

# ADDRESS

## APPLICATIONS AND IMPLICATIONS OF THE TWENTY-FIFTH AMENDMENT

*Akhil Reed Amar\**

*“Houston” is the first word of today’s Address—as it was the first word ever spoken on the lunar surface.*

*This city, the moon, and the specific topic of today’s Address—the Twenty-fifth Amendment—are interconnected. Let me begin by tracing these interconnections. With apologies to Neil Armstrong, I will need to take more than “one small step,” but not much more. When Apollo 11 touched down on the moon, Neil Armstrong immediately relayed the news: “Houston, Tranquility Base here. The Eagle has landed.”<sup>1</sup> The NASA program had achieved its amazing objective of landing a man on the moon in the decade of the 1960s—an objective defined in 1961 by President John Kennedy and pursued after Kennedy’s death by his Vice-President-turned-President, Lyndon Johnson. The two NASA space centers at the heart of this amazing project bear the names of these two Presidents: the Kennedy Space Center in Florida and the Johnson Space Center here in Houston. These extraordinary space centers, however, are hardly the only legacy of the Kennedy-Johnson years. The very transition from Kennedy to Johnson, a transition occasioned by the shocking events in another Texas city, precipitated a constitutional amendment in 1967 aimed at smoothing out the wrinkles in the constitutional fabric of presidential succession.<sup>2</sup> That amendment provides the main topic for today’s Address.*

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1. John Noble Wilford, *A Powdery Surface Is Closely Explored*, N.Y. TIMES, July 21, 1969, at A1.

2. See generally JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT (1976).

*In what follows, I shall collect and comment upon public statements I have made in the last dozen years about how the Twenty-fifth Amendment might be used creatively to better manage various high-stakes situations that might arise or that have already arisen.*

*At the outset, let me offer a few quick words about the Twenty-fifth Amendment's basic structure. Section 1 of the Amendment makes clear that when a President dies, resigns, or is removed (via the impeachment process), the Vice President officially becomes "President" with all the powers, duties, and privileges of that office.<sup>3</sup> Section 2 of the Amendment provides that when a vice-presidential vacancy arises—either because the Vice President has become President under Section 1, or because the Vice President himself has died, resigned, or been removed—the sitting President may fill the vacancy by nominating a new Vice President who will take office upon confirmation by the full Congress.<sup>4</sup> Section 3 establishes procedures under which a President may declare himself "unable to discharge the powers and duties of his office" and thereby temporarily transfer presidential power to the Vice President until the President acts to recover his powers, under procedures also provided in Section 3.<sup>5</sup> Section 4 outlines procedures by which the Vice President may assume the powers of "Acting President" in situations where the President is "unable to discharge the powers and duties of his office" but has not himself transferred power under Section 3.<sup>6</sup>*

*In early 1999, as the nation was experiencing the first impeachment of an elected President in its history, I floated the suggestion that Section 3 of the Twenty-fifth Amendment need not be limited to cases in which the President found himself physically or mentally "unable to discharge the powers and duties of his office." Instead, I argued, the Amendment enabled him to also proclaim himself, in effect, politically unable to act as President—and in such a situation, enabled him to transfer presidential power, temporarily, to his hand-picked vice-presidential running mate. Far from a sign of weakness, this self-abnegation could, I argued, actually strengthen a President's hand in certain situations. (Anyone who fails to understand that power may sometimes be augmented even while power is seemingly being relinquished should study with care *Marbury v.**

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3. U.S. CONST. amend. XXV, § 1.

4. U.S. CONST. amend. XXV, § 2.

5. U.S. CONST. amend. XXV, § 3.

6. U.S. CONST. amend. XXV, § 4.

Madison.) *Here is what I wrote for the February 8, 1999, issue of the New Republic:*<sup>7</sup>

Bill Clinton's grip on power is so fierce, say his critics, that prying him from office would require a device even more powerful than "the jaws of life"—the contraption fire-rescue teams use to extract victims of car accidents from twisted metal wreckage. But suppose Clinton were to confound his detractors and actually do something noble: step down from office, temporarily, until the end of his impeachment trial. What would be the constitutional and political implications of this unprecedented reaction to an unprecedented impeachment of a duly elected President? (Recall that Andrew Johnson, Abraham Lincoln's Vice President, became President not via all men's ballots but because of one man's bullet.)

The constitutional mechanism enabling Clinton to step aside, temporarily, is elaborated in the Twenty-fifth Amendment, adopted in the wake of President Kennedy's assassination. Under Section 3 of this Amendment, "Whenever the President transmits . . . his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits . . . a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President." Note that the inability here need not be physical. Clinton could simply say that, during the pendency of his trial, he deems it politically and morally better for the country that the high powers of the presidency be wielded by someone who is not under any cloud, and that he will retake the office only once the cloud has lifted, upon his due acquittal by the Senate. Legally, Clinton would be free at any time to take back the reins of power—but his pledge not to do so until the end of the trial would, as a practical matter, make it hard for him to renege.

Clinton could have stepped down a while ago, of course. But, before January 20 of this year, any such move by Clinton would not have been very sporting to his loyal Vice President, Al Gore. January 20 marks the exact midpoint of Clinton's second term, which began at noon on January 20, 1997, in keeping with the constitutional calendar mandated by the Twentieth Amendment. Under the Twenty-second Amendment, adopted after FDR's unprecedented tenure in office, "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than

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7. Except for small stylistic changes, the following portion of this Address was originally published as Akhil Reed Amar, *Take Five*, NEW REPUBLIC, Feb. 8, 1999, at 13.

two years of a term to which some other person was elected President shall be elected to the office of the President more than once.” If Clinton had stepped aside before January 20, and if he were eventually to be convicted in the Senate, President Gore would have been limited to a maximum possible tenure of six years in office—eligible to run in 2000, but not in 2004. But, if Clinton steps down any time from now on, Gore would be allowed to serve out the remainder of Clinton’s term and would still be able to run for two terms in his own right.

Far from an act of disloyalty—turning Gore into a premature lame duck—any temporary transfer of power from Clinton to Gore henceforth would be an act of great fidelity and fealty to his number two, a dramatic endorsement by Clinton of Gore as a worthy occupant of the Oval Office.

And what’s in it for Clinton? Just possibly the recovery of his honor and a shot at redemption. Stepping aside temporarily would be a penance he imposed on himself rather than a penalty forced upon him by others. Too often, his concessions thus far have come just one step ahead of the law. He admitted the truth about his relationship with Monica Lewinsky only after the DNA results proved that his past statements were lies; he proposed censure only to fend off impeachment; he mouthed words of contrition without really exhaling. The time to make concessions and show contrition is when you are winning—and in that sense now is the most opportune moment since the scandal broke, because it seems clear that, if he stands pat, he will win in the Senate. (Indeed, the ideal time to be a little self-sacrificing would be now, in the wake of his post-State of the Union bounce.)

Yes, by stepping aside temporarily, he imperils his presidency—he utterly unsettles matters and risks losing all. But it is precisely this willingness to take the risk of losing what he loves—power—that may help redeem him in the eyes of his countrymen and history. If he declines to step down, odds are that he will “win” in the Senate and stay in office—but he may well win by losing, because his acquittal would come after a simple majority of the Senate voted to oust him, rather than two-thirds. Will he be able to lead after this, or will he just mark time? Won’t any “victory” in the Senate taste sour unless he can somehow bring a measure of nobility back to himself and his office?

By contrast, if he wins in the Senate after stepping down—sacrificing himself and making it easier to vote against him—any acquittal would seem a more genuine vindication, a more dramatic rebirth. Given that some Republican senators may be

tempted to vote against him knowing that their votes won't suffice, Clinton could even say that, unless an absolute Senate majority votes to acquit, he will not return; if he wins this high-stakes gamble, he wins with genuine credibility and a true vote of confidence. True, any offer to step down permanently if a majority votes against him risks sliding our separated-powers system toward British-style parliamentarianism, but, with impeachment under way, that specter is already upon us. With a bold move, Clinton might actually enhance the presidency by seizing moral high ground and redefining himself rather than letting others define him.

Now consider Al Gore. The biggest structural problem of the vice presidency is that its occupant lacks a personal mandate from the people. In many states, voters cast separate ballots for Governor and Lieutenant Governor (not to mention other statewide offices like attorney general), but in no state do citizens vote separately for the national vice presidency.<sup>8</sup> A Vice President is merely the bottom half of a presidential ticket, and most voters pay no attention to this office, focusing only on the top of the ticket. (Pop quiz: Name Ross Perot's 1992 and 1996 running mates.) In short, Americans vote for President, and the Vice President simply piggybacks into office. The Constitution does not require this perverse way of picking Vice Presidents, but most of the time it is harmless. However, when something happens to the President, and the Vice President must take over temporarily or permanently, our weird electoral system creates a legitimacy gap because we end up with a chief executive no one squarely voted for. The problem is compounded by ticket balancing, when Americans vote for the avatar of one wing of a party and end up with a representative of the other wing. (Think about Lincoln and Johnson, or James Garfield and Chester Arthur, or William McKinley and Teddy Roosevelt.)

