

2010

Remarks From Senator Birch Bayh

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Remarks From Senator Birch Bayh, 79 Fordham L. Rev. 1091 (2011).

Available at: <https://ir.lawnet.fordham.edu/flr/vol79/iss3/12>

This Symposium 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.

REFLECTION

REMARKS FROM SENATOR BIRCH BAYH*

In 1787, John Dickinson of Delaware, a Democrat to the Constitutional Convention meeting in Philadelphia, asked, “What is meant by the term ‘disability,’ and who shall be the judge of it?”¹

On February 23, 1966, at 1:18 p.m., in the East Room of the White House, John Dickinson received his answer. One hundred seventy-nine years after he asked the question, the Twenty-Fifth Amendment was added to the Constitution.

It’s really fitting that we are gathered here at this great institution. I think if you stop to think about the issue before us, there’s no place in the country that is such a wellspring of knowledge on the dual questions of vice presidential vacancies and presidential disabilities. It started under the leadership of Dean [John D.] Feerick, before he was dean, back when we were both much younger. But right here is a good place—the best place I can think of—to have a symposium studying this subject. I consider it a privilege to be here with the talent that you have put together to speak with a degree of authority that’s sort of unparalleled on this subject.

It has been a subject that has been hidden, until we got to looking at the Twenty-Fifth Amendment. We were reminded not only of the Kennedy assassination and the vacancy, but the three very serious illnesses that President Eisenhower had. They were fresh in our minds. Fortunately, we had the benefit of the person who was the Attorney General at the time, Herbert Brownell, who sat at the bedside of the President of the United States while he went through these three illnesses.

How did I get involved in this? You talk about the kid from the farm and the wheat farmer’s daughter. That’s me. I appreciate the thoughtful references, in hindsight, with what I may or may not have done with the Constitution. At the time that I became Chairman of the Constitutional Amendment Subcommittee it was a position that nobody else wanted. How often do you amend the Constitution, for heaven’s sakes? It had been a long time. It was a graveyard. My responsibility was to keep cooped up these issues that nobody wanted to vote on. They wanted to repeal *Miranda*. They wanted to elect federal judges. They wanted to take away a woman’s right to choose. A lot of those issues were very contentious. We

* These remarks are adapted from an address given by former Senator Birch Bayh, at the Fordham Law Review Symposium, *The Adequacy of Presidential Succession in the 21st Century*, held at Fordham University School of Law on April 16–17, 2010.

1. ROSE McDERMOTT, PRESIDENTIAL LEADERSHIP, ILLNESS, AND DECISION MAKING 197 (2008).

held hearings on them, so you couldn't say they weren't heard, but it seemed to me that they were so politically volatile that the Senate of the United States would not have been served if those had become matters of public discussion and a vote in the United States Senate.

I remember, two weeks after the assassination, I was on a plane—and I guess I'm sharing my personal thoughts that may or may not be on some other people's minds—going to Chicago, to an Indiana Society meeting. In my briefcase I had a tome of information about work that had been done in the whole area of disability by Senator [Kenneth] Keating of New York and Senator [Estes] Kefauver of Tennessee, who had sponsored a constitutional amendment that would provide Congress the authority to deal with it.² When I got to looking at that, I thought, my goodness, the Constitution already gives us the authority to deal with it. Why go through the motions of passing a constitutional amendment that doesn't leave us in a better position than we are in now? If we're going to deal with it, we ought to deal with it in a way in which the decisions are made in advance.

Let me emphasize this. I think the contribution that the Twenty-Fifth Amendment makes is that it puts down the formula for dealing with the most serious issue in our political system, and that's what you do with presidential power. Our history is replete with certain activities that have—if you go back to 1876, the Tilden-Hayes election, that terrible debacle—totally disemboweled the Electoral College.³

The Twenty-Fifth Amendment was something that, frankly, we went through all the effort of creating and hoped and prayed to God that we wouldn't have to use it. You don't want Presidents to die or Vice Presidents to die so there are vacancies. You don't want a President to be disabled. Nevertheless, we thought it was important to have the formula for the prescription of what needed to be done, before there was an emergency. At the time of the emergency, political forces are going to say, what's in our best interests politically? And maybe that supersedes what's in the best interests of the country.

So what we tried to do—and I say “we” with a capital “W”—was to put down a formula that could be studied in advance of any catastrophe, taking into consideration the information and the memories we had of assassinations and illnesses, and then tried to put down a prescription that would pass muster for future situations.

In my briefcase, along with the Keating and Kefauver and [Senator Frank] Church material, I had the work that Herb Brownell had done in putting together the Eisenhower-Nixon agreement as to how the President and the Vice President should handle disabilities. At the time, Eisenhower had three of them. We were blessed to have somebody with Brownell's perception and, later on, blessed to have the influence he had with the American Bar Association.

