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TIMELESS LESSONS FOR THE ISSUES OF OUR ERA

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2

THE VICE PRESIDENCY

Nothing, but Maybe Everything

IN A 1793 LETTER to his beloved wife, Abigail, John Adams, America's first vice president, broodingly described his post as "the most insignificant office that ever the invention of man contrived or his imagination conceived." Four years earlier, in the first Senate's earliest days, Adams had offered up a less bleak and more balanced assessment: "I am nothing, but I may be everything."[1]

To most modern journalists and readers engrossed by the great events of the day, the hour, and the minute, the vice presidency is usually an irrelevance—a "nothing," an "insignifican[ce]" precisely because so few formal powers accompany the office. Notably, NPR has White House correspondents and a congressional correspondent and a legal-affairs/Supreme Court correspondent, but no single person covering the vice presidency as such.

To constitutionalists who take the long view, the matter looks very different. In a heartbeat (or its absence), he who was nothing becomes everything, and has often done so in American history. Consider Andrew Johnson, Teddy Roosevelt, Harry Truman, Lyndon Johnson, and Gerald Ford, to name just a few of history's most notable men who in a flash went from zero to 1600.

But how can the freelance constitutionalist entice the opinion page editor and the everyday reader to attend to the usually dull office of the vice presidency? The essays in this chapter try to do so in several different ways.

Unlike the pieces in Chapter 1 and in most other chapters of this book, the journalistic essays in this chapter are not configured in chronological

order of original publication. Instead, these pieces are now arranged to track Adams's 1789 bon mot. The opening essays focus on the vice presidency in itself—"I am nothing"—and the ones that follow highlight aspects of the vice presidency that snap into view when succession becomes a possibility: "but I may be everything." Note that succession may occur either when a president dies or becomes disabled or steps down before his term has expired; or when a sitting or former vice president is ultimately elected president in his own right, as happened to Adams himself, and as has happened frequently in modern times. In all, five of America's most recent dozen presidents were sitting or former veeps.

THIS CHAPTER'S TWO OPENING ESSAYS adopt what might be called a Seinfeldian strategy, making a virtue out of . . . nothing. These essays, originally published when Dick Cheney sat in the second chair, explore the implications of the fact that vice presidents are often like the rest of us (and like the cast of the sitcom *Seinfeld*): they spend much of their time talking with friends and occasionally badmouthing others. Precisely because vice presidents in these episodes are doing nothing special, no special rules need apply. Thus, when Cheney was yakking with his buddies at Enron, he deserved no special immunity from oversight or investigation; conversely, when Cheney was denigrating his detractors to reporters, he merited the same First Amendment solicitude that we all deserve. At least in these two situations, there need be no special law for vice presidents. It suffices to apply the ordinary rules that apply to ordinary people.

This chapter's next pair of essays explores the drama of the vice president as a running mate—as someone entirely different from you or me, and indeed different even from other top politicians, and as such governed by a special constitutional framework. The first of this pair appeared in the *New Republic* in early February 1999, in the middle of the impeachment trial of Bill Clinton. This essay, "Take Five," sought to bring into view one intriguing situation in which a vice president might in an instant become "everything," at least temporarily: whenever a president—even a physically fit one—chooses to hand off power to his running mate. And Al Gore, as I explained in this piece, was indeed Bill Clinton's running mate, both past and future—a loyal partner whom Clinton had handpicked to run alongside him in 1992 and 1996 and who would likely be running to succeed him in 2000. How, I asked, might Clinton creatively use his constitutional option to hand

off power so as to help his running mate, and also help himself, at a time when he was politically besieged?*

In December 1999, I continued my exploration of running mates in a companion *New Republic* essay, this time exploring some of the special constraints that Gore faced as a loyal veep seeking to succeed his tarnished partner. When an incumbent vice president himself runs for president—as did Gore in 1999–2000—he must be particularly careful about what he says about the incumbent president. In certain respects, he must "speak softly." And the rest of us—voters, reporters, pundits—must understand his campaign performance against the backdrop of his special constitutional role as an incumbent vice president. Precisely because he may be "everything" in the blink of an eye, the political rules for him must be different.

Most of the remaining essays in this chapter focus on the tense and tragic moments when actual presidential power must flow, either temporarily or permanently, to the vice president or someone farther down the line of succession, as a result of death or medical disability. As I explain, America faces serious vulnerabilities involving the succession rung immediately below the vice-presidency, especially because our current system fails to clearly address issues of possible vice-presidential disability and fails to maximize the odds that both the president-elect and the vice-president-elect will in fact be alive on Inauguration Day. Fortunately, there exist some simple statutory fixes that can easily be adopted today to avert the disasters that might otherwise await us. Unfortunately, Congress has yet to adopt any of these sensible fixes, perhaps because the public has failed to notice the dangerous cracks in the system.

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* A similarly creative use of the hand-off power is imaginable when two heavyweight candidates are vying for their party's presidential nomination. If candidate A wins the nomination, how can A's party rival, B, be incentivized to work hard for A's election? In certain situations B might actually be better off if nominee A loses in November, clearing the path for B to try again in four years. But if A were to bring B onto the ticket, B's incentives might change dramatically. Suppose, however, that the second spot will not suffice to satisfy B or B's core constituents. In some scenarios running mates might do well to present themselves to the electorate as a tag team that will use the hand-off power to alternate in the Oval Office, trading back and forth as president and vice president once in office. For more details on how a tag-team candidacy and presidency could work, thanks to the Constitution's recognition of the hand-off power, see chap. 9 of my book *The Law of the Land*.

AND IN THIS FAILURE, there lie certain lessons about constitutional journalism. *Journalism* focuses on the present and on the immediate or easily foreseeable future. *Constitutionalism*, however, needs to ponder all possible future events, even low-probability events—at least if these low-probability events might result in constitutional catastrophe.

When the presidential succession system is on the precipice of cataclysmic failure or actually fails disastrously, journalists will doubtless become interested. As I know from past experience with other constitutional crises, my phone at such a moment would start ringing off the hook. But at that point it is too late. Long before the system fails, how can a freelance constitutionalist journalist get editorial gatekeepers and the public to focus on the problem?

When originally published, the various essays collected here tried to use various hooks—the first anniversaries of the crazy election of 2000 and of the 9/11/2001 attack; the 2003 season debut of a popular TV show, *The West Wing*; the 2010 election of David Cameron in Britain; the political implosion of Newt Gingrich in the early presidential sweepstakes of 2011–2012—to engage the popular imagination, and to retell some basic truths about past presidential successions and presidential transitions that every American should know and that almost no American does know.*

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* An important note on terminology. A presidential "transition" typically occurs when, as a result of the Constitution's quadrennial presidential clock, one president leaves office and a new president enters on January 20. A subset of these transitions, often referred to as "successions," occurs when the outgoing president on January 20 has in effect handpicked or blessed the incoming "successor" president—as would occur if Hillary Clinton "succeeds" Barack Obama on January 20, 2017. This was the kind of "succession" alluded to in the closing sentence of the previous chapter: "Ultimately, nothing succeeds like succession." A different kind of "succession" occurs *intraquadrennially*—at some moment in the middle of a presidential term—when, as a result of death or physical or mental disability or political choice, presidential power devolves permanently or temporarily to the vice president or to some other officer lower down in the chain of command, which is also referred to as "the line of succession."