If Clinton were to stand pat now and ultimately be convicted, the transition to Gore would be awkward—all the more so because no one really expects it to happen, even at this late date. But, if Clinton were to temporarily step down now and then be convicted the transition to Gore would be smoother because Gore would already be in place, installed with a personal and unforced vote of confidence from Clinton himself when it counted. Conversely, if Clinton were ultimately acquitted, Gore would have had a chance to prove his presidential mettle—as the

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8. For more details and analysis, see generally Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992) [hereinafter Amar & Amar, *President Quayle?*].

de jure acting President of the United States—in the most dramatic way imaginable.

Finally, consider the Senate. In keeping with the command of Article I, Section 3, each senator has taken an oath to do “impartial justice.” One meaning of such an oath is that each senator should be “impartisan”—utterly inattentive to the demands of political party. A Republican senator should imagine herself to be a Democrat, and a Democratic senator should imagine himself to be a Republican. But this is hard to do psychologically, and pundits are predicting that the eventual vote in the Senate may well break down cleanly along party lines.

If so, this might be greatly disheartening to the nation. But having Al Gore physically occupying the Oval Office during the remainder of the trial might wonderfully concentrate the minds of the senators and confound perceptions of partisanship. If Republicans vote to convict and Democrats vote to acquit, it will be more clear to Americans that this is not necessarily pure partisanship at play. Pro-conviction Republicans, after all, would be voting in the most emphatic way to keep Al Gore in the White House—and immeasurably strengthen him for a bid in 2000. Conversely, pro-acquittal Democrats would be seen as weakening their presidential prospects for 2000 in order to affirm their sincerely held view that Clinton was duly elected and has suffered enough.

In short, by stepping down temporarily, Bill Clinton could step up morally and politically, in a way that would benefit the vice presidency, the Senate, the country, and even himself. Don't hold your breath—but keep in mind that the Twenty-fifth Amendment offers creative opportunities for the comeback kid to find a place to come back from.

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*For some strange reason, President Clinton declined to take my unsolicited and unconventional advice to relinquish power. But at least one aspect of my 1999 article did portend the future: Al Gore did go on to win his party's nomination for the presidency—as have roughly half of the vice presidents in the aftermath of the Twenty-fifth Amendment. (For most of American history, a very different pattern played out: From 1804 to 1952, less than 15% of vice presidents ever went on to bear their party's standard as a presidential nominee.<sup>9</sup>) As the Bush–Gore 2000*

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9. Prior to the Twelfth Amendment, adopted in 1804, vice presidents were selected in a very different way, and in 1951, the relevant constitutional rules changed again, thanks to the Twenty-second Amendment. For details and analysis, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 433–38 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION].

*election approached, I had a hunch that something weird might be about to happen. True, I didn't precisely predict the fiasco of Florida. But in a pair of pre-election pieces published in Slate, I did worry aloud that the popular vote winner might well lose the Electoral College vote. I also raised some questions about a rather large hole in the Twenty-fifth Amendment's safety net: The Amendment says nothing about how election law should handle the death or disability of a major presidential candidate shortly before Election Day.*

*Here is what I posted on October 21, 2000:<sup>10</sup>*

A plane crashes or a ship sinks or a tire blows. We immediately ask how this happened and how future disasters might be prevented. Yet we do not ask similar questions when our election system suffers a near miss. In the wake of Monday's death of Missouri Governor and U.S. Senate candidate Mel Carnahan, only three weeks before Election Day, we should re-examine our presidential election system. On close inspection, it is a series of accidents waiting to happen.

Imagine, God forbid, that on the eve of the election, a presidential candidate dies or becomes incapacitated. Federal law mandates that all states choose their electors on the first Tuesday after November 1. But if tragedy strikes in late October or early November, there will be insufficient time for the American people to process the tragedy and ponder their remaining electoral options.

National law fixes Election Day, but a patchwork of state laws regulates ballot access and counting. Most states would allow the national parties to designate new candidates, but in some election-eve scenarios, there might not be time for parties to deliberate properly before America votes. New ballots would need to be printed and absentee ballots revised. All this takes time.

Without some postponement, voters might not even be sure for whom they are voting or how their votes will be counted by party leaders, state officials, and Congress (which officially counts Electoral College votes). Suppose that Smith is running for President with Jones as his vice-presidential running mate. If Smith dies in early November, will a vote for the Smith-Jones ticket be counted as, in effect, a vote for Jones as President? Under current statutes, precedents, and party policies, the issue is far from clear—but voters are entitled to know the answers before

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10. Except for small stylistic changes, the following portion of this Address was originally published as Akhil Reed Amar, *Dead President-Elect: What If Al Gore or George W. Bush Got Hit by a Truck?*, SLATE, Oct. 21, 2000, <http://www.slate.com/id/91839> [hereinafter Amar, *Dead President-Elect*].

they cast their votes. Moreover, under current law in many states, if 46% vote for Smith–Jones and 5% write in Jones, election officials would not add these votes together. Jones might lose the state even though 51% of the voters clearly picked him. This oddity arises because many states count votes by presidential–vice-presidential ticket rather than directly by presidential candidate.<sup>11</sup>

The importance of tickets creates further complications. Even if a party quickly converges on a new presidential nominee by elevating its vice-presidential candidate to the top spot, it will then need to fill the bottom spot. This will require vetting possible nominees. It, too, will take time to be done right. Things become even trickier if party leaders decide that the former vice-presidential nominee—perhaps a ticket-balancing sop to the party’s losing wing—should not top the new ticket.

Unlike some European regimes, Americans vote for persons, not parties. Our votes for the presidency are among our most personal votes: For this office—unlike, perhaps, all others in our system—voters should never be asked to sign some blank check or endorse some blank slate with the bland promise that after the election, some party committee will sort everything out and tell them whom they ended up voting for. We the voters need time to focus on the new presidential candidates—their names, their lives, their personal visions—and gain a comfort level with them before we cast our votes. With so much riding on the presidency domestically and internationally—and with no real chance for the people to correct a mistake until four long years have elapsed—we deserve an electoral endgame that reflects popular deliberation and choice, not grief and confusion.

To avert democratic train wrecks in future elections, we must change current laws. A sensible federal statute should provide that, in the event of autumn death or incapacity of a major presidential or vice-presidential candidate—as certified by the Chief Justice—the federal election date should be postponed by up to a month, allowing the necessary democratic deliberations to unfold properly. Each state should decide in advance whether it will postpone its statewide elections to coordinate with the delayed federal election or whether it prefers to hold two elections—the first in November for state races and the second a few weeks later for federal officials.

Election-eve deaths are not the only democratic accidents waiting to happen. If a winning candidate dies after the election

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11. See Amar & Amar, *President Quayle?*, *supra* note 8, at 926–27 (illustrating the result of counting “ticket votes” rather than individual votes for candidates).

but before the Electoral College meets, some state laws would apparently require electoral collegians to vote for him (with his running mate presumably taking office in January), but Congress, following a musty precedent, might well refuse to count these votes. After losing to Ulysses Grant in November 1872, presidential candidate Horace Greeley promptly died, but some electors from states that he carried in November nevertheless voted for him; Congress refused to treat these votes as valid. In Greeley's case, little turned on the issue—Grant had won the election—but the matter would be quite different if the Greeley precedent were extended so as to ignore a dead *winner's* votes and thus snatch the crown from his running mate. Once again, the people's will on Election Day might be thwarted by odd glitches that could easily be cured in advance by a clarifying statute enacted before any actual death occurs.<sup>12</sup>

Another democratic nightmare: If something were to happen to both President Clinton and Vice President Gore, current law would name Representative Dennis Hastert as President—and after him the nonagenarian Senator Strom Thurmond—even though the American people in 1996 voted to give the Oval Office to Democrats, not Republicans. Indeed, there are compelling reasons to think that the current succession statute is itself unconstitutional: The Constitution gives Congress the power to pick which Cabinet officer may move into a vacant Oval Office, in effect enabling the President to name both his vice-presidential running mate and his backup Cabinet successor.<sup>13</sup> But Congress in 1947 unconstitutionally and unwisely switched away from Cabinet succession by putting congressional barons—the Speaker of the House and the President pro tempore of the Senate—first in line, ahead of the Secretaries of State and Defense.

Last but not least of the democratic accidents waiting to happen: The man who loses the national popular vote next month might nonetheless win the electoral vote. If it doesn't happen next month, one day, statistically, it will. When it does, will the loser-winner have the requisite democratic legitimacy at home and abroad? If not, why are we waiting for this tire to blow rather than acting, via constitutional amendment, to fix the system before it crashes?

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12. For more details and analysis of this proposal, see Akhil R. Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 226–28 (1995) [hereinafter Amar, *Presidents*] (based on Senate testimony of February 2, 1994).

13. For more details and analysis of this claim, see generally Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) [hereinafter Amar & Amar, *Presidential Succession*].

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*And here is what I posted on November 2, 2000:*<sup>14</sup>

President Strom Thurmond? Don't laugh. The odds are against it, but there is an outside chance of constitutional meltdown in the days ahead. The problem is created by the Constitution's archaic and confusing rules concerning the Electoral College and its intricate provisions concerning Oval Office vacancies.

