

# Oh, VPOTUS, Where Art Thou? The Constitutional Situs of the Vice Presidency as Surveyed by a Former Vice Presidential Lawyer

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## *Abstract*

*A dispute between a federal oversight authority and the Office of the Vice President (OVP) prompted an unprecedented public discussion regarding the proper location and role of the vice presidency when Dick Cheney's Chief of Staff challenged an audit of classified information on the grounds that the OVP was not an entity within the Executive Branch. The modern role of the Vice President is generally viewed as advisor and supporter of the President, with all executive authority vested in the President. Conversely, the Vice President presides as President of the Senate, casting tie-breaking votes when necessary.*

*This dual role invokes separation-of-powers concerns, because while the Vice President is plainly an officer of both the Legislative and Executive Branches, he is not considered a full-fledged "member" of either branch. Constitutional text, history, and vice presidents themselves have grappled over whether the OVP is best considered as overlapping the Executive and Legislative Branches, being a hybrid of the two, or existing as its own entity. This symposium explores the Vice President's position, delving into his relationships within each political branch, as well as the various duties and functions he performs. Insights from this analysis prompt the theory that*

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*perhaps the Vice President's role fits within both branches of government, contingent on which function he is performing at the time.*

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*And the chief embarrassment in discussing his office is, that in explaining how little there is to be said about it one has evidently said all there is to say.*

—Woodrow Wilson on the vice presidency<sup>1</sup>

An intragovernmental jurisdictional dispute between Vice President Dick Cheney’s Chief of Staff and an obscure federal bureaucrat seeking to audit the Office of the Vice President’s (OVP) handling of classified information sparked predictable outrage from the political establishment, the media, and the academy.<sup>2</sup> But it also prompted an unprecedented public discussion regarding the proper location and role of the vice presidency in our constitutional firmament—a discussion that continues in this Symposium.<sup>3</sup>

Once the superficial mockery faded, more serious questions remained.<sup>4</sup> The modern conception of the vice presidency is the Vice President as the President’s constitutional partner, who assists in carrying out the President’s executive duties as directed by the President.<sup>5</sup> But apart from the Vice President’s contingent roles as president-in-waiting, Acting President, and an arbiter of presidential incapacity,<sup>6</sup> the Constitution does not assign any

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1. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 241 (Houghton, Mifflin, & Co. 1901) (1885).

2. *See infra* Part I.

3. *See generally infra* Parts I–IV.

4. *See infra* Part II.

5. *See infra* Section II.B.

6. U.S. CONST. amend. XXV, § 1 (“In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.”); *id.* § 3 (“Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.”); *id.* § 4 (“Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.”).

day-to-day executive authority to the Vice President.<sup>7</sup> Instead, it vests all executive authority in the President.<sup>8</sup> So, is the Vice President even part of the Executive Branch as a constitutional matter?<sup>9</sup>

On the other hand, the Vice President presides as President of the Senate and actually votes to break ties in that legislative body.<sup>10</sup> But the Vice President is not a member of the federal legislature as defined by the Constitution.<sup>11</sup> So is the Office part of the Legislative Branch?

An answer to these questions might be that the Vice President is part of neither branch, as the Department of Justice suggested when it analyzed the question in the Kennedy Administration.<sup>12</sup> That answer runs counter to our understanding of the tripartite structure of the federal government.

Alternatively, we could conclude that the Vice President is part of *both* the Legislative and Executive Branches. If that is the case, the office is an anomaly in our constitutional system of separated powers. This conception of the Office prompted then-Vice President Gerald Ford to explain: “In finding something for the Vice President to do besides stand and wait, the Founding Fathers violated their own fundamental rule of separation of powers. The Vice President is a constitutional hybrid.”<sup>13</sup>

7. See generally U.S. CONST. amend. XXV.

8. U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

9. The Constitution does not speak at all of “branches” of government, but of powers and authorities. The “Executive Branch” here refers to the President, the executive departments, and those executive officials and components that both assist the President in the enforcement of federal law and advise the President in the exercise of his authority. Similarly, the Legislative Branch refers generally to the Congress and those officers and employees that assist members of Congress in the performance of their legislative functions.

10. U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

11. Article I of the Constitution provides, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1. The House is “composed of Members chosen every second Year by the People of the several States.” *Id.* § 2, cl. 1. The Senate, in turn, “shall be composed of two Senators from each State.” *Id.* § 3, cl. 1.

12. See Memorandum from Nicholas Katzenbach, Assistant Attorney Gen., Office of Legal Counsel on the Participation by the Vice President in the Affairs of the Executive Branch to the Vice President 11 (Mar. 9, 1961), <https://fas.org/irp/agency/doj/olc/030961.pdf> [hereinafter March 9, 1961 OLC Mem.]; see also Memorandum from Nicholas Katzenbach, Assistant Attorney Gen., Office of Legal Counsel on the Constitutionality of the Vice President’s Service as Chairman of the National Aeronautics and Space Council to the Vice President 4 (Apr. 18, 1961), <http://fas.org/irp/agency/doj/olc/041861.pdf> [hereinafter Apr. 18, 1961 OLC Mem.].

13. Gerald Ford, *On the Threshold of the White House*, ATLANTIC (July 1974),

Whatever the answer, the vice presidency is a strange beast in our constitutional structure. But does the question even matter? Where the Vice President fits in the framework of government is often a matter of constitutional metaphysics with little impact on the day-to-day function of government. But on occasion, issues arise that require us to examine more closely the question of the proper constitutional situs of the vice presidency.

My comments here seek to address this issue, in both its constitutional and practical implications. Given the controversy on these questions that arose during the vice presidency of Dick Cheney—for whom I was privileged to serve as Counsel—a once-neglected constitutional question has spawned a flurry of academic scholarship.<sup>14</sup> I do not purport to catalog all of the available scholarship and may not address the issues here in the same depth as some of those scholars.<sup>15</sup> But I do hope to bring a unique perspective to the debate, as someone who considered these issues on an often daily basis in the performance of my professional duties in the OVP.

The Constitution's text, our history, and my own limited experience have led me to conclude that Gerald Ford was essentially correct. While not a full-fledged member of either political branch of government, the Vice President is an officer of and participates in the functions of both branches.<sup>16</sup> The Constitution assigns the Vice President certain contingent functions in the Executive Branch relating to presidential succession, and since the

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<http://www.theatlantic.com/magazine/archive/1974/07/on-the-threshold-of-the-white-house/376282/>.

14. See, e.g., Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. 101, 110 (2007); Adam White, *Will the Real VP Please Step Forward?*, LEGAL TIMES (Oct. 27, 2008), <http://adamjwhite.com/wp-content/uploads/realvp.pdf>.

15. I am particularly indebted to the scholarship of two authorities on the vice presidency. Roy E. (Reb) Brownell has written extensively in the last decade on the constitutional role of the Vice President. See, e.g., Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers, Part I: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL'Y 1 (2014) [hereinafter Brownell, *Constitutional Chameleon, Part I*]; Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place within the American System of Separation of Powers, Part II: Political Branch Interpretation and Counterarguments*, 24 KAN. J.L. & PUB. POL'Y 2 (2015) [hereinafter Brownell, *Constitutional Chameleon, Part II*]. Mr. Brownell has provided much more extensive support for his scholarship than I could have ever hoped to collect in preparing for this Symposium. Joel K. Goldstein's scholarship on the vice presidency spans more than three decades. See, e.g., JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY* (1982); Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505 (1995) [hereinafter Goldstein, *The New Constitutional Vice Presidency*]. Both scholars' historical and constitutional writings better informed my own understanding.

16. See *infra* note 51 and accompanying text.

founding, the Vice President has participated—albeit much less frequently in the early stages of our republic—in the day-to-day deliberations of the Executive.<sup>17</sup> That participation has grown in modern times to the role of which we generally conceive the vice presidency—as a political partner of the President who regularly advises and assists the President in the performance of the Executive function.<sup>18</sup> At the same time, the Constitution plainly assigns an office and a role for the Vice President in the Senate, functions that are both ceremonial and substantive.<sup>19</sup>

This dual function may be an aberration in our scheme of separated powers, but it is the one contemplated by the Constitution. Because the Vice President has constitutional independence from the President, there is no real danger of presidential usurpation of legislative power when the Vice President is performing his legislative function. Nor is there a risk of legislative usurpation of executive power in permitting the officer designated as President of the Senate to participate in executive deliberations, because the President always has the authority to exile the Vice President from any day-to-day role within the Executive Branch.<sup>20</sup>

The constitutional “place” of the vice presidency is largely functional, depending on whether he is performing executive functions (as is most often the case in modern times) or legislative functions as President of the Senate.<sup>21</sup> When presiding over the Senate or voting to break a tie, the Vice President is “of” the Legislative Branch. When exercising authority delegated by the President—or performing more explicit constitutional functions such as determining presidential competence or acting as president—the Vice President is “of” the Executive.<sup>22</sup>

This dual functionality differentiates the Vice President from any other official in government.<sup>23</sup> The President may exercise a form of legislative power in signing or vetoing legislation, but the Constitution does not place him in the Legislative Branch when he does so.<sup>24</sup> The Constitution

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17. *See supra* note 6.

18. *See infra* note 57 and accompanying text.

19. *See* U.S. CONST. amend. XXV.

20. *See infra* note 175 and accompanying text.

21. *See infra* notes 184–89 and accompanying text.

22. *See* Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 5, 47–55 (“When [the Vice President] is carrying out activities, such as those delegated to him by the President, by the Twenty-Fifth Amendment or by statute, he is part of the executive branch.”).

23. *See infra* Section II.B.

24. *See infra* Section II.A.

contemplates that the Vice President will straddle the political branches.<sup>25</sup> Whether or not it can be said, in any particular context, that the Vice President is formally “part” of both branches or neither, the vice presidency is plainly a creature of both political branches.<sup>26</sup> He is *sui generis* in our constitutional system.<sup>27</sup>

#### I. THE ISOO CONTROVERSY & THE “FOURTH BRANCH” VICE PRESIDENCY

The controversy over the constitutional situs of the Vice President was thrust into public view as a result of a May 2006 *Chicago Tribune* story, which reported that Vice President Cheney’s office “refused to report his office’s activities in either the classification or declassification of documents during 2005, as he has refused to disclose since 2003.”<sup>28</sup> Under President Bush’s executive order on classification, the Information Security Oversight Office (ISOO)—a component of the National Archives and Records Administration—was delegated the authority to audit the classification and declassification practices of any Executive Branch “agency.”<sup>29</sup> Especially in the wake of the Department of Justice’s investigation regarding the alleged leak of Central Intelligence Agency (CIA) employee Valerie Plame’s identity to the media, ISOO Director J. William Leonard took a particular interest in the classification and declassification practices of the OVP.<sup>30</sup>

The OVP declined to permit ISOO to audit its classification practices, however.<sup>31</sup> It contended that the OVP was not an “agency” within the

25. See *infra* Section II.C.

26. See *infra* Section II.D; see also Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 25 (“[The Vice President] belongs to both [branches]—though not to both simultaneously. His exact locus in U.S. constitutional structure varies depending on the context in which the Vice President is taking action.”).

