Testimony Before the Senate Committee on Rules and Administration
and the Senate Judiciary Committee
September 16, 2003
By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Southmayd Professor of Law and Political Science at Yale University, and have been writing about the topic of presidential succession for over a decade. In February 1994, I offered testimony on this topic to the Senate Judiciary Subcommittee on the Constitution, and I am grateful for the opportunity to appear again today. As my testimony draws upon several articles that I have written on the subject, I respectfully request that these articles be made part of the record.[1]

The current presidential succession act, 3 USC section 19, is in my view a disastrous statute, an accident waiting to happen. It should be repealed and replaced. I will summarize its main problems and then outline my proposed alternative.

First, Section 19 violates the Constitution's succession clause, Article II, section 1, para. 6, which authorizes Congress to name an "Officer" to act as President in the event that both President and Vice President are unavailable. House and Senate leaders are not "Officers" *within the meaning of the succession clause*.[2] Rather, the Framers clearly contemplated that a *cabinet* officer would be named as Acting President. This is not merely my personal reading of Article II. It is also James Madison's view, which he expressed forcefully while a Congressman in 1792.[3]

Second, the Act's bumping provision, Section 19 (d)(2), constitutes an independent violation of the succession clause, which says that the "officer" named by Congress shall "act as President . . . *until the* [presidential or vice presidential] *Disability*

be removed, or a President shall be elected." Section 19 (d) (2) instead says, in effect, that the successor officer shall act as President *until some other suitor wants the job*. Bumping weakens the Presidency itself, and increases instability and uncertainty at the very moment when the nation is most in need of tranquility.

Even if I were wrong about these constitutional claims, they are nevertheless substantial ones. The first point, to repeat, comes directly from James Madison, father of the Constitution, who helped draft the succession clause. Over the last decade, many citizens and scholars from across the ideological spectrum have told me that they agree with Madison, and with me, about the constitutional questions involved. If, God forbid, America were ever to lose both her President and Vice President, even temporarily, the succession law in place should provide unquestioned legitimacy to the "officer" who must then act as President. With so large a constitutional cloud hanging over it, Section 19 fails to provide this desired level of legitimacy.

In addition to these constitutional objections, there are many policy problems with Section 19. First, Section 19's requirement that an Acting President resign his previous post makes this law an awkward instrument in situations of temporary disability. It rules run counter to the approach of the 25th Amendment, which facilitates smooth handoffs of power back and forth in situations of short-term disability—scheduled surgery, for example. Second, Section 19 creates a variety of perverse incentives and conflicts of interest, warping the Congress's proper role in impeachments and in confirmations of Vice Presidential nominees under the 25th Amendment. Third, Section 19 can upend the results of a Presidential election. If Americans elect party A to the White House, why should we end up with party B? Here, too, Section 19 is in serious tension with the better

approach embodied in the 25th Amendment, which enables a President to pick his successor and thereby promotes executive party continuity. Fourth, Section 19 provides no mechanism for addressing arguable Vice Presidential disabilities, or for determining Presidential disability in the event the Vice President is dead or disabled. These are especially troubling omissions because of the indispensable role that the Vice President needs to play under the 25th Amendment. Fifth, Section 19 fails to deal with certain windows of special vulnerability immediately before and after presidential elections.[4]

In short, Section 19 violates Article II and is out of sync with the basic spirit and structure of the 25th Amendment, which became part of our Constitution two decades after Section 19 was enacted.

The main argument against cabinet succession is that presidential powers should go to an elected leader, not an appointed underling. But the 25th Amendment offers an attractive alternative model of handpicked succession: from Nixon to Ford to Rockefeller, with a President naming the person who will fill in for him and complete his term if he is unable to do so himself. The 25th Amendment does not give a President carte blanche; it provides for a special confirmation process to vet the President's nominee, and confirmation in that special process confers added legitimacy upon that nominee.

