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LOSING THE VEEPSTAKES: HOW THE CONTEMPORARY VICE PRESIDENCIES OF MIKE PENCE AND KAMALA HARRIS RENEW THE CASE FOR VICE-PRESIDENTIAL INDEPENDENCE

Jace Motley*

I. INTRODUCTION

The concept of an independent American vice presidency is nothing new,¹ and historians and scholars have wrestled with the idea at length.² In fact, one of the central debates around the adoption of the Twelfth Amendment—the constitutional amendment that requires separate electoral votes for President and Vice President³—was the degree of political independence that the Constitution should afford the vice presidency.⁴ Over the past two centuries, multiple attempts have been made to address the office’s shortcomings, as evidenced by the fact that nearly

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1. See *infra* notes 4-11 and accompanying text.

2. See, e.g., Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1726-29 (1988); Akhil Reed Amar & Vik Amar, Essay, *President Quayle?*, 78 VA. L. REV. 913, 944-45 (1992); Jamin Soderstrom, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 PEPP. L. REV. 967, 1005-08 (2008).

3. U.S. CONST. amend. XII.

4. See Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1550-52 (2014).

twenty-three percent of the post-Bill of Rights amendments to the Constitution have either directly or indirectly implicated the Vice President.⁵ Today, the unprecedented vice presidencies of Michael (“Mike”) R. Pence and Kamala D. Harris have ushered in several historic firsts for the office and have spawned contemporary political and constitutional considerations for revisiting the Vice President’s role in government. In light of these developments, this Comment presents a renewed case for vice-presidential independence and proposes going one step further: electing the Vice President independently at the midterm elections.

Part II provides an overview of the vice presidency’s constitutional origins, as well as the initial challenges that led to the ratification of the Twelfth Amendment. Section II.A discusses the emergent necessity for modern Vice Presidents to break procedural and legislative ties in the Senate. Section II.B analyzes the historical implications for serving next in line to the President and addresses how today’s vice-presidential selection process deviates from all other federal officeholders. Section II.C explains how the Twenty-Fifth Amendment fundamentally redefined the Vice President’s constitutional duties during instances of presidential inability and how these duties—when coupled with contemporary political realities and a quasi-democratic selection process—create an inherent conflict of interest that contravenes the purpose of the Amendment. Part III of this Comment explores the concept of an independent vice presidency through the lens of the current and most recent Vice Presidents, examining how the present state of national affairs could have been or might be improved with added democratic oversight for an office that presently wields executive and legislative prowess unrivaled by past occupants.

5. Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 680-82 (2016) [hereinafter *History and Constitutional Interpretation*] (“The Twelfth Amendment changed the manner of electing Vice Presidents (and Presidents), the Twentieth and Twenty-fifth Amendments addressed presidential succession and inability, and the Twenty-second Amendment imposed presidential term limits, a formal change that impacted the second office, too.”).

II. THE VICE PRESIDENCY MATTERS

The American vice presidency is widely considered to have been an “afterthought” during the Constitutional Convention of 1787, with its inception occurring only weeks before the delegates adjourned.⁶ The mechanics of selecting a President had plagued the delegates for months, and after no proposals had been able to win over a working majority, the Convention finally settled on a second officeholder, the “Vice” President, as a means of forcing electors to cast at least one electoral vote for a presidential candidate from outside their home states.⁷ This rushed compromise of an office produced varying degrees of uneasiness among those present at the Convention, but those worries ultimately gave way to the more pressing concern of efficiently electing the President.⁸ As a consequence, the Vice President was tasked with only two duties: stepping into the presidency in the event of a vacancy and presiding over the Senate, breaking ties when necessary.⁹

After only four presidential elections, however, the electoral expediency that the vice presidency had purportedly created had become much more of a problem than a solution. While President George Washington received unanimous support in both the 1788 and 1792 elections, the election of 1796 resulted in systemic efforts to undermine the outcome in the Electoral College, and the election of 1800 produced an electoral tie that had to be broken by the House of Representatives.¹⁰ Subsequently, out of a fear that the ill-conceived system might destroy the union, Congress passed the Twelfth Amendment in December 1803, requiring separate electors for President and Vice President.¹¹ In July 1804,

6. Edward J. Larson, *A Constitutional Afterthought: The Origins of the Vice Presidency, 1787 to 1804*, 44 PEPP. L. REV. 515, 516 (2017); see also Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020).

7. The delegates felt that giving electors two votes rather than one would increase the likelihood of presidential candidates receiving a majority in the Electoral College. The presidential candidate with the second-most votes would become Vice President. See Larson, *supra* note 6, at 517-21; *History and Constitutional Interpretation*, *supra* note 5, at 659.

8. See Larson, *supra* note 6, at 522; Chiafalo, 140 S. Ct. at 2320.

9. U.S. CONST. art. II, § 1; *id.* art. I, § 3, cl. 4.

10. Larson, *supra* note 6, at 525-28.

11. *Id.* at 530-31.

just months before the 1804 presidential election, the Twelfth Amendment was ratified by the states, and the vice presidency as we presently understand it was born.¹²

Although the Twelfth Amendment effectively mooted the chief function that the vice presidency had been created to serve, it reaffirmed in no uncertain terms that the office was here to stay.¹³ In the years since, the Vice President's place in government and politics has been one of a chimera, oscillating between the executive and legislative branches at varying frequencies throughout history.¹⁴ Moreover, the adoption of the Twenty-Fifth Amendment in 1967 created additional constitutional responsibilities for the Vice President, giving her a critical role during instances of presidential inability.¹⁵ To be sure, the modern vice presidency is a far cry from the "the most insignificant office that ever the invention of man or his imagination conceived" as former Vice President John Adams once put it.¹⁶ Rather, the vice presidency has evolved into an "indispensable governmental office" that has steadily grown in significance since its inception.¹⁷

A. Someone Has to Break the Ties

The Constitution first references the Vice President in Article I, Section 3, installing her as the President of the Senate, but withholding from her the authority to cast a vote "unless [the Senate] be equally divided."¹⁸ In doing so, the Constitution provides for the Vice President's Article I legislative powers before making any mention of the Vice President's dormant but more ubiquitous Article II role—ascending to the presidency in

12. *See id.* at 527-31 ("[T]he Twelfth Amendment[] fundamentally changed the vice presidency from an independent office to a partisan accessory to the presidency.").

13. *See* Hawley, *supra* note 4, at 1554-55.

14. *See* Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers, Part I: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL'Y 1, 4-5 (2014).

15. Ryan T. Harding, *Preventing Presidential Disability Within the Existing Framework of the Twenty-Fifth Amendment*, 40 U. ARK. LITTLE ROCK L. REV. 1, 10-12 (2017); *see also* U.S. CONST. amend. XXV, § 4.

16. Larson, *supra* note 6, at 524.

17. *History and Constitutional Interpretation*, *supra* note 5, at 684-87.

18. U.S. CONST. art. I, § 3, cl. 4.

the event of its vacancy.¹⁹ The Founders understood that the Vice President's power to break ties would be paramount to achieving finality in the Senate's affairs,²⁰ or, as Alexander Hamilton put it, "to secure at all times the possibility of a definite resolution of the" Senate.²¹ Accordingly, when the Vice President exercises her tie-breaking authority, she becomes the final arbiter on matters that the Senate was unable to decide on its own. In that respect, game theory suggests that "the Vice President has nearly the same voting power as each senator."²²

1. The Historical Use of the Vice President's Article I Powers

With only a few exceptions, Vice Presidents have broken ties relatively infrequently throughout history.²³ For example, John C. Calhoun cast thirty-one votes as Vice President—more than any other—while thirty-one Vice Presidents cast four or fewer tie-breaking votes during their time in office.²⁴ Historically, the limited use of tie-breaking votes may be attributed to the less polarizing political climates of a bygone era.²⁵ For instance, although the Senate has been equally divided in terms of partisan membership only four times in the Nation's history, two of those instances have been in the past twenty-one years.²⁶

The prevalence of filibusters and the difficulty invoking cloture has also undoubtedly played a major role in thwarting the

19. *Id.* art. II, § 1; *id.* amend. XXV.

