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THE  
**CONSTITUTION**  
THAT DELICATE BALANCE

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**Nomination, Election and  
Succession of the President**

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**Lloyd Cutler**, Former Counsel to President Carter

**John Terrence Dolan**, Chairman, National Conservative P.A.C.

**Fred Graham**, Law Correspondent, CBS News

**Hon. Orrin Hatch**, U.S. Senator, Utah  
**Alexander Heard**, Chancellor Emeritus, Vanderbilt University

**Ann Lewis**, Political Director, Democratic National Committee

**Prof. Lawrence Longley**, Dept. of Government, Lawrence University

**Hon. Barbara Mikulski**, U.S. Representative, Maryland

**Edmund Muskie**, Former Secretary of State; Former U.S. Senator, Maine  
**Jack Nelson**, Washington Bureau Chief, *Los Angeles Times*

**Jody Powell**, Press Secretary to President Carter

**Prof. Donald Robinson**, Dept. of Government, Smith College

**Hon. Potter Stewart**, Justice (retired), U.S. Supreme Court

**Jack Valenti**, Special Assistant to President Johnson

**Hon. J. Clifford Wallace**, judge, U.S. Court of Appeals

**Ben Wattenberg**, Senior Fellow, American Enterprise Institute

**Tom Wicker**, Columnist and Associate Editor, *New York Times*

## MEDIA AND SOCIETY SEMINARS

Air Date: October 2, 1984

### Nomination, Election and Succession of the President

**FRED W. FRIENDLY**, Columbia University School of Journalism: From the birthplace of the United States Constitution in Philadelphia, is the way we elect a president a disaster waiting to happen?

**ANN LEWIS**, political director, Democratic National Committee: The rules of a political party are clear. We have two goals: it is to win elections and to govern.

**Prof. ARTHUR MILLER**, Harvard Law School: Mr. Longley, should we wipe out the Electoral College?

**Prof. LAWRENCE LONGLEY**, Dept. of Government, Lawrence University: Yes. It's little more than a state by state collection of political hacks and fat cats.

**JACK VALENTI**, special assistant to President Johnson: It's an act of betrayal so massive and so enormous and so visible that—

**Prof. MILLER**: Ay, there's the rub, it's so visible.

**FRED GRAHAM**, law correspondent, CBS News: And, now, it's a cold November morning and maybe it's too late.

**TOM WICKER**, columnist, *New York Times*: And I think that the calamity of an election going to the House, I use the word calamity, is to be avoided at all costs, because in there, the partisan pressures would be enormous.

**EDMUND MUSKIE**, former Secretary of State, former U.S. Senator, Maine: You know, the power of the presidency is not something you can lightly pass around the table as though you were passing fruit.

**Prof. MILLER**: And success is measured by the fact that we've survived?

**ALEXANDER HEARD**, chancellor emeritus, Vanderbilt University: That's one very good measure of success in this vale of tears through which we go.

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**Mr. FRIENDLY**: When George Washington, who sat in that chair over there as the Constitution was being drafted, became our first president, he didn't need the help of anything called a political party. There's nothing in this Constitution about parties; not about Democrats or Republicans; not even Whigs and Tories. In fact, there's no guidance at all about how we nominate a president. Yet, today, the parties dominate our presidential campaigns, and they make the rules.

Moderator Arthur Miller of the Harvard Law School begins his hypothetical case with the primaries.

**Prof. MILLER**: There must be something about Philadelphia and being in Independence Hall, because last night I had a dream. Benjamin Franklin appeared in my dream, and he said to me, "Arthur, run for the presidency." [laughter] Professor Cox, is there anything in the Constitution that prevents me from running for the presidency?

**Prof. ARCHIBALD COX**, Harvard Law School, former U.S. Solicitor General: I don't know of anything.

**Prof. MILLER**: Does the Constitution say anything about who can run for president?

**Prof. COX**: Natural-born citizen, but your hair indicates you're plenty old enough to make the other—

**Prof. MILLER**: I'm prematurely gray, Mr. Cox. [laughter] So, that's all it says? Thirty-five and born in this country? That means I can run for president. Mr. Dolan, what do I do? Do I just call up— look in the Yellow Pages, call up the Board of Electors in each state and say, "Put my name on the ballot"?

**JOHN TERRENCE DOLAN**, chairman, National Conservative P.A.C.: Well, in the

context of the present political debate, you'd have to win the nomination of one of the major parties, in practicality.

**Prof. MILLER:** I have to be in a party?

**Mr. DOLAN:** In practicality, yeah.

**Prof. MILLER:** I notice the words "in practicality." Is that in the Constitution?

**Mr. DOLAN:** No, that's not in the Constitution, either, unfortunately. Or fortunately. But in fact that's the way it works.

**Prof. MILLER:** Justice Stewart, there's nothing in the Constitution about parties?

**POTTER STEWART, Justice (retired), U.S. Supreme Court:** Not a word. In fact, our first president was very much against them. He called them "factions." I'm talking about George Washington.

**Prof. MILLER:** Mr. Dolan doesn't care where I was born. Mr. Dolan doesn't care how old I am.

**Justice STEWART:** Well, the Constitution says you have to be "natural born," not "native born" or—

**Prof. MILLER:** Natural born.

**Justice STEWART:** Whatever that means.

**Prof. MILLER:** I think I'd qualify.

**Mr. DOLAN:** Well, you're asking two different questions now: the difference between running and winning. If you want a chance of winning, you should have a party.

**Prof. MILLER:** Oh. You only deal with winners?

**Mr. DOLAN:** Well, I was going to say—*[laughter]* Either that or—usually with people who run second. We deal with a lot of those, too.

