

From: Don Brown - Don Brown Books <[REDACTED]>
Sent: Thursday, December 24, 2020 12:08 PM MST
To: Larry Joseph <[REDACTED]>
CC: [REDACTED] <[REDACTED]>; Eastman, John <jeastman@chapman.edu>; William J. Olson <[REDACTED]>; Mark.D.Martin <[REDACTED]>; [REDACTED] <[REDACTED]>; Phillip Jauregui <plj@judicialactiongroup.com>; Pat McSweeney <Patrick@mck-lawyers.com>
Subject: Re: Draft Complaint

Thanks Larry,

Just thinking out loud, but additional guidance on the VP's role might be found in the Unanimous Resolution of the Constitutional Convention, signed by George Washington, on September 17th, 1787. Here's the relevant language.

“That the Senators should appoint a *President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President*; and, that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution. By the unanimous Order of the Convention Go. Washington-Presid: W. JACKSON Secretary.”

Snipping in the resolution for ease of convenience. The language highlighted above is in the last paragraph before Washington and Jackson sign.

DELAWARE Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jacob Broom MARYLAND James McHenry Danz of St. Thos. Jenifer Dand Carroll VIRGINIA John Blair James Madison Jr. NORTH CAROLINA Wm. Blount Richd. Dobbs Spaight Hu Williamson SOUTH CAROLINA J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler GEORGIA William Few Abner Baldwin Attest: William [REDACTED] Secretary	In Convention Monday September 17th, 1787. Present The States of New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification: and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned: that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution. By the unanimous Order of the Convention Go. Washington-Presid: W. JACKSON Secretary. * Language in brackets has been changed by amendment.
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Thus, per the Constitutional Convention, it seems that only the President of the Senate is charged with *receiving, opening, and counting* the votes of the electors. Here the ability and power to count based on this guidance seems to be vested in the President of the Senate, not Congress.

Don't know if I've interpreted out of context, or if this would be helpful. But wanted to toss it out there anyway.

Merry Christmas to all!

TNX,

Don

<http://www.donbrownbooks.com>
[https://en.wikipedia.org/wiki/Don_Brown_\(author\)](https://en.wikipedia.org/wiki/Don_Brown_(author))
Fox News OPEd's <https://www.foxnews.com/person/b/don-brown>
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#LastFighterPilot <https://goo.gl/xctXDP>
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Amazon Author Page: <https://www.amazon.com/Don-Brown/e/B001IODL9E>
New York Post Author Page: <http://nypost.com/author/don-brown/>

On Thu, Dec 24, 2020 at 1:24 PM Larry Joseph <larry.joseph@protonmail.com> wrote:

Dear all,
Here are the latest drafts of the complaint and a motion: any comments are welcome.

I've tried to fix per Bill's and Kris's helpful comments; also, for now the case is on hold. while we consider options for venue and additional plaintiffs.

Also, Merry Christmas if we don't speak before tomorrow.
Best,
Larry

*Law Office of Lawrence J. Joseph
1250 Connecticut Ave., NW, Ste. 700-LA
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: larry.joseph@protonmail.com*

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Original Message

On Tuesday, December 22, 2020 11:32 PM, Larry Joseph <larry.joseph@protonmail.com> wrote:

Thanks, Kris,
The best authority I know is the Founders' statement for the first election, described in the draft complaint as follows: "This intent is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President (i.e., for a time when there would not already be a Vice President), stating in relevant part "that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President." 2 M. Farrand, Records of the Federal Convention of 1787, at 666 (1911). For all subsequent elections, when there would be a Vice President to act as President of the Senate, the Constitution vests the opening and counting in the Vice President."

I guess there is the example (purportedly non-precedential) of the Hawaii votes in 1960. These historical examples (one by the people who wrote the Constitution) are not mere law review articles, but they are not as weighty as reported decisions either.
Best,
Larry

*Law Office of Lawrence J. Joseph
1250 Connecticut Ave., NW, Ste. 700-LA
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: larry.joseph@protonmail.com*

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Original Message

On Tuesday, December 22, 2020 9:43 PM, <[REDACTED]> wrote:

Larry,

I wish I could say otherwise, but I think that the wording of the Twelfth Amendment doesn't support the asserted exclusive authority of the VP to count (and evaluate the validity of) electoral college votes.

