

The Election of an Australian President*

Professor George Winterton and Professor David Flint

Mr Harry Evans (Chairman) — Good afternoon everyone. This place for a Senate lecture is occupied today not by a lecture but by a debate, and the debate is going to be about a question which I think may be significant in the future, that is, if Australia is to have a republican head of state, whether that office-holder should be popularly elected or appointed in some way. And to debate this question we have two distinguished academics, Professor George Winterton and Professor David Flint. The publicity we put out about the lecture has given you some details of these two distinguished gentlemen, and they require little introduction.

I will just say a word about the format of the debate. I'm going to invite each of the speakers to speak for twenty minutes. Professor Winterton is going to speak first and he is going to speak against the concept of a directly elected head of state; then Professor Flint will speak for the same time and he will speak in favour of an elected head of state. I will then invite questions, and I am hoping to devote about ten minutes to people asking questions. Questions can be directed to either or both speakers, but I would like to get a spread of questions so that they can each respond. Questions must be questions and must be brief and concise. Each of the speakers will respond, in the same order in which they spoke, for approximately ten minutes, and in the course of their responses they will, I hope, deal with the questions that they have been asked and also respond to points raised during debate. And if my arithmetic is correct that should bring us to about 1.30 and I will then do a very brief summing up. I will call first on Professor George Winterton.

* The following is a transcript of a debate held in the Department of the Senate Occasional Lecture Series on 19 July 1996. Professor Flint is Dean of Law, University of Technology, Sydney; Professor Winterton is Professor of Law, University of New South Wales.

Professor Winterton — Thank you very much. This debate seemed more relevant at the time it was organised. At the moment I think it looks like a debate organised by the Visigoths to discuss whether or not the Senate of Rome should be elected. But in case you think that was a biased comment I didn't say the Vandals; I only said the Goths. Well, the method of choosing the head of state obviously cannot be considered in isolation from related questions such as the powers of the head of state and the method of removal. For example, if one were concerned about the popular mandate direct election would confer, that would obviously vary with the powers given and the method of removal. So, for instance, a popularly elected president removable at the whim of the prime minister would obviously have far less power than a president elected and removable in converse way, that is to say chosen by the prime minister but removable only by popular referendum.

Nevertheless, we are focussing today solely on the issue of how the head of state should be chosen, so I should perhaps begin by mentioning a few of the assumptions that I will be making. I think we should assume that the head of state will have essentially the same powers as the governor-general, and that the head of state will be removable only either for cause, as federal judges are now, or perhaps without cause by a parliamentary super-majority, say two thirds.

Now the logical place to begin this topic is to see what is the nature of the office, and just very briefly (this is well known to everyone), I think one can say that the Governor-General, the de facto head of state, has two main functions. First, ceremonial and personal; to act as a focus of national unity, to embody the Australian nation and the Australian people, to represent the Australian people to themselves, as Sir Ninian Stephen put it very well. And then there is the other less used but important function, the constitutional role as ultimate constitutional guardian, exercised principally through the Federal Executive Council to ensure regularity in government, but also of course the ultimate power, fortunately rarely exercised, but there is always the threat of exercise of the reserve powers to remove the prime minister and to refuse to dissolve Parliament.

It is clear that with these functions the head of state has to be perceived as a politically impartial person, respected, with broad public support and some basis of legitimacy. This does suggest bipartisanship; that a method of appointment which involves a bipartisan process of choosing the head of state is the most suitable. At present, the head of state enjoys legitimacy by representing the Crown, and the Crown, whatever else one says, does have an established basis of legitimacy. Whatever replaces this has to derive authority from the ultimate source of authority in a republic, namely the people. But it does not follow that the person has to be directly elected by the people as I will note again later. The person must derive authority from the people, but that can be achieved by indirect selection by being elected, for example, by the representatives of the people, especially a two-thirds majority of Parliament, which after all comprises the representatives of the people. I do not think it could be said that a head of state chosen by a super majority of the people's representatives is chosen in a manner incompatible with the republican principle, although this is a point that, for example, Harry Evans, our Chairman, has argued.¹ It must especially be borne in mind that the government itself is not directly elected; it is true that the Members of Parliament are, but the government itself is not directly elected; it merely enjoys the support, the confidence,

¹ H. Evans, 'The Australian Head of State: putting republicanism into the republic', *Agenda*, Vol. 3, no. 2, 1996, pp. 143, 146, and reprinted in this issue.

of the lower house. So, a directly elected president would have a basis of legitimacy different from the government.

