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| |  | | --- | |  |  |  |  |  |  | | --- | --- | --- | --- | | Howard M. Wasserman  is Assistant Professor of Law at FIU College of Law. He has written and spoken on the processes of presidential selection and succession.   |  | | --- | | **Read other reviews:**  [Official site](http://www.nbc.com/The_West_Wing/)  [Internet Movie Database](http://www.us.imdb.com/title/tt0200276/)  [All Movie Guide](http://www.allmovie.com/cg/avg.dll?p=avg&sql=1:181326)  [Readers' comments](http://docs.google.com/user_feedback.htm) |       The vice presidency remains a unique constitutional position, both because of the Vice President's role as adviser (particularly more recently) and immediate executive successor | |  | | --- | | ***The* *West Wing* and Presidential Succession**  by Howard M. Wasserman  The television program *The West Wing* followed the staff and administration of President Josiah Bartlet, a popular two-term liberal-Democratic president that real Democrats only dream about-imagine a President with Bill Clinton's political skills, Michael Dukakis' policy goals, Jimmy Carter's commitment to monogamy, and Daniel Patrick Moynihan's intellect. The show ended its seven-year run in May 2006 with the close of the Bartlet Administration and the start of the succeeding administration of Democrat Matthew Santos.  *The West Wing* had a long-standing constitutional interest, for no apparent reason, with the rules and procedures for presidential selection and succession. Over seven seasons depicting one two-term presidency (and the start of the succeeding administration), the show presented to a popular audience many of the obvious (and not-so-obvious) contingencies of succession at the top of the executive branch. Consider the following.  **Temporary Presidential Disability**  In the cliffhanger from the first to the second season, President Bartlet is wounded in an assassination attempt and is rushed into surgery and placed under general anesthesia. At that moment, the expectation (as has occurred on several real-life occasions) is that the Vice President becomes "acting president" and temporarily assumes the powers and duties of the presidency until the President awakens and is able to discharge his office.  Unfortunately, that formal transfer never occurred. Under § 3 of the Twenty-fifth Amendment, the President must transmit a written declaration to the Speaker of the House of Representatives and the President pro tempore of the Senate stating that he is unable to discharge his powers. But Bartlet never signed any letter prior to being placed under anesthesia. This is understandable, perhaps, as he had just been shot and was being rushed into emergency surgery - it does not leave time (or inclination) to draft a letter to Congress, a point Bartlet's staffers make.  Thus, as a constitutional matter, the executive power never transferred to Vice President John Hoynes. There was a constitutional power vacuum - the executive power remained vested in a wounded and unconscious person. Vice President Hoynes was nominally and presumptively in charge, although he had no actual authority. There also was talk of the unique role that the Secretary of Defense as the "principle assistant" to the President on matters of national security, with the suggestion that the Secretary should wield increased power in the vacuum. Ultimately, everyone - the VP, the National Security Adviser, the Joint Chiefs - looked for guidance to Chief of Staff Leo McGarry, who, it was pointed out, no one voted for.  The power vacuum and who was in charge or not in charge became a subject of continued controversy in later episodes. And it reflected the genuine confusion that surrounded actual assassination attempts, such as the 1981 shooting of President Reagan. But that vacuum was not inevitable (or even likely) under the circumstances. Under § 4 of the Twenty-fifth Amendment, the Vice President and a majority of the cabinet may provide that written notice of the President's temporary disability, devolving power to the Vice President. Once President Bartlet was under anesthesia and his staff had recognized that a proper § 3 transfer had not occurred, Vice President Hoynes and the cabinet would have met and declared Bartlet unable to discharge his duties because under anesthesia, allowing Hoynes formally to assume the executive power.  Of course, that creates less compelling drama than a power vacuum.  **Vice Presidential Resignation**  Toward the end of season four, soon after Bartlet's re-election to a second term, Vice President Hoynes resigned amid revelations of an extra-marital affair and his paramour's plan to write a book revealing confidential information that Hoynes shared as pillow talk. The primary purpose of the Twenty-fifth Amendment, enacted just a few years after the assassination of President Kennedy, was to address the real (and historically regular) occurrence of vice-presidential vacancies. Section Two gives the President the power to nominate a new Vice President, with confirmation by a majority of both houses of Congress.  President Bartlet wanted to nominate his Secretary of State, but faced opposition from Republican House leadership (Bartlet confronted a Republican-controlled Congress throughout his presidency), which threatened a confirmation fight against the Secretary and several other of Bartlet's preferred choices for the position. The Speaker pushed Bartlet to name a Vice President who was more politically acceptable to House Republications - a conservative Democrat named "Bingo" Bob Russell, who had a reputation for being very cozy with big industry, not very bright or experienced, and more conservative than Bartlet. Bartlet accepted Russell in order to avoid a fight; Russell was confirmed easily. But being out of step with (and not respected by) the administration politically, he was isolated and ignored. Indeed, Bartlet refused to endorse or support Russell when the latter used his new position to launch a bid for the Democratic presidential nomination during the show's sixth season.  