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A REALISTIC LOOK AT THE VICE PRESIDENCY: WHY DICK CHENEY IS AN “ENTITY WITHIN THE EXECUTIVE BRANCH”

INTRODUCTION

Few would argue that the office of the Vice President has remained stagnant over the course of American history. What began as a weak institution whose primary duty was to preside over the Senate¹ has blossomed into a position of international reach and influence.² The office owes its success not only to the men who have occupied the post, but also to the Presidents who have advanced its role in government. It has been with the permission and cooperation of their Presidents that the Vice Presidents of today participate in “some of the most important decisions for the country’s policies.”³

But despite the office’s close connection to the Commander in Chief, Vice President Richard B. Cheney has declared that the office is “not . . . an entity within the executive branch,” and therefore not subject to executive orders.⁴ Instead, his advisors argue that since he is the President of the Senate, he is also a part of the Legislature.⁵ The statement was attacked by news columnists,⁶ lambasted by internet bloggers,⁷ and ridiculed by late night

1. See U.S. CONST. art. I, § 3, cl. 4; see also *infra* text accompanying notes 62, 67–68.

2. Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 812 (2005).

3. 110 CONG. REC. S8277 (daily ed. June 22, 2007) (statement of Sen. Durbin).

4. Letter from J. William Leonard, Dir. of the Info. Sec. Oversight Office, Nat’l Archives and Records Admin., to David S. Addington, Assistant to the President and Chief of Staff to the Vice President (June 8, 2006), available at <http://oversight.house.gov/documents/20070621095027.pdf>.

5. See Scott Shane, *Agency Is Target in Cheney Fight on Secrecy Data*, N.Y. TIMES, June 22, 2007, at A1.

6. See, e.g., Maureen Dowd, Op-Ed., *A Vice President Without Borders, Bordering on Lunacy*, N.Y. TIMES, June 24, 2007, § 4, at 15 (“[I]t’s quite a leap to go from hiding in a secure, undisclosed location in the capital to hiding in a secure, undisclosed location in the Constitution.”); Frank Rich, Op-Ed., *When the Vice President Does It, that Means It’s Not Illegal*, N.Y. TIMES, July 1, 2007, § 4, at 12.

7. See, e.g., Steven Taylor, *The Office of the Vice President Does Not Consider Itself an “Entity Within the Executive Branch,”* on PoliBlog, <http://www.poliblogger.com/?p=12133> (June 21, 2007) (“The assertion that the veep’s office is not part of the executive branch is perhaps the most absurd thing that I have heard in some time.”). Others even believed that Cheney’s statement was evidence that he committed fraud. See Posting of Mitchell W. Berger & Gregory A. Haile to ACSBlog, *Guest Blogger: Cheney’s Claims Could Expose Him to Suit*,

comedians.⁸ Senator Dick Durbin declared, “It is hard to imagine the tortured logic Vice President Cheney is using to avoid the requirements of the law and Executive orders.”⁹

What makes Cheney’s statement seem so absurd to so many people? After all, some of the nation’s Founding Fathers, including Thomas Jefferson and John Adams, considered the office to be “constitutionally confined to legislative functions.”¹⁰ Aside from being the President’s successor, the Constitution gives the Vice President only one official role: to preside over the Senate where he can cast the tie-breaking vote during deadlocks.¹¹ Furthermore, the Framers deliberately placed this duty in Article I with the Legislature, not in Article II with the Executive.¹² Clearly they believed that the Vice President’s constitutional duties belonged to the Senate and the Legislative Branch.¹³ One might therefore contend that Cheney’s statement has substance within the framework of the Constitution and the intentions of its drafters.

During the twentieth century, however, “the vice presidency . . . evolved into a position of new importance.”¹⁴ Cheney in particular has been called the most powerful Vice President in the nation’s history.¹⁵ His influence in the Bush Administration touches everything from energy concerns and foreign policy to editing tax proposals and refereeing cabinet disputes.¹⁶ In response to Cheney’s claim that he is not part of the Executive Branch and therefore not bound by executive orders, White House press spokeswoman Dana Perino commented, “This is an interesting constitutional question that legal scholars

<http://www.acsblog.org/separation-of-powers-guest-blogger-cheney-claims-could-expose-him-to-suit.html> (July 5, 2007, 12:53 EST) (“[I]f he continued to maintain his position [Cheney] may have committed a fraud . . . when he asserted that he was a member of the Executive Branch.”).

8. See, e.g., *The Daily Show with Jon Stewart* (Comedy Central television broadcast June 22, 2007).

9. 110 CONG. REC. S8277 (daily ed. June 21, 2007) (statement of Sen. Durbin).

10. Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), in 7 THE WRITINGS OF THOMAS JEFFERSON 119, 120 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1896).

11. U.S. CONST. art. I, § 3, cl. 4.

12. *Id.*

13. Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 515 (1995).

14. JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 13 (1982).

15. See Jo Becker & Barton Gellman, *Angler: The Cheney Vice Presidency: A Strong Push from Backstage*, WASH. POST, June 26, 2007, at A1 [hereinafter *A Strong Push*]; *Nightline: Cheney Wields Unprecedented V.P. Power* (ABC television broadcast Nov. 29, 2003) (“[Cheney’s] power is unparalleled in the history of the republic, frankly, for that position.” (statement of John Hulsman, research fellow at The Heritage Foundation)).

16. See *A Strong Push*, *supra* note 15.

can debate.” White House Press Secretary Tony Snow also stated, “It is a wonderful academic question. . . .”¹⁷

But it is dangerous to trivialize Cheney’s statement as an academic exercise among legal scholars.¹⁸ His actions tread on one of the Constitution’s most sacred principles—the separation of powers.¹⁹ “Congress has a responsibility under the Constitution to conduct oversight of the executive branch.”²⁰ In a letter to the Vice President, Representative Henry Waxman called Cheney’s decision to exempt his office from the Executive Branch “problematic because it could place national security secrets at risk.”²¹ The concern for Cheney’s statement, therefore, is not limited to the obscure realm of constitutional academia. Rather, it is a concern for all Americans who have witnessed the government’s response to national security, environmental issues, the energy crisis, and economic recession.

This Comment does not propose amendments to the Constitution or try to fix an office that has been criticized as “fundamentally flawed.”²² Instead, this Comment attempts to answer a more basic question: To which branch of government does Vice President Cheney belong? I argue that although the office began as a Constitutional anomaly, located somewhere between both the Legislative and Executive Branches, it has gradually migrated into the latter. Part I discusses the historical context of the office and the Founding Fathers’ original intentions. Part II examines the changing view of the office, particularly during the twentieth century when Presidents began to give their Vice Presidents more executive duties. I argue that the Twenty-Fifth

17. AM: *Cheney ‘A Law unto Himself’* (Australian Broadcasting Corp. radio broadcast June 27, 2007), available at <http://www.abc.net.au/am/content/2007/s1963294.htm>.

18. See GOLDSTEIN, *supra* note 14, at 9 (“Such indifference among scholars may once have been appropriate. It no longer is. Compelling arguments justify a detailed consideration of the vice presidency.”).

19. See SAUL K. PADOVER, *TO SECURE THESE BLESSINGS* 333 (1962) (“If it be essential to the preservation of liberty that the legislative, executive, and judiciary powers be separate, it is essential to a maintenance of the separation that they should be independent of each other.” (attributing the comment to James Madison)).

20. House Committee on Oversight and Government Reform, Administration Oversight, <http://oversight.house.gov/investigations.asp?ID=101> (last visited Dec. 15, 2008).

21. Letter from Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov’t Reform, to Richard Cheney, U.S. Vice President (June 21, 2007), available at <http://oversight.house.gov/documents/20070621093952.pdf>.

22. Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1705 (1988). Friedman identifies “three basic problems with the vice-presidency: the method of nomination, the method of election, and the office itself.” *Id.* at 1703. Friedman then proposes three solutions: that the Vice President hold another office of significance within the Executive Branch, that the Vice President be separately nominated, and that the Vice President be separately elected. *Id.* at 1705. For a counterargument, see Goldstein, *supra* note 13, at 549–59, arguing that Friedman’s proposals are “fundamentally at odds with the vision behind the Twenty-fifth Amendment.”

Amendment's realistic approach not only envisioned a stronger Vice President, but also one firmly rooted within the Executive Branch.²³ Finally, Part III applies these lessons to Cheney's Vice Presidency. This Comment concludes by critiquing Cheney's statement as a futile attempt to remove himself nominally from the branch in which he is realistically entrenched both by his activism in the White House and by the Constitution.

