



# Continuity of Government

PRESIDENTIAL SUCCESSION

**The Continuity of Government Commission**

DECEMBER 2022

A M E R I C A N   E N T E R P R I S E   I N S T I T U T E

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# Executive Summary

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Questions about the continuity of our key institutions have arisen at pivotal moments throughout our nation's history. Watershed events such as the Cold War, the death of President Franklin D. Roosevelt, and the assassination of President John F. Kennedy brought continuity-of-government issues into sharp public relief. Ultimately, these events led to significant reforms, including the 25th Amendment and a new Presidential Succession Act.

A decade after the fall of the Soviet Union, the 9/11 attacks forced continuity issues back into the public consciousness. One result was the creation of the first Continuity of Government Commission, the predecessor to the current commission. More than two decades after 9/11, we still have to ask ourselves, Do we have the legal and constitutional framework in place to ensure that our key institutions of government could recover from a catastrophic event?

America has in place legal and constitutional provisions that address presidential succession. These provisions serve us well in the straightforward case of a president's death while in office. However, the current system does not adequately address less straightforward scenarios, such as a mass attack on multiple people in the line of succession, the simultaneous incapacity of the president and vice president, and unique succession issues that could arise between Election Day and Inauguration Day.

In this report, the Continuity of Government Commission recommends several changes to the Presidential Succession Act that address these vulnerabilities. These recommendations would not require constitutional amendments; they are achievable through simple legislative changes.

The core recommendation is that members of Congress should be removed from the line of succession and that we should instead institute a system of cabinet succession incorporating the current line of cabinet successors.

Other recommendations would, if adopted, improve the process for temporarily replacing an incapacitated president and address the prospect of a death or delay interfering with the presidential inauguration process.

The Continuity of Government Commission was originally convened after 9/11 to consider continuity-of-government issues that could follow a mass attack on the three branches of government. In three public reports, that initial commission made a series of recommendations on the continuity of Congress, presidential succession, and the continuity of the judiciary.<sup>1</sup>

In the wake of the coronavirus pandemic, the commission was reconstituted. It is tasked with revisiting core continuity-of-government issues and addressing fresh challenges that have arisen in the past decade.

Earlier this year, the commission issued recommendations on the continuity of Congress that address the prospect of a mass attack killing many members of Congress, potentially rendering the legislative branch inoperable.<sup>2</sup> Those recommendations differ from the first commission's recommendations in important respects. Both sets of recommendations, however, share the same fundamental message: that the most acute threats to the continuity of Congress can be addressed by a constitutional amendment enabling immediate, temporary replacements in the House of Representatives. Such an amendment would ensure that the House—and Congress as a whole—could function in the aftermath of an attack.

The reconstituted commission has not revisited judicial branch continuity issues. The first commission's report on that subject was published in 2011.<sup>3</sup> That report notes that the Supreme Court has a statutory quorum requirement of four justices. If a catastrophic event left the Court with fewer than four members, it would be effectively unable to render decisions—a grave prospect, especially amid a

national crisis. In that report, the commission recommended adopting measures that would allow the remaining members of the Court, along with additional sitting circuit court judges, to form an

emergency interim court empowered to adjudicate cases until the Supreme Court could be reconstituted.

This report completes the work of the Continuity of Government Commission.

# Introductory Statement

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The Continuity of Government Commission was first established in the early 2000s, after the attacks on September 11, 2001, brought gaps in the nation’s continuity-of-government plans to the fore. In a series of public reports, the commission’s first iteration recommended important reforms designed to strengthen the federal government’s ability to weather a catastrophe that fundamentally threatened our constitutional system.<sup>4</sup>

In the decade and a half since the first commission concluded its work, threats to the continuity of government have only grown more acute. The nature of such threats has also changed. Recent events such as the pandemic, disputed elections, and politically motivated violence against elected officials have exposed additional flaws in the federal government’s continuity regime—flaws that our predecessors on the commission hardly could have addressed. As

recent developments have made clear, there is more work to be done.

This recognition led to the reestablishment of the Continuity of Government Commission in the fall of 2021. The commission brings together experts from the private sector, academia, and the highest reaches of government, and it is charged with proposing solutions to the most pressing continuity issues implicating the three branches of the federal government.

Our first report addressed the continuity of Congress. This report addresses shortcomings in our presidential succession system. Its core recommendation is that Congress should implement cabinet succession by removing congressional leaders from the presidential line of succession. This and other recommendations would help ensure a quick, straightforward transition of power in the wake of a catastrophe.

# Recommendations at a Glance

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The commission offers one core recommendation and four additional recommendations that Congress should consider.

## **Core Recommendation: Remove Congressional Leaders from the Line of Succession, Leaving Only the President’s Cabinet in the Line**

The Presidential Succession Act should be amended to remove the Speaker of the House and the president pro tempore of the Senate from the line of succession; this amended line of succession would consist of the president’s cabinet. After the president and the vice president, the line of succession would include cabinet members in the same order in which they appear in the current line of succession, starting with the secretary of state, secretary of the Treasury, secretary of defense, and the attorney general and continuing to the end of the line with the secretary of homeland security.

The commission believes this change would bring the nation’s presidential succession regime more fully into compliance with the Constitution. In addition, adopting this change would reduce the chance that an episode of succession could switch the party controlling the presidency. Finally, this change would provide clarity amid the fog of a mass attack or other crisis, as the presence of congressional leaders in the line of succession at such a time could provoke widespread confusion and raise questions of legitimacy.

As a supplement to this recommendation, a minority of our commissioners also recommend that Congress should consider other options to ensure party continuity and clarity of succession. These other options include convening the members of Congress in the president’s party to select a successor.

## **Additional Recommendation 1: Clarify in Law That Acting Secretaries of Departments Are Not in the Line of Succession**

Only cabinet members confirmed by the Senate for the position of secretary of the department shall be members of the line of succession.

To eliminate confusion regarding the composition of the line of succession and to ensure succession to the presidency by high-level, Senate-confirmed cabinet secretaries, Congress should make this change.

In the fog of war, there could be confusion as to the proper successor to the president if acting secretaries are included in the line of succession. Cabinet departments often maintain internal lines of succession. This could lead to problems in the aftermath of a catastrophic attack. For instance, an internal successor to the secretary of state might see themselves as a potential presidential successor if the president and vice president had both died. That acting secretary of state and another official—the secretary of the Treasury, for example—might both claim to be the lawful successor to the president. To avoid such confusion, Congress should specify that acting secretaries are not in the presidential line of succession.