27. See *infra* Part III; see also Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 6 (“[T]he vice presidency presents one of the more striking examples of the Framers’ break with the pure theory of separation of powers.”).

28. Mark Silva, *Cheney Keeps Classification Activity Secret*, CHI. TRIB. (May 27, 2006), [http://articles.chicagotribune.com/2006-05-27/news/0605270039\\_1\\_government-secrecy-classification-decisions-national-archives-office](http://articles.chicagotribune.com/2006-05-27/news/0605270039_1_government-secrecy-classification-decisions-national-archives-office); see also CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 163–64 (2007).

29. See Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003).

30. See Walter Pincus, *Fine Print: Cheney Had His Own Reading of “Classified,”* WASH. POST (May 27, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/02/AR2009110203525.html>.

31. See Silva, *supra* note 28.

meaning of President Bush's executive order.<sup>32</sup> For purposes of the order, "agency" was defined broadly to include not only those "executive agencies" as defined by Congress,<sup>33</sup> but also "military departments," and "any other entity within the executive branch that comes into the possession of classified information."<sup>34</sup> Read literally, this order would have subjected almost every entity located within the Executive Branch, including the President's own White House Office, to ISOO oversight.

Asked why Vice President Cheney's office resisted ISOO review, Cheney spokesperson Lea Anne McBride told the *Tribune*: "[T]his 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."<sup>35</sup>

This explanation reflected the position later publicly stated by Cheney's Chief of Staff David Addington in a congressional hearing—that the Vice President is not formally part of the Executive Branch, or either political branch for that matter.<sup>36</sup> In response to a question about the Vice President's constitutional location during a 2008 House Judiciary Committee hearing,

32. *See id.*

33. 5 U.S.C. § 105 (2012) ("For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment."). Courts have construed this provision to exclude entities within the government whose only purpose is to advise and assist the President. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *see also, e.g., Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990) ("The Supreme Court has made clear that the Office of the President is not an 'agency' for purposes of the FOIA."). Because its executive function is limited to advising and assisting the President, the OVP has been held not to be an Executive Branch agency. *See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 55 (D.D.C. 2002) ("[T]he Vice President and his staff are not 'agencies' for purposes of FOIA."); *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 216 n.9 (D.C. Cir. 2013) ("[T]his court has held that records of the Vice President and his immediate staff are likewise not agency records for purposes of FOIA."); Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel on Whether the Office of the Vice President Is an "Agency" for Purposes of the Freedom of Information Act to Todd J. Campbell, Counsel & Dir. of Admin., Office of the Vice President (Feb. 14, 1994), <https://fas.org/irp/agency/doj/olc/021494.pdf> ("The Office of the Vice President is not an 'agency' for purposes of the Freedom of Information Act.").

34. Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009); *see also* 5 U.S.C. § 102 (2012) ("The military departments are: The Department of the Army. The Department of the Navy. The Department of the Air Force.").

35. *See Silva, supra* note 28.

36. *See* Kate Klotnik, *Quote of the Day: Vice President Is a 'Barnacle' on the Legislative Branch*, TALKING POINTS MEMO (June 26, 2008), <http://talkingpointsmemo.com/muckraker/quote-of-the-day-vice-president-is-a-barnacle-on-the-legislative-branch>.

Mr. Addington answered: “[P]erhaps the 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.”<sup>37</sup>

For this formulation, Mr. Addington relied on a pair of Department of Justice legal memoranda issued during the Kennedy administration.<sup>38</sup> Those memoranda reflected a functional approach to the Vice President’s constitutional role, in which the nature of the vice presidency varied depending on whether the Vice President was assisting the President in his executive role or carrying out his own constitutional functions as President of the Senate.<sup>39</sup> Mr. Addington—my predecessor as Counsel to the Vice President, who has thought more about the constitutional role of the Vice President than the combined faculties of most elite law schools—had long subscribed to this view, although this was the first time it had had publicly aired.<sup>40</sup>

The response was both savage and oblivious to the origins of Mr. Addington’s position.<sup>41</sup> Senator Chuck Schumer told reporters that the “vice president’s theory seems to be one almost laughable on its face, that he’s not part of the executive branch . . . . I think if you ask James Madison or Benjamin Franklin or any of the writers of the Constitution, they’d almost laugh if they heard that.”<sup>42</sup> Noted legal scholar Maureen Dowd carped that Vice President Cheney “is casting himself as a constitutional chimera, an extralegal creature with the body of a snake and the head of a sea monster. It’s a new level of gall, to avoid accountability by saying you’re part of a

37. *Id.*

38. See March 9, 1961 OLC Mem., *supra* note 12; April 18, 1961 OLC Mem., *supra* note 12 (concluding that the Vice President’s constitutional role did not preclude the Act placing the Vice President on council designed to advise and assist the President with respect to performance of functions in the aeronautics and space field); see also Memorandum from Nicholas Katzenbach, Assistant Attorney Gen., Office of Legal Counsel on the Delegation of Presidential Powers to the Vice President to the Attorney Gen. (June 22, 1961), <http://fas.org/irp/agency/doj/olc/062261.pdf>.

39. See *supra* note 38 and accompanying text.

40. See Klotnik, *supra* note 36.

41. See, e.g., Dana Milbank, *The Cheese Stands Alone*, WASH. POST (June 26, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062501565.html> (“Cheney has, in effect, declared himself to be neither fish nor fowl but an exotic, extraconstitutional beast who answers to no one.”); Maureen Dowd, *A Vice President Without Borders, Bordering on Lunacy*, N.Y. TIMES (June 24, 2007), [http://www.nytimes.com/2007/06/24/opinion/24dowd.html?\\_r=0](http://www.nytimes.com/2007/06/24/opinion/24dowd.html?_r=0) (“[E]ven in my harshest musings about the vice president, I never imagined that he would declare himself not only above the law, not only above the president, but actually his own dark planet—a separate entity from the White House.”).

42. See Milbank, *supra* note 41.

legislative branch that you've spent six years trying to weaken."<sup>43</sup>

There were immediate repercussions beyond this public reproach.<sup>44</sup> Then-Representative Rahm Emanuel introduced legislation to strip the OVP of its Executive Branch appropriation.<sup>45</sup> Recognizing the dual role of the vice presidency, Congress appropriates funds to the OVP in both Executive Branch appropriations acts and Legislative Branch appropriations acts.<sup>46</sup> Most vice presidential staffers, then, are paid from a larger Executive Branch appropriation, while others, whose functions relate more to the vice president's legislative functions (such as the legislative affairs staff), are paid through the OVP's legislative appropriation. Congressman Emanuel argued that if Vice President Cheney did not consider himself part of the Executive Branch, Congress should not appropriate funds to him to assist the President as part of the Executive Branch appropriation.<sup>47</sup>

In response to a demand for further explanation of the OVP's legal position, David Addington wrote to Senator John Kerry to explain that the OVP is not an "agency" within the meaning of the President's classification executive order.<sup>48</sup> Mr. Addington did not restate the constitutional argument, instead demurring that "[c]onstitutional issues in government are generally best left for discussion when unavoidable disputes arise . . . instead of in theoretical discussions."<sup>49</sup> "Given that the executive order treats the Vice President like the President rather than like an 'agency,'" he wrote, "it is not necessary in these circumstances to address the subject of any

43. See Dowd, *supra* note 41.

44. See *infra* notes 45–54 and accompanying text.

45. See *Democrats to Target Funding for Cheney*, ASSOCIATED PRESS (June 26, 2007, 4:18 PM), <http://www.nbcnews.com/id/19442707/ns/politics/t/democrats-target-funding-cheney/#.VrTW65j2b5o>.

46. See Pub. L. No. 108-199, 118 Stat. 325–26 (2004). The 2004 Consolidated Appropriations Act, for instance, set aside \$4.4 million to the OVP as part of its appropriation to the Executive Office of the President "to enable the Vice President to provide assistance to the President in connection with specially assigned functions." *Id.*; see also Pub. L. No. 108-447, 118 Stat. 3166 (2004). The Legislative Branch Appropriations Act in the same year set aside \$2.1 million for the OVP, as well as an expense allowance for the Vice President himself. Pub. L. No. 108-447, 118 Stat. 3166 (2004).

47. See *Democrats to Target Funding for Cheney*, *supra* note 45.

48. See Letter from David S. Addington, Chief of Staff to Vice President Dick Cheney, to John Kerry, U.S. Senator from Mass. (June 26, 2007), [http://www.pegc.us/archive/White\\_House/addington\\_letter\\_20070626.pdf](http://www.pegc.us/archive/White_House/addington_letter_20070626.pdf) [hereinafter Addington Letter]; see also Michael Abramowitz, *Cheney Aide Explains Stance on Classified Material*, WASH. POST (June 27, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062602052.html>.

49. Addington Letter, *supra* note 48.

alternative reasoning, based on the law and the legislative functions of the vice presidency and the more modern executive functions of the vice presidency.”<sup>50</sup>

In an interview with CBS Radio at the time of the controversy, Vice President Cheney did not fully embrace Mr. Addington’s conception of the office, instead insisting that he had a foot in *both* political branches:

Q There was an aide in your office who said that one of the reasons 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.<sup>51</sup>

This viewpoint may have helped defuse Congressman Emanuel’s

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50. *Id.*

51. *Radio Interview by Mark Knoller with Vice President Dick Cheney*, CBS RADIO (July 30, 2007, 12:57 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/text/20070730-1.html> [hereinafter *Interview of the Vice President by Mark Knoller*].

appropriations gambit. The amendment to strip the Vice President's Executive Branch appropriation failed narrowly when a handful of Democrats, including House Appropriations subcommittee chairman John Murtha, broke party ranks to vote against it.<sup>52</sup> And the question of whether the Vice President was subject to the President's classification executive order was ultimately answered by President Bush, who explained through his lawyer that "the Executive Order deals with the President and the Vice President separately from agency heads and thus the Office of the Vice President, like the President's office, is not an 'agency' for purposes of the Order."<sup>53</sup> The President thus avoided the constitutional question, instead opting to merely interpret his own order to exclude the White House and OVP from its reach.<sup>54</sup>

## II. ANSWERING THE QUESTION OF VICE PRESIDENTIAL LOCATION

While the ISOO dispute went away, the bigger constitutional question of the rightful place of the vice presidency in our constitutional scheme still remained.<sup>55</sup> The Executive Branch role of the Vice President is a rather modern invention.<sup>56</sup> The vice presidency evolved from an occasional participant in presidential deliberations to a regular cabinet member in the early to middle 1900s, and finally, to a full-fledged "partner" of the President in the Carter Administration.<sup>57</sup> The more robust Executive Branch

52. See Robert Novak, *Evans Novak Political Report, Week of July 11, 2007*, HUMAN EVENTS (July 11, 2007), <http://humanevents.com/2007/07/11/enpr-week-of-july-11-2007/>. As Vice President Cheney explained at the time, John Murtha, for his part, was not going to let Congress take away the funds otherwise appropriated for his old house colleague and friend Dick Cheney. See generally LOU DUBOSE & JAKE BERNSTEIN, VICE: DICK CHENEY AND THE HIJACKING OF THE AMERICAN PRESIDENCY 97 (2006) (describing Cheney and Murtha as close friends).