Popular election seems in short to have two basic defects. The first is the electoral process itself, and the sort of person likely to be elected, and secondly, the more important reason, the authority inherently flowing to a person who is directly elected. Popular election is favoured, as you know, by a very wide margin in public opinion polls. A recent public opinion poll in the *Australian* on the 22nd of June last year showed popular election favoured by 74 per cent whereas two-thirds election by Parliament received only 16 per cent.² The *Sunday Telegraph* a week or so earlier had published similar figures, 75 per cent to 23 per cent.³ In fact, this was a considerable fall in the percentage favouring popular election. Two *Bulletin* polls in 1994 had registered 91 per cent and 90 per cent.⁴ So public opinion overwhelmingly favours popular election. The reason appears to be to exclude politicians from the position of head of state, and to keep the choice of the head of state out of the hands of politicians. It's interesting to speculate why the public should feel this so strongly. I think there are probably two reasons. One, that the public want a say in the person who will be representing them as head of state, and also, I think, they're suspicious of deals between political parties; somewhat naively believing that a popularly elected president would not result from such a deal. But the reality is of course that popular election will almost inevitably lead to the election of a politician and the choice of candidates will very largely be in the hands of political parties. As Gough Whitlam has aptly remarked, '[T]here is no surer way of absolutely guaranteeing that the president of Australia will always be a party politician than by making the presidency directly elective.'⁵

Ironically the election of a politician will probably be avoided only by leaving the choice to Parliament, especially if bipartisanship is required by, for example, requiring a super majority, such as two-thirds. The *Canberra Times* stated the true position succinctly last year: 'In short, if the politicians elect the president, the result will be a non politician; if the people [elect] the president the result will be a politician.'⁶ That surely is absolutely accurate, absolutely right; but it does seem difficult to persuade the public generally that that's so.

Now it's true that measures could be adopted to try to ameliorate the effect of popular election, for example, by opening up the nomination process. In Portugal and Iceland, for instance, a certain number of electors can propose candidates, so that even though the political parties may be nominating candidates for the presidency, citizens, by getting together 2000 or 10,000 signatures, could also nominate a candidate. Another thing which might be introduced is public funding of election campaigns, with perhaps some limit on public spending. But I think the reality is that even with these measures, an individual, even one quite well off, would be unlikely to have the resources, or the national recognition, to achieve election in a nation-wide poll. It would seem, that political parties with the resources they have at their disposal and the fact that 40 per cent of the electorate almost automatically vote

² *Australian*, 22 June 1995, p. 2.

³ *Sunday Telegraph* (Sydney), 11 June 1995, p. 1.

⁴ *Bulletin*, 15 February 1994, p. 18; *Bulletin*, 8 November 1994, p. 32.

⁵ G. Whitlam, 'The seed from which a republic sprang', *Canberra Times*, 12 November 1994, p. 12.

⁶ 'The power of our first president' (Editorial), *Canberra Times*, 18 May 1995, p. 12.

for whomever they nominate, are the only groups really capable of securing a candidate's election. Another consideration is that many of the people one might consider most suitable for election as head of state would not submit themselves for popular election. Sir Zelman Cowen has commented on that, saying that someone like himself or Sir Ninian Stephen, and I would think Sir William Deane, would be unlikely to allow themselves to be nominated for national election because they would find the divisiveness of the process unseemly. One must also bear in mind that even if the person elected were not connected with a political party, elections are by their very nature inherently divisive. Obviously there is likely to be more than one candidate. People who did not vote for the successful candidate might very well dislike the person elected, and the election process itself inevitably creates division and dissension.

Sir Robert Menzies remarked that 'the notion of a non-political president periodically elected by popular vote, after an election campaign, is a contradiction in terms'.⁷ This is particularly so in the light of the role of the head of state, that is to say a unifying force, somebody representing the entire nation, not just one side of politics. Even a non-politician who had faced an election campaign, which would inherently be divisive, could find transcending that division and acting as a focus of national unity a difficult task.

Now it has to be admitted, in all fairness, that some countries with popularly-elected largely ceremonial presidents, especially Ireland and Austria and probably Iceland, although I'm not that familiar with the latter, do seem to have achieved reasonable success, although I think it is also true that most Irish and Austrian commentators believe that the Irish and the Austrian presidencies have not generally been resoundingly successful. It is true that the present President of Ireland, Mary Robinson, is a great success, but this is generally conceded to be rather exceptional.