## **Additional Recommendation 2: Clarify the Process for the Incapacitation of the Vice President**

The 25th Amendment provides for the temporary replacement of the president in the case of various incapacitation scenarios. But additional issues arise with the simultaneous incapacity of the president and vice president. To ensure a smooth transition in the case of presidential transition, Congress should specify in law that the next person in the line of succession

after the vice president can ensure that an incapacitated president can be replaced.

### **Additional Recommendation 3: Provide by Law for Successors If the Winning Presidential and Vice Presidential Candidates Die Before Inauguration Day**

Congress should pass a law to address the scenario in which the winning presidential and vice presidential candidates die before Inauguration Day. Using its broad authority under the 20th Amendment, Congress should specify in law one of two options:

1. The House leader of the party of the winning candidates shall take over as president on January 20 (either the Speaker of the House or the minority leader).
2. All the members of the House and Senate of the winning presidential candidate's party shall meet to elect a successor who will take office on January 20.

The details of the succession will vary depending on the timing of the deaths of the candidates. A

combination of statutory changes and recommendations from political parties could address three different timing scenarios: (1) after electoral votes are counted on January 6, (2) after the electors have cast their votes in December but before January 6, and (3) after Election Day but before the electors cast their votes. But in each scenario, the following principle should govern: The new president on January 20 shall be of the same party as the deceased winning candidate, and one of the two methods described above shall be used to achieve this result.

### **Additional Recommendation 4: Address Issues Relating to the Counting of Electoral Votes That Aid in Resolving the Presidential Election So That There Is No Vacancy in the Presidency on January 20**

Congress should amend the Electoral Count Act to raise the threshold for objecting to electoral votes, clarify that the vice president's role in the counting of electoral votes is ministerial, and indicate that the votes Congress should count on January 6 are from electors who are certified by their state and cast their votes on the appointed date in December.

# Background

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Our Constitution, laws, and practices include provisions for selecting a new president if the sitting president dies, becomes incapacitated, resigns, is impeached and removed, or fails to qualify for an election.

In many scenarios, a simple transition to a new president will take place without incident. For example, eight presidents have died in office, and, in each case, the vice president has assumed the presidency. But in more difficult cases, such as mass attacks targeting multiple people in the line of succession, ambiguity about presidential disability, or controversies over a contested election, the outcome could be less certain. Imagine a scenario in which our country was facing a grave crisis but the president was unable to act, there were delays in identifying a successor, or there was confusion over the identity of the successor. Changes should be made to reduce the likelihood of these dangerous scenarios.

## Constitution, Legal and Historical Background

The following is adapted from the post-9/11 report of the Continuity of Government on presidential succession.<sup>5</sup>

Our system of presidential succession is governed by a number of constitutional and statutory provisions. The original Constitution authorizes Congress to write a Presidential Succession Act, and we have had three in our history. There are also provisions of the 12th, 20th, and 25th Amendments that affect succession.

**Article II, Section 1.** This article of the Constitution contains the provision that undergirds much of our presidential succession system. The relevant section

gives Congress the power to enact a law that specifies the succession order after the vice president.

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.<sup>6</sup>

The Constitution provides that the vice president should become president if the presidency were to become vacant. But it also delegates to Congress the power to specify a further line of succession if both offices were vacant.

**Presidential Succession Act of 1947.** The full text of our current Presidential Succession Act can be found in Appendix B.

We provide a few highlights of the act here.

- The order of succession (after the vice president) is the Speaker of the House, president pro tempore of the Senate, and cabinet officers in order of the creation of the heads of their departments.
- If the line of succession passes to a cabinet secretary, there is an additional provision (“a bumping provision”) that allows the congressional leaders to bump out the cabinet secretary and assume the presidency.
- The act implies that acting secretaries might be in the line of succession as long as they have been confirmed by the Senate for some other office.



**25th Amendment.** The full text is found in Appendix A.

We provide a few highlights of the amendment here.

- The 25th Amendment provides a procedure for filling a vacancy in the vice presidency by a nomination of a new vice president by the president with confirmation by a majority of both houses of Congress.
- The amendment lays out procedures for how a president might in advance declare a current or anticipated incapacity, how the vice president

and a majority of the cabinet (or perhaps another body provided by law) might declare an incapacity of the president when the president is not able to make that declaration, and how Congress might resolve a disagreement about incapacity between the president and the vice president and cabinet.

- The amendment does not specify how these processes might work if the vice presidency is vacant or the vice president is incapacitated.

**12th and 20th Amendments.** These are also printed in full in Appendix A.

# The Problems in Detail

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Below is a description of some of the key shortcomings of our presidential succession system.

## **Congressional Leaders in the Line of Succession**

There are serious policy and constitutional objections to having congressional leaders in the line of succession. The Constitution allows Congress to specify which “Officer” shall be in the line of succession, a term that many commentators believe refers to executive and judicial officers, not congressional ones. More broadly, structural considerations make it difficult for legislative leaders to assume a position in the executive branch.

Congressional leaders cannot easily step in for an incapacitated president, and they may have conflicts of interest in an impeachment and removal scenario. Congressional leaders may be members of a different political party than the president. A political zealot might seek to change the party in the executive branch with a single attack. A freak accident might lead to a sudden change in party; the death of President Ronald Reagan and Vice President George H. W. Bush could have led to President Thomas “Tip” O’Neill. The death of President Bill Clinton and Vice President Al Gore might have led to President Newt Gingrich. The situation becomes more tenuous if the vice presidency has been vacant for a time.

Such interbranch and interparty shifts would destabilize the nation even under the best of circumstances, let alone if they occurred amid a mass catastrophe.

In addition, the so-called bumping procedure allows congressional leaders to bump out a cabinet member who is serving as president. As a result, several different figures could ascend to the presidency in a short period, and they would not necessarily hail from the

same political party as the former elected president. In addition, following an attack, Congress could employ the bumping procedure as a means of controlling the executive. Take, for example, a scenario in which the secretary of state became president and Congress threatened to replace him or her with a congressional leader unless he or she complied with Congress’s demands. Weaponizing the bumping procedure in this way would eviscerate the separation of powers.

Apart from these core problems, there are a number of additional flaws in the composition and structure of the line of succession.

First, it makes little sense to include the president pro tempore of the Senate in the line of succession. While many figures who have previously held the position have been highly able, the criteria for selecting the president pro tempore—the longest-serving senator in the majority party—all but ensures that he or she will be elderly. For example, Strom Thurmond served as president pro tempore into his late 90s. The Senate majority leader would likely be a more appropriate figure to include in the line of succession.

