

**Analysis of the Lawfulness of Kenneth Chesebro's
Elector Plan Under Federal Election Law**

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[Just Security](#)

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Introduction

This report analyzes the legal propriety of multiple slates of elector-nominees casting ballots purporting to be their state's votes in the Electoral College. Kenneth Chesebro is one of 19 co-defendants in Georgia's state criminal indictment related to efforts to reverse the results of the 2020 presidential election in favor of Donald Trump. The indictment charges Mr. Chesebro with seven criminal offenses, all of which are related to his involvement in planning and organizing for Trump elector-nominees to cast ballots purporting to be electoral votes on December 14, 2020. In several motions, Mr. Chesebro has contended that his conduct was consistent with federal election law because the Electoral Count Act contemplates Congress receiving multiple slates of electors when it convenes on January 6. Mr. Chesebro further contends that because his conduct was purportedly consistent with federal election law, it cannot be criminal under Georgia state law.

This report concludes that Mr. Chesebro's alleged conduct was unlawful under federal election law, which therefore does not preclude prosecution of that conduct under state criminal statutes.¹ The Twelfth Amendment, the Electoral Count Act of 1887, and related provisions of federal law contemplate the submission of certificates from multiple slates of elector-nominees from the same state only in exceptionally narrow circumstances. Multiple slates of elector-nominees are consistent with federal law only when:

- On the date the elector-nominees must cast their ballots in the Electoral College, a good faith dispute about which slate of elector-nominees the state has lawfully appointed remains pending; and
- The elector-nominees cast ballots that purport to be the state's votes in the Electoral College as part of a course of conduct (1) seeking to resolve the contest through the lawful procedures established for the resolution of disputes about the appointment of electors under state law, and (2) seeking for Congress to count those electoral votes pursuant to the lawful application of the provisions of the Electoral Count Act.

This report proceeds as follows. First, the report provides a background on the legal framework governing the Electoral College. Second, it describes how that legal framework applies in a typical election, in which all disputes regarding electors are definitively resolved prior to the date on which the electors vote in the Electoral College. It then describes the two atypical cases that have arisen under the Electoral Count Act: Hawaii in 1960 and Florida in 2000. Third, the report reviews the evidence regarding Mr. Chesebro's involvement in the Trump elector-nominees casting ballots purporting to be their state's electoral votes in states where the relevant state official had certified President Joe Biden's electors. From this evidence, this report reconstructs Mr. Chesebro's plan for those Trump elector-nominees' purported votes to be counted on January 6, 2021 (or later) or otherwise prevent the counting of the Biden electoral votes in those states. Fourth, the report analyzes whether Mr. Chesebro's plan was consistent with federal election law.

¹ This report does not address whether or how the alleged legal propriety of Mr. Chesebro's alleged conduct under federal election law could immunize that conduct from state criminal prosecution.

This report's conclusions are as follows. The available evidence indicates that beginning no later than December 6, 2020, Mr. Chesebro organized and disseminated a plan for the Trump elector-nominees to cast ballots purporting to be electoral votes and for those purported electoral votes to be considered on January 6, 2021, through unlawful procedures.

- Mr. Chesebro planned for the President of the Senate to exercise unilateral authority—unsupported by and contrary to law—with respect to the electoral count by rejecting or failing to count the electoral votes cast by President Joe Biden's electors from states where the relevant state official had certified Biden's electors as lawfully appointed.
- In addition, although Mr. Chesebro's memos and emails at the time contain no evidence of an alternative plan and claimed that the Electoral Count Act was unconstitutional, he has since suggested in court filings that the Trump elector-nominees' casting ballots purporting to be electoral votes was authorized by the Electoral Count Act. That alternative plan, if it existed, would have required Congress to violate the Electoral Count Act by refusing to count the Biden electors' votes when the plain text of 3 U.S.C. § 15 required it to do so.
- Mr. Chesebro's memos also made passing reference to the possibility that a state legislature might appoint the Trump electors after December 14, 2020. That alternative plan would have violated Article II, section 1, clause 4 of the Constitution and 3 U.S.C. §§ 1-2.

Mr. Chesebro's legal positions were so lacking in any legal or historical basis that no reasonable attorney would propose them as part of a lawful plan. Because these plans violated the Twelfth Amendment, the Electoral Count Act of 1887, and related provisions of federal law, Mr. Chesebro's conduct was not lawful under federal election law. Accordingly, Mr. Chesebro's argument that federal election law precludes his prosecution for state crimes fails.

I. Legal Background

The election of the President of the United States is governed both by the Constitution and by provisions of statutory law. The relevant constitutional provisions appear in Article II and the Twelfth Amendment. The relevant statutory provisions are the Electoral Count Act of 1887, as well as related provisions of law governing the timing of the appointment of electors and other procedural matters. Together, these provisions establish a three-part process. First, states appoint electors. Second, electors cast votes in the Electoral College for candidates for President and Vice President. Third, those electoral votes are received and counted in Washington, D.C.

I.A. Constitutional Provisions

The Constitutional framework for presidential elections is governed by three provisions:

- Article II, Section 1, clause 2;
- The Twelfth Amendment (which superseded Article II, Section I, clause 3); and
- Article II, Section 1, clause 4.

These three provisions address four logically distinct aspects of the constitutional process of the Electoral College: (i) how electors are appointed, (ii) when electors may be appointed, (iii) when electors cast their votes in the Electoral College, and (iv) how the electors' votes are counted.

First, Article II, section 1, clause 2 (often called the Electors Clause) provides that states appoint electors, including determining the “manner” in which those electors are appointed:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.²

Second, Article II, section 1, clause 4 provides that Congress determines the “time” when states may appoint electors and the “day” on which those electors cast their votes in the Electoral College:

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.³

Third, the Twelfth Amendment (ratified in 1804 to supersede Article II, section 1, clause 3) governs how the electors' votes in the Electoral College are “counted.” The principal purpose of the Twelfth Amendment was to replace the system in which the candidate with the second-most electoral votes for President became Vice President. With the rise of political factions beginning in the 1790s, the two leading candidates typically represented opposing parties which could—and did, in 1796—result in the President and Vice President being those opposing parties' presidential candidates. Accordingly, the Twelfth Amendment provided that the electors cast two separate votes for President and Vice President, with the candidate receiving the most votes winning those separate elections for each office.⁴

² U.S. CONST. art. II, § 1, cl. 2.

³ U.S. CONST. art. II, § 1, cl. 4.

⁴ The Twelfth Amendment also adjusted the rules for conducting so-called “contingent” elections, in which the House or Senate chooses the President or Vice President respectively if no candidate receives a majority of electoral votes. Although others, notably Dr. John Eastman, suggested a strategy in 2020 that involved a “contingent” election in the House, it appears that Mr. Chesebro did not focus on this possibility.

The Twelfth Amendment retained the critical sentence from Article II, section 1, clause 3 of the Constitution that governs the “counting” of electoral votes. That sentence, emphasized below, assigns roles to the President of the Senate—who is the Vice President when present, and a senator chosen by the Senate as President Pro Tempore otherwise⁵—and to the Senate and House of Representatives:

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons voted for as Vice-President and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;

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 person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.⁶

In summary: States appoint electors in a manner determined by their legislatures, at a time chosen by Congress. Electors cast ballots in the Electoral College, on a date chosen by Congress. Those electors’ votes “are counted” as part of a proceeding that involves the President of the Senate, the Senate, and the House of Representatives and which now takes place on January 6.

⁵ U.S. CONST. art. I, § 3.

⁶ U.S. CONST. amend. XII (emphasis added).

I.B. Statutory Provisions: Act of 1845, the Electoral Count Act of 1887, and Other Statutory Provisions of Title 3

Beginning in 1792 and continuing over the course of the Nineteenth Century, Congress passed legislation that supplemented this constitutional framework. Several statutes are relevant to this report’s analysis: the Act of 1845; scattered sections governing the electors’ voting that are also codified in Title 3 of the United States Code; and the Electoral Count Act of 1887.⁷ Those statutes address three of the four logically distinct aspects of the constitutional process of the Electoral College, along with several procedural formalities for implementing those aspects:

- (i) The Act of 1845 governs when electors may be appointed;
- (ii) Several sections of Title 3 govern when electors cast their ballots in the Electoral College and the procedures for electors transmitting those votes to Congress; and
- (iii) The Electoral Count Act of 1887 governs how states notify Congress who they have appointed as electors, and how Congress resolves disputes regarding electoral votes (including disputes about who a state has appointed as electors).

I.B.1. The Act of 1845: When May States Appoint Electors

Congress enacted the Act of 1845 to implement Article II, section 1, clause 4, by setting the time in which states may appoint electors. That law was codified at 3 U.S.C. §§ 1-2 and in slightly modified form was operative until it was repealed and replaced by the Electoral Count Reform Act of 2022 (ECRA). Section 1 provided that states must appoint electors on what we now refer to as Election Day:

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.⁸

Section 2 created a limited exception to Section 1’s timing requirement:

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.⁹

⁷ Two points of terminology should be clarified. First, the provisions of the Electoral Count Act are typically referred to by their citation in the codification in the United States Code rather than in their original enactment in the Statutes at Large. For example, “Section 15” refers to 3 U.S.C. § 15, which was enacted in 1887 as the sixth section of the bill in the Statutes at Large. Second, the term “Electoral Count Act” is often used to refer to the entirety of the first chapter of Title 3 of the United States Code, 3 U.S.C. §§ 1-21, even though those codified provisions also include the Act of 1845 (3 U.S.C. §§1-2) and several other statutory provisions (3 U.S.C. §§ 3-4, 7-14, 19-21) that were not enacted in 1887. The full text of all 21 provisions of chapter 1 of Title 3 of the United States Code, as in force in 2020, are set forth in an appendix.

⁸ 3 U.S.C. § 1 (2020).

⁹ 3 U.S.C. § 2 (2020).

I.B.2. Scattered Sections of Title 3: When Do Electors Vote, and How Do Electors Transmit Their Electoral Votes to Congress?

Several scattered sections of Title 3 of the United States Code, 3 U.S.C. §§ 7-14, govern when electors cast their ballots in the Electoral College and specify procedures for how the electors transmit those votes to Congress. These sections were also updated in the ECRA in 2022. Four of those sections are relevant here:¹⁰

Section 7 exercised Congress's power under Article II, section 1, clause 4 to specify when electors must cast their ballots in the Electoral College:

The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.

Section 9 specified how electors must complete the certificates reporting their votes in conformity with the requirements of the Twelfth Amendment:

The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates of votes one of the certificates of ascertainment of appointment of electors which shall have been furnished to them by direction of the executive of the State.

Section 10 required that the electors sign the envelopes containing the certificates of their votes:

The electors shall seal up the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice President, are contained therein.

Section 11 specified to whom the electors must transmit the six copies of the certificates of their votes:

The electors shall dispose of the certificates so made by them and the lists attached thereto in the following manner:

First. They shall forthwith forward by registered mail one of the same to the President of the Senate at the seat of government.

Second. Two of the same shall be delivered to the secretary of state of the State, one of which shall be held subject to the order of the President of the Senate, the other to be

¹⁰ Section 8 stated that “[t]he electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution.” 3 U.S.C. § 8 (2020). Sections 12, 13, and 14 established procedures to address if the electors’ certificates were not received promptly. *See* 3 U.S.C. § 12-14 (2020).

preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection.

Third. On the day thereafter they shall forward by registered mail two of such certificates and lists to the Archivist of the United States at the seat of government, one of which shall be held subject to the order of the President of the Senate. The other shall be preserved by the Archivist of the United States for one year and shall be a part of the public records of his office and shall be open to public inspection.

Fourth. They shall forthwith cause the other of the certificates and lists to be delivered to the judge of the district in which the electors shall have assembled.

I.B.3. The Electoral Count Act of 1887: How Must States Tell Congress Who it Has Appointed as Electors, and How Does Congress Resolve Disputes About Electors and Electoral Votes?

In 1887, in response to the crisis arising from the disputed presidential election of 1876, Congress enacted the Electoral Count Act (often referred to as the ECA). The Electoral Count Act was codified at 3 U.S.C. §§ 5, 6, 15, 16, 17, 18. Prior to 2020, Congress amended the Electoral Count Act in minor respects not relevant to this report’s analysis. The Electoral Count Act was also repealed and replaced by the Electoral Count Reform Act of 2022. All six provisions of the Electoral Count Act are relevant to this report’s analysis.

Section 5 established what was often referred to as the “safe harbor,” which created a rule of decision requiring Congress to accept as “conclusive” a state’s resolution of a dispute about electors if certain procedural prerequisites were satisfied:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Section 6 provided in pertinent part that the “executive of each State”—that is, the governor—must send a “certificate” of the “ascertainment”—that is, a determination of the appointment—of the state’s electors:

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the

names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.¹¹

Section 15 provided for the counting of electoral votes in Congress on January 6 after the election and establishes procedures for resolving disputes about that count:

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been

¹¹ 3 U.S.C. § 6 (2020).

lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.¹²

As relevant to this report, this procedure provided that the President of the Senate opened the certificates; four members of Congress serving as “tellers” counted the electoral votes; and the tellers delivered the vote tabulations to the President of the Senate, who announced the result. It also provided an opportunity for members of Congress to object to the counting of votes and, if a member of both the Senate and the House signed the objection, then required both chambers to debate and vote on the objection. Finally, it provided for rules for resolving those objections that depended on, among other things, whether one or “more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate.” This report will analyze those rules for resolving disputes in detail in Part IV.B.

Section 16 provided additional rules for the “joint meeting” of Congress on January 6. It placed strict limits on recesses and the dissolution of the joint meeting:

Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in

¹² 3 U.S.C. § 15 (2020).

which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.¹³

Section 17 placed limits on the length of debate when the two chambers separate from the joint meeting to debate an objection:

When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.¹⁴

Finally, Section 18 provided that the President of the Senate “shall have the power to preserve order” during the joint meeting and that Congress may conduct no other business until the joint meeting is dissolved:

While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.¹⁵

I.C. 2021 Concurrent Resolution

The 117th Congress that counted electoral votes on January 6, 2021, bound itself to follow the Electoral Count Act of 1887. On January 3, 2021, the chambers of Congress adopted Senate Concurrent Resolution 1. That concurrent resolution, corresponding versions of which Congress has adopted prior to the electoral count for each election since 1888, read:

Resolved by the Senate (the House of Representatives concurring), That the two Houses of Congress shall meet in the Hall of the House of Representatives on Wednesday, the 6th day of January 2021, at 1 o'clock post meridian, pursuant to the requirements of the Constitution and laws relating to the election of President and Vice President of the United States, and the President of the Senate shall be their Presiding Officer; that two tellers shall be previously appointed by the President of the Senate on the part of the Senate and two by the Speaker on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States,

¹³ 3 U.S.C § 16 (2020).

¹⁴ 3 U.S.C § 17 (2020).

¹⁵ 3 U.S.C § 18 (2020).

beginning with the letter “A”; and said *tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from said certificates; and the votes having been ascertained and counted in the manner and according to the rules by law provided*, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and together with a list of the votes, be entered on the Journals of the two Houses.¹⁶

The concurrent resolution provided that the “tellers . . . shall make a list of the votes . . . and the votes having been ascertained and *counted in the manner and according to the rules by law provided*.”¹⁷ The “rules by law provided” include the existing provisions of statutory law. Accordingly, the 117th Congress that counted electoral votes on January 6, 2021, bound itself to follow the Electoral Count Act of 1887.¹⁸

II. The Electoral College Process in Practice

These constitutional and statutory provisions establish a legal process that has proven straightforward in practice for almost all elections. This Part discusses that process in practice in three circumstances: (i) the typical case, in which any disputes about electors are definitively resolved well in advance of the day that electors cast their ballots in mid-December; (ii) Hawaii in 1960, in which an ongoing court-ordered recount was in progress on the date that electors cast their ballots; and (iii) Florida in 2000, in which a court-ordered recount was halted immediately before the date on which electors cast their ballots.

