THE INDEPENDENCE OF THE VICE PRESIDENCY

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INTRODUCTION

Public portrayal of the Vice President’s standing in relation to the President suffers from a trio of shortcomings. One is that the Vice President is often characterized, either explicitly\(^1\) or implicitly,\(^2\) as

\[^1\] See, e.g., THOMAS E. CRONIN & MICHAEL A. GENOVESE, THE PARADOXES OF THE AMERICAN PRESIDENCY 316 (1998) (“Foremost among the attributes of an effective president are independence and strength of character . . . . A vice president, on the other hand, . . . must always be loyal and self-effacing while trying to avoid being obsequious. . . . To paraphrase Cat Stevens . . . a vice president, in effect, says, ‘From the moment I was elected, I was ordered to listen.’”) (emphasis added); id. at 333 (“[W]hatever the president decides, the vice president has to support.”) (emphasis added); id. at 327 (“I did not become vice president with President Johnson to cause him trouble. I feel a deep sense of loyalty and fidelity. I believe that if you can’t have that you have no right to accept the office. Because today it is so important that a president and his vice president be on the same wave length . . . .”) (quoting Hubert Humphrey); JAMES E. HITE, SECOND BEST: THE RISE OF THE AMERICAN VICE PRESIDENCY 45 (2013) (“If the historical view of the vice presidency has emphasized its futility, a companion view has persisted that vice presidents are reliable and willing to loyally support their president and the administration to which they are attached.”); id. at 120 (“[O]ne of the cardinal rules adhered to by all vice presidents and presidents: the vice president should never publicly disagree with the president.”); ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 365 (1986) (“The compatibility requirement [between President and Vice President] . . . . makes Vice Presidents the lackeys and messenger boys of Presidents and ensures the corruption of their independence and self-respect.”) (emphasis added); id. at 366 (“If he [the Vice President] makes a militarist or a pacifist or a zealot or a fool of himself, it is always supposed that he is doing so at the behest of his President. No doubt he is . . . .”); Richard D. Friedman, Some Modest Proposals on the Vice-Presidency, 86 MICH. L. REV. 1703, 1708 (1988) (“[The Vice President] casts a deciding vote if the Senate is tied, but the vote cannot truly be considered his own. . . .”); Hugh Heclo, Henry F. Reuss & Arthur M. Schlesinger, Jr., Comments, in, A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 17 (Michael
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Nelson ed., 1988) [hereinafter A HEARTBEAT AWAY] ("[O]nce nominated . . . [the Vice President] may privately reject but could not, as vice president, publicly oppose [the President’s policies] . . . ") (emphasis added); Michael Nelson, Vice President, in, THE PRESIDENCY A TO Z 457, 487 (Michael Nelson ed., rev. ed. 1994) ("[V]ice presidents may come to seem weak and parrotlike, always defending the ideas of another while submerging their own thoughts and expertise. Vice Presidents also may feel compelled to defend policies with which they profoundly disagree."); Joseph A. Pika, The Vice Presidency: New Opportunities, Old Constraints, in THE PRESIDENCY AND THE POLITICAL SYSTEM 496, 505 (Michael Nelson ed., 4th ed. 1995) ("Today it is practically inconceivable that a vice president would publicly oppose a president’s nominee . . . or openly question administration policy, steps that were not uncommon as recently as the 1930s."); id. at 508 ("[D]isplaying absolute loyalty . . . [is an] essential part[ ] of the [vice presidential] job description."); id. at 525 ("[V]ice presidents are accountable to an elected superior and must gear their own activities toward satisfying the president.") (emphasis added); Gerald R. Ford, On the Threshold of the White House, THE ATLANTIC MONTHLY, July 1974, http://www.theatlantic.com/past/docs/issues/74jul/fordhumphrey.htm ("Some say the Vice President does whatever the President wants him to"); cf. A HEARTBEAT AWAY, supra at 10 ("to become vice president is to be bound, by tradition if not by law, to the president’s public policies and private direction."); Robert G. McCloskey, Letter to the Editor, Humphrey’s Compliance Criticized, N.Y. TIMES, June 20, 1968, at 44 [hereinafter McCloskey] ("[O]ne . . . encounters the suggestion that the Vice President is duty bound to be endlessly compliant, that a hint of independence [from the President] would have been incongruous and unthinkable."); The President Giveth and Taketh Away, TIME, Nov. 14, 1969, at 47 (quoting Hubert Humphrey: “Anyone who thinks that the Vice President can take a position independent of the President or his Administration simply has no knowledge of politics or government. . . . Why, could you imagine what would happen to a Vice President who publicly repudiated his Administration!?"

2. The President is regularly referred to as the Vice President’s “boss” and the Vice President as his “subordinate.” These terms reinforce the mistaken notion that the Vice President works for the President and is not independent of him. See, e.g., Clinton v. Jones, 520 U.S. 681, 711 (1997) (Breyer, J., concurring) ("[T]he President, along with his constitutionally subordinate Vice President[,] is the only official for whom the entire Nation votes . . . .") (emphasis added); Gerald W. Johnson, Our Imaginary Vice, 39 AM. SCHOLAR 387, 390–91 (1970) (referring to the Vice President as "a subordinate in the executive branch."). The news media frequently encourage this view. See, e.g., Aamer Madhani, Vice President Joe Biden Leads Defense of President, DETROIT FREE PRESS, Sept. 7, 2012, http://www.freep.com/article/20120907/NEWS15/309070176/Biden-leads-defense-of-president ("Vice President Joe Biden offered a stout defense Thursday of President Barack Obama’s tenure in the White House, using his address to the Democratic National Convention to hail his boss for steering the country out of the worst economic crisis in generations and making the case for a second term.") (emphasis added); Aliyah Shahid, Dick Cheney, Former Vice President, on Gay Marriage on ‘The View’: I Don’t Have a Problem With It, N.Y. DAILY NEWS, Sept. 14, 2011, http://articles.nydailynews.com/2011-09-14/news/30177783_1_gay-marriage-dick-cheney-mary-and-heather ("Cheney’s boss, George W. Bush, backed a constitutional amendment prohibiting gay marriage while in office.") (emphasis added); Robert P. Watson, The Best/Worst Vice Presidential Picks in History . . . and Paul Ryan, HUFF. POST, (Sept. 5, 2012, 10:25AM) http://www.huffingtonpost.com/robert-watson/the-bestworst-vice-presid_b_1857576.html (Agnew “violate[d] the cardinal rule that the VP shall not embarrass the boss!”) (emphasis added). For definitions of “subordinate” and “boss,” see, for example, THE RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1895
lacking independence from the President. The Vice President is widely viewed as ready and willing to do all that the President asks, whenever he asks it; the prototypical “company man.”\footnote{3} As a result, it is often assumed the Vice President \textit{must} do his bidding. However, such assertions confuse political prudence with constitutional prescription. This article will emphasize that, as a constitutional matter, the Vice President is independent\footnote{4} from the President\footnote{5} and can and does

(2d ed. 2001) [hereinafter \textit{Random House}] (defining “subordinate” as “subject to or under the authority of a superior . . . subservient or inferior . . . dependent”) (emphasis added); \textit{Webster’s Third New International Dictionary of the English Language Unabridged} 2277 (1981) [hereinafter \textit{Webster’s}] (defining “subordinate” as “submissive to or falling under the control of a higher authority”); \textit{Random House}, supra at 244 (defining “boss” as “a person who makes decisions, exercises authority, dominates”); \textit{Webster’s}, supra at 257 (defining “boss” as “someone who exercises control or authority”).

For other examples of the view that the Vice President lacks independence, see Amie Parnes, \textit{Obama Lets Biden Talk Off-Script}, \textsc{The Hill} (Oct. 4, 2012, 12:16AM), http://thehill.com/homenews/campaign/260137-obama-lets-biden-talk-off-script (“President Obama’s campaign is letting Joe be Joe on the campaign trail—not requiring Vice President Biden to stick to the script.”) (emphasis added); \textit{The President Giveth}, supra note 1 (“[D]on’t think he’s [the Vice President’s] not acting under orders.”).

3. \textit{See}, e.g., Hite, supra note 1, at 45–46; Schlesinger, supra note 1; Pika, supra note 1.

4. For purposes of this article the word “autonomous” will be used interchangeably with “independent.”

5. A related issue, though beyond the scope of this article, is that the Vice President is also independent of the Senate. \textit{See infra} note 238 and accompanying text (discussing Vice President Thomas Marshall’s actions in opposition to his party’s Senate leadership); \textit{infra} note 380 and accompanying text (quoting Vice President Gerald Ford about his independence from Congress). Admittedly, the Senate, through its rulemaking power, has some leverage over the Vice President as it can delegate authority to him and rescind or limit such delegations. For example, on a few occasions the Senate has assigned the Vice President authority to name senators to committees. \textit{See} \textsc{I George H. Haynes, The Senate of the United States: Its History and Practice} 211 (1960). The Senate’s power to delegate (and rescind or modify such delegations) is akin to the President’s authority to assign tasks to the Vice President in the executive branch. Also similar to the President’s relationship with the Vice President is that there are limits to what the Senate can take away from the Vice President. The Vice President’s authority to preside over the upper chamber and break ties cannot be diluted by the Senate. \textit{See}, e.g., \textsc{Patrick Henry to John C. Calhoun} (Aug. 5, 1826), \textit{in An Argument on the Duties of the Vice-President of the U. States as President of the Senate, and on the Manner in Which They Were Discharged During the First Session of the 19th Congress by the Honorable John C. Calhoun} 33, 38 (Philip Ricard Fendall ed. 1827) [hereinafter \textit{Fendall}] (“[T]he Senate cannot, under any notion of ‘determining the rules of its proceedings,’ suspend the powers of the President ordained to it by the Constitution.”); \textit{Onslow in Reply to Patrick Henry, Letter I} (John C. Calhoun) 3, 4 (1826) [hereinafter \textit{Onslow Letter}] (“[A]ny abridgment of those [vice presidential constitutional] powers by the Senate would be a palpable Infraction of that Constitution.”), \textit{see also} \textsc{Akhil Reed
take actions and public positions that are contrary to the latter’s wishes.6

A second problem in discussions of presidential-vice presidential relations is that, while some authorities properly note the Vice President’s independence,7 they fail to analyze this trait in any detail.8 It


The Vice President is also accountable to the Senate in the sense that the body, along with the House, can impeach and remove him. See Patrick Henry, supra at 40 (“As the Senate would have cognizance of a high misdemeanour committed by the Vice-President, in his capacity of its presiding officer, he cannot be said to be ‘irresponsible’ to the Senate . . . .”). He is not subject to the same disciplinary measures that the Senate can impose on its own members, however. The author would like to thank Mort Rosenberg for raising this issue.

On the other hand, in another context, the Vice President can be considered unaccountable to the Senate. Unlike the Speaker or Senate Majority Leader, the Vice President, qua presiding officer, has only once been elected by the chamber’s members. Moreover, he cannot be toppled from leadership by the body.

6. Just as no official can instruct the Vice President how to cast his tie-breaking vote, exercise his Twenty-Fifth Amendment duties or opine on public policy matters, no one can instruct lawmakers how to do something within their official capacity (e.g., how to vote, whether or not to introduce legislation or make a floor speech). They may feel considerable political pressure from others, such as party leadership, their peers or the President, but they are not compelled to act or to refrain from acting.

7. See, e.g., Paul C. Light, Vice-Presidential Power: Advice and Influence in the White House 119 (1984) (“The President cannot compel activity” out of the Vice President); Sidney M. Milkis & Michael Nelson, The American Presidency: Origins and Development, 1776–1993 420 (2d ed. 1994) (“The vice president is a constitutionally independent official whom the president cannot command or remove, at least not in the usual sense . . . .”); Allan P. Sindler, Unchosen Presidents: The Vice President and Other Frustrations of Presidential Succession 29 (1976) (“The formal position of the vice-president [is not] . . . subject to the direction of the president, [which] underscores the anomaly of that office.”); Thomas E. Cronin, Rethinking the Vice-Presidency, in Rethinking the Presidency 324, 324 (Thomas E. Cronin ed., 1982) (“Technically a vice-president is [not] . . . subject to the direction of the president.”); Michael Nelson, Background Paper, in A Heartbeat Away, supra note 1, at 64 [hereinafter Nelson] (“The vice presidency . . . is constitutionally independent . . . . [T]he president cannot command the vice president to do or not do anything, nor can the president fire the vice president.”); Vice President, in The Oxford Guide to the United States Government 676 (John J. Patrick et al. eds. 2001) (“Constitutionally, the Vice President is not a subordinate of the President, who has no power to issue orders to the Vice President and who cannot remove him from office.”); Memorandum from Antonin Scalia, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Kenneth A. Lazarus, Assoc. Counsel to the President 3 (Dec. 16, 1974) (on file with author) [hereinafter Scalia Memo] (“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. Just as the President cannot remove the Vice President, it would seem he may not dictate his standards of conduct.”); Jonathan Steven Greenberg, The Vice-Presidency: The Place of Forty Two Men in the American Constitutional and Political System (Apr. 5, 1982) (unpublished Senior Honors Thesis, Duke University)
has been largely left as an unexamined assumption. This article will attempt to fill this void and review closely the legal sources of, and justifications behind, vice presidential independence.

Finally, many of the same authorities who recognize the Vice President as constitutionally independent believe this characteristic is little more than a theoretical proposition. They contend that vice presidential autonomy as a practical matter is, or at least has recently become, a dead letter. These scholars end up in the same place as those who question or reject entirely the office’s independence. Thus, there is a rough consensus that the Vice President lacks autonomy, be it either constitutional or practical. This article cuts against the grain and argues that the Vice President is independent in both respects.

To this end, numerous historical episodes—many of which have been long since forgotten—will be reviewed. These examples highlight the Vice President’s independence. They have occurred when vice presidents have: 1) taken public positions contrary to those of President; 2) intentionally preempted the President; 3) publicly asserted their freedom of action; 4) otherwise acted publicly against the President’s wishes through the exercise of their own constitutional powers; or 5) privately refused presidential assignments. The first

(on file with author) 26 (“[T]he Constitution does not make him responsible or subordinate to the President.”); cf. LOUIS CLINTON HATCH & EARL L. SHOUP, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES 11 (1934) (Earl L. Shoup ed., rev. ed., 1970) (“[T]here is attached to the Vice-Presidency another office by nature wholly independent, that of President of the Senate. . . .”).

8. The only discussion of vice presidential independence of any appreciable length is found in Nelson, supra note 7, at 64–69. Yet, even this examination touches only briefly on the legal rationales for vice presidential independence and omits several that are outlined in this article.

9. See SCHLESINGER, supra note 1, at 365 (“The notion that the Vice President must be the echo of the President is relatively new.”); see also Joel K. Goldstein, The New Constitutional Vice Presidency, 30 WAKE FOREST L. REV. 505, 543, 552 n.267 (1995); Heclo et al., supra note 1; Pika, supra note 1.


11. The Vice President’s private disapproval of a course of action taken by the President is distinct from his refusal to accept a presidential assignment. For example, as Vice President, Walter Mondale differed privately with Carter on a number of issues, but he either supported the President’s position publicly or remained silent. See SCHLESINGER, supra note 1, at 359.
four aspects of this definition reflect what David Mayhew calls “position taking.”

Mayhew defines this phenomenon as

the public enunciation of a judgmental statement on anything likely to be of interest to political actors. [For example,] [t]he statement may take the form of a roll call vote. The most important classes of judgmental statements are those prescribing American governmental ends . . . or governmental means . . . . The judgments may be implicit rather than explicit . . . . The position itself is the political commodity.

The fifth aspect of the definition is not public but still manifests the Vice President’s desire to act on his own terms. As will be seen, far from being relics from an ancient past, instances of vice presidential independence have continued right up to the present day.

This article will begin with a discussion of the textual sources of the Vice President’s constitutional autonomy. The major determinant of the Vice President’s independence is that the President may not remove him from office. Textual and jurisprudential considerations both support this notion. Two other constitutional justifications exist over and above the President’s inability to remove the Vice President from office. They include the inapplicability of the Opinion Clause to the Vice President and the officeholder’s status as President of the Senate. As such this part of the discussion will address the first two of the three shortcomings in how the presidential-vice-presidential relationship is seen: the perception that the Vice President lacks independence from the President and the reality that constitutional questions

13. Id. at 61–62.
14. See, e.g., Dick Cheney (with Liz Cheney), In My Time: A Personal and Political Memoir 305 (2011) (“In addition to being the oldest guy in the West Wing, I was also the only one the president couldn’t fire. As vice president, having been elected and sworn in, I carried my own duties as a constitutional officer.”); Milton S. Eisenhower, The President Is Calling 540 (1974) (“Most important of all, the President cannot discharge the elected Vice-President. This point is critical.”); Hite, supra note 1 (“[T]he vice president is the single member of the executive branch the president is powerless to fire. . . .”); Michael Turner, The Vice President as Policy Maker: Rockefeller in the Ford White House 21 (1982) (“the vice president (because of his elected status) is beyond his [the president’s] power of dismissal.”); Clinton L. Rossiter, The Reform of the Vice-Presidency, 63 Pol. Sci. Q. 383, 401 (1948) (“[T]he Vice-President is as irremovable as the Chief Justice . . . .”); Vikram David Amar, Is Governor Sarah Palin Right That the Vice President Has the “Flexibility” to Play a Larger Role in the Legislative Branch? Though the Question is Complex, Palin is Likely in Error, FindLaw (Oct. 9, 2008), http://writ.lp.findlaw .com/amar/20081009.html (“[T]he Constitution’s text does not give the president the power to remove a vice president . . . .”); see also Robert A. Caro, The Years of Lyndon Johnson: The Passage of Power 162–63 (2012).
surrounding the Vice President’s independence have never been scrutinized closely.

Following the segment on the constitutional sources of the Vice President’s independence, the article will examine historical displays of vice presidential autonomy. These will demonstrate that the office’s freedom of action is much more than a theoretical proposition, thus focusing on the third of the three shortcomings. This section constitutes the first attempt in the literature to catalogue and evaluate instances of vice presidential independence. Hitherto these episodes have been viewed as isolated incidents reflecting anomalous vice presidencies. In fact, these instances reflect that independence is inherent in the vice presidential office. The piece will conclude by addressing potential counterarguments.

I. THE REMOVAL POWER AND VICE PRESIDENTIAL INDEPENDENCE

The power of the chief executive to remove senior officials from office is a long-acknowledged presidential power. This authority is directly related to an official’s independence or lack thereof. Common sense dictates that, if Official A can fire Official B, B will tend to do what A wants in order to keep his job, leaving B in a state of dependence. The Supreme Court, in one of its most important decisions on the removal power, *Humphrey’s Executor v. United States*, observed as much: “[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.” And the converse, of course, is true. If an individual cannot be removed by another, the former is independent. In that same vein, the basis for the autonomy of independent agencies is that legislative limitations may be placed on presidential removal of the heads of these entities. Thus, demonstrat-
ing the Vice President is not removable by the President will make clear the former’s constitutional independence.

A. Constitutional Text

There are four mutually reinforcing textual provisions that demonstrate why the Vice President cannot be removed from office by the President and therefore why he is constitutionally independent from the chief executive. First, Article II provides that the Vice President serves a four-year term. It states that the President “shall hold his Office during the Term of four Years, . . . together with the Vice President, [who is] . . . chosen for the same Term . . . .” The corollary to the Vice President serving a four-year term is that he may not be removed from office by the President prior to the conclusion of his term; otherwise, he would not be completing his constitutionally prescribed tenure. This is unlike Cabinet-level officials, who serve at the pleasure of the chief executive. If they defy or displease the President, they face the prospect of presidential removal. Also, unlike the Vice President, a Cabinet secretary is granted statutory duties in an


18. For a brief examination of some of the legal issues involved with a President trying to get rid of a Vice President, see Vikram David Amar, “Commander in Chief”: A New TV Drama Raises Constitutional Questions Worthy of Discussion, FINDLAW (Nov. 11, 2005), http://writ.news.findlaw.com/amar/20051111.html.

19. In addition to the factors provided below, it could also be argued that the President’s inability to remove the Vice President is implicitly borne out by the impeachment process. Article II provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. Under the canon expressio unius est exclusio alterius, inclusion of impeachment as a method of removal for the Vice President could be seen as exclusion of his removal through other means. Cabinet officers, however, can be both removed by the President and removed through the impeachment process, even if a sitting Cabinet secretary has never been impeached and removed. See, e.g., MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 51–52 (2d ed. 2000). Thus, such an argument has only limited resonance.

20. See Nelson, supra note 7, at 64, 69.


22. The exceptions to the four-year term requirement are the Vice President’s elevation to the presidency; his impeachment and removal; and his death, ineligibility or resignation.

23. See, e.g., Myers v. United States, 272 U.S. 52 (1926); see also Cronin, supra note 7, at 333 (“everybody else who works closely with a president can be fired by him.”); BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 100 (2012) (“If [cabinet secretaries] . . . oppose [the President] . . . they get fired.”).
executive branch department and as such is answerable to the President through the Take Care Clause. If the Cabinet secretary does not ensure that the laws are executed in a manner the President believes appropriate, the secretary can be removed since the President is ultimately responsible for executive branch actions.

