Prepared Testimony of

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Regarding
Ensuring the Continuity of the United States Government: The Presidency

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Chairman Lott, Chairman Cornyn, Senator Dodd, Senator Feingold, and members of the Committee on Rules and Administration and the Committee on the Judiciary: Thank you for the opportunity to address this joint hearing on the important issue of presidential succession and continuity in the executive branch of the federal government.

I am an Assistant Professor of Law at Florida International University College of Law and I appear today in my personal capacity as a legal scholar. I approach this topic having spent a great deal of time during the past three years studying, writing, and speaking about the question of presidential succession—initially focusing on creating the best, most structurally consistent double-vacancy succession procedure, then considering the specific context of the new reality created by the terrorist attacks of September 11, 2001.

I. DEFECTS IN THE DOUBLE VACANCY SUCCESSION STATUTE

The current version of the double-vacancy succession statute, 3 U.S.C. § 19, was proposed in 1945 by President Harry S. Truman and enacted into law in 1947. This law is the third exercise of congressional power under Article II, Section 1, Clause 6 to provide by law for the case of simultaneous vacancies in the offices of President and Vice President. The law in place from 1868 until 1947 had established cabinet succession, beginning with the Secretary of State. In proposing the change from cabinet to legislative succession, President Truman accepted the faulty premise that legislative succession is more democratic and that a Speaker acting as president has greater national democratic legitimacy than would an acting president drawn from the cabinet.

It generally is believed that intended targets of the coordinated terrorist attacks of September 11, 2001 included President Bush aboard Air Force One and Vice President Cheney at the White House. These history-changing events, and the ever-present concern for future worst-case scenarios, raise the specter of the invocation of § 19 in a way that the nation really has not experienced since the impeachment and trial of President Andrew Johnson in 1868. The post-9/11 scenarios place the statute's flaws in specific focus.

This Congress now possesses a unique legislative opportunity—the opportunity to revise a flawed law, a law whose flaws become most clear in a real or threatened crisis. Yet this body has the time for reasoned and deliberative exploration of the issue.

A. Faulty Premises of 3 U.S.C. § 19

In 1945, President Truman proposed the change from cabinet to legislative succession. Truman, who had succeeded to the White House upon the death of President Roosevelt in 1945, served his first term without a Vice President in those pre-Twenty-Fifth Amendment days. In nominating George Marshall to be Secretary of State, Truman recognized that he was, under then-existing law, appointing his immediate potential successor. He did not believe, however, that the chief executive in a democracy should possess the power to appoint his own successor. Rather, greater national democratic legitimacy would attach to an acting president who was an elective official, someone who had stood for election at some level. That most-democratic

official, Truman declared, would be the Speaker of the House, the leading officer of, in James Madison's words, the department of government having an "immediate dependence on, and intimate sympathy with, the people." The Speaker is elected every two years by voters in a congressional district and gains national democratic legitimacy by being placed in the speakership by a majority of the members of the House, themselves similarly elected.

Truman simultaneously recognized the risk that § 19 might precipitate a change of political party control, and thus policy direction, in the executive branch; he thus sought to establish a procedure that would ensure party retention of the White House. Truman urged Speaker succession as the solution. This followed inevitably from his initial conclusion that legislative, rather than cabinet, succession was the correct course. Having so concluded, the only question was whether the first officer in line would be the President Pro Tempore of the Senate (as under the original 1792 statute) or the Speaker of the House. Truman settled on the latter, arguing that the House was more likely than the Senate to be controlled by the same party as the White House, meaning the Speaker would be a member of the same party as the President.

Both of the premises on which President Truman relied have proven factually and theoretically incorrect over time. The period since 1947 has been characterized by long stretches in which the President's party is not in the majority party in one or both. More importantly there is nothing inherently undemocratic about the President appointing a potential successor; it is, in fact, a common part of our political system.

