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REPORT ON

The Electoral Count Act of 1887: Proposals for Reform

January 2022 | 117th Congress, Second Session

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INTRODUCTION

Every four years, Congress gathers to count electoral votes and certify a winner of the presidential election. That process is usually uneventful. No longer—on January 6, 2021, supporters of former President Donald Trump stormed the Capitol, seeking to overturn President-elect Joe Biden’s victory. One hundred and forty police officers were injured, one rioter was shot and killed, and five officers who responded to the riot have since died, four by suicide.

There is a law meant to prevent the chaos of that day: the Electoral Count Act of 1887 (the “ECA”).¹ This report will examine the ECA and argue that it is badly in need of reform.

Part I outlines the relevant constitutional text and summarizes past electoral counts, Part II describes the ECA, Part III proposes a series of reforms, and Part IV offers a brief conclusion.

An ECA supporter once argued that “a bad law is better than no law at all.”² That may no longer be true. The events of January 6 demonstrated that Congress needs a new, clear process to certify presidential elections. This report provides a roadmap for that process.

¹ 3 U.S.C. §§ 5-6, 15-18.

² 15 Cong. Rec. 5546 (1884) (statement of Rep. Herbert).

Part I) Background

A) Relevant Constitutional Text

The Constitution is detailed with respect to some aspects of presidential elections. Article II requires Congress to choose the “time” of the election and “day” on which the electors vote (referred to in this report as “elector balloting day”),³ while state legislatures direct the “manner” in which presidential electors are appointed.⁴ Winning candidates must receive electoral votes from “a majority of the whole number of electors appointed.”⁵

Congress has chosen dates for Election Day and elector balloting day,⁶ while all 50 states have implemented a “popular vote” system for electoral appointments.⁷

The Twelfth Amendment prescribes a detailed process for electors to cast electoral votes⁸ but is cryptic regarding Congress’s electoral count:

*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.*⁹

Who does the counting, and how? Does that person or body have any discretion over what to count? Those questions have vexed Congress since at least 1800.¹⁰

B) A Brief History of Electoral Counting

This section describes selected electoral counts and places the ECA in historical context.¹¹

1789-1861: Early confusion

Early Congresses experienced confusion over the counting process.

³ U.S. Const. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United States.”).

⁴ U.S. Const. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

⁵ U.S. Const. amend. XII. The original Constitution contained identical language. U.S. Const. art. II, § 1, cl. 3.

⁶ 3 U.S.C. §§ 1 (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”), 7 (“The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.”).

⁷ The term “popular vote” refers here to an election in which votes cast for a party’s slate of electors are effectively votes for that party’s presidential ticket. See *The Electoral College*, National Conference of State Legislatures (Nov. 11, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx> (providing an overview of the electoral college system).

⁸ U.S. Const. amend. XII. The original Constitution contained identical language. U.S. Const., art. 2, § 1, cl. 3. The Twelfth Amendment required electors to ballot separately for president and vice president but otherwise left the balloting and transmittal process unchanged.

⁹ U.S. Const. amend. XII. As with elector balloting and transmittal, this language is identical to the original Constitution. U.S. Const. art. 2, § 1, cl. 3.

¹⁰ See *infra* note 104 (discussing 1800 bill).

¹¹ For a summary of each electoral count from 1805-1997, see Jack Maskell *et al.*, Cong. Research Serv., RL30769, *Electoral Vote Counts in Congress: Survey of Certain Congressional Practices* (2000) [hereinafter “Maskell”]. For a survey of notable incidents in electoral counts through 2002, see Vasav Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1663-94 (2003) [hereinafter “Kesavan”].

In 1801, Vice President Thomas Jefferson appeared to count disputed (and essential¹²) votes for himself.¹³

Several Congresses grappled with “statehood” questions, i.e., whether a territory achieved statehood prior to casting electoral votes.¹⁴ Congress sometimes sidestepped the issue by simply announcing the result with and without the votes in question.¹⁵ Fortunately, the disputed votes never affected the outcome of an election.

