A Constitutional Anomaly: Safeguarding Confidential National Security Information Within the Enigma That Is the American Vice Presidency

Todd Garvey
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INTRODUCTION

The American vice presidency has undergone a dramatic transformation since its inception at the Constitutional Convention in 1787. From the nation’s most qualified and influential citizens, to obscure and unimpressive unknowns, different periods of our history have seen occupants of differing quality, skill, character, and reputation grace the Office of the Vice President. Throughout this evolution, two general themes can be observed. First, with the exception of the first two occupants, the Vice President has progressed from an ineffective, mostly symbolic representative, into a domestic and foreign policy political power. Second, accompanying this increase in political power and prestige has been an increase in the Vice President’s role within the executive branch of government and a decrease in the office’s daily legislative duties.

The office’s earliest occupants were less than pleased with the power and influence they wielded as the President’s lieutenant. John Adams believed the vice presidency to be “the most insignificant office that ever the invention of man contrived or his imagination conceived.” Teddy Roosevelt declared, “I would a great deal rather be anything, say professor of history, than Vice President.” John Nance Garner, Vice President under Franklin Roosevelt, likened the office’s importance to “a pitcher of warm piss,” lamenting that his acceptance of the office was the “worst damn fool mistake I ever made.” After Calvin Coolidge reluctantly accepted his

* J.D., William & Mary School of Law, 2009; B.A., Colgate University, 2005. To my parents, for leading by example, and in memory of my late grandmother, Marjorie P. Perry.

1 For a thorough historical perspective of the American vice presidency, see JODY C. BAUMGARTNER, THE AMERICAN VICE PRESIDENCY RECONSIDERED (2006).

2 See id. at 14, 123–26. Both John Adams and Thomas Jefferson, due to their popularity during the revolutionary period, remained influential politicians during their respective tenures as Vice President. Id. at 12–13.

3 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, 869 (2000).


5 BAUMGARTNER, supra note 1, at 3.

6 Id.; see also MICHAEL NELSON, A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 21 (1988).
party’s nomination, he received a telegram from former Vice President Thomas Marshall expressing his “sincere sympathy.”

Historically speaking, Vice Presidents had good reason to be discouraged. Initially, the office exercised only those few powers assigned and enumerated within the Constitution. How then, did an office that inspired such discontent, become the center of power and executive influence it is today? One would imagine that modern Vice Presidents would not agree with the sentiments of many of their predecessors. Indeed, no one today would doubt the power wielded by the current Vice President.

Somewhere along the evolutionary track of the American vice presidency, its constitutional positioning was lost. The Founding Fathers considered the Vice President much more a legislative officer than an executive official. Article I assigns the Vice President its only originally enumerated power: the authority to preside over the Senate with the ability to vote in the case of a tie. Not a single executive power was granted to the Vice President by the Constitution. Under Article II, the full executive power is vested in the President alone.

The modern Office of the Vice President began its shift towards the executive only within the last sixty years, as modern Presidents incorporated their running mates into their administrations through executive assignments, delegation of executive authority, and statutory responsibilities. There is a correlation between this movement towards the executive branch and the growing prestige and power of the office. Through these decades of change, time slowly blurred our conception of the Vice President, to the point where the office itself would be unrecognizable to its creators. This so-called “constitutional hybrid” has, understandably, led to gross misconceptions as to the role of the Vice President as a constitutional officer, confusion as to the limits of the Vice President’s powers and duties, and even confusion as to the office’s branch

7 Coolidge is quoted as responding, “I suppose I’ll have to take it.” BAUMGARTNER, supra note 1, at 3.
8 Id.
9 Article I, Section 3 states that the Vice President shall preside over the Senate. U.S. CONST. art. I, § 3, cl. 4. Early Vice Presidents, like Adams, presided over the Senate on a daily basis. John Nance Garner was the last Vice President to follow Adams’s precedent. See NELSON, supra note 6, at 33.
10 See Albert, supra note 4, at 894.
11 See Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3, at 868.
12 U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).
13 U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).
14 See Albert, supra note 4, at 831–37.
15 See id. at 834–36.
16 See id. at 836–37 (“[T]he Vice Presidency has traveled light years since the founding . . . .”).
membership. Confusion inevitably leads to disagreement and debate, especially when interpretation of the Constitution lies at the center of the controversy. One of many interpretive clashes concerning the identity of the Vice President came to a head in the summer of 2007 over the classification and declassification of documents within the Office of the Vice President.

In June of 2007, the Office of the Vice President (OVP), as it has since 2003, refused to comply with Executive Order 13,292 (the Order). The Order, among other things, empowered the National Archives’ Information Security Oversight Office (ISOO) with the authority to oversee certain classification and declassification protocols, but in the summer of 2007 the OVP refused to report its classification information and denied the ISOO the right to carry out an on-site inspection. It was clear at the time that the OVP felt the Order did not cover the Vice President. What was not clear, was why? Various statements surfaced from the OVP alleging a litany of defenses for why the Vice President was exempt from the Executive Order: the Vice President’s unique role as a member of both the legislative and executive branches exempted him; the order did not apply to the Vice President because he was not an “entity within the executive branch”; and the Vice President’s constitutional status was unclear and an “interesting constitutional question” to be explored. The OVP finally settled on a defense in a letter from Vice President Cheney’s lawyer, David Addington, stating that, as a textual matter, the Order distinguished the Vice President and the President from executive agencies.

17 See BAUMGARTNER, supra note 1, at 7.
19 Id.
20 Id.
21 Id.
22 Id.
24 Levine & Malveaux, supra note 18.
The response to the OVP's initial claim that the Vice President was not an entity within the executive branch was quick and critical, perhaps due to the administration's penchant for secrecy and the Vice President's recent, and directly contradictory, claims of protection under the doctrine of executive privilege. The statement was lampooned on many of the late night network comedy shows. Rep. Rahm Emanuel (D-IL) even proposed an amendment on the House floor which would have restricted funding to the Vice President's office.

After receiving no clarification from the OVP as to their failure to comply, the ISOO turned the matter over to the Attorney General, asking Alberto Gonzales to make a determination regarding the obligation of the OVP under the Order. The House Committee on Oversight and Government Reform, chaired by constitutional watchdog Henry A. Waxman (D-CA), quickly became involved in the matter, questioning the legality of the OVP's claim. The public was incredulous. If they knew anything of the structure of the United States government, it was that the Vice President was clearly a member of the executive branch.

Part I of this Note considers the historical evolution of the Vice President's role within America's constitutional structure. From the first Vice President through to the current Vice President, the office has undergone substantial changes. Part II considers the statutory and constitutional arguments that can be made in an attempt to assign the Vice President either to the executive or legislative branch. With compelling arguments on both sides, the answer to this question is not absolute, and continues to puzzle constitutional scholars to this day. The result is a practical, constitutional,

28 Vice President Cheney has repeatedly claimed the protections of executive privilege. See, e.g., Associated Press, White House Contests Post on Providing Visitor Logs, WASH. POST, Dec. 14, 2006, at A8; Carol D. Leonnig & Jim VandeHei, Cheney Wins Court Ruling on Energy Panel Records, WASH. POST, May 11, 2005, at A1. 29 Jon Stewart, anchor of The Daily Show, remarked, "Oh my God, the Vice President is a crazy person . . . . It's like the Harlem Globetrotters saying they were part of Scooby and the Gang, even though they only showed up once at a haunted amusement park and once on some Christmas special . . . ." The Daily Show: Non-Executive Decision (Comedy Central television broadcast June 25, 2007) [hereinafter The Daily Show], available at http://www.thedailyshow.com/video/index.jhtml?videoid=89061&title=non-executive-decision.


33 See, e.g., The Daily Show, supra note 29. 34 See, e.g., Albert, supra note 4, at 836–37. 35 See, e.g., Baumgartner, supra note 1; Donald Young, American Roulette: The History and Dilemma of the Vice Presidency (1965); Albert, supra note 4; Richard D.
and historical analysis of the intended and resulting role of the Vice President—a role that has evolved from a solely legislative officer, to a full-fledged, policy-influencing member of the modern executive branch.\textsuperscript{36}

Utilizing the findings from Parts I and II, Part III analyzes the current constitutional conflict on the premise that the modern Vice President is no longer a legislative officer as was arguably intended, the office having evolved into a clear and influential member of the executive branch. Vice President Cheney’s constitutional arguments, though strong from a historical and textual perspective, hold little weight in light of the contemporary role of the Vice President.\textsuperscript{37} This conclusion weakens Cheney’s proposed interpretation of Executive Order 13,292 and plays a role in the illegality of the office’s failure to adhere to the protocols of the Order.\textsuperscript{38}

The Cheney conflict, pertaining directly to the constitutional position of the Vice President, provides a contemporary opportunity to analyze the Vice President’s current constitutional role within the structure of the federal government. A full analysis presents a somewhat surprising conclusion. The OVP’s claim that the Vice President is not a member of the executive branch is not completely absurd, and, in fact, finds some authority. A historical, constitutional, and statutory analysis reveals an office that existed as an ambiguous constitutional anomaly “located somewhere between the legislative and the executive branches but not entirely welcome at either address.”\textsuperscript{39} Although strong evidence exists that throughout the first 150 or more years of the American Republic, the vice presidency would have been considered, \textit{de jure}, much more a legislative officer than a member of the executive branch,\textsuperscript{40} the Office’s gravitation towards the executive branch in connection with the Office’s burgeoning political power has created, \textit{de facto}, a fully executive vice presidency.\textsuperscript{41}

\section*{I. The Historical Evolution of the Vice President’s Role Within the Constitutional Structure of the United States Government}

From humble beginnings, the OVP has evolved into a position completely overshadowing its former self. When John Adams took his seat at the head of the Senate in 1789, he could never have imagined the power and prestige of the office currently held by Vice President Richard Cheney.\textsuperscript{42} More importantly for this discussion,

\begin{itemize}
\item Friedman, \textit{Some Modest Proposals on the Vice-Presidency}, 86 Mich. L. Rev. 1703 (1988);
\item \textsuperscript{36} See Baumberg, \textit{ supra} note 1, at 14, 123–26.
\item \textsuperscript{37} See infra Parts I.E, II.D.
\item \textsuperscript{38} See infra Part III.C.
\item \textsuperscript{39} Goldstein, \textit{The New Constitutional Vice Presidency}, \textit{ supra} note 35, at 508.
\item \textsuperscript{40} See \textit{id.} at 515.
\item \textsuperscript{41} See \textit{id.} at 549.
\item \textsuperscript{42} Adams characterized the office as “insignificant.” See Albert, \textit{ supra} note 4.
\end{itemize}
Adams likely would not have pictured the executive role of the modern Vice President, or its role in creating and advancing public policy. The vice presidency, created at the 1787 Constitutional Convention, has undergone three general phases of power and influence—the traditional era, the transitional era, and the modern era. This movement towards an executive identity, however, has not been a steady linear progression. The evolution of the OVP has occurred through a process of punctuated equilibrium, or distinct watershed periods of change followed by prolonged periods of stagnation. The traditional era is marked by relatively weak Vice Presidents performing essentially legislative duties. Transitional-era Vice Presidents, spanning the first half of the twentieth century, exhibit a movement towards greater power and more executive responsibilities. The modern Vice Presidents, generally accepted as beginning with Richard Nixon’s second term as Vice President in 1956, complete the institutionalization of the OVP as an executive entity.

