BRIAN C. KALT

Constitutional Cliffhangers

A Legal Guide for Presidents and Their Enemies

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CONSTITUTIONAL CLIFFHANGERS

For Benjamin and Jonathan

PREFACE

Soon after I started writing this manuscript, I attended a reception for a prominent legal scholar. I was lucky enough to speak with him, and at one point the conversation turned to my work. I was about fifteen seconds into a description of an issue I was working on when he asked, with mild revulsion, "Why are you writing about that?"

This book deals with a lot of issues of that ilk: weird twists of constitutional law that might seem unlikely to occur. In short, I am regarded by some of my colleagues as, to quote Leo Rosten in *The Joys of Yiddish*, "the kind who worries whether a flea has a *pupik* [navel]."

But I do think that at least one of the six scenarios in this book—or something very similar—will come to pass someday. I also believe that if anything like them does happen, the fact that people thought and wrote about such things beforehand will help to raise the tone of the public debate. (To be useful on such an occasion, I have provided a thicker-than-usual layer of citations and discussion in the endnotes, which I have consolidated into no more than one per paragraph in the main text.) More broadly, I think it is worth pondering why these sorts of pitfalls arise, how to fix them, and why we often *don't* fix them.

Aside from all this, these scenarios are just very compelling. In addition to their superb dramatic possibilities, they provide an opportunity to think

about important and interesting general topics, like presidential immunities, pardons, constitutional procedures, presidential succession, impeachment, term limits, presidential history, constitutional interpretation, and presidential power in general.

So that is why I am writing about this.

ACKNOWLEDGMENTS

Portions of this book have previously appeared in print as law-review articles. Some have been edited, updated, and paraphrased; parts have been used verbatim, without direct quotation or citation. Specifically, Chapter 1 draws heavily upon Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 Nexus 11 (1997) (with Professor Amar's gracious permission); Chapter 2 on Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 Yale L.J. 779 (1996); and Chapter 5 on Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 Tex. Rev. L. & Pol. 13 (2001).

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CONTENTS

Introduction

Electing, punishing, and replacing presidents can get tense. Ideally, the constitutional rules would be clear on such occasions, but often they are not. This book examines six presidential constitutional cliffhangers: scenarios in which the fate of the president or presidency is in doubt as politicians, courts, and the people argue over the proper interpretation of the Constitution.

The scenarios covered in Chapters 1 through 6, respectively, are:

1. a president is criminally prosecuted;
2. a president pardons himself;
3. cabinet members try to oust an allegedly "disabled" president, who in turn tries to oust them;
4. with the president and vice president dead, the secretary of state and the Speaker of the House fight for control of the presidency;
5. an ex-president is impeached; and
6. a two-term president attempts to stay in power.

As the title indicates, this book is mainly a legal guide to navigating these six scenarios should they ever occur. In the process, though, these six discussions shed light on how law and politics combine to settle cliffhangers, how the constitutional weak spots that produce cliffhangers can be patched up, why such repairs are nevertheless rare, and how best to prevent these weak

spots from forming in the first place. Rather than clutter up the individual legal guides with all this, these insights are distilled and collected in Chapter 7.

First, though, there is an obvious underlying question: why worry about a bunch of odd things that seem so unlikely? One reason is that they let us think more generally about interesting constitutional issues, like immunity, pardons, disability, succession, impeachment, and term limits. The rest of this introduction will offer a more direct reason—that cliffhangers do happen—and will consider what causes these constitutional gaps to arise and persist.

It'll Never Happen (Until It Does)

None of the six scenarios in this book has ever happened. That is why they are in the book—they are unprecedented, so they present legal uncertainty. But constitutional cliffhangers arise all the time; these are just six that have not arisen yet. Indeed, Scenarios 1 and 2 have "happened" recently in one sense of the word: prosecutors have considered prosecuting presidents and have had to analyze presidential immunity, and at least one president considered pardoning himself and had his lawyers look into it. Scenarios 5 and 6 have happened in another sense of the word: officials other than the president have been impeached after leaving office, and leaders other than the president have used loopholes to subvert term limits. Moreover, all six of the scenarios have been recognized and seriously discussed at the highest levels of power. This book is not about idle chatter.

As Nassim Nicholas Taleb has memorably explained, humans tend to underestimate the likelihood of rare but momentous events, which he calls "Black Swans." When Black Swans occur, we may write them off as flukes, or we may abuse hindsight and say that the risk was obvious. Either way, we keep underestimating the chances of new Black Swans.[1]

American constitutional history is full of such unexpected debacles and near misses; to say otherwise "require[s] a quite remarkable exercise of historical amnesia." Some of these incidents arose out of ambiguous constitutional provisions—what I call cliffhangers. In other cases, the constitutional rules were crystal clear but not very good, and led to

chaos.* In all cases, some people warned about the problems in advance, but the rest of the country was content to ignore them. As an example, consider our most contentious presidential election.[2]

The whole election turned on a few hundred disputed votes in Florida. There had been ultra-close presidential elections before, and there had been ambiguous results in individual states before; it was only a matter of time before both happened at the same time. Unfortunately, no steps had been taken to prevent it.

