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REFORMING THE ELECTED PRESIDENCY

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ROUTLEDGE

3 Mandates, majorities and the legitimacy of the Elected President

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3.1 Introduction

In 1991, Singapore's Constitution was amended to transform the office of President – hitherto a ceremonial office – into an elected one. While the President had previously been 'elected' by Parliament, there were no real electoral contests since Parliament was only ever offered a single candidate at each 'election'. The purpose of requiring the President to be elected by universal franchise was to invest the elected candidate with legitimacy to check on the Government of the day. The President's legitimacy would thus flow from the fact of his or her election, coupled with the majority received. Legitimacy would thus pivot on two factors – choice and mandate. In this chapter, I consider the evolution of Singapore's presidential office and argue that developments have left the electorate with little or no choice, the candidate with no mandate and the President with no electoral legitimacy.

3.2 Neutralizing a 'freak election'

The creation of the Elected Presidency must be seen as one in a series of moves by Singapore's ruling party – the People's Action Party ("PAP") – to ameliorate the consequences of their worst nightmare – a 'freak election result'. In such an instance, 'irrational' voters might cause a seismic shift in voting patterns to bring into office an irresponsible and profligate government. The Westminster parliamentary system of government, with its fusion of executive and legislative powers, would provide no check on such a government if it had a parliamentary majority. It was thus necessary to create a countervailing force to put the brakes on the excesses of such a government.

Since it won all the seats in the 1968 general election, the PAP has dominated Parliament with near-hegemonic omnipresence. Indeed, from 1968 to 1981, there was not a single opposition Member of Parliament (MP) in the House. This will account for the shock the PAP received when it lost the by-election in Anson constituency in 1981 when the Workers' Party's Secretary-General J.B. Jeyaretnam defeated its candidate Pang Kim Hin. The Anson by-election result represented the largest percentage vote-swing away from the PAP since 1968 – 37 per cent. Three years later, at the general election of 1984, 12.9 per cent of

the electorate who previously voted for the PAP, voted for the opposition. It was the largest voter swing since 1972. Table 3.1 shows the percentage of popular votes secured by the PAP over the years, and shows why the 12.9 per cent voter swing in 1984 so alarmed the PAP leadership.

In his 80-minute analysis of the 1984 general election results, former Prime Minister Lee Kuan Yew acknowledged the voters' demands for a more accommodating style and for greater consultation but openly questioned the adequacy and desirability of the one-man, one-vote, first past the post system of government. His key point was that had there been a further 14 per cent shift in the voting pattern, the combined opposition would have captured 40 seats against the PAP's 39.[1] The PAP was sufficiently worried about the election outcome and so established a nine-man task force, headed by Party Chairman Ong Teng Cheong to analyse the results.[2] The 1984 general election presented the PAP with another terrifying spectre – that of a 'freak election result'. In announcing the new Cabinet's new tasks, First Deputy Prime Minister, Goh Chok Tong said:

> This general election has proven to be a little scary in that many of us had misjudged the mood of the population. There was nearly a swing which might result in something all of us did not want – freak election results.[3]

Quite clearly, the Non-Constituency Member of Parliament ("NCMP") scheme that was introduced just before the 1984 general election failed to stem the rising demands for greater oppositional voices in Parliament. The NCMP scheme – unique to Singapore – provided that at least three NCMP seats would be offered to the losing candidates (of parties which did not form the Government) who secured the highest number of votes. In other words, three of the best losers would be offered NCMP seats with all rights and privileges of elected MPs save

Table 3.1 The People's Action Party's popular vote share: 1968–2015.

Year	*Popular vote (%)*	*Percentage swing (%)*
1968	86.7	—
1972	70.4	–16.3
1976	74.1	+3.7
1980	77.7	+3.6
1981 (Anson by-election)	47.1	–37.00
1984	64.8	–12.9
1988	63.2	+1.6
1991	61.0	–2.2
1997	65.0	+4.0
2001	75.3	+10.3
2006	66.6	–8.7
2011	60.1	–6.5
2015	69.9	+9.8

that they were unable to vote on constitutional amendments, Supply Bills and motions of 'no confidence' in the Government of the day.

3.3 Enter the Elected Presidency

At about the same time Lee mooted the NCMP Scheme, he also floated the idea of changing the ceremonial office of President to an elected one.[4] Unsurprisingly, Lee's proposal was in direct response to the looming prospect of a 'freak election result'. If the PAP had been ousted from power in a freak election, there would be nothing to prevent a populist and profligate government from raiding Singapore's foreign reserves, squandering the people's hard-earned resources and filling the top echelons of the civil service with relatives, friends, bootlickers and hangers-on. It was thus necessary to create an institution that could check such a government, even if it was the PAP itself. Lee's proposal was to turn the Presidency into an elected office and increase the President's constitutional powers to act as a 'second key'. Lee put it thus:

> Today, any government elected can get at those reserves and spend it. So you can get a wild offshoot of an election – free bus rides, lower electricity, free water, lower MRT fares, and your reserves will just vanish like that within a few years. Then like Brazil, Argentina and Mexico, we'll be borrowing hundreds of millions of dollars. And we're finished. This place will never get off the ground again.
>
> So perhaps – we've been thinking this one over very carefully – we cannot be sure that even an honest government like the PAP without that will and the resolve will resist pressures, may (not) be tempted to give in to pressure and subsidise. Then you use the reserves surreptitiously. So we said perhaps we should have a blocking mechanism. No reserves should be spent without the President and a special committee to approve it.[5]

However, four years were to elapse before the first White Paper on the Elected President was published.[6]

3.3.1 Qualifying the Elected President

The First White Paper set out in general terms, the rationale for the scheme and more significantly, the "fundamental considerations" in the decision to transform the office of the President into an elected one. We focus on two of these avowed considerations – the need for elections to give the President "moral authority" and the requirement that the President hold ministerial or high executive or administrative experience. First, in relation to elections and moral authority, the First White Paper stated:

> Any disagreement with the elected Government on its proposals to spend reserves and assets will inevitably become a highly controversial and

> politicised issue. Therefore, the official or agency entrusted with the task of exercising such checks must have, and be seen to have, the legitimacy and moral authority to block the Government. *Such authority can only be derived from the will of the people as expressed in an election*. Otherwise, the Prime Minister would insist that his Government's intention must prevail, as it was elected by the people. Officials who have not been directly elected, or non-elected bodies like the Presidential Council for Minority Rights ("PCMR") or the Supreme Court, would be placed in a highly invidious position if they tried to block an elected Government.[7] (Emphasis mine).

