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PRESIDENTIAL SUCCESSION SCENARIOS IN POPULAR CULTURE AND HISTORY AND THE NEED FOR REFORM

William F. Baker and Beth A. FitzPatrick***

Shelley said “[P]oets are the unacknowledged legislators of the world.”¹ He meant that what ends up as law always begins first in somebody’s imagination. American democracy, still in its adolescence when Shelley wrote, is exemplary of his statement. What began in the collective imagination of a roomful of men at the First Constitutional Convention in Philadelphia in 1787 is now the framework of the most powerful nation on Earth, whose media dominates the imagination of the world and whose weapons can bring destruction to any part of it within minutes. As makers of law, we must be both brave and very careful about what we imagine.

I am neither a poet nor a legislator, but I have spent most of my career around those people in American society who are most responsible for what populates our collective imagination: the creators of television. By looking at the issue of presidential succession through the lens of the popular imagination, we can begin to see what in the nation’s laws needs changing.

Four of our presidents have been assassinated, and at those times succession leapt to the forefront of public discourse, as it is bound to do again. The Twenty-Fifth Amendment and the Presidential Succession Act of 1947 do not cover every succession scenario our government may be forced to enact, and the stability of our republic is at stake if we do not account for this.

This subject was thoughtfully raised by Dean John D. Feerick and an impressive set of expert panelists at Fordham Law School’s Symposium, *The Adequacy of the Presidential Succession System in the 21st Century*. Hopefully, their analyses will prompt our legislators to action. The time to address these issues is now, before the gaps in our existing succession widen into an emergency or even a disaster.

Presidential succession issues are not “hot topics” in the news media. Most complex legal considerations lack the excitement or urgency that puts

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1. Percy Bysshe Shelley, *A Defence of Poetry*, in 27 ENGLISH ESSAYS: SIDNEY TO MACAULAY (1909–14).

certain news stories at the top. So far, the question of succession has not motivated the American public and their representatives to make serious demands that the Twenty-Fifth Amendment be changed. Americans and their government feel they have more pressing matters to worry about. Yet, succession is precisely the sort of issue that our elected representatives should be pursuing. We elect them in part for their ability to focus on those issues that can have a profound effect on our society, but which are not often—or are even incapable of being—at the center of public discourse. The reform of presidential succession laws is just such an issue.

There are many situations where a presidential successor is not clearly defined by either the Constitution or any statute. In its relentless quest for stories, Hollywood has grasped the importance of this issue and has tenaciously used crisis-in-succession scenarios as plot devices in many movies and television shows. However wild Hollywood's scenarios may seem, there is a real possibility that some of them could come about. The power of narrative to illuminate real-world problems and the amount of intellectual firepower that can be found in the creative department of any TV or film production company is not to be underestimated. In the intensely competitive entertainment economy, the search for a good story—one that will engage the imagination of millions of people—can be as ruthless as any political campaign, legislative battle, or academic dispute. The box office and the Nielsen ratings are as decisive as any election, and writers and producers do not have the luxury of academic tenure.

The plot of Stanley Kubrick's 1964 film *Dr. Strangelove* was constructed around actual contingencies in the Pentagon's plans for how the nation would respond to a nuclear emergency. In the film, a deranged air force commander and a gun-slinging air force captain stumble through gaps in the wartime command structure and unleash a nuclear apocalypse.² After *Dr. Strangelove* was made, those gaps in the emergency command structure were closed up. During the Cold War, the number of times the world was incinerated by nuclear weapons on television and in film probably did a great deal to prevent the real thing from happening.

We can hope the same will be true of the existing gaps in the nation's plan for how to respond to a crisis in presidential succession. Many of the movies and television shows that have made plots or subplots out of presidential succession imagine what would happen if the president was killed in a nuclear attack (*Jericho*³ and *By Dawn's Early Light*⁴), a natural disaster (*The Day After Tomorrow*⁵), or even an alien invasion (*Mars Attacks!*⁶). Other common plotlines feature nefarious vice presidents or other officials seizing presidential office by murdering the chief executive or staging a coup d'état to unseat him. All of these scenarios (barring an

2. DR. STRANGLEOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Columbia Pictures 1964).

3. *Jericho* (CBS television series 2006–2008).

