

## Road Map for a Constitutional Coup: The Republican Plan for Legislative Nullification of the Popular Vote for President

By Jonathan M. Winer

IT HAS NOW BECOME CLEAR THAT THE EFFORTS OF Donald Trump and his supporters to overturn the 2020 elections were a multi-front attack.

The newest revelations have further detailed [the scheme](#) devised by conservative lawyer John Eastman to convince Vice President Pence to overturn the election results on January 6, 2021, the day the House and Senate were scheduled to convene a joint session to certify the election results.

As revealed in Bob Woodward and Bob Costa's new book *Peril*, and more recently [confirmed by Eastman](#) himself, Eastman met with

Trump and Pence on January 4 and laid out a roadmap for Pence to subvert the Constitution and declare Trump the winner. Eastman urged Pence to exclude the electoral votes of any states in which there were disputes over electors. Pence refused to take that path advocated by Trump and Eastman, and consistent with the Constitution, presided over the counting of the electoral votes of every state and declared Joe Biden the President.

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the Department of Justice in the same period, while also never implemented, provided a step-by-step blueprint not only for

2020 but for future constitutional coups by legislatures in states under full partisan Republican control, enabling them to change the results of the popular vote.

That plan, drafted by the then-number three at Justice, Jeffrey Bossert Clark, Assistant Attorney General for the Environment and Natural Resources Division, amounts to a road map for the current and future efforts by Trump and his Republican allies to ensure that he, or another Republican, secures the presidency in 2024 regardless of who wins the popular vote or the true Electoral College vote.

In a December 27 phone call to Acting Attorney General Jeffrey Rosen, Trump demanded that the Acting Attorney General and the Acting Deputy Attorney General Richard Donoghue

overturn the results of the 2020 election - or risk losing their jobs. "Just say that the election was corrupt + leave the rest to me and the R. Congressmen," Trump said on the call, according to handwritten notes taken by Donoghue. The next day, December 28, Clark laid out his step-by-step plan to overturn the election results in a [draft five-page letter](#) along with an email he sent to Donoghue and Rosen. Clark asked them to sign the letter



Photo by Keith Bacongco

in order to send to the legislatures and governors of Georgia and "other relevant states," requesting that they convene immediately, declare the results of the election void, and appoint presidential electors supporting Trump before the January 6 certification deadline.

The unprecedented Clark letter is more than an important historical document. It is the smoking gun evidence of Trump's effort to force the Justice Department to overturn the election in 2020. Even more dangerously, it is a guide to how state legislatures can set aside the will of the people in 2024, and substitute their own choice for President, if voter suppression tactics and gerrymandering prove insufficient to get the result they seek.

Clark's writings rely on a radical interpretation of the Constitution and Supreme Court precedent to effect a Constitutional coup. His ideas are based on language in [Article II, Section 1, Clause 2](#) of the Constitution, which gives state legislatures sole authority to set the terms for how presidential electors are

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**FROM THE EDITOR'S DESK**

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chosen, and thus determine the winner.

This concept is known as the Independent State Legislature Doctrine, established in an 1892 Supreme Court case, *McPherson v. Blacker*, which decided that even after a legislature has granted voters the ability to choose Presidential electors in that state on the basis of who has received the most votes, legislatures remain free to take back that power for themselves at any time.

This position was expressly reiterated by the Supreme Court in *Bush v. Gore*, the five-to-four decision in 2000 in which the conservative bloc on the Court handed George W. Bush the presidency, a ruling the Clark letter cites, though with important caveats that Clark ignores. Clark cites *McPherson* to justify the unlimited and unreviewable exercise by state legislatures of their right to decide on their states electoral votes at any time—even after the popular vote has taken place, regardless of the state's constitution, courts, and voters.

If taken to its logical conclusion, this doctrine would remove the authority of Governors and Secretaries of State to certify Presidential elections based on the popular vote. It would enable state legislatures to ignore those officials, even

when existing state law gives them the specific authority to make such certifications. The popular vote could be ignored so long as the legislature avoided violating the “equal protection” concerns articulated in *Bush v. Gore*.

Under the Clark interpretation of the Independent State Legislature doctrine, decisions by a state legislature to appoint Presidential electors are non-reviewable by judges. They could not be overturned by the finding of the state's judiciary that the legislature has behaved improperly, possibly not even by the Supreme Court, since the state legislature's authority under Article II to do this is “plenary,” or unlimited. This interpretation of the Constitution would allow for no check against any legislature's determination to award its electoral votes to whichever candidate it wished, so long as it is careful to avoid creating a record that it was doing so in derogation of the rights of any particular voting group, such as on the basis of race or color, as precluded by the 15<sup>th</sup> Amendment. Instead, a legislature can simply make a finding that it has the authority to decide the winner on the grounds that, for example, purported fraud has made it impossible to determine the true popular winner selected

by the state's voters.

