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The Constitutional Argument Against the Vice President Casting Tie-Breaking Votes on Judicial Nominees

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THE CONSTITUTIONAL ARGUMENT AGAINST THE VICE PRESIDENT CASTING TIE-BREAKING VOTES ON JUDICIAL NOMINEES

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INTRODUCTION

Article I of the Constitution vests the Vice President with the power to vote in the Senate in the event of a tie. Textually, this power is not subject to any additional qualifications. However, there are reasons to believe that the Framers intended this tie-breaking power to have certain practical limits, specifically in the context of confirming Article III judges. This essay argues that concerns about the separation of powers, the differences between legislation and the confirmation of presidential nominees, anti-majoritarianism, and the forsaken sixty-vote threshold for Supreme Court nominees all militate toward a prudential limit that restricts the Vice President from casting a tie-breaking vote to confirm a Supreme Court Justice.

I. HISTORY OF THE VICE PRESIDENTIAL VOTE AND THE ROLES OF THE SENATE

A. *Vice Presidents Past*

Given its relatively infrequent use since 1789, there has not been much scholarship devoted to the use of the vice president's tie-breaking authority. With the exception of Vice Presidents John Adams (twenty-nine votes), John C. Calhoun (thirty-one votes), and George M. Dallas (nineteen votes), the power has been used quite sparingly.[1] From 1875 onward, vice presidents have rarely cast tie-breaking votes.[2]

Historically, the exercise of this authority was not controversial because its use was confined to procedural and legislative matters—matters on which everyone agreed the vice president had the power to cast tie-breaking votes.[3] Tensions did arise, however, when the tie-breaking authority was used in non-procedural and non-legislative matters.[4] But even in most of these instances, the authority and propriety

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1 U.S. SENATE, OCCASIONS WHEN VICE PRESIDENTS HAVE VOTED TO BREAK TIE VOTES IN THE SENATE, https://www.senate.gov/artandhistory/history/resources/pdf/VPTies.pdf (last visited Feb. 2, 2018), *archived at* https://perma.cc/JP4E-JNDC.

2 *Id*.

3 Henry Barrett Learned, *Casting Votes of the Vice-Presidents, 1789–1915*, 20 AM. HIST. REV. 571 (1915).

4 *Id*. at 572. Vice Presidents Calhoun and Fillmore in 1829 and 1850, respectively, each determined in a divided Senate the election of a chaplain. In 1877 Vice President Wheeler cast a tie-breaking vote favoring the motion to consider a report of the Senate Committee on Privileges and Elections, which touched on the matter of admittance to Senate membership. This 1877 vote sparked an "intelligent, though inconclusive discussion," on the vice president's right to cast a vote in such matters. Senator Allen G. Thurman of Ohio argued that there were certain issues, where although the Senate is equally divided, the vice president should not be allowed to cast a vote, whereas Senator George F. Edmunds of Vermont interpreted the Constitution's grant of authority to the vice president as absolute. *Id*.

of the vice president to cast tie-breaking votes was not questioned.

With respect to presidential nominees, from 1975 until recently, sixty votes were needed for the Senate to end a filibuster and move to a vote.[5] As a result, such nominations never resulted in a tie which the vice president could break. Prior to 1975 two-thirds of Senators were needed to invoke cloture.[6] Thus, until Vice President Mike Pence cast a tie-breaking vote to confirm Secretary of Education Betsy DeVos, no vice president had cast a tie-breaking vote on a presidential nomination since 1862, when Vice President Hamlin voted to postpone cloture on the nomination of a Major-General of Volunteers.[7] However, even this was not a substantive vote, and had "no measurable effect" on the ratification of the appointment a month later.[8] Prior to that, in 1832, Vice President Calhoun cast a tie-breaking vote that defeated the nomination of Martin Van Buren as Minister to Great Britain.[9]

Besides a tie-breaking vote from then-Vice President George H.W. Bush on a motion to reconsider a nominee for a district court judgeship (who was eventually confirmed by a vote of forty-eight to forty-six), no tie-breaking vote has touched upon the nomination of an Article III judge.[10]

The fact that the vice-presidential power to cast tie-breaking votes has been used so sparingly—and virtually never on serious matters—is consistent with the intent of some, albeit a minority, of the Framers of the Constitution. On September 7, 1787, the Constitutional Convention debated the role of the vice president.[11] Three of the Framers, Mr. Elbridge Gerry of Massachusetts, Mr. Hugh Williamson of North Carolina, and Colonel George Mason of Virginia voiced their opposition to the proposed role of the vice president as ex-officio President of the Senate for various reasons.[12] Mr. Gerry saw this role for the vice president as tantamount to "[putting] the President himself at the head of the Legislature."[13] Mr. Williamson commented that the office of the vice presidency was not even needed, but "for the sake of valuable mode of

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5 CHRISTOPHER M. DAVIS, INVOKING CLOTURE IN THE SENATE, CONG. RESEARCH SERV. (Apr. 6, 2017), https://www.senate.gov/CRSpubs/be873e40-a966-4feb-9d72-cf23a93cbe46.pdf, *archived at* https://perma.cc/3WL8-W4JL.