The second objection to popular election, and the more important one I think, is the authority that inherently flows to someone elected through popular election. A popularly-elected president would be the only nationally elected public officer in the entire Commonwealth, who could therefore justifiably claim a greater popular mandate of some sort than the government, which after all may not even command a majority in the lower house. True, the government has to retain the confidence of the lower house but this can be negative confidence in the sense that the House does not vote against them. I think one can say that a popularly-elected head of state is likely to have two consequences on the present balance of power between the head of state and the government: greater willingness to exercise the reserve powers, and greater participation in public affairs such as speech-making. The risk of the latter is demonstrated by the presidential career of President Mary Robinson of Ireland. It's true that she is widely respected throughout the world, but her relations with the Irish Government have not been easy. She has done things that they have objected to. They do see her as a somewhat unruly figure making policy-making more difficult, but she gave fair warning of this in a very telling remark during her election campaign, which highlights the power flowing from public election. She said:

As president, directly elected by the people of Ireland, I will have the most democratic job in the country. I'll be able to look [the Prime Minister] in the eye and tell him to

⁷ Sir Robert Menzies, *Afternoon Light*, Cassell, Melbourne, 1967, p. 236.

back off if necessary because I have been directly elected by the people as a whole and he hasn't.⁸

Now some people, and Harry Evans again is one of these, argue that there is benefit in having a popularly-elected president with this sort of authority, to check and balance the government.⁹ David Flint, also, in an interesting letter to the *Economist* in March, has said that a popularly-elected president would act as a check and balance on the government.¹⁰ But there are two main difficulties with this notion of checking and balancing. The first, and perhaps minor one, is that it causes dissension and confusion in the government, especially in the minds of the public who will see the government speaking with two voices, as has happened in Ireland and in other countries, such as Italy, even without popularly-elected presidents, the government saying one thing, the president another. Now people might respond, well what harm is there in having someone put an alternative point of view; what harm is there in mere speechmaking? But I think one has to bear in mind that this is public conduct; we're not talking here about private comments, for example within the Cabinet or the party; as to which in general the more views heard within government, the better. Public speech-making, as in Ireland, can create confusion, and Malcolm Fraser has rightly said this can be destabilising.¹¹ The principal concern, however, regarding checking and balancing is that advocates treat checks and balances as inherently desirable, and overlook the critical question, which is, who is checking whom and to what end? Now desirable checks and balances, such as judicial review of administration and legislation, responsible government, that is to say governmental accountability to Parliament, and bi-cameralism, are desirable because they ensure governmental lawfulness and promote democratic accountability. But if, for example, the president of a political party were given a veto over legislation or governmental action, or this veto power were given to the heads of certain corporations, no-one would regard this as a particularly desirable check and balance; so there is no inherent virtue in checks and balances. It depends on who is checking whom and why.

The president, it must be borne in mind, would be a single individual, popularly elected it's true, but not accountable to anyone. In fact if the president only has one term of office, he or she is not even going to be accountable to the people at the next election. The president would have limited resources of information, and such a person would be checking a government which is already subject to numerous checks and balances. I know we all think governments need more checks and balances, but governments are already subject to quite a few checks and balances. There is of course Parliament, especially the Senate, there are the political parties, the courts, the public service, the media and, of course, ultimately, the electors. Now Harry Evans has argued that popular election is necessary to place a republican head of state in the same position as the governor-general.¹² The president, he argues, must have, 'a

⁸ Quoted in M. Mee, 'The changing nature of the presidency' (Part 1) [1996], *Irish Law Times* 2, 3.

⁹ H. Evans, 'Electing a president: the elite versus the public', in *Republicanism, Responsible Government and Human Rights* (Papers on Parliament No. 26, August 1995) pp. 37–38; H. Evans, *Essays on Republicanism: small r republicanism* (Papers on Parliament No. 24, September 1994), p. 16.

¹⁰ D. Flint, Letter, *Economist* (London), 16 March 1996, p. 6.

¹¹ M. Fraser, 'We must bounce Keating's republic blank cheque', *Australian*, 20 July 1994, p. 11.

¹² H. Evans, 'The Australian Head of State', op. cit., pp. 146–148; H. Evans, 'Electing a President', op. cit., p. 36.

separate line of political credit'.¹³ But a head of state chosen by political parties, he argues, will be beholden to them and will lack independence:

If the current powers of the governor-general are to be retained, this would strongly suggest that a president must be elected. ... [A]n elected president, with an independent mandate, would most closely approximate the existing constitutional arrangement.¹⁴

However, with all respect, this overlooks the fact that a popularly-elected president may well be beholden to the political parties if he or she needs their support for re-election, while a president elected by, say, a two-thirds majority of Parliament, would need bipartisan support for re-election, and therefore would not be beholden to any one party. You might say, well, somebody beholden to two parties is worse than somebody beholden to one, but I would question that. The reality is that popular election would confer an authority which no governor-general as presently appointed, (that is to say by the Queen on the advice of the prime minister) could possibly match. A popularly-elected presidency would inevitably change the president-prime minister relationship. With all respect to Harry, to suggest that this would be the way to retain the current balance of power is simply incorrect.