The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.

The sentence switches in the middle from the active voice to the passive voice. If your understanding were correct, it would have been worded "...open all of the certificates AND COUNT THE VOTES," remaining in the active voice throughout. The switching to the passive indicates that we don't know who it is that counts the votes.

And aside from that, I also think we would have difficulty convincing a court that the authority to count implies exclusive authority to determine which slate of electors is valid in the event of a dispute.

If there is some case law or significant authority (other than a law review article) to the contrary, I apologize for not being familiar with it. But if it exists, it needs to be presented, emphasized and reiterated.

Kris

Kris

From: Eastman, John <jeastman@chapman.edu>
Sent: Tuesday, December 22, 2020 6:15 PM
To: William J. Olson <[REDACTED]>; Larry Joseph <[REDACTED]>;
Mark.D.Martin <[REDACTED]>; [REDACTED]; Kris W. Kobach
<[REDACTED]>; Phillip Jauregui <plj@judicialactiongroup.com>; Pat McSweeney
<Patrick@mck-lawyers.com>; Don Brown <[REDACTED]>
Subject: RE: Draft Complaint

I agree with this. Except I put the odds at winning in either D.D.C. or CADC closer to zero, and the risk of getting a court ruling that Pence has no authority to reject the Biden-certified ballots very high. And danger that SCOTUS will decline to take as well. Best we could hope for, then, is a dismissal as non-justiciable.

Let's hold and think this through.

John

From: William J. Olson <[REDACTED]>
Sent: Tuesday, December 22, 2020 4:18 PM
To: Larry Joseph <[REDACTED]>; Mark.D.Martin
<[REDACTED]>; [REDACTED]; Kris W. Kobach <[REDACTED]>;
Eastman, John <jeastman@chapman.edu>; Phillip Jauregui <plj@judicialactiongroup.com>; Pat
McSweeney <Patrick@mck-lawyers.com>; Don Brown <[REDACTED]>
Subject: Re: Draft Complaint

External Message

Larry --

My initial view is that this is very well presented, and I apologize for being so blunt, as we all are operating under pressure, but **strategically** although this complaint could be a home run, but more likely a disaster, as it could completely tank the January 6 strategy if it resulted in a judicial determination in the District in which the Congress will meet that Pence is constrained by 3 U.S.C. Section 15.

Others may have been aware of this complaint before, but I just learned of this one hour ago.

Speaking for me, please do not file this tonight, and not until it has been thought through completely, and we have better answers to the questions below and hopefully reach a consensus.

The questions I would raise are below.

Bill

1. What is the likelihood of a favorable decision by USDC-DC?

I would say 10 percent max.

USDC-DC composition is Active judges -- 11 appointed by Dems (Obama/Clinton); 4 appointed by Republicans (Trump)

2. What is the likelihood of a favorable decision by USCA-DC?

I would say 10 percent.

USCA-DC active judges -- 7 Dems; 4 Republicans (some not good)

3. What is the likelihood of a favorable decision by SCOTUS by January 6?

I would say 0 percent.

4. What would Pence do without a declaratory judgment?

unknown

5. What would Pence do with a favorable or unfavorable declaratory judgment?

unknown

6. What do our House and Senate leaders handling the electoral college challenges think about this suit?

unknown

7. What does POTUS think? He could be at risk here.

unknown

William J. Olson, P.C., Attorneys at Law

370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615

Phone: (703) 356-5070; Fax: (703) 356-5085

114 Creekside Lane, Winchester, Virginia 22602-2429

Phone: (540) 450-8777; Fax: (540) 450-8771 <<http://www.lawandfreedom.com>>

On 12/22/2020 5:07 PM, Larry Joseph wrote:

Dear all,

Any thoughts on this draft complaint?

I think the plan is to file today, so please let me know if you will want to provide comments so that I can check back with you on timing.

Best,

Larry

*Law Office of Lawrence J. Joseph
1250 Connecticut Ave., NW, Ste. 700-1A
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: larry.j.joseph@protonmail.com*

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