Second, the 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. While as a matter of political custom the modern presidential nominee selects his party’s vice presidential running mate, the presidential candidate’s selection still has to be approved by the party’s convention delegates. More importantly, as a constitutional matter, the vice presidential candidate must then be chosen separately by the Electoral College, reflecting the will of the voters. The Twelfth Amendment provides as follows:

24. The Vice President does not administer, and is not part of, an executive Department. See infra notes 83–87 and accompanying text.
25. See U.S. Const. art. II, § 3 (“[T]he President shall take Care that the Laws be faithfully executed. . . .”); Myers, 272 U.S. at 117.
26. Myers, 272 U.S. at 117 (“As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that, as part of his executive power, he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.”).
27. Constitutional text does not require that the Electoral College reflect the popular vote within the states. It is up to the individual states to decide how to allocate their respective electoral votes. Nonetheless, today the states’ electoral votes are all allocated in one way or another based on the popular vote. See Lawrence D. Longley & Neal R. Peirce, The Electoral College Primer 99 (1996).
28. See, e.g., Turner, supra note 14, at 21. There are two other ways for a Vice President to take office. If the vice presidency becomes vacant, the President can nominate a Vice President subject to congressional confirmation. See U.S. Const. amend. XXV, § 2; infra note 38. And, if no vice presidential candidate secures a majority of electoral votes, the Senate chooses a Vice President. See id. at amend. XII. See also id. at XX, §§ 3, 4.
29. In 1940, President Franklin D. Roosevelt strong-armed Democratic Party delegates into approving Henry Wallace as the Democrats’ vice presidential candidate. This was the first time in more than a century that a presidential nominee had dictated a vice presidential nominee to a political convention, see Hite, supra note 1, at 46, and it soon became the common practice for both major parties. See, e.g., Nelson, supra note 7, at 33–34, 43.
30. See Scalia Memo, supra note 7, at 3 (“[T]he Vice President is independently elected.”); cf. infra notes 122–23 and accompanying text (quoting John Adams).

It could be argued that vice presidents are not really independent because they are not truly elected separately. State laws prevent voters from “ticket splitting.” See Amar, supra note 18. There is no doubt some tension between the language of the Twelfth Amendment and state law. See Sidney Hyman, The American President
The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each . . . The person having the greatest number of votes for President, shall be the President . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President . . . 31

In essence, the voters put the Vice President in office.

This is not the case with Cabinet secretaries, who are never put before the voters. Instead, Cabinet secretaries draw democratic legitimacy from nomination by a democratically elected President and advice and consent by a democratically elected Senate.32 They are elevated to office as part of the Constitution’s appointment power, which aside from textual exceptions carved out for the Senate, largely resides in the hands of the President.33 With respect to senior-level executive branch appointees, the President has the unilateral authority to nominate such officials,34 to recess appoint them,35 to commission them,36 and to ultimately remove them.37 On the other hand, the President nominates a Vice President only under extraordinary circumstances,38 the President cannot recess appoint him39 and the President

190–91 (1954). Obviously, to the extent that state law is inconsistent (if at all) with the Twelfth Amendment’s admonition to elect presidents and vice presidents separately, the latter must prevail. Moreover, seen another way, the state law issue actually argues for vice presidential independence. Even with current state law making vice presidential candidates “attached at the hip” with their presidential counterparts, vice presidents still take independent actions with surprisingly regularity. Therefore, state law does little if anything to limit vice presidential independence.

31. U.S. CONST. amend. XII (emphasis added).
32. See id. art. II, § 2, cl. 2.
33. See Charles E. Morganston, The Appointing and Removal Power of the President of the United States 28 (1929) (quoting Rep. Elias Boudinot during the First Congress who noted the President has power to nominate, commission and remove senior executive branch officials).
34. See U.S. CONST. art. II, § 2, cl. 2.
35. See id. cl. 3.
36. See id. art. II, § 3.
38. Under the Twenty-Fifth Amendment, the President nominates an individual to be Vice President who must then be confirmed by both houses of Congress. U.S. CONST. amend. XXV § 2. This process is distinct in many ways from that involving Cabinet secretaries, who are subject to advice and consent from the Senate. See Roy E. Brownell II, Can the President Recess Appoint a Vice President?, 42 PRES. STUD. Q. 622, 624–27 (2012).
39. See Brownell, supra note 38.
does not commission him. Therefore, the President does not remove him. Because the public itself puts the Vice President in office, he—like his fellow elected officials—is differently situated from Cabinet secretaries and hence can only be removed through a supermajority process in Congress. In sum, the constitutional parameters surrounding a Cabinet secretary’s tenure are wholly different from those of a Vice President.

A third textual provision underscoring the Vice President’s immunity from the President’s removal power can be found in Section 4 of the Twenty-Fifth Amendment. That provision permits the Vice President to initiate a mechanism against the President’s will to determine presidential inability. It states that:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a

40. See 8 ANNALS OF CONG. 2257 (1799) (statement of Rep. James Bayard) (“It is equally clear that the Vice President is an officer, and yet not commissioned.”); id. at 2272 (Jan. 4, 1799) (defense attorney for Sen. Blount) (dismissing logic under which “the President should issue a commission to himself, [and] to the Vice President . . . . The Constitution, however, is not chargeable with this absurdity. The President and Vice President have their commissions from the Constitution itself . . . .”); CASE OF BRIGHAM H. ROBERTS, OF UTAH, H. REP. NO. 56-85, PT. 1, 56TH CONG., 1ST SESS. 36 (Jan. 20, 1900) (“[T]he provision in the last paragraph of section 3, of article 2, relating to the duties of the President, that he shall commission all the officers of the United States, does not mean that he . . . commission[s] the Vice-President . . . .”). See also Seth Barrett Tillman, Interpreting Precise Constitutional Text: The Argument for a “New” Interpretation of the Incompatibility Clause, the Removal Clause & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz’s Impeachment and Assassination, 61 CLE. ST. L. REV. 285, 314 n.52 (2013).

41. Lawmakers are expelled by a two-thirds vote of their respective house. See U.S. CONST. art. I, § 5, cl. 2. The President and Vice President are removed through the impeachment process (i.e. a majority House vote and a two thirds Senate vote). See id. art. II, § 4; id. art. I, § 2, cl. 5; id. § 3, cl. 6.

42. Paradoxically, to the extent that the Twenty-Fifth Amendment makes the Vice President more a part of the President’s team, in some ways, he could be seen as being made politically less independent. See, e.g., SCHLESINGER, supra note 1, at 365 (“The compatibility requirement [is] . . . now enshrined in the Twenty-fifth Amendment”). See also Goldstein, supra note 9, at 542.
majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.43

Here, the Vice President is expressly authorized to take action counter to the chief executive’s wishes regarding the President’s capacity to govern (subject, of course, to the Cabinet’s approval or that of a separate statutorily created body).44 Depending on the context, the Vice President’s opposition to the President could be reflected in the initial declaration submitted to Congress by the Vice President and the Cabinet (or other body) regarding the chief executive’s fitness. (It would not necessarily be reflected in the first determination as the President could be unable to communicate his wishes; for example, if he were unconscious). But, certainly, the second declaration by the Vice President and Cabinet—in response to the chief executive’s decision to contest the initial declaration—would necessarily be in direct contravention of the chief executive’s wishes since, by definition, the President disputes the assessment of his own incapacity. This express

44. See Joel K. Goldstein, The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships, in MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT 165, 191 (Robert E. Gilbert ed. 2000) [hereinafter MANAGING CRISIS] (“[U]nder Section 4 . . . . [[t]he vice president might find himself at odds with the chief executive . . . over . . . whether the president can do his job . . . . The prospects for an acrimonious encounter with the president would, of course, be greatest when the proposed transfer encounters the president’s opposition.”); see also Robert E. Gilbert, The Genius of the Twenty-Fifth Amendment: Guarding Against Presidential Disability but Safeguarding the Presidency, in MANAGING CRISIS, supra at 25, 33–34 (“Section 4 establishes a procedure . . . provid[ing] for the temporary or even permanent separation of a president from his powers and duties, without his concurrence and possibly even over his strong objections.”); Johnson, supra note 2, at 393 (characterizing Section 4 as authorizing the Vice President to be “insubordinate” to the President).
authority to act contrary to the chief executive underscores the Vice President’s independence.45

Were the Vice President not independent of the President, Section 4 would be a virtual nullity. It would serve little purpose if the Vice President could go to the Cabinet to assert presidential inability and the President could simply cashier both the Vice President and the Cabinet.46 The section’s raison d’être is for the Vice President to take action when the President refuses or is unable to do so.47 Otherwise, Section 3 of the Twenty-Fifth Amendment, which involves voluntary presidential acknowledgement of his own incapacity, would cover all presidential inability scenarios.48 The Vice President in the context of Section 4 actually gives political cover to those who help make the inability determination and who are not independent of the President: his Cabinet members.49 Indeed, Section 4 could be seen as being premised in part on the Vice President’s independent status.

Finally, as will be outlined in more detail below, the Vice President is also President of the Senate. To allow the President to unilaterally remove the presiding officer of the upper house of the legislature would appear to be an invasion of the Senate’s independence.50 After

45. Arguably, to some degree, Section 4 makes the Cabinet independent as well since they too would be acting in contravention of the President’s wishes. However, they are removable by the President and lack other indicia of independence that the Vice President enjoys. See infra Part II. Moreover, Congress has the authority to replace the Cabinet in the inability determination process; it may not do the same regarding the Vice President. See U.S. CONST. amend. XXV, § 4.

46. For a discussion of a hypothetical scenario involving the President firing his Cabinet in the context of an inability determination, see KALT, supra note 23, at 61–62.


48. See U.S. CONST. amend. XXV, § 3.

49. Cf. Nelson, supra note 7, at 15; Ruth C. Silva, Presidential Inability, 35 U. DET. L.J. 139, 169, 171 (1957–58). At the same time, it should be noted that the Cabinet also gives cover to the Vice President, potentially deflecting allegations that the Vice President would be mounting a coup. See FEE RICK, supra note 47, at 61–62; Goldstein, supra note 44, at 194–95. In this respect, the Vice President and Cabinet members serve mutually reinforcing roles.

During President Woodrow Wilson’s incapacity, Secretary of State Robert Lansing consulted with White House staff and the Cabinet about what to do during Wilson’s convalescence. Upon regaining some measure of capacity, Wilson responded by removing Lansing because he deemed him disloyal for having taken such steps. See FEE RICK, supra note 47, at 12–14. This episode informed public debate on presidential disability that preceded adoption of the Twenty-Fifth Amendment. See, e.g., Silva, supra, at 145–47 (noting the concern raised at the time that those who are removable by the President would not be willing to acknowledge the President’s inability).

50. For more on Senate independence, see infra notes 97–109 and accompanying text. It has even been asserted that, since Congress can remove the Vice President
all, the President cannot remove Senators from office nor any Senate officer. Therefore, the Vice President’s part-time status within the legislative branch further underscores that the President cannot remove him from office.

In short, four provisions of constitutional text—those providing for the Vice President’s tenure, his assumption of high office through the Electoral College, his role under Section 4 of the Twenty-Fifth Amendment and his status as President of the Senate—manifest the Vice President’s insulation from the President’s removal power and therefore make evident the office’s constitutional independence.

B. Jurisprudence and Other Persuasive Authority

There is no case law that has directly considered the question of vice presidential independence. However, there is dictum issued by the United States Court of Appeals for the District of Columbia Circuit that confirms this principle. *Meyer v. Bush* involved whether a task force under the Vice President’s direction was subject to the Freedom of Information Act. The decision, handed down by what is widely considered the second highest court in the land, provides a ringing affirmation of the Vice President’s irremovability, and implicitly of the officeholder’s independence. The Court stated that “[t]he Vice President is the only senior official in the executive branch totally protected from the President’s removal power.” There does not appear to be any other case law that expressly discusses the removal power and the vice presidency.

In December 1974, Antonin Scalia, then Assistant Attorney General for the Office of Legal Counsel, was asked by the White House to consider whether a regulation applied to the Vice President. Scalia noted in his analysis that the Vice President was an independent constitutional actor, in part due to his insulation from the President’s removal power.

[W]ith 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 inde-

51. 981 F.2d 1288 (D.C. Cir. 1993).
52. Id. at 1295. While the facts of the decision involved the Vice President’s actions in an executive branch capacity, the Court’s implication that the Vice President falls within the executive branch at all times is misplaced. See U.S. Const. art. I, § 3, cl. 4; id. amend. XII; id. amend. XXV, § 4; Brownell, supra note 16.
53. See Scalia Memo, supra note 7, at 1–3.
pendently elected. Just as the President cannot remove the Vice President, it would seem he may not dictate his standards of conduct.54

Nor is the issue of the Vice President being insulated from presidential removal a mere abstraction.55 At least two presidents have attempted without success to drive vice presidents from office. Reportedly, President Woodrow Wilson asked his Vice President, Thomas Marshall, to commit to stepping down as part of a contingency plan during wartime.56 Wilson apparently believed that, if he and Marshall were defeated in the November 1916 presidential election, the ensuing five-month lame duck period57 would have been too long for the country’s good as World War I raged in Europe.58 If defeated, Wilson proposed that he should name his opponent, Charles Evans Hughes, Secretary of State and then he and Marshall would resign. Under the presidential succession statute at the time the Secretary of State would have become President.59 Marshall wanted no part of this scheme. As his biographer notes, “[t]he one thing [that is] certain was that he [Marshall] had refused to resign.”60 There was no other recourse for Wilson; he could not compel the Vice President to agree to his plan.

President Richard Nixon made numerous attempts to get Vice President Spiro Agnew to resign.61 The President began to feel buyer’s remorse not long after the two men had been sworn into office in 1969.62 By early 1971, Nixon had begun actively plotting to get Agnew out of the vice presidency and to install John Connally in his place.63 A taped conversation between Nixon and his first chief of

54. Id. at 3.
55. The only other examination of this issue at any length appears to be Amar, supra note 18.
57. Prior to the Twentieth Amendment, the President and Vice President took office in March. The Twentieth Amendment changed the inauguration date to January 20. See U.S. CONST. amend. XX, § 1.
60. THOMAS, supra note 56, at 231.
62. See WITCOVER, supra note 61, at 69.
staff, H.R. Haldeman, reveals recognition of the difficulty faced in trying to get rid of the Vice President:

[HALDEMAN]: “Do you want him [Agnew] to get off the ticket? Naah. Have him quit, and kick us in the ass? . . . [The relationship has to be] seen on a positive basis . . .”

[NIXON]: “The relationship’s got to be God-damn good.”

HALDEMAN: “That’s right. He’s elected in his own right. There’s nothing to be done . . . . He can still screw [us].”

NIXON: “You’re God-damn right . . . He can disagree and I can tell him not to run, I mean—”

HALDEMAN: “You can keep him from running, and you can in effect strip him of all his duties, but you can’t get him out of office.”

Ultimately, Nixon was unable to replace Agnew on the ticket in 1972 and the two men were reelected handily. Yet, once it became public in 1973 that Agnew was under investigation for criminal wrongdoing, the President saw an opportunity to push the Vice President out of office once and for all. At one point, Nixon sent his second chief of staff, Alexander Haig, and advisor Bryce Harlow to talk Agnew into stepping down. Haig thereupon announced to Agnew that “[w]e think you should resign.” Agnew indignantly refused, exclaiming that “such a message [should not be delivered] second hand,” but should come from the President himself. The two presidential aides later tried again to get the Vice President to step down but without success.

Not long afterward, Haig returned with White House counsel, Fred Buzhardt, and again urged the Vice President to leave office. As Agnew recalled, “Haig kept insisting I must resign at once. I stubbornly refused. So the General and Buzhardt left my office empty-handed, without my resignation.”

64. Id. at 198–99.
65. See id. at 326–30.
66. See AGNEW, supra note 61, at 102–04. See also WITCOVER, supra note 61, at 305–06.
67. AGNEW, supra note 61, at 103 (quoting Haig). See also WITCOVER, supra note 61, at 306.
68. AGNEW, supra note 61, at 103 (quoting Agnew). See also WITCOVER, supra note 61, at 306.
69. See WITCOVER, supra note 61, at 311–12.
70. See id. at 318–19.
71. Id. at 319 (quoting Agnew).
Haig and Buzhardt did not stop there. That same day, the two Nixon staffers made yet another run at Agnew.72 Looking back, the Vice President remembered that Haig “became so rough with me” that Agnew’s private attorney requested his client remove himself from the meeting.73 Haig later recalled that “Agnew could never have been in any doubt that his resignation was wanted.”74 Had this been a Cabinet officer, Nixon could have avoided all these machinations and simply cashiered Agnew. As his earlier conversation with Haldeman reflected, Nixon knew he lacked such authority. Jules Witcover wrote of the situation: “the problem [with trying to get rid of Agnew] . . . was that Agnew had been elected in 1968 [and 1972] and hence Nixon could not simply fire him.”75

At the end of the day, Agnew did resign but White House pressure was only a part of the reason why. It had much more to do with his impending indictment and criminal jeopardy and the Vice President’s concern about striking a favorable deal with prosecutors.76

Both the Wilson-Marshall and Nixon-Agnew episodes reflect real-world examples of the President’s inability to fire the Vice President. Thus, constitutional text, case law, OLC opinion and past practice demonstrate that the President may not remove the Vice President, clearly marking the latter’s constitutional independence.

II.

THE OPINION CLAUSE, THE PRESIDENT OF THE SENATE CLAUSE AND VICE PRESIDENTIAL INDEPENDENCE

Aside from provisions involving the Vice President’s insulation from presidential removal, there are two other aspects of the Constitution that give rise to his independence. First, the Opinion Clause does not apply to the Vice President.77 As with the removal power, presidential authority to request opinions from senior executive branch officials helps ensure he maintains some degree of control over them.78 The Clause provides that “[t]he President . . . may require the Opinion,
in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ”79 Notably, the provision governs only “principal Officers” in “the executive Departments.” Neither of these elements applies to the Vice President.

“Principal Officers” are Cabinet secretaries,80 not vice presidents. As the Supreme Court has concluded, “[p]rincipal officers are selected by the President with the advice and consent of the Senate.”81 Vice presidents, of course, are not chosen in such a manner. As noted earlier, the Vice President is elected through the Electoral College, or in extraordinary circumstances, nominated by the President subject to congressional confirmation, a process altogether different from Senate advice and consent.82 So the Vice President fails the “principal Officer” test for purposes of application of the Opinion Clause.

Moreover, while the modern Vice President spends most of his time in the executive branch,83 he does not serve within an executive Department.84 The Supreme Court has concluded that “Department” means “a great division of the executive branch of the government, like the State, Treasury, and War.”85 The Vice President does not ad-

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79. U.S. Const. art. II, § 2, cl. 1; cf. Nelson, supra note 7, at 64.
80. See United States v. Germaine, 99 U.S. 508, 511 (1878) (a “principal officer . . . is the equivalent of the head of department”); Amar, supra note 78, at 673 (“[H]e [the President] may demand the opinion of the relevant Cabinet head(s).”).
82. See Brownell, supra note 38. The Vice President can also be chosen in the Senate should the Electoral College not produce a candidate with a majority of electoral votes. See U.S. Const. amend. XII; see also id. amend. XX, §§ 3, 4.
83. See Brownell, supra note 16.
84. Cf. Schwarz v. U.S. Dep’t of Treasury, 131 F. Supp.2d 142, 147 (D.D.C. 2000) (“Offices within the White House whose functions are limited to advising and assisting the President do not come within the definition of an ‘agency’ within the meaning of FOIA or the Privacy Act. This includes the Office of the President (and by analogy the Office of the Vice President) and undoubtedly the President and Vice President themselves.”). See also Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to the Counsel and Director of Administration, Office of the Vice President, Whether the Office of the Vice President is an “Agency” for Purposes of the Freedom of Information Act (Feb. 14, 1994), http://www.fas.org/irp/agency/doj/ole/021494.pdf (concluding the Vice President is not an “agency” for FOIA purposes).
minister a Cabinet agency; he does not and never has run or otherwise been a part of the Department of State, Treasury or Defense. 86 In his executive branch capacity, the Vice President is considered part of the Executive Office of the President. 87 The Vice President therefore also fails the “executive Department” test.

The Twenty-Fifth Amendment further reinforces that the Vice President is neither a principal Officer nor part of an executive Department. Section 4 of the amendment lists the principal Officers and executive departments separately from the Vice President. It provides that “the Vice President and a majority of . . . the principal officers of the executive departments” and later that “the Vice President and a majority of . . . the principal officers of the executive department [sic] . . . .” shall participate in the inability determination process. 88 If the Vice President were a principal officer, this provision would be wholly redundant. The word “other” would need to precede the phrase “the principal officers” for the Vice President to be considered in their number. For these reasons, the Opinion Clause—which provides for the subordination of principal Officers to the chief executive—does not apply to the Vice President. This further manifests his independence from the President.

A second constitutional consideration aside from the removal power that reflects vice presidential independence is that he is the President of the Senate, 89 a legislative branch role. Article I provides that “[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote unless they be equally divided.” 90 In this capacity, he falls within a separate branch of government from the President 91 and may act on his own accord. 92 He may recognize sena-

86. The Department of War was merged with the Department of the Navy and the resulting agency was named the Department of Defense in 1949.
89. See id. art. I, § 3, cl. 4.
90. Id.
91. See Brownell, supra note 16.
tors on the floor, make rulings from the chair and break tie votes. In none of these respects does he answer to the President.

James F. Byrnes, who served as both a Supreme Court justice and a senator, observed in his memoirs that “participation by the Vice President in Senate voting [may be], either in support of his own views or the President’s.” Or as President Dwight Eisenhower wrote, “the Vice President of the United States, with the constitutional duty of presiding over the Senate, is not legally a part of the Executive branch and is not subject to direction by the President.”

Two early authorities on the vice presidency affirm his independent role in the Senate. Professors Louis Hatch and Earl Shoup wrote in their treatise on the position: “there is attached to the Vice-Presidency another office by nature wholly independent, that of President of the Senate.”

