August 2, 2022

The Honorable Amy Klobuchar
Chairwoman
Committee on Rules & Administration
United States Senate
Washington, D.C. 20515

The Honorable Roy Blunt
Ranking Member
Committee on Rules & Administration
United States Senate
Washington, D.C. 20515

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the government as the President of the United States.

Alexander Hamilton
Federalist no. 68, "The Mode of Electing the President"
March 12, 1788

Dear Chairwoman Klobuchar, Ranking Member Blunt, and distinguished Senators:

We would like to thank the committee for taking the time to address this important issue, and in particular all of the Senators and Representatives, their staff, and the scholars and organizations from across the political spectrum who have contributed to the ongoing discussions about reforming the Electoral Count Act of 1887.

We are Thomas A. Berry, a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the *Cato Supreme Court Review*, and Andy Craig, staff writer for the Cato Institute and associate editor of the *Cato Policy Report*. Founded in 1977, the Cato Institute is an independent, nonpartisan public policy research organization dedicated to advancing the principles of individual liberty, limited government, free markets, and peace.

Together with our colleagues, we have conducted in-depth research and analysis on the flaws of the Electoral Count Act and how it should be reformed.[1] We appreciate the opportunity to share our findings and recommendations with the committee.

ECRA Addresses Most Major Problems in the ECA

The legal architecture for electing a President of the United States has come under increasing strain. Ambiguous and outdated statutory language, conflicting interpretations, and partisan

[1] Walter Olson, "Cato Scholars on the Electoral Count Act," *Cato at Liberty* (blog), March 21, 2022. https://www.cato.org/blog/cato-scholars-electoral-count-act

pressures have combined to threaten the American people with presidential elections devolving into a quadrennial constitutional crisis.

This is unacceptable, and the draft Electoral Count Reform Act (ECRA) proposal from Sen. Collins, Sen. Manchin, and their colleagues in the bipartisan working group is a well-crafted starting point for fixing this problem. It reflects many of the ideas we and others have urged Congress to adopt. As it stands, the ECRA draft would be an immense improvement over the status quo and substantially reduce the risks of another disputed election.

The ECRA draft's reforms include: requiring states to set all of their election procedures by laws enacted prior to Election Day; an expedited judicial backstop to handle the risk of rogue actors obstructing the certification of electors; replacing the muddled "safe harbor" and "failed elections" sections of current law with clearer rules; a firmer commitment to respect the timely outcome of the state law process for appointing electors, including applicable court rulings; raising the number of cosponsors needed for congressional objections; reorganizing the notoriously confusing rules for the joint session in 3 USC §15; and a categorical repudiation of claims that the Vice President has any unilateral power over the electoral count.

Taken together, these provisions in the ECRA draft address the most dangerous flaws in the existing Electoral Count Act. Each of them reflects a consensus recommendation common to most analyses of ECA reform. Possible points of improvement will therefore relate mostly to technical drafting issues, or to other areas of concern that the ECRA draft does not yet address.

This law must stand the test of time, able to safely govern presidential elections for many years to come. It must be capable of being dusted off and taken off the shelf in circumstances where it has not been closely examined in decades, and its plain meaning must then be clear on its face. The outpouring of historical scholarship and legal commentary produced in the aftermath of the 2020 election has been of immense value, but it is no substitute for clear words on the page in the law itself.

In light of this, we feel it is critical to carefully scrutinize the details of the draft ECRA, and to ensure scrupulous compliance with all applicable requirements of the Constitution. To that end, we have several points of improvement we would like to recommend for your consideration as the legislative process moves forward, as well as responses to some criticisms of ECA reform that we feel are mistaken.[2]

[2] For more discussion of the ECRA draft, *see*:
Andy Craig, "What's in the Collins-Manchin ECA Reform, and Where It Goes From Here," *Cato at Liberty* (blog), July 22, 2022. https://www.cato.org/blog/cato-scholars-electoral-count-act
Thomas A. Berry, "Some Potential Improvements to the Electoral Count Reform Act," *Cato at Liberty* (blog), July 27, 2022. https://www.cato.org/blog/some-potential-improvements-electoral-count-reform-act

Having an Electoral Count Act Is Constitutional and Necessary

Some have argued that having an Electoral Count Act at all is unconstitutional and that "the only real way to prevent future mischief is to repeal" the ECA.[3] This approach, though motivated by an appropriate desire to constrain Congress's role, is misguided. The Constitution's sparse language describing the electoral count leaves too many gaps for the count to function smoothly without some additional clarifications. *Some* law or joint rule is necessary to fill those gaps.

