Failure to Act and the Separation of Powers—The Vice Presidency and the Need to Surmount Divided Power in Pursuit of a Workable Government

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Abstract

Is the Vice President an executive officer, a legislative officer, or both? This query has existed since the time of the founding. The question poses more difficulty than one might suppose, and it remains unsettled. It can be convenient to ignore questions that one cannot answer, and thus, the Vice President has been the object of political humor and treated as an appendage without present function. Yet, because we attribute great genius to those who drafted the Constitution, what is the effect of leaving this high-ranking officer without adequate definition or purpose? For the first century and a half of the American experience, the Vice President was more often accorded legislative status, with offices not in the White House, but in the capitol. Beginning in the second half of the Twentieth Century, presidents have delegated considerable and increasing executive authority to the Vice President, such that it is now commonplace to think of those occupying the office as "deputy president." While nominally retaining his space in the capitol, today's vice presidents have a greater physical presence in the West Wing of the White House and are expected to be the President's emissary in those tie-breaking moments, over which the Vice President presides as President of the Senate. In this article, Ambassador Douglas Kmiec traces these historical developments and provocatively asks whether seeing the Vice President as either legislative or executive may well miss the point that this officer with dual loyalties is intended to exercise a degree of independence that potentially makes him neither a executive nor a legislative agent, but rather the focal point of political-branch

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discussion, where competing executive and legislative interests intersect and can be potentially integrated into a workable government.

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Will Rogers once described the Office as the very best job in the country—after all, he said, "All he has to do is get up every morning and ask, 'How is the president?'"[1]

Funny—one thing that is certain about the office is that, at times, it has generated more levity than study.[2] Woodrow Wilson remarked: "[T]he chief embarrassment in discussing this office is, that in explaining how little there is to say about it one has evidently said all there is to say."[3]

Again, humorous—and it is good that we can laugh at ourselves and our leaders.

II. DYSFUNCTIONAL GOVERNMENT IS NO JOKE

What is not amusing, however, is our seeming inability to do very much governmentally, as if we were constitutionally paralyzed.[4] While we are a nation of widely different views, this is not a crisis of differing policy

1. DOUGLAS BRINKELY, GERALD R. FORD 53 (2007).

2. *See, e.g.*, Bruce Alpert, *Vice President: From Jake Target to Top Adviser*, VOICE AM. (Oct. 2, 2016), http://learningenglish.voanews.com/a/vice-president-joke-top-adviser-biden-obama-ford-kennedy-nixon-johnson/3531570.html.

3. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 241 (Boston, Houghton, Mifflin & Co., 15th ed. 1913) (1885).

4. Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2219–23 (2013). Of course, one quick way to dismiss the entire topic is to be uninterested in government efficiency or workability, or at least proclaim such disinterest as a matter of ideology. C. Jay Engel, *In Defense of a Gridlocked and Unproductive Congress*, REFORMED LIBERATARIAN (Jun. 21, 2013), http://reformedlibertarian.com/articles/politics/in-defense-of-a-gridlocked-and-unproductive-congress/. This has been the calling of Libertarians from one generation to the next, and it accounts for relatively modest less-than-double-digit percentage of American thinking. Nevertheless, there have been influential figures in our history that have held overtly or covertly some interest in Libertarian sentiment. David G. Savage, *Justice Scalia: Americans 'Should Learn to Love Gridlock*,*'* L.A. TIMES (Oct. 5, 2011), http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005. Thus, the late Justice Antonin Scalia, whose attachment to family, faith, and community would separate him from Libertarian ideology, would nevertheless opine that gridlock was something he loved, reflecting the intended ambition that would check ambition of the separation of powers. *Id.* Professor Stephen Calabresi, whose excellent work is considered in Part II, argues against reducing incompatibility clause limitations largely on the basis of his Federalist Society desire for less reliance upon government. In essence, he argues, if government were more efficient, we would have more of it. *Id.*

perspectives or opinions.[5] Reasonable minds will always differ on how best to interpret the Constitution,[6] provide health care to those lacking it,[7] or address the maldistribution of wealth that denies working-class Americans secure employment and a family wage, even as it creates disproportionate opportunities for the very wealthy to shape political outcomes.[8] The problem is not divergent views; it is that no view can be successfully enacted.[9] A system prone to checkmate went beyond Madison's "ambition checking ambition."[10] As Professor Michael Teter writes: "[T]he Framers had another objective in mind: devising a system that avoided [not only] arbitrary governmental [action but also] inaction."[11]

Instructed by Montesquieu, the founding generation framed a constitution that in design forestalls the concentration of power—Executive, Legislative, and Judicial—into a single tyrannical hand.[12] Allied with this, the Supreme Court ably discharges the Madisonian duty to be the guardian of fundamental individual rights.[13] Yet, where in the Constitution is there encouragement for the political branches to work harmoniously?[14] Failing to identify how and where collaboration can occur prompts presidents to turn to executive orders and recess appointments when an unwilling, obstructionist

5. *See* Teter, *supra* note 4, at 2218 (claiming that the problem is not with contradicting viewpoints on the subject matter of the legislation, but that Congress is failing to make policy decisions or enact any policy).

6. *See* Jocelyn Kiley, *Americans Divided on How the Supreme Court Should Interpret the Constitution*, PEW RES. CTR. (July 13, 2014), http://www.pewresearch.org/fact-tank/2014/07/31/americans-divided-on-how-the-supreme-court-should-interpret-the-constitution/.

7. *See More Americans Disapprove than Approve of Health Care Law*, Pew RES. CTR. (Apr. 27, 2016), http://www.people-press.org/2016/04/27/more-americans-disapprove-than-approve-of-health-care-law/.

8. *See* Frank Newport, *Americans Continue to Say U.S. Wealth Distribution Is Unfair*, GALLUP (May 4, 2015), http://www.gallup.com/poll/182987/americans-continue-say-wealth-distribution-unfair.aspx.

9. *See* E.W., *Unprecedentedly Dysfunctional*, ECONOMIST (Sept. 22, 2014), http://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock.

10. THE FEDERALIST NO. 51, at 264 (James Madison) (Yale University Press 2009).

11. Teter, *supra* note 4, at 2228.

12. *Id.* at 2220; Hilary Bok, *Baron de Montesquieu, Charles-Louis de Secondat*, STAN. ENCYCLOPEDIA PHIL. (Apr. 2, 2014), http://plato.stanford.edu/entries/montesquieu/.

13. Alexander Tsesis, *Safeguarding Fundamental Rights: Judicial Incursion into Legislative Authority*, LOY. UNIV. CHI. ECOMMONS, http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1040&context=social_justice (last visited Feb. 21, 2017).

14. *See* Teter, *supra* note 4, at 2220 (noting that encouragement of interconnectedness is implied through the concept of checks and balances, which necessitates interconnectedness between branches).

Congress refuses to legislate or confirm needed personnel.[15] Meanwhile, a legislature incapable of securing common ground either with the other house or the President punts policymaking to administrative agencies, avoiding difficult substantive policy decisions on matters of health and welfare, immigration, levels of deficit spending, key appointments, and much more.[16]

Relying upon the administrative state is its own constitutional virus. For decades now, this administrative edifice has grown topsy-turvy, and a recent magisterial research effort by Philip Hamburger of the University of Chicago has effectively unmasked the dangers of overreliance upon administrative law and its disregard of constitutionally separated and democratically controlled power.[17] That extraordinary research is today in the center of intellectual argument, even if the subject has yet to be taken up by the broader public forum.[18] The technical and arcane nature of administrative complexity is likely to elude the public at large, until sufficient numbers of the general population feel the sting of biased regulation imposed in favor of one's competitor with greater political access.[19]

While it is commonplace to give renewed emphasis to the separation of powers to counter an unrestrained administrative state,[20] prudential balance is needed. The level of separation must be careful to observe where the

15. *See* Binyamin Applebaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), http://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html; Tara McKelvey, *What Are Presidential Executive Orders?*, BBC NEWS (July 30, 2014), http://www.bbc.com/news/world-us-canada-28554842.

16. *See* Steven G. Calabresi & Joan L. Larsen, *One Person One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1157 (1994) (quoting the Committee on the Constitutional System, a reform group founded by the late White House counsel Lloyd Cutler and a number of other prominent citizens, which stated that, when the government is gridlocked, "chronic budget deficits and growing national debt, an unfavorable balance of trade, conflicting diplomatic efforts, decaying urban areas, porous borders, and a host of other problems seemed to mock the capacities of our political system."). *Id.*

17. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 15–16 (2014).

18. *See, e.g.*, Adrian Vermeule, *Is Administrative Law Unlawful? By Philip Hamburger*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing HAMBURGER, *supra* note 17); *see also* David E. Bernstein, *Book Review: Philip Hamburger, Phillip Hamburger, Is Administrative Law Unlawful?*, 33 LAW & HIST. REV. 759, 759 (2015) (reviewing HAMBURGER, *supra* note 17); William Funk, *Is Administrative Law Unlawful? NO!*, JOTWELL (June 8, 2015), http://adlaw.jotwell.com/is-administrative-law-unlawful-no/.

19. *See* HAMBURGER, *supra* note 17.

20. *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1254–55 (2015) (Thomas, J., concurring) (noting the dangers of an unaccountable administrative state that may contravene the separation of powers).

Constitution envisions the need for unity. Justice Robert Jackson put it best: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[21]

In Europe, the very nature of parliamentary democracy where the head of government and cabinet ministers are drawn into the Executive directly from the Legislative, the way in which unity is promoted is unmistakable.[22] In some European nations, there is a separate head of state as well whose selection is framed as nonpartisan and who is looked to as the embodiment of the national ideal.[23] The situation is different in the United States.[24] Indeed, it is difficult to locate any structural feature that enjoins an ongoing interaction between the Executive and Legislative Branches or across party lines.[25] To be sure, the preamble aspires to "a more perfect Union,"[26] and modern conservatism has made a case for the unitary executive, but it is

21. *Id.*

22. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643–44 (2000). Ackerman notes that a presidential separation-of-powers model has not been the preferred choice among European and Asian nations. *Id.* at 634–36. In place of our system, Germany, Italy, Japan, India, Canada, South Africa, and many other nations have employed what Professor Ackerman calls "constrained parliamentarianism." *Id.* at 634. Ackerman refuses to engage in what he calls "triumphalism," warning that separation of powers abroad has been disastrous, even if it has been tolerable at home. *Id.* at 634, 640. He suggests we had our own doubts in the system of the separation of powers—doubts that were manifested when Douglas MacArthur laid out a new constitution for Japan and did not include the separation-of-powers concept. *Id.* at 635. He notes that "American legal scholars content themselves with pietistic references to Montesquieu and Madison." *Id.* at 638.