20. Samuel Morse, Essay, *The Constitutional Argument Against the Vice President Casting Tie-Breaking Votes on Judicial Nominees*, 2018 CARDOZO L. REV. DE-NOVO 142, 147.

21. THE FEDERALIST NO. 68 (Alexander Hamilton).

22. Vikram David Amar, *The Vice Presidency in Five (Sometimes) Easy Pieces*, 44 PEPP. L. REV. 623, 627-28 (2017) [hereinafter *Vice Presidency in Five Pieces*].

23. Morse, *supra* note 20, at 143.

24. See *Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate*, SENATE HIST. OFF., [<https://perma.cc/SN88-EQNC>] (last visited Oct. 8, 2022); *Votes to Break Ties in the Senate*, U.S. SENATE, [<https://perma.cc/ZW5T-GVEQ>] (last visited Oct. 8, 2022).

25. See Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 690-91 (2013).

26. The Senate chamber has been equally divided during the 47th Congress (1881-1883), the 83rd Congress (1953-1955), the 107th Congress (2001-2003), and the 117th Congress (2021-2023). See *Party Division*, U.S. SENATE, [<https://perma.cc/2S49-5TH4>] (last visited Oct. 9, 2022).

need for tie-breaking votes.²⁷ Before 1917, there was no formal mechanism by which the Senate could end debate and bring a measure up for a vote,²⁸ and it was only after obstructionist abuse of the filibuster that the body embraced the concept of cloture.²⁹ In 1917, the Senate amended its rules to allow for a two-thirds vote to end debate on a measure and clear the way for it to receive a final vote by the full Senate.³⁰ Then, in 1975, the Senate adjusted its cloture threshold to three-fifths of the members present and voting.³¹ These exceedingly high barriers often precluded contentious matters from being presented to the Senate for a final vote and likely played a significant role in reducing the occurrence of ties.³²

Notably, however, that trend appears to be breaking. In November 2013, Senate Democrats invoked the “nuclear option,” a procedural change enabling lower-court judicial nominees, cabinet-level appointees, and other presidential nominees to clear the Senate’s cloture hurdle by a simple majority.³³ Then again, in April 2017, Senate Republicans followed suit by extending the nuclear option to U.S. Supreme Court nominees,³⁴ effectively teeing up the Vice President to cast tie-breaking votes for lifetime positions on the highest court in the land.³⁵ One need only look to the tie-breaking votes of the current and most recent Vice Presidents to understand the unprecedented ramifications that these political and procedural changes are having on the Vice President’s role as a tie-breaker.

2. *The Tie-Breaking Votes of Mike Pence and Kamala Harris*

Vice President Mike Pence presided over the Senate during the 115th and 116th Congresses, both of which operated under

27. See *Vice Presidency in Five Pieces*, *supra* note 22, at 628-29; see also *About Filibusters and Cloture: Historical Overview*, U.S. SENATE, [<https://perma.cc/VV3V-UBYN>] (last visited Oct. 9, 2022).

28. *About Filibusters and Cloture: Historical Overview*, *supra* note 27.

29. *See id.*

30. *Id.*

31. *Id.*

32. See Morse, *supra* note 20, at 144.

33. *Id.* at 145.

34. *Id.* at 146.

35. *Id.*

slender majorities.³⁶ Pence cast thirteen tie-breaking votes during his time in office, several of which represented momentous firsts for the vice presidency. In February 2017, he voted to confirm Betsy DeVos, a controversial nominee for Secretary of Education,³⁷ which marked the *first* time in American history that a Vice President had voted to confirm a Cabinet Secretary.³⁸ Then, in November 2018, Vice President Pence broke the tie to invoke cloture on the nomination of Jonathan Kobes—a federal judicial nominee with an American Bar Association rating of “Not Qualified”³⁹—to the Eighth Circuit Court of Appeals.⁴⁰ Weeks later, Pence voted to confirm Kobes,⁴¹ which similarly marked the *first* time that a Vice President had ever broken a tie to confirm a federal judge.⁴² Other notable tie-breakers were Pence’s vote to pass legislation that allowed states to block federal funding for Planned Parenthood,⁴³ his vote to give parents federal assistance to pay for private and religious K-12 schools,⁴⁴ and his vote to overturn a Consumer Financial Protection Bureau rule that could result in more consumer lawsuits against banks.⁴⁵ Accordingly, Vice President Pence was “essential” in achieving President Donald Trump’s legislative priorities.⁴⁶

36. See *Party Division*, *supra* note 26; *About the Vice President: Vice Presidents of the United States*, U.S. SENATE, [https://perma.cc/6VTH-F5T7] (last visited Oct. 9, 2022).

37. *Votes to Break Ties in the Senate*, *supra* note 24; see Alia Wong, *Education Secretary Betsy DeVos Has Already Affected Public Education*, ATLANTIC (Feb. 7, 2017), [https://perma.cc/KQV9-C7XD].

38. Morse, *supra* note 20, at 146.

39. *Ratings of Article III and Article IV Judicial Nominees: 115th Congress*, AM. BAR ASS’N (Dec. 13, 2018), [https://perma.cc/6QRS-PTE9].

40. *Votes to Break Ties in the Senate*, *supra* note 24; *Ratings of Article III and Article IV Judicial Nominees: 115th Congress*, *supra* note 39.

41. *Votes to Break Ties in the Senate*, *supra* note 24.

42. Jason Silverstein, *Federal Judge Becomes First in U.S. History Confirmed by Tiebreaker in the Senate*, CBS NEWS (Dec. 11, 2018, 7:23 PM), [https://perma.cc/A6ET-6S68].

43. Ryan Struyk, *Mike Pence is Breaking Ties in the Senate at a Record-Setting Pace*, CNN: POL. (Jan. 24, 2018, 10:05 PM), [https://perma.cc/M2S7-DNKP].

44. See Tara Golshan, *Mike Pence’s Tie-Breaking Vote Was Key to Republicans’ Strategy in 2017*, VOX (Dec. 29, 2017, 8:00 AM), [https://perma.cc/3RMA-JSBZ]; see also Erica L. Green, *Tax Bills Could Expand Private School Benefits and Hurt Public Education*, N.Y. TIMES (Dec. 4, 2017), [https://perma.cc/U6S7-R52K].

45. See Golshan, *supra* note 44.

46. Alicia Cohn, *Pence Became Ultimate Tie-Breaker in 2017*, HILL (Dec. 31, 2017, 10:00 AM), [https://perma.cc/5GXX-AXYR].

In that same vein, Vice President Kamala Harris, at the time of writing, currently presides over a fifty-fifty Senate in the 117th Congress.⁴⁷ As an initial matter, it warrants mention that by virtue of Vice President Harris being a Democrat, she effectively cemented the Senate Democrats' majority status in the chamber, a fact that is decisive in determining committee assignments, chairmanships, and the body's legislative calendar.⁴⁸ After just over a year into her first term, she has already cast *twenty-six* tie-breaking votes⁴⁹—putting her on track to cast more tiebreakers than any other Vice President in American history, should circumstances remain unchanged.⁵⁰

To date, Vice President Harris has had the final say on a key procedural hurdle that was needed to advance a \$1.9 trillion coronavirus relief package, a measure that received no support from Senate Republicans.⁵¹ She has also voted to confirm the nominations of multiple senior-level officials in President Joseph (“Joe”) R. Biden’s administration, breaking ties to confirm Kiran Ahuja as the Director of the Office of Personnel Management,⁵² Jennifer Abruzzo as General Counsel of the National Labor Relations Board,⁵³ Catherine Lhamon as Assistant Secretary for Civil Rights in the Department of Education,⁵⁴ and Julia Ruth Gordon as Assistant Secretary of Housing and Urban

47. See *Party Division*, *supra* note 26.

48. See Mark Strand & Tim Lang, *Who's in Charge in a 50-50 Senate?*, CONG. INST. (Feb. 5, 2021), [https://perma.cc/A62A-FUTQ].

