

# REFORMS FOR PRESIDENTIAL CANDIDATE DEATH AND INABILITY: FROM THE CONVENTIONS TO INAUGURATION DAY

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## INTRODUCTION

When Joseph R. Biden and Donald J. Trump took the stage at the first 2020 presidential debate, they were the oldest major party candidates for the presidency ever<sup>1</sup>—and one may have been contagious with a virus that is notoriously lethal for the elderly.<sup>2</sup> Only days after the debate, Trump was diagnosed with COVID-19.<sup>3</sup> His case was so severe that officials believed he would need a ventilator,<sup>4</sup> and Trump feared that he would die.<sup>5</sup> Despite being near Trump for ninety minutes, Biden subsequently tested negative for the virus.<sup>6</sup> Trump survived after receiving a cocktail of experimental medications used to treat severe cases of the virus.<sup>7</sup>

Three months later, on January 6, 2021, the U.S. Congress was poised to certify Biden's victory, and his vice presidential running mate, Senator Kamala D. Harris, was scheduled to participate.<sup>8</sup> The proceedings were disrupted by a violent mob targeting members of Congress. Some attackers said they aimed to assassinate Vice President Michael R. Pence.<sup>9</sup> Harris's arrival to the U.S. Capitol had been delayed just long enough for her to avoid

1. Paige Winfield Cunningham, *The Health 202: President Trump and Joe Biden Are the Oldest Nominees for President, Ever*, WASH. POST (Aug. 17, 2020, 8:02 AM), <https://www.washingtonpost.com/politics/2020/08/17/health-202-president-trump-joe-biden-are-oldest-nominees-president-ever/> [https://perma.cc/WDP2-TZ98].

2. See Jamie Ducharme, *The Presidential Debate Was the Kind of COVID-19 Risk Experts Have Been Warning Us About*, TIME (Oct. 2, 2020, 12:46 PM), <https://time.com/5895518/trump-coronavirus-covid-debate/> [https://perma.cc/ZE4P-WSPN]; *Older Adults*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 13, 2020), <https://web.archive.org/web/20201213203949/https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

3. Ducharme, *supra* note 2.

4. Noah Weiland et al., *Trump Was Sicker than Acknowledged with Covid-19*, N.Y. TIMES (Feb. 11, 2021, 3:50 PM), <https://www.nytimes.com/2021/02/11/us/politics/trump-coronavirus.html> [https://perma.cc/3MFX-38KC].

5. Olivia Nuzzi, *The Entire Presidency Is a Superspreading Event*, N.Y. MAG. (Oct. 9, 2020), <https://nymag.com/intelligencer/2020/10/donald-trump-covid-19-white-house.html> [https://perma.cc/2JX7-6ZZ3].

6. Annie Linskey, *Biden Tests Negative for Coronavirus, Campaign Says*, WASH. POST (Oct. 4, 2020, 7:48 PM), [https://www.washingtonpost.com/politics/biden-tests-negative-for-coronavirus-campaign-says/2020/10/04/72e65358-0653-11eb-9be6-cf25fb429f1a\\_story.html](https://www.washingtonpost.com/politics/biden-tests-negative-for-coronavirus-campaign-says/2020/10/04/72e65358-0653-11eb-9be6-cf25fb429f1a_story.html) [https://perma.cc/UG3B-5UTM].

7. Weiland et al., *supra* note 4.

8. Chelsea Janes, *For Friends and Allies of Kamala D. Harris, Deadly Capitol Attacks Prompt Fresh Fears*, WASH. POST (Jan. 14, 2021, 6:00 AM), [https://www.washingtonpost.com/politics/harris-fears-safety/2021/01/13/bbd3d31a-54ff-11eb-a817-e5e7f8a406d6\\_story.html](https://www.washingtonpost.com/politics/harris-fears-safety/2021/01/13/bbd3d31a-54ff-11eb-a817-e5e7f8a406d6_story.html) [https://perma.cc/G3X6-N8PR].

9. Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021, 9:56 AM), [https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html) [https://perma.cc/QS8J-V8YJ] (“[R]ioters began chanting, ‘Hang Mike Pence!’”).

being present for the insurrection.<sup>10</sup> Following the siege, authorities took extraordinary precautions to protect Biden and Harris on Inauguration Day.<sup>11</sup>

The 2020 presidential election involved several significant threats to the health and safety of the candidates. But dangers to presidential candidates and presidents-elect have been present before. After winning the 1860 presidential election, Abraham Lincoln dodged an alleged assassination plot by wearing a disguise to sneak into Washington, D.C., for his inauguration.<sup>12</sup> A decade later, presidential candidate Horace Greeley died shortly after the election, creating a dilemma over how the electoral votes he had won in his losing bid should be cast and counted.<sup>13</sup> In 1912, Vice President James Sherman, who had been nominated for reelection, died less than a week before his ticket lost the election.<sup>14</sup>

Less than three weeks before Franklin D. Roosevelt's first inauguration in 1933, a gunman fired on him but instead hit five other people in Roosevelt's car, including the mayor of Chicago.<sup>15</sup> In the lead-up to President Roosevelt's successful reelection in 1944, he suffered from ailments that would cause his death less than three months into his new term.<sup>16</sup> During the 1956 campaign, President Dwight D. Eisenhower, who had suffered a heart attack in 1955, obscured his health issues and then had a stroke in the year following his reelection.<sup>17</sup> Eisenhower's successor, John F. Kennedy, who also concealed serious ailments while campaigning,<sup>18</sup> faced an assassination attempt before taking office.<sup>19</sup> Kennedy's brother, Robert F. Kennedy, was a leading candidate for the Democratic presidential nomination in 1968 when

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10. Janes, *supra* note 8.

11. Carol D. Leonnig et al., *Secret Service Launches Massive Security Operation to Protect Biden Inauguration*, WASH. POST (Jan. 12, 2021, 9:54 PM), [https://www.washingtonpost.com/national/biden-inauguration-security-dc/2021/01/12/b1a9781a-54e9-11eb-89bc-7f51ceb6bd57\\_story.html](https://www.washingtonpost.com/national/biden-inauguration-security-dc/2021/01/12/b1a9781a-54e9-11eb-89bc-7f51ceb6bd57_story.html) [<https://perma.cc/PH58-FZ8M>].

12. Joe Heim, *The Attempted Assassination of Abraham Lincoln*, WASH. POST (June 5, 2020, 8:00 AM), [https://www.washingtonpost.com/outlook/the-attempted-assassination-of-abraham-lincoln/2020/06/04/e05eed8-8e3d-11ea-a0bc-4e9ad4866d21\\_story.html](https://www.washingtonpost.com/outlook/the-attempted-assassination-of-abraham-lincoln/2020/06/04/e05eed8-8e3d-11ea-a0bc-4e9ad4866d21_story.html) [<https://perma.cc/DF7N-BPXS>].

13. See Fordham Univ. Sch. of Law's Clinic on Presidential Succession, Report, *Ensuring the Stability of Presidential Succession in the Modern Era*, 81 FORDHAM L. REV. 1, 56 n.246 (2012) [hereinafter First Succession Clinic].

14. JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 161 (1965).

15. Ronald G. Shafer, *The Scariest Moment of a Presidential Transition: Six Gunshots Fired at FDR*, WASH. POST (Nov. 13, 2020, 7:00 AM), <https://www.washingtonpost.com/history/2020/11/13/fdr-assassination-attempt-transition-president-elect/> [<https://perma.cc/5N9N-MRUC>].

16. Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, Report, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917, 989–90 (2017) [hereinafter Second Succession Clinic].

17. *Id.*

18. *Id.* at 990.

19. Dan Lewis, *The Kennedy Assassin Who Failed*, SMITHSONIAN MAG. (Dec. 6, 2012), <https://www.smithsonianmag.com/history/the-kennedy-assassin-who-failed-153519612/> [<https://perma.cc/8LHS-JVL7>].

he was assassinated.<sup>20</sup> Four years later, as George Wallace campaigned for the 1972 Democratic nomination, he was shot and left permanently paralyzed below the waist.<sup>21</sup>

Thomas Eagleton was the 1972 Democratic nominee for the vice presidency for only eighteen days until he stepped aside amid concerns about his past mental health struggles.<sup>22</sup> In the final weeks of the 1980 presidential campaign, the man, who a year later shot President Ronald Reagan, came within feet of President Jimmy Carter at a campaign event.<sup>23</sup> Weeks after President Bill Clinton won reelection in 1996, before the Electoral College had cast its votes, a last-minute motorcade detour during a foreign trip avoided a bridge rigged with explosives.<sup>24</sup> In November 2000, not long before he was declared vice president-elect, Dick Cheney had his fourth heart attack.<sup>25</sup>

Despite previous candidate vacancies and near misses, the procedures for how to address many of these contingencies have shortcomings. Some scenarios are left unaddressed. The policies for other situations might be difficult to use or could result in undemocratic outcomes. This Article discusses possible reforms for addressing disability or death of presidential candidates from the time they are nominated at their political parties' conventions to when they are sworn into office on Inauguration Day.

