

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: President Donald J. Trump

Prepared By: Jenna Ellis

Date: December 31, 2020

***Memorandum Re: Constitutional Analysis of Vice President Authority for January 6, 2021
Electoral College Vote Count***

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

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

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

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

This is a meritorious request because the Vice President has taken an oath to uphold the Constitution. He is not exercising discretion nor establishing new precedent, simply asking for clarification from the constitutionally appointed authority. Further, it would cement precedent that the Constitution requires the state legislatures to act as the sole authority of the "manner" of selecting electoral delegates, and cannot delegate their plenary authority to the state executive branch in a manner that violates Article II and the separation of powers.

ATTORNEY-CLIENT PRIVILEGED

To: Jay Sekulow

Prepared by: Jenna Ellis

Date: January 5, 2020

Re: Vice President Authority in Counting Electors pursuant to U.S. Constitution and 3 U.S. Code §§ 5 and 15

3 U.S. Code § 5 requires a “final determination” in accordance with state law. Where a controversy has been initiated in accordance with State law, that process for a final determination must be completed before a legitimate set of electors can be “ascertained” by the chief executive officers of the state. (In at least six states, state executives rushed to certify while judicial and legislative disputes in accordance with state law had just begun—how can that be constitutional and entitled to deference EVEN IF federal law purports to allow it?)

3 U.S. Code § 15 purports to establish a constitutional process for adjudicating disputes when there is disagreement regarding the legitimacy of more than one set of electors. The problem with Section 15's process is that it violates Article II § 1.2, which requires that electors be selected in the “manner” directed by state legislatures. Section 15, by defaulting to electors certified by the state *executive*, violates the supremacy of the state legislature as the constitutional authority for determining the selection of valid legislators. *See, McPherson v. Blacker*, 146 U.S. 1 (1982); *Bush v. Gore*, 531 U.S. 98 (2000).

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

Congress *may not* arrogate to itself the authority to impose its preferred set of electors when state law has not been followed. This is what § 15 does. While it may be a sensible approach under less contentious circumstances (or perhaps the 1948 Congress did not contemplate a faithless executive), the magnitude of the problem, where at least six states are in significant dispute and a handful of electors counted one way or the other *would* be outcome determinative, § 15 cannot be regarded as constitutional to override Article II, § 1.2.

As a practical matter, there is no provision for communication between the Congress and state legislatures, other than the transmission of purported slates of electors. If the Vice President determines that § 5 has not been completed as to ascertain electors, the Vice President should determine that no electors can be counted from the state. This directly conflicts with the counting procedure laid out in § 15. If the Vice President takes this step there is no clear remedy, other than perhaps injunctive relief by some petitioner seeking a “writ of mandamus”

from the court to the Vice President to exercise his job. Section 15 states the Vice President shall open and hand the votes to the Tellers. Under his Oath of Office and a plain reading of the constitutional provisions, the Vice President has the authority (not just as a ministerial function) to not hand the votes to the teller where no electors have been "ascertained" under § 5. This would have to point back to the state law and where there are actual active disputes that are running in accordance with provisions of state law in order to legitimately assert that § 5 has not been completed.

If the Vice President exercises in this manner would § 15 be "ignored"? such that there would be no "debate" among the separate houses as to "objections"? Probably yes. As outlined above, there is a colorable argument that § 15 violates the supremacy clause of the Constitution regarding plenary state legislative authority under Article II, § 1.2.

What happens next? Does the Vice President have the authority to simply adjourn the body until a determination that the process to have been completed? Probably yes. Discretion of the President of the Senate and that he would be the Vice President is intentional. As John Hoestettler argues in *Ordained and Established*, the Vice President is a legislative officer – not an officer of the executive branch. The founders intended the Vice President to be the second most powerful elected member of the federal government as president of the senate. Tradition and practice after the 12th Amendment have blurred the constitutional distinction but as President of the Senate, the Vice President is a legislative officer—even if he chooses to ignore that role. Therefore the Vice President, as a presiding officer has great constitutional discretion to recognize speakers and to make fundamental determinations – probably not discretion in selecting which electors to count—but for 3 U.S. Code §§ 5 and 15, that would clearly be the case. As suggested, 3 USC § 15 may very well be unconstitutional.

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