6 VALERIE HEITSHUSEN & RICHARD S. BETH, FILIBUSTERS AND CLOTURE IN THE SENATE, CONG. RES. SERV. (2017), https://www.senate.gov/CRSpubs/3d51be23-64f8-448e-aa14-10ef0f94b77e.pdf, *archived at* https://perma.cc/9TBK-REBL.

7 Learned, *supra* note 3, at 572.

8 *Id*.

9 *Id*.

10 RICHARD S. BETH, CLOTURE ATTEMPTS ON NOMINATIONS: DATA AND HISTORICAL DEVELOPMENTS , CONG. RESEARCH SERV. (June 26, 2013), https://www.senate.gov/CRSpubs/83d4b792-d34b-4215-be6d-4a3c4e976d2b.pdf, *archived at* https://perma.cc/GK3Q-F79U.

11 NOTES OF DEBATE IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 596 (The Norton Library 1966).

12 *Id*.

13 *Id*.

election."[14]

Colonel Mason's remarks were more nuanced. He said that endowing the vice president with the powers that come from being an ex-officio president of the Senate "[encroaches] on the rights of the Senate; and . . . [mixes] too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible."[15] Mason also objected to either house of Congress being given the power to make appointments, but simultaneously was averse to vesting "so dangerous a power in the President alone."[16] He suggested that a "privy Council," consisting of six members chosen by the Senate, provide the advisory role for presidential appointments, except those of ambassadors.[17] Although this view was ultimately rejected, it underscores the concern that many Framers had with allowing the vice president to be involved in nominating people to executive and judicial positions and also possibly voting on their nominations.[18]

B. *The Senate Goes Nuclear*

Senate Republicans first toyed with the idea of shutting off debate on judicial nominees with only fifty-one votes when Senate Democrats announced plans to filibuster the nominations of Charles W. Pickering, Jr. and Miguel Estrada for federal appellate judgeships.[19] In the end, seven Senators from each party, dubbed the Gang of 14, struck a deal to end the Democratic filibusters in exchange for Republicans not invoking the nuclear option.

On November 21, 2013, in response to three blocked nominations for the D.C. Circuit Court of Appeals, Senate Democrats changed the rules of the Senate and deployed the nuclear option[20] so that judicial nominees, cabinet secretaries, and other presidentially-nominated positions could advance to confirmation votes with a simple majority vote for cloture, rather than the sixty-vote supermajority that had been commonplace since 1975.[21] This rule change did not affect nominees to

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14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*.

19 Jim VandeHei & Charles Babington, *From Senator's 2003 Outburst, GOP Hatched 'Nuclear Option,'* WASH. POST (May 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051802144.html, *archived at* https://perma.cc/57XM-V9HS.

20 U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its own Proceedings . . . ."); *see also* United States v. Ballin, 144 U.S. 1, 5 (1892).

21 Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Filibusters on Most Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/Senate-Poised-to-Limit-Filibusters-in-Party-Line-Vote-That-Would-Alter-Centuries-of-Precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html, *archived at* https://perma.cc/3ZCQ-RNSB.

the Supreme Court, but many saw the change as a Pandora's box.[22]

Relying on the precedent set by Senate Democrats, Senate Republicans predictably applied the new rule to the nomination of Supreme Court Justices in April 2017 for the nomination of now-Justice Neil Gorsuch.[23] But even then, the vice president did not cast a tie-breaking vote because three Senate Democrats joined Senate Republicans to confirm Justice Gorsuch with fifty-four votes.[24] However, the nuclear fallout produced the grotesque democratic disfigurement—far from historic practice and what the Framers imagined—that we see today, where the vice president is able to vote to confirm cabinet nominees and ambassadors, and could theoretically cast the tie-breaking vote for lower court and Supreme Court nominees.

