

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: President Donald J. Trump

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Date: December 31, 2020

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

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

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

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

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

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