

KEY: Critical that a senator object to the concurrent resolution on Jan. 3

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To: Eastman, John [REDACTED]; Boris Epshteyn [REDACTED]

John and Boris,

As noted earlier, if Pence does not end up rushing through the States, refusing to count any of the 7 states where there are alternate electors, and gaveling that he and Trump are elected, at minimum I think it's essential, and reasonable, for him to not enforce the 2-hour total time limit, and 5-minute limit on each Senator, in debate in the Senate.

It seems clearly unconstitutional to regard the Electoral Count Act as binding the current Senate. So if that were the only factor, Pence would be on strong ground allowing recognizing Hawley, or Lee, or Cruz, or whoever, and allowing debate to go on until there were 60 votes for cloture.

For, once one of them was recognized, and the debate began, I don't think there would even be the opportunity to employ the "nuclear option" to nuke the filibuster with only 51 votes -- that would require recognizing someone who wanted to invoke the nuclear option, which Pence presumably wouldn't do.

The problem with this strategy, as I noted last night, is that, perhaps mindful of the principle that a past Congress can't bind the current Congress, **the House and the Senate have a practice of adopting, by concurrent resolution, the terms of the Act.**

See pages S6-S7 of the Jan. 3, 2017, Congressional Record, [here](#). (Text reprinted at end of this e-mail.)

If that happens on January 3, as best I can tell, the filibuster option goes away. If a concurrent resolution is adopted limiting debate to 2 hours, I think Pence needs to abide by that -- then, his only option for delay would be something that would seem irregular, like using him being the sole person who opens envelopes, as leverage to get more debate. I.e., I won't open more envelopes for another 2 hours, to give those concerned about the state we just debated more time to do a press conference with their additional concerns.

But if, on Jan. 3, at least one senator withholds unanimous consent to the Concurrent Resolution, then we would be able to focus public attention on the ridiculous time constraints for debate imposed by this antiquated Act from more than 130+ years ago.

My understanding is that by objecting, a Senator could force debate on whether the Concurrent Resolution, imposing the time limits in the Act, should be approved. Because there might not even be a quorum there on Jan. 3, possibly withholding unanimous consent would automatically delay things until there was a quorum.

Under this scenario, the only way the time limits could be imposed would be if 60 Senators voted to end debate on the Concurrent Resolution. McConnell and the rest, who just want to say the Electoral Count Act binds their hands, and there's nothing to be done, would have to affirmatively vote to impose these ridiculous limits on debate.

If this is true, maybe we should plan to have Hawley, and other Senators concerned about various States -- for example, I could see Ron Johnson talking at length about WI, and one of the GA Senators talking

about GA -- as part of this debate on the Concurrent Resolution.

After all, the main REASON to oppose adoption of the Concurrent Resolution, limiting debate to just 2 hours on each state, is that THERE IS SO MUCH TO DEBATE! And the way to make that case is to lay out evidence of all the problems in these various states.

So maybe this is our one, clear, procedural chance to hold the floor of the Senate, maybe for hours, maybe for a day or two, maybe for the full time leading up to the Jan. 6 electoral count. Maybe this is where we should focus our attention on educating the public about what has gone on and, also, on PRESSURING THE SUPREME COURT TO RULE. Cruz could spend a lot of time summarizing the Supreme Court filings, and arguing that on Jan. 6, Congress can't count any votes from GA, PA or WI unless and until the Court or state legislatures rule.

Wouldn't this be a tough vote for Republican Senators, even those who hate Trump? To vote for cloture on the Concurrent Resolution would mean a vote to prevent debate on serious irregularities identified in the election which have never been ruled on by any court.

At minimum, a fierce resistance to the Concurrent Resolution might win modifications. For example, settle for 4 hours of debate on each state, with 2 hours to a side, and the time allocated among those objecting and not objecting to a state, to allow for more coherent presentations than permitted by the 5-minute rule.

Below is the text of the 2017 Concurrent Resolution. I think this can give Lee the focus he needs, to get his colleagues to hold firm. Unless there are a dozen or so Republicans willing to join the Democrats to impose ridiculous time limits on debate, and thus appear to try to nail the coffin shut on efforts to communicate to the public what happened here, then an objection to the Concurrent Resolution on Jan. 3 could totally open up the playing field.

Also, this would have the huge advantage of taking pressure off Pence. He wouldn't be the one permitting a filibuster on Jan. 6 -- if this strategy works, the regular rule allowing filibusters will be in force, because McConnell was unable to get cloture on the bill to impose the 2-hour time limit of the Act. Pence could open Arizona, and oversee a lengthy debate, and only after that would need to decide, starting with Georgia, whether to claim the power to count the votes, and refuse to count GA, PA and WI, at least until the Court or state legislatures weighed in.

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Ken

Cong. Record, Jan. 3, 2017, at S6-S7:

TO PROVIDE FOR THE COUNTING
OF THE ELECTORAL VOTES FOR
PRESIDENT AND VICE PRESIDENT
OF THE UNITED STATES

Mr. MCCONNELL. Mr. President, I
ask unanimous consent that the Senate
proceed to the consideration of S.
Con. Res. 2, submitted earlier today.
The PRESIDENT pro tempore. The

clerk will report the concurrent resolution by title.

The legislative clerk read as follows:

A concurrent resolution (S. Con. Res. 2) to provide for the counting on January 6, 2017, of the electoral votes for President and Vice President of the United States.

There being no objection, the Senate proceeded to consider the concurrent resolution.

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the concurrent resolution be agreed to and the motion to reconsider be considered made and laid upon the table with no intervening action or debate.

The PRESIDENT pro tempore. Without objection, it is so ordered.

The concurrent resolution (S. Con. Res. 2) was agreed to, as follows:

S. CON. RES. 2

Resolved by the Senate (the House of Representatives concurring), That the two Houses of Congress shall meet in the Hall of the House of Representatives on Friday, the 6th day of January 2017, at 1 o'clock post meridian, pursuant to the requirements of the Constitution and laws relating to the election of President and Vice President of the United States, and the President of the Senate shall be their Presiding Officer; that two tellers shall be previously appointed by the President of the Senate on the part of the Senate and two by the Speaker on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter "A"; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from said certificates; and the votes having been ascertained and counted in the manner and according to the rules by law provided, the result of the same shall be delivered to the

President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together With a list of the votes, be entered on the Journals of the two Houses.

The PRESIDENT pro tempore. The Chair appoints the Senator from Missouri, Mr. BLUNT, and the Senator from Minnesota, Ms. KLOBUCHAR, as tellers on the part of the Senate to count electoral votes.