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The Vice President—More than an Afterthought?

Richard B. Cheney, Edwin Meese III, & Douglas W. Kmiec*

Abstract

A roundtable discussion among Caruso Family Professor of Law and retired U.S. Ambassador Douglas Kmiec, former U.S. Vice President Richard B. Cheney, and former U.S. Attorney General Edwin Meese III considered the practical implications of conceiving the Vice President as a legislative officer, an executive officer, or both. It was noted that until the second half of the twentieth century, the Office of the Vice President was conceived as legislative. Funding for the Office appeared in budget lines relating to Congress and physically, the Vice President's office was in the Capitol. Beginning with Walter Mondale's service as Vice President, presidents have been delegating increasing executive authority, seeing the Vice President as a "deputy president." Perhaps the most aggressive and influential of the modern "deputy presidents" was Vice President Cheney himself. Attorney General Meese concurred and saw this as positive. Ambassador Kmiec was less approving, encouraging Vice President Cheney and Attorney General Meese to contemplate the benefits that a dual-natured legislative-executive Vice President supplies to maintaining a workable government. The capacity of the Vice President to assert independence, as late Justice Scalia explained in an Office of Legal Counsel opinion, is unique. Unlike members of the Cabinet, the Vice President is not removable by the President, and thus, the Vice President can use his dual nature to advance executive-legislative compromise. Vice President Cheney's reliance upon his significant, but personal, legislative experience prior to his vice presidency to facilitate executive-legislative bargaining suggests

* This dialogue took place on April 1, 2016 at Pepperdine University School of Law. Edited for clarity, the dialogue is not intended as a verbatim transcript.

qualities that presidential nominees might consider more directly in vice presidential selection, and not just geographic complementarity and ideological compatibility. While it has been commonplace to think of the vice presidential office as “an afterthought” borrowed from state charters at the time of the founding, this dialogue suggests how a vice president with a foot in each of the Legislative and Executive Branches can assist in overcoming dysfunctional periods when partisan division is great.

Douglas Kmiec: Mr. Vice-President, General Meese, thank you for being here. Let’s get right to it. We have heard a presentation from Dr. Larson that suggests that [the role of the Vice President at the founding] was not thought of highly—that the Vice President was a political expedient or perhaps a prize given away to earn some political credit for the President. [Basically, that it was a last minute “afterthought” of the founders.] . . . What do you make of that history? . . . Do you agree?

Dick Cheney: I thought Dr. Larson was eloquent and [his appraisal matches what my wife has written in her] book on James Madison and part of that obviously covers his role in drafting the Constitution, and the impression that Dr. Larson presented today is in tune, if you will, with my wife’s interpretation of that. . . . I think it was an afterthought. . . . [Some] of the delegates refused to sign the Constitution because of the flaws that they saw and issues that hadn’t been addressed with respect to the creation of the vice presidency. I think it was a band aid, an effort to deal with the short-term problem; and the rationale behind it, at the time, was pretty much uninformed.

Kmiec: Now, [some of what you call “short-term problems” related to presidential and vice presidential selection matters] is tied up with . . . the Electoral College . . . and the changes [made by the Twelfth Amendment. As for presidential authority,] one discovers [the early] supposition from our revered first President, that in his view, [executive matters

were to be handled] in a nonpartisan way; [see, for example,] his farewell address. . . . Washington warned us very strenuously about the baneful effects of party [politics]. [Modernly, we tend not to understand this because Congress has difficulty getting anything accomplished even with party discipline, and we assume even less would take place without parties.] And when [we reflect on] Washington's conception of his role in the presidency, it is much different than the role that we associate with the President now. Washington saw the Executive not as policy source, but as administrative only. [What Mr. Vice-President do you think that meant for the vice presidency]?

Cheney: Well, one of the things I remember, and I think I have got it correct. There was a little bit of confusion (if you will) between what the Executive role was going to be—it was clearly in the developmental stages. You look at Washington's first address to the Congress, his first message to the Congress. He had [Congressman] Madison draft that message. [Washington then submitted to Congress the letter Madison drafted. To keep this circle going, Madison drafted a reply to his own letter as] the Congressional response to the Executive's message [Washington then had Madison draft Washington's response to the Congress.] The confusion about who was writing . . . was certainly blurred at that point. [This cannot be contemplated today]; imagine today if the President of the United States called on a Congressional leader to write his State of the Union [Address]. They were making it up as they were going along.

