

1977

American Bar Association Special Committee on Election Reform, Symposium on the Vice-Presidency, Panel Discussion 4. Alternatives: Abolition, Succession, and Special Election

Recommended Citation

American Bar Association Special Committee on Election Reform, Symposium on the Vice-Presidency, Panel Discussion 4. Alternatives: Abolition, Succession, and Special Election, 45 Fordham L. Rev. 757 (1977).

Available at: <http://ir.lawnet.fordham.edu/flr/vol45/iss4/5>

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.

Treasury, perhaps? Might that narrow it too much in terms of one's overall abilities as an executive to be President?

SENATOR GRIFFIN: Well, it is something to think about, but I have heard this argument come up over and over again in the confirmation proceedings of various Cabinet officials. Sometimes—I think in the case of Carla Hills, for example—it was pointed out that she didn't have enough experience and background in the housing field. That argument was made, and it was answered that she didn't have to be a specialist; if she was a good administrator, she could run the Department of Housing and Urban Development, gathering under her the various specialists.

So I don't think that is really a big problem. I think anybody who is going to be capable of being Vice-President of the United States should be capable of being Secretary of State, for example, to run almost any of the departments of government.

IV. ALTERNATIVES: ABOLITION, SUCCESSION AND SPECIAL ELECTION

SENATOR BAYH: I endorse wholeheartedly Arthur's idea of doing away with the Vice-President as a *functioning* office indispensable to the running of the government. Realistically, as has been said here, I think there is only one role for the Vice-President, and that is not presiding over the United States Senate. Bob, Margaret, and I can attest, the Vice-President is not there very often and he does not often make a great contribution when he is. The role is to serve as President; we have an office, frankly, that we hope and pray to God we don't have to utilize in its basic purpose: we hope the President doesn't die, doesn't have to resign, isn't disabled, and unless that happens, then I really don't think the Vice-President is essential.

So as I look at the responsibility of this Symposium directed to change, I think we have to ask ourselves, first of all: does it help to have a Vice-President when there is a need for succession? There I think I differ with Arthur. I think there is, that it strengthens the role of a succeeding individual to have served as Vice-President. As inept as he may be, or however little character the jobs he has been given may have had, our success has been remarkable, having Vice-Presidents who, before they were called on to meet the responsibility, all the prophets would have said they would have fallen on their faces. So the success ratio has not been insignificant.

I think what we have to do as we look at this is to accept the premise that, all right, what can we do, if anything, to help the Vice-President be better prepared in the event fate calls on him to serve as President?

Now, there are two things that I think make the Vice-President better prepared to serve as President if he is called on to do so than someone else, and that is why I support the existence of the Vice-Presidency, not that as an ongoing function it is indispensable. One is that I think there is a greater acceptance of a Vice-President when he succeeds to the Presidency than if it is the Speaker of the House or a President pro t m. Second, we have seen a trend where the Vice-President is exposed to more of the operations of the Presidency so he is perhaps a bit more prepared.

MR. YOUNG: I would like to speak also on the question of abolishing the office altogether. Senator Bayh mentioned that we have had a good number of transitions that have proved successful. The Arthur example, going back to that again, was quite successful in that he became a reformer and reversed political attitudes toward the spoils system. Also, retention of the Vice-President means that we are almost certain to retain the four-year electoral mandate. In 1972 we had a landslide in a vote for President of the United States, President Nixon winning by 18 million votes. Yet two years later had we not had a Vice-President in place, we had the dire possibility of seeing the executive branch of the government pass into the hands of the opposition party, and I think we need to preserve the four-year electoral system and the four-year mandate.

An alternative would be to have some sort of caretaker sit in, perhaps the Speaker of the House, perhaps the Secretary of State, for a brief period while we had a special election. But I don't think we should have a man who is regarded as a "caretaker" in the White House.

Secondly, I don't think we should have any sort of special election imposed upon a system that is already overcrowded with many primaries, with the two conventions, with the protracted campaign that runs on for several months. I think the election schedule is already filled, and I think it takes too much time, too much energy, too many resources, and I would oppose any system that contemplates introducing any special election to fill the office of the President of the United States.

