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IS DICK CHENEY UNCONSTITUTIONAL?†

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The Vice Presidency "isn't worth a pitcher of warm spit."
—Vice President John Nance Garner[1]

Twenty years ago I wouldn't have advised my worst enemy to take the Vice-Presidency. It was God's way of punishing bad campaigners, a sort of political purgatory for the also-rans. Now you'd be crazy not to take the job.
—Aide to President Ronald Reagan[2]

Many a true word is spoken in jest, we are told. More surprisingly, sometimes the truth even emerges, unsought, from the mouths of politicians and their flacks. This may be the case with regard to recent claims by Vice President Dick Cheney's office that he is, properly speaking, a "legislative officer" rather than a member of the executive branch.[3] The consequences of this argument, however, may prove unpalatable to the Bush Administration on closer examination. Indeed, an activist vice presidency, in the Cheney model, might be considered unconstitutional if the Vice President is regarded as a legislative official. And, regardless of whether that characterization controls, there may be prudential reasons for keeping the Vice President at a greater remove from executive affairs than has recently been the case.

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1 *Quoted in* Daniel May, *The Third Vice President of the United States of Earth*, 73 A.B.A. J. 76, 76 (1987).

2 *Quoted in* PAUL C. LIGHT, VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE 1 (1984).

3 Peter Baker, *White House Defends Cheney's Refusal of Oversight*, WASH. POST, June 23, 2007, at A02 (noting that Vice President Cheney claims he is not part of the executive branch, but "president of the Senate").

The Cheney-as-legislator kerfuffle appeared as part of an interbranch struggle over the declassification of documents. Representative Henry Waxman argued that Cheney was avoiding legally required scrutiny by the National Archives and Records Administration, while Cheney's office argued that Cheney, as President of the Senate, was not part of the executive branch and hence not subject to such regulation.[4]

The political backlash engendered by this position[5] led Cheney's office to withdraw to the more defensible position that the office of the Vice President, like the office of the President, was not an "agency" for purposes of the statute. Nevertheless, Cheney's spokesmen did not repudiate the earlier position.[6] And, in fact, I believe that the positioning of the vice presidency within the legislative branch—or, at any rate, outside the executive—may be appropriate. Such a reading, however, would render Cheney's role[7] within the Bush Administration, as well as the modern notion of Vice Presidents as junior versions of the commander-in-chief, unconstitutional.

Despite the unfriendly political response, the argument that the Vice President is a legislative official is not inherently absurd. The Constitution gives the Vice President no executive powers; the Vice President's only duties are to preside over the Senate[8] and to become President if the serving

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[4] *See id.*; Scott Shane, *Agency is Target in Cheney Fight on Secrecy Data*, N.Y. TIMES, June 22, 2007, at A1.

[5] *See, e.g.*, David Sarasohn, *The Real Cheney: The Vice President's Constitutional Secret Identity*, OREGONIAN, June 27, 2007, at B4 ("Who knew that the Vice President considered himself partly Congressional?"); *The Cheney Exemption*, CINCINNATI POST, June 26, 2007, at A6 ("Cheney's rationale is that because under the Constitution he is president of the Senate—with the sole duty of breaking ties—he is actually a member of the Legislative, not the executive branch. Cheney might not want to push this line of reasoning too far.").

[6] Letter from David Addington, Chief of Staff to the Vice President, to Senator John Kerry (June 26, 2007), *available at* http://kerry.senate.gov/newsroom/pdf/Addington_Letter.pdf. The operative paragraph provides:

> Constitutional issues in government are generally best left for discussion when unavoidable disputes arise in specific contexts instead of in theoretical discussions. 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 legislative functions of the vice presidency and the more modern executive functions of the vice presidency, to reach the same conclusion that the vice presidency is not an 'agency' with respect to which [the Information Security Oversight Office] has a role.

Id.

[7] Cheney, for example, has been described as "the most powerful vice president in history" and a virtual co-President to Bush. Kenneth Walsh, *The Man Behind the Curtain*, U.S. NEWS & WORLD REPORT, Oct. 13, 2003, at 26, *available at* http://www.usnews.com/usnews/news/articles/031013/13cheney.htm; *see also* STEPHEN F. HAYES, CHENEY: THE UNTOLD STORY OF AMERICA'S MOST POWERFUL AND CONTROVERSIAL VICE PRESIDENT 307–08 (2007) (describing Cheney's role as a wielder of executive power). In at least one case, Cheney was treated equivalently to the President in communications with the Department of Justice. This parallel structure also extended to the Chief of Staff and Counsel to the Vice President. Memorandum from Alberto Gonzales, Attorney Gen., to Heads of Dep't Components and U.S. Attorneys (May 4, 2006), *available at* http://www.rawstory.com/images/other/GonzalesPolicy.pdf.

[8] U.S. CONST. art. I, § 3, cl. 4.