Edwin Meese: Wasn't the political climate at that time though, such a reaction to George III—and the idea of a strong executive was one of the great concerns they had, in terms of having too much power in the presidency. [That] was kind of the backdrop to a lot of the thinking of many of the people at the Constitutional Convention. And of course, up until that

time, there had been no executives. They had Congress [making all national policy decisions], going all the way back to 1776 or so, or even before that time. But the idea of an executive in this country having a lot of power was something that bothered a lot of the participants.

Kmiec: [Absolutely] right, Mr. Attorney General. State executives were disliked because [they were] appointees of the Crown. [After the] Declaration of Independence, it [was] different of course because . . . some portion of the population—Freeholders and so forth—selected the governor. But you are quite right that there was this profound concern with avoiding the abuse of power.

[Hamilton tried to calm the fear by writing that the executive being created was one of limited power modeled on the governor of New York; yet Hamilton also wrote of an executive having “energy and dispatch” since governments also fail from neglect where power is unused or where, because of division and disunity, matters of genuine importance go unresolved.]

. . . .

[Thus, one of the] things that I think commends inquiry into the vice presidency is that it is the sole office that unites the power [of both political branches; by textual design, the office unites] present legislative duty with prospective executive substitution. From this perspective, the vice presidency was not an afterthought but rather a founding era response to the [need for executive–legislative balance anticipating Robert Jackson’s] much later admonition in the *Youngstown* case to the effect that: “The powers are meant not just to be divided and separated, but they are also meant to be integrated to form a working government”¹

1. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–36 (1952) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches

Cheney: The way I look at it, based on my own experience, I was reputed by some to have an especially powerful position as Vice President relative to the one—

Kmiec: [Most assuredly, President Bush said, as I recall,] “When you hear Dick Cheney’s voice, you hear mine.” . . .

Cheney: That was a big part of it.

Kmiec: That was an endorsement.

Cheney: I often think about why it worked the way it did on my watch, and I think about a lot of reasons but none of them really relate to the Constitution, [but rather]—

Kmiec: A personal dynamic?

Cheney: Personal. It was very much personal. And I think it is my ability to work with the Congress [derived from my legislative experience that was most helpful.] I had been a member of the House for ten years; I had been part of the leadership for eight years. Shortly after I was elected Vice President, I was visited by the Speaker of the House and the Chairman of the Ways and Means Committee. The Speaker of the House was a good friend (I had helped him when he first came into the conference), Denny Hastert. Bill Thomas from California was the new Chairman of the Ways and Means Committee. And they came to me and said, “Look, Dick. We know you are going to be the President of the Senate, constitutionally, and you are going to have an office on the Senate side of the Capitol building, but we think of you as a man of the House. We want you to also have an office on the House side of the Capitol.” The Ways and Means Chairman at that point had two very

separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.”).

nice offices—one facing the West front. You could look out the windows all the way to the Lincoln Memorial and Arlington. A huge office with a big table like a cabinet table. [T]he other one he had was a smaller, more normal office, but right off the Democratic Cloakroom, off the House floor. And they gave me my choice [and said] I could have either one of those offices, even though I was President of the Senate [and had an office there as well]. [B]ecause of my background with the House and my relationships, I picked the office right off the Democratic Cloak room, partly because I knew it aggravated my Democratic colleagues. But, that is the only time that has ever happened. For six years, we controlled the House, I had an office, not only on the Senate side, and not only down in the West Wing, but also on the House side of the Capitol building and was able to work from that position to break some log jams on tax legislation and so forth and have a significant legislative impact when it was required. But that was really all based on my personal relationships and past background with both the House and the Senate.²

Kmiec: I think that is a great story, and I think it is also a very illustrative story as to the significance of the Vice President, but I want to give a little bit of credit to the framers. The so-called afterthought [situated the vice-president on Capitol hill, not in the White House]. And yes, it was Dick Cheney's personal qualities that made good use of the presidency of the Senate [and the House office space offered to you], but the two together suggest that the Vice-Presidency was conceived as more than . . . a sinecure [or a] bauble for folks looking for some political reward. Might not the framers get a little tip of the hat for your success?

Cheney: Perhaps, but I was also duck-hunting buddies with Bill

2. See DICK CHENEY, IN MY TIME 310–13 (2011) (telling the story of Vice President Cheney's role as Vice President in brokering the tax bill of 2013 between the White House, the House, and the Senate).

Frist.

