

AMERICAN ENTERPRISE INSTITUTE  
AND  
THE BROOKINGS INSTITUTION  
CONTINUITY OF GOVERNMENT COMMISSION  
Hearing on Potential Reforms to the  
Presidential Succession System

Monday, October 27, 2003

10:00 a.m.

Room SD-226  
Dirksen Senate Office Building  
Washington, D.C.

**C O N T E N T S**

PRESENTATION:

Panel: Update on developments on the continuity of Congress  
since issuance of the Report

Thomas E. Mann  
Norman J. Ornstein

Panel: Review of the statutory and constitutional  
provisions affecting presidential succession

John C. Fortier

Panel: Problems with our presidential succession system

Akhil Reed Amar  
Howard Wasserman  
John C. Fortier

Panel: Proposed solutions

Michael Davidson  
M. Miller Baker  
Akhil Reed Amar

Statement of Hon. John Cornyn  
Norman J. Ornstein

Statement of Hon. Brian Baird  
Statement of Hon. Brad Sherman

Closing Comments: Norman J. Ornstein

P R O C E E D I N G S

SENATOR SIMPSON: This session will come to order, the session of the Continuity of Government Commission. I am Al Simpson, privileged to serve as the cochair of the Continuity of Government Commission with a very remarkable man in Washington and the world, Lloyd Cutler, who is with me. We will conduct the hearing here.

I just want to say that I saw one of my colleagues out in the hall a moment ago, and I was stunned at his comment, and I want to answer it right now. I couldn't get it out. The answer is, "Yes, I did sleep in this suit."

[Laughter.]

So I hope that takes care of that question.

Now, as I say, one of the great privileges of working on this Commission--and it is a serious commission, indeed, and a serious issue, of what would happen with a quorum in the U.S. House and U.S. Senate, what would happen with presidential succession, what would happen with judges, the Supreme Court. Those are the things that we probe on this Commission.

But it is a great privilege to serve with Lloyd Cutler, who became a mentor of mine, as I would sometimes become quite rambunctious and he would come to my office and say, "Alan, listen to what I'm telling you. I have some thoughts." Always congenially presented, never with a partisan tinge, just a remarkable man who knew and loved his government. He is that man and it is a great privilege to serve with him and to work with him on this very serious issue which we hope will bring to the attention of Congress in a way that they will act instead of relegating it to some top shelf or bottom shelf, as Lloyd and I know so well can often be the case.

With that, I defer to my senior colleague, Lloyd Cutler, an ambassador extraordinaire of our government.

MR. CUTLER: Thank you, Alan.

Alan and I have had a love affair for a great man years. For him, it's commonplace to be sitting up on the bench like this. For me, it's a rare and unusual privilege not to be at the green-based table but to be sitting up here without even having to go to the trouble of running to get elected.

[Laughter.]

There are many, many things related to the war on terrorism and defending the homeland against external terrorist attack that we can't do much about. But one we can and should do something about is the ability of the U.S. Government to respond, and with the quorum requirement for doing business in the legislature itself being built right into the Constitution. We would be powerless to act or respond in any way if, let's say, 100 or 200 Members of Congress were killed in some future attack or a natural disaster, and Congress itself could not function because it could not assemble the necessary quorum.

That is the issue which Norman Ornstein and Tom Mann called to our attention, to the country's attention, and it is one we certainly can and should do something

about. The role of this Commission is what should that something be.

We are very grateful to our sponsors--that is, those who have funded this Commission privately, some of the major grant-giving institutions in the country--and we are very grateful to the Brookings Institution and to the American Enterprise Institute to have undertaken this project jointly, as a joint responsibility of two of the leading "think tanks" in this city and, indeed, in the country and the world.

Unfortunately, with forest fires, smoke over Los Angeles, fog, rain, we have had a little attrition in the number of members of the Commission who are going to be here, but I hope not in the number of witnesses. But I gather that Norman Ornstein, who is going to help open these proceedings, has landed at Dulles, but is a little late and should be here. Pinch-hitting for him at the moment is Tom Mann of the Brookings Institution who will tell us just where we are and where we're going.

MR. MANN: Thank you very much.

Senator Simpson, you look so natural up there, you just ought to be there more often.

SENATOR SIMPSON: "New blood."

MR. MANN: And, Lloyd, you fit comfortably behind that dias, I must say. What a pleasure it has been to work with the two of you, with Norm and John, with the other members of the Commission.

What I would like to do is give you a status report on what has happened in the wake of the publication and dissemination of the Commission's first report on preserving our institutions, and as a backdrop for today's major focus, which is on presidential succession.

Now, we all know the problem: how to quickly reconstitute the Federal Government in the wake of mass vacancies from the death and incapacitation of Members of the House and Senate as a consequence of a terrorist attack. It's a serious problem, and it is sobering that we went up to and past the second anniversary of 9/11 without having made any significant progress on this issue.

I wish I could give you a really positive report on how the Congress is moving expeditiously and inexorably to follow the thrust of the recommendations of this report. But I can't do that. The fact is, the conclusion that our Commission came to after months of deliberation that a constitutional amendment was required in this instance is not one that has been widely embraced by the House of Representatives.

On the other hand, I want to tell you there are very encouraging signs in the Senate. We have had some extraordinary leadership in this body by Senator John Cornyn, who chairs the Constitution Subcommittee of the Senate Judiciary Committee. He has held a set of hearings in which a wide range of witnesses testified, including some Members of the House--David Dreier and Brian Baird.

It is also the case that he has begun to move in drafting a constitutional amendment, as well as an implementing statute that goes to the heart of the issues that our Commission raised in its initial report.

I want to also say that the chairman of the full committee, Senator Orin Hatch, has been quite interested in this issue and has shown every sign of wanting to move forward with it as well. The ranking member on the Judiciary Committee, Senator Pat Leahy, has attended the hearing and has indicated a willingness to work with us and others in trying to move the issue forward. Senator Dodd on the Rules Committee has also indicated interest, and Senator Feingold. So I think we're beginning to develop a head of steam in this body that is rather encouraging.

What Senator Cornyn is doing is, in my mind, pursuing a potentially productive path. What he would do is pass a simple constitutional amendment that would give Congress the authority to create means of filling vacancies due to death or incapacitation, but then, through the implementing statute, give the States the freedom to decide how they want to do it. If they decide they will only fill such vacancies due to death by special election, that's their choice. If it takes six weeks or eight weeks, then their vacancies would remain during that time period. But they would have the authority to vest the power in the governor to designate a temporary appointment in the House of Representatives, or in the case of incapacitation, in the Senate.

There could also be a system in which the incumbent Member in advance would draw up a list of those who would serve in that capacity if he were to die or be incapacitated, or the State could define some other means of providing for the temporary appointment. In other words, rather than the Congress imposing that method on the States, the States would have a wide degree of latitude.

Mind you, the authority would be invoked when one-fourth of the membership of either body was found vacant or incapacitated, and that authority would remain in effect for only a specific period of time. Certainly the Congress would have the ability to say that, by a certain length of time, special elections should be held for the House of Representatives in any case, whatever the temporary appointment process might be.

In any case, Senator Cornyn and his staff are working on this language. They expect to introduce the amendment and the implementing legislation very soon and move forward with it in their subcommittee and then to the full Judiciary Committee. So there is action in the Senate.

The House is a somewhat different story. Senator Simpson, you may remember that there is a bit of competitiveness between the two chambers.

SENATOR SIMPSON: I'm shocked.

MR. MANN: I know you're shocked to be reminded of that.

Many members of the House are understandably proud of their reputation as the "people's House", the House that

was designed so that no member would serve in the body without having first been elected by his or her constituents. Of course, when we go back to the founding, the framing of the Constitution, Senators were, of course, appointed by State legislatures.

But I was felt obliged to remind my friends, Members of the House of Representatives, there was a Seventeenth Amendment. Sure enough, members of the Senate are also elected. It is only under those cases of vacancies really due to death where we have had temporary appointments in the Senate, provided for by the Seventeenth Amendment.

But it would be hard to argue effectively that the fundamental difference today between the House and the Senate results from the fact that you have occasional temporary appointments in the Senate before a special election, but no such temporary appointments in the House. The fact is both bodies have direct elections. Both are "small d" democratic institutions, and certainly their relative size, their length of term, the nature of their constituencies and their constitutional powers explain the differences more than this particular element of distinction that a temporary appointment power for the House does not exist now in the Constitution. But many members hold strongly to that.

Mr. Sensenbrenner, the chairman of the Judiciary Committee, and Mr. Dreier, the chairman of the Rules Committee, have argued passionately that the whole character of the House would be altered if temporary appointments were allowed to take place. Therefore, they have introduced a statute, a bill, that calls for expedited special elections in lieu of temporary appointments. Their legislation calls for elections being held within 21 days of the recognition of a catastrophe, leaving mass vacancies or incapacitation. What it allows for then is 14 days for the parties to nominate a candidate and 7 days for the election to take place, and then presumably an instantaneous certification of the results--unlike what we're having in California, where the final counting of absentee ballots and provisional ballots and the canvassing and certification of results is expected to take at least a full month. Anyway, that is what their bill calls for.

The House Administration Committee held hearings on this bill. Chairman Ney and ranking member Larson were there, very actively involved. Congressman Sensenbrenner and Dreier testified along with Congresswoman Candice Miller, former Secretary of State of Michigan. And then a second panel came on afterwards, including Norm Ornstein and myself, and Don Wolfensberger, to talk about this matter.

The long and the short of it is that a number of problems about this solution surfaced in the course of the hearings. Number one, in fact, the 21 day mandate was a mandate that most States simply could not meet. It was much too great a burden to suddenly have to put the whole election administration operation into full speed from a dead start, because there was no scheduled election to get the ballots created, to arrange for the polling places, to train workers and so on. So by the end of this hearing,

Congressmen Sensenbrenner and Dreier were saying, "Well, the 21 days isn't a hard figure. It might be 35 or whatever is needed."

I took this proposal down to a meeting of State and local election officials the weekend before last and raised it with them. All they could say is, "Oh, yes, another unfunded mandate from Washington." They said, "Realistically, we will do what we have to do, what you tell us we have to do. But you can't force an election like this when the nation is in trauma into such an extraordinarily short period of time."

But even if it could be pulled off, the question then becomes would it be desirable? What kind of election would it be? I mean, after all, North Korea has elections, and Saddam's Iraq had elections. The question is, would it be an election in which potential candidates would have a reasonable chance of qualifying to run, and would its citizens have an opportunity to garner enough information to make a reasonable choice? I think the general assessment was probably not, that we ought to hold our special elections as quickly as possible, but we shouldn't sacrifice democratic substance for democratic form.

SENATOR SIMPSON: Tom, let me ask you a question, because we have sat through these hearings before with regard to the succession of Congress, and today we will talk about the succession of the presidency.

But I am always fascinated, and I would say respectfully to my former House colleagues, I only hope they understand the word "temporary". If they don't understand the word "temporary", we're never going to get anywhere with them. I think that's a tragic thing. We're not talking about the sanctity of the House, the sanctity of our Founding Fathers.

I am always dazzled by the phrase that "the character of the House would be altered" if this were to occur. Have you heard anyone ask them if the character of the House would be "altered" if death and incapacity shredded the ability to get a quorum? I think that would change the character of the House somewhat.

[Laughter.]

What about that? What do they say to that?

MR. MANN: Senator Simpson, we raise that with them all the time. We say what would the nature of the House be if there were ten surviving members who had the capacity to meet to form a quorum, to elect a Speaker, to send him on to the acting presidency. They said, "well, you know, certainly something else will emerge to take care of that. We just can't change the basic character of the House." There hasn't been a good answer, quite frankly.

In the hearings, we suggested they might be guilty of a little hubris here, getting so caught up in the special character of the House and the role of temporary appointments in it that they miss the big picture. Which is, we're dealing with an extraordinary situation that might occur. We pray it never does. We are talking about putting

in place a system for an extraordinary emergency, not for the normal routines of U.S. Government.

We use the language "emergency temporary appointments," in which those appointees would be replaced by those elected as quickly as possible, but it would allow the Congress to function at a time when the person serving as President might be an unknown Cabinet member and the country is looking for some genuine stability and continuity.

Senator Simpson, I would love for you to put that question to Congressman Sensenbrenner and Congressman Dreier, Congressman Snyder and a host of others, who put 100 percent of their focus on maintaining the special character of the House.

SENATOR SIMPSON: This is something I will do, because I worked with Jim and David when I was here. I remember Jim Sensenbrenner went through tough times when he was in the minority, and Peter Rodino was the chairman. I remember I took him to a conference committee. I said, "What are you sitting outside for?" He says, "I can't go in there." I said, "Well, come on it. Nobody is going to do anything." That was the kind of partisan then schisms and divisions that Lloyd and I did not see, and certainly he did not see in his long experience in Washington.

But David Dreier and Jim are very bright people. I believe Congressman Snyder testified before us--

MR. MANN: Yes.

SENATOR SIMPSON: And I can understand the intensity. I though hubris was reserved only for the Senate, by the House anyway referring to us.

But there is a stubbornness there that I don't understand, unless it's just the thought that this can never happen. If that's the thought, that this can never happen, I think that should have been abused on September 11th. Because everything we know, and the reason for our activities, is that we fully believe, through intelligence and sources, that they were headed for the U.S. Capitol. We were in session, the House had members, the Senate had people in the building. We know that. We don't know who was here but we know the numbers.

It puzzles me greatly to be talking about our Founding Fathers and our role and historical perspective when we're not talking about anything like that. We're talking about horror and tragedy and savages--you know, use any name you want. We're not talking about political correctness. Political correctness is like wearing duct tape over your mouth. You've got to go for the chunk here and see what's going to happen.

These people, whoever they are, do not concur with our way of government, and would love to disrupt it. There is a wonderful way to disrupt the government, and that is not have temporary appointments, to fill them immediately.

I see that our colleague has come from the West. We do not consider California the West. The West is

Wyoming. But you have come, Norm, from the West, and it's tragic out there, isn't it? Some very tragic things are happening.

Norm, you might interject if you wish, but we're glad to have you here. Tom has been bringing us up to speed on where the Senate and House are legislatively. So I will leave it to you two to--

MR. MANN: By the way, Senator, I think you have really put your finger on it, that behind the view about the "people's house" and the special character and how it would be radically changed is a disbelief that this could ever happen. Because if you believed it could, then the only responsible action, like preparing a will and signing it, is to take decisive action here.

I do want to say--and Norm can elaborate on this. Norm, I have filled in on what Senator Cornyn has been doing in the Senate, and the encouraging developments there, but how the House has been less encouraging. I have talked about the expedited special elections and the problems with it.

But the encouraging part in the House--and to this I turn to Norm to elaborate--has been the work of Brian Baird, Congressman Larson, who is working on his own constitutional amendment, and Chairman Ney of the House Administration Committee, who have all shown clear signals that they understand the magnitude of the problem and the fact that we're not going to solve it by simply speeding up special elections.

MR. ORNSTEIN: Thanks, Tom, and thanks to both of our cochairs.

It is a mess out in Los Angeles with the fires. Apparently, there was a fire right across the street from a control tower that regulates all the traffic into all of the Los Angeles airports, so they were limiting them to two or three an hour where normally there would be a hundred. That messed up the entire day and night and I was fortunate to get back, even if many hours late.

MR. CUTLER: C-Span is filming us in living color. It will show clearly Mr. Ornstein's eyes are very red.

[Laughter.]

MR. ORNSTEIN: Those flights are never pleasant, especially when they're late.

If we were two years ago where we are today, or a year-and-a-half ago, I would be very happy. A constitutional amendment or consideration of anything of this sort is not and should not come quickly and easily without a great deal of deliberation and thought and give and take. You can see from our own efforts with the Commission over these many months that we have evolved a little bit in terms of our own thinking--in fact, quite a lot in terms of our own thinking, the members have--about what the specific form of the amendment ought to be, or what might go into the implementing legislation, the forms we

ought to take. We want to tread very carefully. This is not something that you pass through emotionally and then realize afterwards that you've made a mistake, which then requires reamending the Constitution.

But the shame is that it took us almost two years to reach a point where we could actually get serious engagement by the leadership of the House of Representatives on the issue. That serious engagement--which I think would have been appropriate two years ago, and then we could have taken all these many months in an official and unofficial capacity, going over some of these delicate and difficult issues--that serious engagement is still in the form of substantial measures of, as Tom has suggested, denial.

We really can see this with the alternative that has been proposed by two major figures in the House of Representatives, the Judicial Committee chairman, Jim Sensenbrenner, and the Rules Committee chairman, David Dreier, an appropriate focus on making sure that in the event of a tragedy we can have elections expedited as quickly as possible, but in a form that was and is utterly unworkable, but also in a way that seemed clearly to ignore many of the problems that we have discussed at length of the real potential disasters that we face and, in particular, of course, that of incapacitation, which I believe and many of us believe may be the more serious threat to our institutions in the age of terrorism than everybody dying.

If we don't deal with that--and the Constitution clearly hasn't dealt with that; we clearly dodged many bullets, almost literally, with presidential succession when it came to incapacitation for many years before the country grappled with it--we would be shirking our responsibility.

No special election plan, no matter how quickly you implement those elections, no matter how much you ignore the niceties of real elections, deals with the issue of incapacitation. It is fortunate, as Tom suggested, that we have some members in the House, including prominent figures like Bob Ney and John Larson, who is now working very, very hard, and of course, Brian Baird, who has championed this for a long time, along with others like Chris Cox, who have been engaged, and Martin Frost and Jim Langevin, there are many members of the House who are taking these issues and their responsibilities seriously but not yet the leadership. Fortunately, we have in the Senate a much greater willingness at this point at those top levels to grapple with these issues.

MR. CUTLER: Could you briefly spell out the problem of incapacitation as distinguished from death?

MR. ORNSTEIN: Sure. Let's talk just about a couple of the scenarios that might occur here and what the problem really would be, and in the real life sense.

We talk so much about the fourth plane, and as we now know, at least we have other sources, international sources, reporting that it was headed for the Capitol dome. We have talked about what would happen if we lost a majority of the members of the House of Representatives or a majority of the members of the Senate under those circumstances, but

in the House in particular, where you would not have as quorum, where you might have to resort to what the parliamentarians have suggested could fit the definition of a quorum, a majority of those living, who are also elected and sworn. But that might leave you with just a handful of members, or you might take months to fill those seats.

