

THE ELECTORAL COUNT REFORM ACT



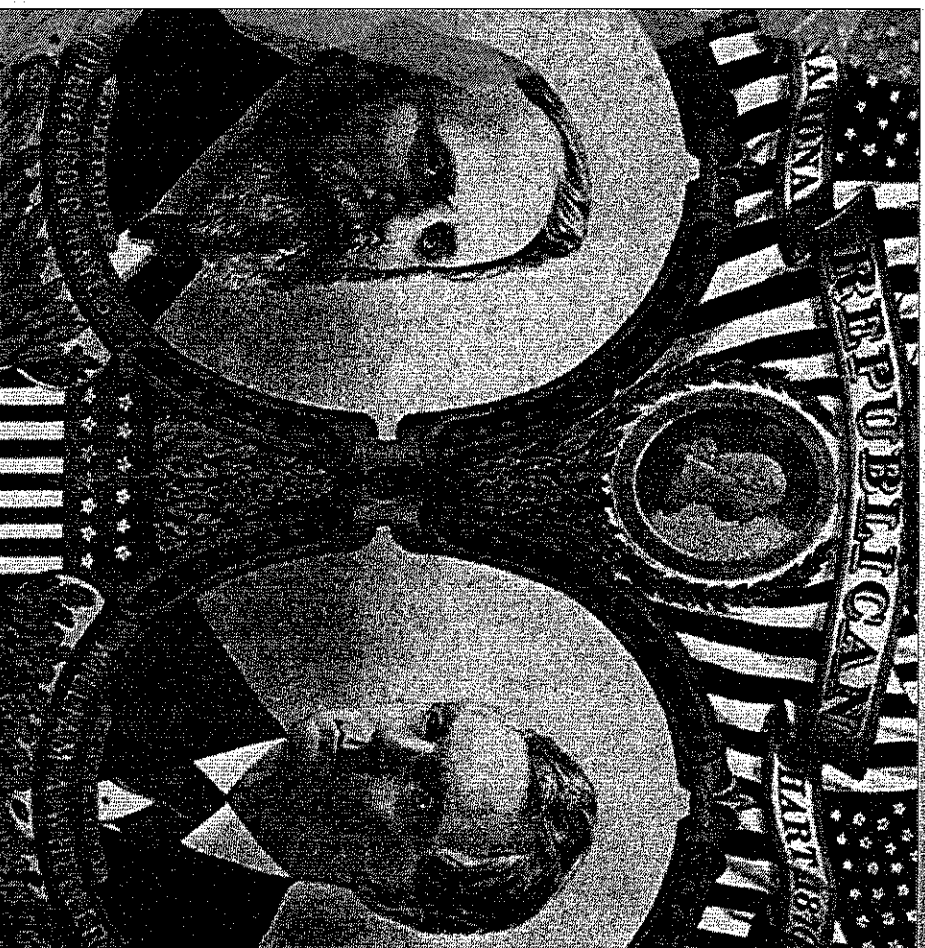
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ORIGINS PRESIDENTIAL ELECTION OF 1876