Part I addresses the time period from the political conventions to Election Day. The political parties should consider changing their rules to make the vice-presidential nominee the designated successor to the presidential nomination but give the national committees the power to override the vice presidential candidate's automatic succession. Additionally, the parties should create processes for candidate inabilities and "dual vacancies" of the presidential and vice presidential nominations. This part also discusses the possibility of delaying an election due to death or inability, as well as policies for encouraging candidates to be transparent about their health.

Part II addresses the period from Election Day to the date when the Electoral College meets. If a candidate death or inability occurs in this period, electors who are not bound by state laws to vote for the deceased or disabled candidate could cast their ballots for replacement candidates. But the prospect of electors and the political parties selecting replacement candidates raises democratic legitimacy concerns because the Electoral

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20. Second Succession Clinic, *supra* note 16, at 1010.

21. *Alabama Governor George Wallace Shot*, HIST. (Feb. 9, 2010), <https://www.history.com/this-day-in-history/governor-george-wallace-shot> [https://perma.cc/3TAA-UNK7].

22. Second Succession Clinic, *supra* note 16, at 991.

23. *Id.* at 1010.

24. L.A. Times Staff, *U.S. Presidential Assassination and Attempts*, L.A. TIMES (Jan. 22, 2012, 8:49 AM), <https://timelines.latimes.com/us-presidential-assassinations-and-attempts/> [https://perma.cc/7F25-TSX5].

25. See Peter Baker & Julie Bosman, *In New Book, Cheney Recalls 5 Heart Attacks and His Brush with Death*, N.Y. TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/politics/in-new-book-cheney-recalls-5-heart-attacks-and-his-brush-with-death.html> [https://perma.cc/68UP-NW3H].

College has evolved to have a purely mechanical function. State laws requiring electors to vote for dead or disabled candidates would reflect the principles of the electoral system, but such laws might face objections on legal and policy grounds.

The final part addresses the period after the Electoral College votes, which extends through Congress's counting of the electoral votes to Inauguration Day. The Twentieth Amendment covers death and inability during this period, but procedures for declaring incapacities are needed. Other concerns are raised by certain succession scenarios. If the president-elect and vice president-elect both died or became unable to perform presidential duties, the speaker of the House would act as president starting on Inauguration Day. This could result in the party that lost the presidential election taking control of the White House. Congress should eliminate this possibility by designating legislative leaders of the president-elect's party as the successors. This part also considers how Congress might use its authority under Section 4 of the Twentieth Amendment to provide for the death of candidates in contingent elections, which involve Congress choosing the winner of the presidential or vice presidential race when no candidate receives a majority of electoral votes. Finally, this part discusses the presidential succession vulnerability that exists during the Inauguration Day ceremony on January 20.

#### I. DEATH OR INABILITY BEFORE ELECTION DAY

The political parties' rules authorize their national committees to fill vacancies on the parties' national tickets that occur after the national conventions. The charter and bylaws of the Democratic Party call for the more than 200 members<sup>26</sup> of the national committee to "fill[] vacancies in the nominations for the office of President and Vice President" by majority vote at a special meeting called by the party chairperson.<sup>27</sup> The Procedural Rules of the 2020 Democratic National Convention elaborate by stating that vacancies might occur as the result of "death, resignation or disability of a nominee."<sup>28</sup> Additionally, the convention rules require the party chairperson to "confer with the Democratic leadership of the United States Congress and the Democratic Governors Association and [] report to the Democratic National Committee."<sup>29</sup>

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26. *About the Democratic Party*, DEMOCRATIC NAT'L COMM., <https://democrats.org/who-we-are/about-the-democratic-party/> [<https://perma.cc/LE4R-G2J6>] (last visited Sept. 17, 2021).

27. See BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES art. II, §§ 7(c), 8(d), [https://democrats.org/wp-content/uploads/2018/09/DNC\\_Charter\\_Bylaws\\_3.12.181.pdf](https://democrats.org/wp-content/uploads/2018/09/DNC_Charter_Bylaws_3.12.181.pdf) [<https://perma.cc/Q7V7-TMHR>]; CHARTER OF THE DEMOCRATIC PARTY OF THE UNITED STATES art. III, § 1(c), [https://democrats.org/wp-content/uploads/2018/09/DNC\\_Charter\\_Bylaws\\_3.12.181.pdf](https://democrats.org/wp-content/uploads/2018/09/DNC_Charter_Bylaws_3.12.181.pdf) [<https://perma.cc/Q7V7-TMHR>].

28. PROCEDURAL RULES OF THE 2020 DEMOCRATIC CONVENTION r. F, <https://www.demconvention.com/wp-content/uploads/2020/08/FINAL-Permanent-Convention-Rules-of-Procedure-7.30.20.pdf> [<https://perma.cc/U2QS-4SUW>].

29. *Id.*

The Rules of the Republican Party provide the 168-member<sup>30</sup> national committee with the power to fill vacancies that “may occur by reason of death, declination, or otherwise” of the presidential or vice presidential candidate.<sup>31</sup> The members of the national committee would vote as part of their state delegations to the Republican Convention, with each delegation receiving the same number of votes that they received at the convention.<sup>32</sup> A replacement candidate would need to receive majority support.<sup>33</sup> The Rules of the Republican Party provide the alternative of reconvening the national convention to fill any vacancies.<sup>34</sup>

#### A. *Death of the Presidential Nominee*

The parties should consider changing their rules for the death of a presidential nominee to make the vice presidential nominee the designated successor to the presidential nomination.<sup>35</sup> But, to provide flexibility, the rules should allow a majority of the national committee to override the vice presidential candidate’s succession. After succeeding to the presidential nomination, the new nominee should select a vice presidential nominee with approval from a majority of the national committee.<sup>36</sup>

The U.S. Constitution makes the vice president the first designated successor to the presidency<sup>37</sup> because it helps ensure that there is always someone to discharge the office’s powers and duties.<sup>38</sup> Of course, the need for a replacement presidential nominee is less urgent. Unlike presidents, nominees do not need to be constantly on call to respond to crises. Yet, a delay in appointing a new presidential nominee could still be detrimental, especially if Election Day is close.

Under the two major parties’ current rules, a prolonged process for selecting a replacement is possible. The parties’ national committees, which are empowered to select a replacement nominee, consist of over 150 members from across the country.<sup>39</sup> It is easy to imagine that the committees would struggle to arrive at a consensus. Recent primary cycles have featured

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30. Alex Isenstadt, *RNC Invites 2024 Hopefuls to January Meeting in Show of Neutrality Toward Trump*, POLITICO (Dec. 2, 2020, 6:09 PM), <https://www.politico.com/news/2020/12/02/rnc-2024-hopefuls-trump-442302> [<https://perma.cc/3V5E-B8TT>].

31. THE RULES OF THE REPUBLICAN PARTY r. 9(a) (2018), [https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018\\_1533138132.pdf](https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf) [<https://perma.cc/M2LL-FZ56>].

32. *See id.* r. 9(b).

33. *Id.* r. 9(d).

34. *Id.* r. 9(a).

35. *See* FEERICK, *supra* note 14, at 273 (“[T]he people would likely insist that the vice-presidential nominee be chosen to fill the vacancy.”).

36. Party rules, as opposed to laws, are preferable for candidate death and inability procedures. Although a law applying to all parties might promote clarity and uniformity, it would almost certainly be an infringement on the parties’ First Amendment associational rights. *See* New York State Bd. of Elections v. Torres, 552 U.S. 196, 202–03 (2008) (“A political party has a First Amendment right . . . to choose a candidate-selection process.”).

37. *See* U.S. CONST. art. II, § 1, cl. 6; *id.* amend. XXV, § 1; *see also id.* amend. XX, § 3.

38. *See* AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 132 (2005).

39. *See About the Democratic Party*, *supra* note 26; Isenstadt, *supra* note 30.

rivalries between various wings of the parties.<sup>40</sup> These tensions could reemerge in the process of selecting a replacement. Although there would be a political imperative to quickly and decisively coalesce around a replacement,<sup>41</sup> forging agreement among over 150 people on such a consequential decision still presents a major challenge, especially when the parties appear to lack a detailed process for doing so.

