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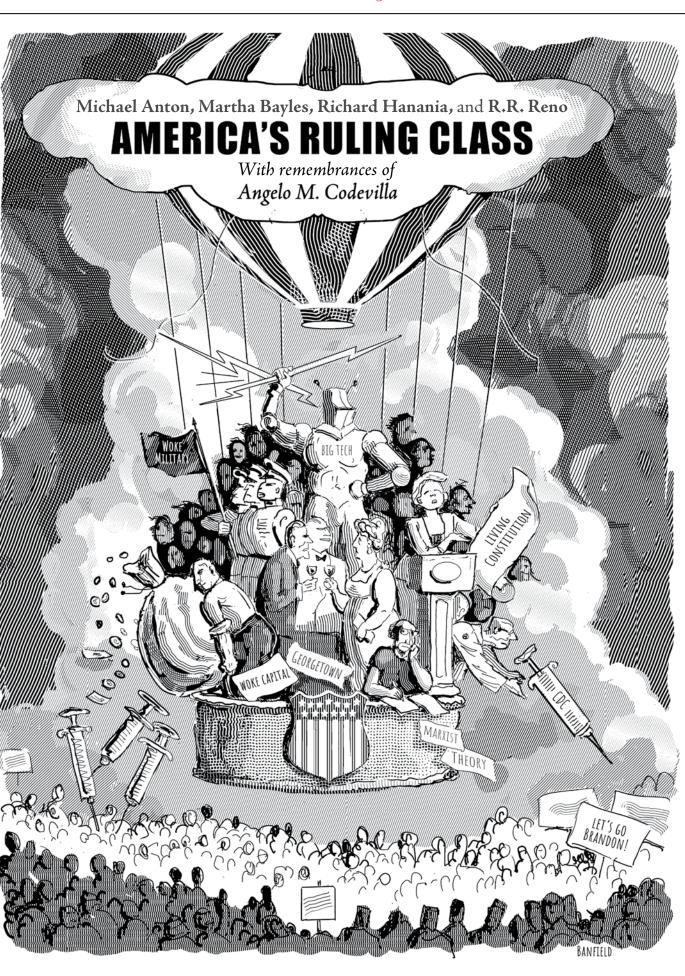
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THE DISPUTED QUESTION

Joseph M. Bessette examines John Eastman's post-election memoranda, with a response by John Eastman.



A Critique of the Eastman Memos

by Joseph M. Bessette

N LATE SEPTEMBER, TWO MEMORANDA surfaced that seemed to outline the plans of former President Donald Trump's personal lawyers to keep the U.S. Congress from certifying the Electoral College victory of his presidential opponent, Joseph Biden. The election had occurred on November 3, 2020, and within a few weeks all 50 states and the District of Columbia had certified the results. The electors, chosen by popular vote and committed to voting for either Trump or Biden, met in their states on December 14. They cast their ballots and sent the vote tallies to Congress, where they were to be opened and officially counted on January 6, the date specified in federal law. In no case did any public official or public agency send in more than one slate of electors.

As is well known, the president's supporters raised concerns about widespread vote fraud and the failure of state executive officials (and sometimes state judges) to follow their own election laws. Arguably, such failure violated the constitutional mandate in Article II, Section 1 that presidential electors be appointed "in such Manner as the Legislature thereof may direct." Even before all the votes were counted,

Trump himself insisted that, in fact, he had won a landslide victory. As he put it in a tweet during the January 6 attack on the Capitol, his "sacred landslide election victory" had been "unceremoniously & viciously stripped away."

The memos at issue were written by John Eastman, then a professor of law at Chapman University in southern California (he has since retired from this position) and also director of the Center for Constitutional Jurisprudence at the Claremont Institute, where he is a member of the Board of Directors and a senior fellow. Eastman is a highly credentialed lawyer who clerked for Justice Clarence Thomas, served as dean of Chapman's Fowler School of Law, and is past chairman of the Federalist Society's Federalism and Separation of Powers Practice Group.

I should add that I know him personally, and we have always been on friendly terms. Eastman's legal and constitutional arguments, made to influence the counting of electoral votes on January 6, must be taken seriously. My aim here is to elucidate those arguments as clearly as I can and to assess their implications. This is, I believe, the most detailed analysis of the memos to date.

As far as I know, Eastman was in no way acting on behalf of, or representing, the Claremont Institute (publisher of the Claremont Review of Books) when he joined the Trump legal team in the fall of 2020, prepared the two memos in late December and early January, and, in an Oval Office meeting on January 4, assisted Trump in trying to persuade Vice President Mike Pence to postpone the counting of electoral votes on January 6. This would give state legislatures time to investigate charges of fraud and illegality. Then, if they became convinced that Trump truly had won their states, they would overturn the previous certification of the Biden electors' votes and, in their stead, certify the votes of Trump electors.

Eastman's memos have generated enormous controversy. Mainstream media outlets now regularly describe them as a scheme to overturn the lawful results of the 2020 presidential election—the "coup memos," to use the media vernacular. On CNN's *Inside Politics*, for example, host John King said of the first memo to become public that "the goal, outlined in six steps, [was] to have then Vice President Mike Pence throw chaos into the electoral college

certification process and find a way to ignore the 2020 election results." "It's just scary," he continued, "scary because of the threat and it's also lunacy as you read through it." Both memos have also been criticized in conservative and libertarian outlets such as the *Volokh Conspiracy* and *National Review*. It is not my intention here to pile on. Yet, given the controversy they have generated and the importance of the issues they raise about counting electoral votes in contested presidential elections, it behooves us to examine the memos and the positions elaborated therein with some care.

The Timeline

HERE ARE, AS NOTED, TWO DISTINCT memos at issue: a two-page memo and a six-page memo. The first to become public was the shorter one. Apparently, it became known to the media through the publication of Bob Woodward and Robert Costa's Peril, which recounts the final days of the Trump Administration. The authors had obtained a copy of the memo, and either they or someone else provided it to media outlets. CNN brought the two-page memo to public attention on September 20. Almost immediately after its release, Eastman made known the existence of the longer six-page memo and provided a copy. On the morning of September 21, CNN posted the full two-page memo online. By the end of the day, the network ran a fairly lengthy story describing Eastman's reaction to the release of the first memo: "Eastman told CNN that the two-page memo had been only a preliminary draft." The story provided links to both the two-page memo and the six-page memo. Neither memo identifies the addressee, the author, or the date. Both are headed "PRIVILEGED AND CONFI-DENTIAL," followed on the next line by "January 6 scenario." Eastman has acknowledged that he is the author of both.

According to the account in Peril, Senator Mike Lee of Utah was the principal Republican senator investigating the legal and constitutional issues surrounding the upcoming congressional certification of the presidential vote. Lee has an extensive legal background. Sometime around Christmas, he was put in touch with Eastman, who told him, "There's a memo about to be developed. I'll get it to you as soon as I can." The two-page memo arrived on Saturday, January 2, four days before the scheduled congressional vote. According to the same source, the second, longer memo was introduced by Eastman two days later (on Monday, January 4) at a meeting in the Oval Office attended by Eastman, President Trump, Vice President Pence, and two Pence

aides—Chief of Staff Marc Short and counselor Greg Jacob. According to Woodward and Costa's summary of the meeting, Trump and Eastman sought (unsuccessfully, it turns out) to persuade Pence he had the constitutional authority to "pause the process in Congress so Republicans in state legislatures could try to hold special sessions and consider sending another slate of electors."

In the first of two interviews that Eastman gave in October to John McCormack of National Review, he asserted that he "never had any dealings with Mike Lee about this at all. I don't know who gave him a copy of the internal memo." But in the second interview, after McCormack read him the relevant passages from Peril, Eastman admitted, "I did have a conversation with Senator Lee. But I have no record of having given him either of the two memos." There seems to be no dispute, however, that Eastman wrote the twopage memo and that Senator Lee received it on January 2. If Eastman did not send it directly to Lee, then presumably he sent it to one or more others who sent it to the senator. (The interviews with Eastman are recounted in "John Eastman vs. the Eastman Memo," published by National Review on October 22. As the title indicates, McCormack elaborates ways in which Eastman's current position varies from the contents of the two memos.)

Furthermore, retired federal appellate judge Michael Luttig seems also to have seen the memo by early January 2021, when he advised Vice President Pence that his "only responsibility...[was] to faithfully count the Electoral College votes as they have been cast." In a series of tweets on September 21, just after the story about the memos broke, Luttig wrote, "I believe(d) that Professor Eastman was incorrect at every turn of the analysis in his January 2 memorandum." Luttig followed this with a point-by-point rebuttal that closely tracked the recommendations of the two-page memo. Eastman once clerked for Luttig, a highly respected conservative jurist who was on President George W. Bush's short list for a Supreme Court nomination. Vice President Pence (either personally or through high-level staff) had previously solicited Luttig's legal and constitutional opinion on the issue. This seems to indicate that Lee, Pence, and Luttig were all in possession of the two-page memo in the leadup to January 6.

Skirting the Question

Before turning to the details of the two memos, it will be useful to review what Eastman has said about the relationship between them. On September

30, the conservative website American Greatness published Eastman's response to the controversy. This is how he began:

The media-generated controversy over the legal memo I wrote in January (a preliminary, incomplete draft of which was recently made public) outlining the possible scenarios for the certification of the electoral vote is another instance of the press whipping up a frenzy around a false narrative and thereby further undermining its own legitimacy.

The carefully curated snip, lifted from a preliminary draft, showed only one scenario out of the many that had been floated.

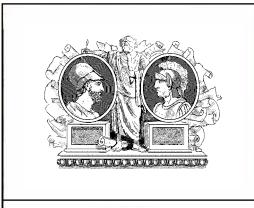
Others, defending Eastman's actions, have reiterated his characterization of the two-page memo released by the press. Ryan Williams, president of the Claremont Institute, wrote in Newsweek on October 1 that "[w]hat the public has seen is a truncated part of a draft version of John's memo." (In the same statement, Williams confirmed that Eastman acted in an "independent role as President Donald Trump's attorney during challenges to the 2020 election.") And in an article on the American Greatness website on October 2, Roger Kimball, editor of the New Criterion and publisher of Encounter Books, called the two-page memo "a bowdlerized fragment of Eastman's original memo."

Although these characterizations of the two-page memo by Eastman, Williams, and Kimball make it appear that the memo was never intended to stand on its own, the evidence indicates that the memo was delivered to Senator Mike Lee, to Vice President Pence (or his staff), and, through Pence's office, to former judge Michael Luttig. This is reason enough to take its contents seriously. Note also that the memo bears no notation indicating that it is a draft—though it is common practice to include such notation prominently when circulating a preliminary memo for review or comment by others.