II.A. The Typical Case

Almost every state in almost every presidential election has followed a typical progression: First, it is determined who may cast ballots in the Electoral College; second, those identified electors then cast ballots; and third, those identified electors’ ballots are counted. Every state holds a popular election for the appointment of its electors.¹⁹ Every state has established procedures for determining the results of its popular election. Those procedures include tabulating the vote totals for the popular election, canvassing the results, and resolving disputes about the results of the popular election through adjudicatory mechanisms such as recounts, administrative contests, and litigation in court. These mechanisms for resolving disputes for the presidential election are the same procedures the state uses to resolve disputes

¹⁶ S.R. 1, 117th Cong. (Jan. 3, 2021), *available at* <https://www.congress.gov/bill/117th-congress/senate-concurrent-resolution/1/text> (emphasis added). *See also* 167 CONG. REC. H11 (Jan. 3, 2021); 167 CONG. REC. S7 (Jan. 3, 2021).

¹⁷ *Id.* (emphasis added).

¹⁸ This concurrent resolution conclusively defeats the argument, not raised by Mr. Chesebro but sometimes advanced by others including his co-defendant Dr. John Eastman, that the Electoral Count Act unconstitutionally binds future Congresses. Through the concurrent resolution, 117th Congress bound itself to follow the Electoral Count Act.

¹⁹ Forty-eight states and the District of Columbia appoint their electors at-large through a single state-wide popular election. Maine and Nebraska use a hybrid system under which the state appoints some of its electors based on a state-wide popular election and some of its electors based on the popular election results in each congressional district.

about the results in the election of other officials like the governor or members of Congress. In the typical case of a presidential election, these procedures are fully exhausted and the results of the popular election—and thus the identities of the electors appointed—are definitively determined prior to the date that the electors must cast their ballots in the Electoral College. Those electors—whose identities are by now certain—then cast their ballots in the Electoral College. Finally, those electors’ votes are counted by Congress on January 6.

II.B. Atypical Cases: Hawaii, 1960 and Florida, 2000

On rare occasions, states have been unable to complete the first step—appointing their electors, including resolving any disputes about which electors had been appointed—by the date on which electors must cast their ballots in the Electoral College. Although the question is not free from doubt, it appears that federal law does not require states to resolve disputes about the identity of its electors prior to that date—though, as discussed below, the Supreme Court has held that a state may so require by its own laws.²⁰

This counter-synchronous process—in which the identities of the states’ electors are not definitively determined until after the date on which federal law requires them to vote—creates a further difficulty. The Constitution requires that electors cast their ballots on a single day, and Congress has determined which day that is. Accordingly, in order for electoral votes to be counted consistent with the Constitution, the electors must cast their ballots on that day *even if* the identity of the state’s electors is not yet definitively determined at the time of voting.

This difficulty gives rise to the possibility of what are sometimes termed “contingent” electors. A “contingent” elector is an elector-nominee—that is, a candidate for elector in the popular election who was pledged to vote for a party’s candidate in the Electoral College—who has not been definitively determined to be one of the state’s electors on the date electors must vote under federal law, but whose appointment is subject to a legal dispute that remains ongoing on that date. Some have argued that it is appropriate, at least in certain circumstances, for contingent electors to cast “contingent” votes on the necessary day in order to preserve the possibility that Congress may constitutionally count those votes if (and only if) the contingent electors are ultimately determined to be the state’s lawfully appointed electors.

The prospect of contingent electors arose twice under the Electoral Count Act prior to 2020: in Hawaii for the presidential election of 1960, and in Florida for the presidential election of 2000. In Hawaii in 1960, the contingent electors for then-Senator John F. Kennedy cast contingent votes that were ultimately counted by Congress on January 6, 1961. In Florida in 2000, no purported contingent electors cast votes. Those two incidents provide historical precedent that frames the lawfulness of contingent electors casting purported electoral votes.

²⁰ In his decisive opinion for the Electoral Commission of 1877, Justice Bradley held that the structural logic of the Electoral College required states to resolve any dispute about the identity of its electors prior to the date on which electors must cast their ballots. No court has resolved this question of federal law. Note that Mr. Chesebro’s plan would have been plainly unlawful under Justice Bradley’s view. On December 14, 2020, the state law processes for resolving disputes in each of the relevant states had determined that the Biden electors had been lawfully appointed. On Justice Bradley’s view, nothing that took place after that date could change the identity of the lawfully appointed electors.

H.B.I. Hawaii, 1960

In the 1960 presidential election, the dispute regarding the result of Hawaii's popular election was not fully adjudicated until just before Congress convened to count the electoral votes on January 6, 1961. The initial canvass favored Nixon by 141 votes. On November 28, Lieutenant Governor James Kealoha issued a certificate of ascertainment for Nixon's electors pursuant to 3 U.S.C. § 6.²¹ A court ordered a recount, which began on December 13.²² The recount was not completed by the date the elector-nominees cast ballots in the Electoral College on December 19, although by then Kennedy had taken the lead by 56 votes.²³

On December 19, both the Kennedy elector-nominees and the Nixon elector-nominees met in the state capitol and cast their purported electoral votes.²⁴ Because the Nixon elector-nominees were named in the governor's certificate of ascertainment issued on November 28, but the Kennedy elector-nominees were not yet named in any certificate of ascertainment, on the date they voted the Kennedy elector-nominees were "contingent." Both slates of elector-nominees then prepared and signed purported certificates of their electoral votes.²⁵

The same day, local newspapers reported that the Kennedy elector-nominees "planned to have a notary public there so if the official Hawaii result for Nixon, already certified the winner by Lieutenant Governor Kealoha were reversed, there would be a record of the Democratic choice."²⁶ A newspaper also reported that the "Lieutenant Governor's office said today that the democratic elector's certificates showing Kennedy the winner will be sent to the same places as the Republican certificates, if the Democrats request it."²⁷ Democratic attorney Robert Dodge, who coordinated the Kennedy elector-nominees' voting, "explained the envelope contained one certificate proving the Democratic electors voted for Kennedy and Johnson, and congratulated [Lieutenant Governor] Kealoha on the co-operation the Democrats received from Kealoha's office."²⁸ On December 20, both slates of elector-nominees mailed their certificates to the General Services Administration.²⁹

²¹ See *Certificates of Ascertainment, Hawaii* (Nov. 28, 1960), available at <https://www.politico.com/f/?id=0000017e-d460-d1c5-a7ff-d6eed74c0000>. Kealoha was acting governor because the governor was out of state.

²² See *Lum v. Bush*, Civ. No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), noted in 107 CONG. REC. 290 (Jan. 6, 1961).

²³ Al Goodfader, *Both Parties Electors To Vote*, HONOLULU ADVERTISER, at A-9 (Dec. 19, 1960), available at <https://www.newspapers.com/image/259032626>; UPI, *Kennedy Retakes Hawaii Lead*, N.Y. TIMES, at 36 (Dec. 18, 1960), available at <https://timesmachine.nytimes.com/timesmachine/1960/12/18/99903613.pdf>.

²⁴ See 107 CONG. REC. 289 (Jan. 6, 1961).

²⁵ *Lum v. Bush*, Civ. No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), noted in 107 CONG. REC. 290 (Jan. 6, 1961). The Kennedy electors' certificate is available at <https://www.politico.com/f/?id=0000017e-d45f-d1c5-a7ff-d6ffa18c0000>.

²⁶ *Kennedy Ups Isle Recount Lead*, HONOLULU ADVERTISER, at 1 (Dec. 18, 1960), available at <https://www.newspapers.com/image/259028489>.

²⁷ Forrest Black, *Isles' Electoral Votes Cast Twice*, HONOLULU STAR-BULLETIN, at 2 (Dec. 19, 1960), available at <https://www.newspapers.com/image/270257302>.

²⁸ Forrest Black, *Elder Statesmen Cast Two Sets Of Electoral Votes for Isles*, HONOLULU STAR-BULLETIN, at 1 (Dec. 20, 1960), available at <https://www.newspapers.com/image/270258591>.

²⁹ The then-current provision of federal law required electors to transmit their certificates on the day after they voted. See 65 Stat. 710, 712 (1951) ("On the day thereafter they shall forward by registered mail two of such certificates and lists to the Administrator of General Services at the seat of government.").

The Hawaii court issued a final order on December 30, holding that the recount showed Kennedy had won by 115 votes and that the Kennedy electors had “received a majority of the votes in the general election . . . and in said general election were duly elected.”³⁰ Governor Quinn issued a certificate of ascertainment naming the Kennedy electors on January 4, 1961.³¹ That superseding certificate arrived in Washington on the morning of January 6, 1961.³²

Congress convened later that day. It had received three packages of documents:³³

1. The Nixon elector-nominees’ certificate of their votes, dated December 19, 1960 and mailed on December 20, 1960. Appended to that certificate of the elector-nominees’ votes was Lieutenant Governor Kealoha’s certificate of ascertainment naming the Nixon elector-nominees, dated November 28, 1960.
2. The Kennedy elector-nominees’ certificate of their votes, dated December 19, 1960 and mailed on December 20, 1960. This package contained no certificate of ascertainment.
3. Governor Quinn’s superseding certificate of ascertainment naming the Kennedy elector-nominees, dated January 4, 1961. Appended to that certificate was a copy of the Hawaii court’s final order determining that the Kennedy elector-nominees had been appointed, as required by 3 U.S.C. § 6.³⁴

Vice President Nixon, presiding over the electoral count as President of the Senate, announced that he had received the three “certificates.”³⁵ Hawaii’s electoral votes would not change the result in the Electoral College, which Kennedy had won by over 80 votes without Hawaii.³⁶ The tellers³⁷ read the contents of the three packages, culminating in Governor Quinn’s superseding certificate of ascertainment and the Hawaii court’s judgment determining that the Kennedy elector-nominees had been lawfully appointed. Nixon then spoke:

The VICE PRESIDENT (after consideration of the aforementioned documents by the tellers):

³⁰ *Lum v. Bush*, Civ. No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), noted in 107 CONG. REC. 290 (Jan. 6, 1961).

³¹ See *Certificates of Ascertainment*, Hawaii (Jan. 4, 1961), available at <https://www.politico.com/f/?id=0000017e-d461-ddf9-a9fe-de739ece0001>.

³² *Id.*

³³ See 107 CONG. REC. 289 (Jan. 6, 1961).

³⁴ The then-current version of 3 U.S.C. § 6 provided that “if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Administrator of General Services a certificate of such determination in form and manner as the same shall have been made[.]” Pub. L. 82-248, § 6, 65 Stat. 710, 711.

³⁵ Nixon’s reference to three “certificates” combines the two certificates of electoral votes, submitted by the Nixon and Kennedy elector-nominees, and Governor Quinn’s superseding certificate of ascertainment naming the Kennedy electors. See 107 CONG. REC. 290 (Jan. 6, 1961).

³⁶ See 1960 ELECTORAL COLLEGE RESULTS, available at <https://www.archives.gov/electoral-college/1960>.

³⁷ The tellers are members of Congress appointed by the two chambers to count the electoral votes on the chambers’ behalf. See 3 U.S.C. § 15 (2020).

The Chair has knowledge, and is convinced that he is supported by the facts, that the certificate from the Honorable William F. Quinn, Governor of the State of Hawaii, dated January 4, 1961 . . . properly and legally portrays the facts with respect to the electors chosen by the people of Hawaii for the election of President and Vice President held on November 8, 1960. . . .

In order not to delay the further count of the electoral vote here, the Chair, without the intent of establishing a precedent, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii. If there be no objection in this joint convention, the Chair will instruct the tellers--and he now does--to count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961--those votes having been cast for John F. Kennedy, of Massachusetts, for President and Lyndon B. Johnson, of Texas, for Vice President.

Without objection the tellers will accordingly count the votes of those electors named in the certificate of the Governor of Hawaii dated January 4, 1961.

There was no objection.

The tellers then proceeded to read, count and announce the electoral votes of the remaining States in alphabetical order.³⁸

After the electoral count was completed and pursuant to 3 U.S.C. § 15, Nixon announced that Kennedy had been elected.

II.B.2. Florida, 2000

In 2000, the intensely litigated election ultimately resulted in a narrow Electoral College victory for Governor George W. Bush over Vice President Al Gore. Election Day was November 7, 2000, and federal law required electors to cast their ballots in the Electoral College on December 18, 2000. The Supreme Court's decision in *Bush v. Gore* on December 12 halted a recount in Florida, at which time Bush held a lead of 537 votes and with it Florida's decisive electoral votes.³⁹ The Court held that no constitutionally adequate recount could be completed before the "safe-harbor" deadline in 3 U.S.C. § 5, which was also December 12.⁴⁰ Although federal law does not appear to require a state to resolve disputes about electors by the safe harbor deadline, and Hawaii had taken until December 30 to complete its recount and related litigation in 1960, the Supreme Court determined that Florida state law required any recounts to finish by December 12.⁴¹ Accordingly, the Supreme Court ordered the recount halted.

³⁸ 107 CONG. REC. 290 (Jan. 6, 1961).

³⁹ 531 U.S. 98 (2000).

⁴⁰ *Id.* at 110.

⁴¹ *Id.*

After the Supreme Court’s decision, Vice President Gore publicly conceded the election.⁴² On December 18, 2000, the Bush electors met at the state capitol and cast their ballots in the Electoral College. Later that day, they prepared, signed, and transmitted certificates of their electoral votes as required by 3 U.S.C. § 9-11. As required by 3 U.S.C. § 9, they appended a certificate of ascertainment naming them as Florida’s electors that Governor Jeb Bush had issued on November 30, 2000.⁴³ There is no record that the Gore elector-nominees met or purported to cast electoral votes. There is no record that the Gore elector-nominees attempted to transmit any documents to the President of the Senate, the Archivist, or any of the other recipients listed in 3 U.S.C. § 11. There is no record that any documents purporting to be transmitted by the Gore elector-nominees were received by the President of the Senate, the Archivist, or any of the other recipients listed in 3 U.S.C. § 11.

On January 6, Vice President Gore presided over the electoral count. Pursuant to the Twelfth Amendment and the Electoral Count Act, Gore opened the certificate of Florida’s electoral votes transmitted by Bush’s electors.⁴⁴ Gore did not open, or make any reference to, any other purported certificates of electoral votes for Florida.⁴⁵ Twenty members of the House of Representatives objected to counting Florida’s electoral votes, citing the halted recount and their disagreement with the Supreme Court’s decision in *Bush v. Gore*.⁴⁶ No Senator joined the objection.⁴⁷ As a result, Gore ruled those objections out of order pursuant to the procedures in 3 U.S.C. § 15.⁴⁸ No member of Congress, including the members of the House who objected to the counting of the Bush electors’ votes from Florida, suggested that the Gore elector-nominees had submitted a certificate of electoral votes or that they had cast votes that should be counted. After Gore ruled the objections out of order, the tellers counted Florida’s electoral votes for Bush.⁴⁹ At the conclusion of the electoral count, and pursuant to 3 U.S.C. § 15, Vice President Gore announced that Bush had prevailed with 271 electoral votes.⁵⁰

II.C. Summary of Precedent

The two incidents discussed above provide the following precedent for contingent elector-nominees casting purported electoral votes. In Hawaii in 1960, contingent elector-nominees for Kennedy cast purported ballots while a court-ordered recount was ongoing. After the recount concluded, a court issued a final order determining that the Kennedy elector-nominees had received the most votes in the popular election and therefore were thus “duly elected.” The governor subsequently issued a certificate of ascertainment naming the Kennedy elector-nominees, which superseded the previously issued certificate of ascertainment naming

⁴² See *Vice President Al Gore’s Concession Speech*, N.Y. TIMES (Dec. 13, 2000), available at <https://www.nytimes.com/2000/12/13/politics/text-of-goreacutes-concession-speech.html>.

