

Reforming the Electoral Count Act, Safeguarding the Vote

A conversation with
BOB BAUER, JACK GOLDSMITH & DAVID F. LEVI



A MEMBER OF THE NATIONAL GUARD WALKS PAST THE U.S. CAPITOL, JANUARY 2021.
PHOTO BY ROD LAMKEY/CNP/MEDIAPUNCH VIA ALAMY.

At the invitation of the leaders of The American Law Institute (ALI), a group of legal experts representing a range of legal and political views has developed a slate of guiding principles for reforming the Electoral Count Act (ECA). Enacted 135 years ago in the years following the disputed 1876 presidential election, the ECA governs Congress' constitutional role in counting each state's electoral votes for president and vice president. The statute has been widely criticized as poorly written, open to conflicting interpretations, and on uncertain constitutional footing. The events of and leading up to the storming of the U.S. Capitol on Jan. 6, 2021, generated urgent calls for reform and new discussions of various approaches for revising the statute.

The group focused on reforms deemed "constitutionally sound and clear and workable in design." Though they hold diverse legal, political, and ideological commitments, the group's members were united by the belief that Congress should reform the ECA before the 2024 presidential election. They also agreed on several general guiding principles — including that ECA reform should not itself introduce new constitutional uncertainties into the presidential election process — and developed specific proposals as to what ECA reform should seek to accomplish.

Co-chaired by **Bob Bauer** (NYU School of Law and former White House counsel) and **Jack Goldsmith** (Harvard Law School and former assistant attorney general, Office of Legal Counsel), the group included **Elise C. Boddie** (Rutgers Law School and former litigation director, NAACP Legal Defense and Educational Fund); **Mariano-Florentino Cuéllar** (president, Carnegie Endowment for

International Peace, and former justice of the California Supreme Court); **Courtney Simmons Elwood** (former general counsel, Central Intelligence Agency); **Larry Kramer** (president, William and Flora Hewlett Foundation, and former dean, Stanford Law School); **Don McGahn** (Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School at George Mason University, and former White House counsel); **Michael B. Mukasey** (former U.S. district court judge and former U.S. attorney general); **Saikrishna Prakash** (University of Virginia Law School); and **David Strauss** (University of Chicago Law School).

Though they hold diverse legal, political, and ideological commitments, the group's members were united by the belief that Congress should reform the ECA before the 2024 presidential election.

Because of the need for quick action, the project did not undergo the typical ALI bicameral process, which requires approval by both the ALI Council and its membership, and is not considered an official ALI project, notes ALI President **David F. Levi** (also director of the Bolch Judicial Institute at Duke Law School and *Judicature's* publisher). "Our support for this project nonetheless contributes to the rule of law," Levi says, "which is a core priority for the ALI."

Following are excerpts from a podcast interview Levi conducted in May

with Bauer and Goldsmith, discussing how the principles came to be and what the group hopes they will accomplish. The principles are published in their entirety on pages 24–25 and are available, along with the full podcast, at ali.org.

DAVID F. LEVI: It is such a pleasure to be here today with two distinguished academics and public lawyers, Bob Bauer and Jack Goldsmith. Bob Bauer is a professor of practice and distinguished scholar in residence at NYU Law School. He served as White House counsel to President Barack Obama from 2009 to 2011. He has also served as co-chair of the Presidential Commission on Election Administration and co-chair of the Presidential Commission on the Supreme Court of the United States. Jack Goldsmith is the Learned Hand Professor of Law at Harvard Law School. He served as assistant attorney general for the Office of Legal Counsel in President George W. Bush's first administration. They are authors of a book called *After Trump: Reconstructing the Presidency*.

You two often work together on projects where you hope to find some common ground. ALI Director Richard Revesz and I asked you to chair a group of 10 distinguished persons from government, the academy, and practice to consider and propose reforms to the Electoral Count Act. This group has now issued a set of proposals that each member of the group was able to agree to, a remarkable achievement given the diversity of their backgrounds, political and otherwise.