I. THE ORIGINAL VICE PRESIDENCY

"[U]nder the Constitution, I have legislative responsibilities. I'm actually paid by the Senate, not by the Executive. I sit as the President of the Senate, as the presiding officer in the Senate. I cast tie-breaking votes in the Senate."²⁴

At its heart, Cheney's argument is based upon an understanding that the Framers of the Constitution intended the office of the Vice President to be situated in the Legislative Branch of government. The strength of this argument necessarily relies upon the belief that the Constitution should be interpreted according to what the document meant to the generation that originally drafted and ratified it.²⁵

A. Framers' Original Intent

The Founding Fathers did not want the office of the Vice President.²⁶ Even in his defense of the institution, Alexander Hamilton begins by admitting that the Vice Presidency was "objected to as superfluous, if not mischievous."²⁷ Why then was it created? The most obvious purpose of the Vice President was to provide a "substitute for the president," since there needed to be some line of succession should the President be unable to fulfill

23. See generally Goldstein, *supra* note 13, at 523–40 (demonstrating the growth of the Vice Presidency and the differences between what the Founding Fathers and the Framers of the Twenty-Fifth Amendment envisioned for the office).

24. CBS Radio News: VP Dick Cheney on Gonzales, Libby, Iraq (CBS radio broadcast July 30, 2007) [hereinafter Cheney Interview], available at <http://audio.cbsnews.com/2007/07/30/audio3113288.mp3> (statement of Richard Cheney); see also U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.").

25. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 542 (1999). Originalists would argue that the purpose of the Constitution is to prevent change. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (Amy Gutmann ed., 1997).

26. See PADOVER, *supra* note 19, at 392 (attributing the comment to Hugh Williamson).

27. THE FEDERALIST NO. 68, at 347 (Alexander Hamilton) (Garry Wills ed., 1982).

his duties.²⁸ But there were other ways to choose a successor to the President.²⁹

Professor Joel Goldstein suggests that the office provided both a means of presidential succession and a solution to presidential elections.³⁰ Early in the debates, it was agreed that the President would be chosen by special electors from each state.³¹ Each elector was to vote “for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.”³² The person with the most votes would become President, and the runner-up would be the Vice President.³³ The Framers feared that unless their second votes had some significance, electors would strategically throw one of their votes so that a candidate from their home state would prevail.³⁴ Thus, the Vice President “was introduced merely for the sake of a valuable mode of election which required two to be chosen at the same time.”³⁵

The delegates did not discuss the function of the Vice President until the closing days of the Convention.³⁶ Even then, little was apparently said.³⁷ Nonetheless, their silence may speak volumes about their intentions for the office. Early in the debates, it was agreed that executive power would be vested in a single President.³⁸ Giving the “next highest after the President”³⁹

28. *Id.*

29. See GOLDSTEIN, *supra* note 14, at 4 (noting that there were suggestions at the Constitutional Convention to have the Chief Justice of the Supreme Court become the successor to the President).

30. See Goldstein, *supra* note 13, at 512.

31. See PADOVER, *supra* note 19, at 351–52.

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

33. Joel K. Goldstein, *An Overview of the Vice-Presidency*, 45 *FORDHAM L. REV.* 786, 789 (1977).

34. See Goldstein, *supra* note 13, at 512; see also PADOVER, *supra* note 19, at 359 (“The only objection which occurred was that each citizen, after having given his vote for his favorite fellow-citizen, would throw away his second on some obscure citizen of another state in order to ensure the object of his first choice.” (attributing the comment to James Madison)). Some delegates, however, believed that the partiality of each state for their own favorite son served a useful purpose. JULES WITCOVER, *FROM ADAMS AND JEFFERSON TO TRUMAN AND QUALYE: CRAPSHOOT—ROLLING THE DICE ON THE VICE PRESIDENCY* 15 (1992) (“Let the people of each State choose its best Citizen.” (quoting John Dickinson)).

35. PADOVER, *supra* note 19, at 392 (attributing the comment to Hugh Williamson).

36. Goldstein, *supra* note 33, at 789 (noting that the “[c]reation of the Vice-Presidency was an afterthought”).

37. Goldstein, *supra* note 13, at 510.

38. See PADOVER, *supra* note 19, at 330–31 (indicating that the idea of a single Executive was approved at the Convention on June 4, 1787). A single President was not appealing to all of the delegates. See *id.* at 327–31. Edmund Randolph vigorously argued for three executives, regarding unity as “the foetus of monarchy.” *Id.* at 328. This lingering threat of a monarchy loomed in the hearts of some of the delegates while they discussed the role of a Vice President. See *id.* at 392 (noting that George Mason “was averse to vest so dangerous a power in the President alone”).

any official role in the Executive Branch, therefore, might have threatened the concept of unity. The Vice President was to be the runner-up of a competitive election, and there would naturally be some animosity between two of the nation's most prominent leaders.⁴⁰ If too much power was shared within the Executive Branch, "the most bitter dissensions [would be] apt to spring," which would "lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide."⁴¹ Thus, the delegates' silence regarding the role of the Vice President in the Executive Branch indicates their caution in giving the office too much constitutional authority.

This is not to say that the Framers wanted the Vice President removed entirely from view. After all, he naturally carried a "weighty role" as the potential successor to the President.⁴² They thought it necessary then to give him "at least one official function."⁴³ In a vote of eight to two the delegates finally agreed that the Vice President would be, *ex officio*, the President of the Senate.⁴⁴ This was a relatively meaningless position, which even the Framers knew would be a "no-show job."⁴⁵ Although the role appeared largely inconsequential, it conveniently solved one dilemma facing the delegates. Because there were an even number of senators, it was necessary for there to be a president of the assembly to cast a tie-breaking vote during deadlock.⁴⁶ Removing one state's senator in order that he may be the presiding officer would weaken that state's representation; therefore, it was necessary to bring in someone else.⁴⁷

Nonetheless, the Vice President's role in the Senate created controversy.⁴⁸ One of the greatest concerns confronting the Founding Fathers was to preserve the fundamental principle of separation of powers that they had worked so hard to promote.⁴⁹ By its nature, some believed that the office of the Vice President would be "an encroachment on the rights of the Senate" that would "mix[] too

39. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 576 (W.W. Norton & Co. 1987) (1840).

40. See Goldstein, *supra* note 13, at 516.

41. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 27, at 357.

42. Albert, *supra* note 2, at 820.

43. *Id.* at 821.

44. PADOVER, *supra* note 19, at 391–92.

45. Friedman, *supra* note 22, at 1707–08; see Goldstein, *supra* note 13, at 512 ("This role seems at most an incidental benefit of the office, a ready chore so the Vice President could earn his keep.").

46. THE FEDERALIST NO. 68, *supra* note 27, at 347.

47. PADOVER, *supra* note 19, at 392 ("[S]ome member by being made President must be deprived of his vote . . ." (attributing the comment to Roger Sherman)); see THE FEDERALIST NO. 68, *supra* note 27, at 347.

48. See PADOVER, *supra* note 19, at 391–92.

49. Goldstein, *supra* note 13, at 515.

much the legislative and the executive.”⁵⁰ Moreover, the anti-Federalists of the group feared that the Executive Branch would be too strong and might overpower the Legislature through the Vice Presidency.⁵¹ One delegate quipped, “We might as well put the President himself at the head of the legislature.”⁵² This suggests that these delegates believed the office was rightfully an executive position being forced upon the Legislature.

The fruit of the deliberations at the 1787 Constitutional Convention was an institution whose purposes were rooted in the Executive Branch, but whose duties were legislative. The Vice President was therefore situated in both branches, but welcome at neither address.⁵³ The Founders’ reservations toward creating the office no doubt resulted in a weak institution riddled with ambiguity.⁵⁴ It is not surprising, then, that problems soon arose.

B. Problems that Arose with the Vice Presidency

1. Impotence of the Office

The office of the Vice President was initially filled by very capable leaders.⁵⁵ John Adams and Thomas Jefferson, both of whom would later become Presidents, were the first two to fill the spot.⁵⁶ It was no accident. The Founders carefully considered the qualifications for the second in line as they debated the method for choosing the Chief Executive. In the *Federalist Papers*, Hamilton wrote, “[A]ll the reasons, which recommend the mode of election prescribed for the one, apply with great, if not with equal, force to the manner of appointing the other.”⁵⁷ But the first Vice Presidents approached the office with reluctance and hesitation, realizing that their actions would have a profound impact on the operations of the office well into the future.⁵⁸

Adams was particularly wary of intruding upon the President’s executive authority.⁵⁹ He attended few cabinet meetings and advised the President only upon occasion.⁶⁰ Consequently, his influence in Washington’s Administration was limited more to the Executive Branch’s ceremonial undertakings than

50. PADOVER, *supra* note 19, at 392 (attributing the comment to George Mason IV).

51. Albert, *supra* note 2, at 825.

52. PADOVER, *supra* note 19, at 391 (attributing the comment to Elbridge Gerry).

53. Goldstein, *supra* note 13, at 508.

54. *Id.* at 518.

55. GOLDSTEIN, *supra* note 14, at 6.

56. *Id.*

57. THE FEDERALIST NO. 68, *supra* note 27, at 347.

58. See MARK O. HATFIELD, VICE PRESIDENTS OF THE UNITED STATES 1789–1993, at 17 (Wendy Wolff ed., 1997).

59. *Id.* at 6–7.