**Prof. MILLER:** Let's see. I'm going to run in the Democratic Party. Ms. Lewis?

**ANN LEWIS, political director, Democratic National Committee:** Well, I want to welcome you. *[laughter]* We're always glad—

**Prof. MILLER:** How do I get your party's nomination.

**Ms. LEWIS:** If you want to be the nominee of my party, you want to win a majority of the delegates who are going to come to San Francisco in 1984; and that means, you are going to assess and put together campaigns within each state that comply. (a) with the national party rules, and (b) with the state party laws by which those delegates are selected.

**Prof. MILLER:** That sounds like a lot of work. Is this structure provided for in the Constitution?

**Ms. LEWIS:** No. I think the political parties are, as far as I can tell, the only major element in our government today that is not in the Constitution; that really developed to meet a need.

**Prof. MILLER:** Hmm. This is very strange. Professor Cox has educated me about the Constitution and says I've got to be 35. You tell me I can't become president until I play by your rules.

**Ms. LEWIS:** And let us be very clear what those rules are for. Those rules are so that the people who identify as Democrats, those people who are willing to be active within my party, have the voice in selecting who runs as the nominee of the party. Cause control of the nomination is central to what constitutes a political party.

**Prof. MILLER:** Mr. Dolan, would I do any better if I flipped the coin again and joined your party? Does that mean I wouldn't have to go through this silly business of primaries?

**Mr. DOLAN:** No, you'd have to do all that. Saying things you don't believe and hiring people you don't like and paying a lot of money; all those other things. *[laughter]*

**Prof. MILLER:** Mr. Heard, does this make any sense to you? This giant superstructure known as the Republican-Democratic parties, without which I can't become president? They make up their own rules.

**ALEXANDER HEARD, chancellor emeritus, Vanderbilt University:** It makes great

sense.

**Prof. MILLER:** You think that's what the people who assembled here almost two centuries ago had in mind?

**Mr. HEARD:** Not at all.

**Prof. MILLER:** It makes great sense but it's not what they had in mind?

**Mr. HEARD:** That's correct. The country has changed, the nature of the government has changed, the substance of the politics has changed; and this is an adaptation that has evolved—imperfectly, no doubt, but evolved anyway—over these almost 200 years, that has been successful.

**Prof. MILLER:** And success is measured by the fact that we've survived?

**Mr. HEARD:** That's one very good measure of success in this vale of tears through which we go.

**Prof. MILLER:** It's now about three weeks before the convention, and it's very clear, just by tabulating the votes, that Chris Cameron—Chris Cameron has got the delegates. He can win on the first ballot. Ms. Lewis, you're sitting at breakfast one morning, and you open up the newspaper and, lo and behold, page one: there's a story that Chris Cameron, this dynamic governor from the Midwest, who's got a lock, now, on your party's convention, had a homosexual affair 12 years ago. How do you react?

**Ms. LEWIS:** You know, I knew, as soon as you said I was sitting at breakfast and I opened the newspaper that—

**Prof. MILLER:** It always happens at breakfast.

**Ms. LEWIS:**—by your standards, it was going to be bad news. *[laughter]* Let's talk, first, about the fact that Chris Cameron does not, in fact, have a lock on the nomination; although in previous years, and particularly in 1980, once delegates were elected pledged to a candidate, they had no flexibility at all, and the rules have been written that way. This year, partly because people were troubled, we did want a little more flexibility, so all the language says now about the delegates is that delegates are expected, in good conscience, to reflect the wishes of the people who elected them.

**Prof. MILLER:** So you're not troubled? *[laughter]*

**Ms. LEWIS:** I'm sick! *[laughter]* I was trying to sound like a grownup. *[laughter]*

**Prof. MILLER:** Your next words would be, "Pass the toast"?

**Ms. LEWIS:** Uh-huh. Uh-huh. *[laughter]* Right. Of course.

**Prof. MILLER:** But your bottom line is that if he's unelectable, you'll do what?

**Ms. LEWIS:** The rules of a political party should be clear. We have two goals: it is to win elections and to govern. And if, finally, something comes up that makes it impossible for us to reach those goals, then I don't think we spend a lot of time concerned with it; we have to move beyond it to get back to where we need to be.

**Prof. MILLER:** Mr. Powell, you are Chris Cameron's campaign manager. What are you telling the hierarchy of your party?

**JODY POWELL, press secretary to President Carter:** I'd first go to my boss and tell him that he's going to have to get out, and he'd better cut the best deal he can; and he might as well face up to it and try to see a way to make the best of it.

**Prof. MILLER:** You'd abandon ship?

**Mr. POWELL:** Well, yeah, having been holed beneath the waterline there, it seems to me that—*[laughter]*

**Prof. MILLER:** What if Cameron denies it?

**Mr. POWELL:** If, indeed, he denies it, then I think you have to hang in there. Assuming I believe he's telling the truth.

**Prof. MILLER:** You believe he's telling the truth. You think you should hang in there. And then—

**Mr. POWELL:** Yeah. Oh, yes. Definitely, in that case.

**Prof. MILLER:** It's very clear, as you look around at the evidence, just to make life as miserable for you as possible, that it's totally ambiguous. A very close relationship with, oh, let's say, a legislative aide when he was in the Congress. Ambiguous circumstances.

**Mr. POWELL:** Then, I think you've got to fight it.

**Prof. MILLER:** Mr. Nelson is a delegate from Missouri. He was elected on a Cameron slate, but you hear he's about ready to break ranks. What do you say to him?

**Mr. POWELL:** I say, "Look, Jack—" [laughter] You, of all people, know what the fourth estate can do to an innocent man. [laughter]

**Prof. MILLER:** Do you have any reaction as a delegate?

**JACK NELSON, Washington bureau chief, Los Angeles Times:** Well, I think I'd have to think about it awhile. See what my own interests were. I mean, you know—I may be in a district where this would really be the kiss of death for me politically.

