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CARL ALBERT, BIPARTISANSHIP, AND PRESIDENTIAL SUCCESSION: LESSONS FROM WATERGATE

*Joseph J. Fins**

As a physician, I feel a little bit out of place, but I am honored to be with you. I'm going to talk about the Carl Albert experience, bipartisanship, and the dual vacancies that might have happened during the Watergate Era. I'll share a lot of interesting primary sources that speak to the issues that we've discussed at this program.

Let me just tell you a little bit about how I got into this. As a "country doctor," this is not my usual line of work. I was invited to the last meeting of the Working Group on Presidential Disability that was hosted by Presidents Ford and Carter, convened by the White House physician, and organized by Jim Toole. It was December 1996, and I was invited along with George Annas, who is a health lawyer at Boston University, because I had done some writing on advance directives and advance care planning.¹ One thing to remember when we think about presidential disability and succession is that presidents are also spouses, parents, and grandparents. Family dynamics are going to play into decisions about incapacity. I had been asked to be there to talk about the family role in some of these decisions and to weigh in on some medical issues. There were a number of White House physicians who were in attendance, including Burton Lee, General John Hutton, and others.

It was a fascinating experience. I was a young scholar at the time, and I felt a little bit out of place. For me, the headline was this curious phrase that

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1. See Susan M. Wolf, Philip Boyle, Daniel Callahan, Joseph J. Fins, Bruce Jennings, James Lindemann Nelson, Jeremiah A. Barondess, Dan W. Brock, Rebecca Dresser, Linda Emanuel, Sandra Johnson, John Lantos, DaCosta R. Mason, Mathy Mezey, David Orentlicher & Fenella Rouse, *Special Report: Sources of Concern About the Patient Self-Determination Act*, 325 NEW ENG. J. MED. 1666, 1671 (1991). For information on the Working Group's proceedings and recommendations, see generally PRESIDENTIAL DISABILITY (James F. Toole & Robert J. Joynt eds., 2001).

Senator Bayh, who of course wrote the Twenty-Fifth Amendment,² used in a conversation during a break. He was telling us a story, and it felt like you were listening to Abraham Lincoln. He had that avuncular character, just an authentic midwestern, patriotic quality. He was telling us this story about the possible dual vacancy during the Watergate Era. Vice President Agnew had resigned and Nixon could have been removed or could have resigned before a replacement vice president was confirmed. Then, Speaker of the House Carl Albert, under the Succession Act,³ would have assumed office.⁴

Senator Bayh said that there was a fear of the presidency going to, his phrase, “the party opposite.”⁵ He was concerned that it would look as if it had been a coup d’état. He told us this anecdote, which stayed with me for years and years and years, that Carl Albert would resign as Speaker so a Democratic House could elect the minority leader, Gerald Ford, to serve as Speaker who would then succeed to the presidency. This would prevent the party-opposite scenario: a Republican (Ford) would then replace a Republican (Nixon).

Carl Albert and Birch Bayh were very concerned about any appearance of a political gain coming from Nixon’s removal because he had committed crimes and constitutional violations. It was not a political impeachment. It was because of the legal issues. And there could have been a disincentive for Nixon to resign because it would’ve gone to the party opposite. So there was this gentleman’s agreement.⁶

Over the years, it’s been sort of a side hobby of mine to look for evidence of this. When I was giving a talk out in Grand Rapids, I got a private tour of the Ford Museum and I found some interesting documents there. One is a letter from Gerry Ford from October 1973, recommending four people to be the new vice president. He recommended John Connally, Melvin Laird, who was the defense secretary, Nelson Rockefeller, who he ultimately chose as his own vice president, or Ronald Reagan.⁷ He said, “I will not go into the reasons for my views as I’m sure [you’re] familiar with reasons in each instance.”⁸ I also saw Nixon’s letter resigning in 1974. Interestingly, the letter notes the time, 11:35 AM, and it is initialed by Henry Kissinger, “HK.”⁹

2. U.S. CONST. amend. XXV.

3. Presidential Succession Act, 3 U.S.C. § 19.

4. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 44–45 (3d ed. 2014).

5. Joseph J. Fins, *Secret Memo Shows Bipartisanship During Watergate Succession Crisis*, CONVERSATION (Jan. 22, 2018, 6:30 AM), <https://theconversation.com/secret-memo-shows-bipartisanship-during-watergate-succession-crisis-90211> [https://perma.cc/2XLN-YG3Z].

6. See *id.*

7. See Letter from Gerald R. Ford, Minority Leader, House of Reps., to President Richard Nixon (Oct. 11, 1973), <https://www.archives.gov/files/education/lessons/ford-nixon-letter/ford-nixon-letter.pdf> [https://perma.cc/9F3F-Y3TG].

8. *Id.*

9. Letter from President Richard Nixon to Henry A. Kissinger, Sec’y of State (Aug. 9, 1974), <https://www.archivesfoundation.org/documents/richard-nixon-resignation-letter-gerald-ford-pardon/> [https://perma.cc/M7CK-MCDU].

