A CONSTITUTIONAL CHAMELEON: THE VICE PRESIDENT’S PLACE WITHIN THE AMERICAN SYSTEM OF SEPARATION OF POWERS

PART II: POLITICAL BRANCH INTERPRETATION AND COUNTERARGUMENTS

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I. INTRODUCTION

This article is the second installment in a two-part treatment of the question, which branch or branches does the Vice President inhabit? The preceding piece analyzed the issue through the lens of more traditional legal interpretive methods: text, structure, jurisprudence and the views of the Framers.1 It also addressed the question from a largely static point of view. This companion piece, on the other hand, will sketch where the vice presidential position has been thought to fit within U.S. constitutional structure over time. As such, it will keep alert to the opinions of public figures, including vice presidents, and prominent commentators as well as practical indicia of branch participation. This historical narrative affirms the conclusion of the first article: that the Vice President is part of both political branches, but not part of both simultaneously, and that determining which branch he is in at a

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particular moment in time requires a contextual analysis. However, this piece adds nuance as it demonstrates that the vice presidency has evolved from being largely a legislative branch position to largely an executive branch one today. This reflects the modern expectations of the office, but does not mean the Vice President has, or even could (short of a constitutional amendment), completely sever his ties to the legislative branch.

Following the historical discussion, this article will turn to potential counterarguments to the thesis presented. These counterarguments include: 1) that the Vice President is part of neither branch; 2) that he is solely part of the legislative branch; 3) that he is solely part of the executive branch; 4) that the Vice President may not serve in both political branches because it would violate the Incompatibility Clause and the doctrine of separation of powers; 5) that the Vice President is an “officer of the United States” and therefore should be considered part of the executive branch; and 6) that the Supreme Court has already addressed the matter and consequently the question is settled. In the end, none of these counterarguments is persuasive. As a result, the argument that the Vice President is part of both elected branches—with his exact locus at a particular point in time varying depending on context—is strongly reinforced.

II. THE VICE PRESIDENT AS PART OF BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES: POLITICAL BRANCH OPINION AND PRACTICE AND THE EVOLUTION OF THE VICE PRESIDENT’S POSITION IN AMERICAN NATIONAL GOVERNMENT

At its core, this article and its companion examine the question of which branch or branches the Vice President occupies in the early twenty-first century. The answer today is different from what it was for most of American history. Prior to World War I, the Vice President was almost exclusively part of the legislative branch, with two exceptions: a handful of largely executive branch responsibilities assigned to him by Congress, and his role as the President’s heir apparent, which granted him what could be seen as a contingent remainder in the executive branch. The situation now has been almost completely reversed. Today, due to constitutional and political evolution, which will be seen to be an uneven but unmistakable progression over the past century, the Vice President is almost exclusively part of the
executive branch and his legislative branch role has been reduced to a rare, mostly ceremonial role.\(^5\) That said, several scenarios could be envisioned that might prompt a return of the Vice President to full-time legislative branch duty.

Since no court has ever squarely decided the issue of which branch the Vice President falls within, an inquiry into this question must also look to authorities outside the judiciary. The views of officials in the executive and legislative branches, and in particular vice presidents themselves, are vital for gaining a sense of where the Vice President resides (and has resided) within American constitutional structure.\(^6\) These perceptions reflect important exegeses of constitutional clauses; clauses that, despite subsequent amendments, still govern the vice presidency. Perceptions by such non-judicial officials also refute the view propounded by some in recent years that the Vice President is and has always been solely a part of the executive branch.\(^7\) They are also important to consult because constitutional interpretation by the political branches has long been granted deference by the courts,\(^8\) particularly when the officials involved are interpreting their own institutional authority.\(^9\) This is because federal officials, such as vice presidents, take an oath of office. To take such an oath and comply with it one established by convention, and vice presidents acquired some presidential duties of modest proportions.”).


6. See, e.g., Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“The Constitution is a framework for government. Therefore, the way the framework has consistently operated fairly establishes that it has operated according to its true nature.”).

7. See, e.g., 153 CONG. REC. 17,418 (2007) (statement of Rep. Yarmuth) (“CHENEY has convinced himself that . . . unlike the previous 44 [vice presidents], [he] is not a member of the executive branch.”); 153 CONG. REC. 17,945 (2007) (statement of Rep. Emanuel) (“Apparently his [the vice presidential] office is not an entity within the executive branch. There have been 46 Vice Presidents in U.S. history, and not one of them knew this or ever claimed this position.”); Transcript: The Vice-Presidential Debate, N.Y. TIMES (Oct. 2, 2008) http://elections.nytimes.com/2008/president/debates/transcripts/vice-presidential-debate.html [hereinafter Debate] (quoting then-Senator Biden: “The idea . . . [the Vice President is] part of the Legislative Branch is a bizarre notion invented by Cheney”); infra note 481.


9. See United States v. Nixon, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 2 (1916) (stating that, to a great extent, “the construction of the power of each branch and its limitations must be left to itself and the political determination of the people who are the ultimate sovereign”).
must interpret the Constitution. Moreover, the officeholders themselves bring a unique practical perspective to bear on legal interpretation surrounding their respective positions; this is an outlook that cannot be ignored.

A. The Early Republic Through World War I: The Vice President as Predominantly Part of the Legislative Branch

Seldom before World War I did vice presidents receive important assignments from the White House. As a result, during this period, vice presidents largely, but not universally, were seen as part of the legislative branch. As has been noted by the U.S. Senate Historical Office, the vice presidency “[d]uring the nineteenth century . . . remained essentially a legislative position.”

1. The Adams Vice Presidency

Confusion about the role of the Vice President under the Constitution reigned from the first. John Adams, the nation’s initial Vice President, was inaugurated in the Senate chamber on April 21, 1789. Adams’ first words...
before the Senate reflect his conception of the vice presidency being part of the legislative branch. Adams commented that, with respect to his new role as Vice President, he was “[n]ot wholly without experience in public assemblies . . . [having been, however,] more accustomed to take a share in their debates, than to preside in their deliberations.”

At the beginning of the First Congress, Senator William Maclay recounted Adams pontificating before the Senate about the post he had just assumed. Four days after his inauguration, the first Vice President addressed the Senate:

I am possessed of two separate powers; the one in esse and the other in posse. I am Vice-President. In this I am nothing, but I may be everything. But I am president also of the Senate. When the President [of the United States] comes into the Senate, what shall I be? I can not be [President] then. [sic] No, gentlemen, I can not, I can not. I wish gentlemen to think what I shall be.

Oliver Ellsworth—who during the ratification debates had discussed the vice presidency and who was now a Senator—could not dispel Adams’ confusion. He replied to Adams: “Mr. President, I have looked over the Constitution (pause), and I find, sir, it is evident and clear, sir, that wherever the Senate are to be, there, sir, you must be at the head of them. But further, sir . . . I shall not pretend to say.”

The ambiguity in the position was further demonstrated in mid-May, over the question of how the Vice President should sign Senate documents: should his stile be “Vice President,” “President of the Senate” or both? Senator Maclay observed:

Every act had been signed “J.A., Vice-President.” The Vice-President gave this information in such a way as left nobody in doubt that his opinion went with the practice. Mr. Carrol[l] got up and said he thought it a matter of indifference, and concluded that he agreed it should be signed “Vice-President.” His looks, I thought, betrayed dissent. . . . He has for some time past been equally with myself opposed to the opinions of the Chair, and this was his peace-offering.

About two weeks ago I was with Mr. Read, of the Delaware State, in the upper gallery of the House of Representatives. A message came from the Senate. The signature was read aloud: “John Adams, Vice-

14. See 1 ANNALS OF CONG. 22–23 (1789) [hereinafter 1 ANNALS] (statement of incoming Vice President Adams).
15. Id. at 23 (emphasis added); cf. id. at 22 (referring to the presidency as “an Executive authority, in the hands of one”).
17. THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789-1791, at 2–3 (intro. by Charles A. Beard 1927).
18. Id. at 3.
Mr. Read turned to me and said, “This is wrong.” Yet Mr. Read now made a very long speech, declaring there was no impropriety in it. Mr. Lee hinted, very diffidently, his disapprobation of it. Mr. Morris said our acts should be signed by our Vice-President. Mr. El[.]sworth showed some inconvenience that would attend this practice.

I rose. Said the very term Vice-President carried on the face of it the idea of holding the place of the President in his absence; that every act done by the Vice-President as such implied that when so acting he held the place of the President. In this point of view nothing could be more improper than the Vice-President signing an address to the President. It was like a man signing an address to himself. That the business of the Vice-President was when he acted exactly the same with that of the President, and could not mix itself with us as a Senate.

Here the Vice-President tried very hard to raise a laugh. Seeing him willing to bear me down, I continued: “Sir, we know you not as Vice-President within this House. As President of the Senate only do we know you. As President of the Senate only can you sign or authenticate any act of that body.” He said after I sat down that he believed he need not put the question; a majority of those who had spoken seemed to be in favor of his signing as President of the Senate. Mr. Carrol[.] said he need not put the question, and none was put. Adjourned.”

A few days afterwards the matter arose again. Maclay further recounted that:

The Vice-President rose and addressed the House: “I have, since the other day, when the matter of my signing was talked of in the Senate, examined the Constitution. I am placed here by the people. To part with the style given me is a dereliction of my right. It is being false to my trust. Vice-President is my title, and it is a point I will insist upon.” He said several other things, then paused and looked over the bill. He then addressed the Senate again, and with great positiveness told them that he would sign it as Vice-President of the United States and President of the Senate. He asked Mr. Lee if it had been compared, and handed it to Mr. Lee. I can not say whether he signed it before he spoke to Mr. Lee or after, but it was not read nor was any question whatever put upon it—whether it should be read, whether it should be signed, or any other motion whatever. Mr. El[.]sworth got up and declared himself satisfied with that way of signing it. Mr. Strong got up and thought it should be Vice-President alone. This certainly is a most egregious insult to any

19. Id. at 38–39 (emphases added).
deliberative body, but, as Patterson told me a day or two after the
gracious affair that if I had not opposed that measure somebody else
would, I determined to see who would oppose this—and all was
silence.\footnote{Id. at 44 (asterisk omitted).}

Later, Maclay noted that “[t]here was something that importe
d the bill being
reported by the committee that composed it, and the minute read that the Vice-
President signed it. I determined I would not imbroil [sic] myself with him if
possible, and nobody made any observation.”\footnote{Id. at 48; see also Letter from John Page to St. George Tucker (July 23, 1789), in 16
DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1110 (Charlene Bangs Bickford et
al. eds., 2004) (“I objected as you do to his signing the Bills V. Pt.—he might as well add
Minister Plenipo. &c. Author of such a Book &c. . . .”).}

The debate over how Adams should sign documents roughly reflects the
question of which branch the Vice President occupies. Maclay’s interpretation
that “every act done by the Vice-President . . . implied that when so acting he
held the place of the President” clearly betrays the view that the title of Vice
President evinced the latter acting in an executive branch capacity. He
expressed similar sentiments when he described Adams placing his signature
and vice presidential title on a document to be sent to the President, likening it
to “a man signing an address to himself.” By contrast, Maclay argued that the
title of President of the Senate reflected the Vice President exercising authority
as a part of the legislative branch and as such demonstrated a distinct status.
Thus, Maclay, and apparently to varying degrees a handful of his Senate
colleagues (e.g., Senators Read, Lee and Ellsworth), in this context implicitly
adopted the position that the post possessed both legislative and executive
branch properties.\footnote{In August 1789, President George Washington paid a visit to the Senate to discuss a
proposed treaty with the Cherokee Indian tribe. See MACLAY, supra note 17, at 125. When he
arrived, Adams permitted Washington to sit in the presiding officer’s seat. See id. At first blush,
this could be viewed as the President and Vice President being interchangeable agents of the
executive branch; the Vice President, in a manner, sitting in for the President when the latter is
not in the chamber. Aside from this early episode, rarely if ever, being repeated, Maclay’s use of
language demonstrates the difference in how the two positions were viewed. When discussing
Washington’s visit to the Senate, Maclay refers to Washington as “the President” but Adams as
“our Vice President.” Id. The possessive “our” indicates that Maclay viewed Adams as part of
the Senate and his branch status as distinct from Washington’s. Furthermore, it is worth noting
that, according to the Senate Journal, with both Washington and Adams in the Senate chamber
 “[t]he Speakers addressed the Vice President: so did the President of the United States.” Journal
of the Secretary of the Senate (Executive Business), in 8 DOCUMENTARY HISTORY OF THE FIRST
FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: PETITION HISTORIES AND
NONLEGISLATIVE OFFICIAL DOCUMENTS 760 (Kenneth R. Bowling et al. eds. 1998); see also
Margaret Munk, Origin and Development of the Party Floor Leadership in the United States
Senate, 2 CAPITOL STUD. 23, 26 (1974) (quoting Henry Cabot Lodge) (the President in formally
visiting the Senate “is to deal with [it] as an organized body, under the guidance of [its] own
presiding officer.”). Finally, on other occasions, Adams was called upon to formally respond in
person to the President on behalf of the Senate. See, e.g., 1 DOCUMENTARY HISTORY OF THE
FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 48, 112, 221 (Linda Grant De

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that he should sign documents using both his executive branch and his legislative branch titles, perhaps recognizing in the process the duality of the position.

While the conflict over titles was resolved contrary to Maclay’s wishes, the first statute ever passed under the Constitution offers support for the Senator’s view that the Vice President and President of the Senate are distinct positions unified in a single person. That measure, which was enacted only a few days after the debate described by the dyspeptic Pennsylvanian, provided that “[t]he said oath or affirmation shall be administered . . . to the President of the Senate . . . .”23 Notably, it did not say “Vice President.”24 Moreover, it indicated that the Vice President could only be sworn in by a Senator.25

Around the same time as the debate over the proper means of addressing the Vice President, Adams himself wrote to a contemporary that “[t]he Constitution has instituted two great offices, of equal rank, and the nation at large in pursuance of it has created two officers: one who is the first of the two equals . . . [and] is placed at the Head of the Executive, the other at the Head of the Legislature.”26 Clearly, Adams saw himself as part of the legislative

Pauw et al. ed. 1972). And, of course, constitutional text implicitly conveys that the Vice President is not filling in for the President of the United States while presiding over the Senate. For one, the Vice President must vacate the presiding officer’s chair when he serves as Acting President. See U.S. Const. art I, § 3, cl. 5. Were the Vice President to be filling in for the President in the upper chamber, this prohibition would be nonsensical as it would make no difference whether the Vice President was Acting President or not, the U.S. presidency would still be formally represented in the presiding officer’s chair. Second, when the Vice President cannot preside over the Senate, the position is filled by a Senator or a Senate officer. The Vice President’s absence from the Senate does not entail an executive branch official presiding. See id.

23. An Act of June 1, 1789, § 1, 1 Stat. at Large, ch. 1. There are two other references in the statute to “President of the Senate,” none to “Vice President.” See id.

From the first the Vice President has engaged in administrative duties in the Senate. See An Act for allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses, 1 U.S. Stat. at Large, ch. 17, 71, § 4 (“the . . . secretary [of the Senate] and clerk [of the House] shall each be allowed (when the President of the Senate or Speaker shall deem it necessary) to employ one principal clerk . . . and an engrossing clerk . . . .”); see also infra notes 92-95 and accompanying text.


25. See Stephen W. Stathis & Ronald C. Moe, America’s Other Inauguration, 10 PRESIDENTIAL STUD. Q. 550, 551 (1980). This restriction was later liberalized by Congress. See id.

26. Letter from John Adams to Benjamin Lincoln (May 26, 1789) (courtesy of Massachusetts Historical Society) (on file with author); see also Linda Dudik Guerrero, John Adams’ Vice-Presidency, 1789-1797: The Neglected Man in the Forgotten Office 185, 193 n.74 (1978) (unpublished Ph.D dissertation, University of California, Santa Barbara). Also, in May 1789, the Senate debated the appropriate titles to use when addressing the President and Vice
branch, indeed “the Head of” it. In July 1789, Adams echoed this sentiment when he replied to a friend that “[t]he Vice President has a constant and laborious service assigned him by the constitution, at the head of the Legislature, which consumes all his time: strength, and spirits . . . . [Appointments] are by the constitution wisely and virtuously assigned to the first executive Magistrate . . . .”27 That September, Adams assumed the same posture when asked to intervene in an executive branch appointment. “For my Part,” he wrote, “I am So clearly convinced, of the Necessity of an Unity in the Executive Authority of Government, and of the Propriety of having all Appointments vested in one Breast, that I wish my friends would excuse me from interfering on any Occasion.”28

Adams remained of this view for the duration of his tenure. The first Vice President observed in March 1790: “The executive authority is so wholly out of my sphere, and it is so delicate a thing for me to meddle in that I avoid it as much as possible . . . .”29 A few weeks later, Adams opined that the Vice President’s position was “totally detached from the executive authority, and confined to the legislative . . . .”30 In May, Adams wrote that the “executive department by the constitution is wholly in the President.”31 A few years later, with respect to the foreign policy charted by the Washington Administration, Adams asserted that he had “no constitutional vote . . . .”32

Even Adams’ communication as President of the Senate to President Washington implied the Vice President being part of the Senate. In a 1793 message from the upper chamber congratulating Washington on his reelection, Adams wrote that “[y]our reelection . . . gives us sincere pleasure.”33 The letter made frequent use of the term “we” as well, further implying Adams’
attachment to the Senate and therefore to the legislative branch. As far as Adams was concerned, he was clearly writing on behalf of the upper chamber to the executive branch, not writing to a fellow executive branch official.

In 1794, Adams declined President Washington’s offer that he negotiate a commercial agreement with Great Britain. In the words of one authority on the vice presidency, Adams believed himself to be “required by the Constitution to preside over the Senate . . . since he was charged by the Constitution with the duty of taking over the first office in an emergency.”

Yet, at the same time, in several of these episodes, Adams betrayed concern that he might be tarred with the controversial policy choices of the Washington Administration. Adams therefore seems to have seen himself as politically, if not constitutionally, tied to the executive branch.

Underscoring the early conception of the Vice President being part of the legislative branch is that Adams apparently sat with the Cabinet on only one occasion: during Washington’s absence from the Capitol on a tour of the southern states in 1791. The President had instructed his Cabinet that while he was away the body should consult with Adams if any major developments occurred. With two apparent exceptions, more than 125 years would pass before a Vice President would again formally join such a gathering.

34. Id. at 494–95.
35. WILLIAMS, supra note 11, at 24; see also Memorandum from Department of Justice Office of Legal Counsel on President’s Authority to Delegate Functions 5 (Jan. 24, 1980) [hereinafter 1980 Opinion] available at http://www.fas.org/irp/agency/olc/012480.pdf. This episode also reflects the constitutional independence of the Vice President from the President—a reality that endures as both a legal and practical matter to this very day. See Roy E. Brownell II, The Independence of the Vice Presidency, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 297 (2014).
36. See HATFIELD, supra note 12, at 7.
37. This could also have been because Adams, like Washington, was part of the governing Federalist Party.
38. See Letter from Thomas Jefferson to Benjamin Rush (Jan. 16, 1811), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 155 (Thomas Jefferson Randolph ed., 1829) (quoting Jefferson that Adams’ Cabinet visit “was the only instance of that being done”).
41. See, e.g., JOHN PHILIP HILL, THE FEDERAL EXECUTIVE 47 (1916) (“The Vice-President has never been considered a member of the Cabinet.”); MARY LOUISE HINDSDALE, A HISTORY OF THE PRESIDENT’S CABINET 320 (1911) (“The Vice-President has not been admitted to the Executive Councils, although the suggestion is sometimes heard to give him something more to
President Washington asked Adams for his advice on diplomatic matters at least three times, and once about nominations to the Supreme Court. Yet, these instances in and of themselves are less compelling than they might at first appear. The consultations could just as easily have reflected Adams’ diplomatic and legal expertise as his formal position in government. For instance, Washington often sought counsel from Representative James Madison, which certainly does not indicate Madison was part of the executive branch at the time.

Nonetheless, Washington on occasion seemed to view Adams’ station as being part of the executive branch, or at least separate from that of the Senate. When asked his preference for Vice President in 1788, Washington wrote that “whosoever shall . . . enjoy the confidence of the States so far as to be elected Vice-President, cannot be disagreeable to me . . . . connected in office with any gentleman of character, I would most certainly treat him with perfect sincerity do than handle the gavel in the Senate by making him a sort of Minister without a portfolio.”; Learned, supra note 11, at 174–75 (following Adams’ appearance at a single Cabinet meeting, “I can discover no evidence that reveals a single instance of the vice-president in attendance at cabinet sessions. . . . It is possible that instances of admitting the vice-president on occasions to a gathering of the cabinet may have occurred, and may some day appear in stray records. But it is certain that from 1789 to 1912 no custom in the matter has been established.”); Rion McKissick, Our Constitutional Fifth Wheel, 3 VA. L. REV. 181, 188 (1915–16) (“From time to time has recurred the suggestion that the Vice-President be invited to attend the Cabinet meetings . . . but, judging from the precedents, he has been about as welcome there as a death’s head.”); see also Charles O. Paullin, The Vice-President and the Cabinet, 29 AM. HIST. REV. 496, 497 (1924) (“[b]y the end of his [Jefferson’s] administration the practice of confining the Vice-President to his legislative duties was firmly established, and with a few exceptions has been strictly followed since that date.”); James R. Garner, Office of the Vice President of the United States 160 (1934) (unpublished Ph.D dissertation, University of Iowa) (quoting Chief Justice Augustus Woodward of the Michigan territory, in 1809: “[from the cabinet, practice has excluded the Vice President”]). Woodward reaffirmed this view several years later. See A.B. Woodward, The Presidency of the United States 9 (1825) (“From this Cabinet, it has been the uniform course to exclude the vice-president. Perhaps his [the Vice President’s] constitutional function of being procutor of the Senate was deemed incompatible with his being a member of the Cabinet. His attendance would frequently be inconvenient, and his possessing a voice in the deliberations of the Senate might render it indelicate. That any dissatisfaction arose from this course being pursued, either at the time of its adoption, or subsequently, has never been manifested.”).

That is not to say that vice presidents did not upon occasion provide policy advice to presidents. Vice President Martin Van Buren, for example, enjoyed a close relationship with President Andrew Jackson. See, e.g., Hatfield, supra note 12, at 111. President James Polk and Vice President George Dallas and President William McKinley and Vice President William Hobart enjoyed close partnerships. See Henry Barrett Learned, The President’s Cabinet: Studies in the Origin, Formation and Structure of an American Institution 385 (1912). Nonetheless, during these administrations, vice presidential advice was apparently not conveyed in Cabinet meetings or in other formalized executive branch settings.


43. See Smith, supra note 27, at 763.

and the greatest candour . . . .” In March 1791, he wrote to Adams about his desire to convene the Senate. He commented that “[c]ertain matters touching the public good require[,] that the Senate shall be convened . . . I have desired their Attendance, as I do yours . . . to receive and deliberate on . . . [certain] Communications . . . .” Here, the President perceived the Senate and the Vice President differently.

In the early years under the Constitution, the House of Representatives also had occasion to debate the Vice President’s status. Like the Senate deliberations over how to address the Vice President, exchanges in the House in 1789 shed further light on how members of the First Congress saw the question of which branch or branches the Vice President occupied. In July of that year, the lower chamber debated how much the Vice President should be paid and in what manner. The discussion centered largely around two propositions, which roughly equate to the question of which branch or branches the Vice President inhabits.

One group of representatives maintained that the Vice President should be provided a per diem when he chaired Senate proceedings, contending that the Vice President was otherwise idle. Such an approach, if adopted, would have followed the same pattern as existed then for lawmakers; they were paid for the days when Congress was in session. An opposing camp argued that the Vice President should be provided with a salary since he would not easily be able to leave the capital and support himself through other means because he would need to be prepared at any moment to succeed to the presidency. In that same respect, members of the latter camp compared the Vice President to the President, who received a salary.

Representative Alexander White led the charge for those who believed the Vice President should be granted a per diem, offering an amendment to modify the proposed salary provision. White stated:

I do not like the principle on which this provision is made for the Vice President; there is nothing, I believe, in the Constitution which


47. See, e.g., 1 ANNALS, supra note 14, at 646–51; see also Schlesinger, supra note 12, at 490.


49. See, e.g., 1 ANNALS, supra note 14, at 646–47.

gives him a right to an annual sum; it fixes no duty upon him as Vice President, requiring a constant attendance. He may be called upon to act as President, and then I would give him the salary of the President; at other times, he is to preside as President of the Senate, then I would pay him for his services in that character. . . .

If I thought, sir, the attendance of the Vice President as necessary as that of the President, I would not hesitate to allow him an annual salary; but I do not conceive it to be so necessary; it is not made so by the Constitution. If he had been appointed Vice President as a perpetual counsel for the President, it would have altered the case; he would then have had services to render, for which we ought to compensate him. . . . I consider it would be improper to pay him on any other principle than in proportion to his services.  

White evidently did not conceive of the Vice President as an executive branch advisor as he did not see Adams as “a perpetual counsel to the president.” Thus, the congressman did not appear to recognize Adams as part of the executive branch, an official on whom the President needed to rely at all times. By supporting a per diem for the Vice President, White wanted him treated like a lawmaker; perceiving the Vice President as part of the legislative branch and akin to a member of Congress.

Representative Theodore Sedgwick disagreed with White. He countered that the latter’s “arguments . . . did not strike him with any force.” He contended that:

\[\text{[s]he reason why the pay of the members of the Senate and House is per diem is, because they contemplate their being together but a very inconsiderable part of their time; but I suppose . . . that every gentleman who has considered the subject, has determined in his own mind that the Vice President ought to remain constantly at the seat of Government; he must always be ready to take the reins of Government . . .}^{53}\]

Sedgwick continued, “it is necessary that he should be provided with a constant salary, to support that rank which we contemplate for him to bear; I therefore conceive it must be such a perpetual salary as the President is entitled to receive.” Sedgwick therefore presumably considered the Vice President part of the executive branch since he believed the officeholder always had to

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51. Id. at 646–47 (emphasis added); see also The Daily Advertiser (July 17, 1789), reprinted in 11 Documentary History of the First Federal Congress of the United States of America 1129 (Charlene Bangs Bickford et al. eds., 1992) (quoting Rep. White) (“all the constitutional services he [the Vice President] could perform were in capacity of President of the Senate, except in the case of a [presidential] vacancy . . .”).

52. 1 Annals, supra note 14, at 646.

53. Id.

54. Id. at 647.
be prepared to assume the presidency; the Vice President’s responsibilities did not lapse with the end of a congressional session.55

Madison also opposed White’s effort to pay the Vice President a per diem. He argued that:

[the] nature of the office will require that the Vice President shall always be in readiness to render that service which contingencies may require . . . . The idea that a man ought to be paid only in proportion to his services, holds good in some cases, but not in others. It holds good in Legislative business, but not in the Executive or Judicial departments. A judge will be sometimes unemployed, as in the case of the Vice President; yet it is found necessary to claim the whole of his time and attention to the duties for which he is appointed.56

From his remarks it is apparent that Madison conceived the Vice President as being part of the executive branch. He argued that members of the executive branch, much like judges, should not be paid a per diem. Since the Vice President is obviously not a member of the judicial branch,57 according to Madison’s reasoning, he was therefore part of the executive establishment.

Representative Elias Boudinot provided perhaps the most thorough discussion of the subject, using arguments such as linkages to the President through Article II and the Vice President’s four-year tenure, that should be familiar.58 He contended that:

55. See id. For another rationale why the Vice President should be paid a salary, see id. at 646 (statement of Rep. Page) (“His idea was, that a proper proportion was observed between the salary of the First and Second Magistrates. As to the utility of the office, he had nothing to say. He had no hand in forming the Constitution; if he had, perhaps he should never have thought of such an officer . . . . [Nevertheless the public] would be displeased to see so great a distinction made between the President and him [Vice President].”). Since Page used the President as his frame of reference for vice presidential pay and not members of Congress, it would seem that he too viewed Adams as part of the executive branch. See id.

56. Id. at 648 (emphasis added).


58. For further debate, see 1 ANNALS, supra note 14, at 648 (statement of Rep. Ames) (“point[ing] out the difference of the situation of the Vice President and the members of the Legislature.”); id. at 650 (statement of Rep. Smith) (“by the Constitution, the Vice President could not be considered as a Senator, and therefore could not, with any propriety, be paid as such.”); id. at 649 (emphasis added) (statement of Rep. Seney) (“[n]o argument has been adduced to convince me that the Vice President ought to receive an allowance any more than the other members of the Legislature.”). Use of the word “other” clearly conveys Representative Joshua Seney’s view that the Vice President—as the Senate’s presiding officer—was part of the legislative branch. Representative Michael Stone agreed, maintaining that “[t]he Vice President cannot be viewed in any other light than that of President of the Senate.” Id. at 650 (statement of Rep. Stone).

59. See Brownell, supra note 1, at 48–51.
The second article calls him into view with the President; he is to be elected in the same manner as the President, in order to obtain the second best character in the Union to fill the place of the first . . . . His duty as President of the Senate is only collateral; consequently he ought to be respected, and provided for according to the dignity and importance of his principal character . . . . I think there is an affinity between the duration of the office and the compensation. The Constitution establishes the office for four years; the compensation ought to be made commensurate with that idea.

Ultimately, White’s effort was defeated and the Vice President was paid a salary for his efforts, not a per diem. He has been compensated that way ever since. Thus, in this respect, the First Congress—in particular the House—made a determination that the Vice President was part of the executive branch in the context of compensation.

The first statutory delegation of authority to the Vice President also reinforced the apparent congressional perception that he was part of the executive establishment in certain settings. It occurred in an enactment in mid-August 1790 and involved the “President of the Senate” serving on the board of commissioners overseeing the federal Sinking Fund. This entity, which the Vice President, the Chief Justice and Cabinet secretaries served on until the mid-1830s, was not a sinecure, but was “clearly expected by Congress to exercise administrative discretion.” One authority has noted that “the fund . . . was closely tied to Hamilton’s plan for central management of the economy. Timely purchases of public securities . . . could operate to stabilize the market and thereby help the overall effort to establish public credit.”

60. 1 ANNALS, supra note 14, at 650–51.
61. See An Act of Sept. 24, 1789, ch. 19, p.1. The Vice President’s salary also appeared in the same chapter of the statute as the President’s and separate from that of Congress. See id. at ch. 17.
62. See An Act making Provision for the Reduction of the Public Debt, Aug. 12, 1790, § 2, ch. 47, p. 186 [hereinafter Act for Reduction of Public Debt]; see also Williams, supra note 45, at 14. Secretary of the Treasury Alexander Hamilton, one of the nation’s ablest lawyers and primary author of the Federalist Papers, apparently requested that the Vice President be made one of the commissioners. See Worthington C. Ford, Sinking Fund, in 3 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES 718, 721 (John J. Lalor ed., 1895).
63. See Edward A. Ross, Sinking Funds, 7 PUB. AM. ECON. ASSOC. 76 (1892); see also Commissioner of Sinking Fund, in 1 THE PAPERS OF JOHN MARSHALL: A DESCRIPTIVE CALENDAR 457–59 (Irwin S. Rhodes ed., 1969) (listing the commissioners’ reports which included the signatures of Vice Presidents Burr, Clinton, Tompkins and Calhoun); 16 ANNALS OF CONG. 943–44 (1807) (noting submission of a Sinking Fund Report signed by Vice President Clinton).
64. Russell Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 SUP. CT. REV. 123, 141.
The legislation showed both the authority and willingness of Congress to grant responsibilities to the Vice President above and beyond his duties as President of Senate. It also showed the malleability of the position that would become more apparent in the twentieth century. At the same time, the delegation was clearly made to members of the magisterial branches—no members of Congress were included. Adams took an active role on the board, hosting meetings at his home and regularly signing correspondence on behalf of the body. Finally, the board seemed to be in the executive branch since the acts of the body first had to receive “the approbation of the President.”

Yet another example of the legislative branch’s ambiguous treatment of the Vice President involved the Militia Act of 1792. The question centered on which officials in the government should be exempted from military service. The final measure provided that the following individuals should be exempted: “the Vice President of the United States; the officers judicial and executive of the government of the United States; the members of both Houses of Congress, and their respective officers.” The Vice President, in the eyes of Congress on this occasion, merited his own category. He was not viewed as an executive officer, a member of Congress or a congressional officer.