Second, there is some ambiguity in the current presidential succession statute regarding the precedence of the Speaker of the House and the Senate president pro tempore. Clearly, the Speaker is above the pro tempore in the line of succession when it is simply executed. For example, if the president and vice president were to both die in office, the Speaker of the House would be next in line to ascend to the presidency. In scenarios involving the bumping procedure, however, the difficulty of precedence may complicate matters. A couple of cases illustrate the potential confusion.

If the president and vice president have died and the Speaker is either dead, unable to take office, or chooses not to take office, then the Senate president pro tempore would be next in line to ascend to the presidency. If the Senate president pro tempore

becomes president, a later Speaker, or a Speaker who has passed on the presidency, might reconsider and wish to take the presidency. The current law does not provide that a Speaker can “bump” out the pro tempore, as it does in the case of a cabinet secretary.

An even more confusing aspect of the law is that if a cabinet secretary succeeds to the presidency, the law would allow either the Speaker or the pro tempore to bump out the cabinet member. Presumably, whoever first chose to bump out the cabinet member would be president.

Simply put, the occupant of the office of pro tempore is not ideally suited to take the presidency because of concerns of age and the relative importance of the office. Second, there is a potential race between the president pro tempore and the Speaker as to who would bump a cabinet secretary who had succeeded to the presidency.

### **Acting Secretaries in the Line of Succession**

The language of the current Presidential Succession Act implies that an acting head of a department is in the line of succession if that person has been confirmed by the Senate for any post whatsoever, not just for head of the department.

In ordinary times, this might lead to confusion in the line of succession. Would the acting secretary of state really be ahead of the Treasury and defense secretaries in the line of succession?

In the case of a catastrophic attack, this provision might cause even greater confusion as departments have their own internal lines of succession, and the death of the head of a department might result in the automatic ascension of an acting secretary. The acting secretary might then claim to be in the line of succession ahead of cabinet officers from other departments lower in the overall presidential succession provisions.

Finally, the confusion over the status of acting secretaries as opposed to secretaries would inevitably become an issue should an attack take place around a presidential inauguration. Traditionally, heads of

departments resign just in advance of the inauguration of the incoming president, leaving their department in the hands of an acting secretary. In this case, an attack around the inauguration would leave the acting secretaries of the outgoing administration in place as the successors for the incoming president.

### **Incapacitation**

The 25th Amendment covers many details of how an incapacitated president transfers power to a vice president. The amendment does not, however, cover the case of a transfer of power from an incapacitated president to other figures in the line of succession if the vice president is not able to act. Although the Constitution gives Congress the authority to enact legislation dealing with these circumstances, Congress has not chosen to do so. The lack of guidelines could lead to great uncertainty if a catastrophic attack were to leave several figures in the line of succession dead or incapacitated.

Imagine that the president is incapacitated and unable to communicate that fact and the vice president is either dead or incapacitated. The expected course of events would be for the next in line in the succession to take over for the president temporarily. For example, we recommend that the secretary of state should take over for the president until the president is recovered. (Alternatively, if the vice president recovered, the vice president would take over.) The difficulty is that there is no clear way to trigger this action without the vote of the vice president and a majority of the cabinet.

### **Issues of Death of the Election Winners**

There are three major scenarios relating to the death of election winners before they take office.

1. The winning presidential candidates (presidential and vice presidential candidates) die after the November election but before the presidential electors cast their votes in December.

2. The winning candidates die after the presidential electors have cast their votes in December but before they are counted on January 6.
3. The winning candidates, now officially the president-elect and vice president elect, die after January 6 but before or on Inauguration Day on January 20.

For each scenario, the problems are grave but different. And while smaller versions of the problem would exist if only the winning presidential or vice presidential candidate were to die, the dire scenarios are when both are deceased.

**Scenario 1.** In this scenario, candidates die shortly after Election Day but before the December voting of the electors.

Assuming the election result is clear, this is not a great legal or constitutional problem, but it would raise significant issues of legitimacy. While voters believe they are voting for presidential candidates such as Joe Biden or Donald Trump, in reality, they are voting for a slate of presidential electors from their state who favor Biden or Trump.

As terrible as it would have been if Biden and Kamala Harris had died shortly after the election, the legal reality is that votes had been cast to select Biden-Harris electors, and those electors would still be alive and able to cast their electoral ballots in December. A majority of electors loyal to the Democratic ticket would stand ready to cast ballots in December. The likely way to resolve this issue is for the Democratic Party to come up with new candidates and instruct the electors to vote for the new ticket. Then, the votes for this new ticket would be counted in Congress on January 6, and the new ticket would take office on January 20 and become president and vice president.

While legally a political party could instruct its loyal electors to cast ballots for a new ticket, this scenario raises significant legitimacy issues. A new ticket, unelected by the people, would assume the presidency

and vice presidency. While many people would see it as fair that the party that won the presidency would get to have a president in office of the same party, the selection process and the communication to the public would have to be designed to assure the country in this time of great uncertainty.

One other problem has arisen in recent years. Since the publication of our previous report, many states have adopted strict laws regarding the binding of presidential electors to the candidates voted for in the November election. The strict laws require that an elector must vote for the candidate who won the popular vote in that state, and if not, the elector would be replaced by a substitute elector who could cast the proper vote.

In the case of a deceased ticket, the electors might be forced to vote for the deceased candidates, rather than a substitute candidate provided by the party.

**Scenario 2.** In this scenario, the winning candidates die after the presidential electors vote in December but before the electoral votes are counted in Congress on January 6.

This is perhaps the most confusing scenario for presidential succession in the transition period.

What should be done in the counting of the electors on January 6 if the winning candidates are dead? We have contradictory precedents for how these ballots should be handled. Should they be counted for the dead candidates? Should they be thrown out? Confusion and partisanship about the counting of ballots could lead to conflict over the true winner of the election.

If the dead candidates' votes were counted and those candidates were elected, then on January 20, a successor would be selected from the Presidential Succession Act. Today, that is the Speaker of the House, of whatever party might take the presidency. Our recommendation is for cabinet succession, but in this case, there would likely not be a new cabinet in place, so a member of the cabinet of the outcoming administration would become president.

**Scenario 3.** In this scenario, the president-elect and vice president elect die after the votes are successfully counted on January 6 but before Inauguration Day.

The simple legal response to this scenario is that the next person in the line of succession becomes president on January 20. With our recommendation for cabinet succession, the death of the winning presidential and vice presidential candidates would leave the top two offices vacant on January 20, and, as the new administration has not yet put in place a cabinet, the next successors would be the cabinet of the outgoing president. In the current line of succession, the Speaker would be next in line, but that Speaker could be of the opposite party. And congressional leaders attend the inauguration, so a mass attack might again leave us with only the outgoing cabinet or possibly newly elected congressional leaders.