But consider this. Consider that just days after the tragedy that struck us on September 11th, with the strong possibility that that fourth plane might have hit the Capitol dome, we had a serious anthrax scare, deadly serious and deadly, right here in this building, in the Hart Building right next door, in the Capitol itself, on the Senate side.

We still don't know who perpetrated that evil, but what we do know is it was highly effective weaponized anthrax that in somewhat larger quantities, instead of just being passed around in envelopes, had it gotten into the ventilation system here, everybody in the chamber breathing it, we could have ended up, a tangible possibility, with 50 or 60 or 70 Senators in intensive care units with inhalation anthrax or symptoms thereof, possibly for months.

Now, if that plane had hit the Capitol dome and the dome, made of cast iron, had left litter from the plane, the explosion itself, molten cast iron flying out for hundreds of yards, we might have had a couple hundred members of the House killed, and we might have had another 200 in burn units for months.

There is nothing in the Constitution, nothing allowable in the law for either house of Congress, if somebody is unable to perform the functions of the office for extended periods of time, save a vote by the chamber to expel such individual from the body, that can bring that person back to be a part of a quorum to vote.

Now, for one person, or two or three or four, it's not a huge catastrophe, and as you both know, we have had instances in both chambers of individuals who have been incapacitated for lengthy periods of time, months or even years. You operate with 99 Senators, or you operate with 433 members of the House, or 434. But if you had 60 Senators in intensive care units for six weeks, eight weeks, even the capacity and the Constitution and the Seventeenth Amendment that allows appointments to the Senate in the event of vacancies doesn't talk hold because there are no vacancies.

Now, what if you have a bunch of people who are going to be out for six weeks, eight weeks, or even three months because of the heinous acts of terrorists? Are we seriously going to expel those people from their offices so that they can be replaced by other appointments, to basically shunt them off of public life? Of course not. We can't and we shouldn't.

What we have got to do, though--because these kinds of circumstances, or a small pox attack that leaves people quarantined for a period of time, sarin gas, any of the number of things now that we know are out there--you have got to have some provision. Because here you're talking about indefinite periods of time. The House of

Representatives we know, with deaths, we can get elections done within two or three or four months, however long it may take; somebody may be out of the capability of serving in the office for many, many months.

It seems to us that we have got to have a provision for emergency interim appointments in the event of widespread incapacitation and, of course, being extremely sensitive to the reality that the determination of such incapacitation and the return to office has to be handled in a delicate fashion, removed from politics, and has to be as much as is humanly possible in the hands of the incapacitated individuals.

If somebody is in the hospital for a period of time and then is ready to come back, the instant that person is ready to come back, they should be able to resume the post and bump whoever has replaced them in the interim. But, without that, we could be without a Congress for an indefinite period of time until you actually reach the next general election. Indeed, with the Senate, given the six-year terms, it could be for even longer than that without a sizeable number of figures.

If you don't deal with that problem, it seems to me, it seems to us, you are shirking your responsibilities in a fundamental way here with what we know is the kind of threat that faces us.

SENATOR SIMPSON: With the present atmosphere perhaps of civility in the country, not just in Congress--I'm always appalled. They say what about civility in Congress. I say, what about civility in the Little League or city council chamber--don't give me that--or the commissioner's room.

But it is that question of the degree of incapacity, and it's the fear that somebody would say this person is incapacitated and politically salt them away, seeking advantage. I mean, that's out there in this arena.

Is that a disturbing part of it, that it is not--and Lloyd is so correct, that we have grappled with that incapacity situation because no one has even thought of it before. But in the doing of that, is there a great deal of discussion about not just the person who is incapacitated saying "I'm ready to come back", but somebody would say "I would like to have a doctor's opinion on that. I don't think he or she is ready to come back." I mean, you're going to have stuff like that. Is that what clouds it?

MR. MANN: I think that's part of it. That is part of it. But one of the conditions that makes this more palatable is we're not talking about ordinary circumstances. We're not talking about one Senator or one House member being incapacitated. We're talking about an attack on our first branch of government. Under those circumstances, it seems to me there would be less possibility of this kind of political manipulation, a greater effort to find some nonpolitical objective way of determining that incapacitation exists. Like the member is simply unable to show up in the body to cast votes, and then to defer to his

or her judgment as to when they would be ready to return to office.

So my feeling is that we actually made a little progress with this in the House hearings, because one of the people testifying against a constitutional amendment was Don Wolfensberger, a long-time staff member of the House Rules Committee. But when hearing the complicated problem of incapacitation, he said that he would amend his view and acknowledge that a constitutional amendment would be necessary to deal with the problem of incapacitation. So, Senator, I think there are some encouraging signs there as well.

MR. ORNSTEIN: One of the things we have to be careful about here is that you don't want to get into a situation where, say, to use a State analogy, all the members of one party leave the State and go to, say, Ardmore, Oklahoma, just to pick a place at random, and have the leadership of the other party declare them incapacitated and fill their seats. Obviously, you don't want this to become a political football in any fashion.

That is why we have had to give a great deal of attention to, and we still need to pay more time and attention to, what triggers these kinds of events. It can't be triggered by a single individual leader. We cannot leave any possibility for the temptation of political manipulation in this process.

When it comes to returning to the post, I think a lot of Americans have actually gotten a bit of education on this. Our own John Fortier wrote an interesting piece in Roll Call about the "West Wing" television show, which took up the question of presidential incapacitation over the end of last season and the beginning of this season.

We don't need to have the same kinds of conditions for Members of Congress, where you need a Cabinet vote in some cases and a very complicated procedure in place. I think all we really need here is that, once an individual member--because it's going to be spread across large numbers of them--is ready enough to sign an affidavit saying "I'm going to return to my post", then that person can return. Because you also don't want to leave this in a position where somebody feels ready to return and is blocked by formalities from doing so.

MR. CUTLER: As I think we will develop later during the day, in the Twenty-Fifth Amendment we already have this problem related to the difference of opinion between the Vice President and the Cabinet on the one hand and the President on the other, as to whether he is or is not incapacitated, or as to whether his incapacitation has terminated and he wants to come back.

MR. ORNSTEIN: We haven't solved that problem entirely, and we need to tinker with that as well.

SENATOR SIMPSON: Well, thank you very much. I do appreciate all the work you have done and all the work your group has done.

I want to add a personal note. Lloyd and I were visiting this morning and one of our wonderful members, Congressman Bob Michel, his wife died this week and we extend to him our deepest sympathies on that loss. She was a wonderful woman, Corinne, and I knew her, you knew her, all of you knew her, and I wanted to extend that. I should have done that at the initiation of the hearing.

MR. ORNSTEIN: Mr. Chairman, if I could just add a note on that. She has been ill, of course, or had been ill for many months, a stroke that I believe followed a hip replacement surgery many months ago. Bob Michel was at her side almost constantly during that time, but still managed to keep up with our Commission and to work along with it. He saw this as an important issue and he has been a champion for us.

SENATOR SIMPSON: That's why he was a combat veteran, heavily decorated, and a congressional member heavily decorated.

So, thank you very much. We will go on now to Panel 2, John Fortier, with a review of the statutory and constitutional provisions affecting presidential succession. We appreciate your fine work. You are a splendid staff person and have given us great guidance.

MR. FORTIER: Thank you for having us here today. We are moving from our initial year of consideration of the continuity of Congress to looking at the Executive branch.

Certainly, while we don't know for certain where that fourth plane was headed, it seems that it was headed for the Capitol, and the other likely alternative was the White House. That is clearly not the only way that terrorists could target the Executive branch.

We have in place, more so than in Congress, a system of presidential succession, but it cuts across various provisions in the Constitution as well as the various statutory provisions. So let me, as a precursor to the rest of the day, lay out more or less what we have in place in law and in the Constitution, give you a little bit of the history of how these came about, and then we will follow that up with a panel later this morning on some of the real problems or quirks in the presidential succession system and spend much of the afternoon hearing some proposals as to how we will fix them, both from some outside experts, as well as from a member of the Senate and several members of the House.

The presidential succession system is primarily governed by Article II of the Constitution, Article II, Section 1, Clause 6. It is in that section that the Founding Fathers gave to the future legislature the power to lay out the details of the Presidential Succession Act in law.

Just a few notes about that clause. It's relatively short, but it's very explicit. There are a

number of ways in which the presidency can be vacant, and all of these different ways that the presidency can be vacant can be impacted by terrorist attacks, or might even be caused by terrorist attacks, or might be exploited by them.

First, the case of the removal of the President. Clearly, if a President is impeached and then removed by the Senate, the office is vacant. The death, the resignation, or the inability to discharge the powers and duties of the said office, the question of incapacitation, which is later dealt with in more detail by the Twenty-Fifth Amendment, but is still mentioned here in the original Constitution as a possibility for the office being vacant and the need to fill it with someone else.

I will note, just looking ahead, there is one other way in which the office might be vacant, and that is dealt with to some extent by the Twentieth Amendment. That is, what if we have no President on January 20th? What if there's a failure to qualify the President? Most likely, that was envisioned as there's an election controversy, like the 1876 election controversy, which isn't resolved by Inauguration Day. Then who is President, the old President, has to leave and the office is vacant. But also it might be caused by an attack that were to kill the President and Vice President before Inauguration Day, the President and Vice President elect, or a much more unlikely scenario, of the President or Vice President not having reached 35 years of age or lived in the country long enough where they wouldn't technically have qualified. But all of those situations would leave the presidency vacant and we need to fill the vacancy somehow.

Then the Constitution goes on to make the point which every American knows, that the Vice President will fill in in those situations. But after that, if the Vice Presidency is also vacant, for any one of those reasons mentioned beforehand, that "Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring--"and I emphasize this term "--what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

Just to unpack that statement a little bit, the word "officer" is significant because it does place some limitation on who Congress may specify is in the line of succession. When Congress chooses to write a Presidential Succession Act, who are the potential candidates that they can put in the legislation?

Now, you will hear later in the day more detailed arguments about what that word "officer" means. It is my own view that that would more clearly be "officer of the United States". In fact, an earlier draft during the Constitutional Convention had that exact phrase--"officer of the United States", which if that is the case, that does not include Members of Congress, which we have included in the line of succession at various times, in the first Act, and then for many years we didn't have Congress in, and now

again we have congressional leaders in the line of succession.

If that "officer" means "officer of the United States", then the Framers were thinking more along the lines of a member of the Executive branch that Congress could specify to be in the line of succession.

I will go on to note that at the very end of the Clause, which I read earlier, "...until the disability be removed...", the Framers had in mind that someone filling in for the President, either the Vice President, or if the Vice President is not available, would only fill in for the inability until the President recovered. The original Constitution doesn't lay out in any detail a procedure for determining when the President is disabled, when he comes back, but it does contemplate the President returning to office, not a person taking over permanently.

There was over the years some dispute about this. Some thought the next person to take over for the President, even in an incapacity situation, would necessarily serve out the term. My view is that that is fairly clear and is certainly accepted now with the Twenty-Fifth Amendment, that whoever takes over for disability would only do so until the President recovered.

Finally, "...or a President shall be elected." This last part of Clause 6 here is significant for two reasons: one, there was a debate about what the language of this would be. There was some consideration that the person who is serving as President, who would become acting President until the end of the term, until the next regularly scheduled presidential election.

But James Madison was very much an advocate of the possibility of having a special election, an election that filled the remainder of the presidential term. So this language is left vague. It allows Congress to specify a special election, or not.

When we get to the first Succession Act, we will see that Congress actually did go ahead and specify such an election. But it gives Congress the option. That is an option that we would have today, to recommend or not recommend.

Do we want to consider the possibility that, let's say, early on in a presidency, the President and Vice President are killed, or a large number of people in the line of succession are killed, and we end up with a somewhat obscure President, not known to the people. Would we want to then--and that person, if it's in the beginning of the term, would serve nearly four years--would we want to then specify that there would be an election six or twelve months down the road to fill out the remainder of the term? It's an option that's open to us.

The first Congress did not pass a Succession Act. There was argument about it, debate, but they couldn't come to agreement. But the second Congress did. The details of it are also in your briefing booklet.

The highlights of it are that Congress, even having debated this just two or three years before the adoption of this law, debating the constitutional provision,

chose to put congressional leaders in the line of succession. It was contentious at the time. James Madison argued very strongly that this was not constitutional, that congressional members were not "officers of the United States" and they were not allowed. But there were some political considerations. Many of the Federalists did not want Thomas Jefferson, who served as Secretary of State, to be next in the line of succession. That argument went out, that the original Act of 1792 has two people in the line of succession after the President and Vice President--first, the President pro tem of the Senate being the third, and the Speaker of the House being the fourth. No one after that. No members of the Cabinet in the line of succession at all.

It also did provide for a special election. In fact, it required a special election in the case that both the President and Vice presidencies became vacant. Just the Vice President acting as President, that would continue for the rest of the term. But if the two were vacant and the President pro tem or the Speaker to step in, that would only be until you could hold a special election to fill out the remainder of the term.

I am not going to go through all of the various deaths and vacancies that occurred in the presidency and vice presidency in the next 90 or so years, but there were actually significant numbers of them. Presidents we will probably be more familiar with, but many, many Vice Presidents actually did not serve out their terms. Both of James Madison's Vice Presidents died in office.

At the time, because we did not have the Twenty-Fifth Amendment, there was no way to fill the vice presidency. Once the vice presidency became vacant, it remained so until the end of the term. So if either a President died and the Vice President moved up, or a Vice President died, you would have a vacancy.

The first presidential vacancy was John Tyler taking over for William Henry Harrison. It is of some historical interest, probably too arcane for constitutional arguments over it, but there was a question as to whether Tyler was President or Acting President. He certainly assumed and took on the mantle of being President. The implications for his powers weren't so great, but there was some presidential aspects which, as I say, I won't get into. But he considered himself President, and that precedent more or less continued, that the Vice President became the President.

Certainly the period beginning with the Civil War and the 20 years after was a period of great instability for continuity of the Executive. Of course, you had the assassination of Lincoln, but then you had the presidency of Andrew Johnson. Andrew Johnson is President and there is no Vice President. Andrew Johnson is impeached and nearly removed, one vote short of being removed by members of the other party, the other faction. Radical Republican sentiment wanted to remove him. One vote short, with the President pro tem of the Senate, who voted for the conviction of Andrew Johnson, actually assuming the presidency had Andrew Johnson been removed.

Then in 1876 you have the Hayes-Tilden election, which goes to within two or three days of Inauguration Day, which back then was in March. That not being resolved until nearly the day, had it not been resolved, there would be no President at the time of the inauguration. Presumably the Succession Act would have kicked in, but it was not specified until later in the Twentieth Amendment that the law could provide for this scenario. So it's not clear what would have happened. Probably you would have had the pro tem of the Senate take over, but that was not laid out in any great detail.

If you move on to the Garfield presidency, Garfield was elected, was shot, and lay incapacitated, in and out of coherence for a long period of time--I think it was close to 80 days or so--which raised great questions of incapacitation which were never fully dealt with. The Vice President didn't step forward at that time and say "I'm going to take over the presidency for incapacitation reasons." It lingered for a while.

Then, when Garfield died, Chester Arthur took over.

Arthur having taken over, we had a situation where there was no one in the line of succession. There was no Vice President any more because Arthur was acting as President. You had no President pro tem of the Senate because at the time Congress didn't typically come in, a new Congress, until December. This happened early in the term. The only time that the Senate had sat, Chester Arthur, the Vice President, had been sitting as President of the Senate, they didn't elect a pro tem. There was no Speaker of the House. There was no one in the line of succession. Had something happened to Arthur, we would have had no one in the line of succession.

That still didn't quite cause Congress to act to change the law until the same situation more or less repeated itself in the Grover Cleveland presidency. Grover Cleveland's Vice President died, and again, there was no one in the line of succession. No pro tem, no Speaker of the House. Just Grover Cleveland without a Vice President.

Finally, Congress decided in 1886 to revise the Act. Here you had a rehearsal of many of the arguments in the in the second Congress, where there was a discussion of whether it was constitutional or not to have members of Congress in the line of succession.

Also, a practical question. Did we want possibly the presidency to switch parties because of a death or incapacitation? You had Cleveland with the possibility of a Republican taking over who was the pro tem of the Senate. Did you want that to sort of switch without having had an election?

Congress came to the decision that it would take members of Congress out of the line of succession, take itself out of the line of succession, and have just a Cabinet line of succession. That law was in effect from 1886 to 1947, just the Cabinet, in order of the creation of their departments, the Secretary of State, down the--at that

time I think there were seven Cabinet departments in the line, and Congress was not in the line.

Skipping ahead to 1945, Harry Truman becomes President. Harry Truman, of course, spent most of his public career in the Congress and was not elected directly to the presidency. Early on, he made a speech and a plea to Congress to change the Presidential Succession Act. He felt very strongly that he, the President, should not be one to appoint his own successor. If Truman had appointed--and he did, actually, a new Secretary of State--he would be appointing with the Senate's confirmation his own successor, and the belief that there should be a democratically elected person in the line of succession. Therefore, reversing the order of the congressional leaders, putting the Speaker of the House first, then the President pro tem of the Senate, followed by the Cabinet, again in order of the creation of their departments.

Most of what Truman proposed in his speech, and later messages to Congress, was adopted by Congress. One feature that Truman did propose which was not was the special election provision. I didn't discuss the special election provision in the Act of 1886. It was a little more vague in the 1886 Act. It didn't require a special election; it called for Congress to come back in session quickly after a vacancy in the presidency to potentially call for a special election, but it didn't require it in the Act itself.

Truman thought there should be a special election if the vacancy occurred early on, again consistent with his view that the successor to the presidency have the stamp of approval of a people. So the Act in 1947 did not ultimately include a special election provision.

I mentioned the order of succession, but there are a couple of other features of the '47 Act which are still in effect today. Really, the only time it has been amended is to add new Cabinet members at the end of the line of succession, not to substantively change the Act. That is, Congress is not only high up in the line of succession, the President, Vice President, Speaker, pro tem, and then the Cabinet, but it also is favored in another way. In the case where an attack would knock out the top four people in the line of succession--the President, Vice President, Speaker and pro tem are killed and a Cabinet member became President--let's say that Colin Powell were to become President--the Act also allows for a new Speaker to be elected, or a new President pro tem, and to bump out the member of the Cabinet.

So you could have a situation where President Bush, let's say an attack occurs, and a President Powell for a number of months, and then you have a new Congress or the existing Congress electing a new Speaker or pro tem--it's sort of a race as to who can get there first--and say that Speaker or pro tem would then claim the presidency and become a third President, you might have three Presidents in the course of a short period of time.