66. See Williams, supra note 45, at 14.
68. See Act for Reduction of Public Debt, supra note 62, at § 2. The requirement of the President’s approval for Sinking Fund decisions signals that the body was an executive branch entity since the work of the judicial branch may not be overturned by the executive branch. See, e.g., Hayburn’s Case, 2 U.S. 409 (1792); Plaut v. Spendthrift Farms, 514 U.S. 211, 224–26 (1995). Thus, the Chief Justice’s role could not have been in a judicial branch capacity. Similarly, the formal work of the legislative branch is not submitted for the approval of the executive branch other than through the Presentment Clause. See Clinton v. New York, 524 U.S. 417, 438 (1998); INS v. Chadha, 463 U.S. 919 (1983). That and the lack of any lawmakers on the panel indicate that it was not a legislative branch entity either. That leaves the executive branch as the only appropriate home for the board.
69. An Act more effectually to provide for the National Defense by establishing an Uniform Militia throughout the United States, 1 U.S. Stat. at Large, ch. 33, 271, 272, § 2, May 8, 1792.
70. The legislative history does not make clear why the Vice President was included in the exemption but it was apparently to ensure he would be able to preside over the Senate without interruption. See The General Advertiser (Dec. 17, 1790), reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: DEBATES IN THE HOUSE OF REPRESENTATIVES 48, 53 (William Charles diGiacomantonio et al. eds. 1995) (Record of Debate of Dec. 16, 1790); see also CURRIE, supra note 42, at 159–60.
In 1792, Congress enacted legislation that further blurs the picture as to how early lawmakers saw the vice presidential position. This involved the mode of resignation for the President and Vice President. As will be recalled, Congress made the process identical for both offices. The statute provides that “the only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.” Thus, the Vice President submits his resignation to an executive branch official, not to a member of the legislative branch. That too would counsel in favor of the Vice President being considered part of the executive branch.

Taken all in all, the Adams vice presidency reveals a fair degree of ambiguity as to which branch or branches the Vice President belonged to at the time.

2. The Jefferson Vice Presidency

The second Vice President, Thomas Jefferson, disagreed about a great many things with his predecessor, yet he concurred with Adams on the location of the vice presidency within the constitutional system. Writing to Jefferson before he assumed the vice presidency, Madison implored his friend to use his new position to try to influence the incoming Adams Administration. Despite the fact that both he and Jefferson were Democratic-Republicans and the President was a Federalist, Madison wrote “[t]here is reason to believe, also, that your neighbourhood to Adams may have a valuable effect on his councils particularly in relation to our external system.”

71. See Brownell, supra note 1, at 52.
72. An Act relative to the Election of a President and Vice President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice President, 1 U.S. Stat. at Large, ch. 8, 241, § 11, March 1, 1792.
73. Interestingly, senators resign by sending a letter to the Vice President in his capacity as President of the Senate. See Brownell, supra note 1, at 46.
74. Letter from James Madison to Thomas Jefferson (Dec. 19, 1796), in 6 WRITINGS OF JAMES MADISON 296, 300–01 (Gaillard Hunt ed., 1906). Madison’s reference to the Vice President’s “neighborhood” to Adams and the overall tenor of the letter reaffirms Madison’s view of the Vice Presidency as an executive branch position. See supra notes 56-57 and accompanying text. As late as April 1797, there was effort by some “to cajole him [Adams] to admit the V.P. into the Council.” LEARNED, supra note 41, at 137–38 (quoting Representative William Smith in a letter to Rufus King); see also Letter from James Madison to Thomas Jefferson (Jan. 15, 1797), in 6 THE WRITINGS OF JAMES MADISON 302, 304 (Gaillard Hunt ed. 1906) (referring to the pending elevation of Vice President John Adams to the presidency as “giving a fair start to his Executive career”); Joel K. Goldstein, The White House Vice Presidency: The Development of a New Constitutional Institution, at 7 (unpublished manuscript) (on file with author).
In no uncertain terms the Vice President elect disagreed. In explaining his decision to Madison in January 1797, Jefferson contended:

as to my participating in the administration, if by that be meant the executive cabinet, both duty and inclination will shut that door to me . . . . [A]s to duty, the constitution will know [the Vice-President] only as the member of a legislative body; and it’s principle is that of a separation of legislative, executive and judiciary functions, except in cases specified. If this principle be not expressed in direct terms, yet it is clearly the spirit of the constitution, and it ought to be so commented and acted on by every friend to free government. 75

That same month, Jefferson conveyed a similar message to Thomas Mann Randolph. The Vice President elect wrote that “[t]he constitution makes me the member of a legislative house, and forbids the confusion of legislative and executive functions except in the person of the President.”76

Jefferson, like Adams before him, also declined to accept a diplomatic assignment. Adams did not contest the matter with his rival. He was resigned to the view that “[t]he nation has chosen Jefferson [to be Vice President], and commanded him to a certain station. The President, therefore, has no right to command him to another, or to take him off from that.”77 Adams stated similar reasons to Henry Knox: “Mr. Jefferson would not go. His reasons are obvious; he has a station assigned to him by the nation, which he has no right to quit, nor have I any right, perhaps to call him from it.”78 This reflects early recognition that the President may not control the Vice President, which in turn implies the latter is not wholly within the executive branch.79

For his part, Jefferson did not merely articulate his vision of the vice presidency in private. He announced to the Senate during his inaugural

75. Letter from Thomas Jefferson to James Madison (Jan. 22, 1797), in 29 THE PAPERS OF THOMAS JEFFERSON 270, 271 (Barbara B. Oberg ed. 2002) [hereinafter 29 PAPERS]. Toward the end of the Adams vice presidency, the pro-Jeffersonian Aurora newspaper took the opportunity to discuss the post. The paper tacitly noted the office’s dual nature, pointing out its apparently latent executive branch status. It remarked that “the office of Vice President has been kept in a perfectly dormant state in an executive sense.” ROY SWANSTROM, THE UNITED STATES SENATE: 1787-1801: A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY 256 (1988) (quoting the Aurora).

76. Letter from Thomas Jefferson to Thomas Mann Randolph (Jan. 22, 1797) in 29 PAPERS, supra note 75, at 273–74; see also Letter from Thomas Jefferson to George Wythe (Jan. 22, 1797), in 7 THE WRITINGS OF THOMAS JEFFERSON, 1795-1801, at 110 (Paul Leicester Ford ed., 1896) [hereinafter JEFFERSON WRITINGS] (emphasis added) (“It seems probable that I will be called on to preside in a legislative chamber. It is now so long since I have acted in the legislative line, that I am entirely rusty . . . . ”); Joel K. Goldstein, Constitutional Change, Originalism, and the Vice Presidency, 16 U. PENN. J. CON. L. 369, 391 n.99 (2013).


78. See ADAMS, supra note 77, at 536.

79. See infra Part III.C.
address that his “office[s] . . . primary business” was merely to preside over the forms of this House.” 80 In May 1797, Jefferson’s conception of the office was reaffirmed when he wrote to Elbridge Gerry that, while Vice President, “I consider my office as constitutionally confined to legislative functions, and that I could not take any part whatever in executive consultations, even were it proposed.” 81 In an 1800 letter to Pierre Samuel Du Pont de Nemours, Jefferson once again emphasized his interpretation of the vice presidential post. He noted that “my office relat[es] altogether to the legislative [depart]ment . . . .” 82 He commented that consequently he was “entirely unacquainted with the measures proposed in that of the Executive.”

Jefferson’s correspondence as sitting Vice President and President-elect with the soon-to-be third Vice President, Aaron Burr, yet again demonstrated the Virginian’s views of the office. He commended Burr on his election as Vice President but did so in terms that made clear Jefferson’s legislative-branch view of the office:

While I must congratulate you, my dear Sir, on the issue of this contest, because it is more honorable, and doubtless more grateful to you than any station within the competence of the chief magistrate, yet for myself, and for the substantial service of the public, I feel most sensibly the loss we sustain of your aid in our new administration. It leaves a chasm in my arrangements, which cannot be adequately filled up. I had endeavored to compose an administration whose talents, integrity, names, and dispositions, should at once inspire unbounded confidence in the public mind . . . . I lose you from the list . . . . 84

In stating that Burr was outside “the competence of the chief magistrate,” Jefferson was clearly conveying that Burr, in his new capacity, was outside of

80. 6 ANNALS OF CONG. 1580–81 (1797); see also HATFIELD, supra note 12, at 20. In the same vein, Jefferson referred to his having before “been a member of legislative bodies . . . .” 6 ANNALS, supra at 1581.

81. Letter from Thomas Jefferson to Elbridge Gerry (May 13, 1797), http://founders.archives.gov/documents/Jefferson/01-29-02-0288 (emphasis added); see also Paulin, supra note 41, at 497. It merits noting that the Vice President was left out of the “protections” afforded federal officials in the 1798 Sedition Act. See An act for the punishment of certain crimes against the United States, 1 Stat. 596, ch. 74, July 14, 1798 (punishing anyone who “shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or the constitution of the United States”); see also ROBERT I. ALOTTA, #2: A LOOK AT THE VICE PRESIDENCY 38–39 (1981).


83. Id; see also Letter from Thomas Jefferson to Benjamin Hawkins (Mar. 14, 1800), in 31 THE PAPERS OF THOMAS JEFFERSON 435, 436 (Barbara B. Oberg ed., 2004) (Jefferson urges his interlocutor not to send official executive branch correspondence to him apparently since he is not part of the executive branch).

84. Letter from Thomas Jefferson to Aaron Burr (Dec. 15, 1800), JEFFERSON WRITINGS, supra note 76, at 467–68; see also Goldstein, supra note 76, at 385 n.64.
the executive branch. Jefferson also put his beliefs into practice. It was as Vice President that Jefferson compiled his famed book on parliamentary procedure.\footnote{See, e.g., HITE, supra note 40, at 35–36.} This undertaking has been characterized as “[t]he single greatest contribution to the Senate by any person to serve as vice president . . . [one that remains] relevant to the Senate of [today].”\footnote{HATFIELD, supra note 12, at 24.} Such an endeavor by the Senate’s presiding officer would seem only to underscore Jefferson’s view that the Vice President was part of the legislative branch.\footnote{See HITE, supra note 40, at 35–36.}

Finally, the second Vice President’s choice of language in discussing Cabinet deliberations reinforces his opinion that he was not part of the executive branch. As Secretary of State under Washington, Jefferson referred to internal discussions with the Cabinet as involving “our council” or “our conclave.”\footnote{See LEARNED, supra note 41, at 136–37 (emphasis added).} As Vice President, however, Jefferson commented on discussions of the Adams Cabinet as involving “his cabinet.”\footnote{Id. at 137 (emphasis added).} Jefferson, as Vice President, simply did not believe himself to be part of the Adams Administration.

No doubt this posture of aloofness from the Adams presidency helped serve Jefferson’s immediate political purposes. As the Senate Historical Office has observed, Jefferson “[c]onsidering himself separate from the executive branch . . . felt free to criticize the Adams administration.”\footnote{HATFIELD, supra note 12, at 21; see also 3 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON AND THE ORDEAL OF LIBERTY 319 (1962) (“As vice president he was in an anomalous position . . . [Jefferson] thought of himself as no part of the administration and felt free to criticize it as he saw fit.”).} In fact, as Vice President, Jefferson essentially served as the leader of the opposition to Adams and ran against him for President in 1800.\footnote{See, e.g., HATFIELD, supra note 12, at 21–25.} That said, Jefferson’s view of the office was consistent throughout his public career and was entirely in keeping with that of Adams, his predecessor and rival.

Thus, the first two vice presidents were of like mind about the constitutional location of the position they held; seeing the post entirely and repeatedly as part of the legislative branch. At the same time, the verdict of Congress during this period was less certain. On one hand, many in the Senate of the First Congress viewed with dismay Vice President Adams’ reference to himself as Vice President while presiding over the upper chamber, although they ultimately acquiesced in his decision to use both his Vice President and Senate President titles in this capacity. Meanwhile, Congress that same year compensated the Vice President in a manner akin to the President and later treated him like the President when considering how he would effectuate his
resignation. Similarly, legislation placed the Vice President on the board of an executive branch entity, the Sinking Fund. Yet, the statute governing the Vice President’s oath implicitly emphasized his ties to the legislative branch and the Militia Act seemed to place him in a category all his own. The first two presidents to some degree treated the first two vice presidents as part of the legislative branch by excluding them from the Cabinet on all but one occasion. Yet, Washington’s correspondence with Adams implied Adams might have some link to the executive branch. In sum, the first two vice presidents, the early congresses, and the first two presidents helped embark the vice presidency on an ambiguous constitutional course, one that has lasted, admittedly with major modifications, right up to the present day.

3. The Nineteenth Century

In the early nineteenth century, in addition to presiding over the Senate and breaking tie votes, the Vice President played a not insignificant role in Senate administration. For several decades, the Vice President examined the Senate Journal and would make corrections prior to its being read.92 The Vice President was also for a time tasked with reviewing and signing off on certain Senate financial and administrative records.93 Vice presidents also made determinations as to whether to certify disputed electoral votes,94 and helped select committee assignments for senators.95 Vice presidents played an important role in Senate parliamentary matters as well. The origins of the filibuster—one of the most distinctive aspects of the Senate itself—derived from a recommendation made to the body by Burr.96 All of these indicia pointed toward the Vice President being part of the legislative branch.

The first decades of the nineteenth century witnessed periodic floor debates that touched on the Vice President’s status. Following the

93. See Williams, supra note 45, at 564.
96. See 1 Haynes, supra note 92, at 393–94. Nor is the Vice President’s authority in Senate rulemaking a relic of the nineteenth century. Vice President Nixon used the presiding officer’s chair to try to modify the cloture rule. See 103 Cong. Rec. 178–79 (1957); 105 Cong. Rec. 8–9 (1959); 107 Cong. Rec. 9–12 (1961). Vice President Rockefeller was more successful, using his position to help lower the threshold for cloture from two thirds to three fifths of the Senate. See, e.g., Paul C. Light, Vice-Presidential Power: Advice and Influence in the White House 196 (1984); Goldstein, supra note 5, at 145. In 1937, it was the ruling of Vice President Garner that created the principle that the Senate Majority Leader should be recognized before all other senators if no other senator holds the floor. See Martin B. Gold, Senate Procedure and Practice 40 (2004). This precedent is the cornerstone of the Majority Leader’s power. See, e.g., 2 Robert C. Byrd, The Senate 1789-1989: Addresses on the History of the United States Senate 190 (1989); see also supra notes 85–86 and accompanying text (discussing Jefferson’s authorship of a book on parliamentary procedure).
controversial election of 1800 when the Jeffersonian vice presidential candidate, Burr, almost became President instead of Jefferson himself, the Twelfth Amendment was debated and adopted. This amendment recognized the reality of political parties. No longer would the Vice President be the runner-up in the race for the presidency. Henceforth, electors would vote separately for President and Vice President. Thus, the Vice President would become more politically tied to the President as they would run together on a party ticket. The amendment also clarified that the Vice President had to have the same qualifications as the President; perhaps in a sense tightening the implicit link to the President and the executive branch.

During the debate in 1803 over the amendment, Senator Robert Wright commented that “in the eye of the Constitution [the President of the Senate] is not a member of the Senate at all.”98 The Vice President, he argued, “enjoys . . . all the influence necessarily attached to . . . [the] office [of President of the Senate], and to the character of heir apparent . . . .”99 On the other hand, Representative Samuel Dinsmore Purviance referred to the presidency and vice presidency as “the great Executive offices.”100

Not all nineteenth-century vice presidents echoed Adams and Jefferson’s views of the office. President Madison’s second Vice President was former Constitutional Convention member, Elbridge Gerry, who assumed the post in 1813. As he had during the Convention, Gerry saw the Vice President as also enjoying executive authority.101 This was a formulation that differed from that proffered by Adams and Jefferson and hinted at the potential of the modern vice presidency. As the newly inaugurated Vice President, Gerry contended that the position granted him two different types of power. Before the Senate he pronounced: “the Constitution ha[d] invested him [the Vice President] with Legislative and Executive powers . . . .”102

Further debate involving the placement of the Vice President in the national government occurred in 1828. Following a vitriolic attack by Senator John Randolph on President John Quincy Adams, Vice President John C. Calhoun—who was estranged from Adams—failed to call Randolph to

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97. Whether the Vice President needed the same qualifications as the President was a matter of some conjecture following the Constitutional Convention. See Brownell, supra note 1, at 38 n.191.

98. 13 ANNALS OF CONG. 81 (1803) [hereinafter 13 ANNALS]; see also Richard D. Friedman, Some Modest Proposals on the Vice-Presidency, 86 MICH. L. REV. 1703, 1721 n.74 (1988).

99. 13 ANNALS OF CONG., supra note 98, at 544–45.

100. Id. at 692.

101. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 536–37 (Max Farrand ed. 1966) (Gerry) [hereinafter 2 FARRAND] (“[w]e might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper.”); see id. at 635 (“[t]he V.P destroys the Independence of the Legislature.”).

102. 26 ANNALS OF CONGRESS 10 (1813); cf. Rosenberg, supra note 42, at 177–78 (noting that Gerry was consulted on occasion by the President).
This sparked a long debate over the powers of the Vice President while presiding over the Senate. During this discussion, some mention was made of the Vice President’s location within American constitutional structure.

Senator John Rowan asserted flatly that “[t]he Vice President belongs to the Executive Department. He is a dormant President.”104 He questioned whether it was “wise in the Constitution to have conferred on the Vice President the power of controlling the deliberations of the Senate . . . . [senators] are elected for six years . . . . The Vice President and President are elected but for four years. The Senate are to be the triers of them both in case of impeachment.”

Calhoun himself conceded that the Vice President is “an officer connected, in a certain measure, with the executive branch of the Government . . . .”106 The South Carolinian reasoned in a public letter written under a nom de plume that:

[i]f the Vice-President should belong to the same party or interest which brought the President into power, or if he be dependent on him for his political standing or advancement, you will virtually place the control over the freedom of debate in the hands of the Executive.

You thus introduce the President, as it were, into the chamber of the Senate, and place him virtually over the deliberation of the body, with powers to restrain discussion, and shield his conduct from investigation.

By raising the specter of the Vice President being the President’s marionette in the presiding officer’s chair, Calhoun saw the position as at least partly affiliated with the executive branch. At the same time, he recognized the independence of the vice presidency, even if it was part of the executive branch. He raised a potential scenario involving “the Vice-President choos[ing] to pursue a course independent of the will of the Executive . . . .”108 Presumably, Calhoun saw the Vice President to be a potentially independent part of the executive branch.

President John Quincy Adams interpreted the vice presidency to be solely a legislative branch post. He made reference to “the Vice President’s province [being] in the Senate.”109 He noted the “ex-officio connexion . . . [the] Vice-President of the United States, [has] with the Senate.”110

103. See, e.g., WILLIAMS, supra note 11, at 39.
104. 4 REG. DEB. 310 (1828).
105. Id.
106. Id. at 318; see also 1 HAYNES, supra note 92, at 214 n.1.
107. Onslow to Patrick Henry, On the Powers of the Vice-President, as President of the Senate, in REPORTS AND PUBLIC LETTERS OF JOHN C. CALHOUN 322, 335 (Richard K. Cralle ed. 1855) (emphasis added).
108. Id. at 336.
On the other hand, Supreme Court Justice Joseph Story seemed of the view that the office was part of the executive branch. The great legal authority wrote in 1833 that “[t]he propriety of creating the office of vice president will be reserved for future consideration, when, in the progress of these commentaries, the constitution of the executive department comes under review. The reasons, why he was authorized to preside in the senate, belong appropriately to this place.”

In 1845, Vice President elect George Dallas made the following statement to the Senate immediately prior to his tenure: the Vice President “is associated with the dignified delegates of republican sovereignties: he is posted by the entire American people in your confederated council . . . .” Dallas certainly saw himself as being “in” the chamber.

During much of the nineteenth century, the Senate permitted the President Pro Tempore, when leaving the chair, to choose his successor as presiding officer. Vice President Dallas on his own accord tried to do the very same thing when stepping down temporarily from the chair in 1847. He asked Senator David Atchison to fill in for him. His actions created a furor in the Senate and ultimately the body took action to ensure this did not become standard practice. The incident reflects that, while the Vice President is part of the Senate, he is not a Senator and must tread cautiously when taking novel action in the upper chamber.

During this same period, Congress included the Vice President on the Smithsonian Board of Regents. Unlike the Board of the Sinking Fund during the first decades under the Constitution, which played an important public policy function and which appeared more clearly to be an executive branch entity, the Smithsonian plays little to no public policy role and its link

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100. Patrick Henry, Letter I (John Quincy Adams) (May 1, 1826), in THE VICE PRESIDENT, supra note 109, at 8.
101. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 734, p. 209 (1833) (emphasis added) (citations omitted).
102. CONG. GLOBE, 28th Cong., 2d Sess. 398 (1845) (emphasis added).
104. See id. at 42 n.43.
106. See CONG. GLOBE, supra note 115, at 161–64; see also CURRIE, supra note 115, at 182–83.
107. See An Act to establish the “Smithsonian Institution,” for the Increase and Diffusion of Knowledge among Men, 9 Stat. 102, Aug. 10, 1846, § 3. For competing authorities on the Smithsonian’s own placement within the federal government, see Brownell, supra note 1, at 24 n.115.
to the executive branch is much more tenuous (if in fact one exists at all). The Vice President’s role with respect to the Smithsonian reflects the largely ceremonial delegations of responsibility to him that would mark most of the nineteenth and early twentieth centuries.

Not long afterward, President Zachery Taylor gave some thought to including Vice President Millard Fillmore in his Cabinet meetings. This proposal did not get far. William Seward described the result: “[t]he idea of the vice president being a member of the cabinet has expired noiselessly.” Thurlow Weed summarized the evolution of Taylor’s reasoning:

General Taylor after his election, conscious of his own want of experience in civil affairs, supposed, until otherwise advised by Hon. John J. Crittenden, that the Vice-President could be ex-officio a member of his cabinet. Expressing in a letter to Mr. Fillmore his regret that he could not have the benefit of his presence and advice in the cabinet, he added that he should rely upon his experience and ask his advice upon all important questions.

The words “could be ex-officio” are perhaps instructive as they imply that the prevailing view of the time was that the Vice President was certainly unable to be a bona fide participant in Cabinet discussion; the most he could hope for was an ex officio role, almost akin to his Senate presiding officer role.

The mid-nineteenth century was also marked by two instances of the Vice President casting a tie-breaking vote that shed light on perceptions of his place in the legislative branch. In 1850, the upper chamber became deadlocked over whether to approve a Senate chaplain. Following a thoughtful debate, Vice President Fillmore broke the tie, which was allowed to stand.

In 1861, the Senate considered an amendment to the Constitution that would have prohibited Congress from abolishing slavery. A tie vote


119. See, e.g., Garner, supra note 41, at 163–64; Learned, supra note 11, at 174–75.

120. See 1 LIFE OF THURLOW WEADE, INCLUDING HIS AUTOBIOGRAPHY AND A MEMOIR 586–87 (1883).

121. Garner, supra note 41, at 164.

122. WEADE, supra note 120, at 586–87; see also Recollections of an Old Stager, 47 HARPER’S NEW MONTHLY MAG., 586, 587–88, Sept. 1873 (“for the first few months of his administration Mr. Fillmore was constantly consulted on matters of public concern, and specially with reference to the personal [sic] policy of the government. But the members of the cabinet soon became jealous of the influence of the Vice-President. . . . [Soon] Mr. Fillmore was reduced to a condition of insignificance . . . .”).

123. See supra note 110 and accompanying text.

124. See CONG. GLOBE, 31st Cong., 1st Sess. (1850); see also CURRIE, supra note 115, at 182.

125. See CONG. GLOBE, supra note 124, at 128; see also CURRIE, supra note 115, at 182.

126. See CONG. GLOBE, 36th Cong., 2d Sess. 1364 (1861).
occurred on a proposed modification to the constitutional amendment, which
the Vice President broke even though constitutional amendments are matters
with which the President himself plays no formal role.\footnote{127}

That same year, Attorney General Edward Bates was asked to evaluate the
lawfulness of President Abraham Lincoln’s suspension of the writ of habeas
corpus. During his opinion, Bates observed that “[t]he President is . . . the only
department which consists of a single man . . . .”\footnote{128} What is important to note
is what Bates did not say. He did not say the executive branch is “the only
department which consists of two men.” Nor did he couple the President
together with the Vice President. He said the executive branch, as a
constitutional matter, is made up of one individual and one individual only and
that formulation left no room for the Vice President.\footnote{129}

At the outset of the Lincoln Administration, Vice President Hannibal
Hamlin reportedly participated in a handful of Cabinet sessions, only the
second Vice President to have done so.\footnote{130} Hamlin’s grandson described the
scenario surrounding the Vice President’s early Cabinet involvement:

Mr. Lincoln’s invitation to Mr. Hamlin to become a consulting
member of his Cabinet was sincere, as everyone well knows who
understands Lincoln. Mr. Hamlin accepted in the same spirit, but it
was natural that in the workings of official and unofficial relations
the executive must sustain with various men, the former
predominate, as they should. . . . A cabinet officer in charge of a
department whose functions are largely executive might value the
advice of a friend, but would not long for it if pressed upon him by
one whose relations with the Cabinet had been established by the
President as of a personal and independent nature. One occupying
this position, and, therefore, having no executive power, would
hesitate to take an invitation to act with the Cabinet in a literal sense.
The Vice-President regulates his relations with the President and
Cabinet according to the footing on which he can place himself by
means of his personal qualities, rather than by his official duties.
Mr. Hamlin did attend numerous cabinet and military conferences at
the White House during the first period of the war, because he had
been given to understand that he was expected to do so. But his lack
of executive power, as well as his respect for the rights of others,

\footnote{127. See id; see also Brownell, supra note 1, at 43–44.}

\footnote{128. Suspension of the Privilege of the Writ of Habeas Corpus, 10 OP. ATT’Y. GEN. 74, 79
(1861); see also Seth Barrett Tillman, Citizens United and the Scope of Professor Teachout’s
http://www.law.northwestern.edu/lawreview/colloquy/2012/7/.}

\footnote{129. Interestingly, Abraham Lincoln’s first Vice President, Hannibal Hamlin, volunteered
for and drilled with a Maine Coast Guard unit for two months. See H. DRAPER HUNT, HANNIBAL
HAMLIN OF MAINE: LINCOLN’S FIRST VICE-PRESIDENT 168–69 (1969); MARK SCROGGINS,
HANNIBAL: THE LIFE OF ABRAHAM LINCOLN’S FIRST VICE PRESIDENT 210–12 (1994);
Greenberg, supra note 57, at 101. In this capacity, Hamlin could likely have been considered part
of the executive branch of the state of Maine.}

\footnote{130. See 2 HAMLIN, supra note 40; see also HITE, supra note 40.}
caused him in the end to confer directly with President Lincoln, and separately with members of the Cabinet. Thus the nature of Mr. Hamlin’s duties and the circumstances of his position compelled him to act chiefly in an individual capacity in relation to the war measures of the administration.\footnote{131}

Thus, while Hamlin met with the Lincoln Cabinet on several occasions, he was included “chiefly in an individual capacity” and not in an institutional one.\footnote{132} For these reasons, far from reflecting a change in perception about the vice presidency, Hamlin’s fortunes only underscored existing notions of the office.

In the aftermath of the Civil War, Congressman Thomas Jenckes offered legislation which would have directed the Vice President to administer a new Cabinet position, the Department of the Civil Service.\footnote{133} The Jencks bill provided that “there shall be created a new department of the government . . . to be called the Department of the Civil Service, [and] . . . the head of said department shall be Vice-President of the United States . . . .”\footnote{134} The intention behind this provision was not only to lend prestige to the new department, but to give the Vice President something more substantive to do than preside over the Senate.\footnote{135} As envisioned by Representative Jenckes, the “bill [would] . . . not give him [the Vice President] the right to a seat in the Cabinet, yet it adds weight to the reasons why he should be invited to become a member of the council.”\footnote{136} Once the bill emerged out of committee, it retained the Vice President as the head of the agency but was modified to make clear that the proposed agency would be “a new executive department of the government.”\footnote{137} The effect of the legislation, while not mandating vice presidential participation in the Cabinet, certainly encouraged that outcome. At a minimum, by heading up a department of government, this bill would have drawn the Vice President more clearly into the executive branch. The bill failed on a procedural vote.\footnote{138}

\footnote{131. HAMLIN, supra note 40.}
\footnote{132. See HITE, supra note 40.}
\footnote{133. See CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 212 (1905); see also Oliver P. Field, The Vice Presidency of the United States, 56 AM. L. REV. 365, 398 (1922).}
\footnote{134. H.R. 948, § 1, 40th Cong., 2d Sess. (1868). New York’s Round Table newspaper had proposed this idea the year before. See H. REP. No. 47, 40th Cong., 2d Sess. (1868), at 98 (quoting the paper).}
\footnote{135. See CONG. GLOBE, 40th Cong., 2d Sess. 2469 (1868) ("it is time, and we believe that this is the occasion for causing this officer [the Vice President] to perform some useful functions in this Government.").}
\footnote{136. Id. at 2469. See infra note 221 and the text immediately preceding and following the note.}
\footnote{137. See H.R. 948, § 1, 40th Cong. 3d Sess. (1868) (emphasis added).}
\footnote{138. See CONG. GLOBE, supra note 135, at 4003.}
In 1869, upon taking office, Vice President Schuyler Colfax noted to the Senate that he was “entering upon the duties [of Vice President] in this Chamber . . .” As Colfax seemed under no illusions that his actual place of business would be the Senate chamber, it does not seem a stretch to infer that he viewed himself more abstractly as being part of the Senate as well.

In the last days of his life in 1875, Colfax’s successor, Vice President Henry Wilson, was told of the passing of an old colleague of his, Senator Orris Ferry. The Vice President mourned the news of Ferry’s death and reflected on his own longevity in the Senate. If I live to the end of my present term [as Vice President], I shall be the sixth in the history of the country who have so served so long a time. Wilson clearly saw himself as Vice President continuing his Senate service and hence considered himself part of the legislative branch.

In 1877, the question of the Vice President’s role in the national government arose again. The newly sworn-in President, Rutherford B. Hayes, at the beginning of his tenure appears to have asked the new Vice President, William Wheeler, to join his Cabinet meetings. The Vice President joined one meeting, but was not welcomed by the President’s Cabinet secretaries. It is uncertain if that was because Wheeler was from an opposite wing of the party and they found his views uncongenial, if it was because they had constitutional misgivings regarding the Vice President joining their Cabinet deliberations or if it was because of some other reason. Either way, Wheeler’s brief exposure to the Cabinet was not unlike Hamlin’s a decade and a half earlier: both participated in Cabinet functions early on in the administration but quickly felt out of place, particularly in relation to the Cabinet secretaries.

140. See Elias Nason & Thomas Russell, The Life and Public Services of Henry Wilson, Late Vice-President of the United States 424 (1876).
141. See id.
142. Id.
144. See Seaver, supra note 143; see also Otten, supra note 40, at 176.
145. Wheeler hinted at being a part of the legislative branch in a speech to the Senate. See 6 Cong. Rec. 2 (1877) (quoting Vice President elect Wheeler: “Service in analogous parliamentary spheres has taught me how delicate and at times difficult and complex are the duties” of Vice President).
Another telling historical episode involved Wheeler. This instance involved a tie vote to determine whether an individual should be seated as a Senator.146 Wheeler cast a tiebreaking vote to defeat the effort to seat the would-be lawmaker.147 Immediately, Senator Allen Thurman sought recognition and argued against the Vice President being able to cast his vote in this manner. “I submit that the provision that the Vice-President shall have no vote except where the Senate is tied cannot apply to the case of seating a member of the Senate.”148 He maintained “that the . . . [constitutional] provision . . . [making] each House . . . the judge of the elections, qualifications, and returns of its own members left the determination . . . in the hands of the Senators themselves.”149 Thurman continued: “the Vice-President is not a member of the Senate. The Senate was intended to be a body representing the States on terms of perfect equality, each State being entitled to two . . . And the Vice-President is chosen in another mode.”150 Thurman concluded: “[i]t can only be said that he has that vote by holding that he is a part of this House. He is not part of the House.”151 Senator George Edmunds countered him. He asked rhetorically, “I take it my friend will agree . . . that the President of the Senate is the President of the body, and in that sense belongs to it as its presiding officer?”152 Edmunds further posited, “I . . . read, in every case of a tie the Vice-President has the casting vote.”153 Senator George Hoar concurred, citing the casting vote of Vice President Fillmore in 1850.154 Thurman found a supporter in Senator William Eaton,155 but ultimately Wheeler’s tiebreaking vote, as with Fillmore’s, was allowed to stand.156 At the end of the day, in the rueful words of Senator Thurman, the chamber’s decision represented a “holding that he [the Vice President] . . . is a part of” the Senate.157

In 1881, at the outset of his vice presidency, Chester Arthur made note of the Vice President’s link to the Senate.158 Likewise, in 1893, Levi Morton commented on the relationship of the Vice President to the Senate.159 He

146. See 6 CONG. REC. 730–37 (1877); see also Otten, supra note 40, at 183–85.
147. See 6 CONG. REC., supra note 146.
148. Id.
149. Id.
150. Id.
151. Id. (emphasis added).
152. Id. (emphasis added).
153. Id. at 738.
154. See id.
155. See id.
156. See id. at 740.
157. Id. at 737.
158. 11 CONG. REC. 2430 (1881) (noting that he was “[a]t the threshold of our official association”); see also DOCUMENTARY HISTORY, supra note 12, at 113.
159. See 24 CONG. REC. 2551 (1893); see also DOCUMENTARY HISTORY, supra note 12, at 169. Authorities in the late nineteenth century largely agreed that the Vice President was affiliated with the legislative branch. See, e.g., H. VON HOLST, THE CONSTITUTIONAL LAW OF
referred to his “association with the representatives of the forty-four States of this great nation in this Chamber . . .”

