

THE INDEPENDENCE OF THE VICE PRESIDENCY

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* The author, an attorney in Washington, D.C., would like to thank Joel Goldstein, Louis Fisher, Don Wallace, Jr., Brian Kalt, Harold Relyea, Seth Barrett Tillman, Mort Rosenberg, Dean McGrath, Betty Koed, Russell Coleman, Fred Karem and Josiah Brownell for their comments and Kathy Reinke for her word processing assistance. The opinions expressed herein and any remaining errors are the author's alone.

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“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.”

Hubert Humphrey, 1969

“[The Vice President] could conceivably come into the situation where the policy of his Administration violates his conscience. Now, we have no historical precedent along that line.”

Edmund Muskie, 1968

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 explicitly¹ 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 Hecllo, 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

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) (“[The 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*, President 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, 10:25 AM) 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.”³ As a result, it is often assumed the Vice President *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 independent⁴ from the President⁵ and can and does

(2d ed. 2001) [hereinafter RANDOM HOUSE] (defining “subordinate” as “subject to or under the authority of a superior . . . subservient or inferior . . . *dependent*”) (emphasis added); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2277 (1981) [hereinafter WEBSTER’S] (defining “subordinate” as “submissive to or falling under the control of a higher authority”); RANDOM HOUSE, *supra* at 244 (defining “boss” as “a person who makes decisions, exercises authority, dominates”); 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, *Obama Lets Biden Talk Off-Script*, 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); *The President Giveth*, *supra* note 1 (“[D]on’t think he’s [the Vice President’s] not acting under orders.”).

3. 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. See *infra* note 238 and accompanying text (discussing Vice President Thomas Marshall’s actions in opposition to his party’s Senate leadership); *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. See 1 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. See, e.g., *Patrick Henry to John C. Calhoun* (Aug. 5, 1826), 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 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.”); *Onslow in Reply to Patrick Henry, Letter I* (John C. Calhoun) 3, 4 (1826) [hereinafter *Onslow Letter*] (“[A]ny abridgment of those [vice presidential constitutional] powers by the Senate would be a palpable infraction of that Constitution.”), see also 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

AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 6 (2012).

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) ("[T]he 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) ("[T]he 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) ("[T]echnically 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.⁹ 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 forgotten¹⁰—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.¹¹ 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); Hecl et al, *supra* note 1; Pika, *supra* note 1.

10. See Transcript of Meet the Press, NBC Radio and Television Program, Sept. 1, 1968 (on file with author) [hereinafter Muskie] (quoting the Democratic Vice Presidential nominee: the Vice President “could conceivably come into the situation where the policy of his Administration violates his conscience. Now, we have no historical precedent along that line”); see also Robert F. Blomquist, *In Search of Themis: Toward the Meaning of the Ideal Legislator—Senator Edmund S. Muskie and the Early Development of Modern American Environmental Law, 1965–1968*, 28 WM. & MARY ENV'T L. & POL'Y REV. 539, 652 (2004).

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.”¹² 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.¹³

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.¹⁴ 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

12. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 61 (2d ed. 2004).

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.¹⁵ 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."¹⁶ 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.¹⁷ Thus, demonstrat-

15. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926).

16. 295 U.S. 602, 629 (1935). The Court has restated this principle in subsequent cases on presidential removal authority. See, e.g., *Wiener v. United States*, 357 U.S. 349, 353 (1958). In *Morrison v. Olson*, the Supreme Court pronounced that "*Myers v. United States* [was] undoubtedly correct . . . in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." 487 U.S. 654, 690 (1988). The Vice President, however, is neither removable by the President nor purely an executive branch official. See Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers Parts I and II* (forthcoming).

17. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 739 (1986) (Stevens, J., concurring) ("In upholding the congressional limitations on the President's power of removal [in

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 President¹⁸ and therefore why he is constitutionally independent from the chief executive.¹⁹ First, Article II provides that the Vice President serves a four-year term.²⁰ 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 . . ." ²¹ 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.²² 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.²³ Also, unlike the Vice President, a Cabinet secretary is granted statutory duties in an

Humphrey's Executor], the Court stressed the independence of the [Federal Trade] Commission from the President."); see also EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* 110-12 (5th rev. ed. 1984).

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.

21. U.S. CONST. art. II, § 1.

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 department²⁴ and as such is answerable to the President through the Take Care Clause.²⁵ 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.²⁶

Second, the Constitution's text makes clear that the Vice President owes his position to the Electoral College (and indirectly to the electorate),²⁷ not to the occupant of the Oval Office.²⁸ While as a matter of political custom the modern presidential nominee selects his party's vice presidential running mate,²⁹ 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.³⁰ 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-President³¹

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.

37. *See* *Myers v. United States*, 272 U.S. 52, 161 (1926).

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.⁴⁰ 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.⁴¹ 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.⁴² 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

43. U.S. CONST. amend. XXV, § 4.

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.

47. See, e.g., JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 200 (1992).

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 FEERICK, *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 FEERICK, *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*⁵¹ 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.”⁵² 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.⁵³ 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-

through the impeachment process, it holds more sway over the Vice President than the President. See Nelson, *supra* note 7, at 106 n.5.

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.

56. See CHARLES M. THOMAS, THOMAS RILEY MARSHALL: HOOSIER STATESMAN 230–31 (1939).

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.

58. See THOMAS, *supra* note 56, at 230–31.

59. See Succession Act of 1886, 24 Stat. 1, ch. 4 (1886).

60. THOMAS, *supra* note 56, at 231.

61. See, e.g., SPIRO T. AGNEW, GO QUIETLY . . . OR ELSE 97, 101, 103–04, 111–12, 130, 132, 142, 143, 146, 157, 187 (1980); JULES WITCOVER, VERY STRANGE BEDFELLOWS: THE SHORT AND UNHAPPY MARRIAGE OF RICHARD NIXON AND SPIRO AGNEW 150–54, 198–99, 207–09, 223–24, 303 (2007). The author would like to thank Joel Goldstein for raising Nixon's efforts to persuade Agnew to step down.

62. See WITCOVER, *supra* note 61, at 69.

63. See *id.* at 149–54, 198–99, 207–09, 223–24, 303.

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.”⁶⁴

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.⁶⁵ At one point, Nixon sent his second chief of staff, Alexander Haig, and advisor Bryce Harlow to talk Agnew into stepping down.⁶⁶ Haig thereupon announced to Agnew that “[w]e think you should resign.”⁶⁷ Agnew indignantly refused, exclaiming that “such a message [should not be delivered] second hand,” but should come from the President himself.⁶⁸ The two presidential aides later tried again to get the Vice President to step down but without success.⁶⁹

Not long afterward, Haig returned with White House counsel, Fred Buzhardt, and again urged the Vice President to leave office.⁷⁰ 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.”⁷¹

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,

72. *See id.* at 320.