It is also not specified what the procedures are when the Speaker or pro tem have to bump out the Cabinet

member. It has been contemplated that, again, let's say a Powell presidency would go forth, and the Speaker and pro tem would be newly elected, and would say in this case to Secretary Powell, "You may act as President, but if it turns out we don't like what you're doing, we will then claim the presidency for ourselves", thereby more or less eviscerating the separation of power.

So the intention of that--and I'm drifting a little bit into the problems of the Act, which we will talk about later--but the intention of that was to again give priority to Congress and to elected officials, but there are some other consequences to having this so-called "bumping" procedure, where the Congress can come back in the line of succession at any time.

It gets very complicated when we think about our other problem, the continuity of Congress, where the Congress itself may be either unable to meet or a very small number of people in Congress might go forward and elect a Speaker. You could conceivably have a Speaker elected by five members bumping out the Secretary of State and becoming the President of the United States.

There was actually significant talk about succession and issues of incapacity of the President in the 50's with Eisenhower, with several health scares, heart attack, a very serious one, and, of course, the assassination of President Kennedy.

But in the wake of that, in the early '60's and through 1967, there was debate in several Congresses, and then ultimately the passing and ratification of the Twenty-Fifth Amendment. The Twenty-Fifth Amendment that we alluded to earlier deals primarily with incapacitation. But just to lay out a couple of other features, in a way, one of the most significant is that it allows for a new Vice President to be appointed. For many years, as I mentioned, we have had cases where the vice presidency lay vacant for almost four years because either the President or Vice President had died early in the term. This provides, if there is a case where just a single death occurs and not the simultaneous death of the President and Vice President, it allows the President to appoint a new Vice President and for, in this case, both the Senate and the House to confirm that person. Of course, we have had that happen twice with both Gerald Ford and then with Nelson Rockefeller.

A couple of features of the Amendment that go beyond that are the questions of how you deal with a President who is incapacitated. There is some clarity in that Act as to how a President signs over the presidency in the case of a temporary incapacitation which he foresees, possibly going under anesthetic for an operation, and then with the notification of Congress, he can claim back the power.

There is also a contentious--well, there is an unforeseen incapacity problem, where the President has something happen to him, an illness or some unforeseen incapacitation, where the Vice President, with a majority of the Cabinet, can declare that the President is incapacitated

and the Vice President will then serve as acting President until the President recovers.

Finally, there is the contentious situation, where perhaps a President is incapacitated and does not think that he or she is incapacitated, a case of mental illness or some other case which would be a little less clear. You would again have the Vice President and the Cabinet, by majority vote of the Cabinet, plus the Vice President, declaring the President to be incapacitated. The President then stands up and says, "No, you're wrong. I am okay. I'm the President."

Then there's a 21 day period where the Vice President actually remains President and Congress would decide by a two-thirds vote. If Congress says by two-thirds vote that the President is really incapacitated, then you go ahead and leave the Vice President in that place as acting President and Congress, by a very high hurdle, resolves it. So those are the main features of the Twenty-Fifth Amendment.

Let me note a couple of things. When the Twenty-Fifth Amendment was first proposed in 1963 before this committee, there was also a provision to take Congress out of the line of succession. There is a way in which the appointing of a new Vice President cuts against Harry Truman's argument, that you shouldn't appoint your own successor, that a new Vice President would be appointed by the current Vice President, that Gerald Ford would appoint Nelson Rockefeller, for example, or Nixon would appoint Ford.

It also took Congress out of the line of succession altogether. It went back on the argument that in 1947 had made. It favored a Cabinet succession provision.

The one area where the Twenty-Fifth Amendment doesn't really cover is in the case where there is no Vice President. This was the case in the "West Wing" scenario that was referred to earlier, where the Vice President has resigned and the President had, in this case, an incapacitation that had to do with him being unable to act due to a conflict of interest that his daughter had been kidnapped and he didn't feel he could act in the interest of the country, so he stepped aside.

In that case, you have a very confusing situation. The Twenty-Fifth Amendment doesn't really cover it. You go back to the 1947 Act, which is vague about how the President leaves office and comes back. So the Twenty-Fifth Amendment covers many things, but that original Twenty-Fifth Amendment that came before the committee was clear, that the Cabinet took over and that, if the Vice President was missing, then it was the Secretary of State with the majority of the remainder of the Cabinet who could declare the President incapacitated. You have the mechanism in work all the time. We don't quite have that yet.

MR. CUTLER: Could I add just one footnote to your history?

MR. FORTIER: Yes.

MR. CUTLER: Which is that several years ago an effort was made by the medical profession, both practicing doctors and the academics, to get in on the subject of whether the President was or was not incapacitated. It fell apart on a dispute among the various branches of the medical profession as to which branches would be consulted and have the right to advise. As a result, nothing happened.

MR. FORTIER: That is correct. There is actually a provision of the Twenty-Fifth Amendment which I didn't mention, and I'm glad you brought it up.

While I mentioned that the Vice President, with a majority of the Cabinet, can declare the President incapacitated, there is another mechanism which has not been exercised by Congress but is open to Congress if they would like it. It says the Vice President and the majority of the Cabinet, or such other body that Congress may decide. So if Congress wanted to appoint a medical commission, as Mr. Cutler is referring to, the Vice President and the majority of that commission could declare a President incapacitated instead of the current situation we have with the Vice President and the Cabinet.

Finally, why don't we move just to the present day. As I mentioned, the only changes in the '47 Act since 1947 have been when we have created new departments--the Secretary of Education and the Secretary of Veterans Affairs--to put them in the line of succession. We have done so really by rote. We have just stuck them at the end of the line of succession, not thinking about the relative importance of the departments.

There are some pieces of legislation currently before the Congress. One of them comes out of this body, out of the Senate. A member of the Judiciary Committee, Senator DeWine, and Senator Dodd of the Rules Committee, introduced this bill which was to put the Homeland Security Director in the line of succession. We now have a Cabinet Department of Homeland Security and we forgot to put him in the line of succession when we created the department. So, instead of simply putting that Secretary at the end of the line of succession, they have thought about it and said well, the relative importance of this Secretary is fairly high, so they have put him behind the Big Four Cabinet members, behind the Secretaries of State, Treasury, Defense, and the Attorney General. Then it's Homeland Security, and then Interior and all the others down to Veterans Affairs.

That bill has gone through the Rules Committee, which actually has jurisdiction in the Senate for presidential succession matters, and the statute, and it has passed the full Senate. The House has not acted, although I will say that there are a number of bills in the House which do additional things which include that provision, so it seems like it's a relatively consensus position.

There are a couple of bills in the House as well. You will hear from the sponsors of them later this afternoon. One is Representative Brad Sherman, who believes that the leadership of the same party of the President should be in the line of succession.

Take, for example, the case where Bill Clinton is President, Al Gore is Vice President, and Newt Gingrich is Speaker of the House. An attack that were to kill the President and Vice President would leave Speaker Gingrich, of the opposite party, as President. You can find examples on the other side, with Speaker O'Neill taking over for President Reagan and others.

His bill would say that, if there's a Democratic President, Bill Clinton, then the Democratic leader, Dick Gephardt, would have been in the line of succession instead of Newt Gingrich.

And it makes a change in the Senate. Instead of the President pro tem, it would be the majority or minority leader, again according to which party the President is of.

The other bill is a bill introduced by Chris Cox and Martin Frost, cosponsored by Representative Baird, who I think will speak about it this afternoon. It fixes several of the provisions that we spoke about today. One is the bumping procedure. It doesn't allow Congress to kind of come back in and bump out a Secretary sitting in line.

It also fixes something I didn't mention, which is where there is an acting Secretary of a department who may be in the line of succession. The Act itself only requires that the Secretary of the department be confirmed by the Senate. That confirmation might be for a person who is second or third in the department--let's say the number two person as the Secretary of State in the State Department, and the Secretary of State steps aside and that number two person becomes President. So this Act would also clear up the provision of an acting President. Then also both of those bills include the provision to put the Homeland Security Director in the line of succession.

Certainly, I think they are positive changes, all of them. There is certainly much more to discuss in terms of the problems and solutions in the line of succession, but there are current efforts going forward.

Let me also again acknowledge Senator Cornyn's leadership on this, holding a hearing with Senator Lott, a joint hearing of the Rules and Judiciary Committees in September of this year to explore these very issues.

SENATOR SIMPSON: Thank you very, very much. Your recitation ought to be a tape for government classes, what we used to call civics classes in my day. It was fascinating.

What intrigued me in reading the background material was that the Postmaster General was once in line. They kicked him or her out--

MR. FORTIER: Just recently. Well, probably 30 years ago. It's not too long ago that he was fifth in the line of succession.

SENATOR SIMPSON: And then the fact that Congresspersons were in, and then they were out, and now they're in and some say they should be out again and it should be Cabinet members only, which is interesting.

My only question is, in your remarkable studies, why didn't they say the Majority Leader instead of the President pro tem? They pick the Speaker. The President pro tem is ceremonial in many ways, always going to the senior member, usually, of the party. What was the quick legislative history of that, why they skipped over the Majority Leader?

MR. FORTIER: The original 1792 Act actually began with the President pro tem, the President pro tem and then the Speaker. The President pro tem is mentioned in the Constitution. Really, the Office of Majority Leader-- actually, it's not even technically an office; it's a party leader--doesn't evolve until much later in our history. So you have "slim pickins" to choose from, at least in the beginning of the Congress, as to who is the most important person in the Senate.

The criterion that we use now is in no law. It's a custom, that it's the longest serving member of the majority party. That, too, did not develop until later.

It was the case, though, that early on, the President pro tem was not a long serving--People didn't serve very long in that office. Sometimes there was no pro tem of the Senate. If the Vice President sat as President of the Senate, there was no need to pick a pro tem. So you did have problems in that early Act of not sometimes having a pro tem.

That being established as the precedent early on, even when they were later taken out in the 1880's, when you came back to 1947 they simply switched the order and put the Speaker and then the pro tem. It certainly could have been the case that they put the Majority Leader in. There is some question as to how you do that because it's a party leader who is recognized by the chair, not a formal office recognized by the Constitution. There probably are ways to get at it, but they went with the pro tem, although they demoted him and put the Speaker above him.

SENATOR SIMPSON: Any further questions?

MR. CUTLER: No.

SENATOR SIMPSON: Thank you very much. That was very helpful and very well done.

Now we have a final panel before our luncheon recess: Akhil Amar, Howard Wasserman, and again John Fortier, on problems with our presidential succession system. We are very pleased to have such fine experts on that issue.

However you wish to proceed.

MR. FORTIER: We will start with Akhil Amar, and then Howard Wasserman, and I will fill in at the end.

SENATOR SIMPSON: Very good.

MR. AMAR: Thank you very much, Mr. Chair.

With your indulgence, I might just try to summarize some testimony that I gave before Senators Lott and Cornyn on this issue, just by way of background.

The topic of presidential succession has been one that I have been writing about really for almost a decade now. I feel a little like Cassandra, who warned about impending disasters. Of course, no one ever listens to her, even though sometimes, in her case, all the warnings were true.

Indeed, almost a decade ago, in February of 1994, I gave some testimony before the Senate Judiciary Subcommittee on the Constitution, Senator Simon, on a related topic. I expressed the view then and in subsequent law review articles, and again last month, that the current succession statute that you've heard John summarize is a disastrous one, a constitutional accident waiting to happen, that needs to be repealed and replaced. So let me summarize quickly the problems with it and then my proposed alternative.

First, I believe it violates the Succession Clause of Article II, Section 1, paragraph 6, because I believe, as did James Madison before me, that "officer" means "officer of the United States", which excludes members of the legislature.

This is obviously a question that is most clear in the Incompatibility Clause of the Constitution, which says that sitting members of the House and the Senate are not allowed to be in the Cabinet, or the Judiciary, for that matter, or to hold the positions of President and Vice President.

The Framers, when they said in Article II, Section 1, the Succession Clause, when they were talking about "officers", they were envisioning Cabinet officers to be named as acting President. That's what James Madison said in 1792, which, of course, raises the question, then why did Congress not quite follow his advice. He actually did help write the clause.

I think John alluded to the answer, which is at that time there was this Pandora's Box that you would open up on which Cabinet officer should you pick. Should you pick Secretary of State Jefferson, who was favored by one party and who thinks he's the senior person, or do you pick Secretary of the Treasury Hamilton, who really sees himself as prime minister and, indeed, has a special relationship to Congress. From the first statute on, he actually reports to the Congress himself in a way that the Secretary of State doesn't.

So the problem with Cabinet succession was that it was just a political hornet's nest at the time, and so James Madison was not listened to, alas. So the first problem is it's unconstitutional, the current statute.

The second problem is the bumping provision about which you've heard, which under the current statute, Section 19(d)(2), provides for this bumping, and that violates the Constitution's Succession Clause which says, as John explained, the officer named by Congress shall act as President until the disability be removed, or a President

shall be elected. But the current statute, in effect, says that this officer will be in place until someone else wants the job, which is not quite--you know, Colin Powell is there until he gets bumped by the Speaker of the House. That is not what the clause of the Constitution permits.

It also weakens the presidency itself at a time of possibly great international and domestic instability and uncertainty. So it creates very bad political incentives, as you can even begin to imagine when you think about having someone there that at any time he missteps can be ousted by someone else, perhaps of the other party.

Now, even if I'm wrong about those constitutional claims, if there are two independent constitutional violations--Congresspersons in the line of succession and the bumping provision--even if you didn't buy those arguments, at the very least they are very strong. Lots of people believe them and they therefore, in my view, in the event of double disaster, they will undercut the legitimacy of the person who needs to assume the mantle of national and world leadership in a time of unprecedented crisis.

It might have been different, in other words, if the statutes that we've had on the books for many years had actually come into effect and we would have the tradition of legislators coming in and acting as President, and it was part of our experience. But it's not. The statutes have never gone into effect, and when they do the first time, and people, as they will, make hay of the issue, political hay or constitutional hay, and point out the legitimacy defects here because they really aren't "officers", that is not going to give the country the kind of stability, the unquestioned legitimacy that you really ideally want to have in this disastrous scenario. It creates a constitutional cloud, really, over the successor.

Now, in addition to the constitutional problems, here are the policy problems. So forget everything I have just said for a moment.

Here is one obvious one. The system doesn't work well at all when it comes to disability, incapacity scenarios. Here's why. Because Section 19 of the current statute, the 1947 statute, requires that the acting President resign his post in order to assume his new duties.

Now, that makes it a very awkward instrument in the situation of temporary disability. So on the "West Wing" episode, if you watched that, John Goodman had to step down from the Speakership, had to step down from, indeed, the House of Representatives entirely, in order to take over as acting President, and then when the disability ended, he is out of a job. He's out of office.

That is quite awkward. It's exactly the opposite of what we have decided makes the most sense, we the people, in the Twenty-Fifth Amendment adopted after the 1947 statute, which facilitates smooth handoffs back and forth between President and Vice President, or smooth handoffs within Executive departments where the head is unavailable, the acting person steps in, and when the head comes back, the acting person steps down--smooth transitions back and forth--because no resignations are required under the

Twenty-Fifth Amendment disability scenario or within most Executive departments when you have the second pinch-hitting for the first and then stepping back.

These are situations, for example, of scheduled surgery and the like. So it doesn't work at all well in cases of disability.

You might say, well, just get rid of the resignation requirement of the statute. The problem is, that is constitutionally motivated in large part from the Incompatibility Clause that I briefly alluded to. It's an even more flagrant violation if someone is simultaneously Speaker of the House and President of the United States, heading both branches simultaneously. The Incompatibility Clause says you can't be in Congress and simultaneously be in the Executive branch.

Now, maybe that's an unfortunate set of constitutional provisions. I know, for example, Mr. Cutler has written very engagingly on over-separation of powers perhaps and the ways in which our system could move more in a parliamentary direction, but that would require a constitutional amendment. So right now, the resignation requirement of the statute is really constitutionally motivated and makes it a very bad instrument in a disability scenario.

Here's another problem with the current statute, the way it fits badly with other elements of the constitutional system. It creates perverse incentives and conflicts of interest. It warps, for example, Congress' proper role in impeachments. Senator Bed Wade, who is supposed to be impartially sitting in judgment over Andrew Johnson, is, in fact, next in line. He has already picked his administration even as he's voting against Andrew Johnson.

That is a corruption really of the role of the foreman of a jury, in effect. It's exactly to prevent that. If the Constitution, in fact, said the Vice President doesn't preside at a presidential impeachment, he would ordinarily be the presiding officer of the Senate. But in presidential and only presidential impeachments, the Chief Justice presides. Why? Because you don't want a person as a presiding officer of a judicial proceeding being a judge in his own case, having a conflict of interest.

You have to remember, at the founding, the Vice President wasn't the running mate of the President. He was actually the person who came in second in the presidential contest. But that is, in effect, what you had with Bed Wade, with Bed Wade sitting in judgment, not just presiding, but actually casting a vote against Andrew Johnson. So it warps the roles in the impeachment process.

Also, I think it warps the role in the confirmation of vice presidential nominees under the Twenty-Fifth Amendment. The Twenty-Fifth Amendment says, when there's a vice presidential vacancy, the President gets to name a new person that is confirmed by the House and Senate. That amendment, of course, was passed after the '47 statute.

But the '47 statute creates very perverse incentives. When Ford, for example, is nominating Nelson

Rockefeller, if something happens to Ford, it's Carl Albert, the Democrat, a party transition of power. The confirmation process for Nelson Rockefeller drags on far longer than it needs, four months, before he's confirmed. If anything happens in that window, well, party power shifts.

But the '47 statute is creating the bad incentive here, because if it were Cabinet succession, then the party out of presidential power has nothing really to gain by simply delaying the confirming vote, because it would just be delaying a transition from Ford to his Cabinet instead of Ford to Rockefeller. So it just doesn't fit the impeachment process very well; it doesn't fit the confirmation process under the Twenty-Fifth Amendment.

Third, it can upend the results of a presidential election. That's the elephant to--

SENATOR SIMPSON: To get every member of the panel in, if you could summarize, then we will go to Mr. Wasserman.

MR. AMAR: Okay. You vote for one party and you end up getting the other party. That's not what people bargained for, and Cabinet succession avoids that.

So, in a nutshell, the big argument against Cabinet succession is he's unelected. I think there are ways of enhancing the legitimacy of that office. In part, if you wanted to designate a new office, a vice Vice President, prime minister, whose only responsibility would be to come in in this double-death, double disaster scenario, by tradition, parties might even designate someone who had been President of the United States before, or some very senior official to do that. That person's job would be to stay out of the line of fire, not even necessarily be in Washington, but in the line of succession.