A. The Convention

The creation of the American vice presidency at the Constitutional Convention is often described as a mere “afterthought,” or worse, an accident. The existence of the Office itself was not proposed until September 4, 1787, more than three months into the Convention. The final draft of the Constitution was approved just thirteen days later. The Committee of Eleven, a group formed to consider miscellaneous questions as the conclusion of the Convention approached, proposed the creation of the OVP along with other provisions, most notably the Electoral College.

The Committee created the Vice President not as a permanent heir to a disabled President, and certainly not as an active executive branch official, but as a “device to facilitate the election of a national President.” In fact, it is debatable whether the

43 See BAUMGARTNER, supra note 1, at 123–26.
44 See id. at 14–34.
45 See id. at 23–33 (discussing significant changes during the transitional era of the vice presidency).
46 See id. at 20–21.
47 See id. at 23–33.
48 See Albert, supra note 4, at 834.
49 Id. at 812 (calling the Founders’ creation of the Vice President “an afterthought whose eventual creation was virtually accidental” (citation omitted)).
51 See id. at 580.
52 See id. at 506–07.
53 Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3, at 867 (citation omitted).
Vice President was intended to officially ascend to the presidency in the case of the death or disability of the President rather than simply act as interim head, or steward of the executive branch until a new election could be held. It was not until John Tyler assumed the presidency upon the death of President William Henry Harrison in 1841 that the idea of vice presidential succession was established.

Strong regional and home-state allegiances were a major concern in creating an electoral process that would result in a strong, effective, and unifying President. The Founders predicted that votes for President would be cast by each state’s electors only for that state’s “favorite son.” Through the creation of the OVP, each state was forced to vote for two candidates, presumptively the candidate from their state and the most qualified candidate. The presidency would be awarded to the candidate with the most votes, and the vice presidency to the candidate finishing in second place. The vice presidency existed, chiefly, as a means to compel state electors to support a candidate hailing from outside of their own state.

Though no delegate ardently supported the creation of the vice presidency, the seemingly overlapping roles of the OVP did spark controversy during the Convention’s debate of the Office. Elbridge Gerry, delegate from Massachusetts, was most concerned with the President’s influence over the Vice President’s control of the Senate and the resulting impact on the doctrine of separation of powers, stating, “We might as well put the President himself at the head of the Legislature.” George Mason, of Virginia, argued against the proposal for its “mix[ing]” of legislative and executive roles and its intrusion on the legislative powers of the Senate. Neither Gerry nor Mason signed the final Constitution. Connecticut’s Roger Sherman summarized the majority view, however, by reminding the delegates that if the Vice President was not placed at the head of the Senate “he would be without employment,” for he had no enumerated role in the executive. The envisioned lack of duties even led to proposals to compensate the Vice President on a per diem basis, paying him only on those days in which he actually “presided over the Senate.”

54 See BAUMGARTNER, supra note 1, at 11.
55 Id.
56 See Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3, at 866–67.
57 Id. at 867; see also Albert, supra note 4, at 816–19.
58 Albert, supra note 4, at 816.
59 Id. at 817–18.
60 Id. at 817.
62 CONSTITUTIONAL CONVENTION DEBATES, supra note 50, at 527.
63 Id.
64 See id. at 638.
65 Id. at 527.
66 BAUMGARTNER, supra note 1, at 9.
Within three days, the Convention voted on the proposal, adopting the OVP and the proposed method of electing a President by a vote of 8-2-1.67 As a member of the majority position, Sherman’s statements suggest that the Convention intended the OVP to perform no duties outside presiding as President of the Senate, thereby restricting the Vice President’s substantive role to solely within the legislative branch.68 As long as the President retained his health, there is no evidence from the Convention that the Vice President would serve any role within the executive branch.69

B. Original Intent

The members of the Constitutional Convention clearly conceived of the vice presidency as a legislative office.70 However, the somewhat cursory process in which the office was created,71 in combination with its constitutional inconsistencies and subsequent malfunctions and reforms,72 begs one to question how much weight to give to the Founders’ intent when considering the constitutional role of the vice presidency.

First, as discussed previously, the creation of the Office occurred very late in the convention and was debated only briefly.73 The OVP was proposed on September 4, 1787, and approved only three days later.74

Second, from a strictly textual standpoint, it is worrisome that the Vice President may preside over his own impeachment.75 The text of the Constitution states, “The Senate shall have the sole Power to try all Impeachments.”76 Because the Vice President acts as the president of the Senate he has the pleasure of presiding over the impeachment of federal officials.77 Recognizing a conflict of interest if the President were impeached, the Framers added a clause to Article I, Section 6 appointing the

67 The delegates from Maryland and New Jersey voted against making the Vice President head of the Senate. CONSTITUTIONAL CONVENTION DEBATES, supra note 50, at 528.
68 Id. at 527.
69 See Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3, at 868.
70 Goldstein, The New Constitutional Vice Presidency, supra note 35, at 515–16 (“Yet the delegates clearly conceived the Vice President’s primary duties as legislative . . . . Indeed, the constitutional debates disclose no notion that the Vice President would assume any executive functions while the Chief Executive retained his good health.”).
71 See CONSTITUTIONAL CONVENTION DEBATES, supra note 50, at 507, 527–28.
72 See, e.g., Albert, supra note 4; see also Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3.
73 See CONSTITUTIONAL CONVENTION DEBATES, supra note 50, at 507, 527–28; see also supra Part I.A.
74 See CONSTITUTIONAL CONVENTION DEBATES, supra note 50, at 507, 527–28.
75 See Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3.
76 U.S. CONST. art. I, § 3, cl. 6.
77 See id.
Chief Justice of the Supreme Court to preside over a presidential impeachment.78 No such exemption was created were the Vice President himself to be tried.

Third, the Founders’ intended role raises the question of why the Vice President should be given the authority to break voting ties within the Senate.79 The Vice President does not participate in any committee debates or back-room negotiations.80 He also does not participate in any floor debates surrounding proposed legislation.81 The Vice President may not even be familiar with the nuances of the bill that produced the tie.82 While the Framers wanted an impartial national official to break Senate ties resulting from contentious issues, modern Vice Presidents merely break ties along partisan lines with little or no involvement in the bill’s procession through the legislative branch.83

Finally, and perhaps most glaring, is the failure of the Founders’ initial executive election system as evidenced by the tumultuous election of 1800.84 Prior to the Twelfth Amendment, the candidate with the second most electoral votes was awarded the vice presidency.85 Although electors were forced to vote for two candidates, they were not made to specify which vote was for President and which was for Vice President.86 In the election of 1800, Jefferson tied with his declared running mate, Aaron Burr, because of this procedural flaw.87 Burr refused to concede and the election was thrown to the House to name the third President of the United States.88 Jefferson eventually won with the backing of Alexander Hamilton,89 but the event illuminated a major flaw in the election system. By not forcing electors to distinguish between votes for President and Vice President, the Framers had created an election system susceptible to chaos and controversy. The flaw was quickly fixed in 1804 by the Twelfth Amendment.90

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78 Id. ("When the President of the United States is tried, the Chief Justice shall preside . . .").
79 See YOUNG, supra note 35, at 318–19.
80 Id. at 319.
81 Id.
82 See id. (discussing the Vice President’s controversial role as Senate vote tiebreaker).
83 See id. (discussing the Vice President’s varying role in promoting and passing legislation).
84 See Albert, supra note 4, at 838.
85 Id. at 817–18.
86 Id.
87 See id. at 838.
88 Id.
89 Though Hamilton’s capitalist vision was diametrically opposed to Jefferson’s agrarian vision for the country, Hamilton labeled Burr “the most unfit man in the U.S. for the office of President.” JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 469 (2003).
90 The Twelfth Amendment charges electors to cast distinct ballots for President and Vice President. U.S. CONST. amend. XII. Each house of the same Congress that adopted the amendment actually held a vote to abolish the vice presidency. BAUMGARTNER, supra note 1, at 14. The proposal failed 19-12 in the Senate and 85-27 in the House of Representatives. Id.
The accepted thought at the Constitutional Convention seems to have been that the Vice President was more a legislative official than a member of the executive branch.\textsuperscript{91} However, the last-minute nature of the addition of the vice presidency, the inconsistencies relating to vice presidential impeachment and method of election, and the Vice President's ability to break ties, all erode the immense weight that should be given to original intent in most constitutional controversies. In creating the office, the Convention was more worried about providing a vehicle to facilitate a successful presidential election than in creating a Vice President of the United States.\textsuperscript{92} Regardless of the weight it should be afforded, it is clear that the original intent of the Constitutional Convention was to create an officer of the legislative branch rather than an influential, policy-driving member of the executive branch.\textsuperscript{93}

\textbf{C. The Early Republican Era: Jefferson and Adams}

The traditional era began with prominent and esteemed Vice Presidents that had garnered their reputation for great public work prior to running for the Presidency.\textsuperscript{94} John Adams and Thomas Jefferson laid the foundation for the traditional vice presidency, though their personal prestige would never be equaled by subsequent occupants of the Office.\textsuperscript{95} The period was marked by a "hands off" approach to executive influence by a politically weak Vice President.\textsuperscript{96}

Both Adams and Jefferson limited themselves to the legislative duties given to the Vice President under Article I, Section 3.\textsuperscript{97} Though Adams presided over the Senate on a regular basis—and to this day holds the honor of casting the most tie breaking votes by a Vice President—\textsuperscript{98} he lamented over how ineffectual and powerless he was. "I am nothing," noted Adams, recognizing only his potential for power as Vice President, "but I may be everything."\textsuperscript{99} Adams, in accordance with his argumentative and aggressive nature, would often participate in Senate floor debates, even taking sides on individual policy proposals.\textsuperscript{100}

\textsuperscript{91} Goldstein, \textit{The New Constitutional Vice Presidency}, supra note 35, at 518.
\textsuperscript{92} Goldstein, \textit{Can the Vice President Preside at His Own Impeachment Trial?}, supra note 3, at 867.
\textsuperscript{93} Goldstein, \textit{The New Constitutional Vice Presidency}, supra note 35, at 518.
\textsuperscript{94} BAUMGARTNER, supra note 1, at 12.
\textsuperscript{95} \textit{Id.} at 14–15 (explaining that subsequent Vice Presidents, starting with George Clinton in 1804, were regarded as "incompetents").
\textsuperscript{96} \textit{Id.} at 14–21.
\textsuperscript{97} \textit{Id.} at 19 (describing the formal duties of the earliest Vice Presidents as "minimal," entailing legislative duties such as presiding over Senate sessions).
\textsuperscript{98} \textit{Id.} at 21.
\textsuperscript{99} Goldstein, \textit{The New Constitutional Vice Presidency}, supra note 35, at 519.
The Anti-Federalists in the Senate saw Adams's participation in Senate activities as an unconstitutional abridgement of separation of powers. Adams, on the other hand, saw it as an opportunity for the Vice President to remain active within the federal government. Anti-Federalists, retaining a strict adhesion to the principles of separation of powers, saw the OVP as imperiling the independence of the legislative branch. In protest, the party refused to recognize Adams's executive position as Vice President of the United States, identifying him only as the legislative president of the Senate.