Clark's email and draft letter described each step needed to apply this doctrine to award the electoral votes of Georgia and other swing states to Trump. First, the Justice Department would cite the reports by Republican legislators that found the state's November elections to be “untrustworthy.” Second, the Justice Department would recommend that the legislature be called back into session “to determine the proper Electors to be certified to the Electoral College in the 2020 presidential race.” Third, the legislature would provide an alternative slate of electors—left unstated but assumed by

Clark is that these would each be for Trump—to be signed, sealed and certified, and sent to the U.S. Senate and the Vice President by January 6 as required by the 12<sup>th</sup> Amendment.

A few state legislatures undertook halting steps in this direction in 2020 but none were completed, though Georgia went the furthest in an effort stopped in its tracks by the decision of Republican Secretary of State, Brad Raffensperger to re-certify the vote for Biden December 7, 2020 and to refuse to allow it to be reopened further.

According to a [six-page memo](#) written by Eastman on January 3,

the day before he met with Trump and Pence, Republican electors for Trump did in fact secretly meet on December 14 to conduct a “trial run” of a variation on the Clark scheme in seven states (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, Wisconsin) and actually sent Pence alternative slates of Trump electors.

Since none of the state legislatures actually completed the steps to throw out the Presidential results based on the choices made by the state's voters, any electoral votes such rogue electors might have sought to cast would have had no Constitutional basis. Republican-controlled state legislatures could overcome this defect in 2024 by acting promptly to shout “fraud” right after the elections, and then act to invalidate the popular vote and legislate their own partisan alternative.

Clark did not specify which states he meant when he stipulated that the legislatures of “each relevant state” should convene to determine which candidate should be awarded those states' electoral votes. But the answer is apparent. In 2020, Republicans controlled both chambers of the state legislatures in Arizona (11 Electoral Votes), Georgia (16 EVs), Michigan (16 EVs), Pennsylvania (20



Jeffrey Bossert Clark

EVs), and Wisconsin (10 EVs). Had those legislatures awarded electoral votes to Trump instead of Biden and those legislative certifications been determined to be the only valid ones by the Supreme Court under the Independent State Legislature doctrine, the results of the 2020 election would have been neatly reversed. Instead of 306 EVs for Biden, and 232 EVs for Trump, the result would magically have become 305 EVs for Trump, and 233 EVs for Biden, thereby giving Trump the numerical “landslide” he demanded.

Here we should recall the concurrence in *Bush v. Gore* of a minority of the members of the Supreme Court (Justices Rehnquist, Scalia, and Thomas), emphasizing the importance of the language in *McPherson* on the powers of the state legislators over the selection of Presidential electors. In this concurrence, Rehnquist stated that the language of Article II, Section 1, Clause 2 “convey[s] the broadest power of determination’ and ‘leaves it to the legislature exclusively to define the method’ of appointment” of electoral votes for President. For that reason, these three Justices found that state legislators, not state courts, were ultimately the decisionmakers on the award of the electoral votes in any state.

Notably, *McPherson* dealt with the authority of state legislatures to set rules governing electoral vote choices in laws enacted *before* the election took place, addressing whether a state could choose ahead of the voting to have electoral votes selected by the legislature itself, by popular vote state-wide, or by congressional district. *McPherson* did not cover a situation in which a legislature decided to change the rules *after* an election was concluded because those controlling the legislature did not like the result.

The federal law governing the process for the counting of electoral votes, [the Electoral Count Act](#), limits the period for state legislative action on controversies over electors to six days before the electors are supposed to cast their votes. That date in 2020 was December 8. But under the Clark/Eastman reasoning, any provision in the Electoral Count Act purporting to limit what state legislatures can do is unconstitutional, and has no legal effect. Thus, regardless of the procedural requirements of the Electoral Count Act, a state legislature, according to Clark/Eastman, could make its choice on Presidential electors whenever and however it pleases, any time up to the counting of the votes specified under the 12<sup>th</sup> Amendment.

