

Testimony of

Dr. John Fortier

Executive Director
Continuity of Government Commission
September 16, 2003

Testimony of
Dr. John C. Fortier
Executive Director
Continuity of Government Commission
and
Research Associate
American Enterprise Institute
Before a joint committee hearing of the
Senate Committee on Rules and Administration and Senate Judiciary Committee
on
"Ensuring the Continuity of the United States Government: The Presidency"

on Tuesday, September 16, 2003,

in Room 325 of the Senate Russell Office Building, at 9:30 a.m.

I would like to thank the Senate Rules and Judiciary Committees for holding a hearing on the important subject of presidential succession. Just over two years have passed since September 11th. Our country is still dealing with the loss and sadness of that day.

In the wake of that tragedy, it is important but necessary to consider the possibility that terrorists would target government leaders and institutions, hoping to sow the seeds of discord and confusion, just at a time we need strong leadership. It was almost so on September 11th, as the fourth plane, United Flight 93, was headed toward Washington, D.C., with its likely target the Capitol or the White House. It is only because of the bravery of the passengers of that flight that we did not suffer additional tragedy.

I am the executive director of the Continuity of Government Commission. The Commission's aim is to make recommendations to ensure the continuity of our three branches of government after a terrorist attack. It is a joint project between the American Enterprise Institute and the Brookings Institution. Lloyd Cutler, former White House Counsel to Presidents Carter and Clinton and former Senator Alan Simpson chair the commission. It includes former Speakers of the House Thomas Foley and Newt Gingrich, and other public officials who have served at the highest levels of government. The commission held public hearings and issued a report on the continuity of Congress issue, which I recommend to you. I would also like to thank the Judiciary Committee and Senator Cornyn who chaired a hearing on that subject last week. Our commission is in the process of holding hearings on presidential succession. As the commission has not yet issued recommendations on the subject, I will speak today on my own behalf. There are, however, intersections between the problems of the continuity of Congress and that of the executive branch because congressional leaders are part of the presidential line of succession. In those cases, I will bring in the official recommendations of the commission.

Today's hearing is an important step toward reforming our presidential succession system, but let me commend the Senate for having started this task earlier this year. In January, Senator DeWine introduced S. 148 placing the Secretary of Homeland Security in the presidential line of succession. Senator Dodd was

the bill's lead co-sponsor. The Rules Committee considered the bill favorably, and the bill has passed the Senate.

I strongly support the substance of the bill, but even more I applaud the serious thinking that is behind it. Typically, when a new department is created, Congress has placed the secretary of that department at the bottom of the line of succession. No thought goes into the relative importance of the office. In this case, the office is different. The department is substantial and concerned with matters of national security. It would make no sense to blindly follow custom and place the secretary of homeland security last in the presidential line of succession. The bill sensibly places the secretary just below the big four cabinet officers: secretary of state, secretary of the Treasury, secretary of defense and attorney general.

It is this willingness to seriously think through the order of the line of succession that could serve as a model for considering other more substantial changes that I will suggest in my testimony. The main message I wish to convey today is: now is the time to rethink our system of presidential succession, not after a succession crisis. If you craft succession provisions that provide for clear, orderly, legitimate succession even after a terrorist attack, you will have won one battle in the war on terrorism. Let us hope that we never need these provisions, but also, let us show our enemies that our institutions of government will not be paralyzed.

In this statement, I will sketch out several large issues that Congress should address to improve the current presidential succession system.

I. Everyone in the line of succession lives and works in the Washington, D.C. area

All of the officials in the line of succession live and work in near proximity to each other. We do take some precautions to ensure that everyone is not in the same place at the same time, e.g. at the State of the Union, one cabinet member is not present. But if, God forbid, terrorists detonated a nuclear device in Washington, everyone in the line of succession might be wiped out. We might then see a parade of generals, undersecretaries, governors and others claiming to be in charge.

How could we address this problem? The Constitution provides that Congress may specify by legislation "what Officer shall then act as President" if both the presidency and vice presidency are vacant. The answer is for Congress to create several additional offices outside of Washington, D.C. to place in the line of succession as a backstop against a catastrophic disaster. The president would nominate individuals to hold these offices, and the Senate would confirm them. Congress should not constrain the president's choice, but it might indicate that the kind of people a president should consider are sitting and former governors and former presidents, former vice presidents, former cabinet secretaries and former members of Congress. Sitting governors could hold these offices in addition to the office of governor, unless they were prohibited from doing so by state law. All of the other former officials would be private citizens who could be nominated to fill the offices. The creation of these offices would offer some assurance that we will always have someone in the line of succession survive an attack.

