THE LAW OF THE LAND

A Grand Tour *of* Our Constitutional Republic

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CHAPTER 9

TEXAS: A LONE-STAR VIEW OF PRESIDENTIAL SELECTION AND SUCCESSION

My first television memory is from November 22, 1963, and even now I flinch whenever a news bulletin flashes across the screen. This chapter examines the constitutional significance of that dark day in Dallas, which prompted the proposal and ratification of the Twenty-fifth Amendment to our Constitution. This amendment, a seemingly small tweak to our system of presidential succession, actually has some large implications and potential applications, several of which have not yet been appreciated by scholars, politicians, and the American electorate.

A thin Texas triangle stretching from Dallas to Stonewall to Crawford offers a special spot from which to survey the relevant constitutional issues. This triangle encompasses not just the poignant place where JFK fell, but also the Texas ranch of the man who caught and carried forward Kennedy's flag, Lyndon B. Johnson, and, in addition, the Texas ranch of George W. Bush, the first president to formally invoke section 3 of the Twenty-fifth Amendment to temporarily transfer power to his vice president. This thin triangle sits "deep in the heart of Texas," and in precisely that part of Texas where the South meets the West. The story of modern presidential selection and succession appears in a particularly interesting way when seen from a Texan, southwestern angle.

The Lone Star State

It is conventional to divide America into four regions—the Northeast, the Midwest, the Deep South, the Far West. The Lone Star State is particularly

intriguing in this schema. Texas sometimes presents itself as part of the South, but at other times identifies with the West—and parts of the Texas Panhandle might even claim to be midwestern. The famous motto of Dallas's sister city, Fort Worth, is "Where the West Begins."

With all this in mind, let us recall the previous chapter's story of the geography of presidential selection, but now let us update that story by bringing the Lone Star State into the picture. Thus, let us plot the broad shift in presidential home bases over the centuries from Virginia to Ohio . . . *to Texas*.

America's early presidency tilted south, with some help from the three-fifths clause, which gave slave states extra seats not just in the House of Representatives but also in the electoral college. Eight of the nation's first nine presidential elections placed a Virginian in the nation's highest seat. We may profitably think of Virginia as the Texas of the Founding—an enormous state by population and landmass, and also a state where the North met the South, on terms favorable to the South, and where both met the West. In 1789, Virginia stretched far from the Atlantic coastline to encompass what are now Kentucky and West Virginia, and its northern panhandle—yes, it had one, too—rose north and west of Pittsburgh to within 150 miles of Canada.[1]

Lincoln's election in 1860 and the ensuing Civil War shattered the Founders' system, and with it the domination of the presidency by the Old South. On reflection, it is understandable why Ohio emerged as the big winner in the presidential sweepstakes from Reconstruction to the Great Depression. The Buckeye State was north enough to be distinctly Unionist ground. Thanks to the Northwest Ordinance, Ohio's soil had always been free; and in the Civil War, Ohio's men had formed the steely backbone of the Union Army and the Republican Party—Generals Ulysses S. Grant and William Tecumseh Sherman, Treasury Secretary Salmon P. Chase, Representative John A. Bingham, and so on. But Ohio also bordered Kentucky, and southern parts of the Buckeye State shared some of the culture and character of its bluegrass neighbor across the river. Thus, post–Civil War Ohio was the crossroads of America, where the East met the West and the North met the South—but met on solidly Unionist ground. I stress "Unionist ground" because the memory of southern secession and the Civil War powerfully shaped the generations that followed. Although Dixie had absolutely dominated

the presidency until Lincoln, no self-described southerner was elected president for the entire century after the bombardment of Fort Sumter.[2]

Then came that day in Dallas, followed by a dramatic demonstration that Texas—as embodied by Lyndon Baines Johnson, the driving inside-the-beltway force behind the landmark 1964 Civil Rights Act—was ready to rejoin the Union in spirit as well as letter. In retrospect, we can now see that in 1963–1964 the presidential torch passed to a new region: after a century of Union-state presidents, five of the next seven men elected to the presidency came to office from the former Confederacy. In 1992, both major-party candidates came from Dixie, as did third-party candidate Ross Perot. Thus, virtually everyone voted for a southerner that year.

Now let's rotate from the North-South axis to an East-West perspective. Before LBJ's election in 1964, only one president in history (Herbert Hoover) had come from what we today would count as the West—that is, from somewhere west of Dallas–Fort Worth. But beginning with LBJ—and counting Texas, as it often likes to be counted, as southwestern—five of the next seven elected presidents (three Texans and two southern Californians) came from the American Southwest.[3]

Putting it all together*: Whereas no elected president for more than a century had come from the South, and only one had come from the modern-day West, all seven men elected president from 1964 through 2004 came from the South and/or the West.* I say "and/or" here to capture the fact that Texas swings both ways. And Texas alone can claim three of these seven elected presidents in this period.

Now bring both presidential and vice presidential candidates into the picture. From 1960 through 2004, a Texan was on the ballot in a staggering nine of twelve presidential elections. And, except for 1992—when two Texans (Bush 41 and Ross Perot) between them garnered a sizable popular-vote majority, but a non-Texan progressive southern Democrat running in the tradition of LBJ (Bill Clinton) managed to win in the electoral college—every time a major party ran a Texan, it won.[4]

All of which makes Illinois senator Barack Obama's electoral achievement in 2008 remarkable. He became not just America's first black president, but also the first real northerner to be elected president since JFK. And Obama did this without a southerner or a westerner as his running mate—a JFK without an LBJ, so to speak. Notably, Obama prevailed

only by besting a southwesterner in the general election: Arizona's John McCain, who had teamed up with the far-western Sarah Palin.*

Later in our story, we shall return to President Obama, and to the presidential election to succeed him that will take place in 2016. But before we get there, we need to examine with care the constitutional amendment that came into existence as a result of the shocking events in Dallas a half century ago.