The problem was that there were no rules for resolving a dispute like this. The quintessential American mixture of politics and litigation filled the void. The Republicans fought to defend their initial lead; the Democrats fought to open things back up and recount the votes. The Republicans controlled key posts in the state government; the Democrats won key victories in Florida state court. The Republicans took their case to Washington, D.C., where Republican-appointed Supreme Court justices declared that there was no time for recounts, handing the election to the Republicans. And so, in 1877, Rutherford B. Hayes became our nineteenth president.[3]

You might recall some similar things that happened in 2000. The underlying quandary—an electoral system in which it is easy for the margin of error to greatly exceed the margin of victory—was no secret before 1876, let alone in 2000. And yet it dangled out there unsolved, waiting to snag both elections. For the most part, it dangles still.

The all-time weightiest (albeit non-presidential) cliffhanger should have been even less surprising. Before 1861, it was unclear whether states could secede from the Union. Different Americans interpreted the Constitution

* The term "constitutional crisis" is often overused to refer to political crises, or to heated disagreements about the Constitution, that are resolved through our normal constitutional processes. *See generally* Sanford Levinson & Jack Balkin, *Constitutional Crises*, 157 U. Pa. L. Rev. 707 (2009); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 Wm. & Mary L. Rev. 2093 (2002). I agree with the Levinson-Balkin definition of a constitutional crisis as one that represents a threat to civil order. *See* Levinson & Balkin, *supra*, at 742. Levinson and Balkin distinguish among three types of crises in which the Constitution is (1) baldly ignored, (2) followed assiduously in a way that is disastrous, or (3) the subject of a disagreement that escalates into potential violence or force. The situations described in my Chapters 3 and 4 would represent Type 3 crises; those in Chapters 1 and 6 might be Type 1 or 2, depending on which side you're on. *Cf. id.* at 729 n.88 (saying that *lack* of controversy over term limits could cause a Type 2 crisis).

differently, but people mainly just watched as tensions rose. After one side put its theory into practice, the country divided into armed camps and settled this legal dispute on the battlefield. The Civil War killed hundreds of thousands of people, largely because of an ambiguity in the Constitution that we couldn't find another way to resolve.

Returning to the presidency, here are some highlights from the list of predicaments and close calls:

- In 1800, the original clunky system for electing presidents produced a tie between Thomas Jefferson and his running mate, Aaron Burr, throwing the election into the House of Representatives. The House deadlocked as some mischievous members—anti-Jeffersonian lame ducks—flirted with selecting Burr until, after seven days and thirty-six ballots, enough of them relented.
- In 1841, President William Henry Harrison died. Vice President Tyler declared himself president; others strongly insisted Tyler was only acting president. The Constitution was ambiguous on the point, but Tyler's view eventually prevailed. This established a precedent that, as a side effect, made it constitutionally awkward for vice presidents to take power *temporarily* when presidents were disabled. This left the country without a functioning presidency on multiple occasions, including several months in 1881 (while the mortally wounded President Garfield lingered) and 1919 (when President Wilson was completely incapacitated by a stroke).
- In 1872, presidential candidate Horace Greeley died between Election Day and the meeting of the electoral college. Some electoral-college members voted for the dead Greeley, while others scattered their votes among four alternative Democrats. Luckily, Greeley had lost to Ulysses Grant on Election Day. Had he won, the presidency could have been left up in the air.
- In 1881, when President Garfield died and President Arthur took office, there was nobody in the line of succession for weeks. Four years later, it happened again, when Vice President Hendricks died and left President Cleveland with no backup. Had either Arthur or Cleveland died, there would have been no president for a while.