It makes little sense in the wake of the tragic deaths of the winning presidential and vice presidential candidates for us to turn to the outgoing president's cabinet. It might be the cabinet of a defeated president, or it might be of the opposite political party.

### **No Resolution of the Election**

If the election cannot be resolved by January 20, the country faces the possibility of a vacancy in the presidency and another form of a presidential succession issue.

Recent events on January 6, 2021, raised these issues. The long time to resolve the counting of the votes in Florida in 2000 also pointed to problems of delays in resolving the election. Perhaps the starkest example of this scenario was the election of 1876. In that election, there were severe disputes between the political parties in Congress as to the status of the slates of electors in several states and whether Rutherford B. Hayes or Samuel Tilden was the legitimate winner. Leaving aside all the specific controversies and the extraordinary mechanisms that were employed to resolve them, the election was unresolved until just a couple of days before Inauguration Day (which was then in March), and the prospect of a vacancy in the presidency on Inauguration Day loomed.

The processes here are complex, but our commission makes recommendations to make it more likely that the presidential election is resolved in a timely manner and the presidency is filled by the election winner, not a successor, on January 20.



# Detailed Recommendations

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Below is an in-depth discussion of our core recommendation for cabinet succession and additional recommendations to address specific succession scenarios.

## **Core Recommendation: Remove Congressional Leaders from the Line of Succession, Leaving Only the President's Cabinet in the Line**

*The Speaker of the House and the Senate president pro tempore should be removed from the presidential line of succession. The succession order should be president, vice president, and the heads of the departments as laid out by the Presidential Succession Act.*

Including congressional leaders in the line of succession often creates confusion, raises constitutional and separation of powers issues, and includes the possibility of a party change in the White House. The commission recommends cabinet succession. The second Presidential Succession Act, which preceded our current act enacted in 1947, had pure cabinet succession with no congressional leaders in the line. There is also a strong constitutional argument that goes back to James Madison in the earliest days of our republic that holds that the Constitution forbade the inclusion of congressional leaders in the line.

If there is a catastrophic attack, cabinet succession will provide a successor who is in the deceased president's administration. Presumably, they are knowledgeable about and sympathetic to the deceased president's party and priorities.

The problem is especially acute in several areas. First, in the case of the incapacitation of the president and vice president, it is hard to see how a Speaker of the House (perhaps of an opposing party) would

resign from Congress to take over the presidency, perhaps only for a few hours or days. The Constitution is clear that a cabinet member could step in seamlessly and could step back out when the president recovered. The current law requires cabinet members to resign from their office if they assume the presidency, but earlier Presidential Succession Acts did not, and the Constitution allows for a cabinet secretary, unlike the Speaker, to assume the presidency without resigning from office.

Second, the bumping procedure is especially problematic. If the president and vice president were to die and the Speaker and pro tempore were unable to take the presidency or declined to take the presidency, the congressional leaders (or a new Speaker or president pro tempore) would be able to bump out the cabinet secretary holding the presidency at any time. This could lead to great instability, and it would distort the separation of powers, with congressional leaders holding great power over the president.

Third, congressional succession could lead to a party switch in the presidency. For example, President Clinton could have been replaced by Speaker Gingrich, or President Trump could have been replaced by Speaker Nancy Pelosi.

Fourth, with regard to the president pro tempore, the current selection criterion for the office is for the longest-serving member of the majority party of the Senate to hold the office. This leads to generally older figures holding the office, and the occupant of the office is not necessarily a leader of the majority caucus in the Senate. For these reasons, the simplicity of cabinet succession is preferred to the current inclusion of congressional leaders.

In sum, cabinet succession would ensure that (1) the new president would be of the same party and administration as the deceased president and vice president and (2) a clear successor is indicated for death, disability, and the fog of war.

The order of cabinet succession in the current Presidential Succession Act should be maintained, starting with the secretary of state, secretary of the Treasury, secretary of defense, and attorney general and continuing with the other departments until the secretary of homeland security.

And with this reliance on cabinet succession, security officials should redouble their existing efforts to ensure that all members of the line of succession are not in the same location at the same time.

While the commission does recommend removing congressional leaders and changing to cabinet succession, a minority of our members urge that Congress also be presented with other options to fill presidential vacancies that would also ensure that the presidential successor would be of the same political party.

Congress could also consider relying on cabinet succession to fill an immediate vacancy in the presidency and vice presidency, with the congressional members of the president's party (senators and representatives together) meeting to vote on a permanent successor who would assume the presidency and serve until the end of the term.

The aim of this option would be to ensure that the presidential successor reflected the will of the deceased president's party. Unlike the simple cabinet succession option, this option would require a constitutional amendment.

### **Additional Recommendation 1: Clarify in Law That Acting Secretaries of Departments Are Not in the Line of Succession**

*Only cabinet secretaries who have been confirmed by the Senate for the position of head of the department shall be in the line of presidential succession.*

The current line of succession allows for acting secretaries to be included in the line of succession. The commission recommends their removal. All sitting cabinet members (subject to eligibility requirements) who have been confirmed by the Senate for the position of head of a department shall be in the

line of succession. But acting secretaries who have been confirmed for some position (not the head of department) shall not be in the line.

This recommendation preserves the importance of the nomination and confirmation process. A president nominates and the Senate confirms a cabinet secretary as head of a department knowing that that person not only is going to run a department but also will be a possible successor to the presidency.

Further, including acting secretaries in the current line of succession risks confusion in a catastrophic attack. If, for example, an attack killed the president, vice president, and the secretary of state, an acting secretary of state could be elevated to the position through the department's internal line of succession. Then we have the possibility of a conflict. Should the acting secretary of state or the secretary of the Treasury become president?

### **Additional Recommendation 2: Clarify the Process for the Incapacitation of the Vice President**

*Congress should pass legislation clarifying how a declaration of presidential disability shall occur if the vice presidency is vacant or the vice president is incapacitated. Congress should specify in law that in the case of a vice presidential vacancy or if the vice president is incapacitated, the next person in the line of succession shall act as the vice president in triggering a declaration of incapacity of a president. That is, just as a vice president with a majority of the cabinet would inform Congress of the disability of the president, in the case of the incapacity of the vice president, the next cabinet member, the secretary of state (if constitutionally eligible for the presidency and confirmed by the Senate for that position) shall, with a majority of members of the cabinet, make a declaration of the president's incapacity to Congress.*

The 25th Amendment improved our succession system by detailing the process of how a president might be declared incapacitated. One area that

was not clarified was how the process is to work if the vice presidency is vacant or the vice president is incapacitated.