Vice President Adlai Stevenson, who served from 1893 to 1897, similarly implied he was part of the Senate as its presiding officer. In his memoirs, he quoted from his farewell address before the upper chamber. He expressed his “[good] fortune . . . [as] having been the associate . . . of the men with whom I have so long held official relation in this [Senate] chamber.” Language such as “associate” and having had “official relation in” the Senate betray that Stevenson likely saw himself as part of the Senate.

4. The Late Nineteenth and Early Twentieth Centuries

Beginning in the late 1890s, a number of progressive reformers began to call for modifying the vice presidency. No longer content to see vice presidents wallow unproductively in the Senate and remain unprepared to succeed to the highest office in the land, these progressive voices weighed in through either word or deed in favor of the Vice President joining Cabinet meetings. They included Walter Clark, Theodore Roosevelt, William Jennings Bryan, Woodrow Wilson, and Albert Beveridge. This reformist advocacy continued for a generation and culminated in the late 1910s and early 1920s when the Vice President began to join Cabinet deliberations. The Vice President’s inclusion in Cabinet sessions allowed him to secure a foothold in the executive branch and led to his later participation in more weighty executive branch matters. From these modest beginnings the vice presidency

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160. A DLAI E. S TEVENSON, SOMETHING OF MEN I HAVE KNOWN 64 (1909) (emphasis added); see also 29 CONG. REC., 2932 (1897) (quoting Stevenson); DOCUMENTARY HISTORY, supra note 12, at 205.


would flower into what is today thought of as almost entirely an executive branch position.

In 1896, Walter Clark, then associate justice and later chief justice of the North Carolina Supreme Court, proposed that the Vice President be included in the Cabinet. He built on Representative Jenckes’ proposal from nearly three decades before that the Vice President be put in charge of a new civil service department. Future Vice President Theodore Roosevelt took a similar view that same year. He believed “[t]he Vice-President has a three-fold relation. First to the administration; next as presiding officer in the Senate, where he should be a man of dignity and force; and third in his social position, for socially he ranks second to the President alone.” He added that the Vice President “should always be a man who would be consulted by the President on every great party question. It would be very well if he were given a seat in the Cabinet.”

President William McKinley’s first Vice President, Garrett Hobart, provided a model at the time for how the Vice President could assist the chief executive. He enjoyed such influence he was referred to as “assistant president.” Hobart undertook significant executive branch tasks. For example, at McKinley’s request, Hobart told Secretary of War, Russell Alger, that he needed to resign.

Yet, Hobart was fully aware of his ties to the legislative branch. He remarked at one point to the upper chamber: “Although not a member of the Senate, I have, as you know, an intimate official and personal connection with that body . . . .” Despite his unquestioned authority, Hobart’s power was personal and not institutional; it occurred due to

164. See Walter Clark, The Vice-President: What to do with Him, 8 GREEN BAG 427, 428 (1896).
165. See id.
166. 13 THE WORKS OF THEODORE ROOSEVELT 139 (Hermann Hagedorn ed. 1926) (reprinting a Review of Reviews piece from Sept. 1896).
167. Id. at 145.
168. Id. at 143; see also 1 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION 254 (1910) (quoting Roosevelt’s arguments with apparent approval). In 1901, Vice President Theodore Roosevelt confided to a friend: “the Vice-Presidency is an utterly anomalous office (one which I think ought to be abolished).” Williams, supra note 45, at 72 (quoting letter from Roosevelt). A few weeks following his election to the vice presidency, Roosevelt described the position as “a fifth wheel to the coach . . . .” Id. at 65
169. See DAVID MAGIE, LIFE OF GARRET AUGUSTUS HOBART: TWENTY-FOURTH VICE-PRESIDENT OF THE UNITED STATES 170 (1910) (“In the public mind Mr. Hobart became associated with the administration.”). Hobart was well informed of Cabinet proceedings and had McKinley’s ear even if the Vice President did not formally attend such meetings. See id. at 169.
170. See id. at 169; see also DAVID S. BARRY, FORTY YEARS IN WASHINGTON 246 (1924) (“[i]t was not until Hobart’s time that the Vice-President was regarded as anything but a fifth wheel to the executive branch.”).
171. See, e.g., BARRY, supra note 170, at 259; MAGIE, supra note 169, at 208, 210–11.
172. MAGIE, supra note 169, at 164 (quoting Hobart); see also DOCUMENTARY HISTORY, supra note 12, at 240; 30 CONG. REC., 1 (1897) (noting “I will be associated” with the Senate).
his close relations with the President and did not give rise to any immediate change in the office itself.\(^{173}\)

In 1901, then-two-time presidential candidate William Jennings Bryan suggested vice presidential participation in the Cabinet.\(^{174}\) Seven years later, pursuing the presidency for a third time, Bryan indicated he would have the Democratic candidate for Vice President—John Worth Kern—sit in on Cabinet deliberations were the two men elected.\(^{175}\) The Great Commoner announced:

> I think that the Vice President has too long been relegated to the background. There is no reason why he should not have a place in the affairs of State. If he is called on to take the President’s place he should know something about the work from first-hand experience. He can gain that knowledge by service in the Cabinet.\(^{176}\)

The Bryan-Kern ticket, however, went down to defeat in the fall, and many observers remained unprepared to embrace this option.\(^{177}\)

Also, in 1908 a modest precedent was set by one of the unlikeliest of vice presidents. Charles Fairbanks was not held in high regard by President Theodore Roosevelt and as such was largely ignored by the “Rough Rider.”\(^{178}\)

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173. Hobart’s biographer appreciated the dual-branch nature of the vice presidency. See Magie, supra note 169, at 146–47 (“If on the legislative side of the Government a Vice-President seems to fill a position of small importance, this is even more apparent on the executive side. By virtue of his office he does not become a member of the Cabinet, nor can he claim to be admitted to the councils of the administration.”).

174. See, e.g., Learned, supra note 11, at 173; Garner, supra note 41, at 165. This was echoed in 1906 by a Bryan ally. See Bryan’s Vice President a Cabinet Councilor, N.Y. Times, July 27, 1906, at 3 (quoting a Bryan confidante: “I know that Bryan has determined, if ever he is elected to the Presidency, to make his Vice President a member of his Cabinet Council. Bryan’s Vice President will be asked to participate in the discussions which concern the welfare of the country, and it will be a precedent that all future Presidents would have to follow.”).

175. See Garner, supra note 41, at 165.

176. Bryan would put Kern in the Cabinet, N.Y. Times, July 16, 1908, at 1; see also Learned, supra note 11, at 173. See infra note 221 and the text immediately preceding and following the note.

177. See Emlen McLain, Constitutional Law in the United States 202 (1905) (emphasis added) (“the vice-president is an executive officer only in case he is called upon to perform the functions of the president on the removal of the latter from office, or his death, resignation, or inability . . . . The function of the vice-president as presiding officer of the Senate is not in any sense executive.”); The Vice President, N.Y. Times, July 17, 1908, at 6 (“Mr. Bryan’s proposal to make the Vice President a member of the Cabinet ex officio is not justified by the Constitution.”). For a contemporary rebuttal, see Granville Munson, Letter to the Editor, The Cabinet: An Extra-Legal Body to Which Vice President is Eligible, N.Y. Times, July 21, 1908, at 6. For a colorful and soon-to-be repeated characterization of the office, see George Fitch, The Political Lemon, SAT. EVEN POST, Oct. 17, 1908, at 14 (“He is the vermiciform appendix of the Government, the unsolved problem of politics . . . .”)

178. Fairbanks opposed the idea of the Vice President joining the Cabinet but not on constitutional grounds. See Where the Electoral College Fails, N.Y. Times, Mar. 7, 1909, at 10 (quoting former Vice President Fairbanks about the proposition of the Vice President joining the Cabinet: “The idea has been proposed several times, but the question arises that if the Vice President were to be admitted to the Cabinet, of what use would he be there? He has nothing to
Yet, that year, Roosevelt asked Fairbanks to represent the United States at Quebec’s Tercentenary observance. This appears to have been the first time a Vice President served as presidential emissary and the first time a Vice President left the United States in an official capacity.

That same year, Woodrow Wilson, then an esteemed political scientist and President of Princeton University, wrote of the Senate: “its presiding officer [the Vice President] is [one of] . . . its constituent parts . . . .” Although, as President, Wilson would later give the office an important nudge toward the executive branch, as an academic he viewed the office as a “constituent part” of the Senate and expressed concern that the Vice President was “not afforded an opportunity to learn the duties of the [presidential] office.” The very next year, Senator Albert Beveridge—a high-profile Progressive leader—took up the cause, arguing that the Vice President should be placed in the Cabinet.

During the Taft Administration, Vice President James Sherman may have made an occasional unofficial appearance at Cabinet meetings. That could have been consistent with Sherman’s views about the position, which hinted toward the Vice President being part of the executive branch. In a 1909 address to the Senate, Sherman implied he was not part of the legislative branch. He stated: “The Vice-President is not one of the makers of the law.” Nonetheless, in 1911, Sherman took action from the chair that raised concerns in some quarters about the Vice President overstepping his bounds. During consideration of what would become the Seventeenth Amendment, a modification to the underlying measure was put forward. The tally ended in a tie, which the Vice President broke. Sherman’s action in this regard prompted debate the next day over the scope of the Vice President’s power to

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179. See The Reincarnation of Quaint Old Quebec, N.Y. TIMES, July 12, 1908, at 6; see also Greenberg, supra note 57, at 156.
180. See Greenberg, supra note 57, at 156. Vice President William King was outside the country at the beginning of his very brief tenure due to ill health. As either Vice President or Vice President elect, John Adams, Thomas Jefferson and John Breckinridge all declined diplomatic assignments. See id. at 93.
182. Id. at 64. See infra note 221 and the text immediately preceding and following the note.
184. See Garner, supra note 41, at 166; see also 1 HAYNES, supra note 92, at 225 n.2. Others at the time did not think him linked at all to the executive branch. See Sherman Exceptionally Qualified for Vice Presidency, WASH. POST, Mar. 4, 1909, at IN3 [hereinafter Sherman Exceptionally Qualified] (“because of his long experience in legislative matters, [James Sherman] is exceptionally well qualified to perform the duties of that office . . . ”).
185. 44 CONG. REC. 1 (1909).
186. See 47 CONG. REC. 1923 (1911); see also Henry Barrett Learned, Casting Votes of the Vice- Presidents, 1789-1915, 20 AM. HIST. REV. 571, 575–76 (1915).
vote that bore no small relationship to the question of which branch or branches of government he occupied.\textsuperscript{187}

Senator Augustus Bacon argued that Article I, Section 3 of the Constitution, which permits the Vice President to break tie votes, did not extend to constitutional amendments. He contended that the Presentment Clause of the Constitution, like the Tie-Breaking Clause, had no language of limitation in it.

\[\text{[I]}\text{t is a fact recognized by all lawyers, a fact universally recognized by all the departments of the Government, that [a constitutional amendment] \ldots has not to be sent to the President, that it has not to have the approval of the President of the United States; that the President of the United States has nothing to do with it that he can neither approve it nor disapprove it \ldots .}\textsuperscript{188}\]

In elaborating, Bacon remarked that:

for the same reason that the President of the United States is not recognized as having any function to perform in the approval or disapproval of this particular resolution, in my judgment the Vice President has no office to perform in regard thereto, and can not either upon the final vote or upon any intermediate vote vital to that final vote affect the result by his vote.\textsuperscript{189}

He concluded by reasoning that “the decisions of the Supreme Court of the United States [have decided that] \ldots the President of the United States has no function to perform in connection with it, by every rule of analogy does not the same thing apply to the action of the Vice President?”\textsuperscript{190} Bacon’s “every rule of analogy” comment unmistakably reflected his view that the Vice President was similarly situated to the President, almost assuredly meaning he deemed the former to be part of the executive branch.

Senator Charles Culberson agreed with Bacon’s position and cited \textit{Hollingsworth v. Virginia}.\textsuperscript{191} Bacon and Culberson’s arguments both rested on the implicit premise that, because the President—as head of the executive branch—plays no role in the consideration of constitutional amendments, the Vice President—as a subordinate member of the executive branch—should not be able to participate either.

\textsuperscript{187. See 47 CONG. REC. 1949, 1949–58 (1911).}
\textsuperscript{188. Id. at 1950.}
\textsuperscript{189. Id. at 1952.}
\textsuperscript{190. Id. at 1955; see also id. at 1956 (citing \textit{Hollingsworth v. Virginia}, 3 U.S. 378 (1798), for the proposition that “the President of the United States has no function to perform in connection with a resolution proposing an amendment to the Constitution, that the same rule does not apply to the function of the Vice President, when the authority conferred upon the Vice President is found in the same section of the Constitution which confers the other power on the President of the United States? The power, unqualified as it is, is held not to give power to the President over such a resolution. The same reason denies the exercise of a similar power over the same resolution by the Vice President.”).}
\textsuperscript{191. 47 CONG. REC. 1953 (citing \textit{Hollingsworth}).}
Earlier precedents involving vice presidential votes over internal Senate matters were brought to bear in opposition to Bacon’s efforts, but no one engaged directly with the Georgia Senator’s framing of the issue.\footnote{192}{See 47 CONG. REC. 1952, 1952–55.} Ultimately, Bacon’s endeavor, like that of Senator Thurman three decades prior, was unsuccessful and the Vice President’s action stood.\footnote{193}{See id. at 1958.}

Despite Bacon and Culberson’s opinions that indicated the Vice President was part of the executive branch—a view that was almost imperceptibly gaining some currency—the prevailing outlook at the time was expressed in a piece in 1912. It concluded that the Vice President “is not a member of the Cabinet, and cannot claim the right to be present at its meetings, to be consulted as to its policy, or even to be informed of its decisions.”\footnote{194}{The American Vice-Presidency, THE LIVING AGE, Sept. 21, 1912, at 758; see also, e.g., Sherman Exceptionally Qualified, supra note 184. But see Died While In Office, Seven Vice Presidents and Five Presidents are Chronciled, N.Y. TIMES, Nov. 1, 1912, at 13 (emphasis added) (“the Vice President . . . . is the second highest office in the Executive Department of the Government . . . .”). During World War I, Representative Evers Anson Hayes reinforced the enduring perception that the Vice President was outside the executive branch. He argued that a constitutional amendment was necessary for the Vice President to participate in Cabinet meetings and introduced just such a measure. See H.J. RES. 122, 64th Cong., 1st Sess., (1916) (“The Vice President shall be ex officio a member of the Cabinet of the President, without a portfolio.”); see also Lucius Wilmerding, Jr., The Vice Presidency, 68 POL. SCI. Q. 17, 33 (1953).}

In early 1913, there was speculation that President-elect Woodrow Wilson would have his Vice President elect, Thomas Marshall, join Cabinet deliberations.\footnote{195}{See May Sit in Cabinet, WASH. POST, Feb. 28, 1913, at 1 (“closer cooperation between the executive and legislative branches . . . may be established under . . . President Wilson . . . [in part by] permit[ting] the Vice President . . . to sit for the first time in the cabinet councils of the President. . . .”); see also John E. Brown, Woodrow Wilson’s Vice President: Thomas R. Marshall and the Wilson Administration, 1913-1921, at 180–81 (1970) (unpublished Ph.D dissertation, Ball State University).} In response to this rumored proposal, The New York Times stubbornly clung to the conventional wisdom. The title of its editorial said it all: “A Fanciful Suggestion.”\footnote{196}{See A Fanciful Suggestion, N.Y. TIMES, Jan. 5, 1913, at 16 (“It would not be consistent with . . . respect for the Vice President to attend meetings of the Cabinet in which he has no legal right, no duties to perform, no responsibilities, and not the shadow of effective power . . . . Sitting in the Cabinet room and listening to its legitimate occupants would be . . . incongruous with the real duties of the Vice Presidential office.”).}

The new President wound up not inviting the Vice President to join Cabinet proceedings and Marshall began his tenure much like his predecessors. Remarking upon the removal of the U.S ambassador to Mexico, Marshall noted that “the handling of the Mexican situation is the business of the Administration, and not my private and social business.”\footnote{197}{Bryan Missed Danger Sign, N.Y. TIMES, Mar. 13, 1913, at 3; see also Brown, supra note 195, at 210.} As a student of the Marshall vice presidency aptly observed, “[i]t does seem noteworthy that at
this early date in his Vice Presidential office Marshall recognized that a gulf existed between ‘Administration business’ and his own sphere of responsibility.” 198 In fact, Marshall saw himself and was seen by the Senate as sufficiently part of the legislative branch that his vote on one occasion was paired with that of a Senator. 199 The two men realized they both would be absent from the chamber and both would be on opposite sides of the issue and that therefore the outcome of the vote would not be affected.200

At the same time, there was a hint of bigger things to come. In 1915, Wilson requested that Marshall fill in for him at the Panama-Pacific Exposition, a major international gathering in San Francisco.201 This would appear to mark only the second occasion in which a Vice President attended a formal international gathering at the behest of the President, building upon the Fairbanks precedent of attendance at the Quebec conference.

B. Post-World War I: The Vice President as Increasingly Part of the Executive Branch

The first halting steps toward including the Vice President in Cabinet meetings on a regular basis, and by extension more fully becoming part of the executive branch, occurred right after the First World War. 202 In light of Wilson’s planned attendance at the Versailles Peace conference, the President deemed it wise for Marshall to preside over the Cabinet during his extended absence from the country, the first such lengthy trip by a President overseas. The result constituted the first appearance by a Vice President in formal executive councils since Wheeler four decades before, 203 and only the third instance since the Adams vice presidency.

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198. Brown, supra note 195, at 210. During this same period, noted authority John Philip Hill essentially expressed support for Marshall’s characterization of the office. He observed that “[t]he executive power is vested in the President alone, and the exclusion of the Vice-President from the Cabinet seems to be due to the theory that during the life of the President the Vice-President’s executive potentialities are dormant and that he has no duties except as President of the Senate, of which he is a constitutional part.” HILL, supra note 41, at 48 (emphasis added).

199. See 53 CONG. REC. 8510 (1916); see also CHARLES M. THOMAS, THOMAS RILEY MARSHALL, HOOSIER STATESMAN 162–63 (1939); Tie Vote in Senate Disposes of Rublee, N.Y. TIMES, May 24, 1916, at 22.

200. See 53 CONG. REC. 8510 (1916).

201. See Wilson Abandons His Visit to Coast, N.Y. TIMES, Mar. 6, 1915, at 4.

202. See, e.g., TURNER, supra note 4, at 10 (describing how vice presidential participation in Cabinet sessions “has had the effect of denting the notion that the vice president is wholly a creature of the legislature.”); HITE, supra note 40, at 73 (“By inviting the vice president into the cabinet, Warren Harding set in motion the modern American vice presidency”); Richard L. Worsnop, Vice Presidency, 2 EDITORIAL RESEARCH REPORTS, Nov. 11, 1970, at 833, 847 (“Some prestige was added to the vice presidency in Woodrow Wilson’s second term when the practice of having the Vice President meet with the Cabinet . . . was revived on a temporary basis.”); see also HAROLD C. RELYEA, RL 30842, CONG. RESEARCH SERV., THE VICE PRESIDENCY: EVOLUTION OF THE MODERN OFFICE, 1933-2001, Feb. 13, 2001, at 1; HITE, supra note 40, at 145.

203. See supra notes 143–45 and accompanying text.
Nonetheless, Marshall was hesitant to undertake even this minor departure from past practice. Marshall viewed vice presidential officeholders as "member[s] of the legislative branch." Stated the Vice President to the assembled Cabinet:

I am here and am acting in obedience to a request preferred by the President upon the eve of his departure [for Versailles] and also at your request. . . . I am not undertaking to exercise any official duty or function. I shall preside in an unofficial and informal way over your meetings out of deference to your desires and those of the President.

Interestingly, Marshall’s statement to the Cabinet was prepared on Senate letterhead. The Vice President’s self-effacing posture reflected his apparent opposition to Wilson’s suggestion. The former believed “[i]t would be very embarrassing at times to be in a confidential relationship to both the legislative and executive branches.”

Upon the President’s return from the peace conference, Marshall was asked to sit in on the first Cabinet meeting Wilson called following his arrival. The New York Times observed that Marshall was “invited to attend as a special mark of courtesy for his presiding over the meetings during President Wilson’s absence.”

Despite his experience with the Cabinet, Marshall was still sufficiently disconcerted about the apparent duality of the vice presidential position that, during Wilson’s incapacity when he was forced to serve as host for foreign dignitaries, he would suspend his role in the Senate. As one contemporary commented: it was “[t]oo much Jekyll and Hyde for him.”

206. See Brown, supra note 195, at 371.
207. See THOMAS, supra note 199, at 222–23.
208. Id. at 223; see also Brown, supra note 195, at 464 (“If we take Marshall at his word in terms of the many times he spoke about his presence at cabinet meetings, it can be said that he felt (rationalized?) that the President of the Senate should not be privy to the conversations of both Congress and the Administration.”).
209. See Williams, supra note 45, at 171.
210. Found at Work by Attaches, N.Y. TIMES, Feb. 26, 1919, at 1 (emphasis added). It is perhaps ironic that, following Wilson’s stroke and resulting incapacity, when the need for vice presidential participation in the executive branch was most acute, Marshall did not join Cabinet meetings. The author would like to thank Joel Goldstein for raising this point.
211. See GENE SMITH, WHEN THE CHEERING STOPPED: THE LAST YEARS OF WOODROW WILSON 113 (1964).
212. Id. Irving Williams put it well of Marshall’s tenure: “Essentially a Nineteenth Century type of Vice-President, he was quite frequently uncomfortable in the office in the Twentieth.” Williams, supra note 45, at 591. Wilson and Marshall referred to their official relationship as being “associated with” one another. See id., at 155, 161. Wilson, of course, had few qualms
Wilson’s successor, Warren Harding, built on this modest precedent. He asked his running mate, Calvin Coolidge, to regularly join Cabinet meetings. At the time it was speculated that the Senate might resist having the Vice President assume this role, reflecting the novelty of such an approach and the Senate’s own feelings of possessiveness toward the office. Indeed, Coolidge himself initially had some misgivings. Yet, Harding apparently felt pressured to make this gesture to Coolidge during the 1920 campaign because the Democratic candidate for President, James Cox, had made the same offer to his running mate, Franklin D. Roosevelt. Harding could also have been inspired to take this step based on his and Coolidge’s experiences as lieutenant governor. For his part, Roosevelt, as a vice presidential candidate, observed that “the Vice President could not without legislation employ ['direct executive authority'].” The future President noted that the second office “had no duties in relation to either the executive or the judicial branch of the Government,” likening the post to “a kind of fourth branch of the government . . . .”

Harding remarked at the time of his announcement:

The sort of government I have in mind ought to take advantage of the capacity and experience of a man like Governor Coolidge by bringing him into the councils . . . . I don’t see why it hasn’t been done long ago. Governor Coolidge . . . has had experience as an about bringing the two political branches closer together in other contexts. This is reflected in his writings, see Wilson, supra note 181, at 69–74; and also in his actions as President. He was the first President, for example, since John Adams to appear in person to give the State of the Union. See, e.g. Sidney M. Milkis & Michael Nelson, The American Presidency: Origins and Development, 1776-1993, at 241 (2d ed. 1999).

213. See, e.g., Harding Confers on the Campaign with Gen. Wood, N.Y. Times, July 11, 1920, at 1. Harding’s future attorney general, Harry Daugherty, may have been the originator of this suggestion. See Hite, supra note 40, at 234 n.7.

214. See id. It was commented that “Congress could provide for it by law. The Vice President could be made the intermediary between the President and the governmental departments having to do with internal affairs. He could call for information from the department heads, advise concerning expenditures, and exercise control, subject, of course, to the president’s veto.” Irving T. Bush, Needed a Business Manager, Collier’s 13 (March 13, 1920); see also Rosenberg, supra note 42, at 233.


216. See Garner, supra note 41, at 167–68. Following his electoral defeat to be Vice President in 1920, Roosevelt penned a note to a friend who had recently taken a job as a Capitol Hill reporter. Roosevelt humorously remarked that “[o]ne of us at least has landed in the Senate Chamber . . . .” See Williams, supra note 45, at 210–11 (emphasis added).

217. See Williams, supra note 45, at 212 (quoting Harding) (“Governor [Coolidge] and I each served as Lieutenant-Governor in our state, and . . . have learned . . . how possible it is for a second official . . . to be helpful . . . in a party administration. I think that the Vice-President should be more than a mere substitute in waiting . . . . I wish him to be . . . a helpful part of a Republican administration.”).

218. Franklin D. Roosevelt, Can the Vice President be Useful?, SATURDAY EVENING POST, Oct. 16, 1920, at 8, 81.

219. Id. at 8.
executive and should be helpful. I think the Vice President can be a most effective agency in keeping the executive officers in touch with the legislative branch of the government.\footnote{220}{Garner, supra note 41, at 168 (quoting Harding).}

There are essentially five policy rationales for including the Vice President in Cabinet meetings (and more broadly in executive branch activities). The Vice President could: 1) serve as a legislative liaison for the President;\footnote{221}{There was no formal White House legislative liaison operation until the Eisenhower Administration. See Kenneth E. Collier, Between the Branches: The White House Office of Legislative Affairs 30 (1997).} 2) more constructively make use of his time attending Cabinet sessions and carrying out executive branch assignments than presiding over the Senate; 3) provide helpful policy advice to the President and the Cabinet secretaries; 4) help ease the burdens of the President; and 5) improve the transition between Vice President and President should tragedy befall the latter. Harding’s public justifications for including Coolidge in Cabinet sessions focused on rationales 1 and 3. As will be recalled, Representative Jenckes had focused on rationale 2 a half century earlier while Bryan had emphasized rationale 5 a decade and a half prior. Once the Vice President began to gravitate more toward the executive branch these rationales would soon be heard with increased regularity.

Harding said that Coolidge would be “in the fullest sense a partner in the operation of affairs.”\footnote{222}{Haynes, supra note 92, at 228. Harding made the following request of Coolidge a few days after being sworn in: I have asked the Members of the Cabinet to meet with me for the first time on Tuesday morning . . . I shall be very greatly pleased if you can arrange to meet with us. Several months ago I said publicly that I thought the Vice President ought to be called into the conferences of the official family of the Administration and I very much hope you will find it possible and agreeable to accept. It has seemed to me that the second official of the Republic could add materially to the fullness of his service in this way. I am quite well aware that there is no constitutional or statutory provision for such participation, but cabinet councils are wholly of an advisory nature in any event and I am sure your presence and your suggestions will be welcome to the members of the Cabinet, and I know that they will be gratefully received by me. I shall look forward to your coming with a very great satisfaction and I hope you will find it possible to arrange to be present on all such meetings. Williams, supra note 45, at 214 (quoting a March 7, 1921 letter from Harding to Coolidge).} Not surprisingly, Vice President Marshall did not approve of this proposal.\footnote{223}{See Marshall Opposed to Seat in Cabinet, N.Y. Times, Dec. 5, 1920, at 4.} Marshall stated at the time:

[the Constitution of the United States intended that the Vice President should be the presiding officer of the Senate and nothing else. . . . To be a presiding officer it is necessary that the Vice President shall have the entire confidence of all the Senators. If a Vice President should attend meetings of the Cabinet practically as a member, it would tend to arouse suspicion, and Senators of the minority party might not trust him . . . . If any representatives from
the Capitol are to attend Cabinet meetings, the majority leader of the Senate and the majority leader of the House should be the men selected.\textsuperscript{224}

The \textit{New York Times} shortsightedly opined that this “extra-legal scheme will [not] have much success in causing the Vice Presidency to be essentially different from what it has been since the foundation of the Government.”\textsuperscript{225} Undeterred by the sentiments of his predecessor, Vice President Coolidge joined the Cabinet and took the most junior seat at the table.\textsuperscript{226}

Coolidge certainly seemed of the view that the vice presidency was largely an executive branch position. He commented that “[q]uite aside from its relationship to my own status, I have been gratified at Senator Harding’s declaration that he intends to make the Vice President a more significant part in the Administration.”\textsuperscript{227} He later recalled that “[m]y conception of my position is that I am vice-president. I am a member of the administration.”\textsuperscript{228} Nevertheless, Coolidge conceded that “the Constitution identifies the Vice Presidency with the Senate . . . .”\textsuperscript{229}

Coolidge’s novel attendance at Cabinet meetings did not pass unnoticed by commentators.\textsuperscript{230} It was characterized at the time as the Vice President

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\item[224.] \textit{Id.} It is not unprecedented for a congressional leader to attend a Cabinet meeting. \textit{See} ROBERT V. REMINI, HENRY CLAY: STATESMAN FOR THE UNION 155 n.3 (1993) (discussing Clay’s one-time admission to the Monroe Cabinet as Speaker of the House); Greenberg, \textit{supra} note 57, at 89 (noting Senator Seward’s periodic appearances at President Taylor’s Cabinet sessions); Marie D. Natoli, The Vice Presidency Since World War II 288 (1975) (unpublished Ph.D dissertation, Tufts University) (mentioning President Truman’s decision to include Senator Kenneth McKellar in Cabinet sessions).
\item[225.] \textit{Vice President and Cabinet}, N.Y. TIMES, July 14, 1920, at 6.
\item[226.] Over time, the Vice President has supplanted the Secretary of State as the second-ranking official in the Cabinet. For generations, the Secretary of State chaired Cabinet meetings in the President’s absence. \textit{See e.g.,} Garner, \textit{supra} note 41, at 159. The Secretary also initially chaired NSC meetings when the President was unavailable. \textit{See} PAUL KENGOR, WREATH LAYER OR POLICY PLAYER? THE VICE PRESIDENT’S ROLE IN FOREIGN POLICY 49 (2000). This changed under Eisenhower. \textit{See id.} As late as the mid-1970s, the Secretary of State—not the Vice President—was reportedly second in the chain of command in the event of a nuclear attack on the United States. \textit{See} Steven M. Gillon, \textit{A New Framework: Walter Mondale as Vice President, in AT THE PRESIDENT’S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY 144, 146 (Timothy Walch ed. 1997) [hereinafter PRESIDENT’S SIDE]} (noting that President Carter issued an executive order replacing the Secretary of State with the Vice President as second in the chain of command in the event of a nuclear conflict); \textit{see also} KENGOR, \textit{supra} at 21, 93; \textit{cf.} HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT”: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 111–16 (1992).
\item[227.] Coolidge Agrees, \textit{supra} note 215, at 1.
\item[228.] Robert H. Ferrell, \textit{The Republican Ascendancy, in PRESIDENT’S SIDE, supra} note 226, at 24, 29.
\item[230.] Some expressed support for this departure from past practice. \textit{See} John Brooks Leavitt, \textit{A Solution of the Presidential “Inability” Problem, 8 A.B.A. J. 189, 190 (1922)} (“Let the Vice-President be made a member of the cabinet. Not a line of legislation is needed. Nothing but
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forming “a vermiform appendix to the [President’s] official family.”

This Harding initiative reflected, in the words of one expert, “a breaking down of the sharp distinction between the executive and the legislative branches of the government which had endured from the foundation of the republic . . . .”

Despite Coolidge’s participation in the Harding Administration, old habits die hard. Coolidge’s Vice President, Charles Dawes, rejected out of hand the notion that the Vice President should sit with the Cabinet.

[T]he plan of having the Vice President sit with the Cabinet was unwise. The Cabinet and those who sit with it always should do so at the discretion and inclination of the President. Our Constitution so intended it. The relationship is confidential . . . . No precedent should be established which creates a different and arbitrary method of selection. Should I sit in the Cabinet meetings the precedent might prove injurious to the country. With it fixed, some future President might face the embarrassing alternative of inviting one whom he regarded as unsuitable into his private conferences, or affronting him in the public eye by denying him what had come to be generally considered his right. Dawes therefore declined to follow the precedent set by Vice President Coolidge’s attendance at Cabinet sessions, believing it represented the “wrong principle.” This led more than a few to deem the Harding-Coolidge initiative an unsuccessful experiment.

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232. *Id.* at 292. Prominent political scientist Oliver P. Field observed that same year that “[w]e do not know whether he [the Vice President] was to be a legislative or an executive character, or both, or one at one time and another at a different time.” Field, *supra* note 133, at 369.

233. *Dawes is Unwilling to Sit in Cabinet*, N.Y. TIMES, Feb. 5, 1925, at 2; see also JOHN D. FEERICK, FROM FAILING HANDS, THE STORY OF PRESIDENTIAL SUCCESSION 188 (1965).