Reconstruction Era - Contentious Election

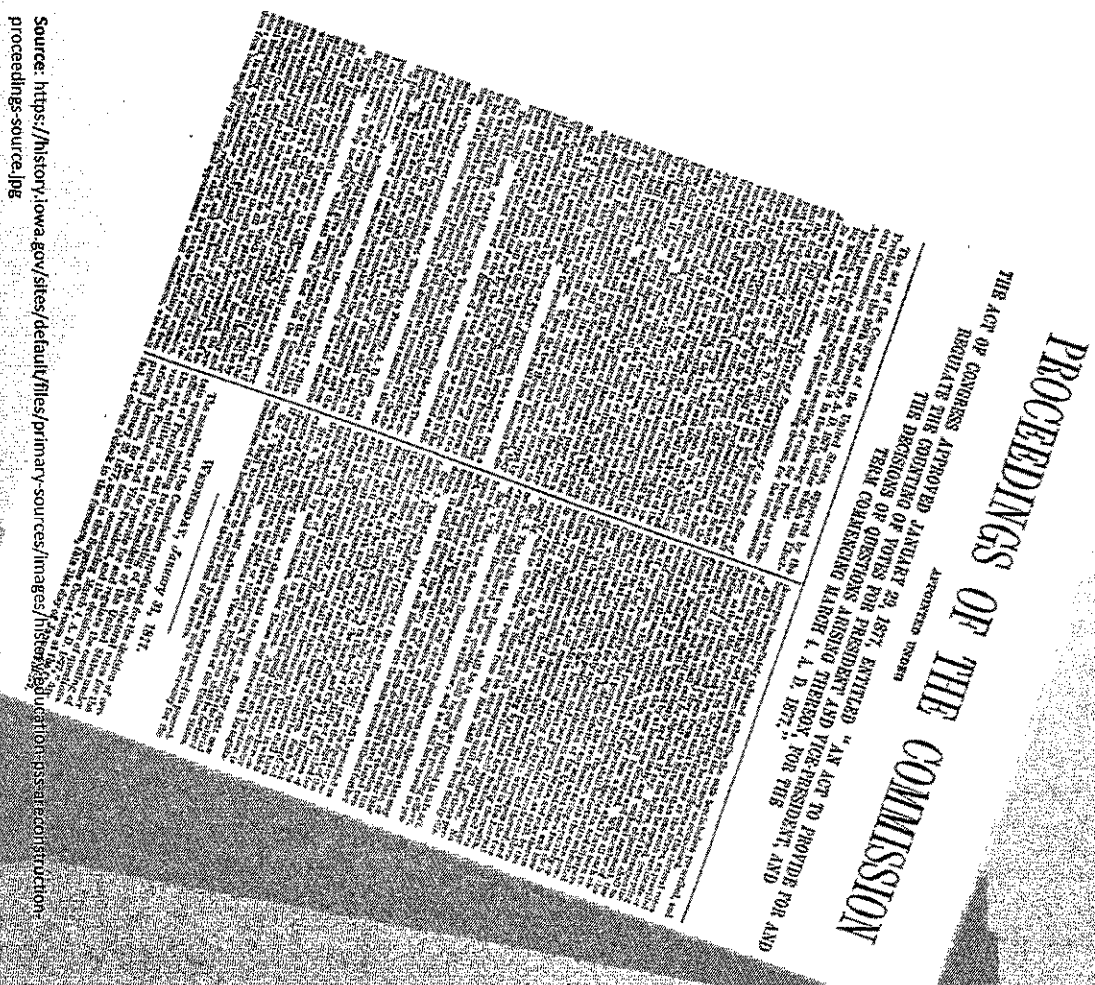
- Democrat Samuel Tilden ran against Republican Rutherford B. Hayes
- No clear winner emerged and outcomes in South Carolina, Florida, and Louisiana were unclear
- The final determination would be made by Republican-controlled "returning" boards
- These boards had the power to determine which votes counted and which would be thrown away if decided they were fraudulent
- Boards in three contested states decided that fraud, intimidation, and violence in certain districts invalidated votes
- These votes were mainly Democratic votes for Tilden

All three states' returning boards awarded their electoral votes to Hayes



ELECTORAL COMMISSION

- Electors were to cast ballots on December 6, 1876
- Four states (Oregon, South Carolina, Florida, and Louisiana) had two sets of conflicting electors
 - Congress received **two sets of conflicting electoral votes**
- Left Tilden with 184 votes and Hayes with 165. 20 votes were disputed.
- Disagreements as to who should decide which votes to count
- Resolution: **Electoral Commission Act of 1877**
 - Established commission of five senators (three Republicans, two Democrats), five representatives (three Democrats, two Republicans), and five Supreme Court Justices (2 Democrats, 2 Republicans, and 1 Independent) to decide which votes to count to resolve the dispute
 - Independent Justice refused to serve and was replaced by a Republican Justice
- Hayes declared winner of the 1876 election, with 185 electoral votes to Tilden's 184 TWO days before inauguration day



Source: <https://history.iowa.gov/sites/default/files/primary-sources/images/instructional-proceedings-source.jpg>

ELECTORAL COUNT ACT OF 1887

Federal law that added procedures for counting electoral votes following a presidential election

- Proposed after the 1876 Presidential Election in an attempt to guide electoral disputes in a divided Congress
- Attempt to minimize Congressional involvement when elections were disputed

Changes to election law:

- Codified safe harbor period in 3 U.S.C. § 5
- Revision of ascertainment process
- Certificate of Final Determination
- Introduced Certificate of Vote
- Assigned duties to Archivist of the United States
- Revised counting procedures

ELECTORAL COLLEGE TIMELINE

17 Dec. 2024

→ **Electors to Vote in their States**

Occurs on the first Monday after the second Wednesday in December of presidential election years. See, 3 U.S.C. § 7

3 Jan. 2025

(or any time before)

→ **Archivist transfers Certificates to Congress**

20 Jan. 2025

→ **Inauguration Day**

As set forth by the 20th Amendment to the U.S. Constitution, the President and Vice president are to be inaugurated on this day

→ **Electoral Votes Received by President of the Senate and the Archivist**

Votes must be delivered to above-mentioned officers by the fourth Wednesday in December. See, 3 U.S.C. § 12