A failure to quickly select a replacement nominee could damage the party's chances for winning the presidency. It could also harm the country's democracy. The two-party system counts on both parties presenting voters with a choice between two credible nominees about whom the voters have enough time to learn. By the time presidential candidates have received their parties' nominations at the conventions, they have been campaigning for at least a year and have been the focal points of their parties' nationally televised conventions. It would be essential for replacement nominees to use all of the remaining time until the election to introduce themselves to the public. A significant delay would deprive voters of the opportunity to cast informed votes and could even cause confusion at the polls. If a replacement was not named in time to update ballots, or at least to sufficiently educate the public, some voters may not even know for whom they were voting.

A replacement candidate chosen by party leadership might lack legitimacy due to the absence of a popular mandate. The original presidential nominee would have received the support of millions of voters during the primaries, while the replacement candidate may have received no support from primary voters. For much of the country's history, political party leaders selected their parties' presidential nominees.<sup>42</sup> But over the past half-century, the principle that primary voters should select presidential nominees has become firmly entrenched.<sup>43</sup> The democratic legitimacy held by the presidential nominee would best be replicated by the vice presidential nominee's succession to the nomination. Even though the vice presidential nominee might not have run in the primaries, the presidential nominee would have selected the vice presidential nominee—another norm that has emerged

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40. See, e.g., Jonathan Martin, *A Major Fear for Democrats: Will the Party Come Together by November?*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/us/politics/democratic-party-unity-primary.html> [<https://perma.cc/94JJ-GF9K>].

41. The process did move quickly the only time that a party replaced a candidate before an election. See Second Succession Clinic, *supra* note 16, at 1008–09. After Thomas Eagleton stepped down from the vice presidential nomination in 1972, the Democratic National Committee swiftly, and nearly unanimously, approved the replacement, who the presidential candidate had selected. See James M. Naughton, *Shriver Is Named for Second Place by the Democrats*, N.Y. TIMES (Aug. 9, 1972), <https://www.nytimes.com/1972/08/09/archives/shriver-is-named-for-second-place-by-the-democrats-national.html> [<https://perma.cc/9MJG-MNAG>]. But the process probably would not be nearly as simple for filling a vacancy at the top of the ticket.

42. Elaine C. Kamarck, *Returning Peer Review to the American Presidential Nomination Process*, 93 N.Y.U. L. REV. 709, 711–12 (2018).

43. See *id.* at 712–14; Adam Levy, *DNC Changes Superdelegate Rules in Presidential Nomination Process*, CNN (Aug. 25, 2018, 7:33 PM), <https://www.cnn.com/2018/08/25/politics/democrats-superdelegates-voting-changes/index.html> [<https://perma.cc/6N5N-7WQ7>].

within the last century.<sup>44</sup> Therefore, the vice presidential nominee would probably have many of the same policy positions that won the presidential nominee the support of primary voters.

The vice presidential nominee is preferable to other possible designated successors, including the candidate who finished second in the party's presidential primary. Given the importance of the primary process, some might argue that it is critical to select a replacement nominee who had received support from primary voters. But even after a close primary race, it is possible that the runner up would have vastly different policy views from the deceased presidential nominee—views that may have led primary voters to vote against the runner-up.<sup>45</sup> Additionally, the runner-up would probably want to choose a new vice presidential candidate, which would eliminate any continuity in the party's ticket. Making the vice presidential candidate the designated successor would also provide another incentive for presidential candidates to choose vice presidential candidates who are capable of serving as president—a critical qualification that has sometimes been undervalued.<sup>46</sup>

Admittedly, the vice presidential candidate might not always be the ideal successor to the presidential nomination.<sup>47</sup> Political considerations, such as “ticket balancing,” may have been a primary consideration in the vice presidential candidate's selection, and the candidate's suitability for the presidency may not have received enough attention.<sup>48</sup> It is also possible that a party might be skeptical of the vice presidential candidate's chances of winning at the top of the ticket. Accordingly, a majority of the national committee should be able to override the vice presidential candidate's succession. To select an alternate presidential nominee, the party might employ the special committee process that is discussed below for situations in which both the presidential and vice presidential candidates die.<sup>49</sup>

Allowing the replacement presidential nominee to select a new vice presidential nominee, with approval from the national committee, would recognize the importance of the working relationship between the president and vice president.<sup>50</sup> Presidential nominees often search for vice presidential

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44. See JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE FROM MONDALE TO BIDEN* 173–74 (2016).

45. Second Succession Clinic, *supra* note 16, at 1015.

46. See, e.g., *id.* at 1014 (noting that 2008 Republican presidential nominee John McCain selected Sarah Palin as his running mate “without probing the depth of her knowledge on domestic and foreign policy”).

47. Fordham Law School's Second Presidential Succession Clinic recommended that the vice presidential candidate only be the designated successor in the final weeks of the campaign. Before then, a “[v]acancy committee” would suggest potential replacements to the national committee. See *id.* at 1016–17.

48. See *id.* at 1014–15.

49. See *infra* Part I.B.

50. It is essential for parties to have both presidential and vice presidential candidates because some states count votes by “ticket[s]” instead of by presidential candidate. Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 220 (1995).



nominees who complement their governing and managerial styles.<sup>51</sup> That is because the vice president has become an integral figure in most administrations, in some cases serving as the top advisor to the president and taking responsibility for critical initiatives.<sup>52</sup> Recognizing the importance of the relationship between the president and vice president, the Twenty-Fifth Amendment gave the president the discretion to nominate a replacement vice president when there is a vacancy.<sup>53</sup> In fact, the Twenty-Fifth Amendment's framers cited the modern practice of the political parties allowing presidential nominees to choose the vice presidential nominee.<sup>54</sup>

### *B. Death of the Presidential and Vice Presidential Nominees*

For a scenario where both the presidential and vice presidential nominees have died, the parties should consider a rule allowing a special committee to suggest a replacement presidential nominee to the national committee, which would need to approve the recommended candidate by majority vote.<sup>55</sup> If the national committee did not give its approval, the special committee could suggest another candidate or the national committee could take it upon itself to select a new nominee. The special committee might consist of representatives of: (1) the party, such as the chairperson; (2) the party's governors and congressional leadership, such as speaker of the House, House minority leader, and Senate majority or minority leader; and (3) the deceased candidates' campaign. Once the party selects a new presidential nominee, the nominee should choose a running mate with approval from a majority of the national committee.

The parties' current rules do not explicitly cover a dual vacancy of the presidential and vice presidential nominations, but the procedures for individual vacancies would likely still work. Those procedures would call for the respective national committees to fill both vacancies,<sup>56</sup> with the Republican Party's rules providing the alternative of reconvening the national convention.<sup>57</sup>

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51. See BIPARTISAN POL'Y CTR. WORKING GRP. ON VICE PRESIDENTIAL SELECTION, *SELECTING A VICE PRESIDENT: ADVICE FOR PRESIDENTIAL CANDIDATES* 4 (2016).

52. See GOLDSTEIN, *supra* note 44, at 4.

53. U.S. CONST. amend. XXV, § 2; Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORDHAM L. REV.* 959, 982–83 (2010).

54. Goldstein, *supra* note 53, at 984.

55. This idea draws on the Second Succession Clinic's proposal for the parties to create a "[v]acancy committee" to suggest potential replacements to the national committee. See Second Succession Clinic, *supra* note 16, at 1016–17. The parties should consider defining the membership of a special committee in advance of when it is needed.

56. CHARTER OF THE DEMOCRATIC PARTY OF THE UNITED STATES art. III, § 1(c), [https://democrats.org/wp-content/uploads/2018/09/DNC\\_Charter\\_Bylaws\\_3.12.181.pdf](https://democrats.org/wp-content/uploads/2018/09/DNC_Charter_Bylaws_3.12.181.pdf) [<https://perma.cc/Q7V7-TMHR>].

57. THE RULES OF THE REPUBLICAN PARTY r. 9(a) (2018), [https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018\\_1533138132.pdf](https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf) [<https://perma.cc/M2LL-FZ56>].

A scenario where the national committee needed to select replacements for both spots on the party's ticket at the same time could be even more unwieldy and time consuming under the current rules than filling a sole vacancy. A special committee with far fewer members than the national committee might streamline the process. There might still be disagreement among the special committee, but its smaller size would probably facilitate meaningful dialogue and deliberation.

Including at least some of the party's governors and congressional leaders on the committee would add democratic accountability because those officials are elected. Consultation with governors and congressional leaders on filling vacancies is already called for by the party's Procedural Rules of the 2020 Democratic National Convention.<sup>58</sup> The officials from the deceased candidate's campaign would help ensure that their candidate's vision, which primary voters endorsed, would be reflected in the choice of a replacement.

### C. *Inability of the Presidential Nominee*

The political parties should consider authorizing the vice presidential nominee and the special committee described above to declare presidential nominees unable. An inability declaration should require a two-thirds vote from the special committee and approval from the vice presidential nominee. The presidential nominee should be allowed to appeal an inability determination to the national committee, which would then need to ratify the inability determination by a two-thirds vote.<sup>59</sup> If a presidential nominee were removed for inability, the vice presidential nominee should become the presidential nominee and pick a new running mate with majority approval from the national committee. To avoid this process, candidates who recognized that they were unable could simply resign.