The President may appoint an immediate potential successor in two circumstances. One is the express presidential power under the Twenty-fifth Amendment, ratified in 1967, to appoint a Vice President when there is a vacancy in that office. The other occurs at the outset of the election process, when a presidential candidate hand-selects a running mate, the person who will be Vice President and the proverbial "one heart beat away" from the presidency. Selection of a running mate can be understood as the practical equivalent of an appointment, because the President and his running mate are, in essence, a package deal. Although the Vice President formally stands for popular election in 51 jurisdictions and for distinct election in the Electoral College, the outcome of the vice presidential election inevitably tracks the outcome of the presidential election. The presidential and vice presidential candidates appear on the ballot in tandem as a single ticket and voters case their ballots for that ticket. Electoral laws in all states currently prohibit voters from splitting their executive tickets, i.e., from voting for electors committed to one presidential candidate and a different vice presidential candidate. Many states then formally or informally bind electors to vote in accord with their commitment and with the statewide popular vote. A vote for one presidential candidate automatically functions as a vote for that candidate's hand-picked running mate.

Appointing a contingent successor is a proper executive function in a democracy, so long as that appointment is not unilateral. Rather, democratic principles require that the appointment be made with some outside approval of the selection, particularly an approval that reflects, even indirectly, the support of a national constituency. Thus, both houses of Congress must confirm a vice presidential appointee under the Twenty-fifth Amendment. And, at least formalistically, voters approve a vice presidential candidate by voting for a presidential ticket. Indeed, at least

theoretically voters could reject a presidential candidate because of the candidate's choice of running mate.

The point is that the President essentially hand-picks his Vice President, the immediate contingent successor, without complaints as to the democratic legitimacy of that process or the democratic legitimacy of the Vice President succeeding as President. There likewise should be no complaints as to the democratic legitimacy of a cabinet officer, hand-picked by the President, being at the head of the line of double-vacancy succession. National democratic legitimacy is provided by the confirmation of all cabinet appointees by the Senate, a popularly elected body. In fact, despite President Truman's insistence that the elevation of a member of the House to the speakership grants that person greater popular legitimacy, it is worth nothing that both the Speaker and cabinet officers derive national democratic legitimacy from approval by one popularly elected house of Congress--the Speaker by the House of Representatives, cabinet secretaries by the Senate.

Cabinet officers acting as president possess what Akhil Amar and Vikram Amar call "apostolic legitimacy," national democratic legitimacy by virtue of having served as the chosen policy surrogate of the nationally elected President. Cabinet secretaries are hand-selected by the President to represent the same national electoral constituency and to help the President exercise the executive power and carry out a national policy agenda. This connection to the President, and to that national constituency, provides a national base of legitimacy to a cabinet officer pressed to act as president. The link between cabinet officers and the President preserves some measure of the last presidential election, the most recent popular democratic statement on the direction of the executive branch.

Moreover, as between cabinet and legislative succession, the former better assures party continuity in the White House. As long as the possibility of divided government—of legislative and executive departments controlled by different parties—exists in the constitutional structure, the possibility of a change in party control and policy direction exists if legislative officers occupy the top of the line of succession. Cabinet officers generally will be members of the President's party and likely will be committed to the same policy agenda as the President. As acting president, the Secretary of State, for example, likely will continue to pursue those policies upon succession, which may not be true of a legislative officer from a different political party carrying a different policy agenda.

B. What the Events of September 11 Tell Us About The Faulty Premises of § 19

The events of September 11 shed light on the mistaken premises underlying § 19. Had the attacks succeeded in assassinating President Bush and Vice President Cheney, it is likely that Secretary of State Colin Powell would have been well-situated to lead the nation. He would have brought the experience of his position as one of the delegatees of the late President's foreign affairs and military powers. He would have been more knowledgeable of the military and international landscape and better able to lead and guide the ensuing military, political, and diplomatic efforts. His national profile would have provided nationwide public confidence and support in the role of national healer during the time of mourning. This confidence comes not only from the person of the cabinet officer (Secretary Powell brings an especially high national

profile and reputation), but also from that personal and political connection to the nationally elected President and the national constituency he represented.

As to the problematic matter of party change, consider that on September 11, 2001, the Senate was under Democratic control, meaning that the third person in the line of succession, the President Pro Tempore, was of a different political party than the Republican President. The only way to ensure party and policy continuity is by placing cabinet members at the front of the line of succession. Such continuity by an acting president is essential in the wake of the type of catastrophic attack directed against the structure of government itself that 9/11 suggests may be possible.