4. *BY DAWN'S EARLY LIGHT* (HBO television series 1990).

5. *THE DAY AFTER TOMORROW* (20th Century Fox 2004).

6. *MARS ATTACKS!* (Warner Brothers Pictures 1996).

alien invasion) are possible, and our laws are, for the most part, constructed to provide appropriate solutions.

But there are many recent stories from TV and film that begin where existing law ends. In the closing episodes of the fourth season of the popular television drama, *The West Wing*, fictional President Josiah Bartlet's daughter is kidnapped.⁷ To both provide leadership and neutralize the bargaining power of the kidnapper, Bartlet temporarily relinquishes his presidential powers, invoking Section 3 of the Twenty-Fifth Amendment which states:

[W]henver the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.⁸

But in the fictional world of *The West Wing*, the vice presidency is vacant due to a recent scandal, leaving no vice president to discharge President Bartlet's powers under the Twenty-Fifth Amendment. The episode ends with Speaker of the House Glen Walken becoming President.⁹ The show's writers might have reasoned that the President's personal situation rendered him unable to serve, thereby allowing him to invoke Section 3 of the Twenty-Fifth Amendment; because there was no Vice President to take over as Acting President, the Presidential Succession Act of 1947 would then dictate that the Speaker of the House become President.¹⁰ Some scholars argue, however, that because there was no Vice President to take over, President Bartlet could not have invoked Section 3 of the Twenty-Fifth Amendment, and instead, the succession should have been dictated solely by the Presidential Succession Act of 1947.¹¹

In a later episode, President Bartlet's daughter is rescued from her captors, and he reclaims his powers by notifying congressional leaders as required by Section 3 of the Twenty-Fifth Amendment.¹² Again, constitutional experts argue that, in reality, Bartlet would not have needed to notify Congress, because the Twenty-Fifth Amendment would not have applied to this situation. Instead, he could have resumed his powers under the Presidential Succession Act, which provides that the Speaker of the

7. *The West Wing: Commencement* (NBC television broadcast May 7, 2003).

8. *The West Wing: Twenty Five* (NBC television broadcast May 14, 2003) (quoting U.S. CONST. amend. XXV, § 3).

9. *Id.*

10. "If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President." Presidential Succession Act, 3 U.S.C. § 19(a)(1) (2006).

11. John C. Fortier, *The West Wing and Presidential Succession: Fact or Fiction?*, AM. ENTERPRISE INST. FOR PUB. POL'Y RES. (Sept. 24, 2003), <http://www.aei.org/article/19238>.

12. *The West Wing: The Dogs of War* (NBC television broadcast Oct. 1, 2003).

House shall act as President *only* until the President's disability has been removed.¹³

Still others argue that the Presidential Succession Act would not have governed this situation. According to Tom Rozinski, a political science professor at Touro College, the Succession Act is supposed to be used in situations where there is no President or Vice President—it was not designed as something that a President can voluntarily invoke when he or she feels unable to serve.¹⁴ The first sentence of the Act outlines situations where there is no President—“death, resignation, removal from office, inability, or failure to qualify”—not situations where a President can disqualify himself.¹⁵ The first sentence also mentions inability, but Rozinski argues that inability means physical or mental sickness. The aforementioned *West Wing* episode highlights, but does not address, whether a personal tragedy and conflict of interest issue are sufficient reasons for a President to declare himself unable to fulfill his duties. Bartlet's temporary abdication because of his daughter's kidnapping makes moral sense, but neither the Twenty-Fifth Amendment nor the Succession Act of 1947 clearly defines what “inability” means. This lack of clarity in the Constitution needs to be fixed.