We recommend that Congress should pass legislation clarifying that the next person in the line of succession, after the vice president, shall act just as the vice president does in the role of declaring an incapacitation.

For example, if the vice presidency was vacant, under our preferred succession line, the secretary of state with a majority of the cabinet could declare that the president was incapacitated.

*For the sake of clarity, Congress shall specify in law which officials are considered part of the president's cabinet that would be called on to support a declaration of incapacity by the vice president. Preferably, Congress would use the same definition of the cabinet in the Presidential Succession Act.*

The commission recommends a small change to improve the clarity of the 25th Amendment process for declaring a president incapacitated. The vice president and a majority of the cabinet can make a declaration that the president is incapacitated. (Alternatively, Congress can by law provide a body other than the cabinet.) It would be helpful for Congress to define in law the members of the cabinet to avoid confusion. We also believe that Congress should specify that acting cabinet secretaries would not be part of that definition.

### **Additional Recommendation 3: Provide by Law for Successors If the Winning Presidential and Vice Presidential Candidates Die Before Inauguration Day**

*Congress should provide by law for successors if the winning presidential and vice presidential candidates die before Inauguration Day.*

Congress should pass a law to address the scenario of the death of the winning presidential and vice presidential candidates before Inauguration Day. Congress

should specify in law one of two options for selecting a successor who will take office on January 20 if the winning presidential and vice presidential candidates have died: (1) The House leader of the party of the winning candidates shall take over as president on January 20 (either the Speaker of the House or the minority leader) or (2) all the members of the House and Senate of the winning presidential candidate's party shall meet to elect a successor who will take office on January 20.

Article II, Section 1, Clause 6 of the Constitution empowers Congress to write a Presidential Succession Act to specify who would assume the presidency in the absence of the president and vice president.

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.<sup>7</sup>

The language places certain limits on Congress in writing the law. Most obviously, it allows Congress to specify certain people as an "Officer" to be on a list of successors. It does not, for example, allow Congress to create any process it would like. Congress specifies which officers would be successors. On the meaning of "Officer," a substantial number of constitutional experts, including Madison, have held that it refers to executive branch or judicial officers, not congressional officers. Some scholars believe that the term is broad enough to include congressional officers, but no one believes that it means just any person.

For these reasons, any attempt to create a line of succession for a typical succession scenario would be limited to a law specifying a list of people who hold specific offices as successors.

For one important scenario, the constitutional language is broader. The 20th Amendment gives Congress broad authority to craft a solution to the problem of the death of the winning presidential and vice presidential candidates.

Section 3 reads:

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.<sup>8</sup>

The language allows Congress broad authority to craft a remedy—not limited to a list of officers—to the problem of a vacancy in the offices of president and vice president on January 20, when the term of a new president is to commence.

The commission’s recommendation is that Congress take advantage of its broad authority and enact a law specifying how a successor will be chosen in the case of the vacancy of the presidency and the vice presidency on January 20 following an election.

The commission recommends two options to Congress, both of which preserve party continuity from the deceased winning candidates to the successor. A deceased winning Republican ticket will be replaced by a Republican successor, and a deceased winning Democratic ticket will be replaced by a Democratic successor.

The commission recommends two options to Congress.

1. Create a law that specifies that the House party leader of the deceased winning party candidates shall become president on January 20 (i.e., the Speaker or minority leader, depending on the party of the winning candidate).

2. Establish that the members of Congress from the deceased winning party shall meet to vote for a successor who will take office on January 20.

That law by itself will suffice to select a successor in certain time frames (after January 6), but to ensure it works in the way intended, additional legislation will be required to ensure the wanted outcome.

**Timeline.** There are three distinct time frames to consider if the death of the winning presidential and vice presidential candidates occurs:

1. After the successful counting of votes on January 6,
2. After the presidential electors have cast their votes in December but before they have been counted on January 6, or
3. After Election Day but before the electors cast their votes in mid-December.

*After the Successful Counting of Votes on January 6.* In this time frame, the law recommended above will function as intended. The death of the winning candidates will lead to either a House leader assuming the presidency on January 20 or the members of Congress of the winning candidates’ party meeting and selecting a successor who will take office on January 20.

*After the Presidential Electors Have Cast Their Votes in December but Before They Have Been Counted on January 6.* The difficulty of dealing with this scenario is that the deaths occur before Congress counts electoral votes on January 6. In the past, there has been some dispute as to whether Congress should count electoral votes for deceased candidates as valid or if they should be discarded.

The above proposal will work as intended if Congress also writes into law that electoral votes for deceased candidates shall be counted as valid on January 6. So in this case, Congress will count the votes of the deceased candidates, and as these candidates have

a majority of electors, the deceased candidates will be declared the winners and become president-elect and vice president elect. When we get to January 20, there will be a vacancy in the presidency, as the president-elect and vice president elect are dead, so the special succession act to fill the vacancy will kick in, and the successor provided for by law will take office on January 20.

*After Election Day but Before the Presidential Electors Cast Their Votes.* In this case, as there will be a law in place that specifies a successor and a provision in the law that instructs Congress to count as valid votes for a deceased candidate, the presidential electors can cast their votes for the deceased winning ticket with confidence that ultimately those votes will be counted by Congress. Then the vacancy on January 20 will be filled by one of the two options that Congress has written into law. The successor will be of the same party as the winning candidates, and the successor will be selected by the process written into law.

#### **Additional Recommendation 4: Address Issues Relating to the Counting of Electoral Votes That Aid in Resolving the Presidential Election So That There Is No Vacancy in the Presidency on January 20**

*Congress shall provide by law that on January 6, when the electoral votes for president and vice president are counted in a joint session of Congress, the threshold for making an objection to the votes of the electors shall be at a minimum 20 percent of the House of Representatives and 20 percent of the Senate.*

The commission makes recommendations to lessen the possibility that an election will not be resolved by January 20. It does not consider all scenarios for election breakdown, but it suggests several areas where the process should be improved. In two areas—raising the threshold for considering an objection to electors and indicating that the vice president’s role in counting ballots is ministerial—the

commission’s recommendations are similar to proposals in Congress receiving significant support.

The commission recommends that the process for making objections to electoral slates and votes on January 6 is streamlined and limited to those objections with substantial support. Under the current Electoral Count Act, one member of the House of Representatives and one senator can make an objection that will cause the two houses of Congress to divide and debate for up to two hours. In theory, objections and this debate could be raised for all 50 states and the District of Columbia.