Both parties' current rules envision candidate disability, but they do not define "disability" or provide a way to determine its existence. The Democratic Party's rules explicitly mention "disability,"<sup>60</sup> while the Republican Party's rules recognize that vacancies in the party's nominations "may occur by reason of death, declination, or otherwise."<sup>61</sup> The "otherwise" language is best understood as encompassing a wide range of contingencies that make a candidate unavailable, certainly including disability.<sup>62</sup>

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58. PROCEDURAL RULES OF THE 2020 DEMOCRATIC CONVENTION r. F, <https://www.demconvention.com/wp-content/uploads/2020/08/FINAL-Permanent-Convention-Rules-of-Procedure-7.30.20.pdf> [<https://perma.cc/SYD6-HJED>].

59. For an analysis of the merits of a lawsuit filed by a candidate to challenge removal from the ticket, see Second Succession Clinic, *supra* note 16, at 1018–20.

60. PROCEDURAL RULES OF THE 2020 DEMOCRATIC CONVENTION r. F, <https://www.demconvention.com/wp-content/uploads/2020/08/FINAL-Permanent-Convention-Rules-of-Procedure-7.30.20.pdf> [<https://perma.cc/SYD6-HJED>].

61. THE RULES OF THE REPUBLICAN PARTY r. 9(a) (2018), [https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018\\_1533138132.pdf](https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf) [<https://perma.cc/M2LL-FZ56>].

62. See Brian C. Kalt, *The Rules for Displacing an Ailing Presidential Candidate*, LAWFARE (Oct. 4, 2020, 11:01 AM), <https://www.lawfareblog.com/rules-displacing-ailing-presidential-candidate> [<https://perma.cc/QA24-REDF>].

Before the Twenty-Fifth Amendment's ratification, the Constitution, like the political parties' rules, lacked a definition for presidential inability or a process for declaring it.<sup>63</sup> The Twenty-Fifth Amendment's framers declined to add a definition, preferring instead to create processes for determining inability.<sup>64</sup> The amendment's Section 3 allows the president to voluntarily declare himself disabled, while Section 4 lets the vice president and a majority of the Cabinet or another body created by Congress declare the president unable.<sup>65</sup>

Although different considerations exist in the pre-inaugural period, the Twenty-Fifth Amendment's inability procedures provide some insights for crafting candidate inability procedures. Additionally, use of an inability process similar to one in the Constitution might encourage the public to view the process as legitimate. The amendment's framers made the vice president an indispensable participant in the Section 4 process partially because the vice president would take over in the event of the president's removal from the office's powers and duties.<sup>66</sup> For the same reason, it would be sensible to involve the vice presidential nominee in an inability determination, if the parties made the vice presidential nominee the automatic successor to the presidential nomination, as this Article suggests the parties consider.

Empowering the person in the second spot to take part in a process that could move that person to the top of the ticket might appear to create a conflict of interest. But the political repercussions would probably be severe for taking part in a removal that the public deemed unwarranted. And, historically, vice presidents have been hesitant to initiate transfers of power, even when it might have been necessary.<sup>67</sup>

The Twenty-Fifth Amendment involves the president's Cabinet secretaries in an inability determination for several reasons. The members of the Cabinet are presumably political allies of the president who would be unlikely to improperly participate in declaring the president unable.<sup>68</sup> Additionally, the Cabinet secretaries' work and interactions with the president might give them information about the president's health.<sup>69</sup> These considerations also support involving the vice presidential nominee and representatives of the campaign in declaring the presidential candidate unable. Consultation with doctors and other relevant medical experts should inform inability determinations where necessary, just as the Twenty-Fifth Amendment's framers expected the Cabinet and vice president to seek expert input.<sup>70</sup>

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63. U.S. CONST. art. II, § 1, cl. 6.

64. Second Succession Clinic, *supra* note 16, at 928; Goldstein, *supra* note 53, at 994.

65. U.S. CONST. amend. XXV, §§ 3, 4.

66. John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 *FORDHAM L. REV.* 173, 202 (1965).

67. See John D. Feerick, *Presidential Inability: Filling in the Gaps*, 33 *POL. & LIFE SCI.*, no. 2, 2014, at 11, 13–14.

68. *Id.*

69. *Id.*

70. *Id.* at 23.

Giving elected officials and the vice presidential nominee a role in determining presidential candidate inability would add accountability to the process. The lawmakers who designed the Twenty-Fifth Amendment believed the decision-makers must be accountable to the public.<sup>71</sup> Elected officials are accountable to their constituents, and the vice presidential nominee is accountable to voters on Election Day.

“Disability” should not be defined in the rules for the same reason it is left undefined in the Twenty-Fifth Amendment: to provide flexibility.<sup>72</sup> Not all of the conditions that might merit use of the disability procedures are predictable, making it important for the decision-makers to have discretion. But the rules should make it difficult to remove candidates for all but the most serious ailments. Deference to the presidential candidate reflects the importance of the popular mandate the candidate received from primary voters. Allowing the presidential candidate to appeal a disability determination to the national committee would provide a critical check. And requiring the national committee to ratify a disability determined by a two-thirds vote would weight the process in the candidate’s favor—just as the Twenty-Fifth Amendment’s appeal provision is tilted toward the president.<sup>73</sup>

Removal of a presidential nominee should be permanent. Although it is important to maximize the possibility that the candidate who primary voters choose will be on the ballot, multiple changes to a party’s national ticket in the weeks before Election Day risk confusing voters and preventing many from casting informed votes.

#### *D. Inability of the Presidential and Vice Presidential Nominees*

The parties should consider allowing the special committee to handle scenarios where both the presidential nominee and vice presidential nominee become disabled. Both nominees should be allowed to appeal the decision to the national committee. After both candidates have been removed from the ticket, the special committee should suggest a replacement presidential nominee to the national committee. Following approval from the national committee of a new presidential nominee, the nominee should choose a new vice presidential candidate.

The process for declaring a dual inability should closely mirror the process for declaring an inability of the presidential nominee, and the process for selecting a replacement should be the same as the replacement process for when both candidates die. The only difference would be that the unable vice presidential nominee would not participate in the inability declaration.

A dual inability is a remote possibility, but it is still important to provide for it. The presidential succession framework currently lacks a procedure for

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71. Goldstein, *supra* note 53, at 992–93.

72. Second Succession Clinic, *supra* note 16, at 928. The terms “disability” and “inability” are used interchangeably here.

73. An inability determination must receive approval from two-thirds of both houses of Congress if the appeal process is triggered. *See* U.S. CONST. amend. XXV, § 4.

a dual inability of the president and vice president.<sup>74</sup> The vulnerability created by this gap was highlighted in October 2020 when President Trump contracted COVID-19 and Vice President Pence was at risk of falling ill.<sup>75</sup> At the time, Trump and Pence were the Republican nominees for president and vice president.

#### E. Vice Presidential Nominee Death and Inability

If the vice presidential candidate dies, the parties should consider allowing the presidential candidate to choose a replacement nominee with approval from a majority of the national committee. To declare a vice presidential nominee unable, the presidential nominee should act with a majority of the special committee. The presidential nominee should then fill the vacancy on the ticket's second spot with approval from a majority of the national committee.

#### F. Delaying the Election

In some candidate death or inability scenarios, it might make sense to delay the election.<sup>76</sup> An election should only be delayed when absolutely necessary. None of the United States's fifty-nine presidential elections has been postponed.<sup>77</sup> That no level of turmoil—including a civil war<sup>78</sup>—has prevented on-time presidential elections is a sign of the strength of the nation's democracy. And conducting elections as scheduled has more than symbolic value. A candidate could seek to delay an election as part of an attempt to undermine the democratic process. Nonetheless, allowing voters to make informed choices is integral to democracy, and candidate death or inability immediately before an election might make it hard for voters to learn about replacement candidate(s). If a vacancy happened especially close to an election, a delay might be necessary for the party to follow an adequate process for selecting replacement(s).

An election delay would need to be coordinated at the national level because the date of presidential elections is set by federal law.<sup>79</sup> Congress

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74. Second Succession Clinic, *supra* note 16, at 958–59; Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027, 1030 (2017).

75. Garrett M. Graff, *The Real Nightmare Scenario: A Sick Mike Pence*, POLITICO (Oct. 2, 2020, 3:15 PM), <https://www.politico.com/news/magazine/2020/10/02/pence-trump-covid-coronavirus-sick-425329> [https://perma.cc/SD3A-UZS4].

76. See Amar, *supra* note 50, at 222–23.

77. Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 524 (2005).