If the 25th Amendment reflects the best approach to *sequential* double vacancy—where first one of the top two officers becomes unavailable, and then the other—a closely analogous approach should be used in the event of a *simultaneous* double vacancy. Congress could create a new cabinet post of Assistant Vice President, to be nominated by the President and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a

moment's notice, and to lie low until needed: in the line of succession but out of the line of fire. The democratic mandate of this Assistant Vice President might be further enhanced if presidential candidates announced their prospective nominees for this third-in-line job well before the November election. In casting ballots for their preferred presidential candidate, American voters would also be endorsing that candidate's announced succession team of Vice President and Assistant Vice President. Cabinet officers should follow the Assistant Vice President in the longer line of succession.

This solution solves the constitutional problems I identified: The new Assistant VP would clearly be an "officer" and bumping would be eliminated. The solution also solves the practical problems. No resignations would be required—power could flow smoothly back and forth in situations of temporary disability. Congressional conflicts of interest would be avoided. Party and policy continuity within the executive branch would be preserved. And the process by which the American electorate and then the Senate endorsed any individual Assistant VP would confer the desired democratic legitimacy on this officer, bolstering his or her mandate to lead in a crisis.

The two additional issues I have raised today—Vice Presidential disability and windows of special vulnerability at election time—also have clean solutions, as explained in my 1994 testimony.[5] Thank you.

[1]These articles, in chronological order, are as follows:

Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing The Constitution's Succession Gap, 48 Ark. L. Rev. 215 (1995) (based on Senate testimony of 2/2/94)
http://islandia.law.yale.edu/amar/lawreview/1995Presidents.pdf

Akhil Reed Amar and Vikram David Amar, Is the Presidential Succession Law Constitutional?, 48 Stan. L. Rev. 113 (1995)
http://islandia.law.yale.edu/amar/lawreview/1995Succession.pdf

Akhil Reed Amar, Dead President-Elect, Slate, Oct. 20, 2000
http://slate.msn.com/?id=91839

Akhil Reed Amar, This is One Terrorist Threat We Can Thwart Now, Washington Post Outlook, Nov. 11, 2001
http://islandia.law.yale.edu/amar/oped/2001Terrorist.pdf

Akhil Reed Amar and Vikram David Amar, Constitutional Vices : Some Gaps in the System of Presidential Succession and Transfer of Executive Power, Findlaw, July 26, 2002
http://writ.news.findlaw.com/amar/20020726.html

Akhil Reed Amar and Vikram David Amar, Constitutional Accidents Waiting to Happen—Again, Findlaw, Sept. 6, 2002
http://writ.news.findlaw.com/amar/20020906.html

[2] For more discussion and analysis, see Amar and Amar, Presidential Succession Law, 48 Stan. L. Rev. at 114-27.

[3] According to Madison, Congress "certainly err[ed]" when it placed the Senate President pro tempore and Speaker at the top of the line of succession. In Madison's words,

> It may be questioned whether these are *officers*, in the constitutional sense. . . . . Either they will retain their legislative stations, and their incompatible functions will be blended; or the incompatibility will supersede those stations, [and] then those being the substratum of the adventitious functions, these must fail also. The Constitution says, Cong[ress] may declare *what officers* [etc.,] which seems to make it not an appointment or a translation; but an annexation of one office or trust to another office. The House of Rep[resentatives] proposed to substitute the Secretary of State, but the Senate disagreed, [and] there being much delicacy in the matter it was not pressed by the former.

Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 Papers of James Madison 235 (R. Rutland et. al. eds. 1983). Several members of the First and Second Congresses voiced similar views, see John D. Feerick, From Failing Hands: The Story of Presidential Succession 57-59 (1965); Ruth C. Silva, The Presidential Succession Act of 1947, 47 Mich. L. Rev. 451, 457-58 (1949).

[4] For more analysis of the first three problems, see Amar and Amar, Presidential Succession Law, 48 Stan. L. Rev. at 118-29. For more discussion of the fourth problem, see Amar and Amar , Constitutional Accidents. For more discussion of the fifth problem see Amar, Presidents; Amar, Amar Dead President-Elect, Amar, One Terrorist Threat.

[5] See generally Amar, Presidents. For additional elaboration, see Amar and Amar, Presidential Succession, 48 Stan. L. Rev. at 139; Amar, Dead President-Elect; Amar, One Terrorist Threat; Amar and Amar, Constitutional Accidents.