It is not clear how realistic such political bargaining would be over a vice presidential nominee. Obviously our actual experience with vice-presidential appointments is limited to President Nixon's appointment of Gerald Ford in 1973 and Ford's appointment of Nelson Rockefeller in 1974. Congressional Democrats did not attempt to affect either choice, perhaps recognizing that the President must have the leeway to select a Vice President with whom he is personally and/or politically comfortable. We would hope that the legislative opposition would not demand that its preference supersede the President's. The vice presidency remains a unique constitutional position, both because of the Vice President's role as adviser (particularly more recently) and immediate executive successor. We should hope that Congress does not attempt to create a situation in which politics or policy would change in the event the President dies or becomes disabled.  But political gamesmanship with a vice presidential nominee is not out of the question, just of a different form. House Democrats delayed Rockefeller's confirmation for five months, not hoping to affect the choice, but simply to keep the vice presidency vacant and thus to keep Democratic Speaker Carl Albert next in the line of statutory succession (see below). One also might expect congressional leaders of one party to resist a nominee who could be a serious future presidential candidate-knowing that candidate would have an advantage running four years hence as a sitting Vice President.  **Temporary Disability and Statutory Succession**  Immediately after Vice President Hoynes resigned (but before Bartlet could nominate a replacement), terrorists kidnapped Zoe Bartlet, the President's youngest daughter. Feeling more panicked father than leader of the free world, Bartlet invoked the Twenty-fifth Amendment and again declared himself temporarily unable to discharge his duties. This time, he was able to write and sign the § 3 letter to the Speaker and President pro tem.  Unfortunately, there was no Vice President to act as president under the Twenty-fifth Amendment. Bartlet's action thus triggered not constitutional succession, but the statutory provisions of 3 U.S.C § 19 for succession below the Vice President. Under the current statute, the executive power devolved to Speaker of the House Glenallen Walken, a hawkish conservative Southern Republican.  The drama then focused on how Walken would wield his temporary powers and how a White House staff of Democrats loyal to Bartlet would interact with the new man in the Oval Office. Leo McGarry sat in on Walken's policy and strategy meetings, but found his counsel far less welcome or followed. Walken also began talking about implementing substantive policies-military and domestic-at odds with the agenda of Bartlet and his administration. This led to a confrontation between Josh Lyman, Bartlet's Deputy Chief of Staff, and a Walken staffer about Walken using the situation for political and partisan advantage, with the Walken staffer accusing Lyman of holding a "craven" view of politics.  Zoe Bartlet was found after 72 hours, after which the President unilaterally reassumed the executive power by sending a second letter to the Speaker and President pro tem declaring that he was once again able to discharge his duties.  Many legal commentators, including me, have argued that having legislative leaders at the head of the statutory line of executive succession is unconstitutional, unwise, or both. The scenario depicted on *The West Wing* demonstrates why.  Because members of Congress are prohibited from serving in the Executive Branch, Walken resigned the Speakership and his House seat in order to become acting president for a brief period. After three days of minding the store, Walken did not return to Congress. He became a private citizen, out of public service - the reward for his stepping into the breach in a national emergency.  On the other hand, the President was replaced (however briefly) by his chief political rival, with a different agenda and the opportunity (and perhaps desire) to pursue that agenda for political advantage. If nothing else, the show depicted the strange and unworkable situation created by an acting president in the Oval Office surrounded by West Wing staff not inclined to help him carry out any agenda and on whom he is not inclined to depend. And there is the genuine risk that someone would use the opportunity for partisan gain, especially if in office longer than 72 hours. Perhaps this fear is craven - but politics occasionally are.  The myriad problems with legislative succession contrast with the relative smoothness of the alternative-succession by the cabinet officers who already were helping the President wield executive power, historically beginning with the Secretary of State. On *The West Wing*, that means the acting president would have been the very person Bartlet was hoping to make Vice President.  **Replacing a Vice President-"Elect"**  Appropriately, the series ended with one final foray into executive succession - replacing a candidate for executive office who dies prior to Inauguration. The dramatic move became necessary with the December 2005 death of actor John Spencer, who played Leo McGarry.  During the final season, McGarry was the Democratic nominee for Vice President, the experienced veteran providing the younger Santos with gravitas. McGarry suffered a heart attack and dies on Election Night, several hours before polls close on the West Coast and ten hours before Santos was declared the winner of the popular votes in states totaling 272 electoral votes, enough to give him the presidency.  