II. WHAT SEPTEMBER 11 CHANGES ABOUT THE STATUTORY NEEDS

Prior to September 11, it would have been possible to argue for the simple policy change of removing legislative officers from the line altogether and relying solely on cabinet succession. Cabinet officers in the line of succession would have seemed sufficient on the assumption (similar to the assumption that likely drove President Truman and Congress in 1945) that an attack killing every single member of the cabinet was unlikely. September 11 changed this assumption by raising the specter of a series of surprise coordinated terrorist attacks striking down several executive branch officers in multiple locations simultaneously. The risk of a more comprehensive attack inflicting more comprehensive damage on the structure of the federal government demands more comprehensive changes to § 19.

A. Cabinet Succession

The primary change, as discussed, would re-establish primary cabinet succession, as existed under the law from 1868 until 1947, removing the Speaker and President Pro Tempore from the head of the line. This guarantees an acting president who, prior to acting as president, was a top official in the executive branch of the national government, a member of the President's political party, and hand-picked by the President to exercise a delegated portion of the executive power in furtherance of the President's national agenda. This officer also is confirmed by a Senate acting with knowledge of amended § 19 and the fact that this individual, if confirmed, will be high in the line of presidential succession.

But the new mass-destruction scenarios demand a related change of a longer line of succession. Given my inclination towards cabinet succession, one way to extend the line is to create new cabinet-level positions. One such office that should be created is that of First Secretary, a designated second successor, one officer whose official job is to become acting president in the event of a double vacancy. This individual must satisfy the constitutional presidential eligibility requirements and, most importantly, his selection and Senate confirmation would focus on this specific and unique role of being a contingent presidential successor and the suitability and qualifications of this nominee for that role.

The First Secretary's primary duty would be to remain in a secure location outside Washington, D.C. and away from the President and Vice President. This officer must also be in contact with the President and the administration, as an active member of the cabinet, aware of

and involved in the creation and execution of public policy. The benefits of having the President's hand-picked policy surrogate assume the executive power derive from that surrogate knowing and continuing current policies, which in turn assumes that the individual had, in fact, been working on behalf of the President and those policies. It is not enough for a successor to previously have been placed in office by presidential nomination and Senate confirmation; he must actually have been in the loop of presidential policymaking prior to the attack that created the vacancy.

The creation of this specialized cabinet office also dovetails with President Bush's "shadow government" plan. The notion underlying the shadow government is to have members of every executive department and agency working in a secure location, preparing to continue the executive branch in the event of a mass-attack on the federal government. A shadow government scheme, headed by a single proper statutory successor, is effective in avoiding the most catastrophic scenario by ensuring that one statutory successor and some portion of the executive branch is secure at all times and will survive the attack. The primary function of the First Secretary would be to lead this contingency body, both while working in the shadows and as the new executive branch in the wake of an attack.

B. Continued Relevancy of Legislative Succession

The Speaker and President Pro Tempore should not be at the head of the line of succession; immediate succession by either raises the structural difficulties already discussed. Nevertheless, both legislative officers should remain in the succession order, but at the end of the line. The second lesson of 9/11 is that the line of succession should contain everyone who constitutionally may be an officer under the Succession Clause and who, as a normative policy matter, should be included in the line. Legislators are not favored successors, but having two additional officers in line provides additional flexibility to handle the mass-destruction scenario, by providing two more individuals who legally may assume the executive power in the wake of a destructive attack.

This warrants a brief mention of congressional continuity, a subject that the Judiciary Committee has considered separately. A plan to ensure continuity in Congress ensures the continued presence of a Speaker and President Pro Tem, since the first step in each house will be to choose those officers. So long as there is a working Congress, there will be a Speaker and President Pro Tem, either of whom would be statutorily eligible to act as president upon resignation of his legislative seat. Maintaining these legislative officers in the line of succession thus ensures a proper statutory successor in the event of the worst-case scenario of the President, Vice President, and all cabinet secretaries (including the First Secretary somewhere outside of Washington) being killed in an attack.

This raises the question of whether legislative officers such as the Speaker and President Pro Tempore are eligible under the Succession Clause; my answer is yes, they are eligible. The Succession Clause provides that "Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and the Vice President, declaring what Officer shall then act as President and such Officer shall act accordingly." U.S. CONST. Art. II, § 1, cl.6. This provision refers to "officers," unmodified by reference to any department or branch.