Defining and codifying Congress's power to discount invalid electoral votes permissibly fills these constitutional gaps. Making an accurate count requires somehow discounting votes that are *prima facie* invalid. Because the Constitution does not say or even imply who should make this judgment, assigning that power by statute to some group present at the count (such as to Congress itself) is permissible gap-filling and, within certain constitutional limits, is not an illegitimate aggrandizement of Congress's role.[4]

Nor is it unconstitutional for Congress to answer these questions via statute. The argument has been raised that the Constitution would require any regulation of the count to be by joint rule (passed by both houses but *not* signed by the president), since the Constitution allows each house to "determine the Rules of its Proceedings" by a vote of that house alone.[5]

This clause does likely mean that Congress *could* enact an ECA by joint rule, at least for those parts that only govern the procedures during the joint session. (Other parts of the law are addressed to actors outside of Congress, such as the states, and thus are not in the nature of a congressional rule). But that Congress can enact its own rules by a non-statutory resolution does not mean Congress *must* do so. Rather, as other scholars have suggested, the Constitution most likely gives the two houses the authority to change the ECA's rules for conducting the count by concurrent resolution without the need for a presidential signature.[6] But until the two houses actually exercise that option, the ECA stands as a valid exercise of their rulemaking power, since it was passed by both houses. A reformed ECA passed as a statute would stand on exactly the same footing.

To be sure, a congressional power to second-guess the conduct of the popular election in each state or to decide other disputes arising before the electors cast and seal their ballots would be on more questionable constitutional grounds. Since such questions can be resolved before the

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[3] *Wall Street Journal*, "Preventing Another Jan. 6," editorial, February 16, 2022. https://www.wsj.com/articles/preventing-another-jan-6-electoral-count-act-congress-11644342408

[4] Thomas A. Berry, "The Legitimate Role of Congress in the Electoral Count," Cato Briefing Paper no. 135, February 22, 2022. https://www.cato.org/briefing-paper/legitimate-role-congress-electoral-count

[5] *See, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 North Carolina Law Review 1653, 1779–87 (2002).

[6] *See* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of the Proceedings Clause*, 19 Journal of Law and Politics 345, 407–08 (2003).

electoral votes are cast, they are not inherently part of the task of counting the votes transmitted to Congress.

But the fact that many have attempted to use the 1887 ECA to assert too much power for Congress is not a reason to discard *any* version of an ECA. Rather, it is a reason to make explicit that the valid grounds for rejecting an electoral vote are strictly limited to enforcing certain specific provisions of the Constitution.

Valid Grounds for "Regularly Given" Objections Should Be Defined

The Framers considered and very deliberately rejected letting Congress choose the President. That task is instead given to the Electoral College, a kind of pop-up fourth branch of government created for this purpose. Congress's role is simply to count the votes received from the electors duly appointed by the states in a manner of each state's choosing.[7]

In counting the votes, there are some narrow circumstances in which Congress might be called upon to make a decision as to what constitutes a valid electoral vote. Electors must follow certain constitutional procedures, such as meeting on the same day throughout the United States, and certain votes are not allowed, such as for presidential and vice-presidential candidates who both live in the same state as the elector.[8]

These rules do not concern *who* a state has appointed as its electors. On that question, the ECRA draft would properly have Congress defer to the "conclusive" certifications from the states, including any relevant court rulings. Rather, these rules relate to *how* and *for whom* the validly appointed electors have voted. Thus, they are not susceptible to review until after the Electoral College has met and the sealed vote certificates required by the Twelfth Amendment arrive in Congress.

