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## A Modern Father of Our Constitution: An Interview With Former Senator Birch Bayh

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## INTERVIEW

### A MODERN FATHER OF OUR CONSTITUTION:

#### AN INTERVIEW WITH FORMER SENATOR BIRCH BAYH

*Following the death of President John F. Kennedy in 1963, Birch Bayh, then a freshman Senator from Indiana, undertook a remarkable campaign to amend the U.S. Constitution and address gaps in our system of presidential succession. The effort to ratify the Twenty-Fifth Amendment was orderly, swift, and effective. In leading this campaign, Senator Bayh took his first step in becoming the only American since the Founding Fathers to draft more than one amendment to the Constitution. As part of this Symposium, the Fordham Law Review sought to merge constitutional theory with historical context and the practicalities of lawmaking surrounding the Twenty-Fifth Amendment. The following interview lends a historical and practical perspective to the academic discussion of our nation's system of presidential succession and sheds light on the distinguished career of an inspiring public servant.*

#### INTRODUCTION

The honorable Birch Bayh led an enduring career in public service. As a Senator, he was a framer of two amendments to the Constitution, and nearly oversaw the ratification of a third. During his time in office he spearheaded the passage of some of the most important federal laws of the 1960s and 1970s.

Hailing from Terre Haute, Indiana, and raised on his family farm, Bayh attended Purdue University School of Agriculture after serving in the U.S. Army. Prior to his election to the Senate, Bayh was a Member of the Indiana House of Representatives, where he eventually served as Minority Leader and later as Speaker. During his time in state office, Bayh studied for his law degree from Indiana State University at night and continued to run the family farm. In 1962, he was elected to the United States Senate, where he served until 1981.

During his Senate career, Senator Bayh served on the Judiciary Committee, the Appropriations Committee, and the Environment and Public Works Committee. He demonstrated an early commitment to social justice and equal opportunity, helping to draft the monumental Civil Rights

Act of 1964<sup>1</sup> and Voting Rights Act of 1965.<sup>2</sup> Bayh later co-authored Title IX of the Education Amendments of 1972 (Title IX),<sup>3</sup> a milestone in the women's rights movement that prohibits discrimination on the basis of sex in federally funded education programs and activities. Bayh was also the chief architect of the Juvenile Justice and Delinquency Prevention Act of 1974,<sup>4</sup> which aims to prevent the detention and incarceration of youth in juvenile and adult facilities. In 1977, as Chairman of the Select Committee on Intelligence, he co-sponsored the Foreign Intelligence Surveillance Act of 1978,<sup>5</sup> a response to Fourth Amendment violations resulting from domestic spying programs. Through his co-authorship of the Bayh-Dole Act,<sup>6</sup> which enables small businesses and nonprofit organizations, such as universities, to retain title to inventions developed under federally funded research programs, Senator Bayh revolutionized the U.S. patent system. The Bayh-Dole Act has been hailed as “[p]ossibly the most inspired piece of legislation to be enacted in America over the past half-century” and was the impetus behind similar legislation in other countries across the globe.<sup>7</sup> More than just an active author of legislation, as a member of the Senate Judiciary Committee, Senator Bayh helped defeat two of President Richard M. Nixon's nominees to the U.S. Supreme Court, Judges Clement Haynsworth and G. Harrold Carswell, who were both alleged to be segregationists. For this work he won the highest honor from the Leadership Conference on Civil Rights for “his unyielding dedication to human equality and civil freedom.”<sup>8</sup>

Senator Bayh has the distinct honor of being the only American since the Founders to draft multiple amendments to the Constitution.<sup>9</sup> As Chairman of the Senate Subcommittee on Constitutional Amendments, Senator Bayh authored two amendments to the Constitution: the Twenty-Fifth Amendment on Presidential and Vice Presidential succession,<sup>10</sup> and the Twenty-Sixth Amendment, which lowered the voting age to eighteen in the midst of the Vietnam War Draft.<sup>11</sup> Bayh was also the principal Senate sponsor of the Equal Rights Amendment, which passed both Houses of

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1. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h (2006)).

2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

3. Pub. L. No. 92-318, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688).

4. Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of 42 U.S.C.); *see also* Juvenile Justice and Delinquency Prevention Reauthorization Act of 2009, S. 678, 111th Cong. (2009) (reauthorization bill).

5. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

6. Pub. L. No. 96-517, § 6(a), 94 Stat. 3018 (1980) (codified as amended at 35 U.S.C. §§ 200-211 (2006)).

7. *Innovation's Golden Goose*, *ECONOMIST*, Dec. 14, 2002, at 3.

8. *Current Fellows*, THE C.V. STARR CENTER FOR THE STUDY OF THE AM. EXPERIENCE, [http://starrcenter.washcoll.edu/fellows/current\\_fellows.php](http://starrcenter.washcoll.edu/fellows/current_fellows.php) (last visited Nov. 11, 2010).

9. *Id.*

10. U.S. CONST. amend. XXV.

11. U.S. CONST. amend. XXVI.

Congress and was ratified by thirty-five states, missing by three states the required number for ratification as a constitutional amendment.<sup>12</sup>

Throughout his tenure in the Senate, Bayh also focused on electoral reform. On January 10, 1977, Senator Bayh introduced a proposed amendment that would have abolished the Electoral College and provided for direct election of the President and Vice President of the United States.<sup>13</sup> The resolution came close to moving through the Senate, but ultimately failed to garner enough votes to end the filibuster blocking the bill.<sup>14</sup> Following his tenure in the Senate, Senator Bayh served as Chairman of the National Institute Against Prejudice and Violence from 1984 to 1994. Bayh is presently a partner at Venable LLP in Washington, D.C. He also remains active in Electoral College reform through his work with the National Popular Vote initiative.

#### INTERVIEW

Deborah Eltgroth, Editor-in-Chief of Volume 78 of the *Fordham Law Review*, and Daniel Hafetz, Symposium Editor of the same, conducted the interview that follows at Senator Bayh's home in Easton, Maryland on October 2, 2009. Accompanying the Law Review was John D. Feerick, professor and former Dean of Fordham University School of Law. Feerick attended Fordham University and obtained his law degree from Fordham University School of Law in 1961. During his time in law school, he served as Editor-in-Chief of the Law Review.

Feerick first immersed himself in the topic of presidential succession in a 1963 article published in the *Fordham Law Review*, entitled *The Problem of Presidential Inability—Will Congress Ever Solve It?*<sup>15</sup> He published a later article in the same volume, *The Vice-Presidency and the Problems of Presidential Succession and Inability*.<sup>16</sup> While serving on the American Bar Association Conference on Presidential Inability and Vice Presidential Vacancy, Feerick worked with Senator Bayh during the Senator's Twenty-Fifth Amendment campaign. Feerick's scholarship and ideas ultimately culminated in the text of the Twenty-Fifth Amendment. He has published two books on the subject, *From Failing Hands: The Story of Presidential*

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12. The Equal Rights Amendment read as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

ROBERT A. BRADY, THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED: UNRATIFIED AMENDMENTS & ANALYTICAL INDEX, H.R. DOC. NO. 110-50, at 30-31 (2007).

13. See generally Birch Bayh, *Foreword* to JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE, at xxv-xxvi (2d ed. 2008).

14. *Id.* at xxv.

15. 32 FORDHAM L. REV. 73 (1963).

16. 32 FORDHAM L. REV. 457 (1964).

*Succession*<sup>17</sup> and *The Twenty-Fifth Amendment: Its Complete History and Applications*.<sup>18</sup> He remains an active scholar in this field, contributing to this Symposium with his article on *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*.<sup>19</sup> His efforts to turn his academic expertise on presidential succession into practical contributions continue with his inauguration in 2010 of the Fordham University School of Law clinic on *The Adequacy of the Presidential Succession System*.

For many years Feerick served as Chairman of the New York State Commission on Government Integrity, and he is a past Chairman of the Board of Directors of the American Arbitration Association. He founded and now serves as director of the Feerick Center for Social Justice and Dispute Resolution at Fordham University School of Law, which focuses on legal issues critical to the poor and underrepresented, with family homelessness among the center's most urgent priorities. Feerick continues to teach, write, and work as a mediator, arbitrator, and volunteer.

#### I. INTRODUCTIONS

FORDHAM L. REV.: While reading your book *One Heartbeat Away*,<sup>20</sup> we were struck that, as a freshman Senator who had found himself in this incident of history, President Kennedy just assassinated, you had both the understanding and grasp of the law and the Constitution to arrive at the language and provisions for this Amendment. But just as striking was your political foresight, your intuition, and how you learned so quickly the process for getting something like this passed. It wasn't just any piece of legislation; it was a constitutional amendment, and thus was even more of a Herculean effort. And it was with such mastery that you were able to do that.

SENATOR BAYH: I hope I approached it that way. I think I learned from my father during the brief period of time he was in my life. He ended up going to Kunming, China. Mom died when I was twelve. They were both schoolteachers. Dad coached four sports at Indiana State University and taught history, and then came to Washington doing the D.C. public school system's physical education program. In April of '41, before the war started, they asked him to come in and start this program. The Army gave him a mission of going around and establishing physical fitness programs adjacent to all of these concrete ships they were putting down. This was before Pearl Harbor so that thinking was a little farsighted there.

Anyhow, I loved him dearly. I learned a lot from him. He was a basketball referee. In fact, he's in the Indiana Basketball Hall of Fame

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17. JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* (1965).

18. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (2d ed. 1992).

19. John D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 78 FORDHAM L. REV. 907 (2010).

20. BIRCH BAYH, *ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION* (1968).

because of his refereeing prowess. In my family, you didn't argue with the referee or the umpire. My sport was baseball. If it was close enough to call, it was close enough to swing at.

I grew up with my maternal grandparents while they were in their eighties. Particularly my grandmother, who was a schoolteacher—I felt like she was both mother and father to me. My granddad was a sort of stoic, rawboned fellow that came over the Allegheny Mountains in a covered wagon right after the Civil War and put that farm together. I was blessed to have them to take my sister and me in when we were basically orphans. It was a life-changing experience for me, because I fell in love with the farm. It's still in my blood. I still have my patch of tomatoes out here. They're not going to be there for long. Nature's taking care of that.

The thing I love about agriculture is that it's pretty hard to get away from the facts. There it is. Mother Nature takes care of it. If you do something wrong, you pay. I learned to treat other people the way you'd like to be treated yourself, whether in the law firm, the classroom, or in the United States Senate. This is no different today. I think a lot of people do just this. I was blessed to have people, at least during those days, who treated other people the way they'd like to be treated: listen to what somebody has to say and then make a judgment call and hope that, once the call is made and the majority speaks, the others will go along. I was fortunate to have a lot of good teachers—my colleagues. Even as we disagreed, I think one learned. I was blessed that I had a chance to spend eight years in the legislature and, at the tender age of thirty-one—I was still in law school—to be Speaker of the House and have a legislative body from the ages of twenty-four to seventy-one. Most of those newcomers were old enough to be my father and had never held public office in their lives. We had a houseful of cats here. How do you put them together?

So I learned rather quickly. It was about treating them like they would like to be treated and the way I'd like to be treated myself. I think being a good legislator is sort of like being a good citizen. The Twenty-Fifth Amendment is a good example of getting the so-called loyal opposition involved.