President dies or leaves office.[9] Traditionally, what staff, office, and perquisites the Vice President enjoyed came via the Senate; it was not until Spiro Agnew mounted a legislative push that the Vice President got his own budget line.[10] The Vice President really is not an executive official. He or she executes no laws—and is not part of the President's administration the way that other officials are. The Vice President cannot be fired by the President; as an independently elected officeholder, he can be removed only by Congress via impeachment. (In various separation of powers cases, as noted below, the Supreme Court has placed a lot of weight on this who-can-fire-you test.)

Traditionally, Vice Presidents have not done much, which is why the position was famously characterized by Vice President John Nance Garner as "[not] worth a pitcher of warm spit."[11] That changed when Jimmy Carter gave Fritz Mondale an unusual degree of responsibility,[12] a move replicated in subsequent administrations, particularly under Clinton/Gore and Bush/Cheney.[13]

The expansion of vice presidential power, however, obscures a key point. Whatever executive power a Vice President exercises is exercised because it is delegated by the President, not because the Vice President possesses any executive power already. The Vesting Clause of Article II vests all the executive power in the President, with no residuum left over for anyone else.[14] Constitutionally speaking, the Vice President is not a junior or co-President, but merely a President-in-waiting, notwithstanding recent political trends otherwise. To the extent the President delegates actual power and does not simply accept recommendations for action, the Vice President is exercising executive authority delegated by the President while being immune to removal from office by the President, unlike everyone else who exercises delegated power. The only recourse for the President is with-

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[9] U.S. CONST. amend. XXV, §§ 1, 3–4. It is worth noting that the power to communicate the President's incapacity is shared with other officials whose character is clearly legislative—the speaker of the House and the president pro tempore of the Senate.

[10] LIGHT, *supra* note 2, at 69.

[11] May, *supra* note 1, at 76.

[12] LIGHT, *supra* note 2, at 155–57.

[13] For more on the expansion of vice presidential power, see David Nather, *The Vice Presidency: An Office Under Scrutiny*, CONG. Q. WKLY., June 9, 2007, at 1734 ("Ever since Jimmy Carter gave Walter F. Mondale an office in the West Wing and the authority to go with it in 1977, vice presidents have come to expect a level of influence that would have been unthinkable in earlier decades.").

[14] U.S. CONST. art. II, § 1; *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1171 (1992) (discussing the Vesting Clause in the context of removal power). I am aware of no argument to the effect that the Vesting Clause of Article II imbues the Vice President with any executive power, and of course such an argument would be plainly contrary to the text. Nonetheless, in modern times the presence of some sort of "spillover" executive authority in the Vice President sometimes seems to be assumed.

drawal of the delegation, with instruction to subordinate officials within the Executive Branch not to listen to the Vice President.[15]

However, it seems pretty clear that the President is not allowed to delegate executive power to a legislative official, as that would be a separation of powers violation. This is where the claim that Cheney is really a legislative official creates problems for the White House. To the extent that this is what is going on, the "Cheney is a legislative official" argument is one that opens a big can of worms.

This question has produced no caselaw, and may never, as it may pose a very difficult "political question" or incur standing problems that render it not amenable to judicial review. But any potential challenge to the delegation of executive power to the Vice President poses some serious problems if the Vice President is characterized as a legislative official. In general, the delegation of executive power to legislative officials violates the constitutional separation of powers.

In *Bowsher v. Synar*, the leading case on the subject, the Supreme Court found that the provisions in the Gramm-Rudman-Hollings deficit reduction act that vested powers to the Comptroller of the Currency violated constitutional separation of powers principles because the act granted executive authority to an official under the control of Congress.[16] Yet, in truth, the Comptroller General was not all that easy for Congress to remove: He could be impeached, as can any "civil officer" of the United States, or he could be removed for cause via a joint resolution of Congress that was, in practice, more difficult to put into practice than impeachment. More troubling was that the Comptroller General could not be removed by the President:

> The critical factor lies in the provisions of the statute defining the Comptroller General's office relating to removability. Although the Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate, and confirmed by the Senate, *he is removable only at the initiative of Congress.*[17]

The Court found that the power to remove is the key:

> To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. As the District Court observed: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions,

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[15] Interestingly, the closest analog to the Vice President in this regard is the First Lady, who also sometimes gets delegated tasks, but who has no executive authority of her own. The First Lady—or perhaps, soon, the First Gentleman—can, however, be divorced. So far, the Bush Administration has not advanced any claim that the First Lady is really a legislative officer.

[16] 478 U.S. 714 (1986).

[17] *Id.* at 727–28 (emphasis added) (citation omitted).