Constitutionally, the key next Tuesday is not who wins the nationwide popular vote, but who wins the state-by-state electoral vote. Americans will pick 538 electors, and to win, a candidate needs an absolute majority: 270.

But what if Bush and Gore tie at 269 apiece? This is not a fanciful scenario. For example, imagine that Gore wins the following states where he seems clearly or slightly ahead today: California (54 electoral votes), New York (33), Florida (25), Pennsylvania (23), Illinois (22), Michigan (18), New Jersey (15), Massachusetts (12), Washington (11), Wisconsin (11), Maryland (10), Minnesota (10), Connecticut (8), Hawaii (4), Rhode Island (4), District of Columbia (3), Delaware (3), and Vermont (3). If Bush wins everywhere else, each man would have 269 electoral votes. Several other easily imaginable permutations could yield the same 269–269 tie.

In this event, our Constitution and statutes allow the race to be decided in the incoming House of Representatives. But in this vote, each state must vote as a bloc, and the winner must win an absolute majority of states—twenty-six out of fifty. Some state delegations, however, are likely to be evenly divided between Republicans and Democrats. If each of these delegations could cast a half vote for each man, then one candidate could likely emerge victorious. But the Constitution says that each state shall have “one vote” and says nothing about half votes. House rules and House precedents from the elections of 1800–1801 and 1824–1825 (the only times the House has picked the President), disallow half votes. Thus, divided delegations probably won't count, and neither Bush nor Gore might be able to reach the magic number of twenty-six.

So, what happens then? The presidency would appear to stand vacant after noon on January 20. The Constitution says that the Vice President should then take over. But who will be Vice President after January 20?

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14. Except for small stylistic changes, the following portion of this Address was originally published as Akhil Reed Amar, *President Thurmond?*, SLATE, Nov. 2, 2000, <http://www.slate.com/?id=1006401>.

If Bush and Gore tie at 269, so will Cheney and Lieberman. In this event, the Twelfth Amendment provides that the Senate shall pick between them and that the winner must get an absolute majority—fifty-one votes. Here, all bets are off. Imagine the scenarios:

President Lieberman? If the Democrats manage to win every tight race, the new Senate could be evenly split. The Senate's presiding officer (until January 20) is none other than Vice President Al Gore, and he could cast the tie-breaking vote for Lieberman. Lieberman might possibly be free to later nominate Gore as his Vice President under the Twenty-fifth Amendment and then step down once Gore was confirmed, though there are serious unresolved questions here.<sup>15</sup>

President Cheney? If Republicans hold on to the Senate, then they could pick Cheney (who in turn might be able to eventually switch positions with Bush under the Twenty-fifth Amendment).

President Hastert? If the Senate splits down the middle, it is not completely clear that the Vice President may cast a tie-breaking vote under the Twelfth Amendment. Arguably the Amendment requires an absolute majority of senators, and technically Gore is not a senator. If neither side has fifty-one senators, federal succession laws could make the Speaker of the House the acting President. Republican Dennis Hastert currently holds the speakership and will likely retain it if the Republicans keep control of the House in Tuesday's congressional elections.

President Gephardt? If the Democrats win back the House on Tuesday, the new Speaker might be Richard Gephardt rather than Dennis Hastert.

President Thurmond? If the House elections turn out to be very close, the House could be without a Speaker at the beginning of the session. (This happened repeatedly in the nineteenth century.) Next in line under the succession law is the President pro tempore of the Senate, the nonagenarian South Carolina Republican, Strom Thurmond. If Republicans win back the Senate, 51–49, Thurmond could conceivably, by declining to

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15. Strictly speaking, Lieberman in this scenario would not be "President" but would merely be a Vice President acting as President. As such, there is a serious question whether he could invoke the nomination provisions of Section 2 of the Twenty-fifth Amendment. The Amendment seems to distinguish clearly between true Presidents and "Acting Presidents" and explicitly reserves the power to nominate a new Vice President to a true President. Put another way, if Lieberman were merely a Vice President acting as President, there would be no true vice-presidential vacancy to fill under Section 2. For more analysis, see Amar & Amar, *Presidential Succession*, *supra* note 13, at 138 n.144.

vote for Cheney and thus denying Cheney the needed fifty-one votes, crown himself king.

President Albright? The presidential succession laws currently in place probably violate the Constitution. Only “Officers of the United States” may be picked as presidential successors, and senators and representatives are not such officers, properly speaking.<sup>16</sup> The next person on the statutory succession list is the Secretary of State, Madeleine Albright. Our first woman President!

But wait. Albright was not born in the United States,<sup>17</sup> so she is ineligible. Next in line is Secretary of the Treasury Larry Summers.

There is a lesson in all this head-spinning speculation: Our current systems of presidential selection and succession are a mess—various accidents and crises waiting to happen. Why not amend the Constitution and provide for direct popular election for all future presidential contests?

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*Although the Bush–Gore election did not end up in the exact sort of train wreck that I had imagined, the Florida mess was pretty ugly and the Supreme Court’s decision in Bush v. Gore<sup>18</sup> was uglier still. I have set forth my criticisms of the Court elsewhere.<sup>19</sup> Today, I add only that in the days after the Court stopped the recount and handed the election to George W. Bush, I thought to myself that Bill Clinton should have used the Twenty-fifth Amendment to deliver a poetic rebuke to the Court and a fitting consolation prize to Gore. Clinton could have easily done so by resigning under Section 1 of the Amendment and thereby making Al Gore the President of the United States for at least a day or perhaps a month prior to Bush’s inauguration. (Careful observers will of course note that I had urged something similar, via Section 2, in 1999.) Had Clinton resigned after Bush v. Gore and had Gore later sought a rematch against Bush in 2004, it would have been a contest among true equals—between two true Presidents of the United States. But, as we have already seen, Bill*

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16. See Amar & Amar, *Presidential Succession*, *supra* note 13, at 114–17 (attacking the constitutionality of the current presidential succession statute).

17. This was an imprecise statement on my part. The key issue is not where Albright was born, but whether she was a U.S. citizen on the date of her birth, under the laws on the books on that date. See AMAR, *AMERICA’S CONSTITUTION*, *supra* note 9, at 164, 554 n.91 (describing a natural born citizen as one who is a citizen at the time of his birth).

18. *Bush v. Gore*, 538 U.S. 98 (2000).

19. See Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009) (criticizing the Supreme Court’s handling of the 2000 election dispute).

*Clinton was not one to walk away from power lightly—even to do the right thing by his loyal “veep.”*

*The next major event to prompt me to think again about the Twenty-fifth Amendment was that terrible day in September 2001. The prospect of possible pre-election mayhem seemed even more vivid to me than it had been the previous fall, and once again it struck me that the Twenty-fifth Amendment had no comprehensive provisions to address the election law issues raised by the specter of terrorism aimed at the heart of the American presidential election system. Here is what I wrote in the Washington Post on the two-month anniversary of 9/11.<sup>20</sup>*

A year ago this month, a freakishly close presidential election focused Americans’ attention on the glitches of election codes and voting machines and spurred talk of election reform. Now, different images haunt our imagination, and anti-terrorism legislation is the order of the day. It is not much of a stretch to imagine that future terrorists might target the very foundations of our democracy—the elections themselves.

Election reform, meet anti-terrorism legislation.

Over the past year, more than 1,500 election bills have been introduced in legislatures across America proposing fixes for what had gone wrong in the past—everything from modernizing tabulation technology to repealing the Electoral College and making Election Day a national holiday. And then the terrorists struck.

Our new awareness of the possibility of terrorism brings into focus a set of problems that have shadowed our voting system for decades. Natural disasters can compromise elections, as can a candidate’s election-eve death or incapacitation, whether from natural causes or assassination. If tragedy were to strike in late October or early November, would voters be able to weigh their remaining electoral options? The fallout could be far more destabilizing than the few weeks of uncertainty we lived through last year.

Think back for a moment to the reason September 11 was a specially marked date on New Yorkers’ calendars: It was a local election day, with contests that included the city’s mayoral primary. As the horrific events unfolded, Governor George Pataki understood that an orderly and democratically satisfactory election that day was impossible. State law allowed him to

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20. Except for small stylistic changes, the following portion of this Address was originally published as Akhil Reed Amar, *This Is One Terrorist Threat We Can Thwart Now*, WASH. POST, Nov. 11, 2001, at B2 [hereinafter Amar, *Terrorist Threat*].

postpone the balloting. But current federal law does not permit a similar delay of congressional and presidential elections. The law mandates an election on the first Tuesday after November 1, come hell or high water, terror or trauma.<sup>21</sup>

So suppose that a major presidential or vice-presidential candidate dies or is incapacitated shortly before Election Day. A patchwork of state laws governs ballot access and counting, and most states allow national parties to substitute new candidates. But in some situations, parties would lack time to deliberate and state officials would lack time to print revised ballots. Without some postponement, voters might not even know whom they were really voting for. If presidential candidate Smith died, would a vote for Smith be counted as a vote for his or her vice-presidential running mate Jones, or for some player to be named later by a conclave of party bigwigs?