I think they make a lot out of it when you run for public office and you get a lot of press and people say a lot of nice things, like you just said. But I think you would say that about my neighbors here in the neighborhood and certainly the people I grew up with on the farm, who gave me my basic understanding of what life was all about.

FEERICK: We'd like to begin, Senator, with the topic of the Twenty-Fifth Amendment and succession.

SENATOR BAYH: I'll be glad to give you my best thinking. It's just my thinking.

In looking at this subject, immodest as it may sound, you probably have right here around this table the two minds that have spent more time worrying about this and given it more thought than anybody else in America. That's because we happened to be there at that time, and that was our mission. As I think will come out in the answers to some of these

questions, John Feerick, as a very young lawyer, an assistant for the American Bar Association (ABA), played a key role in putting this all together. I can't speak too highly of him. He happens to be a friend, but even if I didn't like him, I'd have to say that there's no way we could have gotten this done without his assistance. You have the role of the Bar Association, which I'll speak to later on. His assistance went way beyond just being a player in the Bar Association.

FEERICK: In Washington you had Don Channell; in Chicago, Bert Early and Lowell Beck.

SENATOR BAYH: But you were the fuselage that held it all together, the nitty-gritty. And that's how we developed such a close relationship. This subject has played such an important role in my life. Once you're immersed in it, as John Feerick and I have been, you never get it out of your system.

John Feerick and I have had the wonderful experience of working together to put the Twenty-Fifth Amendment to bed and also to defend it from a group of folks in North Carolina that kept telling us that they knew better how to do it.<sup>21</sup> All of their thoughts were well intended, but none of them had a full appreciation of the history that went into putting the Twenty-Fifth Amendment together. As I'll point out in here, the Twenty-Fifth Amendment is not a perfect document, but we think—at least I think and I continue to think—it's probably the best you're going to get under the circumstances. You start tinkering with it—it's sort of like pushing your finger in a balloon. You push it in someplace and it pops out someplace else. And usually the pop is bigger than the push was.

In teaching over at Washington College and preparing a talk on the separation of church and state, I ran across a great Holmes quote, and I think it's relevant to looking at the Twenty-Fifth Amendment. He said, "[A] page of history is worth a volume of logic."<sup>22</sup>

We lived the history. A lot of other people have the logic about how it worked, but we lived the history that went behind putting this document in the Constitution.

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21. The Working Group on Presidential Disability met at Wake Forest University to discuss potential reforms to "the procedures for determining presidential disability." PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS ON THE TWENTY-FIFTH AMENDMENT AND ISSUES OF INABILITY & DISABILITY AMONG PRESIDENTS OF THE UNITED STATES 183, 185-361 (James F. Toole & Robert J. Joynt eds., 2001) [hereinafter PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS]. Some of the papers discussed by the Working Group at Wake Forest University and at other meetings were published in Volume 30 of the *Wake Forest Law Review*. See, e.g., Herbert L. Abrams, *The Vulnerable President and the Twenty-Fifth Amendment, with Observations on Guidelines, a Health Commission, and the Role of the President's Physician*, 30 WAKE FOREST L. REV. 453 (1995); Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 439-50 (1995); Bert E. Park, *Protecting the National Interest: A Strategy for Assessing Presidential Impairment Within the Context of the Twenty-Fifth Amendment*, 30 WAKE FOREST L. REV. 593 (1995).

22. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

## II. THE TWENTY-FIFTH AMENDMENT: HISTORY AND PHILOSOPHY

*The Subcommittee on Constitutional Amendments & the Committee Process*

FORDHAM L. REV.: How did you get involved in the Subcommittee on Constitutional Amendments?

SENATOR BAYH: My predecessor was Senator Estes Kefauver, who died early on when I got to the Senate. That was a real loss, because he'd been a hero of mine. He was a man of the people. He took on President Truman. He did what he thought was right. I thought that I had a chance to serve on the Judiciary Committee with him.

FEERICK: My recollection is that Kefauver died in August of '63.

SENATOR BAYH: He did. He did. I remember learning, at Sibley Hospital—I had just cut off a big toe with the front end of the lawn mower, and I was in bed over there. Somebody said, "Estes Kefauver died." "Oh, my gosh," I thought.

In October of 1963, Fred Graham, who had been Kefauver's Chief of Staff—who later went on to be a correspondent for CBS—reached out to me about the vacancy on the Subcommittee on Constitutional Amendments. Fred said, "You know, there's this vacancy, and you're the only Senator on the Judiciary Committee that doesn't have a subcommittee. You might want to talk to Senator Eastland about that. He may have decided to close the committee down, but it wouldn't hurt to talk to him."

So I got an appointment and saw Senator Eastland. He got a little scotch and ice. I didn't really drink at the time, but I may have taken a sip or two of it. And I made my pitch: "Mr. Chairman, when I went to law school, constitutional law was my most exciting subject. Boy, it would be my dream come true if I could be Chairman of that Subcommittee."

He said, "Well, Birch, I hope you understand here, but Allen Ellender has been giving us a rough time. I sort of told him I'd close this down. I hope you understand, boy."

I said, "Mr. Chairman, I'd even put one of my own staff people there. It wouldn't cost you a nickel."

"I just made up my mind, Birch. I hope you understand."

"Thank you, Mr. Chairman," and I left.

The next morning, 9:00, my secretary said, "You've got Chairman Eastland on the phone."

"Birch?"

"Yes, Mr. Chairman."

"I want you to be Chairman of that Subcommittee. I think you'd be a good one." Click.

Whenever else could a plantation owner, one step away from being a slave master, an avowed segregationist, ever do anything to get a little chit with a liberal young turk like me? We became very good friends, he and I did, not just because of that, but because of other things. I remember one



time, several years later, he sat down next to me and said, “Birch, I want you to explain something to me.”

“Yes, Mr. Chairman.”

“You got this abortion issue. You got this prayer issue. You got this busing issue. Any one of those would kill me back home. How do you do it, boy?”

I said, “I don’t know, Mr. Chairman. Maybe I’m not doing it right. We’ll see what the people think.”

So we had that kind of relationship.

FEERICK: Senator Eastland, during those years that he chaired the Judiciary Committee, was towering in importance and significance—he controlled what went to the floor of the Senate from the Judiciary Committee.

SENATOR BAYH: There’s no way of invoking cloture and getting your bill out of the Judiciary Committee. You can vote it out. But if the Chairman won’t let it come up, you won’t have a chance to vote on it. He had that power.

But I liked him and I think he liked me. I didn’t like some of the things he stood for, and the other way around. But I’m sure he supported us on the Twenty-Fifth Amendment. I know he did. I’m sure he opposed us on direct elections of presidents. And he was one of those first in line when it came to racial issues, a strong segregationist.

### *The Significance of the Twenty-Fifth Amendment*

FORDHAM L. REV.: There was this watershed moment leading up to the passage of the Twenty-Fifth Amendment, the tragic death of the President. There was no question that Lyndon Johnson was going to become President at the time. Yet why did you identify it as something that absolutely needed to happen? Why is this so important to us as a country?

SENATOR BAYH: First of all, we were confronted with the stark reality that the President is human and life can be taken out rather quickly. It almost happened—it was a millimeter away with Reagan. We found out that—for the sixteenth time—the Vice President had become President and nobody died after the Vice President took office.

But the significance of a President dying is deepened when there is a vacancy in the Vice Presidency. You get a real tragedy in the country when a President is assassinated or dies due to his health. To add to that the uncertainty about the authority of the person who takes over—as would be the case if the President who succeeds dies and you have the Speaker of the House take over—you may get someone who is of a different party. Although we like to believe that everybody knows who the Speaker of the House is, I’m not sure everybody equates Nancy Pelosi as being the next President of the United States.

If I had to do this thing over, I’d try to find a way to placate my colleagues in the Senate, but back then it was a matter of deference. The

President Pro Tem of the Senate, Robert C. Byrd, becoming President of the United States? The President Pro Tem of the Senate is not even the majority of the Senate. It's just whoever has been there the longest.

One of the things that catalyzed this more than anything else and got people's interest was that joint session of Congress, with Lyndon Johnson addressing the Congress immediately after taking office. And there was this image of Carl Hayden and John McCormack at the ages of eighty-six, and seventy-one, respectively.<sup>23</sup> Yet one or both of those people could end up being President of the United States. There needed to be steps taken to fill that vacancy.

Why is it important to act? I think it's important to act so that you don't have the Succession Act take effect. The answer to many of the criticisms of the remaining gaps in the Twenty-Fifth Amendment is that it is essential to fill that vacancy quickly.

Basically, it's one crisis at a time. The crisis of succession is bad enough. Let's not have a crisis of lacking confidence in the person who goes there, because that wasn't what was supposed to be done.

#### *Compromise in the Process*

FORDHAM L. REV.: One interesting issue is that of compromise, in terms of what the final product was as compared to some of the discussions leading up to the passage of the Amendment.

SENATOR BAYH: Like I say, it's not a perfect document, but we struggled with it. As they say, "Laws and sausage are the same: You don't want to see either one of them made." The process is sometimes a questionable process that ultimately reaches a good end. But I don't think it's too questionable a process, because it's our process, our democratic process.

There was a major difference of opinion as to how to approach this. Apparently there are some who still don't understand why we reached the conclusion we reached. But we did it by compromise. My good friend Senator Everett Dirksen [of Illinois]—and he was a good friend—I couldn't believe it: I was wet behind the ears, but the Republican opposition sought me out to work with me.

Where I'm coming from is, Everett Dirksen's idea and the Republican idea was to have a Twenty-Fifth Amendment that gave Congress authority to act on this subject at some future time. I guess giving Congress authority to do something makes a lot of sense, but it seems to me—look at what it says in the Constitution about inability—there's no question that Congress already had the authority to do it. You don't need a document to create another authority.

But more to the point, it was our judgment, I think—Dean Feerick and the Bar Association and all of us who were pushing the Twenty-Fifth

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23. See BAYH, *supra* note 20, at 8–10 (recounting the impact this image had on public perception).

Amendment in its present and final form—wherever you have a disabled President, particularly, or wherever you have a vice presidential vacancy, there is a lot of jockeying around, where the politics of the day will determine what's right or wrong, what's good for our party and bad for theirs, or good for this human being or that human being. It's impossible to avoid. That's the human nature of the political system.

What we wanted to have was a system that would—right and wrong, without politics, without a crisis of the moment—say, “Here it is.” This would take away the ability to say, “Okay, how is it going to help me or hurt them?” because it's right there in the Constitution, and this is what you have to do.

So we had respectful differences of opinion. Everett was an avid spokesman. He didn't get quite as melodramatic on this as he did on the prayer amendment,<sup>24</sup> but he made a very strong argument for his version.

I think when you get right down to the common sense of it, he understood why we were doing what we did. Once we had defeated him, he was a strong supporter of it. We passed it in the Senate and then the House passed it in a different version. I was chairing the Conference Committee, as the Chairman of that Subcommittee, and I would be the most junior member of the Senate conferees. Obviously, a minority leader would be on that as a Senate conferee. So I went over and I got an appointment to see Senator Dirksen. I went over to his office. He kept me waiting a long time. On his desk there was about a six-inch pile of postcards. They were arranged so that, even with a casual sideways glance, you could see.

“We need the prayer amendment.” He was softening me up. He said, “You know, I just get all these petitions for doing something about this prayer amendment.”

