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A CONSTITUTIONAL CHAMELEON:

THE VICE PRESIDENT’S PLACE WITHIN

THE AMERICAN SYSTEM OF

SEPARATION OF POWERS

Part II:

Political Branch Interpretation and

Counterarguments

Roy E. Brownell II*
INTRODUCTION

This article is the second installment of a two-part treatment of the question, which branch or branches does the Vice President fall within? The preceding piece analyzed the issue through the lens of more traditional legal interpretive methods: text, structure, jurisprudence and views of the Framers. It also addressed the question from a largely static point of view. This companion piece, on the other hand, will sketch where the vice presidential position has been thought to fit within U.S. constitutional structure over time. As such, it will keep alert to the opinions of vice presidents as well as practical indicia of branch participation. This historical narrative affirms the conclusion of the first article—that the Vice President is part of both political branches, but not part of both simultaneously. However, this piece adds nuance as it demonstrates that the vice presidency has evolved from being largely a legislative branch position to largely an executive branch one today. This reflects the modern expectations of the office but does not mean the Vice President has, or even could, completely sever his constitutional ties to the legislative branch.

Following the historical discussion, this article will turn to potential counterarguments. These include: 1) that the Vice President is part of neither branch; 2) that he is solely part of the legislative branch; 3) that he is solely part of the executive branch; 4) that the Vice President may not serve in both political branches since it would violate the Incompatibility Clause and the doctrine of separation of powers; 5) that the Vice President is an “officer of the United States” and therefore should be considered part of the executive branch; and 6) that the Supreme Court has already addressed the matter and consequently the question is settled. In the end, none of these counterarguments is persuasive. As a result, the thesis that the Vice President is part of both elected branches—with his exact locus varying depending on the context—is strongly reinforced.


At its core, this article and its companion examine the question of which branch or branches the Vice President falls within in 2014. The answer today is different from what it was for most of American history. Prior to World War I, the Vice President was almost exclusively

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1 See Roy E. Brownell II, A Constitutional Chameleon: The Vice President’s Place within the American System of Separation of Powers: Part I: Text, Structure, Views of the Framers and the Courts.

2 Another potential counterargument or criticism—that if the Vice President is considered part of the legislative branch the Chief Justice must also be so considered—is detailed elsewhere by the author. See Roy E. Brownell II, When the Chief Justice Serves in the Legislative Branch, 3 AKRON J. CONST. LAW & POL’Y 31 (2012). The Chief Justice in the narrow context of a presidential impeachment trial is indeed part of the legislative branch and therefore this potential counterargument is also overcome. See id.
Read, Lee and Ellsworth), in this context implicitly adopted the position that the post possessed both legislative and executive branch properties.\textsuperscript{20} Ultimately, the Senate acceded to Adams' interpretation that he should sign documents using both his executive branch and his legislative branch titles, perhaps recognizing in the process the duality of the position.

While the conflict over titles was resolved contrary to Maclay's wishes, the first statute ever passed under the Constitution offers support for the senator's view that the Vice President and President of the Senate are distinct positions unified in a single person. That measure, which was enacted only a few days after the debate described by the dyspeptic Pennsylvanian, provided that "[t]he said oath or affirmation shall be administered . . . to the President of the Senate . . . ."\textsuperscript{21} Notably, it did not say "Vice President."\textsuperscript{22} Moreover, it indicated that the Vice President could only be sworn in by a senator.\textsuperscript{23}

Around the same time as the debate over the proper means of addressing the Vice President, Adams himself wrote to a contemporary that "[t]he Constitution has instituted two great offices, of equal rank, and the nation at large in pursuance of it has created two officers: one who is the first of the two equals . . . [and] is placed at the Head of the Executive, the other at the Head of the Legislature."\textsuperscript{24} Clearly, Adams saw himself as part of the legislative branch.

