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**BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
UNITED STATES HOUSE OF REPRESENTATIVES
OVERSIGHT HEARING REGARDING
“The Presidential Succession Act of 1947”**

October 6, 2004

Mr. Chairman, Ranking Member, and Members of the Subcommittee:

Thank you for the invitation to offer my views at this oversight hearing on the Presidential Succession Act of 1947, which is found at 3 U.S.C. § 19. This is a subject of profound national importance, and I am pleased to do whatever I can to assist the Congress in correcting the many deficiencies of the 1947 Act.

In December 2001, I wrote a white paper for the Federalist Society entitled “Fools, Drunkards, and Presidential Succession” in which I provided detailed criticism of the 1947 Act. On February 28, 2002, I gave detailed testimony to this subcommittee that substantially drew on my Federalist Society article. I also testified on this subject before a joint hearing of the Senate

Judiciary and Rules Committees on September 16, 2003. Thus, I would refer the subcommittee to my prior testimony before this subcommittee and the Senate for a detailed treatment of the myriad constitutional and operational problems associated with the Presidential Succession Act of 1947.

Suffice it to say here that the 1947 Act is almost certainly the most dangerous statute to be found in the United States Code. The 1947 Act is extremely dangerous because it threatens to deprive the United States of clear Executive authority at the precise moment when the need for what Alexander Hamilton called “energy in the Executive” may be most urgent, and when the absence of such clear Executive authority may be fatal to American lives—possibly very many American lives—and vital American interests.

I will briefly summarize my recommendations on major statutory changes that Congress should enact as soon as possible.

First, the House Speaker and President pro tempore should be completely removed from the line of succession for a host of constitutional and policy reasons set forth my in prior testimony to this subcommittee and in the outstanding scholarship of Professor Akil Amar and Professor Ruth Silva before him. This is not a radical or unprecedented proposal. It merely returns the nation to the situation that existed from 1886 until 1947. In 1886 Congress confronted many of the same issues that we will discuss today, and it wisely concluded that congressional officers should not be placed in the line of succession for both constitutional and policy reasons. Unfortunately Congress reverted back to the pre-1886 regime in 1947, but I respectfully submit that Congress got it right in 1886.

Second, the statutory line of succession should be reconstituted to include the Secretary of State, the Secretary of Defense, the Attorney General, and the Homeland Security Secretary

(in that order) plus those other persons (in and outside of the cabinet) nominated by the President and confirmed by the Senate specifically for the purpose of serving in the line of succession. (Nomination by the President and confirmation by the Senate for the purpose of serving in the line of succession should make such a person an “Officer of the United States.”) Whether the Secretary of the Treasury or the Secretary of Health and Human Services should be placed in the line of succession should be left to the President’s discretion, subject to the advice and consent of the Senate. What should be beyond reasonable dispute is that the mere holding of cabinet office does not by itself qualify the officeholder for assuming the Acting Presidency. Does anyone seriously believe that the Secretary of Agriculture should be catapulted into the Presidency, especially in extreme circumstances that might resemble 9/11 and the assassination of President Kennedy rolled into one?

By allowing the President to nominate persons outside of the cabinet and indeed out of government to serve in the line of succession, this amendment would also allow for the dispersal of presidential successors outside of the Washington, D.C., metropolitan area, an area that must be a primary target for any weapon of mass destruction targeted by America’s enemies. Those persons outside of government nominated by the President and confirmed by the Senate to serve in the line of succession could receive nominal compensation, regular intelligence updates, and appropriate security. This would avoid the political problem of the well-paid, do-nothing sinecure. Former Presidents, former Vice Presidents, former cabinet officers, and retired members of Congress come to mind as persons who might be nominated to serve in the line of succession. The Senate’s advice and consent function would serve to check any abuse by the President in making such nominations.

Third, Congress should eliminate the requirement that statutory successors serving in the cabinet resign their cabinet posts before assuming the Acting Presidency. This requirement is counterintuitive and might cause a cabinet officer to hesitate before acting, or even to decline to act, especially if the “Acting Presidency” might be limited to a few hours or days. A rational succession mechanism would induce *action* by potential successors, but the 1947 Act has the perverse effect of potentially inducing hesitation and inaction by statutory successors.