Individual electors occasionally failed to vote due to death, disability, or lack of attendance. Congress sometimes reduced the “whole number of electors appointed”¹⁶ to account for those missing votes;¹⁷ other times it did not.¹⁸

A major controversy erupted in 1857, when Wisconsin’s electors were unable to vote on the prescribed day due to a snowstorm.¹⁹ At the joint session, the presiding officer²⁰ ruled objections to Wisconsin’s votes out of order and seemed to simply count the votes,²¹ raising the question of who holds the counting power.²² The joint session dissolved to debate the issue in each chamber and although the question was never resolved, most Members agreed that Wisconsin’s votes should not have been counted.²³

¹² By counting Georgia’s votes for himself and his running mate Aaron Burr, Jefferson ensured that he and Burr both received a majority of electoral votes, although they remained tied (a situation that was only possible prior to the Twelfth Amendment, when electors did not distinguish between presidential and vice presidential votes). Under the Constitution as originally written, this ensured that Jefferson and Burr faced only each other in the ensuing contingent election in the House. *See* U.S. Const. art. II, § 1, cl. 3. Had this not been the case, the contingent election would have included the top five vote-getters, and Jefferson would also have faced his Federalist opponents, President John Adams and Charles Pinckney. Because Federalists held a numerical majority in the House at the time, and the House was evenly split when measured by state delegations (then, as now, the Constitution required votes in contingent House elections to be cast by each state delegation as a unit), Jefferson’s victory in a five-candidate runoff was by no means assured. For a detailed account of the 1800 election and 1801 contingent election, *see* Tadahisa Kuroda, *The Origins of the Twelfth Amendment: The Electoral College in the Early Republic, 1787-1804* 83-105 (1994).

¹³ *See* Bruce Ackerman and David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 Va. L. Rev. 551, 599-610 (2004). Jefferson counted Georgia’s votes, which appeared to lack the requisite technical certifications. *See id.* at 588-99.

¹⁴ *See* Subcomm. on Compilation of Precedents, *Counting Electoral Votes*, H.R. Misc. Doc. No. 44-13 46-47 (1877) [hereinafter “CEV”] (Indiana statehood in question in 1817).

¹⁵ *See id.* at 49-56 (Missouri statehood in question in 1821); *id.* at 72-75 (Michigan statehood in question in 1837).

¹⁶ The Constitution requires winning presidential candidates to obtain electoral votes from a majority of the “whole number of Electors appointed.” U.S. Const. amend. XII. *See infra* pp. 17-18 (discussing the provision).

¹⁷ CEV at 40 (in 1808, a Kentucky elector did not attend elector balloting day and the denominator was reduced); Maskell at 8 (in 1816, three electors from Maryland and one from Delaware did not attend elector balloting day and the denominator was reduced); CEV at 229 (in 1864, an elector from Nevada did not attend elector balloting day and the denominator was reduced).

¹⁸ Maskell at 10 (in 1832, two electors from Maryland did not cast votes and the denominator appeared to be unaffected).

¹⁹ CEV at 86-144.

²⁰ The presiding officer was the president pro tempore of the Senate due to a vacancy in the vice presidency.

²¹ CEV at 87-89.

²² *E.g.*, CEV at 97 (1857) (statement of Rep. Marshall) (“The Constitution requires this House to act, and to count the vote; my proposition is, that until the House agrees to the vote offered to be counted, it is not constitutionally counted, and the President of the Senate cannot, of his own mere will, give that vote any force or validity in that election, or declare a result to which the House has not agreed by a count of the votes.”).

²³ *Id.* at 94-144. *But see* Kesavan at 1687 n.141 (describing two senators who defended the acceptance of Wisconsin’s votes).

1865-1887: Congress takes control

After the Civil War, Congress experienced an increasingly turbulent series of counts.

