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Jody C. Baumgartner

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The Vice Presidency in the Twenty-First Century

Jody C. Baumgartner*

Abstract

The vice presidency has undergone almost revolutionary change since its inception 227 years ago. Conceived as a convenient solution to a problem created by the Electoral College, the Vice President has only two constitutional functions—to serve as a successor to the President and as the President of the Senate. However, over the past sixty years, vice presidents have become increasingly part of and integral to American governance, and the last three (Al Gore, Dick Cheney, and Joe Biden) have been exceptionally active executive actors. What was once an all-but-forgotten office is now an essential part of a president's administration. These developments are, generally speaking, welcomed by political observers and analysts. However, they also raise important practical, legal, and normative questions moving forward. This Article begins by reviewing the emergence of the modern vice presidency and follows with an analysis of the current role of the office. Next, the article examines the attributes, successes, and failures of modern vice presidents, focusing primarily on the tenures of Gore, Cheney, and Biden. Finally, the Article turns to some of the challenges vice presidents will face going forward, as well as the legal and normative questions that surround this new model of the vice presidency.

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I. INTRODUCTION

The verdict is in: the United States vice presidency has grown up. Originally born 227 years ago, the office was, in many respects, the bastard step-child of our constitutional system of governance.¹ It was conceived only in the waning days of the Constitutional Convention of 1787 as a convenient method of resolving a problem created by the original Electoral College system of selecting a president.² In particular, each Elector was required to cast two votes for president, one of which was to be for an individual not from the Elector's home state.³ This was done to help ensure that the country selected competent, qualified individuals who held something of a national appeal, rather than a home-state favorite from one or more of the larger states acting in concert.⁴ But if each Elector cast two votes, what should be done with the second-place winner? The answer was to award him with the vice presidency.⁵

This answer, however, created a new problem. What would, or should, the Vice President do? The resolution in this case was also fairly straightforward, if a somewhat awkward fit for a new constitutional order built on a foundation of separating each institution of government from the others.⁶ The only two constitutional functions of the vice presidency place it

1. See U.S. CONST. art. II, § 1, cl. 3, amended by U.S. CONST. amend. XII.

2. See generally Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811 (2005).

3. See Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 511 (1995) [hereinafter *The New Constitutional Vice Presidency*].

4. See *id.*

5. See *id.*

6. See JODY C BAUMGARTNER & THOMAS F. CRUMBLIN, *THE VICE PRESIDENCY: FROM THE SHADOW TO THE SPOTLIGHT* 10–11 (2015).

squarely in both the Executive (as successor to the President) and Legislative (as President of the Senate) Branches of government.⁷ In this respect, the vice presidency was, and remains, an institutional anomaly.

However, with the exception of those vice presidents who succeeded to the presidency (nine of the forty-seven), the vice presidency has mainly been associated with the Legislative Branch throughout American history.⁸ This is no longer the case.

Beginning with Richard M. Nixon, vice presidents have increasingly become part of and integral to the Executive Branch.⁹ The evolution of the office has proceeded in fits and starts. While Nixon was given real responsibility by Dwight Eisenhower; John Kennedy, Lyndon Johnson, and Nixon himself treated their vice presidents fairly poorly.¹⁰ Jimmy Carter made a deliberate decision to ensure that Walter Mondale was included in all policy decisions.¹¹ Ronald Reagan did not follow this model with George H.W. Bush.¹² However, he did give his vice president more responsibility than Bush gave Dan Quayle.¹³

The last three occupants of the vice presidency, Al Gore, Dick Cheney, and Joe Biden, served for a total of twenty-four years.¹⁴ Each has been an exceptionally active vice president, and each enjoyed the confidence of his president—facts that are not unrelated.¹⁵ Vice presidents are now able assistants to their presidents, acting variously as surrogate, policy lead, political mouthpiece, and more. What was once an all-but-forgotten office is now an integral part of a president's administration. Perhaps most importantly, from a constitutional perspective, each vice president was competent and qualified to succeed to the presidency in the event of a presidential vacancy.¹⁶ Generally speaking, these developments are welcomed by political observers and analysts. However, they also raise

7. See *The New Constitutional Vice Presidency*, *supra* note 3, at 515.

8. See *id.*

9. See generally JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* (1982).

10. See *id.* at 151–76.

11. See *The New Constitutional Vice Presidency*, *supra* note 3, at 545.

12. See *id.*

13. See *id.*

14. See *Chronological List of Presidents, First Ladies, and Vice Presidents of the United States*, LIBR. CONGRESS (Feb. 1, 2016), http://www.loc.gov/rv/print/list/057_chron.html.

15. See *infra* notes 94–116 and accompanying text.

16. See *infra* note 94.

important practical, legal, and normative questions moving forward.

In the next section, I briefly review the emergence of the modern vice presidency and follow this with an overview of the office.¹⁷ Next I examine the attributes, failures, and successes of modern vice presidents, focusing primarily on the tenures of Gore, Cheney, and Biden.¹⁸ This brief review sets the stage for the discussion in the final section, where I turn to some of the challenges vice presidents will face in the coming century, as well as the legal and normative questions that surround this new model for the vice presidency.¹⁹

II. THE MODERN VICE PRESIDENCY

The casual observer could be excused for not fully understanding how far the vice presidency has come since the nineteenth century. It was during this time that the office acquired the reputation (generously) as a resting place for political mediocrities. For example, the eminent statesman Daniel Webster, in turning down the chance to run for the vice presidency in 1839, declared: “I do not propose to be buried until I am dead.”²⁰ Before becoming William McKinley’s vice president, Theodore Roosevelt claimed he “would a great deal rather be anything, say professor of history, than vice president.”²¹

While there were a number of reasonably well-qualified and competent vice presidents during this time,²² the low political esteem of the office was not completely undeserved.²³ Aaron Burr, the third Vice President, was indicted for murder while serving in office; his successor, George Clinton, was senile throughout most of his tenure; Daniel Tompkins (James Monroe’s Vice President) was drunk for most of his second term.²⁴ In the nineteenth century, most vice presidents were selected as an afterthought, mainly to balance the presidential ticket regionally and to help unite the

17. *See infra* Part II.