2. BIRCH BAYH, *ONE HEARTBEAT AWAY* 350 (1968).

3. WILLIAM H. REHNQUIST, *THE CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004).

As I read through all these, it just seemed to me that certain things made common sense. I've been blessed on several occasions. I'm not the most religious guy, but I think there were two or three times that the Old Man Upstairs had his servant, Birch, in the palm of His hand. Circumstances defy any reason as to how I got where I was, and I think He must have been on my shoulder when we first started thinking about that Twenty-Fifth Amendment.

I got out my yellow pad and started scribbling. There were some things that made common sense. It may have been a constitutional amendment, but we didn't need a lot of "constitutionalese" and verbiage here. What we needed was what made common sense.

It seemed to me, first of all, that we needed a constitutional amendment, something that could not be changed easily by Congress at a moment where political winds may have been blowing one way or the other. It needed to be a two-pronged approach. We needed to have a way of filling vice presidential vacancies. Once you accomplish that, where we were able to fill that vacancy, at a time when I think the nation was well served. You can argue about the wisdom of the various statutory provisions that have provided legislative and executive succession.

So in choosing a new Vice President, what made sense? The Vice Presidency had developed to the place where it tended to be an office that had some responsibility. We needed to find someone to put in there that could work with the President. Our history had been dotted with a few experiences where you had Vice Presidents that were warring with the President. We needed somebody who could work with the President. If Congress would choose, it might be the opposite political party. It seemed to me that it made a lot of sense, as I was scribbling on my yellow pad, that the President ought to make that decision. Then you say, "Wait a minute. You don't want somebody picking his own successor." So we added the congressional dimension to it, which is a pattern consistent with the Electoral College, if you stop to think about it. I looked at it as Congress serving as the electing body after the President has made the nomination.

So that has been the way the vacancy has been filled. Those were the things that I put on that crazy yellow pad.

The question of disability was a more difficult situation. I was blessed to have the Brownell formula, which made a whole lot of sense. We ended up with the Brownell formula, which was the President making the decision and then the Vice President making a decision after consulting with whomever he thought was appropriate. We put a little meat on that by saying he should consult with the Cabinet, so that you had the Vice President not acting only by himself. Then we added the congressional dimension on to that, in the event there was disagreement. I thought the President would be protected and the country would be protected.

Basically, that's what ended up on that yellow pad. I got to looking back at some of the notes I had. On December 12, 1963, the subject of that

yellow pad, Senate Joint Resolution 139,⁴ was introduced into the Senate. That's what ultimately became Senate Joint Resolution 1⁵ in the next Congress and became the Twenty-Fifth Amendment.

Without the assistance of certain individuals or organizations, we wouldn't have been successful. One person did more to see that we had the advantage of the study that the Bar Association had done and got the Bar Association in the mix. We asked them to hold a panel hearing on the subject. John Feerick was the one that led the charge on that. We are indebted to him more than we can say. We continue to be in debt to him to this very day. It was John that helped us put that panel together. We asked him to look at what we had recommended. They had a very illustrious panel. You remember Wally Craig, the president. Brownell, of course, played an important role, as did Lewis Powell.

We had a lot of brainpower looking at this. They ended up saying Resolution 139 made a whole lot of sense. They put on the ABA Good Housekeeping Seal of Approval, which basically resulted in the Bar Association changing its position—because they had supported the Keating resolution,⁶ which would have given Congress the authority they already had—and came down strongly in favor of having a specific formula. It not only helped us get through the Congress, but also played an absolutely indispensable role in the ratification process. Those people really went at it. They organized their state organizations. They made sure they lobbied their members of Congress. They lobbied their state legislatures, and we got the three-fourths necessary to put the Twenty-Fifth Amendment in the Constitution, on that day that I described earlier in 1966.

I think I have probably said all I need to say here, maybe a little bit too much. Maybe I ought to add one extra word: whatever you think about the Twenty-Fifth Amendment, it works. It has worked both in the filling of the vacancies and in disability.

In declaring his disability, President Ronald Reagan stated that Vice President [George H.W.] Bush would act as President for the duration of his operation, but for some reason noted that this delegation was not what Congress intended. Unfortunately—Ronald Reagan didn't miss very many opportunities to make a record—this was when he could have been a blazing example of how the disability works.

More recently, we have had President George W. Bush invoke the disability provision up front, no effort to try to make it something different than it was. I want to compliment President Bush and Vice President [Dick] Cheney for the seamless way in which that was handled.

In fact, what we were trying to do, as far as disability is concerned, was to educate the American people that their President is not Superman.

4. S.J. Res. 139, 88th Cong. (1963), *available at* http://www.wordiq.com/definition/25th_amendment#Senate_Joint_Resolution_139_281963.29.

5. S.J. Res. 1, 89th Cong. (1965), *available at* http://www.wordiq.com/definition/25th_amendment#Joint_Resolution_1_281965.29.

6. S.J. Res. 35, 88th Cong. (1963), *available at* <http://www.amendment25.com/sjr35.html>.

Presidents have frailties. We were trying to get the American people to understand that Presidents can be disabled, can be cured, but that the functioning of government doesn't miss a beat. We say that to the American people, we say that to our adversaries, and we say that to our allies.

Thank you very much.