The present Prime Minister, John Howard, has noted that a popularly-elected president 'would alter for all time the nature of our system of government'. He said that it 'would entrench rival centres of political power. ... [A]n Australian president, having a popular mandate, would feel infinitely more powerful in dealing with an incumbent prime minister than would any governor-general, irrespective of the formal powers that might be given to that president'.¹⁵ This is certainly borne out by the French experience in 1962 when the president became popularly elected, and without one extra power being given to the president, overnight the presidency was transformed.

Harry Evans has argued that the great problem with our current system of government is excessive prime ministerial power and he may well be right. The excessive concentration of power in the hands of the prime minister and the prime minister's control of the lower house are indeed serious problems. But it surely does not follow that excessive prime ministerial power is to be matched by excessive presidential power. Two wrongs in this respect surely don't make a right. Both David Flint and Harry Evans have suggested that popular election is the only truly republican method of choosing a head of state. This would suggest that countries like Germany, India, Israel and Italy, which do not have popularly-elected presidents, are not really republics. But, as I noted earlier, there is nothing unrepublican in having a head of state chosen **indirectly** by the people by being elected by the people's representatives in Parliament, by a super-majority as would most likely be the case, especially if this requires bi-partisanship, because surely such an officer would really embody the characteristics of the office that I mentioned at the outset: political impartiality and an ability truly to represent the entire nation. Thank you.

¹³ H. Evans, 'Electing a president', op. cit., p. 36.

¹⁴ *ibid.*

¹⁵ J. Howard, 'Mr Keating's mirage on the hill: how the republic, like the Cheshire Cat, came and went', in *Upholding the Australian Constitution, Vol. 3: Proceedings of the Third Conference of the Samuel Griffith Society* (Melbourne, 1994), pp. 130–131.

Chairman — I will now call upon Professor David Flint to put the contrary case.

Professor Flint — Thank you Mr Chairman. The advent of an Australian republic would offer Australia two stark choices. On the one hand we could keep our existing checks and balances bequeathed to us by our founders and enshrined in the constitution. We could do this by allowing the people to choose their own president. On the other hand, we could emasculate one of our central checks and balances by attempting to make the head of state the creature of the legislature.

It's becoming clearer every day, Mr Chairman, in this republican debate, that the real debate is not between republicans and monarchists, it is between those, whether they be monarchists or republican, who wish to preserve the existing checks and balances, and those who would hand over more power to, as Professor Patrick O'Brien says, a privileged élite.

The official minimalist republican proposal is for a pseudo-election; one which needs prior agreement between government and opposition. Now Bernard Levin, writing in the *Times*, once warned, that any political proposal which commends itself to both front benches is at best useless and at worst against the public interest. One which appeals to both parties is likely to be a constitutional outrage, and certainly to be seriously damaging to the people's liberty and prosperity.

It was one of the great founding fathers of the American constitution, Alexander Hamilton, who insisted that Congress play no part, no part at all, in the election of the president. Politicians, he argued, would inevitably use their power with a sinister bias. By that he meant that their purposes, their intentions, would be other than the selection of an independent head of state. The election would be clouded by their inevitable need to make deals and to enter into trade-offs. As Shane Stone recently observed about the proposed conscience vote on the Euthanasia Bill in this Federal Parliament, what you will see is the linking up of groups in factions. Deals will be done and there will be trade-offs with people in the Senate in exchange for other bills; 'I know how the system works', he said. These deals of course, Mr Chairman, will be kept from the people. Shades, I suppose, of the Kirribilli House agreement.¹⁶ I remind you, if we need reminding, that that was an agreement to hand over the prime ministership of this Commonwealth in anticipation of an election. It was shrouded in mystery; it was kept from the people and we only learnt about it when the principles fell out, when it was leaked. The founders of the American Republic, wise men that they were, understood politics, and they understood politicians. They knew about deals and trade-offs. They knew how unsavoury such a process would be; they understood the more sinister implication that the politicians would inevitably wish to make the president indebted to them, and accountable to them, and therefore not to the people. Hamilton demonstrates this most clearly when the president comes up for re-election. The only way a president can be fearless during his or her term in dealing with Congress or Parliament is by knowing that the people, and not the politicians, will decide whether to re-elect him.