→ **Congress Counts Electoral Votes**

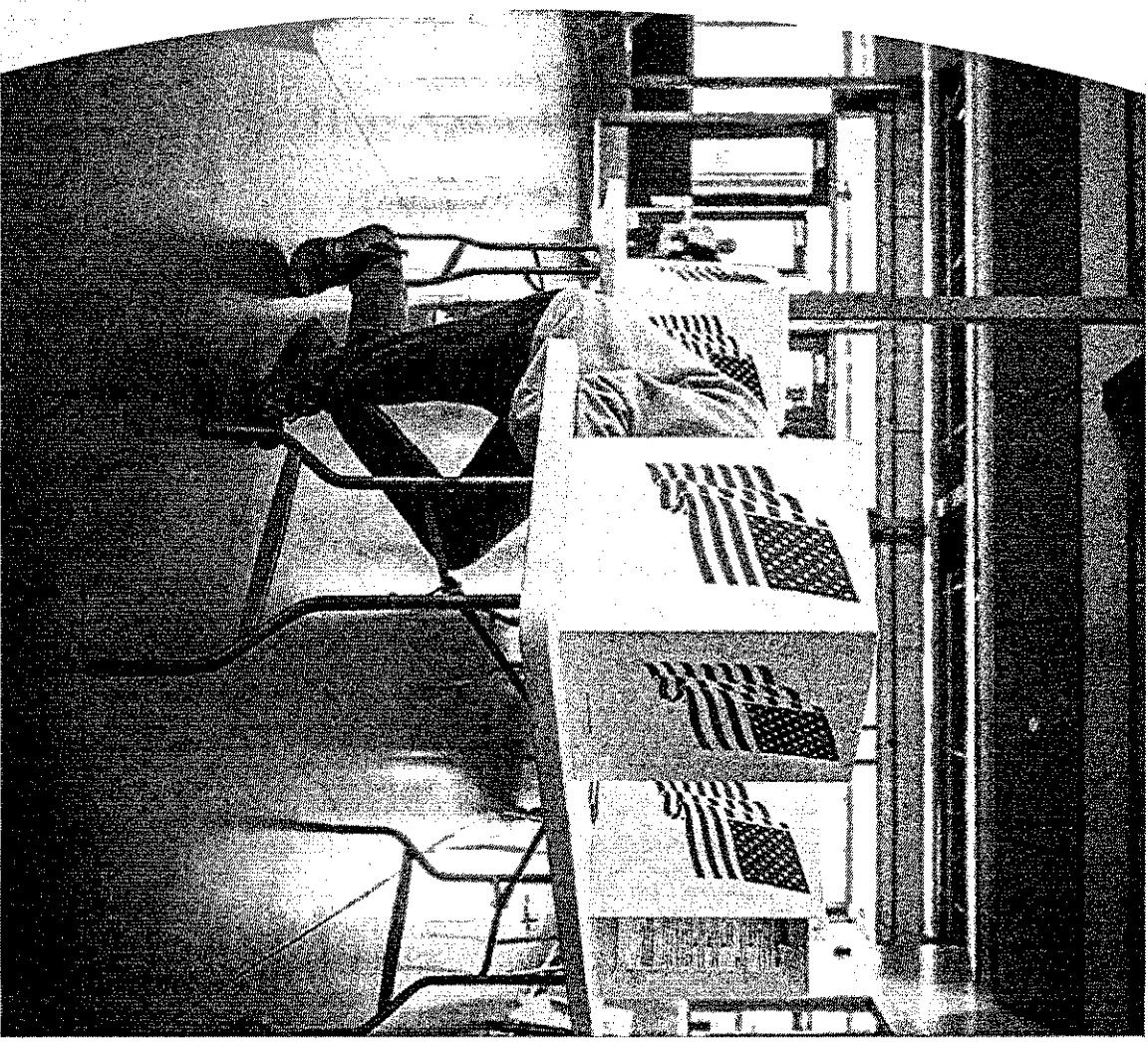
Senate and House assemble at 1:00 p.m. in a joint session to count the electoral votes and declare the results. See, 3 U.S.C. § 15

