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HOW CLOSE HAS THE UNITED STATES COME TO HAVING LAWMAKERS SUCCEED TO THE PRESIDENCY?

*Roy E. Brownell II**

Other panelists have discussed many of the important theoretical concerns about having lawmakers in the line of succession, including the possibility of partisan control of the White House changing hands. That is to say that the will of the American voters from the previous presidential election would suddenly be reversed. I would like to build on those remarks and discuss some historical examples that demonstrate how close the nation has come to actually having to implement legislative succession to the presidency.

Thankfully, the country has never experienced a situation in which both the president and vice president have died or otherwise left office at the same time, nor has the nation endured an extended period when both the president and vice president have been incapacitated. But the country has come very close on several occasions. I believe a handful of historical episodes should make clear that the notion of legislative succession to the presidency—accompanied by a change in partisan control of the White House—is not a remote abstraction, but a real possibility.

Under the 1792 Presidential Succession statute,¹ the successors after the vice president were the Senate president pro tempore (PPT) followed by the Speaker. Under the authority of that statute, there were several near misses to legislative succession involving a potential change in partisan control of the executive branch.²

In 1844, John Tyler, a Democrat, was president. That year, he was aboard the naval vessel the *U.S.S. Princeton* when a massive cannon blew up, killing

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1. See Act of Mar. 1, 1792, ch. 8, 1 Stat. 239 (repealed 1886).

2. There have been other occasions that could arguably be considered close shaves with respect to dual vacancy or dual incapacity. See, e.g., DEL QUENTIN WILBER, *RAWHIDE DOWN: THE NEAR ASSASSINATION OF RONALD REAGAN* 131 (2011). Some of these incidents could have prompted legislative succession and a partisan shift in control of the presidency. Others could have involved legislative succession, but not resulted in a different party running the executive branch. See, e.g., Roy E. Brownell II, *The Executive Branch's Longstanding Embrace of Legislative Succession to the Presidency*, 52 U. MEM. L. REV. 281, 297–99 (2021).

two Cabinet secretaries who were topside at the time.³ Purely through good fortune, the president had not yet reached the deck of the ship and was spared.⁴ Had he not been so lucky, because there was no vice president, the PPT at the time—Senator Willie Mangum of the Whig Party—would have become acting president.⁵ This would have meant a change in partisan control of the executive branch.

In 1865, following the assassination of President Abraham Lincoln, Democrat Andrew Johnson was elevated to the presidency. Just weeks afterward, with no vice president in office, Johnson caught what may have been pneumonia.⁶ He was so sick, in fact, that his secretary of state and secretary of war were sent scrambling trying to track down the PPT. At the time, the PPT was Senator Lafayette Foster, who was a Republican.⁷ The problem was that, at the time, Foster was in the wilds of the New Mexico territory, conducting oversight on U.S. government treatment of Native Americans.⁸ The two Cabinet secretaries were only able to find and contact Senator Foster by sending a courier riding horseback from the nearest outpost. After some effort, the courier finally located the senator in a remote corner of the territory, sitting peacefully by a campfire.⁹ The rider handed Senator Foster a telegram beseeching him to head for the closest big city to reestablish communication with Washington, D.C., in case he had to become acting president.¹⁰

Three years later, during the impeachment trial of President Johnson, the Senate came within a single vote of removing the president and elevating Senator Foster's successor as PPT, Senator Ben Wade, to the presidency.¹¹ Like Foster, Wade was a Republican.¹²

3. See ROBERT SEAGER II, AND TYLER TOO: A BIOGRAPHY OF JOHN & JULIA GARDINER TYLER 204–06 (1963); JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 96–97 (1965).

4. See SEAGER, *supra* note 3, at 204–06; FEERICK, *supra* note 3, at 96–97.

5. See FEERICK, *supra* note 3, at 96–97.

6. See Salmon P. Chase, *The Journals of Salmon P. Chase, 1829-1872*, in 1 THE SALMON P. CHASE PAPERS 584–85, 584 n.49 (John Niven ed., 1993); 13 CONG. REC. 133 (1881) (statement of Sen. Anthony); THOMAS VOGT & DARLA SHAW, LAFAYETTE FOSTER: A HEARTBEAT AWAY FROM THE PRESIDENCY 103–04 (2006); MEMORIAL SKETCH OF LAFAYETTE S. FOSTER 43 (1881) (ebook), https://www.cga.ct.gov/hco/books/Lafayette_Foster_Memorial.pdf [<https://perma.cc/7PZ2-H9QC>].

7. See Chase, *supra* note 6, at 584, 584 n.49; MEMORIAL SKETCH OF LAFAYETTE S. FOSTER, *supra* note 6, at 40, 43; 13 CONG. REC. 133 (statement of Sen. Anthony).