\textsuperscript{20} In August 1789, Washington paid a visit to the Senate to discuss a proposed treaty with the Cherokee Indian tribe. \textbf{See MACLAY, supra note 15, at 125.} When he arrived, Adams permitted Washington to sit in the presiding officer's seat. \textbf{See id.} At first blush, this could be viewed as the President and Vice President being interchangeable agents of the executive branch; the Vice President, in a manner, sitting in for the President when the latter is not in the chamber. Aside from this early episode, rarely if ever, being repeated, Maclay's use of language demonstrates the difference in how the two positions were viewed. Maclay in his diary discusses Washington's visit to the Senate. He refers to Washington as "the President" but Adams as "our Vice President." \textit{Id.} The possessive "our" indicates that Maclay viewed Adams as part of the Senate and his branch status as distinct from Washington's. Finally, it is worth noting that, according to the \textit{Senate Journal}, with both Washington and Adams in the Senate chamber "[t]he Speakers addressed the Vice President: so did the President of the United States." \textit{Journal of the Secretary of the Senate (Executive Business), in 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: PETITION HISTORIES AND NONLEGISLATIVE OFFICIAL DOCUMENTS 760 (Kenneth R. Bowling et al. eds. 1998).} On other occasions, Adams was called upon to formally respond in person to the President on behalf of the Senate. \textbf{See, e.g., 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 48, 112, 221 (Linda Grant De Pauw et al. ed. 1972).}

\textsuperscript{21} An Act of June 1, 1789, § 1, 1 Stat. at Large, ch. 1. There are two other references in the statute to "President of the Senate," none to "Vice President." \textit{See id.}

From the first the Vice President has engaged in administrative duties in the Senate. \textbf{See An Act for allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses, 1 U.S. Stat. at Large, ch. 17, 71, § 4 ("the . . . secretary [of the Senate] and clerk [of the House] shall each be allowed (when the President of the Senate or Speaker shall deem it necessary) to employ one principal clerk . . . and an engrossing clerk . . . .")}.


\textsuperscript{23} \textbf{See Stephen W. Stathis & Ronald C. McE, America's Other Inauguration, 10 PRES. STUD. Q. 550, 551 (1980). This restriction was later liberalized by Congress. \textit{See id.}}

\textsuperscript{24} \textbf{Letter from John Adams to Benjamin Lincoln, May 26, 1789, Massachusetts Historical Society (on file with author). \textit{See also Linda Dudik Guerrero, John Adams' Vice-Presidency, 1789-1797: The Neglected Man in the Forgotten Office, unpublished Ph.D dissertation, University of California, Santa Barbara, 185, 193 n.74 (1978). Also, in May 1789, the Senate discussed the appropriate title to address the President and Vice President over and}
respect to the Smithsonian reflects the largely ceremonial delegations of responsibility to him that would mark most of the nineteenth and early twentieth centuries.

At around this same time, President Zachary Taylor gave some thought to including Vice President Millard Fillmore in his Cabinet meetings. This proposal did not get far. William Seward described the result: "[t]he idea of the vice president being a member of the cabinet has expired noiselessly." Thurlow Weed summarized Taylor's reasoning and his:

General Taylor after his election, conscious of his own want of experience in civil affairs, supposed, until otherwise advised by Hon. John J. Crittenden, that the Vice-President could be ex-officio a member of his cabinet. Expressing in a letter to Mr. Fillmore his regret that he could not have the benefit of his presence and advice in the cabinet, he added that he should rely upon his experience and ask his advice upon all important questions.

The words "could be ex-officio" are instructive as they imply that the prevailing view of the time was that the Vice President was unable to be a bona fide participant in Cabinet discussion.

The mid-nineteenth century was also marked by two instances of the Vice President casting a tie-breaking vote that shed light on perceptions of his place in the legislative branch. In 1850, the upper chamber became deadlocked over whether to approve a Senate chaplain. Following a thoughtful debate, Vice President Fillmore broke the tie.

In 1861, the Senate considered a proposed amendment to the Constitution that would have prohibited Congress from abolishing slavery. A tie vote occurred on an amendment to the proposed amendment, which the Vice President broke even though the matter under discussion was one that the President himself plays no formal role.

That same year, Attorney General Edward Bates was asked to evaluate the lawfulness of President Abraham Lincoln suspending the writ of habeas corpus. During his opinion, Bates observed that "[t]he President is ... the only department which consists of a single man ..." What is important to note is what Bates did not say. He did not say the executive branch is "the only department which consists of two men." Nor did he couple the President together with the