An issue of this kind arose last year in Missouri. U.S. Senate candidate Mel Carnahan died in mid-October, but voters nevertheless elected him in November in the expectation that his wife, Jean Carnahan, would be installed in his stead. She was. But had he died closer to the election or had the loser—then-Senator John Ashcroft—been less gracious and more litigious, Missouri might have been almost as tumultuous as Florida last December.

The 1963 assassination of President John F. Kennedy spurred reformers to enact the Twenty-fifth Amendment, which streamlined issues of vice-presidential succession. But the assassination five years later of the late President's brother—presidential candidate Robert F. Kennedy—failed to prompt comparable reform to address the death or disability of presidential candidates. Indeed, had RFK been shot hours before the general election rather than hours after the California primary, the vulnerability of the current system would have been obvious to all—and would likely have prompted serious discussion of election-postponement legislation.

Election reform to protect against such dramatic assaults will require hard choices. The tight timetable we now have was created by the Twentieth Amendment in 1933 to shrink the lame duck period between a President's election and inauguration. The idea was that an incumbent President should yield as quickly as possible—on January 20 to be precise—to a new President with a fresh electoral mandate. But shortening that period any further

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21. See 3 U.S.C. § 1 (2006) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.").

would not only leave less time for counting, recounting, and resolving any complaints that arise, it would also make it harder for the eventual winner to assemble his new administration before inauguration. (Last year's shortened transition period surely complicated life for George W. Bush.)

One option would be for federal law to move the federal Election Day to October, with provision for postponement in rare circumstances. This, of course, would widen the very gap between election and inauguration that the Twentieth Amendment sought to shrink. A better response would thus be to keep Election Day as is, but allow brief postponement in rare circumstances, with streamlined voting technology, statutes, and court procedures to ensure enough time for proper counts and recounts.

A sound reform law might also allow for the postponement of the Electoral College meeting. State laws often purport to bind electors to vote for the candidate who won the state's popular vote, but what if this candidate has died or become disabled between Election Day and the day of the meeting?

This actually happened in 1872, when Democrat Horace Greeley died shortly after losing to incumbent Ulysses S. Grant. Some loyal electors voted as pledged—for the dead man—and Congress later disregarded their votes. Little turned on Congress's ruling, given that Greeley had clearly lost in November. Had he won, however, surely the fairest result would have been to credit his electoral votes to his running mate. Otherwise, the party that won the presidency on Election Day could conceivably lose it before the inauguration. But Congress in 1873 simply tossed Greeley's votes aside, and that precedent remains a source of potential mischief today. Like ordinary voters, electors should understand in advance whether and how their votes will be counted and should be able to cast these votes in an atmosphere of calm deliberation. And that may mean allowing for the postponement of the Electoral College meeting in a crisis.

The question remains of how—and by whom—a postponement should be triggered. Handing this power to the Chief Justice risks sucking the Supreme Court into partisan politics, the danger of which is well illustrated by last year's controversy surrounding *Bush v. Gore*. The current Federal Election Commission may likewise lack the necessary credibility and impartiality. One possibility would be to let each major party (defined as the top two vote-getters in the previous election) trigger a postponement upon request. Parties would hesitate to delay elections for frivolous or partisan reasons because the voters could immediately punish any postponements seen as gamesmanship.

A final issue is whether, in an emergency, to postpone all federal elections or simply the presidential one. Once again, a law could be drafted to specify the decisionmaker and vest that person with considerable discretion. Because federal law controls only federal elections, each state would decide whether to postpone elections for state officers so as to coordinate with the delayed federal election or whether instead to hold two elections in short order for state and federal officers, respectively.

However all these wrinkles are ironed out, the experiences of this past year have made it clear that election reform proposals cannot afford to focus exclusively on fixing the problems of the past. Our democratic processes need to be protected from much less predictable threats.

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*The careful observer will detect in my November 2001 piece at least two shifts in my thinking compared to my earlier musings. First, the Florida fiasco had made me more conscious of the difficulty of postponing elections while also reserving enough time for careful recounting. Second, after witnessing the Supreme Court's jaw-dropping performance in Bush v. Gore, I was somewhat less enthusiastic about making the Chief Justice the pivotal decisionmaker in regards to electoral postponement.*

*Once again, however, the political powers that be did not seem particularly interested in pursuing my advice. But academics are nothing if not persistent. And when life hands you colonoscopies, make use of the moment! So when, in June 2002, President George W. Bush underwent a scheduled colonoscopy, during which time he actually invoked Section 3 of the Twenty-fifth Amendment to temporarily transfer presidential power to Vice President Dick Cheney, I thought the time was yet again ripe to try to persuade my fellow citizens to think more generally about the Amendment and other problems that this Amendment could be used to solve. The result was a two-part essay that my sometime co-author (and fulltime brother) Vikram David Amar and I published on Findlaw.com. Here is Part I, which we posted on July 26, 2002.<sup>22</sup>*

For a couple of hours in late June, Vice President Dick Cheney became the acting President of the United States, as George W. Bush underwent anesthesia for a scheduled medical procedure. The smooth handoff of presidential power from Bush

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22. Except for small stylistic changes, the following portion of this Address was originally published, in large part, as Akhil Reed Amar & Vikram David Amar, *Constitutional Vices: Some Gaps in the System of Presidential Succession and Transfer of Executive Power*, FINDLAW.COM, July 26, 2002, <http://writ.news.findlaw.com/amar/20020726.html>.

to Cheney and back to Bush occurred pursuant to the Constitution's Twenty-fifth Amendment, which provides a detailed framework regulating various sorts of presidential disability.

But this Amendment did not become part of the Constitution until 1967. Why did it take Americans nearly two centuries to clarify something so important? The unsettling answer is that both the Framers and later generations of Americans gave rather little thought to the vice presidency and certain specific issues involving the transfer of executive power. The very idea of a vice presidency was dreamed up in the closing days of the Philadelphia Convention of 1787, and its chief value was as one cog in an intricate Electoral College contraption regulating *presidential* elections.

Delegates worried that after George Washington left the political scene, each state might simply cast all its electoral votes for its own favorite son. But then this scattering of electoral votes would deny any one candidate a majority and thus, throw every presidential election into Congress, in which case the Executive might become overly dependent on the Legislature. The Philadelphia delegates' ingenious solution was to require each state to vote for two persons, one of whom must be an out-of-stater. This rule would give a boost to national candidates—respected statesmen who might be everyone's second choice after the local favorite son. And to discourage states from gaming the system by wasting their second (out-of-state) vote—thereby cycling back to a fractured world of favorite sons—the Framers created an office called the Vice President and provided that this office would go to the runner-up in the presidential race. Thus states would have strong incentives to take their second (out-of-state) vote seriously.

When Elbridge Gerry (who, ironically enough, would one day serve as Vice President) complained about this odd office and proposed eliminating it, another delegate candidly responded that “such an officer as the vice-President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.”

In light of this history, it is hardly surprising that the Founders' Constitution neglected to specify certain critical details concerning the vice presidency and its relationship to the presidency itself.

The original Electoral College system quickly collapsed once national presidential parties and informal presidential-vice-presidential tickets began to emerge. After the Adams-Jefferson-

Burr election of 1800–1801, the Electoral College was revised by the Twelfth Amendment, which directed states to cast separate votes for the President and the Vice President. But even the Twelfth Amendment focused far more on the presidency than on the number two slot. Indeed, critics predicted that the Amendment would diminish the quality of future vice presidents, who would no longer be major presidential candidates in their own right, but merely second-fiddles to party leaders.

This criticism proved prescient. So long as presidents stayed healthy in office—as did the first eight presidents spanning the Constitution’s first half century—the vice presidency received rather little attention. Indeed, for much of American history—around thirty-seven of the Constitution’s first 180 years—the country did without a Vice President entirely, yet few seemed to notice. The first vacancies occurred in James Madison’s presidency, when his first-term Vice President George Clinton died in 1812 and his second-term Vice President Elbridge Gerry died in 1814. Under the Philadelphia Constitution, no mechanism existed to fill a vice-presidential vacancy—yet another signal of the low status of the office in early America.

But at critical moments in American history when presidents died or became disabled, the cracks in the Founders’ Constitution became visible. The relevant constitutional text of Article II, Section 1 provided that “In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . .” Did “the Same” mean the *office* itself, or merely the *powers and duties* of the office?

If the former was the case, an ascending Vice President was entitled to the honorific title of “President.” More importantly, if an ascending Vice President indeed became President rather than just assuming presidential powers and duties, he could claim a President’s salary, which was both higher than a Vice President’s and also immune from congressional tampering under the rules of Article II. In turn, such immunity would enable him to wield the veto pen and other executive powers with greater independence from the Legislature than would be the case if he were beholden to Congress for his very bread.

Unsurprisingly, Tyler ultimately resolved the constitutional ambiguity in his own favor, claiming that he was indeed the President, and not simply the Vice President acting as President. Following Tyler, later vice presidents regularly proclaimed themselves presidents upon the deaths of their running mates,

with Millard Fillmore replacing Zachary Taylor in 1850 and Andrew Johnson succeeding Abraham Lincoln in 1865.