8. See Chase, *supra* note 6, at 584, 584 n.49; MEMORIAL SKETCH OF LAFAYETTE S. FOSTER, *supra* note 6, at 41–43; 13 CONG. REC. 133 (statement of Sen. Anthony).

9. See VOGT & SHAW, *supra* note 6, at 103–04; Chase, *supra* note 6, at 584–85, 584 n.49.

10. See Chase, *supra* note 6, at 584–85, 585 n.49; 13 CONG. REC. 133 (statement of Sen. Anthony); VOGT & SHAW, *supra* note 6, at 103–04; MEMORIAL SKETCH OF LAFAYETTE S. FOSTER, *supra* note 6, at 43.

11. See FEERICK, *supra* note 3, at 114.

12. See *id.*

In 1886, legislative succession was removed from the statute books¹³ but, in 1947, lawmakers reinserted the Speaker and the PPT, in that order, into the line of succession.¹⁴

Since Democratic President Harry Truman did not have a vice president from 1945 until 1949, Republican Speaker Joe Martin perhaps came closer to becoming acting president than any other Speaker. Not long after the bill's adoption, President Truman went on an official trip to Brazil.¹⁵ While on his trip, his motorcade almost drove over the edge of a precipice. Speaker Martin recalled that, "Truman, while on a visit to South America, came dangerously close to plunging down a mountainside in an automobile. The news was a sobering reminder of how near I was living day and night to the edge of great responsibility."¹⁶ As was the case with Tyler and Johnson, a partisan switch in the White House could easily have occurred.

These examples reflect instances when a lawmaker from outside the President's party could have become acting president due to the possibility of a vacancy in both the presidency and the vice presidency. But what about situations in which both the president and the vice president are incapacitated? History affords at least one such example here as well.

In 1985, President Reagan had a surgical procedure to excise polyps from his intestine.¹⁷ Prior to being anesthetized, Reagan transferred the powers and duties of his office to Vice President George Bush under Section 3 of the Twenty-Fifth Amendment.¹⁸

While acting as president, Bush decided to unwind and play some tennis. However, during his match, the acting president backpedaled furiously to retrieve a lob, tripped, fell, banged his skull on the cement surface, and for a few anxious moments was out cold.¹⁹ Thus, White House press aide Marlin Fitzwater recalled that, for a short period of time, "both the president and vice president were unconscious."²⁰ Several years later, the vice president's military aide remarked about the situation, "[w]e figured out later that at least for a few seconds, [Speaker] Tip O'Neill was in charge. But we decided not to tell him."²¹ O'Neill, of course, was a Democrat.

What the episodes from the Tyler, Johnson, Truman, and Reagan presidencies show is that the nation has come perilously close to

13. See Act of Jan. 19, 1886, ch. 4, 24 Stat. 1 (repealed 1947).

14. See Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19).

15. See JOE MARTIN AS TOLD TO ROBERT J. DONOVAN, MY FIRST FIFTY YEARS IN POLITICS 187 (1960).

16. *Id.*

17. See, e.g., GEORGE W. BUSH, 41: A PORTRAIT OF MY FATHER 148 (2014).

18. See, e.g., *id.*

19. See *id.* at 148-49; DORO BUSH KOCH, MY FATHER, MY PRESIDENT: A PERSONAL ACCOUNT OF THE LIFE OF GEORGE H.W. BUSH 223-24 (2d ed. 2014); MARLIN FITZWATER, CALL THE BRIEFING! 285 (1995).

20. FITZWATER, *supra* note 19, at 285; see also KOCH, *supra* note 19, at 223.

21. Monte Burke, *George H.W. Bush's Sporting Life*, FORBES (Mar. 25, 2010, 4:40 PM), <https://www.forbes.com/forbes/2010/0412/life-fishing-tennis-baseball-skydiving-george-bush-sporting-life.html?sh=74d9e6147c15> [https://perma.cc/C77J-NB2D].

implementing legislative succession and to experiencing a sudden change in party control in the executive branch. The question then arises, did lawmakers themselves ever think that they might become acting president? The answer is: yes, indeed.