What duties would these officers perform? Being an officer of the United States implies that one has duties to fulfill. Congress should not simply create offices without function. There are a number of ways that Congress could structure these duties. My proposal is that these four or five offices would be regional security advisers, possibly with some responsibility for regional coordination of homeland security measures. The primary duties of these officers would be advisory. They would receive remote security briefings on a regular basis and convene by secure conference call with the president and other national security advisors to give input to the president. The president would hopefully choose individuals from different regions of the country. If officers in the line of succession had little involvement with the security policies of the administration, they would be woefully unprepared to take over after a terrorist attack, even if they had prior experience in government. The advisory role I propose would benefit the president and better prepare the officers to take over the presidency if necessary. In some ways the role I envision for these advisors parallels the role of the vice president as it has developed over the past thirty years. Starting

with Vice President Mondale, vice presidents have become close confidants of presidents, especially on national security measures. We have come a long way from earlier this century when Harry Truman took office after the death of FDR and did not know that we had been working on an atomic bomb. As national security advisers, we would not expect the regional officers to have the same level of access as the vice president has to the president, but a significant role will better prepare the individuals and the country if a catastrophic attack killed many in the line of succession. These officers might also be given a role in coordinating homeland security regions in their regions, especially if sitting governors were chosen.

Where in the line of succession would these four or five regional officers be placed? Given the substantial functions of the big four cabinet secretaries and the secretary of homeland security, these five positions should precede the regional officers. But I believe that these regional officers should precede or possibly replace the cabinet officers lower in the line of succession. In most cases, a president does not select a secretary of education or agriculture for his or her ability to lead the country in a time of crisis. In these instances, the main concern is the ability to function in a particular policy area. The regional advisers, on the other hand, would be picked almost exclusively for their ability to assume the presidency if necessary. And hopefully, the regional council of advisers would be made up of people who had already served in public life at a high level or are sitting governors. One other, added benefit would be that each time we elect a new president, we would have a series of Senate confirmation hearings that would emphasize to the American people that there is a conscious effort to put high quality people in the line of succession. It would send a signal that we are prepared to rebound from the worst-case scenario.

II. The Role of Congress in the Line of Succession

One of the thorniest set of questions that should be addressed relates to the role of Congress in the line of presidential succession. Under which circumstances, if at all, should congressional leaders be placed in the line of succession?

The dominant position among constitutional scholars today is that it is unconstitutional for congressional leaders to be in the line of succession. The most explicit reason is found in the language of Article II. Congress shall specify "what Officer" shall appear in the line of succession. It is fairly clear that the framers of the Constitution meant that "Officer" refers to an officer of the United States, who must be a member of the executive branch. Congressional members and leaders are not officers of the United States. In addition, a larger structural argument is that bringing congressional leaders into the line of succession violates separation of powers' principles. If we were a parliamentary system, a president (or prime minister) chosen by a majority of the legislature would be the norm, but the framers were clear in rejecting that model. James Madison made these arguments during the debate over the first presidential succession act. Akhil Amar is the most forceful proponent of this argument today.

As a pure matter of the intent of the framers, I share the view that Congress was not intended to be part of the line of succession. Historically, Congress has gone back and forth on this question, with the first succession act (1792-1886) including only congressional leaders, the second act (1886-1947) taking congressional leaders out and including only the cabinet, and our current act (1947-present), which includes congressional leaders followed by the cabinet. Given this history, I encourage you to approach the question in a practical way. When does it make sense to have Congress in the line? Presidential succession covers a number of scenarios, the death, incapacity, resignation, removal and failure to qualify of the president. In considering each of these scenarios, you may come to the conclusion, as I have, that Congress's role in the line of succession might be significantly reduced in many of these areas.

Presidential incapacitation. If the president is incapacitated and the vice presidency is vacant, then the Presidential Succession Act calls on the Speaker of the House to stand in as acting president. To do so, the Speaker must resign from the speakership and from his or her seat in Congress. It is hard to imagine a Speaker resigning his or her post in order to take over for a president who goes under anesthesia for minor surgery and might resume the duties of the presidency within hours. One might also imagine a scenario whereby a president fades in and out of capacity. A president after a heart attack or stroke recovers

sufficiently to resume the office and displaces the Speaker who had assumed the role of acting president. Then the president suffers a setback, at which time a new Speaker of the House, recently elected upon the departure of the old Speaker, would then be called upon to act as president.