In 1865, Congress agreed to the “Twenty-Second Joint Rule,”²⁴ which created a one-house veto over electoral votes and was aimed at controlling rebellious southern states.²⁵ That rule, and other similar resolutions, were used to reject electoral votes from former Confederate states in 1865,²⁶ 1869,²⁷ and 1873.²⁸

In 1873, the Senate authorized its Committee on Privileges and Elections to independently investigate the underlying elections in Arkansas and Louisiana, which was the first time either house considered such a measure necessary.²⁹

In 1875, the Republican Senate allowed the Twenty-Second Joint Rule to lapse after Democrats won control of the House, and various attempts to reform the counting process between 1873-76 failed.³⁰

The 1876 election between Republican Rutherford B. Hayes and Democrat Samuel Tilden was the nation’s most chaotic electoral count until that time. Briefly:³¹ neither candidate received an electoral majority and multiple states presented serious controversies.³² Congress appointed a 15-member commission to decide “which is the true and lawful electoral vote” of those states.³³ The commission decided the disputes for Hayes along party lines, and congressional

²⁴ CEV at 224 (rule text).

²⁵ See L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 Dick. L. Rev. 321, 328 (1961) [hereinafter “Wroth”].

²⁶ CEV at 147-223 (houses debating and passing a resolution prohibiting electoral votes from Confederate states); *id.* at 227-228 (President of Senate relying on same resolution to exclude Louisiana’s and Tennessee’s electoral votes).

²⁷ S. Res. 139, 40th Cong. (1868) (resolution setting conditions for former Confederate states to submit electoral votes, under which Mississippi, Virginia, and Texas were not permitted to cast votes). See also CEV at 237-244 (houses debating and agreeing to accept Louisiana’s votes); *id.* at 265 (counting Georgia’s votes in alternative form).

²⁸ The 1873 count posed numerous issues – Congress received two sets of electoral votes from Louisiana and rejected them both, accepted Mississippi and Texas’s votes notwithstanding technical objections, rejected Arkansas’ votes due to numerous technical and substantive issues, and rejected three Georgian votes for Horace Greeley, who had died before the electors voted. Congress relied on the Twenty-Second Joint Rule to reject the votes from Arkansas, Georgia, and Louisiana. For a summary of that year’s issues, see Maskell at 14-15. See also Kesavan at 1687-88; CEV at 335-408 (providing a detailed account of the 1873 count).

²⁹ CEV at 335-345 (Senate debating and adopting resolution authorizing committee to investigate returns in Arkansas and Louisiana and granting the committee subpoena authority to do so). Congress then relied at least partly on the Committee’s report to reject Louisiana’s votes. CEV at 394.

³⁰ See Wroth at 330-31.

³¹ For a longer discussion of the Hayes-Tilden election, see Edward B. Foley, *Ballot Battles: The History of Disputed Elections in the United States* 117-149 (2016) [hereinafter “Ballot Battles”].

³² The states in question were Florida, Louisiana, South Carolina, and Oregon. The issues in the southern states were largely caused by Republican chicanery, while Oregon’s controversy was manufactured by Democrats. Tilden only needed one electoral vote from the three disputed southern states and was probably the true winner of Florida, and thus the election. *Ballot Battles* at 120-22. That view does not, however, account for suppression of African American votes, which was widespread and would likely have swung the election back to Hayes. *Id.* at 122.

³³ The commission comprised five senators, five congressmen, and five Supreme Court justices. Its decisions were final but could be overturned by both houses acting concurrently. See An act to provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon, for the term commencing March fourth, anno Domini eighteen hundred and seventy-seven, 19 Stat. 227, 228 (Jan. 29, 1877). See also Wroth at 331-32 (describing creation and composition of the commission).

Democrats threatened to physically obstruct the final count. A constitutional crisis loomed when Hayes offered to end Reconstruction in exchange for the presidency. Democrats accepted, and the Jim Crow era followed soon thereafter.³⁴

After two close elections in 1880 and 1884³⁵ and numerous failed efforts at reform, Congress passed the ECA in 1887.³⁶

1888-1997: The uneventful post-ECA era

The ECA was initially a success and enabled more than a century of smooth electoral counts.

In 1889, an unknown individual submitted competing returns from Oregon, apparently as a joke.³⁷ The presiding officer obtained unanimous consent to count Oregon's true votes.³⁸

In 1961, Hawaii submitted multiple returns due to a complicated series of post-election recounts.³⁹ Vice President Richard Nixon, as presiding officer (and that year's Republican nominee), obtained unanimous consent to count Hawaii's most recent returns for his opponent, Senator John F. Kennedy.⁴⁰ Hawaii's votes did not affect the outcome of the election.

