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American Bar Association Special Committee on Election Reform, Symposium on the Vice-Presidency, Panel Discussion, Supplementary Appendix A: American Bar Association Special Committee on Election Reform

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APPENDIX A: AMERICAN BAR ASSOCIATION
SPECIAL COMMITTEE ON ELECTION REFORM

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association favors (1) retention of the constitutional office of Vice-President of the United States in its present form, but urges each President to involve the Vice-President intimately and productively in operations of the presidency, and (2) that in the nomination and election process the Association (a) favors retention of the present practice by which a newly-nominated presidential candidate recommends his or her vice-presidential running mate to the party's nominating convention, and (b) urges that each contender for a party's nomination announce a tentative list of his or her potential vice-presidential running mates publicly prior to the opening of the party convention, and (c) favors televised debate by vice-presidential candidates, as an integral part of any future presidential candidate debating series.

REPORT

Our Committee was created in October, 1973, to study such subjects as the method of nominating and electing the President and Vice-President of the United States and the financing of national political campaigns and was charged with the responsibility of recommending proposals for improving the federal election system. Pursuant to these directions, we have issued recommendations and reports concerning the abolition of the electoral college system, public financing of political campaigns, procedures for voter registration by mail in federal elections, and the effectiveness of the 25th Amendment.

Our committee was created subsequent to the resignation from office of a Vice-President and the withdrawal from the national ticket of a Vice-Presidential candidate. As a result of these events, we were especially charged with evaluating proposals for improvement of the Vice-Presidency. Towards this end we assembled for a Symposium on the Vice-Presidency at Fordham University School of Law a group of political leaders, historians, political scientists, lawyers, and other authorities on the Vice-Presidency. The group consisted of United States Senator Birch Bayh; Joel Goldstein, a current Rhodes Scholar at Oxford; United States Senator Robert Griffin; Ira Jackson, Assistant Dean, John F. Kennedy School of Government and co-author of its Institute of Politics Report on Vice-Presidential Selection; Charles H. Kirbo, Atlanta attorney and adviser to President Jimmy Carter; James C. Kirby, Professor, New York University Law School; Joseph M. McLaughlin, Dean, Fordham University Law School; Clarence M. Mitchell, Director, Washington Office, National Association for the Advancement of Colored People; Endicott Peabody, former Governor of the Commonwealth of Massachusetts and member of the Humphrey Commission on Vice-Presidential Selection;

George Reedy, Dean, College of Journalism, Marquette University, and former aide to President Lyndon B. Johnson; Arthur Schlesinger, Jr., Albert Schweitzer Professor of the Humanities of The City University of New York; former United States Senator Margaret Chase Smith; William B. Spann, Jr., President-elect of the American Bar Association; and Donald Young, author of "American Roulette: The History and Dilemma of the Vice Presidency." The proceedings of the Symposium took place on December 3, 1976, were widely reported in the press, and will be made available this year in published form.

The Constitutional Scheme

Under Article II of the Constitution the Vice-President is given the duty to discharge the powers and duties of President in case of the death, resignation, removal, or inability of the President, and the duty to preside over the Senate. The first duty has been discharged eight times when Presidents died in office and, most recently, when a President resigned. The second duty has diminished over the course of history, although there are recent examples of Vice-Presidents casting tie-breaking votes.

Until the twentieth century the Vice-President had practically no other responsibilities than to be a successor to the President and to preside over the Senate. In this century the Vice-President has become a regular member of the President's Cabinet, a member of the National Security Council, a statutory member of various other groups, and a representative of the President. The Twenty-fifth Amendment adopted in 1967 assigns to the Vice-President a role in the process of determining a President's inability.

Proposals for Change

A number of proposals relating to the office have been advanced since 1972. These involve the process by which Vice-Presidents have been selected and the duties of the office. Several persons, including Arthur Schlesinger, Jr., have suggested that the office be abolished in its entirety. A review of the major proposals follows.¹

It has been suggested that the Vice-President should run for office and be elected to it just as the President. This proposal would have candidates for Vice-President running in state primaries and conventions and it would allow the electorate to choose a candidate of a different party for Vice-President.

1. We incorporate by reference the special paper prepared at the request of and for our Committee by Joel K. Goldstein, entitled "An Overview of the Vice Presidency," where these proposals are discussed with some detail [Appendix B *infra*].

It has been suggested that only candidates for the Presidency should run in our regular quadrennial election and that after taking office a new President should nominate a person for Vice-President under the provisions of the Twenty-fifth Amendment.