53. Letter from Fred F. Fielding, Counsel to the President to Sam Brownback, U.S. Senator for Kansas 3 (July 12, 2007), <https://www.fas.org/sgp/isoo/olc072007.pdf>; see also Letter from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., to J. William Leonard, Dir., Info. Sec. Oversight Office 2 (July 20, 2007), <https://www.fas.org/sgp/isoo/olc072007.pdf> (noting that the President's determination "directly resolves the question you presented to the Attorney General" asking whether the OVP is an "agency" for purposes of Executive Order 12,958).

54. See Letter from Steven G. Bradbury to J. William Leonard, *supra* note 53.

55. See Apr. 28, 1961 OLC Mem., *supra* note 12, at 1–2.

56. See *id.*

57. Apr. 28, 1961 OLC Mem., *supra* note 12, at 1–2 ("In general . . . the [Vice President's Executive Branch] role was not a significant one until 1933, when Roosevelt and Garner took office. Until then, for example, only three Vice Presidents had ever sat with the Cabinet . . . . Beginning with Garner, participation by the Vice President in the deliberation of the Cabinet became a matter

roles of Vice Presidents Cheney and Biden would have seemed foreign to our first Vice President, John Adams, who generally considered himself—to the chagrin of many members of Congress—the head of the Legislative Branch.<sup>58</sup>

#### A. *The Vice President's Constitutional Roles*

What does the Constitution say of the Vice President's role in our national government? The vice presidency is created by Article II of the Constitution, which generally governs the Executive Branch.<sup>59</sup> Article II provides that the Vice President shall be “chosen for the same Term” as—and elected “together with”—the President.<sup>60</sup> But while it originally established the procedures under which the President and Vice President were chosen (since amended by the Twelfth Amendment),<sup>61</sup> Article II provided no everyday role for the Vice President in the Executive Branch.<sup>62</sup> Instead, the constitution vested all of the executive power exercisable under Article II in the President.<sup>63</sup> The Vice President's only role was contingent, serving as a “president in waiting” in the event of removal, death, resignation, or inability of the President to perform the functions of the office.<sup>64</sup>

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of course.”); see also Reynolds, *supra* note 14, at 112, n.12 (citing PAUL C. LIGHT, VICE PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE 155–57); JOEL K. GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION 172–75 (1982) (describing Vice President Walter Mondale's influence during the Carter Administration).

58. See *Vice President of the United States (President of the Senate)*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Vice\\_President.htm?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.senate.gov/artandhistory/history/common/briefing/Vice_President.htm?utm_source=twitterfeed&utm_medium=twitter) (last visited Jan. 31, 2017).

59. U.S. CONST. art. II. Article II does contemplate some role for Congress in executive affairs, providing, for example, for Senate advice and consent in executive and judicial appointments as well as treaties. *Id.* At the same time, Article I provides for some role for the President in legislative affairs, as when the President signs or vetoes legislation. See *id.* art. I, § 7.

60. *Id.* art. II, § 1, cl. 1. In one of the few mentions of the vice president in the *Federalist Papers*, Hamilton explains that the “Vice-President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great, if not equal force to the manner of appointing the other.” THE FEDERALIST NO. 68 (Alexander Hamilton) (Yale University Press 2009).

61. See U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. amends. XII, XX, XXV.

62. See U.S. CONST. art. II.

63. *Id.* § 1, cl. 1; §§ 2–3.

64. *Id.* § 1, cl. 6. As originally adopted, the Constitution provided that the “powers and duties of the [presidency]” would devolve on the Vice President in these events, leaving open the question of

That contingent role was expanded by the Twenty-fifth Amendment, which provides a process by which the President can temporarily transfer the powers of the office to the Vice President whenever the President determines that he is “unable to discharge the powers and duties of his office.”<sup>65</sup> In those circumstances, the Vice President shall discharge those powers and duties as “Acting President” until the President resumes his responsibilities.<sup>66</sup> The Twenty-fifth Amendment also makes the Vice President a necessary player (along with a majority of the cabinet) in determining presidential incompetence, and, again, designates the Vice President as Acting President in the event of such a determination.<sup>67</sup> In the

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whether the Vice President would become the President or simply act as President. *Id.*; see March 9, 1961 OLC Mem., *supra* note 12, at 216–17. When William Henry Harrison died in 1841, then-Vice President John Tyler effectively resolved that question by asserting that he was not simply invested with the powers of the presidency, but that he was the actual President. See EDWIN MEESE III ET AL., HERITAGE GUIDE TO THE CONSTITUTION 430 (Heritage Foundation 2005); March 9, 1961 OLC Mem., *supra* note 12 at 217 (“Whatever the merits of the controversy, Tyler’s position prevailed.”). The Twenty-fifth Amendment affirms this interpretation, providing that the Vice President “shall become President” upon removal, death or resignation of the President. U.S. CONST. amend. XXV, § 1.

65. U.S. CONST. amend. XXV, § 3. As originally adopted, Article II provided that the powers and duties of the Presidency “shall devolve on the Vice President” in the event of removal, death, resignation, or inability of the President to discharge his official duties. U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV. The Twenty-fifth Amendment confirms this vice presidential role as Acting President, permits presidential delegation of that role in the event of incapacity, and adopts processes to determine involuntary presidential incapacity. U.S. CONST. amend. XXV.

66. See U.S. CONST. amend. XXV. This authority has been invoked three times, once by President Ronald Reagan and twice by President George W. Bush. See Gerhard Peters, *List of Vice-Presidents Who Served as “Acting” President Under the 25th Amendment*, AM. PRESIDENCY PROJECT, [http://www.presidency.ucsb.edu/acting\\_presidents.php](http://www.presidency.ucsb.edu/acting_presidents.php) (last visited Jan. 31, 2017) (publishing letters of transfer and resumption of powers). Reagan expressly disclaimed reliance on the Twenty-fifth Amendment at the time but followed its procedures and later stated that he had invoked the Amendment in his memoirs. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* XVI (2d ed. 1992). Vice President Cheney acted as President for just over two hours on a Saturday afternoon in July 2007, when President Bush went under sedation for a colonoscopy. Sheryl Gay Stolberg, *Cheney Pens Letter While Acting as Potus*, N.Y. TIMES (July 30, 2007), [http://thecaucus.blogs.nytimes.com/2007/07/30/cheney-pens-letter-while-acting-as-potus/comment-page-1/?\\_r=0#](http://thecaucus.blogs.nytimes.com/2007/07/30/cheney-pens-letter-while-acting-as-potus/comment-page-1/?_r=0#). Cheney used the time to write a letter to his grandchildren. *Id.*

67. See U.S. CONST. amend. XXV, § 4 (“Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.”). Apart from some not-too-credible episodes of 24, no vice president has ever

event of a dispute between the President, on one hand, and the Vice President and cabinet, on the other, Congress ultimately determines presidential competence or incompetence, with a two-thirds vote of both houses required to continue the Vice President in the role as Acting President.<sup>68</sup>

This obvious check on overreach by the Vice President and cabinet means that even the Vice President's *contingent* executive authority is highly constrained.<sup>69</sup> Yet it is still a critical executive role, as James Madison explained in opposing an early legislative proposal to limit the Vice President's pay to days he presided over the Senate: "[T]he nature of the office will require that the Vice President shall always be in readiness to render that service which contingencies may require."<sup>70</sup> The Twenty-fifth Amendment only confirms that critical vice presidential executive function in ensuring continuity of government—in times of both temporary and permanent presidential incapacity.<sup>71</sup>

The only noncontingent functions assigned to the Vice President by the Constitution are in the Legislative Branch.<sup>72</sup> "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided."<sup>73</sup> The Vice President has two constitutional functions in the Legislative Branch—presiding over the Senate and breaking ties.<sup>74</sup> But even the founders intended, contrary to Vice President John Adams's conception, that the upper house of Congress would still function in the absence of the Vice President.<sup>75</sup> The Constitution thus provided that

been part of such deliberations. *See, e.g., 24 Plot Summary*, IMDB (2003), [http://www.imdb.com/title/tt0502193/plotsummary?ref\\_=tt\\_ov\\_pl](http://www.imdb.com/title/tt0502193/plotsummary?ref_=tt_ov_pl).

68. *Id.*

69. *See id.*

70. *See* Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 307 (quoting 1 ANNALS OF CONG. 648 (1789)).

71. *See* U.S. CONST. amend. XXV.

72. *See* U.S. CONST. art. I, § 3, cl. 4.

73. *Id.* And in the event of the impeachment of a President, the Vice President would not preside over the Senate impeachment proceedings; instead, the Chief Justice of the United States Supreme Court presides over a presidential impeachment. *Id.*

74. *See* U.S. CONST. amend. XXV. To the extent it can be viewed as a legislative role, the Vice President, as President of the Senate, plays a role in the counting of electoral votes under the Twelfth Amendment as well. *Id.* amend. XII ("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.").

75. There have been eighteen periods in American history when the federal government operated without a sitting vice president. Thomas H. Neale, *Vice Presidential Vacancies: Congressional*

the Senate would choose a President pro tempore, who presides over the Senate “in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.”<sup>76</sup>

### B. *Rejecting the Single Branch Vice Presidency*

So of which branch is the Vice President technically a part? The modern conception of the Vice President as part of the Executive Branch is so engrained in our political culture that the last Vice President, Joe Biden, insisted during a vice presidential debate that the Vice President is a part of the Executive Branch *only*.<sup>77</sup> Criticizing Vice President Cheney over the ISOO controversy, then Senator Biden argued:

The idea [Cheney] doesn’t realize that Article I of the Constitution defines the role of the vice president of the United States, that’s the Executive Branch.<sup>78</sup> 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

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*Procedures in the Ford and Rockefeller Nominations*, CONG. RESEARCH SERV. 4–5 (Aug. 21, 1998) (discussing sixteen occasions prior to enactment of Twenty-fifth Amendment). Some of those periods were extensive, such as when John Tyler replaced William Henry Harrison upon his death only a month after his inauguration. *Id.* at 5. The Twenty-fifth Amendment addressed the problem of vice presidential vacancies by permitting the President to fill a vacancy, with confirmation to the office upon majority vote of both Houses of Congress. U.S. CONST. amend. XXV, § 2. Two vacancies have been filled under the Twenty-fifth Amendment—Vice Presidents Ford and Rockefeller. *See* Neale, *supra*.

76. U.S. CONST. art. I, § 3, cl. 5.

77. *Transcript: The Vice Presidential Debate*, N.Y. TIMES (Oct. 2, 2008), <http://elections.nytimes.com/2008/president/debates/transcripts/vice-presidential-debate.html>.

