

1977

American Bar Association Special Committee on Election Reform, Symposium on the Vice-Presidency, Panel Discussion 5. Closing Statements and Recommendations

Recommended Citation

American Bar Association Special Committee on Election Reform, Symposium on the Vice-Presidency, Panel Discussion 5. Closing Statements and Recommendations, 45 Fordham L. Rev. 767 (1977).

Available at: <http://ir.lawnet.fordham.edu/flr/vol45/iss4/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

elections in a short period of time. I agree with Senator Bayh, and I will add something else to it. If you have no primaries, or few, invariably your selection is going to come out of the Congress. So you will have somebody in Washington who has been getting a lot of national news. For a governor or someone, some other person, some businessman, it takes several months to build up enough force for the press to even recognize him.

PROF. SCHLESINGER: I wouldn't propose a primary. I do think a national convention might be convened. The state committees might choose the delegates to the convention, and the local pressures on them would insure a certain representativeness in the delegations.

I would propose, for example, that, had a special election followed Nixon's resignation, Governor Rockefeller or Governor Reagan would have been very strong contenders, much stronger contenders than any members of the Senate would be. This kind of procedure would not confine the choice to members of Congress.

SENATOR BAYH: But you would agree that in a short time frame, whether it is somebody from Washington or somebody from Sacramento, that the odds are it is going to be a well-recognized name, somebody who is already out there on the track, and not someone who is involved in building name-recognition throughout the country.

DEAN JACKSON: I might add, somewhat parenthetically, that those of us who share Professor Schlesinger's concern about the "imperial Presidency" might take pause at his suggestion of the abolition of the office of the Vice-President. One devastating effect of abolition, I submit, would be to strengthen the power and prestige of the White House staff, which I consider a documented danger, and to foreclose the President's options to use the legitimate political prestige of an elected official to take a leading role in Presidential initiatives.

V. CLOSING STATEMENTS AND RECOMMENDATIONS

MR. FEERICK: I would like to suggest that we might conclude if each member of the panel would take up to two minutes to raise any other matters or indicate what you think the American Bar Association should recommend with respect to the Vice-Presidency.

DEAN REEDY: Right now, frankly, I don't think we have much choice but to leave it alone. I don't think a persuasive case has been made that there are deficiencies of such a serious extent as to require action. I don't believe the deficiencies can be remedied without going into the Constitution itself, and I doubt if people are ready to go into the Constitution. The system has worked fairly well. I think there is a need for a Vice-President. I am in a peculiar position, sympathizing with the reasoning behind Arthur Schlesinger's conclusion but not the

conclusion itself, because I think the people must have someone whom they have become accustomed to thinking of in terms of a potential President in case of a loss. And, therefore, my overall conclusions are that there really is very little you can do right now except leave it alone.

PROF. KIRBY: I would certainly leave the twenty-fifth amendment alone. As I indicated earlier, I think it has served the country well. As to those who chided some of us who helped produce that, saying, "Are you proud of having produced our first unelected President," I always respond, "Our first unelected President compares favorably with quite a few of our elected Presidents," and the 38 million votes Gerald Ford got seem to demonstrate he was within the pale of a reasonable candidate under the circumstances.

The only case that I think has been made for changes is to remove the Vice-President from the Senate, which doesn't necessarily require a Constitutional amendment, I suppose, since he is away so much now anyway. Just expand that waiver of his right to exercise the office of President of the Senate, except perhaps at its opening session and closing session when he would perform ceremonially.

I would like to complete the record on one point about special elections. Until Birch Bayh effectively leads us to the direct election of the President, I assume any special election of either a new President or Vice-President would have to be by the Electoral College, which creates enormous risks of inconclusiveness. The President is not really elected by the popular vote, he is not elected until the electors meet, and when we have a close election and the prospect of contests in various states, the outcome can be drawn out for many months, as it was at the time of the Hayes-Tilden election. With our present election machinery, the idea of quick, expedited special elections is not nearly as easy to implement as it might appear at first blush.

