

COMMENTARY

A RESPONSE TO AKHIL REED AMAR’S ADDRESS ON APPLICATIONS AND IMPLICATIONS OF THE TWENTY-FIFTH AMENDMENT

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I. INTRODUCTION

Life has taught those of us who have lived as long as I have that the seemingly impossible can happen and that we must be prepared to deal with the unimaginable on a moment's notice. In October 1963, I wrote an article for the *Fordham Law Review* in which I contemplated the need for such preparations should the unimaginable indeed strike:

The problem of presidential inability has now been generally forgotten by our national legislators as well as by the public. Since we have a young, able and healthy President, all indications are that the issue will remain dormant until another inability crisis confronts the country. Yet it is imperative that Congress act now.¹

A month later, that “young, able and healthy President” was assassinated. For a period of time after President John F. Kennedy's death, many wondered aloud how we would have dealt with his inability had he lived. His death gave impetus to the drive to change the Constitution with the adoption of the Twenty-fifth Amendment.

Today, Professor Akhil Amar ranks among the nation's leading authorities in dramatizing gaps and defects in our succession and electoral systems and in offering thoughtful, if not provocative, solutions. His lecture, a compendium of his thinking in these areas, makes an invaluable contribution deserving of the attention of our national legislators. In responding to his views, I draw on my own writings in the 1960s and the work of the 1966–1967 American Bar Association Commission on Electoral College Reform, for which I was privileged to serve as its reporter.

I think it important at the outset to provide a constitutional context. The Constitution, in Article II and several of its Amendments—the Twelfth, Twentieth, Twenty-second, and Twenty-fifth—provides an overarching framework for presidential

1. John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73, 76 (1963) (footnote omitted).

succession and the Electoral College. This framework is supplemented by both federal and state law.

Article II, Section 1 provides for a system of presidential electors in choosing a President and Vice President, setting out provisions which were modified by the Twelfth Amendment, principal among which were separate ballots by electors for President and Vice President. Each state appoints, in the manner determined by its legislature, the electors from that state who cast the ballots for President and Vice President. These ballots are opened, counted, and declared by Congress and, in the case of no one having a majority of the electoral votes, the House of Representatives elects the President and the Senate the Vice President. Finally, Article II authorizes Congress to determine the “Time of [choosing] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”²

Article II also deals with succession by the Vice President in the event of the removal, death, resignation, or inability of the President. It empowers Congress to provide for the case of removal, death, resignation, and inability of both the President and Vice President and to declare “what Officer shall then act as President . . . until the Disability be removed, or a President shall be elected.”³

The Twentieth Amendment deals, among other things, with succession contingencies such as the death of a President-elect before his term begins, in which case the Vice President-elect becomes President, and situations where a President has not been chosen or has failed to qualify by that time, in which case the Vice President acts as President.⁴ The Amendment enables Congress to provide for a case where neither a President-elect nor Vice President-elect has qualified, declaring who then acts as President or the manner in which such person is to be selected until a President or Vice President has qualified.⁵ The Twentieth Amendment also allows Congress to provide for the case of the death of any candidate whose name appears on the lists to be considered in a contingent election by the House and Senate.⁶

The Twenty-second Amendment sets a term limit for the President of the United States:

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2. U.S. CONST. art. II, § 1, cl. 4.
 3. U.S. CONST. art. II, § 1, cl. 6.
 4. U.S. CONST. amend. XX, § 3.
 5. *Id.*
 6. U.S. CONST. amend. XX, § 4.

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.⁷

The Twenty-fifth Amendment deals with several subjects. It confirms that the Vice President shall “become President” and serve for the rest of the term in cases of removal, death, and resignation of the President,⁸ but he simply acts as President in cases of inability for the duration of the inability.⁹ It also provides for the filling of a vacancy in the office of the Vice President.¹⁰ In addition, the Amendment sets out procedures for dealing with situations of inability, allowing the President latitude in declaring his own inability,¹¹ and where he does not do so, designating the Vice President and a majority of the Cabinet (or other such body as Congress may determine by law) to make the decision.¹² Such a decision, however, may be challenged, in which case Congress decides the issue.¹³

Buttressing these provisions is a collection of federal statutes that set out procedures for the Electoral College,¹⁴ including the date for the choosing of the presidential electors,¹⁵ the date on which they meet to vote,¹⁶ and the date for the opening, counting, and announcing of their votes in Congress.¹⁷ The method of nominating electors is governed by the laws of the fifty states and the District of Columbia.¹⁸

II. HISTORICAL CONTEXT

Professor Amar has highlighted important history surrounding the subject of presidential succession, and I will try not to repeat it other than to the extent necessary for purposes of the completeness of this Commentary. What is significant for these purposes is to underscore some relevant history on

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7. U.S. CONST. amend. XXII, § 1.
 8. U.S. CONST. amend. XXV, § 1.
 9. U.S. CONST. amend. XXV, §§ 3–4.
 10. U.S. CONST. amend. XXV, § 2.
 11. U.S. CONST. amend. XXV, § 3.
 12. U.S. CONST. amend. XXV, § 4.
 13. *Id.*
 14. 3 U.S.C. §§ 1–20 (2006).
 15. 3 U.S.C. § 1 (2006).
 16. 3 U.S.C. § 7 (2006).
 17. 3 U.S.C. § 15 (2006).
 18. *See* 3 U.S.C. §§ 1–5, 21 (2006).

presidential inability that informs as to what was intended by the provisions of the Twenty-fifth Amendment.

The Twenty-fifth Amendment was not first contemplated and created in the 1960s, but is rather the result of a history of presidential incapacities and the resulting confusion in the executive branch. To provide a historical context, I would like to briefly mention three instances in our nation when a President's inability, combined with ambiguities in the Article II Succession Clause, has led to uncertainty within our government.