Candidates. This is my final point. Candidates could tell the American people, even before the election, whom they plan to nominate to that position, and the election itself would thereby confirm legitimacy on this person, the same way it confirms legitimacy on the Vice President.

SENATOR SIMPSON: That was very helpful and very remarkable in its scope.

Mr. Wasserman, please.

MR. WASSERMAN: Thank you, Senator Simpson, Mr. Cutler.

I agree with what Professor Amar said about the problems, about the recurring order of succession with the Speaker and President pro tem being the primary and preferred successors as problematic.

I want to take a slightly different tact, because I think, putting the constitutional question aside, which I think is at least a close question, the order of succession is still inconsistent and problematic when considered in light of what I refer to as structural principles, policy concerns, policy guidelines that dictate what Congress should do in designing and enacting framework legislation,

such as Section 19, legislation that controls things like selection procedures for Federal officials.

If we compare the current line of succession with some of the key principles, we see that the statute is not, in any way, shape or form, the best way to go. The Incompatibility Clause to one side, it is inconsistent with separation of powers to have Executive power devolve to a legislative officer. Because what it means is that someone assumes the Executive power and becomes President solely by virtue of having curried favor, having gained sufficient support with a majority of one House of Congress to put himself in position to assume that power.

It is inconsistent with political partisanship and the role that political parties have come to play in the Federal Government, given the likelihood, since 1947, that this statute would have resulted in a change in party control of the White House, with party control being a surrogate for a dramatic change in policy.

What is interesting on the political partisanship issue is that President Truman addressed this in recommending an amended statute. He thought that Speaker succession was the way to ensure that the same party would retain control of the White House. His assumption was--and prior to 1945, this largely had been true--the White House and the House of Representatives would be under the same party control, and the Speaker and the President would be members of the same party and you have party continuity.

Now, post-1945, we have long periods of divided government, especially as between the House of Representatives and the Executive branch. So while it was designed to minimize the risk, his assumption has proven to be incorrect. If the basic assumption of the statute is wrong, then that just gives us an indication that we need to amend the statute.

The legislative succession also is inconsistent with democracy and principles of democratic legitimacy to keep this reason in mind. I am not sure that the Secretary of State is not just as democratic an officer as the Speaker of the House considered on a national level.

A Secretary of State or any other high Cabinet officer gains two forms of democratic legitimacy. He gains a certain amount of popular legitimacy by virtue of being confirmed by a majority of the Senate, which as Senator Simpson pointed out is now popularly elected. He gains what Professor Amar has called apostolic legitimacy by virtue of being the hand-picked policy surrogate of the popularly and nationally elected President. He has been chosen by the President to help him carry out the Executive power in a very high profile manner. I think that gives a certain amount of democratic legitimacy.

Now, the Speaker, obviously, becomes Speaker by virtue of approval by a majority of the House of Representatives, so the difference between the Speaker and the Secretary of State is how each one comes before that House of Congress for approval. The Speaker has been elected by the voters of his district, and the Secretary of

State has been nominated by the nationally elected President.

The difference then is approximately 188,000 votes. That's the number of people who voted for Speaker Hastert in his congressional district in the 2000 election. I'm just sure that, at a national level, 188,000 votes makes a significant difference in terms of the democratic legitimacy of one or the other officer acting as President.

The last problem that I want to emphasize that John has already spoken about is the absence of a special election provision in the current statute. Because we would have seen the most problematic situation if the tragedy of September 11th had included the deaths of President Bush and Vice President Cheney. Dennis Hastert would have acted as President for a substantial period of three years and four months until the next regularly scheduled election could have been held in November of 2004, and until inauguration in 2005. That is a substantial period under an acting President.

I think we gain two benefits from putting a President in place. It bestows direct popular legitimacy on the occupant of the White House because he has been deliberately selected by the national electoral constituency, and I think it enables the country to move forward in the longer term. You now have a President and a Vice President, you have the Executive branch structure that the Constitution assumes.

Thank you.

SENATOR SIMPSON: Very, very fascinating.  
To you, John.

MR. FORTIER: We're going to try to talk about some of the problems with the succession system this morning, and focus a little more on the solution this afternoon. Clearly, it is hard to separate them. But let me just tick off some of the problems, some of which have already been mentioned.

The first one, everyone in the line of succession lives and works in Washington, D.C. We don't want to be too alarmist, but certainly we are here as a commission contemplating the possibility of a catastrophic terrorist attack, whether that is through something of weapons of mass destruction or an attack that occurs at a time where everyone gathers together.

We certainly do have some traditions, such as the one ascending one Cabinet member away from the State of the Union that might lessen that possibility, but since everyone is here and because of the inauguration scenario, you do have the possibility that everyone in the line of succession would be wiped out.

Given that Congress is in the line of succession, now ultimately Congress might reconstitute itself, elect some leaders, but we know of the problems of that with our earlier work on the Commission. Can we broaden the line of succession to include figures who are outside of Washington? I know they have been alluded to here.

Akhil Amar has a proposal for sort of a second Vice President which might be outside of Washington. Norm Ornstein and I have talked about having some offices created outside of Washington which might be filled by governors or former leaders who would be further down the line of succession. I know Professor Wasserman has also discussed that, as well as potentially putting Congress back at the end of the line of succession.

All of these things we should think about. We should think about the possibility that the whole line of succession is wiped out, and is there a way of protecting ourselves from that.

Second, the very large issue of Congress' role in the line of succession. Obviously, we have as a country gone back and forth on that. I agree with the constitutional issues that were raised by people from Madison through Amar, as to the Framers intent on this, that they probably did not intend Congress to be in the line of succession, although we have had them in for a long period of time.

My tact is really to look at the practical effects, and many of them Akhil Amar laid out. Does it make sense to have a Speaker of the House come in for a short period of time in case of disability? Think again to our "West Wing" scenario or to just generally the case of a Speaker of the opposite party. Does it make sense for Speaker Gingrich to take over for--Vice President Gore is killed and President Clinton is incapacitated for two weeks. Does it make sense for Speaker Gingrich to take over for two weeks, where he would be able to fire the Cabinet, fire the staff, have access to all sorts of presidential documents, and then have to leave office, have to leave his Speakership and the Congress all together? The incapacitation issue of a temporary takeover by the other party seems to make little sense.

By the way, you can differentiate between the different types of vacancies. The law allows you to say the person is President under a death scenario or a resignation scenario, but incapacitation is different. We might want to say it's a Cabinet succession in that case.

You could, if not take Congress out of the line of succession, certainly lessen its role, take out the bumping procedure, take out the case of impeachment. I might add that the case of the Nixon presidency, when Agnew had left office and there was no Vice President and we were awaiting the confirmation of Gerald Ford, to elaborate on what Akhil mentioned, there were some pushing Speaker Albert to delay that confirmation of Ford.

While Albert didn't seem to seriously consider it, there were people who commissioned Ted Sorenson to write transition memos for the Carl Albert presidency. I have them in my files, extensive memos about how the Democratic Speaker of the House would take over in the removal of a Vice President. It's very similar to the case of Andrew Johnson. Do we want that conflict of interest to be there? I think Akhil laid that out.

There are several other problems, and let me tick them off. The Twenty-Fifth Amendment doesn't deal with the case of a Vice President vacancy very well. If there is no Vice President, we should try to give some greater guidance to, in law, if possible, to how a takeover from the next person in the line of succession should take place.

There is also the question of the immediacy of having a President, the need for knowing who is President immediately after an attack. We may be able to lay out on paper a very complicated system, but that presumes full knowledge of what the situation is on the ground. The likelihood is, in a case where a number of members in the line of succession are killed, there is confusion. We don't know where the Secretary of State is, or if the Secretary of State is unable to communicate while being alive.

The way the Act is now, it could be that somebody further down the line has to be specified as President because we need someone to make a critical national security decision, whether it involves nuclear weapons or a conventional attack of some sort on our enemies. We are going to look for somebody to be President right away, and yet we may have missed somebody. We may have passed over somebody who legitimately should have been President in our haste to find somebody immediately to be President. The Act doesn't really resolve that.

Do we then, once we find the Secretary of State, do we install him or her as the President? The Act doesn't really contemplate that, although it seems fair that that person would be it, or should we go with the President who we had to have make a critical national security decision and was President at that time? Should we allow that person to be President? It allows for the possibility of conflict. Can we resolve that?

The question of the special election I think has been addressed. I think we should consider that possibility under certain circumstances of a vacancy early on.

Finally, let me stress to you the danger of the Inauguration ceremony. The Inauguration is an extremely dangerous time for the continuity of government. It is because not only do we gather everyone together in one location where, theoretically, if an attack were to occur, most of the members in the line of succession would be killed or incapacitated by such an attack, but also because the presidential term is fixed and ends at January 20th at noon, no matter whether there is an obvious President to take their place or not.

What if the President and Vice President-elect are killed just before the inauguration, or even just after the technical inauguration? Who is next in the line of succession? Well, of course, the Speaker and the pro tem who attend the inauguration ceremony as well. After that, who is in the line of succession? The Cabinet. But whose Cabinet?

Let's take the case of President Clinton leaving office on January 20th, 2001, and President Bush taking over. If at 12:01 President Bush and Vice President Cheney and the Speaker and pro tem were killed by an attack that

occurred at the inauguration ceremony, there would have been no time for the new President to have nominated a Cabinet and for the Senate to have confirmed them.

Even in the best-case scenario we do that three or four hours later in the day, where there's a gap between 12:00 and 3:00. We have at times had a five-day gap. Who would be President? Well, Madeleine Albright, if she had not stepped down, would not have been eligible. She is not a born American citizen and it would have been President Larry Somers who would have been President had such an attack occurred. The Treasury Secretary of the former administration would then be President.

It is even more complicated than that because, even though Cabinet members are not required to resign, they often do resign, either at 12:00 noon on January 20th, or even on January 19th, and they leave in their place acting Cabinet Secretaries.

Now, an acting Cabinet Secretary, as long as they've been confirmed by the Senate for some lesser position in the department, would then be eligible to be in the line of succession. I have written a piece entitled "President Michael Armacost", which is that the President of Brookings could have become the President of the United States.

MR. CUTLER: It would have been a very good choice.

MR. FORTIER: Yes.

[Laughter.]

He's a very able person, but he served as the number three person in the State Department of the prior administration, in this case the Reagan administration. For five days he was acting Secretary of State. That acting Secretary would have taken precedence over the existing Secretary of the Treasury or any acting Secretaries down the line.

Anything happening around the inauguration, you not only have the potential of somebody even less well known than a Cabinet member becoming President, you also have the potential for real confusion. Who is President if the acting Secretary of State stands up and says, "I'm President." Then does the true Secretary of Treasury accept that, or does he say, "No, I'm really President." Clearly, we need to lay out and be more specific about who becomes President during the inauguration time.

But we need to consider some measures of how to get the new President's Cabinet in place, even before the inauguration, by having, for example, the outgoing President nominate the Cabinet, even on the morning of the 20th, and have the Senate be able to confirm them before the inauguration, or to postpone the ceremony possibly, which we do sometimes when it occurs on a Sunday, so that everyone doesn't gather together when we don't have a full line of succession.

MR. CUTLER: Mr. Fortier, let me ask you one question.

Nobody has mentioned the role of the electoral college. Why shouldn't the electoral college, which was originally to exercise independent judgment, why shouldn't it play a role, particularly if the death of the President and the Vice President occurs very close to the original election and while the electoral college is still there and in being?

MR. FORTIER: Sure. There actually have been proposals to this effect, especially when we were debating the Twenty-Fifth Amendment, how do we get this new Vice President confirmed, and there was some thought we would return to the electoral college and see if we could get them together.

I will say a few words, and I think Akhil Amar will want to say something as well, because he has written about this extensively.

There are a series of scenarios that occur starting--well, you could even argue they occur starting before the nominating conventions of the parties, where the death of especially both the President and Vice President-elect, the nominees, can cause a lot of problems. The parties have some procedures to replace their nominees if they die or are killed, but they are not current and I'm not sure they are well thought out as to how the American people would react to, let's say, a party substituting a new person for President a week before the election, something like the Wellstone election.

After the formal date of the November election, between that time period and when the electoral college meets, there are again some provisions for the party to tell their electors who the new person is. But again, we could be more clear about that.

A very difficult period between when the electoral college meets and the Congress counts the votes, do we have a President-elect and Vice President-elect at that time or not? Are they elect when they're counted by the Congress or cast by the electoral college?

Finally, between January 6th, when the Congress counts the votes, and January 20th, when the new President and Vice President-elect are scheduled to take over, what happens in that case? There are provisions of the Twentieth Amendment which allow Congress to specify some of these matters.

There is the additional one of what if the election is deadlocked in the Congress and the Congress has to decide, the House or the Senate, and you have some of the people who Congress was supposed to choose from are not alive? These are all difficult questions which would be better laid out in advance than to try to deal with them on the ground.

MR. AMAR: This is actually the subject of my February 2, 1994 testimony before Senator Simon's subcommittee. I have published this law review article and would be happy to give it to you.

There are four or five different windows of special vulnerability, beginning with the period right

before the election itself. What happens if something untoward happens to the candidate? And the American people, we only do this once every four years. It's a sacred, solemn moment in democracy and they don't know who the heck they're voting for and how the votes will count. So if Bobby Kennedy had been shot not the night of the California primary but the evening before the national election in November, all hell would have broken loose.

So the vulnerability begins there, and it continues between the moment of the election day and the formal meeting of the electoral college, because technically no one is President-elect yet and it's complicated by a President--like Horace Greeley, who died in that window. Some of his electors nevertheless voted for him and Congress refused to count those votes. So there is a second vulnerability, especially if something happens the day before the electoral college meets. They don't quite know again what the heck a vote means, and State law has purported to bind some of them to vote for certain people who may not even be alive at that point.

There is a third window between the meeting of the electoral college and the counting of the votes in Congress, and then a fourth window between that certification moment and Inauguration Day. Each one has its own little wrinkles, and I tried to go through the different issues of those rays.

It may require actually legislation that permits temporary postponement of certain events, including elections, as happened on 9/11 itself in New York, which was a local election day. But under State law, Governor Pataki was permitted to and did choose to, as soon as the horror became evident, basically postpone that election, which I think was absolutely the right thing to do. Current law does not permit that to happen, but it could.

Then we would need to have some specificity about what are the triggering events, because we wouldn't want parties to be able to manipulate this process just because the polls suggest that their guy is losing the day before the election.

MR. CUTLER: Professor Amar, refresh us on what happened when Senator McGovern, having been nominated for President, picked Senator Eagleton to be his Vice President, and Senator Eagleton had to withdraw because of the publicity about his psychiatric condition.

MR. AMAR: And that was so early in the process that it was just governed by Democratic party rules. Their rules about parties giving them names for putting on the Presidential election ballots and all the rest, those hadn't even begun to be triggered, so we didn't have the situation, for example, that one had in New Jersey recently, when a Senator who basically was already on the ballot wanted to get his name off and the party wanted to substitute.

MR. CUTLER: Procedurally, what happened when nominee McGovern picked Sargent Shriver?

MR. AMAR: The Democratic party had a procedure in place to basically authorize that as the choice of the Democratic party.

MR. CUTLER: Did they reconvene the convention? What did they do?

MR. AMAR: No, I don't believe that they did. It's the national committee. But each party has its own rules and structures, and State law basically interacts with that by letting the parties have certain deadlines about when the parties have to designate their nominees for the ballot.

Once that has happened, once you're on the ballot, trying to change those names, which is what happened recently in New Jersey--that's sort of a separate thing.

We had something similar in Missouri, when Governor Carnahan died and they just kept his name, in effect, on the ballot. But again, he died sufficiently in advance of the election that the voters basically were told a vote for Mel Carnahan is, de facto, a vote for Jean Carnahan. But if he had died very shortly before the election, there might not have been time for the people to get that message and they wouldn't quite have known who they were voting for. Of course, this also happened in Minnesota with Paul Wellstone.

SENATOR SIMPSON: I think obviously your party is ahead of ours on that kind of activity. We don't know, and we won't find out.

Let me say that I think this has been fascinating. I think you respectfully would say we might contact Ted Sorenson and get his present views. I think it would be fascinating. He went to Harvard, he's a very bright, remarkable man. I know him, and Lloyd has known him for years before I. Get him and, just out of curiosity, find out his present views now with regard to what he did write with regard to Carl Albert.

The other thing, I was Chairman of the Senate Veterans Affairs Committee and I noticed the Secretary of Veterans Affairs is always last, totally last.

[Laughter.]

They're always last. Even when they insert people. I just wanted you to know that. That's offensive.

[Laughter.]

It's totally offensive to me.

And then I thought of the curiosity of the elimination of Congress from this procedure when they become the eliminators. It would be very difficult.

MR. FORTIER: But it was done in the 1880s.

SENATOR SIMPSON: I know it was. I know. But rather than be preservationists of their position, they need to--I think that's well worth looking at, indeed.

Now I'm going to give you a social note. It's not a war story, and it will last one minute. I didn't five of

those inaugurations and was very honored to be there on the podium at three of them.

I will never forget the time when President Clinton was coming in, and President Bush was going out, a very cordial day, and my wife and I took George and Barbara Bush down the east front of the Capitol--there's nobody back there, maybe a camera. There's a limo and a helicopter.

You leave 200,000--and--some of your fellow citizens who are gathered on the Mall and you walk the President of the United States and Barbara Bush down the east steps of the Capitol, chuckling, visiting, you give them a hub and they get on the helicopter. Out of the limo comes Bill and Hillary Clinton, whom I had known when he was Governor, and Ann and I walk them up the east steps of the Capitol--and nobody is in charge for a bunch of steps. And then out into the masses, where the swearing in takes place.

It's fascinating, absolutely fascinating. We chuckle about it and, of course, said "Al Bumpers has told me all about you. I know all about you." I said, "What did he say?" I can't share with the American public what he said.

[Laughter.]

But Hillary was very gracious and said, "Ann, Barbara Pryor has told me about you and you will be in the people's house soon."

Anyway, that was a fascinating bit of personal history, because in that two, three, or five minutes, and the helicopter takes off and the limo leaves--all that takes place in great order. But for a few minutes down the east steps of the Capitol, there is a great gap for a second.

MR. CUTLER: Can I relate one other social note like that. That is, on January 20th, 1981, when President Reagan was sworn in and took office, he then made--this was immediately after President Carter had negotiated the release of our hostages in Tehran--President Reagan made Air Force One available to President Carter so that he could travel to Wiesbaden to the military hospital to meet the hostages who had just been released. The trip went very, very well, especially President Carter's meeting with the ex-hostages.