In the weeks and months since it became public, Eastman has not defended the contents of the two-page memo, especially its highly controversial recommendation that Vice President Pence gavel Donald Trump the winner at the joint session of Congress on January 6 (more on this below). For example, on September 27, Eastman appeared on the podcast *Another Way* for a nearly hour-and-ahalf long conversation with Harvard Law professor Lawrence Lessig and Matthew Seligman, a legal expert on election law who taught a course with Lessig on disputed presidential

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elections. There, Eastman explained that the short memo "was just a preliminary version, just done quickly over Christmas day, or Christmas Eve, I think." Near the end of the conversation, Seligman pressed Eastman on his view regarding the independent authority of the vice president, when presiding over the joint session of Congress, to reject electoral votes unilaterally or to decide among competing slates. Eastman replied that the first memo "was done on a 24-hour turn[around] over Christmas, and it was only because I was asked that specific question, and I laid out what would happen under it. It was not my advice. That's why my name's not on it." (Anyone interested in the substance of the debate about how to resolve disputed presidential elections should listen to the entire podcast, which is a scholarly engagement of the relevant legal and constitutional issues at a very high level.)

Similarly, in his piece for American Greatness, Eastman wrote that "in my memo I do not even recommend the alternative which they claim I do." But here he must be talking about the later six-page memo, which indeed makes no formal recommendations. By its own terms, however, the two-page memo doesn't just list possible scenarios; it recommends a course of action. Moreover, it is not clear what Eastman means when he accuses the press of presenting only "a carefully curated snip" from the two-page memo, since CNN made both memos available in full, word-for-word, within 24 hours of breaking the story. It is true that the press pounced on one particular paragraph (#3 of the two-page memo). But the reason for this will become obvious when we examine the contents of the memos.

In my view, it is not helpful when other conservatives misstate what happened here. It is not correct, for example, to say that "[w]hat the public has seen is a truncated part of a draft version of John's memo." CNN posted the entire two-page memo on its website—not "a truncated part" of it—and then linked both memos in a longer story, all within 24 hours or so of breaking the story. It is, of course, a distinct question whether CNN news anchors and commentators (and others) properly interpreted the contents of the memos, or whether they failed to give sufficient attention to the longer memo. But at least we can say this: CNN certainly made it easy to check the originals. Moreover, based on what we now know, the publicly released two-page memo was not "a bowdlerized fragment of Eastman's original memo." That description reverses the sequence of the creation of the memos, implying that the longer memo was

written first and then "bowdlerized" (by the press?) to give a distorted rendition of Eastman's argument. I am aware of no evidence to support this interpretation; nor, as far as I know, does Eastman himself make such a claim

Fortunately, we can examine and assess the memos themselves. Originally communicated as "PRIVILEGED AND CONFIDENTIAL," presumably because they were legal work produced for a client, they are now in the public domain (Eastman has affirmed that Donald Trump has given him permission to discuss the memos). The memos make claims about the vice president's authority over certifying electoral votes, and they detail a variety of congressional certification scenarios, some of which (as we will see) would, in effect, allow the vice president to choose the president of the United States. Can the arguments and scenarios in the two memos withstand scrutiny? If not, why not? Are they of any value in guiding us as to how to address, through new law or constitutional amendment, the conundrum we face when statewide vote results are disputed in presidential elections—a conundrum likely to bedevil us for many elections to come in our hyper-partisan political environment?

The Ultimate Arbiter

E START WITH THE TWO-PAGE memo. As noted above, the memo, lacking an addressee, designated author, or date, was titled "January 6 scenario." The first (single-sentence) paragraph reads: "7 states have transmitted dual slates of electors to the President of the Senate." As many commentators have pointed out, this assertion is itself deeply problematic, for in no state did any public official or agency (including any chamber of a state legislature) send to Congress the votes of more than a single slate of electors. Though the memo neither names the seven states nor explains what it means by "dual slates of electors," this information is provided in the subsequent longer memo. There we learn that the states are Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin. Altogether, these seven states cast a total of 84 electoral votes for Biden. Had Trump won an additional 38 electoral votes from some combination of these states, he would have achieved a majority in the Electoral College and been re-elected.

What, then, does the author mean when he says that these states "transmitted dual slates of electors to the President of the Senate"? Simply this (from the longer memo): "Because

of...illegal actions by state and local election officials," Trump electors in these states "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." Although in most of these states the popular vote for president was closely divided, this was hardly the case in New Mexico, where Biden won 54.3% of the popular vote to Trump's 43.5%, or a margin of slightly under 100,000 out of 923,965 votes counted.

The second paragraph of the two-page memo has two sentences. The first quotes one provision of the 12th Amendment: "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." The 12th Amendment did change the presidential vote process by dividing up the votes for president and vice president (rather than awarding the office of vice president to the second-place finisher in the presidential vote). But the particular language cited in the memo is identical to that in Article II, Section 1 of the original Constitution. Neither the Constitution of 1787 nor the 12th Amendment says anything about what happens if there are dueling slates of electoral votes from a state, or if there is any reason to believe that the votes sent to Congress are defective in form or in some way inaccurate. In such cases, who decides?

The vice president, serving as president of the Senate, opens the votes, which "shall then be counted." Does this make the vice president the ultimate authority as to which votes count in contested cases, or does the passive voice ("shall then be counted") imply that the legislators do the actual counting? The two-page memo sides with the vice president: "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 [John] Adams and [Thomas] Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch." Lest there be any ambiguity, the penultimate sentence of the memo asserts that when there is a dispute about electoral votes, the Constitution makes the vice president "the ultimate arbiter."

Pressing Pause

In Neither this memo nor the longer one does Eastman elaborate the nature and relevance of the Adams (1796) and Jefferson (1800) precedents. In neither case, however, were there dueling slates of electoral

votes from any state. In 1796, newspapers had raised questions as to whether Vermont's four electors had been lawfully selected. In 1800, the four Georgia electors did not follow the proper form for certifying their votes. Vice President Adams presided over the joint session in 1797, opened the sealed envelope with the Vermont votes, and then turned it over to the congressionally appointed "tellers" to be counted. After this process had been followed for all the states, the tellers reported the results to Adams, who then announced his own victory. This was repeated with Jefferson and the Georgia votes four years later. In neither case did a single legislator in attendance object, and no one doubted that Vermont had voted for Adams in 1796 and Georgia had voted for Jefferson in 1800.

In 2004, David Fontana and Bruce Ackerman presented the results of their extensive research on these two episodes in a lengthy article for the *Virginia Law Review*. Drawing upon this work and additional research of his

The memos detail a variety of scenarios, some of which would, in effect, allow the vice president to choose the president of the United States.

own, Matthew Seligman (one of the interlocutors in the podcast mentioned above) has recently argued persuasively that the dominant view among early American lawmakers was that Congress, not the vice president as president of the Senate, was responsible for counting the electoral votes—and therefore that the House and Senate had full authority to determine how to resolve electoral disputes. Seligman presented a short version of his argument at Slate on October 22 ("John Eastman Is Right: His Election Memo Was 'Crazy'"). He also posted a draft of a longer, scholarly article on the same topic: "The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes."

Although there is no explicit constitutional rule for how to resolve disputes about electoral votes, Congress tried to fill this gap in 1887 when it passed the Electoral Count Act, a decade after the presidential election of 1876, which saw three Southern states submit to Congress contesting slates of electoral votes. (There was also a dispute about

one elector from Oregon.) Eastman's initial memo introduces a lengthy excerpt of the relevant portion of the act by stating, "[t]he Electoral Count Act, which is likely unconstitutional, provides:...." Following the excerpt is a short paragraph indicating why "we believe [this part of the Act] is unconstitutional." It gives two reasons: 1) the Act provides for each house of Congress to vote separately on disputed electoral votes "whereas the 12th Amendment provides only for a joint session," and 2) it makes the "executive" of the state the final authority "regardless of whether there was ever fair review of what happened in the election, by judges and/or state legislatures."

The next paragraph begins, "So here's the scenario we propose:" After this come six numbered paragraphs. In the first, the vice president, presiding over the joint session as the president of the Senate, "begins to open and count the ballots." In effect, then, the memo interprets the key phrase from the 12th Amendment—"open all the certificates and the votes shall then be counted"—as equivalent to the phrase: "open all the certificates and count the votes."

The memo's second paragraph stipulates that when the vice president, going through the states in alphabetical order, gets to Arizona, "he announces that he has multiple slates of electors, and so is going to defer decision on that until finishing the other States. This would be the first break with the procedure set out in the Act." Note that here the vice president has made two momentous decisions: 1) that the votes for Trump sent in by his 11 proposed Arizona electors, though not endorsed or certified by any public official or agency in the state, constitute an alternative "slate[] of electors," and 2) that the vice president need not follow the provisions of the Electoral Count Act governing contested slates of electors—that is to say, the vice president may unilaterally choose to treat the Electoral Count Act as unconstitutional.

Throwing Out Votes

T IS THE NEXT PARAGRAPH (#3) THAT IS the most controversial. Here it is in its entirety:

At the end [of the roll of the states] he [i.e., Pence] announces that because of the ongoing disputes in the 7 States, there are no electors that can be deemed validly appointed in those States. That means the total number of "electors appointed"—the language of the 12th Amendment—is 454 [as opposed to the 538 potential votes in the current Elec-

toral College]. This reading of the 12th Amendment has also been advanced by Harvard Law Professor Laurence Tribe [here the memo links to a September, 2020 article in *Verdict* co-authored by Tribe with fellow legal scholars Neil Buchanan and Michael Dorf]. A "majority of the electors appointed" would therefore be 228. There are at this point 232 votes for Trump, 222 votes for Biden. Pence then gavels President Trump as re-elected.

We must be clear on exactly what the memo here recommends. If, in states where the authorities certified Biden's victory, any group of proposed Trump electors sent their "votes" to Congress, this alone would be sufficient for the vice president to reject the certified votes from these same states and then also to exclude them from the total needed to determine what number constitutes a majority of the "electors appointed." Thus, even though the seven states at issue did in fact and in law appoint electors who then voted for Biden on December 14, those votes will be treated as if never cast at all. Given the current size of the House of Representatives (435) and Senate (100), and including the District of Columbia's three electoral votes, the total number of electors is 538. A majority is 270. But if you eliminate the 84 electors from the seven states in question, you get a total of 454 electors, reducing the majority to 228. Because Trump received 232 uncontested votes, he would have a majority and Pence would declare him the winner. Under this scenario, even New Mexico's five votes for Biden would not be counted, despite the fact that in the state's official count of under a million votes cast, Biden received 100,000 more votes than Trump. Has anyone suggested that Trump "really won" the popular vote in New Mexico? Has even Trump made such a claim?