In July 1881, the nation was confronted with its first case of prolonged presidential inability when President James Garfield was shot by an assassin and wavered between life and death for eighty days following.¹⁹ For most of the last eighty days of his life, Garfield was confined to bed. During the period of his inability, Garfield's visitors were restricted to close friends and family, with occasional visits from members of the Cabinet. At no point during these eighty days did Vice President Chester Arthur confer with Garfield. Arthur was in New York when informed of Garfield's shooting, and he was unwilling to go to Washington until officially notified of the President's death. Garfield's only official act during the eighty days following his shooting was the signing of extradition papers. He was prevented from discharging his powers and duties by his doctors, who felt that his only chance of survival lay in isolation from the burdens of the presidency. During this time, the members of the Cabinet tried to keep the wheels of government turning. But there was much the Cabinet could not do, and important matters, such as the handling of foreign affairs, were neglected.²⁰

It is reported that a majority of the Cabinet was of the view that any succession by Arthur would be to the President's office for the rest of the term.²¹ Arthur, however, fearful of being labeled a usurper, made it clear that he would not assume presidential responsibility while Garfield was alive.²²

Following Garfield's death in September 1881, the debate raged over the meaning of the succession provision of the Constitution.²³ When Arthur became President, there was no Vice President, President pro tempore of the Senate, or Speaker of the

19. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 8 (2d ed. 1992).

20. *Id.* at 8–9.

21. *Id.* at 9.

22. *Id.*

23. *Id.*

House—in short, no constitutional successor to the presidency.²⁴ In a message to Congress, Arthur himself expressed concern over the ambiguities in the succession provision.²⁵ However, with the passing of Arthur's administration, interest in solving the problem of presidential inability faded.²⁶

In October 1919, President Woodrow Wilson suffered a stroke which paralyzed the left side of his body.²⁷ From that time until the inauguration of Warren G. Harding on March 4, 1921, the country was without the services of an able President.²⁸ The facts of Wilson's illness were concealed not only from the public but also from Congress and members of the Cabinet.²⁹ Vice President Thomas Marshall was kept almost completely ignorant and was forced to depend upon secondhand accounts for his information.³⁰ While Wilson lay ill, unable to discharge the powers and duties of office, attempts were made to provide executive leadership.³¹ The day after the stroke, Secretary of State Robert Lansing suggested to Joseph Tumulty, the President's secretary, that the Vice President should be called upon to act as President.³² When Lansing suggested either the President's physician or Tumulty should certify the President as disabled, Tumulty declared, "You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back I will not be a party to ousting him."³³ Wilson's physician also made clear that he would oppose any attempt to have Wilson declared disabled.³⁴ In the days and weeks that followed, there were repeated demands for Marshall to act as President.³⁵ The confusion surrounding the succession provision, coupled with Marshall's strong reluctance to appear as a usurper, all combined to prevent him from so acting.³⁶

Throughout the Wilson inability period, commentators offered varying interpretations of the Constitution's succession

24. *Id.*

25. *Id.* at 9–10. Arthur specifically posed these questions: "Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import? What must be its extent and duration? How must its existence be established?" *Id.* at 10.

26. *Id.* at 11.

27. *Id.* at 13.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. JOSEPH P. TUMULTY, WOODROW WILSON AS I KNOW HIM 443–44 (1921).

34. FEERICK, *supra* note 19, at 13.

35. *Id.* at 14.

36. *Id.*

provision.³⁷ But the installation of a new administration once again pushed the matter aside from any serious consideration.³⁸

On September 24, 1955, President Dwight Eisenhower suffered a heart attack while vacationing in Colorado, thus confronting the nation once again with a case of presidential inability.³⁹ That evening, Vice President Nixon, Acting Attorney General William Rogers, and White House assistant Wilton Persons met to discuss arrangements for the operation of the executive branch during Eisenhower's inability.⁴⁰ It was decided that the Cabinet and White House staff should continue the administration of the government, and the next day Nixon announced that "[t]he business of government will go on as usual without any delay."⁴¹ On September 30, the Cabinet met and agreed on the procedure for running the country while the President was recovering.⁴² The Cabinet agreed that on actions which Cabinet members would normally take without consulting either the Cabinet or the President, there would be no change in procedure from the normal; questions which would normally be brought before the Cabinet for discussion before decision should continue to be discussed there; and decisions which would require consultation with the President should go first to the Cabinet or the National Security Council for thorough discussion and possible recommendation, and then go to Denver, where Eisenhower was recovering, for his consideration.⁴³ Although this system worked without incident, it left everyone "uncomfortably aware of the Constitution's failure to provide for the direction of the government by an Acting President when the President is temporarily disabled and unable to perform his functions."⁴⁴

As Congress pondered this problem, but was unable to provide a solution, President Eisenhower became increasingly concerned about the possibility of another case of inability during his administration.⁴⁵ He then drafted an informal agreement which offered a solution to the inability problem if it were ever to

37. *Id.* at 15.

38. *Id.*

39. *Id.* at 17.

40. *Id.* at 18.

41. William M. Blair, *Team to Continue President's Plans*, N.Y. TIMES, Sept. 26, 1955, at 1 (quoting Vice President Richard M. Nixon).

42. FEERICK, *supra* note 19, at 18.

43. *Id.* at 18–19.

44. SHERMAN ADAMS, *FIRST-HAND REPORT: THE INSIDE STORY OF THE EISENHOWER ADMINISTRATION* 159 (1962).

45. FEERICK, *supra* note 19, at 55.

arise again. Eisenhower showed the agreement to Vice President Nixon and Attorney General Rogers and, after incorporating their suggestions, set forth this approach in a letter, sending copies to Nixon, Rogers, and Secretary of State Dulles.⁴⁶ This “letter agreement” provided the following:

- (1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the Office until the inability had ended.
- (2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the Office and would serve as Acting President until the inability had ended.
- (3) The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.⁴⁷

Later, similar understandings were adopted by President Kennedy and Vice President Johnson, President Johnson and House Speaker McCormack, and President Johnson and Vice President Humphrey.⁴⁸ However, these letter agreements did not have the force of law behind them and depended entirely on the good will of the incumbent President and Vice President. Nevertheless, they represented the first significant step toward solving the inability problem.⁴⁹

III. AMBIGUITIES IN THE PRESIDENTIAL SUCCESSION CLAUSE AND THE PROBLEM OF PRESIDENTIAL INABILITY

James Kirby, in writing on the ambiguities of presidential succession, explained that most difficulties regarding Article II's Succession Clause “result from the framers' lumping together all four contingencies for [transfer] of executive power and providing that the same consequences flow from inability as from death, resignation, and removal.”⁵⁰ Death, resignation, and removal are

46. *Id.*

47. Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, PUB. PAPERS 196, 196–97 (Mar. 3, 1958).