25 Dec. 2024

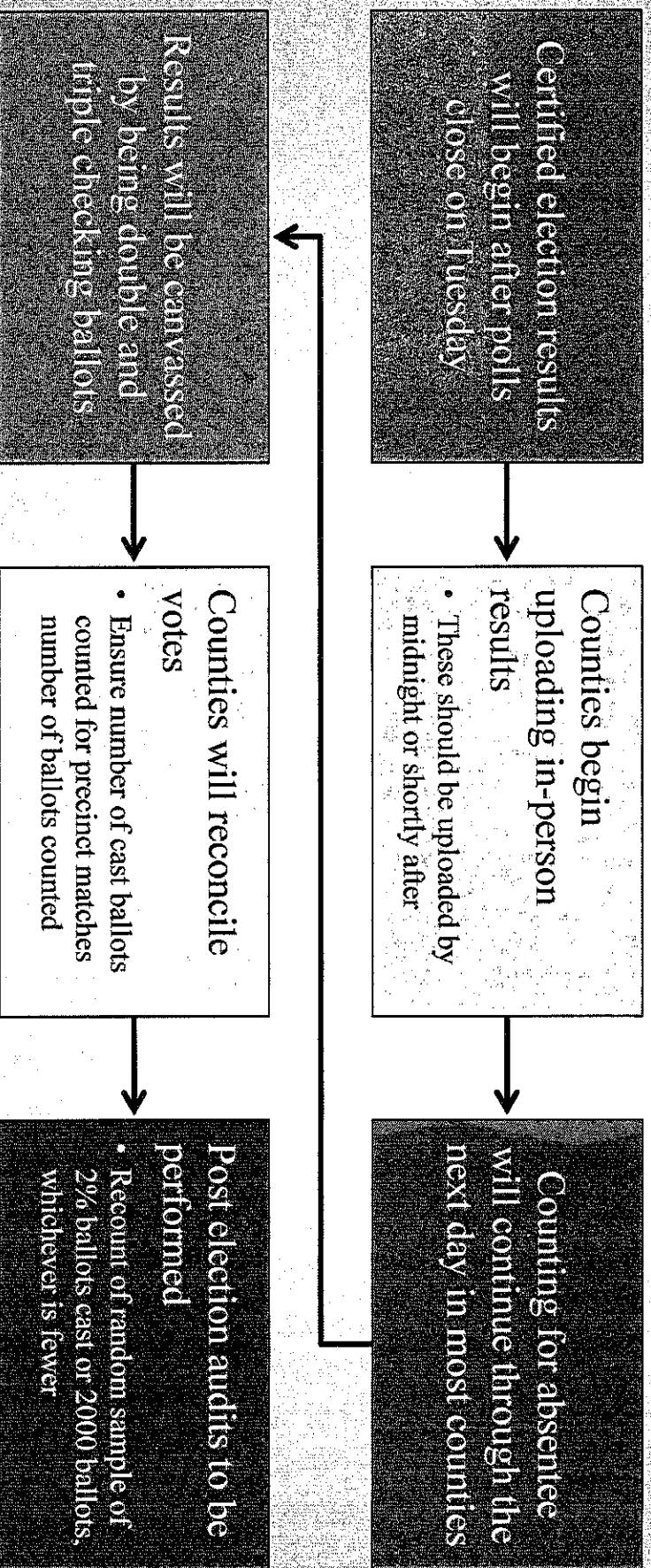
6 Jan. 2025

ELECTION DAY

- Falls on the first Tuesday after the first Monday in November
- 2 U.S.C. § 7
- November 5, 2024



CERTIFICATION PROCESS





SAFE HARBOR PERIOD

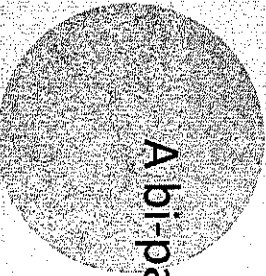
- Deadline for states to certify their results
- “Not later than the date that is **6 days before the time fixed for the meeting of the electors**, the executive of each state shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.”
- 3 U.S.C. § 5(a)
- **December 11, 2024**

CERTIFICATES OF ASCERTAINMENT

State Executive prepares seven Certificates of Ascertainment

Must occur at least six days before meeting of the electors

ELECTORAL COUNT REFORM ACT OF 2022



A bi-partisan law that reforms the 1887 Electoral Count Act



Intention to replace the 19th century law with one that provides clear procedures that maintain appropriate state and federal roles in selecting the President and Vice President of the United States

CHANGES TO THE 1887 ELECTORAL COUNT ACT

Provides for a single, conclusive slate of electors

- Identifies that each state's **governor** (unless otherwise specified) as responsible for **submitting the certificate of ascertainment** identifying the state's electors
- Provides for expedited judicial review, including a **three-judge panel** with direct appeal to the Supreme Court, of certain claims related to a state's certificate identifying its electors.
- Would require **Congress to defer to a slate of electors** submitted by a state's executive pursuant to the judgments of state or federal courts

CHANGES (CONTINUED)

- Reaffirms role of the Vice President
 - Makes clear that constitutional **role of the Vice President is solely ministerial** and that he or she does not have any power to solely determine disputes over electors
- Raises Threshold for Objections Against Electors
 - Requires an objection to be at least **one-fifth of both the House of Representatives and the Senate.**
- Strikes provision from the Electoral Count Act that would permit **state legislatures to override the popular vote** in their states by declaring a "failed election."
 - Instead, a state may move its election day