The JFK-LBJ Amendment

Cold-hearted as it sounds, America dodged a bullet on November 22, 1963. Our beloved president was slain, but our constitutional system and our vital national interests survived without catastrophic damage. Imagine, instead, what might have happened—in a nuclear world, and in the shadow of the Cuban missile crisis—had Lee Harvey Oswald's bullets merely damaged rather than completely destroyed President Kennedy's brain. What if Kennedy had lingered in medical limbo for weeks or months while crises erupted at home and abroad? Or suppose JFK made a surface recovery masking the fact that he was actually cognitively unable to function properly in office? What if he was incapable of comprehending his own unfitness and thus unwilling to yield power—an unwillingness that was actually itself a symptom of his mental unfitness?

As America's leaders pondered such deeply unpleasant questions in the days after Dallas, a consensus emerged that the Constitution should be amended to address with suitable specificity some of the imaginable scenarios. The upshot was the Twenty-fifth Amendment, proposed by bipartisan congressional supermajorities in the summer of 1965 and ratified by the last of the requisite thirty-eight states in early 1967.

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* Obama himself might also technically be classified as a far-westerner, having been born and raised in Hawaii; but by 2008 his political base was emphatically the state of Illinois, which of course lies east of Dallas–Fort Worth. Were we to count Obama as both eastern and western, both northern and southern, then our story of the modern rise of southwestern presidents becomes even more stark: strictly speaking, Hawaii is America's most southwestern state, though its history and culture are quite distinct from those of other states that are typically understood as constituting America's Southwest.

Recall from our previous chapter that section 1 of the amendment codified the century-old understanding that when a president dies or leaves office, his vice president immediately becomes not merely an acting president, but a president full-stop, indistinguishable from any other duly chosen president, and thus entitled, among other things, to a full presidential salary, undiminishable by Congress.

Section 2 introduced a seemingly small but actually substantial and (as we shall see later) potentially transformative innovation: whenever the vice presidency becomes vacant—either because of a vice presidential death, resignation, or removal, or because a former vice president has now become president under section 1—the president can fill the vacancy by nominating a new vice president, who must win approval by a majority vote of each house of Congress before taking office. This section constitutionalized several important and interrelated principles—principles that, though not explicitly mentioned in the text of section 2, combine to form this section's animating vision.[5]

Let's begin with the No Vacancy Principle and the Competence Principle. Section 2 reflects the ideas that gaps in the line of succession should be filled as soon as possible—that, ideally, no vice presidential vacancies should exist for any extended period—and that America should at virtually every instant have a sitting and highly competent vice president ready and able to take over immediately.

Prior to this amendment, there was simply no way of filling a vacant vice presidency. For nearly 40 of the first 175 years under the Constitution, the nation had managed to make do without a vice president.[6] Had something happened to the president during these windows of vulnerability—fortunately, nothing ever did—a federal statute would have kicked in, shifting presidential power to some official named by law. (Recall the previous chapter's detailed analysis of America's three successive succession statutes, enacted in 1792, 1886, and 1947.)

Section 2 of the JFK-LBJ Amendment reflects the idea, made shockingly vivid by Dallas, that when disaster strikes, primary reliance should not be placed on this rickety backup scheme of statutory succession, a scheme that could give presidential power to someone wholly unprepared for it. In a nuclear world, a full-time executive understudy who receives regular executive briefings should always be at the ready—namely, a vice president who is prepared to take the helm at a moment's notice.

Section 2 of the JFK-LBJ Amendment also reflected the principles of Handpicked Succession, Party Continuity, and Anti-Assassination. A president himself should name the protégé within his party who will succeed him—who will carry forward his flag, in the event he cannot—for the entire four-year term for which he was elected. In obvious ways, the Handpicked Succession Principle reinforces the Competence Principle. A president is generally well positioned to know his job and to know who can complete this job in the event of his own death or disability. A president will also have good incentives to keep his vice president fully briefed on all critical matters if the president has handpicked this protégé instead of having an understudy foisted upon him by some other person or institution. Would-be political assassins would never be rewarded with the mind-boggling power of completely reversing the outcome of the previous presidential election; bullets would never be able to transfer the White House to the party that the voters had rejected on presidential Election Day. Instead, a fallen president's policies would be vindicated by his handpicked successor, much as LBJ went on to brilliantly champion JFK's unfinished agenda.

As a check on potential presidential corruption or gross misjudgment, Congress under section 2 would need to approve the president's handpicked choice—further buttressing the Competence Principle. Congressional approval would also embody the related principle of National Democracy. By saying yes to a president's nominee, a majority of each house of the national legislature would give the new vice president a resounding democratic stamp of approval.

In ordinary circumstances, quadrennial presidential elections vindicate all six of our principles. A party's presidential nominee *handpicks his chosen successor*, who serves as his vice presidential running mate. A national electorate approves both candidates on Election Day, thereby vouching for their *presidential competence*, conferring upon them a *national democratic mandate*, and *avoiding vacancy* by filling the Number 2 slot in advance of any possible mishap. In the event something bad happens to Number 1, *party continuity* is preserved when Number 2 takes over. Would-be political *assassins are never rewarded* with the power to wrest the presidency away from the party that won it on Election Day and transfer it to the party that lost this presidential contest. Whenever the people vote for Party X for the presidency, America gets four full years of Party X's policies in the Oval Office, as implemented either by the person who himself

won the voters' support, or by his handpicked, full-time, and democratically approved partner and protégé.*

Sections 3 and 4 of the JFK-LBJ Amendment added additional elements and refinements. Section 3 established procedures under which a president may declare himself "unable to discharge the powers and duties of his office" and thereby temporarily transfer presidential power to the vice president until the president acts to recover his powers, under a complementary set of procedures also provided in section 3. Section 4 outlines rules by which the vice president may assume the powers of an "Acting President" in situations where the president is "unable to discharge the powers and duties of his office" but has not himself transferred power under section 3.