It is hardly a surprise that this paragraph set off alarms in the media, and has been the focus of intense criticism from legal scholars and others. What is the principle here—that whenever proposed electors from a state which the other side officially won meet on the designated day, vote for their candidate, and send in their "votes" to Congress, the vice president on his own authority may simply refuse to count the officially certified votes from enough of these states to give the victory to the vice president's preferred candidate—who could, of course, be the vice president himself or herself? If that's the principle, then, of course, in the future proposed delegates from all the states that the other side won in the certified vote will send in their "votes" to

Washington so that the vice president can, in effect, choose the next president. One doesn't have to be a scholar of the American Founding, a professor of constitutional law, or an expert in election law to know that this simply cannot be right.

Or perhaps the principle is that whenever two slates of electoral votes from the same state show up at the vice president's office, even if one lacks certification from any public official or agency, the vice president must automatically reject all the certified votes from that state, no discretion necessary. In that case, we would soon have no electoral votes at all counted in the joint session, sending every presidential election to the House. At the Philadelphia Convention in 1787, the framers grappled for days with how the new chief executive should be elected. In the end, they rejected election by Congress because of the danger that this would render the president subservient to the legislative body. So, under paragraph #3 of Eastman's two-page memo, either 1) the vice president must reject the certified votes from all states in which the losing side sends in its own votes, thereby throwing every presidential election into the House of Representatives; or 2) the vice president gets to pick and choose which certified votes to count, making him the ultimate kingmaker—even if he is the one who gets to wear the crown.

Kingmaker

ERHAPS BECAUSE THIS PROPOSAL IS simply untenable, the memo does not stop here. Although paragraph #3 ended with Pence gaveling Trump's victory, the fourth paragraph draws back: "Howls, of course, from the Democrats, who now claim, contrary to Tribe's prior position, that 270 is required. So Pence says, fine. Pursuant to the 12th Amendment, no candidate has achieved the necessary majority. That sends the matter to the House," where each state gets one vote. The memo then notes that if Republicans in the House stand firm, their control of 26 state delegations will assure Trump's victory. (Laurence Tribe, a prominent liberal law professor and practicing attorney, now retired from Harvard Law School, is mentioned by name in each of the final four paragraphs. No other academic or legal expert is mentioned in the memo.) It is hard to know what to make of the transition from paragraph #3 to paragraph #4. Could Pence decide the matter at one point—"Pence then gavels President Trump as re-elected"and then in the face of "[h]owls...from the Democrats" immediately reverse course and, instead, send the case to the House of Representatives so that it can choose the President? Though the memo presents these two scenarios sequentially, perhaps it is better to think of them as two distinct alternatives available to Pence if he simply ignores the Electoral Count Act.

Paragraph #5, by contrast, assumes that "the Electoral Count Act is followed" in its requirement that when legislators object to electoral votes in the joint session, "the two houses break into their separate chambers." But the memo also requires Congress not to follow the Act's time constraints on debate: "That would mean that a prior legislature was determining the rules of the present onea constitutional no-no." This would allow Republican senators to insist on "normal rules (which includes the filibuster)." A Senate filibuster would create "a stalemate that would give the state legislatures more time to weigh in to formally support the alternate slate of electors, if they had not already done so." This is the first time the memo mentions the possibility of state legislatures "formally endors[ing]" pro-Trump Republican electors in states that had previously certified Biden's

But note how little additional time this tactic would allow. Under the 20th Amendment to the Constitution, the terms of the president and vice president end at noon on January 20—exactly two weeks after the joint session. Would the Republican legislatures in these crucial swing states conduct a hurried investigation to learn who "truly won" their state, or would they simply assert that Trump had won and certify the votes of his electors? In Arizona, it took five months to conduct a comprehensive audit of the presidential vote in a single large county, Maricopa (which includes Phoenix). According to the final audit report, the process "involved over 1,500 people who contributed a total of over 100,000 hours of time." At the end, both sides claimed victory. Democrats (and Republican election officials) noted that the final vote count was virtually identical to the initial certified results. Meanwhile, Trump and his supporters emphasized that the audit disclosed a large number of potential vote problemssuch as mail-in ballots from people who no longer lived at the specified address, people who voted in multiple counties, and people who no longer lived in Maricopa County. According to Trump, this demonstrated "fraud many more times than the so-called margin of 'victory,' which was only 10,457." If such a massive five-month post-election audit in one county of one state could not determine that Biden's victory was fraudulently obtained,

why should we expect that state legislatures could reach definitive conclusions, one way or the other, in the two short weeks between January 6 and January 20?

Here the scenarios in the two-page memo end. The final paragraph emphasizes the vice president's independent authority to make the key decisions. It begins, "The main thing here is that Pence should do this without asking for permission—either from a vote of the joint session or from the Court." If Democrats challenged the vice president's actions in court, the case would likely be dismissed as involving "non-justiciable political questions." The paragraph, and the memo, concludes: "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."

In total, then, the memo presents three distinct scenarios, apparently ordered from most controversial to least. In the first, Pence declares Trump the winner. In the second, he sends the matter to the House of Representatives, where the Republican hold on 26 state delegations should ensure a Trump victory. In the third, he allows the dispute procedures of the Electoral Count Act to begin, but then ignores key time limits in the Act so that a resulting stalemate between the chambers gives state legislators time to endorse the votes of Trump electors in states that had previously certified the votes of Biden electors. The memo does not explain what would happen after this—whether the vice president would rule that any subsequent endorsements by the legislatures would supersede the prior endorsements by governors or other executive officials, or whether Congress would make this decision. Nonetheless, it is fair to say that by its insistence that the vice president is the "ultimate arbiter" and that "[w]e should take all of our actions with that in mind," the memo strongly implies that if state legislatures certified the votes of alternative Trump electors, the vice president would count them at a reconvened joint session.

The vice president, according to this twopage memo, has vast independent powers over the certification of electoral votes. He may ignore federal law by disregarding officially certified votes if the electors pledged to the losing candidate simply meet and send in their own votes (even if the certified victor won by a comfortable majority, as in New Mexico in 2020). When he does so, he may exclude the certified votes from the total used to calculate a majority (in effect removing these votes from both the numerator and the denominator), thus reducing the absolute number of votes required for victory. Alternatively, he may keep the excluded votes in the denominator, denying the apparent winner a majority of all the electoral votes (currently 538), thereby sending the dispute to the House of Representatives for final resolution. Or, if he rejects these options, he may decide to follow some, but not all, of the provisions of the Electoral Count Act, potentially leading to a stalemate, thereby giving time for state legislatures to endorse the votes of competing slates of electors. As the "ultimate arbiter," the vice president seems to have unfettered discretion to choose among these various options.

The Six-Page Memo

S NOTED ABOVE, AS SOON AS THE TWOpage memo became public on September 20, Eastman described it as only a "preliminary draft" and provided the longer six-page memo. According to Peril, this longer memo was the basis for the Oval Office meeting on Monday, January 4. In his interviews with John McCormack of National Review, Eastman reported that the final six-page memo was drafted on January 3 and that the memos "were not part of our discussion on January 4, but the ideas certainly were." We don't know from Peril or (I believe) from Eastman himself to whom he submitted the longer memo or how extensively others may have circulated it.

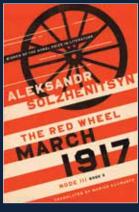
The six-page memo has four sections. Preceding these sections is a short paragraph that begins, "Article II, § 1, cl. 2 of the U.S. Constitution assigns to the legislatures of the states the plenary power to determine the manner for choosing presidential electors" (emphasis in the original). Next comes a nearly two-page section on "[i]llegal conduct by election officials." It begins by asserting that "important state election laws were altered or dispensed with altogether in key swing states and/or cities and counties." It then lists examples of such violations of state law in Georgia, Pennsylvania, Wisconsin, Michigan, Arizona, and Nevada. For four of these states, the memo details at least three purported violations of state law by executive or judicial officials. Only one violation is alleged in each of the remaining two states: a federal court decision to shorten Arizona's requirement for voters to register within 29 days of the election, and Nevada officials' decision to allow machine inspection of signatures as opposed to human inspection. There is, however, no mention of any supposed illegal actions by officials in New Mexico, which Biden won handily. The section concludes: "Because of these illegal

YOUR FALL READING LIST



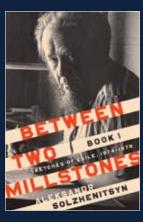
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actions by state and local election officials (and, in some cases, judicial officials[),] the Trump electors in the above 6 states (plus in New Mexico) met on December 14, cast their electoral votes, and transmitted those votes to the President of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

The next section is titled, "The Constitutional and Statutory Process for Opening and Counting of Electoral Votes." It repeats the language in the first memo from the 12th Amendment about the president of the Senate (i.e., the vice president) presiding over the joint session of Congress for the official count of electoral votes. It follows this with the same language from the two-page memo on the vice president's authority: "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."

Next comes the same lengthy excerpt from the Electoral Count Act as appeared in the previous memo, introduced with the same statement that "[t]he Electoral Count Act of 1887...is likely unconstitutional." Following the excerpt is virtually the same summary paragraph explaining why "we believe [this part of the Act] is unconstitutional." The one difference is that the longer memo adds this sentence: "That also places the executive of the state above the legislature, contrary to Article II." This refers to the provision of the Electoral Count Act that makes the electoral votes certified by the "executive" of the state the ones to be counted if the House and Senate disagree. This, then, appears to link back to the very opening of the six-page memo: "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." In a dispute over electoral votes between the executive of a state and its legislature, it is the lawmakers who retain the decisive constitutional authority.

War Games

three pages of the memo. Section III, which fills nearly all of the next two pages, is titled "War Gaming the Alternatives." It details nine different possibilities. In five of these Biden wins, and in four Trump wins. In the first scenario, no one objects to the electoral votes previously certified by state

authorities, and Biden wins. In the next three scenarios, legislators object to the ballots received from "the 7 states with multiple ballots" and, following the terms of the Electoral Count Act, "[t]he two bodies adjourn to their separate chambers and decide which slate of electors to count." In the first of these three scenarios the House and Senate vote for the Biden electors. In the second, the two houses disagree, but because the Electoral Count Act privileges votes certified by the state's executive, Biden wins. In the third, there is a Senate filibuster, which eventually ends, and, following one of the previous two scenarios, Biden wins.