Furthermore, I don't think it is realistic to expect that Congress is going to consider another Constitutional amendment soon. This is an enormous ordeal. I have read Mr. Bayh's book,²⁰ Mr. Feerick's book. This was a tremendous struggle, to find the right language for the various clauses of the twenty-fifth amendment. This indicates, in my mind at least, that Congress probably is not going to have any stomach for any further Constitutional amendment of the electoral system.

20. B. Bayh, *One Heartbeat Away* (1968).

For these reasons essentially, I would favor the present process—with some minor revisions in the nominating process for Vice-President—and retention of the office of Vice-President.

PROF. SCHLESINGER: I think I am pleased that the panel has not indulged so far in the illusion that the Vice-Presidential office can be transformed into a serious working office making daily contributions to the running of government. As I say, we have had 41 Vice-Presidents. None of them has ever been given a serious job.

For the reasons that George Reedy suggested, I have tried to suggest I do not think a Vice-President will ever be given any serious job by a President. This means that the argument for the Vice-Presidency, for retention of the office, gets down, as far as I can see, to two points, both made very persuasively by Senator Bayh, and they are: first, the problem of succession; and second, the futility of trying to produce any sort of radical change.

Birch, I think you are probably right, at this stage, about the present unlikelihood of radical change. Yet, you have to start somewhere. You started from nowhere, in your various and successful efforts to amend the Constitution. I think that the only way any constructive change is ever going to be brought about is if it makes sense and if people begin to discuss it, and if it wins the backing of eminent committees and eminent people, and so on, so that it enters the blood stream, so to speak, and maybe some time, maybe not in this generation but some time in the future, something will happen. So I don't think the fact of the temporary or the contemporary futility of a suggestion should necessarily mean that we should not consider it and try to do a little pioneering.

I think I would say that not only can the office of the Vice-President not be transformed into anything of any seriousness, but that it is a positively damaging office for those who hold it. It does not prepare people for the Presidency in any effective way. Presidents generally exclude Vice-Presidents from the most serious problems. It is simply a historical fact. Presidents do not even like to see the Vice-Presidents around, no matter how friendly they may have been before the inauguration day, because Vice-Presidents are a constant reminder of their own mortality, and Presidents know and Vice-Presidents know that the only job is to wait for the President to die. This is not the basis for an enduring friendship. And that is why Vice-Presidents spend so much of their time in foreign travel, why they spend so much time at state funerals in Jakarta and Helsinki; anything to get them out of town.

I think it is a humiliating, frustrating and in many cases a deeply demoralizing experience, and I think people are often better prepared for the job without being Vice-President. I think Hubert Humphrey

would have made a better President in 1964 than in 1968 precisely because he would have been spared that experience. I think of what Bill Moyers said about Harry Truman, that he was lucky he was only Vice-President for three months; if he had been Vice-President for three years, he wouldn't have been as effective a President.

I think all that should be taken into consideration. It is not an effective school training ground for the Presidency, nor is it the only way to solve the question of succession.

I would remind you of what happened in France a few years ago when President Pompidou died. The French constitution provided for a special election to be held within 35 days. A special election was held. France elected Giscard d'Estaing. There was a curious contrast between the great American democracy, which by this time had an appointed President and soon an appointed Vice-President—you had the two top officials, neither of whom had been produced by the electoral process, neither had been voted for by anybody in the country for the offices they held—as against the system in France, where the death of the President was followed by an orderly process of presidential choice.

Oddly enough, the French system is the system that was first contemplated in the Constitutional Convention. The idea was that we should have a President pro tem in case of vacancy in the Presidential office and that this should be followed by what Madison called an intermediate election to choose a new President. The office of the Vice-Presidency came into the picture, as you all will remember, only in the last fortnight of the Constitutional Convention, not to deal with the succession problem but to deal with a different problem, and that was the problem of making sure that there would be a "national" President. Under the Electoral College, at a time when loyalty ran to states rather than the national government, it was supposed that each state would vote for a favorite son. By compelling each state to cast its votes for two candidates, one of whom had to live outside the state, it was thought possible to overcome local loyalties and, out of this, to produce someone who would command national support, and it was decided to make the man who came in first President and the man who came in second Vice-President, and that, as Hugh Williamson of the drafting committee explained to the Constitutional Convention, such an office as Vice-President was "not wanted"; it was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time.

