

## MUSINGS ON A CONSTITUTIONAL MYSTERY: MISSING PRESIDENTS AND “HEADLESS MONSTERS”?

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On Monday afternoon, January 20, the nation celebrated the second inauguration of William Jefferson Clinton as President of the United States. As a throng of thousands clustered tightly around the congressional dome, no one seemed concerned that just before Clinton recited the oath of office our nation may have been without a President.

How is this possible? Under the Twentieth Amendment to the Constitution, “[t]he terms of the President and Vice President shall end at noon on the 20th day of January.” True to form, President Clinton was running behind schedule for his inauguration. It was roughly five minutes past noon before he completed the presidential oath of office as required under Article II, Section 1 of the Constitution.<sup>1</sup> In view of this gap between the end of Clinton’s first term and the completion of the presidential oath, the following question arises: who was President during the interval between noon and when Clinton was sworn in for his second term?<sup>2</sup>

Clues to this mystery are afforded by a number of constitutional provisions. These are the starting points for our analysis:

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1. See James Bennet, *A Day When Opponents Can Stop Momentarily to Embrace*, N.Y. Times at A1, A10 (Jan. 21, 1997). This information was confirmed by a representative of the White House Press Office.

2. The authors placed calls to the White House Press Office and Office of Legal Counsel, as well as to the Presidential Inaugural Committee, in search of information related to this query. No one contacted at the above offices offered a position on the question: who was President between noon and the completion of the President’s oath? But a representative of the White House Office of Legal Counsel responded to our suggestion that we might have temporarily been without a President by asking: “[d]o you think we had a headless monster here?”

(1) Article II, Section 1, clause 8, provides that before the President “enter on the Execution of his Office, he” take an oath to “preserve, protect and defend the Constitution of the United States.”

(2) As already indicated, according to the Twentieth Amendment the terms of the President and Vice President end at noon on January 20. It further provides that “the terms of their successors shall then begin.”

(3) Section 3 of the Twentieth Amendment states “[i]f, at the time fixed for the beginning of the term of the President . . . the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified.”

What do these provisions suggest about the puzzle at hand? Who was President between noon and five minutes past noon this past Inauguration Day? There appear to be three possible answers.

### I. STILL PRESIDENT CLINTON

First, Clinton himself may have remained President throughout the time in question. After all, according to the Twentieth Amendment, noon marks both the end of his first term and the beginning of the next presidential term—Clinton’s second term as President. Doesn’t this end the mystery about who was President after noon?<sup>3</sup> Not quite. Several constitutional provisions suggest that the Twentieth Amendment’s reference to a new term does not resolve our inquiry. For instance, the Twentieth Amendment states the terms of the President’s and Vice President’s “successors” shall begin at noon. But the relevance of this provision to a second term President is less than clear; can a President ever be his own “successor”? In addition, even if the Twentieth Amendment makes clear that the next presidential *term* begins at noon, it may be that recitation of the presidential oath is nonetheless required to initiate any particular President’s occupancy of the “Office of President.”<sup>4</sup> In assessing this pros-

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3. At least one commentator believes there is no mystery. See Thomas H. Moore, *Washington to Celebrate Another Peaceful Transition*, CNN/Time AllPolitics (Jan. 20, 1997) <<http://allpolitics.com/news/9701/20/inauguration.advancer/>> (“Don’t worry about watching the clock too much; The Constitution’s 20th Amendment says Clinton and Gore’s first terms expire at noon, and their second terms begin immediately, oath or no oath.”).

4. U.S. Const., Art. I, § 1, cl. 8. But see William F. Brown and Americo R. Cinquegrana, *The Realities of Presidential Succession: The Emperor Has No Clones*, 75 *Georgetown L.J.* 1389, 1401 n.47 (1987) (arguing it is not legally necessary for the Vice President to take the presidential oath prior to assumption of the Presidency).

pect, consider that the presidential term is affixed to no person; it begins and ends at preordained times, regardless of who occupies the office or how many persons occupy the office during that period.<sup>5</sup> This suggests that the mere commencement of one term immediately following the cessation of the previous term does not obviate the need for a particular person to complete the oath to “enter on the Execution of [the] Office.”<sup>6</sup>

Under our analysis then, the presidential oath appears to be a precondition for assuming the Presidency.<sup>7</sup> Yet, additional considerations could lead one to reject the conclusion that Clinton ceased being President—albeit momentarily—during the recent inaugural ceremony. One might imagine, for example, that if recitation of the presidential oath is required of those assuming the presidency, this requirement is not temporally rigid. In other words, an incoming President may have to take the oath, but only as soon as it is practicable. Under this view, the oath remains tightly linked to the legitimate exercise of presidential powers while not serving as an absolute temporal precondition to assumption of the office. The intuitive appeal of such a reading of the Constitution is clear; imposing an inflexible time requirement for the taking of the oath would expose the normal stability

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5. The fact that the presidential term is fixed and invariant while the officers that fill it are more transient may illustrate the institutional role of the President in a separation of powers system. A number of constitutional commentators have suggested that part of the appeal of the independent executive in our nation's separation of powers system stems from its permanence. For example, James Ceasar argues that a permanent executive guarantees that “[t]he nation's heart would never cease to beat.” James Ceasar, *In Defense of Separation of Powers*, in Robert A. Goldwin and Art Kaufman, eds., *Separation of Powers—Does It Still Work?* 168 (American Enterprise Institute for Public Policy Research, 1986). The Constitution's invitation to Congress to provide for a line of successors to “act” as President also captures this aspiration that the “role” of President always be tended to, even though the Office of President may not be. See Art. II, § 1, cl. 3 and U.S. Const., Amend. XX, § 3 (which invite Congress to provide for presidential succession).

