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The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective

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Joel K. Goldstein

The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective

21 U.N.H. L. Rev. 369 (2023)

ABSTRACT. Despite decisively losing the 2020 popular and electoral votes, Donald Trump attempted to retain presidential power by trying to persuade Vice President Mike Pence to misuse his role as President of the Senate during the electoral vote count to withhold some votes from former Vice President Joe Biden. Pence refused, and Biden's election was recognized, but only after some Trump supporters violently assaulted the United States Capitol Building and personnel there. Congress subsequently passed legislation to address the process of counting electoral votes, which in part clarified the President of the Senate's limited and ministerial role in the process. Although further legal clarity is a virtue, the President of the Senate's limited role in the process was evident prior to January 6, 2021, permitting no legitimate controversy. Various modes of constitutional argument coalesced to dictate that result, and the Electoral Count Act of 1887 and historical practice reinforced that conclusion. Amidst the unprecedented misbehavior of the day, Trump's asserted position that Pence could refuse to count certain Biden electoral votes represented a shocking assault on fundamental principles of American government and a departure from basic norms of constitutional behavior.

This article explores the textual, historical, and structural constitutional arguments that compel the conclusion that the President of the Senate's role in counting the electoral votes is entirely ministerial and formal and shows how the Electoral Count Act of 1887 supported that conclusion.

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INTRODUCTION 371

I. JANUARY 6 AND BEFORE: THE FACTS 373

II. PENCE AS PRESIDENT OF THE SENATE DURING THE ELECTORAL
 COUNT: A LEGISLATIVE OFFICER WITH CONFLICTS..... 379

III. THE PRESIDENT OF THE SENATE AND THE COUNTING CLAUSE ... 383

A. The Circumscribed Nature of the Senate President's Role 385

 1. The Constitution Does Not Make the Senate President the
 Presiding Officer 385

 2. The Text Suggests Congress, Not the Senate President, is the
 Counter 387

 3. History Overwhelmingly Suggests the Senate President is Not
 the Counter 390

 4. Structural Ideals Confirm that the President of the Senate
 Can't Reject Electors 402

CONCLUSION..... 410

APPENDIX I 412

APPENDIX 2 418

INTRODUCTION

Once it became clear that all other roads to a second presidential term were foreclosed, Donald Trump went where no American president had ever gone. He demanded that Vice President Mike Pence, as President of the Senate during the electoral vote count on January 6, 2021, reject or defer submitting some of Vice President Joe Biden's electoral votes to prevent Biden's election and allow himself to retain power.¹ Trump's strategy was unprecedented, audacious, illegal, and unconstitutional, and Pence refused to cooperate.² Following a Trump rally, a mob of Trump supporters invaded the Capitol Building.³ Blood was shed, lives were lost, and the constitutional process was disrupted for almost six hours, in what leading Republicans recognized as "terrorism" and "insurrection."⁴ Trump watched the surreal scene from the West Wing but ignored pleas from supporters to protect those at the Capitol and the constitutional processes until belatedly delivering a half-hearted request for violence to cease.⁵

Pence was right. The President of the Senate lacks power, under the Constitution or law, to act as Trump insisted. The Constitution's text, history, structure, and just plain common sense rebut the idea that the President of the

¹ See, e.g., *infra* notes 3–5, 14–17, 22–36 and accompanying text.

² See, e.g., Vice President Michael R. Pence "Dear Colleague" Letter, January 6, 2021 <https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf> (calling idea that vice president could exercise "unilateral authority" regarding electoral count "antithetical" to constitutional design and noting that no vice president had ever asserted such power); *Liz Cheney's opening statement at Jan. 6 select committee hearing*, POLITICO (June 9, 2022, 10:07 PM), <https://www.politico.com/news/2022/06/09/liz-cheney-jan-6-committee-full-statement-00038730> (calling what Trump asked Pence to do "wrong," "illegal," and "unconstitutional").

³ Dan Barry et al., '*Our President Wants Us Here*': *The Mob That Stormed the Capitol*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/KV68-L6AT>] (last updated Nov. 10, 2021).

⁴ See, e.g., 167 Cong. Rec. S735 (daily ed. Feb. 13, 2021) (statement of Sen. Mitch McConnell) (calling January 6 mob activity "terrorism" to disrupt government business in response to Trump's false statements); *id.* at S738 (daily ed. Feb. 13, 2021) (statement of Sen. Susan Collins) (stating Trump provoked "an insurrection" to prevent "the peaceful transition of power"); *id.* at S26 (daily ed. Jan. 6, 2021) (statement of Sen. Mitt Romney) (stating that Trump had incited "an insurrection"); *Statement by President George W. Bush on Insurrection at the Capitol*, George W. Bush Presidential CTR. (Jan. 6, 2021) (calling January 6, 2021 events an "insurrection" which "could do grave damage to our Nation and reputation").

⁵ Lisa Mascaro et al., *Jan 6: Trump spurned aides' pleas to call off Capitol mob*, AP News (July 22, 2022), <https://apnews.com/article/capitol-siege-panel-hearing-3e3dc618ed8cee37147cf6a792cocofa> [<https://perma.cc/WQR3-4296>].

Senate can unilaterally reject electoral votes. It's not a close call. Sure, the Constitution's text doesn't explicitly state who counts the electoral votes, but that doesn't render its meaning mysterious or make all interpretations equal or even plausible. Inexplicit text often suggests better interpretation, as do constitutional practice, structure, ideals, and consequential considerations. Especially when the text doesn't mandate an interpretation, constructions that advance constitutional ideals should outrank those which frustrate them.⁶ Particular interpretations gain strength when multiple conventional methods of constitutional argument support them.⁷ It would be hard to imagine a course more offensive to basic constitutional ideals than the one Trump embraced or one so many arguments reject.

Although textual and historical arguments rebut Trump's insistence that the President of the Senate can unilaterally decide what electoral votes to count, structural and consequential arguments make the rejection a slam dunk. Giving the Senate president the power Trump imagined always violated constitutional ideals, but constitutional change during the last century, especially regarding the vice president's constitutional status, renders the idea even more offensive. And the Electoral Count Act of 1887 (ECA) confirmed that ministerial role. In response to Trump's misconduct, Congress has recently passed legislation to address counting electoral votes to reconfirm, in part, the Senate president's limited role in the process, and properly so.⁸ Further legal clarity is a virtue, but the limited role of the Senate president was evident before January 6, 2021, to permit no legitimate controversy.⁹ Allowing the President of the Senate, especially a vice president, to preside only makes sense if the role is entirely ceremonial, as it has been historically.

⁶ *McCulloch v. Maryland*, 17 U.S. 316, 408 (1819) ("Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation . . .").

⁷ See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193, 1240–43 (1987).

⁸ Derek T. Muller, *Congress Passes Legislation that will Close Off Presidential Election Mischief and Help Avoid Another Jan. 6*, THE CONVERSATION, (Dec. 12, 2022, 4:46 PM), <https://theconversation.com/congress-passes-legislation-that-will-close-off-presidential-election-mischief-and-help-avoid-another-jan-6-196204> [<https://perma.cc/ZY2W-PD9N>].

⁹ Derek Muller, *Amending the Electoral Count Act Doesn't Concede That Trump Was Right About Pence's Role on Jan. 6*, ELECTION LAW BLOG, (Sept. 28, 2022, 4:28 AM), <https://electionlawblog.org/?p=132146> [<https://perma.cc/LN8P-5MDN>].

With that understanding, the role has value.

In addition to Trump's misguided constitutional interpretation, the process necessary to produce his desired result disdained basic constitutional ideals. Trump's insistence that Pence could unilaterally render the novel statutory and constitutional interpretations to re-elect Trump and Pence defies fundamental ideals of democracy and the rule of law.

After Section I outlines basic facts surrounding January 6, 2021, Section II briefly places Pence's role as presiding officer in institutional context. Section III, the bulk of this Essay, outlines the textual, historical, and structural arguments which establish the limited, ministerial role of the President of the Senate regarding the electoral count. Lastly, Section IV offers conclusions.

I. JANUARY 6 AND BEFORE: THE FACTS

The pertinent facts are not in legitimate dispute. Biden and Senator Kamala Harris polled seven million more popular votes than Trump-Pence, their distribution producing a 306 to 232 electoral vote victory.¹⁰ Trump and his allies initiated more than sixty lawsuits challenging certain states' elections, but with one minor exception, their claims failed.¹¹ Attorney General William Barr and later acting Attorney General Jeffrey Rosen told Trump the justice department uncovered no evidence of fraud to affect any state's outcome; numerous Trump associates delivered the same message.¹² Legally authorized officials certified the prevailing electoral slate in every jurisdiction before or by mid-December, 2020, and those electors met in each state on December 14, 2020, casting ballots as expected for Biden-Harris or Trump-Pence, and transmitting their ballots for counting and record-keeping purposes as required.¹³

Trump tried to reverse the election. He and his allies pressured state officials

¹⁰ *Presidential Election Results: Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> [<https://perma.cc/BM72-E3LN>] (last updated Jan. 28, 2023, 11:57 PM).

¹¹ See Hon. John C. Danforth et al., LOST NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION, (July 2022), <https://lostnotstolen.org/> [<https://perma.cc/6TY2-8CYF>] (providing detailed discussion of litigation results).

¹² CITIZENS GUIDE TO JANUARY 6 AND ONGOING THREATS TO DEMOCRACY 9–10 (Just Security, Sept. 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-protect-democracy-citizens-guide-to-january-6th-and-ongoing-threats-to-democracy.pdf> [<https://perma.cc/N8JW-8UT8>].

¹³ *2020 Electoral College Results*, National Archives, <https://www.archives.gov/electoral-college/2020> [<https://perma.cc/82JM-36TV>] (last visited Feb. 23, 2023).

to change the certified vote.¹⁴ In several Biden states, Trump associates arranged the submission of Trump electors, “fake electors,” as Trump operatives appropriately called them before abandoning that telling nomenclature.¹⁵ On January 3, 2021, the ten living former secretaries of defense, including two Trump appointees, issued a statement that the election was over and that civilian and uniform military leaders were obliged to cooperate in a peaceful transfer of power.¹⁶ This unprecedented bipartisan statement by national security luminaries reflected their perception of Trump’s proclivities.¹⁷

Since electors had submitted 306 certified electoral votes for Biden-Harris, Trump could prevail only by nullifying more than thirty-six of Biden’s votes to reduce his total below the 270-vote threshold. The ECA, which had governed thirty-three presidential elections since 1887, provided elaborate procedures for opening, considering, and counting state certificates.¹⁸ It limited Congress’s authority to

¹⁴ Nicholas Wu & Kyle Cheney, *Ron Johnson Tried to Hand Fake Elector Info to Mike Pence on Jan. 6, panel reveals*, POLITICO (June 21, 2022, 4:30 AM) <https://www.politico.com/news/2022/06/21/jan-6-panel-trump-overturn-2020-election-00040816> [https://perma.cc/5XYG-NSTD]. See, e.g., *Telephone Conversation with Chief of Staff Mark Meadows, Georgia Secretary of State Brad Raffensperger, Georgia Deputy Secretary of State Jordan Fuchs, General Counsel to the Georgia Secretary of State Ryan Germany, and Attorneys Cleta Mitchell and Kurt Hilbert, American Presidency Project* (January 2, 2021), <https://www.presidency.ucsb.edu/documents/telephone-conversation-with-chief-staff-mark-meadows-georgia-secretary-state-brad> [https://perma.cc/7GMA-2J3J].

¹⁵ Alan Feuer & Kate Benner, *The Fake Electors Scheme, Explained*, NEW YORK TIMES (July 27, 2022), <https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html> [https://perma.cc/2NKH-R7Q6]; Maggie Haberman & Luke Broadwater, *‘Kind of Wild /Creative’: Emails Shed Light of Trump Fake Electors Plan*, NEW YORK TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html> [https://perma.cc/VJH2-QND9].

¹⁶ Ashton Carter et al., *All 10 living former defense secretaries: Involving the military in election disputes would cross into dangerous territory*, WASH. POST (Jan. 3, 2021, 5:00 PM), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html [https://perma.cc/6RYL-BRBY].

¹⁷ Joel K. Goldstein, *Teaching Constitutional Law After the Trump Presidency*, 66 ST. LOUIS U. L. J. 409, 439 (2022).

¹⁸ See, e.g., 3 U.S.C. § 15 (prescribing meeting of House and Senate in House chamber on January 6 at 1 p.m. in years following meeting of electors with President of the Senate presiding); *id.* (providing that President of Senate would open “all the certificates and papers purporting to be certificates of the electoral votes” for action in alphabetical order of the states, starting with the letter “A” which would be handed to tellers appointed by each house and the tellers would read the

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

decide whether to count a state's electors.¹⁹ It assumed that the state-certified electoral votes would routinely be accepted unless each house determined that the votes were not "regularly given"²⁰ or the state governor had not "lawfully certified" the electors' appointment.²¹

By January 6, super-majorities in each house acknowledged Biden's victory.²² Democrats controlled the House of Representatives, and although Republicans temporarily narrowly retained a Senate majority, Republican Majority Leader Mitch McConnell recognized Biden's election and discouraged Republican senators from

certificates aloud in the presence and hearing of the two houses and make a list of the votes from them); *id.* (requiring the President of the Senate to call for objections which needed to be written, state clearly and without argument its grounds and be signed by at least one member of each house as certificates are read from each state, and upon receiving any such objections regarding a particular state, the houses separate and debate and vote upon the objections); *id.* § 17 (limiting debate to two hours and allowing each member to speak no more than once for no more than five minutes); *id.* § 15 (requiring the two houses "immediately" reconvene after voting on objections to each state, that the result be announced, and the process would proceed to the next state alphabetically, with no action on another state's papers until objections on the prior state had been finally resolved); *id.* § 16 (prescribing seating in House chamber and imposing time limits of the count and on recesses); *id.* § 18 (empowering President of Senate to preserve order, prohibiting debate in the joint meeting, and forbidding the presiding officer from putting a question other than "to either House" on a motion to withdraw).

¹⁹ Edward B. Foley, Reforming the Electoral Count Act, *DEMOCRACY JOURNAL* (Summer 2022), <https://democracyjournal.org/magazine/65/reforming-the-electoral-count-act/> [<https://perma.cc/U8H4-8A9Y>] (pointing out that the ECA attempted to restrain Congress but suffers from use of archaic language).

²⁰ See, e.g., Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 542, 619-20, 627 (2004) (describing "regularly given" basis for challenge as relating to "improprieties" in elector's behavior in office such as violation of constitutional or statutory requirements); Derek Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1540 (2021) (confining "regularly given" basis for challenging votes to "a limited set of post-appointment [of the elector] controversies").