In the euphoria of all of that, we decided why should we go back to Washington? Why shouldn't we keep Air Force One?

[Laughter.]

We had a President aboard, and let's make a farewell tour around the world. How far would we have gotten?

SENATOR SIMPSON: I don't mean the gap was a serious constitutional gap. It's just a fascinating ripple, just a ripple. And then, of course, the one--and I think Lloyd was there--when we had the inauguration indoors in the Capitol Rotunda. I don't know how many it held, but they finally stopped because people were just crowded in. It was a bitter cold day and they were doing very well, until the trombonist couldn't get his lips off the trombone. They figured that they should quit, should stop. The bands were

paralyzed, and least the reed and brass instruments. But that was a fascinating day.

Were you in the Rotunda that day?

MR. CUTLER:

MR. FORTIER: I was not.

SENATOR SIMPSON: Well, it was our party doing it that day. I would have allowed you to come in if we had been of the other faith.

[Laughter.]

Anyway, we are going to recess until 1:30, and then we will pick up with a panel with Miller Baker, Howard Wasserman, Akhil Amar, Norm Ornstein, John Fortier, on proposed solutions, and then a panel of Members of Congress, with Senator John Cornyn and Representatives Brian Baird and Representative Brad Sherman. So we will look forward to returning at 1:30. Thank you very much. [Whereupon at 12:06 p.m., the hearing recessed, to reconvene at 1:30 p.m., this same day.]

#### AFTERNOON SESSION

[1:45 p.m.]

SENATOR SIMPSON: Here we are. This has been a very productive morning, and we have more. Such talent we have, as cochairman Cutler and I deal with the issue, and then to have our fellow Commissioner, Professor Phil Chase Bobbitt with us, it's very pleasant. He brings a lot to our deliberations.

We will now go to the panel. Michael Davidson is here, and I'm going to let him go forward, or I think the panel wishes him to go forward. He brings great talent and expertise and background. He was certainly very evident when I was in the Senate, and in a very balanced way, a remarkable counsel.

This panel will proceed. Mr. Baker, we're pleased to have you here, and Akhil Amar and Mike Davidson. Please, Mike.

MR. DAVIDSON: Members of the Commission, thank you very much for the opportunity to appear before you. I have prepared some written remarks which I imagine will be part of the record of the proceedings, and therefore would like to abbreviate those remarks in talking to you.

SENATOR SIMPSON: Without objection, so ordered.

MR. DAVIDSON: The focus of what I will address is the question of whether it is and remains to be a constitutional choice for the Congress to keep the Speaker of the House and the President pro tempore of the Senate in the statutory line of succession.

Professor Amar has written on this subject. I think my views are somewhat different, and I am truly happy that he's here with me to reflect on whatever these thoughts may be and to amplify his own.

The burden of my remarks is that while the wisdom of keeping the Speaker or the President pro tempore on the presidential succession list is a matter of fair debate, Congress, in this year, 2003, is not precluded by the Constitution from adhering to Congress' initial decision in 1792, or its renewed decision in 1947, to keep the Speaker and President pro tem on the list, in whatever place or order it deems good policy.

The Commission has reviewed the constitutional text which provides that the Congress may, by law, designate what officer would succeed to the presidency after the Vice President. Congress first exercised this power in an Act that President Washington approved on March 1, 1792. The first part of that Act, which is sometimes known as the Presidential Election and Succession Act of 1792, provided for the appointment of electors in the States, the meeting in each State of electors, the gathering up of the electoral votes, and their counting in the Congress.

The latter part, Section 9, dealt with presidential succession and placed the President pro tempore of the Senate first and the Speaker of the House next after the Vice President. There was considerable debate, in fact, in the Congress that spanned two Congresses--it began in the first Congress and continued into the second Congress--about the appropriate order of succession.

In the House--and we know more about the House because its proceedings were open and the reporters notes that became the annuals of Congress provide us with significant, although not verbatim information about debates in the House--we know more about the House than the Senate, which was then proceeding in closed session.

The House debates reflect that a full range of alternatives were considered. There were proponents for designating the Secretary of State as the first in line after the Vice President, designating the President pro tempore, the Chief Justice, and even State officers. The debate addressed constitutionality. Members spoke on both sides of the question of whether the President of the Senate was an officer of the United States who could be designated to succeed to the presidency.

The Houses were divided. The House of Representatives favored placing the Secretary of State first after the Vice President, and the Senate preferred the President pro tempore, and in the end the Senate prevailed and the Congress added the Speaker after the President pro tempore. The important point about that debate is that there was nothing that was either casual or unmindful about the decision to place the presiding officers of Congress in the line of succession.

The overall bill was a piece of major legislation. It was enacted in 1792, after considerable debate in proceeding time, to govern the first election that would truly be conducted under an act of Congress, because Washington's election had, in fact, preceded the coming together of the Congress and the charting out of particular electoral rules. This was the major enactment that provided for the system of how the electoral system would work in

regard to the presidency, and it addressed that second important point of succession to the presidency.

While we know that initial Congresses are not infallible, Marbury against Madison, for example, struck down a provision of the Judiciary Act of 1789. The Supreme Court accords great weight on--and now I'm going to quote-- "to a construction of the Constitution made by a Congress, which was to provide by legislation for the organization of the government, in accord with the Constitution" which had just then been adopted. That's a quotation from Mars against United States in 1926.

But there is more than just the venerableness of the decision of the second Congress to place the presiding officers of Congress in the line of presidential succession. First, the text of the Constitution does not preclude the choice. The Succession Clause simply provides that Congress may designate by law what officer shall then act as President. It does not modify the term "officer" as other provisions of the Constitution referring to officers do. It does not contain the modification, for example, "officers of the United States". It is simply, plainly "officers".

In Article I, the Framers provided that there would be "officers of the Congress", the presiding officer of each body, the Speaker of the House, or the President, from time to time, pro tem of the Senate in the absence of the Vice President. Thus, within the plain terms of the Constitution, the Speaker and President pro tem are officers.

Second, in terms of function, the President pro tempore assumes in the Vice President's absence the Vice President's expressed constitutional task of being President of the Senate. For that reason, and now thinking back to how people in the second Congress, given the task of charting out in legislation these important matters, may very well have thought of this matter, it was natural for them to think of the person who succeeded to the Vice President in the function of being President of the Senate.

This resonates, in fact, as one looks back at the Constitutional Convention, which at a critical early time in the report of the Committee of Detail, would have made the President of the Senate the successor to the President.

In short, from the perspective of 1787 to 1792, from the Constitution's adoption to enactment of the Succession Act, keeping a line of succession through the presidency of the Senate was harmonious with the Founding generation's views.

Well, as the Commission knows, Congress took the President pro tempore and the Speaker out of the line of succession in 1886, and provided for succession through the Cabinet in order of the creation of Cabinet departments. And then, in 1947, Congress put them back in, placing the Speaker after the Vice President and the President pro tempore next.

The history of that enactment I think is very important for your deliberations. Two months after becoming President in 1945, concern that there will be no elected Vice President for almost four years, President Truman asked

Congress to revise the Succession Act of 1886. He noted that under the Act, by virtue of President Roosevelt's death, is now lies within my power--speaking of himself--to nominate my immediate successor.

Truman asked that the Speaker and President pro tem be restored to the line of succession, but that the Speaker be placed ahead of the President pro tempore, reversing the order of the 1792 Act.

In support of placing the Speaker immediately after the Vice President, President Truman stated this: "The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all of the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government whose selection next to that of the President and Vice President can be most accurately said to stem from the people themselves."

In 1945, the Speaker and the President pro tempore were Democrats. In 1947, when President Truman again asked the Congress to act, the Speaker and President pro tempore were Republicans as a result of their party's sweep in the 1946 elections. Truman felt so strongly about the principle of succession by elected officials that, for him, party control of the presidency was not paramount. Under the measure he urged and signed in 1947, the Republican Speaker, with a Republican President pro tem, of the 80th Congress, which on other fronts he was battling mightily across the span of the United States, campaigning against the 80th Congress, either of those Republicans would have succeeded as President if he had died before the 1948 election.

When Congress took up the measure in 1947, the very constitutional arguments which have been presented to you were presented again to the Congress. The Department of Justice wrote to the Congress, initially to the House of Representatives, supporting the constitutionality of placing the Speaker where he is now in the line of succession, after the Vice President, again adverting to the fact that this was a fundamental decision made by an early Congress.

Now, since 1947, there has been a constitutional change that may bear on thinking about the succession question. The Twenty-Fifth Amendment, ratified in 1967, provides for filling a vacancy in the office of the Vice President by nomination of the President and confirmation by a majority vote of both Houses of Congress. This may reduce, although not eliminate, as in the case of catastrophic loss, the kind of question that the Commission is concerned with, the practical significance of which officer follows the Vice President on the succession list, because there is now a way of replenishing the office of the Vice President.

But also the principle important to Truman, that the President and Vice President are elected, and that those immediately after them in the line of succession should also be elected, will not apply fully when a vacancy in the vice presidency has been filled. It may be a smaller step to move to Cabinet succession after the nation, by way of

constitutional amendment, has approved the idea that is acceptable in the case of a vacancy to have a Vice President who is appointed. But it would still remain the point, that when a choice is available, such as between the Speaker of the House and anyone in the Cabinet, that the principle of succession by an elected official should continue to govern.

Overall, and let me conclude, the basic idea, I believe, should continue to be that expressed by one of the participants in the debate in 1792. In fact, speaking in January of 1791, Representative Samuel Livermore said to Congress that it should "Fix on the officer who would, from the nature of his office, most naturally succeed."

In doing so, the Congress may rely on both the history and plain text of the Constitution and choose from the range of officers established by or pursuant to the Constitution, including one or both of the presiding officers of the House and Senate.

As I indicated, Professor Amar has a much fuller analysis, and we've had a nice, friendly discussion about that. But, in sum, although there may very well be contemporary wisdom as we look at the nature of the Cabinet, at the functions of the Speaker of the House, the manner of selection of the President pro tem, to, as a matter of policy, reconsider the decision of 1792, the further decision of 1947. This is a matter of choice in which the Commission and its recommendations to Congress, and Congress in its deliberations, has the fullness of possibilities under the Constitution and is not precluded by a particular view that the appointment of those presiding or officials of the Congress would be unconstitutional.

Thank you very much.

SENATOR SIMPSON: That was very impressive. Thank you very much. Questions? Well, let's go to the next person.

MR. CUTLER: Mr. Bobbitt has a question.

SENATOR SIMPSON: Yes, Phil.

MR. BOBBITT: Just a couple of questions.

I suppose I will have to declare an interest and say that I have worked with Michael Davidson for 16 years now, and I have the highest respect for everything that Senator Simpson said is true in spades. He is really a great asset to the Senate, a great friend of both sides of the aisle.

My questions are two. First of all, more so of a comment, it may be the Twenty-Fifth Amendment cuts even more your way than you argued, because part of Truman's argument, as I understand it, wasn't just that the Speaker was elected from his constituency, but that he was elected by persons who themselves all had constituencies. The Twenty-Fifth Amendment requiring a majority to confirm the nominee of the President for the Vice President's replacement also is done by people who themselves have a national constituency when taken in the aggregate.

Now, I don't know that I would come out on this one way or the other just now, but it is something you might want to consider.

My second point is more in the nature of a direct question. Taking your point, that the historical evidence is close, because James Madison did not win the argument in 1792, and taking your point that the textual argument could be parsed both ways because the word "officer" stands alone in the text that we're construing, unlike other text, I wish you would give us your views about the structural arguments.

Would you say, dealing with the legitimacy of these proposals, that someone coming into office as the President or our Chief Executive, by virtue of his role as a great parliamentary leader, as Speaker of the House, for example, adds to the legitimacy in the time of crisis, or would you say that government can be so conflicted that, when it's divided among the parties, the Speaker, from particularly a divisive era, would gain the system, or try to contrive at the removal of a President in order to seize power and lead to a crisis of legitimacy?

MR. DAVIDSON: One thing that the reading of his history has persuaded me--in fact, it was Representative Livermore, who in the fuller context of these remarks was encouraging, as I understood it, the House not to become engaged in the question of whether it was choosing Thomas Jefferson to be the successor after the Vice President, a particular individual that they knew, a judgment about the contemporary politics. Rather, it was his urging to think more broadly. These are rules that last a long time. They would last in times of divisive government and, hopefully, will reach a time in which they exist in a time of less divisive government. It was that we can't make the determination based upon what we now know in these next several years, or in the immediate past years, to be the tenor of American politics. We may be forewarned by it, but not finally governed by it.

So the question would be, more likely than not, what kind of national experience--after the threshold question of whether election is to be preferred as a route to the ultimate governance of the chief magistrate--what kind of experience would suit that position well.

We do have in American history a very honored role of the Secretary of State. I mean, it's absolutely true. I hope that Professor Amar has a chance to, in fact, go through the history of the importance of Secretaries of State in the line of succession, the actual line of succession, as they would then be nominated to run for the presidency.

After the Secretary of State, it is very hard to say that about the rest of the Cabinet. People may be selected because of very special proficiencies and histories with regard to the particular subject matter of the Cabinet department and not with a sense of their breadth of the values, debates and strifes of American politics. So it's very hard to get beyond the first one and to know what kind of constituency is served.

The value of the Speaker--and I'm just now addressing the Speaker--is that this is a person who, in fact, needs to comprehend the gamut of American public life. He or she is the true leader of the body that represents the people, as we tend to think of it that way, in the most direct way, only because, although Senators are elected, the House is elected entirely every two years, so it tends to reflect more immediately where the body politic is at one time.

That is a perception. The ability to keep a House functioning and an understanding of where the body politic is is an important attribute of what that person may bring to the job. So it is a competition of possibilities, a history which credits to our Secretaries of State an important breadth of understanding, but also a recognition that the Speaker brings very particular contemporary values, and domestically.

For that, let me just conclude with this. Our foreign policy is not simply dealing with other nations. Our foreign policy is, in large part, a matter of helping the American public understand and come to important decisions. The skills of diplomacy are not necessarily the skills of helping the nation as a whole make a decision that will support that foreign policy.

SENATOR SIMPSON: I hate to interrupt, but I must. Senator Cornyn will be here at about 2:30 and I would like to go to Mr. Baker, and then Mr. Amar. So we will do that, and then have some questions.

MR. BAKER: If that works for Professor Amar's schedule, because I know he has to go back to New Haven.

MR. AMAR: It's okay.

MR. BAKER: Senator Simpson, Mr. Cutler, Professor Bobbitt, thank you for the invitation to be here today.

I would just say briefly there are serious constitutional arguments on both sides of this question of can you have legislative officers. I come down on the side of James Madison and Professor Amar.

I think the best argument for me is the structural argument. When you consider the fact that the Constitution does not allow Congress to appoint a lowly postmaster or clerk of court, it is hard to believe that the same Constitution would permit Congress to appoint essentially a President by designating its own officer to be in the line of succession. To me, the structural arguments carry the day. But I recognize there are powerful arguments on the other side, as articulated by my friend, Mike Davidson.

I think the events of March 30th, 1981, the day President Reagan was shot, illustrate many of the weaknesses in the existing system. The Vice President was in Texas, the Cabinet assembled in the White House situation room, and National Security Advisory Dick Allen recorded with an audiotape those deliberations of the Cabinet in the White House situation room. The transcript of those tapes can be

found at the NPR website. It's fascinating, but it illustrates many of the problems that we have with the system today.

The Vice President, although he was in transit back to Washington, could not effectively communicate with the Cabinet, could not effectively make a decision. There were disagreements in the Cabinet about, among other things, whether or not the alert status of American nuclear forces should be increased. Casper Weinberger, on his own authority in the military chain of command, ordered a heightened alert status for American Strategic Forces, and that was to the real consternation of Secretary of State Alexander Haig. The tensions in the Cabinet Room that day were palpable. Yet, the country was at peace, no decisions had to be made. It is very unclear what would have happened had a presidential decision been required on the afternoon of March 30th, 1981.

The Speaker of the House, Tip O'Neill, the leader of the opposition, was down the street here, wasn't invited to join the Cabinet, although he was the person under the 1947 statute who would have had to make any decisions. Yet, the Vice President could not be reached and the President was unconscious on the operating table. But the Speaker of the House would have had to resign his position in the House to make a decision, or to exercise presidential authority. That would have induced hesitation, certainly on his part, and his tenure as acting President of the United States might have been three or four hours by the time that Vice President Bush returned to Washington.

It is worthy of examination, the transcripts of that day, the Allen tapes, by this Commission to fully consider the possibilities of what can go wrong under the 1947 statute.

I have testified in front of the Judiciary Committee and the Rules Committee. I made a number of suggestions, and I will just briefly summarize some of the improvements that I think should be made to the 1947 Act.

By the way, I agree with Professor Amar. It should be repealed and replaced. But obviously, there is room for disagreement here. But there are certain things that I think everybody can agree upon.

First, the bumping procedures under the 1947 Act should be eliminated immediately. This allows, in a worst case scenario, a handful of surviving Members of Congress to elect a new Speaker or new President pro tem, and that new Speaker or President pro tem could then bump the Secretary of State or other Cabinet officers serving as acting President. I don't think it's legitimate; I don't think it's constitutional; it's bad policy. It's a disaster waiting to happen, to allow a handful of Members of Congress to select a new Speaker or President pro tem who can then bump a Cabinet officer and become acting President. So that should be changed, regardless of whatever else happens.

Second, Section 19 should be amended, the 1947 Act, to eliminate the requirement that statutory successors resign their posts before assuming presidential duties. The reason is that this induces hesitation at the exact moment

when decisive Executive authority may be critical. It's absence may be fatal to American lives and to American interests. The situation of March 30th, 1981, where the Speaker of the House would have had to resign his position in order to exercise presidential authority, is an example of that.

My third suggestion is we should amend the 1947 Act, if we're going to keep it, to allow a senior Cabinet officer, under a temporary disability, to assume the presidency when that temporary disability is removed. The example we have is from September 11th, when on September the 11th the senior Cabinet officer, Secretary of State Colin Powell, was in South America. We had the Treasury Secretary as the senior Cabinet officer in Washington.

If the enemy had successfully attacked the White House and the Capitol that day, and had the President been in town, it may have been unclear whether the President, the Vice President, the Speaker and President pro tem were alive or dead. In that situation, perhaps there would have been a requirement for an immediate presidential decision.