Fourth, Congress should modify, but not entirely *eliminate*, the “bumping” or displacement provisions of the 1947 Act. To put the matter in simplistic terms, there is “bad bumping” and then there is “good bumping.” Congress should eliminate the former, but expressly provide for the latter.

Congress should eliminate the ability of any *newly selected* prior-entitled officeholder, such as a new House Speaker, President pro tempore, or Secretary of State, to displace a lower-ranking statutory successor from the Acting Presidency. This would preclude the scenario outlined in my prior testimony, made possible under the 1947 Act and the rules of the House, of a handful of surviving members of the House of Representatives selecting a new speaker in the wake of an attack, who in turn could oust the Secretary of State or other cabinet officer serving as Acting President.¹

Congress should also provide that if a more senior and otherwise capable statutory successor voluntarily *chooses* not to assume the Acting Presidency, that person thereby permanently waives his right to claim the office in the future. Under the 1947 Act, a Speaker or

¹ Likewise, a more senior cabinet successor (e.g., the Secretary of State) who is appointed by a more junior cabinet successor (e.g., the Secretary of Defense) serving as Acting President should not displace or “bump” the appointing successor. However, the law should allow newly appointed officials to take their place in the line of succession, so that statutory successors to the Acting President could be replenished.

President pro tempore (but not a cabinet officer) may choose not to assume the Acting Presidency, but then later reassert those rights. That right of “re-assumption” should be eliminated.

In one respect, however, “bumping” is both salutary and constitutional. That is the situation where a more senior statutory successor is *temporarily* unable to serve as Acting President, but thereafter recovers the ability to do so.

In my view, the overriding goal of the Succession Clause is the smooth and seamless transfer of Executive authority to the most senior successor authorized and available to exercise such power. The Succession Clause provides that to the extent the President is unable to “discharge the powers and duties of the said office, the same shall devolve on the Vice President.” The implication of this phrase is that when the President recovers his ability to discharge the duties of his office after a period of temporary disability, Executive authority necessarily reverts back to the President.

Although this seamless transfer of authority between the President and Vice President during the former’s “period of inability” has been somewhat (and probably unduly) complicated by the cumbersome transfer procedures established by the 25th Amendment, the same general principle governs, I believe, the transfer of authority between “Officers” designated by Congress to serve as Acting President in the event of a double vacancy. Thus, if the most senior successor in Congress’s designated statutory line of succession is temporarily unable to serve (e.g., Secretary of State Colin Powell was arguably unable immediately to serve as Acting President on the morning of September 11, 2001, because he was in South America), Executive authority should revert to that successor when he or she is able to act.

I understand that Professor Amar argues that under the Succession Clause, a statutory successor serving at Acting President may be not be “bumped” by a more senior statutory successor who was previously unable to act. As I understand it, Professor Amar’s argument is based on the text, which provides that the statutory Officer designated by Congress “shall act accordingly, *until the Disability be removed*, or a new President shall be elected.” (emphasis added). According to Professor Amar, a statutory Acting President cannot be removed until the disability of the *President or Vice President* is removed, or a new President is elected.²

Although Professor Amar’s inference from the text is a fair one, I do not think that it is the *only* fair inference that one may draw from the text. The Succession Clause, in its entirety, provides:

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.

U.S. Constitution Art. II, § 1, Cl. 6 (emphasis supplied). The Clause authorizes Congress to provide “by law” for the “case” of a double vacancy or inability, declaring what Officer shall as act as President, and such Officer shall act “*accordingly*.” The Officer designated by Congress is to assume Executive Authority “according” to the “law” enacted by Congress to “provide for the

² It should be noted that the Presidential Succession Act of 1947 reflects Professor Amar’s views on this issue, insofar as it governs the succession rights of cabinet officers *inter se*. Under the 1947 Act, if by happenstance the Secretary of Veterans Affairs happens to be the first available cabinet officer available to assume Executive authority, no member of the cabinet may thereafter displace him or her, even if the senior members of the cabinet recover the ability to act. The 1947 Act, however, does allow the Speaker or the President pro tempore, including a newly chosen Speaker or President pro tempore, to displace cabinet officers for any reason. *See* 3 U.S.C. § 19.

case” of a double vacancy or inability. Thus, if Congress provides for multiple successor Officers in a descending order of priority, Congress may stipulate that a temporarily unavailable higher-ranked Officer may assume Executive authority from a lower-ranked Officer upon recovering the capacity to act. The exercise of Executive authority *according to the law enacted by Congress* terminates when “the Disability [of the President or Vice President] be removed, or a President shall be elected.”

