SECTION TWO TRANSCRIPT

Tom Klingenstein / John Eastman Interview

**Tom Klingenstein:**

John, you've made the case for why you believe the election may have been stolen. So now the question is, was there a legal remedy? That's what we shall discuss now. The biggest question is who counts the electoral votes?

I wanna start by reading the relevant part of the 12th Amendment. It's just two sentences. It follows exactly the words in Article Two of the Constitution. And the words read, “The President of the Senate shall in the presence of the Senate and House of Representatives open all certificates and the votes shall then be counted. So, John, make sense of that for us.

**John Eastman:**

Well, one thing's very clear and you, you rightly point out that that language in the 12th Amendment. Is identical to the original language in Article Two. And so we have to look at the, uh, the Convention debates and the ratification debates over the original Constitution.

One thing's very clear from those debates, they didn't want Congress having a role in the choosing of the President because that would destroy separation of powers. It would make the President subservient to Congress or the legislative branch. And also very clear from that text, it's unambiguously, the Vice President is the one who opens the certificates.

What's ambiguous is who then counts 'em, because as you rightly point out, we shift from the P active voice - the Vice President opens all the certificates - and then they shall be counted. That's in the passive voice. But, but as legal scholars, John Yu and Robert Della Hunte and Gary Lawson and Jack Bierman have all pointed out, the only person that has an active role in the whole process is the Vice President, the President of the Senate.

Um, Congress is there to be present in the presence of the House and Senate.

**Tom Klingenstein:**

Is that right?

**John Eastman:**

The Vice President counted and we, we know that. Uh, from, you know, cause of course the first election there was not gonna be a sitting Vice President who was already the President of the Senate. So when the Convention sent the Constitution to the States for radification, it included a cover letter and says on the first one, “The first thing you'll do is you'll appoint somebody to serve as the President of the Senate, and he'll open and count”

That's the only evidence we have from the era of, of what they thought about this.

**Tom Klingenstein:**

So we're pretty sure that the intent of the Founders and the drafters was that the Vice President counted. You are an originalist. So, I would think that settles it.

**John Eastman:**

Well, I would think so too. Uh, of course, uh, the question is, does he have to count all the certificates that show up?

And of course, that's even among originalists, a dispute. Uh, or is he, uh, does he have some judgment role, some discretion in determining that I'm not gonna open and then count certificates that are obviously fraudulent or that should not have been certified.

**Tom Klingenstein:**

What is the rationale that Constitutional scholars employ to now argue that as Congress that counts, even though it seems pretty clear that the original intent was for the vice president.

**John Eastman:**

Well, I think two things. One, Congress, like I said, tries to take power to itself. But second, there's this, um, ih, intuition that we couldn't possibly give such power to a single person who might be one of the candidates for the office.

Um, this self-interested aspect of the Vice President serving as the president of the Senate and may well be a candidate for President or for Vice President, making a judgment in his own cause. And so there's an intuition there.

**Tom Klingenstein:**

And don't you think that they would've been aware of whatever conflict existed?

**John Eastman:**

Well, so it's important to realize that this dispute about the Electoral College Act and the language of it, comes very late in the day of the Federal Convention. They were involved all summer long, that hot summer in Philadelphia with much bigger questions, big states versus small states - the lurking question of slavery, those kind of things.

And we, we settle on the electoral college late in the day and all the intricacies of it that we've had to deal with for the last 200 years are no part of the discussion.

**Tom Klingenstein:**

I wanna expand a little bit on the concern about a conflict between the President and Congress. So what was it specifically that they were worried about?

**John Eastman:**

Well, they didn't, they didn't wanna set up a parliamentary system where the President, the

Chief Executive owed his existence in continuing time in office to the sign off from the Parliament or the Congress. They wanted separation of powers. They thought our freedom would be enhanced if the powers the main executive and the legislative powers were not in the same hands. So, they deliberately denied Congress any role in the choosing of the President, even in the case of a contingency election where nobody wins an outright majority of electoral votes, and it gets thrown to the House of Representatives to decide.

