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MEMORANDUM

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 6, 2020
RE: **Important That All Trump-Pence Electors Vote on December 14**

This follows up on my November 18 memo (copy [here](#)) advocating that unless the President and Vice President plan to concede the race if they fail to reach 270 electoral votes by December 14, the Trump-Pence electors all should meet in their respective States, and cast their votes and send them to Washington, so that the votes will be physically present at the joint session of Congress on January 6.

This memo briefly covers three points: (1) importance of all the electors in all six contested States voting; (2) messaging about this being a routine measure; and (3) logistics.

1. The Trump-Pence electors in all six contested States must vote

I'd be happy to follow up on the subject with a separate memo, if the national legal strategists are interested, but I've mulled over how January might play out, and it seems feasible that the Trump campaign can prevent Biden from amassing 270 electoral votes on January 6, and force the Members of Congress, the media, and the American people to focus on the substantive evidence of illegal election and counting activities in the six contested States, provided three things happen:

(a) All the Trump-Pence electors meet and vote, in all six contested States, and send in the certificates containing their votes, in compliance with federal and state statutes, on December 14;

(b) There is pending, on January 6, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State (of course, ideally by then Trump will have been awarded one or more of the States); and

(c) On January 6, in a solemn and constitutionally defensible manner, consistent with clear indications that this what the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation's history, Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.

I'm not necessarily advising this course of action, and the Vice President need not make a decision on how to proceed until January 6, and obviously there are many factors that will come to bear on how he proceeds, assuming the race has not been conceded before January 6. My point here is that it is important that the alternate slates of electors meet and vote on December 14 if we are to create a scenario under which Biden can be prevented from reaching 270 electoral votes, even if Trump has not managed by then to obtain court decisions (or state legislative resolutions) invalidating enough results to push Biden below 270.

Again, I'd be happy to elaborate further on the January 6 scenario I have in mind, but provided the three conditions above are met, unless I am missing something, I believe that what can be achieved on January 6 is not simply to keep Biden below 270 electoral votes. It seems feasible that the vote count can be conducted so that at no point will Trump be behind in the electoral vote count unless and until Biden can obtain a favorable decision from the Supreme Court upholding the Electoral Count Act as constitutional, or otherwise recognizing the power of Congress (and not the President of the Senate) to count the votes.

Specifically – but only if all six States are still contested, and all six slates of Trump-Pence electors had voted on December 14 – I think the count could be managed so that Biden would have to seek Supreme Court review either when he is behind 12-0 in the electoral count or, at latest, when he is behind 232-227.

Even if, in the end, the Supreme Court would likely end up ruling that the power to count the votes (in the sense of resolving controversies concerning them) does not lie with the President of the Senate, but instead lies with Congress (either voting jointly, or in separate Houses), letting matters play out this way would guarantee that public attention would be riveted on the evidence of electoral abuses by the Democrats, and would also buy the Trump campaign more time to win litigation that would deprive Biden of electoral votes and/or add to Trump's column.

I recognize that what I suggest is a bold, controversial strategy, and that there are many reasons why it might not end up being executed on January 6. But as long as it is one possible option, to preserve it as a possibility it is important that the Trump-Pence electors cast their electoral votes on December 14.

2. Messaging about the December 14 vote as routine

If the Trump campaign ends up deciding to have all of its electors vote on December 14, even in States in which Trump has not been declared the winner, presumably word of this will leak out prior to December 14. So perhaps before then there should be messaging that presents this as a routine measure that is necessary to ensure that in the event the courts (or state legislatures) were to later conclude

that Trump actually won the state, the correct electoral slate can be counted in Congress in January – just as the Democrats did in Hawaii in 1960, which ended up with Hawaii’s electoral votes being awarded to Kennedy, even though the litigation was not resolved until after the electors voted (see my Nov. 18 memorandum).

Two points might be made to support this as being a routine, sensible measure. First, our key adversary in Wisconsin, the Wisconsin Elections Commission (WEC), has recognized that there is plenty of time for litigation to play out, and no need to rush unduly, because the real deadline is January 6. See pages 6-10 of its Wisconsin Supreme Court brief, here.

Similarly, Justice Ginsburg noted that the date which has “ultimate significance” under federal law is “the sixth day of January,” the date set by 3 U.S.C. § 15 on which the Senate and House determine “the validity of electoral votes.” Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting) (opinion here).

Professor Tribe, a key Biden supporter and fervent Trump critic (e.g., here, here, and here), has likewise noted that the only real deadline for a State’s electoral votes to be finalized is “before Congress starts to count the votes on January 6.” Laurence H. Tribe, “Comment: eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors,” 115 Harv. L. Rev. 170, 265-66 (2001) (copy here).