78. *See id.* Biden clearly misspoke here in referencing Article I as the home of the executive power. Cheney ribbed Biden about the mistake in an interview shortly after the debate, stating that Joe’s been chairman of the Judiciary Committee, a member of the Judiciary Committee in the Senate for 36 years, teaches constitutional law back in Delaware, and can’t keep straight which article of the Constitution provides for the legislature and which provides for the executive. So I think I’d write that off as campaign rhetoric. I don’t take it seriously.

*See* Shannen W. Coffin, *Biden Reinforces the Point*, NAT’L REV. (Dec. 21, 2008, 5:44 PM), <http://www.nationalreview.com/corner/175049/biden-reinforces-point-shannen-w-coffin>.

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.<sup>79</sup>

Biden's analysis was self-rebutting because he acknowledged the Vice President's role in the Legislative Branch yet somehow asserted that the office had a complete lack of "authority relative to the Congress."<sup>80</sup> And his Executive Branch conception of the vice presidency would have been a creature virtually foreign to the early vice presidents.<sup>81</sup> In an early Senate debate on how he should be addressed, Vice President Adams noted the nonexistent everyday role he had as Vice President: "I am Vice President. In this I am nothing, but I may be everything. But I am President also of the Senate."<sup>82</sup> Thomas Jefferson sought to calm apprehensions about his role as Vice President in a 1797 letter to Elbridge Gerry (later a vice president himself), assuring Gerry that "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."<sup>83</sup>

That view of the Vice President's role (or non-role) in the Executive Branch was shared by many of the occupants of the office well into the Twentieth Century:

Most Presidents and most Vice Presidents have believed with Truman (in 1955) that the Vice President "is not an officer of the executive branch" and with Eisenhower (in 1963) that the Vice

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79. *Transcript: The Vice Presidential Debate*, *supra* note 77.

80. *Id.*; see generally Shannen W. Coffin, *Biden's Error on the Vice Presidency*, NAT'L REV. (Oct. 2, 2008, 10:39 PM), <http://www.nationalreview.com/corner/171225/bidens-error-vice-presidency-shannen-w-coffin> (critiquing Joe Biden's response on the constitutional role of the Vice President).

81. See Coffin, *supra* note 80.

82. DAVID MCCULLOUGH, JOHN ADAMS 402 (2001).

83. Letter from Thomas Jefferson, Vice President of the U.S., to Elbridge Gerry (May 13, 1797), <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl119.php>; see also Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 312–13 (discussing Jefferson's rigid views of the vice presidency).

President “is not legally a part of the Executive branch and is not subject to direction by the President.”<sup>84</sup>

It also finds support in early historical practice. Vice President John Adams rejected President Washington’s suggestion that he undertake a diplomatic mission to Great Britain, insisting that the Constitution required him to remain in the country to preside over the Senate.<sup>85</sup> Vice presidents followed this precedent for more than a century—no vice president left the country on official business until the early 1900s.<sup>86</sup>

Similarly, Adams participated in only one cabinet meeting in 1791, sitting in for President Washington while the President was absent on a tour of the South.<sup>87</sup> Vice President Hannibal Hamlin had occasion to meet with President Lincoln’s cabinet during deliberations over the Civil War, but considered himself separate from the cabinet.<sup>88</sup> But the Vice President did not become a *regular* cabinet participant until the 1900s.<sup>89</sup> President Wilson is said to have opened this door by asking Vice President Thomas Marshall to preside over a single cabinet meeting while Wilson attended the Versailles Peace talks.<sup>90</sup> President Harding later offered a regular seat at the cabinet

84. Arthur Schlesinger, Jr., *Is the Vice Presidency Necessary?*, ATLANTIC (May 1974), <http://www.theatlantic.com/magazine/archive/1974/05/is-the-vice-presidency-necessary/305732/>.

85. See Letter from Harold F. Reis, Acting Assistant Attorney Gen., Office of Legal Counsel, to Hon. Walter Jenkins, Office of Vice President (July 24, 1962) (on file with the Fed’n of Am. Scientists) [hereinafter July 24, 1962 OLC Mem.] (citing IRVING G. WILLIAMS, *THE RISE OF THE VICE PRESIDENCY* 25 (1956)); see also Roy E. Brownell, *The Independence of the Vice Presidency*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 297, 321 (2014) [hereinafter Brownell, *The Independence of the Vice Presidency*]. Vice President Thomas Jefferson similarly declined a diplomatic mission when subsequently offered by President Adams. See Brownell, *The Independence of the Vice Presidency*, *supra*, at 321. Of course, representing the United States on a diplomatic mission does not, in itself, suggest that the emissary is part of the Executive Branch, as evidenced by Chief Justice John Jay’s lead role in negotiating the Jay Treaty with Great Britain while still sitting head of the judiciary. See *John Jay’s Treaty, 1794–95*, OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/jay-treaty> (last visited Jan. 31, 2017).

86. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 326. President Theodore Roosevelt asked his Vice President, Charles Fairbanks, to represent the United States at Quebec’s Tercentenary celebration. *Id.* John Nance Garner later travelled even more extensively in his official capacity. See *id.* at 337; see also March 9, 1961 OLC Mem., *supra* note 12, at 216.

87. July 24, 1962 OLC Mem., *supra* note 85, at 4; WILLIAMS, *supra* note 85 (“We have Jefferson’s testimony that this was the only time the Vice-President sat in at a cabinet meeting.”).

88. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 319–20.

89. See *infra* notes 90–91 and accompanying text.

90. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 329; see also March 9, 1961 OLC Mem., *supra* note 12, at 217.

table to Vice President Coolidge.<sup>91</sup> While vice presidential participation in the cabinet was more sporadic in the interim, Vice President John Nance Garner also assumed a role as a regular cabinet participant in the Franklin D. Roosevelt administration.<sup>92</sup> And at the request of President Truman, Congress formally designated the Vice President a member of the statutory National Security Council in 1949.<sup>93</sup>

It was not until the Kennedy Administration that the Vice President was even given office space in the Executive Office Building next to the White House.<sup>94</sup> Even then, the degree to which the Vice President could or should participate in the Executive Branch was still an unsettled question.<sup>95</sup> Vice President Lyndon Johnson sought the advice of the Department of Justice on whether he could even participate in Executive Branch affairs.<sup>96</sup> He was advised that “the Vice President is not prevented either by the Constitution or by any general statute from acting as the President’s delegate,” where the President’s authorities are delegable.<sup>97</sup>

Since the mid-twentieth century, vice presidents have been delegated significant authority to assist the President with respect to some of the more difficult issues facing an administration.<sup>98</sup> In the months before the American entry into World War II, President Roosevelt appointed Vice President Henry Wallace as the Chairman of the Economic Defense Board (later the Board of Economic Warfare), which not only advised the President on wartime economic matters but developed policy that was binding on

91. March 9, 1961 OLC Mem., *supra* note 12, at 217. My understanding of the relevant history here has always been limited, mostly drawn from the Department of Justice’s recitation of the relevant history in its March 1961 OLC Memo. *See id.* That history is not nearly as accurate as one more recently detailed by Reb Brownell and other scholars. *See* Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 329–39.

92. March 9, 1961 OLC Mem., *supra* note 12, at 7; *see also* Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 336–37.

93. March 9, 1961 OLC Mem., *supra* note 12, at 7 (citing 50 U.S.C. § 402(a)). This statutory duty has been viewed as not presenting a constitutional concern because the statutory council’s role is simply to advise the President, and the President is obviously free to reject that advice. *See id.*

94. *See* Schlesinger, *supra* note 84.

95. *See id.* (discussing the confusing role of the Vice President throughout many administrations).

96. *See generally* March 9, 1961 OLC Mem., *supra* note 12 (a memorandum from the Department of Justice in response to Lyndon B. Johnson’s inquiry).

97. *Id.* at 9.

98. *Id.* at 218 (discussing the significant and unprecedented amount of power Vice President Wallace was given during Roosevelt’s third term).

federal agencies.<sup>99</sup> This effectively made cabinet secretaries answerable, in part, to the Vice President in carrying out those polices.<sup>100</sup>

More recently, Vice President Walter Mondale described his role in the Carter administration as a “general adviser” to the President, advising the President on cabinet appointments and participating in most major decisions.<sup>101</sup> Among his other responsibilities, President Bush tasked Vice President Cheney at the outset of his administration with leading the development of a national energy policy.<sup>102</sup> President Obama designated Vice President Biden to lead his presidential “new moonshot” initiative to cure cancer.<sup>103</sup>

Owing to this enhanced role of the Vice President as presidential adviser, Congress has, since 1971, took as part of Executive Branch appropriations funds “[f]or expenses necessary to enable the Vice President to provide assistance to the President in connection with specially assigned functions.”<sup>104</sup>

This more robust role, acknowledged and even encouraged by Congress, represents a paradigm shift that is a product almost entirely of the late twentieth century, leading one commentator to correctly conclude that “as a matter of constitutional text and history, Biden [was] certainly wrong” about the Vice President’s constitutional situs.<sup>105</sup> The Office is not *solely* located

99. *Id.*

100. See March 9, 1961 OLC Mem., *supra* note 12, at 6–7. The Department of Justice later cited this vice presidential role in concluding that a presidential delegation of delegable executive authority to a Vice President was appropriate under federal statutory and constitutional law. *Id.*

101. See Goldstein, *The Modern American Vice Presidency*, *supra* note 15, at 172 n.94, 175.

102. See STEPHEN F. HAYES, CHENEY, THE UNTOLD STORY OF AMERICA’S MOST POWERFUL AND CONTROVERSIAL VICE PRESIDENT 313–17 (2007); see also *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 372 (2004). Although the issue of vice presidential situs was not part of that case, the Supreme Court referred to Vice President Cheney as part of the Executive Branch. *Cheney*, 542 U.S. at 385 (“The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives.”). Given the role that the Vice President was performing—advising and assisting the President in the formulation of national policy—the Court was certainly correct that the Vice President was functioning in the Executive Branch for those purposes. *Id.* at 373.

103. See Nicole Guadiano, *Vice President Biden Will Head Pursuit of Cancer Cure*, USA TODAY (Jan. 12, 2016), <http://www.usatoday.com/story/news/politics/2016/01/12/vice-president-biden-head-pursuit-cancer-cure/78705646/#>.

104. See Executive Office Appropriation Act, 1971, Pub. L. No. 91-422, 84 Stat. 876, 876 (1970). That original Executive Branch appropriation was \$700,000, compared to \$367,263 allocated under the Legislative Branch Appropriations Act of 1971 for “clerical assistance to the Vice President.” Legislative Branch Appropriation Act, 1971, Pub. L. No. 91-382, 84 Stat. 807, 807 (1970).