73. *See* AGNEW, *supra* note 61, at 146; *see also* WITCOVER, *supra* note 61, at 320.

74. WITCOVER, *supra* note 61, at 304 (quoting Haig).

75. *Id.* at 173. Witcover said elsewhere of Agnew’s position: “The vice president had been reelected in his own right and the president did not have the power to fire him.” *Id.* at 312.

76. *See, e.g., id.* at 328, 336, 340.

77. *See, e.g.,* Amar, *supra* note 18.

78. *See, e.g.,* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 661 (1996).

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 Officer[s]” 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-

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).”).

81. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). *See also* *Edmond v. United States*, 520 U.S. 651, 659 (1997) (the Appointments Clause “vest[s] the President with the exclusive power to select the principal (noninferior) officers of the United States”); *Morrison v. Olson*, 487 U.S. 654, 716 (1989) (Scalia, J., dissenting) (“[M]ost (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*.”).

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/olc/021494.pdf> (concluding the Vice President is not an “agency” for FOIA purposes).

85. *Burnap v. United States*, 252 U.S. 512, 515 (1920); *see also* *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 887 (1991) (quoting with approval H.R. Rep. No. 203, 89th Cong., 1st Sess., 3 (1965) (“[I]t is instructive that the [legislative history] . . . on the Twenty-fifth Amendment confirm[s] that the term ‘department’ refers

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 President⁹¹ and may act on his own accord.⁹² He may recognize sena-

to Cabinet-level entities: . . . [the relevant report provides that] ‘[t]he intent . . . is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1 . . . would participate . . . in determining inability.’”); *id.* at 886 (quoting *United States v. Germaine*, 99 U.S. 508, 510–11 (1878)) (“This Court for more than a century has held that the term ‘Departmen[t]’ refers *only* to ‘a part or division of the executive government, as the Department of State, or of the Treasury,’ expressly ‘creat[ed]’ and ‘give[n] . . . the name of a department’ by Congress”) (emphasis added).

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.

87. See *Executive Office of the President*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop> (last visited Apr. 26, 2014) (“The following entities exist within the Executive Office of the President . . . Office of the Vice President”).

88. U.S. CONST. amend. XXV, § 4 (emphasis added).

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.⁹³ 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.”⁹⁴ 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.”⁹⁵ 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.”⁹⁶

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 way⁹⁷ would undercut the freedom of the Senate to carry out its own constitutional functions.⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ One Senate official recalled that "everyone in the room knew that Johnson had been rebuffed."¹⁰² Ultimately, the Vice President was poised to lose a re-vote on the issue before Johnson gave up his bid.¹⁰³ Among the concerns raised at the time were the "constitutional grounds" that the Vice President was not a senator.¹⁰⁴ 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."¹⁰⁵ 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."¹⁰⁶ Senator Clinton Anderson also expressed healthy skepticism in this regard.¹⁰⁷ 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 . . . [those] roles . . . has outlined for himself disaster.").

101. See, e.g., ROWLAND EVANS & ROBERT NOVAK, *LYNDON B. JOHNSON: THE EXERCISE OF POWER* 307 (1966). See also Nelson, *supra* note 7, at 63.

102. CARO, *supra* note 14, at 169 (quoting Senate Secretary to the Majority Bobby Baker).

103. See *id.*

104. See JULES WITCOVER, *CRAPSHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY* 165 (1992). For more on this incident, see LEONARD BAKER, *THE JOHNSON ECLIPSE: A PRESIDENT'S VICE PRESIDENCY 20-28* (1966); CARO, *supra* note 14, at 163-69.

105. WITCOVER, *supra* note 104, at 165.

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

107. 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.").

108. See, e.g., DON OBERDORFER, *SENATOR MANSFIELD: THE EXTRAORDINARY LIFE OF A GREAT AMERICAN STATESMAN AND DIPLOMAT* 157 (2003).

109. Tom Wicker, *L.B.J. in Search of His New Frontier*, N.Y. TIMES, Mar. 19, 1961, at 29.

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

111. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 537 (Max Farrand ed. 1966) (Morris).

112. Tench Coxe, *An American Citizen I*, INDEPENDENT GAZETTEER (Phila.), Sept. 26, 1787, in, 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 20, 23 (Bernard Bailyn ed. 1993).

113. See also *supra* notes 27–41 and accompanying text.

114. *A Native of Virginia: Observations Upon the Proposed Plan of Federal Government*, Apr. 2, 1788, in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 679 (John P. Kaminski et al. eds. 1990).

115. *Letter from Arthur Lee to John Adams*, Oct. 3, 1788, in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 34, 34 (John P. Kaminski et al. eds. 1988) (emphasis added).

remarked of the presidency in Monroe-esque fashion that the officeholder will be “reminded of his duty by an independent *vice President*.”¹¹⁶

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.¹¹⁷

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.¹¹⁸

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.¹¹⁹ 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-

116. *John Brown Cutting to William Short*, Dec. 13, 1788, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 475, 478 (John P. Kaminski et al. eds. 1983).

117. *Letter from John Adams to William McPherson*, 1789 (no specific date given), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 941–42 (Charlene Bangs Bickford et al. eds. 2004).

118. See IRVING G. WILLIAMS, THE AMERICAN VICE-PRESIDENCY: NEW LOOK 24 (1954).

119. See U.S. CONST. art. II, § 1, cl. 3, *superseded* by U.S. CONST. amend. XII. See also SCHLESINGER, *supra* note 1, at 339.

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 1797.¹²⁰ The Virginian argued that the proposed mission was beyond the scope of his constitutional responsibilities.¹²¹ 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.”¹²² 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.”¹²³ 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,¹²⁴ such as in his role in drafting the Kentucky Resolutions, which opposed the Federalist Party-supported Alien and Sedition Acts.¹²⁵ And, in perhaps the ultimate act of vice presidential independence, Vice President Jefferson challenged President Adams for the presidency in 1800.¹²⁶ In so doing Jefferson worked behind the scenes to fund and help coordinate his political campaign against the President.¹²⁷

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* 12 (3d ed. 1966); Nelson, *supra* note 7, at 28.

122. *Letter from John Adams to Elbridge Gerry*, in 8 *THE WORKS OF JOHN ADAMS* 538–40 (April 6, 1797) (Charles F. Adams ed., 1853), available at http://files.libertyfund.org/pll/pdf/Adams_1431-08_EBK_v5.pdf. See also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* 240 n.9 (1997).