The 1887 ECA permits objections of this sort on the basis that votes have not been "regularly given." This term of art was intended to solely refer to matters relating to the votes themselves, not to the validity of the appointment of the electors.[9]

Unfortunately, Congress has developed a bad habit of ignoring this limit and allowing "regularly given" objections beyond the scope of the term's actual meaning. This has fueled the mistaken perception that Congress has a blank check to reject a state's election results and appointment of

[7] For a discussion of this bifurcation, *see*: Andy Craig, "What Changes Should Be Made to the Electoral Count Act?," *Cato at Liberty* (blog), January 12, 2022. https://www.cato.org/blog/what-changes-should-be-made-electoral-count-act

[8] U.S. Const. art. II, § 1; U.S. Const. amend. XII.

[9] *See generally* Derek T. Muller, *Electoral Votes Regularly Given*, 55 Georgia L. Rev. 1529 (2021).

its electors, even though the Constitution confers no such power and both the 1887 ECA and the ECRA draft attempt to repudiate it.

"Regularly given" objections were made in 2001, 2005, 2017, and 2021. Some failed due to the lack of a Senate cosponsor, but the objections in 2005 and 2021 forced Congress to debate and vote on the matter. However, none of these objections were properly within the scope of alleging that the votes had not been regularly given.

Instead, the procedure was used to raise objections that the electors had not been lawfully certified, based on complaints about how a state conducted its election, thus evading the ECA's commitment (strengthened in the ECRA draft) to respect timely and final state certifications on that question.

The draft ECRA retains the "regularly given" language without any elaboration, and in so doing it risks endorsing as valid precedent the erroneous no-limits interpretation Congress has adopted. As the Supreme Court has explained, "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it."[10] In this case, the "old soil" should be left behind.

Instead, the specific grounds for objections could be enumerated, each reflecting a specific constitutional rule.[11] Alternatively, and to keep things simpler, a categorical definition of regularly given could be added, requiring that objections must rely on a specific provision of the Constitution relating to how the electors meet and vote and for whom they may vote, but *not* how they were chosen because that question is already handled elsewhere. Additionally, a specific disclaimer disallowing objections to the outcome or conduct of a state's popular election could be inserted.

These improvements would not change the intent behind both the 1887 ECA and the ECRA draft. Instead, they would simply codify the proper and intended meaning of the 1887 law's unclear terminology. An explicit definition of "regularly given" would make the law much clearer on its face, without the need to refer to outside authorities on how to construe that term. And it would repudiate the constitutionally defective precedents Congress has attached to this language.

More explicit limits on the valid grounds for objection would, most importantly, ensure that the reformed statute and its interpretation in practice are both compliant with the Constitution. It would also provide members of Congress with a definitive rule to cite when resisting political pressure to make improper objections.

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[10] *George v. McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (internal quotation marks omitted).
[11] For a model example of such a list, *see*: Andy Craig, "How to Pick a President: A Guide to Electoral Count Act Reform," Policy Analysis no. 931, Cato Institute, June 28, 2022. https://www.cato.org/policy-analysis/how-pick-president-guide-electoral-count-act-reform#6-challenges

Members who wish to express their views on election disputes in the states can make floor speeches and other public statements, introduce legislation, and file amicus briefs. But Congress should not interrupt the electoral count for objections that cannot be acted upon except by violating the Constitution and breaking Congress's statutory promise to the states about when the state's certification "shall be conclusive."

Twentieth Amendment and Candidate Eligibility Objections

There is an additional wrinkle that must be addressed due to the often-overlooked effect of a constitutional amendment ratified after the 1887 ECA was adopted.

Even if interpreted narrowly and as originally understood, "regularly given" objections would likely encompass objections that a presidential or vice-presidential candidate is not constitutionally eligible due to age, residency, citizenship status, term limits, or death.[12] This is within the proper scope of Congress's power to decide, but such cases must be treated in a distinct manner pursuant to the Twentieth Amendment, adopted in 1933. In particular, votes for ineligible or deceased candidates must still be counted, rather than thrown out altogether, to both comply with the Constitution and to avoid a possible perverse result.

The Twentieth Amendment established a new rule that if by Inauguration Day "the President elect shall have died, the Vice President elect shall become President." The same principle and procedure likewise applies "if the President elect shall have failed to qualify" due to other kinds of ineligibility besides death. In this scenario, the constitutionally mandated result is that the Vice President-elect, the deceased or ineligible winner's running mate, should become President. In order to obtain this result, electoral votes cast for dead or ineligible candidates must still be counted.