INTERPRETATIONS OF KEY PROVISIONS OF ECRA

<p>"Force Majeure" – Section 102</p>	<p>Interpretation of this term tends to relate to business disputes, not election law cases.</p> <p>Important to understand what does and does not constitute a force majeure</p>
<p>"Lawfully Certified" – Section 15</p>	<p>One ground for objections to certificate of the votes at the joint session is that the electors were not "lawfully certified" under the certificate of ascertainment. Could include arguments that electors are not those identified in the certificate, that there were deficiencies of ascertainment, or that the electors were ineligible under Article II, Section 2 of the United States Constitution</p>
<p>"Regularly Given"</p>	<p>Alternative ground for objecting to certificate of voters of electors</p> <p>Vote of the elector has not been "regularly given"</p> <p>Vague term that is used to object to certificate of voters</p>

INTERPRETATIONS OF KEY PROVISIONS (CONT.)

<p>Denominator Question</p>	<p>If electors were not “lawfully certified,” those electors are not considered for purposes of determining the total number of “electors appointed,” and, therefore, what constitutes a majority. However, ECRA silent about what happens if electoral votes are not counted because they were not regularly given</p>
<p>Private Cause of Action</p>	<p>ECRA does not specifically state that it creates a private cause of action for its enforcement. But does strongly imply as to actions by the candidates to require the issuance and transmission of the certificate of ascertainment of appointment of electors. But still a question about who may sue and where.</p>
<p>Authority to Determine Whether Objections Meet Requirements</p>	<p>House and Senate will only consider an objection if it is “in order” (in writing, has enough signatures, and states clearly and concisely, without argument, one of the permissible grounds.) Still up for debate who determines whether the objection is “in order.” Also, can that decision be challenged, and, if so, how?</p>

POTENTIAL CONSTITUTIONAL CHALLENGES TO THE ECRA

Electors Clause of Constitution

United States Constitution Art. 1, § 1, Cl. 2: Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .”

Language suggests that state legislatures decide on electors. Thus, any language that purports to limit state’s rights, could be deemed unconstitutional.

Twelfth Amendment

“Electors shall meet in their respective states and vote by ballot for President and Vice-President. . . .; the 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.”

ECRA provides that the Vice President’s role is ministerial and administrative only and without discretion

ROLE OF THE VICE PRESIDENT

What is the role of the Vice-President if the ECRA is found to be unconstitutional?

- Question is still up for debate

Arguably, most reasonable reading of the Constitution is that the Vice-President is responsible for both counting electoral votes and for deciding which submission to count if a state has submitted more than one.

- See, Jack Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes*, 16 FIU L. Rev. 297 (2022).



FAITHLESS ELECTORS

- Roughly 180 instances of faithless electors exercising their own personal preference in casting votes for president or vice-president, including 7 electors who defected from Trump or Clinton in 2016.
- Have not changed outcome of an election yet
- But current political landscape creates plausible scenarios in which winning candidate could receive only 270 or 271 electoral votes
- Different laws regarding faithless electors in different states
- Still a question of whether there are potential constitutional prohibition on faithless electors in states that do not void faithless electors' votes

STATE ELECTION LAWS

Constitution delegates broad discretion in selecting electors of the states

Bush v. Gore stated that a State Legislature could do away with elections altogether and reassert right to choose presidential electors

Potential presidential election controversies are likely to involve state law

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AND
Q&A

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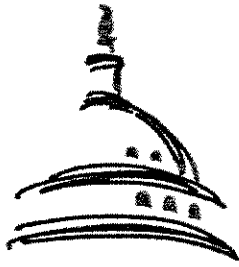
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ELECTORAL COUNT REFORM ACT OF 2022

ECRA would reform and modernize the outdated 1887 Electoral Count Act to ensure that electoral votes tallied by Congress accurately reflect each state's public vote for President. It would replace ambiguous provisions of the 19th-century law with clear procedures that maintain appropriate state and federal roles in selecting the President and Vice President of the United States as set forth in the U.S. Constitution.

KEY PROVISIONS INCLUDE:

- **Single, Conclusive Slate of Electors.** Includes a number of important reforms aimed at ensuring that Congress can identify a single, conclusive slate of electors from each state:
 - **Identifies Official to Submit Slate.** Identifies each state's Governor, unless otherwise specified in the laws or constitution of a state in effect on Election Day, as responsible for submitting the certificate of ascertainment identifying that state's electors. Congress could not accept a slate submitted by a different official. This reform would address the potential for multiple state officials to send Congress competing slates.
 - **Provides for Expedited Judicial Review.** Provides for expedited review, including a three-judge panel with a direct appeal to the Supreme Court, of certain claims related to a state's certificate identifying its electors. This accelerated process is available only for aggrieved presidential candidates and allows for challenges made under existing federal law and the U.S. Constitution to be resolved more quickly.
 - **Modernizes Rules for Counting Electoral Votes.** Requires Congress to defer to slates of electors submitted by a state's executive pursuant to the judgments of state or federal courts.
- **Role of the Vice President.** Affirmatively states that the constitutional role of the Vice President, as the presiding officer of the joint meeting of Congress, is solely ministerial and that he or she does not have any power to solely determine, accept, reject, or otherwise adjudicate disputes over electors.
- **Higher Objection Threshold.** Raises the threshold to lodge an objection to electors to at least one-fifth of the duly chosen and sworn members of both the House of Representatives and the Senate. This change would reduce the likelihood of frivolous objections by ensuring that objections are broadly supported. Currently, only a single member of both chambers is needed to object to an elector or slate of electors.
- **Protection of Each State's Popular Vote.** Strikes a provision of an archaic 1845 law that could be used by state legislatures to override the popular vote in their states by declaring a "failed election" – a term that is not defined in the law. Instead, this legislation specifies that a state could move its presidential election day, which otherwise would remain the Tuesday immediately following the first Monday in November every four years, only if necessitated by "extraordinary and catastrophic" events.



The Electoral Count Act and Presidential Elections

December 19, 2022

Every four years in November, citizens vote for presidential and vice presidential electors—known collectively as the electoral college—who meet in their respective states in December to vote for the U.S. President and Vice President. On the following January 6, a joint session of Congress convenes to count and announce the electors' votes. (For more information, see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.) The U.S. Constitution, the Electoral Count Act of 1887 (ECA), codified at 3 U.S.C. §§ 5-6, 15-18, and other federal statutes set forth key procedures for this process. This Insight discusses the presidential election process established in the ECA and in related constitutional and federal statutory provisions and recent congressional action.

Process Prior to Convening Joint Session of Congress to Count Electoral Votes

Election Day: Appointment of Electors

The Electors Clause of the Constitution (Article II, Section 1, clause 2) provides that “[e]ach state shall appoint” presidential and vice presidential electors in the manner “as the Legislature thereof may direct.” Article II, Section 1, clause 4, further provides Congress with power to determine *when* the states choose their electors or “the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Accordingly, Congress enacted a federal statute establishing Election Day for presidential and vice presidential electors as the first Tuesday after the first Monday in November every four years. Federal law further provides that whenever a state holds an election for presidential electors “and has failed to make a choice on the day prescribed by law,” electors can be appointed on a later date “in such a manner as the legislature of such State may direct.”

Congressional Research Service

<https://crsreports.congress.gov>

IN12065

Certificate of Ascertainment of Appointed Electors Sent to Archivist

The ECA requires that “the executive of each State” send to the Archivist of the United States (Archivist), by registered mail and under state seal, “a certificate of such ascertainment of the electors appointed,” including the name of, and number of votes cast for, each elector. Further, the ECA commands that such certificates of ascertainment be sent “as soon as practicable” after the “final ascertainment” of the appointment of the electors or “as soon as practicable” after the “final determination of any [election] controversy or contest” that was resolved under the state’s statutory procedure for election contests.

Duplicate Certificates of Ascertainment Sent to Electors and to Congress

On or before the electors meet to cast their votes, the ECA directs “the executive of each State” to deliver to the electors of the state, under state seal, “six duplicate-originals of the same certificate” of ascertainment that were sent to the Archivist. At the first meeting of Congress following the appointment of the presidential electors, the ECA requires the Archivist to transmit “copies in full of each and every” certificate of ascertainment to the two houses of Congress.

States’ Determination of Election Contests: “Safe Harbor” Provision

The ECA specifies that if a state, under laws enacted before Election Day and “by judicial or other methods,” has made a “final determination of any controversy or contest” regarding the appointment of electors in the state, and if that determination is made at least six days prior to the day that the electors are to meet to cast their votes, such determination “shall be conclusive, and shall govern in the counting of the electoral votes.” Known as the “safe harbor” provision, this clause seeks to “assure finality of the State’s determination” in resolving a presidential election contest (*Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring)).

Electors Meet to Cast Their Votes

The Twelfth Amendment requires the electors to meet to cast their votes “by ballot” for President and Vice President “in their respective states.” Federal law specifies that the electors meet and cast their votes “on the first Monday after the second Wednesday in December” following election day at a location “in each State as the legislature of such State shall direct.”