I said, “Senator, I'm going to make sure we have a hearing on your amendment. I promise you that. I'd like to make sure that we're all on the same page supporting”—

“Oh, yes, I'll support the Senate position. Those House members don't know what they're talking about.”

Well, we got a little compromise. But he was with us, once we had won. I think, in retrospect, he probably said, “Well, they're probably right,” because he could have a better appreciation of the policies that would be going on than I could. So we really didn't compromise on the idea of granting additional congressional authority to handle succession.

What we did compromise on was the amount of time to send a letter to the Speaker and the amount of time that you had to act if you were the Vice President or the President. That was really a little landscaping around the big house though.

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24. See S.J. Res. 141, 89th Cong., 2d Sess., 112 CONG. REC. 23,531-56 (1966).

*Shaping the Amendment:  
The Contributions of the American Bar Association and the Addition of  
Section 4*

FORDHAM L. REV.: Once you were the Chairman of the Subcommittee on Constitutional Amendments, how did the Twenty-Fifth Amendment begin to take shape?

SENATOR BAYH: In October 1963, I was the new Chairman of the Subcommittee on Constitutional Amendments. We all know what happened on November 22nd.

At the time, nobody doubted that the Vice President would come up, and nobody questioned the law.

But there were gaps. Bob Keefe, my Chief of Staff, found out that the Bar Association had legislation—they'd been studying this whole issue of succession for a long time. So he went to Don Channell, I guess, and Don Channell went to the powers-that-be. John, who did all the work, was assigned to this along with Lowell Beck. So the three of us began to move on this.

The Bar Association had done a lot of work on presidential succession and had given it a lot of thought and had put down the foundation of good legislation. I don't know whether the bill that I introduced was exactly like the Bar Association had prepared it or whether it was something else.

FEERICK: One contribution of the Bar Association—there were contributions in a few areas—but one in particular—was the so-called either/or language of Section 4. In other words, it set out a particular formula in the Amendment—Vice President, Cabinet, as you said before—but then gave Congress a power to change the body that was to work along with the Vice President. It took parts of the two major proposals, one very specific and one that would give Congress broad power—in a sense, parts of each came into Section 4. That came out of the meetings that you participated in with the ABA conference group.

SENATOR BAYH: The Bar Association held a conference on this and had people from all across the country that were experts on the subject. We got a lot of input from that. With the product that came out of there, everybody had a little apple on that tree, but the major trunk was the Bar Association work that they had done.

John did all the heavy lifting as far as putting that conference together and seeing that everybody was properly attended to and copious notes were kept of what was said and by whom.

My gut tells me that when we put the legislation in, it did not have the alternative group. Somebody raised the question, what if the Cabinet won't work, because it's close to the President? That's when we put in "such other body as Congress may by law provide."

FEERICK: Just to set the record straight, Senator Bayh's memory is correct. Even though the ABA had the consensus of the "such other body" language, I don't think that got into the legislative proposals at that point.

The American Bar Association consensus was released at the end of January of 1964. It had a number of points. I'll read you point five. It said,

The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected members of each House of the Congress.<sup>25</sup>

In the ABA consensus discussions, in which you played a very important part, my recollection is that there came a point when we were debating a specific amendment as against an amendment that would give Congress a broad power to determine the beginning or the ending of the inability. The person who, as I recall, made the suggestion that maybe we could weave the two together was somebody you knew very well. His name was Vince Doyle, and he worked for the Library of Congress.

At some point in the discussion he suggested that idea. Then we went back and forth, and finally came to a consensus. When the ABA consensus was released at the end of January, it had the "such other body" language in there. But it's possible that it didn't get into the legislative proposals at that point.

SENATOR BAYH: There was a good deal of heated debate about, "What if the Cabinet won't act?"

FORDHAM L. REV.: Out of loyalty?

SENATOR BAYH: Yes, out of loyalty. I was much surprised to find out Bobby Kennedy, still Attorney General at the time, was holding a rump group, and he had Phil Hart and some others back there in the back of the Senate, really giving them a hard time, that they shouldn't support this, that President Kennedy didn't know anybody on the Cabinet before he became President, although he served in the Congress with two or three of them. But I took him on. I'm not sure that he was the one that raised the question, because he was concerned that the Cabinet might be disloyal to the President, and thus the Cabinet couldn't be trusted to act with the Vice President. That was his concern.

FORDHAM L. REV.: He was afraid of a coup?

SENATOR BAYH: Yes, which was one of the things we were concerned about. You could use this provision as a means of taking over the power of the Presidency.

I recall somebody raising that on the floor: What if the Cabinet is loyal to the President, even if he's as loony as a bedbug or whatever? They won't act.

But we thought the likelihood of that happening was slim. Everett Dirksen, when he came on board and supported this, after we'd voted down

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25. FEERICK, *supra* note 18, at 60.

his alternative, he said, “In the white heat of publicity, Congress is going to do what’s right. They’ll do the brave thing.”

A lot of what we did was contingent on the fact that around the disability—particularly, the highly contested disability—there would be a whole lot of editorial comment and it would be impossible for somebody to be involved in a coup kind of situation.

FEERICK: The Senate passed the legislation first in September of ‘64. Section 4, which was Section 5 as introduced in 1963 and 1964, stated as follows:

Whenever the President makes public announcement in writing that his inability has terminated, he shall resume the discharge of the powers and duties of his office on the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine. But if the Vice President, with the written approval of a majority of the heads of executive departments in office at the time of such announcement, transmits to the Congress his written declaration that in his opinion the President’s inability has not terminated, the Congress shall thereupon consider the issue.<sup>26</sup>

So as introduced in the Senate in 1963 and 1964, “such other body” is not present. But then when it passed in September, I think, of ‘64, it was in there.

SENATOR BAYH: It was put in as a result of somebody raising it on the floor.

They went back there in the cloakroom and cobbled up the language. There isn’t much there. But they were trying to determine just exactly what the words would say and not give too much away. There was a lot of give-and-take there. The Bar Association did have this in there—why we didn’t have it in there, I don’t know. I think we just didn’t want to confuse the situation and we wanted it to be clean—and we had faith that the Cabinet would act. But then a lot of the folks would say, “What if they don’t act? Then Congress shall prescribe by law.”

Now, I have a very distinct recollection of giving a speech, of Walter Reuther introducing me to the International Autoworkers Convention in Atlantic City. And who should arrive on the scene but Lyndon Johnson, President of the United States, also to address the autoworkers.

He said, “Birch, can we give you a ride back in the helicopter?”

“Thank you, Mr. President.”

“We’ll be glad to do that.”

So there were just the two of us in the cabin, Lyndon Johnson and little old Birch Bayh.

I said, “Mr. President, I’d like to talk to you about lending your support to our Twenty-Fifth Amendment.”

He said, “Birch, you’re never going to get that passed until you get a Vice President. The House is never going to vote to take John McCormack

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26. *Id.* at 246.

out of the succession. You just need to wait until Hubert and I get elected. Then you introduce that thing, and you'll have clear sailing in the House."

A very wise man. It had never entered my mind in that crass a turn, but I could see why the members of the House—they just felt that kind of loyalty.

## II.A. TWENTY-FIFTH AMENDMENT & DISABILITY

### *Presidential Disability*

FORDHAM L. REV.: What were some other points of contention in the debates surrounding the Amendment?

SENATOR BAYH: A subject that gets my and Dean Feerick's blood pressure up more than anything else—John, I shouldn't speak for you, but having been in the trenches with you in North Carolina a couple of times—is presidential disability. One needs to recognize that to make the disability question work, if the President voluntarily gives up the office, he gets it back voluntarily. That's the reason we put it that way, because we wanted that to happen. The only time it's really been used in that way was when President Reagan said, "Well, I don't think Congress really meant it, but I'm going to turn this over to Vice President Bush and let him be the Acting President."

The one issue that kept coming up with the Miller Commission, and has kept coming up still, is determining the disability of a President in the event there's a dispute, where the President, like Eisenhower, isn't likely to assent, and the Vice President must act without getting presidential assent. Of course, when the President recovers, he can seek to reclaim, but the burden is on him to seek to reclaim, then, instead of the other people, as had been the case previously.

But where you have a difference of opinion between the President, on the one hand, and the Vice President and the majority of the Cabinet, on the other, as to whether he's disabled, then you have a real problem. There are those who think the only way to make this determination is if you get a panel of doctors and let them be the judge, totally ignoring that if you get four different doctors on a panel, they probably could all have four different prognoses. Plus they have no appreciation at all of the political factors that you have to consider in this. It also ignores the fact that even a President that's not all there can come across pretty astute for half an hour in front of a panel of doctors.

The doctor will ask some questions that may not be totally relevant in pinpointing what's wrong with him, because he's got political questions and one thing or another.

Obviously, you need to have a doctor or doctors involved in making that decision at the presidential level, before the President declares himself disabled. On the other hand, the Vice President and the Cabinet also have their doctors. Then they would reach a conclusion as to who's right and

who's wrong. But to make this final assessment, it just didn't make sense having a panel of doctors who aren't elected and responsible to anybody. That was a number-one point of contention with the Twenty-Fifth Amendment, and I think it is still an issue in some people's minds.

*The Importance of Having the Cabinet Make the Decision Regarding Disability*

FORDHAM L. REV.: Going back to the Cabinet provision—of course, it doesn't say "Cabinet" in the Constitution . . .

SENATOR BAYH: Then you get into the question about the way things are operating now.

FORDHAM L. REV.: Yes, that's what we were thinking. When it was initially envisioned, those are the President's closest advisers. The Vice President is a close adviser. But now the White House has such a robust policy arm, where there is a czar that is a counterpart to almost every department head. Does that undermine how you envisioned the Amendment to operate, which is to have people close to the President, who have insight into his health and his ability, to be able to make that call?

SENATOR BAYH: I don't think so. It's a delicate balance between getting the independent judgment of Cabinet officials that have some authority on their own, on the one hand, and having decisions made by people that are personal staff of the President. There's very little independent judgment there. They would be more inclined to protect the President, in order to protect their own jobs, because if he's out, they don't know where they might sit with the Vice President.

So I think, to the extent that the Cabinet may not be as close to him, if the question of disability arises, they're going to have all sorts of opportunity to examine the situation and see whether this is for real or not. I think they're in a position to have more independent judgment, absent the President breathing down at them because he's disabled, than the people in the office right next door to him in the White House.

FORDHAM L. REV.: You mean people other than those who are close advisors might work just as well?

SENATOR BAYH: I think so. Obviously, the kind of people that you describe—the czars and all those people that see him every day—they're going to be called on by members of the Cabinet. I envision the Cabinet being in the back and having some very contentious discussions about this, and I think they'll have some doctors in there, too. But the doctors aren't going to have the final say.

FEERICK: Even with the changing appearance of the White House staff, different members of the Cabinet still have direct communication with the President. There are Cabinet meetings and there are other settings in which members of the Cabinet meet with the President and do have some empirical data available to them as to how the President is functioning from



those kinds of contacts with the President, notwithstanding the presence of a large White House staff.

FORDHAM L. REV.: And there might be all sorts of informal methods.

SENATOR BAYH: I'm sure that the President will be talking to at least one Cabinet person every day, because those people are the ones who have the responsibility for implementing what the people in the White House may decide.