Failing to observe this point could result in the presidency passing, not to the disqualified candidate's running mate as the Twentieth Amendment requires, but rather to that candidate's defeated opponent. This would be the case under either possible interpretation regarding the calculation of a winning majority: either the electors who voted for an ineligible candidate are not counted for that purpose, leaving the defeated party's candidate with an apparent majority, or the House must proceed to a contingent election, in which case only the defeated party's presidential candidate would be eligible for consideration.

In order to comply with the Twentieth Amendment, candidate eligibility objections must be distinguished from other sorts of objections. Instead of being removed from the count, the votes for ineligible candidates must still be counted, with the provisions of the Twentieth Amendment then applied if an ineligible candidate has received a winning majority. Likewise, if an ineligible candidate for Vice President receives a winning majority, this should be construed as creating a

[12] *See* Muller, *supra*, at 1537–38.

vacancy to be filled under the Twenty-fifth Amendment rather than a contingent election in the Senate where the only other candidate would be the disqualified candidate's defeated opponent.

Constitutional compliance on this point does not require creating any new or more complicated procedures. Eligibility objections can still be handled at the same time and in the same manner as other objections. A provision should simply be inserted clarifying the different *effect* of such objections if sustained: that the votes will still be counted, that a sustained eligibility objection will automatically apply to all other votes cast for the same person, and that the Twentieth Amendment's terms will apply if a deceased or ineligible candidate has received a winning majority of the votes.

"Failed Elections" Should Be Tightly Defined

One of the core purposes of the statutory provisions under discussion is to decide how Congress will use a power explicitly granted by the Constitution: "The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[13]

Congress first narrowed that time of choosing electors to a single day in early November, what we now know as Election Day, in 1845. At the time, however, some states required an absolute majority for their popular election to be conclusive, otherwise sending the choice to a contingent election in the legislature. Later, for a time, some states also conducted runoff elections.[14]

To accommodate these variations, Congress adopted what is now codified in 3 U.S.C. § 2, which says that if a state's popular election "has failed to make a choice on the day prescribed," then the choice of electors may be made later in such manner as the legislature may direct. Over time, this has also come to be understood to encompass natural disasters and similar catastrophes interrupting Election Day.[15]

The ECRA draft narrows this provision in three ways. First, it scraps any idea of accommodating runoff or contingent elections, which no state has used in several decades. Second, it requires the state's emergency backup procedures to be set by law prior to Election Day, allowing only an extended use of the same method that the state was already using (i.e., an extended popular election, rather than switching to legislative selection of electors). Third, it limits the scope of when this provision may be invoked, to cover only "extraordinary and catastrophic" events.

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[13] U.S. Const. art. II, § 1.

[14] On this history, *see* Thomas A. Berry, "A Presidential-Election Runoff Would Be Legal for States to Adopt," National Review Online, April 14, 2016. https://www.nationalreview.com/2016/04/presidential-election-runoff-states/

[15] A notable non-presidential example of such an emergency occurred on September 11, 2001, when the primary elections for New York City's municipal offices were canceled and rescheduled.

This is a good step, but the language could be tighter to exclude arguments that allegations of fraud or protracted litigation could qualify as "extraordinary and catastrophic." One drafting option would be to explicitly invoke the legal concept of *force majeure*, which is well-defined and provides ample guidance for the courts. Another would be to specify that only actual disruptions to the administration of the election, impairing people's ability to cast their votes or the ability of those votes to be counted, can qualify.

This provision should also set a maximum permissible end date that states may set for their emergency procedure, such as the end of November or two weeks past Election Day, which is omitted in the current ECRA draft.

It would also be reasonable to set some guidelines for who can make the determination that a sufficient catastrophe has occurred and how that decision can be challenged, while still generally deferring to prior-enacted state law. The ECRA draft's provision for defining the executive of the state for elector certification purposes (that is, the governor by default unless the state designates somebody else ahead of time) might be useful for this purpose, as well. The possible role of state and federal courts in reviewing an emergency determination should also be carefully considered, especially if the intent is to make such determinations reviewable in federal court.