48. FEERICK, *supra* note 19, at 56.

49. *Id.*

50. James C. Kirby, Jr., *A Breakthrough on Presidential Inability: The ABA*

factual circumstances, while “inability is a condition whose existence might well be in doubt Also, death, resignation, and removal will result in a permanent succession to the powers and duties of the presidency, but inability might be temporary, leaving the possibility that a disabled President might resume the exercise of his office.”⁵¹

Additionally, as stated by Kirby, “[t]he clause is ambiguous as to whether the ‘office’ itself or merely ‘the powers and duties’ thereof devolve on the Vice President in each of the four contingencies.”⁵² If it is the office which devolves, the Vice President would presumably become President, and thus in a case of inability, it is unclear whether the displaced President may regain the office if he were to recover from the inability.⁵³ If the “powers and duties” were to devolve, the Vice President probably would merely act as President for the duration of the inability.

In 1841, when President William Harrison died of pneumonia, Vice President John Tyler immediately proceeded to Washington and took the presidential oath of office.⁵⁴ Although Tyler was apparently of the view that he ascended to the “office” of the President, this view was not without dispute.⁵⁵ John Quincy Adams, a former President of the United States and then a member of the House of Representatives, noted in his diary that Tyler’s assumption of the title and office of the President “is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.”⁵⁶

In the inability cases of Garfield and Wilson, “there was near paralysis in government because the Vice Presidents failed to act as President.”⁵⁷ A substantial reason for this failure was due to uncertainty as to whether the disabled Presidents could have resumed office upon recovery.⁵⁸

Kirby stated that “[t]he most serious defect in the [succession] clause is the lack of any method for determining the existence, duration, and termination of [presidential] inability.”⁵⁹

Conference Consensus, 17 VAND. L. REV. 463, 465 (1964).

51. *Id.*

52. *Id.*

53. *Id.*

54. FEERICK, *supra* note 19, at 5.

55. *Id.* at 5–6.

56. 10 MEMOIRS OF JOHN QUINCY ADAMS 463–64 (Charles Francis Adams ed., 1876).

57. Kirby, *supra* note 50, at 465–66.

58. *Id.* at 466.

59. *Id.*

This deficiency has indeed resulted in much uncertainty. At no point in Article II or elsewhere in the Constitution is the word “inability” defined.⁶⁰ The debates at the Constitutional Convention “are not at all revealing . . . as to what inability is or who determines it.”⁶¹ Only John Dickinson of Pennsylvania raised the problems of the absence of a definition of inability, when, on August 27, 1787, he asked, “What is the extent of the term ‘disability,’” and “who is to be the judge of it?”⁶² These questions have puzzled politicians and legal historians ever since.

IV. RATIFICATION OF THE TWENTY-FIFTH AMENDMENT

Prior to the Twenty-fifth Amendment, little effort was made to come to grips with the constitutional and political problems of presidential succession and inability. However, the shocking death of President Kennedy revived the conversation for the need to solve the problems raised by the presidential Succession Clause.⁶³ Richard Merelman chronicled the following history:

From November 22, 1963, until Inauguration Day, January 20, 1965, the United States was without a Vice President. On the death of President Kennedy, his Vice President, Lyndon Johnson, immediately succeeded to the office, leaving the Vice Presidency vacant. More important, the two immediate successors to President Johnson [under the succession statute of 1947] were both aged and, even by their own admission, doubtful about their capacities to fill the Presidency, should that eventuality arise. . . . Nonetheless, it was realized that, had the President been able to fill the office of Vice President by his own choice or had there been other means for filling the vacancy, the situation would be substantially improved. Fears were also expressed because, had President Kennedy been disabled permanently by the assassin’s bullet, no mechanism existed for Vice Presidential accession.⁶⁴

60. John D. Feerick, *Presidential Inability: The Problem and a Solution*, 50 A.B.A. J. 321, 321 (1964) (“The Constitution is singularly vague on the subject of Presidential inability. It neither defines inability nor provides a method of determining the commencement or termination of inability.”).

61. *Id.*

62. JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* 44 (1965). Later on, the term “inability” was substituted for “disability.”

63. Feerick, *supra* note 60, at 321.

64. RICHARD M. MERELMAN, *PRESIDENTIAL DISABILITY AND SUCCESSION* 9–10 (1965).

Following President Kennedy's death, there descended on Congress a number of proposals dealing with the problem of presidential inability, most of which also addressed the related problem of presidential succession.⁶⁵ Senator Birch Bayh of Indiana, chairman of the Subcommittee on Constitutional Amendments, announced in December 1963 that the subcommittee would hold hearings on both problems early in 1964. Bayh and several other senators proposed a constitutional amendment (S.J. Res. 139) containing provisions on inability, filling a vice-presidential vacancy, and succession beyond the vice presidency. In coordination with Bayh's initiatives, the American Bar Association called a special conference of twelve lawyers to examine the problems and offer recommendations.⁶⁶ The following consensus developed from this two-day conference:

1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.
2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.
3. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall [devolve] upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.
4. The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.
5. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President

65. FEERICK, *supra* note 19, at 59.

66. *Id.* at 59–60.

may then be determined by the vote of two-thirds of the elected members of each House of the Congress.⁶⁷

The conference also considered the related question of presidential succession, resulting in the following consensus:

1. The Constitution should be amended to provide that in the event of the death, resignation or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.
2. It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected members of Congress meeting in joint session, shall then become Vice President for the unexpired term.⁶⁸

The consensus was endorsed by the ABA on February 17, and formally presented to the Subcommittee on Constitutional Amendments on February 24, 1964.⁶⁹

At the hearings of the Subcommittee on Constitutional Amendments, a majority of the witnesses expressed their support for the inability provisions of the ABA consensus.⁷⁰ As a national consensus on the inability problem gradually began to take shape along the lines of the ABA approach, widespread agreement manifested itself at the hearings on the need for a Vice President at all times.⁷¹ The consensus was that having a Vice President in place “would provide for an orderly transfer of Executive authority in the event of the death of a President.”⁷² While there was general agreement as for the need to have a Vice President in place, the measures and recommendations presented to Bayh’s subcommittee differed on the means of filling a vice-presidential vacancy.⁷³ After much debate within Congress, it was decided that “[w]henver

67. ABA, PRESIDENTIAL INABILITY AND VICE PRESIDENTIAL VACANCY: A NATIONAL FORUM app. (1964) (on file with Houston Law Review).

68. *Id.*

69. *Presidential Inability and Vacancies in the Office of Vice President: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 88th Cong. 86* (1964) [hereinafter *1964 Senate Hearings*].

70. FEERICK, *supra* note 19, at 61.

71. *Id.* at 65.

72. *1964 Senate Hearings, supra* note 69, at 3.

73. Proposals for filling a vice-presidential vacancy included presidential nomination, congressional selection, the election of two Vice Presidents every four years, the reconvening of the last Electoral College to select a new Vice President, and a new election. See FEERICK, *supra* note 19, at 66–72.

there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”⁷⁴

As both houses of Congress debated the proposed amendment, many of the ABA’s recommendations were adopted, while others were amended or eliminated from the final legislation.⁷⁵ The final version of the Twenty-fifth Amendment eventually passed the House and the Senate, was ratified by the necessary state legislatures, and at a White House ceremony held on February 23, 1967, was formally proclaimed the Twenty-fifth Amendment to the Constitution.⁷⁶

V. MEANING OF “UNABLE” AND “INABILITY” IN THE TWENTY-FIFTH AMENDMENT

In suggesting that President Clinton could have invoked Section 3 of the Twenty-fifth Amendment by declaring himself unable to discharge the powers and duties of his office so that he could defend against his impeachment, Professor Amar applies the definition of the word “unable” beyond merely a physical or mental disability.⁷⁷

The terms “unable” and “inability” are nowhere defined in either Section 3 or 4 of the Amendment not as the result of an oversight, but rather a judgment that a rigid constitutional definition was undesirable since cases of inability could take various forms not neatly fitting into such a definition.⁷⁸ A definition of the words would lead to difficult questions of interpretation at a time when the country was faced with a case of inability.⁷⁹

The debates surrounding the Twenty-fifth Amendment indicate that the terms “unable” and “inability” are intended to cover all cases in which some condition or circumstance prevents the President from discharging his powers and duties, and the interest of the country requires that the Vice President discharge

74. U.S. CONST. amend. XXV, § 2.

75. See generally FEERICK, *supra* note 19, at 61–107 (discussing the hearings in the House of Representatives and the Senate).

76. *Id.* at 111.

77. Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 2 (2010) (suggesting that a President could “also proclaim himself, in effect, *politically* unable to act as President—and in such a situation . . . transfer presidential power, temporarily, to his hand-picked vice-presidential running mate”).

78. FEERICK, *supra* note 19, at 197.

79. *Id.*

them.⁸⁰ According to the framers of the Amendment, “the word ‘inability’ and the word ‘unable,’ as used in [Section 4] . . . which refer to an impairment of the President’s faculties, mean that he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office.”⁸¹ The most frequently mentioned cases covered by the expression during the debates were situations involving physical and mental illness, either temporary or permanent.⁸² Professor Ruth Silva, a leading expert, noted that where political circumstances differ, the same infirmity may or may not be disabling.⁸³

Section 3 covers a case in which the President recognizes his own inability and wishes to suspend temporarily his exercise of the powers and duties of President.⁸⁴ The legislative history of Section 3 indicates it was intended to cover situations such as the President’s entering a hospital for an operation or going abroad where he might be out of effective communication with the White House.⁸⁵ During the House hearings, former Attorney General Brownell stated:

A typical situation that is covered by this section is one in which the President is physically ill and his doctors recommend temporary suspension of his normal governmental activities, to facilitate his recovery. Other situations that have been visualized are those where the President might be going to have an operation, or where he was going abroad and might be out of reliable communication with the White House for a short period.⁸⁶

Political uses were not in the conversation surrounding the Twenty-fifth Amendment. Such uses, I suggest, are not to be

80. *Id.* at 197–98.

81. 111 CONG. REC. 3282 (1965) (statement of Sen. Bayh). Quoting a prior statement by Senator Birch Bayh, the chief legislative sponsor of the Amendment, Senator John Pastore clarified the purpose of the Amendment:

[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy, or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability under the terms that we are discussing.

Id. (statement of Sen. Pastore).

82. FEERICK, *supra* note 19, at 198.

83. RUTH CARIDAD SILVA, PRESIDENTIAL SUCCESSION 91 (1951) (“In times of serious national emergency, for example, an illness of a few days may jeopardize the public interest more than an illness of several months at another time.”).

