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Hearing: Relating to the Death of a President-Designate Between the General Election and Inauguration

Committee on the Judiciary. Senate. United States.

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PRESIDENTIAL SUCCESSION BETWEEN THE POPULAR ELECTION AND THE INAUGURATION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

RELATING TO THE DEATH OF A PRESIDENT-DESIGNATE BETWEEN THE GENERAL ELECTION AND THE INAUGURATION

FEBRUARY 2, 1994

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WEDNESDAY, FEBRUARY 2, 1994

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:35 a.m. in room SD–226, Dirksen Senate Office Building, Hon. Paul Simon, chairman of the subcommittee, presiding.

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. The subcommittee hearing will come to order. First of all, my apologies to the witnesses. I don't like to have people keep me late and I don't like to keep other people late, and I got jammed in on one of these things that I couldn't get out of.

We have the question—and let me pay tribute to Thomas H. Neale, who is an analyst in the Government Division of the Congressional Research Service, for his research in this area about what we do in this area of Presidential succession. It is clear what happens after people are sworn in. It is clear that a political party has the right. We have had recent examples. There have been three examples where Vice Presidential nominees have left the ticket.

In the case of Stephen A. Douglas, his Vice Presidential nominee, a Senator, left the ticket. In the case of George McGovern, our colleague, Senator Tom Eagleton, left the ticket. In the case of William Howard Taft in the 1912 election, the Vice President, his nominee, died just 6 days before the election.

What came out of a hearing that we had last year on another subject is less clear. There is some question on the part of experts on the period between the election and the swearing-in, though the 20th amendment covers part of that, but there is apparently a great deal of uncertainty of what would happen between the time the electoral college meets and the electoral college vote is counted.

Realistically, we have had cases. Horace Greeley died just a few days after an election. Horace Greeley was not elected, but we some day may have a problem and we can correct it statutorily, but we ought to take a look at the problem to see if something can or should be done.

I am pleased that we have some people who have done work in this field. First of all, our first witness is the former Senator from

the State of Indiana, who has contributed a great deal to constitutional discussions over the years and has been in the leadership in this field, Senator Birch Bayh.

STATEMENT OF HON. BIRCH BAYH, A FORMER U.S. SENATOR FROM THE STATE OF INDIANA

Senator BAYH. Thank you very much, Mr. Chairman. I must confess it is a privilege to be here with the other witnesses and to share my thoughts with you. As I go down this list, it would appear to me that probably Assistant Attorney General Dellinger is a lot busier than any of the rest of us, and if you would care to take him ahead of me that is all right with me.

Senator SIMON. If you would prefer to listen to the other witnesses first and——

Senator BAYH. No. I just, as a matter of courtesy—I know how busy he must be, and you know all I am doing is trying to make a living as a lawyer.

Senator SIMON. Well, this body is very prejudiced in favor of Senators and former Senators when it comes to testifying. Maybe we shouldn't be, but we are, so we are calling on you first here.

Senator BAYH. Well, since you are the chairman and a sitting member, I certainly wouldn't want to take issue with your giving preference to former Senators.

It is a privilege to have a chance to be here, and as I see Walter Dellinger and Walter Berns, particularly, they were kind enough to testify before Senate Judiciary subcommittees back when I was interested in this kind of thing and it is a privilege to be with them and Mr. Potter and Professor Amar.

I want to compliment you, Senator Simon, for looking into this issue. As you may have observed, this is a subject that human nature tries to avoid. We don't like to think about Presidents or Vice Presidents dying. We don't like to think of them becoming ill, but the fact of the matter is they do, and so I think that although people might like to hide the fact that Presidents do die, or Presidential candidates or Presidents-elect, candidates, et cetera, do die and we need to give consideration to that.

When we were worrying about the 25th amendment, we tried to find out exactly what various generations of legislators and leaders thought, and there is not a very good track record there. In fact, at Philadelphia there was only one comment. The delegate from Delaware, a fellow by the name of Dickinson, asked one sentence, what is meant by the word "inability" and who shall decide, and it was never answered.

It was with that rather sketchy record we began looking at the 25th amendment. The 12th has very little record. The 20th has more direction. I hope that a study of the 25th amendment dealing with both succession and disability at a little later stage of the game after they have taken the oath of office—I think you have a pretty good track record there of what Congress was considering.

I might say a word or two about the 25th amendment because it is, I think, a pretty good foundation on which to build. It is not a perfect document. There are shortcomings which are obvious, and I must say at the time we were deliberating on it we thought about these other matters that now you are addressing, and perhaps we

were not as conscientious as we should be in excluding them. It was a political decision. We thought, dealing with a constitutional amendment, it would only carry so big a load, and dealing particularly with the disability question in addition to filling vacancies in the Vice President, we thought we ought to try to concentrate on that. Now, you are coming along, I am happy to see, and can deal with this, I think, by statute.

If you look at the 25th amendment, Presidential power and disposing of it or transferring it is probably the most controversial issue in the political process because that is the most power. When President Reagan, I like to say, involved himself in the nonuse of the 25th amendment by transferring the Presidency temporarily to Vice President Bush and saying that this wasn't what Congress intended, frankly I think he did the right thing, but for the wrong reason because that was the only way he could do it.

But after he did that, then I think every political columnist in this town and perhaps elsewhere in the country wrote rather scathing articles pointing out the weaknesses of the 25th amendment, which were obvious. The University of Virginia Miller Center commissioned a study chaired by former Attorney General Brownell and myself and a number of other very learned people, excluding me from the learned category. We had Fred Fielding, the general counsel to President Reagan at the time of the assassination attempt, as well as at the time of the transfer of power. We had a number of people.

After a lengthy of study of about 1½ years, the commission wrote a report, which I would be glad to make available to your committee if you don't already have it, that really gave a strong endorsement to the 25th amendment not as a perfect solution, but as the best solution. We found out, and in studying it in hindsight it was certainly accurate, that when you try to solve one of the problems that exists in the 25th amendment, a larger one is created. Enough said for that.

Let me urge you to go forward with dispatch now on this amending process. If you do it now before there is a crisis, you can deal with it dispassionately, nonpolitically, and try to find the right solution. If you wait until a tragedy occurs, it will be right in the heat of a political environment that makes it almost impossible to make an objective assessment. Now, you can deal with it generically. If it happens at or shortly after an election, the people who must solve it will deal with it in terms of how it affects them or their party. So I think it is certainly wise to go forward now.

I can't help but sort of give a backhand slap at the electoral college system which, as you know, I did everything I could in my power to get rid of the darned thing, and we got 50-some votes. The electors keep popping up as spoilers, and as you deal with this problem one of the things you have to deal with is faithless electors and how much of a marching order you can give to electors. My concern is you can't give them very much of a marching order, so they are there and I think you have to deal with it.

I personally believe, and I think the other witnesses probably will take issue with me, but I personally believe if you look at the combination of article II, the 12th, the 20th and the 25th amendment, I think you have a clear pattern of what Congress has de-

cided over the years and what, with the will of the people, given an election and the importance of predictability—I think you really probably don't need a statute. But I think it is wise to have one to make sure there is no question about it.

Because there are five of us testifying, we might have five different ideas about that particular issue, and I urge you to proceed with full speed with a statute that will take into consideration what the people wanted at the election, if it is after the election, and do it in a way in which it can be predictable as to what the outcome will be.

I think that you should give serious consideration to that time frame immediately following the election and not wait to consider it after electors have been chosen at the State level before their votes are cast in Washington, so that you have a pattern from the time the people decide who they want for their President, and try to find a way in which you can structure this so the people will get, in the final analysis, what they thought they were getting on election day.

One of the things about the electoral college system is that a lot of people don't even understand it. There are electors. Even with all the publicity that they got because of Mr. Perot and one thing and another, if there had been a malfunctioning so that the electors could have destroyed what the people wanted to have happen, there would have been a great deal of distress among the electorate.

I would ask you if you might not want to consider what happens if both the President and the Vice President die. The normal succession act can take place, but if you have an election where the people desire a real change in policy and they choose a President and a Vice President of one party who then die and the succession then goes to the speaker of the House of a party that has just been voted down, I think you have a problem there.

You have another situation where, if you are doing something in the use of the Succession Act, if you have a President, for example, who—well, let me change directions here. If a President dies or a Vice President dies, as unfortunate as it may be, it is a simpler problem to solve than if they are disabled. I would suggest that perhaps you and the committee should give consideration to the disability question. It is a much more difficult animal to ride because if the President is dead, unfortunately, he is not a complicating factor. If he is alive, then to use the normal Succession Act—the 25th amendment provisions is what I would suggest to use because that has been pretty well thought out, but it is not without complications.

One of the complications you would find in the event this happened before the President and the Vice President were sworn in is there would be no Cabinet. You certainly would not want to use the Cabinet of the previous administration. However, as you know, the 25th amendment permits Congress to establish another body in the event something like this occurs that could then work in concert with the Vice President so he could assume the powers and duties as acting Vice President in the event the President is unable to do so.

But you have all of the pressures, the palace guard around the President-elect; you have the family, you have all of the various camps that may have supported the President and the Vice President in the primaries. So the disability question is one that is more difficult to deal with, but if you are going to try to patch up all these weaknesses I would suggest that you ought to try to give some attention to that because there is maybe not as great a chance, but there is almost as much chance that either the President or the Vice President are going to become disabled as if one of them might die in that period of time.

As far as the nominating process is concerned, I frankly would like to see if we can't get some uniformity so that both political parties—there is predictability about how they must act and what they must do, in what time frame. Beyond that, I think the present system operates pretty well.

I know you mentioned the fact that Presidential candidate Greeley died, and yet there were some votes cast for him. I really don't think that is a fair xample because he came in a poor third and it was obvious that he wasn't going to be President. You had the two principal candidates that got the electoral votes, most of them, and I am not concerned about votes being cast for a Presidential candidate who is the obvious choice of the people who then dies and to permit the Vice President to succeed. Even if the votes have been cast for a dead President, that really doesn't concern me.

Why don't I just stop this mini-buster here, and if you have any questions I will be glad to answer them.

Senator SIMON. Let me just—and I do this because you have contributed more in this area probably than any living American with what you have done through the 25th amendment. Let me just summarize what CRS says, what Thomas H. Neale says here.

> Following the 1992 Presidential election, the electors met, as required by law, in their respective States on December 14, 1992, fully 41 days after popular votes were cast on November 3. This interval arguably constitutes the period of perhaps the greatest uncertainty in the Presidential election calendar. Electors have been chosen and the results of their vote, and so forth.

This is the area where there is some uncertainty, or at least there are a great many people who believe there is some uncertainty. There are others who believe that there is not. It seems to me we have to devise a system where you minimize uncertainties, where you do not have, as you suggest, any kind of a partisan fight because there is an emergency that has occurred. We ought to know precisely what we do and where we go.

So I would just ask that fertile mind of Birch Bayh that I have seen work on so many problems to be reflecting on this. I think, clearly, we can solve this problem statutorily and the question is how we do it and where we go. We call someone the President-elect on the day after the election. That technically is not yet the case under the law.

Senator BAYH. If I might just interject, that is why it is my uneducated judgment here on this—but if you take what the 12th and the 20th amendment and what the people—it is what the people want, what they expect to get. To suggest that an election victory that has a clear-cut majority of the electoral votes on election day—to have something happen to a President and not be able to

use the services of the Vice President because technically he hasn't had the electors act two times, I think is to ignore what the people really have a right to expect.

So I can't get all excited about the fact that the electors haven't voted once and their votes haven't been counted a second time. It is clear what the people intended. You might have to find some nice way of dealing with this, and particularly the independence of the electors. If it is a close election, if there happened to be three candidates, then it is much more complicated, and we have seen the possibility of that happening, of course.

Senator SIMON. And we have to be looking at the law. What if a President is killed, or the person we call the President-elect, after an election, or what if a President-elect and a Vice President-elect are at an event together and a tragedy occurs? We hope we never have to face these things, but I think we have to look at those possibilities.

I thank you once again.

Senator BAYH. I compliment you for your leadership in this area and I wish you well.

Senator SIMON. Thank you.

Senator BAYH. If there is anything I can do along the track, let me know. I will stay out of your way otherwise.

Senator SIMON. We are pleased to have Assistant Attorney General Walter Dellinger, and it is a pleasure to address you by that title here, General. He has been a witness frequently before the Judiciary Committee. I don't know if you have testified before the Judiciary Committee since you have been confirmed or not.

Mr. DELLINGER. This is my first testimony on behalf of the Government.

Senator SIMON. We are going to have to give you a rough time now that you are——

Mr. DELLINGER. I am no longer free to say whatever pops into my head as I was as a professor.

Senator SIMON. Well, we welcome you here. Let me just add it was my privilege to speak on the floor in your behalf. It was an easy task to speak in your behalf because I know you are going to be contributing a great deal in the Justice Department.

STATEMENT OF WALTER DELLINGER, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. DELLINGER. Thank you, Senator. I think it is a fine service that you and the members of your staff are performing in addressing this issue. The succession of power in a democratic republic is a magic moment and can be a moment of peril.

Although we certainly wish to see if legislation will facilitate the avoidance of any remaining uncertainties, I think it is wise to keep in mind that the system we have in place has, for 200 years, produced a clear and legitimate outcome in more than 50 elections, with one, possibly two at most, having any dispute. That is a remarkable record for a constitutional system, and I think the Framers' original work in the 2nd and 12th amendments is often not given the credit it deserves.

As we look at the issues you have wisely chosen to bring up for public discussion and analysis, I think we see that even in the midst of the Depression the States were serious enough to turn to this problem by ratifying the 20th amendment to take care of some part of this problem. I think all who appear before you and those who have worked on this problem on your behalf agree that the 20th amendment clearly and explicitly solved the question of what happens if a President-elect dies after the time the Congress counts the votes in early January. The 20th amendment provides that the Vice President-elect shall become President.

So it leaves us with two periods of time with which to be concerned here today. The first is the period of time, working backwards in time, after the electoral votes are cast in each State, but before those votes have been opened and counted before the Congress of the United States.

It is my opinion that the 20th amendment solves this question as well, and that a person becomes President-elect on the day that electors meet in each State capital, cast their votes, and a person receives a majority of all those votes that are cast. The reason I believe this is, though I certainly respect the contrary arguments that are made, I think the relevant intent here is the intent of the framers of the 20th amendment, and it is quite clear what their intent was.

When I say it is the intent of the framers of the 20th amendment, I mean that whatever we might think about when one officially becomes President under article II of the constitution or when one officially becomes President under the 12th amendment, the 20th amendment stands on its own bottom. It is the only place in the Constitution that uses the term "President-elect," so that what we are looking at is what the term "President-elect" mean within the meaning of the 20th amendment.

The House report noted that the committee used the term "President-elect," and "in its generally accepted sense as meaning the person who has received the majority of the electoral votes." Therefore, they have made it clear their understanding that the use of that term "President-elect" in the 20th amendment may be different than when someone officially becomes President. That may be only when, under the 12th amendment, the point at which Congress has counted the votes and resolved any disputes that may arise before the Congress, before the House and the Senate, as to the validity of certain electoral votes. But the 20th amendment, I think, stands on its own bottom and clearly intends that a President-elect be the person for whom the electors have voted when their votes are cast in each State capital.

Then we have, working backwards in time, the third period. What if a tragedy should occur between the date of the election on the first Tuesday after the first Monday in November and the date on which the electors meet in each State capital?

As the framers of the 20th amendment said, and perhaps this seems somewhat cavalier to our ears accustomed to a majoritarian democracy, there is no constitutional problem here; the President is whoever the electors choose. Now, I know we want to address the problem and make sure that that choice appears to be a fully legitimate choice within our constitutional system.

Let us remember that in the ordinary circumstances the tragic death of the President-elect after the November election and before the electoral votes are cast in each State capital is likely not to create a problem, as the electors are likely to vote for the person who has been nominated for Vice President by the prevailing party. It is not assured, but it is likely to work out.

I think too often discussions of our whole electoral process quickly turn into rococo discussions of what if a series of events occurred. I believe that the natural thing for electors to do who are party faithful in the main is to follow the direction of the national party. The natural thing in most circumstances is for the national party committee to direct its party electors who have won in the prevailing States to cast their votes for the Vice President-elect.

There may be circumstances in which there would be a breakdown in that process of coming to coordinated agreement. That could occur in the following circumstances. Some electors may vote instead for the deceased Presidential candidate either because they are literalistically following some State laws that purport to require them to vote for the person whose name appeared on the ballot and received the most votes and they literalistically follow that, dead or alive, or because they have read the inspiring works of the Southmayd Professor from Yale School Law, my friend, Akhil Amar, and have followed a process of voting for a deceased candidate.

I must say, Senator, you know the clearly untrue canards in certain parts of your home State and others that sometimes people in cemeteries are voted as voters, but we know this has never happened.

Senator SIMON. They would never say that about Illinois.

Mr. DELLINGER. No, they would never say that about Illinois. Let us assume it is about North Carolina. There would be some irony that in some circumstances you would have deceased voters voting for a deceased candidate, but I just note that irony in passing.

It is possible that you could then have some electors deciding to vote for the deceased candidate, some voting for the person whom they are directed to vote for by the national party. You could have a severe split in the national party if there were severe disagreement about the Vice Presidential candidate's suitability to be President, and many thinking that the strongest runner-up in the national primaries should be the nominee.

You could imagine in a case of real ideological split, if President Johnson had run for reelection and had chosen Senator McGovern as his running mate to try to heal that breach, the party might have been badly split when you had that great ideological divide over the war in Vietnam.