Together these sections introduced two more implicit concepts, the Smooth Handoff Principle and the Cabinet Monitoring and Mediating Principle, into America's post-Dallas Constitution. Section 3 makes it easy for a president who anticipates a merely temporary disability—say, a planned routine surgery—to hand off power seamlessly to his handpicked vice president, and to do so in a manner that makes it easy for

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* Recall from the previous chapter that although the current system confers a personal mandate of sorts on the winning vice presidential candidate, this personal mandate is not as clean and emphatic as it could be, and that our system might be improved were states to allow citizens to vote separately for president and vice president and thereby bestow a more direct and more personal mandate upon the latter. To put the point a different way: the JFK-LBJ Amendment envisions that the Congress will generally approve a president's handpicked successor, so long as the successor is truly competent and of proper character. In presidential elections, a separate ballot line for the vice president should likewise be designed to induce voters to focus squarely on the competence and character of the vice presidential candidate. Both Congress and the voters on Election Day are apt to give the president and the presidential candidate, respectively, wide deference in picking his (or her) junior partner; but having an independent check on what would otherwise be unlimited discretion to handpick incompetent cronies will give each president and presidential candidate good incentives to handpick a genuinely worthy wingman (or wingwoman).

In the rare case that the voters on Election Day elect a split ticket (either under the current system or in some future reformed system of separate election), an assassination of the president might indeed shift policy—but in a way that the voters themselves in some sense preapproved. The resulting policy shift, though still troubling, would be less democratically disastrous than would be the case if an assassination handed the presidency to a party that undeniably lost the *entire* presidential election.

him to resume presidential power when the disability has passed. These smooth section 3 handoffs back and forth can occur in an instant and might last only a few days or perhaps even a few hours. But as Americans had come to realize after Dallas—and with memories of the Cuban missile crisis still quite vivid—days and even hours matter in the atomic age. Section 3, with its contemplated handoffs back and forth, works best when a president and vice president understand themselves as a team—as they are wont to do when the president handpicks his teammate, either at his party convention in an election year, or under section 2 of the JFK-LBJ Amendment.

Section 4 envisions scenarios when a president is himself disabled but does not know it or cannot admit it. It enables the vice president to take over—but only when backed by the president's cabinet. (Section 4 also allows Congress, by law, to designate some entity other than the cabinet—for example, a team of medical experts—to make this decision, but Congress has never made such a legal designation.) This procedural gear nicely intermeshes with the other carefully crafted gears put in place by the amendment's other sections. A vice president may be trusted not to use section 4 to attempt a palace coup precisely because he is the president's own handpicked partner and protégé. He is not, for example, the leader of the opposition party. Moreover, a vice president who invokes section 4 to grasp the reins of power must typically act with the backing of the president's handpicked cabinet—a body that presumably has worked intimately with both the president and the vice president and is in a good position to monitor the situation and mediate various complications.

The JFK-LBJ Amendment Passes Its First Tests

Having examined the main provisions and principles of the JFK-LBJ Amendment, let us now see how the amendment has operated, post-LBJ.

President Johnson himself had no occasion to invoke the amendment, but his successor, Richard Nixon, did. On October 10, 1973, Nixon's handpicked running mate, Spiro T. Agnew, resigned his position as vice president and pled guilty to felony tax-evasion charges arising from Agnew's shady financial dealings and bribe-taking prior to his federal service. A short two days after Agnew's resignation—a brisk timeline in perfect keeping with the No Vacancy Principle—President Nixon nominated Gerald Ford to fill the now-empty vice presidential slot under section 2 of

the JFK-LBJ Amendment. On December 6, Ford received the necessary congressional backing and took office as the first vice president ever to hold office under the JFK-LBJ Amendment.

On August 9 of the following year, Nixon himself had to resign in disgrace in the Watergate scandal. Gerald Ford immediately became president under the express provisions of section 1 of the JFK-LBJ Amendment.

By becoming president, Ford had created a vacancy in the vice presidency. Though he came into office facing a proverbial sea of troubles requiring immediate attention, Ford properly gave priority to the No Vacancy Principle. Thus, only eleven days after moving into the Oval Office—on August 20, 1974—President Ford nominated Nelson Rockefeller to fill the vacancy Ford had himself created by moving up. This time, it took Congress a full four months to say yes; and Rockefeller took office on December 19, 1974. The JFK-LBJ Amendment was less than eight years old, and already its new No Vacancy Principle had twice been put into operation.

But on both occasions, had Congress needlessly slow-walked the section 2 confirmation process? Presidents had acted promptly, and then Congress had dawdled, acting with considerable deliberation but not much speed. A cynic might wonder whether the Presidential Succession Act of 1947 was creating bad incentives, contrary to the deep principles of the JFK-LBJ Amendment. Had something terrible happened to President Nixon (a Republican) after Agnew's resignation but before Ford's confirmation, or, in turn, had some disaster befallen President Ford (a fellow Republican, of course) before Rockefeller was sworn in, who would have moved into the Oval Office as acting president of the United States until January 20, 1977? A *Democratic* Speaker of the House, pursuant to this 1947 law. So perhaps some congressional Democrats were dragging their feet and crossing their fingers. But if a Democratic Speaker of the House had moved into the White House as a result of presidential mishap and vice presidential vacancy, this statutory succession would have undermined the basic principles of Party Continuity and Handpicked Succession at the core of the JFK-LBJ Amendment.

Thus, one key implication of the foregoing analysis of the Twenty-fifth Amendment of 1967 is that the earlier Presidential Succession Act of 1947 needed and still needs to be revamped to ensure that the deep

principles underlying the more recent and more sensible amendment are given their due.*

The Democratic House Speaker during the Nixon-Ford years was Oklahoma's Carl Albert—not a Texan, but close. Had Albert in fact become acting president under the 1947 statute during a period of congressional slow-walking of a vice presidential nominee, the most honorable course of action for him would have been to resign the presidency immediately after the nominee was eventually confirmed. The American people had voted for Republicans in the presidential election of 1972; and thus, Republicans were democratically entitled to hold the White House until the next regularly scheduled presidential election in 1976.