84. FEERICK, *supra* note 19, at 198.

85. *Id.*

86. *Presidential Inability: Hearings Before the H. Comm. on the Judiciary*, 89th Cong. 240 (1965) (statement of Herbert Brownell, Chairman, ABA Special Comm. on Presidential Inability and Vice-Presidential Vacancy).

encouraged. Whether Section 3 is broad enough to cover the case of a President deciding to step aside temporarily, as suggested by Professor Amar, in order to devote his full time to his defense against impeachment and removal, is a debatable question. In an article I wrote for the *New York Times* at the time of President Nixon's possible impeachment, I suggested that he may be able to use the Twenty-fifth Amendment to temporarily step aside to defend against impeachment, without having to resign.⁸⁷ Although such a use of the Amendment was never mentioned by the Congress that proposed it, it probably would be within the scope of Section 3, because the Section was intended to be interpreted broadly.⁸⁸ However, Section 3 does not provide a mechanism for a President to step aside temporarily without justification.⁸⁹

Section 4 of the Amendment covers the most difficult cases of inability—when the President cannot or refuses to declare his own inability.⁹⁰ Circumstances commonly referred to as falling under this section include cases of mental inability, as well as situations where the President is kidnapped or captured, under an oxygen tent at a time of enemy attack, or bereft of speech or sight.⁹¹ At various times during the debates of 1964 and 1965, it was made clear that unpopularity, incompetence, impeachable conduct, poor judgment, and laziness do not constitute an “inability” within the meaning of the Amendment.⁹²

Because the Amendment was intended to be used where the President is in fact “unable” to discharge the powers and duties of the office, political uses of the Amendment, such as Professor Amar's suggestion that presidential candidates may seek four terms as co-Presidents under Section 2 or 3,⁹³ must be reviewed with careful scrutiny. The Constitution provides for a four-year term for the President,⁹⁴ who could be elected President a maximum of two terms.⁹⁵ The Constitution's drafters did not contemplate and intend for a four-term co-presidency.

87. John D. Feerick, *The Way of the 25th*, N.Y. TIMES, Dec. 13, 1973, at 47.

88. FEERICK, *supra* note 19, at 198.

89. *Id.*

90. *Id.* at 200.

91. *Id.*

92. See 111 CONG. REC. 3283 (1965) (statement by Sen. Bayh) (“[W]e are not dealing with an unpopular decision that must be made in time of trial and which might render the President unpopular. We are talking about a President who is unable to perform the powers and duties of his office.”).

93. See Amar, *supra* note 77, at 34–36.

94. U.S. CONST. art. II, § 1, cl. 1.

95. U.S. CONST. amend. XXII, § 1.

VI. THE TWENTY-FIFTH AMENDMENT
AND THE ELECTORAL COLLEGE

Professor Amar points out issues with our Electoral College system and the Twenty-fifth Amendment's lack of a solution to certain election scenarios. If a presidential candidate were to die or become disabled either on the eve of Election Day, or after Election Day but before the Electoral College meets, confusion may ensue. In addition, the candidate who loses the popular vote might nonetheless win the electoral vote, and Amar suggests a constitutional amendment to provide for direct popular election for all future presidential candidates.⁹⁶ I agree with such a reform.

The Twenty-fifth Amendment was intended to do no more than what it covers and, in that regard, it has functioned well in times of need. In a 1968 article for the *Fordham Law Review*, I voiced my own concerns about the Electoral College and argued for its abolishment in favor of a system of direct, nationwide popular vote.⁹⁷ Inherent in the Electoral College system is the possibility that the will of the people will be frustrated. Under the current system it is necessary to win not the popular vote, but rather a majority of the electoral votes. This can result in a president being elected over a candidate who in fact won the popular vote, as we saw in 2000 when George W. Bush defeated Al Gore. Possible disproportion between the electoral and popular votes is attributable to a number of factors, most notably the fact that in all but two states, the winner of the highest number of popular votes cast in a state receives all of that state's electoral votes.⁹⁸ This "winner take all" approach fails to give any recognition to minority votes cast in a state.⁹⁹

While the Twenty-fifth Amendment has greatly strengthened our system of presidential succession, Professor Amar is certainly correct that it does not close certain gaps resulting from the Electoral College. First, the death of a presidential or vice presidential candidate before Election Day is not covered. However, it is important to note that both national political

96. Amar, *supra* note 77, at 9–10.

97. See generally John D. Feerick, *The Electoral College—Why It Ought to Be Abolished*, 37 *FORDHAM L. REV.* 1 (1968).

98. *Id.* at 12–13. Maine and Nebraska apply the Congressional District Method of distributing electoral votes within a state. ME. REV. STAT. ANN. tit. 21-A, §§ 802, 805(2) (2008); NEB. REV. STAT. § 32-1038(1) (2008). This method allows states the chance to split their electoral vote between multiple candidates. See Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 *YALE L.J.* 935, 946–47 (1996).

99. Feerick, *supra* note 97, at 13.

parties have adopted procedures to cover such a situation. For instance, the Democratic National Committee, in the 2008 Call for the Democratic National Convention, stipulated the following:

In the event of death, resignation or disability of a nominee of the Party for President or Vice President after the adjournment of the National Convention, the National Chairperson of the Democratic National Committee shall confer with the Democratic leadership of the United States Congress and the Democratic Governors Association and shall report to the Democratic National Committee, which is authorized to fill the vacancy or vacancies.¹⁰⁰

The Republican Party provided for similar rules:

The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which may occur by reason of death, declination, or otherwise of the Republican candidate for President of the United States or the Republican candidate for Vice President of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filling any such vacancies.¹⁰¹

If a presidential or vice-presidential candidate were to die or become disabled after Election Day but before the electors met to cast their votes, the electors would have, as a procedural matter, more freedom to vote for anyone they pleased.¹⁰² Since the procedure adopted by each national political party would cover this contingency, a new candidate could be nominated by the appropriate national committee.¹⁰³ This nomination, it seems likely, would be honored by the electors so that if they would have voted for the dead or disabled candidate, they would probably now vote for the new nominee.¹⁰⁴

Perhaps the area of greatest uncertainty is the time between the meeting of the Electoral College and January 6, when the electoral votes are opened, announced, and counted before Congress.¹⁰⁵ The death of a presidential candidate in this period would raise the question as to whether votes for a dead person could be counted.¹⁰⁶ If they were not, and if the deceased

100. DEMOCRATIC NAT'L COMM., CALL FOR THE 2008 DEMOCRATIC NATIONAL CONVENTION 19 (2007) (on file with Houston Law Review).

101. REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 8 (2008), available at http://www.gop.com/images/legal/2008_RULES_Adopted.pdf.

102. FEERICK, *supra* note 62, at 272–73.

103. *Id.* at 273.

104. *Id.*

105. *Id.*; see Feerick, *supra* note 97, at 24.

106. Feerick, *supra* note 97, at 24.

candidate were the presidential contender with a majority of the electoral votes, the election of President would devolve on the House while there would likely be a Vice President-elect.¹⁰⁷ It has also been suggested that Congress could make the vice-presidential winner the President-elect.¹⁰⁸

In my opinion, the electoral votes of a deceased candidate should be counted because the counting is a nondiscretionary act and because the Twelfth Amendment appears to require only that the person be alive when the votes are cast.¹⁰⁹ This view is further supported when read in conjunction with the Twentieth Amendment. The House of Representatives Committee on Election of the President, in its report submitted to Congress proposing the Twentieth Amendment, stated its view that Congress has no discretion in this circumstance and that Congress must declare the actual vote, as the votes were valid at the time they were cast.¹¹⁰

In 1967, the ABA's Commission on Electoral College Reform recommended an amendment that would have addressed many of these concerns.¹¹¹ Specifically, the Commission proposed an amendment that would "provide for the election of the President and Vice-President by direct, nationwide popular vote"; "require a candidate to obtain at least forty percent of the popular vote in order to be elected President or Vice-President"; "provide for a national runoff election between the two top candidates in the event no candidate receives at least forty percent of the popular vote"; and "contain appropriate provisions in case of the death of a candidate."¹¹² The ABA plan passed in the House by a vote of 330 to 70, but died on a filibuster in the Senate.¹¹³

VII. CONTINGENCIES UNADDRESSED BY THE TWENTY-FIFTH AMENDMENT

Professor Amar notes that, in addition to the Electoral College scenarios discussed above, the Twenty-fifth Amendment leaves other succession contingencies unaddressed. First, the Amendment "provides no satisfactory mechanism for

107. *Id.*

108. FEERICK, *supra* note 62, at 273.

109. Feerick, *supra* note 97, at 24.

110. H.R. REP. NO. 72-345, at 5 (1932).

111. ABA, ELECTING THE PRESIDENT: A REPORT OF THE COMMISSION ON ELECTORAL COLLEGE REFORM 3 (1967).

112. *Id.*

113. See PAUL R. CLANCY, JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN 237, 239 (1974).

determining vice-presidential disability.”¹¹⁴ Further, if the Vice President were disabled, or the vice presidency vacant, “the Twenty-fifth Amendment’s elaborate machinery for determining *presidential* disability [under Section 4] will seize up.”¹¹⁵ For example, if an attack were to result in the death of the President and the permanent disability of the Vice President, the disabled Vice President would become the disabled President and there would be no mechanism under the Twenty-Fifth Amendment to declare the new President disabled. Professor Amar proposes that these problems could and should “be fixed by a simple federal statute.”¹¹⁶ His suggestion has appeal but presents issues regarding the extent of Congress’s ability to create succession law under Article II of the Constitution.

As Professor Amar explains, certain potential inability problems unanswered by the Twenty-fifth Amendment may occur when the vice presidency is vacant. But the Amendment goes a long way towards filling that gap. Section 2 outlines the procedures for filling a vacancy in the office of the vice presidency.¹¹⁷ The history of this section manifests the intention that there be both a President and a Vice President at all times, and that whenever a vacancy occurs in the vice presidency, both the President and Congress act with reasonable dispatch to fill it.¹¹⁸ Vice President Ford, nominated by President Nixon after the resignation of Vice President Spiro Agnew, was confirmed by Congress two months after the nomination, the first time Section 2 was implemented.¹¹⁹ Following President Nixon’s resignation, it took Congress four months to confirm the new President Ford’s nomination, Nelson Rockefeller, as Vice President under Section 2 of the Twenty-fifth Amendment.¹²⁰ In order to shorten the time period where the vice presidency may be vacant, in 1974 the ABA Committee on Election Reform recommended the use of joint hearings by both houses of Congress with respect to the filling of a vacancy in the vice presidency arising under Section 2.¹²¹ Section 2 has not been implemented since, but I believe this recommendation would

114. Amar, *supra* note 77, at 20.

115. *Id.*

116. *Id.* at 21.

117. U.S. CONST. amend. XXV, § 2.

118. FEERICK, *supra* note 19, at 196; *see also* S. REP. NO. 93-42, at 279 (1973) (noting the growing importance of the vice presidency in our government, as well as the emerging consensus that there was a need for a Vice President at all times).

119. FEERICK, *supra* note 19, at 129.

120. *Id.* at 164, 183–84.

121. *Id.* at 228.

help expedite the filling of any future vacancies. Obviously, there still would be some gap period where the vice presidency would be vacant, but the statutory line of succession is available for such a contingency.

The drafters of the Twenty-fifth Amendment intentionally declined to provide for every conceivable succession contingency that could arise, primarily to ensure that the Amendment would pass both houses of Congress and be ratified by the necessary three-fourths of the state legislatures. An amendment providing for every possible contingency, it was believed at the time, would be too complex and therefore unlikely to survive the difficult ratification process. While certain contingencies may be addressed by future statutes, some measures of reform may require a constitutional amendment, as a statute alone may exceed the powers given to Congress in Article II of the Constitution. In any case, how much we could and should do in addressing these contingencies are subjects worthy of further consideration.

