

Department of Justice
EXECUTIVE SECRETARIAT
CONTROL SHEET

DATE OF DOCUMENT: 05/12/2006

WORKFLOW ID: 1003435

DATE RECEIVED: 05/15/2006

DUE DATE: 09/22/2006

FROM: The Honorable David S. Addington
Chief of Staff and Counsel
Office of the Vice President

Washington, DC 20501

TO: DAG

MAIL TYPE: Priority VIP Correspondence-Policy/Issue

SUBJECT: (Fax rec'd from ODAG) In response to the AG's memo dated 5/4/2006, regarding communications with DOJ, writing to assist the Department and, through the work of the Department, federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts. Encloses a paper that will assist the Department in eliminating erroneous references to the Vice Presidency as part of the executive branch, part of the "Executive Office of the President," part of the "White House," as an "agency," or as under Presidential direction. See WF 998258.

DATE ASSIGNED
09/15/2006

ACTION COMPONENT & ACTION REQUESTED
For DAG signature.
Office of the Deputy Attorney General

INFO COMPONENT: OAG, ODAG, OASG, OLC

COMMENTS: 9/18/2006: DAG approved and signed letter dated 9/15/06. ODAG handled original distribution. cc: CIV. 9/15/2006: OLC submitted a revised ltr for DAG signature. 9/8/2006: Per ODAG (Elston), pkg returned to OLC (Colborn) to draft an appropriate response. 9/6/2006: Per note from OLC (Kernodle) dtd 9/5/06, OLC does not concur. OLC/Bradbury advised that no response is necessary. 8/9/2006: Per ODAG (Elston), forwarded to OLC for concurrence with a one-week due date. 8/2/2006: Acting ASG initialed on 8/2/06. 7/27/2006: CIV submitted action memo to the DAG dated 7/25/06 w/ltr for DAG signature. 7/14/2006: Per CIV request copy of incoming letter forwarded to ATR, CRM, CRT, EOUSA, ENRD and TAX for information only. 5/22/2006: Original rec'd in ES and forwarded to DAG files.

FILE CODE: DAG FILE: WHITE HOUSE Correspondence, DAG Chron DS-09-15-06

EXECSEC POC: Barbara Wells: 202-616-0025



OFFICE OF THE VICE PRESIDENT
WASHINGTON

(St. Michaels, Maryland)

Via Fax to (202) 514-0467
(6 pages including this page)

FOR OFFICIAL USE ONLY

May 12, 2006

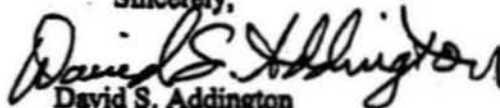
The Honorable Paul J. McNulty
Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear General McNulty:

Consistent with the Attorney General memorandum of May 4, 2006 regarding communications with the Department of Justice, I am writing to assist the Department and, through the work of the Department, the Federal courts, in ensuring that the legal status of the Vice Presidency is reflected accurately in documents filed in the courts. Because the legal status of the Vice Presidency is rarely at issue in cases in the Federal courts, sometimes little thought is given to the subject, but, when those rare cases arise, accuracy in describing the legal status of the Vice Presidency is important. The enclosed paper will assist the Department in eliminating erroneous references to the Vice Presidency as part of the executive branch, part of the "Executive Office of the President," part of the "White House," as an "agency," or as under Presidential direction.

Your Department's continued leadership in protecting the institutions of the Presidency and the Vice Presidency under the Constitution are appreciated and respected.

Sincerely,


David S. Addington
Chief of Staff

cc: The Honorable Patricia Mack Bryan
Legal Counsel, United States Senate
Washington, D.C. 20510
Fax (202) 224-3391

May 12, 2006

LEGAL STATUS OF THE VICE PRESIDENCY

The Vice Presidency and the Office of the Vice President are sometimes referred to in error as part of the "executive branch,"¹ part of the "Executive Office of the President,"² part of the "White House,"³ as an "agency,"⁴ or as under Presidential direction.⁵ The legal status of the Vice Presidency and the Office of the Vice President are set forth below.

The Vice Presidency is a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter.⁶ Although it is not a part of either branch, the Vice Presidency performs functions both legislative functions⁷ and executive functions.⁸ To assist Vice Presidents in the performance of their legislative and executive functions, the Congress by law provides appropriations for Vice Presidential staff in

¹ See, for example, Supplemental Protective Order Regarding Classified Documents, 1 nt. 1 (April 4, 2006) in the case of *United States v. I. Lewis Libby*, Crim. No. 05-394 (RBW)(D.D.C.) ("For purposes of this Order, the executive branch is defined as entities in the executive branch (including but not limited to the Executive Office of the President, the Office of the Vice President, the Central Intelligence Agency, and the State Department) other than OSC."). References in footnotes 2 through 5 below are to documents in the *Libby* case.