A general theme of this chapter is that these two kinds of succession—January 20 and non-January 20, quadrennial and intraquadrennial—are interrelated in interesting and intricate ways that have not been well understood. Thus, in "Take Five," written in the middle of Bill Clinton's 1999 impeachment trial, I explored whether Clinton could have used the intraquadrennial power to hand off authority to his veep, Al Gore, in ways that would have also affected Gore's prospects for election in his own right to the presidency the following year. By temporarily succeeding Clinton intraquadrennially in 1999, Gore might have been more likely to succeed Clinton in the standard electoral way in 2000–2001. In the companion "Speak Softly"

In the case of the *West Wing* episode, there is an interesting backstory. Over the years, I had occasionally consulted with the writers of this show, who were aware of my worries about the holes in our current succession safety net. When these writers chose to dramatize some of these defects in a season-ending cliffhanger, public interest was piqued. As the new television season began in September 2003, with millions poised to watch how the fictional crisis would end, the *Washington Post* agreed to run my op-ed on the real-world issues of presidential succession, and two Senate committees decided to hold a joint hearing on the matter and to solicit my testimony. Thank you, President Bartlet!

Even with Hollywood's help, however, I have not succeeded in getting my succession-reform plan off the drawing board and onto the congressional floor for enactment and then onto the president's desk for signature. Several of the reform ideas presented in this chapter have won the general support of a bipartisan Continuity of Government Commission, which issued a major report on presidential succession in 2009, explicitly citing and endorsing my general approach.[2] This commission was sponsored by both the conservative American Enterprise Institute and the center-left Brookings Institution; and its members included former House speakers Tom Foley (a liberal Democrat) and Newt Gingrich (a conservative Republican), along with an impressive array of scholars across the disciplinary spectrum, including law professors, historians, and political scientists.* But this commission's strong support for

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piece in 2000, I explored the converse situation: How, even as he was running to succeed Clinton in the standard electoral way in 2000, Gore had to be ever attentive to the possibility that he might be called upon to succeed Clinton intraquadrennially in case of mishap—presidential death or disability. In "How to Thwart Electoral Terrorism," I explored how death or disability of a presidential or vice presidential candidate at the end of a standard election campaign could result in a gap in the intraquadrennial line of succession, were a January 20 Inauguration Day to dawn without both a living president-elect and a living vice-president-elect ready to take their respective oaths of office. And in "Insta-Gov," I showed how presidential transitions after standard elections could be speeded up through creative use of the Twenty-fifth Amendment—an amendment centrally focused on the vice presidency and the mechanisms of intraquadrennial succession.

* The willingness of two former House speakers to concur in a report advocating removal of House speakers from the line of succession, per my proposal, is particularly notable and laudable. For discussion of Independent Counsel Ken Starr's eventual willingness—similarly notable and laudable—to join ranks with those of us who had long insisted that the congressional law creating and structuring the very office of independent counsel was ill-conceived and unconstitutional, see pp. 279–280.

my ideas marks only the first step on a long road. My aim has always been, and still remains, not merely a bipartisan commission report, but a bipartisan congressional statute.

Virtually all experts agree that our current succession statute needs to be revised. Even if the statistical likelihood of double-death or double-disability is much lower than I fear, it is still north of zero. The time to make the needed statutory repairs is now—precisely when the worst imaginable succession scenarios are still only imaginary.

CHENEY, ENRON, AND THE CONSTITUTION

Time.com, Saturday, February 2, 2002

Waving the banner of executive privilege,[3] Vice President Dick Cheney refuses to disclose details of meetings he held last year with Enron officials. If Congress ultimately decides to press the issue, Cheney would be wise to yield.

The phrases "executive privilege" and "separation of powers" do not appear in the Constitution. Nevertheless, the Constitution clearly creates three distinct departments, and some sort of executive privilege may properly be deduced from this general tripartite structure.

But what sort? In the 1974 Nixon Tapes case, the Supreme Court recognized that presidential conversations with executive staff are presumptively privileged, but then proclaimed that, unless national security were involved, this executive privilege must yield whenever courts had need for specific, material, and relevant evidence. This is a rather puny privilege. *Anyone* can resist a subpoena that is overbroad or irrelevant. When husbands speak with wives, clients with attorneys, patients with doctors, or penitents with priests, these conversations are all entitled to far more protection than the Nixon Tapes Court gave to presidents speaking with staffers.

Cheney rightly worries that the Nixon Tapes case and later lower court opinions have eroded executive privilege. In a system of separated powers, each branch must have some internal space—a separate house—to deliberate free from the intermeddling of other branches. Senators must be free to talk candidly with colleagues and staff in cloakrooms; judges need similar freedom to converse with each other in judicial conferences and with clerks in closed chambers; jurors deliberate in secret; and for similar reasons presidents need room for confidential conversations with staff.

Imagine that the president is considering appointing some rising political star to high office. Aides brief the president on potential objections to the appointment, reporting facts and rumors about the star, her family, and her inner circle. To do his job right, the president needs this candid advice and information, but is unlikely to get it if the conversation can easily be subpoenaed in a lawsuit designed to embarrass the administration or the potential nominee. For this reason, Chief Justice John Marshall explicitly refused to force Attorney General Levi Lincoln to disclose confidential conversations with President Jefferson in the famous 1803 case, *Marbury v. Madison*. (The Nixon Tapes Court somehow overlooked this part of *Marbury*.) The principle that cabinet officers report directly to the president, rather than to Congress or the courts, draws additional support from a little-noticed part of the Constitution known as the opinions clause.

But Cheney's case raises special complications. He is neither the president nor a cabinet or subcabinet official wholly within the executive branch. Constitutionally, he is also an officer of the legislature—indeed, the Senate's presiding officer. Enron officials at these meetings were themselves not governmental officers of any sort. Nor was the topic here some purely executive issue like an appointment or a prosecution or pardon; rather it was what legislation to propose to Congress. When Senate Minority Leader Trent Lott meets with lobbyists about their legislative wish lists, these meetings are not privileged, even if Lott is acting in political partnership with the president and will later report to him. Constitutionally, how are Cheney's conversations with Enron decisively different?

It's a stretch to think the Enron officials themselves can claim "executive privilege." If the company itself can be directly subpoenaed, why can't Cheney be likewise subpoenaed to provide the same information? When a client talks to her lawyers with others in the room, she generally is deemed to have waived attorney-client privilege; so, too, when penitents speak to priests outside the confessional seal. By similar logic, executive privilege is waived, or at least weakened, when executive officials meet with outsiders.