18. *See infra* Parts III, IV.

19. *See infra* Part V.

20. CQ PRESS, AMERICAN POLITICAL LEADERS FROM 1789–2009 16 (2009) [hereinafter AMERICAN POLITICAL LEADERS].

21. *See* BAUMGARTNER & CRUMBLIN, *supra* note 9, at 3 Box.1.1 (2015).

22. *See* Jody C. Baumgartner, *The Second-Best Choice? Vice-Presidential Candidate Qualifications in the Traditional and Modern Eras*, 6 WHITE HOUSE STUD. 155, 179 (2006).

23. *See infra* note 24 and accompanying text.

24. *See* BAUMGARTNER, *supra* note 6, at 1.

party after the convention.²⁵ Vice presidents who stayed in Washington throughout their tenure (some did not) spent most of their time fulfilling their duty as President of the Senate.²⁶ Several, for example Hannibal Hamlin and George Dallas, met their presidents only after the election.²⁷ John Breckenridge “did not have a private audience with President Buchanan until his last year in office.”²⁸ The office was largely considered to be legislative in nature.²⁹

Starting in the early to mid-Twentieth Century several factors, some of which were interrelated, conspired to change the vice presidency.³⁰ By the end of World War II, the American system of government looked significantly different from the one that the framers constructed.³¹ No longer was a largely minimalist national government led by Congress.³² The national government had grown and was increasingly president centered.³³ Second, and relatedly, the country underwent a series of presidential succession-related crises involving Presidents Franklin Roosevelt (death in office), Dwight Eisenhower (health issues), John Kennedy (assassination), and Richard Nixon (resignation).³⁴ The first of these three inspired presidents to become more willing to include vice presidents in affairs of state.³⁵ It also motivated Congress to pass and states to ratify the Twenty-fifth Amendment, which set forth presidential and vice presidential succession.³⁶ But succession concerns did not stop with presidents.³⁷ The “Eagleton Affair” in 1972 and Spiro Agnew’s resignation in 1973 focused continued attention on the readiness of vice presidents for the presidency.³⁸

25. *See id.*

26. *See id.* at 71.

27. *See id.*

28. *Id.* at 45.

29. *See id.* at 165.

30. *See id.* at 83.

31. *See* AMERICAN POLITICAL LEADERS, *supra* note 20, at 15–17; *see also* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 83–95, 211.

32. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 85.

33. *See id.* at 84.

34. *See id.* at 84–88.

35. *See id.* at 86. This was due in large part to the fact that upon the death of Franklin Roosevelt, “Vice President Harry Truman . . . had little knowledge about the development of an atomic bomb or ‘the agreements Roosevelt had reached with the Russians and British at Yalta.’” *Id.*

36. *See id.*

37. *See id.*

38. *Id.* at 83–88.

Another factor in the evolution of the institution was a fundamental change in vice presidential selection.³⁹ In the past, presidential running mates had been selected at and by the national party conventions, with little if any thought given to compatibility between the two individuals.⁴⁰ Presidential candidates had no say in the matter.⁴¹ Little wonder then that relations between presidents and their vice presidents were often strained. This began to change in 1940, when Franklin Roosevelt demanded to be allowed to choose his own running mate.⁴² Over the next twenty years or so, candidates gained increasing amounts of influence in the selection of the vice presidential candidate, and by 1960, the new norm was that the choice was the potential president's alone.⁴³ The selection process underwent another shift in 1976 when Jimmy Carter expended a considerable amount of time vetting, examining, and meeting with each of his choices.⁴⁴ This was done in large part to ensure that he was compatible with the vice president.⁴⁵ Other presidential candidates have followed this Carter model of vice presidential selection.⁴⁶ One of the effects of this shift is that presidents are now much more likely to be able to work with and trust their vice presidents.⁴⁷

In addition, it is now common for presidential candidates and presidents-elect to meet with their vice presidential counterparts and forge an agreement regarding what role the vice president will play in the administration.⁴⁸ This has been the norm since Gerald Ford asked Nelson Rockefeller to be his vice president.⁴⁹ Vice presidents also have more resources available to them that help ensure their relevance and ability to assist the president.⁵⁰ These include transportation (Air Force Two), an

39. *See id.* at 88–91.

40. *See id.* at 32.

41. *See id.*

42. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 54 (“At the pinnacle of his power, Roosevelt made it clear that if he did not get his choice of running mate (Henry Wallace) he would not accept the nomination.”).

43. *See id.* at 52–55.

44. *See id.* at 84.

45. *See id.*

46. *See id.*

47. *See id.* at 88–90.

48. *See id.* at 84 (“At minimum this helps ensure that vice presidents will not be irrelevant.”).

49. *See id.* at 90–91.