23. *See* INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, NON-EXECUTIVE PRESIDENCIES IN PARLIAMENTARY DEMOCRACIES 1–3 (2014), http://www.constitutionnet.org/files/non-executive_presidencies_0.pdf. President George Abela occupied this role for the Republic of Malta during my service there as United States Ambassador to Malta. *Dr George Abela*, GOV.MT, https://www.gov.mt/en/Government/Government%20of%20Malta/Presidents%20of%20Malta/Pages/Dr-George-Abela.aspx (last visited Feb. 6, 2017). President Abela's soft-spoken but powerful capacity to speak to his nation's ideals with eloquence and practical reform inspired my own desire to contemplate whether the Vice President could play a similar role in the United States. While this man of character inspired his people in many ways, the depth of his intellectual contribution to the dynamic reform of the Maltese Constitution can be found in Ufficcju tal-Pesident, Il-Forum Tal-President, Il-Konstituzzioni Ta' Malta Ghadha Sservi L-Htigijiet Tal-Poplu? (L-Ewwel u-t-Tieni Eddizzjoni (Valletta 2013). This Article is dedicated to our personal friendship and that of Malta and the United States.

24. *See infra* Part III.

25. *See infra* Part III.

26. U.S. CONST. pmbl.

separation of power—ambition checking ambition—that dominates the American constitutional landscape.[27]

This brings us to the subject of this Symposium: the vice presidency. Let us begin, as always, with constitutional text:

"The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."[28]

"The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and together with the Vice President, chosen for the same Term, be elected . . . ."[29]

Having set the table and identified the essential inquiry of the conference—namely, whether the vice presidency facilitates the keeping of political promise and public accountability—let me briefly suggest in this introductory essay a list of possible questions the reader might keep in mind as the Symposium explores vice presidential past, present, and future.

III. THE VICE PRESIDENCY—EXECUTIVE? LEGISLATIVE? BOTH?

Properly situating the Vice President of the United States in light of America's separation of powers has been a source of constitutional confusion from the inception of the country.[30] The vice presidents themselves have often been as uncertain as others.[31] For example, first Vice President John Adams tells the first Congress that he is possessed of two powers: "[T]he one in *esse* and the other in *posse* . . . . I am nothing, but I may be everything."[32] Addressing the Senate over which he is made

27. *See* THE FEDERALIST NO. 51, at 264 (James Madison) (Yale University Press 2009) ("Ambition must be made to counteract ambition.").

28. U.S. CONST. art. I, § 3, cl. 4.

29. U.S. CONST. art. II, § 1, cl. 1.

30. *See infra* Part III.

31. *See infra* Part III.

32. JAMES GRANT, JOHN ADAMS: PARTY OF ONE 353 (2006) (emphasis added). Adams opined in correspondence: "The Constitution has instituted two grand offices, of equal rank, and the nation at large in pursuance of it have created two officers: one who is placed at the Head of the Executive, the other at the Head of the Legislative." *Letter from John Adams to Benjamin Lincoln, 26 May 1789*, FOUNDERS ONLINE: NAT'L ARCHIVES, http://founders.archives.gov/documents/Adams/99-02-02-0580 (last visited Feb. 3, 2016). Adams was given to overstatement. *See, e.g.*, SANDRA M. GUSTAFSON, ELOQUENCE IS POWER: ORATORY & PERFORMANCE IN EARLY AMERICA 140 n.1 (2000). Nevertheless, whether the Senate is of equal rank to the Executive, it is clear that when the House and Senate are in adversarial deadlock even by a single vote, and the President can come to

President in Article I, Adams plaintively asks: "I wish [the] gentlemen to think what I shall be."[33] The answer was not immediately forthcoming; instead, there was even disagreement over how Adams was to identify himself in routine documents and correspondence.[34] With some hesitancy, Adams ultimately signed both as Vice President and President of the Senate.[35]

It is commonplace to dismiss the vice presidency with humor or derision. The standard tale calls the position an "afterthought."[36] Even the brilliant historian Edward Larson in his colorful portrayal of the office—a portrayal labeled "truly eloquent"[37] by Vice President Cheney during the Symposium—accepts the idea that the position was last-minute.[38] As

terms with neither, the public is the loser. *See* discussion *infra* note 4. Hamilton explained, "Congress . . . has been frequently in the situation . . .where a single veto has been sufficient to put a stop to all their movements . . . . [I]ts real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of [the] insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority." THE FEDERALIST No. 22, at 110 (Alexander Hamilton) (Yale University Press 2009).

33. WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY 3 (Edgar S. Maclay ed., 1890).

34. MARK O. HATFIELD, VICE PRESIDENTS OF THE UNITED STATES, 1789–1993 (1997) *as reprinted in John Adams, 1st Vice President (1789–1797)*, U.S. SENATE: SENATE HIST., http://www.senate.gov/artandhistory/history/common/generic/VP_John_Adams.htm (last visited Feb. 3, 2017).

35. *Id.*

36. IRVING G. WILLIAMS, THE RISE OF THE VICE PRESIDENCY, at v (1956) (calling the office an "after-thought"); Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 812, 815 (2005) (describing "the Vice Presidency as little more than a postscript to the text of the Constitution, an afterthought whose eventual creation was virtually accidental" and an office that "merited little attention at the Constitutional Convention of 1787. Only near the close of the Convention was the office even considered, raised as an option, and subsequently introduced for debate and discussion") (footnote omitted); Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 510 (1995) [hereinafter Goldstein, *New Constitutional V.P.*] (calling the vice presidency an "afterthought" and saying that "[t]he founders apparently took the office seriously for the first time late in the Constitutional Convention," yet "they said little about it in debate or in the Constitution itself") (footnote omitted); JOEL KRAMER GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY 3 (1982) (saying that the office was "not suggested until the closing days of the Constitutional Convention") [hereinafter GOLDSTEIN, MODERN V.P.]; *see, e.g.*, BIRCH BAYH, ONE HEARTBEAT AWAY (1968); Vikram David Amar, *The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185 (2004).

37. Richard B. Cheney, Edwin Meese III, & Douglas W. Kmiec, *The Vice President—More than an Afterthought?*, 44 PEPP. L. REV. 535, 536 (2017).

38. Edward J. Larson, Pepperdine University School of Law Professor, Address at the Pepperdine Law Review Symposium: The United States Vice-Presidency: In History, Practice, and the Future (April 1, 2016), http://pepperdinelawreview.com/the-united-states-vice-presidency-in-history-practice-and-the-future/.

Professor Larson records, despite Adams's double signature, those serving in the first administration and one-half of the American republic viewed the work of the vice presidency as not particularly demanding.[39] Jefferson found it compatible with his keeping a fine garden, for example.[40]

Until the middle of the twentieth century, vice presidents viewed themselves as legislative in nature.[41] They maintained offices in or near the Senate; they were paid from legislative appropriation and, to a greater or lesser degree, they presided over the Senate.[42] Beginning with Franklin Roosevelt, his multiple vice presidents took on executive duties, but idiosyncratically.[43] His last Vice President, Harry Truman, was so distant from the executive loop that he was not privy to the development of the atomic bomb.[44] Truman had that oversight corrected by having the Vice President made a permanent member of the National Security Council.[45] Other direct legislative assignments attempting to make the Vice President head of personnel failed for want of majority approval.[46]

It was Lyndon Johnson who secured an office in the White House complex and a separate budget line in the executive appropriation.[47] Johnson asked the Justice Department Office of Legal Counsel for guidance as to the nature of his duties and was told by Nicholas deB. Katzenbach[48]

39. *See* Edward J. Larson, *A Constitutional Afterthought: The Origins of the Vice Presidency, 1787 to 1804*, 44 PEPP. L. REV. 515, 524 (2017).

40. Peter J. Hatch, *Thomas Jefferson's Legacy in Gardening and Food*, MONTICELLO.ORG (2010), https://www.monticello.org/site/house-and-gardens/thomas-jeffersons-legacy-gardening-and-food.

41. *See infra* notes 42–46 and accompanying text.

42. *See* Albert, *supra* note 36, at 834; PAUL C. LIGHT, VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE 68–69 (1984).

43. *See* GOLDSTEIN, MODERN V.P., *supra* note 36, at 136–37; Goldstein, *New Constitutional V.P.*, *supra* note 36, at 522–23.

44. Albert, *supra* note 36, at 832.

45. *Id.* at 833.

46. *But see* Joshua Spivak, *A Strong VP Is Good for the Country*, USA TODAY, July 8, 2004, at A13 (noting that after Truman, "[s]ubsequent presidents have added substantially to the Vice President's portfolio").

47. LIGHT, *supra* note 42, at 68–69.

48. The Katzenbach memos are discussed in an opinion by Walter Dellinger finding that the Office of the Vice President is not an agency and perhaps not even an establishment within the Executive Branch for purposes of the Freedom of Information Act. Memorandum from the Off. of Legal Counsel to the Counsel & Dir. of Admin. of the Off. of Vice President on Whether the Office of the Vice President Is an "Agency" for Purposes of the Freedom of Information Act, 18 U.S. Op. Off. Legal Counsel 10 (Feb. 14, 1994) (1994 WL 931954) [hereinafter "Agency" Memo].

that he was in neither branch, which more or less equated with what the Kennedys thought appropriate given the intensity of their political rivalry.[49] President Carter is identified as the first president to include his Vice President, Walter Mondale, in all aspects of executive governance.[50] Our Symposium guest, Richard Cheney, followed in this executive path.[51]

IV. SO THEN, WHICH IS IT—LEGISLATIVE, EXECUTIVE, BOTH, OR NEITHER?

The answer most often given is a shrug, suggesting that it is not a very important question to resolve. The unamended Constitution did not even provide for a mechanism to replace the Vice President upon death, and for many years the nation survived without one altogether.[52] From the standpoint of assessing where, if at all, the Constitution promotes collaboration so as to avoid stalemate or constitutional gridlock, it is fair to say that hardly anyone envisioned the Office of the Vice President as having the elements necessary to help overcome governmental stalemate. The suggestion is now on the table, and the reader is requested to walk with this author and the scholars assembled under the exemplary leadership of *Pepperdine Law Review* editors Robert Shapiro and Andrew Kasabian through the following thought experiment—namely, as a singularly unique office combining both executive and legislative responsibility, the vice presidency is better conceived not as "deputy President" but as the source of a workable government.

Arguably, a fuller understanding of the vice presidency also helps expose the causes of administrative excess.[53] There is a salient difference between administrative bodies acting outside the law of the Constitution by intermixing separated powers and an office with express authorization for

49. Memorandum from the Off. of Legal Counsel to the Counsel & Dir. of Admin. of the Off. of Vice President on the Participation of the Vice President in the Affairs of the Executive Branch (Mar. 9, 1961) (https://www.justice.gov/sites/default/files/olc/opinions/1961/03/31/op-olc-supp-v001-p0214_0.pdf).