Also, executive privilege is weakest when Congress itself seeks to pierce it. Private plaintiffs and unelected special prosecutors lack a democratic mandate to obstruct a president chosen by the American people; but Congress is elected to oversee the executive, and where necessary to enact reform laws. If Congress itself were to subpoena Cheney, he should not lightly disregard the people's representatives. (In 1974, the House Judiciary Committee voted to impeach Richard Nixon for defying certain congressional subpoenas.) The

matter, however, is rather different if Congress continues to hide behind the politically unaccountable General Accounting Office rather than confront Cheney directly.

If the Bush administration seeks to limit the damage already done to executive privilege, it should find a stronger case in which to assert it—a case involving purely executive officers making an executive decision where there is no reason to think the government is trying to cover up any misconduct. Both the Nixon and Clinton administrations pushed executive privilege on bad facts, and lost. Surely the Bush administration can find a better place to make a last stand for privilege than Fort Enron.

STEALING FIRST

Slate, Tuesday, July 18, 2006, 4:07 p.m. (ET)

In an administration not known for its love of the Bill of Rights, Vice President Dick Cheney may soon find himself in a new role: defender of the First Amendment.

Along with several other current or former administration officials, Cheney is being sued by Valerie and Joseph Wilson, who claim that, in response to an anti-administration op-ed Joseph Wilson published in July 2003 in the *New York Times*, the defendants violated the Wilsons' constitutional rights by organizing a vicious whispering campaign against them. One result of this campaign was a newspaper column, authored by journalist Robert Novak, that outed Valerie Wilson (née Valerie Plame) as a CIA operative.

Now, Cheney's first instinct may be to assert, brusquely, that he is legally immune from damage suits challenging his actions as vice president. In 1982, the Supreme Court held, in *Nixon v. Fitzgerald*, that Richard Nixon could not be sued for damages by Ernest Fitzgerald, a government employee whom Nixon fired after Fitzgerald had blown the whistle on the administration. According to the Court, even if Nixon had acted unconstitutionally, he was absolutely immune from a civil damage suit, given that he was acting within the "outer perimeter" of his presidential powers, which include the power to fire executive-branch subordinates. Cheney may well feel that the same basic rule should apply to vice presidents, and that he, too, should be absolutely immune from civil liability, even if he violated the Constitution. (On this imperious view, constitutional accountability is for the little people.)

But does Richard Cheney really want to go down in history next to Richard Nixon? Wouldn't it make more sense for him to position himself in the law books alongside John Peter Zenger?

Zenger—a publisher sued for libel in the 1730s—famously defended freedom of expression, and Cheney should do likewise. In other words, Cheney should use this as a teaching moment, to explain how a proper understanding of First Amendment principles actually supports him and not the Wilsons, who have claimed that Cheney violated their free-expression rights. The result would be an elegant First Amendment jujitsu, using all the Wilsons' free-press momentum against them, to defeat their lawsuits.

Here is the key fact that Cheney should stress: Unlike Nixon, who fired a government whistle-blower, Cheney did not fire the Wilsons. He merely *spoke out* against them. True, he did so furtively, in what many might view as an underhanded whispering campaign. But the First Amendment protects a wide variety of speech and expression, encompassing the right to print, orate, and yes, to whisper—even to whisper anonymously and with petty or partisan motivation.

And to whom were Cheney and his fellow defendants whispering? To the press! This is the other key fact for the New Dick Cheney, the Zorro-Zenger Defender of the First Amendment. The Wilsons claim that they were being punished for speaking out against Cheney and the administration. But if the Wilsons have a right to criticize Cheney in the press, Cheney can claim that he has an equal right to criticize the Wilsons when talking to the press, whether on the record or off.

Of course, not all words are absolutely protected by the First Amendment. For example, the words "you're fired" may be properly viewed as constitutionally unprotected conduct rather than pure speech. So, too, the words "kill him" when the Godfather is ordering his hit man into action.

The Wilsons' suit in effect claims that the outing of Valerie Wilson is like a hit ordered by a mobster. But is it? While there are criminal laws on the books that prohibit the improper outing of CIA agents, it does not appear that these laws were violated. Indeed, the special prosecutor in charge of investigating the leak, Patrick Fitzgerald, has not brought any criminal charges under the anti-outing laws, even as he has filed other—perjury-related—charges growing out of the Wilson affair.

Of course, the Wilsons need not prove that the leak was criminal to win their civil suit. For example, although firing a government whistle-blower to

punish his speech might not be criminal, it might nevertheless be unconstitutional. But it is at precisely this point in the legal argument that Cheney should reiterate that he and his fellow whisperers were speaking to *responsible journalists*, and that the whisperers' purpose was to give the journalists background for understanding the possible bias of Joseph Wilson and certain groups within the CIA.

The Wilsons do not allege that Cheney said "kill Valerie"—and in general, courts should not lightly assume that criticism of a government agency (such as the CIA) is the same as an open call to assassination or some other express advocacy of illegal violence. If courts did indulge this assumption, Cheney should add, a great many government critics would be unduly vulnerable to prosecution or civil liability. Given that even ordinary citizens have robust rights of free expression, so should vice presidents, Cheney should argue. For he, too, was in effect criticizing a certain public official (Joseph Wilson, a longtime public servant) and a certain government agency (the CIA).

In short, rather than hiding behind the claim that he, like the president, is somehow above the law, Cheney should assert that he—like any ordinary citizen!—has a legally protected right to speak to the press.

Coming from Cheney, any effort to claim this First Amendment high ground might initially be greeted with skepticism. But, in truth, several aspects of the Wilsons' legal complaint—filed last Thursday in federal district court—should trouble thoughtful civil libertarians:

Casual use of the "T" word. The complaint opens—quite oddly for a legal document—by quoting the first President Bush railing against "insidious . . . traitors" who compromise undercover operatives. But treason is defined very narrowly in the Constitution, and for good reason. Not all disclosures—even of sensitive information—are treasonous or even unpatriotic. A great deal depends on intent and context, and to use the "T" word loosely is to engage in McCarthyism. Loose talk of treason is especially dangerous in a legal document seeking to invoke the coercive power of the judiciary. Indeed, if the complaint's loose language were taken seriously, it would pose a serious threat to responsible journalists who are in the business of making hard decisions about what information should properly be brought to the public's attention. If the outing of Valerie Wilson was really treason, then journalist Robert Novak would be in dire legal peril. Yet special prosecutor Fitzgerald has cleared Novak of criminal wrongdoing.