On that day, for example, we know that the fighter pilots were told that, in order to shoot down any apparently hijacked airliners, it required a presidential decision. Well, who would have made that decision on September 11th in that kind of situation? My suggestion would be that the Secretary of State, if he's temporarily unable to assume his position, should be able to assume presidential duties upon being able to do so. Right now, we have a law that induces hesitation because of the fact that officers may, in fact, feel compelled to restrain themselves from accepting those positions in that kind of situation.

The fourth thing I would do, as Professor Amar has said, is remove the Speaker and President pro tem from the line of succession, along with the less important Cabinet officers.

Finally, I would allow the President to appoint, with the advice and consent of the Senate, his line of succession. I would give the President the discretion. That might include former Cabinet officers, former Presidents, former Vice Presidents. Those individuals, subject to Senate confirmation, should be able to exercise presidential duties in the event of an emergency.

My testimony is in the record here from the Senate, and if there are any questions, I am happy to answer them.

SENATOR SIMPSON: Thank you very much. It was very helpful. I know that Professor Amar has a schedule to meet, so if you would like to speak and then we'll have questions for the panel, if we so desire.

MR. AMAR: Thank you, Mr. Chair.

The article that my brother, Vic Amar, and I wrote in 1996 is entitled, "Is the Presidential Succession Law Constitutional?" Because we actually didn't think, in the end, it was necessary to answer the question that it's decisively and unambiguously unconstitutional. It still

might be infinitely bad policy in any number of ways, and indeed, we thought it was the case that merely the severe constitutional doubts that surrounded it were sufficient in the context of this unusual situation to doom it and make it a very bad statute, indeed.

Our fundamental, our most basic argument for thinking that it's constitutionally problematic, and not one, not two, but about ten different ways, is not textual at all, or even historical. It is, as I think Professor Bobbitt pointed out--and it's not surprising, because we've been powerfully influenced by his work--structural in nature. The Article is, in fact, dedicated to Charles Black, the pioneer of arguments of structure and relation. Those are the things, with all due respect, that I don't think Mr. Davidson's testimony fully came to grapples with. It's not just a textual point about the word "officer". In fact, we don't think that's ultimately decisive.

Now, there are two big questions of legitimacy ultimately. That's what we're talking about here, legitimacy. There are two questions--a kind of democratic legitimacy point, but a constitutional legitimacy point, too.

Even if you think that the Speaker is democratically legitimate, if he's seen widely by many sectors of the society, and many law professors and law training folk pointing to Madison and many other things, from Madison to the Twenty-Fifth Amendment, if he is seen as unconstitutional, that bears on constitutional legitimacy in a moment of crisis, even if there's a doubt or question mark about that. So I think the burden of proof really has to be that.

Unless we're really sure that this thing is constitutional, we should try to avoid it--for this purpose. That might not be true for many, many other statutes which aren't triggered in moments of great national trauma and doubt.

Just briefly to respond to some of the excellent points that were made in Mr. Davidson's testimony, which I just had a chance to look at. The provision in the 1792 statute for the President pro tem and the Speaker of the House is one part of a much larger statute, so when it's signed, it's the whole thing that is signed into law. It is a statute that was never really implemented, or at least this aspect of it. So we really haven't had quite a testing of it. It didn't create facts on the ground the way the judiciary Act of 1789 and many other statutes do.

Why do I mention that? In part because the rule of often deference to longstanding statutes, and especially statutes passed by the early Congresses--this wasn't, in fact, the first Congress--partly has to do with a point about judicial review. It's a point in Professor Bobbitt's terminology about a certain prudential concern, about the difficulty after the fact of undoing things that are deeply entrenched.

If you're going to proclaim a national bank unconstitutional 20 years after it's been up and running, and vast riches have been invested in reliance on it, this

is not a kind of statute that created those kinds of vested reliance interests that are part of our culture or even part of our strong political tradition, because it never came into effect. Of course, Madison did say no. I think he counts for a considerable amount.

Here's the biggest problem with that statute as a precedent for 1947. There are many problems with it, even as a precedent for the '47 law, the current law, but here's the biggest one. I mentioned this in footnote 131 of the Stanford article.

It evaded the key issue. The key issue is, does the President pro tem have to step down when he assumes the acting presidency? The statute doesn't say. Imagine it says, you know, basically anticipating the "great legal scholar" Yogi Berra, that "When you reach a fork in the road, take it." Either he has to step down, or he doesn't. If he has to step down, Madison says he's just pulled the constitutional rug out from under him. Even if he once was an officer, he is no more. He has just self-destructed. But if he doesn't step down, you've got a walking, talking, profound violation of the incompatibility idea that you can't simultaneously be at both ends of Pennsylvania Avenue, being the head of one branch and the head of the other branch, any more than--here's a point textually. It doesn't say that the Vice President presides over the Senate, but surely, when he's impeached, he doesn't preside over the Senate, even though I can't point to a text that says that. But he really can't be in two places at the same time, in the dock and in the chair.

The spirit of the Constitution is structured and just recoils at that idea. So, too, I think there are issues of constitutional spirit here connected to the fact that presidential vacancies aren't just created exogenously by outside events. They are created by impeachment, and this works the entire structure of the impeachment process.

They can be created by the refusal of the Congress to approve a nomination under the Twenty-Fifth Amendment, and that's again not exogenous. That's endogenous to the system of confirmation. So these are arguments not just from texts but spirit.

The fundamental point is that the first Congress didn't address this point--does he have to step down? Once you say, as the current law--the statute was just silent on that key point. The current law says, yeah, of course he has to step down. Of course, he does. Once you say that, of course the Incompatibility Clause applies here and in spirit.

It's just not a sensible statute. I don't even have to argue that it's unconstitutional. Indeed, I don't place my ultimate reliance only on that. It just doesn't work in cases of disability. It creates all these doubts and hesitations at the moment when you need a smooth and decisive transfer of power, permitting one back as well. That's the Twenty-Fifth Amendment approach that we, the people, really did, I think, endorse when we focused on it clearly. It's an approach in serious tension with the '47 statute.

Put that tension just in the way that I did in my testimony. If the Twenty-Fifth Amendment reflects the best approach to sequential double vacancy, when first one of the top two officers becomes unavailable and then the other, a closely analogous approach should be used in the event of simultaneous double vacancy. Basically, the idea of the President designating his successors.

Now, we shouldn't be limited in our history by looking at just what Samuel Livermore or someone else said in 1792. We want to look at all of American history. The fact is, this statute actually was really problematic during the impeachment of Andrew Johnson. That is one of the reasons it was repudiated in 1886, which I think Mr. Davidson sort of leaps over when he talks about 1792 and 1947.

We learned something, actually, in Johnson's impeachment, which is you don't want the foreman of the jury basically having a vested interest in the case. You don't want the entire jury having a kind of constitutional self-interest because they get to pick the President pro tem. They turn themselves into an electoral college, a profound parliamentarianization of our process if impeachment becomes, whenever the legislature is controlled by the opposition party, a kind of vote of no confidence, which really undercuts--And these aren't textual points. These are structural points about our system and ultimate policy arguments.

Now, here I think are the two points where we converge, and here I will close. One idea of convergence is the Twenty-Fifth Amendment is an important factor to be taken into account. It wasn't there in 1947. I think it really undercuts some of the ideas driving the '47 statute. So even if you didn't buy anything about Madison or the founding, the Twenty-Fifth Amendment needs to be factored into the process.

Here's a second point that we agree on. Democratic legitimacy as well as constitutional legitimacy is very important in these situations. It is one of the reasons that I have suggested we might want to create a new office, because the person who is the best Secretary of State may not be the best person to pinch hit in this one extreme circumstance.

Barry Bonds, two years from now, may still be the best clean-up hitter in baseball, but maybe you don't want to play him every day in left field or at first base where he could get injured, so you could designate one person to be next in line. It doesn't necessarily even have to be in Washington, D.C. It could be a past President, a past statesman of extraordinary distinction that the American people would have a comfort level with. And the presidential candidates would tell, would name de facto to the American voters before they cast their ballots. So in voting for the President, you're voting for his Vice President, you're voting for his next in line, and that is what confers maybe more democratic and national legitimacy than one Speaker elected from one safe district, whether

it's a safe Republican district or a safe Democratic district.

So I think we are very much in sync in thinking that democratic legitimacy is important. You can achieve that through true officer status.

The final point--and here's where maybe again we converge--if you insisted that officers were constitutionally ineligible, you couldn't have the President pro tem and the Speaker even low down on the succession list, but maybe, if we don't insist it's an absolute constitutional prohibition but it's just unworkable at the head of the line in all these ways, practical, structural, prudential, as well as the textual and historical, lower down on the list when all hell is literally breaking loose, when all sorts of people are unavailable, maybe these folks would be better than the very low level Cabinet officers.

At that point, I think only a constitutional "crank" might say, gee, but they're not really sort of officers because so many of the basic premises of the system are really not quite fully operational.

To paraphrase Lincoln here, I close: Are all the laws to go unexecuted, save one? Are you going to basically stick with this one word "officer" and sort of miss the fundamental crisis of legitimacy that would attach if you had someone very low down on the succession list without democratic legitimacy, as opposed to the Secretary of State or the vice-Vice President or something like that.

MR. CUTLER: We all admire the economy and the laconic style of this little Constitution, and yet, there seems to be an inconsistency between Article I, Section 3, dealing with the choice of the President of the Senate and the President pro tem of the Senate, and Article I, Section 2, dealing with the choice of, in effect, the President of the House, namely, the Speaker, with no reference to a Speaker pro tem at all.

Beyond that, Article I, Section 3, limits the function of the President pro tem of the Senate in time. He can only function during the absence, travel or whatever reason, of the President of the Senate, the Vice President, really, or when the Vice President is busy fulfilling the duties of the President because the President is incapacitated or whatever.

Why did they do it that way? It doesn't seem to make much sense. You would think that in Article I, Section 2, there would have been provision for a Speaker pro tem, whose functions would also be limited in time, but there is no reference to anything like that.

MR. AMAR: A few points about history. For much of our history, we have really been without Speakers at all in any 24 month cycle. People are elected in November and they don't even take office until the following December, 13 months later, which is not, from a modern point of view, that democratic--this is before the lame duck amendment--where their term formally started in March. So for the first eight months, they are not in session at all.

Then, when the Congress convenes, it takes a long time sometimes to pick a Speaker. This happened in the 1850's twice. For months, there is wrangling when there is no Speaker at all, so the country is without a Speaker for 11 months out of a 24 month cycle.

The Senate, as a continuing body, doesn't quite have that problem. It's in place. But it may not have a President pro tem in place. Thomas Jefferson doesn't vacate the chair as Vice President so that there can't be a President pro tem elected, in part because he's concerned that if there is, there will be some monkey business in the election of 1801 and actually they won't pick either Burr or Jefferson and will pick someone else.

One of the other practical, prudential reasons for not having these guys next in line is that they don't exist some of the time, much of the time, in the way that Cabinet officers, like the presidency itself, are 24/7/365.

Senator Simpson asked this question earlier. Why did they pick the President pro tem as opposed to the Majority Leader early on? I think because that very clause seemed to suggest, in effect, he substitutes for the Vice President when the Vice President isn't around. He's the one who sits in the Vice President's chair in the Senate when the Vice President isn't there.

Some people are even under the misimpression in these early Congresses that he actually became Vice President when the Vice President assumed the presidency. This is, in fact, not true. He is a Senator from a single State, which is not true of the Vice President, who doesn't count for the two Senators from each State.

But among the many mistakes that they made-- because they made mistakes when they actually passed the 1792 statute--one of them was, in effect, thinking that the President pro tem was really Vice President when the Vice President became President.

They didn't quite have this on the House side, I think, because they didn't have the unique office of the Vice President who wouldn't always be presiding that caused them to think about President pro tem.

If you were to try to pick someone else from the Congress, some other legislative leader, there's an additional constitutional problem, because they're not mentioned in the Constitution itself. Even if Congress today were to designate them "officers of Congress," there would be a further weakness in their claim of constitutional legitimacy because they don't even have some of the textual legs to stand on that the President pro tem and the Speaker do, which are at least mentioned in the Constitution by name as "officers". So that is yet another sort of problem with anyone else other than these two being named.

The answer is, it is connected to the complicated relation of the Vice Presidency to the Senate.

MR. CUTLER: I'm going to ask one more question, if I may, of a former member of the House. That is, when you would stand up and address the person presiding in the House, what would you call him? Is it Mr. Speaker?

SENATOR SIMPSON: In the House, it would be Mr. Speaker, and here--

MR. CUTLER: If it's the most junior Congressman, with sort of "KP" duty, as they call it now--

SENATOR SIMPSON: Well, not quite KP duty. That's "Kitchen Police" to those of you who are young. That's what that means.

But in the Senate, it was Mr. President, or Madam President of the Senate. But always never--and then the chair would always introduce or request the participation of the senior Senator from Minnesota or the junior Senator from Minnesota, sometimes the name, and that courtesy still goes on. But that was the way of address.

MR. CUTLER: But in the House, if I'm the most junior member of the House and I take my turn in the chair, what does a member of the House call me when he asks for recognition?

SENATOR SIMPSON: We used to call them everything when we were in the Senate.

[Laughter.]

I don't know. I suppose Michael would know. I suppose just presiding officer, Mr. Speaker. When the Speaker was not in the chair, then I would address the chair.

MR. DAVIDSON: Apart from the committee of the whole question, starting on the Senate side, however, whoever might be in the chair, whether it's the Vice President, the President pro tem, or members rotating through the chair on designation by the President pro tem, that person is "Mr. President." At that moment, that person is functioning as President of the Senate, making, on advice of the Parliamentarian, parliamentary rulings.

Although I risk some speculation in talking about the House side, it is my impression that it would be Mr. Speaker, whether it's the actual Speaker or the person designated to be that at that particular moment.

If I could just say one thing about the Majority Leader suggestion--and others have made it--in the Senate, the Majority Leader, and the same is true of the Minority Leader, they are not officers of the body. They are party leaders. They are not elected by the body as a whole. They are designated by their caucuses. They gain their function and importance by the history of the recognition by the chair of them at critical moments, or at any moment that they seek recognition.

But in the history of the Senate, as those two positions have developed, it is not under the "officers" clause but simply in the internal organization of the Senate.

MR. AMAR: So they don't have that textual leg to stand on if you wanted to designate them in the line of succession. There is yet another embarrassment that they face--

MR. DAVIDSON: That's right. Democrats do not take part in electing the Republican leader, and the Republicans do not take part in electing the Democratic leader.

MR. BOBBITT: I think this might be directed towards Michael Davidson, but anyone can answer this if they wish.

Just as a factual matter, when did the Senate adopt the custom of making the most senior member of that body the President pro tem?

MR. DAVIDSON: Only because I was fortunate enough to photocopy that page on my way here, this occurred in 1890. In fact, in thinking about this problem that we're now all discussing, that's a very important consideration.

In the early years, and perhaps up to 1890, in the early years, literally the President pro tem was chosen when the Vice President was not there. I can't tell you what went into all those selections, but one could imagine that if it were a critical absence of the Vice President, that is, the death of the President, in fact, part of the choice would be we know this person would be next in line.

But by 1890, in the Congressional Service report that I'm now looking at, it says the practice changed to having someone permanently in that position and seniority was the method of selection.

SENATOR SIMPSON: If I may interrupt again, Phil, and Lloyd, we have Senator John Cornyn with us. I know how that works, so step right up here quickly because you have other things to do. Then we can come back, or as our staff would tell us, we will go back.

But it is a great pleasure to have you here, and on behalf of my cochairman, Lloyd Cutler, and Professor Bobbitt, we are very pleased to have you here and thank you for what you're doing in this area. We would very much love to hear what that is.

SENATOR CORNYN: Thank you very much, Chairman Simpson. It's good to be with you and co-chairman Cutler, and my friend, Phil Bobbitt, from Austin, Texas.

I want to extend my congratulations to the Commission for your hard work on these issues which, as we can tell, do not necessarily command the most attention of issues that are pressing here on Capitol Hill, but are important nonetheless.

The report that the AEI and the Brookings Institution prepared on the Continuity of Government was a huge help, and I believe actually jump started this important debate. I was proud to deliver my congratulations on the Floor of the Senate earlier this year.

If the truth be known, my interest in this subject started with a conversation I had with Norm Ornstein, so I will have to give him the claim or credit as the case may be. Norm is one of those smart people who get things moving through sheer force of intellectual will, and this is no exception, at least insofar as my case is concerned.

I was pleased to chair a Judiciary Committee hearing to build on the issues addressed in the AEI/Brookings report, and I also cochaired a hearing on presidential succession with Senator Lott, chairman of the Rules Committee. I look forward to learning more about the Commission's views on that thorny subject.

My office has been working closely with Norm and John and Thomas Mann to develop legislation in both areas, and we are looking forward to getting that finalized and introduced as soon as possible. Indeed, as I arrived here today, I was handed a working draft of that legislation, and we look forward to having something concrete for the consideration of the Congress here as soon as possible for consideration of the Senate.

I believe these issues deserve more than just token attention. It isn't something we should put off for another day. I believe it's urgent and it is an absolutely critical part of our ongoing war on terror. It is increasingly clear that our current system of providing for the continuity of government in the event of a disaster is inadequate to address the realities of a post-9/11 world.

As unthinkable as another attack of that magnitude may be, we in the United States Congress have to be ready for the worst. It is not an option; it is our duty. We must provide for the stable continuance and functions of the government, despite all possible catastrophes.

We must not leave our nation's citizens without representation, without order, without defense. We owe it to the American people to ensure that our government remains strong and stable, even in the face of disaster.

I really appreciate the opportunity to be here with you today, and certainly to answer any questions you may have. But let me again congratulate you on the great work that you've done in bringing this matter to the attention of the American people and the Congress in such a well-informed and well thought out way.

Thank you very much.

SENATOR SIMPSON: Thank you very much, Senator. Any questions?

MR. BOBBITT: I suppose this is in the nature of a comment, just to say how proud I am to have a Senator from Texas who is taking the leadership on this issue.

It is very easy to put off these things. They don't have much electoral salience, they're not a partisan issue. It's like drawing a will. It's something we would just as soon not think about. It takes a very, I think, thoughtful and very forward leaning leader to do this and naturally, being from Texas, I am pleased it is a Senator from Texas.

SENATOR CORNYN: Thank you. I appreciate those comments very much.