Jefferson expressly stated that the OVP was a strictly legislative officer, going so far as to say that involvement within the executive branch would be unconstitutional. In referencing the clearly enumerated limits of the OVP, Jefferson wrote, "As to duty, the Constitution will know me only as the member of a Legislative body; and its principle is, that of a separation of Legislative, Executive, and Judiciary functions, except in cases specified . . . this principle . . . is clearly the spirit of the Constitution."

Though Adams and Jefferson each brought prestige to the OVP, the office took a sharp turn towards obscurity after their departure. Following the Twelfth Amendment and its change to the presidential election system, the Vice President was turned into little more than the "social host" of the executive branch. Many traditional-era Vice Presidents, realizing their futile situation, did not even reside in Washington. The OVP devolved into a largely ceremonial institution, occupied by little-known men, wielding little to no power, and performing very few, if any, executive duties. The OVP remained powerless, with few occupants of note, for almost 125 years.

D. The Conversion from Legislative to Executive

"[M]ediocrity to obscurity" was the accepted progression for most traditional-era Vice Presidents. It wasn't until Theodore Roosevelt that the first great shift in

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101 Albert, supra note 4, at 824.
102 Goldstein, The New Constitutional Vice Presidency, supra note 35, at 519 (stating that although Adams believed the vice presidential position was "the most insignificant office that ever the invention of man contrived," he was still more active in his Senate role than other Vice Presidents).
103 Albert, supra note 4, at 824–25.
104 Id. at 824.
105 Nunn (Broad) vs. Jefferson (Narrow), WALL ST. J., May 5, 1988, at 32.
106 Id.
107 BAUMGARTNER, supra note 1, at 22.
108 Id. at 21.
109 Id. at 19–21.
110 Id. at 23 (describing the first transitional-era Vice President as Theodore Roosevelt, who came into office in 1901, almost 125 years from the time the first Vice President took office in 1789).
111 Id.
vice presidential power occurred. This so called “transitional era” marked “a sharp departure from the limited and humble origins” of the traditional American vice presidency. Under Franklin Roosevelt’s administration, Vice Presidents John Nance Garner and Harry Truman began to regularly participate in executive cabinet meetings. While this meant a significant increase in the office’s involvement in executive policy making, the extent of that involvement was still limited. Truman, for example, was not aware of the development of the atomic bomb until he ascended to the presidency upon Roosevelt’s untimely death.

The Eisenhower/Nixon administration is typically considered “the next great leap” in the development of the OVP as an executive institution. Lyndon Johnson was the first Vice President to obtain the contemporary notion of proximity to the President when he moved his offices from Capitol Hill and into the Executive Office Building—an unambiguous sign of a repositioning from legislative to executive. In 1969, in order to fund the increasing duties of the office, the OVP was provided with a line item within the executive budget. In 1974, Gerald Ford received his own distinct staff—surprisingly something no Vice President before him ever had. The OVP was now funded by both the legislative and the executive branches.

While it was clear the Roosevelt, Truman, and Eisenhower administrations had transformed the functioning of the American vice presidency, the Office was not yet perceived as a fully executive official. Truman explicitly wrote in his memoirs that the Vice President “is not an officer of the executive branch.” Eisenhower as well, was not yet convinced of a complete shift, writing that the Vice President was “not legally a part of the Executive branch and [was] not subject to direction by the President.” The last vestiges of the OVP’s legislative role still remained.

112 Id. at 23–24.
113 Goldstein, The New Constitutional Vice Presidency, supra note 35, at 505.
114 See Friedman, supra note 35, at 1723.
115 Id. at 1710.
116 Albert, supra note 4, at 833. Eisenhower was credited with the “next great leap in the growth of the Vice Presidency.” Id.
117 Id. at 834.
118 See id.
119 See id.
120 See id.
121 50 U.S.C. § 402 (2000) (establishing the National Security Council and including the President, Vice President, Secretary of State, and others as members of the Council).
122 YOUNG, supra note 35, at 318.
124 Id.
E. The Contemporary Vice Presidency

It was not until Walter Mondale’s tenure that our modern understanding of an executive Vice President was solidified. Mondale fulfilled the transition started by Garner, Truman, and Nixon by completing the “institutionalization” of the vice presidency. Mondale is credited for permanently changing the office “into an active participant in executive government.” During his tenure, the Vice President’s office was moved to the west wing of the White House so Mondale could have continuous and easy access to President Carter. As Vice President, he regularly attended cabinet meetings, participated in weekly lunches with the President, and even obtained his own vice presidential airplane.

Following Mondale’s precedent, modern Vice Presidents have been increasingly more involved in executive decision making, in domestic policy, in foreign policy, in lobbying Congress, and in advocating for the President’s policy agenda. Today, Vice President Cheney controls presidential briefings, has taken the lead on controversial executive policies like the National Security Agency’s wiretapping program and the creation of military commissions, enjoys unprecedented access to President Bush, manages judicial nominations, and maintains a strong influence on environmental policy and tax policy. Vice President Cheney has exponentially increased the Vice President’s role as an executive advisor, often transcending his role as an advisor, becoming a policy creator.

A practical and honest look at the modern Vice President reveals an overtly active executive official only discretely connected to the legislative branch through the Vice President’s role of breaking a rare Senate tie. In practice, the modern OVP is a fully functioning executive institution, retaining little to none of its original ties to

125 See Albert, supra note 4, at 834.
126 Id.
127 Friedman, supra note 35, at 1723.
128 See id. (explaining that since President Roosevelt “reinstated the regular vice presidential attendance at cabinet meetings,” it became routine for later Vice Presidents to attend).
129 Albert, supra note 4, at 834.
130 See, e.g., id. at 813.
133 See BAUMGARTNER, supra note 1, at 115. By 2006, Vice President Cheney had broken a Senate tie six times. Id. at 114.
the legislative branch. Vice President Cheney has completed the constitutional about-face from the legislative officer of 1787 to the executive official of 2007.

II. TO WHICH BRANCH DOES THE VICE PRESIDENT BELONG?

Vice President Cheney’s claim that the OVP is not an entity within the executive branch under the Order will resonate if, in fact, the Vice President is not an actual member of the executive branch. A full analysis of the constitutional placement of the OVP must consider historical, textual, statutory, and practical considerations. The historical analysis, as discussed above, seems to support the existence of the OVP as a legislative officer rather than an executive official. This conclusion can be attacked, however, by arguments critical of the process and creation of the Founders’ initial view of the vice presidency. The textual and statutory analysis will paint a somewhat ambiguous portrait of the constitutional placement of the vice presidency, but a practical look at the modern vice presidency manifests a clear executive placement for the OVP.

A. Separation of Powers

Why is it important that we determine to which branch of the federal government the Vice President belongs? Why not just concede that the OVP is a constitutional anomaly belonging partially to both the executive and legislative branches, or perhaps, as the Vice President’s press secretary claimed for a short period, to neither branch—or a “fourth branch”? Implicit in the notion of an ordered American constitutional system is the Enlightenment political doctrine of separation of powers. It is America’s traditional acceptance of this doctrine that precludes the conclusion that the Vice President may stand astride two branches of government.

The Founders “regarded [the theory of separation of powers] as an essential element in the structuring of free government.” Their adherence to this doctrine, as

134 See Goldstein, Can the Vice President Preside at His Own Impeachment Trial?, supra note 3 (“The Vice President has evolved into an officer of the Executive Branch. He rarely presides over the Senate, except on ceremonial occasions or to break ties in favor of the Administration.”).

135 See id. at 868 (“The framers conceived the Vice President as a legislative officer.”); see also supra Part I.

136 See, e.g., YOUNG, supra note 35, at 318 (arguing that according to the Constitution, it is not essential that a Vice President preside over the Senate “at the exclusion of any assignments that may come from the President,” thus making executive matters a higher priority); Albert, supra note 4, at 812 (arguing the position of Vice President was the Constitutional Convention’s “afterthought” and a “postscript”).


139 Id.
evidenced in the Federalist Papers and other founding documents, makes it unlikely and contradictory that the Framers of the Constitution would have created an executive office which maintained membership in the legislative branch, or vice versa.\footnote{See THE FEDERALIST NO. 47, at 299 (James Madison) (Henry C. Lodge ed., 1895).}

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective," wrote James Madison, "may justly be pronounced the very definition of tyranny."\footnote{Id. at 300.} However, Montesquieu's theory does not demand an absolute and full separation of all branches.\footnote{See id. at 300–01.} As Madison understood the doctrine, members of one branch could exercise certain levels of control over another branch.\footnote{See id. at 301–02.} Separation of powers was violated only "where the whole power of one department is exercised by the same hands which possess the whole power of another department."\footnote{Id. at 302.}

Though our modern understanding of the doctrine gravitates towards a more complete separation, Madison presciently left room for limited aspects of inter-branch control.\footnote{See id. at 307.} The narrow interpretation of the separation of powers leaves no room for the existence of a constitutional hybrid, while the broader view seems to predict and accept the occurrence. No matter the accepted interpretation of separation of powers, it remains imperative to determine the Vice President's positioning within our constitutional system in order to solve arising constitutional questions involving branch membership, like the conflict between Vice President Cheney and the ISOO.

\section*{B. Arguments for Executive Branch Membership}

The average American, and rightfully so perhaps, would never think to question the constitutional role of the Vice President as anything other than executive. The Vice President runs with the President on the executive ticket, he occupies an office in the White House, he participates in executive policy discussions, and he often actively pushes the President's executive agenda.\footnote{See, e.g., Angler Part I, supra note 131; sources cited supra note 132.}

In only eight years as Vice President, "Cheney has shaped his times as no Vice President has before."\footnote{Angler Part I, supra note 131.} To say that Cheney has been "involved" in policy would be an understatement. Cheney has been the driving force behind Supreme Court nominees, tax proposals, and energy policy, not to mention his leadership role in expanding executive authority, the installment of his own plan for the treatment of detainees, and his significant influence over President Bush in conducting the War on Terror.\footnote{See, e.g., id.; sources cited supra note 132.}
Cheney also reportedly directs and controls briefings to the President, and commands the budget process. The Vice President clearly has one hand on the Bush administration helm, steering President Bush by framing policy options, confident that his advice will be viewed as the "final words of counsel." While as a practical matter, it would seem clear that the Vice President must be a member of the executive branch, there are various statutory and constitutional arguments to be made that may clarify the Vice President's position as an executive entity.