²¹ 3 U.S.C. § 15; see Siegel, *supra* note 20, at 616; see also Edward Foley et al., *How Congress Can Fix the Electoral Count Act*, *WASH. POST* (Jan. 4, 2022, 3:22 PM), <https://www.washingtonpost.com/opinions/2022/01/04/congress-fix-electoral-count-act/> [<https://perma.cc/Z4ZM-AW7K>] (pointing out that the ECA did not make Congress a "national recount board" and that Congress lacked power to question certified electoral votes based on defect in popular vote appointing them when only one set of votes was submitted from a state).

²² Patricia Zengerle & Tim Reid, Senior Republicans Accept Biden as President-elect, Reject Talk of Overturning Election, *REUTERS* (Dec. 14, 2020, 6:09 PM) <https://www.reuters.com/world/us/senior-republicans-reject-talk-overturning-election-us-senate-2020-12-14/> [<https://perma.cc/SZ7A-VK9G>] (pointing out Democratic control of the House and sufficient Republican senators acknowledging his election).

challenging his electoral votes, and since only about 25% of Republican senators indicated they would defy McConnell's advice, Biden would nonetheless comfortably prevail.²³

Although Trump's congressional allies formally invoked the ECA even while abusing its provisions,²⁴ Trump realized its application would confirm Biden's election. He implored Pence to override it.²⁵ Sometimes Trump claimed Pence could unilaterally reject certified Biden votes. "The Vice President has the power to reject fraudulently chosen electors," Trump tweeted on January 5, 2021, after meeting with Pence in the Oval Office the prior day.²⁶ Under some scenarios, if Pence rejected Biden's electors in seven states with eighty-four electoral votes,

²³ See Ali Zaslav et al., *McConnell for the First Time Recognizes Biden as President-elect*, CNN (Dec. 15, 2020, 8:15 PM), <https://www.cnn.com/2020/12/15/politics/mitch-mcconnell-congratulates-joe-biden/index.html> [<https://perma.cc/E3BV-4RPR>] (stating McConnell's recognition of Biden's election and his opposition to challenging it); Burgess Everett, *At Least 12 GOP Senators to Challenge Biden's Win*, POLITICO (Jan. 2, 2021, 10:08 PM) <https://www.politico.com/news/2021/01/02/ted-cruz-electoral-college-challenge-453430> [<https://perma.cc/NMJ3-5GJ7>] (stating that about 25% of Republican senators would challenge Biden's election in defiance of McConnell as would some Republicans in the Democratically controlled House). Ultimately, Republican challenges to Biden electoral votes in Arizona and Pennsylvania were made and defeated. See 167 CONG. REC. S31-32 (daily ed. Jan. 6, 2021) (where the challenge to the Arizona electoral votes failed 93-6 in the Senate); *id.* at H93 (challenge to Arizona electoral votes failed 303-121 in the House); *id.* at S38 (where the challenge to Pennsylvania's electoral votes failed 92-7 in the Senate); *id.* at H112 (challenge to Pennsylvania electoral votes failed 282-138 in the House).

²⁴ See, e.g., Foley et al., *supra* note 21 (pointing out that Republican objectors improperly acted "to second-guess the voting process in the states."); Foley, *supra* note 19 (stating that during the January 6 "insurrection" various Republican senators and representatives had improperly sought to "repudiate the valid votes" states had sent to Congress).

²⁵ Ken Bredemeier, *Trump Repeatedly Implored Pence to Upend 2020 Election Outcome, Witnesses Testify*, VOA (June 16, 2022, 3:44 PM) <https://www.voanews.com/a/lawmakers-hear-testimony-how-trump-implored-pence-to-upend-2020-election-/6620568.html> [<https://perma.cc/XPV7-TTB2>].

²⁶ Donald J. Trump, *Tweets of January 5, 2021*, THE AMERICAN PRESIDENCY PROJECT (Jan. 5, 2021), <https://www.presidency.ucsb.edu/node/348379> [<https://perma.cc/K4BN-8PSP>]; see also Zeke Miller & Jill Colvin, *Trump insists, falsely, that Pence can Decertify Results*, AP NEWS (Jan. 6, 2021), <https://apnews.com/article/election-2020-joe-biden-donald-trump-senate-elections-elections-aaa0b96179c454426453a99ca1e2e30> [<https://perma.cc/2PXX-MQU9>] (quoting Trump statement that Pence could "decertify the results or send them back to the states for change and certification" and could "also decertify the illegal and corrupt results and send them to the House of Representatives for the one vote for one state tabulation.").

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

Trump might be re-elected with 232 of the 454 electors recognized as valid²⁷ or the election might be thrown into the House of Representatives with each state having one vote and Republicans controlling twenty-six delegations.²⁸

Pence rejected Trump's strategy. After the *New York Times* reported on January 5 that Trump and Pence disagreed regarding the Senate president's powers, Trump falsely claimed Pence agreed with him, labeling the *Times* story "fake news."²⁹ By January 6, Trump had retreated to a related demand,³⁰ one previously mentioned but now emphasized. Under this "send them back" approach, Pence would defer acting on Biden's certified electoral votes in "disputed" states and give the states' legislatures ten days to investigate and hopefully certify Trump's electors. At 1 a.m. on January 6, 2021, Trump tweeted that if Pence "comes through for us, then we will win the Presidency Mike can send it back!"³¹ About seven hours later, Trump tweeted "States want to correct their votes All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"³² Trump told his January 6 rally that Pence should send the issue back to the states, which he said Pence was empowered to do.³³ "All Vice President Pence

²⁷ See Memorandum from John Eastman on the January 6 Scenario (on file with CNN), at 4–5. The six-page Eastman memorandum is available, among other places, at *Trump lawyer's full memo on plan for Pence to overturn the election*, CNN (Sept. 21, 2021, 5:47 PM), <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html>.

²⁸ See *id.* at 5.

²⁹ *Here's every word of the third Jan. 6 committee hearing on its investigation*, NPR, (June 16, 2022, 8:25 PM), <https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee> [<https://perma.cc/JBN9-ERAU>].

³⁰ Eastman, *supra* note 27; Memorandum from Jenna Ellis Memorandum to President Donald J. Trump on the Constitutional Analysis of Vice President Authority for Jan. 6, 2021 Electoral College Vote Count, (Dec. 31, 2020) (on file with Politico) (recommending that Pence not open certificates in six states with disputes but return them to the states' legislatures to advise by January 15 which is the state's electors); see also Betsy Woodruff Swan & Kyle Cheney, *Trump campaign lawyer authored 2 memos claiming Pence could halt Biden's victory*, POLITICO (December 10, 2021, 1:00 PM), <https://www.politico.com/news/2021/12/10/trump-lawyer-pence-biden-524088> [<https://perma.cc/5XYG-NSTD>] (providing links to Ellis memos).

³¹ Donald J. Trump, *Tweets of January 6, 2021*, THE AMERICAN PRESIDENCY PROJECT (Jan. 6, 2021), <https://www.presidency.ucsb.edu/documents/tweets-january-6-2021> [<https://perma.cc/ME9C-ZML2>].

³² *Id.*

³³ *Here's every word of the third Jan. 6 committee hearing on its investigation*, NPR, (June 16,

has to do is send it back to the states to recertify and we become president and you are the happiest people,” Trump said.³⁴ He also disparaged Pence.³⁵ Republicans controlled state legislatures in most “contested” states, and Trump may have hoped at least three states’ legislatures would certify his electors instead, although by January 5 that prospect seemed improbable.³⁶

Trump’s strategies rested on the premise that the President of the Senate possessed unilateral power to decide what electoral votes counted. Trump attorney Professor John Eastman claimed that “very solid legal authority, and historical precedent” supported the position “that the President of the Senate does the counting, including the resolution of disputed electoral votes . . . and all the Members of Congress can do is watch,”³⁷ an assertion he reiterated and said should guide Trump’s actions.³⁸ Professor Eastman also claimed Vice Presidents John Adams, Thomas Jefferson, and Richard M. Nixon had made determinations “regarding contested electoral votes” and relied on those precedents and unspecified scholarly articles.³⁹

The “send them back” strategy violated the Constitution and the ECA. Although

2022, 8:25 PM), <https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee> [<https://perma.cc/JBN9-ERAU>].

³⁴ *Id.*

³⁵ *Id.* (“And Mike Pence, I hope you’re going to stand up for the good of our Constitution and for the good of our country. And if you’re not, I’m going to be very disappointed in you. I will tell you right now. I’m not hearing good stories.”); *see also* Tweets of January 6, 2021, *supra* note 31 (“Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”).

³⁶ *See* Memorandum from Greg Jacob to Vice President Pence on the Analysis of Professor Eastman’s Proposals, (Jan. 5, 2021) (on file with Just Security, available at <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-greg-jacob-memorandum-analysis-of-eastman-proposals-january-5-2021.pdf>) [<https://perma.cc/JP4G-54R5>] (stating that Eastman conceded that no state legislature had certified state electors and that most had signaled no intention to do so).

³⁷ Eastman, *supra* note 27; *see also* Shorter Memorandum from John Eastman on the January 6 Scenario (on file with CNN, available at <https://cdn.cnn.com/cnn/2021/images/09/20/eastman.memo.pdf>) [<https://perma.cc/8EMS-BXL4>] (Earlier, shorter memorandum which Eastman later described as “preliminary” making same point).

³⁸ *See* Eastman, *supra* note 27, at 6.

³⁹ John Eastman, *Here’s the advice I actually gave Vice President Pence on the 2020 election*, SACRAMENTO BEE (Oct. 7, 2021, 3:00 PM), <https://www.sacbee.com/opinion/op-ed/article254812552.html> [<https://perma.cc/UQ8Q-SKVA>].

this article focuses on Trump's mistaken premise regarding the Senate president's unilateral constitutional power, Trump's strategy presented other legal problems. Constitutionally, once the President of the Senate opens the electoral certificates in the presence of the House of Representatives and Senate, "the votes shall *then* be counted."⁴⁰ This process does not permit the delay Trump's strategy envisioned. Trump's strategy also ignored the ECA's time limits.⁴¹ The ECA required the President of the Senate to open and present the state electoral certificates in alphabetical order, beginning with the "A" states,⁴² which Trump's strategy violated by deferring some Biden states.⁴³ The ECA required the Senate president to solicit and receive all objections to a state's certificates before the houses separate to address them prior to considering the next state,⁴⁴ which Trump's strategy also violated. The ECA required submitting controverted certificates to the House and Senate, not to the states.⁴⁵

II. PENCE AS PRESIDENT OF THE SENATE DURING THE ELECTORAL COUNT: A LEGISLATIVE OFFICER WITH CONFLICTS

It was anomalous but somewhat fitting that the electoral vote count presented the seminal moment of Pence's vice presidency. The electoral college and vice

⁴⁰ U.S. CONST. amend. XII (emphasis added); see also Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, 73 CASE W. RESV. L. REV. 27, 33–34 (2022) (recognizing that constitutional requirement that "the votes shall then be counted" precluded President of the Senate from sending certified votes back to states).

⁴¹ 3 U.S.C. § 16; Jacob, *supra* note 36, at 2. Eastman wrote the ECA was "likely unconstitutional" for authorizing the House and Senate to deliberate separately and for providing that absent agreement between the House and Senate, the electors certified by the state governor are counted "regardless of whether there was ever fair review of what happened in the election, by judges and/or state legislatures," Eastman, *supra* note 27, at 3. The 2020 election did not raise the latter claim since the House and Senate agreed Biden received 306 electors and the former is specious. The Constitution does not state that the two houses cannot separate to act and its language, envisioning the presence of the two bodies, not their members, implies that they attend and will act as distinct institutions, therefore separately. Space does not allow a full consideration here of constitutional attacks on the ECA which others have raised.

⁴² 3 U.S.C. § 15.

⁴³ Jacob, *supra* note 36, at 1.

⁴⁴ 3 U.S.C. § 15.

⁴⁵ *Id.*; Jacob, *supra* note 36, at 2.

presidency entered history together⁴⁶ near the Constitutional Convention's end.⁴⁷ The founders conceived the electoral college to resolve a dispute over how to elect the president and probably created the vice presidency to facilitate the electoral college.⁴⁸ They realized the electoral college would fail if electors supported home-state candidates, so they gave each elector two votes for president but required at least one vote go to someone not from the elector's state.⁴⁹ To dissuade vote wasting, they created the vice presidency for the runner-up and made him President of the Senate and first presidential successor.⁵⁰

Alexander Hamilton initially thought the electoral college system if "not perfect, ... at least excellent,"⁵¹ but that characterization soon proved generous and wrong. Although political parties began slotting candidates for president and vice president, electors could not discriminate between their two votes, thereby risking inadvertent or mischievous inversion. To prevent the minority Federalists from electing Jefferson's 1804 running mate as president by exchanging electoral votes for concessions, Jeffersonians acted to separate electoral voting for the two offices.⁵² Some suggested the change made the vice presidency superfluous since it was created to facilitate presidential election and proposed its abolition.⁵³ It survived, but the Twelfth Amendment provided for its separate election. The history of the electoral college and vice presidency, like two roads, essentially diverged, until January 6, 2021.

Pence's vice presidency was unlike the office John Adams held, and not simply because he served with Trump, not George Washington. Adams (and Jefferson and Burr) occupied a legislative position. Vice presidents' only ongoing constitutional

⁴⁶ JOEL K. GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY: THE PATH TO SIGNIFICANCE, MONDALE TO BIDEN 12* (2016) [hereinafter *WHITE HOUSE VICE PRESIDENCY*].

⁴⁷ *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 493–94 (Max Farrand ed., Yale Univ. Press 1911).

⁴⁸ *Id.* at 527 (statement of Mr. Williamson) (stating that vice presidency "was not wanted" but created "for the sake of a valuable mode of election").

⁴⁹ GOLDSTEIN, *WHITE HOUSE VICE PRESIDENCY*, *supra* note 46, at 12; EDWARD J. LARSON A *MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* 40–41 (2007).

⁵⁰ GOLDSTEIN, *WHITE HOUSE VICE PRESIDENCY*, *supra* note 46, at 12.

⁵¹ THE FEDERALIST NO. 68 at 411–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵² DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805*, 393–94 (1970); Akhil Reed Amar & Vik Amar, *President Quayle?* 78 VA. L. REV. 913, 922–23 (1992).

⁵³ *See* 13 ANNALS OF CONG. 21 (remarks of Sen. Dayton); *id.* at 22–23 (remarks of Sen. Jackson); *id.* at 23 (remarks of Sen. Hillhouse).