And second, in relation to the qualifications of the presidential candidate, the First White Paper stated:

> Whoever is entrusted with the safeguard role must be capable, experienced in public affairs, and have an astute overview of the national interest. He must have the wisdom to judge the Government's actions in the two areas, and the courage and decisiveness to disagree with the Government when national interest so requires. Such a person must himself have exercised authority, preferably in the public sector and have experienced the contrary pulls and pressures of government decision making. He must be able to balance the demands of political expediency and the public interest. The Constitution should require Presidential candidates to have such experience and qualities.[8]

The First White Paper also offered suggestions on the type of public-sector candidates who might qualify to be a presidential candidate: Ministers of Government, Speaker of Parliament, Chief Justice, Judges of the Supreme Court, Attorney-General, Auditor-General, Accountant-General, Permanent Secretaries, Chairmen or Chief Executives of Statutory Boards. For the private sector, the First White Paper only listed Chief Executive Officers of publicly listed companies.[9]

3.3.2 Revisiting the early debates on qualification

At first blush, these two fundamental considerations – the need for legitimizing elections and highly qualified candidates – appear unconnected, but they are not. The need for specially qualified candidates necessarily limits the pool of candidates eligible to contest presidential elections. The narrower the criteria, the fewer the candidates available. Public discussion on the First White Paper was wide-ranging and in some sense speculative since the specific provisions and powers of the proposed Elected President scheme were not explicitly spelt out.

Two Members of Parliament (MPs) thought the proposed criteria to be too stringent. Ibrahim Othman (MP for Tanah Merah) told Parliament that many people told the Ministry of Community Development's Feedback Unit (now renamed REACH) that they felt that the net could be cast wider to "include

others who have been successful in life, for example, a successful businessman or an outstanding civil servant".[10] The Singapore Democratic Party's Chiam See Tong (MP for Potong Pasir) felt that the candidacy 'should be open' with the criterion of 'age' as only possible limitation, preferring a candidate of at least 35 years of age.[11] Tan Cheng Bock (MP for Ayer Rajah) did not comment on the proposed requirements, but argued that if the proposed Presidential Elections Committee (PEC) was not impartial, "the people have no free choice".[12] Responding to Ibrahim Othman, First Deputy Prime Minister Goh Chok Tong retorted that the criteria were "not stringent enough":

> If you want to leave open a big hole in which all kinds of candidates can slip through to stand for election, then we are in fact having a worse situation because all kinds of people can become President. It is not an improvement over the present system where all kinds of candidates can stand for elections in a general election. I think this is one of the more innovative features of this elected President which some Members might not have noted, i.e., the quality control over potential candidates for important positions. I wish it could be extended to all candidates standing for election to Parliament … if you compare the qualifications required for someone to stand for election and the qualifications you would insist upon before you appoint a person an accountant, a SAF officer, a doctor or a lawyer, you will be shocked at the slack and totally non-existent control over eligibility to stand for election to be a Member of this House.[13]

In 1990, a second White Paper[14] was released, along with the Constitution of the Republic of Singapore (Amendment No 3) Bill.[15] Clause 38 of the Second White Paper offered a slightly expanded list for qualification. Presidential candidates had to be citizens of Singapore, and served for at least three years in one of the following capacities:

a Minister, Chief Justice, Speaker of Parliament, Attorney-General, Judge or Judicial Commissioner of the Supreme Court, Chairman of the Public Service Commission ("PSC"), Auditor-General, Accountant-General;
b Chairman or chief executive officer of a company with a paid-up capital of at least $100 million; or
c Chairman or chief executive officer of a key statutory board, namely, Government of Singapore Investment Corporation Pte Ltd; MND Holdings Pte Ltd; Singapore Technologies Holdings Pte Ltd; and Temasek Holdings Pte Ltd.

During the Second Reading of the Constitution (Amendment No. 3) Bill, more MPs voiced their concerns over the stringency of requirements for presidential candidates. The concerns and arguments raised may be divided into two broad categories: (a) that the restrictive criteria limits the pool of eligible candidates; and (b) that there is an overemphasis on particular requirements.

Ibrahim Othman repeated his call to cast the net wider as the proposed eligibility criteria was "too restrictive", had "an elitist bent" and was "loaded in favour of the establishment".[16] Ibrahim was also concerned that with such elitist credentials, the President might "lose touch with the feeling of the people".[17] Given the President's wide-range and scope of powers which required him to be familiar and experienced "in many fields, from law to economics to religion", Chandra Das (MP for Cheng San GRC) wondered if "there will always be a suitable candidate for the post".[18] Das also questioned if all the public officers designated for qualification were indeed suitable. "The Chief Justice", Das said, "may be an expert in law but his understanding of Supply Bills and for him to apply his judgment correctly would be in doubt when he gets elected as Elected President."[19] Finally, he argued that as the presidential candidate was from "the top echelons of the establishment", he or she was unlikely to "stand in opposition to the ruling party".[20] Dr Koh Lam Son (MP for Telok Blangah) argued that it would "seem almost undemocratic if eligibility is confined to a select few, and not thrown open to a wider mass of Singaporeans" and proposed including anyone who has been a Member of Parliament.[21] Dr Aline Wong (MP for Tampines GRC) pointedly observed that the Bill prescribed "two types of qualification" – personal integrity, and financial management experience – expecting them to repose in the same candidate. This, she argued, was "too restrictive" and urged that the pool be enlarged "to include prominent citizens who are known to have made contributions" to Singapore "but who may not have had the requisite experience with financial management, just as in the case of the Chief Justice, Speaker of Parliament, Attorney-General, [and] High Court Judges."[22]

Addressing these concerns, Prime Minister Goh Chok Tong explained that the list in the proposed Bill was "no more than a proxy for the attributes" the Government was looking for:

> We are actually looking for people with competence. They must be competent people before they can stand for election. Secondly, they must be trustworthy. Third, they must have sound judgement. That means, when they look at the situation they can come to the right conclusion. They assess people, they know who are opportunists, who are crooks and who are honest people …
>
> On the suggestion that we should widen the criteria, if you read the clauses carefully, you will notice that, in fact, almost anyone is eligible to stand for election as President, provided he can satisfy the Presidential Elections Committee that he is a person with such experience and qualifications as are necessary for him to carry out effectively the functions and duties of the office of the President.[23]

Following two days of intense debates in Parliament, a Select Committee was appointed.[24] The Select Committee examined the issue of candidate qualification and proposed that the pre-qualification approach should remain, working on the basis that it should not be easier for a person to become a President than a Prime

Minister. Speaking at the Third Reading of the Bill, Prime Minister Goh Chok Tong again dealt with the issue of qualifications for presidential candidates but this time, emphasized the need for candidates to possess "moral stature":

> The President's moral stature is important. If he lacks the necessary experience and stature, he will not have the moral weight to veto the Prime Minister should he hold a contrary view. This moral standing can come only if the President is a man of substance, tested and known for his integrity, objectivity, competence and judgment. It cannot come simply through winning elections.[25]

Dr Koh Lam Son once again objected to these stringent criteria on the basis that it was undemocratic, but more importantly, that too much emphasis had been placed on financial management expertise:

> Mr Speaker, I would also prefer that the pre-qualifications be kept to a minimum so as to increase the pool of talented and capable men from which a President can be elected. I say this because it is the most democratic thing to do. This system has worked well for us, Members of Parliament. The people must have the right and the choice to elect or reject a candidate.
>
> I also feel that as the Bill presently stands, there is far too much emphasis on this expertise on financial management before a person can qualify to be considered a candidate for the post of Elected President. This, to me, is too restrictive. I feel that we would be depriving ourselves of many talented, honest and, in some instances, internationally renowned Singaporeans from standing for the post because of this proviso of financial expertise …
>
> The point, Mr Speaker, is that a man of great leadership abilities with no financial background can safeguard our reserves … So let the very stringent restrictions be removed, and let us allow Singaporeans their democratic right to elect a person they have confidence in.[26]

Koh's democracy argument drew a sharp retort from the Prime Minister:

> So what is democracy all about? It is not the right to stand for election. It is giving the electorate the right to choose good candidates to Parliament. If we do not give the people a choice, then they are choosing between two bad candidates. But if you pre-qualify them, and you allow good candidates to emerge and be chosen, you can be sure that only good ones will be chosen returned to Parliament.
>
> Now, the question is whether the criteria are too stringent or whether we should not lower them to widen the pool, as some Members have argued. I think the present criteria as spelt out are sufficient to draw in good people. They are not so high as to limit the numbers to four or five potential candidates. I think a large number of Singaporeans can meet the criteria …

> We place great store on financial knowledge and expertise because this one key area in which we expect the President to exercise judgment. Unless he has knowledge of finances and is able to evaluate reports, he will not be able to perform his job well. So you have got to ensure that Presidential candidates do have the ability, first, to read accounts, secondly, to understand them, to evaluate them, and most importantly, to make a judgment whether to exercise his veto power or to agree with the government of the day should they wish to draw on reserves for certain well-argued cases.[27]

Several amendments were made to the original Bill although the eligibility requirements were left intact. It was passed into law in January 1991.[28] It should be noted that during the Select Committee hearings, Associate Professor Valentine Winslow not only argued strongly against the stringent criteria but further proposed that like Article 67(3) of the South Korean Constitution,[29] a requirement should be made that in the absence of a contest, the candidate returned should have a minimum receipt of one-third of the total eligible votes.[30]

3.3.3 Implementation of the scheme

I do not propose to go into the intricacies of the many complex details of the constitutional amendments that introduced the Elected Presidency[31] but aspects of the scheme that are germane to our discussion will be highlighted. The presidential candidate must meet two requirements. First, he or she must satisfy the PEC that: "he is a person of integrity, good character and reputation".[32] Second, he or she must also show that for a period of not less than three years, he or she has held office in one of numerous capacities laid down under Article 19(2)(g). Specifically, these offices are:

a Minister;
b Chief Justice;
c Speaker;
d Attorney-General;
e Chairman of the Public Service Commission;
f Auditor-General;
g Permanent Secretary;
h Chairman or chief executive officer of one of the following:
  - Board of Commissioners of Currency, Singapore
  - Central Provident Fund Board
  - Housing and Development Board
  - Jurong Town Corporation
  - Monetary Authority of Singapore; or Post Office Savings Bank of Singapore.

i Chairman of the Board of Directors or Chief Executive Officer (CEO) of a company incorporated or registered under the Companies Act with a paid-up capital of at least $100 million or its equivalent in foreign currency; or

j in any other similar or comparable position of seniority and responsibility in any other organisation or department of equivalent size or complexity in the public or private sector which, in the opinion of the Presidential Elections Committee, has given him such experience and ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of the President.

It will be seen that between 1988 and 1991, the eligibility criteria was slightly broadened to include chairmen or CEOs of public companies with a paid up capital of at least S$100 million. The final clause in Article 19(2)(g) gives the PEC the power to qualify "comparable candidates". Under Article 18, the PEC consists of the Chairman of the PSC; the Chairman of the Public Accountants Board; and a member of the PCMR nominated by the Chairman of the Council.

As candidates for the first and second presidential elections had automatically qualified,[33] the PEC was only called upon to seriously exercise this discretion in 2005 in the case of Andrew Kuan, former Group Chief Financial Officer of the Jurong Town Corporation.[34] Kuan was declared ineligible because the PEC assessed:

> the seniority and responsibility of that position as being not comparable to those mentioned in the Constitution and he therefore could not have the experience and ability in administering and managing financial affairs as to effectively discharge the functions and duties of the office of President.[35]

Kuan was once again declared ineligible when he made a second bid for a Certificate of Eligibility in 2011.