It's not thrown to the House with everybody having one vote. It's thrown to the House with each state having one vote, which un under the circumstances was, was as close to you could get as a Federalism solution rather than a national legislature solution solving it.

**Tom Klingenstein:**

Now, it's it too simplistic to say, well, Congress would appoint the President, if the President vetoed X, Y, Z bill, is that the kind …

**John Eastman:**

Or, or didn't veto our pay increase or you know, whatever kind of pressure they want. Or,or more dangerous if he knows he owes his office to the Congress and he wants to run for le reelection, during the whole course of his four years, he's gonna be trimming his sales to do what Congress wants rather than what he and his independent judgment, his chief executive thinks is appropriate.

**Tom Klingenstein:**

And the Supreme Court has never ruled on this question.

**John Eastman:**

It's never ruled on this question.

**Tom Klingenstein:**

Okay, now let's get back to what I think is the biggest hurdle that you mentioned and that is the conflict of interest. I think most of us think it's so terribly implausible that one man or woman would make a choice that could, in effect, elect his party, and as you said, um, might even elect himself into office if he were running for President. Now that justifies common sense.

**John Eastman:**

Well, I think so. And so let's look at it in the Founder's perspective. One of the phrases you read in that statutory or that Constitutional text was in the presence of the Senate in the House of Representatives. They fully thought that the fact that whatever was gonna be done here by the Vice President had to be done in public in the presence of the House and Senate would be a sufficient check against anything untoward being done by the Vice President.

The second thing that people for forget is if the Vice President is in fact an interested party, and by that I mean directly in interested, he's one of the candidates, not just of, of the same political party as the candidate because that's gonna exist every time. Um, but as the candidate himself, he always has the option of recusing himself.

And the next person in line, the President ProAm of the Senate, would step up and take on the role. Uh, and so those two mechanisms were considered sufficient check. If they'd thought about it or talked about it, uh, I believe for them to have, uh, to have, you know, still recognized that the Vice President rather than Congress would be the, the ultimate decider or judgment here.

**Tom Klingenstein:**

 You know, again, I wanna be very clear on this point. Um, today we find it absurd that the VP, by rejecting electoral votes, could elect his own party and himself. And the Founders counted very heavily on the honor of the Vice President, and that was very important. Are there other instances in the Constitution that rely so heavily on the honor?

**John Eastman:**

 (heavy sigh… ) You know, I, I mean, uh, we don't have any other ex example like this. I think, uh, this is really a, a unique revision~~.~~

**Tom Klingenstein:**

Now we're talking about, basically the check is honor. How about the Courts? Do they provide a check?

**John Eastman:**

Well, uh, I think there, there are, uh, significant legal scholarship, uh, after Bush versus Gore that argued that the Supreme Court had no role in adjudicating that decision.

**Tom Klingenstein:**

… and that's your position.

**John Eastman:**

That's my position.

**Tom Klingenstein:**

One logical choice to count votes, I think is the, uh, Chief Justice and did they consider the Chief justice?

**John Eastman:**

We don't have any indication from the debates in the Convention that they consider the Chief Justice. And again, so just kind of put the Constitution Convention begins in in May, May 25th, uh, and ends on September 17th. This discussion about the electoral college and the language of the electoral college doesn't occur till the first week of September, very late in the day, and a lot of the bigger questions have now been solved, and they're just kind of filling in the pieces rather quickly. And if anybody had seen the problem of the Vice President, uh, having an oftentimes self-interested role to play here, uh, nobody talked about it. If they had seen that, maybe they would've made the Chief Justice preside over the joint session.

**Tom Klingenstein:**

Now, the other option, I think, which some people have argued is the states let the states decide, and Congress or the VP, whoever does the counting, uh, selects, approves the slate that's been submitted by the state, unless there are two slates.