³⁴ See Kesavan at 1690 (“The famous “Compromise of 1877” . . . served to avert this [constitutional] crisis. Southern Democrats would proceed with the formal counting of the electoral votes, allowing Republican Hayes to be elected President, but would extract several substantial concessions from him. Among other things, congressional Republicans, speaking for Hayes, agreed to cease federal military support for the Reconstruction governments of the South, sealing the end of Reconstruction.”). See also Ron Chernow, *Grant* 858 (2017) (“After 1877, the black community in the South steadily lost ground until a rigid apartheid separated the races completely, a terrible state of affairs that would not be fixed until the rise of the civil rights movement after World War II”); Gilbert King, *The Ugliest, Most Contentious Presidential Election Ever*, *Smithsonian Mag.* (Sep. 7, 2012), <https://www.smithsonianmag.com/history/the-ugliest-most-contentious-presidential-election-ever-28429530/> (“The compromise enabled Democrats to establish a “Solid South.” With the federal government leaving the region, states were free to establish Jim Crow laws, which legally disenfranchised black citizens. Frederick Douglass observed that the freedmen were quickly turned over to the “rage of our infuriated former masters.” As a result, the 1876 presidential election provided the foundation for America’s political landscape, as well as race relations, for the next 100 years.”).

³⁵ Both elections hung on New York and crises were narrowly averted both times. In 1880, the Republican candidate was convinced that widespread fraud in New York had robbed him of victory. He briefly considered pushing Congress to overturn the results before backing down. The 1884 election was even closer, with a margin in New York of only 1,047 votes. Grover Cleveland was both the Governor of New York and the Democratic nominee (and eventual winner), and a crisis was averted only after an exhaustive canvass failed to uncover irregularities. See *Ballot Battles* at 152-53 (summarizing both elections).

³⁶ The Electoral Count Act of 1887, 24 Stat. 373, ch. 90, 49th Cong. (1887).

³⁷ Stephen A. Siegel, *The Conscientious Congressman’s Guide to the ECA of 1887*, 56 U. Fla. L. Rev. 542, 638 (2004) [hereinafter “Siegel”].

³⁸ 20 Cong. Rec. 1860 (1889) (statement of Sen. Ingalls). The Senate president pro tempore presided due to a vacancy in the vice presidency.

³⁹ Initial results showed Vice President Richard Nixon winning Hawaii, so the governor certified Nixon’s slate and sent the certificate to Congress. On elector balloting day, Senator Kennedy’s electors also assembled (aware of an ongoing recount), voted for Kennedy, and sent those returns to Congress (uncertified by the governor). Then, after the recount declared Kennedy the winner in Hawaii, a newly elected governor sent Congress the Kennedy slate’s votes, this time with that governor’s certification. Thus, Congress was faced with three competing returns (Nixon/certified, Kennedy/uncertified, and Kennedy/certified). See Kesavan at 1691-92.

⁴⁰ 107 Cong. Rec. 290 (1961) (statement of Vice President Nixon). Nixon also declined to pursue election contests that year in Illinois and Texas, where pro-Kennedy irregularities had been alleged. In explaining his decision, Nixon said that “I could think of no worse example for nations abroad, who for the first time were trying to put free electoral procedures into effect, than that of the United States wrangling over the results of our presidential election, and even suggesting that the presidency itself could be stolen by thievery at the ballot box.” *Ballot Battles* at 227.

In 1969, Congress debated whether to reject a “faithless vote”⁴¹ from an elector in North Carolina and agreed to accept the vote.⁴²

2001-2021: Renewed controversy

The last two decades have seen a resurgence of controversy at the count.

In 2001, multiple Representatives objected to Florida’s electoral votes but lacked a Senate cosponsor, failing to force a vote under the ECA.⁴³

In 2005, Members from both chambers objected to Ohio’s electoral votes, forcing the chambers to separate and debate the objection under the ECA. Both houses rejected the objection and Ohio’s votes were counted.⁴⁴

In 2017, multiple Representatives objected to numerous states’ votes but lacked a Senate cosponsor.⁴⁵

On January 6, 2021, Members from both chambers objected to numerous states’ votes, and supporters of former President Trump stormed the Capitol to prevent the certification of President-elect Biden’s victory. President Biden’s victory was certified after a delay of several hours.⁴⁶

⁴¹ “Faithless votes” are votes cast by electors for someone other than their party’s nominees. *See Faithless Electors*, FairVote.com (Dec. 15, 2020), https://www.fairvote.org/faithless_electors.