Judicial Procedures and Governor's Certification Drafting Concerns

Besides the retention of the "regularly given" objection without modification, there are other aspects of the ECRA draft that we believe could be improved with relatively small adjustments to the text. For ease of reference, we will refer to provisions in the current draft ECRA bill by the section number where they would appear in Title 3 of the U.S. Code, if enacted.

Ensuring That State Executives May Not Disenfranchise Their States

The ECRA mandates that a governor must issue a certificate ascertaining the winner of the state "[n]ot later than the date that is 6 days before the time fixed for the meeting of the electors[.]" Section 5(a)(1). But what if a governor misses this deadline and no certificate has been issued by this date? Would this failure automatically result in no electors being appointed by that state, thus disenfranchising the state? A literal reading of the ECRA draft's counting provision might suggest this result. It mandates that "only the votes of electors who have been appointed under a certificate … issued pursuant to section 5" may be counted. Section 15(e)(1)(A)(i). And a certificate that has not met the deadline set in section 5 has arguably not been "issued *pursuant to* section 5" (emphasis added).

The solution is to clarify that if no certificate has been issued by the deadline, a subsequent certificate issued by court order would qualify and would allow the state's electoral votes to be

counted. Thus, if the failure to issue a certificate is challenged in court, a court may order the governor to issue a certificate.

We believe that this would be preferable to simply allowing the governor to issue a late certificate *without* a court order. If that were allowed, a governor could intentionally wait until the last possible moment before the electors meet to issue a certificate, and thus eliminate any possible time for judicial review.

We therefore suggest appending a sentence to this effect to the end of section 5(c)(1)(B): "If no certificate of ascertainment of appointment of electors has been issued by the date that is 6 days before the time fixed for the meeting of the electors, then a certificate of ascertainment of appointment of electors as required to be issued by State or Federal judicial relief granted prior to the date of the meeting of electors shall be treated as a certificate of ascertainment of appointment of electors issued pursuant to this section."

Providing for a State Executive's Refusal to Comply with a Court Order

The ECRA draft rightly allows for judicial review in case a governor does not follow the law in issuing a certificate. The bill makes clear that any certificate "as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section." Section 5(c)(1)(B). But when a judicial order does require the governor to revise a certificate, what happens if the governor simply refuses? If the governor simply refuses to issue a revised certificate until January 6 (even upon pain of contempt of court), does the original erroneous certificate still control?

The text of the ECRA could be read to allow a governor to attempt this harmful strategy. Under the text of the draft bill, it is not a judicial order *itself* that supersedes a certificate. Rather, it is a new certificate "as required to be revised" by judicial order that supersedes an old certificate. And the draft bill does not suggest that anyone other than the governor (or other statewide official previously designated under state law) may issue such a revised certificate.

To prevent the possibility of the governor (or some other single state official) standing in the way of judicial review, we suggest adding a clarification that a court may order *any* state official to issue a revised certification. This could be achieved by appending to the end of section 5(c)(1)(B) a sentence to this effect: "If the executive of a state refuses to promptly comply with a judicial order to issue a revised certificate of ascertainment of appointment of electors, any such revised certificate issued by any other official of that state upon order of that court shall replace and supersede any other certificates submitted pursuant to this section just as if that revised certificate were issued by the executive of that state."

In addition, the ECRA draft could account for the very unlikely but still possible contingency that *no* state official is willing to comply with a judicial order to issue a revised certificate. This could be achieved by further adding to section 5(c)(1)(B) a sentence to this effect: "In the event that, by the sixth day of January succeeding the meeting of electors, no state official has complied with a judicial order granted prior to the date of the meeting of the electors to issue a revised certificate of ascertainment of appointment of electors, that judicial order itself shall be treated for purposes of section 15 as if it were a revised certificate of ascertainment of appointment of electors issued on the date of the judicial order."

To make sure that such orders are verified in Congress, the bill's language could be further tweaked to ensure that judicial orders to issue revised certificates are themselves sent to both the electors and the Archivist, just as the certificates themselves are sent.

Ensuring that Expedited Federal Court Procedures May Be Utilized

The ECRA draft provides special venue rules and expedited procedures for actions brought by aggrieved candidates under federal law "with respect to the issuance of the certification" in Section 5(d)(1). Most notably, these rules provide for an initial hearing before a three-judge panel and then direct appeal to the Supreme Court. Section 5(d)(1)(B);(D). The ECRA draft stresses that in such an action it would be "the duty of the court to expedite to the greatest possible extent the disposition of the action[.]" Section 5(d)(1)(C).