78. Becky Little, *How the Union Pulled Off a Presidential Election During the Civil War*, HIST. (Apr. 2, 2020), <https://www.history.com/news/civil-war-presidential-election-abraham-lincoln> [https://perma.cc/WB48-3575].

79. U.S. CONST. art. II, § 1, cl. 4 (“Congress may determine the Time of chusing [sic] the Electors.”); 3 U.S.C. § 7; CONG. RSCH. SERV., RL32654, SAFEGUARDING FEDERAL ELECTIONS FROM POSSIBLE TERRORIST ATTACK: ISSUES AND OPTIONS FOR CONGRESS 2–3 (2004).

also has the power to postpone the meeting of the Electoral College,<sup>80</sup> which might be necessary if Election Day were pushed back. Inauguration Day cannot be changed by legislation; the Constitution requires that it occur on January 20 in the year after an election.<sup>81</sup> Any election delay due to a candidate death or inability should be brief. For the orderly transfer of power to occur in January, the winning candidate's transition work should ideally begin in November.<sup>82</sup>

Congress might pass a law providing a mechanism for an automatic delay of an election if a candidate death or inability happened close to an election. Professor Akhil Reed Amar has suggested such an approach. He proposed the chief justice of the United States as a possible official to certify that a death or inability had occurred in order to trigger a delay.<sup>83</sup> Another possibility is the appointment of a commission to handle potential delays. Professor Jerry Goldfeder has previously proposed using a commission to decide on postponing an election in the event of a terrorist attack.<sup>84</sup> He outlined two possible commissions for Congress to consider creating: one with representatives of the parties and any independent candidates and another with congressional leaders.<sup>85</sup> A hybrid approach with both congressional leaders and party representatives is also worth consideration. The party representatives could provide input on whether a delay is necessary for their party to select new candidates, while the elected officials could make the commission's decision more accountable to the public.

### G. Candidate Health Disclosures

Transparency about primary candidates' health might reduce the chances that prospective candidates who are at high risk of serious medical issues will decide to run—possibly making it less likely that the parties would ever need to use the vacancy procedures. Furthermore, voters deserve to know at least some information about candidates' health. Unfortunately, candidates have not always been forthcoming.<sup>86</sup> Incentivizing transparency, as opposed to requiring it, might be most realistic. Approaches that merit consideration are

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80. See 3 U.S.C. § 7. Moving the date of the Electoral College meeting would automatically push back the “safe harbor” date, when states must certify their vote counts to guarantee that Congress will accept their results. The safe harbor date is “six days before the time fixed for the meeting of the electors.” *Id.* § 5.

81. U.S. CONST. amend. XX, § 1.

82. See Tom Wheeler, *With Only 11 Weeks, A Transition Delayed Is a Transition Denied*, BROOKINGS INST. (Nov. 18, 2020), <https://www.brookings.edu/blog/techtank/2020/11/18/with-only-11-weeks-a-transition-delayed-is-a-transition-denied/> [<https://perma.cc/MK5D-5ZC3>].

83. Amar, *supra* note 50, at 222–23.

84. Goldfeder, *supra* note 77, at 563–64.

85. *Id.*

86. MEGHA DHARIA ET AL., FORDHAM UNIV. SCH. OF L., DEMOCRACY AND THE CONST. CLINIC, WHAT SHOULD PRESIDENTIAL CANDIDATES TELL US ABOUT THEMSELVES?: PROPOSALS FOR IMPROVING TRANSPARENCY IN PRESIDENTIAL CAMPAIGNS 14–18 (2020), [https://www.fordham.edu/download/downloads/id/14399/What\\_Should\\_Presidential\\_Candidates\\_Tell\\_Us\\_About\\_Themselves\\_Democracy\\_Clinic.pdf](https://www.fordham.edu/download/downloads/id/14399/What_Should_Presidential_Candidates_Tell_Us_About_Themselves_Democracy_Clinic.pdf) [<https://perma.cc/AJP8-DM44>]; Second Succession Clinic, *supra* note 16, at 988–97.

a commission that establishes standards for health disclosures, which Fordham Law School's Second Clinic on Presidential Succession recommended,<sup>87</sup> or a commission that conducts voluntary exams of candidates, which Fordham Law School's Democracy and the Constitution Clinic recommended.<sup>88</sup>

## II. DEATH OR INABILITY AFTER ELECTION DAY BUT BEFORE THE ELECTORAL COLLEGE VOTE

There are no established procedures for candidate death or inability after Election Day but before the Electoral College meeting. On Election Day, voters technically cast ballots for electors, not presidential or vice presidential candidates.<sup>89</sup> The political parties choose their electors in each state before the election.<sup>90</sup> If candidates died or became disabled after the election, their parties might attempt to instruct the electors to vote for certain replacements when the electors cast their votes about a month-and-a-half after Election Day. That is what happened when Horace Greeley died shortly after the 1872 election.<sup>91</sup> Whether electors would or could follow such instructions is unclear.

### A. Electors' Varying Authority in Death and Inability Scenarios

Thirty-three states and Washington, D.C., have "faithless elector" laws that prohibit electors from exercising discretion in casting their votes.<sup>92</sup> The rest of the states allow electors to vote how they choose, though it is very rare for unbound electors to vote for anyone other than the presidential and vice presidential candidates who won the popular votes in their states.<sup>93</sup> But that norm might be disrupted by candidate death or disability; the electors might follow instructions from their political party or vote for a candidate of their own choosing.

Different wording in states' faithless elector laws appears to create varying requirements for electors when candidates die or become disabled. In thirteen states and Washington, D.C., electors are required to vote for their

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87. See Second Succession Clinic, *supra* note 16, at 1003–07.

88. DHARIA ET AL., *supra* note 86, at 18–20.

89. John D. Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 FORDHAM L. REV. 1, 2 (1968).

90. Jerry H. Goldfeder, *Election Law and the Presidency: An Introduction and Overview*, 85 FORDHAM L. REV. 965, 969 (2016).

91. First Succession Clinic, *supra* note 13, at 56 n.246.

92. *Faithless Elector State Laws*, FAIRVOTE (July 7, 2020), [https://www.fairvote.org/faithless\\_elector\\_state\\_laws](https://www.fairvote.org/faithless_elector_state_laws) [<https://perma.cc/F7RS-8C4C>].

93. Hans A. von Spakovsky & Zack Smith, "Faithless Electors" Won't Affect Any Presidential Election, HERITAGE FOUND. (July 13, 2020), <https://www.heritage.org/election-integrity/commentary/faithless-electors-wont-affect-any-presidential-election> [<https://perma.cc/7QJS-FQEY>] (stating that there have only been 180 faithless electors "out of more than 23,000 electoral votes, or only one-half of 1 percent").

party's candidate or nominee.<sup>94</sup> These laws would probably require electors to vote for a replacement candidate chosen by the electors' party, even if their party selected the replacement after the election. The replacements would become the parties' candidates or nominees for whom the electors are required to vote by law. Virginia's law requires electors to vote for "the nominees of the national convention to which the state convention elects delegates."<sup>95</sup> Unless a political party reconvened its convention to fill a vacancy, which the Republican National Committee's rules do provide as an option, electors in Virginia might not be required to vote for replacement candidates.

Fifteen states have faithless elector laws that would require electors to vote for a dead or disabled candidate. Not all of those laws, however, impose a penalty for faithless votes, though some call for the automatic cancellation of faithless votes. The laws in nine of those states require electors to vote for the winner of the popular vote in the state. In four states, the laws demand that electors vote for the candidate for whom they agreed to serve. And, in two states, the electors must vote for the candidates who appear on their parties' ballots on Election Day. None of these laws make exceptions for candidate death or inability.<sup>96</sup>

Some laws have explicit or implicit exceptions. Hawaii and Tennessee require electors to vote for their parties' nominees "if both candidates are alive."<sup>97</sup> Electors in Utah must vote for their parties' nominees, "except in the cases of death or felony conviction of a candidate."<sup>98</sup> The Wisconsin statute states, "A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting [of the Electoral College]."<sup>99</sup>

### B. Challenges to Reform

Requiring electors to vote for the popular vote winners, including when candidates die or become disabled, is the approach that is most consistent with the principles underlying the modern presidential election system.<sup>100</sup> Although the Constitution's framers envisioned the electors deliberating to select the president, they have virtually never done so.<sup>101</sup> "Almost immediately, presidential electors became trusty transmitters of other people's decisions," the U.S. Supreme Court observed in *Chiafalo v. Washington*.<sup>102</sup> In *Chiafalo*, which was decided in July 2020, the Court

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94. See generally NAT'L ASS'N OF SECRETARIES OF STATE SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS (2020), <https://www.nass.org/sites/default/files/surveys/2020-10/summary-electoral-college-laws-Oct20.pdf> [<https://perma.cc/8JCS-45MS>].