The concept of the special election was embodied specifically in the Presidential Succession Act of 1792.²¹ It was embodied by implication

21. Act of March 1, 1792, ch. 8, §§ 9, 10, 1 Stat. 239.

in the Presidential Succession Act of 1886.²² And it was proposed by Harry Truman in 1945 when he was contending for passage of a new Succession Act, though it was deleted by Congress in the course of the passage of that Act in 1946.²³

It would seem to me that if you believe in self-government, the logical way to do it is the way it was originally contemplated by the Founding Fathers, the way that it is conducted in France today, and that is, in the case of a vacancy in the Presidential office, I believe you have to have an acting President provided for, followed by a new election, as in the French constitution.

In our case, I don't think an acting President should come from Congress, because I believe that the importance of policy continuity is very great.

Therefore, I think the Secretary of State, if constitutionally qualified—or if not, returning to the Succession Act of 1886, other appointees, descending through the Cabinet—should serve as Acting President for a period of 35 days as in France or, say, 60 days, and then you have an election.

There is complaint that we have too many elections. Surely we do, but for the President of the United States, on the rare occasion that this contingency will come, certainly the principle of self-government is worth a little discomfort, and perhaps we can learn through this process the way to make our elections more compact and not protract them in this painful way we have come to do in recent years.

Elections, it is said, are divisive. One has to balance risks. There are those who say that elections in wartime are divisive. But we had wartime elections in 1864 and 1944. The country survived. I think that it may well be that the process of election may resolve confusions and produce a more abiding unity than the appointment or succession to the Presidency of a man not specifically chosen for that office by the people.

So I do urge first, the notion of a return to the original system of an application to American circumstances, a system that works so well and efficiently in France, not to be excluded. It is the one approach to the process that will result in putting in the White House an elected President to fill out the term, as we often elect people to the House and the Senate to fill out a term. This will establish the Presidency on the basis of democratic choice, which is a proper principle, and it will be consistent with that principle of the Constitution requiring the President to be elected.

I think that this deserves consideration because it rests firmly on

22. Act of Jan. 19, 1886, ch. 4, 24 Stat. 1. For discussion of the 1792 and 1886 Acts see J. Feerick, *From Failing Hands* 57-62, 140-46 (1965).

23. 3 U.S.C. § 19 (1970).

democratic principles. The only way we may ever get, it seems to me, to the only reasonable solution of this problem is through talking about it as early and as often as possible.

MR. KIRBO: I think maybe some of us misconceive the present process.

I see no reason why the President shouldn't be allowed to select his running mate as is being done. I think perhaps Mr. Schlesinger misconceived the process to the extent that under the present process he apparently assumes that the Vice-President is elected for on-the-job training. But under the present process, certainly the one Mr. Carter used, Senator Mondale was selected on the basis that he was now prepared to serve as the President. I think that is what the process contemplated, not that he was being held out as someone that could get some additional training and perhaps he would qualify as President. That was the first and foremost question that was asked about each man being considered: Is he able now to assume the Presidency?

I also question the conclusion that the man cannot learn, cannot equip and prepare himself while he is Vice-President, regardless of the duties that the President gives him. Certainly no one would say that all of the Vice-Presidents degenerated while they were in office. Certainly, Mr. Truman was a man that studied, reflected, observed and prepared himself. And when he became President, he made a good President.

I don't agree that if you are not given the authority to run HEW or to run some other branch of government, that you degenerate during a period of time when you have the opportunity to observe the government closely, certainly a better opportunity than you have any other way. So I think in that respect that the system has been misconceived.

Also, one of the main duties of the President, the greatest test he will have, is in appointments. Under the process, he selects the heads of the judicial system. In fact, he appoints the judicial system in the form of the Supreme Court and the various judges. He appoints the Cabinet members who carry out the functions of the government. So people are entitled to know in the very beginning what sort of judgment does he have, what sort of people will he select, and when he selects a Vice-President, if he uses poor judgment, they have some indication of his judgment, and they have a right to reject it.

So I think that the process in that respect is good. It has got some deficiencies in it. But any process that I have seen has also got defects.