The next three scenarios, in all of which Trump emerges the victor, are preceded by the following language: "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)." This was the position urged in the two-page memo.

The first of these three scenarios rests on the condition that at least some state legislatures (not merely some legislators) have certified the votes of Trump electors, in opposition to their state's prior certification of the votes of Biden electors:

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[al] votes, and TRUMP WINS.

The next scenario assumes that the state legislatures have not so acted:

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 [sic] to count neither slate of electors.... 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. [Emphasis in the original.]

This is quite similar to paragraph #3 of the two-page memo. The difference is that here the vice president first weighs "all the evidence and letters from state legislators" before ruling that no electors were appointed in the seven states at issue. In the earlier memo, the mere fact that Trump's electors met and sent in their votes was sufficient for Pence to refuse to count the certified Biden votes for the seven states, thereby dropping 84 electoral votes from both the numerator and the denominator needed to calculate the majority winner. This scenario does not mention the possibility that Pence might decide differently for different states, creating the possibility that Biden might win a majority even under the new count.

The third scenario is effectively identical to paragraph #4 of the two-page memo:

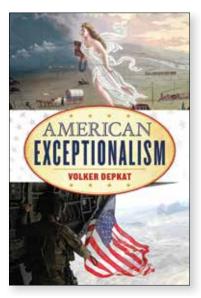
Alternatively, VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 elector[al] votes, throwing the election to the House. IF the Republicans in the State Delegations stand firm,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

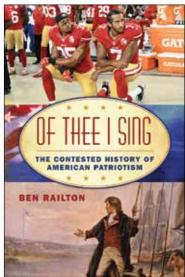
Note both 1) that in this scenario the mere fact that potential electors pledged to Trump met on December 14 and sent their "votes" to Congress is sufficient for Pence to reject the certified electoral votes received from their states and 2) that here the denominator for calculating a majority remains 538, the total set by the Constitution given the current size of the House and Senate.

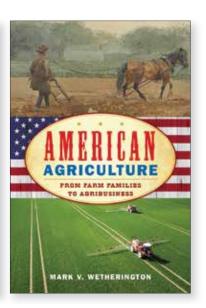
The final two scenarios presume that "VP Pence determines that the ongoing election challenges must conclude before ballots can be counted, and adjourns the joint session of Congress, determining that the time restrictions in the Electoral County [sic] Act are contrary to his authority under the 12th Amendment and therefore void." Subsequently, "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." (As noted above, it seems wholly unrealistic to believe that a state could complete a "comprehensive audit/investigation" of its election returns in the two weeks before Trump's term ended on January 20.) In so doing, Eastman argues, a legislature "exercise[s] authority it



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has directly from Article II and also from 3 U.S.C. § 2 [which allows a state that 'failed to make a choice on the day prescribed by law' to appoint its electors 'on a subsequent day']." In one scenario, the investigations do not prove sufficient "fraud and illegality" to change the results: "BIDEN WINS." In the other scenario, at least some state legislatures become convinced that "there was [sic] sufficient fraud and illegality to affect the results of the election." These legislatures "certif[y] the Trump electors." Then, after the joint session of Congress reconvenes, "those votes are counted and [if this results in Trump winning at least 270 electoral votes] TRUMP WINS."

Queensbury Rules

he final short section IV has this heading: "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." What follows are two short paragraphs. The first reproduces the final paragraph (#6) of the two-page memo:

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.

The memo then concludes:

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 [sic] allowed to stand—and the Supreme Court has signaled unmistakably that it will not do anything about it [sic]—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.

Recall that although Eastman has virtually disavowed the two-page memo, he has not distanced himself in the same way from its sequel. Nonetheless, in calling the first memo a "preliminary draft" of the second, he implies some kind of organic continuity between the two. So, in what ways does the second memo repeat, or reinforce, the key points of the first memo, and in what ways does it vary?

Here are the ways in which the second memo is similar to the first:

- it asserts that there are "dual slates of electors" from seven states, even though no official person or agency had certified the votes of more than one slate;
- it claims that key provisions of the Electoral Count Act of 1887 are "likely unconstitutional" or simply "unconstitutional";
- it basically repeats the two most controversial scenarios—one in which Pence declares Trump the victor by dropping all the Biden votes from seven states, and another in which Pence sends the matter to the House by dropping these Biden votes—and
- it emphatically makes large claims for the vice president's authority under the 12th



Amendment—that he resolves disputes over electoral votes, that "all the Members of Congress can do is watch," that the vice president should exercise his authority "without asking for permission," and that the vice president is the "ultimate arbiter" of matters pertaining to contested electoral votes.

And here are ways in which the second memo differs from the first:

- it details the ways in which public officials in six states did not follow their own election laws:
- it lists nine distinct alternatives for how the vote count might proceed, including five in which Biden wins;
- unlike the two-page memo, which explicitly proposes a course of action, it makes no formal recommendations;
- it essentially asserts that a state legislative certification of electoral votes supersedes a prior executive branch certification;
- it includes the provocative statement that "we're no longer playing by Queensbury Rules"; and
- it concludes by asserting that the nation is "facing a constitutional crisis" and that if the certified results of the November presidential election are not overturned, "we will have ceased to be a self-governing people."

Eastman's Written Response

Since the longer memo includes all the key elements of the first memo, it would be helpful if we knew which substantive claims in the first memo Eastman now disavows when he says, as in the Another Way podcast, "It was not my advice." Yet, in the piece he published on the American Greatness website on September 30, he simply ignored the two-page memo. As for the longer memo, here are six key passages from Eastman's description of it for American Greatness, with my comments after each selection:

1. "[I]n my memo I do not even recommend the alternative [paragraph #3 of the two-page memo] which they claim I do."

Eastman refers here to "my memo," implying that there was really only one—the second, which grew out of the earlier "preliminary draft." But the first memo, as we have seen, unambiguously recommends the course of action Eastman refers to here: Pence rejects 84 electoral votes from seven states, excluding these votes from both the numerator and de-

nominator and "gavel[ing] President Trump 3. "Ironically, the scenario I actually recas re-elected." ommended to Vice President Mike

2. "Each of the scenarios I presented was grounded in constitutional text and supported by scholarly writings or prior judicial precedent. They were presented to serve as the basis of a full discussion of all the options available to our elected leaders, premised on the assumption of proven electoral fraud or illegality."

This wording makes clear that the four scenarios in the six-page "legal memo" (this is how Eastman labels the document at the beginning of the article) were not presented as merely hypothetical things that might happen on January 6, but rather as legitimate constitutional options available to the vice president: "grounded in constitutional text and supported by scholarly writings or prior judicial precedent." Eastman adds that these options were "premised on the assumption of proven electoral fraud or illegality." Is this true? It is for the first and fourth "Trump wins" scenarios, according to which state legislatures certify Trump electors—assuming, of course, that the legislatures sincerely conclude that fraud and illegality resulted in Biden's initial win. But what of the second and third Trump-victory scenarios? In the second, the state legislatures "have not certified" Trump electors, and the vice president on his own reviews the evidence and letters from state legislators (presumably between January 4 and 6). He then decides at the joint session to count neither the Biden nor Trump electors, which results in a Trump victory by discounting 84 electoral votes altogether (essentially the paragraph #3 scenario of the first memo).

Given the sheer complexity of the charges of fraud and illegality—pressed by Trump's lawyers unsuccessfully for several months throughout the key swing states—is it reasonable to characterize a judgment by Pence in Trump's favor, reached by reviewing evidence from six or seven states over two days, as proof of "electoral fraud or illegality" sufficient to flip the results? Surely not. Finally, in the third of the pro-Trump scenarios—where Pence simply sends the matter to the House of Representatives for a state-by-state vote for president—there is no assumption or finding of fraud or illegality at all, just a determination by Pence that "multiple electors were appointed from the 7 states" and "not counted because of ongoing election disputes." And this is despite the fact that no public official or agency in these states had certified any electoral votes other than those for Biden.

3. "Ironically, the scenario I actually recommended to Vice President Mike Pence was that he accede to requests from numerous state legislators, including the president pro tempore of the Pennsylvania state senate, to delay the proceedings long enough for the legislatures in the contested states to assess the impact of acknowledged illegality in the conduct of the election."

This is the fourth (and final) of the scenarios that would result in Trump's re-election (assuming that a sufficient number of state legislatures certified Trump electors). Eastman maintains that this is what he actually recommended to Pence, presumably at the Oval Office meeting on January 4. Woodward and Costa confirm this. For whatever reasons, however, the six-page memo does not recommend this course of action, because it makes no formal recommendations at all.

4. "Indeed, I explicitly stated to Pence during an Oval Office meeting on January 4 that even assuming he had constitutional authority to reject contested electoral votes, it would be 'foolish' to exercise any such authority in the absence of the state legislatures actually having certified the alternate Trump slate of electors."

Here Eastman makes a prudential judgment that it would be "foolish" for Pence to reject the "contested electoral votes" without state legislative certification of Trump electors. Though this contradicts the course of action recommended in the previous two-page memo, one can hardly fault the author for changing his mind between January 2 and 4, if this is what happened. Note also that this prudential judgment in no way undermines the holding in both memos that Pence had the constitutional authority to throw out Biden votes without any new state legislative action.

5. "The memo's proposals aimed to prevent certification of a potentially illegal election—and this is what the [media blood]hounds call 'overturning the election' and urging a 'coup'.... Simply applying [Laurence] Tribe's constitutional analysis, I noted that if all 84 of the contested electoral votes were disregarded on the grounds that they were based on the counting of explicitly illegal ballots, Trump would lead 232 to 222—a majority of the 454 actually 'appointed.' And under Tribe's

constitutional analysis, Trump would have won."

Although this is an accurate restatement of one of the scenarios in the six-page memo (and also in the two-page memo), this way of formulating the point makes it appear that what is going on here is a kind of legal exercise: if Laurence Tribe's analysis of several years ago is sound, what would follow for the 2020 election? Yet neither of Eastman's memos rests its case for this highly controversial scenario on the soundness of Tribe's prior writings. Presumably, Eastman cites Tribe to show that at least part of his argument is compatible with previous work by an ideological opposite. (For the record, Tribe has denied that he agrees with Eastman on this, but see the Tribe quotes near the end of this piece.)

6. "Finally, the memo unambiguously acknowledges that if, after formal investigation by the legislatures in the contested states, it was determined that any proven fraud and illegality was 'insufficient to alter the results of the election, the original slate of electors would remain valid' and Biden would prevail when the joint session of Congress reconvened. That is the plain text of my full memo."