49. *Votes to Break Ties in the Senate*, *supra* note 24.

50. Philip Bump, *No Vice President Has Broken More Senate Ties as Early as Kamala Harris Has*, WASH. POST (Apr. 22, 2021, 5:28 PM), [https://perma.cc/7RSZ-3MXG].

51. Marisa Schultz, *Kamala Harris Casts Tie-Breaking Vote to Launch Debate Over \$1.9 Trillion COVID-19 Bill*, FOX NEWS (Mar. 4, 2021, 4:18 PM), [https://perma.cc/VLW6-DQ8N].

52. See *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Kiran Arjandes Ahuja as Director of the Office of Personnel Management*, P.N. 220, 117th Cong. (1st Sess. 2021), [https://perma.cc/KZT2-ZB3T].

53. *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Jennifer Ann Abruzzo as General Counsel of the National Labor Relations Board*, P.N. 126, 117th Cong. (1st Sess. 2021), [https://perma.cc/398D-BVQM].

54. *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Catherine Elizabeth Lhamon as Assistant Secretary of Civil Rights for the Department of Education*, P.N. 572, 117th Cong. (1st Sess. 2021), [https://perma.cc/TY9F-JLNE].

Development.⁵⁵ She even cast the tie-breaking vote to discharge the nomination of Colin Kahl, President Biden's nominee to be Undersecretary of Defense for Policy, after his nomination had stalled in the Senate Armed Services Committee,⁵⁶ a move that ultimately resulted in his confirmation by the full Senate.⁵⁷ Notably, in November 2021, Vice President Harris cast the pivotal tie-breaking vote to discharge the nomination of Jennifer Sung, President Biden's nominee to the Ninth Circuit Court of Appeals, after a deadlocked Senate Judiciary Committee failed to advance Sung's nomination.⁵⁸ This marked the first time that Harris had to break a tie for a judicial nominee,⁵⁹ and her intervention proved to be indispensable to Sung's ultimate confirmation, as the full Senate could not have otherwise given her a vote just over a month later.⁶⁰

Given the weakened procedural rules that have made it easier for contentious votes to come to the floor and the narrow partisan majorities that have characterized the Senate in recent years,⁶¹ it is becoming increasingly imperative for the Vice President to exercise her Article I powers in accordance with the will of the electorate, rather than the individual who gave her the job. The unprecedented tie-breaking votes of Vice Presidents Pence and Harris shed considerable light on the modern vice presidency's rapidly changing legislative role and present a case for greater electoral accountability in the future.

55. *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Julia Ruth Gordon as Assistant Secretary of Housing and Urban Development*, P.N. 1523, 117th Cong. (2d Sess. 2022), [<https://perma.cc/3JTC-S8VV>].

56. Joe Gould, *DoD Nominee Colin Kahl Advances in Senate as Vice President Casts Tie-Breaking Vote*, DEF. NEWS (Apr. 21, 2021), [<https://perma.cc/9G8V-EDJM>].

57. *Nomination of Colin Hackett Kahl as Under Secretary of Defense for Policy*, P.N. 79-6, 117th Cong. (1st Sess. 2021), [<https://perma.cc/WN2G-ATJ4>].

58. James Arkin, *Harris Breaks Senate Tie to Move Snug Closer to 9th Circ.*, LAW360 (Nov. 3, 2021, 9:04 PM), [<https://perma.cc/2YGS-YP3M>].

59. *Id.*

60. *Nomination of Jennifer Sung to be United States Circuit Judge for the Ninth Circuit*, P.N. 807, 117th Cong. (1st Sess. 2021), [<https://perma.cc/5LSB-HZED>].

61. *See supra* notes 23-35 and accompanying text.

B. Next in Line

For the reasons stated above, the modern Vice President is far more than a de facto number two. However, the Constitution provides that her ancillary (but perhaps more quintessential) role is to outlast the sitting President in the event he or she becomes incapable of serving.⁶² In fact, nine Vice Presidents have become President on account of the incumbent President either dying in office or resigning.⁶³ Put another way, out of the forty-five men that have served as President,⁶⁴ one in five of them earned the distinction by default after the presidency had devolved upon them.

Among these accidental Presidents are John Tyler, Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, Harry Truman, Lyndon Johnson, and Gerald Ford.⁶⁵ While it is beyond the scope of this Comment to address the relative successes and failures that each President experienced during his time in office, it warrants mention that only four men—Roosevelt, Coolidge, Truman, and Lyndon Johnson—were subsequently elected to the office in their own right.⁶⁶

Six more Vice Presidents have become President upon later being elected to the office but without first having ascended to fill a vacancy; the most recent example being President Biden. Others in this category include John Adams, Thomas Jefferson, Martin Van Buren, Richard Nixon, and George H.W. Bush.⁶⁷ Indeed, for much of American history the vice presidency has

62. See U.S. CONST. art. II, § 1, cl. 6.

63. See Friedman, *supra* note 2, at 1703; *About the Vice President: Vice Presidents of the United States*, *supra* note 36.

64. *Presidents*, THE WHITE HOUSE, [https://perma.cc/FW3P-KSLG] (last visited Oct. 9, 2022).

65. See *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, U.S. HOUSE OF REPRESENTATIVES, [https://perma.cc/A6T7-TM9U] (last visited Oct. 9, 2022); Joseph Uscinski, *Smith (and Jones) Go to Washington: Democracy and Vice-Presidential Selection*, 45 POL. SCI. & POL. 58, 58 (2012).

66. See *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, *supra* note 65; Scott Bomboy, *Gerald Ford's Unique Role in American History*, NAT'L CONST. CTR. (July 14, 2022), [https://perma.cc/CY7T-44UJ].

67. See *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, *supra* note 65.

been considered “the best springboard to the presidency,”⁶⁸ and some have even sought out the office in hopes of leveraging it into the presidency.⁶⁹ Once again, while this Comment does not seek to evaluate the performance of each President in this class, it is notable that only two men—Jefferson and Nixon—were re-elected.⁷⁰ History, however, remains to be written for Biden.

Altogether, fifteen Vice Presidents have gone on to serve as President,⁷¹ or in other words, one in three Presidents have formerly served as Vice President. But why should any of this matter? The rate at which Vice Presidents have become President is significant because the modern nomination process, the crucible through which we select Presidents, largely denies voters the same degree of participation in selecting *Vice* Presidents. Instead, major party presidential nominees—not the voters—typically choose the vice-presidential nominee at or around the same time as their party’s nominating convention.⁷² This presents voters with the squarely undemocratic choice of either ratifying the presidential nominee’s vice-presidential pick or voting against their first choice for President.⁷³

Take Vice President Harris, for example. Once a top-tier contender for the 2020 presidential election, Harris was forced to drop out of the race nearly two months before caucusing even began, citing insufficient funds and lethargic poll numbers.⁷⁴ In a turn of events, however, Democratic presidential nominee Joe Biden chose her as his running mate in August 2020,⁷⁵ and Harris was sworn in as Vice President to the oldest President in

68. Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRESIDENTIAL STUD. Q. 374, 376 (2008) [hereinafter *Modern Vice Presidency*].

69. *See id.* at 375.

70. *See Presidents, Vice Presidents, & Coinciding Sessions of Congress*, *supra* note 65.

71. *About the Vice President: Vice Presidents of the United States*, *supra* note 36.

72. *Vice Presidency in Five Pieces*, *supra* note 22, at 631; *see also* Uscinski, *supra* note 65, at 59-60.

