Fordham Law Review

Volume 79 | Issue 3 Article 7

2010

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Recommended Citation
79 Fordham L. Rev. 897 (2010).

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ADEQUACY OF CURRENT SUCCESSION LAW IN LIGHT OF THE CONSTITUTION AND POLICY CONSIDERATIONS

*Benton Becker**

I was pleased and honored to have the opportunity, in 1973, to represent then-Congressman Gerald R. Ford at his confirmation hearings for the Office of Vice President of the United States. Those were difficult and trying times, as some of us in this room are old enough to remember. The country was deeply split with respect to the Vietnam War, and there was constant talk of the impeachment of the President, Richard M. Nixon. With each day, a new revelation occurred that threw more coals on that fire to impeach President Nixon. It was in that environment of divisiveness in this country that Spiro T. Agnew, Nixon's Vice President, on October 10, 1973, resigned from office.[1]

His resignation was not, like John C. Calhoun's as Vice President, a voluntary one.[2] Agnew's resignation was virtually an agreed-upon condition as a plea negotiation with respect to his entry of a *nolo contendere* plea to bribery charges, negotiated by the Department of Justice.

Shortly thereafter, President Nixon nominated the House Minority Leader, Gerald Ford, to his position. Then-Congressman Ford had been under consideration by President Nixon in 1968 at the convention as a running mate, but Nixon chose Agnew instead. In 1973, Gerald Ford was the first person ever designated under the Twenty-Fifth Amendment to serve in the Office of Vice President and to fill the vacancy that existed there.

The Amendment was at that time, in 1973, about five years old. There were no procedures. There were no standards. There were no rules. We only knew what the Twenty-Fifth Amendment told us. The Twenty-Fifth Amendment told us that he had to be confirmed by a majority of the Senate, and, for the very first time in American history, the first time in the Constitution or in any statute, the House of Representatives got into the

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* Counsel to Gerald R. Ford during the Twenty-Fifth Amendment Vice Presidential Confirmation Hearings. This Article is adapted from Professor Becker's remarks at the Fordham University School of Law Symposium, *The Adequacy of the Presidential Succession System in the 21st Century*, April 16-17, 2010.

1. James M. Naughton, *Agnew Quits Vice Presidency and Admits Tax Evasion in '67; Nixon Consults on Successor*, N.Y. TIMES, Oct. 11, 1973, at 1.

2. *Id.* (reporting that in 1832, Vice President "John C. Calhoun stepped down after he was chosen to fill a Senate seat from South Carolina").

confirmation act as well. Following the Senate confirmation, there had to be a confirmation by the House.[3]

We did not know what committee we were going to appear before at the Senate or the House. We did not know if the Senate was first or the House was first. We did not know whether the votes were going to be taken on the same day or were going to be done separately. Very little had been implemented.

What we did know was that we had a Congressman who had served eleven terms and had been in the House for twenty-three years. We knew that, given the times and the tenor of the times in Washington at that point and throughout the nation, the scope of the inquiry of Congressman Ford would be far beyond the scope of the inquiry of any Cabinet member or Article III judge's confirmation procedure. It would be far, far more detailed, because there were many people in Washington in September of 1973 who believed that this nominee was going to be President, one way or another. Sooner or later, Richard Nixon was going to resign or be impeached. And each day's revelation seemed to support that premise.

Consequently, there was a very serious effort to undertake a congressional background check of the man, Gerald Ford, who represented the Fifth District of Michigan for twenty-three years. The congressional background check included an immediate designation of seventy-two—count them, seventy-two—FBI agents working full-time on the background of this man.

Furthermore, every vote, every contribution, every matter that this man had ever been involved with over that twenty-three year career in the House became grist for the mill. The Bureau investigated all of these matters in detail.

I was quickly informed, shortly after the nomination, that the Senate rules, which would be followed by the House as well, provided that counsel for Congressman Ford and Congressman Ford himself, would not have an opportunity to read, inspect, challenge, or have any access whatsoever to the FBI reports. Those reports, in their raw form, would be given to the chairperson of the Senate committee and the House committee that were undertaking the confirmation proceedings. Only the chair would get them, not the members of the committee and not the nominee.