⁴³ See *Certificate of Ascertainment, Florida* (Nov. 30, 2000), available at <https://www.archives.gov/files/electoral-college/2020/ascertainment-florida.pdf>.

⁴⁴ 147 CONG. REC. 1330 (Jan. 6., 2001).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Alison Mitchell, *Over Some Objections, Congress Certifies Electoral Vote*, N.Y. TIMES (Jan. 7, 2001), available at <https://www.nytimes.com/2001/01/07/us/over-some-objections-congress-certifies-electoral-vote.html>.

⁴⁸ 147 CONG. REC. 1345 (Jan. 6, 2001).

⁴⁹ *Id.*

⁵⁰ 147 CONG. REC. 1430 (Jan. 6, 2001).

Nixon's elector-nominees. On January 6, 1961, Congress convened to count the electoral votes pursuant to the procedures of the Electoral Count Act. After opening the certificates, Nixon "suggest[ed]" that the Kennedy elector-nominees "be considered as the lawful electors from the State of Hawaii." After Nixon called for objections and received none, thus receiving unanimous consent, the tellers counted the Kennedy elector-nominees' votes for Hawaii.

In Florida in 2000, a court-ordered recount was subject to ongoing litigation that culminated in the Supreme Court's decision in *Bush v. Gore*, which halted the recount days before the day on which electors must cast their ballots. On that day, the Bush electors cast ballots and the Gore elector-nominees did not. The Gore elector-nominees took no steps to prepare, sign, or transmit any paperwork. No paperwork purporting to be from the Gore elector-nominees was received by the President of the Senate, the Archivist, or by anyone else. No purported certificate of any purported votes by the Gore elector-nominees was presented to Congress on January 6, and no member of Congress claimed that the Gore elector-nominees had cast ballots or transmitted a certificate of any purported votes. The objection to counting the Bush electors' votes was overruled, and Congress counted those electoral votes.

These two incidents provide the outlines for demarcating when federal law contemplates contingent elector-nominees casting ballots and when it does not. In Hawaii in 1960, the contingent elector-nominees for Kennedy cast ballots during an ongoing legal dispute about the outcome of the popular election. The Kennedy elector-nominees—and those who assisted them—cast those ballots as part of an explicit plan to preserve the possibility that their votes would be counted by Congress if, and only if, the recount and litigation determined that they had been lawfully appointed. Upon the resolution of that dispute through lawful state procedures, Congress determined to count the Kennedy elector-nominees' votes rather than the Nixon elector-nominees' votes through the application of Section 15 of the Electoral Count Act when Nixon called for any objections and received none. Nixon stated that the basis for counting the Kennedy elector-nominees' votes was that the governor's certificate of ascertainment, backed by a court order, had determined that the Kennedy elector-nominees had been lawfully appointed. The Kennedy elector-nominees thus cast their contingent ballots as part of an explicit plan to preserve the possibility that Congress would count their votes pursuant to the lawful procedures of 3 U.S.C. § 15 if, and only if, the lawful state procedures for the resolution of a dispute about electors ultimately determined that the Kennedy elector-nominees had been lawfully appointed.

By contrast, the process for Florida in 2000 followed the same course that the typical case would, despite the dispute about the results of the popular election. In early December 2000, that dispute involved a court-ordered recount and litigation in state and federal court. That litigation culminated in the Supreme Court's decision in *Bush v. Gore*, which ended the recount and finally resolved all litigation prior to the date on which electors cast ballots on December 18, 2000. The Gore elector-nominees did not cast ballots purporting to be electoral votes or take any other steps to do so. Congress counted the Bush electors' votes through the application of the lawful procedures of 3 U.S.C. § 15. No one in Congress—including Vice President Gore or any of the members who objected to counting the Bush electors' votes—suggested that the Gore elector-nominees had, or could have, cast ballots. Accordingly, because the dispute had been resolved through the lawful state procedures for adjudicating disputes about electors, the process involving the Gore elector-nominees was finally resolved by December 18, 2000.

III. Factual Analysis of Mr. Chesebro’s Plan

III.A. Analysis of Mr. Chesebro’s Memoranda

Kenneth Chesebro produced four successive memoranda proposing and planning for Trump elector-nominees to cast purported ballots in the Electoral College on December 14, 2020, in states where those Trump elector-nominees had not been certified by state officials as the winners of the popular election.⁵¹ The purpose of that plan was purportedly to satisfy the requirement in Article II, section 1, clause 4 of the Constitution that all electors cast their ballots on the same day.⁵² Congress exercised that authority by designating “the first Monday after the second Wednesday in December.”⁵³ As explained above, if an elector does not cast her ballot on that date, then her electoral vote would not be constitutionally valid. In 2020, that date was December 14.

In a memo dated November 18, 2020, Mr. Chesebro considered the possibility that a dispute was not resolved until after December 14, 2020. That initial memo contemplated that courts would resolve such a dispute after December 14 but before January 6, 2021. Beginning no later than a memo dated December 6, 2020, Mr. Chesebro proposed that the Trump elector-nominees cast ballots so that they could form the basis of unilateral action by the President of the Senate, without any litigation resolving the dispute in favor of the Trump elector-nominees and without any state official certifying that the Trump elector-nominees were lawfully appointed.

III.A.1. Mr. Chesebro’s November 18, 2020 Memo

On November 18, 2020, Mr. Chesebro sent an initial memo to Judge James Troupis, a retired judge and lawyer working with the Trump campaign in Wisconsin.⁵⁴ The memo was titled “The Real Deadline for Settling a State’s Electoral Votes.” The November 18 memo claimed that the “real deadline” for resolving disputes about electors was January 6, 2021, the date of the joint session of Congress. The memo stated:

There is a very strong argument, supported by historical precedent (in particular, the 1960 Kennedy-Nixon contest), that the real deadline for a finding by the Wisconsin courts (or, possibly, by the Legislature) in favor of the President and Vice President is not **December 8** (the “safe harbor” deadline under the Electoral Count Act), nor even **December 14** (the date on which electors must vote in their respective States), but **January 6** (the date the Senate and House meet for the counting of electoral votes).⁵⁵

⁵¹ The factual summary and analysis in this Part draws upon Tom Joscelyn, “Kenneth Chesebro: Chief Architect of the False Elector Scheme” (forthcoming in *Just Security*).

⁵² U.S. CONST., art. II, § 1, cl. 4.

⁵³ 3 U.S.C. § 7 (2020).

⁵⁴ *Memorandum from Kenneth Chesebro to Judge James R. Troupis*, “RE The Real Deadline for Settling a State’s Electoral Votes,” (Nov. 18, 2020), available at <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-november-18-2020.pdf> (“Chesebro Nov. 18 memo”).

⁵⁵ Chesebro Nov. 18 memo, at 1 (emphasis in original).

Mr. Chesebro cited the Hawaii incident from 1960 as justification for his claim that January 6 was the “real deadline.”⁵⁶

In the November 18 memo, Mr. Chesebro concluded:

It may seem odd that the electors pledged to Trump and Pence might meet and cast their votes on December 14 even if, at that juncture, the Trump-Pence ticket is behind in the vote count, and no certificate of election has been issued in favor of Trump and Pence. However, a fair reading of the federal statutes suggests that is a reasonable course of action.⁵⁷

Mr. Chesebro reiterated that Trump’s elector-nominees should convene and cast ballots on December 14, 2020, “so that any judicial proceedings which extend past that date, working toward resolution of who has won Wisconsin’s electoral votes, are entirely compatible with federal law provided that they are completed by January 6.”⁵⁸

Mr. Chesebro’s November 18 memo thus contemplated the possibility that an election dispute was not resolved by the day electors were required by federal law to cast their ballots. Mr. Chesebro advised that, in such a situation, the Trump elector-nominees should cast ballots on the required day to ensure that those votes would be “considered timely” in the event that a “court decision (or perhaps, a state legislature determination)” was “rendered after December 14 in favor of the Trump-Pence slate of electors.”⁵⁹ The November 18 memo addressed only Wisconsin and did not purport to consider a plan for any other state.

III.A.2. Mr. Chesebro’s December 6, 2020 Memo

By early December, Mr. Chesebro’s plan had evolved substantially. On December 6, 2020, Mr. Chesebro sent a second memo to Judge Troupis, titled “Important That All Trump-Pence Electors Vote on December 14.”⁶⁰ That memo recommended that the Trump’s elector-nominees meet and cast their votes in “all six” of the supposedly “contested states”: Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. Critically, Mr. Chesebro’s plan for what would be done with those purported electoral votes had changed dramatically.

Legal Strategy: “The Trump electors in all six contested States must vote”

In the November 18 memo, Mr. Chesebro argued that Trump’s elector-nominees should meet and cast ballots so that their votes would be valid, and therefore could constitutionally be counted on January 6, if a court decision or the state legislature determined after December 14 that the Trump elector-nominees had prevailed in Wisconsin. In the December 6 memo,

⁵⁶ See *supra* Part II.B.1.

⁵⁷ Chesebro Nov. 18 memo, at 2.

⁵⁸ *Id.* at 1.

⁵⁹ Chesebro Nov. 18 memo, at 1 (emphasis in original).

⁶⁰ *Memorandum from Kenneth Chesebro to James R. Troupis*, “RE: Important That All Trump-Pence Electors Vote on December 14,” (Dec. 6, 2020), available at <https://int.nyt.com/data/documenttools/chesebro-dec-6-memo/ce55d6abd79c2c71/full.pdf> (“Chesebro Dec. 6 memo”)

however, Mr. Chesebro’s plan was for the Trump elector-nominees’ votes to be considered on January 6 even if no litigation yielded a court order in favor of the Trump elector-nominees and even if no state official had certified that the Trump elector-nominees were the state’s lawful electors.

Mr. Chesebro presented his three-part plan for “the Trump campaign [to] prevent Biden from amassing 270 electoral votes on January 6”⁶¹ as follows:

1. First, Mr. Chesebro stated that the Trump elector-nominees in six states must meet and vote on December 14.
2. Second, Mr. Chesebro advised that, as of January 6, 2021, there should be at least one “pending” lawsuit in each of the six states “in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State.” Mr. Chesebro added in parentheses: “ideally by then Trump will have been awarded one or more of the States.”⁶²
3. Third, Mr. Chesebro proposed that “Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.”⁶³

Mr. Chesebro’s plan in the December 6 memo departed from his analysis in the November 18 memo in two critical respects. First, the November 18 memo contemplated that litigation might resolve in favor of the Trump elector-nominees after they voted on December 14 but before “the real deadline for resolving the contest” of January 6.⁶⁴ By contrast, the December 6 memo is predicated on litigation “pending” on—and thus, not being resolved by—January 6. Second, the November 18 memo appeared to contemplate that Congress, pursuant to the procedures of the Electoral Count Act, would count the Trump elector-nominees’ purported votes after a court ordered a state official—and in particular, pursuant to the procedures of the Electoral Count Act, the state’s governor—to certify that the Trump elector-nominees had been lawfully appointed. By contrast, the December 6 memo suggested that Vice President Pence ignore the Electoral Count Act and instead exercise a purported unilateral constitutional authority to take action with respect to the electoral count.

The December 6 memo then emphasized that the “alternate slates of electors” were necessary to “prevent” Biden “reaching 270 electoral votes” on January 6:

My point here is that it is important that the alternate slates of electors meet and vote on December 14 if we are to create a scenario under which Biden can be prevented from reaching 270 electoral votes, even if Trump has not managed by then to obtain court

⁶¹ Chesebro Dec. 6 memo, at 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Chesebro Nov. 18 memo, at 7.

decisions (or state legislative resolutions) invalidating enough results to push Biden below 270.⁶⁵

Mr. Chesebro explained that his strategy would not just “keep Biden below 270 electoral votes,” but also that it “seems feasible that the vote count can be conducted so that at no point will Trump be behind in the electoral vote count unless and until Biden can obtain a favorable decision from the Supreme Court upholding the Electoral Count Act as constitutional, or otherwise recognizing the power of Congress (and not the President of the Senate) to count the votes.”⁶⁶ In particular, Mr. Chesebro argued that, because the electoral count proceeded alphabetically by state, the count “could be managed” so that Vice President Biden would have “to seek Supreme Court review either when he is behind 12-0 in the electoral count or, at least, when he is behind 232-227,” but “only if all six States are still contested, and all six slates of Trump-Pence electors had voted on December 14.”⁶⁷

Mr. Chesebro conceded that the Supreme Court would probably not rule in favor of the position he advocated. But he contended that his proposed course of action would be worth pursuing even if the Court ruled that it was unlawful:

Even if, in the end, the Supreme Court would likely end up ruling that the power to count the votes (in the sense of resolving controversies concerning them) does not lie with the President of the Senate, but instead lies with Congress (either voting jointly, or in separate Houses), letting matters play out this way would guarantee that public attention would be riveted on the evidence of electoral abuses by the Democrats, and would also buy the Trump campaign more time to win litigation that would deprive Biden of electoral votes and/or add to Trump’s column.⁶⁸

Mr. Chesebro concluded his legal analysis by “recogniz[ing] that what I suggest is a bold, controversial strategy, and that there are many reasons why it might not end up being executed on January 6.”⁶⁹ The memo concluded that “as long as it is one possible option, to preserve it as a possibility it is important that the Trump-Pence electors cast their electoral votes on December 14.”⁷⁰

“Messaging about the December 14 vote as routine”

After presenting Mr. Chesebro’s new legal strategy, the December 6 memo suggested that the Trump campaign publicly release “messaging about the December 14 vote as routine.”⁷¹ Mr. Chesebro was concerned that “word of this will leak out prior to December 14” that Trump elector-nominees would be casting their votes “even in States in which Trump has not been declared the winner.”⁷² He therefore proposed “messaging . . . this as a routine measure that is

⁶⁵ Chesebro Dec. 6 memo, at 2.

⁶⁶ *Id.* at 2 (emphasis in original).

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

necessary to ensure that in the event the courts (or state legislatures) were to later conclude that Trump actually won the state, the correct electoral slate can be counted in Congress in January.”⁷³ He further suggested that the Trump elector-nominees’ voting should be explained “just as the Democrats did in Hawaii in 1960, which ended up with Hawaii’s electoral votes being awarded to Kennedy, even though the litigation was not resolved until after the electors voted (see my Nov. 18 memorandum).”⁷⁴ This “messaging” conflicted with his legal strategy, which no longer relied on election litigation resolving in favor of the Trump elector-nominees and instead suggested that the President of the Senate exercise unilateral authority to intervene in the electoral count on January 6.

The December 6 memo then suggested that the “messaging” cite public statements made by “prominent liberal figures” Van Jones and Lawrence Lessig.⁷⁵ Mr. Chesebro quoted a CNN piece authored by Jones and Lessig in November 2020 that stated that a governor “should await the final resolution of the popular vote count before he certifies which slate should represent the state. **So long as that certification happens before January 6, there is nothing that should stop it from being counted by Congress.**”⁷⁶ Mr. Chesebro then stated that in light of “these prior statements by these and other prominent liberal figures,”

[I]t would be the height of hypocrisy for Democrats to resist January 6 as the real deadline, or to suggest that Trump and Pence would be doing anything particularly controversial in asking the electors pledged to them to please assemble in their respective States and cast their votes, so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature.⁷⁷

The December 6 memo did not reconcile that the course of action suggested by Jones and Lessig was explicitly conditioned on the state’s governor issuing a “certification . . . before January 6” and the certified electoral votes “being counted by Congress.” By contrast, the plan Mr. Chesebro presented in the December 6 memo was expressly predicated on the Trump elector-nominees *not* being certified by any state official (because litigation would still be “pending”) and the President of the Senate taking unilateral action with respect to the allegedly “disputed” votes, rather than Congress counting electoral votes pursuant to the Electoral Count Act.