Several lawmakers have made tentative plans about what they would have done had they been confronted with this scenario. Dr. Norm Ornstein alluded to the actions of Senator Wade during the impeachment trial of President Johnson.²² During the trial, Senator Wade evidently gave serious thought to the composition of his future Cabinet.²³ He huddled with Republican presidential nominee Ulysses Grant to discuss the matter.²⁴ It was widely supposed that Representative Benjamin Butler would be his secretary of state.²⁵ Wade even went so far as to offer the post of secretary of the interior to G.W. Julian and to make arrangements for the distribution of federal patronage in one state.²⁶

Speaker Martin certainly took the possibility of becoming acting president seriously. He later admitted that he had considered whom he might have named as secretary of state. Martin said, “[w]hile I never gave systematic thought to what I would have done or whom I would have appointed to my cabinet if it had fallen to my lot suddenly to be [acting] President, the idea lurked in my mind that I might ask Herbert Hoover to return to Washington as Secretary of State. His great experience both as cabinet officer and [as] President would have been almost indispensable to me.”²⁷

The closest any lawmaker has apparently come to indicating that he or she might not have served for any extended period of time as acting president was Senator Carl Hayden, who was PPT from 1957 to 1969. The Senator remarked that, had he been elevated to the Oval Office, he would have taken the following steps: “I’d call Congress together, have the House elect a new Speaker, then I’d resign and let him become [acting] President.”²⁸ Interestingly, Hayden’s act of self-denial did not involve his declining the job altogether and allowing it to pass to the secretary of state. Instead, he had indicated that he would have ensured that the acting president would have come from the legislative branch. I will defer to Dr. Joseph Fins, who will

22. See Norm J. Ornstein, *Problems with the Legislative Succession Provisions of the Presidential Succession Act of 1947*, 91 FORDHAM L. REV. ONLINE 19, 20 (2022).

23. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 214 n.‡ (2d ed. 1992); Akhil Reed Amar & Vikram David Amar, Essay, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 123 (1995).

24. See CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN 188–89* (1929); ADAM BADEAU, *GRANT IN PEACE: FROM APPOMATTOX TO MOUNT MCGREGOR—A PERSONAL MEMOIR* 136–37 (1887).

25. See LATELY THOMAS, *THE FIRST PRESIDENT JOHNSON: THE THREE LIVES OF THE SEVENTEENTH PRESIDENT OF THE UNITED STATES OF AMERICA* 586, 595 (1968); H.L. TREFOUSSE, *BENJAMIN FRANKLIN WADE* 299–301 (1963).

26. See DAVID O. STEWART, *IMPEACHED* 247 (2009); BOWERS, *supra* note 24, at 188.

27. MARTIN AS TOLD TO DONOVAN, *supra* note 15, at 187.

28. ROSS R. RICE, *CARL HAYDEN: BUILDER OF THE AMERICAN WEST* 220 (1994).

discuss the tenure of Speaker Carl Albert, whose experience is also relevant in this context.²⁹

Finally, I would note that Speaker Dennis Hastert did concede that he did not want to become acting president. But, unlike Senator Hayden, Hastert indicated he would not have walked away from the Oval Office. “I really didn’t want to be President, temporary or permanent,” Hastert recalled. “And [my wife] Jean, who wasn’t thrilled with my present job, would not be happy with this The opt-out provision [in the 1947 statute] might have seemed attractive, but I understood that it wasn’t really an option because if you had a constitutional crisis and you were Speaker, you couldn’t pass it up. You had to accept”³⁰

The words and actions of Wade, Martin, Hayden, and Hastert each indicate that lawmakers themselves have given some serious thought to becoming acting president.

The prospect of a Speaker or a PPT becoming acting president and potentially flipping partisan control of the White House is a very real one. The question for the public to consider is: Does having lawmakers in the line of succession manifest the most sensible approach for addressing executive succession and inability?

29. See Joseph J. Fins, *Carl Albert, Bipartisanship, and Presidential Succession: Lessons from Watergate*, 91 *FORDHAM L. REV. ONLINE* 59, 60–63 (2022); see also Joseph J. Fins, *The Hidden Bipartisanship During Watergate*, *SALON* (Jan. 29, 2018, 6:00 AM), https://www.salon.com/2018/01/29/secret-memo-shows-bipartisanship-during-watergate-succession-crisis_partner/ [<https://perma.cc/EG6G-6V8Z>]; Ted Gup, *Speaker Albert Was Ready to Be President*, *WASH. POST* (Nov. 28, 1982), <https://www.washingtonpost.com/archive/politics/1982/11/28/speaker-albert-was-ready-to-be-president/84ebaa61-9cf1-4817-836e-a993e7e0e980/> [<https://perma.cc/5E5T-LJEE>]; Memorandum from Theodore C. Sorensen to Carl Albert, Speaker, House of Reps. (Nov. 8, 1973), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1004&context=twentyfifth_amendment_watergate_era [<https://perma.cc/SP7K-DRM6>].

30. DENNY HASTERT, *SPEAKER: LESSONS FROM FORTY YEARS IN COACHING AND POLITICS* 213–14 (2004).