**John Eastman:**

I think everybody agrees that if there are two slates, the question is, if there's only one slate, but it's obviously fraudulent, does that power of discernment, of judgment also exist? And in my view, it does and it must.

**Tom Klingenstein:**

So, so give an example.

**John Eastman:**

So in the last election, we had two states that Trump won pretty clearly, no North Carolina and Kansas, but they were both, uh, headed by Democrat governors. Let's suppose despite the popular vote, clearly going for Trump, that the Governor of that of Kansas had certified the Biden electors and sent them, and there's only one slate of electors up there.

Is it really the case that the Vice President of the United States, in exercising powers that we've just now conceded, has no ability to make a judgment that these are fraudulent and I'm not gonna ratify a fraudulent certification.

**Tom Klingenstein:**

There is a counter-argument, I think. All these states have some process to resolve disputes, so most of the time they'll settle things. Now, there could be fraud. There could be a mistake. But those are vulnerabilities that we have to live with because look, every arrangement has vulnerabilities, and so the argument is that having the states decide has the fewest number of vulnerabilities.

**John Eastman:**

So, so let me change my Kansas hypothetical just a bit. Let's say that Trump won, but it was a close election and he won on the basis of 20,000 votes that the Governor in collusion with the Secretary of State is to k able to keep hidden away, and we don't discover those extra 20,000 votes that put Trump over the top, until the eve of the joint session of Congress. But those votes are discovered, and then it's patently cleared everybody that Trump won and the Governor was involved in a fraud and the state on that and wasn't able to resolve it in the, in the quick turnaround time.

Is it really the case that the Vice President has to ratify that acknowledged, admitted open to everybody, fraud and I think no. And then the question for us is, was there anything like that at issue here? And I believe there was.

**Tom Klingenstein:**

80 years later, we passed the Electoral Count Act, which said explicitly, Congress counts.

**John Eastman:**

 Congress counts. Congress can object. Congress can reject, elector. All of those things, in my view are usurpatience of power that was not given to Congress by the Constitution. And by the way, Congress's recent attempt to amend the Electoral County Act does, I think, two important things. First of all, it assumes that the prior version had enough ambiguity that arguments like mine had some plausibility.

And then the second, they make the unconstitutional problem worse because they, uh, take even more powers among themselves, which I think as an original matter, the Constitution clearly barred.

**Tom Klingenstein:**

But basically your argument would hold even under amended Electoral Count Act.

**John Eastman:**

Yes, indeed.

**Tom Klingenstein:**

But of course, you read a lot of Law Review articles and, uh, most of those, not all of them, but some of the modern day ones, um, argue that it's Congress that counts. But, they all, all of them leave open the possibility that the VP counts.

**John Eastman:**

Right. In fact, one of the leading articles, remember nobody looked at this stuff for a century until after Bush versus Gore, and then there's a whole uh, uh, flurry of scholarship. But one of the, one of the leading articles, uh, one of the first articles out of the box admits that for the first 50 years, everybody agreed that you know, that the decisions here are vested in the Vice President and in the state legislatures.

**Tom Klingenstein:**

So what we've talked about is the text a little ambiguous, the intent which you think is pretty clear, uh, I don't think there's much in the way of legal precedent. So then we go to historical precedent. How does that weigh?

**John Eastman:**

In the election of 1796, there was a dispute about the legality of the electors from New Hampshire.

***\*\*Correction: The electors were from Vermont, not New Hampshire.***

John Adams counted. He was the Vice President at the time. He counted those electors and put him over the top to win the presidency. In 1800 uh, there was not only a dispute, but pretty clear facial invalidity of the electors from Georgia. They didn't individually sign as the, as the law required. Jefferson counted those on his own, made that unilateral determination. He didn't put it up to a vote of Congress to decide whether we should count these or not.

**Tom Klingenstein:**

There are scholars on the other side that read the elections of 1796 and 1800 a little differently as evidence that Congress counts, not the Vice President.

**John Eastman:**

I, I will give a brief

**Tom Klingenstein:**

Okay.