I think that that is a fairly remote possibility. I think the electors would vote as the national party suggested. I think the national party would suggest that they vote for the Vice Presidential candidate of the prevailing party, and that is what would, in fact, transpire in the electoral college and we would have no problem.

If, however, there were a breakdown so that the electors split their votes among the deceased candidate for President, the Vice Presidential nominee and some other major figure in the party, that, I think, is not quite the crisis we think it is because then the

choice would devolve upon the House of Representatives, and I do not see that as necessarily being a constitutional crisis or a situation in which the election is, "thrown into the House."

The selection by the House of Representatives would, after all, be a selection by the process that is the common process used in every other Western democracy, to have its chief executive chosen by the dominant party caucus in the most numerous branch of the legislature. This would not be seen as a constitutional crisis by our allies in Europe. They are likely to say, well, my goodness, this time they are going to use an election process we can understand. The majority party in the legislature will be choosing the chief executive the way all the rest of us do in the EEC and NATO countries. So I do not see this as an illegitimate choice if there were a breakdown in coordination among electors. As long as major figures in the prevailing party received electoral votes placing them among the top three from whom the House may choose, then I think the process would proceed.

In terms of suggested legislation, let me be brief. In light of any doubt I would have if legislation moved through Congress, I would certainly have this Congress express its view that the person who receives a majority of all electoral votes as those are cast in each State capital in December is the President-elect within the meaning of the 20th amendment. That does not mean that Congress might not later resolve disputes on January 6. It just means that if the 20th amendment kicks in, this Congress believes that that person would be the President-elect, and that is certainly a useful activity.

I believe that State legislatures should pass laws directing their electors, those who prevail in their State, to cast their vote for the nominee of the national party to which they chose to run as electors. I think that is the appropriate mechanism. I think that it is constitutional for States to choose a method of choosing electors that chooses instructed electors.

I think it actually would solve a very interesting problem raised by Senator Bayh. Senator Bayh raises a problem not yet, I think, raised by anyone else here, which is what about a Presidential candidate who wins in November and becomes severely disabled. What, then, are electors to do? Let us say one is paralyzed by an incapacitating stroke and is into a coma for the foreseeable future. The 25th amendment may not take place. We don't have a President-elect at that point, the day after the November votes are cast.

I think you could then, under this process, have the national parties direct that their electors cast their votes for the Vice Presidential nominee of the party. I mean, it would not be a happy solution, but it would be one where giving the authority and judgment to the national parties would prevail. I happen to, I think, reflect in these comments perhaps a predisposition to believe in our political party system and to believe that it should be strengthened, and that voters should realize they are voting for a political party.

I will conclude by reiterating that the process has served us well. I do not think the Framers ever hardened into law any expectation that electors would be an elite body making their own judgment. Note that electors cast their votes under the 12th amendment, which was passed in 1804, 17 years after the Constitutional Con-

vention, after three Presidential elections. By the time the 12th amendment was passed, it had become an accepted custom that electors were agents directed by the voters how to cast their votes. So for the framers of the 12th amendment, if not for article II, it is absolutely clear that the electors can be instructed. I think that is not inappropriate.

I will conclude by telling you how much we appreciate your turning your attention to this problem. Thank you, Senator.

[The prepared statement of Mr. Dellinger follows:]

PREPARED STATEMENT OF WALTER DELLINGER ON BEHALF OF THE OFFICE OF LEGAL COUNSEL U.S. DEPARTMENT OF JUSTICE

Mr. Chairman, and Members of the Subcommittee:It is by now a truism that the selection of an American President is a process remarkable for its length. Only the hardiest of candidates, observers say, can survive the grueling political testing that begins before the first presidential primary and ends as the last polls close on election day.

For constitutional purposes, however, election day marks the start, and not the finish, of the electoral process: Over a month later, in mid-December,[1] the electors selected on election day meet in their respective states and cast their votes for President.[2] Several weeks after that, on January 6th, the votes of the electors are formally counted in Congress.[3] And it is not until two more weeks have passed that the winning candidate is finally sworn into office on January 20th.[4]

It is this interval between the general election and the inauguration of a new President that concerns us today. Specifically, we must consider the consequences that would follow if the winner of the popular vote in states having a majority of electoral votes—referred to here as the "president-designate" —were to die at some time before assuming office in January. Though such a tragic scenario assuredly would have serious political ramifications, it would not, in my view, produce a constitutional crisis in the true sense. Although some degree of confusion would almost surely surround such an unprecedented occurrence, existing constitutional mechanisms for selection and succession of the President would be sufficient to provide for this contingency.[5]

The sequence of events described above produces three relevant intervals of time. Working backward, they are the period between the counting of electoral votes in Congress and the inauguration; the period between the casting of the electoral votes and the counting of the votes; and the period between the general election and the casting of electoral votes. I will address these intervals in turn, considering the implications of the president-designate's death during each and, where appropriate, discussing possibilities for legislative reform.

Two weeks before the new President takes office on January 20th, the President of the Senate, in the presence of both Houses of Congress, opens and counts the ballots cast by the electoral college. The candidate with the most votes, provided he or she carries a majority of the total electors, "shall be the President,"[6] and is declared by the President of the Senate the person elected.[7] The same process is repeated for the office of the Vice President.

If the President-designate were to die after the counting of electoral votes on January 6th, and before taking office on January 20th, what would happen? This is the easiest question we face, because the Twentieth Amendment, by its terms, provides an answer: "If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President."[8] Clearly, the "President elect" referred to by the Twentieth Amendment is someone who has yet to take office; at a minimum, that term must comprehend the person

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[1] 3 U.S.C. § 7 (1988).
[2] U.S. CONST. amend. XII.
[3] 3 U.S.C. § 15 (1988); U.S. CONST. amend. XII.
[4] U.S. CONST. amend. XX, § 1.
[5] Because existing constitutional mechanisms are likely to be sufficient, it is not clear that Congressional action is necessary at this time. Since legislation could alleviate some of the uncertainty that might otherwise attend the death of a President-designate, however, I am pleased to offer these suggestions in the event that the Subcommittee decides to proceed to the consideration of legislation.
[6] U.S. CONST. amend. XII.
[7] 3 U.S.C. § 15 (1988).
[8] U.S. CONST. amend. XX, § 3.

declared President after the electoral votes are counted. Accordingly, the Twentieth Amendment's succession provision governs, and the Vice President-elect is sworn in as President on January 20th.

I take it that this result is beyond serious dispute. Nevertheless, were additional support required, it could be found in the legislative history of the Twentieth Amendment.

The House Committee which considered the Joint Resolution proposing the Twentieth Amendment explained:

> DEATH OF THE PRESIDENT ELECT BEFORE THE BEGINNING OF HIS TERM
>
> If the person who received the majority of the electoral votes dies after the votes are counted, or if the person who is chosen by the House in case the election of the President is thrown into the House, should die before the date fixed for the beginning of his term, the same question arises as to whether the Vice President would become President.
>
> The first sentence of section 3 of the proposed amendment provides that the Vice President will become President.[9]

In mid-December,[10] the electors chosen on election day meet in their respective states and cast their ballots for President and Vice President.[11] A certificate of their votes is then forwarded to the President of the Senate,[12] to be opened and counted on January 6th.

What would be the consequence if the President-designate were to die after a majority of electors cast votes for him or her in December, but before the votes were formally counted by Congress in January? Again, I think the Twentieth Amendment provides the answer, but here with somewhat less clarity.

Whether the Twentieth Amendment covers this situation turns on the meaning of "President elect" as used in that Amendment. If the term refers to the person for whom a majority of electors have cast their votes, at the time that they do so, then the President-designate is, during this period, the President-elect, so that his death would trigger the succession provisions of the Twentieth Amendment. If, on the other hand, the President- designate does not become "President elect" until after the electoral votes are opened and counted in Congress, then the Twentieth Amendment would not apply before January 6th.

A convincing argument can be made that the counting of electoral votes in Congress is in the nature of a formality, or ministerial task; the substantive work of selecting a President is entrusted to the electors, and is completed when they designate their votes. Under this view, the "President elect" and the "Vice President elect" are chosen on the date in December when the electors meet and vote, and any subsequent death would be governed by the Twentieth Amendment.

By itself, this argument might not be strong enough to carry the day. Fortunately, however, any ambiguity in the text of the Twentieth Amendment may be resolved by recourse to the Amendment's legislative history. On this point, the intent of the Congress that sent the Twentieth Amendment to the states is quite clear: the Amendment's succession provisions are to govern when the person receiving a majority of electoral votes cast dies before those votes are counted in Congress.

> DEATH OF THE PRESIDENT ELECT AFTER THE ELECTORS VOTE AND BEFORE THE VOTES ARE COUNTED
>
> Two serious problems are presented in the case of the death of the person who has received a majority of the electoral votes after the electors vote and before the votes are counted:
>
> (1) May the votes which were cast for a person, who was eligible at the time the votes were cast but who has died before the votes are counted by Congress, be counted?
>
> (2) Would the Vice President elect become President?

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[9] H.R. Rep. No. 345, 72d Cong., 1st Sess. 6–7 (1932) [hereinafter House Report].

[10] The precise date set by Congress is the first Monday after the second Wednesday in December. 3 U.S.C. § 7 (1988).

[11] U.S. CONST. amend. XII. The electors do not, as is sometimes supposed, meet as one body in an "electoral college," for purposes of debate and deliberation. In fact, such concerted action is precluded by constitutional provisions requiring that the electors meet in their various states on the same date. This "detached and divided situation," it was believed, would "expose [the electors] much less to heats and ferments," and minimize the possibility of "cabal, intrigue, and corruption." The Federalist No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[12] 3 U.S.C. §§ 9–11 (1988).

> It is the view of your committee that the votes, under the above circumstances, must be counted by Congress. An analysis of the functions of Congress indicates that no discretion is given and that Congress must declare the actual vote. The votes at the time they were cast were valid—so that the problem involved in the case of votes cast for a dead person is not here presented. Consequently, Congress would declare that the deceased candidate had received a majority of the votes.
>
> But would the Vice President elect become President? * * *
>
> In order to remove all possible doubt * * * the first sentence of section 3 of the amendment proposed by this resolution provides specifically that the Vice President elect, in such case, shall become President.
> It will be noted that the committee uses the term "President elect" in its generally accepted sense, as meaning the person who has received the majority of the electoral votes, or the person who has been chosen by the House of Representatives in the event that the election is thrown into the House. It is immaterial whether or not the votes have been counted, for the person becomes President elect as soon as the votes are cast.[13]

Given this clear evidence of congressional intent, the Twentieth Amendment should be deemed to apply to the death of a President-designate during the period between the casting of votes by the electors in each state capitol and the counting of those votes by Congress.[14]

Under Article II, section 1 of the Constitution, each state appoints a specified number of presidential electors "in such manner as the Legislature thereof may direct." Uniformly, the states have provided for the appointment of electors by way of popular election. So it is that on the familiar first Tuesday of November[15]—the day we think of as "election day"—the voters go the polls and select the presidential electors who will, in turn, meet the following month to choose a President and Vice President.

This two-tiered process leaves us with a final question: what would happen if the President-designate, who won the popular vote on election day, were to die before the electors met and cast their votes? Here, I am afraid, the Twentieth Amendment can offer no guidance. That Amendment provides for the succession of the "President elect," and it seems clear that no President has been constitutionally elected until the electoral votes are cast in December. Indeed, this last problem is not really about succession at all, for there is, during this period, no President (or President-elect) to be succeeded. Rather, the problem is one of election: given the death of the popular vote winner, who shall become President?

The short answer, under the Constitution, is whoever the electors choose. I said at the outset that this situation does not pose a crisis of constitutional *law*. That is because the Constitution's election provisions do not depend on the existence of a candidate supported by popular mandate, and would continue to function in the absence of such a candidate. The electors would, as planned, meet in their various states. Once gathered, they would cast their votes; as a matter of constitutional law, at least, electors are not bound to vote for the popular choice, or indeed for any particular candidate.[16] The person receiving a majority of electoral votes would, under the terms of the Twelfth Amendment, become the President, and our election problem is "solved."

It is fair to ask, of course, how this process would work in practice, and whether it would produce a satisfactory result. On this level, too, I see little cause for alarm. In all likelihood, the electors, predominantly party loyalists, would cast their votes for a substitute nominee chosen by the prevailing national party. The new nominee might well be the Vice President-designate or, perhaps, the candidate running second in a closely contested primary season; constrained by the need to choose a candidate acceptable to its electors, the party would be most unlikely to designate someone without a tenable claim to the nomination. In any event, the upshot would be the election of the candidate of the party that prevailed in November—which,

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[13] House Report, *supra* note 9, at 5–6.

[14] If the Subcommittee were to propose legislation addressing presidential succession in these circumstances, then it might wish, in order to avoid any potential uncertainty, to include a provision defining "President elects" for purposes of the Twentieth Amendment, as the person for whom a majority of electors have designated their ballots on the date of the meeting of the electors.

[15] More precisely, the date set by Congress for appointment of electors is the Tuesday after the first Monday in November. 3 U.S.C. § 1 (1988).

[16] For purposes of this discussion of the Constitution, I leave to one side the existence of various state laws binding the votes of electors. That issue is addressed separately below.

given the unavailability of the President-designate, seems a perfectly legitimate, if second-best, outcome.

There is always the possibility that a faction-ridden party would be unable to agree upon a substitute nominee, or that some of the party's electors would refuse to vote for the new nominee. Such a scenario might well lead to a split electoral vote, with no candidate receiving a majority. Again, the Constitution provides the mechanism for selection, this time election by the House of Representatives.[17] And again, this result, though close to unprecedented, could hardly be deemed unacceptable; in the remarkable situation described here, it is not self-evident who could most legitimately lay claim to the presidency, so that no decision by the House could be said to frustrate an otherwise appropriate outcome. In these tragic circumstances, choice of the national executive by the popular branch of the national legislature—a process similar to that routinely used in most other Western democracies—does not seem unacceptable.[18]

In short, the Constitution already provides—and provides acceptably, I think—for the situation in which a President-designate dies after winning the popular vote in November and before the electoral votes are cast in December. This is, I should add, the same conclusion reached (with admirable brevity) by the House Committee considering the legislation that became the Twentieth Amendment: "Inasmuch as the electors would be free to choose a President, a constitutional amendment is not necessary to provide for the case of the death of a party nominee after the November elections and before the electors vote."[19]

At the same time, however, it must be conceded that the death of a President-designate during this period would produce substantial confusion and uncertainty. The political parties, the presidential electors, and the people themselves would be faced with a wholly unprecedented situation; political upheaval, accompanied by an acute sense of crisis, could well be the result. What can be done, under the existing constitutional regime, to minimize these effects? At least four possibilities deserve consideration.[20]

A. CONGRESS CAN SHORTEN THE INTERVAL BETWEEN THE GENERAL ELECTION AND THE CASTING OF ELECTORAL VOTES

The Constitution gives Congress the authority to establish the two dates that define the time period with which we are here concerned: the date on which the presi-

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[17] "[I]f no person have [a] majority [of electoral votes], then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President." U.S. CONST. amend. XII.

The prospect of an election "thrown" to the House is generally viewed with alarm, as posing a constitutional crisis in its own right. In fact, the Framers were generally of the view that final selection by the House (or, as originally contemplated, the Senate) would be the norm, rather than the exception; rarely (after George Washington) would any candidate have so strong a national following that he could win a majority vote in the electoral college. *Debates in the Federal Convention of 1787 as Reported by James Madison, in* Documents Illustrative of the Formation of the Union of the American States 109, 662–664, 668–669, 673–675 (Charles C. Tansill ed., 1927). *See also* Joseph E. Kallenbach, The American Chief Executive 49–50 (1966).

[18] A problem could arise if the House, which is confined for its choice to the top three electoral vote-winners, were faced with an unduly limited field. So long as a significant number of the prevailing party's electors cast their votes for the Vice President-designate or for some other substitute candidate named by the party—by far the most likely outcome—the problem is avoided; one or both of these persons will finish among the top three, and the House will have recourse to a suitable choice for President.

> At least theoretically, however, one might construct a scenario in which no candidate of the prevailing party is among the top three electoral vote-winners from whom the House may choose. If every elector of the affected party were to cast his or her vote for the dead President-designate, and if those votes were disqualified as invalid, then the House might be faced with a field of one: the nominee of the unsuccessful party, as the only candidate receiving any (valid) electoral votes.
>
> This is, it should be evident, a remote contingency. By diminishing the prospect of votes cast for the dead President-designate, some of the possible reforms discussed below would make it remoter still. But even in the imagined worst-case scenario, the House's hand would not be forced. Faced with a choice it deemed unacceptable, the House could simply decline to choose at all; in that event, the Vice President-elect (chosen either by the electors or, under the Twelfth Amendment, by the Senate) would become acting President under the terms of Section 3 of the Twentieth Amendment. ("If a President shall not have been chosen before the time fixed for the beginning of his term * * * then the Vice President elect shall act as President until a President shall have qualified * * *").

[19] House Report, *supra* note 9, at 5.

[20] Again, it is not clear that the existing system poses a sufficient danger of malfunction to warrant legislative intervention.

dential electors are selected, and the date on which the electors meet and vote.[21] Currently, those dates are set by statute as the Tuesday after the first Monday in November, and the Monday after the second Wednesday in December.[22] That leaves a gap of roughly six weeks during which the death of the President-designate could generate the confusion described above.