Before 2000, there was only one instance in the over 100 years of the Electoral Count Act that any objections were raised. In 2000 and 2016, House members raised objections without a Senate counterpart. In 2004, House members’ objections were joined by a single senator, and the houses divided to debate and decide the question. In 2020, members of the House and several senators objected to two states’ electors, and twice the houses had to divide and debate the measures. In none of these cases were the objections upheld.

It requires a majority of the House and the Senate to uphold an objection to slates of electors. If a large number of House members and senators wish to consider an objection, our recommendation allows them to do so. But the possibility of a small number of each House using dilatory tactics to delay the electoral count are limited by imposing a significant threshold.

*Congress shall clarify in law that the role of the vice president in the counting of electoral votes is ministerial. If objections are to be raised to the counting of electoral votes, those objections should be made by Congress, not the vice president alone.*

The commission recommends that Congress clarify that the vice president’s role in counting the votes of electors is ministerial.

To avoid confusion and potential conflict between Congress and the vice president, Congress should clarify in law that the vice president has a constitutional role in the counting of electors but that the role is ministerial. In the case that objections are to be



raised or upheld in the counting of electors, it is Congress's role, not the vice president's.

*Congress shall specify in law that in the counting process, the votes of the electors to be counted shall be the legitimate votes of state electors who have been sent by the appropriate body in each state, and the count does not include electors without such a sanction. Assuming that there is one legitimate slate of electors meeting these criteria, the vice president shall read aloud the following statement before the opening of a state's slate of electors: "This certificate is the only certificate of vote from that state and purports to be a return from the state, and that has annexed to it a certificate from an authority of the state purporting to appoint or ascertain electors."*

Congress should clarify in law that the slates of electors being counted are those with legitimate sanction of the state in question.

The Constitution calls for the counting of electoral slates that were legitimately sent by states. Private individuals or electors not sanctioned by the state need not be counted.

In 2020, the vice president used a new formulation to describe the electors who were being counted. This formulation affirmed that the votes being counted were official, from the state and not from private parties.

In the over 100 years under the Electoral Count Act, there has been only one obscure case in which one could argue that there were two slates of electors sent

at different times by a state (relating to the Hawaii electoral vote in the 1960 election). In all the other cases, the counting of the vote was clearly of a single official slate authorized by a state. More-specific language would highlight the point that a single slate has been submitted.

*Congress shall specify that if a state has selected a slate of electors to cast ballots on the appropriate date of December, no alternative slates could later be declared to be the official slates in the place of the original slate.*

Congress shall specify in law that the electors selected to cast ballots in December are not to be replaced subsequently by other slates of electors. Once a state has selected a slate of electors and those electors have voted in December, there is no room for a state to after-the-fact authorize another slate of electors as the true electors.

The simple point is that states need to resolve their elections by mid-December, appoint the electors they have certified as the legitimate electors at the time, and not subsequently replace those electors later. The popular election is over and resolved by mid-December, and presidential electors are selected at that time, not later.

Delaying or raising the possibility that new slates of electors might be selected at a later date have deleterious effects on holding an effective counting of the electors' votes on January 6 and having a president ready to take office on January 20.

# Conclusion

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Our current presidential succession laws would provide a certain level of protection and clarity in the event of a sitting president's death. But these laws do not adequately guard against potentially catastrophic threats from adversaries, disease, and other sources.

A core principle animates the commission's work in this area: We should have a system of presidential succession that provides a clear and immediate answer to the question of who is president. The commission therefore supports simple and straightforward changes that would provide such clarity under even the most chaotic circumstances. The commission's recommendations are also designed to ensure that there is no sudden and unexpected party change in the presidency due to a catastrophe.

The key recommendation to remove congressional leaders from the line of succession and adopt cabinet succession provides clarity and simplicity and ensures the continuity of a presidential administration. A previous iteration of the Presidential Succession Act

provided for cabinet succession. If a president and vice president were killed or incapacitated simultaneously, the American people would have a cabinet member from the current administration take the job in short order. We should look to that law as a model for future reform.

The commission also recommends several changes that would apply in more specific scenarios. Those changes include removing acting secretaries from the line of succession, clarifying presidential incapacitation procedures when the vice president is unable to act, and ensuring that deaths of presidential candidates or problems resolving elections between Election Day and Inauguration Day do not prevent us from having a president on January 20.

Adopting the crucial reforms laid out in this report would assure the American people that they will always have a president—no matter the circumstances. It would also send a clear message to our adversaries: American institutions are resilient enough to weather any catastrophe.

# Appendix A. Constitutional Provisions

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Below are constitutional provisions that govern our presidential succession system.

## Article I, Section 5, Clause 1

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

## Article II, Section 1

Section 1. The executive Power shall be vested in a President of the United States of America.

He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United 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.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

## **Amendment XII**

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as

Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; —The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as president, as in the case of the death or other constitutional disability of the President.—] The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## **Amendment XVII**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have

the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

## Amendment XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. 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.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the

persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

## Amendment XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become president.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President



and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If

the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

# Appendix B. Presidential Succession Acts

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Below are the 1792, 1886, and 1947 Presidential Succession Acts.

## Presidential Succession Act of 1792

Chapter VIII. An Act relative to the Election of a President and Vice President of the United States, and declaring the Officer who shall act as President in case if Vacancies in the offices both of President and Vice President.

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That except in case of an election of a President and Vice President of the United States, prior to the ordinary period as hereinafter specified, electors shall be appointed in each state for the election of a President and Vice President of the United States, within thirty-four days preceding the first Wednesday in December, one thousand seven hundred and ninety-two, and within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election, which electors shall be equal to the number of Senators and Representatives, to which the several states may by law be entitled at the time, when the President and Vice President, thus to be chosen, should come into office: *Provided always,* That where no apportionment of Representatives shall have been made after any enumeration, at the time of choosing electors, then the number of electors shall be according to the existing apportionment of Senators and Representatives.

SEC. 2. *And be it further enacted,* That the electors shall meet and give their votes on the said first Wednesday in December, at such place in each state as shall be directed, by the legislature thereof; and the electors in each state shall make and sign three

certificates of all the votes by them given, and shall seal up the same certifying on each that a list of the votes of such state for President and Vice President is contained therein, and shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of government, before the first Wednesday in January then next ensuing, one of the said certificates, and the said electors shall forthwith forward by the post-office to the President of the Senate, at the seat of government, one other of the said certificates, and shall forthwith cause the other of the said certificates to be delivered to the judge of that district in which the said electors shall assemble.