234. Schlesinger, *supra* note 204 (quoting Dawes); see also CHARLES G. DAWES, NOTES AS VICE PRESIDENT, 1928-1929, at 33–34 (1935) (“the official relations of the President and the Vice President lend themselves to the encouragement of misapprehensions which are easy to create. I have always sensed the inherent embarrassments involved in the plan of having the Vice President sit in the Cabinet, as Coolidge did under the Harding administration. After my election, not knowing how Coolidge felt about it, I wrote him stating my views on the subject. This was done to relieve him—if he shared my views—of any embarrassment, if he desired to carry them out, notwithstanding the fact that he had accepted Harding’s invitation. Again I did not want to...
Given the bold assertion by Dawes, it is not surprising he viewed the Vice President as essentially part of the legislative branch. In his inaugural address to the Senate, Dawes observed that the Vice President’s “constitutional and official relations are to the Senate as a whole . . . .”236 No mention was made of any ties to the executive branch.237

President Herbert Hoover restored the practice of having the Vice President join Cabinet meetings.238 In this regard, Vice President Charles Curtis joined the Hoover official family. An exchange between then-candidate Hoover and the Republican vice presidential nominee is instructive as to the perceived location of the vice presidency at the time. In requesting that Curtis join his Cabinet, Hoover conveyed his belief that the latter’s “experience . . . should be available to the administrative arm of the Government.”239 Curtis responded that “having the Vice President keep in active touch with the executive problems of government . . . can be a distinct benefit to the executive branch as well as to the legislative branch.”240 Hoover and Curtis together seem to have adopted Harding’s two rationales for including the Vice President in the Cabinet: to provide advice to the President and the Cabinet and to liaise with Congress.

Neither Hoover nor Curtis, however, apparently perceived the position as part of the executive establishment. Upon becoming Vice President, Curtis commented that the Senate and the public as a whole wished him “to be an integral part of” the upper chamber and “not being strange to or remote” from the Senate.241 Yet, Curtis did not go so far as to consider himself “one of the makers of the law nor” did he feel the need to “be consulted about the rules governing your actions.”242 In an address to the Senate at the conclusion of his vice presidential term, Curtis took much the same position, referring to

do him the discourtesy of declining a possible invitation, and I thus avoided any necessity for such a course, however remote.”)

235. See, e.g., Coolidge to Drop Harding Precedent, N.Y. TIMES, Nov. 27, 1924, at 18 (“If carried out it will mean the abandonment of a precedent set by President Harding”); Vice President and Cabinet, N.Y. TIMES, Nov. 27, 1924, at 18 (concluding that the experiment of Coolidge joining Cabinet sessions had been a failure “because it was artificial and unreal”).

236. See 67 CONG. REC. 3 (1925).

237. See id.

238. See, e.g., Hoover Aims to Reform Machinery for Enforcing Dry Law and Many Others, N.Y. TIMES, Mar. 9, 1929, at 1; Curtis to Join in Cabinet Meetings: Will Participate in First One Today, N.Y. TIMES, Mar. 8, 1929, at 1; 1 HAYNES, supra note 92, at 229 n.2. Some were skeptical that Hoover’s reinstitution of Harding’s precedent would be successful. See Curtis at Cabinet Meetings, N.Y. TIMES, Mar. 9, 1929, at 18.


240. Id.

241. Dawes and Curtis Disagree on Rules, N.Y. TIMES, Mar. 5, 1929, at 4; see also Goldstein, supra note 76, at 396 n.127.

242. Stathis & Moe, supra note 25, at 559 (emphasis added). In all likelihood, this position was taken by Curtis to set himself apart from his predecessor who had advocated that the Senate change its rules regarding filibusters. See HATFIELD, supra note 12, at 363–64.
senators as his “associates.” He also “bid farewell to this legislative atmosphere.”

The budding tradition of the Vice President joining Cabinet proceedings was reconfirmed under President Franklin D. Roosevelt. Following the Coolidge/Curtis precedents and the offer made to him by Cox some years earlier, Roosevelt invited Vice President John Nance Garner to participate. During his second year as Vice President, Garner noted that “[b]y [presidential] invitation, the Vice President sits in at all Cabinet meetings . . . . Not even the Speaker nor the majority leader sits in on Cabinet meetings.” Clearly, Garner’s point of departure was that he remained part of the legislative branch as he compared his position to those of the Speaker of the House and Senate Majority Leader.

Since the Curtis-Garner period, the Vice President’s participation in the Cabinet has been uninterrupted. The decade and a half following Wilson’s request that Marshall join Cabinet meetings in his absence marked a turning point for the office. The fifteen-year period began—even so slowly—to change perceptions of the vice presidency. Instead of being seen at best as a

243. See 76 CONG. REC. 5656 (1933).
244. Id.
245. See, e.g., GOLDSTEIN, supra note 5, at 136.
247. By the early 1930s, more commentators had begun to accept the Vice President’s burgeoning executive branch role. A 1930 doctoral dissertation referred to the vice presidency as constituting the “second office[ ] of the executive.” Rosenberg, supra note 42, at 50. Two years later, constitutional scholar John Mabry Mathews, wrote that “[t]he only office in the executive department, besides that of the President, directly created by the Constitution is that of the Vice President.” JOHN MABRY MATHews, THE AMERICAN CONSTITUTIONAL SYSTEM 124 (1932) (emphasis added). He also conceded that “[i]n reality . . . . the normal function of the Vice President is merely that of presiding over the Senate . . . .” Id.; see also, e.g., Mildred Adams, The Dual Job of Being Vice President, N.Y. TIMES, June 26, 1932, at 8 (“it is . . . . possible that there was intended to be at least a speaking acquaintance between the Executive and the Legislative branches, that the sharp division of government into three parts was to be mitigated by the fact that the executive officer who was second in command would preside over deliberations of the legislature.”); C.W.B. Hurd, As Vice President, Garner is Different, N.Y. TIMES, Apr. 23, 1933, at 8 (referring to Garner’s “two separate entities: The Vice President is under the Constitution one upon whom devolves the duties of the Presidency in case anything happens to the President. Meantime the Vice President has a present responsibility as . . . . the President of the Senate”); Mildred Adams, Busy Mr. Garner is Ready for Congress, N.Y. TIMES, Dec. 30, 1934, at 5 (referring to the vice presidency alternately as “the nation’s second most important executive office” and as a position that “while they [the Framers] were neatly parceling the powers of government into three pigeonholes labeled executive, legislative and judicial, they foresaw a certain need for a link between the first two branches, and that is what they specified that the Vice President, second in command in the executive branch, should be presiding officer and thereby first in command in the legislative branch.”).

In 1935, Professor Earle D. Ross wrote that “this official who is potentially the nation’s chief executive is provided by the Constitution, not with executive duties . . . . but with an ineffective, usually nominal legislative function.” The National Spare Tire, 239 N. AM. REV. 275, 276 (1935). Ross referred to the Vice President as “a representative of the executive branch . . . . with formal connection with both branches . . . .” [He is] neither real executive nor legislator . . .
peripheral member of the executive branch through a handful of statutory delegations (e.g., serving as a board member of the Sinking Fund) or having only a contingent membership in the executive branch, the Vice President would in time come to be seen as a senior member of the executive department with only a peripheral tie to the Senate. Nonetheless, this full transformation in perception of the vice presidency would take another three decades.

Garner not only sat in on Cabinet meetings but also broke new ground by accompanying an official delegation to the Philippines and Japan in 1935, building on the precedent of Fairbank’s visit to Quebec and Marshall’s representation of Wilson at the 1915 International Exposition. He also briefly visited Mexico. More so than either Coolidge or Curtis, Garner in the early New Deal period was a presidential confidante and legislative troubleshooter. Garner allowed that “there is the satisfaction of being able to serve the President in a modest and obscure way as his agent at the Capitol.” In addition, he participated in National Emergency Council sessions, an entity created to combat the Great Depression. Recognizing the important changes that took place during his tenure, Garner was quoted as saying: “Until this administration the principal job of the Vice President was to preside over the Senate and dress up fancy and attend innumerable functions.” Garner concluded that the position constituted “a no man’s land somewhere between the legislative and executive branch.” At another juncture, Garner described the post as “being neither an executive of the government nor a legislator . . . .

." See id. at 278. The great historian of the Senate, George Haynes, concluded in 1938 that “[b]y the framers of the Constitution the office of the Vice-President was ‘put, so to speak, half-way between the White House and the Capitol, where it has ever remained.’ In consequence, there attaches to the Vice-Presidency a prestige derived from two entirely different sources.” 1 HAYNES, supra note 92, at 229 (citations omitted).

248. Indeed, many would come to view him (mistakenly) as having no legislative branch link whatsoever. See generally supra note 7; infra notes 478, 481.

249. See, e.g., RELYEA, supra note 202, at 2–3. Apparently Garner went in his capacity as Senate President. See Williams, supra note 45, at 324 n.54.

250. See Greenberg, supra note 57, at 220.

251. See, e.g., GOLDSTEIN, supra note 5, at 136.


253. See RELYEA, supra note 202, at 3.

254. GOLDSTEIN, supra note 5, at 8 (quoting Garner).

255. Id. at 138. Variations of that formulation would be used by others in the decades to follow. See, e.g., David S. Broder, The Triple-H Brand on the Vice-Presidency, N.Y. TIMES, Dec. 6, 1964, at 30 (referring to the vice presidency as “the strange no-man’s land between legislative and executive power”).

256. Garner, supra note 246, at 23; see also Greenberg, supra note 57, at 225 (emphasis added) (quoting Garner: Roosevelt “talked the legislative leaders into a lot of things, and we seldom talked him out of anything permanently.”).
An important symbolic moment occurred in 1937 when Garner took the oath of office alongside Roosevelt in the East Front of the Capitol.\textsuperscript{257} Prior to that year, vice presidents had typically taken their oath in the Senate chamber while presidents had been separately inaugurated at the East Front of the Capitol.\textsuperscript{258} This reflected the increasing linkage between the President and the Vice President. Garner’s executive branch tasks ensured that he devoted about fifty percent of his day to activities other than presiding over the Senate.\textsuperscript{259}

Another significant change occurred in 1940. Before that year, party elders had largely selected vice presidential candidates; this was not typically undertaken by presidential nominees themselves.\textsuperscript{260} The consideration was electability, not compatibility. As a result, the two candidates often had little in common ideologically or personally.\textsuperscript{261} Roosevelt broke the mold in 1940 when he insisted on Henry Wallace as his running mate.\textsuperscript{262} This precedent soon became the norm and had the effect of enhancing presidential-vice presidential compatibility, which improved the chances of the President delegating meaningful authority to the Vice President and bringing him more into the executive branch orbit.

In mid-1940, Congress created the “Office of the Vice-President.”\textsuperscript{263} It was accompanied by a modest appropriation and provision for administrative support.\textsuperscript{264} By the time of U.S. entry into World War II, a Vice President could expect to receive presedential delegations of authority. Beginning in earnest with Wallace, in the words of a leading authority on the vice presidency, the “constitutional aspect of [the Vice President’s] functions [began to be subordinated] to his extraconstitutional ones.”\textsuperscript{265} In this regard,
Roosevelt’s second Vice President became the first to be granted serious, formal authority within the executive branch. Roosevelt appointed him head of the Economic Defense Board (later re-christened the Board of Economic Warfare), where three thousand executive branch employees answered to him. Wallace was also named the head of the Supply Priorities and Allocation Board and participated in the body Roosevelt established to consider uses for atomic power.

Building on the Garner precedent, Wallace traveled abroad widely, but as the President’s representative, not the Senate’s. He visited China, the Soviet Union, India, Mexico and other parts of Central and South America and served as a public advocate for the administration. The corollary to this increased executive branch responsibility was decreased emphasis on the Vice President’s legislative branch duties. As noted political scientist Louis Brownlow observed, “Mr. Wallace . . . was entrusted with many activities that had nothing whatever to do with his legislative duties . . . . [this] had the effect of divorcing him in the public mind from his legislative duties . . . .”

More broadly, these delegations to Wallace reflected that, as the size and responsibilities of the federal government expanded through the New Deal and World War II, there was plenty to be done and the Vice President could assist with the work load. It was all hands on deck. As the preeminent authority on the vice presidency, Professor Joel Goldstein, has observed, the position’s transformation took place gradually in the broader context of the expansion of the roles and powers of the federal government and the executive branch itself. Indeed, underscoring Brownlow’s earlier point, by the late 1940s, the American public had clearly come around to the idea that the Vice President could be used in an executive branch capacity to assist an overburdened President. One survey indicated that four out of five Americans believed the President should give projects to the Vice President.

an executive officer. When any one thinks of the office, he naturally connects it with the Senate . . . .”

267. See id. at 152.
268. See LIGHT, supra note 96, at 15.
269. See, e.g., RELYEA, supra note 202, at 4.
270. See Williams, supra note 45, at 576.
271. See TURNER, supra note 4, at 11; see also HITE, supra note 40, at 90.
272. See e.g., LIGHT, supra note 96, at 14.
274. See, e.g., GOLDSTEIN, supra note 5, at 139–40; Natoli, supra note 224, at 173.
275. See, e.g., Nelson, supra note 8, at 61. This reflects rationale 4. See supra note 221 and the text immediately preceding and following the note.
276. See GOLDSTEIN, supra note 5, at 139–40; see also TURNER, supra note 4, at 10, 19.
277. See Plans to Remodel Vice Presidency: Obstacles to Dewey Project for Mr. Warren,
Interestingly, despite his trailblazing vice presidential role, Wallace in the 1950s tacitly linked the Vice President not to the executive branch but to the legislative department. At the time, Wallace proposed assembling the top figures in government to determine issues of presidential incapacity, including “[t]he top man in the Senate . . . but not the Vice President.” By excluding the Vice President from being considered the “top man in the Senate,” Wallace’s unstated assumption was that the Vice President fell within the upper chamber.

Harry Truman only spent a few weeks as Vice President and never had an opportunity to build on the Curtis/Garner/Wallace gains. Nonetheless, once he became President, he insisted that the Vice President be included as a statutory member of the National Security Council (NSC). During consideration of whether to add the Vice President to the NSC, the House committee that drafted the amendment briefly considered the placement of the Vice President within American governmental structure. Recalling two of the rationales provided earlier for greater vice presidential participation in the executive branch, the committee noted:

It is common knowledge that ways and means have been sought throughout recent years to more effectively utilize the person and the position of the Vice President of the United States. The only duty assigned to him is to preside over the Senate. He is not the servant of the President and cannot be placed in an administrative job which would subordinate him to the President. He cannot be placed at the head of a department and, on a constitutional basis, it is exceedingly difficult to find any administrative function for him. However, with the increasing complexity of the operation of the Federal Government, it now seems to be generally desirable to more effectively employ the office of the Vice President and the talents of

U.S. NEWS & WORLD REP., July 9, 1948, at 19 [hereinafter Plans] (“A recent Gallup Poll showed that 80 per cent of the people think the Vice President ought to help the President with administrative problems, so that the President would have more time to deal with policy.”).


279. See HATFIELD, supra note 12, at 415–17. For a view of the vice presidency at the time of Truman’s taking office, see Merlo Pusey, Assistant President, Suggests New Role Vice President, WASH. POST, Jan. 9, 1945, at 7 (“In these days of big government the Vice President ought to be No. 2 man in the executive branch. . . . The present arrangement of giving the V.P. a minor role in the legislative branch is so grossly out of keeping with his chief raison d’etre that to think about it is to be amazed that the arrangement has stood so long.”); cf. Natoli, supra note 224, at 269 (quoting FRANK MCAUGHTON & WALTER HEHMeyer, HARRY TRUMAN, PRESIDENT 7 (1948) (“The peculiar anomaly of the Vice-presidency [sic] . . . denies its titleholder . . . full-fledged membership in the administrative branch [and] deprives him . . . of virtually any authority in the United States Senate”). Others continued to argue that the Vice President was exclusively a legislative branch position. See Luther Huston, The Vice President Talks of His New Job, N.Y. TIMES, Jan. 21, 1945, at 13 (“The Vice President has no executive part in the Government . . . .”); Plans, supra note 277, at 19 (“The Vice Presidency . . . is a position that never has been effectively tied in with the executive branch.”).

the person who shall occupy that position.\textsuperscript{281}

The committee’s posture reflected the transition that the vice presidency was undergoing. At around this same time, proposals began to emerge to secure for the Vice President an institutionalized executive branch role.\textsuperscript{282} Representative Mike Monroney introduced a constitutional amendment to give executive branch duties to the Vice President.\textsuperscript{283}

Yet, while the post was being increasingly used by the President as a means of assisting in executive branch matters, conceptually it was still thought of in many circles as essentially a legislative branch position. Truman’s own beliefs reflect this confusion; they also demonstrate that acceptance of the Vice President’s “entry” into the executive branch was not an inexorable progression. In 1947, facing poor prospects for reelection, Truman considered running for Vice President again.\textsuperscript{284} He wrote in his diary that, “I’d be glad to be in second place, or Vice President. I like the Senate anyway.”\textsuperscript{285} The clear assumption by Truman was that the vice presidency was a Senate job.

Elsewhere, Truman would insist that:

\begin{quote}
[I]he Vice-President is not an officer of the executive branch of the government and therefore does not attend Cabinet sessions except at the invitation of the President. The history of the office shows that the Vice-President has rarely been used for executive work except where his relations with the President were unusually intimate. I was fortunate to attend . . . Cabinet meetings . . . to report legislative conditions to the President.\textsuperscript{286}
\end{quote}

Truman also commented that “the Vice-President is in between the legislative and the executive branches of the government without, in the last analysis, being responsible to either.”\textsuperscript{287} On another occasion, however, Truman interpreted the vice presidential slot as “a sort of appendage to the Presidency.”\textsuperscript{288}

\begin{notes}
\textsuperscript{281} Amending the National Security Act of 1947, H.R. REP. NO. 112, at 2 (1st Sess. 1949). The rationales are numbers 2 and 4. See supra note 221 and the text immediately preceding and following the note.

\textsuperscript{282} See TURNER, supra note 4, at 15–19.

\textsuperscript{283} See id. at 16, 19. At around this time noted political scientist Clinton Rossiter urged the Vice President to become formally a part of the Cabinet. See Clinton L. Rossiter, The Reform of the Vice-Presidency, 63 POL. SCI. Q. 383, 397–98 (1948).


\textsuperscript{285} Id. at 159–60.

\textsuperscript{286} HARRY S. TRUMAN, YEAR OF DECISIONS 223 (1955).

\textsuperscript{287} Id. at 71; see also Robert Bendiner, The Changing Role of the Vice-President, 137 COLLIER’S, Feb. 17, 1956, at 48, 50.

\textsuperscript{288} Schlesinger, supra note 204 (quoting Truman). A 60-year observer of the Washington scene and biographer of two vice presidents, Bascom Timmons, got it right in the late 1940s. See BASCOM N. TIMMONS, GARNER OF TEXAS: A PERSONAL HISTORY 176 (1948) (“When presiding in the Senate he [Vice President Garner] would be associating with the legislative branch; when
Truman’s Vice President, Alben Barkley, seemed of two minds regarding the placement of the vice presidency within American constitutional structure. On one hand, he wrote that “[t]he Vice President’s principal duty is to preside over the Senate.” In this same vein, in his memoirs, the Kentuckian recalled a meeting of the “Congressional ‘Big Four.’” In this group Barkley included the Vice President, the Speaker of the House, the House Majority Leader and the Senate Majority Leader. In the words of a reporter commenting not long after Barkley’s vice presidential tenure, the Kentuckian appeared “trouble[d] in trying to reconcile a Vice President’s role as ‘Assistant President’ with his duties on Capitol Hill . . . .” Similarly, Professor Richard Neustadt noted that Barkley failed to attend many NSC meetings. The Vice President’s ostensible excuse was his concern about someone in his role participating in core executive branch duties. And Barkley would be the final Vice President to devote significant time to his Senate duties. On the other hand, Barkley elsewhere characterized himself as part of the executive branch. In 1952, he wrote that “the Vice-President [is] . . . a part of the administration in control of the government . . . .” Finally, when assuming the chair Barkley seemed to view himself as potentially part of both branches. He commented upon becoming Vice President:

I should like the Senate to know, and the Congress to know, and the administration and the Government to know, and the people to know, that if at any time I may be of service to the Congress, to the administration, of course, and to the Government and to the American people beyond the mere technical duties of presiding over the Senate, I shall be happy to be available for any such service as any branch of the Government, or both branches of the Congress, may feel I can render.

During the vice presidency of Richard Nixon, the position took another big stride toward greater involvement in the executive branch.

attending Cabinet meetings, with the Executive . . . [This reflects a] divided function.”).
his eight-year tenure, the perception that the office was part of the legislative branch would become decidedly the minority view. Concerns about the workload of the executive branch, anxiety about succession matters stemming from President Dwight Eisenhower’s health problems and the Vice President’s own visible role in carrying out administration tasks caused the institution of the vice presidency to be closely analyzed during Nixon’s two terms. Increasingly, authorities concluded the Vice President had developed into a dual branch role.298

In building his executive branch bona fides, Nixon undertook a great deal of foreign travel as a representative of the administration,299 sat on several boards and commissions300 and assumed a prominent leadership role during the President’s health scares.301 Owing to Eisenhower’s indifference to partisan political matters, Nixon also took the lead on political party matters.302 As a result of these activities, Nixon spent little time in the presiding officer’s chair.303


298. See, e.g., Arthur Krock, Nixon has Unique role in the Administration, N.Y. TIMES, July 26, 1953 (“The Vice President is a hybrid in the Government, being both an executive and legislative officer.”); James MacGregor Burns, A New Look at the Vice Presidency, N.Y. TIMES MAG., Oct. 9, 1955, at SM11 (speaking of Vice President Nixon that “[h]e considers his executive role far more important than his legislative job . . . . His first loyalty is to the President; if an issue arises between the President and the Senate he acts as an agent of the former in trying to work out a compromise.”); Harold B. Hinton, Nixon Active on Eisenhower’s Team, N.Y. TIMES, June 28, 1953 (referring to the vice presidency as “that immiscible compound of the legislative and the executive . . . .”); Robert C. Albright, Nixon Making a Real Job of V.P., WASH. POST, June 21, 1953, at B1 (under Nixon the “office has become a central point of contact between the executive and legislative branches.”); Peter Frelinghuysen, Jr., Member of Congress, Assignments for Mr. Nixon, N.Y. TIMES, Apr. 22, 1958, at 32 (“there is no constitutional obstacle which would prevent the President from assigning the Vice President executive responsibilities.”); Irving G. Williams, The American Vice-Presidency and Foreign Affairs, 120 WORLD AFFAIRS 38, 40 (1957) (emphasis added) (“the Vice-President has become the second most important person in the Executive branch . . . .”); see also Thais M. Plaisted, The Vice Presidency of the United States, 50 SOC. STUD. 88, 90, 93, 95, 97 (1959) (concluding the Vice President is part of the executive branch).

Despite Nixon’s prominent executive branch duties, many commentators still had a difficult time perceiving the changes that were taking place regarding the office. See, e.g., Nixon’s Asia Tour Adds to Prestige, N.Y. TIMES, Dec. 20, 1953, at E7 (“Under our form of government the office of Vice President fits into the legislative branch.”); Arthur Orr, Vice President, Letter to the Editor, WASH. POST, Jan. 15, 1957, at A14 (“the Vice President . . . being a part of the legislative branch of the Government, has allowed himself to be drawn into the wholly unconstitutional position of performing services in both the legislative and the executive branches . . . . Perhaps the Vice President can be more useful as part of the executive branch. Should that be desired, the Constitution should be amended . . . .”).

299. See, e.g., HATFIELD, supra note 12, at 441–42.
300. See LIGHT, supra note 96, at 32.
301. See, e.g., HATFIELD, supra note 12, at 443.
302. See, e.g., GOLSTEIN, supra note 5, at 184–85.
303. See id. at 142.
In 1955, the Office of Legal Counsel (OLC) was asked to interpret a statute to determine which positions were exempted from civil service retirement benefits. The question was who fell under the category of “elective officers in the executive branch of the Government” under 5 U.S.C. § 693. For apparently the first time, the Department of Justice (DOJ) had occasion to formally consider the placement of the Vice President in the national government. OLC concluded that the Vice President qualified in this statutory context as part of the executive branch.

The President, at least in the broader sense, disagreed with OLC. In a 1957 memorandum, President Eisenhower recognized Nixon’s “special position of having one foot in the legislative branch . . . .” In his memoirs, Eisenhower further explained that “the Vice President . . . with the constitutional duty of presiding over the Senate, is not legally a part of the Executive branch and is not subject to direction by the President.” At another juncture, the thirty-fourth President noted that “the Vice President, not being technically in the Executive branch of government, was not subject to presidential orders. . . .” For that reason, Eisenhower made “requests” of Nixon and did not give him instructions.

Similarly, in a 1958 press conference, Eisenhower explained why he had declined to delegate certain duties to Nixon. The President explained:

The Vice President has statutory [sic] constitutional duties. It would be impossible, as a matter of practice to give, within the executive department, the Vice President’s specified duties because if you happen to have a Vice President that disagrees with you, then you would have a very—an impossible situation . . . . I decided as a matter of good governmental organization that it would not be correct to give him a governmental position in the executive department.


305. See id.

306. KENGER, supra note 226, at 50 (quoting Eisenhower); cf. Joseph F. Menez, The Vice Presidency in the United States: Up from Oblivion, 65 QUEEN’S QUARTERLY 22 (1958) (quoting Eisenhower: “Dick is the most valuable member of my team.”).

307. DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS: WAGING PEACE 1956-1961 6 (1965) [hereinafter EISENHOWER, WAGING PEACE]; see also Nelson, supra note 8, at 64.

308. DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS: MANDATE FOR CHANGE 1953-1956 540-41 (1963) [hereinafter EISENHOWER, MANDATE]; see also RICHARD M. NIXON, SIX CRISES 184-85 (1962) (“Eisenhower . . . . recognized that the Constitution had established the presidency and vice presidency as separate and independent offices. He never ordered me to do something.”).

309. See Nelson, supra note 8, at 10.

310. Transcript of the President’s News Conference on Foreign and Domestic Affairs, N.Y. TIMES, Apr. 3, 1958, at 8.
Instead, Eisenhower referred ambiguously to Nixon “as an associate in government.” Finally, the former general recalled on one occasion that he “telephoned Vice President Nixon to ask him also to mention [a potential special session] . . . to his colleagues in the Senate . . . .”

In Nixon’s estimation, however, the position was an executive branch one. Writing about Eisenhower’s agreement with him as to what should occur were the President to become incapacitated, Nixon had this to say about the effect of such a measure on the vice presidency: “[The action] will assure the continued useful employment of the Vice President as a deputy of the President rather than as a fifth wheel of the government . . . . The Vice President will thus become an integrated member of the incumbent Administration.” On another occasion, Nixon, after expressing some frustration with President Eisenhower to a reporter, emphasized he was “still a part of this Administration.”

Eisenhower’s Attorney General, William Rogers, agreed with Nixon’s assessment. In considering various proposals to resolve the presidential inability problem, Rogers opined that “the determination of inability [should be] left within the Executive branch, either by the President or the Vice President . . . or by the Vice President and Cabinet . . . .”

Despite the advances under Nixon’s tenure, a 1956 hearing held by a Senate Government Operations subcommittee reflects the continued ambiguity of the vice presidency in the mid-1950s. At the time, former President Hoover had proposed that the President’s chief of staff be given the enhanced title of “Administrative Vice President” as well as some additional formal authority. Hoover’s views on the vice presidency are not only notable because of his experience as President and Cabinet Secretary, but also due to his role as leader of two well-known government commissions that studied and recommended reforms for the executive branch.

Borne of that experience, Hoover believed that Congress needed to create an Administrative Vice President position to relieve some of the President’s workload. This was because he believed the vice presidency, as it was then

312. EISENHOWER, WAGING PEACE, supra note 307, at 37 (emphasis added).
313. NIXON, supra note 308, at 180.
315. Natoli, supra note 224, at 345 (quoting Rogers).
316. See 1956 Hearings, supra note 273.
317. See, e.g., id. at 42 (quoting Sen. Kennedy); id. at 59 (quoting Clark Clifford). For more on the administrative vice presidency proposal, see MILTON S. EISENHOWER, THE PRESIDENT IS CALLING 539–61 (1974).
318. The official names of the two “Hoover Commissions” were the First Commission on Organization of the Executive Branch of the Government and the Second Commission on the Organization of the Executive Branch of the Government.
319. See, e.g., 1956 Hearings, supra note 273, at 2, 7. This is, of course, one of the rationales for the Vice President spending more time in the executive branch. See supra note 221
conceived, could not receive delegated administrative projects from the chief executive.  

Hoover testified before the Senate panel that the Vice President “could not undertake executive duties.”  

This was in part because of “his constitutional duties as a member of the legislative branch . . . .”  

Due to this status, Hoover reasoned that the Vice President “could not be made subject by law to the President, such as would be required in any administrative or executive responsibility.”

Hoover argued before the Senate subcommittee that:

in order to give the President full executive authority he [the Vice President] would have to be placed subject to the President, which would be a pretty vital change in the whole constitutional concept of the Vice President. . . . Certainly I would not suggest that he be given executive or administrative duties. That brings in a conflict fundamentally in our setup of Government.

Senator John McClellan, chairman of the full committee, opined in response to Hoover’s proposal that “some thought might be given toward amending the Constitution to place the Vice President of the United States in the executive branch of Government where, I think, he properly belongs. Today he is in the legislative branch of the Government . . . .” McClellan reiterated his point later in the hearing. “[I]t does seem to me that the Vice President really belongs in the executive branch of the Government.”

Hoover responded to McClellan, stating that “you might effect the same suggestion I am making if you changed the constitutional provisions with regard to the Vice President and required him by constitutional amendment to be entirely subject to the President, as the Executive, and then you would make him a sort of Executive Vice President.”

Clark Clifford, an attorney and former special assistant to President Truman, appeared as a later witness at the hearing. He engaged in an exchange with Senator Stuart Symington, which is equally revealing as to how the Vice President was still perceived in many circles in 1956. Clifford commented that:

I should like to suggest for consideration a more fundamental and elemental approach . . . that is to change the concept of the function

and the text immediately preceding and following the note.

320. See 1956 Hearings, supra note 273, at 7–8.
321. Id. at 7.
322. Id. at 8.
323. Id.
324. Id. at 13–14.
325. Id. at 18.
326. Id. at 18–19; see also Proposal to Create an Administrative Vice President, Report of the Comm. on Gov’t Operations Subcomm. on Reorganization, S. Rep. No. 84-1960, at 7 [hereinafter Administrative Vice President Report] (quoting Sen. McClellan: “the . . . Vice President . . . should be related to the executive branch . . . .”).
327. 1956 Hearings, supra note 273, at 19.
of the Vice President. I believe that the Vice President could be moved from the legislative branch, where he now is, to the executive branch. It would take a constitutional amendment . . . .

I think the Vice President could be the second officer in the executive branch of the Government . . . . I suggest, that the Vice President belongs in the executive branch of the Government . . . . [As part of the current discussions there should be considered a] shifting of the Vice President from the legislative branch to the executive branch.

Symington, however, took a more nuanced posture. He described the vice presidency as “the link . . . between the legislative branch and the executive branch . . . .”

The committee, in its subsequent report on the Hoover proposal, noted that “there is considerable divergence of view concerning the suggestion to transfer the elected Vice President from the legislative to the executive branch. In any event, before a constitutional change of this radical nature is undertaken, there should be extensive and thorough consideration of all aspects of the matter.”

At the same time the Senate panel was considering the vice presidency, an executive branch panel was considering the very same subject. The President’s Advisory Commission on Government Organization was headed by future Vice President Nelson Rockefeller. As part of this effort, language in a memorandum to the President on the subject of the linkage of the Vice President to the legislative branch was struck at commission member Milton Eisenhower’s request. As had Hoover before, the advisory body

328. Id. at 57, 59–60; see also id. at 55 (statement of Clark Clifford) (“I have an uneasy feeling about the insertion of the legislative branch into” the President’s areas of responsibility); id. at 58 (speculating “if the Vice President were in the executive branch . . . .”).

329. Id. at 60. This conception of the vice presidency was shared by Professor Joseph Menez. In mid-decade, Menez opined:

He is the one high official who serves in two branches of the government. He can preside over the Senate and, with the President’s permission, over the Cabinet. The Constitution has decreed that the legislative and executive powers shall be separate; but it also has implied that the Vice-President shall be the connecting link.


330. Administrative Vice President Report, supra note 326, at 8. Ultimately, the Eisenhower Administration rejected Hoover’s suggestion for an Administrative Vice President. See W.H. Lawrence, White House Bars 2d Vice President, N.Y. TIMES, Jan. 15, 1956, at 69.