The Subcommittee may wish to consider legislation that closes this gap, either by pushing back the day on which electors are selected, or moving up the day on which they vote. Unfortunately, it probably is not possible to eliminate the gap entirely; even in this day of modern voting systems, it takes time for the states to count the popular votes cast for electors, and still more to resolve any disputes. Nevertheless, the gap could be reduced appreciably, and with it, the probability that a President-designate will die before becoming a "President-elect" whose succession is governed by the Twentieth Amendment.

B. CONGRESS CAN POSTPONE THE MEETING OF THE ELECTORAL COLLEGE IN THE EVENT OF THE DEATH OF THE PRESIDENT-DESIGNATE

The confusion surrounding the death of a President-designate during this period would reach its zenith were the death to occur in the days, or even hours, immediately preceding the scheduled meeting of the electors. In that event, the affected political party might be unable to designate a substitute nominee before the electors were required to vote, and the electors themselves might be left without time to fully analyze their options.

Under its Article II authority to establish the date on which electors vote, Congress can provide for this contingency. The practical difficulties imagined above could be relieved by legislation postponing the convening of the electoral college if, during some period immediately prior to the scheduled meeting—say, two weeks—a candidate who won the popular vote in states having a majority of electoral votes were to die. Indeed, a statute of this type was envisioned by the House Committee responsible for the joint resolution that led to the Twentieth Amendment.[23]

C. THE STATES CAN INSTRUCT THEIR ELECTORS HOW TO VOTE

The proposals discussed above are designed to reduce the probability that the situation we are considering will occur in the first instance, and to eliminate some of the practical complications that might arise if it did. We are still left, however, with the central uncertainty surrounding the death of a President-designate before the electoral votes are cast: when the electors meet in their various states, for whom will they vote?

The surest way to eliminate this uncertainty is with legislation requiring that electors cast their votes in a specified manner. That is to say, if our end goal is a predictable and unified electoral vote—as in the normal election year, when we can predict with some certainty that a majority of electors will vote for the living President-designate—then we should select electors who are instructed how to vote in advance.

For Congress, unfortunately, this is easier said than done. Article II of the Constitution reserves to the states close to exclusive authority over the appointment of electors; the only role contemplated for Congress is, as mentioned above, the setting of the date.[24] In light of this textual division of authority, it is far from clear that the Constitution would permit Congress to legislate in the manner contemplated.

For the states, it is a different matter. Given their Article II power over the appointment of electors, the states would seem to be well-positioned to ameliorate un-

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[21] U.S. CONST. art. II, § 1.

[22] 3 U.S.C. §§ 1, 7 (1988).

[23] House Report, *supra* note 9, at 5.

The Subcommittee might also consider a similar approach to a different, but analogous, problem: that presented by the death of a major party candidate immediately before the November election itself. Again, the candidate's party might be unable to designate a substitute nominee before the scheduled election; and again, the voters—this time, the general electorate—might be caught without sufficient time to make an informed decision. These problems would be eased considerably by legislation postponing election day in the event of the death of a major party candidate during the period just before the scheduled election.

To avoid unnecessary confusion, the effect of such legislation probably should be limited to the death of candidates of "major" parties, defined, for instance, as parties polling 25 percent or more in the previous general election. *Cf.* 26 U.S.C. § 9002(6) (defining "major party" for purposes of presidential election campaign fund).

[24] The Twenty-third Amendment provides the one exception to this rule, empowering Congress to direct the manner of appointment of the District of Columbia's electors.

certainty by legislation instructing their electors how to vote. This approach, however, does raise one critical question: whether state legislation instructing electors how to vote would be deemed constitutional, as against arguments that Article II and the Twelfth Amendment guarantee to electors the freedom to vote as they see fit.

We are confronted at the outset with a strong argument that the Framers intended, or at least expected, that presidential electors would exercise independent judgment. Indeed, certain constitutional provisions may be read most sensibly as reflecting such an understanding. Article II, for instance, prohibits Senators, Representatives, and "Person[s] holding an Office of Trust or Profit under the United States" from becoming electors. Unless electors were given some discretion as to how to vote, this conflicts rule would appear unnecessary.[25] Further, the Twelfth Amendment specifies that electors shall vote "by ballot," and that their votes shall be transmitted "sealed" to the Senate. Both these provisions import a strong sense of secrecy,[26] which would be quite unwarranted if the votes of electors were predetermined.

This vision of unconstrained electors finds additional support in the expressed views of some of the Framers themselves. Alexander Hamilton, for one, described electors free to vote for the candidates of their choosing: "[I]mmediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation * * *. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation."[27]

There are, on the other hand, indications that others among the Framers had a different understanding of the role of electors. James Wilson of Pennsylvania, an advocate of popular election of the President, appeared to assume that many electors would follow the popular vote. Speaking at the Constitutional Convention, he praised the electoral system ultimately adopted as tantamount to "election mediately or immediately by the people."[28]

Under this conception, electors might be expected (or instructed) to represent the popular will, rather than substituting their own judgment.[29]

More important, even assuming that the Framers *expected* or *anticipated* that electors would operate as independent agents, it is by no means clear that this expectation hardened into a constitutional command binding on the states. Nothing in the text of Article II or the Twelfth Amendment, or of any other constitutional provision, precludes efforts to bind the votes of electors. On the contrary, Article II vests the states with broad discretion over the selection of electors, advising only that electors shall be appointed "in such Manner as the Legislature [of each state] may direct." By its terms, this grant of authority appears generous enough to allow for appointment of electors who have been instructed how to vote.

Our entire electoral history, moreover, teaches that presidential electors have not, in practice, functioned as independent decisionmakers. Instead, since the very earliest elections, presidential electors have been expected to, and almost always have, voted for the nominees of their parties, to whom they are pledged in advance.[30] Nearly two centuries of consistent historical practice is entitled to significant weight in the constitutional balance, at least where, as here, it does not run counter to any textual provision of the Constitution.

However we might resolve this issue were we writing on a clean slate, the fact is that the Supreme Court, relying principally on the historical practice noted above, already has held that the states may limit elector discretion. In *Ray* v. *Blair*, 343

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[25] The conflicts provision might be useful if it were anticipated that some states would choose to have uninstructed electors even if other states instructed electors how to vote.

[26] At the time, perhaps more so than today, "ballot" implied a confidential vote. *See* Samuel Johnson, A Dictionary of the English Language (1755) ("To BALLOT * * * To choose by ballot, that is, by putting little balls or tickets, with particular marks, privately in a box; by counting which it is known what is the result of the poll, without any discovery by whom each vote was given.").

[27] The Federalist No. 68, *supra* note 11, at 412. *See also* The Federalist No. 64, at 391 (John Jay) (Clinton Rossiter ed., 1961) ("as an assembly of select electors possess * * * the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment").

[28] *Debates in the Federal Convention of 1787, supra* note 17, at 412.

[29] Wilson's views on this subject, it should be noted, are not entirely free from doubt. At one point during the ratification debate, Wilson referred to the likelihood that electors would be able to "know and judge" presidential candidates. *Debates in the Federal Convention of 1787, supra* note 17, at 664. Arguably, this statement presupposes that electors will exercise autonomous judgment.

[30] *See, Ray* v. *Blair*, 343 U.S. 214, 228–30 (1952); *McPherson* v. *Blacker*, 146 U.S. 1, 36 (1892).

U.S. 214 (1952), the Court sustained a state law allowing political parties to exact from primary candidates for elector a pledge to support the party nominee. And though the Court stopped short of approving similar pledges for the general election, it did reject the argument that the Constitution demands absolute freedom for electors. "The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept." *Id.* at 228.

Nothing in the years since *Ray* v. *Blair* was decided undermines the Court's conclusion in that case. The constitutional text continues to commit discretion over the appointment of electors to the states. The "long-continued practical interpretation" of the role of electors noted in *Ray, id.* at 229, persists undiminished. In short, it seems most unlikely that the Supreme Court would today have cause to disavow *Ray* v. *Blair,* and hold that the Constitution impliedly compels independence for electors. Accordingly, we can work safely from the assumption that the states may, if they wish, instruct their electors how to vote.

Just over half the states and the District of Columbia have taken advantage of this authority, and require by law that their electors vote for particular candidates when they convene in December. The most common formulation of this obligation is also, I think, the most appropriate. In a majority of these states, electors are bound simply to vote for the candidate of their party.[31] Should the President-designate die during the interval between the general election and the casting of electoral votes, such laws would appear to cover the situation, making a legal requirement of what is already the natural outcome: the prevailing party's electors will vote for the substitute nominee designated by their party.

Other states conceive of their electors' obligations differently. In a handful of states, electors are bound to vote for the candidate who won the state's popular vote in November;[32] in a few, electors must vote for the candidate whose name appeared with theirs on the official election ballot.[33] Generally, all of these laws operate to the same effect, directing electors selected in November to vote for their party nominee. If, however, the President-designate dies before the electoral college convenes, then this latter group of state laws functions quite distinctively, essentially requiring that the affected electors cast their votes for the deceased candidate. To avoid this doubtlessly unintended result, the relevant states might reformulate their laws with this contingency in mind, and join those other states that have directed the prevailing party's electors to vote for the person designated by their party.

Of course, state laws instructing electors how to vote will bring the desired certainty to the proceedings only if they are enforceable. Though electors are likely, as a practical matter, to vote in accord with state law regardless of enforcement, strong enforcement provisions can make that likelihood a certainty. Although most states that bind their electors do not provide for any enforcement mechanism, two states—Michigan and North Carolina—have taken additional steps to ensure that their electors vote as directed. In both these states, the failure of an elector to cast his or her vote as required by state law constitutes a resignation; the faithless elector's vote is not counted, and he or she is replaced immediately by the remaining electors.[34]

In sum, much of the uncertainty that would surround the casting of electoral votes after the death of the President-designate could be avoided if the electors were bound, under state law, to cast their votes for the person who is the nominee of their party at the time of the electoral vote. The effect of such laws would be enhanced by adoption of the Michigan-North Carolina approach to enforcement, providing that votes cast in derogation of state law obligations would not be counted.

D. CONGRESS CAN PROVIDE FOR THE MANNER IN WHICH ELECTORAL VOTES ARE COUNTED

As we have seen, Congress' part in selecting electors is a small one; primary responsibility for this stage of the electoral process is left to the states. The situation is quite different, however, with respect to the final counting of the electors' votes. This task is explicitly entrusted to Congress by the Twelfth Amendment. It would seem, then, that by virtue of its authority to "make all Laws which shall be nec-

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[31] *E.g.,* D.C. Code Ann. §1–1312 (1981); Fla. Stat. Ann. §103.021 (1992); N.C. Gen. Stat. §163–212 (1991); Wash. Rev. Code Ann. §29.71.020 (1993).

[32] *E.g.,* Colo. Rev. Stat. §1–4–304 (1980); Mont. Code Ann. §13–25–104 (1992); Vt. Stat. Ann. tit. 17, §2732 (1982).

[33] *E.g.,* Conn. Gen. Stat. Ann. §9–176 (1989); Mich. Comp. Laws Ann. §168.47 (1989).

[34] Mich. Comp. Laws Ann. §168.47 (19 89); N.C. Gen. Stat. §163–212 (1991).

essary and proper for carrying into Execution * * * all other Powers vested by this Constitution in the Government of the United States,"[35] Congress is empowered to establish the manner in which electoral votes will be counted. Indeed, Congress has already taken advantage of this authority, providing by statute for the way in which it will hear and decide objections to electoral votes.[36]

Were the President-designate to die before the casting of electoral votes in each state, I can envision at least two questions regarding the counting of electoral votes that might arise. The first involves votes cast by electors for the dead President-designate. This scenario is not as far-fetched as it may seem. Some electors of the affected party, confused and without guidance, might well decide that the most loyal course is a vote for their party's former standard-bearer; others, as discussed earlier, might even find themselves bound under state law to cast their votes for the deceased candidate.

Such votes would almost surely exacerbate the uncertainty surrounding the electoral proceedings. At the very least, a significant number of electoral votes cast for the dead President-designate would diminish the ability of the affected party to muster a majority for its substitute nominee, increasing the likelihood of resort to the House. Perhaps more important, the constitutional validity of these votes would be in real doubt, so that their counting would present Congress with a thorny constitutional question at a most inopportune time.[37]

To avoid this added uncertainty, the Subcommittee might consider legislation providing that an electoral vote for a candidate who is dead at the time the vote is cast will not be counted. Such legislation would guide electors in a direction that comports, I think, with our common intuition about the proper result: electors should vote for a living person who can assume office in January. In the unlikely event that some electors nevertheless designated votes for the dead President-designate, the legislation would relieve the counting Congress of the burden of determining the validity of those votes.[38] Finally, legislation along these lines might have the benefit of encouraging states, which presumably wish to have their electoral votes counted, to avoid binding their electors through formulations that could operate to direct votes for a deceased candidate.

A second potential source of confusion during the electoral vote count is the fate of votes cast contrary to state law obligations. As we have seen, most state laws that purport to bind electors are not self-enforcing. In the case of the death of the President-designate, the resulting upheaval might prompt electors who were, for instance, formally bound to vote for their party nominee to consider casting their votes for some other person. Rather than producing the hoped-for certainty, state laws binding electors would end up generating additional uncertainty: for the electors, uncertainty as to whether they can, as a practical matter, vote in derogation of their state law pledges; and for the counting Congress, uncertainty as to whether votes so cast should be counted.

Again, Congress might wish to eliminate much of this confusion by answering the relevant question in advance. Here, the appropriate legislation might provide that Congress will not count electoral votes cast contrary to state law obligations (where state law obligates electors to vote for a living candidate).[39] In effect, federal law would act as a back-up enforcement mechanism for applicable state laws, giving

[35] U.S. CONST. art. I, §8, cl. 18.

[36] 3 U.S.C. §§15–18 (1988).

[37] One might imagine an argument that the dead President-designate does not meet the Article II qualifications for the presidency—he or she is no longer, for instance, a citizen of the United States, and most certainly cannot take an oath of office—so that he or she is not eligible to receive electoral votes. The House Committee considering the Twentieth Amendment apparently was of the view that such arguments were to be taken seriously: "It seems certain that votes cast for a dead man could not legally be counted." House Report, *supra* note 9, at 6.

Congress adhered to this position on the one occasion it was forced to confront the question directly. In 1872, Horace Greeley, the unsuccessful Democratic candidate in the general election, died just before the meeting of the electoral college. When three electors cast their votes for Greeley despite his demise, Congress refused to count the votes.

[38] Technically, of course, one Congress cannot bind a future Congress; the counting Congress, in the event, would retain the authority to legislate a different result. As a practical matter, however, I think it unlikely that a Congress faced with this situation would change the rules already established by law.

[39] If, on the other hand, state law appeared to require (as some state laws do) that an elector cast her vote for the dead President-designate, then the legislation imagined here would not hold the elector to her pledge. This qualification is necessary, I think, to avoid placing a federal imprimatur on what is almost certainly an unintended result of state law. It also avoids any inconsistency with the possible legislation described earlier, providing that votes cast for a dead person will not be counted.

electors a powerful incentive to vote in accord with their state law duties.[40] And by establishing a federal scheme that expressly recognizes these state laws, such congressional action may well promote passage of similar laws in additional states.

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We are dealing here with a tragic scenario. The death of the winner of the November election before he or she is inaugurated, as after, would be devastating for the country. It need not, however, provoke a constitutional crisis. As I have attempted to show, the Constitution already provides the basic structure through which such a contingency would be addressed. The Subcommittee is to be commended for giving careful attention to these issues and to the possibility that further legislation might alleviate any remaining uncertainty caused by the untimely death of the people's choice.

Senator SIMON. I thank you. I have just been advised that I have 8 minutes left to cast a vote. I am sorry to delay the hearing further, but we will have to take a temporary recess.

[Recess.]

Senator SIMON. The subcommittee will resume its hearing. Again, I apologize. This is one of those terrible mornings where you are all getting delayed.

Let me ask you, General, you mentioned particularly using the party apparatus. If there is a determination that we need to clarify this, should we recognize the party apparatus in the law?

Mr. DELLINGER. I think if I were a State legislator, I would. As a State legislator, I would provide that electors should vote for candidate designated by the national party, assuming that their national party ticket prevailed in the State and they were elected as the electors.

In Congressional legislation, if you were to pass a law that faithless electors' votes would not be counted, perhaps it should be in terms of the votes of electors who fail to vote as State law requires for the persons designated by the national party. That is a possibility on which I don't have a strong view.

Senator SIMON. If we decide to move on legislation, I would like to submit draft legislation to all of the witnesses to get your reaction on that draft legislation.

Mr. DELLINGER. Senator, I would be happy to do so at the Department of Justice. Finally, then, in closing, let me just commend you for the fact that I think you do not seem inclined toward the road of a constitutional amendment on this issue. Am I correct in that, that you would rather proceed by statute?

Senator SIMON. No, no, I don't think we need a constitutional amendment on this at all. It seems to me that we can take care of this statutorily.

Mr. DELLINGER. Right. My 1-minute version would be that the electoral college has, in fact, served us well. The electoral system, in fact, tends to produce a clear and legitimate winner in what are otherwise closely divided contests. It avoids the horrendous problem of a national recount. It discourages third-, fourth- and fifth-party candidacies that would be trying to get bargaining leverage for the runoff. I think, altogether, it has worked well. It allows our Presidential election to be conducted by 51 separate governmental

[40] *Cf.* Charles L. Black, Jr., *The Faithless Elector: A Contracts Problem*, 38 La. L. Rev. 31, 33 (1977) (suggesting that Congress exercise equitable power to ensure that electors vote as pledged).

jurisdictions, which is a great insulator and preventer of fraud, instead of having it conducted by one national election apparatus. So I think it is altogether to the good, and that the choice by the House is a useful one when it fails.