MR. GOLDSTEIN: From being on this panel, I have come to the sense more and more that there really isn't a whole lot that can be done about the Vice-Presidency, that most of the major structural reforms would probably do more damage to the total system of government than they would improve the Vice-Presidency. The Vice-Presidency should be retained, primarily because I don't see that any other system of succession would be any better, and I think that the proposals that have been made would create other difficulties.

In the abstract, I would be very much for a system of special elections; but I think that there is a risk to stability, the risk of too frequent turnover, the difficulty in fitting a system of special elections into the current system, which are reasons why I would oppose a system of special elections.

As for selection, to some extent Senator Bayh's suggestion about polling the convention delegates some time after the convention, to me is appealing because in the past, especially in recent years, the major problem has been haste; Presidential candidates really don't have the time and the conditions aren't always conducive to making a good choice.

In terms of the election, I would hope there would be Presidential debates in the future and I would hope that those would include at least one Vice-Presidential debate.

In terms of executive duties, I think that the Vice-President should be available to help the President in ways that the President chooses, that Presidents will be wise to call on, to rely on the counsel of an experienced politician in different areas, but I would be against giving the Vice-President a specific duty because I think that would be a threat to executive power. It seems to me that the President should not be burdened with people whom he can't remove who have specific duties.

DEAN McLAUGHLIN: I did want to note one thing that caught my eye. If everybody seems to agree that the Vice-President is about as useful as a Swiss admiral, I don't understand why everybody also agrees he has to be compatible with the President. If that's the case, it strikes me that this whole thing has gotten out of perspective.

GOV. PEABODY: I concur. Mr. Chairman, I do have a recommendation to the American Bar Association. As Senator Bayh has indicated, unquestionably the issue of repeal of the Electoral College is going to come up this year, and you have an opportunity to make a recommendation as to what should replace it—presumably, the election of the President and the Vice-President by popular vote.

In focusing on the Vice-President, the problem is this: in past history, 22 percent of the years that we have been governed, we have been governed as President by Vice-Presidents who have been picked out of the hat late at night at a convention. The solution is to give the people an opportunity to select their own Vice-President. Accordingly, I would recommend to this Commission that the amendment to repeal the Electoral College should provide for a separate election of the Vice-President of the United States. The Congress will have to make a decision as to whether the Vice-President should be bracketed on the ballot, unlike any other elective office that I know of, or whether he should run and get elected on his own. This decision as to the Vice-President should come up during that discussion.

I would concur with Dean McLaughlin's remarks in that the discussion today has brought out that compatibility of the Vice-President

with the President, certainly after the election is over, however it may be during the campaign, is not that important, because the Vice-President has no powers. He is in waiting. He can be put in the deep-freeze and left there. But we want someone who is responsive to the vote of the people and who is there because the people put him there. That is a foundation on which everything is built.

So I would say it makes not that much difference if he is compatible. It makes not that much difference if he is of a different party. It will put all the more pressure on party nominating conventions to come up with someone who is electable to office and so we don't get a drone or someone who does not have the capacity to be President, so parties will put their good people forward as Vice-President as well, and with the very good likelihood that they will be elected President at a later time.

I would confine my recommendations for action this year to that.

As far as the duties of the Vice-President are concerned, I am impressed and also depressed that we have not been able to arrive at a consensus, and I think that there needs to be further discussion on that particular subject. I think I go along with Margaret Chase Smith for the moment, and let that be resolved by the President but let us get a popularly elected Vice-President in office.

MR. YOUNG: Mr. Chairman, I have reviewed the various reforms proposed in the literature we received before this meeting. And I have listened to the other reform ideas that have been set forth today. I am obliged to say that with no exceptions, I am inclined to stick with the present process with respect to nominating and electing the Vice-President, though the duties they perform may present some problems.

I am inclined to be against any reform that involves Constitutional amendment because I think it is a long, grueling process and, as a practical matter, Congress is not going to approach the amending issue again, having done so in 1967.