² See, for example, Government's Response to Defendant's Third Motion to Compel Discovery, 33 n. 12 (April 5, 2006) ("... The Executive Office of the President is the umbrella entity within which there are many additional components, such as the White House Office, the OVP, and the NSC, among others ...").

³ See, for example, Motion of I. Lewis Libby to Compel Discovery of Rule 16 and Brady Material in the Possession of Other Agencies, 6 and 7 (January 31, 2006) ("... the Office of the Vice President (which cooperated with the investigation at the direction of President Bush ...) ...") ("... President Bush's directive to the White House (which includes the OVP) ...").

See, for example, Third Motion of I. Lewis Libby to Compel Discovery Under Rule 16 and Brady, 3 and 12 March 17, 2006 ("... from agencies other than the Office of the Vice President ...") ("... from agencies other than the OVP ...").

Motion of I. Lewis Libby to Compel Discovery of Rule 16 and Brady Material in the Possession of Other Agencies, 7 and 10 (January 31, 2006) ("... in light of President Bush's directive to the White House (which includes the OVP) ... after receiving the full cooperation of the OVP at the President's direction").

See, Opinion of the Office of Legal Counsel, Department of Justice (OLC), "Constitutionality of the Vice President's Service as Chairman of the National Aeronautics and Space Council" (April 18, 1961); see also, OLC Opinion, "Participation by the Vice President in the Affairs of the Executive Branch" (March 9, 1961).

U.S. Constitution, article I, section 3 ("The Vice President of the United States shall be President of the Senate, but he shall have no Vote, unless they be equally divided.")

U.S. Constitution, article II, and amendments XII and XXV. See section 106(a) of title 3, United States Code ("In order to enable the Vice President to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities, the Vice President is authorized" certain staff and funding).

the annual legislative branch appropriations act⁹ and in the annual transportation-treasury appropriations act.¹⁰ Also, employees of executive branch agencies may be assigned or detailed to the Vice President.¹¹ The aggregation of Vice Presidential employees whose salary is disbursed by the Secretary of the Senate from the Vice President's legislative appropriations in the annual legislative branch appropriations act, Vice Presidential employees employed with the Vice President's appropriation in the annual transportation-treasury appropriations act, employees assigned or detailed to the Vice President from executive branch organizations, and consultants engaged by the Vice President, constitute the "Office of the Vice President." Neither the Vice Presidency nor the Office of the Vice President is an "agency."¹²

The Senate provides to Vice Presidents under the law, among other things, compensation and benefits,¹³ office space and support, an official expense allowance,¹⁴ an official stationery account,¹⁵ certain telecommunications and audiovisual support,¹⁶ certain transportation support,¹⁷

⁹ See, for example, Public Law 109-55 (August 2, 2005).

¹⁰ See, for example, Public Law 109-115 (November 30, 2005).

¹¹ See 3 U.S.C. 112.

¹² See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (use of term "agency" in Administrative Procedures Act construed not to include President) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); Haddon v. Walters, 43 F. 3d 1488 (D.C. Cir. 1995) (Executive Residence not an "executive agency" as defined in 5 U.S.C. 105, because it is distinguished from an "independent establishment" by 3 U.S.C. 112 and because the government in general is addressed in Title 5 of the U.S. Code, but the President's advisors and staff are addressed in Title 3 of the U.S. Code). Given the "unique constitutional position," Franklin, of the Vice President, and noting that the OVP, like the Executive Residence, is distinguished from an "independent establishment" by 3 U.S.C. 112, courts should not treat the term "agency" appearing in a statute as including the Vice President or OVP, at least absent an express statement to treat them as included. Note also that Congress has, by a law enacted subsequent to Haddon, recognized that the entities listed in 3 U.S.C. 112, which includes the Office of the Vice President, are not agencies, and has endowed the heads of these entities with the same authorities with respect to the civilian personnel of such entities that the heads of agencies may exercise with respect to the personnel of agencies. See 637 of the Treasury and General Government Appropriations Act, 2002 (Public Law 107-67, November 21, 2001) ("During fiscal year 2002 and thereafter, the head of an entity named in 3 U.S.C. 112 may, with respect to civilian personnel of any branch of the Federal Government performing duties in such entity, exercise authority comparable to the authority that may by law (including chapter 57 and sections 8344 and 8468 of title 5, United States Code) be exercised with respect to the employees of an Executive agency (as defined in 5 U.S.C. 105) by the head of such Executive agency, and the authority granted by this section shall be in addition to any other authority available in law.")

¹³ 2 U.S.C. 60c-1, 3 U.S.C. 104, and 5 U.S.C. 2106 and 8901, and title 5, United States Code, generally, regarding benefits of "Members of Congress" as defined in section 2106 to include the Vice President.