This also is accurate, but it ignores the fact that the six-page memo includes two scenarios (as did the two-page memo) by which Trump would become president without any investigation at all by state legislatures.

A Government of Laws

Y PURPOSE HERE HAS BEEN TO PROvide a close analysis of John Eastman's two memoranda and not to assess the soundness of whatever oral advice Eastman gave to his client, President Trump, or to Vice President Pence, in the two or three days before the January 6 joint session.

The memos are controversial mainly because they maintain that these few words of the 12th Amendment—"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"—vest in the vice president uncontrollable power and discretion to 1) reject the only certified electoral votes submitted by a state if the losing side sends in its own "votes" (even if the certified candidate won the popular vote handily); 2) decide whether to exclude the rejected votes only from the numerator in calculating the majority needed to

win the presidency or also from the denominator; 3) decide, depending on the number of electoral votes at issue, whether to send the election to the House of Representatives; 4) decide whether to follow the provisions of the Electoral Count Act of 1887, which spells out in great detail how to resolve disputes over contested electoral votes; 5) decide whether to send contested elections back to the state legislatures for further investigation; and 6) if a state legislature certifies electoral votes other than those previously certified by executive officials, decide to reject the original certification in favor of the later certification.

Near the end of his second memo, Eastman writes that "we're no longer playing by [Marquess of] Queensbury Rules." Though I am not a lawyer, this seems to me a remarkable statement to make in a legal memo. By what rules, then, are we playing? To our misfortune, the authors of the Constitution and of the 12th Amendment did not make provision for settling disputes about electoral votes in presidential elections. (Seligman shows in

Constitutionalists who cherish the rule of law and the legitimacy of our governing institutions have every reason to be deeply troubled.

the article cited above that in 1800 both the House and Senate passed bills to address contested presidential elections, but the bills died when the chambers could not agree on all the details.) Yet the American founders embraced as central to their whole enterprise the principle famously articulated in the Massachusetts Constitution of 1780: that ours should be "a government of laws and not of men." The Eastman memos, by finding that the Constitution vests a vast reservoir of uncontrollable power and discretion in the vice president, fall far short of meeting this basic test of American constitutionalism.

Because I am a constitutionalist and a political conservative, it particularly pains me that the Claremont Institute, whose vital mission it is "to restore the principles of the American Founding to their rightful, preeminent authority in our national life," has, with its public statement of October 11, basically circled the wagons, blaming "disinformation," "almost universally false news accounts," "deliberate misrepresentations," and "false and

slanderous statements" for the controversy that followed the release of the memos. The Institute's statement, which purports to "correct the record and state the truth about...John's legal advice" to the vice president, remarkably does not even mention the two memos, whose very publication sparked the current controversy. According to its authors—the chairman of the Board of Directors and the president of the Claremont Institute—the statement seeks "to correct the record and state the truth." Quoting Thomas Jefferson, they write that truth will prevail if not "disarmed of her natural weapons, free argument and debate." And they conclude: "The Claremont Institute will not remain silent in the face of widespread lies peddled by malicious domestic political opponents. We welcome debate, and so should our opponents and especially our friends."

Well, I am neither malicious nor a domestic political opponent, but rather a long-time friend of the Institute and sometime contributor to its programs, who has devoted a considerable part of his scholarly life to understanding the framers' design for the presidency and its contribution to the success of American democracy. The framers well understood that presidential elections could give rise to dangerous passions that would threaten the nation's "domestic tranquility"—one of the six essential purposes of the Constitution announced in its Preamble. Thus, when Alexander Hamilton defended in The Federalist the Constitution's provision for choosing presidents, he praised this innovation for making it unlikely that the contest for the nation's highest office would stimulate "tumult and disorder" or would "convulse the community with any extraordinary or violent movements." Though the rise of political parties altered how the Electoral College system functions, surely here the framers' ends should be ours as well.

Half a century after the founding, Alexis de Tocqueville described American presidential elections as "a crisis in the affairs of the nation":

For a long while before the appointed time is at hand the election becomes the most important and the all-engrossing topic of discussion. The ardor of faction is redoubled; and all the artificial passions which the imagination can create in the bosom of a happy and peaceful land are agitated and brought to light.... As the election draws near, the activity of intrigue and the agitation of the populace increase; the citizens are divided into hostile camps...; the whole nation glows with feverish excitement.

Without clear rules for resolving electoral vote disputes—our version of "Queensbury Rules," if you will—a future election crisis could do permanent damage to our political and civic order. This is what might possibly have happened if on January 6 Vice President Pence had—on the basis of an imagined constitutional authority—either gaveled Donald Trump as re-elected; sent the election to the House of Representatives for a Trump victory by the votes of 26 Republican-majority state delegations; or sent the election back to the state legislatures so that they could determine in two weeks' time who truly won.

Hamilton and Tocqueville remind us of the stakes involved in how we conduct our presidential elections. As I have tried to show, constitutionalists who cherish the rule of law and the legitimacy of our governing institutions have every reason to be deeply troubled by the Eastman memos and the effects they might have had on the peaceful transition of power from the Trump to the Biden Administration—and perhaps on such transitions of power in the future.

As if to underscore the point, the *Atlantic* posted an article by a staff writer in early October that asked whether Vice President Kamala Harris, who will preside over the congressional certification of the 2024 presidential vote on January 6, 2025, may have to "stop the steal" by Republicans. Laurence Tribe told the writer that Harris would not be "simply a figurehead" and that she could reject what he called "ungrounded challenges" to state certifications. "She may have other powers, he said, but he refused to discuss them with me." The reason for his reticence: "I don't want to lay out a complete road map for the

other side." As if preparing the ground for a large assertion of power by Harris, the article ends with this quotation from a Democratic lawyer: "We all know how it turned out for Weimar.... And we may face the hypothetical, the worst-case scenario, where it's only the vice president standing between totalitarianism and us, between a bloodless coup and democracy." Predictions like this should weigh heavily on conservatives who might have been inclined to accord Vice President Pence vast authority over the congressional certification of the 2020 presidential vote.

I trust these reflections have advanced the very debate that the Claremont Institute welcomes.

Joseph M. Bessette is the Alice Tweed Tuohy Emeritus Professor of Government and Ethics at Claremont McKenna College.

CONSTITUTIONAL STATESMANSHIP

by John C. Eastman

"scenarios" memos I prepared in late December of last year and early January of this year. And yes, there are two memos. The first, a two-page preliminary draft, dealt with only one of the scenarios discussed in the more complete six-page version. Joe Bessette is to be commended for giving them the serious attention they deserve, even though I think he overlooks some significant historical evidence and legal scholarship underlying the various scenarios set forth in the memos, which I address below.

But first, let me correct a couple of factual errors. Relying on news accounts, Bessette states that "the second longer memo was introduced by Eastman two days later (on Monday, January 4) at a meeting in the Oval Office." That account, although inaccurate, is repeated by Yale Law School Fellow Matthew Seligman in his recent draft article, "The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes," available online on the open access research platform SSRN. The second memo was finalized on January 3 and shared only with members of President Trump's legal team. I did not "introduce it" at

the January 4 Oval Office meeting, and to my knowledge, no one else in that meeting had a copy of it, either. This is significant because it vitiates the claim that I provided the memo to Pence in order to advise Pence that he had the authority to unilaterally declare Trump re-elected.

Bessette is mistaken, too, that "the evidence indicates that the [two-page] memo was delivered...to Vice President Pence (or his staff), and, through Pence's office, to former Judge Michael Luttig." The only "evidence" for this is that, in his September 21 Twitter thread, Luttig wrote: "I believe(d) that Professor Eastman was incorrect at every turn of the analysis in his January 2 memorandum," thereby implying with the use of the parenthetical past tense, at least as Bessette reads it, that he had reviewed the memo back in January and disagreed with it then as well. If that was indeed Luttig's intent, he was re-writing history.

Luttig's own account of his dealings with Pence's team in January is contained in Carol Leonnig and Philip Rucker's book, *I Alone* Can Fix It: Donald J. Trump's Catastrophic Final Year, which promotes itself as "the de-

finitive behind-the-scenes story of Trump's final year in office." As Leonnig and Rucker recount, Luttig was called about 9 p.m. Eastern time on January 4 by Richard Cullen, a good friend of Luttig's who was serving as an outside legal advisor to Pence. Cullen told Luttig, "We've got an issue. It's John Eastman.... He's advising the president that the vice president doesn't have to accept the electoral college vote." Luttig's quoted response: "Now look, John is a brilliant constitutional scholar. Whatever John is telling the president has some basis in the law." The two spoke again the next morning and Luttig offered to "tweet something," which Cullen thought would be very helpful in giving "Pence some backup with Trump." Cullen apparently thought having a statement from Luttig, for whom I once served as a law clerk when he was a circuit judge on the U.S. Court of Appeals for the Fourth Circuit, would give Pence stronger ground to dispute my advice in his discussions with Trump. After Luttig shared his planned Twitter thread with Cullen (who also shared it with Marc Short, Pence's chief of staff), Cullen told Luttig that "the vice president would appreciate this." THE CLAREMONT INSTITUTE
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Luttig then tweeted the following thread at 9:53 a.m. Eastern time on January 5:

The only responsibility and power of the Vice President under the Constitution is to faithfully count the electoral college votes as they have been cast. The Constitution does not empower the Vice President to alter in any way the votes that have been cast, either by rejecting certain of them or otherwise. How the Vice President discharges this constitutional obligation is not a question of his loyalty to the President any more than it would be a test of a President's loyalty to his Vice President whether the President assented to the impeachment and prosecution of his Vice President for the commission of high crimes while in office. No President and no Vice President would-or should-consider either event as a test of political loyalty of one to the other. And if either did, he would have to accept that political loyalty must yield to constitutional obligation. Neither the President nor the Vice President has any higher loyalty than to the Constitution.

Luttig's assessment is quite clearly not based on any serious study of the constitutional issues involved, the kind of study for which he was famous when serving on the U.S. Court of Appeals. Although he claims that the vice president's "only responsibility and power" is to "faithfully count the electoral votes as they have been cast" (emphasis added), the only thing clear from the language of the 12th Amendment (and the identical predecessor language in Article II) is that the vice president is to "open" the ballots; the issue of who actually counts them is ambiguous, as the power to count is in the passive voice ("the votes shall then be counted"). As prominent Yale constitutional law professor Bruce Ackerman and George Washington University law professor David Fontana put it a 2004 article, "Thomas Jefferson Counts Himself into the Presidency," in the Virginia Law Review, "The constitutional text does not speak clearly. It authorizes the Vice-President to 'open' the certificates but leaves the extent of his further powers hidden in the passive voice: 'and the Votes shall then be counted." Section 15 of the Electoral Count Act of 1887 provides that four "tellers"—two each from the House and Senate—are to do the counting after the ballots are opened by the vice president.