Further, as far as building into the present electoral system any system of primaries, mini-conventions or, as Senator Griffin suggested, applying the twenty-fifth amendment after the inauguration of the President to investigate a new Vice-President, I think we already have too much time, money and resources devoted to the electoral process now. I think it would be nice if we were able to move to a system such as Professor Schlesinger has described, in England or France, or some modification thereof, in which we could elect a President in 35 or 60 days; but the fact is, I don't think we can break down this long, drawn-out system of primaries that we have now. So I am not in favor of adding to that system in any way.

I would like to touch on some reforms barely touched on today. One

is Vice-Presidential primaries. I oppose that; having people campaigning in the spring and summer of 1976 for the office of Vice-President would have added perhaps ten or twelve additional people to a great number already running for President, and I'm afraid that the American people did not have an adequate chance to examine the many people running for President under the present setup this year. Early in February or March, two or three Democrats began to emerge as leading contenders, and thereafter media focus was heavily on these two or three people. There were many other qualified people who dropped out, including Senator Bayh, who is clearly one of our most able Senators, before really having a chance to present their case to the American people.

I am afraid that media coverage of Vice-Presidential candidates running at the same time would be weak. I think, also, if one such person did succeed in the Vice-Presidential primary system, it would be someone who was already well-known. I can't imagine a dark horse emerging in the Vice-Presidential field, because of lack of media attention. I think that probably there would be difficulty raising money for a Vice-Presidential primary campaign and that the winner would be somebody less qualified than most of the Vice-Presidents we have chosen under the present system.

I would also like to touch on the Electoral College, although I understand that is the subject of another study that you plan to have made. I favor continuation of the Electoral College. If you examine the statistics, there has only been one legitimate case, in my opinion, in which a minority candidate has been elected in the Electoral College. That was 1888; Grover Cleveland won a plurality of the popular votes but Benjamin Harrison was elected in the Electoral College. In 1876 there was a stolen election, in any event, and in 1824 Jackson got a plurality of the popular vote, nowhere near a majority.

I am afraid if you get away from the Electoral College, you are going to throw this thing wide open to an unlimited field and we are going to have a great number of people listed. I remember in 1961 in the State of Texas we had a special election for United States Senator, and more than 50 people were in. The United States Presidency is a great prize. Many people grinding particular axes would become involved, and I think that many people would say: "Well, at least I can make the runoff." With people seeking to win fifteen or twenty percent of a vote on the first round of a popular Presidential election, you may end up with a choice of someone campaigning on abortion against another campaigning on handguns.

I don't think we should go away from a system which more often than not produced a person who was highly acceptable to the Amer-

ican people. So I would be inclined to be against that so-called reform, as well.

I believe we have begun to get a greater public awareness and awareness of people in Washington on these related issues only in the last few years. The twenty-fifth amendment itself has been effective since 1967. The concept of a working Vice-President has been really developing only since 1941. And various convention reforms have been introduced only in the last four to eight years.

The McGovern Commission is the basis of modern Democratic Convention reform. That dates from about 1971, or it was put into effect at the Democratic conventions after 1968. Republicans have been moving, perhaps a little more slowly, but they are also looking toward various convention reforms to reduce the hoopla and the confusion and make the conventions centers of more reasonable discourse.

I believe we should run, perhaps, some risk but wait a bit longer to see how the amendment works in subsequent applications. I think we should also wait to see how these convention reforms work.

I might be in favor of shifting the platform for the third night to allow more leeway for deliberation on Vice-Presidents. I think we ought to wait and see what a really responsible Presidential/Vice-Presidential team can do in terms of Vice-Presidential duties.

I think we have a team like that now. I think we have been so blighted by the Watergate period and Vietnam period that we have not had a chance in the last decade or so to observe a smoothly functioning executive team and what potential can be drawn out of this position of Vice-President. I would be inclined to monitor all of these developments and, if at any time in the future it seems that reforms of a more substantive nature are called for, fine; but my recommendation now would be essentially a wait-and-see attitude.