Thank you very much, Senator.

Senator SIMON. I thank you. Let me just add, I understand I missed the most interesting discussion while I was gone. I wish I had been here.

Mr. DELLINGER. I would like to say for the record that Professor Amar has persuaded me to change one word of my view—one word, not a big word. I said, in defending the notion that selection by the House of Representatives was not a big constitutional crisis, that the Framers were generally of the view that selection by the House would be the norm. He has persuaded me to say that "the Framers" is an overstatement and that I should say "some Framers" were of the view that it would be normal for the House to wind up choosing the President. Through vigorous argument, he has persuaded me and I will correct my testimony from "the Framers" to "some Framers" on that particular point.

Thank you, sir.

Senator SIMON. I thank you. I might mention this whole question came up as a result of a hearing on the electoral college, and I have become persuaded that we do not need a constitutional amendment on the electoral college. But out of that hearing came this area where there is some gray, where we may need some statutory definition, I think.

Mr. DELLINGER. Thank you, Senator.

Senator SIMON. I thank you.

Our panel now is Trevor Potter, the Chairman of the Federal Election Commission; Akhil Amar, Professor at Yale Law School; and Walter Berns, Professor at Georgetown University. I note he is the John M. Olin University Professor, and John M. Olin was from the State of Illinois.

Unless there is a preference, I will just go in the order mentioned here and, Mr. Potter, we will call on you first.

PANEL CONSISTING OF TREVOR POTTER, CHAIRMAN, FEDERAL ELECTION COMMISSION; AKHIL REED AMAR, SOUTHMAYD PROFESSOR, YALE UNIVERSITY LAW SCHOOL; AND WALTER BERNS, JOHN M. OLIN PROFESSOR, GEORGETOWN UNIVERSITY, AND ADJUNCT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

STATEMENT OF TREAVOR POTTER

Mr. POTTER. Thank you, Mr. Chairman, and good morning. I am Trevor Potter, the Chairman of the Federal Election Commission. It is a pleasure to appear before you this morning. My testimony addresses a relatively narrow portion of the issue before you today and will therefore be brief.

As you know, the Federal Election Commission is responsible for the implementation of the Federal Election Campaign Act of 1971 and of Title 26 of the Presidential Election Campaign Fund, which pertains to the certification of matching funds in the Presidential

primary elections and grants to the major national political parties for their national nominating conventions.

The Commission as an independent agency will administer whatever legislation is enacted concerning the payment of Federal funds to Presidential candidates and nominating conventions. Accordingly, on behalf of the Commission, I offer the following comments.

It is our understanding that the subcommittee is considering a number of statutory and constitutional issues. One of the questions concerns the Presidential nominee succession should a party nominee die or become disabled after winning sufficient popular votes for an electoral college majority, but before the casting of the electoral college votes.

Specifically, it is our understanding that the subcommittee is considering a proposal that would amend title 26, section 9008, to add an eligibility requirement in order for a national committee to receive its convention funding. The party committee would be required to agree that, in the event of the death or disability of the party's Presidential nominee after the popular election, but prior to the electoral college vote, it would nominate the Vice Presidential candidate as its Presidential nominee.

At the moment, both parties' rules would refer the question to a specially called meeting of the party national committees for a decision on a new nominee. Under current section 9008 of title 26, each major party is entitled to a public grant to finance its Presidential nominating conventions. In addition, the Commission has a variety of implementing regulations requiring the national committee of a major party to agree to certain conditions.

Given this contractual framework, Congress could establish additional conditions precedent to the receipt of Federal funding for party nominating conventions. These conditions could include requiring the parties to nominate a particular person, such as their Vice Presidential nominee or runner-up, as their Presidential nominee if the original nominee dies or is incapacitated in the period between election day and the electoral college vote.

The Federal Election Commission takes no position as to whether or not adding such a proposed new condition is an appropriate or effective solution to the Presidential succession concerns you are seeking to address. That is Congress' decision and is beyond the purview or expertise of the Commission. However, should such a proposal become law, the Commission would be able to promulgate implementing regulations to condition party-nominating convention funds.

There are three concerns the subcommittee may wish to consider as it reviews this proposal. First, what sanctions would apply in the event a party committee does not fulfill its agreement? Second, what would the schedule be for implementation of this proposal? It would require the parties to agree to amend their rules and fundamental charters, actions which may only be possible by the parties assembled in their quadrennial conventions. Finally, what provision should be made for the possibility that one or both of the major parties would decide to forgo convention funding rather than accept the conditions for succession of the Vice Presidential nominee?

Again, Mr. Chairman, thank you for inviting the Commission to testify before you. We would be happy to answer any questions you may have.

[The prepared statement of Mr. Potter follows:]

PREPARED STATEMENT OF HON. TREVOR POTTER ON BEHALF OF THE FEDERAL ELECTION COMMISSION

Mr. Chairman, Members of the Subcommittee, good morning. I am Trevor Potter, Chairman of the Federal Election Commission. It is a pleasure to appear before your Subcommittee this morning.

As you know, the Commission is responsible for the implementation of the Federal Election Campaign Act of 1971, as amended, and Title 26 of the Presidential Election Campaign Fund Act, pertaining to the certification of matching funds in the presidential primary elections, grants to major party Presidential candidates in the general election, and payments to the National political parties for their national nominating conventions.

The Commission, as an independent agency, will administer whatever legislation is enacted concerning the payment of federal funds to Presidential candidates and nominating conventions.

Accordingly, on behalf of the Commission, I offer the following comments for the Subcommittee to consider:

It is our understanding that the Subcommittee is considering a proposal to address the issue of Presidential succession should the President-elect die after winning the popular election, but before the casting or counting of the electoral college votes. Specifically, it is our understanding that the Subcommittee is considering a proposal that would amend Title 26, §9008, to add an eligibility requirement in order for a national committee to receive its convention funding. The party committee would be required to agree that, in the event of the death of the party's Presidential nominee after the popular election, but prior to the electoral college count, it would nominate its Vice Presidential candidate as its Presidential nominee.

Under current section 9008 of Title 26, each major party is entitled to a public grant of $4 million (plus a cost-of-living adjustment) to finance its Presidential nominating convention. In 1992, this formula resulted in each of the two major parties receiving $11.048 million. In addition, the Commission's implementing regulations require the national committee of a major political party to agree to comply with certain conditions in order to be eligible to receive such convention financing. For example, under 11 C.F.R. §9008.8(b) of the Commission's regulations a national committee shall establish a convention committee and shall file an application statement.

The convention committee then shall:

(1) register with the Commission as a political committee, and shall receive all public funds to which the national committee is entitled;

(2) agree to various conditions, such as compliance with expenditure limitations, the filing of convention reports, establishment of bank accounts, and furnishing expense information to the Commission upon request. This agreement is also binding upon the national committee.

Given this contractual framework the Congress could establish additional conditions precedent to the receipt of federal funding for party nominating conventions. The Commission takes no position as to whether or not adding the proposed new conditions is an appropriate solution to the Presidential succession concerns you are seeking to address. That is Congress' decision, and is beyond the purview or expertise of the Federal Election Commission. However, should this proposal become law, the Commission would be able to promulgate implementing regulations.

There are three concerns which the Subcommittee may wish to consider in its deliberations regarding this proposal. First, what sanctions should apply in the event a party committee does not comply? The most obvious, of course, is to require repayment of the funds.

Second, what would the schedule be for implementation of this proposal? It would undoubtedly require the parties to amend their rules and fundamental charters—actions which may only be possible by the parties assembled in their quadrennial conventions.

Finally, what provision should be made for the possibility that one or both of the major parties could decide to forego federal convention funding rather than accept the conditions for succession of the Vice Presidential nominee?

Again, thank you for inviting me to testify before your Subcommittee. I would be happy to answer any questions you may have.

Senator SIMON. I thank you, Mr. Chairman. We appreciate it. Professor Amar?

STATEMENT OF PROFESSOR AKHIL REED AMAR

Professor AMAR. Thank you, Mr. Chairman. It is a great honor to be with you here today. I agree that there is a problem in our current system. I characterize it in my written statement which I have provided as a time bomb that is ticking, and I believe that we can defuse it now with a simple statute that doesn't require the major mechanism of constitutional amendment. I agree, therefore, with Walter Dellinger and with the Chair, as I heard him, that I don't think an amendment is necessary to solve these technical glitches in the succession scheme.

My proposal, which is elaborated in much more detail in my written remarks, is based on an intuition and then two or three implementing suggestions for getting to that intuition, achieving it. Here is the intuition, and this tracks, I think, Senator Bayh's remarks, also. The people vote on election day and they think on election day that they have elected the next President and Vice President of the United States, and that electoral mandate from the people in this awesome, wonderful moment that I think shines out to the rest of the world when we the people of the United States peacefully elect our President and Vice President—that should, if at all possible, be respected.

If the President were to die after inauguration, the Vice President would take over under the clear terms of the constitution, article II. If the President-elect were to die the day before the inauguration, the Vice President-elect takes over under the clear provisions of the 20th amendment, and my intuition is that same result, if possible, should be achieved all the way back through the process to election day. After election day, de facto, even if not technically within the meaning of the particular words "President-elect" of the 20th amendment—de facto, we have in most situations a President-elect and a Vice President-elect, and if something happens, God forbid, to the person who won the election on election day, the most sensible solution, it seems to me, would be for the Vice President-elect to take over. That person really should be sworn in on election day.

That is the intuition. If you don't share that intuition, then you won't like my proposals, but if you do share that intuition, then here is how I propose we get from here to there. We need to modify the timing of certain critical events. In particular, if a death occurs on the eve of the meeting of the electoral college, there is going to be rampant confusion, chaos, and time is needed, it seems to me, for everyone—for the polity, for the parties, for the members of the electoral college—to absorb the situation, to figure out what the rules are and what they should do.

Therefore, I propose that Congress pass now, in advance, before the crisis arises, legislation as part of Title 3 that in the event of death—and I specify for major party candidates, and you could provide triggers for who would fall in that definition. It doesn't seem particularly sensible to do it for every minor candidate. The electoral college could be postponed a suitable time, a week or so, to allow the situation to be absorbed.

This is, in fact, what was clearly suggested in the legislative history of the 20th amendment, to which Professor Dellinger referred both in his oral and his written remarks. They actually, when they looked at the 20th amendment, thought that that was a sensible thing to do.

A second possible date modification I suggest is the election day itself. Prior to the election day, and this is the flip side of my intuition, we do not yet have, in effect, a President-elect and a Vice President-elect. The people have yet to speak. I believe, if possible, they deserve to speak with the utmost clarity that we can create in an election system, and I believe that they are entitled to speak with a clear menu of choices before them.

If, God forbid, on the eve of election day a leading Presidential candidate were to die—and, again, we can specify what we mean so that not every minor candidate's death would trigger this—I believe the election should be postponed so that the parties can designate a new slate of candidates for the American people to pick on election day. The postponement could be for up to, say, 4 weeks if the death occurred literally the first Monday of November or something. If it occurs before Labor Day or before October 1st, no additional time would be necessary. We would have the time, I believe, to gear up a process of a new slate of nominees and an election that would clarify the issues.

Senator SIMON. But that would require a constitutional amendment.

Professor AMAR. I don't believe so. The idea of the first Tuesday in November is just provided for in Title 3 of the U.S. Code, and that date could easily be modified. The only date that really is fixed in the Constitution is January 20th, and the one concern that this does raise is the more you push back the election, the more difficult it is to have a transition, of course. So you are going to squeeze the transition, but, in my view, better a bumpy transition and perhaps an awkward honeymoon when the folks first are inaugurated than having the wrong people in office for four years. Let us give the American people, if possible, the chance to do it right on election day and pick the candidates.

So, once again, this actually is in the legislative history of the 20th amendment, the suggestion that Congress by ordinary statute could push back the election day in the event of a death right before the election. So both of those things that, just by way of background, I kind of came up with by brainstorming and looking at the Constitution turn out, after I did a little bit more research, to have been things that were proposed in the official House report that Aaron Rapapport sent me for the 20th amendment.

So those are two proposed suggestions. Now, here is the third, that the Greeley precedent from 1872–1873 is a bad one. The Greeley precedent, in effect, said Congress in counting the electoral votes won't count the votes for someone who is already dead. Along with Senator Bayh, I think that that decision was made sort of hastily and without a lot of forethought. Not a lot rode on it because Greeley only got three electoral votes; he wasn't going to win anyway.

It seems to me perfectly legitimate as one, not the only but one option that the electors might pursue, the members of the electoral

college, to vote for—let us say the candidate dies before the day before the electoral college meets. The electoral college meeting is postponed for 6 days, 7 days, and they continue to vote for the people who won the election, for the now dead Mr. Smith for President and his running mate, Ms. Jones.

If Congress counts those votes, the practical result of that will be on inauguration day Jones will become President, which is what would have happened if Smith had died after inauguration, what would have happened if Smith had died after the electoral college votes were counted under the 20th amendment, which probably would be the case if Smith had died the day after the electoral college meets. I agree with Professor Dellinger that that is the clear intent of the 20th amendment. Its particular wording is not particularly clear on that, so there is some ambiguity about that time period after the electoral college has met and before the electoral college votes are counted.

But here is the basic intuition of the 20th amendment. The basic intuition is, in effect, although it seems counter-intuitive, to swear in dead people. What the 20th amendment, in effect, says is on inauguration day swear in the fellow who is dead; one nano-second later, the Vice President will assume the office under the clear terms of article II and the 12th amendment.

I am saying let us carry that intuition backwards all the way in time for the entire period when we really do have, de facto, in the minds of all American citizens, or most of them—and this was Senator Bayh's point—a President-elect. Let us carry that intuition all the way back to the Tuesday in November. After that Tuesday, let us treat that person, in effect, as a President-elect. If the electoral college chooses to vote for that person, Congress should count those votes, and what that will mean is that Jones will take over on inauguration day, which is what the American people, I think, thought they were voting for.

Just to sum up the intuition and the idea one other way, I think the American people see all the other steps in the process after election day as procedural window dressing—inauguration gala balls and the swearing-in ceremony and the official ceremonial counting in the Congress and the meeting of the electoral college. They basically think that they voted for President and Vice President. They voted for Smith and Jones, and if Smith dies Jones is supposed to take over. That should be true regardless of the exact moment when Smith's heart stops beating, whether it is the day after inauguration, the day before, and I would take it all the way back if that is what the electors decide to do.

The reason today that they wouldn't be able to do that is we have the Greeley precedent on the books, and so it wouldn't at all be clear to them that if they did that you all would count their votes, and if you all wouldn't count their votes, then the tremendous irony would be that the other fellow, the fellow that lost on election day, might be the only living person with Presidential electoral college votes that would be counted by this body, and that, it seems to me, would be a clear perversion of the will of the people as expressed on election day.

So the intuition is Jones really is the person who should take over. The particular proposals have to do with pushing the dates

backwards to eliminate confusion and chaos, and to allow the voting for and counting of votes for dead people seems counter-intuitive, but achieves the sensible result of the Vice President taking over.

If I could just make three small additional points unrelated at the end, first, I don't believe that the Congressional Research Service proposal will cure the problem. It shortens the window. It actually tries to push everything in the other direction, change the days by moving things up, saying, well, if it is only 10 days rather than 41 days, it is ¼ as likely that someone is going to die in that period. It tries to close the window of vulnerability, but it doesn't close it shut. As long as the window of vulnerability is open, we are going to have this problem.

My further claim is, in closing it, but not all the way, it actually—to use the window metaphor, more cold air is going to come in with that. When you have less time to deliberate, only 10 days rather than 41 days, possibly—if the death occurs in that 10-day period, it is quite often going to occur right before the electoral college is going to meet. There is going to be chaos. People won't know exactly how to act and you are much more likely to get a split vote. So I actually don't think that the Congressional Research Service proposal can completely sort of cure this problem because it doesn't close the window shut.

My second point has to do with a glitch in the 25th amendment, which is perhaps a little bit beyond the narrow purview. But if you are trying to clean up all of these problems, here is another one. The President under the 25th amendment becomes disabled. The Vice President under the 25th amendment triggers a disability initiation process and becomes acting President. Now, what happens if the Vice President becomes disabled?

If he dies, no problem; the Presidential Succession Act kicks in the speaker of the House. If the President gets better, no problem; the acting President steps down and the President takes over. But if the President is disabled and the acting President is disabled, there is not even a mechanism that the 25th amendment clearly contemplates for doing anything about that. There is not a similar mechanism for initiating an inquiry into acting President disability as was provided for Presidential disability under the 25th amendment. So, that is just one completely unrelated point, but if you are trying to solve all these problems with a statute, there may be a statutory solution to that.

My final point has to do again with Presidential succession after inauguration, and I mention this very briefly in my last footnote of my written remarks. Suppose one day after inauguration both the President and Vice President die. Under the Presidential Succession Act, the Speaker of the House, or next in line, becomes President. As Senator Bayh says, there is a real problem if those folks represent the party that was repudiated on election day. The people voted for one party and they are going to get, under the current scheme, for 4 years the other party. That is a legitimacy problem.

