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

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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

[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,

[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

[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.