50. *See* Joel Goldstein, *How the Vice President Became a Powerful and Influential White House Player*, WASH. POST (July 20, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/20/how-the-vice-president-became-a-powerful-and-influential-white-house-player/.

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

52. *Compare* U.S. CONST. art. II, *with* U.S. CONST. amend. XXV.

53. *See infra* Part V.

the admixture.[54] An understanding of the Vice President that does not make him complicit in the administrative overreach documented by Professor Hamburger[55] is worth exploring. Accepting the dangers of wrongly blurred power that give rise to the present-day administrative state,[56] it is important not to overcorrect. It is the thesis of this Article that in separating power to avert the transplantation of tyranny onto the North American continent, the founding generation did not intend to ignore the need for government to fulfill promises as much as it articulates them. That need remains great, as evident by the bipartisan frustration with the presidential contestants of 2016.[57]

V. THE ORIGINS OF THE VICE PRESIDENTIAL OFFICE

Splendid research published in *Pepperdine Law Review* by Jamin Soderstrom[58] under the encouragement of Professor Akhil Amar, a frequent and welcome visitor to our faculty, reveals that the vice presidential office, like many other parts of the Constitution, was influenced greatly—if not lifted directly—from any one of a number of state constitutions, most notably New York.[59]

The vice presidential office was modeled on the office of Lieutenant Governor.[60] Like the Vice President, the Lieutenant Governor presided over the upper legislative chamber.[61] On this basis, Soderstrom speculates that

54. *See infra* notes 103–05 and accompanying text.

55. *See* HAMBURGER, *supra* note 17, at 15–16.

56. *See* HAMBURGER, *supra* note 17. As Professor Hamburger observes:

> "[O]nce the history and the depth of the constitutional problem are understood . . . it becomes difficult to miss what is at stake. It will be seen that administrative law is the contemporary expression of the old tendency toward absolute power—toward consolidated power outside and above the law. On this foundation, the familiar constitutional violations take on unexpected significance, and yet other constitutional violations of equal import become painfully apparent."

Id.

57. *See, e.g.*, *Right Direction or Wrong Track*, RASMUSSEN REP. (Oct. 10, 2016), http://www.rasmussenreports.com/public_content/politics/mood_of_america/right_direction_wrong_track_oct31 (reporting that just above thirty percent of likely voters in the United States believe the country is "headed in the right direction").

58. Jamin Soderstrom, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 PEPP. L. REV. 967 (2008).

59. *Id.* at 968; N.Y. CONST. art. I, § 3; *id.* art. III.

60. Soderstrom, *supra* note 58, at 979–80.

61. Soderstrom, *supra* note 58, at 980; N.Y. CONST. art. III, § 6.

this intermixing of executive and legislative power in the vice presidential office did not "shock" the founders.[62] There was one notable difference: the Lieutenant Governor was expected to act or "fill in" for the Governor more frequently than such "acting" executive duty has been given to the Vice President.[63] Both the U.S. Constitution and the New York Charter provide that the second in command is to be excused from legislative responsibilities whenever acting as the executive.[64] The history of our presidency and vice presidency, however, had thus far limited vice presidential stand-in responsibility to the role of successor in the event of death, resignation, or removal, and to the role of "Acting President," pursuant to the Twenty-fifth Amendment in cases of mental or physical disability.[65] Were the Office construed in parallel with the New York Charter, the role of the vice presidency would be more broadly conceived as filling in for the President whenever the President thought it useful or advisable.[66] Modern transportation and communication now seldom—if ever—make this a necessity, and it can be assumed that such power sharing would be personally difficult for a healthy president or met with public disapproval.[67] Modernly, even if it might not be shocking for a vice president to accept such greater substitutionary responsibility, there are three difficulties. First is the practical one: a president who is dissatisfied with performance of his vice president in these "assigned"[68] executive duties has no practicable means to remove a nonperforming vice president in the same way that the president would be able to remove a cabinet officer.[69]

62. Soderstrom, *supra* note 58, at 983–84.

63. Soderstrom, *supra* note 58, at 983–84. *Compare* N.Y. Const. art. III, § 6, *with* U.S. CONST. art. II, § 1, U.S. CONST. amend. XX, §§ 1–4, *and* U.S. CONST. amend. XXV.

64. U.S. CONST. art. I, § 3. Both documents also provide for the absence of the Lieutenant Governor or Vice President from legislative duty by specifying a replacement for that legislative function—in each case a pro tempore official. N.Y. CONST. art I, § 3; *id.* art. III, §§ 6–7.

65. U.S CONST. amend. XXV. *See generally* Birch Bayh, *The Twenty-Fifth Amendment: Dealing with Presidential Disability*, 30 WAKE FOREST L. REV. 437, 441 ("In assessing the adequacy of the Twenty-fifth Amendment, it is helpful to examine its applicability to historic incidents of disability. Although the Twenty-fifth Amendment did not exist during the three Eisenhower illnesses, its provisions are intended to cover such disabilities.").

66. *See* Soderstrom, *supra* note 58, at 982–91.

67. *See id.*

68. *See* Todd Garvey, *A Constitutional Anomaly: Safeguarding Confidential National Security Within the Enigma that Is the American Vice Presidency*, 17 WM. & MARY BILL RTS. J. 565, 580 (2008).

69. *Compare* Meyer v. Bush, 981 F.2d 1288, 1295 (D.C. Cir. 1993) ("The Vice President is the only senior official in the executive branch totally protected from the President's removal power."),

Second, a supposition that the Vice President could take on any delegated authority from the President is at odds with a fair amount of present-day constitutional analysis.[70] The resistance to executive delegation or assignment by vice presidents contemporaneous with the ratification and early constitutional experience may be argued to confirm the text of the Constitution, which, as Justice Scalia was fond of pointing out, vests the entire executive power in the President.[71] As Professor Glenn Reynolds has commented: "Whatever executive power a Vice President exercises is exercised because it is delegated by the President, not because the Vice President possesses any executive power already. The Vesting Clause of Article II vests all the executive power in the President, with no residuum left over for anyone else."[72] Based upon the Supreme Court's decision in *Bowsher v. Synar*, which held that executive authority could not be delegated to an officer removable only by Congress,[73] Professor Reynolds suggests that any attempt to assign executive responsibility to the Vice President, who is only removable by impeachment,[74] is an even weaker case for delegation.[75] Reynolds speculates that it comes very close to Congress

with In re Sealed Case, 121 F.3d 729, 753 n.22 (D.C. Cir. 1997) (citing Myers v. United States, 272 U.S. 52, 134 (1926)) ("While the President's removal power over some executive branch officials is limited, the President has unqualified power to appoint and remove cabinet officers.").

70. *See, e.g.*, Saikrishna B. Prakash, *Fragmented Features of the Constitution's Unitary Executive*, 45 WILLAMETTE L. REV. 701, 720 (2009) (contending that the Constitution forbids the President from delegating any of his presidential powers to the Vice President); Glenn Harlan Reynolds, *Is Dick Cheney Constitutional?*, 102 NW. U. L. REV. 1539, 1541 (2008) (noting that the President is not allowed to delegate power to a "legislative official," posing a problem for claims that the Vice President is a legislative official).

71. *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) ("[Article II, Section 1, Clause 1 of the Constitution] does not mean *some of* the executive power, but *all of* the executive power.") (emphasis added).

72. *See* Reynolds, *supra* note 70, at 1541. The source of the Vice President's power can be contested, of course, by recalling that Article I, Section 3 does make reference to the Vice President's exercise of executive power, suggesting that possession of the power may be said to transfer to the Vice President to the extent the delegation was properly made. *See* U.S. CONST. art. I, § 3, cl. 5. Again, had these occasions of delegation to the Vice President been as frequent as that anticipated for the Lieutenant Governor, perhaps this claim of ownership of power would have been more clear.

73. Bowsher v. Synar, 478 U.S. 714, 726 (1985).

74. *See* U.S. CONST. art. II, § 4. Vice President Cheney revealed at the Symposium that he had placed an undated letter in the President's hand. *See* Cheney et al., *supra* note 37, at 544–46. The Vice President did not know of any predecessor or successor who had done the same. *Id.*

75. Reynolds, *supra* note 70, at 1543.

executing its own laws, which is "plainly out of bounds."[76]

It is also sometimes argued that the Vice President cannot exercise executive authority because he has not been properly appointed under the provisions of the Appointments Clause.[77] The Appointments Clause provides for the nomination by the President and confirmation by the Senate of all principal officers and such inferior officers as Congress may provide from time to time.[78] The inferior officers can be appointed by the heads of departments, the President alone, or the courts of law.[79] Vice presidents are neither principal nor inferior officers by the terms of the Constitution's two-level appointment structure.[80] While it is not entirely clear where Professor Reynolds ends up, he suggests that "it would seem that [Dick Cheney's] expansive role in the Bush administration is unconstitutional," even as he admits that a constitutional challenge is unlikely, given that few, if anyone, would have standing to raise the issue before the Court.[81] I concur with respect to nonjusticiability.

These formal objections would thus invalidate or open to question the more aggressive or activist actions of nearly every vice president in recent time, beginning with the first substantial delegation from President Carter to Vice President Walter Mondale.[82] It is argued here, however, that this analysis is too facile. First, it cannot be said that the delegations given contemporary Vice Presidents transfer the accountability or the administration of the programs to the supervision of the Vice President.[83]

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76. *Id*.

77. *See* Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers: Part II: Political Branch Interpretations and Counterarguments*, 24 KAN. J.L. & PUB. POL'Y 294, 397–98 (2015) [hereinafter Brownell, *Constitutional Chameleon, Part II*].

78. U.S. CONST. art. II, § 2, cl. 2.

79. *Id.*

80. *See* Brownell, *Constitutional Chameleon, Part II*, *supra* note 77, at 397 (noting that the Vice President is not an officer under the terms of the Appointments Clause, but instead "assumes his high position due to the decision of the electorate through the Electoral College," and not by presidential appointment and Senate ratification).

81. Reynolds, *supra* note 70, at 1543.

82. David Nather, *The Vice Presidency: An Office Under Scrutiny*, N.Y. TIMES (June 12, 2007), http://www.nytimes.com/cq/2007/06/12/cq_2875.html ("Ever since Jimmy Carter gave Walter F. Mondale an office in the West Wing and the authority to go with it in 1977, vice presidents have come to expect a level of influence that would have been unthinkable in earlier decades.").