I suggest in that footnote at the end of my remarks that that is not required by the Constitution in any way. The Constitution, in the event of double death, provides that Congress by statute may

provide for an acting President until a President shall be elected. My point is we don't have to wait 4 years for the next Presidential election. We could have a special election after a suitable 3-month period. So we could have a caretaker President for 3 months in the event of double death. That was just my reading of the words of the Constitution.

What I have since learned from some material, again, that Aaron Rapapport sent me is that that intuition of mine is powerfully confirmed by the history of this issue. In 1792, Congress passed a statute under article II to implement that double death scenario, and the statute provides for a special election, just a caretaker President and a special new Presidential election. That was the law from 1792 to 1886. Then in 1886 there was a new statute that said Congress could, but need not, provide for a special election in the event of double death, just a caretaker.

That was the law until 1947, and in 1947 Harry Truman, who became President because of President Roosevelt's death and cared a lot about these issues, put on the agenda of this body the Presidential succession issue. For the first time, in 1947, the rule became that the person who took over was going to take over for the entire remainder of the term. President Truman himself thought that was wrong. He thought that that person wouldn't have sufficient democratic legitimacy because no one in America had voted for that person. Indeed, they might have voted against that party.

So those are unrelated to the narrow time frame that we have been talking about, but I just wanted to mention those issues as well. Thank you very much.

[The prepared statement of Professor Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR[1]

Death and taxes are taboo. Talk about taxes is bad politics, and talk about death is bad form. But for the sake of our children and grandchildren, if not ourselves, we must talk about, and sometimes must raise, taxes. And we must also talk—and talk now—about death and presidential succession. For our current legal regime is a constitutional accident waiting to happen—a future crisis that is both thoroughly predictable and easily avoidable through ordinary, nonpartisan legislation that can be enacted now, long before any crisis arises. In this essay, I shall sketch out what I see as the problem; and the nonpartisan legislative solution I envision.

I. THE PROBLEM

It would probably surprise most thoughtful Americans, even those familiar with our Constitution, to learn that major glitches exist in our scheme of presidential succession. To detect these gaps, we must carefully examine the Constitution's provisions. The original Constitution, in Article II, provides that in the event of the president's "Removal, * * * Death, Resignation, or Inability" the "powers and Duties" of the president "shall devolve on the Vice President," whose election is provided for earlier in Article II. That Article goes on to empower Congress "by Law" to enact succession rules in the event of "Removal, Death, Resignation or Inability" of both the president and Vice president. (Congress has done so in 3 U.S.C. § 19, the presidential Succession Act.)

Later constitutional amendments refine this succession scheme. After political parties emerged in the presidential elections of 1796 and 1800, Americans in 1804 adopted the Twelfth Amendment, which modifies the rules for electing presidents and Vice presidents in order to make it easier for a party to run a presidential/Vice presidential "ticket." Although the Twelfth Amendment nowhere requires Americans

[1] Southmayd Professor, Yale Law School.

to elect a unified party "ticket,"[1] it does enable them to do so more easily. In the process, the Twelfth Amendment arguably also eases the process of presidential succession. In the typical case, a president who dies in office will be succeeded by his own "running mate"—a person whom the president himself chose as his would-be successor, and whom the American electorate embraced as such.

In 1933, the Twentieth Amendment tried to smooth out additional succession wrinkles. Section 3 of the Amendment addresses a question not explicitly addressed by Article II: What happens if, say, the day before Inauguration, the "President elect" dies? Section 3 provides that in this case, "the Vice president elect shall become President" on Inauguration Day. Section 4 of the Amendment deals with another wrinkle, enabling Congress "by law" to provide for "the case of the death" of a leading Presidential or Vice Presidential candidate in the rare situation where no candidate has a clear electoral college majority, and where, ordinarily, the election would be thrown into the House or Senate.

Still further refinements appear in the Twenty-Fifth Amendment, proposed and ratified after President Kennedy's assassination. Sections 1 and 3 clarify the principles underlying the original Constitution's Article II. Section 1 makes clear that in the event of a President's removal, death or resignation, the Vice President not only assumes the powers and duties of the Presidency, but does indeed "become President." And Section 3 spells out elaborate procedures for determining the existence and duration of Presidential "Inability "—an altogether too cryptic term in Article II. When these procedures are satisfied, the Vice President assumes presidential powers and duties as "Acting President" during the period of the (formal) President's inability. Section 2 of the Twenty-Fifth Amendment can be seen as extending the practical effect of the Twelfth Amendment. In the event of "a vacancy in the office of the Vice President"—a vacancy typically created by the Vice President's death, resignation, or removal (as in the case of Spiro Agnew) or accession to the presidency (as in the case of Lyndon Johnson)—the president shall, subject to Congressional approval, name a Vice president to fill the vacancy. Like the Twelfth Amendment, this. Section typically enables a President to pick his own would-be successor, subject to democratic approval of that successor.

It might at first seem that the Constitution's comprehensive provisions concerning presidential succession, spanning 3 centuries, and 4 discrete rounds of constitutional text, would cover all contingencies, or at least, all the big, easily foreseeable ones. But look again. What happens if, God forbid, the person who wins the general election in November and the electoral college tally in December dies before the electoral college votes are officially counted in Congress in January? If the decedent can be considered "the President elect" within the meaning of the Twentieth Amendment, then the rules would be clear; but it is not self-evident that a person who dies before the official counting of electoral votes in Congress is formally the "President elect." Both Article II and the Twelfth Amendment seem to focus on the formal counting of votes in the Congress as the magic, formal moment of vesting in which the winning candidate is elected as "President."[2] Although the legislative history of the Twentieth Amendment suggests that the electoral college winner is "President elect" the moment the electoral college votes are cast,[3] and before they are counted in Congress, the text of the Amendment fails to say this explicitly. In the absence of such explicit language, some might argue that the formal vesting rules of Article II and the Twelfth Amendment remain in effect, and that the Twentieth Amendment term "President elect" does not apply to death prior to formal vote- counting in Congress. (So too, the argument might run, the legislative history of the Twentieth Amendment plainly says that electoral votes will be counted in, and electoral college deadlocks will be resolved by, the incoming Congress, rather than the lame duck Congress;[4] but the text of the Amendment does not explicitly require this.)

Far greater—indeed, horrific—uncertainty hangs over earlier stages of the election process. What happens if, God forbid, the person who clearly wins both the popular and de facto electoral vote on Election Day in November, dies suddenly, the day before the electoral college formally meets and votes in December? What is a faithful elector to do here? If she votes for the decedent, will this vote even be counted by the Congress? In the 1872 election, Congress decided not to count the three

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[1] For more discussion of this point, see Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 198–24 (1992).

[2] See U.S. CONST. art. II § 1, ¶3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall *then* be counted. The Person having the greatest Number of Votes *shall be the President* * * *.") (emphasis added); *id.* amend. XII (similar).

[3] H.R. Rep. 345, 72d Cong., 1st Sess., at 4–6. (February 2, 1932).

[4] *Id.* at 2, 3.

electoral votes for presidential candidate Horace Greeley, who had died after the November election but before the meeting of the electoral college. The language of the Twentieth Amendment requires an awful lot of stretching to reach the case at hand.[5] In everyday expression, we refer to the winner of the November election as the "President elect" even on Election Night, with the informal vesting moment hovering between television network proclamations of victory, concession speeches by the opponent, and the victory speech by the winner. But formally, under the Constitution, surely the victor is not the "president elect" until—at least—the electoral college has met and voted.[6]

Again, what is a faithful elector to do? If she votes for the decedent, can she be certain that her vote will be counted? If her vote, and the votes of other faithful electors are not counted, then perhaps the other party's presidential candidate—the loser in November—would become President. This scenario is especially imaginable if the other party controls both House and Senate. Such control might enable the other party to ignore the electoral votes for the decedent, cynically but plausibly pointing to the Greeley precedent. The other party could then proceed to elect the November loser President under the provisions of the Twelfth Amendment.

Fearing such a scenario, suppose our faithful elector decides to do rough justice by voting for her party's Vice-Presidential candidate as President. But this scheme will work only if the other electors, in other states, do likewise. Yet there is, by hypothesis, almost no time to coordinate any voting strategy where the November winner dies unexpectedly hours before 51 groups of electors meet in 51 different places on the same day, and must vote on that day. Nor is clear that state law would allow such rough justice substitution, for some states purport to bind electors to vote for the November winner of their state election. Though the constitutionality of such laws seems highly dubious if we consult constitutional text, history, and structure, the Supreme Court came close to approving such laws in a brief opinion in a 1952 case, *Ray* v. *Blair*.[7] (Here is yet another source of uncertainty.) Finally, any rough justice substitution might create a Vice Presidential vacuum for faithful electors. It would be awkward, to say the least, to vote for the same person for both President and Vice President—and clearly unconstitutional to do so, under the Twelfth Amendment, for electors from that candidate's home state.[8] Thus even if rough justice substitution could be quickly co-ordinated by faithful electors, and upheld under constitutionally dubious state laws, it might enable the other party to win the Vice Presidency undeservedly, perhaps after various Congressional shenanigans under the Twelfth Amendment.

Now, finally, consider the horrible uncertainty hanging over a hypothetical tragedy occurring even earlier in the process. What happens if, God forbid, the candidate leading in all the polls suddenly drops dead on the first Monday in November, hours before Election Day—after a handful have already cast absentee ballots, but before the vast majority have voted? What is an informed voter going to the polls on Election Day to do? Will her vote for someone whom she (and everyone else) knows is already dead even be counted by state election officials on Election Night? Or by the electoral college in December? Or by Congress in January? What if our informed voter tries to do rough justice by writing in her party's Vice Presidential candidate for President? Would this vote be counted? (In some states, it is not entirely clear whether one can write in candidates whose names already appear on printed ballots.)[9] And what about the "Vice-Presidential vacuum" problem created by this rough justice substitution? In many states, votes are apparently counted by "ticket" rather than by Presidential candidate; crazy as it sounds, a candidate receiving 51 percent of the overall vote for President would apparently lose in many states unless those who voted for this new Presidential candidate (Jones) also all voted for the same running mate (Green).[10] And remember that, once again, there

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[5] Indeed, the legislative history of the Amendment pointedly declined to repudiate the Greeley precedent, see H.R. Rep. 345, *supra* note 3, at 5.

[6] See *id.* at 6.

[7] 343 U.S. 214 (1952). *Ray* approved Alabama's enforcement of a Democratic Party rule that electoral college candidates must pledge to support the party nominee as a condition of being listed on a primary ballot. Though the Court bracketed the issue, 243 U.S. at 223 n. 10, its logic would seem to allow state enforcement of a similar party pledge rule in the November general election.

[8] U.S. CONST. amend. XII ("The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves.")

[9] See Amar & Amar, *supra* note 1, at 926.

[10] Concretely: assume 30 percent of the voters vote for Jones for president and for Green for Vice president; 30 percent vote for Jones (president) and Blue (Vice president); and 40 percent vote for Black for president and White for Vice president. Under the voting rules of most if not

is—by hypothesis—virtually no time for our informed voter to coordinate her strategy with other like-minded voters.

In short, our seemingly comprehensive succession scheme, spanning 3 centuries and 4 drafting efforts, has some major gaps. It will not do to shrug our shoulders with indifference, and airily proclaim that the doomsday scenarios I have conjured up are unlikely to occur. Earthquakes are also unlikely, but sensible architects design buildings to withstand these rare events, and sensible planners lay down emergency routines before the ground shakes.

Nor should we play Pangloss and try, squint-eyed, to read sheer sloppiness as hidden wisdom by saying, "perhaps a little uncertainty is a good, or at least acceptable thing. Succession rules that are too certain, too predictable, are perhaps unfortunate, providing would-be assassins too clear notice of the likely consequences of their successful intervention in history. We cannot always specify in advance whose accession to the presidency would be the most sensible, and so we should decide case by case, after the fact, all things considered." Thus saith Pangloss. But our entire constitutional structure plainly says otherwise. Uncertainty, especially over so vital an issue as Presidential succession, is not, on balance, a virtue. Again and again, our Constitution has tried to lay down clear rules about the matter—and, where it is silent, our Constitution, on at least 3 occasions,[11] has explicitly invited Congress to lay down clear succession rules in advance of a crisis. The gaps we have seen are genuine glitches in our Constitution's structure, not mysterious embodiments of it.

II. THE SOLUTION

There is in short, a time bomb ticking away in our Constitution, and the time to defuse it is now, before anyone gets hurt. Happily, the solution can take the form of an ordinary, nonpartisan piece of Congressional legislation. We need not clutter up the Constitution with yet a fifth attempt at ironing out Presidential succession wrinkles. There is no need to crank up the elaborate machinery of Article V supermajorities at both federal and state levels. If, despite our best efforts, future glitches arise—and the Constitution's track record on the succession issue counsels humility in our ability to foresee *all* contingencies—a legislative solution today may make it easier to improve on the scheme by later ordinary legislation instead of yet another (*sixth!*) effort at constitutional drafting. Finally, an ordinary legislative solution is deeply. in keeping with the Constitution's repeated invitations to Congress to regulate issues of presidential succession;[12] with Congress' unique role in officially counting presidential electoral votes in the magic moment of formal vesting;[13] and with the legislative scheme Congress has already enacted concerning presidential elections.[14]

My proposed legislation is wonderfully simple. In addition to its provisions in sections 15–18 of Title 3 of the United States Code, Congress should provide by statute that an electoral vote for any person who is dead at the time of the Congressional counting *is a valid vote, and will be counted,* so long as the death occurred on or after Election Day. Modifying section 1 of Title 3,[15] Congress should further provide that, if one of the major party's presidential or vice presidential candidates dies or becomes incapacitated shortly before Election Day, (as certified by, say, the Chief Justice of the United States) the presidential election should be postponed for up to, say, 4 weeks. similarly, the death or incapacity of a major candidate on the eve

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all states, Black—not Jones—would win the state's electoral votes. For the Black/White "ticket" received more votes than any other "ticket," and states apparently count votes by "ticket." For more elaboration of this practice, see Amar & Amar, *supra* note 1, at 926–27; for criticism, see *id., passim.*

[11] U.S. CONST. art. §II, ¶1, 6 ("the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President."); *id.* amend. XX, §4 ("The Congress may by law provide for the case of the death of any persons from whom the House of Representatives may choose a President whenever the choice shall have devolved upon them * * *"); *id.* amend. XXV, §4 ("Congress may by law provide" certain mechanisms for determining Presidential inability).

[12] *See supra* note 11.

[13] *See supra* note 2.

[14] *See generally,* 3 U.S.C. §§1–18.

[15] That section now reads as follows: "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."

of the meeting of the electoral college should trigger a one week postponement of the meeting day set forth in Title 3 section 7.[16]

In the remainder of this essay, I shall explain how and why my proposed legislation would solve the problems identified earlier.

The intuition underlying the proposal is simple: Presidential succession rules for the period between Election Day and Inauguration should track, as closely as possible, the succession rules that would be in operation after Inauguration Day. Twenty-four hours after Inauguration, if, God forbid, the President dies, his (typically hand-picked) Vice President takes over, and she in turn names a new Vice President, subject to Congressional approval. If, God forbid, the death occurs instead twenty-four hours before Inauguration, a similar succession should occur on Inauguration Day. The new Vice President should be sworn in as President on Inauguration Day and then name her successor. That, I take it, is the clear command and intuition of the Twentieth Amendment's Section 3. And here is my constitutional and commonsensical intuition: a similar succession should occur, if, God forbid, the death at the top of the ticket occurs not 24 hours before Inauguration Day but any time after Election Day.

To put the point differently, the Twentieth Amendment's *spirit* is best vindicated by treating its concept of "President elect" realistically, not formalistically. The strict words of the Amendment apply only after the electoral college has cast its votes and given a candidate a majority or (stricter still) only after the Congress has counted the electoral votes.[17] But the reality today is that a President *elect* is *elected* on *Election* Night, by the People, and not by electors in colleges meeting later, or by Congress counting votes still later. Once the People have spoken on Election Night, they have already designated a de facto President elect and Vice president elect. And if—any time after the election—the de facto President elect dies, the de facto Vice President elect should be in line for Inauguration as would the de jure Vice President elect after the death of the de jure President elect under the Twentieth Amendment; or the Vice President after the death of the President under Article II and the Twenty-Fifth Amendment.

So much for my basic constitutional and commonsensical intuition which, I hope, is widely shared. Now for the seemingly counterintuitive insight: we can often most easily accomplish our intuitive goal, and approximate the clear post-Inauguration succession scheme by the seemingly counterintuitive practice of *voting for and counting the votes for a candidate who is already dead.* Actually, the idea is really not so counterintuitive once we stop and think about it. When a president elect dies one day before Inauguration, Section 3 of the Twentieth Amendment in effect says, "act as if a dead man can be sworn in, and one nanosecond after this fictional swearing in, the Vice president will become president under Article II."

Though it might seem counterintuitive to swear in a dead man, the goal is a kind of constitutional cy pres, achieving the purposes of the post-Inauguration succession rules under Article II and the Twenty-Fifth Amendment. And I propose that we carry the Twentieth Amendment's insight backward in time, throughout the entire period between Election Day and Inauguration Day. Just as the Twentieth Amendment in effect tells us to swear in the dead man as if alive, and then follow Article II and the Twenty-Fifth Amendment, so I suggest that electoral college members vote for, and that members of Congress count the votes for, a dead man as if alive, and then follow the ordinary succession rules on Inauguration Day, allowing the Vice president to become president.

