with the death of the President and Vice President, but also with their "Removal," "Resignation," "Inability," and "fail[ure] to qualify" for office.5 In the three succession acts that have governed this country, Congress has not made a clear distinction among the different kinds of succession.6 Congress could have treated these instances as distinct types warranting a succession plan tailored to the circumstance.7 For example, it might have been wise for the Speaker of the House to become President after the death of the President and Vice President.8 Alternatively, Congress could have the Secretary of State, rather than

5. U.S. CONST. art. II, § 1, cl. 6, amend. XX, § 3.
6. The Twentieth Amendment, ratified in 1933, explicitly permitted Congress to deal with the failure to qualify, even though this situation might have been implicit in the removal or resignation of a President. Id. amend. XX, § 3. The failure to qualify includes a number of instances where there is no President-elect who may claim the Presidency, leaving the office vacant when the term of the outgoing President expires. Id. art. II, § 1. The current Presidential Succession Act uses the term "fail[ure] to qualify," but again makes very little distinction between succession of this type and its other forms. See 3 U.S.C. § 19. It is true that the Presidential succession acts necessarily deal with the question of Presidential incapacitation differently than that of death, removal, resignation and failure to qualify, but only in the sense that it is implied that a President might return to office after his disability is removed. Id. This is not so much a different treatment of the case, but a recognition that there is one difference inherent in the nature of this kind of incapacitation—that a President may return to exercise the duties of the office. It is useful to note that there is no distinction made in the Presidential Succession Act as to who will succeed the President in the case of incapacitation from the other forms or in any requirements for notification as are found in the Twenty-fifth Amendment. See id.; see also U.S. CONST. amend. XXV.
8. Id.
the Speaker, temporarily take over if a President and Vice President had been incapacitated.\footnote{9}

By examining each of the cases separately, this paper makes clear that Congress has the power to treat each type of succession separately. Further, this paper adds clarity to the constitutional and policy aspects of different forms of Presidential succession. In particular, it finds that in several instances of succession, namely, resignation, incapacitation, and impeachment, the inclusion of congressional leaders in the line of succession is even more objectionable than in the case of death. In addition, this paper distinguishes the case of a President who fails to qualify. In such a case, unlike the others, it is clearly constitutional for congressional leaders to be placed in the line of succession, and in certain scenarios, it might be good policy for such leaders to be in the line.

\textbf{I. CONGRESSIONAL LEADERS IN THE LINE OF SUCCESSION}

Article II of the U.S. Constitution states:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.\footnote{10}

Congress is given the power to make a law to specify the line of Presidential succession by statute.\footnote{11} There are few restrictions on this power, but these restrictions form the basis for constitutional objections to the inclusion of congressional leaders in the line of succession. The key term is "Officer," by which the Framers likely meant "Officer of the United States,"\footnote{12} as James Madison argued in the First and Second Congresses,\footnote{13} and as well known scholars persuasively argue today.\footnote{14}

While Congress, the states, and other institutions may have their own officers, "Officers of the United States" are federal executive branch officers.

\footnotetext[9]{See id.}
\footnotetext[10]{U.S. CONST. art. II, § 1, cl. 6.}
\footnotetext[11]{See id.}
\footnotetext[12]{See Calabresi, supra note 3, at 163.}
\footnotetext[13]{JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 611 (1965).}
\footnotetext[14]{See, e.g., Presidency Continuity Hearing, supra note 7 (statement of Akhil Amar), http://judiciary.senate.gov/testimony.cfm?id=914&wit_id=2603; see also Amar & Amar, supra note 3, at 116.}
figures.\textsuperscript{15} Congressional leaders are not "Officers of the United States" and are, thus, not eligible to be included in the line of succession.\textsuperscript{16}

The Constitution's requirement that those in the line of succession be "Officers of the United States" was not followed in the first Presidential Succession Act of 1792 nor in the current statute, which was enacted in 1947.\textsuperscript{17} Both included the Speaker of the House and the President pro tempore of the Senate in the line. This textual argument against including members of Congress in the line of succession, based on the meaning of the term "Officer," is bolstered by a larger structural argument.\textsuperscript{18} Separation of powers recommends against allowing Congress to pick its own leaders as the President, as the Framers had not created a parliamentary system where the legislature selects the executive.\textsuperscript{19}

Despite what we believe is a compelling case that congressional leaders should not be included in the line of succession, the law in this area has alternated between succession by congressional leaders and Cabinet succession. The First Congress was unable to agree on a succession act,\textsuperscript{20} but the Second Congress ultimately passed controversial legislation that placed only two congressional leaders, the President pro tempore of the Senate and the Speaker of the House, in the line of succession.\textsuperscript{21} The law also provided that if one of these congressional leaders acted as President, and there was sufficient time left in the term, there would be a special election to fill the remainder of the Presidential term.\textsuperscript{22}

The first succession act faced strong criticism in the second half of the nineteenth century, as the country faced two troubling instances where there was no one alive in the line of succession after the President. In 1881, President James A. Garfield was shot by a disgruntled office seeker.\textsuperscript{23} He lay wounded for eighty days, much of the time unable to carry out his duties.\textsuperscript{24} Only when President Garfield died in August did Vice President Chester Arthur assume the duties of the Presidency.\textsuperscript{25} For a time, then-President Arthur had no Vice President in the line of succession.