Elsewhere, the Constitution refers to "Officers of the United States" or "Officers under the United States" or "civil officers" in contexts that limit the meaning of those terms only to executive branch officers, such as cabinet secretaries.

The issue is whether the unmodified "officer" of the Succession Clause has a broader meaning. On one hand, it may be synonymous with the modified uses of the word elsewhere, all referring solely to executive branch officials, in which case the Speaker and President Pro Tem cannot constitutionally remain in the line of succession. On the other hand, the absence of a modifier in the Succession Clause may not have been inadvertent. The unmodified term may be broader and more comprehensive, covering not only executive-branch officers, but everyone holding a position under the Constitution who might be labeled an officer. This includes the Speaker and President Pro Tem, which are identified in Article I as officers of the House and Senate, respectively. The definitive meaning is not historically or structurally certain, as suggested by the fact that Congress on two occasions—1792 and 1947—has placed legislative officers in the line of succession. The broader reading of the Succession Clause is, at the very least, a reasonable one. Thus there is no basis to jump to the conclusion that including legislative officers in the statutory line is somehow inconsistent with the letter or spirit of the Constitution.

Finally, to the extent that legislative officers remain in the line of succession, even if at the bottom, such that either's actual assumption of the executive power will occur only in the most extreme circumstances, two practical concerns remain. First, having legislative officers in line continues the possibility of a change in party control in the frequent times of divided government. Second, the structural reality in the Senate is that the President Pro Tempore does not wield primary responsibility for the direction and control of the legislative or partisan agenda. The President Pro Tempore is the senior-most member of the Senate majority party and the presiding officer for debate in the absence of the Vice President, but true control over the Senate's agenda rests with the party caucus leaders, particularly the majority leader.

In February 2002, H.R. 3816 was introduced in the House of Representatives, that would have amended § 19 to address those two problems. First, the bill would have replaced the President Pro Tem in the line of succession with the Senate Majority Leader, recognizing that this is the legislator with power over the Senate policy agenda. Second, it would have empowered the President to designate the legislative officer who will be in the line depending on whether the President's party is in the majority or minority in that house of Congress —Speaker or House Minority Leader, Senate Majority or Minority Leader. The President could change that designation at any time if there were a change in party control of one or both houses. To the extent legislative officers remain anywhere in the line of succession, these changes ensure that there would be no change in party control, and thus in policy direction, in the (now more remote) event of succession by a legislator. It further ensures that whomever assumes the executive power is someone who has been active in setting the public agenda, whether in the executive branch or in Congress.

But note two new problems the proposal would create. First, it is not clear whether legislative party caucus leaders are legislative officers under the Constitution. An argument that they are not comes from the fact that party leaders are not chosen by the whole of a particular house, but only by the members of that party caucus. In any event, party leaders are not

legislative officers whose existence is constitutionally mandated, as are the Speaker and the President Pro Tempore; the Constitution does not require formal party caucuses or leaders of those caucuses and does not require that control of the house be determined according to party divisions and lines. The party structure and the party leadership offices are a product of an organizational decision by each house, established unilaterally pursuant to the Article I powers of each house to determine the rules of its proceedings. This means, of course, that party leadership offices could be eliminated unilaterally, if one house wished to move to a non-partisan structure. Given that the line of succession is established by statute, passed pursuant to the bicameralism and presentment requirements of Article I, § 7, it is structurally troubling to have the succession order include an officer whose office may be eliminated by the unilateral decision of one house.

Having legislators in the line of succession may leave Congress with a choice between two problematic ideas. On one hand is the clear risk of party change in the event of legislative succession; on the other hand is the inclusion in the statutory line of two legislators who, because of the manner of their selection and the nature of their office, do not obviously attain the same status as legislative officers. The question of which of these policy choices is preferable is something I expect to investigate more fully and something Congress must consider in any revisions to § 19.

C. Unworkability of a Different Extension of the Line of Succession

Another idea that has been floated, although never formally proposed, since September 11 would extend the line of succession to include state governors. Governors indeed are appealing additions to § 19. They are chief officers of the executive branches in their states. They are popularly elected by a statewide constituency, the same statewide constituency that selects Senators, as well as Representatives in some less-populous states. Many governors of larger states have national visibility that might provide some degree of national democratic legitimacy.

