Twitter Thread by michaelmorley11



michaelmorley11
@michaelmorley11

1/ This piece argues based on a precedent set by Thomas Jefferson in 1800 that VP Pence should present & count only the alternate unofficial slates of electoral votes from states like PA when Congress meets in joint session to count electoral votes on Jan. 6. The argument fails.

> \u201cThomas Jefferson, author of the Declaration of Independence, the man whose face adorns Mt Rushmore, [...] only became President because he used his unilateral power as President of the Senate to open and count the presidential ballots in his own favor.\u201dhttps://t.co/k7l160VIsu
>
> — Ron (@CodeMonkeyZ) December 29, 2020

2/ Jefferson, as VP, presided over the joint session where electoral votes from the Election of 1800 were counted. Georgia's votes suffered from several technical procedural defects that were facially apparent.

3/ As presiding officer, Jefferson had the contestable votes counted w/o giving members of Congress a chance to object. This is allegedly a precedent for allowing Pence to unilaterally count whatever slates of electoral votes he wants. But the analogy fails for many reasons.

4/ For more details of the underlying facts, see an article specifically on this incident by David Fontana & Bruce Ackerman, "Thomas Jefferson Counts Himself into the Presidency," https://t.co/pvsf13Kyt4

5/ First, the Jefferson precedent occurred decades before Congress enacted the Electoral Count Act ("ECA"), which regulates the process of counting electoral votes - including many aspects of the VP's role. Congress has limited the VP's discretion since the election of 1800.

6/ One might question the ECA's constitutionality. But when the new Congress convenes after a presidential election, the chambers adopt a concurrent resolution stating they'll follow the ECA & reprinting most of its key provisions for counting votes & running the joint session.

7/ Second, Jefferson's actions were contrary to a precedent set by VP John Adams in 1796 when he presided over the joint session. Many legal concerns had publicly been raised to Vermont's electoral votes. Adams properly invited objections - there were none - before counting them.

8/ Third, Jefferson didn't purport to choose between competing slates of electors from a state or preventing Congress from choosing between them. The only potential problem with the votes was technical, about the form of the submission.

9/ Fourth, the votes Jefferson counted had been cast by the state's officially appointed electors, and certified by the state. He did not purport to unilaterally count unofficial votes from uncertified competing electors.

10/ Fifth, as @derektmuller sagely points out, the tellers appointed by the House and Senate chose to record Georgia's electoral votes. There's no evidence Jefferson forced, or could've forced, them to do so.

11/ Similarly, even though Jefferson didn't solicit objections, if Members of Congress felt strongly enough, they could've raised objections anyway. The absence of any objections can be read as congressional acquiescence, rather than an exercise of unilateral VP power.

12/ @Nedfoley likewise explains in his brilliant book Ballot Battles, https://t.co/sGrHGdy9Yi, that the Fontana/Ackerman account of Jefferson's actions may be overstated.

13/ In short, in counting electoral votes from the election of 1800, Jefferson (ignoring the precedent set by Adams) overlooked a purely technical, clerical defect in Georgia's electoral votes, which were the state's legally valid, officially certified votes, and no one objected.

14/ This precedent: (i) is inconsistent w/ Adams' even earlier precedent to the contrary of soliciting objections from Congress, (ii) likely superseded by the ECA and accompanying concurrent resolutions, and (iii) easily distinguishable on numerous material grounds.

15/ In any event, this lone precedent may also be rejected as normatively improper & inconsistent with the 12th Amendment's text & structure. After saying the VP shall "open" electoral votes, the amendment shifts to passive voice, saying they "shall then be counted."

16/ That's far from the most natural way of suggesting that the VP shall be solely responsible for counting the votes and have power to unilaterally resolve any disputes concerning their validity or competing slates.

17/ In short, the Jefferson precedent from the Election of 1800 does not empower VP Pence to unilaterally decide to count unofficial competing slates of purported electoral votes, attempt to grant them safe harbor status, or preclude Congress from considering the official slates.

18/ If anything, to the extent there's a live dispute concerning the Jan. 6 session, it's whether VP Pence must present the unofficial competing slates of electoral votes to Congress at all. I think the answer under the ECA is likely "yes," but there are strong counterarguments.

19/ And by fleshing out some of the ECA's vague provisions, the concurrent resolution that the House and Senate typically adopt prior to the joint session may shift the calculus, alleviating the need for him to present such competing slates.