“Logistics for casting/transmitting electoral votes on December 14”

Finally, the December 6 memo presented several steps and requirements under federal and Wisconsin law for the Trump electors to cast their purported electoral votes and then transmit those votes to Washington, D.C. Mr. Chesebro claimed that “the electors in the contested States should be able to take the essential steps needed to validly cast and transmit their votes without any involvement by the governor or any other state official.”⁷⁸ Although the

⁷³ *Id.* at 2-3.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 4 (emphasis in Chesebro Dec. 6 memo).

⁷⁷ *Id.*

⁷⁸ *Id.* at 5 (emphasis in original).

December 6 memo made that broad claim about all “the contested States,” it did not discuss any state’s law aside from Wisconsin.

The December 6 memo recognized that the Trump electors would not be able to comply with one requirement of federal law:

The only thing ordinarily contemplated by Sect. 9 [of the Electoral Count Act] that the Trump-Pence electors would not be able to do (unless Trump wins by December 14) is staple to each of the certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows, this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.⁷⁹

The December 6 memo did not reconcile the factual and procedural differences between the Hawaii incident in 1960 and the course of action he proposed in the memo. As explained above, in Hawaii in 1960, the governor issued a superseding certificate of ascertainment naming Kennedy’s elector-nominees pursuant to a court order after the recount determined that Kennedy had won the state’s popular election. Congress received that superseding certificate of ascertainment on January 6, 1961, and by unanimous consent it counted the Kennedy elector-nominees’ votes pursuant to the procedures of 3 U.S.C. § 15. By contrast, the plan Mr. Chesebro had presented earlier in the December 6 memo was predicated on litigation being “pending” on, and thus not resolved by, January 6, 2021. Mr. Chesebro’s plan thus did not contemplate that the governor or any other state official would provide a certificate of ascertainment for the Trump elector-nominees prior to January 6.

III.A.3. Mr. Chesebro’s December 9, 2020 Memo

Mr. Chesebro’s third memo to Judge Troupis was dated December 9, 2020, titled “Statutory Requirements for December 14 Electoral Votes.”⁸⁰ The December 9 memo provided a “summary of the requirements under federal law, and under the law of the six States in controversy, concerning what is required for presidential electors to validly cast and transmit their votes.”⁸¹ The December 9 memo supplemented the December 6 memo by providing an overview of state law requirements for electors voting, filling vacancies of electors, and transmitting purported electoral votes to various officials including the Archivist of the United States and the President of the Senate.

At the outset, the December 9 memo recognized that “none of the Trump-Pence electors [were] currently certified as having been elected by the voters of their State.”⁸² Nonetheless, Mr. Chesebro claimed that:

⁷⁹ *Id.* at 6.

⁸⁰ *Memorandum from Kenneth Chesebro to James R. Troupis*, “Statutory Requirements for December 14 Electoral Votes,” (Dec. 9, 2020), available at <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf> (“Chesebro Dec. 9 memo”).

⁸¹ Chesebro Dec. 9 memo, at 1.

⁸² *Id.*

[M]ost of the electors (with the possible exception of the Nevada electors) will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election.⁸³

The December 9 memo thus listed three possible authorities that might “recognize” the Trump electors as “valid.” By including Congress in this list, the December 9 memo appeared to contemplate a course of action in which Congress counts electoral votes cast by the Trump elector-nominees even if no court and no state official had previously determined that those Trump elector-nominees were lawfully appointed by the state. Mr. Chesebro further claimed that “each electoral vote” could be “potentially important if the election ultimately extends to, and perhaps past, January 6 in Congress.”⁸⁴ The December 9 memo did not cite any legal authority or precedent to support its contention that “the election ultimately” could “extend . . . past[] January 6 in Congress.”

In addition, the December 9 memo noted that the state law requirements in Georgia gave rise to “a wrinkle” in the event that any of the original Trump-Pence electors had to be replaced by substitutes. Mr. Chesebro explained:

Unlike in other States, where that choice is automatically effective, in Georgia a choice must be ratified ‘immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall immediately cause notice of his or her election in writing to be given to such person.’

Could the Governor, in the current situation, refuse to ratify the choice, on the ground that this slate of electors is not the one the voters elected on Nov. 3 (according to the official canvass)? Given the statutory provision, **it seems imperative that every effort be made to secure the participation of all 16 electors, and to avoid making a substitution if at all possible.**⁸⁵

Mr. Chesebro concluded that “voting by an alternate slate of electors” is “somewhat dicey in Georgia and Pennsylvania in the event that one or more electors don’t attend (require gubernatorial ratification of alternates).”⁸⁶ This “wrinkle” ultimately became relevant because four of the original Trump elector-nominees declined to cast purported ballots on December 14, thereby creating vacancies that required filling.

III.A.4. Mr. Chesebro’s December 13, 2020 Email Memo

On December 13, 2020, the day before federal law required electors to vote, Mr. Chesebro wrote a fourth memo via email to former Mayor Rudolph Giuliani and another

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 3. *See* Ga. Code § 21-2-12.

⁸⁶ Chesebro Dec. 9 memo, at 5.

redacted recipient.⁸⁷ This fourth memo, titled “Brief notes on ‘President of the Senate’ strategy,” shifted focus from organizing the Trump elector-nominees casting purported votes to taking steps so that the Trump elector-nominees’ votes would be counted on January 6, 2021. The December 13 memo advocated that the President of the Senate could exercise “the sole power to count electoral votes, and anything to the contrary in the Electoral Count Act is unconstitutional.”⁸⁸

Mr. Chesebro stated the “bottom line” as follows:

The bottom line is I think having the President of the Senate firmly take the position that he, and he alone, is charged with the constitutional responsibility not just to **open** the votes, but to **count** them – including making judgments about what to do if there are conflicting votes – represents the best way to ensure:

- (1) that the mass media and social media platforms, and therefore the public, will focus intensely on the evidence of abuses in the election and canvassing; and
- (2) that there will be additional scrutiny in the courts and/or state legislatures, with an eye toward determining which electoral votes are the valid ones.⁸⁹

Mr. Chesebro further argued:

I think having the President of the Senate use the defensible claim that he is in charge of counting the votes as leverage to obtain that needed scrutiny would be worthwhile even if it couldn't ultimately prevent the election of Biden and Harris. The Republicans used this argument in 1877 as leverage, and with it managed to get an election commission created which elected Hayes. Republicans should use it again.⁹⁰

The remainder of the December 13 memo consisted of two parts: (i) a “chronology of how things could play out, if there is a serious effort to employ the argument that the President of the Senate counts the votes,” and (ii) “[t]he originalist argument re the 12th Amendment” and the purported powers of the President of the Senate.

“Chronology”

The December 13 memo’s “chronology” proceeded as follows:

- Prior to January 6: The December 13 memo proposed that on “Jan 3-5, and perhaps before then,” “Committees of the Senate hold hearings detailing widespread violations of

⁸⁷ See Email from Kenneth Chesebro to Rudy Giuliani, Subject: PRIVILEGED AND CONFIDENTIAL – Brief Notes on “President of the Senate” strategy, (Dec. 13, 2020 9:48 pm), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman004708/pdf/GPO-J6-DOC-Chapman004708.pdf> (“Chesebro Dec. 13 memo”). The redacted recipient appears to be Boris Epshtyen. *See id.*, p. 1 (“I did do a very rough e-mail on Dec. 13, which Boris requested on behalf of the Mayor.”).

⁸⁸ Chesebro Dec. 13 memo, at 5.

⁸⁹ *Id.* at 1.

⁹⁰ *Id.*

law, and fraud, in the election in the states at issue.”⁹¹ The “[i]dea” behind such hearings “would be to buttress the substantive basis for the President of the Senate later refusing to count votes from those States, absent more needed scrutiny.”

In addition, the December 13 memo proposed a “hearing in the Senate Judiciary Committee exploring the constitutional question of how the votes must be counted, with at least two highly qualified legal scholars concluding that the President of the Senate is solely responsible for counting the votes, and that the Electoral Count Act is unconstitutional in dictating limits on debate and dictating who wins electoral votes when there are 2 competing slates and the House and Senate disagree.” The December 13 memo did not identify any “highly qualified legal scholars” who would offer such testimony about the powers of the President of the Senate.

- On January 6: The December 13 memo proposed a “theme” that on January 6, the “counting of the votes” proceed pursuant to what the memo refers to as “a strict textual, originalist basis” that “break[s] with the procedures set out in the Electoral Count Act.”

These “break[s]” from the Electoral Count Act included:

- The Vice President would refuse to serve as presiding officer over the electoral count. The December 13 memo offers two grounds for that action.
 - First, the December 13 memo claims that the Electoral Count Act cannot constitutionally “impose duties on either the President or Vice President beyond those set out in the Constitution.” According to the December 13 memo, “the Vice President’s duties” relating to the electoral count “are precisely set out in [Twelfth Amendment to] the Constitution, and Congress may not add to them.”
 - Second, the December 13 memo suggests that, even if the Electoral Count Act could constitutionally impose such duties upon the Vice President, “Pence [should] take[] the position that he should not, and cannot, in this instance, preside, because he has a conflict of interest, as one of the candidates for election.”
- The December 13 memo continued: “At this point, the Vice President will have emphasized the need for focus on plain language and adherence to the Constitution, by rejecting the role of presiding officer imposed by the Electoral Count Act,” which would “politically . . . insulate him and the President from what will happen next.”
- After Vice President Pence “recuse[d]” from the electoral count, the Dec. 13 memo proposed that “president pro tempore act[ing] as the President of the Senate” would preside in Pence’s place. The President of the Senate, according to the December 13 memo, would then “announce[] that he cannot and will not, at

⁹¹ *Id.* at 2.

least as of that date, count any electoral votes from Arizona because there are two slates of votes, and it is clear that the Arizona courts did not give a full and fair opportunity for review of election irregularities, in violation of due process.”

- The December 13 memo continued: “Unless by then the Supreme Court has taken that case and rejected it on the merits, the President of the Senate can make his own judgment that the Arizona proceedings violated due process, so he won't count the votes in Biden's column.”
- Finally, according to the December 13 memo, the President of the Senate would “refuse[] to count Arizona in the Trump-Pence column,” and would “say[] that if Arizona wants to be represented in the electoral count, either it has to rerun the election, or engage in adequate judicial review, or have its legislature appoint electors.” The December 13 memo provided no basis for the legal authority for the President of the Senate to issue such an ultimatum to the State of Arizona.
- After January 6:
 - In the December 13 memo, Mr. Chesebro conceded that “I would not bet on a majority of the Court siding with the President of the Senate, even though a majority might well agree with that [sic] the Constitution is correctly construed, from an originalist perspective, in exactly that manner.” Instead, he thought that “to bring an end to a huge political crisis” that Mr. Chesebro’s own proposed plan would have precipitated, it was “more likely” that “the Court would find some way to rule in Biden's favor or, at minimum, find the controversy nonjusticiable (as with the Texas case) on some basis, such as the ‘political question’ doctrine, thus insulating its legitimacy from partisan conflict.”
 - The December 13 memo then sketched several possible outcomes, depending on the Supreme Court’s decision. According to Mr. Chesebro, the “most likely” outcomes of his plan were either losing in the Supreme Court or reprising the Crisis of 1877, the most severe constitutional crisis in American history aside from the Civil War.
 - First, the December 13 memo claimed that even “[i]f Biden were to win in the Court, much will still have been accomplished, in riveting public attention on election abuses, and building momentum to prevent similar abuses in the future.”
 - Second, the December 13 memo argued that “[i]f the Court were to dodge, then we would have a situation similar to 1877.” In that case, the December 13 memo suggested, “the parties would realize that if they remained at loggerheads,” and “with [Inauguration Day on] January 20 looming, political leaders would face a choice.” According to the December 13 memo, the Court’s inaction would result in an impasse “with the President of the Senate perhaps refusing to open the votes of the

contested states as long as his authority to count the votes was being challenged, and [Speaker of the House Nancy] Pelosi refusing to hold an election for president in the House.” The resulting “choice” would consist in “[e]ither Pelosi would become acting president on January 20 (after resigning as Speaker)” by the order of succession established pursuant to Section Three of the Twentieth Amendment, or “the Senate would reelect Pence as Vice President, who would then become acting president on Jan. 20” also by the terms of the Twentieth Amendment.

- The December 13 memo conceded that “this situation . . . would seem messy and unpalatable to many.” But, it argued, the conflict would bring “renewed attention on the election abuses.”
- The December 13 memo then speculated about two possible resolutions to that “messy and unpalatable” situation:
 - First, “with several states controlled by Republican legislators faced with perhaps not being counted in the Electoral College, it doesn't seem fanciful to think that Trump and Pence would end up winning the vote after some legislatures appoint electors.” The December 13 memo did not offer any legal analysis for state legislatures’ alleged authority to appoint electors after January 6.
 - Second, “there might be a negotiated solution in which the Senate elects Pence Vice President, and Trump agrees to drop his bid to be elected in the House, so that Biden and Harris are defeated, even though Trump isn't reelected.” The December 13 memo did not offer any legal analysis of any constitutional basis for such a “negotiated solution.”
- The December 13 memo’s “chronology” concluded that “[a]ny of the outcomes sketched above seems preferable to allowing the Electoral Count Act to operate by its terms,” which the memo characterized as “Vice President Pence being forced to preside over a charade in which Biden and Harris are declared the winner of an election in which none of the serious abuses that occurred were ever examined with due deliberation.”

“Originalist argument”

The December 13 memo conceded that “[t]oday, it would be unimaginable that we would write a Constitution that would give either the Vice President, or the most senior member of the majority in the Senate, sole power to decide contested results for the presidential election.” Nonetheless, and although Mr. Chesebro also conceded that he had “not delved into the historical record,” the memo included a short sketch of “the constitutional argument that the President of the Senate would rely on” in asserting unilateral power over the electoral count.

Mr. Chesebro noted that, although he had not examined “the historical record,” “Vice President Pence’s counsel” Greg Jacob had done so “and seem[ed] totally up on this.” He also noted that “John Yoo in particular” could “add a great deal.” Both Mr. Jacob and Mr. Yoo subsequently advised Vice President Pence that the President of the Senate did not have authority under the Constitution to take unilateral action regarding the electoral count on January 6, 2021. As the Capitol was under assault, Mr. Jacob told John Eastman that the constitutional theory regarding the powers of the President of the Senate advanced by Mr. Chesebro and later by Eastman was “essentially made up.”⁹²

Instead of relying on “the historical record” itself, Mr. Chesebro stated that he wrote the December 13 memo’s “originalist” analysis based on his “referenc[ing] 3 law review articles I happen to have taken with me”: “Kesavan. 80 N.C. L. Rev. 1653 (2002); Nagle. 104 N.C. L. Rev. 1732 (2004),⁹³ and Foley, 51 Loyola U. Chi. L.J. 309 (2019).”⁹⁴ None of the three articles Mr. Chesebro cited endorsed his conclusion regarding the powers of the President of the Senate.⁹⁵

The December 13 memo then offered three points in favor of its “originalist” conclusion regarding the powers of the President of the Senate:

- “Historical era.” First, the December 13 memo suggested that when the original Constitution was “enacted in 1787, before political parties . . . the Framers didn’t imagine that disputes over the electoral count would arise, as Justice Story noted in the 1830s.” The December 13 memo claimed that “the Framers thought that the Electoral College would operate with the state legislatures selecting wise men in their state, who would know the most reputable figures nationally; that they’d deliberate and send in electoral votes to Congress.” The memo further suggested that “during this era there was an emphasis on honorable behavior and circumspection” and “[l]eaders were greatly concerned about their reputation, about whether they were perceived as honorable, both during their lives and afterwards.” As a result, the memo concluded, “there was much less concern that someone in a national legislature entrusted with power to count votes would abuse it.”

