

Preventing the Next Election Crisis

The aftermath of the 2020 election was an unprecedented stress test for America's electoral institutions. For the first time in American history, an incumbent president refused to accept that he had been defeated for reelection. President Trump and those in his orbit tried every tactic they could to dispute, delay, and hinder the peaceful transfer of power. That campaign against the Constitution reached its tragic culmination in the storming of the United States Capitol on January 6, 2021.

The date of the Capitol riot was set by a previously obscure 19th-century law, the Electoral Count Act (ECA). Passed in an attempt to fix the problems from the disputed 1876 election, this law governs the process by which Electoral College votes are cast, certified, sent to Congress, and counted before a joint session as required by the Constitution. In most elections, this has been a little-noticed formality, the last official step in confirming an election outcome. But thanks to shoddy drafting and arguable ambiguities in the ECA, Trump was able to incite a mob with the false claim that Congress, or perhaps even Vice President Pence acting alone, could overturn the reality that Joe Biden won the 2020 election.

Cato experts have urged Congress to reform the Electoral Count Act as the most urgently needed legislative response to prevent future constitutional crises. Robert Levy, chairman of Cato's board of directors, was writing explanations of the constitutional principles at stake even as the 2020 dispute was ongoing, posting "Presidential Elections: A Primer" to the *Cato at Liberty* blog in December 2020. (See also, "Voting Reforms: Setting Priorities," page 2.)

Senior fellow Walter Olson has also praised ECA reform as a better alternative

to the sweeping voting and elections bills that were being pushed by congressional Democrats on a party-line basis, which have since failed to pass in the Senate ("The Dos and Don'ts of Defending Democracy," *Cato Policy Report* (November/December 2021)).

In recent weeks, ECA reform has been a hot topic in Congress, with serious efforts underway to pass a reform bill on a bipartisan basis. The Committee on House Administration, chaired by Rep. Zoe Lofgren (D-CA), released a staff report outlining the ECA's history, problems, and a list of proposed fixes. Three senators in the Democratic caucus, Angus King (I-ME), Dick Durbin (D-IL), and Amy Klobuchar (D-MN), released a discussion draft of their initial proposal for bill language. And a bipartisan group of more than a dozen senators, led by Sen. Susan Collins (R-ME), is reportedly working on their own draft. Two of those senators, Joe Manchin (D-WV) and Lisa Murkowski (R-AK), conducted a rare bipartisan joint interview with CNN's Jake Tapper to promote the group's work on the ECA and related issues.

As reform proposals are being formulated, Cato has been an active participant in getting the details right, including meeting with Capitol Hill offices for members from both parties and in both chambers.

Cato research fellow Thomas A. Berry helped highlight a particular problem that was otherwise being overlooked. As he explained, the ratification of the Twentieth Amendment in 1933 changed the rules for how Congress must handle electoral votes cast for allegedly ineligible candidates. Instead of throwing those votes out altogether, Congress must instead count them, and if they then also find that the winning candidate is ineligible (or dead), then the presidency passes to his or her running mate, the vice president-elect. Aside from

an important point of constitutional compliance, this rule also ensures that the voters get the party of their choice in the White House rather than potentially giving the presidency to the defeated opponent of an ineligible or deceased candidate.

In all, Cato has published more than a dozen pieces exploring the details of the Electoral Count Act, explaining what a reform bill should look like, and reviewing the ideas proposed so far in Congress. This work has been widely cited in the national press, including the *New York Times*, the *Washington Post*, and CNN.

These ideas include raising the threshold needed to trigger a debate and vote in Congress on rejecting a state's votes, clarifying the purely ministerial role of the vice president, and spelling out an exhaustive list of valid grounds for objections. The latter should be limited to a narrow range of constitutional mandates that are properly up to Congress to enforce, such as ensuring that states cast the right number of votes or did not cast votes that are not permitted, including for presidential and vice-presidential candidates both from the same state as the electors. At the same time, this would exclude Congress from judging the underlying conduct of the popular election in each state, a matter that is for the states and the courts to decide.

"The Cato Institute has long worked to encourage people everywhere to better understand and appreciate the principles of government that are set forth in America's Founding documents," wrote Cato's president, Peter Goettler, after the assault on Congress. "Among these principles is the peaceful transfer of power after free and fair elections." By seeking to clarify and strengthen the rules governing that process, Cato is working to make sure that crucial constitutional principles can withstand challenges for generations to come. ■