\begin{itemize}
\item \textsuperscript{15} Amar & Amar, supra note 3, at 114-17.
\item \textsuperscript{16} See id.
\item \textsuperscript{17} FEERICK, supra note 13, at 57-63, 204-10.
\item \textsuperscript{18} Amar & Amar, supra note 3, at 118-19.
\item \textsuperscript{19} Id. at 118. There is, of course, an exception to this rule, as Congress is given a role in selecting the President when the electoral college fails to produce a majority for one of the candidates. U.S. CONST. amend. XII.
\item \textsuperscript{20} FEERICK, supra note 13, at 58.
\item \textsuperscript{21} Id. at 58-60.
\item \textsuperscript{22} Id. at 59-60.
\item \textsuperscript{23} Id. at 118.
\item \textsuperscript{24} Id. at 125.
\item \textsuperscript{25} Id. at 128-29.
\end{itemize}
succession because without the benefit of the Twenty-fifth Amendment, adopted years later, there was no way to fill a vacancy in the Vice Presidency until the next Presidential election. In addition, the Senate had not chosen a President pro tempore, and the House had not chosen a Speaker. President Arthur, upon taking the oath of office, recognized that there was no one in the line of succession, so he called a special session of the Senate, which on October 13 elected David Davis, an independent, as President pro tempore. The country went nearly a month with no one in the line of succession. This episode led to calls for reform of the Presidential Succession Act, but no action. Eerily, a similar situation arose four years later during President Grover Cleveland’s first term, when his Vice President, Thomas Hendricks, died in office very early in the term. Again there was no President pro tempore or Speaker of the House for a time.

These incidents led to a major congressional debate over reforming the Presidential Succession Act. During this debate, Congress rehashed many of the issues it had discussed in the First and Second Congresses; particularly, it debated the constitutionality of the eligibility of members of Congress to be in the line of succession. Also, on the policy side, there was concern that congressional leaders might be of another party than the President. David Davis was elected as an independent President pro tempore, sitting directly behind the Republican Arthur for over three years of his term. At this time, the arguments on the side of Cabinet succession won the day. Under the Presidential Succession Act of 1886, Congress removed congressional leaders from the line of succession entirely, and placed the Cabinet officers directly behind the President and the Vice President.

The era of Cabinet succession continued for over sixty years. The death of President Franklin Roosevelt and Harry Truman’s succession to the Presidency would herald the third Presidential Succession Act, which is still in effect today. President Truman, in a 1945 speech, outlined his belief that a President should not appoint his own successor. In this

26. Id. at 130-31.
27. Id. at 131-32.
28. Id. at 130-32.
29. Id. at 141.
30. Id. at 144.
31. Id. at 131.
32. Id. at 132.
33. Id. at 143.
34. Id. at 205. The Presidential Succession Act of 1886, with its Cabinet succession scheme, had specified that next in the Presidential succession line after the Vice President would be the Secretary of State, who like all of the Cabinet would have been appointed by the President. Id.
speech, President Truman also stressed the importance of elected leadership.\textsuperscript{35}

The Truman speech spurred Congress into action and, ultimately, to the passage of the current Succession Act. The 1947 Act, which closely followed President Truman's proposal, is a hybrid between the first two succession acts, putting both congressional leaders and Cabinet officers in the line of succession.\textsuperscript{36} But Congressional leaders are favored over Cabinet officers in two ways. First, they precede the Cabinet in order of succession.\textsuperscript{37} Second, if a Cabinet member becomes President because everyone else above that person in the line of succession is killed, then Congress can elect new leadership and either a new Speaker or a new President pro tempore would then be able to bump out the Cabinet member who holds the Presidency.\textsuperscript{38}

Congressional leaders, then, have been in the line of succession for much, but not all, of the Nation's history, even though this system is of dubious constitutionality. For both constitutional and policy reasons, we favor a return to a purely executive branch line of succession. But in this paper, we note that deliberation about the role of congressional leaders in the line of succession might usefully be broken down into several parts. Because our succession acts have tended to treat the several types of succession in more or less the same fashion, constitutional and policy reasons for keeping leaders of Congress out of the line of succession have been obscured. The following sections will examine the constitutional and policy implications of having congressional leaders in the line of succession in the case of death, resignation, impeachment and removal, and inability or failure to qualify.

\textsuperscript{35} Id.
\textsuperscript{36} Id. at 208-09; see also 3 U.S.C. § 19 (2000).
\textsuperscript{37} 3 U.S.C. § 19.
\textsuperscript{38} FEERICK, supra note 13, at 208-09; Joseph B. Kallenbach, The New Presidential Succession Act, 41 AM. POL. SCI. REV. 931, 934 (1947), http://links.jstor.org/sici?sici=00030554%28194710%2941%3A5%3C931%3ATNPSA%3E2.0.CO%3B2. On the bumping procedure, several scholars have noted its questionable constitutionality. Leaving aside the question of the propriety of including congressional leaders in the line of succession, one major argument against the bumping procedure is that it violates the language of Article II that the successor shall act as President until "the Disability be removed, or a President shall be elected." U.S. CONST. art. II, § 1. The argument is that the acting President shall serve indefinitely until one of the two listed conditions is met. In the case of an incapacitated President, the acting President shall serve until the disability of the President is removed. Otherwise, the acting President will cease to act as President only after a Presidential election, either a special election which is allowed by the Constitution, or by the next general election. The bumping procedure provides that an acting President shall serve until another acting President bumps him or her. see RUTH SILVA, PRESIDENTIAL SUCCESSION 175 (1951); Amar & Amar, supra note 3, at 135.
A. Death

When the average person thinks of Presidential succession, he or she thinks of the death of a President. The Constitution provides for the Vice President to succeed the President, but if both the President and Vice President die, the Presidential Succession Act is triggered. The constitutional argument against including congressional leaders in the line of succession is straightforward. As congressional leaders are not “Officers of the United States,” they are not eligible to be successors to the President.