⁴² *See Kesavan* at 1692-94 (describing the North Carolina incident).

⁴³ 107 Cong. Rec. H31-45 (2001). The ECA requires at least one Member of each house to support an objection before the objection may be considered. 3 U.S.C. § 15. Once that threshold is met, the houses must separate to consider the objection for up to two hours. *Id.* For a detailed discussion of the ECA’s procedures, *see infra* at pp. 14-15.

⁴⁴ 109 Cong. Rec. H84-129 (2005) (House and joint session proceedings), *id.* at S41-56 (Senate).

⁴⁵ 163 Cong. Rec. H185-190 (2017).

⁴⁶ 167 Cong. Rec. H76-115 (2021) (House and joint session proceedings); *id.* at S13-38 (Senate).

Part II) The ECA Explained

A) *The Election Calendar (3 U.S.C. §§ 1 and 7)*

Election Day is currently “the Tuesday next after the first Monday in November” (November 2-8),⁴⁷ and the Electoral College meets on “the first Monday after the second Wednesday in December” (December 13-19).⁴⁸ This leaves 41 days between Election Day and elector balloting day (and a mere 35 days for states to resolve any controversies⁴⁹), and 18-24 days between elector balloting day and the joint session on January 6.⁵⁰

Thirty-five days may be too little time for states to resolve their controversies,⁵¹ and there is no clear need for elector balloting day and the joint session to be separated by three weeks.

B) *The “Safe Harbor” (3 U.S.C. § 5)*

3 U.S.C. § 5, known as the “safe harbor” provision, is at the heart of the ECA.

The provision reads:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

A state must thus meet several requirements to receive the safe harbor:

1. The state must pass laws providing for the “final determination of any controversy or contest concerning the appointment of all or any [electors]”;
2. Those laws must have been enacted prior to Election Day; and

⁴⁷ 3 U.S.C. § 1. This provision is not part of the ECA but is integral to its broader statutory scheme.

⁴⁸ 3 U.S.C. § 7.

⁴⁹ See *infra* pp. 7-8 (discussing “safe harbor” provision).

⁵⁰ The date of the joint session is also set by statute. 3 U.S.C. § 15 (setting joint session for January 6).

⁵¹ Under the original ECA, states had 62-69 days to solve their controversies, depending on the calendar. See Siegel at 584. In 1934, Congress moved elector balloting day from January to December and moved the joint session from February to January to conform with the newly adopted Twentieth Amendment, which moved Inauguration Day from March 4 to January 20 (Inauguration Day had previously been set for March 4 by statute). See Pub. L. No. 73-286, §§ 6-7, 48 Stat. 879 (1934). For a discussion of the presidential election calendar’s evolution since the founding, see Siegel at 579-84.

3. The process established by those laws must in fact have yielded a “final determination”⁵² of controversies regarding the state’s electoral appointments at least six days before elector balloting day.

If the state meets those requirements,⁵³ then Congress will treat the state’s ascertainment of its own electors as binding.

The safe harbor provision sought to fill a gap in state election laws. In the late 1800s, an officeholder’s right to office could typically only be challenged through the common law writ of “quo warranto,” a cumbersome judicial process that was hardly ever resolved by the beginning of the officeholder’s term.⁵⁴ Reasoning that states were well-positioned to resolve their own disputes, Congress incentivized states to create new, streamlined election contest laws that would resolve disputes well before Congress’s electoral count.⁵⁵ If the state passed and used such laws, Congress promised to respect the state’s appointments at the joint session.⁵⁶

If a state failed to pass or use such laws, then the ECA’s other counting rules would apply, and Congress would be freer to reject the state’s appointments. As the relevant committee report put it in 1886, “it will be the State’s own fault if the matter is left in doubt.”⁵⁷