MR. READ: I agree with those that have spoken and say they feel there is a need to keep the Vice-Presidency. I concur with Professor Schlesinger; I don't think that the Vice-President has an awful lot to do, but I don't think that there is an awful lot that we can do to give him any more.

What we need more than that, I think, is to have a person in a position that the public accepts as the President-in-waiting, if you will, as the legitimate President if something happens to the President. The past two years have shown us what a valuable institution this can be. I have a little bit of fear and trepidation to think what might have happened if we had had some kind of temporary caretaker government take over after the Nixon resignation, for example. Perhaps not quite as dramatic but equally bad would have been a situation of a caretaker

government after the Kennedy assassination. I think the Vice-Presidency has a very real benefit to the body politic in avoiding those kinds of problems.

I can't really accept an independent election of the Vice-President running on a separate ballot from the election of the President. I have a certain amount of sympathy for the comments that have been made: what do we really get out of the compatibility between the President and the Vice-President? Is it really all that important to have him on the same team when the Vice-President doesn't do that much anyway? I think what we have to look at is the alternative. If the Vice-President is not going to be the chief cheerleader for the administration, then he is going to have to become the chief critic of the administration, and I don't think it would serve the political process well to have an elected nationwide official, incompatible with the President, who has an independent national constituency and who stands up all the time and criticizes the President.

For example, I think that this year, had that kind of independent election been in effect, we quite possibly would be facing four years of Ford and Mondale together. Without passing any comment on the attributes of either of those two individuals, I don't think it would be good for the political system to have the President, who has, as all recognize, the sole authority, trying to run the government, with a capable individual of a different political party with nothing to do but go around criticizing what the President was doing. We have a lot of Congressmen and public figures in and out of office who will disagree with the President, any President, doing that already. I don't think we need a separate, independently elected official to do it.

There is merit in keeping the Vice-Presidency a little bit open so that there is some flexibility for him to be a minister without portfolio, if you will. Dean Jackson pointed out a few minutes ago that Vice-President Ford served as Chairman of the Privacy Commission and that other Vice-Presidents before and since have chaired fairly important commissions and agencies. I think that to the extent that you can give jobs like that to a Vice-President that are important, you lend a certain additional degree of authority or credibility to whatever that commission has to say and you don't interfere with the day-to-day operation of the government, which is the President's responsibility.

MR. GOLDEN: I believe we should preserve the President's right to select his running mate, but I do favor a screening process of some kind so as to prevent such incidents as have occurred in the very recent past. Perhaps I'd better put it more positively in saying I believe in a disclosure process for the benefit of the public. I think the public has been sadly neglected too long in this whole business of the selection of

Vice-Presidential nominees. I don't care what form this disclosure takes so long as the public has an opportunity to know who is the running mate. I think this was done in part by President-elect Carter, with great press coverage of the people with whom he spoke before he made his selection.

MR. MITCHELL: I certainly want to agree that the office of the Vice-President of the United States should be accorded the respect that it deserves and I do not think it helps to inspire the American people to demean that office by snide remarks or inferences that it is useless, no more than I think we should demean any of our federal offices which are occupied by people who have been put there by their constituents.

I think one of the first things we have got to do in this country is to put a stop to the derogatory rhetoric that is floating around, always demeaning those who have been elevated to positions of trust, and I will include the Vice-Presidents in that. I will then say that with respect to the system of primaries as conducted in the past campaign, in my judgment it is a disastrous system because it permits parochial interests to determine the outcome, and the cumulative result is that those who are the most skillful in catering to such parochial interests are likely to get the delegates.

With respect to the convention itself . . . the President should designate people that he feels will be compatible and the delegates should be given a realistic opportunity to vote among those suggested names. I feel that it would not be wise to have this list submitted before the President obtains the nomination, but it should be submitted afterward.