105. White, *supra* note 14, at 1.

within the Executive Branch.<sup>106</sup>

That is not to conclude that the vice presidency can be located *solely* within the Legislative Branch either.<sup>107</sup> While the discussion above reveals that the Vice President did not have a vibrant executive role for much of the country's history, it was not a nonexistent role.<sup>108</sup> Even at the beginning of our constitutional government, President Washington did not exclude Vice President Adams *entirely* from his diplomatic and executive deliberations; indeed, he sought that active participation at times, as evidenced by his invitation to Adams to negotiate with Great Britain.<sup>109</sup>

More importantly, the Constitution's text provides evidence that the Vice President was part of the Executive from the beginning, even if the executive role contemplated by the Constitution is generally a springing one.<sup>110</sup> Article II both created the vice presidency and defined its term as coextensive with the presidency.<sup>111</sup> Changes to the Constitution's original structure have further integrated the vice presidency into the Executive Branch.<sup>112</sup> By altering the manner in which the Vice President was chosen—providing that the Vice President be elected in a ballot separate from the President instead of the presidential runner-up being named Vice President—the Twelfth Amendment transformed the Vice President from presidential rival to presidential running mate.<sup>113</sup>

106. *Id.* at 1, 2.

107. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 294. As Reb Brownell points out, however, a number of scholars maintain that “the vice president is solely a creature of the legislative branch.” See *id.* at 379 n.522.

108. See *generally id.* (describing in detail the roles taken on by vice presidents throughout history, beginning with the first Vice President, John Adams).

109. *Id.* at 303.

110. See Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345, 353 (2001) (demonstrating that the Constitution provides a backdrop for the Vice President's role in taking on executive power in the President's absence).

111. Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 48–49.

112. *Id.* at 51–55.

113. See Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1507 (2014) (“As it made the presidency more majoritarian, this change in balloting eroded the independence of the Vice-President and denigrated that office's political significance, rendering the executive branch at once more politically homogeneous and more politically unified under presidential control.”); *id.* at 1559–61; see also Goldstein, *The New Constitutional Vice Presidency*, *supra* note 15, at 520 (“The advent of the Twelfth Amendment changed the constitutional understanding of the vice presidency.”). But see Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 323–24 (arguing that the Twelfth Amendment “did nothing to diminish the vice president's constitutional independence from the president”).

More recently, the Twenty-fifth Amendment assigned Executive Branch functions to the Vice President, granting the Vice President a role in determining involuntary presidential incapacity and, consistent with the original constitutional design of Article II, in serving as Acting President in the event of incapacity.<sup>114</sup> The practical result of both amendments was to more fully integrate the Vice President as a political and constitutional partner of the President within the Executive Branch.<sup>115</sup>

The Constitution elsewhere reinforces the Vice President's office within the Executive Branch. The Impeachment Clause provides that the "President, Vice President and all civil Officers of the United States, shall be removed *from Office* on impeachment," thus recognizing that the Vice President holds an office under Article II.<sup>116</sup> Similarly, the Oath Clause strongly implies that the Vice President is an executive officer.<sup>117</sup> That clause requires a constitutional oath of "Senators and Representatives," as well as members of state legislatures, "and all executive and judicial Officers, both of the United States and of the several states."<sup>118</sup> Notably, the Vice President is not required to take an oath in his capacity as President of the Senate, because the oath is limited to "Senators and Representatives" in the Legislative Branch.<sup>119</sup> So, unless the Vice President is singularly exempt from the constitutional oath,<sup>120</sup> the Vice President's constitutional oath

114. See generally Goldstein, *The New Constitutional Vice Presidency*, *supra* note 15, at 507–08 ("The Twenty-fifth Amendment expressed a new vision of the vice presidency fundamentally different from that embodied in the initial Constitution."); *id.* at 509 ("When the architects of the Twenty-fifth Amendment met in the mid-1960s, they conceived of the vice presidency much differently than had the framers 180 years before. They saw a robust office, firmly lodged in the executive branch, with a promising future. They crafted the Twenty-fifth Amendment based upon that vision.").

115. See *supra* notes 113, 114 (showing that both the Twelfth and Twenty-fifth Amendments contributed to the vice presidency's greater presence within the Executive Branch).

116. U.S. CONST. art. II, § 4 (emphasis added).

117. See *id.* art. VI, cl. 3.

118. *Id.* The President's oath is separately prescribed in Article II. *Id.* art. II, § 1, cl. 8.

119. See *id.* art. VI, cl. 3.

120. The Senate has a number of appointed officers, which the Constitution empowers the Senate to choose. See *id.* art. I, § 3, cl. 5. For instance, the Senate has an appointed secretary and a Sergeant at Arms. See *Officers*, U.S. SENATE, <http://www.senate.gov/reference/Index/Officers.htm> (last visited Jan. 31, 2017). While these appointed officers are also not required by Article VI to swear an oath, they do not exercise any constitutional authority, but simply assist members of Congress in carrying out their constitutional duties. Compare Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995) ("No constitutional oath is required of legislative officers, like the Clerk of the House [of Representatives] or the Secretary of

obligation would seem to arise from his role as an “[E]xecutive Officer.”<sup>121</sup>

### C. *The Branchless Vice President?*

Even though the Constitution contemplates limited functions to the Vice President in both the Executive and Legislative Branches, there are textual reasons to conclude that the Vice President is not technically “part” of either branch.<sup>122</sup> With respect to the Executive Branch, of course, the Constitution vests “[t]he executive power” in the President.<sup>123</sup> As Justice Scalia aptly summarized, “this does not mean *some* of the executive power, but *all* of the executive power.”<sup>124</sup> The President, of course, must rely on others to assist him in the execution of this power, so the Constitution provides that the President can appoint officers to carry out delegated executive responsibilities.<sup>125</sup>

Implicit in the President’s power to appoint subordinate officials is the

the Senate, presumably because those officers were not thought to be very important.”), with Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL’Y 331, 340–41 n.21 (2007) (noting that the First Congress subjected Clerk of the House and Secretary of the Senate by statute to the Article VI oath).

121. See Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 52–53. But see Seth Barrett Tillman, *Closing Statement, An “Utterly Implausible” Interpretation of the Constitution*, in Seth Barrett Tillman & Steven G. Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 146, 149–50 (2008) (suggesting that the Vice President is not subject to oaths clause); 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, 139 n.79 (2006) (the Constitution leaves “the Vice President as a *sui generis* figure, one to whom the Article VI oath does not clearly apply”).

122. See *infra* notes 75–95.

123. U.S. CONST. art. II, § 1.

124. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); see also *Touby v. United States*, 500 U.S. 160, 168 (1991) (“The Constitution vests all executive power in the President . . .”). As noted, however, the Constitution provides some role for the Senate in what can fairly be considered executive functions, such as declaring wars and advising and consenting on executive and judicial appointments. See U.S. CONST. art. I, § 8. Justice Scalia was, of course, discussing legislative interference with what is considered to be the core of executive power—the power to enforce the laws. See *Morrison*, 487 U.S. at 705.

125. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2012) (quoting THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1749 334 (John C. Fitzpatrick ed., 1938)) (“In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’”).

power to remove them.<sup>126</sup> The Supreme Court has placed limits on that removal authority,<sup>127</sup> but it remains an important aspect of constitutional accountability.<sup>128</sup> A President is ultimately accountable to “we the people” for the exercise of the executive authority, so the officers that the President appoints are generally accountable to the President.<sup>129</sup> Even where Congress has been held to have the authority to limit the President’s removal power—as with certain so-called “independent” agencies where the President’s removal power has been limited to “for cause” removals—it is doubtful that it could completely eliminate that authority.<sup>130</sup>

So why, then, did the Framers place the Vice President completely beyond the President’s removal power? Only Congress can remove the Vice President from office, by impeachment.<sup>131</sup> President Richard Nixon famously schemed mightily, without success, to remove Vice President Spiro Agnew from office.<sup>132</sup> It is anomalous, to say the least, that the President would lack removal authority over the second highest-ranking executive officer.<sup>133</sup>

Nor does the Constitution empower the President to direct the Vice President to do his bidding.<sup>134</sup> Even apart from the removal power implicit in the Constitution, the President is explicitly empowered to direct the

126. See *Morrison*, 487 U.S. at 685–86 (citing *Myers v. United States*, 272 U.S. 52 (1926)).

127. The Supreme Court has recognized that Congress can limit, in some circumstances, the authority of the President to remove certain officers at will. See, e.g., *Morrison*, 487 U.S. at 660–61 (independent counsel); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 623 (1935) (Federal Trade Commission). While I may quarrel with some of the limitations on the President’s removal power, that quarrel is beyond the scope of this piece.

128. See *Morrison*, 487 U.S. at 657–58 (noting that limiting the President’s removal powers must not interfere with the President’s exercise of executive power).

129. *Free Enter. Fund*, 561 U.S. at 492–93 (“It is [the President’s] responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase . . . [T]he President therefore must have some ‘power of removing those for whom he can not continue to be responsible.’”) (internal citation omitted).

130. See *Morrison*, 487 U.S. at 691–93.

131. U.S. CONST. art. II, § 4; see also Reynolds, *supra* note 14, at 114; see also Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 304–11 (discussing textual provisions supporting vice presidential independence from the President).

132. Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 312–14. Agnew resigned on his own only when faced with the possibility of indictment. *Id.*

133. See *id.* at 304–11 (discussing textual provisions supporting vice presidential independence from the President).

134. *Id.* at 308–10; see also U.S. CONST. art. II, § 2.

activities of subordinate Executive Branch officials.<sup>135</sup> The Opinions Clause authorizes the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>136</sup> But the Vice President is notably absent from the officials thus subject to presidential control.<sup>137</sup> As the Department of Justice has concluded, the Vice President “is an elective officer in no way answerable or subordinate to the President.”<sup>138</sup>

At the same time, while the Vice President is plainly an officer of the Legislative Branch by virtue of his constitutional role as President of the Senate, he is not a full-fledged “member” of the Legislative Branch.<sup>139</sup> The Constitution vests the legislative power “in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>140</sup> The House is composed of members chosen every two years by the people of the several states,<sup>141</sup> while the Senate “shall be composed of two Senators from each State,” now chosen by the people of the states as well as a result of the Seventeenth Amendment.<sup>142</sup> In the ordinary course of the Senate (i.e., the absence of a tie vote), the Vice President “shall have no vote.”<sup>143</sup> The Vice President is also subject to different qualifications for office from a senator.<sup>144</sup>

135. U.S. CONST. art. II, § 2.

136. *Id.*; see Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 33–34.

137. U.S. CONST. art. II, § 2; Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 33.

138. March 9, 1961 OLC Mem., *supra* note 12, at 221.

139. See U.S. CONST. art. I, § 1.

140. *Id.*

141. *Id.* § 2.

142. See *id.* art. II, § 3; U.S. CONST. amend. XVII; see also Letter from Laurence H. Silberman, Acting Attorney Gen. to the Hon. Howard W. Cannon, Chairman, Senate Comm. on Rules & Admin. 6 (Sept. 20, 1974), <http://fas.org/irp/agency/doj/olc/092074.pdf> (“[T]he 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 the Vice President is neither a senator nor a “member” of either House of Congress allays any concerns that the Vice President’s role in the Executive Branch is inconsistent with the Incompatibility Clause of Article I, section 6. U.S. CONST. art. I, § 6 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance of Office.”).