In addition, incapacitation magnifies the issue of the presidency switching parties. Whether or not you believe that it is appropriate for the presidency to switch parties upon the death of the president and vice president if the Speaker is of the opposite party, it makes little sense in the case of incapacitation. What if an attack killed the vice president and wounded the president? Let's posit that the president's wounds are severe enough to keep him from performing his duties for two or three weeks. Should a Speaker of the House of the opposite party take over for that period of time? Would that person keep the staff or the cabinet of the disabled president? Would he have access to sensitive policy and national security information for this brief period? In all but the most extreme case of incapacitation, where a president is likely never to recover, it makes no sense for an interloper from the other branch of government, and perhaps from the opposing party, to take over temporarily. The logical choice for succession for incapacitation is the cabinet. Congress could rewrite the succession act to take Congress out of the line in these instances.

Impeachment and Removal: The line of succession also applies to the case when the vice presidency is vacant and the president is removed from office. We have had two instances in our history that approached this scenario in the presidencies of Andrew Johnson and Richard Nixon. After the assassination of Abraham Lincoln, Andrew Johnson assumed the presidency, leaving the vice presidency vacant. Before the ratification of the Twenty-fifth Amendment in 1967, there was no mechanism for filling the vice presidency. Johnson was impeached and came within one vote of being removed from office. Johnson had run with Lincoln as a Republican, but was viewed as a member of the opposition party by the radical Republicans in Congress. Had Congress removed Johnson, the Senate president pro tem, who voted for Johnson's removal, would have succeeded him. In Nixon's case, Vice President Agnew had resigned, and some in Congress foresaw the demise of Nixon himself. A group of representatives encouraged Carl Albert, then Speaker of the House, to hold up the confirmation of Gerald Ford for Vice President, so that Congress could then remove Nixon and elevate the democrat Albert to the presidency. While Albert does not seem to have seriously entertained such a strategy, there were many who did. The seriousness of the effort is evidenced by the fact that Ted Sorensen, former aide to Kennedy and Johnson, was tasked to write memos planning for the transition into office of an Albert administration.

Having congressional leaders in the line of succession in the case of the removal of the president might in extreme cases encourage Congress to remove a president of the other party just so the presidency would switch parties. If a president is truly deserving of removal from office, Congress would be less self-interested if the cabinet were next in the line of succession. Congress would then limit itself to determining when the president is to be removed without the prospect of partisan gain from the removal. Again, cabinet succession is more appropriate in this case. If others in the cabinet share in the corruption of the president, Congress could remove as many cabinet members as it sees fit.

Failure to Qualify. The Twentieth Amendment gives Congress the power to specify who shall serve as president in the case where no one qualifies to be president when a new presidential term begins on January 20th. The most likely scenario for a failure to qualify is an election controversy. The 1876 election, for example, was not fully resolved until just a few days before the presidential term was about to begin (then in March). One might also contemplate a situation where no one receives a majority of the electoral college, throwing the election to Congress, and Congress deadlocking on a choice. Finally, one should consider the case of a terrorist attack that kills the president and vice-president-elect shortly before taking office. In all of these cases, cabinet succession is not possible. A new cabinet cannot be officially nominated and confirmed until after a new president takes office. The terms of the exiting president and vice president end at noon on January 20th. If congressional leaders were not in the line of succession, this would leave only the cabinet of the previous administration in the line of succession. It would lead to a perverse result that an election controversy or terrorist attack would give the presidency to the secretary of state of the prior administration. The old cabinet would reflect an earlier political reality. The secretary of state of the previous administration might have been nominated and confirmed eight years before. The prior

administration might have been discredited, and the president may have decided not to run for office, and the election controversy or pre-inauguration attack would then return a member of that administration to office. Or a president might have been soundly defeated for office by a challenger, but if an attack killed the president-elect and vice president-elect, the secretary of state of the defeated president might become president.

In the case of no president able to qualify for office on January 20th, it makes sense to have Congress in the line of succession. Much of Congress would have been elected at the same election as the deceased president-elect, and its leaders appointed by a majority of the House and Senate respectively. While not a perfect solution to the problems of a failure to qualify or a pre-inauguration terrorist attack, including congressional leaders in the line of succession for this purpose is superior to having the previous cabinet take over.