60. *Id.* at 6.

policy determinations.⁶¹ Instead, Adams focused on his role as President of the Senate, stating that the Vice President was “totally detached from the executive authority and confined to the legislative.”⁶² In his capacity as President of the Senate, Adams cast twenty-nine tie-breaking votes, far more than any Vice President since.⁶³ Yet, even as head of the Legislature, Adams was frustrated by the limitations of his office.⁶⁴ The task of presiding rather than debating was not quite adapted to his character.⁶⁵ “[M]y country has in its wisdom contrived for me,” he stated, “the most insignificant office that ever the invention of man contrived or his imagination conceived. And as I can do neither good nor evil, I must be borne away by others, and meet the common fate.”⁶⁶

Jefferson, too, realized the impotence of the Vice Presidency. Having fundamentally different views from Adams, who had defeated him in the 1796 election, Jefferson was not interested in being the Chief Executive’s assistant.⁶⁷ Instead, Jefferson confined his role in government to that of President of the Senate, where he promised to approach his duties “with more confidence” than his predecessor.⁶⁸ Nonetheless, Jefferson could not stop Adams and the Federalists from pushing through legislation that Jefferson believed violated the Constitution.⁶⁹ When he called for the states themselves to nullify the federal laws, Jefferson was only able to muster support from the legislatures of his home state Virginia and neighboring Kentucky, both of which modified what they believed to be his rather extreme rhetoric.⁷⁰

The point of illustrating the first two Vice Presidencies here is not to criticize their failure to contribute to American politics. Indeed, both Adams and Jefferson served as leaders of their respective parties, which in and of itself indicates their contributions. Rather, the first two Vice Presidencies demonstrate how the office was an ineffective means of wielding political power. Without presidential backing or executive authority, the Vice President

61. *Id.*

62. *Id.* at 7.

63. See Senate Historical Office, Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate (Mar. 13, 2008), available at <http://www.senate.gov/artandhistory/history/resources/pdf/VPTies.pdf>.

64. HATFIELD, *supra* note 58, at 7; see also Goldstein, *supra* note 13, at 519 (“[T]he office was a sinecure, a prescription for frustration for the nation’s second citizen.”).

65. HATFIELD, *supra* note 58, at 7.

66. 1 THE WORKS OF JOHN ADAMS 460 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856).

67. HATFIELD, *supra* note 58, at 20–21.

68. *Id.* at 20.

69. See *id.* at 23.

70. See *id.* at 23–24.

was no more than a “constitutional luxury,”⁷¹ even for men who had substantial political clout.⁷² The formation of political parties during the 1790s would reduce the Vice President’s political standing even further.⁷³

2. Political Weaknesses

As early as the 1790s, the politics of the nation were substantially different from that desired by the delegates of the Constitutional Convention.⁷⁴ In his farewell address, President Washington discouraged the nation from creating political parties.⁷⁵ Dependence on political allies undermined the competition among the branches that the Constitution had envisioned.⁷⁶ Nonetheless, the rising tide of political factions was inevitable. By 1796, parties had formed presidential tickets, designating one candidate for President and another for Vice President in the hopes of attracting more support from different regions of the country.⁷⁷ The party system exposed one of the weaknesses in the Constitution and called for an amendment that left the Vice President as nothing more than a vestigial remnant of an obsolete design.⁷⁸

In the disastrous election of 1800, both Jefferson and Aaron Burr of the Republican ticket received the same number of electoral votes.⁷⁹ The Framers had anticipated ties in the electorate and provided a remedy: “[I]f there be more than one who have such Majority, and have an equal Number of Votes,

71. Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, NEXUS, Spring 1997, at 11, 16; see GOLDSTEIN, *supra* note 14, at 146.

72. Adams and Jefferson are not the only examples of strong leaders who failed to win respect for the new office of the Vice Presidency. Consider, for example, John C. Calhoun, a powerful congressman who had chaired the Foreign Affairs Committee during the War of 1812 and served as President Monroe’s Secretary of War. HATFIELD, *supra* note 58, at 85–86. As Vice President, Calhoun could not convince President John Quincy Adams to stay out of South American affairs. See *id.* at 88. Even as a presiding officer during the “Golden Age of the Senate,” Calhoun failed to win respect for the office. See *id.* at 84, 90 (“[I]t is not the duty, nor the right, of the President of the Senate to call a member to order.” (quoting John Randolph)).

73. See GOLDSTEIN, *supra* note 14, at 6.

74. See *id.*

75. See George Washington, President of the United States, Farewell Address (Sept. 17, 1796), reprinted in 6 ANNALS OF CONG. app. 2869, 2873–74 (1796) (“[A]ll combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are . . . of fatal tendency.”).

76. See Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 110 (2006); see also PADOVER, *supra* note 19, at 363 (“[C]onsidering the powers of the President and those of the Senate, if a coalition should be established between these two branches, they will be able to subvert the Constitution.” (attributing the comment to George Mason IV)).

77. See GOLDSTEIN, *supra* note 14, at 6.

78. See *id.*

79. *Id.*

then the House of Representatives shall immediately chuse by Ballot one of them for President⁸⁰ However, in the unlikely event of a tie,⁸¹ they had planned for a resolution between adversaries, not allies.⁸² Even Aaron Burr speculated that “[t]he Matter of V.P—is of very little comparative Consequence,” since the election would probably end with Jefferson as President and Adams as Vice President.⁸³

Although Jefferson eventually won the dispute by a vote in the House of Representatives, the country had come dangerously close to electing a man whom the people never wanted to be President.⁸⁴ Thus, an amendment which provided a separate election for the Vice President and the President was proposed.⁸⁵ However, some feared that the Vice President would become an office “worse than useless.”⁸⁶ He would “not stand on such high ground in the method proposed as he” did in the previous system of a double ballot.⁸⁷ Consequently, they believed that the office would attract men of inferior quality.⁸⁸ There were even attempts to abolish the office entirely.⁸⁹ Nonetheless, these attempts failed, and the Twelfth Amendment was ratified on September 25, 1804.⁹⁰ Caught between two competing branches without any meaningful role in either, the office of the Vice President was struggling to survive past its infancy.

3. Succession Under Article II

If the primary purpose of the Vice Presidency—that of providing a means to secure a President—posed problems, so did the Vice President’s other purpose of providing a successor to the Commander in Chief. This problem stemmed from the Framers’ ambiguous, if not careless, choice of words in drafting the Constitution.⁹¹ Article II states: “In Case of the Removal of the

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

81. *See* PADOVER, *supra* note 19, at 364 (“It is probable that a majority of the votes will fall on the same man; as each elector is to give two votes, more than one-fourth will give a majority.” (attributing the comment to Gouverneur Morris)).

82. *See* Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 312 (1999) (“Presidents did not hand-pick their Vice-Presidents, who were more likely to be rivals than partners.”).

83. HATFIELD, *supra* note 58, at 35 (quoting Aaron Burr).

84. GOLDSTEIN, *supra* note 14, at 6.

85. *Id.*

86. *Id.* (quoting Roger Griswold).

87. *Id.* (quoting Samuel Taggart).

88. *See id.* at 6–7 (“[T]he vice-presidential nomination was awarded as a consolation prize to a defeated faction of a party. The credentials of some nominees were ludicrous.”).

89. *See* GOLDSTEIN, *supra* note 14, at 6.

90. *Id.* at 6–7.

91. *See* WITCOVER, *supra* note 34, at 17 (“The convention, ironically, seemed much more concerned with whether the vice president would serve as president of the Senate than with the

President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President”⁹²

But what does “the Same shall devolve” mean? If “the Same” refers to “Powers and Duties,” then the Vice President would merely act as President until a successor was chosen.⁹³ If “the Same” refers to “Office,” then the Vice President would in fact become President.⁹⁴ Fortunately, the nation was not forced to decide the meaning until 1841, when the sudden death of William Henry Harrison launched Vice President John Tyler into the number one spot.⁹⁵ Tyler believed that the Constitution meant to confer upon him not only the powers and duties, but also the title of President.⁹⁶ When Harrison’s Cabinet, among others, complained of his usurpation, Tyler responded, “I am the President, and I shall be held responsible for my administration.”⁹⁷

Amid the growing popularity of Tyler’s new found epithet, “His Accidency,” Congress convened in a special meeting to resolve the issue.⁹⁸ One Congressman suggested the Legislature address Tyler as “Vice President now exercising the office of President.”⁹⁹ Another envisioned a major struggle if a President were only temporarily disabled and later sought to resume power.¹⁰⁰ However, Senator Calhoun reminded the Senate that this was not the current dilemma, and Congress adopted a resolution recognizing Tyler’s legitimate claim to the Presidency.¹⁰¹ This created “a new constitutional understanding” of the office,¹⁰² which gave the Vice Presidency more substance. Should the number one spot become vacant, the Vice President would actually become President and not merely a temporary fix. Eventually, the Twenty-Fifth Amendment incorporated the “Tyler precedent” into the Constitution.¹⁰³

infinitely more important matter of his succession to the presidency if fate or circumstance dictated.”).