Additional arguments are compelling. Structural concerns about the separation of powers make congressional leaders a problematic choice. Further, the Constitution describes the successor as “acting” as President, but remaining in the office that he or she holds while assuming the duties of the Presidency. If this is what the Framers intended, then it would be impossible for a congressional leader to hold his or her post and act as President, as the Constitution forbids holding office in both the legislative and executive branches.

As a policy matter, the chief objection to congressional succession in the case of the death of the President and Vice President is that it undermines stability in the transfer of power. First, there is the possibility that a congressional leader would be of the opposite party of the President. In that case, a new President would likely reject the policies or personnel of the current administration. Stability would be undermined especially in the case of a terrorist attack that requires a foreign policy response, as a change in party could make a swift response very difficult.

The potential for a switch in the party of the President might tempt foreign enemies or zealous domestic partisans to attempt to change the party in control of the White House by killing the President and Vice President. President Garfield’s assassin infamously cried that he had killed the President in order to elevate Chester A. Arthur, the “stalwart” candidate, to the Presidency. If we had a Cabinet succession system, a change in party or philosophy would be less likely.

Second, even if the Speaker of the House is philosophically compatible with the President, the Speaker has not been part of the President’s administration, and presumably would have less knowledge of the

40. Amar & Amar, supra note 3, at 121.
41. FEERICK, supra note 13, at 207-08.
42. U.S. CONST. art. II, § 1.
43. Amar & Amar, supra note 3, at 120-21.
44. FEERICK, supra note 13, at 131.
45. Id. at 118. Stalwart was a branch of the Republican Party. Id.
intimate details of the President's foreign policy and other matters. After the Vice President, the Secretary of State would be most capable to take over the Presidency without a significant transition or change in policy. The constitutional argument against including congressional leaders in the line of succession along with the policy argument that Cabinet succession better preserves the continuity of party and policy of an administration are compelling reasons to consider removing congressional leaders from the line and returning to Cabinet succession.

But the case of the death of a President does not illustrate the difficulties of having congressional leaders in the line of succession as well as several other types of Presidential succession. In the case of resignation, removal, and incapacity, the case for Cabinet succession is stronger.

B. Resignation

In most ways, resignation resembles the case of succession after death, as the Offices of the President and/or Vice President are vacated without the action of others. President Richard Nixon is the only President to have resigned. The presence of congressional leaders in the line of succession, however, might change a President's calculation about resignation. If the Vice Presidency were vacant, a President who was contemplating resignation might think twice if the potential successor was a member of the opposite political party. If Gerald Ford had never been confirmed as Vice President and President Nixon was faced with resignation, would he have fought to the bitter end so that Democratic Speaker of the House Carl Albert would not have become President?

Two situations where a sitting President might contemplate resignation are scandal and illness. Faced with a serious scandal a President may

46. Compare U.S. CONST. art. II, § 1, cl. 6, with id. art. II, § 4.
49. See id.
50. See id.
51. See id. at 17-22, 214-15 (explaining how President Eisenhower contemplated resigning due to health concerns and how President Nixon ultimately did resign due to the Watergate scandal).
consider resigning.\textsuperscript{52} But if, absent a Vice President, the Speaker of the House is of the opposite party, the President might stretch out the period of scandal because he would not want to turn over power to someone of the other party or even to a leader of the same party who may be less in accord with the aims of the administration than a Cabinet member.\textsuperscript{53}

Alternatively, the consideration of resignation might be tied to Presidential illness.\textsuperscript{54} If a President found him or herself too weak to carry out the duties of the office and believed the condition to be permanent, then that President might consider resigning for the good of the country.\textsuperscript{55} If the Vice Presidency were vacant, then a President might choose not to turn over the reigns of power to a Speaker of the other party or one not in sync with the policies of the President. This resistance to resignation might lead to a debilitated President. Moreover, if the Vice Presidency were vacant as in this scenario, there would be no one to trigger the provisions of Section 4 of the Twenty-fifth Amendment and take over against the wishes of a President unable to function.\textsuperscript{56} This would leave our country in a situation vulnerable to attack.

One additional possibility would be that a gravely ill President would hope to appoint a new Vice President under Section 2 of the Twenty-fifth Amendment. But if there were a Speaker of the House of the opposite party, he or she might block the nomination, knowing the President was ill and might die or resign and leave the Presidency to the Speaker.\textsuperscript{57} From a crassly partisan perspective, the incentive for a Speaker would be to keep the Vice Presidency vacant, and presumably, as the Speaker was elected by the majority party in the House, he or she might have the votes to do so. If the Secretary of State were next in line, then Congress would not have the same self-interested motive to resist confirming a new Vice President, as there would be no partisan gain in doing so.