¹⁴ 2 U.S.C. 31a-1, 3 U.S.C. 111, and annual legislative branch appropriations act.

¹⁵ 2 U.S.C. 46a.

¹⁶ 2 U.S.C. 46d-1, 2 U.S.C. 123b, 123b-1.

¹⁷ 2 U.S.C. 68-5

official postal service under the frank,¹⁸ special delivery postage,¹⁹ and copies of the annotated Constitution,²⁰ Senate Precedents,²¹ the Congressional Record,²² and congressional eulogies.²³

The executive branch provides to Vice Presidents under the law, among other things, physical protection,²⁴ an official residence,²⁵ costs of foreign travel,²⁶ office space and support, transportation, telecommunications and audiovisual support,²⁷ and limited transition assistance upon leaving office.²⁸

While the Constitution assigns a number of functions to the Vice President, much of what modern Vice Presidents do consists of performing "functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities."²⁹ Presidents may choose to assign, or not to assign, such executive functions to Vice Presidents; Vice Presidents may choose to perform, or not to perform, such assignments; and, while a President cannot dismiss a Vice President from office, a President may withdraw in whole or in part assignments of executive functions to a Vice President.³⁰ But a President's decision to assign such a function, and a Vice President's decision to perform such a function, does not affect the constitutional status of the Vice Presidency, which is not within the executive branch or the legislative branch, and is by the Constitution attached to the legislative branch. Of course, the Vice President's constitutional status is consistent with his performance of executive functions assigned by the President, and the Vice President partakes in the constitutional and legal protections for those executive functions when performing them,³¹ in addition to other such protections attached to the Vice Presidency.

¹⁸ 39 U.S.C. 3210, 3216, and 3219.

¹⁹ 2 U.S.C. 42a.

²⁰ 2 U.S.C. 168b.

²¹ 2 U.S.C. 28c.

²² 44 U.S.C. 906.

²³ 44 U.S.C. 723.

²⁴ 18 U.S.C. 3056 and 3056 note, 3 U.S.C. 202.

²⁵ Public Law 93-346, as amended (3 U.S.C. 111 note).

²⁶ 22 U.S.C. 2671.

²⁷ Section 912 of Public Law 104-201 (10 U.S.C. 111 note).

²⁸ Presidential Transition Act of 1963, as amended (3 U.S.C. 102 note).

²⁹ 3 U.S.C. 106(a).

³⁰ See OLC Opinion, "Participation by the Vice President in the Affairs of the Executive Branch," 10 (March 9, 1961).

³¹ See, *Cheney v. United States District Court*, 542 U.S. 367 (2004).

The following descriptions of the Office of the Vice President (OVP) in U.S. Government documents illustrate the cooperation that occurs between the President (and his staff) and the Vice President (and his staff), while recognizing the ultimate independence of the Vice President:

[White House Staff Manual, Page C-9 (July 2002)]

The Vice President's staff advises, assists and supports the Vice President in carrying out executive and legislative duties. The Vice President's staff provides support on domestic policy, national security affairs, legislative affairs, communications, scheduling, advance, military support, protective matters, administration and legal matters, and supports the Vice President's spouse, as provided by law. Recognizing the unique status of the Vice President as having both executive and legislative functions, policies and practices set forth in this manual apply to the Vice President's staff to the extent not specifically directed otherwise by the Vice President, consistent with applicable laws and regulations and, in the case of Senate employees, Rules of the Senate.

* * * * *

["Policy and Supporting Positions," Committee on Government Reform, U.S. House of Representatives, 108th Congress, 2d Session, 226 (November 22, 2004)("The Plum Book")]

APPENDIX NO. 5 OFFICE OF THE VICE PRESIDENT

The Vice Presidency is a unique office that is neither part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter. The Vice Presidency performs functions in both the legislative branch (see article I, section 3 of the Constitution) and in the executive branch (see article II, and amendments XII and XXV, of the Constitution, and section 106 of title 3 of the United States Code).

The annual legislative branch appropriations act (see, for example, Public Law 108-83) and the annual transportation-treasury appropriations act (see, for example, Public Law 108-199) provide funds for the Vice President to hire employees to assist him in carrying out his legislative and executive functions. Executive branch employees also may be assigned or detailed to the Vice President (see 3 U.S.C. 112) and the Vice President may employ consultants (see 3 U.S.C. 106(a)). The Office of the Vice President (OVP) consists of the aggregation of Vice Presidential employees whose salary is disbursed by the Secretary of the Senate from the Vice President's legislative appropriation, Vice Presidential employees employed with the Vice President's executive appropriation, employees assigned or detailed to the Vice President, and consultants engaged by the Vice President.