This provision does *not*, however, establish a cause of action for an aggrieved candidate to bring such a suit. As the bill itself stresses, these rules only "establish venue and expedited procedures" in such an action; they do not establish a cause of action granting the right to bring such an action in the first place. Section 5(d)(1)(C).

If such a cause of action can be found somewhere else in federal law (perhaps under the Fourteenth Amendment's guarantees of due process and equal protection), then these expedited procedures can be utilized. But it is not *certain* that such a cause of action can be found elsewhere in federal law. And if it cannot be found elsewhere, then the expedited procedures cannot serve their intended purpose of providing a speedy resolution for challenges to certificates.

The solution is to provide, in the text of ECRA itself, a narrowly circumscribed cause of action to challenge a state executive's erroneous certificate or failure to issue a certificate. This is the only way to guarantee that the expedited procedures may be used as intended.

Preventing Unintended Uses of the Expedited Court Procedures

The ECRA draft limits the expedited procedures to actions brought "*with respect to* the issuance of the certification" (emphasis added). The clear intent is to limit these procedures to only the

situation when time is most of the essence: the period between a potentially erroneous certification and the meeting of the electors. But if that is indeed the intent, the choice of the term "with respect to" is not the best language to implement that intent.

The Supreme Court has explained that "[u]se of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject."[16] For example, the Court has held that for the purposes of the Bankruptcy Code, even "a statement about a single asset can be a 'statement respecting the debtor's financial condition'" because a "single asset has a direct relation to and impact on aggregate financial condition[.]"[17]

Applying this same canon of interpretation to the ECRA draft, courts could find that nearly any election-law challenge brought by an "aggrieved" presidential candidate is "with respect to" the issuance of a governor's certificate, since nearly any legal dispute related to the election could affect which candidate is ultimately certified as the winner. The use of the broad phrase "with respect to" may thus unintentionally result in the expedited procedures being invoked not just after a certificate is issued, but also in the bulk of presidential election litigation that occurs *before* the certificate is issued.

There is a simple solution to this drafting issue. In addition to the other limitations already included in section 5(d)(1), the bill could further limit the expedited procedures to actions brought either after the state's executive has issued a certificate or when there are fewer than six days before the date of the meeting of the electors, whichever comes first. This would properly limit the expedited procedure to the period when it is actually necessary.

Ensuring That Only One Correct Slate Is Read and Presented to Congress

Once Congress has assembled to count the electoral votes, the ECRA requires that the president of the Senate shall "open the certificates and papers *purporting to be* certificates of the votes of electors appointed pursuant to a [governor's certificate] issued pursuant to section 5" (emphasis added). Section 15(d)(1)(A).

The use of the equivocal phrase "purporting to be" is puzzling. As the ECRA later makes clear, "only the votes of electors who have been appointed under a certificate … issued pursuant to section 5" may be counted. Section 15(e)(1)(A)(i). That means there is no reason to read a slate of votes merely *purporting* to be so appointed. The ECRA should instead make clear in section 15(d)(1)(A) that the president of the Senate shall only read those papers that *actually are* accompanied by the true and operable governor's certificate.

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[16] *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018).
[17] *Id.* at 1761.

Clarifying the Authority and Discretion of the Tellers

The ECRA draft, like the current ECA, establishes four tellers at the electoral count, two appointed by each house. Section 15(c). At the end of the counting process, the tellers "shall make a list of the votes …; and the votes having been ascertained and counted according to the rules …, the result of the same shall be delivered to the President of the Senate[.]" Section 15(e)(3).

This passive voice phrasing implies, but does not make explicit, that it is the tellers' duty to ascertain and count the electoral votes according to the ECRA's rules. The bill should make explicit that the tellers do indeed have this function, or else specify who else is to do it. And it would be preferable to establish a procedure in case the tellers should disagree on the application of any rule, such as a fifth teller appointed by the other four who shall break any ties.