As a constitutional matter, it is also defensible to include Congress in the line of succession for this purpose. The Twentieth Amendment that authorizes Congress to specify who will be president if no one qualifies does not use the term "Officer" found in Article II. It reads: "...Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified..." This language does not in any way limit the person that Congress may specify to act as president.

Death or Resignation. If the president and vice president have died or resigned from office, current law calls for the Speaker of the House to be the next in the line of succession followed by the president pro tem of the Senate. Should congressional leaders remain in the line of succession for death and resignation or would we be better off with a cabinet succession arrangement? There are good policy reasons to support either case. In the end, I have come to the conclusion that it would be better to take Congress out of the line in the case of death or resignation, but this is a close call, and you should weigh carefully the pluses and minuses of both arrangements.

On the positive side for having members of Congress in the line of succession--they are elected. When President Truman assumed the presidency, the succession act included only cabinet members, not members of Congress. Truman proposed putting congressional leaders back in the line of succession. His main argument was that a person who succeeds to the presidency should be elected. The Speaker of the House is elected by the people of his or her district and then again elected to lead the House by a majority of members. The Speaker has a claim to having been democratically elected by a majority of the country, albeit indirectly. This of course is less true of the president pro tem of the Senate. The pro tem is elected by the people of his or her state and again chosen by a majority of the Senate, but the pro tem is not selected to lead the majority. Rather, he or she is selected on the basis of seniority in the majority party, an honor for long service rather than a vote of confidence to lead a majority.

On the opposite side of the argument, having congressional leaders in the line of succession opens up the possibility of the presidency switching parties in the middle of a term. Imagine a terrorist attack in 1997 that killed President Bill Clinton and Vice President Gore and elevated Speaker Gingrich to the presidency. Or conversely, had a terrorist attack in 1982 killed President Reagan and Vice President Bush, Speaker Tip O'Neill would have become president. Cabinet succession would preserve greater continuity in the policy of the administration. In addition, cabinet members are major figures, who have been given the stamp of approval of the Senate, a democratically elected body.

The Bumping or Supplantation Procedure

One provision of presidential succession act that you should reconsider is the 'bumping procedure'. If the presidency passes to a cabinet member, then a newly elected Speaker of the House or a new president pro tem of the Senate can replace a cabinet member who has been serving as president. This provision was put into the 1947 succession act because of Truman's belief that elected officials should take priority over non-elected officials in the line of succession. Imagine a catastrophic attack kills the president, vice-president and congressional leadership. The secretary of state assumes the duties of the presidency. But whenever

Congress elects a new Speaker or president pro tem, that new leader may 'bump' the secretary of state. The result would be three presidents within a short span of time. Even more problematic, the act does not specify that the Speaker or president pro tem needs to 'bump' a cabinet member immediately. You might then have the case of a cabinet member acting as president, but the secretary would live under the threat of being bumped from the office by congressional leaders at any time, a scenario that would completely undermine our system of separation of powers.

Finally, there is the extreme case that intersects with the problem of the continuity of Congress. Imagine a scenario where the president, vice president and most of the Congress were killed (say at a State of the Union address). The secretary of state would act as president, but only until a new Speaker of the House or new president pro tempore of the Senate were elected. But in such an extreme scenario Congress would have trouble operating in a normal fashion. If most of Congress had been wiped out, the House of Representatives in particular would have had difficulty reconstituting itself. Because the House of Representatives fills its vacancies only by special election, it could be many months until the vacancies were filled. In recent years, it has taken over four months on average to fill House vacancies. After a catastrophic attack, the House would face one of two scenarios. First, it might not be able to meet at all because the constitution defines a quorum as a majority of the body. This would mean that no new Speaker could be elected for months. The secretary of state would remain president until either a new Speaker or new pro tem took the office (A new pro tem might be elected more quickly as gubernatorial appointments would replenish the Senate quickly). The alternative is more troubling. The House has defined its quorum more leniently than the Constitution's majority of the body. The current House precedents hold that a quorum is a majority of those "chosen, sworn and living." In the extreme scenario when only five members of Congress survived an attack, three of them might convene and elect a new Speaker who could then bump the secretary of state and become president for the remainder of the term. While this is an unlikely scenario, would we feel secure in a president who had been elected by 20 members of the House, or 50, or 100 or even 200?