From a constitutional standpoint, "[t]he executive Power shall be vested in a President of the United States of America." Implicit in the executive power is the authority to delegate executive duties to executive officials and executive agencies. Given that the "vesting clause" places the entirety of executive power with the President, with no "residuum" left for other entities, whatever executive power the Vice President retains is by virtue of delegation to the OVP by the President. However, it would raise serious separation of powers concerns for an official of one branch to delegate his essential authority to a member of a competing branch. Delegation of executive power to a Vice President who claimed to be a member of the legislative branch would necessarily face greater scrutiny from courts as an invalid exercise of the fundamental powers of the executive branch by a member of the legislative branch.

As a permanent member of the National Security Council, the Vice President has specific statutorily assigned executive duties. President Truman gave the OVP a specifically assigned executive duty through the National Security Act of 1947, which designed a council qualified to "advise the President with respect to the integration of domestic, foreign, and military policies relating to that national security." Fellow members of the National Security Council, including the Secretary of State and Secretary of Defense, are all planted firmly in the executive branch. The Vice President's membership on the National Security Council places him in a small group

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149 See Angler Part I, supra note 131; Angler Part III, supra note 132.
150 Angler Part I, supra note 131.
151 U.S. Const. art. II, § 1.
152 Pub. L. No. 82-248, 65 Stat. 713 (codified at 3 U.S.C. § 301 (1951)).
154 "In general, the delegation of executive power to legislative officials violates the constitutional separation of powers." Id. at 1542. The non-delegation doctrine acts as a safeguard against voluntary intermingling of the branches, and an enforcer of separation of powers. Though the Court has not expressly struck down a statute as a violation of the non-delegation doctrine since 1935, the Court has recently hinted at the doctrine in expressing its rejection of the Line Item Veto Act and the Balanced Budget and Emergency Deficit Control Act. See, e.g., Clinton v. City of New York, 524 U.S. 417 (1998); Bowsher v. Synar, 478 U.S. 714 (1986).
156 Id.
157 Id.; see, e.g., The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities, 72 GEO. L.J. 1855, 1859 n.32 (1984).
of high-level executive officers with special advisory influence over the President. This is strong evidence of executive branch membership.

The OVP obtains funding and staff in order to assist the Vice President in carrying out his assigned executive duties. This funding and staff is provided to the Vice President to "enable [him] to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." This funding comes directly out of the executive budget and is classified under United States Code Title 3, Chapter 2: "Office and Compensation of President." The statute not only authorizes funding for the Vice President in carrying out his executive duties, but also recognizes the President's daily working relationship with the Vice President. The statute directly references the Vice President as fulfilling "executive duties and responsibilities." A Vice President that performs executive duties and is funded through a line item on the executive branch budget must be considered an entity within the executive.

From a practical standpoint the Vice President looks like an executive official, talks like an executive official, and acts like an executive official. Vice President Cheney has an extremely close and congenial relationship with the President. He participates, if not runs, executive cabinet meetings during which he wields great power. Cheney himself has claimed to be an executive official through his invocation of the doctrine of executive privilege. Any reasonable observer of the daily functions of the White House would have to concede that the Vice President seems to be an active and influential entity of the executive branch.

C. Arguments for Legislative Branch Membership

Evidence supporting a legislative Vice President is not confined to historical visions and original intent. Historically, the Vice President was considered a legislative official. Not surprisingly then, lost remnants of that idea remain within the Constitution and the United States Code. These arguments provide some foundation for Cheney's original assertion that the OVP is not an "entity within the Executive branch."

160 Id. (emphasis added).
163 Id. (emphasis added).
164 See Angler Part I, supra note 131 (reporting that the Vice President and President convene for weekly lunch meetings).
165 See id.; Angler Part III, supra note 132.
166 See supra note 28 and accompanying text.
167 See infra text accompanying notes 169-74.
168 Levine & Malveaux, supra note 18.
Much like the arguments for executive membership, evidence of legislative membership can also be found in the source of the Vice President’s funding. The Vice President continues to draw his salary from the legislative branch under 5 U.S.C. § 2106, which provides for the organization of government and payment of government employees and officials.\(^{169}\) When classifying government employees for payment purposes, § 2106 states, “For the purpose of this title, ‘Member of Congress’ means the Vice President, [and] a member of the Senate or the House of Representatives . . . .”\(^{170}\) Therefore, as far as his salary is concerned, the Vice President is an employee of the legislative branch.

From a purely constitutional perspective it is hard to argue that the Vice President is \textit{not} a member of the legislative branch. The Vesting Clause of Article 2, Section 1 of the Constitution empowers the President, and the President alone, with executive power.\(^{171}\) The absolute language of this clause leaves free no residuum of power for other entities.\(^{172}\) Had the Framers intended the Vice President to exercise some modicum of constitutionally authorized executive power they very easily could have included the Vice President in their distribution of executive power.\(^{173}\) Instead, the text of Article II furnishes the Vice President with no executive powers.\(^{174}\)

Though the Vice President lacks constitutional executive power, the document does assign specific legislative powers to the Vice President.\(^{175}\) Indeed, the only specifically enumerated power assigned to the Vice President was the Office’s role as president of the Senate.\(^{176}\) Article I, Section 3 reads, “The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”\(^{177}\) This clause places the Vice President at the head of the Senate and, in the case of a tie, empowers him to cast a deciding vote.\(^{178}\) The Vice President, as the leader of a legislative body and a quasi-voting member of the Senate could, therefore, be regarded as a member of the legislative branch. It would be logically inconsistent not to consider an individual with the authority to vote in a legislative body a “member” of that body. A Vice President could easily cast more votes in the Senate than, say, a medically incapacitated member, such as Senator Tim Johnson.


\(^{170}\) Id.

\(^{171}\) U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).


\(^{173}\) See \textit{supra} notes 92–93 and accompanying text.

\(^{174}\) See \textit{supra} note 171 and accompanying text.

\(^{175}\) See \textit{supra} notes 9, 12 and accompanying text.

\(^{176}\) U.S. CONST. art. I, § 3, cl. 4.

\(^{177}\) Id.

\(^{178}\) Id.
from South Dakota, who spent nearly a year away from the Senate after a life threatening brain hemorrhage in December of 2006.\textsuperscript{179} Confined to a strictly textual analysis, the Constitution clearly perceives the Vice President as a legislative officer.

The Incompatibility Clause raises another interesting constitutional argument supporting legislative branch membership. Separation of powers is an accepted aspect of American constitutional law, and would presumptively prevent one individual from holding political positions in two branches of government. The drafters of the Constitution embedded one aspect of the doctrine within the Constitution through the Incompatibility Clause.\textsuperscript{180} Article I, Section 6 reads, “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”\textsuperscript{181} How then, could the Vice President retain an office in the executive branch along with his role as a quasi-voting member of the Senate?

The applicability of this Clause to the constitutional positioning of the Vice President must be considered within the context of history. The members of the Constitutional Convention authored both the language that created the Vice Presidency and the Incompatibility Clause. Either the Framers created an office that violated their fundamental values and the Constitution, or the Vice President is either an executive office holder or a member of Congress.\textsuperscript{182} It would be unreasonable to think that the Framers created “a walking violation of the separation of powers doctrine” within their own founding document.\textsuperscript{183} The Vice President cannot hold an office within the executive branch while simultaneously being a member of Congress. Considering the indicia of the historical vice presidency and original intent, if these two roles are in fact mutually exclusive, greater evidence favors a “center of gravity” in the legislative branch.\textsuperscript{184}

Strong arguments can be made against the applicability of the OVP to the Incompatibility Clause. The main contention is that the Vice President is by no means a “member” of the Senate.\textsuperscript{185} Under Article I, Section 3, and subsequently the Seventeenth Amendment, the Senate is wholly composed of two representatives from each state.\textsuperscript{186} Were the Vice President considered a member of the Senate, whichever state he hailed from would possess three representatives in the Senate. Certainly however, one could perceive Article I, Section 3 and Section 6 as independent grants

\begin{itemize}
  \item \textsuperscript{179} Bart Jansen, \textit{Senate Welcomes Back S.D. Democrat Tim Johnson}, CQ TODAY, Sept. 5, 2007.
  \item \textsuperscript{180} U.S. CONST. art. I, § 6, cl. 2.
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} Friedman, supra note 35, at 1722.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id. at 1721. Furthermore, “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.” U.S. CONST. amend. XVII.
  \item \textsuperscript{186} Friedman, supra note 35, at 1721.
\end{itemize}
of membership. It is quite reasonable to think that the president of a body, empowered with the responsibility of breaking tie votes on highly contentious issues, would be a "member" of that legislative body.

One could argue that if the OVP is considered an executive office, it is so only by virtue of the goodwill of the President, and not by any constitutional mandate.\(^\text{187}\) Other than modern statutory assignments like membership in the National Security Council, the Vice President's executive duties exist only by virtue of the President's delegation of authority, an authority inherent within the executive power and codified in 3 U.S.C. § 301.\(^\text{188}\) Therefore, the Vice President's executive power lies only in his continuing relationship with the President, or to put it pessimistically, the Vice President's power relies on the whims and emotions of the President.\(^\text{189}\) If the President chooses to no longer delegate executive authority to the Vice President, chooses to remove him from cabinet meetings, or chooses to remove him from all executive policy assignments and return the office to the days of Jefferson, he may do so. The argument can be made that executive membership exists only as a function of the Vice President's continued benevolent relationship with the President and not by any constitutional or statutory authority.\(^\text{190}\) Once that relationship sours and executive delegations of power are removed, the Vice President would cease to be an executive entity.

To clarify this point, consider this hypothetical.\(^\text{191}\) Information is leaked by an anonymous staffer in which the staffer overheard Vice President Cheney, in a private conversation, voice his opposition to the President's immigration and naturalization policies. The Washington Post subsequently runs a story releasing Cheney's opposition to the President's policies. The statement completely alienates Cheney from President Bush and causes Bush to lose trust in his Vice President. Bush, through an executive order, chooses to remove all executive authority he has delegated to Vice President Cheney. Cheney will no longer participate in cabinet meetings, he will no longer hold any advisory role within the White House, and will no longer be privy to any confidential political or military information. President Bush even evicts Cheney

\(^{187}\) See Reynolds, supra note 153, at 112.

\(^{188}\) The statute recognizes the President's inherent authority to delegate "any function which is vested in the President by law" but limits the individuals to which the President can delegate power to "the head of any department or agency in the executive branch" or any official appointed with the advice and consent of the Senate. 3 U.S.C. § 301 (2008).

\(^{189}\) "I've just reminded Hubert," remarked Lyndon Johnson, in reference to his ability to manipulate Hubert Humphrey's executive power, "that I've got his balls in my pocket." Friedman, supra note 35, at 1709.

\(^{190}\) See Reynolds, supra note 153, at 112.

