AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Elections and Political Parties

**Kenneth Chesebro, Memo on the President of the Senate Strategy** (2020)[[1]](#footnote-1)

*The 2020 presidential election was hotly contested and rendered all the more unusual by the effects of the global pandemic. States altered their voting procedures to accommodate a wider range of voting methods and a more extended process of counting votes. Although public opinion polls had suggested through the Trump presidency that he would struggle to assemble an electoral majority to win reelection, he nearly managed to pull off the same feat that he did in 2016 and win narrow majorities in just the right states to pull off a victory in the Electoral College. Nonetheless, by late in the night on Election Day it was evident that the president had failed to repeat history and pull off the upset victory over his Democratic rival.*

*President Trump and his most ardent supporters refused to concede defeat, however. The Trump campaign launched an unprecedented effort to overturn the apparent election results in the weeks following the election. Those efforts repeatedly met failure, but the president eventually landed on one last option. On January 6, 2021, the two chambers of Congress would meet in joint session to perform their duty under the Twelfth Amendment to count the votes cast by the presidential electors on December 14, 2020. The Twelfth Amendment dictates that, “the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and votes shall then be counted.” Republican Representative Louie Gohmert had filed a federal lawsuit seeking to judicial declaration that the vice president could unilaterally refuse to count votes from any state’s slate of presidential electors, but the suit was rejected. President Trump and his attorneys lobbied Vice President Mike Pence to accept that theory and reject a sufficient number of Democratic votes to give Trump the victory. When the day for counting the electoral votes arrived, the president held a rally outside the Capitol demanding that Congress “stop the steal.” When hundreds of those rally attendees stormed the Capitol building to stop the vote count, President Trump tweeted that “Mike Pence didn’t have the courage to do what should have been done.” That tweet spurred Twitter to remove several of Trump’s posts and eventually to permanently suspend his account.*

*Kenneth Chesebro was one of the first to suggest that Vice President Mike Pence had the power to set aside electoral votes cast for Joe Biden and simply declare that Donald Trump had won reelection. John Eastman eventually became the most visible proponent of that view, but Eastman had initially rejected that argument as legally flawed. A Harvard-trained private attorney based in Wisconsin, Chesebro had worked on Democratic presidential candidate Al Gore’s challenge to the apparent George W. Bush victory in the 2000 election. He was recruited into the Trump campaign as it began considering how to challenge the apparent Biden victory in November 2020. He advised the campaign that Trump electors should meet and cast their votes even in states in which Trump seemed to have lost in order to preserve the possibility that their votes might be counted later. In no state did the Trump electors formally meet, but in several states ad hoc groups of Trump supporters did declare themselves to be official electors and sent their ballots to Washington, D.C. to be counted. John Eastman and other members of the Trump campaign later urged that these be treated as an “alternative” slate of electoral votes that could be substituted for Joe Biden’s electoral votes on January 6th. In an email to John Eastman days after Donald Trump urged his supporters to gather in Washington, D.C. on January 6th for a “wild” protest, Chesebro suggested that the U.S. Supreme Court would be more likely to issue a ruling to decisively resolve the election disputes if “the justices start to fear that there will be ‘wild’ chaos on January 6,” as they had arguably done in issuing a decision in* Bush v. Gore *on December 12, 2000.*

*On December 13, the day before the presidential electors were to officially record their votes, Chesebro sent a memo to former New York City Mayor Rudy Giuliani, who had been acting as a lawyer for Trump throughout his presidency and campaign. That memo outlined a “’President of the Senate’ strategy” by which president of the Senate would refuse to count electoral votes for Joe Biden on January 6, 2021. Notably this plan would have required the cooperation of numerous Republican leaders to be carried into full effect, which never came to fruition, but it also hinted at the possibility of the vice president simply deciding the presidential election on his own. A pared-down version of that strategy was eventually adopted by Trump allies, and decisively rejected by Pence himself on January 6th.*

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The bottom line is I think having the President of the Senate firmly take the position that he, and he alone, is charged with the constitutional responsibility not just to *open* the votes, but to *count* them – including making judgments about what to do if there are conflicting votes– represents the best way to ensure:

1. That the mass media and social media platforms, and therefore the public, will focus intently on the evidence of abuses in the election and canvassing; and
2. That there will be additional scrutiny in the courts and/or state legislatures, with an eye toward determining which electoral states are the valid ones.

And I think this strategy can be carried out with surrogate of the President and Vice President, with them standing mostly above the fray, urging only that there be real scrutiny of what happened in this election, and that they’re willing to live with the result as long as there is a serious look, especially by the state legislatures, at what happened there, to ensure it will never happen again.

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Here is a chronology of how things could play out, if there is a serious effort to employ the argument that the President of the Senate counts the votes.

Jan. 3-5, and perhaps before then.

Committees of the Senate [where the Republican hold the majority] hold hearings detailing widespread violations of law, and fraud, in the election in the states at issue. . . . Idea would be to buttress the substantive basis for the President of the Senate later refusing to count votes from those States, absent more needed scrutiny.