SEC. 3. *And be it further enacted,* That the executive authority of each state shall cause three lists of the names of the electors of such state to be made and certified and to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes.

SEC. 4. *And be it further enacted,* That if a list of votes, from any state, shall not have been received at the seat of government on the said first Wednesday in January, that then the Secretary of State shall send a special messenger to the district judge in whose custody such list shall have been lodged, who shall forthwith transmit the same to the seat of government.

SEC. 5. *And be it further enacted,* That Congress shall be in session on the second Wednesday in February, one thousand seven hundred and ninety-three, and on the second Wednesday in February succeeding every meeting of the electors, and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice

President ascertained and declared, agreeably to the constitution.

SEC. 6. *And be it further enacted*, That in case there shall be no President of the Senate at the seat of government on the arrival of the persons entrusted with the lists of the votes of the electors, then such persons shall deliver the lists of votes in their custody into the office of the Secretary of State, to be safely kept and delivered over as soon as may be, to the President of the Senate.

SEC. 7. *And be it further enacted*, That the persons appointed by the electors to deliver the lists of votes to the President of the Senate, shall be allowed on the delivery of the said lists twenty-five cents for every mile of the estimated distance by the most usual road, from the place of meeting of the electors, to the seat of government of the United States.

SEC. 8. *And be it further enacted*, That if any person appointed to deliver the votes of the electors to the President of the Senate, shall after accepting of his appointment neglect to perform the services required of him by this act, he shall forfeit the sum of one thousand dollars.

SEC. 9. *And be it further enacted*, That in case of removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected.

SEC. 10. *And be it further enacted*, That whenever the offices of President and Vice President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, specifying that electors of the President of the United States shall be appointed or chosen in the several states within thirty-four days preceding the first Wednesday in December then next ensuing: Provided, There shall be the space of two months between the date of such notification and the said first Wednesday in December, but if there shall not be the space of two months between the date of

such notification and the first Wednesday in December; and if the term for which the President and Vice President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December in the year next ensuing, within which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

SEC. 11. *And be it further enacted*, That the only evidence of a refusal to accept or of a resignation of the Office of President and 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.

SEC. 12. *And be it further enacted*, That the term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.

## Presidential Succession Act of 1886

CHAP. 4.—An act to provide for the performance of the duties of the office of President in case of the removal, death, resignation, or inability both of the President and Vice-President.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability,

then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided*, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress “in extraordinary session, giving twenty days” notice of the time of meeting.

SEC. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

SEC. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine and one hundred and fifty of the Revised Statutes are hereby repealed.

### **Presidential Succession Act of 1947 (as Amended)**

Section 19. Vacancy in offices of both President and Vice President; officers eligible to act

- (a) (1) If, by reason of death, resignation, removal from office, 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.

- (2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.
- (b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President *pro tempore* of the Senate shall, upon his resignation as President *pro tempore* and as Senator, act as President.
- (c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—
- (1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and
- (2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.
- (d) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President *pro tempore* to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of

State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

- (2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.
- (3) The taking of the oath of office 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.
- (e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.
- (f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

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# Commissioner Biographies

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## 2003–08 Continuity of Government Commission

### Co-Chairmen

Lloyd Cutler  
Alan K. Simpson  
David Pryor

### Commissioners

Philip Chase Bobbitt  
Kenneth M. Duberstein  
Thomas Foley  
Charles Fried  
Martin Frost  
Newt Gingrich  
Jamie S. Gorelick  
James Ho  
Fred Ikle  
Max Kampelman  
Nicholas deB. Katzenbach  
Robert A. Katzmann  
Lynn Martin  
Kweisi Mfume  
Robert H. Michel  
Leon Panetta  
Donna E. Shalala

### Senior Counselors

Norman J. Ornstein  
Thomas E. Mann

### Executive Director

John C. Fortier

## 2021–22 Continuity of Government Commission

### Co-Chairs

**Arthur B. Culvahouse Jr.** is of counsel to the international law firm O'Melveny & Myers, which he chaired from 2000 to 2012. He has also had several stints in public service, having most recently served as the United States ambassador to Australia from 2019 to 2021. He previously served as White House counsel during the last two years of the Reagan administration. Additionally, both President Donald Trump and the late Sen. John McCain (R-AZ) tapped Culvahouse to vet their vice presidential candidates.

**Donna Shalala** serves as the University of Miami Board of Trustees presidential chair and professor emerita in the university's Department of Health Management and Policy. From 2019 to 2021, she served as a member of the US House of Representatives, representing Florida's 27th Congressional District. Previously, Shalala served as president of the Clinton Foundation, the University of Miami, and Hunter College; chancellor of the University of Wisconsin–Madison; and the 18th United States secretary of health and human services throughout the Clinton administration.

### Commissioners

**Katherine Archuleta** is the founding partner of Dimension Strategies, a consulting firm based in Denver, Colorado, that advises clients on workforce, economic development, education, and environmental issues, among others. She also recently cofounded the Latina Initiative, a nonpartisan, non-profit organization dedicated to engaging Latina voters through digital messaging campaigns that reflect

their opinions and interests. Archuleta has served in various senior government roles, most recently as the Senate-confirmed director of the US Office of Personnel Management from 2013 to 2015. Previously, she served as chief of staff to US Secretary of Labor Hilda Solis during the Obama administration, deputy chief of staff and chief of staff at the US Department of Transportation, and senior adviser to the secretary at the US Department of Energy during the Clinton administration. She served in senior leadership to Denver Mayor Federico Peña and Denver Mayor John Hickenlooper. She currently sits on the advisory board of Representative Democracy.

**Brian Baird** is the president of 4Pir2 Communication, a communications, science, and policy consulting firm based in Edmonds, Washington. He previously served as a member of the US House of Representatives, representing Washington's 3rd Congressional District from 1999 to 2011, and as the president of Antioch University's Seattle campus from 2013 to 2015. While in Congress, Baird chaired the Energy and Environment and Research and Education Subcommittees of the House Committee on Science and Technology.

**Mike Bishop** is the president of American General Counsel, a law firm he founded in 2019 that provides general counsel and other services to companies and business executives. He previously served as a member of the US House of Representatives, representing Michigan's 8th Congressional District from 2015 to 2019, and as the majority leader of the Michigan Senate from 2007 to 2011. While in the US Congress, Bishop served on the House Committee on the Judiciary, the House Committee on Ways and Means, and the House Committee on Education and the Workforce.