83. *See* 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, 14 n.59 (2014) [hereinafter Brownell, *Constitutional*

On closer examination, these so-called delegations have really been opportunities for the Vice President to lend opinion as to how others are performing their executive responsibilities.[84] Thus, for example, consider Vice President George H.W. Bush's chairing of a task force on deregulation in the Reagan administration.[85] This was more in the nature of a president taking advantage of senior advisory guidance than the delegation of executive decision-making.[86] The Vice President's role was certainly much different than that of the comptroller general in *Bowsher*, where the legislative officer could direct the President—and derivatively all heads of executive departments—to make substantial budget cuts in the event certain debt reduction targets were not achieved.[87] To act as an opinion resource, as a source of encouragement or creative ideas, or even as an occasional prod to or encouragement of the work of others is not law enforcement, administration, or promulgated guidance, let alone notice-and-comment rulemaking or the exercise of discretion granted by the legislature.[88] Indeed, in colonial times, the upper chamber of the legislature was often styled to serve the purpose of being a counselor to the Governor.[89] In this regard, the founders might well have thought that placing the Lieutenant Governor (the forerunner of the Vice President) in a tie-breaking role for the chamber hardly incongruous or unusual.[90] Professor Reynolds intimates that it can be politically compromising for the Vice President to be seen as intimately

Chameleon, Part I].

84. *See generally id.* (discussing the expanding influence of the Vice President on the Executive Branch).

85. *See* Meyer v. Bush, 981 F.2d 1288, 1297–98 (D.C. Cir. 1993) (finding that the task force did not have "substantial independent authority," but rather functioned solely to "advise and assist" the President).

86. *Id.*

87. Bowsher v. Synar, 478 U.S. 714, 733 (1985).

88. *See* Prakash, *supra* note 70, at 718 (describing the Vice President as a "legislative official waiting for more work" with limited duties under the Constitution).

89. CHARLES A. BEARD & MARY R. BEARD, HISTORY OF THE UNITED STATES 49–50 (1921); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 138–39 (1969).

90. *See* Soderstrom, *supra* note 58, at 983, n.75 (commenting that a Lieutenant Governor or Vice President equivalent came out of "an executive body—usually some type of council—rather than a legislative body" in six states, including Georgia, Maryland, Massachusetts, Pennsylvania, South Carolina, and Virginia). The apparent separation-of-powers "violation" is certainly lessened if the upper chamber is seen as providing counsel to the Executive, though oddly after making this excellent point, Soderstrom chooses to ignore it and simply declares that he assumes a separation-of-powers violation. *See id.*

involved in a failed policy of the President.[91] In this, Professor Reynolds seems to be concerned with what politicians call "plausible deniability," meaning that if a president runs the risk of removal for a controversial policy, vice presidential involvement in that policy might leave the country less able to endure a change of leadership than if the Vice President had kept his distance and his opinions to himself.[92] This may well be good political advice, but it is not really a constitutional objection to vice presidents being more regularly kept up to date about national security and other matters. One would hope the learning curve could be well handled in the event the President needed replacement, especially if that replacement was the result of unexpected death or resignation.[93]

Professor Reynolds's speculations are interesting, but in terms of understanding the constitutional structure of the vice presidency, his observations are something of a head fake.[94] Assessing how much is too much executive influence on the President of the Senate simply fails to come to grips with the fact that the founders created an office where an executive-in-waiting also has been given an important legislative function.[95] For present purposes, it is more interesting to know *why* the founders chose to construct the vice presidency with this type of partial agency of one branch in the work of another, than whether such intermixing should be labeled to be in violation of the Constitution—which some might say, in this context, was a nonsensical inquiry: how can a constitutionally defined office really be unconstitutional? In this regard, the conscious blending of separated power in the Office of the Vice President is consistent with those other places in the Constitution where the executive shares in lawmaking by signing or vetoing a presented bill, where legislators provide for the exercise of executive discretion through rulemaking, or where budget making and appropriations are used by the legislature to evaluate the fidelity of the executive to the implementation of legislative purpose and, by threat of withholding funds, redirect executive decision-making.[96]

The Supreme Court has reaffirmed many times that the separation of governmental powers into three coordinate branches is essential to the

91. *See* Reynolds, *supra* note 70, at 1543–44.
92. *See id.*
93. *See* Brownell, *Constitutional Chameleon, Part II*, *supra* note 77, at 356.
94. *See* Reynolds, *supra* note 70, at 295.
95. *See infra* notes 97–100 and accompanying text.
96. *See* U.S. CONST. art. I, § 7, cl. 2; art. II, § 3.

preservation of liberty,[97] but the separation is only half of the story.[98] Madison, in writing about the principle of separated powers, said: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."[99] But the overlap of executive and legislative activity that characterizes the vice presidency also serves as reminder that the framers did not require and indeed rejected the notion that the three branches must be entirely separate and distinct.[100] As the Supreme Court reminds us in upholding the participation of federal judges in the work of a sentencing commission, an entity appointed by the President to undertake essentially legislative work that is located in the judicial branch,[101] Madison defended a far more flexible conception of the separation of powers than is sometimes remembered.[102] In particular, Madison wrote:

> [Separation] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other . . . that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.[103]

The Court describes the separation of powers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.[104] Upholding the sentencing commission, the Court observed that

> this flexible understanding of separation of powers . . . [simply accepts] Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single

97. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 685–96 (1988).

98. *See infra* notes 99–106 and accompanying text.

99. THE FEDERALIST NO. 47, at 245 (James Madison) (Yale University Press 2009).

100. *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977) (rejecting as archaic the complete division of authority among the three branches); United States v Nixon, 418 U.S. 683, 684 (1974) (affirming Madison's flexible approach to separation of powers).

101. Mistretta v. United States, 488 U.S. 361, 406–07 (1989).

102. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 230–31 (1994).

103. THE FEDERALIST NO. 47, at 246–47 (James Madison) (Yale University Press 2009).

104. Buckley v. Valeo, 424 U.S. 1, 122 (1976); *see also* INS v. Chadha, 462 U.S. 919, 951 (1983).

> Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.[105]

Ambition checking ambition works well enough to address what the Court calls encroachment or aggrandizement that, if allowed to go unchecked, could imperil the integrity of the separate branches.[106] But ambition versus ambition does little to advance harmony.[107] The vice presidency is a unique part of the check and balance, not operating exclusively within either the Legislative or Executive Branch, but instead reminding each of the necessity for the accommodation of its respective interests if a positive—indeed any—result beyond stalemate is to be achieved.[108] The vice presidency with its dual-branch responsibility mitigates the disadvantages of presidential as opposed to parliamentary democracy.[109]

Finally, returning to the inquiry of whether the Vice President can substitute more largely for the President, a vice president who chooses to become deputy president by assuming substantial executive responsibilities lessens the potential of that office to draw upon its unique executive and legislative mix to promote, at key moments, harmony of purpose or compromise between the two branches.[110] In short, the greater the acceptance of executive responsibility, the less likelihood that the Vice President will either have the credibility or the comfort level to assist with overcoming dysfunction. One might even speculate that there is some reason to believe that having the "deputy president" attempt to arbitrate under this scenario would cause some dysfunction of its own, as the idea of co-presidencies has not been well received from the time of the founding onward.[111] Since the historical origin of the vice presidency in the office of

105. *Mistretta*, 488 U.S. at 381.

106. *Buckley*, 424 U.S. at 122–23.

107. *See id.*

108. *See* Brownell, *Constitutional Chameleon, Part I*, *supra* note 83, at 63.

109. *See supra* notes 22–25 and accompanying text.

110. *See* Brownell, *Constitutional Chameleon, Part I*, *supra* note 83, at 55–56.

111. *See* Albert, *supra* note 36, at 837–40. The Vesting Clause is thought to have been written to specifically disavow a plural executive, which had been considered in convention discussion. David Forte & Matthew Spalding, *The Heritage Guide to the Constitution: Executive Vesting Clause*, HERITAGE FOUND. (2012), http://heritage.org/constitution#!/articles/2/essays/76/executive-vesting-clause. On the political front, Ronald Reagan briefly contemplated bringing Gerald Ford, a former

New York Lieutenant Governor, the inquiry of whether the Office of the Vice President can reduce present-day gridlock thus continues.[112]

VI. THE CONCEPTION AND RECONCEPTION OF EXECUTIVE RESPONSIBILITY FOR LEGISLATION OVER TIME

Because Professor Reynolds and others claim the vice presidency to be defined in knowing disregard of the separation of powers,[113] perhaps we should tarry just a moment longer in our effort to see if modern day vice presidents can help reduce government dysfunction, to assess the original conception of the vice presidency in conjunction with the presidency itself, and how the Twelfth Amendment affects both offices.[114]

It is not exaggeration—though somewhat discordant, no doubt, to formalist ears—to understand both the President and the Vice President as facilitating lawmaking.[115] The Vice President is the presiding officer of the Senate and is, at times, needed to work past an impasse of an otherwise evenly divided chamber.[116] The President's role in the legislative process, and in particular, his decision to either veto or utilize a signing statement affects directly the existence or nonexistence of law, or with a signing message, its initial implementation.[117] While the scope and depth of the Vice President's legislative participation and influence have varied over time, it is fair to opine that it is the presidency that has undergone the greater reconceptualization. As scholars have noted, such venerable figures as Washington and Madison characterized the President in strictly ministerial or "take care" terms—that is, as a manager or administrator.[118] Washington

President, onto his ticket in 1980, only to discover that Ford had a far broader role of authority than Reagan would have been comfortable with. *See* Lou Cannon & David S. Broder, *Reagan Nominated, Picks Bush*, WASH. POST (July 17, 1980), https://www.washingtonpost.com/archive/politics/1980/07/17/reagan-nominated-picks-bush/a1badab9-a12b-4e7f-86a2-1bde75e03346/.

112. *See infra* Part VI.

113. *See, e.g.*, Reynolds, *supra* note 70, at 1542.

114. *See infra* notes 115–23 and accompanying text; *see also* Parts VII & VIII.

115. Brownell, *Constitutional Chameleon, Part II*, *supra* note 77, at 294–98.

116. *See* Brownell, *Constitutional Chameleon, Part I*, *supra* note 83, at 15.

