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

**John Eastman, Constitutional Authority of State Legislatures to Choose Electors** (2020)

*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.*

*In the days after the November election, John Eastman provided a memo to the Trump campaign on the possibility of Republican state legislatures displacing presidential electors pledged to vote for Democratic candidate Joe Biden and replacing them with Trump electors. 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 6th rally outside the Capitol, and 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. Eastman eventually argued that even if Congress declared Biden the winner of the election on January 6th, the outcome of the presidential election could still be changed up to and* even after *Biden was inaugurated if legislatures determined that the election was “fraudulent.” In the days after January 6, Eastman sent an email to another Trump lawyer, former New York City Mayor Rudy Giuliani, saying “I’ve decided that I should be on the pardon list, if that is still in the works.”*

*This memo built on the experience of the disputed presidential election of 2000. With the electoral victory hinging on the outcome of Florida, Republican presidential candidate George W. Bush held a razor-thin lead after the initial counting of the ballots. Democratic candidate Al Gore repeatedly turned to the Democratic-leaning state courts to challenge those results and generate a recount that would tilt the balance in his favor. As that legal battle dragged out and approached the date at which the Electoral College was slated to meet to cast its ballots to formally determine the winner of the presidential election, some Republicans began to argue that the Republican-controlled Florida state legislature should step in and settle the controversy by appointing a slate of Bush-pledged electors to represent the state in the Electoral College. That contingency proved unnecessary, but the stage was set for some disappointed presidential aspirant to appeal to a friendly state legislature to cast the state’s electoral votes in his favor. In 2020, Eastman urged the Trump campaign to make that play.*

*Ultimately, no state or federal court agreed with the Trump campaign’s arguments that a significant number of ballots had been cast illegally or fraudulently, and no state legislature went along with the Trump campaign’s plan to designate an “alternative” slate of presidential electors. When January 6, 2021 arrived, each state had submitted only one set of certificates recording the votes of the presidential electors and those certificates matched the results of the general election in which the voters had cast their ballots in November 2020. Though interrupted by the riot, Vice President Pence oversaw the opening of those certificates and the counting of those electoral votes and declared Biden the winner of the presidential election.*

In a number of jurisdictions, state executive branch officials or courts have altered state election laws in ways that may be affecting the outcome of the Presidential election, or at the very least creating unacceptable uncertainty about the results of the election. In Wisconsin, for example, the Wisconsin Elections Commission authorized local election clerks to "cure" spoiled ballots by adding missing addresses of witnesses, in violation of state law, and it directed county clerks to ignore state voter id laws for anyone claiming they were "indefinitely confined" because of Covid fears. . . . Pennsylvania's Secretary of State likewise unilaterally ordered an extension of the deadline for receipt of absentee ballots, contrary to Pennsylvania law. . . .

All of these actions are undermining the constitutional authority of the *Legislature* of each State to determine the “Manner” in which the State’s presidential electors are appointed. . . . The question is: What can be done about it? For most of the violations, the damage has already been irretrievably done. The ballots that have been illegally “cured,” or accepted without complying with voter ID requirements, or accepted after the statutory deadline, have been intermixed with valid ballots and can [no] longer be identified so that the illegally-cast ballots can be deducted from the totals. A new election could be held, free of the taint of the illegal conduct, as occurred in 2018 after an illegal ballot harvesting scheme was uncovered in the election for North Carolina’s 9th congressional district, but it would have to be statewide to avoid violation [of] the Fourteenth Amendment’s Equal Protection Clause, and the December 14 statutory deadline for the meeting of the electors makes that logistically implausible, placing the very ability of the affected states to appoint electors at risk. But there is a third alternative.

In the early decades of our nation’s history, most state legislatures selected the state’s presidential electors themselves; only after 1824 did the majority of state legislatures provide for choosing electors by popular election. Nevertheless, the constitutional power to decide on the method for choosing electors remains exclusively with state legislatures. The Supreme Court has described the constitutional authority of the state legislatures to determine the manner of choosing electors as “plenary.” It has even noted that, “whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time.” *McPherson v. Blacker* (1892). To be sure, “at any time” would likely not allow the Legislature to pick its own slate of electors after the results of a fair election which had been conducted pursuant to the Legislature’s existing statutory procedures, merely on the grounds that the Legislature would have preferred a different outcome. *Bush v. Gore* (2000). But such is not the case when the existing procedures were not followed, and when significant statistical anomalies raise serious questions about whether the election was fair. In such cases, the “manner” for choosing electors set out by the Legislature was not followed; the constitutional default of the Legislature exercising its plenary power—or, rather, resuming that power—is therefore again at the forefront. . . .

This is in accord with federal law as well. Section 2 of Title 8 provides: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” The intermingling of illegal with legal ballots in significant enough numbers that the election cannot be validly certified, means that the State “has failed to make a choice” on election day, and the appointment of electors therefore devolves back on the Legislature of the State, which has plenary power to decide whether to exercise that appointment power itself, or to craft some other mechanism for appointing the State’s slate of electors.

This is what the Florida legislature was prepared to do in 2000, prior to the resolution of that State’s election controversy by the Supreme Court in Bush v. Gore. The vote on election day had been certified by the Florida Secretary of State as a Bush victory, but the State Supreme Court had, contrary to state law, ordered a recount in only heavily-Democrat counties. The expectation was that such a partial recount would have tilted the election to Gore, and therefore either invalidated the initial certification or at least called it into question. The relevant committees in both houses of the State legislature therefore crafted identical resolutions that would allow the Legislature to reclaim the plenary power of choosing its own slate of electors (with the expectation that the Legislature’s slate would support Bush).

There is more than enough in the way of alteration of the legislatively approved manner of choosing electors to warrant legislatures in several states taking back their plenary power to determine the manner of choosing electors, even to the point of adopting a slate of electors themselves. Moreover, when one adds into the mix the significant statistical anomalies that raise serious concerns of outright election fraud, the Legislatures should feel themselves duty bound to rectify the situation by the constitutional remedy available to them.

. . . .

These statistical anomalies, particularly when combined with hard evidence of voters barred from voting because someone had, unbeknownst to them, requested and at times even voted an absentee ballot in their name, strongly support the conclusion that something is amiss here, and that Legislatures simply must investigate and then, if convinced that the election was too fraught with risk of fraud to be properly certified, exercise their prerogative to legislatively designate a slate of electors.