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117 See, e.g., Garné, supra note 93, at 163-64; Learned, supra note 11, at 174-75.
118 See 1 LIFE OF THURLOW WEED, INCLUDING HIS AUTOBIOGRAPHY AND A MEMOIR 586-87 (1883).
119 Garné, supra note 93, at 164.
120 WEED, supra note 118, at 586-87. See also Recollections of an Old Stager, 47 HARPER'S NEW MONTHLY MAG., 586, 587-88, Sept. 1873 ("for the first few months of his administration Mr. Fillmore was constantly consulted on matters of public concern, and specially with reference to the personal [sic] policy of the government. But the members of the cabinet soon became jealous of the influence of the Vice-President. ... [Soon] Mr. Fillmore was reduced to a condition of insignificance.").
121 See 21 CONG. GLOBE 127-28 40th Sess. (Jan. 9, 1850). See also CURRIE, supra note 113, at 182.
122 See 21 CONG. GLOBE, supra note 128, at 128. See also Currie, supra note 113, at 182.
124 See id. See also Brownell, supra note 1.
‘branchless’ agency, since it is only ‘all legislative Powers,’ Art. I, § 1, ‘[t]he executive Power,’ Art. II, § 1, and ‘[t]he judicial Power,’ Art. III, § 1, which the Constitution divides into three departments.”\footnote{Mistretta v. United States, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting).} It could be maintained the Vice President has little or no constitutional power so he too could be a branchless entity.

Despite having prominent advocates, the argument that the Vice President resides outside of the established three branches of government falls well short of the mark.\footnote{See Greenberg, supra note 55, at 25.} First, constitutional text implicitly provides for three branches of government.\footnote{See Buckley v. Valeo, 424 U.S. 1, 124 (1976) (“The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted . . . . Article I, § 1, declares: ‘All legislative Powers herein granted shall be vested in a Congress . . . . Article II, § 1, vests the executive power ‘in a President’ . . . . and Art. III, § 1 declares that ‘The Judicial Power . . . shall be vested in one supreme Court, and in . . . Inferior Courts . . . .’”).} The tripartite structure of federal governance is laid out in large measure in the first three articles of the Constitution.\footnote{See, e.g., Mistretta, 488 U.S. at 423 (Scalia, J., dissenting).} Article I provides most of the authority for the legislative branch;\footnote{See U.S. CONST. art. I.} Article II provides most of the authority for the executive branch;\footnote{See id. at art. II.} and Article III provides most of the authority for the judicial branch.\footnote{See id. at art. III.} Were there a fourth branch of government it would presumably be found in Article IV. That part of the Constitution, however, marks a clear departure from the previous three articles which lay out functional powers and implicitly assign those powers to branches of government. Article IV focuses instead on the relationship and reciprocity among the states and how new states are to be admitted to the Union. There is no textual mention of any additional functional division of governmental authority.

Moreover, Article VI appears to dispel any uncertainty as to the assignment of constitutional officers to branches of government. It provides that “[t]he Senators and Representatives . . . and all executive and judicial officers . . . shall be bound by Oath or Affirmation, to support this Constitution.”\footnote{Id. at art. VI, § 3.} There are three categories of officials in Article VI: those in the legislative branch (“Senators and Representatives”) and “executive and judicial officers.” No other categories and hence no other branches are included.\footnote{That said, Article VI can be viewed as underinclusive since the President is not listed. He, of course, takes an oath under authority of Article II. See U.S. CONST., art. II, § 1, cl. 6. The author would like to thank Seth Barrett Tillman for raising this point.} 

Further, the clauses discussing the Vice President carry no indication that he exists outside of the understood three-branch formulation. The Vice President’s role in presiding over the Senate is defined by Article I,\footnote{See U.S. CONST. art. I, § 3.} essentially the legislative branch article. His participation in the certification of electoral votes also makes clear his actions take place in the context of the legislative branch.\footnote{See id. at amend. XII (emphasis added) (‘The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted’).} At the same time, the office is created by Article II, what amounts to the
being only three branches of government. The fourth-branch proposition in turn has been rightly ridiculed by a number of Supreme Court justices.

Thus, the argument that the Vice President constitutes his own branch of government or otherwise exists outside of the tripartite system of government fails since it collides squarely with constitutional text, structure, early informed opinion and case law.

