Twitter Thread by Jeff Carlson

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1) Congress is incentivized to see Pence's role as passive.

But Constitutional scholars differ and/or acknowledge that varying interpretations exist.

Note: I am NOT predicting what Pence will do. I will just be highlighting some ambiguities.

(Apologies - will be long thread)

2) Edward Foley is head of Election Law Dept at Ohio U.

He is Left & originator of Blue Shift theory

What follows are quotes from his "war-game" paper published in the Loyola University Chicago Law Journal - Preparing for a Disputed Presidential Election
https://t.co/XtrBK9qBFs

3) "As part of an effort to prepare for the risk of a disputed presidential election in 2020, it is imperative to consider how the embarrassingly deficient procedures might operate if they were actually called into play."

4) "The Constitution itself says remarkably little relevant to this topic, and what it does say is shockingly ambiguous."

Here is the applicable text of the Twelfth Amendment:

> [T]he 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;—
> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.[33]

5) "The first thing to observe about this constitutional language is that the critical sentence is written in the passive voice: “the votes shall then be counted.” Here, thus, is the first frustrating ambiguity."

6) "It could be the “President of the Senate” who does the counting; or, after the President of the Senate has finished the role of “open[ing] the certificates” then the whole Congress, in this special joint session, collectively counts the electoral votes."

7) "Either way, this language contains no provision for what to do in the event of a dispute, whether with respect to the “certificates” to be “open[ed]” or with respect to the “votes” contained therein.”

8) "It certainly says nothing about what to do if the President of the Senate has received two conflicting certificates of electoral votes from the same state, each certificate purporting to come from the state’s authoritatively appointed electors."

9) "As the distinguished jurist Joseph Story observed early in the nineteenth century, this crucial constitutional language in the Twelfth Amendment appears to have been written without imaging that it might ever be possible for this sort of dispute to arise."

10) Despite its ambiguity, or perhaps because of it, the peculiar passive-voice phrasing of this crucial sentence opens up the possibility of interpreting it to provide that the “President of the Senate” has the exclusive constitutional authority…”

11) "...to determine which “certificates” to “open” and thus which electoral votes “to be counted.” This interpretation can derive support from the observation that the President of the Senate is the only officer, or instrumentality, of government given an active role..."

12) "...in the process of opening the certificates and counting the electoral votes from the states. The Senate and House of Representatives, on this view, have an observational role only."

13) "The opening and counting are conducted in their “presence”—for the sake of transparency—but these two legislative bodies do not actually take any actions of their own in this opening and counting process."

14) "How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. They have no constitutional way to act together as one amalgamated corpus."

15) "Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein."

16) "This interpretation of the 12th Amendment is bolstered by the further observation that responsibility to definitively decide which electoral votes from each state are entitled to be counted must be lodged ultimately in some singular authority of the federal government."

17) "Given the language of the Twelfth Amendment, whatever its ambiguity and potential policy objections, there is no other possible single authority to identify for this purpose besides the President of the Senate."

18) "according to this argument, the inevitable implication of the Twelfth Amendment's text is that it vests this ultimate singular authority, for better or worse, in the President of the Senate."

19) "Subject only to the joint observational role of the Senate and House of Representatives, the President of the Senate decides authoritatively what "certificates" from the states to "open" and thus what electoral votes are "to be counted.""

20) Foley doesn't like this interpretation but he acknowledges it as valid.

To circumvent it, Foley suggests use of Electoral Count Act (federal - not Constitutional - law).

Problem is, ECA is unconstitutional as it violates 12th & Article II

This is why Gohmert brought suit.

21) Foley touches on legality/standing of competing electors:

"What matters is whether or not Congress receives a submission of electoral votes from a state, not whether that submission is legally valid according to some standard that Congress might not recognize as binding."

22) Use of ECA likely leads to either Biden win or - much less likely (given GOP cowardice) but also possible - an impasse between houses.

Pence could cite violation of Article II and count no votes from disputed states.

Note: Again, I am NOT saying this is what he will do.

23) Pence could also defer which might allow the states to have official legislative sessions to determine if they felt it necessary to decertify the results that were originally for Biden.

24) It's also "possible" that Pence could refuse to open the votes, declaring that he believes them to be the result of fraud, with a request for Supreme Court intervention.

25) I am not saying or predicting what Pence will do - only he knows. It's entirely possible even he is unsure right now.

The easy option for Pence is to go w/tradition and punt to Congress.

But it seems incorrect to accept that this is his only "legal" option.