123. See *Letter from John Adams to Henry Knox*, Mar. 30, 1797, in ADAMS, *supra* note 122, at 535–36.

124. See, e.g., JOHN FERLING, *ADAMS VS. JEFFERSON, THE TUMULTUOUS ELECTION OF 1800*, at 103–04 (2004) (“Jefferson took charge of organizing the opposition to the Federalists in Congress. . . . [Jefferson’s] skills were partially responsible for the Republicans’ success in blocking, or modifying, much of the Federalist military-preparedness program.”); see also ROY SWANSTROM, *THE UNITED STATES SENATE: 1787–1801: A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY*, S. DOC NO. 100-31, at 256–57 (1988) (describing Jefferson’s role as a Republican “President of the Federalist-controlled Senate”).

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.¹²⁸ 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.¹²⁹ Burr’s deciding vote frustrated the Jefferson-led Democratic-Republicans in an early attempt to rescind the Judiciary Act of 1801.¹³⁰ 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.”¹³¹

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.¹³²

Here again is a reaffirmation of Monroe's view of the vice presidency, the officeholder not as a sycophant but as a check on the President.

Ultimately, by having electors vote separately for President and Vice President,¹³³ thus permitting party tickets to get elected instead of two potentially opposing candidates, the Twelfth Amendment essentially acknowledged the existence of political parties. The Amendment, however, did nothing to diminish the Vice President's *constitutional* independence from the President. The Vice President was now of the same party as the President, but he still served a four-year term, still fell outside the confines of the Opinion Clause and still presided over the Senate.¹³⁴ As a result, vice presidential independence continued without abatement throughout the Nineteenth Century. 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 candidates—would put forward vice presidential nominees. Vice presidential candidates were initially selected by caucuses of federal lawmakers and later by party conventions.¹³⁵ Not until 1940 would presidential candidates begin to gain control over selection of vice presidential candidates.¹³⁶ Thus, even after the Twelfth Amendment, for over a century vice presidents had little political reason to feel beholden to the President.

132. 13 ANNALS OF CONG. 89–90 (1803) (statement of Sen. Hillhouse). *See also* LOLABEL HOUSE, A STUDY OF THE TWELFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 50 (1901); Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 922–24 (1992).

133. *See* U.S. CONST. amend. XII. Electors make separate choices for President and Vice President even though voters, under current state law, may not. *See, e.g.*, HYMAN, *supra* note 30, at 190–91.

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 parties could still occur if the House and Senate are forced to choose the officeholders. *See* U.S. CONST. amend. XII; *id.* XX §§ 3–4.

135. *See, e.g.*, EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897, at 58, 63–64, 71–72, 126–27, 168, 180–84 (Charles Knowles Bolton rev. ed. 1928).

136. *See, e.g.*, Nelson, *supra* note 7, at 33–34, 43. President Andrew Jackson essentially selected Martin Van Buren to be his running mate, but Jackson's actions were the exception that proved the rule. *See* HITE, *supra* note 1, at 46. The nominee's authority to pick his running mate would not take root until after 1940. *See id.*

B. *The Nineteenth Century: 1804–1900*

Actions taken by George Clinton reflected continued vice presidential independence following the Twelfth Amendment.¹³⁷ In 1811, Vice President Clinton, who was then serving alongside President James Madison, voted against renewal of the Bank of the United States,¹³⁸ a position distinctly at odds with the views of Madison.¹³⁹ Clinton was also publicly critical of other aspects of Madison's policy agenda.¹⁴⁰ Clinton's biographer observed that the Vice President "was one of the centers of opposition to President Madison."¹⁴¹

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."¹⁴² 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."¹⁴³

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,¹⁴⁴ voted against legislation Adams supported to build a canal between the Illinois River and Lake Michigan.¹⁴⁵ The South Carolinian also

137. Clinton served as Vice President alongside two presidents: Thomas Jefferson and James Madison. As Vice President, Clinton expressed disagreement with many of Jefferson's policies in letters to friends, but it is uncertain if he ever aired these grievances publicly. See E. WILDER SPAULDING, *HIS EXCELLENCY GEORGE CLINTON: CRITIC OF THE CONSTITUTION* 285–87 (1938); see also Greenberg, *supra* note 7, at 53.

138. See 22 *ANNALS OF CONG.* 346–47 (1811).

139. See HATFIELD, *supra* note 130, at 57; JOHN P. KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* 289–90 (1993); RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 491 (1971).

140. See, e.g., Nelson, *supra* note 7, at 30.

141. KAMINSKI, *supra* note 139, at 289.

142. GEORGE ATHAN BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN* 324 (1976) (quoting Letter from Albert Gallatin to Joseph H. Nicholson (May 21, 1812), in 1 HENRY ADAMS, *WRITINGS OF ALBERT GALLATIN* 518 (Philadelphia 1879)).

143. KAMINSKI, *supra* note 139, at 289 (quoting Gallatin).

144. Calhoun is one of only two men to have served as Vice President for two different presidents. See, e.g., HATFIELD, *supra*, note 130, at 86–87, 92–93. The other was Clinton, who served with both Presidents Jefferson and Madison. See, e.g., *id.* at 53–56.

145. See 2 *REG. DEB. IN CONG.* 698 (1826); see also MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 157 (1987).

voted in opposition to a tariff bill the Adams Administration favored.¹⁴⁶ In addition, he worked to defeat U.S. participation in an international conference, the Panama Congress, a major priority for the President.¹⁴⁷ Adams said ruefully of Calhoun: “Calhoun thinks for himself, independently of all the rest”¹⁴⁸

By 1826, the tension between President Adams and Vice President Calhoun reached such a boiling point that the two men began denouncing each other in the press under *noms de plume*.¹⁴⁹ 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 Executive.”¹⁵⁰ He expressed concern about the Vice President becoming “a subservient yielding to the Executive will.”¹⁵¹ 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 assignments.¹⁵² Calhoun purposely placed senators on key committees who opposed the President’s agenda.¹⁵³ Adams wrote that “in so organizing the Committee [on Foreign Relations] . . . you intended . . . to trammel unfairly the Administration”¹⁵⁴ 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.”¹⁵⁵ Henry Clay commented at the time: “The Vice President [Calhoun] is up to the hub with the opposition.”¹⁵⁶

146. See 3 REG. DEB. IN CONG. 496 (1827); see also PETERSON, *supra* note 145, at 154 (labeling Calhoun’s action “an anti-administration vote”).

147. See, e.g., PETERSON, *supra* note 145, at 138–39.

148. Greenberg, *supra* note 7, at 66 (quoting THE DIARY OF JOHN QUINCY ADAMS, 1794–1845, at 191 (Allan Nevins ed. 1928)).