Ironically, Luttig's error here unwittingly embraces (implicitly) two of the premises in

the scenario addressed in the two-page memo that Bessette believes Luttig was repudiating, namely, "that the President of the Senate [that is, the Vice President] does the counting," and that by taking a constitutional power away from the vice president, the Electoral Count Act is unconstitutional. Significantly, however, there is no hint in Luttig's January 5 Twitter thread that he had any knowledge of the memo, and neither is there any suggestion in the "definitive" Leonnid and Rucker account that Luttig had been given a copy of the memo, or that Pence and his team had the memo, or that it contained advice I actually gave to the vice president. Leonnid and Rucker describe the advice I actually gave: "In the run-up to January 6, Eastman had argued that Pence could conceivably object to certification and send electoral votes back to states and force state legislatures to review the votes." That account is mostly accurate—and if by "force" they mean that Pence's action would have brought pressure to bear on the state legislatures to address the impact of acknowledged illegality in the conduct of their states' elections, and by "object to certification" they mean simply delay opening of the ballots, then it is entirely accurate.

Prior Analysis and Evidence

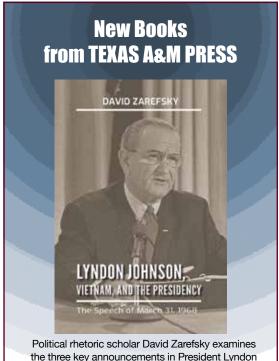
ESSETTE DOES CORRECTLY NOTE that I have not defended the twopage memo in the two months since it became public. That is because that preliminary memo does not reflect the advice I actually gave to the vice president, as I have noted repeatedly (e.g., "Setting the Record Straight on the POTUS 'Ask" at the American Mind). So why does that memo contain the phrase "here's the scenario we propose"? Because I was asked to prepare a memo articulating how the legal theory underlying the most aggressive claims of vice-presidential power that had been floated would play out in practice. It was for discussion purposes only, and—as the more complete memo makes clear—only one of the scenarios being discussed. As I explicitly stated to Vice President Pence on January 4, and as even the New York Times recently confirmed, I thought that particular scenario was based on the weaker argument about the vice president's authority under the 12th Amendment. But "weaker" did not mean without some historical and scholarly support.

Each of the points made is grounded in prior scholarly analysis and/or historical evidence, beginning with the claim that there were dual slates of electors from seven states. Luttig asserts in his September 21 Twitter

thread that "Eastman was incorrect at every turn..., beginning with his claim that there were legitimate, competing slates of electors presented from seven states." Bessette describes my claim about dual slates as "deeply problematic." It is not. As fully explained in the six-page version of the memo, Trump electors from seven states in which election challenges were still pending met (albeit of their own accord) on the date designated by Congress, cast their votes, and transmitted those votes to Congress.

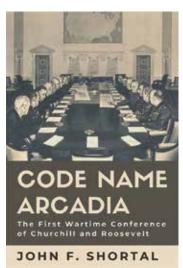
Although both Bessette and Seligman correctly note that they had not been formally certified by any state authority at the time, they stood in exactly the same position as the John F. Kennedy electors in Hawaii in 1960, who likewise met of their own accord on the designated day, cast their votes, and transmitted those votes to Congress. (The electors from Florida, Louisiana, and South Carolina for Democratic presidential candidate Samuel Tilden did the same thing in 1876, meeting on the designated day of their own accord and casting their votes.) When the election challenge in Hawaii was deemed to have determined that Kennedy rather than Richard Nixon prevailed in Hawaii, those electoral votes were retroactively certified and, having met the statutory and constitutional requirements of voting on the designated day, were eligible to be counted at the joint session of Congress (as detailed, for example, in Nathan L. Colvin and Edward B. Foley's 2010 Miami Law Review article, "The Twelfth Amendment: A Constitutional Ticking Time Bomb"). (I should note, however, that in counting them without the formal concurrence of the House and Senate, acting separately, Vice President Nixon violated Section 15 of the Electoral Count Act of 1887.)

The Pennsylvania Republican Party's press release about the Trump electors confirms their purpose: "We took this procedural vote [fashioned after the 1960 Presidential election in Hawaii] to preserve any legal claims that may be presented going forward," it noted, adding: "The conditional resolution [of the electors] states that electors certify their vote for the President and Vice President 'on the understanding that if, as the result of a final non-appealable Court Order or other proceeding prescribed by law, [they] are ultimately recognized as being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Pennsylvania." There is thus nothing "incorrect," and certainly not "deeply problematic," about my claim that there were "dual slates of electors



the three key announcements in President Lyndon Baines Johnson's March 31, 1968 address to the nation. Zarefsky traces the development of the speech through eleven drafts, reflecting disagreements and doubts among the writers and advisers. In turn, he sets these efforts in the larger context of the Cold War and the impact of the Tet offensive. Drawing on archival sources and reflecting rhetorical insights, this book illuminates one of the most consequential speeches of the 1960s. Even though the fighting in Vietnam would continue for several more years, the course of America's conduct in Vietnam was changed permanently by this speech.

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An Especially Aggressive Position

ESSETTE NEXT TAKES UP THE CLAIM in the two-page memo (and scenario "c" in the full memo) that, under the language of the 12th Amendment (and its identical precursor language in Article II), the vice president, serving as president of the Senate, has sole authority not only to "open" the electoral votes but to count, and determine the validity of, them as well. This is, as I have said, the most aggressive of the arguments that had been floated for discussion. Long before I wrote my memos, Edward Foley, the director of the Election Law Center at Ohio State University's Moritz College of Law, called it in an "especially aggressive position" in his 2019 article, "Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management," in the Loyola University of Chicago Law Review. But the argument was not manufactured out of whole cloth. Serious scholars, as well as important historical figures, have made it. Foley himself acknowledged that it has a "significant historical pedigree," and claimed in his 2010 article co-authored with Nathan Colvin quoted above that "[d]uring the first period, from 1789 to 1821, the power [to count and/or determine the validity of votes] was generally thought vested in the states or the President of the Senate" rather than the two houses of Congress, whether acting together or separately. There is also an important article published in 2002 in the North Carolina Law Review, "Is the Electoral Count Act Unconstitutional," in which Yale law student Vasan Kesavan wrote, "The Framers clearly thought that the counting function was vested in the President of the Senate alone." Although Kesavan claims later in the same article that "the best interpretation as a matter of text and the better interpretation as a matter of history [because of the understanding that no one should be judge in his own case] is that the counting function is vested in the Senate and House of Representatives," he based his initial assertion on several pieces of historical evidence, including:

• The resolution by the constitutional convention transmitting the proposed Constitution to the states for ratification, which dealt with the fact that there would be no vice president serving as president of the Senate for the first election of president: "The Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening, and counting the Votes for President" (emphasis added); and

 Chancellor James Kent, who wrote in his influential Commentaries on American Law (1826-30):

> The Constitution does not expressly declare by whom the votes are to be counted and the result declared. In the case of questionable votes, and a closely contested election, this power may be allimportant; and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.

To be sure, Kent left open the possibility of a legislative override, but Kesavan elsewhere in the same article persuasively argues that "[i]f the counting function belongs to the President of the Senate, the Electoral Count Act is unconstitutional because it vests the counting function in the two Houses of Congress, and under the Constitution, Congress may not strip the President of the Senate of her constitutional duty." Kesavan cites the 1886 remarks of Senator Henry Wilson in the Congressional Record, who argued that the counting function is vested in the president of the Senate and that the Necessary and Proper Clause "does not confer on Congress the power to assume unto itself the duty which the Constitution imposes on that officer," and the remarks of Representative Charles Baker, who argued, "If the Constitution...does...by fair implication, vest in the President of the Senate the power and duty not only to open, but also to count, the votes, then Congress can not, by this or any other legislation, take away or transfer to any other person or officer that power and duty." (See also Michael Stokes Paulsen's "Someone Should Have Told Spiro Agnew" in Constitutional Commentary [1997], noting that each House of Congress may not use the Rules of Proceedings Clause to strip the vice president of constitutional duties, and Samuel T. Spear's "Counting the Electoral Votes" in the Alabama Law Journal [1877], in which Spear argues that "[t]he Constitution says that 'the votes shall then be counted,' and if this mandate be addressed to the President of the Senate, that ends the question so far as the counting is concerned. The Constitution has then trusted him with the whole power, and any legislation to direct him, would be an impertinent intrusion upon his prerogative.")

Congress itself, in the law it passed creating a commission to deal with the contested 1876 election, was uncertain of whether it had any authority in the matter. As Colvin and Foley describe it, quoting from J. Hampden Dougherty's 1906 book, *The Electoral System of the United States*: "In a doubly uncertain move, Congress gave the Electoral Commission 'the same powers, *if any*, now possessed for that purpose by the two Houses acting separately or together."

More recently, University of California, Berkeley, law professor John Yoo and University of St. Thomas law professor Robert Delahunty advanced this position in an important article, "What Happens if No One Wins?," published at the *American Mind* in October 2020:

We suggest that the Vice President's role is not the merely ministerial one of opening the ballots and then handing them over (to whom?) to be counted. Though the 12th Amendment describes the counting in the passive voice, the language seems to envisage a single, continuous process in which the Vice President both opens and counts the votes.

The check on error or fraud in the count is that the Vice President's activities are to be done *publicly*, "in the presence" of Congress. And if "counting" the electors' votes is the Vice President's responsibility, then the inextricably intertwined responsibility for judging the validity of those votes must also be his.

If that reading is correct, then the Electoral Count Act is unconstitutional. Congress cannot use legislation to dictate how any individual branch of government is to perform its unique duties: Congress could not prescribe how future Senates should conduct an impeachment trial, for example. Similarly, we think the better reading is that Vice President Pence would decide between competing slates of electors chosen by state legislators and governors, or decide whether to count votes that remain in litigation.