[*Laughter.*]

Meese: As a matter of fact, didn't you have . . . an office [not only] in the White House in the West Wing. [but] also . . . in the [Old Executive] Office Building. [No wonder you could never be found.]

[*Laughter.*]

Cheney: Good point.

Meese: Looking at the vice presidency as it has come down through the years, as recently as Calvin Coolidge, I don't think there is much thought of the Vice President having a big role in the Executive Branch When Eisenhower came in, he was used to a military structure, and he talked about Nixon becoming kind of an executive [assistant] President, and there was discussion of whether the Vice President should have more of a role in the Executive Branch than it had up to that [point]. Is that about your recollection of how that office kind of changed at that point and has been really more involved with the Executive since that time?

Cheney: I think so, and clearly it has evolved over time. Prior to the time I got the job, one of the reasons I said "No" when it was first offered was that I had never met a vice president who was happy. There were those who had ultimately succeeded to the presidency for one reason or another, and Harry Truman and others who went on to distinguished careers because they became President. But I remember when I was first Chief of Staff, Nelson Rockefeller was Vice President. Very unhappy because he had plans for operating as Vice President the way he had operated as Governor of New York: big projects, lots of money. [But] we were in a period of time when our policy was "No New

Starts.” We were trying to save money because there was a deficit. And he eventually left and was never happy, and allegedly there was a report that he once said that the only way he would serve his role as the Vice President in the second four-year term was if he could also be White House Chief of Staff. That was the job he really aspired to in terms of getting things done . . .

Kmiec: [As it turned out, history] did not give him the chance to prove that proposition.

Cheney: No, because he lost the vice presidency. He was removed and he went on to other things.

Meese: He wasn’t even the candidate for Vice President.

Cheney: No. And I was never a candidate for Vice President until George Bush finally nominated me after he persuaded me that I should go on the ticket. But I think in recent administrations—if we go back to the Carter–Mondale relationship—I think there was a step up, if you will—in terms of the degree in which they worked closely together. Mondale played a more prominent role than was the historical model. And I think that obviously continued in my case. With respect to Joe Biden now, I don’t know enough yet about the details about how Joe functions, but clearly, in recent decades, there has been an enhancement of the power and responsibility and the influence of the Vice President.

Kmiec: In fact . . . there are stories of you meeting with Vice President Quayle where Vice President Quayle tells you, “Be prepared to take a lot of foreign trips, do a lot of ceremonial duties, and raise some money for the party or for the President,” and I think your terse response was “I have a different conception of the office.”

Cheney: “A different understanding.”

Kmiec: “A different understanding,” [but I would respectfully argue one still shy of the fullness of the executive–legislative ideal; indeed, the upgrade of the executive side of the vice presidential office might be] objected to by the fifteen words in the Constitution that say that the executive power is vested in the President of the United States. And the late Justice Scalia, who dissented more than once in a separation-of-powers case, [would opine] that meant *all* the executive power was vested in the President of the United States. . . . During your vice presidential service, did you think you were stepping outside of your constitutional role?

Cheney: Well, you know Scalia was also a duck hunter. . . .

Kmiec: Ah, the ducks again.

Cheney: Obviously, there were times I played a significant role—but the thing to remember is that is what the President wanted. The reason it worked as well as it did for the two of us, [is that George W. Bush] had spent an amazing amount of time, more than I have ever seen any other President, . . . thinking about the vice presidency. To a point that I discovered years later, after I left office, that in 1992, when I was Secretary of Defense and his dad was running for reelection, that he had gone to his dad, [George. H.W. Bush], and suggested to him that he make a change in his running mate, and that he replace Dan Quayle with me as Vice President. This is back eight years before he himself selected me as Vice President. Eight years before, he had been thinking about who ought to be Vice President in his dad’s administration. He had, I think, very carefully thought-out plan of what it was he wanted from his Vice President. I got involved when he first approached me about being Vice President, I said “No.” I was happy in the private sector, and I had no desire at all to become Vice President. Then he asked me to help him find somebody, and we worked through about a two- or three-month

process where I was running the search, vetting the various candidates and so forth. But also, what it did—I think it was deliberate on his part—was that he never took that first “No” for an answer. He thought if he could get me involved and working with him as he talked about what he was looking for, as he conveyed to me what I should be looking for in terms of a candidate, I absorbed his perception about how I wanted the office to work. And when we got all through with the search, and I had offered up everyone I could think of (I was obviously a failure as a headhunter), he turned to me and he said, “You are the solution to my problem,” and he persuaded me that I was what he needed, and that is where the ultimate agreement came from. There was never a contract or even a handshake on how it was all going to work. We just talked about it enough while I was doing the search, so I had a good understanding of what he was looking for. He obviously had decided some time before that if he had the chance to pick a vice president; I was the person he would pick.