**John Eastman:**

A brief view of it because, uh, uh, the, the claim is that, well, Adams kind of paused to let Congress raise an objection if they want. Nobody objected. So then he proceeded implicitly, uh, acknowledging Congress's authority to override his decision if they wanted to. I think that's reading a lot into the silence, uh, in the debate. And they make a similar argument, uh, about the election of 1800

**Tom Klingenstein:**

Now, we've been talking about who counts. But an equally important question, regardless of who you think counts, is what I would call a question of jurisdiction. For example, say Biden wins the popular vote in Pennsylvania, which appo appoints Biden electors, but then the Biden electors are bribed to vote for Trump, which they do. So, in this case, everyone's clear, regardless of who's counting that, those bribed votes don't get counted. That's part of the electoral vote, but that's not what we're talking about here. What we're talking about is the popular vote and you, unlike most others, think the Vice President can reach into the popular vote, so if there are irregularities, as is the case here, he can make a judgment and potentially reject electors based on an illegal popular vote.

**John Eastman:**

So let's change it and take out the bribery of the electors and let's change it to bribery elect election officials allowing unregistered voters to vote in violation of state law.

And it clearly tipped the balance on the election.

**Tom Klingenstein:**

Right. But that's where your detractors would say the Vice President can't go.

**John Eastman:**

So the, the, the, the, the one, my one disagreement with professors John Yu and uh, Robert Della Hunt on this - he says, if the legislature in the state hasn't done anything about it, the Vice President has no authority to do anything about it.

**Tom Klingenstein:**

Right.

**John Eastman:**

Let's, let's change the facts a little bit. Uh, or let's, let's not change it. In Pennsylvania, there was no legislature who could do anything about it, because at the end of November, the outgoing legislature ends and the new legislature isn't sworn in until January. So even if they wanted to do something about it, there's no legislative body to meet and do something about it.

Are the Vice President's hands tied to let this obvious fraud go through and put a guy into the White House who quite clearly didn't win the election, uh, as a result? And my answer is no. Other people have said, eh, there's nothing we can do about it. I, I don't think the Constitution is that lacking in the ability to deal with blatant fraud. It's gotta be blatant though. I, you know, I would not let this be used as a pretext. Oh, well, you know, they let some people's signatures go through without, and I'm gonna decide that, uh,

**Tom Klingenstein:**

Right.

**John Eastman:**

You know, whatever. I mean, it has to be blatant and illegal. And remember, let's go back to one, the other legal issue here we haven't talked about yet, but kind of sets the stage for this. Article Two of the Constitution assigns to the state legislatures

**Tom Klingenstein:**

Right

**John Eastman:**

… the authority to direct the manner of choosing electors. When state election officials violated those election laws, they were acting not just illegally under state election law, but unconstitutionally in the conduct of a Federal election. Uh, and that meant the election was void initially. As a result, and, and, uh, I, I, you know, in order to uphold the Constitution, I don't think everybody should just sit on their hands and say, oh, we can't do anything about it.

**Tom Klingenstein:**

Now, as we've said, you did not advise the Vice President to reject. You advised him to give the state legislatures a few more days to evaluate what happened.

**John Eastman:**

So, so we have an example of a delay, although it was, uh, implemented by Congress rather than the Vice President. In 1876, there were dual slates of electors from several states that called the election into question. They created a commission. There's no authority specified in the 12th amendment for the creation of a commission. But they delayed for several months while the commission did an investigation and assessed which of the two slates should be given count.

So we have an example of this in our history, even though in that instance, I think it was

Congress usurping power,

**Tom Klingenstein:**

Right

**John Eastman:**

…that belonged to the Vice President. But if Congress could do it without any claim of power, certainly the Vice President who has, as an original matter, the judgment authority to decide which ballots to open, I think was important.

**Tom Klingenstein:**

So to press the delay question, in the Electoral Count Act I believe it says something to the effect you have to decide on election day - there are a few exceptions - states which require, which may have runoffs, I think natural disasters, but except for those, the argument there is make a choice on election day, you don't get to delay.

