

RE: [EXTERNAL]Re: KEY: Critical that a senator object to the concurrent resolution on Jan. 3

Eastman, John [REDACTED]

Fri 1/1/2021 8:24 PM

To: Boris Epshteyn [REDACTED]

Cc: Kenneth Chesebro [REDACTED]

Added in S.Ct. below, and some other stuff.

From: Boris Epshteyn [REDACTED]

Sent: Friday, January 1, 2021 5:18 PM

To: Eastman, John [REDACTED]

Cc: Kenneth Chesebro [REDACTED]

Subject: Re: [EXTERNAL]Re: KEY: Critical that a senator object to the concurrent resolution on Jan. 3

External Message

These are talkers for Congress and Pence, right?

Does this include all the meat we need re controversy in front of SCOTUS?

Do we need/want to make edits before sending to Members?

Here are talking points for members of Congress, and the grounds for Vice President Pence to exercise constitutional powers assigned to him.

1. In multiple states, state and local election officials, as well as judicial officials, ignored or altered state election law without consent of the legislature, including most troublingly laws enacted to minimize the risk of fraud in absentee voting.
2. Because under Article II, sec. 1, cl. 2 of the Constitution, only the Legislature can determine the "manner" of choosing presidential electors, those state actions were unconstitutional. *McPherson v. Blecker*, *Bush v. Palm Beach*, *Bush v. Gore*.
3. That means the election "failed" to legally elect electors on the date assigned by Congress, so under 3 USC 2, the power to select the manner of choosing electors has devolved back onto the Legislature—even to the point of choosing the electors themselves. The Seventh Circuit has, in an important opinion (though ultimately ruling against the President on laches grounds), that the Legislatures would have such a power if the election had been illegally conducted.
4. The Supreme Court has made it clear that it has no intention of addressing this illegal and unconstitutional conduct. So upholding the rule of law now falls to other constitutional actors who have constitutionally assigned roles. At this point, the best we can likely hope for is a strident dissent from Thomas or Alito that maps out the illegal conduct and the constitutional actors who can provide a remedy.
5. Legislatures should be either de-certifying existing electors, or even better certifying the alternate slate of electors, depending on the evidence of illegality and fraud in their particular states.

6. Then, there is the role of the VP at the Joint Session of Congress. The 12th Amendment provides: “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” Although the passive voice in the last part of that phrase creates some ambiguity, the stronger argument, well supported in the legal scholarship, is that the VP not only opens the certificates, but has ultimate authority to determine which shall be counted when there are multiple slates of electors.
7. When VP gets to Arizona, if he has a credible ground for contending that there is still an ongoing, credible challenge to the results of the election, he should declare that neither slate can be counted until that challenge is resolved, then move on to Arkansas. If he gets an objection, gavel it out of order as an intrusion on his power to open (and implicitly to decide which) the slate of electoral votes and to count them.
8. If, instead, the Legislature has certified the alternate slate of electors, he should deem that slate to be the valid one, and any suggestion in 3 USC 15 that the “executive” slate is the default should be rejected as a violation of the Legislature’s plenary power under Article II.
9. If he does let the objections follow the procedure set out in 3 USC 15, I think he will have conceded the validity of that statute, as least in part as per my discussion of Nec & Prop above. I think that would be a huge mistake. As the likely result under that statute would be, at best, Senator voting to uphold the objection, and the House voting to overrule it. The text of Sec. 15 then says the electoral votes are affirmed (if only 1 slate from the state) or the one certified by the executive (if two slates). Either way, Biden wins.
10. If that happens, as a much less enviable fallback, Senators should filibuster, contending that the 5-minute rule specified in that statute means that a former legislature is binding the current Senate, which is impermissible.
11. Once the filibuster is broken, if the Senate and the House do not agree on the objections when they are back in Joint Session, Vice President Pence should accept the legislature’s slate (again, if it has been certified by the legislature). Same reasoning as in #2 above.
12. If this plays out under scenario #1, there would be 7 states whose contested electoral votes are not counted, leaving Trump ahead 232 to 222. That would be a “majority of the electors appointed,” as specified in 12th Amendment, and Pence would announce Trump as the winner. Anything less than all 7 (or less than 6, if Nevada is the 7th), would leave Biden in the lead with the “majority of electors appointed”, however.
13. Alternatively, if Biden is simply held to under 270 by virtue of electoral votes not being counted (even though “appointed”), or by virtue of a switch to legislature-certified electors, then the election gets thrown to the House. If the Republicans there hold true and vote with their state delegations, Trump should win a bare majority of the states (26).

Boris Epshteyn

Strategic Advisor

Donald J. Trump for President, Inc.

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On Jan 1, 2021, at 5:32 PM, Eastman, John █ wrote:

As for bullet points for Pence.

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2. If, instead, the Legislature has certified the alternate slate of electors, he should deem that slate to be the valid one, and any suggestion in 3 USC 15 that the "executive" slate is the default should be rejected as a violation of the Legislature's plenary power under Article II.
3. If he does let the objections follow the procedure set out in 3 USC 15, I think he will have conceded the validity of that statute, as least in part as per my discussion of Nec & Prop above. But then the fallback should be for Senators to filibuster, contending that the 5-minute rule specified in that statute means that a former legislature is binding the current Senate, which is impermissible.

4. Once the filibuster is broken, if the Senate and the House do not agree on the objections when they are back in Joint Session, Vice President Pence should accept the legislature's slate (again, if it has been certified by the legislature). Same reasoning as in #2 above.

5. If this plays out under scenario #1, there would be 7 states whose contested electoral votes are not counted, leaving Trump ahead 232 to 222. That would be a "majority of the electors appointed," as specified in 12th Amendment, and Pence would announce Trump as the winner. Anything less than all 7 (or less than 6, if Nevada is the 7th), would leave Biden in the lead with the "majority of electors appointed", however.

6. Alternatively, if Biden is simply held to under 270 by virtue of electoral votes not being counted (even though "appointed"), or by virtue of a switch to legislature-certified electors, then the election gets thrown to the House. If the Republicans there hold true and vote with their state delegations, Trump should win a bare majority of the states (26).

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