How might a supremely honorable Albert have blunted the unfortunate rules of the 1947 statutes? By creatively using the JFK-LBJ Amendment, of course. Had Nixon been hit by lightning and killed during the Agnew vacancy, Acting President Albert himself could have renominated Gerald Ford, and upon Ford's congressional confirmation, Albert could have stepped down in favor of Ford (who would then be free to pick Rockefeller as his understudy). Or had Ford become president without incident, Albert could have done a similar thing to help Ford out during the Rockefeller nomination process: in the event that lightning struck and killed Ford,† Acting President Albert could have used the JFK-LBJ

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* Some might wonder how a presidential succession amendment and a presidential succession statute can formally coexist. Why doesn't the amendment simply repeal any existing statute and eliminate the need for any new statute? The answer is that the JFK-LBJ Amendment addresses single-vacancy issues, whereas the statute concerns itself with double-vacancy scenarios, in which both president and vice president are unavailable for service. So the problem is not the very existence of a succession statute—we need one now and always will—but rather the specific content of the 1947 succession statute still on the books, whose rules and incentives are in serious tension with the spirit of the more recently adopted amendment.

† A personal aside: In 1975, after Rockefeller had been confirmed, two would-be assassins in separate and unrelated incidents did take deadly aim at President Ford. Both assassination attempts failed. One of these attempted assassins, Sara Jane Moore, had several years earlier attended my family's annual Christmas party. At that time, she was the wife of a Bay Area physician who worked with my parents. I have no strong recollection of the day this woman came to my house, but my parents do, and this may be one more reason why, decades later, I continue to be obsessed with the constitutional issues surrounding assassination attempts.

Amendment itself to renominate Rockefeller and then step aside upon Rockefeller's congressional confirmation.

True, Albert wouldn't have been required to make these moves, and therein lies the problem with the Presidential Succession Act of 1947. But these are certainly the kinds of moves that any good-faith interpreter of the Twenty-fifth Amendment's deep structural principles ought to contemplate.

Texas Again—and Bush 41

In 1976, Gerald Ford ran for election in his own right and lost to Jimmy Carter. Both in the popular vote and in the electoral college, the count was extremely close. Interestingly enough, Texas was a key swing state in this election. Ford won every western state—every single state in whole or in part west of Dallas–Fort Worth—in the continental United States, except Texas, which he lost by a narrow margin. Had Ford won Texas plus any one of the other states he barely lost, he would have triumphed in the electoral college.

Four years later, the Republicans, having learned the lesson of 1976, put Texan George H. W. Bush on the bottom of the ticket, alongside Ronald Reagan from Southern California. The two men swept Texas by double digits and won the White House handily. In retrospect, this thumping Republican victory in Texas in 1980 symbolizes a momentous shift in the geography of the modern presidential selection game. In the eleven presidential elections that have taken place since Texas Democrat Lyndon Johnson left office, 1976 is the only time the Democrats managed to carry Texas. An electoral cornerstone of the Democrats' New Deal–Great Society coalition is no more.

Although Republicans emphatically won the presidential race both in Texas and in the nation as a whole in 1980, it was only luck—and not sound legal design—that enabled the GOP to keep the fruits of its electoral triumph. In 1981, another gunman took deadly aim at a popular and charismatic president. This time, thankfully, the president survived and recovered. Imagine, however, that John Hinckley's bullet had in fact killed Reagan. And imagine further that upon assuming the presidency under section 1 of the JFK-LBJ Amendment, George H. W. Bush had made a proper nomination to fill the now-vacant vice presidency, pursuant to section 2 of the amendment. Suppose, finally, that a Democrat-controlled House one again slow-walked this nomination, and that something

catastrophic happened to Bush 41 in this interval. (These are not outlandish hypotheticals: ours is a dangerous world, especially for presidents.)

In such a scenario, who would have moved into the White House for the next three and a half years? Democratic Speaker of the House Tip O'Neill—Reagan's main domestic nemesis, representing the party that voters had thumpingly rejected in the presidential election of 1980. So says the outdated Presidential Succession Act of 1947, in violation of virtually all the basic principles of the JFK-LBJ Amendment.

Plainly, an O'Neill presidency would have stood the Anti-Assassination Principle on its head, enabling one man's bullets to reverse all voters' ballots. (Lincoln's words with respect to *secession* ring true with respect to *succession*, too: "[B]allots are the rightful, and peaceful, successors of bullets; and . . . when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets.") Far from being Reagan's handpicked helper—or at least a handpicked helper of the man Reagan had handpicked, Bush 41—a President O'Neill would have been one of the last persons in town that Reagan or Bush 41 would have chosen to carry their flag. Party continuity would have been flouted; and congressional slow-walking would have been rewarded, contrary to the No Vacancy Principle.[7]

Had Bush 41 merely been temporarily disabled in our hypothetical rather than killed, and had Bush eventually recovered, the handoffs back and forth between Bush and O'Neill would have likely been anything but smooth. In fact, O'Neill would have been obliged by the clear command of the clunky 1947 succession statute (and by the Constitution, properly construed) to leave the House in order to act as president, making it virtually impossible for him to smoothly return to his old post whenever Bush 41 recovered.[8]

What about the Competence, National Democracy, and Cabinet Monitoring Principles? It turns out that serving as Speaker of the modern House is not a particularly good way of preparing for the presidency. Most Speakers are amateurs on the world stage and hyper-partisans to boot. Speakers become Speakers nowadays by winning repeatedly in reliably safe districts that are either far more conservative or far more liberal than the nation as a whole, and then by winning the votes of a majority of their party colleagues, who are also either far more liberal or conservative than the median American voter. A president must win votes of the middle of America; a Speaker of the House must win the votes of the middle of the party. Speakers are unlikely to possess significant foreign policy expertise; nor do they typically have daily interactions with cabinet officers, who, under section 4 of the JFK-LBJ Amendment, might be called upon to

make key decisions about whether the president is truly disabled at the outset of a succession crisis and whether he remains disabled thereafter.