When the elected President died, and died quickly—as did Harrison, Taylor, and Lincoln—little beyond title and salary turned on whether a Vice President actually became President. But the next presidential death highlighted more troubling constitutional ambiguities. In 1881, James Garfield was shot by a dissatisfied office-seeker, then lingered for months, waxing and waning in bed. Meanwhile the nation drifted, leaderless.

Why didn't Vice President Chester A. Arthur step in, given that the President was obviously disabled? Partly because of questions raised by the Tyler precedent: If Arthur had assumed the duties of the presidency, would he thereby *become* President under the Tyler precedent? Suppose Garfield later recovered, as for a time seemed likely. If Arthur had already become President, would Garfield be out of luck (and out of a job)? If so, Arthur would have in effect staged a coup, and permanently ousted Garfield.

Moreover, Article II, Section 2 neglected to specify who should decide whether presidential "inability" existed. Garfield alone? Arthur alone? The Cabinet? The Congress? The Supreme Court?

Muddying the matter further, Garfield and Arthur came from opposite wings of the Republican Party. Garfield seemed to smile upon a professional civil service, while Arthur was a Republican "stalwart" who favored rewarding the party faithful with government jobs. Garfield paid dearly for his perceived views. Upon arrest, Garfield's assassin blurted out, "I did it and will go to jail for it. I am a Stalwart, and Arthur will be President." In his pockets, police found a letter addressed "To the White House" proclaiming Garfield's death a "sad . . . political necessity" to "unite the Republican party," and a letter addressed to Arthur making various recommendations for Cabinet reshuffling.

Although Arthur of course had no ties to this madman, had the Vice President attempted to swoop into power, this might indeed have looked like a coup d'état to America and the world. So Arthur did nothing, and months dragged on with the country effectively without a President. Garfield eventually died, and under the Tyler precedent, Arthur then became President.

A similar situation arose in 1919, when Woodrow Wilson suffered a series of strokes that left him practically incapacitated. Once again, the Vice President hung back, in part because of the uncertainty created by the Tyler and Garfield

precedents. Once again, the nation endured months without an executive in charge.

But in an age of nuclear weaponry—and now, global terrorism—America can ill afford to be leaderless for long, or to have unclear rules about who is in charge. The Twenty-fifth Amendment, proposed and ratified after JFK's assassination, fills many of the gaps left open by the Founders.

For starters, the Amendment makes clear that when the President dies or resigns or is removed from office, then—and only then—the Vice President does in fact “become President.” Otherwise, if the President is merely disabled (perhaps only temporarily) from exercising the powers and duties of his office, then the Vice President may step in and “assume the *powers and duties* of the office as *Acting President*” without prejudice to the President's ability to resume his post if and when he has recovered from his disability. That is exactly what Cheney did when Bush was under anesthesia.

The Amendment also provides a clear framework for determining whether the President is in fact disabled, and for how long. This framework specifies the precise roles of the President, the Vice President, the Cabinet, and the Congress in resolving questions about possible disability. The Amendment also authorizes Congress, by statute, to involve physicians and other experts in the disability-determination process.

Yet another provision of the Amendment allows a President, with congressional approval, to fill a vice-presidential vacancy. Through this Amendment, Richard Nixon named Gerald Ford to the vice presidency when Spiro Agnew left office in 1973, and Ford in turn appointed Nelson Rockefeller in 1974 when Ford himself became President upon Nixon's resignation.

Even the Twenty-fifth Amendment, however, leaves some vital issues unaddressed. For example, it provides no satisfactory mechanism for determining vice-presidential disability. Given the health problems that many of America's vice presidents have historically faced—indeed, given the troubled medical history of Cheney himself—this is a serious omission. Compounding the problem, if the Vice President ever were to be disabled (or if the vice presidency were at any point vacant) the Twenty-fifth Amendment's elaborate machinery for determining *presidential* disability will seize up; much of the key decisionmaking under this Amendment pivots on determinations that must be personally made by the Vice President. Also, the Amendment fails to address certain problems that arise if death or disability occurs after a presidential election but before Inauguration Day.

These flaws could probably be fixed by a simple federal statute, but thus far Congress has ignored these issues. History suggests that Americans are slow to imagine the unimaginable—even after it happens—and slower still to repair visible defects in our legal regime of presidential selection and succession.

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*And here is Part II, posted on September 6, 2002:*<sup>23</sup>

September presents haunting reminders that bad things sometimes happen to good people and a great nation. One hundred and one years ago today, William McKinley was shot by a politically motivated assassin. McKinley died several days later, on September 14, 1901. In mid-September 1881, President James Garfield also died from gunshot wounds inflicted by a politically motivated assassin. And then of course there is the date that will live in infamy, September 11, 2001.

America cannot always prevent tragedy, but America often can, with relative ease, minimize the constitutional damage resulting from political assassins and the like. Yet the country's current legal framework is notably flawed—a series of constitutional accidents waiting to happen, and in some cases waiting to happen again. In this column, we shall briefly catalogue some of the problems that can occur and some simple nonpartisan solutions that lawmakers should adopt now—before tragedy strikes again.

The Twenty-fifth Amendment, adopted after JFK's assassination, provides a detailed framework for determining whether the President is so severely disabled as to justify allowing someone else to act as President for the duration of the disability. But the Amendment says nothing about possible vice-presidential disability, and federal statutes are likewise silent on the topic.

Suppose, for example, that the Vice President is in a coma, whether from natural causes or because of some attempted assassination. Current law offers no framework for determining that the Vice President is disabled and therefore unfit for the job until he recovers, and in the absence of such a framework he formally retains all the powers and duties of his office. Nor does current law allow someone other than the Vice President or President to initiate determinations of presidential disability.

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23. With some alterations, the following portion of this Address was originally published as Akhil Reed Amar & Vikram David Amar, *Constitutional Accidents Waiting to Happen—Again: How We Can Address Tragedies Such As Political Assassinations and Electoral Terrorism*, FINDLAW.COM, Sept. 6, 2002, <http://writ.news.findlaw.com/amar/20020906.html> [hereinafter Amar & Amar, *Constitutional Accidents*].

These legal gaps yield several scenarios of needless vulnerability. First, there is the problem of vice-presidential disability/presidential death. If the Vice President is not fit to take over, but there is no proper legal mechanism for making this determination while he is Vice President, then what happens if the President dies—whether because of some assassination or political terrorism, or from natural causes? The comatose Vice President would now become the comatose President.

Even worse, in this scenario there is no statutory or constitutional framework in place to determine his unfitness *as President!* Unless a President voluntarily steps aside (which is unlikely if he is comatose), the only constitutional or statutory mechanism now in place to establish that a President is disabled is triggered by the Vice President. But in the vice-presidential disability/presidential death scenario, there is no longer any Vice President in office.

Similar problems arise under a vice-presidential disability/presidential disability scenario. Imagine that the Vice President is comatose, and the President does not die, but himself becomes severely disabled—whether from some terrorist incident or from natural causes. Here too, the problem is that current law requires that (unless the President himself voluntarily steps aside) the Vice President initiate the machinery for determining presidential disability. Thus, if the Vice President is himself disabled, the machinery simply freezes up, and there is no clearly established legal framework for determining presidential disability.

Consider also a related scenario involving a disabled Acting President, in which a President becomes disabled first, and a fit Vice President steps up to assume the role of Acting President. If that Acting President later becomes disabled or arguably disabled, who could trigger the process of making the disability determination?

Now consider two vice-presidential vacancy scenarios: Either the Vice President has died, and has not yet been replaced—or the President has died, and the former Vice President has become President but not yet installed his new Vice President. In these scenarios, there is once again no Vice President in place to trigger the disability-determination process in the event the President suffers some serious physical or mental setback.

Although the Twenty-fifth Amendment nowhere addresses these scenarios, neither does it preclude a congressional statute that would solve these problems. Indeed, other language in the Constitution—in Article II—invites Congress “by law” to provide

for cases of presidential and vice-presidential death and disability. In the event both President and Vice President have died or become disabled, Article II gives Congress power to decide by law “what Officer” should act as President. At least two questions arise: Who should be that officer? And, in the event of double death, how long should that officer serve?

The presidential succession statute currently in place, enacted in 1947, answers these two questions, but gets both answers wrong, and indeed gives a plainly unconstitutional answer to the first question—the “who” question.<sup>24</sup> According to the Act, in the event of a double death, the Speaker of the House becomes President. The line of succession continues with the President pro tempore of the Senate and then members of the Cabinet, beginning with the Secretary of State. The Act also specifies that the successor President serves out the remainder of the deceased President’s term.

But as James Madison argued in 1792, congressional legislators are not “officers” of the United States, as the Article II statutory Succession Clause uses the word. In the Constitution, “officers” generally means executive and judicial officials, not legislators. (Otherwise the Article I, Section 6 rule that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office” would be incoherent.)

In particular, the Article II statutory Succession Clause envisioned that a Cabinet secretary handpicked by the President himself would substitute in the sad event of double death or double disability. This rule of Cabinet succession (which was in place for sixty years before Congress changed the law in 1947) helps maximize the policy continuity between the President that Americans voted for on Election Day and the statutory successor who ends up taking his place.