I believe further that after the election of the President, there ought to be, there can be, and there must be the use of the Vice-President in some meaningful way in the Senate, where the Constitution gives him the right to preside, and in the executive family of the President where circumstances require the use of all talent.

PROF. SCHLESINGER: I don't regard political analysis as an exercise in self-deception, so I don't think we should kid ourselves about the Vice-Presidency.

As a historian, Clarence, I really can't bring myself to believe that citation of the historical record on this office is snide. That is what historians are for. I suppose the experience of 41 Vice-Presidents is not irrelevant to a consideration of what to do about the 42nd, 43rd or 44th. I think the Vice-Presidency has all the dignity it deserves. To try to inject false dignity into the office seems to me, as I say, self-deception.

I would say I think the fundamental principle was laid down at the

Constitutional Convention in article two, section one of the Constitution, which says the President and the Vice-President shall be elected. I think it is a fundamental principle of our Constitution. I think it is a fundamental principle of a democratic policy. That fundamental principle was repealed by the adoption of the twenty-fifth amendment, which has now placed us in a position where we end up with both a President and a Vice-President who were not elected but who were appointed by their immediate predecessors. It also violated President Truman's principle that it should not be within the power of the President to appoint his own successor. I believe the twenty-fifth amendment represents a departure from the basic Constitutional and democratic principles. I believe that it should be repealed.

I believe it should be replaced by a new amendment, as I have suggested earlier, which would abolish the office of the Vice-President and provide for a special election in case of a vacancy in the Presidency. I would hope—and I recognize this is a solitary view in this group—but I would hope that the ABA Committee will give some consideration to this and some consideration to the modalities of a special election. I do think that is the logical solution and it is a democratic solution. You have to restore the people's right to choose, to withdraw from the President of the United States the right conferred on him by the twenty-fifth amendment in certain circumstances to appoint his own successor. Pending this more drastic resolution of the problem, I would do nothing about the Vice-Presidency.

DEAN JACKSON: I just wanted to bring up one serious legal deficiency that affects the Vice-Presidency—it is a rather remote statistical possibility, but Professor Schlesinger referred to it earlier this morning—that is, the event of a double vacancy in both the office of the Presidency and the Vice-Presidency. We only have to look back two years to see a near-occurrence of the double vacancy where a President was almost impeached before a new Vice-President could replace the one who resigned to avoid trial and conviction. It is also not impossible that some day, God forbid, a President and a Vice-President will be on a plane together or in a public place where they will both be killed. If either were to take place before a term expired, and especially before the mid-point of that term, I agree with Professor Schlesinger that the Founding Fathers intended for there to be a special election. The Presidential Succession Act of 1792 called for special elections in that event.

Senator Hathaway has submitted a bill²⁵ which would basically restore this, which was law of the land for a hundred years, and he

25. S. 2678, 93d Cong., 1st Sess. (1973).

would reform the process somewhat so that the line of succession in the event of a double vacancy would go to the ranking member of the House who is of the President's political party as acting President and then the people would have a right to choose, in regular election through the normal nominating procedure, elected rather than appointed leadership for the nation for a period of at least two years.

It is a rather minute statistical possibility but I think the ABA has an obligation to forewarn the American public and to help insure the opportunity for that to take place if it should ever be needed in the future.

MR. SPANN: I would simply add my voice to those who deplore the idea of FBI screening. I think it is a dangerous idea. The reference in the Kennedy School report to investigations conducted on Ford and Rockefeller is, of course, because they were nominees of the then President of the United States. The FBI is set up legally, at the present time at least, to be under the Attorney General of the United States, who is a part of the administration. Frankly, the report of the committee which I chaired²⁶ said there ought to be more oversight over the FBI in the Attorney General's office. I think the Attorney General is a political creature, and I would certainly not think that was the place for any screening to go on. Besides, I agree with those who say that what the FBI has done in the past in other situations of screening has not been impressive, so I would simply add the thought that that is a proposal to which I would be very much opposed.