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 spectacle of the President and the Vice President of the United States, under . . . pseudonyms . . . hurling charges . . . at each other.”); see also Greenberg, *supra* note 7, at 64–65 (“[Calhoun] squabble[d] openly with his President.”). Some have questioned whether Adams himself was the author of the anti-Calhoun pamphlets. See NEIL MACNEIL & 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.

150. *Onslow Letter*, *supra* note 5, at 14.

151. *Id.* at 15.

152. See, e.g., HATFIELD, *supra* note 130, at 90.

153. See *id.* at 89; see also PETERSON, *supra* note 145, at 136.

154. *Letter from Patrick Henry (John Quincy Adams) to John C. Calhoun* (Aug. 8, 1826), in FENDALL, *supra* note 5, at 54.

155. *Id.* at 55 (emphasis in original).

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).

159. See Sidney Hyman, *Between Throttlebottom and Jefferson*, N.Y. TIMES, Mar. 28, 1954, at SM12, SM60.

160. See *id.*

161. See, e.g., Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 POL. SCI. Q. 475, 479 (1974).

162. See, e.g., HATFIELD, *supra* note 130, at 96; PETERSON, *supra* note 145, at 192–94.

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 officer 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 Zachary 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

senator would be, because he is not elected by a single State, but by the whole country.”) (emphasis added); *see also* JOHN QUINCY ADAMS & CHARLES FRANCIS ADAMS, 2 *THE LIFE OF JOHN ADAMS* 155 (1871) (“[T]he [Senate] duties of the second office . . . impose silence, calmness, and *impartiality* [on the officeholder.]”) (emphasis added); WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 131 (1908) (1961 ed.) (“His duties are only the formal and altogether impartial duties of a presiding officer. His position seems to demand that he should take no part in party tactics and should hold carefully aloof from all parliamentary struggles for party advantage.”); *Dawes and Curtis Disagree on Rules*, N.Y. TIMES, Mar. 5, 1929, at 4 (quoting Dawes: “I have never consciously deviated from the duty . . . of impartiality in partisan, personal and sectional differences.”).

166. JOHN M. BELOHLAVEK, *GEORGE MIFFLIN 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.”).

170. *See* VANCE R. KINCADE, JR., *HEIRS APPARENT: SOLVING THE VICE PRESIDENTIAL DILEMMA* 7 (2000).

171. *See* PHILIP SHRIVER KLEIN, *PRESIDENT JAMES BUCHANAN: A BIOGRAPHY* 302–03, 328–29 (1962).

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 substance, from Lincoln’s more measured and conciliatory approach toward the South.¹⁷⁴

Henry Wilson, President Ulysses S. Grant’s second Vice President,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 myself”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/19th_century/lincoln2.asp (last visited Apr. 24, 2014).

175. Schuyler Colfax was Grant’s first Vice President.

176. See 3 CONG. REC. 2050 (1875). See also ERNEST MCKAY, *HENRY WILSON: PRACTICAL RADICAL, A PORTRAIT OF A POLITICIAN* 237 (1971).

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 MCKAY, *supra* note 176, at 237.

178. See MCKAY, *supra* note 176, at 234–35; Greenberg, *supra* note 7, at 120–21; *Washington Notes*, N.Y. TIMES, Jan. 17, 1874, at 5.

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.

184. See DORIS WEATHERFORD, A HISTORY OF THE AMERICAN SUFFRAGIST MOVEMENT 249 (1998).

185. THE AMERICAN VICE-PRESIDENCY IN THE LAST HALF OF THE NINETEENTH CENTURY: A DOCUMENTARY HISTORY 76 (Leonard Schlup & Thomas Sutton eds. 2007) [hereinafter DOCUMENTARY HISTORY] (quoting Wilson in *Henry Wilson’s Views*, N.Y. TIMES, June 5, 1875, at 2).

186. See James T. Otten, Grand Old Partyman: William A. Wheeler and the Republican Party, 1850–1880 (1976) (unpublished Ph.D. dissertation, University of South Carolina) (on file with author).

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

191. *Political Notes*, N.Y. DAILY TRIB., July 5, 1877, at 4–5. *See also* Otten, *supra* note 186, at 209.

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.

206. Nelson, *supra* note 7, at 30 (quoting Arthur).

207. *See* MATTHEW JOSEPHSON, *THE POLITICOS, 1865–1896* 314 (1938) ("Vice-President Arthur himself, in defiance of [President] Garfield . . . went to New York to aid [former Senators Conkling and Pratt] in their contest [for reelection]."); *see also* Paul H. Blackman, *Presidential Disability and the Bayh Amendment*, 20 W. POL. Q. 440, 441 (1967).

208. James R. Garner, *Office of the Vice President of the United States*, 181 (1934) (unpublished Ph.D. dissertation, University of Iowa) (on file with author) (quoting Blaine).

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*, CHI. DAILY TRIB., Sept. 9, 1885, at 5 (quoting the speech).

212. *Hendricks' Demagogical Speech*, CHI. DAILY TRIB., Sept. 12, 1885, at 4.

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*, CHI. 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).

215. See HATFIELD, *supra* note 130, at 273; ROBERT MCELROY, *LEVI PARSONS MORTON: BANKER, DIPLOMAT AND STATESMAN* 187 (1930).

216. See HATFIELD, *supra* note 130, at 273.

217. MCELROY, *supra* note 215, at 184.

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.²²¹ Assuming a disinterested posture in the chair, Morton presided over the bill's defeat.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.²²³ The defeat of the bill was Harrison's most stinging disappointment as President.²²⁴

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

C. *The Early Twentieth Century: 1900–1940*

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

221. *See 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. *See id.* at 184–86, 193–94.

222. *See id.* at 189–90, 194.

223. HATFIELD, *supra* note 130, at 273.

224. *See 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. *See Editorial*, N.Y. TIMES, May 9, 1890. *See also* Greenberg, *supra* note 7, at 134.

225. *See* HATFIELD, *supra* note 130, at 281–82.

226. *See id.*

227. *See id.* at 282.

228. *See id.*

229. *See id.* at 320.

230. *See id.* at 318.

231. *See* IRVING G. WILLIAMS, THE RISE OF THE VICE PRESIDENCY 90 (1956); HATFIELD, *supra* note 130, at 320.

Fairbanks also owned an Indiana newspaper.²³² His paper's broadsides against President Roosevelt were so withering and unrelenting that the President gave thought to suing the paper for libel.²³³

President William Howard Taft had designs on using Vice President James Sherman as a liaison with Speaker of the House Joe Cannon.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 contemptuously 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 parliamentary 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 interested 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 HISTORY 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 Discord Sent Out From Washington*, N.Y. TIMES, Oct. 13, 1915, at 1.