Other proposals include requiring Presidential candidates to indicate their choice for Vice-President prior to the commencing of the national conventions; providing that the delegates to a convention will choose their party's candidate for Vice-President from a list of acceptable nominees supplied by the Presidential candidate; and deferring the choice of a Vice-Presidential candidate to a "mini-convention" held a few weeks after the major convention.

The proposals with respect to the Vice-President's duties range from abolishing his role as President of the Senate to expanding that role, for example, by giving him the right to participate in Senate debates, to vote on all questions, and to appoint Senate committees. Some proposals would enlarge the Vice-President's statutory duties. Other proposals include procedures for a special election whenever the Vice-President succeeds to the Presidency rather than have him serve for the remainder of the President's term. Some of the special election proposals are addressed only to Vice-Presidents selected under the Twenty-fifth Amendment.

Summary of Recommendations

We have carefully considered all of the proposed reforms and the divergent views expressed at our Committee-sponsored symposium on the Vice-Presidency. Based on our study, we are of the opinion that the office of Vice-President should not be abolished and that its constitutional duties should not be changed. We further believe that Presidential candidates should continue to choose their running mates but that they should give advance notice to the public of potential running mates who are not then candidates for President. We also feel that Vice-Presidential debates should be encouraged.

Finally, we are of the view that the proper approach toward greater utilization of Vice-Presidents is to encourage Presidents to involve them more intimately and effectively in their administrations rather than to give Vice-Presidents permanent responsibilities that might limit their availability to assist the President.

Discussion

The primary duty of the Vice-President is to become President if the need should arise. Admittedly, this duty of waiting for some unfortunate incident is not enough to keep a qualified person occupied or challenged. However, the

value to our political system in having an acknowledged and accepted successor far outweighs the fact that Vice-Presidents are at times underutilized.

Our Committee does not consider these proposals workable and desirable, in part because our government and political system are best served by accession of a President with full authority, who could help to unify the country, rather than to require a divisive political campaign following immediately on the death, resignation, or removal of a President. Additionally, such proposals would of necessity either drastically alter the Presidential nomination process or would have a caretaker government remain in office for an unacceptably long interval. The fact that Vice-Presidents have been able to take over the Presidency in times of major national trauma (specifically, within recent memory, the Kennedy-Johnson and Nixon-Ford transitions) establishes the fact that the Vice-Presidency in its present form provides an individual able to become President. Of vital importance, this individual is immediately and fully accepted as President by Americans and by foreign leaders. Since in our opinion the Vice-Presidency already performs its primary role effectively—that of providing a President in an emergency—the needed reforms in the office of Vice-President are in the nature of refinements, rather than a major overhaul.

Clearly, it is desirable to design duties to further prepare Vice-Presidents to assume the duties of the Presidency. This is a goal which is more easily stated than achieved, however. To increase the Vice-President's duties within the legislative branch of government is inconsistent with the thought that the Vice-President's primary duty is to assume leadership of the executive branch in an emergency. (The Vice-President is now the constitutionally mandated presiding officer of the Senate, with a vote only in the case of a tie.) Increasing the Vice-President's role in these day-to-day workings of the legislative process, especially a role largely ceremonial, quite simply does not prepare the incumbent for suddenly taking over the executive branch.

For different constitutional reasons, we do not believe it practical to increase the Vice-President's permanent duties within the executive branch. To give him any major and exclusive executive authority would encroach upon the authority of the President; under the Constitution "the executive power shall be vested in a President of the United States." As long as we have a single executive who has full executive authority, we believe that the Vice-Presidency should not be endowed with permanent executive duties.

In our view, Vice-Presidents should be used more as "ministers without portfolio," in which capacity they can focus high-level government attention on major problems and do so with the known and express approval and implicit authority of the President. Vice-President Rockefeller's recent chairmanship of the Domestic Council Privacy Committee is a step in this direction, and the use of future Vice-Presidents in similar and expanded roles is to be encouraged. Such an expanded role clearly appears to be the mutual intent of Vice-President Mondale and President Carter. Since the desire and willingness of a President to productively employ the talents and expertise of a

Vice-President appear to be the crucial determinants of a Vice-President's real worth in the Executive Branch, the new Administration's stated intent is noteworthy. An incoming Vice-President could not prepare better for succession to the Presidency than by participating in "all the crucial decision-making processes establishing this government," as the Vice-President stated before assuming his office.

President Carter's own pre-inaugural statement on the Vice-President's role accurately describes the committee's sense of what a "minister without portfolio" can be: "I think the extent to which he will be actively identified as being very close to me and involved in the decision-making process will make his functions within our own country and abroad much more effective."