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

duty, presiding over the Senate, was one they fulfilled through Alben Barkley's tenure (1949–53).⁵⁴ Whereas nineteenth and early twentieth century vice presidents were independent of and often adverse to corresponding presidents, changes in American government and politics primarily beginning in the 1930s transformed relationships between the two officers⁵⁵ and brought the vice presidency into the executive branch during Richard M. Nixon's term (1953–61).⁵⁶ The deliberations culminating in the Twenty-Fifth Amendment recognized that change, a process that intensified as vice presidents, beginning with Walter F. Mondale (1977–81), moved into the West Wing and became close presidential associates.⁵⁷ Whereas earlier vice presidents had little executive connection as simply a contingent successor, mid-twentieth-century practice made the executive role present, dominant, and continuous and rendered the legislative function episodic, infrequent, and largely ceremonial.

Like his recent predecessors,⁵⁸ Pence was a loyal executive branch subordinate.⁵⁹ His flattery of Trump seemed unbounded.⁶⁰ Trump may have expected his obsequious number two to fall into line on January 6 but, if so, Trump misunderstood the Constitution.

Although modern vice presidents function almost entirely as central administration figures,⁶¹ on rare occasions the Constitution or other law makes

⁵⁴ GOLDSTEIN, WHITE HOUSE VICE PRESIDENCY, *supra* note 46, at 13, 21–22.

⁵⁵ *See generally* JOEL K. GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION (1982).

⁵⁶ *See id.* at 140–41.

⁵⁷ *See* GOLDSTEIN, WHITE HOUSE VICE PRESIDENCY, *supra* note 46, at 36–104.

⁵⁸ *See id.* at 105.

⁵⁹ Joel K. Goldstein, *Mike Pence has lasted two years as Trump's VP. That May be His main accomplishment*, WASH. POST (Jan. 18, 2019, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/18/mike-pence-has-lasting-2-years-as-trumps-vp-that-may-be-his-main-accomplishment/> [https://perma.cc/BRD6-DN8U].

⁶⁰ Joel K. Goldstein, *Trump has made Pence the sycophant-in-chief. That's why he's keeping him.*, NBC NEWS (Aug. 23, 2019, 4:24 AM), <https://www.nbcnews.com/think/opinion/trump-has-made-mike-pence-sycophant-chief-s-why-he-ncna1045436> [https://perma.cc/VX32-H8K4].

⁶¹ Roy E. Brownell, II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers Part I: Text, Structure, Views of the Framers, and the Courts*, 24 KAN. J. L. & PUB. POL'Y 1 (2014) [hereinafter, *Chameleon I*]; Roy E. Brownell, II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers Part II: Political Branch Interpretation and Counterarguments*, 25 KAN. J. L. & PUB. POL'Y

them independent agents, sometimes with legal duties. Recognizing this reality, Reb Brownell, an astute vice-presidential scholar, has termed the vice president a “constitutional chameleon” who generally now functions as a presidential, executive branch subordinate but on rare occasions acts as a legislative officer.⁶²

The electoral vote count was a rare occasion when Pence was acting as a congressional, not executive, officer. The Constitution makes the vice president the President of the Senate,⁶³ empowers the Senate to elect a President pro tempore in the vice president’s absence or when he or she acts as president,⁶⁴ and assigns the Senate president certain duties regarding the electoral vote count.⁶⁵ Specifically, the Constitution provides that the Senate president shall receive the certified lists of electoral votes from each state⁶⁶ and the District of Columbia⁶⁷ and open them in the presence of the Senate and House of Representatives.⁶⁸ Although Congress is not then engaged in lawmaking, the Constitution emphasizes the legislative character of the electoral count roles by assigning them to the “President of the Senate,” not to the “vice president.”⁶⁹ The ECA confirmed custom in designating “the President of the Senate” as the presiding officer of the Senate-House meeting

294, 295–96 (2015) (arguing that vice president is now almost exclusively a part of the executive branch unlike earlier reality).

⁶² Brownell, *Chameleon I*, *supra* note 61, at 5–6.

⁶³ U.S. CONST. art. I, § 3, cl. 4.

⁶⁴ U.S. CONST. art. I, § 3, cl. 5 (“The Senate shall chuse their Other Officers, and also a President pro tempore in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”).

⁶⁵ U.S. CONST. amend. XII; *see also* art. II, §1, cl. 3 (original provision regarding electoral voting and count superseded in 1804 by Twelfth Amendment but stating same provisions regarding President of the Senate).

⁶⁶ U.S. CONST. amend XII (providing, since 1804, that electors shall make, sign, and certify lists of persons who receive electoral votes for president and vice president which they shall “transmit sealed to the seat of 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”); U.S. CONST. art. II, § 1, cl. 3 (stating original provision which governed from 1789 to 1803 and which, in this case, was identical).

⁶⁷ U.S. CONST. amend. XXIII, § 1 (providing for D.C. to select electors and act in accordance with the Twelfth Amendment).

⁶⁸ U.S. CONST. amend XII (assigning this role to “the President of the Senate” since the Amendment’s ratification in 1804); U.S. CONST. art. II, § 1, cl. 3 (stating original provision which governed 1789-1803 and in which in this case was identical).

⁶⁹ *See* Brownell, *Chameleon I*, *supra* note 61, at 31–32.

where electoral votes are counted⁷⁰ and assigning duties to that officer.⁷¹

Regardless of whether the vice president or the Senate president pro tempore acts as President of the Senate regarding the electoral count, the Constitution and the ECA conferred essentially the same powers and duties regarding the assigned roles.⁷² That parity underscores the role's legislative nature since the Senate president pro tempore has no executive status.⁷³ For the electoral vote count, the Senate president leads the senators into the House chamber and occupies the Speaker of the House's chair, with the speaker seated to the left, both surrounded by legislative personnel,⁷⁴ all associating the President of the Senate with Congress in this role.

Pence's January 6 identity was further complicated since he was a candidate for national office, as Trump's running mate, and the recipient of electoral votes. This personal interest did not make Pence unique as is discussed below.

III. THE PRESIDENT OF THE SENATE AND THE COUNTING CLAUSE

The Constitution prescribes that "the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted."⁷⁵ Many criticize the text as ambiguous,⁷⁶

⁷⁰ 3 U.S.C. § 15 ("the President of the Senate shall be their presiding officer.").

⁷¹ Joel K. Goldstein, *A Mail Addressee and Opener: The President of the Senate and Counting Electoral Votes*, 81 OHIO ST. L. J. ONLINE 203, 204–05 (2020) [hereinafter *A Mail Addressee and Opener*].

⁷² The vice president has a tie-breaking vote when the Senate is evenly divided. U.S. CONST. art. I, § 3 cl. 4. No such vote has been exercised during electoral count activities. The President pro tempore is not given that prerogative, only a vote as senator.

⁷³ U.S. CONST. art. I, § 6, cl. 2 ("and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office."). As third in line of presidential succession, the president pro tempore has an entirely remote, contingent status. 3 U.S.C. § 19.

⁷⁴ 3 U.S.C. § 16; *see also Brownell, Chameleon I, supra* note 61, at 33 (emphasizing the importance of legislative venue and surroundings).

⁷⁵ U.S. CONST. amend XII; U.S. CONST. art. II, § 1, cl. 3.

⁷⁶ *See, e.g.,* Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 479 (2010) (referring to the "critical ambiguous text"); *id.* at 480 (identifying ambiguities); *id.* at 486 (calling the text "extremely vague"); Siegel, *supra* note 20, at 551 (calling Constitution "remarkably cryptic" regarding counting and collating electoral votes); Delahunty and Yoo, *supra* note 40, at 29 (describing clause as "ambiguous"); *id.* at 52–53 ("highly indeterminate"); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 615–16 (2004) (criticizing the text for not stating

especially regarding the last seven words just quoted. The clause leaves two issues for interpretation, and although this discussion focuses on who is the counter, a preliminary and related question merits attention. Two distinct senses exist for what it means to count the votes. Most basically, counting electoral votes is an arithmetical exercise involving tallying the votes to determine whether a presidential and vice-presidential candidate receive the requisite majority for election. Yet, the Constitution and law impose requirements for electors and electoral votes, and where their validity is controversial, the arithmetical operation requires an antecedent decision regarding whether a vote should be counted.⁷⁷ The founders may have imagined “counted” to refer simply to arithmetic rather than whether to include particular votes,⁷⁸ may have overlooked the problem,⁷⁹ or may have left the question for later resolution. The electoral college’s belated entry at the Constitutional Convention compressed discussion of it, and other matters also preoccupied the delegates as they completed their work.⁸⁰ In any event, the two issues are related because who should count the votes might depend on the assignment’s scope, whether simply arithmetic to 270 or also determining which votes to include.⁸¹

who has the “last word”); *id.* at 630 (stating that text does not allocate power between President of the Senate and Congress); Brownell, *Chameleon I*, *supra* note 61, at 27 n.125 (concluding there is question where Constitution lodged power); Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 *LOY. U. CHI. L. J.* 309, 324 (2020) (referring to text as “shockingly ambiguous” and having a “frustrating ambiguity”).

⁷⁷ See Siegel, *supra* note 20, at 556 (describing the issues of who counts and the scope of the power as “[c]losely related” with the latter being more “contentious”).

⁷⁸ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1464 (1833) (“In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons who gave the votes It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.”); Colvin & Foley, *supra* note 76, at 479–80 (2010) (arguing that formulation suggests founders viewed counting as uncontroversial, ministerial exercise).

⁷⁹ Ackerman & Fontana, *supra* note 76, at 630–31; L. Kinvan Wroth, *Election Contests and the Electoral Vote*, 65 *DICK. L. REV.* 321, 324 (1961) (“The possibility that a dispute might arise with which Congress would have to deal does not seem to have been considered.”); Foley, *supra* note 76, at 325 (suggesting the clause did not consider possibility of dispute).

⁸⁰ See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 493–667.

⁸¹ Siegel, *supra* note 20, at 556 (pointing out that the issues are “integrated” since who counts might turn on the scope of that power).

Either way, this constitutional situation is not unusual. The Constitution, Chief Justice John Marshall famously wrote, provides an outline which sketches broadly, leaving particulars for future resolution, by practice or legislation.⁸² Formal constitutional amendments must meet multiple super-majority thresholds,⁸³ a characteristic that encourages leaving some matters unspecified. Leaving open items permits flexibility to accommodate changing exigencies. Constitutional customs or norms develop as practices evolve or are entrenched; custom and legislation are easier to revise than constitutional text. Moreover, constitutional architects defer details to avoid controversies that might cost support and preclude constitutional amendment.

It is impossible to discern the founders' specific intent, assuming one existed; in any event, what they did matters more than their disparate thoughts. Clearly, however, Trump's demand was not about arithmetic, but that Pence unilaterally reject, or at least defer, Biden votes.

A. The Circumscribed Nature of the Senate President's Role

1. The Constitution Does Not Make the Senate President the Presiding Officer

The Constitution and the ECA gave Pence a ministerial role with little authority regarding the electoral vote count. Notwithstanding some comment,⁸⁴ the constitutional text does not make the President of the Senate chair of the electoral

⁸² *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget that it is a *Constitution* we are expounding.”).

⁸³ U.S. CONST. art. V.

⁸⁴ *See, e.g.,* Ackerman & Fontana, *supra* note 76, at 556 (accusing founders of “technical incompetence” and an “obvious mistake” in making vice president presiding officer of electoral vote count); *id.* at 626 (stating that “it was still silly to give the sitting Vice-President a central position in the vote count” and stating that he or she was designated to “supervise” the count); *id.* at 629 (criticizing the founders as mistaken for putting vice president “in a constitutional situation marked by an egregious conflict of interest”); *id.* (calling for a constitutional amendment removing the vice president from the chair as “urgently” needed).

vote count.⁸⁵ It never so states nor do the roles it specifies (receiving and opening the certificates) so imply since they are independent of presiding. The opening chore requires a Senate president to attend, but someone can receive and open mail without occupying the center chair; the corner office occupant doesn't typically open the mail.

The President of the Senate has presided, by practice or statute. The initial September 4, 1787 draft gave the Senate, but not the House, a role in counting electoral votes and conducting a contingent election should no candidate receive a majority.⁸⁶ It provided that "The President of the Senate shall, in that house, open all the certificates; and the votes shall be then and there counted," and that if no candidate received a majority, the Senate would elect a president from the five highest vote-getters.⁸⁷ With the opening, counting, and contingent election in the Senate, not surprisingly its president would preside.

The Constitutional Convention substantially modified that proposal. An approved motion added "in the presence of the Senate and House of Representatives" after "counted."⁸⁸ Another change empowered the House to conduct the contingent election.⁸⁹ The words "in that house" were not specifically addressed but were ultimately omitted so the language proposed and ratified did not place the count in the Senate,⁹⁰ and the words "in the presence of the Senate and House of Representatives" were moved to precede "open" rather than follow "counted."⁹¹

The creation of a joint Senate-House gathering to open and count the electoral votes eliminated the earlier logic behind the President of the Senate presiding. The Convention did propose a resolution suggesting that after the Constitution was approved and presidential electors, senators and representatives elected, the senators and representatives should meet and the Senate should "appoint" a President of the Senate "for the sole purpose of receiving, opening and counting the votes for President."⁹² The Senate and House had to assemble somewhere, and meeting in the Senate chamber in 1789 made it natural that its president would

⁸⁵ Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 203; Vesan Kesavan, *Is the Electoral Count Act Constitutional?* 80 N.C. L. Rev. 1653, 1696–97 (2002).

⁸⁶ See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 494, 497–98.

⁸⁷ *Id.* at 498.

⁸⁸ *Id.* at 518; see also *id.* at 526.

⁸⁹ *Id.* at 518–19, 527.

⁹⁰ *Id.* at 521, 528.

⁹¹ *Id.*

⁹² *Id.* at 604–05, 665–66.

preside. The Senate was more elite, containing the representatives of each state, the vice president outranked the Speaker of the House and, in 1792, Congress designated the President pro tempore as first in line of presidential succession after the vice president. Accordingly, some logic made the Senate president an appropriate presider. When the proceedings moved regularly to the House, some House members resisted having the Senate's president preside.⁹³

The President of the Senate presides then, by custom and the ECA,⁹⁴ not by a textual constitutional grant.⁹⁵ No implied power, to count electoral votes or otherwise, can come from a non-existent textual grant to preside.⁹⁶

2. The Text Suggests Congress, Not the Senate President, is the Counter

The Constitution does not state that the President of the Senate counts the votes nor does it specifically assign that responsibility.⁹⁷ Some have argued that the President of the Senate exercises it,⁹⁸ although that has been a minority view

⁹³ 19 ANNALS OF CONG. 1423–24 (1809) (objections discussed in House to President of the Senate assuming Speaker's chair); 30 ANNALS OF CONG. 113 (1817) (member of House directing comment to Speaker, not President of the Senate); 37 ANNALS OF CONG. 1147–48, 1162–63 (1821) (apparently unbeknownst to the Senate, the House's resolution provided that the President of the Senate would preside over the Senate whereas the Speaker of the House would preside over the House); 1 REG. DEB. 515–16, 525–26 (1825) (joint resolution not referring to President of Senate as presiding officer).