To further test our constitutional and commonsensical intuition, and see how the proposed legislation would achieve its intended goal let us consider various untimely deaths in different periods, working backwards chronologically.

A. Post-inauguration period

Let's begin with the Post-Inauguration period. Suppose that, any time after being sworn in, President Smith dies. The clear rules of Article II and the Twenty-Fifth Amendment go into effect here, as described earlier. Vice President Jones becomes President, and Jones handpicks a would-be successor, Green, as Vice President, subject to democratic approval. If, instead, Vice President Jones dies in this period while President Smith is alive, then President Smith will pick a new would-be successor (Brown). If, God forbid, both Smith and Jones die together, then Congressional legislation—the Presidential Succession Act—kicks in and provides the rules of succession, pursuant to the explicit invitation of Article II.

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[16] That section now reads, in relevant part: "The electors of president and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment * * *."

[17] *See supra* notes 2–4 and accompanying text.

B. Formal President elect period

Now consider the fortnight immediately before Inauguration, but after the Congress has officially counted the electoral college votes, and certified a President elect and Vice President elect. Let's call this the Formal President Elect Period. If President elect Smith dies in this period, then—as we have seen—Vice President elect Jones will become President on Inauguration Day, pursuant to the Twentieth Amendment, and will then have a right to pick a would-be successor as Vice President, under the Twenty-Fifth Amendment. If, instead, Jones dies instead of Smith during this period, Smith will take office as President on Inauguration Day and fill the vacancy left by Jones' death—here too, under the Twenty-Fifth Amendment. If, God forbid, both President elect Smith and Vice President elect Jones die together, once again congressional legislation under the Presidential Succession Act kicks in and provides the rules of succession.

C. Informal President elect period

Next, consider the immediately preceding three week period, *after* the electoral college has voted, giving a clear majority to smith and Jones for president and Vice president, respectively, but before these electoral votes have been formally counted in Congress. Let's call this the Informal President Elect Period. If Smith dies in this period, what will happen? Will Congress count his electoral college votes? Today, genuine uncertainty reigns; and a Congress controlled by the party that lost in November might try to invoke the Greeley precedent as a principled basis for *not* counting Smith's votes. If Congress were to treat a vote for Smith as a blank vote, then no candidate would have a majority of all electoral votes cast. The contest might then be decided under the Twelfth Amendment with the obvious victor being Candidate Black—who ran for president and lost in November, but who now has more presidential electoral college votes than any other *now living* person—who indeed, might be the only living person with any presidential electoral votes. The legitimacy crisis that could arise here is obvious. Leaders of the Smith-Jones party will cry foul and try to wrap themselves in the legislative history of the Twentieth Amendment, while leaders of Black's party will piously point to Greeley, pronounce the text of the Twentieth Amendment ambiguous,and indignantly declare that Black, after all, received more of a presidential mandate than anyone else—surely, they will say, more than Jones, whom no one in November voted for *as President.*[18] Interest groups, pundits, and the media will predictably divide into warring camps, and confusion and cynicism will reign among the citizenry.

But note how the proposed legislation will avoid a future legitimacy crisis. Long before the unhappy death scenario arose, Congress would have addressed the issue with precise, nonpartisan legislation—passed in a calm, deliberate manner behind a kind of "veil of ignorance," proclaiming that a vote for Smith will be counted, whether Smith be a Republican or Democrat, and regardless of which party controls the Congress.

Spoilsports might argue that, strictly speaking, any legislation passed today could not conclusively bind a future result-oriented Congress, which would be free to replace the earlier law after Smith's death but before the official vote counting in Congress. (One Congress cannot generally bind a successor Congress.) And worrywarts might fret over whether our proposed legislation should be enacted as a law rather than a joint or concurrent resolution, since it seeks to regulate how votes will be counted in Congress itself. (Sections 15 through 18 of Title 3, however, do provide a clear precedent for regulating Congressional vote-counting by law.)

The spoilsports and worrywarts largely miss the point. The key function of our proposed legislation is to serve as a *precommitment* and *focal point.* With our proposed legislation on the books, it will be much more difficult, politically, for a future result-oriented Congress to change the rules and discount the votes for Smith. The principled precedent will be our legislation, not the Greeley affair. Citizens, pundits, reporters, and politicians will be able to point to the plain language, in black and white, in the United States Code, answering the question of the hour. Any deviation from this clear focal point will obviously smack of changing the rules in the middle of the game—indeed, after the game has ended.

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[18] Elsewhere, Vik Amar and I have suggested ways to improve the mandate that a Vice President receives on Election Day, by allowing voters to vote separately for President and Vice President and even (if they choose) split their ticket. *See* Amar & Amar, *supra* note 1. My argument today in no way requires acceptance of that more provocative separate ballot proposal. Indeed, for simplicity, all the examples in today's essay assume unified tickets (though allowing ticket-splitting between Presidential and Vice Presidential candidates would not, I believe, fundamentally change my analysis or conclusions today).

With our proposed legislation in place, what result? Congress will count votes for the now-dead Smith, who will thus become, formally, the "President elect." Jones will be the Vice President elect, and will be sworn in as President on Inauguration Day under the clear rules of the Twentieth Amendment. Soon thereafter, she will name a new Vice President, subject to democratic approval under Section 2 of the Twenty-Fifth Amendment. This is exactly the same result as would have occurred if Smith had died after the formal vote-counting in Congress, or after Inauguration Day. And that is exactly as it should be—the precise hour of death is largely arbitrary, and should not affect succession. (Remember, this, after all, is the constitutional and commonsensical intuition driving our proposed legislation.)

So too, if instead of Smith, Jones died in the Informal president Elect period, Jones' electoral votes would be counted; she would become the formal Vice president elect; and after Inauguration, president Smith would fill the vacancy in the Vice presidency under the Twenty-Fifth Amendment. And if, God forbid, both Smith and Jones were to die together in this period, their electoral votes would be counted, and on Inauguration Day, Congressional legislation under the Presidential Succession Act would kick in to determine who shall be sworn in as President. Once again these results are—by design—exactly the same as would occur if the deaths had occurred a few weeks later, after Congressional vote-counting, or Inauguration.

D. De facto popular President elect period

Now let's consider what I shall call the De facto Popular President Elect Period—the five weeks after the Election Day but before the meeting of the electoral college. Suppose Smith—proclaimed by all as the "next President" on Election Night—dies during this period. What is a faithful elector to do? As I have discussed earlier, it is far from clear what she would or should do with the current regime in place.

But see how our proposed legislation will show her the way. Her uncertainty in our earlier discussion was largely due to confusion and uncoordination. She is confused over whether a vote for Smith will be counted by Congress, or will be, in effect, a wasted (or even perverse) vote if Congress follows the Greeley precedent.[19] And she may not be able to coordinate strategy with like-minded electors spread across the continent, all of whom had planned/promised on Election Night to support the Smith/Jones ticket. By providing a *precommitment* and *focal point*, our proposed legislation solves her confusion problem. Congress has promised that a vote for Smith *will* count—and any repudiation of that promise would be a very politically costly breach of faith. By providing an obvious example in black and white in a simple sentence in the United States Code, Congress will focus our informed elector's mind on the obvious (though at first, perhaps counterintuitive) good sense of acting *as if* Smith were still alive.

Congress in counting votes, performs in effect a ministerial function, registering the will of the voters in the electoral college. But these electoral voters, in turn, play a largely ministerial role today, registering the will of the real voters on Election Day. By promising in its law to count votes for Smith, Congress in effect would be encouraging the electors to count the *citizenry's* vote for Smith on Election Day.

But why not do more than "encourage" our faithful elector to vote for smith? Why not somehow require her by law to do so? To begin with, no legislative requirement seems necessary here. By hypothesis our faithful elector was planning to vote for the Smith/Jones ticket before Smith died. Politically, she pledged to her fellow citizens that she would support that ticket. In today's political culture, an elector typically sees herself as someone who carries out the state electorate's will, as expressed on Election Day. On Election Day, the citizens voted for the Smith/Jones ticket—for Smith as President, and Jones as President, if Smith should die. To the extent they thought about it, few voters, I suspect, would think that things should be any different if Smith died before or after Inauguration, or before or after the Electoral College has met. De facto, the real election has already occurred, and after Election Night, Smith and Jones are—de facto, and for all practical purposes—the President elect and Vice President elect. In popular consciousness, the steps that follow—electoral college meetings, vote countings, swearings in—are largely ceremonial. Most faithful electors, I believe, recognize all this, and would happily vote for Smith, once assured that this vote will indeed be counted.

So no real Congressional "mandate" for electors seems needed. Nor, I believe, would a congressional mandate be easily squared with the Constitution. The Constitution plainly contemplates that, at least formally, the electors must themselves

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[19] The legislative history of the Twentieth Amendment is no help here; indeed, it pointedly leaves open the vitality of the Greeley precedent, implying that Congress perhaps should *not* count any electoral college vote for a candidate already dead before the electoral college meeting, see H.R. Rep. 345, *supra* note 3, at 5.

decide upon their votes. Notwithstanding some language in *Ray* v. *Blair*,[20] I myself have real doubts about state laws that attempt to force electors to take legally binding pledges as a condition of November ballot access. But even if a legal pledge can be required, it is far from clear that any legal sanction could be imposed in the event of a subsequent violation of that pledge. And even if the faithless elector could be punished, it is further dubious that her faithless vote is somehow void. In any event, even if states could regulate their own electors, I find it hard to see where Congress would have the authority to bind electors by law.

Happily, no binding is necessary; our proposed legislation should do the trick. Our faithful elector, once she understands the situation, could vote for the Smith/Jones ticket, as she had planned and politically pledged; and so could her fellow faithful electors in other states. Congress will count the votes for Smith, per its precommitment, and Jones will become President on Inauguration Day, and name her successor under the Twenty-Fifth Amendment. Once again—and by design—our proposed legislation will mean that the accidental timing of a death will not change the succession results.[21]

But what about the problem created not by confusion but by the difficulty of coordination? All that is needed to cure that problem is a Congressional statute—passed under the clear authority of Article II[22]—that modifies the day on which the electoral college shall meet, in the event of an unexpected death or incapacity (as certified, by, say the Chief Justice of the United States) in order to allow, say, one week for electors to absorb the situation.

One variant of this scenario is also imaginable. Jones might well communicate with her electors, and might try to instruct them to vote for *Jones* for President, and for Green—her newly announced handpicked successor—for Vice President. Two reasons might underlie Jones' proposed rough justice substitution. First, Green would not need to be confirmed after Inauguration under the Twenty-Fifth Amendment, and could hit the ground running on January 20. Second, and related, on the off chance that something were to happen to *Jones* in the weeks ahead, the Smith/Jones party—which, after all, won in November—would be assured that the party would control the Oval Office. If instead, the rules of succession under Congress' Presidential Succession Act were to kick in, *Black's* party, which lost the election, might be able to win through death what it lost at the polls.

But this Jones-for-President scenario is imaginable precisely because it, too does do rough justice, and plausibly implements the people's mandate in November. Once again, Jones will be President, barring future tragedy; and in the event of tragedy will be replaced by Green—her handpicked successor, democratically approved. This is, in effect, what the people voted for in November, and what they would have gotten had Smith died the day after Inauguration—with one small difference The forum of democratic approval of Jones' would-be successor has shifted from the Congress under the Twenty-Fifth Amendment to the electoral college in our scenario. But this should not trouble us, for the electors, too, were democratically chosen—chosen, indeed, for the very purpose of voting for President and Vice President. Although typically mere ciphers recording the citizenry's verdict on Election Day, the

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[20] *See supra* note 5. In earlier work, Vik Amar and I may have read *Blair* too broadly, see Amar & Amar *supra* note 1, at 943 n. 86. Contrary to the loose language in that passing footnote, I now do not think that *Ray* "strongly suggests that states can bind collegians any way they choose."

[21] But what if party bosses tried to order electors to vote for the bosses' favorite candidate King, rather than Smith, in a naked attempt to muscle out Jones? As a realistic matter this seems unlikely, as Jones will be, after Smith's death, the de facto "leader of the party" in most scenarios, and the one with the most obvious mandate from the People on Election Day (For suggestions how to strengthen that mandate, see generally Amar & Amar, *supra* note 1.) If, however, electoral-collegian "tampering" by party bosses were seen as a problem, perhaps Congress could prohibit—either directly, or through conditional funding rules for any party that seeks federal election funds—any direct effort to lobby electors between Election Day and Electoral College Meeting Day by anyone other than the candidates themselves, or their direct agents. (Especially in a death scenario the surviving running mate must be free to consult his/her electors, for reasons explained *infra*.) Congressional power here might perhaps be supported by the clear role Congress may play under Article II in providing for the dates on which electors are chosen, and meet; and by analogy to "electioneering" rules protecting ordinary citizens from being lobbied immediately prior to casting their votes.

The "antilobbying" law sketched in this footnote is of course wholly severable and distinct from my main legislative proposal.

[22] U.S. CONST. art. II, § 1, ¶4 ("The Congress may determine the Time of Choosing the Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United states.") The legislative history of the Twentieth Amendment explicitly invites Congressional legislation postponing the electoral college meeting in the event of a death after Election Day but before the regularly scheduled meeting of the electoral college. See H.R. Rep. 345, *supra* note 3, at 5.

vestigial body of the electoral college does, it seems, have a mandate to deal with a genuine emergency that the citizenry could not and did not address, an emergency that arises after Election Day. If the electoral college has any function at all today, it is precisely to deal with the case at hand as a proxy for the people.

What would happen if, instead of Smith, Jones dies after Election Day but before the electoral college meets? With our proposed legislation in place, electoral collegians who had planned and politically pledged to Smith/Jones could continue to vote for Jones, secure in the knowledge that Congress would count this vote; that Jones would thus become the formal Vice President elect; and that after Inauguration, President Smith would fill the vacancy in the Vice Presidency, subject to democratic approval, under the Twenty-Fifth Amendment. Alternatively Smith may communicate with his electors and instruct them to vote for his newly-announced handpicked successor, Brown. Once again, this substitution seems unproblematic, approximating the results that would have occurred had Jones died after Inauguration, with only a small change in the mechanism of democratic approval for Smith's handpicked successor.

But what if, God forbid, both Smith and Jones die after Election Day, and before either of them has had any chance to name a would-be successor? Several scenarios might unfold. None is particularly happy; but there are no happy choices here. Though these scenarios yield different outcomes, none seems in principle, wrong, since it is hard to see which choice is clearly right. The people's will on Election Day—to elect Smith, and (if not Smith) Jones, and (if not one of them), someone they handpick, subject to democratic approval—cannot be carried out, and so some democratic body must improvise.

In one scenario electoral college majorities might continue to vote for Smith and Jones. With our proposed legislation in place, these votes will be counted; Smith and Jones will become, formally President elect and Vice President elect; and on Inauguration Day, the succession rules of the Presidential Succession Act will kick in and determine who shall be sworn in as President. This is the same result as would occur if Smith and Jones had died one day after the electoral college met, or one day after Inauguration.

Alternatively, the leaders of Smith and Jones' party might try to get in the act, designate substitute candidates, and inform electors who had pledged and planned to vote for Smith/Jones that they should instead vote for the new substitute ticket. If electors—typically party regulars—follow the marching orders of party bosses, then the substitute ticket will receive an electoral college majority, and take office in Inauguration Day. The outcome is different from the one that would occur if the rules of the Presidential Succession Act kicked in, but—once again—it is hard to see how this difference would create any legitimacy crisis. The electors have at least as much of a democratic mandate to improvise in this unprovided-for case, as does Congress.

Instead, suppose some electors follow the party bosses' marching orders, and others do not, voting for Smith/Jones, or for their own substitute candidates. In this case, no candidate may have a majority of electoral votes, and the contest might be thrown into House and Senate for resolution under the Twelfth Amendment (with Section 4 of the Twentieth Amendment also possibly coming into play). The result under this scenario would likely differ from both the Presidential Succession Act outcome and the party bosses' marching orders scenario—but once it is hard to say that any one of these procedures is privileged, on democratic or constitutional theory grounds, over the others.

In short, our proposed legislation does not solve this truly unprovided-for case of double death; but at least does not make the problem any worse. Can we do any better than this? Possibly, if we are willing to be imaginative. Here is one, perhaps farfetched, supplemental suggestion—which, I hasten to add, is wholly severable from my main legislative proposal. Congress could provide by a statute passed now—well before any crisis—that if, in the month before the electoral college has met, both the de facto President elect and the de facto Vice President elect die or become incapacitated (as certified by, say, the Chief Justice of the United States) the date of the meeting of the electoral college shall be postponed, and shall not occur until 4 weeks after certification. In the interim, the U.S. Census Bureau shall administer a wholly nonbinding "Presidential/Vice Presidential Preference Poll," for purely informative purposes, and for whatever political weight the electoral college members choose to attach to it. The poll would look like a ballot, and be administered like an election, by the Census Bureau. Federal and State force and fraud rules in effect for ordinary elections would apply, under the terms of this supplemental statute; and eligibility to participate in this poll would be governed by the same rules as applied in the earlier November election. The candidates listed on this informal "ballot" would be exactly the same as in the earlier November election—

with one key difference. Party leaders of the party represented by the (now dead or incapacitated) Smith and Jones would be authorized to designate substitute candidates. The Census Bureau would be responsible for certifying the results of this poll, state by state.