Interestingly, the PEC decided that four candidates were eligible to run in the 2011 election. Of the four candidates, only two – Tony Tan and Tan Cheng Bock – qualified automatically under Article 19. Tan was a former Deputy Prime Minister and also served as Chairman of the Oversea-Chinese Banking Corporation and was Chairman of Singapore Press Holdings Ltd at the time of his nomination while Tan Cheng Bock had previously served as Chairman of public-listed Chuan Hup Holdings Ltd. Two other candidates – Tan Kin Lian and Tan Jee Say – were also declared to be eligible. Tan Kin Lian, who was CEO of the highly successful and visible insurance cooperative NTUC Income for 30 years, was expected to qualify since he had grown NTUC Income's assets from $28 million in 1977 to $17 billion in 2007; NTUC Income had a share capital of $500 million. Quite rightly, the PEC felt that NTUC Income was 'comparable in size and complexity' to a company with a paid-up capital of $100 million.[36]

The surprise qualifier was Tan Jee Say, a former Principal Private Secretary to the then Deputy Prime Minister Goh Chok Tong, who, from 1997 to 2001, was Regional Managing Director of AIB Govett Asia, an asset management company. AIB Govett Asia did not have a paid-up capital of $100 million. Nonetheless, the PEC felt that Tan's position was "a position of comparable

seniority and responsibility as a CEO" of an organization "of equivalent complexity" to companies in Singapore with a paid-up capital of $100 million.[37]

3.3.4 The Menon Constitutional Commission

On 27 January 2016, during the parliamentary debate on the President's Address, Prime Minister Lee Hsien Loong announced the Government's intention to review the Elected Presidency scheme.[38] The review was not occasioned by "any dissatisfaction with the present working arrangements, or any difference of views between the Government and the President" but "to keep the Presidency a robust and effective institution".[39] Lee highlighted three areas which he thought required review: (a) the qualifying criteria for the President; (b) how to further build up the institution of the Council of Presidential Advisers (CPA); and (c) how to ensure that racial minorities stood a chance of being elected to the office of President.

With respect to the eligibility criteria, Lee felt that it should "be brought up to date" because: (a) the old threshold of $100 million in paid-up capital for public companies was valued in 2016 at $158 million (taking into account inflation), but the value did not reflect how much Singapore had changed since then; (b) Singapore's Gross Domestic Product had risen from $72 billion in 1990 to $400 billion in 2016; (c) Government spending had gone up from $11 billion in 1990 to $68 billion in 2015; (d) CPF balances had increased from $41 billion in 1990 to $275 billion in 2016; and (e) the number of companies with $100 million paid-up capital was 158 in 1993 but 2,100 in 2016.[40] He ended by stating that a Constitutional Commission would be appointed to study the issues raised and to obtain views from the public and recommend improvements to the system.

The nine-member Commission, under the Chairmanship of Chief Justice Sundaresh Menon, was appointed on 10 February 2016 with the following Terms of Reference:[41]

1 To review the qualifying process for Presidential candidacy, particularly the eligibility criteria for such candidates.

   To consider whether the existing provisions in these areas are adequate, taking into account:

   i The President's custodial role in safeguarding our financial reserves and the integrity of our public service; and

   ii The need to ensure that those eligible for candidacy are individuals of character and standing, who possess the experience and ability to discharge these duties and responsibilities of Presidential office with dignity and distinction.

   To recommend any refinements and amendments to the abovementioned areas which are necessary in view of the considerations in (1)(i) and (ii) above.

2 To consider and recommend what provisions should be made to safeguard minority representation in the Presidency, taking into account:

   i The President's status as a unifying figure that represents multi-racial Singapore; and

ii The need to ensure that candidates from minority races have fair and adequate opportunity to be elected to Presidential office.

3 To review the framework governing the exercise of the President's custodial powers, particularly the role and composition of the Council of Presidential Advisers.

To consider whether the existing provisions in these areas are adequate, taking into account:

i The custodial powers that the President is entrusted with, and the Council of Presidential Advisers' central function as an independent body to counsel and advise the President on the exercise of his powers; and

ii The need to safeguard our financial reserves and the integrity of our public service, and ensure that decisions in these areas are made with the support of careful consideration given by a group of persons with substantial suitable experience in the public and private sectors.

To recommend any refinements and amendments to the above-mentioned areas which are necessary in view of the considerations in (3)(i) and (ii) above.

4 To receive and consider representations on (1) to (3) above.

5 To prepare and submit a report of the Commission's proceedings, findings and recommendations to the Prime Minister. In preparing this report, the Commission may seek legal or other professional advice and/or request for information, on any matters within its terms of reference.

The Commission invited the public to submit written feedback on matters falling within the Terms of Reference and a total of 107 representations were received. Twenty contributors were invited to make oral representations to elaborate on or clarify their written submissions, and these hearings were held over the course of four days between 18 April and 6 May 2016. At this point, I must declare my interest in this matter – I was one of the 20 persons who made both written and oral representations to the Commission.

3.4 Selecting the 'Elected' President?

As we saw from the foregoing, the stringent qualification requirements for presidential candidates were controversial from the outset. The MPs' main concerns were that the pool was too small and that 'good' and 'worthy' candidates would be excluded on account of these requirements. However, no one except for Chandra Das appears to have openly questioned the assumed parity in qualification between public- and private-sector candidates who would automatically be qualified. Even so, his critique was couched in terms of finding all the qualities thought necessary in a candidate reposing in any single person. Unfortunately, this assumption – which I challenged – was never overturned during the Constitutional Commission hearings. During the Commission hearings, I pointed out that a candidate whose only experience and skill sets were gained through spending three years as either the Chief Justice, Attorney-General, Speaker of

Parliament or Chairman of the PSC could not possibly be equated with the private-sector candidate (i.e. the Chairman or CEO of a public listed company with $100 million in paid-up capital).