50. *See id.* at 91.

official residence (the Naval Observatory), office space in the West Wing, budget and staff in the Executive Branch (as opposed to the Senate), and access to the president and the presidential paper flow.⁵¹ Finally, the vice presidency is increasingly seen as a stepping stone to the presidency, which means that vice presidents are more reluctant than ever to be marginalized.⁵² Importantly, presidents seem to respect that fact.⁵³

In all, these changes have contributed to what amounts to a near-total transformation of the institution. What was once a largely legislative office is now firmly part of the executive branch.⁵⁴ Modern vice presidents rarely preside over the Senate.⁵⁵ By 1972, the vice-presidential office was officially included in the Executive Branch budget.⁵⁶ Modern vice presidents are increasingly active in their executive branch duties, acting as surrogates for their presidents.⁵⁷ These duties include symbolic and ceremonial acts (e.g., attending funerals), foreign and diplomatic affairs (e.g., travelling overseas to meet foreign heads of state), developing and overseeing implementation of a particular domestic policy (e.g., helping promote a president's policy), as well as political affairs (e.g., campaigning for the party's candidates for congressional office).⁵⁸ Additionally, vice presidents are increasingly trusted by and loyal to their presidents.⁵⁹ This is important, inasmuch as a vice president is only as relevant as his president wishes him to be.⁶⁰

The emergence of an active, executive vice presidency did not occur at once. In fact, the office grew in fits and starts, beginning with Richard Nixon.⁶¹ While Eisenhower was not particularly close to his vice president, he did trust Nixon enough to include him in foreign policy discussions, task

51. *See id.* For example, in the earlier years, vice presidents had small staffs whereas “[b]y the time Mondale took office he had a staff of between sixty and seventy.” *Id.*

52. *See id.* at 102.

53. *See id.* This is in spite of the fact that only two vice presidents (Martin Van Buren and George H.W. Bush) have been elected to the presidency in the post-Twelfth Amendment era. *Id.* at 150.

54. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 77.

55. *See id.* at 116–17.

56. *See id.* at 91.

57. *See* GOLDSTEIN, *supra* note 9, at 151–76.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 74.

him with various diplomatic missions abroad, and more.⁶² Lyndon Johnson, Hubert Humphrey, and Spiro Agnew were somewhat marginalized by the respective administrations, but each was given several executive assignments (e.g., Johnson oversaw the newly created Space Council, a forerunner to NASA).⁶³ In spite of the fact that Rockefeller, like his predecessors, was largely excluded from the inner circle, he too was given various responsibilities, and had a good relationship and a regular weekly meeting with President Ford.⁶⁴

Importantly, Rockefeller's agreement with Ford about his role in the administration and the weekly meetings with the President set a precedent that future administrations have followed.⁶⁵ When Jimmy Carter met with Walter Mondale, the two agreed that Mondale would be included in all policy discussions and decision-making.⁶⁶ Mondale also had regular weekly meetings with the President, and Carter made it clear to all of his aides that the Vice President was a full member of the team.⁶⁷ This set the stage for future vice presidents, all of whom have established similar arrangements with their presidents.⁶⁸ Mondale's successor, Dan Quayle, was not as integral to the George H.W. Bush administration as Mondale was to Carter's.⁶⁹ However, he was given a number of responsibilities, was trusted by Bush, and in the end, was far more active than vice presidents in the pre-modern era.⁷⁰

The past three vice presidents, Al Gore, Dick Cheney, and Joe Biden, were more active than Mondale, central to the administration, and implicitly trusted by their respective presidents.⁷¹ Each acted as head of at least one major executive initiative on the part of the administration, was given

62. *See id.* at 74.

63. *See* GOLDSTEIN, *supra* note 9, 151–76.

64. *See* James Cannon, *Gerald R. Ford and Nelsen A. Rockefeller: A Vice Presidential Memoir*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 135–43 (Timothy Walch ed., 1997).

65. *See id.*

66. PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* 201 (Johns Hopkins Univ. Press ed., 1984).

67. *See id.* at 177–78.

68. *See id.* at 260–61.

69. *See* Shirley Anna Warsaw, *J. Danforth Quayle (b. 1947)*, in *VICE PRESIDENTS: A BIOGRAPHICAL DICTIONARY* 393–400 (L. Edward Purcell ed., 2001).

70. *See id.*

71. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 201–03.

responsibility for other policies, served as primary legislative liaison, traveled abroad extensively, acted as presidential surrogate domestically, and importantly, was involved in policy decision-making on a wide range of issues.⁷² There seems to be no question that a new paradigm has emerged and is in place for future vice presidents. For example, although Joe Biden claimed on the campaign trail that he would “adopt a much lower profile” than Cheney if elected, nothing has been further from the truth.⁷³ Biden has been an exceptionally active vice president, publicly taking the lead on a number of President Obama’s initiatives, such as overseeing implementation of the Troubled Asset Relief Program and taking the political lead in gun control reform.⁷⁴ Notably, he and Obama developed, what has been by all accounts, a superb working relationship, which has led to Biden becoming in the words of one observer, “the Most Influential Vice President in History.”⁷⁵

The following section will examine the vice presidencies of Gore, Cheney, and Biden in more detail.⁷⁶ How did these three men come to the office? How did they adjust? And most importantly, how successful were they in executing the duties of the office and why?

III. MODERN VICE PRESIDENTS

The United States has only had three vice presidents since Al Gore took office on January 20, 1993.⁷⁷ In one respect, three individuals constitute a very small sample upon which to base any conclusions about a government institution.⁷⁸ However, given the evolution of this particular office and the tenure of the past three occupants, much can be gleaned about the modern vice presidency by restricting our attention to these three.

72. *See id.* at 139–99.