One basis for the Supreme Court to disallow any post-election action by a legislature to change the Presidential outcome chosen by the state’s voters would be Equal Protection, an issue that was at the core of the Supreme Court’s ruling in *Bush v. Gore* that halted the vote counting in Florida’s Broward County and thereby determined the election of George W. Bush over Al Gore. There the Supreme Court found that once a state legislature had vested the right to vote for President in its people, it must give “equal weight accorded to each vote” and “equal dignity owed to each voter.” The decision further stated that “[h]aving once granted the right to vote on equal terms, the

State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another,” citing the proposition that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”

That language would seem to preclude a legislature from changing a state’s law to make its own ruling on electoral vote after the election has taken, because it would not be giving equal weight to each vote, but selecting the results on the basis of raw power.

But there is other language in the *Bush v. Gore* decision that counters this principle: “The State, of course, after granting the franchise [to its voters] in the special context of Article II, can take back the power to appoint electors. . . there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.” This language could be twisted to support the proposition that Equal Protection would not apply if the legislature takes the franchise for

**This language could be twisted to support the proposition that Equal Protection would not apply if the legislature takes the franchise for Presidential votes away from all of its voters and asserts its right to appoint Presidential Electors directly.**

Presidential votes away from *all* of its voters and asserts its right to appoint Presidential Electors directly, even if the result would be to choose as electors those favoring the candidate who had already lost the popular vote in the state, thereby not giving equal weight or dignity to each vote in practice.

Given the stakes and the further politicization of the judiciary, it is entirely possible the Supreme Court would choose to stay out of the role of deciding which electoral votes should be deemed valid in a Presidential election. It could find that decisions on the recognition of electoral votes must be solely determined by Congress under the 12<sup>th</sup> Amendment.

In 2020, this outcome would have provided a cover for handing the Presidency to Trump. In a contested-vote scenario, the House and the Senate would likely have failed to agree on whether to respect either these states’ earlier certifications for Biden, or the later ones for Trump submitted by those states’ legislatures.

Under the 12<sup>th</sup> Amendment, if there is a disagreement between the House and Senate, the certification process goes to the House, where states vote on a state-by-state basis, one vote per state delegation. Whichever party controls a state’s Congressional delegation, controls the state’s vote. This arithmetic currently gives the advantage to Republicans, who control a majority of the 50 states House delegations due to gerrymandering and their dominance in states with smaller populations. In 2020, if the House had held a state-by-state canvass, voting based on the partisan tilt would have selected Donald Trump.

Seventy minutes after Clark sent his draft letter to Acting Attorney General Rosen and Acting Deputy Attorney General Donoghue, Donoghue replied to reject every aspect of what Clark had recommended. He cited former Attorney General William Barr as having already expressly found there was no basis for believing that fraud had affected the outcome of the Presidential election. On January 2, Rosen sent a brief concurring cover

note, stating that he was again confirming he would not sign on to Clark's coup plan.

But there was even more in Clark's plans. As he provided a road-map for overturning the results of the election, he also laid out an agenda to deploy Presidential emergency powers against anyone and everyone who might be accused by any conspiracy monger that they were somehow "complicit" with foreign governments to engage in election fraud. This was the perverse revenge part of the coup plan for the investigations into the Russian influence in the 2016 campaign to assist Trump's election.

In his December 28 cover note to Rosen and Donoghue, claiming information from online "white hat hackers," Clark called for a classified briefing from then Director of National Intelligence John Radcliffe, a far right Trump appointee, on "foreign election interference issues." His purpose was to establish a basis, even a secret one, for Trump to activate Presidential Emergency Powers under the International Emergency Powers Act and [Executive Order 13848](#), which authorizes the President to freeze and seize the assets of anyone who "directly or indirectly" engages in, sponsors, conceals, or otherwise is "complicit" in foreign interference in a United States election, or provides technological support for such activities.

Clark's email stated that these unnamed hackers had put "evidence (in the public domain)" that a machine manufactured by Dominion Voting Systems accessed the Internet through a "smart thermostat with a net connection trail leading back to China." The [Chinese-thermostat theory](#) which was among a host of false claims launched about Dominion's voting machines was one being pushed by conspiracy-theorist and Overstock.com founder Patrick Byrne, the ultra-right wing news agencies NewsMax and the One America News Network, both of whom have since been [sued by Dominion](#) for promoting lies about the company.

If the White House had acted under this conspiracy-based part of the Clark plan, the President could have made unilateral findings of "fact" designating, for instance, Dominion, the Government of China, or depending on the day and [conspiracy theorist](#), Venezuela and Cuba, mysterious entities supposedly based in Germany or Spain, and anyone else allegedly involved in foreign interference in the elections as the subjects of sanctions.