Mr Chairman, may I make three preliminary observations. First, I assume that the Westminster system will continue. Now there are obvious weaknesses with combining the head of state with the head of government as in the United States. There is no way, for

¹⁶ At a meeting at Kirribilli House, Sydney, in November 1988 an agreement was reached between the then Prime Minister, Bob Hawke, and his Treasurer, Paul Keating, that Keating would support Hawke's leadership until the 1990 election, after which Hawke would relinquish the leadership to Keating.

example, of resolving a supply crisis. As an American woman in Canberra last year during the American supply crisis was reported to have said when she couldn't get services from the Consul-General's office here in Canberra, 'What we need is a governor-general'. And the president is extremely difficult to remove. Nixon is the notorious example. Another incident just after the Bay of Pigs fiasco with Kennedy is not so well known. The president explained to Richard Bissell, the CIA's Deputy Director of Plans: 'If this were the British government, I would resign and you, being a senior civil servant, would remain. But it isn't. In our government, you and Allen [Dulles, the Director] have to go, and I have to remain.'¹⁷

My second observation is that the process proposed by the minimalists cannot hope to emulate the process of appointing the governor-general. Now if there is one person who ought to know something about the way in which Parliament operates, it's Bill Hayden, and he pours cold water onto the suggestion that the parliamentary appointment of a president is going to be the gentlemanly or ladylike process beloved of the minimalists. They, he says, 'need to be reminded of the adversarial structure of our political system. The hectoring style of so many Senate committee hearings is illustrative of the sort of grinding and very personal inquisition to which a nominee could be subjected. The processes here ... would make the Supreme Court confirmation hearings of the USA Senate ... look like a suburban manse morning tea party. The prospect of such an experience ... would discourage all but the most stout-hearted.'¹⁸

And this brings me to my third point, and that is that a president will be intrinsically different from a Governor-General even if restricted to the reserve powers. A Governor-General has no tenure; he doesn't follow convention, he risks removal. A president has tenure. As Mr Hayden predicts there will be more frequent clashes with the executive. And he says that a non-executive president, whether elected by Parliament or by the people, could become a first-class nuisance.

Now the French know more about these matters than most people. In our two centuries of tranquil development, France has had four monarchies, five republics, two empires, the Vichy Regime and four revolutionary regimes within the First Republic. Under the Third Republic, the parliamentary-elected president was to follow the British model. He or she was to reign but not to rule. The first three all attempted to rule—Thiers, Mac-Mahon and Grévy. Mac-Mahon, in fact, dismissed a government. Félix Faure (to demonstrate that I'm not choosing just some presidents from the Third Republic) towards the end of the 19th Century regarded foreign affairs as his and played a significant role in cementing the Franco-Russian alliance. He refused, on his own initiative, to reopen the Dreyfus case. And if presidents can unify a country, as is so often suggested in the republican debate, Félix Faure certainly unified his country, but more in his passing than anything he did in his life. This occurred in the course of what the French described as 'rendezvous gallant' with Madame Stenhile, whose cries caused staff to burst in to release her hair from the deceased president's hands. He's celebrated everywhere in France by countless avenues and rues. When the National Assembly elected Paul Deschanel in 1920, Clemenceau, who stood against him, said that they had elected a madman. Unfortunately, he was right and Parliament was wrong. When the president gave a speech, which was well received in Nice by cries of encore, he gave it again in full. On his way to Montbrison he fell out of the presidential train. He was found

¹⁷ Quoted in P. Wyden, *Bay of Pigs: the Untold Story*, Jonathan Cape, London, 1979, p. 311.

¹⁸ Bill Hayden, *Hayden: an Autobiography*, Angus & Robertson, Sydney, 1996, p. 554.

wandering along the track in his pyjamas. The music halls resounded with a new song 'Le Pyjama présidentiel'. He was succeeded in 1920 by Millerand, who shocked even the French by his blatant intervention in government. He forced the foreign minister, Aristide Briand, to resign. Mr Chairman I can't imagine why a president would want to make a foreign minister resign. The last president, to his great credit, refused to resign in 1940, to allow Pétain to be appointed dictator, which obviously was to be another deal and another trade-off. Pétain was appointed anyway and Lebrun resigned, but nobody noticed. The new Vichy regime was more eager than even the Nazis expected in deporting Jews. Charles de Gaulle was condemned to death *in absentia*, and who put this appalling leader in power? Not the French people. It was the French Parliament who chose Pétain.

What does all this mean? It means that the minimalist republic will unleash the constraints which our founding fathers put on the office of governor-general. And it will be no use at all trying to predict in advance what a president will do. When President Eisenhower was asked, 'Mr President, what was the greatest mistake of your presidency?', he thought for a moment and replied, 'They're both sitting on the Supreme Court'. All the resources of the US presidency couldn't predict how judges would behave once appointed. Why? Because judges are appointed with tenure. Our president won't have life tenure, but he or she will have five years and considerably more power than a Supreme Court judge in the United States. It's reassuring, Mr Chairman, that all opinion polls indicate that the people recognise all this; they recognise that a president is inherently and fundamentally different from a governor-general. They recognise that the powers of the office will be enhanced because of the tenure granted, and the absence of the conventions which surround the Crown. They are suspicious, and they are suspicious because they do not wish to place this high office as a gift between politicians. That is why, when surveyed, every age group, from every State, the supporters of all the parties, overwhelmingly say that if Australia were to become a republic, they, the people, and not the politicians, should choose the head of state.