117. *Id.*

118. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1531 (2014). The President was anticipated to have wider latitude in matters of diplomacy and foreign affairs, but his authority in that context is shared with one (e.g., treaty making) or both houses (e.g., war making in the sense of lawful declaration) of Congress. *Id.* at 1581–83. Justice

would meticulously remove policy or political language from remarks following a collaborative, largely managerial, model.[119] Madison likewise "objected to Congress's . . . practice of referring policy questions to the executive branch for advice . . . . He repeatedly pressed to stop those referrals and finally succeeded in 1795."[120] Madison sought to be "a professional executor, above party and above politics, with no distinct political or programmatic agenda of his own to press."[121] The Twelfth Amendment will feed a much different political, policy, and party-driven conception of the American presidency.[122] The vice presidency was derivatively affected.[123]

VII. THE TWELFTH AMENDMENT

Under the original Constitution, the President and Vice President are chosen by electors who are themselves chosen as the state legislatures may direct.[124] Each elector is given two votes, one of which must be cast for a candidate who is not an inhabitant of the same state as the elector.[125] The Vice President was the runner-up or the person receiving the second-highest majority of electoral votes cast for president.[126] By this means, it could readily be anticipated that those meriting either office would be of equal stature.[127] Professor Akhil Amar and other scholars believe the vice presidency was an enticement to the electors to not toss aside their second votes after likely having given an initial vote to a favorite son.[128]

The Twelfth Amendment altered the mechanism for selecting a

Sutherland would famously trace the Executive's role in foreign affairs to extra-constitutional aspects of sovereignty. *See* United States v. Curtiss-Wright Export Corp., 209 U.S. 304, 316–20 (1936).

119. Hawley, *supra* note 118, at 1533.

120. *Id*. at 1533–34.

121. *Id.* at 1533.

122. *See infra* Part VIII.

123. *See generally* Hawley, *supra* note 118, at 1560 (analyzing how the Twelfth Amendment politicized the presidency, but did not have a similar effect on the vice presidency).

124. U.S. CONST. art II, § cls. 2–3, *amended by* U.S. CONST. amend. XII.

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

126. *See id.*

127. *See id.*

128. *See, e.g.*, Akhil Reed Amar, *Applications and Implications of the Twenty-fifth Amendment*, 47 HOUS. L. REV. 1, 17 (2010); Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 920 (1992).

President and Vice President.[129] Seen as a technical or mechanical adjustment, the Twelfth Amendment provided for separate balloting for President and Vice President largely to accommodate the conceptually undesired but practically indispensable emergent political parties.[130]

The immediate need for the Amendment arose when the electors in 1800 divided their votes evenly between Thomas Jefferson and Aaron Burr.[131] The election was given to the House and for thirty-five ballots, the lame-duck outgoing Federalist Congress persisted in favoring Burr and its Federalist ideology.[132] To avoid this type of stalemate in the future, the Amendment provides for separate ballots for President and Vice President.[133] The effect was to allow party members to articulate their party preference separately for both offices and, in most cases, end up with a president and vice president of the same political party.[134] It is not self-evident that this particular unity of president and vice president is helpful to the cause of overcoming gridlock. As will be presented below, it is out of the independence of vice presidential behavior that the necessary credibility may emerge to help overcome dysfunction. [135]

Scholars disagree over the significance of the Twelfth Amendment. For example, because the Amendment made no major change in the Electoral College, Bruce Ackerman views the Amendment as "the very opposite of a serious attempt to think the problem [of presidential selection] through."[136] By contrast, calling the Amendment "transformative," Joshua Hawley argues that the Twelfth Amendment sealed the demise of Washington's conception of the President as nonpartisan manager.[137] In reality, whether the founders generally, or our most revered one, envisioned a partisan or apolitical President, there were ample partisans among the first executive administration—most notably Alexander Hamilton and Thomas Jefferson.[138]

129. Amar, *supra* note 128, at 18; s*ee* U.S. CONST. amend. XII.

130. Amar, *supra* note 128, at 17–18; Amar & Amar, *supra* note 128, at 918–21.

131. Amar & Amar, *supra* note 128, at 922; Hawley, *supra* note 118, at 1535–38.

132. Hawley, *supra* note 118, at 1535–38.

133. *See id.*; U.S. CONST. amend. XII.

134. *See* U.S. CONST. amend. XII; Amar & Amar, *supra* note 128, at 918–21; Hawley, *supra* note 118, at 1545.

135. *See infra* notes 163–85 and accompanying text.

136. BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 247 (2005).

137. Hawley, *supra* note 118, at 1501, 1505, 1533.

138. *Id*. at 1529–30; Ben W. Heineman Jr., *The Origins of Today's Bitter Partisanship: The*

Hamilton regularly involved the Executive in the making of policy, though he dutifully made the Federalist argument not to politicize the Twelfth Amendment.[139] As far as the Jeffersonians were concerned, a politicized presidency was just fine, as it moved the Constitution toward what they believed was the only true source of legitimacy in a democratic republic—popular approval.[140]

The separate balloting introduced by the Twelfth Amendment, as noted, accentuated the role of political parties and also gave rise to the fear of lesser candidates for the now-denominated second spot.[141] There even was an effort to abolish the Office.[142] It was argued that those attracted to the vice presidency would be of "secondary character" and that the Office would "be a sinecure."[143] This sinecure would be sold to the highest political bidder capable of bringing electoral gain to the candidate for President.[144]

The predictions had initial validity.[145] The Nineteenth Century saw a precipitous decline in the caliber of the recruits for Vice President.[146] While there were a few prominent figures among the early vice presidents, such as John C. Calhoun and Martin Van Buren, and more often than not, the office was seen generally and by its occupants as a consolation prize.[147] The physical characteristics of those attracted to the post gave it away: these were individuals well advanced in years and failing health and frequently

Founding Fathers, ATLANTIC (Sept. 9, 2011), http://www.theatlantic.com/national/archive/2011/09/the-origins-of-todays-bitter-partisanship-the-founding-fathers/244839/.

139. Hawley, *supra* note 118, at 1529, 1548–49.

140. *Id*. at 1548–49. Moreover, the Jeffersonian Republicans claimed, the Electoral College was hopelessly flawed. *See id.* at 1544. Beyond pointing to the electoral difficulties in 1796 and 1800, the Jeffersonians illustrated how the system would not necessarily reflect elector preference. *Id.* One common illustration was a consideration of four candidates with electors dividing their ballots between two competing favorites, then uniformly voting for a third, thinking that candidate to be the Vice President. *Id.* The result: the third candidate—no one's choice for the presidency—would be selected as President and the next highest candidate receiving a majority would become Vice President. *Id.* Ballots needed to be designated for President and Vice President, the Jeffersonians insisted, or the system would repeatedly malfunction. *Id.*

141. *See id.* at 1554–55, 1560.

142. Goldstein, *supra* note 43, at 514.

143. *Id.* at 520.

144. *Id.* at 521.

145. *See infra* notes 146–48 and accompanying text.

146. Joel K. Goldstein, *An Overview of the Vice-Presidency*, 45 FORDHAM L. REV. 786, 790 (1977).

147. *Id.*

had little or no relevant experience.[148]

Thankfully, the nation did not suffer greatly due to the serendipitous longevity of those serving as president.[149] Of the twenty-three vice presidents in the Nineteenth Century, six were not nominated by their presidents to serve another term, six died in office, and none were nominated to seek the presidency in their own right.[150] However, on four occasions, vice presidents did succeed to the top job following the death of an elected chief executive.[151] The historical score keepers give these administrations low marks.[152]

The men[153] drawn into the vice presidency in the nineteenth century could be notorious as well as inept.[154] John Breckenridge became a Confederate general and Schuyler Colfax came very close to being removed from office for corrupt financial dealings.[155] More contemporary vice presidents would also not be entirely free from personal shortcomings (Spiro Agnew's resignation was followed shortly by his indictment and later conviction for fraud).[156] Overall, vice presidential candidates are seen to be of more substantial quality in the twentieth century, and they have been frequently drawn from positions of legislative leadership;[157] for example, Charles Curtis and Alben Barkley were previously Senate majority leaders, and John Nance Garner was Speaker of the House of Representatives.[158] As Vice President Cheney would reflect at the Symposium, his own decade in

148. *Id.*

149. *See infra* note 150 and accompanying text.

150. Goldstein, *supra* note 146, at 790.

151. MODERN V.P., *supra* note 36, at 7. These include Vice President Tyler (succeeded Harrison), Millard Fillmore (succeeded Taylor), Andrew Johnson (succeeded Lincoln), and Chester A. Arthur (succeeded James Garfield). *See id.* at 7 n.18. Tyler chose not to run, and the others all failed to achieve a nomination. *See id.* at 7.

152. *Id.* at 7–8.

153. To date, all vice presidents have been men—notwithstanding Walter Mondale's historic first in the nomination of the articulate Geraldine Ferraro and John McCain's subsequent surprise nomination of the less-well-considered Sarah Palin. *See* John Mashek, *Sarah Palin and Geraldine Ferraro—How Times Have Changed*, U.S. NEWS & WORLD REP. (Sept. 15, 2008), http://www.usnews.com/opinion/articles/2008/09/15/sarah-palin-and-geraldine-ferraro--how-times-have-changed.

154. *See* MODERN V.P., *supra* note 36, at 8.

155. *Id.*

156. *Id.* at 11.

157. *See id.* at 8.

158. *Id.*

the House of Representatives proved invaluable to the success of President Bush's tax program.[159]

Legislative experience is logically helpful to executive–legislative bargaining, but it is obviously personality based. Of greater conceptual importance was the characterization of the office by the late Antonin Scalia when he headed the Office of Legal Counsel.[160] Scalia determined that the hybrid nature of vice presidency made it neither executive nor legislative, but independent.[161] Scalia wrote: "With regard to the Vice President there is even a constitutional question whether the President can direct him to abide by prescribed standards of conduct. The Vice Presidential office is an independent constitutional office, and the Vice President is independently elected."[162]

The distinguished scholar of Constitutional government, Professor Roy Brownell, concurred:

> [The Twelfth Amendment] did nothing to diminish the Vice President's *constitutional* independence from the President. The Vice President was now of the same party as the President, but he still served a four-year term, still fell outside the confines of the Opinion Clause and still presided over the Senate. As a result, vice presidential independence continued without abatement . . . .[163]

One of the many examples of such independence was that of Vice President George Clinton, who voted against the renewal of the Bank of the United States contrary to the position taken by President James Madison.[164]

There have been examples of modern-day independence as well.[165] Vice President George H.W. Bush strongly disagreed with President Reagan's attempt to reach an agreement with Panamanian dictator and drug

159. *See* Cheney et al., *supra* note 37, at 539–40.

160. Memorandum from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Counsel on Applicability of 3 C.F.R. Part 100 to the President and the Vice President to Kenneth A. Lazarus, Assoc. Counsel to the President (Dec. 16, 1974), http://fas.org/irp/agency/doj/olc/121674.pdf [hereinafter Scalia Memorandum].

161. *See id.*

162. *Id.*

163. Roy E. Brownell II, *The Independence of the Vice Presidency*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 297, 324 (2014) [hereinafter Brownell, *Independence of the V.P.*] (internal citation omitted).

164. *Id.* at 325.