Such an order could have stipulated the freezing of all of their assets—in the case of Dominion, for example, any voting equipment and software owned by the company. By executive order, President Trump could have prohibited any U.S. person, including Dominion's own U.S. employees, from engaging in any transactions with the company, including receiving their paychecks, in the same way they would be prohibited from transactions involving terrorists. One can hope that even courts packed with conservative judges would have found any such use of emergency powers to be a gross case of Presidential overreach. But in such a situation, one can imagine millions of Americans assuming the worst of the other side, and civil conflict spreading far beyond the insurrection that took place in the Capitol on January 6.

The coup doctrine enunciated by Clark remains alive. To date, there has been no reporting on whom he was working with in the Trump campaign, the Trump White House or beyond to develop it. Nor has any Congressional committee yet secured Clark's testimony to gather those facts. Similar gaps remain regarding the coordination of Eastman's activities, and how Eastman got connected to Trump. Since the elections, we have seen a coordinated nationwide strategy by which Republican-controlled state legislatures have been enacting election laws to give themselves greater control over the outcomes.

These new laws begin [with voter suppression provisions](#) to make it difficult for Democratic-leaning constituencies to vote. They also introduce new controls to allow partisan [state legislatures](#) to maintain control over elections to give Republicans greater control of vote-counting processes; reduce the authority of governors and secretaries of state to exercise independent judgment about who has won the popular vote in the state; and potentially even move [certification dates](#) to enable the legislature to invalidate a governor's certification after the fact.

The Republicans pushing this scheme [on a national basis](#) characterize their actions as entirely proper under the Independent State Legislature doctrine. But what the country now faces looking forward to in 2024 is a highly partisan Supreme Court that could accept the plan laid out by Clark, enabling partisan state legislatures to decide Presidential elections in what should rightly be called "Legislative Nullification." Nullification has a long and disgraced historical lineage, from nullification of federal tariffs (South Carolina in the 1830s), to federal desegregation orders (Arkansas in the 1950s), to health care policy (Texas in 2020). This latest nullification scheme aims at nullifying democracy itself. ■

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**Clark also laid out an agenda to deploy Presidential emergency powers against anyone and everyone who might be accused by any conspiracy monger that they were somehow "complicit" with foreign governments to engage in election fraud.**

## The Pyrolysis Solution: Senator Manchin, Addressing Climate Change is Not a Zero-Sum Game

By Carlton Brown

**B**ECAUSE SENATOR JOE MANCHIN OF WEST VIRGINIA insisted that Democrats walk back many of the critical climate protection measures in President Biden's legislative agenda, the United States will, ironically, lose a historic opportunity to reduce carbon dioxide emissions while at the same time retaining the jobs of the 14,000 West Virginia coal miners whose livelihoods Manchin in theory has been trying to protect.

Among the deleted items in the Clean Energy Performance Program (the CEPP contains the climate provisions in Biden's Build Back Better legislation), was the budget line that could potentially lead to funding for pyrolysis, a process that converts

organic material like coal into a synthetic gas. The gas can then be reduced to its simplest chemical compounds and elements: water, solid carbon (biochar), and hydrogen.

Further, by casting pyrolysis funding aside, the Senate is undercutting American leadership at the upcoming U.N. Climate Change Conference of the Parties, or COP26, in Glasgow, making it harder for the United States to send a strong signal to other leading producers of CO<sub>2</sub> to make and follow through on commitments to reduce carbon in the atmosphere.

Despite well-documented logistical and technical hurdles, conversion to the hydrogen economy is often viewed as the pathway with the most potential to achieve carbon-neutral equitable economic growth. This conversion is also the most effective way to curb global warming for the 11.5 billion people who will populate the earth by 2100.

Across Europe, China, Canada, parts of South America, and the United States, there are ambitious plans to migrate away from hydrocarbons (the chief components of petroleum and natural gas) for generating energy and fueling transportation. In the United States, the Defense Department is converting domestic military bases to hydrogen-powered fuel cells (which combine hydrogen and oxygen to produce electricity, with water and heat as by-products), issuing hydrogen batteries for complex military equipment, and testing hydrogen-powered drones.

BMW, Toyota, and Honda have developed and now sell

hydrogen-powered cars. There are several global companies manufacturing hydrogen-powered buses and heavy trucks and incorporating hydrogen as a marine fuel.

According to the Fuel Cell and Hydrogen Energy Association—an organization that advocates for the use of hydrogen-generated electricity—in 2020, excluding military installations, there were 550 megawatts of electricity produced using stationary hydrogen fuel cells. Though at this point this is an infinitesimally small segment of U.S. power generation, it is produced by environmentally forward-leaning market and thought leaders like Google, Apple, Coca-Cola, Amazon, and Microsoft, who

are setting the pace for change in the United States.