The numbers, titles and salaries of OVP personnel change with some frequency. The salaries of Vice Presidential employees whose salary is disbursed by the Secretary of the Senate from the Vice President's legislative appropriation cannot exceed a maximum specified by law (see 2 U.S.C. 60a-1). The salaries of Vice Presidential employees whose salary comes from

the Vice President's executive appropriation also cannot exceed a maximum specified by law (see 3 U.S.C. 106). The authority to appoint, administratively determine the pay of, and discharge Vice Presidential employees rests with the Vice President.

The current duty station of all OVP positions is Washington, D.C.

[Executive Office of the President, Congressional Budget Submission
for Fiscal Year 2007, pp. OVP-3 and 9]

For reader convenience, the executive functions of the Vice Presidency will be referred to in this document as the "Office of the Vice President" and will be, for ease of reference, discussed as if it were part of the EOP. . . .

Mission Statement and Background

The Special Assistance to the President appropriation was established on September 26, 1970, to provide funds to implement 3 U.S.C. §106. Section 106 authorizes funds for personnel and expenses for the Vice President, "to enable the Vice President to provide assistance to the President in connection with performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." The appropriation funds the executive functions of the Vice Presidency.

The objective of the Office of the Vice President is to assist and support the Vice President in carrying out executive and legislative duties. The Vice President's staff provides support on domestic policy, homeland security, national security affairs, legislative affairs, communications, scheduling, advance, military support, protective matters, administration, and legal matters, and supports the official activities of the Vice President's spouse, as provide by law.

Any filings with Federal courts that involve the legal status of the Vice Presidency or the Office of the Vice President should make clear to the Court that (1) the Vice Presidency is a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter, (2) the Vice Presidency, although it is not a part of either branch, performs both legislative functions and executive functions, (3) the Vice Presidency is separate from and independent of the Presidency, although often (as now) Presidents and Vice Presidents work closely together, and (4) the Court should take appropriate account of these points when its decisions touch or depend upon the legal status of the Vice Presidency or the Office of the Vice President.



U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

July 25, 2006

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ACTING ASSOCIATE ATTORNEY GENERAL *WJG*
8/2/06

FROM: Peter D. Keisler *PK*
Assistant Attorney General

SUBJECT: Letter to David S. Addington, Chief of Staff to the Vice
President. Regarding the Legal Status of the Vice Presidency

PURPOSE: To respond to David Addington's letter of May 12, 2006,
addressed to the Deputy Attorney General (DAG), regarding
the legal status of the Vice Presidency.

TIMETABLE: As soon as possible.

SYNOPSIS: David Addington wrote to the DAG, regarding
communications with the Department of Justice, to assist the
Department and, through the work of the Department, the
Federal courts, in ensuring that the legal status of the Vice
Presidency is reflected accurately in documents filed in the
courts.

DISCUSSION: The response assures David Addington that in the rare cases in
which the legal status of the Vice Presidency is at issue, the
Department's court pleadings will accurately describe the Vice
presidency's legal status.

RECOMMENDATION: It is respectfully requested the DAG sign the attached response.

August 9, 2006

TO: Exe Sec

FROM: Monica Keasley

SUBJECT: Workflow 1003435

Per Michael Elston send to OLC for concurrence with a one-week deadline and return to ODAG.

If you have any questions please let me know.

September 5, 2006

TO: Executive Secretariat

FROM: Jeremy D. Kernodle, Attorney-Adviser, Office of Legal Counsel

JDK

SUBJECT: Workflow ID 1003435

OLC does not concur. Per Steve Bradbury, Acting Assistant Attorney General, no response to OVP is necessary.

Return to OLC (Colborn) to
draft an appropriate response
Elston 8 Sept 06

← EXPEDITE



Office of the Deputy Attorney General
Washington, D.C. 20530

September 15, 2006

The Honorable David S. Addington
Chief of Staff to the Vice President
of the United States
Washington, D.C. 20501

Dear Mr. Addington:

Thank you for your letter of May 12, 2006, regarding the legal status of the Vice Presidency. Having reviewed your letter and the attached memorandum, we will ensure that, in the rare cases in which the legal status of the Vice Presidency is at issue, the Department's court pleadings accurately describe the Vice Presidency's legal status.

Please do not hesitate to contact me should you have further questions on this or any other issue.

Sincerely,

Paul J. McNulty
Deputy Attorney General

Memorandum for the Deputy Attorney General

Page 2

Subject: Letter to David S. Addington, Chief of Staff to the Vice President, Regarding
Legal Status of the Vice Presidency

APPROVE:

 9/15/2006

Concurring Components:

None

DISAPPROVE: _____

Nonconcurring Components:

None

OTHER: _____

Attachment