143. U.S. CONST. art. I, § 3.

144. For instance, while the age requirement for serving as a U.S. Senator is thirty years, a Vice President must satisfy the presidential age requirement of thirty-five years. Compare *id.* art. I, § 3, cl. 3 (setting Senate eligibility) with *id.* art. II, § 1, cl. 5 (setting presidential eligibility); see also *id.* amend. XII (“But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”).

Nor is the Vice President subject to the constitutional protections and limitations that are afforded members of Congress.<sup>145</sup> Both the constitutional privilege from arrest and speech or debate immunity apply only to Senators and Representatives, which the Vice President plainly is not.<sup>146</sup> And by subjecting the vice presidency to Congress's power of impeachment, the Constitution strongly suggests that the Vice President is not wholly a creature of the Legislative Branch.<sup>147</sup>

So it could be argued, with some force, that the Vice President really is not "part" of either political branch of government. He lacks any constitutional role in the Executive, apart from serving as president-in-waiting. And he is not a "member" of either house of the Legislature.<sup>148</sup> Cheney Chief of Staff David Addington's view that the Vice President is not "part" of either branch, then, is far from the laughable proposition that pundits claimed it was.<sup>149</sup>

And it is also far from unprecedented. When running for Vice President in 1920, Franklin Roosevelt noted in the *Saturday Evening Post* that "there is no little truth" to the "witticism that the Vice President constitutes a kind of fourth branch of the Government."<sup>150</sup> Indeed, in the Department of

145. See *infra* notes 146–47 and accompanying text.

146. See U.S. CONST. art. I, § 6, cl. 1. This does not mean that the Vice President does not enjoy some privilege akin to speech or debate immunity when exercising his legislative function. See Roy E. Brownell II, *Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development*, 84 ST. JOHN'S L. REV. 423, 579–86 (2010) [hereinafter Brownell, *Vice Presidential Secrecy*]; Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) (arguing that the Vice President should be privileged from arrest while attending to tie breaking duties in the Senate, even though not technically a Senator). But that privilege may be more a matter of common law legislative privilege than constitutional privilege. Amar & Katyal, *supra*, at 707. I do not delve into that issue here.

147. See March 9, 1961 OLC Mem., *supra* note 12, at 222 ("Since the power of impeachment is a check devised to safeguard the principle of separation of powers against deprivations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.").

148. U.S. CONST. art. I, § 3, cl. 5. On the other hand, neither are the "other officers" that Article I empowers the Senate to choose. *Id.* Thus, the Sergeant at Arms or the Secretary of the Senate are plainly Legislative Branch officers, but not "members" of the Senate. One key difference is that the Constitution assigns a constitutional role to the Vice President in the deliberations of the Senate, which further suggests that the Vice President is part of the Legislative Branch.

149. See *supra* note 36 and accompanying text.

150. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 375 n.502 (quoting Franklin D. Roosevelt, *Can a Vice President Be Useful?*, SATURDAY EVENING POST, Aug. 16, 1920, at 8) (internal citation omitted).

Justice opinions issued in response to Vice President Lyndon Johnson's inquiries about his proper role in the government, then-Assistant Attorney General Nicholas Katzenbach concluded that the vice presidency is not, in fact, part of either political branch: "Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor the Legislative branch but is attached by the Constitution to the latter."<sup>151</sup>

While certainly within the realm of fair debate, this conclusion, on balance, seems unsatisfying.<sup>152</sup> The Constitution plainly contemplates three, and only three, branches of government.<sup>153</sup> It could be argued the administrative state has overtaken any notion of a pure tripartite government.<sup>154</sup> But there is no evidence that the founders thought they were creating a free-floating "fourth branch" vested in a single actor when they created the vice presidency.<sup>155</sup> That the Vice President's constitutional role is defined in both Article I (addressing the Legislative Branch) and Article II (addressing the Executive Branch) suggests that the founders did not view the Vice President as wholly separate from those political branches.<sup>156</sup> And it would be exceedingly odd to conclude that the Vice President is named by the Constitution as an officer in both political branches with functions respecting each branch but without being a part of either.<sup>157</sup>

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151. See March 9, 1961 OLC Mem., *supra* note 12 at 222; see also Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 375 (citing President Wilson's similar view that the Vice President was not part of either branch, but attached to the Senate).

152. Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 376.

153. *Id.*

154. See, e.g., *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . ."); see also *Freytag v. Comm'r*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring) ("Depending upon how broadly one reads the President's power to dismiss 'for cause,' it may be that he has no control over the appointment of inferior officers in such agencies; and if those agencies are publicly regarded as beyond his control—a 'headless Fourth Branch'—he may have less incentive to care about such appointments.").

155. See *supra* note 36 and accompanying text. It is perhaps overly simplistic to conceptualize this position as a setting up a "fourth branch" of government. The Vice President's constitutional authorities are so circumscribed that it may be fairer to simply conclude that he is *sui generis* and simply not part of any branch of government at all.

156. See *id.* art. I, § 3; *id.* art. II, § 1; Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 21–22.

157. See generally Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 376–79.

*D. The Vice President in Both Branches: A Walking Violation of the Separation of Powers?*

If the vice presidency is not entirely within one or the other political branch, but also is not wholly absent from either political branch, that really leaves only one viable alternative: that the office is part of both. In both constitutional text and historical practice, the Vice President plainly has functions in both the Executive Branch and the Legislative Branch.<sup>158</sup>

Those respective roles have varied over time and with the relative persuasiveness of the occupant of the office.<sup>159</sup> For example, owing largely to the size of the country at the time, John Adams was called on to break at least twenty-nine ties in the Senate.<sup>160</sup> He also presided regularly over the Senate's proceedings and even participated in its early debates—that is until resentment among Senators led him to step away from his daily role.<sup>161</sup> Adams's vice presidency was the apex of the Vice President's Legislative Branch participation, but modern vice presidents still carry on the same constitutional tie-breaking functions and, on occasion, preside over the proceedings of the Senate.<sup>162</sup> On the other hand, unlike Adams and his early successors, more recent vice presidents have had a vigorous role in day-to-day operations of the Executive Branch. Some went so far, for instance, as

158. See Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 5–6.

159. See generally Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 295–374 (describing the evolution of the Vice President's role based on the person who holds that position, including the Adams and Jefferson vice presidencies).

160. See 4 ROBERT C. BYRD, *THE SENATE, 1789–1989 HISTORICAL STATISTICS 1789–1992* 640 tbl. 6-1 (Wendy Wolff ed., 1993). There are suggestions elsewhere that Adams may have cast thirty-one tie-breaking votes, but Senate records have only documented twenty-nine.

161. See McCullough, *supra* note 82, at 404 (noting that Adams took part in the early debates over how to address the President “more than the members deemed appropriate”); Williams, *supra* note 85, at 23 (noting Adams “presented the agenda, intervened in debate, apostrophized the Senate for real or fancied derelictions of duty, refused to yield the chair when the Senate turned itself into Committee of the Whole, gave his opinions on any matters before it when he felt like it, and exercised his right of the casting vote more than any other future Vice-President would”); see also MARK O. HATFIELD, *VICE PRESIDENTS OF THE UNITED STATES 1789–1993* 8 (1997) (describing Adams's withdrawal from debate on advice of John Trumbull); DICK CHENEY WITH LIZ CHENEY, *IN MY TIME* 494 (2011) [hereinafter CHENEY] (“The first vice president, John Adams, even participated in debate on issues that came before the Senate, although after a friend advised him that his lengthy disquisitions were stoking resentment, he eased off.”).

162. CHENEY, *supra*, note 161, at 495 (“By my time, the position of Senate president had pretty much boiled down to casting tie-breaking votes—a job not to be disdained. My ability to cast those votes gave Americans the Bush tax cut that they still enjoy as I write.”).

to label Vice President Cheney a “shadow president.”<sup>163</sup> Whatever the merits of that label, that perception illustrates the degree to which the Vice President’s practical role in executive deliberations has increased over time.

The principal objection to the dual role of the Vice President is, of course, that it would violate a strict conception of the separation of powers.<sup>164</sup> As Glenn Harlan Reynolds argued in one of the first law review pieces published in the wake of the Cheney–ISOO controversy:

[S]eparation 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. If this is the case, then the case for vesting executive powers in the Vice President—who is a legislative official himself, and also not removable by the President—is even weaker. Indeed, this arrangement seems perilously close to permitting “Congress to execute the laws,” which is plainly out of bounds.<sup>165</sup>

This argument has more than simply superficial appeal to those of us who are greatly concerned about the separation of powers. The Supreme Court has been wary of one branch aggrandizing itself at the expense of another.<sup>166</sup> Thus, the President cannot disregard the Senate’s determination that it is in session by seeking to appoint officers under the recess appointment clause while the Senate is in pro forma session.<sup>167</sup> By the same logic, Congress cannot interfere by legislation with the manner in which the President solicits and receives advice from his closest advisers.<sup>168</sup>

163. Jacob Heilbrunn, *Sunday Book Review: The Shadow President*, N.Y. TIMES (Oct. 12, 2008), <http://www.nytimes.com/2008/10/12/books/review/Heilbrunn-t.html> (reviewing BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY (Penguin Books 2008)).

164. Reynolds, *supra* note 14, at 113.

165. *Id.* at 114.

166. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 129 (1976) (“[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”); INS v. Chadha, 462 U.S. 919, 951 (1983) (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”).

167. *See* Nat’l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550, 2574 (2014) (“For purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”).

168. This was a principal argument made by the Vice President in the Federal Advisory Committee Act (FACA) litigation regarding the proceedings of President Bush’s National Energy

At the same time, the Constitution is rife with textual examples of one branch of government having some constitutional role in the function of another.<sup>169</sup> Thus, the Chief Justice presides over Senate impeachment proceedings of the President.<sup>170</sup> The President plays a determinative role in whether a bill becomes a law under Article I.<sup>171</sup> And the Senate advises and consents to the appointment of ambassadors, judges, and principal executive officers under Article II.<sup>172</sup> In each of these circumstances, the Constitution actually requires the sharing of what might otherwise be considered one branch's exclusive legislative or executive authority with one of the other branches.<sup>173</sup> The Vice President's dual role is thus not entirely unprecedented.

At the end of the day, the separation-of-powers objection is not convincing. With respect to his day-to-day Executive Branch functions, the Vice President's role depends almost entirely on his personal and professional relationship with the President.<sup>174</sup> The President may not be able to remove the Vice President from office, but he certainly can remove him from any role in day-to-day executive deliberations.<sup>175</sup> Nothing would

Policy Development Group (NEPDG). See *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004) (“[S]pecial considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.”); *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (construing FACA narrowly not to apply to NEPDG deliberations “[i]n light of the severe separation-of-powers problems in applying FACA on the basis that private parties participated in, or influenced, or were otherwise involved with a committee in the Executive Office of the President”).