Further, the bill should make clear just how much discretion the tellers have in applying the counting rules. For example, may the tellers decline to count a slate of electors on the tellers' view that the executive's certificate was not issued in pursuance of state law, and that the certificate was therefore not "issued pursuant to section 5"? Section 15(e)(1)(A)(i). Or may the electors decline to count a slate because the certificate was issued fewer than six days before the meeting of the electors? In our view, the former would be too much discretionary power to place in the hands of the tellers, while the latter would be appropriately within the tellers' purview to ensure a certificate *facially* complies with section 5. But in any event, the law should leave no doubt as to just how much authority the tellers have.

Clarifying the Scope of the "Lawfully Certified" Objection

The ECRA draft would permit Congress to reject electors who "were not lawfully certified under a certificate" according to section 5. Section 15(d)(2)(B)(ii)(I). But this does not clarify why this objection would ever be necessary, given the ECRA's vote tabulation rules. As previously noted, the vote tabulators (most likely the tellers) may only count votes that have been cast by electors appointed under a certificate "issued pursuant to section 5." Section 15(e)(1)(A)(i). This rule appears to be categorical, barring the counting of all votes that do not meet this requirement *whether or not* Congress sustained an objection to those votes. So what additional purpose does it serve to allow Congress to reject electors as not "lawfully certified"?

One option, in line with the apparent intent of this provision, is that "lawfully certified" objections would only apply in cases where the purported electors do not comport with the persons named in the certificate of appointment as determined under Section 5. This would give teeth to the conclusive nature of the certificates of appointment issued by the state, as modified by any relevant court rulings. Rather than challenging the contents of that certificate, "lawfully certified" objections would rely on it and be used to enforce it.

This would make the scope of the objection overlap with the requirement already in the vote tabulation rules, and thus it should be unnecessary to ever use it if those rules are being properly

followed. But it would allow Congress to reject the appointment of purported electors that the tellers have erroneously allowed to be presented, and serve to clarify in what respects a "conclusive" appointment certification is, in fact, conclusive.

The only other objection permitted under this category should be that an elector is constitutionally ineligible due to holding an impermissible federal office. This would allow the two categories of objections to fit neatly onto the terms for counting "the whole number of electors *appointed*" (emphasis added) for determining a winning majority. "Lawfully certified" objections would cover cases where the appointment of the elector was invalid, and thus no such elector was in fact appointed, while "regularly given" objections would cover cases of invalid votes cast by validly appointed electors. In the latter case, the electors have still been appointed, and so they should still count in determining the requisite majority as defined by the Constitution.

Parliamentary Procedure in the Joint Session

One problem bedeviling both the existing ECA and any attempt at reform is the lack of clarity for parliamentary procedure during the bicameral joint session. Though both houses of Congress might gather together to hear a speech, the electoral count is the only occasion when Congress must *act* as a body and conduct business during a joint session. And Congress has never sorted out exactly how that's supposed to work.

This presents a problem for any possible set of rules. Any specific procedural requirements set by the ECA must be enforced somehow. The problem is further compounded by the correct desire to avoid any discretionary authority for the Vice President as the presiding officer. In addition, any opportunity to challenge parliamentary rulings (such as that an objection is out of order) should not become a backdoor for debating and voting on impermissible objections. That would effectively defeat the purpose of requiring a minimum number of cosponsors and limiting the valid grounds for objections.

In tackling this problem, Congress must venture into more novel territory than with other aspects of ECA reform. But it is possible to square the circle without violating any fundamental principles, and that is a critical piece of the puzzle for a reformed ECA to work in practice.

One possibility would be to make use of the official House and Senate Parliamentarians, binding the Vice President to act on their advice (possibly with a third parliamentarian they have jointly selected, to avoid deadlock). Of course, while the House and Senate Parliamentarians are respected and trustworthy, they are not members of Congress and cannot be given the binding final say. To accommodate appeals of parliamentary rulings expeditiously and to limit frivolous appeals, the right to make an appeal should be vested solely in the constitutional officers and the majority and minority leaders of both houses. And these appeals should be put to an immediate

vote, without debate, with the concurrence of a majority of both houses necessary to overturn the ruling.[18]

A procedure along these lines, or something like it operating on similar principles (perhaps relying on the tellers as discussed above rather than the parliamentarians), would allow Congress to proceed confident that the rules mean something, that there is a way for them to be enforced, that there is no backdoor way to evade them, and that any final decision rests with Congress as a whole and not the Vice President alone.