**Prof. MILLER:** Somehow, I'm hearing Ms. Lewis's appeal to the virtues of flexibility: to be translated in to an appeal to the enlightened self-interest of the individual delegate.

**Mr. NELSON:** I think that's right.

**Prof. MILLER:** How do you think a delegate would react in this situation?

**Mr. NELSON:** Just like I reacted.

**Prof. MILLER:** Mr. Wicker, what are you writing in *The New York Times* when all this is breaking and there's this talk of opening the convention?

**TOM WICKER, columnist, New York Times:** I would take the position that delegates should stand by their man until the story was shown to be solid.

**Prof. MILLER:** Why should the delegates stand by him? If the delegate is working in a system, according to Ms. Lewis, that has two objectives, to win and to govern, and the pundits are saying Cameron can't make it, why should the delegates stand by him?

**Mr. WICKER:** Well, the practical answer to that might be that if you throw Cameron over the side and go to the guy who's been consistently losing all the primaries, you're probably going to lose even more badly than you would have anyway.

**Prof. MILLER:** Mr. Cutler, I come to your office one day, and I say to you, "I voted for Cameron. I want my vote to count for Cameron. Why can't I make this party count the vote that I cast?"

**LLOYD CUTLER, former counsel to President Carter:** You voted for a delegate to a convention.

**Prof. MILLER:** I thought I voted for Cameron. His name was on the—

**Mr. CUTLER:** Well, that's what you may have thought, but you didn't. You voted for a delegate to a convention who said, "I'm pledged to Cameron," but that was subject to party rules, and the party rules might provide that he could change his mind. Even on the first ballot.

**Prof. MILLER:** You mean to say, these parties have such a lock on the system that it's like a shell game? They con me into thinking I'm voting for a candidate when in fact I'm voting for one of their functionaries, who under their rules can do whatever he or she wants?

**Mr. CUTLER:** That's exactly right. The party system, and the electoral system for the final vote for the president, are both representative systems. You vote for a representative to represent you in a convention, or in the Electoral College, who's going to choose a presidential candidate or a president.

**Prof. MILLER:** And, Mr. Cox, it seems to me that we're now talking about the Democratic Party or the Republican Party, about to ditch the vote of millions of people and control who runs for president of the United States. And, as a citizen, I have no recourse?

**Prof. COX:** New events that appear to be relevant to the decision.

**Prof. MILLER:** Relevant to whom? Not me.

**Prof. COX:** Well, you elected people to make the decision, as Lloyd Cutler said. And you should have—if you studied so hard, you should have known that.

**Prof. MILLER:** I should have known I was being conned from the word go; that I really wasn't voting for Cameron. So, now we have this party structure, nowhere mentioned in the Constitution, and in the twelfth hour they can pick whoever they want despite the trappings of the Democratic primary process. Ms. Mikulski, that make sense to you?

**Rep. BARBARA MIKULSKI, Maryland:** The road to the convention is a yearlong process. Any number of things could occur to the nominees. It could be death; it could be disability; it could be any number of things, so that the delegates chosen in March, by the time they got into San Francisco in July would have direction and guidance from the people who chose them, but would not view that as a plebiscite. We see ourselves as a deliberative body. I ran for delegate. It was really heck.

**Prof. MILLER:** You're saying that when they went into the booth on the primary, they were really voting for you? They said—

**Rep. MIKULSKI:** They were voting for both. They chose me because I said I was for Cameron. That, in and of itself, was a statement about my values, my principles, the type of candidate I wanted. If there were any unforeseen circumstances, they knew what I stood for by my declaration for Cameron. Cameron could have been killed in an automobile accident.

**Prof. MILLER:** Or he could have—

**Rep. MIKULSKI:** Instead, he was hit by the front page.

**Prof. MILLER:** Right. [laughter] Judge Wallace, I'm having a terrible time. I am an outraged, hoodwinked voter. I want my primary vote to count. Can the courts do anything for me?

**Judge J. CLIFFORD WALLACE, U.S. Court of Appeals:** Well, I think that you'd have a tough case. My guess would be that, unless you came into—the whole political process is one, as I view it, is that that should be largely left to the people, and that the courts should be involved only in those extraordinary situations where there is the type of thing occurring which cannot be handled in a political context, but, because it involves the right to vote in the political process, it wouldn't get short shrift.

**Prof. MILLER:** Assuming I got no relief from Judge Wallace's court and I took it up to a hypothetical Supreme Court, how would you look at it, Justice Stewart?

**Justice STEWART:** The parties, which we've agreed are not mentioned anywhere in the Constitution of the United States, are voluntary associations, and as such protected by the First Amendment to the Constitution. And any rules that they want to make as voluntary associations take precedence over any state laws.

**Prof. MILLER:** So, all in all, I've got a very tough road—

**Justice STEWART:** Yes, you do.

**Prof. MILLER:** —which is likely to dead-end.

**Justice STEWART:** Yes, you do.

**Prof. MILLER:** Well, let's draw the curtain on it, then. Let's consign Mr. Cameron to oblivion and put the election this way: We're past convention; the incumbent president is Ben Baker. He is the incumbent. The challenger is Alan Abel. Mr. Heard, I've learned a lot this morning, and I now understand that when I go into the polling booth on primary day, I'm not really voting for anything other than someone who will be flexible at the appointed hour in San Francisco or Miami or Chicago or New York, but when I go into that booth on election day, I'm really voting for Abel or Baker, right?

**Mr. HEARD:** No.

**Prof. MILLER:** I'm not?

**Mr. HEARD:** You're voting for somebody who says that he will vote or she will vote for Abel or Baker, but you can't even count on that.

**Prof. MILLER:** Well, wait. This is like watching a bad movie twice. [laughter] That's what they told me was happening on primary day.