95. See *id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. This suggestion is inspired by Professor Amar's slightly different proposal for a law requiring Congress to count electoral votes for dead candidates. Amar, *supra* note 50, at 222.

101. See JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 3–5 (2020).

102. 140 S. Ct. 2316, 2326 (2020).



upheld the constitutionality of state faithless elector statutes that bar electors from exercising their own discretion.<sup>103</sup> The Court based its ruling in part on the “established practice” of the Electoral College serving as “a mechanism not for deliberation but for party-line voting.”<sup>104</sup>

Because electors do not have a consequential part in selecting the president and vice president, most voters pay no attention to who they are. They are chosen by the leaders of their state political parties and may not represent the views of voters who cast ballots for their parties’ candidates. Allowing electors to intervene to select replacements for dead or disabled candidates would be undemocratic and inconsistent with how the Electoral College works in practice.

It is also undesirable for political parties to be involved in choosing replacements. The parties could use the same processes described in their party rules to choose new candidates for the electors to support. In 1912, Republican electors followed instructions from their party to vote for a replacement for James Sherman, the vice presidential nominee who died shortly before his ticket lost the election.<sup>105</sup> But replacements named by a party would not necessarily be representative of the will of the voters. If the political parties chose replacement candidates before the election, voters would still be able to register their preferences, which adds a measure of accountability and legitimacy. Voters would obviously no longer have that opportunity after Election Day. Prioritizing voters’ input is consistent with the diminished role of party establishments in selecting presidential nominees.<sup>106</sup>

State laws that require electors to vote for dead or disabled candidates would recognize that the Electoral College process is a formality.<sup>107</sup> This approach would allow for candidate death and inability scenarios to be resolved in the same way from Election Day to the inauguration. After electors voted for a deceased or disabled candidate, the candidate would become president-elect or vice president-elect for the purposes of the Twentieth Amendment, and the amendment’s succession procedures would apply.<sup>108</sup>

However, this policy would raise legal and policy concerns. First, it is unclear whether states have authority to require electors to vote for dead candidates. In *Chiafalo*, the Supreme Court left the issue unresolved, stating

103. *Id.* at 2328–29.

104. *See id.* at 2326–27.

105. *See* Second Succession Clinic, *supra* note 16, at 1008.

106. *See* DAISY DE WOLFF ET AL., FORDHAM UNIV. SCH. OF L., DEMOCRACY AND THE CONST. CLINIC, SELECTING REPRESENTATIVE AND QUALIFIED CANDIDATES FOR PRESIDENT: PROPOSALS TO REFORM PRESIDENTIAL PRIMARIES 8–9 (Jan. 2021), [https://www.fordham.edu/download/downloads/id/15276/selecting\\_representative\\_and\\_qualified\\_candidates\\_for\\_president.pdf](https://www.fordham.edu/download/downloads/id/15276/selecting_representative_and_qualified_candidates_for_president.pdf) [<https://perma.cc/5ZFE-ZV73>].

107. Reflecting the Electoral College’s mechanical function, at least one federal law states that a candidate becomes “President-Elect” based on the Election Day outcome, not the meeting of the Electoral College. *See* The Presidential Transition Act of 1963 § 3(c), Pub. L. No. 88-277, 78 Stat. 153, 154 (1964) (codified as amended at 3 U.S.C. § 102 note).

108. *See infra* Part III.A.

that its decision should not be interpreted to allow faithless elector statutes that mandate electoral votes for deceased candidates.<sup>109</sup>

Second, Congress's decision to not count Greeley's electoral votes after the 1872 election set a precedent that a future Congress might cite to avoid counting the votes for a dead candidate.<sup>110</sup> But the Greeley precedent might not be difficult to overcome. Professor Amar suggests that Congress should undo the precedent by passing a law requiring the counting of electoral votes for dead candidates.<sup>111</sup> Even without a law, the Greeley precedent might not be entitled to much weight. Professor Joel Goldstein calls it "extremely weak" because Congress hardly debated its decision and Greeley had lost the election decisively, making the counting of his electoral votes inconsequential under the circumstances.<sup>112</sup>

Third, the Constitution's text might be interpreted to prevent electors from voting for candidates who have died. Professor Goldstein highlights this concern, observing that the Twelfth Amendment authorizes electors to vote for a "person," which might not include a decedent.<sup>113</sup> This issue could give Congress another reason not to count electoral votes for dead candidates and it could provide a basis for opposing candidates to file lawsuits.

Fourth, if both the winning presidential and vice presidential candidates died, casting electoral votes for them would lead to the speaker of the House, the next official in the line of succession, becoming acting president on Inauguration Day.<sup>114</sup> This outcome would be highly undemocratic if the speaker of the House did not belong to the same party as the deceased candidates. The party that lost the presidential election would have the opportunity to hold the White House for a full four-year term.

Given these concerns, other alternatives deserve consideration. One possibility is for states' faithless elector statutes to require electors to vote for the vice presidential candidate for president if the presidential candidate dies. The electors might also be required to vote for a new vice presidential candidate named by the new presidential candidate. But giving a presidential candidate unchecked authority to name a vice presidential candidate is inconsistent with the vice presidential replacement process in the Twenty-Fifth Amendment, which requires assent from majorities of both houses of Congress.<sup>115</sup> The dual death scenarios are even more vexing because the only alternatives might be to allow the parties or electors to name replacements, which would be problematic for the reasons discussed.<sup>116</sup>

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109. 140 S. Ct. at 2328 n.8.

110. See Brian Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 101, 112 (2017).

111. Amar, *supra* note 50, at 222.

112. Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 HOUS. L. REV. 67, 76–77 n.32 (2010).

113. *Id.* at 76.

114. See 3 U.S.C. § 19(a)(1).

115. See U.S. CONST. amend. XXV, § 2.

116. See *supra* Part I.B.

The challenges related to candidate death and inability between Election Day and the casting of electoral votes stem from the Electoral College system's flaws.<sup>117</sup> The only complete solution may come from abolishing the Electoral College, which would require a constitutional amendment.

### III. DEATH OR INABILITY AFTER THE ELECTORAL COLLEGE VOTE

The Twentieth Amendment provides for succession contingencies involving the president-elect and vice president-elect. Lawmakers who designed the amendment believed candidates became president-elect and vice president-elect after the Electoral College vote in mid-December, as opposed to after Congress's counting of the electoral votes on January 6.<sup>118</sup> This interpretation is not universally accepted,<sup>119</sup> but it makes practical sense for the purposes of the Twentieth Amendment. The Twelfth Amendment requires Congress to count electoral votes for candidates who die after the electors cast their votes.<sup>120</sup> Therefore, the Twentieth Amendment's provisions will inevitably apply to candidates who die after the Electoral College meeting, no matter the definition of president-elect and vice president-elect. The procedures for death of presidential and vice presidential candidates are clear in most cases, but there is ambiguity when it comes to the amendment's treatment of inability.

#### A. Death of President-Elect and/or Vice President-Elect

If the president-elect dies, the Twentieth Amendment provides that the vice president-elect becomes president on Inauguration Day.<sup>121</sup> The Twentieth Amendment extends the Constitution's designation of the vice president as the first successor to the presidency into the pre-inaugural period.<sup>122</sup> There is no process for selecting a new vice president-elect; as soon as the president takes office, he or she could use the Twenty-Fifth Amendment to appoint a vice president with approval from Congress.<sup>123</sup>

The Twentieth Amendment does not explicitly provide for the death of both the president-elect and vice president-elect. But that contingency is almost certainly covered by Section 3, which states, in part, "Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified."<sup>124</sup> A failure to "qualify" was intended to cover any contingency that made the president-elect and vice

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117. See John D. Feerick, *The Electoral College: Time for a Change?*, 90 *FORDHAM L. REV.* 395 (2021); Goldstein, *supra* note 112, at 74–75.

118. See H.R. REP. NO. 72-345, at 6 (1932).

119. See CONG. RSCH. SERV., RS22992, *THE PRESIDENT-ELECT: SUCCESSION AND DISABILITY ISSUES DURING THE TRANSITION PERIOD* 4 (2012).

120. See FEERICK, *supra* note 14, at 273–74.

121. U.S. CONST. amend. XX, § 3.

122. See *id.* art. II, § 1, cl. 6; *id.* amend. XXV, § 1.

123. *Id.* amend. XXV, § 2.

124. *Id.* amend. XX, § 3.

president-elect unavailable to take the oath of office on Inauguration Day;<sup>125</sup> such contingencies certainly include death.<sup>126</sup> Congress has passed a law pursuant to this power. The Presidential Succession Act of 1947<sup>127</sup> designates successors for when the president-elect and vice president-elect fail to qualify.<sup>128</sup> In that scenario, the speaker of the House would be sworn in to act as president.<sup>129</sup> If there were no speaker, the Senate president pro tempore would become acting president.<sup>130</sup> The rest of the line of succession comprises the heads of the executive departments.<sup>131</sup> Cabinet secretaries who were still in office in this scenario would have been appointed during the prior presidential term.