The episodes also beg the question of whether the Speaker should be next in line for the presidency at all. Many have argued that the new President should be of the same party as the former President, so continuity in policy can be preserved.¹⁶ House Speakers are often from the opposing party of the President. Their temporary ability to fill vacancies by wielding the presidential power of appointment, which might even extend to the Office of Vice President, may undermine the intention of the Constitution. On *The West Wing*, Speaker of the House Glen Walken is President Bartlet's ideological opposite. With Walken as Acting President, Bartlet's supporters fear that he will select a new Vice President who is opposed to the President's political philosophy.¹⁷ As discussed before, the situation is avoided when the President reclaims his powers.

Another potential risk of having a House Speaker from the party opposing the President take over as President is that he or she may make policies that run counter to the elected President's wishes. This was a concern raised by some of the characters in *The West Wing*.¹⁸ It was also illustrated in the 2005 television show *Commander in Chief*, in which the fictional President Mackenzie Allen requires emergency surgery. The President temporarily relinquishes her presidential powers by invoking

13. Fortier, *supra* note 11; *see also* 3 U.S.C. § 19(c)(2).

14. Telephone Interview with Tom Rozinski, Assistant Professor, Department of Political Science, Touro College (July 21, 2010).

15. 3 U.S.C. § 19(c)(2).

16. *See* THOMAS H. NEALE, CONG. RESEARCH SERV., RL 31761, PRESIDENTIAL SUCCESSION: AN OVERVIEW WITH ANALYSIS OF LEGISLATION PROPOSED IN THE 109th CONGRESS 9 (June 29, 2005).

17. *The West Wing: 7A WF 83429* (NBC television broadcast Sept. 24, 2003).

18. *West Wing: Twenty Five* (NBC television broadcast May 14, 2003).

Section 3 of the Twenty-Fifth Amendment.¹⁹ Here, as in *The West Wing* episode, there is no Vice President (the show's fictional Vice President having resigned in an earlier episode), so Speaker of the House Nathan Templeton should have become Acting President under the Presidential Succession Act of 1947, not the Twenty-Fifth Amendment.

As Acting President, Templeton uses his one day in office to force an end to an airline labor strike, something the President never would have done. His actions are hardly surprising because he is from a different party, does not share President Allen's political philosophy, and has opposed her actions on other matters in the past. Templeton is also planning to run against her in the next presidential election.²⁰ This episode prompts the question: should the Succession Law be changed so that a member of the President's Cabinet, who shares the same ideology as the President, is next in line? The counterargument to this is that the Speaker's position as an elected official makes him or her a more democratic choice than any unelected Cabinet member.

Thankfully, the plotlines of *The West Wing* and *Commander-in-Chief* have not happened in reality, however they highlight problems with our laws which should be addressed. On the other hand, one might argue that the United States has encountered real succession issues throughout its history where there was no clear answer, and the nation has survived them. Nine times in American history, the public has seen a new President ascend to power rather than be elected to it.

The vague language of the Constitution regarding presidential succession was tested when William Henry Harrison died on April 2, 1841 and John Tyler assumed the presidency. Harrison was in office only a month—the shortest presidential tenure of record. Tyler quickly declared himself President, thereby establishing the precedent that upon the death of the President, the Vice President becomes President, not merely Acting President.²¹ Some had interpreted the Constitution as saying that the Vice President was only to become Acting President.²² It was not clear to many whether “the same” meant that merely the powers and duties of the presidency would devolve on the Vice President, or whether the office, along with its powers and duties, would devolve. However, Tyler remained resolute, arguing that the intent of the framers was that the Vice President would assume the title of President. His decisiveness and swift assumption of power provided stability to the country and avoided “the possibility of factious and violent disputes about the legitimacy of succession.”²³ Tyler's

19. *Commander in Chief: The Elephant in the Room* (ABC television broadcast May 31, 2006).

20. *Id.*

21. ROBERT SEAGER II, AND TYLER TOO: A BIOGRAPHY OF JOHN AND JULIA GARDINER TYLER 148–49 (1963).

22. Article II, Section I of the Constitution reads, “In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President.” U.S. CONST. art. II, § 1, cl. 6.