Additionally, it has been suggested that solutions may exist in Article II, independent of the Twenty-fifth Amendment, to provide for situations where the President is disabled but the vice presidency is vacant, or a situation where the President dies and a disabled Vice President becomes President. In 1961, Attorney General Robert Kennedy, in an advisory opinion for President John F. Kennedy regarding presidential inability, wrote that “[t]he large majority is of the view that the Vice President or other ‘officer’ designated by law to act as President has the authority under the Constitution to decide when inability exists,” and he remarked that his two immediate predecessors favored this interpretation as well.¹²²

Ruth Silva also shared this view, writing that “the Vice President, or the ‘officer’ designated by law to act as President, is constituted the judge of a President’s inability.”¹²³ She argued further that the successor is the sole judge of a President’s inability, stating that “[t]he Constitution provides that the power of acting as President belongs to the Vice President or to the ‘Officer’ while a President is disabled. Since the Constitution mentions only the successor, he is the judge of the facts.”¹²⁴ Accordingly, if the office of the Vice President were vacant, then (under the 1947 Succession Statute) the Speaker of the House would have the power to decide whether the President is disabled. The Speaker would be expected to consult

122. 42 Op. Att’y Gen. 69, 88–89 (1961).

123. SILVA, *supra* note 83, at 101.

124. *Id.*

with the Cabinet and others with knowledge of the President's condition. The fact that the Speaker may be a member of the opposition party is troubling, however, adding (as discussed below) to the argument for removing legislators from the line of succession.

VIII. LEGISLATORS IN THE LINE OF SUCCESSION UNDER THE 1947 SUCCESSION STATUTE

Pertaining to the Twenty-fifth Amendment is the question of whether legislators should be placed in the presidential line of succession. As to the meaning of "Officer" in Article II, Section 1 of the Constitution, Professor Amar contends that congressional legislators are not officers of the United States as intended by the Succession Clause of the Constitution.¹²⁵ Therefore, by placing the Speaker of the House and the President pro tempore in the line of succession, the current presidential succession statute, 3 U.S.C. § 19, enacted in 1947, is unconstitutional. In addition, he suggests the 1947 statute's bumping provision is an independent violation of the Succession Clause.¹²⁶

Constitutionality aside, Professor Amar has also raised important policy concerns resulting from including legislative officers in the line of succession. Among these concerns are separation of powers issues, the possibility of political gamesmanship, potential conflicts of interest, and perhaps most importantly, the possibility of a President from the party opposite of that chosen by the people.

There is no doubt that there is a serious question as to whether the Speaker and President pro tempore are officers of the United States as intended by the Constitution, as I noted in my earliest writings, joining a view held by many others at the time.¹²⁷ Many well-respected commentators believe that the Constitution does not consider legislative officers as officers of the United States. Among them is Ruth Silva, who had studied this particular area in great detail, writing that "the Constitution does not contemplate the presiding legislative officers as officers of the United States," and that this view is "supported by all the commentators."¹²⁸

125. Amar, *supra* note 77, at 12.

126. *Id.* at 30.

127. See FEERICK, *supra* note 62, at 267–68.

128. Ruth C. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 463–64 (1949); accord WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 214 (2d ed. 1829); THOMAS SERGEANT, CONSTITUTIONAL LAW 363–64 (2d ed. 1830).

However, this question is not free from doubt. The Constitution is not without its ambiguities in the analysis of the officer question. The succession arrangements in the thirteen original colonies, as well as provisions of the early state constitutions, indicate that legislative succession was sometimes contemplated to fill a vacancy in the office of the governor. The early state constitutions had succession provisions, and a consideration of those provisions is important for the light they cast on the Constitution's succession provision.¹²⁹ Some of these state constitutions provided for legislative succession. New York, for example, ran the line of succession first to a lieutenant governor and then to the president pro tempore,¹³⁰ while Delaware's and North Carolina's lines of succession included the speaker of the lower house.¹³¹ These early state constitutions, drafted not long before the U.S. Constitution, support an argument that legislative succession was within the contemplation and experience of the Constitution's framers.

I agree with Professor Amar that the bumping provision of the 1947 Act invokes independent legal issues in that the Constitution provides that the officer appointed by Congress shall act as President "until the Disability be removed, or a President shall be elected."¹³² However, as Amar notes, the language of the 1947 Act allows a higher-ranking member on the succession ladder to "bump" a lower-ranking member; thus, the officer appointed by Congress, if bumped, would not be acting as President "until the Disability be removed, or a President shall be elected."¹³³

While I am not entirely convinced that it is unconstitutional to place legislators in the line of presidential succession, I recognize the substantial body of scholars and historians who are. Professor Amar notes that James Madison himself, who helped

129. FEERICK, *supra* note 62, at 37.

130. Article XXI of the New York Constitution reads as follows:

[W]henever the Government shall be administered by the Lieutenant-Governor, or he shall be unable to attend as President of the Senate, the senators shall have power to elect one of their own members to the office of President of the Senate, which he shall exercise *pro hac vice*. And if, during such vacancy of the office of Governor, the Lieutenant-Governor shall be impeached, displaced, resign, die, or be absent from the State, the President of the Senate, shall in like manner as the Lieutenant-Governor administer the government, until others shall be elected by the suffrage of the people at the succeeding election.

N.Y. CONST. of 1777 art. XXI.

131. DEL. CONST. of 1776 art. VII; N.C. CONST. of 1776 § 19. For a more detailed discussion on succession provisions in the colonies and early state constitutions, see FEERICK, *supra* note 62, at 23–38.

132. U.S. CONST. art. II, § 1, cl. 6.

133. Amar, *supra* note 77, at 28.

draft the Succession Clause, argued that congressional leaders are not “Officers” of the United States as intended by Article II.¹³⁴ However, some have noted that Madison’s political influences may have played a part in reaching his conclusion.¹³⁵ While the question of whether or not the Constitution contemplates legislative leaders as “Officers” is a difficult one, I would accept these legal risks if I thought the policy reasons for excluding legislators from the line of succession were not compelling.

Yet there are indeed compelling policy reasons to exclude legislators from the line of succession. First, the experience of House Speakers and Presidents pro tempore is almost strictly legislative in nature; thus, they may lack the necessary executive experience required of the President.¹³⁶ Further, the individuals holding these positions arrive there after many years of service, so they are usually well on in years.¹³⁷ For example, the President pro tempore, elected by the Senate, is customarily the most senior member of the majority party.

