

Will the Real **VP** Please Step Forward?

Defining the role
of the vice president.

BY ADAM J. WHITE

The vice president occupies a perennially curious office. In 1920, it was held in such low regard that a candidate for vice president—Franklin Roosevelt, no less—felt the need to defend the office in a *Saturday Evening Post* article entitled “Can the Vice-President Be Useful?”

Even as the vice presidency increased in importance in more recent years, the office remained sufficiently enigmatic so that, more than 200 years after the Constitution was ratified, the debate continues as to the constitutional role of the vice president.

Indeed, in the Oct. 2 debate between vice presidential candidates Gov. Sarah Palin and Sen. Joe Biden, the moderator raised that very issue. Biden, a senator for more than 35 years and quite possibly our next vice president, answered without hesitation:

“[The vice president] works in the executive branch. . . . And the primary role of the vice president of the United States of America is to support the president . . . [and] to preside over the Senate, only in a time when in fact there’s a tie vote. The Constitution is explicit. . . . He has no authority relative to the Congress. The idea he’s part of the legislative branch is a bizarre notion.”

Last week, Palin presented a slightly different picture. In answer to a child’s question, she said:

“A vice president has a really great job because not only are they there to support the president’s agenda, . . . [b]ut also, they’re in charge of the United States Senate, so if they want to, they can really get in there with the senators and make a lot of good policy changes.”

Palin’s answer has been viewed askance. Biden’s answer

fairly reflects the modern conventional wisdom. And as a matter of constitutional text and history, Biden is certainly wrong.

IN THE CONSTITUTION

Although the vice president is mentioned in Article II of the Constitution (which creates the presidency), the powers assigned to that office are entirely legislative. Article I, Section 3 specifies that the vice president is the president of the Senate, that he casts the tie-breaking vote when the Senate is deadlocked, and that he is an “Officer” of the Senate. Article II, Section 1 gives the vice president’s role in the counting of Electoral College votes.

True, Article I, Section 3 notes that the vice president sometimes may “exercise the Office of President.” The 25th Amendment further details his elevation to the office of the president upon his predecessor’s death or removal. But neither of those provisions describe the vice president’s powers *as vice president*; they merely set forth the circumstances in which a sitting vice president “assumes the powers and duties” of another office—those of the presidency.

The Constitution’s grant of exclusively legislative powers to the vice president is no accident. At the Constitutional Convention of 1787, the Committee of Detail originally specified that the president of the Senate, then to be a senator himself, would stand ready to “exercise” the powers of the president upon the president’s death, resignation, removal from office, or incapacitation.

The office of Senate president was modified when a subsequent committee designed the Electoral College. As part of that change, the president of the Senate no longer was to be a senator. Instead, he was to be elected nationally and hold a new title, “Vice President.”

Nevertheless, while the title and method of selection changed, the powers of a vice president remained entirely legislative. As Roger Sherman observed at the Constitutional Convention, “If the vice-President were not to be President of the Senate, he would be without employment.”

EARLY PRACTICE

According to the first vice president, John Adams, his

office was nothing less than “the Head of the Legislative [Branch],” an office parallel to that of the president. Adams stated that his office was “totally detached from the executive authority and confined to the legislative.”

Of course Adams advised President George Washington, but he attended only one Cabinet meeting and declined Washington’s request that he undertake a diplomatic mission to England. Instead, Adams focused his energies on managing the Senate. According to Irving Williams, author of *The Rise of the Vice Presidency* (1956), Adams “stamped the chamber his plaything” and “was for all practical purposes a member of the Senate,” such that some senators mused that “it might be as well to vest the whole senatorial power” in Adams.

Adams’ successors often embraced his model. His own vice president, Thomas Jefferson, was also Adams’ nemesis, and as such Jefferson’s advisory role was limited. Jefferson, like Adams, declined a diplomatic tour; instead, he wrote the Senate’s Manual of Parliamentary Practice.

And so on. President Jefferson did not merely ignore his first vice president, Aaron Burr; after Burr left office, Jefferson supported his prosecution for treason. President John Quincy Adams and Vice President John Calhoun attacked each other in the press, under pseudonyms. Well over a century passed between Vice President John Adams’ attendance at a Cabinet meeting in 1791 and the next such occurrence in 1918 (Thomas Marshall, if you must know). True, some presidents sought vice presidential advice, but this was considered a matter of individual comity, not constitutional mandate.

The vice presidency assumed its now-familiar shape in the mid-20th century. Under President Franklin Roosevelt, the vice president began to attend Cabinet meetings regularly. In the words of a March 1961 memorandum from the Justice Department’s Office of Legal Counsel, Roosevelt gave Vice President Henry Wallace “responsibility and power in measures never known to a Vice President before,” putting him in charge of various executive boards.

Roosevelt, according to that OLC memo, helped to usher in “the ‘contemporary renaissance’ of the Vice Presidency.” Only a dozen years later, Vice President Richard Nixon was almost exclusively a presidential adviser—a trend that continues today.

A LEGAL DEBATE

Also in the mid-20th century, the OLC wrote several memorandums that discussed the constitutional role of the vice president. As Barton Gellman, author of the Dick Cheney biography *Angler*, recently observed on *Slate*, the OLC came down “on three sides of the question of whether the vice presidency is a legislative or executive office.”

First, in 1955, it asserted (without substantive analysis) that the vice president was “in the executive branch of the Government.”

In April 1961, the OLC moved to a tentative middle ground: “Perhaps the best thing that can be said is that the

Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter.”

Finally, in 1962, the OLC completed its about-face: “[T]he Vice President has a unique status in the legislative branch. . . . [F]rom the very beginning of the Nation, the office of Vice President has been considered as being in the legislative branch.” In support of this position, the OLC cited “the opinion of statesmen and scholars,” including wise man Clark Clifford.

Upon close inspection, very few of the legal arguments traditionally raised in support of the vice president-as-executive-officer theory pass muster.

For example, the OLC in 1961 reasoned that the vice president could not be a member of the Senate because Article I, Section 6 of the Constitution forbids senators from holding “any Office under the United States” and because the Senate is allowed to set qualifications for its “Members” and to punish them. But this argument misses its mark: As the OLC also recognized in 1961, to say that the vice president is not a member of the Senate is not to say that he is not—to borrow the OLC’s word—“attached” to the Senate.

A second argument carries greater weight: Article I, Section 3 of the Constitution plainly states that the Senate is “composed” of the senators, and that clause makes no allowance for the inclusion of the vice president in the Senate’s composition. This is, admittedly, a strong point for the executive-branchers, and one that cannot be directly rebutted except to say that subsequent clauses in Section 3 make clear that the vice president is an “Officer” of the Senate.

But ultimately, Article I, Section 3’s internal tension is a red herring. No matter which constitutional branch the vice president is “in”—or whether he is “in” both branches or neither branch—his office’s constitutional powers are exclusively legislative.

THE NEXT DEAL

So where does that leave the next vice president? What will be his or her role? That’s a question that can be answered only by the next president and vice president.

Only the president can decide whether to take the vice president’s advice, and only the vice president can decide whether to offer it. Similarly, while the Constitution gives the vice president specific powers over the Senate, only the vice president can decide how often to exercise those powers—how often to “really get in there with the senators”—and how much to delegate to the Senate’s president pro tempore.

The candidates’ deliberations already have begun. According to press reports, each of the major party tickets has discussed the role of the vice president. But no matter what deals the next president and vice president make in advance, history strongly suggests that their first arrangement will not be their last.

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