### *Doctors and Declaring Disability*

SENATOR BAYH: All those things that go back to Wilson's situation—it was Edith Bolling and Joe Tumulty, Secretary to the President, who were making the decisions while the President was incapacitated.

At the Wake Forest Conference on presidential disability, there was the number one Wilson disability scholar—Dr. James F. Toole. He kept talking about all those terrible things that happened under Wilson, which all would have been handled under the Twenty-Fifth Amendment.<sup>27</sup>

FEERICK: When the Wake Forest group got started, they called and asked me if I would be on the planning committee. I said, "What are you planning for?"

They said, "Well, we have to repeal the Twenty-Fifth Amendment and put the doctors in place."

I said, "I can't join your planning committee. I can't look at that issue fairly and objectively. You already started out with a conclusion that I don't agree with."

So I didn't join the planning committee.

Then I get a call from the American Bar Association. They asked if I would represent them on that committee. Already having the earlier conversation with the doctors, I said, "No. I can't be fair and objective. I think you need to find someone else."

They said, "Do you have any suggestions?"

I said, "You might take a look at a professor by the name of Joel Goldstein." I think that's how Joel got involved.

But then, as you recall, at the very end, when they were coming down to the wire, I guess they wanted me to come to a meeting in Washington where they were summing up all the reports. You were there, Senator Bayh. I was there. Joel Goldstein was there. I wasn't very happy with some of the conclusions. I think the three of us ended up writing a dissenting view.

SENATOR BAYH: They had two of these dissenting views. At least we were in on the conference. One of Bush's doctors, Dr. Lawrence C. Mohr, was a champion on our side.

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27. PRESIDENTIAL DISABILITY: PAPERS, DISCUSSIONS, AND RECOMMENDATIONS, *supra* note 21, at 3–6.

When you have the President's doctor talking about what ought to be done, and it's inconsistent with what the people who called the conference were suggesting—well, they called the conference with the idea of what ought to be done before anybody had been heard.

*President Reagan's Handling of the Twenty-Fifth Amendment*

FEERICK: Fred Fielding, White House Counsel to Presidents Reagan and George W. Bush, is joining the Symposium in April.

SENATOR BAYH: He was right there at the time of the Miller hearing, I was on that panel, of course—

FEERICK: I think you co-chaired with Herb Brownell.

SENATOR BAYH: Yes. Herb was another indispensable player in this.

FEERICK: He was wonderful.

SENATOR BAYH: A great human being. He was Eisenhower's Attorney General, when he suddenly awakened and he didn't have a President who could talk, walk, or make decisions. So he had lived through all that and understood the importance of it. A great human being.

I remember asking Fred—this letter that Reagan sent to the Speaker and the President Pro Tem of the Senate was a letter that said, basically, "Although I don't think this is what Congress had in mind when they wrote the Twenty-Fifth Amendment, I'm now turning the office over to my Vice President to serve as Acting President during my disability."<sup>28</sup>

I asked him, "Fred, how did you ever let the President send a letter like that?"

I forget who the President's Chief of Staff was at the time. It was a big business type. Anyhow, he said, "This is the only thing we could get him to sign."

He absolutely refused to recognize that in a situation where he was going to be *non compos mentis*, somebody else should be running the shop.

We also learned something else again. We learned from talking to doctors that anybody who has been heavily sedated should never make a decision of any consequence within forty-eight hours. It takes that long for the brain to clear. During that period of time, he signed the Iran-Contra documents.

As Herb Brownell said, "It's one thing to be able to wave out the hospital window. It's another to be able to govern."

Obviously, the Twenty-Fifth Amendment doesn't cover that. I think it's all the more important—if anything happens—to not go rushing out there and making a decision before his mind really clears. It won't be his decision, because he'll think it's clear from the beginning. But make sure that you have enough time to wait.

My concern with opening this issue for renewed debate and legislation—I don't think you amend the Constitution by statute, although there are some

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28. See FEERICK, *supra* note 18, at xv.

provisions that may express congressional intent and which can support a clarifying statute—is when you open it up for one of those things that’s simple and easy, Charlie and Susan and Molly all want to load onto that train. You end up with something that’s really a whole lot worse than what you have now. Of course, there’s the Succession Act.<sup>29</sup> You can deal with that by statute.

FEERICK: I tend to be, to put in the bottom line, very protective of the present system. You know that.

SENATOR BAYH: I sort of am, too.

## II.B. GAPS IN THE TWENTY-FIFTH AMENDMENT: DOUBLE VACANCIES, ELECTORAL GAPS, & “POLITICAL INCAPACITY”

### *Filling a Vacancy in the Vice Presidency*

FORDHAM L. REV.: One of the areas of contention was filling a vacancy in the Vice Presidency. There has been some debate about having a special election to fill a vacancy in the Vice Presidency or, if there was a vacancy in both the Presidency and Vice Presidency, a special election to fill both offices.

FEERICK: So whenever there’s a vacancy in the Vice Presidency, one proposal is to have a special election to fill that vacancy, rather than, as in the Twenty-Fifth Amendment, have the President propose someone to the Congress to fill the vacancy.

SENATOR BAYH: We wanted to have a document in the Constitution that solved the problem while not creating a bigger one.

There are historical moments when you had presidents and vice presidents that couldn’t get along with one another. That contentious relationship was one that was not in the best interest of the country. So we want a President and a Vice President who, if they’re not working together, at least are not warring against each other. Sometimes the tension arises not from the officers themselves but between their staffs. The authority Kennedy gave Johnson was the first instance of a President giving the Vice President any authority. President Kennedy and President Johnson got along very well, despite the fact that their staffs, I don’t think, talk to each other if any of them are living now. Of course, when Johnson came in, he gave Humphrey authority. And so it goes.

I think that’s the right thing to do. But you don’t want to do that unless you have faith in the person that’s there. He needs to be basically one that you’re comfortable with. Hopefully he’ll disagree with you when he thinks you’re wrong, but when you say, “This is the way it is,” as President, the Vice President says, “Yes, sir. What can I do to help?”

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29. Pub. L. No. 80-199, 61 Stat. 380 (1947) (codified as amended at 3 U.S.C. § 19 (2006)); see also Joel Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959 (2010).

In filling the vacancy, it seems to me that there needs to be somebody whom the President can work with. That's why we gave him the power to nominate. But we don't want him to be a kingmaker. Rather than reconvene the Electoral College, we had the same number of people voting, except in the two houses. They would elect, basically, after the President had nominated. And the process doesn't have to be partisan—you'll notice, there was a Democratic Congress that went along with Gerry Ford. In fact, I happened to have been the lead-off witness in the House hearings on the subject, saying that I thought Gerry Ford was just exactly the kind of person we had in mind when we wrote the Twenty-Fifth Amendment. History has proven that he was the right guy to move on up.

And you have to look at what the people said. Let's take the Nixon experience and the Agnew experience, which was the first time that the succession became a matter of issue. Nixon had been elected for four years. The American people said, "We want him for four years." We don't know for sure, but when Agnew left and there was that vacancy, and Carl Albert was next in command, I can't imagine Richard Nixon resigning and turning all the machinery of government, which was controlled by Republicans, over to a new President, Democrat Carl Albert. I just don't think he would have. So the fact that the Amendment operated to put a Republican there who could step up when he resigned and continuity would exist in the government—I think, without that, Nixon would not have resigned. He would have been impeached. I don't think that would have been in the best interest of the country.

So I think, in our own way, John, we did maintain sanity there by having the Twenty-Fifth Amendment in place. Gerry Ford, nobody questioned that he was the Vice President when he was chosen that way, and nobody questioned when he became President shortly thereafter.

*Political Opportunism in Filling a Vacancy in the Vice Presidency*

FORDHAM L. REV.: The timing of the appointment of Ford was interesting, because Agnew was already being investigated. That was under way before Watergate. Was there any concern that the Senate would hold up the appointment of Ford while the Vice Presidency was still vacant, impeach Nixon, and then install their man in the White House? There would be a double vacancy, a vacancy in the Presidency and the Vice Presidency, and then, theoretically, the Speaker of the House could have become President. Was that a concern at all?

SENATOR BAYH: Temptation, sure. The House was doing all the investigating, of course. They had to bring their proceedings. I have no doubt in my mind that if Nixon had stayed in there, they would have brought the proceedings and the Senate would have probably booted him out of there.

I'm certain it was in some people's minds. They may have even expressed that to me. I think there would have been stronger support for that in the House, where Speaker Albert would have been next in line. But

anybody that raised that to me knew they'd have to clear me out of the Senate first in order to do that, because that wasn't what the Twenty-Fifth Amendment intended.

I think, when it got right down to it, I'm sure Speaker Albert said the same thing: "It wouldn't be bad to be President, but I've got the next-best job in town, maybe even the best job, as Speaker." He had a respect for the constitutional structure, I think.

*Political Uses of the Twenty-Fifth Amendment & Ambiguity in  
Legislative Intent*

FORDHAM L. REV.: To the extent that there are gaps that the Twenty-Fifth Amendment left open, what are the obstacles in addressing these gaps and in convincing everyone that this is what we should be thinking about now? As an example of an issue open for debate, some authors have questioned whether the Twenty-Fifth Amendment's disability provision can be invoked in a situation where the President is "politically incapacitated."<sup>30</sup>

SENATOR BAYH: There are a couple of gaps that are real gaps that I got to looking at that I thought probably could be handled. One issue has to deal with the authority of the Acting President in a situation of presidential disability. I think an Acting President has the same authority that a President would have under the circumstances. There's no need for him being the "acting" there if there isn't something giving him the authority to act in the full capacity as President as long as he's there.

I'm trying to think how you get legislative history without having to pass a new statute—whether it be a committee report out of the Judiciary Committee of both houses, expressing the sentiment of the Senate and the House that, under the Twenty-Fifth Amendment, the Acting President should have all the power and authority given to any President, as long as he serves in that office. Then, based on that fact, conclude that we do not believe that the Twenty-Fifth Amendment is designed to be used as a political tool for presidents who are confronted with political problems.

Maybe the two ideas could be put together into a solid argument. But my concern is—I am very concerned that this Supreme Court is such a philosophically bound court. This is a concern of mine, having been intimately involved in Title IX and writing an amicus brief to the Court in the last case that they heard, the Jackson case.<sup>31</sup> Title IX is just one short

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30. See Akhil Reed Amar, Sterling Professor of Law & Political Sci., Yale Univ., Applications and Implications of the Twenty-Fifth Amendment, Address at the Frankel Lecture (Nov. 6, 2009), in 47 HOUS. L. REV. 1, 3–7 (2010); see also John D. Feerick, A Response to Akhil Reed Amar's Address on Applications and Implications of the Twenty-Fifth Amendment, 47 HOUS. L. REV. 41 (2010).

31. Brief Amicus Curiae of Birch Bayh in Support of the Petitioner, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (No. 02-1672).

sentence. It doesn't say anything about whether retaliation exists or not.<sup>32</sup> There were no hearings held on it. There's no committee report to say what the committee intended. All it has are the words of the author. In this instance, it's Senator Birch Bayh.

Where I'm going is that if we have a President who has political problems and something is done to try to take him out of there, and he appeals to the Supreme Court—if he's a Republican President, how do you suppose they're going to rule?