> … it is not entirely clear that the competence and experience required to head up a large corporation can necessarily be equated to someone occupying the office of the Auditor-General or Speaker of Parliament, for example. As a simple matter of comparison, the Auditor-General of Singapore presided over an organisation with a budget of some $32.2 million in FY2015; while the Speaker of Parliament's institutional budget came to $35.1 million in FY2015. These sums are still vast compared to the Public Service Commission's budget in FY2015, which came to just over $2 million. However, the threshold for 'commercial candidates' is $100 million.[42]

Thus, if financial competence, experience and judgement were key to the role of the President, there really is no reason why former Chief Justices, Speakers of Parliament or Chairmen of the PSC should be privileged with automatic qualification. The Commission however dismissed my argument, stating that:

> although the private- and public-sector routes to qualification are both targeted at identifying persons with the relevant skillsets, no single office is ever likely to endow the holder of that office with *all* the attributes necessary for him to discharge *all* the Presidential functions,

and as such, "it may not be correct to compare the two routes as if they are precisely alike".[43]

This is an odd response since I was hardly comparing the 'two routes' for qualification but rather questioning the qualities and qualifications of candidates to *perform the same task* – which is to safeguard Singapore's financial reserves and integrity of the civil service. If the job is the same, why should we continue to countenance, and indeed widen such a wide gulf in experience between public-sector and private-sector candidates? Even so, the Commission recommended the removal of the Auditor-General and Accountant-General from Article 19(2)(g) on the ground that: "the scope of these two offices and the extent of the responsibilities borne by their holders do not … justify automatic qualification" since they are "not necessarily held by civil servants with the rank of Permanent Secretary" and their role in the "delivery of public goods and services" was ancillary and limited.[44] It seems strange that the Commission did not feel the same way about the offices of Chief Justice, Attorney-General, Speaker or Chairman of the PSC had correspondingly limited roles in the delivery of public goods and services.

Instead of proposing the elimination of more public offices by which candidates can automatically qualify, the Commission recommended"'doubling the duration which applicants must have served in the qualifying office, from the current term of 3 years to 6 years" to "capture at least some elements of the applicant's

performance" and "filter out those who were either removed or not re-appointed because they had been found wanting".[45] Parliament rejected both of the Commission's recommendations and retained the offices of Auditor-General and Accountant-General in Article 19(2)(g) and kept the period of qualification for public offices at three years. The new Article 19(2)(g)(ii) allows the period of service in a public office to be broken up so that the sum total of service is three years. So, if a person served as Attorney-General for one year and Chief Justice for two years, that would automatically qualify that candidate.

In addition, the new Article 19(3)(c) gives the PEC discretion to consider public officers of 'comparable' experience and ability. It reads:

> 19(3) The public sector service requirement is that the person has –
>
> (*a*) held office for a period of 3 or more years as Minister, Chief Justice, Speaker, Attorney-General, Chairman of the Public Service Commission, Auditor-General, Accountant-General or Permanent Secretary;
> (*b*) served for a period of 3 or more years as the chief executive of an entity specified in the Fifth Schedule;
> (*c*) satisfied the following criteria:
> (i) the person has served for a period of 3 or more years in an office in the public sector;
> (ii) the Presidential Elections Committee is satisfied, having regard to the nature of the office and the person's performance in the office, that the person has experience and ability that is comparable to the experience and ability of a person who satisfies paragraph (*a*) or (*b*); and
> (iii) the Presidential Elections Committee is satisfied, having regard to any other factors it sees fit to consider, that the person has the experience and ability to effectively carry out the functions and duties of the office of President; or
> (*d*) held office or served, as the case may be, for a first period of one or more years in an office mentioned in paragraph (*a*), (*b*) or (*c*) and a second period of one or more years in an office mentioned in paragraph (*a*), (*b*) or (*c*), and the 2 periods add up to 3 or more years.

This additional layer of discretion further complicates the already incoherent relationship between the public- and private-sector requirements. What does it take for a public officer to have experience and ability comparable to the Chairman of the PSC, for example? On what basis can the PEC deal with a claim by say, a former Police Commissioner to be qualified?

Interestingly, the Constitutional Commission noted that only about 70 public-sector candidates automatically qualified under Article 19(2)(g) but expressed grave concerns that the $100 million threshold established in 1991 for private companies was now insufficient given the change in economic circumstances. It noted that in 1991, there were only 158 companies with $100 million in paid-up

capital whereas in 2016, the 158th largest company in Singapore had a paid-up capital of $1.6 billion. This represented a 16-fold increase in the capitalization of Singapore's largest companies and this criterion had to be updated to reflect this change of circumstances.

A number of representors discussed raising the bar for private-sector candidates by: (a) substituting "paid-up capital" with "shareholder equity" since the latter better reflected the company's financial well-being than the former; and (b) raising the bar by requiring candidates to have run companies with at least $500 million in shareholder equity. The Commission agreed and their recommendation in this regard was accepted by Parliament. While there is good sense in pegging a company's worth to its shareholder equity rather than its paid-up capital, the raising of the $100 million benchmark is questionable. Is a person who can profitably run a $100 million company qualitatively different from one who can run profitably run a $500 million company? If there is no clear and apparent difference, then the new qualification does little more than to reduce the pool of private-sector candidates.

Beyond the initial qualification requirements under Article 19(2)(g), all presidential candidates must satisfy the PEC that they are persons "of integrity, good character and reputation". Initially, the unelected PEC comprised the Chairman of the PSC, the Chairman of the Accounting and Corporate Regulatory Authority (ACRA) and a member of the PCMR nominated by the Chairman of the Council. With the latest amendments, membership of the PEC has doubled with the addition of: a member or former member of the Council of Presidential Advisers; a person qualified to be a Judge of the Supreme Court appointed by the Chief Justice; and a person from the private sector, who in the opinion of the Prime Minister, has private-sector expertise and experience that is relevant to the functions of the PEC, and is appointed by the Prime Minister.

This enhanced PEC is now required under the new Article 19(4)(a) to determine if a private-sector candidate is "comparable to the experience and ability of a person who has served as a chief executive" of a company with $500 million in shareholder equity. At the same time, a private-sector candidate must satisfy the PEC that "having regard to any other factors" the PEC "sees fit to consider", he or she "has the experience and ability to effectively carry out the functions and duties of the office of President".