As stringent European CO<sub>2</sub> reduction requirements are being enforced, European steelmakers are turning to hydrogen to manufacture steel. To solve the problem of variability of solar and wind-generated power for the grid, hydrogen is ultimately a superior solution for energy storage than even the most efficient lithium battery technology. Though hydrogen is

all around us, literally and figuratively, full-scale deployment for energy generation and storage remains beyond the horizon.

The current slow migration to hydrogen can potentially be accelerated by coal and other hydrocarbon extraction workers in West Virginia using pyrolysis for coal gasification. The gas is created by heating pulverized coal to 1,000 degrees Celsius in a vacuum chamber. At this high temperature, the process converts the coal into a synthetic gas that can be separated into hydrogen, clean water, and biochar, all of which have alternative uses that don't contribute to greenhouse gases in the atmosphere. The hydrogen can be used for generating electricity in fuel cells. The clean water can be used for anything that requires clean water, and the biochar can be used as concrete filler or street paving, or converted into carbon filament for strengthening other materials.

Instead of thinking about migrating away from coal for power production, we should be thinking of using coal as a bridge to the clean energy hydrogen economy. Instead of eliminating coal mining jobs in West Virginia, the Biden administration should be investing in the development of pyrolysis process plants, fuel cells, and smart-grid power transmission infrastructure in West Virginia. These coal-to-green-infrastructure investments can produce and distribute carbon-free electric energy to the national electrical grid, which will also be modernized and upgraded by CEPP.



Senator Joe Manchin of West Virginia at Third Way Think Tank

The Build Back Better investments in smart grid and the incentives for utility companies to convert to renewable energy should be paired with investment in the technology to convert coal into a hydrogen energy source in coal country. These investments will preserve and perhaps even grow jobs in the coal mining industry and process industry. West Virginia, which has long been a chemical and polymer industry hub, has a tech workforce with the requisite skills to design and operate pyrolysis process facilities. The required investment will grow skilled, good-paying jobs in the extraction industry, the process industry, and the power distribution and generation industries in coal country.

Many environmentalists believe conversion to the green hydrogen economy is the gold standard for how we should continue to supply the earth's energy needs without accelerating climate change. Because the technology that we have for generating hydrogen from water is not yet viable, we cannot afford to sit on our hands awaiting the perfect solution.

Although pyrolysis and fuel cell technology are well established and can be advanced more rapidly to scale, without government investment and incentives the cost to produce electricity from coal-sourced hydrogen is more than the free market can bear. Still, in the same way that solar tax credits accelerated the adoption of solar cells, the government has the capacity to accelerate the conversion to the hydrogen economy without leaving coal miners and other extraction-sector jobs on the chopping block.

We can all win. Public funding for pyrolysis can be a yes vote for the miners in West Virginia who have often been overlooked, as their industry is stigmatized and their livelihoods have been eroded by tougher environmental regulations and market forces. A yes vote will be a vote for a more sustainable future for ourselves and future generations. With a few billion dollars of investment in hydrogen energy production through pyrolysis, we can reduce CO<sub>2</sub> and we can save and create jobs. As an intermediate step, this option is a far better choice than doing nothing at all, the option that the political system for the time being has delivered. ■

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## The Legacy of Colin Powell, and the Legacy of Vietnam

*By George Black*

**T**HE CAUSE OF GENERAL COLIN POWELL'S PASSING will be recorded on his death certificate as complications from Covid-19. But his vulnerability to a rare breakthrough infection was the result of two underlying conditions, Parkinson's disease and multiple myeloma, a cancer of the blood that destroys the bone marrow cells that strengthen the immune system. Those diseases, both incurable, shine a light on an often forgotten period in Powell's long and distinguished career. Both are now on the Veterans' Administration's list of diseases presumptively associated with service in Vietnam and exposure to the chemical defoliant known as Agent Orange.

Every veteran who served in Vietnam between 1961 and 1975 is entitled to benefits if he or she subsequently suffers from one of a list of eight types of cancer and nine other diseases, regardless of proof of direct exposure to the chemical. But Powell's case is unusual. He was not only exposed to the defoliants; he directly accompanied the unit of South Vietnamese soldiers who were spraying them, in one of the earliest and most controversial missions of the war. Not only that, but the chemical used by the troops he was advising was not Agent Orange, but its little-known precursor, Agent Purple. This substance was composed of the same 50-50 mix of two chemical ingredients, 2,4-D and 2,4,5-T, but was roughly three times as contaminated by TCDD-dioxin, generally considered to be one of the most toxic substances ever created. The use of Agent Purple was phased out in 1965 after the introduction of Agent Orange, which was less expensive to produce.