The Vice President’s constitutional freedom of action as presiding officer of the Senate not only illustrates the autonomy of the officeholder, but also the independence of the Senate as a whole. To permit the President, as a constitutional matter, to order the Vice President to preside a certain way or to vote a certain way would undercut the freedom of the Senate to carry out its own constitutional functions. In the second half of the twentieth century, as the Vice President came to be seen as more of an Executive Branch figure, the

92. See infra Part III.
93. The Vice President, in his capacity as President of the Senate, also presides over the counting and certification of electoral votes, which places him once again within the legislative branch. See U.S. Const. amend. XII; Brownell, supra note 16.
94. JAMES F. BYRNES, ALL IN ONE LIFETIME 233 (1958); Cronin, supra note 7, at 329. See also Greenberg, supra note 7, at 16 (“Vice-Presidents do not lobby only for the President, as might be expected.”).
95. DWIGHT D. EISENHOWER, WAGING PEACE, 1956–1961 6 (1965) [hereinafter EISENHOWER II]. See also DWIGHT D. EISENHOWER, MANDATE FOR CHANGE, 1953–1956 540–41 (1963) (“the Vice President, not being technically in the Executive branch of government, [is] . . . not subject to presidential orders . . . .”). See also infra notes 380–81 and accompanying text (discussing President Ford’s comparable remarks).
96. HATCH & SHOUP, supra note 7, at 11. For a similar attachment formulation, see Onslow Letter, supra note 5, at 10 (“[T]he simple intention of the framers . . . was to annex to the office of Vice President that of President of the Senate”).
97. As a political matter, a Vice President may feel compelled to vote as the President wants, but he is not constitutionally obligated to do so. The same, of course, may be said of a senator. The President may put great political pressure on a senator to act or vote a certain way, but the senator is not legally compelled to do as the chief executive desires. The President may not fire the Senator. The same is true of a Senator’s relationship with Senate leadership; he may not be fired by the Senator Majority Leader and cannot be forced to vote a certain way.
98. See, e.g., HATCH & SHOUP, supra note 7, at 11; CARO, supra note 14, at 165 (“[O]ne of the Senate’s most sacred precepts [is]—its independence of the executive branch”).
Senate became increasingly sensitive to perceived encroachments by the Vice President on its proceedings. In so doing the chamber has responded in prickly fashion to attempts by the Vice President to influence its decision making by asserting the Senate’s independence from the President.

For example, as outgoing Senate Majority Leader and Vice President-elect, Lyndon Johnson attempted to continue chairing Senate Democratic Caucus meetings. Numerous Democratic senators condemned the idea and seventeen senators voted against Johnson’s participation. One Senate official recalled that “everyone in the room knew that Johnson had been rebuffed.” Ultimately, the Vice President was poised to lose a re-vote on the issue before Johnson gave up his bid. Among the concerns raised at the time were the “constitutional grounds” that the Vice President was not a senator. In the words of Jules Witcover, five senators protested “that having the Vice President preside over the caucus would do violence to the constitutional separation of powers.” Senator Albert Gore, Sr. commented caustically that “[w]e might as well ask Jack Kennedy to come back up to the Senate and take his turn presiding.” Senator Clinton Anderson also expressed healthy skepticism in this regard. While

99. See, e.g., Cheney, supra note 14, at 307 (recalling the request he join the regular Senate Republican policy meetings, Vice President Cheney stated, “I was grateful for the senators’ hospitality since as an institution the Senate does not always take kindly to vice presidents, who have a foot in the executive branch as well as in the legislative.”); Cronin & Genovese, supra note 1, at 319 (“Senators today view vice presidents as intruders.”). See also Nelson, supra note 7, at 63. While Senate disquiet over perceived vice presidential influence in the chamber has become more pronounced in the past half century or so it is not an altogether recent phenomenon. See, e.g., Onslow Letter, supra note 5, at 14 (expressing concern about the President exercising undue authority over the Senate).

100. See, e.g., At Issue: The Vice Presidency, A Conversation with Hubert H. Humphrey 12 (National Educational Television 1965) (quoting Humphrey: “[A]ny Vice President that thinks he can fulfill the roles of congressional leadership or interfere with . . . has outlined for himself disaster.”).


102. See id.


104. Witcover, supra note 104, at 165.

105. Cronin, supra note 7, at 328 (quoting Gore).

106. See Evans & Novak, supra note 101, at 307 (summarizing Senator Anderson’s argument that the Vice President is less a part of the legislative branch than of the
memory of Johnson’s heavy-handed style as Majority Leader no doubt played a role in the Democratic senators’ opposition,108 the reasons supplied by lawmakers for opposing his continued participation in their deliberations nonetheless reflected genuine concern over the institutional independence of the Senate from the executive branch. In sum, senators “regarded [the Vice President] as representing the executive branch.”109

Thus, there are two constitutional considerations beyond the Vice President’s immunity from presidential removal that further reflect his independence from the chief executive. They are manifested in the Opinion Clause and the Vice President’s presiding officer role.

III.

History

A. The Early Republic: 1787–1804

Past practice demonstrates that the Vice President’s independence from the chief executive is far from a constitutional abstraction. It has been and remains a reality.110 This independence is evinced through vice presidential position taking that is contrary to the President’s views or political interests, occurs in the absence of a presidential public position, or involves the Vice President publicly touting his own independence. It is also reflected through vice presidents privately rejecting presidential assignments. As such, this section highlights the third prong of this article’s thesis: that vice presidential independence has been and continues to be a reality.

While the Vice President’s constitutional independence has remained constant over time (even allowing for the Twelfth Amendment), changes in American political culture have greatly raised the stakes for a Vice President breaking with the President. Not surprisingly, vice presidential independence has evolved over time, reflecting larger changes in the American political landscape; the primary consideration being the Vice President’s twentieth-century evolution to more of an executive branch position and the rise of the mass media’s executive and observing that “[o]thers agreed with Clinton Anderson’s constitutional argument about separation of powers.”).


110. This segment expands upon a discussion on this subject in Roy E. Brownell II, Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development, 84 St. John’s L. Rev. 423, 573–76 (2010).
ability to publicize presidential and vice presidential disagreements. Nonetheless, vice presidents have persisted in asserting their independence in one fashion or another to this very day.

Many of those who were politically active at the time of the Constitutional Convention of 1787 and the state ratification conventions and who commented on the vice presidency noted the office’s independence from the President. During the Philadelphia Convention, for example, Gouverneur Morris made a telling reply to a colleague who hinted the Vice President would be unfailingly loyal to the President. Morris retorted that “[t]he vice president . . . [would] be the first heir apparent that ever loved his father.”¹¹¹

Tench Coxe, who would later serve as Assistant Secretary of the Treasury under Alexander Hamilton, also made clear his sentiments regarding the Vice President’s autonomy. He wrote at the time of the Connecticut State Ratification Convention that “[o]ur vice-president . . . is chosen by the people through the electors and the senate, [and] is not at all dependent on the president . . . .”¹¹² Clearly, Coxe recognized that the Vice President’s separate election signaled his independence.¹¹³ Future President James Monroe also noted the Vice President’s autonomy: “[t]he Vice-President will probably be a candidate to succeed the President. The former will therefore be a perpetual centinel [sic] over the latter; will be a stimulus to keep him [the President] up to his duty, and afford an additional security for his upright conduct.”¹¹⁴ In this regard, Monroe believed that the Vice President would serve not as a docile subordinate to the President but as a check on him.

Arthur Lee wrote to John Adams in 1788 about the office’s independence. He opined that “the President & Vice President . . . if they understand one another, will easily govern the two Houses to their will.”¹¹⁵ To Lee, it was readily apparent that the two officeholders would not always see eye to eye publicly. Yet another contemporary

¹¹³. See also supra notes 27–41 and accompanying text.
remarked of the presidency in Monroe-esque fashion that the officeholder will be “reminded of his duty by an independent vice President.”

This sentiment continued following ratification of the Constitution. The very first Vice President, John Adams, implied he was under no binding obligation to follow the course laid out by the President. In the context of the Senate’s role in reviewing presidential nominations, Adams wrote of his power to break tie votes that

according to my construction of the constitution the Senate have only a negative on the nominations of the President, and as I have a voice only in case of division of Senators . . . [if] I shall venture to put a negative on a nomination of the President supported by the suffrages of half the Senate I should be very likely to make presumptions [sic] in favor of a constitutional nomination.

Adams clearly believed his default position should be to support the President’s selection of senior governmental personnel, but not to support the President’s choice automatically.

Vice presidential independence manifested itself in early practice as well as opinion. In 1794, Vice President Adams refused a request by President George Washington to negotiate a treaty with Great Britain regarding commercial affairs. Adams demurred apparently because he believed that under the Constitution he was duty bound to serve as President of the Senate.

Early rebuffs of the President occurred in part because under the original text of the Constitution there was no allowance made for political parties putting forward a slate of presidential and vice presidential candidates. The candidate receiving the most electoral votes would become President and the one with the second most would become Vice President. Thus, even as a political matter, there was no indication that the Vice President should comply with the President’s wishes. This led to Adams serving as President with his opponent in the 1796 presidential race—Jefferson—holding office as Vice Presi-
dent. Jefferson, therefore, was in no way beholden to Adams for his position, either constitutionally or politically.

Jefferson, as Vice President-elect, consequently had no qualms about declining a diplomatic assignment offered by incoming President Adams in 1797. The Virginian argued that the proposed mission was beyond the scope of his constitutional responsibilities. Adams did not contest the matter with his then-rival. He was resigned to the fact that “[t]he nation has chosen Jefferson [to be Vice President], and commanded him to a certain station. The President, therefore, has no right to command him to another, or to take him off from that.” Adams provided similar reasons to Henry Knox. “Mr. Jefferson would not go. His reasons are obvious; he has a station assigned to him by the nation, which he has no right to quit, nor have I any right, perhaps, to call him from it.” In this respect, Adams shared Coxe’s rationale for the office’s independence.

Upon taking office, Jefferson felt free to work actively to frustrate the Adams Administration on a number of fronts, such as in his role in drafting the Kentucky Resolutions, which opposed the Federalist Party-supported Alien and Sedition Acts. And, in perhaps the ultimate act of vice presidential independence, Vice President Jefferson challenged President Adams for the presidency in 1800. In so doing Jefferson worked behind the scenes to fund and help coordinate his political campaign against the President.

120. See Williams, supra note 118, at 24. See also Nelson, supra note 7, at 28.
121. See, e.g., Donald Young, American Roulette: The History and Dilemma of the Vice Presidency (3d ed. 1966); Nelson, supra note 7, at 28.
125. See, e.g., Ferling, supra note 124, at 115.
126. See, e.g., id. at 140.
127. See, e.g., id. (“Jefferson, like Adams, acted like a candidate. From Monticello, he urged friendly scribes to write polemics on his behalf, helped with the expenses incurred in publishing and distributing these writings, and purchased some tracts in
In the election of 1800, the clear presidential candidate for the Democratic-Republicans—Jefferson—almost lost the presidency in the House of Representatives to the party’s clear vice presidential candidate, Aaron Burr. The House had to vote thirty-six times before choosing Jefferson, in part because Burr refused to defer to Jefferson. Not surprisingly, this strained relations between the two men. As Vice President, Burr took the action that Adams had hinted at just a few years prior: casting his vote against the desires of the President. Burr’s deciding vote frustrated the Jefferson-led Democratic-Republicans in an early attempt to rescind the Judiciary Act of 1801. Of course, Jefferson could do nothing to bring Burr to heel. His actions merely confirmed Jefferson’s view that the Vice President was a “crooked gun whose aim or shot you could never be sure of.”

After the problems of the election of 1800, it was proposed that the method of choosing presidents and vice presidents be altered. This led to the Twelfth Amendment, which provides for electors to make separate choices for President and Vice President. During debate over the Twelfth Amendment, the independence of the vice presidency was discussed. In 1803, Representative James Hillhouse stated that

[t]he First Magistracy of this nation is an object capable of exciting ambition . . . . It was to place a check upon this ambition that the Constitution provided a competitor for the Chief Magistrate . . . . [Men] of each of the parties may hold the two principal offices of the Government; they will be checks upon each other . . . . [W]ould not one of a different party placed in that chair tend to check and bulk and saw to it that they got into the hands of influential officeholders who would put them to good use. . . . Jefferson wrote numerous letters in which he spelled out his convictions, producing a party platform of sorts.,” see also id. at 196 (“For Jefferson, the battle to win the presidency had probably begun as early as two months into Adams’ term.”).

128. See, e.g., id. at 182–84.

129. Jefferson broke one tie vote that may have been contrary to Adams’ views. It involved whether a protest submitted by publisher William Duane should be read by the Senate. See 3 Dumas Malone, Jefferson and the Ordeal of Liberty 465–66 (1962). Duane, who had flouted the Senate’s authority, was a bête noire of the Federalists and of Adams and there would seem to have been little sympathy among them for giving Duane a political platform to defend his actions. See 2 Henry S. Randall, The Life of Thomas Jefferson 503 (photo reprint 1970) (1857). Nevertheless, the example is not wholly clear-cut on whether the President opposed this particular vote.

130. See 11 Annals of Cong. 148–50 (1802); see also Young, supra note 121, at 14 (describing Jefferson’s reaction to Burr’s tiebreaking vote); Vice Presidents of the United States, 1789–1993, S. Doc. No. 104-26, at 37–39 (Mark O. Hatfield et al. 1997) [hereinafter Hatfield] (describing the reason behind Burr’s vote and its subsequent political consequences).

131. Cronin & Genovese, supra note 1, at 325.
preserve in temper the over-heated zeal of party? . . . If we cannot
destroy party we ought to place every check upon it.\textsuperscript{132}

Here again is a reaffirmation of Monroe’s view of the vice presi-
dency, the officeholder not as a sycophant but as a check on the
President.

Ultimately, by having electors vote separately for President and
Vice President,\textsuperscript{133} thus permitting party tickets to get elected instead
of two potentially opposing candidates, the Twelfth Amendment es-
sentially acknowledged the existence of political parties. The Amend-
ment, however, did nothing to diminish the Vice President’s
\textit{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.\textsuperscript{134} As a result, vice presidential indepen-
dence continued without abatement throughout the Nineteenth Cen-
tury. This continuing constitutional independence was reinforced by
the means of vice presidential selection. In the Nineteenth Century and
well into the Twentieth, political parties—not presidential candi-
dates—would put forward vice presidential nominees. Vice presiden-
tial candidates were initially selected by caucuses of federal
lawmakers and later by party conventions.\textsuperscript{135} Not until 1940 would
presidential candidates begin to gain control over selection of vice
presidential candidates.\textsuperscript{136} Thus, even after the Twelfth Amendment,
for over a century vice presidents had little political reason to feel
beholden to the President.

\begin{footnotes}
\item[132.] 13 \textsc{Annals of Cong.} 89–90 (1803) (statement of Sen. Hillhouse). \textit{See also}
\textsc{Lolabel House}, \textit{A Study of the Twelfth Amendment of the Constitution of
the United States} 50 (1901); Akhil Reed Amar & Vik Amar, \textit{President Quayle?},
\item[133.] \textit{See U.S. Const.} amend. XII. Electors make separate choices for President and
Vice President even though voters, under current state law, may not. \textit{See, e.g.}, Hy-
man, \textit{supra} note 30, at 190–91.
\item[134.] Later, under the Twenty-Fifth Amendment, the Vice President would also be
afforded authority to act contrary to the chief executive in the context of determining
presidential inability. And, of course, a President and Vice President of different par-
ties could still occur if the House and Senate are forced to choose the officeholders.
\textit{See U.S. Const.} amend. XII; \textit{id.} XX §§ 3–4.
\item[135.] \textit{See, e.g.}, Edward Stanwood, \textit{A History of the Presidency from 1788 to
1928).
\item[136.] \textit{See, e.g.}, Nelson, \textit{supra} note 7, at 33–34, 43. President Andrew Jackson essen-
tially selected Martin Van Buren to be his running mate, but Jackson’s actions were
the exception that proved the rule. \textit{See Hite, supra} note 1, at 46. The nominee’s
authority to pick his running mate would not take root until after 1940. \textit{See id.}
\end{footnotes}
B. The Nineteenth Century: 1804–1900

Actions taken by George Clinton reflected continued vice presidential independence following the Twelfth Amendment. In 1811, Vice President Clinton, who was then serving alongside President James Madison, voted against renewal of the Bank of the United States, a position distinctly at odds with the views of Madison. Clinton was also publicly critical of other aspects of Madison’s policy agenda. Clinton’s biographer observed that the Vice President “was one of the centers of opposition to President Madison.”

In 1812, Clinton died in office, necessitating a replacement on the Democratic-Republican ticket. Elbridge Gerry was selected to run alongside Madison this time. Party stalwart Albert Gallatin expressed the hope of many in the Democratic-Republican Party that Gerry would not turn out like Clinton and “give us [the Jeffersonians] as much trouble as our late Vice-President.” Gallatin wrote tellingly of the vice presidency: “I know that nothing can be more injurious to an Administration than to have in that office a man in hostility with that Administration, as he will always become the most formidable rallying point for the opposition.”

Manifestations of vice presidential independence continued during the tenure of John C. Calhoun, who served from 1825 to 1832. Calhoun, who initially served with President John Quincy Adams, voted against legislation Adams supported to build a canal between the Illinois River and Lake Michigan.
voted in opposition to a tariff bill the Adams Administration fa-
vored.\footnote{146}{See 3 \textit{Reg. Deb. in Cong.} 496 (1827); see also Peterson, supra note 145, at 154 (labeling Calhoun’s action “an anti-administration vote”).} In addition, he worked to defeat U.S. participation in an in-
ternational conference, the Panama Congress, a major priority for the
President.\footnote{147}{See, e.g., Peterson, supra note 145, at 138–39.} Adams said ruefully of Calhoun: “Calhoun thinks for himself, independently of all the rest . . . .”\footnote{148}{Greenberg, supra note 7, at 66 (quoting The Diary of John Quincy Adams, 1794–1845, at 191 (Allan Nevins ed. 1928)).}

By 1826, the tension between President Adams and Vice Presi-
dent Calhoun reached such a boiling point that the two men began
denouncing each other in the press under \textit{noms de plume}.\footnote{149}{See Margaret L. Coit, John C. Calhoun: American Portrait 164 (1991) (1950) (”[T]hrough the spring and summer of 1826 the public was treated to the spec-
tacle of the President and the Vice President of the United States, under . . . pseud-
onyms . . . hurling charges . . . at each other.”); see also Greenberg, supra note 7, at
64–65 (“[Calhoun] squabbled[d] openly with his President.”). Some have questioned
whether Adams himself was the author of the anti-Calhoun pamphlets. See Neil Mac-
Neil & Richard A. Baker, The American Senate: An Insider’s History 306, 413 n.17 (2013). At a minimum, the letter writing was done with Adams’ approbation.} Calhoun announced in one of these writings the possibility of “the Vice President choos[ing] to pursue a course independent of the will of the Ex-
ecutive.”\footnote{150}{Onslow Letter, supra note 5, at 14.} He expressed concern about the Vice President becoming “a subservient yielding to the Executive will.”\footnote{151}{Id. at 55 (emphasis in original).} In another of these
exchanges, Adams laid bare his frustration with Calhoun. This
stemmed from the Vice President exercising authority delegated to the
presiding officer at the time to give senators their committee assign-
ments.\footnote{152}{See, e.g., Hatfield, supra note 130, at 90.} Calhoun purposely placed senators on key committees who
opposed the President’s agenda.\footnote{153}{See id. at 89; see also Peterson, supra note 145, at 136.} Adams wrote that “in so organiz-
ing the Committee [on Foreign Relations] . . . you intended . . . to
trammel unfairly the Administration . . . .”\footnote{154}{Letter from Patrick Henry (John Quincy Adams) to John C. Calhoun (Aug. 8, 1826), in Fendall, supra note 5, at 54.} In fact, “on each of four
highly important standing committees, namely those on Foreign Relations, Finance, Indian Affairs, and the Judiciary, you placed only a
single Senator who was not hostile to the Administration.”\footnote{155}{Id. at 55 (emphasis in original).} Henry Clay commented at the time: “The Vice President [Calhoun] is up to
the hub with the opposition.”\footnote{156}{Robert V. Remini, Henry Clay: Statesman for the Union 292 (1991) (quoting Letter from Clay to Crittenden (Mar. 10, 1826)).}
Later, as Andrew Jackson’s Vice President, Calhoun was no different.157 He voted to break a tie and defeat one of the President’s most prized nominees, Martin Van Buren, after “Old Hickory” had tapped the “Little Magician” to be minister to Great Britain.158 Calhoun subtly worked against President Jackson in other ways, such as on the question of whether a state could nullify federal law.159 During the famed Webster-Hayne debate on the Senate floor, Calhoun discreetly passed handwritten pointers to pro-nullifier Senator Robert Hayne, who vigorously opposed Jackson’s position.160 Calhoun also surreptitiously authored the South Carolina Exposition, which argued South Carolina had the authority to disregard federal statutes.161 He would later come out publicly in favor of nullification as Vice President.162 These views stood in marked contrast to Jackson’s stance on the issue.163

Nineteenth and early twentieth-century authorities affirm that the Vice President was far from the President’s cat’s paw. They routinely cited his independent judgment in the presiding officer’s chair. Supreme Court Justice Joseph Story wrote that the Vice President’s “impartiality in the discharge of its duties might be fairly presumed; and the employment would not only bring his character in review before the public; but enable him to justify the public confidence, by performing his public functions with independence, and firmness, and sound discretion.”164 Nor was he alone, noting the non-partisan behavior frequently exhibited by the Vice President in the presiding officer’s chair.165 Vice President George Dallas stated: “My unalterable

157. See id. at 385 (making reference to “Calhoun’s open defiance of Jackson”); see also id. at 369.
158. See 8 REG. DEB. IN CONG. 1310 (1832); see also EDGAR WIGGINS WAUGH, SECOND CONSUL, THE VICE PRESIDENCY: OUR GREATEST POLITICAL PROBLEM 65–66 (1956).
160. See id.
162. See, e.g., HATFIELD, supra note 130, at 96; PETERSON, supra note 145, at 92–94.
163. See, e.g., HATFIELD, supra note 130, at 95–96.
164. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 210 (1833) (emphasis added). See also BILLIAS, supra note 142, at 325 (quoting Vice President Gerry in a letter to his daughter: “I can know no political distinctions in my present office; my way is clear: to discharge the duties of office with impartiality & correctness.”).
165. See FURMAN SHEPPARD, THE CONSTITUTIONAL TEXT-BOOK: A PRACTICAL AND FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 74 (1855) (“[I]t was thought the Vice-President would be more impartial, as presiding officer, than a
determination is not to allow the party to warp my judgment a hairs breadth as presiding office and I am absolutely sure of being able to carry this determination into execution . . . .”166

Vice President Millard Fillmore carried on the tradition of vice presidential independence when he informed President Zachery Taylor he would be supportive of the Compromise of 1850 if he had to break a tie vote.167 This was counter to President Taylor’s outlook on the measure.168 The chief executive died before Fillmore was forced to take such action.

