AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

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

**Ted Cruz, Proposal to Delay Counting the Electoral Votes** (2021)

*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.*

*On January 2, John Eastman sent a memo to some Republican senators outlining a “January 6 scenario” that would result in Donald Trump being declared president. Eastman was a law professor at Chapman University and was the most distinguished member of the legal team that had been advocating on the president’s behalf since election night. Eastman spoke at the January 6 rally outside the Capitol, and he had given presentations to state legislatures urging them to replace Biden electors with ones pledged to Donald Trump. He laid out the legal case to Pence that held that the vice president had the authority to set aside state ballots that had been cast for Biden.*

*Notably, the Eastman proposal to Republican senators was premised on persuading some Republican state legislatures to decertify Biden electoral votes and submit an alternative slate of electors. The Trump campaign had not yet persuaded any state legislature to take such a step (and most analysts thought such an action at that late date would be legally invalid). Eastman hoped to delay the counting of the electoral votes in order to give the president more time to pressure Republican state legislatures.*

*Republican Senator Ted Cruz authored a proposal on January 2 for a ten-day delay in the counting of the electoral votes so that the state legislatures could “audit” the election returns and recertify their electoral votes. The proposal attracted a handful of supporters but was soundly rejected by a majority of the Republican senators. Cruz continued to urge Congress to adopt his plan as the rioters were invading the capitol on January 6th.*

*During the January 6th riot, the president and his team continued to call Republican members of Congress urging them to delay any counting of the votes until some state legislatures came around. Trump did not find the votes to support such a delay, and Congress completed the count of the electoral votes after the rioters were cleared from the capitol grounds.*

America is a Republic whose leaders are chosen in democratic elections. Those elections, in turn, must comply with the Constitution and with federal and state law.

When the voters fairly decide an election, pursuant to the rule of law, the losing candidate should acknowledge and respect the legitimacy of that election. And, if the voters choose to elect a new office-holder, our Nation should have a peaceful transfer of power.

The election of 2020, like the election of 2016, was hard fought and, in many swing states, narrowly decided. The 2020 election, however, featured unprecedented allegations of voter fraud, violations and lax enforcement of election law, and other voting irregularities.

Voter fraud has posed a persistent challenge in our elections, although its breadth and scope are disputed. By any measure, the allegations of fraud and irregularities in the 2020 election exceed any in our lifetimes.

And those allegations are not believed just by one individual candidate. Instead, they are widespread. . . .

Some Members of Congress disagree with that assessment, as do many members of the media.

But, whether or not our elected officials or journalists believe it, that deep distrust of our democratic processes will not magically disappear. It should concern us all. And it poses an ongoing threat to the legitimacy of any subsequent administrations.

Ideally, the courts would have heard evidence and resolved these claims of serious election fraud. Twice, the Supreme Court had the opportunity to do so; twice, the Court declined.

On January 6, it is incumbent on Congress to vote on whether to certify the 2020 election results. That vote is the lone constitutional power remaining to consider and force resolution of the multiple allegations of serious voter fraud.

At that quadrennial joint session, there is long precedent of Democratic Members of Congress raising objections to presidential election results, as they did in 1969, 2001, 2005, and 2017. And, in both 1969 and 2005, a Democratic Senator joined with a Democratic House Member in forcing votes in both houses on whether to accept the presidential electors being challenged.

The most direct precedent on this question arose in 1877, following serious allegations of fraud and illegal conduct in the Hayes-Tilden presidential race. Specifically, the elections in three states-Florida, Louisiana, and South Carolina-were alleged to have been conducted illegally.

n 1877, Congress did not ignore those allegations, nor did the media simply dismiss those raising them as radicals trying to undermine democracy. Instead, Congress appointed an Electoral Commission-consisting of five Senators, five House Members, and five Supreme Court Justices-to consider and resolve the disputed returns.

We should follow that precedent. To wit, Congress should immediately appoint an Electoral Commission, with full investigatory and fact-finding authority, to conduct an emergency 10-day audit of the election returns in the disputed states. Once completed, individual states would evaluate the Commission's findings and could convene a special legislative session to certify a change in their vote, if needed.

Accordingly, we intend to vote on January 6 to reject the electors from disputed states as not ‘regularly given' and ‘lawfully certified' (the statutory requisite), unless and until that emergency 10-day audit is completed.

We are not naïve. We fully expect most if not all Democrats, and perhaps more than a few Republicans, to vote otherwise. But support of election integrity should not be a partisan issue. A fair and credible audit-conducted expeditiously and completed well before January 20-would dramatically improve Americans' faith in our electoral process and would significantly enhance the legitimacy of whoever becomes our next President. We owe that to the People.

These are matters worthy of the Congress, and entrusted to us to defend. We do not take this action lightly. We are acting not to thwart the democratic process, but rather to protect it. And every one of us should act together to ensure that the election was lawfully conducted under the Constitution and to do everything we can to restore faith in our Democracy.