73. Uscinski, *supra* note 65, at 60.

74. Scott Detrow & Asma Khalid, *Kamala Harris Drops Out of Presidential Race*, NPR (Dec. 3, 2019, 3:25 PM), [<https://perma.cc/2XC6-33BP>].

75. Christopher Cadelago & Caitlin Oprysko, *Biden Picks Kamala Harris as VP Nominee*, POLITICO (Aug. 11, 2020, 7:09 PM), [<https://perma.cc/F225-N4KV>].

American history just over a year after the national electorate had rejected her bid for higher office.⁷⁶

Vice President Pence's meteoric rise to the number two spot also sheds light on the inherently undemocratic system of vice-presidential selection. Pence, then a one-term Governor from Indiana, had been experiencing underwater approval ratings and was in the midst of a hotly contested re-election campaign⁷⁷ when 2016 Republican presidential nominee Donald Trump chose him as his running mate.⁷⁸ Pence, facing an uncertain re-election bid to stay on as his state's Governor,⁷⁹ found himself as the Vice President-elect less than four months later.⁸⁰ In January 2017, Pence was sworn-in as Vice President to, at the time, the oldest President in American history.

The historical regularity with which Vice Presidents have been thrust into the presidency is decidedly incongruous with the electoral marathon required of modern presidential candidates. Today's presidential campaigns are "nearly two-year affairs"⁸¹ and give "voters ample time to learn about the candidates and make an educated choice."⁸² Even congressional candidates are subjected to a more protracted vetting process, with campaign "[f]undraising for the next election begin[ning] as soon as the last election ends."⁸³ Accordingly, the limited time and manner with which the electorate can express a preference for Vice President raises significant questions as to "whether the vice president is an

76. Chelsea Janes & Cleve R. Wootson Jr., *Kamala Harris Sworn into History with Vice-Presidential Oath*, WASH. POST. (Jan. 20, 2021, 8:20 PM), [https://perma.cc/X5NM-P8GB].

77. Matthew Nussbaum, *Trump Flirts with Unpopular Pence*, POLITICO (July 12, 2016, 1:51 PM), [https://perma.cc/4DQC-LYMZ].

78. Kelly O'Donnell, *It's Official: Trump Announces Mike Pence as VP Pick*, NBC NEWS (July 15, 2016, 10:02 AM), [https://perma.cc/ABE2-R6Y2].

79. Brian Slodysko, *Gov. Mike Pence Facing Tough Re-Election After Social Issues Stands*, INDIANAPOLIS STAR (May 27, 2016, 7:11 AM), [https://perma.cc/6BPV-7NBZ].

80. See Brian Eason, *Donald Trump and Indiana's Mike Pence Win Presidential Race*, INDIANAPOLIS STAR (Nov. 9, 2016, 6:58 AM), [https://perma.cc/EU48-D596].

81. Sarah Mervosh & Matt Flegenheimer, *How Early Do Presidential Campaigns Start? Earlier than You May Think*, N.Y. TIMES (Dec. 31, 2018), [https://perma.cc/S2YN-7FQ2].

82. John Haltiwanger, *Americans Are Already Exhausted with the 2020 Election, and It's Just Getting Started. Other Countries Have Laws Limiting the Length of Campaigns.*, BUS. INSIDER (Feb. 10, 2020, 8:52 AM), [https://perma.cc/L3SE-XW4S].

83. *The Fundraising Never Stops*, OPENSECRETS, [https://perma.cc/8E7Z-SS7C] (last visited Oct. 10, 2022).

elected official in the customary meaning of the term.”⁸⁴ Indeed, voters have elected a number of Vice Presidents “who could never have won the vice presidency, to say nothing of the presidency, head to head against their leading opponent.”⁸⁵ Thus, in the historical context in which one in three Vice Presidents have become President, the vice-presidential nomination and election process is decidedly “less democratic compared to other elected offices.”⁸⁶

C. Additional Constitutional Considerations: The Twenty-Fifth Amendment

While four of the seventeen constitutional amendments that were ratified after the Bill of Rights either directly or indirectly implicated the vice presidency,⁸⁷ the most significant among them is the Twenty-Fifth Amendment. “The Twenty-[F]ifth Amendment constitutionalized new ideas regarding the vice presidency” and “reflected the idea that the Vice President was an indispensable governmental office that must be filled whenever it became vacant.”⁸⁸ Particularly, it expanded the Vice President’s constitutional duties during instances in which the President may become unable to exercise the powers and duties of his office.⁸⁹

Section 1 of the Twenty-Fifth Amendment essentially codified over a century’s worth of precedent that, upon the death, resignation, removal, or inability of the President to fulfill his duties, the Vice President actually *becomes* President, as opposed to the *acting* President.⁹⁰ Additionally, in the event of a

84. Uscinski, *supra* note 65, at 59 (“[T]he selection of the vice-presidential running mate has instead fallen into the hands of only one person: the presidential nominee.”).

85. Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 24 (2010).

86. Uscinski, *supra* note 65, at 59.

87. See *History and Constitutional Interpretation*, *supra* note 5, at 680-81.

88. *Id.* at 684; see also Soderstrom, *supra* note 2, at 1000; Harding, *supra* note 15, at 2.

89. See *History and Constitutional Interpretation*, *supra* note 5, at 685.

90. See Harding, *supra* note 15, at 10. The original vice-presidential succession clause provides only that, in the event of the President’s death, resignation, removal from office, or inability to fulfill his duties, “the Same shall devolve on the Vice President.” U.S. CONST. art. II, § 1, cl. 6. This language was ambiguous as to whether the Vice President actually became President or, if rather, the Vice President was simply to act as President until a new President was chosen. However, upon the death of President William Henry Harrison in

vice-presidential vacancy, Section 2 permits the President to nominate a new Vice President, subject to “confirmation by a majority vote of both Houses of Congress.”⁹¹ Sections 3 and 4 provide for the voluntary and involuntary transfers of power during times of presidential disability.⁹²

Multiple instances of presidential inability had plagued governmental operations and raised “several succession-related questions” before the adoption of the Twenty-Fifth Amendment.⁹³ Principally, although the Constitution made it clear that the Vice President would take over in the event the President was unable to discharge his official duties, it was silent on *who* was responsible for determining any such inability.⁹⁴ Accordingly, Congress provided clarity with the Twenty-Fifth Amendment. When contemplating Sections 3 and 4 of the Twenty-Fifth Amendment, Congress sought to maintain the checks and balances among the separate branches by vesting only the President and Vice President with the authority to make an initial determination of presidential inability, thus ensuring that any transfer of presidential power would originate from within the executive branch.⁹⁵

Section 3 concerns the *voluntary* transfer of power from the President to the Vice President.⁹⁶ Under this section, the Vice President becomes the “Acting President” when the President informs the Speaker of the House and the President Pro Tempore

April 1841, Vice President John Tyler took the presidential oath and “insisted that he was President, not simply Vice President acting as President.” See *History and Constitutional Interpretation*, *supra* note 5, at 671-72. After Congress voted to address Tyler as “President” in May 1841, the precedent was established, and seven other Vice Presidents preceding the passage of the Twenty-Fifth Amendment followed the “Tyler Precedent” after their predecessors’ deaths. *Id.* at 672-73.

91. U.S. CONST. amend. XXV, § 2.

92. U.S. CONST. amend. XXV, §§ 3-4.

93. THOMAS H. NEALE, CONG. RSCH. SERV., R45394, PRESIDENTIAL DISABILITY UNDER THE TWENTY-FIFTH AMENDMENT: CONSTITUTIONAL PROVISIONS AND PERSPECTIVES FOR CONGRESS 23 (2018). Examples include: President Garfield’s assassination in 1881, President Cleveland’s various surgeries in 1893, President Wilson’s stroke in 1919, President Franklin Roosevelt’s deteriorating health in 1944-45, and President Eisenhower’s multiple hospitalizations between 1955 and 1957. See *id.* at 23-26.