Promiscuous use of tort law to chill public expression. The Wilsons also complain that defendants committed the tort of "publication" of "private facts." This is a tort that has a proper place in American law—as when, for example, a newspaper gratuitously publishes an account of an otherwise non-newsworthy person's closeted sexual identity or publishes graphic and unconsented-to telephoto pictures of such a person in his bathroom. But courts and commentators have stressed that this tort needs to be very strictly limited to protect First Amendment rights of speakers to publish politically important facts and thereby vindicate the public's right to know. The truthfulness of the published information is not generally a defense to this tort. Thus, this tort, if construed as broadly as the Wilson complaint urges, could become as dangerous as libel law was in the pre-Zenger era, when truth was no defense. If the Wilsons were to win on this ground, we could well end up with an oppressive tort-law version of an Official State Secrets Act, not merely cloaking a private domain for private citizens but also shielding the press (and the public) from potentially relevant political information about public servants. And if Cheney and his gang are liable, why not Novak and his newspaper? The newspaper, after all, is where the "widespread publication" that the Wilsons complain of actually occurred.

Seeking damages without strong proof of financial harm. Another flaw of old-fashioned libel law was that a plaintiff could receive a massive damage award even though there was no proof that a libelous expression caused him any real financial harm. But in 1964 the Supreme Court put an end to this racket in the famous First Amendment case of *New York Times v. Sullivan*. The Wilson complaint seeks unspecified damages. Unmentioned in the complaint is a major (and apparently quite lucrative) book deal just signed by Valerie Wilson.

The threat of broad civil discovery at the expense of journalistic privilege. Perhaps the Wilsons' real goal here is not to win the lawsuit but simply to get civil discovery against the defendants, thereby enlisting the coercive power of the courts to oblige the defendants and other witnesses to tell all—to divulge who said what to which journalist when. In a criminal case, journalists' claims of privilege may sometimes properly take a backseat to the broader public interest in catching the bad guys or clearing an innocent defendant who has been wrongly accused. But to allow every private plaintiff with a private grudge to compel journalists to divulge their sources is a very

different matter. Here, too, the Wilsons' complaint may raise a serious threat to the very press freedom that it purports to champion.

There is much to criticize in Cheney's and his allies' conduct during this whole sorry mess. But it is doubtful that tort law à la Wilson is the solution. Much as it might gall him to do so, Cheney's best response to the Wilsons' complaint would be to wrap himself in the First Amendment and fight. And while he is at it, perhaps he might read the amendment—heck, the whole Bill of Rights!—and think of the rest of us.

TAKE FIVE

New Republic, Monday, February 8, 1999

According to his detractors, Bill Clinton's grip on power is so fierce that it would take the Jaws of Life to pry him from office. But suppose Clinton were to confound his critics and actually do something noble: Step down from office, temporarily, until the end of his impeachment trial. What would be the constitutional and political implications of this unprecedented reaction to an unprecedented impeachment of a duly elected president? (Recall that the 1868 impeachment defendant Andrew Johnson had become president not via all men's ballots but because of one man's bullet.)

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

Clinton could have stepped down a while ago, of course. But, before January 20 of this year, any such move by Clinton would not have been very

sporting to his loyal vice president, Al Gore. January 20 marks the exact midpoint of Clinton's second term, which began at noon on January 20, 1997, in keeping with the constitutional calendar mandated by the Twentieth Amendment. Under the Twenty-second Amendment, adopted after FDR's unprecedented tenure in office, "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." If Clinton had stepped aside before January 20, and if he were eventually to be convicted in the Senate, President Gore would have been limited to a maximum possible tenure of six years in office—eligible to run in 2000, but not in 2004. But, if Clinton steps down any time from now on, Gore would be allowed to serve out the remainder of Clinton's term and would still be able to run for two terms in his own right.

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

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

Yes, by stepping aside temporarily, he imperils his presidency—he utterly unsettles matters and risks losing all. But it is precisely this willingness to take the risk of losing what he loves—power—that may help redeem him in the eyes of his countrymen and history. If he declines to step down, odds are that he will "win" in the Senate and stay in office—but he may well win by losing: A majority of the Senate might in fact vote to oust him, but he will remain in office and formally be acquitted so long as the vote against him falls short of two-thirds. Will he be able to lead after this, or will he just mark

time? Won't any "victory" in the Senate taste sour unless he can somehow bring a measure of nobility back to himself and his office?

By contrast, if he wins in the Senate after stepping down—sacrificing himself and making it easier to vote against him—any acquittal would seem a more genuine vindication, a more dramatic rebirth. Given that some Republican senators may currently be tempted to vote against him knowing that their votes won't suffice to convict and remove him, Clinton could even say that, unless an absolute Senate majority votes to acquit, he will not return; if he wins this high-stakes gamble, he wins with genuine credibility and a true vote of confidence. True, any offer to step down permanently if a majority votes against him risks sliding our separated-powers system toward British-style parliamentarianism, but, with impeachment under way, that specter is already upon us. With a bold move, Clinton might actually enhance the presidency by seizing moral high ground and redefining himself rather than letting others define him.

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

If Clinton were to stand pat now and ultimately be convicted, the transition to Gore would be awkward—all the more so because no one really expects it to happen, even at this late date. But, if Clinton were to temporarily step down now and then be convicted, the transition to Gore would be smoother, since Gore would already be in place, installed with a personal

and unforced vote of confidence from Clinton himself when it counted. Conversely, if Clinton were ultimately acquitted, Gore would have had a chance to prove his presidential mettle—as the de jure acting president of the United States—in the most dramatic way imaginable.

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

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

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

SPEAK SOFTLY

New Republic, Monday, December 6, 1999

Suddenly Al Gore can't put enough distance between himself and President Clinton. What began a few months ago as a gentle and carefully worded condemnation of Clinton's promiscuity has swelled into a general rebuke of the president's political persona, culminating in a *New Yorker* interview that appeared last week. "Bill Clinton sees a car going down the street and says,

'What are the political implications of that car?'" Gore told the magazine. "I see a car going down the street and I think, How can we replace the internal combustion engine on that car?"

As if that weren't enough, the *New York Times* followed with a front-page headline, for a story about a U.N.-dues deal between Clinton and anti-abortion Republicans, that proclaimed, "Gore Splits with the White House." The *Times* quoted a senior Gore official who said the vice president had "strong reservations" about the deal and "opposed what the White House ended up doing." The adviser almost certainly spoke with the campaign's blessing: Distance from the president is precisely the image Gore's handlers want to project. Separation, they seem to believe, is the only antidote to "Clinton fatigue," and most of the pundits seem to agree.

But the handlers and the pundits need to take the Constitution into account. Politically, shouting out his independence—or even picking a fight with Clinton—might be the best thing Gore could do. But constitutionally it's risky business. A sitting vice president running for president is different from all other contenders. Unlike the others, he could become president at any moment, and so he must not say things that could compromise his delicate role as next in line. History makes clear what's at stake.

Start with the Founding. The vice presidency emerged late in the Philadelphia Convention, largely as a device to grease the presidential selection process. Having Congress select the president every time would make the executive branch too dependent on the legislative branch. But southerners wouldn't stand for direct popular election of the president because slave states would get no credit for their human chattel. Thus, the framers settled on a complex electoral-college scheme—based on the notorious three-fifths compromise—that effectively guaranteed Virginia the most electoral clout even though the state disenfranchised a large fraction of its population. Not surprisingly, Virginians dominated the early presidency, holding the office for thirty-two of the first thirty-six years of its existence.

