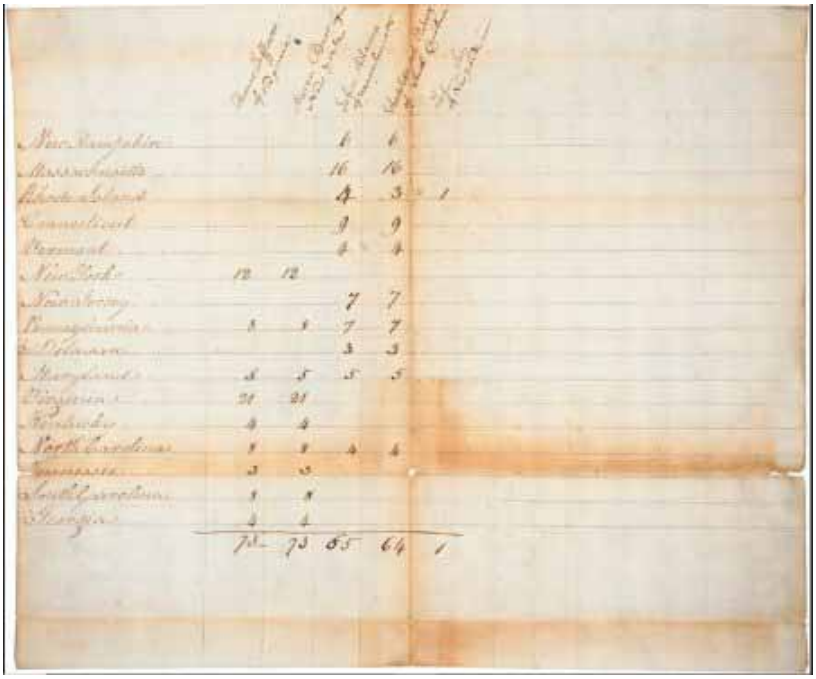
How to Avert a Pseudo-Presidency

"A WORD OF ADVICE"

by Joseph DeMaio, ©2021



Electoral Votes recorded from the presidential election of 1799 (National Archives)

(Jan. 2, 2021) — Happy New Year.

And, speaking of the impending festivities next Wednesday in the Joint Session of the Congress, where the "counting" of the 2020 General Election electoral votes to actually elect the next president will take place, some interesting new developments emerge.

Specifically, it still appears that Senator Josh Hawley intends to raise an objection to the counting of tainted electoral votes oozing out from certain battleground or "swing" states, including, among others, Pennsylvania, Georgia, Michigan and Wisconsin.

In addition, the newest development lies in a report that similar objections will be raised by Congressman Mo Brooks, with indications that as many as 140 – yes, Virginia…, 140 – additional members of the House of Representatives may also join in the objections.

The rising number of House objectors seems to be tied directly to Vice-President Pence's decision to move to dismiss the recent complaint filed against him by Congressman Louie Gohmert…, which complaint has, in fact, now been dismissed on the purported grounds that Gohmert and the other plaintiffs… wait for it… wait for it: lacked

"standing," the favorite excuse by the judiciary for avoiding dealing with disfavored issues.

On the other hand, note that the figure "140" as potential additional objectors is attributed to a "tweet" posted by one George Papadopoulos, so the actual number is more likely somewhere between 1 and 140. But there is, in addition, more discussion about precisely how the proceedings in the Joint Session might unfold.

Your humble servant has in the past suggested a course of action which Vice-President Pence, acting as the President and Presiding Officer of the Joint Session, could follow which would obviate the need for reliance on any mechanism other than the 12th Amendment, including bypassing the cumbersome, incomprehensible and potentially unconstitutional "Electoral Count Act" ("ECA") of 1887, 3 U.S.C. §§ 1-21.

To recap, a plausible argument can be made that Vice-President Pence could, at the very inception of the gathering following the call to order – and confirming the existence of a quorum *at that time* – call for a threshold "point of order" inquiring of the assembled legislators whether any of them propose to announce objections to any proffered states' electoral votes.