Mr Chairman, it will of course be said that what has happened in France is of no concern to us. That warnings by the American founding fathers are not relevant. That the Kirribilli House agreement was an aberration. That politicians will not make deals and trade-offs; that the parliamentary election will be without any sinister bias. Let me remind you, if you need to be reminded, that we have just experienced an attempt to emasculate the head of state. I refer of course to the failed attempt in New South Wales to remove the ceremonial role of the Governor and to expel him from Government House. However unpleasant this may be some might place this failed attempt only on a par with a more recent attempt to transport the Sisters of Charity from St Vincent's to St George. But it's more important than that because of the role of the governor. The governor is a check and balance on a state government. To do this properly, the government must be housed independently, and not in a grace and favour office lent by the Premier. The governor needs staff: the governor needs space. The governor needs to maintain his or her links with the people, that is why the ceremonial role, far from being divorced from the constitutional role is symbolic of, and sustains the link between, the office and real source of its authority, the people. This sad story demonstrates that we must ensure that the president is neither in the pocket nor under the thumb of the Prime Minister nor of the politicians.

It is of course worth recalling that a former government of New South Wales expelled the then Governor-General from Government House in 1912 and turned the stables into a conservatorium. There was a sinister aspect to the affair in 1912. This was the other plan of

the government of New South Wales, that is to actually abolish the office of governor. Then with a nominated Legislative Council, which the government also planned to abolish, and a Legislative Assembly under its control, and no separation of powers in New South Wales, the government would have enjoyed unlimited powers. Unlimited powers, subject to the federal constitution, was the model of Cromwell's Protectorate. In any event the project proved too daunting a task. There was one other example of a governor being moved against by a premier. This was in Canada. In the 30s a radio-evangelist Bible Bill Ableheart became Premier of Alberta. He hated the press. His social credit legislation included *An Act to Ensure the Publication of Accurate News and Information*. Well you know what that meant! It meant that the press was to report government press releases and comments. It meant they couldn't report deals and trade-offs or leaked material. Fortunately, he failed in this attempt. The Lieutenant-Governor refused to sign the bill and reserved it for the Governor-General. But if Mr Ableheart couldn't control the press and couldn't control the Viceroy, he could at least have his revenge. He refused parking rights to the Governor, and then he stopped all funding of Government House. In the cold Alberta winter the Governor had to eventually move to the warmth of a hotel. Mr Ableheart might well have said in his sweet moment of revenge: 'This one's for the press.' Just as we heard recently in New South Wales: 'This one's for Jack Lang.'

These cases demonstrate, Mr Chairman, the dangers of leaving the selection of the president to an unworthy back-door deal between politicians. Mr Chairman, if there is going to be a deal, let it be a deal with the Australian people. If there is going to be a trade-off, let it be a trade-off with the Australian people. And if there is going to be an election, let it not be a pseudo-election determined in a deal behind closed doors. Let it be an election without any sinister bias; an election by the people. Thank you.

Chairman — I will now call on questions and I would ask questioners to go to the microphones to ask their questions.

Questioner — I would like to ask Professor Flint a question. How would he propose to filter suitable candidates for election as president of Australia. I have in mind that every vested interest will have a go at it, everything from Right to Life to the National Rifle Association, who can rustle up numbers and money. We could have a Melbourne Cup field. Is that what you envisage or will it be some other mechanism?

Questioner — I would like to ask, firstly Professor Winterton: if we decided that the referendum was going to be between the current system and a directly-elected by the people president, which one he would support; and similarly I would like Professor Flint to comment whether, if it was a choice between the current system and a parliament two-thirds elected system, which one he would support?

Questioner — In the debate which took place in the Parliament in the latter part of last year, there was strong bipartisan support for an election of president by the Parliament and a sentiment directed largely to that candidate being non-political. I wonder if both speakers would like to comment on the possibilities of the major parties in the Parliament, in the event of a general election for president, still nominating a non-political candidate.

Questioner — In the election that has happened a few weeks or a month or so ago, the Prime Minister, as far as I understand, was directly elected. Any lessons in that for us?

Questioner — A question to Professor Flint. You talked about how gruelling the scrutiny by the Parliament might be. How would that be any more gruelling than a popular election?

Questioner — I would like to address this question to Professor Winterton. What's intrinsically objectionable about a politician being part of a third constituency of the Parliament, also fully elected?

Chairman —I will now invite our speakers to respond to each other and to the questions they have been asked. I will call on Professor Winterton first.