Even if this argument regarding the “historical” context were correct, it provided no evidence at all that the Twelfth Amendment—ratified in 1804—actually gave the President of the Senate unilateral power to resolve disputes about electoral votes.

⁹² Email from Greg Jacob to John Eastman (Jan. 6, 2021), *available at* <https://www.washingtonpost.com/politics/2022/03/03/heated-jan-6-email-exchange-between-trumps-pences-lawyers-annotated/>.

⁹³ The Dec. 13 memo incorrectly cites the Nagle piece as having been published in the North Carolina Law Review. It had been published in the Columbia Law Review. *See* John C. Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732 (2004).

⁹⁴ Chesebro Dec. 13 memo, at 1.

⁹⁵ *See* Expert Report of Matthew A. Seligman, *In the Matter of John Charles Eastman*, Case No. SBC-23-O-30029 (May 15, 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4552179.

- “Text.” Second, the December 13 memo purported to examine the text of the Twelfth Amendment, which establishes the constitutional framework for the electoral count. The memo quoted that text:

“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 December 13 memo then conceded that “the passive language is ambiguous; the text doesn’t specify who counts the votes.”

The December 13 memo then offered several atextual, structural considerations. First, it suggested that “it seems that [Congress’s] job is to watch the votes being opened and counted -- this ensures transparency.” Second, it asked rhetorically “And how would they even have time to do anything?” In the December 13 memo’s view, “[t]here is nothing in the Twelfth Amendment that suggests the joint meeting is to be suspended if there is a dispute over a state’s votes, with the House and Senate separately deliberating.” Third, it notes that if the “ultimate decision” were “lodged in two authorities -- such as the House and Congress -- then one could have a stalemate, with one authority disagreeing [sic] with the other.”

From these atextual considerations, the December 13 memo concludes that “it seems entirely sensible to read this language as granting sole power to count the votes to the President of the Senate, with the Members of Congress having no power to influence the result.”

- “Historical indications that this is what was intended.” Third, the December 13 memo briefly mentions a handful of historical incidents that it claims serve as precedent for “how a constitutional provision was understood and carried out during the Framers’ generation”:
 - The December 13 memo claimed that during the first electoral count in 1789, the President of the Senate counted the electoral votes for George Washington’s unanimous election as the first President. The memo fails to acknowledge that no dispute arose during the electoral count in 1789 and the count thus offered no precedent regarding who holds constitutional authority to resolve such disputes.
 - The December 13 memo also claimed that “[t]he President of the Senate was permitted to count the votes even though in two early instances, that power was arguably abused.” According to the December 13 memo, these two incidents were: “In 1797, Vice President John Adams, overseeing his own election for President, purportedly counted improper votes from Vermont, and in 1801, Vice President Thomas Jefferson purportedly did the same for votes from Georgia.” The memo offered no historical evidence to substantiate these allegations.

III.B. Analysis of Mr. Chesebro's Emails

The above analysis of Mr. Chesebro's four memos establishes that by no later than December 6, 2020, the plan he proposed involved circumventing the lawful procedures for resolving election disputes through litigation and the certification of electors by the appropriate state officials. Mr. Chesebro's plan instead involved the President of the Senate exercising a purported unilateral power under the Constitution to intervene in the electoral count. In addition to those memos, Mr. Chesebro's email correspondence between mid-November 2020 and January 2021 demonstrates his extensive involvement in executing that plan. Several of those emails also confirm that Mr. Chesebro and others understood the plan not to rely on litigation resolving in favor of the Trump elector-nominees.

Mr. Chesebro was centrally involved in organizing Trump elector-nominees casting ballots in seven states which had certified Biden electors. For each of those states, Mr. Chesebro prepared documents purporting to be certificates of the Trump elector-nominees' electoral votes. The states for which Mr. Chesebro prepared and distributed these documents were Arizona,⁹⁶ Georgia,⁹⁷ Michigan,⁹⁸ New Mexico,⁹⁹ Nevada,¹⁰⁰, Pennsylvania,¹⁰¹ and Wisconsin.¹⁰² In addition to those purported certificates, Mr. Chesebro distributed instructions directing the Trump electors on procedures and formalities for the voting process, forms for filling vacancies if a Trump elector-nominee was not present, a cover memo explaining to whom the purported certificates should be sent, and draft press releases announcing that the Trump elector-nominees had purported to cast votes in the Electoral College.

Several emails in this correspondence confirmed that the plan was not focused on the resolution of litigation. On December 8, 2020, Jack Wilenchik, an attorney working for the Trump campaign in Arizona, spoke to Mr. Chesebro on the telephone regarding Mr. Chesebro's plan. After completing the call, Mr. Wilenchik described the Trump elector-nominees' purported electoral votes as "fake" and not "legal under federal law":

⁹⁶ Email from Kenneth Chesebro to Greg Safsten (Dec. 11, 2020), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000918596/pdf/GPO-J6-DOC-CTRL0000918596.pdf>

⁹⁷ Email from Kenneth Chesebro to Derek Shafer (Dec. 11, 2020), *available at* https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000042622_00003/pdf/GPO-J6-DOC-CTRL0000042622_00003.pdf.

⁹⁸ See UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, at n.66 (Dec. 22, 2022), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/html-submitted/ch3.html>.

⁹⁹ Email from Kenneth Chesebro to Mike Roman (Dec. 13, 2020), *available at* https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000082463_00020/pdf/GPO-J6-DOC-CTRL0000082463_00020.pdf.

¹⁰⁰ Email from Kenneth Chesebro to Joshua Findlay (Dec. 11, 2020), *available at* https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000044083_00087/pdf/GPO-J6-DOC-CTRL0000044083_00087.pdf; https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000044010_00034/pdf/GPO-J6-DOC-CTRL0000044010_00034.pdf.

¹⁰¹ Email from Kenneth Chesebro to Thomas W. King III (Dec. 10, 2020), *available at* <https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000061077/pdf/GPO-J6-DOC-CTRL0000061077.pdf>

¹⁰² https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000042150_00009/pdf/GPO-J6-DOC-CTRL0000042150_00009.pdf

I just talked to the gentleman who did that memo, [Chesebro]. His idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (even though the votes aren't legal under federal law --because they're not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6th. (They could potentially argue that they're not bound by federal law because they're Congress and make the law, etc.) Kind of wild/creative --I'm happy to discuss. My comment to him was that I guess there's no harm in it, (legally at least) --i.e. we would just be sending in “fake” electoral votes to Pence so that “someone” in Congress can make an objection when they start counting votes, and start arguing that the “fake” votes should be counted.¹⁰³

Similarly, on December 11, 2020, Jim DeGraffenreid, the Trump elector-nominee for Nevada with whom Mr. Chesebro was coordinating, told Mr. Chesebro that the governor and secretary of state had provided a certificate of ascertainment that “of course, [] shows us with less votes than the Biden electors.”¹⁰⁴ Mr. DeGraffenreid asked Mr. Chesebro whether the Trump elector-nominees “should [] use this COA for anything?”¹⁰⁵ Mr. Chesebro responded:

No, the COA need not be attached to the electoral votes – the purpose of having the electoral votes sent in to Congress is to provide the opportunity to debate the election irregularities in Congress, and to keep alive the possibility that the votes could be flipped to Trump and Biden.¹⁰⁶

Mr. Chesebro’s plan to use the Trump elector-nominees’ purported electoral votes as the basis for an “opportunity to debate the election irregularities in Congress” and then “start arguing that the ‘fake’ votes should be counted” on January 6 presupposes that litigation had not been resolved in the Trump elector-nominees’ favor prior to January 6.

III.C. Analysis of Mr. Chesebro’s Interactions with Trump Campaign’s Lawyers

Three senior lawyers for the Trump campaign confirmed in interviews with the January 6th Select Committee that Mr. Chesebro’s plan shifted from the litigation “contingency” he had suggested in his November 18 memo to the more aggressive approach in his December 6 memo that circumvented litigation and certification by a state official. Those three senior lawyers are Matthew Morgan (General Counsel for the Trump Campaign), Joshua Findlay (Associate General Counsel for the Trump Campaign), and Justin Clark (Deputy Campaign Manager for the Trump Campaign).

¹⁰³ See Indictment, *United States v. Trump*, No. 1:23-cr-00257-TSC, at 23-24 (D.D.C. Aug. 1, 2023), available at <https://www.justsecurity.org/wp-content/uploads/2023/08/just-security-united-states-v-donald-trump-2020-election-interference-january-6th-with-names.pdf>.

¹⁰⁴ Email from Jim DeGraffenreid to Kenneth Chesebro (Dec. 11, 2020), available at https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000044010_00031/pdf/GPO-J6-DOC-CTRL0000044010_00031.pdf

¹⁰⁵ *Id.*

¹⁰⁶ Email from Kenneth Chesebro to Jim DeGraffenreid (Dec. 11, 2020), available at https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000044010_00031/pdf/GPO-J6-DOC-CTRL0000044010_00031.pdf

III.C.1. Trump campaign lawyers supported a “contingent” elector plan predicated on the outcome of litigation.

Mr. Morgan and his team initially supported an effort to convene Trump elector-nominees in the six allegedly disputed states on December 14, 2020. After performing his own research on election disputes, Mr. Morgan concluded “it would be a sticky situation if the campaign were to win one of its litigation matters in a State after December 14th.”¹⁰⁷ He explained that “[i]f you have a case or controversy that potentially changes the certificate of ascertainment at a later date, you would want to have electors ready.”¹⁰⁸ Justin Clark similarly stated that, “[i]n the event that the litigation was won or . . . you win the Wisconsin case, Wisconsin goes for Donald Trump, the executive in that state would then send a different certificate of ascertainment to the vice president saying count these votes, not those votes.”¹⁰⁹ In order to avoid a situation in which the Trump campaign ultimately prevailed in litigation but the Trump electors’ votes were not validly cast on the legally required day, Mr. Morgan concluded the Trump elector-nominees should vote on a “contingent basis.”¹¹⁰

To effectuate this contingency plan, beginning in early December of 2020 officials with the Trump campaign contacted “the various [Trump] electors” to “encourage them on a contingency basis to at least cast” their votes.¹¹¹ Mr. Morgan’s “initial understanding” that they would “not necessarily submit but cast those votes on the 14th as a contingency for, if litigation, we prevailed in any of the States and the certificate of ascertainment changed.”¹¹² For example, Mr. Morgan testified that “[i]f somehow the campaign was able to win [litigation] in Wisconsin, then the votes of the electors would be submitted.”¹¹³

III.C.2. Trump campaign lawyers opposed an “alternate” elector plan that bypassed courts and instead relied on unilateral action on January 6.

The Trump campaign’s lawyers realized in early December that Mr. Chesebro’s plan departed from the “contingency” plan they had previously endorsed. Mr. Morgan explained there “was a shift in the analysis in December” and that “an email or a memo or some written communication” that “implied or said that the campaign’s desire was to not just cast the ballots but to proceed with submitting them.”¹¹⁴ Mr. Clark similarly explained that Mr. Chesebro’s plan “morphed into something I didn’t agree with” and “turned into something that wasn’t the original intention of that email or that memo.”¹¹⁵

¹⁰⁷ Interview of Matthew Morgan, Select Committee to Investigate the January 6th Attack on the U.S. Capitol, Apr. 25, 2022, at 69-70, available at <https://perma.cc/QZ2E-GJ7S>. (“Morgan Interview”).

¹⁰⁸ *Id.* See also *id.* at 70 (“My view in late November, early December was that make sure you have the electors buttoned up and ready to go in case the certificate of ascertainment change after the Safe Harbor date or after the electoral college date.”).

¹⁰⁹ Interview of Justin Clark, Select Committee to Investigate the January 6th Attack on the U.S. Capitol, May 17, 2022, at 115, available at <https://perma.cc/T9X8-8UX5>. (“Clark Interview”)

¹¹⁰ Morgan Interview at 70.

¹¹¹ *Id.* at 71.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (stating that the original “contingency basis” plan was for electors to “cast and hold” their votes, but the plan later “shifted to cast and send”).

¹¹⁵ Clark Interview at 114.

According to Mr. Morgan, Mr. Chesebro's new plan proposed "this idea of alternate electors" that fundamentally differed from Morgan's "initial conception of contingent electors." Morgan's "initial view" was "if litigation after that Safe Harbor date or after the electoral college date had changed the certificate of ascertainment, similar to the 1960 example of Hawaii, then my view was you would have wanted the electors to have cast so that those ballots would be eligible to be [paired] with the certificate of ascertainment."¹¹⁶ Mr. Morgan explained that "typically the highest elected official, the Governor, signs, the ascertain[ment]," certifying "the success of one presidential candidate or the other in the State."¹¹⁷ Without this "certificate of ascertainment" the elector-nominees' votes would be "no good" and "not valid."¹¹⁸ Mr. Morgan concluded that a purported "vote of an elector without a certificate of ascertainment would not be validly submitted."¹¹⁹ By contrast, Mr. Chesebro "suggested that we submit them anyways."¹²⁰ Mr. Clark accordingly concluded that Mr. Chesebro's plan was "stupid" because there was "no contingency whereby their votes are going to be the counted."¹²¹

Mr. Morgan testified that he objected to the "reference to the Vice President" in Mr. Chesebro's plan.¹²² Mr. Morgan explained his "view [] that then was that will be challenging for the Vice President, regardless of my understanding of the law, just politically challenging for the Vice President."¹²³ Mr. Morgan had served as counsel to Mr. Pence and he was concerned "at the time" that Mr. Chesebro's plan for Trump elector-nominees to submit purported certificates without the backing of a court order or certification by a state official would "make the Vice President's life harder."¹²⁴ Mr. Morgan "didn't want to be a part of that."¹²⁵

III.C.3. Trump campaign lawyers refused to participate in Mr. Chesebro's plan.

After the Supreme Court rejected Texas's complaint in *Texas v. Pennsylvania* on December 11, 2020,¹²⁶ the Trump campaign's lawyers viewed their litigation options as exhausted. Mr. Morgan and Trump campaign Deputy General Counsel Joshua Findlay accordingly initiated plans to "wrap up th[e] operation" of organizing Trump electors to cast ballots as a litigation contingency.¹²⁷

¹¹⁶ Morgan Interview at 75.

¹¹⁷ *Id.* at 67.

¹¹⁸ *Id.* at 69-70.

¹¹⁹ *Id.* at 74.

¹²⁰ *Id.* at 75.

¹²¹ *Id.* at 116.

¹²² Morgan Interview at 72 ("And my sense of the matter was that this was not an exercise that, given my former relationship with the Office of the Vice President and the Vice President, that I necessarily wanted to continue with."). See also *id.* at 75 (Clark "couldn't imagine a situation where a contingent elector's vote would be counted.")

¹²³ *Id.* at 75.

¹²⁴ *Id.* at 74.

¹²⁵ *Id.* at 74. Morgan stated that "as former counsel to the Vice President, when random or unexpected things show up in the office . . . it's a headache. It's just something you have to deal with. And so having that previous experience, if unexpected things show up, it's just going to cause, like, a question of what do we do, what do we do with these, and all the rest." *Id.* at 78.

¹²⁶ *Id.*

¹²⁷ Findlay Interview at 39-40.