Ackerman and Fontana advanced a similar position in their 2004 article addressing Thomas Jefferson's decision to count electoral votes from Georgia in the 1800 election, which, they asserted, were "obviously defective" because they had not been certified by the electors as required by the Constitution and federal statute: "After all, the Constitution delegated to Jefferson, and only Jefferson,

an affirmative role in the vote-counting ritual." And although they view it as "silly," they note that the Constitution "give[s] the sitting Vice-President a central position in the vote count." They add that "[t]he fact Jefferson exercised the (textually arguable) authority [to determine the validity of votes] as Senate President on the Georgia matter seems very significant as a legal matter," and the fact that his determination "might well have made a difference to the outcome...greatly enhances the precedential significance of his ruling."

To be fair, Ackerman and Fontana note elsewhere in the article that "[t]he constitutional text does not speak clearly. It authorizes the Vice-President to 'open' the certificates but leaves the extent of his further powers hidden in the passive voice: 'and the Votes shall then be counted." (They also describe the constitutional text as "painfully inadequate" and characterize it as a "ticking timebomb" "if a vote-counting problem should arise.") They ultimately applaud Jefferson for his statesmanship in giving priority to "substance over form"—had Jefferson not accept-

Congress should not have a role in the selection of the chief executive lest that office become subservient to Congress.

ed the defective Georgia electoral votes, the top five vote getters (rather than just Jefferson and Aaron Burr) would have been referred to the House of Representatives for a decision on who would be president, where it was very likely the lame-duck Federalist majority would have denied Jefferson the election he had clearly won. Ackerman and Fontana accurately explain that Jefferson unilaterally determined to count the defective Georgia votes without pausing to await objections. What's more, they claim, as a matter of "principle," that Jefferson "was correct to use his power as Senate President to assure that the votecounting ritual in Washington corresponded to the true electoral decisions made in the states."

Who Counts the Votes?

F COURSE, OTHER SCHOLARS HAVE disagreed with the interpretation that the 12th Amendment gives the vice president authority over the counting. Matthew Seligman calls it "gravely

wrong" and "extraordinary." But almost all legal scholars who have written on the subject seem to agree—at least, until the present controversy—that the Constitution's text on this point is ambiguous. Foley, in his 2019 article, claims that "[t]he procedures for handling a disputed presidential election that reaches Congress are regrettably, and embarrassingly, deficient." Yet he does concede that "[d]espite its ambiguity, or perhaps because of it, the peculiar passive-voice phrasing of this crucial sentence opens up the possibility of interpreting it to provide that the 'President of the Senate' has the exclusive constitutional authority to determine which 'certificates' to 'open' and thus which electoral votes 'to be counted." He elaborates the basis for such an interpretation in terms very similar to the position taken by Yoo and Delahunty:

This interpretation can derive support from the observation that the President of the Senate is the only officer, or instrumentality, of government given an active role in the process of opening the certificates and counting the electoral votes from the states. The Senate and House of Representatives, on this view, have an observational role only. The opening and counting are conducted in their "presence"—for the sake of transparency—but these two legislative bodies do not actually take any actions of their own in this opening and counting process. How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. They have no constitutional way to act together as one amalgamated corpus. Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein.

This interpretation of the Twelfth Amendment is bolstered, moreover, by the further observation that the responsibility to definitively decide which electoral votes from each state are entitled to be counted must be lodged ultimately in some singular authority of the federal government. If one body could decide the question one way, while another body could reach the opposite conclusion, then there inevitably is a stalemate unless and until a single authority is identified with the power to settle the matter once and for all. Given the language of the Twelfth Amendment, whatever its ambiguity and potential

policy objections, there is no other possible single authority to identify for this purpose besides the President of the Senate....

Thus, according to this argument, the inevitable implication of the Twelfth Amendment's text is that it vests this ultimate singular authority, for better or worse, in the President of the Senate. Subject only to the joint observational role of the Senate and the House of Representatives, the President of the Senate decides authoritatively what "certificates" from the states to "open" and thus what electoral votes are "to be counted."

To be sure, Foley is more inclined to the counterargument, that the Article I Necessary and Proper Clause "gives Congress ample legislative authority to fill the gaps and clarify the ambiguities that exist in the text of the Twelfth Amendment itself." He thinks it "fair to say that [the] counterargument...has had more adherents throughout history than the argument on behalf of exclusive constitutional power lodged in the President of the Senate," but quickly adds that "it must be recognized that the argument on behalf of exclusive Senate President authority has never been thoroughly vanquished." Indeed, because the argument "has a significant historical pedigree" and "routinely had its advocates in the years leading up to the disputed election of 1876," he expected that "Trump and his supporters would almost certainly invoke this argument if and when it was to his advantage to do so."

In short, there is much more to this dispute than Bessette (or Seligman) claims, and I stand by my statement in both memos that "[t]here 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" even though, as explained below, that is not the advice I ultimately gave to the vice president. But if that position is true, then, as Foley and others have acknowledged, no act of Congress—not the resolutions in 1796 and 1800 on which Seligman relies, nor the Electoral Count Act of 1887—can take away powers that the Constitution assigns to the vice president. Bessette's concern that my discussion of the process in item two of the two-page memo "would be the first break with the procedure set out in the [Electoral Count] Act" therefore begs the constitutional question at issue.

Bessette does make a strong case, as did Pence in his public memo of January 6, that it would be odd for the founders to have given such power to the vice president, knowing full well that he would frequently be a contender for the office. But Pence ignored, and Bessette mentions only in passing, another at least equally strong concern of the founders, namely, that Congress should not have a role in the selection of the chief executive lest that office become subservient to Congress. Vasan Kesavan quotes Senator Charles Pinckney himself a member of the constitutional convention and of the South Carolina ratifying convention—who forcefully argued in opposition to the 1800 Grand Committee Bill, pushed by Federalists in the runup to the 1800 election in order to prevent Jefferson's election: "Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislatures, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in, or control over the election of a President." The framers "well knew," Pinckney added, "that to give to the members of Congress a right to give votes in this election, or to decide upon them when given, was to destroy the independence of the Executive and make him the creature of the Legislature" (emphasis added). That concern also explains why Article II assigns plenary power to the state legislatures to determine the manner of choosing presidential electors, and why, under both the 12th Amendment and its predecessor language in Article II, the failure of any candidate to achieve a majority of electoral votes sends the matter to the House of Representatives where the election is determined with each state delegation having one vote, a clear nod to the principle of federalism rather than to congressional authority.

Determining the Validity

ESSETTE NEXT TAKES UP "THE MOST controversial" paragraph 3 of the two-page memo (scenario c.ii in the full memo), which contains the next procedural step under what I have consistently described as the most aggressive assertion of vice-presidential authority that had been floated for discussion. The analysis provided in that paragraph thus assumes the constitutional authority of the vice president to not only count but to determine the validity of the electoral votes. Bessette finds the paragraph extremely objectionable on two grounds. He thinks that my argument is that the mere sending of alternative elector votes to Congress "alone would be sufficient for the vice president to reject the certified votes from these same states" and then also

"to exclude them from the total needed to determine what number constitutes a majority of the 'electors appointed."

As to the first point, that is not the language in the two-page memo, of course, which specifically references "the ongoing disputes in the seven states," not the mere sending of votes by alternative electors. But even with that correction, the fact that the two-page memo was a preliminary draft of the full memo becomes extremely relevant, because as Bessette himself acknowledges, the complete version specifically mentions that the vice president's determination is to be "based on all the evidence and the letters from state legislators calling into question the executive certification." Without that, or alternatively without alternative slates of certified electors, this "most aggressive" scenario would in my view be insupportable even if it otherwise had merit.

As for the second point, this is the issue for which I relied on Harvard Law professor Laurence Tribe's analysis of what he called "the denominator problem." Standing alone, I do not think the issue is controversial. If the electors from any state are not appointed, the text of the 12th Amendment compels the conclusion that they are not to be included in the calculation for what constitutes "a majority of the whole number of Electors appointed" (emphasis added). As an aside, Tribe's claim that I took his argument out of context is nonsensical; I merely applied his constitutional analysis to the different set of facts actually presented—84 electoral votes at issue rather than the mere 20 at issue in his hypothetical. As a further aside, Bessette's focus on New Mexico is beside the point; I included it merely because there was still-pending litigation in New Mexico and the Trump electors in that state, as in the six other states, had met and voted. But even if New Mexico's five electoral votes were not deducted, Trump would still have had—with 232 out of 459—a "majority" of the electors appointed.

My main disagreement with Bessette here is his claim that "the seven states at issue did in fact and in law appoint electors" for Biden (my emphasis). This entire dispute turns on the question of whether the electors were legally appointed, and the whole foundation for my memo, and for my ultimate advice, was that they were not, precisely because non-legislative officials in the several states at issue altered or suspended state election law in violation of the Constitution's Article II grant of that power exclusively to the state legislatures. Remove that foundational premise, and I would not have made the arguments I did. Bessette can't resolve the dispute by ipse dixit,

and he does not try. The next two paragraphs on this point are just so much hand-wringing that presume the very thing in dispute.

Violations of the Rules

ESSETTE NEXT TAKES UP WHAT HE eventually recognizes as the "alternative" scenario in the two-page memo (and which is expressly described as an "alternative" in section c.iii of the full memo), namely, that if neither candidate achieves 270 electoral votes because of disputed votes and, implicitly, if Tribe is wrong about the denominator problem (e.g., if the electors were deemed "appointed" even though the votes were deemed invalid), then the election would, under the 12th Amendment, be thrown to the House of Representatives for resolution, with each state's delegation getting a single vote and an absolute "majority of all the states shall be necessary to a choice." Beyond the issue of Pence choosing not to accept certain electoral votes already discussed above, there is really nothing controversial about this added step.

Bessette then turns to the actual advice I gave to Vice President Pence, namely, that he accede to requests from hundreds of state legislators to delay the proceedings to give them a bit more time, now that they were back in ses-

sion, to assess the impact that the illegal conduct of state election officials had had on the results of the election. Bessette has two main objections to this advice. First, that because I acknowledge in the memo that "we're no longer playing by Queensbury Rules," I have somehow violated a fundamental principle of American constitutionalism, namely, that ours is "a government of laws and not of men." That criticism ignores the context, of course, which is that swing-state elections had been conducted unconstitutionally because the "manner" for choosing electors—state election law—had been deliberately altered or ignored by election officials who had no authority to do so. It was they who had violated "Queensbury rules"—that is, the Constitution—and my memos were aimed at exploring every possible legal option to remedy those violations.

