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

**Gregory Jacob, Analysis of Professor Eastman’s Proposals** (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.*

*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.*

*Among those advising Pence was his legal counsel, Greg Jacob. Jacob had served in the administration of George W. Bush in a variety of legal roles. On December 8, Jacob had provided Pence with a memo giving more general background on the process for counting electoral votes. Jacob was among those lobbied by Eastman in the days leading up to January 6. On January 5, Jacob provided Pence with this legal memo specifically analyzing Eastman’s arguments and concluding that Eastman’s proposal was unprecedented, contrary to the vice president’s legal duties, and had no support to any judicial or political body. Jacob later testified that Eastman admitted that his legal theory would probably lose in a unanimous ruling if the case reached the Supreme Court, but that he hoped the Court would never reach the merits of such a case.*

*Notably, the Eastman proposal as outlined in the Jacob’s memo 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 that Pence would at least put Congress into recess for several days so that Trump could continue to lobby state legislatures. Republican Senator Ted Cruz had likewise lobbied for a ten-day delay to allow state legislatures to “audit” and recertify the results, but he failed to win over the Republican caucus for such a delay. 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. On the same day that Jacob testified before a congressional committee in the summer of 2022 about the illegality of the plan to have Pence throw out Biden electoral votes and the committee released video of a January 6th rioter telling the crowd, “I’m telling you, if Pence caved, we’re gonna drag mother\*\*ers through the streets,” Donald Trump gave the keynote address at the annual convention of the Faith & Freedom Coalition and declared, “Mike Pence had a chance to be great. He had a chance to be frankly historic. . . . But Mike did not have the courage to act.”*

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Professor Eastman acknowledges that his proposal violates several provisions of statutory law. Specifically, the Electoral Count Act of 1887 provides that:

* Electoral vote certificates must be “opened, present, *and acted upon* in the alphabetical order of the States, beginning with the letter A. It further provides that “[n]o votes or papers from any other State shall be acted upon” until any objections “to the votes or papers from any State shall have been *finally disposed of*.” Professor Eastman instead proposes that no action be taken, and disposition mad, on the competing certificates for the five to seven States with multiple electoral vote submissions.
* After each electoral vote certificate is read, “the President of the Senate *shall call for objections*, if any.” Professor Eastman instead proposes that the Vice President not call for objections with respect to certificates for the five to seven States with multiple electoral vote submissions. This would have the effect of depriving Representatives and Senators of the ability to make objections to the counting of electoral vote certificates, and to debate those objections.
* The Electoral Count Act provides that, whether or not any objections have been made, competing slates of electors must be submitted to the Senate and House for debate and disposition. Professor Eastman’s proposal would instead refer competing slates of electors to State legislatures for disposition.
* The Electoral Count Act provides that the joint session cannot be dissolved once it begins; that any recess can only be until the next morning (Sunday excepted); and that only five days of such recesses are allowed. Professor Eastman’s proposal, by contrast, contemplates an extended recess of the joint session to allow State legislatures to investigate the election and to vote on which slate of electors to certify.

Professor Eastman’s proposal is also contradicted by the opinion authored by Republican Supreme Court Justice Joseph Bradley as the deciding vote on the Electoral Commission of 1877. Justice Bradley found that the Vice President cannot decide the validity of electoral votes, and cannot order that investigations into their validity be conducted outside of Congress. . . .

Finally, Professor Eastman’s proposal is strongly in tension with the decision handed down yesterday by the District Court for the District of Columbia in the *Wisconsin Voters Alliance* litigation. The essence of Professor Eastman’s proposal is that dispute between competing slates of electors should not be referred for decision to the House and the Senate, or determined based on certifications made by State executives. Rather, he contends, they must be referred to and decided by State legislatures. But whereas the former procedures are provided for by the Electoral Count Act, Professor Eastman’s proposed course of action has never occurred in the history of the United States. In *Bush v. Gore* (2000), the Supreme Court allowed Florida’s electoral vote dispute to be resolved through certification by the State executive. And in *Wisconsin Voters Alliance* the court held that “[p]laintiffs’ theory that [the Electoral Count Act is] unconstitutional and that the Court should instead require state legislatures themselves to certify every Presidential election lies somewhere between a willful misreading of the Constitution and fantasy.”

Had one or more State legislatures in the seven disputed States certified and submitted a competing slate of electors, a strong argument could be made that such a submission would qualify as a certification by a “State authority” sufficient to trigger the Electoral Count Act’s provisions for deciding multiple state disputes. A reasonable argument might further be made that when resolving a dispute between competing electoral slates, Article II, Section 1 of the Constitution places a firm thumb on the scale on the side of the State legislature. . . . Here, however, no State legislature has appointed or certified any alternate slate of electors, and Professor Eastman acknowledges that mot Republican legislative majorities in the States have signaled they have no intention of doing so.

Professor Eastman acknowledges that if under present circumstances the Vice President attempted to act in accordance with this proposal, the Vice President would immediately be sued for violating numerous provisions of statutory law. That lawsuit would be filed in the U.S. District Court for the District of Columbia, which just issued the *Wisconsin Voters Alliance* decision rejecting similar arguments that the Electoral Count Act is unconstitutional and that electoral slates must be certified by State legislatures. In light of the unfavorable composition of the D.C. Circuit, it should be assumed the same position would prevail in any appeal.

. . . . Professor Eastman acknowledges that majorities in both the House and the Senate would oppose his proposed novel procedure, which would deprive them of their present statutory right to object and debate electoral votes. He further acknowledges that as of today, no Republican-controlled legislative majority in any disputed State has expressed an intention to designate an alternate slate of electors.

If the Vice President implemented Professor Eastman’s proposal, he would likely lose in court. In a best-case scenario in which the courts refused to get involved, the Vice President would likely find himself in an isolated standoff against both houses of Congress, as well as most or all of the applicable State legislatures, with no neutral arbiter available to break the impasse.