But this system for tallying electoral votes state by state created problems. If each state voted for its favorite son, no winner would emerge, which would throw presidential elections into Congress and weaken the presidency. That's where the vice presidency came in: According to the final Philadelphia plan, each state would cast two votes for president, one of which had to go to an out-of-state candidate. To discourage states from simply wasting the second vote, the Constitution provided that the person who came in second in the presidential race would automatically become vice president.

This system did not last long. It was destabilizing to automatically place the president's biggest and perhaps fiercest political rival in the position of number two, a heartbeat away from the top. This awkwardness became readily apparent once George Washington, who had no real challengers, left the presidency after two terms. John Adams won the office in 1796, with Thomas Jefferson coming in second and thereby securing the vice presidency. By 1798, the two men were bitter foes, and the election of 1800 featured the disquieting spectacle of the sitting vice president sharply and publicly challenging the sitting president. Energized by this open feud, political parties began to emerge, polarizing the electorate. Had the partisan frenzy led to an attack on Adams or to his assassination—both imaginable scenarios, given the goings-on in France at the time—the Founders' system would have been partly to blame.

In response to the 1800 election, the Twelfth Amendment was adopted. Henceforth, members of the electoral college would vote separately for president and vice president. Thus each national political party would be free to run a two-man ticket clearly designating one candidate for the top slot and a running mate for the number-two position. The amendment's immediate impetus was the confusion arising from the 1800 race: Jefferson and his running mate, Aaron Burr, had technically both been candidates for the presidency, and the formal inability to designate Burr as merely a vice-presidential candidate had caused a great deal of mischief. The effect of the change, however, was to redefine the relationship between America's top two officers—quelling the animosity once built into the system. What ultimately emerged under the Twelfth Amendment's umbrella was a closer partnership between presidents and vice presidents.

Yet, even with this change, the relationship between chief executives and their running mates remained delicate, especially because of the parties' common practice of balancing tickets with men from opposite wings. Indeed, it was only because of the discretion of vice presidents that the new system worked. For example, shortly before his death, Abraham Lincoln proclaimed his openness to black suffrage; his vice president, Andrew Johnson, disagreed but kept mum. Had he publicly blasted Lincoln, Johnson's succession to the presidency upon Lincoln's assassination would have been that much harder for an already divided nation to accept. (According to reliable historical accounts, when Lincoln first publicly floated the idea of giving blacks the vote, John Wilkes Booth was present in the audience, was horrified by Lincoln's proposal, and muttered then and there that he would do Lincoln in. Three

days later, Booth tried to visit Johnson only hours before the assassination, leading some conspiracy theorists to speculate that the two men were in cahoots.)

The next presidential assassination illustrated the problem even more vividly. In 1880, the Republicans balanced a "Half-breed"[4] and a "Stalwart": the top slot went to James Garfield, who seemed open to a professional civil service, and the second spot went to Chester Arthur, who preferred a spoils system. Four months after the inauguration, a disgruntled spoilsman shot Garfield and, upon his arrest, informed the police, "I am a Stalwart and Arthur will be president." In his pocket, police found a letter, addressed to Arthur, making various recommendations for cabinet reshuffling. Arthur, in fact, knew nothing of this madman and had done little to undercut his president. Had he been sharply and publicly critical, however, Arthur's succession could have led to a serious constitutional crisis.

Presidents can be felled by impeachers as well as by assassins. And so Gore's effusive praise of Clinton on the day of his House impeachment, while politically wounding to the vice president, was constitutionally noble. Imagine if, on that day, Gore (or his staff) had joined the Clinton bashers, even subtly, and then the Senate had gone on to remove the president from office. Presidents who take over after assassinations or impeachments already suffer a legitimacy gap because they were not elected on their own. Any hint that Gore had participated in a palace coup—et tu, Al?—would have made his own presidency that much weaker. In fact, at a time of great uncertainty and division, the president would have been a constitutional cripple.

Once again, a quick look at American history clarifies matters. When Congress impeached Johnson in 1868, the vice presidency stood vacant, having been opened up by Johnson's accession. (Prior to the passage of the Twenty-fifth Amendment, which was adopted after John F. Kennedy's assassination, there was no constitutional procedure for filling a vice-presidential vacancy.) The man who thus stood next in the line of succession was the Senate president pro tem, Ben Wade. Wade had helped lead the charge against Johnson and was widely rumored to have already picked his cabinet before voting to convict. Wade's obvious self-dealing offended the public's sensibilities, and, years later, this lingering disgust led to a new statute redefining the rules of presidential succession.

So the first reason for a sitting vice president to hold his tongue is clear enough: He has a unique obligation to do nothing that might destabilize the country or compromise a transition of power. If American history has taught

us anything, it is that presidential mishaps can happen at any time and without warning. At any moment, the country may need the vice president to smoothly step in.

The second reason for restraint is that the vice president has no independent electoral mandate. Despite the Twelfth Amendment, current election laws do not allow ordinary Americans to vote separately for presidents and vice presidents. Instead, citizens cast a single ballot for a joint ticket. Thus, a vice president serves not because Americans voted for him personally but solely because he was handpicked by his running mate, for whom the people did vote. When a vice president criticizes the president, therefore, he risks pulling the legitimacy rug out from under himself.

What is called for, then, is a delicate constitutional etiquette balancing the roles of vice president and presidential aspirant. Gore must be Clinton's partner today and his own man tomorrow. In this delicate balance, he may carefully distance himself from Clinton—for instance, geographically. (By moving his campaign headquarters to Nashville, he signals that, although he covets the Oval Office, he is content to wait until 2001 to move in; until then, it's Clinton's show. Historically, many vice presidents have spent most of their time far from Washington, DC. Indeed, Walter Mondale was the first vice president to have a permanent office in the West Wing, and Spiro Agnew's staff didn't even have White House passes.) Gore is also free not to push for certain administration policies; nothing in our Constitution or our traditions requires him to work for the president. But that doesn't mean he may openly and sharply criticize Clinton.

Al Gore has the right to be the best presidential candidate possible and the duty to offer us his personal vision. But, until he is elected president in his own right, he must also remain a loyal vice president who could, if necessary, insure the peaceful and legitimate transition of power at the very moment our government is weakest: when a president goes down.

THWARTING ELECTORAL TERRORISM[5]

Washington Post, Sunday, November 11, 2001

A year ago this month, a freakishly close presidential election focused Americans' attention on the glitches of election codes and voting machines, and spurred talk of election reform. Now, different images haunt our imagination and anti-terrorism legislation is the order of the day. It is not much of a

stretch to imagine that future terrorists might target the very foundations of our democracy—the elections themselves.

Election reform, meet anti-terrorism legislation.