By contrast, former Mayor Rudolph Giuliani and Mr. Chesebro advocated continuing to organize Trump elector-nominees casting ballots on December 14. At the time, Mr. Giuliani was “making a lot of decisions about litigation strategy.”¹²⁸ Mr. Giuliani offered the “opposite recommendation” to the Trump campaign’s lawyers and “was on the opposite side of this.”¹²⁹ Mr. Giuliani had “really bought into” Mr. Chesebro’s new plan, and Mr. Chesebro continued to “aggressively promot[e]” it.¹³⁰ Mr. Morgan told Mr. Findlay that “Rudy want[ed] to keep fighting this thing” and “wants Ken [Chesebro] to be doing this.”¹³¹ Together, Mr. Giuliani and Mr. Chesebro were the “main ones driving” the post-litigation effort.¹³²

Because the Trump campaign’s lawyers had concluded that Mr. Chesebro’s initial plan for the Trump elector-nominees to cast ballots was no longer viable because litigation was exhausted, they decided they “were not going to be working on this operation anymore” and would “pass it off to Ken Chesebro.”¹³³ Mr. Morgan concluded that “the litigation was over so it doesn’t seem like a good idea for us to be involved in it.” Accordingly, he asked Mr. Findlay “to send an email to everyone” who had been working on the “contingency” electors plan to say “this has been officially passed off to Ken” and he “will answer any questions or have anything to do with it going forward.”¹³⁴ Mr. Findlay explained that “was the end of my involvement with the whole thing.”¹³⁵ Mr. Morgan directed Findlay to “email Mr. Chesebro politely to say this is your task. You are responsible for the electoral college issues moving forward.”¹³⁶ Mr. Morgan determined that Mr. Chesebro “could take the lead on that,” “be responsible for that” and “direct that activity.”¹³⁷ Mr. Morgan emphasized that he took his “responsibility to zero.”¹³⁸

III.D. Summary of Mr. Chesebro’s Plan

In summary, in his memos and emails beginning no later than December 6, 2020, Mr. Chesebro outlined a detailed plan to use the Trump elector-nominees’ purported electoral votes as the basis for the President of the Senate exercising an alleged unilateral power to resolve disputes regarding electoral votes. That plan did not rely on pending election litigation yielding a court order determining that the Trump elector-nominees were lawfully appointed in any of the relevant states.¹³⁹ His plan did not rely on any state official issuing any sort of certification

¹²⁸ *Id.*

¹²⁹ *Id.* at 41.

¹³⁰ *Id.* at 30.

¹³¹ *Id.* at 40, 42-43.

¹³² *Id.* at 30.

¹³³ *Id.* at 39-40, 42.

¹³⁴ Findlay Interview at 40.

¹³⁵ *Id.*

¹³⁶ Morgan Interview at 71.

¹³⁷ *Id.* at 73.

¹³⁸ *Id.* at 74. *See also id.* at 75 (“I think the only other person I discussed it with was Justin Clark only to say that I wanted to get myself and Josh Findlay removed from the task or responsibility of any additional concerns of the electoral college votes.”). Morgan also said that by the time the Trump elector-nominees met and cast their ballots on December 14, he and Josh Findlay had “sufficiently handed off any task or responsibility to Ken Chesebro and had kind of put it in the back of our minds and we moved on.” *Id.* at 79.

¹³⁹ The only litigation Mr. Chesebro’s plan contemplated was a challenge to the purported power of the President of the Senate to resolve that alleged dispute unilaterally.

naming the Trump elector-nominees.¹⁴⁰ Moreover, Mr. Chesebro anticipated that the position he advocated would either be rejected by the Supreme Court, or that the Supreme Court would refuse to rule on the issue. If the Court refused to intervene, it would create a “messy and unpalatable situation” in which the political parties would be at “loggerheads.” Mr. Chesebro speculated that, in the face of that impasse, the parties might then arrive at an extra-constitutional “negotiated solution” in order to escape the constitutional crisis that his plan had precipitated.

Ultimately, Mr. Chesebro’s co-defendants followed his plan. In the days leading up to January 6, 2021, Mr. Trump and Dr. John Eastman pressured Vice President Pence to take unilateral action with respect to the electoral count even though no court or any other state official or entity had taken any action purporting to certify or otherwise authorize the Trump elector-nominees.

IV. Analysis of Lawfulness of Mr. Chesebro’s Plan

This Part analyzes whether Mr. Chesebro’s plan was consistent with federal election law. Mr. Chesebro argues that his conduct was consistent with federal election law because the Electoral Count Act contemplates Congress receiving multiple slates of electors when it convenes on January 6. Mr. Chesebro further contends that, because his conduct was allegedly consistent with federal election law, it cannot be criminal under Georgia state law.¹⁴¹ As explained in the preceding Part, Mr. Chesebro’s plan did not involve the Trump elector-nominees’ votes being counted by Congress (or the Biden elector-nominee’s votes being rejected) pursuant to 3 U.S.C. § 15 only if the lawful state procedures for the resolution of a dispute about electors ultimately determined that the Trump electors had been lawfully appointed. That plan instead involved the President of the Senate ignoring the Electoral Count Act by exercising an alleged unilateral authority to intervene in the electoral count without any state authority having determined that the Trump electors were lawfully appointed.

Mr. Chesebro and those offering public defenses on his behalf have invoked the alleged lawfulness of multiple slates of elector-nominees purporting to cast ballots in the Electoral College by noting that the Electoral Count Act contemplates the possibility of multiple submissions, citing the Hawaii incident from 1960. This logic fails. The potential lawfulness of the preparation of paperwork in one set of circumstances for one particular purpose does not entail that the preparation of similar paperwork is lawful in different circumstances and for a different purpose. For example, it is perfectly lawful to mail an accurate car title registration to a government agency. As the Supreme Court held in *Schmuck v. United States*, that otherwise “routine and innocent” act of paperwork can constitute mail fraud when it is part of a scheme to sell cars whose odometers have been fraudulently manipulated.¹⁴² Similarly, even if federal election law permits contingent electoral slates in the narrow circumstances exemplified by the Hawaii incident in 1960—where those contingent electors voted only so their votes might be

¹⁴⁰ Mr. Chesebro parenthetically mentioned the possibility that a state legislature might intervene to appoint the Trump electors, but the detailed exposition of the plan did not rely on any such state legislative action. This report explains the unlawfulness of a state legislature purporting to appoint electors after Election Day in Part IV.C.

¹⁴¹ As noted in the Introduction, this report does not address whether or how the alleged legal propriety of Mr. Chesebro’s conduct under federal election law could immunize that conduct from state criminal prosecution.

¹⁴² 489 U.S. 705, 711 (1989).

counted by Congress pursuant to Section 15 of the Electoral Count Act after the state’s lawful procedures for adjudicating disputes about electors resulted in a final determination in their favor—it does not follow that federal election law permits contingent electoral slates as part of a plan for their votes to be counted in a manner that circumvents the Electoral Count Act and the state’s lawful dispute resolution procedures.

This Part concludes that Mr. Chesebro’s plan was not consistent with federal election law, including the Twelfth Amendment, the Electoral Count Act, and related provisions of federal statutory law. It proceeds as follows. First, it establishes that the President of the Senate does not have unilateral authority to resolve disputes about electoral votes or to take other unilateral actions with respect to the electoral count. Mr. Chesebro’s contention to the contrary is so lacking in any legal or historical basis that no reasonable attorney would adopt his position. Second, it addresses two subsidiary legal positions that Mr. Chesebro may argue he advanced as part of his plan instead of relying on the unilateral powers of the President of the Senate: (i) that Congress could lawfully count the purported electoral votes cast by the Trump electors through the procedures of the Electoral Count Act; and (ii) that state legislatures could lawfully appoint Trump electors directly. Neither of these secondary legal positions, even if they were in fact part of Mr. Chesebro’s plan, had legal merit. Mr. Chesebro thus proposed a plan designed to secure Mr. Trump a victory in the Electoral College through unlawful pseudo-procedures that were not authorized by, or consistent with, federal election law.

IV.A. The Powers of the President of the Senate

Mr. Chesebro’s plan relied on the President of the Senate purporting to exercise an alleged unilateral under the Constitution to intervene in the electoral count. Mr. Chesebro’s memos claim that this position is supported by an “originalist” understanding of Article II and the Twelfth Amendment.¹⁴³ Mr. Chesebro provided little argument or evidence to support that claim. His December 13 memo briefly discusses the text of the Twelfth Amendment¹⁴⁴ and alleged historical precedent for the President of the Senate exercising unilateral power with respect to the electoral count.¹⁴⁵

There is no historical or legal evidence whatsoever to support the conclusion that the Constitution gives authority to the President of the Senate to exercise unilateral power with respect to the electoral count. As I testified in the attorney discipline proceeding against Dr. John Eastman brought by the State Bar of California, no reasonable lawyer exercising diligence

¹⁴³ See Chesebro Dec. 13 memo, at 3-4; Dec. 6 memo, at 1 (“[C]onsistent with clear indications that this what the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation’s history, Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.”).

¹⁴⁴ See Chesebro Dec. 13 memo, at 4 (“[I]t seems entirely sensible to read this language as granting sole power to count the votes to the President of the Senate, with the Members of Congress having no power to influence the result.”).

¹⁴⁵ See Chesebro Dec. 13 memo, at 4 (“The President of the Senate was permitted to count the votes even though in two early instances, that power was arguably abused.”).

appropriate to the circumstances would adopt that conclusion regarding the President of the Senate. I explained that conclusion in detail in my expert report in the Eastman matter.¹⁴⁶

In the remainder of Part IV.A, I summarize the evidence and conclusions from that expert report. The historical evidence beginning with the Founding, continuing through the Early Republic and throughout the Nineteenth Century, conclusively refutes the view that the President of the Senate has unilateral authority under the Twelfth Amendment to resolve disputes about the electoral count. The text of the Constitution, the drafting history and ratification debates of Article II and the Twelfth Amendment, the records of the electoral counts, and Congressional efforts to legislate and regulate the electoral count in 1800 definitively demonstrate that Congress, not the President of the Senate, retains all substantive authority over the electoral count.

IV.A.1. Ratification Debates

There is no record of any member of Congress, or Vice President, or anyone else ever arguing in any context that the President of the Senate has the unilateral constitutional authority to resolve any dispute about electoral votes during the Founding era. The first time a member of Congress suggested this view was in 1857, and that view was definitively rejected at the time.

In the ratification debates in Congress regarding the Twelfth Amendment, members repeatedly raised the concern that the Vice President, in his capacity as President of the Senate, might engage in “intrigue” to ascend to the presidency by manipulating a contingent election in the House of Representatives. The concern that the Vice President might seize the presidency through a convoluted mechanism requiring hundreds of co-conspirators in the House would be nonsensical if he might achieve the same end directly by unilaterally resolving a manufactured “dispute” about electoral votes himself.

Moreover, in 1800, three years prior to Congress drafting and proposing the Twelfth Amendment, both chambers of Congress passed a bill that would have created a congressional committee to resolve all disputes regarding the counting of electoral votes. Although the House and Senate were unable to agree on a final version of the bill, both chambers passed versions of the bill that unequivocally asserted Congress’s sole power to resolve disputes regarding the counting of electoral votes. Because the Twelfth Amendment repeated the exact same critical text from the unamended Article II, Congress incorporated its settled understanding of that text’s meaning into the Twelfth Amendment. Accordingly, the Congress that proposed the Twelfth Amendment in 1803 understood it to grant to Congress, not to the President of the Senate, the authority to resolve disputes about electoral votes.

IV.A.2. Records of Electoral Counts

The records of every electoral count in American history demonstrate that Congress, not the President of the Senate, has sole authority to count electoral votes and resolve any disputes about the electoral count.

¹⁴⁶ See Expert Report of Matthew A. Seligman, *In the Matter of John Charles Eastman*, Case No. SBC-23-O-30029 (May 15, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4552179.

In the three electoral counts for the presidential elections immediately preceding the ratification of the Twelfth Amendment in 1804, Congress appointed several of its own members as “tellers” to “make a list of the votes as they shall be declared.” The official records of Congress’s proceedings explicitly state that the tellers—not the President of the Senate—“counted” and “examined” the votes, “ascertained the number of votes,” and “delivered the result” to the President of the Senate.” Neither Vice President John Adams in 1797 nor Vice President Jefferson in 1801 purported to exercise any unilateral authority to resolve any dispute. There is no evidence whatsoever that any dispute arose during either electoral count. The official records of Congress conclusively demonstrate that no question about the validity of any electoral votes was raised during either electoral count. There is no evidence whatsoever that anyone at the time, including Adams’s and Jefferson’s political opponents, ever suggested that either Vice President had exercised any unilateral power in the electoral count.

In 1805, Congress conducted the first electoral count after the ratification of the Twelfth Amendment. That Congress was the same Congress that had passed the Twelfth Amendment just over a year previously, and it consisted of the exact same people. During that electoral count, Vice President Aaron Burr stated to the tellers: “You will now proceed gentleman, said he, to count the votes as the Constitution and laws direct.” Then, “[a]fter the returns had been all examined, without any objection having been made to receiving any of the votes, Mr. S. Smith, on behalf of the tellers, communicated to the President the foregoing result.” Accordingly, in the first count applying the Twelfth Amendment, Vice President Burr recognized that the tellers counted electoral votes. Moreover, prior to handing the results to Burr for him to ceremonially announce, the tellers gave members of Congress an opportunity to object. This proceeding thus demonstrates that Congress, not the President of the Senate, has authority under the Twelfth Amendment to count electoral votes and to resolve disputes about those votes.

Every time in American history that a question arose during the electoral count about whether to count a state’s electoral votes, Congress unequivocally asserted its sole authority to resolve the dispute. Prior to the enactment of the Electoral Count Act of 1887, such questions arose in the electoral counts of 1817, 1821, 1837, 1857, 1865, 1869, 1873, and 1877. No President of the Senate ever purported to exercise any unilateral authority to resolve the dispute in any of these electoral counts.

- In 1817, the first time that the possibility of rejecting a state’s electoral votes arose during the electoral count, Congress unequivocally asserted its authority to resolve whether to count Indiana’s electoral votes. When a member of Congress objected to counting Indiana’s electoral votes, the chambers separated to debate the issue.
- In 1821 and 1837, Congress adopted joint resolutions that governed the counting of the disputed electoral votes from Missouri and Michigan. Those joint resolutions adopted a hypothetical or alternative count, according to which the prevailing candidate won with the disputed electoral votes or won without the disputed electoral votes. Through those joint resolutions, Congress exercised sole authority to determine whether and how to count the disputed electoral votes.

- In 1857, Congress debated whether to count Wisconsin’s electoral votes, which had been cast on a day other than the day prescribed by law. The President of the Senate expressly disclaimed making any decision on the validity of Wisconsin’s electoral votes and expressly stated that the sole authority to make such a decision rests with Congress. The dispute about Wisconsin’s electoral votes was resolved by Congress.
- Beginning in 1865 and for over 150 years, Congress has unequivocally asserted authority to resolve disputes about electoral votes and to regulate all other substantive aspects of the electoral count through a formal rule or statute. That assertion of authority began with Joint Rule 22 in 1865, continued with the Electoral Commission of 1877, extended with the Electoral Count Act of 1887, and was reaffirmed by the Electoral Count Reform Act of 2022. Every Vice President (or President pro tempore of the Senate in his absence), without exception, has acquiesced to that assertion of authority.
 - The disputes in 1865, 1869, and 1873 were governed by Joint Rule 22. Congress adopted Joint Rule 22 in 1865, and under that rule Congress exercised exclusive authority to resolve disputes about electoral votes. The President of the Senate had no substantive authority to take any action under Joint Rule 22, which definitively rejects the position that the President of the Senate has any authority under the Constitution to take unilateral action with respect to the electoral count.
 - The dispute in 1877 was governed by the Electoral Commission Act. That statute, which applied only to the election of 1876, established a committee composed of members of Congress and justices of the Supreme Court to resolve disputes about electoral votes. The President of the Senate had no substantive authority to take any action under the Electoral Commission Act, which definitively rejects the position that the President of the Senate has any authority under the Constitution to take unilateral action with respect to the electoral count.
 - The Electoral Count Act of 1887 has governed the electoral count since its enactment. Congress has followed the Electoral Count, without exception, in every electoral count since 1888. In 2000, the Supreme Court twice applied the Electoral Count Act without questioning its constitutionality and thus without questioning Congress’s assertion of authority to resolve disputes about electoral votes. Every Justice authored or joined an opinion in *Bush v. Palm Beach County Canvassing Board*¹⁴⁷ or *Bush v. Gore*¹⁴⁸ that assumed the constitutionality of the

¹⁴⁷ 531 U.S. 70, 79 (2000) (“If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, [under Section 5 of the Electoral Count Act] that determination shall be conclusive if made at least six days prior to said time of meeting of the electors. . . . Since § 5 [of the Electoral Count Act] contains a principle of federal law that would assure finality of the State’s determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”).