To avoid these scenarios, I urge you to consider removing the 'bumping procedure' and fixing the continuity of Congress problem by ensuring that the House and Senate are returned to near full membership as quickly as possible. The Continuity of Government Commission has recommended that a constitutional amendment providing for emergency interim representatives to be appointed to fill House vacancies and stand in for incapacitated members if there were an attack killing significant fraction of Congress.

The President Pro Tempore. If Congress leaves congressional leaders in the line of succession, it must seriously consider whether to include the Senate president pro tempore in the line of succession. There are many individual presidents pro tempore of the Senate who could have ably acted as president had they been called to do so. The problem lies not in individuals, but the criterion by which the president pro tem is selected. For many years, the custom of the Senate has been to select the longest serving senator of the majority party as the president pro tem. While experience in the Senate would be a plus, in general the criteria for selection are not the best predictors of fitness to hold the presidency.

First, the pro tem does not represent a majority of senators in the same way as the majority leader. A pro tem may be of the same party as the majority, but he or she might represent a small wing of the party. Second, a president pro tem will likely be one of the oldest senators. Some will be in excellent health, but others may not be.

Congress could consider including the majority leader in the line of succession instead of the pro tem. But Congress might also improve the status quo with a better selection of and larger role for the president pro tem. Congress could simply indicate that it will not necessarily follow the custom of electing the longest serving senator of the majority party as president pro tem. It should indicate that the holder of the office will be selected based on his or her fitness to hold the office of president in an emergency. The same person who is the longest serving senator of the majority party might very well also be an excellent choice to serve in the line of succession. But if the Senate were merely to indicate that it had changed its criteria even though the holder of the office might not change, it would send a signal to the American people that we care about presidential succession.

Second, the president pro tem of the Senate, if he or she is to remain in the line of succession, should receive regular executive branch security and other briefings. Just as in the case of regional homeland security officers mentioned earlier in this testimony, the pro tem and the president would gain from such briefings. It would also better prepare the pro tem for the presidency if the need should arise.

III. Incapacitation

The problem of incapacitation of the president plagued our nation for many years before the ratification of the Twenty-fifth amendment in 1967. The most famous example of incapacitation in the presidency was the end of the Wilson presidency, where the president was unable to function, and presidential decisions were apparently made by his wife and close advisers. The Twenty-fifth amendment provides a significant amount of protection against this scenario. It has detailed procedures for the transfer of power from a president to a vice president and back again. It provides for both voluntary and involuntary transfers of power. But it has one weakness. It does not at all address the problem of an incapacitated presidency when the vice presidency is vacant. In this case, presidential incapacitation is not covered by the Constitution, but by the succession act of 1947, which is vague about the details. The original version of the Twenty-fifth amendment that came before the Senate Judiciary committee in 1963 provided for members of the cabinet to take over for the president if the vice presidency was vacant, and it included the same detailed procedures that apply to the vice president. However, these provisions were taken out for political reasons. If we were redrafting the Twenty-fifth amendment, I would recommend to you the original version that provides for cabinet members taking over for incapacitation. But given the current circumstances, I recommend that you try to provide more guidance in the presidential succession act for presidential incapacitation when the vice presidency is vacant.

IV. The Immediate Need for a President. After an attack, there may be a need for a new president to act immediately. One can of course think of the most pressing case if a president needs to consider launching a nuclear attack. But short of this ultimate scenario, a president may have to send troops into action, enter into delicate negotiations with allies and adversaries, or increase intelligence surveillance within hours of an attack.

Unfortunately, in the aftermath of an attack, it is unlikely that there will be immediate clarity as to who is alive, who is incapacitated, and where all of the members of the line of succession are. Our presidential succession act does not adequately account for the confusion that would undoubtedly follow an attack.

Take for example the case of an attack that seems to have killed the president, vice president, the Speaker, pro tem and the secretary of state. Let us say that circumstances require immediate decisions that only the president could legitimately make. In our scenario, the secretary of the Treasury assumes the duties of the president, orders the bombing of enemy targets, rounds up thousands of foreign nationals, and threatens the launch of nuclear missiles. Thirty-six hours after the attack, the secretary of state is located. He had been trapped in a bunker, and his communications systems had failed. By all rights the secretary of state should have been sworn in as president, as he is ahead of the secretary of the Treasury in the line of succession. But now the secretary of the Treasury has acted in a significant way as president of the United States. Should the secretary of the Treasury stand aside for the secretary of state or not? The law itself is vague about this subject.