94. See *id.* at 21-22.

95. Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 989 (2010) [hereinafter *Taking from the Twenty-Fifth Amendment*].

96. Harding, *supra* note 15, at 11.

of the Senate that he or she is “unable to discharge the powers and duties of his [or her] office.”⁹⁷ However, once the President informs the Speaker and President Pro Tempore that his inability has been lifted, he “reclaim[s] [his duties] immediately without review.”⁹⁸ Presidents have invoked Section 3 four times in the past thirty-seven years⁹⁹ and have given it serious consideration on a number of other occasions.¹⁰⁰

In 1985, Ronald Reagan became the first President to take advantage of Section 3 when he underwent elective colon cancer surgery.¹⁰¹ In 2002 and 2007, President George W. Bush again utilized Section 3 to transfer power to Vice President Dick Cheney while he underwent “routine medical procedure[s].”¹⁰² Most recently, in November 2021, Vice President Harris became the first woman to exercise presidential authority when, for eighty-five minutes, she stepped in as Acting President while President Biden was anesthetized for a colonoscopy.¹⁰³ In contrast, and perhaps to underscore the voluntary nature of Section 3, President Trump reportedly refused to transfer power to Vice President Pence on two separate occasions: once during a routine colonoscopy—for which he allegedly declined anesthesia to avoid “temporarily relinquish[ing] his presidential

97. U.S. CONST. amend. XXV, § 3.

98. See *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 989; U.S. CONST. amend. XXV, § 3.

99. See Gerhard Peters, *List of Vice-Presidents Who Served as Acting President Under the 25th Amendment*, AM. PRESIDENCY PROJECT (Nov. 19, 2021), [<https://perma.cc/8XQ9-UTPR>].

100. See *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 976-77.

101. Peters, *supra* note 99.

102. See Letter to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States, 1 PUB. PAPERS 1083 (June 29, 2002); Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States, 2 PUB. PAPERS 1003-04 (July 21, 2007).

103. See Peters, *supra* note 99; Kate Sullivan, *For 85 Minutes, Kamala Harris Became the First Woman with Presidential Power*, CNN: POL. (Nov. 19, 2021, 12:29 PM), [<https://perma.cc/GK7A-E36S>].

powers”¹⁰⁴—and once while he was hospitalized for COVID-19.¹⁰⁵

On the other hand, Section 4 of the Twenty-Fifth Amendment concerns the *involuntary* transfer of power and created an active constitutional duty for the Vice President by making her “a necessary participant in disability determinations.”¹⁰⁶ Under Section 4, the Vice President becomes Acting President when she and a majority of the Cabinet “transmit to the President [P]ro [T]empore of the Senate and the Speaker of the House . . . their written declaration that the President is unable to discharge the powers and duties of his office.”¹⁰⁷ Notably, Congress retains the authority to substitute the Cabinet for “some other body” as it may deem appropriate, but under no circumstances can it dispense of the Vice President’s constitutional role in determining presidential disability.¹⁰⁸ The requirement that the Vice President participate in involuntary transfers of power ensures that a member of the executive branch always has “an effective veto” when determining presidential disability.¹⁰⁹ Only after such a determination has been made is Congress called upon to be the final authority on presidential disability.¹¹⁰

104. Grace Panetta & Jake Lahut, *Trump Skipped Anesthesia for a Previously Unreported Procedure at Walter Reed to Avoid Giving Pence Temporary Power, According to New Book*, BUS. INSIDER (Sept. 28, 2021, 9:40 AM), [<https://perma.cc/SK78-284L>].

105. See Melissa Quinn, *O’Brien Says Trump Transfer of Power “Not Something That’s on the Table”*, CBS NEWS (Oct. 4, 2020, 11:37 AM), [<https://perma.cc/P3ZW-S4VA>].

106. *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 985.

107. U.S. CONST. amend. XXV, § 4.

108. *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 988.

109. *Id.*

110. See U.S. CONST. amend. XXV, § 4. Once the Vice President and a majority of the Cabinet transmit their findings of presidential disability to Congress, “the Vice President immediately assumes the powers of the presidency” and becomes Acting President. Harding, *supra* note 15, at 11. However, if the President notifies Congress in writing that no disability exists, he regains the powers of his office. In the event the President does so, the Vice President and the Cabinet have four days to again declare the President unable to serve, in which case the Vice President regains and *retains* the status of Acting President until Congress settles the question of presidential disability within twenty-one days. A congressional determination of presidential disability requires a two-thirds vote by both chambers, and if Congress fails to do so, the President regains the powers and duties of his office. See *id.* at 11-12.

The Vice President’s role in initiating an involuntary transfer of power was partly premised on the “judgment that executive officials would be most likely to recognize presidential inability and . . . determine when the disability had ended.”¹¹¹ And while Section 4 has never been invoked, it was at least contemplated by senior administration officials on three separate occasions: first, following the assassination attempt on President Reagan in 1981;¹¹² second, when a presidential aide found President Reagan in an “inattentive and inept” state in 1987;¹¹³ and third, in the wake of President Trump’s perceived involvement in the January 6, 2021, attack on the U.S. Capitol.¹¹⁴ In this regard, Section 4—without defining what constitutes presidential inability¹¹⁵—may be viewed as converting the Vice President from a powerless number two during instances of legitimate presidential inability into a “watchdog”¹¹⁶ over the executive branch from *within* the executive branch.¹¹⁷

111. *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 989.

112. *Id.* at 977-78.

113. NEALE, *supra* note 93, at 17.

114. See *June 28th Select Committee Hearing: Hearing Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. (2022), [<https://perma.cc/5RM9-2U54>] (statement of Cassidy Hutchinson, Former Special Assistant to the President and Aide to the Chief of Staff); Jordan Williams, *Pompeo, Mnuchin Among Trump Cabinet Members Who Discussed 25th Amendment: Report*, HILL (Jan. 8, 2021, 9:21 AM), [<https://perma.cc/RWX7-E378>]; Natalie Prieb, *DeVos Says She Talked 25th Amendment, Resigned After Trump Crossed ‘Line in the Sand’ on Jan. 6*, HILL (June 9, 2022, 11:24 AM), [<https://perma.cc/942M-2YR4>] (“[DeVos] said that she spoke with other Cabinet members about the option of invoking the 25th Amendment to remove [Trump], noting that there were ‘more than a few people’ in the White House who considered the move.”).

115. See Adam R. F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL’Y REV. 459, 461 (2009) (“[T]he Amendment describes presidential inability as the President’s being ‘unable to discharge the powers and duties of his office.’ That phrase is never defined, and the Constitution offers no measure of physical debility, mental infirmity, or emotional instability that would satisfy it.”).

116. Amar & Amar, *supra* note 2, at 944.

117. See *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 987-91; see also Harding, *supra* note 15, at 20 (“[W]hen in doubt, it would be preferable for the Vice President to err on the side of decisiveness during times of potential inability. If a power vacuum occurs in the executive branch, it is preferable that this vacuum is filled by the Vice President, who was elected by the people of the United States and has a constitutional responsibility to them . . .”).

III. THE CASE FOR AN INDEPENDENT VICE PRESIDENCY

In light of the growing need for vice presidential tiebreakers in the Senate, the rate at which Vice Presidents historically become President, and the Vice President's constitutional role in preserving the functionality and integrity of the executive branch during instances of presidential inability, the United States should ratify a constitutional amendment that provides for the Vice President to be independently elected every four years during the midterm elections. This proposal does nothing to alter the Vice President's existing constitutional duties, but instead, simply amplifies the present framework in a way that provides the American people with a more democratic role in selecting a constitutional officer who materially affects their everyday lives.