165. *See infra* notes 166–201 and accompanying text.

lord Manuel Noriega and publicly criticized the President for it.[166] Vice President Albert Gore criticized President William Clinton's personal misbehavior.[167] Vice President Gore likewise sought to prevent the return of Elian Gonzalez to Cuba, contrary to the view of the Clinton White House, which wanted it handled as a more low-key immigration issue.[168] With respect to our guest, Professor Brownell writes that Vice President Cheney "broke with the President on no less than four major occasions."[169] These included the advisability of sending United Nations inspectors back into Iraq—Cheney opposing while President Bush thought to the contrary.[170] Vice President Cheney publicly argued against President Bush on the issue of gay marriage, which Bush wanted precluded at the federal level.[171] Vice President Cheney thought it a matter of individual freedom, which—if regulated at all—should be regulated by the states.[172] Cheney pushed for a change in the judicial filibuster Senate rules, which Bush thought were none of the executive's business.[173] Vice President Cheney also signed onto an amicus brief favoring Supreme Court review in the controversial Second Amendment *Heller* case,[174] whereas the administration favored remanding the issue of gun rights to the lower courts.[175] Professor Brownell records: "White House chief of staff Josh Bolten was especially angry at this incident," and that his anger did not dissipate when, in conversation with Vice President Cheney's Chief of Staff, David Addington, Mr. Addington reminded Mr. Bolten that "he worked for the vice president . . . and that the Senate functions of the vice president were the vice president's business."[176] Addington was the confirmation of Antonin Scalia's conception of the vice presidency as "wholly independent."

There are thus multiple examples of vice presidential independence, and

166. Brownell, *Independence of the V.P.*, *supra* note 163, at 353.
167. *Id.* at 353–54.
168. *Id.* at 354–55.
169. *Id.* at 355.
170. *Id.*
171. *Id.* at 356.
172. *Id.*
173. *Id.*
174. D.C. v. Heller, 554 U.S. 570 (2008); Brief for 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives as Amici Curiae Supporting Respondent, D.C. v. Heller, 554 U.S. 570 (2008) (2008 WL 383530).
175. Brownell, *Independence of the V.P.*, *supra* note 163, at 357.
176. *Id.*

the extent to which vice presidents have defied their presidents surprises scholars and even the occasional vice president.[177] Expressing surprise, Vice President Cheney quipped that it might put a strain on the relationship.[178] But that is only true from the singular perspective characterizing the Vice President as a deputy president. A deputy is expected to be loyal, but a vice president understood to be independent would be known to the President and to the Senate as someone in need of convincing, not direction.[179] Perceiving the Vice President as independent, as Scalia determined him to be for the Office of Legal Counsel, gives the Vice President an internal and external stature that is not fully appreciated if the Vice President is perceived as solely a deputy on the presidential team.[180] Internally, an independent vice president is a type of "team of rivals" competitor to be won over.[181] Externally, the Vice President would likewise attract legislative attention for purposes of persuasion.[182] With the Vice President being wooed from executive and legislative quarters, he occupies a unique position to insist that both sides address the individual concerns of the other branch.[183] It is not exactly the ambition checking ambition[184]—in Madisonian terms—of two branches contesting over constitutional terrain, but it is a parallel competition occurring within a single officer with two constitutional personalities.

The suggested conception of the Vice President as an independent constitutional officer facilitating the reconciliation of divergent executive–legislative positions would measure success in office differently than the deputy presidents from Mondale to Cheney. That measure of success for a

177. *See supra* notes 164–76 and accompanying text.

178. Ashley Killough, *Cheney Unapologetic in New Documentary*, CNN (Mar. 15, 2013), http://www.cnn.com/2013/03/15/politics/cheney-documentary/.

179. *See* Brownell, *Independence of the V.P.*, *supra* note 163, at 316–17.

180. *See* Scalia Memorandum, *supra* note 160.

181. *Cf.* Doris Kearns Goodwin, *Defeat Your Opponents. Then Hire Them.*, N.Y. TIMES (Aug. 3, 2008), http://www.nytimes.com/2008/08/03/opinion/03goodwin.html (describing the benefits and difficulties of creating a modern day "team of rivals").

182. *See* Brownell, *Independence of the V.P.*, *supra* note 163, at 316–17; Interview by Mark Knoller with Dick Cheney, Vice President of the United States, CBS Radio, Washington, D.C. (Jul. 30, 2007) (discussing the Vice President's dual role in the Executive and Legislative Branches, with the Vice President serving as President of the Senate, casting tie-breaking votes in the Senate, and receiving salary from the Senate).

183. *See supra* Parts II–V; CONG. GLOBE, 31st. Cong., 1st. Sess. 128 (1850) (showing extensive debate until Vice President Fillmore broke the tie).

184. THE FEDERALIST NO. 51, at 264 (James Madison) (Yale University Press 2009).

vice president who draws upon his independent pedigree is the avoidance of stalemate and governmental inaction.[185] By this measure, Vice President Biden would be seen as not particularly successful, at least in terms of, say, the immigration reform legislation that died in the Senate during the Obama administration, which forced the President to turn to a more questionable executive order practice.[186] Biden, like Cheney, played the role of loyal deputy to the President and used his past legislative relationships to advance the Obama agenda, but he cannot be said to have built up the independent vice presidency that, as presented here, becomes an active negotiation post with the aim of achieving executive *and* legislative accomplishment.[187]

Biden's role, like others of the modern era, has been to play an advisory, counseling, or task-force role for the President from the President's perspective.[188] In this regard, Biden's vice presidential day resembles that of Vice President George H.W. Bush, with only a change in topic.[189] Biden gave advice on guns, the partial military withdrawal from Iraq, and various fiscal matters,[190] while Bush Sr. oversaw task forces for Ronald Reagan on

185. True, the Constitution forbids the Vice President to be President of the Senate when he is Acting President of the United States in the formal sense of the Twenty-fifth Amendment, but as Attorney General Meese articulated at the Symposium, the acting designation under that Amendment has been thought limited to temporary need occasioned by transient mental or physical disability. *See* Cheney et al., *supra* note 37, at 549–50.

186. Margaret Talev, *Is Biden Obama's Weapon or Weakness in the GOP Senate?*, BLOOMBERG (Nov. 10, 2014), http://www.bloomberg.com/politics/articles/2014-11-10/is-joe-biden-obamas-weapon-or-weakness-in-the-gop-senate; Chuck Todd, et al., *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014), http://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276.

187. Michael L. Hirsch, *Joe Biden: The Most Influential Vice President in History?*, ATLANTIC (Dec. 31, 2012) http://www.theatlantic.com/politics/archive/2012/12/joe-biden-the-most-influential-vice-president-in-history/266729/ ("But in terms of the sheer number of issues Biden has influenced in a short time, the current Vice President is bidding to surpass even Cheney. Fiscal issues and guns are only a small sampling of this Vice President's portfolio. Back in 2010 it was Biden's office that, in the main, orchestrated the handover to the Iraqis. It is Biden's view of Afghanistan that has, bit by bit, come to dominate thinking inside the 2014 withdrawal plan. On financial reform it was Biden who prodded an indecisive Obama to embrace, at long last, Paul Volcker's idea of barring banks from risky trading, according to Austan Goolsbee, formerly the head of Obama's Council of Economic Advisers. The VP also tilted the discussion in favor of a bailout of the Big Three auto companies, according to Jared Bernstein, Biden's former economic adviser. 'I think he made a difference in president's thinking,' Bernstein said. 'He understood the importance of the auto companies to their communities, and throughout the country.'").

188. *See id.*; Helene Cooper, *For Biden, No Portfolio but the Role of a Counselor*, N.Y. TIMES (Nov. 5, 2008), http://nytimes.com/2008/11/26/us/politics/26biden.html?_r=0.

189. *See infra* notes 190–91 and accompanying text; *see* Goldstein, *supra* note 40.

190. Hirsch, *supra* note 187.

deregulation and drug policy.[191]

While not contemplating the role for the Vice President outlined here as a logical focal point to get beyond executive–legislative impasse, Attorney General Meese did portray at the Symposium a more flexible approach to the separation of powers than that which was frequently litigated during the Reagan Administration.[192] The former Attorney General cannot be faulted for not seeing Scalia's view of the Vice President as independent since Scalia himself did not reconcile his vice presidential characterization and his highly formal view of the separation of powers.[193] For example, the Reagan administration asserted that Congress could not share in executive enforcement through the legislative veto;[194] that it was improper to involve members of the federal judiciary in what the late Justice Scalia would refer to as "junior varsity" lawmaking[195]—the drafting and promulgation of sentencing guidelines,[196] and that an independent counsel who could not be removed by the Attorney General was an unconstitutional actor.[197] Now, to be sure, the Reagan administration only prevailed in the legislative veto case,[198] and the Supreme Court found no separation-of-powers violation in either the sentencing commission[199] or the independent counsel.[200] Thus perhaps Attorney General Meese was merely respecting precedent in showing greater acceptance of the Court's more functional definition of the separation of powers than he had the Department of Justice argue in those cases.[201] Nevertheless, at the Symposium, Attorney General Meese adhered to evaluating the vice presidency solely in terms of executive achievement. How the late Justice Scalia would meld the formal view of separated power he shared with Attorney General Meese with Justice Scalia's Office of Legal

191. *George H.W. Bush, 43rd Vice President (1981–1989)*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/generic/VP_George_Bush.htm (last visited Feb. 6, 2017).

192. *See* Cheney et al., *supra* note 37, at 549–50.

193. *See infra* note 197 and accompanying text.

194. David Schoenbrod, *How the Reagan Administration Trivialized Separation of Powers (and Shot Itself in the Foot)*, 57 GEO. WASH. L. REV. 459, 460 (1989); INS v. Chadha, 462 U.S. 919, 923 (1983).

195. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

196. Kate Stith, *The Arc of the Pendulum: Judge, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1432–33 (2008).

197. *See* Schoenbrod, *supra* note 194, at 460; Morrison v. Olson, 487 U.S. 654, 668–69 (1988).

198. *See Chadha*, 462 U.S. at 959.

199. *Mistretta*, 488 U.S. at 412.

200. *Morrison*, 487 U.S. at 697.

201. *See* Cheney et al., *supra* note 37, at 549–50.

Counsel view of the vice presidency as independent is not known. That said, when Scalia's reasonable conclusion of vice presidential independence is combined with the textual capacity of the Vice President to cast a tie-breaking vote when the Senate is evenly divided, leaves the Vice President as the only explicit means within the constitutional document for getting past dysfunction and stalemate.[202] When the Vice President is reduced to being merely a deputy to the President, however, the question of whether the President can deploy him or her to undertake executive responsibility is constitutionally problematic. While contemporary vice presidents have undertaken this executive work with some notable success as a loyal partisan of the President, we can see that there is an opportunity cost to such success, and it is the loss of the independent capacity of the Vice President to be the occasion for bargaining between the Executive and Legislative Branches. Losing that bargaining capacity was a substantial loss in the pre-Trump polarized age of gridlock and inaction.[203] It is far too early to assess whether President Trump's unusual method for forcing his perspective will resolve dysfunction by other means.