Meese: But it is fair to say that no other vice president had had the experience that you had in both branches.

Cheney: That is true.

Meese: So there was, in fact, [some compatibility] with the idea of the Vice President, [as Professor Kmiec described the original understanding that attempted to bring executive and legislative together]. You were kind of the model, whether he mentioned that directly or not. And so it was natural that he [talked] you into the thing, so you finally became not just the model, but the candidate.

Kmiec: Although it is true, [General, that Mr. Cheney’s background resulted in a helpful] Executive and Legislative mix, [perhaps one uniquely steeped in legislative achievement coming into the vice presidency, though some

no doubt would identify Lyndon Johnson for similar legislative talent, but without the success or influence as vice president. I would argue that the personal ability to harmonize executive–legislative interests still falls short of the original understanding—that is, a vice president with not just a fortuitous mix of personal executive–legislative experience, but also an understanding that the office itself intrinsically calls for dual loyalty to both Branches.]

[And as for vice-presidential recruitment,] I will say that obviously George W. Bush was more persuasive than Zachary Taylor, who tried to get Daniel Webster to take the vice presidency. [Webster quipped]: “No sir, I will not take the Vice Presidency. I prefer to be dead before I am buried.”

Cheney: That would have been my feeling before.

Kmiec: [On this question of dual legislative–executive loyalties], you did do something that other vice presidents haven’t done, and that is to submit an undated letter of resignation. [T]hat is an interesting thing to do because one of the things you were astutely recognizing was that in order for the President to be serene in his understanding that he had control, in a unitary executive sense, of the Executive Branch, he needs the ability to dismiss someone if necessary. And of course, vice presidents cannot be dismissed unless impeached. . . . Did you have occasion to disagree with the President from time to time?

Cheney: Sure, we had our differences.

Kmiec: Can you give us an example or two?

Cheney: In terms of disagreements, there were occasions where we had differences of view. Part of the process we had were weekly lunches, and that was a time that was always strictly just one-on-one with the President and me, and we

would talk about anything, and we would express our disagreements. A lot of those were and still remain private. It was important to have that ability to [keep them] private. There were other occasions where we disagreed. I am trying to think. Well, for example, when we got into a debate. We had discovered in the Spring of '07, I had been visited by [Israeli representatives who came into my office] and started throwing photographs down on the table; [they] were pictures that had been taken inside a nuclear reactor that had been built out . . . in the Eastern Syrian desert by the North Koreans. That was quite a surprise. The North Koreans had, some months before, tested their first nuclear device, and all of a sudden we find several months later that not only had they been working with a nuclear device, but they built a complete nuclear reactor with the Syrians. It hadn't been fueled yet, but it was a major concern in terms of proliferation. The place where it was located was a part now controlled by ISIS and the prospects there were pretty disturbing. What ultimately happened was that the Israelis went in and took it out. Exactly the right thing [and what] the Israelis needed to do. The difference of opinion was [that] I wanted us to take it out. [I argued] that it was very important that the U.S. managed to back up what it said repeatedly, which was that we were opposed to the proliferation of nuclear weapons . . . , and we had taken such a strong position that it was important that we back it up. [As it turns out,] I was the only one in the administration who held that view. The President [arranged for] a meeting upstairs in the residence, basically the National Security Council. He allowed me to make my pitch (we had had a private conversation before). He encouraged me to lay out the rationale for why the United States ought to be the one to take the action in destroying the North Korean-built reactor, and then he asked for a show of hands—how many of the members of the National Security Council agreed with that? [N]obody. Nobody agreed with me. I still think it is the right thing that should have been done. I think it would have given real meaning

and substance to our strong statements about avoiding nuclear proliferation. The discovery of that reactor and the Israeli action in taking it out sent a very strong signal in the area. I still would argue that I had the better policy option. He was the President, and obviously, he did what he wanted to do.

Kmiec: And you made that argument entirely internally? You did not go outside with it?

Cheney: Internally. I did not go public with it. Although . . . it got out eventually that we differed, but it was not disclosed for the time being, and we did not talk about it for several months before we even acknowledged that there had been a nuclear reactor in Syria.