73. *See id.* at 177.

74. *See id.* at 177–92.

75. Michael Hirsh, *Joe Biden: The Most Influential Vice President in History?*, ATLANTIC (Dec. 31, 2012), <http://www.theatlantic.com/politics/archive/2012/12/joe-biden-the-most-influential-vice-president-in-history/266729>.

76. *See infra* Part III.

77. *See* JOINT COMMITTEE ON PRINTING U.S. CONGRESS, OFFICIAL CONGRESSIONAL DIRECTORY 2013–2014 568 (2013).

78. *See id.* (indicating that there have been forty-seven vice presidents to serve the United States since 1789).

All three of these vice presidents share several characteristics.⁷⁹ First, all had fairly lengthy careers—twenty-five years on average—in national government office prior to the vice presidency.⁸⁰ At one extreme, Biden served in the Senate for a full thirty-eight years before agreeing to become Barack Obama’s running mate.⁸¹ At the other extreme, Gore had been a member of Congress for sixteen years, eight years each in the House and the Senate.⁸² Cheney had a varied political career.⁸³ He served in both the Nixon and Ford administrations, for a time as the latter’s Chief of Staff.⁸⁴ He also had a ten-year tenure in the House of Representatives and was George H.W. Bush’s Secretary of Defense.⁸⁵ If experience in national government equates to qualifications for the office, especially as it relates to readiness to succeed to the presidency in the event of a presidential vacancy, modern vice presidents seem to pass this test.

In addition, most modern vice presidents can be thought of as Washington insiders, familiar with the ways of Beltway politics⁸⁶—which is certainly the case with Gore, Cheney, and Biden.⁸⁷ This is important inasmuch as all three of our last presidents have been Washington outsiders, largely lacking in national government experience.⁸⁸ Both Bill Clinton and George W. Bush were state governors prior to winning the presidency, with no formal experience in national politics whatsoever.⁸⁹ Obama had been a U.S. Senator for approximately three years before his presidency.⁹⁰ In each case, these presidents were all relatively inexperienced in national politics and were able to rely on their vice presidents to help them navigate the

79. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 103.

80. See *id.* at 105 tbl.6.3.

81. See *id.*

82. See *id.*

83. See *Dick Cheney Fast Facts*, CNN, <http://www.cnn.com/2013/09/21/us/dick-cheney-fast-facts/> (last updated Jan. 9, 2016).

84. See *id.*

85. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 108.

86. See *id.* at 108.

87. See *supra* notes 81–85 and accompanying text.

88. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 108.

89. See David J. Andersen & John Weingart, *Governors Who Became President*, RUTGERS, <http://governors.rutgers.edu/on-governors/us-governors/governors-and-the-white-house/governors-who-became-president/> (last visited Jan. 20, 2017).

90. See *Barack Obama*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/Photo_Barack_Obama.htm. (last visited Jan. 20, 2017).

sometime labyrinth ways of national politics.⁹¹ Each vice president brought a store of knowledge regarding how Congress actually works, as well as personal connections in Congress that the vice president was able to use to the advantage of the administration.⁹² This was especially true in Biden's case.⁹³ Cheney was also well versed in the ways of the national bureaucracy, given his background in the Executive Branch.⁹⁴

The last three vice presidents were also fairly well-known national figures.⁹⁵ This is important considering that the press have treated less well-known vice presidents (e.g., Dan Quayle) and vice presidential candidates (e.g., Geraldine Ferraro, Sarah Palin) somewhat negatively.⁹⁶ This is not to suggest that all vice presidents receive positive press coverage.⁹⁷ Nothing could be further from the truth. Unpublished research of my own, for example, empirically confirms what most observers probably suspect: that Dick Cheney was the subject of significantly more negative news stories than Gore, Biden, and perhaps surprisingly, Quayle.⁹⁸ The point is that all things being equal, negative treatment in the national press would tend to reduce the efficacy of a vice president, and being a relative unknown seems to increase the chance that news coverage will be negative.⁹⁹

These men share a few other characteristics. First, all three were party men.¹⁰⁰ All worked well with their party's congressional delegations and all did yeoman's service in campaigning for congressional candidates.¹⁰¹ This fact is significant inasmuch as it is fashionable in some circles to imagine that a presidential candidate might consider an individual from the opposing party as a running mate, like the reports that John McCain may have been

91. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 108.

92. See *id.* at 103.

93. See *id.* at 177–78.

94. See *id.* at 139–99.

95. See Jody C. Baumgartner, *The Post-Palin Calculus: The 2012 Republican Veepstakes*, 45 PS: POL. SCI. & POLS. 605, 605–09 (2012).

96. See STACY G. ULBIG, VICE PRESIDENTS, PRESIDENTIAL ELECTIONS, AND THE MEDIA: SECOND FIDDLES IN THE SPOTLIGHT 55–56 (2013).

97. See *id.* at 56.

98. See *id.*; see also Jeffrey M. Jones, *VP Favorable Ratings: Gore Down; Cheney, Biden Flat*, GALLUP (July 14, 2010), <http://www.gallup.com/poll/141269/favorable-ratings-gore-down-cheney-biden-flat.aspx> (“Cheney is viewed the least positively of the three most recent vice presidents.”).

99. See ULBIG, *supra* note 96, at 62.

100. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 109.