331. See W.H. Lawrence, New Role Shaped on Vice President, N.Y. TIMES, Dec. 19, 1956, at 25 (“Top Administration officials are considering a constitutional amendment to make the Vice President the second executive officer. . . . Under the plan, the Vice President would be separated from the Legislative Branch . . . and moved into the Executive Branch as a true Presidential deputy.”). Legislation introduced by Representative Peter Frelinghuysen, Jr. in 1956 would have created an administrative vice president. Senator Keating offered comparable legislation in 1963. See Worsnop, supra note 202, at 852–53.

332. See TURNER, supra note 4, at 17–18.

333. See Comments on Draft Memoranda to the President, Feb. 27, 1956 (on file with author) (“Milton said he likes the draft memoranda dated February 23, 1956. His only revision was to delete the sentence on page 3, reading: ‘Also, as President of the Senate, he is a member of
urged creation of an Administrative Vice President, an official who could take on functions delegated by the President. The panel also urged the “regular” Vice President be assigned more “ceremonial” functions to relieve the President’s workload.

Despite continued confusion in some circles about the office, by the start of the 1960s, the vice presidency as a practical matter had evolved to the point where fewer and fewer authorities saw the office as solely a legislative branch position. This changing perception was manifested at the outset of Lyndon Johnson’s vice presidency. Shortly before his swearing in, Vice President elect Johnson attempted to secure the consent of Senate Democrats for him to chair Senate Democratic Caucus meetings as Vice President. Johnson, the former Senate Majority Leader, wanted to “still control the Senate” as Vice President. Seventeen Democratic senators, however, cast their ballots against Johnson assuming this role. While this opposition was not sufficient to defeat the proposal outright, the open hostility to the idea doomed the experiment. At the time it was reported that, among the concerns raised, were the “constitutional grounds” that the Vice President was not a Senator.

334 See TURNER, supra note 4, at 17–18.
335 See id. at 18.
336 See Neustadt, supra note 293, at 187 (“[b]y 1960, the [Vice President] not only was, in fact, but also saw himself to be an officer of the executive branch.”).
337 As Vice President, Alben Barkley frequently joined gatherings of the Senate Democratic Policy Committee, but he did not chair them. See Polly Ann Davis, Alben W. Barkley: Vice President, 76 REG. OF KENTUCKY HIST. SOC’Y 112, 121 (April 1978), available at http://www.jstor.org/stable/23378959. See also ROTHMAN, supra note 133.
339 See ROWLAND EVANS & ROBERT NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER 307 (1966); see also THOMAS E. CRONIN & MICHAEL A. GENOVESE, THE PARADOXES OF THE AMERICAN PRESIDENCY 319 (1998) (“Senators today view vice presidents as intruders . . . ”); Nelson, supra note 8, at 63 (“[T]o the extent that vice presidents have become closely identified with . . . presidents . . . the Senate has become steadily less receptive to vice presidents who hope to play a formal role there.”); CARO, supra note 338, at 166 (quoting Senate aide Bobby Baker: “[N]o member of the Executive Branch—even a Lyndon Johnson—would be welcomed [to the conference].”).
340 See, e.g., JULES WITCOVER, CRAPSHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY 165 (1992). Much of this opposition as a practical matter was driven by Johnson’s heavy handedness as Senate Majority Leader. See, e.g., DON OBERDORFER, SENATOR MANSFIELD: THE EXTRAORDINARY LIFE OF A GREAT STATESMAN AND DIPLOMAT 157 (2003) (“Many of the [Senators’] objections were couched in Constitutional terms, on grounds that Johnson henceforth would be an official of the executive branch rather than a member of Congress, but the passions expressed were deeply personal. Johnson had ridden herd on the Senate Democrats like an overseer of Texas ranch hands”); DORIS KEARNS, LYNDON JOHNSON
senators apparently protested, in reporter Jules Witcover’s words, “that having the Vice President preside over the caucus would do violence to the constitutional separation of powers.” Senator Albert Gore, Sr. commented caustically about the scheme that “[w]e might as well ask Jack Kennedy to come back up to the Senate and take his turn presiding.” Senator Clinton Anderson also expressed healthy skepticism in this regard. In sum, senators regarded [the Vice President] as representing the executive branch.

Reinforcing the evolution of the position was that Johnson and his staff were given offices in the Executive Office Building, next to the White House. This was the first time the Vice President had received executive branch office space. Prior to that the Vice President could only hang his hat on Capitol Hill. Historian Robert Dallek has observed that “Johnson’s presence in the EOB had significant constitutional implications.”

Yet, the Vice President’s status remained sufficiently unclear as to prompt Johnson, in his first months as Vice President, to tread carefully with his executive branch duties. As such, he requested several legal opinions about his authority to carry out functions delegated to him by the President. These

AND THE AMERICAN DREAM 164 (1977) (following his embarrassment at the cold reception he received from the Democratic caucus “[a]ll the hopes he had entertained of leading the Congress from the Vice President’s chair were discredited[,] [s]uddenly . . . [Johnson] felt separated forever from the institution to which he believed he had given the best part of his life.”). For more on this incident, see LEONARD BAKER, THE JOHNSON ECLIPSE: A PRESIDENT’S VICE PRESIDENCY 20–28 (1966).

341. WITCOVER, supra note 340; see also MINUTES OF THE SENATE DEMOCRATIC CONFERENCE, 1903-1964, at 578 (Donald A. Ritchie ed., 1998) [hereinafter RITCHIE].

342. Cronin, supra note 265, at 328.

343. See EVANS & NOVAK, supra note 339, at 307 (summarizing Senator Anderson’s argument that the Vice President is less a part of the legislative branch than of the executive and observing that “[t]hey agreed with Clinton Anderson’s constitutional argument about separation of powers.”); see also Goldstein, supra note 76, at 398 n.139 (quoting Sen. Proxmire) (“It was also unconstitutional, in my view. I mean, here you had the Vice President, representing the executive branch, coming down here to run our caucus . . . .”); David, supra note 262, at 736 (“Nixon’s success in establishing the Senate image of the Vice Presidency as a post in the Executive Branch probably contributed to Johnson’s [sic] discomfiture.”).


345. See Wicker, supra note 344, at 123 (“The most striking development of Mr. Johnson’s two months in office has been the disclosure, confirmed by Mr. Kennedy, that the Vice President is to have a six-room suite in the Executive Office Building, next door to the White House. No Vice President, including Richard Nixon, has ever achieved a location so close to the Presidency . . . . he will be the only man in town with a physical foot in both camps—executive and legislative.”); see also LIGHT, supra note 96, at 68; Johnson to Get Offices in Sight of White House, N.Y. TIMES, Mar. 1, 1961, at 18.


347. See Memorandum for the Vice President from Nicholas deB. Katzenbach, Ass’t Attorney General, Office of Legal Counsel, Constitutionality of the Vice President’s Service as Chairman of the National Aeronautics and Space Council (Apr. 18, 1961) [hereinafter April
opinions represent the most detailed governmental analyses to date of the Vice President’s placement within the U.S. constitutional framework. Of course, the very fact that the Vice President himself tasked DOJ with the legal analysis (as opposed to a Senate counsel) would seem to presuppose Johnson’s understanding of the fundamental question.\textsuperscript{348}

In March of 1961, the Assistant Attorney General for OLC, Nicholas deB. Katzenbach, submitted a memorandum to Johnson regarding “the extent to which the Vice President may properly perform functions in the Executive Branch of the Government.”\textsuperscript{349} Katzenbach noted the dearth of judicial precedent on the matter and turned to a discussion of past practice.\textsuperscript{350} Observing the changes in perception of the position, he wrote that “the office has moved closer and closer to the Executive.”\textsuperscript{351}

Katzenbach posited that “the range of transferrable duties [that the President could assign to the Vice President] would seem to be co-extensive with the scope of the President’s power of delegation.”\textsuperscript{352} The Assistant Attorney General cautioned, however, that Congress could not delegate authority to “the Vice President to be wielded independently of the President . . . .”\textsuperscript{353} This would violate the Executive Power Clause and be further complicated by the fact that “the Vice President[s] [role as] . . . an elective officer [renders him] in no way answerable or subordinate to the President [which raises] . . . practical difficulties . . . .”\textsuperscript{354}

\begin{footnotes}

\textsuperscript{348}. The author would like to thank Joel Goldstein for raising this point. For some background on this assignment, see Transcript, Nicholas D. Katzenbach Oral History Interview 1, Nov. 12, 1968, by Paige E. Mulhollan, Internet Copy, LBJ Library, at 2–3 (Johnson “expressed an interest in just what the limits of the Vice-President’s executive powers might be, because of the unique position of the Vice-President as being an Executive Branch member but the only one to have any legislative responsibilities. . . . it was our view that he was a member of the Executive Branch with only this very narrow legislative function, but there were no executive powers that would have been improper for him to exercise. He really was a member of the Executive Branch.”); see also Goldstein, supra note 74, at 24.

\textsuperscript{349}. Memorandum for the Vice President from Nicholas deB. Katzenbach, Ass’t Attorney General, Office of Legal Counsel, Participation by the Vice President in the affairs of the Executive Branch 1 (March 9, 1961) [hereinafter March Katzenbach Memo], available at http://www.fas.org/irp/agency/doj/olc/030961.pdf.

\textsuperscript{350}. See id.

\textsuperscript{351}. Id. at 8.

\textsuperscript{352}. Id. at 9.

\textsuperscript{353}. Id.

\textsuperscript{354}. Id. at 9–10.

\end{footnotes}
Katzenbach was not impressed with the argument that the Vice President, in carrying out executive branch responsibilities, would potentially run afoul of the doctrine of separation of powers. He contended that “active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter his service in the Senate would diminish the powers of the Legislature.”

He added that “[a]side from practicalities, it does not appear that doctrinal considerations block the Vice President’s performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members.”

In addition, Katzenbach observed that the Vice President was not a third house of the legislature and that the position was authorized by Article II. Moreover, since the Vice President is impeachable, and “[s]ince the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.”

Nor was Katzenbach concerned about the Incompatibility Clause. He reasoned that, because the Clause states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in office,” and because “the Vice President holds ‘an Office under the United States,’ it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate.”

Katzenbach concluded with the formulation that would later bedevil Vice President Dick Cheney from a public relations standpoint: “[p]erhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter.”

Johnson also wanted to know specifically if the Vice President’s proposed service as chairman and member of the National Aeronautics and Space Council was permissible. Professor Richard Neustadt, who was advising the Kennedy Administration at the time, wrote a memorandum in February 1961 about the Space Council. In the memorandum, Neustadt wrote about the Vice President’s role on the Council, expressing “concern[] about the

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355. See id. at 10.
356. Id.
357. Id. (citations omitted).
358. See id.
359. Id. at 10–11.
360. See id. at 10 n.10.
361. Id.
362. Id. at 11.
363. See April Katzenbach Memo, supra note 347.
importance of protecting the Vice President’s position as a constitutional officer who cannot share [and] . . . should not be pressed to take operating responsibility.”

Neustadt acknowledged the changes that were occurring with respect to the vice presidency: “I recognize that Messrs. Kennedy and Johnson are breaking new ground in the evolution of the Vice Presidency, and that practice over the coming years may conceivably render my concern ‘old fashioned.’ The Vice President [however] is in a better position to judge this than I.”

Neustadt was prescient; the view that the Vice President was seriously limited in his ability to work in the executive branch would indeed soon come to be seen as “old fashioned.”

In an April memorandum, Katzenbach revisited many of the points he had raised in his analysis a month before. He observed that “[a]lthough the Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of Government . . . it neither grants nor forbids his functions in the conduct of affairs of the Executive Branch.”

Finally, the Assistant Attorney General noted that Article I, Section 5 delegated authority to each house of Congress to “be the judge of the elections, returns and qualifications of its own members and may punish and expel them, [provisions that] plainly do not apply to the Vice President.” He therefore concluded that the Vice President would be able to serve on the council.

Thus, Johnson undertook work on the space council, one of a handful of such boards in which he participated. The “go ahead” from Katzenbach reflected the increased acceptance of vice presidential participation in executive branch boards. This gradual accretion of practical, executive branch activities over time would continue to change the perception of the office.

In June of that same year, Katzenbach wrote a third memorandum on the President’s authority to delegate projects to the Vice President. In weighing the question yet again, he remarked that “the Vice President occupies a unique position under the Constitution, and there has been no judicial test of . . . the extent to which he may properly be regarded as an officer within the executive branch.” Katzenbach sounded a cautious note on the delegation question. “There is a good deal of judicial authority relating to the delegation of

366. Id.
367. See April Katzenbach Memo, supra note 347, at 1.
368. Id. at 3 n.1.
369. See id. at 4.
370. See, e.g., Preliminary Report from Robert B. Barnett, Office of Staff Secretary, for Walter F. Mondale, Democratic Vice Presidential Nominee 12–13, 17 (1976) (on file with the Jimmy Carter Library) [hereinafter Barnett Memo]
371. See, e.g., Goldstein, supra note 76, at 403–04.
Presidential powers, but this authority deals with delegations . . . to officers appointed with the advice and consent of the Senate." He noted that:

> [w]hile I do not believe the lack of judicial precedent or the Constitutional position of the Vice President would stand in the way of an increasing participation by him under delegations made to him by the President, there is perhaps some reason to proceed on a case by case basis, thus testing its political acceptability . . .

After discussing political precedent beginning with Vice President Wallace, Katzenbach reasoned that “[t]he creation of such assignments has tended to increase the identification of the Vice President with the executive branch and the general acceptability of a delegation of executive functions to him.” He, therefore, concluded that the President could delegate tasks to the Vice President as he saw fit provided those assignments did not otherwise violate the Constitution.

The Attorney General himself wrote an opinion in August 1961 that touched on the vice presidency. In a memorandum on the question of presidential inability, Robert Kennedy observed that “in the past two decades . . . the Vice Presidency has moved substantially from its anomalous status under the Constitution in both the executive and legislative branches toward the former.

In 1962, DOJ was asked a question about the tax status of staff members of the Vice President. In the discussion, the Vice President’s placement within U.S. constitutional structure arose yet again. The Acting Assistant Attorney General for OLC wrote to a Johnson aide that: “it seems difficult to conceive that an officer whose only constitutional function . . . is to preside over the Senate and to vote . . . is not ‘in the legislative branch.’” After evaluating several constitutional provisions involving the Vice President, OLC concluded that “[t]hey do not indicate that he is not ‘in’” the legislative branch, and in fact “[i]t would reasonably follow that he is ‘in the legislative branch.’

As the Kennedy Administration progressed, the gravitation of the Vice President toward the executive branch came to be recognized at the highest
levels of Congress. Senate Majority Leader Mike Mansfield wrote in 1963 that “[t]he Vice President [is] a member of the executive branch . . . .”

Later that year, Johnson was elevated to the presidency following Kennedy’s assassination. When it came time for Johnson to select his own running mate, he had no hesitation about where the vice presidency resided. In recommending Hubert Humphrey to be the Democratic vice presidential nominee in 1964, Johnson made clear his view that Humphrey would be part of the executive branch. He remarked “[t]he qualities that he brings to office will help make the Vice Presidency an important instrument of the executive branch.”

This slow, uneven migration of the vice presidency toward more of an executive branch role was underscored as a textual matter by the Twenty-Fifth Amendment, which was adopted in 1967. This action acknowledged the enhanced executive branch status of the Vice President.

The general tenor of debate on the Twenty-Fifth Amendment reflected the perception that the vice presidency had increasingly become a significant force within the executive branch. Professor Goldstein, has observed that the Twenty-Fifth Amendment “rested on the premise that the vice presidency had become an indispensable part of the executive branch . . . .”

In its initial deliberations over the Twenty-Fifth Amendment in 1964, the Senate Judiciary Committee reflected that “[f]or more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive


384. See Goldstein, supra note 297, at 181 (“Bayh and his colleagues viewed the vice president as part of the executive branch.”); Vikram David Amar, The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues, 2004 CATO SUP. CT. REV. 185, 207 (concluding that the Twenty-Fifth Amendment “formally concretizes an evolving importance of the vice presidency to the executive branch.”); see also Joel K. Goldstein, The New Constitutional Vice Presidency, 30 WAKE FOREST L. REV. 505, 560 (1995) [hereinafter Goldstein, New].

385. Joel K. Goldstein, More Agony than Ecstasy: Hubert H. Humphrey as Vice President, 103, 122, in PRESIDENT’S SIDE, supra note 226; see also Goldstein, New, supra note 384, at 560. At least one witness who testified before the relevant Senate Judiciary subcommittee stubbornly clung to the view that only a constitutional amendment would permit the Vice President to perform executive branch tasks. See Presidential Inability and Vacancies in the Office of Vice President: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 89th Cong. 80-81 (1965) (statement of Michael Musmanno, Supreme Court of Pennsylvania) (“Under my proposed constitutional amendment, the Vice-Presidency is transferred from the legislative department of the Government to the executive . . . . the office has outgrown the temple of the Constitution, so that the occupant must work outside in the cold and the wet of unconstitutional authority.”).
functioning of our Government . . . .\textsuperscript{386} The next year, in conveying his support for the Twenty-Fifth Amendment, President Johnson wrote that “[o]nce only an appendage, the office of Vice President is an integral part of the chain of command . . . .\textsuperscript{387}

The driving force behind the amendment, Senator Birch Bayh, observed at the time that “[t]he Vice President is today an integral part of Cabinet meetings. Modern-day Presidents seek the advice and counsel of their Vice Presidents.\textsuperscript{388} On the Senate floor, he added that “[t]oday, the office of Vice President . . . . is the office of the President’s chief ambassador.\textsuperscript{389} Bayh commented further that “the office of Vice President has gone through a period of development, perhaps to a greater degree than any other office in the history of the country.”\textsuperscript{390} Finally, he concluded the Vice President has “become a full-fledged, working member of the executive branch.”\textsuperscript{391}

Other lawmakers strongly supported Bayh’s characterization.\textsuperscript{392} Senator Hiram Fong, a key advocate for the Amendment, noted that “[t]he Vice-Presidential office under our system of government is tied very closely with the Presidency.”\textsuperscript{393} Similarly, the chief sponsor of the Amendment in the House, Chairman of the Judiciary Committee, Representative Emanuel Celler, recognized that “[t]he Vice President is part of the official family of the President. . . . He is essential, I would say, in present-day government.”\textsuperscript{394} Senator Frank Church noted the “intimacy of connection between the Vice President and President which calls for the closest possible rapport between the two.”\textsuperscript{395} Representative John Lindsay observed that “Presidents have been
wise enough to bring their Vice Presidents into the business of executive decisions.”

To Lindsay, a Vice President was “an executive branch person.”

The American Bar Association (ABA) played a major behind-the-scenes role in the adoption of the Twenty-Fifth Amendment. In its advocacy for the Amendment, the ABA wrote in 1964 that “[t]he office of Vice President today has become a vital part of the Executive Branch of the government.”

As discussed in the companion to this piece, the Twenty-Fifth Amendment makes clear the Vice President’s ties to the executive branch. Under Section 4, he is called upon to trigger the mechanism for determining presidential inability to discharge the powers and duties of his office. In this process, the Vice President works with the Cabinet (or other body created by Congress). Participation in the potential, temporary removal of the highest member of the executive branch—the President—and working with the Cabinet to this end would seem clearly to be executive branch roles. So too would the very fact that the Vice President in this capacity is called upon to preserve the continuity and proper functioning of the executive branch. As a result, the idea that the Vice President is solely a part of the legislative branch was largely put to rest.

The years following adoption of the Twenty-Fifth Amendment have witnessed numerous vice presidents who were of the view that the officeholder is a part of both political branches.

Regarding his own experience as Vice President, Humphrey noted the dual roles of the office.

First of all, who are you? You’re not the President, and yet you preside over the Senate. You’re not a Senator; you don’t have a

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396. 111 CONG. REC. 7962 (1965) (statement by Rep. Lindsay); see also Goldstein, New, supra note 384, at 538.
397. 111 CONG. REC. at 7961 (1965).
398. Natoli, supra note 224, at 342 (quoting an ABA publication on the proposed amendment).
399. See, e.g., Amar, supra note 384, at 207.
400. This was reflected by authorities toward the end of the 1960s. See RICHARD LANGHAM RIEDEL, HALLS OF THE MIGHTY: MY 47 YEARS AT THE SENATE 187 (1969) (“The Vice President is a hybrid creature of the Constitution, a sort of noble mongrel who belongs partly to the Legislative and partly to the Executive branch of government. Until a few years ago his only roost was on Capitol Hill among the legislators. Now he migrates between his offices at the Senate and his quarters in the White House.”); David, supra note 262, at 721 (“The Vice Presidency is in transition to a new institutional status in which it will be recognized as an office established predominantly in the Executive Branch, while retaining its constitutional prerogatives in the Legislative Branch.”); If a President and “Veep” Disagree, U.S. NEWS & WORLD REP., Sept. 16, 1968, at 14 (“[T]he Vice President has tended to be more a part of the legislative than of the executive branch of Government. . . . In recent years, however, the Vice Presidency seems to have been in a period of transition with more of a link to the executive branch being established.”). Some authorities at the time were already viewing the Vice President as strictly an executive branch personage. See Gerald W. Johnson, Our Imaginary Vice, 39 AM. SCHOLAR 387, 390–91 (1970) (referring to the Vice President as “a subordinate in the executive branch . . . ”).
vote. . . . it’s an awkward office. You’ve got two left feet, most of the time trying to walk a straight line—not getting into the President’s hair, or getting into the business of the Senate, and yet you are in both of these.

Clearly, Humphrey saw the position as involving both executive and legislative branch characteristics. Yet, in 1965, he conceded that he was perceived by lawmakers as an executive branch figure. “I do feel and do believe that the members of the Congress do look upon [the Vice President] pretty much as an executive officer.” No doubt remembering Johnson’s abortive attempt to remain involved in Senate business even while preparing to maintain an active executive branch role, Humphrey noted that “[a]ny Vice President that thinks that he can fulfill [lawmakers’] roles or interfere with their roles, is—well, he has outlined for himself disaster.”

Humphrey’s tenure, like that of his two predecessors, included assignments to a handful of executive branch commissions. Following Humphrey’s term, the position’s gradual accumulation of executive branch linkages continued. In 1969, the Vice President and his growing entourage were awarded their own executive branch budget line. Prior to that, vice presidents had been compelled to cobble together a makeshift staff through their own Senate personnel and by making use of executive branch detailers. By 1969, vice presidents were given their own executive branch employees, further institutionalizing the vice presidency’s link to the presidency.

In February 1969, at the beginning of Vice President Spiro Agnew’s tenure, then-Assistant Attorney General of OLC, William Rehnquist, submitted a memorandum to the White House that discussed the Vice President’s status within the federal government. The question involved whether the Vice President could be appointed to a statutory board consisting

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401. MARIE D. NATOLI, AMERICAN PRINCE, AMERICAN PAUPER: THE CONTEMPORARY VICE PRESIDENT IN PERSPECTIVE 11 (1985) (emphasis added) (quoting Humphrey); see also id. at 10 (as Vice President “you’re no longer a member of the [Senate] Club, and you’re not quite out . . . . And you’re the President’s man . . . .”) (quoting Humphrey); cf. 113 CONG. REC. 918 (1967) (quoting Vice President Humphrey: “The Chair is now the Presiding Officer of the entire Senate and stands as a servant of the Senate, rather than as an advocate within it.”).


403. Id. He also stated in the same interview that “we, in the Executive Branch, must . . . demonstrate to [Congress]” the wisdom of the President’s agenda. See id. at 13.

404. See LIGHT, supra note 96, at 69–78. Joel Goldstein has termed this phenomenon the “common law development of the vice presidency . . . .” Goldstein, New, supra note 384, at 560. These seemingly minor accretions of bureaucratic perquisites “shape our understanding of the constitutional nature of the job.” Id.

405. See LIGHT, supra note 96, at 69. Further legislative authorization for the hiring of vice presidential staff was enacted in 1978. See Pub. L. 95-570, 92 Stat. 2446 (1978); see also RELYE, supra note 202, at 24.

406. See LIGHT, supra note 96, at 69.

407. See id. at 69–70.
of executive branch officials.\textsuperscript{408} In his analysis, Rehnquist had to determine “whether the Vice President fits in . . . ‘the executive branch of the Government.’”\textsuperscript{409} He wrote perceptively that:

\textit{[t]he Vice President, of course, occupies a unique position under the Constitution. For some purposes, he is an officer of the Legislative Branch, and his status in the Executive Branch is not altogether clear. Nevertheless, the Vice President has been made an Executive officer by law for a number of purposes . . . . Moreover, the Vice President has been named by each of the recent Presidents . . . to carry out significant Executive duties . . . . In light of these precedents, the Vice President has now assumed a particular place in Government in which his status may be characterized as Legislative or Executive depending on the context . . . .} \textsuperscript{410}

Based on this reasoning, Rehnquist had little difficulty concluding that the Vice President could serve on the board in question.

As for himself, Agnew seemed to view the office as being part of both political branches. On more than one occasion he characterized it as an executive branch post. He observed that “[a]ny schoolchild would know the vice president is just an extension of the president.”\textsuperscript{411} At another juncture, Agnew wrote that he “ha[d] been honored to serve in this administration.”\textsuperscript{412} In his memoir, Agnew would describe his clash with executive branch officials as follows: “I was locked in battle with high officials at the Department of Justice and the White House—officials of the same administration I served.”\textsuperscript{413}

Yet, at other times, he seemed to recognize the legislative branch platform the vice presidency offered. Agnew’s conflict with the White House over the DOJ investigation of his conduct got to the point where Agnew considered leaving the executive branch altogether. He recalled:

\begin{quote}
For a while, I seriously considered closing my suite in the Old Executive Office Building next door to the White House and moving lock, stock, and barrel to my small suite in the Senate Office Building, thus symbolically cutting loose from Nixon and drawing into a tight shell to fight by myself.\textsuperscript{414}
\end{quote}

Agnew’s comments reflect an understanding that the Vice President could always return full time to the legislative branch should he so choose.

\begin{itemize}
\item \textsuperscript{408} See Memorandum for Edward L. Morgan, Deputy Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (Feb. 7, 1969) available at http://www.fas.org/irp/agency/doj/olc/020769.pdf.
\item \textsuperscript{409} Id. at 2.
\item \textsuperscript{410} Id.
\item \textsuperscript{411} JULES WITCOVER, VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON AND SPIRO AGNEW 139 (2007) (quoting Agnew).
\item \textsuperscript{412} Id. at 325 (emphasis added) (quoting Agnew).
\item \textsuperscript{413} SPIRO T. AGNEW, GO QUIETLY . . . OR ELSE: HIS OWN STORY OF THE EVENTS LEADING TO HIS RESIGNATION 95 (1980); see also id. at 66 (“When one comes to the executive branch [as I did]”); id. at 163 (referring to “men in my own administration.”).
\item \textsuperscript{414} Id. at 152 (quoting Agnew).
\end{itemize}
A ham-handed attempt by Agnew to lobby senators prompted one prominent lawmaker to opine on the dual-nature of the office. Senate Majority Leader Mansfield commented acidly that “[a] Vice President should not interfere in Senate affairs . . . . He is not a member of the Senate. He’s a half-creature of the Senate and a half-creature of the executive.”\footnote{415} Ironically, Agnew was criticized in other circles for presiding too little over the upper chamber.\footnote{416} On another occasion in the Agnew vice presidency, President Pro Tempore Senator Richard Russell commented that “[o]ne of the unique qualities of the Senate is the fact that we have a member of the executive branch of the Government presiding over the most powerful legislative body in the world.”\footnote{417}

In 1972, also during the Agnew vice presidency, the United States Government Organization Manual presented the Vice President and his staff as a discrete entity within the executive branch.\footnote{418} Mid-decade witnessed the Vice President’s executive branch operations beginning to parallel those of the White House.\footnote{419} Henceforth, the Vice President would have his own policy, political, communications, press and scheduling staff.\footnote{420}

In August 1974, DOJ was asked to look into the applicability of conflict of interest rules to President Gerald Ford’s nomination of Nelson Rockefeller to serve as Vice President.\footnote{421} In the memorandum, written by then-Deputy Attorney General Laurence Silberman, one question was whether the statute which governed executive branch appointees included within its scope the Vice President. Silberman was skeptical. He believed that “because [the Vice President’s] single constitutionally enumerated function (presiding over the Senate) is not an ‘executive branch’ function . . . [this] arguably removes the Vice President from coverage.”\footnote{422} Silberman reasoned that “it can be argued that the Vice President is not an officer of the executive branch within the meaning of [the statute] . . . but rather primarily one in the legislative

\footnote{415}{Spiro Agnew: The King’s Taster, TIME, Nov. 14, 1969 (quoting Mansfield). Mansfield’s comments here are different from his views of a decade prior. See supra note 382 and accompanying text.}
\footnote{416}{See Worsnop, supra note 202, at 852.}
\footnote{418}{See Light, supra note 96, at 63 (“The manual had no trouble placing this ‘hybrid’ office in the Executive Office of the President, acknowledging its status as part of the White House, not Congress.”); see also id. at 70–71. For a contemporary view of the office, see Donald E. Graham, The Vice Presidency: What it is, What it could be, WASH. Post, Sept. 18, 1972, at A22 (“The vice president today is therefore more a figure of the executive than the legislative branch . . . .”).}
\footnote{419}{See Light, supra note 96, at 71–75, 94, 95; Relyea, supra note 202, at 24.}
\footnote{420}{See Nelson, supra note 8, at 36.}
\footnote{421}{See Memorandum to Richard T. Burress, Office of the President from Laurence H. Silberman, Deputy Attorney General Re: Conflict of Interest Problems Arising out of the President’s Nomination of Nelson A. Rockefeller to be Vice President Under the Twenty-Fifth Amendment to the Constitution (Aug. 28, 1974), available at http://www.fas.org/irp/agency/doj/olc/082874.pdf.}
\footnote{422}{Id. at 2.}
branch.”  

Later that year, Silberman wrote to Representative Howard Cannon to explore the applicability of the same statute and a second measure to the Vice President. Silberman argued to Cannon that the Vice President was not a member of Congress. Nonetheless, “for certain purposes he can be regarded as being in the legislative branch.” In support of this proposition, Silberman noted the Vice President’s authority to break tie votes. At the same time, the Deputy Attorney General pointed out that the Vice President was not subject to unicameral expulsion from office as is a Senator. He, therefore, did not believe that constitutional provisions involving “members” of Congress included the Vice President. After weighing these clauses, Silberman concluded that “[c]onsidered as a whole, these provisions indicate that the Vice President has a unique status in the legislative branch, but not the status of a ‘Member’ of the Congress within the meaning of the Constitution.”

That same year, Vice President Ford noted the bifurcated nature of the vice presidency. He observed:

The Vice President is a constitutional hybrid. Alone among federal officers he stands with one foot in the legislative branch and the other in the executive. The Vice President straddles the constitutional chasm which circumscribes and checks all others. He belongs both to the President and to the Congress, even more so under the Twenty-fifth Amendment, yet he shares power with neither.

To that end Ford believed that “[t]he vice presidency . . . defies definition.”

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423. Id. at 6.
425. See id.
426. See id.
427. See id.
428. Id. Regarding whether the Vice President is a member of the Senate, see also April Katzenbach memo, supra note 347, at 3; WILSON, supra note 181, at 131 (“The Vice President is not a member of the Senate.”); CONG. GLOBE, 29th Cong., 2d ed. 162 (1847) (statement of Sen. Crittenden) (“For some years past, the Vice President has been the President of the Senate, and not a member of this body. He has been a sort of peace officer, to keep order—an executive officer—grand marshal . . . .”); id. (statement of Sen. Badger) (“The Vice President is not a member of this body. He occupied the chair by virtue only of his official character.”).
430. Id. For a view contemporaneous with Ford’s vice presidency from an experienced observer of public administration, see EISENHOWER, supra note 317, at 540 (“The . . . Vice-President is not a member of the executive branch. . . . He is not, as I have said, a member of the executive establishment.”). For a view of the Vice President’s place within American
Ford’s successor, Rockefeller, continued the trend of the position assuming more meaningful executive branch duties. The Vice President received a commitment from Ford to meet regularly one-on-one. In 1975, he was granted significant authority by Ford over the Domestic Council, at the time the rough equivalent of the National Security Council. The Vice President also headed a task force that investigated the intelligence community. In 1975, at Rockefeller’s urging, the vice presidential seal was changed. Notably, it was altered by executive order and not through Senate resolution.

During Rockefeller’s tenure, President Ford was asked at a press conference about the Vice President’s actions in the Senate to water down the filibuster. He stated:

I think we have to understand that the Vice President occupies a position as the presiding officer of the United States Senate under the Constitution . . . . I am in the executive branch of the government. He, in that part of his responsibility, is in the legislative branch. He has the obligation under the Constitution to make a ruling . . . . I think it is . . . inappropriate . . . for me to tell him as a member of the legislative branch, in that capacity, how he should rule, and therefore I did not.