**John Eastman:**

Well, so, so there are two provisions. One's the choice on election day. The second is, what happens on January 6th during the joint session of Congress? So let's take the first one. Uh, it's, uh, currently codified in Title Three, Section Two of the United States Code. And it basically says, you know, you gotta, you've gotta meet on the first Tuesday after the first Monday in November, what we call election day. Uh uh, and the exception is if they fail to make a decision on that day, the legislature gets to decide.

**Tom Klingenstein:**

I see.

**John Eastman:**

Now, during the debate, and by the way, this, this is not part of the Electoral County Act of 1887. This is adopted in 1845 after a pretty fraudulent election in 1840. And so people would vote in one state and then they'd roll over to another state, uh, and cast votes there. Uh, and it was, it was pretty nefarious. And so, Congress put a stop to it by saying we're gonna have a uniform election day.

Um, uh, the example given by the member of Congress that introduced this language was his own state of Georgia required a majority vote in order to win the election. And so if you had somebody just win a plurality like the Georgia Senate runoff in 2020, you have to go to a second runoff election.

**Tom Klingenstein:**

Right.

**John Eastman:**

…Uh, and so that was certainly one of the motivating reasons why they have this language. But other people in that debate said, well, you know, we might be barred from making it to the polls because a river floods or a bridge goes out. Um, that shouldn't prevent us from being able to have our electoral vote. And in my view, an illegal election is a third category that the language of that provision covers.

**Tom Klingenstein:**

And it's written down.

**John Eastman:**

It's written down.

**Tom Klingenstein:**

And what are the words?

**John Eastman:**

Well, the words are, uh, if, if they fail to make a choice on the day of the election, the legislature can decide what to do about it.

Right. I'm paraphrasing a little bit. Major provisions of the election law adopted by the legislature were ignored, and that meant you had an invalid election, which meant we make failed to make a choice by lawful conduct of the election.

**Tom Klingenstein:**

And has this ever happened before?

**John Eastman:**

No. No. Um, well, it may have happened before, but nobody, nobody's pushed back on it.

**Tom Klingenstein:**

So can you delay the joint session?

**John Eastman:**

Well, so there's another provision of the Electoral Count Act that since once they start their work, they cannot adjourn until the work is finished. And that's,

**Tom Klingenstein:**

So now we're on January 6th.

**John Eastman:**

January 6th, and once they gavel the session started at 1:00 PM. They gotta work through until they finish, uh, and therefore a delay would violate the Electoral Count Act.

Now I think even that provision of the Electoral Count Act, uh, is not quite so clear cut as that. It distinguishes between adjourning and it says you clearly can’t adjourn. And a recess, and it says you can't take a recess. And then it says, unless it's necessary to resolve a dispute over electoral votes, which is exactly what we had. So even the, the statute itself,

**Tom Klingenstein:**

Yeah.

**John Eastman:**

…even if the statute were clear and it infringes on the Vice President's ability to conduct the investigation he believes is necessary to exercise powers he has directly from the Constitution, then the statute is unconstitutional and can't interfere with his, his authority.

Um, and so, let's assume Congress has the ability to count the votes and make the judgment on whether they're valid or not. And in 1876 they decide that they need two months of a commission to kind of advise them. But there's an electoral count act in place that say once they convene, they can't adjourn or recess.That statute is an unconstitutional infringement on their power to take the necessary break in order to resolve the question.

**Tom Klingenstein:**

Now, we talked about in the prior section here, uh, you had lots of legislators, um, requesting of the Vice President that he delay counting. If there were no such requests, could the Vice President delay or even reject?

**John Eastman:**

Well, if the case is as blatant as my Kansas case is, then I think he has that judgment power.

**Tom Klingenstein:**

Now there would like, there would likely be objectors.

**John Eastman:**

Objectors.