It has also been proposed that the Vice-President be relieved of the constitutional duty of presiding over the Senate and officially be made a part of the Executive Branch. While such a change might have beneficial results, we believe that it would be largely meaningless in view of the fact that Vice-Presidents really spend little time presiding over the Senate. Nor would officially making the Vice-President part of the Executive Branch be a meaningful change unless he has also given some real executive duties: as noted above that would be inconsistent with the role of the President.

Addressing the issue of Vice-Presidential selection, we feel that there is no reform proposal preferable to the present system, under which the presidential nominee exercises almost complete discretion in selecting a running mate. To the extent that various reform proposals would give the Vice-President a separate constituency from the President, they would serve to create greater independence of the President. The Vice-President would be less a part of the President's "team" and would be given even less in the way of meaningful duties by the President if there were more independence of the President. Thus, the Vice-President would become less prepared to assume the Presidency rather than more prepared. These difficulties would be compounded if a Vice-President were individually elected who was a political antagonist of the President. In this situation, the Vice-President, having a separate national constituency and no real duties to keep him occupied, would likely become the chief national critic of the President's policies and programs. Our political systems already provide sufficient procedures for criticizing an administration's programs without institutionalizing in the office of the Vice-Presidency the role of chief national critic. More fundamentally, such a role would be inconsistent with the Vice-President's primary duty of preparing to become President in an emergency.

The responsibility for selecting a Vice-Presidential nominee should remain with the Presidential nominee. However, there are procedures which could improve the selecting process. All too frequently, Vice-Presidents have been selected in the early morning hours following a contested nomination. Too often the results have been a Vice-Presidential nominee who was not well known to the public, who may not even be well known to the Presidential nominee, and who may have serious deficiencies. Nothing, of course, can insure a perfect selection process, but the Committee believes the system can

be improved. (For example, Spiro Agnew was selected as Vice-President twice and served in that capacity for five years before evidence came to light of his conduct as Governor.)

As we see it, the key is to have the political parties adopt procedures which would require the contenders for the Presidential nomination to make public a list of potential Vice-Presidential running mates sufficiently in advance of the party convention to permit a more considered decision. Such lists can be released early enough and be small enough to permit media and public consideration of the potential candidates prior to convention week. Such lists made public within a short period of time after the last Presidential primary would be desirable. Such a procedure not only would permit a more thorough public consideration of the relative records and abilities of the potential candidates, but would also permit a more thorough consideration of those factors by the Presidential nominee. This would likely improve the caliber of the Vice-Presidential nominees and also improve the likelihood that the Presidential nominee would select a running-mate with whom he was compatible. Such a result would likely produce Vice-Presidents who would be given meaningful tasks by the President, thereby better preparing the Vice-President to assume the office of President when the need arose.

For several reasons we believe that these lists of Vice-Presidential possibilities should not be binding on the Presidential nominee. First, the ultimately successful nominee should be free to pick any of the defeated Presidential contenders though he may not want to name them on his list. Additionally, one purpose of the list is to produce a more thorough examination of possible Vice-Presidents; if no contenders pass such examination, the nominee should not be bound. In reaching the conclusion in favor of a pre-convention procedure we considered the proposals for a post-convention procedure. Such a selection, we felt, involved practical problems, such as the delay and diversion it would cause in the development of a presidential nominee's election campaign, and the unification of the nominee's political party; its interference with the convention of a political party holding a later convention; and its impact on the presidential nominee having a Vice-Presidential choice rejected so soon before the election. The suggestion that the Vice-President not be selected until after the President was inaugurated also was considered undesirable.

In the final analysis, we favor the choice of a Vice-President as at present by the broad representation of a political party present at its national convention. We do not favor, however, any requirement that a Presidential candidate name his Vice-Presidential choice prior to his own nomination. We also considered and rejected the proposals calling for an investigation of all Vice-Presidential nominees by the Federal Bureau of Investigation. We consider such a mechanism unnecessary and potentially dangerous. The Vice-President is, of course, a vital national figure, if for no other reason than the fact that many Vice-Presidents go on to serve as Presidents. All too often, however, the public votes for the Presidential candidate and has only limited information about the Vice-Presidential candidate. Last year's Vice-Presidential debates countered this trend by focusing on the Vice-Presidential

nominees independently of the Presidential candidates. It is felt that this debate served a vital role and that such debates in future years should be encouraged. Accordingly any impediment to such debates such as equal time rules should be eliminated.

Respectfully submitted,

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by the House of Delegates
American Bar Association