Vice President Walter Mondale held the same view of the post as Ford and Humphrey. In 1978, Mondale stated of the vice presidency: “It’s the only office that breaches the separation of powers; you’re both an executive and a legislative officer.” The Minnesotan made the same observation in 1981.
He remarked that the Vice President was “the only officer of the federal government who breaches the separation of powers, being a member of both the legislative and the executive branches of government.”

More than three decades later, he commented that:

The vice presidency has, for most of our history, been one of the big riddles of American government. It has been hard to know what the office really means. The only elected officer of the federal government who belongs to both the executive and legislative branches, he was unwanted by either branch. . . . Jimmy Carter . . . ‘executivized’ the vice presidency, [and] the vice president became . . . an active participant in the executive branch.

Mondale made these observations about his having been part of both branches even though he enjoyed an exalted and hitherto unprecedented role within the executive branch.

It is generally acknowledged that Mondale was the first Vice President to be an all-purpose, high-level advisor to the President and, as such, he took the position to new heights of authority and prestige. This included a West Wing office, the freedom to join any meeting involving President Carter and the right to receive copies of all memoranda going into and out of the Oval Office. Moreover, in the words of Professor Paul Light, Mondale began “the integration of the Vice-President’s staff into the White House policy process.”

Mar. 11, 1978, at 376, 379 (quoting Mondale); see also Greenberg, supra note 57, at 330. For opinion at the time that reflects the shifting view of the office, see Bonafede, supra at 377 (quoting James MacGregor Burns: “The vice presidency has been tucked securely into the executive establishment.”).

438. Walter F. Mondale, The Vice Precedent, POLITICO, Mar. 5, 2007. See Walter F. Mondale, Sideman: Reflections on the Vice Presidency, Lecture at Macalester College, St. Paul, Minnesota at 3 (May 6, 2002) (transcript on file with author) (“In a strange way, since the vice presidents were in both branches, they historically had been treated as though they were in neither.”); Jonathan Singer, My Exclusive Interview with Vice President Mondale, JONATHANSINGER.BLOGSPOT.COM (Feb. 22, 2005), http://jonathansinger.blogspot.com/2005/02/interview-with-vice-president-walter.html (quoting Mondale) (“Before [President Carter] . . . the Vice President was both in the Executive and Legislative branches, but wanted by neither.”); see also Tom Daschle & Charles Robbins, The U.S. Senate 45, 227 (2013) (“For most of our history, since the Vice Presidents were in both branches, they have been treated as if they were in neither.”) (quoting a Mondale speech with approval from 2002). Following Mondale’s nomination, the New York Times noted the dual nature of the office. See The Vice Presidency, N.Y. TIMES, July 16, 1976, at 30 (“Like Senator Humphrey, his mentor, Mr. Mondale, if elected will probably spread-eagle both the legislative and executive traditions of the office.”).

439. See, e.g., Light, supra note 96, at 140–41, 201–22.
440. See, e.g., Goldstein, supra note 5, at 172–75.
441. See, e.g., Goldstein, New, supra note 384, at 545; Light, supra note 96, at 76. For a short time, Agnew occupied an office in the West Wing but soon abandoned it to be nearer his own staff. See Goldstein, New, supra note 384, at 545 n.229.
442. See Nelson, supra note 8, at 12.
443. Light, supra note 96, at 75; see also Walter Mondale, The Good Fight 171–74 (2010).
During the Mondale vice presidency, the divided nature of the office was reflected again in the analysis of OLC.\textsuperscript{444} John Harmon, the Acting Assistant Attorney General for OLC, analyzed whether the Hatch Act governing political activity by federal employees should be applied differently with regard to different vice presidential staff members.\textsuperscript{445} Harmon concluded that the Act should apply to those vice presidential staff members in the executive branch but not to those in the legislative branch,\textsuperscript{446} again demonstrating the dual-hatted constitutional status of the vice presidency.

During the vice presidency of George H.W. Bush, the question of the office’s location within the government was raised on the Senate floor. In 1987, Senator Ted Stevens referred to Bush’s role as presiding officer. He commended “the Vice President for his attention to the Senate.”\textsuperscript{447} Stevens noted that Bush “has been present quite often and has conducted himself as a Member of the Senate in accordance with the traditions and sense of our body.”\textsuperscript{448} Senator Robert Byrd, an authority on the Senate and its history, then took to the floor and said he “share[d] the sentiments that have been expressed by” Stevens.\textsuperscript{449}

Vice President Dan Quayle’s views reflect the longstanding confusion about the office. At one point, he wrote that “the vice presidency is an awkward office because the vice president is both the president of the Senate and a White House adviser who will carry out the president’s agenda on Capitol Hill. Like all recent vice presidents, I was caught between two branches of government . . . .”\textsuperscript{450} Quayle reiterated this point on a separate occasion: “It’s an awkward job. It’s awkward constitutionally—president of the Senate, member of the executive branch.”\textsuperscript{451} At another juncture, Quayle characterized the vice presidency as a “curious institution” devoid of “executive responsibility.”\textsuperscript{452} Years later, he took what might be termed a pre-modern view of the office, remarking that “the vice president is not part of the executive branch.”\textsuperscript{453} Like many of his predecessors, Quayle said somewhat different things at different times about the location of the vice presidency.

The question of where the Vice President resides within U.S. constitutional structure prompted a significant amount of popular attention

\textsuperscript{445} See id. at 1, 6, 8.
\textsuperscript{446} See id.
\textsuperscript{448} Id.
\textsuperscript{449} Id. (statement by Sen. Byrd).
\textsuperscript{450} Dan Quayle, \textit{Standing Firm: Personal Reflections on being Vice President, in PRESIDENT’S SIDE, supra} note 226, at 169, 178.
\textsuperscript{451} KENGOR, supra note 226, at 167–68 (quoting Quayle).
\textsuperscript{452} DAN QUAYLE, STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR 91 (1994).
\textsuperscript{453} HITE, supra note 40, at 198 (quoting Quayle).
during the vice presidency of Dick Cheney. The major impetus behind this
debate stemmed from Cheney’s office’s interpretation of an executive order
involving the archiving responsibilities of executive branch agencies. In
descending requests from the Information Security Oversight Office—a unit of
the National Archives and Records Administration (NARA)—that he submit
materials to the agency, Cheney’s office reasoned that the Vice President was
not subject to the order since he was not “an entity within the executive
branch.”

Cheney’s office provided Katzenbach’s rationale from four

decades earlier: “[t]he best that can be said is that the vice president belongs
neither to the executive nor to the legislative branch, but is attached by the
Constitution to the latter.” This assertion by Cheney’s office became
public in 2007 and excited much comment. Indeed, it was widely lampooned
as critics characterized the Vice President as a fourth branch of government
who was trying to evade accountability for his actions.

454. See, e.g., Dana Milbank, The Cheese Stands Alone, WASH. POST, June 26, 2007, at
A2. Ultimately, DOJ concluded that the Vice President was not in fact an “agency” for purposes
of the executive order and consequently did not have to comply. See Letter from Steven G.
Bradbury, Principal Deputy Assistant Att’y Gen. to J. William Leonard, Director, Information
Security Oversight Office, National Archives and Records Administration (July 20, 2007),
available at http://www.fas.org/irp/agency/doj/olc/072007.pdf. This was consistent with Vice
President Cheney’s posture toward other statutory directives involving “agencies” in the
executive branch. See Letter from David S. Addington, Counsel to the Vice President, to Sandy
Mabry, Director, Office of Government Ethics (Mar. 18, 2002) (stating that the relevant
“reporting requirement . . . applies only to the ‘head of each agency in the executive branch,’
which does not include the Vice President because he does not head an ‘agency in the executive
branch.’”); Letter from David S. Addington, Counsel to the Vice President, to Sandy Mabry,
Director, Office of Government Ethics (Jan. 13, 2004) (same); Letter from David S. Addington,
Counsel to the Vice President, to Marilyn Glynn, Acting Director, Office of Government Ethics
(Feb. 25, 2005) (same).

455. Kevin Bogardus, Palin won’t say Whether veep is an Executive post: Cheney is
Wrong, says Sen. Joe Biden, THE HILL, Sept. 19, 2008, at 1, 8 (quoting a letter from Cheney’s
chief of staff, David Addington).

The National Archives controversy soon spilled over into the press and prompted an exchange of
letters between Senator John Kerry and Vice President Cheney’s chief of staff. See Letter to
David S. Addington, Chief of Staff, Office of the Vice President from Senator John F. Kerry
(June 25, 2007) (on file with author). In the reply to Senator Kerry’s letter, Addington noted that
in light of the wording of the executive order “it [was] . . . not necessary . . . based on the law and
history of the legislative functions of the vice presidency and the more modern executive
functions of the vice presidency” to discuss “theoretical” constitutional matters. Letter from
David S. Addington, Chief of Staff, Office of the Vice President, to Sen. John F. Kerry, June 26,
2007 (on file with author). Other lawmakers also wrote the Vice President about the matter. See
Letter to The Vice President from Henry A. Waxman, Chairman, House Committee on Oversight
and Government Reform (June 21, 2007) (on file with author); Letter to Senator Sam Brownback
from Fred F. Fielding, Counsel to the President (July 12, 2007) (on file with author).

456. See e.g., HITL, supra note 40, at 255 n.59 (quoting Hendrik Hertzberg: “Cheney
provoked widespread hilarity by pleading executive privilege (in order to deny one set of
documents to the Senate Judiciary Committee) while simultaneously maintaining that his office is
not part of the executive branch (in order to deny another set to the Information Security
Oversight Office of the National Archives). On Cheney’s version of the government organization
chart it seems, the location of the Office of the Vice-President is undisclosed.”); Lloyd de Vries,
The controversy soon became a proxy for Cheney’s unpopularity at the time as well as his perceived unaccountability.\footnote{Cheney: The Fourth Branch?, CBS NEWS (July 3, 2007), www.cbsnews.com/news/chenyethe-fourth-branch/ (Cheney “went back and forth [about his branch membership] . . . just so he could avoid complying with Congress and the law. . . . Maybe he thinks he’s a Superhero with two identities. He’s Senate Boy and then he changes into Veep Man—both of whom have amazing powers not found in the Constitution. It’s as if he’s trying to exist in a fourth branch of the government—Cheneyland.”); Civics Quiz: Is Cheney Part of the Executive Branch?, ABC NEWS (June 26, 2007), http://abcnews.go.com/print?id=3316591 (quoting then-Rep. Rahm Emanuel: “He’s acting as if he’s unaccountable—a whole fourth branch of government unto himself.”); Milbank, supra note 454 (“Cheney has, in effect, declared himself to be neither fish nor fowl but an exotic, extracorporalistic beast who answers to no one.”); James Traub, After Cheney, N.Y. TIMES, Nov. 29, 2009, available at www.nytimes.com/2009/11/29/magazine/29Biden.html?page; Lea Anne McBride: “This [matter of his perceived unaccountability] . . . .”}

457 Cheney maintained this posture when pressed by a reporter:

Cheney: The Fourth Branch?, CBS NEWS (July 3, 2007), www.cbsnews.com/news/chenyethe-fourth-branch/ (Cheney “went back and forth [about his branch membership] . . . just so he could avoid complying with Congress and the law. . . . Maybe he thinks he’s a Superhero with two identities. He’s Senate Boy and then he changes into Veep Man—both of whom have amazing powers not found in the Constitution. It’s as if he’s trying to exist in a fourth branch of the government—Cheneyland.”); Civics Quiz: Is Cheney Part of the Executive Branch?, ABC NEWS (June 26, 2007), http://abcnews.go.com/print?id=3316591 (quoting then-Rep. Rahm Emanuel: “He’s acting as if he’s unaccountable—a whole fourth branch of government unto himself.”); Milbank, supra note 454 (“Cheney has, in effect, declared himself to be neither fish nor fowl but an exotic, extracorporalistic beast who answers to no one.”); James Traub, After Cheney, N.Y. TIMES, Nov. 29, 2009, available at www.nytimes.com/2009/11/29/magazine/29Biden.html?page; Lea Anne McBride: “This [matter of his perceived unaccountability] . . . .”

458 Kevin Bogardus & Rebecca Brown, Cheney gets last laugh, THE HILL, June 19, 2008, http://thehill.com/homenews/news/15345-cheney-gets-last-laugh (quoting Cheney). His spokesperson echoed this view. See Keith Koffler, Cheney’s Words Show He Counts Self Part of Government’s Executive Branch, GOVERNMENT EXECUTIVE (last updated June 29, 2007), http://www.govexec.com/oversight/2007/06/cheneys-words-show-he-counts-self-part-of-executive-branch/24763/ (quoting the Vice President’s spokesperson, Lea Anne McBride: “This [matter involving the executive order] has been thoroughly reviewed and it’s been determined that the reporting requirement does not apply to [the Office of the Vice President], which has both legislative and executive functions.”).
Q: There was an aide in your office who said that one of the reasons

Cheney viewed himself as ultimately responsible to the President. “In terms of accountability, I’m accountable [to the President].” See id. And Cheney frequently referred to the position in an executive branch context. Regarding the outcome of litigation with the then-General Accounting Office, Cheney stated that “I think it restored some of the legitimate authority of the executive branch, the president and the vice president, to be able to conduct their business.” See id. (emphasis added); Interview of the Vice President by Campbell Brown, NBC News, ARCHIVES.GOV (Jan. 28, 2002), http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20020128.html (quoting Cheney: “The important thing here . . . to understand is what we’re focused on are those things that relate to my role as Vice President; that as Vice President I’m the constitutional officer provided for in the Constitution. And the General Accounting Office has authority over statutory agencies, but not over constitutional officers. That’s not the way their statute is set up. And that it’s important here to protect the ability of the President and the Vice President to get unvarnished advice from any source we want.”); see also Letter from Vice President Cheney to the Senate (Aug. 2, 2001), in 147 CONG. REC. 19,179 (2001) (“While 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.”). At other times Cheney implied he had more of a legislative branch connection. See Koffler, supra (quoting Cheney as saying he was “a product of the United States Senate”).

Cheney, in his own personal capacity, maintained the bifurcated formulation. See Memorandum of Points and Authorities in Support of Defendant Vice President of the United States Richard B. Cheney’s Motion to Dismiss at 20, Wilson v. Libby, 498 F. Supp. 2d 74 (D.D.C. 2006) (No. 06-1258), 2006 WL 3406490, aff’d, 535 F.3d 697 (D.C. Cir. 2008) (arguing that “[a]mong the more important considerations [in the Supreme Court’s decision in Cheney v. U.S. District Court] is the close link—both in the public eye and in the operations of the respective offices—between the President and Vice President. The Vice President holds a unique office with both executive and legislative functions.”).

President Bush appeared to see the vice presidential office as part of the executive branch. See BRUCE P. MONTGOMERY, THE BUSH-CHENEY ADMINISTRATION’S ASSAULT ON OPEN GOVERNMENT 77 (2008) (emphasis added) (quoting President George W. Bush: “when the GAO overstepped its bounds to try to get advice given to the vice president and me, we resisted.”) (emphasis added). The President’s chief of staff addressed the issue squarely in an interview. See Transcript of NBC News’ Meet the Press, May 1, 2005, available at http://www.nbcnews.com/id/7698687/ns/meet_the_press/t/transcript—http://www.nbcnews.com/id/7698687/ns/meet_the_press/t/transcript (quoting President Bush’s chief of staff Andrew Card: “The vice president is also the president of the Senate. He’s the only individual in our great democracy that is part of the legislative branch and the executive branch. He’s part of Article I of the United States Senate, and he’s part of Article II as vice president of the United States.”).

In its dialogue with congressional committees over access to vice presidential information, the Bush Justice Department frequently coupled the President and Vice President together. The phrase “the President and Vice President, the two constitutional officers of the Executive Branch” appears with some regularity in the correspondence. See, e.g., Letter to Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, from Keith B. Nelson, Principal Deputy Assistant Att’y Gen., United States Department of Justice (June 11, 2008) (on file with author).

For its part, the 2004 Plum Book, repeated the Katzenbach formulation: “The Vice Presidency is a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter. The Vice Presidency performs functions in both the legislative branch . . . and in the executive branch . . . .” GOVERNMENT PRINTING OFFICE, UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, app. No. 5, 226 (2004) [hereinafter 2004 Plum Book].
you weren’t abiding by that executive order was that you’re really not part of the executive branch. Do you have—are you part of the executive branch, sir?

THE VICE PRESIDENT: Well, the job of the Vice President is an interesting one, because you’ve got a foot in both the executive and the legislative branch. Obviously, I’ve got an office in the West Wing of the White House, I’m an advisor of the President, I sit as a member of the National Security Council. At the same time, under 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. So the Vice President is kind of a unique creature, if you will, in that you’ve got a foot in both branches.

Q: But you are principally a part of the executive branch, are you not?

THE VICE PRESIDENT: 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, although I think it would be fair to say I spend more time on executive matters than legislative matters.  

In his memoirs, Cheney reaffirmed this conception of the office: “vice presidents . . . have a foot in the executive branch as well as in the legislative.”

The high-profile dispute over which branch Cheney belonged to spilled over into the House of Representatives during the summer of 2007. In June, then-Representative Rahm Emanuel offered an amendment on the House floor. Emanuel’s proposal would have eliminated executive branch funding for the Vice President, the argument being that, since the Vice President asserted he was not part of the executive branch, he should not receive executive branch monies. This led to a series of floor speeches about the status of the Vice President within U.S. constitutional structure, with the

459. Interview of the Vice President by Mark Knoller (CBS radio broadcast July 30, 2007), available at http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070730-1.html. The President’s spokesman showed little interest in wading into the controversy. See Mike Allen, Dems force Cheney to flip-flop on secret docs, POLITICO NEWS (June 27, 2007), http://www.politico.com/news/stories/0607/4679.html (quoting White House spokesman Tony Snow: “The vice president is the president of the Senate . . . . It is a wonderful academic question and I’m just not going to go any further than we’ve gone to date.”).


461. See 153 CONG. REC. 17,945 (June 28, 2007).

462. See id. (statement by Rep. Emanuel) (“I offer a simple amendment that bars the executive branch from being used to fund the office that does not exist in the executive branch, the Office of the Vice President.”).
overarching theme being Cheney’s unpopularity and perceived unaccountability.

In debate preceding the amendment, Emanuel argued that “the Vice President has declared he is a member of the legislative branch, the legislative branch. Every 10-year-old who is studying social studies in the United States knows that the Vice President is in the executive branch.”\(^463\) The Illinois congressman continued:

we have decided that if the Vice President is no longer a member of the executive branch . . . we will no longer fund the executive branch of his office, and he can live off the funding for the Senate presidency. We will follow the logic of this ludicrous argument that the Vice President of the United States is in the legislative branch . . . \(^464\)

Representative Ralph Regula countered more soberly that “the Vice President does have constitutional responsibilities as President of the Senate” and that “the Vice President’s office serves an important executive and legislative function.”\(^465\)

Perhaps the most probing analysis came from Representative Sheila Jackson Lee, even though her ultimate conclusion was off the mark. In concluding the Vice President was not part of the legislative branch, she relied on five arguments, many of which will be familiar. First, she noted that the public considered the Vice President part of the executive branch.\(^466\) Second, she contended that if the Vice President were in fact part of the legislative branch, the relevant house could remove him,\(^467\) yet impeachment is the only remedy for vice presidential removal.\(^468\) Third, she argued that the Vice

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\(^{463}\) 153 CONG. REC. 17,419 (June 26, 2007).

\(^{464}\) Id. Further debate on the constitutional issue can be found at id. at 17,946 (statement of Rep. Schakowsky) (“I turned to my Constitution for some help. It looks to me like article II does include the Vice President in the executive.”); id. (statement of Rep. Serrano) (“The Vice President has to decide if he is a part of the Senate or is he a part of the executive branch.”); id. (statement of Rep. Andrews) (“Under our Constitution, what you call yourself does not define your responsibility.”); id. at 17,950 (statement of Rep. Waxman) (“The Vice President can’t unilaterally decide he is his own branch of government . . . .”); cf. id. (statement of Rep. Frank).

\(^{465}\) Id. at 17,946. Others dismissed the debate altogether as little more than political theater. See id. at 17,948 (statement of Rep. Issa) (“this is not a . . . legitimate debate, about whether or not the Vice President is in one branch or the other. After all, he presides over the U.S. Senate.”). Others who opposed the Emanuel amendment still conceded they thought the Vice President was part of the executive branch. See id. at 17,948 (statement of Rep. Blunt) (“We know he is not part of the legislative [branch].”).

\(^{466}\) See id. at 17,947 (statement of Rep. Jackson Lee) (“most Americans . . . know that the Vice President is a member of the Executive Branch of the Federal Government.”).

\(^{467}\) See id. (“A member of the Federal legislature can be involuntarily removed from office if his or her colleagues, by a 2/3 margin, vote to expel. The Vice President can be involuntarily removed from office after impeachment by the House and conviction in the Senate.”).

\(^{468}\) See id.
President did not meet the Article I definition of a member of Congress. Fourth, she asserted that Article II linked the Vice President to the executive branch. Finally, Representative Jackson Lee commented that the Vice President’s four-year term of service does not reflect that served by federal lawmakers, be they representatives or senators.

Emanuel’s effort was ultimately defeated 209 to 217. Though the debate was perhaps animated less by constitutional principle than partisan zeal, it provided once again an example of the confusion that surrounds the location of the vice presidency in U.S. constitutional structure.

At around the same time as the Emanuel amendment, a handful of his Democratic colleagues took to the House floor to urge that Vice President Cheney be impeached or resign. One of the grounds for vice presidential impeachment was Cheney’s assertion that he was not part of the executive branch for purposes of the NARA executive order.

One senior House member, Representative Jim McDermott, stated that “[w]hen a sitting Vice President claims that he is not part of the executive branch of government to which he was elected, it is time to remove him.” In reaching this conclusion, McDermott relied in part on an article by Bruce Fein that the lawmaker submitted for the Record. In this piece, Fein dismissed the notion that because the Vice President “also serves as president of the Senate . . . the vice president is a unique legislative-executive creature . . . .” Fein argued:

[...] take the vice president’s preposterous theory that his office is outside the executive branch because it also exercises a legislative function. The same can be said of the president, who also exercises a legislative function in signing or vetoing bills passed by Congress. Under Cheney’s bizarre reasoning, President Bush is not part of his own administration: The executive branch becomes acephalous.

For reasons alluded to in the companion to this piece, and as will be discussed later in more detail, Fein’s attempt to equate the Vice President’s

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469. See id. (“The Vice President is not a ‘member’ of the Legislative Branch because membership in that branch is governed by the first clause in sections 2 and 3 of Article I . . . . A person is a member of the legislative branch only if they are so qualified by virtue of compliance with Article I, section 2, clause 1 or Article I, Section 3, clause 1. Acting as President over the Senate is not sufficient to make one a ‘member’ of the Senate, and thus a member of the legislative branch.”).

470. See id. (“The Vice President is a creature of the Executive Branch of the Federal Government as Article II of the Constitution makes clear.”).

471. See id. (“No member of Congress is elected to serve a four-year term as is the Vice President.”).

472. See id. at 17,996.

473. Id. (quoting Bruce Fein, Impeach Cheney—The Vice President has run Utterly Amok and Must be Stopped, SLATE (June 27, 2007), http://www.slate.com/id/2169292.).

474. Id.

475. See Brownell, supra note 1, at Part II.A., especially Figure No. 2 and accompanying notes.
legislative \textit{branch} role to the President’s legislative \textit{function} is flawed and cannot withstand scrutiny.\footnote{See \textit{infra} Part III.C.}

Fein concluded his argument incongruously by noting that the President could not delegate the degree of authority to the Vice President that Bush had because “[t]he sole constitutionally enumerated function of the vice president is to serve as president of the Senate without a vote except to break ties.”\footnote{153 \textit{Cong. Rec.} 17,997 (June 28, 2007).} As part of this same debate, several other House members made brief statements highlighting their concern about the Vice President’s assertion regarding his constitutional placement.\footnote{See \textit{id.} at 17,924 (statement of Rep. Yarmuth) (“Cheney has convinced himself that . . . . unlike the previous 44 [vice presidents], [he] is not a member of the executive branch.”).}

In the immediate aftermath of this controversy, two insightful student notes were published which discussed the Cheney vice presidency and its place in the federal government, largely in the context of his dispute with the National Archives.\footnote{See generally \textit{Subhawong}, \textit{supra} note 388; \textit{Garvey}, \textit{supra} note 479.} Both contended that Cheney was part of the executive branch to the extent he was involved with protecting classified information.\footnote{See \textit{id.} at 17,418 (statement of Rep. Watson) (entitling her remarks: “Vice President Cheney Needs to Take a Civics Class—He is a Member of the Executive Branch.”); \textit{see id.} at 17,924 (statement of Rep. Yarmuth) (“Cheney has convinced himself that . . . . unlike the previous 44 [vice presidents], [he] is not a member of the executive branch.”).}

The question of the Vice President’s place in U.S. constitutional structure—and indirectly the role of Cheney in the operations of the federal government—was sufficiently controversial that it even became an issue in the 2008 presidential race.\footnote{See generally \textit{Subhawong}, \textit{supra} note 388; \textit{Garvey}, \textit{supra} note 479.} In the vice-presidential debate, moderator Gwen Ifill asked both Governor Sarah Palin and then-Senator Joe Biden for their thoughts on the position of the Vice President in American constitutional structure.

\begin{center}
\textbf{PALIN: . . . . Of course, we know what a vice president does. And that’s not only to preside over the Senate and [we] will take that position very seriously also. I’m thankful the Constitution would allow a bit more authority given to the vice president if that vice president so chose to exert it in working with the Senate and making
\end{center}
BROWNELL: CONSTITUTIONAL CHAMELEON, PART II

sure that we are supportive of the president’s policies . . .

IFILL: Governor, you mentioned a moment ago the constitution might give the vice president more power than it has in the past. Do you believe as Vice President Cheney does, that the Executive Branch does not hold complete sway over the office of the vice presidency, that it it is also a member of the Legislative Branch?

PALIN: Well, our founding fathers were very wise there in allowing through the Constitution much flexibility there in the office of the vice president . . . . Yeah, so I do agree with him that we have a lot of flexibility in there, and we’ll do what we have to do to administer very appropriately the plans that are needed for this nation . . . .

IFILL: Vice President Cheney’s interpretation of the vice presidency?

BIDEN: Vice President Cheney has been the most dangerous vice president we’ve had probably in American history. The idea he doesn’t realize that Article I [sic] of the Constitution defines the role of the vice president of the United States, that’s the Executive Branch. He works in the Executive Branch. He should understand that. Everyone should understand that.

And the primary role of the vice president of the United States of America is to support the president of the United States of America, give that president his or her best judgment when sought, and as vice president, to preside over the Senate, only in a time when in fact there’s a tie vote. The Constitution is explicit.

The only authority the vice president has from the legislative standpoint is the vote, only when there is a tie vote. He has no authority relative to the Congress. The idea he’s part of the Legislative Branch is a bizarre notion invented by Cheney to aggrandize the power of a unitary executive and look where it has gotten us. It has been very dangerous.

Both candidates overstated their positions, Biden especially so. Palin was correct to imply that the Vice President can play a legislative branch role that can be helpful in advancing the President’s agenda and that the vice presidential position has exhibited a great deal of flexibility over the years. Its evolution into primarily (though not exclusively) an executive branch post reflects this notion. That said, contemporary political mores and Senate practice suggest there are serious limitations to the Vice President’s presiding

482. Debate, supra note 7. The debate prompted further discussion of the issue that again featured more heat than light. See Chris Rodda, Palin’s “Role of the Vice President” Gaffe: An Historical Perspective, HUFFINGTON POST (Oct. 13, 2008), http://www.huffingtonpost.com/chris-rodda/palins-role-of-the-vice-p_b_134043.html; George Will, Careless with the Constitution, REAL CLEAR POLITICS (Oct. 30, 2008), http://www.realclearpolitics.com/articles/2008/10/palin_and_money_doing_mc.html. Then-presidential candidate Senator Barack Obama also addressed the issue of the vice presidency. See Bogardus, supra note 455 (“My vice president . . . will be a member of the executive branch. He won’t be one of these fourth branches of government . . . .”) (quoting then-Senator Obama).
officer role. Biden’s contention that the Vice President being viewed as part of the legislative branch is a modern conception is far off the mark. To the contrary, it is only the modern conception of the office that has the Vice President falling primarily within the executive branch. His role was almost exclusively in the legislative branch throughout the first century and a half under the Constitution.

In light of the intense controversy surrounding Cheney’s characterization of the placement of the vice presidency, Biden—as a vice presidential candidate from the opposite party—presumably stated the position he did in order to distance himself politically from the unpopular Cheney. The Obama White House website, however, took a more nuanced view in its description of the vice presidency. It commented that “[t]he Vice President is also part of the Executive Branch, ready to assume the Presidency should the need arise.” At the same time, the website acknowledged (as it had to) that “the Vice President also serves as the President of the United States Senate, where he or she casts the deciding vote in case of a tie.” The administration,

483. While Cheney joined weekly Senate Republican luncheons as Vice President, Senate Majority Leader Harry Reid made it clear that Vice President Biden would not be extended the same privilege: “He can come by once a while, but he’s not going to sit in on our lunches. . . . He’s not a senator. He’s the vice president.” Lisa Mascaro, Biden Unwelcome in Senate Huddles, Where Cheney Wielded Power, LAS VEGAS SUN, Dec. 7, 2008, available at http://www.lasvegassun.com/news/2008/dec/07/biden-unwelcome-senate-huddles-where-cheney-wielded/. Biden’s spokesperson indicated that “the vice president elect ha[s] no intention of continuing the practice started by Vice President Cheney of regularly attending internal legislative branch meetings—he firmly believes in restoring the Office of the Vice President to its historical role.” Id. An unnamed staffer elaborated: “It’s just a basic issue of separation of powers.” See Emily Pierce & David M. Drucker, Reid Comes Out Fighting, ROLL CALL (Jan. 7, 2009), http://www.rollcall.com/issues/54_68/news/31095-1.html?type=printer_friendly.

484. Biden also erred in arguing that the Vice President’s sole role in the legislative branch involved breaking tie votes. In fact, the Vice President can preside over the Senate and as such exercise the power to recognize speakers. He can play a role in Senate rulemaking, Senate administration and in the counting and certification of electoral votes. The Senate may also choose to delegate certain tasks to him.


in a nod to its campaign posture, also hastened to note that “[e]xcept in the case of tie breaking votes, the Vice President rarely actually presides over the Senate.”

During early 2010, there was much speculation over whether Biden—as Senate President—would attempt to modify Senate rules to make it easier to secure enactment of health-care legislation supported by President Obama. The prospect of his doing so was greeted with skepticism in part due to contemporary political mores, which see the Vice President as more a part of the executive branch. This, of course, was a political concern and not a legal one. Thoughtful lawmakers conceded that the Vice President enjoyed a continued, if largely minimal, role in the Senate. Senator Carl Levin observed that Biden was not completely divorced from the legislative branch: “Hey, sure he’s got a toe in the legislative branch. But he’s in the executive branch.”

After all the public debate and partisan controversy in 2007 and 2008, Biden in 2013 referred to himself as being part of the Senate in two humorous asides. In saluting the new Secretary of Defense Chuck Hagel at an event on Capitol Hill, Biden commented “[r]emember, I’m still part of the Senate.” The next year, at a White House gathering Biden joked that he was “poorest man in Congress.” Biden’s views, even in a humorous context, betray the same position held by a majority of his predecessors.

Undeniably, perceptions of the vice presidency have changed in dramatic fashion since the time of Adams and Jefferson. In the 1790s, the first two vice presidents viewed the post as exclusively a legislative branch position. At the onset of the twenty-first century, a vice presidential candidate with thirty years of Senate experience would maintain that the idea of the Vice President being part of the legislative branch was a novel and “bizarre” concept. By the same

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488. Id.
489. See, e.g., Ota, supra note 483.
490. See id.
491. J. Taylor Rushing, Joe Biden still has one foot in the Senate: may be key to Healthcare, THE HILL, Mar. 9, 2010, available at http://thehill.com/homenews/senate/85597-joe-biden-still-has-one-foot-in-the-senate (quoting Levin). For a similar view by a former Senate Majority Leader, see DASCHLE & ROBBINS, supra note 438, at 39 (“The line between the legislative and executive branches is not always as sharp as the lines with the judicial branch. . . . [For example,] the vice president serves as president of the Senate.”).
494. In its document, the 2012 Plum Book, the House Committee on Oversight and Government Reform returned to the earlier formulation that “[t]he Vice Presidency is a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter.” COMM. ON OVERSIGHT AND GOV’T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITIONS, 210 (Comm. Print 2012). For the 2004 Plum Book, see supra note 458.
token, a senior House member the year before would cite the Vice President’s staff’s assertion that the office was not part of the executive branch as grounds for impeachment.

