

November 10, 2014

Extract from Roy E. Brownell II, Part 1, A
Constitutional Chameleon: The Vice President's
Place within the American System of Separation
of Powers: Text, Structure, Views of the Framers
and the Courts (2014), citing Teachout-Tillman
Exchange

Seth Barrett Tillman

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

PART I: TEXT, STRUCTURE, VIEWS OF THE FRAMERS AND THE COURTS

*Roy E. Brownell II**

"It is one of the remarkable things about . . . [the Vice President], that it is hard to find in sketching the government any proper place to discuss him."

– Woodrow Wilson, *Congressional Government*

I. INTRODUCTION

The issue of which branch¹ or branches the Vice President resides in has not received full-length treatment in the academic literature. When scholars have analyzed the vice presidency and been confronted with the question, most have made only brief mention of the Vice President's constitutional status. Many seem content to conclude that the position is simply "anomalous" or a "hybrid" and to leave matters at that.²

* The author would like to thank Joel Goldstein, Louis Fisher, Don Wallace Jr., Harold Relyea, Seth Barrett Tillman, Russell Coleman, Todd Garvey, William Josephson, Josiah Brownell, Dean McGrath, and Fred Karem for their comments on the piece and Kathy Reinke for her word processing assistance. The opinions expressed herein and any errors are the author's alone.

1. "Branch," "department," and "establishment" will be used interchangeably in this article and its companion.

2. See, e.g., JAMES E. HITE, *SECOND BEST: THE RISE OF THE AMERICAN VICE PRESIDENCY* 197 (2013) (noting "the outwardly hybrid status of the office"); *id.* at 95 (referring to "the unique, inherent duality of the institution"); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861*, at 181 (2005) ("The Vice-President . . . was and remains an anomalous officer with an executive title but without executive responsibility under the Constitution"); JODY C. BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY*

Thus, as can be seen in Figure No. 2, the drafters of the Constitution put forward three separate, consecutive articles to roughly reflect three branches of government, but they also created partially overlapping functional powers and personnel.⁶¹ To a great extent, the Framers' departures from the pure doctrine of separation of powers⁶² reflected their desire to ensure checks and balances.⁶³

notes 12, 43.

55. The judiciary would appear to exercise functional executive power when appointing inferior officers and arguably when ruling on matters involved with the treaty power. *See supra* notes 14, 15.

56. The Senate exercises functional judicial power when holding impeachment trials. *See supra* notes 17, 39. Congress does so when creating lower federal courts and establishing the place for certain criminal trials; for judging the elections and qualifications of its own members; and for "punish[ing] its Members for disorderly Behaviour." U.S. CONST. art. I, § 5, cl. 2; *supra* note 17.

57. This term is defined as encompassing the President, Vice President, federal lawmakers and federal judges.

58. The Vice President falls within the legislative branch when serving as President of the Senate, casting tiebreaking votes in the upper chamber and presiding over the counting of electoral votes.

59. The Vice President falls within the executive branch when carrying out duties delegated by the President and when participating in the determination of presidential inability under the Twenty-Fifth Amendment. *Cf.* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 98 n.231 (1994) ("Nothing in the Constitution commits any part of the executive power to the President's subordinates, except in two cases: when Congress vests the appointment of inferior officers in the heads of departments . . . and when 'the Vice President and a majority of . . . the principal officers of the executive departments' certify that 'the President is unable to discharge the powers and duties of his office.'"); Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 476 (2009) ("The power Section 4 grants to the Vice President and Cabinet . . . is an exception to the Constitution's otherwise nearly exclusive grant of executive power to the President."). The Vice President's Twenty-Fifth Amendment power would be considered a derivative of the functional executive power of appointment. *See supra* notes 15, 35.

Even before the Twenty-Fifth Amendment, the Vice President arguably enjoyed functional executive authority to decide questions of presidential inability. *See* Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 204 (1958). This purported authority never seems to have been asserted by vice presidents and was never exercised.

60. The Chief Justice serves in the legislative branch when sitting as President of the Senate during the impeachment trial of the President. *See* Steven G. Calabresi & Joan Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1123-24 n.384 (1994); Roy E. Brownell II, *When the Chief Justice Serves in the Legislative Branch*, 3 AKRON J. CONST. L. & PUB. POL'Y 31 (2012); *cf.* David Y. Thomas, *The Law of Impeachment in the United States*, 2 AM. POL. SCI. REV. 378, 395 (1908).

61. *See, e.g.,* NEUSTADT, *supra* note 32, at 29; Calabresi & Larsen, *supra* note 60, at 1047. Separation of powers is not manifested in the U.S. Constitution solely by the first three articles, however. The Incompatibility Clause also provides a means of separation. The author would like to thank Seth Barrett Tillman for his thoughts on this issue.

62. *Cf.* Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) ("In the main, [the Constitution] . . . has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government.") (emphasis added).

63. *See, e.g.,* VILE, *supra* note 10, at 156; Magill, *supra* note 11, at 1132.

b. Structure

In addition to these four textual factors, there are at least ten broader structural considerations that reflect the Vice President's legislative branch connection and that further illustrate he is not solely an executive branch official despite the modern emphasis placed on those duties. These structural concerns are highlighted by the numerous ways in which under the Constitution the Vice President is dissimilar to the President, who is the quintessential executive branch official.¹⁷⁷ One would expect that, if the Vice President were solely part of the executive branch, he would receive treatment by the Constitution that accords with that of the President, the only other constitutional officer in that department of government. After all, the Vice President is the President in waiting.