⁹⁴ 3 U.S.C. § 15 (“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.”).

⁹⁵ Siegel, *supra* note 20, at 636 (“With the opening of the votes, the Senate President has reached the end of his constitutional role in the presidential election process.”).

⁹⁶ *But see* Kesavan, *supra* note 85, at 1697–1700 (rejecting long-standing practice that President of the Senate presides due to conflict of interest and analogy to prohibition of him/her presiding over presidential impeachment trial). I do not find this argument persuasive if the President of the Senate's role is ministerial.

⁹⁷ Colvin & Foley, *supra* note 76, at 480 (stating that the Twelfth Amendment is “unclear” regarding who has power “to count and/or determine the validity of votes”); Ackerman & Fontana, *supra* note 76, at 552 (stating the text “does not speak clearly.”); *id.* at 615 (referring to the “painfully ambiguous” constitutional text on this point); *id.* at 617 (calling constitutional text “obscure” on this point); Kesavan, *supra* note 85, at 1703 (calling counting assignment “noticeably ambiguous”).

⁹⁸ *See, e.g.,* Jack Michael Beerman & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes*, 16 FIU L. REV. 297, 298, 300, 305 (2022) (concluding

historically⁹⁹ and is deeply problematic.

The text and its context point powerfully away from the President of the Senate as the counter. Significantly, the text shifts from active (“President . . . shall . . . open”) to passive (“the votes shall then be counted”) voice when it moves from opening to counting the votes.¹⁰⁰ The text specifically assigns opening to the President of the Senate, yet not counting, simply stating that the counting shall occur “then,” right after the certificates have been opened, and with the Senate and House of Representatives as well as the President of the Senate, present. If the President of the Senate was to be the counter, the Constitution could easily have said so in the same sentence, stating that “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates and then count all of the votes” or words to that effect. The shift to passive voice has the effect and apparent intent of withholding that role from the President of the Senate.¹⁰¹ Of course, the text doesn’t prohibit the President of the Senate from being the counter. Yet, by specifically making him the addressee and opener but not the counter, the Constitution signals the powers specifically conferred as the ceiling of

President of the Senate resolves genuine disputes over certificate validity but subject to judicial review); Delahunty & Yoo, *supra* note 40, at 29, 33, 34, 52, 134–37 (Constitution gives Vice President power to resolve disputes but only in rare situations such as when state submits rival slates); *see also* Foley, *supra* note 76, at 325–26 (formulating argument that Senate president decides and referring to its pedigree without endorsing it). It is worth noting that both recent articles arguing that the President of the Senate has some decisional authority reject Trump’s claim that under the circumstances in 2021 Pence could constitutionally have rejected or deferred Biden electoral votes. *See* Beerman & Lawson, *supra* 98, at 298 (stating Pence should simply have opened the certificates and upon confirming that they were properly certified, counted them); Delahunty & Yoo, *supra* note 40, at 33–34 (under the facts in 2020–21, no dispute justified Pence’s intervention and accordingly the votes as submitted should simply have been counted).

⁹⁹ *See* Foley, *supra* note 76, at 327 (observing that argument that Congress has power to allocate power to decide disputes has had more adherents than argument that President of the Senate has power).

¹⁰⁰ U.S. CONST. amend. XII.

¹⁰¹ Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 203 (identifying the shift from active to passive voice as “signaling that the opener is not the counter); *The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules & Admin.*, 117th Cong. 6 (2022) (statement of Derek T. Muller, Professor of Law) [hereinafter Testimony], available at https://www.rules.senate.gov/imo/media/doc/Testimony_Muller3.pdf [<https://perma.cc/FKM9-ZXDQ>] (describing as “an unusual inference” that “the same subject counts votes when the voice of the verb changes in that very sentence.”).

his constitutional role.¹⁰²

Only an aggressive textual contortion could leverage a stated power to open into an implied power to count, including the unilateral power to decide whether to discard votes. Modest grants don't usually generate robust implied powers. A power to open something in the presence of others doesn't necessarily give the opener a further, more consequential power while rendering mere spectators those whose presence is required. From a provision that "the father shall open the refrigerator in the presence of his family," no one would construe the subsequent words "and the food shall then be eaten" to make Dad the only eater while the hungry spouse and children simply watch. Or "the locksmith shall open the safe in the presence of the heirs, and the decedent's assets shall then be counted" would not lead anyone to proclaim the locksmith the counter and determiner of the decedent's assets. Here, the limited grant shrinks further, by mandating the House's and Senate's presence to oversee the simple opening assignment, especially given the Constitution's inclination to divide and check power. In imposing two institutional chaperones when the Senate president opens the envelopes, the Constitution rejects the possibility that he or she assumes unilateral power over the extracted contents.

Those who envision the President of the Senate as the counter treat the Senate and House of Representatives as mere spectators.¹⁰³ But why reduce the representatives of the people and states to such a passive role? The House and Senate are not present simply to furnish witnesses, a role a few members of the bodies could have fulfilled. Significantly, the Constitution requires the presence of the two institutions, not simply their members.¹⁰⁴ Contrary to some suggestion,¹⁰⁵ the possible need to conduct a contingent election doesn't mandate that the two bodies attend the opening and count but simply that they convene once it ended. Indeed, the Constitutional Convention may have decided to propose including both

¹⁰² Siegel, *supra* note 20, at 636; Kesavan, *supra* note 85, at 1709 ("The best interpretation as a matter of text and the better interpretation as a matter of history is that the counting function is vested in the Senate and House of Representatives.").

¹⁰³ See, e.g., Beerman & Lawson, *supra* note 98, at 299 (referring to houses of Congress as "mere witnesses" to Senate president's opening of certificates); *id.* at 301 (stating members of Congress simply "bear witness"); *id.* at 301–02 (stating that members of Congress are present "as witnesses, nothing more"); Delahunty & Yoo, *supra* note 40, at 82 (stating that Twelfth Amendment does not give House and Senate any role other than as spectator).

¹⁰⁴ U.S. CONST. amend XII ("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.") (Emphasis added).

¹⁰⁵ Beerman & Lawson, *supra* note 98, at 301, 302 (attributing presence of House and Senate to need to perform contingent election).

bodies at the opening before it gave the House, not the Senate, the role of performing a contingent presidential election, a sequence suggesting that responsibility doesn't explain the two houses' presence.¹⁰⁶ The most plausible reason for the institutional presence of the Senate and the House is so they can act regarding the opening and counting, including supervising or performing them and deciding some questions that arose.

The Constitution's failure to specify a counter allows custom or legislation to operate. Although the text signals misgivings regarding the Senate president as the counter, Congress might override that presumption. Significantly, it has not done so. Even while making the Senate president the presider, Congress has not entrusted counting or decision-making to him or her. Instead, it has limited the Senate president's role, the ECA being the most enduring example.

3. History Overwhelmingly Suggests the Senate President is Not the Counter

Long-standing practice by government officials regarding institutional arrangements can clarify constitutional meaning,¹⁰⁷ and it does here. For most of American history, Congress, not the President of the Senate, has counted the electoral votes and decided whether law precludes counting submitted votes for limited reasons.¹⁰⁸ Records of early vote counts are often so cryptic as to prevent reliable judgments about what happened. Notwithstanding the paucity of materials, long-standing practice shows that someone other than the Senate president generally counted and addressed questions regarding validity.

Consistent with the suggestion from the Constitutional Convention, the first Senate elected New Hampshire's John Langdon as President pro tempore "for the sole purpose of opening the certificates and counting the votes of the electors of the

¹⁰⁶ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 526 (reporting inclusion of House as well as Senate at opening); *id.* at 527 (reporting change from Senate to House as performing contingent presidential election). *But see id.* at 517 n.2 (expressing some uncertainty regarding order of proceedings).

¹⁰⁷ *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) ("But it is conceived that a doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.").

¹⁰⁸ *See, e.g.,* Siegel, *supra* note 20, at 552 (asserting that Congress asserted control over counting by 1800).

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL
VOTES: A POST-JANUARY 6 PERSPECTIVE

several States in the choice of a President and Vice-President of the United States.”¹⁰⁹ Langdon apparently counted the votes with nearby members from both houses making lists of them.¹¹⁰ Washington’s unanimous selection obviated judgment calls.¹¹¹

This episode merits little precedential weight.¹¹² From March 4, 1789, until April 6, 1789, the Senate lacked a quorum, so apparently it took attendance and awaited arrivals.¹¹³ When the twelfth senator appeared at the ninth session, the Senate elected Langdon, one of eight who arrived a month earlier,¹¹⁴ and notified the House it was ready to open and count the ballots.¹¹⁵ The imperative to launch Washington’s presidency and the new republic presumably precluded further delay to fill procedural gaps, especially since circumstance made this event ceremonial, almost perfunctory. The first President of the Senate obviously could not be a vice president since election of such an officer depended on the opening and counting of the electoral votes. And the Senate could elect Langdon, as a specially elected Senate president for the single purpose related to the electoral vote count, at least strongly suspecting that he was not an electoral vote recipient. Accordingly, the 1789 count under these unique circumstances was not precedential.

Before the 1793 count, the houses gave tellers the role of examining and ascertaining the votes.¹¹⁶ When the houses assembled, Vice President Adams “opened, read, and delivered to the tellers appointed for the purpose” the electoral certificates.¹¹⁷ The tellers then “examined and ascertained” the votes and made a list which they gave Adams to read.¹¹⁸ Similarly, four years later, Adams “opened and

¹⁰⁹ 1 ANNALS OF CONG. 16–17 (1789).

¹¹⁰ *Id.* at 17 (stating plan for a member of senate and house to sit at the clerk’s table to list votes).

¹¹¹ *See id.* at 17.

¹¹² *See Kesavan, supra* note 85, at 1706 (arguing against attaching much weight to this precedent due to absence of president or vice president). *But see* Colvin & Foley, *supra* note 76, at 483–84 (suggesting the precedent might support a strong role for the Senate president).

¹¹³ *See* 1 ANNALS OF CONG. 15–16 (1789).

¹¹⁴ *Id.* at 16–17; *see* Siegel, *supra* note 20, at 542–43 (calling counting electoral vote Congress’s first act).

¹¹⁵ 1 ANNALS OF CONG. 17.

¹¹⁶ 3 ANNALS OF CONG. 639, 640–41, 644–45, 861, 866, 873 (1793).

¹¹⁷ *Id.* at 645.

¹¹⁸ *Id.* at 645–46; *see* Colvin & Foley, *supra* note 76 at 484 n.27 (recognizing a “slight change” in the procedure and “some diminished role for the President of the Senate” as tellers assumed a role in counting the votes, although regarding the “slight change,” stating that “it is impossible to know

delivered” the certificates to the tellers who “examined and ascertained the votes” and prepared a list which Adams read.¹¹⁹ And, in 1801, Jefferson opened the certificates and delivered them to the tellers who “having examined, and ascertained the number of votes” delivered a list to Jefferson to be read which revealed that Jefferson and Burr each had seventy-three votes.¹²⁰ Accordingly, only during the first election, when Congress could not formulate procedures, did the President of the Senate apparently count the votes.¹²¹ Since 1793, tellers have done so.¹²²

Early on, Congress assumed power to legislate regarding the electoral count. In 1792, it required the state executives to furnish electors a certificate of their authority, to be forwarded with their votes to authenticate them, and established times for the electors to be chosen and vote and for Congress to meet to count their votes.¹²³ In 1800, each house passed separate measures to create a committee to investigate and report to the two houses.¹²⁴ The House and Senate would meet in

with any certainty if this was not a mere change in word choice rather than a change in the proceedings.”).

¹¹⁹ 6 ANNALS OF CONG. 1542–44 (1797); *see also id.* at 2096 (House journal reporting that Adams opened each state’s certificates and delivered them to the Senate clerk to be read after which all papers regarding the state were handed to the tellers who “noted the contents.” The tellers then “reported the result” to Adams who stated the results of the “report” the tellers provided).

¹²⁰ 10 ANNALS OF CONG. 743–44 (1801); *see also id.* at 1023–24 (1801) (House Journal reporting that “The President of the Senate, in the presence of both Houses, proceeded to open the certificates of the electors of the several States, beginning with the State of New Hampshire; and as the votes were read, the tellers on the part of each house, counted and took lists of the same, which, being compared, were delivered to the President of the Senate . . .”).

¹²¹ *See* Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 204.

¹²² Goldstein, *Teaching Constitutional Law After the Trump Presidency*, *supra* note 17 at 428; Matthew A. Seligman, *The Vice President’s Non-Existent Unilateral Power to Reject Electoral Votes*, (Oct. 1, 2021) (manuscript at 17), <https://ssrn.com/abstract=3939020> (observing that both houses appointed tellers who tallied votes and reported it to the president of the Senate beginning in 1792); Eric Muller, *Rebutting some of the claims in the Eastman memo about Congress’s role in counting electoral votes*, ELECTION LAW BLOG (Sept. 21, 2021), <https://electionlawblog.org/?p=124703> [<https://perma.cc/PY69-F54N>] (stating that Congress has appointed tellers to count the electoral votes in every election beginning in 1793); Muller, *Testimony*, *supra* note 101, at 6–7 (suggesting the Senate and House have appointed tellers to count electoral votes beginning in the 1790s); *cf.* Siegel, *supra* note 20, at 552 (concluding that Congress asserted the right to count electoral votes “very early on, certainly by 1800.”) *cf. also* Colvin & Foley, *supra* note 76, at 481 (stating that after early period, power to make determinations passed to Congress).

¹²³ Act of March 1, 1792, ch. 8, 1 Stat. 239.

¹²⁴ *See* Wroth, *supra* note 79, at 326.