92. U.S. CONST. art. II, § 1, cl. 6.

93. Goldstein, *supra* note 13, at 517. Professor Goldstein argues: “The drafts of the pertinent provisions at the Constitutional Convention contained language that envisaged the Vice President as a substitute who might occasionally exercise presidential powers and duties, not as an officer who would become President.” *Id.*

94. *Id.*

95. HATFIELD, *supra* note 58, at 142.

96. *See id.* at 143.

97. *Id.* (quoting John Tyler).

98. *Id.*

99. *Id.*

100. HATFIELD, *supra* note 58, at 144.

101. *Id.*

102. Goldstein, *supra* note 13, at 522.

103. U.S. CONST. amend. XXV, § 1 (“In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”).

II. THE MODERN VICE PRESIDENCY

Despite the Vice President's importance as successor to the President, until midway through the twentieth century, the office was useful only as a means of securing votes for presidential nominees. Political parties were far less concerned with a vice presidential candidate's qualifications to run the country than with the state that he called home.¹⁰⁴ But the needs of the nation shifted, and the office adapted. Modern Vice Presidents enjoy broad international reach and influence, often using the office as a "springboard to the Presidency."¹⁰⁵ President Franklin Roosevelt realized the importance of the Vice President when he stated: "While my heart and lungs are good and the other organs functioning along okay . . . nothing in life is certain. . . . It's essential that the man who runs with me should be able to carry on."¹⁰⁶

But the path to the modern Vice Presidency was not a smooth ride. Although the office has changed dramatically over the past two hundred years, these changes came in several increments.¹⁰⁷ No single person created the modern Vice Presidency. It was a confluence of factors including global events, constitutional amendments, and political forces that contributed to the office's current state.¹⁰⁸

A. *Roosevelt Sets the Stage for the Modern Vice President*

Recent Vice Presidents have shared a close political link with their Commanders in Chief. But this was not always the case. Until the mid-twentieth century, the convention, not the President, picked vice presidential nominees.¹⁰⁹ Party leaders generally looked for candidates who could balance the ticket, satisfy a party faction, or bring in key votes.¹¹⁰ They paid little attention to the pair's personal and political compatibility. Often, the chosen candidate reluctantly accepted the vice presidential nomination and approached

104. See HATFIELD, *supra* note 58, at 167 (attributing the fact that eight of the twenty-two Vice Presidents during the nineteenth century called New York home to the state's high number of electoral votes).

105. Albert, *supra* note 2, at 812; see GOLDSTEIN, *supra* note 14, at 11 ("Occupants of the office in this century have almost invariably been considered presidential timber.").

106. WITCOVER, *supra* note 34, at 76 (alteration in original) (quoting Jim Farley's account of a conversation with Franklin D. Roosevelt).

107. See GOLDSTEIN, *supra* note 14, at 8; see also Albert, *supra* note 2, at 812 ("There have been four pivotal constitutional moments in vice presidential history.").

108. See Albert, *supra* note 2, at 831. Vice presidential scholar Richard Albert divides the evolution of the office along three axes: substantive functions, structural components, and political purposes. *Id.*

109. GOLDSTEIN, *supra* note 14, at 47.

110. *Id.* at 48.

the office with little enthusiasm.¹¹¹ Additionally, presidential candidates were not always fond of their running mates, and some even viewed their Vice Presidents as political adversaries.¹¹² Needless to say, the lack of a strong bond between the two did not help advance the stature of the Vice Presidency.

But as the country found itself in the throes of depression and war, a new sense of national urgency allowed President Franklin Roosevelt to transform the Executive Branch and, necessarily, his relationship with the Vice President.¹¹³ The Founding Fathers had envisioned that Congress would create legislation, which the President would then enforce.¹¹⁴ Roosevelt reversed these roles.¹¹⁵ He became actively involved in initiating and seeking congressional support for legislation as part of his “New Deal.”¹¹⁶ The New Deal opened the flood gates that had been holding back the power of the Executive Branch.

Roosevelt needed help to control the enormous growth of government activity.¹¹⁷ The Reorganization Act of 1939 allowed him to appoint assistants within the Executive Branch.¹¹⁸ But Roosevelt also needed a liaison between the White House and Capitol Hill, which he found in his Vice President, John Nance Garner.¹¹⁹ Although initially a reluctant candidate for Vice President, “Cactus Jack” immediately proved to be invaluable to the Roosevelt Administration.¹²⁰ His long legislative experience and desire to impact Congressional decisions made him Roosevelt’s “political general,” leading the charge on Capitol Hill.¹²¹ Realizing the importance of Garner’s sway over the conservatives in Congress,¹²² Roosevelt made his Vice President an integral

111. Vice President Garret Hobart, for example, felt ambivalent about the honor of being nominated. HATFIELD, *supra* note 58, at 290. Others, like William Wheeler, even refused to campaign. *Id.* at 245.

112. For example, President Ulysses S. Grant questioned the motivations of his Vice President, Schuyler Colfax, when Colfax returned from an alleged retirement from politics. *See id.* at 227–28.

113. David K. Nichols, *Congressional Dominance and the Emergence of the Modern Presidency: Was Congress Ever the First Branch of Government?*, in SEPARATION OF POWERS AND GOOD GOVERNMENT 113, 113 (Bradford P. Wilson & Peter W. Schramm eds., 1994).

114. GOLDSTEIN, *supra* note 14, at 26–27.

115. *Id.* at 27.

116. *See* Nichols, *supra* note 113, at 113–14.

117. *See* JOHN HART, THE PRESIDENTIAL BRANCH FROM WASHINGTON TO CLINTON 26 (2d ed. 1995).

118. *Id.* at 30.

119. *See* HATFIELD, *supra* note 58, at 388–89.

120. *Id.* at 385, 388.

121. *Id.* at 389.

122. *Id.* at 388 (“[T]he new vice president renewed political alliances with over twenty of his former colleagues . . . [S]ome of them had become the leaders of the party’s conservative wing of southern and western Democrats, who held the key committee chairmanships.”).

part of his Administration. He invited Garner to attend all cabinet meetings,¹²³ and frequently phoned him to solicit opinions about proposals for legislation.¹²⁴ Garner often harbored personal opposition to some of the President's political agenda, but he dutifully convinced reluctant lawmakers to support the President's "good politics and good patriotism."¹²⁵

Vice President Garner, however, did not forget his conservative ties to Congress. When Roosevelt needed support for his attempt to pack the Supreme Court with more liberal justices, Garner showed his disapproval first by holding his nose and gesturing with a "thumbs down" when the plan was introduced, and then by going on "a vacation" with his wife when the Senate was about to vote on the proposal.¹²⁶ "This is a fine time to jump ship," fumed Roosevelt.¹²⁷ The tension between the two reached a climax when Roosevelt ran for an unprecedented third term. "No man should exercise the great powers of the presidency too long," stated Garner.¹²⁸ It was evident that if Roosevelt wanted another term, he would have to find a new running mate.¹²⁹

Roosevelt's experience with Garner convinced him that he needed to find a Vice President with whom he shared the same ideologies, not just someone who would do his bidding in Congress.¹³⁰ He found such a partner in Henry Wallace, and Roosevelt was adamant about having Wallace as his running mate.¹³¹ When it was brought to Roosevelt's attention that the Democratic convention might not select Wallace for the vice presidential spot, he barked, "Well damn it to hell . . . they will go for Wallace or I won't run, and you can jolly well tell them so."¹³² Needless to say, Wallace was chosen.¹³³ Roosevelt's personal role in selecting his running mate over the wishes of party leaders represented a huge shift in the vice presidential selection

123. WITCOVER, *supra* note 34, at 71.

124. HATFIELD, *supra* note 58, at 388.

125. *Id.* at 389.

126. WITCOVER, *supra* note 34, at 73–74.

127. HATFIELD, *supra* note 58, at 391.

128. WITCOVER, *supra* note 34, at 75.

129. *Id.*

130. *See* HATFIELD, *supra* note 58, at 399.

131. *See id.*; WITCOVER, *supra* note 34, at 78 ("Henry's not a mystic, he's a philosopher, a liberal philosopher, and I'm sure that he'll be all right." (quoting Franklin D. Roosevelt)).

