

Principles for ECA Reform

THE PROJECT

April 4, 2022

At the invitation of the leadership of the American Law Institute, a group whose members span a range of legal and political views came together to consider possible Electoral Count Act (ECA) reforms. Group members have varied backgrounds in election and constitutional law, and in government. All share the belief that Congress should reform the ECA. After studying the ECA's flaws and various public proposals for its reform, members came to agreement on core principles that should guide this reform.

That the group came to a consensus on core principles does not mean that each member would apply those principles in the same way in shaping the details of reform. Nor do all members view these principles as the only feasible ones that Congress might consider and eventually adopt. And the group would not be united around any view that ECA reform is the only action that Congress could, or should, take on matters relating to electoral rules, procedures, or administration in federal elections.

Nonetheless, the group unanimously agrees that Congress should reform the ECA in time for the 2024 election and proposes the following principles in an effort to contribute to a constitutionally sound bipartisan consensus in Congress.

GENERAL PRINCIPLES TO GOVERN ECA REFORM

Under Article II, section 1 of the Constitution, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," and "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes." And the Twelfth Amendment provides that "[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."

Against this background, Congress enacted the ECA 135 years ago. The ECA is widely seen to be impenetrably complex and poorly conceived, especially in its definition of the congressional role in the final tally of electoral votes for President and Vice President.

ECA reform should be guided by these general considerations:

- Congress lacks the constitutional authority to address every issue that may arise in the presidential selection process.
- ECA reform should not itself become the basis of fresh uncertainties about the presidential selection process by raising new questions about whether Congress has acted within constitutional limits and inviting legal challenges on that basis. The aim of ECA reform should be, at a minimum, to address the core dangers and uncertainties presented by the current law without introducing new problems of the same kind.

- ECA reform should clarify that Congress has an important but limited role in tallying electoral votes, consistent with the best understanding of the Twelfth Amendment and other relevant authorities.
- ECA reform should help check efforts by any State actor to disregard or override the outcome of an election conducted pursuant to State law in effect prior to Election Day, including State law governing the process for recounts, contests, and other legal challenges. (Currently every State has chosen to select presidential electors through the popular vote.) This is the most difficult element of reform because the question of Congress’ role in addressing abuses of this kind can raise novel and difficult constitutional questions and generate sharp political disagreement. ECA reform cannot by itself address every conceivable problem that may arise within a State, many of which will require legal and political responses at the State level.
- ECA reform should not affect the authority of the federal courts to address Due Process, Equal Protection, and other constitutionally based claims of unlawful State action in the administration, count, and certification of a State’s popular vote.

SPECIFIC PRINCIPLES TO GOVERN ECA REFORM

A. Congressional Powers in Counting and Determining the Validity of Electoral Votes

- Congress’ power to consider objections to electoral votes transmitted from the States, and to reject any such votes, should be limited at most to objections grounded in explicit constitutional requirements: the eligibility of candidates or electors, the time for the selection of electors, and the time by which the electors must cast their votes (as specified by Congress pursuant to its Article II power over timing).
- The ECA provides that Congress cannot consider an objection to a certificate of electors submitted by a State unless joined by one member from each chamber. ECA reform should raise this threshold considerably. In determining the requisite threshold, Congress should balance (1) the need to avoid delays and disruption in the vote count occasioned by objections from only a handful of members, against (2) the importance of permitting significant objections, commanding meaningful support from both chambers, to be lodged and resolved.
- Congress should clarify that a threshold of at least a majority in each chamber is needed to sustain any objection properly made within the specified categories of allowable challenges to electoral votes.
- In enforcing its constitutional power over the timing for the selection of electors, Congress should amend the ECA to clarify that a “failed election” under 3 U.S.C. § 2 may include extraordinary (catastrophic) events, such as a natural disaster, but excludes the pendency of legal challenges brought against the outcome of the popular vote in State or federal court, or before a State legislature (or body established by a State legislature).

- Congress should clarify that under the Twelfth Amendment, the authority of the President of the Senate as presiding officer is limited to opening the envelopes containing the lists with the electors' votes as lawfully transmitted by the States, and otherwise presiding over the proceedings to ensure that they comply with the procedural requirements specified in that Amendment, the ECA and other applicable standing rules.

B. Reform Related to the Electoral College Meeting Date

- Congress should move the Electoral College meeting date to a later date to ensure that States have more time to conduct recounts as needed, and so that legal challenges can be resolved.

C. Reforms Related to State Action to Override or Disregard the Outcome of the Vote Under Existing Law

- Congress should exercise its Article II timing power to clarify that State legislatures and other State institutions do not have power after the Election Day specified by Congress to disregard the vote held pursuant to the State law in place on that day, or to select electors in a manner inconsistent with the State law in place on that day.
- To address the problem of multiple lists from any one State seeking recognition for purposes of Congress' Twelfth Amendment vote count responsibility, Congress should do the following:
 - Require the State official or body responsible under State law for certifying final election results to transmit to the Archivist by a certain date the certificate of identification of electors and their votes, which reflects the final results of the State's election as conducted under the laws duly enacted by the State prior to Election Day.
 - Make clear that Congress will choose the certificate that is sent by the State official or body responsible under State law for certifying final election results.
 - Authorize any candidate for President or Vice President on the ballot in a State to bring a civil action in a three-judge federal court seeking a declaratory judgment that identifies, for purposes of the federal law duty described above, the State official or body responsible for certifying final election results pursuant to this duty. The three-judge court should be appointed as provided in 28 U.S.C. § 2284.
 - Congress should additionally authorize the federal court to order appropriate injunctive or mandamus relief against the identified State official or body to carry out the federal-law duty to transmit the certificate of identification of electors and their votes. Congress should specify that the provision for injunctive or mandamus relief is severable in case a court deems the granting of such relief to be unconstitutional.

- Congress should specify that the three-judge court shall resolve all issues before it without delay, with direct appeal to the United States Supreme Court, which will have mandatory appellate jurisdiction.

GROUP MEMBERS

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Bob Bauer is Professor of Practice and Distinguished Scholar in Residence at New York University School of Law. He served as White House Counsel (2009-2011), as Co-Chair of the Presidential Commission on Election Administration (2013-2014), and as Co-Chair of the Presidential Commission on the Supreme Court of the United States (2021).

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