First, there is a significant amount of complexity of the law. If the president or vice president is incapacitated and then later recovers, they may bump out a congressional leader or cabinet member who is acting as president. If the Speaker or pro tem is incapacitated and recovers, he or she might bump a cabinet member who is acting as president. However, a cabinet member cannot bump another cabinet member higher in the line of succession. So if the attorney general were acting as president and the secretary of defense (who is higher in the line of succession) recovers from an injury that had incapacitated him, the attorney general would remain president.

But in our scenario, the secretary of state was not incapacitated, just incommunicado. Thus the law gives no guidance on how to proceed. Because in reality, we might need to have someone designated as president within minutes of an attack, there is the real possibility that the legitimate acting president will be passed over for reasons of expediency. But the later appearance of a cabinet member who should have been acting president would create confusion at the time we need clarity. It might also precipitate a struggle for the office that would seriously undermine our political system.

There is no easy answer to this problem, except that the law should recognize that the aftermath of an attack will not be orderly and it should provide for different contingencies. In our scenario, Congress could structure the law so that the secretary of the Treasury continues to act as president with the rationale that important decisions would likely be made and that the presidency should not change hands frequently. Or it could empower the secretary of state to take over. Either course is reasonable, but Congress should be clear about how we ensure that we have a president in the very short term (minutes or hours after an attack) and provide guidance as to who should be president for the longer term after the fog of a catastrophic attack clears.

V. A Special Election. What if a significant attack occurred early in a term and left a successor of questionable ability in office? Congress should consider holding a special election to fill the remainder of the term of the presidency in certain cases.

Congress has the power to pass legislation to require a special election for the presidency to fill the remainder of an unexpired term. Just as special elections are held for vacant House and Senate seats, a special election for the presidency is possible. It was, in fact, included in the first presidential succession act. Under that law, if the presidency and vice presidency became vacant, the president pro tem of the Senate would have taken over the presidency or the Speaker of the House would have if there were no president pro tem. Under either of those circumstances, if the vacancies did not occur late in a presidential term, the congressional leader would act as president only until a special election could be held. James Madison had been an advocate of such a special election during the constitutional convention.

I propose that if both the presidency and vice presidency become vacant in the first two years of a term, then a successor shall act as president, but a special election for president shall be called six to twelve months after the vacancies. This special election would provide two benefits. First, it would allow the people to elect a president they trust to handle significant security matters. If the line of succession puts the presidency in the hands of someone the people do not support, then a special election would allow the people to elect another. Second, a special election might give needed legitimacy to a successor. If the next president is a relatively obscure cabinet official or a newly elected Speaker of the House or president pro tem, then a special election would put a stamp of legitimacy on the acting president.

Our current presidential system of electing presidents is lengthy, and it would not make sense to have a severely truncated election. But if the vacancy occurred within the first two years of a term, an election could be set to fill the remainder of the term with enough time for candidates to run in primaries and a general election, possibly as soon as six months after a vacancy, but more likely closer to a year.

VI. Fix the Inauguration Scenario. The inauguration of a new president is the most vulnerable time for the government, when the mechanisms for providing an orderly transfer of power to a presidential successor threaten to break down. Not only do most of the figures in the line of succession gather together for a public ceremony, but also there are often gaps between when the line of successors of the old administration leaves office and the new one is put in place.

At noon on January 20th following an presidential election year, the term of the outgoing president ends and the new president's term begins. The president-elect, vice president-elect, the Speaker of the House and the president pro tem of the Senate all typically attend the swearing-in ceremony, as do most Supreme Court justices and members of Congress. With all of these figures present, a catastrophic attack at the

inauguration would kill the top four in the line of succession. Who would succeed to the presidency? The cabinet. But which cabinet? As the president-elect would not have had time to get his cabinet secretaries confirmed, the cabinet of the previous administration would be next in line. Terms of cabinet members are not constitutionally limited. Unlike the outgoing president and vice president, the terms of the cabinet members from the prior administration would continue until they submit resignation letters. So a catastrophic attack at an inauguration would be followed by a mad scramble to determine which cabinet secretaries of the previous administration were still alive and had not submitted resignation letters. If the secretary of state of the previous administration were alive and had not yet resigned, he or she would be next in line to be president.