We were never given, although we asked for it in both bodies, a list of witnesses that the committee might bring. We were able to get them informally, through minority members of the committee in the Senate. For example, Senator Bob Griffin of Michigan was extremely helpful to us in helping us prepare for the confirmation proceedings before the Senate, which were to occur first.

Let me say clearly that Gerald Ford was a Boy Scout all of his life. He was a fine man, and there was really nothing there that could be injurious to Gerald Ford. But I kept remembering back to a public statement that Jimmy Hoffa once made when Bobby Kennedy had such a targeted

3. U.S. CONST. amend. XXV.

investigation on everything that Jimmy Hoffa did. Hoffa implied that nobody could withstand this kind of scrutiny.

I will tell you, Gerald Ford had ten times the scrutiny that Jimmy Hoffa ever had by these committees.

The Senate undertook a complete audit of the last ten years of Congressman Ford's finances and undertook to question and explore his background and his competency for the Office of Vice President in what I considered to be a very professional way and a very thoughtful way and a very courteous way—nothing more than I would have expected from the United States Senate in 1973.

To the young people present, it may sound like I am talking about a different planet or a different nation, when one looks at the partisanship that exists in Washington today. That did not exist with the Ford confirmation proceedings in the United States Senate.

There was a book on the bookstands at that time written by some lobbyist named Robert Winter-Berger.[4] The book, a very trashy book, made references to members of Congress that Mr. Winter-Berger had allegedly (or imaginatively) given money to over the years. The book was replete with factual errors. Two of the members of Congress that Mr. Winter-Berger claimed he gave money to had died two years before the alleged payment. There was a reference to a date when Mr. Winter-Berger claimed to have met with Congressman Ford in Congressman Ford's Washington office; however, to Mr. Winter-Berger's embarrassment, Congressman Ford was not in Washington on that date.[5]

We wanted to rid the issue of Winter-Berger at the Senate, before the House undertook confirmation. The way we did that was, we asked for the opportunity to cross-examine witnesses that were brought by the Senate committee. We were denied that. So we went back to our second source, Bob Griffin. Senator Griffin from Michigan was very helpful. We provided questions for Senator Griffin when Mr. Winter-Berger appeared.

Mr. Winter-Berger appeared before that Committee and testified for probably two and a half or three hours. At the conclusion of the Committee's report, the committee transcribed Mr. Winter-Berger's testimony, and sent it to the Department of Justice with the recommendation that the Department of Justice take a hard look at it and consider whether or not perjury had been committed before the Committee.[6]

We were satisfied that Mr. Winter-Berger's testimony demonstrated that he was devoid of credibility.

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4. ROBERT N. WINTER-BERGER, THE GERALD FORD LETTERS (1974).

5. *See generally id.*

6. JAMES A. CANNON, TIME AND CHANCE: GERALD FORD'S APPOINTMENT WITH HISTORY 242 (1994); J.Y. Smith & Lou Cannon, *Gerald R. Ford, 93, Dies; Led in Watergate's Wake*, WASH. POST, Dec. 27, 2006, at A1.

Congressman Ford testified for approximately seven or eight hours before the Committee.[7]

Prior to and during the Senate confirmation hearings, I became aware of activity by the Executive Branch and the Nixon White House. White House Chief of Staff Al Haig knew that FBI reports were not being given to the nominee. He was aware that the rules that had been established by both Houses provided that the FBI reports would not be given to the nominee nor could the nominee view the contents of the reports directly or indirectly through any backdoor. Yet that did not prevent General Haig, who was Nixon's Chief of Staff, from trying to surreptitiously deliver information to Congressman Ford regarding what the FBI was doing, what they found, and so forth. I discovered that surreptitious and self-serving effort by General Haig and took immediate action. Approximately two weeks prior to Mr. Ford's appearance before the Senate Committee, I was present with him in his congressional office preparing him for his Senate committee testimony. Our work was interrupted by a secretary's announcement that "General Haig was on the phone for Congressman Ford." Mr. Ford had listened to General Haig, who commenced to relate the content of the FBI vice presidential confirmation reports to the Congressman. With Congressman Ford's consent, I took the phone, interrupted the conversation, and as firmly as I could, instructed General Haig to cease transmitting any such information to Congressman Ford. I further informed the General that "we would handle the confirmation, and we did not want or need White House assistance."