\(^{191}\) The forthcoming scenario may not be as far fetched as it may seem at first glance. There have been a number of Presidents whose relationships with their Vice Presidents disintegrated during their terms. Lyndon Johnson, Hubert Humphrey, and Spiro Agnew were all locked out of their respective administrations at one point. See Baumgartner, supra note 1, at 128–29.
from his west wing office, moving him back to the Capitol. Cheney no longer has access to the President, nor does he perform any other executive duties. Now that the practical argument for the Vice President as an executive member is removed from the equation, we are left with a Vice President whose daily duties parallel those of Adams and Jefferson, in that his duties are solely legislative in nature. Considering the original intent of the Founders and the historical legislative foundations of the Vice President, how could this hypothetical Vice President be considered a member of the executive branch?

By this reasoning it becomes entirely possible that our traditional view of a purely executive Vice President lies, at the very least, on shaky ground. In fact, the Vice President’s executive authority rests entirely at the pleasure of the President. Our perception of the OVP would be greatly changed if a President chose to remove his executive authority from the Vice President.

The basis for an executive Vice President is not constitutional or historical, nor was it intended by our Founders. Executive membership is purely based on the practical application, and limited statutory grants, of modern duties of the Vice President as delegated by the President. If, and only if, that authority were removed, the only argument that seems to classify the Vice President as executive, the argument of practical application, disappears. We are left only with the original intent of the Framers and the historical nature of the Vice President, both of which point to a legislative assignment.

D. Branch Membership Conclusion

As late as the 1950s, the Vice President could honestly claim to be much more a legislative officer than an executive official. To make such a statement today requires willful ignorance and a false characterization of the duties and powers of the modern Vice President. The current Vice President is an active participant in executive policy making and advising, maintains an influential role within the National Security Council, holds a strong relationship with the President, is privy to classified executive documents and exercises executive classification authority, wields great political influence over the executive branch, and rarely, if ever, exercises his constitutional authority to preside over the Senate. Though it may run counter to our history, prudence dictates that the modern Vice President, with his conspicuous executive identity and his utterly absolute isolation from Congress, must be considered a member of the executive branch.

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192 See supra Part I.C.
193 See Reynolds, supra note 153.
194 See supra note 48 and accompanying text.
195 See supra notes 131–34 and accompanying text.
III. **Vice President Cheney’s Confrontation with the ISOO**

With the preceding analysis placing the modern Vice President as a member of the executive branch, an honest consideration of Cheney’s conflict with the ISOO and the reach of Executive Order 13,292 becomes possible. The Vice President put forth two main arguments to buttress the claim that his Office was not covered by the Order. The first, and broader argument, was that the classified information protocols within the Order did not apply to the OVP because the Vice President is not an “entity within the executive branch” as defined by the Order.196 This was the argument that fell flat in the face of public incredulity and that has been disproved in Parts I and II. The OVP quickly shifted, but did not abandon, nor ever denounce, the “not an entity” argument, for a second and more finely tuned argument: Cheney was not beholden to the protocols of the Order for reasons related to exemptions created within it.197

**A. Executive Order 13,292 as Applied to the Office of the Vice President**

President Clinton instituted Executive Order 12,958 in April of 1995 in an attempt to create a “uniform system for classifying, safeguarding, and declassifying national security information.”198 Specifically, Executive Order 12,958 laid out procedures to be followed throughout the executive branch with regard to the classification and declassification of information at the various levels of confidentiality, as well as the implementation and review of the instituted protocols.199 Oversight of the classification and declassification process was granted to the newly created ISOO.200 In pursuit of enforcing Executive Order 12,958, the ISOO was granted authority to carry out investigations and inspections, including the authority to conduct on-site inspections of offices bound by Order 12,958.201 Clinton’s Order was soon implemented through 32 C.F.R. § 2001, which empowered the ISOO to collect yearly statistics on classification and declassification of materials from any agency “that creates or handles classified information.”202

Executive entities, including the OVP, have been reporting the number of pages they have classified and declassified each year to the ISOO since Clinton’s 1995 Executive Order 12,958.203 Based on statistics gathered by the ISOO during President Bush’s first term, information classified by executive agencies had almost doubled

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197 See Addington Letter, *supra* note 27.
199 *Id.*
200 *Id.* (Section 5.3, 3 C.F.R. 351, created the ISOO).
201 *Id.*
203 See, e.g., Silva, *supra* note 196.
between 2001 and 2004 from 8.65 million classification decisions to 15.65 million respectively.204 As of 2007, executive agency classifications had risen to a staggering 23.1 million.205 A reasonable increase makes sense when one considers the burgeoning national security infrastructure of a post-9/11 world, including the creation of the Department of Homeland Security, combined with the Bush administration's penchant for secrecy.206 Yet questions have been raised claiming this "overclassification" of national security material obstructs not only governmental transparency, but also hampers, among other things, the smooth exchange of intelligence between national security agencies.207

In March of 2003, President Bush amended Executive Order 12,958, incorporating his own views on classified national security information through Executive Order 13,292.208 Bush's amendment retained much of the language and purpose of Executive Order 12,958, with a few subtle, yet far reaching alterations.209 Many of these alterations revolved around Richard Cheney and the OVP, creating a vast expansion of vice presidential powers in the realm of classification and declassification of national security information.210

Three significant grants of authority to the OVP in Bush's Order, which received very little coverage from the press at the time, arose from § 1.3(a) on original classification authority, § 1.3(c) on the delegation of classification authority, and § 3.5(b) which exempted the OVP from mandatory declassification review.211 Through Order 13,292, the Vice President was given original authority to classify information.212 Whereas the President could have delegated classification authority to the Vice President prior to 2003, the amended Order now empowered the Vice President with the ability to classify information without the approval of the President.213

Beyond granting this original classification authority, the amended Order also granted the Vice President the power to delegate classification authority.214

204 Id.
206 Silva, supra note 196.
210 See id.
211 The first two sections were finally the subject of a detailed article published in the National Review in February 2006. Id.
214 Id.
1.3(c) of the Order states that Top Secret, Secret, and Confidential classification authority "may be delegated only by the President; [and] in the performance of executive duties, the Vice President."²¹⁵ This clause enables the Vice President to delegate classification authority to "subordinate officials" with a "demonstrable and continuing need to exercise this authority."²¹⁶

The final alteration found in the Order exempts the OVP from intra-agency mandatory declassification review.²¹⁷ Section 3.5 mandates that "all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency," except information originated by the President, Vice President in the performance of his executive duties, their staffs, appointed presidential committees or boards, and other entities within the executive that "solely advise and assist the incumbent President."²¹⁸ Section 3.5 clearly creates an exemption for the Vice President in regard to the mandatory intra-agency declassification review.²¹⁹ Although it is uncertain how this section applies to the ISOO, this is the clause the OVP argues exempts the OVP from ISOO review.²²⁰

The end result of the Order is an "enormously consequential expansion of vice-presidential power."²²¹ Vice President Cheney has been given original and delegatory classification authority, a clearly executive power which augments the argument that the modern Vice President is an executive entity. The Order also exempts the OVP from the prescribed mandatory intra-agency declassification review.²²² The extent of this exemption lies at the center of the OVP's conflict with the ISOO. May the Vice President exercise his newly authorized classification authority free of outside oversight and review, or does the Order subject the OVP to outside review of classification procedures by the ISOO like any other executive entity covered by the Order?

**B. The Battle Over Review of OVP Classification Procedures**

In May of 2006, Mark Silva of the *Chicago Tribune* published an article relating 2005 statistics released by the National Archives, on the classification and declassification of national security information.²²³ Silva reported that the OVP again, as it had since 2003, refused to report classification statistics, purportedly in violation of Bush's 2003 Order which applies to any entity within the executive branch.²²⁴ When asked by
Silva why the OVP refused to report the required classification information, Cheney spokeswoman Lea Anne McBride made a novel argument: the Vice President was not an agency under the Order.225 “This has been thoroughly reviewed and it’s been determined that the reporting requirement does not apply to [the Office of the Vice President],” said McBride, “which has both legislative and executive functions.”226 True, the Vice President does have legislative and executive functions, but is this enough to exempt the OVP from the broadly worded Order? Was the Vice President claiming that he was not a member of the executive branch?

The opening shot was fired by Steven Aftergood of the Federation of American Scientists shortly after the publication of Silva’s article.227 Writing to William Leonard, then-Director of the ISOO, Aftergood voiced his concern over what he saw as willful non-compliance with a standing Executive Order.228 Aftergood reminded Leonard that the ISOO’s directives are binding on any executive agency.229 Section 6.1 of the Order defines “agency” as any “entity within the executive branch that comes into the possession of classified information.”230 Aftergood denounced the OVP’s claim to be exempt from the order as an argument that could not “be proposed by a reasonable person in good faith,” and recommended the ISOO compel the OVP to comply with the Order, or “[a]sk the Attorney General to render an opinion on the applicability” of the reporting requirements to the OVP.231

Leonard responded with a letter to Cheney chief lawyer and confidante, David Addington.232 Leonard mentioned Aftergood’s letter as well as his duty under § 5.2 of the Order to “consider and take action on complaints and suggestions from persons within or outside the Government.”233 Alarmed, Leonard understood the Vice President’s argument to mean that the OVP did not believe itself to be an “entity within the executive branch.”234 Leonard went on to warn Addington of the consequences of this position.235 Leonard argued, were Cheney not an “entity” within the executive, “this could possibly impede access to classified information by OVP staff, since such access would be considered a disclosure outside the executive branch.”236

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225 Id.
226 Id.
228 Id.
229 Id.
231 Aftergood Letter, supra note 227.
232 Letter from J. William Leonard, Dir., Info. Sec. Oversight Office, to David Addington, Chief of Staff to the Vice President (June 8, 2006) (on file with author).
233 Id.
234 Id.
235 Id.
236 Id.
Leonard concluded that, as a majority of classified disclosures from other executive agencies to OVP staff are made under the assumption that the disclosures are being made intra-branch, it is "entirely appropriate" that classification activity of the OVP be reported to the ISOO under the Order.\textsuperscript{237}

With no movement from the OVP, Leonard apprised the Attorney General Alberto Gonzales of the situation and asked him to "render an interpretation as to whether the Office of the Vice President of the United States (OVP) is an agency as defined in § 6.1(b) of the Order and thus responsible to fulfill the responsibilities of an agency as set forth in the Order."\textsuperscript{238} In his January 9, 2007, letter, Leonard based his argument for the inclusion of the OVP in the Order on a plain text reading of the Order and the subsequent policy implications resulting from an exemption for the OVP.\textsuperscript{239} Leonard clearly and concisely argued that, though there was an explicit exemption for the Vice President himself in regard to the mandatory declassification review, the Order did not exempt the OVP from on-site review by the ISOO, writing: "This sole explicit reference for the purpose of exempting the OVP from a provision of the Order supports an interpretation that the rest of the Order does apply, to include the Order’s definition of an ‘agency;’ otherwise there would be no need for an exemption."\textsuperscript{240} An exemption for the Vice President under a specific section did not translate into an exemption for the Vice President throughout the Order.