A. Vice Presidential Independence and Executive Branch Functionality

The case for vice presidential independence cannot be sufficiently weighed without also addressing the potential implications for the Vice President's relationship with the President. As an initial matter, the impulse that it is *necessary* for the President and Vice President to work together in consort, frankly, conflates reality. The argument for executive branch unity has been met with haphazard support among the states and has only become mainstream at the federal level in recent decades.¹¹⁸ But most importantly, the modern Vice President's increased prominence in legislative matters and her obligations under Section 4 of the Twenty-Fifth Amendment present contemporary arguments in favor of vice-presidential independence.

118. See Louis Jacobson, *The Challenges of Electing Governors and Lieutenant Governors Separately*, UVA CTR. FOR POL. (Jan. 27, 2022), [<https://perma.cc/TH2L-F9U6>]; Joshua Holzer, *What Does the Vice President Do?*, THE CONVERSATION (Jan. 19, 2021, 12:07 PM), [<https://perma.cc/4382-244N>].

1. The States on Independently Elected Executive Branch Officers

The model various states use to structure their executive departments pointedly undermines the argument that functional governments require a uniformly elected executive branch. State Lieutenant Governors are “much like the vice president on the federal level: [t]hey serve as a backup in case of death or resignation from office, and they don’t have a lot of other specific duties in their portfolio.”¹¹⁹ A simple survey of all fifty state constitutions, however, suggests that executive branch unity at the state level has not been a point of critical concern.¹²⁰ Of the forty-three state constitutions that provide for a Lieutenant Governor, seventeen of them require the Governor and Lieutenant Governor to be elected separately.¹²¹ A number of states even go a step further, “provid[ing] for the popular election of up to seven executive officials who each have constitutional duties assigned to them and who each are accountable to the electorate.”¹²² For example, the Arkansas Constitution provides for a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, each of whom are separately elected officers of the state’s executive branch.¹²³

Notably, this model “permits split-party election results,”¹²⁴ and it is not uncommon for voters in these states to elect executive officers—namely, Governors and Lieutenant Governors—from different political parties.¹²⁵ In light of this reality, these states have nonetheless elected to maintain the way in which they structure their executive departments. It follows, then, that to the extent any of these states have experienced governmental dysfunction as a result of holding separate elections for various executive officers, any such dysfunction has yet to spur a change to their respective constitutions.

119. Jacobson, *supra* note 118.

120. See Soderstrom, *supra* note 2, at 1015-16.

121. See Jacobson, *supra* note 118.

122. Soderstrom, *supra* note 2, at 1012-13.

123. See ARK. CONST. art. 6, § 1.

124. Soderstrom, *supra* note 2, at 1015.

125. Jacobson, *supra* note 118.

2. *The Vice President's Emergent Role in Executive Branch Affairs*

For much of history, “Vice [P]residents rarely had an important voice in White House policy making.”¹²⁶ For example, in describing his participation in President Woodrow Wilson’s administration, Vice President Thomas Marshall wrote, “I was of no importance to the administration beyond the duty of being loyal to it”¹²⁷ Moreover, when President Eisenhower was asked to name a “major idea” that Vice President Nixon had brought to the table, he famously replied, “If you give me a week, I might think of one. I don’t remember.”¹²⁸ In fact, Vice President Lyndon Johnson felt so sidelined during his time in President Kennedy’s administration that he insinuated his only real job was to remind the President of his mortality, remarking, “Every time I came into John Kennedy’s presence, I felt like a goddamn raven hovering over his shoulder. . . . I detested every minute of it.”¹²⁹

Indeed, the centralized executive role that modern Vice Presidents now play in their respective presidential administrations only began to take hold in 1976, when President Jimmy Carter and Vice President Walter Mondale jointly set out to integrate the vice presidency into the West Wing’s business.¹³⁰ Mondale believed that “such a significant vice presidential role could only occur in the executive branch,” since, as he explained, his constitutional duties in the Senate were largely “ceremonial with the exception of casting tie-breaking votes.”¹³¹ Under Mondale’s watch, the vice presidency developed into a “significant role in the executive branch,” and contemporary Presidents have continued to utilize their Vice Presidents for

126. *Modern Vice Presidency*, *supra* note 68, at 376.

127. Ronald G. Shafer, *He Thought the Vice Presidency Was Useless—Until Woodrow Wilson Had a Stroke*, WASH. POST (Dec. 14, 2021, 7:00 AM), [<https://perma.cc/6SCN-KPSL>].

128. *Modern Vice Presidency*, *supra* note 68, at 376.

129. DORIS KEARNS GOODWIN, *LYNDON JOHNSON AND THE AMERICAN DREAM* 251 (Open Rd. Integrated Media, Inc. 2015) (1976).

130. *Modern Vice Presidency*, *supra* note 68, at 377-78.

131. *Id.* at 378 (quoting Memorandum from Walter Mondale to Jimmy Carter on the Role of the Vice President in the Carter Administration (Dec. 9, 1976), [<https://perma.cc/PC6C-ZTMT>]).

certain “roles that can only be performed at the highest levels.”¹³² As a result, the modern vice presidency practically serves as “an extension of the presidency,” with the Vice President primarily acting as the President’s agent.¹³³

3. *Modern Considerations for Vice-Presidential Independence*

The vice presidencies of Mike Pence and Kamala Harris offer new considerations for the appropriate degree of deference that Vice Presidents should afford to Presidents. While the apparent benefits of a devoted Vice President are not de minimis, the notion that our national interests are best served by a Vice President who is subservient to the President implicitly rests on the premise that such a relationship benefits the *Chief Executive*, plainly ignoring the Vice President’s auxiliary constitutional duties under both Article I and Section 4 of the Twenty-Fifth Amendment. This Section merely argues that the benefits of a subordinate Vice President do not outweigh the inherent conflicts of interest presented by the modern vice presidency’s unprecedented involvement in legislative affairs and its role in maintaining the functionality and integrity of the executive branch. Put another way, present political realities now make it such that democratic principles are more susceptible to subversion when the President and Vice President operate in unison, as opposed to at arm’s length.

Unlike Vice President Mondale, who cast only one tie-breaking vote during his time in office,¹³⁴ Mike Pence and Kamala Harris have demonstrated how today’s hyper-partisan political climate and diminished procedural hurdles for holding votes in the Senate have resulted in the Vice President playing an outsized role in passing legislation, installing high-level administration officials, confirming lifetime-tenured judges, and solidifying partisan majorities.¹³⁵ And although it has become widely accepted that the Vice President is expected to carry out

132. *Id.* at 387.

133. Morse, *supra* note 20, at 154.

134. *Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate*, *supra* note 24.

135. *See supra* Part II.

the *President's* agenda in the event of an equally divided Senate,¹³⁶ the fact remains that the Constitution vests the tie-breaking authority in the *Vice President*.¹³⁷ Certainly, had the Founders wished, they could have cut out the middleman by simply gifting that function to the President. In this way, the modern vice presidency's excessive integration into the executive branch has "distort[ed] the separation of powers between the branches," particularly, when the Vice President casts tie-breaking votes to confirm presidential nominees.¹³⁸

Furthermore, in the context of declaring presidential inability under the Twenty-Fifth Amendment, there are conceivable scenarios in which unwavering vice-presidential loyalty might undermine basic democratic principles. For the reasons discussed below, Vice President Pence's final days in office, at a minimum, legitimize concerns about whether the President's handpicked number two should reasonably be expected to identify instances of presidential inability with objectivity.¹³⁹ Indeed, rudimentary logic suggests that an independently elected Vice President would be in a far superior position to "serve as a watchdog for the American people by sniffing out possible executive misconduct and self-dealing."¹⁴⁰

Finally, electing the Vice President independently at the midterm elections would not preclude Presidents and Vice Presidents from belonging to the same party, nor would it prevent the two from maintaining a congenial relationship. As many states have seen, it is quite common for Chief Executives and their understudies to maintain "good working relationship[s]" even

136. See Morse, *supra* note 20, at 155 ("When vice presidents cast a tie-breaking vote on a legislative or procedural matter in the Senate, the operative effect is that the Executive Branch resolves an issue that arose in the Senate.").