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

joint session, and if objection was made, would separate to consider them.¹²⁵ The houses ultimately disagreed on whether a disputed vote would be counted if either house disagreed,¹²⁶ but the houses implicitly agreed that Congress had power to so legislate. Although some who contest Congress's power cite the lengthy 1800 constitutional discussion of Senator Pinckney, significantly: (a) Pinckney, though arguing Congress lacked power to decide to reject votes states had submitted, identified Congress, not the President of the Senate as the counter;¹²⁷ and (b) right after Pinckney had finished, the Senate voted 16-12 to pass the measure he had denounced as unconstitutional, thereby rejecting his view.¹²⁸

During Jefferson's first term, the Twelfth Amendment was ratified in 1804 and governed that election. It preserved the language regarding the roles of the Senate president related to the electoral vote count¹²⁹ and the lengthy debates included no reported discussion of the subject. The practice of tellers counting the votes during the three most recent elections helped liquidate the meaning of the clause,¹³⁰ as arguably did Congress's consensus regarding its power to decide disputes, as reflected in the 1800 legislative effort.¹³¹ Legislation Congress passed implemented the amendment and emphasized the Senate president as the certificate opener but left the counter unspecified, arguably suggesting, consistent with practice, that Congress performed that role.¹³²

After the Twelfth Amendment, the President of the Senate continued to defer. In 1805, after announcing receipt of packets of apparent electoral votes, Vice President Burr directed the tellers "to count the votes as the Constitution and laws direct" as he opened them.¹³³ They tabulated the votes, noting some minor discrepancies.¹³⁴ "After the returns had been all examined, without any objection

¹²⁵ See 10 ANNALS OF CONG. 176 (1800) (Senate modifying House measure to require concurrent vote to accept challenged electoral vote).

¹²⁶ See *id.* at 709–10 (House refusing to accept Senate change).

¹²⁷ See *id.* at 130, 137.

¹²⁸ *Id.* at 146.

¹²⁹ Cf. U.S. CONST. art. II, §1, cl. 3 with amend. XII.

¹³⁰ Muller, Testimony, *supra* note 101, at 5 (arguing that "it was accepted" that Congress counted electoral votes before Twelfth Amendment was proposed).

¹³¹ Wroth, *supra* note 79, at 327.

¹³² *Id.* n.28 (noting that the legislation implementing the Twelfth Amendment suggests that the President of the Senate is not to count the votes); see Act of March 26, 1804, ch. 50, 2 Stat. 295; 13 ANNALS OF CONG. 1305–07 (1804).

¹³³ 14 ANNALS OF CONG. 56 (1805).

¹³⁴ *Id.*

having been made to receiving any of the votes,”¹³⁵ a teller reported the results to Burr who stated that pursuant to the report it was his “duty to declare agreeably to the Constitution” that Jefferson was elected president and George Clinton, vice president.¹³⁶ Similarly, four years later, President pro tempore John Milledge opened the certificates and handed them to a teller who read them as other tellers compared the various certificates and tallied the votes.¹³⁷ An irregularity, the lack of a governor’s certificate on one paper, was noted, but no objection was made, and Milledge read the results given him.¹³⁸

When issues arose regarding whether electoral votes merited counting during the pre-Civil War period, Congress assumed it had power to decide.¹³⁹ Although these episodes sometimes reached accommodations without resolving substantive issues, the two houses’ actions reflected a general premise that they, not the Senate president, should decide. The failure to make advance arrangements for handling an objection in 1857 to Wisconsin’s votes, which the electors cast late due to a snowstorm, did not affect the outcome but caused a procedural snafu.¹⁴⁰ The Senate president disclaimed any decisional authority,¹⁴¹ but the conundrum did not admit to an easy fix. In adopting the Twenty-Second Joint Rule of 1865, Congress “asserted unfettered discretion to reject electoral votes”¹⁴² since it provided the houses would separately consider objections and challenged votes would only be counted if both houses agreed.¹⁴³ It was used, to varying degrees, in the next three elections but was not renewed for the 1876–77 election.¹⁴⁴ Congress created an electoral commission to address disputes in the Hayes-Tilden election.¹⁴⁵

The ECA has governed since 1887. Its premise was that Congress, not the

¹³⁵ *Id.* at 56–57.

¹³⁶ *Id.* at 57.

¹³⁷ 19 ANNALS OF CONG. 1424 (1809).

¹³⁸ *Id.* at 1424–25.

¹³⁹ *See, e.g.*, 30 ANNALS OF CONG. 944–49 (1817) (Houses separate to consider how to handle Indiana’s electoral votes); 37 ANNALS OF CONG. 345–47 (1821) (Houses separate and agree that Missouri vote should be stated in the alternative); 13 REG. DEB. 1584 (1837) (resolution agreeing to state Michigan’s electoral votes in the alternative if they did not affect result); *see also* Wroth, *supra* note 79, at 327–28, n.30.

¹⁴⁰ CONG. GLOBE, 34th Cong., 3rd Sess. 652–54 (1857).

¹⁴¹ *Id.* at 644, 645.

¹⁴² Siegel, *supra* note 20, at 557.

¹⁴³ *See* Wroth, *supra* note 79, at 328.

¹⁴⁴ *Id.* at 328–33 (summarizing the history of the Twenty-Second Joint Rule).

¹⁴⁵ Siegel, *supra* note 20, at 575.

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

President of the Senate, would count the votes and decide certain questions regarding them.¹⁴⁶ It deemed the Senate president's constitutional power ended once he opened the certificates; Congress could legislate regarding what follows.¹⁴⁷ The ECA's procedural provisions were first implemented in 1889,¹⁴⁸ and it was in effect for thirty-four of fifty-nine presidential elections up to and including 2020, or 58%. Use of the ECA procedures over 130 years gave its provisions constitutional support.¹⁴⁹ On five occasions, objections have been made and governed by 3 U.S.C. § 15. Objections in 1969,¹⁵⁰ 2005,¹⁵¹ and 2021¹⁵² caused the houses to separate, whereas those in 2001¹⁵³ and 2017,¹⁵⁴ and some in 2021,¹⁵⁵ were insufficient since they were not signed by a senator as well as a House member. In 1961, Nixon stated that if Hawaii's ballots were questioned, the two houses would separate to consider the matter, indicating his recognition of the ECA.¹⁵⁶ Their agreement would resolve the question, or else the ballots the state executive certified would count pursuant to 3 U.S.C. § 15.¹⁵⁷

Trump's claim, that Pence had unilateral power to reject or return to the states certified electoral votes, rested on extremely aggressive interpretations of behavior

¹⁴⁶ *Id.* at 636.

¹⁴⁷ *Id.*

¹⁴⁸ 20 Cong. Rec. 1859-60 (1889) (noting applicability of 1887 law and applying it to contemporary electoral vote count).

¹⁴⁹ See *McCulloch v. Maryland*, 17 U.S. 316, 401-02 (1819) (discussing the role of long-standing practice in shaping constitutional meaning); Pence, January 6, 2021 Letter, *supra* note 2, ("During the 130 years since the Electoral Count Act was passed, Congress has, without exception, used these formal procedures to count the electoral votes every four years.").

¹⁵⁰ 115 CONG. REC. 146 (1969) (houses separate to consider objection to a North Carolina electoral vote).

¹⁵¹ 151 CONG. REC. 198-99 (2005) (houses separate to consider objection to Ohio electoral votes).

¹⁵² 167 CONG. REC. H77, H98 (daily ed. Jan. 6, 2021) (houses separate to consider objections to Arizona and Pennsylvania votes).

¹⁵³ 147 CONG. REC. 104-06 (2001) (houses do not separate because no senator joins in objections to Florida electoral votes).

¹⁵⁴ 163 CONG. REC. H186-89 (daily ed. Jan. 6, 2017) (houses do not separate because no senator joins various objections).

¹⁵⁵ 167 CONG. REC. H95-97, H114 (houses do not separate because no senator joins in objections to Georgia, Michigan, Nevada, or Wisconsin electoral votes).

¹⁵⁶ 107 CONG. REC. 260 (1961).

¹⁵⁷ *Id.*

of vice presidents during electoral counts in 1797, 1801,¹⁵⁸ and 1961. None support Trump's claim and the third cuts strongly against it.¹⁵⁹

Historical evidence may enhance constitutional understanding when documents are sufficiently complete to recapture the past. Yet, when records are so cryptic to require resort to attenuated inference, history disappears as a source of reliable constitutional interpretation. Despite admirable explorations, the records regarding the 1797 and 1801 electoral vote counts are too sparse to conclude that Vice Presidents Adams or Jefferson unilaterally counted electoral votes in their favor. And, even under the most aggressive interpretation, those counts don't support Trump's scheme.

In 1797, rumors suggested Vermont's votes, upon which Adams's election depended, were not legally authorized.¹⁶⁰ Adams apparently announced the result given him with Vermont's votes, reporting that he had seventy-one votes, Jefferson sixty-eight, that seventy was a majority, so that "the person who has seventy-one votes" would be president and the one with sixty-eight, vice president. The House records then recount that "The President of the Senate then sat down for a moment, and then rising again thus addressed the two Houses," stating that he had been elected president and Jefferson, vice president.¹⁶¹ Four years later, Georgia's electoral votes for Jefferson and Burr, deviated from formal requirements.¹⁶² Tellers apparently notified Jefferson of the defect, but the votes were counted. The record did not state that Jefferson sat before announcing the result. Professors Ackerman and Fontana interpret the 1797 notation that Adams "sat down for a moment" as allowing opportunity for objection to Vermont's votes,¹⁶³ especially since there was no report that Adams "sat down for a moment" when he presided in 1793 or that any other Senate president did so in the first fourteen such proceedings.¹⁶⁴ They write that Adams "would not have paused unless he harbored some doubts about his authority as President of the Senate to resolve disputed issues unilaterally."¹⁶⁵ Their characterization of Jefferson's failure to pause and other evidence appears under the

¹⁵⁸ Eastman, *supra* note 27, at 3 (invoking "historical precedent" that the President of the Senate does the counting, based on Adams and Jefferson resolving disputed electoral votes in their favor).

¹⁵⁹ See Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 205.

¹⁶⁰ See Ackerman & Fontana, *supra* note 76, at 569–76.

¹⁶¹ 6 ANNALS OF CONG. 2098 (1797).

¹⁶² Ackerman & Fontana, *supra* note 76, at 587–92.

¹⁶³ *Id.* at 580–81.

¹⁶⁴ *Id.* at 580. But see *id.* at 580 n.73 (acknowledging that the failure of the brief accounts of Adams's behavior in 1793 to state that he sat does not mean that he did not do so).

¹⁶⁵ *Id.* at 581.

misleading title “Thomas Jefferson Counts Himself into the Presidency.”¹⁶⁶

Perhaps the Ackerman-Fontana take on Adams’ pause is correct, but their conclusion is far from inevitable. Their research found no contemporary support for their inference. Other explanations are possible.¹⁶⁷ After eight frustrating years as vice president, Adams had finally achieved the pinnacle over his political and ideological rival, Jefferson. Perhaps Adams sat to savor the moment or because he was overcome by his election to follow Washington. Either sentiment would explain not sitting in 1793 (if he didn’t) and the other instances where the Senate president isn’t recorded as sitting. We can speculate why Adams sat, but we don’t have a clue what happened or why Adams’s sat and paused.

Regardless of why Adams sat, Adams may, as Ackerman and Fontana surmise, have entertained “some doubts” about whether the President of the Senate could unilaterally decide such matters.¹⁶⁸ He should have, given the text and the inconsistency of such authority with founding ideals. Although Adams apparently left no ruminations on the subject, Jefferson, as Ackerman and Fontana point out,¹⁶⁹ wrote his close ally, James Madison, before the count that “substance and not form should prevail” regarding the Vermont electoral votes and instructed Madison to express Jefferson’s view “on every occasion foreseen or not foreseen by me,” and that Vermont’s votes should be counted as cast for Adams and his running mate Thomas Pinckney.¹⁷⁰ Jefferson presumably wanted Madison to suppress any congressional objection to Adams receiving Vermont’s votes. Jefferson apparently envisioned the possibility of a deliberative process in the House and Senate involving members of Congress, so Adams may have, too.

In any event, 1797 provides no support for Trump’s position that Pence could unilaterally reject Biden’s electoral votes. The tellers, not Adams,¹⁷¹ examined the Vermont votes and included them in their report. No one objected to Adams’s

¹⁶⁶ *Id.* at 551.

¹⁶⁷ Delahunty & Yoo, *supra* note 40, at 98–99 (arguing that other explanations are possible and rejecting the Ackerman-Fontana interpretation but concluding that Adams decided issue in his favor).

¹⁶⁸ Ackerman & Fontana, *supra* note 76, at 581.

¹⁶⁹ *Id.* at 577.

¹⁷⁰ Letter from Thomas Jefferson to James Madison (Jan. 16, 1797), NARA <https://founders.archives.gov/documents/Jefferson/01-29-02-0207> [<https://perma.cc/U29L-AJAP>].

¹⁷¹ 6 ANNALS OF CONG. 2096 (1797); *see also* Seligman, *supra* note 122, at 19.

Vermont votes,¹⁷² perhaps due to Jefferson's instruction to Madison,¹⁷³ and accordingly they were included. Whereas Trump wanted Pence unilaterally to refuse to count Biden's electoral votes that Biden (and 81 million Americans) wanted counted, Adams simply read the tally handed him, to which no one objected. Absent protest, Vermont's votes were like all others.

Nor does the 1801 count show the Senate president unilaterally including contested votes. It was known that Georgia had cast its four electoral votes for Jefferson and Burr,¹⁷⁴ but the formal defect apparently only surfaced after Jefferson opened the envelopes during the joint assembly and they were examined. The cryptic House and Senate records signal nothing unusual. The Senate record reported that Jefferson opened the certificates and handed them to the tellers "appointed for the purpose" who "examined and ascertained" the votes and delivered them to Jefferson who announced the result "as delivered by the tellers."¹⁷⁵ Newspapers reported formal defects in Georgia's votes.¹⁷⁶ The defects were known, including by the three tellers, two of whom were Federalists,¹⁷⁷ and to the congressmen present.¹⁷⁸ A teller could have objected¹⁷⁹ as could a member of either body. None did.¹⁸⁰ Ackerman and Fontana note that the record does not indicate that Jefferson sat momentarily after reading the results, but that would be relevant only if Adams sat to allow objections, which is entirely conjectural, and if no other

¹⁷² See Colvin & Foley, *supra* note 76, at 485 (noting absence of objection); *but see* Delahunty & Yoo, *supra* note 40, at 98 (speculating that the lack of objection may have indicated that members of Congress conceded Adams's right to make the decision). The Delahunty-Yoo inference seems highly implausible. More likely, Jefferson's instruction to Madison not to contest the issue played a role. But Jefferson apparently thought objections might be made. See Colvin & Foley, *supra* note 76, at 485 (stating that absence of objection makes it impossible to know or speculate what would have happened if objection had been made).

¹⁷³ Jefferson, *supra* note 170.

¹⁷⁴ Ackerman & Fontana, *supra* note 76, at 598 & n.123; *see also id.* at 612–13 (finding that Georgia's electors voted for Jefferson and Burr); LARSON, *supra* note 49, at 263 (noting absence of controversy that Georgia's electors intended to vote for Jefferson and Burr).