But, by and large, vice presidents through World War I were almost exclusively part of the legislative branch, with a few modest executive branch delegations thrown in for good measure. They also maintained what amounted to a contingent remainder in the presidency. The years since have demonstrated the slow and somewhat uneven gravitation of the Vice President toward the executive branch. The trend toward a greater executive branch role for the Vice President was both recognized and formalized in the Twenty-Fifth Amendment. Nonetheless, as much as vice presidents have drifted toward the executive establishment, their duties as President of the Senate still ensure them some constitutional mooring to the legislative branch. Political practice cannot vitiate text. Consequently, seven of the ten vice presidents since adoption of the Twenty-Fifth Amendment have essentially recognized at one time or another the position’s unique role as part of both elected branches (e.g., Humphrey, Agnew, Ford, Mondale, Quayle, Cheney and Biden).

III. POTENTIAL COUNTERARGUMENTS TO THE VICE PRESIDENT BEING PART OF BOTH POLITICAL BRANCHES

There are several counterarguments that could be marshaled against the thesis presented in this article and its companion: that the Vice President is part of both elected branches of government, but not part of both simultaneously. At the end of the day none is persuasive and this two-part article’s thesis is bolstered accordingly.

A. The Vice President is Part of Neither Political Branch

The view that the Vice President is a part of neither political branch and amounts to a fourth department of government is one that became associated in the popular consciousness with Vice President Cheney. It derives from his staff’s quotation of Katzenbach’s formulation: “the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter.” Whether this actually reflects Cheney’s own

495. See, e.g., GOLDSTEIN, supra note 5, at 134–42; 146–50; see also Joel K. Goldstein, The Rising Power of the Vice Presidency, 38 PRES. STUD. Q. 374, 376 (2008) (“By 1976, the office had moved in two directions. It had moved up, in that it had become a more serious position, and it had moved over, closer to the executive branch.”); Richard Albert, The Evolving Vice Presidency, 78 TEMP. L. REV. 811, 812 (2005) (“The Vice Presidency has evolved into an institution far different from its original design.”).

496. Nonetheless, it is remarkable to reflect upon a constitutional office essentially shedding its main constitutional function over time and acquiring in its place other more desirable duties in another branch of government altogether.

497. Bogardus, supra note 455 (quoting Cheney’s chief of staff).
personal position is another matter altogether. Nonetheless, this position needs to be examined not only due to the public rhetoric, but also because some prominent authorities have adopted the same or a very similar opinion.

For example, Woodrow Wilson appears to have been of the view that the vice presidency was a *tertium quid* of sorts.

> [The Vice President’s] position is one of anomalous insignificance and curious uncertainty. Apparently he is not, strictly speaking, a part of the legislature,—he is clearly not a member,—yet neither is he an officer of the executive. It is one of the remarkable things about him, that it is hard to find in sketching the government any proper place to discuss him. He comes in most naturally along with the Senate to which he is tacked;[500] but he does not come in there for any great consideration. He is simply a judicial officer set to moderate the proceedings . . . . So long as he is Vice-President, he is inseparable officially from the Senate . . . .

Similarly, Franklin D. Roosevelt wrote, while running for Vice President himself: “[t]here is no little truth, then, in the witticism that the Vice President constitutes a kind of fourth branch of the Government . . . .”

This argument could be expanded to include the point that, since independent agencies by statute enjoy a status akin to a fourth branch of government, there is no reason why the Vice President under the Constitution cannot occupy a comparable situ. Justice Antonin Scalia has written that

498. Cheney and his office at times seemed to take varying positions on the subject, but Cheney himself does not appear to have personally and publicly endorsed the position that the vice presidency constitutes its own branch of government. See supra notes 458-460 and accompanying text.

499. See, e.g., Vice President, in *The Oxford Guide to the United States Government* 676 (John J. Patrick et al. eds. 2001) (“The Vice President is not a member of either the executive or the legislative branch.”); *Hite*, supra note 40, at 1 (the Vice President has “becom[e] almost a fourth branch of the United States government.”); Dorothy C. Tompkins, *The Office of Vice President: A Selected Bibliography* 1–2 (1957) (“The Vice President is not a representative of the legislative branch. . . . The Vice President is not a member of the executive branch of government. Congress cannot put him in an administrative job and thus make him a subordinate of the President. It cannot put him at the head of a department.”); Henry Comstock Maxson, Political Practice in the Vice Presidency 23 (1974) (unpublished Ph.D. dissertation, Brown University) (on file with author) (the Constitution “suspend[s] the Vice Presidency somewhere between the Executive and Legislative branches . . . . The Vice Presidency is mentioned in both Article I and Article II . . . . [and] the office seems to be straddled between two functions . . . .”); Clinton Rossiter, *The American Presidency* 136 (1960 2d. ed.) (the vice presidency is “[s]uspended in a constitutional limbo between executive and legislature, and in political limbo between obscurity and glory.”); see also 1 HAYNES, supra note 92, at 229.

500. The “tacked” reference by Wilson may have been the genesis of Katzenbach’s characterization of the position as being “attached” to the legislative branch.

501. *Wilson*, supra note 159, at 162; see also id. at 220 n.3 (“the Vice-President . . . is an appendage, not a member, of the Senate.”). While Wilson’s views predate the Twenty-Fifth Amendment, they still are representative of this line of reasoning.


“[w]here no governmental power is at issue, there is no strict constitutional impediment to a ‘branchless’ agency, since it is only ‘[a]ll legislative Powers,’ Art. I, § 1, ‘[t]he executive Power,’ Art. II, § 1, and ‘[t]he judicial Power,’ Art. III., § 1, which the Constitution divides into three departments.”

It could be maintained that the Vice President has little or no constitutional power so he too could be a branchless entity.

Despite having prominent advocates, the argument that the Vice President resides outside of the established three branches of government falls well short of the mark. First, constitutional text implicitly provides for three branches of government. The tripartite structure of federal governance is laid out in large measure in the first three articles of the Constitution. Article I provides most of the authority for the legislative branch; Article II provides most of the authority for the executive branch; and Article III provides most of the authority for the judicial branch. Were there a fourth branch of government it would presumably be found in Article IV. That part of the Constitution, however, marks a clear point of departure from the previous three articles which generally lay out functional powers and implicitly assign those powers to branches of government (often to more than one branch). Article IV focuses instead on the relationship and reciprocity among the states and how new states are to be admitted to the Union. There is no mention of any additional division of federal governmental authority.

Moreover, Article VI appears to dispel any uncertainty as to the assignment of constitutional officers to branches of government. It provides that “[t]he Senators and Representatives . . . and all executive and judicial officers . . . shall be bound by Oath or Affirmation, to support this Constitution.” There are three categories of officials in Article VI: those in the legislative branch (“Senators and Representatives”) and “executive and judicial officers.” No other categories and hence no other branches are included.

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505. See Greenberg, supra note 57, at 25.
506. See Buckley v. Valeo, 424 U.S. 1, 124 (1976) (“The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted . . . . Article I, § 1, declares: ‘All legislative Powers herein granted shall be vested in a Congress . . . . Article II, § 1, vests the executive power “in a President” . . . . and Art. III, § 1 declares that “The Judicial Power . . . shall be vested in one supreme Court, and in . . . inferior Courts . . . .’”).
507. See, e.g., id.; Mistretta, 488 U.S. at 423 (Scalia, J., dissenting).
508. See U.S. CONST. art. 1.
509. See id. art. II.
510. See id. art. III.
511. Id. art. VI, § 3. The Vice President, of course, has always taken an oath.
512. That said, Article VI could be viewed as being underinclusive since the President is not listed. He, of course, takes an oath under authority of Article II. See id., art. II, § 1, cl. 6.
Further, the clauses discussing the Vice President carry no indication that he exists outside of the understood three-branch formulation. The Vice President’s role in presiding over the Senate is defined by Article I, essentially the legislative branch article. His participation in the certification of electoral votes also makes clear his actions take place in the context of the legislative branch. At the same time, the office is created by Article II, what amounts to the executive branch article. His eligibility, length of tenure, mode of election and means of removal all mark him as part of the executive branch as does his role in determining presidential inability which associates him with the Cabinet.

As if text were not sufficient, early opinion under the Constitution makes clear that there are only three branches of government. For instance, writing in 1790 as the nation’s first Secretary of State, Thomas Jefferson observed that “[t]he Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy.” Other early authorities echo this view. None appears to have maintained that four branches of government exist.

Moreover, the Supreme Court has routinely noted that there are only three branches of government and that this set of categories encompasses the totality of federal powers and personnel. For example, in its unanimous, landmark opinion in United States v. Nixon, the Supreme Court stated that “[i]n designing the structure of our Government [the Framers] . . . divid[ed] and allocat[ed] the sovereign power among three co-equal branches [thereby] . . . provid[ing] a comprehensive system . . . .” Clearly, in a “comprehensive”

The author would like to thank Seth Barrett Tillman for raising this point.

513. See id. art. 1, § 3, cl. 4.
514. See id. amend. XII (emphasis added) (“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted”).
515. See Brownell, supra 1, at 47–51.
517. See Letter from John Jay to George Washington (Aug. 8, 1793), available at http://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html (emphasis added) (“We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government.”) (emphasis added); 5 ANNALS OF CONG. 493 (1796) (statement by Rep. Madison), available at http://press-pubs.uchicago.edu/founders/documents/v1ch10s21.html (emphasis added) (“The Constitution of the United States is a Constitution of limitations and checks. The powers given up by the people for the purposes of Government, had been divided into two great classes. One of these formed the State Governments; the other, the Federal Government. The powers of the Government had been further divided into three great departments”).
518. Some Framers had questions about how to categorize the Vice President but all tried to categorize him in one or more of the three agreed-upon branches. See Brownell supra note 1, at 56–64.
system involving three branches of government there is no room for a fourth branch. Even the Court in *Humphrey’s Executor v. United States*, which acknowledged the unique status of independent agencies, still reaffirmed the notion that there existed only three branches of government.\(^{520}\) The proposition of a fourth branch in turn has been rightly ridiculed by a number of Supreme Court justices.\(^{521}\)

\(^{520}\) Humphrey’s Ex’r v. United States, 295 U.S. 602, 629 (1935) (noting “the three general departments of government”).

\(^{521}\) See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (“the Federal Maritime Commission, is an ‘independent’ federal agency. Constitutionally speaking, an ‘independent’ agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a ‘fourth branch’ of Government . . . the agencies, even ‘independent’ agencies, are more appropriately considered to be part of the Executive Branch. . . .”); Freytag v. Comm’n, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part/concurring in judgment) (derisively referring to independent agencies as potential “headless Fourth Branch(es)” of government); Process Gas Consumers Grp. v. Consumer Energy Council of America, 463 U.S. 1219, 1219 (1983) (White, J., dissenting) (“[u]nder this ruling independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch. I cannot believe that the Constitution commands such a result.”); Fed. Trade Comm’n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“administrative bodies . . . have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories. . . .”).

A variant of this position is that the Vice President is not part of the legislative branch; he merely presides over one half of it. \(^{Cf.}\) Seth Barrett Tillman, *Why our next President may keep his or her Senate seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL’Y 107, 109 n.5 (2009) (“the Vice President presides over the Senate, although he or she is not a member of it.”). In this sense, the President presides over the executive branch, the Speaker presides over the House and the Chief Justice presides over the Supreme Court; they are not part of any of the branches but sit above them. \(^{Cf.}\) id.; Strauss, *supra* note 503. This view also must fail for the same reasons outlined above and for some reasons unique to it: how can one preside over a body but not be part of it? Does anyone, for example, seriously question whether the Speaker of the House is part of the legislative branch? “Of” denotes being part of something; in this case it means part of a branch or branches of government. \(^{See.}\) e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 860 (11th ed. 2003); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1343 (2d ed. unabridged 1987); SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 502–03 (1768); THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE
Thus, the argument that the Vice President constitutes his own branch of government or otherwise exists outside of the tripartite system of government fails since it collides squarely with constitutional text, structure, early informed opinion and case law.

B. *The Vice President is Solely Part of the Legislative Branch*

Far more compelling than the “fourth-branch” argument is the belief that the Vice President is exclusively part of the legislative branch. This supposition is one that held sway for much of American history and only began to erode in the decades following World War I. In the years since, this view has become increasingly less prevalent. A modern corollary to such an argument could also be made: the Vice President is a part of the legislative branch who nonetheless, as a practical matter, takes action in the executive branch.

522. Indeed, several prominent modern scholars still apparently maintain this view. See CRONIN & GENOVESE, supra note 339, at 316 (“[T]echnically a vice president is neither a part of the executive branch nor subject to the direction of the president.”); Marie D. Natoli, *Abolish the Vice Presidency?*, 9 Pres. Stud. Q. 202, 203 (1979) (“A first step would be Constitutional change to put the Vice Presidency where it belongs, namely, in the Executive Branch of government.”); Bruce P. Montgomery, *Congressional Oversight: Vice President Richard B. Cheney’s Executive Branch Triumph*, 120 Pol. Sci. Q. 581, 596 (2005–06) (“[T]he Constitution does not vest executive authority in the vice president, but rather relegates his office to legislative matters.”); Michael C. Dorf, *A Brief History of Executive Privilege, from George Washington through Dick Cheney*, Find Law’s Legal Commentary (Feb. 6, 2002), http://writ.news.findlaw.com/dorf/20020206.html (“As far as the Constitution is concerned, the Vice President’s role is legislative in nature: to preside over and break ties in the Senate.”); Reynolds, supra note 479, at 1540 (“[I]t believe that the positioning of the Vice Presidency within the legislative branch—or, at any rate, outside the executive—may be appropriate.”). For earlier authorities who took this opinion, see, e.g., EDGAR WIGGINS WAUGH, *SECOND CONSUL: THE VICE PRESIDENCY: OUR GREATEST POLITICAL PROBLEM* 151 (1956) (“[T]he Vice President is only a potential executive officer.”); MARSHALL EDWARD DIMOCK & GLADYS OGDEN DIMOCK, *AMERICAN GOVERNMENT IN ACTION* 577 (1946) (“Unless the Constitution is amended, the Vice-President is disqualified for the post of general manager [of the executive branch] because he must preside over the Senate.”); Barnett Memo, supra note 370, at 24 (“[T]he view has also prevailed that the President could not yield executive power to the Vice President [because the Charter] . . . vests the undivided executive power in the President. Some have [therefore] seen the vesting of executive power in the Vice President as unconstitutional. Others believe the President cannot, as a practical matter, give power to a man who he cannot fire.”); cf. ALLAN P. SINDLER, *UNCHosen PRESidents: THE VICE PRESIDENT AND OTHER FRUSTRATIONS OF PRESIDENTIAL SUCCESSION* 29 (1976) (“The formal position of the vice-president, who technically is neither a part of the executive branch nor subject to the direction of the president, underscores the anomaly of that office.”).
branch yet remains at all times part of the former. Ultimately, both variations suffer from serious flaws and collapse under their own weight.

The view that the Vice President is solely part of the legislative branch is deficient because it overlooks the numerous textual provisions that link the office to the executive branch. Arguably the whole point of having a Vice President is for him to succeed to the presidency, providing him with a contingent tie to the executive branch. His length of tenure, mode of election, means of removal, qualifications and method of resignation all associate him clearly with the President. His role in determining presidential inability with the Cabinet further affiliates him with the executive branch. So too does the President’s power to nominate a new Vice President under the Twenty-Fifth Amendment. Structural features based on Article I, Article VI and the Seventeenth Amendment also counsel against the Vice President being considered exclusively part of the legislative branch. One must write all of these provisions and structural features wholly out of the Constitution in order for the view to be viable that the Vice President is solely a legislative branch official.

Judicial dicta also counsel against categorizing the vice presidency as exclusively part of the legislative branch. The Supreme Court itself in *Cheney v. United States District Court* assumed the Vice President was part of the executive branch—at least when carrying out duties delegated by the President. Chief Justice Burger took much the same position in his dissent in *Nixon v. Administrator of General Services*, as have several lower federal courts.

Perhaps most damning of all to the argument that the Vice President is exclusively part of the legislative branch is the fact that virtually none of his professional time is any longer dedicated to the Senate. Barkley was the final Vice President to devote a significant amount of his vice presidency to the upper chamber; he was in the chair for more than half of the time the body was

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523. It could also be contended that the degree to which the Vice President is part of the executive branch is solely a matter of presidential choice. See, e.g., Neustadt, *supra* note 293, at 188 (“Revolutionized or not, the vice president’s enhanced role and status are contingent on the pleasure of the president. Without that, they are rendered irrelevant, even the statutory ones.”); see also Reynolds, *supra* note 479, at 1542; Garvey, *supra* note 479, at 584. This is overstated, however. The Vice President’s link to the executive branch rests on more than simply presidential grace and congressional delegation. He also is clearly connected to the executive branch by the Twenty-Fifth Amendment and implicitly by Article II and various structural features outlined in the companion to this piece. See Brownell, *supra* note 1, at 47–55.

524. See Brownell, *supra* note 1, at 47–51.
525. See id. at 50–51.
526. See id. at 50.
527. See id. at 52–53.
530. See Brownell, *supra* note 1, at 68–71.
conducting public business.\textsuperscript{531} By contrast, his successor, Nixon, estimated that he devoted only about five to ten percent of his time to his Senate duties.\textsuperscript{532} Agnew dedicated about the same proportion of his schedule to legislative branch matters.\textsuperscript{533} Humphrey estimated that he assigned a third of his schedule to his Senate responsibilities.\textsuperscript{534} Mondale spent a mere eighteen hours presiding over the Senate during the entirety of his first twelve months as Vice President. For one two-year stretch Vice President Bush presided over the Senate for less than two percent of the total time the upper chamber spent conducting its business.\textsuperscript{535} Senate participation by the Vice President has remained a rarity in the years since.

While there is strong support among the original Framers and early vice presidents for the notion that the vice presidency is solely part of the legislative branch, this authority predates the changes that revolutionized the office in the years following World War I, including the Twenty-Fifth Amendment. Such a perspective is also rejected by modern vice presidents, most of whom believe that the post is at least partly tied to the executive branch.

In sum, the conception that the Vice President is exclusively part of the legislative branch is overcome by text and structure, judicial dicta, past practice and modern vice presidential opinion.

\textbf{C. The Vice President is Solely Part of the Executive Branch}

The argument could also be made that the Vice President is exclusively part of the executive branch. Indeed, this has become so ingrained in the public consciousness that the very notion that the Vice President is part of the legislative branch, or even that he \textit{used to be part} of the legislative branch, has today become an object of ridicule in many circles.\textsuperscript{536} However, as should now be familiar, the Vice President chairs the Senate, breaks tie votes and presides over the counting and certification of electoral votes. These are textually-assigned legislative branch roles and past practice, no matter how compelling, cannot cut the cord of text.\textsuperscript{537} By the same token, the Twenty-

\textsuperscript{531} See \textsc{Gold}, supra note 96, at 13.

\textsuperscript{532} See, e.g., \textsc{Goldstein}, supra note 5, at 142.

\textsuperscript{533} See id.

\textsuperscript{534} See David, supra note 262, at 744 n.105; see also 121 Cong. Rec. 639 (1975). By 1975, Senate Majority Leader Mansfield ruefully observed on the Senate floor how little time modern vice presidents spent presiding: “in late years, the Vice President has been all too seldom in his chair presiding over this body as the President of the Senate. I wish at this time to congratulate the Vice President for occupying that chair, in his official capacity, for 4 days in a row. That is a record, at least since 1967. Speaking for the Senate as a whole, I hope that this Vice President will be more often sitting in that chair than other Vice Presidents, both Democrat and Republican, have in the past.”); see also \textsc{Goldstein}, supra note 5, at 142.


\textsuperscript{536} See supra notes 7, 464, 478, 481.

\textsuperscript{537} See \textsc{Hite}, supra note 40, at 160 (“The inference is not of the vice president’s role in the legislative branch being incrementally erased by a commensurate increase in responsibilities
Fifth Amendment, even though it bolstered the Vice President’s ties to the executive branch, did not modify or delete the Vice President’s Senate duties. And the Vice President is not subject to the Opinion Clause.\textsuperscript{538}

There are also a score of structural reasons why the Vice President cannot be considered solely a part of the executive branch; they reflect the dissimilarities between the Vice President and President, the only other constitutional official in the executive branch. Unlike the President, the Vice President has no oath spelled out in the Constitution, there is no special provision governing who shall preside during the Vice President’s impeachment trial, there is no inability provision specific to the Vice President, he is not term limited, his salary may be reduced, he may participate formally in a host of legislative branch matters that the President may not (e.g., constitutional amendments, intra-Senate administrative matters, unicameral resolutions, bills that fail to pass both houses, Senate rule interpretations and modifications) and he plays a formal role in the beginning and premature end of senators’ terms.\textsuperscript{539} For these textual and structural reasons alone he cannot be treated as solely an executive branch personage.

A similar argument against the Vice President being considered solely an executive branch figure could be made based on judicial dicta. \textit{Bowsher v. Synar} and \textit{Mississippi v. Johnson}, for example, imply that the Vice President is part of the legislative branch.\textsuperscript{540} Other lower federal courts are even more explicit on the subject.\textsuperscript{541} And, as many as 25 vice presidents—more than half of them—have viewed the vice presidency as, to some degree, a part of the legislative branch.\textsuperscript{542} The inability of the President to remove the Vice President also lends itself to the latter not being wholly of the executive branch.\textsuperscript{543} To the extent the executive branch is unified, in that the President

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\textsuperscript{538} See Brownell, \textit{supra} note 1, at 27–35.
\textsuperscript{539} See id. at 46.
\textsuperscript{540} See id. at 64–65.
\textsuperscript{541} See id. at 65–67.
\textsuperscript{542} See \textit{infra} note 568.
\textsuperscript{543} See, e.g., Reynolds, \textit{supra} note 479, at 112.
can control executive branch subordinates;\textsuperscript{544} that too counsels against the 
Vice President being considered solely part of the executive department. After 
all, the President cannot command the Vice President to take action since he 
cannot remove him.\textsuperscript{545} And he cannot compel the Vice President to provide 
opinions and advice.\textsuperscript{546}

A closely related counterargument could be that the Vice President is 
always part of the executive branch even though he carries out some minor 
legislative responsibilities. As Justice Stevens wrote of the Comptroller 
General: “Obligations to two branches are not . . . impermissible, and the 
presence of such dual obligations does not prevent the characterization of 
the official with the dual obligations as part of one branch.”\textsuperscript{547} The same 
theoretically could be said of the Vice President’s obligations to the Senate. 
He has Article I obligations but, owing to the vastly greater time the modern 
Vice President spends on his executive branch responsibilities in this day and 
age, it could be argued that he is, strictly speaking, only part of the executive 
branch.

That logic may or may not hold true with respect to the Comptroller 
General, but it does not work with respect to the Vice President. Unlike the 
Comptroller General, a creature of statute, the Vice President is a 
constitutional officer and his ties to both branches are in the text of the 
Constitution. After all, he is President of the Senate; as noted earlier, “of” 
means being a part of something. The numerous other textual, structural, 
historical, jurisprudential and practical linkages outlined in the companion to 
this piece demonstrate that the Vice President does not merely owe obligations 
to the legislative branch, he is part of it.

1. The President and Vice President Both Exercise Legislative Power 
and Both are within the Executive Branch

Yet another variation of the executive branch counterargument would be 
that the functional legislative role played by the Vice President is similar to 
that played by the President during the lawmaking process.\textsuperscript{548} The President, 
under Article I, plays a functional legislative role in that he must consider 
whether he should support enactment of bills that Congress places before

\textsuperscript{544} See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO: THE UNITARY EXECUTIVE: 
PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 20 (2008).

\textsuperscript{545} See, e.g., Morrison v. Olson, 487 U.S. 654, 688 (1988) (quoting Humphrey’s Executor 
that “the ‘coercive influence’ of the removal power . . . ‘threate[n][s] the independence of [the]’” 
officials in question).

\textsuperscript{546} See Brownell, supra note 1, at 33–35.

\textsuperscript{547} Bowsher v. Synar, 478 U.S. 714, 746 (1986) (Stevens, J., concurring) (citations 
omitted).

\textsuperscript{548} See, e.g., Fein, supra note 473; cf. Rateree v. Rockett, 852 F.2d 946, 951 (7th Cir. 
1988) (“[W]hen the Vice President of the United States votes in the Senate to break a tie . . . he 
acts legislatively, not executively. Similarly, the President acts legislatively when he approves or 
vetoes bills passed by Congress.”).
him. The President is therefore undoubtedly carrying out functional legislative power pursuant to Article I. The Vice President also has Article I legislative responsibilities. Since it is universally recognized that the President, despite his Article I lawmakers function, is part of the executive branch, the logic goes that the Vice President must therefore also be considered part of the executive branch despite his own Article I lawmakers function.

For several reasons, this position cannot withstand scrutiny. First, the President’s and the Vice President’s Article I roles are fundamentally different. As discussed in the companion to this piece, there is a crucial distinction between performing functional legislative or executive duties and actually being part of the legislative or executive branches. They are closely related, but are not coextensive concepts.

The President, when considering whether to sign bills or not, is acting under authority of Article I and is undeniably engaging in functional legislative activity. But in so doing he is not placed by the Constitution within the legislative branch. Article I provides that the “Congress of the

550. See Brownell, supra note 1, at 12 nn. 43–44.
551. See, e.g., id. at Part II.A.; see also RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1990 ed. (The Constitution provides “a government of separated institutions sharing powers.”).

In the case of functional executive power, the Vice President exercises a small portion on his own. See Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 YALE L.J. 51, 98 n.231 (1994) (“Nothing in the Constitution commits any part of the executive power to the President’s subordinates, except in two cases: when Congress vests the appointment of inferior officers in the heads of departments . . . and when ‘the Vice President and a majority of . . . the principal officers of the executive departments’ certify that ‘the President is unable to discharge the powers and duties of his office’”); Adam R.F. Gustafson, Note, Presidential Inability and Subjective Meaning, 27 YALE L. & POL’Y REV. 459, 476 (2009) (“The power Section 4 grants to the Vice President and Cabinet . . . is an exception to the Constitution’s otherwise nearly exclusive grant of executive power to the President.”).

553. See, e.g., Clinton v. New York, 524 U.S. 417, 438 (1998) (“Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process”); Buckley v. Valeo, 424 U.S. 1, 121 (1976) (“The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress.”); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899) (“[T]he Constitution . . . authoriz[es] the President to perform certain functions of a limited number that are legislative in their general nature”); NEUSTADT, supra note 551 (quoting President Eisenhower: “I am part of this legislative process.”); cf. Smiley v. Holm, 285 U.S. 355, 373 (1932) (noting that “the veto power of the governor” is an example of “the lawmaking power”).
554. See, e.g., Brownell, supra note 1, at 12 n.45; 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 298 (1888) (noting that the Framers “made[ ] the President independent, and kep[ ] him and his ministers apart from the legislature”); cf. Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) (the “signing into law [of] an ordinance . . . [is] formally legislative, even though [the official in question is] . . . an executive official. We have recognized that officials outside the
United States . . . shall consist of a Senate and House of Representatives."

No mention is made of the President being part of the Senate or House; consequently, he is not part of Congress and therefore he is not part of the legislative branch. On the other hand, Article I makes clear that the Vice President is indeed part “of” the Senate and the Senate is part of Congress and Congress is part of the legislative branch; therefore the Vice President is part of the legislative branch.

By the same token, the constitutional language governing the President’s functional legislative role does not imply at all that he is part of the legislative branch. Article I, Section 7 provides that:

> every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . .

Unlike the Vice President, who is President “of” the Senate, Article I, Section 7 conveys that only after Congress has taken action does the President play a legislative role. The text states in this regard that the President receives the measure after each house “shall have passed” the bill and that he sees it “before it become a law.” Far from being part of the legislative branch, the text makes clear that the President waits until after the legislative branch has finished its work before he can take formal legislative action. Only then is he “presented” with the bill.

The word “presented” itself implies that the bill is new to him. One is not presented with something one has continually worked on and become familiar with (as would be the case if one were part of the legislative branch); one is
presented with something when one sees it formally for the first time.\textsuperscript{560} Similarly, the language involved with the President’s veto—that “he shall return it [the bill], with his Objections to that House in which it shall have originated”—implies further that he is outside of the legislative branch.\textsuperscript{561} One does not return something to oneself and the reference “to that House” further reinforces this point.

The President’s power to recommend measures to Congress is similar. Article II provides that “He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.” There is every reason to believe that the President is outside of Congress from this passage as well. He “give[s] to the Congress Information,” which implies the body does not already have such information as the legislature presumably would if the President were part of the same institution. Moreover, the President “recommend[es] to their Consideration Measures” he feels are warranted. The “their” clearly indicates the President is on the outside looking in. Otherwise, the language would have read something along the lines of: “He shall . . . recommend for their and his own Consideration such Measures as he shall judge necessary and expedient.” Thus, as a textual matter, it is clear that the President is not part of Congress.

Practical considerations bolster the textual factors. The President gives no floor speeches, he makes no procedural motions, he introduces no legislation, he offers no amendments, he recognizes no speaker, he plays no role in Senate rulemaking, he casts no votes.\textsuperscript{562} He can make legislative recommendations and then, only after the proposed law is passed by both houses, does he again formally play a role in the lawmaking process.\textsuperscript{563} And, of course, law can be made without his participation at all.\textsuperscript{564}

This scenario is far different from the situation involving the Vice President’s legislative branch role. The Vice President, when presiding over the Senate and breaking ties, is acting under authority of Article I (like the President reviewing bills) and is acting in a functional legislative capacity (like

\begin{itemize}
\item \textsuperscript{560} See, e.g., \textit{The American Heritage Dictionary of the English Language} 1432 (3d ed. 1992) (defining “present” as “[t]o introduce”).
\item \textsuperscript{561} U.S. CONST. art. I, § 7 (emphases added).
\item \textsuperscript{562} Informally, of course, the President may participate in the political effort to line up votes or urge passage of certain legislation. But again, he is not taking part in formal legislative branch proceedings. The same could be said of lobbyists, government agencies, or the general public: they also advocate for legislative outcomes but are not formally part of the legislative branch’s proceedings.
\item \textsuperscript{563} See Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (“The Executive, except for recommendation and veto, has no legislative power.”).
\item \textsuperscript{564} See U.S. CONST. art. I, § 7 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”). 
\end{itemize}
the President recommending and reviewing bills), but he is explicitly made part of the legislative branch (unlike the President recommending and reviewing bills).

Distinct from the President, the Vice President can actually participate in internal legislative branch deliberations by presiding over the Senate and breaking ties. As has been noted, he can also involve himself in legislative branch matters that the President ultimately may not review for veto purposes, such as constitutional amendments, concurrent resolutions, bills failing to pass both houses, internal Senate rulemaking, the appointment of Senate officers, the seating of senators and unicameral resolutions. He can recognize senators in debate. Thus, clearly the Vice President does more than exercise Article I legislative power as does the President; he is part of the legislative branch itself and part of the internal lawmaking process. And not without import is that he does this while he is physically in the Senate chamber. The President, on the other hand, does not veto bills on the Senate floor.

The gap between the Vice President’s functional power and immediate branch location is brought into sharper relief through consideration of a few examples. For instance, a Vice President presiding over the Senate during executive session while the upper chamber is considering a treaty or nomination reflects the Vice President exercising functional executive power, but functional executive power within the legislative branch.\(^565\) At the same time, he is exercising internal legislative power.