6. U.S. Const., Art. II, § 1, cl. 8. For what appears to be a contrary understanding of the relationship between the 20th Amendment's reference to “terms” and the oath requirement, see Brown and Cinquegrana, 75 *Georgetown L.J.* at 1419 n.106 (cited in note 4) (stating President-elect's failure to take the presidential oath after the completion of a predecessor's term could not result in our having no President “because since 1933 the twentieth amendment has provided that the terms of the new President and Vice President begin at noon on Jan. 20”); see also Moore, *CNN/Time AllPolitics* (cited in note 3).

7. It remains *possible* that the oath is not required as a precondition for assuming the Office of President, and that no constitutional infirmity would result from the President's *never* taking the oath. This notion, however, is difficult to reconcile with the text of the Presidential oath clause, and we have found no support for this view among commentators.

and permanence of the presidential office to the vagaries of administering the constitutional pledge.<sup>8</sup>

The problem, however, is that the Constitution's language suggests this more pragmatic view is not the proper understanding of the presidential oath and its significance. The Constitution states that the oath should be taken "[b]efore he enter on the Execution of his Office," at least hinting that the oath itself triggers the start of a President-elect's service.<sup>9</sup> What is the source of constitutional authority for the view that the oath clause need only be administered within a reasonable time? Absent a reasonable time exception, the oath remains a strict precondition for (re)assumption of the presidential office, and therefore Bill Clinton seemingly could not have been President between the expiration of his first term and his completion of the oath on January 20.<sup>10</sup>

There is a final potential basis for arguing that Clinton never stopped serving as President. Even if we understand the oath as being required for assumption of the presidential office, why should a re-elected President have to repeat the oath, particularly when his terms are consecutive?<sup>11</sup> Clinton's first term oath might carry through to his second term. The Constitution clearly contemplates multiple-term Presidents, but the presidential oath clause itself says nothing to indicate that a re-elected President need repeat the oath. On the other hand, the oath clause fails to exempt re-elected Presidents from the oath requirement. And, as suggested earlier, the language and structure of the Constitution caution against conflating the notion of presidential terms with the qualification of particular persons for occupancy of the Office of President. The Constitution may be indifferent about who occupied the office in the preceding term, and it may require an affirmation at the start of each term, regardless of whether the President-elect served before.

In sum, there are good reasons to believe: (1) the oath is a precondition for assumption of the Office of President; (2) this

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8. Cf. *supra* note 5.

9. U.S. Const., Art. II, § 1, cl. 8 (emphasis added).

10. A further danger with the view that a President-elect is only required to take the oath within a reasonable time is that it invites treacherous issues of line-drawing. How long is it permissible to wait? What grounds for delay are acceptable? Moreover, if some delay is permitted by the Constitution, do the justifications for delay begin to erode the rationale for having the oath at all?

11. The analysis may be different when one's service as President is interrupted and another individual becomes President (as opposed to Acting President) in the intervening period, as was the case with Grover Cleveland, who served as President from 1885-1889 and again from 1893-1897.

requirement applies equally to first and second term Presidents; and (3) the mere fact that the Twentieth Amendment specifies noon as the end of one presidential term and the beginning of another does not propel a President-elect into the Office of President without recitation of the presidential oath. If the preceding statements are correct, Bill Clinton ceased being President of the United States at noon<sup>12</sup> on January 20, and reassumed the office approximately five minutes later after having completed his oath.

## II. FOUR YEARS EARLY: PRESIDENT GORE

In the event Clinton was not President throughout Inauguration Day, it may be that Vice President Gore, who minutes before Clinton's oath had taken his own oath as Vice President,<sup>13</sup> briefly and unwittingly served as President, or at least Acting President.

The Twentieth Amendment provides "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." By not completing his oath Clinton apparently had not "qualified" to take office at noon. In such a case, Vice President Gore would be directed by the Constitution to *act* as President until Clinton had completed his constitutional duty.<sup>14</sup>

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12. The Twentieth Amendment specifies noon as the pivotal moment, but fails to specify noon *where*—in what time zone? One imagines this refers to the time at the site of the inauguration—or of the taking of the presidential oath—but this is mere conjecture.

13. The White House Press Office told the authors the Vice President was scheduled to take his oath at 11:57 a.m.; however, the time coding on C-Span's tape of the inauguration showed Gore completing his oath at 11:55 a.m.