\textsuperscript{52} See, e.g., JEFFREY D. SCHULTZ, PRESIDENTIAL SCANDALS 386 (2000) (noting President Nixon's resignation on August 9, 1974).
\textsuperscript{53} FEERICK, supra note 48, at 214.
\textsuperscript{54} See id. at 17-22 (describing the health difficulties President Eisenhower suffered while President, i.e., heart attack, surgery to remove a nonmalignant obstruction of his small intestine, and stroke, which caused him to contemplate resignation).
\textsuperscript{55} See id. (recanting how a distraught President Eisenhower reportedly told his confidants: "[i]f I cannot attend to my duties, I am simply going to give up this job. Now that is all there is to it.").
\textsuperscript{56} Id. at 206.
\textsuperscript{57} See id. at 195 (explaining that if a "vacancy in the Vice Presidency exists, [and] the President should die, resign, or be removed, the Speaker, upon his resignation from Congress, would fill out the presidential term by reason of the 1947 succession statute").
C. Impeachment and Removal

The line of succession also applies to the case when the Vice Presidency is vacant and the President is removed from office. We have had two instances in our history that approached this scenario in the presidencies of Andrew Johnson and Richard Nixon. In 1865, after the assassination of President Abraham Lincoln, Vice President Andrew Johnson assumed the Presidency, leaving the Vice Presidency vacant. Before the ratification of the Twenty-Fifth Amendment in 1967, there was no mechanism for filling a vacancy in the Vice Presidency. President Johnson was impeached by the House and came within one vote of being removed from office by the Senate. President Johnson, originally a Democrat, had run on a ticket with the Republican Lincoln, but was viewed as a member of the opposition party by the radical Republicans in Congress. Had Congress removed President Johnson, Benjamin Wade, the Senate President pro tempore, who had voted for Johnson's removal, would have succeeded him.

In President Nixon's case, Vice President Spiro Agnew had resigned, and some in Congress foresaw the demise of President Nixon himself. A group of representatives encouraged Carl Albert, then Speaker of the House, to hold up the confirmation of Gerald Ford for Vice President, so that Congress could then remove President Nixon and elevate the Democrat Albert to the Presidency. While Albert did not seem to have seriously entertained such a strategy, there were many who did. The seriousness of the effort is evidenced by the fact that Ted Sorensen, former aide to Presidents John F. Kennedy and Lyndon B. Johnson, was tasked to write memos planning for the transition into office of an Albert administration.

58. See id. at 213-15.
59. See infra notes 60-67 and accompanying text.
60. SCHULTZ, supra note 52, at 124.
61. Id. at 125, 133 (explaining that President Johnson survived three different impeachment charges by one vote each).
62. Id. at 122-23, 129-30. In an effort to reach out to Democrats who had been loyal to the Union during the Civil War, Republican President Abraham Lincoln chose Andrew Johnson, a southern Democrat, to be his running mate during Lincoln's bid for reelection. Id. Johnson had demonstrated his loyalty by being the only southern legislator to remain in office when the South seceded from the Union. Id. Johnson had been a Senator from Tennessee when the Civil War began. Id.
63. FEERICK, supra note 48, at 214.
64. See id. at 215.
66. See id.
67. Theodore Sorensen, Remarks at the Council for Excellence in Government's Workshop on Covering the Transition from Campaigning to Governing (June 27, 2000)
Having congressional leaders in the line of succession in the case of the removal of the President might, in extreme cases, encourage Congress to remove a President of the other party just so the Presidency would switch parties. When a President is truly deserving of removal from office, Congress would be less self-interested if the Cabinet were next in the line of succession. Congress would then limit itself to determining when the President is to be removed, without the prospect of partisan gain from the removal. Again, Cabinet succession is more appropriate in this case. If others in the Cabinet share in the corruption of the President, Congress could remove as many Cabinet members as it saw fit.

D. Presidential Incapacitation

If the President is incapacitated and the Vice Presidency is vacant, then the Presidential Succession Act calls on the Speaker of the House to stand in as acting President.\(^6\) This scenario raises a number of thorny questions. First, a Speaker of the House would have to resign from the Speakership and the House to act as President.\(^6\) Second, the constitutional and statutory requirements that a Speaker resign might cause the Speaker to decline to take the Presidency. This declination would raise troubling questions: How would the Speaker decline? Would there be a timeframe for accepting the post?

The current Act allows for a Speaker of the House or President pro tempore of the Senate to bump out a Cabinet member who is serving as President.\(^7\) Would a Speaker who declines the Presidency be able to later change his or her mind and bump out a Cabinet member? Third, if a Speaker were to replace an incapacitated President, the possibility that he or she would be a member of the opposite political party raises many difficulties. The Speaker, as acting President, would have access to all of the classified and confidential information of the incapacitated President's administration. The Speaker, as acting President, would be able to fire all of the White House staff and political appointees.

Fourth, imagine the case of a severely wounded President who fades in and out of capacity. The Presidential Succession Act makes it explicit that the Speaker of the House or President pro tempore of the Senate must resign as Speaker or President pro tempore and from his or her seat in Congress.\(^7\) Even if the Presidential Succession Act did not specify it,

(Transcript available online at http://www.excelgov.org/displayContent.asp?NewsItemID=1718&Keyword=prnwTransition).