Let's start with the constitutional structure and background relating to presidential election administration. Can you give us a thumbnail sketch of these provisions?



JACK GOLDSMITH: Sure, David. The main structural constitutional provisions that inform presidential elections come from Article II of the Constitution and from the 12th Amendment, which amended Article II. Article II states: “Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.” That is the provision that gives the states the primary responsibility to choose the electors who choose the president of the United States. Article II also says that Congress can determine the time of choosing the electors and the day on which they give their votes. The states choose the electors for president, but Congress gets to choose the day of the election.

The 12th Amendment provides that the president of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates containing the electors from the states, and the votes shall then be counted. A couple of important ambiguities are worth noting: One is that the president of the Senate, who in many instances is the vice president, is given the power to open these certificates. And then the 12th Amendment has this phrase in the passive voice that says, “and the Votes shall then be counted,” without specifying where the power to count lies. Is it in the president of the Senate? Is it in the two houses of Congress? That’s an important ambiguity that’s been an issue.

Those are the main structural provisions. Lots of constitutional provisions potentially come to bear on the selection of the president and how elections are conducted in the states, including the Equal Protection Clause, as was famously at issue in *Bush v. Gore*, and also the Due Process Clause, First Amendment law, and the like.

For the most part, for a long time, some of ECA’s weaknesses were papered over by general agreement on how political actors should behave. Candidates conceded elections, and Congress proceeded in good faith to administer its responsibilities under the Electoral Count Act. And what we discovered in 2020 is that those norms are giving way.

LEVI: Thank you. The ECA was enacted after the Hayes/Tilden election of 1876. Bob, can you give us some of the historical background and tell us what the ECA adds to this constitutional structure that Jack identified?

BOB BAUER: Certainly. The 1876 election produced no clear winner in the Electoral College. Neither candidate received the majority of the electoral votes, and states began turning in multiple slates, so Congress wasn’t even able to resolve the question of which slates should be counted in the column of particular states. As a result, Congress did this extraordinary thing: It established a commission to try to resolve the question. You can imagine during this period lots of backroom

dealing and politics — more than any consideration of constitutional or legal issues or even vote-counting accuracy issues. And what ultimately occurred was that the Democrats decided they could live with Rutherford B. Hayes so long as he agreed to withdraw federal troops from the South.

So Hayes was elected president. Congress recognized that this was an ugly episode resolved in a particularly messy way. And, 11 years later, Congress enacted the ECA. It’s a mess of a statute, incomprehensible in many places and difficult to understand in application — and some of those are issues that we would hope would be addressed in ECA reform — but it fundamentally attempts to have the process be more orderly, to clarify Congress’ role in it, and to incentivize states to resolve controversies in a timely fashion so that Congress doesn’t have a multiple-slate problem. It did, among other things, set up a safe-harbor date by which it was thought that states could qualify presumptive acceptance of their slates if they resolved controversies and submitted the slates by that date.

It also adopted other procedures to assure transmission in timely fashion to the archivist of the United States for Congress to count the electoral votes, procedures by which Congress would fulfill its 12th Amendment duties. Those included the procedures by which objections could be raised by members and by which the two houses would consider and ultimately decide whether to sustain or reject those objections. That’s fundamentally what the ECA attempted to do — to clean up a little bit after the 1876 election.

LEVI: What caused you to turn your attention to reform of the ECA in particular?

GOLDSMITH: As you said, Bob and I wrote this book together called *After Trump*, which was about reconstituting the presidency in terms of norm violations and law violations that were prevalent in the Trump administration. We laid out a plan for reform that we thought should be akin in ambition to the reforms of the 1970s. After the book was published, we established an organization called the Presidential Reform Project that aimed to implement some of these reforms. Then we had the presidential election of 2020 and the events of January 6, 2021, all of which highlighted something that had become increasingly clear going back actually a couple of decades — namely, that the ECA is a terribly worded statute that’s full of ambiguities. It might contain authority for Congress that might not be constitutional, and, as demonstrated on January 6, the rules were unclear about the vice president’s role and the role of Congress. Bob and I, like a lot of people, started thinking about what could be done for future elections to improve this system.