¹⁷⁵ 10 ANNALS OF CONG. 743–44 (1801); *see also* Seligman, *supra* note 122, at 23–24 (pointing out that tellers counted votes on behalf of Congress).

¹⁷⁶ Ackerman & Fontana, *supra* note 76, at 601–02.

¹⁷⁷ Seligman, *supra* note 122, at 22–23.

¹⁷⁸ Ackerman & Fontana, *supra* note 76, at 615.

¹⁷⁹ *Id.* at 614; *see also* LARSON, *supra* note 49, at 263 (stating that no member of Congress raised the issue although some knew of the defect).

¹⁸⁰ EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 398 n.100 (2016).

opportunity to object existed, which there is no reason to conclude.¹⁸¹ The House record reports that after the tellers counted, listed, and compared the votes, they gave the list to Jefferson, who, “in pursuance of the duty enjoined upon him,” announced the vote to the two houses and that he and Burr had a majority of the votes of the appointed electors and an equal vote.¹⁸² Jefferson seemingly acted in accordance with the Senate and House resolutions which stated that the tellers would “make a list of the votes” and deliver “the result” to the President of the Senate who “shall announce the state of the vote,”¹⁸³ so the reference to him performing a duty does not support the conclusion that the Constitution imposed it.

No contemporary account apparently suggested that Jefferson ruled on the Georgia electors or acted improperly. The earliest such “evidence” apparently came in a memoir by a Burr ally/Jefferson enemy of questionable integrity thirty-five years later based on double hearsay and that misreported some information.¹⁸⁴ That’s not a very convincing basis for forming a conclusion regarding an important historical question, for reaching a constitutional interpretation, or for overturning the 2020 (or any other) presidential election. A short, mid-1870s comment of former Vice President Hannibal Hamlin referred to a “tradition” that the tellers showed the defective ballot to Jefferson, and he returned it “and decided it must be counted.”¹⁸⁵ Hamlin did not witness (and was not even alive during) the events, and his account relies on multiple hearsay from unspecified sources three-quarters of a century later.

The absence of contemporary corroboration is particularly striking given the significance of the Georgia votes. Without them, Jefferson and Burr would have tied with sixty-nine electoral votes but been one vote shy of an electoral vote majority of seventy.¹⁸⁶ Under the Constitution then, the House would choose between the top five electoral vote-getters, not just Jefferson and Burr.¹⁸⁷ The

¹⁸¹ Ackerman & Fontana, *supra* note 76, at 553, 601 (noting the absence of indication that Jefferson paused); *see also* Seligman, *supra* note 122, at 22–23 (pointing out that Annals does not state that Jefferson did not allow time for objection).

¹⁸² 10 ANNALS OF CONG. 1024 (1801); *see id.* at 744.

¹⁸³ 10 ANNALS OF CONG. 742 (1801) (stating Senate resolution); *id.* at 743, 1022 (stating House resolution); *see also* Colvin & Foley, *supra* note 76 at 486 (relying on Ackerman and Fontana, concluding that Jefferson “decisively” resolved the issue).

¹⁸⁴ Ackerman & Fontana, *supra* note 76, at 603–08.

¹⁸⁵ *Id.* at 609.

¹⁸⁶ *Id.* at 585.

¹⁸⁷ U.S. CONST. art. II, § 1, cl. 3 (providing if no candidate has an electoral vote majority, the House votes among the five with the most electoral votes).

expanded choice would have preserved as presidential options Federalists Adams, his running mate, Charles C. Pinckney, and John Jay. In the highly contentious election of 1800, Federalists would have exploited any impropriety by Jefferson. Yet, they apparently did not accuse Jefferson of abusing his authority or making a flawed ruling;¹⁸⁸ nor did newspaper accounts.¹⁸⁹ Nor did the lengthy correspondence between Adams and Jefferson apparently address the Georgia vote.

That silence speaks loudly.¹⁹⁰ If Jefferson had counted himself into the runoff, thereby excluding Federalist candidates, surely some Federalists would have lambasted him,¹⁹¹ particularly if Ackerman and Fontana are correct that four years earlier Adams questioned the unilateral authority of the President of the Senate to rule.

The 1801 election does not support Trump's argument that Pence could unilaterally reject or return Biden electors. The tellers, not Jefferson, counted.¹⁹² There was no dispute. Members of Congress could have objected; none did. Just as Adams did not resolve a dispute in 1797, Jefferson did not four years later.¹⁹³ As Derek Muller nicely put it, "it is strange to say that Adams and Jefferson 'resolved' disputed votes, as unanimous consent of Congress (or the failure to object) is a weak basis to say that these Presidents of the Senate *resolved* any controversies."¹⁹⁴

The third example, involving Nixon in 1961, confirms the extremely limited role of the Senate president. Unlike 1797 and 1801, the 1961 records are comprehensive and the "unanimous consent...failure to object" is explicit.¹⁹⁵ No imaginative

¹⁸⁸ Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 205.

¹⁸⁹ Ackerman & Fontana, *supra* note 76, at 617–18 (noting newspapers reported the event without criticizing Jefferson's conduct notwithstanding the inflamed passions of the time).

¹⁹⁰ Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 205. *See also* Ackerman & Fontana, *supra* note 76, at 612 (noting the significance of the Federalists' silence in view of the partisan rancor and close election)

¹⁹¹ Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 205; Seligman, *supra* note 122, at 24 (pointing out implausibility of such contemporary silence had Jefferson unilaterally awarded him and Burr Georgia's votes).

¹⁹² Beerman & Lawson, *supra* note 98, at 307 n.19 (stating that tellers may have concluded the Georgia certificate satisfied the requirements and may have decided to count the votes.).

¹⁹³ *See, e.g.*, Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 205 (concluding evidence presented does not support Ackerman-Fontana description); Muller, *Rebutting some of the claims in the Eastman memo*, *supra* note 122 (calling Ackerman-Fontana argument "overstated"); Seligman, *supra* note 122, at 16–17 (interpreting Ackerman-Fontana article as concluding that Jefferson did not decide the constitutional issue).

¹⁹⁴ Muller, *Testimony*, *supra* note 101, at 6.

¹⁹⁵ *Id.*

inference is needed. Initial returns suggested Nixon narrowly won Hawaii, so the acting governor certified the election of the three Republican electors on November 28, 1960, and they cast three votes for Nixon and Henry Cabot Lodge on December 19, 1960.¹⁹⁶ The Democratic electors voted for John F. Kennedy-Lyndon B. Johnson that day and transmitted uncertified votes. The third set, dated January 4, 1961, from Hawaii Governor William Quinn, recited that a court opinion had determined that the Democratic electors had achieved a 115-vote majority and accordingly certified the three Democratic electors who voted for Kennedy and Johnson.¹⁹⁷

On January 6, 1961, when the count reached Hawaii, Nixon announced receipt of three sets of certificates which he handed to the tellers, and which were read into the Record.¹⁹⁸ Nixon declared that he had “knowledge” and was “convinced that he [was] supported by the facts.” Without intending to create a precedent or to avoid a delay of the electoral vote count, he “suggest[ed]” that the electors in the third certificate be considered the properly appointed electors. “[I]f there be no objection in this joint assembly,” Nixon said he would instruct the tellers to count the three Democratic votes in the third certificate. Hearing no objection, he did so.¹⁹⁹ Nixon repeated that his action was “[w]ithout objection” and the *Congressional Record* confirmed that “[t]here was no objection.”²⁰⁰

It doesn't take the legal acumen of Justice David Souter to realize that the 1961 Hawaii example doesn't support Trump's position that Pence could unilaterally exclude electoral votes. Nixon's action differed in at least five material ways from Trump's position. First, Nixon conditioned his suggestion that Kennedy's Hawaii electors be counted on the absence of objection. Far from asserting a right to decide, Nixon recognized a single member of Congress could torpedo his suggestion. Nixon required unanimity, a higher standard than the ECA imposes. Second, Nixon's unanimous consent proposal followed a judicial determination; he didn't flout governing law. Third, Hawaii's electors were immaterial to the outcome; Kennedy and Johnson would be elected either way. Fourth, Nixon was conceding electors to his opponent, not converting Kennedy's electors. Finally, Nixon's gesture allowed the House and Senate to avoid spending time separating and determining the issue. Only if “yes” means “no” does Nixon's 1961 Hawaii action support Trump's

¹⁹⁶ 107 CONG. REC. 289 (1961).

¹⁹⁷ *Id.* at 289–90.

¹⁹⁸ *Id.* at 289.

¹⁹⁹ *Id.* at 290.

²⁰⁰ *Id.*

theory.²⁰¹

4. Structural Ideals Confirm that the President of the Senate Can't Reject Electors

Not surprisingly, the President of the Senate has played a modest, largely ceremonial role during the electoral vote count. Neither vice presidents nor other Senate presidents have made the opportunistic and audacious claims Trump made. And although a few members of Congress and academics have made robust claims for the Senate president, neither Congress nor Senate presidents have made such claims and Congress has specifically rebutted any such idea through the legislation it has passed. The idea of lodging such formidable power in the Senate president was always inconsistent with constitutional ideals, and constitutional development has exacerbated the insult.

In considering constitutional structure, it is important to recognize the enormous impact of constitutional amendments on the role of the Senate president regarding electoral vote counts. Although vice presidents have presided over thirty-seven of the fifty-nine electoral vote counts (63%),²⁰² that percentage should rise substantially since the Twenty-Fifth Amendment, ratified in 1967, now allows filling vice-presidential vacancies.²⁰³ On seventeen (of the twenty-two) times a Senate president pro tempore presided,²⁰⁴ vice-presidential vacancy was the cause, either because the president or vice president had died (fifteen times)²⁰⁵ or resigned (once) during the four-year term²⁰⁶ or because no vice president had been elected prior to

²⁰¹ Cf. Delahunty and Yoo, *supra* note 40, at 32 (noting that Nixon's action did not alter the outcome of the election which he lost).

²⁰² See Appendix 1 hereto showing the 37 times a vice president presided over the electoral vote count.

²⁰³ U.S. CONST. amend XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority of both Houses of Congress.").

²⁰⁴ See Appendix 1 (showing the 22 times a President pro tempore of the Senate presided).

²⁰⁵ The vice presidency was vacant due to presidential or vice-presidential death at the electoral vote counts of 1813, 1817, 1845, 1853, 1857, 1869, 1877, 1885, 1889, 1901, 1905, 1913, 1925, 1949, and 1965. See JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 314 (3rd ed. 2014) (listing times of vice-presidential vacancies).

²⁰⁶ John C. Calhoun resigned as vice president on December 28, 1832 prior to the 1833 count. See FEERICK, *supra* note 205, at 314. Although Spiro T. Agnew also resigned as vice president on October 10, 1973, after his replacement under Section Two of the Twenty-Fifth Amendment,

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

the 1788–89 election. From 1789 to 1920, vice presidents presided over fifteen (45%) and Senate presidents pro tempore over eighteen (55%) of the thirty-three electoral vote counts, a period in which seven vice presidents and five presidents died in office.²⁰⁷ From 1921 through 2021, vice presidents presided over twenty-two of twenty-six counts (85%), whereas the president pro tempore presided over four, three due to vice-presidential vacancy following presidential deaths and vice-presidential successions, and only one due to vice-presidential absence.²⁰⁸

The ratification of the Twenty-Fifth Amendment substantially reduces the likelihood of vice-presidential vacancies and eliminates the main reason vice presidents have not presided. Whereas the second office was vacant during seventeen of the forty-five electoral counts for more than thirty-seven of the 178 years before that Amendment (38% of the counts, 21% of the time), it was unfilled for only six months of the fifty-five years since then, less than 1% of the time.²⁰⁹ The vice presidency has been occupied during the last fourteen counts.²¹⁰ Absent a vice-presidential vacancy late in a presidential term, the existence of the Twenty-Fifth Amendment means that the office will likely be filled and a vice president will be available to preside. And when the office is filled, vice presidents generally preside over the electoral vote count. Presidents pro tempore presided only five times due to vice-presidential absence,²¹¹ and two of those instances involved a single vice president, and four occurred in the first half century.²¹²

Gerald R. Ford., succeeded to the presidency, Nelson Rockefeller became vice president under Section 2, *see* FEERICK, *supra* note 205, at 167–89, 314, and presided over the 1977 electoral vote count. *See* Appendix 1.

²⁰⁷ *See* FEERICK, *supra* note 205, at 313–14 (showing instances where presidents and vice presidents died in office); *see also* Appendix 1, for information on which computations are based.

²⁰⁸ *See* Appendix 1 (showing vice presidents presided during this period except in 1925, 1945, and 1965 owing to vice-presidential vacancy due to presidential deaths, *see* FEERICK, *supra* note 205, at 313, and 1969 due to vice-presidential absence).

²⁰⁹ Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 *FORD. L. REV.* 959, 975 (2010).

²¹⁰ *About the Vice President*, United States Senate, <https://www.senate.gov/about/officers-staff/vice-president/vice-presidents.htm> [<https://perma.cc/WY9P-UKTB>] (showing vice presidency has been occupied during time period covered by last 14 electoral vote counts dating to January, 1969).

²¹¹ *See* Appendix 1 (showing that of sitting vice presidents, only George Clinton (1809), Daniel Tompkins (1821 and 1825), Martin Van Buren (1837), and Hubert H. Humphrey (1969) missed electoral vote counts as vice presidents).

²¹² Tompkins was absent twice, and Clinton and Van Buren, once each, in the early nineteenth century.

Allowing the Senate president to determine whether to accept electoral votes offends basic constitutional ideals that influenced the founding and that have become more entrenched as the Constitution and relevant institutions have evolved. Although a single decision-maker can provide definitive resolution, that advantage can be obtained by default rules and is outweighed by the profound insult to democracy, an expanding constitutional commitment.²¹³ The vice president or Senate president pro tempore brings partisan loyalties and entrusting either with latitude to make dispositive rulings would undermine the fairness of the proceedings. When a senator or representative casts their single vote those ballots are mixed with others from the body of 100 or 435 in which they serve. It is quite a different proposition to empower a single vice president or Senate president pro tempore to make dispositive decisions regarding whether to count electoral votes. Vice presidents are, at best, a marginal factor in presidential voting.²¹⁴ Giving that person such power, especially after their ticket was rejected, as occurred in 2020, is even more inconsistent with democratic principles. As Pence rightly observed, giving the vice president such power “would be entirely antithetical” to the Constitution’s design.²¹⁵

²¹³ See U.S. CONST. amend. I (guarantees of freedom of speech, press, assembly and right to petition government); *id.* amend. XIV, §§ 1–2 (expansion of citizenship and equal protection and other rights afforded blacks and other historically disadvantaged groups, elimination of Three-Fifths Clause, and added power to reduce apportionment in response to racial discrimination in voting); *id.* amend. XV (extending right to vote based on race or color); *id.* amend. XVII (direct election of Senators); *id.* amend. XIX (women’s suffrage); *id.* amend. XX (minimizing lame-duck sessions); *id.* amend. XXIII (providing D.C. electoral votes); *id.* amend. XXIV (prohibiting poll tax); *id.* amend. XXVI (extending vote to 18-year-olds); *id.* amend. XXVII (deferring Congressional pay raises until after intervening election).