C. *The Vice President Today*

Current Vice President Michael Pence has exercised his Article I authority in numerous novel ways. As of the publication of this essay, Vice President Pence has cast tie-breaking votes in the Senate on nine separate occasions.[25] In his first vote, he broke the tie to confirm Betsy DeVos as the Secretary of Education[26] amidst serious questions about her qualifications and fitness for the position.[27] This was the first time a vice president had ever invoked their Article I authority to confirm a member of a President's cabinet.[28]

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22 Amber Phillips, *So, Which Party is Responsible for the Death of the Filibuster? Let's Debate*, WASH. POST (Apr. 4, 2017) https://www.washingtonpost.com/news/the-fix/wp/2017/04/04/so-which-party-is-responsible-for-the-death-of-the-filibuster-lets-debate, *archived at* https://perma.cc/Y5AK-3MJB. Then-Senate Minority Leader Mitch McConnell said in 2013, "Let me assure you: This Pandora's box, once opened, will be utilized again and again by future majorities—and it will make the meaningful consensus-building that has served our nation so well a relic of the past." *Id*.

23 Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html, *archived at* https://perma.cc/M7ZQ-NTDU.

24 Darla Cameron, Kevin Schaul, Kim Soffen & Kevin Uhrmacher, *Vote count: How the Senate Changed Its Rules and Confirmed Gorsuch*, WASH. POST (Apr. 7, 2017, 12:12 PM), https://www.washingtonpost.com/graphics/politics/gorsuch-senate-votes, *archived at* https://perma.cc/6YWL-NGG3.

25 *Tie Votes*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/four_column_table/Tie_Votes.htm (last visited Sept. 24, 2018), *archived at* https://perma.cc/7A96-XXLF.

26 *PN37—Elisabeth Prince DeVos—Department of Education*, U.S. CONG., https://www.congress.gov/nomination/115th-congress/37 (last updated Feb. 7, 2018), *archived at* https://perma.cc/7BMG-HLE2.

27 DeVos drew criticism for her support of the expansion of charter schools and of school voucher programs, which direct tax dollars to for-profit schools, parochial schools, and online schools. She was also criticized for suggesting that guns were necessary in some schools to protect children against grizzly bears. *See* Dana Goldstein, *Betsy DeVos, Pick for Secretary of Education, Is the Most Jeered*, N.Y. TIMES (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/us/politics/betsy-devos-nominee-education-secretary.html, *archived at* https://perma.cc/3K6E-P8B9.

28 *See supra* note 25, at n. 3. The closest historical analog to this novel exercise of authority

Vice President Pence also cast tie-breaking votes to confirm one of President Trump's nominees for an ambassadorship,[29] as well as a nominee for a position in the Office of Management and Budget.[30] Not since Vice President Alben W. Barkley, from 1949 until 1952, has a vice president cast so many tie-breaking votes in the Senate in such a relatively short period of time,[31] and Barkley did so for much less consequential matters.

The resurgence of the vice-presidential vote is likely an outgrowth of partisanship in the Senate, but this resurgence raises a host of concerns that merit evaluation. The possibility of vice presidents wielding this power more frequently in connection with the Senate's executive business requires an evaluation of the proper exercise of this constitutional power.

D. *The Three Roles of the Senate*

In Federalist No. 68, Alexander Hamilton briefly touched upon the issue of the vice president's power to vote in the Senate. One justification Hamilton gives for the power is that, "to secure at all times the possibility of a definite *resolution* of the body, it is necessary that the [vice president] should have only a casting vote."[32]

The Constitution entrusts two distinct responsibilities to the Senate, namely legislative and executive business.[33] The Senate's legislative business involves passing resolutions, and its executive business includes votes on presidential nominees and treaties. By discussing resolution of the body, and not executive business, Federalist No. 68 can logically be read to suggest that the vice-presidential power to cast tie-breaking votes was intended to extend only to the Senate's legislative duties and not its

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was the 1862 tie-breaking vote by Vice President Hamlin to delay the vote on a nomination. *See* Learned, *supra* note 3.

29 *U.S. Senate Roll Call Votes 115th Congress—2nd Session: On the Nomination (Confirmation Samuel Dale Brownback, of Kansas, to be Ambassador at Large for International Religious Freedom)*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00023 (last visited Sept. 24, 2018), *archived at* https://perma.cc/72X4-UVL5.

30 *U.S. Senate Roll Call Votes 115th Congress—2nd Session: On the Nomination (Confirmation Russell Vought, of Virginia, to be Deputy Director of the Office of Management and Budget)*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00040 (last visited Sept. 24, 2018), *archived at* https://perma.cc/2CQC-6J9Q.

31 *See supra* notes 1–3 and accompanying text. Pence's nine votes have actually come in a shorter period of time than Barkley's eight votes.