**Mr. HEARD:** That's the way it is.

**Prof. MILLER:** Who am I voting for?

**Mr. HEARD:** You're voting for an elector who will probably, almost all of the time, but not all of the time—

**Prof. MILLER:** But let me first understand who these people are. Where did they come from, these electors?

**Mr. HEARD:** Well, they've come out of the states; they're on the ballot in each state.

**Prof. MILLER:** Have you ever been an elector?

**Mr. HEARD:** No, sir.

**Prof. MILLER:** Anybody here ever been an elector? Mr. Longley? What were your qualifications?

**Prof. LAWRENCE LONGLEY, Dept. of Government, Lawrence University:** My qualifications were that I wrote a book on the topic and I told the state party chairman I wanted to be an elector, and he said, "Fine."

**Prof. MILLER:** Oh. *[laughter]* I see. The state party chairman now determines who I vote for in November? Ms. Lewis, how are electors chosen? Is he a typical elector?

**Ms. LEWIS:** No, regrettably, very few of them are authors. I am aware of no state convention in history that has taken much time or trouble deciding who the electors will be; but really, the scary part, and we've just come to that, is that there are so few ways in which the electors actually have accountability. There are only, I think five, certainly less than six, states that enforce on the electors that they shall in fact carry out what they have been elected to do.

**Prof. MILLER:** So there are no qualifications for being an elector, other than—

**Ms. LEWIS:** The qualifications are that you will be chosen by your state party.

**Prof. MILLER:** So, when I go in the booth, I'm voting for Mr. Longley? Even though he hasn't got any of the qualifications of the person who's going to fill the office he's going to vote for?—Mr. Robinson, there seems to be a bit of a shell game going on. I have yet to vote for anyone directly.

**Prof. DONALD ROBINSON, Dept. of Government, Smith College:** Well, in all except the extraordinary circumstance, your vote for an elector is, in effect, a vote for the presidential candidate. The elector is essentially a ceremonial figure. He or she votes for the candidate to whom he or she are pledged, and the primary qualification, I think, that we're looking for, that is, that state parties look for in choosing electors, is loyalty, dependability. They're chosen because they can be trusted to vote for the presidential candidate.

**Prof. MILLER:** Let's see how it works.

**Prof. ROBINSON:** Okay.

**Prof. MILLER:** It's election night. Baker and Able have waged this very tough, honorable campaign. At two o'clock in the morning, it's too close to call, even with the exit polling of the networks, so when we wake up at nine in the morning, or at eight in the morning, or at seven in the morning, we discover the following situation: incumbent President Ben Baker has a two million vote majority; however, the electoral votes are lying 271 to 267 in favor of Abel. Mr. Graham, it's air time on that morning program you do, which shall remain nameless. Give me 60 seconds of explanation for the American people, who are sitting there wanting to know who their president is.

**FRED GRAHAM, law correspondent, CBS News:** Well, I'm sure the first thing I'd say is, "Good morning, Diane." *[laughter]* And then I'd say that this is probably a morning in our history that surely many have predicted and have feared, but that somehow permitted to happen. At the time the Constitution was drafted, there seemed to be a potential fatal flaw even then. Thomas Jefferson called it "a blot" on the Constitution. We've arrived at a situation in which for years reform efforts failed, because it appeared that at that moment, the threat wasn't possible. And now, it's a cold November morning and, maybe, it's too late. Back to you, Diane. *[laughter]*

**Prof. MILLER:** There's a certain tone of quiet desperation that I hear. You're not happy.

**Mr. GRAHAM:** It seems to me that if you'd had a bitter election, questions of war and peace, and the candidate who got the most votes was not going to be elected, it would be a

devastating prospect for governing for the next four years.

**Prof. MILLER:** Mr. Cutler, you're serving as Ben Baker's counsel, and he calls you up and says, "Mr. Cutler, this is insane. They stole the election from me. They're taking my presidency away from me, and I won by two million votes. That's probably ten times Kennedy's margin over Nixon. Yet, I don't get it. Is there anything you can do?"

**Mr. CUTLER:** Well, you can't do anything based on the two million vote margin, but you might have a good shot at disqualifying one of those electors, or persuading three of them to change their votes.

**Prof. MILLER:** Hmm. In other words, to submarine the Electoral College? *[laughter]*

**CUTLER:** Not to submarine it; to carry out the original Constitutional provision that it was to be a deliberative body.

**Prof. MILLER:** All right. Since we can't do anything for President Baker on principle, I'm going to unleash the Ben Baker team of Powell, Cutler, Lewis and Dolan. *[laughter]* And they have one objective: to turn some electors. There's Mr. Valenti. He's an elector from—

**JACK VALENTI, special assistant to President Johnson:** Texas.

**Prof. MILLER:** Texas. *[laughter]* What might work, Mr. Powell?

**Mr. POWELL:** I think a lot of people involved in politics would think twice before they got involved in an effort to, in effect, subvert the processes. Without knowing a lot more about it, I think I would say, "Mr. President, I'm sorry. If you want to want to do that, you're going to have to get some help somewhere else."

**Prof. MILLER:** Cash in your chips?

**Mr. POWELL:** Yeah.

**Prof. MILLER:** Mr. Dolan, what would you do?

**Mr. DOLAN:** If in fact the convention process is supposed to be deliberative and we shouldn't be bound, and if in fact the electoral process is supposed to be deliberative, I don't see anything wrong with trying to convince electors to change their mind. But it's a mixture of what's fair, what's right, what's best for the country and what's right for him. And, you know, hopefully most of the time those things will be consistent.

