Twitter Thread by Matthew A. Seligman

Matthew A. Seligman
@Matt_Seligman

And here is the final stand. The President asserts that the Vice President has authority (presumably unreviewable) to determine which electoral votes count. This is dangerously incorrect, and it's worth going into detail about why. A thread:

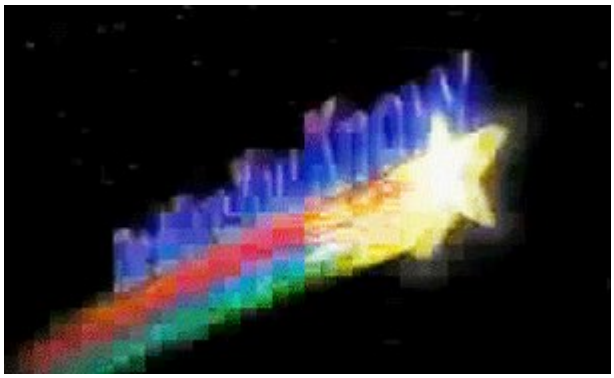
> The Vice President has the power to reject fraudulently chosen electors.
>
> — Donald J. Trump (@realDonaldTrump) January 5, 2021

This is what @lessig and I have called the "VP Super Power Theory" in our course on disputed presidential elections @Harvard_Law. We do a deep dive into it on the Another Way to Elect a President podcast @EqualCitizensUS:

https://t.co/QDPe9MQVNh

What's the backstory of this radical theory of the VP's power? Poor drafting of the Twelfth Amendment, which says: "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."

Note the passive voice: the VP opens the certificates, but who does the counting? (Writing tip: avoid the passive voice, especially when drafting a constitutional provision that allocates critical powers among political actors.)



So, the VP Super Power Theorist argues, the VP is the only actor mentioned in the sentence so it *must* be the VP who does the counting (and thus can reject electors' votes). Wrong. Every single method of interpretation demonstrates otherwise. Let's go through them:

Text: it would have been simple to state "The VP shall open the certificates and then he shall count them." But that's not what the Twelfth Amendment says! That indicates that the counting power lies elsewhere.

Structure: the rest of the Twelfth Amendment establishes procedures for the House of Representatives to select a president if no candidate gets a majority of electors (which might happen when there are >2 candidates, as in 1824).

That provision would be pointless if the VP could decide not to count electors in his sole and unreviewable discretion. Indeed, the entire elaborate architecture of the Twelfth Amendment could have just been replaced with: "the VP appoints the next President." Not what it says.

History: the Framers had *just* fought a war to overthrow a monarchy. Remember "taxation without representation" as a rallying cry? Representation was the key word. The Framers were deeply committed to a republican form of government (that is, an elective democracy).

Can anyone seriously believe that they then designed the process for presidential elections to empower the VP to re-elect himself or even to elevate himself to the presidency? And remember, there was no two-term limit on the presidency until the Twenty Second Amendment in 1947.

The VP Super Power Theory thus entails that the Framers established a presidency with a de facto lifetime term--a possibility they considered (probably because they knew Washington would be the first President), and specifically rejected. There is a 4-year term for a reason.

The VP Super Power Theory is thus fundamentally incompatible with their commitment to sovereign power residing, inalienably, in the people rather than in a ruler (as was the case in European monarchies at the time).

Subsequent history: The Electoral Count Act of 1887, and for decades before that a Joint Rule adopted by Congress at the beginning of each Session, assigns the power to count the electoral votes to Congress. Not the VP. That's been the explicit system for close to 200 years.

But wait! The VP Super Power Theorist argues that it doesn't matter what Congress has done because the VP's alleged power is *constitutional*. So just like any other statute passed by Congress is invalid if it violates the Constitution, so to is the ECA! This misses the point.

The point is that the centuries-long practice after Constitutional ratification informs us about what the Constitution itself means. See, e.g., NLRB v. Noel Canning, 573 U.S. 513 (2014), where the Supreme Court applied that methodology to the Appointments Clause.

This is what (following James Madison, principal architect of the Constitution) @WilliamBaude, @curtisabradley, and others have called "constitutional liquidation"--the meaning of the Constitution becomes determinate through its application over time.

And with respect to the counting power under the Twelfth Amendment, the centuries-long practice tells us that the counting power is Congress's, not the VP's.

In sum: the Constitution does not grant the VP power to reject electoral votes unilaterally. The President is wrong on the law. And what's even more clear: he's explicitly rejecting democracy.