101. See *id.* at 202.

leaning toward Joe Lieberman in 2008.¹⁰² The reality is that the political party matters in politics, even in party-wary America, and this is certainly true at the presidential level.¹⁰³

Finally, all three of these men were trusted by and loyal to their presidents.¹⁰⁴ Neither trust nor loyalty could be assumed prior to the modern era.¹⁰⁵ John Calhoun, for example, broke with Andrew Jackson on at least two votes in the Senate, and John Nance Garner openly challenged Franklin Roosevelt for the Democratic Nomination in 1940.¹⁰⁶ Gore, Cheney, and Biden all had true and meaningful partnerships with their presidents.¹⁰⁷ Each was trusted with substantive policy decisions at various points, had the ear of his president, and importantly, never wavered publicly in his support for the administration.¹⁰⁸

In Gore's case, this relationship seemed to grow organically from the moment he and Clinton met.¹⁰⁹ The two seemed, in other words, to be both personally compatible and politically simpatico.¹¹⁰ And although he was later disappointed to learn the truth of it, Gore was notably supportive of Clinton during the Lewinsky scandal.¹¹¹ George W. Bush's trust of Cheney began well before the two took office, with Cheney discussing foreign policy with then-Governor Bush, while Bush was considering a run for the presidency.¹¹² Bush subsequently relied on Cheney to conduct his search for a running mate and organize the transition to the presidency after the election.¹¹³ Biden seemed to have to work a bit harder to gain Obama's trust, primarily because of this tendency to go "off script" on the campaign

102. See Jody C. Baumgartner, *The Veepstakes: Forecasting Vice Presidential Selection in 2008*, 41 PS: POL. SCI. & POLS. 765, 765–72 (2008).

103. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 103.

104. See *id.* at 202.

105. See *id.* at 32.

106. See LOUIS CLINTON HATCH, *A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES* 105–06 (1934); see also JODY C BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY RECONSIDERED* 26 (2006).

107. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 4.

108. See *id.*

109. See *id.* at 141.

110. See *id.* at 126–27.

111. See John M. Broder, *Clinton's Affair Took a Toll on Relationship with Gore*, N.Y. TIMES (Mar. 3, 2000), <https://partners.nytimes.com/library/politics/camp/030400wh-dem-gore2.html>.

112. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 158.

113. See *id.*

trail.¹¹⁴ In fact, at one point during the 2008 campaign, Biden was effectively shut out of high-level strategy discussions and shut off from Obama.¹¹⁵ This changed, and the two established an excellent working relationship fairly early on in their tenure.¹¹⁶

Vice presidents in the modern era have been, generally speaking, politically experienced individuals: familiar with the ways of Washington politics, no strangers to national media exposure, and loyal party men.¹¹⁷ In other words, the fairly recent example of Dan Quayle notwithstanding, all have been practiced politicians.¹¹⁸ Moreover, vice presidents have been trusted by their presidents; and therefore, involved in the administration.¹¹⁹ All of this may be comforting to those who see readiness for ascension to the presidency as a prerequisite for the job.

IV. RECENT VICE PRESIDENTS: SUCCESSES AND FAILURES

More differences between Gore, Cheney, and Biden emerge when examining their respective successes and failures in office. However, from the start it should be noted that there is no generally agreed upon rubric for evaluating vice presidents (or presidents, for that matter). Therefore, any discussion of successes and failures will to some degree be, of necessity, subjective. It should also be noted that modern vice presidents do many of the same tasks as did their predecessors throughout history.¹²⁰ For example, modern vice presidents, acting as presidential surrogates, perform a variety of symbolic acts: opening hospitals and bridges, visiting the sites of natural disasters, attending funerals, and so on.¹²¹ Vice presidents are also asked to work for the benefit of their party and their party's candidates during political campaigns.¹²² This they typically do with great vigor.¹²³

114. *See id.* at 128.

115. *See id.*

116. *See id.* at 139–99.

117. *See* Mark Rathbone, *US Vice Presidents*, HIST. TODAY (Dec. 2011), <http://www.historytoday.com/mark-rathbone/us-vice-presidents>.

118. *See id.*

119. *See id.*

120. *See* Jody C. Baumgartner, *Scoundrel or Über-Lieutenant? The Vice Presidency of Dick Cheney*, 29 AM. REV. POL. 235, 245–46.

121. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 119–20.

122. *See id.* at 110–15.

123. *See id.*

Although Walter Mondale avoided being charged with any formal policy-oriented tasks (known as line assignments), it is still fairly commonplace for presidents to ask their vice presidents to oversee either the formulation, implementation, or both, of particular public policies.¹²⁴ And while the evaluation of the merits of any given policy are open to debate, we can use these policies as a rough measure of vice presidential success in this regard. One of the first things Al Gore was asked to do during his tenure was lead the “reinventing government” initiative (the National Performance Review) to cut government waste and improve bureaucratic responsiveness and service delivery.¹²⁵ He was also the face of the Clinton administration in its push to pass the North American Free Trade Act, famously besting failed presidential candidate H. Ross Perot on a nationally televised debate over the issue in the fall of 1993.¹²⁶ In addition, Clinton allowed Gore to take the lead in developing relations with Russia, primarily through personal contact with Russian Prime Minister Viktor Chernomyrdin.¹²⁷ Finally, Gore was also quite influential in guiding the administration’s environmental and technology policies.¹²⁸

George W. Bush gave Dick Cheney his first assignment before the two even took office.¹²⁹ Cheney was asked to organize and lead the presidential transition.¹³⁰ Somewhat perhaps presaging their coming eight years in office, this sparked some controversy because Cheney began the effort while the 2000 presidential election recount and associated court cases were still underway.¹³¹ Shortly after his inauguration, Bush put Cheney in charge of the National Energy Policy Development group, which was largely

124. *See id.* at 118–19.