In sum, Article II empowers Congress to choose which Cabinet position is next in line, but it does not empower Congress to choose one of its own members instead. Thus, if the American people voted for a Republican presidential ticket, they should not end up with a Democratic statutory successor President, and vice versa. (We first criticized the 1947 law in 1995 when the Democrats controlled the presidency and Republican Newt Gingrich stood next in line as Speaker of the House. But we feel the same way about the issue today, when

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24. For more details and analysis of this claim and the claims in the ensuing paragraphs, see generally Amar & Amar, *Presidential Succession*, *supra* note 13.

the White House is controlled by the Republicans and when Democrat Richard Gephardt would be Speaker of the House if the Democrats win a few more seats in the upcoming off-year election.)

Because no Cabinet secretary enjoys a personal mandate from a national electorate nor do congressional leaders picked within individual states and districts, the Cabinet successor who takes over in the event of double death should serve only as long as is necessary to arrange a special off-year presidential election to choose someone to finish the term. That way, the nation spends as little time as possible with a President lacking a personal national electoral mandate.

If personal mandates from the American people are important, isn't there something odd about America's current system of choosing vice presidents? After all, voters often pay little attention to the bottom of the ticket. According to exit polls, America has at times elected vice presidents who could never have won the vice presidency, to say nothing of the presidency, head to head against their leading opponent.

If people vote for a presidential ticket despite the vice-presidential candidate, then what would that Vice President's mandate be were he to become President after a terrorist incident or otherwise? Why should the American people be led by a President who never did, and perhaps never could, win the support of the national people? (Remember Dan Quayle?)

One way to strengthen the Vice President's personal mandate would be to allow voters to vote separately for President and Vice President, just as many states allow separate votes for Governors and Lieutenant Governors. Nothing in the Constitution prevents states from giving voters this option, but it does raise several complexities.<sup>25</sup>

Here is yet another problem: Suppose a President-elect were to die between Election Day and Inauguration Day. Shouldn't the Vice President-elect automatically become President on Inauguration Day?

If the death occurs after Congress has counted the Electoral College votes, this is precisely what would happen under the Twentieth Amendment. But suppose the death occurs, whether naturally or because of terrorism, hours before the meeting of the Electoral College? Too unlikely ever to actually happen? Not at all. Consider that in 1872, presidential candidate Horace Greeley

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25. For more details and analysis, see Amar & Amar, *President Quayle?*, *supra* note 8, at 918–26.

died after the election but before the Electoral College met. Some electors nevertheless voted for Greeley, and Congress refused to count these electoral votes. Nothing much turned on that decision—Greeley had lost to Ulysses Grant, anyway.

But now suppose the candidate who won the November election died right before the Electoral College met, and that some of the Electoral College nevertheless voted for him—perhaps because college members had pledged to do so, or because state law purported to bind them, or because they had little time to process the tragedy and consider their other options. If Congress applied the Greeley precedent, then all these electoral votes would be tossed aside, and the candidate who *lost* the election might well become the President.

But what if the death occurred shortly before Election Day? Again, this is no abstract hypothetical. In America's last general election, the Democratic U.S. Senate candidate from Missouri, Mel Carnahan, died in a plane crash in late October, just weeks before the voters went to the polls.

The 1968 assassination of presidential candidate Robert F. Kennedy reminds us that terrorism compounds the risks run by candidates. (Indeed, future historians may well look back at RFK's assassination as an eerie precursor to more recent acts of terror in the heartland; Kennedy was felled by a gunman from the Middle East, apparently because of the candidate's commitment to Israel.)

What if Kennedy had been assassinated not hours after the California primary in June 1968 but hours before the general election in November 1968? In the wake of massive grief and confusion, what kind of election would this have been, with millions of voters unsure whether their votes for a dead candidate would even count, or how?

One solution would allow for an election to be postponed in certain disastrous circumstances. For example, Congress could provide that if a major party presidential candidate were to die or become incapacitated (as certified by, say, the Chief Justice of the United States) shortly before Election Day, the presidential election should be postponed—a few weeks should suffice—in order to allow the system to regroup and field a new ticket, and to allow the states to reprint ballots.

If election postponement might make sense in the case of the death of a candidate, it might likewise make sense in other types of national emergency or mass terrorism. Recall that September 11, 2001, was a scheduled election day in New York, the day the parties were supposed to elect their mayoral candidates. But

when tragedy struck, the primary was postponed, as state law allowed it to be.

If, God forbid, a similar event were to happen on or near the national Election Day—timed, perhaps, in an attempt to undermine the functioning of American democracy—there ought to be a similar mechanism for postponing the election until the nation gets back on its feet. But current federal law does not provide for such a mechanism.

All of our suggestions today raise important issues of principle and detail. Some readers will doubtless find our proposed solutions imperfect, or worse. Perhaps some readers may have better solutions. But the time for citizens and policymakers to start discussing these issues is now, before tragedy strikes again and does needless damage to American democracy.

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*Although Washington, D.C., did not seem in any hurry to enact reform along the lines I had proposed, Hollywood was paying closer attention and chose to “enact” some of my ideas in a somewhat different fashion—by acting them out in a fictional drama. During the summer and fall of 2003, the screenwriters of the hit NBC series *The West Wing* teed up the issue of presidential succession in their inimitably gripping way—and the moment was yet again ripe for serious discussion. In part because of this hit series, the *Washington Post* took renewed interest in the matter and two committees of the U.S. Senate even scheduled a joint hearing to ponder the topic. Thank you, President Bartlet!*

*Here is what I wrote in the *Washington Post* on September 14, 2003:<sup>26</sup>*

Life and art (or at least television) converge this month as both the U.S. Senate and NBC’s *The West Wing* focus on America’s bizarre presidential succession rules.

On Wednesday, September 24, fans of the fictional President Josiah “Jed” Bartlet will learn whether he regains his office after having temporarily abandoned it. At the end of last season, terrorists kidnapped Bartlet’s daughter, exposing him and the country to possible political extortion. With his Vice President having recently resigned, Bartlet, a staunch Democrat, found himself obliged for the good of the nation to hand over

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26. Except for small stylistic changes, the following portion of this Address was originally published as Akhil Reed Amar, *After the Veep, Redraw the Line*, WASH. POST, Sept. 14, 2003, at B2.

power to the Republican Speaker of the House, played by John Goodman.

Now flash back to the real world. On Tuesday, the Senate will hold hearings to consider whether our law should indeed put the Speaker in the West Wing if both the President and Vice President resigned, died, or became disabled. Of course, such a double disaster is a low-probability event—but then, so was the electoral train wreck of 2000. Wise lawmakers must plan for highly destabilizing contingencies—earthquakes, blackouts, voting machine foul-ups, terror attacks, assassinations—before they happen. This week’s hearings are part of a broader process of post-9/11 reassessment now underway, aimed at maximizing continuity of government in the event of crisis.

The proper starting point for planning is the Constitution, which says that if both the President and the Vice President are unavailable, presidential power should flow to some other federal “Officer” named by law. The Framers clearly had in mind a Cabinet officer—presumably, one who had been picked by the President himself before tragedy struck. In fact, no less an authority than James Madison insisted that the constitutionally mandated separation of executive and legislative powers made congressional leaders ineligible.<sup>27</sup> Yet the current succession statute, enacted in 1947, puts the Speaker of the House and then the President pro tempore of the Senate—historically the majority party’s most senior senator, who presides over the Senate in the Vice President’s absence—ahead of Cabinet officers, in plain disregard of Madison’s careful constitutional analysis.

In truth, 1947 was not the first time Congress chose to ignore Madison. In the early years of George Washington’s presidency, then-congressman Madison’s argument for Cabinet succession stumbled into a political minefield. Which Cabinet position should head the list? Secretary of State Thomas Jefferson thought his office deserved top billing, but Treasury Secretary Alexander Hamilton had other ideas. Eventually, in 1792, Congress detoured around the minefield by placing the President pro tempore of the Senate at the top of the line of succession, followed by the Speaker of the House. Though the 1947 law flips this order, it suffers from the same constitutional flaws that Madison identified two centuries ago.

Constitutionality aside, the 1947 law defies common sense. Suppose that a President is not dead but briefly disabled, and the

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27. For more details and analysis of this claim, see generally Amar & Amar, *Presidential Succession*, *supra* note 13.

Vice President is also unavailable, for whatever reason. Because separation-of-powers principles prohibit a sitting legislator from serving even temporarily in the executive branch, the statute says that a Speaker of the House must quit Congress before moving into the Oval Office, as happened on *The West Wing*. But if the disabled President then recovers and reclaims power, the former Speaker will have no job to return to. That hardly seems a fitting reward for faithful public service in a crisis. A more sensible law would let a Cabinet officer step up for the duration of the disability and then step down whenever the President recovered.

In another wrinkle, the 1947 law allows the Speaker to play an ugly wait-and-see game. If he thinks a disability will not last long—and, again, if the Vice President is out of the picture—he can allow a Cabinet officer to act as President. If the disability then worsens, the Speaker can, with a snap of his fingers, bump the Cabinet secretary out of the Oval Office and put himself in. But bumping would only encourage political gamesmanship, weaken the presidency itself, and increase instability at a moment when tranquility should be the nation's top priority.