32 THE FEDERALIST No. 68 (Alexander Hamilton) (Isaac Kramnick ed., Penguin Books 1987) (emphasis added).

33 RICHARD S. BETH, BILLS, RESOLUTIONS, NOMINATIONS, AND TREATIES: CHARACTERISTICS, REQUIREMENTS, AND USES, CONG. RESEARCH SERV. (Nov. 26, 2008), https://www.everycrsreport.com/files/20081126_98-728_56b0db894884fa6ee61086da028aca73ea677091.pdf, *archived at* https://perma.cc/GLX4-3LBV.

executive duties, and thus not to confirmations of presidential nominees.[34] This is consistent with the Framer's fears that, through the vice president, the Executive branch could cast the deciding vote on its own nominees. Further, the separation-of-powers concern with the vice president casting tie-breaking votes in executive matters is intensified when it comes to judicial nominations because the independence of the judiciary is involved.

Historically, when the Senate was equally divided on a judicial nomination, the vice president did not cast a deciding vote, and the nominee was rejected. On May 22, 1832, the vice president was presiding in the Senate.[35] In executive proceedings that same day, the Senate considered the nomination of James G. Bryce as judge of the United States for West Florida, and although the forty-four Senators present were equally divided on the question, Vice President Calhoun did not cast a decisive vote for the President's nominee.[36] Perhaps Vice President Calhoun wanted the nomination to fail, as he did the Van Buren nomination,[37] yet this is apparently the only instance where the Senate was equally divided on a judicial nomination. Notably, the matter was resolved without the vice president voting, against the grant of judicial power, because the nominee did not have enough votes to be confirmed.

The Constitution also entrusts to both the Senate and the House the responsibility to determine the rules of their proceedings.[38] This is neither legislative nor executive business, but that which does not "relate to measures of legislation by Congress or to reciprocal or common business of the two Houses, or . . . to any particular proceeding of the Senate . . . ."[39] In this non-substantive Senate business, Senator Bacon proposed that the vice president, "not being a member of this body, has not the right to vote . . . ."[40]

These three different roles demonstrate that in each capacity, the Senate is effectively doing something different, and these differences govern whether or not the vice president should be permitted to exercise the tie-breaking authority. The only generality one may draw is that vice

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34 The definition of the word "resolution" as found in dictionaries from the late 1700s tend not to support the claim that the word was exclusively used in connection with legislative business. *See* JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775), *available at* https://babel.hathitrust.org/cgi/pt?id=nyp.33433081968483;view=1up;seq=15, *archived at* https://perma.cc/LVM7-BDE9. However, in Thomas Jefferson's *A Manuel of Parliamentary Practice For the Use of the Senate of the United States* (1801), the word "resolution" is used exclusively in reference to legislative proceedings. THOMAS JEFFERSON, A MANUEL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 36 (1801).

35 S. JOURNAL, 22nd Cong., 1st Sess. 293 (1823).

36 S. EXECUTIVE JOURNAL, 22nd Cong., 1st Sess. 249 (1823).

37 *See supra* note 9 and accompanying text.

38 U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly behavior, and, with the Concurrence of two thirds, expel a Member.").

39 *See* Learned, *supra* note 3, at 575 (quoting Senator Augustus Octavius Bacon of Georgia).

40 *Id*.

presidential participation is always proper in legislative and procedural matters. In executive business, and business that is neither executive, legislative, nor procedural, there is no consensus on the propriety of the vice president casting a tie-breaking vote.

II. LEGISLATIVE VOTES AND CONFIRMATION VOTES

The legislative and executive functions of the Senate differ in many important ways. The most relevant distinction is the permanence and irreversible nature of presidential nominations, especially with respect to Article III judges.[41] While the independence of the federal judiciary is a key concern, the other distinctions are worth highlighting.

A. *Legislation in the Senate*

In its legislative function, the Senate may vote to pass a bill that is small and relatively inconsequential, or massively significant and contentious. When the Senate is evenly divided on a legislative vote, the vice president may properly break the tie to ensure a definite resolution.[42] In such cases, assuming the president signs the bill into law, it will become the law of the United States. However, such a law can be changed by many means. Laws can be amended, sometimes radically changing how they function.[43] Laws, and even constitutional amendments, can also be completely repealed.[44] Finally, the Supreme Court can declare a law or part of a law unconstitutional, as the Court has done on many occasions.[45]

The legislative process is final, until it is not. Myriad constitutional mechanisms exist for laws to be changed, and while many laws are permanent and sacrosanct for all intents and purposes, the fact is that those laws could very well cease to exist. Our democratic system ensures that our government is responsive to the will of the people. It would be quite a juxtaposition to have certain laws that could not be amended or

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41 U.S. CONST. art. III, § 1, cl. 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

42 *See* THE FEDERALIST No. 68, *supra* note 32.