Professor Winterton — Thank you very much. Perhaps I can just very briefly respond to a few points that David Flint mentioned. First of all his discussion of France and so on. This is, with respect, quite typical of the monarchists. Sir Harry Gibbs is a past master of this ploy. I am surprised that David Flint restrained himself and spoke only of France. Was he forgetting Rwanda, Cambodia? Perhaps the Cambodian president wasn't elected by Parliament, but I am sure the Rwandan one was. All this is, with respect, irrelevant. And I think, David, the questions do demonstrate the fact that although you spent time demolishing, as you would have perhaps thought, the position of the so-called minimalists, you didn't really argue in favour of a popular-elected presidency. But really the position of the French presidency is absolutely irrelevant. One has to compare the proposed presidency with the comparable situation which is the present governor-generalship. Now if we look at the present Governor-General, that officer is essentially appointed by the prime minister. It's true that the appointment is formally made by the Queen. The choice of candidate, however, is in the hands of the prime minister; the Queen undoubtedly can query a suggestion but she couldn't actually, in effect, choose the nominee. The nomination is in the hands of the prime minister. And all commentators, I think, have rightly said that on the whole the candidates chosen have been very successful. It's true there have occasionally been a few hiccups and Sir John Kerr might be more of a belch than a hiccup, but on the whole they have been quite good. But prime ministers are conscious of a sense of history in choosing the candidates. They know they are going to be judged by history; they know they are going to be judged by the electorate. And if this is the position when the person is chosen by one person, the leader of the government, why should one imagine that when the Commonwealth Parliament, by say two-thirds majorities in both Houses, are choosing the person, they wouldn't be conscious of the electoral judgement and the voice of history judging them. I just cannot see why one has such faith in the choice by an individual leader of a government, with all the arrogance usually attending to that position, and has such lack of faith in politicians. I say politicians because people tend to think of politicians—one would think from some of the discussion about their roles that they were criminals. A lady asked do I have any objection to a politician being president. Certainly not. I don't see why one should. I think, and I said it at the time, that Prime Minister Keating's proposal to ban politicians from the presidency for five years was unwise. Politicians are simply our representatives, no better, no worse, in fact sometimes probably better, than many of us. So I find this great fear of politicians, as if they were some sort of criminal class, very strange. After all, they are elected by the people, we choose them and I think on the whole they are not too bad.

Now there is also great fear of deals, that there might be a deal between the prime minister and the opposition leader, for example, in choosing the president. Well, why not? I don't really see any problem. Let's assume that each person has somebody good in mind as a nominee and the prime minister were to say 'well we'll support your person this time if you

support our person next time'. If they are both good candidates, where is the objection? I think to suggest that there should be some sort of pristine arrangement without any deals is naive. And who would say that Bill Hayden didn't become governor-general as a result of a deal? It was a deal. Even if the leader of the Labor Party in 1983 had not been such a worthy person as Bill Hayden, we would probably still have had that person as the governor-general pursuant to the deal made when Bob Hawke became Opposition Leader.

Referring to some of the other questions, a question was asked: 'Is there any lesson in the recent popularly-elected prime minister?' Well of course John Howard wasn't popularly elected as Prime Minister, but the government was chosen indirectly by the people at the recent election. I think there are some lessons in that. One has only to remember that we had three Opposition leaders leading the Liberal Party in the last Parliament. We chose none of them. The Liberal Party and National Party chose them. That's likely to be the case with nominees of political parties if they fight elections. We will have no say. To say the people are directly choosing the president is misleading because the people will, as happens now with general elections, be choosing among candidates proposed by parties. And, as suggested by the other speaker, undoubtedly also interest groups. To think that one is not choosing a politician or not choosing somebody chosen by a politician, that one's choosing somebody one chooses oneself, is a very misleading concept.

Finally, I was asked whether I would prefer the present system or a popularly-elected presidency. Well, of course, assuming the assumptions that I have made, and that is to say that we retain the present system of government, and essentially provide similar powers for the head of state, provide for the continuation of conventions that presently govern the governor-general, perhaps clarify which powers are reserve powers and the others not, I certainly would prefer a popularly-elected president. Thank you.

Chairman — I will now call on Professor David Flint to make his response.

Professor Flint — Thank you Mr Chairman. I have been asked a number of questions. Before replying to those, I think I have to emphasise again that a president and a governor-general are very different institutions. They will necessarily be different. The fact that the prime minister recommends the governor-general doesn't mean that the governor-general is actually appointed by the prime minister. The fact that the appointment is by the Crown creates a completely different atmosphere for the governor-general, who then is bound by the conventions which surround the Crown, and is removable on the recommendation of the prime minister if he or she steps out of line. It is so different from having a person there who has the reserve powers plus the other nuisance powers that Bill Hayden sets out, and who will be there for four or five years or whatever the term is. And what I am saying is that if we become a republic, and we want to have this independent head of state, we can't replicate the present system, but the next closest thing is to have a popularly-elected president.