137. U.S. CONST. art. I, § 3, cl. 4.

138. Morse, *supra* note 20, at 155 (discussing how vice presidential participation in selecting cabinet members and federal judicial nominees makes "a mockery of the advice and consent process" when the Vice President is required to break a tie to confirm those very nominees).

139. See *infra* notes 157-59 and accompanying text. This Comment takes no position on the merits behind Vice President Pence's decision not to invoke Section 4 of the Twenty-Fifth Amendment in the wake of the January 6, 2021, Capitol riots. This author simply includes the example to illustrate the principles discussed.

140. Amar & Amar, *supra* note 2, at 944.

when they do not agree on everything.¹⁴¹ Given the vice presidency's historic lack of involvement in executive affairs, this Section simply contends that it is not *necessary* for the two to function in lockstep, and that rather, democratic ideals are best served when there is no obligation to do so.

B. Increased Accountability for the Federal Government

Electing the Vice President separately at the midterm elections would provide the national electorate with additional democratic oversight for both the executive and legislative branches. The fundamental difference between this proposal and others that call for an independently elected Vice President¹⁴² is its temporal focus. Electing (or re-electing) the Vice President two years after the presidential election would enable voters to take into consideration the present state of national affairs as well as the incumbent President's job performance. But more importantly, it would unshackle the Vice President from being "a partisan accessory to the presidency"¹⁴³ and enable her to exercise independent judgment on behalf of the American people who expressly gave her the job. The vice presidencies of Mike Pence and Kamala Harris provide a contemporary and useful context for how such a proposal could strengthen democratic accountability for the federal government.

1. Accountability for the Executive Branch

The executive branch is held accountable by the national electorate only once every four years,¹⁴⁴ and given that the Twenty-Second Amendment limits the Chief Executive to two terms,¹⁴⁵ an individual who is re-elected to the presidency effectively serves out the entirety of his second term with no direct electoral accountability. Of course, the executive branch may be checked in other respects, such as Congress's power to

141. Jacobson, *supra* note 118.

142. *See, e.g.*, Friedman, *supra* note 2, at 1726, 1728-29; Amar & Amar, *supra* note 2, at 944-45; Soderstrom, *supra* note 2, at 1005-06.

143. Larson, *supra* note 6, at 527.

144. U.S. CONST. art. II, § 1, cl. 1.

145. U.S. CONST. amend. XXII, § 1.

impeach¹⁴⁶ or an Article III court's ability to intervene,¹⁴⁷ but the electorate's role in influencing executive branch operations—particularly, in voters' ability to express approval or disapproval for the President's performance—is limited to the midterm *congressional* elections. Thus, electing the Vice President at the midterms would ensure that the executive branch is subject to at least some degree of direct electoral accountability every two years.

Mike Pence's vice presidency demonstrates the office's potential for checking executive abuse from within the executive branch and illustrates how additional democratic oversight might have reshaped recent national affairs. Although President Trump lost the popular vote in 2016, he was elected President in what was perhaps the single largest electoral upset in American history.¹⁴⁸ Following the 2018 congressional midterm elections, Republicans lost control of the House of Representatives after voters gave Democrats a majority for the first time in eight years.¹⁴⁹ In fact, 2018 saw the highest voter turnout for a midterm election in a century, and Democrats performed seven points higher in the national popular vote than they had in 2016, besting Republicans by nine points overall.¹⁵⁰ Were the Vice President also on the ballot in 2018, it would take little imagination to conceive a reality in which voters might have chosen a Democrat, a result that could have dramatically re-characterized the final weeks of Trump's presidency.

During his final two years in office, President Trump became the only Chief Executive to be impeached twice.¹⁵¹ The House first impeached him on December 18, 2019, charging one count

146. U.S. CONST. art. 1, § 2, cl. 5.

147. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

148. See Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016, 3:58 AM), [https://perma.cc/6M6B-EMGU].

149. See *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, [https://perma.cc/3HAU-55XD] (last visited Oct. 13, 2022).

150. See Scott Keeter & Ruth Igielnik, *Democrats Made Gains from Multiple Sources in 2018 Midterm Victories*, PEW RSCH. CTR. (Sept. 8, 2020), [https://perma.cc/FSZ2-NKS9].

151. See Jacob Pramuk, *Trump Becomes First President to Be Impeached Twice, as Bipartisan Majority Charges Him with Inciting Capitol Riot*, CNBC (Jan. 14, 2021, 7:08 AM), [https://perma.cc/89AV-3KH4].

of obstruction of Congress and one count of abuse of power.¹⁵² Both counts were dispensed with along largely party-line votes in the Democrat-controlled House and in the Republican-controlled Senate, and President Trump was ultimately acquitted on both charges.¹⁵³ The second impeachment, however, came in the wake of the January 6, 2021 attack on the United States Capitol, in which rioters were seemingly encouraged by President Trump to siege the Capitol shortly before Congress was scheduled to certify Joe Biden as the winner of the 2020 presidential election.¹⁵⁴ In response, the House again impeached President Trump on January 13, 2021, charging one count of inciting an insurrection, with every Democrat and ten Republicans supporting the measure.¹⁵⁵ Nevertheless, the Senate again acquitted President Trump, but this time with seven Republicans voting to convict him, and only *after* he had left office.¹⁵⁶

Given the relatively short window of time between President Trump's charged conduct and the inauguration of President-elect Joe Biden, congressional leaders called on Vice President Pence to invoke Section 4 of the Twenty-Fifth Amendment and declare the President unfit to serve out the remainder of his term.¹⁵⁷ In fact, among congressional leaders' chief concerns with impeaching the President so close to the expiration of his term was the procedural inability to hold a trial in the Senate before he left office.¹⁵⁸ Although Vice President Pence ultimately declined to invoke the Twenty-Fifth Amendment, a valid question presented itself as to whether an independently elected Vice President—Republican or Democrat—would have chosen the same course of action.

152. *President Donald Trump Impeached*, HIST., [<https://perma.cc/U6GF-WMJU>] (last visited Oct. 13, 2022).

153. *Id.*

154. See Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, GUARDIAN (Feb. 13, 2021, 7:12 PM), [<https://perma.cc/CHW7-YZQ7>].

155. See Pramuk, *supra* note 151.

156. Levine & Gambino, *supra* note 154.

157. See Jacob Jarvis, *Donald Trump Facing Second Impeachment as 25th Amendment Hits Dead End*, NEWSWEEK (Jan. 8, 2021, 6:41 AM), [<https://perma.cc/86NR-MCZA>].

158. Jim Acosta & Pamela Brown, *Pence Has Not Ruled Out 25th Amendment, Source Says*, CNN: POL. (Jan. 9, 2021, 10:08 PM), [<https://perma.cc/RC99-L3QZ>].

The foregoing series of events presents a compelling case for electing the Vice President separately at the midterm elections. After observing two years of the Trump Administration and assessing President Trump's approach to governing, voters could have affirmed or repudiated the President's performance by selecting a Vice President who best represented their interests for the remainder of the President's term. Had such a hypothetical Vice President decided to invoke Section 4 of the Twenty-Fifth Amendment in the aftermath of January 6, 2021, she would have done so with the assurance that the American people had expressly entrusted her with that authority under the Constitution. In effect, she would serve as the people's "watchdog."¹⁵⁹

2. *Accountability for the Legislative Branch*

As President of the Senate, the Vice President ensures finality in the Senate's business by casting a tie-breaking vote when the Senate is equally divided on a matter.¹⁶⁰ Moreover, in the event the Senate's composition is equally divided—i.e., fifty Republicans and fifty Democrats—the Vice President's party effectively decides which party controls the chamber.¹⁶¹ Thus, Vice President Harris's procedural influence in a fifty-fifty Senate perhaps illustrates the most significant way in which the American people might utilize the vice presidency as a means of checking Congress's legislative agenda at the midterms.