Further tightening of the already stringent and restrictive requirements for presidential candidates has further limited of choices available to the voting public. A combination of stringent constitutional requirements and the PEC's screening effectively pre-selects candidates for the office of President. This restriction is even greater with the enactment of a new Article 19B which provides for "reserved elections" for members of different ethnic groups if "no person belonging to that community has held the office of President for any of the 5 most recent terms of office of the President." This new clause operates retrospectively to the time of Singapore's independence in 1965, and as such, the 2017 Presidential Election was reserved for Malay candidates. As such, the amendments further limit voters' choice, which further problematize the claim

that elections endow the President with a mandate. Put another way, the harder it is to qualify as a presidential candidate, the less candidates there are likely to be, and this necessarily limits voter choice. Indeed, as seen in the 2017 election, the combination of the stringent requirements and the reserved election qualified only a single candidate resulting in no election, and no mandate for the 'elected' President.

3.5 'Electing' the selected President

Elections are the bedrock of democratic representation and participation. Those elected are presumed to have the mandate of those who elected them, and thus a corresponding legitimacy to undertake whatever their office requires of them. The bigger the majority, the greater the legitimacy and the more secure the mandate. Indeed, it was on this basis that Parliament transformed the office of President into an elected one. As Richard Katz points out, elections function to: (a) legitimize the elected; (b) offer voters selection and choice; (c) create or foster representation; and (d) facilitate popular involvement in the process.[46]

3.5.1 Why elect the President? The problem of walkovers

Prior to 1991, all presidents were nominated and 'elected' by Parliament – there was no real electoral contest in this closed system. Parliament's 'electing' of the President was really a reaffirmation of the Government's choice – nothing more. At the same time, there was an unspoken convention of having the highest office in the land rotate among members of the major ethnic groups in Singapore: Yusof Ishak (Malay, 1965–1970); Benjamin Henry Sheares (Eurasian, 1970–1981); and C.V. Devan Nair (Indian, 1981–1985). The transformation of the office to an elected one, albeit with serious limitations, must be that elections gave holders of the office a majoritarian mandate upon which sat its moral authority to control an elected government. This was emphasized at the inception of the elected office, and again reiterated by Prime Minister Lee Hsien Loong when he announced plans to review the Constitution in 2016. In his speech, the Prime Minister said:

> The President must remain an elected office. If the President is not elected, he will lack the mandate to wield his custodial powers. I have read various op-eds in the newspapers which say we can go back to the old system, just do away with the Elected President and have Parliament elect the President; do not have a national election.
>
> I think the Workers' Party has sometimes espoused this view, too. I think it is most unwise. The President has a role. It is a difficult system to get right, but we have to adjust it and try and get it more right than wrong over a period of time, and not abandon the project altogether and leave ourselves naked and defenceless against all the difficulties which the Elected President enables us to avoid.[47]

The logic of this idea surely lay in (a) giving the electorate a *real choice* in terms of the candidates; and (b) ensuring that the chosen ca ndidate had indeed been put through the rigours of elections and emerged with an undisputed majority. However, provisions in the Constitution and the Presidential Election Act subvert this logic in two ways. First, by severely limiting voters' choice in stipulating the type of candidate who can stand for election based on a mixed criterion of executive experience and financial savvy; and second, by allowing sole candidates to be declared 'elected'.

Any doubt as to whether a candidate succeeded in securing the electorate's mandate is put to rest if he or she obtains an absolute majority during an election. This mandate becomes rather less tenuous if the majority secured is not absolute, and worse still if there is a walkover with no contest. Indeed, a major sticking point concerning the process of electing the President has been Section 15 of the Presidential Elections Act, which stipulates that if, on nomination day, "only one candidate stands nominated" that candidate shall be declared "to be elected to the office of President". A candidate can become President simply through a walkover. This happened thrice, in 1999 and in 2005 when the late S.R. Nathan stood as the sole candidate in both elections, and in 2017 when Halimah Yacob was declared the sole qualified candidate in the reserved election.

The elections of 1999, 2005 and 2017 and that of 2011 bring into sharp relief the fact that none of the winning candidates had an absolute majority of the votes cast. In the case of Presidents Nathan and Halimah, who faced no opponent, it is difficult to ascertain what proportion of the public actually supported them or gave them their mandate to function as President. In such cases, it may well be worthwhile to reconsider the idea of having some kind of endorsement exercise, something akin to the South Korean system of requiring candidates to obtain at least one-third the eligible votes as proposed by Valentine Winslow back in 1990.

3.5.2 Contests, run-offs and absolute majorities

Contrast this with the 2011 election in which President Tony Tan was elected. This election was problematic. Notwithstanding his victory in this four-man race, Tony Tan very narrowly defeated his closest opponent, Tan Cheng Bock, by only 7,382 votes (or 0.35 per cent of the votes cast). Tony Tan's share of 35.2 per cent was just slightly more than a third of all votes cast. Viewed conversely, a large segment of the population – close to 65 per cent of all electors – were actually *not* in favour of Tony Tan. It would thus be difficult to claim the moral high ground to say that such a majority gave him a true mandate from the people to speak and act for them as President.

At the Constitutional Commission hearing, I proposed that in the event of an election involving more than two candidates, a second-round run-off election should be held to give the final winner a clear majoritarian mandate. This system is not new, having been used in countries such as Austria, Brazil, France, Finland and India. The object of this two-round run-off system is to have the second

round of voting limited to the top two first-round candidates. Thus, in the case of Singapore's 2011 election, a run-off would have pitched Tony Tan and Tan Cheng Bock against each other. Whoever won that election would have an absolute majority. In addition to ensuring that the winner obtained an absolute majority, the run-off system has the added advantage of forcing the electorate to choose between the top two candidates.

At the oral hearing, I offered the classic example of how effective this system was by looking at the 2002 French presidential election. A total of 16 candidates took part in the election and the top two candidates after the first round of voting were Jacques Chirac (19.88 per cent) and Jean-Marie Le Pen (16.86 per cent). The difference between the two candidates was a mere 3 per cent and their total votes constituted only 36.74 per cent of the vote; the remaining 63.3 per cent being spread between the other 14 candidates. However, after the second round of voting, Chirac won with a majority of 82.21 per cent while Le Pen only secured 17.79 per cent of the vote, just 0.93 per cent more than he won in the first round.[48] If the French had stopped after the first round of voting, Chirac's 19.88 per cent could be interpreted as him having 'lost' the vote of more than 80 per cent of the electorate. However, with the run-off vote, he secured an overwhelming majority and correspondingly, an unassailable mandate to govern.