MR. CUTLER: Senator, we very much appreciate what you've been doing here. Since we all know there are very few

things we really can do to prepare for possible attacks by terrorists, this is one where we can do something.

We have made amendments to the Constitution extremely difficult--two-thirds majority of both Houses, and ratification by three-quarters of the States. We have assigned the ratification period a length of seven years in all the most recent amendments, saying the States have seven years to ratify or not ratify the amendment.

We don't have seven years here. Would you agree with that? Do we need to accelerate that period?

SENATOR CORNYN: I couldn't agree more. I would say, Chairman Cutler, that sitting on the Judiciary Committee, and particularly as chair of the Constitution Subcommittee of the Judiciary Committee in the Senate, I hear frequently of the reluctance of my colleagues to address constitutional amendments because, obviously, it's an enormous responsibility, primarily to get it right, but to not suggest constitutional amendments willy-nilly or in circumstances where it's really not called for.

But, indeed, of course, the Framers did provide an Article V for means of constitutional amendment, which you have just described. It is hard. But it seems to me that if there are any issues that are appropriate for constitutional amendment, one where people of good will can get together without regard to political party or any other considerations other than just good government, it ought to be on something like this.

We have done it 27 times before in our history, and I think this perhaps should be the 28th. So I appreciate very much your involvement in this and your appreciation, and the wisdom that each of you bring to bear on an issue that does not necessarily command as much attention as the current events on the front page of the newspaper, but which are inextricably connected with those events.

SENATOR SIMPSON: Senator, it must be impressive to the people of Texas to have you and Professor Bobbitt, who do so much in so many ways, elective and nonelective life in the country, and deal with issues. I was always involved in things that I said were filled with emotion, fear, guilt and racism. It was such fun. Immigration, Social Security, veterans affairs, nuclear high level waste--people just ignored me, saying he's going to blow up.

But immigration is another one just like this. You have turned your attention to that. That's a no-win, and it should never be partisan. But this one, the strangest part of it is, here you are moving in the Senate, and we have people who are adroit and knowledgeable on what we're trying to do, because Norm and Tom do work people over. They really do.

[Laughter.]

But the troublesome part is this continual mantra which is we don't want to alter the character of the House. It surely will alter it in a disaster in a most hideous way. So we will have to work through that. It comes from the

pride--I'm going to call it that--of saying we have always been directly elected by "the people". It's like Jerry Spence, my old friend, the lawyer. He said "I'm just here for the little people." Except for Imelda Marcos. I'll hear from him.

[Laughter.]

I've known Spence a long time. You know, here it is. It's reality. We wouldn't even be here if we were trying to put together a bill like this and September 11th hadn't happened. We would just be babbling in the vapors. But it did happen, big time, and 3,000 of our fellow men and women are gone, and this baby was headed our way.

We're not trying to spook people up, we're just trying to deal with the reality of a temporary --I keep using the word "temporary". That doesn't seem to leak through. I know Jim Sensenbrenner and I know how stubborn he is. Let's get right down to it. He's a great guy, but he has dug in. I'm going to visit with him. Can't lose a thing there.

I have always enjoyed him. I will visit with David. These are good people. I want to ask them that question: what more could alter the character of your body than bodies?

SENATOR CORNYN: Chairman Simpson, you raise some practical concerns. Obviously, if we don't get the political support we need in order to get this initiative moving, then we're not going to be successful. So I wish you every good luck in your discussions. Perhaps there is a way we could frame the issue in a way that would maximize the House of Representatives ability to keep the nature of that institution as it is now, an elective body. I know that's a concern. But as you point out, we're talking about an emergency response on a temporary basis until the usual process of selection could be returned.

But we did hear in the committee hearing that I chaired on this subject concerns from those who actually administer elections on an ongoing basis, and their concerns about expedited elections. Certainly we could have expedited elections, but I don't want to risk disenfranchising some of the people that perhaps have earned the greatest right to participate--for example, our military serving overseas, which would be a challenge.

So I'm convinced that people of good will, working together, trying to find a solution, can come up with some compromise, some means to fix the problem, because I believe that's why all of the people you mentioned and others, that's why we're here. If we can try to figure a way around this, to try to find a solution in a way that does not offend the fundamental sensibilities of Members of Congress, I'm hopeful we can do it. You have to be an optimist to be in this business anyway. I think you'll agree.

SENATOR SIMPSON: Sure helps. I remember that. Yes, sir.

MR. BOBBITT: I would like to make one last point. Senator Cornyn, as many of you know, was the Attorney General of

Texas before he came to Washington. Prior to that, he was a Supreme Court Justice, and before that, a judge.

I think what we're working on here is really about the rule of law. When you think about how we can lose the war on terrorism, if we had to declare martial law in this country, you would have to say we've had a tremendous setback.

When you stockpile laws, you are doing something just as important as stockpiling vaccines to prevent a foreseeable but, we pray, unlikely eventuality. But this is all about keeping all of us up to the standard of law, no matter how we come down on the particular minutiae. I hope you would endorse that, Senator.

SENATOR CORNYN: Thank you very much.

SENATOR SIMPSON: A very remarkable analogy. We do appreciate it very much. There is a good bipartisan group working in the House, they're at it, and we will hear from two of those today. But thank you for your service. I hope you enjoy the Senate as much as I did. I know that chairing the Constitution Subcommittee, it was Birch Bayh who chaired that when I first came here. He was trying to get rid of the electoral college. We hope we'll have more success.

[Laughter.]

A wonderful friend there, too. Thank you very much.

SENATOR CORNYN: Thank you.

SENATOR SIMPSON: Now we will proceed again with our panel of Norm Ornstein, Mr. Wasserman, and John Fortier. I will be punctuating your comments with the arrival of Congresspersons from time to time, and just stop you in a second, just cut you off like that. We are going to hear from Brian Baird and Brad Sherman. They will both be coming.

For now, continue to lay it on.

MR. ORNSTEIN: We know our place, Senator.

[Laughter.]

Just one little addendum to the last panel, which is whomever is presiding when the House is the House, it's "Mr. Speaker". But when the House devolves to the committee of the whole, it's Mr. or Madam Chairman. Otherwise, it doesn't matter. That is the way it works.

MR. CUTLER: Or Madam Speaker.

MR. ORNSTEIN: Or Madam Speaker, which happens reasonably frequently.

Let me cut to the chase and just address some of the things that we need to grapple with here on presidential succession, because I believe the Commission should issue a robust and detailed recommendation.

I personally join with several of my colleagues in believing that the 1947 Act really ought to be replaced. We

ought not to tinker at the margins. Many of the provisions may stay, but we should start afresh and think this one through.

In particular, not only do we have to get rid of some of the obvious deficiencies, like the bumping provisions, we need to deal, as John Fortier has said so well and so eloquently in his testimony before the hearing that Senators Cornyn and Lott cochaired, with many of the now very concrete possibilities that leave us holes in the presidential succession process. We should address those directly and make sure that we can fill as many holes as we can.

Particularly, we need to look at the inaugural. That really is the moment of the most intense vulnerability to the entire system, all three branches, and the time when we may end up with so many uncertainties in the fog after an attack that we wouldn't even have the prospect, as we do under other circumstances, of kind of benign martial law. We might have genuine struggles over who is in charge. That would be the nightmare to end all nightmares. We need to do as much as we can on that score.

I would just quickly join with my colleagues. I believe that "officer" means "officer." In the Constitution, even if it doesn't say "officer of the United States", it is "Officer" with a capital "O", which surely has to mean something that wouldn't be there if it were uncapitalized the way the other terms and words often are in the Constitution itself.

But I also associate myself with Akhil Amar and his brother. You don't have to reach a point where you say that having the Speaker of the House and the President pro tem in line of succession is unconstitutional. You simply have to look at whether it's wise. Given the scenarios that we have heard about, given the realities in the history of the United States, the obvious conflicts of interest that take place, we should grapple with that more directly.

My guess is, although I have not discussed this directly with Ted Stevens, the current President pro tem--I have raised it with Robert Byrd, the former President pro tem--I think in both instances they will not look at this in a personal way but look at it in a more detached fashion. I would believe that would be true of Speaker Hastert and his counterparts as well.

At minimum, if the Congress decides that it wants to keep these positions in place, one other recommendation we could make--and we will hear from Congressman Sherman, who wants to make sure it's the same party--but there is no reason why we couldn't recommend that the President pro tem actually be the Majority Leader, and that perhaps a new position, honorific position, be given to the most senior member of the majority party. It's a meaningful title in a lot of ways and it brings many elements and perquisites to it. But it might make more sense at least if we have to have a fall back to move in that direction. But my preference would be to take them out entirely.

I would also join with several of my colleagues and suggest that, on balance, what I would do if I could in

this instance, I would keep the top four Cabinet members in place and work on a provision to make sure that we get people actually in position and confirmed by the Senate before noon on January the 20th. We have looked at different ways of doing this. I think it is imminently doable.

But then I really believe that the best alternative here is to have the President nominate a succession of people, and I think it can be brought explicitly into the law that the intention here is to have them represent a range geographically, not just be located in Washington, of those the President deems as having the qualities to serve as President of the United States if a succession were necessary, but with confirmation by the Senate so that they become officers, and the duties of those officers would include briefings by intelligence people and the other things that would bring you up to speed; that with the check and balance of a Senate confirmation, you're not going to get any President picking just simply cronies or close colleagues or relatives. They would have to be people with some substance.

If we do that, we can solve a whole series of problems that relate to the dangers that come with the war on terrorism, and with making sure we have an appropriate position in place.

SENATOR SIMPSON: We have some stirring--

MR. ORNSTEIN: Yes, we have our Members here.

SENATOR SIMPSON: I believe we have Congressman Baird and Congressman Sherman here. Let's go with Congressman Baird, a fellow graduate of the University of Wyoming. I wanted to get that in. If you think Texas has got some slug, we have some here. This is a fine young man who has been very helpful to us in our deliberations. It is good to have you here. I see that you are noted as a distinguished alum of the University of the Arts and Sciences, a wonderful tribute.

Representative Sherman, it is a great pleasure to have you here. I haven't come to know you as I have Congressman Baird, but we are very eager to hear from both of you. We want to respect your time, so just go right ahead. We may have some questions afterwards, but take whatever time you wish.

Thank you very much for coming.

MR. BAIRD: Let me begin by thanking you for your continued work on this issue, and of course, Norm Ornstein and Tom Mann and the entire Commission has been exemplary and has provided a tremendous service. I will keep my remarks brief.

As you know, we focused extensively already on the issue of continuity of the Congress itself. I am sure Norm and others have discussed the interplay between that process and the presidential succession. Of primary concern to me, and I think to many of us, is the possibility that if we

deal with just one issue, be it the continuity of the Congress, but we also don't address the Presidential Succession Act, we have potential interplays that you have undoubtedly discussed at length. But the gravest concern for me is the possibility of supplanting a Cabinet member who has become the President.

This was actually discussed in the congressional working group, headed by Martin Frost and Chris Cox. One of the positive accomplishments of that group, I think we did achieve consensus that that existing provision is simply not acceptable. You do not want, at a time of national crisis, a member of the Cabinet, possibly even the Secretary of State, who has been sworn into office, by whom we don't know--I don't think that has yet been resolved, how they actually get sworn in in the time of worst catastrophe--but let's assume they have been sworn in.

Subsequently, a House, possibly as few as a couple of Members, convenes and elects a House member as Speaker. That person now could supplant a person who has already been sworn in, possibly sworn in before the eyes of the American public. And if a conflict were to arise, obviously the normal arbiter of that conflict would be the Supreme Court. But under a worst case scenario, which I think we must consider, there is no arbiter. So presumably, we would have yet another opportunity for constitutional crisis at precisely the worst time.

We must address that issue, I think first and foremost. To me, it is personally--although I think the constitutional issues raised by the Commission are very sound about whether or not members of the House and Senate can serve in the line of succession, I think, nevertheless, while we resolve that, we have got to first and foremost address this issue of leap frogging from House member to the presidency over the top of a sworn Cabinet member.

With that, I am going to turn this over to Brad Sherman, who has done some wonderful work on this issue. Again, let me thank you for your work and your leadership on this. My hope would be that we could move this, if not as a package arrangement with the continuity of the House and presidential succession, at least the same urgency dedicated to both and hopefully resolve this within the next year.

I guess there's one more thing I want to address. I hope we can certainly do this before the next presidential inaugural. I believe that is the time of the absolute greatest vulnerability, as I'm sure Norm has talked about. You could not ask for a better time to hit this government, nor could you ask for a more catastrophic time, given our ambiguity of laws.

It is good timing from a terrorist perspective because it's on national and world TV. It's good timing because we're outside oftentimes. But it is even more problematic because we have, at present, that I know of, no mechanism to carry over from one government to the next, particularly if there is a change, if the incumbent is replaced and his or her Cabinet does seem to be the likely successors, given that that administration may have been defeated, but the new President has not had time yet to have

a Cabinet nominated and approved by the Senate, that, I think, is our most vulnerable time, both physically because we're outside, but also constitutionally.

SENATOR SIMPSON: Representative Sherman.

MR. SHERMAN: Thank you.

For those of you I haven't met, I am Brad Sherman from California's best-named city, Sherman Oaks.

[Laughter.]

It's a pleasure to be with you and I commend you for your attention to this important work.

I began to focus on presidential succession back in 2000, introduced legislation in March of 2001, and then, with September, 2001, it has become a more pressing issue. I think we don't have to consider worst case scenarios, although we should, to realize just how we have been on thin ice, avoiding by luck and providence quite a number of disasters.

Keep in mind, nine of our 43 Presidents were not elected to be President; one of our 43 Presidents was not elected to be Vice President. Whether you look at Nixon resigning only after Ford was confirmed, whether you look at Chester A. Arthur serving as a result of an assassination, with no one named to become President after him if he had not continued, you see that this is an important issue and one where it has been more through, as I said, luck and providence, that we have escaped catastrophe rather than solid planning.

We defend the physical Capitol of the United States with these thick Jersey barriers, but obviously, the statutes to provide for continuity are not nearly as solid. The best example, though, of what we could be in for, was John Wilkes Booth. He didn't just kill President Lincoln. He had a plan involving the decapitation of our Executive branch and tried to assassinate the Secretary of State and the Vice President on the day. One would expect Al Qaeda would be just as ambitious some day if they saw an opening.

Another thing that commends dealing with presidential succession is it can be done by statute. We could actually effectuate something, as Brian says, by the end of next year.

I think there are two things that are critical. One is that we have the continuity established with ascertainability and legitimacy. There should not be a scenario that any of the professors that come here before you can put forward where we don't know who is President and who isn't.

We have a circumstance where you have some person might be President and another temporarily acting as President. Often, the possible ambiguities come up with the bumping. I think Brian had a better word for it. For example, some Secretary of State is serving and then a new Speaker of the House is elected.

What I would suggest is, when someone is President, they serve until the end of that term. But when someone is acting as President only because the legitimate

officeholder is incapacitated or perhaps incommunicado--one of the statements before you deals with the possibility that were it a time of crisis and the Secretary of State is incommunicado, and the Secretary of Treasury steps forward--we should always know who has the right to act as President and who ultimately holds that office just as soon as that person is in touch with us and is competent.

The second issue, and one that I think deserves just as much attention, is continuity of policy. That is to say, whoever succeeds to the presidency should be someone who reflects generally the same philosophy. There are those who want to avoid party, and maybe it shouldn't be exactly party. But it should be that each person in succession was selected by the person elected to be President, perhaps with confirmation or some other affirmation from Congress.

The first reason this is important is that the possibility of a radical change in our policy will affect the "decision makers" in determining whether someone continues to serve as President.

There are four ways in which someone would leave the presidency, temporarily or permanently: impeachment, assassination, resignation or taking a leave of absence. In each one of those circumstances, if somebody--A recent example. Al Gore might have been unavailable or might not have been serving as Vice President and a member of this Commission, Newt Gingrich, could have stood second in line to President Clinton. Well, would that have affected the impeachment decision? I don't know. But the lust of one party or philosophy for power might have clouded judgments.

Could it have affected an assassin? Imagine an assassin who can think in his own warped little mind that he's going to dramatically shift the nation from bad policy to good by a single ugly act.

Resignation. Would President Nixon have resigned if Tip O'Neill stood next in line?

Finally, taking the leave of absence. We all watched the "West Wing" and we see a President happily taking a leave of absence under circumstances when his staff argues to the contrary, and I wondered whether that would really happen if at that point an acting President was ready to sign a multitude of bills in a day or an hour that otherwise the President would not want signed.

If, instead, you had this continuity of policy, then the decision makers would impeach only those who deserve to be impeached, assassins would not be inspired, a President would feel free to resign for personal reasons, or take a leave of absence for personal reasons.

But not only is it important that we not adversely affect the possibility of somebody succeeding to the presidency because of this desire to change policy, but also imagine a period of time when Al Gore was not serving as Vice President, where every day leaders around the world would wonder, is it Clinton's policies or Newt Gingrich's policies that will control the only superpower in the world? Imagine factoring that into the decision and then, if Clinton had had a health problem, imagine factoring that as a major part of the decision.

Whether it is the stock markets or our allies or our enemies, they should wake up every morning knowing that, by that nightfall, the United States will be following policies that are generally reflective of the person elected as President.

The way to achieve this continuity of policy is either of two approaches. The simplest approach, go back to an approach we had earlier in our history and just take Congress out of the line. Go through a list of Cabinet officers. An interesting proposal is to have a first Secretary or an assistant Vice President even before the Secretary of State, proposals to have a few officers or Cabinet officers or other officers selected by the President who do not habitually reside in Washington and, therefore, might well escape any disaster that befalls the Capitol.

But wherever the line starts, wherever it ends, if it's made up exclusively of those selected by the President, then you're going to have people that he has confidence in and who would generally, at least to a degree that he or she thinks is significant, follow the same policies.

There is one proposal to take members of Congress, the Speaker and the President pro tem, and put them at the end of the line of succession. I would recommend against that, just because it gives the two leaders of Congress virtually no prospect of becoming President and all the honor of coming after every Cabinet officer in a pecking order, set forward for an important post. So I would suggest taking them out all together, and I believe Senator Lott has legislation that would do that.

I have more complicated legislation that I've been putting forward since March of 2001, that instead leaves the two congressional leaders right toward the top. The only reason I did that is that I didn't want to insult my senior colleagues by taking Congress out of the line and depriving them of even the possibility of serving their nation in a time of crisis.

