



CRS Report for Congress

The President-Elect: Succession and Disability Issues During the Transition Period

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Summary

Procedures governing replacement of a President or Vice President-elect during the transition period depend on when the events that might lead to a temporary or permanent replacement occur. At the general election, voters choose members of the electoral college, which formally selects the President and Vice President several weeks later. Between election day and the electors' meeting, the two major political parties' rules provide that replacement candidates would be chosen by their national committees should vacancies occur. Most authorities agree that the President- and Vice President-elect will have been chosen once the electoral votes are cast on December 15, 2008. The electoral votes are counted and declared when Congress meets in joint session for this purpose on January 8, 2009. During this period, between December 15 and the January 20 inauguration, if the President-elect dies, the Vice President-elect becomes President-elect, under the 20th Amendment to the Constitution. Although the 20th Amendment does not specifically address questions of disability or resignation by a President- or Vice President-elect, the words "failure to qualify" found in the amendment might arguably be interpreted to cover such contingencies. While the 20th Amendment does not address vacancies in the position of Vice President-elect, these would be covered after the inauguration by the 25th Amendment. In the event no person qualifies as President or Vice President, then the Presidential Succession Act (61 Stat. 380, 3 U.S.C. 19) would apply: the Speaker of the House of Representatives, the President pro tempore of the Senate and duly confirmed Cabinet officers, in that order, would act as President. Since the terrorist attacks of September 11, 2001, observers have expressed concern that an attack during the presidential inauguration ceremony might lead to the death or disability of most or all officials in the line of presidential succession. This concern takes particular note of the fact that there are generally few, if any, duly confirmed cabinet members at that time. One potential remedy for this situation would be for an official in the line of succession to be absent from the ceremony. Another might be for a cabinet secretary from the outgoing Administration to remain in office until after the inauguration; alternatively, a cabinet secretary-designate of the new administration might be nominated by the incumbent President, confirmed by the Senate, and installed prior to the inauguration. Either action would avoid a gap in the line of presidential succession under these circumstances.

Introduction

Presidential transitions in the past half-century have generally been characterized by high levels of activity and frequent improvisation as the President-elect's team works to finalize personnel and policy arrangements for the incoming administration within a period of just over ten weeks. The process takes on further significance and complexity when a new President replaces a retiring incumbent, and political party control of the executive branch also changes.

Succession and disability procedures concerning the President-elect and Vice President-elect provide a potential complicating factor during the transition period. They are based on a combination of political party rules, federal law and constitutional provisions, different elements of which apply during three distinct periods in the transition period. Depending on circumstances, Congress could be called on to make decisions of national importance in questions of either the death or disability of a President- or Vice-President-elect.

Succession Between the Popular Election and the Meeting of the Electoral College

The first period in which succession procedures would be invoked in the event a President-elect or Vice President-elect were to die or leave the ticket for any reason includes the time between the election and the date on which the electors meet in December to cast their votes (in 2008, the electors will meet on December 15).¹ Most commentators suggest that in this case the political parties would follow their long-established rules, by which their national committees designate a substitute nominee.² In the event of the presidential nominee's death, it might be assumed that the vice presidential nominee would be chosen, but neither of the major parties requires this in its rules. Further, it is assumed that the electors, who are predominantly party loyalists, would abide by the national party's decisions. Given the unprecedented nature of such a situation, however, confusion, controversy, and a breakdown of party discipline among the members of the electoral college might also arise, leading to fragmentation of the electoral vote.³ For instance, an individual elector or group of electors might justifiably argue that they were nominated and elected to vote for a particular candidate, that the death or withdrawal of that candidate released them from any prior obligation, and that they were henceforth free agents, able to vote for any candidate they chose.

¹ "The electors ... shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment..." 2 U.S.C. 7.

² See Republican Party Rules (2004), Rule No. 9, available at [<http://www.gop.com/About/Rules6-10.htm>]; The Charter and Bylaws of the Democratic Party of the U.S., February 3, 2007, Article Three, Section 1(c), available at [http://s3.amazonaws.com/apache.3cdn.net/58e635582dc516dd52_5wsmvyn09.pdf].

³ U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Presidential Succession Between the Popular Election and the Inauguration*, hearing, 103rd Cong., 2nd sess., February 2, 1994 (Washington: GPO, 1995), pp. 12-13.

