Re: Democracy in the park

Kenneth Chesebro

Mon 11/23/2020 11:07 AM

To:Judge Troupis [redacted];Joe Olson [redacted];Dan Kelly [redacted];George Burnett [redacted]

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Hi, Jim,

Regarding "Democracy in the Park," and the matter of "indefinitely confined" voters, a quick thought -- one related to a memo I'm currently working on, explaining the legitimacy, indeed, the necessity, of the Legislature appointing an alternative slate of electors, ideally by December 8.

In some ways, the ballot harvesting in the parks, and the "indefinitely confined" scam, are more vulnerable to Article II attack than the point about the absentee ballot envelopes.

I can imagine a state court, and maybe even the U.S. Supreme Court, saying that the absentee envelopes could, without totally torturing the meaning of the statute as it existed before Election Day, be regarded as some sort of "application." I mean, we have a pretty technical argument, mostly about the chronology of voting vs. signing the envelope.

But looking back at the Rehnquist opinion in Bush v. Gore (531 U.S. at 114-15), requiring an examination of state law "as it existed prior to the action of the court," reading the statute about how alternative polling locations can be set up, one would read it as allowing overflow areas near the clerks' office, not as allowing clerks to join in league with nonprofits and Dem activists to host voting fairs, with free food, etc., in parks. It's absurd to think that the Legislature meant to permit the clerks to participate in such ballot-harvesting operations. **I mean, the summary Joe just sent around re the legal violations is mind-boggling!**

Maybe even worse, one could never read the statute allowing people too sick and homebound to obtain a photo i.d., and/or to upload it to the internet, as authorizing election officials to allow 100s of thousands of able-bodied people to vote on this basis, just to avoid the voter-id requirement.

It seems to me that if a factual record on these points can be developed, if you look in combination at all the problems with this election -- the # of ballots affected by these two points, plus all those involved with the envelopes -- it can fairly be said that **the presidential election in Wisconsin was NOT held "in such Manner as the Legislature thereof" directed**, thus violating Article II.

The point here is that the Bush v. Gore Rehnquist analysis for three justices doesn't only apply to the counting of votes (there, Florida came up with novel ways of conducting the recount which could not be squared with the statutes on the books), right? It also applies to how the election was conducted on and prior to Election Day. And here it was conducted, by Dem officials who were desperate to ramp up Dem voter turnout, in ways that cannot possibly be squared with Wisconsin statutes.

So assume we show that the Wisconsin Legislature delegated to election officials the power to allow Wisconsin citizens to appoint the electors, but the officials failed to carry out the election in the manner they were directed to do it. What's the solution?

Well, if courts can cleanly fix errors by throwing out ballots, like with the absentee envelopes, and the person who challenged the election ends up ahead, then the courts can fix the problem by certifying the challenger as the winner. That's the ideal result in Wisconsin, and it looks like we have a good chance of achieving it.

But, if courts can't cleanly fix the errors in that way (for example, assume we lose on the absentee envelope legal issue, and all we have are factually murkier objections to ballot harvesting and "indefinitely confined"), then **the Legislature should decree that the voters of Wisconsin, due to malfeasance by election officials, have FAILED TO MAKE A CHOICE in the manner directed by the Legislature which delegated the appointment process to voters**.

In that event, contrary to the view of the Wisconsin Legislative Reference Bureau, it seems clear that Wisconsin can appoint electors. The Bureau has overlooked 3 U.S.C. Sect. 2, captioned "Failure to make choice on prescribed day":

> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

On this view, if we can show that election officials in Wisconsin, in a material way, failed to carry out the presidential election in the "Manner" that the Legislature "direct[ed]," as the Legislature was authorized by Art. II to insist on, then it means that the citizens of Wisconsin "failed to make a choice" on Election Day, and the Legislature is free to appoint electors.

Doing so doesn't disenfranchise voters. It's clear that citizens have no right to vote for president. And it's clear that if a Legislatures chooses to let citizens vote for president, the voting has to be done in the manner the Legislature directed -- not in some other manner, manipulated by a particular political party for partisan advantage. So it logically follows that partisan election officials go too far over the line, the election just doesn't count.

Of course, we don't currently know whether courts will ultimately rule that the election was not conducted in the way the Legislature directed. Such a determination, especially if by the U.S. Supreme Court, might not come until much later, even after the electors must vote on December 14. So the prudent thing would be for the Legislature to at least vote an alternative slate of electors as a backup, and for the Trump-Pence electors to cast electoral votes and send them to D.C. on December 14. This would preserve the ability of Trump and Pence to benefit from an eventual U.S. Supreme Court ruling that the Wisconsin election was held in violation of Article II, so that the certification of Biden and Harris as the winners is constitutionally invalid. In that event, the only electoral votes validly before Congress would be the Trump-Pence slate.

What I like about this setup is that there would be no effort to get the Legislature to override the will of the people. The Legislature would merely active proactively, to fill a possible vacuum that might end up existing, if a court later rules that the election itself violated Article II. For the Legislature not to act in this way would create the risk that on January 6, Wisconsin would be unrepresented in the Electoral College, because there would be no valid electoral votes to be counted.

The above is very, very rough, but I wanted to get it out to you asap for your consideration, as it may bear on how the "Democracy in the Park" and "indefinitely confined" points are developed.

Ken

From: Judge Troupis [redacted]
Sent: Monday, November 23, 2020 9:21 AM
To: Joe Olson [redacted]; Dan Kelly [redacted]; Kenneth Chesebro [redacted]; George Burnett [redacted]
Subject: Democracy in the park

18000 votes were cast at Democracy in the park. We want to argue to toss them. City Attorney will set exact #. We argue against counting tomorrow.
Joe, please circulate all our arguments and background. Please set 11:30 for a call Joe.
Jim

Sent from my iPhone