

## REMARKS BY JESSE WEGMAN\*

I want to thank you, Dean John Feerick and Professor John Rogan, for inviting me and letting me participate in this. It's already been a very moving event. I also want to thank Kitty Bayh, Senator Birch Bayh's wife, who's here and who very graciously let me spend a lovely late fall afternoon at their house in 2018 so I could interview the senator for my book. It was a really powerful day. We talked for several hours. I don't think I realized then that the end was near, but I feel especially grateful to have been able to spend some time with him.

I was looking through my notes from our interview and I found this one quote that, for me, really encapsulated the senator's remarkable humility, given how much he had accomplished. He recalled his father's reaction to his election to the Indiana state legislature at the age of twenty-six.<sup>1</sup> He said, "When my father found out what I was doing, I think he wondered what he'd done wrong as a parent."<sup>2</sup> The senator came from a farming family, and I don't think politics was really among their dreams for their children.

I was doing the math: I was thirty-six days old when Billie Jean King kicked Bobby Riggs's butt, and I was about eight years old when Senator Bayh left the U.S. Senate. I'm embarrassed to say I knew very little about his work and about his influence on our Constitution and our laws until I began working on my book. You're going to hear about the man who is essentially a modern Founding Father, who's the only person in American history other than James Madison to pass, sponsor, or be closely involved with the passage of multiple *constitutional* amendments.<sup>3</sup> We have the

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\* Member of *The New York Times* editorial board and author of *Let the People Pick the President: The Case for Abolishing the Electoral College*. These remarks were made during the Symposium entitled *Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, hosted by Fordham Law School's Feerick Center for Social Justice on October 16, 2019, at Fordham University School of Law. The text of these remarks has been lightly edited and footnoted. For an overview of the corresponding Tribute, see *Foreword: Celebrating the Impact of Senator Birch Bayh: A Lasting Legacy on the Constitution and Beyond*, 89 *FORDHAM L. REV.* 1 (2020).

1. See John D. Feerick, *Dedication to Senator Birch E. Bayh*, 86 *FORDHAM L. REV.* 907, 908 (2017).

2. Interview with Birch Bayh, former U.S. Senator from Ind., in Easton, Md. (Sept. 20, 2018).

3. Interview, *A Modern Father of Our Constitution: An Interview with Former Senator Birch Bayh*, 79 *FORDHAM L. REV.* 781, 782 (2010).

Twenty-Fifth<sup>4</sup> and the Twenty-Sixth<sup>5</sup> Amendments and, we hope soon, the Equal Rights Amendment,<sup>6</sup> which would be the Twenty-Eighth.<sup>7</sup>

I'd like to talk about what Senator Bayh's staffers call "the one that got away": the proposed Electoral College amendment.<sup>8</sup> There are really two things about that effort that I'd like to focus on and that really struck me while working on my book about the Electoral College. One is Senator Bayh's own evolution in his support for a national popular vote, and the second is just how close he got—and we got—to electing our president by a popular vote.

On the first point, his evolution: Senator Bayh ended up as the chairman of the Subcommittee on Constitutional Amendments in 1963.<sup>9</sup> Sort of by accident, he fell into the job.<sup>10</sup> I don't think he, or anyone else, expected that it was going to be much of a consequential position. He recalled in a speech after leaving the Senate that the subcommittee was a "graveyard" for constitutional amendments.<sup>11</sup> Referring to the subcommittee, he said, "How often do you amend the Constitution, for heaven's sakes?"<sup>12</sup> Well, he would change that story pretty quickly—just a few weeks after he became the chairman, President John F. Kennedy was assassinated and the subcommittee got to work on what would become the Twenty-Fifth Amendment.<sup>13</sup>

What ended up as the closest we've ever come to abolishing the Electoral College actually started with a more modest objective.<sup>14</sup> It started with a request from President Lyndon B. Johnson to Senator Bayh.<sup>15</sup> The president had just seen Senator Bayh pass the Twenty-Fifth Amendment with remarkable speed and competence.<sup>16</sup> He said to the senator that he wanted

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4. U.S. CONST. amend. XXV.

5. U.S. CONST. amend. XXVI.

6. 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).

7. Jesse Wegman, Opinion, *The Man Who Changed the Constitution, Twice*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/opinion/birch-bayh-constitution.html> [<https://perma.cc/7L3K-ZU27>].

8. From 1966 to 1979, Senator Bayh led congressional efforts to pass and ratify a constitutional amendment that would have abolished the Electoral College. *See infra* notes 19–44 and accompanying text.

9. BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 27–29 (1968).

10. *See id.* After the previous chairman, Senator Estes Kefauver, passed away on August 10, 1963, Bayh learned that the subcommittee was going to be shut down. Bayh expressed interest in the subcommittee's work and by September 30, he was announced as its new chairman. *Id.*

11. Reflection, *Remarks from Senator Birch Bayh*, 79 FORDHAM L. REV. 1091, 1091 (2011).

12. *Id.*

13. *See* JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATION* 56–58 (3d ed. 2014).

14. *See* JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* 142 (2020).

15. *Id.* at 141–42.

16. *Id.* The Twenty-Fifth Amendment passed both chambers of Congress in 1965 and became effective in February 1967, less than four years after President Kennedy's death. John

him to work on another amendment to abolish faithless electors,<sup>17</sup> which is an issue, interestingly, that has come up again and has reached the U.S. Supreme Court.<sup>18</sup>

Senator Bayh agreed to take up this amendment that would have abolished faithless presidential electors and opened hearings in 1966.<sup>19</sup> When he began the hearings, he made a gentle nod to the perceived importance of the popular vote.<sup>20</sup> He said that the popular vote would be “the ideal solution, the natural answer for a democratic society.”<sup>21</sup> But he also said it would be politically impossible to adopt because the small states would never go for it.<sup>22</sup> In his opening remarks at the first Senate hearings on this amendment, he said, “putting it optimistically,” the odds of Congress passing a popular vote amendment were “extremely slim—if not hopeless.”<sup>23</sup>

Over the next few weeks and months, his subcommittee took an enormous amount of evidence from witnesses, from documents, and from arguments, and it converted him. He realized that all of the other proposals for tweaking the Electoral College were not sufficient because they didn’t solve the fundamental problem that the president could be elected without winning the popular vote nationally. On May 19, 1966, after several months of hearing from these witnesses, he made a speech on the floor of the Senate,<sup>24</sup> which I consider to be the most powerful argument that has been made for the popular vote in American history. It was short—a three- or four-page speech.

He opened by acknowledging that everyone said this would never happen,<sup>25</sup> and then he brought up the fact that we had just had the “one person, one vote” rulings<sup>26</sup> in the Supreme Court, the Civil Rights Act of

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D. Feerick, *Presidential Succession and Inability: Before and After the Twenty-Fifth Amendment*, 79 *FORDHAM L. REV.* 907, 924 (2010).

17. WEGMAN, *supra* note 14, at 141–42. Casting a vote in a presidential election is actually a vote for a slate of electors who have pledged to vote for a presidential candidate. *Electoral College Fast Facts*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Electoral-College/Electoral-College/> [https://perma.cc/67NV-QHLT] (last visited June 22, 2020). Electors from twenty-six states and the District of Columbia are bound to cast their votes as pledged, sometimes by oath or on threat of a fine. *Id.* A “faithless” elector is one who breaks the pledge and votes for another candidate. *Id.*

18. *See generally* Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (holding that states may constitutionally enforce presidential electors’ pledges to support a specific candidate); *Colo. Dep’t of State v. Baca*, No. 19-518 (U.S. July 6, 2020) (per curiam) (reversing the Tenth Circuit’s holding for the reasons stated in *Chiafalo*).

19. *See Election of the President: Hearings on S.J. Res. 4 et al., 89th Congress and S.J. Res. 2 et al., 90th Congress, Before the Subcomm. on Const. Amends. of the S. Comm. on the Judiciary*, 89th & 90th Cong. 16 (1966–1967) (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

20. *See id.* at 22 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

21. *Id.* (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

22. *Id.* at 22–23 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

23. *Id.* at 23 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Const. Amends.).

24. *See* 112 *CONG. REC.* 10,998–11,000 (1966) (statement of Sen. Birch Bayh).

25. *Id.* at 10,999.

26. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964) (holding that state legislative districts must be apportioned according to population); *Wesberry v. Sanders*, 376 U.S. 1

1964<sup>27</sup> had just passed, and the Voting Rights Act of 1965<sup>28</sup> had just passed.<sup>29</sup> American democracy was changing dramatically and the expectations of who was a part of our democracy were changing dramatically. He said, “Today, for the first time in our history, we have achieved the goal of universal suffrage regardless of race, religion, or station in life. Today we are witnessing a political development in our States where for the first time in decades, legislatures fully represent people.”<sup>30</sup>

Then he said all of these reforms that Congress had been considering—eliminating faithless electors and a few other tweaks to the Electoral College—did not go nearly far enough.<sup>31</sup> He said that the considered reforms “would be like shifting around the parts of a creaky and dangerous automobile engine, making it no less creaky and no less dangerous. What we may need is a new engine . . . because we are in a new age.”<sup>32</sup> That was his argument for abolishing the Electoral College and adopting a popular vote, which he said was “a logical, realistic, and proper continuation of this nation’s tradition and history—a tradition of continuous expansion of the franchise and equality in voting.”<sup>33</sup> It’s pretty hard to argue against that, but people have found ways.

