

SUBJECT: PRIVILEGED & CONSTITUTIONAL -- possible strategy on whether Legislature can select the Trump electors
FROM: Kenneth Chesebro <[REDACTED]@msn.com>
TO: Judge Troupis <[REDACTED]@gmail.com>
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Jim,

As I briefly sketched in my text, the Nov. 16 memo by legislative attorney Michael Gallagher advising Speaker Voss that after the Wisconsin legislature provides by statute for the people to vote on the president, and the election has been held, "the legislature has no unilateral authority to reverse the choice of the people of the state" (page 2), overlooks a key statutory provision.

In 1845, after the practice of States having their citizens vote for electors had become well established, Congress enacted a fallback which explicitly permits legislatures to appoint electors after an election, in one circumstance.

3 U.S.C. Sect. 2 reads:

Failure to make choice on prescribed day.

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 [i.e., election day, here Nov. 3], **the electors may be appointed on a subsequent day** in such a manner as the legislature of such State may direct."

(Emphasis added.)

Now, in the usual course, Sect. 2 will give a legislature no excuse to appoint electors on a subsequent day. The election will be held, following the statutes on the books prior to election day, and the election will be duly certified and the governor will sign certificates of ascertainment by the "safe harbor" day identified in 3 U.S.C. Sect. 5.

But what if that doesn't happen?

The result of the Wisconsin election is supposed to be certified on December 1, and the "safe harbor" date is December 8. Suppose that, as December 8 nears, Trump is still behind in the recount, but there are ongoing judicial proceedings which involve serious allegations that election officials willfully disregarded, and twisted, the statutes and procedures in place prior to election day.

In that event, there would be a serious risk that the election result would not be finalized by December 8 -- and even if it was finalized by then, because of the election officials' (and the courts'?) failure to decide the contest using only "judicial or other procedures" in place before election day," the result might not be respected by Congress.

Wisconsin clearly has an interest in having electors selected by the "safe harbor" day, to ensure that Congress will regard that selection as conclusive (this assumes the Electoral Count Act is constitutional -- the state legislators might want to take that position, but we never should; we should keep the flexibility for pro-Trump Members of Congress to argue the Act cannot bind them).

In my view, a responsible state legislature could conclude that the failure of the election officials and the courts to definitely resolve the result of the election, pursuant to extant law, without doing something creative that sparked controversy, constituted a "fail[ure] to make a choice on the day prescribed law by" within the meaning of Sect. 2. In other words, if by December 8 we can't be sure how the voters elected on November 3, based on procedures that were in place on November 3, we should conclude that the State didn't actually make a choice on November 3 -- thereby authorizing the state legislature to appoint the electors.

This is precisely what the Florida Legislature planned to do during Bush v. Gore. (I can go into that in more detail if needed.) And in his book analyzing that controversy, Judge Posner credited that approach as reasonable:

Failing to make a choice and uncertainty about what choice has been made are not the same thing; the outcome of a close election is often not known on election day. But at some point continued uncertainty about the outcome of the November 7 election might be deemed a failure to have chosen electors on that day, in which event the Florida legislature could elect its own slate, which, given the composition of the legislature, would have been a slate pledged to Bush.

Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 133 (2001).

This is not the only theory under which the legislature could select electors. It might be argued that legislatures have plenary power to impose their own will at any time, even after an election, and there is support for that in McPherson v. Blacker, 146 U.S. 1, 35 (1892), particularly in a Senate report cited there.

But it strikes me as the only theory that can be easily squared with the statutes, and that is modest enough that it might lead state legislators to think that they have a role to play here. We already have ample indications that the Wisconsin election officials are playing fast and loose with the controlling statutes and the recount procedures, and there is every reason to expect that lower court judges will do the same.

If one adopts the view in my earlier memo, that the real deadline for resolving controversies is January 6, the date Congress meets in joint session to count electoral votes, a possible strategy emerges.

One, proceed deliberately after losing the recount, through challenges in the lower courts, unworried about meeting the December 8 deadline. Trump can afford to do this, because if he ultimately wins in the Wisconsin Supreme Court, and the governor has to sign a certificate stating that he is the winner, these electoral votes will almost surely be honored in Congress, despite not meeting the "safe harbor" date.

Two, assuming the case does not look like it will be reaching finality by December 8, and if there are real concerns that the election officials and courts are disregarding pre-election law, and the Florida courts did in Bush v. Gore, have state legislators willing to take the lead adopt the approach of the Florida Legislature, and urge that the legislature resolve the matter of the electoral votes by December 8, to ensure that Wisconsin is represented with votes in the electoral college that Congress will defer to.

In other words, try to pursue a shot at having two bites at the apple -- litigate, hoping to ultimately win by January 6, but also use delay in litigation to try to win in the state legislature on December 8. If Trump can get the Wisconsin legislature to award him the electoral votes, he could still continue with the litigation, as winning it would remove any argument Biden could have in Congress.

The whole idea is a long shot. Probably it would only be viable if by early December there was a palpable sense among conservatives that there was a concerted effort by Democrats to steal this election in multiple states, and that the Wisconsin vote and vote counting were so egregiously manipulated and opaquely handled that it

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