B. The Vice President is Solely Part of the Legislative Branch

More compelling than the “fourth-branch” argument is the belief that the Vice President is exclusively part of the legislative branch. This supposition is one that held sway for much of American history and only began to erode in the decades following World War I. In the years

504 295 U.S. 602, 629 (1935) (noting “the three general departments of government”).
505 See, e.g., Federal Maritime Com’n v. South Carolina State Ports Authority, 535 U.S. 743, 773 (2002) (Stevens, J., dissenting) (“the Federal Maritime Commission, is an ‘independent’ federal agency. Constitutionally speaking, an ‘independent’ agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a ‘fourth branch’ of Government . . . the agencies, even ‘independent’ agencies, are more appropriately considered to be part of the Executive Branch. . . .”); Freytag v. Commissioner of Internal Revenue, 521 U.S. 868, 921 (1991) (Scalia, J., concurring in part, concurring in judgment) (derisively referring to independent agencies as potential “headless Fourth Branch(es) of government.”); Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216, 1219 (1983) (White, J., dissenting) (“[u]nder this ruling] independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch. I cannot believe that the Constitution commands such a result.”); Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“administrative bodies . . . have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories”).

A variant of this position is that the Vice President is not part of the legislative branch; he merely presides over one half of it. Cf. Seth Barrett Tillman, Why our next President may keep his or her Senate seat: A Conjecture on the Constitution’s Incompatibility Clause, 4 DUKE J. CON. L. & PUB. POL’Y 107, 109 n.5 (2009) (hereinafter Tillman) (“the Vice President presides over the Senate, although he or she is not a member of it.”). In this sense, the President presides over the executive branch, the Speaker presides over the House and the Chief Justice presides over the Supreme Court; they are not part of any of the branches but sit above them. Cf. id. See also Seth Barrett Tillman, Either Or: Professors Zephyr Teachout and Akhil Reed Amar—Contradictions and Suggested Reconciliation 90-91 (2012) (unpublished manuscript on file with author). This view also must fail for the same reasons outlined above and for some reasons unique to it: how can one preside over a body but not be part of it? Does anyone, for example, seriously question whether the Speaker of the House is part of the legislative branch? “Ol” denotes being part of something; in this case it means part of a branch or branches of government. See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 860 (11th ed. 2003); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1343 (2d ed. unabridged 1987); SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 502-03 (1768); THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE n.p. (1780). Similarly, not only is the President a part of the executive branch—he is in many ways the very constitutional embodiment of it. See Brownell, supra note 1. Finally, practice from the first makes clear that the Chief Justice, with the exception of presidential impeachment trials, is part of the judicial branch.

506 Indeed, several prominent modern scholars still maintain this view. See CRONIN & GENOVESE, supra note 329, at 316 (“technically a vice president is neither a part of the executive branch nor subject to the direction of the president.”); Marie D. Natoli, Abolish the Vice Presidency?, 9 PRES. STUD. Q. 202, 203 (1979) (“A first step would be Constitutional change to put the Vice Presidency where it belongs, namely, in the Executive Branch of government.”); Bruce P. Montgomery, Congressional Oversight: Vice President Richard B. Cheney’s Executive Branch Triumph, 120 POL. SCI. Q. 581, 596 (2005-06) (“the Constitution does not vest executive authority in the vice president, but rather relegates his office to legislative matters.”); Michael C. Dorf, A Brief History of Executive Privilege, from George Washington through Dick Cheney, Find Law’s Legal Commentary, February 6, 2002,
A sixth potential counterargument is that the Vice President could be seen as an "Officer of the United States" and therefore viewed exclusively as part of the executive branch. Article II, Section 2, Clause 2 provides that the President "shall have Power ... by and with the Advice and Consent of the Senate ... [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law ... " The absence of any mention of federal lawmakers in this formulation strongly implies they are not "Officers of the United States" and that such a designation applies only to the magisterial branches. Since "Officers of the United States" are either executive branch members or federal judges, since the Vice President is clearly not part of the judiciary, and since at least one Framed made reference to the Vice President as an "officer of the United States," the argument could be made that the Vice President must be considered an "Officer of the United States" and consequently be seen as solely part of the executive branch.