But there is no constitutional basis for including state officials in the line of succession. Even assuming, as I do, that the unmodified word "officer" in the Succession Clause is more comprehensive than only executive branch officers, it still can include only officers of the national government, officers who hold a position created by and drawing authority from the Constitution or laws of the United States. The word cannot include those whose office or power derives entirely from the law of a distinct sovereign political entity, such as a State. This reading is supported historically by the Framers' intent to create a stronger, more national, and more independent central government, a purpose that would be undermined if the national executive power could devolve to an individual whose office and authority are drawn entirely from the law of a particular state and whose loyalties perhaps lie more with state than national interests.

Proponents of this extension likely would respond that Congress could establish by law that every governorship is, automatically, an office of the national executive branch; the President would present, or nominate, the individual elected by the voters of each State to the Senate and the Senate would confirm that individual to this national office. Having been made an officer in the national executive branch, the governor now is an eligible successor under Article II, § 1. Nothing in the Constitution specifically forbids state officers from holding

federal offices, although most state constitutions specifically preclude federal officers from jointly holding significant state offices, presumably including the governorship. This plan thus may run afoul of the basic structural rules of State governments. It also raises a Tenth Amendment issue. If, under *Printz v. United States*, 521 U.S. 898 (1997), Congress cannot compel state officials to enforce federal law, it is hard to see how Congress could compel state officials to assume a leadership role in the national government under the direct authority of the United States.

There also is the difficulty of ordering among governors. It is not clear how Congress, in enacting framework legislation of general prospective applicability, could decide neutrally whether the governor of California or Florida or Arkansas should be higher in the line of succession. Making any such choice invites the very geographic and regional divisions, conflicts, and favoritism that the Framers sought to minimize by creating a national government in 1789. One answer might be to draft § 19 to enumerate an order among cabinet officers, then expressly delegate to the President the discretion to establish an order among the fifty governors. Presumably each President, not bound by the need to speak in neutral terms of prospective general applicability, would establish an order based on the current occupants of each governorship, looking to party affiliation and perhaps size and influence of each state. However, the sectional and regional favoritism remains; the choice of determining what region is favored simply has been shifted from Congress to the President.

I mention this idea only for purposes of rejecting it as an unworkable extension. To call governors (even if formally nominated by the President and confirmed by the Senate under the plan I have discussed) officers of the national executive branch is to elevate form over substance. They would have no true function within the national executive branch. They do not exercise any of the President's delegated executive power or act as the President's hand-picked policy surrogate or help the President represent his national constituency. They never attain the apostolic legitimacy that enables a cabinet secretary forced to act as president to do so with some level of national support and democratic legitimacy. Senate confirmation alone does not render an individual a nationally legitimate successor; that legitimacy comes from the link to the populist President and to the individual's work within that administration.

D. Conclusion

The unworkability of the extension to governors exemplifies a basic, but important, point. There are no possible extensions of the line of succession in § 19 beyond the cabinet and those special legislators who, through the additional credential of selection by a majority of one house of Congress, have been elevated to the status of legislative officers.

Congress can, and should, amend § 19 to create the best possible order of successors, which means cabinet officers at the head of the line. And it can establish a position such as First Secretary, an officer who, by staying out of harm's way and leading the shadow government outside Washington, lessens the likelihood of ever descending too far down the line of succession.

But this exhausts the officers who constitutionally or practically can act as president. The current line of succession, reordered, must be the starting point for a presidential succession process geared to the new mass-destruction scenario.

III. SPECIAL PRESIDENTIAL ELECTION

The single imperative change to double-vacancy succession procedure is to amend § 19 to provide for a special presidential election whenever an acting president is in the White House—that is, whenever someone other than the Vice President has assumed the executive power. Voters elect a new President and Vice President, under established Electoral College procedures, and place a President, rather than an acting president, in the Oval Office. This person would serve the remainder of the extant four-year presidential term and the next regular quadrennial election will take place as planned.

The 1792 statute required the Secretary of State, when the double vacancy occurred, to call on every state to act within 34 days to appoint presidential electors who would meet and choose a new President and Vice President. That provision was removed when the law was amended in 1886 and there has been no provision for special presidential elections since then. In 1945, President Truman recommended that the amended statute provide for selecting a new President and Vice President, either in a special election or at the next congressional election after the double vacancy; Congress did not include that provision in the final version.