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 Administration*, 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.* (Marshall "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”²⁴⁰ 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.²⁴¹ Another instance occurred in 1921 when the Vice President testified on his own accord before a congressional committee in support of legislation.²⁴² During his testimony, Marshall made no reference whatsoever to the administration’s posture on the bill.²⁴³

Marshall also made a number of controversial public statements on policy matters,²⁴⁴ such as on control of the Panama Canal,²⁴⁵ on the perceived need to liquidate large private inheritances,²⁴⁶ on problems associated with advertising and newspapers²⁴⁷ and on the sinking of the *Lusitania*.²⁴⁸ 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”²⁴⁹ 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”²⁵⁰ 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.

242. *See Department of Public Welfare in the District of Columbia, Hearing on S. 4863 Before the S. Comm. on the District of Columbia, 66th Cong., 3–6 (1921) [hereinafter D.C. Hearings].*

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.

249. Irving Gregory Williams, *The Vice-Presidency of the United States in the Twentieth Century: History, Practices, and Problems* 215 (1953) (unpublished Ph.D. dissertation, New York University) (quoting Coolidge).

250. *Id.* at 245.

occupies it, to whom a political future in the narrow sense is not all important.”²⁵¹

Dawes began his tenure as Vice President by publicly stating his intention not to join President Coolidge’s Cabinet.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”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.²⁵⁴ This involved his making speeches around the country.²⁵⁵ Coolidge apparently did not look kindly upon this initiative.²⁵⁶ Dawes also undercut Coolidge’s Senate strategy on important banking legislation.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.²⁵⁸ The President reluctantly signed the bill.²⁵⁹

When considering high-profile farm legislation, Dawes opposed the administration’s preferred measure and supported instead the competing McNary-Haugen bill.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.”²⁶¹ In order to minimize potential embarrassment to all involved, the statement was later struck from the *Congressional Record*.²⁶² The President remarked acridly to a White House guest that “the McNary-Haugen people have their headquarters in [the Vice President’s] . . . chambers.”²⁶³ Much as

251. *Id.*

252. *Id.* at 245–48.

253. *Id.* at 248; 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.”).

254. See *Coolidge Striving to Prevent Break on Dawes Program*, N.Y. TIMES, July 20, 1925, at 1.

255. See Greenberg, *supra* note 7, at 188–89.

256. See *id.*

257. See Garner, *supra* note 208, at 185–86.

258. See *id.* at 186.

259. See *id.*

260. See Irving G. Williams, *Senators, Rules, and Vice-Presidents*, in 5 THOUGHT PATTERNS 21, 26 (Arpad F. Kovacs ed., 1957); HATFIELD, *supra* note 130, at 359, 366.

261. Williams, *supra* note 249, at 256 (quoting Watson).

262. See *id.*

263. *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

264. See Garner, *supra* note 208, at 186.

265. HATFIELD, *supra* note 130, at 368.

266. Helen Ruth Rosenberg, *The Vice-Presidency of the United States 188 & n.1* (1930) (unpublished Ph.D dissertation, University of California, Berkeley) (quoting the newspaper) (emphasis added).

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.

268. See Greenberg, *supra* note 7, at 206–07.

269. See W.K. Klugston, *Kansans Stirred by Wheat Policy*, N.Y. TIMES, July 12, 1931; *Farm Board Stands on Wheat Policy*, N.Y. TIMES, July 7, 1931, at 43; *Seek a Reversal of Wheat Policy*, N.Y. TIMES, July 5, 1931, at 4; *Figures Large Cut in World’s Wheat*, N.Y. TIMES, July 2, 1931, at 30; *Will Modify Policy for Selling Wheat*, N.Y. TIMES, June 29, 1931, at 1.

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.”).

271. *Figures Large Cut in World’s Wheat*, *supra* note 269 (quoting Curtis).

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

Farm Board Wheat, N.Y. TIMES, July 14, 1931, at 42; *Curtis Back to Draft Farm Plea*, N.Y. TIMES, July 26, 1931, at 21.

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.*

277. See, e.g., JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933–1939 135–37, 167–68, 231–32, 292, 295, 331 (1967). For more on the Roosevelt-Garner tension in the second term, see Williams, *supra* note 249, at 328–51.

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.²⁸⁴ Garner appointed only one of the trio, ignoring Roosevelt's other two choices.²⁸⁵ 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."²⁸⁶ In fact, he went so far as to become a leading figure in the unsuccessful effort by some in the Democratic Party to deny Roosevelt a third term.²⁸⁷ Garner explained that he took this stance since he was "the only one who [could] . . . head up any opposition" to Roosevelt.²⁸⁸ Irving Williams explains this was "because of the independence of his office from the President."²⁸⁹

In 1939, Garner even used his authority to break a tie vote against the Roosevelt Administration.²⁹⁰ That year, during consideration of a tax bill, Senator Robert LaFollette, Jr. offered an amendment to increase surtaxes on income,²⁹¹ a measure apparently consistent with the Administration's position.²⁹² 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.²⁹³ Under parliamentary rules, a tie vote automatically defeats the measure in question and accordingly the LaFollette amendment failed.²⁹⁴ 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).

291. See 84 CONG. REC. 7691–92, 7696–99 (1939).

292. See Packman, *supra* note 290, at 252 n.26; see also MARK H. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939* 269, 274 (1984); ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 499 (2006).

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.”²⁹⁵

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

As the twentieth century progressed, the vice presidency gradually evolved into more of an executive branch position.²⁹⁶ Beginning with President Warren Harding’s invitation to Vice President Coolidge to regularly attend Cabinet meetings,²⁹⁷ the Vice President gradually took on more of the trappings of an executive branch office.²⁹⁸ With the exception of Dawes, every Vice President since has been a participant in the gatherings. Instead of spending most of his professional time in the Senate’s presiding officer’s chair, the Vice President’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).²⁹⁹

Meanwhile, vice presidential nominees increasingly came to be chosen by presidential candidates and less by party conventions.³⁰⁰ As will be recalled, prior to 1940³⁰¹—when Roosevelt demanded that delegates select Henry Wallace³⁰²—presidential candidates played little part in the selection of vice presidential nominees. As a result, two men—often ideologically and personally incompatible³⁰³—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 President 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 PRESIDENCY* 82 (1992).

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.³⁰⁴ Predictably, this led to tension—both public and private—between presidents and vice presidents.³⁰⁵ 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.³⁰⁶ 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.³⁰⁷ 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.³⁰⁸ During Nixon's tenure as Vice President, the Californian on occasion took

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.³⁰⁹ One example was the debate in 1958 over whether to emphasize tax reductions or public works projects.³¹⁰ 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.”³¹¹ Nixon also took a less sanguine public posture than Eisenhower regarding the launch of Soviet space satellites.³¹² 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.”³¹³ James Reston at the time characterized these stances as reflecting the Vice President’s “independence.”³¹⁴

Nixon also publicly expressed misgivings about Eisenhower’s approach to agricultural policy.³¹⁵ Three months before the 1960 presidential election, Vice President (and presidential candidate) Nixon announced that farm policy at the time was “wrong.”³¹⁶

As noted earlier, President Eisenhower himself openly acknowledged the Vice President’s independence.³¹⁷ 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.”³¹⁸

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.