The mission on which Powell's men used Agent Purple took place in February 1963, when he was a young Army captain assigned to the Special Forces base at A Shau, in a remote mountain valley on the border with Laos. The most important North Vietnamese bastion inside South Vietnam, the valley was one of its most fearsome battlefields, best remembered for the carnage in May 1969 at Dong Ap Bia, the Mountain of the Crouching Beast. Americans called it Hamburger Hill for the hundred or more Americans who died there, along with perhaps ten times as many North Vietnamese fighters.

Among the generals and civilian politicians who debated the use of toxic chemicals in warfare, the most controversial element was not the defoliation of the forest cover that concealed enemy troops, but the destruction of the crops that might feed them. When scientists proposed the destruction of the Japanese rice crop in 1944, FDR's chief of staff, Admiral William Leahy, vetoed the idea, saying that it "would violate every Christian ethic I have ever heard of and all known laws of war." JFK felt much the same way, and when the first targets for defoliation were proposed in 1962 he strongly opposed all missions aimed at enemy crop fields, for fear they would harm and antagonize the peasant farmers that the United States was ostensibly there to protect and defend.

But JFK's military commanders overcame his well-documented resistance by stressing the strategic importance of the A Shau Valley, a terminus for the Ho Chi Minh Trail just below the Demilitarized Zone that divided North and South Vietnam. Helicopters delivered 55-gallon barrels of Agent Purple to the A Shau base, and after decanting the chemical into backpack sprayers, Powell's men used it on eight separate occasions, destroying 29 acres of manioc and sweet potatoes. By the time the herbicide campaign, Operation Ranch Hand, ended in 1971, some 500,000 acres—about 780 square miles—of crop fields had been destroyed. This was accomplished with the use of several of the so-called rainbow chemicals—Agents Purple, Orange, White, and Blue (a powerful arsenical compound). In all, more than 19 million gallons of toxic herbicides were sprayed on South Vietnam in the course of the war.

Powell was invalidated out of his first tour of duty after just six months, when a punji stick—a sharpened stake of bamboo that was probably contaminated with excrement—went clean through his foot. But he returned for a second tour in July 1968, by this time promoted to major. His assignment took him initially to Duc Pho, a small base in Quang Ngai province, a long-time stronghold of the National Liberation Front, or Viet Cong. Here he almost certainly encountered a second element of the herbicide campaign that was separate from Operation Ranch Hand and overseen not by the Air Force but the Army Chemical Corps. The perimeter of bases like Duc Pho, and the surrounding helicopter landing zones and fire support bases that Powell visited while he was there, were routinely sprayed by ground crews and helicopters to keep down vegetation for protection against enemy attack.

After two months he was transferred to nearby Chu Lai to serve as chief of operations for the Americal Division, a company of which had carried out the worst known massacre of the war in the village of My Lai six months before his arrival. Again, herbicides were used frequently at the Chu Lai base and the surrounding support facilities while Powell was there, and the whole of Quang Ngai province was heavily sprayed. Declassified Air Force records make it possible to reconstruct these operations with considerable precision. Some 220,000 gallons were sprayed on Quang Ngai in 1968 and 1969. About 80 percent were Agent Orange; the remainder were Agents White and Blue.

After the war ended, Vietnam veterans fought a bitter battle for recognition that their postwar cancers and other diseases, as well as the birth defects suffered by their children, might be attributable to their exposure to the toxic defoliants. It was not until 1991, with the Agent Orange Act, that their plight was

fully acknowledged. Although it was, and remains, impossible to show cause-and-effect in individual cases, the Act gave vets the benefit of the doubt, in a kind of moral atonement for the years of ostracism they had suffered in the wake of the first foreign war the United States had ever lost. It mandated the Institute of Medicine and the V.A. to continue studying the effects of dioxin on veterans' health, and over the years more diseases were added to the original list. These included the two from which Powell was suffering: multiple myeloma and, most recently, Parkinson's disease.

Like Powell, the Vietnam generation is now aging, growing sicker, and dying, and the V.A., too often an orphan stepchild among government agencies, continues to review their requests for compensation. Still, many applications are rejected. In the decades after the war, the Air Force's chief toxicologist, Alvin "Dr. Orange" Young, consistently denied that the defoliants had any demonstrated impact on human health and made, in his own words, "a few million dollars" by consulting for the Defense Department and the V.A., which often relied on his advice to deny benefits to sick veterans he dismissed as "freeloaders" trying to "cash in" on the compensation program.