At the time of writing, the possibility of yet another equally divided Senate appears quite plausible. In the wake of the 2022 congressional midterm elections, three Senate races—Arizona, Georgia, and Nevada—remain too close to call.¹⁶² In such an event, Vice President Harris would again be the dispositive factor in securing Democrats' majority control of the chamber,¹⁶³ even

159. Amar & Amar, *supra* note 2, at 933 (describing how an independently elected Vice President would serve as a "watchdog" within the Executive branch).

160. *See supra* note 18 and accompanying text.

161. *See* Strand & Lang, *supra* note 48.

162. Zach Montellaro & Madison Fernandez, *Hundreds of Thousands of Votes Still Being Counted in Key Senate States*, POLITICO (Nov. 11, 2022, 9:50 AM), [<https://perma.cc/8ZGE-RHKV>] ("If the two parties split Arizona and Nevada, Senate control would once again come down to Georgia, just as it did in 2020.")

163. *See* Strand & Lang, *supra* note 48.

if Republicans were to carry the national popular vote. This is a peculiar, yet not infrequent, consequence of when and how the Constitution provides for the election of Senators.¹⁶⁴

Unlike the House of Representatives, in which the entire chamber must answer to the voters every two years,¹⁶⁵ Senators are elected to six-year terms, meaning that only a third of all Senate seats are voted on during the biennial congressional elections.¹⁶⁶ Consequently, the Senate's unique electoral scheme produces a somewhat anomalous result in which—once every six years—voters in each state are precluded from expressing any electoral preference as to the Senate's composition for a full, two-year session of Congress (hereinafter referred to as the “Sexennial Dilemma”).¹⁶⁷ For example, Michigan's two Senate seats belong to Senate Classes I and II.¹⁶⁸ In 2018, Michigan elected Debbie Stabenow to the Senate as its member from Class I.¹⁶⁹ Then, in 2020, Michigan elected Gary Peters to the Senate as its member from Class II.¹⁷⁰ Accordingly, during the 2022 midterms, when only Senators from Class III will be on the ballot,¹⁷¹ the Sexennial Dilemma will prevent Michiganders from exercising any degree of direct electoral oversight as to their representation in the Senate.

Of course, there are reoccurring instances in which a state's Sexennial Dilemma does not fall within a midterm year. This pattern is cyclical and relatively straightforward. For example, Arkansas did not hold Senate elections in 2000 (presidential cycle), 2006 (midterm cycle), 2012 (presidential cycle), and 2018

164. See Frances E. Lee & Bruce I. Oppenheimer, *Senate Apportionment: Competitiveness and Partisan Advantage*, 22 LEGIS. STUD. Q. 3, 18-19 (1997).

165. U.S. CONST. art. I, § 2, cl. 1.

166. U.S. CONST. art. I, § 3, cl. 1.

167. The Constitution divides Senators into three separate classes, generally referred to as Classes I, II, and III. Because each state is only given two Senators, no state will have a member from all three classes. See *id.* at cl. 2.

168. *Class I—Senators Whose Term of Service Expire in 2025*, U.S. SENATE, [<https://perma.cc/6TZH-3UEX>] (last visited Oct. 14, 2022); *Class II—Senators Whose Terms of Service Expire in 2027*, U.S. SENATE, [<https://perma.cc/ZS2U-YVF7>] (last visited Oct. 14, 2022).

169. *Class I—Senators Whose Term of Service Expire in 2025*, *supra* note 168.

170. *Class II—Senators Whose Terms of Service Expire in 2027*, *supra* note 168.

171. *Class III—Senators Whose Terms of Service Expire in 2023*, U.S. SENATE, [<https://perma.cc/65KW-XZCY>] (last visited Oct. 14, 2022).

(midterm cycle);¹⁷² and Arkansas will not hold Senate elections in 2024 (presidential cycle) and 2030 (midterm cycle).¹⁷³ As the system is currently structured, Arkansans have no direct electoral impact on the Senate's affairs when there is a Sexennial Dilemma during a *midterm* election. However, the same cannot be said when there is a Sexennial Dilemma during a *presidential* election, since the winner of the presidential race will determine which nominees and appointees get sent to the Senate in the first place, and the new President would have the authority to veto any legislation that he or she found disagreeable. Accordingly, holding vice-presidential elections in tandem with the midterm elections would simply ameliorate the under-democratic phenomenon that is the Sexennial Dilemma.

Again, using Michigan as an example, Michiganders under this proposed scheme would be presented with a meaningful opportunity to influence the Senate's legislative affairs during their Sexennial Dilemma without directly changing the Senate's composition, since the newly elected Vice President would determine majority control of the chamber in the event of another fifty-fifty Senate. On the other hand, even if the Senate were not equally divided along partisan lines—as was the case with Vice President Pence¹⁷⁴—an independently elected Vice President would nonetheless have a far greater incentive to cast tie-breaking votes in line with national attitudes, as opposed to those emanating from the Oval Office. Thus, the constitutional process for electing Senators prompts additional considerations for how electing the Vice President separately at the midterms could produce greater congressional accountability.

In sum, when the Vice President is called upon to dislodge a procedural or legislative logjam in the Senate, her judgment not simply affects, but rather determines, which individuals may lead

172. See *Election Results*, ARK. SEC'Y OF STATE, [<https://perma.cc/KC3Y-FLK7>] (last visited July 24, 2022) (election results from Arkansas's 2000, 2006, 2012, and 2018 elections can be found by clicking on the respective links listed on the elections results homepage); ARK. SEC'Y OF STATE, HISTORICAL REPORT OF THE SECRETARY OF STATE 356-66 (2018), [<https://perma.cc/DFP5-9JS2>].

173. See *Historical Report of the Secretary of State*, *supra* note 172, at 356-66; *Class III—Senators Whose Terms of Service Expire in 2023*, *supra* note 171; *Class II—Senators Whose Terms of Service Expire in 2027*, *supra* note 168.

174. See *Party Division*, *supra* note 26.

federal departments and agencies, which individuals may serve for life on the federal bench, which party will control the body's chamber, and which federal policies will advance or die.¹⁷⁵ In that regard, a Vice President who merely acts as a proxy for the President inherently "circumvent[s] the important check the Framers placed on executive power."¹⁷⁶ Accordingly, electing the Vice President independently at the midterms would endow the American people with a more democratic avenue for assessing their Vice President's judgment before she is called upon to represent their interests, while also facilitating greater electoral accountability for Congress.

IV. CONCLUSION

The American vice presidency, originally conceived as "an afterthought at the Constitutional Convention" of 1787,¹⁷⁷ has evolved into an indispensable federal office that ensures finality on legislative and procedural matters in the Senate, while also maintaining the continuity and integrity of the executive branch. Mike Pence and Kamala Harris, two Vice Presidents from two different parties with two different backgrounds, are similar in at least one respect: their vice presidencies demonstrate the remarkable rate at which modern Vice Presidents are being called upon to exercise their office in ways that have real and lasting effects on American society.

Without changing the duties or structure of the office, the existing constitutional powers delegated to the vice presidency make it an effective agent for furthering democratic principles and equip the American people with a powerful tool for holding the federal government accountable. Accordingly, voters would be in a better position to leverage the democratic utility of the vice presidency if they were given the occasion to elect her separately during the midterm elections. Such a change, viewed through the lens of the current and most recent Vice Presidents, would have appreciable benefits for the institution of American democracy.

175. See, e.g., *supra* Section II.A.

176. Morse, *supra* note 20, at 156.

177. Larson, *supra* note 6, at 516.