BAUER: I’ll mention one aspect of this that makes legal reform really urgent. One issue we address throughout our book is the erosion of norms. We have constitutional requirements. We have legal requirements. And then of critical importance, of course, is how political actors fill in the gaps by accepting certain conventions about how they should behave. And for the most part, for a long time, some of ECA’s weaknesses were papered over by general agreement on how political actors should behave. Candidates conceded elections, and Congress proceeded in good faith to administer its responsibilities under the Electoral Count Act. And what we discovered in 2020 is that those norms are giving way. They’re

eroding. And that makes the necessity of legal reforms all that more urgent because we’re not able to rely anymore on a shared understanding of how these gaps should be addressed and what sort of behavior we can expect from actors to fundamentally honor what we believe are the key constitutional themes and expectations that we should all have.

LEVI: Your proposal covers enormous ground in an area of law that’s quite complex. It contains general principles to govern ECA reform and then a set of more specific principles focused on ECA reforms. The first general principle states that Congress lacks the constitutional authority to address every issue that may arise in the presidential election process. And the second principle states that ECA reform should not itself become the basis of fresh uncertainties about the presidential election process — a kind of “first do no harm” sort of principle. What work are these two principles doing?

BAUER: The first principle is meant to bring focus to the actual matter at hand, which is Congress’ role pursuant to the 12th Amendment. Of course, there are other aspects of the presidential selection process. We saw how these controversies played out in the states in 2020, with roles played by different actors in the states, by state officials, by state legislatures declining to take certain action that was urged upon them by state courts. The goal of ECA reform is to clarify Congress’ role in this complex process. And so the first principle is intended to make it very clear that Congress has certain authorities but lacks others, and, as you point out, that relates to the second principle that you cited. It would be a mistake to view ECA reform as

some comprehensive effort to resolve all of the questions set up in the presidential election process. It can’t do that. It can’t do that as a constitutional matter. It almost certainly can’t do it as a prudential matter. It would wind up traveling into areas that are likely to spark very sharp disagreement and make it harder to reach bipartisan consensus. And so, for that reason, we wanted to sort of set the table with the first two principles about what precisely, defined as carefully as possible, the mission of the group was.

LEVI: Your third general principle is that ECA reform should clarify that Congress has an important but limited role in tallying electoral votes, considered with the best understanding of the 12th Amendment and other relevant authorities. Jack, can you explain what the third principle does?

GOLDSMITH: It’s related to the first one, especially, but we wanted to emphasize both that Congress has an important role in tallying these votes, but also a limited one. It clearly has this vital role in counting the electoral votes from the states. And it’s the last institutional step in the election of the president. And it also, we believe, has a narrow role in raising objections related to constitutional issues — for example, to assess whether an elector meets constitutional criteria and the like. But we also wanted to emphasize how limited that role is, because some interpretations of the ECA give Congress a much more robust role in counting the votes, deciding which votes to count, and, in some views, in choosing the president.

LEVI: So your fourth principle states that 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. You go on to say that 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 — and that 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. Bob, you've already said a little bit about this, but can you explain what the concern is here?

BAUER: Yes, I think it is a dominant concern for people who watch a lot of sharp political jockeying and the erosion of norms that govern our expectations for the behavior of actors in our democratic process. And that is simply the attempt to change the rules after the game is over — someone's been able to assess the score and found out that they're on the losing end. That is obviously a huge challenge to anybody's conception of a fair outcome or what we expect from the democratic process. For reasons that relate to due process and equal protection considerations, that effort to change the rules — after the game is over, to alter what they consider to be an undesirable outcome — cannot happen. Our democracy would simply founder. So that is the reason for the prominence of the principle. Our effort at the very outset was to establish baselines like that one, which we simply have to enforce if we're going to have meaningful ECA reform that upholds our basic understanding of how the Constitution is supposed to operate and what voters

in the democratic process ought to be able to rely upon.