Let me give you an idea of the depth of the FBI inquiry into Mr. Ford's background. This was 1973. In the early 1940s, Gerald Ford played football for the University of Michigan. He played sixty minutes. He was the center and he was a linebacker. Against Ohio State, in his third year, linebacker Gerald Ford was called for a penalty of unnecessary roughness when tackling an Ohio State halfback.

Listen to this. More than thirty-three years later, in 1973, two FBI agents found that halfback and asked him this question, "What unnecessary roughness did linebacker Ford do?"

The halfback called the Congressman's office and, quite highly amused, told us of his silly encounter with the FBI. He thought it was amusing that he would be interviewed by the FBI (incidentally, he volunteered that the tackle was a "clean hit"). The FBI left no stone unturned, none at all.

The Senate committee, of course, voted favorably, the recommendation to confirm.[8] The Senate voted favorably. Within three days, we were before a committee of the House of Representatives.[9]

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7. *See generally* Marjorie Hunter, *Ford Is Approved by Senate, 92–3; House Set To Act*, N.Y. TIMES, Nov. 28, 1973, at 1.

8. *Id.*

9. *See* Marjorie Hunter, *Ford Sworn as Vice President After House Approves, 387–35, He Vows Equal Justice for All*, N.Y. TIMES, Dec. 7, 1973, at 1. *See generally* 119 CONG. REC. 39807–900 (1973); ANDREW DOWNER CRAIN, THE FORD PRESIDENCY: A HISTORY (2009).

I never did find an adequate explanation for the House Committee assignment, but I will simply tell you the bottom line. The bottom line, despite numerous standing and special committees of the House to choose from, Ford's confirmation was assigned to the Judiciary Committee, which was at that very time entertaining three impeachment resolutions against the man who had nominated Ford for Vice President. It was a far more hostile audience than the Senate committee. Of course, it was a larger Committee in terms of the number of members. Consequently, the number of questioning minutes Committee members were afforded was shorter than that of the Senate committee.[10]

But at times it seemed that the House committee was not a committee of the Federal Legislature, but it more closely resembled a political convention of ambitious politicians. Members were making speeches about Richard Nixon and adding to their end of their speech, "Now, if you were President, would you do that, Congressman Ford?" or "What do you think about that?" and trying to get Congressman Ford to speak about Nixon and to stoke the fires of divisiveness. Several of the Committee members were not seeking factual and truthful information about the Congressman and/or his nomination.[11] I do not include all of the Committee members, but many of them appeared to me as such.

For example, Congressman John Conyers, who is now, as we speak today, the Chairman of the House Judiciary Committee, was a member of that committee in 1973. As the committee questioning went around the room—"you're next," "you're next," "you're next"—each time it got around to Congressman Conyers, he made the same remarks and comments. He said, in essence, "I can't ask any questions of you, Congressman, because I was denied the FBI reports." Only the Chairman has the FBI reports, and the Chairman will not share them with the other members.[12] Congressman Ford advised that he was in the same predicament, i.e. without FBI reports, and simply offered to answer any questions Committee members may have.

Conversely, Congresswoman Elizabeth Holtzman, from New York, took exactly the opposite tack, saying in essence, "I'm only given X number of minutes. I don't have time for you to answer all of my questions, so let me just tell you what my questions are." Thereupon she read a number of questions not seeking, because of time restrictions, any answers.[13] We would always ask the Congresswoman for her questions and submit written answers within days. Just questions, questions, questions, and no answers. Many of the questions implied serious deficiencies with respect to the

10. *See generally* 119 CONG. REC. at 39807–900.
11. *See generally id.*
12. *See generally id.* at 39825–34.
13. *See id.* at 39809–12.

character, dignity, and qualifications of Congressman Ford.[14] Nonetheless, I believe, we conducted ourselves as gentlemen.