As an initial matter, officials in the other branches are generally treated by the Constitution in the same manner as their intra-branch peers while the Vice President is not. Constitutionally speaking, other than the Speaker and the President Pro Tempore, there is no distinction among federal lawmakers in their respective chambers.¹⁷⁸ That is to say that all federal lawmakers vote for bills, resolutions and constitutional amendments. All senators may vote on nominations, on treaties and in impeachment trials. Each lawmaker can exercise and participate in all of the chamber's constitutional responsibilities. They also enjoy all the same privileges. All federal lawmakers, for instance, enjoy absolute immunity from civil suit for official actions and an internal confidentiality privilege under the Speech or Debate Clause.¹⁷⁹ Their equal constitutional treatment is reflected by their equal voting power. The President

precisely where the Constitution sanctioned the vice president to be."); *cf.* *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution.").

177. See *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866); *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74, 79 (1861) ("The President is a department of the government; and . . . the only department which consists of a single man . . ."); Letter from John Adams to Oliver Whipple (May 18, 1790) (on file with author) (the "executive department by the constitution is *wholly* in the President.") (emphasis added); DAVID A. MCKNIGHT, *THE ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT* 346 (1878) (repr. ed. 1993) ("the President is . . . one branch of 'the Government'"); Woodrow Wilson, Address to a Joint Session of Congress on Tariff Reform (Apr. 8, 1913), available at <http://www.presidency.ucsb.edu/ws/?pid=65368> ("the President of the United States is . . . not a mere department of the Government"). See also Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. L. REV. COLLOQUY 13 (2012), available at <http://www.law.northwestern.edu/lawreview/colloquy/2012/7/LRColl2012n7Tillman.pdf>.

178. See, e.g., MAYHEW, *supra* note 45, at 8-9 (quoting Gerhard Loewenberg, *The Role of Parliaments in Modern Political Systems*, in *MODERN PARLIAMENTS: CHANGE OR DECLINE* 3 (Gerhard Loewenberg ed., 1971): a "*representative assembly* [is] . . . [an] entit[y] [whose] . . . 'members are formally equal to each other in status, distinguishing parliaments from hierarchically ordered organizations.'").

179. See U.S. CONST. art. I, § 6, cl. 1; *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *but cf.* *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011).

Vice President is not a senator. By the same token, the Seventeenth Amendment also implies the Vice President is not a senator. It provides that "[e]ach Senator shall have one vote."²⁹⁰ That could be read to mean that only senators can vote. In this view, it is worth recalling that the Senate is "composed of" one hundred senators and no one else. Consequently, it could be argued that the Vice President is not truly "of" the Senate. Taken to its logical conclusion, that would mean that, since the Vice President cannot be within the Senate, he cannot be part of the legislative branch and therefore must be part of the executive branch.²⁹¹ This dovetails with the language of Article VI, which likewise appears to limit the legislative branch to senators and representatives.

However, the context of these provisions almost assuredly implies actual *membership* in the body and not the issue of broader affiliation with the chamber. No one would seriously claim that the Vice President is actually a senator. As noted earlier, Senate officers are clearly "part of" the Senate, even if they are not senators. And they too are mentioned in constitutional text.²⁹² Congressional staff, who number in the thousands, are legally treated as "alter egos" of members and enjoy legislative branch protections under the Speech or Debate Clause.²⁹³ And they, unlike officers, are nowhere mentioned in constitutional text. Surely, if Senate staff are part of the legislative branch, but are omitted from constitutional text, then the President of the Senate, who is expressly mentioned in the charter in conjunction with the Senate, should also be so categorized, at least part of the time.

Fifth, another structural feature hinting that the Vice President is part of the executive branch at least some of the time concerns use of the term "office" under the Constitution.²⁹⁴ A careful reading of text reveals that the presidency is repeatedly referred to as "the Office of President."²⁹⁵ Article I states that "[t]he Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise *the Office of President of the United States*."²⁹⁶ Article II provides that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the

290. See *id.* amend. XVII; see also Garvey, *supra* note 3, at 583. The counter is that the Vice President is expressly authorized elsewhere by the Constitution to vote to break ties, even though he is not a senator. See U.S. CONST. art. I, § 3; see also Friedman, *supra* note 235, at 1721 n.74.

291. Implicit in this argument is that the Vice President must be part of one of the three branches of government. See, e.g., *United States v. Nixon*, 418 U.S. 683, 707 (1974) (emphasis added) ("In designing the structure of our Government [the Framers] . . . divid[ed] and allocat[ed] the sovereign power among three co-equal branches [thereby] . . . provid[ing] a *comprehensive* system . . ."). For a further discussion, see Brownell, *supra* note 5.

292. See U.S. CONST. art. I, § 3, cl. 5.

293. See *Gravel v. United States*, 408 U.S. 606, 616-17 (1972).

294. This insight resulted from a conversation with Seth Barrett Tillman.

295. See, e.g., U.S. CONST. art. I, § 3, cl. 5.

296. *Id.* (emphasis added).