

Dec 12, 2020, 8:25 AM

Boris Epshteyn

Ken - two questions:

1. When electors are counted in Joint Session - is it each house that debates disputes or is it by delegation?

2. Does VP have ultimate

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2. Does VP have ultimate authority on which slate of electors should be chosen?

BE

1. Under the Electoral Count Act, upon a written objection by at least one House Member and one Senator, the House and Senate are to separate, debate for no more than two hours (no one speaks for more than 5 mins), and then vote up or down. If House and Senate disagree, the slate certified by governor stands. Scholarly consensus is these rules are unconstitutional — see footnote 4 of my Nov. 18 memo. They're really just a political precommitment device to have a tiebreaker. There's at least one way to see up a test case to force SCOTUS to rule on constitutional, if there's a will to do it. The Electoral Count Act is key to covering up fraud by ensuring there's no real

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by ensuring there's no real debate in Congress; it needs to be struck down, even if result of this election isn't altered.

Boris Epshteyn

BE

Ok. What's role of VP?

2. A very good argument can be made that the President of the Senate both opens and counts the vote. Congress authorized that for Washington's first election, and there are examples through the 1850s. John Yoo advocated this view in October.



What Happens if No One Wins?

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What Happens if No One Wins?

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to be done publicly, "in the presence" of Congress. And if "counting" the electors' votes is the Vice President's responsibility, then the inextricably intertwined responsibility for judging the validity of those votes must also be his.

If that reading is correct, then the Electoral Count Act is unconstitutional. Congress cannot use legislation to dictate how any individual branch of government is to perform its unique duties: Congress could not prescribe how future Senates should conduct an impeachment trial, for example. Similarly, we think the better reading is that Vice President Pence

12th Amendment, "the President of the Senate [i.e., the Vice President] shall, in the Presence of the Senate and House of Representatives, open all the certificates [of the electoral votes of the states] and the votes shall then be counted." Left unclear is who is to "count" the electors' votes and how their validity is to be determined.

Over the decades, political figures and legal scholars have offered different answers to these constitutional questions. We suggest that the Vice President's role is not the merely ministerial one of opening the ballots and then handing them over (to whom?) to be counted. Though the 12th Amendment describes the counting in the passive voice, the

Boris Epshteyn

BE

Got it, thank you

I have discussed this, briefly, with the Vice President's

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I have discussed this, briefly, with the Vice President's counsel — former O'Melveny partner; very able guy; examined the issue as far back as 2000, when Gore considered deviating from the Act in his role as President of the Senate. I can write a memo on possible strategies if you like.

Boris Epshteyn

BE Sounds good. Something brief if ok?

Sure. One quick take: perhaps best shot at setting up a test case would be for Pence to recuse (on conflict of interest), and for Grassley, or whoever is in line after him willing to take the role, to act as President of the Senate to assert the prerogatives of that position under the plain language of the

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under the plain language of the Counting Clause. And have him ready to file a lawsuit seeking to invalidate the Act as soon as Dems assert the House and Senate do the counting. At minimum lawsuit would buy time and rivet attention. I'd love to know if legal giants like Cruz and Lee would back that.

Boris Epshteyn

Ok. Let's make sure all gets done on Monday then go from there

BE

Dec 12, 2020, 11:19 AM

Boris Epshteyn

Ken - briefed Mayor on our discussion. When you have time, without taking focus off Monday, a memo on VP's powers during Joint Session would be vital to have.

BE

Dec 12, 2020, 8:21 PM

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