> obey." The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.[18]

As *Bowsher* states, separation of powers prohibits vesting of executive powers in an official subject to (largely notional) control by Congress and who is not removable by the President. If this is the case, then the case for vesting executive powers in the Vice President—who is a legislative official himself, and also not removable by the President—is even weaker. Indeed, this arrangement seems perilously close to permitting "Congress to execute the laws,"[19] which is plainly out of bounds.[20] Thus, if the Vice President is a legislative official, as Cheney's office argued, it would seem that his expansive role in the Bush Administration is unconstitutional.

Nonetheless, a Supreme Court decision addressing this question is unlikely any time soon. There are no cases in the pipeline, and it is not clear who would bring such an action. But litigation before the Supreme Court is not the only avenue for addressing the arrangement. Congress is vested, under Article I, Section 8, with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, *or in any Department or Officer thereof.*"[21] Congress can protect the separation of powers, and the viability of Vice Presidents as backup presidents, by employing this constitutional power to prohibit the Vice President from exercising any executive functions.

And, in fact, there may be practical reasons to limit vice presidential involvement in day-to-day executive business regardless of whether we accept the characterization of the vice presidency as a legislative office or not. Whether or not the Vice President is seen as a legislative officer, the office of Vice President is something special. The Vice President is, after all, primarily meant to serve as a sort of spare President, and—as with spare

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[18] *Id.* (citations omitted).

[19] *Id.*

[20] *See* Buckley v. Valeo, 424 U.S. 1, 121–22, 138–39 (1976). There is also an interesting alternative argument that the Vice President may not exercise executive powers as a result of the Appointments Clause; *Buckley* quotes language from *United States v. Germaine*, to the effect that

> [t]he Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. *That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.*

Id. at 125 (emphasis added by the *Buckley* Court) (quoting United States v. Germaine, 99 U.S. 508, 509–10 (1879)) (internal quotation marks omitted). The application of this language to the Vice President raises some interesting questions that are beyond the scope of this brief Essay, but the issue is certainly worth noting.

[21] U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

tires or backup servers—it may be safest not to put the spare into ordinary service before it is needed. Presidents are lost in three ways: death, resignation, and impeachment. Vice presidential involvement in policy has the potential to put the "spare" role at risk in at least two of these contexts. When Presidents resign or are impeached, it is often over matters of policy. Although the risk that a Vice President will be involved in the precipitating events is hard to estimate, it is certainly higher for an activist Vice President than it will be for a Vice President playing a traditionally quiescent role. Though talk of impeaching the current occupants of either office is unlikely to come to anything, it illustrates the risks.[22] As an assistant to Vice President Hubert Humphrey once remarked, the most important part of the Vice President's job is as backup President: "Judge the Vice-President on no other measure than his preparation for succession. He is a reservoir for the future rather than a resource for the present."[23] Likewise, a Carter aide noted the advantage of Mondale's distance from public decisionmaking: "He can tell everyone he knows how to do the job, but no one can say 'Fritz Mondale was the one who got us into Iran.'"[24] That discussion aimed at Mondale's electoral fitness, but it also bears on the viability of a Vice President who succeeds the President after resignation or impeachment. Had Carter been impeached or forced to resign as a result of the Iran debacle, Mondale's public distance would have been important in preserving his ability to govern.

Vice Presidents have increasingly been used as resources in the present, however. This growing involvement of Vice Presidents in the executive department generally has been seen as a good thing, as it allows someone deemed by the electorate competent enough to become President to put his talents to work for the country, rather than having them languish while the Vice President inquires daily into the President's health. And good arguments exist for not keeping the Vice President entirely out of the loop; institutional memory is important for any succession, as illustrated with the famous case of Harry Truman's ignorance about the atomic bomb. But the Vice President is the only person nationally elected to serve if the President is unable to govern, and the Vice President's involvement, a la Cheney, in day-to-day policy activities sacrifices the distance that earlier Vice Presidents possessed; those unhappy with President Bush's Iraq policies, for example, can criticize Cheney in a way that critics of Carter's Iran policies could not criticize Mondale. In the event that policies in which the Vice President is implicated go sufficiently awry to end a presidency, the Vice President will not be able to appear as a fresh start and may be liable to impeachment or forced resignation as well. In such cases, this risks a move to someone not nationally elected—the speaker of the House or the

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[22] *See, e.g.*, Bruce Fein, *Impeach Cheney: The Vice President Has Run Utterly Amok and Must Be Stopped*, SLATE, June 27, 2007, http://www.slate.com/id/2169292/.

[23] LIGHT, *supra* note 2, at 52.

[24] *Id.*

president pro tempore of the Senate—and very serious consequences for a nation that would be, in those circumstances, already divided and vulnerable.

All evidence to the contrary notwithstanding, we are not so short of executive talent that we must run such a risk in order to provide the President with managerial assistance. As the Bush/Cheney Administration winds down, with the party affiliation of the next administration sufficiently unclear so as to minimize partisan game-playing in Congress, now might be a good time for Congress to consider requiring that future Vice Presidents keep a greater distance from executive affairs.