This position, however, suffers from a number of fatal flaws. First, as the Supreme Court in Free Enterprise Fund v. PCAOB has crisply observed, "[t]he people do not vote for the 'Officers of the United States.'" The Court's opinion in Free Enterprise Fund echoes numerous earlier judicial pronouncements in this regard. This, of course, is contrary to the

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581 Richard Friedman implies that the Vice President is an "Officer of the United States," see Friedman, supra note 96, at 1720 & 1720 n.72, but not exclusively part of the executive branch. See id. at 1723 n.87 ("the more interesting argument ... is not whether the vice-president is part of the executive branch, but to what extent he is part of the legislative branch."). See also id. at 1720-21. For a discussion of which officeholders are indeed "Officers of the United States," see generally Tillman, supra note 506. See also Reynolds, supra note 465, at 114 n.20. As a result, even if the Vice President were somehow considered an officer of the United States, that would not be at all fatal to his being perceived as part of both political branches. That is because his fellow presiding officer of the Senate—the Chief Justice—is so categorized. See Brownell, supra note 2. The Chief Justice is unquestionably an officer of the United States. He is nominated by the President subject to Senate advice and consent and he is commissioned. Yet, the Chief Justice is still part of the legislative branch when the Senate is holding an impeachment trial of the President. See id.

582 U.S. Const., art. II, § 2, cl. 2.

583 See also 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 26 (Jonathan Elliot ed. 1836) (repr. ed. 1937) (Maclaine) ("that the Vice-President was not a member of the Senate, but an officer of the United States"). See also Friedman, supra note 96, at 1720 n.72.

584 130 S. Ct. 3138, 3155 (2010). See also, Morton Rosenberg, Applicability of the Emoluments Clause (Article I, Section 6, Clause 2) of the Constitution to the Office of Vice-President, Cong. Research Serv. Memorandum, Nov. 30, 1973, 13 (on file with author).

585 See Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article."); id. at 132 ("all officers of the United States are to be appointed in accordance with the [Appointments] Clause."); Weiss v. United States, 510 U.S. 163, 169-170 (1994) (citing the two aforementioned passages from Buckley with approval); United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."); United States v. Smith, 124 U.S. 525, 532 (1888) ("An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in [earlier Supreme Court decisions] ... What we have here said is but a repetition of what was there authoritatively declared."). For other related authority, see Motions Sys. Corp. v. Bush, 437 F.3d 1356, 1365 (Fed. Cir. 2006) (Gajarsa, J., concurring in part) ("[T]he President of the United States [is] a

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mode of vice presidential elevation. The people through the electoral college vote for someone to become Vice President.

Moreover, the court has further explained that “officers of the United States” are not only elected but appointed subject to Senate advice and consent.586 The Vice President again assumes his high position due to the decision of the electorate through the Electoral College, not through presidential nomination and Senate approval. Even under the extraordinary procedure of the Twenty-Fifth Amendment, he is not appointed subject Senate advice and consent, he is confirmed by both houses of Congress, a much different process.587

Second, under Article II, Section 3, “all the Officers of the United States” are commissioned.588 As one authority has noted “[a]ll means all.”589 Yet, the Vice President is not commissioned.590 Since “all Officers of the United States” are to be commissioned and since the Vice President is not commissioned, the clear conclusion to draw is that he is not in fact an “Officer of the United States.”

Therefore, because the Supreme Court has concluded repeatedly that “Officers of the United States” are not elected and are instead appointed, the Vice President cannot be considered an “Officer of the United States.” That the Vice President is not commissioned only underscores this point. Consequently, because the Vice President is not an “officer of the United States”—a status that implies the individual being part of the magisterial branches—there is no impediment to the Vice President being considered part of the legislative branch as well as the executive establishment.

F. The Supreme Court has Addressed the Question

constitutinal official who is plainly not an ‘officer of the United States’ for Appointments Clause purposes"). See also Tillman, supra note 506, at 138; Rosenberg, supra note 587, at 10-13.

586 See supra note 509.
587 See Roy E. Brownell II, Can the President Recess Appoint a Vice President? 42 PREN. STUD. Q. 622 (2012).
588 U.S. CONST., art. II, § 3. See also Tillman, supra note 506, at 122.
589 Tillman, supra note 506, at 122.
590 See ANNALS OF CONG. 2257 (Jan. 3, 1799) (Rep. 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. 85, pt. 1, 56th Cong., 1st Sess. 36 (Jan. 20, 1900) (“the 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”); 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 COLUM. L. REV. 285, 314 (2013). See also Tillman, supra note 506, at 122 & n.39 (“if the Vice President were an officer of the United States, then Vice President John Adams should have received a commission from George Washington, and subsequent Vice Presidents should have received commissions from either the outgoing or the incoming President . . . . the President and Vice President . . . have never received presidential commissions.”). See also FIDELICK, supra note 12, at 195 n.; Rosenberg, supra note 587, at 10.