**Tom Klingenstein:**

But even if there weren't,

**John Eastman:**

Even if there weren't, uh, I'm sure there would be court actions brought, uh, but if this thing is really non justiciable, political questions, those should be dismissed on jurisdictional grounds.

Um, but, but again, uh, that was not the advice I gave because these were disputed questions. There was investigation, there were investigations that were ongoing, and the legislatures were asking not to reverse the election, not to re-certify for Trump, but for time to make an assessment of whether the illegality they had confirmed had impacted the election to such a degree that the wrong guy had been certified.

**Tom Klingenstein:**

But now my impression is that Trump at least initially wanted Pence not to delay, but reject outright. Is that right?

**John Eastman:**

He has. He has some tweets in the days leading up to our meeting on January 4th saying that Trump, I mean that P Pence just has the authority to reject. And some of the legal scholarship and some of the other people that were writing memos and you know, putting out public statements or whatever had made that case. Um, the President asked me in that meeting in the Oval Office,

**Tom Klingenstein:**

This is July 4th.

**John Eastman:**

January 4th.

**Tom Klingenstein:**

On January 4th. Yeah.

**John Eastman:**

And he had asked me, now you agree with that? Right? I said, well, it's, it's a lot more complicated and a nuanced than that. And it's at that point when the Vice President turned to me point blank and said, “Do you believe I have the authority just simply to reject the votes?: And I said, “Mr. Vice President, it's an open question. It's never been addressed. There's scholarship on both sides of the issues. I happen to think in these circumstances, it's the weaker argument, and that in these circumstances is an important caveat.”

**Tom Klingenstein:**

You made the prudential decision that in these circumstances it made no sense.

**John Eastman:**

We’d have revolt in the street, but we also only had one slate of electors that had been certified and I, and I told him, I said, “It would be foolish to exercise such power even if you had it.” In the absence of the legislature weighing in with a formal certification of alternative electors, rather than just the letter …

**Tom Klingenstein:**

 What goes into the Vice President's decision? I mean, presumably he needs some evidence. I mean, he can't just wake up in the morning and decide we're gonna reject the other party's votes.

**John Eastman:**

So I, I think two things. One, legally he needs evidence that the wrong electors were certified.

**Tom Klingenstein:**

Evidence from the legislators.

**John Eastman:**

From the legislature.

**Tom Klingenstein:**

Usually.

**John Eastman:**

Yeah. You, uh, but second prudentially, the evidence has to be so convincing that if he takes such a dramatic step that both sides would say, well, that's the right outcome. Or at least all but the most crazy people on the fringe.

**Tom Klingenstein:**

Now, this is, this is in the case of reject.

**John Eastman:**

Yeah.

**Tom Klingenstein:**

Okay. So you're not gonna get clear cut in this case.

**John Eastman:**

One has to assume some level of honesty on the parties that we're dealing with, uh, for clear cut. But yeah, I see the point.

**Tom Klingenstein:**

So in the case of rejecting, as you just said, it has to be compelling. Both signs have to agree, but now what applies in the case of delay? Cuz clearly both sides didn't agree in this case.

**John Eastman:**

Yeah, well, remember, remember what, what we're dealing with a difference between a delay and a rejection is that the Vice President is making the ultimate decision in settling the matter versus a delay. And it's not just a delay, but it's a delay in a remand. It's a delay to let the legislatures take up the question that they've asked, been asking you to take up. Uh, and we're now coming back into session where they could take it up. So what we're doing there is, is sending this back to the legislature to assess what happened in their state and advise the joint session of Congress, including the Vice President, who actually won the election to the extent that that can be determined. And my, my memo specifically says, “If you send this back to the legislatures and they determine that the impact of the illegality that they all recognized was less than the margin, they let you know that Biden's certification stands and Biden wins.”

And I've got that in my memo in bold letters. Um, but if on the other hand, their assessment is that in fact the wrong guy was certified, that Trump actually won under the principle of our Declaration of Independence about consent of the governed - or the will of the voters as we more modernly described that - how is that gonna be best manifest? If Trump won Pennsylvania and Biden had been illegally certified, don't we want the actual winner to be properly certified and seated, and in order to be the expression of the actual, rather than the fraudulent will of the voters?