I also saw the index card that Ford used to recite the oath of office, which was on display at the Ford Museum.

But when I was at the Ford Museum they didn't have anything about Carl Albert's role in the Watergate Era. Albert was the Speaker during the presidential transitions in that time. If you look at pictures from presidential addresses to Congress during this period, you'll see Agnew sitting next to Carl Albert, Ford next to Albert, and Rockefeller next to Albert. The continuity here is in the Speaker. He's the only person who hasn't shifted in this musical chairs with this cast of characters.

During the middle part of the Trump administration, I was wondering about Bayh's story over and over again and how it was emblematic of bipartisanship. This patriotism that would have led Carl Albert to actually resign the speakership so a member of the party opposite could become president, and there could be continuity with Nixon's party. I got interested in this. I wanted to know, was Bayh's anecdote true? And why hasn't this been a more prominent feature of the Watergate story? And could I find evidence of it? More aspirationally, could this inspire the kind of bipartisanship that we're lacking right now? Of course, it would have implications for future vacancies.

I contacted the Birch Bayh Archives at the University of Indiana and tried to reach Senator Bayh, who, unfortunately, at that stage of his life, was not in a position to remember that part of his life as he had been suffering from some illnesses. They did very nicely recommend that I speak to Jay Berman. He was Senator Bayh's chief of staff, and Jay very graciously had lunch with me at the Century Club in New York City. We talked about this phrase "party opposite." He said it sounded like Senator Bayh.¹⁰

Then I found some more information indicating that Albert didn't want to take partisan advantage and become president.¹¹ Berman did not know about this plan to resign, but he told me that he recalled a possible Ted Sorensen memo advising Carl Albert about a possible succession to the presidency. He said it might be in the Carl Albert Archives. So I looked in the Carl Albert Archives at the University of Oklahoma, and I found a nineteen-page memo from Ted Sorensen who, of course, was President Kennedy's alter ego.¹² Before we had chiefs of staff in the White House, he was essentially Kennedy's chief of staff. Joel Jankowsky, Albert's legislative aid, who I also spoke to and who organized his papers, did not recall seeing this document. But there it was in the archives.

If you look at Sorensen's letter to Carl Albert, it's dated November 8, 1973, after the Midnight Massacre as things were really heating up with

10. *See* Fins, *supra* note 5.

11. *See id.*

12. *See* 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/H7YN-RBMX>].

Watergate.¹³ It says: “Enclosed is a first draft. [And I’d] be happy to [talk] with you . . . at your convenience.”¹⁴ He says, “I admire your recognition of the need for advance[d] planning.”¹⁵ This is not the first conversation or exchange the two of them had.

We see Carl Albert planning prospectively for potentially becoming acting president. The document is really extraordinary. On the first page, the introduction talks about an unexpected vacancy in the presidency before the confirmation of a new vice president.¹⁶ Speaking to the issue of a perceived conflict of interest, there’s a little caveat here that Ted Sorensen says to him, “[s]hould a new Vice President be confirmed before a vacancy occurs, or should the President serve out his term, this entire Memorandum will become unnecessary and can be destroyed (if you fear that its existence, if discovered, might be misinterpreted as evidence of an improper motivation on your part for the President’s ouster).”¹⁷

Several points. One, the political nature of this kind of preparation and the concern that it would look like Albert was doing it for political gain, which was totally counter to what he intended. Second, the beautiful writing of Ted Sorensen. If you want to read a wonderfully written book that you could teach writing with, read Ted Sorensen’s book, *Counselor*.¹⁸ It is an extraordinary, extraordinary piece of writing. That one sentence is just, you know, “ask not what you can do for Carl Albert, ask what you can do for your country,” kind of literature.

The key point in this document is what is stated on page seventeen. I was sitting at this very desk in my office reading through this document, and there are all kinds of things about selecting your Cabinet, about whom you’d keep on, how much you get paid, where you’d live, and all these things. I was saying, “okay, I guess there’s nothing here.” Then on page seventeen, I came to this point: “Other Decisions to be made in the First Week.”¹⁹ I whooped because it was so exciting. Sorensen writes, “[y]ou should have a Vice President soon.”²⁰ Good point. “If as . . . part of your non-partisan approach you want Gerry Ford and that is still appropriate, you could include that in your Statement upon Taking the Oath of Office. If not, you can seek suggestions and discuss possibilities in the series of meetings outlined above.”²¹

Here’s the point. It’s remarkable. Sorensen and Carl Albert encapsulate, in their disagreement, the very issues that we’ve been talking about today.

13. See Letter 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=twenty_fifth_amendment_watergate_era [https://perma.cc/H7YN-RBMX].

14. *Id.*

15. *Id.*

16. See Memorandum from Theodore C. Sorensen to Carl Albert, *supra* note 12, at 1.

17. *Id.*

18. See generally TED SORENSEN, *COUNSELOR: A LIFE AT THE EDGE OF HISTORY* (2008).

19. Memorandum from Theodore C. Sorensen to Carl Albert, *supra* note 12, at 17.

20. *Id.*

21. *Id.* at 17–18.