The results of this "poll," it must be stressed, would have no binding legal effect. It would be purely advisory with whatever weight members of electoral college chose to give it. Though "extralegal," it is not illegal or unconstitutional. Nor is it objectionable on democratic theory grounds, for its purpose is to elicit more information from the People in light of the clear frustration of the will, expressed on Election Day, that Smith or Jones or someone named by them should occupy the Oval Office for the next four years.

Nor is our imaginative supplemental legislation wholly unprecedented. The main binding legal effect of this law—postponement of the meeting of the electoral college—is clearly permitted under the language of Article II, which explicitly declares that "Congress may determine * * * the Day on which [the electoral college] shall give their votes." And the Presidential poll itself is really not that different from the November election itself—an "extraconstitutional," but hardly unconstitutional, product of state legislatures delegating to the people the power to choose presidential electors who politically pledge to vote for certain candidates. Nor is it very different from systems developed in states prior to the Seventeenth Amendment, in which popular beauty contest elections for United States senator were held to provide information about the popular will to the state legislatures that formally elected the senators.

The biggest problem with our imaginative supplemental legislation is a practical one of timing. The results of the electoral college might not be known until mid January, with formal Congressional vote-counting taking place, say, 2 days later. There would be virtually no time for an orderly transition of administration.[23] But perhaps an awkward honeymoon is better than a bad marriage; three bumbling months with the right people in the White House—with a popular mandate to govern—may be much better than four years of the wrong folks in office, selected by the vagaries of the Presidential Succession Act or one of its equally imperfect counterpart mechanisms.

E. General election period

Let us, finally, turn to the period before the people have spoken on Election Day in November. If major party candidate Smith dies after his party's nomination, but before the election, the current regime could lead to confusion and chaos—especially if the death occurs right before Election Day. Unlike the situations we have already canvassed, in this scenario, there is no de facto president elect; the people have not yet spoken on Election Night. And they are, I believe, entitled to speak clearly, with explicit options laid out before them on a ballot and clearly defined by a general election campaign.

The best solution here, I suggest, is that the election be postponed for up to 4 weeks. (If the death occurs more than 4 weeks before the regularly scheduled Election Day, no postponement need occur.) Congress should provide now—well before any future crisis—that if, in the four week period prior to Election Day, a major party presidential or Vice presidential candidate dies or becomes incapacitated, as certified by, say, the Chief Justice, no electors shall be chosen until four weeks have elapsed after certification.

The proposal is limited to major party candidates, which could easily be defined as parties or candidates that polled more than 10 percent in the previous presidential contest, or that presented more than a certain number of petitions in the current election year prior to Labor Day. (This last provision avoids entrenching the existing two major parties.) In this four week period, the dead or incapacitated candidate could be replaced, and the American people on Election Day would have a complete menu of choices, defined by a focussed campaign.

Congressional power to enact this proposal clearly derives from Article II, which authorizes Congress to "determine the Time of choosing the Electors"—as Congress now does in 3 U.S.C. §3, establishing the familiar November Tuesday Election Day.[24] (Congress would also need to decide whether other elections—for Congress,

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[23] January 20 is established in the Constitution as Inauguration Day, see U.S. CONST. amend. XX § 1. Thus, this date is a fixed landmark, short of constitutional amendment.

[24] Here too, *cf. supra* note 22, the legislative history of the Twentieth Amendment explicitly invites "Congress by general statute" to "postpone the day of the election" in a death scenario, see H.R. Rep. 345, *supra* note 3, at 5.

etc.—should also be postponed or, instead, whether those should take place as scheduled, with a special, President-only election held later.)

Once again, the biggest problem here is that the window for smooth transitions of power shrinks under this proposed legislation, from ten weeks to as few as six weeks in the event of an untimely candidate death. But better a bumpy transition than a muddled mandate.[25] Election Days are awesome moments in a well-functioning democracy, and deserve to be done right.

Senator SIMON. We thank you.

Professor Berns?

STATEMENT OF PROFESSOR WALTER BERNS

Professor BERNS. Senator, I would like to join my colleagues on this panel in praising you for taking the time and trouble to address this issue. I can't believe that your constituents in Illinois pushed this service on you.

Senator SIMON. You are correct in that. I don't know that we received one letter from anyone on this.

Professor BERNS. I have prepared a 9-page statement and I hope that it can be printed in the record. May I ask that it be done?

Senator SIMON. Yes. All statements will be put in the record in their entirety.

Professor BERNS. As I say in that statement, most of what I have to say on this subject comes from that little book that we at the American Enterprise Institute published called *After the People Vote: A Guide to the Electoral College.* As we say about that little publication, it provides the answers to all the questions that we hope we never have to ask. From my point of view, most of the answers that we do have now with respect to legally binding rules in the event of this contingency or another are satisfactory.

There is one exception to that, and that has to do, in my view, with the event of the death of a candidate in that period between the meeting in mid–December of the electoral college and the counting of the votes on January 6 in the Congress. Here, I disagree with my old friend, Walter Dellinger, on this question. The issue has to do with whether we have a President-elect or a Vice President-elect until Congress officially opens, counts, and resolves all disputes concerning that vote.

If we do have a President-elect and a Vice President-elect before that, in this period before Congress acts, then the 20th amendment clearly resolves the difficulties. It takes over and it preempts essentially the 12th amendment to the Constitution. If we don't have a President-elect, then the 12th amendment governs.

I can make the point I want to make by simply offering the terrible possibility that Bill Clinton would have died on, say, January 1 before he took office, and then the question is who would become

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[25] The desirability of a President with a mandate to govern might also suggest that the general rules of succession under the presidential Succession Act be reconsidered. Under Article II, the Congress may by law provide for the case of post–Inauguration double death in the White House by "declaring what Officer shall then act as president" until "a President shall be elected." Could not Congress provide for a special Presidential election to be conducted three months after the double death, to fill out the remainder of the four-year term? Under this model, the Speaker of the House (or whoever is next in line) would serve as a caretaker acting president only long enough for the American people to be consulted again, to designate a real President for the remainder of the term. (Of course, nothing would prevent the acting caretaker from running in this election; and if he or she were to win, s/he would have a more genuine mandate to fill the Oval Office and lead the country.)

The proposal to modify the general rules of the presidential Succession Act is, of course, wholly severable from the other proposals in this essay.

President of the United States. The answer would have been George Bush because the 12th amendment reads,

If no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for President, the House of Representatives shall choose immediately by ballot the President.

Well, George Bush was the only one who got electoral votes and if Bill Clinton had died, then George Bush would have become President, if my reading of this language about the President-elect is the accurate one. General Dellinger disagrees.

The issue has to do, I think, with the significance we attach to what Congress does when it counts and opens the votes. Can Congress on that occasion affect the outcome? The statute governing this allows members of Congress to raise objections, and then provides that the House and Senate must immediately deal with those objections. Of course, it is possible that one of those objections will have material effect, and if that is possible then we don't have a President-elect until all those things are resolved.

So again, to repeat, this is the one period, this time period, where I think there is a serious problem. There is an answer now. The answer comes from the 12th amendment, but I think we all would agree that a Presidential candidate who is clearly repudiated at the polls, as George Bush, I think, was in 1992, it is simply unacceptable that he, under the law as it stands, would become President in the event of, say, Bill Clinton's death.

I will conclude. We are getting late here. I think this one difficulty can be resolved quite simply. Incidentally, Professor Amar, I think you made mistake, if I may. You said, with respect to the times that are fixed, there is only one date that is fixed, January 20. January 3 is fixed. Congress, by the 20th amendment, must be in session at that date, and that had something to do with this Presidential business because it was clearly the intent of the framers of the 20th amendment that it be the new Congress, not the old Congress but the new Congress, that counts the vote, and so forth.

Professor AMAR. But it is not in the words of the 20th amendment.

Professor BERNS. January 3 is.

Professor AMAR. But not that the votes have to be counted on January 3.

Professor BERNS. No, no. That is right. That is by statute, yes.

Professor AMAR. Yes, so it doesn't really matter.

Professor BERNS. My suggestion is, and it is in my statement, that a simple statute done under the authority of section 4 of the 20th amendment could be adopted, and it would read something like this.

Upon the death of the person receiving the greatest number of votes for President, the person receiving the greatest number of votes for Vice President shall become President.

This would preempt the 12th amendment.

Thank you, Senator.

[The prepared statement of Professor Berns follows:]

PREPARED STATEMENT OF WALTER BERNS[1]

Much of this statement is taken from the book, Walter Berns (ed.), *After the People Vote: A Guide to the Electoral College* (American Enterprise Institute Press, 1992, 2nd ed., 1992).

I don't have to persuade the members of this Subcommittee that it is important to have a legally binding rule governing unusual cases of succession to the country's highest offices. We have such rules, rules governing *almost* every conceivable contingency, and so long as they are followed, this country will not suffer a crisis of succession. The one exception has to do with the death (resignation, disqualification) of a presidential and vice presidential candidate, specifically a death (etc.) that occurs in the period between the meeting of the Electoral College in mid-December and the counting of the electoral vote in Congress on January 6. Fortunately, this contingency can be met by a simple Act of Congress.

DEATH (ETC.) BEFORE NOVEMBER ELECTION

"If a candidate nominated by a political party dies or resigns before the date fixed for the choice of presidential electors * * * the national committee of the affected party will meet and choose a new presidential or vice presidential candidate. Article III of the Charter and Bylaws of the Democratic Party and rule 27 of the rules of the Republican Party permit the national committees so to act." (See *After the People Vote,* pp. 92–93.)

In 1972, e.g., upon the resignation of vice presidential candidate Thomas Eagleton at the end of July, the Democratic National Committee met on August 8 and nominated R. Sargent Shriver as the new candidate.

A more interesting case occurred in 1912 when the Republican candidate for vice president (Vice President James S. Sherman) died October 30, only a few days before the election. The Republican National Committee convened *after* the election and chose another vice presidential candidate, Nicholas Murray Butler. When the electoral college met in mid-December, the Republican electors cast their ballots for Butler.

DEATH (ETC.) AFTER NOVEMBER ELECTION

If the death or resignation occurs between the November election and mid-December when the electors cast their ballots, "the national committee of the party affected would probably proceed as it would if the candidate died or resigned before the November elections—assuming there was time to convene the committee." (*After the People Vote,* p. 26.) The only question here has to do with those states where electors are pledged to vote for a named candidate.

At the time of the 1992 election, 19 states and the District of Columbia exacted pledges from their electors to cast their ballots in a particular way, eight of them for a named candidate and the others for the candidates of their parties. Colorado is typical of the "named candidate" states. It requires each elector to "vote for the pair of presidential and vice presidential candidates who received the highest number of votes at the preceding general election..." Ohio is typical of the others. It requires electors to cast their votes "for the nominees * * * of the political party which certified [them] to the Secretary of State * * *." (See Thomas Durbin (ed.), *Nomination and Election of the President and Vice President of the United States, 1988* [Congressional Research Service, Library of Congress, for the Committee on Rules and Administration, United States Senate, G.P.O. 1988], p. 316 for Colorado and p. 370 for Ohio.)

None of the eight states requiring electors to vote for a named candidate stipulates a penalty for electors who violate their pledges. Thus, upon the death of the candidate receiving a "the highest number of votes in the preceding general election," a Colorado elector would not be subject to a penalty for casting his vote for the candidate subsequently named by the party committee.

Furthermore, while the Supreme Court in *Ray v. Blair* (343 U.S. 214) upheld the legality of pledges required by a political party from candidates for the office of presidential elector, it did not directly address the constitutional status of pledges. If that question were to arise, I suspect the Court would hold that electors retain their constitutional status as free agents to vote for whomever they please.

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[1] John M. Olin University Professor, Georgetown University; Adjunct Scholar, American Enterprise Institute.

DEATH (ETC.) BETWEEN JANUARY 6 AND JANUARY 20

A death or resignation occurring in this period—between the counting of the electoral votes by Congress and the date on which the president and vice president take office—would be governed by the Twentieth Amendment of the Constitution. Section 3 of the Amendment reads as follows:

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President * * * and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected * * *.

Thus, if both the president elect and vice president elect were to die during this period, the law enacted by Congress under the authority of this constitutional provision (the Presidential Succession Act, as amended) would take effect. (See U.S. Code, Title 3, chapter 1, section 19.)

DEATH (ETC.) BETWEEN MID-DECEMBER AND JANUARY 6

There is a question concerning the consequences if the death or resignation occurs in this period. Would we have a president elect and a vice president elect before the Congress counts and announces the electoral vote? If so, section 3 of the Twentieth Amendment governs the case, and, if the president elect dies, the "the Vice President elect shall become President."

But it is doubtful that there will be a president and vice presdient elect before the electoral votes are counted and announced by Congress on January 6. Although the electors will have voted and the country will know—or will think it knows—whether anyone has received a majority, those votes will be under seal and will not be known officially until they are opened and counted by the Congress.

The statute (3 USC ch. 1, sec. 15) requires the president of the Senate (when opening "the certificates and papers purporting to be certificates of the electoral votes" of each state in turn) to "call for objections, if any." It then specifies the manner of dealing with those objections. Only after they have been dealt with, or only after all the questions concerning the validity of the certificates have been resolved, may the president of the Senate "announce the state of the vote." It follows, therefore, that only then will there be a president elect and a vice president elect. The Twentieth Amendment cannot govern the case of a candidate's death occurring between mid- December and January 6; it can only be governed by the Twelfth Amendment, and this will create problems.

The death or resignation of a candidate during this period would be of political concern only if the candidate had been the choice of a majority of electors, or if no candidate had won a majority. In either case, the choice of a president would devolve upon the House (or, in the choice of a vice president, upon the Senate) . This conclusion rests on the following clause of the Twelfth Amendment: "and if no person [living] have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President." Thus, to be concrete, if the Republican, Democratic, and some third-party candidate all win electoral votes, and if the one winning a majority were to die or resign between mid-December and January 6, the House would, on January 6, choose a president from the other two.

Under this interpretation, if Bill Clinton had died during this period (between mid-December and January 6), the House would have been required to choose George Bush as president (he being the only other candidate receiving electoral votes). In this situation, the administration would consist of a Republican president and a Democratic vice president. This would be awkward but probably not intolerable. (After all, the country survived the John Adams-Thomas Jefferson administration.) But are we prepared to tolerate a situation where a person who was clearly rejected by the people (George Bush) nevertheless succeeds to—or, in this case, resumes—the presidency?

To avoid this situation, the Congress might choose to ignore the fact that Bill Clinton had died and (when it counts the votes on January 6) proceed to name him president elect. Then, because "the President elect shall have died," vice president elect Al Gore would, under the Twentieth Amendment, become president. Congress might reason that this outcome is in accordance with the popular will, or at least does not thwart it. The trouble with this scenario is that, when counting the electoral votes on January 6, the President of the Senate is required by statute to "call for objections, if any," and someone is almost certain to object to counting the votes

cast for someone who had died. (This happened in 1872 when three Georgia electors voted for the candidate of the Democratic party, Horace Greeley, even though he had died a week before the meeting of the electoral college. In the event, after an objection by one member of Congress, the votes for Greeley were not counted in the official tally.)

I am suggesting a lack of coherence between the Twelfth Amendment and section 3 of the Twentieth. The Twentieth Amendment deals with the deaths of the president *elect* and the vice president *elect*, but, because of the powers of Congress under the statute (3 USC ch. 1, sec. 15; see *After the People Vote*, pp. 17–19), there may not be a president and vice president elect until Congress resolves all disputes (if any) concerning the regularity of the electoral vote and announces the results. Until then, the death of a presidential and vice presidential candidate would bring the Twelfth Amendment into play, with the results that are not compatible with the purpose of the Twentieth.

Congress could resolve this difficulty by exercising its powers under section 4 of the Twentieth Amendment:

> Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 19 of the Presidential Succession Act meets the cases of the more or less simultaneous deaths (etc.) of a president *and* a vice president (by prescribing that the Speaker—or President pro tempore of the Senate, or Secretary of State, Treasury, Defense, etc.—shall act as president). But it does not, nor does any other statute, deal with the case of the death "of any of the persons from whom" the House may choose a president and the Senate a vice president.

This could easily be remedied by a new section (number 21) of the Presidential Succession Act providing that, e.g., upon the death of the person receiving the greatest number of votes for president, the person receiving the greatest number of votes for vice president shall become president. This would preempt the Twelfth Amendment.

The same end could be accomplished by amending section 3 of the Twentieth Amendment (which deals with the death [etc.] of "the President elect," and, in such event, provides that the "Vice President elect shall become President"); but the enactment of a statute is easier than the adoption or amendment of a constitutional provision.

Senator SIMON. Since Walter Dellinger is still here, if he doesn't mind joining the panel, we will have to make it very brief, but I would be interested in the reaction of particularly Professor Amar and General Dellinger. I have got to get used to calling you General now. Then, Mr. Chairman, I want to ask you one other question, also, in regard to your statement.

You heard what Professor Berns said. Number one, do you agree with his assessment that we would end up with a George Bush election in that event? The second question is, if that is the case, can we correct that defect statutorily?

Mr. DELLINGER. I believe we would have wound up with a George Bush rejected by the voters being re-sworn in as President had it not been for the 20th amendment. I believe that the 20th amendment takes care of the situation from the day the electors cast their votes forward, though I recognize the strength of Professor Berns' arguments to the contrary, and that the electors following the instructions of their party takes care of the situation from the date the popular election is held until the date the electors cast their votes.

I do have a question for Professor Amar, Mr. Chairman, if I may.

Senator SIMON. You may, and then I want to hear Professor Amar's response on this, also.