The Tilden-Hayes election is another example. There, the Republican Congress refused to accept the electors from three southern states that were for Tilden. Instead, they decided they'd set up a panel, which was bipartisan, composed of members of the House and Senate and one member of the Supreme Court, who happened to be a Republican. The vote was eight to seven Republican. They not only didn't count the Tilden ballots, they counted the Hayes ballots, which gave him the Electoral College victory by one vote. As a tradeoff for the Democrats, Hayes agreed to take all of the troops out of the South that were enforcing the civil rights of blacks—so total regression. They weren't slaves, but they were basically in the same position because they had no rights at all—all as a result of this one member of the Supreme Court.

It sort of makes one wonder about where the Court fits in, because it would be the court of last resort to settle any dispute like this.

FEERICK: You are picking up some of the suggestions that the Amendment might be available to a President who is going through an impeachment investigation. Can a President, under Section 3, remove himself or herself, saying, "This is a Twenty-Fifth Amendment use, because I don't have enough time to take care of impeachment and my duties as President"?

That's just one example of current debate about succession. Some people also argue that whatever use you have under Section 3 is perhaps a precedent for also using Section 4. Professor Amar of Yale Law School, who has written on the subject, has been provocative in some of the views about the reach of the inability provisions of the Amendment.<sup>33</sup>

SENATOR BAYH: I think it's a legitimate question here.

Let's take the specific example: President Nixon is about to be impeached, so he invokes the disability provision and says, "I'm disabled," and the Vice President becomes Acting President. I think he could do this legally, but I think that ensures he is going to get impeached. I don't think that slows down the impeachment process. It might even accelerate it. So he's out of there.

Now, when you have an Acting President who becomes President, Congress can deal with that one way or the other. I don't see how you can

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32. See *Jackson*, 544 U.S. at 175 (holding that Title IX implied a private right of action for claims of retaliation, despite the fact that "Congress did not list any specific discriminatory practices when it wrote Title IX"), *rev'g* 309 F.3d 1333 (11th Cir. 2002).

33. See, e.g., Amar, *supra* note 30.

say you can't use that as a subterfuge, but if it is subterfuge, then that's a declaration against interest, it seems to me.

FEERICK: Here's part of the issue. You have an issue about—one way to label it is “the fitness of a President.” This impeachment inquiry is going on, and the President wants to deal with the impeachment and says, “I've been disabled, because I have to spend a lot of time dealing with impeachment. Therefore, I can use the Twenty-Fifth Amendment.”

So the question that I think you have lurking throughout the document is, “What's disability?” It's back to the age-old question: What does it cover?

SENATOR BAYH: “What is the extent of the term ‘disability’ and who is to be the judge of it?”<sup>34</sup> So said Dickinson of Delaware, as I recall.<sup>35</sup>

FEERICK: So Professor Amar and others have suggested that, the term being general, it can cover a lot of different situations, even though in the debates leading to the Twenty-Fifth Amendment, most of the focus was on physical and mental capacity. There were examples given, such as what if the President is kidnapped?

SENATOR BAYH: His plane goes down on a deserted island and you can't find him, there's no communication, and missiles are getting launched or need to be launched.

Those are all very real concerns.

FORDHAM L. REV.: That was an area where the record was clearer because there were discussions about this very contingency. From reading the legislative history leading up to it, those were the recurring themes—physical disability or the far-removed chance of being kidnapped. But is it fair to say that these concerns about some of these more political uses are new issues?

SENATOR BAYH: I have some recollection of that coming up in the hearings: What if the President does this or that? I think the general reaction was very much as mine is here a couple of generations later: Any President that tries to do that is going to foredoom himself. If they don't have impeachment proceedings started and he does something like that, then, it seems to me, this would be grounds for impeachment.

FORDHAM L. REV.: What if you had a situation where it's not impeachment, and the judge orders the President to sit for a trial. In that situation, the President is essentially physically detained. But maybe the underlying issue in the civil trial could be grounds for impeachment. It seems that what you're saying is that if it's ever used in such a scenario, then there's no threat, I guess, of misuse under Section 4, because you'll just have impeachment, if that's correct.

FEERICK: In my book on the Twenty-Fifth Amendment I write that “[w]hether Section 3 is broad enough to cover the case of a President's deciding to step aside temporarily, as was suggested during Nixon's last

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34. FEERICK, *supra* note 18, at 3.

35. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 427 (Max Farrand ed., 1937).

year in office, in order to devote his full time to his defense against impeachment and removal is a debatable question.”<sup>36</sup>

So I’m ducking the issue.

I continue, “Although such a use of the Amendment was never mentioned by the Congress which proposed it, it probably would not be beyond the scope of Section 3, since the Section was intended to be broadly interpreted. However, Section 3 does not provide a mechanism for a President to step aside temporarily without justification, thereby neglecting his duties.”<sup>37</sup>

It’s interesting. I have a student right now, Brian Hannon, who is reading everything on disability and has a different view from Professor Amar. He is saying that “inability,” as he sees it, was not intended to be synonymous with “unfitness.” If you have an issue of unfitness—dealing with impeachment or some other political issue—that’s not inability.

So we have the debate. Some people would stretch the term to deal with things that we, at the time, never focused on specifically.

SENATOR BAYH: Maybe we focused on it and then said, “So what?” I guess a presidential disability is pretty much what the President says it is. The question is, how is it going to fly with members of Congress and with the public generally? That’s why the business of stepping out in order to avoid impeachment, I think, guarantees impeachment. The Supreme Court may say, if he’s not mentally incapacitated, you can’t impeach him. I could argue that case.

*The Problem of Double Vacancies, Declaring an Acting Vice President Disabled & the Pre-Twenty-Fifth Amendment Letter Agreements*

FORDHAM L. REV.: Another question that the Twenty-Fifth Amendment does not resolve—albeit, a question raised by a far-fetched scenario—is how the disability provision would operate in a situation where the Vice President became Acting President, and then the Acting President became disabled. There would be no Vice President there to declare him disabled. Thus, Section 4 would be inoperative.

FEERICK: The question is, “What happens when nothing in the Twenty-Fifth Amendment deals with the disability of a Vice President who is acting as President during the disability of a President?”

SENATOR BAYH: You might argue, since there’s no longer a Vice President, that the Succession Act would be triggered.

FEERICK: Right. If there’s a serious issue, any issue, a disability of a Vice President acting as President, you’re not in the Twenty-Fifth Amendment analysis now.

SENATOR BAYH: Basically, you’re President.

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36. FEERICK, *supra* note 18, at 198.

37. *Id.*



FEERICK: You're right, Vice President acting as President. But you're still the Vice President. If we didn't have a Twenty-Fifth Amendment at all—just forget it for a second—and you had a serious case of the disability of a Vice President, how would you deal with it? The Succession Act applies to the disability of a President and Vice President. It applies if you have a double vacancy or a double disability.

The succession law says who is next in line. So the issue that some people would see is that the person next in line might assert that he has some authority to determine that he's entitled to act, because the succession law designates him as the successor in the event of the disability of a President and Vice President. Since the President is disabled and now the Vice President, acting as President, is disabled, the Speaker should be called upon to discharge her statutory duty as the Speaker of the House of Representatives to become the Acting President, replacing the current Acting President because he's disabled—the current Acting President is a Vice President who is disabled.

SENATOR BAYH: I wish they'd change the succession statute. Like I mentioned earlier, I'm very concerned about the President Pro Tem. I would make it the Majority Leader of the Senate and the Speaker of the House. You have to give the Senate a little role there, I think, because they're not going to go along with what you want to do. Would a new succession statute take precedent over the House, making the Majority Leader next in line over the Speaker? I don't know. The House is the body that reflects the people generally.

FEERICK: What is your reaction to how declaring a President disabled would function without an explicit provision like the Twenty-Fifth Amendment? Before the Twenty-Fifth Amendment, when the Attorney General's office—at the time, Robert Kennedy—put out an opinion to support the letter agreement between President Kennedy and then-Vice President Johnson, it supported the idea that the Vice President had authority to declare a President disabled.<sup>38</sup> It said the President can pass over his powers and duties to the Vice President. But it also suggested that when the President was disabled, the Vice President had the authority to declare the President disabled and take over.

SENATOR BAYH: Only with the consent of the Cabinet.

FEERICK: This was the Kennedy opinion.

SENATOR BAYH: But I don't agree with the Kennedy opinion.

FEERICK: So there is the issue of the legality of the Kennedy opinion before the passage of the Twenty-Fifth Amendment. The Kennedy letter agreement says that the Vice President should consult with whomever, particularly with the Cabinet. It doesn't mandate that. But he takes over when the President is disabled. It's implicit in there—maybe it's explicit—that the Vice President can declare a President disabled, who is disabled.

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38. FEERICK, *supra* note 18, at 55–56 & n.\*; *see also* Letter from John D. Feerick to Representative Richard Poff, U.S. House of Representatives (Feb. 7, 1965) (on file with the Fordham Law Review).

Who knows? Somebody has to determine that. At the time, Senator Bayh, I think you took issue with that.

SENATOR BAYH: That's a prescription for a coup right there.

FEERICK: Yes. Even with the existence of the Twenty-Fifth Amendment, these letter agreements are still relevant, because they raise central questions to analogous situations where the Twenty-Fifth Amendment is inoperable. Benton Becker, General Counsel to President Ford, thinks the letter agreements constituted an unconstitutional delegation of power.

SENATOR BAYH: You mean the Kennedy agreement?

FEERICK: Yes. Why is he spending his time on that?

FORDHAM L. REV.: We believe he is looking at the letter agreements generally, which arranged for the transfer of power if the President became unable. There were similar agreements between President Eisenhower and Vice President Nixon, President Kennedy and Vice President Johnson, President Johnson and Speaker McCormack, and President Johnson and Vice President Humphrey.<sup>39</sup> I believe he is focusing on Johnson's agreement with McCormack, which arranged for the transfer of power from Johnson to McCormack if Johnson became unable. The Twenty-Fifth Amendment had not been enacted at that point. Some argue that that was an unconstitutional delegation of power.

FEERICK: The Twenty-Fifth Amendment does not apply if you have no Vice President. The Vice President is gone and the Vice Presidency is empty. It just happens suddenly. Something happens to the Vice President, and the President, arguably, is disabled. People speculate that if the President is disabled and there's no Vice President, the Twenty-Fifth Amendment doesn't cover that, and therefore it's a gap.

That's one of the examples. As you said before, all those possible contingencies were discussed. But it was hard enough to get the Amendment that we have now. If you put all these other contingencies in there, it pushes out this way, as you said.

SENATOR BAYH: This just argues for filling that vacancy quickly.

FEERICK: Right.

SENATOR BAYH: In the one experience we had, with Ford, it happened quickly. If Congress doesn't go along with it, then . . .

FEERICK: If, for example, they were both shot, if something happened to both of them at the same time, and the Vice President dies—if the President is clearly disabled, the succession law is, I think, going to take over.

SENATOR BAYH: In that case it goes directly to the Speaker, which I prefer, frankly.

FEERICK: Would you reverse the order, too, and have the Majority Leader of the Senate go before the Speaker? That's a different issue.

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39. FEERICK, *supra* note 18, at 55–56 & n.\*.

SENATOR BAYH: If you're going to make the change in the Senate, I think to just take them out of the position they are in now.

FEERICK: How does it work? If they are both disabled—suppose the President is unconscious and the Vice President died—I don't think there's any issue. The Speaker is immediately going to take over, under the succession statute. Who's going to claim that there is not a disability there?