23. EDWARD P. CRAPOL, JOHN TYLER: THE ACCIDENTAL PRESIDENT 27 (2006).

goal was to show the nation and the world that America's constitutional procedures for transfer of power worked.²⁴

Although Tyler was confirmed as President by Congress without significant disagreement, there were many objectors to Tyler's ascension to power.²⁵ Some members of Congress viewed him as merely a surrogate, and former Presidents from opposing parties declared their objections.²⁶ Andrew Jackson called Tyler "an imbecile in the Executive Chair" and John Quincy Adams called him unfit because he had "all the . . . vices of slavery rooted in his moral and political constitution."²⁷ Throughout Tyler's presidency, many fought against what they saw as an unlawful seizure of power, and even employed the phrase "His Accidency" to undermine Tyler's authority.²⁸

Our country has also encountered situations where we did not have a fully functional President. On July 2, 1881, James A. Garfield was shot at the Baltimore & Potomac Railway station in Washington, D.C. But it was not until over two months later, in September, that he died. Garfield had lucid moments during his convalescence, but his condition varied; by modern standards, in a world of hair-trigger national security decisions and global risk, many might have considered somebody with his injuries unfit to be President.²⁹ At the time, the nation had never faced a situation where a President might be unable to "discharge the Powers and Duties of the said Office."³⁰ It was suggested by Garfield's Secretary of State, James G. Blaine, that the Cabinet declare Vice President Chester A. Arthur Acting President.³¹ When asked for his opinion on Blaine's proposal, Arthur refused to discuss it;³² he had never wanted to be President and the thought of assuming the office overwhelmed him.³³ Arthur turned down the offer, not wanting to look like he was grabbing power.³⁴ Arthur and Garfield were from rival factions of the Republican Party, and Arthur made it clear that he disliked Garfield.³⁵ In reality, the thought of becoming President overwhelmed Arthur, which was most likely the reason that he turned down the offer.³⁶ Fortunately, Congress was not in session during the summer of

24. *Id.* at 16.

25. OLIVER PERRY CHITWOOD, JOHN TYLER, CHAMPION OF THE OLD SOUTH 206 (2006).

26. *Id.* at 205-07.

27. GARY MAY, JOHN TYLER 5 (2008).

28. MARK K. UPDEGROVE, BAPTISM BY FIRE: EIGHT PRESIDENTS WHO TOOK OFFICE IN TIMES OF CRISIS 86 (2008).

29. IRA RUTKOW, JAMES A. GARFIELD 121 (2006).

30. U.S. CONST. art. II, § 1, cl. 6.

31. ALLAN PESKIN, GARFIELD: A BIOGRAPHY 604 (1978).

32. KENNETH D. ACKERMAN, DARK HORSE: THE SURPRISE ELECTION AND POLITICAL MURDER OF PRESIDENT JAMES A. GARFIELD 430 (2003).

33. *See* THOMAS C. REEVES, GENTLEMAN BOSS: THE LIFE OF CHESTER ALAN ARTHUR 242 (1975).

34. *See* PESKIN, *supra* note 31, at 604.

35. *Id.* at 599.

36. REEVES, *supra* note 33, at 242.

1881, so there was little for Garfield to do. Americans were surprised at “how smoothly [the nation] could run . . . without a president.”³⁷

As Garfield’s condition deteriorated, it became apparent that Arthur would become President, and many people were apprehensive to have him in the nation’s highest office.³⁸ Arthur had lost favor with the public in the months leading up to the assassination attempt against Garfield as a result of his opposition to Garfield and alignment with one of Garfield’s political rivals, Senator Roscoe Conkling, on many issues.³⁹ It appeared to many that Arthur was acting as Conkling’s Vice President, not Garfield’s, and had abused his office.⁴⁰ *The New York Times* declared Arthur unfit to assume the presidency.⁴¹ However, on September 22, Garfield died and Arthur took the oath of office without much protest from either himself or the American public.⁴² Arthur’s respect for Garfield during his convalescence and his genuine sadness over Garfield’s death had convinced the public and the press that Arthur was not scheming with Conkling to knock Garfield out of power.⁴³ *The New York Times* gave Arthur the benefit of the doubt and, reversing course, published several articles that affirmed Arthur as a virtuous man who was fit to assume the presidency.⁴⁴