In short, if we tweak the actual facts of the 1981 attempted assassination—the closest we have come as a nation to a repeat of Dallas—and if we then measure our hypothetical O'Neill presidency against the underlying principles of the JFK-LBJ Amendment, it becomes evident that the 1947 Presidential Succession Act is a constitutional disaster waiting to happen. Nor is there anything unique about the year 1981 or about O'Neill in particular. Presidents and vice presidents are always in some danger; most modern presidents—indeed, all presidents since LBJ except Jimmy Carter—have had to face an opposition-party Speaker of the House at some point; and Tip O'Neill was hardly unique among modern-day Speakers in being entirely unsuited for the presidency.

And therein lies hope. Because Speakers of both parties have typically been unfit for the presidency, and because both parties in recent years have won the presidency fair and square on various Election Days, both parties should favor reform going forward. 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.

The most sensible reform would replace the outmoded Presidential Succession Act of 1947 with new rules more in sync with the deep principles of the JFK-LBJ Amendment—ideally, new rules putting the secretary of state or some other presidentially handpicked cabinet officer first in the line of succession after the vice president, in a return to the more sensible succession system that was in place before 1947, under the Presidential Succession Act of 1886.*

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* For more on the 1886 act, recall the discussion in the previous chapter at p. 176. In June 2009, the Continuity of Government Commission, a joint project of the American Enterprise Institute and the Brookings Institution, issued a report endorsing my proposal to scrap the 1947 act—a report all the more notable because commission members included former Republican House Speaker Newt Gingrich and former Democratic House Speaker Tom Foley. See *Preserving Our Institutions: The Continuity of the Presidency. The Second Report of the Continuity of Government Commission* (June 2009, AEI-Brookings). Two native Texans who have worked with me to vindicate the deep principles of the JFK-LBJ Amendment via a revamped presidential succession statute deserve special thanks: Professor Philip Bobbitt from Austin, Texas (whose maternal uncle was none other than LBJ himself), and Senator John Cornyn. We haven't succeeded yet, but I remain hopeful.

Texas Again—and Bush 43

It is now time to bring three more Texans into the conversation. In the summer of 2000, the sitting governor of Texas, George W. Bush, having already locked up the Republican Party nomination for the presidency, handpicked Dick Cheney as his vice presidential running mate. Cheney, who had been living in Dallas, promptly announced his intention to relocate his residence to Wyoming—a state that he had previously represented in the House of Representatives and where he still maintained a home.

The reason for this relocation was obvious to constitutional experts. The Twelfth Amendment explicitly provides that when presidential electors cast ballots for president and vice president, at least one of these two candidates "shall not be an inhabitant" of the electors' own state. In other words, Texas's electors in December 2000 could not lawfully cast their electoral votes for two Texans, no matter how popular this ticket was among Lone Star State voters on Election Day. And without Texas's big prize of 32 electoral votes, it was doubtful in the summer of 2000 that Cheney, as the bottom half of the Bush-Cheney ticket, could reach the magic national number of 270 total electoral votes on Election Day. So the simple solution was for Cheney to announce in July 2000 that he would leave Texas and return to his old stomping ground of Wyoming. If Paris was worth a mass, surely the vice presidency was worth a move.

Enter University of Texas law professor Sanford Levinson, who cried foul in a *New York Times* op-ed on August 4, 2000. Entitled "2 Texans, Not 1," Levinson's op-ed argued that constitutionally conscientious Texas electoral college members might not be able to cast their votes in December for both Bush and Cheney, and that this inability might open the door for the Democratic vice presidential nominee to sneak into the vice presidency even if Bush ended up winning the November presidential sweepstakes. Though Bush could get to 270, thanks to Texas, Cheney might be left out in the cold.

Professor Levinson is a brilliant man, but how could he speak with any confidence in *August* about where Dick Cheney might lawfully reside in *December*? Surely a person can make a legitimate change of residence over a course of months. Let's assume that Cheney's motives were entirely political. So what? A person is entitled to move states for job-related reasons and to realize his dreams. Put more precisely, the right to travel and to relocate one's state residence has long been recognized as an essential part of the Constitution's basic structure; as an implicit component of the

freedom of interstate commerce; as one of the interstate privileges and immunities of American citizenship under Article IV; and as an explicit guarantee of the opening sentence of the Fourteenth Amendment. As great as the Lone Star State is—and as hard as this might be for some Texans to fathom—today's Texans have an absolute right to leave Texas, should they so desire. Misguided though they might be, Texans even have a right to become Wyomingites.

The matter might be different if Cheney were seeking to wriggle out of Texas taxes or Texas child-support payments or some other basic civic obligation. (I am reminded here of the great country music classic, "All my exes live in Texas.") But instead, Dick Cheney in 2000 was offering himself up to the nation for public service, and he was doing so as the handpicked choice of a major-party presidential candidate. In other words, the deep principles of the JFK-LBJ Amendment were highly relevant to the constitutional question Professor Levinson raised. Alas, nowhere in his August op-ed, or in a forty-nine-page law review article on Cheney's move that Levinson later coauthored, did the JFK-LBJ Amendment even make an appearance. Yet surely this amendment—which of course postdates the Twelfth Amendment and which reflects modern America's considered judgment about the proper relationship between presidents and vice presidents in an era of political assassins and ICBMs—should exert a strong gravitational pull as sound interpreters ponder whether to read the Twelfth Amendment's inhabitant clause very expansively à la Levinson or more modestly à la Cheney.[9]

In short, the JFK-LBJ Amendment should remind us that presidents need to be exquisitely comfortable with their vice presidents in order to ensure that vice presidents will remain in the loop, and will be able to receive and return smooth handoffs of power during routine presidential surgeries and the like. Thus, we should strongly disfavor a contestable reading of some other clause of the Constitution (such as Levinson's overly broad reading of the Twelfth Amendment inhabitant clause) that undermines the Handpicked Succession Principle, which should be understood to entitle a president or would-be president to his *first choice* among legally permissible wingmen, so long as that first choice is upright and competent to fill the big chair should disaster strike.