**Prof. MILLER:** Ms. Lewis?

**Ms. LEWIS:** I will be looking for electors on whom I could appeal. I think, on two grounds: on patriotism and on process, on fair play. I could ask them to abstain. I could ask for people to say, "Is it not so important? Do you want to participate in the first time in our history, in so many years, in which the popular vote is undermined? Or shall we abstain and take it to the House?"

**Prof. MILLER:** To get it to the House, which is where you go if neither candidate has a majority—

**Ms. LEWIS:** Right.

**Prof. MILLER:**—you would have to get two electors—

**Ms. LEWIS:** To abstain.

**Prof. MILLER:**—to abstain. Mr. Valenti, you're an elector. Who do you think you are?

**Mr. VALENTI:** The truth is that if I were part of the Democratic Party apparatus, no way I'd change. If I were myself, they couldn't stack it high enough for me to change. It's an act of betrayal so massive and so enormous and so visible that— *[laughter]*

**Prof. MILLER:** Ay, there's the rub. It's so visible. *[laughter]*

**Mr. VALENTI:** It is visible. It isn't something that you can do in a clandestine fashion, so it can't be hidden.

**Prof. MILLER:** Mr. Longley?

**Prof. LONGLEY:** We had an elector in 1976, not an election where his vote would have made a difference, an elector in the state of Virginia who decided not to vote for Gerald Ford, "cause he felt Gerald Ford was not sufficiently forthright in opposition to abortion. I think it's possible, in this kind of a close scenario, where two or three votes could tilt the election, that

two or three electors might at least contemplate, consider, threaten, to abstain or withhold their vote, in order to make sure there is sufficient attention paid to problems of abortion, the environment.

**Prof. MILLER:** If you really had a Jack Judas, Ms. Lewis, would you play ball? You've got an Abel elector by the name of Jack Judas.

**Ms. LEWIS:** Yeah. Who really wants something for their vote?

**Prof. MILLER:** Yeah.

**Ms. LEWIS:** And that is the toughest question of all. It is easy to know you ought to do your best; it is easy to know you ought to know what all the options are; but if someone really comes in and says, "I'm willing to change my vote in exchange for X—"

**Prof. MILLER:** And we don't even have to talk about what X is. It could be small, it could be big.

**Ms. LEWIS:** Oh, it's big. You see, there's no small in that bargain. Then you're talking about the presidency of the United States, so any bargain is a very large one. That's not one I want to make.

**Prof. MILLER:** That's where "consistent with principle" comes in?

**Ms. LEWIS:** Yeah, it does.

**Prof. MILLER:** Mr. Longley, should we wipe out the Electoral College?

**Prof. LONGLEY:** Yes. I think it's an unworthy institution. It has never operated as its creators had intended and it's one that, I think, today would be ill-equipped to serve as a deliberative body, to either deliberate on the choice of president, or to barter or bargain for who should be president.

**Prof. MILLER:** The one time we need them most, they are least capable?

**Prof. LONGLEY:** That's right. It's little more than a state-by-state collection of political hacks and fat cats. *[laughter]*

**Prof. MILLER:** Uh-huh. Or academics who have written books. *[laughter]*

**Prof. LONGLEY:** Occasionally.

**Prof. MILLER:** Mr. Robinson?

**Prof. ROBINSON:** I think the Electoral College, as it's evolved, has served a useful purpose. I think the room for mischief is enormous, and for that reason I would want to make the electoral votes automatic. That is, when a man carries a state, or a candidate carries a state, that candidate gets all the electoral votes and no monkey business. But as long as we have the device of human beings casting these votes, then we do have a safety valve, so that if something is discovered between election day and that time in December when the electors vote, it gives us a chance, if the occasion is serious enough, for a second thought.

**Prof. MILLER:** Well, let me tell you what happens. Four electors announce that they are switching from Abel to Baker, and they make that announcement in terms of principle, democracy, popular vote, strength in the international community. Professor Cox, you're the legal advisor to Abel, and he's now found those four electors switching over to Baker. And Abel appeals to you and says, "Is there anything we can do about this legally? Can we enjoin them? Can we bring a lawsuit?"

**Prof. COX:** Well, I'm going to have to decide whether to raise the question when the electors from the state meet, or whether I'm going to raise it in the Congress, the House of Representatives, whether it prescribes by statute, apparently, some power of the two houses to decide whether the votes were, I think the phrase is "regularly given" by the elector.

**Prof. MILLER:** Justice Stewart, do you think this is a justiciable matter for the courts, or should, as I think counsel are sort of suggesting, it be left for Congress?

**Justice STEWART:** Well, first of all, the Constitution of the United States does not provide for popular election of the president or the vice president or anybody else. And the idea that just because the incumbent candidate got a higher popular vote entitles him to the Electoral College vote is contrary to the Constitution.

**Prof. MILLER:** You think the Constitution accepts the notion that four electors might

switch?

**Justice STEWART:** Well, yes, it does. It does. It contemplates, I think, an elite body of people who shall use their discretion and use their judgment, after deliberation.

**Prof. MILLER:** Well, no matter what the courts do, there will come a day in January when we've got to count those votes. Senator Hatch, you're a senator of Abel's party on the day that the electoral votes are counted in the Congress. If you want those ballots of those four electors cast as they originally were intended, you're going to have to challenge, because they are now going to count for Baker.

**Sen. ORRIN HATCH, Utah:** I would challenge him. I think they should be cast the way they were elected to cast.

**Prof. MILLER:** Your position would be, a vote in the Electoral College should be cast as originally intended?

**Sen. HATCH:** That's exactly right. I think that's the way it should be.

**Prof. MILLER:** When the House of Representatives met, what would you say?

**Rep. MIKULSKI:** I would not challenge the change in vote. I would stick with the Electoral College as cast and would immediately, as one of my first legislative acts, introduce the Constitutional amendment to do away with the Electoral College.