43 For example, in December 2017, Congress repealed the individual mandate provision of the 2009 Affordable Care Act. *See* Robert Pear, *Individual Mandate Now Gone, G.O.P Targets the One for Employers*, N.Y. TIMES (Jan. 14, 2018), https://www.nytimes.com/2018/01/14/us/politics/employer-mandate.html, *archived at* https://perma.cc/8DXA-GLZK.

44 U.S. CONST. amend. XXI (repealing U.S. CONST. amend. XVIII).

45 *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding a portion of the Brady Act, which imposes affirmative duties upon states, unconstitutional); New York v. United States, 505 U.S. 144, 176 (1992) (holding the take-title provision of the Low-Level Radioactive Waste Policy unconstitutional).

repealed through the democratic process.

This all demonstrates how legislative enactments, even those that have become functionally permanent, lack the permanence of other Senate actions. If the vice president takes part in a legislative or procedural vote, that is circumstantial evidence that, at the very least, the vote is somewhat controversial. The controversial nature indicates that at some time in the future, in one way or another, there is a distinct possibility that the legislation the vice president voted on will change in character or be repealed when the political winds shift.[46] Thus, when a vice president casts the tie-breaking vote on a legislative matter, the effect of that vote is less permanent than when the vice president casts a tie-breaking vote to confirm presidential nominations.

B. *Non-Judicial Confirmation Votes*

There is nothing, at least in this day and age, less controversial about important pieces of legislation than there is about presidential nominations. But there is an important distinction: the Senate cannot alter a presidential nomination after it has fulfilled its constitutional advise and consent role. With respect to appointments to the Executive Branch, the Senate cannot (and should not be able to) remove executive officers after confirming them.[47] Only the president can do so.[48]

Perhaps for this reason, and the Framers' concern about the vice president casting the decisive vote on an executive nomination, there are only three historic examples of the vice president casting such votes. In 1925, Vice President Charles G. Dawes almost cast the tie-breaking vote to confirm President Calvin Coolidge's nominee for attorney general. There was no objection to the idea that he may be needed to participate in the vote, but as fate would have it, Dawes was napping at the nearby Willard Hotel, and in the time it took for Dawes to make his way to the Capitol, one Democratic senator switched his vote and the nomination was rejected.[49] As noted, Vice President Calhoun also defeated the nomination of Van Buren to be the Minister to Great Britain. And finally,

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46 *See supra* note 43.

47 While one may conjure up a hypothetical in which a majority in the Senate "goes rogue" and begins impeaching justices of the Supreme Court, that possibility is too far-flung to merit serious discussion in this article.

48 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) ("[T]he power of the President alone to make the removal is confined to purely executive officers . . . ."). *See also* Morrison v. Olson, 487 U.S. 654 (1988) (recognizing that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment) (citing Bowsher v. Synar, 478 U.S. 714 (1986)).

49 MARK O. HATFIELD, WITH THE SENATE HISTORICAL OFFICE, VICE PRESIDENTS OF THE UNITED STATES, 1789–1993 359–68 (Wash.: U.S. Gov't Printing Off. 1997), https://www.senate.gov/artandhistory/history/resources/pdf/charles_dawes.pdf, *archived at* https://perma.cc/9DCP-L547.

Vice President George Clinton voted to confirm John Armstrong as the Minister to Spain in 1806.[50]

This scant, largely distant history of the vice president casting tie-breaking votes on presidential nominees for executive offices indicates that vice presidents may have perceived a prudential limit on their power to cast such votes, but it is by no means conclusive.

C. *Judicial Confirmations in the Senate*

The concerns over vice presidents casting votes on nominations to the executive branch are magnified with respect to votes on nominations to the judicial branch. Unlike ambassadors, cabinet secretaries, agency heads, and other high-level executive nominees, Article III judges exercise purely judicial power, and cannot be removed by the president.[51] They can be impeached, but impeachment is justified only in rare circumstances.[52]

Most of the executive positions that require presidential nominations[53] last only until the next lost election, so the political process still provides a check on these appointments. While these appointments may be permanent for the entirety of a presidential administration,[54] they do not enjoy the job security of Article III judges.