Further, respected voices in the minority community are recently on record that January 6 is the important date. Consider, for example, this article in Roll Call on October 26 (emphasis added):

Some people believe the GOP’s reluctance to support efforts in the battleground states of Michigan and Pennsylvania to begin processing mail-in votes before Election Day is tied to the fact that they have Democratic governors and Republican-controlled legislatures. If disputes over mail-in votes are dragging on in court when it comes time for the Electoral College to meet on Dec. 14, it’s possible legislators could put up their own slates.

Those disputes would land in the lap of Congress, and don’t expect objections to come only from Republicans.

Sherrilyn Ifill, president and director of the NAACP Legal Defense and Education Fund, noted during a webinar hosted by the Aspen Institute on Oct. 2 that just as the Black Caucus objected to the Florida vote in 2001, the same could happen in January if voters are intimidated from casting ballots or election officials are stopped by

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armed groups or court orders from counting absentee or provisional ballots.

“We are a nonpartisan organization, but we believe it’s critical that every vote is counted,” she said. “And so I would just draw your attention to the fact that **we really have to take this all the way to Jan. 6**, and that potential statutory challenge may be received quite differently in 2021 than it was received in 2001.”

Second, prominent liberal figures urged, just before election day, that given that post-election litigation might drag on for some time, each campaign should have its slate of electors vote on December 14.

Consider [this essay](#), published on CNN.com by Van Jones and Larry Lessig on Nov. 4, when they thought Trump might be ahead in the count in Pennsylvania after election day, and that Democrats then would have to contest the State. Jones and Lessig wanted to make clear in advance that Democrats would have until January 6 to pull out a win (having learned Gore's painful lesson from 2000 that you need to give yourself as much time as possible to come from behind). After considering the key insight that can be gleaned from the 1960 Hawaii electoral count, they advised (emphasis added):

That insight shows what should happen this year on December 14, 2020, when the electors are to meet to cast their ballots. **On that day**, assuming the final count of the popular votes has not yet been certified, **both slates** of Pennsylvania presidential electors should meet in Harrisburg. **Both slates should cast their votes** by ballot. And Pennsylvania Gov. Tom Wolf should await the final resolution of the popular vote count before he certifies which slate should represent the state. **So long as that certification happens before January 6, there is nothing that should stop it from being counted by Congress.**

Given such prior statements by these and other prominent liberal figures, it would be the height of hypocrisy for Democrats to resist January 6 as the real deadline, or to suggest that Trump and Pence would be doing anything particularly controversial in asking the electors pledged to them to please assemble in their respective States and cast their votes, and transmit them to Washington, on December 14, so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature.

3. Logistics for casting/transmitting electoral votes on December 14

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy [here](#)).

The state-law requirements are set out in Wis. Stats. § 7.75 ([here](#)).

Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. But here is a brief summary, in chronological order, of the requirements, which I set out to make clear that the electors in the contested States should be able to take the essential steps needed to validly cast and transmit their votes without any involvement by the governor or any other state official.

The electors here function, in effect, as agents of the federal government, under powers delegated to them by the federal Constitution and statutes (assuming that they end up being recognized as the validly appointed electors, following final judicial and/or state legislative action).

- Under federal law, the ten Trump-Pence electors must all meet, together, on December 14, “at such place in each State as the legislature of such State shall direct.” 3 U.S.C. § 7.
- Under Wisconsin law, they “shall meet at the state capitol,” i.e., in the Capitol Building, “at 12:00 noon.” Wis. Stat. § 7.75(1).
- There is no requirement that they meet in public. It might be preferable for them to meet in private, to thwart the ability of protesters to disrupt the event – witness, via [this video](#), what happened when the Trump-Pence electors met in public in 2016, even though the Trump-Pence victory in Wisconsin had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.
- Preferably all ten electors who were on the ballot would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, it is sufficient that three electors who were on the ballot make it, provided that other party stalwarts (not constitutionally disqualified from serving) are available to step in. Wis. Stat. § 7.75(1) (“if there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy.”).

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- The ten electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8; Wis. Stat. § 7.75(2).

- The electors would then prepare six identical sets of papers – “certificates” – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. Apparently each page is signed by each elector. 3 U.S.C. § 9.

- The only thing ordinarily contemplated by Sect. 9 that the Trump-Pence electors would not be able to do (unless Trump wins by December 14) is staple to each of their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows, this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

- Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State of Wisconsin for President and Vice President. 3 U.S.C. § 10.

- Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

- 1 to the President of the Senate, by registered mail, on the same day (“forthwith”).

- 2 to Wisconsin’s Secretary of State (apparently by hand), one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

- 2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail (“[o]n the day thereafter”).

- 1 to the U.S. District Court for the Western District of Wisconsin (apparently by hand).

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Given the possible upside of having the Trump-Pence electors meet to vote on December 14, it seems advisable for the campaign to seriously consider this course of action and, if adopted, to carefully plan related messaging.

K.C.