Certificates of Votes Sent to President of Senate, Secretary of State, Archivist, and Federal Judge

After the electors meet to cast their votes, the Twelfth Amendment requires the electors to create “lists” containing the number of votes cast by the electors for each presidential and vice presidential candidate, “sign and certify” the lists, and send to the President of the Senate (the Vice President of the United States). Accordingly, federal law specifies that after the electors vote, they “make and sign six certificates” of their votes, which contain two separate lists of the votes cast for President and Vice President. It further provides that the electors attach a certificate of ascertainment to each certificate of the vote; seal and certify them; and send one set to the President of the Senate, two sets to the state’s secretary of state, two sets to the Archivist, and one set to the federal judge in the district where the electors voted.

Procedures for Joint Session of Congress to Count Electoral Votes

Date of Joint Session to Count Electoral Votes

The ECA requires Congress to count the electoral votes on January 6 at 1:00 p.m. following each presidential election unless the date is changed by law.

Opening and Reading of Electoral Votes

The Twelfth Amendment instructs 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.” The ECA provides that the electoral votes be counted at a joint session of the Senate and the House of Representatives, meeting in the House chamber, with the President of the Senate serving as the presiding officer. The ECA further specifies that the President of the Senate open and present the certificates of the electoral votes in alphabetical order.

Counting Electoral Votes and Announcing Result

The ECA requires the appointment of “tellers” who read, record, and count the votes of each state and the District of Columbia. The law directs the President of the Senate to announce whether any candidates have received the required majority, “which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President.”

Majority of Electoral Votes Required for Election

The Twelfth Amendment requires the winning candidate to receive “a majority of the whole number of Electors appointed” and anticipates that, if no candidate receives a majority of the electoral votes, the House of Representatives shall elect the President and the Senate shall elect the Vice President in a contingent election. For additional discussion, see CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

Objections to Counting One or More Electoral Votes

The ECA provides that as the tellers read each certificate, the President of the Senate shall call for any objections. It specifies that each objection be made in writing, stating “clearly and concisely, and without argument, the ground thereof,” and be signed by at least one Senator and one Member of the House. When such an objection is received, the ECA directs that “the Senate shall thereupon withdraw” from the House chamber, the two houses debate the question in their respective chambers for a maximum of two hours, and each body vote separately to accept or reject the objection. The ECA specifies that both houses of Congress must agree to an objection for a state’s electoral vote to be excluded from the vote count, providing that “the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors.” Following the votes, the ECA instructs that the joint session “immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.” In addition, the ECA sets forth a process to address the receipt of multiple certificates from the same state.

For additional discussion, see CRS Report RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress*, coordinated by Elizabeth Rybicki and L. Paige Whitaker.

Recent Congressional Action

During the 117th Congress, the process described above has been the subject of committee examinations as well as legislation. Actions taken in the 117th Congress, with links to electronic resources providing more information concerning those actions, are described below in chronological order.

In January 2022, the Committee on House Administration released a staff report prepared for the chair with a detailed explanation of the ECA and a discussion of proposals for reform. The House Select Committee to Investigate the January 6th Attack on the Capitol has held multiple hearings concerning the events that occurred during the 2021 joint session to count the electoral votes, including six in June 2022. On July 20, 2022, a bipartisan group of Senators announced that they had reached agreement on legislation to reform the ECA (S. 4573). They shared a summary of the proposal and spoke about it on the Senate floor (see the *Congressional Record*, July 20 and July 21). On August 3, 2022, the Senate Rules and Administration Committee held a hearing, “The Electoral Count Act: The Need for Reform,” in which sponsors of the measure and legal scholars testified about the proposed legislation. Companion measures, identical to the Senate-introduced bill, were introduced in the House on September 14, 2022 (H.R. 8824), and September 15, 2022 (H.R. 8846).

On September 19, 2022, the chair of the House Administration Committee introduced a bill, H.R. 8873, that addressed the subject in a different way. The bill was referred to the House Administration Committee, and a one-page summary of the bill has been posted on the committee’s website. On September 20, the House Rules Committee held a hearing concerning procedures for bringing the legislation before the full House, receiving testimony from Members both in favor of and against the legislation. The House debated and approved the procedures for considering the bill and then debated and passed the bill on September 21, 2022. The vote on final passage of the bill was 229-203.

On September 27, 2022, the Senate Committee on Rules and Administration held a markup of S. 4573. After debating and voting on several amendments, the committee voted, 14-1, to advance the bill with a full-text substitute amendment. (See the CQ markup report; link requires a paid subscription.) The bill was reported with the amendment on October 18, 2022. A written committee report has not been filed. The full Senate has not taken up S. 4573. Senate sponsors have indicated that they are pursuing inclusion of the text in appropriations legislation expected to be considered before the end of the 117th Congress. (See news coverage in *Roll Call* and remarks of the Senate majority leader on the floor December 13, 2022.)

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United States

What's in the U.S. Congress's Electoral Count Reform Act?