In contrast, the independence of judges is the cornerstone of our judicial system. In Federalist No. 78, Hamilton wrote extensively on the importance of, and justification for, having judges who could not be removed from office except in instances of, presumably, bad behavior. Independent judges, Hamilton wrote, are "[an] excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."[55]

When designing a judicial system, it must be placed somewhere on a spectrum between complete independence and strict accountability.[56] Too far to the accountability side, and the judges will look like representatives imbued with judicial authority. Too far to the independence side and judges can make decisions wildly out of touch with society's beliefs. The Framers of the Constitution erred on the side

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50 S. EXECUTIVE JOURNAL, 9th Cong., 1st Sess. 29 (1806).

51 *See supra* note 48.

52 *See infra* note 60.

53 Occasionally, presidents do decide to keep officials who were appointed by their predecessor. *See, e.g.*, *Obama Keeps Several Bush Picks in Top Jobs*, C.B.S. NEWS (Aug. 31, 2009) https://www.cbsnews.com/news/obama-keeps-several-bush-picks-in-top-jobs, *archived at* https://perma.cc/5ZEY-T2RQ.

54 As long as the president does not fire them.

55 THE FEDERALIST No. 78 (Alexander Hamilton) (Isaac Kramnick ed., Penguin Books 1987).

56 *See generally* Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153 (2003).

of independence and qualified judicial tenure only on "Good Behaviour."[57] This ensures that only the most egregious violations of judicial power and abuses of office are punished by removal.[58] Impeachment has historically been limited to ethical violations and criminal conduct.[59] Those exercises of judicial power that are questionable and disfavored are permitted to stand because the institutional interests in independence outweigh many individual imprudent acts of judges.[60] To impeach and remove an Article III judge on scant evidence of bad behavior would be a serious violation of the separation of powers.

For good reason, neither the people nor the president can remove Article III judges from office. The Framers gave the Senate an advice and consent role in the nomination of Article III judges, and the Seventeenth Amendment[61] enabled the people, rather than the state legislators, to elect their Senators. It follows that the advice and consent role gives the people, through their elected Senators, a voice in the nomination of federal judges and other presidential nominees.

If the Vice President were to cast the tie-breaking vote to confirm a Supreme Court Justice, or even a controversial district court judge, that decision would—barring unforeseeable circumstances—be final. Statistically, that judge would likely serve until their death.[62] Since all Article III judges now need only a simple majority to be confirmed,[63] the need for the vice president's vote would signify that less than a majority of the country, speaking through its Senators, wish to confer upon the nominated individual the functionally uncheckable power of the federal judiciary.[64]

Unlike legislation, the act of confirming a judicial nominee in the Senate cannot and indeed should not be altered.[65] This permanence requires that nominees for federal judgeships must gain, at the very least,

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57 *See supra* note 41.

58 Since 1803, only fifteen federal judges have been impeached by the House of Representatives, and only eight were removed in the Senate. *See Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges (last visited Sept. 9, 2018), *archived at* https://perma.cc/2U8R-STCL. By an overwhelming percentage, death is the primary reason that seats on the federal bench become vacant. *See Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges (last visited Sept. 9, 2018), *archived at* https://perma.cc/LP4Z-AM7C.

59 *See* Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUSTICE (Mar. 23, 2018), https://www.brennancenter.org/blog/impeachment-and-removal-judges-explainer, *archived at* https://perma.cc/7X7C-AVTH.

60 In his 1992 book-length study of two precedent-setting impeachment cases, the late Chief Justice William Rehnquist found that the early uses of impeachment power established the norm that judicial acts would not be a basis for impeachment. *Id.*

61 U.S. CONST. amend. XVII.

62 *See supra* note 58 and accompanying text.

63 *See supra* notes 21–23 and accompanying text.

64 However, this could also be true if fifty-one Senate votes came from Senators representing the smallest states.

65 *See* THE FEDERALIST No. 78 (Alexander Hamilton).

the support of a majority of Senators, to give effect to the purpose of the Seventeenth Amendment.[66] Ideally, federal judges should need a two-thirds majority to be confirmed in the Senate, but reality dictates a lower threshold. If the vice president were to be the deciding vote for the confirmation of an Article III judge, that judge would lack the legitimacy that the judicial system requires as an institution. The questions of legitimacy increases in importance for federal appellate judges, especially the justices of the Supreme Court.[67]

When the Senate fulfills its advice and consent role, and the result for all functional purposes is permanent, irrevocable, and of great consequence for the entire country, the vice president should not exercise the Article I authority to break a tie vote. Allowing the vice president to break a tie serves the interest of a definite resolution,[68] but if the Senate deadlocks, that judicial nomination would fail and that would also be a definite resolution without the need for the vice president to vote. Based on prudential concerns, evidence that vice-presidential participation in specific, non-resolution matters was not envisioned by the Framers of the Constitution, and in the interest of maintaining the legitimacy of the judicial system, doubts about a judicial nominee should be resolved against the conferral of uncheckable judicial authority.