For decades, the conditions in our V.A. hospitals have been a national disgrace, and no facility has been more notorious than the Department

of Veterans Affairs Medical Center in Washington, D.C. Just ten miles away, at the Walter Reed Army Medical Center, Colin Powell received the superb care that he richly deserved for his long years of service. But thousands of others have been less fortunate, and it would be a fine addition to Powell's legacy if his death served to dramatize not only the continued scourge of Covid-19, but the enduring pain of so many of his fellow Vietnam veterans. ■

*George Black is working on a book on the legacies of the war in Vietnam, to be published by Knopf.*



*General Collin Powell, United States Army*

## Big Taxin' Deal: Reforming Corporate Income Taxation

By Steven Pressman

**T**HE UNITED STATES BEGAN TAXING CORPORATE income in 1909, with a 1 percent tax on profits exceeding \$5,000 (\$150,000 in today's dollars). The top tax rate peaked at around 50 percent between World War II and 1978. It then declined slowly, reaching 35 percent in 1998. President Trump's 2017 Tax Cut and Jobs Act cut the rate sharply—to 21 percent starting in 2018. The Brookings Institution, an economic think tank, estimated that this last change reduced corporate tax revenues in the United States by 40 percent, or \$135 billion.

These are legislated rates; the rates companies actually pay are much lower. Last year, 55 highly profitable U.S. companies paid nothing in federal income taxes. Some firms, including Amazon, Facebook, and Nike, have paid few or no taxes to the federal government for many years.

One reason for this is that corporations book their profits in subsidiaries located in interna-

tional tax havens, such as Bermuda and Ireland, as well as in corporate-friendly states like South Dakota and Delaware (as revealed in the recently disclosed Pandora Papers), where corporate profits are taxed lightly, if at all, and related information is closely guarded.

This is easy to do, in part, because firms do business with their subsidiaries. They buy things from their subsidiaries and sell things to their subsidiaries. The price they pay is not set by the market; it is not the going price. Rather, firms set these prices in order to distort the amount and source of their profits. When companies pay high prices to their tax-haven subsidiaries, the subsidiary makes a great deal of money; the rest of the firm (located outside the tax haven) earns little. One famous example of this is Nike's trademarked "swoosh," owned by a Bermuda subsidiary responsible for most of Nike's profits. Bermuda doesn't tax corporate profits, and the United States doesn't tax profits that are booked abroad and remain abroad.

The result is a race to the bottom. Nations compete for corporate tax revenue by lowering their corporate tax rate. Lowest rate wins. The consequences are just what one would expect. In the 1950s, corporate income taxes provided around 30 percent of U.S. federal government tax revenues. By the 1980s, the figure was 10 percent. The 2017 tax bill cut this to under 7 percent. As corporations pay less in taxes, governments accumulate more debt to finance their expenditures and come under increasing

pressure to cut their spending.

A standard objection to taxing corporate income is that it involves "unfair" double taxation—after corporations get taxed, their shareholders are taxed again when reporting dividends and capital gains on individual income tax returns. Other critics claim the tax is regressive, paid by workers and consumers, because firms pass taxes along via higher prices and lower wages. Neither claim is true.

Corporate income taxes are paid mainly by firm shareholders. If workers did pay the tax via lower wages, cutting the corporate income tax should lead to large wage gains (as President Trump promised when promoting his 2017 tax bill). But this hasn't happened. As corporate tax rates have fallen since 1978, wages have stagnated, increasing by not much more than inflation. Firms

have had greater incentives to squeeze workers because the firm gets to keep most of the gains from cutting wages and benefits since it pays very little in corporate income taxes.

The double-taxation objection is also fatuous. Our income gets taxed many times. It is taxed by the federal government, state governments, and local governments. Then people pay sales taxes

when buying things and property taxes on their home.

The real problem, though, is not double taxation but untaxed corporate income. Jeff Bezos provides a good example. Most of his wealth consists of Amazon stock. His pay as CEO was a bit more than \$1 million annually. Amazon pays no dividends. Profits remain within the firm to help boost stock prices. Bezos's capital gains are not taxed unless he sells his Amazon stock; and these gains can be passed tax-free to heirs because of estate tax loopholes. Unless Amazon's profits are taxed, the majority of Bezos's income remains untaxed, making it easier for him to accumulate vast wealth.