Current law may even encourage a more disruptive sort of bumping. Whenever legislative leaders help impeach and remove the President or Vice President, they themselves move up one notch in the succession order. Might this conflict of interest compromise their roles as impeachment judges and jurors?

In fact, when President Andrew Johnson was impeached in 1868, Senate leader Ben Wade stood at the top of the succession list, thanks to the 1792 law. (There was no Vice President in 1868; Johnson himself had been elected to this post in 1864 but left it vacant when he became President upon Lincoln's assassination in 1865.) Even as Wade sat in supposedly impartial judgment over Johnson, he had already begun making plans to move into the White House. Though Johnson ultimately was acquitted, the Wade affair prompted reformers in 1886 to remove all legislative leaders from the line of succession. But in 1947, the lessons of 1868 were forgotten, and legislators returned to the top of the succession list.

Other conflicts of interest under the current law arise when a President seeks to fill a vacant number two spot by nominating a new Vice President to be confirmed by Congress. Such vacancies should be filled quickly, but the statute gives congressional leaders perverse incentives to delay confirmation. In 1974, it took a Democratic Congress four months to confirm Republican President Gerald Ford's nominee, Nelson A.

Rockefeller. Had something happened to Ford in the meantime, Democratic Speaker Carl Albert would have assumed power.

Which highlights perhaps the biggest problem: If Americans elect a President of one party, why should we get stuck with a President of the opposite party—perhaps (as in the fictional *The West Wing*) a sworn foe of the person we chose? Cabinet succession would avoid this oddity.

Supporters of the 1947 law say that presidential powers should go to an elected leader, not an appointed underling. But congressmen are elected locally, not nationally. Legislators often lack the national vision that characterizes the President and his Cabinet team. Historically, only one Speaker of the House, James K. Polk, has ever been elected President, compared with six secretaries of state.

Some have suggested that, if existing Cabinet slots are deemed unsuitable to head the succession list, Congress could create a new Cabinet post of “Second” or “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 the 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.

If the proposed Assistant Vice President’s job description seems rather quirky—doing almost nothing while remaining ready to do everything—this is of course also true of the vice presidency itself. And because, despite every precaution, mishap might befall the Assistant Vice President, a new statute would, like the current one, need to put existing Cabinet officers on the next rungs of the succession ladder.

However the details are resolved, America needs to address the anomalies in the current law and to do it quickly. At present, any shift from congressional to Cabinet succession would be a partisan wash—from one set of Republicans to another. But if a divided government returns after the 2004 elections, reform will be much harder to achieve. Although any statutory fix will come too late to help President Bartlet next week, now is the perfect time to enact reforms that might assist President Bush and his successors in the real West Wing.

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*And here is my September 16, 2003, testimony before the Senate Committee on Rules and Administration and the Senate Judiciary Committee, in which various Twenty-fifth Amendment arguments that appeared only fleetingly in my Washington Post piece were given greater prominence.*<sup>28</sup>

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.

The current presidential succession act, section 19 of title 3, United States Code, 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, Clause 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*.<sup>29</sup> 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.<sup>30</sup>

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28. The following portion of this Address was originally published as *Ensuring the Continuity of the United States Government: The Presidency: J. Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Rules and Administration*, 108th Cong. 6–9 (2003) (statement of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale Law School).

29. For more discussion and analysis, see Amar & Amar, *Presidential Succession*, *supra* note 13, at 114–27.

30. According to Madison, Congress "certainly err[ed]" when it placed the President pro tempore of the Senate and Speaker of the House 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, Congress 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]

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. Its rules run counter to the approach of the Twenty-fifth 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 Twenty-fifth Amendment. Third, Section 19 can upend the results of a presidential election. If Americans elect party A to the White House, why should we

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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 THE PAPERS OF JAMES MADISON 235, 235–36 (Robert A. Rutland et al. eds., 1983). Several members of the First and Second Congresses voiced similar views. See JOHN D. FERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 57–59 (1965) (detailing the views of several members of Congress that House and Senate members were not officers); Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 457–58 (1949) ("The constitutional objection most frequently raised against the new presidential succession law is that presiding legislative officers are not officers in the constitutional sense . . .").

end up with party *B*? Here, too, Section 19 is in serious tension with the better approach embodied in the Twenty-fifth 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 Twenty-fifth Amendment. Fifth, Section 19 fails to deal with certain windows of special vulnerability immediately before and after presidential elections.<sup>31</sup>

In short, Section 19 violates Article II and is out of sync with the basic spirit and structure of the Twenty-fifth 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 Twenty-fifth 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 Twenty-fifth 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 Twenty-fifth 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

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31. For more analysis of the first three problems, see Amar & Amar, *Presidential Succession*, *supra* note 13, at 118–29. For more discussion of the fourth problem, see Amar & Amar, *Constitutional Accidents*, *supra* note 23. For more discussion of the fifth problem, see Amar, *Presidents*, *supra* note 12, at 217–21; Amar, *Terrorist Threat*, *supra* note 20; Amar, *Dead President-Elect*, *supra* note 10.

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 Vice President 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 Vice President 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.<sup>32</sup> Thank you.

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*For an academic, anything worth publishing is worth publishing twice—as this Address itself evidences. One year after my Senate testimony, the Constitution Subcommittee of the House Judiciary Committee solicited my testimony on presidential succession issues, and I largely repeated verbatim my earlier statement to the Senate. In one particular, however, I backpedalled. Some senators had balked at the idea of creating a new position of Assistant Vice President. I rather liked the idea, for it seemed to take supreme advantage of specialization of labor: Pick the one person—perhaps even a former President—who could be the best able to take charge in the extremely unlikely and wholly unprecedented situation of simultaneous double death or double disability. At this moment, the nation and the world would be reeling, and we all would benefit from the soothing presence of a figure who understood the job of the President instinctively, who had all the major world leaders already on his speed-dial, and who had been in effect pre-approved by the American electorate during the presidential campaign itself. Just as a baseball team might, at a critical moment, need a left-handed strikeout ace who*

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32. See generally Amar, *Presidents*, *supra* note 12. For additional elaboration, see Amar & Amar, *Presidential Succession*, *supra* note 13, at 139; Amar, *Terrorist Threat*, *supra* note 20; Amar & Amar, *Constitutional Accidents*, *supra* note 23; Amar, *Dead President-Elect*, *supra* note 10.

*is able to get one key batter out in the ninth inning—and thereby win Game Seven of the World Series—so might the nation need a player who would come in from the dugout to save the day in a moment of crisis. But not everyone loves the specialty player—the pinch hitter, the pinch runner, the “closer.” Many purists still object to the designated hitter. So in my House testimony of October 6, 2004, I modified my earlier testimony as follows:*

Essentially, there are two plausible options. Under one option, 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. . . . If this option were deemed undesirable, Congress could avoid creating a new position of Assistant Vice President, and instead simply designate the Secretary of State, or any other top Cabinet position, first in the line of succession after the Vice President.<sup>33</sup>

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*In case any of you missed it, there was yet another interesting presidential election a while ago. During the 2008 primary season, my thoughts once again turned to the Twenty-fifth Amendment. The careful observer will note several familiar aspects of my latest idea. As in my 1999 New Republic essay, I envision using Section 3 of the Amendment beyond physical and mental disabilities, to encompass political disabilities—even self-imposed ones. As in my 2000 Slate posting, I wonder whether clever politicians could use Section 2 of the Amendment to in effect “flip the ticket” by allowing the President and Vice President to trade places. As in my 2003 Senate testimony and 2004 House testimony, I seek to enhance democratic legitimacy by using presidential elections to secure a popular vote of confidence for various schemes of presidential succession. And as in 1999, I wonder whether creative use of the Amendment may enable a true presidential-vice-presidential team to leverage the benefits of joint incumbency to stretch out the incumbency advantage from two terms to four terms.*

*Here is what I posted in Slate on March 21, 2008.<sup>34</sup>*

When Hillary Clinton recently floated the idea of choosing Barack Obama as her running mate, she won political points

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33. *Presidential Succession Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 36 (2004) (statement of Akhil Reed Amar, Southmayd Professor of Law and Political Science, Yale Law School).

34. The following portion of this Address was originally published as Akhil Reed Amar, *Clinton–Obama, Obama–Clinton: How They Could Run Together and Take Turns Being President*, SLATE, Mar. 21, 2008, <http://www.slate.com/id/2187034>.

without being taken seriously (especially by Obama). The primary season has turned into the kind of slog and slugfest that makes opponents more opposed to each other, not less. But humor me, for a moment, and imagine that the kind of reconciliation that would allow them to be running mates is possible. Not to mention the best outcome for the party.

But which should it be: Clinton–Obama or Obama–Clinton? In fact, voters in November could actually endorse *both* versions of the ticket—truly, two Presidents for the price of one. How? The Constitution’s Twenty-fifth Amendment allows for a new paradigm of political teamwork: The two Democratic candidates could publicly agree to take turns in the top slot.