III. INTER-BRANCH CONFLICTS

A. *The President's Agent*

Under the electoral system created by the Framers, the vice presidency was to be filled by the individual who received the second most votes in the Electoral College.[69] Under that system, rather than act as an agent of the president, the vice president acted as the President's direct opposition, creating a microcosm of the country's political divisions in the White House, for better or worse.

The election of 1800 revealed problems with such a system when both Aaron Burr and Thomas Jefferson received the same number of

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66 This is not to say that all close votes for judicial nominees present legitimacy issues. For example, although Justice Clarence Thomas was confirmed with only fifty-two votes, he had the support of a majority of the Senators. While a two-thirds supermajority would better insulate the judiciary from partisan attacks, there is no principled reason to attack the legitimacy of a particular judge or Justice because of a close vote *unless the vice president breaks the tie*.

67 The vast majority of cases end at the Courts of Appeals. For example, of the roughly 8,000 cases in which petitions for certiorari were filed in 2017, the Supreme Court decided only seventy-two cases. The cases the Supreme Court does take up are often the difficult issues that have divided the federal courts, and those cases that resolve certain issues of national importance. *See, e.g.*, Adam Feldman, *Cert Analytics*, EMPIRICAL SCOTUS (Jan. 10, 2017), https://empiricalscotus.com/2017/01/10/cert-analytics, *archived at* https://perma.cc/H6TG-8S9Y.

68 *See* THE FEDERALIST No. 68, *supra* note 32.

69 U.S. CONST. art. II, § 1, cl. 3.

votes.[70] Four years later, Congress adopted the Twelfth Amendment,[71] which created the system we have today where the president and vice president run on the same ticket.

Over 150 years later, the Twenty-Fifth Amendment formally provided that the vice president would assume the presidency if the president was unable to discharge the duties of the office.[72] However, neither the Twelfth nor the Twenty-Fifth Amendments changed the text of the Constitution regarding the vice president's role as President of the Senate or his tie-breaking authority. Although the vice presidency evolved through both Amendments, there is no formal indication that either Amendment altered the vice president's constitutional powers.

Historically, the vice presidency has been mocked for its lack of importance. It has been referred to as "simply standby equipment," [73] it has been passed up on more than one occasion,[74] and vice presidents have taken on executive tasks that "were not deemed worthy of the president's calendar"[75] but still required an executive presence.

But this attitude toward the vice presidency has largely changed in the modern era. Vice presidents today represent the interests of the president for whom they serve by giving speeches, campaigning, attending ceremonies, and visiting foreign countries.[76] Their relationships, know-how, and experiences are at the president's disposal, and oftentimes vice presidents are chosen to address a presidential candidate's specific electoral weaknesses.[77] For all practical matters, the contemporary vice presidency is an extension of the presidency, and the modern vice president acts primarily as an agent of the president.

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70 John Ferling, *Thomas Jefferson, Aaron Burr and the Election of 1800*, SMITHSONIAN MAG. (Nov. 1, 2004), https://www.smithsonianmag.com/history/thomas-jefferson-aaron-burr-and-the-election-of-1800-131082359, *archived at* https://perma.cc/C5NV-STJY.

71 U.S. CONST. amend. XII.

72 U.S. CONST. amend. XXV.

73 Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRESIDENTIAL STUD. Q. 374, 374 (2008) (internal quotation marks omitted).

74 *See id*. (quoting Daniel Webster's and John Nance Garner's respective denigrations of the office).

75 *Id*. at 376. *See also* George C. Edwards III & Lawrence R. Jacobs, *The New Vice Presidency: Institutions and Politics*, 38 PRESIDENTIAL STUD. Q. 369, 370 (2008) ("For nearly 200 years, the vice president languished in obscurity, derision, and irrelevance.").

76 *See generally* Edwards & Jacobs, *supra* note 75.

77 *Id*. at 379; *see also* Nora Kelly, *Choosing the Veep of Your Dreams*, ATLANTIC (Apr. 23, 2016), https://www.theatlantic.com/politics/archive/2016/04/vice-president-clinton-trump/479553, *archived at* https://perma.cc/X58A-NN3X ("How can they—their background, their reputation—help or hinder a campaign? Joe Biden in 2008 helped alleviate worries about President Obama's foreign policy credentials . . . Bill Clinton's decision to choose Al Gore was a 'generational message.' Even John McCain's oft-criticized selection of Sarah Palin painted a potentially helpful picture: She had a reputation in Alaska for being a reformer . . . .").