Congress should change the line of succession for pre-inaugural contingencies to guarantee that the legislative leaders of the president-elect's party are the successors. The current line of succession could lead to the undemocratic result of the party that lost the presidential election taking the White House on Inauguration Day because the speaker and president pro tempore are not always members of the president-elect's party.

A revised line of succession should provide that the speaker of the House is the first in the statutory line of succession when the president-elect and speaker of the House belong to the same party. When they are from different parties, the House minority leader should be first in the line.<sup>132</sup> The president pro tempore should not be in the line of succession. It is customarily a position held by the most senior member of the majority party in the Senate, meaning the president pro tempore, while distinguished, is almost always in the twilight of their career and not necessarily prepared to assume the responsibilities of the presidency.<sup>133</sup> When the Senate is held by the president-elect's party, the Senate majority leader should be second in the statutory line of succession. Otherwise, the Senate minority leader should be second.<sup>134</sup>

Some proposals for reforming the presidential line of succession would remove legislators. Under these proposals, members of the Cabinet would comprise all or most of the line of succession.<sup>135</sup> There are compelling arguments for removing legislators from the line of succession,<sup>136</sup> especially because they may not be constitutionally eligible successors to the presidency

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125. See *Proposed Constitutional Amendment: Hearing Before the Comm. on Election of President, Vice President and Representatives in Congress*, 72d Cong. 9–10 (1932).

126. See H.R. REP. NO. 72-345, at 9 (1932); see also Goldstein, *supra* note 53, at 1034.

127. Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19).

128. 3 U.S.C. § 19(a)(1).

129. U.S. CONST. amend. XX, § 3; 3 U.S.C. § 19(a)(1).

130. U.S. CONST. amend. XX, § 3; 3 U.S.C. § 19(b).

131. 3 U.S.C. § 19(d)(1).

132. See Feerick, *supra* note 67, at 19.

133. Second Succession Clinic, *supra* note 16, at 946–47.

134. See Feerick, *supra* note 67, at 19.

135. Second Succession Clinic, *supra* note 16, at 952; First Succession Clinic, *supra* note 13, at 46–47; CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY 45–46 (2009).

136. See Second Succession Clinic, *supra* note 16, at 946–50.

when vacancies occur after the inauguration.<sup>137</sup> But these proposals are focused on vacancies in the presidency and vice presidency. In a scenario where the president-elect and vice president-elect die, they could not appoint members of the Cabinet, making a Cabinet line of succession impractical. Additionally, concerns about the constitutionality of legislative succession would not exist in the pre-inaugural period because the Twentieth Amendment appears to allow a broader range of people to act as president in the event of vacancies during this time. Article II limits post-inauguration successors to “Officer[s],”<sup>138</sup> who some argue are only Senate-confirmed executive branch officials.<sup>139</sup> The Twentieth Amendment uses a more general term for potential pre-inauguration successors: “person[s].”<sup>140</sup>

*B. Inability of the President-Elect and/or Vice President-Elect*

Inability of the president-elect or vice president-elect is covered by the Twentieth Amendment. Although the amendment’s text does not mention inability, the legislative history strongly suggests that the “failure to qualify” language encompasses inability.<sup>141</sup> Accordingly, in cases where the president-elect is unable, the vice president-elect becomes acting president on Inauguration Day and serves in that capacity until the inability ends and the president assumes office.<sup>142</sup> However, there is no clear procedure for declaring the existence of an inability.

The vice president-elect might have the authority to make an inability declaration. Before the Twenty-Fifth Amendment provided procedures for declaring presidential incapacities, some scholars suggested that the “contingent grant of power theory” gave the vice president authority to determine that the president was disabled.<sup>143</sup> That theory holds that the person who is empowered to act in a certain circumstance, such as by discharging the presidency’s powers and duties, has the power to determine whether that circumstance exists.<sup>144</sup> Yet, the contingent grant of power theory does not provide the unquestionable legal basis that should exist for transfer of presidential authority.

Congress should pass a law for declaring the president-elect unable. A procedure would help ensure that there was someone to ably discharge the powers of the presidency immediately at the start of a new term. Additionally, an incapacitated president would not be able to appoint a

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137. See generally Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995). But see Goldstein, *supra* note 53, at 1019–20.

138. U.S. CONST. art. II, § 1, cl. 6.

139. Second Succession Clinic, *supra* note 16, at 949.

140. U.S. CONST. amend. XX, § 3.

141. See, e.g., H.R. REP. NO. 72-345, at 5–6 (1932); *Proposed Constitutional Amendment*, *supra* note 125, at 8–9 (statement of Rep. Clarence F. Lea); see also Marcello Figueroa, *Revisiting § 3 of the Twentieth Amendment 2* (Dec. 2019) (unpublished manuscript) (on file with author).

142. U.S. CONST. amend. XX, § 3.

143. Second Succession Clinic, *supra* note 16, at 963.

144. *Id.*

Cabinet, which would complicate the Twenty-Fifth Amendment's use if the president was not an incumbent.<sup>145</sup> One possibility is to authorize the vice president-elect and congressional leaders of the president-elect's party<sup>146</sup> to make the declaration. This procedure should be reserved for the most unambiguous cases of inability, such as those involving unconsciousness, so approval from the vice president-elect and all of the congressional leaders might be required. And the president-elect might be given unilateral authority to declare an inability over.

The Twentieth Amendment does not provide explicit authorization for Congress to create a procedure for declaring incapacities. But because a procedure is essential to make the amendment function, the Necessary and Proper Clause should provide a sufficient basis for creating a procedure.<sup>147</sup>

Congress should also create a process for declaring a dual incapacity of both the president-elect and vice president-elect. Congressional leaders of the president-elect's party and the person who is next in the line of succession—typically the speaker of the House—might be empowered to approve an incapacity determination.

### C. Contingent Election Gaps

There are no procedures for candidate death or incapacity in a situation where Congress must choose the winner of the presidential or vice presidential race in a “contingent election.” Contingent elections occur when no candidate receives a majority of the electoral votes.<sup>148</sup> If no candidate receives a majority in the presidential contest, the Twelfth Amendment lets the House of Representatives choose the winner from the three candidates who received the most electoral votes. In a House-contingent election, each state delegation receives one vote, and the candidate who receives a majority of all of the states wins. The Senate is responsible for choosing a vice president if none of the candidates win a majority of electoral votes. Senators select from the top two candidates, and each senator has one vote, with a majority required to prevail.<sup>149</sup>

The Twentieth Amendment's Section 4 authorizes Congress to pass a law providing procedures for “death of any of the persons” from whom the House

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145. Acting secretaries remaining from the prior administration could probably participate, but it would be undesirable because they would not be allies of the president. See John Rogan, *Trump Has a Lot of Temps in Top Jobs. Would They Get a Say in Removing Him from His?*, WASH. POST (July 22, 2019, 2:00 PM), <https://www.washingtonpost.com/outlook/2019/07/22/trump-has-lot-temps-top-jobs-would-they-get-say-removing-him-his/> [<https://perma.cc/DL6F-QYM2>].

146. The statute might allow independent candidates who are not members of a party to designate individuals to participate in declaring them unable.

147. See U.S. CONST. art. I, § 8, cl. 18; cf. Second Succession Clinic, *supra* note 16, at 963.

148. THOMAS H. NEALE, CONG. RSCH. SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 1 (2020).

149. See U.S. CONST. amend. XII.

or Senate may choose in contingent elections.<sup>150</sup> But Congress has not done so since the Twentieth Amendment was ratified in 1933.<sup>151</sup>

The most sensible, yet flawed, law for the death of a presidential candidate in a contingent election would provide for a deceased presidential candidate's running mate to become the replacement presidential candidate. This approach, which Professor Brian Kalt recommends,<sup>152</sup> would automatically provide a replacement presidential candidate and avoid the undemocratic option of letting a political party or electors choose a replacement after voters have cast their ballots. It would also recognize the vice president's role as the first successor to the presidency.

Complications arise because the running mate would probably be a candidate for the vice presidency in the Senate-contingent election.<sup>153</sup> If the running mate stepped down from the vice presidential candidacy to become the presidential candidate, the running mate's party would not be represented in the Senate-contingent election. Not only would the party not have a chance to win the vice presidency, it would be out of contention for the presidency if the House-contingent election resulted in a deadlock.