Of course, the filthy rich who want to avoid taxes as much as possible, generally borrow at low interest rates to meet immediate spending needs above their annual salary. This lets them avoid taxes on stock gains and to continue earning high returns on their stock holdings.

Taxing corporate profits is an important step toward getting the rich to pay for expenditures required to run the country. It would also provide revenue to fund essential government spending. And both the rich and large multinational corporations benefit significantly from these social expenditures.

Companies are protected by national laws and courts, and by defense spending. They make money using government-educated workers, and transporting goods over government-funded roads and bridges. Firms make profits when hired to participate



in government infrastructure and building projects. Further, if companies are people with rights, and can make unlimited political expenditures (as the U.S. Supreme Court ruled in *Citizens United v. Federal Election Commission*), they should be taxed like people so that they contribute toward protecting these rights.

Even Adam Smith favored high taxes on monopoly profits. For Smith, taxing the profits of large companies facing little competition was desirable because it reduced monopoly profits. Monopoly power has risen substantially over the past several decades. Monopolistic firms have developed enormous political power on top of great economic power. Taxing corporate income would help reverse this undemocratic trend and discourage the rise of large monopolistic firms.

Corporate income taxation is in such disarray because our corporate tax laws were written more than 100 years ago. A century ago, international trade involved parts and goods produced in one country and sold to a firm in another country. There were no foreign subsidiaries muddying the water. Nor was there a problem with trade in services. Today, one-quarter of international trade involves services—advertising, call centers, streaming, intellectual property (Nike’s swoosh), and legal services. Complicating things further, when customer likes and searches are sold to advertisers (e.g., Facebook), it is unclear where “production” takes place and where profits are made. Companies get to decide this, and of course choose tax havens as the place of production.

The good news is that things may soon change for the better. In July, the finance ministers of the G20 countries agreed to a U.S. proposal to change corporate taxation worldwide. The plan has two key provisions. First, a 15 percent minimum corporate tax rate on companies with more than \$890 billion in revenue worldwide. Second, multinationals with more than \$23.8 billion in revenue will pay 20 percent to 30 percent of their profits (above 10 percent of their revenue) to countries where they sell goods rather than to the countries where they claim to earn their profits. More than 130 nations and jurisdictions have agreed to this plan.

The 15 percent floor would end the race to the bottom. If Ireland retains its 12.5 percent tax rate, other nations can tax 2.5 percent of each corporation’s worldwide profits. Just as important, taxing profits based on company sales rather than a company’s decisions about where it wants to declare profits will reduce tax-haven shopping.

There is a danger that the 15 percent rate will become a ceiling, as all nations cut their corporate tax rates to 15 percent. On the other hand, once countries agree on a floor, they may see the benefits to a higher minimum rate. A global minimum tax rate, once institutionalized, can easily be raised.

And it should be raised. A 15 percent rate is not nearly sufficient; it is the tax rate paid by an average U.S. worker. Large, profitable firms can certainly afford to pay a higher tax rate. Even a 25 percent rate is less than half the rate that prevailed during the post-WWII era, a time of rapid economic growth in the United States and throughout the developed world. So a higher corporate income tax rate should not slow economic growth;

firms will forgo a larger fraction of their profits rather than shun those profits.

Key technical and political issues remain. There are questions about how to divide up additional tax revenues (somewhere between \$100 billion and \$240 billion annually). Here, the United States provides a good model. Many U.S. states use the location of sales and employment to determine the fraction of corporate profits that each state gets to tax. This prevents companies from reporting their profits in low-tax states. States participating in this agreement then have free rein to tax the corporate profits allocated to them.

The key political issue concerns how to get all nations to sign on to new international tax rules. Without approval by all European Commission members, the accord cannot pass. Ireland and Hungary are two of the biggest problems because their corporate income tax rate is currently below 15 percent. Hungary’s Prime Minister Viktor Orbán has called the minimum corporate tax an “absurd” idea. However, in early October both countries agreed to support the new corporate tax legislation, after considerable pressure from the United States and other developed nations.

The new international corporate tax rules must still be officially approved by all nations. Perhaps the biggest stumbling block, moving forward, is whether President Biden can get the Senate to

approve new corporate tax laws, when 67 senators (at least 17 Republicans) must approve any tax treaty.

An international agreement on taxing corporate income would be a huge step forward, after decades of government spending cutbacks and rising government debt in the face of reduced revenues from corporations. It would also be a big win for the Biden administration because solving the world’s problems, such as climate change, requires the cooperation of other nations and it would show that the Biden administration has the ability to work with other countries to achieve such ends.

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