²¹⁴ See *e.g.*, CHRISTOPHER C. DEVINE & KYLE C. KOPKO, DO RUNNING MATES MATTER? THE INFLUENCE OF VICE PRESIDENTIAL CANDIDATES IN PRESIDENTIAL ELECTIONS (2020); GOLDSTEIN, THE WHITE HOUSE VICE PRESIDENCY, *supra* note 46, at 246–47, 294–96; GOLDSTEIN, THE MODERN AMERICAN VICE PRESIDENCY, *supra* note 55, at 113–33.

²¹⁵ Pence, *supra* note 2, at 1–2 (“Our Founders were deeply skeptical of concentrations of power and created a Republic based on separation of powers and checks and balances under the Constitution of the United States. Vesting the Vice President with unilateral authority to decide presidential contests would be entirely antithetical to that design. As a student of history who loves the Constitution and reveres its Framers, I do not believe that the Founders of our country intended to invest the Vice President with unilateral authority to decide which electoral votes should be counted during the Joint Session Congress, and no Vice President in American history has ever asserted such authority.”); see also Colvin & Foley, *supra* note 76, at 524 (“The view that the President of the Senate retained such a level of control and power runs contrary to other conceptions of how the legislature should work and is, in a sense, quite autocratic—not to mention

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

Giving the vice president such unilateral power offends separation of powers principles. The Senate president discharges duties in conjunction with Congress during the electoral count, but the contemporary vice president is the president's close governmental associate and an integral executive branch member. Vice presidents beginning with Nixon have found their principal assignments in the executive branch, a trend that intensified since the Mondale vice presidency as vice presidents moved into the West Wing and became close presidential advisers and agents.

The vice presidency's migration to the executive branch is not simply institutional evolution. Rather, the constitutional vision underlying the Twenty-Fifth Amendment identifies the vice presidency as an executive office.²¹⁶ Its provisions regarding filling a vice-presidential vacancy and handling presidential inability were predicated upon that constitutional understanding,²¹⁷ and a belief that presidents and vice presidents do and should have a close governmental and political relationship animates the Amendment, a vision antithetical to that at the founding or in 1804.²¹⁸

As such, the constitutional understanding of the vice presidency now differs markedly from the founding.²¹⁹ Giving a vice president a role in the electoral count did not raise separation of powers concerns when the Constitution saw the vice president as a legislative figure. But the office's move to the executive branch, as recognized by the Twenty-Fifth Amendment, gives those concerns constitutional dimension. Whatever was the original meaning of the Counting Clause in 1789 or 1804, the new separation of powers concerns provide a new reason against according the vice president such power not specifically conferred.²²⁰ Giving the vice president significant authority in counting electoral votes would entrust that responsibility to someone the Constitution recognizes as a high-ranking executive

the now-obvious potential for conflicts of interest that can result from this type of unilateral assertion.”).

²¹⁶ Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 530–34, 540 (1995) [hereinafter *The New Constitutional Vice Presidency*]; Goldstein, *Taking From the Twenty-Fifth Amendment*, *supra* note 209, at 985–91.

²¹⁷ See Goldstein, *The New Constitutional Vice Presidency*, *supra* note 216, at 530–534, 538, 540, 542.

²¹⁸ *Id.* at 532–34, 542.

²¹⁹ See generally Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 383–94 (2013) (describing legislative nature of early vice presidency); Goldstein, *The New Constitutional Vice Presidency*, *supra* note 216.

²²⁰ Cf. U.S. CONST. art I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be evenly divided.”).

branch official, thereby undermining the nature of the proceeding.

Of course, the creation of the electoral college reflected an aversion to parliamentary government, and the Constitution limited Congress's ability to choose²²¹ or remove²²² a president or vice president. Significantly, subsequent constitutional amendments have softened that original attitude.²²³ Moreover, the constitutional rejection of parliamentary government pales when compared to constitutional antipathy to government by an unchecked executive. The idea that the president's right hand could decide whether to count a rival's electoral votes need only to be stated to be rejected.

The vice president's executive branch affiliation is not the most serious conflict of interest which arises if the vice president has unilateral counting authority. Vice presidents frequently seek re-election as vice president or election as president. They have run for re-election in eighteen²²⁴ of the fifty-nine elections, presiding on fifteen of those occasions.²²⁵ Incumbent vice presidents have run for president eight

²²¹ See *id.* amend. XII (empowering electors to choose president); *id.* art. II, § 1, cl. 2, 3 (describing electoral college system).

²²² See *id.* art. I, § 2, cl. 5, § 3, cl. 6; see also *id.* art. II, § 4 (describing procedures for impeachment and removal from office including dividing the power to impeach and conduct trials between the House and Senate, requiring super-majority for conviction, and limiting offenses meriting impeachment).

²²³ See, e.g., *id.* amend. XII (expanding occasions when Senate elects vice president); *id.* amend. XX, § 3 (empowering Congress to provide for absence of president-elect and vice president-elect, including declaring a manner to select a person to act as president, and to deal with death of a candidate who would otherwise be an option in a contingent election); *id.* amend. XXV (requiring confirmation by both houses of Congress to fill a vice-presidential vacancy and bicameral super-majority support to continue the transfer of presidential power from a president involuntarily declared unable).

²²⁴ Vice presidents sought re-election in the elections preceding the counts of 1793 (Adams), 1809 (George Clinton), 1821 (Daniel Tompkins), 1829 (John C. Calhoun), 1841 (Richard M. Johnson), 1913 (James S. Sherman), 1917 (Thomas Marshall), 1933 (Charles Curtis), 1937 (John Nance Garner), 1957 (Nixon), 1973 (Spiro T. Agnew), 1981 (Mondale), 1985 (George H.W. Bush), 1993 (Dan Quayle), 1997 (Al Gore), 2005 (Dick Cheney), 2013 (Biden), and 2021 (Pence). See Appendix 2. Sherman, who is included in this listing, died shortly before the date for casting popular votes.

²²⁵ Clinton (1809), Tompkins (1821) and Sherman (who died before the popular vote) did not preside. See Appendix 2.

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

more times,²²⁶ presiding over the electoral vote counts six of those times.²²⁷ Accordingly, vice presidents have been candidates in twenty-six of the fifty-nine elections and presided over twenty-one associated electoral vote counts.

Creation of a means to fill a vice-presidential vacancy and the greater significance and visibility of the vice presidency increases the likelihood that future vice presidents will seek re-election or the presidency. After Van Buren's election as president in 1836–37, only one vice president (Breckinridge) received a presidential nomination during the 125 years until Nixon did in 1960. In sixty-two years since then, four sitting (and three former) vice presidents have done so.²²⁸ After 1840 until 1912, no vice president ran for a second vice-presidential term. From Mondale through Pence, all seven vice presidents have been nominated for a second term and presided over an electoral vote count in which they were a candidate. Vice presidents seeking re-election or the presidency presided over nine of the eleven electoral vote counts between 1981 and 2021.²²⁹ Future vice presidents will likely preside more often when candidates than in the past.

As a presidential or vice-presidential candidate, the vice president has an immediate stake in the electoral count. In either role, giving a vice president authority to decide what votes count would undermine the impartiality of the process. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment and, not improbably, corrupt his integrity," Madison wrote.²³⁰ Hamilton agreed that "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."²³¹ The Constitution restricts arrangements undermining a decision-maker's

²²⁶ Adams (1797), Jefferson (1801), Van Buren (1837), Breckinridge (1861), Nixon (1961), Humphrey (1969), Bush (1989), and Gore (2001) ran for president as sitting vice presidents. See GOLDSTEIN, *THE WHITE HOUSE VICE PRESIDENCY*, *supra* note 46, at 266–67. See Appendix 2.

²²⁷ Of those in the prior footnote, Van Buren (1837) and Humphrey (1969) did not preside over the count. See Appendix 2.

²²⁸ Nixon (1960), Humphrey (1968), Bush (1988) and Gore (2000) as well as former vice presidents Nixon (1968), Mondale (1984), and Biden (2020). See GOLDSTEIN, *supra* note 46, at 266–67 (documenting presidential nominations of all but Biden which, presumably, is known to all who have read this far).

²²⁹ Mondale (1981), Bush (1985), Bush (1989), Quayle (1993), Gore (1997), Gore (2001), Cheney (2005), Biden (2013), and Pence (2021) presided over counts in which they were candidates. Only Cheney (2009) and Biden (2017) presided over electoral counts as sitting vice presidents in which they were not candidates. See Appendix 2.

²³⁰ THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

²³¹ THE FEDERALIST No. 80 at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

impartiality²³² or involving self-dealing,²³³ and additional unstated prohibitions surely apply but were not considered by the framers,²³⁴ or they would have been viewed as implicit.²³⁵

The likelihood that vice presidents will frequently be candidates for national office should affect interpretation of the counting function. Allowing a vice president to exercise the power Trump envisioned offends the principle of fair and impartial adjudication regarding the most significant event in American government and politics. It only makes sense for the vice president to preside if the role is ministerial.²³⁶ In that instance, any conflict of interest diminishes.

The Twentieth Amendment, ratified in 1933, adds structural arguments against allowing the vice president a decisive role in the electoral count. In shortening the lame duck period and requiring the new Congress to assemble before the electoral vote count, it expressed a principle that participants in the electoral vote count and any contingent decision-making should have a current electoral mandate rather than including those defeated or whose service was ending.²³⁷ Congress reset the date for the electoral vote count following ratification of the Twentieth Amendment and, significantly, after the ECA made clear the Senate president's ministerial

²³² See, e.g., U.S. CONST. art. 1, § 3, cl. 6 (prohibiting vice president from presiding over presidential impeachment trial since he is an interested party).

²³³ See, e.g., *id.* art. I, § 6, cl. 2 (prohibiting members of Congress from being appointed to offices created or which had their emoluments increased during their service); *id.* art. II, § 1, cl. 2 (prohibiting electors from holding offices of trust or profit under the United States); *id.* art. II, § 1, cl. 7 (forbidding presidential pay to be changed); *id.* art. III, § 1 (prohibiting judicial pay reductions); *id.* amend. XXVII (forbidding Congressional pay increases to go into effect until after an intervening congressional election).

²³⁴ AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 12 (2012) (pointing out absence of evidence that founders contemplated and "specifically endorsed" the vice president presiding over his or her own impeachment trial).

²³⁵ *Id.* at 13–14 (arguing that prohibition on vice president presiding at own impeachment trial was implicit); Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L. J. 849, 865 (2000).

²³⁶ Colvin & Foley, *supra* note 76, at 481 ("If the Vice President's role is merely ministerial, there is not much of a conflict of interest as a practical matter; but if the Vice President's duty encompasses resolving potentially decisive controversies over which candidate gets a state's electoral votes, then the conflict is monumental.")

²³⁷ See, e.g., H.R. REP. NO. 72-345 at 3 (describing a purpose of the proposed amendment to allow new Congress "to count the electoral votes" and make choice if necessary); S. REP. NO. 72-26 at 4–5 (explaining that newly elected members of House should participate in contingent election).

role.²³⁸ For a vice president whose term will end in two weeks to exercise dispositive authority regarding the electoral vote count offends that principle.²³⁹

The assault on constitutional ideals is not cured by the president pro tempore rather than the vice president exercising unilateral rejection power. Giving such power to a single person is inconsistent with the system's commitment to democracy.²⁴⁰ As Pence put it in February, 2022, "Frankly there is no idea more un-American than the notion that any one person could choose the American president[.]"²⁴¹ Lodging rejection power in one senior senator certainly doesn't avoid congressional overreaching.²⁴² And excluding the House from the limited decision-making allowed is inconsistent with the constitutional text, the history at the Philadelphia Convention expanding its role, and the spirit of the Twentieth Amendment since its entire membership had just been re-elected.

The Constitution envisions a system of checks and balances to deter autocratic behavior and encourage deliberation and consensus. Trump's vision of a single interested allied party unilaterally deciding whether to accept or reject electoral votes runs afoul of basic constitutional premises.

As perverse as Trump's substantive view that Pence had unilateral power to reject or return Biden's electoral votes,²⁴³ the associated procedural steps were equally appalling. The ECA had governed thirty-three electoral counts over 134 years, yet Pence would have had to declare it unconstitutional unilaterally to avoid the numerous ways his proposed conduct violated it. Trump seemed unbothered by asking his vice president unilaterally to deem unconstitutional a measure with such

²³⁸ An Act to provide for changing the time of the meeting of Congress, the beginning of the terms of Members of Congress, the time when the electoral votes shall be counted, and for other purposes. Pub. L. No. 73-286, ch. 390, § 2, 48 Stat. 879 (1934).

²³⁹ See Goldstein, *A Mail Addressee and Opener*, *supra* note 71, at 206.

²⁴⁰ See Colvin & Foley, *supra* note 76, at 524 ("The view that the President of the Senate retained such a level of control and power runs contrary to other conceptions of how the legislature should work and is, in a sense, quite autocratic—not to mention the now-obvious potential for conflicts of interest that can result from this type of unilateral assertion.").

²⁴¹ Jill Colvin, *Pence: Trump is 'wrong' to say election could be overturned*, AP NEWS (Feb. 4, 2022), <https://apnews.com/article/mike-pence-donald-trump-election-2020-84ff467d9ff5bfaado84e274f69ac521> [<https://perma.cc/3ZFY-P8Q2>].

²⁴² Muller, *Testimony*, *supra* note 101, at 6 (calling the idea an "even greater absurdity").

²⁴³ Foley, *supra* note 76, at 318 n.23 (deeming Pence "nullifying" opponent's electoral votes without a competing certificate an "exceedingly implausible scenario"); *id.* at 321 (calling it "an especially aggressive position" that Pence could unilaterally choose which votes to accept among competing certificated slates); *id.* at 329 n.46 (calling possibility of Pence declaring the ECA inapplicable "so far-fetched" and "beyond the stretch of imagination").

deep historical roots.²⁴⁴ Nor did Trump pause because his own election in 2017 benefitted from the ECA which Vice President Biden had faithfully applied to his co-partisan's detriment.