If you feel it's necessary to keep Congress in, then allow the President--and I outline this in the legislation that I hope I can make part of the record, as well as two articles that I've written--allow the President to designate either the minority leader or the Speaker of the House of Representatives to come third, or second, depending upon how you're counting, right after the Vice President, and then either the majority or minority leader of the Senate.

This would allow for Congress to be involved, continuity of policy, and everybody in line to be someone who had not only presidential imprimatur but substantial respect in the Congress, the Cabinet officers being confirmed, the majority/minority leaders and Speaker of the House all having substantial support in the various branches of Congress.

The advantage of that is that it leaves them in, it keeps the continuity of policy, and it also eliminates the, frankly, unfortunate circumstance of having a tradition in the Senate of selecting the oldest member of the majority party and then a statute that puts that person right behind

the Vice President. Imagine the temptation that must have posed Al Qaeda had they focused on it to win our good friend, Strom Thurmond, President pro tem. You had a circumstance where you could not only radically shift our policy by removing Clinton and Gore, but if the member of this Commission, Gingrich, was subject to some sort of conspiracy, the fourth person with not only radically different philosophy but, frankly, at age 98, Strom was not at his best.

If you feel you need to leave Congress in, I think I've got an approach that puts somebody with continuity and an established vital leader in the list, not to say--and I don't want to comment about all the current or any particular President pro tem of the Senate, some of whom may be working on appropriations important to the 27th District.

[Laughter.]

One or two other comments. One is that it's important for us to deal--and other speakers, including Brian have mentioned this--with the whole process between the election and the swearing in. You have excellent testimony before you about the idea of bringing the new Cabinet officers in and having them confirmed before the actual swearing in. But I would say the whole issue of what happens if both the President and Vice President, who are selected by the electoral college in December, fail to be inaugurated on January 20th, that whole issue ought to be delved into because that is when we are at our most vulnerable.

It has been suggested in other testimony that we explicitly take acting Secretaries out of the line of succession, saying an acting Secretary of State should not come before the full Secretary of the Treasury. I would commend that to you.

I've taken up far more of your time than I should have, and I thank you.

SENATOR SIMPSON: That is really splendid, both of you. I really appreciate that personally.

I was interested in that first Secretary proposal in the background material. That's interesting, and that person would be known to the American public, too, which is an interesting part of that.

You know, they say it's a government of laws and not men and women. It is my experience that it's a government of men and women. That's what I did when I was out here for 18 months, and that's how you got things done. So let's go over to the House, to--it doesn't matter what party.

What are you two fine people able to say when this ritualistic statement is made, that we don't want to "alter" the character of the House? In other words, that phrase comes from those who oppose what we do. They say we can't have anything like that because it would "alter" the character of the House, the people's House, direct election, how troubling, how un-American, how undemocratic. And here all we're talking about is a temporary thing, just totally

temporary. I can't seem to get that across, at least in my view, personally.

So what do you say to those who say, vehemently, that this is an altering of the character of the House of Representatives? What is your response to the argument?

MR. BAIRD: Well, the proximal alteration cause is the attack by the terrorists. Nobody who has worked on this set out and said let's start from scratch and see if we can dream up a clever excuse for eliminating direct elections. Nobody did that. What we did was we watched airplanes fly into public buildings and kill thousands of our fellow citizens, and we thought for about two seconds and said, if it had been a nuclear weapon, the world would have changed immediately in an even more profound way. That realization is what has altered our world.

In all the proposals for a continuity of the House, what we have called for is direct election, but following a period of temporary appointment. So those who would say in seeking for House continuity we have changed something fundamental in the Constitution have created a straw man. And it is a damaging straw man in this case because it distorts the true nature of the situation.

The difference is, do you temporarily modify basically one line of Article I of the Constitution, or do you tear that entire Article out of the document for a period of months? That is the simple difference. Those who would say that the continuity of the House is a threat to the Constitution neglect the fact that they basically eliminated all of Article I for a sustained period.

We haven't been successful in conveying that in a compelling manner to people in positions of control over this issue in the House, but I see that as the fundamental difference and it's deeply troubling that we have not been able to convey that.

Let me offer two other suggestions. One, I would add to Mr. Sherman that the President should be able to nominate former members of the Senate as well in his list of succession, and while I'm at it, I would suggest an alternate capital site in Laramie, Wyoming as a possible suggestion. Both, I think, offered with genuine sincerity and--

SENATOR SIMPSON: You and I know that.

[Laughter.]

MR. SHERMAN: If I may also respond, if someone says it would alter the character of the House, terrorists killing 25 percent of the members of the House, that's what alters the character of the House. What you want to do is minimize that alteration, and the way to do that is to make sure first that you have the House of Representatives, and second, that you haven't radically dis-enfranchised, say, a section of the country or a viewpoint, one way or the other, as to which 25 or 30 or 40 percent of the House.

A House meeting with only 60 percent of its members, with everyone from the South and West gone, that's a radical--You can say you've kept the character, because

they were all elected in districts, except you're leaving out all the South and the West, or all the North and the East.

Finally, I would suggest that you maintain the character of the House best if each member were to file something designating their successor or designating a panel of a few successors from which the governor would select, but that it would be clear that this would not be something operative just because a particular member resigned or became incapacitated. You don't want to be able to, in mid-term, resign and have your kid take over your seat. This would apply only if 25 percent of the House left. The way to maintain the character is to have somebody fill my seat that is most consistent with what voters thought they were getting.

SENATOR SIMPSON: I just have one more, and then I'm going to go to my cochair.

But it seems to me that one of the things that we in politics always detest, at least all thoughtful politicians, is to be ridiculed or embarrassed. I can tell you, it seems to me that if we do nothing and something happens, the populace, Democrat, Republican, Independent, will say "where were you bums? What were you doing? What in the world were you up to? You knew it happened. Why didn't you do something?"

I would hate to be the one out there saying we were trying to do things which are esoteric than real. Because at one of the hearings, some young lady said, if the whole purpose of terrorism is to disrupt the government, and they know we have the machinery in place where it won't happen, what a great place to be. I mean, that's reality. I'm deeply appreciative.

Lloyd, excuse me.

MR. CUTLER: On your suggestion, Mr. Chairman, about the elected member designating who would be his successor, the French have a system very much like that. They require--and they do this by legislation. They require that if you are elected to the assembly, and you are then named for the Cabinet--and they have the same provision that we do, that if you join the executive branch of the government, you must resign your seat--you may designate who your successor is. They do it, as I understand it, at the time they themselves are elected.

MR. SHERMAN: I think that would be appropriate, but unlike that system, where the more typical circumstance is one member leaving, either to resign, that it would not be applicable because we don't want to change the character of the House if we don't have to. One member leaving, we just have a special election.

MR. CUTLER: Right.

MR. SHERMAN: I wouldn't want to go to the circumstance where, as I said, you could just resign mid-term and hand the baton over to somebody.

MR. CUTLER: With respect to the notion that it's important to deal with presidential succession, with which we fully agree, would you agree that we need to deal with judicial succession as well?

The quorum for the Supreme Court is specified by legislation and could be altered by legislation, provided you had a Congress and a President who could function and adopt the legislation. But there are many questions relating to whether, for example, you could create an acting or temporary Justice of the Supreme Court, as to whether if, instead, you decide to alter the quorum requirement down from the present six to, say, three or whatever.

How do you deal with the associated questions, namely, who will pick the Supreme Court Justice? How will he be confirmed? Is he only there temporarily? Should it go by order of succession in each of the Circuits, seniority or something like that, or should it be left to--provided we have a functioning President and Congress--should it be left to the normal system?

MR. BAIRD: I appreciate that question very much. My premise in working so hard on this is that I believe the most powerful message we can send our own people and the world, and those who wish to do us harm, is the notion--and not just the notion, but the reality--that you could kill every single one of us, instantaneously, and within a matter of days our government is back up and running, under constitutional provisions, under the brilliance of checks and balances and separation of powers that has served this country and this world so well for so long.

What a tremendously powerful message it would be if the instantaneous elimination of all of us were followed just a few days later with replacement of people with equal stature, perhaps greater stature, of wisdom, of competence, where the American people could say, yes, you killed a lot of good people, and you destroyed some magnificent buildings and some marvelous history, but the institutions that are so fundamental and specified in the Constitution will persevere.

So I think the next task, as we work on presidential succession, along with congressional continuity, is to find a mechanism, a valid mechanism, for quickly replacing judges. I haven't thought as extensively about that, but I have given it some consideration.

I would suggest that there may be merit to not having the newly confirmed President also nominate a Supreme Court and go through all the bloody confirmation process. I think some mechanism, such as you outline, Mr. Cutler, would be preferable.

The President is going to have his or her hands full at that time. I think some other mechanism, devoid of political and in fighting, again on a temporary basis, would make some sense. Not a lifetime appointment, but perhaps

having those folks fill the slot until such time as a duly-elected President can nominate would make sense to me.

MR. CUTLER: There is one other issue which partly--

MR. SHERMAN: If I could respond to that as well. We've got the three branches of government. The Executive would be called upon in a time of crisis to make decisions in perhaps minutes, perhaps involving retaliation. Congress might be expected to act in days or weeks. A Judiciary would probably not act for months on whatever issues arose.

While this Commission would naturally want to come up with a complete package to deal with every issue, every branch of government, that package would inevitably involve at least one and maybe more than one controversial constitutional amendments, which could not possibly be adopted in the next year and possibly never would be. While I do think you should come up with recommendations as to all three branches of government, they may have to move through our current government separately.

The critical thing is that we deal with the Executive, because that is the most easily decapitated branch of government. It is the only branch of government as to which there had been one partially successful effort to decapitate. And it is a branch of government which, if there was some horrendous attack, would probably be making the initial responses. Perhaps providence is with us.

That is also the only branch of government were you can deal with most of the problems with a statute. So I would hope we amend the 1947 presidential succession statute just as quickly as we can get our colleagues to focus on it, even if dealing with Congress I think would take a constitutional amendment. Some of the less likely scenarios involving the Executive might require a constitutional amendment, and the Judiciary would probably require a constitutional amendment unless it dealt only with the quorum issue.

MR. CUTLER: I think your point is very well taken.

There is one more issue which is partly, but only partly, related to 9/11 and terrorism. That is the suggestion that gets made from time to time that Congress should not have to assemble in Washington and vote physically present in the two chambers, that there should be an electronic method in which you could vote from your home district or some such thing.

Do you want to comment on that?

MR. BAIRD: Well, Jim Langevin, who is a new member of the House and a former Secretary of State, has done some outstanding thought on this and has proposed legislation to precisely study that issue.

I think there's real merit to it. The worst case scenario is an absolutely unexpected and devastating attack, but it is entirely plausible to imagine scenarios in which we have reason to believe that such an attack could take place and there is a need for the government to act in

response to that threat, and it is not a good idea to convene, at least here--maybe Laramie, Wyoming does become more appealing at that point.

But if it is dangerous for us to get together, or if there is an outbreak of some contagion which suggests we don't want to travel, you don't want to have a situation where the Executive branch essentially says, because the Congress cannot convene and conduct a vote, therefore, I can act without congressional approval on matters of war, expenditures, et cetera, so I think we need to study that.

Again, I really want to underscore that all of these are under extraordinary circumstances. I would not favor a situation where we thought we could just have the regular business of the Congress conducted without face-to-face interactions. I think that would be a problem.

SENATOR SIMPSON: Phil, please, go right ahead.

MR. BOBBITT: Two quick points. One very practical and one more theoretical.

On the practical side, I gather that many of your colleagues are a bit standoffish about these proposals because they contemplate a time in which a governor or some other body might appoint an interim successor, who then would run for election for that constituency. That appointment would give that person a considerable leg up, particularly in a time of crisis or a short lead time to an election.

How do you all deal with that?

MR. BAIRD: I think it's a legitimate question, but I think it's based on a somewhat specious line of reasoning. You're exactly right. It is one of the issues that has been raised.

The Framers were pretty clear that one of the great constraints on an elected member's conduct is the possibility of running for their election. The minute someone takes office, they then become subject to that constraint.

Now, that has good and bad consequences. You can occasionally vote certain ways, as people are well aware, based on the proximity of the next election, not on principle. But that's been with us forever.

I don't buy the premise that because we hold elections so dear we will then prevent the people--that we will not have sufficient confidence in the people in the subsequent election to allow them to make their own choice. The point being, if you appoint a successor, the people have judgment and wisdom to, in the special election, reject them. If it's a political nomination or it's some bad choice, or the person conducts themselves dishonorably, that's what that subsequent special election is about.

So those who say we hold elections tremendously dear, but we don't have any confidence in the people to use good judgment in an election, I find are logically inconsistent.

MR. BOBBITT: My second point is just to draw the following analogy. People who follow critical infrastructure, the preservation of strategic studies around the new era we're entering, often talk about a shift from threat or target-based strategies, like deterrence, to vulnerability-based strategies, like redundancy, resiliency, deception.

It seems to me that what you're doing is very much in sync with that move in strategic studies. Not that we want to give up on the deterrence and the prosecutorial and targeting side, but we want to supplement it by making ourselves less vulnerable.

MR. BAIRD: We all have a vested interest in the protection side of this, so we would never want to abandon that. But we also have to recognize that protection can't be perfect, especially in a time of this weaponry. The resilience is precisely what we're talking about.

Senator Simpson's point earlier about what the American people would say if this were to happen, and this body failed to act knowing that it could happen. The Constitution is such a remarkable document that it gives us a mechanism of putting these kinds of issues before the people in the form of constitutional amendments. That's why we can amend the Constitution. We would still have to have three-quarters approval by the legislatures for this to become part of the Constitution. So if we truly trust the people, we should put this before them and let them choose.

I can tell you from personal experience in my district, and everywhere else I have gone, the people get this. They get it clearly, faster than this body got it. You can pick a plane ride and talk to people and show them the book by the Continuity Commission and the people will say, "Holy smokes" or worse, "you ought to fix this." They get it.

The Readers Digest did a poll of its readership, and the people get it. They do not want to wake up one morning and not have a Congress. They do not want confusion and uncertainty in the presidential succession line. They don't want to give up checks and balances and separation of powers. If we truly trust the people, we ought to listen to their good judgment and act to fix this.

Senator Simpson is absolutely right. It would be to our eternal disgrace, I believe, if something dreadful were to happen and the mechanisms were not in place to provide for continuity and something even more dreadful took place in that vacuum, which I think we have to seriously consider.

MR. SHERMAN: If I can also comment on that, resilience is deterrence, and deterrence is protection. I will feel safer walking into the Capitol knowing that the terrorists know that some other bald guy from the San Fernando Valley will show up if for some reason this one is unable--and 25 percent of my colleagues are also unable.

The other thing I would also mention, I became interested in presidential succession with no great thought of terrorism. This was back in March of 2001. Of all the

concerns we have, only the presidential succession issue could really happen in the absence of a catastrophic terrorist attack. We're just talking about one or two individuals, perhaps one dying of natural causes, one being assassinated. Not only do we have the terrorism risk, but we have all the more natural or "one lone nut" risk with the Executive branch. I hope we focus on that even more quickly than we focus on these other issues.

SENATOR SIMPSON: I can't thank you enough. Congressman Sherman, the documents you referred to, the bills you referred to, will be part of the record, those drafts.

Are there further questions of these two fine gentlemen? If not, thank you for taking the time to come before the Commission. We deeply appreciate it. Thank you, and go forth. Gird your loins.

[Laughter.]

MR. ORNSTEIN: We're going to wrap this up quickly.

SENATOR SIMPSON: I thought we would suggest that, yes. I knew that you knew that I would suggest that, Norm.

MR. ORNSTEIN: A couple of final comments, including a little bit of a road map.

We will be working and exchanging documents with members of the Commission, and I hope through a more informal dialogue as well, even as we continue to work with Senator Cornyn and his very able staff, with Senator Lott, with their Democratic counterparts as well, on the presidential succession issue, and as we move forward on the congressional issues as well. We will then move--and we will try and at least do this on a parallel track--to deal with the issues of the Court.

I would take some small issue with Brad Sherman. I think this is a little bit more urgent than he does. Many of the scenarios that we have discussed in the fog of an attack, there would be real questions that would be raised about the legitimacy of actions.

What if, say, 100 members of the House of Representatives remained alive, adopted the interpretation of the quorum that parliamentarians have used in the past in the House, that a majority of those elected, sworn and living do constitute an adequate quorum to do business and move forward, choose a Speaker and so on. There will be a challenge to that. The actions they might take that could range up to and including a declaration of war or suspension of habeas corpus. These are not areas where you want to leave ambiguity.

What if something happens at an inaugural and we get six people popping up saying "I'm the President"? You want to have an adjudicatory body. The American people will demand it, as they did after the election of 2000, with the full legitimacy to be able to say this is adequate, correct, constitutional, and this is not.

So having a Supreme Court in place in this age of terrorism, or a final court of judgment, as quickly as

possible is, in fact, something meaningful, and we will try to move forward on that issue as well so that we can fill out the full portfolio of our responsibilities.

Finally, on behalf of Tom Mann and John Fortier, I want to thank Jim Ho, the able staff director of the Subcommittee on the Constitution, and Chairman Cornyn, for providing us with this room, and also, of course, in working very closely with us on these issues. Also, I want to thank Kimberly Spears, who has helped to do so much on this Commission along with John, and, of course, all of you for your commitment to public service here as well.

SENATOR SIMPSON: Thank you, Norm. Do we have a thought from our co-counsellor here?

MR. MANN: Thank you, Senator Simpson.

Just a word about the Commission's schedule. Speaking to a number of staffers during the course of the day, I realize there is an interest in moving ahead on the Hill early next year with the presidential succession. So I would urge us to begin the Commission deliberations on our recommendations so that we might have developed a consensus and make that available in both the Senate and the House before our formal report is prepared and published, so that we have an opportunity to shape this legislative effort in a way that could make a real difference.

SENATOR SIMPSON: We will be accepting your recommendations.

But I want to thank my cochairman, Lloyd Cutler. It's always a delight to work with him, and an honor and a privilege. I have learned that. He's a great American citizen. He's always there to serve his country and to give good counsel to others, regardless of party.

To Phil Bobbitt, who certainly with his record of public service, it's a great pleasure. To Norm and Tom, you are very fine catalysts of our efforts. Your energy and enthusiasm are infectious. To John Fortier, who gives us very solid research and splendid administrative skills, it has enhanced our work significantly. And to Kim, there she is, the most capable and efficient staff person.

We look forward to the time when you will call us again to some inappropriate date that will be impossible to meet, but we'll try. Thank you all very much for your wonderful support.

[Whereupon at 3:45 p.m., the hearing was adjourned.]