I have been asked about the selection, how would you cut down the excessive number of candidates? Well, there are ways of doing this, for example, by having a list of required nominators, certain names on a petition or something of that nature. It would be possible to screen out the number of candidates to a reasonable number, and you could have a preferential system of election or you could have what the French and Russians have, that is a second round. I have been asked my preference between the existing system and a popularly-elected president. Now if there were to be a plebiscite, not a referendum, but a plebiscite, on a republic, I would hope that it wouldn't give you the stark choice between a

republic or the existing system because that would be meaningless. It ought to give you a range of preferences and you ought to be allowed to exercise a right of preferential voting. And I would vote 1 for the present system, 2 for a popularly elected president, 3 for the pseudo-election and 4 for a prime minister-nominated president.

I have been asked about the Israeli system. I think the Israeli system seems to mix the presidential system with the Westminster system, and I think that has to do with particular features of the way in which the Knesset is elected and the need to have a coalition and the difficulty of forming a coalition so that it gives one prime ministerial candidate an impetus, at least in the beginning, over the other parliamentary leaders.

I have been asked, wouldn't a popular election be as gruelling, or perhaps even more gruelling, than a parliamentary election with all those Senate hearings that Bill Hayden says would make the American system seem like a suburban manse tea party. Well, obviously a popular election would be gruelling, but that's not what the minimalists are telling us. They are telling us that the parliamentary election, the two-thirds requirement, will ensure that the process is identical to the present system. Bill Hayden warns, and I think he's pretty right on this, that it will be very different and only stout-hearted candidates need apply. So those High Court judges who don't want to be interrogated, those leading academics who don't want to be interrogated about their past, about irrelevant matters in their youth as you find in the United States would have to reply, 'I did have a marijuana cigarette but I didn't inhale'. The position will be a powerful position and there will be factions, and there will be minor parties who won't want a particular candidate and of course they are going to look into reasons why one ought not elect that particular candidate.

Mr Chairman, I am at a loss to understand why the minimalists are so afraid of having a popular election. Is it that the Australians will do the wrong thing in such a popular election? It reminds me of some of the arguments which were put in the House of Commons in the British Parliament against the Reform Bill and then against universal suffrage. One Lord Warncliffe argued, 'It's useful to have elections by persons who, from their station in society, are acquainted with the characters of the men of talents today'. I am wondering whether that's the attitude of the minimalists.

Well Mr Chairman, we are told that certain things will happen in the minimalist election. And the predictions are not necessarily going to happen. We have Bill Hayden telling us that it's going to go down a completely different path. Beware of experts telling you what will happen if a certain course is adopted. In 1935 the nation was confronted with a problem. Our sugar cane crop was being destroyed by the grayback beetle. It was a real problem and they sought expert advice. The advice of the experts was to import a sack load of *bufo marinus* from Hawaii who would eat the grayback beetle. The government followed the advice of the experts. The experts however forgot one thing. The beetles fly and *bufo marinus* cannot. *Bufo* however loved the Queensland climate, bred rapidly, spread everywhere and ate everything, everything that is except the grayback beetle. And that was the beginning of the Queensland cane toad disaster. Perhaps the minimalists are prescribing for us something like the Queensland cane toad disaster.

The minimalists have not identified, and they cannot identify, a real problem. There is no problem. If we want change let us not get the change wrong, and everything is wrong with the minimalist solution, everything. It is wrong in the mode of election, it is wrong in the sort of person who will be appointed, the stout-hearted person that Bill Hayden says will only apply,

and it's wrong in arguing that the governor-generalship will effectively continue. It cannot. But the minimalists wish to keep the people out of the election. The president will be the result of backroom deals and there will be trade-offs. There will be an election, as Hamilton warned, with a sinister bias. If there is going to be a deal, let it be a deal in which we are the parties, let the election be one by the Australian people. Thank you.

Chairman — Well, by the brevity of our speakers and the shrinking-violet nature of our questioners, I have been left an enormous amount of time to sum up and the temptations are dreadful. I think you may have detected in the debate a slight blurring of lines here, in that we did not have two vigorous partisans for the two different views. But I suggest to you that it is a question on which vigorous partisanship is not really appropriate, and I think it is entirely appropriate that we had two very thoughtful people giving us a very comprehensive coverage of the issues which are involved in this question. I think we may have imported a closet monarchist without knowing it. That too might be regarded as giving us a fair coverage of all the issues, because if we are to have a range of options put, which is the policy of the current government, presumably that will be one of the options put.

So I have been very grateful to have two thoughtful people to cover the issues in such a good fashion, and I hope that you will join me in expressing your appreciation of a very interesting session.