VIII. ADDITIONAL MEANS OF OVERCOMING DYSFUNCTION

Even if the Vice President is perceived as independent and far more than an afterthought, it is unlikely that the suggested change in the conception of that office alone will supply the workable government Justice Jackson opined needed to be forged out of separated power.[204]

While it is beyond the scope of the present Symposium inquiry, let us briefly contemplate additional possibilities for workability. One such possibility would be simultaneously combining service in Executive and Legislative office.[205] This is ground that has been initially well explored by Professor Stephen Calabresi. Professor Calabresi's fine work reveals that such construction would almost certainly require constitutional amendment in order to be reconciled with the Incompatibility, Ineligibility, and Emolument Clauses.[206] Calabresi and his coauthor Joan Larsen disfavor this

202. U.S. CONST. art. I, § 3, cl. 4.

203. *See supra* Part VIII.

204. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

205. *See* Goldstein, *supra* note 36, at 515 (asserting that the "framers created the vice presidency as something of a constitutional hybrid between the Executive and Legislative Branches").

206. *See generally* Calabresi & Larsen, *supra* note 16, at 1098–1100 (noting that "reform

change, but consistent with the rethinking of the vice presidency, more attention is needed.[207]

The Incompatibility Clause prevents members of Congress from serving in the Cabinet—at least without resigning from their congressional posts.[208] This effectively prevents the kind of parliamentary unity that exists under British cabinet government.[209] Article I, Section 6, Clause 2 of the U.S. Constitution provides that "no person holding any office under the United States, shall be a member of either House during his continuance in office."[210] The provision prudently divides power to prevent abuse, but it has also kept the Executive and Legislative Branches in separation, not unity of purpose.[211] That may not have been its intent.[212] As Stephen Calabresi and Joan Larsen write: "[T]he Incompatibility Clause . . . was intended to be a constitutional ethics rule [and] not a mainstay of the separation of powers."[213] So too, the Ineligibility Clause, which appears nearby in Article I, provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."[214] One is not to benefit from one's own legislative handiwork by occupying an office one has created or increased.[215] Also in the same vicinity is Article I, Section 9—the Foreign Incompatibility Clause—which is designed to prevent corruption by grants of title of nobility.[216] This provision guards against bribery or foreign corrupt influence.[217] Finally is the provision that "no

literature typically lists the proposal to gut the [Incompatibility] Clause as just one item on a whole menu of constitutional amendments aimed at narrowing the gulf between the Legislative and Executive departments").

207. *See id.* at 1109.

208. U.S. CONST. art. I, § 6, cl. 2.

209. Calabresi & Larsen, *supra* note 16, at 1048.

210. U.S. CONST. art. I, § 6, cl. 2.

211. Calabresi & Larsen, *supra* note 16, at 1046.

212. *Id.* at 1048, 1062–63.

213. *Id*. at 1062–63.

214. U.S. CONST. art. I, § 6, cl. 2.

215. *See* Calabresi & Larsen, *supra* note 16, at 1064 ("The goal here is plainly to stop corruption by banning [Members of Congress] from ever benefiting personally from the creation of new government offices or from general pay raise bills.").

216. U.S. CONST. art. I, § 9, cl. 8.

217. *See* Calabresi & Larsen, *supra* note 16, at 1064 (explaining that the Foreign Incompatibility Clause is "plainly an anti-bribery measure").

Senator or Representative or person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[218] Again, the framers desired to eliminate corruption of a vote out of a desire to retain Executive office.[219]

In the Constitutional Convention debates, there was expressed concern over the possible unintended consequences of these provisions: Hamilton observed, "We have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government."[220] Along these lines, the Federalists worried that an American President without the ability to give offices to favored individuals would be nothing more than a figurehead.[221]

Madison likewise feared that there would be less incentive for people to run for Congress if they were ineligible for national executive or administrative positions.[222] To address this concern, Madison sought a compromise: he would preclude members of Congress only from serving in those offices that they themselves established or that they themselves enhanced in terms of compensation.[223] Madison's compromise was not adopted, however, because Republican voices argued that if people would not serve in public office without the lure of executive appointment, the culture had become base indeed.[224] Moreover, the opponents of joint executive–legislative appointment reasoned that it would always be possible to find ways around the limitations.[225] Calabresi and Larsen reference Roger Sherman's observation "that a cunning legislator could avoid the rule by creating a new office and arranging for the appointment of an existing officer to the new post, thus opening the vacated office for himself."[226]

Calabresi and Larsen argue that providing greater executive reliance

218. U.S. CONST. art. II, § 1, cl. 2.

219. *See* Calabresi & Larsen, *supra* note 16, at 1065.

220. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 381 (Max Farrand ed., rev. ed. 1987) (June 22, 1787).

221. *See id.*; Calabresi & Larsen, *supra* note 16, at 1072–73 (noting that advocates supporting a strong Executive debated at the Federal Convention about whether the President would "in reality have any strength or independence" and that Federalists feared the President would be an "impotent figurehead").

222. Calabresi & Larsen, *supra* note 16, at 1074.

223. *Id.* at 1075.

224. *Id.* at 1076.

225. *Id.*

226. *Id.*

upon members of Congress would weaken the presidency.[227] Perhaps, but could not an astute President avoid overdependence on the legislative members of his cabinet, and would not the net benefits seem largely to overwhelm the risk? As a matter of logic, moreover, resigning a congressional seat to accept an executive appointment poses its own difficulty. Inevitably, it raises justifiable revolving-door criticism and a suspicion that service with the Executive is aimed at the short-term purpose of gaining administrative influence in order to sell it on K St.[228] By contrast, simultaneous executive–legislative service should be easier to monitor and, of course, as a formal matter, members—unlike former members—would be subject to the ethical codes of both the Executive and the Legislative Branches.[229]

Aligned against the Incompatibility Clause was the prescient voice of Justice Joseph Story, who perceived the great disadvantage of not allowing the President to choose a cabinet from sitting members of Congress.[230] In Justice Story's opinion, the Clause destroyed any hope of an accountable government in America.[231] Because the Constitution bars Cabinet members from simultaneously serving in Congress, the government is compelled to entrust its legislative proposals to others, "who are either imperfectly acquainted with the measures, or are indifferent to their success or failure."[232] Anyone who has ever served in a presidential transition realizes how much reinvention of the wheel is necessitated by having to go outside of those legislatively familiar with existing laws and regulations.[233] In place of bringing experienced legislative voices into the executive who in turn could secure the passage of the President's policies, Story anticipated that

227. *See id.* at 1106 ("[T]he *actual* effect of the Incompatibility Clause is to strengthen the [P]resident. Its repeal would weaken him without actually killing him off.") (emphasis added).

228. *Id.* at 1079–80 (citing political science research showing that politicians with the goal of working in a particular office in the future will tailor their current job behaviors to that end).

229. *But see id.* at 1110–11 (noting that members of Congress would likely still pursue their own agendas if moved to the Cabinet, were they to be operating in both Executive and Legislative Branches). *See generally id.* at 1077–86 (explaining the potential for ethics violations when legislative members seek executive appointments while still in Congressional office).

230. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 334 (1833).

231. *Id.*

232. *Id*. at 333–34.

233. *See* Calabresi & Larsen, *supra* note 16, at 1085 (explaining how Congressional members' friends, family, staffers, and former colleagues had "political savvy" that made them "a bit *more* able than many other Reagan or Bush Administration officials") (emphasis added).

less visible blandishments would need to be offered to obtain any legislative success.[234] "[P]rivate intrigues, political combinations, irresponsible recommendations, and all the blandishments of office, and all the deadening weight of silent patronage" would become the President's tools for getting his programs through Congress, Story determined.[235]

Finally, Story argued that the President would see more clearly the necessity for high talent to be brought into his cabinet if he could rely on current members of Congress.[236] Story predicted that because the Cabinet members would be forced to participate in the work of the legislature and would be required to defend aggressively the government's position in Congress, the President would feel compelled to choose appointees "not from personal or party favourites, but from statesmen of high public character, talents, experience, and elevated services."[237]

IV. REVIVING POLITICAL PARTIES

If methods of integration of executive and legislative interests cannot be found within the Constitution because of the incompatibility provisions, it may well be that it is time to reevaluate the nature and authority of political parties. The framers were repulsed by party government.[238] George Washington was unequivocal on this in his farewell address instructing that we should guard against "the baneful effects of the spirit of party."[239] Yet, there was a problem: those effects of party that were so baneful and

234. STORY, *supra* note 230, at 334.

235. *Id.*

236. *Id.* at 335.

237. *Id.* at 335. Incompatibility clauses were also targeted by Woodrow Wilson. Wilson's opposition to these provisions found first exposition to his student days at Princeton. As Calabresi and Larsen admit and succinctly summarize:

> While still an undergraduate at Princeton University, Woodrow Wilson, borrowing from Justice Story's critique of the Incompatibility Clause, wrote a paper arguing that in order to have truly responsible government, not only should the President's Cabinet be *allowed* in Congress, but the President should be *required* to choose his Cabinet from the ranks of Congress, and to resign when the government lost the support of the legislature.

Calabresi & Larsen, *supra* note 16, at 1107 n.313 (emphasis added) (citing Woodrow Wilson, *Cabinet Government in the United States*, *in* THE PAPERS OF WOODROW WILSON, 493, 497 (Arthur S. Link ed., 1966)); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 102, 284–85, 318 (Boston, Houghton, Mifflin & Co., 15th ed. 1913) (1885).

238. *See infra* note 239 and accompanying text.

239. *See* GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS, S. Doc. No. 106-21, at 16 (2000), https://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

unwanted in polite Virginia society proved to be indispensable to operating a government.[240] One of the best introductions to the practical utility of political party to overcome entrenched division is that of James Sundquist and Lloyd Cutler, both of whom concluded that when the framers attempted to run the government they created, they found they could not do it without political parties. [241]

Party government worked because it allowed each party to present its program to the public, and straight-ticket balloting could deliver a unified government to secure its accomplishment.[242] For a good long time, secrecy of the ballot was not observed in America.[243] Rather, as Sundquist and Cutler reveal, one would go to the polls, request the ballot of one's favored party from the representative of the party, and drop the ballot in the box.[244] The notion of splitting one's ticket in complete secrecy was not the way it was done.[245] In the view of Mr. Cutler and Brooking's James Sundquist, it is the ability to split one's ballot that has yielded—for the last fifty years—the phenomenon of an ever-worsening divided government.[246]

Political theorists have been candid: for party government to succeed, the party has to overcome—as Justice Jackson opined—the challenges of the separation of powers.[247] As political scientist V.O. Key Jr. observed: "For government to function, the obstructions of the constitutional mechanism must be overcome. And, it is the party that casts the web, at times weak, at times strong, over the dispersed organs of government and gives them a semblance of unity."[248] From 1884 to 1956, there were seventeen presidential elections, and every entering president had a Congress made up of his own party.[249] For the most part, the opposite is true today.[250] Mr.