Much like the approach of Dallas, Vice President John C. Breckenridge assumed a non-partisan posture while presiding over the Senate.169 Breckenridge also defied President James Buchanan when the Vice President supported Stephen Douglas for Senate in 1858.170 The fifteenth President was viscerally opposed to Douglas in part because of the latter’s support for popular sovereignty in the territories.171

Less than two weeks prior to President Abraham Lincoln’s assassination, Vice President Andrew Johnson made a speech in Washington following the collapse of the Confederate capitol of Richmond.172 He pronounced of leaders of the Confederacy, “I would arrest them; I

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166. JOHN M. BELOHLAVEK, GEORGE MALLIN DALLAS: JACKSONIAN PATRICIAN 133 (1977) (quoting Dallas).

See also infra notes 169, 217–24 and accompanying text.

This ostensible posture of maintaining neutrality while presiding continued into the modern period. See also 113 CONG. REC. 918 (1967) (statement of Vice President Humphrey) (“The Chair is now the Presiding Officer of the entire Senate and stands as a servant of the Senate, rather than as an advocate within it.”).

167. See HATCH & SHOUP, supra note 7, at 35.

168. See id.

169. See WILLIAM C. DAVIS, BRECKINRIDGE: STATESMAN SOLDIER SYMBOL 179 (2d ed. 1992) (citation omitted) (Breckenridge “might easily have managed the debate and exercised the rules in the administration’s favor had he wished.”).


172. See Speech of Andy Johnson, N.Y. TIMES, Apr. 8, 1865, at 3 [hereinafter Speech of Andy Johnson]; see also Greenberg, supra note 7, at 107.
would try them; I would convict them, and I would hang them . . . . 

[E]vil doers should be punished . . . . [D]eath is too easy a punishment 

[for them].”173 In calling for Confederates leaders to be summarily 
hanged, Johnson’s remarks differed in spirit, and very likely in sub-
stance, from Lincoln’s more measured and conciliatory approach to-
ward the South.174

Henry Wilson, President Ulysses S. Grant’s second Vice Presi-
dent,175 acted independently on several occasions during his tenure. 
While presiding over the Senate, Wilson used his tie-breaking vote to 
secure Senate passage of the Equalization of Bounties Bill and thus 
ensured its being sent to the President’s desk.176 Grant was forced to 
veto the measure, which would have provided payouts to certain Civil 
War veterans.177

Wilson also came out steadfastly in support of women’s suffrage, 
despite instructions to the contrary.178 Before the National Woman 
Suffrage Convention, he announced “that my wife, my mother, and 
my sisters were as much entitled to the right of suffrage as my-
self . . . .”179 He made these remarks even though he admitted he was 
“under imperative orders to make no speeches on any subject.”180 
Those “orders” presumably came from the White House.181 Susan B. 
Anthony noted to those assembled that “Vice President Wilson is the 
first Vice President we have ever had who was in favor of woman

173. Speech of Andy Johnson, supra note 172.
174. See Carl Sandburg, Abraham Lincoln: The Prairie Years and the War 
Years 696 (One Volume ed. 1954); Greenberg, supra note 7, at 107. During his 
second inaugural address, Lincoln stated that U.S. policy was to act “[w]ith malice 
toward none, [and] with charity for all . . . .” President Abraham Lincoln, Second 
Inaugural Address (Mar. 4, 1865), available at http://avalon.law.yale.edu/
175. Schuyler Colfax was Grant’s first Vice President.
176. See 3 Cong. Rec. 2050 (1875). See also Ernest McKay, Henry Wilson: 
177. See Ulysses S. Grant, Pocket Veto, in 9 A Compilation of the Messages and 
Papers of the Presidents 4274–75 (James D. Richardson ed., 1897). See also Mc-
KAY, supra note 176, at 237.
178. See McKay, supra note 176, at 234–35; Greenberg, supra note 7, at 120–21;
179. See McKay, supra note 176, at 234–35.
180. Washington Notes, supra note 178; Greenberg, supra note 7, at 120.
181. See Greenberg, supra note 7, at 120.
suffrage."182 No President, Grant183 or any other, would speak out in support of women’s suffrage until Woodrow Wilson.184

Finally, Vice President Wilson fired a shot across the President’s bow when public speculation began as to whether Grant would seek or should seek a third term. Wilson proclaimed in June 1875 the following:

[that a third term for a President] come[s] in conflict with the settled convictions of the American people . . . they would elect no man for President [for] a third term, no matter what services he had rendered to the country . . . such an event was not in the chapter of possibilities, and . . . ought to be dismissed at once, and strongly repudiated by the Republican party.185

William Wheeler served as Vice President alongside President Rutherford B. Hayes.186 Wheeler placed a much higher premium on party loyalty than did Hayes. When the President acted in a manner consistent with the Republican Party, his Vice President backed him.187 When he did not, Wheeler went his own way.188 In this regard, Wheeler and Hayes had serious differences regarding two of major issues of the day: civil service reform and Southern reconstruction.189 The Vice President’s opposition manifested itself publicly on both issues.

One avenue was through the press, which in time would come to be the preferred method of exercising vice presidential independence. In an interview Wheeler was critical of the President’s civil service policy, which he said “cannot be carried out without breaking up the [Republican] party . . . .”190 The New-York Daily Tribune observed that the Vice President was “not in accord with the administration so far as endorsing the recent Civil Service order goes. . . . [H]e is op-

182. See McKay, supra note 176, at 235.
183. See Kate Havelin, Ulysses S. Grant 82 (2004); Greenberg, supra note 7, at 121.
187. See id. at 198.
188. See id.
189. See id. at 190.
190. Id. at 209 (quoting Wheeler).
posed to it.”191 In this vein, Wheeler worked behind the scenes in the Senate to defeat two Hayes nominees, one of whom happened to be Theodore Roosevelt’s father.192 Wheeler also undertook political activity in his home state of New York that was hostile to Hayes, prompting one pro-Wheeler newspaper to ask its readers rhetorically “since when is Wheeler responsible to Hayes”?193

Federal policy toward Louisiana was the cause of numerous difficulties for Hayes after he ordered the military from the state.194 As such the President created a commission to try to sort through matters there.195 Wheeler refused the President’s request to serve on the commission.196 In fact, the Vice President became so disenchanted with Hayes’ southern policies that he openly ridiculed them in the media, a move characterized by one authority as an “open condemnation of administration policy . . . .”197

One of Wheeler’s actions as President of the Senate involved his breaking a tie vote to help permit the seating of William Pitt Kellogg as senator from Louisiana.198 His election had been disputed and the Senate was forced to decide whether Kellogg should be seated.199 This disputed election led to discussion over a second disputed election, this one involving admission of Matthew C. Butler from South Carolina.200 Again, Wheeler’s vote decided the matter.201 The author of the only full-length treatment of Wheeler’s life explains that the Vice President’s “position in the Kellogg and Butler admittance questions were not aligned with that of Hayes and his advisors . . . .”202

As the same authority on Wheeler’s life noted, “[t]he combined effect of the southern and civil service policies completely alienated the Vice-President from his chief. . . . [h]e ceased to attend public functions with the President,” once going so far as to decline due to the death of a fictitious brother-in-law.203 Relations became so

192. See Otten, supra note 186, at 210–11.
193. Id. at 212 (quoting the Malone Palladium, Aug. 28, 1879, at 2).
194. See id. at 235.
195. See id. at 235–36.
196. See id. at 236.
197. Id. at 243–44.
198. See 6 Cong. Rec. 730 (1877); see also Otten, supra note 186, at 183–85.
199. See Otten, supra note 186, at 183–85.
200. See 6 Cong. Rec. at 736–37. See also Otten, supra note 186, at 183–86.
201. See 6 Cong. Rec. at 738.
202. Otten, supra note 186, at 187; see also id. at 242.
203. See id. at 239; see also id. at 242.
strained that Wheeler declined to defend Hayes publicly during the 1878 midterm elections.204

Chester Arthur was at least as brazen in his independence as Wheeler. Arthur went so far as to publicly oppose one of President James Garfield’s nominees and question the President’s honor at the same time.205 Arthur excoriated the chief executive: “Garfield has not been square, nor honorable, nor truthful . . . . It’s a hard thing to say of a president of the United States, but it’s only the truth.”206 Against the wishes of Garfield, the Vice President also actively worked for the reelection of two New York Senators.207

James G. Blaine, former Speaker of the House, presidential nominee in 1884 and long-time fixture in Washington, made a keen observation about the potential for a Vice President to oppose a President. The Vice President, he remarked, is “not unnaturally thrown into a sort of antagonism with the Administration—an antagonism sure to be stimulated by the coterie . . . disappointed in efforts to secure favor with the President . . . composed of malcontents of the opposition . . . .”208

Thomas Hendricks was Grover Cleveland’s first Vice President.209 In September 1885, in Indianapolis, Hendricks gave a well-publicized speech about the future of Ireland, the whole of which at the time was part of the United Kingdom.210 He opined that

I think . . . Ireland . . . [will] be governed by a written constitution, in which the Parliament will be restricted as our Legislature is . . . . Will it not be a grand sight when in the City of Dublin there will meet a constitutional convention to form a constitution of Ire-

204. See id. at 246.
205. See HATFIELD, supra note 130, at 254. Arthur, in tandem with two senators, actually submitted a formal remonstrance to the President about the nomination. See 2 THEODORE CLARKE SMITH, THE LIFE AND LETTERS OF JAMES ABRAM GARFIELD 1112 (1925); see also Greenberg, supra note 7, at 128.
209. Hendricks died in office in 1885. During Cleveland’s second term, he served with Adlai Stevenson.
210. See JOHN W. HOLCOMBE & HUBERT M. SKINNER, LIFE AND PUBLIC SERVICES OF THOMAS A. HENDRICKS 386 (1886); see also DOCUMENTARY HISTORY, supra note 185, at 151–55.
land? . . . I do not know of anything that would give me greater pleasure than to attend that constitutional convention in Dublin.211

Hendricks’ public embrace of Home Rule for Ireland was highly controversial at the time. The Chicago Daily Tribune ripped him for the suggestion: “Hendricks ought to realize that he owes something to the position he holds and that it is very unseemly for him to be making public harangues in favor of the dismemberment of a friendly foreign Power. Let him confine his demagogic displays to matters here at home.”212 Predictably, it also earned him the enmity of many in Britain.213 Moreover, his policy pronouncement on Ireland was not echoed by President Cleveland.214

In 1891, Vice President Levi Morton proved unhelpful to President Benjamin Harrison during consideration of a voting rights bill, referred to at the time as the “Force bill.”215 This measure, which would have compelled the former Confederate states to allow African-American males access to the ballot box, was a top priority for Harrison.216 Morton’s biographer observed that the Vice President believed “that the President of the Senate should be as impartial in his rulings as the Chief Justice . . . presiding over the Supreme Court.”217 That philosophic approach to the office, which mirrored the attitude of many of his predecessors, manifested itself when the Senate debated the measure.218

Southern Democrats stopped at nothing to block the measure, which they feared would prompt a return to the Reconstruction era, undo their efforts to suppress the franchise among African-American males and ensure Republican electoral dominance.219 They, therefore, set about delaying a vote on the bill.220 Morton refused to assist his

211. John E. Lamb, Parnell Indorsed: A Rousing Meeting at Indianapolis Sends Greeting to Ireland’s Great Leader, Ch. Daily Trib., Sept. 9, 1885, at 5 (quoting the speech).
213. See, e.g., Angry Criticism: English Papers and Vice President Hendricks, Boston Daily Globe, Sept. 11, 1885, at 2; Foreign Intelligence: Vice-President Hendricks’ Speech Indorsing Parnell Savagely Attacked in England, Ch. Trib., Sept. 11, 1885, at 5.
214. Three decades later, President Wilson lobbied Britain to permit Ireland to govern itself, but even these sentiments were conveyed privately. See Alan J. Ward, Ireland and Anglo-American Relations, 1899–1921 146–47 (1969).
216. See Hatfield, supra note 130, at 273.
218. See id. at 187, 189.
219. See id. at 187–89.
220. See id. at 188–89.
fellow Republicans in their attempts to break the filibuster of the legislation.\textsuperscript{221} Assuming a disinterested posture in the chair, Morton presided over the bill’s defeat.\textsuperscript{222} One of Harrison’s Senate allies mocked the Vice President as “assert[ing] . . . authority with as little show of force as if [he] . . . were presiding over a company of guests at” his home.\textsuperscript{223} The defeat of the bill was Harrison’s most stinging disappointment as President.\textsuperscript{224}

While debating repeal of the Sherman Silver Purchase Act in 1893, Vice President Adlai Stevenson did little to help President Grover Cleveland.\textsuperscript{225} While the President was a strong advocate for repeal, Stevenson was cool to the idea.\textsuperscript{226} When a Senate filibuster blocked Cleveland’s efforts, Stevenson lifted not a finger to help the President bring around fellow Democrats.\textsuperscript{227} Neither did the Vice President embrace efforts to rule from the chair in a manner that would have helped shut off debate.\textsuperscript{228}

C. The Early Twentieth Century: 1900–1940

President Theodore Roosevelt and Vice President Charles Fairbanks were not on friendly terms either.\textsuperscript{229} Nor did they share similar ideological views.\textsuperscript{230} As a result, Fairbanks apparently used his authority as presiding officer to try to scuttle the President’s Square Deal legislative agenda.\textsuperscript{231}

\textsuperscript{221} See \textit{id.} at 187–94. The Speaker of the House at the time was the formidable Thomas Brackett Reed, who had recently taken action to curb obstructionism in the lower chamber. Senate Republicans were acting on the assumption that Morton would take similar action from the presiding officer’s chair in the Senate. \textit{See id.} at 184–86, 193–94.

\textsuperscript{222} See \textit{id.} at 189–90, 194.

\textsuperscript{223} \textit{Hatfield, supra} note 130, at 273.

\textsuperscript{224} See \textit{id.} Morton was apparently frustrated with President Harrison when his requested postmaster appointments were rebuffed. This dispute got into the press but it is uncertain if Morton himself was responsible for the dust up becoming public. \textit{See Editorial, N.Y. Times,} May 9, 1890. \textit{See also} Greenberg, \textit{supra} note 7, at 134.

\textsuperscript{225} See \textit{Hatfield, supra} note 130, at 281–82.

\textsuperscript{226} See \textit{id.}

\textsuperscript{227} See \textit{id.} at 282.

\textsuperscript{228} See \textit{id.}

\textsuperscript{229} See \textit{id.} at 320.

\textsuperscript{230} See \textit{id.} at 318.

\textsuperscript{231} \textit{See Irving G. Williams, The Rise of the Vice Presidency} 90 (1956); \textit{Hatfield, supra} note 130, at 320.
Fairbanks also owned an Indiana newspaper.232 His paper’s broadsides against President Roosevelt were so withering and unre-
relenting that the President gave thought to suing the paper for libel.233

President William Howard Taft had designs on using Vice Presi-
dent James Sherman as a liaison with Speaker of the House Joe Can-
non.234 At the start of their term, Taft proposed to Sherman, “I am
going to rely on you, Jim, to take care of Cannon for me. Whatever I
have to do there will be done through you.”235 Sherman reacted con-
temptuously to the President’s suggestion: “Not through me. You will
have to act on your own account. I am to be Vice President and acting
as a messenger boy is not part of the duties as Vice President.”236

During the Woodrow Wilson Administration, there were reports
that Vice President Thomas Marshall would not help the President on
rivers and harbors legislation.237 Marshall, a Democrat, also ignored
the Senate Democratic leadership on how he should make parliamen-
tary rulings.238

An exchange between President Wilson and his aide Joe Tumulty
about Marshall reflects that even in the Twentieth Century, a Vice
President’s tiebreaking vote could not be taken for granted. Regarding
a measure involving voting rights for women, Tumulty wrote to the
President, “I think a word telling the Vice-President how deeply inter-
ested you are should be sent to him by you as in case of a tie vote he
might be needed. I think you can fairly assume that he would favor
suffrage.”239 Wilson inquired anxiously: “[a]re you sure that the Vice
President would vote for woman suffrage[?]” The President instructed

232. See Robert F. Lancaster, Indiana’s Four U.S. Vice Presidents, 43 INDIANA HIS-
TORY BULL. 47, 49 (1966).
233. See id., see also Greenberg, supra note 7, at 150.
234. See Hatfield, supra note 130, at 328.
235. Id. (quoting Taft).
236. Id. (quoting Sherman).
237. See Break with Wilson Denied by Marshall, Vice President Scouts Rumors of
238. See Marshall and the Sandbag, N.Y. TIMES, Oct. 25, 1915, Mag. Section. For
more on Marshall’s stymieing Senate Democratic leadership, see John Eugene Brown,
Woodrow Wilson’s Vice President: Thomas R. Marshall and the Wilson Administra-
tion, 269–70, 432 (1970) (unpublished Ph.D dissertation, Ball State University) (on
file with author); Thomas, supra note 56, at 159–60. See also Thomas, supra note
56, at 159 (quoting Wilson’s Secretary of the Treasury William McAdoo who said of
Marshall’s tenure as presiding officer: “He sometimes disappointed his party because
on some crucial points his rulings favored the opposition, when they should have
favored, and very probably could have favored, his own party.”); see also id. (Mar-
shall “doubtless did not feel compelled to violate his practice of impartiality in order
to aid proceedings that were contrary to his own judgment.”).
239. Brown, supra note 238, at 352 (quoting Tumulty).
Tumulty to let Marshall know “the suffrage amendment . . . I earnestly desire to see passed . . . .” The language used by Wilson is instructive: he does not tell Tumulty to order Marshall to vote a certain way, only to mention its importance to him.

Marshall also made his independence clear on other occasions. His refusal to agree with Wilson’s joint resignation scheme has been discussed earlier. Another instance occurred in 1921 when the Vice President testified on his own accord before a congressional committee in support of legislation. During his testimony, Marshall made no reference whatsoever to the administration’s posture on the bill.

Marshall also made a number of controversial public statements on policy matters, such as on control of the Panama Canal, on the perceived need to liquidate large private inheritances, on problems associated with advertising and newspapers and on the sinking of the Lusitania. These statements were presumably contrary to Wilson’s views.