315. See Warren Weaver, Jr., *Nixon to Air Rifts with Eisenhower*, N.Y. TIMES, Aug. 14, 1960, at 1.

316. See *id.*, see also Arthur Krock, *Role of Eisenhower in Training of Nixon*, N.Y. TIMES, Dec. 27, 1959, at E3.

317. See *supra* note 95 and accompanying text.

318. RICHARD M. NIXON, *SIX CRISES* 185 (2d ed. 1990).

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 cam-

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.*

328. Hubert Humphrey, *On the Threshold of the White House: From Hubert H. Humphrey*, ATLANTIC MONTHLY, July 1974, available at <http://www.theatlantic.com/past/docs/issues/74jul/fordhumphrey.htm> (emphasis added); see also Hubert H. Humphrey, *Changes in the Vice Presidency*, CURRENT HISTORY 58, 59 (Aug. 1974) (“[T]he Vice President *should* support the President in public . . .”) (emphasis added); but cf. Humphrey, *supra* note 1.

paign Humphrey made a somewhat modest eleventh-hour attempt to assert his independence. In a statement issued in Salt Lake City,³²⁹ Humphrey broke with the President and urged that the United States suspend its bombing of North Vietnam.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.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.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."³³³ Early in his first term, the Vice President undercut the administration.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.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 2000.³³⁶ 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.³³⁷ Nixon queried his staff: "Is Agnew insubordinate, do you think?"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."³³⁹

Also, in mid-1969, Agnew publicly repudiated the administration's efforts to overhaul welfare programs.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.³⁴¹ However, the Nixon Administration not long before had called for the states to share more of the burden.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?"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."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.³⁴⁵ Joseph Rhodes, Jr., a college student and member of a presidential task force, publicly criticized Nixon for his remarks.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."³⁴⁷ This, however, was not the administration's posture toward its own commission member.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 *Washington Evening Star*: "President Rebuffs Agnew on Student."³⁴⁹ It was around this time that, in

337. *See id.* at 66–67.

338. *Id.* (quoting Nixon).

339. *Id.* at 55 (quoting Vic Gold).

340. *See id.* at 68.

341. *See id.*

342. *See id.*

343. *Id.*

344. *Id.*

345. *See id.* at 97.

346. *See id.* at 101–02.

347. *Id.* at 102 (quoting Agnew).

348. *See id.*

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.

Witcover's words, Nixon became "concerned about Agnew's growing . . . independence."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."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.³⁵² At a gathering of Republican Governors in Virginia, Agnew unburdened himself to several reporters about Nixon's approach to mainland China.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.'"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."³⁵⁵ Not surprisingly, Agnew's comments made for hot copy.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."³⁵⁷ In Oval Office recordings, Nixon expressed outrage at the Vice President's conduct.³⁵⁸ In speaking with National Security Advisor Henry Kissinger, Nixon thundered "[t]he vice president cannot speak for himself in foreign policy."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."³⁶⁰

350. *Id.* at 107.

351. *Id.* at 153 (quoting Nixon).

352. *See id.* at 163–65.

353. *See id.* at 164–65. Agnew also apparently expressed his misgivings about the President's China policy when visiting with African leaders. *See* John Robert Greene, "I'll Continue to Speak Out": Spiro Agnew as Vice President, in, *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 103, 108–09 (Timothy Walch ed., 1997).

354. WITCOVER, *supra* note 61, at 165 (quoting Vic Gold).

355. *Id.* (quoting David Keene).

356. *See id.* at 166.

357. *Id.*

358. *See id.* at 166–67.

359. *Id.* at 167.

360. *Id.* Witcover characterized Agnew's gambit as an "outburst of policy independence." *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.³⁶¹ Agnew flatly rejected the assignment.³⁶² 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."³⁶³

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.³⁶⁴ In trying to extricate himself from that predicament, Agnew chose to turn over his financial records to investigators³⁶⁵ 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.³⁶⁶ 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."³⁶⁷ In light of Nixon's contemporaneous Watergate woes, the President and his staff were deeply worried about an impeachment "doubleheader"³⁶⁸ and were adamantly opposed.³⁶⁹

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"³⁷⁰ 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.

365. See Lou Cannon, *Offers To Let Prosecutors Interview Him: Agnew Says He'll Bare His Records*, WASH. POST, Aug. 15, 1973, at A1.

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 1¾-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.”³⁷¹ 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.”³⁷²

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.³⁷³ 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.”³⁷⁴ The President “recognized that Agnew in effect was making war on Nixon himself.”³⁷⁵ Nixon then was forced to publicly show his support for Peterson.³⁷⁶

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.³⁷⁷

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

371. Cannon, *supra* note 365, at A7 (quoting Agnew).

372. See AGNEW, *supra* note 61, at 114.

373. See WITCOVER, *supra* note 61, at 333–36.

374. *Id.* at 335; see also AGNEW, *supra* note 61, at 182.

375. WITCOVER, *supra* note 61, at 335.

376. See *id.* at 336. Following this public criticism, Nixon warned Agnew through his chief of staff that, if another outburst against the Justice Department took place, the President would ensure that the Department would not reach a plea agreement with Agnew and would prosecute him. Agnew complied. At first blush, this could be seen as the Vice President lacking independence vis-à-vis the President. Two factors indicate otherwise. First, a law-abiding Vice President would have been subject to no such coercion. Second, as a constitutional matter, Agnew still could have continued his public criticism of the Department—it simply would have been politically and personally foolhardy of him to do so given his criminal jeopardy. He, therefore, toed the line because it was in his political and personal interest to pursue such a course, not because he was constitutionally compelled to as a subordinate of the President.

377. AGNEW, *supra* note 61, at 152; see also WITCOVER, *supra* note 61, at 324.

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.

380. Ford, *supra* note 1.

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.”³⁸³

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.³⁸⁴ 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.³⁸⁵

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.³⁸⁶ 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.”³⁸⁷ They cited a White House source who said “[b]elieve me, there was no doubt in Rockefeller’s mind about the President’s views.”³⁸⁸

383. *Id.*; see also JAMES CANNON, *TIME AND CHANGE: GERALD FORD’S APPOINTMENT WITH HISTORY* 263 (1994).

384. See, e.g., Rowland Evans & Robert Novak, *Ford is Big Loser of the Filibuster Fight*, *BOS. GLOBE*, Mar. 3, 1975, at 15.