SENATOR BAYH: They can't. Then the Speaker takes over.

FEERICK: Yes, in the case of a double disability.

SENATOR BAYH: The Twenty-Fifth Amendment is mute on that.

FEERICK: Yes. But the Constitution is not, because Section 2 gives Congress the power, under the other provisions of the Constitution, to redress the issue.

To that end, Congress has established a line of succession to cover double disability. It is in the Succession Law of 1947.<sup>40</sup> If you have the situation where there's an Acting President because the President is disabled, and an issue arises with the Vice President, the open question is whether Congress can say, "We have some power under the Necessary and Proper Clause to dictate how to handle a situation where it is clear that the President is disabled." Congress can deal with the problem of a disability of the Vice President acting as President. They have some authority, under Article II of the Constitution, in dealing with the line of succession that gives them authority to say who the successor is in the case of a double disability, and possibly to say something about that disability.

Otherwise, you have an unworkable situation.

Now there is a serious issue about the Vice President's disability. The Twenty-Fifth Amendment doesn't apply because there is no specific constitutional provision for Congress or anyone in the Executive Branch to declare the Acting President disabled. Congress is saying that the Speaker takes over, with the disability of both the President and Vice President. But now Congress is faced with a situation where the Vice President who is acting as President doesn't acknowledge that he has a disability. It's easy if he says, "Yes, I'm disabled." Then the Speaker takes over—there's no issue.

So the question I have is where the Congress—because it hasn't done so in the succession law—has some ability to legislate because it has the power to say who is next in line when there is a double disability. That enables Congress, under the Necessary and Proper Clause, to figure out how to deal with, in a double disability situation, the Vice President acting as President who is claiming he's not disabled.

FORDHAM L. REV.: Theoretically, the Speaker could say, "I'm going to invoke Section 4 of the Twenty-Fifth Amendment. I'm going to declare the Vice President disabled." Even though there's no provision for the Speaker to do that, he could say, "Because I'm next in line, then I can

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40. Presidential Succession Act of 1947, Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)).

basically do what the Vice President should be able to do.” Then there could be a battle between Congress and the Speaker.

FEERICK: I think, if I were counsel for the Speaker, I might say, “You’re not bound by what the Cabinet says. You’re not bound by the Cabinet, because it doesn’t apply to you. In the absence of the Twenty-Fifth Amendment, which doesn’t apply, you have the power to take over at this point. The line of succession says you take over in a case of disability. This guy, who says he’s not disabled, is disabled,” although the Speaker would probably want to get some support from the Congress, I would think, as a practical matter, if you have a dispute between the Vice President acting as President, who claims to be able, and the Speaker, who says, “You’re not able.”

That’s a tough problem. I don’t know how that would play out. There are just a lot of possibilities.

SENATOR BAYH: If I were Speaker, I’d sure try to see if I could get the Cabinet to support me.

FEERICK: Right. That’s what you were saying.

FORDHAM L. REV.: To play it safe, make it legitimate.

FEERICK: If the Cabinet didn’t support him, then the Vice President is still acting as President, until such time as the country starts to express itself, depending on how he’s doing.

But something you said before to me, Senator Bayh, is very appealing. In a crisis like that, you can’t rule out good people figuring out how to deal with that in a way that’s respectful of the Constitution and promoting public confidence. It may not go down well for those who want to see everything defined in advance.

SENATOR BAYH: I would imagine that the Vice President, given a crisis confronting our country—if we don’t have a crisis, it’s another thing—and the Vice President, for all intents and purposes, is *non compos mentis*, he would catch unshirted hell. I think they would make it impossible for him to serve, because he’s not capable of serving.

### *Electoral Succession*

FORDHAM L. REV.: There are several gaps at various points in the system of electoral succession—for example, if a presidential nominee were to die before Election Day or were to die before the vote of the Electoral College or were to die between the vote of the Electoral College and congressional certification.<sup>41</sup> Would abolishing the Electoral College reduce these gaps?

SENATOR BAYH: Yes.

But, shoot, you could have a President who got the popular vote dying before the votes are counted, before Election Day. After Election Day, he

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41. See generally Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043 (2010) (discussing gaps in electoral succession and the failures to reform the Electoral College system).

could die before he is sworn in. All of those things are possible, no matter how you choose them, it seems to me.

Isn't there a general consensus that the Vice President would be the one who would be chosen or not chosen? What is the law on that? Do we have any law on that?

FEERICK: Once there's a President-elect, you have the Twentieth Amendment.<sup>42</sup> But a gap arises before the votes are counted and declared by Congress. Then there's some debate, whether Congress, in a joint session in early January, can count electoral votes for somebody who has died between the casting of the votes and the declaration of the votes. Some people say Congress can't. But I think there is a lot of authority that, once the electors voted, as long as people were alive at that point, you have, presumptively, a President-elect and a Vice President-elect who had the votes. Therefore, even in advance of Congress declaring it, if the electoral votes that were cast in early December have identified a President-elect and Vice President-elect, I think there's good authority in the reasoning and constitutional provisions to say that it has to count the vote. If the President-elect died in that gap period, the Vice President-elect takes it, based on the Twentieth Amendment.

FORDHAM L. REV.: The reasoning seems sound. So, Senator Bayh and Dean Feerick, the gaps in succession all arise before the vote in the Electoral College?

FEERICK: My argument had been—and I think there are other arguments that I didn't deal with—that the Twelfth Amendment<sup>43</sup> specifically mandates Congress counting the votes. If a Presidential candidate who died is counted, under the Twelfth Amendment, there would still be a Vice President-elect.

But some people say there is legislative history in a committee report for the Twentieth Amendment, and the committee report assumed that once the votes were cast, even before the count, you would have had a President-elect and Vice President-elect, unless you had a situation where nobody got a majority at all.

So there is support for the view that when the electoral votes are cast, if everybody is alive, that's the point, one can argue, that you have a Vice President-elect. So if anything happens to the President-elect between that point and Inauguration Day, the Vice President-elect becomes President.

But then the question is, what happens when somebody dies after the election and before the electors meet? The electors now have a substantial role. They have to decide what they're going to do in the electoral proceedings—who they're going to vote for.

SENATOR BAYH: They're perfectly free to cast them for John Brown if they want to, or Wayne Morris—Ronald Reagan, at one time.

FORDHAM L. REV.: If that's what could happen, maybe someone could argue that it is good thing that we have an Electoral College that

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42. U.S. CONST. amend. XX.

43. U.S. CONST. amend. XII.

could decide the issue. On the other hand, one could argue that, in fact, that is exactly the reason we should get rid of the Electoral College, that it shouldn't be up to electors, who are not representatives—

SENATOR BAYH: Not bound to anybody.

FORDHAM L. REV.: Exactly.

SENATOR BAYH: That's sure one of the reasons.

FEERICK: There would probably be some other views on this area, I expect.

FORDHAM L. REV.: With the Electoral College, some would argue that you are creating stability. Yet that's at the expense of legitimacy and democratic voice. The balancing of legitimacy, on the one hand, and continuity and stability, on the other, raises an interesting issue. Any reform of the Electoral College will undoubtedly have important consequences for presidential succession.

SENATOR BAYH: Suppose the President dies after being elected. Do electors have the capacity? I think they do. The question is which slate of electors Congress accepts, which goes back to the old Tilden-Hayes situation.

If the Congress is Republican and the Democratic candidate dies—

FEERICK: The question there would be, "How would the electors cast their votes?" The President dies after the election, taking his question, before the electors meet.

## II.C. LINE OF SUCCESSION AND CONTINUITY IN GOVERNMENT

### *The Nation's Sentiments About Succession in 1963*

FORDHAM L. REV.: Can you describe the sentiment of the nation around the time of the passage of the Amendment, the reactions to that iconic photograph of Johnson standing in front of an aged McCormack and Hayden, and the role of the media at the time in facilitating these conversations and catalyzing some of the initial steps that were taken?

SENATOR BAYH: For those of us involved, we thought it was a real testimony to the need to do what we were doing. The population generally, I don't think, thought, "One of those fellows is going to be the next President of the United States." But those in news did, and the people in our universities and in our law firms that were conversant with the issue, they sure did.

I think they were with us, but it just convinced them that they were right.

I would hope that the time doesn't come when—as you point out, what happens if the Senate or the House refuses to go along with the President's choice? I would hope they would catch hell from the people back home, because the press writes editorials in all the newspapers that we can't play politics with this, just to protect the Speaker of the House or the President Pro Tem of the Senate.

I think the Ford example is as good an example as you're going to find of the Twenty-Fifth Amendment working well. Gerry Ford was a man of his time. He happened to be the right kind of person to play a role that ultimately would become increasingly significant, and which he was exactly well-qualified to fulfill.

I'm glad I was there and I'm glad he was there, more importantly.

*The Political Sensitivity of Reforming the Line of Succession*

FORDHAM L. REV.: You talk in your book about the need to be cognizant of that situation in which we had specific people in line under the status quo, and, in calling for reform efforts and change, there was the need to be tactful and measured.

SENATOR BAYH: We're talking about two different things here, succession in the constitutional structure and succession by statute, which is only relevant if the constitutional provisions aren't followed. I think Johnson was right that the best way to handle that was to wait until John McCormack was not in the chain of command. That's what happened. I'm sure I had more than one conversation with the Speaker, letting him know what we were doing and why we were doing it. Never a peep about, "Don't do that yet. Wait a year," or something. None of that.

I like to think that in times of crisis—let's say, at a time of great crisis—great men step forward and do the right thing. Maybe that's being naïve, but I think that's the case. All of us love our country, regardless of how we might vote. Amen.

*Line of Succession & State Appointment of Members of the House of Representatives in Response to an Attack on Congress*

FEERICK: With regard to the line of succession, there have been a lot of proposals advanced to change the line of succession beyond the Vice Presidency, as you know. You made reference to focusing on the Majority Leader of the Senate. But there are a number of scholars, really from the beginning of debates on this issue, who have felt that the legislative offices should not be in the line of succession, from a constitutional standpoint and a policy standpoint.

Then there are proposals that the line of succession is not large enough. If you had a terrorist attack that had a devastating effect on Washington, it would weaken the country. So there should be a longer line of succession that includes governors and others.

What are your thoughts on the matter?

SENATOR BAYH: The issue of the line of succession surely provoked my thought processes. I assume that the House rules set forth a succession plan if something happens to the Speaker.<sup>44</sup>

But just as when there is a joint session there is always one cabinet member that's never there, I think that whoever would follow if both the Speaker and the next officer in line are taken out—long before we thought about a nuclear explosion—I never thought about somebody driving an airplane into the Capitol Building during a joint session.

I think there's something to be said, John, for having a law that says that in the event there is a tragedy, the governor of each state shall immediately appoint members of the Senate and House that are of the same political disposition as those who were killed, and that they will meet at a point to be determined.

That could be handled pretty quickly, in a matter of days. Of course, in the world in which we're living, a lot can happen in a matter of days. So maybe that's not quick enough.

FEERICK: Some constitutional scholars would say that there's no power in the Constitution to deal with a vacancy in the House of Representatives. You have a provision in the Constitution for the governor to fill a vacancy in the Senate.

But you're focusing on, again, this question of state law. I really haven't studied that subject—whether the governor of a state could, under state law, just fill a vacancy in the House of Representatives.