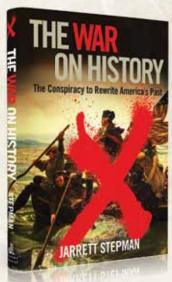
To be sure, the advice that I gave for the vice president to delay the proceedings of the Joint Session of Congress would be contrary to the provision of the Electoral Count Act that the session not be adjourned until its work was completed, but as noted above, a good number of legal scholars have contended that the Act itself is unconstitutional, particularly to the extent it intrudes on powers assigned directly to the vice president by the Constitution. Moreover, it is hard to imagine

that a minor procedural provision of a statute should result in certification of a presidential election that was conducted in violation of constitutional requirements. The Supremacy Clause of the Constitution provides that the Constitution, and then only laws "which shall be made in Pursuance thereof," is the supreme law of the land.

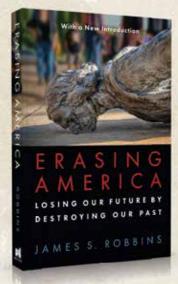
Bessette's second objection here is a practical one, based on timing: "Note how little additional time this tactic would allow," he asserts, given that the 20th Amendment to the Constitution mandates that the term for the new president begins at noon on January 20. Given that it took Arizona over five months to conduct a comprehensive audit involving over 1,500 people, Bessette wonders how Republican legislatures could possibly manage the task "in two short weeks." His concern here is misplaced, for it is not the definitive scope of the fraud (which may be unknowable), but the impact of the illegality that is at issue. One recent example will suffice to explain the point. The sheriff in Racine County, Wisconsin, recently announced that he would be referring criminal charges against county officials who knowingly violated state law and allowed ballot harvesting of votes from mentally incapacitated residents of nursing homes. Added to the illegal "human drop box" bal-

TOPPLING STATUES. RE-WRITING HISTORY.

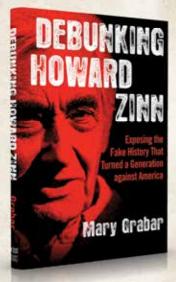
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lot-harvesting scheme called "Democracy in the Park," the illegal suspension of voter I.D. requirements for those absentee voters who falsely claimed to be indefinitely confined, and the illegal curing of absentee ballots, well over 100,000 ballots were affected by the illegal conduct, in a state where Biden's margin of victory was only 20,682. Given that it would be impossible to determine how those ballots were actually voted, whether Biden or Trump actually won cannot be determined. That means the State "failed to make a choice on the day prescribed by law," and under Section 2 of Title 3 of the United States Code, "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."

Each of the contested states had similar issues with illegal conduct affecting more votes than Biden's margin of victory. In Pennsylvania, for example, the secretary of the Commonwealth's unconstitutional elimination of signature verification requirements resulted in a dramatic decrease from prior election cycles in the number of fraudulent ballots that were discovered and invalidated, from as high as 8% in some counties to a mere 0.28% in 2020, affecting as many as 150,000 ballots on that issue alone—nearly double the Biden margin of victory in that state. Georgia had the same problem, with a non-legislative (and therefore unconstitutional) relaxing of signature and other verification requirements producing a decline in disqualified ballots from 2.9% in 2016 to an anemic 0.34% in 2020, affecting roughly 40,000 ballots, or nearly four times the 11,779 vote margin in the state. Other issues, too, affected these and/or the other swing states of Michigan, Arizona, and Nevada, such as the unlawful transmittal of absentee ballots without request, the unlawful curing of ballots with missing information in order to avoid statutory mandates that such ballots not be counted, the allowance of voter registrations for underage prospective voters before the time permitted by statute, etc. A full audit on the scale of that which was conducted in Arizona was not necessary for the state legislatures to determine that, in light of this illegal activity by state and local election officials, the actual results of the election conducted on election day simply could not be determined, thus triggering the U.S. Code's contingent authority for the legislatures to act as they saw fit.

Seligman claims that my reliance on that statute is "incorrect," because in his view, "the Section 2 exception applies *only* when state law requires a majority winner and the popular election on Election Day yields only a

plurality winner." He made that point during the lengthy podcast I did with him and Harvard Law professor Lawrence Lessig, when I pointed out that even were that the motivating purpose of the section, it would take something more to prove that it was the only situation covered by the language. He offered no evidence then, and his recent draft article also offers no evidence on that score, save for his assertion that he explains it "elsewhere" in an unpublished paper. But even if he has unearthed some evidence to suggest that Section 2 is so limited, the legislatures' powers under Article II are not. As the Supreme Court acknowledged in McPherson v. Blecker (1892), "there is no doubt of the right of the legislature to resume the power [to appoint electors] at any time, for it can neither be taken away nor abdicated." Due process concerns might limit the legislature's ability to appoint electors, after a valid election, merely on the grounds that it did not like the voters' choice, but when the election itself failed to follow the "manner" that the legislature had set out, those concerns do not (or at least should not) exist.

I do find it disappointing that Bessette references a patently false media narrative

Trying to prevent illegal conduct from deciding an election is not a "coup."

claiming I admitted my analysis was "crazy." That meme is a distortion of a statement I made to John McCormack at National Review. As McCormack's article makes clear, I was speaking about the notion that Trump would win if the election was thrown to the House of Representatives. In describing that particular scenario, my memo italicized the caveat: "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." What I described as "crazy" was for anyone to expect that all Republicans would stand firm. A single vote, say, from Representative Liz Cheney of Wyoming, whether for Biden or merely to abstain, or a single vote in any state in which Republicans held only a one-vote margin, would prevent Trump from obtaining the constitutionally required absolute majority of states. Nevertheless, what the late Rush Limbaugh used to call the "drive-by media" seized on that statement to claim falsely that I had disavowed my entire analysis as "crazy." Granted, McCormack invited that distortion by first

reporting the "crazy" phrase standing alone, only much later in the article providing the context. But the context is there for anyone to see, and Bessette ought to have been more careful than simply to repeat the distortion.

Principle and Prudence

INALLY, BESSETTE NOTES THAT IT "pains" him that the Claremont Institute "has...basically circled the wagons" in its defense of me. While I certainly appreciate the Institute's ongoing support, I would hope that giving me a platform to defend my views is not based on some undue sense of loyalty, for I would neither ask for nor deserve such loyalty if I had sought to overthrow the legitimate government of the United States, as I have been falsely accused of doing. As I have previously noted, trying to prevent illegal conduct from deciding an election is not a "coup." But the Institute's full name is the Claremont Institute for the Study of Statesmanship and Political Philosophy. Statesmanship is the political skill of advancing principle to the fullest extent possible given the circumstances. It is central to the argument for revolution contained in the Declaration of Independence:

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Fontana and Ackerman make a similar point in their defense of Jefferson's decision to count Georgia's electoral votes when "the certificate was illegal on its face." "Placed in full historical context," they write, "Jefferson's decision provokes renewed appreciation for the complexities of constitutional interpretation, with three distinct dimensions salient in the present case: ...principle...prudence...[and] pragmatism." "All in all," they conclude, "it was not the best moment for a rule of rules unvarnished by principle, prudence, or pragmatism to prevail. By recognizing this, Jefferson provides a glimpse into

the meaning of constitutional statesmanship well worth bringing to light after all these years."

Foley makes a similar point with prescient reference to the very situation we confronted in 2020. He begins by "noting that the strength of any argument against direct legislative appointment of presidential electors may depend heavily on the specific factual context in which such direct legislative appointment is attempted." If illegal activity by election officials in the conduct of the election was something akin to a cyberattack, he posited, the authority of the state legislature to certify an alternative slate of electors would be strengthened (at least in the eyes of Trump's supporters). "That [would be] enough for Congress to consider the votes and potentially accept those votes as the authoritative electoral votes" from that state. If both the House and Senate voted to accept the governor-certified Biden electors instead of the legislaturecertified Trump electors, that would end the matter "in terms of what the [Electoral Count Act] provides," he added.

But even then, "as a political matter, the fight may remain unsettled depending on exactly the nature of the Senate's vote. If only a few renegade Republicans—like Mitt Romney and Lisa Murkowski—joined all the Democrats [in the Senate]" to join the House in accepting the Democratic electors, "Mike Pence might be tempted to assert a constitutional prerogative to supersede the provisions of the Electoral Count Act and, despite this joint agreement of the two congressional chambers, declare the legislatively appointed electors to be the authoritative ones." Conversely, "if Mitch Mc-

Connell leads the Republican-controlled Senate to agree with the Democratic-controlled House that the governor-certified electoral votes from Pennsylvania are the valid ones, it would seem impossible as a practical matter for Pence to prevail on his constitutional claim that he is entitled to overrule this bicameral (and bipartisan) determination of which electoral votes from Pennsylvania to count."

Granted, the pragmatism Foley describes in his hypothetical appears to be in furtherance of base politics rather than high principle, but it has been my contention all along that in the circumstances that actually unfolded, principle of the highest order—the legitimacy of government based on the consent of the governed—was at stake. It is undisputed that Democratic Party election officials in key swing states altered or ignored state election laws that had been put in place by the state legislatures pursuant to their plenary authority to determine the manner of choosing presidential electors. It is equally undisputed that Democratic operatives even took over county election operations in some key counties in those states. The evidence strongly indicated at the time—and is even more strongly being confirmed as additional time goes by-that that unconstitutional conduct affected the results of the election, that the certification of electors was therefore improper, and that to simply ratify those certifications would undermine rather than uphold the "consent of the governed" principle.

Fontana and Ackerman praised Jefferson John C. Eastm for "us[ing] his power as Senate President to assure that the vote-counting ritual in Washington corresponded to the true electoral demont Institute.

cisions made in the states." Because of practical considerations, I advised Vice President Pence that even if he had such unilateral power as had been exercised by Jefferson (a position that I explicitly described as an "open question"), it would be foolish to exercise it absent certification of alternate Trump electors by the state legislatures. But that did not foreclose the more modest path in pursuit of the "consent of the governed" principle for which I advocated, namely, that Pence simply accede to requests from state legislators for time to give their best assessment on what "the true electoral decision" made in their respective states was. I stand by that advice, and remain of the view that had Pence accepted it, he would have demonstrated his own constitutional statesmanship in furtherance of the consent principle to the extent prudently possible. Instead, the wounds that were inflicted by the manifestly illegal conduct of the election, and by the unwillingness of our courts even to address that illegal conduct (and yes, in almost every instance, election challenges were dismissed on technical procedural grounds without the courts ever addressing the significant evidence of illegal conduct that had been presented), remain as raw as ever, foreclosing, or at least forestalling, the healing necessary to bridge the increasingly intractable chasm that divides our fellow citizens. That, to me, is the greatest tragedy of this whole affair.

John C. Eastman is founding director of the Claremont Institute's Center for Constitutional Jurisprudence and a senior fellow of the Claremont Institute.