385. *The President’s News Conference of March 6, 1975*, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD: BOOK I* 326 (1977) [hereinafter *PUBLIC PAPERS*]; see also Patrick Buchanan, *Fall of filibuster jeopardizes Ford*, *CHI. TRIB.*, Mar. 16, 1975, at A6.

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).

387. Evans & Novak, *supra* note 384, at 15.

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 1975.³⁸⁹ 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.³⁹⁰ The very next year, Rockefeller took positions on health care and welfare policy that had not been approved by the Ford White House.³⁹¹ 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.³⁹²

In May 1988, Vice President George H.W. Bush publicly distanced himself from President Ronald Reagan.³⁹³ This break was over whether the United States should try to reach an agreement with Panamanian dictator and drug lord, Manuel Noriega.³⁹⁴ 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"³⁹⁵ The *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-

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 [was] . . . 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); TURNER, *supra* note 14, at 133 ("The fiscal crisis . . . produced an open disagreement between the president and vice president . . ."); *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 *id.* at 132-45.

390. See TURNER, *supra* note 14, at 176.

391. See *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.").

392. See *id.*

393. See David Hoffman, *Bush Splits With Reagan On Handling of Noriega, He Would Not "Bargain with Drug Dealers,"* WASH. POST, May 19, 1988, at A1. The author would like to thank Joel Goldstein for alerting him to this episode.

394. See Steven V. Roberts, *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 CRONIN & GENOVESE, *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.").

395. Roberts, *supra* note 394 (quoting Bush).

dence.”³⁹⁶ Nor was this a minor issue. The battle over this policy within the administration was described by an insider as “monumental.”³⁹⁷ 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.³⁹⁸

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.³⁹⁹

As might be expected, this put the Reagan Administration in an awkward position.⁴⁰⁰

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.⁴⁰¹ Gore, who like Bush in 1988 was undertaking his own campaign for the presidency, was highly critical of Clinton’s actions.⁴⁰² 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."⁴⁰³

Gore's public posture apparently left the President "livid."⁴⁰⁴ The chief executive, said an aide, was "very upset" and "dismay[ed]" at the Vice President's remarks.⁴⁰⁵ 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."⁴⁰⁶

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.⁴⁰⁷ The boy's mother and her shipmates had perished in an effort to come to America.⁴⁰⁸ 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.⁴⁰⁹

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.⁴¹⁰ Gore struck out on his own and urged adoption of legislation that would have made an exception in the law for Gonzalez.⁴¹¹ 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."⁴¹² 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"⁴¹³ According to a reporter, "White House officials were caught off guard

403. See 20/20: *Interview with Al Gore* (ABC television broadcast June 16, 1999), available at <http://votesmart.org/public-statement/1873/abc-2020-transcript>.

404. See Broder & Van Natta, *supra* note 401.

405. See *id.*

406. *Id.*

407. See *A Chronology of the Elian Gonzalez Saga*, FRONTLINE, PBS, available at <http://www.pbs.org/wgbh/pages/frontline/shows/elian/etc/eliancron.html>.

408. See *id.*

409. See *id.*

410. See *Early Edition: Gore Breaks with Clinton on Elian Gonzalez Case* (CNN television broadcast Mar. 31, 2000), available at <http://transcripts.cnn.com/TRANSCRIPTS/0003/31/ee.07.html> [hereinafter *Gore Breaks*].

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.

[by Gore's gambit] and have been harshly critical in private of the vice president's decision."⁴¹⁴

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.⁴¹⁵

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"⁴¹⁶ 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.⁴¹⁷ In August 2002, Cheney publicly got out in front of the President on whether UN weapons inspectors should be allowed back in the country.⁴¹⁸ Even though he already knew the President was headed in the opposite policy direction,⁴¹⁹ 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."⁴²⁰ Esteemed vice presidential scholar Joel Goldstein characterized this as an example of "Cheney's willingness to stray publicly from administration policy."⁴²¹ President Bush, according to his press secretary at the time, "was hot about it; he was not pleased It wasn't him. It wasn't Bush's point of view."⁴²²

414. *Gore Breaks*, *supra* note 410 (quoting John King).

415. See *A Chronology of the Elian Gonzalez Saga*, FRONTLINE, PBS, available at <http://www.pbs.org/wgbh/pages/frontline/shows/elian/etc/eliancron.html>, *supra* note 407.

416. See Joel K. Goldstein, *Cheney, Vice Presidential Power, and the War on Terror*, 40 PRES. STUD. Q. 102, 126 (2010) (quoting Scott McClellan).

417. See BOB WOODWARD, *PLAN OF ATTACK* 163–64 (2004); Goldstein, *supra* note 416, at 126–27.

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).

419. See PETER BAKER, *DAYS OF FIRE: BUSH AND CHENEY IN THE WHITE HOUSE* 209–11 (2013).

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

423. See, e.g., Associated Press, *Cheney at Odds with Bush on Gay Marriage*, MSNBC (Aug. 25, 2004), available at <http://www.msnbc.msn.com/id/5817720> [hereinafter *Cheney at Odds*].

424. *Id.*

425. *Id.*

426. *Id.* (quoting the head of Family Research Council).

427. See David D. Kirkpatrick, *Cheney Enters Filibuster Fight, Backing Change in Senate Rules*, N.Y. TIMES, Apr. 22, 2005, available at <http://www.nytimes.com/2005/04/22/politics/22cnd-judge.html?pagewanted=print&position=>.

428. *Meet the Press*, (NBC television broadcast May 1, 2005), available at <http://www.msnbc.msn.com/id/7698687/print/1/displaymode/1098/>.

A final example of Cheney's independence entailed litigation involving the Second Amendment.⁴²⁹ 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."⁴³⁰

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.'⁴³¹

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"⁴³² 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."⁴³³ Cheney himself conceded his actions were "pretty big news."⁴³⁴

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*."⁴³⁵

429. See Robert Barnes, *Cheney Joins Congress in Opposing D.C. Gun Ban*, WASH. POST, Feb. 9, 2008, at A1 (describing Cheney as "breaking with his own administration's official position.").

430. See Brief for Amici Curiae, 55 Members of United States Senate, the President of the United States Senate, and 250 Members of United States House of Representatives in Support of Respondent, Appendix: Those Joining in Amici Curiae Brief, at 1a, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

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.

432. BAKER, *supra* note 419, at 579–80.

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.⁴³⁶ 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.⁴³⁷

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,⁴³⁸ 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; Hecló 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

441. U.S. CONST. art. II, § 1.

442. *Id.* § 3.

443. See generally, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 14, 20 (2008); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

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 imbues 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).

447. *See, e.g.*, Brownell, *supra* note 16; Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1123–24 n.384 (1994).