The Commission was quite adamant in rejecting this suggestion, arguing that it was "wrong to assume that a candidate's legitimacy" was "contingent upon him obtaining the support of an absolute majority of the eligible electorate, or even securing an absolute majority of the votes cast."[49] It said:

> It cannot be the former because if that were the case, nations where voter turnout is poor may be hard pressed to ever claim a legitimate electoral mandate in the majoritarian sense. The Commission also does not agree with the latter proposition. In the Westminster tradition, the first-past-the-post system is a widely-accepted mode of conferring a legitimate democratic mandate on the candidate who emerges victorious at the polls. The question of legitimacy is not a simple numeric exercise of achieving majority support from the voters.[50]

It was the Commission's view that a winner's legitimacy came from "the fact that he has assumed office through a process which is free, open and fair, and which binds all citizens" and the first-past-the-post (simple plurality) system of voting confers as much legitimacy on the candidate as any other system. As such, any insistence "upon an absolute majority or a majority greater than that enjoyed by the Government in Parliamentary elections is, in the Commission's respectful view, simply not warranted".[51]

This logic is difficult to fathom. Electoral legitimacy comes from two things – choice and majorities. Taking the Commission's argument to its logical conclusion, this means that as long as an established process or procedure is carried out freely, openly and fairly, the election is fair and the candidate's legitimacy is secured. Legitimacy often flows from legality, but not always. A procedurally

fair election is not necessarily a fair election if substantive unfairness results from it. To take an extreme example – candidacy for the Presidency is limited to former Prime Ministers of Singapore. How much legitimacy would the President have if that requirement reduced the pool of candidates to a single person? In such a case, there would be no choice and no majority, and the Commission would have us believe that such a candidate is as legitimate as one who has won a four-man contest through two rounds of election, securing an absolute majority? The argument applies equally in cases where there is a walkover.

The Commission offered two other reasons for rejecting this proposal: first, that run-off elections would likely be "unnecessarily complex and cumbersome"; and second, that such elections "may worsen the difficulties that candidates from racial minority groups might already face when running for Presidential office", especially in the case where a Chinese candidate is contesting against a candidate from a minority ethnic group as "racial considerations may be brought into sharper relief and may have a much more palpable impact on the outcome of the election." While such a system would certainly involve more time and administrative energy, elections are only held once in six years and the added 'inconvenience' is easily offset by a better system. The last objection cuts both ways. There is nothing to stop candidates in a first-past-the-post system from resorting to ethnic arguments to win votes; and it is conceivable that ethnic considerations could be brought in as sharp relief in cases where there are more than one candidate. Interestingly, at the end of its Report, the Commission nonetheless acknowledged the importance of elections and mandates if the President was to continue in his custodial role:

> The Commission considers that if the President is to continue to perform these custodial functions, the office should remain an elected one. The reasons have already been canvassed above but two bear repeating. First, it would be incongruous to have a second key in the hands of the President, if the holder of the first key (namely, the Government) is to appoint the holder of the second key. Quite apart from whether such a person could or might in fact be an effective check on Parliament, the perceived lack of independence is problematic. Second, the President will likely require a popular mandate if he is to have the authority to act as the custodian of the nation's reserves and be an effective check against governmental action, should the occasion arise. An appointed President is unlikely to have the standing or authority to effectively block a decision made by a democratically elected government.[52]

If elections and mandates were key to the President's legitimacy and authority, surely proposals to strengthen that mandate through a run-off should be taken far more seriously that it currently has.

3.6 Conclusion

With the passage of the Constitution of the Republic of Singapore (Amendment) Act 2016, Parliament lost a wonderful opportunity for rationalizing the Elected

Presidency scheme. Worse still, the Constitution was amended to provide for a 'reserved' election to be held in the event that no candidate from any of Singapore's main ethnic groups – Chinese, Malay, Indian and Others – occupied the Presidency for five consecutive terms. This amendment was brought in to resuscitate the symbolic role of the President, which was lost when the Constitution was amended in 1991. The tension between requiring the President to play two roles – that of financial custodian, and that of symbol and unifier of the state – was recognized by the Commission. Recognizing that this matter lay beyond the scope of its Terms of Reference, the Commission nevertheless felt it necessary to weigh in on the matter:

> The former requires that he be non-partisan and a unifier of the nation, while the latter potentially requires him to confront the Government of the day – a task which is somewhat at odds with the role of a unifier. Furthermore, while the prospect for such confrontation necessitates that the President hold the legitimacy and authority that comes from having an elected mandate, it seems out of place for persons seeking a nonpartisan unifying office to have to go through a national election, which will likely be politicised and divisive.[53]

The solution, thought the Commission, might be the "unbundling" of the President's symbolic and custodial roles and reposing them in two different institutions:

> The Commission suggests that the unbundling of the President's custodial role and its devolution to a specialist body could be operationalized in the following fashion. The custodial function over the nation's fiscal reserves and key public service appointments could be vested in an appointed body of experts. The Commission conceptualises such a council of experts as a second chamber of Parliament with the ability to delay measures, force a debate upon them and require the Government to override any objections only with a super-majority. Hence, unlike the Elected President, the council, as an appointed body of experts, would never have the power to absolutely veto or block Government initiatives (as the Elected President presently does when he has the support of the CPA). But through a combination of raising the issue, forcing a debate on the council's objections and requiring a super-majority, a suitable balance could be struck between the need to safeguard our critical assets on the one hand, and, on the other hand, enabling the Government to act.[54]

This proposal found favour with MPs from the Workers' Party but drew no response from the Government. This is most unfortunate, given that the Commission was the first Constitutional Commission to be convened since 1966. Had the matters been more thoroughly and critically considered, the Constitution could have been amended to give the electorate a real choice and made that

choice really count through the ballot box. Instead, it opted to narrow the field and hang onto the first-past-the-post system that cannot vest a candidate with an absolute majority in a contest involving more than two candidates, and giving him or her the true mandate to check on the elected government.