7. Id. § 19(a)(1), (b). Section 19(a)(1) provides:
the Constitution forbids simultaneously holding offices in the executive and legislative branches.\textsuperscript{72} Incapacitation of a President poses a dilemma for congressional leaders in the line of succession, because if they were to become acting President, they might be displaced by the President once the President regains his or her health.\textsuperscript{73} In the meantime, they will be left without a position in the Congress. Constitutionally, it would not pose a problem for the Secretary of State, as a Cabinet member, to exercise the powers of the Presidency, and then relinquish those powers while retaining the position of Secretary of State. The Presidential Succession Act, however, does require that the Cabinet Secretary resign from office in order to act as President.\textsuperscript{74} This provision of the Act is not constitutionally required as there is no bar to holding two offices in the executive branch of government.\textsuperscript{75} Moreover, while losing his or her post might be a small disincentive for a Cabinet member to step in for a President, the recovered President could reappoint the Cabinet member (with Senate confirmation or, for a time, as a recess appointment). Because a Cabinet member still serves at the whim of the President, who might at any time fire him or her, refusing to act as President would not protect that Cabinet member from being fired by the President.

Contrast this situation to one in which the Speaker assumed the Presidency. Here a recovered President could neither reappoint the person as a member of the House or Speaker of the House, nor could he or she remove a Speaker who chose not to act as President.\textsuperscript{76} Additionally, the problem of an incapacitated President with a vacant Vice Presidency might cause a Speaker to consider not acting as

If, by reason of death, resignation, removal from office, \textit{inability}, or failure to qualify, there is neither a President nor Vice-President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.


72. U.S. CONST. art. I, § 6, cl. 2 ("[A]nd no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

73. 3 U.S.C. § 19(d)(2).

74. \textit{Id.} § 19(d)(3). ("The taking of the oath by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.").

75. \textit{See U.S. Const.} art. I, § 6, cl. 2 (preventing the holding of office in the legislative and executive branch, but not the holding of two offices within the executive branch).

76. \textit{Id.} § 2, cls. 4-5 (describing the procedure for filling vacancies and electing officers in the House of Representatives); \textit{id.} § 3, cls. 2, 5 (describing the procedure for filling vacancies and electing officers in the Senate).
President even when the President is clearly incapacitated. This would introduce delay and uncertainty into an already unstable situation.

The Presidential Succession Act also raises practical questions. It seems plausible that a person in the line of succession might decline to serve as acting President, but how would this be done? Would the Speaker issue a letter stating that he has refused the acting Presidency, passing the office off to the next in line? Would the country wait as the Speaker mulled over his options?

Furthermore, the Presidential Succession Act allows for a Speaker or President pro tempore to bump a Cabinet member who has assumed the Presidency. If the Speaker of the House and the President pro tempore refused the Presidency in an instance when the President was incapacitated for a short period of time, then the Secretary of State would act as President (under the cloud that the congressional leaders might bump him or her out of office at any time).

Additionally, imagine if the Speaker from the opposite party of the President took over the Presidency, as in the fictional scenario depicted in a recent set of episodes of the television show The West Wing. As acting President, the former Speaker would be able to fire the White House staff and political appointees. Even more troubling, he or she could access all confidential memos concerning delicate foreign policy matters and others with a more political character. Should an interloper from the other branch of government, and perhaps from the opposing party, temporarily take over for a President who might be out for a relatively short period of time?

Finally, consider the case of a President who fades in and out of capacity. This is not a remote possibility. Both Presidents Garfield and Wilson had periods of greater and lesser lucidity during their times of incapacitation. President Eisenhower also had several significant medical events.

Consider the following scenario: A Speaker takes over

---

77. See 3 U.S.C. § 20. Section 20 provides:
The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

Id.

78. 3 U.S.C. § 19(d)(2).


80. FEERICK, supra note 13, at 123-25, 165-74.

for a President who is incapacitated. Later, the President could recover and resume the duties of the office, thereby displacing the Speaker, who had resigned from Congress to act as President. In the meantime, a new Speaker of the House could have been elected. If the President suffers a relapse, then this new Speaker would become President, and so on. This would be a severe form of instability in the White House.

A similar case with a Secretary of State taking over, without the Presidential Succession Act's requirement to resign, would not result in such chaos. The Secretary of State might step in temporarily, but step back to the Secretary of State position, while being able to fill in again if the President faded out of capacity.

E. Failure to Qualify

The Twentieth Amendment gives Congress the power to specify who shall serve as President in the case where no one qualifies to be President when a new Presidential term begins on January 20. The most likely scenario for a failure to qualify is an election controversy. The 1876 election, for example, was not fully resolved until just a few days before the Presidential term was about to begin. One might also contemplate a situation where no candidate receives a majority of the electoral college, throwing the election to Congress, and Congress deadlocking on a choice. Finally, one should consider the case of a terrorist attack that kills the President-elect and Vice President-elect shortly before they take office. In all of these cases, Cabinet succession is impossible, because the new Cabinet (that of the President-elect) is officially nominated and confirmed only after the new President takes office.

The terms of the exiting President and Vice President end at noon on Inauguration Day. If congressional leaders were removed from the

---

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

Id.