**Philip Bobbitt** is the Herbert Wechsler Professor of Federal Jurisprudence at Columbia Law School, where he specializes in constitutional law and theory and international law. He is also a visiting professor of law at Yale Law School and a distinguished senior lecturer at the University of Texas School of

Law. Bobbitt previously served as director for intelligence, senior director for critical infrastructure, and senior director for strategic planning at the National Security Council; counselor on international law at the State Department; legal counsel to the Senate Iran-Contra Committee; and associate counsel to President Jimmy Carter.

**Jean Bordewich** is a former program officer for US democracy at the William and Flora Hewlett Foundation, where she managed a portfolio of grants related to strengthening US democracy, in particular the institution of Congress. Bordewich previously spent more than 20 years as a congressional staff member, including a five-year stint as staff director of the US Senate Committee on Rules and Administration. She also served three terms as a councilwoman in New York's Hudson Valley and served as chief of staff and campaign director for a member of the US House of Representatives.

**Nadia Brown** is a professor of government, chair of the Women's and Gender Studies Program, and an affiliate in the Department of African American Studies at Georgetown University. Her research interests include identity politics, legislative studies, and black women's studies. Brown is a prolific author and editor, having written award-winning books on minority women in US politics and American government in times of challenge, among others. She is also a leading member of the #MeTooPoliSci Collective, which aims to combat sexual harassment in the political science community.

**Reb Brownell** writes and lectures about Congress and the separation of powers and has contributed to a number of books and scholarly publications related to the presidency, the vice presidency, and sports history. He previously served as deputy chief of staff and counsel to Sen. Mitch McConnell (R-KY), as a senior adviser for Senate affairs at the US Department of State, at the US Agency for International Development, and on the staffs of three US Senate committees and the staff of a member of Parliament in the British House of Commons.

**Donna Edwards** is a *Washington Post* contributing columnist who regularly provides political commentary on NBC, MSNBC, and Fox. She previously served as a member of the US House of Representatives, representing Maryland's 4th Congressional District from 2008 to 2017. Notably, Edwards is the first African American woman to be elected to Congress from Maryland. While in Congress, Edwards served on the House Committee on Ethics; the House Committee on Science, Space, and Technology; and the House Committee on Transportation and Infrastructure. Earlier in her career, she worked as a project engineer at NASA and at various organizations in the nonprofit sector.

**James Ho** is a United States circuit judge of the United States Court of Appeals for the Fifth Circuit. Before joining the bench in 2018, Ho was a partner in the Dallas office of the international law firm Gibson, Dunn & Crutcher, where he also served as co-chair of the appellate and constitutional law practice group. Ho previously served as the fourth solicitor general of Texas from 2008 to 2010, chief counsel to the Senate Judiciary Subcommittees on the Constitution and Immigration, a lawyer in the Office of Legal Counsel and the Civil Rights Division at the US Department of Justice, and a law clerk to Justice Clarence Thomas. He was appointed to the Continuity of Government Commission in 2008 and continues to serve in an advisory role today.

**Greg Jacob** is a partner in the Washington, DC, office of O'Melveny & Myers, where he specializes in labor and employment matters. Jacob previously served as deputy assistant to the president and counsel to Vice President Mike Pence from 2020 to 2021, as solicitor of labor from 2007 to 2009, as a domestic policy staffer in the Bush White House, and in the Office of Legal Counsel at the US Department of Justice.

**Elsie Scott** is the founding director of the Ronald W. Walters Leadership and Public Policy Center, a Howard University-affiliated center serving as a focal point for research and publications on policy issues affecting the global black community. She previously

served as president and CEO of the Congressional Black Caucus Foundation, executive director of the National Organization of Black Law Enforcement Executives, and deputy commissioner of training for the New York City Police Department.

**Alan Simpson** (ex officio) represented Wyoming in the US Senate from 1979 to 1997, serving as Senate majority whip from 1985 to 1987 and Senate minority whip from 1987 to 1995. Since leaving office, Simpson has served as co-chair of the National Commission on Fiscal Responsibility and Reform, a member of the Iraq Study Group, and a practicing lawyer and law professor in Wyoming.

### Recently Deceased

Two of our commissioners passed away during our recent deliberations:

**Ken Duberstein**, chief of staff to Ronald Reagan

**Judge Robert Katzmann** of the Second Circuit Court of Appeals

### Commission Staff

**John C. Fortier** is a senior fellow at the American Enterprise Institute and executive director of the Continuity of Government Commission. He also served as executive director of the first iteration of the Continuity of Government Commission from 2002 to 2011. Before rejoining AEI in 2020, Fortier was director of governmental studies at the Bipartisan Policy Center and the principal contributor to the AEI-Brookings Election Reform Project. He has taught at Kenyon College, the University of Pennsylvania, the University of Delaware, Boston College, and Harvard University.

**Norman J. Ornstein** is a senior fellow emeritus at the American Enterprise Institute and an adviser to the Continuity of Government Commission. He is also board chair of the Campaign Legal Center and cohost of AEI's Election Watch series. Ornstein

previously served as a senior counselor to the first Continuity of Government Commission, as codirector of the AEI-Brookings Election Reform Project, and on the faculties of the Catholic University of America and Johns Hopkins University.

**Research Assistant**

Max Markon

# Notes

1. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*, American Enterprise Institute and Brookings Institution, May 2003, <https://www.aei.org/research-products/book/the-congress>; Continuity of Government Commission, *Preserving Our Institutions: Presidential Succession*, American Enterprise Institute and Brookings Institution, June 2009, <https://www.aei.org/research-products/book/preserving-our-institutions>; and Continuity of Government Commission, *Preserving Our Institutions: The Supreme Court*, American Enterprise Institute and Brookings Institution, October 2011, <https://www.aei.org/research-products/report/preserving-our-institutions-the-continuity-of-the-supreme-court>.
2. John C. Fortier and Norman J. Ornstein, *The Continuity of Congress*, American Enterprise Institute, April 11, 2022, <https://www.aei.org/research-products/report/the-continuity-of-congress>.
3. Continuity of Government Commission, *Preserving Our Institutions: The Supreme Court*.
4. Continuity of Government Commission, *Preserving Our Institutions: The Continuity of Congress*; Continuity of Government Commission, *Preserving Our Institutions: Presidential Succession*; and Continuity of Government Commission, *Preserving Our Institutions: The Supreme Court*.
5. Continuity of Government Commission, *Preserving Our Institutions: Presidential Succession*.
6. US Const. art. II, § 1, cl. 6.
7. US Const. art. II, § 1, cl. 6.
8. US Const. amend. XX, § 3.

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