Whether legal authority exists to name a replacement to run in the Senate in this scenario is unclear. Section 4's first clause gives Congress the authority to "provide for" the death of a presidential candidate, and its second clause gives authority to "provide for" the death of a vice presidential candidate.<sup>154</sup> Because death is the only contingency listed, a narrow reading might indicate that Congress can only authorize naming a replacement when the vice presidential candidate dies. However, a broader interpretation could support naming a new vice presidential candidate as part of the authority to "provide for" the death of the presidential candidate.

An alternative to naming a replacement vice presidential candidate is for the running mate to be a candidate in both the House- and Senate-contingent elections.<sup>155</sup> If the running mate won in both the House and the Senate, the running mate could vacate the vice president-elect position. Then, after taking office as president, that individual could nominate a vice president

150. *Id.* amend. XX, § 4.

151. Former Senator Paul Simon proposed legislation on this issue in the 1990s. Kalt, *supra* note 110, at 118–19. In June 2020, Senator Rob Portman introduced legislation to create a panel of experts to recommend a Section 4 policy. *See* S. 3950, 116th Cong. § 2 (2020). Senator Portman cosponsored similar legislation in 2021 with a bipartisan group of members from the House and Senate. Press Release, Portman, King Introduce the Bipartisan, Bicameral SOLVE ACT to Help Establish an Appropriate Process in the Event of a Candidate's Death in an Contingent Presidential Election (July 22, 2021), <https://www.portman.senate.gov/newsroom/press-releases/portman-king-introduce-bipartisan-bicameral-solve-act-help-establish> [<https://perma.cc/N7LY-2VBK>].

152. Kalt, *supra* note 110, at 128–29, 142. Senator Simon's legislation also took this approach. *Id.* at 128.

153. If the presidential and vice presidential candidates' ticket received the third most electoral votes, the presidential candidate would be eligible for the House contingent election, but the vice presidential candidate would not be eligible for the Senate contingent election. *See* U.S. CONST. amend. XII.

154. U.S. CONST. amend. XX, § 4.

155. Kalt, *supra* note 110, at 129.

through the Twenty-Fifth Amendment's process. Even though the Constitution clearly does not envision the president and vice president being the same person,<sup>156</sup> there is no explicit constitutional prohibition against this arrangement. But it could still invite lawsuits that would call into question the legitimacy of the election's outcome.

Congress should "provide for" the sole death of a vice presidential candidate before a contingent election by allowing the presidential candidate to name a replacement. This policy would embrace the discretion presidents have to choose their vice presidents. The Senate would provide a meaningful check, similar to how Congress must approve a replacement vice president under the Twenty-Fifth Amendment<sup>157</sup> and how the political parties must support the presidential candidate's vice presidential pick.<sup>158</sup>

For a scenario in which both the presidential candidate and the vice presidential candidate died, the only realistic option might be for Congress to pass a law allowing the deceased candidates' party (or electors for independent candidates) to name new presidential and vice presidential candidates. Allowing the political parties to replace candidates after an election is far from ideal. A party could choose a replacement who was more politically extreme than the original candidate. And the possibility of a candidate taking office as president without winning any popular votes raises serious democratic legitimacy concerns. Accordingly, Congress might consider requiring approval for a party's replacement from that party's congressional leaders.

If a presidential candidate or vice presidential candidate became physically or mentally unable, the candidate should still participate in a contingent election. If an unable candidate won a contingent election, a process like the one suggested earlier for declaring incapacities in presidents-elect and vice presidents-elect could be employed.<sup>159</sup>

#### *D. Inauguration Day Vulnerability*

A catastrophic incident on Inauguration Day could unleash a precarious succession scenario. On Inauguration Day, the outgoing and incoming president and vice president traditionally convene at the Capitol for the swearing-in ceremony.<sup>160</sup> The two legislative leaders who are the next in the presidential line of succession—the speaker of the House and the Senate

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156. See, e.g., U.S. CONST. art. II, § 1, cl. 2; *id.* amend. XII; *id.* amend. XXV, § 2.

157. *Id.* amend. XXV, § 2.

158. See, e.g., Russell Berman, *A Vice Presidential Free-for-All?*, ATLANTIC (Apr. 20, 2016), <https://www.theatlantic.com/politics/archive/2016/04/trump-gop-running-mate-convention-delegates/478992/> [<https://perma.cc/J5R7-AS62>].

159. See *supra* Part III.B.

160. Donald Trump's failure to attend the 2021 swearing-in ceremony marked the first time in a century-and-a-half that an outgoing president did not attend his successor's inauguration. Ayesha Rascoe, *For First Time In 150 Years, Outgoing President Doesn't Attend Inauguration*, NPR (Jan. 20, 2021, 4:10 PM), <https://www.npr.org/2021/01/20/958905703/for-1st-time-in-150-years-outgoing-president-doesnt-attend-inauguration> [<https://perma.cc/4RTS-X38E>].



president pro tempore—are typically there, too.<sup>161</sup> If all of those officials were killed or incapacitated in an attack, the line of succession would reach the leaders of the Cabinet departments. But, when a new president is taking office, almost all of the outgoing Cabinet secretaries normally resign by noon on Inauguration Day,<sup>162</sup> which is the time set by the Twentieth Amendment for the end of the presidential term.<sup>163</sup>

Before the Senate confirms the new president's Cabinet secretaries, the departments are led by acting secretaries, whose eligibility as presidential successors is questionable. The line of succession statute and its legislative history leave the matter unaddressed.<sup>164</sup> Since the statute does not explicitly bar them from acting as president, an acting secretary probably would serve in that capacity after an Inauguration Day catastrophe—if only because there would be no other officials who were even arguably eligible. Of course, that outcome is far from ideal—and not only because of the eligibility ambiguity. Acting secretaries are lower-ranking officials who might be ill-suited to serve as president. Additionally, an acting secretary might be from a different political party than the president-elect.

An acting secretary would serve as president until the House chose a new speaker or the Senate chose new a president pro tempore.<sup>165</sup> That process could take time, especially given that many members of both chambers probably would have been at the inauguration and, as a result, in harm's way.

Prior administrations have recognized the Inauguration Day succession vulnerability. In fact, officials confronted the possibility of an attack on the 2009 swearing-in ceremony, when intelligence revealed a potentially credible terrorist bomb plot. Defense Secretary Robert Gates, who was slated to remain in his post in the new administration, did not attend the ceremony as a precaution.<sup>166</sup> In 2017, President Barack Obama's Homeland Security secretary remained in office and stayed away from incoming President Trump's swearing-in. President pro tempore Orrin Hatch also avoided the gathering.<sup>167</sup> It is not publicly known whether similar precautions were taken for the 2021 Inauguration,<sup>168</sup> which occurred only two weeks after a mob stormed the Capitol, with some in the crowd rampaging over the platform constructed for the inauguration.<sup>169</sup>

161. Second Succession Clinic, *supra* note 16, at 956.

162. *Id.*

163. U.S. CONST. amend. XX, § 1.

164. Second Succession Clinic, *supra* note 16, at 954–56.

165. See 3 U.S.C. § 19(d)(2).

166. Peter Baker, *Obama's War over Terror*, N.Y. TIMES MAG. (Jan. 4, 2010), <https://www.nytimes.com/2010/01/17/magazine/17Terror-t.html> [https://perma.cc/CM85-B9ZD].

167. Second Succession Clinic, *supra* note 16, at 957.

168. Patricia Kime, *Who Was the Designated Survivor for the Inauguration?: Outgoing Administration Doesn't Say*, MILITARY (Jan. 20, 2021), <https://www.military.com/daily-news/2021/01/20/who-was-designated-survivor-inauguration-outgoing-administration-doesnt-say.html> [https://perma.cc/68Q9-JCRV].

169. Will Weissert, *Capitol Siege Raises Security Worries for Biden Inauguration*, ASSOCIATED PRESS (Jan. 8, 2021), <https://apnews.com/article/election-2020-joe-biden->

The practice of a member of the outgoing president's Cabinet serving as a designated survivor is sensible, but it leaves open the possibility of an official from the party that lost the election taking over as acting president. A better policy has been recommended by Fordham Law School's Second Presidential Succession Clinic and the Continuity of Government Commission. Their proposal would involve the Senate confirming some of the incoming president's top-ranking Cabinet secretaries shortly before the inauguration.<sup>170</sup> Then, some or all of the newly confirmed department heads could wait out the ceremony off-site.

#### CONCLUSION

The 2020 election cycle and many before it illustrate an unfortunate reality: threats to the health and safety of presidential and vice presidential candidates are real. Congress and the political parties should give careful consideration to improving and supplementing the procedures for pre-inaugural succession and inability.

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[<https://perma.cc/XDP5-UT9K>].

170. Second Succession Clinic, *supra* note 16, at 957; CONTINUITY OF GOV'T COMM'N, *supra* note 135, at 49.