He would also announce that he will ***not*** be opening any of the envelopes containing the "certified" electoral votes of any of the states until all objections to a particular state's votes are heard. Pursuant to that point of order, rather than under any reliance on the protocols of the ECA, any objections to a particular state's votes would determine whether Vice-President Pence would open that particular state's envelope to have their votes counted or by him alone disregarded. If after that exercise it appeared that Slow Joe Biden's legitimate and lawfully acquired electoral vote total dropped below the 270-vote "victory" threshold, the Vice-President could proceed directly to the "one-vote-per-state" protocol authorized by the Amendment, leading to the selection of the next President of the United States.

The Democrats present in the Session; the mainstream media loons; and everyone with an IQ at or below room temperature would scream and howl that he does not have the authority to do that. With due respect, there is not only scholarly analysis to support him doing *exactly* that, there is also ample historical precedent for such a course of action. For example, law professor Edward B. Foley, the "Ebersold Chair in Constitutional Law and Director," Ohio State University Moritz College of Law, provides some prescient and useful insight into these issues.

In his 2019 law review article "Preparing for a Disputed Presidential Election: an Exercise in Election Risk Assessment and Management," 51 Loy. U. Chi. L. J. 309 (2019), he notes that the 12th Amendment's use of the passive voice regarding the opening and "counting" of the votes opens the interpretation of the Amendment as meaning that the Vice-President ***alone*** has the authority to open – or not open – and count – or not count, disregard and exclude from the "count" – any state's electoral votes.

Specifically, Professor Foley asserts: "Despite its ambiguity, or perhaps because of it, the peculiar passive-voice phrasing of this crucial sentence opens up the possibility of interpreting it to provide that the 'President of the Senate' has the exclusive constitutional authority to determine which 'certificates' to 'open' and thus which electoral votes [are] 'to be counted.' This interpretation can derive support from the observation that *the President of the Senate is the only officer, or instrumentality, of government given an active role in the process of opening the certificates and counting the electoral votes from the states.*

"The Senate and House of Representatives, on this view, have an observational role only. The opening and counting are conducted in their 'presence' – for the sake of transparency – but these two legislative bodies *do not actually take any actions of their own in this opening and counting process.* How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. *They have no constitutional way to act together as one amalgamated corpus. Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein.*" (Emphasis added)

Professor Foley then adds: "This interpretation of the Twelfth Amendment is bolstered, moreover, by the further observation that the responsibility to definitively decide which electoral votes from each state are *entitled to be counted must be lodged ultimately in some singular authority of the federal government*. If one body could decide the question one way, while another body could reach the opposite conclusion, then there inevitably is a stalemate unless and until a single authority is identified with the power to settle the matter once and for all." (Emphasis added)

Finally, Professor Foley concludes: "Given the language of the Twelfth Amendment, whatever its ambiguity and potential policy objections, ***there is no other possible single authority to identify for this purpose besides the President of the Senate***." While Professor Foley is not a Justice of the Supreme Court, his analysis makes a lot of sense. Furthermore, as discussed later, there exists the precedent of Vice-President Thomas Jefferson, sitting as the President of the Senate in 1801 and "counting" defective Georgia electoral votes, to eventually elevate himself into position to win the presidency (Thomas Jefferson Counts Himself into the Presidency (gwu.edu)).

Moreover, if Professor Foley's analysis were to be applied to the present situation, Vice-President Pence could avoid injecting into the mix the byzantine and virtually incomprehensible provisions of the ECA, including 3 U.S.C. § 15, which some have characterized as "the worst written legislation in the history of mankind."

Furthermore, reliance on the 12th Amendment alone pursuant to a Pence "point of order" at the outset would avert future challenges to the legitimacy and constitutionality of the proceedings if otherwise conducted under the ECA, and in particular, 3 U.S.C. § 15, "Counting Electoral Votes in Congress." Note that there are exactly zero – yes, Virginia,

zero – Supreme Court opinions addressing the question of the constitutionality of 3 U.S.C. § 15.