Likewise, the JFK-LBJ Amendment teaches that vice presidents should ordinarily be members of the president's party, should be able to work closely with cabinet members, and should enjoy a national democratic mandate. All these Twenty-fifth Amendment principles would be

violated by Levinson's approach, which would have made it harder for Bush-Cheney to win election even if a clear majority of Texas voters and a clear majority of the national electoral college wanted that team.

Had Texas electors somehow been forced to throw away their second-choice ballots, and had Democrat Joe Lieberman, Al Gore's running mate, somehow become George Bush's vice president, the sizable policy space between these two men would have created correspondingly sizable assassination incentives. The ever-real possibility of presidential assassination is something that Texans, in particular, should never forget, given what happened in their own state in 1963. Thus, so long as there is any room for good-faith debate over the boundaries of the Twelfth Amendment inhabitant clause, sound interpreters should disfavor any approach that makes it hard for would-be vice presidents to relocate their places of inhabitance, even for brazenly political reasons.

It might be objected that my proposed approach over-reads the Twenty-fifth Amendment, which addresses the issue of presidential succession and says nothing explicit about presidential elections. This objection misses how the two topics are connected. The amendment, sometimes called the Presidential *Succession* Amendment, is designed to preserve the fruits of the previous presidential *election*. Remember: All of the amendment's *succession* principles—Handpicked Succession, Party Continuity, Anti-Assassination, and so on—were designed to mimic the generally operative principles of modern presidential *elections*. The central idea of handpicked succession codified in section 1 of the Succession Amendment was based on the modern practice—a practice that emerged long after the Twelfth Amendment—of the party nominee personally picking his first-choice running mate rather than having this running mate imposed on him by his party convention.[10]

Or, if we reverse the camera angle: The whole point of a proper presidential and vice presidential election is to pick a pair of persons who will be able to work together smoothly as a team under the letter and spirit of the Twenty-fifth Amendment. We should construe any ambiguities in the presidential and vice presidential election rules by always keeping in mind the basic job descriptions of the modern presidency and vice presidency and the proper working relationship between these two offices, as outlined by the JFK-LBJ Amendment.

To put the point a different way, we must understand that the Twelfth Amendment, even if very expansively construed, in no way prevents two Texans in the White House. It simply limits the ability of *Texas's electors*

to vote for two Texans. And because of the obvious textual narrowness of the Twelfth Amendment's inhabitant clause, the JFK-LBJ Amendment points the way to easy workarounds that would enable a Bush-Cheney team in the White House if this be the will of the national electorate.

So let's imagine—contrary to what actually happened—that Cheney had not moved to Wyoming; that he had remained a proud Texan even as he teamed up with another proud Texan; and that Texas's electors were thus barred, à la Levinson, from giving their electoral votes to both Bush and Cheney as their constituents plainly would have liked. And let's imagine further—again, contrary to what really happened, which was far stranger than any hypothetical that a law professor might dream up—that Bush in fact won the national electoral college vote fair and square, and handily, with no Florida nonsense, but that Joe Lieberman had managed to become Bush's vice president on Inauguration Day, because the Texas electors were barred by the Twelfth Amendment from casting their votes for Cheney.

In this scenario, the obvious path of political honor and of good-faith adherence to the deep principles of the JFK-LBJ Amendment would have been for Lieberman to do what Carl Albert should have done in our earlier hypothetical. Thus, Lieberman should have stepped down immediately after Inauguration, thereby enabling Bush to name Cheney as his vice president under section 2 of the JFK-LBJ Amendment. And Congress should then have confirmed Cheney in a heartbeat, because Cheney, in our hypothetical, did have a proper Election Day mandate to serve as Bush's wingman.

Had George W. Bush entertained even the slightest doubt that Lieberman would do the right thing on Inauguration Day, here is what the Bush-Cheney team itself could have done to work around the residence rules of the Twelfth Amendment. After winning 270 or more electoral votes on Election Day, Bush could have instructed all his electors, in Texas and everywhere else, to vote for some non-Texan Republican—let's call him Steve Strawman—for vice president. Strawman would have needed only to be eligible—thirty-five years old, natural born, and so on—and loyal to Bush. Formally, Bush and Strawman would have been announced as the electoral college winners for the presidency and vice presidency, respectively. One nanosecond after taking office on Inauguration Day, Strawman would have resigned—having no real popular mandate to do anything but step aside. Bush would have thereupon named Cheney—his true first choice and the true first choice of the voters on Election

Day—to the vice presidency under section 2 of the JFK-LBJ Amendment. And Congress, in this scenario, should then have immediately confirmed Cheney, because the Twelfth Amendment's inhabitant clause is, by its express terms, wholly inapplicable here; because this clause no longer vindicates any important constitutional principle worthy of broad construction; because Cheney was in fact the man with the Election Day mandate to serve as vice president; and because the JFK-LBJ Amendment was designed to ensure a close working relationship between a president and his competent first choice for vice president.

Put another way, in sharp contrast to the focus on state of residence in the Founding-era's Twelfth Amendment, the more recent JFK-LBJ Amendment pointedly omits any requirement that a president, when filling a vice presidential vacancy under section 1, must name someone from a state different from his own. The amendment purposefully gives a president very broad freedom to pick the person who will be the best fit for the vacant office and the best working helpmate, regardless of state of residence; and Congress should approve the president's first pick, so long as that pick is legally eligible and a person of genuine presidential competence and character.