In the age of the twenty-four hour news cycle and its periodic obsessions, such situations might cause more of a reaction. The attempted assassination of President Ronald W. Reagan is one example. When President Reagan was shot in 1981, Vice President George H.W. Bush was in the air and out of contact. While Reagan was lying on an operating table, the assistant press secretary was holding a nationally televised press conference at the White House. When press members asked who was running the government while President Reagan was undergoing surgery, the press secretary said, “I cannot answer that question at this time.” The press was shocked.⁴⁵ In an attempt to defuse the situation, Secretary of State Alexander M. Haig, Jr. rushed into the press room and announced that, constitutionally, he was next in line after the Vice President, and because the Vice President was out of contact, he was in charge. Haig’s comments only worsened the situation, demonstrating Haig’s lack of constitutional knowledge; in reality, the Speaker of the House would have been next in line. Haig meant that he was in charge of the White House until Bush returned; however, his poor choice of words caused many to think he was trying to usurp power.⁴⁶

37. PESKIN, *supra* note 31, at 603.

38. ZACHARY KARABELL, CHESTER ALAN ARTHUR 62 (2004).

39. See PESKIN, *supra* note 31, at 599; REEVES, *supra* note 33, at 414.

40. KARABELL, *supra* note 38, at 58.

41. *Id.* at 63.

42. See generally PESKIN, *supra* note 31, at 603–08.

43. ACKERMAN, *supra* note 32, at 430–31; REEVES *supra* note 33, at 242.

44. ACKERMAN, *supra* note 32, at 430.

45. STEVEN F. HAYWARD, THE AGE OF REAGAN: THE CONSERVATIVE COUNTERREVOLUTION 1980–1989, at 138–39 (2009).

46. Norman Ornstein, *It’s Armageddon: Who’s In Charge Here?*, FORTUNE, Feb. 9, 2004, available at http://money.cnn.com/magazines/fortune/fortune_archive/2004/02/09/360087/index.htm.

The White House's reaction to the crisis situation was hardly reassuring. According to Senator Birch Bayh, author of the Twenty-Fifth Amendment, the Amendment should have been invoked.⁴⁷ Section 3 of the Amendment states that in the event that the President cannot discharge his powers and duties, the Vice President shall assume those powers (provided that certain procedural requirements are met).⁴⁸ The amendment was passed in 1967 and had not been invoked up to that time, possibly explaining the Cabinet's reluctance to do so.⁴⁹ In addition, Reagan had only held office for two months at the time of the shooting. As Senator Bayh noted, "[i]ncoming administrations are usually not ready for a crisis."⁵⁰ In times of crisis, however, there is no time for reluctance or unpreparedness. The transfer of power should be seamless. The response to Reagan's assassination attempt demonstrated that the procedural aspects of the Twenty-Fifth Amendment need improvement.

As we saw with the Reagan assassination attempt, the nation understandably reacted violently to even the perceived possibility of anybody unlawfully seizing power. An alarmed public, sufficiently goaded by continuous and sensationalized media coverage, would likely exacerbate the potential harm of any ongoing crisis, especially a domestic one.

Imagine, for example, if George W. Bush had been incapacitated, or had had any reason, even a minor one, to relinquish his presidential powers during the initial financial collapse in September of 2008, or in the afternoon and evening of September 11, 2001. We cannot go on hoping that any arising ambiguity in presidential succession will not coincide with a sensitive domestic or international crisis. Just because the Framers of the Constitution did not foresee globalized security risks or instantaneous twenty-four hour news does not mean we should not begin to make provisions in our laws for their effects. The Framers, in an immense leap of imagination, designed a political system that could be changed. I hope our lawmakers have the courage to follow in that tradition, and to follow the paths of inquiry blazed by the creators of our popular entertainment.

47. Birch Bayh, *The White House Safety Net*, N.Y. TIMES, Apr. 8, 1995, available at <http://www.nytimes.com/1995/04/08/opinion/the-white-house-safety-net.html>.

48. See U.S. CONST. amend. XXV, § 3.

49. HAYWARD, *supra* note 45, at 140.

50. Bayh, *supra* note 47.