However, the principal reason legislators should be removed from the presidential line of succession is not because they are not capable of doing the job, but rather to ensure continuity of policy and administration in a time of crisis, which will not be assured with a legislative officer from the opposition party acting as a successor.¹³⁸ A quick shift in party control of the government is not likely to promote stability and order at a time when the country will need it most.

The Continuity of Government Commission, a private American Enterprise Institute Commission, recommended a number of changes to the current succession law that I believe would improve our system of presidential succession.¹³⁹ First, in the event that legislators are to remain in the line of succession in the future, any succession statute should provide for legislative leaders of the President’s own party in the line of succession, as this will lighten some of the continuity concerns inherent in legislative succession.¹⁴⁰ “Second, if Congressional

134. *Id.* at 23.

135. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 132–33 (1995) (noting how “political rivalries influenced the 1792 Act”).

136. FEERICK, *supra* note 62, at 266.

137. *Id.*

138. *Id.* at 267.

139. CONTINUITY OF GOV’T COMM., PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY 45–48 (2009), available at <http://www.continuityofgovernment.org/SecondReport.pdf>.

140. *Id.* at 46.

leaders remain, the current system of selecting the President *pro tempore* should be changed. The most sensible system would be for the Majority Leader to take this place in the line.”¹⁴¹ Or Congress could “choose the President *pro tempore* on some basis other than seniority in the majority party, with an eye to who would be the best successor to the President in a crisis.”¹⁴² Additionally, “[g]iven the possibility of an attack with weapons of mass destruction, it is essential that the line of presidential succession include at least some individuals who live and work outside the Washington, D.C. area.”¹⁴³ Finally, I am of the opinion that the 1947 Succession Statute needs to be clarified as to whether and when “acting” secretaries are to be included in the line of succession. There should be no confusion on this subject.

IX. SPECIAL ELECTIONS

In the event of a double vacancy in the presidency and vice presidency, Professor Amar proposes that the successor should serve only as long as is necessary to arrange a special off-year presidential election to choose someone to finish the term, so that the nation spends as little time as possible with a President lacking a personal mandate from the people.¹⁴⁴ In addition, he notes the prospect of allowing voters to vote separately for President and Vice President in order to strengthen the Vice President’s personal mandate.¹⁴⁵

The notion of a President and Vice President elected with a personal mandate has appeal, but both proposals raise troubling issues. Such proposals would change important principles which have operated throughout our experience with presidential succession—those of the stability and continuity of the elected President’s four-year term.¹⁴⁶ A special election in the event of a double vacancy may produce a President from the opposition party of the previous President, an event that would hinder the objective of stability and continuity at a time of crisis.

Further, a special election in the event of a double vacancy may raise constitutional issues as well. The Presidential Succession Act of 1792, which called for a special election to be held in November of the year in which a dual vacancy was to

141. *Id.* at 47.

142. *Id.*

143. *Id.* at 45.

144. Amar, *supra* note 77, at 24.

145. *Id.*

146. FEERICK, *supra* note 19, at 220.

occur, was criticized during the debates of the Succession Act of 1886 as unwise and unconstitutional.¹⁴⁷ It was stated that a special election would disrupt the orderly processes of government which contemplated regular elections.¹⁴⁸

Another objection to a special presidential election system is that the triggering events, such as the death of a President and Vice President, might not be conducive to the holding of a special election.¹⁴⁹ A double vacancy would in all likelihood occur during a period of national crisis, if not trauma, and a special election might propel the country into a divisive period of politics at a time where the country would need stability and unity most.¹⁵⁰ While a special election in the event of a double vacancy has appealing benefits, as noted by Professor Amar, I believe these benefits are outweighed by the potential negative consequences it could produce.

Professor Amar also notes the possibility of allowing voters to vote separately for President and Vice President in order to strengthen the Vice President's personal mandate.¹⁵¹ While this possibility also raises interesting prospects, it too presents potential problems. First, it would be possible for a Vice President to be selected from the opposite party of the President. Joel Goldstein, in his outstanding book on the vice presidency, describes in detail the growth of the importance of the vice presidency.¹⁵² As a result of the increasing role of the Vice President, it is important that there be unity of policy within the executive branch. The President and Vice President work in tandem, and if the two are elected separately, they may often find themselves at odds, thereby contributing to ineffective executive leadership.¹⁵³ This election scheme, while enhancing the personal mandate of the Vice President, runs contrary to the important development of the President and Vice President working together in the executive office.

X. CONCLUSION

Professor Amar's Frankel Lecture, a summary of many writings by him on subjects of presidential succession and election, is important from many standpoints. The first is its

147. FEERICK, *supra* note 62, at 146.

148. *Id.*

149. FEERICK, *supra* note 19, at 221.

150. For a detailed discussion on special elections for President and Vice President, see *id.* at 220–27.

151. Amar, *supra* note 77, at 24.

152. JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY* 134–50 (1982).

153. FEERICK, *supra* note 19, at 226–27.

educational value. Citizens are the fabric of our democracy. Education is crucial to promoting their confidence and participation in government. The strong relationship between education and the vibrancy of a society based on the rule of law is indisputable. As Thomas Jefferson said, "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."¹⁵⁴ Increasing citizen awareness of the kinds of issues identified by Professor Amar allows for genuine deliberation and debate. The success of the American Democracy has been closely linked to anticipating and avoiding problems, at the core of which is an informed citizenry. Second, the lecture highlights important issues with respect to our current system of presidential succession and election. This is significant, as our current system in some of these areas is in need of reform. Third, it offers many thoughtful suggestions for dealing with the issues raised, the most serious of which I consider being the Succession Law of 1947 and the Electoral College system of electing the President and Vice President.

Professor Amar provides an invaluable contribution to our country through the superlative nature of his scholarship and writings. I am honored to be invited to offer a commentary and response to his seminal Frankel Lecture, and to be joined in doing so by Professor Joel Goldstein.

154. Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), *reprinted in* 11 THE WORKS OF THOMAS JEFFERSON 493, 497 (Paul Leicester Ford ed., 1905).

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