132. WITCOVER, *supra* note 34, at 78 (quoting Franklin D. Roosevelt).

133. *See id.* at 80. Despite some dissention among party conservatives, who were concerned about Roosevelt being a three-term President, he won in a landslide over his competitors for the Democratic nomination. *See id.* at 76 ("The vote was FDR 946, Farley 72, Garner 61, Senator Millard Tydings of Maryland 9, Secretary of State Cordell Hull 5.").

process.¹³⁴ The personal compatibility of the ticket became a major factor¹³⁵—a trend that would continue to this day.¹³⁶

B. A New Executive Officer

Over the next several years, Vice Presidents assumed more executive duties. With his eyes set on the war clouds over Europe, Roosevelt appointed Wallace as the chairman of the Economic Defense Board.¹³⁷ Additionally, Wallace was the first Vice President to take an active role in foreign policy as the President's personal ambassador to countries throughout South America, Europe, and Asia.¹³⁸ Vice President Alben Barkley, under President Harry Truman,¹³⁹ was given an ex officio membership to the National Security council.¹⁴⁰

As they took on more executive functions, Vice Presidents spent less time in Congress.¹⁴¹ With the array of new functions President Dwight D. Eisenhower had given him, it is no wonder that Vice President Richard Nixon found his constitutional role as presiding officer of the Senate dull.¹⁴² Eisenhower gave Nixon both domestic and foreign projects,¹⁴³ earning him a role as the President's advisor in both policy and politics.¹⁴⁴ As Eisenhower's personal ambassador, Nixon traveled through fifty-four countries and met with forty-five heads of state during his eight years as Vice President.¹⁴⁵ On the home front, Eisenhower used Nixon's political savvy to broker deals with powerful senators who were trying to undermine the Administration.¹⁴⁶ Despite his active role in Eisenhower's Administration, Nixon was careful not to usurp power when the President suffered a coronary attack.¹⁴⁷ Nixon's

134. *See id.* at 81.

135. *Id.*

136. *See* Stephen Goode, *Quayle Predicts Dole Will Pick a Governor*, INSIGHT, Aug. 28, 1995, at 12, 13 ("There 'must be a comfort level between the president and the vice president' that is genuine." (quoting Dan Quayle)).

137. WITCOVER, *supra* note 34, at 81.

138. HATFIELD, *supra* note 58, at 403.

139. *See* Robert H. Ferrell, *Seasoned Politicians: Harry S. Truman and Alben W. Barkley as Vice Presidents*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 63, 63 (Timothy Walch ed., 1997).

140. Albert, *supra* note 2, at 833.

141. Barkley was the last Vice President to preside regularly over the Senate. HATFIELD, *supra* note 58, at 427.

142. *Id.* at 442.

143. Albert, *supra* note 2, at 833.

144. HATFIELD, *supra* note 58, at 438.

145. *Id.* at 442.

146. *Id.* at 438–39 (illustrating the methods Nixon used in handling the Bricker Amendment and the "McCarthy problem").

147. *Id.* at 443.

ability “to provide leadership without appearing to lead” during this time was praised by even his sharpest critics.¹⁴⁸

C. *The Twenty-Fifth Amendment Forges a New Vision of the Office*

President Eisenhower’s brush with death and President John F. Kennedy’s assassination once again brought the issue of succession to the forefront of national concern.¹⁴⁹ The Twenty-Fifth Amendment was proposed to provide a smooth transition of power in the event of a presidential vacancy—whether by death, resignation, removal, or disability.¹⁵⁰ Unlike the Framers of the original Constitution, the Framers of the Twenty-Fifth Amendment had the advantage of hindsight.¹⁵¹ They witnessed the failures of the original design for the Vice Presidency, and this experience put them in a much better position to fix the problems.¹⁵² Consequently, their perception of the office was far different from that of the Founding Fathers.¹⁵³

First, the Framers of the Twenty-Fifth Amendment saw the Vice President as the true successor to the President rather than a mere temporary replacement.¹⁵⁴ Section 1 of the Amendment confirms the Tyler precedent,¹⁵⁵ stating: “In case of the removal of the President from office or of his death or resignation, the Vice President *shall become* President.”¹⁵⁶ This simply makes constitutional in text what was “constitutional in fact.”¹⁵⁷ Before the adoption of the Twenty-Fifth Amendment, every President who died in office was

148. *Id.* (quoting Richard Nixon).

149. See Richard M. Nixon, *We Need a Vice President Now*, SATURDAY EVENING POST, Jan. 1, 1964, reprinted in *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 88th Cong. 238 (1964) [hereinafter *1964 Senate Hearings*] (“It is a tragic fact that it took a terrible crime in Dallas to remind us of a serious defect in our constitutional process. The murder of our President has forced us to reassess our law of succession and the office of the Vice President.”).

150. See GOLDSTEIN, *supra* note 14, at 202.

151. See *1964 Senate Hearings*, *supra* note 149, at 22 (statement of Sen. Kenneth B. Keating, Member, S. Subcomm. on Constitutional Amendments) (“The limits of human foresight can perhaps explain why the Founding Fathers left the glaring omissions and silences on Presidential inability we perceive today in article II of the Constitution.”).

152. See *id.* (statement of Sen. Kenneth B. Keating, Member, S. Subcomm. on Constitutional Amendments) (“Having had no operating experience, so to speak, under the novel institution of the Presidency which they were creating, it may well be that those wise statesmen counted upon the trial-and-error process of experience to galvanize their descendants into finally devising an adequate and lasting solution.”).

153. Goldstein, *supra* note 13, at 540.

154. *Id.* at 537.

155. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 193 (2d ed. 1992).

156. U.S. CONST. amend. XXV, § 1 (emphasis added).

157. Goldstein, *supra* note 13, at 527.

succeeded by his Vice President under the Tyler precedent.¹⁵⁸ Nonetheless, the Amendment was an important step toward securing the validity of the office and ensuring the Vice President's status as the President's rightful heir.

Second, the Framers of the Twenty-Fifth Amendment saw the Vice Presidency as a necessary institution within the government.¹⁵⁹ Their view of its importance is underscored by the mere fact that Section 2 of the Amendment provides a means of succession to the Vice Presidency¹⁶⁰—something the Framers at the 1787 Convention did not even consider during their debates.¹⁶¹ The Framers of the Twenty-Fifth Amendment had witnessed the growth of the office during the twentieth century, and they realized that it was indispensable.¹⁶² Senator Bayh referred to it as “the second most important office in the land,” and he emphasized its “resurgence and redevelopment” during the Eisenhower and Kennedy Administrations.¹⁶³ Senator Fong echoed the sentiments of the nation by proclaiming that “[n]o one in America today doubts that the Vice-Presidency is an office of paramount importance.”¹⁶⁴ Former Vice President Richard Nixon even suggested that the office should continue to expand and assume greater responsibilities.¹⁶⁵ Because the office had received more power from the Chief Executive, it was “no longer the ornamental office that it once was.”¹⁶⁶

Finally, the Framers of the Twenty-Fifth Amendment spoke of the Vice President increasingly as a member of the Executive Branch.¹⁶⁷ While the

158. See GOLDSTEIN, *supra* note 14, at 10 (listing vice presidential successors to the President).

159. 1964 *Senate Hearings*, *supra* note 149, at 2 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments) (“Why have a Vice President? Hasn’t this office been the object of sharp satire since the Constitutional Convention created it as an afterthought? . . . Maybe so—once upon a time. But no more—not in 20th century America.”).

160. U.S. CONST. amend. XXV, § 2; see also 1964 *Senate Hearings*, *supra* note 149, at 1 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments) (stating that the best way to preserve stability in the event that both a President and Vice President die within the same four year term is to “make certain that the Nation always has a Vice President as well as a President”).

161. Goldstein, *supra* note 13, at 526.

162. See FEERICK, *supra* note 155, at 33.

163. 110 CONG. REC. 22,986 (1964) (statement of Sen. Bayh).

164. *Id.* at 22,993 (statement of Sen. Fong).

165. See Nixon, *supra* note 149, at 238 (“Clearly there can be no reversal of this trend toward greater duties and responsibilities for the Vice President.”).

166. 1964 *Senate Hearings*, *supra* note 149, at 52 (statement of Sen. Jacob K. Javits).

167. Goldstein, *supra* note 13, at 531. In fact, Senator Keating proposed that there be two Vice Presidents, one who discharged executive duties and another who discharged legislative duties. 1964 *Senate Hearings*, *supra* note 149, at 26–27 (statement of Sen. Kenneth B. Keating, Member, S. Subcomm. on Constitutional Amendments). This idea was rejected by others who felt that the Vice President should continue to grow in stature and that spreading the duties too thin would undermine this advancement. See *id.* at 5 (statement of Sen. Birch Bayh, Chairman, S.

Founding Fathers only spoke of a “close intimacy,”¹⁶⁸ there is no shortage of quotes from the debates over the Twenty-Fifth Amendment that indicate the Framers’ attitude toward the relationship between the Chief Executive and the Vice President. In his opening statement before the Senate Subcommittee on Constitutional Amendments, Senator Bayh noted:

The Vice President is today an integral part of Cabinet meetings. Modern-day Presidents seek the advice and counsel of their Vice Presidents. The Vice President is a statutory member of the National Security Council. He is Chairman of the President’s Committee on Equal Employment Opportunity. He is Chairman of the National Aeronautics and Space Council.¹⁶⁹

Senator Jacob K. Javits would later add that the Vice President is “a worldwide traveler for American goodwill” who “must be kept abreast of the critically important knowledge and basis for decision which inhere in the Presidency.”¹⁷⁰ Representative Byron G. Rogers believed the Vice President worked more closely with the President than did any other cabinet member.¹⁷¹ Attorney General Nicholas Katzenbach even referred to the Vice Presidency as a “high command of the executive branch of the Government.”¹⁷² The point was clear to the Framers of the Twenty-Fifth Amendment: by 1967 the Vice President had “become a full-fledged, working member of the executive branch.”¹⁷³

D. Moving the Vice Presidency to the Executive Branch

The conception of this new Vice President, found within the vision of the Twenty-Fifth Amendment, soon proved to be a reality. Even as the Amendment was being drafted, Vice President Hubert Humphrey was taking the office to a new level of activism “as the busiest vice president in history during his first year in office.”¹⁷⁴ President Johnson used Humphrey much like

Subcomm. on Constitutional Amendments); Nixon, *supra* note 149, at 237. Moreover, the legislative Vice President would have practically no meaningful post as only the President of the Senate, and the office would attract men of inferior political stature. See *1964 Senate Hearings*, *supra* note 149, at 5 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments).