The safe harbor had the added benefit of shifting adjudicatory responsibility away from Congress. After the ill-fated Hayes-Tilden commission, Congress would no longer investigate the merits of election controversies, and the ECA’s sponsors hoped the joint session would become “little more than a formal ceremony.”⁵⁸

Despite that logic, the safe harbor has never worked as intended.⁵⁹ The ECA does not describe how Congress grants safe harbor status or define which controversies are eligible for the safe harbor. Congress has never actually used the safe harbor provision in any way,⁶⁰ and the provision is widely misunderstood.⁶¹

⁵² The ECA does not define the term “final determination,” and the term was not discussed by Congress when the ECA was passed. See Siegel at 590 n.300.

⁵³ For a discussion of the extent to which the safe harbor contains other implicit requirements, see Siegel at 596-99 (discussing whether state laws must include quasi-judicial procedures); *id.* at 599-604 (discussing whether the safe harbor has an implicit exception for fraud).

⁵⁴ See Siegel at 570-73 (describing origins of quo warranto and application to early American election contests).

⁵⁵ See generally Siegel at 584-85.

⁵⁶ The safe harbor does not prevent Congress from rejecting a state’s votes for other, non-appointment related reasons, such as a defect in an elector’s vote. See *infra* pp. 25–28 (listing objections).

⁵⁷ Wroth at 335 n.60 (quoting H.R. Rep. No. 1638, 49th Cong., 2d Sess., 18 Cong. Rec. 30 (1886)).

⁵⁸ Siegel at 585 n.277 (quoting George Edmunds, *Presidential Elections*, 12 Am. L. Rev. 1, 18 (1877)).

⁵⁹ See Wroth at 338 (“Unfortunately the [safe harbor’s provisions] present such difficulties, both of interpretation and application, that in the great majority of cases they will not apply.”).

⁶⁰ See Siegel at 613 n.442 (concluding that Florida’s electoral vote in 2000 is the sole instance in which the safe harbor played a role). The Court in *Bush v. Gore* also struggled to reach a common understanding of the safe harbor. *Bush v. Gore*, 531 U.S. 98, 110 (2000) (halting Florida’s recount on the theory that Florida’s legislature expressed an immovable desire to meet the safe harbor deadline); *id.* at 113 (Rehnquist, C.J., concurring) (same); *id.* at 130 (Souter, J., dissenting) (calling the safe harbor issue “not serious”); *id.* at 143 (Ginsburg, J., dissenting) (“[T]he [safe harbor] ‘deadline’ . . . lacks the significance the Court assigns it.”); *id.* at 553 (Breyer, J., dissenting) (“The concurrence’s logic turns the presumption that legislatures would wish to take advantage of [the] ‘safe harbor’ provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.”) (emphasis original).

⁶¹ Commentators often mistakenly assert that safe harbor is achieved if a governor’s certificate is issued by the safe harbor date. See, e.g., Nick Corasaniti et al., *The Nation Reached ‘Safe Harbor.’ Here’s What That Means*, N.Y. Times (Dec. 8,

C) *The Governor’s Certificate (3 U.S.C. § 6)*

3 U.S.C. § 6 requires the governor of each state to send the Archivist of the United States a certificate identifying the state’s electors and popular vote canvass.⁶² The certificate must be sent “as soon as practicable” after the electors are appointed. The governor must also provide the electors with six duplicate certificates before elector balloting day.⁶³ If a controversy or contest is resolved under the safe harbor provision, the governor is to communicate that result to the Archivist in a certificate “as soon as practicable.”⁶⁴

Congress hoped that the governor’s certificate would publicize the state’s election (or safe harbor) results and further insulate those results from objections in Congress.⁶⁵

D) *The ECA’s “Counting” Provisions (3 U.S.C. § 15)*

3 U.S.C. § 15 contains the ECA’s substantive “counting” rules, which are its best known (and most criticized) provisions.⁶⁶

2020), <https://www.nytimes.com/2020/12/08/us/politics/election-safe-harbor-deadline.html> (conflating certification with safe harbor status); Jan Wolfe, *Explainer – Why ‘safe harbor’ day spells trouble for Trump’s legal bid to overturn election defeat*, Reuters.com (Dec. 8, 2020), <https://www.reuters.com/article/usa-election-safe-harbor/explainer-why-safe-harbor-day-spells-trouble-for-trumps-legal-bid-to-overturn-election-defeat-idUSKBN2811DN> (same). Safe harbor status depends on the existence and resolution of a “controversy or contest,” which is separate from the issuance of a governor’s certificate.

