

## PRIVILEGED AND CONFIDENTIAL

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.

### **I. 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. A sampling of the more significant violations is as follows:

- a. **Georgia** (as alleged in *Trump v. Kemp et al.* (N.D. Ga., filed Dec. 31)
  - i. SOS altered signature verification requirements via an unauthorized settlement agreement.
  - ii. Portable “polling places” targeted to heavily democrat ares
  - iii. Refusal by the state judiciary to even assign a judge to hear the statutorily-authorized election challenge brought by the Trump campaign on Dec. 4.
  
- b. **Pennsylvania** (as noted in *Trump v. Boockvar et al.* (S.Ct., filed Dec. 21)
  - i. Following a collusive suit brought by the League of Women Voters against the Democrat Secretary of the Commonwealth seeking to require that absentee ballots not passing the signature verification process be given notice and an opportunity to cure, the Secretary unilaterally abolished the signature verification process altogether, issuing a directive that not only was it not required, it was not even permitted. She then filed an emergency writ action with the partisan-elected Supreme Court to ratify her elimination of that statutory requirement
  - ii. The PA Supreme Court agreed with the Secretary, but went further, also eliminating the statutory right of candidates to challenge illegal ballots during the absentee ballot canvassing.
  - iii. The PA Supreme Court next eviscerated the statutory requirement that candidates be allowed to have election observers, holding that 1 individual “in the room”—even if at the entrance of the football field-sized Philadelphia Convention Center—was sufficient.
  - iv. The PA Supreme Court then eviscerated the remaining validation requirements in state law, holding that the statutory requirement that a voter “fill in, sign, and date” the absentee ballot certificate was

unenforceable because “fill in” was ambiguous, and because the date requirement served no purpose, in its view.

- c. **Wisconsin** (as noted in two cert petitions, *Trump v. Biden*, filed on Dec. 29, and *Trump v. Wisc. Elections Comm’n*, filed on Dec. 30)
  - i. The use of unmanned drop boxes, not authorized in Wisconsin law
  - ii. The use of so-called “human drop boxes”, also not authorized in Wisconsin law, and utilized in “Democracy in the Park” efforts coordinated by Dane County (Madison) election officials and the Biden campaign.
  - iii. Allowed election officials to add missing information to absentee voter or witness declarations, contrary to law, which says such ballots must not be counted.
  - iv. Dane and Milwaukee County clerks recommended that voters fraudulently claim to be “indefinitely confined” in order to avoid voter id requirements.
  
- d. **Michigan**
  - i. Mailed out absentee ballots to every registered voter, contrary to statutory requirement that voter apply for absentee ballots
  - ii. Established remote drop boxes only in heavily Democrat precincts, without the statutorily mandated video surveillance.
  - iii. Absentee ballots delivered at 3 am were counted without affording candidates the opportunity to observe, contrary to state law
  
- e. **Arizona**
  - i. Federal court reduced Arizona’s 29-day-before-election registration requirement
  
- f. **Nevada**
  - i. Machine inspection of signatures, rather than the human inspection of signatures mandated by state law, was allowed.

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.

## **II. The Constitutional and Statutory Process for Opening and Counting of Electoral Votes.**

- 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.

- 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 12<sup>th</sup> 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 with 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 12<sup>th</sup> 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 ([here](#))), **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 12<sup>th</sup> 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 12<sup>th</sup> 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.