125. *See* John Kamensky, *A Brief History of Vice President Al Gore’s National Partnership for Reinventing Government During the Administration of President Bill Clinton 1993–2001*, NAT’L PARTNERSHIP FOR REINVENTING GOV’T (Jan. 12, 2001), <http://govinfo.library.unt.edu/npr/whoweare/historyofnpr.html>.

126. *See* 1993 *NAFTA Debate: Al Gore vs Ross Perot (Full Debate)*, CNN POLITICS (Nov. 9, 1993), <http://www.cnn.com/videos/politics/2016/09/02/nafta-debate-1993-al-gore-ross-perot-entire-larry-king-live.cnn/video/playlists/larry-king-live-interviews/>.

127. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 146.

128. *See* SCOTT W. RAGER, *Albert Arnold Gore, Jr., (b. 1948)*, in *VICE PRESIDENTS: A BIOGRAPHICAL DICTIONARY* 401–12 (L. Edward Purcell ed., 2001).

129. *See* Nina Totenberg, *Cheney: A VP with Unprecedented Power*, NPR (Jan. 15, 2009), <http://www.npr.org/templates/story.story.php?storyId=99422633>.

130. *See id.*

131. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 161–62.

responsible for setting the administration's energy policy.¹³² Cheney seemed to have been influential in the President's decision to renege on a campaign promise to try and lower carbon-dioxide emissions, shaping the 2001 budget that led to tax cuts, warrantless wiretapping, and other administration policies, not least of which was the decision to invade Iraq in 2003.¹³³ While his influence noticeably waned during his second term, there is no question that Cheney worked closely with Bush on matters of public policy.¹³⁴

Joe Biden was more active in formally helping implement and shape public policy.¹³⁵ For example, one of his first jobs was overseeing the economic stimulus package (the American Recovery and Reinvestment Act) by, among other things, serving as the main point of contact with state and local officials around the country.¹³⁶ He also served as chair of a newly created Middle Class Task Force, designed to explore child and elderly care, retirement savings, and other issues affecting the middle class.¹³⁷ He headed a Gun Violence Task Force formed after the Sandy Hook Elementary School shootings in 2012, a review of federal training programs designed to recommend how to make gun-control programs more accessible and effective, and, in his last year in office, a major initiative to advance cancer research.¹³⁸

According to the Constitution, vice presidents have a role in the legislative process.¹³⁹ As President of the Senate, the Vice President historically presides over the business of that body, but Nelson Rockefeller was the last vice president to do so with any regularity.¹⁴⁰ This duty is now typically discharged by a senior senator acting as president *pro tempore*.¹⁴¹ In addition, vice presidents are required to break tie votes in the Senate, but

132. See Baumgartner, *supra* note 120, at 235–52.

133. See *id.* at 239.

134. See *id.* at 235–52.

135. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 177–82.

136. See *id.* at 181–82.

137. See JULES WITCOVER, *THE AMERICAN VICE PRESIDENCY: FROM IRRELEVANCE TO POWER* 504 (2014).

138. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 182; Sarah Wheaton & Sarah Karlin, *Biden Launches Moon Shot for a Cancer Cure*, POLITICO (Jan. 16, 2016), <http://www.politico.com/story/2016/01/joe-biden-cancer-research-moonshot-217854>.

139. See U.S. CONST. art. II, § 1, cl. 3.

140. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 123.

141. See U.S. CONST. art. I, § 3, cl. 5.

this also happens relatively infrequently.¹⁴² The Vice President's true value to the President, in terms of the legislative process, is the work he does acting as presidential liaison with members of Congress.¹⁴³ Here, pre-existing relationships can be quite helpful.¹⁴⁴

Each of the last three vice presidents have worked diligently with Congress to promote the president's agenda.¹⁴⁵ Gore, for example, was instrumental in helping push the North American Free Trade Act through Congress.¹⁴⁶ Cheney, as former Minority Whip in the House of Representatives, worked closely with the Republican caucus in both the House and the Senate.¹⁴⁷ He was the first Vice President to maintain offices in the House as well as the Senate, and he regularly attended meetings of the House Republican leadership.¹⁴⁸ Biden has a number of legislative accomplishments to his credit, helping in the passage of the administration's 2009 stimulus package and the ratification of the 2010 START Treaty, working in budget negotiations with Congress to avoid a government shutdown in 2011, and more.¹⁴⁹

Vice presidents since Richard Nixon have all made numerous trips abroad.¹⁵⁰ In the case of a few vice presidents (e.g., Spiro Agnew), some of these trips were likely designed to get the vice president out of the way of the media spotlight or perhaps even the president.¹⁵¹ In the past, many vice presidents were sent abroad in part to burnish their foreign policy credentials, in preparation for a bid for the presidency.¹⁵² In many cases,

142. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 116–17.

143. See Paul T. David, *The Vice Presidency: Its Institutional Evolution and Contemporary Status*, 29 J. POL. 721, 725 (1967) (“Garner became Vice President in 1933 with a definite understanding that he would attend cabinet meetings and assist in maintaining liaison between the Executive and Legislative Branches, as he did for several years.”); Molly Redden, *A Brief History of Joe Biden's Up-and-Down Vice Presidency*, NEW REPUBLIC (Jan. 6, 2013), <http://newrepublic.com/article/111649/joe-biden-ups-and-downs-his-vice-presidency>.

144. See Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRESIDENTIAL STUD. Q. 374, 382–83 (2008).

145. See *infra* notes 146–49 and accompanying text.

146. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 146.

