WRITTEN STATEMENT OF GREGORY F. JACOB

Hearing before the Select Committee to Investigate
the January 6th Attack on the United States Capitol

U.S. House of Representatives

June 16, 2022

It was the honor of a lifetime to serve a Vice President whose devotion to the Constitution, and whose commitment to his Oath before God to uphold it, were the cornerstone by which he daily faithfully discharged the duties of his Office.

I first spoke to Vice President Pence about the Twelfth Amendment and the Electoral Count Act in early December 2020. The Vice President's first instinct was that the Framers of our Constitution, who abhorred concentrated power, would never have entrusted any one person with the unilateral authority to alter the outcome of a presidential election—particularly not a person who is on the ticket. The Vice President never wavered from that view.

I will briefly summarize the legal work my office performed at the Vice President's direction in December 2020 and January 2021. We analyzed the various theories of unilateral vice presidential power that were presented to us, and we explained the reasons those theories were inconsistent with the Constitution and the law. We successfully resisted, with the assistance of the United States Department of Justice, two lawsuits filed against the Vice President that sought to compel him to exercise imagined extraconstitutional authority to personally determine whether duly ascertained electoral votes should be counted. We engaged with the Senate Parliamentarian to revise the parliamentary scripts for the January 6, 2021 Joint Session to ensure that they complied fully with all requirements of the Electoral Count Act, and transparently explained to the viewing public that only one duly ascertained slate of electors had been received from each State. We also assisted the Vice President with drafting the statement he released prior to the electoral vote count explaining to Congress and to the American people the basis for his firm conclusion that the Vice President's role in counting electoral votes is purely ministerial.

By the time the first lawsuit was filed against the Vice President on December 23, and well before John Eastman appeared on our radar screen on January 4, my legal team had pulled together and analyzed the records for every electoral vote count in our nation's history, the history of the disputed Election of 1876 and the Electoral Commission that was created to resolve it, the Electoral Count Act of 1887 and its legislative history, and every law review article written on the subject of the Electoral Count Act's constitutionality. Our office was determined that no one would ever be able to say that the Vice President's conclusion about the limits of his constitutional authority was the result of a failure to examine relevant law, history, or practice. I want to thank Matt Sheehan, Lindsay Pickell, Devin Petricca, and Ugonna Eze for their service to the Vice President and our country. Thanks to their diligent work through late nights and holidays, no lawsuit or lawyer was ever able to confront us with a legal argument or an

asserted account of history with which we were not already intimately familiar, which proved critical in the fast-paced days leading up to January 6.

I hope the Vice President found the legal advice my staff and I provided him helpful as he handled a charged constitutional moment, but it was not determinative of the outcome. Vice President Pence loves the Constitution. He studied the law and history, he read law review articles, he ably rebutted John Eastman's arguments. He concluded that although the relevant text of the Twelfth Amendment is inartfully drafted, the Framers could not possibly have intended to empower the Vice President to reject duly ascertained electoral votes, or to unilaterally suspend the constitutionally mandated vote counting proceedings. When asked last year by a student at an event at the University of Iowa to name the person who told him that he was required to certify the 2020 election, the Vice President accurately answered: James Madison.

This Committee is considering changes to our statutory laws to prevent a recurrence of January 6. I agree that changes should be made. The truth is, however, that our enacted laws were already clear that the Vice President did not possess the extraordinary powers others urged upon him. New statutes will make little difference if we do not first inculcate in our citizens and demand in our leaders unfailing fidelity to our Constitution and the rule of law. That means you always follow them, even when it hurts. You stand up for them, even where there is a cost.

We are losing—I pray we have not lost—a common devotion to the first principles that have bound our people together for more than two centuries, and have made America a beacon of hope and freedom in the world. Our Declaration of Independence recognizes as a self-evident truth that our God-given and unalienable rights to life and liberty depend for their security on the just administration of the laws in accordance with the consent of the governed.

The law is not a plaything for Presidents or judges to use to remake the world in their preferred image. Our Constitution and our laws form the strong edifice within which our heartfelt policy disagreements are to be debated and decided. When our elected and appointed leaders break, twist, and fail to enforce our laws in order to achieve their partisan ends, or to accomplish frustrated policy objectives they consider existentially important, they are breaking America. We should not feign surprise when our citizens treat the law and the Constitution with the same level of respect that our leaders do.

So in considering changes to our laws governing the counting of electoral votes, I respectfully suggest that Congress should with humility study and acknowledge how it has fulfilled its own constitutionally prescribed role over the last 20 years. Memories of the 2020 election are fresh, but history records that in four of the last six presidential elections—a majority of the presidential elections in the last two decades—efforts were made in Congress to reverse election outcomes. On January 6, 2001, several Members objected to counting the electoral votes of Florida. On January 6, 2005, a broader effort was made to reject Ohio's electoral votes. There was no evidence of

fraud in Ohio. Yet dozens of Members voted to disenfranchise Ohio's voters, and more than 120 others abstained from that vote, placing political self-interest ahead of the rights of Ohio's voters to have their votes counted. On January 6, 2017, Members lodged objections to counting the electoral votes of Alabama, Florida, Georgia, Michigan, Mississippi, North Carolina, South Carolina, and Wisconsin.

The objectors to the elections of 2000, 2004, and 2016 likely did not believe their efforts to reverse State outcomes would succeed. They were simply using the Joint Session and the Electoral Count Act for purposes of political theater, without giving much thought to their constitutionally appropriate role. But by the time January 2021 arrived, John Eastman was able to point to a well-worn road suggesting that momentous decisions about the outcome of presidential elections can legitimately be made in the United States Capitol on January 6.

The events of January 6, 2021 have, I hope, settled any lingering questions about the Vice President's constitutionally appropriate role in certifying the results of presidential elections. The text, structure, and history of the Twelfth Amendment, comprehensively and fairly considered, supply a decisive answer, as does the Electoral Count Act of 1887. As Vice President Pence has said: "Frankly, there is almost no idea more un-American than the notion that any one person could choose the American President."

As this Committee considers recommending legislative changes concerning Congress's own role in certifying presidential elections, I commend to it the text of the Twelfth Amendment, and the specific and limited duties that Congress is assigned. I also commend to it Federalist No. 68. There Alexander Hamilton wrote that the Constitution does "not ma[ke] the appointment of President to depend on any preexisting bodies of men," which he warned might be subject "to cabal, intrigue, and corruption." For precisely this reason, the Constitution prohibits Senators and Representatives from serving as electors. Hamilton also warned that any body meeting in one location to choose the President would be exposed to "heats and ferments" that could "convulse the community with [] extraordinary or violent movements."

How prescient.

I'll close by borrowing a few words that were used by James Madison 210 years ago when he endorsed a national call to prayer at the outset of the War of 1812: May Almighty God guide our councils, animate our patriotism, and inspire our nation with a love of justice and concord.