Kmiec: Now, we heard the history of the Electoral College and the way it changed from [the casting of] two undifferentiated votes to [the casting of] two votes: one vote for the President and one for the Vice President. The original method was said to attract men of equal stature so that the person who received the second number of votes [for President] became Vice President. . . . When the system changed so that [the President and Vice President] ran on separate ballots, then [that] created a second tier [perhaps without the ability or commitment for the presidency should they come to serve]. In fact, Professor Larson got a laugh or two when he said it was the perfect retirement spot [allowing Jefferson time to garden in solitude]. Your example now illustrates that you had enough substance and personal gumption to take on the President of the United States, even when you were the only voice in the context of the Cabinet. How does a presidential candidate find that quality? . . . What other qualities in selecting a Vice President would you hold out to us?

Cheney: I think, and I have argued before, [that] lots of times that presidents picking their running mates might have to deal

with gender, or race, or geography. I think there is only one criterion that matters more than all the others put together. And that is the capacity of the individual to be President of the United States, and to take over if needed. I think if we look back at history we will find that there have been a number of selections made over the years where clearly the vice presidential designate does not meet that requirement. There are a lot of pressures that come to bear. Basically, I ran two searches for vice presidents. I did it once for Gerry Ford after Rockefeller stepped down in '76. We then had to have a replacement for the Convention, for the summer. And I ran that search based on guidance from Gerry Ford and then again for President George W. Bush several years later.

Kmiec: And the qualities to step in at any given moment? Is it breadth of experience? Is it adherence to cardinal virtues?

Cheney: I think that has a lot to do with it. Obviously, a certain degree of compatibility between the President and the Vice President is one of the things. Another thing that was important in terms of my role [and] my ability to operate was, I had taken myself out of contention with the presidency. It was very clear that I was not using the vice presidency as a stepping stone to become a candidate myself, because back in '93, after I left the Defense Department, I seriously considered running for President. I set up a PAC, did [a significant number of speaking events in] campaigns in that election cycle, but I concluded after it was all over with, that I would not run for President. Part of that was health related. By the time that I had gotten to that point, I had had three heart attacks, [and] quadruple coronary bypass. I was fearful that if I got into a campaign, which was a long shot anyway, and I lost, that it would be tied in with my heart, and that I would immediately be labeled as the guy who lost because he had a bad heart and that would put a real crimp on future prospects with respect to business and anything else I might want to do. And so I

decided not to be a candidate. And I never changed in that. One of the reasons that I think George Bush was comfortable with me and gave me as much latitude as he did, was because he knew that I wasn't worried about what my standing was going to be in the Iowa caucuses, in any sense, because I wasn't going to be running. I had already taken myself out of the game. And I think that was a very important part of building the degree of trust you had to have, not only with the President, but with the staff, and also with the folks on Capitol Hill who knew that what I said was something that I really believed. Or in speaking to the President, it wasn't because I was trying to influence the outcome of the Iowa caucuses in that sense.

Kmiec: I just want to remind the [other] panelists that if they have questions they are welcome to interject [at any time, and the same for the audience], I see cards [being collected—please ask away], because I have an inexhaustible supply of questions in my head. [There are] two that I want to go to before turning to the [audience's questions]. One is for you, Mr. Attorney General. We have this anomalous officer, [the Vice President whose constitutional loyalties go in two directions. Typically, executive privilege cannot be maintained as against the Legislative Branch when materials have already been disclosed beyond the Executive Office]. How do we handle this difficulty when, right in the middle of [the cabinet and other executive meetings], is this person who's formally not part of the Executive Branch in an active sense, but only in a waiting sense, and [based on the first 150 years of our history was accommodated more in the nature of a legislative officer]? Is there not a serious constitutional fly in the ointment in that one?

Meese: People could conjure up one but I think the idea of the separation of powers as being two or three walled separations, two separations alone, is a wrong concept. The separation is the idea that power would be dispersed among

their bodies, but not that two of those bodies couldn't require further limitation on power by requiring two of them to agree in order to have something done by the government. In other words, the whole concept behind the Founders was to limit power. They found the key to having executive ability to do things, but at the same time not lose the liberty of the people and not have oppression, so they found the key was limiting power. And so when they limited power among three branches and then further limited even each branch to operate individually on some things, such as requiring two branches to cooperate or as here, really, allowing the President to determine what executive powers, if any, the Vice President had. And that is why they said in Article II: all power, all executive power in the President. They didn't say the President and the Vice President. So what the Vice President here has been saying is that his power as Vice President and in its executive nature depended upon what the President delegated to him. And so I don't think the thoughts of the Founders were exactly in line with what they intended to do—and that was to limit power.