168. See PADOVER, *supra* note 19, at 391 (attributing the comment to Elbridge Gerry).

169. *1964 Senate Hearings*, *supra* note 149, at 2 (statement of Sen. Birch Bayh, Chairman, S. Subcomm. on Constitutional Amendments).

170. *Id.* at 52 (statement of Sen. Jacob K. Javits).

171. *Presidential Inability: Hearings Before the H. Comm. on the Judiciary*, 89th Cong. 159–60 (1965) [hereinafter *1965 House Hearings*] (statement of Rep. Byron G. Rogers, Member, H. Comm. on the Judiciary).

172. *Id.* at 108 (statement of Nicholas Katzenbach, U.S. Att’y Gen.).

173. See 110 CONG. REC. 22,996 (1964) (statement of Sen. Bayh).

174. ALBERT EISELE, *ALMOST TO THE PRESIDENCY: A BIOGRAPHY OF TWO AMERICAN POLITICIANS* 235 (1972).

Roosevelt used Garner in persuading Congress to adopt his proposals.¹⁷⁵ But it was clear that Humphrey was acting on behalf of Johnson and not as an independent legislative officer.¹⁷⁶ Vice President Spiro Agnew also quickly discovered that he did not belong in the Senate when Senator Len Jordan scolded, “You can’t tell me how to vote!” sending Agnew back to try his luck in the White House.¹⁷⁷ Although Vice President Dan Quayle initially tried to take an active role in the Senate, he too found himself becoming more a part of the Executive than the Legislative Branch.¹⁷⁸

Soon after the ratification of the Twenty-Fifth Amendment, the Vice President became the President’s advisor in virtually all key decisions.¹⁷⁹ Walter Mondale lobbied President Carter for a central role in his Administration.¹⁸⁰ In response, Carter invited his Vice President to every meeting that he scheduled, allowing Mondale to choose those he wanted to attend.¹⁸¹ The two also shared a weekly luncheon to exchange ideas.¹⁸² To show that Mondale’s opinion mattered, Carter moved the Vice President’s office into the West Wing for easy and regular access—a significant step both practically and symbolically, continuing to this day.¹⁸³ Mondale later explained, “[W]e entered our offices understanding—perhaps for the first time in the history of those offices—that each of us could do a better job if we maintained the trust of the other.”¹⁸⁴

That view of the relationship between the President and Vice President has persisted. Despite President Ronald Reagan’s initial misgivings about Vice President George Herbert Walker Bush, the two had weekly luncheons so that Reagan could draw from Bush’s broad experience in politics and diplomacy.¹⁸⁵ When Bush became President in his own right, he invited Quayle “to become fully informed about every aspect of the presidency.”¹⁸⁶ President Clinton and

175. See HATFIELD, *supra* note 58, at 469; *supra* text accompanying notes 113–25.

176. HATFIELD, *supra* note 58, at 469.

177. ALLEN DRURY, *COURAGE AND HESITATION* 98–100 (1971).

178. HATFIELD, *supra* note 58, at 549 (“From the viewpoint of the Executive Branch, I found the Senate disorganized and unmanageable.” (quoting Dan Quayle)).

179. Robert A. Rankin, Editorial, *Gore Expands Role of the Vice Presidency*, MIAMI HERALD, Dec. 5, 1993, at 1M (stating that the Mondale Vice Presidency “set the model for the modern vice presidency as the president’s senior advisor on virtually everything”).

180. Steven Thomma, *Mondale Advises Quayle to Fight for Office’s Stature*, MIAMI HERALD, Dec. 8, 1988, at 30A (“Mondale [still possesses] a copy of a memo he wrote 12 years ago to Jimmy Carter, then the president-elect, arguing for a more activist vice presidency.”).

181. HATFIELD, *supra* note 58, at 522.

182. *Id.*

183. Albert, *supra* note 2, at 834.

184. PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* 213 (1984) (quoting Walter Mondale).

185. HATFIELD, *supra* note 58, at 535–36.

186. *Id.* at 549.

Vice President Al Gore even presented themselves as a type of co-presidency in their bid for the White House,¹⁸⁷ where Gore quickly took an active role in environmental issues¹⁸⁸ and foreign policy.¹⁸⁹ Indeed, the Vice Presidency has come a long way from being “constitutionally confined to legislative functions.”¹⁹⁰ It is in the context of the modern Vice President under the Twenty-Fifth Amendment that we must address the question of where Cheney belongs between the Executive and Legislative Branches.

III. CHENEY’S VICE PRESIDENCY

In an interview with Mark Knoller of CBS Radio, Vice President Cheney stated that “the Vice President is kind of a unique creature . . . in that you’ve got a foot in both branches.”¹⁹¹ When pressed to state the branch to which he believes he principally belongs, Cheney responded, “Well, I suppose you could argue it either way. The fact is I do work in both branches. Under the Constitution, I’m assigned responsibilities in the Legislative Branch. Then the President obviously gives me responsibilities in the Executive Branch. And I perform both those functions”¹⁹² However, actions speak louder than words. Cheney has represented himself as a member of the Executive Branch in three ways: functionally, politically, and constitutionally.

A. *Cheney as the Chief of Staff*

From the moment he took office, one of Cheney’s major concerns was giving the Vice Presidency more power.¹⁹³ When former Vice President Dan

187. See Chris Reidy, *Spittin’ Image: Gore Is Remaking the Vice Presidency*, BOSTON GLOBE, Aug. 29, 1993, at 67 (“While Bill Clinton and Al Gore have yet to develop the sort of copresidency they seemed to hint at during the 1992 campaign, the new vice president nevertheless looms large as a potentially influential player in the administration.”); see also Michael Nelson, *Vice President’s Expectations Are Probably Too High*, TIMES UNION (Albany), Jan. 17, 1993, at E1 (“Clinton . . . publicly proclaimed before the election that there would be a ‘full partnership’ in the Clinton administration between him and Gore.”).

188. See Jodi Enda, *For Gore, Homework and Persistence Are Keys*, PHILA. INQUIRER, Nov. 5, 2000, at D3 (“Less than five months after the clean-air decision, Gore did something that took even high-ranking White House aides by surprise. As negotiations for an international treaty intended to reduce global warming stood on the brink of collapse during a conference in Japan, the vice president hopped on a plane to revive them.”).

189. See Marianne Means, Op-Ed, *Gore Closest Thing to Co-President Constitution Allows*, SEATTLE POST-INTELLIGENCER, Dec. 23, 1993, at A8 (“In one of the fastest transformations in history, Vice President Al Gore has suddenly become our designated heavy hitter in foreign policy, outdoing President Clinton and Secretary of State Warren Christopher.”).

190. Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 10, at 120.

191. Cheney Interview, *supra* note 24.

192. *Id.*

193. See *A Strong Push*, *supra* note 15.

Quayle told him of the mundane duties of the office, Cheney replied with a smile, "I have a different understanding with the president."¹⁹⁴ His understanding is "that the vice president should be the chief of staff in effect, that everything should run through his office."¹⁹⁵ Having served as President Ford's Chief of Staff, Cheney realized the potential power of the Vice President, if given the proper patron.¹⁹⁶ President Bush has been more than willing to allow his Vice President to hammer out the finer details of executive projects.¹⁹⁷ As *Washington Post* journalist Barton Gellman put it, "He doesn't just advise, he operates."¹⁹⁸

In fulfilling his constitutional responsibilities, Vice President Cheney has cast a tie-breaking vote in the Senate only eight times during his two term tenure.¹⁹⁹ In contrast, his executive responsibilities are practically limitless, impacting "whatever area [he] feels he wants to be active in."²⁰⁰ He has taken on "the iron issues" such as the economy, national security, and energy concerns, and he has become the "go-to guy on the Hill," where he presses through President Bush's legislative proposals.²⁰¹ Even Cheney himself acknowledges that he spends "more time on executive matters than legislative matters."²⁰² While he technically has responsibilities in the Senate, he predominantly focuses on his responsibilities in the White House.²⁰³

Cheney's influence in the Executive Branch is unlike that of any of his predecessors. While he has no direct constitutional authority in the Executive Branch, Cheney receives great deference from Bush's advisors.²⁰⁴ Attorney General John D. Ashcroft once observed, "When [Cheney] talked, everybody would listen."²⁰⁵ Similarly, journalist Barton Gellman noted that at meetings without the President, Cheney is "the only one everyone stands up for when he

194. Barton Gellman & Jo Becker, *Angler: The Cheney Vice Presidency: A Different Understanding with the President*, WASH. POST, June 24, 2007, at A1 [hereinafter *A Different Understanding*].