There was a member from California named Jerome Waldie, who was blatantly running for the Democratic Party nomination for Governor of California. He saw the Ford confirmation procedures by the House Committee as an opportunity to gain some notoriety and ink in California. His questions directed at Mr. Ford were calculated to enhance his candidacy with, in my opinion, little interest in exploring the candidate's qualifications. Congressman's Waldie's Committee behavior, I remember telling Mr. Ford, demonstrated the wisdom of our Founding Fathers who wrote the Constitution, and specifically excluded the House of Representatives from any confirmation consideration. Many of Waldie's questions pertained to Mr. Ford's recommendation to the Judiciary Committee that it explore Justice William O. Douglas's receipt of compensation for service on boards of directors while he was a member of the Supreme Court.[15]

My goodness gracious, you would think that Congressman Ford had asked for the moon or was accusing someone or even trying to impeach someone. Never was that his intent. His intent was merely to investigate compensation received by Justice Douglas and Article III judges. Wrongly, Mr. Waldie's questions on this subject inferred a sinister motive by Congressman Ford.

The Judiciary Committee, after going through many, many sessions, concluded its work with a favorable majority vote. The full House voted overwhelmingly in favor of confirmation.[16]

On December 6, 1973, Congressman Ford was sworn in as the Vice President of the United States, under the Twenty-Fifth Amendment.[17]

Let me add a word or two, because the story does not end there. These were harsh times for our nation and our Constitution. In December 1973, when Gerald Ford became the Vice President of the United States, the media focus was on Watergate, Richard Nixon, the people in the Nixon White House, the Special Prosecutor indictments, the White House tape revelations, and the House Judiciary Committee's impeachment inquiry, resulting in even greater divisiveness in the nation. It was a very, very heated time. It is in that environment, on December 6, 1973, that Gerald Ford became the Vice President.

There were people in high positions in the Nixon White House who honestly believed, and carried out their beliefs with their behavior, that Vice President Gerald Ford was nothing more than another middle-level executive branch officer, who could be told what to do. And punished

14. *See generally id.* at 39807–900. *See also Gerald R. Ford Biography*, GERALD R. FORD PRESIDENTIAL LIBR. & MUSEUM, http://www.ford.utexas.edu/grf/fordbiop.asp (last updated Feb. 5, 2008).

15. *See generally* 39820–21.

16. *See* Marjorie Hunter, *Ford Sworn as Vice President After House Approves, 387–35; He Vows Equal Justice for All*, N.Y. TIMES, Dec. 7, 1973, at 1.

17. *See id.*

severely for failure to behave as told. As a consequence, key members of the Nixon White House undertook to take advantage of Vice President Ford's good nature and of his general disposition, practiced throughout his political life, to be a good team player. These individuals took advantage of the Vice President's characteristics, by among other ways, scheduling him for speeches around the nation without his prior approval. They would send him memos that read, "You have been scheduled to speak in Kansas on such-and-such a day and in Alabama on another such day, before such-and-such group. The White House staff will write your speech."

The Vice President's office was located in the Executive Office Building, next door to the White House. The Washington political culture at that time held that the closer your office was to the office of the President, the greater your influence. Conversely, the farther away your office was to the office of the President, the less your influence. Vice President Ford visited the Nixon White House by invitation, not by vocation.

Those speeches that were prepared by the White House staff never arrived early. Most often they never arrived before the Vice President boarded the Air Force II to go to the speech location. Sometimes the speech draft did not arrive even after the Vice President landed. On a few occasions, the Vice President was already seated at the event head table when he was handed, for the first time, a draft of the speech he was scheduled to make.

I can only tell you that many of the Nixon White House staff prepared speeches for the Vice President that were Agnew-like, blind defenses of Nixon and the Nixon White House.

But Gerald Ford was, for the first two to three months, unwilling to confront that issue. His team-player nature continued to control.

I had a session with him sometime in early March or early April of 1974. Very clearly, I let him know that he held the only position in the White House that Richard Nixon could not fire. Of course, he knew that, but he had not fully realized that he had been cast in an Agnew role, blindly defending the President.