147. See *id.* at 165.

148. See *id.*

149. See *id.* at 185–86.

150. See *id.* at 71.

151. See *id.* at 72.

152. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 145–46.

trips abroad are ceremonial in nature.¹⁵³ Lyndon Johnson, for example, was sent to represent the United States at the funerals of former United Nations Secretary General Dag Hammarskjöld and Pope John XXIII.¹⁵⁴

However, in most cases, the vice president is given at least some amount of substantive diplomacy to conduct.¹⁵⁵ Gore, for example, made numerous trips to a wide range of countries throughout his tenure and was responsible for a variety of policies.¹⁵⁶ Notably, he traveled to Japan in 1997 to help pass the Kyoto Treaty, and, through frequent meetings with Russian prime ministers, was responsible for much of U.S. policy with Russia.¹⁵⁷ Biden was a prodigious traveler, hardly surprising given his years on the Senate Foreign Relations Committee.¹⁵⁸ Biden also frequently travelled abroad during his time in the Senate and consequently knows many foreign leaders.¹⁵⁹ During his tenure as Vice President, Biden lent a helping hand in virtually every diplomatic hot spot the United States has been involved in around the globe, traveling to more than two dozen countries in every region of the world.¹⁶⁰ He was especially active in Iraq, Afghanistan, and the Middle East.¹⁶¹

Finally, and this is very arguably the hallmark feature of the modern vice presidency, the past three vice presidents have had the President's ear.¹⁶² All met regularly and privately with their presidents to talk about various public policy alternatives.¹⁶³ Beginning with Nelson Rockefeller, the Vice President has had regular weekly lunch with the President during which they could privately exchange views.¹⁶⁴ This practice continued for the Gore, Cheney, and Biden vice presidencies, but there was also

153. *See id.*

154. *See* GOLDSTEIN, *supra* note 9, at 165.

155. *See infra* notes 156–61 and accompanying text.

156. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 145–46.

157. *See id.*

158. *See id.* at 183, 185.

159. *See id.* at 169.

160. *See* James Traub, *After Cheney*, N.Y. TIMES (Nov. 24, 2009), <http://www.nytimes.com/2009/11/29/magazine/29Biden-t.html>.

161. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 145–46.

162. *See infra* notes 163–67 and accompanying text.

163. *See infra* note 165 and accompanying text.

164. *See* Mark O. Hatfield, *Nelson Aldrich Rockefeller, 41st Vice President (1974–1977)*, SENATE HIST. OFF. 1, 7 (1997), http://www.senate.gov/artandhistory/history/resources/pdf/nelson_rockefeller.pdf.

significant daily interaction between the President and Vice President in the case of each.¹⁶⁵ Cheney, for example, met with Bush every morning during meetings of the National Security Council and several times throughout the day.¹⁶⁶ Biden met with Obama every morning and, most days, spent several hours with him throughout the day.¹⁶⁷

How often this interaction between vice president and president translated into actual influence is open to debate. However there seems to be little question that, in at least some cases, vice presidents helped shape presidential decision-making, or at minimum, fortified presidential resolve on positions presidents had already taken.¹⁶⁸ All three, for example, had at least some input on some initial (and on a few subsequent) presidential appointments.¹⁶⁹ However, vice presidential influence seems to extend beyond presidential appointments. Gore, for example, helped shape Clinton's 1995 efforts to lead the North Atlantic Treaty Alliance's efforts in Bosnia-Herzegovina and his strategy in the 1995–1996 budget battle with Congress, and helped Clinton overcome his misgivings about the 1996 welfare reform efforts.¹⁷⁰ George W. Bush adopted most of the recommendations of Cheney's energy task force, and according to reports, Cheney was at least partially responsible for the Bush administration's reversal on a promise to lower carbon dioxide emissions and cut special-education funding.¹⁷¹ Perhaps most infamously, Cheney was staunchly in favor of invading Iraq in 2003.¹⁷² Biden was instrumental in helping Obama shape U.S. strategy in both Afghanistan and Iraq.¹⁷³

To summarize, all three of our most recent vice presidents can count numerous successes. There are, however, entries on the negative side of the ledger for each as well. Most notably, the influence each seemed to have

165. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 169, 190; see also *Albert Arnold Gore, Jr., 45th Vice President (1993–2001)*, SENATE HIST. OFF. 1, 9, http://www.senate.gov/artandhistory/history/resources/pdf/Gore,_Albert.pdf (last visited Jan. 20, 2017).

166. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 169.

167. See *id.* at 169, 190.

168. See, e.g., *id.* at 149 (“Often Gore’s contributions came in the form of quiet advice that helped shape debate, reinforce the president’s position, or support him when he seemed to vacillate.”).