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

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

Think back for a moment to the reason September 11 was a specially marked date on New Yorkers' calendars: It was a local election day, with contests that included the city's mayoral primary. As the horrific events unfolded, Governor George Pataki understood that an orderly and democratically satisfactory election that day was impossible. State law allowed him to postpone the balloting. But current federal law does not permit a similar delay of congressional and presidential elections. The law mandates an election on the first Tuesday after November 1, come hell or high water, terror or trauma.

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

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

litigious, Missouri might have been almost as tumultuous as Florida last December.

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

Election reform to protect against such dramatic assaults will require hard choices. The tight timetable we now have was created by the Twentieth Amendment in 1933 to shrink the lame-duck period between a president's election and inauguration. The idea was that an incumbent president should yield as quickly as possible—on January 20, to be precise—to a new president with a fresh electoral mandate. But shortening that period any further would not only leave less time for counting, recounting, and resolving any complaints that arise, it would also make it harder for the eventual winner to assemble his new administration before inauguration. (Last year's shortened transition period surely complicated life for George W. Bush.)

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

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

This actually happened in 1872, when Democrat Horace Greeley died shortly after losing to incumbent Ulysses S. Grant. Some loyal electors voted as pledged—for the dead man—and Congress later disregarded their votes. Little turned on Congress's ruling, given that Greeley had clearly lost in November. Had he won, however, surely the fairest result would have been to

credit his electoral votes to his running mate. Otherwise, the party that won the presidency on Election Day could conceivably lose it before the inauguration. But Congress in 1873 simply tossed Greeley's votes aside, and that precedent remains a source of potential mischief today. Like ordinary voters, electors should understand in advance whether and how their votes will be counted, and should be able to cast these votes in an atmosphere of calm deliberation. And that may mean allowing for the postponement of the electoral college meeting in a crisis.

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

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

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

CONSTITUTIONAL ACCIDENTS WAITING TO HAPPEN . . . AGAIN

FindLaw, Friday, September 6, 2002 (with Vikram David Amar)

September presents haunting reminders that bad things sometimes happen to good people and a great nation. One hundred and one years ago today, William McKinley was shot by a politically motivated assassin. McKinley

died several days later, on September 14, 1901. In mid-September, 1881, President James Garfield also died from gunshot wounds inflicted by a politically motivated assassin. And then of course there is the date that will live in infamy, September 11, 2001.

America cannot always prevent tragedy, but America often can, with relative ease, minimize the constitutional damage resulting from political assassins and other acts of political violence. Yet the country's current legal framework for presidential succession is notably flawed—a series of constitutional accidents waiting to happen, and in some cases waiting to happen again. There are simple nonpartisan solutions that lawmakers should adopt now to address these potential problems, before tragedy strikes again.

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

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

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

Even worse, in this scenario there is no statutory or constitutional framework in place to determine his unfitness *as president* once he ascends to that office! Unless a president voluntarily steps aside (which is unlikely if he is comatose), the only constitutional or statutory mechanism now in place to establish that a president is disabled is one triggered by the vice president. But in the scenario described here, there is no longer any vice president in office.

Similar problems arise under a scenario in which both the vice president and the president are disabled. Imagine that the vice president is comatose,

and the president does not die but himself becomes severely disabled—whether from some terrorist incident or from natural causes. Here, too, the problem is that current law requires that (unless the president himself voluntarily steps aside) the vice president initiate the machinery for determining presidential disability. If the vice president is himself incapacitated, the machinery simply freezes up, and there is no clearly established legal framework for determining presidential disability.

Consider also a related scenario involving a disabled acting president, in which a president becomes disabled first, and a fit vice president steps up to assume the role of acting president. If that acting president later becomes arguably or even clearly incapacitated, who could trigger the process of making the disability determination?

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

Although the Twenty-fifth Amendment does not itself address these scenarios, neither does it preclude a congressional statute that would solve these problems. Indeed, other language in the Constitution—in Article II—invites Congress "by law" to provide for cases of presidential and vice-presidential death and disability. In the event both the president and the vice president have died or become disabled, Article II gives Congress power to decide by law "what Officer" should act as president. At least two questions arise: Who should be that officer? And, in the event of double death in the executive branch, how long should that officer serve?

The presidential succession statute currently in place, enacted in 1947, answers these two questions but gives a plainly unconstitutional answer to the first question—the "who" question—and arguably errs on the second, "how long," question.[6] According to the act, in the event of a double death, the speaker of the House becomes president. The line of succession continues with the president pro tempore of the Senate, and then members of the cabinet, beginning with the secretary of state. The act also specifies that the successor president serves out the remainder of the deceased president's term.

But as James Madison argued in 1792, congressional legislators are not "officers" of the United States, as the Article II statutory succession clause

uses the word. (Here is the relevant language, with emphasis added: "Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what *officer* shall then act as President.") In the Constitution, "officers" generally means executive and judicial officials, not legislators. (Otherwise the Article I rule that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office" would be incoherent.)

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

In sum, Article II empowers Congress to choose which cabinet position is next in line after the vice president, but it does not empower Congress to choose one of its own members instead. If the American people voted for a Republican presidential ticket, they should not end up with a Democratic statutory successor president; and vice versa. (We first criticized the 1947 law publicly in 1995 when the Democrats controlled the presidency and Republican Newt Gingrich stood next in line as speaker of the House. But we feel the same way about the issue today, when the White House is controlled by the Republicans and when Democrat Richard Gephardt would be speaker of the House if the Democrats win a few more seats in the upcoming off-year election.)

As to the question of the successor's term in office, because no cabinet secretary enjoys a personal mandate from a national electorate—nor, of course, do congressional leaders picked within individual states and districts—perhaps the cabinet successor who takes over in the event of double death should serve only as long as is necessary to arrange a special off-year presidential election, to choose someone to finish out the term. That way, the nation spends as little time as possible with a president lacking a personal national electoral mandate.[7]

Finally, if personal mandates from the American people are important, isn't there something odd about America's current system of choosing vice presidents? Voters often pay little attention to the bottom of the ticket. At times, America has elected vice presidents who, according to exit polls, could never have won the vice presidency (to say nothing of the presidency) head to head against their leading opponent.

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

One way to strengthen the vice president's personal mandate would be to allow voters to vote separately for president and vice president, just as many states allow separate votes for governors and lieutenant governors. Nothing in the Constitution prevents states from giving voters this option—but it does raise several complexities.[8]

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

AFTER THE VEEP, REDRAW THE LINE

Washington Post, Sunday, September 14, 2003

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

On Wednesday, September 24, fans of the fictional president Josiah "Jed" Bartlet will learn whether he regains his office after having temporarily abandoned it. At the end of last season, terrorists kidnapped Bartlet's daughter, exposing him and the country to possible political extortion. With his vice president having recently resigned, Bartlet, a staunch Democrat, found himself obliged for the good of the nation to hand over power to the Republican speaker of the House, played by John Goodman.

