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

**Jenna Ellis, Constitutional Analysis of Vice President Authority for Vote Count** (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.*

*Jenna Ellis was a little-known criminal defense attorney in Colorado who became an aggressive defender of President Trump in conservative media. As Trump began to plan for his reelection, he drew her into the campaign. Eventually she became a close confidante of President Trump and former New York City Mayor Rudy Giuliani. As January 6th approached, she prepared for Trump himself a short legal memo offering a “constitutional analysis” of the vice president’s role in counting the electoral votes for the presidency. It was among the documents that helped persuade Trump that Pence could set aside electoral votes for Biden. She prepared a second memo for Jay Sekulow, who had been one of Trump’s lawyers during his first impeachment but who had been publicly skeptical of the theory that Pence could determine the outcome of the election. Ellis’s scheme would require Pence to stop the count of the electoral votes until the state legislatures had resolved all outstanding claims that the Trump campaign was continuing to make that the election results were invalid.*

Six states currently have electoral delegates in dispute and there is sufficient rational and legal basis to question whether the state law and Constitution was followed There is clear basis in the Constitutional text that the Vice President s role is to open all electoral votes from the electors chosen in the "manner,, prescribed by the state legislatures. The Vice President cannot fulfill that responsibility if he does not know which ones were so chosen.

On January 6, the Vice President should therefore not open any of the votes from these six states, and instead direct a question to the legislatures of each of those states and ask them to confirm which of the two slates of electors have in fact been chosen in the manner the legislature has provided for under Article II, Section 1.2 of the U.S. Constitution. The Vice President should open all other votes from states where electors have been certified and count accordingly.

The question would then require a response from the state legislatures, which would then need to meet in an emergency electoral session (which they may constitutionally call for on their own power, not withstanding any other provision of state law-state law may not impede the legislatures from fulfilling their Constitutional duty).

In his formal request, the Vice President should require a response from each state legislature no later than 7:00pm EST on January 15, 2021. If any state legislature fails to provide a timely response, no electoral votes can be opened and counted from that state. The Constitution provides that if no candidate for President receives a majority of electoral votes, the Congress shall vote by state delegation. This would provide two and one-half days for Congress to meet and vote by delegation prior to January 20 at noon for inauguration.

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. . . . Where a controversy has been initiated in accordance with State law, that process for a final determination must be completed before a legitimate set of electors can be "ascertained" by the chief executive officers of the state. (In at least six states, state executives rushed to certify while judicial and legislative disputes in accordance with state law had just begun-how can that be constitutional and entitled to deference EVEN IF federal law purports to allow it?)

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Where a determination or ascertainment process has not been completed in .accordance with state law, no elector can be deemed as legitimate/valid/constitutionally determined because the constitution *requires*that electors be chosen as directed by the state legislature and the state law as enacted by the general assembly. Where state law provides a ·process to resolve challenges and controversies (including in the judiciary), these processes and procedures *have to be completed*.

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. . . . As a practical matter, there is no provision for communication between the Congress and state legislatures, other than the transmission of purported slates of electors. If the Vice President determines that§ *5* has not been completed as to ascertain electors, the Vice President should determine that no electors can be counted from the state. . . .

What happens next? Does the Vice President have the authority to simply adjourn the body until a determination that the process to have been completed? Probably yes. Discretion of the President of the Senate and that he would be the Vice President is intentional. . . .

Therefore, the Vice President should begin alphabetically in order of the states, and coming first to Arizona, not open the purported certification, but simply stop the count at that juncture, invoking authority of 3 U.S. Code § *5* and require the final determination of ascertainment of electors to be completed before continuing. The states would .therefore have to act.