

Re: Privileged and confidential -- additional thoughts re electors voting on Dec. 14

Kenneth Chesebro [REDACTED]

Tue 12/8/2020 1:10 PM

To: Judge Troupis [REDACTED]

I wouldn't be surprised if Senator Johnson and others have been focusing for awhile on how Pence might be able to help slow things down and create pressure to allow a debate. There are a lot of smart people in the Senate

Anything Pence can do unilaterally to slow things down will obviously be of enormous benefit to senators who support Trump but who, standing alone, would find it difficult to resist pressure for closure.

If the count were conducted piecemeal, with 2 hours of debate on each state, during each debate at least one Senator would filibuster, but I don't see how you'd get 41 Republican senators to vote against cloture after a few hours (maybe only 2 hours) of debate -- enough Trump critics and politically vulnerable senators would presumably quickly give in, given how the mass media would portray them as incorrigible obstructionists peddling "baseless" claims.

By contrast, if he has the will to do it, Pence could stand as Horatius at the Bridge, and help ensure adequate time for debate, shielding the Republican senators from a politically dicey cloture vote.

Main point of my focus on getting all electors to vote on Dec. 14 is it would make Pence's exercise of his power to set the pace of the count look much more reasonable.

Because, if on Jan. 6 none of the six states in question had an alternative slate of electors, what would be the point of Pence insisting on extended debate to probe election irregularities? Even if Congress rejected the electoral votes of 5 of the 6 contested states, Biden would still win, because there would be no vehicle for awarding those electoral votes to Trump (his electors not having voted on Dec. 14), and Democrats in the House would claim that all Biden needed was a majority of the electoral votes actually cast.

By contrast, if all six of the contested states on Jan. 6 have alternative slates of electors, it totally makes sense for Pence to insist that those states be treated separately, and with great deliberation, because there is no way the electoral votes of those states could be counted without first deciding which slate was validly elected, which would require debate that Pence would insist on.

Glad you followed up with Senator Johnson. The prospect of extending the fight into January is exciting!

Ken

From: Judge Troupis [REDACTED]

Sent: Tuesday, December 8, 2020 9:57 AM

To: Kenneth Chesebro [REDACTED]

Subject: Re: Privileged and confidential -- additional thoughts re electors voting on Dec. 14

I spoke with Senator Johnson late last night about the Pence angle at the end. Just wanted to take his temperature.

This is an excellent summary of the end game. Thank you.

Just read about Texas action at SCOTUS arguing for legislative appointment of Electors. Can you pull the briefs etc and let me know your thoughts. (Might be helpful on timing issues as well for us per WEC?)

Jim

Sent from my iPhone

On Dec 8, 2020, at 12:15 AM, Kenneth Chesebro [REDACTED] wrote:

Hi, Jim, nice of you to call me. And I'm glad you like my idea regarding how leverage might be exerted in January to force serious review in Congress of election fraud in various States.

Several more notes, staying away from the specifics of how it might play out in January:

1. Court challenges pending on Jan. 6 really not necessary.

In my memo I mentioned that a key element of the strategy I've sketched would depend on litigation (either in state or federal court) pending in the six contested states on January 6.

I'm glad you pressed me on that, for example, could abuses in Georgia be examined even if no litigation were pending. On reflection, I think having the electors send in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**, and based on final litigation in the States, Biden is still above 270 electoral votes (or, at minimum, is still ahead of Trump, with perhaps one or more States up in the air).

The reason is that constitutionally speaking, there is no barrier to Congress (here, we're talking the Senate, assuming it's still controlled by Republicans) deliberating on which electoral slate to count, even if one electoral slate is endorsed by the governor, after all litigation is final -- indeed, even if that slate met the Dec. 8 "safe harbor" deadline.

The reason is that the Constitution doesn't specify what it means to "count" the electoral votes, and everyone agrees there is some level of judgment in counting -- here, at minimum, judgment about whether the election was conducted in the "Manner" directed by the state legislature.

Thus, as Professor Tribe has put it ([here](#)), Congress has the "ability, under the Twelfth Amendment, to determine which set of [a state's] electoral votes to count." 115 Harv. L. Rev. at 277.