- In 1933, an assassin shot at President-Elect Franklin Roosevelt. He missed and instead killed Chicago mayor Anton Cermak, who was standing next to Roosevelt. While logic suggests that Vice President Elect Garner would have been inaugurated as president if Roosevelt had been killed, the original Constitution was unclear; the Republicans could have seized upon this ambiguity and called for a new election. But there was double luck. Not only had the assassin missed Roosevelt, but the Twentieth Amendment had been ratified three weeks earlier. It filled the constitutional gap and specified that Garner would have been inaugurated.
- Finally, a more recent example. In 2008, controversy swirled over the circumstances of the births of both presidential candidates, and whether they were "natural born citizens" as required by the Constitution. Republican nominee John McCain's birth in the Panama Canal Zone presented a thorny enough legal question that the Senate felt the need to pass a resolution on the matter. Meanwhile, Democratic nominee Barack Obama faced conspiracy theories about the circumstances and documents surrounding his birth. Had the situations been different—had the cases against McCain or Obama been stronger, or had the election been close—things quickly could have gotten messy.[4]

There are *many more* potential cliffhangers out there than just the six in this book. Viewed individually, each one may seem unlikely to flare up. Viewed collectively, though, the odds are good that something will happen, just as it has (or almost has) so many times before. This is worth worrying about.[5]

How Does This Happen?

Writing constitutions is hard. To write a perfect one, drafters would have to imagine every contingency that could arise over the next few centuries, agree on the best way to handle each one, draft airtight legal language, end up with a document that is not too complex to be ratified, and ensure that future generations understand both exactly what it says and exactly what it

means. Each step in that process provides an opportunity for imperfection, and thus for constitutional cliffhangers.

Most people think of the Constitution—and battles over it—in the context of governmental powers and individual rights. In these areas, the Constitution is "short and vague," as Talleyrand reputedly said constitutions should be, using indefinite terms like "executive power," "due process," and "unreasonable search and seizure." But the Constitution is not just a flexible framework of powers and rights; it also sets out the nuts and bolts of constitutional structures and procedures. Here, brevity and vagueness (as well as sloppiness and miscalculation) can be dangerous weaknesses. It is no coincidence that the Constitution's original provisions for electing the president were longer than its provisions defining presidential power, nor is it a coincidence that after the election of 1800 mentioned previously, the original election provisions had to be scrapped and replaced with an even longer version.[6]

For the most part, the Constitution's structural and procedural provisions are clear and precise. To be elected president, for instance, a candidate must receive an electoral-college "majority," not just a "reasonable number" of electoral votes. But there is pressure for these provisions to have other, contradictory characteristics. For instance, these provisions ideally cover as many foreseeable situations as possible—witness the super-long election provisions in the last paragraph—which can cause confusing complexity, and which increases the number of places where problems can creep in. Another example is that while certainty is helpful, some situations—take presidential disability, for instance—call for case-by-case flexibility, and thus for "short and vague" formulations. On top of everything else, these provisions must be politically feasible. Thus, constitutional drafters cannot be perfect. The Constitution does not and cannot provide conciseness and completeness, certainty and flexibility, perfection and popularity, all at the same time.[7]

The Twenty-Second Amendment offers a good example of how these conflicting goals can produce a potential cliffhanger. The amendment's drafters wanted to send presidents home after two terms. As they debated how to count partial terms toward the limit, Senator Warren Magnuson persuaded them to sweep all complications aside and instead use simple,

straightforward language. Unfortunately, as detailed in Chapter 6, his simple, straightforward language created a loophole that a determined president and a sympathetic electorate could exploit to evade term limits. Adding insult to injury, Congress proceeded to re-clutter up Magnuson's language anyway.

It's like telling a child in the backseat to stop touching his brother, a simple and straightforward command. Everyone knows what comes next, though: the motivated boy will stick his finger as close to his brother's face as he can without touching it. Modifying the command ("Don't annoy your brother!") seems to address that loophole, but it sacrifices clarity—it's too subjective to be effective if, as is likely, the child is still motivated enough. Now consider the considerably more powerful enticement that is the White House. During a conflict over control of the presidency, you can imagine how strong the incentives are to zero in on any potentially useful weak spot in the rules. And weak spots are inevitable whenever one drafts legal language, let alone language for a constitution that is supposed to be concise and accessible.[8]

Another problem is that when a constitution is still in effect hundreds of years after its drafting, some of the drafters' underlying assumptions and common understandings will have faded away. Chapter 2, for example, deals with the Constitution's failure to specify whether presidents can pardon themselves. There is a strong argument that the Constitution's Framers thought that it literally went without saying that presidents cannot pardon themselves. Similarly, Chapter 5 deals with impeaching ex-presidents; there is a strong argument that the Framers thought that "late" impeachment was too obviously acceptable to bother saying so. But without any specifications in the text, and with the hazy distance of two centuries, the Framers' unwritten assumptions have been transformed from things that everyone understood into fodder for argument and disagreement.

More modern and immediate problems abound as well. Chapters 3 and 6 deal with language drafted in the twentieth century, not the eighteenth. Both chapters show how the contemporary amending process is painfully slow in some parts while rushed and utterly blithe in others. The process is good at constructing a consensus for a particular goal, but it is not as good at