14. That there is a distinction between *becoming* a President and *acting* as President seems to inhere in the text of the Constitution itself. Article II, § 1, cl. 6 provides that "[i]n 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" while Congress may provide for the "Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then *act* as President, and such Officer shall *act* accordingly, until the Disability be removed, or a President shall be elected" (emphasis added). Similarly, the 20th Amendment states that "if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified." The 25th Amendment provides that the Vice President shall serve as "Acting President" should the President find him or herself unfit to "discharge the powers and duties of his office," or if the Vice President has the support of "a majority of either the principal officers of the executive departments" or of another body provided by law.

These provisions—which invoke the language of "acting" in describing non-presidential officers assuming presidential powers and duties—appear to stand in contrast with other language in the 25th Amendment. It states that "[i]n case of the removal of the President from office or of his death or resignation, the Vice President shall *become* President" (emphasis added). What are we to make of this distinction between acting as President and becoming President? The distinction might simply reflect a semantic difference

But what are the precise constitutional conditions under which this functional substitution can take place? Before filling in for a President who has not “qualified,” must the Vice President recite the presidential oath?<sup>15</sup> While the Constitution itself provides no clear guidelines on this point, the 1948 statute which details presidential succession after the Vice President requires fulfillment of the presidential oath before these other officers can assume the presidency.<sup>16</sup> Perhaps we should take a cue from Congress about the relationship between the presidential oath and the exercise of presidential duties and powers. Since Gore did not recite the presidential oath it may be that he too was ineligible to serve even as Acting President in the minutes between noon (when his first term as Vice President expired) and the fulfillment of Clinton’s oath.

### III. A “HEADLESS MONSTER” IN WASHINGTON

Furthermore, even if the Vice President is not required to complete the presidential oath in order to serve as Acting President under the terms of the Twentieth Amendment, recitation of the Vice Presidential oath—which stems from the constitutional oath required of all officers mentioned in Article VI<sup>17</sup>—may be a strict precondition for assuming the powers and duties of the Vice Presidency.<sup>18</sup> Gore took the vice presidential oath, but apparently did so *before* noon. What is the effect of having com-

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between the permanence of becoming President after an irreversible condition (death or resignation) and a potentially more contingent and reversible presidential service. Might we read Congress’s decision to compensate Acting Presidents under the presidential succession statute as if they held the Office of President as endorsing this view? See 3 U.S.C. §19(f). Alternatively, we might also consider that a differentiation between *becoming* President and *acting* as President implies a difference in constitutional roles and political powers.

15. We note that the oaths required of the President and Vice President are different (only the presidential oath is explicitly set out in the Constitution) and that this may point toward a substantive distinction in their constitutional import and the extent to which they are required for assumption of the respective offices. Moreover, even if we accept that the presidential oath is required for Vice Presidents assuming the presidency, perhaps the requirements vary depending on whether the Vice President is *becoming* President or simply *acting* as President. See *supra* note 14.

16. See 3 U.S.C. § 19. A compelling argument has been made that the succession statute is unconstitutional. See Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995); see also Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 Stan. L. Rev. 155 (1995) (contending that whether the succession statute is constitutional is a “political question,” and therefore nonjusticiable).

17. U.S. Const., Art. VI, § 3 (“all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution”).

18. Cf. *supra* note 15.

pleted the oath for a second term prior to the commencement of that term?

A plausible argument can be made that if a re-elected Vice President needs to renew his oath for the second term then that pledge must occur *after* the first term has ended. Would it be permissible to take the oath months (or even years) in advance of the period of service to which the oath pertains? Presumably not. And if some point of demarcation is required in this case, that point well might be after the start of the new term. Under this view, Gore's pre-noon recitation of his oath would have rendered him without authority to step in as President or Acting President when Clinton "failed to qualify" for his office.<sup>19</sup>

In short, there is good cause for believing that, for a fleeting moment, our nation was without a President.<sup>20</sup>

#### IV. CONCLUSION

Inauguration Day's twilight zone of presidential authority descended without national concern or apparent practical consequence. But its potential reappearance in more threatening forms prompts the imagination. What if a national crisis developed in the middle of the inauguration of a duly-elected-but-not-yet-sworn-in President who was hostile to the policies and perspectives of the previous administration? Who would serve as President under these conditions? The fact that Monday's inauguration passed uneventfully should not close our minds to the possibility of more troublesome scenarios.

Moreover, quite apart from identifying a parade of potential horrors, this exploration of the constitutional issues related to presidential oaths and succession is propelled foremost by an interest in constitutional literacy. Notwithstanding the apparent obscurity (and arguable absurdity) of the scenarios and dilemmas sketched in this article, the larger project of understanding the Constitution is advanced by examining all of its components and their relation to one another. Such examinations facilitate a kind of constitutional "housekeeping," which enables us to distinguish between acceptable and unacceptable constitutional quirks and imperfections.

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19. U.S. Const., Amend. XX.

20. If Gore was required to take his oath in order to become Acting President, had he recited it *after* noon we would have been without a President for the period between noon and completion of the Vice Presidential oath.

It may be that we were without a President for a brief time on January 20. The question now is whether we can live with a Constitution that would permit this to occur.