Of course, what is fair play for Republicans is also fair play for Democrats. Having just imagined an alternative universe in 2000 in which the JFK-LBJ Amendment could have been used to help Bush, Cheney, Texas, and the Republicans, let's now imagine a different alternative universe in 2000 in which the JFK-LBJ Amendment could have been deployed on behalf of the Democrats in the race—neither of whom, of course, was a Texan.

Recall that as events actually unfolded, Bush-Cheney did not exactly win in a fair and square way. Florida was a fiasco. Thousands of Democratic voters, many of them African Americans, were illegally purged from the voting rolls. Long lines in poor black and brown precincts drove away lots of would-be voters, mainly Democrats. Chad buildup and malfunctioning machines ended up spoiling a ridiculously large number of presidential ballots, most of which would have gone to Al Gore and Joe Lieberman. Misleading ballots were yet another problem, and statewide election officials dramatically failed in their obligations to run a fair, impartial election and vote count. (And let's not forget that the governor of Florida who presided over this electoral debacle was none other than Texas-born Jeb Bush, the brother of candidate George W.)

And then, to top it all off, the United States Supreme Court embarrassed itself in *Bush v. Gore*, wrongly ending a recount that was then under way and improperly snatching various legal issues away from the Florida courts.

But the Supreme Court is final, you say. There was nothing that could be done after the justices had pronounced their last word.

Not so. Presidents, too, are constitutional interpreters and decision-makers. And here is what President Bill Clinton could have done to express his solidarity with his loyal wingman, Al Gore, and his contempt for this appalling Supreme Court decision. He could have invoked section 3 of the JFK-LBJ Amendment, proclaimed himself disabled—heartsick!—and thereby officially made Gore America's "acting president."[11]

Clinton might even have gone a step further and resigned in protest of the Court's decision—a resignation that would have made Al Gore the president of the United States, full-stop, under section 1 of the JFK-LBJ Amendment, thereby placing Gore in a better position to challenge Bush 43 in 2004 in a rematch on a more level rhetorical playing field—ex-president against sitting president. (Recall from the previous chapter that in 1892 a somewhat similar rematch in fact occurred between ex-president Grover Cleveland and sitting president Benjamin Harrison, a rematch won by the ex-president, a Democrat, who thereby avenged his weird electoral college defeat at the hands of the Republican four years earlier.)

Of course, history didn't happen that way—in part, I suggest, because politicians, pundits, and the public have tended to overlook the many interesting possibilities created by the seemingly minor adjustment known as the Twenty-fifth Amendment.

As history actually unfolded, the first formal invocation of section 3 occurred not because Bill Clinton was heartsick in 2000 but because George W. Bush underwent a scheduled colonoscopy in June 2002, and temporarily handed off power to Dick Cheney. For several hours, Cheney was officially acting president. In June 2007, Bush had another scheduled colonoscopy, and once again he used section 3 of the JFK-LBJ Amendment to effect a temporary handoff to Cheney. These handoffs were altogether admirable—in perfect harmony with the JFK-LBJ Amendment's letter, spirit, and intent.

Alas, at the very end of his time in office, our most recent Texan in the White House missed an opportunity to dramatize another sensible application of the JFK-LBJ Amendment. Recall that Barack Obama and Joe Biden beat John McCain and Sarah Palin quite handily in November 2008, even though the Democratic duo lost Texas. Officially, no Texan was on the ballot that year. But in political reality, there were two enormous Texan elephants in the room—or, to be more precise, one Texan elephant, and one ex-Texan elephant. Presidential elections are often referenda on the incumbent, whether or not the incumbent is formally on the ballot. Obama and Biden were running not just against McCain and Palin, but also against the Bush-Cheney record.

As returns came in on Election Night, it was clear to all that Obama and Biden had not just won, but won handily. In the popular vote, the only Democrat in the previous sixty years who had won by a bigger margin was LBJ himself in 1964, when he truly was landslide Lyndon. And, to repeat, the losers that night were not just John McCain and Sarah Palin, but also Bush and Cheney. America that night had voted to break with their vision, to try a new path.

And the economy was in freefall.

Yet even after the people had spoken on Election Night, Bush and Cheney remained in power, awkwardly, for the next two and half months. In effect, these men had suffered a national vote of no confidence; they had no mandate; and the economy continued to slide downward.

In other countries, once the election has occurred, or once a vote of no confidence has carried, incumbents leave office in a hurry, and the winners, with a fresh mandate, take the helm in speedy fashion. And Americans could have done the same thing in early November 2008—thanks to the JFK-LBJ Amendment. Cheney could have resigned the day after the election, Agnew-style; Bush could have named Barack Obama his new vice president under section 2 of the JFK-LBJ Amendment; the Congress could have voted its assent in minutes; Bush would then have been free to step aside in favor of President Obama, whose first act would have been to nominate Biden to be his Number 2 under section 2. In short, there was no need to have waited two and a half months to effect the people's verdict on presidential Election Day.[12]

Perhaps Obama himself did not want to start early—and if so, this would be a good reason why the JFK-LBJ Amendment was in fact not used in the way that I am imagining. Perhaps the amendment should be

used in this way only when the American people are told in advance of the election that the winners will take over immediately. But as we think about future elections, we should think about all the ways that the JFK-LBJ Amendment might be creatively used in a variety of scenarios beyond scheduled colonoscopies.[13]

Texas Again—and Bush 45?