Leonard also explained to the Attorney General, as he had to David Addington, the policy implications relating to the disclosure of classified material if the OVP was not an executive branch entity.\textsuperscript{241} Leonard closed: "I believe that OVP staff, when they are supporting the Vice President in the performance of executive duties, are an entity within the executive branch that comes into possession of classified information and are thus, for purposes of the Order, an agency."\textsuperscript{242}

Five months later, after no reply from either Vice President Cheney or Attorney General Gonzales, Aftergood filed a Freedom of Information Act request with the Department of Justice’s Office of Legal Counsel.\textsuperscript{243} His letter, dated May 31, 2007, asked for copies of all documents generated in response to Leonard’s request for an interpretation of the OVP’s responsibilities under the Order.\textsuperscript{244} On June 4, 2007, Aftergood received a disappointing, but perhaps expected, reply from the Department of Justice.\textsuperscript{245} The Office of Legal Counsel had found "no documents within the scope

\textsuperscript{237} Id.
\textsuperscript{238} Leonard Letter, supra note 31.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Letter from Steven Aftergood, Fed’n of Am. Scientists, to Elizabeth Farris, Office of Legal Counsel, U.S. Dep’t of Justice (May 31, 2007) (on file with author).
\textsuperscript{244} Id.
\textsuperscript{245} Letter from Bradley Smith, Office of Legal Counsel, U.S. Dep’t of Justice, to Steven
of [Aftergood’s] request.” Evidently, no investigation, no research, no review, and no interpretation had been made pursuant to Leonard’s request for clarification of the Order.

The story gained public legs on June 21, 2007, once Henry Waxman (D-CA), chairman of the House Committee on Oversight and Government Reform, released a lengthy letter he had written to Vice President Cheney. Waxman called the Vice President’s decision to exempt himself from the Order “problematic” because it “place[d] national security secrets at risk.” Waxman added that considering the OVP’s repeated inability to protect classified information or avoid dangerous security breaches, he “question[ed] both the legality and the wisdom of [the Vice President’s] actions.” Waxman emphasized the importance of on-site inspections by the ISOO, a power granted to the ISOO by the Order, as essential to ensuring agency compliance and protection of classified information. The letter highlighted the OVP’s obstruction of these on-site inspections as well as Addington’s disturbing retaliatory attempt to abolish the ISOO, via amendment to the Order, following Leonard’s request for the OVP to report on their classification protocols and to allow an on-site inspection.

Waxman also questioned Cheney’s misuse of the “declassification process for political reasons.” Waxman cited the selective leaking surrounding the prosecution of I. Lewis “Scooter” Libby, as well as the prosecution of a former aide for supplying plotting-revolutionaries in the Philippines with classified information. Waxman stressed his legitimate concerns over the OVP, of all executive offices, exempting itself from an executive order intended to protect and secure the classified information. “Your office may have the worst record in the executive branch for safeguarding classified information,” wrote Waxman, “[g]iven this record, serious questions can be


246 Id.
247 Compare Leonard Letter, supra note 31 (showing Leonard’s request to Gonzales), with Smith Letter, supra note 245 (stating that the Office of Legal Counsel had no documents concerning Leonard’s request).
248 Waxman Letter, supra note 32.
249 Id.
250 Id.
251 Id.
252 Id.
253 Id. In a recent interview, ISOO director Leonard also voiced concern over the Vice President’s use of the classification process for political motives, questioning Cheney’s practice of marking internal political communications as “Treat as Sensitive Compartmentalized Information” and stressing the potential for this misuse of the classification process to confuse analysts and endanger actual confidential national security information. Michael Isikoff, Challenging Cheney, NEWSWEEK, Dec. 24, 2007, http://www.newsweek.com/id/81883.
254 Waxman Letter, supra note 32.
255 Id.
raised about both the legality and the advisability of exempting your office from the rules that apply to all other executive branch officials."\textsuperscript{256} The media latched on to the Waxman letter and the story broke in all the major media outlets.\textsuperscript{257}

The day after the Waxman letter was released, the press began asking questions at the daily White House press briefing.\textsuperscript{258} Press Secretary Dana Perino had the unenviable job of fielding the plethora of questions that came from the White House Press Corps regarding the OVP's alleged exemption.\textsuperscript{259} In the face of the unconvinced and curious journalists, Perino seemed to float the earlier argument that, due to the Vice President's legislative duties, he was not an "entity within the executive branch," while still relying on the argument that the language of the Order treats the Vice President differently from other agencies.\textsuperscript{260} When asked whether the Vice President was a member of the executive or legislative branch, Perino dangled provocative phrases such as: "that's an interesting constitutional discussion about the separation of powers"; the Vice President maintains a "unique role"; and "this is an interesting constitutional question that the legal scholars can debate."\textsuperscript{261} Perino backed up the branch membership defense with the statutory interpretation defense, saying the Order was "just simply a matter of a small portion of an executive order regarding reporting requirements, of which [the Vice President] is not subject to" and it was "clear from the reading of [the Order], the Vice President is not treated separately from the President."\textsuperscript{262} What was clear, was that the OVP had yet to articulate a clear reason why the Vice President was exempt from the Order.

On the 25th of June, Senator Dick Durbin, Chairman of the Senate Subcommittee on Financial Services and General Government, sent Vice President Cheney a letter expressing his concern over the "legality and the appropriateness" of the OVP's exemption from the Order.\textsuperscript{263} Durbin, however, summarizing the public's understanding and rejection of the branch membership defense, may have mischaracterized the constitutional status of the Vice President in writing that Cheney was grossly distorting the intent of the framers. Just because the Speaker of the House and the President Pro Tempore of the Senate are in the line of presidential succession does not make

\footnotesize{\textsuperscript{256} Id.}

\footnotesize{\textsuperscript{257} See, e.g., June 22 Perino Briefing, supra note 26 (demonstrating that the White House Press Corps spent an entire briefing focused on the Waxman letter).}

\footnotesize{\textsuperscript{258} See, e.g., id.; June 25 Perino Briefing, supra note 25.}

\footnotesize{\textsuperscript{259} See, e.g., June 22 Perino Briefing, supra note 26.}

\footnotesize{\textsuperscript{260} See, e.g., id. It is entirely possible that Addington sent Perino into the briefing room simply to gauge the press's response to the former argument.}

\footnotesize{\textsuperscript{261} June 22 Perino Briefing, supra note 26.}

\footnotesize{\textsuperscript{262} Id.}

\footnotesize{\textsuperscript{263} Letter from Richard Durbin, U.S. Senator, Chairman of Senate Subcomm. on Fin. Services & Gen. Gov't, to Richard Cheney, U.S. Vice President (June 25, 2007) (on file with author).}
them part of the executive branch. Nor is the Chief Justice of the Supreme Court an officer of the legislative branch simply because the Constitution specifies that he preside over the Senate during an impeachment trial.264

Officials within the line of succession have no ongoing affirmative grant of executive power, unlike the Vice President, who may constitutionally exercise legislative power whenever a tie arises in the Senate. The Chief Justice only presides over the impeachment of a President, and in such scenarios acts more as an outside mediator than a voting member of the Senate.265 Durbin had a legitimate and reasonable concern in Cheney’s self-exemption from the Order, but his reasoning reflected the common misunderstanding of the vice presidency in the context of history.

Finally, on June 26, 2007, more than one year after the initial request, the OVP responded to the ISOO’s appeal for compliance with the Order.266 Cheney’s lawyer, David Addington, rather than respond directly to the ISOO, replied to an earlier letter from Senator John Kerry regarding the Vice President’s position.267 In the OVP’s first official response to the ISOO’s inquiry, Addington chose to focus solely on the alleged exemption language of the Order.268 “Executive Order 12958 as amended in 2003,” wrote Addington, “makes clear that the Vice President is treated like the President and distinguishes the two of them from ‘agencies.’”269 But what of the OVP’s initial argument, that due to the hybrid nature of the Vice President he was exempt from the Order? Addington added:

Given that the executive order treats the Vice President like the President rather than like an ‘agency,’ it is not necessary in these circumstances to address the subject of any alternative reasoning, based on the law and history of the legislative functions of the vice presidency and the more modern executive functions of the vice presidency.270

The official stance of the OVP seemed to be that because the textual language of the Order exempted the Vice President from its obligation to the ISOO, the alternative constitutional argument, though not necessarily incorrect, need not be invoked. Even if the OVP was settling on the textual argument, it by no means abandoned the broader and more provocative constitutional argument. Later that day, Tony Snow supported

264 Id.
265 U.S. CONST. art. I, § 3, cl. 6.
266 Addington Letter, supra note 27.
267 Id.
268 Id.
269 Id.
270 Id.
Addington's textual argument while downplaying the constitutional argument in the daily White House press briefing. 271

Although Chairman Waxman sent further communications to the Department of Justice (DOJ) for updates on the status of their review of the application of the Order to the OVP, no decision was ever released by the DOJ. 272 The executive branch settled on the textual argument for the exemption, downplayed, but did not abandon, the constitutional argument, and the story all but blew over. 273 The last cinders of the argument were reignited on Christmas Eve of 2007. 274 The previous September, ISOO Director Leonard had retired after thirty-four years of public service. 275 Leonard gave no reason for the unexpected retirement, but it was assumed that his exit was, at least in part, due to the conflict with Cheney and Addington. 276 Leonard took the high road in his resignation letter, writing only, "the integrity of the security classification system is essential to our nation’s continued well-being; yet it will not be maintained on its own." 277

On Christmas Eve, however, Newsweek released an interview with Leonard in which he voiced his discontent with Cheney’s classification methods. 278 He admitted that his conflict with Cheney’s office was a “contributing” factor in his resignation. 279 He also confirmed that there had been an email from Addington to the National Security Council Task Force recommending that the ISOO be abolished via amendment to the Order. 280 As the ISOO director, Leonard was disappointed at Addington’s response to a legitimate national security concern. 281 Leonard went further to denounce the traditional balancing test for the declassification of national security information—a black and white test weighing national security against the public’s right to know. 282 He recommended a needed shift towards the recognition of the national security dangers related to keeping information secret. 283 "[D]isclosing information may cause

271 June 26 Snow Briefing, supra note 23.
272 Letter from H. Marshall Jarrett, Office of Prof’l Responsibility, U.S. Dep’t of Justice, to Steven Aftergood, Dir. Of the Project on Gov’t Secrecy, Fed’n of Am. Scientists (Feb. 14, 2008) (on file with author). In February of 2008, the DOJ Office of Professional Responsibility found no professional misconduct in the Office of Legal Counsel’s failure to issue an interpretation of the Order. Id.
273 June 26 Snow Briefing, supra note 23 (emphasizing the textual argument when responding to questions).
274 Isikoff, supra note 253.
276 Isikoff, supra note 253.
277 Id.
278 Id.
279 Id.
280 Id.
281 See id.
282 Id.
283 Id.
damage," Leonard stated, "but you know what, withholding that information may even cause greater damage."