¹⁴⁸ 531 U.S. 98, 110 (2000) (“[The Electoral Count Act] requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court’s order that comports with minimal constitutional standards.”). *See also id.* at 113 (“If we are to respect the legislature’s Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the ‘safe harbor’ provided by § 5 [of

Act, which is founded on the constitutional proposition that Congress, not the President of the Senate, holds all substantive authority relating to the electoral count.

Based on a comprehensive evaluation of the historical materials, centuries-long congressional practice, and the Supreme Court’s statements on the issue, there is no legal or historical basis whatsoever supporting Mr. Chesebro’s contention that the President of the Senate held constitutional authority to exercise unilateral power with respect to the electoral count. Accordingly, Mr. Chesebro’s plan for the President of the Senate to take such action was inconsistent with federal election law.

IV.B. The Dispute Resolution Procedures of the Electoral Count Act Under Section 15

As explained in Part III of this report, Mr. Chesebro repeatedly stated that his plan involved the President of the Senate exercising alleged unilateral power to intervene in the electoral count. For example, in his December 6 memo he proposed that “Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.”¹⁴⁹

In his Motion to Dismiss the Indictment Under the Supremacy Clause, however, Mr. Chesebro adopts a starkly different position that rejects any unilateral power by the President of the Senate:

The U.S. Constitution vests Congress alone with the authority to receive, adjudicate, and count presidential electoral ballots or returns. See U.S. CONST. amend. XII. To address the inconsistent interpretations of the Twelfth Amendment and the resulting chaos that had ensued in previous presidential elections, Congress passed the Electoral Count Act (“ECA”) in 1887. The ECA was to govern how Congress would receive, adjudicate, and count the presidential elector ballots.¹⁵⁰

the Electoral Count Act].”) (Rehnquist, J. concurring); *id.* at 124 (“[Section] 5 [of the Electoral Count Act] provides a safe harbor for States to select electors in contested elections ‘by judicial or other methods’ established by laws prior to the election day.”) (Stevens, J., dissenting); *id.* at 130 (“[Section 5 of the Electoral Count Act] sets certain conditions for treating a State’s certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under [Section 15 of the Electoral Count Act]. . . . [T]he sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its ‘safe harbor.’ And even that determination is to be made, if made anywhere, in the Congress.”) (Souter, J., dissenting); *id.* at 143-44 (“Were [the deadline in Section 5 of the Electoral Count Act] to pass, Florida would still be entitled to deliver electoral votes Congress must count unless both Houses find that the votes ‘ha[d] not been ... regularly given.’ The statute identifies other significant dates. But none of these dates has ultimate significance in light of Congress’ detailed provisions for determining, on ‘the sixth day of January,’ the validity of electoral votes.” (Ginsburg, J., dissenting) (citations omitted); *id.* at 153 (“[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes.”) (Breyer, J., dissenting).

¹⁴⁹ Chesebro Dec. 6 memo, at 1.

¹⁵⁰ Chesebro Supremacy MTD, at 2. Mr. Chesebro’s motions are riddled with numerous fundamental misunderstandings of federal election law. For example, the Supremacy Motion also states that “[u]nder the ECA, Congress delegated to the States limited authority to determine their presidential electors for their State.” *Id.* To the

Mr. Chesebro then argues in his Motion to Dismiss the Indictment Under O.C.G.A. § 16-3-20(5) & (6) that “not only was all the advice that Mr. Chesebro provided based on his legal research and good faith conclusions therefrom, but the ECA actually expressly contemplates and permits the use of alternate electors.”¹⁵¹ Accordingly, although Mr. Chesebro’s memos and emails from December 2020 clearly do not advance a plan that involves Congress counting purported electoral votes cast by the Trump elector-nominees or Congress rejecting the Biden electors’ votes,¹⁵² this report nonetheless addresses this belated suggestion.

Under the plain text of 3 U.S.C. § 15 in force in 2020, Congress could not lawfully count the purported electoral votes cast by the Trump elector-nominees in the states that Mr. Chesebro characterized as disputed, nor could it lawfully reject the Biden electors’ votes. As legal scholars have noted, Section 15 is difficult to parse in some respects. Those potential ambiguities do not extend to the unlawfulness of Congress counting the Trump elector-nominees’ purported electoral votes or rejecting the Biden electors’ electoral votes. Section 15 is structured to provide substantive rules of decision for Congress counting electoral votes for each of four separate scenarios. In each of those scenarios, the substantive rule of decision unambiguously established in the text mandated that Congress count the electoral votes cast by the Biden electors. Accordingly, even if Mr. Chesebro’s plan had advocated relying on Congress counting the electoral votes pursuant to the procedures of the Electoral Count Act, that plan would necessarily require Congress to act unlawfully.

IV.B.1. Case 1: Single Slate

The first scenario addresses the case in which Congress receives only a single submission from a slate of electors for the state:

contrary, Article II, section 1, clause 2 of the Constitution provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” U.S. CONST. art. II, § 1, cl. 2. Congress thus never held the “authority to determine [a state’s] presidential electors,” and the Electoral Count Act does not “delegate[.]” such power to the States. This report does not address all misunderstandings in Mr. Chesebro’s motions.

¹⁵¹ Chesebro Justification MTD, at 3 (citing 3 U.S.C. § 15). *See also* Chesebro Supremacy MTD, at 3 (“[T]he ECA makes explicit that Congress is to receive both Presidential Elector ballots and contingent Presidential Elector ballots.”).

¹⁵² Mr. Chesebro’s plan in December 2020 may have avoided relying on Congress because, as a matter of political reality, any such plan would inevitably failed to result in Mr. Trump prevailing in the electoral count. His plan presupposed that the governor would not issue a superseding certificate of ascertainment naming the Trump elector-nominees, because a governor could lawfully do so only if litigation, a recount, or other state procedure determine that Mr. Trump had prevailed. (Mr. Chesebro also did not suggest that a governor unlawfully issue a certificate of ascertainment without such authorization, a strategy I have elsewhere referred to as a “rogue governor.” *See* Matthew A. Seligman, *Disputed Presidential Elections and the Collapse of Constitutional Norms*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283457.) As a result, under the rules of the Electoral Count Act, Congress would count the Trump electors’ votes only if *both* the House and Senate voted to do so. On January 6, 2021, the House was controlled by the Democratic Party—a fact that was definitively known by early November 2020. As a result, as John Eastman subsequently explained in his own memos in late December 2020 and early January 2021, the application of the Electoral Count Act would invariably result in a Biden victory. Mr. Chesebro seems to recognize this fact in his December 13 memo, in which he stated: “Any of the outcomes sketched above seems preferable to allowing the Electoral Count Act to operate by its terms, with Vice President Pence being forced to preside over a charade in which Biden and Harris are declared the winner of an election in which none of the serious abuses that occurred were ever examined with due deliberation.”

[N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.¹⁵³

Mr. Chesebro’s plan hypothesizes multiple slates of electors from each state, so that plan was predicated on the premise that this first scenario did not apply. Moreover, for each of the relevant states the Biden electors—not the Trump elector-nominees—“had been lawfully certified” “according to section 6.” Section 6 establishes the governor’s duty to provide a certificate of ascertainment for the lawfully appointed electors:

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment.¹⁵⁴

In every state for which Mr. Chesebro’s plan was to be deployed, the governor had issued this certificate of ascertainment naming the Biden electors.¹⁵⁵ Finally, this first scenario permits Congress to “reject the vote or votes” only when both the House and Senate “agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.” The phrase “regularly given” applies to the votes cast by the electors in the Electoral College, not the votes cast by regular voters in the state’s popular election. This first scenario’s rule of decision thus permits Congress to reject the “lawfully certified” electors’ votes only if those electors’ votes were not “regularly given.” An elector’s vote is not “regularly given” if, for example, it was cast on a day different from the day set by Congress in 3 U.S.C. § 7, pursuant to its authority under Article II, section 1, clause 4, or possibly if the electors’ vote was cast for a candidate who is not eligible to serve as president (by failing to be 35 years old, failing to be a citizen, or some other reason). Accordingly, under the plain text of Section 15, Congress could not lawfully count the Trump elector-nominees’ votes nor could it lawfully reject the Biden electors’ votes.

IV.B.2. Case 2: Multiple Slates, One Backed By State’s “Final Determination” By Safe Harbor Deadline

The second, third, and fourth scenarios address the cases in which “more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate.”¹⁵⁶ The second scenario addresses the case in which multiple slates of elector-nominees purport to be from a state and one of those slates of elector-nominees qualifies for the so-called safe-harbor:

¹⁵³ 3 U.S.C. § 15 (2020).

¹⁵⁴ 3 U.S.C. § 6 (2020),

¹⁵⁵ As noted above, Mr. Chesebro’s plan presupposed that the governor would not issue a superseding certificate of ascertainment naming the Trump electors, because a governor could lawfully do so only if litigation, a recount, or other state procedure determine that Mr. Trump had prevailed.

¹⁵⁶ 3 U.S.C. § 15 (2020).

[T]hose votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made.¹⁵⁷

This second scenario requires Congress to count the votes cast by the elector-nominees “who are shown . . . to have been appointed” “by the determination mentioned in section 5.” Section 5, in turn, establishes the safe harbor:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.¹⁵⁸

Section 5 thus requires that a “final determination of any controversy or contest concerning the appointment of all or any of the electors of [a] State, by judicial other means . . . shall be conclusive, and shall govern in the counting of the electoral votes” as long as two requirements are satisfied. First, the “State shall have provided” for that final determination “by laws enacted prior to the day fixed for the appointment of the electors.” Second, “such determination [must be] made at least six days prior to [the] time of meeting of the electors,” which is often referred to as the safe-harbor deadline.

In other words, if a state establishes a set of procedures for resolving disputes about which elector-nominees the state has appointed and that set of procedures reaches a final resolution of that dispute by the safe-harbor deadline, then Congress must defer to the state’s resolution of the dispute in the electoral count.

Under this second scenario, it would have been unlawful for Congress to count the Trump elector-nominees’ votes or to reject the Biden electors’ votes for any of the allegedly disputed states. Neither Mr. Chesebro nor anyone else has ever contended that the Trump elector-nominees qualified for the safe-harbor, because all recounts, litigation, and other state procedures that had concluded in these states had “determined” that the Biden electors were lawfully appointed.

IV.B.3. Case 3: Multiple Slates, Multiple Purported “Lawful Tribunals”

The third scenario addresses the case in which multiple slates of elector-nominees purport to be from a state, each of which is backed by a “decision” of an entity that claims to be the state’s “lawful tribunal” for resolving disputes about electors:

¹⁵⁷ *Id.*

¹⁵⁸ 3 U.S.C. § 5 (2020).

[B]ut in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law¹⁵⁹

This scenario thus involves a dispute about which entity was the “lawful tribunal” for the state “so authorized by its law.” For example, this scenario might arise if, for example, different submissions are backed by the State’s secretary of state and its board of canvassing, both of which claim to have authority under state law to resolve election disputes. There was no such dispute in any state in 2020, and neither Mr. Chesebro nor anyone else has ever contended that there was such a dispute. In any event, Mr. Chesebro’s plan presupposed that no litigation in state or federal court—the state’s “lawful tribunal” that was indisputable “authorized by its law”—had resulted in a court decision in favor of the Trump elector-nominees. Accordingly, even if the second scenario applied, it would have plainly been unlawful for Congress to reject the Biden electors’ votes or to count the Trump elector-nominees’ purported votes.

IV.B.4. Case 4: Multiple Slates, No Final Determination By Lawful Tribunal

Finally, the fourth scenario addresses the case in which multiple slates of elector-nominees purport to be from a state, none of which is backed by a “determination of the question in the State” under Section 5:

[I]n such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.¹⁶⁰

This fourth scenario applies only when there was no “determination” by the state’s “lawful tribunal” that “determine[d] what electors have been appointed.”¹⁶¹ As explained above and as Mr. Chesebro conceded, the “lawful tribunal” of each of the relevant states—recounts, court decisions, and other state procedures—had “determine[d]” that the Biden electors “ha[d] been appointed.” This fourth scenario therefore plainly did not apply.

Even if the fourth scenario did apply, its rule of decision requires Congress to count the votes which “were cast by lawful electors appointed in accordance with the laws of the State.” Mr. Chesebro’s plan was predicated on the assumption that no state official issuing any sort of certification purporting to authorize the Trump elector-nominees. His plan presupposed litigation was “pending” on January 6, and thus that no court had issued an order (final or otherwise) that

¹⁵⁹ 3 U.S.C. § 15 (2020).

¹⁶⁰ 3 U.S.C. § 15 (2020).

¹⁶¹ 3 U.S.C. § 15 (2020). The latter two quotations appear earlier, in the third scenario, and are cross-referenced in the fourth scenario as “determination of the question in the State *aforesaid*.” *Id.* (emphasis added).

the Trump elector-nominees had been validly appointed. His plan does not mention the possibility that a governor issue a certificate of ascertainment naming the Trump elector-nominees, and it would have been unlawful for a governor to do so absent a court or other lawful tribunal ordering him to do so. Mr. Chesebro’s plan involved the Trump elector-nominees transmitting their purported electoral votes for consideration on January 6 without the backing of any lawful state entity whatsoever. Under those circumstances, Congress could not lawfully determine that the Trump elector-nominees were the “lawful electors appointing in accordance with the laws of the State.”

Moreover, as every court case, recount, and other procedure in each of the relevant states determined at the time, the Biden electors were the “lawful electors appointed in accordance with the laws of the state.” Since then, no court case, audit, or any other proceeding of any kind has ever established otherwise—or even cast any plausible doubt on the states’ conclusion that the Biden electors were lawfully appointed in those states. Accordingly, under the fourth scenario Congress could not lawfully count the Trump elector-nominees’ votes nor reject the Biden electors’ votes.

IV.B.5. Summary of Lawfulness of Rejecting Biden Electors Under Section 15

Under Section 15 of the Electoral Count Act, Congress could not have lawfully counted the Trump electors’ votes nor rejected the Biden electors’ votes in any of the relevant states. As a result, any plan for the Trump elector-nominees to cast ballots purporting to be electoral votes that is predicated on Congress taking either of those actions would require Congress to violate the Electoral Count Act. Accordingly, even if Mr. Chesebro had advocated that plan in December 2020, that plan would not have been lawful under federal election law.

IV.C. State Legislatures’ Power to Appoint Electors Directly After December 14, 2020

Mr. Chesebro’s memos make several passing references to the possibility that a state legislature might take some action subsequent to December 14, 2020 to appoint, certify, or otherwise authorize the Trump electors.¹⁶² That suggestion would have violated 3 U.S.C. §§ 1-2, which Congress enacted pursuant to its clear authority under Article II, section 1, clause 4 of the Constitution to set the “time” at which states must appoint their electors.