In addition to Professor Foley, a law review article entitled "Thomas Jefferson Counts Himself Into the Presidency," 90 Va. L. Rev. 551 (2004) chronicles the events in 1801 following the hotly contested 1800 general election. The scholarly work lays out in painstaking detail the trail of intrigue, political jockeying and irregularities – sound familiar yet? – whereby Thomas Jefferson, as President of the Senate, took steps ultimately leading to his winning of the presidency. While Vice-President Pence is not seeking the presidency, he is, after all, seeking another term as Vice-President.

The authors of the article posit that, in the event of a future (the article having been written in 2004) similar imbroglio, a future President of the Senate should take some advice. In addressing the process whereby Jefferson had "opened" the defective Georgia ballots, the article notes: "Nevertheless, there can be no denying that Jefferson did more than 'open' the Georgia ballot on that fateful day. *He asserted his authority to decide the merits on a contestable issue. If some future Senate President were to claim a similar authority, he or she would not be wrong in pointing to Jefferson's precedent.*" (Emphasis added)

The article's authors continue: "If he [*i.e.*, a future President of the Senate] follows Jefferson's lead, however, he cannot be allowed to go halfway. Jefferson used his power for a particular end – 'to prevent the phaenomenon of a Pseudo-president.' [footnote 260, which reads: "Letter from Thomas Jefferson to James Madison (Jan. 16, 1797), in 16 Madison Papers… at 461."] This should be the touchstone for any future President of the Senate. *If he abuses his authority to create a "Pseudo-president" by blatantly political vote counting, he would be converting Jefferson's precedent into a fig-leaf for a desperate act of political usurpation.*" (Emphasis added)

If ever there were a situation where the potential existed for ratifying a "desperate act of political usurpation" involving the creation of a "pseudo-president," it is revealed today and it does not involve President Trump. Stated otherwise, if ever there were two candidates for the offices of President – a septuagenarian who refers to his running mate as "President-elect Harris" – and Vice-President – a cunning lawyer who likely is constitutionally-ineligible, they are Joe Biden and Kamala Harris.

The reference in the Virginia Law Review article to "pseudo-presidents" and "fig leaves" is also pertinent. Webster's Dictionary defines the term "pseudo" thusly: "being apparently rather than actually as stated**:** sham, spurious."

The prospect of having as the next President of the United States a person as deeply flawed as Joe Biden, flanked by a lawyer who salivates over the potential for invocation of the 25th Amendment and becoming the Fourth Usurper in Chief (Mr. Biden would be, for a while, the third), all wrapped up in a blue satin bow giving the term "election fraud" new meaning… is a "sham" or "spurious" outcome which Vice-President Michael Pence can avert.

As for "fig leaves," they are normally referenced by analogy to the practice of concealing things otherwise desired to be hidden from view…., like the removal of ballots from under tables after election counting center observers have left or been ordered to leave; like discovering batches of pristine, unfolded ballots purporting to be "mail-in" ballots; or like blocking the windows of ballot counting rooms so observers cannot watch. And just now, we find this.

What will Vice-President Pence do? Right now, that is anyone's guess. His move to dismiss the Gohmert complaint was not particularly predictive. But your humble servant has a word of advice for the Vice-President: read up on what Thomas Jefferson did in 1801 to prevent the installation of a "pseudo-president," not to mention a "pseudo-vice-president."

Bear in mind that the 12th Amendment governs not only the proceedings to take place Jan. 6, 2021, but also states: "But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

Here's a wild thought: could it be that the Vice-President determines at the beginning of the Joint Session that, because the electoral count fate of Joe Biden is so inseparably tied to the constitutional eligibility of Kamala Devi Harris – after all, the 12th Amendment required them to run as a team – that exactly zero electoral votes for the "Harris-Bide…" oops… there I go again, relying on Joe Biden's words… the "Biden-Harris" duo can be counted, such that their vote total dips below the 270-vote threshold, triggering the "one-vote-per-state" protocol? Hmmmm….

Set your DVR's, faithful P&E readers, because the events of the Joint Session will be interesting and, potentially, historic as well.