C. Final Analysis: Does the Order Apply to the OVP?

With the historical context of the functions and duties of the Vice President, as well as the arguments made for both sides in response to the OVP's conflict with ISOO over reporting requirements behind us, the question of whether the OVP is covered by the Order can be fully considered. Cheney and Addington, with support from the White House, argue the Order "makes clear that the Vice President is treated like the President and distinguishes the two of them from 'agencies.'"\footnote{Id.} Three inquiries must be made in order to answer the government's final argument for exemption from the Order. First, is the OVP treated equivalently to the President under the Order, therefore maintaining separate obligations from an agency? Second, does the OVP meet the requirements for classification as an agency under the Order? Third, is the OVP an entity within the executive branch? Answering these three preliminary questions regarding the status of the Vice President will provide the reasoning behind the applicability of the Order to the OVP.

1. Is There an Express Exemption for the OVP Under the Order?

The Vice President argues that the President's intent under the Order was to treat the OVP no differently from the President.\footnote{Id.} This was certainly the intent of the Order in certain sections and in regard to certain classification procedures.\footnote{Id.} Because of the cursory nature of the answer Addington provided in response to the ISOO inquiry, as well its high level of generality, it is unclear as to what section of the Order the OVP is basing its claim.\footnote{Id.; see also June 22 Perino Briefing, supra note 26 ("[I]f you look on page 18 of the EO ... there's a distinction regarding the Vice President versus what is an agency.").} It is reasonable to suspect that the OVP's arguments stem from § 3.5 and § 6.1 of the Order.\footnote{Exec. Order No. 13,292, 3 C.F.R. 205–07, 214.}

Section 3.5 outlines procedures for a mandatory declassification review by each agency that participates in the classification process.\footnote{Section 3.5 reads, in relevant part:
(a) Except as provided in paragraph (b) of this section, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

[1–3 omitted]. . . .}
section states that "all information classified under this order . . . shall be subject to a review for declassification by the originating agency." Clause (b), however, creates an exemption to this required review when the information is originated by the President and his staff, the Vice President and his staff, or other executive entities whose sole function is to "advise and assist" the President. Is this the section the OVP is relying on as the basis for their exemption? If so, that reliance seems to be misplaced.

Section 3.5 certainly deals with classification oversight and review. This clause however, clearly pertains to inter-agency mandatory review. The language mandates a review "by the originating agency" not by an outside office like the ISOO. The "originating agency" would be the agency that initially classified the information. Section 3.5, therefore, exempts the OVP from conducting its own mandatory declassification review. It does not however, exempt the originator from the outside review of the ISOO, which is authorized under a different section of the Order.

Section 5.2 establishes the ISOO and authorizes the National Archivist to appoint the ISOO Director. The section also delineates the powers and authority of the ISOO in conducting oversight of the Order's classification protocols. Among those powers listed are the authority to develop and implement the Order, oversee compliance, review and approve agency methods for declassification, conduct on-site reviews of each agency's programs, and "to require of each agency those reports, information, and other cooperation that may be necessary to fulfill its responsibilities." This clause is a significant grant of power and a considerable amount of responsibility for a single office in policing and overseeing the entire classification and declassification

(b) Information originated by: (1) The incumbent President or, in the performance of executive duties, the incumbent Vice President; . . . is exempted from the provisions of paragraph (a) of this section.

Id. at 205–06.

291 Id.
292 Id.
293 Id. (emphasis added).
294 Section 5.2, in part, reads:

(b) Under the direction of the Archivist, acting in consultation with the Assistant to the President for National Security Affairs, the Director of the ISOO shall: (1) develop directives for the implementation of this order; (2) oversee agency actions to ensure compliance with this order and its implementing directives; (3) review and approve agency implementing regulations and agency guides for systematic declassification review prior to their issuance by the agency; (4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill its responsibilities.

Id. at 210–11.

295 Id.
296 Id.
process. All directives issued by the director in an effort to implement the Order are "binding upon the agencies."\textsuperscript{297} The section also grants the ISOO power to "consider and take action on complaints and suggestions from persons within or outside the Government."\textsuperscript{298} This is the clause Director Leonard acted on when he responded to the Federation of American Scientists' letter criticizing the OVP's failure to comply with the Order.\textsuperscript{299}

Conspicuously absent from all of § 5 is any reference to exemptions for the OVP. Specific references are made for separate treatment of the OVP in §§ 1, 3, and 4, but no mention of differential treatment is made in § 5.\textsuperscript{300} An honest reading of the Order presents no exemption for the OVP from the review authority granted to the ISOO. Leonard emphasized this point in his letter to then-Attorney General Alberto Gonzales in his request for an interpretation of the Order's applicability to the OVP: "This sole explicit reference for the purpose of exempting the OVP from a provision of the Order supports an interpretation that the rest of the Order does apply, to include the Order's definition of an 'agency;' otherwise there would be no need for an exemption."\textsuperscript{301} For example, the President and the Vice President are treated on equal terms throughout the Presidential Records Act (PRA), but, unlike the Order, the PRA contains express language to that effect.\textsuperscript{302} The existence of explicit exemptions of the OVP from the more general agencies in individual sections of the Order lead to an interpretation that the OVP, if it meets the definition of an agency, is included in those sections where no explicit exemption exists. This leads directly to question number two.

2. Does the OVP Meet the Requirements for Classification as an Agency Under the Order?

Section 6.1 provides definitions for pertinent terms found throughout the Order.\textsuperscript{303} Section 6.1(b) states: "'Agency' means any 'Executive agency,' as defined in 5 U.S.C. [§] 105; any 'Military department' as defined in 5 U.S.C. [§] 102; and any other entity within the executive branch that comes into the possession of classified information."\textsuperscript{304} The clause creates a broad coverage umbrella for the Order. But what exactly is an "Executive agency"? The Order cites to 5 U.S.C. § 105 which states that an "'Executive agency' means an Executive department, a Government corporation, and an independent establishment."\textsuperscript{305} Not much help. Fortunately, one of the few

\textsuperscript{297} Id. at 210.
\textsuperscript{298} Id. at 210–11.
\textsuperscript{299} Leonard Letter, \textit{supra} note 31.
\textsuperscript{301} Leonard Letter, \textit{supra} note 31.
\textsuperscript{303} Exec. Order No. 13,292, 3 C.F.R. 214–18.
\textsuperscript{304} Id. at 214.
issues surrounding this controversy to have been previously considered, both evaluated within the Department of Justice’s Office of Legal Counsel and litigated before the Supreme Court, is what exactly constitutes an “agency.”  

Ironically, much of this litigation stemmed from another statute which pertained to prying information from the clutches of the executive branch. The Freedom of Information Act (FOIA) guarantees the public a legal right of access to certain government documents. FOIA mandates disclosure of certain “agency” documents upon written request, and defines an “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”

This is language very similar to that used to define “agency” in the Order and can shed light on interpreting the breadth of that term.

In February of 1994, then-Assistant Attorney General Walter Dellinger authored an opinion for the DOJ’s Office of Legal Counsel regarding the status of the OVP as an agency for the purposes of FOIA. Dellinger concluded that the OVP was not an “agency” under FOIA and, therefore, was not restricted by its terms. Dellinger centered his analysis on the so-called “sole function test” as articulated by the Supreme Court, and the absence of express language conveying an intent that the Vice President be subject to the Act. These are two arguments the OVP could employ in defense of its exemption.

In Soucie v. David, appellants challenged the Office of Science and Technology’s (OST) refusal to disclose a requested report relating to the development of supersonic aircraft. One of the questions presented by the case was whether the OST, created to evaluate federal scientific research programs and to advise the President on issues of science and technology, was an agency under the Act. “If the OST’s sole function were to advise and assist the President,” wrote Chief Judge Bazelon for the D.C. Court of Appeals, “that might be taken as an indication that the OST is part of the President’s staff and not a separate agency.” FOIA conferred “agency status


308 Id. § 552(f).

309 See Dellinger Memo, supra note 306.

310 Id.

311 Id.

312 448 F.2d 1067 (D.C. Cir. 1971).

313 Id. at 1071–72.

314 Id. at 1075 (emphasis added).
on any administrative unit with substantial independent authority in the exercise of specific functions.\textsuperscript{315} However, because the OST retained the power to evaluate federal science and technology programs, it had functions beyond simply advising the President.\textsuperscript{316} The Court held that "[b]y virtue of its independent function" the OST was an Agency subject to the requirements of the Act.\textsuperscript{317}

The Supreme Court of the United States adopted the sole function test in Kissinger \textit{v. Reporters Committee for Freedom of the Press}.\textsuperscript{318} Kissinger was an action brought by a group of journalists against then-Secretary of State Henry Kissinger to force disclosure of certain documents under FOIA.\textsuperscript{319} The journalists sought records kept by Kissinger's secretary regarding phone conversations in which Kissinger participated during his time as assistant to the President.\textsuperscript{320} The Supreme Court relied on legislative history in reasoning that those "'whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA."\textsuperscript{321} It was clear to the Court that, when acting in his capacity as an assistant to the President, Kissinger's sole function was to provide advice and support to the President.\textsuperscript{322} Therefore, the phone records did not qualify as "agency" records under the Act.\textsuperscript{323} In important dicta, the Court did imply, however, that records from National Security Council meetings in which Kissinger participated may have qualified as agency records.\textsuperscript{324}

\textit{Kissinger}, \textit{Soucie}, and the Dellinger memo help to elucidate the issue of whether the OVP constitutes an "agency" for the purposes of the Order. A reasonable application of the sole function test to the OVP must come to the conclusion that the OVP is an agency. In \textit{Soucie}, the OST was found to be an agency because of its role in evaluating federal science programs.\textsuperscript{325} In \textit{Kissinger}, an assistant to the President was found not to be an agency, for his only role was to advise the President.\textsuperscript{326}

Does the OVP serve the sole function of advising and assisting the President? Dellinger argued in his 1994 memo that "[t]he OVP clearly satisfies the Supreme Court's 'sole function' test, because the Vice President and his staff do not have

\begin{footnotesize}
\begin{enumerate}
\item[315] \textit{Id.} at 1073.
\item[316] \textit{Id.} at 1075.
\item[317] \textit{Id.}
\item[318] 445 U.S. 136, 156 (1980).
\item[319] \textit{Id.} at 136–37.
\item[321] \textit{Id.} at 156.
\item[322] \textit{Id.}
\item[323] \textit{Id.}
\item[324] \textit{Id.} at 157. The Court cited a House Report which indicated that the National Security Council was an executive agency subject to FOIA. \textit{Id.} at 156. The Court then declined to "decide when records . . . merely 'relate to' the affairs of an FOIA agency become records of that agency." \textit{Id.}
\item[325] \textit{Soucie v. David}, 448 F.2d 1067 (D.C. Cir. 1971).
\item[326] \textit{Kissinger}, 445 U.S. at 136–38.
\end{enumerate}
\end{footnotesize}
'substantial independent authority in the exercise of specific functions,' . . . but rather have the sole function of advising and assisting the President.'