169. See generally Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 10–12.

170. U.S. CONST. art I, § 3, cl. 6. One might characterize the Chief Justice’s role here as judicial in nature, but, in any other circumstance (such as the impeachment of the Vice President or a judge) impeachment is otherwise entirely a creature of the Legislature. *Id.* (“The Senate shall have the sole Power to try all Impeachments.”).

171. U.S. CONST. art. I, § 7, cl. 2 (“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.”).

172. *Id.* art. II, § 2, cl. 2.

173. *Id.* (“He shall . . . by and with the Advice and Consent of the Senate . . . 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.”).

174. See Brownell, *Vice Presidential Secrecy*, *supra* note 146, at 598.

175. Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 365 n.30. This removal power has its limits, because the President could not remove the Vice President from deliberations over presidential incapacity under the Twenty-fifth Amendment or the Vice President’s contingent role as president-in-waiting. But the President could effectively limit the Vice

prevent the President from evicting the Vice President from the White House entirely should the political relationship fall apart.<sup>176</sup> Thus, there is no legislative encroachment on the Executive stemming from the Vice President's executive role because it exists only at the invitation of the President.<sup>177</sup>

Nor does the Vice President's legislative role in the Senate give rise to separation of powers concerns.<sup>178</sup> As a practical matter, the Vice President, as the political partner of the President, is certainly likely to vote with the President in any tie votes in the Senate.<sup>179</sup> That vote is not guaranteed, however, and the President is constitutionally powerless to compel it.<sup>180</sup> Indeed, some vice presidents have voted against legislation supported by the President.<sup>181</sup> A Vice President may, of course, pay a significant political price for breaking with the President.<sup>182</sup> But the Constitution leaves that choice entirely to the Vice President.<sup>183</sup>

Thus, the most satisfying answer to the constitutional situs of the vice presidency would seem to be the one that Vice President Cheney gave in response to the ISOO controversy: The Vice President has "a foot in both [political] branches."<sup>184</sup> It may be best to conceive of the vice presidency as part of both political branches of government, with the particular location at any given moment varying depending on whether the Vice President is performing his executive role of advising and assisting the President or his legislative role in presiding over and breaking ties in the Senate.<sup>185</sup>

Yet, even there, "part of" may be too strong a characterization, since the Vice President is not *wholly* "part of" either political branch.<sup>186</sup> As the

President's Executive Branch role to these contingent constitutional functions.

176. See discussion Section II.C.

177. See Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 387–92.

178. See generally *id.*

179. See Brownell, *Vice Presidential Secrecy*, *supra* note 146. But see Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 370.

180. See Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 370–71.

181. See *id.* at 325–27 (discussing contrary votes by Vice Presidents George Clinton and John C. Calhoun).

182. See generally *id.* at 370–71.

183. U.S. CONST. art. II, § 2, cl. 3; see, e.g., Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 350–51 (describing how Vice President Ford disagreed with President Nixon during the Watergate controversy).

184. See *Interview of the Vice President by Mark Knoller*, *supra* note 51.

185. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 391–92.

186. See *supra* note 158 and accompanying text.

constitutional successor to the President and the President of the Senate, the Vice President is plainly “of” both branches—whether the office is fully “part” of either branch.<sup>187</sup> The office is the “constitutional hybrid” that Vice President Ford described it to be.<sup>188</sup>

It may make more sense to consider the vice presidency in functional terms, depending upon which role he is playing.<sup>189</sup> When presiding over the Senate and casting the rare vote to break a tie, the Vice President is part of the Legislative Branch.<sup>190</sup> When assisting the President in the exercise of his Article I powers—or on rare occasion, acting as President—the Vice President is functioning in the Executive Branch.<sup>191</sup> But he is generally not exercising both functions at the same time.<sup>192</sup> In this sense, the vice presidency is perfectly consistent with the constitutional separation of powers.<sup>193</sup>

187. See Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 3–4. A better case can be made that the Vice President is always “part” of the Legislative Branch. *Id.* at 75. He is President of the Senate, which is part of the Legislative Branch. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 300. And he is authorized to exercise a constitutional function in that branch every day that the Senate is in session (whether modern vice presidents actually do so is simply a matter of practice, not constitutional authority). *Id.* at 55. His day-to-day role in the Executive Branch, however, depends entirely on the President’s discretion. *Id.* This may explain why Nicholas Katzenbach suggested the vice presidency was “attached by the Constitution” to the Legislative Branch. See March 9, 1961 OLC Mem., *supra* note 12, at 222.

188. See Gerald Ford, *On the Threshold of the White House*, ATLANTIC MONTHLY (July 1974), <http://www.theatlantic.com/magazine/archive/1974/07/on-the-threshold-of-the-white-house/376282/>.

189. See Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel on the Advisory Commission on Intergovernmental Relations for the Hon. Edward L. Morgan, Deputy Counsel to the President 2 (Feb. 7, 1969), <http://fas.org/irp/agency/doj/olc/020769.pdf> (“[T]he 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, and in which his availability for inter-agency or inter-governmental coordination duties at the designation of the President seems well established.”).

190. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 370.

191. See *id.* at 338–39, 400.

192. See Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 338–39. The Constitution provides that the Senate’s president pro tempore will preside over the Senate when the Vice President is acting as President. *Id.* at 55. Indeed, the Department of Justice has opined that the Vice President would “lose his title as President of the Senate” while acting as President due to presidential disability. See Operation of the Twenty-fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 70 (1985) (citing 111 Cong. Rec. 3270 (remarks of Sen. Saltonstall)); John D. Ferrick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173, 198 (1965).

193. See Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 395. An objection could be made that this functional approach to the Vice President’s situs could also result in the President being viewed as part of the Legislative Branch when signing a bill into law or vetoing legislation—

III. THE PRACTICAL SIGNIFICANCE OF THE VICE PRESIDENT'S  
CONSTITUTIONAL LOCATION

Which leads us back to the original question: Does any of this really matter? In most instances, the answer is plainly “no.” The federal government has operated continuously for more than 225 years without much turning on where the Vice President is properly located in the constitutional scheme.<sup>194</sup> The long-term evolution of the vice presidency from the regular presiding officer in the Senate to a frequent participant in the affairs of the President has occurred without otherwise upsetting the constitutional order.<sup>195</sup> But on occasion, the question still raises its head in a meaningful way.<sup>196</sup>

The ISOO controversy was but one example.<sup>197</sup> The OVP resisted ISOO oversight of the OVP's classification practices essentially on the ground that the office was not an “entity within the executive branch.”<sup>198</sup> This position was certainly correct in a sense: The OVP is not *wholly* within the Executive Branch.<sup>199</sup> Indeed, during the Bush Administration, the OVP—which is nothing more than the Vice President and his staff—was not formally part of the Executive Office of the President (EOP).<sup>200</sup> A number

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or that the Senate being viewed as part of the Executive Branch when, for instance, it advises and consents on Executive Branch appointments. *See id.* But given the text of the Constitution, neither can be seriously viewed as being “part” of the other branch when performing those functions. *See id.* at 383–90. The President is neither a “member” of the Legislative Branch nor an officer of it under the Constitution's text; he simply performs a legislative function *qua* executive. *See id.* The Vice President, by contrast, is explicitly designated as President of the Senate in Article I and is given Executive Branch functions by the Twenty-fifth Amendment. *See id.* Both textual references suggest a sense of inclusion in each respective branch when the Vice President is performing the assigned functions.

194. *See* Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 398–400.

195. *See id.*

196. Roy Brownell argues, with some force, that the question is important even in the abstract. *See* Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 20–21. First, the question of the vice presidency's situs helps explain and clarify some misunderstandings about the separation of powers. *Id.* Second, the question helps explain our history, accounting for the “stunted development” of the vice presidency in our first 125 years. *See id.*

197. *See supra* Part I.

198. *See supra* notes 28–35 and accompanying text.

199. *See supra* note 158 and accompanying text.

200. *See The Executive Office of the President*, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/government/eop.html> (last visited Jan. 17, 2017) [hereinafter *President George W. Bush*]. The Executive Office of the President is the Executive Branch entity, containing the immediate staff of the President. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-606,

of vice presidential staff members are paid from Congress's legislative appropriation to the Vice President and assist the Vice President in his role as President of the Senate; thus, treating the OVP as "within the executive branch" under the executive order would subject legislative staffers to Executive Branch oversight.<sup>201</sup>

Nevertheless, the OVP was not wholly separate either.<sup>202</sup> At the time, several vice presidential staff members held commissions from the President as Assistants to the President.<sup>203</sup> This was a deliberate decision by Vice

THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW 10 (2008), <https://fas.org/sgp/crs/misc/98-606.pdf>. It exists to assist the President in carrying out his daily responsibilities. *Id.* at 5. EOP was originally created in 1939 by executive order and congressional Executive Branch Reorganization Act. *Id.* at 2, 5. Over the years, various components have been added and removed from the EOP under subsequent executive orders and reorganization acts. *See* 5 U.S.C. §§ 133–133r, 133t note. But the OVP has never been formally designated as part of the EOP by executive order or statute. *See* RELYEA, *supra*, 29–32, app. B (listing chronology of principal EOP units, which does not include the OVP). President Carter submitted and Congress approved a reorganization plan in 1977 that streamlined the EOP. Reorganization Plan No. 1 of 1977, 91 Stat. 1633 (1977). In a letter to Congress that accompanied the plan, President Carter erroneously identified the Office of Vice President as a preexisting component of EOP. *See* Memorandum from Robert G. Dixon, Jr. Assistant Attorney Gen., Office of Legal Counsel on Draft Standards of Conduct for the Office of the Vice President to Hon. William E. Casselman II, Legal Counsel to the Vice President 1 (June 13, 1974) <http://fas.org/irp/agency/doj/olc/061374.pdf> [hereinafter Casselman Memo] (asking whether "the vice president's staff should legally be treated generally in the same manner as employees of the Executive Office of the President."). *Id.* But the OVP was never formally designated part of the EOP in the text of any executive order or reorganization plan submitted to Congress. And only a few years earlier, the Department of Justice, in an opinion provided to OVP, assumed that vice presidential staff were distinct from employees of the EOP. *See* Casselman Memo, *supra*, at 1 (asking whether "the Vice President's staff should be treated generally in the same manner as employees of the Executive Office of the President"). The Obama Administration treated the OVP as part of the EOP, but did so only as a matter of practice, not of law. *See The Vice President's Residence & Office*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/1600/vp-residence> (last visited Feb. 1, 2017).

201. *Cf.* Brownell, *Constitutional Chameleon, Part I*, *supra* note 15, at 42 n.214. A similar issue arose in the 1970s, when the OVP asked the Department of Justice's Office of Legal Counsel whether it could treat employees paid through Legislative Branch appropriations as subject to federal ethics laws applicable to employees in the Executive Branch. *See* Casselman Memo, *supra* note 200, at 1–4. The Department of Justice concluded that the Vice President could, by regulation, impose the same standard on all of the employees of his office, regardless of from which appropriation they are paid. *See id.* But in so doing, the Department of Justice noted the "difficult question" of whether OVP employees paid through legislative appropriations could be prosecuted under a statute that applied only to employees within the Executive Branch. *Id.* at 1. The Department advised the OVP that it should not cite these Executive Branch ethics statutes "as though they were clearly in point," but merely as a "source reflecting the underlying purpose and spirit of the particular standard of conduct involved." *Id.* at 2.