Now, let me just mention something very specific here, which goes back to the very first principle. Other actors in the process — state and federal courts, for example — police for some of that misconduct. They enforce constitutional guarantees. And we make it very clear in our proposal that extant authority to address those kinds of problems, which are rule shenanigans like the one I described, would be left untouched by anything Congress does on ECA reform.

LEVI: Your sixth and last general principle says that 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. Jack, what are you getting at here? And is it different than what Bob just discussed?

GOLDSMITH: It's very related to what Bob was just discussing. There's a robust jurisprudence in the federal courts on equal protection. *Bush v. Gore* was the most famous case involving equal protection in the presidential election context. Due process principles come to bear in federal court in assessing the legality of state elections. First Amendment principles come to bear. And the reason to emphasize this is that it's very important to understand the background against which Congress is legislating. It goes back to some of the earlier principles — that under the Constitution, Congress cannot and should not answer every problem that might come up in the election of a president. Various institutions play various roles, and this principle is

designed to emphasize that, for many problems that will arise in a presidential election, the federal courts stand ready under various constitutional provisions to police mischief in the states.

LEVI: May I say, as we discuss this, I see just how smart you and your colleagues on the group were in coming up with the general principles, and then having the specific principles, which we're about to get into. Because these general principles are foundational, there's a lot beneath them that maybe the two of you might not agree on when you sort of drill down. But you are able to agree on the overall point, the thrust of reform. And that's so important.

Your specific principles to govern ECA reform are grouped under three headings: "Congressional Powers in Counting and Determining the Validity of Electoral Votes," "Reform Related to the Electoral College Meeting Date," and "Reforms Related to State Action to Override or Disregard the Outcome of the Vote Under Existing Law." So starting with the first bucket, congressional powers, you outline five specific principles. Bob, can you summarize and explain those?

BAUER: Yes. The ECA has a loose — and in some places very hard to understand — series of provisions governing how Congress exercises authority for 12th Amendment purposes. Most notably, I'll give you an example from 2020, when there was a debate about the role of the vice president. Could the vice president of the United States suspend the proceeding because the vice president concluded that certain slates before the Congress, duly transmitted by the states, were somehow, in some way, the wrong slates and didn't reflect the true winner in the state? Could the

vice president remove from the vice president's back pocket, if you will, another set of slates and say, "These were forwarded to me, and I'm going to put those in play as alternatives to the slates that we received in the ordinary course"?

So it was important to define the vice president's role as presiding officer of the Senate. It's not an insignificant role. The vice president does, in fact, preside over the proceedings — a procedural role that is clearly significant but does not extend to making substantive judgments about which slates to count and which slates not to count, which are the correct slates and which are not. The vice president operates as a presiding officer but does not speak for the body. The body makes those decisions.

Then there's a series of questions around objections — not who may raise them, because members of Congress may raise them, but how many members are required in the House and the Senate to bring an objection forward? What kind of objections can they make, and how are those actions disposed of? And we address that by strongly recommending that the objections be grounded in very, very narrow constitutional considerations — for example, the failure of the elector of a candidate to meet constitutional eligibility requirements. It would not mean that an objection would call upon Congress to look behind the certification and decide whether votes in particular states have been counted correctly. That's not Congress' role.

Then there was the question of how many of those objections would be sufficient to call upon the two houses to consider them formally. We think that the threshold needs to be raised. Under the current ECA, one member from each house is sufficient to tie the Congress up in the consideration of

It was important to clarify that Congress should not treat disputes over an election as a "failed election" for purposes of one provision of the ECA. A failed election, for example, might occur because of a catastrophic act, a hurricane, some natural disaster that prevents the votes from being counted. But it cannot include ... taking into account disputes about the outcome. Those disputes are resolved through the legal process under state law, and it's important that it be recognized that it's not a failed election. It's a disputed election.

objections of almost any kind. And we thought the threshold for that needed to be increased, just as it is important to have a clear understanding that the majority of the two houses would be required to sustain an objection to electoral slates on the kind of narrow grounds that I was referring to earlier.