I raise one question. There was an article in *The Wall Street Journal* on November 16th entitled "A Gap in the Succession Laws," referring to the gap that would exist right now if anything happened to Carter, and for the brief period between the election and meeting of the Electoral College, voting of the Electoral College and counting of ballots by the Congress and certification of the election, and between that time and the inauguration. I just wonder if the Committee has undertaken to consider that situation at all. We have not talked about it here, but I think it is part of the problem.

MR. FEERICK: It is something that we are focusing on.²⁷

26. ABA Special Committee to Study Federal Law Enforcement Agencies (FLEA).

27. "At present, there is no doubt about who would become President on January 20 if the winning candidate died after the counting of the electoral votes on January 6 and before Inauguration Day. Section 3 of the Twentieth Amendment provides that if a President-elect dies before the time fixed for his term to begin (January 20), the Vice-President-elect becomes President. In such a case, the new President would be empowered, under the proposed Twenty-fifth Amendment, to fill the resulting vacancy in the Vice-Presidency. . . . The Succession Law of 1947 would apply in the event both died . . . before January 20.

". . . No provision is made in law for the death of a Presidential candidate in the forty-one-day period between [E]lection [D]ay in November and the meeting of the electors in December. . . .

SENATOR GRIFFIN: A short time before the Republican convention in Kansas City, the Detroit News paid for a professional survey which ran Gerald Ford against Jimmy Carter head to head in Michigan. Gerald Ford came out easily on top.

Then it proceeded to run Gerald Ford in tandem with various possible candidates for Vice-President—Ed Brooke, Ann Armstrong, John Connolly and one or two others. The interesting result was that in each case Gerald Ford's popularity decreased and declined. When we got to Kansas City and got into the midnight meeting, it was seriously argued that the real question before us was who could he pick that would subtract the least from Gerald Ford's chances of being elected.

PROF. SCHLESINGER: You ought to be in favor of the abolition of the office.

SENATOR GRIFFIN: Well, I am coming around to that. I don't have any question in my mind from various elections that the selection of the Vice-Presidential nominee has actually helped the candidate, but I suspect in many instances the question is which one would subtract the least.

In any event, I am convinced that the greatest and most important consideration in the selection, whether it is to win the nomination, to unify the party, or to win the election, is political. Of course, each possible nominee is always described as one who is qualified to be President.

I am a realist. I think that the most promising chance is in the area of the party organization and the convention. While we say that the Vice-President is elected under the present system, I think I tend to agree with Governor Peabody that he really is not, when the people are voting for the President and seldom voting for the Vice-President, though it may, to some extent, affect their vote.

I think the chance of any real structural Constitutional change is very slight. I think that has been demonstrated here today. Least likely, in my opinion, would be Arthur Schlesinger's proposal that we abolish the office altogether. I think people want it. The chance for adoption is probably not much better, but I suggest that we follow in all instances the pattern of the twenty-fifth amendment rather than repealing it, as Arthur Schlesinger has suggested. I think it is great. I join with Jim Kirby and others who think it has done an outstanding job. When it is used, the President is not looking to his election—at least that is not the primary and immediate consideration—he is more

The Democratic and Republican parties both provide [that their] national committees are authorized to fill [such] a vacancy." Commission on Electoral College Reform, American Bar Association, Electing the President 32-3 & n.41 (1967).

likely to look for qualifications and acceptability to Congress. The Congress is going to be confirming the nomination; every aspect of the candidate will be carefully checked out. I think the twenty-fifth amendment has worked well and if we were to make any real change, it ought to be in adopting that procedure in every instance of Vice-Presidential selection.

With that, Mr. Chairman, and since I am the last speaker, I just want to add my commendation to the ABA and the Fordham Law School for having this session. I think that even if we all conclude that nothing is going to happen, it has been a useful exercise. I think there will be better understanding of the office and the problems of the office, and who knows, maybe at least in the area of the convention and the party structures, maybe some improvements will be made. I hope so.