There is, however, one additional wrinkle in the succession procedure. Acting secretaries are in the line of succession as long as they were confirmed by the Senate for some position. By custom, an outgoing secretary of a department resigns by noon of January 20th, even though they are not constitutionally required to do so. The department then is run by an acting secretary, who might have been the number two or three person at the department. Unless that person is a career official, he or she would have required Senate confirmation for their lower level posts. So in the case of an attack on the inauguration, it is likely that the number two or three person at the state department of the previous administration would be next in line for president!

The aftermath of the inauguration scenario would also be confusing. If a somewhat obscure subcabinet official assumed the presidency, he or she would remain in that post until Congress could elect a new Speaker of the House or president pro tempore. As noted earlier, Congress has its own problems reconstituting itself, so it is possible that this presidency would last for some time. Or alternatively, it is possible that this president would be displaced by a Speaker of the House elected by a few remaining members of Congress.

An attack at an inauguration could lead to a parade of horrible scenarios that would demoralize rather than reassure the nation. Congress should act to fix this problem. I propose three changes in inaugural custom that would greatly improve the succession system and one other change in law that would be beneficial as well.

The central difficulty with presidential succession after an inauguration is that the new president would not have a cabinet in place. It is common for a president-elect to announce the names of cabinet nominations in advance of January 20th so that the Senate can begin confirmation hearings. After the inauguration ceremony, the Senate will come into session to consider most of the nominees. Sometimes the nominees are confirmed three or four hours after the term begins, although in recent years there have been cases of a day passing before the confirmations take place, and even one case, in 1988 where five days passed. During some window of time (possibly only three or four hours), the new president does not have a cabinet and the line of succession is populated with secretaries or acting secretaries of the prior administration.

Establish a Custom that the Outgoing President Nominates the Incoming Cabinet on the morning of January 20th. If the outgoing president would nominate the cabinet chosen by the incoming president, say at 9:00 a.m. on January 20th, the Senate could then come into session to confirm the non-controversial nominees. The advantage of such a system is that the cabinet would be in place just before the president-elect takes office, and several members of the cabinet could stay away from the inauguration ceremony to ensure some continuity of administration after an attack.

Hold the public ceremony for the inaugural swearing-in on January 21st. If it is not possible to establish a custom of the outgoing president making nominations for the president-elect, it might also be possible to move the time of the public ceremony. There is precedent for such a move. If January 20th occurs on a Sunday, the public inaugural ceremony is held the next day. Instead of the current arrangement, the president could be sworn in privately at noon on January 20th. The president could then nominate cabinet members, and the Senate could confirm them. The following day at the public inauguration ceremony, some of the members of the confirmed cabinet would avoid the ceremony.

Secretaries of Departments of a prior administration should stay in their posts until their replacements are confirmed by the Senate. It is important that some of the cabinet secretaries remain in place until their successors are confirmed. It would lessen the possibility of an acting secretary ascending to the presidency.

Remove Acting Secretaries from the Line of Succession. Congress should amend the presidential succession act so that acting secretaries are not part of the line of succession. It would be a particularly helpful change for the inauguration, but it would be a sensible change at all times. It makes little sense, for example, that an acting secretary of state would outrank the confirmed secretary of the Treasury in the line of succession.

Other problematic scenarios before inauguration day. An attack on inauguration day would threaten an orderly transfer of power. But other scenarios also merit your attention. Some scenarios will require laws to fix, and others might require change in the rules of the political parties. Let me simply list the problematic scenarios in reverse chronological order. If terrorists were to target the president-elect and vice president-elect or candidates for president and vice-president, they might create great confusion.

What if the president-elect and vice president-elect were killed after the electoral votes were counted in Congress but before inauguration? What if no one secures a majority of the Electoral College and the election goes to the House of Representatives and the Senate to choose the president and vice president and terrorists kill several of the candidates? What if the president-elect and vice president-elect were killed after the members of the Electoral College cast their votes but before Congress counts the votes? What if those on the winning ticket in the November election were killed before the meeting of the Electoral College? What if a candidate died shortly before the November election? What if a candidate who received a majority of delegates in party primaries dies before the convention nomination?

Each of these scenarios is complex in its own way. It is worthwhile at a legislative and party level to try to devise procedures that would be acceptable to the American people if a crisis arose.