Mr. DELLINGER. Well, why don't you hear that? That is your choice, sir.

Senator SIMON. Yes.

Professor AMAR. I think that the 20th amendment's legislative history is really quite clear in the intendment that a person becomes President-elect when the electoral votes are cast, and I think General Dellinger is very persuasive on that. The problem is it is not clear from the text of the 20th amendment, and the rest of the Constitution seems to use a different triggering mechanism. It is when the votes are counted, under article II and the 12th amendment, that a person shall then be President.

If I had to decide which is the best interpretation, I think I would stick with General Dellinger's that the clear purpose of the 20th amendment was to displace that. They just didn't do, frankly, a particularly good job of making that crystal clear.

One way to say that to Professor Berns is, just in the colloquy we had before, he thinks the clear intent of the 20th amendment was also that the new Congress, not the lame duck Congress that might have been repudiated at the polls, but the new Congress would be the Congress counting the votes and, in the event of a contingency, deciding on who wins if no one got a majority. The clear intendment, the purpose, of the 20th amendment is not in the language of the 20th amendment, again, and there is nothing in the 20th amendment that would prevent, as I read it, the lame duck Congress from trying to do all this stuff before January 3.

So the 20th amendment is somewhat unhappily drafted in these two key respects. Is it going to be the new Congress or the old Congress? They wanted it be the new, but they didn't say so clearly. When is someone President-elect? I think they clearly meant when the electoral votes are cast. They just didn't say so very clearly.

If I had to decide it, though, as a legal proposition or if I were advising this body in the event that ever occurred, I would side with General Dellinger. But precisely because there really is this great unclarity and someone so distinguished as Professor Berns and many others would disagree, I think we should clear it up now with a clarifying statute.

Professor BERNS. May I say, Senator——

Senator SIMON. Yes, Professor Berns.

Professor BERNS. Looking at the legislative history of the 20th amendment, I would agree that one can derive from it the intention at the time to interpret the term "President-elect" as my colleagues on this panel have done. But, you know, it is not in the text. There is this question, and again I repeat to a large extent it turns on what significance we attach to the powers of the Congress when the votes are counted. That statute, to repeat, does say objections can be made, and they have to be settled.

But beyond all that, to reiterate something that Professor Amar just said, it is so simple to get rid of this ambiguity. All you have to do is use the authority of section 4 of the 20th amendment itself, pass a simple statute of the sort that I have mentioned here, and that resolves the difficulty. General Dellinger and I—our disagreement has no significance after that.

Mr. DELLINGER. That is correct.

Professor AMAR. I think we all agree that a clarifying statute is in order. There is one respect, though, in which I disagree even with Professor Dellinger and with Professor Berns. We are talking about words in the Constitution. Here is a word that is not in there; it is not in the 12th amendment either. It is put in in brackets in both Professor Berns' book and I think in his testimony. It is the word "living." It is not in there, and I would say even before the 20th amendment that it would be kind of silly and not common sensical at all—and the Constitution is a common-sense document—if George Bush somehow had to be President because Bill Clinton died the day before the electoral college votes were counted in Congress.

Senator SIMON. Let me just comment. There is some confusion and what we need is clarity, and I think the clarity can be achieved statutorily. What I would like to do is to use the three of you as consultants.

Mr. Chairman, there is no question in terms—I know of no reason, but there is no constitutional question of our ability to say, in order to be eligible for funds, the political party has to clarify their succession rules. Am I correct or am I not?

Mr. POTTER. I would hesitate to state that there was no constitutional question, particularly in the presence of the three persons at this table who may have a better view of it. However, I would say that my understanding of the Supreme Court's position in these matters—in particular, the *Buckley* v. *Valeo* decision—is that the Congress may offer the parties a deal in which they accept Federal funding conditional on fulfilling certain obligations or agreements, and that in that framework a condition on making the Vice Presidential nominee the Presidential successor from the party standpoint would appear to fit within that framework.

Senator SIMON. General Dellinger?

Mr. DELLINGER. Let me just add that I do, Trevor, have constitutional misgivings about Federal funding being used as a point of leverage on political parties. I know there are some senses in which we do that already in the law, but I think we should hesitate long before we tell political parties how to select their candidates.

A party may wish, for example, to name a Vice Presidential candidate as a sop to a small but disgruntled minority within the party that would not be the person that they would put forward for their electors if they had a choice. I do think it would be a very troublesome precedent to move down the line of using the Federal funding of Presidential campaigns as leverage on the parties.

Would we propose that parties would have to have candidates of different genders in order to be eligible for Federal funding? How far would we go? I find that to be sort of a troubling path even if *Buckley* v. *Valeo* would indicate that it is a path that might conceivably be open.

Senator SIMON. I regret that time is a factor here.

I will get back to all four of you with rough draft language and we will see where we go from here. I really appreciate your scholarship and your research and your helpfulness here.

Our hearing stands adjourned.

[Whereupon, at 12:17 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF LAWRENCE D. LONGLEY ON BEHALF OF THE LAWRENCE UNIVERSITY

Mr. Chairman, my name is Lawrence D. Longley, and I am Professor of Government at Lawrence University in Appleton, Wisconsin. Since 1985, I have also served as Co-Chair of the Electoral Systems Research Committee of the International Political Science Association.

I have been a "student" of the processes of presidential election for close to twenty-five years, and over this time have written some forty articles, papers, and books on change or reform of the electoral college means of choosing the U.S. President. These publications have included *The Politics of Electoral College Reform,* published by Yale University Press in 1972 and 1975, and—with noted Washington journalist Neal R. Peirce—*The People's President: The Electoral College in American History and the Direct Vote Alternative,* also published by Yale University Press, which was acclaimed by *U.S. News and World Report* during the 1992 presidential election as "the bible on the topic." I might add that in both the 1992 and 1988 elections, I served as a presidential elector, one of the 538 faceless individuals who actually elect the United States President—including in the tragic instance of a possible death, disability, or resignation of a presidential candidate immediately prior to or in the weeks following the November presidential election.

DEATH, DISABILITY, OR RESIGNATION OF A PRESIDENTIAL CANDIDATE OR PRESIDENT-ELECT

Under the United States' multistage process of electing a President-stretching from the day that the national party conventions nominate candidates to the day in January that a new chief executive is inaugurated—a number of contingencies can arise through the death, disability, or withdrawal of a prospective President or Vice President.

The first contingency may arise through the death of one of the nominees between the adjournment of the convention and the day in November when the electors are officially chosen. No law covers this contingency, though both the Democratic and Republican parties have adopted procedures to cover the eventuality. The rules of the Democratic party, approved by its National Committee most recently on March 23, 1991, provide that the approximately 410 members of the Democratic National Committee shall have the power to fill the vacancy. A resolution adopted by each Republican National Convention similarly authorizes the Republican National Committee to fill any vacancy, but in the Republican case with each state or territory's delegates empowered to cast the same number of votes that the state or territory had at the original nominating convention. Alternatively, the Republican National Committee is authorized to call a new convention, a step it might well take if the election were not imminent.

Should they be called on to fill a vacancy caused by the death of a presidential candidate, the national committees might in most instances select the vice presidential nominee as the candidate for President and substitute a new candidate for Vice President. If the death of a candidate took place just before election day—espe-

cially if he were one of the major presidential candidates—Congress might decide to postpone the day of the election, allowing the national party time to name a substitute and the new candidate at least a few days to carry his campaign to the people.

At no time in our history has a presidential candidate died before election day. In 1912, however, Vice President James S. Sherman, who had been nominated for reelection on the Republican ticket with President Taft, died on October 30. No replacement was made before election day, but thereafter the Republican National Committee met and instructed the Republican electors (only eight had been elected) to cast their vice presidential votes for Nicholas Murray Butler. In 1860 the man nominated for Vice President by the Democratic National Convention, Benjamin Fitzpatrick of Alabama, declined the nomination after the convention had adjourned. By a unanimous vote, the Democratic National Committee named Herschel V. Johnson of Georgia to fill the vacancy. The Democratic vice presidential nominee in 1972, Senator Thomas F. Eagleton, resigned a few weeks after being nominated after it had been revealed that he had twice been hospitalized and had received electroshock therapy for depression. The Democratic National Committee hastily assembled and selected Sargent Shriver of Massachusetts as his replacement.

The second major contingency may arise if a presidential or vice presidential candidate dies between election day and the day that the electors actually meet—under current law, a period of approximately five weeks. Theoretically, the electors would be free to vote for anyone they pleased. But the national party rules for the filling of vacancies by the national committees would still be in effect, and the electors would probably respect the decision of their national committee on a new nominee. Again, the elevation of the vice presidential candidate to the presidential slot would be likely but not certain.

The only time that a candidate died in this period was in 1872, when the defeated Democratic presidential nominee, Horace Greeley, died on November 29—three weeks after the election and a week before the electors were to meet. Sixty-six electors pledged to Greeley had been elected, and they met to vote on the very day that Greeley was laid in his grave. Sixty-three of them scattered their votes among a variety of other eminent Democrats, but three Greeley electors in Georgia insisted on marking their ballots for him despite his demise. On January 6, 1873, Congress refused to count these votes in the official national tally.

The third contingency may occur through the death of a President- or Vice President-elect between the day the electors vote in mid-December and January 6, the day that the votes are counted in Congress. There would likely be debate about whether the votes cast for a dead man could be counted, but most constitutional experts believe that the language of the 12th Amendment gives Congress no choice but to count all the electoral votes cast, providing the "person" noted for was alive when the ballots were cast. (The 1873 precedent, in which Congress refused to count the Greeley votes, would not be binding, because Greeley was already dead when the electors cast their votes.)

The U.S. House committee report endorsing the 20th Amendment sustains this view. Congress, the report said, would have "no discretion" in the matter and "would declare that the deceased candidate had received a majority of the votes." The operative law would then be section 3 of the 20th Amendment, which states: "If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President." And when the Vice President-elect took office as President, he would be authorized under the 25th Amendment to nominate a new Vice President.

Similarly, if the Vice President-elect should die before the count in Congress, he would still be declared the winner, and the new President would be able to nominate a replacement.

A fourth contingency may be caused by the death of either the President- or Vice President-elect between the day the votes are counted in Congress and Inauguration Day. If the President-elect died, the foregoing provisions of the 20th Amendment would elevate the Vice President-elect to the presidency. In the event of the death of the Vice President-elect, the 25th Amendment would similarly authorize the new President to nominate a Vice President, subject to the approval of Congress.

No President-elect has ever died in this period. But on February 15, 1933, a week after his election had been declared in joint session of Congress and three weeks before his inauguration, President-elect Franklin D. Roosevelt barely escaped a would-be assassin's bullets in Miami, Florida.

In the event that neither a President nor a Vice President qualified on Inauguration Day, January 20, then the Automatic Succession Act of 1947 would go into effect, placing the Speaker of the House, the President Pro-Tempore of the Senate, and then the various Cabinet officials in line for the presidency.

A BETTER SOLUTION

In its Hearings today, the Subcommittee on the Constitution is exploring a number of issues and concerns raised by this complex process for electing the United States President. Certainly there are valid questions concerning the operations of a process that chooses electors on a date in one month, mandates their meeting some six weeks later in another month, and officially counts their electoral votes on a fixed date in a third month. During this time of over two months, there are inherent possibilities of difficulty (and certainly understandable confusions and uncertainties) should a presidential candidate or President-elect die, become disabled, or resign. A number of these concerns have been identified in the testimony prepared for these Hearings by Professor Akhil Reed Amar of Yale Law School. In his statement, Professor Amar has suggested a number of reasonable statutory remedies for specific flaws and uncertainties in the necessity of a presidential candidate or President-elect succession. These recommendations are grouped by him under the umbrella designation of a "wonderfully simple" solution.

I would suggest that these statutory proposals by Professor Amar, along with similar remedies discussed by Thomas H. Neale of the Congressional Research Service and others, are generally laudable, but nevertheless fail to deal with possible problems inherent in presidential elections because of the continued existence of our indirect presidential electoral process involving the electoral college, the fatally-flawed institution by which our indirect presidential elections are conducted, and presidential electors, the persons who actually elect the President.

Alternatively, a system providing for the direct election of the President along the line of S.R. Res 297, introduced by Senators David Pryor and David L. Boren in 1992—the direct vote plan which has in recent decades enjoyed the unified support of the American Bar Association, the AFL–CIO, the League of Women Voters, the Chamber of Commerce of the United Sates, and Common Cause along with Presidents Nixon and Carter—is a "wonderfully simpler" solution to many of the problems discussed here today. In short, it is a better solution than the more contrived statutory proposals which have been advanced.

A direct election of the President would eliminate many of the succession problems arising under the present electoral system because once the popular votes were certified following the November election, there would be a clear and official President-elect. Should an unfortunate accident befall him in the weeks after electoral certification and prior to Inauguration Day, the Vice President-elect would succeed him as President-elect, assuming the presidential office on January 20.

This simpler solution would thus remove most of the uncertainties that now exist in the election of the President resulting from the elongated and multistaged mechanism of electoral vote determination in November, electoral college meetings in December, and electoral vote counting in January. In its place would instead be a direct tally and certification of popular votes in November.

Also removed by a direct vote plan would be the opportunity for mischief in the election of the President by electors should the death, disablement, or resignation of a candidate or President-elect occur during the six weeks after the popular vote but prior to the mid-December electoral college meetings (or, for that matter, shortly prior to the popular election itself at a time insufficient to allow for candidate replacement or election postponement).

Members of the contemporary electoral college are seldom selected for their intelligence or public stature; today the electoral college is little more than a state-by-state collection of political hacks and fat cats (and I speak myself as a presidential elector in both the 1988 and 1992 elections). Any process which might rely upon presidential electors in unsettled circumstances voting with particular wisdom or in light of broad national interests would be at best a chancy operation.

Presidential electors do not think such deliberative responsibilities should devolve upon themselves. In the most recent Hearings of this Subcommittee on the Election of the President, on July 22, 1992, I reported that the Wisconsin electoral college went on record in 1988 overwhelmingly in support of the *abolition* of the electoral college. The argument that persuaded the electors there assembled to support the elimination of their own office was the argument that the election of President was too important to be left to people like us." ("The Electoral College and Direct Election of the President," Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 102nd Congress, 2nd Session, July 22, 1992, p. 113).

In the concluding words of his Prepared Statement for today's Hearings, Professor Amar states: "Election Days are awesome moments in a well-functioning democracy, and deserve to be done right." This is entirely correct, but the best way of ensuring that our presidential elections *are* done right would be to abolish the distorted and

unwieldy counting device of the electoral college with all of its complexity and uncertainties. We should instead establish a direct and popular election of the people's President. While thus providing for a far more equitable and certain electoral verdict, we would also be protecting the nation from most of the concerns that have been identified today as arising under the present system in the case of presidential candidate or President-elect, death, disability, or resignation. The simplest solution is also the fairest and most certain—in short, the best solution.

Lawrence D. Longley is Professor of Government at Lawrence University in Appleton, Wisconsin. He is the author or co-author of over eighty-five articles, papers, and books on American politics and political institutions, including books on *The Politics of Broadcast Regulation* and a major study of Congress, *Bicameral Politics,* published by Yale University Press. In the area of Electoral College reform, he is the author or co-author of *The Politics of Electoral College Reform* (Yale University Press), as well as some forty other articles and papers on change or reform of the electoral college means of choosing the U.S. President. Professor Longley is also co-author, along with noted Washington journalist Neal R. Peirce, of the standard book analyzing the Electoral College throughout American history, *The People's President,* published by Yale University Press and acclaimed by *U.S. News and World Report* during the 1992 presidential election as "the bible on the topic."

Professor Longley himself served as a Presidential Elector in both the 1988 and 1992 elections of the U.S. President. He was also a consultant to the U.S. Senate Judiciary Committee for much of the 1970's and continuing in the 1990's, and has been invited to testify as an expert witness or contribute research findings to U.S. Senate Hearings on Electoral College reform on several occasions—most recently in Senate Hearings in July of 1992 and February of 1994. In 1992 he also served as a consultant to the U.S. House of Representatives concerning the rules to be followed should that presidential election need to be decided in the House of Representatives. Professor Longley has spoken widely concerning electoral reform, including many public speeches and radio and television interviews both in the United States and abroad. His television network appearances have included appearances on Public Television, CNN, and C–SPAN; an election day discussion by Professor Longley on the NBC *Today Show* concerning the Electoral College and presidential elections; and participation by him in the nationally broadcast PBS Television Series "The Constitution: That Delicate Balance." Since 1985, he has served as Co-Chair of the Electoral Systems Research Committee of the International Political Science Association and, since 1991, as Co-Chair of that international organization's Research Committee of Legislative Specialists.

Professor Longley's current research and writing concern the comparative analysis of electoral and legislative change, and have resulted in three new books: *Two Into One,* a study of international legislative institutional change published in 1991, *Working Papers on Comparative Legislative Studies* published in early 1994, and *Changing the System,* an analysis of cross-national electoral reform to be published next year. A recent project, with Pulitzer Prize-winning political scholar James MacGregor Burns and others, is a book proclaiming the Democratic Party's ideological foundations: *The Democrats Must Lead: The Case for a Progressive Democratic Party.* A member of the National Committee of the Democratic Party, Professor Longley was an automatic "Super Delegate" to the 1992 Democratic National Convention in New York City, a 1992 presidential elector casting one of the votes which officially elected the U.S. President, and was involved in a number of additional aspects of the 1992 presidential election.

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