

Improvements in the Manager’s Amendment to the *Electoral Count Reform Act*

Prepared by the Majority Staff of the Senate Rules Committee

The *Electoral Count Reform Act* (S. 4573) updates the antiquated *Electoral Count Act of 1887* to ensure states, Congress, or the Vice President cannot overturn the will of the people in a presidential election. After months of negotiation and consultation with Rules Committee Chairwoman Amy Klobuchar (D-MN) and Ranking Member Roy Blunt (R-MO), a bipartisan working group of senators led by Senators Susan Collins (R-ME) and Joe Manchin (D-WV) introduced the bill on July 20, 2022. The Rules Committee held a bipartisan hearing on the bill on August 3, where witnesses on both sides of the aisle agreed that improvements could be made to strengthen the bill before it heads to the Senate floor.

Following the Rules Committee hearing, Chairwoman Klobuchar and Ranking Member Blunt reached an agreement with Senators Collins and Manchin on changes to the bill to incorporate feedback from legal scholars and practitioners from both parties. At the Rules Committee markup on September 27, Chairwoman Klobuchar and Ranking Member Blunt will jointly offer a substitute amendment to the bill reflecting the changes below that have been agreed to by the Senators. The improvements in the Klobuchar-Blunt substitute amendment clarify the intent of the bipartisan group’s work and address concerns raised by experts without upsetting the original bipartisan consensus achieved by the working group.

- **Clarify the limited authority of the three-judge panel to ensure other election cases can continue in state and federal court:** To address concerns that the three-panel district court procedure set up by the bill would sweep in all court cases related to the election, the substitute amendment clarifies that nothing in the bill preempts or displaces other state or federal election-related or civil rights court proceedings. This provision ensures that the three-judge panel proceedings focus on narrow issues concerning whether the governor issued the correct certificate of electors as required by law. Clarifying the narrow scope of legal claims to be heard by the three-judge panel will also help address concerns that the six day window for litigation is too short to allow for resolution of more complex disputes. Section 5(d)(2).
- **Prevent unnecessary and potentially problematic Supreme Court decisions by providing for discretionary - rather than mandatory - review:** To address concerns that the bill would require the Supreme Court to rule on all cases from the three-judge panel concerning a governor’s issuance of a certificate of electors – including cases the Court would not ordinarily hear at all – the substitute amendment allows the Supreme Court to grant or deny review, just as it does in the vast majority of other cases. Allowing the Court to decline review will ensure that the justices are not required to issue binding rulings that would create uncertainty in future elections unnecessarily. Section 5(d)(1)(D).
- **Ensure appropriate judicial review of a governor’s certification of electors:** To address concerns that a governor’s certification of the electors would be unreviewable in court, the substitute amendment clarifies that a certificate of electors issued by a state’s governor (or a governor’s refusal to certify) can be challenged in court, and that any certificate of electors a court orders to be issued or revised is still binding on Congress as the conclusive certificate.

In addition, the substitute amendment clarifies that a court can take action to compel the issuance of a certificate of ascertainment of appointment of electors if a governor refuses to issue the certificate as required by state law. Section 5(c)(1).

- **Add protections to prevent political gamesmanship and ensure elections can only be extended in true emergencies:** The substitute amendment clarifies that extended elections are triggered only by “*force majeure* events that are extraordinary and catastrophic,” to ensure that only unforeseen emergencies trigger extended elections and guard against bad faith exploitation of the extended election provision for political reasons. While the original bill is a significant improvement on the “failed election” provision in the current *Electoral Count Act*, this clarification provides an important safeguard against political gamesmanship through attempts to manipulate these provisions while ensuring states have flexibility to respond to genuine emergencies. Section 21(1).
- **Allow federal judicial review to proceed quickly:** The substitute amendment further expedites the judicial review process by exempting the three-judge panel convened to hear claims related to a governor’s certification or transmission of electors from the requirement in existing law for a five-day notice period before a three-judge panel can meet. By allowing the three-judge panel to meet quickly and providing more time for possible appeals, this will also help address concerns that a six day window for litigation is too short to allow for resolution of more complex disputes. Section 5(d)(1)(B)(ii).
- **Increase transparency for certificates of electors:** The substitute amendment prevents further delay in certification of elections by clarifying that each state governor must “immediately” transmit a certificate of electors to Congress and the Archivist of the United States once the state’s election is certified. Section 5(b)(1).
- **Technical edit to ensure consistent use of “elector” and “electoral vote”:** The substitute amendment makes a technical edit to ensure consistency with existing statutory and constitutional text to refer to “electors to which a State is entitled” rather than “electoral votes cast by a State.” Section 15(e)(2).