As an initial matter, Mr. Chesebro’s passing suggestion addresses a conceptually different question than whether the President of Senate has unilateral power with respect to the electoral count or whether Congress could lawfully refuse to count the Biden electors’ votes. Those two questions pertain to the counting of electoral votes on January 6, whereas the

¹⁶² See Chesebro Dec. 6 memo, at 4 (“asking the electors pledged to them to please assemble in their respective States and cast their votes , and transmit them to Washington , on December 14, so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature.”); Chesebro Dec. 9 memo, at 3 (“so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election.”); Chesebro Dec. 13 memo, at 3 (“if Arizona wants to be represented in the electoral count, either it has to rerun the election, or engage in adequate judicial review, or have its legislature appoint electors.”).

possibility of a state legislature taking action pertains to whether and what kind of authority any state entity had purported to give the Trump elector-nominees. Mr. Chesebro’s passing suggestion invokes the proposal that a state legislature back the Trump elector-nominees to compete with the Biden electors, who were named the governor’s certificate of ascertainment under 3 U.S.C. § 6 which in turn was backed the state’s final resolution of the dispute through recounts, court decisions, and other procedures. If a state legislature took such an action—which none did in 2020, and none ever has since states began holding popular presidential elections in the 19th century—then the dispute between counting the Trump electors’ purported votes and the Biden electors’ votes would still need to be resolved on January 6. As explained in Parts IV.A and IV.B above, the President of the Senate has no legal authority to take any unilateral action with respect to the electoral count and Congress could not have lawfully rejected counting the Biden electors’ votes under Section 15 of the Electoral Count Act.

In addition, Mr. Chesebro’s suggestion was itself unlawful. The Constitution vests Congress with the exclusive power to set the time when states may appoint electors. Congress has exercised that power in 3 U.S.C. §§ 1-2, which authorize states to appoint electors on Election Day subject only to a narrow exception if a state “has failed to make a choice” on Election Day. That narrow exception applied only in circumstances plainly not present in any state during the election of 2020. Accordingly, no reasonable attorney exercising diligence appropriate to the circumstances would conclude that a state legislature could lawfully appoint electors for the 2020 presidential election after December 14, 2020.

IV.C.1. Congress’s Power to Set the Time for Appointing Electors

Article II, section 1, clause 2 of the Constitution vests state legislatures with the power to determine the manner in which states appoint electors:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors¹⁶³

Article II, section 1, clause 4 of the Constitution vests Congress with the power to determine the time when states appoint electors:

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.¹⁶⁴

Congress exercised this power in two statutory provisions that were subsequently superseded by the Electoral Count Reform Act in 2022:

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.¹⁶⁵

¹⁶³ U.S. CONST. art. ii, § 1, cl. 2.

¹⁶⁴ U.S. CONST. art. ii, § 1, cl. 4.

¹⁶⁵ 3 U.S.C. § 1.

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.¹⁶⁶

Accordingly, in 2020 a state could lawfully appoint electors after Election Day only if the state “failed to make a choice” on Election Day.

Mr. Chesebro’s memos did not offer any argument whatsoever that a state legislature could lawfully appoint electors after the electors cast their ballots on December 14, 2020. To my knowledge, he has not offered any such argument at any other time in any other context. However, another lawyer with whom Mr. Chesebro collaborated in December and January of 2020 has attempted to offer such an argument. Dr. John Eastman has contended that state legislatures retain the authority to appoint electors “at any time” pursuant to the Electors Clause. Recall that the Electors Clause provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. ...¹⁶⁷

Dr. Eastman’s interpretation of the Electors Clause, which appears to be based on the so-called “independent state legislature theory,” is frivolous. The Electors Clause grants state legislatures the authority to determine the “manner” in which the state appoints electors. The Supreme Court decided the scope of the independent state legislature theory this past Term in *Moore v. Harper* to decide whether and to what extent state legislatures’ authority may be constrained by state constitutions. The Court rejected a more expansive interpretation of the Electors Clause that suggested that state legislatures’ authority was unconstrained by state constitutions.¹⁶⁸ In any event, the resolution of that issue was irrelevant to the issue here. No matter the scope of state legislatures’ constitutional authority to determine the “manner” of appointing electors, the power to determine the “time” when states must appoint electors unambiguously rests exclusively with Congress. No court and no scholar has ever supported Dr. Eastman’s frivolous interpretation.

In support of his frivolous interpretation of the Electors Clause, Dr. Eastman has cited an 1892 Supreme Court case, *McPherson v. Blacker*.¹⁶⁹ Dr. Eastman has quoted the following sentence out of context:

Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.¹⁷⁰

Dr. Eastman claims this sentence means that state legislatures may appoint electors directly “at any time,” including after Election Day or even after Congress convenes to count the electoral votes. That interpretation of the Supreme Court’s decision in *McPherson*, like Dr. Eastman’s

¹⁶⁶ 3 U.S.C. § 2.

¹⁶⁷ U.S. CONST. art. ii, § 1, cl. 2.

¹⁶⁸ See generally *Moore v. Harper*, No. 21-1271 (U.S.).

¹⁶⁹ 146 U.S. 1 (1892).

¹⁷⁰ *Id.* at 35 (quoting Senate Rep. 1st Sess. 43rd Cong. No. 395) (emphasis added).

interpretation of the Electors Clause, is frivolous. The issue in *McPherson* was Michigan’s decision more than a year before Election Day to change the manner of appointing electors from an at-large election to appointment by elections in each congressional district. In the course of its analysis, the Court quoted from a Senate Report from 1874 as Congress considered a statute that would have mandated states to appoint electors by district. That quotation from the Senate Report is the quotation Dr. Eastman relies on. The Senate Report expressed the position that Congress could not constitutionally mandate states to appoint electors by district because states held the constitutional authority to appoint electors directly in *future* elections. Neither the Senate Report nor the Court in *McPherson* ever suggested that a state may violate Article II, section 1, clause 4 by appointing electors outside the time set by Congress. No reasonable attorney exercising diligence appropriate to the circumstances would adopt Dr. Eastman’s interpretations of the Electors Clause and *McPherson*.

Accordingly, the Constitution vests Congress with exclusive authority to determine when states may appoint electors, and states’ authority to determine the “manner” in which they appoint electors does authorize them to appoint electors outside the “time” set by Congress.

IV.C.2. The Scope of 3 U.S.C. § 2

Mr. Chesebro’s suggestion that state legislatures could lawfully appoint electors after electors cast their ballots on December 14, 2020, therefore turns on the scope of 3 U.S.C. § 2. No reasonable attorney exercising diligence appropriate to the circumstances would conclude that any state “failed to make a choice” on Election Day within the meaning of 3 U.S.C. § 2.

Section 2 originated in 1845 and has changed little since.¹⁷¹ On its face, the meaning of “failed to make a choice” is not clear. The legislative history indicates a much narrower scope than Mr. Chesebro’s position requires. In 1845, three states—Georgia, Massachusetts, and New Hampshire—required that electors be appointed by winning a majority in a popular election.¹⁷² If more than two candidates ran, the leading candidate might win only a plurality of the popular vote. When the window for appointing electors was 34 days, as it was prior to 1845, these states would have enough time to hold a runoff election. Congress’s decision to narrow the window to a single Election Day precluded a traditional runoff (and no state had yet devised an instant runoff system). The legislative debates make clear that Congress intended Section 2 to address this concern, permitting a state to appoint electors after Election Day when it “fails to make a choice” in the specific and narrow sense that the popular election did not yield a majority winner as required by the state’s law.

When Congress debated restricting the appointment of electors to a single day, Representative John Hale of New Hampshire explained that “it appeared to him that the bill”

¹⁷¹ See Act of Jan. 23, 1845, ch. 1, 5 Stat 721.

¹⁷² See An Act to prescribe the mode of choosing the Electors of President and Vice President of the United States to which this state is entitled by the constitution of the United States, Acts of the General Assembly of the State of Georgia, Passed at Milledgeville at an Annual Session in November and December 1824 58–60; An Act directing the mode of choosing Electors of President and Vice President of the United States, The Laws of the Commonwealth of Massachusetts, Passed by the General Court, At Their Session which Commenced on Wednesday the Fourth of January, and Ended on Saturday, the Twenty- Fourth of March, Eight Hundred and Thirty Two, § 2; 28 N.H. REV. STAT. §§ 4, 5 (1843).

without the Section 2 exception “was deficient, as it made no provision for an election, if the people should fail to elect on the day designated [and] [i]n the State which he had the honor to represent, a majority of all the votes cast was required to elect the electors of President and Vice-President of the United States and it might so happen that no choice might be made.”¹⁷³ In addition, over half of states have enacted laws that purport to use the Section 2 exception in the event that the popular election ends in a tie. Although the legislative history does not refer to this possibility, it is a natural application of the deeper legal principle. Those states that do not require a majority winner still require a plurality winner, and a tie deprives the election of the plurality winner that the state’s law required. These two historical applications of Section 2’s exception share a common structure: the state’s laws set a mathematical requirement for victory in the popular election, and the popular election did not yield a result that satisfied that mathematical requirement.¹⁷⁴

One scholar has argued for a slightly broader interpretation of Section 2 to include elections disrupted by natural disasters.¹⁷⁵ Michael Morley notes that after Representative Hale’s objections, Representative Samuel Chilton stated that “some provision” should “be made to meet the condition of things existing in Virginia. They voted in that State *viva voce*, and it frequently happened that all the votes were not polled in one day.”¹⁷⁶ According to Chilton, this might arise due to natural disasters or storms:

[I]n a State circumstanced as Virginia was—mountainous and intersected by large streams of water—at times of high water, and of inclement weather, voters were frequently prevented from attending the polls in one day, not only in the presidential elections, which had induced the legislature to authorize the continuance of the elections when . . . any considerable number of voters had been prevented from coming to the polls. The case had happened, and would happen again, when all the votes could not be polled. It could not surely be the design of any gentleman, by this bill, that those who were entitled to vote . . . should be deprived of this privilege.¹⁷⁷

Morley argues that Section 2 was enacted to accommodate both Hale’s concern about runoff elections and Chilton’s concern about natural disasters. Scholar Michael L. Rosin contends that Section 2 extends only to Hale’s concern about runoff elections.¹⁷⁸ No one in

¹⁷³ CONG. GLOBE, 28th Cong., 2nd Sess., 14 (statement of Rep. Hale).

¹⁷⁴ This mathematical understanding of the former 3 U.S.C. § 2 is bolstered by the fact that three of the relevant states in 2020 had statutory provisions for appointed electors after election day in the event of a tie in the popular election. See Az. Code § 16-649(A) (selection by lot by the state Secretary of State); Mich. Code §§ 168.852, 841 (selection by lot by a board); Pa. Code § 25-3168 (selection by lot by the state Secretary of State).

¹⁷⁵ Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 188 (2020).

¹⁷⁶ CONG. GLOBE, 28th Cong., 2nd Sess., 14 (statement of Rep. Chilton).

¹⁷⁷ *Id.*

¹⁷⁸ Michael L. Rosin, *What Did the Twenty-Eight Congress Mean by a “Failed Election?”*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4339759. Rosin notes that when Congress debated a proposed amendment that would expand Section 2 further, Hale argued against the expansion by “observ[ing] that, exceptions having been made in favor of those States that require a majority vote to elect their electors, he for one, as a representative of one of the States thus situated, was contented to go further, and make an exception in favor of the State that chooses her electors by her legislature.” CONG. GLOBE, 28th Cong., 2nd Sess., 30. Rosin further notes that Virginia soon repealed the state law that permitted late voting in the event of inclement weather. See “An Act

Congress suggested that Section 2 applied to any circumstance aside from these two narrow exceptions, and no scholar has ever argued for a broader interpretation. Neither the legislative history nor historical practice supports a far broader interpretation that would permit a state legislature to appoint electors after Election Day on the basis of allegations of voter fraud or other improprieties in the election. Accordingly, Mr. Chesebro's passing suggestion that a state legislature might appoint electors after electors cast their ballots on December 14, 2020, lacked any basis in law or history.

Conclusion

This report concludes that Kenneth Chesebro's plan, as articulated in memos and emails drafted in December 2020, was unlawful under federal election law. That plan involved the Trump elector-nominees for six allegedly disputed states to cast ballots purporting to be their states' electoral votes, and then for the President of the Senate to use those purported electoral certificates as a pretext to exercise an alleged unilateral power under the Constitution to intervene in the electoral count to secure a victory for Donald Trump in the Electoral College. There is no legal or historical basis whatsoever to support the lawfulness of that plan. In addition, there is no legal or historical basis whatsoever to support the lawfulness of Mr. Chesebro's belated contention that his actions were consistent with the Electoral Count Act, nor the argument that a state legislature could lawfully appoint electors after Election Day in any state. Mr. Chesebro's legal positions were so lacking in any legal or historical basis that no reasonable attorney would propose them as part of a lawful plan. Accordingly, any argument that a criminal prosecution of Mr. Chesebro is legally unsound because his actions were authorized by federal election law must fail.

concerning general elections," in ACTS PASSED AT A GENERAL ASSEMBLY OF VIRGINIA: PASSED IN 1852-53, IN THE SEVENTY-SEVENTH YEAR OF THE COMMONWEALTH 4 (William Ritchie 1853).

**Appendix: The Electoral Count Act of 1887 and Related Provisions of Federal Statutory
Law in Force in 2020**

Section 1

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. § 1 (2020).

Section 2

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

3 U.S.C. § 2 (2020).

Section 3

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

3 U.S.C. § 3 (2020).

Section 4

Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.

3 U.S.C. § 4 (2020).

Section 5

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes

as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (2020).

Section 6

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

3 U.S.C. § 6 (2020).

Section 7

The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.

3 U.S.C. § 7 (2020).

Section 8

The electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution.

3 U.S.C. § 8 (2020).

Section 9

The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

3 U.S.C. § 9 (2020).

Section 10

The electors shall seal up the certificates so made by them, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice President, are contained therein.

3 U.S.C. § 10 (2020).

Section 11

The electors shall dispose of the certificates so made by them and the lists attached thereto in the following manner:

First. They shall forthwith forward by registered mail one of the same to the President of the Senate at the seat of government.

Second. Two of the same shall be delivered to the secretary of state of the State, one of which shall be held subject to the order of the President of the Senate, the other to be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection.

Third. On the day thereafter they shall forward by registered mail two of such certificates and lists to the Archivist of the United States at the seat of government, one of which shall be held subject to the order of the President of the Senate. The other shall be preserved by the Archivist of the United States for one year and shall be a part of the public records of his office and shall be open to public inspection.

Fourth. They shall forthwith cause the other of the certificates and lists to be delivered to the judge of the district in which the electors shall have assembled.

3 U.S.C. § 11 (2020).

Section 12

When no certificate of vote and list mentioned in sections 9 and 11 of this title from any State shall have been received by the President of the Senate or by the Archivist of the

United States by the fourth Wednesday in December, after the meeting of the electors shall have been held, the President of the Senate or, if he be absent from the seat of government, the Archivist of the United States shall request, by the most expeditious method available, the secretary of state of the State to send up the certificate and list lodged with him by the electors of such State; and it shall be his duty upon receipt of such request immediately to transmit same by registered mail to the President of the Senate at the seat of government.

3 U.S.C. § 12 (2020).

Section 13

When no certificates of votes from any State shall have been received at the seat of government on the fourth Wednesday in December, after the meeting of the electors shall have been held, the President of the Senate or, if he be absent from the seat of government, the Archivist of the United States shall send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged, and such judge shall forthwith transmit that list by the hand of such messenger to the seat of government.

3 U.S.C. § 13 (2020).

Section 14

Every person who, having been appointed, pursuant to section 13 of this title, to deliver the certificates of the votes of the electors to the President of the Senate, and having accepted such appointment, shall neglect to perform the services required from him, shall forfeit the sum of \$1,000.

3 U.S.C. § 14 (2020).

Section 15

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement

shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (2020).

Section 16

At such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

3 U.S.C. § 16 (2020).

Section 17

When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

3 U.S.C. § 17 (2020).

Section 18

While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

3 U.S.C. §18 (2020).

Section 19

- (a)
- (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of

Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)

(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the

House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

3 U.S.C. § 19 (2020).

Section 20

The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

3 U.S.C. § 20 (2020).

Section 21

As used in this chapter the term—

(a) “State” includes the District of Columbia.

(b) “executives of each State” includes the Board of Commissioners of the District of Columbia.

3 U.S.C. § 21 (2020).