AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES AND POWERS

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Supplementary Material

Chapter 12: The Contemporary Era – Elections and Political Parties

**John Eastman, Memo on Counting Electoral Votes** (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.*

*Vice President Pence had not publicly announced prior to January 6 how he would approach his duties at the joint session, but he consulted with a number of authorities, including former vice president Dan Quayle, who reportedly told Pence “forget it. . . you have no power.” Before the session started, Pence released a letter affirming that he did not have the authority to set aside votes and that only Congress acting as a body could set aside votes as invalid.*

*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.[[1]](#footnote-1)*

January 6 scenario

Article II, § 1, cl. 2 of the U.S. Constitution assigns to the *legislatures* of the states the plenary power to determine the manner for choosing presidential electors. Modernly, that is done via statutes that establish the procedures pursuant to which an election must be conducted.

1. **Illegal conduct by election officials.**

Quite apart from outright fraud (both traditional ballot stuffing, and electronic manipulation of voting tabulation machines), important state election laws were altered or dispensed with altogether in key swing states and/or cities and counties. When the laws at issue were specifically designed to reduce the risk of fraud in absentee voting, those violations are particularly troubling.

. . . .

Because of these illegal actions by state and local election officials (and, in some cases, judicial officials, the Trump electors in the above 6 states (plus in New Mexico) met on December 14, cast their electoral votes, and transmitted those votes to the President of the Senate (Vice President Pence). There are thus dual slates of electors from 7 states.

1. **The Constitution and Statutory Process for Opening and Counting of Electoral Votes.**
   1. a. **The 12th Amendment** provides that “the 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.”

i. There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch.

* 1. b. The Electoral Count Act of 1887, which is likely unconstitutional, provides:

If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title [the so-called “safe harbor” provision] to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

i. This is the piece that we believe is unconstitutional. It allows the two houses, “acting separately,” to decide the question, whereas the 12th Amendment provides only for a joint session. And if there is disagreement, under the Act the slate certified by the “executive” of the state is to be counted, regardless of the evidence that exists regarding the election, and regardless of whether there was ever fair review of what happened in the election, by judges and/or state legislatures. That also places the executive of the state above the legislature, contrary to Article II.

**III. War Gaming the Alternatives.**

a. VP Pence opens the ballots, counts those certified by the State executive, and does not receive any objections meeting the requirements of the Electoral Count Act. **BIDEN WINS 306-232.**

b. VP Pence opens the ballots, receives objections to the 7 states with multiple ballots. The two bodies adjourn to their separate chambers and decide which slate of electors to count.

i. House votes to count the Biden slate; Senate votes to count the Biden slate as well (depending on Georgia election, only 1-3 Republicans voting with the Democrats would yield this result. **BIDEN WINS 306-232.**

ii. House votes to count the Biden slate; Senate votes to count the Trump slate. Under the Electoral Count Act, because the two houses do not agree, the slate certified by the “executive” prevails. **BIDEN WINS 306-232.**

iii. House votes to count the Biden slate; there is a filibuster in the Senate (contrary to the time limits of the Electoral Count Act). Stand-off until the filibuster ended by a cloture vote, which would only take 10-12 Republican Senators to accomplish. After the cloture vote, either i or ii above. **BIDEN WINS 306-232.**

c. VP Pence opens the ballots, determines on his own which is valid, asserting that the authority to make that determination under the 12th Amendment, and the Adams and Jefferson precedents, is his alone (anything in the Electoral Count Act to the contrary is therefore unconstitutional).

i. If State Legislatures have certified the Trump electors, he counts those, as required by Article II (the provision of the Electoral Count Act giving the default victory to the “executive”-certified slate therefore being unconstitutional). Any combination of states totaling 38 elector votes, and **TRUMP WINS.**

ii. If State Legislatures have not certified their own slates of electors, VP Pence determines, based on all the evidence and the letters from state legislators calling into question the executive certifications, decides to count neither slate of electors. (Note: this could be done [when] he gets to Arizona in the alphabetical roster, or he could defer Arizona and the other multi-slate states until the end, and then make the determination). At the end of the count, the tally would therefore be 232 for Trump, 222 for Biden. Because the 12th Amendment says “majority of electors *appointed*,” having determined that no electors from the 7 states were appointed (a position in accord with that taken by Harvard Law Professor Laurence Tribe), **TRUMP WINS.**

iii. Alternatively, VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 elector votes, throwing the election to the House. *IF the Republicans in the State Delegations stand firm*, the vote there is 26 states for Trump, 23 for Biden, and 1 split vote. **TRUMP WINS.**

d. VP Pence determines that the ongoing election challenges must conclude before ballots can be counted, and adjourns the joint session of Congress, determining that the time restrictions in the Electoral County Act are contrary to his authority under the 12th Amendment and therefore void. Taking the cue, state legislatures convene, order a comprehensive audit/investigation of the election returns in their states, and then determine whether the slate of electors initially certified is valid, or whether the alternative slate of electors should be certified by the legislature, exercise authority it has directly from Article II and also from 3 U.S.C. § 2, which 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.”

i. If, after investigation, proven fraud and illegality is insufficient to alter the results of the election, the original slate of electors would remain valid. **BIDEN WINS.**

ii. If, on the other hand, the investigation proves to the satisfaction of the legislature that there was sufficient fraud and illegality to affect the results of the election, the Legislature certifies the Trump electors. Upon reconvening the Joint Session of Congress, those votes are counted and **TRUMP WINS.**

IV. **BOLD, Certainly. But this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage; we’re no longer playing by Queensbury Rules, therefore.**

The main thing here is that VP Pence should exercise his 12th Amendment authority without asking for permission – either from a vote of the joint session or from the Court. Let the other side challenge his actions in court, where Tribe (who in 2001 conceded the President of the Senate might be in charge of counting the votes) and others who would press a lawsuit would have their past position -- that these are non-justiciable political questions – thrown back at them, to get the lawsuit dismissed. The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.

I have outlined the likely results of each of the above scenarios, but I should also point out that we are facing a constitutional crisis much bigger than the winner of this particular election. If the illegality and fraud that demonstrably occurred here is allowed to stand—and the Supreme Court has signaled unmistakably that it will not do anything about it—then the sovereign people no longer control the direction of their government, and we will have ceased to be a self-governing people. The stakes could not be higher.

1. The Eastman memo is examined in some detail in Derek Muller, “Rebutting Some of the Claims in the Eastman Memo about Congress’s Role in Counting Electoral Votes,” *Election Law Blog* (September 21, 2021) (https://electionlawblog.org/?p=124703); Ned Foley, “Initial Reaction to Eastman Memo,” *Election Law Blog* (September 21, 2021) (https://electionlawblog.org/?p=124705). Eastman’s claim that there were dueling electors in 2020 is examined in Keith E. Whittington, “Counting Ballots and Stealing Elections,” *Lawfare* (January 5, 2021) (https://www.lawfareblog.com/counting-ballots-and-stealing-elections). [↑](#footnote-ref-1)