Which brings me, finally, to the upcoming presidential election of 2016. Just for fun, let me spin out an entirely fanciful scenario illustrating yet another way in which the JFK-LBJ Amendment could be used in the future. I will try to steer my flight of fancy in a way that enables me, one last time, to bring Texas into the picture.[14]

Imagine that the Republicans cannot decide between Texas senator Ted Cruz and Texas-born Jeb Bush, formerly the governor of Florida. Republicans want both Texans. And as a team, the two would make a powerful ticket—a diehard and a moderate, highly likely to win both Texas and Florida, two big cornerstones of a winning electoral strategy. But neither wing of the Republican Party is willing to allow the other wing to monopolize the top spot. Moderates insist that Bush must top the ticket, whereas diehards will be satisfied only if Cruz controls.

So at the Republican National Convention, the candidates devise a clever compromise. It will take a village, or at least a tag team, to beat the formidable Hillary Clinton, the Democratic nominee in our playful scenario. So Cruz and Bush flip a coin; and the winner of this coin flip tops the ticket—but only for now. In their acceptance speeches, Bush and Cruz jointly announce that they intend to alternate in power. For example, they could tell the voters that Bush, as the coin-flip winner, will nominally top the ticket and will, if elected, take office in January 2017, but will serve as president for only the first three years of the four-year term. In January 2020, the teammates will use the Twenty-fifth Amendment to switch places—to flip the ticket (in a process I will explain momentarily). Thus, beginning on January 20, 2020, Cruz will be the president and Bush 45 the vice president.

There is nothing magical about this January 20, 2020, date. Many other dates would do. But for maximal democratic legitimacy, Bush and Cruz would need to tell 2016 voters long before Election Day about the details of their planned ticket flip.

If this Republican dream team won in 2016 and proved popular in office, the teammates could run for reelection in 2020, but this time, sitting president Cruz could top the ticket. If reelected, Cruz might then serve until, say, January 20, 2024—four consecutive years in all—and then Bush 45 would resume the top spot for the final year of the second term. Thus, Bush 45 would also end up serving four years, albeit not consecutively.

Nothing in the Constitution would prevent our tag team from presenting themselves to the electorate in similar fashion in 2024. If the voters were to endorse the pair yet again, then at this point Bush 45 would have been elected twice as president and would become ineligible in any future presidential race; but Cruz would remain fully eligible to run in 2028. Thus, so long as the electorate continued to back our dynamic duo, these teammates could, between themselves, share power for a total of four full terms. (Under the Twenty-second Amendment, no person can be elected to the presidency more than twice; and under the Twelfth Amendment, vice presidents must meet the same eligibility and electability rules as presidents.)

Ticket-flipping and tag-team alternation, then, would enable our Texan and ex-Texan duo to leverage the advantages of incumbency well into the future—to stretch their potential presidential tenure over sixteen years rather than the standard eight. Variants of the tag-team approach have operated in other leading democracies. Consider, for example, England's Tony Blair and Gordon Brown (although their alleged gentleman's agreement to alternate in power was never made public) and Israel's mid-1980s alternation agreement between Shimon Peres and Yitzhak Shamir.

Exactly how does the Constitution enable a sitting president and vice president to trade places? Simple: On January 20, 2020 (or whenever), Bush 45 resigns, making Cruz the president full-stop under section 1 of the JFK-LBJ Amendment. Cruz in turn immediately names Bush to be vice president under section 2, and Congress immediately approves. Voilà—the ticket, flipped! As long as the Congress approves, the JFK-LBJ Amendment would thus enable the president and vice president to switch seats in a nimble transaction that could be completed in less time than it takes to eat a taco.

And as a matter of democratic principle, Congress should approve such a deal, given that the American voters would have blessed it long in advance, in the 2016 presidential election itself. But suppose a recalcitrant Congress refused to play along. (Imagine it was controlled by Democratic

naysayers and slow-walkers.) No matter. Instead of formally resigning, Bush could accomplish the flip on his own, simply by transferring presidential power to Cruz under section 3 of the JFK-LBJ Amendment, making Cruz the acting president—just as his big brother Bush 43 had made Dick Cheney the acting president, briefly, in 2002 and again in 2007.

One obvious difference would be that the 2002 and 2007 transfers of presidential power were effected for more obviously medical reasons, whereas our imagined uses of the JFK-LBJ Amendment in the Bush-Cruz scenario are more political in nature. But nothing in the amendment limits transfers to purely medical disabilities, and a broader understanding of section 3 is in keeping with the amendment's largest purpose, that of facilitating teamwork and handoffs between America's top two executive officials.[15]

Of course, at every instant, America would have one and only one person acting as president and formally in charge. Handoffs of power between teammates would occur much as they have when incumbents traditionally leave office, as when Reagan yielded in 1989, at the end of his second term, to his own handpicked running mate, Bush 41. As we have seen, the JFK-LBJ Amendment was specially designed to facilitate easy transfers of power back and forth between presidents and vice presidents. However, the amendment's full potential to create a different kind of teamwork at the top—and to launch a new kind of presidential election strategy—has yet to be fully understood.

My first television memory, associated with one Texas city, is counterbalanced by my most vivid early television memory, as a ten-year-old boy, when mankind reached the moon, and astronauts spoke directly to and about another Texas city. The first word uttered on the lunar surface was "Houston."* This was a reference to the Houston Space Center and thus a tribute to the NASA man-on-the-moon-in-this-decade program brilliantly launched by the great John Kennedy and brilliantly carried forward by JFK's great wingman, LBJ—in perfect keeping with the Handpicked Succession, National Democracy, Competence, Party Continuity,

* When Apollo 11 touched down on the moon, Neil Armstrong immediately relayed the news: "Houston, Tranquility Base here. The Eagle has landed."

No Vacancy, and Anti-Assassination Principles that I have sought to describe in this chapter.

Americans are a profoundly imaginative people, and "Houston" should remind us that we must never stop imagining. In that spirit, I have in this chapter tried to offer up an imaginative overview of an amendment that, like the Houston Space Center itself, will be forever linked in American memory to two of America's most imaginative presidents, John Fitzgerald Kennedy of Massachusetts and Texas's own native son, Lyndon Baines Johnson.