Dellinger's argument seems to misinterpret the independent powers of the Vice President. As discussed previously, the Vice President is a distinct entity with various powers and roles in the federal government. Most blatantly, he acts as the President of the Senate, with the authority to vote in the case of a tie. Dellinger argues that the Vice President's legislative role need not be considered because FOIA does not apply to Congress. True, FOIA did not apply to congressional records, but the language of Soucie and Kissinger do not support the view that the sole function test refers only to executive functions. Neither the test in FOIA nor the Order requires that an agency have substantial independent authority in the exercise of specific executive functions.

The Vice President, in another independent function, also holds a permanent seat on the National Security Council. Although the Council exists to advise the President in national security decisions, the important dicta in Kissinger seems to state that the Council itself qualifies as a separate agency. For good measure, the Vice President also serves as a permanent and official member of the Board of Regents for the Smithsonian Institution. Assuredly, the modern Vice President acts as a major advisor to the President, but it can not be said that the advisory function is its sole governmental function.

In concluding that the OVP was not an agency under FOIA, Dellinger cited the textual language from the Presidential Records Act to show that vice presidential records receive the same treatment as presidential records. The PRA expressly states "Vice- Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records." This clear language is conspicuously absent from the Order. The OVP and White House's response to repeated questions investigating the reasoning behind the Vice President's claimed exemption has been to tirelessly reiterate that the President intended that the Vice President be treated equally to the President and separately from agencies. If this was indeed the intent of the Order,
then why did the President not say so? Why not include the same simple language that was included in the PRA?

There are arguments to be made that favor the exemption of the OVP from classification as an agency, many of which have been accepted by federal courts. Contrary to this author's reasoning, the United States District Court for the District of Columbia has specifically held, albeit without thorough explanation, that the OVP does not constitute an “agency” under FOIA. Specifically, in 2000, the court held that offices within the executive branch “whose functions are limited to advising and assisting the President” do not qualify as agencies. In one conclusory and unexplained sentence the court reasoned, “This includes the Office of the President (and by analogy the Office of the Vice President).” In 2004, the same court referenced the “sole function test” and noted that “[c]learly the Vice President and the Office of the Vice President function in that capacity.” Then again in 2006, the D.C. court cited the Schwarz case in holding that the OVP was not an agency under FOIA. In all these cases, no reference was made to the previously discussed independent powers exercised by the Vice President.

Perhaps the OVP's strongest argument in favor of the exemption comes from a canon of statutory interpretation used by the courts. "When faced with a problem of statutory construction," reasoned Chief Judge Bazelon, "this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." The Order is an executive order authored by and administered by the President. That being the case, courts would likely give great deference to the President's interpretation of his own executive order. Considering the President supports the Vice President's interpretation of the order, it is likely a court, especially the D.C. Circuit Court, would be willing to find an overall exemption for the OVP.

Using the useful parallel of litigation surrounding the definition of an “agency” under FOIA, it is evident that precedent supports the OVP's status as a non-agency under that statute. This certainly strengthens the OVP's claimed exemption under the Order, but it is not dispositive in coming to a final conclusion. Key differences exist in the language used to define agency in FOIA and the Order.

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339 Id. at 147.
340 Id. (emphasis added).
3. Is the OVP an Entity Within the Executive Branch?

Even if the OVP is not considered an agency under the language of FOIA, it should be considered an agency under the more broad language of the Order. While FOIA includes any "other establishment in the executive branch" in the definition of agency, the Order more broadly includes "any other entity within the executive branch that comes into the possession of classified information." An executive "establishment" lends itself to the requirement of independence from the President as the courts interpreted it under FOIA. "Entity" however is a much broader term. The Oxford English Dictionary defines it as "being, existence." It would seem impossible to choose a term with wider application in the executive branch. Any office that merely exists within the executive branch and comes into possession of classified information is covered by the definition of agency under the Order.

Most likely recognizing the broad implications of the language used to define an agency, the OVP was forced to make an argument for exemption based on the Office’s alleged constitutional positioning outside of the executive branch. Parts I and II have shown that in relation to the modern Vice President this is an untenable position. The contemporary Vice President, and Richard Cheney specifically, exist within the executive branch. Therefore, even if the OVP is not an agency under FOIA, it is an "entity within the executive branch" under the Order. Since the Office has clearly come into possession of classified information it should be bound by the Order, which includes participation in reporting to the ISOO and cooperation with ISOO on-site inspections. The Vice President’s refusal to submit to oversight by the ISOO is a violation of the Order.

D. Consequences of Non-Compliance with the Order

The consequences of an executive office that refuses to participate in classification security protocols, believing instead that national security is best served through strict concealment of sensitive information and executive consolidation, could be severe. In today’s world, sensitive national security information must be securely protected, interpreted efficiently and accurately, and applied in an effective and valuable manner. The OVP’s conduct raises concerns in all three of these areas.

Even with the Vice President’s penchant for secrecy, sensitive information has not been securely protected within the OVP. The Office has a reputation for classified

346 Freedom of Information Act § 552(f).
348 OXFORD ENGLISH DICTIONARY (2d ed. 1989).
350 Id.
351 Isikoff, supra note 253.
352 See Waxman Letter, supra note 32 (asserting that Vice President Cheney’s Office “may have the worst record in the executive branch for safeguarding classified information”).
intelligence failures, most notably the very public outing of covert CIA Agent Valerie Plame. By refusing to cooperate with an ISOO review of the Office's classification procedures, the OVP is barring the very entity that was created to help identify and correct these types of classified information failures.

Secondly, the OVP's failure to comply with the Order hampers the efficient and accurate analysis and interpretation of classified information by resulting in a system of excessive classification. A record 15.65 million classification decisions were reported by executive agencies in 2004. The esteemed Judge Richard Posner has identified the many consequences to national security that result from overclassification. Overclassification makes officials careless with classified information, hampers their ability to remember what is classified and what is not, restrains dissent through lack of knowledge, enables agencies to bury their mistakes, and most importantly inhibits information sharing among intelligence branches and officers. "[O]verclassification feeds the delusions of omniscience," writes Posner, "that come naturally to senior officials of the world's greatest power." Instead of making its way through the intelligence chain to various analysts and specialists, the sensitive information is halted in the OVP and seen by only a handful of individuals with adequate security clearance. The role of the ISOO, through on-site inspections and classification process review is to combat this overclassification. By refusing to release information regarding their classification procedures the OVP is not protecting national security, it is threatening it.

Whereas overclassification as a result of a good faith belief in the advancement of national security through the concealment of sensitive intelligence information is understandable, the overclassification of non-essential intelligence for political reasons is utterly unacceptable. In reference to Pentagon Papers, the seminal government secrecy case, Solicitor General Erwin Griswold commented, "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not

353 See, e.g., Mike Allen & Dana Priest, Bush Administration is Focus of Inquiry; CIA Agent's Identity was Leaked to Media, WASH. POST, Sept. 28, 2003, at A1.
355 Silva, supra note 196. In response to a slight decrease in classification decisions in 2006, Steven Aftergood of the Federation of American Scientists remarked, "The numbers are down from record-high levels to second record-high levels . . . . It's hard to get excited about that, but it's better than increases." Id.
356 See POSNER, supra note 207, at 90–93.
357 Id. at 93.
358 Id.
359 Id. at 89–90.
360 See, e.g., INFO. SEC. OVERSIGHT OFFICE, supra note 354, at 3.
with national security, but rather with governmental embarrassment of one sort or another." Vice President Cheney has the habit of using classification procedures to protect politically sensitive information rather than sensitive security information. In his Newsweek interview, former ISOO Director Leonard criticized Cheney's practice of protecting sensitive political information within his office by marking the documents with "handle as SCI [Sensitive Compartmentalized Information]." Cheney used this method to conceal information relating to a proposed media response to accusations made by Plame's husband. These kinds of uses of the classification system foster disrespect for the system and undermine the seriousness of classifying information. Again underlying the importance of ISOO review of OVP conduct, these abuses of the classification system were meant to be combated by ISOO access and review.

The Vice President's cavalier attitude towards the classification process and relentless pursuit of executive concealment is one of many examples of the Bush administration's use of secrecy in carrying out controversial policy. The administration has been marked by a number of abuses of secrecy in the execution of its NSA domestic electronic surveillance and extraordinary rendition programs, as well as its repeated invocation of executive privilege and the state secrets privilege. The conflict with the ISOO is just one battle in the war between open government and transparency on one hand, and the consolidation of executive power and secrecy on the other.

CONCLUSION

The American vice presidency has undergone significant changes in power, structure, and prestige—maturing exponentially over the last 250 years as it slowly gravitated towards the exercise of executive power. The Office has grown in influence as it becomes more and more an executive official and less and less a legislative officer. Under Dick Cheney, the Vice President's executive duties have known no bounds. Vice President Cheney creates policy, acts as an advisor to the President, and participates in daily briefings, discussion, and executive decisions. He has sired a new era of vice presidential power and influence, rivaling anything the American vice presidency has seen throughout its existence.

363 Isikoff, supra note 253.
364 Id.
365 Id.
366 See, e.g., INFO. SEC. OVERSIGHT OFFICE, supra note 354, at 6–7 (discussing the intentions behind Executive Order 12,958).
367 See, e.g., Angler Part I, supra note 131; Angler Part II, supra note 132.
368 Albert, supra note 4, at 813.
369 See supra text accompanying notes 164–66.
370 See supra Parts I.C–E.
President Bush's Executive Order 13,292 was authored with the purpose of protecting the most sensitive national security information found within the executive branch. The Order applies to all agencies within the executive, and "any other entity within the executive branch that comes into the possession of classified information." Although it can be argued that the Vice President does not constitute an agency under the Order, it can not be asserted with honesty that the modern OVP is not an "entity within the executive branch that comes into possession of classified information." The modern Vice President maintains an executive identity, is not specifically exempted from ISOO review, and is therefore bound by the protective protocols as laid out in the Order. It is apparent that the Vice President has attempted to exploit the historically legislative nature of the OVP in an effort to consolidate executive power by excluding outside review of the Office's classification policies. By refusing to report classification statistics, and by obstructing the ISOO's ability to conduct a review of the OVP's classification procedures, the OVP has violated, and is currently in violation of, the Order.

With Vice President Cheney's tenure in office coming to a close, and little evidence of future investigatory action by the DOJ, it is clear that there will be no resolution to this controversy before inauguration day. However, this does not make independent oversight of the classification process a moot issue. Indeed, it will be for the next President to determine whether national security is best served through a continuation of the new era of extreme secrecy and executive consolidation, ushered in by the Bush and Cheney administration, or by favoring openness, transparency, and the free flow of national security information amongst the intelligence community. That same President must also confront the rise of the vice presidency as an executive institution. Will the next President be willing to delegate substantial amounts of authority to a Cheney-style executive Vice President? Or will we see a roll back in the OVP's executive duties and influence over the President as part of a backlash against the precedent set by the most powerful, and perhaps most controversial, Vice President in American history? The fate of the Office, whether to progress in power or embark on a return to impotence, will be surrendered to the man who on January 20, 2009, placing his right hand on the Bible, swears to preserve, protect, and defend the Constitution of the United States.

372 Id. at 214.
373 Id.