83. Id. § 1.


85. U.S. CONST. amend. XX, § 1.
current line of succession, this would leave only the Cabinet of the previous administration in the line of succession. This would lead to the perverse result that an election controversy or terrorist attack would give the Presidency to the Secretary of State of the prior administration.

The old Cabinet would likely reflect an earlier political reality. It is possible, under these circumstances, that the Secretary of State of the previous administration might have been nominated and confirmed eight years before. The prior administration might have been discredited, and the President might have decided not to run for office. The election controversy or preinauguration attack would then return a member of that administration to office. Alternatively, the outgoing President might have been soundly defeated for office, but if an attack killed the President-elect and Vice President-elect, the Secretary of State of the defeated President might become President.

In the case where a President is unable to qualify for office on January 20, it would not make sense for Congress to rely strictly on Cabinet succession. Here there are a number of measures that Congress could specify in the Presidential Succession Act. Among these possibilities is to include congressional leaders in the line of succession. It would be an improvement over simple Cabinet succession from a policy standpoint, and it is permissible, constitutionally, because the language of the Twentieth Amendment, authorizing Congress to provide for the circumstance where there is a “failure to qualify,” is different from that in Article II and contains no mention of the limitation of successors to “Officer[s].”

The major advantage of including congressional leaders in the line of succession in the case where there is no President who qualifies on Inauguration Day is that all members of the House of Representatives and one-third of the senators are recently elected and therefore reflect a current sentiment of the people. Contrast this with the outgoing Cabinet, whose connection to the recent Presidential election is remote at best.

It would also be constitutionally permissible for Congress to include congressional leaders in the line of succession in the case that there is no President on January 20. The Twentieth Amendment, which authorizes Congress to specify who will be President if no one qualifies, does not use the term “Officer” found in Article II. It reads: “Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified.” This language does not in any way

86. Id. § 3.
87. Id. art. II, § 1, cl. 6.
88. See Presidency Continuity Hearing, supra note 7.
89. U.S. CONST. amend. XX, § 3; see also id. art. II, § 1, cl. 6.
90. Id. amend. XX, § 3.
limit the person whom Congress may specify to act as President. The person specified to take over in the case of a failure to qualify need not be an "Officer" of the United States, nor does that person need to hold any position in the government at all.

There are potential problems with including Congress in the line of succession if the President-elect and Vice President-elect fail to qualify on January 20; however, in some scenarios, the alternatives are not very palatable. One set of potential problems arises if there is an election controversy. In the event of a controversy or deadlock that precludes the selection of a President before Inauguration Day, current law allows the Speaker of the House to act as President until either a President or Vice President qualifies for office. This means the members of the House of Representatives, who are involved in counting the electors from the electoral college or in directly selecting the President in the absence of a majority in the electoral college, would know that if no resolution of the election occurred, their own Speaker would act as President.

Take, for example, the 2000 election. If the dispute over the Florida electors had persisted, and Congress was unable to resolve disputed sets of electors sent by the Supreme Court of Florida, the Governor, the State legislature, etc., the controversy might have lasted until Inauguration Day. If the electors were not chosen in time for inauguration, House Speaker Dennis Hastert would have stepped in to act as President. From a purely partisan perspective, House Republicans might have resisted resolving the Presidential dispute in Democratic candidate Al Gore's favor, had they known the Republican Hastert would take over on January 20. Therefore, a conflict of interest exists between the House's duties to properly count electors, resolve disputes, and announce the selection of a new President before January 20.

In addition to a potential conflict of interest, there is another problem with having congressional leaders in the line of succession in the case of an election controversy that lasts until Inauguration Day. Because the Speaker is unable to hold legislative and executive office simultaneously, the Speaker must resign from Congress. Again, consider the hypothetical of the 2000 election controversy lasting until inauguration.

91. See id.
92. See supra notes 89-91 and accompanying text.
93. See Presidency Continuity Hearing, supra note 7.
95. Id. §§ 15, 19(a).
96. In the 1876 election, the contest was not resolved in Hayes' favor until two days before the inauguration. See supra note 84 and accompanying text.
If at noon on January 20 there was no President-elect, and Dennis Hastert assumed the Presidency, then he would have continued acting as President only until the election controversy was resolved.\textsuperscript{99} Three weeks later, if the majority of electors voted for one candidate for President (or for Vice President), or a deadlocked House or Senate elected a President, if no candidate received a majority of the electoral votes, then Hastert would have had to step aside\textsuperscript{100} and be left with no seat in Congress.\textsuperscript{101} A Speaker or President pro tempore might be reluctant to act as President under such conditions.

The case of the death of the President-elect and Vice President-elect would not present the same difficulties.\textsuperscript{102} There would be no conflict of interest on the part of a Congress involved in resolving an election dispute, and a Speaker of the House would not take the office temporarily, but would serve for the entire four-year term.\textsuperscript{103}

Exclusion of congressional leaders from the line of Presidential succession is not wholly attractive. For example, Cabinet line of succession would mean that the Cabinet of the outgoing administration would be next in the line of succession.\textsuperscript{104} In addition to the problems with this scenario mentioned earlier, it is common that many of the Cabinet secretaries resign on, or in advance of, January 20.\textsuperscript{105} Some leave acting secretaries in their place, and as long as those secretaries have been confirmed by the Senate (they are not career civil servants or recess appointments), they would be in the line of succession.\textsuperscript{106} In the case of a terrorist attack occurring on Inauguration Day, there would be chaos trying to figure out which Cabinet secretaries from the prior administration were still in office and whether they had left acting secretaries who were eligible to serve as President.\textsuperscript{107}

Another option Congress could consider is to require that the outgoing President remain in office until the election controversy is resolved. This plan would have the advantage of ensuring stability in the Presidency and would guarantee that someone with experience would be in place. But it would again have an effect on the way that Congress resolves an election controversy.