Kmiec: [So, if the vice presidents considered themselves to be legislative in nature for a century and a half, then] then branches are not hermetically sealed?

Meese: There was no firewall, as we would call it today, in that sense.

Kmiec: So in that sense, again [focusing on] the vice presidency, [is it really accurate to call the office an afterthought or a fortuitous circumstance? Doesn't the original understanding confirm Justice Jackson's interpretation that the powers are separated to limit power and to avoid oppression, but not so divided as to foreclose cooperation?]

Meese: Well it may have been an accident of the manipulations of the Electoral College and all that sort of thing, but if we

didn't have a vice president what would you do? We have had numerous incidents over the years where something happened to the President for one reason or another. If you didn't have a vice president, what would you do? Would you turn to the totally unelected Secretary of State as the primary "first among equals," I guess you would call it, of the Cabinet officers? How would you fill that gap?

Kmiec: There is the statutory line of succession, as you know. Thanks to Alexander Haig—we will always have a vibrant memory of him invoking the line—[after President Reagan was shot]—as he understood it.

Meese: Well, he was wrong.

Kmiec: That's why we have a memory of it.

Meese: And the Speaker of the House is next in line after the Vice President, so if there were no Vice President you would have the Speaker of the House. Then you would have a person who was elected by, at most, the citizens of one state or one congressional district becoming the President—so probably [a person with] the lowest electoral majority anybody could have would be the head of a great country.

Kmiec: Well as you pointed out, if you keep going, you have the Cabinet officers, who are not elected by anyone.

Here is a somewhat related question from the audience, which I think is a good one. It says, "Since 1940, presidential candidates have chosen their vice presidential candidates on their own or sometimes in consultation, as you have just described, Mr. Vice President, with close political advisors. Is that enough accountability in a democratic sense or should there be an alternative, such as a primary for Vice Presidents or perhaps opening it up to the larger convention where the delegates would choose the

Vice President maybe from a list that the nominee for President narrowed down to three, or something of that nature? What is your own thought on accountability and the selection of the Vice President?"

Cheney: I guess I feel the ability of the Vice President to really contribute, to be active and effective, turns ultimately upon what the President wants. Think of Lyndon Johnson. There's a guy who is a legislative genius, the King of the Senate. He could get anything done as the Senate leader, and when the Kennedy administration made him Vice President, they absolutely cut his legs off. What you remember about Lyndon Johnson's vice presidency is that he got to go to Afghanistan. This is before there was a war, and he came home with a camel driver. Major story. Everybody here today wasn't born then, but it was a classic [tale] of a very powerful, very competent, very experienced man who had been running the Senate very effectively, and once he became the Vice President, he had almost nothing to do because that's what the Kennedys were prepared to share with him. So, when we start to tamper with the process and say that "Well, maybe the Convention ought to choose," [we have to ask if it will make him more effective. Ultimately for him to be effective, it has to be with the approval and support of the President, and it doesn't matter how else he may be selected. I am not sure you are going to get something to make enough difference, and in the final analysis you may say that the President did not pick well, and that is a judgment on the President. But if he is not satisfied and happy with that choice, that individual is going to be relegated to duties like attending trips and such.

Kmiec: [Back to dual loyalties of the Vice President, and the implicit independence of the Vice President], I was surprised [at the number of] examples of vice presidents casting a vote against a presidential nominee [or] against a presidential program. Now most of that happened in the nineteenth century, but some of it is closer to today. [What

do you make of such examples?]

Cheney: Well it certainly would put a strain on the relationship.