Now flash back to the real world. On Tuesday, the Senate will hold hearings to consider whether our law should indeed put the speaker in the West Wing if both the president and vice president resigned, died, or became disabled. Of course, such a double disaster is a low-probability event—but then, so was the electoral train wreck of 2000. Wise lawmakers must plan for highly destabilizing contingencies—earthquakes, blackouts, voting-machine foul-ups, terror attacks, assassinations—before they happen. This week's

hearings are part of a broader process of post-9/11 reassessment now underway, aimed at maximizing continuity of government in the event of crisis.

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

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

Constitutionality aside, the 1947 law also defies common sense. Suppose that a president is not dead but briefly disabled, and the vice president is also unavailable, for whatever reason. Because separation-of-powers principles prohibit a sitting legislator from serving even temporarily in the executive branch, the statute says that a House speaker must quit Congress before moving into the Oval Office, as happened on *West Wing*. But if the disabled president then recovers and reclaims power, the former speaker will have no job to return to. That hardly seems a fitting reward for faithful public service in a crisis. A more sensible law would let a cabinet officer step up for the duration of the disability and then step down whenever the president recovered.

In another wrinkle, the 1947 law allows the speaker to play an ugly wait-and-see game. If he thinks a disability will not last long—and, again, if the vice president is out of the picture—he can allow a cabinet officer to act as president. If the disability then worsens, the speaker can, with a snap of his

fingers, bump the cabinet secretary out of the Oval Office and put himself in. Even if this constitutionally dubious option were never exercised, its mere existence encourages political gamesmanship, weakens the presidency itself, and increases instability at a moment when tranquillity should be the nation's top priority.

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

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

Other conflicts of interest arise under the current law when a president seeks to fill a vacant number-two spot by nominating a new vice president to be confirmed by Congress. Such vacancies should be filled quickly, but the statute gives congressional leaders perverse incentives to delay confirmation. In 1974, it took a Democratic Congress four months to confirm Republican President Gerald Ford's nominee, Nelson A. Rockefeller. Had something happened to Ford in the meantime, Democratic Speaker Carl Albert would have assumed power.

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

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

Some have suggested that, if existing cabinet slots are deemed unsuitable to head the succession list, Congress could create a new cabinet post of "second" or "assistant" vice president, to be nominated by the president and confirmed by the Senate in a high-visibility process. This officer's sole responsibilities would be to receive regular briefings preparing him or her to serve at a moment's notice and to lie low until needed: in the line of succession but out of the line of fire. The democratic mandate of this assistant vice president might be further enhanced if presidential candidates announced their prospective nominees for the job well before the November election. In casting ballots for their preferred presidential candidate, American voters would also be endorsing that candidate's announced succession team.

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

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

INSTA-GOV

Slate, Friday, May 14, 2010, 4:40 p.m. (ET)

As the world speeds up, can American constitutional democracy keep pace? This month floods hit, terrorists plotted, oil gushed, markets nosedived (then rebounded), and ash spewed. In response, our government moved at warp speed to operate floodgates, nab suspects, redeploy ships, calm investors, and tweak airline rules. But what if a month like this coincided with a period in which the wrong people are in power—that is, in the lame-duck moment when our country is being run by leaders who have just been evicted by the voters but have yet to vacate the premises?

On this score, Britain and America offer a study in contrast. In Britain, voters vote and losers leave almost instantly, as we have just witnessed. Gordon Brown is dead, electorally speaking; long live David Cameron! But in America, George W. Bush continued to hold office for months after his policies were decisively repudiated by the voters in early November 2008. Even as the economy continued to crater, the people's choice, Barack Obama, had no right to take charge.

American history serves up other particularly awkward transitions. On November 8, 1932, Herbert Hoover lost the presidency to Franklin Delano Roosevelt by a whopping margin of 472 to 59 electoral votes (57 percent to 40 percent in the popular vote count), yet remained in power until March 4, 1933, as the nation drifted further downward and government did . . . nothing. Between Abraham Lincoln's election in November 1860 and his inauguration in March 1861, the nation plunged into its deepest crisis ever because the electorally repudiated incumbent, James Buchanan, refused to nip secession in the bud. For most of the nation's first century and a half, voters waited even longer for a new Congress—thirteen months after Election Day for the House (yes, from a November election until December of the following year) and also for the Senate, elected via state legislatures.

Now we wait ten weeks for the whole federal government to turn over, thanks to the Twentieth Amendment, ratified shortly after FDR thumped Hoover. But could America sync up with the twenty-first century's pace and transfer power with the speed of Britain and other parliamentary democracies? It is widely thought not: Because various dates are fixed in our written Constitution, Americans have generally assumed that we could never approximate British briskness without a major constitutional overhaul. But in fact, Americans could speed things up dramatically without any need to amend our good old Constitution. All we need to do is creatively revise our political customs and tweak our election statutes.

Begin with the executive branch. Imagine that in November 2012, Mitt Romney and Chris Christie decisively best Barack Obama and Joe Biden on Election Day.* In fact, Romney could become president in a matter of minutes after the concession speeches, regardless of the official timetables in the Constitution. First, Vice President Biden could graciously step down,

* [Readers should recall that these words were written more than two years before the Republican Party chose its actual 2012 ticket, Romney and Paul Ryan, who ultimately lost to incumbents Obama and Biden.]

Gordon Brown style. Next, President Obama could nominate Romney to be vice president, under the Twenty-fifth Amendment, the one that enabled Richard Nixon to nominate Gerald Ford in 1973 after Spiro Agnew resigned. Congress could immediately confirm Romney by simply voting yes for him, just as Congress eventually voted yes for Ford in 1973. And then Obama could gracefully step aside for President Mitt Romney.

Romney, in turn, could immediately use the Twenty-fifth Amendment to install Christie as the new vice president, just as Ford, after becoming president in 1974, named Nelson Rockefeller. President Romney could also name his slate of cabinet officers, and the Senate could confirm these secretaries in a few days, in keeping with America's honeymoon tradition of deference to an incoming president's cabinet choices. (The first time in American history that a newly elected president was denied his choice for a cabinet position was in 1989, when the Senate refused to confirm John Tower to serve as George H. W. Bush's secretary of defense.) In thinking about a quick changeover of the executive branch, we should also remember that most senators are old hands at the confirmation game, and that the Senate's staggered election calendar ordinarily ensures that at any given moment at least two-thirds of the body are seasoned veterans.

Of course, if Obama and Biden were willing to do all this in November 2012, they should announce their intentions long in advance, so that their Republican opponents and the voters are not caught by surprise. And they could even cite precedent. Nearly a century ago, President Woodrow Wilson devised a similar plan to approximate British-style transitions. When running for reelection in 1916, Wilson decided that he would resign shortly after the election in the event that he was defeated by Republican Charles Evans Hughes. The plan was for Wilson to name Hughes secretary of state, an office that at the time was first in the line of succession after the vice president. Thus, if both Wilson and his vice president, Thomas Marshall, resigned after Hughes's confirmation, Hughes could take over as acting president long before his formal inauguration in March.