\textsuperscript{99} Id. § 19(c)(1).
\textsuperscript{100} See id.
\textsuperscript{101} See id. § 19(a)(1).
\textsuperscript{102} See Presidency Continuity Hearing, supra note 7.
\textsuperscript{103} 3 U.S.C. § 19(c).
\textsuperscript{104} See Presidency Continuity Hearing, supra note 7.
\textsuperscript{105} See John C. Fortier, President Michael Armacost?, 21 BROOKINGS REV. No. 4, Fall 2003, at 33, 34.
\textsuperscript{106} See, e.g., id. at 33-36.
\textsuperscript{107} E.g., id. at 34.
If, for example, there was an outgoing Democratic President, then Democratic members of Congress would have an incentive to prevent the resolution of an election controversy. This outgoing President could be a discredited and defeated figure, and as the election controversy might continue on indefinitely, the outgoing President could remain President for up to another four-year term. As a positive, the former President does not face the dilemma that a Speaker of the House does in deciding whether or not to resign from Congress. When the controversy subsided, the outgoing President would leave office (unless, of course, the outgoing President was determined to be the winner of an election controversy, in which case, he or she would remain in office).

Another measure to consider in order to deal with the problem of an attack on or prior to Inauguration Day that kills the President-elect or the Vice President-elect is to establish a custom that the outgoing President nominates the Cabinet choices of the incoming President before noon on January 20. The Senate could then confirm the choices in advance of the inauguration ceremony. The reason for such a custom would be that, even in the most expedited cases, an incoming President takes the oath of office at noon on January 20, then officially nominates his Cabinet, and the Senate, subsequently, confirms most of the nominees later in the day, as hearings have been held in the days leading up to the inauguration. Even with this relatively efficient course of events, there is still a gap of several hours when the new President has no Cabinet. And it is just at this time that all of the important figures in Washington gather at the inaugural ceremony. If terrorists struck at this time, there would be chaos. An early morning appointment by the outgoing President and Senate confirmation of the Cabinet would allow for some of the new Cabinet to avoid the inauguration ceremony and improve the chances that a high level successor would be available if an attack were to occur.

To summarize the consequences of a President’s failure to qualify, this set of situations is quite different from other succession scenarios. The constitutional language of the Twentieth Amendment does not require that the successors be “Officers,” and therefore congressional leaders would be eligible to succeed to the Presidency. Also, there are some

108. See Presidency Continuity Hearing, supra note 7.
109. See id.
110. See id.
111. Id. (“The President-elect, the Speaker of the House, and the President Pro Tempore of the Senate all typically attend the swearing-in ceremony, as do most Supreme Court Justices and members of Congress. With all of these figures present, a catastrophic attack at the inauguration would kill the top four in the line of succession.”).
112. Id.
113. U.S. CONST. amend. XX, § 3.
circumstances where this might make sense from a policy perspective. Surely, it would be preferable to strict Cabinet succession where the outgoing Cabinet would fall next in the line. However, there are other options as well, and no choice is completely palatable for this scenario.

II. THE BUMPING OR SUPPLANTATION PROCEDURE

One additional provision of the Presidential Succession Act that involves congressional leaders is the "bumping procedure." If the Presidency passes to a Cabinet member, then a newly elected Speaker of the House or a new President pro tempore of the Senate can replace a Cabinet member who has been serving as President. Congress put this provision into the 1947 succession act because of President Truman's belief that elected officials should take priority over nonelected officials in the line of succession.

In the event of a catastrophic attack that kills the President, Vice President, and congressional leadership, the Secretary of State assumes the duties of the Presidency. Yet, whenever Congress elects a new Speaker or President pro tempore, that new leader may "bump" the Secretary of State. The result would be three presidents within a short span of time. Even more problematic, the Act does not specify that the Speaker or President pro tempore needs to "bump" a Cabinet member immediately. A situation may arise when a Cabinet member is acting as President but lives under the threat of being bumped from the office by congressional leaders at any time. Such a scenario would completely undermine our system of separation of powers.