Marshall’s successor, Calvin Coolidge, came to understand the autonomy of the vice presidency first hand as chief executive. He later wrote that “[i]f the Vice-President is a man of discretion and character so that he can be relied upon to act as a subordinate in that position, he should be invited to sit with the Cabinet . . . .” To Coolidge, a Vice President’s willingness to do what a President asked was far from a given. The issue was brought home for him when his own Vice President, Charles Dawes, took to “as often as not blocking the President . . . .” As vice presidential scholar Irving Williams wrote of Dawes’ tenure, his actions reflect “the inherent freedom of action . . . in the Vice-Presidency when a man of opinions and explosive energy

240. Id. at 353 (emphasis added).
241. See supra notes 56–60 and accompanying text.
243. See generally id.
244. See, e.g., Greenberg, supra note 7, at 166, 168, 169. On other matters Marshall sounded off but later held his tongue when Wilson put forward an opposite position. See id. at 171.
245. See, e.g., Thomas, supra note 56, at 141.
246. See id. at 145–48.
247. See id. at 155.
248. See id. at 155–56.
250. Id. at 245.
occupies it, to whom a political future in the narrow sense is not all important.”\footnote{251}

Dawes began his tenure as Vice President by publicly stating his intention not to join President Coolidge’s Cabinet.\footnote{252} This occurred before Coolidge had even broached the subject with him. Williams observes that by this action “Dawes had made a bumptious declaration of Vice-Presidential independence . . . .”\footnote{253} Throughout the rest of his term, Dawes gave Coolidge continued heartburn. The Vice President undertook his own effort to modify Senate rules to make the body more efficient and reduce filibustering.\footnote{254} This involved his making speeches around the country.\footnote{255} Coolidge apparently did not look kindly upon this initiative.\footnote{256} Dawes also undercut Coolidge’s Senate strategy on important banking legislation.\footnote{257} The President had acted on the assumption that the measure would be voted down or otherwise blocked in Congress; instead, with the Vice President’s help, it wound up on Coolidge’s desk.\footnote{258} The President reluctantly signed the bill.\footnote{259}

When considering high-profile farm legislation, Dawes opposed the administration’s preferred measure and supported instead the competing McNary-Haugen bill.\footnote{260} In defending the McNary-Haugen legislation on the floor, Senator James Watson blurted out that “[t]his explanation [of the measure] . . . was prepared by the Vice-President, who is a supporter of the McNary-Haugen bill.”\footnote{261} In order to minimize potential embarrassment to all involved, the statement was later struck from the \textit{Congressional Record}.\footnote{262} The President remarked acidly to a White House guest that “the McNary-Haugen people have their headquarters in [the Vice President’s] . . . chambers.”\footnote{263} Much as

\footnote{251. \textit{Id}.}
\footnote{252. \textit{Id}. at 245–48.}
\footnote{253. \textit{Id}. at 248; \textit{see also} Henry Comstock Maxson, Political Practice in the Vice Presidency 26 (1974) (unpublished Ph.D dissertation, Brown University) (“Vice President Dawes . . . establish[ed] . . . a voting record clearly independent of the Coolidge administration.”).}
\footnote{254. \textit{See Coolidge Striving to Prevent Break on Dawes Program}, \textit{N.Y. Times}, July 20, 1925, at 1.}
\footnote{255. \textit{See Greenberg, supra note 7, at 188–89.}}
\footnote{256. \textit{See id}.}
\footnote{257. \textit{See Garner, supra note 208, at 185–86.}}
\footnote{258. \textit{See id}. at 186.}
\footnote{259. \textit{See id}.}
\footnote{260. \textit{See Irving G. Williams, Senators, Rules, and Vice-Presidents, in 5 Thought Patterns} 21, 26 (Arpad F. Kovacs ed., 1957); \textit{Hatfield, supra note 130, at 359, 366}.}
\footnote{261. Williams, \textit{supra note 249, at 256 (quoting Watson)}.}
\footnote{262. \textit{See id}.}
\footnote{263. \textit{Id}. (quoting Coolidge).}
was the case with Grant and the Civil War veterans legislation, Coolidge was put in the awkward position of having to veto a bill because of the actions of the Vice President.\(^{264}\) As the Senate Historical Office has noted, Dawes “[a]s vice president . . . would not accept direction from the president . . . .”\(^{265}\)

Newspaper commentary at around the same time reflects a realization that the Vice President is independent of the President. In 1929, the *Springfield Republican*, perhaps with Dawes in mind, wrote about the advisability of including the Vice President in Cabinet proceedings. Such a step, the paper wrote, “might strengthen considerably an administration in the Senate, especially if the Vice President could be depended on to break the tie votes so as to promote the administration’s interests.”\(^{266}\) A big “if” indeed.

Charles Curtis served as Vice President alongside President Herbert Hoover.\(^{267}\) Yet, Curtis openly opposed Hoover on a farm policy matter in 1931.\(^{268}\) That year, Hoover urged the Federal Farm Board to take steps the result of which ensured that the sale price of wheat would continue to decline; this upset American farmers in the Midwest, including those in Curtis’ home state of Kansas.\(^{269}\) The Board’s subsequent action, which according to reports at the time, “had the support of the administration,”\(^{270}\) enraged Curtis. The Vice President stated “I think they [the Board] have made a mistake . . . .”\(^{271}\) He and Kansas Senator Arthur Capper personally lobbied the Board to change its policy but to no avail.\(^{272}\)

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265. Hatfield, *supra* note 130, at 368.
267. Irving Williams indicated without elaboration that Curtis countered the Hoover administration in the Senate. See Williams, *supra* note 249, at 574. At a minimum, Curtis worked against Hoover on issues outside the Senate.
270. *Farm Board Stands on Wheat Policy*, supra note 269; *Seek a Reversal*, supra note 269 (reporting that “Hoover is satisfied with the present program and intends to stand behind it.”).
272. *Farm Board Stands on Wheat Policy*, supra note 269 (reporting that “The Federal Farm Board today again declined to modify its wheat price stabilization policy . . . despite appeals made by Vice President Curtis and Senator Capper”). For continued lobbying efforts by Curtis to reverse this policy, see *Curtis to Renew Plea on
In 1932, Curtis publicly broke with the President again, this time over the issue of prohibition.273 Addressing a crowd in his home state of Kansas at an event that formally marked his renomination as Republican vice presidential candidate, Curtis made clear that he differed with the President on the Eighteenth Amendment.274 The head of the Democratic National Committee mocked the split between Hoover and Curtis: “It looks as though the Republican ticket had a half-dry head and dried-out tail.”275 Or as Curtis’s biographer noted, “Curtis expressed views that were said to be as dry as Hoover’s had been wet.”276

Vice President John Nance Garner was supportive of President Franklin D. Roosevelt during their first term together. However, the Vice President displayed an independent streak during the late 1930s with respect to policies and legislation supported by the President.277 Garner made clear his disagreement with Roosevelt during the court-packing controversy.278 At the height of congressional debate, when his influence in the Senate could have been most useful, Garner simply alighted to his Texas ranch.279 Roosevelt privately termed Garner’s actions “jump[ing] ship.”280

Independent behavior by Garner only increased after the 1937 court-packing fight.281 As Williams wrote of Roosevelt’s second term, “Garner’s legislative power . . . was harnessed now to contain the Administration.”282 In 1938, the Vice President was delegated authority by statute to place three senators on an investigative committee.283

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273. MARVIN EWY, CHARLES CURTIS OF KANSAS: VICE PRESIDENT OF THE UNITED STATES, 1929–1933 52–53 (1961); see also Text of Vice President Curtis’s Acceptance Speech, N.Y. Times, Aug. 19, 1932.
274. See Ewy, supra note 273, at 53.
275. Id. (quoting James Farley).
276. Id.
278. See Williams, supra note 249, at 332–35.
279. See id. at 333–34.
280. Id. at 334 (quoting Roosevelt).
281. See, e.g., Pika, supra note 1, at 505 (“Garner . . . functioned as an effective New Deal lobbyist until 1937, when he asserted his independence by opposing Roosevelt’s proposal to expand the Supreme Court.”).
282. See Williams, supra note 249, at 574.
283. See Pub. Res. No. 113, 52 U.S. Stat. at Large, ch. 456, p. 705 (June 16, 1938); see also Williams, supra note 249, at 342–43.
Roosevelt suggested three names. Garner appointed only one of the trio, ignoring Roosevelt’s other two choices. By the late 1930s, in the words of Garner’s biographer, the Vice President had evolved into “the symbol of opposition to the course Roosevelt was taking.” Garner explained that he took this stance since he was “the only one who [could] . . . head up any opposition” to Roosevelt. Irving Williams explains this was “because of the independence of his office from the President.”

In 1939, Garner even used his authority to break a tie vote against the Roosevelt Administration. That year, during consideration of a tax bill, Senator Robert LaFollette, Jr. offered an amendment to increase surtaxes on income, a measure apparently consistent with the Administration’s position. The final vote ended in a tie which Garner could have broken in the Administration’s favor. Instead, he opted not to vote at all. Under parliamentary rules, a tie vote automatically defeats the measure in question and accordingly the LaFollette amendment failed. Thus, by not voting, Garner countered the policy preference of the Roosevelt Administration.

The voluntary nature of the Vice President’s deference to the President’s wishes is reflected in the words of Roosevelt himself. As a vice presidential candidate in 1920, the future President commented

284. See Williams, supra note 249, at 343.
285. See id. at 344–45.
286. Bascom N. Timmons, Garner of Texas: A Personal History 245 (1948); see also Williams, supra note 249, at 346.
287. See Williams, supra note 249, at 348. In some ways Garner’s posture harkened back to Henry Wilson’s when Grant was considering a third term. See supra note 185 and accompanying text. Adoption of the Twenty-Second Amendment removed this source of potential friction and permitted second-term vice presidents to pursue the presidency for themselves. See U.S. Const. amend. XXII; see also Joel K. Goldstein, The Modern American Vice Presidency: The Transformation of a Political Institution 13–14 (1982).
288. Williams, supra note 249, at 348 (quoting Garner).
289. Id. at n.83.
290. See Martin Packman, Vice Presidency, Editorial Research Reps. 239, 252 n.26 (1956).
293. See 84 Cong. Rec. 7699 (1939).
294. See id.
on the importance of “the willingness and desire of the Vice President
to subordinate himself, in a sense, to the President.”

D. The Late Twentieth and Early Twenty-First
Centuries: 1940–2014

As the twentieth century progressed, the vice presidency gradu-
ally evolved into more of an executive branch position. Beginning
with President Warren Harding’s invitation to Vice President Coo-
lidge to regularly attend Cabinet meetings, the Vice President gradu-
ally took on more of the trappings of an executive branch office. With
the exception of Dawes, every Vice President since has been a
participant in the gatherings. Instead of spending most of his profes-
sional time in the Senate’s presiding officer’s chair, the Vice Presi-
dent’s activities began to consist more and more of executive branch
work delegated to him by the President (and, to a lesser degree, by
Congress).

Meanwhile, vice presidential nominees increasingly came to be
chosen by presidential candidates and less by party conventions. As
will be recalled, prior to 1940—when Roosevelt demanded that dele-
gates select Henry Wallace—presidential candidates played little
part in the selection of vice presidential nominees. As a result, two
men—often ideologically and personally incompatible—were

295. Franklin D. Roosevelt, Can the Vice President be Useful? SAT. EVEN. POST, Oct. 16, 1920, at 8, 82.
296. See Brownell, supra note 16; Goldstein, supra note 287, at 134–76.
297. See Schlesinger, supra note 1, at 349 (“[A]ttendance at cabinet meetings proved
an opening wedge” into the executive branch).
298. Only a few vice presidents attended Cabinet sessions before Coolidge. Vice
President Marshall was invited to attend a handful of Cabinet sessions during Presi-
dent Wilson’s participation at the Versailles peace conference and one immediately
thereafter as a tip of the hat from Wilson. Vice President Wheeler apparently attended
a Cabinet session in the Hayes Administration. See Otten, supra note 186, at 176.
Adams participated in one session during President Washington’s absence from the
capital. See Henry Barrett Learned, The President’s Cabinet: Studies in the
Origin, Formation and Structure of an American Institution 121, 123–24, 384
(1912).
299. See, e.g., Goldstein, supra note 287, at 142.
300. See, e.g., Nelson, supra note 7, at 34, 43.
301. See, e.g., id.; Pika, supra note 1, at 505.
302. As Vice President, Henry Wallace would later make a number of favorable
pronouncements about the Soviet Union, statements with which Roosevelt presumably
did not agree. See, e.g., Jules Witcover, Crapshoot: Rolling the Dice on the Vice
303. See, e.g., 1 Harry S. Truman, Memoirs of Harry S. Truman: Year of
Decisions 68 (1955) (“[V]ery few Vice-Presidents have been in complete agreement
with the policies of the presidents with whom they have served.”).
thrown together awkwardly on to national party tickets. Predictably, this led to tension—both public and private—between presidents and vice presidents. This change in the parties' nominating processes has led in due course to presidents becoming responsible for the fate of their vice presidents, vice presidents becoming more politically beholden to chief executives and the two officeholders developing greater personal and ideological compatibility. These two mutually reinforcing trends—the Vice President's gravitation toward more of an executive branch role with more desirable duties assigned to him by the President and the establishment of the presidential nominee's authority to essentially select his own running mate—have given the modern President much greater political leverage over the Vice President. This reality in turn has helped foster the misperception in recent years that the Vice President lacks independence or, if it is even conceded he is independent, that he fails to exercise this authority.

Even with these dynamics at work—which have dramatically raised the stakes for vice presidents to assert their independence—they have continued to do so. What changed is the manner in which vice presidential independence has manifested itself. Beginning in the middle decades of the twentieth century, vice presidents began to spend less time in the Senate. As a result, vice presidential opportunities to assert independence in that forum have declined precipitously; although, as will be seen, they have not disappeared entirely. At the same time, private refusals by vice presidents to undertake certain presidential assignments continued. And the most fertile area of opportunity for independence began to emerge through use of the burgeoning mass media, which welcomed any vice presidential breaks with the President.

Such was the case with Vice President Richard Nixon. During Nixon's tenure as Vice President, the Californian on occasion took

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304. See, e.g., Nelson, supra note 7, at 29.
305. See, e.g., Goldstein, supra note 9, at 552 & n.267.
306. See Nelson, supra note 7, at 44; Goldstein, supra note 287, at 141. The transformation in vice presidential selection since 1940 was not instantaneous. See, e.g., Pika, supra note 1, at 526 n.22 (“Vice-presidential nominees were selected by the conventions of both parties in 1948 and by the Democratic convention in 1952 and 1956.”); see also Goldstein, supra note 44, at 178–79 (discussing presidential responsibility for vice presidential performance).
307. Prior to World War I, the Vice President was almost wholly in the legislative branch; he had virtually no executive branch role, consequently there was little expectation that the President might give (or withhold) a prestigious assignment.
308. Alben Barkley apparently disagreed with President Truman about some policy issues, but it is unclear if he aired those views in public. See Charles M. Hardin, Letter to the Editor, Vice Presidents' Loyalty, N.Y. TIMES, July 23, 1968, at 38. During
public positions at variance with those of President Eisenhower. The Vice President commented publicly that he favored the former: “That is my position, but I don’t say it is or is not the Administration’s position.” Nixon also took a less sanguine public posture than Eisenhower regarding the launch of Soviet space satellites. Nixon told reporter Stewart Alsop regarding the Eisenhower Administration’s attempts to accommodate the Soviets: “This ‘togetherness’ bullshit. I don’t believe in that. I think the time will come when we’ll look back at this era and ask ourselves whether we were crazy or something.” James Reston at the time characterized these stances as reflecting the Vice President’s “independence.”

Nixon also publicly expressed misgivings about Eisenhower’s approach to agricultural policy. Three months before the 1960 presidential election, Vice President (and presidential candidate) Nixon announced that farm policy at the time was “wrong.”

As noted earlier, President Eisenhower himself openly acknowledged the Vice President’s independence. This manifested itself when he delegated assignments to the Vice President. Nixon recalled that Eisenhower would convey his interest in Nixon carrying out a task by “wonder[ing] aloud if I might like to take over this or that project, always couching his recommendations in terms which would cause no embarrassment to either of us if I preferred to say no.”

Barkley’s vice presidency, when Congress was considering whether to add the Vice President as a member of the National Security Council, the House committee that drafted the measure briefly noted the Vice President’s independence. The committee stated that the Vice President “is not the servant of the President . . . .” House Comm. on Armed Services, Amending the National Security Act of 1947, H. Rep. No. 112, 81st Cong., 1st Sess., Feb. 14, 1949, 2.

309. See James Reston, Vice Presidential Duties, N.Y. TIMES, Apr. 3, 1958, at 8 (“[T]he President and his White House staff are slightly miffed at the Vice President for speaking out on his own in the last six months, sometimes in ways somewhat different from the official line.”); see also JEFFREY FRANK, IKE AND DICK: PORTRAIT OF A STRANGE POLITICAL MARRIAGE 161–64 (2013).
310. See Reston, supra note 309, at 8.
311. Id.
312. See id.
313. FRANK, supra note 309, at 163 (quoting Nixon).
314. See Reston, supra note 309, at 8.
317. See supra note 95 and accompanying text.
This was because, Nixon noted, Eisenhower “recognized that the Constitution . . . established the presidency and vice presidency as separate and independent offices.” 319 As a result, Eisenhower “never ordered [Nixon] . . . to do something.” 320 Eisenhower himself emphasized that the Vice President “work[ed] voluntarily” for him in taking on a number of executive branch assignments. 321 He recollected that “[i]t was on such a volunteer basis that early in my administration I had first sent him as a personal representative on a seventy-two day trip” to Asia and the Pacific. 322

Shortly before his term began, President-elect John F. Kennedy proposed that the incoming Vice President, Lyndon Johnson, travel to Mexico. 323 As a vice presidential aide recalled, the overseas trip would have provided “a great opportunity for some visibility [for Johnson], [and it displayed] a good sign of [presidential] trust.” 324 However, Johnson flatly refused. 325 The Vice President elect’s paranoia was triggered by the proposal: “Johnson . . . suspected [that] it was a plot” hatched by the President’s brother, Bobby Kennedy, to embarrass him. 326 Johnson believed the future Attorney General wanted to expose him to “the same kinds of problems Richard Nixon had had in Venezuela” when the latter’s vehicle had been attacked by violent anti-American mobs. 327

Following Johnson’s and Hubert Humphrey’s election in 1964, the latter indicated publicly that he did not have to adopt the President’s policy stances. He observed only that “while a person is Vice President . . . he should and usually does carry out the wishes of the President and administration.” 328 After Johnson declined to run for reelection in 1968, Humphrey was himself nominated for President by the Democratic Party. Prompted by the need to free himself from Johnson’s unpopular position on the war in Vietnam, late in the camp-

319. Id. at 184–85.
320. Id. at 185.
321. See EISENHOWER II, supra note 95, at 6.
322. See id., see also id. at 631 (noting “Nixon’s willingness to perform a variety of tasks, at my request”).
323. See LIGHT, supra note 7, at 119.
324. Id.
325. See id.
326. See id.
327. See id.
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paign Humphrey made a somewhat modest eleventh-hour attempt to assert his independence. In a statement issued in Salt Lake City,\(^\text{329}\) Humphrey broke with the President and urged that the United States suspend its bombing of North Vietnam.\(^\text{330}\)

Humphrey’s hesitation in taking this step prompted some measure of public debate over whether the Vice President could or should “break” publicly with the President.\(^\text{331}\) Professor Robert McCloskey stated well the independence of the office:

[O]ne . . . encounters the suggestion that the Vice President is duty bound to be endlessly compliant, that a hint of independence would have been incongruous and unthinkable. Nothing in the Constitution sustains this interpretation of the office, nor has custom created a tradition of Vice-Presidential servility . . . . in actual history most Vice Presidents have maintained some measure of personal independence.\(^\text{332}\)

Humphrey’s successor, Spiro Agnew, was elected alongside Richard Nixon in 1968. As author Jules Witcover recorded, not long after becoming Vice President Agnew “began to go public with views that were at variance with the administration.”\(^\text{333}\) Early in his first term, the Vice President undercut the administration.\(^\text{334}\) He encouraged local officials to advocate against a Nixon proposal that would have affected the tax treatment of income from state and municipal bonds.\(^\text{335}\)

In the summer of 1969, Agnew announced to the media that the administration should make every effort to plan for a manned mission to Mars by 2000.\(^\text{336}\) This was still under consideration within the executive branch and the Vice President’s outburst prompted discussion by

\(^{329}\) See Marie D. Natoli, The Humphrey Vice Presidency in Retrospect, 12 PRES. STUD. Q. 603, 607–09 (1982).

\(^{330}\) See, e.g., WITCOVER, supra note 61, at 49; see also Natoli, supra note 329, at 607 (Humphrey “had struck the initial note of independence from Lyndon Johnson.”). After President Johnson had been given an advance copy of the speech, he remarked to the Vice President: “Hubert, you give that speech and you’ll be screwed.” Marie D. Natoli, The Vice Presidency Since World War II, 226 (1975) (unpublished Ph.D dissertation, Tufts University) (on file with author). See also id. (characterizing Johnson as “livid” at the speech). Humphrey’s opponent in the 1968 presidential race, Richard Nixon, actually criticized Humphrey for his break with Johnson. The former Vice President said: “Mr. Humphrey ought to get in line, agree with his President for a change.” Id. at 230.

\(^{331}\) See, e.g., Muskie, supra note 10.

\(^{332}\) McCloskey, supra note 1.

\(^{333}\) WITCOVER, supra note 61, at 65.

\(^{334}\) See id.

\(^{335}\) See id.; see also Greenberg, supra note 7, at 299.