**Sen. HATCH:** I would join Congresswoman Mikulski in a Constitutional amendment. I think it needs to be done. I would be for a Constitutional amendment to bind the electors to vote the way they were elected to vote.

**Rep. MIKULSKI:** That's not my Constitutional amendment.

**Sen. HATCH:** I understand.

**Rep. MIKULSKI:** My Constitutional amendment would do away with the Electoral College altogether. I don't see the Electoral College taking care of women and minorities, and as a vehicle for insuring affirmative action voices participate in the process. I think that the Electoral College no longer serves an important function.

**Prof. MILLER:** What is your motivation for voting for them as cast, that morning?

**Rep. MIKULSKI:** First of all, my electoral—my electors happened to be all Baker, so we were fine. My congressional district had all voted for Baker, so that in expressing the will of the people, acting as almost an elector by proxy, if you will, I upheld what I felt was the position of my constituency.

**Prof. MILLER:** And so, sitting there on the challenge, you are voting as the representative of your district?

**Rep. MIKULSKI:** That's right.

**Prof. MILLER:** Let me change the scenario a bit. Let us assume that the challenge is successful; that both houses agree to knock out the four votes. We're now in a situation, because neither candidate has a majority of the electoral votes, and under the Constitution, the House of Representatives, voting state by state, each state having one vote, must determine who the president of the United States is. Your district voted Baker; your state voted Baker; the popular vote was Baker, the original electoral vote was Abel.

**Rep. MIKULSKI:** I vote Baker.

**Prof. MILLER:** Again on the theory that your duty in that vote is to represent your district, your state, or the popular vote?

**Rep. MIKULSKI:** Yes.

**Prof. MILLER:** Ald suppose you were the swing vote in your delegation?

**Rep. MIKULSKI:** For purposes of that vote, I am a representative of the people.

**Prof. MILLER:** Which people? The people in your district, the people in your state, or the people of the nation as reflected in the national total vote count?

**Rep. MIKULSKI:** We would cast them along the lines the way our districts and states went.

**Prof. MILLER:** Mr. Wicker, not trying to appeal to any latent cynicism in you, what do you think would happen when this election gets thrown into the House of Representatives?



**Mr. WICKER:** I think that the calamity of an election going to the House — I use the word calamity — is to be avoided at all costs, because in there, the partisan—the partisan pressures would be enormous, and I think that the president of the United States, who is Baker, and who's won the popular vote but lost the electoral vote, I think he should be on the air almost as soon as Fred Graham to make a strong appeal to his electors and to the Abel electors to vote as the public has suggested, because after all, what Abel has done, is he's won a Constitutional victory. Nobody's been cheated here. He's won an election precisely as the Constitution prescribes, so I think it would be incumbent on the president of the United States on that cold November morning to get up and tell the people that he had lost and lost constitutionally, and therefore in the interests of the nation, he hoped that none of the electors would follow any of these blandishments.

**Prof. MILLER:** Unfortunately, on a colder January day, and we are in the House of Representatives, where, maybe, none of us want to be. Mr. Nelson, what do you think is going to happen?

**Mr. NELSON:** I think they're going to vote party line.

**Mr. WICKER:** Absolutely.

**Prof. MILLER:** Straight party line?

**Mr. NELSON:** Well, maybe not straight party line. There'll be some wheeling and dealing, probably, going on, but my guess is that, in the end, they'll vote pretty much party line.

**Mr. VALENTI:** If I were a congressman and I would vote my district, and most—whether it's my party or not, because they're the people who are voting for me, and obviously if I'm a Democrat and the Republicans carried that district, that means that I am winning Republican votes each time I'm running.

**WICKER:** That's right.

**Mr. VALENTI:** And therefore I'm going to be darn sure I do not—

**Mr. WICKER:** Or the president's winning Democratic vote.

**Mr. VALENTI:**—cause fury to reside in the hearts of the—

**Prof. MILLER:** I find it interesting, because I'm beginning to hear consensus that each member of the House should vote their district, but there's a bit of a disagreement as to how you define the district. Your party in that district, or the popular vote in that district?

**Rep. MIKULSKI:** There is, within particularly those of us with the two-year term, a high degree of accountability, and people would really insist that the majority of where that district went should be reflected in that ballot. I think it would be an insistence on the part of the people themselves, which, if denied, there would be very serious repercussions.

**Prof. MILLER:** Just as the hapless voter. I've got to say it's rather interesting that I didn't really vote in the primary. I voted for some party delegate; I didn't really vote in the election. I voted for some party elector; and if this thing gets thrown into the House. I have the spectre of the president of the United States being selected on the basis of a partisan party vote in the House of Representatives. All this under a Constitution that nowhere recognizes the existence of parties. Let's move on.

Abel is the president. Abel has been elected by whatever process. And it is now into his term of office. He is on a tour in a Third World area, when in the middle of a public ceremony, a grenade is thrown. It explodes; the President is injured but not seriously. He is quite groggy. Mr. Powell, who's president?

**Mr. POWELL:** For all practical purposes, I think the President is still president. I don't think I start invoking—racing around trying to figure out how to invoke all sorts of constitutional shiftings and changes. You may take some steps with regard to our nuclear retaliatory capability, but, you know, that's about it. And I'm not sure about that.

**Prof. MILLER:** Mr. Cutler, when the President was elected and you were appointed as counsel, did you do any thinking about this problem?

**Mr. CUTLER:** By the time of the trip, I certainly would have done some thinking about it, and become aware of the Twenty-Fifth Amendment.

**Prof. MILLER:** Now, how would that thinking have gone?

**Mr. CUTLER:** Well, the Constitution has been amended to provide for a specific solution of the problem. It would be a little hard to apply during those four hours he was incapacitated in a Third World country. But if he were incapacitated for any period, either the President could notify the Congress that he felt unable to discharge his duties for the time being and the duties would devolve on the Vice President as acting president. If the President did not do that because he was unconscious or just didn't want to, the Vice President and what's called a majority of the principal officers of the Executive Department could certify that determination to the Congress and the same thing would happen. The Vice President would become acting president.