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.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."⁴⁵⁰ One commentator noted this concern decades ago:

[t]he 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.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.").

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.").

450. This phrase is from Sidney Blumenthal, *Cheney's Coup*, *SALON*, Feb. 23, 2006, available at <http://www.salon.com/2006/02/23/cheneypower/>.

451. WAUGH, *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.⁴⁵² Taken to an extreme, the President could essentially shut the Vice President out of executive branch decision-making and advising altogether.⁴⁵³ President Lyndon Johnson did as much to Vice President Humphrey for a period of time regarding Vietnam after the latter had displeased him.⁴⁵⁴ For similar reasons, Agnew was asked to no longer participate in NSC meetings.⁴⁵⁵ Obviously, independence comes at a price.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

[such as the Vice President] should be authorized to execute the laws in the President's name, it would violate one of the soundest principles of our system of government. The Vice-Presidency would be a dagger aimed constantly at the precious unity of the executive power."'). Because vice presidents cannot be removed, presidents have often treaded carefully in their delegations to them. See Goldstein, *supra* note 416, at 122.

452. President Roosevelt, for example, removed a major delegation of authority to Vice President Henry Wallace during World War II. See Williams, *supra* note 249, at 445–49; *Scalia Memo*, *supra* note 7, at 3 ("As a practical matter, of course, the President could require certain standards from the Vice President in the discharge of any duties delegated to him by the President."); see also CRONIN & GENOVESE, *supra* note 1, at 314 ("The President can bestow assignments and authority and can remove that authority at will.") (quoting Hubert Humphrey). And, of course, the President's staff can also cut a Vice President down to size through various means of bureaucratic subterfuge. See GOLDSTEIN, *supra* note 287, at 148–49; TURNER, *supra* note 14, at 126–28, 159–63, 172–75.

453. The President may not lawfully exclude the Vice President from executive branch decision making about presidential inability, however. See U.S. CONST. amend. XXV, § 4.

454. See Joel K. Goldstein, *More Agony than Ecstasy: Hubert H. Humphrey as Vice President*, in *AT THE PRESIDENT'S SIDE: THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 103, 108–09 (Timothy Walch ed., 1997). See also Cronin, *supra* note 7, at 335 ("Johnson would simply exclude Humphrey from his team of insiders whenever the vice-president sought independence or tried to develop his own line of thinking.").

455. See WITCOVER, *supra* note 61, at 163. On another occasion, Agnew was asked not to take a view different from the President during Cabinet sessions. See AGNEW, *supra* note 61, at 31 (quoting chief of staff H.R. Haldeman to Agnew: "The President does not like you to take an opposite view at a cabinet meeting, or say anything that can be construed to be mildly not in accord with his thinking.").

456. See, e.g., LIGHT, *supra* note 7, at 269 (vice presidential "disagreement [with the President] . . . in open forums carries high costs For Vice-Presidents . . . there are often high risks associated with . . . open dissatisfaction with [presidential] policies.").

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.⁴⁵⁷ 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 presidency⁴⁵⁸—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.⁴⁵⁹ 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.

458. See, e.g., *Civics Quiz: Is Cheney Part of the Executive Branch?*, ABC NEWS (June 26, 2007), <http://abcnews.go.com/GMA/story?id=3316434> (quoting then-Rep. Rahm Emanuel: Cheney is "acting as if he's unaccountable—a whole fourth branch of government unto himself."); Dana Milbank, *The Cheese Stands Alone*, WASH. POST, June 26, 2007, at A2 ("Cheney has, in effect, declared himself to be neither fish nor fowl but an exotic, extra-constitutional beast who answers to no one.").

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.⁴⁶⁰ It would also hinder the chief executive's authority to administer the executive branch and faithfully execute the laws.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,⁴⁶² and such a scenario would prevent him from doing so.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.⁴⁶⁴

Such a delegation would also violate the Opinion Clause, as discussed earlier,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

CRONIN & GENOVESE, *supra* note 1, at 324; Joel K. Goldstein, *Vice President*, in 4 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 1556, 1562–63 (Leonard W. Levy & Louis Fisher eds. 1994). Cheney considered serving both as Vice President and as Secretary of Defense. See BAKER, *supra* note 419, at 81–82.

460. See U.S. CONST. art. II, § 2, cl. 2.

461. See generally CALABRESI & 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.

462. See *Myers v. United States*, 272 U.S. 52, 135 (1926).

463. See Goldstein, *supra* note 9, at 556.

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.").

465. See *supra* Part II.

creature of statute. While Cabinet officials can be subpoenaed by committees subject to certain limitations,⁴⁶⁶ the Vice President has never been forced to appear before a congressional panel.⁴⁶⁷ For these rea-

466. See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 195–96 (1974); LOUIS FISHER, THE POLITICS OF EXECUTIVE PRIVILEGE 91–93, 124–26 (2004).

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, 2–4 (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 irremovable Cabinet secretary would violate the Constitution.

C. Vice Presidential Independence No Longer Manifests Itself

A third potential counterargument is that vice presidential independence 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.⁴⁶⁸ 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 different 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 scenarios in which a Vice President could act independently of the President. 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 independence 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 President 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.⁴⁶⁹

the Council on Competitiveness. *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. *See id.* at 535–37. Many senior lawmakers on oversight panels have conceded they cannot compel the Vice President to appear. *See id.* at 562 (quoting Sens. McCain and Levin and Rep. Waxman).

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?⁴⁷² 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

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.⁴⁷³ 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

473. See WITCOVER, *supra* note 61, at 272 (quoting a Nixon discussion with Agnew: "Those bastards in the press, you know what they are, and don't give them any opportunity to say you're against the president."); *id.* at 254 (quoting Agnew paraphrasing Nixon's remarks to him: "The biggest game in Washington is to create a fight between the president and the vice president.'").

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.⁴⁷⁴ 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 *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.

474. 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, *supra* note 416, at 127-29.

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 1932⁴⁷⁵ and in 1874.⁴⁷⁶ In this vein, the Vice President could be thought less independent than federal judges who are both irremovable⁴⁷⁷ and may not have their salaries reduced.⁴⁷⁸

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.

477. See U.S. CONST. art. III, § 1.

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 presidency, Congress and the President can abolish their offices altogether. Moreover, while it is true that federal judges have more than one aspect of constitutional independence (i.e., irremovability, life tenure and a guaranteed salary), so does the Vice President. As will be recalled, 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 independence of *both* federal judges and vice presidents is multi-layered.

Further, recess appointed judges desirous of promotions or ambitious 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 President who is laboring under an inability (or as a practical matter possibly permanently removing him from office), no such section covers vice presidential incapacity.⁴⁸² Arguably, the Vice President alone determines 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.