Several scholars have persuasively argued that this provision is unconstitutional. Leaving aside the involvement of congressional leaders in the line of succession, the "bumping" procedure goes against the language of Article II that states that Congress may specify in law the successor: "declaring which Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected." This language provides that Congress may

114. Presidency Continuity Hearing, supra note 7.
115. See supra note 38 and accompanying text.
116. Presidency Continuity Hearing, supra note 7; Amar & Amar, supra note 3, at 135.
117. FEERICK, supra note 13, at 204-09.
119. See Presidency Continuity Hearing, supra note 7.
120. 3 U.S.C. § 19(d)(1); see Presidency Continuity Hearing, supra note 7.
121. Amar & Amar, supra note 3, at 135-36; see also Temporary Filling Hearing, supra note 3.
122. U.S. CONST. art. II, § 1, cl. 6 (emphasis added).
specify a successor who shall serve until one of two conditions arises.\textsuperscript{123} First, if the successor is serving due to a disability of the President, then the successor's Presidency will cease when the disability is removed.\textsuperscript{124} Second, Congress may choose to conduct a special election to fill the remainder of the term.\textsuperscript{125} Such a provision was included in the first succession act.\textsuperscript{126}

This Article II language also allows for a successor to serve as President until a new President is elected in a subsequent general election.\textsuperscript{127} Nevertheless, the language of Article II is clear that short of one of the two previously mentioned scenarios, the successor will remain in office.\textsuperscript{128} Therefore, the bumping procedure, whereby a Cabinet member succeeds to the Presidency only to be subsequently bumped from office by a Speaker or President pro tempore, violates this provision.\textsuperscript{129}

III. PROBLEMS IN THE CONTINUITY OF CONGRESS AFFECT THE PRESIDENTIAL LINE OF SUCCESSION

Finally, there is the extreme case where Presidential succession is negatively impacted by the problems regarding the continuity of Congress.\textsuperscript{130} Imagine a scenario involving the deaths of the President, Vice President, and most of the Congress, such as an attack at a State of the Union Address. The Secretary of State would succeed as President, but only until the election of a new Speaker of the House or new President pro tempore of the Senate, under the “bumping provision” of the Presidential Succession Act.\textsuperscript{131} In such an extreme scenario it would be difficult for Congress to operate in a normal fashion.\textsuperscript{132} If most of Congress was killed in an unexpected disaster, the House of Representatives, in particular, would face difficulty reconstituting itself.\textsuperscript{133} This is because the House of Representatives can fill its vacancies only

\begin{itemize}
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id.; Amar & Amar, supra note 3, at 135-36.
  \item \textsuperscript{125} U.S. CONST. art. II, § 1, cl. 6; Amar & Amar, supra note 3, at 133 n.125.
  \item \textsuperscript{126} Presidential Succession Act of March 1, 1972, reprinted in Feerick, supra note 48, app. C at 253.
  \item \textsuperscript{127} U.S. CONST. art. II, § 1, cl. 6.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} Amar & Amar, supra note 3, at 135.
  \item \textsuperscript{130} Continuity of Gov't Comm'n, supra note 1, at 3-4.
  \item \textsuperscript{131} Amar & Amar, supra note 3, at 135.
  \item \textsuperscript{132} Continuity of Gov't Comm'n, supra note 1, at 8.
  \item \textsuperscript{133} Id. at 3.
\end{itemize}
by special election, and therefore, it could be many months until all the vacancies were filled. In recent years, it has taken an average of over four months to fill House vacancies.

After a catastrophic attack, the House of Representatives would face one of two scenarios. First, it might not be able to meet at all because the Constitution defines a quorum as a majority of the body. This would mean that no new Speaker could be elected for months. The Secretary of State would remain President until either a new Speaker or new President pro tempore took the office.

The alternative scenario is perhaps more troubling. The House has historically defined its quorum more leniently than the Constitution's definition, which requires a majority of the body. Currently, House precedents hold that a quorum is a majority of those "chosen, sworn and living." In an extreme scenario, if only five members of Congress survived an attack, three of these surviving members could convene and elect a new Speaker, who could then bump the Secretary of State and become President for the remainder of the term. While this is an unlikely scenario, would we feel secure in a President who had been elected by twenty members of the House, or fifty, or 100, or even 200?

IV. CONCLUSION

The place of congressional leaders in the line of succession is troubling for both constitutional and policy reasons. However, approaching the problem by paying attention to the different ways Presidential succession is triggered has advantages. The Constitution contemplates that succession may take place in the case of the death, removal, incapacity, resignation, or failure of the President to qualify. Some of these scenarios cause more severe constitutional and policy problems than the

134. U.S. Const. art. I, § 2, cl. 4 ("When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.").
135. Continuity of Gov't Comm'n, supra note 1, at 6-7.
136. Id. at 7.
137. Id. at 8.
138. Id.
139. Amar & Amar, supra note 3, at 135. A President pro tempore might be elected faster as gubernatorial appointments would replenish the Senate more quickly. Continuity of Gov't Comm'n, supra note 1, at 6.
140. Continuity of Gov't Comm'n, supra note 1, at 8.
141. Id. at 9.
142. Id. at 2.
143. See generally Amar & Amar, supra note 3, at 135.
144. U.S. Const. art. II, § 1, cl. 6.
case of the death of the President and Vice President. In some situations involving the failure to qualify, it may be a viable alternative to have leaders of Congress ascend to the Presidency, such as the case where both the President elect and Vice President-elect are killed before Inauguration Day, or when no one can claim victory due to an election controversy.

Overall, differentiation between various causes for succession may encourage Congress to consider removing congressional leaders from the line of succession in many instances. However, short of this result, it may open the door for Congress to tailor solutions for different types of succession crises. Furthermore, it may force Congress to face the political reality that important actors in Congress might not want congressional leaders to be eliminated entirely from the line, but would perhaps accept that congressional leaders be either removed or have their role scaled back in the most troubling cases.

145. Presidency Continuity Hearing, supra note 7.
146. Id.
147. Id.
148. Id.