202. *See Interview of the Vice President by Mark Knoller*, *supra* note 78.

203. *See generally infra* notes 204–05 and accompanying text.

President Cheney to “tie the staffs together [in order to] strengthen the operation.”<sup>204</sup> And the majority of staff members were paid out of the Vice President’s larger Executive Branch appropriation.<sup>205</sup> Thus, the public outcry when the OVP asserted that it was not “within the executive branch” was unsurprising.<sup>206</sup> And it was also not surprising that the controversy was resolved by avoiding the more complicated question of vice presidential location.<sup>207</sup> A strict reading of the executive order would have equally subjected the President and his inner circle to audit by an ISOO bureaucrat, because the White House office was technically an “entity within the executive branch.”<sup>208</sup> By construing his own order not to reach the White House Office and OVP, President Bush resolved the immediate crisis without delving into the constitutional thicket.<sup>209</sup>

Vice President Cheney’s dual legislative–executive role had practical significance on other occasions during the Bush administration.<sup>210</sup> Vice President Cheney straddled the political branches in a dispute over the execution of a warrant by the Federal Bureau of Investigation to search the Capitol Hill office of Congressman William Jefferson.<sup>211</sup> In May 2006, the FBI raided the office of Congressman Jefferson, a Louisiana representative caught with \$90,000 hidden in a freezer.<sup>212</sup> The raid raised bipartisan hackles in Congress, where members on both sides of the aisle thought the warrant violated the separation of powers and speech or debate immunity.<sup>213</sup> Congressional leadership cried foul to President Bush.<sup>214</sup>

Owing perhaps in equal parts to his Senate role and his role as an alumnus of the House of Representatives, Vice President Cheney sided with

204. JAMES ROSEN, CHENEY ONE ON ONE 106 (2015).

205. See *supra* note 46 and accompanying text.

206. See Silva, *supra* note 28; Milbank, *supra* note 41; Dowd, *supra* note 41.

207. See *supra* note 53 and accompanying text.

208. See Exec. Order No. 13,292, 3 C.F.R. (2003); *President George W. Bush*, *supra* note 200.

209. See *supra* note 53 and accompanying text.

210. See Brownell, *The Independence of the Vice Presidency*, *supra* note 85, at 355–57 (discussing four occasions in which Vice President Cheney acted independently of the Bush White House); Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 363–64 (discussing Rep. Rahm Emanuel’s efforts to eliminate Executive Branch funding for the Vice President).

211. PETER BAKER, DAYS OF FIRE 462 (2013).

212. *Id.* at 461.

213. See *id.* at 461–62.

214. *Id.*

Congress.<sup>215</sup> Deputy Attorney General Paul McNulty was summoned to the White House to explain the legality of the search.<sup>216</sup> McNulty threatened to resign if forced to give back the materials.<sup>217</sup> With Cheney's help, a compromise was reached that put the seized materials in a sealed room until a court could decide the legality of the search.<sup>218</sup> For a Vice President who was often accused of aggrandizing the power of the Executive Branch,<sup>219</sup> Cheney was plainly an advocate for legislative privileges in this instance.<sup>220</sup>

An even more interesting illustration of the Vice President's constitutional dual role arose later in the Bush Administration in the form of an amicus curiae brief filed in the United States Supreme Court.<sup>221</sup> This particular dispute, which arose a few months after I left the OVP, provides a concrete illustration of the dual role of the vice presidency.<sup>222</sup> At the same time, it illustrates both the constitutional independence of the vice presidency and the Vice President's complete practical dependence on the President for any meaningful role in the Executive Branch.<sup>223</sup>

The dispute concerned the landmark Second Amendment case, *District of Columbia v. Heller*, which raised the question of the constitutionality of the District of Columbia's handgun ban.<sup>224</sup> The Department of Justice, represented by the Solicitor General, filed a brief on behalf of the Bush Administration that defended an individual's Second Amendment right to bear arms.<sup>225</sup> The Solicitor General's brief declined to take a position on the constitutionality of the District's handgun ban, instead asking the Court to remand to the lower courts to decide the issue in the first instance.<sup>226</sup>

In his book, *Days of Fire*, Peter Baker reports that the Vice President

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215. *Id.* at 462.

216. *Id.* at 462.

217. *Id.*

218. *Id.*

219. See, e.g., James D. Meyers, *Bringing the Vice President into the Fold: Executive Immunity and the Vice Presidency*, 50 B.C. L. REV. 897, 907–08 (2009).

220. See *supra* notes 213–18 and accompanying text.

221. See Brief for Amici Curiae 55 Members of United States Senate et al. in Support of Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

222. See Brownell, *Independence of the Vice President*, *supra* note 85, at 357.

223. See Brownell, *Vice Presidential Secrecy*, *supra* note 146, at 568–70, 575–76.

224. 554 U.S. 570, 573 (2008); see also BAKER, *supra* note 211, at 578.

225. See Brief for Amici Curiae, *supra* note 221; see also BAKER, *supra* note 211, at 578.

226. See Brief for Amici Curiae, *supra* note 221; see also BAKER, *supra* note 211, at 578.

was “angry at the Justice Department’s equivocation.”<sup>227</sup> So when invited to join in an amicus curiae brief to be filed by several members of Congress, Cheney agreed.<sup>228</sup> But he did not sign the brief as Vice President, instead doing so in his capacity as “President of the Senate.”<sup>229</sup> The amicus brief went further than the Solicitor General’s brief on behalf of the Bush Administration, arguing that the District’s handgun ban was unconstitutional and that further lower court proceedings were unnecessary.<sup>230</sup> The result was that the Vice President outflanked the President’s legal position on the Second Amendment, taking a more aggressive position before the Supreme Court than that taken by the President’s lawyers on behalf of the Executive Branch.<sup>231</sup> And the Constitution gave the President no authority to stop him.<sup>232</sup>

But that does not mean that the President was without any remedy for the Vice President’s exercise of his constitutional independence.<sup>233</sup> The President’s Chief of Staff, Joshua B. Bolten, made sure to reinforce that point.<sup>234</sup> After getting permission from Cheney, Bolten went to meet with Cheney’s Chief of Staff David Addington to “lay down the law.”<sup>235</sup> Mr. Addington reminded Bolten that “he worked for the vice president, not the

227. See BAKER, *supra* note 211, at 578.

228. See Cheney, *supra* note 161, at 495.

229. See Brief for Amici Curiae, *supra* note 221. An appendix to the brief notes that “the following members of the United States Congress, and President of the United States Senate, Richard B. Cheney, join in this amicus brief.” *Id.* at app. 1a.

230. See Brief for Amici Curiae, *supra* note 221.

231. According to Vice President Cheney, Justice Antonin Scalia later remarked that the Court was unsure of how to rule in the case, until “the vice president’s brief showed up.” CHENEY, *supra* note 161, at 495–96.

232. Vice President Cheney notes in his autobiography that there were several members of President Bush’s staff who “seemed pleased” with his separate amicus curiae brief. *Id.* at 495 (“Barry Jackson, who had replaced Karl Rove as the president’s political advisor, said he was delighted to see that I’d taken a firm position in support of the Second Amendment,” and President Bush notes Cheney, “never said a word to me about it.”).

233. See Brownell, *Independence of the Vice President*, *supra* note 85, at 360 (asserting that the independence of the Vice President is constant). There is a serious question whether the Vice President’s limited legislative role under Article I would even encompass the filing of legal briefs in the Supreme Court. See *id.* On the other hand, there is very little “legislative” nature in any individual members of Congress filing such a brief. See *id.* But whether or not joining the brief fell within the constitutional role of the Vice President as President of the Senate, the President plainly lacked the power to tell the Vice President that it was not. *Id.*

234. BAKER, *supra* note 211, at 579.

235. *Id.*

President's chief of staff."<sup>236</sup> Bolten responded: "Understood, . . . but if we have another episode like this, I will make sure all of your belongings and your mail are forwarded to your tiny office in the Senate and you won't be welcome back inside the gates of the White House."<sup>237</sup> Mr. Addington, Baker reports, "got the point."<sup>238</sup> Whatever Bolten's understanding of the constitutional niceties of the vice presidency, he plainly understood that the President had complete control over the Vice President's participation in the day-to-day functions of the Executive Branch.<sup>239</sup>

#### IV. CONCLUSION

A *New Yorker* cartoon someone recently handed me shows a lawyer standing before the Supreme Court.<sup>240</sup> One of the justices (who looks a lot like Justice Breyer) is holding up his hands to stop the counsel mid-sentence, interjecting, "Whoa, don't ask constitutional questions you don't want to know the answers to."<sup>241</sup> In some sense, the question of the Vice President's constitutional situs is one of those questions—or at least one you usually don't *need* to know the answer to. Yet delving into that question yields some fascinating insights.

The ISOO controversy and similar disputes during the Cheney vice presidency provided additional fodder for the many Cheney critics, but it also launched a useful public debate on this question.<sup>242</sup> Given the limited powers of the vice presidency and the political nature of the question, the

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236. *Id.*; see also CHENEY, *supra* note 161, at 495 ("Addington, who was always careful to protect the institution of the vice presidency, listened and then explained to Josh, with a smile, I'm sure, that he worked for the vice president, not the President's chief of staff."). Addington, however, did hold a commission from the President as well. But that Commission was simply viewed as honorific and did not transform Addington into a constitutional officer. Assistants to the President are generally not constitutional "officers of the United States," because their only role is to advise and assist the President, and they do not exercise substantial authority under federal law. See, e.g., Officers of the United States Within the Meaning of the Appointments Clause, 31 O.L.C. 73, 122 (2007) ("That a person has a commission may no doubt provide evidence that he holds an office. . . . But it does not follow that a person not commissioned does not hold an office, or, conversely, that only officers have commissions.").

237. BAKER, *supra* note 211, at 579.

238. *Id.*

239. See *supra* notes 233–38 and accompanying text.

240. See *The Cartoon Bank*, NEW YORKER, <http://www.newyorker.com/cartoons/a19389> (last visited Jan. 31, 2017).

241. *Id.*

242. See, e.g., Reynolds, *supra* note 14, at 1539.

answer will likely never be determined by a court of law. And it certainly has not been conclusively determined here. There are myriad reasons based on the constitutional text and historical practice to reach competing conclusions on the question.<sup>243</sup> My best take is that the Vice President can be fairly located in both political branches of government, depending on which function he is performing. In that sense, the Vice President is neither fish nor fowl in our constitutional scheme—and that is perfectly consistent with constitutional text and history.

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243. See, e.g., Brownell, *Constitutional Chameleon, Part II*, *supra* note 15, at 294.

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