Of course, formally it is the votes of electors in the Electoral College and the acceptance of those College votes by Congress that chooses the President and Vice President. That process takes approximately two months beyond Election Day.  The question was how Santos and the Democratic Party would and should select McGarry's replacement as Vice President. The procedure for doing this in fact involves a complex and uncertain interaction of several federal constitutional provisions, federal statutes, and state laws, and independent actions by the states, the two major political parties, the Electoral College, and Congress. As recently as 1994, the Senate Judiciary Committee held hearings to clarify how the law should handle the death of a presidential (or vice presidential) candidate prior to Inauguration.  Santos argued that it would be patently undemocratic for him or the Democratic Party to instruct Democratic electors to vote for a new candidate or to have unnamed and unknown electors select a Vice President who never stood before the American people for democratic consideration. This reflects a very modern view of the Electoral College-its original design entailed independent electors with discretion to select the best people for the jobs of President and Vice President, without regard to the public will.  Instead, Santos waited until after Inauguration to do anything. On January 20, McGarry would not "qualify" for his vice presidential office under the Twentieth Amendment to the Constitution, because of death, creating a vacancy in the Vice Presidency. Santos then would nominate a replacement under the Twenty-fifth Amendment, who would be subject to approval by both houses of Congress.  This is one (the writers suggest only) democratically legitimate way to find a new Vice President. The series ended following the inauguration ceremony with the understanding that this is what would happen.  But, in truth, a great deal must have occurred (or not occur) behind the scenes under federal and state law to allow the process to play out this way. Any change in the underlying process might produce a very different outcome - Democratic President Santos with Republican Vice President Ray Sullivan, who had been the GOP candidate for Vice President. Sullivan was a conservative Republican and darling of the religious right.  First, Santos and the Democratic Party must have declined to place a new vice presidential candidate to replace McGarry before the Electoral College, which they did on the stated belief that naming a substitute would be undemocratic. But, in fact, both national parties retain the power to name a new nominee in this circumstance and to instruct or urge electors committed to their ticket to cast votes for the substitute. This happened in 1912, when James Sherman, President William Howard Taft's running mate, died just before Election Day and the Republican Party urged its electors to vote for Nicholas Butler (of course, the Republicans received only eight electoral votes in that year's three-way race, thus the electors were not choosing the person who would become Vice President).  Such a switch may have been impossible, however, for electors from states with "faithless elector laws," laws purporting to bind presidential electors to vote a certain way in the College. Some laws require an elector to vote either for the winner of the state's popular election or for the person named as the party's candidate in the general election. Either type would compel those electors to vote for McGarry.  The problem arises if those bound electors still cast votes for McGarry, but other Democratic-committed electors vote for the DNC's new choice. This would deprive any candidate of a majority in the Electoral College. The vice presidential election would be thrown into the Republican-controlled Senate, which, under the Twelfth Amendment, would choose between the two top vote-getters in the Electoral College (likely Republican Sullivan and the DNC's substitute). The Senate majority may have been tempted to select Sullivan simply because it had the votes.  Second, in the absence of a DNC-designated replacement, Democrat-committed electors all must have cast their College votes for McGarry, even though he was dead, rather than for some other candidate. If, in the confusion, as few as three electors failed to vote for McGarry, denying him a majority, the election again would have been thrown to the Senate, with the same possible outcome.  Third, if all Democratic electors voted for McGarry, Congress must have accepted and counted those votes even though he was dead. There is precedent for Congress not recognizing such votes-in 1872, Congress declined to accept three electoral votes cast for presidential candidate Horace Greeley, who had died between Election Day and the meeting of the Electoral College. Had a majority in Congress disregarded McGarry votes, the VP election again would have gone to the Senate. Moreover, in this circumstance, the Senate's only choice would have been the Republican, Sullivan; because he was the only candidate to receive valid votes in the Electoral College (McGarry's votes having been rejected by Congress), his would be the only name submitted to the Senate contingency election.  **A Final Note**  For seven years, *The West Wing* successfully dramatized, for popular consumption, the vagaries and defects in our structural constitutional schemes, defects that otherwise come to light only amid real-life tragedy. Beyond the quality of the show (it earned four Emmy Awards for Best Drama and 25 Emmies in all), it will be missed as a vehicle for popular understanding of, and perhaps real political change in, the uncertain and problematic processes of presidential selection and succession.  Posted May 19, 2006 |   **Would you like to comment on this article? 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