Furthermore, as it became clear—more and more daily—Richard Nixon was either going to resign or be impeached. That truism forced the recognition that, "Someday you are going to be President. You are not going to be President of Richard Nixon's constituency. You are going to be President of the United States, and the people in the United States have to accept you as their President, not Richard Nixon's replacement. Your honesty and your candor have to be brought forth to the people. That will not happen if you allow the Nixon White House to manipulate you with these speeches."

In true Gerald Ford fashion, he immediately understood, he was sympathetic to it, and he went beyond what I recommended. I recommended no more speeches by the White House staff. Further, the Vice President would not commit in advance unless his office wrote the speech.

But beyond that, in the month of May of 1974, Gerald Ford attended a Cabinet meeting. This coincided, as I recollect, with the revelation of the smoking-gun White House tape of March of 1972.[18]

Vice President Ford attended a Cabinet meeting and, at the Cabinet meeting, requested and received permission to make an off-the-agenda remark and announced to President Nixon—in the presence of the Cabinet—that he could no longer and would no longer publicly support this administration or this President in its public comments regarding the Watergate matter.

This was an act of great courage and guts. I always thought that the Vice President's statement, among other acts that he did, including the pardon of Richard Nixon, represented great demonstration of political courage on his part. In his retirement, we spoke frequently and visited frequently. He was most proud of so many of the offices and awards that he had received over the years. But the one that pleased him the most was the award that Senator Ted Kennedy and Caroline Kennedy presented to him: the Kennedy Family Profiles in Courage Award.[19] This award represented the political courage demonstrated by President Ford during his Presidency. Although the award was specifically focused on President Ford's pardon grant to Richard Nixon, I always believed that President Ford's Cabinet announcement of no longer defending the Nixon White House was equally politically courageous.

In response to the question of whether there is a conflict of interest with legislative succession, let me respond briefly to that and tell you that when Congressman Ford was being confirmed, the Speaker of the House, Carl Albert, was second in line, from the moment of Agnew's resignation, and would remain the second in line until such time as someone occupied the Vice Presidency and President Ford was confirmed.

We were concerned initially about the possibility of some future Speaker—not necessarily Carl Albert, but any Speaker—who might want to become President and might see an opportunity to advance his or her position to the White House by simply delaying and delaying and frustrating, and possibly even denying confirmation to a vice presidential designee or Vice President nominee. It was a serious concern. If you had, theoretically, a Newt Gingrich who wanted to be President, who theoretically had the authority and the power to withhold confirmation out of the House, withhold the Committee hearings, control the vote on the floor in such a way as to stretch out and lengthen that process until maybe

18. For information on the White House tapes, see *White House Tapes*, NIXON PRESIDENTIAL LIBR. & MUSEUM, http://nixon.archives.gov/forresearchers/find/tapes/index.php (last visited Nov. 11, 2010).

19. Jeff Jacoby, *Commentary: Ford's Act of Clemency – Americas – International Herald Tribune*, N.Y. TIMES (Dec. 27, 2006), http://www.nytimes.com/2006/12/27/world/americas/27iht-web.1227ford.globe.4027875.html; News Release, *Special One Hour Documentary "Profiles in Courage: A Kennedy Legacy" To Be Broadcast Nationally on August 26, on NBC Stations*, JOHN. F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (Aug. 17, 2006), http://www.jfklibrary.org/JFK+Library+and+Museum/News+and+Press/Profiles+in+Courage+A+Kennedy+Legacy+to+Air+on+NBC+Stations.htm.

the President is impeached or resigned—you might have such an ambitious person sometime in the future.

Let me make it very clear that that was not the case in 1974. The case in 1974 was that Carl Albert was very anxious to move down the succession ladder from number two to number three. He was very cooperative at every step of the way in moving the nomination forward. But we had an initial concern on that score.

In 1974, when President Ford was confirmed, Washington and the Congress were different from today. Who among us today, in 2010, does not recognize the partisanship and the divisive nature of the Congress of the United States has changed considerably in that forty or fifty-year period? Without reflecting on the present Speaker, it would seem to me a far greater likelihood for pure partisanship controlling an unfavorable and unfair result by delaying the nomination. In the present atmosphere there exists in Washington partisanship that did not exist in 1974 with President Ford.