\(^{336}\) See WITCOVER, supra note 61, at 66.
the President and a senior advisor.\textsuperscript{337} Nixon queried his staff: “Is Agnew insubordinate, do you think?”\textsuperscript{338} As one Agnew aide recollected, Nixon and his aides grew frustrated because the White House “couldn’t count on him to do what he was told. . . . They didn’t like to have his independence out there.”\textsuperscript{339}

Also, in mid-1969, Agnew publicly repudiated the administration’s efforts to overhaul welfare programs.\textsuperscript{340} The Vice President lent his name to a National Governor’s Conference proposal urging the federal government to assume complete responsibility for welfare programs.\textsuperscript{341} However, the Nixon Administration not long before had called for the states to share more of the burden.\textsuperscript{342} Sometime later, when Agnew was departing from Camp David for the Senate to potentially break a tie vote on a Nixon-supported anti-ballistic missile initiative, the President asked him half seriously “[y]ou know how to vote on that, don’t you?”\textsuperscript{343} Agnew retorted in the same spirit “[i]f it’s a tie on ABM, Mr. President, I’ll be on the phone about the welfare program.”\textsuperscript{344}

In 1970, following the shooting of four student protestors at Kent State University, President Nixon was overheard making disparaging remarks about the anti-war movement.\textsuperscript{345} Joseph Rhodes, Jr., a college student and member of a presidential task force, publicly criticized Nixon for his remarks.\textsuperscript{346} Agnew responded by calling for the commission member to step down: “Mr. Rhodes should resign immediately. He clearly does not possess the maturity, the objectivity and the judgment to serve on a fact-finding body of national importance.”\textsuperscript{347} This, however, was not the administration’s posture toward its own commission member.\textsuperscript{348} Nixon’s press secretary had to clarify that the commission member would in fact not be removed, which prompted the following headline from the \textit{Washington Evening Star}: “President Rebuffs Agnew on Student.”\textsuperscript{349} It was around this time that, in

\begin{itemize}
  \item \textsuperscript{337} See id. at 66–67.
  \item \textsuperscript{338} Id. (quoting Nixon).
  \item \textsuperscript{339} Id. at 55 (quoting Vic Gold).
  \item \textsuperscript{340} See id. at 68.
  \item \textsuperscript{341} See id.
  \item \textsuperscript{342} See id.
  \item \textsuperscript{343} Id.
  \item \textsuperscript{344} Id.
  \item \textsuperscript{345} See id. at 97.
  \item \textsuperscript{346} See id. at 101–02.
  \item \textsuperscript{347} Id. at 102 (quoting Agnew).
  \item \textsuperscript{348} See id.
  \item \textsuperscript{349} Id. at 102–03 (quoting the headline). Haldeman wrote in his diary: “VP really blew it by blasting publicly instead of working it out internally.” Id. at 104.
\end{itemize}
Witcover’s words, Nixon became “concerned about Agnew’s growing . . . independence.”\footnote{350} Nixon confided to Haldeman, “[I] agree with him [Agnew] 80 percent of the time, but God damn, the other 20 percent of the time, I don’t.”\footnote{351}

Nixon set in motion the American diplomatic opening to the People’s Republic of China. Agnew, however harbored serious misgivings about the substance of the policy and about being kept out of the loop on the policy’s development.\footnote{352} At a gathering of Republican Governors in Virginia, Agnew unburdened himself to several reporters about Nixon’s approach to mainland China.\footnote{353} A vice presidential aide remembered that Agnew “understood the ramifications. That was calculated. It was deliberate. I think he really felt deeply about the [China] policy. . . . [Agnew] was surprised about it [the opening to China] as much as anybody, and this was his way of saying [to the administration], ‘Screw you.’”\footnote{354}

Another vice presidential staff member concurred. He noted that “Agnew believed he was being undermined. He was a very strong supporter of Taiwan and it was a way he could say things he believed, and show he was one who was not going to do as he was told. And he was very proud of it.”\footnote{355} Not surprisingly, Agnew’s comments made for hot copy.\footnote{356} Unlike his prior run-ins with the administration, as Witcover records, “[f]or the first time on a truly major issue, the vice president was second-guessing the president.”\footnote{357} In Oval Office recordings, Nixon expressed outrage at the Vice President’s conduct.\footnote{358} In speaking with National Security Advisor Henry Kissinger, Nixon thundered “[t]he vice president cannot speak for himself in foreign policy.”\footnote{359} Perhaps forgetting his own breaks with Eisenhower while Vice President, Nixon continued “I mean, what the hell, the vice president, his job is to support the president.”\footnote{360}

\footnote{350. \textit{Id.} at 107.}
\footnote{351. \textit{Id.} at 153 (quoting Nixon).}
\footnote{352. \textit{See id.} at 163–65.}
\footnote{354. \textit{WITCOVER, supra} note 61, at 165 (quoting Vic Gold).}
\footnote{355. \textit{Id.} (quoting David Keene).}
\footnote{356. \textit{See id.} at 166.}
\footnote{357. \textit{Id.}}
\footnote{358. \textit{See id.} at 166–67.}
\footnote{359. \textit{Id.} at 167.}
\footnote{360. \textit{Id.} Witcover characterized Agnew’s gambit as an “outburst of policy independence.” \textit{Id.} at 170.}
Following the ticket’s reelection in 1972, President Nixon and his aides urged Agnew to take the job of heading up the bicentennial commission. Agnew flatly rejected the assignment. He told Nixon and his senior staff: “I look upon the Bicentennial as a loser, because everybody has his own ideas about it and nobody can be the head of it without making a million enemies. A potential presidential candidate doesn’t want to make any enemies.”

Later that year, as the Watergate affair was unfolding, Agnew became engulfed by scandal himself. The matter involved his acceptance of bribes while in state office. In trying to extricate himself from that predicament, Agnew chose to turn over his financial records to investigators and then to ask the House of Representatives to look into his conduct. Nixon, who was stonewalling investigators in the Watergate matter, was deeply unhappy about Agnew’s gambit since the President believed it would make him look all the more obstructionist. Nor was he happy about Agnew’s overtures to the House. The Vice President recalled, “[m]y plan to take my case to the House touched off a commotion in the Nixon inner circle.” In light of Nixon’s contemporaneous Watergate woes, the President and his staff were deeply worried about an impeachment “doubleheader” and were adamantly opposed.

Journalist Lou Cannon analyzed the situation at the time as such: “Agnew [. . .] continued a policy of newly asserted vice presidential independence from the White House . . . .” Underscoring this point

361. See Agnew, supra note 61, at 37–38.
362. See id.
363. Id.
364. Agnew also allegedly continued to accept bribes at the beginning of his vice presidency. See, e.g., Witcover, supra note 61, at 264.
366. See id.; see also Christopher Lydon, Agnew Says ‘Damned Lies’ to Report of Kickbacks; Doubts He’ll Be Indicted; ‘Nothing to Hide,’ N.Y. Times, Aug. 9, 1973, at 1, 21; Witcover, supra note 61, at 311; see also Agnew, supra note 61, at 109–10.
367. Agnew, supra note 61, at 141; see also Witcover, supra note 61, at 317. Senator Barry Goldwater advised Agnew to “[g]o to the House, but don’t tell the White House—just go on your own.” Id. at 324 (quoting Goldwater).
368. Witcover, supra note 61, at 317.
369. See id. at 318–19.
370. Cannon, supra note 365, at A7; see also Lou Cannon, Agnew Adopting Independent Role, Wash. Post, Aug. 12, 1973, at A1 (“Agnew’s practice of playing second violin in the White House orchestra ended last week on an abrupt, discordant note. After a 1½-hour meeting with Mr. Nixon described by White House sources as ‘acrimonious,’ Agnew emerged firmly committed to an outspoken course of action that he knows may be contrasted to President Nixon’s policy of silence and half-statements about Watergate.”).
during a press conference, Agnew announced that “I think the Vice President of the United States should stand on his own two feet . . . . It really isn’t that important what a President says.” He continued: “I think the office of the Vice-President is an important enough one that the man has to stand on his own feet. So I’m not spending my time looking around to see who’s supporting me. I’m defending myself.”

As events regarding his own scandal unfolded, the Vice President went so far as to publicly attack Henry Peterson, a senior official in the Nixon Justice Department who was directly advising the President on the Agnew matter. As Witcover characterized it, the “vice president was declaring open war on the man he [Nixon] personally had designated to find out the truth about Agnew.” The President “recognized that Agnew in effect was making war on Nixon himself.”

Nixon then was forced to publicly show his support for Peterson.

Agnew’s clash with the White House and the Department of Justice over his scandal got to the point where he considered leaving the executive branch altogether. He recollected:

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

Agnew thus considered what could be seen as the ultimate act of vice presidential independence: abandoning the trappings of the executive branch altogether and returning full time to the Senate.

In his memoirs, Agnew drolly described the efforts of one of his successors, Nelson Rockefeller, to revise the vice presidential seal. To Agnew’s way of thinking, Rockefeller’s efforts unwittingly carried
symbolic importance. Ford’s Vice President took the seal with its “‘tired old bird with its wings down’ and had it replaced by a more aggressive eagle—perhaps one better equipped to engage its presidential counterpart in battle.”378 This anecdote—coming from a modern Vice President—is a telling reminder of the potential for conflict that still exists between the two officeholders.

Like so many of his predecessors, Vice President Gerald Ford was also outspoken about his independence, albeit in far different circumstances. He commented that he would, as Vice President, “remain [his] own man, fly [his] own course, and speak [his] own convictions.”379 At one juncture, Ford observed regarding the Vice President’s independence that “[w]henever I assert that I am my own man, it’s ironic that everyone assumes it to be a declaration of independence from the White House and not from the Capitol as well.”380 Ford pointed out that “[s]ome say the Vice President does whatever the President wants him to [do but that is] . . . unrealistic.”381

Ford not only spoke of vice presidential independence but exercised it. In the midst of President Nixon’s battle with a Senate panel over access to Watergate tapes, Ford proposed publicly both sides “compromise” on the matter.382 One author describes the episode as such: “Ford had the audacity, from Nixon’s outlook, to stray from the official line on Watergate . . . . [In so doing, Ford] had broken one of

378. Agnew, supra note 61, at 127. Agnew may also have taken a position counter to Nixon on campaign finance reform. See Natoli, supra note 330, at 253.
379. Suzanne Dean, Ford Says He’ll Stay ‘Own Man,’ WASH. POST, June 9, 1974, at A5 (quoting Ford). Milton Eisenhower, brother of the President and an authority on governmental operations in his own right, wrote that same year that “there is no legal bar to his [the Vice President’s] openly disagreeing with the President . . . . the President cannot discharge the . . . Vice-President. This point is critical.” Eisenhower, supra note 14, at 540.
381. Id. Ford seems to have asserted some degree of independence from time to time. See Philip Abbott, Accidental Presidents: Death, Assassination, Resignation, and Democratic Succession 175 (2008) (discussing Ford’s defiance of Nixon’s White House aides); Marjorie Hunter, G.O.P. Begins to Rally Around Ford; Growing Crowds Hail New Boldness, N.Y. TIMES, Mar. 10, 1974, at 1 (quoting Ford as saying “I’m running my own show” and quoting him as critiquing the President’s “poor[ ]” performance at a press conference); Marjorie Hunter, Mr. Ford: He Is Now His Party’s Leader, N.Y. TIMES, May 12, 1974 (quoting Ford’s characterization of the contents of Watergate transcripts involving the President as “disappointing and disturbing”); Natoli, supra note 330, at 323 (characterizing “[t]he Ford Vice Presidency [as] fluctuat[ing] between assertions of loyalty to Richard Nixon and innuendos of criticism of the President.”); See also Natoli, supra note 330, at 324–25, 329, 334. 382. See Hite, supra note 1, at 120.
the cardinal rules [that] . . . the vice president should never publicly disagree with the president.”

Ford’s own Vice President, Nelson Rockefeller, made a public break with him on a number of public policy matters. In early 1975, Rockefeller, as President of the Senate, became entangled in a bitter fight in the upper chamber over the future of the filibuster. Ultimately, Rockefeller sided with those who wanted to make it easier to shut off debate. The conflict was sufficiently high profile that in a press conference President Ford was asked about Vice President Rockefeller’s actions to water down the filibuster. The former Vice President stated:

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

Clearly, Ford did not feel it was within his authority to instruct Rockefeller how to act in the presiding officer’s chair. Sources at the time, however, reported that Ford had indicated to Rockefeller how he would like to see the Vice President rule even if he lacked the authority to direct him to do so. Rowland Evans and Robert Novak wrote that “[a]ccording to Ford sources, the President told Rockefeller that the decision on critical rulings was his, as Senate presiding officer, but clearly stated which way he hoped Rockefeller would rule.” They cited a White House source who said “[b]elieve me, there was no doubt in Rockefeller’s mind about the President’s views.”

383. Id.; see also James Cannon, Time and Change: Gerald Ford’s Appointment with History 263 (1994).
386. Evans & Novak, supra note 384, at 15; see also Public Papers, supra note 385, at 326–27 (Ford implying he counseled Rockefeller to rule other than how he did).
388. Id.; cf. David S. Broder, “Civil War” Within The GOP, Wash. Post, Mar. 12, 1975, at A14 (“From all available evidence, the rulings were Rockefeller’s own.”).
An even more prominent disagreement involved whether New York City should receive a federal bailout in October 1975. \footnote{389 See Martin Tolchin, Did Rockefeller Give Ford a Way Out?, N.Y. Times, Oct. 14, 1975, at 43 (“Vice President Rockefeller’s call for Congressional action to assist New York City [. . .] apparently totally at odds with President Ford’s repeated opposition to Federal intervention . . . .”); see also Michael S. Kramer, “I NEVER WANTED TO BE VICE-PRESIDENT OF ANYTHING!” 376 (1976) (Rockefeller “publicly disagree[d] with the president” on whether there should be a federal bailout of this city); \textit{Turner}, supra note 14, at 133 (“The fiscal crisis . . . produced an open disagreement between the president and vice president . . .”); \textit{id.} at 176 (“Rockefeller invoked his right to independence on . . . New York City’s need for federal loan guarantees . . . .”). For a full discussion of the conflict in views, see \textit{id.} at 132–45.} At the time, Ford was opposed, but Rockefeller publicly supported such a step. This open disagreement reflected both Ford’s and the Vice President’s recognition of Rockefeller’s independence as well as mutual accommodation between the two men. \footnote{390 See \textit{id.} at 176–77 (“[I]n 1976 . . . Rockefeller . . . [spoke] out more widely in advocacy of policy positions not endorsed by the administration, including establishment of a national health insurance program and federal assumption of welfare programs administered by state government.”)).} The very next year, Rockefeller took positions on health care and welfare policy that had not been approved by the Ford White House. \footnote{391 See \textit{id.}} The Vice President believed that the federal government should set up a national health insurance plan and should assume responsibility for state programs supporting the poor. \footnote{392 See \textit{id.}}

In May 1988, Vice President George H.W. Bush publicly distanced himself from President Ronald Reagan.\footnote{393 See David Hoffman, \textit{Bush Splits With Reagan On Handling of Noriega, He Would Not “Bargain with Drug Dealers,”} \textit{Wash. Post}, May 19, 1988, at A1. The author would like to thank Joel Goldstein for alerting him to this episode.} This break was over whether the United States should try to reach an agreement with Panamanian dictator and drug lord, Manuel Noriega.\footnote{394 See Steven V. Roberts, \textit{Bush and Reagan Seem to Disagree on Noriega Talks}, N.Y. Times, May 20, 1988, at A1. Bush’s actions contradicted statements he had just made in which he had emphasized his fealty to Reagan. See \textit{Cronin & Genovese}, \textit{supra} note 1, at 314 (quoting George H.W. Bush) (“The job [of Vice President] . . . lends itself to loyally supporting the president . . . giving him your best judgment, and then when the president reaches a decision, supporting it.”).} Bush proclaimed in a speech that “[d]rug dealers are domestic terrorists . . . [and] I won’t bargain with terrorists, and I won’t bargain with drug dealers either . . . .”\footnote{395 Roberts, \textit{supra} note 394 (quoting Bush).} The \textit{New York Times} reported at the time that “aides to the Vice President said he was trying to distance himself from the Administration’s policy,” likening it to “a declaration of indepen-
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Nor was this a minor issue. The battle over this policy within the administration was described by an insider as "monumental." It certainly served the Vice President’s purposes as he was beginning in earnest to campaign for the presidency and his opponent enjoyed an advantage in public opinion on the question of how to combat illegal drugs.

Bush wrote in his diary at the time:

I’ve become more convinced than ever that the Noriega deal is terrible. . . . I make some comment in a speech that I wouldn’t deal with drug dealers—domestic or foreign—and people take it as a break with Reagan on Noriega which to some degree it is. I hate doing this, and I don’t feel comfortable with it! I like the President so much, and yet, he’s wrong on this one.

As might be expected, this put the Reagan Administration in an awkward position.

Vice President Al Gore served two full terms alongside President Bill Clinton. Although the two men enjoyed a close relationship during most of their tenure, Gore demonstrated his independence from Clinton on at least two occasions. One involved Clinton’s sex scandal with a White House intern, Monica Lewinsky. Gore, who like Bush in 1988 was undertaking his own campaign for the presidency, was highly critical of Clinton’s actions. In June 1999, the Vice President

396. Id.
397. See id.
398. See id.
399. George Bush, All the Best, George Bush: My Life in Letters and Other Writings 386–87 (1999). As President, Bush may have experienced the other side of the coin. On occasion, Vice President Dan Quayle took a more skeptical posture with respect to the Soviet Union than did the rest of the administration. See Pika, supra note 1, at 518. Following a 1989 summit in Malta with Soviet leader Mikhail Gorbachev, President Bush struck a conciliatory posture. See id. Before Bush had returned to the United States, Quayle expressed concern about the U.S.S.R.’s reform efforts and that nation’s posture in Latin America and the Caribbean. See id. The Bush Administration tried to paper over the cracks of the disagreement and the President let it be known to Quayle that his comments were unwelcome. See id. This appeared to end the Vice President’s freelancing. See id. To what degree this episode reflected internal confusion rather than outright vice presidential defiance of the President is unclear.

400. See David Hoffman & Judith Havemann, Bush Presses to Cut Off Talks With Noriega: Administration Tentatively Declines to Take Vice President’s Advice, WASH. POST, May 20, 1988, at A1.
401. See John M. Broder & Don Van Natta, Jr., Aides Say Clinton is Angered As Gore Tries to Break Away, N.Y. TIMES, June 26, 1999 at A1. The author would like to thank Joel Goldstein for noting Gore’s breaks with Clinton.
402. See id.
termed the chief executive’s actions “inexcusable,” “terribly wrong” and “awful, terrible, horrible.”

Gore’s public posture apparently left the President “livid.” The chief executive, said an aide, was “very upset” and “dismayed” at the Vice President’s remarks. Another source close to President Clinton indicated that, while the President was remorseful about his relationship with Lewinsky, “he’d rather not have to be reminded of [it] . . . by his Vice President.”

Nor was the Lewinsky matter the only assertion of independence by Gore. Clinton’s response to the Elian Gonzalez situation also prompted a vice presidential break from the President. On Thanksgiving Day, 1999, Gonzalez, a five-year old youth from Cuba, was discovered on a small flotilla by an American fishing vessel in the Caribbean. The boy’s mother and her shipmates had perished in an effort to come to America. The boy’s father lived in Cuba and made clear he wanted custody of the boy; the question remained whether the child should remain in the United States with relatives or be returned to Cuba.

The Clinton Administration’s posture was that this high-profile matter was strictly a question of U.S. immigration law in which the boy’s father would have the right to win custody. Gore struck out on his own and urged adoption of legislation that would have made an exception in the law for Gonzalez. He stated “[i]t now appears that our immigration laws may not be broad enough to allow for such an approach in Elian’s case.” Gore’s actions were described by one journalist as “breaking with the president [and] the Justice Department . . . . [i]n a dramatic attempt to distance himself from the Clinton administration’s handling of the Elian Gonzalez case . . . .” According to a reporter, “White House officials . . . . were caught off guard

404. See Broder & Van Natta, supra note 401.
405. See id.
406. Id.
408. See id.
409. See id.
411. See Mark Silva, Gore Distances Himself from Clinton Administration on Elian, MIAMI HERALD, Mar. 31, 2000.
412. Id.
413. Gore Breaks, supra note 410 (quoting John King); Silva, supra note 411.
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[by Gore’s gambit] and have been harshly critical in private of the vice president’s decision.”

By embracing legislation contrary to the administration’s posture, Gore could have been put in a situation where he would have had to cast a tiebreaking vote against the President. Ultimately, no legislation progressed that far in the Senate and the boy was returned to his father.

Vice President Dick Cheney was not afraid to act independently during the George W. Bush Administration. One senior White House press aide later bemoaned that the Vice President was “unable to stay on message” as Cheney broke with the President on no less than four major occasions.

The first instance involved the lead up to the Iraq War. At the time there was intense internal debate within the administration about the utility of permitting UN weapons inspectors to return to Iraq. In August 2002, Cheney publicly got out in front of the President on whether UN weapons inspectors should be allowed back in the country. Even though he already knew the President was headed in the opposite policy direction, Cheney announced: “A person would be right to question any suggestion that we should just get inspectors back into Iraq, and then our worries will be over.” Esteemed vice presidential scholar Joel Goldstein characterized this as an example of “Cheney’s willingness to stray publicly from administration policy.” President Bush, according to his press secretary at the time, “was hot about it; he was not pleased . . . . It wasn’t his point of view.”

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414. Gore Breaks, supra note 410 (quoting John King).
416. See Joel K. Goldstein, Cheney, Vice Presidential Power, and the War on Terror, 40 PRES. STUD. Q. 102, 126 (2010) (quoting Scott McClellan).
418. See, e.g., Bob Woodward, Bush at War 344–45 (2002) (Cheney’s “swipe at weapons inspections was contrary to Bush’s year-long assertions that the next step should be to let the weapons inspectors back into Iraq.”); see also id. at 345; Julian Borger, White House in Disarray After Cheney Speech, GUARDIAN, Sept. 1, 2002, available at http://www.theguardian.com/world/2002/sep/02/iraq.usa1 (last visited Apr. 29, 2014).
420. Goldstein, supra note 416, at 126 (quoting Cheney).
421. Id. at 127.
422. Baker, supra note 419, at 211 (quoting Ari Fleischer).
A second example of vice presidential independence involved Cheney breaking openly with President Bush on the issue of gay marriage. 423 The Vice President lent his support to expanding the definition of marital union:

With the respect to the question of relationships, my general view is freedom means freedom for everyone . . . . People ought to be free to enter into any kind of relationship they want to. The question that comes up with the issue of marriage is what kind of official sanction or approval is going to be granted by government? Historically, that’s been a relationship that has been handled by the states. The states have made that fundamental decision of what constitutes a marriage. 424

Regarding the President’s position, Cheney continued, “my own preference is as I’ve stated, but the president makes policy for the administration. He’s made it clear that he does, in fact, support a constitutional amendment on this issue [to define marriage as involving heterosexual couples].” 425 One prominent activist expressed surprise that the Vice President would take a position contrary to the President: “[I]t [is] hard to believe the vice president would stray from the administration’s position.” 426

Third, Cheney staked out his own position on changing Senate rules to end the filibustering of judicial nominees, the so-called “nuclear option.” While President Bush had indicated he would not get involved in internal Senate matters, Cheney commented publicly that, in his position as President of the Senate, he would interpret Senate rules to prohibit the intentional delay of votes on judicial nominees. 427 When Bush’s chief of staff, Andrew Card, was asked whether Cheney’s beliefs reflected the Bush Administration’s policy regarding use of the “nuclear option,” Card responded that Cheney was speaking in his capacity as part of the legislative branch “as the president of the Senate” and not on behalf of the President. 428

424. Id.
425. Id.
426. Id. (quoting the head of Family Research Council).
A final example of Cheney’s independence entailed litigation involving the Second Amendment. Taking an approach different from that put forward by the Bush Justice Department, Cheney signed an amicus curiae brief submitted to the Supreme Court by members of Congress in the case of District of Columbia v. Heller. He did so expressly in his capacity as “President of the United States Senate.”