240. *See infra* notes 241–42 and accompanying text.

241. James L. Sundquist, *The Question Is Clear, and Party Government Is the Answer*, 30 WM. & MARY L. REV. 425, 425–32 (1989); Lloyd N. Cutler, *Now Is the Time for All Good Men*, 30 WM. & MARY L. REV. 387, 389 (1989).

242. Sundquist, *supra* note 241, at 426.

243. *Id.*

244. *Id.*; Cutler, *supra* note 241, at 393.

245. Sundquist, *supra* note 241, at 426–27.

246. *Id.*; Cutler, *supra* note 241, at 392–93.

247. *See infra* note 248 and accompanying text; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

248. Sundquist, *supra* note 241, at 427.

249. *Id.* at 428.

250. *See* Mike Dorning & Jonathan Allen, *How Obama Lost the Senate*, BLOOMBERG (Nov. 4, 2014), http://www.bloomberg.com/politics/articles/2014-11-05/republicans-gain-from-voter-dissatis

Cutler made a number of other recommendations, including a federal statute that would create a two-stage election, with the presidency being determined first and House and Senate elections several weeks later, to allow the people the opportunity explicitly to either create a unified or divided government.[251]

X. THE SELECTION OF VICE PRESIDENTIAL CANDIDATES

If the Scalia view of the Vice President as independent were to take hold, the importance and method of vice presidential selection would loom large. As a formal matter, it is clear "that the Vice President owes his position to the Electoral College (and indirectly to the electorate), not the occupant of the Oval Office."[252] Several times during the Symposium, Vice President Cheney dismissed constitutional concerns with the terse comment: "Well, it is the President's administration," while adding that he owed his position to the President.[253] Respectfully, this is mistaken.[254] Political custom obscures this, however, by allowing the ultimate decision of who will stand as the vice presidential candidate to a party's presidential candidate.[255] This arguably affects the way a vice president is evaluated by the public. Voters should be evaluating the Vice President in terms of his

faction-over-economy; *see also* Jonathan Hobratsch, *The Second Term Midterm Presidential Curse*, HUFFINGTON POST (Oct. 30, 2014), http://www.huffingtonpost.com/jonathan-hobratsch/the-secondterm-midterm-pr_b_6072276.html (noting that four two-term presidents, from Eisenhower to George W. Bush, "concluded their final two years in office without the support of either house of Congress"). Although one has to speculate that the prior kerfuffle over the candidacy of President Donald Trump suggests that the Democrats at least have found a way to unify the government, to the chagrin of the GOP, President Trump hardly seemed to be a party man. *See* Molly Ball, *The Party of Donald Trump?*, ATLANTIC (July 14, 2016), http://www.theatlantic.com/politics/archive/2016/07/the-party-of-donald-trump/491231/; Conor Friedersdorf, *Donald Trump's Threats Against Minorities Are Unifying Democrats*, ATLANTIC (July, 26, 2016), http://www.theatlantic.com/politics/archive/2016/07/donald-trumps-threats-against-minorities-are-unifying-democrats/493004/.

251. Cutler, *supra* note 241, at 400–02.

252. Brownell, *Independence of the V.P.*, *supra* note 163, at 306.

253. Dick Cheney, 46th Vice President of the U.S., Address at the *Pepperdine Law Review* Symposium: *The United States Vice-Presidency: In History, Practice, and the Future* (April 1, 2016), http://pepperdinelawreview.com/the-united-states-vice-presidency-in-history-practice-and-the-future/.

254. Brownell, *Independence of the V.P.*, *supra* note 163, at 306 ("[T]he Constitution's text makes clear that the Vice President owes his position to the Electoral College (and indirectly to the electorate), not to the occupant of the Oval Office.") (footnote omitted).

255. *See id.* Lee Sigelman & Paul J. Wahlbeck, *The "Veepstakes": Strategic Choice in Presidential Running Mate Selection*, 91 AM. POL. SCI. REV. 855, 855 (1997) (noting that presidential nominees have selected their own running mates since 1940).

own capability to produce workability, not how well he compliments the President. Typically, a vice presidential running mate is usually only announced at the convention with a vote of acclamation following. Not surprisingly, Ronald Reagan, who has gained an almost deified status in the GOP, is said to have broken the mold by selecting Richard Schweicker of Pennsylvania almost a month in advance of the convention in 1976 in order to gain advantage over Gerald Ford.[256] Reagan's gambit narrowly failed, but it at least set a pattern of more carefully vetting potential vice presidential candidates and preconvention announcements well in advance.[257] For example, Mitt Romney tapped Congressman Paul Ryan, the present Speaker of the House, three weeks before the 2012 convention.[258] Like so much that is now stage managed for maximum media impact, Romney introduced Ryan standing astride the USS Wisconsin, a carrier named for Ryan's home state.[259]

The current vice presidential candidate selection process may be sufficient for a person perceived to be relevant only in the event of death, resignation, or removal, but it is hardly ideal for evaluating how well the vice presidential candidate advances workability.[260]

XI. SHOULD VICE PRESIDENTIAL CANDIDATES BE CHOSEN BY MEANS OTHER THAN BY THE PRESIDENTIAL NOMINEE?

Should vice presidential candidate selection be accomplished by a more transparent, democratic means? One possibility would be to have political conventions determine the vice presidential nominee.[261] More expensively—but awkwardly, given the exhausting nature of presidential

256. Matt Negrin, *Risky Strategy that Doomed Reagan in '76 Could Boost Democrats*, BOS. GLOBE (Feb. 24, 2008), http://archive.boston.com/news/nation/articles/2008/02/24/risky_strategy_that_doomed_reagan_in_76_could_boost_democrats/?page=full.

257. *See Selecting a Vice President: Advice for Presidential Candidates*, BIPARTISAN POL'Y CTR. (Apr. 2016), http://bipartisanpolicy.org/library/selecting-a-vice-president-advice-for-candidates/.

258. Matt Viser & Bryan Bender, *Romney Taps Ryan, Shakes Up Race*, BOS. GLOBE (Aug. 11, 2012), https://www.bostonglobe.com/news/politics/2012/08/11/mitt-romney-chooses-paul-ryan-running-mate/8VGZE7REz89yUpftzPrH8H/story.html.

259. *Id.*

260. Sigelman & Wahlbeck, *supra* note 255, at 855. It has been the custom since 1940 to have presidential nominees choose their own vice presidential candidates. *Id.*

261. *E.g.*, Albert, *supra* note 36, at 888; Michael Leahy, *Isn't There a Better Way to Pick a Vice President?*, WASH. POST (Oct. 14, 2011), https://www.washingtonpost.com/opinions/isnt-there-a-better-way-to-pick-a-vice-president/2011/09/27/gIQAFE7dkL_story.html.

primaries—a separate vice presidential primary pre- or post-convention might be pursued.[262] The First Amendment associational right secures the right of each party to determine its own rules, subject to constitutional guarantees of nondiscrimination, but do the means foster the desired executive–legislative harmony?[263]

It is unclear. On the one hand, as Vice President Cheney argued, if a change in mechanism of candidate selection made it less possible for the President to find at least basic compatibility with the Vice President, such intraparty squabbling could well impede bargaining with the opposition;[264] however, the contrary supposition would be that the Vice President, with a complementary but different perspective than the President, would enhance the ultimate credibility and independence needed by the Vice President to perform a unifying role.[265] Arguably, efforts to balance the ticket geographically, philosophically, and demographically would avoid a vice president of anticipatory antagonistic views.[266] There is independence and there is intolerable insubordination, and presumably a rational mind can discern the difference.[267] In this regard, Albert Gallatin observed: "I know that nothing can be more injurious to an Administration than to have in [the vice presidency] a man in hostility with that Administration; as he will always become the most formidable rallying point for the opposition."[268]

262. *E.g.*, Albert, *supra* note 36, at 855.

263. *See* Julia E. Guttman, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 123 (1984) (stating that the "freedom of association necessarily includes a right of political association which protects the right to form a political party for the advancement of partisan political beliefs"); Terry v. Adams, 345 U.S. 461, 469–70 (1953) (holding that white-only primaries are discriminatory and unconstitutional).

264. *See* Cheney et al., *supra* note 37, at 548–49.

265. *See supra* Part IX; Albert, *supra* note 36, at 894 (noting that modern-day American political practices have transformed the vice presidency into a "commanding hub of power and influence in Washington and across the globe.").

266. *See supra* part IX; Sigleman, *supra* note 255, at 856 (noting that the important question in evaluating the Vice President's characteristics is how they "relate to the presidential nominee").

267. *See* Brownell, *Independence of the V.P.*, *supra* note 163, at 364–67 (dispelling concerns that an independent Vice President would be unaccountable).

268. *Id.* at 325 (citing JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 289 (1993)).

XII. CONCLUSION

We can do better. Understanding the vice presidency as not merely a curious afterthought, but as a deliberate intermixing of the executive and legislative authority reveals the extent to which this encourages an independence of mind capable of transcending partisan division, especially at those times where the Executive and Legislative Branches are held by opposing parties. Such an understanding could render the office particularly well suited to address gridlock and stalemate in ways more tangible than even the most unctuous call for bipartisanship.[269] Properly understood, the office of the vice presidency can be the locus of a new era of executive–legislative cooperation in the fulfillment of not just campaign promise, but of the promise of the Constitution of a workable government. It is hardly surprising that an early effort to spell out this constitutional vision of the vice presidency focused on making the Vice President the head of the Civil Service.[270] Only an uncongenial and overly formalistic conception of the separation of powers stood in the way.[271] As one scholar observed: "[A] politically independent Vice-President was a very real possibility, and might have significantly altered the practice of executive administration."[272]

It still can. It should.

269. *See* Greg Hinz, *Obama Calls for Bipartisanship—But Voters Are Humming a Different Tune*, CRAIN'S CHI. BUS. (Feb. 10, 2016), http://www.chicagobusiness.com/article/20160210/BLOGS02/160219991/obama-calls-for-bipartisanship-but-voters-are-humming-a-different-tune.

270. Brownell, *Constitutional Chameleon, Part II*, *supra* note 77, at 320.

271. *See id.*

272. Hawley, *supra* note 118, at 1560.