Also, there is a hearing in the Senate Judiciary Committee exploring the constitutional question of how the votes must be counted, with at least two highly qualified legal scholars concluding that the President of the Senate is solely responsible for counting the votes, and that the Electoral Count Act is unconstitutional in dictating limits on debate and dictating who wins electoral votes when there are 2 competing slates and the House and Senate disagree.

Jan. 6. The House and Senate assemble for the opening and counting of the votes.

The theme that the counting of the votes will proceed on a strict textual, originalist basis proceeds when Vice President Pence steps up to the podium, to cause the first break with the procedures set out in the Electoral Count Act.

The Electoral Count Act states that the House and Senate shall meet in the House on Jan. 6 at 1 p.m., “and the President of the Senate *shall* be their presiding officer.”

The Vice President announces that he will *not* serve as presiding officer. . . .

Note that Pence so far has *only* indicated that *he will not serve as presiding officer*, based on a constitutional objection to Congress imposing extra duties on the Vice President.

It is a *separate* matter whether he will have a role in the joint session itself. Because the Vice President clearly serves as the President of the Senate, and the Twelfth Amendment states that in the joint session, “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”

So by the constitutional test, he *should* perform that role. . . .

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At this point, the Vice President will *recuse* himself, on the basis that he is a candidate for election himself, and given that there is dispute about the electoral votes of some of the States, and especially given that it might be the responsibility of the President of the Senate to actually *count* the votes, he has a conflict of interest, and he feels he cannot participate in the proceeding. . . .

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In the absence of the Vice President, the president pro tempore acts as the President of the Senate, and thus is the one with the sole power and responsibility to play that role in the joint session. So regardless of whether it is Chuck Grassley or another senior Republican who agrees to take on the role of defending the constitutional prerogatives of the President of the Senate, whoever it is then proceeds to open and count first Alabama, and then Alaska, at which point Trump and Pence are leading 12-0.

He then opens the two envelopes from Arizona, and announces that he cannot and will not, at least as of that date, count any electoral votes from Arizona because there are two slates of votes, and it is clear that the Arizona courts did not give a full and fair opportunity for review of election irregularities, in violation of due process.

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After Jan. 6

Lots of lawyers and political strategists connected to the campaign can wargame much better than me what would then happen, but if the President of the Senate stuck to his guns, absent him being impeached and removed from office, the fact that he is the only one permitted to even OPEN the votes could give him enormous leverage. He would of course make clear that if the Supreme Court rules that he is not the one with the power to count the votes (whether or not the Electoral Count Act is constitutional) he would of course comply with whatever the Court orders.

What the Supreme Court would do is anyone’s guess, but I would bet on a majority of the Court siding with the President of the Senate, even though a majority might well agree that the Constitution is correctly construed, from an originalist perspective, in exactly that manner. More likely, to bring an end to a huge political crisis, the Court would find some way to rule in Biden’s favor or, at minimum, find the controversy nonjusticiable. . . .

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If the Court were to dodge, then we would have a situation similar to 1877. . . .

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In this situation, which would seem messy and unpalatable to many, with renewed attention to the election abuses, and with several states controlled by Republican legislators faced with perhaps not being counted in the Electoral College, it doesn’t seem fanciful to think that Trump and Pence would end up winning the vote after some legislatures appoint electors, or else that there might be a negotiated solution in which the Senate elects Pence Vice President and Trump agrees to drop his bid to be elected in the House, so that Biden and Harris are defeated, even though Trump isn’t reelected.

Any of the outcomes sketched above seems preferable to allowing the Electoral Count Act to operate by its terms, with Vice President Pence being forced to president over a charade in which Biden and Harris are declared the winner of an election in which none of the serious abuses that occurred were ever examined with due deliberation.

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In analyzing the original meaning of the 12th Amendment, we have to forget about our current political climate, and remember the world in which the Framers wrote and ratified this language.

Today, it would unimaginable that we would write a Constitution that would give either the Vice President, or the most senior member of the majority of the Senate, sole power to decide contested results for the presidential election. However, Art. II, Sec. I, cl. 3 was enacted in 1787, before political parties, when the Framers didn’t imagine that disputes over the electoral count would arise. . . .

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Further, during this era there was an emphasis on honorable behavior and circumspection. Leaders were greatly concerned about their reputation, about whether they were perceived as honorable, both during their lives and afterwards. So there was much less concern that someone in a national legislature entrusted with power to count votes would abuse it.

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But notice that the only person or entity *doing* anything here [in the text of the Twelfth Amendment] is the President of the Senate. All that is required of the Senate and the House is their “presence.” . . . [I]t seems that their job is to watch the votes being opened and counted – this ensures transparency.

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So it seems entirely sensible to read this language as granting sole power to count the votes to the President of the Senate, with the Members of Congress having no power to influence the result. At the time this language was enacted, this scheme made sense. Maybe it makes less sense now, but if that’s the case, then the Constitution can be amended to make more sense. But as long as this language can be reasonably read to grant the President of the Senate the sole power to count the votes, whoever holds that post at a particular time should assert that prerogative. . . .

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1. Eastman v. Thompson, Case No. 8:22-cv-00099-DOC-DFM (Dist. C.D.Ca. 2022), Exhibit A, Document 350-2. [↑](#footnote-ref-1)