In his memoirs, Cheney recounted the situation:

In 2008, I found something else I could do as president of the Senate . . . . [which was to sign an amicus brief] . . . . [T]he Justice Department . . . . asked that the Supreme Court send the case back to the lower courts. This stance seemed inconsistent with the president’s previous position on the Second Amendment, and it was certainly inconsistent with my view . . . . It wasn’t a hard decision. I signed on, joining fifty-five senators and 250 House members, as ‘President of the United States Senate, Richard B. Cheney.’

As author Peter Baker notes, “Cheney had publicly taken a position at odds with the administration’s . . . . [and] Cheney’s break with Bush on gun rights was seen in some quarters of the White House as a bold act of defiance . . . by the . . . vice president . . . .” The Vice President’s chief of staff, David Addington, confided to a colleague after the brief was filed that “the White House is going to be hot.” Cheney himself conceded his actions were “pretty big news.”

White House chief of staff Josh Bolten was especially angry at this incident. As Cheney recalled, Bolten confronted Addington, and expressed concern about the Vice President’s actions. Cheney recollected that Addington “was always careful to protect the institution of the vice presidency . . . . and . . . [he] explained [to Bolten] . . . that he worked for the vice president, not the president’s chief of staff, and that the Senate functions of the vice president were the vice president’s business.”

431. CHENEY, supra note 14, at 494–95 (emphasis added). Cheney later recounted that “Justice Antonin Scalia later joked that the Court was unsure how to rule until, thankfully, ‘the vice president’s brief showed up.’” Id. at 495–96.
433. Id. at 579.
434. CHENEY, supra note 14, at 495; see also BAKER, supra note 419, at 578–80.
435. CHENEY, supra note 14, at 495 (emphasis added).
Cheney’s successor, Joe Biden, took a public position on gay marriage that was also at odds with the President with whom he served. He too expressed support for gay marriage. After taking heavy criticism for being less progressive than the Vice President on the subject, President Barack Obama adopted Biden’s stance within a few days.

E. Historical Lessons

Cheney’s and Biden’s position taking reflects only the latest in a long line of independent actions undertaken by vice presidents. This unbroken practice represents several principles. First, it demonstrates that the Vice President’s constitutional independence is not a sterile, legal abstraction. This autonomy has been exercised on numerous occasions by numerous vice presidents dating back to the advent of the Constitution. Nor are these episodes limited to pre-modern vice presidencies, rather they have continued right up to the present day.

Second, it is worth noting that assertions of independence have changed in character over the course of the nation’s history. They reflect the evolution of the vice presidency as an institution from largely a legislative branch position to largely an executive branch one. From the beginning of the office until the first few decades of the Twentieth Century, vice presidential autonomy manifested itself largely in the Senate where as presiding officer vice presidents could use their legislative branch authority to thwart presidents. Autonomous vice presidential position taking took the form of breaking ties, making Senate committee assignments and presiding over the Senate in ways that reflected vice presidential priorities.

As the office began to become more of an executive branch post, the opportunities for assertions of vice presidential autonomy were modified even as the political stakes for the Vice President were raised. The Vice President spent much less time in the Senate so his

436. See, e.g., Editorial, Mr. Biden’s Moment of Truth, N.Y. TIMES, May 7, 2012, available at http://www.nytimes.com/2012/05/08/opinion/mr-bidens-moment-of-truth.html (“[A]ides to Mr. Biden . . . [and] Mr. Obama [are] trying to portray the vice president’s remarks as in line with the president’s views. They are not.”).
437. See, e.g., Glenn Thrush & Jennifer Epstein, Obama Backs Gay Marriage, W.H.: Biden Forced the President’s Hand, POLITICO, May 10, 2012, at 1. It could be contended that this was a mere gaffe by Biden but the Vice President never “walked back” the position. Moreover, Obama aides were convinced Biden’s actions were intentional. See Glenn Thrush, The Happy Warrior’s Last Ride, POLITICO MAGAZINE, March/April 12, 20 (2014) (“Obama’s team didn’t buy Biden’s explanation that the gay-marriage endorsement was accidental”).
438. See Pika, supra note 1, at 505; Heclo et al, supra note 1.
opportunities to assert his independence in that sphere were narrowed, although—as Cheney’s and Rockefeller’s actions indicate—they were not eliminated entirely.

Moreover, the role of mass media has evolved and became an increasingly important part of political life in the Nineteenth and early Twentieth Centuries. As such, independent vice presidential actions manifested themselves more often in public remarks. These statements initially were expressed in newspapers. Calhoun appears to have been the first to do this, initially under a *nom de plume*. Later, however, he and others such as Wilson and Hendricks would give speeches enunciating policy positions that they could be sure the media would pick up. Beginning with Wheeler and Arthur, vice presidents began to use interviews to air their differences with their presidents.

As the profile of the office has grown in modern times, these public statements have become bigger and bigger news items. As outlined above, they include: Nixon’s divergence from Eisenhower on tax and farm policy and on the threat posed by Soviet space satellites; Humphrey’s last-minute departure from Johnson on the bombing of North Vietnam; Agnew’s discordant policy stances on American space travel, welfare reform, the tenure of a presidential commission member, the opening to mainland China and issues related to the investigation of the Vice President; Ford’s posture on Watergate; Rockefeller’s break with Ford on modifications to the filibuster, the New York City bailout, health care policy and welfare reform; Bush’s departure from Reagan on negotiations with Noriega; Gore’s statements about the Lewinsky scandal and the Elian Gonzalez matter; Cheney’s decision to chart his own course on the advisability of permitting UN weapons inspectors into Iraq, gay marriage and the changing of Senate rules; and Biden’s candid views on gay marriage. In effect, the Vice President has his own bully pulpit he can use to no small effect.439 Given the public expectations that the Vice President is part of the President’s team, a public break with the chief executive in the modern era of mass media can be just as jarring an assertion of vice presidential independence as casting a tie-breaking vote against the President’s wishes.

Third, vice presidential actions taken in opposition to the President can be seen to exist along a rough continuum, from less confrontational to more so.440 The less confrontational end of the spectrum includes when the Vice President makes public pronounce-

439. *See, e.g.*, GOLDSTEIN, *supra* note 287, at 11–12 (“occupant[s] [of the vice presidential office] . . . . receive greater media attention than other public figures.”). 440. The author would like to thank Brian Kalt for raising this point.
ments while: 1) the issue is still under internal consideration by the executive branch (e.g., Agnew on a manned mission to Mars) or the President is in the process of reviewing his own existing policy position (e.g., Biden on gay marriage); or 2) the President has chosen to be silent (e.g., Agnew on the need to fire a presidential commission member, Hendricks on Irish Home Rule, Wilson on women’s suffrage, Cheney and Rockefeller on revising Senate rules).

It then proceeds to the more confrontational posture of the Vice President flatly contradicting the President’s public position. This also can take several forms, including: 1) the Vice President speaking out on an issue even if the President does not appear to be considering the Vice President’s approach and/or does not appear to be reconsidering his own stance (e.g., Johnson on reconstruction policy, Marshall on several occasions, Ford on production of Watergate materials, Rockefeller’s views on health care policy and welfare reform); 2) the Vice President undermining the President as presiding officer (e.g., Morton on voting rights for African Americans, Stevenson on currency reform, Fairbanks countering the Square Deal agenda, Dawes on banking and farm legislation, Garner on court packing); 3) the Vice President voting against the President in the Senate (e.g., Burr on the Judiciary Act, Clinton on the National Bank, Calhoun on several occasions, Wheeler on seating a senator, Garner on tax policy); 4) the Vice President taking other formal action against the President (e.g., Cheney signing onto an amicus brief); or 5) the Vice President speaking out publicly against the President’s position to the press (e.g., Calhoun on nullification, Wheeler on Reconstruction policy, Arthur on a presidential nominee, Curtis on wheat prices and prohibition, Nixon on taxes, the threat posed by Soviet space satellites and farm policy, Humphrey on the bombing of North Vietnam, Agnew on the opening to China, Rockefeller on a bailout for New York City, Bush on negotiations with Noriega, Gore on the Lewinsky matter and the fate of Elian Gonzalez and Cheney on gay rights).

Finally, these examples reflect another reality. While the Vice President’s constitutional independence remains constant, his political and practical independence varies depending on several factors. These factors include an assessment at some level by the Vice President of his own self interest, be it the Vice President’s future political aspirations, the political standing of the President and the Vice President at the time, the Vice President’s relationship with the President and how publicly the Vice President is associated with a certain policy position.
IV.

POTENTIAL COUNTERARGUMENTS TO THE NOTION OF VICE PRESIDENTIAL INDEPENDENCE

Several potential counterarguments could be marshaled against the views that the Vice President is constitutionally independent of the President, that he is also practically independent of the President and that he continues to exercise such authority. In the end, however, none is persuasive and the three-pronged thesis of this article is bolstered accordingly.

A. Vice Presidential Independence Disrupts Executive Branch Unity

One potential rebuttal involves the question of how the Vice President can be independent without the unity of the executive branch being ruptured. After all, Article II, Section 1 provides that “[t]he executive Power shall be vested in a President of the United States of America.”441 Moreover, the President is charged with “tak[ing] Care that the Laws be faithfully executed . . . .”442 Putting to one side the theory of the unitary executive—the various permutations of which are beyond the scope of this article443—there can be little doubt that one of the principal reasons the United States has a President is that the framers wanted a unified executive branch.444 A plural executive was expressly rejected at the Constitutional Convention. As Hamilton wrote, “[t]he ingredients, which constitute energy in the executive, are first unity . . . .”445

Thus, it could be argued that when the Vice President acts against the President’s wishes, it shatters the degree of unity that would appear essential to the realization of the Framers’ design for a unified executive branch. Arguably, such a circumstance would violate the

442. Id. § 3.
444. See, e.g., Free Enterprise Fund v. PCAOB, 130 S. Ct. 3138, 3154 (2010) (quoting Clinton v. Jones, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring in judgment) (“Article II ‘makes a single President responsible for the actions of the Executive Branch.’”)); 1 ANNALS OF CONG. 480 (June 16, 1789) (Madison) (“[T]he first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.”).
445. THE FEDERALIST No. 70 (Hamilton) 354, 355 (Garry Wills ed. 1982).
rule that the Vice President “is constitutionally prohibited from sharing the ‘executive Power.’” 446

For several reasons, this counterargument poses little difficulty to the principle that the Vice President is constitutionally independent. As an initial matter, it will be recalled that many of the Vice President’s independent actions have taken place in his capacity as President of the Senate. The Executive Power and the Take Care Clauses only grant the President authority over the executive branch. In his capacity as President of the Senate, the Vice President is not even part of the executive branch; 447 he is part of the legislative department. Because these incidents take place when the Vice President falls within a separate branch of government, they do nothing to disrupt the unity of the executive branch.

Furthermore, the Vice President’s role and powers as assigned by the Constitution must be read in concert with Article II, Sections 1 and 3. As the Supreme Court has noted on numerous occasions, each part of the Constitution must be interpreted in a manner so as not to disable any other part of the document. 448 Thus, the textual requirement of a

446. Young, supra note 121, at 8; see also Ruth C. Silva, Presidential Succession 170 (1951) (“[T]he Constitution vests executive power in the President and thus by implication forbids its exercise by anyone who is not actually a President.”); G. Homer Durham, The Vice-Presidency, 1 W. Pol. Q. 311, 312 (1948) (“In vesting the executive power in Article II, the constitution bestows no grant on the Vice-President.”); Nelson, supra note 7, at 64 (“The constitutional independence of the vice presidency, joined to the constitutional indivisibility of executive power, limits the range of responsibilities that the vice president can perform well in the executive branch.”); Glenn Harlan Reynolds, Is Dick Cheney Unconstitutional?, 102 Nw. L. Rev. Coll. 110, 112 n.14 (2007) (“I am aware of no argument to the effect that the Vesting Clause of Article II imbibes the Vice President with any executive power, and of course such an argument would be plainly contrary to the text.”); Schlesinger, supra note 161, at 480 (“For a long time [presidents] . . . supposed themselves constitutionally forbidden to” delegate projects to vice presidents).


448. See Marbury v. Madison, 5 U.S. 137, 174 (1803) (“It cannot be presumed that any clause in the Constitution is intended to be without effect . . . .”); Ullmann v. United States, 350 U.S. 422, 428 (1956) (“[N]o constitutional guarantee enjoys preference, so none should suffer subordination or deletion.”); Myers v. United States, 272 U.S. 52, 151 (1926) (“[T]he usual canon of interpretation of that instrument [the Constitution], . . . requires that real effect should be given to all the words it uses.”); Holmes v. Jennison, 39 U.S. 540, 570–71 (1840) (“In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning”); Ogden v. Saunders, 25 U.S. 213, 316 (1827) (Trimble, J., concurring) (“[I]n construing an instrument of so much
unified executive must be read in conjunction with other provisions involving the Vice President, such as the Vice President’s executive branch authority to lead determinations as to presidential inability under Section 4 of the Twenty-Fifth Amendment.\textsuperscript{449} Other clauses, such as those establishing a four-year term and separate election, also denote vice presidential independence. So does his exclusion from the Opinion Clause. Seen in this way, the Vice President’s independent, constitutional authority does not erode the unity of the executive branch, such as it is. His independence should be read alongside Article II, Sections 1 and 3 as parallel constitutional requirements.

B. An Independent Vice President is Unaccountable

A second, related counterargument is that, if the Vice President is truly independent from the President, he must not be subject to any control at all, what rhetorically has been termed a “unitary vice president.”\textsuperscript{450} One commentator noted this concern decades ago:

[The Vice President is an independent officer. He is in nowise responsible to the President or subordinate to him. . . . But to allow him authority for executive action—particularly should his acts not be subject to Presidential review and veto—would be a dangerous and doubtless unconstitutional intrusion into the domain of the chief executive.\textsuperscript{451}

solemnity and importance, effect should be given, if possible, to every word. No expression should be regarded as a useless expletive”); see also Prout v. Starr, 188 U.S. 537, 544 (1903) (“It is one of the important functions of this Court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.”); Hurtado v. California, 110 U.S. 516, 534 (1884) (“According to a recognized canon of interpretation especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous.”); Prigg v. Pennsylvania, 41 U.S. 539, 612 (1842) (“No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”).

\textsuperscript{449}. See U.S. Const. amend. XXV, § 4; see also Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 Yale L.J. 51, 98 n.231 (1994) (“Nothing in the Constitution commits any part of the executive power to the President’s subordinates, except in two cases: when Congress vests the appointment of inferior officers in the heads of departments, and [Section 4].”); Adam R.F. Gustafson, Note, Presidential Inability and Subjective Meaning, 27 Yale L. & Pol’y Rev. 459, 476 (2009) (“The power Section 4 grants to the Vice President and Cabinet, by contrast, is an exception to the Constitution’s otherwise nearly exclusive grant of executive power to the President.”).

\textsuperscript{450}. This phrase is from Sidney Blumenthal, Cheney’s Coup, SALON, Feb. 23, 2006, available at http://www.salon.com/2006/02/23/cheney_power/.

\textsuperscript{451}. W AUGH, supra note 158, at 194; see also CLINTON ROSSITER, THE AMERICAN PRESIDENCY 140 (2d ed. 1960) (“If an officer not subject to the power of removal
This concern can be countered by the fact that the President can discipline the Vice President in a host of ways short of outright removal. The chief executive can do this by rescinding or narrowing any delegations he has made to the Vice President.\textsuperscript{452} Taken to an extreme, the President could essentially shut the Vice President out of executive branch decision-making and advising altogether.\textsuperscript{453} President Lyndon Johnson did as much to Vice President Humphrey for a period of time regarding Vietnam after the latter had displeased him.\textsuperscript{454} For similar reasons, Agnew was asked to no longer participate in NSC meetings.\textsuperscript{455} Obviously, independence comes at a price.\textsuperscript{456} But that is equally true for lawmakers who buck their congressional leadership. They can be denied plum committee assignments or floor time for their favored bills or amendments.

If the Vice President has aspirations to become President, the sitting chief executive also has a political apparatus in place that can either bolster or frustrate the Vice President’s ambitions. And, of
course, if the President and Vice President are in a first term, the chief executive can essentially drop the Vice President from the national ticket, damaging the latter’s chances of getting the presidential nomination four years later. Thus, the chief executive has disciplinary tools he can use with respect to the Vice President, ones that ensure the President still controls the executive branch functions of the Vice President (outside of the Twenty-Fifth Amendment). The chief executive simply lacks authority under the Opinion Clause to require information from him and lacks the ultimate sanction, which is the power to remove the Vice President from office.

Further, the assertion—often heard during the Cheney vice presidency—that the office is not accountable to anyone is misplaced. The Vice President is accountable to the American public. He can be defeated for reelection. If he engages in Treason, Bribery, high Crimes or Misdemeanors, he can be impeached and removed by Congress—like the President. And if he displeases the President, he can lose prestigious executive branch assignments. Thus, the assertion that the Vice President is unaccountable is much more rhetorical than serious. He is accountable to the public just like other elected officials, such as the President and federal lawmakers.

Another permutation of vice presidential independence might arise if the officeholder were tasked with a delegation from Congress. For instance, suppose Congress provided that, upon assuming high office, the Vice President would automatically become Secretary of Commerce. Would the Vice President still be independent from the

457. As a practical matter, it can be difficult for a President to bump a Vice President off the ticket. See Nelson, supra note 7, at 46; cf. Goldstein, supra note 44, at 204. Nixon’s efforts to get Agnew to resign resulted in criticism from the right. See WITCOVER, supra note 61, at 321, 324. Only two vice presidents have been dropped since 1900 and both under extenuating circumstances: Rockefeller was elevated to the vice presidency after being nominated by an unelected and politically weakened President Ford. Wallace was already FDR’s second Vice President and Roosevelt was seeking a fourth term, which caused disquiet in many circles. Concerns about the leftward leanings of both men prompted both Roosevelt and Ford to jettison their vice presidents.


459. If the appointment were not automatic, the delegation would be less troubling. In that context, if the Vice President displeased the President, the chief executive could simply remove him from his position as Secretary. The Vice President, of course, would retain his constitutional office. From time to time, there have been proposals to mandate that the Vice President be made a Cabinet secretary. See, e.g.,
President? The answer is yes, but the delegation would be unconstitutional for several reasons. It would undercut the President's authority to nominate his Cabinet members.\textsuperscript{460} It would also hinder the chief executive's authority to administer the executive branch and faithfully execute the laws.\textsuperscript{461} In order for the President to fulfill these twin responsibilities and to avoid creating a plural executive, the chief executive must have authority to replace his Cabinet secretaries,\textsuperscript{462} and such a scenario would prevent him from doing so.\textsuperscript{463}

This position was taken in 1963 by Assistant Attorney General for the Office of Legal Counsel Nicholas Katzenbach:

To the extent that legislation might attempt to place power in the Vice President to be wielded independently of the President, it no doubt would run afoul of Article II, section 1 of the constitution, which provides flatly that "the executive power shall be vested in the President of the United States." Furthermore, since the Vice President is an elective officer in no way answerable or subordinate to the President, the practical difficulties which might arise from such legislation are as patent as the Constitutional problem.\textsuperscript{464}

Such a delegation would also violate the Opinion Clause, as discussed earlier,\textsuperscript{465} since the Vice President is not lawfully subject to presidential requests for information and the President must be able to request such materials from his Cabinet secretaries. In addition, such a statute would frustrate congressional efforts to compel the Vice President's attendance at hearings as he is a constitutional officer, not a

\textsuperscript{460}. See U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{461}. See generally CALABRESE & YOO, supra note 443; see also SCHLESINGER, supra note 1, at 360 (quoting former Vice President Rockefeller) ("If Congress were to enact or assign, on a legislative basis, certain responsibilities to the Vice President, whoever was President at that time should veto the legislation."); GOLDSTEIN, supra note 287, at 292 ("The Vice President is the one officer in the executive branch who cannot be removed at will by the President. A plan that would tie specified functions to the second office would remove a portion of the executive responsibility from the President."); see also CRONIN & GENOVESE, supra note 1, at 324.

\textsuperscript{462}. See Myers v. United States, 272 U.S. 52, 135 (1926).

\textsuperscript{463}. See Goldstein, supra note 9, at 556.

\textsuperscript{464}. Memorandum on Participation by the Vice President in the Affairs of the Executive Branch from Nicholas deB. Katzenbach, Ass't Att'y Gen., Office of Legal Counsel, to Lyndon B. Johnson, Vice President (Mar. 9, 1961), available at http://www.fas.org/irp/agency/doj/olc/030961.pdf, at 9–10; see also id. at 11 ("[P]articipation [by the Vice President in the executive branch] has not threatened the unity of the Executive. Unless it should do so in the future, it will not meet the Constitutional bar.").