MR. GOLDSTEIN: If I could go back to a little bit of the discussion that Professor Schlesinger and Mr. Young were having, I was interested in Mr. Young's point of the danger of introducing a new election into an already overcrowded system. I sooner think that sometimes democratic reforms can have very undemocratic outcomes.

Aside from some of the objections that have been raised to special elections in terms of the question of stability, one of the proposals has been to have a special election within 90 days if the vacancy occurred in the last year or before the last year of the Presidential term—and I wonder whether, if you have a vacancy toward the end of the term, whether you are not going to cause great complications in the whole system of primaries. You could have a case where a special election took place in, say, February or March, right at the same time when you have people gearing up to run in the primaries. It seems to me the outcome of this would be to prevent a Governor Carter or a McGovern or a John Kennedy from becoming Presidential candidates in some cases. But what it would tend to do would be to make the Presidential candidates people who would be likely to be acceptable to the political leaders and also who would tend to be Congressional leaders. This is one of the reasons for the French system. The analogy may not be entirely good, because in France, presidents do tend to come from Parliament and people who are national political leaders and there isn't this whole primary attitude which, I believe, allows a neutral attitude to surface.

The other question is how you would work it into the transition period, and I suspect in many cases you might find that the acting President would subsequently be elected, given the fact that Vice-Presidents who succeed tend to be very popular at the beginning. But suppose he wasn't elected. Suppose you had the candidate from a different party who was elected. It would seem to me one of the problems you would have would be: would he take over immediately? Right now President-elect Carter has this eleven-week period in which to choose new personnel. If you had somebody emerge after a special election from a different party, he would have to put together a government, I would think, in a rather short period of time.

The third point I would like to raise—and perhaps it is a very remote possibility and an unimportant one, but I guess as we have seen in the last few years, things that have been thought to be remote possibilities have a way of coming true—how would the special election system handle the case of Presidential inability?

I know, Professor Schlesinger, you have written that inability really isn't a very major concern, but I wonder whether you would have a special election or not in a case of Presidential inability.

PROF. SCHLESINGER: I didn't go into the detail of it, but I would not favor a special election in the last year of a President's four-year term. I would have the acting President serve out the last year of the term.

As to the question of interregnum, I think it is too long as it is. I

think, again, there are limitations to the European examples. In France, the French constitution provides the maximum length of the interregnum as 35 days. In England, the Prime Minister moves out one day and the new man moves in the next. There are differences, because the American President has a greater number of appointments to make. The civil service extends much farther upward in France and England. But I do believe that the problems of interregnum, as I have both studied them and experienced them, are not so imposing as to require the amount of time the present Constitution allots to them. I think it is a problem, but I don't think we have to have an interregnum as long as the one currently provided for in the Constitution. As for Presidential inability, if it is total inability, you have a new election. If it is a passing inability, of the kind discussed in the amendment, I would have the Secretary of State—if constitutionally qualified—play the role of the Vice-President under the amendment.

SENATOR GRIFFIN: I think it could be emphasized that a very important advantage, fall-out, benefit of the suggestion of a special election would be that we would have to hold it in a short period. You alluded to that. I think if there is one reform that we could use that the electorate would certainly welcome, it would be some way of shortening the campaign. Our process has gotten long and tortuous. It is an especially difficult period for an incumbent President to be involved over such a long period of time in the process of becoming nominated. Although I don't put Arthur's reform proposal at the top of my list, I certainly think that aspect of it could well be emphasized.

SENATOR BAYH: [With respect to the weaknesses of delay and uncertainty in the present system,] our primary order of business in the first period of this next session is going to be to try to move a piece of legislation that has had great popular support, concerning the Electoral College. The weakness and the need for reform were made evident by the recent election. We have gone through an election where we came within 10,000 votes, really, of electing a President who had fewer popular votes than the man he ran against. In 1968, just two elections away, we came within 71,000 votes of giving a fellow by the name of George Wallace the ability to use his 36 electors to bargain off the Presidency.