[*Laughter.*]

One time fairly recently I remember [a] debate in the Senate [having] to do with reducing the number of Senators that it would take to break a filibuster, and Rockefeller got actively involved as vice president, in the Chair, taking a position that [President] Ford was [not] necessarily opposed to, but that Ford had not been involved in and didn't really want to be involved in. [Nevertheless,] Rockefeller went and got very actively involved. I think he even addressed the Chamber in the Senate. And in the final analysis, he ended up having to go back to the Senate and apologize to the Senate for his conduct. He was very much out there on his own. So, it can happen. You have to be wise enough to know when to be maybe a little more aggressive or a little more far afield than the boss. [But] in the final analysis, the President is the President, and you can go and jump off a boat headed in a totally different direction, [but] being at odds with the administration is probably not a good idea

Meese: I think the greater danger, as far the country is concerned, is where the President does not take the Vice President into his confidence. There is a story at least, I don't know if it is true or not, that Truman did not know about the atomic bomb until he became President. It seems to me that in terms of lack of preparation for the presidency, that's rather an extreme case of the President not advising the Vice President of what was going on. Fortunately, I think since that time, there are very few situations where the President and the Vice President have not had as close a connection as they [might need].

Kmiec: Now we recently had some published remarks by Bush

Forty-one about your role and Mr. Rumsfeld's role, [to say that the former President thought you both too aggressive in his son's presidency]—and this being aired on daytime public television—let me just say the senior President Bush labeled you both as “ferrous-bottomed”

Cheney: Iron-assed.

Kmiec: Yes, [so much for altering the C-SPAN audience]—thank you very much.

[*Laughter.*]

Seriously, I know you think very highly of the elder President Bush, and I am not looking for your reaction necessarily to that particular comment, other than to ask you as you reflect on your own vice presidency, are there some things you would have done differently?

Cheney: Right off hand, I can't think of any.

[*Laughter.*]

It's a fascinating story. John Meacham's book is a great book about [of] George W. Bush. During . . . a conversation with the President, President Bush Sr. made the comment that I had undergone a change from when I had been his Defense Secretary until I became his son's Vice President.

Kmiec: And he attributed it to 9/11?

Cheney: I attributed it to 9/11. I think he did too, but there is no question about it. I became much more aggressive and hard-nosed. Iron-assed in the aftermath of 9/11 because it was not a law enforcement problem, which is how it had always been treated in the past. It was an act of war here on the homeland, and I spent a good part of my time as

Vice President doing everything I could think of to make certain that it didn't happen again—that we had gotten the guys who had done it, that we established the procedures of counterterrorism to prevent it. And I admit it, that he was right in terms of his assessment. I got a very nice note from him afterwards saying, “Dick, I did it.” And then went on to say some very nice things about our association. [Later, we had occasion to be together] at the Alfalfa club, a club that has been in business in Washington for over one hundred years They meet once a year. There were lots of laughs, jokes, and so forth. Forty-one was loved at Alfalfa, and he came this year even though he was in a wheelchair and not in good health. I got an invitation to sit next to him at the table. It was his way to smooth over the relationship and convey the message that there were no hard feelings on either side.

Kmiec: Now there are a few questions here that go a little bit beyond the vice presidential topic, but it is an opportunity to have your thoughts, and I think it would be good to do that. Would either of you like to reflect on the recent passing of Nancy Reagan and what she meant to the former President, the late President Reagan?

Meese: Well, the one thing I will say is that she didn't try to usurp the powers of the Vice President. Because there was an awful lot of talk about her being the voice behind the throne, that sort of thing, which really was not true.

Kmiec: She didn't have Don Reagan fired?

Meese: No, she didn't have him fired. Let's say they didn't get along well, and the President decided it would probably be better that he found other work. But Nancy Reagan was a very good wife. She was devoted to her husband; she was her husband's source of strength But I never, in eight years as the President's legal adviser and Chief of Staff in California and eight years in the presidency, . . . there was

not one instance where she tried to interfere in policy or . . . in any improper way try to influence what was going on in the government. Now, there is no doubt she had definite ideas, and she was a good wife. She probably talked to him at night on some of those things. She was very alert to people whom she did not think were serving him well, and she let him know that. The main thing she was concerned about, quite frankly, was that as the oldest President in office at that time, that he did not get overtired or do other things, travel too much, or do things that would keep him from being a highly competent and effective President. And that was the one time she would call over to the Oval Office, the White House office, and talk about schedules or something like that. Overall, she was very important to him, and I think very important to the country. And also, the thing she did in taking on the counter-drug campaign in terms of talking to kids and education and that sort of thing—it reinforced things he was trying to do. I think most of this really came out at the funeral where people like Tom Brokaw spoke, and Brian Mulroney, the former Prime Minister of Canada, and people like that. But also the general buzz through the crowd, including the press, was that she had been a real asset, not only to him but to the country.

Cheney: I'm speaking as someone who had done everything I could to defeat Ronald Reagan in 1976. She never held it against me.

Meese: That's right.