But maybe not to bog down my question by the legal analysis, the idea of having a law, assuming it's constitutional, that would enable governors to fill positions in Congress obviously has appeal to you in the kind of tragedy we're talking about.

SENATOR BAYH: I don't think we should get involved in the normal appointment process. Some states require a special election for members of Congress. We're all now familiar with the situation of back and forth in Massachusetts [in the aftermath of Senator Edward M. Kennedy's death and the vacancy of his seat]. I think under normal circumstances, that can be left to the individuals, and you won't get involved. You have a real states' rights question.

But when you have a matter of national consequence, like a terrorist act, I think a national statute is appropriate—and it ought to hold each governor accountable to the same standard, it seems to me, and this standard is to maintain the status quo. Don't let a governor try to go packing the Congress one way or another. We can say that the respective party chairmen of each state shall make recommendations. In other words, you don't want a Democratic governor to appoint Republicans that are all subservient to him.

The thing about the purists that say Congress shouldn't get involved in making decisions in the executive branch is that they ignore the need to

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44. Rules of the House of Representatives, 111th Cong., R. I(3)(A), available at <http://www.rules.house.gov/ruleprec/111th.pdf>.



have democratic legitimacy. The reason Harry Truman wanted to change the Succession Act was that he thought whoever was President ought to be elected by somebody. Those Cabinet officials aren't elected by anybody. They just say, "You're it."

*Secret Order for Shadow Government*

FORDHAM L. REV.: Related to what Dean Feerick said about this being one issue where Congress could act, Senator Bayh, you identified a plan and a process that might work. It calls to mind a secret executive order that was allegedly issued by President Reagan, which may or may not have been in effect since then. President Reagan allegedly issued a secret executive order that creates a means for re-establishing the executive branch in the event of the President and Vice President's death.<sup>45</sup> This alleged process bypasses the Succession Act of 1947, therefore precluding the Speaker of the House and President Pro Tem from succeeding to the Presidency. What are your thoughts on this? Is there a potential rallying point for future action in this area?

SENATOR BAYH: Well, I'm not for secret government. I have no problem with having a plan for a shadow government to protect the country from a disaster. But we ought to know who they are and we ought to know how they're chosen. I assume this would be the hand from the grave continuing to write on after death.

Something has to be done. We have a normal process now for what happens if the President dies, if the Vice President dies. It goes to the Speaker. What happens if the Speaker dies? If we're talking about a mini-terrorist act, that shadow government, I would assume, would all be going up in smoke. Those people are close enough to the throne that they're going to be in Washington, and everybody would— isn't that terrible to think about?

It's not beyond belief. I'm not pooh-pooing the idea. But I think we need to be careful. We are a democracy, after all. The President is not a king. Whatever framework he sets up ought to be a matter of public knowledge. If it has any credibility, then it needs to be signed off on, it seems to me, by Congress.

What do they do? Do they also have Justices of the Court, shadow Justices of the Court? You can imagine that this is ripe for litigation of all kinds, as to who gets what.

The more public knowledge there is in advance, and acceptability, the better off we are.

I assume most states have succession acts, so that if the governor is at the State of the Union message and it all goes up, the lieutenant governor then becomes governor. Reconfiguring a Congress very much in light of the one

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45. Bruce Ackerman, *Take Your Paws Off the Presidency! Does the Bush Administration Have a Secret Succession Order that Bypasses Congress?*, SLATE (July 15, 2008, 3:35 PM), <http://www.slate.com/id/2195384/>.

that is no longer with us—that can be done—I was going to say “as a simple matter.” It isn’t a simple matter or anything like that, but it could be done rather expeditiously, provided that you have it carefully enunciated as to what you want to happen, and where, under what circumstances it is triggered, and how the members are chosen.

Once you have a sitting Congress, then you are able to come to grips with laws that are written by the representatives of the people, generally not somebody who is President, who is no longer there.

I still like the idea of someone like Steny Hoyer being at the Greenbrier when the State of the Union is given.

With regards to the secret plan, with everything else the President has to do, I could understand completely if nobody has thought about that. A young President—he’s going to live forever.

FORDHAM L. REV.: Even if a law providing for the President to set up a shadow government was passed on to President Obama, there is still the issue of transparency that you hit on, and also separation of powers. What has Congress’s role been in approving this plan? What is their knowledge of this plan?

SENATOR BAYH: The question is, what is the plan? If it is a plan to deal with presidential disabilities, which is the immediate matter of concern, I don’t think that needs to be a matter of public knowledge. In fact, it’s probably better that the public doesn’t know about it, because some character can take advantage of a weakness in it.

But one of the important things is that the President’s wife needs to be sitting in on all this, so that she will be able to attest to the fact that that’s what her husband would have wanted to do. The Vice President’s wife too—so Jill and Michelle.

#### II.D. REFORMING CURRENT SUCCESSION LAW

FORDHAM L. REV.: You have spoken in the past of the need to be proactive about the issue of succession, in other words, the difficulty of taking this issue on absent a crisis situation. What are the difficulties in being proactive? What would need to happen in the media and in Congress to lay the groundwork for such an initiative?

SENATOR BAYH: These are very real issues. I guess it’s hard for me to be totally objective. Maybe it’s hard for John to be totally objective. We’ve been there and we’ve explored all these alternatives. The Miller Center brought up all these hypothetical situations and alternative succession structures. All of us came to the conclusion that this isn’t perfect, but if you try to fill one little gap, you’re going to create a larger problem someplace else.

My concern is that you can’t really control what the beast is going to look like by the time it gets out of Congress and back to the states. If you have a little, noncontroversial gap that you’re going to fill, that doesn’t

mean other people can't piggyback on that and open up a whole can of worms. Hopefully such a piece of legislation wouldn't pass.

FEERICK: I was a commentator at the recent Continuity of Government Commission meeting, where they issued their report on presidential succession,<sup>46</sup> in early July. The members of the Commission seemed to express a lot of frustration that Congress doesn't seem interested in taking up these issues in any significant kind of way.

How do you get Congress to be proactive about issues—like those the Continuity of Government Commission deals with—that are bipartisan in nature? How can we build a meaningful proactive process in Congress?

SENATOR BAYH: There are thinkers and then there are doers. Sometimes there are thinkers that are also doers.

I don't know who is on the Continuity of Government Commission or who chooses it, what qualifies somebody to serve on it. But they ought to have a sitting member—two or three, one from the House and one from the Senate or two from Republicans and Democrats in the House and the Senate—on the body that makes these recommendations.

I had never heard of the Commission. That's no criterion for their credibility. I don't know what effort they have made. With the Twenty-Fifth Amendment, we were fortunate to be able to take people in our study groups that really were movers and shakers, as well as thinkers.

FEERICK: The one thing that was present at the time—there was a young Senator from Indiana by the name of Birch Bayh, who was chairman of a very important subcommittee and who had a very strong interest in the Constitution and issues such as succession and direct popular election. I'm not sure, without that kind of force of one person that galvanized an entire body, some of these reforms would ever have happened.

SENATOR BAYH: If that is the case, then we were lucky to be there.

People are so busy up there now, but I think there are still some with interest—something like the continuity of government is pretty heady stuff. Everything has gotten so polarized now, but you ought to be able to get the Democrats and Republicans in the House and the Senate that could agree to disagree on everything else. They're all going to try to do something that's in the best interest of the country in case of a disaster.

### III. OTHER LEGISLATIVE WORK OF SENATOR BAYH

#### *Involvement in Electoral College Reform*

FORDHAM L. REV.: To step out of succession for a moment, would you mind discussing your involvement in the Electoral College reform, both at the amendment stage and since then. You have been extremely active

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46. PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY, THE SECOND REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION (2009).

since you left office. As we understand it, it has been a major project of yours.

SENATOR BAYH: We got the Bar Association to get together a blue-ribbon panel. It worked so well once, with the Twenty-Fifth Amendment, we decided to try it again. The interest involved in that panel was much more diverse. We had the labor unions and the Chamber of Commerce and the League of Women Voters and other people involved in that panel.

There again, there was a little duplicity, because, in my heart of hearts, I concluded that any extensive, reasonable discussion of the subject would conclude that the direct popular vote was the best way to go. Interestingly enough, that's exactly what happened.

So we, armed with that, did what we wanted to do anyhow. But we had that kind of momentum behind us and those organizations supporting us. We were able to get it out of the House by a large vote. I had sixty Senator sponsors for it in the Senate, and I figured I would get the other six when the debate got going. Then the most unlikely of all experiences, I think, that have happened to me while I was in the Senate—Strom Thurmond, who was anti-Semitic and anti-black along with everything else, was also anti-direct popular vote. He got the idea of sending telegrams to all of the prominent black leaders and Jewish leaders. He played on something that always frightened me about direct popular vote—despite the small states feeling they had the advantage, the large states were the ones that really had the advantage.

He told these groups, "What you're going to do is, you're going to give up your advantage to have influence to sway these large electoral votes if you have a direct popular vote. It will just be confined to one person/one vote. You won't be able to sway that whole group of electors," which is true, of course. A couple of these guys—Eddie Williams, who ran the study group for the Black Caucus, and one of the top Jewish leaders in the country—came to my office and said, "You're going to have to back away from this."

I said, "What do you mean?"

They said, "Well, it would give us less power."

I finally said—the only time while I was there, in my eighteen years—I said, "Look, I busted my tail to see that each of you and your constituencies got one person/one vote. Now you're telling me that if you have 1.01, you want to keep it? Get your rear ends out of my office and don't come back."

It was clear they were going to pursue it, and they were able to call off enough of the liberal votes—I lost four or five votes in the liberal section. I think we ended up with maybe fifty-two or fifty-three votes, fifty-five maybe. I forget what it was. I didn't even have my sixty.

I asked myself, "What in the world did I do wrong?" That was one of the times I questioned—I asked myself, "What could I have done differently to keep that from happening?" I suppose, if we had had more time to get around and educate individual Senators—and perhaps, as I look at it, maybe that's what I should have done. I just had to take this off the floor.

But as I recall, we were under a lot of pressure to get it out of there. Other things had been backing up because of this popular vote thing. I guess I was afraid, if I ever took it down, they would never bring it up again.

Anyhow, I think that's what I should have done. But I didn't. Whether that would have affected them or not I don't know.

Then you had somebody like Vernon Jordan—"I can't be with you on this. It's hurting my people."

I think what Vernon was saying was, "It wouldn't give me as much clout when I sit down with my member of Congress or my Senator, because he knows that I speak for somebody who can sway the whole bloc in New York or California or New Jersey," or wherever it might be.

That was a tough one to lose, particularly to lose that way, from that hypocritical approach.

There's a fellow in California by the name of Dr. John R. Koza. He is a computer scientist. He came up with the idea of using Section 1 of Article II, which basically says the electors shall be chosen by the state legislators. The manner in which the electoral votes shall be cast in the state shall be determined solely by the legislators thereof. So the theory is—I guess two years ago now, I spent the whole month of January in Annapolis, and Maryland, for the first time, went on record as saying that they would cast all of their electorals for whoever got the most popular votes, contingent on enough states joining an interstate compact with them that would constitute a majority of the electoral votes. It would not take effect until enough states had signed on.

We [Maryland] have been joined by New Jersey, Illinois, and Hawaii. California passed it twice, but it was vetoed by the Governor both times. In Hawaii, they overrode the veto of the Governor there. There are several states—Arkansas, New Mexico, even North Carolina—close to doing it. And, since New York has a new Senator, we thought we could give another try in New York.