Last but not least, it was import-

ant to clarify that Congress should not treat disputes over an election as a "failed election" for purposes of one provision of the ECA. A failed election, for example, might occur because of a catastrophic act, a hurricane, some natural disaster that prevents the votes from being counted. But it cannot include, it seems to us — and our ECA reform would preclude — taking into account disputes about the outcome. Those disputes are resolved through the legal process under state law, and it's important that it be recognized that it's not a failed election. It's a disputed election, and that would not be a reason, for example, for Congress to turn away the slates that states send in.

LEVI: The next section includes just one principle, and that concerns reform relating to the Electoral College meeting date.

GOLDSMITH: The principle states that Congress should move the Electoral College meeting date to a later date than is specified in the current provision, to make sure that the states have more time to conduct recounts and so that legal challenges can be resolved. The ECA currently specifies the date for the Electoral College to meet as the Monday after the second Wednesday in December. That was December 14 in the last election. This is when the electors actually show up in the states and vote.

As litigation has become much more complex and contested, there's been a perpetual worry that that's just not enough time. So our basic suggestion is that it be moved to later in December. We don't specify a date. We think Congress should figure out the appropriate trade-offs. But Congress needs time on the other end, before it meets in early January, to deal with problems ►

that may arise. We think on balance that the date should be moved to closer toward the end of the month.

LEVI: This also reflects your general principles and the thrust of the paper, which is that this action will be — and should be — in the states. Congress also needs time, but it has a more limited role. So you’re taking time away from Congress and giving it to the states.

GOLDSMITH: We think that’s appropriate because there’s a lot more that might happen in the states or with state processes, and Congress can do with less time on the other end.

LEVI: So the third bucket of specific proposals includes reforms related to state action to override or disregard the outcome of the vote under existing law. The first specific principle states that 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. Jack, can you tell us why you included this principle? Is this controversial?

GOLDSMITH: I don’t believe it is or should be controversial. Looked at one way, it’s simply a matter of Congress specifying the intersection between its timing role and the state’s role in setting the manner for the choosing of the electors. The clearest power Congress has with regard to presidential elections is choosing the timing of the election. And that means that the date on which Congress specifies the presidential election shall take place shall be the day on which the president

is chosen. The states have the power to choose the manner, but that power ends when Congress chooses the date of the election. This is simply a matter of specifying when that is. The goal here is to make clear that states cannot change the rules after the election.

There are worries about this happening, that actors within the states will not like the results and will want to exercise their power to change the rules, change the counting of the votes, change how to ascertain the votes. There are worries that states might be motivated to do this after an election that doesn’t go a certain way or that maybe certain institutions in the state don’t like.

So this is a quite important principle. The state laws in place on Election Day are the laws that govern, and Congress can achieve that by exercising its timing power.

LEVI: The paper has a fairly detailed proposal for how to address the problem of multiple lists from a state seeking recognition for purposes of Congress’ 12th Amendment vote-count responsibilities. Bob, can you explain the problem of multiple lists?

BAUER: The states are supposed to transmit to the Congress a certification of the identity of electors and the votes they cast so that the votes can be counted and the winner of the election can be determined. This was an issue in the 1876 election — you could wind up with competing sources of authority in the states claiming that they have the actual list, the certificate that Congress ought to treat as the binding certificate for vote-count purposes.

For example, the governor of the state might put in one certificate, and the state legislature, presumably controlled by the other party, might say:

“Well, that’s incorrect. It doesn’t reflect the true vote count. We’re sending a different list pursuant to our constitutional authority to appoint electors.” You could imagine another circumstance in which the governor decides not to send in the list the governor should be sending, and the state legislature transmits the list. So Congress has to decide which votes it should be counting.