Reuters

December 20, 2022 9:23 AM EST · Updated a year ago



A general view of the U.S. Capitol after United States on Capitol Hill in Washington, D.C., U.S. August 6, 2022. REUTERS/Ken Cedeno [Acquire Licensing Rights](#)

WASHINGTON, Dec 20 (Reuters) - The U.S. Congress is poised to pass [legislation](#) that would tighten the way presidential elections are certified, aiming to prevent a repeat of the chaos that followed Donald Trump's 2020 presidential defeat.

Here are details on the Electoral Count Reform Act, which lawmakers included in a year-end government funding bill:

AIMS TO PREVENT ANOTHER JAN. 6

The bipartisan effort would rewrite the 1887 Electoral Count Act, which lays out the process by which Congress tallies the state-by-state results from a presidential election and formally certifies the winner. Critics say the law is poorly written and open to misinterpretation.

The congressional session, which takes place roughly two months after the election, was largely seen as a formality until Trump supporters stormed the U.S. Capitol on Jan. 6, 2021, in an unsuccessful attempt to prevent lawmakers from certifying Democrat Joe Biden's victory.

Trump and his advisers had cited provisions of the 1887 law as they pressed Republican allies to overturn his loss.

BIPARTISAN SUPPORT

While other election-law reforms have foundered in Congress this year due to Republican opposition, the Electoral Count Reform Act has solid bipartisan support, at least in the Senate.

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Crafted by Republican Senator Susan Collins and Democratic Senator Joe Manchin, two moderates, the bill is backed by Republican and Democratic leaders.

In a committee vote in September, the lone "no" vote was cast by Republican Senator Ted Cruz, who led efforts in Congress to block certification on Jan. 6.

The House of Representatives passed a similar bill in September, largely along party lines.

WHAT WOULD IT DO?

The legislation would clarify that vice presidents only play a ceremonial role when Congress tallies the state-by-state election results and certifies the outcome.

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Trump had urged his vice president, Mike Pence, to prevent lawmakers from certifying Biden's victory. When Pence said he did not have the authority to do so, Trump denounced him at a rally and his supporters threatened to kill the vice president as they stormed the Capitol.

The legislation also would make it harder for lawmakers to interfere with the process, by requiring approval of one-fifth of the House and Senate to consider a challenge to a state's results.

Current law requires Congress to consider a challenge if only one lawmaker from each chamber raises an objection. That happened on Jan. 6, requiring Congress to consider baseless challenges to Biden's victories in Arizona and Pennsylvania after they hid from the violent, pro-Trump mob that stormed the Capitol.

Congress ultimately rejected those challenges, though eight Senate Republicans and 139 House Republicans supported them.

It also would specify that only a state's governor, or another official designated by law, would be allowed to submit election results.

That would head off Trump's 2020 strategy of recruiting sympathetic state legislators to submit "alternate" results showing he won states that he actually lost. He now faces criminal probes from the U.S. Justice Department and a Georgia prosecutor for that effort.

PRESIDENTIAL TRANSITIONS

The legislation also clarifies how a winning candidate can set up their administration before they take office -- another routine process that was upended after the 2020 election by Trump.

Biden's transition work was held up for several weeks after that election when the head of the U.S. General Services Administration, Emily Murphy, refused to release money to allow him to do so.

The new law says the GSA would release transition money to both candidates if neither has conceded five days after Election Day, but would cut off funds to the loser after the outcome was clear.

Reporting by Andy Sullivan; Editing by Scott Malone and Jonathan Oatis

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Chair

Tom Corbett

Tom Corbett is executive in residence at Duquesne University School of Law. The former governor most recently served as an adjunct professor at the law school.

As the commonwealth's 46th governor, Corbett held Pennsylvania's highest office from January 18, 2011 through January 20, 2015. Corbett has a long and distinguished career serving citizens as assistant U.S. attorney, U.S. attorney, chair of the Pennsylvania Commission on Crime and Delinquency, Pennsylvania attorney general, and governor. Corbett has also served as a key advisor to U.S. presidents and governors.

Corbett served as a member of the Pennsylvania National Guard 28th Infantry Division from 1971 until 1984, rising from private to captain.

Tom Vanaskie

Tom Vanaskie served on the United States Court of Appeals for the Third Circuit and Chief Judge of the United States District Court for the Middle District of Pennsylvania. He is a member of Stevens & Lee's Litigation Department and chairs the firm's Appellate and Mediation, Neutral Services and Alternative Dispute Resolution practice groups.

In May of 2021, he was appointed by the President of the Pennsylvania Bar Association to serve as chair of a statewide task force to study the impact of the COVID-19 pandemic on the delivery of legal services and to make recommendations to mitigate the disruption of services resulting from future catastrophes. The task force generated a comprehensive report that will serve as the foundation for enhancing the use of technology to assure that legal services will be delivered despite widespread disasters