Miscellaneous Other Provisions

Various other minor provisions merit brief consideration. One frequent topic of discussion has been the timeline between Election Day and Inauguration Day. We agree with others who have advocated moving the date of the Electoral College meeting back, from its current date in mid-December to late December or early January.

This would serve primarily to allow the courts the greatest possible amount of time to rule on any litigation concerning a state's election outcome and the appointment of its electors. In contrast, the time period after the Electoral College meeting until the joint session of Congress serves little purpose other than the physical transmission of the certificates to Washington, DC.

On that note, the ECRA draft makes one noteworthy improvement by allowing certificates to be sent by "the most expeditious method available." This change will obviate past concerns about certificates being delayed in the mail by allowing states to simply use couriers, a best practice which should be encouraged given the constitutional importance of these pieces of paper.

The ECRA draft would move the Electoral College meeting back a single day, from the Monday currently specified to the Tuesday after. Consideration should be given to moving it even later, so long as a few days are still provided prior to January 6 to ensure physical delivery of the vote certificates.

The ECRA draft is combined with another proposed piece of legislation, the Presidential Transition Improvement Act (PTIA), with reforms to the process for the General Services Administration to provide transition services to the "apparent" winner of the election. This determination does not implicate any legally binding process for deciding the outcome of the election, but relates solely to provisions for office space, materials, and related administrative support.

In the past, there has been controversy over issuing this GSA ascertainment, which the existing statute provides little guidance for. The common practice, until 2020, was to rely on national

[18] For model statutory language and further explanation, *see* Craig, "How to Pick a President," *supra*.

media outlets calling the election, but this is impossible to specify with any objective precision. One reasonable option, adopted by the PTIA draft, is to authorize the GSA to simply provide transition services to both candidates involved in a protracted dispute until it is resolved.

However, the PTIA draft attached to ECRA might rely too much on a complicated set of criteria, divided into three different timeline stages, which include at some points determining if all other candidates have conceded. A concession is a political statement without legal form or effect, so relying upon it in this way might be problematic. It is not difficult to imagine, and we have seen recent examples, how a defeated candidate might make an ambiguous statement that arguably does not qualify as a full concession. A related concern is that any reference to *all* other candidates must account for how such language, unless otherwise limited, would include many independent and third-party candidates.

The transition provisions are of less concern than the Electoral Count Act reforms, but one suggestion would be to focus less on trying to define objective criteria for something so intangible and informal as recognizing a presumptive president-elect. Instead, taking a cue from the drafters of the Twenty-fifth Amendment, the law could rely on specifying who is to decide the question. This might include, for example, a role for congressional leaders, or an independent commission appointed ahead of time for this narrow purpose, or designating the Federal Elections Commission to make the call. In any event, a judicial cause of action can serve as a fail-safe, as PTIA would provide.

Conclusion

The Cato Institute has distributed millions of copies of our pocket edition of the Declaration of Independence and the Constitution of the United States, "to encourage people everywhere to better understand and appreciate the principles of government that are set forth in America's founding documents."

Those principles have stood the test of time, and ensuring they last long into the future is at the heart of the matter this committee is considering: a government "deriving its just powers from the consent of the governed," under a supreme law of the land ordained and established by "We, the People," with fixed terms of office marked by free and fair elections.

These were radical new ideas at the time of the Framers, but today we rightly regard them as indispensable to "insure domestic Tranquility" and "secure the Blessings of Liberty to ourselves and our Posterity." Nobody should have any reason to think they can defeat these fundamental principles by force, fraud, or lawlessness.

Americans must have confidence that the Constitution will prevail in determining the occupant of our highest office. The Electoral Count Act as it stands is woefully inadequate to provide that

assurance. By reforming the Electoral Count Act, America's constitutional institutions can be put on a firmer foundation, with orderly, predictable, stable rules for how we translate the votes cast at the polls in November to the inauguration of a President in January.

This long-overdue and much-needed reform is about more than just cleaning up stylistic clutter and ambiguous word choices in a very old statute. It represents Congress's affirmation to the American people that we can all rely upon the Constitution's promises of individual liberty, representative government, and the rule of law.

Sincerely,

/s/
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