Senator Griffin has been one of those who has been helping us in this regard. I am hopeful that we will be able to make some progress. It is a nonpartisan effort that has been supported by the Bar Association, the Chamber of Commerce, the League of Women Voters, the AFL-CIO, and the United Auto Workers. Eighty percent of the people told George Gallup they are for this kind of thing, and we are going to

move in this direction, and I hope before I am through I can convince my good friend, Clarence Mitchell . . . I don't think anybody, Carter, Ford, Democrat or Republican, would really relish the role of the Presidency if he were not the popular choice of the people.²⁴

SENATOR GRIFFIN: . . . I want to emphasize that Birch Bayh's twenty-fifth amendment is really a great and fine piece of work. It has worked exceedingly well in two situations already.

I might just say that I am a member of the Senate Rules Committee and sat in on the confirmation hearings on the nomination of Mr. Ford and Mr. Rockefeller, so I have been a very close participant in that operation, and I really think that rather than having the Speaker of the House, who isn't selected by the people but only selected by one house of the Congress, be in line for the succession, and rather than having a Cabinet officer who is only selected by the President and confirmed by one house of the Congress, it makes a lot of sense to follow the procedure that has been established.

VOICE: I would like to ask Professor Schlesinger for a little enlargement on his proposal, which I am not too familiar with. I would particularly like to know who would be the acting President and how long would the campaign be in a special election, and what his thoughts were on how the parties would select their candidates to run in that special election, whether they would have a convention as they do now.

PROF. SCHLESINGER: I believe that the President should be drawn from the executive branch in order to preserve the continuity of policy which was mandated when the voters spoke at the previous general election. And, therefore, the notion under the Succession Act of 1946 of bringing the Speaker of the House or the President pro tem of the Senate in seems to me a mistake; and the principle in the Succession Act of 1886 of descending through the Cabinet seems to me the proper principle as to the Presidency.

As to the length of the campaign, that would be a matter of judgment. It would seem to me 60 or 90 days would be adequate.

I am very glad that Bob Griffin agrees that our political campaigns have gotten out of control because I think it is keenly felt among the electorate that anything that might mean less time and less money and less agony would be helpful, both for the special election and possibly for subsequent general elections.

As for the mode by which Presidential candidates can be chosen,

24. S.J. Res. 1, 95th Cong., 1st Sess. (1977); see Weaver, *Move Is Begun in Senate to Replace Electoral College With Direct Vote*, N.Y. Times, Jan. 28, 1977, at A10, col. 4; Commission on Electoral College Reform, American Bar Association, *Electing the President* (1967).

again there are a variety of ways. The simplest and shortest would be to do it through the National Committees, which as a result of new party rules are much more representative bodies than they have been in the past. But I think probably the better way would be in a new national convention.

SENATOR BAYH: Can I make one observation?

You and I have had a chance to discuss this at length on the public record, which nobody has bothered to read, and I don't blame them. It was not what you might call good bedtime reading.

But I think it is important, if we are going to go the Schlesinger route, to understand really where we are headed in all of its consequences. Because to compare the French system and English system and the ability of England and France to respond on a short-term basis I think has to take into consideration the different political system, the parliamentary political system, in which leaders who run in the next election are already well known, the platforms are pretty well staked out, and so it is easy to do in a short-term frame of reference.

Although I think we can make some significant changes in the primary process and we can shorten it and make it less expensive, it seems to me if we shorten that period and lay that time frame on at least recent history, we will have no nominees by the name of Goldwater, we will have no nominees by the name of McGovern, or by the name of Ford, or by the name of Carter. Because one of the things about our political process, with all of its shortcomings, is that it lets a fellow who happens to be a peanut farmer from Georgia or a senator from a sparsely populated state like Arizona, if he is willing to spend the time and take his case and what he believes philosophically to the people of the country, have a chance to be President of the United States. I don't want to take away that opportunity. I would like to knock off some of the rough edges, and I hope we can do that, but I don't know how a candidate can build his case in a special-election time frame, and I feel very strongly about that. I think it is important to recognize what the consequences are.

PROF. SCHLESINGER: I think those are cogent points. I think it is a balance of disadvantages. In the first place, special elections are not going to happen all that often. In the second place, they will fill out an unexpired term. Further, it would not interfere with the regular primary process. I wholly agree with what Birch Bayh says about the value of the primary system. It would be reinstated in full form by the time of the next quadrennial election.

There are disadvantages. It seems to me they are less weighty disadvantages than those in the present system.

MR. KIRBO: Let me say one thing on this question of special