**Prof. MILLER:** On the morning the President is going to take Air Force One, why isn't something done at that moment?

**Mr. CUTLER:** Something is done with respect to the button; the issues that would have to be resolved in very short order in the event of a threatened attack, et cetera. But apart from that, if it happens in a Third World country, you just have to do it on an ad hoc basis; who's ever there gets in touch with the Vice President and he takes over, not constitutionally, but just ad hoc.

**Prof. MILLER:** Ah. But that's an interesting point. The Vice President will take over but not constitutionally.

**Prof. COX:** Why couldn't he draw a conditional document just before undertaking this trip and delegating the Secretary of State or the Secretary of Defense the power to act for him if his doctors reported him unconscious, pending such time as there might be a decision to invoke the Constitutional amendment?

**Mr. CUTLER:** I believe, with respect to the button, there is an elaborate procedure; a highly classified one. With respect to his other functions, they must go to the Vice President. I think, and no one else.

**Prof. MILLER:** Suppose the President were going in for a tonsillectomy tomorrow. The anesthetic might be such that it would affect him in a significant way for four to eight hours. Do you think the Twenty-fifth Amendment would be invoked in that situation?

**Mr. CUTLER:** No. But I think the kind of procedure that Archie Cox described would be invoked.

**Prof. MILLER:** Why not the Twenty-fifth Amendment?

**Mr. CUTLER:** Because it is such a grave procedure out of proportion to the circumstances of an appendectomy or a tonsillitis operation.

**Prof. MILLER:** And by grave procedure?

**Mr. CUTLER:** I think presidents would be most reluctant to do that.

**Prof. MILLER:** You make it sound like some macho problem. [laughter]

**Prof. MILLER:** It is in a way.

**Prof. MILLER:** Hmm? You think it would cast doubt on the nation's legitimacy around the world?

**Mr. CUTLER:** It would introduce a period of doubt and uncertainty, yes.

**Prof. MILLER:** Senator?

**EDMUND MUSKIE, former Secretary of State, former U.S. Senator, Maine:** You know, the power of the presidency is not something you can lightly pass around the table as though you were passing fruit. Whoever has these powers for however long, and his or her supporters, his or her believers, you know, when they have those powers, they're going to be conscious of the power that is theirs.

**Prof. MILLER:** But in this scenario, we're dealing with a very limited situation. Under the Twenty-fifth Amendment, Section Three, he writes a letter to the Speaker of the House, and the president pro tempore, saying, "I am going to be incapacitated for a limited period of time. My powers should be exercised by the Vice President." Eight hours later, he writes a second letter, saying, "I am now recapacitated and I resume my powers of the presidency." There's really no great threat of conspiracy there.

**Sen. MUSKIE:** You know, out of such apparently simple developments, great transfers in power can take place that become irrevocable. I mean, does a president have to transfer his powers every time he has a toothache? What about when he's asleep? What about when he's asleep? Suppose he takes a sleeping pill?

**Prof. MILLER:** That is precisely what, I guess, I'm getting at. Namely, that for a variety of reasons that are pragmatic, the Twenty-fifth Amendment, Section Three, is just bypassed. Mr. Valenti?

**Mr. VALENTI:** Let's take a real case. President Johnson went to Bethesda Hospital; there were a few of his aides around him; nobody else got into that hospital room. Several of us were there. Let's suppose that he went unconscious for 12 hours. We would have immediately then called the Vice President: "Get up here quickly." and he would have come to the hospital, we would have made known to that; and then, the White House staff would have coalesced around the Vice President, and he would have gotten the Secretary of State and the Secretary of Defense; they would have probably had a meeting, and there would have been a consensus that, in that time, the Vice President would be giving the orders, and the White House staff would be right beside him to give it whatever legitimacy a White House staff can confer on anybody. But nonetheless, it would be there, because the apparatus of the White House, make no mistake about it, is in the hands of the staff and the president. Now, that's not in the Constitution, but that's the way it is.

**Prof. MILLER:** Well, as we've learned this morning, lots of things are not in the Constitution, but that's the way they are. Let me change the hypothetical a little. It's now six weeks after that unfortunate incident. Mr. Cutler, you're still the legal advisor to the President; you're the closest man to him. He seems physically fit, but every once in awhile, he seems to lapse for a few seconds. Tunes out; tunes back in. What do you do? Anything?

**Mr. CUTLER:** If the President were capable of considering the matter himself, I suppose, the first appeal would be to him personally.

**Prof. MILLER:** What would you say to the President?

**Mr. CUTLER:** "We think you're losing it. We hope it's going to be temporary." I'm assuming the doctors are saying this is about to become a long-term matter and it won't be five minutes a day or ten minutes a day, it'll be—

**Prof. MILLER:** "Now, Mr. Cutler, you know that we are trying to move our domestic program forward. We've got to keep moving. We've got to keep moving. We cannot either take time out on this subject, nor can we have a crisis of legitimacy at this point, so I want this to be forgotten."

**Mr. CUTLER:** If he planned to do nothing about it and the condition seemed to aggravate itself, you would, as I say, consult the other members of the White House staff and the leading Cabinet people, but you'd probably wait until the disease got a good deal worse.

**Prof. MILLER:** What's the plan? Let me give you a Cabinet: Mr. Muskie is the Secretary of State; Ms. Lewis is Secretary of the Interior.