Adopted in 1967, in the shadow of John F. Kennedy’s assassination, the Twenty-fifth Amendment allows Presidents unilaterally to transfer presidential power to their Vice Presidents and enables Presidents, with congressional consent, to fill a vacancy in the vice presidency should one arise. By creatively using the constitutional rules created by this Amendment, the Democrats can, if they are so inclined, present the voters in November with a new kind of balanced ticket.

Here’s how it would work: In August at the Democratic National Convention, the party would nominate one candidate for President and the other for Vice President in the time-honored way. In their acceptance speeches, the nominees would announce that they intend to alternate. For example, they could tell the voters that the person heading the Democratic ticket would, if elected, take office in January 2009 but would serve as President for only the first three years of the four-year term. In January 2012, the teammates would use the Twenty-fifth Amendment to switch places, and the person elected Vice President would assume the presidency for the final year of the term. There is nothing magical about these dates. Almost any date would do. For maximal democratic legitimacy, however, the candidates should inform the voters before the election of the specific date when their planned shift of power will occur.

Of course, if this dream team proved popular in office, the teammates could run for reelection in 2012. This time, it might make the most sense for the ticket to be the inverse of 2008. Thus, the person at the bottom of the 2008 ticket could top the 2012 ticket. If reelected, our initial-Vice-President-turned-President might then serve until, say, January 2016—four consecutive years in all—and then our initial-President-turned-Vice-President would resume the top spot for the final year of the

second term. (Thus, this person, too, would end up serving four years, albeit not consecutively.)

And here's the icing on the constitutional cake: Nothing in the Twenty-fifth Amendment or elsewhere in the founding document would prevent this team from presenting themselves to the electorate in similar fashion in 2016. If the voters were to endorse the pair yet again, then at this point one of the teammates would have been elected twice as President and would become ineligible in any future presidential race, but the *other* teammate would in fact remain fully eligible to run in 2020. With the result that, if voters so chose, the teammates could, between themselves, share power for a total of four full terms. (Under the Twenty-second Amendment, no person can be elected to the presidency more than twice, and under the Twelfth Amendment, Vice Presidents must meet the same eligibility and electability rules as Presidents.)

Ticket-flipping, then, provides a brilliant way for the Democrats to leverage the advantages of incumbency after 2009 so as to stretch their potential presidential tenure over the ensuing sixteen years rather than the standard eight. The arrangement requires two strong candidates, each of whom is very plausibly presidential and each of whom has a large and intense political base, whose enthusiasm would be needed to assure success in the general election. This year the Democrats are blessed with two such powerhouses.

Which of the two candidates should top the ticket in 2008? Whoever ends up with more delegates at the convention. But if the two can privately—or even publicly—agree now to run as a true team in the general election, both will have ironclad incentives to play nice in the remaining primaries and caucuses and at the convention itself.<sup>35</sup> Each will want to head the ticket,

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35. In the original version of this article for *Slate* I wrote:

Why should Sen[ator] Obama promise to make Sen[ator] Clinton his running mate and to share the presidency with her? Because half a loaf is better than none, and without this deal he may end up with nothing—neither the presidency nor the vice presidency nor a great shot at becoming president later in life.

This last point is worth stressing. If Clinton were to win the nomination and choose someone else as her running mate, what would happen to Obama? Were Clinton to lose to John McCain in the general election, Obama could of course run again in 2012. But among Democrats in the modern era, the only candidates besides incumbent presidents to have actually won the presidency were fresh faces—that is, candidates running for the presidency for the first time. Democrats love fresh faces—JFK in 1960, Jimmy Carter in 1976, Bill Clinton in 1992. Prominent non-incumbent Democrats on their second or third tries for the presidency have either failed to get the nomination—like Hubert Humphrey in 1972, Jerry Brown in 1992, and John Edwards this year—or lost

but because the person on the bottom will also become President if the pair wins in November, competition for the top spot will be far less likely to spiral out of control in the turbulent weeks and months ahead. And so for the party, the benefits are manifold: A dream-team, turn-taking ticket would ensure that the Democrats' two most popular leaders and their supporters behave themselves and then truly unite. Moreover, the policy differences between Clinton and Obama are so tiny that it would be perfectly principled to tell voters that the ticket will flip at some specified post-inaugural date.

Exactly how does the Constitution enable a sitting President and Vice President to trade places? Whenever a President resigns, the Vice President automatically becomes President, as when Richard Nixon stepped down and thus made Gerald Ford President in 1974. Under the Twenty-fifth Amendment, the new President, in turn, picks a new Vice President, subject to congressional approval. President Ford picked Nelson Rockefeller to be his Vice President, and Congress said yes. Here's the twist: The Twenty-fifth Amendment would allow the new President to pick the old President as the new Vice President. *Voilà*—the ticket, flipped! As long as the Congress approves, the Twenty-fifth Amendment would thus enable the President and Vice

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in the general election, like Adlai Stevenson in 1956, Humphrey in 1968, and Al Gore in 2000. Presidential competition within the Democratic Party is thus especially fierce because each candidate realizes that, most likely, it is now or never. (Competition among Republicans, by contrast, is generally tamer because the GOP loves political encores and is better at electing decidedly unfresh faces. Several Republicans have won the top prize on their second or third try—Richard Nixon, Ronald Reagan, and the first George Bush, for example. McCain hopes to join their ranks this year.)

Alternatively, if Clinton heads up an Obama-less ticket this year and beats McCain, Obama's chances of making it to the presidency would become even worse. Challenging a Democratic incumbent in 2012 would be an uphill battle, so Obama would probably need to wait at least until 2016, at which point he could very well face stiff party competition from whomever Clinton picks as her running mate. The fact that Obama's presidential prospects would be *worse* if Clinton were to win on her own than if she were to lose to McCain highlights another tactical truth: Even if Clinton has the votes at the convention to prevail and the power to pick someone other than Obama as her running mate, it might be unwise to do so, given that Obama might have diminished incentives to deliver his ground troops for her come November.

Of course, everything in this analysis is symmetrical: We could switch the names *Obama* and *Clinton* in the preceding paragraphs and the points would be equally valid. A half-loaf for Clinton is better than none; and if Obama ends up on top of a Clinton-less ticket, she loses her own best chance ever to become president. Most important, were Obama to run without Clinton, she might actually be better off if he were to lose the general election to McCain; and this, in turn, gives him a good tactical reason to put her on the ticket, so that she and her most ardent supporters have the proper incentives.

President to switch seats in a nimble transaction that could be completed in less than an hour.

As a matter of democratic principle, Congress should approve such a deal, given that the American voters would have blessed it long in advance, in the presidential election itself. But suppose a pigheaded Congress refused to play along, for example, because it was controlled by Republican naysayers. No matter. Instead of formally resigning, a President could accomplish the flip on his or her own, simply by transferring presidential power to the Vice President under a different section of the Twenty-fifth Amendment that allows the President unilaterally to transform the Vice President into the “Acting President.” In 2002 and again in 2007, George W. Bush used this section to hand over power to Dick Cheney before undergoing brief anesthesia. When Bush recovered, he resumed the reins of power.

To be clear: At every instant, America would have one, and only one, person acting as President and formally in charge. Handoffs of power between teammates would occur much as they have when incumbents traditionally leave office, as when Reagan yielded in 1989, at the end of his second term, to his own handpicked running mate, the first George Bush. The Twenty-fifth Amendment was specially designed to facilitate easy transfers of power back and forth between Presidents and Vice Presidents. Its full potential to create a different kind of teamwork at the top—and to launch a new kind of presidential election strategy—has yet to be fully appreciated. Thanks to this Amendment, the Democratic Party need not tear itself apart in trying to choose between two historic firsts. Instead, Democrats can offer the voters both—the first black President *and* the first woman President—via the first truly balanced presidential ticket.

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*When I wrote the piece above, I did not seriously expect that my tag-team, ticket-flipping proposal would in fact be adopted in the 2008 race.<sup>36</sup> The idea was too edgy, too novel, to be sprung on the citizenry near the end of the primary season, without the proper groundwork having been laid much earlier. But I do think*

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36. The actual result—with Obama as President and Hillary Clinton as Secretary of State was, however, not wildly at odds with the incentive analysis I offered in note 35, *supra*. Clinton did indeed end up with an important and prestigious office. If she had any indication from Obama prior to the convention that she would likely be given this position in an Obama administration, this hint or promise would have given her an added incentive to work extra hard for an Obama victory—especially because she could plausibly imagine that her position as the top Cabinet officer might be a suitable launching pad for a second presidential run in 2016.

*that some time in the foreseeable future a tag-team approach may well be tried because there may well come a day when a team would end up combining the teammates' political positives without a corresponding increase in the team's political negatives—with more added base than added baggage. To generalize the point: A turn-taking, ticket-flipping approach would work best whenever a political party genuinely has two strong candidates, each of whom is very plausibly presidential and each of whom has a large and intense political base whose enthusiasm is needed to assure success in the general election.*

*I'm not predicting that my tag-team, ticket-flipping idea will in fact be tried within the next few elections. But stranger things have happened. (Take Florida, 2000.) And if something like this does happen in your lifetime, you can say you heard it here first—in Houston.*