As we noted, we think the objection procedure ought to be limited to objections that are clearly grounded in constitutional concerns, not those that go to the question of whether the votes were accurately counted in the states. We do not believe Congress should play the role of deciding whether a certain category of ballot should or should not have been excluded from the count. So the goal is to find out which is the certified list that Congress ought to have the vice president open up and tally.

We think that there is a basis for a limited cause of action that presidential and vice presidential candidates can file in federal court to seek a judgment about which body or official in the state is responsible for sending in the certificate — the real certificate, the one that contains the votes that should be counted. The court also has a responsibility, or could have the power delegated by Congress under the ECA reform, to compel a recalcitrant state official who’s withholding that certificate to provide it to Congress so that Congress can perform its 12th Amendment constitutional responsibilities.

I should add that these are complex constitutional questions, but we believe that, even though this is a state vote count and a state certification, Congress has a federal duty under the 12th Amendment to count. And so, the declaratory judgment that

a federal court is called upon to render here is a declaratory judgment clearly in aid of a federal duty, a duty to the Congress to provide that certificate. We also provide that — in the event there is any constitutional question around compelling, say, a recalcitrant administrative official from providing the certificate — that’s severable. A constitutional question there doesn’t doom the entire statute, and the court can still issue, in support of Congress’ counting role, a declaratory judgment about which certificate containing which votes is the one from that state.

LEVI: Why federal court rather than state?

GOLDSMITH: The ultimate issue is a federal law question of the federal duty of the state official to transmit the certificate of the electors to the Congress. And we thought that in answering that federal question, and the embedded state law question in that federal question, that the federal courts were the appropriate institution to do that. Ultimately, the federal question would be reviewed by the Supreme Court whether we gave it to state or federal courts.

Another reason to give it to the federal courts is that we can specify the jurisdiction. We contemplated the creation of a three-judge panel so that there would just be two levels of review — a three-judge panel and then the Supreme Court. Time is of the essence. So, basically, this is a federal duty. We think federal courts are most competent and appropriate to adjudicate this federal duty, including the embedded state law claim, and it’s just easier for Congress to ensure expedited review in the federal courts than in the state courts.

We think the objection procedure ought to be limited to objections that are clearly grounded in constitutional concerns, not those that go to the question of whether the votes were accurately counted in the states. We do not believe Congress should play the role of deciding whether a certain category of ballot should or should not have been excluded from the count. _____

BAUER: And to clarify, any fact finding would not be directed toward resolving claims about whether votes were properly counted in the state. That remains something that Congress would itself not do and the federal courts would not do. The court’s role is to identify, under state law, which body or official is responsible under state law for submitting the certificate with the names of electors.

LEVI: It’s probably what we would call a mixed question of law and fact, because it might be dictated by past practice and there might be a dispute over what past practice was.

So that is actually the last of your specific principles. It’s really a tribute

to the way in which this is done because you do it very succinctly. What’s been the reaction to the principles?

BAUER: There’s an active debate taking place on Capitol Hill, and there’s been a lot of commentary, other proposals that have come before the Hill and that Congress has actively engaged in exploring. We’ve been very glad that they took notice of this proposal, and we have engaged with them to explain the proposal in greater detail and to answer their questions. We’ve been very gratified from two perspectives: First, we’re delighted to see that there’s still this energetic debate on ECA reform; we need it. And second, we seem to have helped inform that debate and, hopefully, maybe shape views on what form ECA reforms should take. Obviously there’s a lot going on in this world and before the Congress, but we are cheered by the debate that’s going on.

LEVI: That’s a cause for some optimism. Really, what you’ve done here is marvelous. It wasn’t clear that one could hammer out principles and operate on the same page with people who approached these issues from very different backgrounds and experiences. And you did it. Thank you. It’s a promising first step at a time when we need promising first steps.



PRINCIPLES FOR ECA REFORM . 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 princi-

ples 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.

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