169. See *id.* at 149, 169, 190.

170. See *id.* at 149.

171. See *id.* at 169.

172. See *id.*

173. See *id.* at 191.

with the President may have waned somewhat during the second term.¹⁷⁴ This is probably most clear with Cheney and Bush.¹⁷⁵ During his second term, Bush seemed to rely more on a less-hawkish Condoleezza Rice for foreign policy direction and advice, perhaps in part to resuscitate his public image.¹⁷⁶ Of the three, Cheney is almost certainly the least well thought of.¹⁷⁷ He was accused of a variety of “sins” throughout his tenure, including advocating questionable legal policies in the war on terror, being too secretive, orchestrating the “outing” of Central Intelligence Agent Valerie Plame, and perhaps most damning of all, manipulating the President.¹⁷⁸ It is fair to say that the majority of elites have an overall negative view of Cheney’s vice presidency.¹⁷⁹ In addition, his public approval ratings (both favorability and job approval) plunged into the lower thirty percent range by the end of his second term.¹⁸⁰

The negatives for both Gore and Biden were perhaps less obvious, certainly to the general public.¹⁸¹ Unlike Cheney, both had favorability and job approval ratings that hovered around the fifty percent range throughout their terms in office.¹⁸² Because it was understood that Gore intended to run for President in 2000, there may have been a perception that some of the actions he took during his second term were politically motivated.¹⁸³ However, this never became the dominant narrative.¹⁸⁴ Biden continued (and likely will continue, given his personality) to make the occasional gaffe while in office.¹⁸⁵ However, most created only a minor stir for one or two news cycles.¹⁸⁶ He also invested a good deal of political capital in his failed

174. *See id.* at 202.

175. *See id.* at 170.

176. *See id.*

177. *See infra* notes 178–80 and accompanying text.

178. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 157–72 (discussing Cheney’s tenure as Vice President and his criticism for the “various policies he advocated, his secretive manner, his penchant to go around standard bureaucratic procedures, and for presumably exercising undue influence over the president”).

179. *See generally* Baumgartner, *supra* note 120.

180. *See* BAUMGARTNER & CRUMBLIN, *supra* note 6, at 206.

181. *See id.* at 203 (“Accounts of Gore and Biden seem to be generally positive.”).

182. *See id.* at 205–06.

183. *See id.* at 147 (“It should be noted that some of Gore’s public political activity was likely designed and executed with an eye toward a run for the presidency in 2000.”).

184. *See id.*

185. *See id.* at 180.

186. *See id.*

attempt to move Congress to adopt stricter gun control measures in the wake of the Sandy Hook shootings.¹⁸⁷ This, however, is unlikely to be seen as a failure, given the reticence of a Republican-led Congress to tinker with so-called gun rights.¹⁸⁸ In all, both the Gore and Biden vice presidencies were viewed more positively than the Cheney vice presidency.

V. MOVING FORWARD: LEGAL AND POLITICAL QUESTIONS

In the modern era, the vice presidency has been transformed.¹⁸⁹ Vice presidents, once passive constitutional legislative officers, are active para-constitutional executive assistants and advisers to their respective presidents.¹⁹⁰

It could be argued that the emergence of the modern model of an active, executive vice presidency was a fitting resolution to the unsolved dilemma facing the framers, namely, what to do with the Vice President. The problem of an office with a decidedly marginal role in the constitutional scheme of governance (after all, there were several other reasonable alternatives suggested with regard to presidential succession or presiding over the Senate) became even more acute in the post-Twelfth Amendment era.¹⁹¹ Prior to this, qualified and competent individuals could believe they had a chance of winning the presidency.¹⁹² Afterwards, being relegated to the second spot on the ticket meant four years in the political wilderness, with a good chance of being dropped from the ticket if the president ran for re-election.¹⁹³ Moreover, an active vice president that serves as a presidential right-hand man is consistent with the 1937 Brownlow

187. See Tanya Somanader, *Vice President Biden Heads to Capitol Hill to Tell Republicans in Congress: Do Your Job*, WHITE HOUSE (Sept. 8, 2016, 9:25 AM), <https://www.whitehouse.gov/blog/2016/09/08/vice-president-biden-heads-capitol-hill-tell-congress-do-your-job>.

188. See Sarah Wheaton, *Biden's Misfire on Gun Control*, POLITICO (Oct. 12, 2015 11:10 AM), <http://www.politico.com/story/2015/10/joe-biden-gun-control-effort-sandy-hook-214644> (“None of the advocates, Hill aides, current and former senators, White House officials and others close to the negotiations holds Biden personally responsible for defeat in another battle with the fearsome gun lobby.”).

189. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 83–95.

190. See *id.* at 210.

191. See *id.* at 13.

192. See *id.* at 25 (“Under the original system, any individual that received votes from the Electoral College had the potential to become [P]resident.”).

193. JODY C BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY RECONSIDERED* 7–9, 13–14 (2006).

Commission's assertion that the modern president "needs help" in the execution of his duties.¹⁹⁴

However, a vice president who is more active and who is part of a reciprocally loyal relationship with the President poses other questions—many of which are related—for the republic.¹⁹⁵ For example, what is the Vice President's job? "Cheney was partly correct when he claimed he was 'not part of the Executive Branch,' except for the fact that he was so patently wrong."¹⁹⁶ The reality is that modern vice presidents occupy a para-constitutional netherworld as a legislative officer clearly working for the president.¹⁹⁷ But who is the Vice President ultimately answerable to? The Senate? The President? The American people? Upon what set of criteria should we evaluate vice presidents? When the vice president speaks or acts, is he speaking for himself or for the president? How could a president control a rogue vice president? How much influence should a vice president have over presidential decisions?

As important as these questions are, at the end of the day, they are normative questions, and as such, are largely unanswerable in any definitive sense. However, there are a number of legal and constitutional questions arising from the development and emergence of an active executive vice presidency as well. For example, does executive privilege apply to vice presidents? Can a vice president be impeached for actions taken on presidential direction? The articles in this Issue speak to several of these questions.

194. James W. Fesler, *The Brownlow Committee Fifty Years Later*, 47 PUB. ADMIN. REV. 291–96 (1987).

195. See BAUMGARTNER & CRUMBLIN, *supra* note 6, at 203–10.

196. *Id.* at 210.

197. See *id.*