This has become such a Democratic issue, and I think it's because, when we first started it, it was right after Bush, and the Republicans look at this as us getting our pound of flesh in exchange for Bush being chosen President. Of course, it's not a Republican or Democratic issue at all. You could argue one party benefits or doesn't, depending upon the circumstances.

To get this crazy thing, we have had to concentrate on those legislative bodies that had both houses controlled by the Democrats, as was the case with Delaware, and I think New Jersey went with us.

The cause is motoring along.

The fact of the matter is that most states have a state law that says electorals shall be chosen by the unit rule, that they all go for whomever carries the state. That is not a national law. That is a law in the individual states. Indiana has that. Maryland had it until they changed it. The idea is to change that law so that the state legislators say, "Hey, we want a President who is the majority in the country."

FEERICK: One memory. The year might have been 1977. I think there was a vote on the merits of the amendment in either 1977 or 1978, whatever that year is. That was, in my recollection, the first time in the Senate that there was a vote on the direct popular election and the merits amendment. But before that vote, it could have been someone in your office, it could have been someone with the ABA who was in touch with your office who asked me if I would meet with Senator Javits and talk to him about the ABA position on direct popular election. It was very important—it was communicated to me, as I recall, to you, where Senator Javits might be on the issue. I did meet with him.

SENATOR BAYH: I remember that.

FEERICK: Somebody may have been with me. I just don't recall. But what I remember about the meeting was, he said that his major constituent groups were opposed to the amendment, for the reasons that you mentioned, but it had a lot of merit, and he would think about it. I was trying to express support from the Bar of New York and the ABA. Then I remember hearing from someone in your office after the debate about how he stood up for the amendment in that final debate.

SENATOR BAYH: In his own pontifical way, he did. Among a group of smart people, he probably had more intellectual capacity than anybody else. But he could take forever to discuss a point. There's such a thing as knowing too much about the subject matter. It was never A, B, C; it was A2 plus B2 plus whatever.

I thought that was pretty courageous of him, given what we learned.

FEERICK: That's what came back to me, what you felt about that.

SENATOR BAYH: I have to believe that your meeting with him had an impact on him.

FEERICK: I'm not sure. But what I remember about the meeting was that he was torn.

SENATOR BAYH: It gave him cover to do what was right.

*Passing the Twenty-Sixth Amendment & the Effort To Pass the Equal Rights Amendment*

FORDHAM L. REV.: Would you describe your involvement with two more amendments—one that passed and one that didn't—the Twenty-Sixth Amendment and the Equal Rights Amendment?

SENATOR BAYH: The Twenty-Sixth Amendment: we produced that shortly after the Twenty-Fifth Amendment was adopted, as you know.<sup>47</sup> There were lots of reasons that the vote of young people should be considered, I thought at the time. Given this last presidential election, its promise came to fruition.

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47. U.S. CONST. amend. XXVI.

The chief selling point was that you had young men over there that were dying in the jungles, who weren't old enough to vote for the people that sent them there. That was a compelling feature.

We had a young fellow who was the Mayor of Cincinnati. He was responsible for having almost an immediate ratification process as soon as we got this passed. It was bang, bang, bang. I think maybe at the time that was the shortest period of ratification. I don't know what has happened since. Certainly it was ratified more quickly than the Equal Rights Amendment was.

I became involved in the Equal Rights Amendment, having grown up on a farm where my grandmother worked as hard as my grandfather. There was never an important decision made without Aunt Kate's having a voice in it. Most of the time her voice was controlling. I never even knew what discrimination against women was. I certainly didn't have evidence of it in my family.

But then I fell in love with a wheat farmer's daughter from Oklahoma, who I met at a speech contest. She had been governor of Oklahoma Girls State, president of Girls Nation, got Harry Truman's autograph in the Rose Garden between her junior and senior year. She was the first girl chosen as student body president in high school, a straight-A student. Her dream was to go to the University of Virginia. Her application was returned, "Need not apply." That was the first time this young person had realized there was one thing she couldn't do because she was a woman.

She won the speech contest, by the way.

Once I was married to Marvella, it became a driving force in my public life. The only vote I cast as Speaker of the House when I was in the legislature—the Speaker doesn't normally vote, but you need fifty-one votes to pass, and we had this equal-pay-for-equal-work bill. I saw it had fifty votes, and I said, "The Speaker votes aye," and the bill passed.

Interesting. I guess it's nice to be smart, but it's probably just as important to be lucky. I just about did myself in on the Equal Rights Amendment issue. We were having hearings, I think, on—probably, on lowering the voting age. Suddenly in the back of the room right by the door, a bunch of women held up signs—"ERA, ERA"—and started jumping up and down and yelling, just totally destroying the environment in the hearing. I just about ordered the police to clear the room when we voted on the bill—I told my staff person, "Find out what those damn women want. If they want to talk to me, I'll give them all the time they want. Let's get this hearing over with. Let's not disrupt the normal proceedings."

So I went over and voted and came back and met with those women for probably an hour and agreed that I would support the Equal Rights Amendment. I didn't know what "ERA" meant. It was Betty Friedan and Gloria Steinem and all those—Bella Abzug, one of the champions.

So I was introduced to the Equal Rights Amendment and got it through both houses by two-thirds vote. It fell three votes short of ratification. Indiana was the last state to ratify. I'd hate to tell you some of the things I did to convince some of those members of the legislature that they really

didn't want to be against this. I never did trade anything off, but I sure let people know I was going to watch how they voted on the Equal Rights Amendment.

In the end, sometimes the women were their own worst enemies. Prior to my getting involved, they would carry a pen with a pig in it into the State House: "This is a member of the House and the Senate. They won't vote for women's rights."

I said, "Wait a minute." I finally got them to be sensible about it. But this was going to be voted on on the first day of the—whether it was a Monday or a Tuesday, the first vote. I found out on Saturday that they had planned to have a big rally on the steps of the State House.

I said, "I don't think you ought to do that."

"Why? We want to show them that people are supporting women's rights."

I said, "First of all, you have to remember that all but one of those legislators who is going to be voting in the House is a man. Basically, you're appealing to men, and you don't want to offend them. Now, you're going to have a rally. If you have a rally, one of two things can happen. What happens if you plan a rally and nobody shows up?"

"Well, we're going to take care of that. We're going to bus in a lot of people from Chicago."

I said, "Wait a minute. If you bus in a lot of people from Chicago and you have a bunch of people there, you've got a big crowd of people. For sure, somebody's going to make a fool of themselves. And that's what's going to be on the news. That's what these men are going to see just before they go to vote the next day."

They cancelled the rally. But they just weren't thinking. Anybody who really is familiar with the situation, as I was, would have come to the same conclusion. But the people wanted to do everything they possibly could, refusing to recognize that sometimes the best thing to do is nothing. That was one of those cases.

I sure was sick about not being able to get Illinois. Phyllis Schlafly killed us—a housewife that descended on the Illinois legislature with women carrying loaves of bread into the legislature: "They want to take me out of my home. I like being a mother. I like being able to bake and cook for my children. This would keep us from doing that"—ignoring the fact that there were a lot of mothers that had to work and aren't getting equal pay for equal work. Obviously, this was not destroying the opportunity for mothers to stay at home, if that's what they wanted to do. It was just bogus. But she did it to us, I must say.

I debated her a couple of times. I loved it. She had a great habit of throwing out a lot of figures that she had no basis for whatsoever, bragging about her daughter: "My daughter can do this and do that." I said, "Ms. Schlafly, what you're doing is denying other women's daughters the same opportunity that your daughter has."

It was interesting.



I was going to go to Idaho to give a speech up there at a big public meeting. Idaho was a state that had rescinded their earlier ratification of the Equal Rights Amendment, which, of course, constitutionally you can't do. You have the power to ratify and then you're discharged. You don't have the power to rescind. But, anyhow, they were going through this. The matter was before the Court.<sup>48</sup> I thought, "Man, oh man, these crazies are going to pass the thing."

*Role in Quashing Proposed Amendments in Committee*

FORDHAM L. REV.: A big role—and you touched upon it before—as Chairman of the Subcommittee on Constitutional Amendments was not only to frame and push forward proposed amendments, but to prevent other amendments from going to the Senate floor for a vote. That role is arguably just as important.

SENATOR BAYH: I didn't know what I was getting into when I wanted to be Chairman of the Subcommittee. I got there, and that Committee was a graveyard of amendments that had been proposed as a result of people not liking a Supreme Court decision. The *Miranda* decision, they came down with one. The prayer decision, they came down with one. Somebody wanted to elect federal judges. The busing, the abortion proposed amendments—all those were the result of a Supreme Court decision.

Judicially, the first busing order came out in the Southern District of Indiana. Man, oh man, it was rough there.

So I think I did two things. One is, I didn't let any of those things get out on the floor where, maybe in the heat of responding to what looked like a quick fix it would get passed. The prayer amendment is the best example I can think of, but also election of federal judges—congressmen might just say "Why shouldn't we elect federal judges? We elect everybody else." Or with *Miranda*, "Why don't we give our policemen the best powers they have to defend us? We don't need to worry about some things that may be done as far as individuals are concerned, as far as the *Miranda* warnings are concerned."

Nobody in that Senate—unless there were one or two that were in favor of the amendment—the body as a whole didn't want to have to deal with those out on the floor. So I was providing a service to the Senate to keep those bottled up where they belonged.

We talk about the ones that came out. Fortunately, nothing is said about the ones that didn't come out, because they just sort of lay there.

CLOSING

FEERICK: Can I tell you one of my war stories that I'm very proud of, because it involved you, obviously? I was asked by Orison Marden, when he was President of the ABA, when the ABA came out with direct popular

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48. See generally *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

election, would I draft something? Everett Dirksen and, I guess, Emanuel Celler—

SENATOR BAYH: Celler was all for it.

FEERICK: They wanted a draft proposal that would reflect the ABA recommendations, with the runoff and the forty percent, things like that. So Orison Marden asked me if I could—I have to try to find the document.

So I got together in a hotel room in Texas, at a meeting of the ABA, with Jim Kirby, your good friend Jim Kirby.

SENATOR BAYH: Is he still alive?

FEERICK: No. Jim died about ten years ago. He was a great guy.

He was on the succession group, as you know. Jim and I sat in a hotel room, with the Constitution, and said, “What should a direct popular election amendment with the ABA recommendations look like?” We drafted up something, gave it to Orison Marden. He gives it to Dirksen and Celler. That was the proposal they introduced.

Dirksen, in the Congressional Record, said that, in talking about the proposal that he was introducing on direct popular election, “We thank the ABA,” and I think he specifically mentioned Jim and me.<sup>49</sup> Even though that went down—despite your great leadership, it didn’t make it—I often viewed that particular experience—it may be the one that stands out for me. It didn’t make it, but it was—

SENATOR BAYH: We were doing the right thing.

FEERICK: We were doing the right thing.

This has been terrific, and your participation, really, more than anything, gives this program credibility.

SENATOR BAYH: I have a good sidekick here.

FORDHAM L. REV.: We’re so grateful for your time, for your participation in this.

SENATOR BAYH: I’ve enjoyed it. As you can tell, it’s a subject that’s near and dear to my heart.

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49. See 113 CONG. REC. 9615 (1967).