Sorensen says, “I question whether it is either necessary or desirable to commit yourself to resigning in favor of a Republican Vice President. That would only heighten the impression of political instability in our government.”²² Then he goes on to talk about the Succession Act. “You are the legitimately chosen successor selected by our most representative body under a long-standing plan adopted by the Legislative Branch. This is stressed along with the non-partisan nature of your Administration[,] . . . the Oath-taking Statement, which speaks in terms of your remaining [only] until [January 1977]”²³ Albert was also going to intend to limit his term as this unexpected president.

Some summary comments here. First, there are lessons and there are limits to the Watergate analogy. Albert and Sorensen were good-faith actors. We can’t necessarily assume that in the hyper-partisan world we live in today. Carl Albert’s way of being a patriot was to avoid partisanship. Sorensen’s way of being a patriot was to maintain government stability by adherence to the Succession Act. But partisanship, not by bipartisan patriotism, I think is what we are dealing with today. Hyper partisanship makes party-opposite resignations impossible. Can you imagine Speaker Gingrich or Pelosi ceding the presidency in a Clinton or Trump era? I can’t.

Next point is the irony that even though Carl Albert was a Speaker and was a representative of the legislative branch, he was actually *favoring* the continuity of the party in the executive branch. And Ted Sorensen, who as a creature of the executive branch having worked with President Kennedy and the Kennedy White House, was actually favoring a *legislative* succession under the Succession Act. You can admire them both for stepping out of expected roles in the service of what is perceived as a greater good.

The next point is that dual vacancies are going to be much more likely for biological reasons or malign threats. While we have been meeting, news just came out from the *Washington Post* that Attorney General Merrick Garland and Commerce Secretary Raimondo have both tested positive for COVID, and members of the White House staff have tested positive for COVID, having been all at the Gridiron Dinner on Saturday night.²⁴ The dual-vacancy question is not a hypothetical; the president and vice president could have been exposed. I’m not saying they were, but they could have been in that same ecosystem. This is not a hypothetical.

The next point is malign threats. I happen to have had the honor of serving on the National Academies of Sciences, Engineering and Medicine’s Commission that looked at the Havana Syndrome.²⁵ As we know, there was

22. *Id.* at 18.

23. *Id.*

24. See Paul Farhi, Roxanne Roberts & Yasmeen Abutaleb, *After Gridiron Dinner, a Covid Outbreak Among Washington A-List Guests*, WASH. POST (Apr. 6, 2022, 5:39 PM), <https://www.washingtonpost.com/media/2022/04/06/gridiron-dinner-covid-coronavirus-outbreak-superspreader/> [https://perma.cc/BBG2-ZNNZ].

25. See generally NAT’L ACADS. OF SCIS., ENG’G & MED., AN ASSESSMENT OF ILLNESS IN U.S. GOVERNMENT EMPLOYEES AND THEIR FAMILIES AT OVERSEAS EMBASSIES (David A.

a report that there might have been that same threat at the executive office building (EOB), potentially exposing others on the White House campus who could be in the line of succession.²⁶

The next point is about the *pace* of transitions. During Watergate you have a slow burn. The Sorensen letter was in November 1973. The Nixon resignation was in August 1974, ten months later. Compared to the rapid explosion of problems with a biological or malign threat, you're not going to have time for a future Ted Sorensen to write an elegant nineteen-page memo.

A penultimate point. The odds of a dual vacancy causing a change to a party opposite are quite high given the predominance of divided government between the executive and legislative branches. Given this probability, the switch to the party opposite will likely be contested, and we are going to have partisan litigation about the eligibility of the Speaker as a non-officer to serve in the executive branch. This is going to lead to a tremendous amount of instability during a crisis.

My final point. Bayh and Albert's instinctive worry of the presidency moving to the party opposite is worth heeding. Aristotle would characterize their concerns as *phronesis*: virtuous, practical wisdom. Losing both a president and a vice president is a national trauma. Switching parties would seem to compound that stress, and I think that is something to be avoided. As many of the other scholars have said more eloquently than I have, we need a more responsive and agile process. We need to resolve the eligibility question prospectively. And we need to avoid causing political instability with the risk of party-opposite scenarios by keeping succession in the executive branch so that we don't have a party-opposite scenario.

Relman & Julie A. Pavlin eds., 2020), <https://nap.nationalacademies.org/read/25889/chapter/1> [<https://perma.cc/NR2T-Z2WQ>].

26. See Scott Pelley, *Havana Syndrome: High-Level National Security Officials Stricken with Unexplained Illness on White House Grounds*, CBS NEWS (Feb. 20, 2022, 7:00 PM), <https://www.cbsnews.com/news/havana-syndrome-white-house-cabinet-60-minutes-2022-02-20/> [<https://perma.cc/7FBV-YPD4>].