**Tom Klingenstein:**

Was there ever a chance that Biden or that Trump would've been declared the winner after January 6th?

**John Eastman:**

Well, uh, no (long pause) I, I, I, I think most people think that the certification on January 6th ends the matter. Um, you know, we got January 6th, we have January 20th. So let's suppose, let's suppose a massive fraud comes along after the certification, um

**Tom Klingenstein:**

After January 6th.

**John Eastman:**

After January 6th, but before inauguration. Um, and it's quite clear that because of this massive fraud, the wrong guy was certified. Could Congress reconvene the joint session and revisit the question with all of the fight about whether it's Congress or the Vice President that we've been talking about. I think probably yes. We've never had that happen before. Um, uh, but we're, we're taking as the predicate for that question, the fraud is so manifestly clear that the wrong person was certified.

Uh, then there's another interesting question about what happens if that fraud becomes manifestly clear after Inauguration Day. Hands tied - we live with the, the wrongly elected guy for four years. Well, we've got examples in our history, lots of examples of not Presidential elections, but Congressional elections or state legislative elections where the fraud becomes clear after not only election day, but after.

**Tom Klingenstein:**

And could that conceivably apply in the case of the President?

**John Eastman:**

Well, it's, it's unclear practically. Here's one thing that's clear. The, the Constitution only explicitly has two routes for removing a President - the original constitution by impeachment for high crimes and misdemeanors. And let's suppose in fact the fraud is proven beyond a doubt, so much so that the New York Times even has to write a story saying, we admit we were wrong. Right? Uh, and Biden had nothing to do with it. He was an innocent beneficiary of this fraud. You can't get him for high crimes and misdemeanors cuz he had nothing to do with it. And removing him is just gonna elevate Kamala Harris, who also benefited from the fraud.

That doesn't seem to be a remedy. The other route in the Constitution is if somebody's incapacitated and can be removed. Maybe he is, maybe he is not, but it's got nothing to do with what happened in the election.

**Tom Klingenstein:**

Right.

**John Eastman:**

So then the question is, are those the exclusive routes? And it's, they're the only ones authored you mentioned in the Constitution. But they don't purport to cover the gamut of things that we might confront.

What normally we do in that situation is we fall back on the English Common Law and the English Common Law on the law of frauds is if the fraud is proved, it vitiates the actions taken per you unravel that the actions taken pursuant to the fraud. Uh, and we've, we've got examples of that in other elections,

**Tom Klingenstein:**

But it's not gonna happen.

**John Eastman:**

It's not gonna happen because cuz I always set up as a predicate, the fraud has to be so clear that even the New York Times would acknowledge it. And that's just, as you pointed out, extremely unlikely as they would say.

**Tom Klingenstein:**

Lawyers tend to argue, well, what is the best opinion? Right, not the second best or the third best. And you are arguing the second best or the third best.

**John Eastman:**

Well, there's that, but there's also, um, uh, the assessment of what was going on, and if in fact the election was stolen because of illegal conduct in, in the way the elections were held - not just illegal, but unconstitutional, right?

Then we then the very rule of law is at stake if we don't do something about it. So in that circumstance, should you try and make every plausible legal argument to expose what went on and to make sure that the consent - remember, we live in a Republican form of government that is supposed to be derived from the ultimate sovereign authority of the people giving its consent to government.

**Tom Klingenstein:**

How many people have looked at this issue? Serious scholars, jurists…

**John Eastman:**

Probably a dozen. And you know, like you said before in, you know, eight of those 12, probably on at least one or more of the points agree with me. Um, but uh, but they also disagree with me on other points. But, but uniformly now, uh, except for that eight or 10, most everybody else says, well, the Vice President had no authority. He's just a potted plant. Or to use the more polite term, it's just a ministerial duty that he's performing. The Constitution doesn't create a lot of just pure ministerial duties. They don't go to the trouble of giving somebody a power that has no discernment or judgment authority behind the exercise of that power.