I find this speech so powerful. He closes with a nod to James Madison,<sup>34</sup> which I think is prescient. At this point, Senator Bayh had only passed one constitutional amendment.<sup>35</sup> He didn’t realize he was about to join the father of our Constitution as the only other person to pass more than one amendment. He said, “[D]irect popular election brings with it many virtues and no vices; . . . . If there was doubt about it in the early years of the Republic, there can be no doubt today. Let us echo Madison. Let us put our trust in the people.”<sup>36</sup> By the way, James Madison was also a supporter of the national popular vote.<sup>37</sup>

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(1964) (holding that congressional districts must have roughly equal populations); *Gray v. Sanders*, 372 U.S. 368 (1963) (holding that Georgia’s county unit system, which gave rural counties more voting power in primary elections, violated the Equal Protection Clause of the Fourteenth Amendment).

27. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2, 28, and 42 U.S.C.).

28. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

29. 112 CONG. REC. 10,998–99 (statement of Sen. Birch Bayh).

30. *Id.* at 10,998.

31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.* at 10,999.

35. *See supra* note 16 and accompanying text.

36. 112 CONG. REC. 10,999.

37. At the Constitutional Convention of 1787, Madison expressed his view that letting “the people at large” choose the president was the “fittest” option. *See* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 337 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836).

Senator Bayh acknowledged later that President Johnson was not at all happy with his revelation and his conversion to being a supporter of the popular vote, but the senator pushed it for the next several years.<sup>38</sup>

And here is the other part of the story that really is astonishing to me. I've been amazed at how few people remember this; it has sort of gone down the American memory hole. Birch Bayh got us within five votes in the Senate of a full floor vote moving this amendment to the states for ratification.<sup>39</sup> In September of 1969, almost exactly fifty years ago this week, the U.S. House of Representatives overwhelmingly passed an amendment to abolish the Electoral College; I think the vote was 338 to 70, easily clearing the two-thirds requirement.<sup>40</sup> It went to the Senate and it looked like they might have the votes in the Senate, but then it was bottled up. And who bottled it up? Well, it was largely three senators from the South: Strom Thurmond, James Eastland, and Sam Ervin.<sup>41</sup> I'll leave for another conversation the reasons why they did that, but they basically bottled it up in committee and then filibustered it until it died.<sup>42</sup>

Senator Bayh brought the amendment back every single session for the next ten years: in 1971, 1973, 1975, 1977, and 1979.<sup>43</sup> He never stopped pushing for it, but he never again got as close as he did in September of 1969.<sup>44</sup> I just think it's a remarkable thing, and we should remember how close this country was to actually moving to a popular vote for president, thanks to Senator Bayh.

The last point I'll make relates to the National Popular Vote Interstate Compact, which is the state-based effort that Professors Akhil Reed Amar and Vikram David Amar first proposed back in 2001<sup>45</sup> and that has been taken up in various forms over the years. It is now being run by a group called National Popular Vote. When that group came to Washington, D.C., in 2005 to test the waters and see whether there was going to be any interest

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38. See ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 214 (2020).

39. See Warren Weaver Jr., *Senate Unit Asks Popular Election of the President*, N.Y. TIMES (Apr. 24, 1970), <https://www.nytimes.com/1970/04/24/archives/senate-unit-asks-popular-election-of-the-president-amendment-to.html?searchResultPosition=5> [https://perma.cc/WC67-TFAT].

40. 115 CONG. REC. 26,007 (1969).

41. See WEGMAN, *supra* note 14, at 155–56.

42. See Warren Weaver Jr., *Senate Shelves Direct Election Even with Compromise by Bayh*, N.Y. TIMES (Oct. 6, 1970), <https://www.nytimes.com/1970/10/06/archives/senate-shelves-direct-election-even-with-compromise-by-bayh.html?searchResultPosition=1> [https://perma.cc/5PYR-55GE].

43. *The Art of Leadership: A Companion to an Exhibition from the Senatorial Papers of Birch Bayh*, IND. UNIV. BLOOMINGTON, <https://libraries.indiana.edu/birch-bayh-biography> [https://perma.cc/4E96-6UZA] (last visited June 22, 2020).

44. See *id.*

45. Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW (Dec. 28, 2001), <https://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html> [https://perma.cc/V8FL-9ZVD].

for the popular vote compact, the very first person they met with on the very first day was Senator Bayh.