195. *A Strong Push*, *supra* note 15 (quoting John O. Marsh Jr., a former Army secretary and longtime friend of Cheney).

196. *A Different Understanding*, *supra* note 194.

197. *See A Strong Push*, *supra* note 15.

198. *Lateline: Cheney Still Has Influence, Expert Says* (Australian Broadcasting Corp. television broadcast June 28, 2007) [hereinafter *Cheney Still Has Influence*].

199. *See* Senate Historical Office, *supra* note 63.

200. *A Different Understanding*, *supra* note 194 (quoting Joshua B. Bolten, White House Chief of Staff).

201. *Id.* (quoting Mary Matalin, counselor to the Vice President).

202. Cheney Interview, *supra* note 24.

203. *See A Different Understanding*, *supra* note 194.

204. *See id.*

205. Barton Gellman & Jo Becker, *Angler: The Cheney Vice Presidency: The Unseen Path to Cruelty*, WASH. POST, June 25, 2007, at A1 (quoting John D. Ashcroft).

walks into the room.”²⁰⁶ Crossing Cheney has even cost some officials their jobs—a lesson learned all too well by Treasury Secretary Paul H. O’Neill after he opposed Cheney on his proposal to cut taxes.²⁰⁷

Cheney is usually the last person to speak to Bush before he makes final decisions.²⁰⁸ But Cheney also has a substantial say in what the President hears first. Whereas previous Vice Presidents enjoyed a standing invitation to join the President during cabinet meetings, Cheney has intervened at the cabinet and sub-cabinet levels, even in the President’s absence.²⁰⁹ At these meetings he acts not only as a sounding board, but also as a filter, rejecting options that he deems infeasible even before they reach the President’s doorstep.²¹⁰

Occasionally, Cheney is the *only* person to talk to Bush before he makes a decision. Two months after the attacks on September 11, 2001, Cheney convinced Bush over the course of their weekly luncheon to sign an executive order that denied foreign terrorism suspects access to any court hearing.²¹¹ Secretary of State Colin Powell and National Security Advisor Condoleezza Rice were reportedly enraged to discover that they had not been consulted on such a major decision that affected both foreign policy and national security.²¹² Similarly, Attorney General John Ashcroft felt that as the President’s senior law enforcement officer, in charge of terrorism prosecutions nationwide, he should have had some input before the order was signed.²¹³ John C. Yoo, a deputy chief of the Office of Legal Counsel, argued that “[t]he issue we dealt with was: Can the president do it constitutionally? . . . [The State Department] wouldn’t have views on that.”²¹⁴ But the Vice President did, and apparently he was the only high ranking official to voice his opinion to the President.²¹⁵

In other matters, it would seem that Cheney bypasses the President altogether. When the chairmen and ranking minority members of the intelligence committees were summoned to the White House for their first briefing on government eavesdropping in the wake of 9/11, they were led immediately to the Vice President’s office.²¹⁶ Under previous Presidents,

206. *Cheney Still Has Influence*, *supra* note 198.

207. *A Strong Push*, *supra* note 15.

208. *Id.*

209. *A Different Understanding*, *supra* note 194.

210. *A Strong Push*, *supra* note 15 (“Perhaps more important than Cheney’s influence in pushing policies is his power to stop them before they reach the Oval Office.”).

211. Eugene Robinson, ‘Angler’ for Power, WASH. POST, June 26, 2007, at A21.

212. *A Different Understanding*, *supra* note 194.

213. *Id.*

214. *Id.* (noting that the State Department “hosts the archives of the Geneva Conventions and the government’s leading experts on the law of war”).

215. *Id.* (“Almost no one else had seen the [proposal].”).

216. *A Different Understanding*, *supra* note 194 (noting that Bush told a member of the intelligence committee that “the vice president should be your point of contact in the White House,” as Cheney “has the portfolio for intelligence activities”).

conversations of such gravity would at least have *involved* the Commander in Chief.²¹⁷ Similarly, Cheney has made his office a “hub of tax policy.”²¹⁸ He met with Federal Reserve Chairman Allen Greenspan more often than Greenspan met with President Bush.²¹⁹ R. Glenn Hubbard, Bush’s former Chairman of the Council of Economic Advisers stated, “I’d have conversations with [Cheney] that were at a level of detail that those with the president were not.”²²⁰

B. *What the People Wanted*

Cheney has represented himself as a member of the Executive Branch politically in two ways. First, he adds “gravitas” to the Bush Administration.²²¹ President Bush did not select Dick Cheney as his running mate to win Wyoming’s three electoral votes.²²² As Bush has explained, “I picked him because he is without a doubt fully capable of being president of the United States.”²²³ But it is doubtful that Americans were considering Cheney’s presidential qualifications when they voted for Bush.²²⁴ The people voted for the Bush/Cheney ticket because they saw in Cheney what was needed in Bush to run the White House: experience. Bush has even acknowledged this: “I’m basically a media creation. I’ve never done anything. I’ve worked for my dad. I worked in the oil business. But that’s not the kind of profile you have to have to get elected to public office.”²²⁵ Voters would not be happy with a “media creation” running the country. They needed and expected Cheney to be the President’s right hand man in the White House. Pundits promised voters that Cheney would be “a prime minister with helping to set up the White House, setting an agenda and dealing with Congress.”²²⁶ Indeed, at the Republican National Convention in 2000, Cheney stated, “I am glad to be back in the arena,” referring not to the upcoming campaign, but to the White House itself.²²⁷

217. *Id.*

218. *A Strong Push*, *supra* note 15.

219. *Id.*

220. *Id.*

221. Jonathon Karl, *Cheney’s Impressive Resume Commands Attention*, CNN, July 23, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/07/23/cheney.profile/index.html>.

222. JOHN NICHOLS, *DICK: THE MAN WHO IS PRESIDENT 172* (2004) (quoting George W. Bush).

223. *Id.*

224. *See* GOLDSTEIN, *supra* note 14, at 133 (noting that “few voters weigh heavily the attributes of competing vice-presidential candidates” and that the “primary purpose of presidential elections is to pick a President, not a contingent leader”).

225. NICHOLS, *supra* note 222, at 165 (quoting George W. Bush).

226. Karl, *supra* note 221.

227. Richard Cheney, Republican Vice-Presidential Candidate, Acceptance Speech at 2000 Republican National Convention (Aug. 2, 2000) (transcript available at <http://query.nytimes.com/>

Second, Cheney answers to only one person: the President.²²⁸ In this way, he is politically like a member of the President's staff. Members of the Legislature answer directly to the people who elect them and must constantly worry about how they appear to the public. Cheney, however, seems to care little about how he is perceived by the public or portrayed by the media.²²⁹ Having no presidential aspirations of his own,²³⁰ approval ratings in the teens do not seem to affect Cheney's decision making.²³¹ Certainly, Cheney was elected in the manner prescribed by Article II and the Twelfth Amendment. But, as Professor Goldstein has pointed out, "Even though some citizens are influenced by the vice-presidential candidates it would be inaccurate to conclude that the Vice President is really elected."²³² Rather, he was effectively appointed by Bush, following the tradition of approval by a relatively passive convention.²³³

C. *The Supreme Court Determines Cheney Is Part of the Executive Branch*

By all accounts Cheney is a secretive man,²³⁴ and he has refused to turn over documents to outside officials on more than one occasion.²³⁵ After Bush

gst/fullpage.html?res=9B04E0D8163CF930A3575BC0A9669C8B63&n=Top/Reference/Times%20Topics/Subjects/E/Elections).

228. It is worth noting here that Vice President Cheney does not always get his way. *See A Different Understanding*, *supra* note 194 ("Bush has set his own course, not always in directions Cheney preferred."). Cheney has suffered several domestic policy defeats, but word of them usually does not reach the public. *See A Strong Push*, *supra* note 15.

229. Kevin Vance, *Behind-the-Scenes Cheney: Biography Links Leadership Style to Early Work on Hill*, WASH. TIMES, July 31, 2007, at A2 (noting that Cheney has even joked, "Am I the evil genius in the corner that nobody ever sees come out of his hole? . . . It's a nice way to operate, actually"). This is in sharp contrast to other Vice Presidents, such as Richard Nixon, who used his public image to increase the significance of the Vice Presidency. *See supra* text accompanying notes 141–48.

230. *Cheney Still Has Influence*, *supra* note 198.

231. *See A Different Understanding*, *supra* note 194.

232. GOLDSTEIN, *supra* note 14, at 132; *see also* Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 POL. SCI. Q. 475, 483–84 (1974) ("No one votes for a Vice President *per se*. He is a part of a package deal . . .").

233. *See Friedman*, *supra* note 22, at 1705 ("A party's choice of its candidate for vice-president is rarely the result of any true democratic process; rather, it is almost always a matter of the presidential nominee's discretion, quickly ratified by a passive convention.").