**Rep. MIKULSKI:** Bravo!

**Prof. MILLER:** Mr. Wattenberg, why don't we make you Health, Education—or Human Services. And, Mr. Cox, you can be the Attorney General. Mr. Cutler has now given you his report from inside the Oval Office, he being the closest man. Mr. Wattenberg, what's your reaction?

**BEN WATTENBERG, senior fellow, American Enterprise Institute:** I would be very worried, first, about the press saying that there's a coup underway. That's where I would start. I'd say, you know, how will this be seen to the rest of the world? And I would call in, as the secretary of Health and Human Services, I'd call in the Surgeon General and try to find out exactly what was really going on medically with the President.

**Prof. MILLER:** "Too early to tell," they say. "He's been—he's a very difficult patient. He's growing more resistant. We can't get at him." Ms. Lewis do you have a strategy of what to do?

**Ms. LEWIS:** We start with the Vice President, and we know that. And the reason, again, it gets difficult is—

**Prof. MILLER:** Mr. Heard is the Vice President.

**Ms. LEWIS:** Good. How willing a partner is he in this? How much of an inner circle is he? Was he originally part of the team, or is he somebody who was brought in at the convention for balance and there's always been just a little bit of distance between the two? Not that such things ever happen in real life. At that point, and it is serious, if you've got me in it, and I'm not exactly in the inner circle; I'm Interior and we know why I got that job—[laughter]—then, you will get ready to move, because if it's gone beyond three people talking around a table, then you're ready to do something. There is no way in Washington, on a matter like this, you get to eight people, ten people, unless you want to build support for an action you've already decided to take, and that looks to me like Section Four; that we really are seriously thinking about invoking a decision that the President is disabled. Essentially, we're doing it around him.

**Prof. MILLER:** So, you're thinking about that?

**Ms. LEWIS:** Uh-huh.

**Prof. MILLER:** Well, Mr. Secretary of State?

**Sen. MUSKIE:** What's involved here is a serious question of whether the President is capable, or whether there is the risk that he is incapable of conducting the duties of his office. Now, one cannot even breathe this possibility until there is sufficient evidence to indicate that it's a real possibility.

**Prof. MILLER:** Mr. Heard?

**Mr. HEARD:** It's a question of what one concludes the facts are, and if they are as foreboding as these—this last statement from the Secretary of State, then, I think the Vice President has to take the initiative provided for in the Twenty-fifth.

**Prof. MILLER:** Mr. Attorney General?

**Prof. COX:** The first critical thing, just to make it a little more explicit, is how is this condition, this disease, affecting the President's judgment in the times when he's not tuned out? Is he capable of being a reasoning, understanding human being?

**Prof. MILLER:** Does the amendment give us any guidance in knowing what is meant by "disabled" or "incapacitated"?

**Prof. COX:** It seems to me, it intends to leave that to the judgment of the Vice President and the principal officers, and that their judgment, surely, must be final on this.

**Prof. MILLER:** Mr. Barrett, earlier in the administration of President Reagan, we had a moment in time where reasonable people might say the President was incapacitated.

**LAWRENCE BARRETT, senior White House correspondent, Time:** Two moments, in fact, during the same week.

**Prof. MILLER:** What happened to the Twenty-fifth Amendment in those circumstances?

**Mr. BARRETT:** The White House staff made a pretty much unilateral decision not to invoke it or not to begin the process that might invoke it, and in the second of the two instances, Bush was not even consulted. Neither were any of the principal officers.

**Prof. MILLER:** Uh-huh. Do you have any sense as to why they chose not to pursue the Twenty-fifth Amendment?

**Mr. BARRETT:** Yes, I think for the same reason that Mrs. Wilson kept Woodrow going as best she could, and a White House staff's first instinct is always to protect the President in every way, even if that means taking a risk in some other respect.

**Prof. MILLER:** Now, that's the second time you've referred to the White House staff.

**Mr. BARRETT:** The White House staff.

**Prof. MILLER:** Not the President, not the Cabinet, not the Vice President.

**Mr. BARRETT:** Well, in certain situations, and this is one of them, the White House staff is a far more powerful body, even though it's extralegal, than any of the aforementioned. The Cabinet, or most members of it, passed in and out of the situation room on the day on which Reagan was shot, Monday, March 30th. The papers were physically present; the White House counsel had obtained the papers. One White House staffer saw what was going on;



saw that Haig was looking at them, Haig being the senior Cabinet member, and that staff member locked the papers up in a safe, in fact.

**Prof. MILLER:** Imprisoned the Twenty-fifth Amendment?

**Mr. BARRETT:** Imprisoned— well—

**Prof. MILLER:** Metaphorically.

**Mr. BARRETT:** Metaphorically, yes.

**Prof. MILLER:** What I hear you saying is, "Yes, we have a Twenty-fifth Amendment but, in practical terms, White Houses being what they are, it's not likely to be invoked."

**Mr. BARRETT:** If a president is in a coma, it would be. But when there's any borderline situation where a case could plausibly be made that we can squeak by, squeak by without untoward consequences, the staff is going to lean that way, and no vice president is going to take the leadership in pushing the other way, because then he will be perceived as grabbing for power.

**Prof. MILLER:** Let me pass through this once more. Mr. Cutler, it's getting very bad. The lapses are longer: there are moments of irrationality or paranoia, moments of hallucination, perhaps. Want to get your Cabinet together?

**Mr. CUTLER:** No. I should say that I think the Reagan administration, in a collective sense, was right not to invoke the Twenty-fifth Amendment, and that you postpone the Twenty-fifth Amendment issue until it is clear in your mind, and ultimately in the minds of the Vice President and the senior cabinet people that the President is unable to discharge the duties of his office.

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**Mr. FRIENDLY:** These debates about the presidency began here in Philadelphia, almost two centuries ago. The Constitution is ambiguous, yet we have survived as a nation, as Alexander Heard noted, "one very good measure of success."