This can involve looking at what actually happened in the election, not just at what the governors or courts said happened. Going **behind** the governors' certificates is exactly what the Democrats sought to do in the Hayes-Tilden contest of 1876-77, when the Republican governors of three States certified, somewhat dubiously in at least one instance, that Hayes had won the States. The Democrats naturally preferred the electoral slates that had been certified by Democrats in the States.

There's nothing in the Constitution (setting aside legislation; see next point) to prevent the Senate now, if it wishes, from holding hearings, with testimony, to decide if the election was stolen in one or more States, before voting on which slate of electors should be counted -- again, even if Trump lost all the legal cases, and none are still pending. The Senate could decide if it wished that the court proceedings were too cursory, and/or the judges involved used procedural tactics to avoid the merits, so that independent examination is required.

2. Democrats' main weapon is the Electoral Count Act.

Democrats' playbook for January 6 depends entirely on the script set out in the Electoral Count Act, under which, after the certificates are opened, the tellers are supposed to tally up the votes and, as to any contested States, the two Houses may deliberate for only two hours before definitively voting on whether to accept as valid, and count, a slate.

Under this scheme, Trump and Pence would be denied the opportunity for the presentation of any evidence (for example, live testimony) regarding the fraud in the election -- only limited debate would be allowed. Of course, preventing any sustained public inquiry into the election is key for the Democrats.

If the Electoral Count Act could be pushed aside, the Democrats would have to contend with unlimited debate in the Senate, which would be ended only with 60 votes for cloture -- giving Senators who support Trump plenty of leverage to insist on sustained inquiry into the evidence of fraud in both the election and in the canvassing. I mean, what would happen to 10 Republican senators who refused to allow an examination of what happened in the election?

3. The Electoral Count Act is not binding

The vulnerability for Democrats is that the Electoral Count Act is **not legally binding**. The scholarly consensus is that, for multiple reasons, it is difficult to imagine the Supreme Court ruling that in counting electoral votes, Congress must limit itself to debating for only 2 hours per contested State, or that Congress must accept as valid a particular State's electoral votes just because the State's governor certified them. See sources in footnote 4 of my Nov. 18 memo, [here](#); see also Prof. Tribe's argument ([here](#)) that how to count electoral votes is inherently a "political question," on which the Supreme Court should not intrude. 115 Harv. L. Rev. 276-87.

4. Procedural leverage: a practical way around the Electoral College Act

The problem for Republicans, however, is that the Electoral Count Act is, in ordinary circumstances, **politically** binding. Many of the legislators who enacted it assumed it wasn't constitutional, but they hoped that it would set ground rules for counting electoral votes that would prevent another crisis such as the one that occurred in 1876-77, in which the two Houses of Congress were controlled by different parties, and there was no clear way of resolving the partisan conflict.

At minimum, politically the Act is viewed as setting up a special rule for each House governing the counting of electoral votes, which would take a majority vote to displace.

Conventional wisdom would say that we are stuck with the Electoral College Act, and the Democrats' script, because:

(1) there is no way that all Senate Republicans would vote in lockstep to jettison the Electoral Count Act -- some obviously despise Trump, and others appear to believe that the election was fair; and

(2) there is no way that pro-Trump Republicans could convince the Supreme Court to invalidate the Electoral Count Act (in part because of the "political question" doctrine discussed by Tribe).

That's where the tactic we discussed might come into play. It would create leverage that could turn the tables on Democrats, by holding up the count unless and until they either got an order from the Supreme Court blocking the tactic (unlikely) or else agreed to extended debate. It would be impossible for the count to continue with the ordinary procedure under the Electoral Count Act.

5. Objection to extended delay

Any effort to extend scrutiny of the election returns past January 6 would be met with the objection that the process of electing the President might not be complete before January 20. But that is no reason to avoid taking the time necessary to ensure that the electoral votes of particular states are not tainted by fraud. The Constitution provides an orderly means of ensuring that there is no gap in the executive branch. If Democrats refused to agree to a reasonable amount of time for Congress to investigate and vote on the six States being contested, and the dispute dragged on, on January 20 Nancy Pelosi (upon resigning as Speaker) would become Acting President -- unless, of course, before then the Senate decided to resolve the impasse by electing Pence as Vice President, so that on January 20 he would become Acting President.

The above is more extensive than I had intended, but I hope that despite the excess verbiage, some of it is helpful.

Ken