234. *See, e.g., Cheney Still Has Influence*, *supra* note 198 ("Because [Cheney is] so secretive and stealthy you don't hear about it when he advises one course and then takes another."); *see also A Different Understanding*, *supra* 194 ("Stealth is among Cheney's most effective tools. Man-size Mosler safes . . . store the workaday business of the office of the vice president. . . . Across the board, the vice president's office goes to unusual lengths to avoid transparency.").

235. *See* Henry A. Waxman, Chairman, H. Comm. on Oversight and Gov't Reform, *Fact Sheet: The Vice President's Efforts to Avoid Oversight and Accountability*, <http://oversight.house.gov/documents/20070621095118.pdf> (last visited Dec. 15, 2008) (listing Cheney's "repeated efforts to shield the activities of his office from public scrutiny").

made Cheney Chairman of the National Energy Policy Development Group in 2001, the Government Accountability Office asked Cheney to identify the industry officials with whom his group had met.²³⁶ Cheney refused to release their names, stating: “[T]his request that in fact we’re suppose[d] to provide [Congress] with this information with respect to . . . those meetings in the Executive Branch between the Vice President and other individuals strikes me as—as inappropriate”²³⁷ Executive power, he argued, should remain free from the interference of other branches.²³⁸

The resulting Supreme Court case²³⁹ had the potential to answer key questions regarding the Vice President’s role in the Executive Branch. Cheney argued that his communications with the President were protected by the principle of separation of powers.²⁴⁰ Anticipating that his opponents would capitalize on the dual nature of the Vice Presidency, Cheney had stated in a letter to Congress, “[W]hile the Vice President is the President of the Senate, he also has executive duties and responsibilities in support of the President, as the Congress has by law recognized.”²⁴¹ Additionally, Cheney emphasized his role in the Executive Branch as a close confidant to the President.²⁴² Cheney even relied on the Recommendations Clause and the Opinion Clause, two constitutional provisions strictly limited to Article II and the Executive Branch, in order to protect his discussions with the President.²⁴³

236. *See id.*

237. *Nightline: A Conversation with Dick Cheney* (ABC television broadcast July 25, 2001).

238. Brief for the Petitioners at 30–31, *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004) (No. 03-475).

239. *Cheney*, 542 U.S. 367.

240. Brief for the Petitioners, *supra* note 238, at 12 (“[T]he legislative power and judicial power cannot be utilized to require the Vice President to disclose to private litigants the substance or the details of the process by which a President obtains information and advice from the Vice President, heads of departments and agencies, and assistants to the President in the exercise of powers committed exclusively to the President by the Constitution . . .”).

241. Letter from Richard Cheney to the House of Representatives and the Senate (Aug. 2, 2001), *reprinted in* 147 CONG. REC. S10,447 (daily ed. Oct. 10, 2001).

242. *See* Brief for the Petitioners, *supra* note 238, at 12; *see also id.* at 25–26 (arguing that the Vice President is in fact acting on behalf of the President, and therefore, the same considerations that would preclude action against the President would preclude action against the Vice President).

243. *Id.* at 37. Despite popular belief, Cheney never officially argued that he was entitled to executive privilege. *See e.g.*, Robinson, *supra* note 211 (“Didn’t Cheney claim executive privilege as his reason for keeping secret the process he followed in developing the administration’s energy policy . . . ?”). In fact, the Court in *Cheney v. United States District Court for the District of Columbia* held that Cheney did not have to assert executive privilege to prevent Congress’s broad discovery requests in a civil suit. *Cheney*, 542 U.S. at 388. Cheney believed that the separation of powers doctrine was sufficient protection for his communications with the President. Brief for the Petitioners, *supra* note 238, at 31 (“Congress cannot ‘inquire into matters which are within the exclusive province’ of the Executive This is true,

The Supreme Court agreed with Cheney, using language that repeatedly “lump[ed] the vice presidency together with the presidency.”²⁴⁴ The Court determined, “These separation-of-powers considerations should inform a court of appeals’ evaluation [of a case] involving the President or the Vice President.”²⁴⁵ Elsewhere the Court referred to Cheney as a person who is in the “closest operational proximity to the President.”²⁴⁶ The Court also explicitly rejected any argument based on cases that did not involve senior members of the Executive Branch as “altogether misplaced.”²⁴⁷ “Were the Vice President not a party in the case,” the Court admitted, “the argument . . . might present different considerations.”²⁴⁸ Cheney won his case: in the eyes of the Supreme Court, Vice Presidents are members of the Executive Branch.

CONCLUSION

Vice President Cheney’s argument that he is not an “entity within the executive branch” fails for several reasons. First, Cheney’s reliance on the Founders’ original intentions for the office has been superseded by the new wisdom of the Twenty-Fifth Amendment. While the Founders may have originally believed that the primary duties of the Vice President—as President of the Senate—were legislative, their reasons for creating the office were purely executive. The main purpose of the Vice President was to ensure that the proper President would be elected. The secondary purpose was to provide for a means of succession. The methods prescribed in the original Constitution to meet these objectives were flawed and led to major problems for a young democracy. With the advantage of hindsight, the Twelfth Amendment corrected the mode of election, and the Twenty-Fifth Amendment corrected the mode of succession. Although they were exceedingly wise, the Founding Fathers were anything but clairvoyant. Cheney is truly mistaken if he believes

moreover, without regard to the assertion of a claim of Executive privilege.” (quoting *Barenblatt v. United States*, 360 U.S. 109, 112 (1959)). Perhaps Cheney did not want to recall Nixon’s infamous use of privilege, or perhaps he did not want to open a debate about whether he would be able to assert privilege on his own behalf (thus directly bringing into question whether he belonged in the Executive Branch). See Jeffrey P. Carlin, Note, *Walker v. Cheney: Politics, Posturing, and Executive Privilege*, 76 S. CAL. L. REV. 235, 269 (2002). Nonetheless, the Court failed “to explain how, or even why, executive privilege applies to the peculiar office of the vice presidency.” Vikram David Amar, *The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues*, in *CATO SUPREME COURT REVIEW 2003–2004*, at 185, 200 (Mark K. Moller ed., 2004).

244. Amar, *supra* note 243, at 200.

245. *Cheney*, 542 U.S. at 382.

246. *Id.* at 381.

247. *Id.* at 385.

248. *Id.* at 381.

that we should rely on the Founding Fathers' original vision of the Vice Presidency in light of all the problems it created.

Second, Cheney's argument fails to account for the transformation of the office, especially over the past century. To meet the growing needs of a strong Executive, the Vice Presidency has migrated into the Executive Branch. Vice Presidents have steadily assumed a greater role as presidential advisors, ambassadors, and confidants. They have chaired significant executive posts and regularly attended presidential cabinet meetings where they have influenced key policy decisions. With an office physically located in the West Wing, Vice President Cheney has spent less time on Capitol Hill and more time in the White House at the President's disposal. As Jon Stewart put it, "[Saying that Cheney is part of the Legislative Branch is] like the Harlem Globetrotters saying they were part of Scooby and the Gang, even though they only showed up once at a haunted amusement park and once on some Christmas special that doesn't even count!"²⁴⁹

Finally, Cheney's argument fails because he himself successfully convinced the Supreme Court that the Vice President is a member of the Executive Branch. As the supreme interpreters of the Constitution, the Court has held that an overbroad discovery request made by the Legislative Branch in a civil suit against the Vice President violates the principle of separation of powers.²⁵⁰ Because there are only three branches of government, and the Vice President is obviously not in the Judicial Branch, he necessarily belongs in the Executive Branch. As one reporter observed, "He can't possibly argue that he's part of neither branch."²⁵¹ If Cheney truly believed that he were not a part of the Executive Branch, then he would have to assume that the Court was incorrect in its assessment of his own argument that he is an executive official.

Thus, the current office of the Vice President is firmly rooted within the Executive Branch, despite Cheney's best arguments to the contrary. While Cheney has been criticized by some as being one of the most reprehensible political figures in the history of the nation,²⁵² he deserves some credit for expanding the office of the Vice Presidency—an institution which has become an increasingly vital part of the government over the past one hundred years. Credit also belongs to President George W. Bush, whose willingness to delegate authority has given Cheney a proper home in the White House. But the majority of credit belongs to Cheney's predecessors during the last century,

249. *The Daily Show with Jon Stewart*, *supra* note 8.

250. *Cheney*, 542 U.S. at 391–92.

251. Dana Milbank, *The Cheese Stands Alone*, WASH. POST, June 26, 2007, at A2 (quoting Keith Koffler of Congress Daily) (internal quotation marks omitted).

252. See, e.g., John Mashek, *Cheney: The Worst Ever*, on A Capital View, <http://www.usnews.com/blogs/mashek/2007/6/11/cheney-the-worst-ever.html> (June 11, 2007, 14:59 EST).

whose vision of the Vice Presidency provided Cheney with the tools he needed to assume unprecedented powers as an entity within the Executive Branch.

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