Any double-vacancy succession statute places in the White House someone who never stood before the national electoral constituency. A succeeding officer below the Vice President, whether pulled from the cabinet or Congress, was not on the minds of individual voters as a holder of the "executive Power" under the Constitution when they cast their votes for any federal office. It is, of course, unavoidable that some such officer must act as president in the wake of an attack that creates a double vacancy. It is necessary, therefore, to limit the term of this acting president in favor of a duly and constitutionally selected President.

A special election places the direct popular imprimatur of the national electoral constituency on the occupant of the White House. There is a symbolic benefit to having a President who has stood for election before the entire nation at the head of the executive branch, for the benefit of both the officer holder and the People. A President (as opposed to an "acting president") will be better able to establish a program and agenda, direct military and diplomatic activities, and lead the national recovery from the tragedy. The role of an acting president should be far more limited—restoring order, providing emergency relief, and leading the national mourning in the immediate aftermath of the attack—before giving way to a duly elected President.

This election should occur within six or seven months of the double vacancy. The longer period is a product of the fact that every state utilizes popular election as the means of choosing presidential electors. This means, of course, that the law must allow sufficient time for States to organize and carry out 51 simultaneous state-controlled popular elections. Six months seems sufficient lead time for the states, especially if Congress also required every state to prepare detailed contingency plans for a quick cold-start to the state election machinery.

Moreover, a six-month period should be sufficient to allow for national mourning and for the restoration of public stability and normalcy that will allow the People to participate intelligently in a popular election. A shorter period than this is not workable; one cannot imagine gearing up for, and a carrying out, a presidential election 60 days after a 9/11-type attack that killed both the President and Vice President and destroyed large pieces of the national government. Nor can one expect candidates and the people to engage in truly reasoned democratic deliberation in a shorter period of time. Finally, the special election should be unnecessary if one year or less remains on the existing presidential term, since the wheels of the regular quadrennial election already are in motion. The presidential election also may be incorporated into a mid-term congressional election.

Consider that on September 11, 2001, President Bush and his administration had been in power for less than eight months. Had that attack killed both the President and Vice President, an acting president would have controlled the White House for more than three years, until an election in November 2004 and presidential Inauguration in January 2005. It is irrelevant for present purposes whether the acting president had been the Speaker (Dennis Hastert under the current statute) or the Secretary of State. The gravest problem in terms of democratic legitimacy arises simply from the White House being occupied for almost a full presidential term by anyone not elected by the voters of the national constituency according to established procedures.

A special election also enables Congress to eliminate the current provision for supplantation, or bumping, of a lower statutory officer by a "prior-entitled" statutory successor. Bumping has been widely criticized by legal scholars who point out that the mechanism does little beyond fostering partisan gamesmanship and confusion as to who is, and should be, acting as president. The apparent purpose of bumping is to ensure that the most favored statutory officer (under the current statute, a former legislative officer rather than a cabinet officer) assumes the executive power for the remainder of the presidential term, a possibly substantial period of time.

A special election eliminates the concern that motivates the bumping provision. Because any acting president generally will serve approximately six months and at most one year, having the acting president be the highest possible individual in the line is less important than it otherwise might be. The amount of time in which an acting president holds the executive power will be sharply and clearly limited. Whether the Secretary of State or the Secretary of Veterans' Affairs or the Speaker of the House is a more favored acting president, given the shortened period in which the acting president is in office, it is not worth the confusion as to who is properly acting as president that bumping creates.

IV. CONCLUSION

Section 19 has been the target of criticism, both as a matter of constitutional law and sub-constitutional public policy. The events of September 11, 2001, and the scenarios of broader attacks on government itself, highlight the defects in the law and provide an impetus for Congress to effect statutory change. The events of two years ago demonstrate two important things. First, that officers at the top of the President's cabinet, those with high national profiles

and reputations, are the preferred acting presidents, the preferred successors in the event of a double vacancy. Second, the term of any acting president should last no longer than six or seven months, only long enough to restore order and begin the national recovery. A President, chosen in a special election, must then assume the executive power as quickly as the realities of the electoral process and the will of the electorate allow.

I thank both Committees for providing me the opportunity to speak with you today. I wish this body every success in its efforts to create the most workable presidential succession process.

Respectfully submitted,

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