That's not all. Having unilaterally declared the ECA unconstitutional, Pence would then have to adopt a minority view of the Counting Clause to claim unilateral power to do what had never been done before—to reject or defer his opponent's electoral votes in order to retain power. And he would have had to take that action although about 75% of Senate Republicans accepted Biden as the winner along with many Republicans in the House and all Democrats.²⁴⁵

Even had Pence complied with Trump's plot, it's hard to believe Trump would have retained the presidency for another term. If he did, he would not be the president of a democracy committed to the rule of law or the other constitutional ideals of the United States of America.

CONCLUSION

Vice presidents who discharge a ceremonial presiding role after losing the presidency or re-election may serve a positive function in uniting the country and modeling commitment to the rule of law and democratic process. After suggesting the unanimous consent resolution to the Hawaii issue in 1961, Nixon noted the symbolism of his announcement of Kennedy's victory. "I do not think we could have a more striking and eloquent example of the stability of our constitutional system and of the proud tradition of the American people of developing, respecting and honoring institutions of self-government," said Nixon.²⁴⁶ "In our campaigns, no matter how hard fought they may be, no matter how close the election may turn out to be, those who lose accept the verdict and support those who win," Nixon said.²⁴⁷ Nixon wished Kennedy and Johnson well "in a cause that is bigger than any man's ambition, greater than any party. It is the cause of freedom, of justice, of peace for all mankind."²⁴⁸ Senate Majority Leader Mike Mansfield²⁴⁹ and Majority Whip

²⁴⁴ *Id.* at 329 n.46 (stating that idea of Pence declaring the ECA inapplicable in a double-certificate situation "seems so far-fetched to [be] beyond the stretch of imagination").

²⁴⁵ *Id.* at 330 (anticipating the importance to Pence of the position of McConnell and Senate Republicans).

²⁴⁶ 107 CONG. REC. at 291 (1961).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.* at 286.

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL VOTES: A POST-JANUARY 6 PERSPECTIVE

Hubert H. Humphrey²⁵⁰ praised Nixon's magnanimous statement. Al Gore, in 2001, also acted in principled fashion²⁵¹ and adhered closely to the ECA procedures in rejecting numerous objections to Florida's electoral votes since no senator joined them.²⁵² In 2017, Biden rejected challenges to Trump's votes for not complying with the ECA.²⁵³ Pence's conduct on January 6–7, 2021 electoral count was consistent with that tradition.

In recognizing and executing the ministerial role given them, those vice presidents modeled basic principles of American constitutional democracy. Trump's conduct, before and on January 6, reflected another extreme, one inimical to American constitutional democracy.

This Essay's conclusion, that the Constitution does not empower a President of the Senate to unilaterally reject electoral votes, does not reflect misgivings regarding the devotion to constitutional principles of many recent vice presidents nor does it assume that members of Congress will properly discharge their oaths regarding electoral vote counts. Vice presidents have behaved well in their confined circumstances, whereas many senators and representatives who objected to the 2020 electoral votes provided disturbing examples of politicians who irresponsibly pandered rather than faithfully applied law and fact.

Ultimately, America's constitutional system relies on institutional checks and balances to constrain abuses of power and encourage rational deliberation and on the commitment of leaders and citizens to constitutional principle, what former Attorney General Herbert Brownell memorably termed "constitutional morality" or "constitutional propriety." Absent widespread commitment to "a certain sense of constitutional morality," Brownell counselled, constitutional arrangements cannot "guaranty against the usurpation of power or any coup d'état."²⁵⁴ January 6 provided American history's most poignant example.

²⁵⁰ *Id.* at 287.

²⁵¹ See Albert Gore, Jr., *Address Conceding the 2000 Presidential Election*, THE AMERICAN PRESIDENCY PROJECT (Dec. 13, 2000), <https://www.presidency.ucsb.edu/node/216701> [<https://perma.cc/52BS-HU5U>].

²⁵² See 147 CONG. REC. 101–02, 104–06 (2001).

²⁵³ 163 Cong. Rec. H186–89 (daily ed. Jan. 6, 2017).

²⁵⁴ *Presidential Inability: Hearings Before the Special Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary*, 85th Cong. 31 (1957) (statement of Herbert Brownell, Jr., Att'y Gen.).

Appendix 1: Who Presided Over Electoral Counts

Electoral Count

<u>Date</u>	<u>Presiding Officer</u>	<u>Title</u>	Why VP Didn't Preside	<u>Source</u>
4/6/1789	John Langdon	Sen PPT	No VP	1 Annals of Congress 16–17 (1789)
2/13/1793	John Adams	VP		3 Annals of Congress 645-46 (1793)
2/8/1797	John Adams	VP		6 Annals of Congress 1542-43 (1797)
2/11/1801	Thos. Jefferson	VP		10 Annals of Congress 743-44 (1801)
2/13/1805	Aaron Burr	VP		14 Annals of Congress 55-57 (1805)
2/8/1809	John Milledge	Sen PPT	VP absent	19 Annals of Congress 1424 (1809)
2/10/1813	Wm. Crawford	Sen PPT	VP vacant	25 Annals of Congress 79 (1813)
2/12/1817	John Gaillard	Sen PPT	VP vacant	30 Annals of Congress 944, 949-50 (1817)

**THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL
VOTES: A POST-JANUARY 6 PERSPECTIVE**

2/14/1821	John Gaillard	Sen PPT	VP absent	37 Annals of Congress 1153-54, 1164 (1821)
2/9/1825	John Gaillard	Sen PPT	VP absent	1 Register of Debates 525-27 (1825)
2/11/1829	John Calhoun	VP		5 Register of Debates 350-51 (1829)
2/13/1833	Hugh L. White	Sen PPT	VP vacant	9 Register of Debates 486,1722- 23 (1833)
2/8/1837	Wm. King	Sen PPT	VP absent	4 Cong. Globe 167 (1837)
2/10/1841	Richard Johnson	VP		9 Cong. Globe 160 (1841)
2/12/1845	Wm. Mangum	Sen PPT	VP vacant	14 Cong. Globe 277 (1845)
2/14/1849	George Dallas	VP		18 Cong. Globe 535 (1849)
2/9/1853	David Atchison	Sen PPT	VP vacant	22 Cong. Globe 549 (1853)
2/11/1857	James Mason	Sen PPT	VP vacant	26 Cong. Globe 651 (1857)
2/13/1861	John Breckinridge	VP		30 Cong. Globe 894 (1861)

2/8/1865	Hannibal Hamlin	VP		35 Cong. Globe 668 (1865)
2/10/1869	Benjamin Wade	Sen PPT	VP vacant	40 Cong. Globe 1056 (1869)
2/12/1873	Schuyler Colfax	VP		46 Cong. Globe 1296 (1873)
2/1/1877	David Ferry	Sen PPT		5 Cong. Rec. 1195 (1877)
2/9/1881	Wm. Wheeler	VP		11 Cong. Rec. 1371, 1386 (1881)
2/11/1885	George Edmunds	Sen PPT	VP vacant	16 Cong. Rec. 1514, 1532 (1885)
2/13/1889	John Ingalls	Sen PPT	VP vacant	20 Cong. Rec. 1817, 1859 (1889)
2/8/1893	Levi Morton	VP		24 Cong. Rec. 1340 (1893)
2/10/1897	Adlai Stevenson	VP		29 Cong. Rec. 1715 (1897)
2/13/1901	William Frye	Sen PPT	VP vacant	34 Cong. Rec. 2371 (1901)
2/8/1905	William Frye	Sen PPT	VP vacant	39 Cong. Rec. 2089-90 (1905)
2/10/1909	Charles Fairbanks	VP		43 Cong. Rec. 2148 (1909)
2/12/1913	Augustus Bacon	Sen PPT	VP vacant	49 Cong. Rec. 3041-42 (1913)

**THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL
VOTES: A POST-JANUARY 6 PERSPECTIVE**

2/14/1917	Thos. Marshall	VP		54 Cong. Rec. 3288-89 (1917)
2/9/1921	Thos. Marshall	VP		60 Cong. Rec. 2868-69 (1921)
2/11/1925	Albert Cummins	Sen PPT	VP vacant	66 Cong. Rec. 3509-10 (1925)
2/13/1929	Charles Dawes	VP		70 Cong. Rec. 3396 (1929)
2/8/1933	Charles Curtis	VP		76 Cong. Rec. 3639 (1933)
1/6/1937	John N. Garner	VP		81 Cong. Rec. 83 (1937)
1/6/1941	John N. Garner	VP		87 Cong. Rec. 43-44 (1941)
1/6/1945	Henry Wallace	VP		91 Cong. Rec. 90-91 (1945)
1/6/1949	Arthur Vandenberg	Sen PPT	VP vacant	95 Cong. Rec. 89-90 (1949)
1/6/1953	Alben Barkley	VP		99 Cong. Rec. 130-31 (1953)
1/7/1957	Richard Nixon	VP		103 Cong. Rec. 294-95 (1957)
1/6/1961	Richard Nixon	VP		107 Cong. Rec. 288-91 (1961)
1/6/1965	Carl Hayden	Sen PPT	VP vacant	111 Cong. Rec. 136-37 (1965)

1/6/1969	Richard Russell	Sen PPT	VP absent	115 Cong. Rec. 145 (1969)
1/6/1973	Spiro Agnew		VP	119 Cong. Rec. 378- 39 (1973)
1/6/1977	Nelson Rockefeller		VP	123 Cong. Rec. 319- 20 (1977)
1/6/1981	Walter Mondale		VP	127 Cong Rec. 192- 93 (1981)
1/6/1985	George H. W. Bush		VP	131 Cong. Rec. 588 (1985)
1/6/1989	George H. W. Bush		VP	135 Cong. Rec. 194- 95 (1989)
1/6/1993	Dan Quayle		VP	139 Cong. Rec. 312- 13 (1993)
1/6/1997	Al Gore		VP	143 Cong. Rec. 279- 80 (1997)
1/6/2001	Al Gore		VP	147 Cong. Rec. 101 (2001)
1/6/2005	Dick Cheney		VP	151 Cong. Rec. 197 (2005)
1/6/2009	Dick Cheney		VP	155 Cong. Rec. 357- 58 (2009)
1/6/2013	Joe Biden		VP	159 Cong. Rec. 88- 89 (2013)
1/6/2017	Joe Biden		VP	163 Cong. Rec. H185 (daily ed. 2017)

THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL
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1/6/2021

Mike Pence

VP

167 Cong. Rec. H76
(daily ed. 2021)

Note on Methodology: Names of Senate president pro tempores who are not identified by name in the official reports are taken from *About the President Pro Tempore/Presidents Pro Tempore*, United States Senate, <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm>.

Names of vice presidents who are not stated in the official reports can be found in *About the Vice President/Vice Presidents of the United States*, United States Senate, <https://www.senate.gov/about/officers-staff/vice-president/vice-presidents.htm>.

In 1821 and 1825, when Daniel Tompkins was vice president, the official records report that the “President of the Senate” presided. Prior to 1890, a President pro tempore of the Senate was only elected during the absence of a vice president. *About the President Pro Tempore/Historical Overview*, United States Senate, <https://www.senate.gov/about/officers-staff/president-pro-tempore/overview.htm>. Since Senate records list Senator John Gaillard as president pro tempore during the time period covering the electoral counts of 1821 and 1825, I have concluded that he, not Tompkins, presided since otherwise he would not have been designated as the president pro tempore during that period. I am grateful to Daniel S. Holt, Assistant Historian at the U.S. Senate Historical Office for a very helpful exchange regarding this methodological point although I am solely responsible for the methodology and the chart.

Appendix 2: Instances When Sitting Vice Presidents Were Presidential or Vice-Presidential Nominees

Electoral Vote

<u>Count</u>	<u>Year</u>	<u>VP</u>	<u>Office Sought</u>	<u>Presided?</u>	<u>Source</u>
	1793	John Adams	VP	Yes	3 Annals of Congress 645-46 (1793)
	1797	John Adams	President	Yes	6 Annals of Congress 1542-43 (1797)
	1801	Thos. Jefferson	President	Yes	10 Annals of Congress 743-44 (1801)
	1809	George Clinton	VP*	No	19 Annals of Congress 1424-25 (1809)
	1821	Daniel Tompkins	VP	No	37 Annals of Congress 1153-54, 1164 (1821)
	1829	John Calhoun	VP	Yes	5 Register of Debates 350-51 (1829)
	1837	Martin Van Buren	President	No	4 Cong. Globe 167, 617-18 (1837)
	1841	Richard Johnson	VP	Yes	9 Cong. Globe 160 (1841)
	1861	John Breckinridge	President	Yes	30 Cong. Globe 894 (1861)

**THE MINISTERIAL ROLE OF THE PRESIDENT OF THE SENATE IN COUNTING ELECTORAL
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1913	James Sherman	VP	No**	49 Cong. Rec. 3041-42 (1913)
1917	Thos. Marshall	VP	Yes	54 Cong. Rec. 3288-89 (1917)
1933	Charles Curtis	VP	Yes	76 Cong. Rec. 3639 (1933)
1937	John N. Garner	VP	Yes	81 Cong. Rec. 83 (1937)
1957	Richard M. Nixon	VP	Yes	103 Cong. Rec. 294-95 (1957)
1961	Richard M. Nixon	President	Yes	107 Cong. Rec. 288-91 (1961)
1969	Hubert H. Humphrey	President	No	115 Cong. Rec. 145, 171-72 (1969)
1973	Spiro T. Agnew	VP	Yes	119 Cong. Rec. 378-39 (1973)
1981	Walter F. Mondale	VP	Yes	127 Cong Rec. 192-93 (1981)
1985	George H.W. Bush	VP	Yes	131 Cong. Rec. 588 (1985)
1989	George H.W. Bush	President	Yes	135 Cong. Rec. 194-95 (1989)
1993	Dan Quayle	VP	Yes	139 Cong. Rec. 312-13 (1993)
1997	Al Gore	VP	Yes	143 Cong. Rec. 279-80 (1997)
2001	Al Gore	President	Yes	147 Cong. Rec.

				101, 114-15(2001)
2005	Dick Cheney	VP	Yes	151 Cong. Rec. 197, 243 (2005)
2013	Joe Biden	VP	Yes	159 Cong. Rec. 88-89 (2013)
2021	Mike Pence	VP	Yes	167 Cong. Rec. H76, 115(daily ed. 2021)

*Clinton was re-elected Vice President but also received six electoral votes for president, placing him a distant third behind James Madison (122 votes) and Charles C. Pinckney (47).

**Sherman died on October 30, 1912, before the popular vote was given. Nicholas Murray Butler was designated to receive the eight electoral votes from electors supporting Taft and Sherman. Sherman is included on this chart since he ran for vice president in the election but, having died prior to the electoral count (and indeed the date of the popular vote) he could neither preside nor be elected.