\textsuperscript{465}. See supra Part II.
creatures of statute. While Cabinet officials can be subpoenaed by committees subject to certain limitations, the Vice President has never been forced to appear before a congressional panel. For these rea-


467. See Brownell, supra note 110, at 502–66. While no Vice President has ever been compelled to appear before a congressional committee, several have attended hearings voluntarily to promote their own priorities. See, e.g., Energy Independence Authority Act of 1975, Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, U.S. Senate, 94th Cong., 2d sess. on S. 2532, Apr. 12, 1976, 1–9, 11–32 (Vice President Rockefeller testifying in favor of energy legislation); Thirtieth Anniversary of the Employment Act of 1946—A National Conference on Full Employment, Hearings Before the Joint Economic Comm., U.S. Cong., 94th Cong., 2d Sess., Mar. 18, 1976, 1–9 (Vice President Rockefeller testifying about efforts to achieve full employment); Our Third Century: Directions, A Symposium, S. Comm. on Gov’t Operations, U.S. Senate, Feb. 4, 1976, 6–39 (Vice President Rockefeller testifying about long-term policy goals for the nation); Special Conference with the Vice President on Science Policy, H.R. Comm. on Science and Technology, U.S. House of Rep., 94th Cong., 1st Sess., Serial J, June 10, 1975, 1–11 (Vice President Rockefeller discussing science policy); Departments of State, and Justice, the Judiciary, and Related Agencies Appropriations, 1956, Hearings Before the Subcomm. of the S. Comm. on Appropriations, U.S. Senate, 84th Cong., 1st Sess. on H.R. 5502, Apr. 27, 1955, 187–97 (Vice President Nixon testifying in favor of foreign aid programs); Second Deficiency Appropriation Bill for 1935, Hearings Before the Subcomm. of the S. Comm. on Appropriations, U.S. Senate, 74th Cong., 1st Sess on H.R. 8554, June 27, 1935, 75–77 (Vice President Garner testifying with respect to funding for the Texas centennial); D.C. Hearings, supra note 242, at 3–6 (Vice President Marshall testifying in favor of legislation); 1 Rep. of Comms. of House of Rep. 42d Cong., 3d Sess. 81 (1873) (Vice President Colfax testifying voluntarily to try to vindicate himself in the context of an investigation into the Credit Mobilier scandal); see also Turner, supra note 14, at 216–17. Vice President Cheney appeared before the National Commission on Terrorist Attacks upon the United States (alongside the President), a panel that was “established in the legislative branch” of government. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107–306, 116 Stat. 2383, Tit. VI, § 601 (2002).

Vice President Lyndon Johnson appeared before the Senate Foreign Relations Committee in closed session to brief members on a trip to Asia he had taken in 1961, although it was not a hearing per se. See The Proceedings in Washington, N.Y. Times, May 26, 1961, at 13. Johnson also came before the House Committee on Foreign Affairs under similar circumstances. See Washington Proceedings, N.Y. Times, June 6, 1961, at 12. Johnson’s appearance had been characterized at the time as “informal and private,” however, and did not involve the Vice President appearing against his will. See Humphrey Agrees to Private Session, Wash. Post, Mar. 2, 1966, at A7. To the contrary, the appearances had been undertaken at Vice President Johnson’s behest. See Robert C. Albright & Bryce Nelson, Fulbright Sees Continued Viet Probe; Hartke, Church Hit Johnson Policy, Wash. Post, Feb. 22, 1966, at A1, A9.

In 1966, Vice President Hubert Humphrey declined to appear at a hearing of the Senate Foreign Relations Committee. See Robert C. Albright, Humphrey Declines New Bid to Testify, Wash. Post, Feb. 26, 1966, at A1, A8. The committee had to scramble to accommodate Humphrey and ultimately he briefed the panel on neutral turf behind closed doors. See Brownell, supra note 110, at 513–16. Vice President Quayle declined to appear at several oversight hearings to discuss his role regarding
sons, a congressional requirement that the Vice President be an irre-
movable Cabinet secretary would violate the Constitution.

C. Vice Presidential Independence No Longer Manifests Itself

A third potential counterargument is that vice presidential inde-
pendence is a mere formality, an academic matter with no bearing at
all on the realities of the modern vice presidency. In other words,
modern vice presidents do not take action against modern presidents.
This position can be easily refuted, however, by an examination of the
repeated independent actions undertaken by modern vice presidents.
Since World War II, a Vice President has broken with the President
more than twenty times. That is a considerable number. As recently
as the tenures of Joe Biden and Dick Cheney, vice presidents have
publicly taken policy positions contrary to the views of the sitting
chief executive. Other modern vice presidents who have taken differ-
ent public stances on issues include Nixon, Humphrey, Agnew, Ford,
Rockefeller, Bush and Gore. Vice presidents Ford and Agnew publicly
touted their independence and Humphrey alluded to the very same
principle. Thus, history reflects that vice presidential autonomy is a
reality, not a mere law school hypothetical.

Looking to the future, one could well imagine several other sce-
narios in which a Vice President could act independently of the Presi-
dent. A presidential inability determination under Section 4 of the
Twenty-Fifth Amendment is one such example. As described above,
this provision—almost by definition—manifests vice presidential in-
dependence from the chief executive. Another instance would be if a
President’s and Vice President’s elections were thrown into the House
and Senate, respectively, for a decision. In such circumstances, a Pres-
ident of one party and a Vice President of another could be elected
(particularly where partisan control of the two legislative chambers
was in different hands). Vice presidential independence would almost
certainly reappear in that context as well.

\(\text{See id. at 531–35.} \) Efforts to force Vice President
Gore to appear before an investigative panel on campaign finance activities were not
seriously pursued by senators. \(\text{See id. at 535–37.} \) Many senior lawmakers on oversight
panels have conceded they cannot compel the Vice President to appear. \(\text{See id. at 562} \)

468. The author has endeavored to collect as many examples of vice presidential
independence as possible, but no doubt there are some that have eluded detection.
469. The author would like to thank Joel Goldstein for noting this hypothetical.
D. Independent Vice Presidential Actions No Longer Take Place

A fourth and closely related potential counterargument is that vice presidential actions contrary to the President have not taken place during the modern vice presidency. That is to say, vice presidential independence in the modern era is composed merely of words and not of deeds. In this regard, no Vice President has cast a tiebreaking vote against the President in decades. In sum, speaking out against the President is simply not the same as voting against him. Such a counterargument, however, is misplaced for several reasons.

As an initial matter, the premise that public statements are not actions is deeply flawed. In a democracy position taking is doing something. It is making a commitment as to what action the position taker will pursue; it is narrowing his range of options. The primary “action” that lawmakers carry out is to vote and taking a position locks them into how they will vote.470 The same is true of the Vice President whose most manifest constitutional power is casting tiebreaking votes. When the Vice President breaks publicly with the President he is signaling that, if the issue becomes deadlocked in the Senate, he will vote against the chief executive (or put himself in the highly embarrassing position of having to publicly reverse himself). For instance, what would have happened if a gay marriage vote had taken place with Biden or Cheney in the chair; what if the “nuclear option” had been put before Cheney; or what if legislation on Elian Gonzalez had come before Gore? Assuming a public posture on an issue and casting a tiebreaking vote on the subject are all part of position taking.471 Vice presidential position taking is also signaling that, if the Vice President became President, he would pursue a policy course different from the sitting chief executive.

Furthermore, even if one assumes the faulty premise that public statements are not actions, vice presidents have still taken “action” against presidents in the modern era. It will be recalled that Cheney joined an amicus brief on litigation before the Supreme Court involving the Second Amendment; his position was at odds with that of the President. Rockefeller took steps on the filibuster that contradicted Ford’s views. There are also acts of private vice presidential defiance. For instance, Agnew refused to lead the bicentennial commission and Johnson rebuffed Kennedy’s suggestion he travel to Mexico.

470. See David Rogers, Tales of CRs Past Hold Lessons for Boehner, GOP, POLITICO, Sept. 23, 2013, 6 (with “position-taking . . . the legislator is frozen in place.”).
471. See Mayhew, supra note 12.
And there are times when a public pronouncement by a Vice President on a matter might be much more significant than casting a tiebreaking vote against legislation the President supports. For example, imagine if Vice President Gore had called for President Clinton’s resignation in early August 1998 when it had become apparent Clinton had misled the American people and federal investigators about his relationship with a White House intern. Such a pronouncement could very easily have toppled the President. Or what if Vice President Cheney had publicly declared the Iraq War a lost cause? It would have been devastating to President Bush’s war aims. What if Vice President Biden announced that the Affordable Care Act was a failure? In a democracy, which is based on persuasion and public discourse, words matter a great deal, especially when they come from the individual who is a heartbeat away from the presidency and who is assumed to be a presidential confidante and potential successor.

Finally, the modern Vice President has minimal opportunity to “do” something contrary to the President in his Senate capacity (although Rockefeller and Cheney did so). This is because he spends most of his professional time in the executive branch where his only real means of “doing” something contrary to the President is to contradict him publicly or to privately decline to do what he asks.

In sum, a Vice President taking a public position against the President is indeed taking action independent of the President.

E. Vice Presidential Independence is of no Importance

A fifth and related counterargument (or at least a potential criticism) is that, even if the Vice President is independent, does it really matter? He has few constitutional powers and these are exercised infrequently. What is he free to actually do? Most of his authority is delegated from the chief executive, who can calibrate the Vice President’s workload as he sees fit.

The answer is that, for several reasons, the Vice President’s independence does matter and can prove very important on occasion. As a preliminary matter, the Vice President could choose to exercise his constitutional powers in a way that can frustrate the chief executive. He can break tie votes and preside over the Senate in ways counter to the President’s interests. As outlined above, numerous vice presidents have done just that and some of these issues have been significant. For example, vice presidential independence in the Senate played no small role in determining federal policy toward the South after the Civil War.

472. The author would like to thank Dean McGrath for raising this issue.
War, which ultimately included the decision not to enforce voting rights for male African Americans in the region. The Vice President can also exercise his powers under Section 4 of the Twenty-Fifth Amendment, which could temporarily (or as a practical matter permanently) remove the President and make the Vice President Acting President. Few would argue that such an exercise of authority would not be significant.

As noted immediately above, an additional means of being independent is that the Vice President can publicly take positions that either contradict the chief executive’s views or fill a void in the absence of presidential leadership. The media profile surrounding the Vice President is matched by few other public officials, and exceeded probably only by that of the chief executive himself. The Vice President’s public pronouncements on policy, therefore, necessarily draw attention and can embarrass the President if contrary to his views. Vice President Biden’s public embrace of gay marriage, for example, forced President Obama’s hand on the subject. The President felt compelled to change his public position or, at a minimum, announce his change of heart earlier than he had planned. Cheney’s speech on weapons inspectors in Iraq played a major role in public debate in the lead up to the second Gulf War. Agnew’s remarks on Nixon’s China policy proved highly awkward for the chief executive. Previously mentioned hypotheticals involving Gore and the Lewinsky matter, Cheney and the Iraq War and Biden and the Affordable Care Act further demonstrate the potential importance of public vice presidential position taking. Thus, vice presidential independence can and indeed does matter.

F. The Vice President Cannot be Independent
During His First Term

A sixth counterargument could be that, as a practical matter, the modern Vice President is not truly independent of the President during their first term. The reasoning would be that, since it is politically so imprudent for the Vice President to break with the chief executive during a first term—when he could essentially be dropped from the reelection ticket by the President—no true independence can exist. His constitutional independence is reduced to the vanishing point. For
example, some of Cheney’s independent actions (i.e., filing an amicus brief and revealing he would rule in favor of the “nuclear” option in the Senate) did not take place until his second term.\footnote{Cheney was not planning to run for President after his two terms, which gave him greater autonomy than most second-term vice presidents. See Goldstein, \textit{supra} note 416, at 127–29.} Gore’s criticism of Clinton on the Lewinsky matter and on the fate of Elian Gonzalez took place during his second term. The same held true for Bush’s break with Reagan on the Noriega negotiations. Similarly, Rockefeller’s vocal stances on health care and welfare reform without Ford’s clearance did not take place until after the President had dropped him from the ticket. Agnew broke with Nixon on the question of his legal defense strategy in their second term. Nixon’s public distancing of himself from Eisenhower on taxes, on farm policy and on the Soviet space threat and Garner’s public stance against New Deal expansion all took place in each man’s second term.

From a constitutional perspective, these points are of course irrelevant. That vice presidents typically do not break with presidents in their first terms is hardly surprising. This reflects political prudence, not a \textit{constitutional} requirement. To argue otherwise is to wind up in the absurd position of contending that second-term vice presidents are constitutionally independent, but first-term vice presidents are not. Nothing in constitutional text or history gives any such indication. First-term vice presidents are just as constitutionally independent as second-term vice presidents; they simply have more to lose politically by striking out on their own.

From a practical standpoint, the assertion is also factually inaccurate. Numerous manifestations of vice presidential autonomy have indeed occurred during first terms. Biden’s remarks about gay rights were made during his first term. Cheney’s pronouncement on UN weapons inspectors and on gay rights took place in his initial four-year stint. Rockefeller’s break with Ford on the filibuster and the New York City bailout took place prior to Ford dropping him from the ticket, what was akin to his first term in office. Agnew’s statements on human space travel to Mars, welfare reform, the fate of a Nixon commission member and the opening to China all took place during his first term. Thus, examples of vice presidential independence in a first term are far from uncommon. As a result, this counterargument is both constitutionally flawed and factually incorrect.
G. The Vice President is not Independent since the President and Congress can Bend Him to Their Will

Seventh, it could be argued that there are ways a President—in conjunction with Congress—could bring a recalcitrant Vice President to heel to overcome whatever constitutional independence he may enjoy. For instance, what if a chief executive and Congress decided to lower the Vice President’s salary after the latter displeased them? Lest this hypothetical be thought to be totally outlandish it is worth noting that there is precedent for legislation reducing a Vice President’s pay. This occurred in 1932 and in 1874. In this vein, the Vice President could be thought less independent than federal judges who are both irremovable and may not have their salaries reduced.

Such an assertion is dubious for several reasons, however. For one, by this same logic, the heads of independent federal agencies

475. See Act of June 30, 1932, ch. 314, 47 Stat. 382, § 105(a) (“The salaries of the Vice President and the Speaker of House of Representatives are reduced by 15 per centum; and the salaries of Senators, Representatives in Congress . . . are reduced by 10 per centum.”). See also Slashes to Save $37,500, N.Y. Times, July 16, 1932, at 1; Garner, supra note 208, at 177.

476. See Act of Jan. 20, 1874, ch. 11, 18 Stat. 4 (“the act of March third, eighteen hundred and seventy-three . . . as provides for the increase of the compensation of public officers and employees . . . except the President of the United States and Justices of the Supreme Court be, and the same is hereby, repealed, and the salaries, compensation, and allowances of all such persons, except as aforesaid, shall be as fixed by the laws in force at the time of the passage of said act . . . .”); see also Edward Waterman Townsend, Our Constitution: Why and How It Was Made—Who Made It, and What It Is 187–88 (1906).

Relatedly, in 1823, a bill was passed that provided the President with final authority over a monetary issue involving the Vice President. Vice President Daniel Tompkins was governor of the state of New York during the War of 1812. In the rush of events during the war, Tompkins contributed his own assets and interspersed them with state and federal dollars. He emerged from the war in desperate financial straits and appealed to both state and federal authorities for reimbursement. See Hatfield, supra note 130, at 74–79. Congress passed legislation that permitted Tompkins to be partially reimbursed if the President approved the figure. See Act of Feb. 21, 1823, ch. 12, 6 Stat. 280, § 1 (1846) (“That the proper accounting officers of the treasury be, and they are hereby, authorized to adjust and settle the accounts and claims of Daniel D. Tompkins, late Governor of the state of New York, on principles of equity and justice, subject to the revision and final decision of the President of the United States.”). Such a bill clearly placed a presidential sword of Damocles over the Vice President.


478. See id.; see also The Federalist No. 79, at 400 (Alexander Hamilton) (Garry Wills ed., 1982) (“Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”). The author would like to thank Seth Barrett Tillman for raising this issue.
would not be viewed as independent either because they also can have
their salaries reduced. Indeed, unlike with respect to the vice presi-
dency, Congress and the President can abolish their offices altogether.
Moreover, while it is true that federal judges have more than one as-
pact of constitutional independence (i.e., irremovability, life tenure
and a guaranteed salary), so does the Vice President. As will be recal-
led, the Vice President is not only irremovable (itself manifested in
several different parts of the Constitution), but his independence is
further reflected by his exclusion from the Opinion Clause and his
part-time status within a separate branch of government. The indepen-
dence of both federal judges and vice presidents is multi-layered.

Further, recess appointed judges desirous of promotions or ambi-
tious lower court judges with similar inclinations may actually feel
little independence from the executive branch, or from the Senate for
that matter. If they do not rule a certain way, they may believe they
are costing themselves future judicial appointments. Vice presidents,
on the other hand, cannot be recess appointed and are not subject to
advice and consent so they are not subject to coercion in this way.479
In this sense, Vice Presidents may be even more independent than
federal judges.

In addition, Congress and the President can pressure the judiciary
by reducing their staff or administrative budget. Congress can modify
federal courts’ jurisdiction.480 Federal judges are hardly immune from
political branch influence.

In some settings, the Vice President can be seen to be even more
independent than the President himself.481 One way is in the area of
determining his inability. Whereas, Section 4 of the Twenty-Fifth
Amendment provides a mechanism for temporarily removing a Presi-
dent who is laboring under an inability (or as a practical matter possi-
bly permanently removing him from office), no such section covers
vice presidential incapacity.482 Arguably, the Vice President alone de-
termines whether he is incapacitated. The most likely means of remov-

479. See Brownell, supra note 38.
480. See U.S. Const. art. III, § 2, cl. 2.
481. The author would like to thank Joel Goldstein and Fred Karem for raising this
point.
482. See Akhil Reed Amar, Applications and Implications of the Twenty-Fifth
Amendment, 47 Hous. L. Rev. 1, 21 (2010) (“[T]he Twenty-Fifth Amendment says
nothing about possible vice-presidential disability, and federal statutes are likewise
silent on the topic . . . . Current law offers no framework for determining that the Vice
President is disabled and therefore unfit for the job until he recovers . . . .”); Joel K.
Goldstein, Akhil Reed Amar and Presidential Continuity, 47 Hous. L. Rev. 67, 71
(2010) (“[T]here is no constitutional or statutory mechanism . . . to declare a Vice
President disabled.”); see also Cheney, supra note 14, at 319–22.
ing a Vice President laboring under an inability and unwilling or unable to admit it would be through the impeachment process.483 One could well imagine a mentally deranged Vice President sounding off regularly against presidential policy with no presidential (and arguably no congressional) recourse. Under such a scenario a President could be removed, at least temporarily, for incapacity.

Another example of the Vice President enjoying greater independence than the President lies in the impeachment process. Whereas, the President is wholly removed from the House and the Senate impeachment deliberations, the Vice President could very well preside over his own Senate trial and theoretically influence the outcome of the proceedings against himself.484

For these reasons, the fact that the President and Congress can pressure the Vice President does not eliminate his independence any more than the political branches’ ability to pressure the judiciary eliminates the independence of federal judges.

At the end of the day, while a number of potential counterarguments exist to the concept of the Vice President being constitutionally independent and actually exercising that authority, none is persuasive.

CONCLUSION

The intent of this article has been threefold: 1) to attempt to dispel the popular misconception that the Vice President is necessarily subservient to the chief executive; 2) to provide the first in-depth discussion of the legal arguments behind, and the historical development of, the Vice President’s constitutional independence from the President; and 3) to demonstrate that displays of vice presidential autonomy have a long and continuous pedigree.

483. See Roy E. Brownell II, Vice Presidential Inability (forthcoming article).
484. See Stephen L. Carter, The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision, 131 U. PA. L. REV. 1341, 1357 & n.72 (1983) (“Yet the Vice President himself is also impeachable, and if impeached by the House, he would be tried in the Senate. It appears, therefore, that the Vice President could preside at his own impeachment trial, should he choose to do so.”); Michael Stokes Paulsen, Someone Should Have Told Spiro Agnew, 14 CONST. COMMENT. 245–46 (1997) (arguing that the Vice President may preside at his own Senate trial); Richard M. Pious, Impeaching the President: The Intersection of Constitutional and Popular Law, 43 ST. LOUIS U. L.J. 859, 862 n.15 (1999) (“A vice president who is impeached could claim the right to preside over his own trial since he is also the president of the Senate.”); Adam M. Samaha, Undue Process, 59 STAN. L. REV. 601, 623 (2006) (“After all, a vice president has a plausible textual argument under Article I, Section 3 for presiding at his or her own impeachment trial.”). But see Joel K. Goldstein, Can the Vice President Preside at His Own Impeachment Trial? A Critique of Bare Textualism, 44 ST. LOUIS U. L.J. 849, 865 (2000) (arguing the Vice President may not preside over his own Senate impeachment proceedings).
What this article has endeavored to show more broadly is not that there is a "unitary" vice presidency of some sort, but to demonstrate that, like other elected federal officials, the Vice President is independent in his own constitutional sphere of activity, narrow though it may be. Just as other federal officials cannot direct the President to veto a bill or compel a congressman to hold an oversight hearing, the chief executive cannot order the Vice President to make a particular ruling in the Senate or to avoid determining that the President is unable to fulfill his duties under the Twenty-Fifth Amendment. Not only are there numerous examples of the Vice President exercising independent authority, Section 4 of the Twenty-Fifth Amendment could hardly function without this characteristic. At the end of the day, like all other federally elected officials, the Vice President is autonomous in his own realm of authority, subject to a variety of political checks and ultimately accountable to the American public.