B. *The Separation of Powers Problem*

The office of the vice presidency is provided for in Article II of the Constitution,[78] which makes the office part of the Executive Branch. Indeed, he or she is but a heartbeat away from the Presidency itself.[79] There has, however, been some debate over whether the vice presidency is indeed a position in the Executive Branch, or whether the role is primarily legislative since the only constitutional power granted to the vice president is found in Article I.[80]

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. Vice presidents do not participate in the debate, or the study of the issue at hand, they merely weigh the issue on its face and casts the deciding vote. This ensures for the "definite resolution of the body" that Hamilton imagined in Federalist No. 68.[81]

In the case of presidential nominations, the vice president, as an executive branch official, may play a role in the choice of who to nominate to fill vacancies in the federal judiciary. This is also true for the nomination of cabinet members and other political appointees.[82]

This dual role that the vice president may play distorts the separation of powers between the branches of government. If, for example, the president outsourced the selection of a judicial nominee to the vice president, then the vice president broke a tie to confirm that nominee, it would be a mockery of the advice and consent process. Yet there are no procedural mechanisms to stop this from happening, only prudential limitations.

Some executive business is so important, and of such great consequence, that the Framers created a check on the executive power by

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78 U.S. CONST. art. II, § 1, cl. 1.

79 WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 311 (2008).

80 In 2007, Vice President Richard Cheney contended that his office is not obligated to submit to oversight, unlike other members and parts of the Executive Branch are, because his office is not an entity within the Executive Branch. *See* PETER BAKER, *White House Defends Cheney's Refusal of Oversight,* WASH. POST (June 23, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/22/AR2007062201809.html, *archived at* https://perma.cc/7ZHY-GMD6. This argument was ridiculed by administration critics because, for the proceeding seven years, the White House had acknowledged the Executive Branch status of the vice president. *See* Satyam Khanna, *Overwhelming Proof that Cheney Is in the Executive Branch*, THINK PROGRESS (June 29, 2007), https://thinkprogress.org/overwhelming-proof-that-cheney-is-in-the-executive-branch-57aa6f177ca9, *archived at* https://perma.cc/LXU7-7V7H.

81 *See supra* note 32.

82 Vice President Pence handled the transition effort for the Trump Administration after Chris Christie was pushed aside. *See* Michael D. Shear, Maggie Haberman & Michael S. Schmidt, *Vice President-Elect Pence to Take Over Trump Transition Effort*, N.Y. TIMES (Nov. 11, 2016), https://www.nytimes.com/2016/11/12/us/politics/trump-cabinet.html, *available at* https://perma.cc/55P3-XAZ4. "The reorganization puts the urgent task of selecting cabinet officials and key West Wing posts in the hands of Mr. Pence . . . ." *Id*.

giving the Senate an advisory role in the nomination of some positions.[83] If a nomination is unable to garner the support of a majority of Senators, that is a signal that the Senate does not consent to the nominee. The vice president should not tip the scales in such an event and circumvent the important check the Framers placed on executive power.

CONCLUSION

Allowing the vice president to cast a tie-breaking vote in order to confirm a judicial nominee would not run afoul of the Constitution *per se* but would violate underlying values. It would infringe on the separation of powers, the notion of advice and consent, and the idea of majority rule. For judicial nominations, where the president must seek the advice and consent of the Senate, there is reason to believe that the vice president's Article I authority ought not be invoked when a majority of the Senate does not consent to the nominee.

We should not embrace with open arms all that our Constitution does not explicitly prohibit as it pertains to governmental authority. To respect the Constitution is not to just respect its letter, but to respect the values that it embodies. Our Constitution does not prohibit journalists from being investigated by the government, but the values of the First Amendment clearly counsel against such action. Nor does our Constitution explicitly prohibit the President using the Department of Justice to target political opponents for prosecution under the guise of law enforcement, but our understanding of our system of government strongly mitigates against such action.

The vice president's Article I authority to break ties in the Senate should be limited to the Senate's legislative business and should not extend to the Senate's executive business as it concerns federal judicial nominees, and especially nominees to the Supreme Court. The crown jewel of our constitutional system—our independent judiciary—requires utmost legitimacy. To allow a nominee to ascend to the federal bench in the face of such opposition in the Senate would rob our judiciary of that requisite legitimacy.

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83 *See*, *e.g.*, Russell L. Weaver, "*Advice and Consent" in Historical Perspective*, 64 DUKE L. J. 1717, 1721–22 (2015).