This understanding of Congress’s power to provide for the exercise of Executive authority by a hierarchy of successors is consistent with the Clause’s treatment of the exercise of Executive authority by the Vice President: when the President is unable to exercise his duties, the Vice President may do so, until the President recovers his capacity. It would be odd for the Clause to prohibit Congress from employing the same practical, flexible approach to the temporary “inability” of a more senior Officer in a *statutory* hierarchy of successors.

Moreover, to the extent that the Clause allows for two alternative inferences, in choosing between inferences the tie-breaker should be considerations of practical governance and the possibility of absurd results. Because “law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities.” *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989). If Professor Amar is correct, when a successor at or near the very bottom of the statutory hierarchy of successors (e.g., the Secretary of Veterans Affairs or the Secretary of Education) happens to be the first available statutory successor able to assume Executive authority, then a more senior and patently more fit successor who was under a temporary disability, such as the Secretary of State, would not thereafter be able to assume the duties of Acting President. Professor Amar’s construction thus has the effect of penalizing Congress for prudently providing for an extended line of succession by creating a possible trap in

which Congress's last choice of potential successors could become Acting President under fluke circumstances, and thereafter not subject to replacement by more senior successors who were temporarily unavailable.

In addition to allowing for the possibility of such unfortunate results, Professor Amar's construction—which as noted above is already reflected in the 1947 Act insofar as it applies to the rights of cabinet officers *inter se*—has other destabilizing effects. It could induce hesitation on the part of available, but lower-ranked, statutory successors fearful of the charge of usurpation.³ Such lower-ranked successors may be hesitant to act until the unavailability or status of other, higher-ranked successors can be definitively confirmed, which hesitation might prove disastrous to the national interest. The succession mechanism should induce *action*, not hesitation, by the first available statutory successor. Thus, the first available statutory successor should be able to act decisively, on the basis of incomplete information as to the definitive status of more senior successors, with the knowledge that if a more senior successor is later to be able to act, Executive authority will automatically revert back to that more senior successor.

Finally, Congress should not provide for a new presidential election in the event of a double vacancy, even if the double vacancy occurs relatively early in the presidential term. The principal objective of the succession mechanism should be *stability*. Once a new President and Vice President take office, the nation and the world should know and understand that in the event

³ In some future crisis, when a statutory successor may be called upon to act in circumstances where it is unclear whether there are any surviving senior successors, the successor may recall the ridicule that Secretary of State Alexander Haig suffered for his famous "I'm in charge here" statement to the world on March 30, 1981. What is often overlooked about that episode is what prompted Haig's remark. The White House press spokesman had just stated on live television, broadcast worldwide, that he did not know who was running the government. Although Secretary Haig's demeanor in this famous episode was less than reassuring, his essential judgment was sound: it was necessary to assure the world (and foreign enemies in

of a double vacancy, there will be continuity of policy because the President's designated successor confirmed by the Senate will serve as Acting President until the expiration of the President's term. If federal law specifically provided for a special election in the event of a double vacancy, foreign enemies (governments as well as terrorists) and domestic madmen might be tempted to plot a double assassination for the specific purpose of forcing a new election, and thereby possibly effecting a change in policy. Recent events in Spain demonstrate that terrorists can very well attempt to manipulate the outcome of elections; the same mindset could certainly contemplate a terrorist attack with the goal of forcing a special election. The succession mechanism should not provide any incentive to those who might to seek to effect a change in policy by assassination, and unfortunately, a provision for a special election would do exactly that.

particular) that the continuity of Executive authority was not affected by the attempt on President Reagan's life and the possible inability of the Vice President to discharge presidential duties.