\(^{565}\) See Wallace v. United States, 258 U.S. 296, 298 (1922) (“The Senate in confirming nominations is not exercising a judicial but an executive function.”); Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) (“[T]he Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties.”); 2 FARRAND, supra note 101, at 522–23 (Wilson) (“the Senate . . . are to make Treaties . . . they are to try all impeachments . . . to make the Executive & Judiciary appointments. . . . [thus] the Legislative, Executive & Judiciary powers are all blended in one branch of the Government.”); 1 ANNALS, supra note 14, at 479–81 (emphasis added) (statement by Rep. Madison) (“The Constitution affirms, that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct.”) (emphasis added); Jefferson Opinion, supra note 516 (“The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. . . . it has declared that ‘the Executive powers shall be vested in the President,’ submitting only special articles of it to a negative by the Senate”); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 466 (Merrill Jensen ed. 1976) (statement of William Findley: “[t]he Senate shares with the President the executive functions of appointments and treaty making.”); HENRY CABOT LODGE, THE SENATE OF THE UNITED STATES AND OTHER ESSAYS AND ADDRESSES HISTORICAL AND LITERARY 9 (1921) (“[t]he Senate has the President the executive functions of appointments and treaty making.”); LINDSAY ROGERS, THE AMERICAN SENATE 12–13 (1926) (1968 repr. ed.) (“The Constitution . . . conferred on the upper chamber certain special functions of an executive and judicial character: confirmation of appointments, ratification [sic] of treaties, and the trial of impeachments.”); CLARA HANNAH KERR, THE ORIGIN AND DEVELOPMENT OF THE UNITED STATES SENATE 135 (1895) (“treaties were regarded as part of the executive duties of the senate”); ELAINE K. SWIFT, THE MAKING OF AN AMERICAN SENATE: RECONSTITUTIVE
time, the Vice President presiding over an impeachment trial reflects him exercising functional judicial authority but functional judicial power within the legislative branch.566 (Vice President Burr, for example, questioned witnesses during the impeachment trial of Samuel Chase).567

A second set of considerations also weighs against the Vice President being considered part of the executive branch all of the time and that reason involves the opinion of vice presidents themselves. As many as 25 vice presidents568 have stated or implied at one time or another that the position is

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566. See, e.g., Kilbourn, 103 U.S. at 191 (“The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.”); In Re Request for Access to Grand Jury Materials Grand Jury No. 81, 833 F.2d 1438, 1446 (11th Cir. 1987) (“If the House approves and transmits articles of impeachment, the Senate must exercise its judicial power and convene as a court of impeachment. The Senate must then sit as judges and jurors to hear such evidence as is admissible and arguments as are made to decide the case.”); The Federalist No. 65, at 330 (Hamilton) (Garry Wills ed. 1982) (“The Senate, in a distinct capacity, [has a] . . . judicial character as a court for the trial of impeachments. . . . We will therefore . . . [examine] the judicial character of the Senate. A well-constituted court for the trial of impeachments, is an object not more to be desired than difficult to be obtained in a government wholly elective.”); Jefferson Opinion, supra note 516 (“The Constitution “has vested the Judiciary power in the courts of justice, with certain exceptions . . . in favor of the Senate.”); Life and Works of John Adams 448 (1856) (“The Senate, which in the last resort is made the judicial tribunal to try the President for malversation in office”), quoted in 2 David K. Watson, The Constitution of the United States: Its History, Application and Construction 977 (1910); Raoul Berger, Impeachment: The Constitutional Problems 140 n.58 (2d ed. 1974) (“The impeachment power is manifestly ‘judicial.’”); 2 George H. Haynes, The Senate of the United States: Its History and Practice 855 n.2 (1960 ed.) (quoting then-Senator James Buchanan in 1837: “[a]bove all, we should be most cautious in guarding our judicial character from suspicion. . . . We should never voluntarily perform any act which might prejudice our judgment or render us suspected as a judicial tribunal.”); Swanson, supra note 75, at 14 (citations omitted) (“[T]he Senate [was made to] . . . serve[e] in the threefold capacity of legislative chamber, judicial court (the Senate being made the court in impeachment cases), and council of advice to the Executive.”); Lodge, supra note 565, at 10 (“The judicial functions of the Senate consist in its being the court before which all impeachments must be tried.”); Kerr, supra note 565, at 159 (referring to the Senate in an impeachment context as “a judicial body.”); Swift, supra note 565, at 50-51 (“The framers endowed the Senate with . . . the judicial power to remove” the executive); Robert C. Byrd, The Senate: Great Forum of Constitutional Liberty 16 (2011) (“The Senate was a body in which legislative, executive, and judicial powers would be combined.”); David Y. Thomas, The Law of Impeachment in the United States, 2 Am. Pol. Sci. Rev. 378, 392 (1907-08) (“an impeachment is not a bill, neither is a court of impeachment a legislative body. . . . The Senate sitting as a court of impeachment is a court of record . . . ”) see also Brownell, supra note 1, at Part II.A.

567. See 14 Annals of Cong. 93, 266, 275 (1804).

568. Vice Presidents Adams, Jefferson, Gerry, Dallas, Wilson, Marshall, Dawes, Wallace, Truman, Barkley, Humphrey, Agnew, Ford, Mondale, Quayle, Cheney and Biden all made fairly
at least partly in the legislative branch. This list includes even modern officeholders such as Humphrey, Agnew, Ford, Mondale, Quayle, Cheney and Biden. As many as 11 presidents were of the same view. They include John Quincy Adams, Wilson, Hoover, Franklin Roosevelt and Eisenhower. On the other hand, it does not appear that any President has ever flatly asserted that the chief executive is part of the legislative branch.

A third consideration involves the Vice President’s independence from the President. This trait is demonstrated by history. History reflects that constitutionally the Vice President plays an independent role in the legislative branch, he does not play the part of a presidential marionette. While in the chair, vice presidents have voted against or ruled against presidential priorities on numerous occasions. Right up to the present day vice presidents have taken public policy positions contrary to the President’s.

In this regard, it is necessary for structural reasons to conceive of the Vice President—when serving in his Senate capacity—as being part of the legislative branch. Otherwise, the unity of the executive branch would be seriously disrupted. Putting to one side the theory of the unitary executive—the various permutations of which are freighted with controversy and beyond the scope of this article—there can be little doubt that one of the principal reasons the United States has a President is that the Framers wanted a unified executive branch. A plural executive was expressly rejected at the Constitutional Convention. As Hamilton wrote, “[t]he ingredients, which constitute energy in the executive, are first unity . . . .” Considering the Vice President to be at all times within the executive branch—even while he is defying the President, voting against his legislative priorities and remaining insulated from the President’s removal power—shatters the degree of unity clear at one point or another that they viewed themselves as part of the legislative branch, at least part of the time. Vice Presidents Colfax, Arthur, Morton, Stevenson, Hobart, Coolidge, Curtis and Garner all made remarks that were somewhat less clear but could still be interpreted as linking the vice presidency to the legislative branch. Vice Presidents Nixon, Lyndon Johnson, Rockefeller and arguably Calhoun appear to be the only vice presidents whose public comments about the office tie it exclusively to the executive branch. Vice President Sherman may also have hinted at an executive branch linkage.

Six other presidents—Adams, Jefferson, Arthur, Coolidge, Truman and Ford served as Vice President and, as noted above, appeared to view the office as at least partly a legislative branch position. Presidents Washington, Madison, Lyndon Johnson and Obama appeared at least at one point in their career to view the position as part of the executive branch.

569. Six other presidents—Adams, Jefferson, Arthur, Coolidge, Truman and Ford served as Vice President and, as noted above, appeared to view the office as at least partly a legislative branch position. Presidents Washington, Madison, Lyndon Johnson and Obama appeared at least at one point in their career to view the position as part of the executive branch.

570. See Brownell, supra note 35, at 319–60.

571. See, e.g., Cronin, supra note 265, at 329 (quoting James F. Byrnes, former Supreme Court justice and Senator: “participation by the Vice-President in Senate voting [may be], either in support of his own views or the President’s”).

572. See Brownell, supra note 35, at 319–60.


574. THE FEDERALIST No. 70 (Hamilton) 354, 355 (Garry Wills ed. 1982).
that would appear essential to realization of the Framers’ design of a unified executive branch.\(^{575}\)

For the reasons outlined above, it is clear that the Vice President cannot be seen as always being in the executive branch.

**D. The Incompatibility Clause and the Doctrine of Separation of Powers**

Yet another potential counterargument to the Vice President straddling both political branches is based on Article I, Section 6, Clause 2—the Incompatibility Clause—which prohibits members of Congress from also serving in the executive branch. Under this rationale, the Vice President cannot be part of the executive department.\(^{576}\) This argument has been hinted at by Glenn Harlan Reynolds.\(^{577}\) Despite its distinguished advocate, such an argument fails for several reasons.

First, it assumes that the Vice President is a Senator, which he is not.\(^{578}\) The Vice President has a unique status within the legislative branch, but is not a member. The Constitution makes clear there are only two senators per state.\(^{579}\) If the Vice President were viewed as a Senator, one state would have three senators which would violate both Article I and the Seventeenth Amendment.\(^{580}\) It could also run afoul of one of the express reasons for the Vice President presiding over the Senate: to preclude a state from having enhanced representation in the Chamber. The Vice President is not directly elected by voters in a single state, he is elected nationally through the Electoral

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575. See, e.g., *March Katzenbach Memo*, *supra* note 349, at 11 (“[P]articipation [by the Vice President in the executive branch] has not threatened the unity of the Executive. Unless it should do so in the future, it will not meet a Constitutional bar.”); *Rossiter*, *supra* note 499, at 140 (“If an officer not subject to the power of removal [such as the Vice President] should be authorized to execute the laws in the President’s name, it would violate one of the soundest principles of our system of government. The Vice-Presidency would be a dagger aimed constantly at the precious unity of the executive power.”).

576. The intent of the Incompatibility Clause was not to prevent any member of any branch from serving in any other branch. The Framers wanted to avoid having lawmakers being bought off with executive branch posts as had occurred in Great Britain. See, e.g., Steven G. Calabresi & Joan Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 *Cornell L. Rev.* 1045, 1068–69 (1994). That is why the prohibition only addresses members of Congress.

577. See, e.g., Reynolds, *supra* note 479, at 112–14; see also Orr, *supra* note 298; Garvey, *supra* note 479, at 583. Professor Peter Shane makes reference to this position but does not embrace it. See *Peter M. Shane, Madison’s Nightmare: How Executive Power Threatens American Democracy* 228 n.60 (2009).

578. See e.g., Friedman, *supra* note 98, at 1720–21; Garvey, *supra* note 479, at 583–84; *Reis Letter*, *supra* note 378, at 4, 6 (“the Vice President has a unique status in the legislative branch. . . . [H]e is not strictly a member of Congress.”); *Wilson, supra* note 181, at 131 (“[T]he Vice President is not a member of the Senate.”). Were the Vice President considered a member of the Senate, he could be removed by the Senate alone. See, e.g., Friedman, *supra* note 98, at 1721.

579. See e.g., U.S. CONST. art. I, § 3, cl. 1; *id.* amend. XVII.

580. See Garvey, *supra* note 479, at 583.
College, he serves a four-year and not a six-year term, he may not introduce bills, he may not vote in most circumstances, he sits on no committee and he may speak in the Senate only on rare occasions and only with the consent of the chamber. In short, considering the Vice President a Senator for Incompatibility Clause purposes would radically reorder the Constitution. Presumably, if he were treated as a Senator in this context, little would prevent him from being treated as a Senator in other constitutional contexts (e.g., extending to him full voting privileges despite the Senate President Clause). Not only would that violate the clauses involving Senate voting, eligibility, tenure and the like, it would also overturn practice dating from the first weeks under the Constitution. The Vice President has never been considered a Senator. Far wiser are the words of then-Acting Attorney General Laurence Silberman. He noted, “[c]onsidered as a whole, [the Constitution] . . . indicate[s] that the Vice President has a unique status in the legislative branch, but not the status of a ‘Member’ of the Congress within the meaning of the Constitution.”

On this same score, Katzenbach some years earlier noted that because the Clause states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in office,” and because “the Vice President holds ‘an Office under the United States;’ it would [therefore] do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate.” He also observed that Article I, Section 5 delegated authority to “each House [of Congress which] shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them, [provisions that] plainly do not apply to the Vice President.” Thus, to Katzenbach and OLC, the underlying assumptions behind the Incompatibility Clause counterargument were wholly misplaced.

Second, the Vice President’s status as part of both the legislative and executive branches is reflected in the text of the Constitution just as is the Incompatibility Clause. If at all possible, one must reconcile the Incompatibility Clause with Article I, Section 3, and the Twelfth Amendment which place the Vice President in the legislative branch, and Article II and the Twenty-Fifth Amendment, which reflect his executive branch roles. Otherwise, one is forced to read one set of constitutional provisions out of the Constitution altogether. That, of course, is not even considering the myriad of structural reasons discussed in the companion to this article, which further

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581. *Silberman Letter*, *supra* note 424, at 6; *see also e.g.*, Friedman, *supra* note 98, at 1720–21; *Reis Letter*, *supra* note 378, at 4, 6; *MAGIE*, *supra* note 169, at 140–41 (“Over this body, but not a member of it, the Vice-President in virtue of his office presides.”).
582. *March Katzenbach Memo*, *supra* note 349, at 10 n.10.
583. *April Katzenbach memo*, *supra* note 347, at 3 n.1.
584. *See id.; see also March Katzenbach Memo, supra* note 349, at 10 n.10.
585. *See e.g.*, U.S. CONST. art. I, § 3, cl. 4; *id.* art. II, § 1, cl. 1; *id.* amend. XII; *id.* amend. XXV; *see also Calabresi & Larsen, supra* note 576, at 1124 n.384 (the President of the Senate Clause “waive[s] the ban of the Incompatibility Clause . . . ”).
reflect the Vice President’s roots in both political branches and which further undercut the argument against giving priority to the Incompatibility Clause. The better view is to read Article I, Article II, the Twelfth Amendment and the Twenty-Fifth Amendment—as well as the other relevant structural factors—as placing the Vice President in both political branches, with his exact location varying depending on the context, and having Article I, Section 6 preclude federal lawmakers from serving in the executive branch. This interpretation leaves all relevant constitutional clauses and structural linkages undisturbed.

Third, this reading of the Incompatibility Clause is consistent with the interpretations given the provision by the political branches. On the specific issue of the vice presidency, as has been seen in DOJ opinions and political branch practice, the Incompatibility Clause has not proved an obstacle to vice presidential participation in executive branch activity. This dates back to creation of the Board of the Sinking Fund in 1790, a year into the implementation of the Constitution. Furthermore, interpreting the Incompatibility Clause in a manner so as to preclude the Vice President’s executive branch participation would require overturning the lawfulness of all executive branch assignments given the Vice President since 1790; a tall order indeed.586

Moreover, the clause has been narrowly construed in other contexts, which makes it even less likely that the courts would apply it in a manner to foreclose the Vice President from carrying out executive branch duties. For example, it has not been applied to prevent lawmakers from serving in various executive branch capacities such as in the Armed Forces Reserves.587 Federal lawmakers (i.e., “members”) serving under the President in the military is far more textually troubling than the Vice President—when presiding over the Senate according to constitutional text—being viewed as part of the legislative branch. Yet, members of Congress serving in this capacity appears permissible under the Constitution.588 Such a traditionally narrow construction of the Incompatibility Clause would counsel against it being interpreted so expansively as to consider the Vice President a “Senator” and thus preclude him from executive branch responsibilities.

On a more general level, it could be argued that having the Vice President straddle the political branches runs afoul of the doctrine of separation of

586. See TURNER, supra note 4, at 197 n.17 (“[N]o constitutional challenge has seriously been mounted against the modern practice of investing the office of vice president with executive branch duties. Therefore, it must be considered doubtful that any constitutional barrier exists.”).

587. See Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) (determining the respondents had no standing, thus leaving intact the political branch construction which allowed federal lawmakers to serve in the military); 1 Op. O.L.C. 242 (1977) (“[E]xclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress.”); cf. United States v. Lane, 64 M.J. 1 (C.A.A.F. 2006) (concluding that a Senator may not serve as an appellate judge on a military court but taking no opinion on a member’s overall service in the military).

powers. The reasoning would be that, putting aside the technicalities of the Incompatibility Clause, on a broader structural level there are only three branches of government under the Constitution and no official can properly straddle two branches without violating this fundamental maxim.

For a number of reasons this position is also highly unpersuasive. First, the original Framers did not completely separate the branches from one another. Separation of powers is a principle that undergirds the Constitution but, as seen in the companion piece, the Framers rejected its strict application to the structure of American national government. Functional powers were

589. See Reynolds, supra note 479, at 113; Garvey, supra note 479, at 578–79, 583; cf. Friedman, supra note 98, at 1719–22. Glenn Harlan Reynolds has argued specifically in this regard that “as Bowsher [v. Synar] states, separation of powers prohibits vesting of executive powers in an official subject to (largely notional) control by Congress and who is not removable by the President.” See Reynolds, supra note 479, at 114. Therefore, the argument goes, if the Vice President is part of the legislative branch, he cannot perform executive branch duties. See id. There are a number of serious shortcomings with this argument. First, Bowsher involved the Comptroller General, a creature of statute. See 478 U.S. 714 (1986). The Vice President, of course, is a creature of the Constitution. His position occupies a unique perch bestriding both political branches as a matter of constitutional text and structure, not legislative mandate.

Second, as Reynolds himself concedes through the words “largely notional,” the Vice President is hardly under the control of the legislative branch when in the presiding officer’s chair. The Vice President may have Senate delegations withdrawn from him, but he may not be expelled from office by the Senate. Like the President and federal judges, he can only be impeached and removed, which requires the House to take action first. Similarly, the Senate cannot prevent him from presiding over its proceedings or breaking tie votes.

Third, if Reynolds is correct, 225 years of past practice in which the Vice President has been delegated executive branch tasks would all have to be treated as unconstitutional. Reynolds’ position flies in the face of Supreme Court precedent which defers to political branch interpretation dating back to the founding generation. See, e.g., J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 412 (1928) (“This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions.”); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (“The construction placed upon the Constitution . . . by the men who were contemporary with its formation . . . is of itself entitled to very great weight”); Prigg v. Pennsylvania, 41 U.S. 539, 621 (1842) (placing a premium on “contemporaneous expositions of” the Constitution by the Framers).

Finally, the Vice President is not part of both branches at the same time under the argument set forth in this article and its companion. The setting determines which branch he is in at any one time. Thus, he is not a legislative branch official when fulfilling executive branch assignments. And, as noted, even when he is considered solely a legislative branch official, interpretation of the Incompatibility Clause has traditionally been liberal, thus further undercutting Reynolds’ position.

590. See, e.g., M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (1967) (according to the “pure doctrine’ of the separation of powers . . . . no individual . . . [is] allowed to be at the same time a member of more than one branch.”); cf. Akhil Reed Amar, A Few Thoughts on Constitutionalism, Textualism, and Populism, 65 FORDHAM L. REV. 1657, 1660 (1997) (“You can’t basically be at both ends of Pennsylvania Avenue at once.”).

591. See Figure No. 2 and accompanying text in Brownell, supra note 1; see also Buckley v. Valeo, 424 U.S. 1, 121 (1976) (“[T]he Constitution by no means contemplates total separation
placed as a matter of text in different branches and checks and balances were applied as counterweights.\textsuperscript{592} Personnel were also made to straddle branches.\textsuperscript{593} The Framers of the Twenty-Fifth Amendment only accentuated these features. Thus, the Vice President’s role in both political branches indisputably violates the theoretical notion of separation of powers,\textsuperscript{594} but that is because the text of the Constitution itself so instructs\textsuperscript{595} and because the Framers so intended.\textsuperscript{596}

At the end of the day, if Congress can create agencies that apparently straddle the constitutional divide between branches\textsuperscript{597}—and it has done this from the very beginning\textsuperscript{598}—there should be little reason to think that the Framers could not do the same when fashioning the Constitution itself. As the Supreme Court of Mississippi commented in the context of litigation involving powers assigned to the Lieutenant Governor by the State Senate: “there is no natural law of separation of powers. Rather, the powers of government are separate only insofar as the Constitution makes them separate. The Lieutenant Governor is unusual in that he is made an officer of—and given powers in—two branches of government.”\textsuperscript{599} The exact same principle applies to the Vice President.

of each of these three essential branches of Government . . . ”).

\textsuperscript{593} See generally Calabresi & Larsen, supra note 576; Brownell, supra note 2.
\textsuperscript{594} See, e.g., 1 HAYNES, supra note 92, at 204 (stating that the Vice President “was made President of the Senate, despite the obvious violence . . . this assignment did to the theory of the separation of powers.”); JAMES F. BYRNES, ALL IN ONE LIFETIME 233 (1958) (“[P]articipation by the Vice President in Senate voting . . . constitutes a violation of the spirit of the fundamental provision of the Constitution that the three branches of our government shall forever be separated.”); SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 228 (2012) (“[T]he vice presidency instantiates, more than any other office within the national government, the utter impossibility of viewing the United States as being committed to a hermetically sealed version of ‘separation of powers’ and branches of government.”); Natoli, supra note 224, at 155 (“[T]he Constitutional position of the Vice President is . . . a breach of the doctrine [of separation of powers], since it places a member of the Executive within the legislature as Presiding Officer of the Senate. This function is constitutionally granted.”).
\textsuperscript{595} See U.S. CONST. art. I, § 3, cl. 4; id. art II, § 1, cl. 1; id. amend. XII; id. amend. XXV.
\textsuperscript{596} See, e.g., Ford, supra note 429 (with regard to the vice presidency “the Founding Fathers violated their own fundamental rule of separation of powers.”).
\textsuperscript{598} See supra notes 62–68 and accompanying text (discussing membership of the Board of the Sinking Fund which was created in 1790 and included the Vice President, Chief Justice and Cabinet Secretaries).
\textsuperscript{599} Dye v. State, 507 So. 2d. 332, 346 (Miss. 1987). A similar argument was made before
Second, in addition to text, there are numerous other factors that counsel against the principle of separation of powers preventing vice presidential participation in both elected branches. They include case law and past practice, both of which clearly reflect that the Vice President has a place in both departments.

Finally, it is worth noting that the Vice President is never simultaneously part of both political branches. The context determines the branch he is in at the moment. This is reflected by the President Pro Tempore Clause. The Senate must have a presiding officer at all times while in session. The Vice President is only President of the Senate while in the Senate chair. If he is not in the chair, the position of Senate President reverts to the President Pro Tempore or a Senator otherwise designated. To view the Vice President as Senate President outside of the upper chamber when it is in session would mean the Senate would have two presidents. Any concerns about his breaching the theoretical separation of powers are therefore reduced accordingly since he is not part of the two political branches at the exact same time.

E. The Vice President is an “Officer of the United States” and Therefore must be part of the Executive Branch

A sixth potential counterargument is that the Vice President could be seen as an “Officer of the United States” and therefore exclusively part of the executive branch. Article II, Section 2, Clause 2 provides that the President...
“shall have Power . . . by and with the Advice and Consent of the Senate . . .
[to] appoint Ambassadors, other public Ministers and Consuls, Judges of the
supreme Court, and all other Officers of the United States, whose
Appointments are not herein otherwise provided for, and which shall be
established by Law . . . ."606 The absence of any mention of federal lawmakers
in this formulation strongly implies they are not “Officers of the United States”
and that such a designation applies only to the magisterial branches. Since
“Officers of the United States” are either executive branch members or federal
judges, since the Vice President is clearly not part of the judiciary, and since at
least one Framer made reference to the Vice President as an “officer of the
United States,”607 the argument could be made that the Vice President must be
considered an “Officer of the United States” and consequently be solely part of
the executive branch.

This position, however, suffers from a number of fatal flaws. First, as the
Supreme Court in Free Enterprise Fund v. PCAOB has crisply observed, “[t]he
people do not vote for the ‘Officers of the United States.’”608 The Court’s
opinion in Free Enterprise Fund echoes numerous earlier judicial
pronouncements in this regard.609 This, of course, is contrary to the mode of
to his being perceived as part of both political branches. That is because another presiding officer
of the Senate—the Chief Justice—is so categorized. See Brownell, supra note 2. The Chief
Justice is unquestionably an officer of the United States. He is nominated by the President
subject to Senate advice and consent and he is commissioned. Yet, the Chief Justice is still part
of the legislative branch when the Senate is holding an impeachment trial of the President. See id.


607. See 4 The Debates in the Several State Conventions on the Adoption of the
Federal Constitution 26 (Jonathan Elliot ed. 1836) (repr. ed. 1937) (Maclaine) (“[T]hat the
Vice-President was not a member of the Senate, but an officer of the United States”); see also
Friedman, supra note 98, at 1720 n.72.

608. Free Enterprise Fund v. PCAOB, 130 S. Ct. 3138, 3155 (2010); see also Morton
Rosenberg, Cong. Research Serv., Applicability of the Emoluments Clause (Article I, Section 6, Clause 2) of the Constitution to the Office of Vice-President, 13 (1973)
(on file with author).

609. See Buckley v. Valeo, 424 U.S. 1, 126 (1976) (“[A]ny appointee exercising significant
authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must,
therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.”); id. at 132 (“[A]ll
officers of the United States are to be appointed in accordance with the [Appointments]
Clause.”); Weiss v. United States, 510 U.S. 163, 169–70 (1994) (citing the two aforementioned
passages from Buckley with approval); United States v. Mount, 124 U.S. 303, 307 (1888)
(“Unless a person in the service of the government, therefore, holds his place by virtue of an
appointment by the President or of one of the courts of justice or heads of departments authorized
by law to make such an appointment, he is not, strictly speaking, an officer of the United
States.”); United States v. Smith, 124 U.S. 525, 532 (1888) (“An officer of the United States can
only be appointed by the President, by and with the advice and consent of the Senate, or by a
court of law or the head of a department. A person in the service of the government who does not
derive his position from one of these sources is not an officer of the United States in the sense of
the Constitution. This subject was considered and determined in [earlier Supreme Court
decisions] . . . . What we have here said is but a repetition of what was there authoritatively
declared.”). For other related authority, see Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1365
vice presidential elevation. The people, through the Electoral College, vote for someone to become Vice President.

Moreover, the court has further explained that “officers of the United States” are appointed subject to Senate advice and consent. The Vice President again assumes his high position due to the decision of the electorate through the Electoral College, not through presidential nomination and Senate approval. Even under the extraordinary procedure of the Twenty-Fifth Amendment, he is not appointed subject to Senate advice and consent, he is confirmed by both houses of Congress, a different process altogether.610

Second, under Article II, Section 3, “all the Officers of the United States” are commissioned.611 As one authority has noted “[a]ll means all.”612 Yet, the Vice President is not commissioned.613 Since “all Officers of the United States” are to be commissioned and since the Vice President is not commissioned, the clear conclusion to draw is that he is not in fact an “Officer of the United States.”

Therefore, because the Supreme Court has concluded repeatedly that “Officers of the United States” are not elected and are instead appointed, the Vice President cannot be considered an “Officer of the United States.” That the Vice President is not commissioned only underscores this point. Consequently, because the Vice President is not an “officer of the United States”—a status that implies the individual is part of the magisterial

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610. See Roy E. Brownell II, Can the President Recess Appoint a Vice President? 42 PRES. STUD. Q. 622 (2012).

611. U.S. CONST. art. II, § 3; see also Tillman, supra note 521, at 122.

612. Tillman, supra note 521, at 122.

613. See 8 ANNALS OF CONG. 2257 (Jan. 3, 1799) (statement of Rep. Bayard) (“It is equally clear that the Vice President is an officer, and yet not commissioned.”); id. at 2272 (defense attorney for former Sen. Blount) (dismissing the logic under which “the President should issue a commission to himself, [and] to the Vice President . . . . The Constitution, however, is not chargeable with this absurdity. The President and Vice President have their commissions from the Constitution itself”); CASE OF BRIGHAM H. ROBERTS, OF UTAH, H. REP. No. 56-85, pt. 1, at 36 (1900) (“[T]he provision in the last paragraph of section 3, of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he . . . commission[s] the Vice-President”); Seth Barrett Tillman, Interpreting Precise Constitutional Text: The Argument for a “New” Interpretation of the Incompatibility Clause, the Removal Clause & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz’s Impeachment and Assassination, 61 CLEV. ST. L. REV. 285, 314 (2013); see also Tillman, supra note 521, at 122, 122 n.39 (“If the Vice President were an officer of the United States, then Vice President John Adams should have received a commission from George Washington, and subsequent Vice Presidents should have received commissions from either the outgoing or the incoming President. . . . the President and Vice President . . . have never received presidential commissions.”); see also Feerick, supra note 12, at 195 n.; ROSENBERG, supra note 608, at 10.
branches—there is no impediment to the Vice President being considered part of the legislative branch as well as the executive establishment.

F. The Supreme Court has Addressed the Question

A final counterargument could be made based on the premise that the Supreme Court has spoken on the question of which branch the Vice President occupies. The Court in *Cheney* clearly viewed the post as an executive branch position. Why would that not settle the issue? There are several reasons why it does not.

First, the Court was not asked and did not purport to decide which branch or branches the Vice President inhabits. Consequently, the Court’s passages about the Vice President’s link to the executive branch are merely dicta.

While Supreme Court dicta deserve close attention, dicta are not in and of themselves definitive. Since Supreme Court holdings cannot supplant explicit textual provisions, *a fortiori* dicta cannot. No matter what the Court were to say, Article I still makes the Vice President the Senate’s presiding officer. It still grants him a tie-breaking vote in the body and the Twelfth Amendment still assigns him responsibility to preside over the counting and certification of electoral votes. Similarly, the various structural linkages between the Vice President and the legislative branch cannot be cast aside by the Court.

Second, Supreme Court opinions and numerous other federal court decisions have concluded in dicta of their own that the Vice President is indeed part of the legislative branch. In its dicta in *Cheney*, the Supreme Court gave

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614. See Subhawong, *supra* note 388, at 306 (“In the eyes of the Supreme Court, Vice Presidents are members of the Executive Branch.”). Such a counterargument, of course, assumes that the Supreme Court is the final word for all time on all matters of national legal interpretation, a position that is not without serious flaws. See, e.g., LOUIS FISHER, ON APPRECIATING CONGRESS: THE PEOPLE’S BRANCH 59–112 (2010).


616. See, e.g., Graves v. New York, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) (observing that text is the “ultimate touchstone” of the Constitution, not Supreme Court precedent); Edwin Meese III, Att’y Gen., *The Law of the Constitution*, Speech given at Tulane University, Oct. 21, 1986, *reprinted in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 99, 101–02 (Steven G. Calabresi ed. 2007) (There “is the necessary distinction between the Constitution and constitutional law. The two are not synonymous. . . . The Constitution is . . . a document of our most fundamental law. . . . Constitutional law, on the other hand, is that body of law that has resulted from the Supreme Court’s adjudications involving disputes over constitutional provisions or doctrines. . . . in terms of sheer bulk, constitutional law greatly overwhelms the Constitution. But in substance, it is meant to support and not overwhelm the Constitution from which it is derived”); 3 CHARLES WARREN, THE SUPREME COURT IN AMERICAN HISTORY 470–71 (1923) (“However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decisions of the Court.”); Raoul Berger, *War-Making by the President*, reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 604, 606 (Richard A. Falk ed. 1976) (“The cardinal index of constitutionality is the Constitution itself, not what others have said about it . . . . we must look at the Constitution with eyes unclouded by the opinions of others.”).
no indication it was reconsidering these judicial passages, much less overturning them. Neither did it purport to overturn the lawfulness of 225 years of vice presidential activity in the Senate chair. Thus, while the Cheney dicta provide important texture to the question of where the Vice President resides within U.S. constitutional structure, they do not resolve the matter.

Finally, nothing in the Cheney dicta expressly precludes the Vice President from being considered part of the legislative branch when presiding over the Senate. The dicta treat the President and Vice President as one and the same only in the context of the litigation at hand. The background of Cheney involved the Vice President acting upon an express delegation from the President. The case had nothing to do whatsoever with the Vice President acting pursuant to his own constitutional legislative branch duties. It is not surprising, therefore, given the facts of the case, that the vice presidency is mentioned as an executive branch position.

In sum, potential counterarguments against the Vice President being part of both elected branches are not persuasive; in fact, their failure only serves to reinforce the thesis of this two-part discussion.

IV. CONCLUSION

This article and its companion have endeavored to examine in some detail the question: in which branch or branches does the Vice President reside? Review of constitutional text and structure, judicial dicta, the views of the Framers, past practice and opinion and practical considerations all reflect that the Vice President is part of both elected branches. The best reading of the legal authorities is that the placement of the Vice President depends on context and on applying the aforementioned legal methodologies.

If, for example, the Vice President is casting a tie-breaking vote on a procedural matter related to a constitutional amendment, he is part of the legislative branch. As a textual matter, the Vice President is acting under authority of Article I, typically thought to be the legislative branch article. From a structural perspective, he is acting in a capacity in which the President—the quintessential executive branch figure—cannot, which is to directly affect an amendment to the Constitution. Case law has supported that the Vice President, when acting in this vein, is part of the legislative branch. The Framers generally considered the tie-breaking vote role as placing the Vice President within the legislative branch. Historically, vice presidents have indeed broken tie votes related to constitutional amendments. And, as a

617. See Transcript of Oral Argument, at 5, Cheney v. United States District Court, 542 U.S. 367 (2004) (No. 03-475), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/03-475.pdf (“[T]he Vice President is acting as the subordinate and surrogate for the President here. This is the President’s authority.”) (quoting Solicitor General Olson).
practical matter, the Vice President takes this action in the Senate chamber. In this setting, it is clear the Vice President is part of the legislative branch.

Another example is the Vice President carrying out a diplomatic mission assigned him by the President. In this context, the Vice President is carrying out Article II activities as he is utilizing power assigned him by the President. Article II is typically thought to be the executive branch article. As a matter of past practice, when the Vice President carries out duties delegated by the President he is thought to be part of the executive branch. And completion of this project would take place outside of the Senate chamber. In this setting, the Vice President would be in the executive branch.

On a broader level, the conclusions drawn in this article and its companion reflect many of the fundamental contradictions of the vice presidential office and of the doctrine of separation of powers as applied to the American Constitution. These contradictions include functional powers and personnel that transcend branches of government and articles of the Constitution. Viewing the Vice President in proper perspective not only clarifies many longstanding misperceptions about the office itself but also helps bring the doctrine of separation of powers in the United States into sharper focus.