The historical record does not provide much guidance as to this situation. Horace Greeley, the 1872 presidential nominee of the Democratic and Liberal Republican Parties, died on November 29 of that year, several weeks after the November 5 election day. As it happened, 63 of the 66 Greeley electors voted for other candidates, and Congress declined to count the three cast for Greeley on the grounds that electoral votes for a dead person were invalid.⁴ Even so, the question as to the validity of the Greeley electoral votes was of little concern, since the “stalwart” or “regular” Republican nominee, Ulysses S. Grant, had won the election in a landslide, gaining 286 electoral votes.

Succession Between the Electoral College Vote and the Electoral Vote Count by Congress

The second period in which succession procedures would be invoked in the event a President-elect or Vice President-elect were to die or leave the ticket includes the time between the meeting of the state electoral college delegations,⁵ when the electoral votes are cast (December 15, 2008), and the date on which Congress counts and certifies the votes (January 8, 2009). The succession process during this period would turn on the issue of when the candidates who received an electoral vote majority actually become President-elect and Vice President-elect. The results of the electoral college are publicly known, but are the candidates who won a majority of electoral votes actually “elect” at this point, or do they attain this position only after the electoral college returns have been counted and declared by Congress on January 8? Some commentators doubt that there would be a President- and Vice-President-elect before the results are certified. They maintain that this contingency would lack clear constitutional or statutory direction.⁶

Others, however, assert that once a majority of electoral votes has been cast the winning candidates immediately become the President- and Vice President-elect, even though the votes have yet to be officially counted or the results declared.⁷ If this is the case, then Section 3 of the 20th Amendment would apply as soon as the electoral votes were cast: namely, if the President-elect dies, then the Vice President-elect becomes the President-elect. This point of view receives strong support from the language of the 1932 House committee report accompanying the 20th Amendment. Addressing the question of when there is a President-elect, the report states:

It will be noted that the committee uses the term “President elect” in its generally accepted sense, as meaning the person who has received the majority of electoral votes, or the person who has been chosen by the House of Representatives in the event that the election is thrown into the House. It is immaterial whether or not the votes

⁴ U.S. Congress, House of Representatives, *Counting Electoral Votes. Proceedings and Debates of Congress Relating to Counting the Electoral Votes for President and Vice President of the United States*, 44th Cong. 2nd sess., Misc. Doc. No. 13 (Washington: GPO, 1877), pp. 363-380.

⁵ The 12th Amendment requires the electors to meet separately, in their respective states.

⁶ *Presidential Succession Between the Popular Election and the Inauguration*, pp. 39-40.

⁷ *Ibid.*, p. 12.

have been counted, for the person becomes the President elect as soon as the votes are cast.⁸

The 20th Amendment is, however, silent on such questions as disability of the President- or Vice President-elect, or their resignation during this period.

Succession Between the Electoral Vote Count and Inauguration

During this third period, provisions of the 20th Amendment would cover several aspects of succession. As mentioned previously, Section 3 of the 20th Amendment provides for succession in the case of the death of the President-elect, providing that the Vice President-elect becomes President-elect. Further, a Vice President-elect who succeeds under these circumstances would have the authority, after his or her inauguration, to nominate a replacement Vice President under the provisions of Section 2 of the 25th Amendment.

Moving beyond death of a President-elect, the 20th Amendment does not appear to specifically cover such other circumstances as resignation from the ticket, disability, or disqualification of either the President- or Vice President-elect. In the case of a President-elect, however, if the language of the amendment were interpreted so that the aforementioned circumstances constituted a “failure to qualify,” then the vice President-elect would act as President “until a President shall have qualified....”⁹ Under this construction, a Vice President-elect might act as President until a disabled President-elect regained health, or, if the President-elect resigned from the ticket, failed to regain health, or subsequently died from the effects of a disability, the Vice President might act for a full four-year term.

The death, disability or departure of the Vice President-elect is not specifically covered by the 20th Amendment, but in this circumstance, the President would nominate a successor after being inaugurated, again in accordance with Section 2 of the 25th Amendment.

Finally, the 20th Amendment empowers Congress to provide by law for instances in which “neither a President elect nor a Vice President elect shall have qualified.” Such legislation would declare “who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.” The Presidential Succession Act of 1947 (the Succession Act) as amended (61 Stat. 380, 3 U.S.C. 19) implements this authority, providing that if, “by reason of death, resignation, removal from office, inability, or *failure to qualify* [emphasis added], there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in

⁸ U.S. Congress, House, *Proposing an Amendment to the Constitution of the United States*, report to accompany S.J.Res. 14, 72nd Cong., 1st sess., Rept. 345 (Washington, GPO: 1932), p. 6.

⁹ 20th Amendment, Section 3, clause 2: “If a President shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified....”