Cheney: She couldn't have been nicer to me, personally. My family, social invitations, and so forth. There was never any sense of retribution or anything, even though I had been on the opposite side.

Kmiec: The person that I wanted to ask you about, and that one of our questioners wanted to ask you about, [is] your fellow

duck hunter, Justice Antonin Scalia, and what you think he brought to constitutional understanding.

Cheney: Justice Scalia was a giant. In the history of the Court, in the history of American jurisprudence, I think he played a major, major role and is sadly going to be missed. . . . Our careers began about the same time, and we got to know each other over the years, although I was not an attorney. We were good friends, and we spent a lot of time learning together. The moment when things sort of came together, . . . there was a suit before the Supreme Court designed to force me as the Chairman of the President's Energy taskforce, to divulge a list of all the names I had talked to as we put together the energy policy, and I refused to do that. Congress had asked.

Kmiec: The Federal Advisory Committee Act, is that right?

Cheney: Yes. We had put together the Advisory Committee in such a way that it did not apply in this case. I argued that the President and Vice President are free to talk to anyone they want, and they don't have to tell members of Congress or anybody else who they talk to. That went to the Supreme Court. Ultimately, they ruled in our favor. During the course of this, Justice Scalia and I had been on a duck hunt in Louisiana. The Sierra Club wanted to allege that there was something improper about the two of us going on a duck hunt while this case was pending in court, and they wrote a brief demanding a remedy? . . . They wrote a brief and filed it at the Supreme Court demanding that Scalia withdraw from consideration of the case. And Justice Scalia wrote a beautiful twenty-page, elegant document telling them to stick it where the sun don't shine. He filed it. He was just a great guy, and I was always tremendously impressed throughout his friendship, but also, I really think he was a historic figure in American jurisprudence.

Meese: I think it was interesting that he had that ability to separate

policy differences from personal relationships. I think the fact that he and Ruth Bader Ginsburg were probably the two closest people on the court [personally] was an indication of that fact.

Kmiec: I was just thinking of that myself. There was a ceremony just a little while ago where a bust was unveiled of the Vice President, as is the tradition in the Capitol, and interesting that it is in the Capitol and not in the White House, or in the old Executive Office Building. In terms of that kind of friendship, the current Vice President, Joe Biden, came, and as you know, made very nice remarks on that afternoon. We started our discussion [in this Symposium] about the concern that Mr. Biden has raised [about government] dysfunction, and since we have been talking about the Supreme Court vacancy, occasioned [by the death of Justice Scalia], is it in your judgment, the appropriate thing to do, to leave that vacancy until the next election?

Cheney: I agree with the position that the majority leader [took], that Congress . . . [not] consider the nomination until after the election. There obviously have been times before when the Senate has rejected nominees. I think it is partly a tactical move by the Senate leadership. We have got some close elections out there this year by the Senate—if you start down that path, and you hold hearings and bring a vote to the floor, at this stage, it would put a lot of very difficult political pressure, if you will, on a number of members who are up this time, who are going to have to defend their vote. To some extent, [the Senate leader] protects them from that by taking the position he has. The decision is so important in terms of the future of the court, when you replace Scalia, the ultimate conservative Justice, with somebody very different in terms of their judicial philosophy and so forth. It is going to shape the court for the next thirty years. It is bound to be the subject of debate and argument on both sides. Obama will argue his point of view; the Republicans will argue their point of view. I am not surprised that there

is controversy there

Meese: I think it is interesting to notice that this issue first came up, to my recollection, during George W. Bush's last term. Chuck Schumer, Joe Biden, and Harry Reid all were very vociferous that should there be a vacancy in the Supreme Court, they would never confirm anyone during that last year that [Bush] was in office. So, I think we just look at this as the Biden–Schumer rule that the Republicans are now following.

Kmiec: Well it could be. I suspect there are folks out there who would [hope for the country to go in a more] bipartisan direction [especially in light of the disabling effect delayed consideration will have on the Court and federal courts in general]. But be that as it may, it has been a wonderful discussion. I [have in my mind] so many quips about the Vice President. One that comes to mind [presently] is Thomas Marshall, who was Vice President for Woodrow Wilson, [and who] told a story of two brothers leaving a village. One went to sea, one became Vice President. Neither of them was heard from again. [We are delighted that you both have been heard from again.] We are very glad for your presence and [especially pleased to add your voices to a better understanding of the vice presidency]. Thank you both.