Notes

1 See "PM hints at change in one-man, one-vote system" (*Business Times*, 24 December 1984), 14.
2 Foo Choy Peng, "Goh sets out the two major tasks" (*Business Times*, 1 January 1985), 1; "Task force to study electoral swing" (*Business Times*, 5 January 1985), 1.
3 "Task force" (n. 2).
4 See "A law to protect foreign reserves", *Straits Times* (16 April 1984), 1. According to then First Deputy Prime Minister Goh Chok Tong, the scheme had been discussed by the Cabinet since 1982. See "Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Service (White Paper), Statement by First Deputy Prime Minister and Minister for Defence", *Singapore Parliamentary Debates: Official Reports*, 29 July 1988, vol. 51, col. 479.
5 "25 Years of hard work could vanish in 25 days of madness", *Straits Times* (16 April 1984), 8.
6 See Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services, Cmd 10 of 1988 (hereinafter "First White Paper").
7 *Ibid.*, 4.
8 *Ibid*.
9 *Ibid*., 5.
10 *Singapore Parliamentary Debates: Official Reports*, 11 August 1988, vol. 51, col. 562.
11 *Singapore Parliamentary Debates: Official Reports*, 12 August 1988, vol. 51, col. 591.
12 *Ibid.*, col. 577.
13 *Ibid.*, cols 633–4.
14 See Safeguarding Financial Assets and the Integrity of the Public Services: The Constitution of the Republic of Singapore (Amendment No 3) Bill, Cmd 11 of 1990 presented to Parliament on 27 August 1990 (hereinafter "Second White Paper").
15 Bill No. 23 of 1990 (hereinafter "Constitution (Amendment No 3) Bill").
16 *Singapore Parliamentary Debates: Official Reports*, 4 October 1990, vol. 56, col. 483.
17 *Ibid*., col. 484.
18 *Ibid*., col. 468.
19 *Ibid*., cols 468–9.
20 *Ibid*., col. 469.
21 *Ibid*., col. 488.
22 *Singapore Parliamentary Debates: Official Reports*, 5 October 1990, vol. 56, cols 532–3.
23 *Ibid*., cols 560–1.
24 See Report of the Select Committee on the Constitution of the Republic of Singapore (Amendment No 3), Bill No. 23 of 1990 (Parl 9 of 1990) presented to Parliament on 18 December 1990 (hereinafter "Report of the Select Committee").
25 *Singapore Parliamentary Debates: Official Reports*, 3 January 1991, vol. 56, col. 719.
26 *Ibid*., cols 726–7.
27 *Ibid*., cols 746–7.
28 Act No. 5 of 1991, assented to by President Wee Kim Wee on 18 January 1991. The amendments to the Constitution under this Act were not brought into force until 30 November 1991 by GN No. S518/91. An exception was made in respect of the entrenchment provisions under the new Article 5(2A).

29 Article 67(3) provides that: "If and when there is only one presidential candidate, he shall not be elected President unless he receives at least one-third of the total eligible votes."
30 "Report of the Select Committee" (n. 23), B54. See also Valentine S. Winslow, "The Election of a President in a Parliamentary System: Choosing a Pedigree or a Hybrid?", in Kevin Y.L. Tan and Lam Peng Er (eds), *Managing Political Change in Singapore: The Elected Presidency* (London: Routledge, 1997).
31 But see Kevin Y.L. Tan and Lam Peng Er (eds), *Managing Political Change in Singapore: The Elected Presidency* (London: Routledge, 1997). See also, Kevin Tan Yew Lee, "The Elected Presidency in Singapore: Constitution of The Republic of Singapore (Amendment) Act 1991" (1991) *Singapore Journal of Legal Studies* 179; Valentine S. Winslow, "Electing the President: The Presidential Elections Act 1991" (1991) *Singapore Journal of Legal Studies* 476.
32 Article 19(2)(e).
33 The candidates for the inaugural presidential election in 1993 were Ong Teng Cheong and Chua Kim Yeow. Ong had served as Minister and was Deputy Prime Minister while Chua had been Accountant-General and also Chairman of the Post Office Savings Bank of Singapore. The sole candidate in the 1999 election was S.R. Nathan, who had served as Permanent Secretary and had been Chairman of Singapore Press Holdings.
34 "Ex-JTC man wants to run for President", *Straits Times* (5 August 2005), 1.
35 Presidential Elections Committee, "Press Statement by the Presidential Elections Committee on Applications for Certificates of Eligibility" (*Elections Department*, 13 August 2005) www.nas.gov.sg/archivesonline/data/pdfdoc/20050813991.pdf (accessed 1 December 2017). See also, M. Nirmala, "President Nathan poised to serve 2nd term" (*Straits Times*, 14 August 2005), 1.
36 Presidential Elections Committee, "Certificates of Eligibility Issued for Presidential Election 2011" (*Elections Department*, 20 August 2011) www.eld.gov.sg/pressrelease/PreE2011/2011%20-08-11%20Certificates%20of%20Eligibility%20for%20Presidential%20Elections%202011.pdf (accessed 1 December 2017).
37 *Ibid*.
38 *Singapore Parliamentary Debates: Official Reports*, 27 January 2016, vol. 94.
39 *Ibid*.
40 *Ibid*.
41 Constitutional Commission, *Report of the Constitutional Commission 2016* (Singapore Government 2016) (hereinafter "Menon Commission Report").
42 Kevin Y.L. Tan, "Representation on Constitutional Review of the Elected Presidency", 19 March 2016 (on file with the author).
43 Menon Commission Report (n. 41), para. 4.27.
44 *Ibid*., para. 4.28.
45 *Ibid*., para. 4.34.
46 Richard S. Katz, *Democracy and Elections* (Oxford: Oxford University Press, 1997), 101–5.
47 *Singapore Parliamentary Debates: Official Reports*, 27 January 2016, vol. 94.
48 See generally, Eric Dubois and Christine Fauvelle-Aymar, "Vote Functions in France and the 2002 Election Forecast", in Michael S Lewis-Beck (ed.), *The French Voter: Before and After the 2002 Elections* (Basingstoke: Palgrave Macmillan, 2004).
49 Menon Commission Report (n. 43), para. 7.4.
50 *Ibid*.
51 *Ibid*., para. 7.5.
52 *Ibid*., para. 7.42.
53 *Ibid*., para. 7.43.
54 *Ibid*., para. 7.48.