**Tom Klingenstein:**

I assume you would give the very same legal advice today.

**John Eastman:**

I would. I would. Uh, I would, I wish we had less chaotic legal efforts in November and

December, making more crystal clear the things that have become increasingly clear since then, uh, about the illegality and the, the fraud that occurred as a result of that illegality.

**Tom Klingenstein:**

So I listened to all this. And I say that the one thing that should be clear is that almost nothing is clear. Everything seems to be contested, and there are usually arguments on both sides. Now, if I were to summarize what brought us to this point of darkness, I would list the following first.

The text of the two controlling documents are very unclear from the beginning. People have understood the 12th Amendment to be, uh, understood different things. One of the controlling documents, the Electoral Count Act is most likely unconstitutional in parts. No court has ruled directly on the issue.

There are only a handful of scholars who have even studied it. The historical evidence is clouded and in the current environment, which is so hyper-partisan, commentary is just so much influenced by one's political beliefs. So, if you put all those things together, I think you can explain why things are as dark and opaque as they are.

**John Eastman:**

Well, look, uh, a very prominent professor at Harvard who taught an election law class invited me to do an hour-long podcast with him. When we look, we delved into the intricacies of this law. It's very dense, as you've pointed out. Uh, uh, uh, and there are arguments on both sides, and I thought, um, uh, I thought credible arguments on both sides.

**Tom Klingenstein:**

And in fact, this gentleman you're referring to, his name is, uh, Larry Lessig, he is the Harvard professor and I think his podcast is another way. John appeared with Lessig and another scholar. It is a very sort of high-level debate. Dense, as John said. It's something that you're not gonna get at the first reading, but it bears rereading.

So we have one more thing and that's an advertisement. Now you can imagine that John is not a wealthy man, that his finances are stretched. He's being sued from here to wherever. So John, maybe you could discuss how people could help you.

**John Eastman:**

Uh, but, uh, well, more than a half a million dollars in legal fees have already been racked up.

I've got a legal defense fund. It's called **GiveSendGo.com/Eastman,** or you can just Google John Eastman Legal Defense Fund and it'll come up. The beauty of that site is that people can send money to help with the legal defense, but also send prayers, which both my wife and I read, and they're gratifying.

And we also use it as a blog of, you know, major articles that kind of really explore what's really going on here and the significance of it. Articles like from people like Roger Kimble, who's done a great deal of work, or Molly Hemingway and Margot Cleveland and others. Uh, we post links to those articles as well so people can keep up with what's going on.

**Tom Klingenstein:**

Now I gather you have a substack as well.

**John Eastman:**

I have a substack as well, JohnEastman.substack or John.Eastman.substack. I forget exactly, but John Eastman substack.

**Tom Klingenstein:**

You get a lot of requests for interviews – not necessarily friendly and you record them.

**John Eastman:**

I found that if you record an interview with a hostile reporter, um, they tend to be more honest in how they characterize your statements cuz they know they can be called on it. But, but there are a couple times when reporters ignored and, and, and published things that were opposite of what I said, and I've got it on tape and in some of the interviews I'd call 'em out on it.

It was with some of the other members of the press. So it'll be kind of fun. The Eastman interviews, it'll be the series that that'll be up on the sub stack at some point.

**Tom Klingenstein:**

So this may be the Eastman tapes,

**John Eastman:**

The Eastman tapes, uh,

**Tom Klingenstein:**

Nixon tapes,

**John Eastman:**

and it won't have an 18-minute gap.

**Tom Klingenstein:**

So why don't we end this section. We'll go on then to the question of prudence.

**John Eastman:**

Okay.

END OF SECTION TWO TRANSCRIPT

Tom Klingenstein / John Eastman Interview

May 5th – Women’s Republican Club, NYC