

April 18, 1961

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4 MEMORANDUM FOR THE VICE PRESIDENT

4 Re: Constitutionality of the Vice President's service as chairman of the National Aeronautics and Space Council.

H.R. 6169, 87th Congress, introduced at the request of the President, would amend section 201 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2471) to remove the President and certain other persons from membership on the National Aeronautics and Space Council and make the Vice President a member and chairman. The function of the reconstituted Council, as stated in the bill, would be "to advise and assist the President, as he may request, with respect to the performance of functions in the aeronautics and space field."

The question has arisen whether there is any Constitutional bar to the proposed service of the Vice President on the Council.

Although the Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of the Government (Art. I, sec. 3), it neither grants nor forbids his functions in the conduct of affairs of the Executive Branch. The courts have never had occasion to consider the extent to which he may properly take part in those affairs. It is necessary therefore to look mainly to historical precedents for guidance.

The role of the Vice President in the Executive Branch has varied greatly through the years and in any given Administration has been determined largely by the President. In general, however, the role was not a significant one until 1933, when Roosevelt and Garner took office. Until then, for example, only three Vice Presidents had ever sat with the Cabinet: Adams on one occasion in 1791 during Washington's

absence, Marshall on a few occasions while Wilson attended the Paris Peace Conference and Coolidge regularly, at Harding's invitation. Beginning with Garner, participation by the Vice President in the deliberations of the Cabinet became a matter of course. Garner was also consulted by the President on foreign policy matters and in 1936 became the first Vice President in office to travel beyond the country's borders on an official mission. Since then it has become commonplace for the Vice President to undertake assignments abroad ranging from good will trips to missions as a diplomatic agent of the President.

The Office of Vice President experienced perhaps its greatest growth as a consequence of World War II. By order of President Roosevelt, Wallace served as chairman of the powerful Board of Economic Warfare and for a period of two years was the superior of a number of department and agency heads in connection with a variety of economic defense activities in the international field. He also served pursuant to a Presidential executive order as chairman of the Supply Priorities and Allocations Board until it was replaced by the War Production Board shortly after Pearl Harbor. And together with the Secretary of War, the Chief of Staff and others, he was named by Roosevelt in October 1941 to a Presidential advisory committee which participated in the making of the major policy decisions on the development and use of atomic energy.

More recently, Vice President Nixon acted from 1953 to 1961 as chairman of the President's Committee on Government Contracts and of course the Vice President is now chairman of the successor President's Committee on Equal Employment Opportunity.

In addition to his Presidential assignments, the Vice President presently has two functions prescribed by statute. One, which dates back more than a century but is of little interest here, consists of membership in the Smithsonian Institution and on its Board of Regents (20 U.S.C. §§ 41, 42). The other, instituted in 1949, is membership on the National Security Council (50 U.S.C. § 402(a)).

Since the Vice President is not prevented by the Constitution or, it might be added, by any general statute, from acting as the President's delegate, the range of duties he may undertake at the instance of the President would seem to be co-extensive with the latter's power of delegation. But in considering

Congressional, as distinguished from Presidential, bestowals of functions it is necessary to advert to a limiting provision of the Constitution (Article II, section 1) which declares flatly that "the executive power shall be vested in a President of the United States." Legislation which might threaten the unity of the Executive by attempting to place power in the Vice President to be wielded independently of the President would undoubtedly run afoul of this provision. As for H.R. 6169 specifically, however, it would not contravene the provision since it would mark the duties of the National Aeronautics and Space Council, and thus of its chairman, as purely advisory. Furthermore, the bill is supported, as a matter of historical precedent, by the more than a decade of Vice Presidential service on the advisory National Security Council.

The doctrine of separation of powers needs to be mentioned by reason of the Vice President's designation by the Constitution as the presiding officer of the Senate. At first glance it might seem that any close affiliation with the Executive Branch would be inconsistent with this function. However, except for a very few years during the incumbency of the first Vice President, the chair of the Senate has had a relatively unimportant part in its proceedings. Thus, active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter he would be in a position to diminish the powers of the Legislature.

Aside from practicalities, it does not appear that doctrinal considerations block the Vice President's performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members. <sup>1/</sup> Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress.

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1/ Art. I, sec. 6, cl. 2 of the Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Since the Vice President holds "an Office under the United States," it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate. Moreover, clauses 1 and 2 of Art. I, sec. 5, which provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them, plainly do not apply to the Vice President.

His office was created by Article II of the Constitution dealing with the Executive Branch, and section 4 of that Article makes him, just as the President, subject to impeachment by the Legislative Branch. Since the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.

Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter. Whatever the semantic problems, however, they would not seem to be especially relevant to the question whether Congress may designate the Vice President to undertake Executive responsibilities. As Mr. Justice Holmes once noted in a similar context, "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." <sup>2/</sup> If a judicial test of the employment of the Vice President in the affairs of the Executive were ever to occur, there is little reason to think that it would be decided purely on the basis of abstractions. To the contrary, the comparative silence of the Constitution in regard to the Office of the Vice President virtually guarantees that the decision would be based primarily on considerations of practice and precedent and that theoretical arguments drawn from the doctrine of separation of powers would gain little attention.

Consistent with the foregoing, I am of the opinion that service of the Vice President as chairman of the National Aeronautics and Space Council under the provisions of H.R. 6169 would not violate the Constitution.

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Office of Legal Counsel

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2/ Springer v. Philippine Islands, 277 U.S. 189, 209 (1928),  
dissenting opinion.