Congress, act as President.”¹⁰ The act further extends the order of succession to the President pro tempore of the Senate and the secretaries of the principal executive departments (the President’s Cabinet).¹¹ It should be noted that persons acting as President under the Succession Act would continue to do so only until a qualified individual higher in the order of succession is able to act. In this instance, the higher qualified official then supplants the lower.¹²

Concern about succession during the transition period has increased since the terrorist attacks of September 11, 2001, and centers primarily on presidential succession under the Succession Act. What might happen in the event of a mass terrorist attack during or shortly after the presidential inaugural? While there would be a President, Vice President, Speaker, and President pro tempore during this period, who would step forward in the event an attack removed these officials? This question takes on additional importance since the Cabinet, an important element in the order of succession, is generally in a state of transition at this time. The previous administration’s officers have almost always resigned by January 20, while the incoming administration’s designees are usually in the midst of the confirmation process. Further, only cabinet officers who hold regular appointments and have been confirmed by the Senate are eligible to act as President under the Succession Act. It is possible to envision a situation in which not a single cabinet officer in the incoming administration will have been confirmed by the Senate under these circumstances, thus leaving succession an open issue should the Speaker and the President pro tempore also be unavailable.

One option to avoid this potential situation would be for some official or officials in the line of presidential succession not to attend the presidential inauguration ceremony. The President’s State of the Union Message to joint sessions of Congress offers a precedent in this case. For reasons of security, one member of the President’s Cabinet has not attended this event for many years; this practice took on additional urgency following the terrorist attacks of 2001, and it is widely assumed that since that time, the designated survivor has been conducted to a secure location in order to guarantee continuity in the executive branch. In the interest of legislative branch continuity, beginning at least in 2004, Congress has similarly designated one or more Senators and Representatives (usually representing both political parties) who do not attend the State of the Union session.¹³

Two additional remedies could eliminate the possibility of a gap in the line of presidential succession under these circumstances. First, one or more incumbent cabinet

¹⁰ For additional information on the Presidential Succession Act and other aspects of presidential succession, please consult CRS Report RL34692, *Presidential Succession: Perspectives, Analysis and Proposed 110th Congress Legislation*, by Thomas H. Neale.

¹¹ Under the Succession Act, the President pro tempore of the Senate would, like the Speaker, have to resign from the presidency pro tempore and the Senate in order to act as President. Similarly, the cabinet appointment of any secretary of an executive department acting as President would be automatically vacated. 3 U.S.C. 19(d)(3).

¹² 3 U.S.C. 19(d)(2). For instance, if the President pro tempore of the Senate were serving, he or she could be superseded if the Speaker of the House qualified for the position.

¹³ Alan Fram, “Four to Miss Bush Speech Due to Security,” AP Online, January 21, 2004. Available at [<http://www.highbeam.com/doc/1P1-89589949.html>].

officers of the outgoing administration might be retained in office (and, away from the inaugural ceremonies) at least until after the President- and Vice-President elect have been safely installed. Alternatively, one or more cabinet officers of the incoming administration could be nominated by the incumbent President, confirmed, and installed in office before the January 20 inauguration.¹⁴ One advantage conferred by these related proposals would center on the fact that cabinet secretaries, unlike elected officials, do not serve set terms of office which expire on a date certain. Further, while the President-elect cannot submit cabinet nominations until assuming office, there is no legal impediment to prevent the outgoing incumbent from submitting any or all of his successor's nominations to the Senate after it convenes at the opening of the new Congress, which assembles on January 6, 2009.

Both the retention of incumbent secretaries pending Senate confirmation of their successors or pre-inaugural nomination and confirmation of one or more cabinet secretaries of the incoming administration would depend on high levels of good will and cooperation between the incumbent President and his successor, and between the political parties in the Senate. Moreover, the latter option would arguably impose a sizeable volume of confirmation-related business on the newly-sworn Senate (and, possibly the Senate in the previous Congress) during the ten-week transition period.

Recent press accounts suggest that incumbent Secretary of Defense Robert M. Gates may be retained in his position for an indefinite period following the inauguration of President Barack H. Obama on January 20, 2009.¹⁵ While it is not known whether succession concerns had any role in this reported decision, Secretary Gates's continuance in office, and his absence from the inauguration ceremony, would arguably meet some of the concerns expressed earlier in this report.

¹⁴ Here, too, the secretary would arguably avoid being present at the inaugural ceremony.

¹⁵ Michael D. Shear and Ann Scott Thompson, "Gates Said to be Near a Deal to Keep Post," *Washington Post*, November 26, 2008, p. A1, A10.