Written by **Steve Byas** on December 26, 2020

Governors Have Usurped Legislative Role on Electoral Votes, Lawsuit Charges

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"Kings and Queens dissolve parliaments and legislative bodies, not Governors," said Phill Kline, director of the Amistad Project, in explaining the federal lawsuit filed this past week in the U.S. District Court for the District of Columbia. The suit is asking that legislatures in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin be allowed to meet and make the decision on whether to certify electors before Congress meets to count the votes on January 6.

"At least that was the case until this year," Kline added. "Governors in these contested states have declared themselves to be the law due to COVID and are now actively preventing the state legislatures from exercising their constitutional authority to review the election process."

The argument of the Amistad Project (a project of the nonpartisan Thomas More Society, a legal group that has been very active in the culture war in recent years) is that both federal and local statutes are interfering with the constitutional authority of state legislatures to certify presidential electors, and that the laws are a violation of the doctrine of separation of powers. (Article II of the U.S. Constitution states, "Each state shall appoint, *in such manner as the legislature thereof may direct*, a number of electors…." (Emphasis added).

Although the Electoral College has met, and based on those results, former Vice President Joe Biden was elected president, the lawsuit contends that the date of December 14 — the date that the electors met across the nation — is an arbitrary date. The date for *contested* electors can be changed. (There are precedents, such as in 1960, when Hawaii's electors originally voted for Republican nominee Richard Nixon, but later, when Democratic nominee John Kennedy was found to have won the state by 115 votes, the Republican electors were replaced by the Democratic Party electors).

But in these contested states, governors have prevented legislatures from meeting to investigate allegations of fraud. "No person," Kline argued, "or small group of persons, should be able to prohibit the state legislature from performing its constitutional responsibilities."

Erick Kaardal, the lead attorney for the Amistad Project, said, "Unfortunately, current federal and state code has allowed a constitutionally non delegable legislative function and responsibility to become a ministerial process." In other words, governors have simply assumed legislative powers.

The Amistad Project is asking that the federal court declare unconstitutional any federal or state laws that interfere with the authority of the state legislatures to conduct a post-election certification of the presidential electors. Additionally, the Amistad Project is asking that the Congress and Vice President

Mike Pence (who will preside over the electoral vote count on January 6) not count the votes from the contested states of Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin, until the legislatures in each one of those states are able to meet in a joint session to vote to certify their electors.

Kline summed up the lawsuit: "Governors do not have a right to certify election results through fiat. The Constitution gives state legislatures alone the right to certify presidential electors."

As serious as the issue that the lawsuit is addressing directly, the larger issue of the long-term trend toward executive branch usurpation of legislative branch powers (both at the state and federal levels) is also very serious. Kline offered specific examples of the usurpation he is alleging. "The governor of Pennsylvania is refusing to allow the legislature there to meet, while in Michigan the attorney general is threatening legislators who disagree with certification with criminal investigation, and Gov. Whitmer uses COVID — and later a non-existent threat — as an excuse to prevent Republicans in [the] Michigan Legislature from entering the Capitol Building while Democrats were allowed in the building to vote on certification."

Across America, in the midst of the COVID public health issue, we have seen governors asserting power through "executive orders" to usurp the authority of the legislative branch. "Executive orders" are a power of the chief executive (the president, a governor, or mayor) to implement existing law, not a constitutional way to make law. The making of law is the exclusive province of the legislative branch, not the executive branch. Throughout history, executive branch officials have often sought to push the envelope in asserting their legal authority. As in this case, executive officials have argued that there is an "emergency." Far too often, legislators -— in Congress or at the state level — have simply deferred to the executive branch. Part of the problem is that legislators are often reluctant to oppose an executive who is a member of their own political party. Other legislators are happy to not have to vote on controversial matters. Others are pleased with the policy outcome, even if it was accomplished in an unconstitutional manner.

Regardless of the reason it happens, governors have no constitutional right to interfere with a power that is held by their state's legislature, and if the state legislature wants to meet and investigate the multiple allegations of vote fraud in the recent election, they should do so without the executive branch throwing up obstacles. Hopefully, the federal court will come down on the side of the Constitution.

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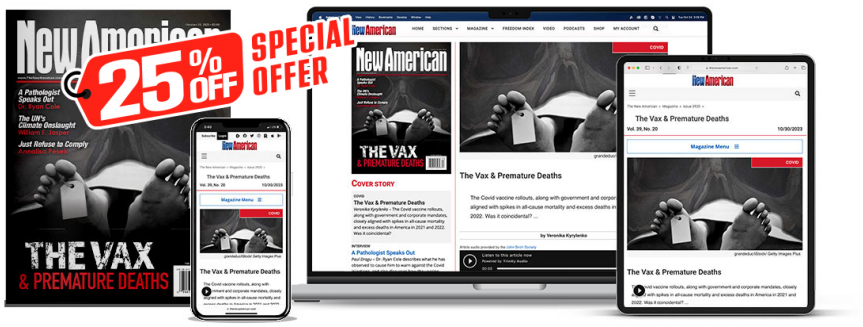

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