As things actually turned out, Wilson won reelection and nothing came of his early resignation idea, which was probably just as well, since he did not properly announce his intentions. But if Obama and Biden were to revive Wilson's idea, future incumbents might feel morally bound to follow their precedent, much as presidents after George Washington typically felt obliged to follow his lead of resigning after a maximum of two terms long before the Twenty-second Amendment required them to do so.

Now turn to House and Senate elections. Here, too, creative resignations could dramatically shorten the current lame-duck period. If every incumbent representative and every senator facing the end of his or her six-year term were to formally resign the day before the November election, that election could in effect do double duty. First, the election could determine, as it does now, who will serve in the new Congress that will begin service on January 3. But it could also operate as a special vacancy-filling election, with the winner entitled to fill out the remainder of the term for the resigning Congress member. Of course, any incumbent who runs for reelection and wins immediately fills the seat she just officially vacated by resignation. But any incumbent who loses would leave early. If we were worried about the very short continuity-in-government gap between resignations and certifications of replacements, then each resignation could be drafted so as to operate conditionally—"effective when my successor's election shall have been certified." (Several recent Supreme Court justices—most recently, Sandra Day O'Connor—have drafted just this sort of conditional resignation, formally effective only upon the seating of a successor.)[9]

Custom, rather than law, would drive this new system. Formally, losing presidents and vice presidents would be choosing to resign, and incumbent lawmakers would likewise be opting to step down earlier than required by law. But the same is true in Britain—it is longstanding custom that obliged Gordon Brown to step down as soon as it became clear that his political opponents had managed to form a majority coalition. (A legalized alternative would be to move American elections to late December, but this approach leaves little margin for error in the event of an Election Day or electoral college mishap.)

If Americans truly want to streamline our transfers of power, the Constitution does not stand in the way. The question is thus not whether we can easily emulate the Brits. It's whether we want to.

WHY SPEAKERS OF THE HOUSE SHOULD NEVER BE PRESIDENT

New Republic, Thursday, January 12, 2012

Are there lessons to be learned from the implosion of Newt Gingrich's presidential campaign over the past month? Several come easily to mind, from the virtues of campaign organization to the importance of message discipline.

But there's another that deserves attention: namely, that serving as speaker of the House is a highly dubious qualification in preparation for assuming the presidency. The recent stumblings of current House Speaker John Boehner—including his failed bid last month to negotiate with President Obama over payroll tax cuts—are further testimony to this point.

The fact is, most speakers have limited skill sets. They are amateurs on the world stage and hyper-partisans to boot. In other words, most speakers are un-presidential—an unfitness that becomes dramatically apparent when a speaker goes head to head against a president or seeks the presidency itself. Some politically astute observers see this mismatch as a source of amusement. But it's much more than that: Given that current law places the speaker atop the line of presidential succession, it's a disaster of epic proportions waiting to happen.

Some background. The Constitution does not specify who should step up if both the president and vice president are dead or disabled. The document instead empowers Congress to legislate which "officer" should fill the breach. By "officer," the framers meant a cabinet officer; strictly speaking, congressional leaders were not "officers" within the meaning of the Constitution's succession clause. But in 1792, Congress could not decide which cabinet secretary deserved top billing, Thomas Jefferson or Alexander Hamilton. Over the constitutional objections of James Madison, Congress finessed the feud by (surprise, surprise) favoring itself: Congressional chieftains, not cabinet secretaries, topped the 1792 succession list. Congress later replaced this law with a proper regime of cabinet succession in 1886, but reversed course in 1947, placing the speaker atop the succession order.

The unconstitutionality of the 1947 law is reason enough to scrap it. But what gives the issue particular urgency is the recent polarization of the parties and the extreme partisanship this polarization has instilled in the House of Representatives and the speakers who lead it. When Democrat Harry Truman gave hell to congressional Republicans in the late 1940s, many of Congress's most conservative members were southern Democrats and some of the body's most progressive members were northern Republicans. No more. Today's congressional Democrats are all to the left of today's congressional Republicans.

Presidents, too, must now more clearly pick a side than was true in the late 1940s. Nowadays, there is no one like Ike, who ran as a Republican but could have won as a Democrat.

In today's polarized landscape, the 1947 succession law becomes hugely destabilizing. What legitimacy would the conservative Republican Boehner

have, were tragedy to befall the center-left Democrats, Barack Obama and Joe Biden, who won the 2008 presidential election? Would Secretary of State Hillary Clinton quietly accept this massive power shift—effectively undoing the election—or would she instead insist that, legally, she was next in line, given the unconstitutionality of the 1947 law? Whom would the military salute? Would opposing mobs clash in the streets? Would the Supreme Court get sucked into the vortex—another *Bush v. Gore* fiasco?

These nightmare scenarios become even worse if we imagine—as history and realism demand that we imagine—successions triggered by suspicious acts of violence. In 1865, Andrew Johnson's task of national reconciliation was complicated by the fact that Lincoln's killer had tried to visit Johnson only hours before the assassination. In 1963, Lyndon Johnson likewise faced wild conspiracy theories stressing that President Kennedy was killed in Johnson's home state of Texas. In 1881, the madman who shot James Garfield had penned a letter advising the soon-to-be president, Chester Arthur. In all three cases, presidential power peacefully shifted to the dead president's own running mate. But when power instead shifts to the opposite party in the person of an intensely controversial partisan, conspiracy theories may be much more virulent, disaffection far more extreme.

And make no mistake, speakers are by the very structure of their posts intensely partisan figures. Speakers become speakers by winning repeatedly in reliably safe districts that are either far more conservative or far more liberal than the nation. Presidents must win votes of the middle of America; speakers must win the votes of the middle of the party. The skills required of each could hardly be more different.

And while intense partisanship is built into the speaker's job, foreign policy expertise is not. Refreshingly—but dangerously, given current succession law—Boehner has no pretentions to global vision. To him, Cairo means Illinois, not Egypt. While Gingrich is full of global pretensions, as a speaker he had little exposure to matters such as treaty negotiation or ratification. Gingrich's intemperate comments about Palestinians and Muslims reflect this inexperience. Diplomacy-savvy Republicans like Condoleezza Rice, James Baker, and Richard Lugar do not talk this way.

Of course, we should not single out Boehner and Gingrich. Many of the same things could be said of most modern speakers.

And therein lies hope. Precisely because speakers of both parties have typically been unfit for the presidency, both parties should favor reform.

Every one of the last eight presidents except Jimmy Carter has faced an opposition-party speaker. By now, both sides should agree that whenever a party wins the presidential vote, that party should hold the presidency for four years, because that is what Americans voted for and because even good opposition-party speakers would be bad successor presidents.

Given the current fluidity of the American mood, the 2012 election could give us a Democratic president and a Republican speaker, or a Republican president and a Democratic speaker. Now is thus the perfect time for both parties to embrace real reform by putting cabinet officers—the president's handpicked helpmates, who understand the world and share the president's worldview—back atop the line of succession.