⁶² 3 U.S.C. § 6 (“It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast[.]”).

⁶³ *Id.* (“[A]nd it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State[.]”). This requirement dates to 1792, in Congress’s only pre-ECA legislation affecting electoral counting. Act of Mar. 1, 1792, ch. 8, § 3, 1 Stat. 239, 240. The electors are to subsequently make six certificates of their own votes, affix one of the governor’s certificates to each electoral certificate and distribute the six packages to various state and federal authorities. 3 U.S.C. §§ 7-11.

⁶⁴ 3 U.S.C. § 6 (“[A]nd if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made[.]”). As Siegel notes, the ECA is ambiguous as to whether, if there is a safe harbor determination, the governor should first send a certificate reflecting the state’s initial appointment, then send a second certificate reflecting the safe harbor determination, or simply wait until the safe harbor process is resolved before sending any certificate. Siegel at 610 n.420.

⁶⁵ See Siegel at 608-12 (tracing history and purpose of governor’s certificate).

⁶⁶ See, e.g., Edward B. Foley, *How John Kasich Could End Up Picking the Next President*, Politico (Mar. 20, 2016), <https://www.politico.com/magazine/story/2016/03/the-bizarre-130-year-old-law-that-could-determine-our-next-president-213645> (calling the provisions “hopelessly incomprehensible”); John W. Burgess, *The Law of the Electoral Count*, 5 Pol. Sci. Q 633, 643 (1888) [hereinafter “Burgess”] (“The language of this paragraph is very confused, almost unintelligible[.]”); Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* 141 n.88 (2001) (describing the provisions as “maddeningly complex”).

The rules describe four different scenarios and a “governor’s tiebreaker,” all of which are copied and color-coded here:

[A]nd no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but 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 whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

Each provision is discussed in greater detail below.

Scenario 1: A single return

Text

[A]nd no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but 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 whose appointment has been so certified.

Analysis

If a state submits a single set of electoral votes accompanied by a governor’s certificate, then those votes are counted unless both houses of Congress agree to reject them.

There are two permissible grounds for rejecting the votes:

1. The electors' appointments were not "lawfully certified"; or
2. The electors' votes were not "regularly given."

Those terms are not defined, but "lawfully certified" is generally understood to require the certificate to conform with the ECA's requirements⁶⁷ and not otherwise be unconstitutional.⁶⁸ It is not clear to what extent the phrase authorizes Congress to review the state's underlying election results.⁶⁹

"Regularly given" refers to the casting of electoral votes. The phrase has been interpreted to prohibit votes that are constitutionally defective or are cast corruptly, though its exact scope is unknown.⁷⁰

This section creates a strong presumption of regularity for a single set of certified returns.

Scenario 2: Multiple returns, one of which has safe harbor status

Text

If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State;

⁶⁷ See Wroth at 338 ("[V]otes 'lawfully certified to' would seem to be votes certified to in accordance with the terms of the [ECA].").

⁶⁸ See Siegel at 619 ("A vote not 'lawfully certified' included Congress's power to reject electoral votes due to preexisting constitutional infirmities.").

⁶⁹ See Siegel at 621-23 (reviewing the ECA's legislative history and 19th-century administrative law and concluding that "lawfully certified" likely empowers Congress to prevent error by a governor in performing their ministerial certification duties, may allow Congress to ensure that state and local election officials correctly performed their ministerial canvassing duties, and may also empower Congress to prevent fraud at any level of state or local government, but that the phrase likely does not allow Congress to second-guess the discretionary decisions of local precinct officials when counting or rejecting particular ballots). See also 18 Cong. Rec. 31 (1886) (statement of Rep. Caldwell) (quoting a minority committee report, which worried that the ECA's "lawfully certified" standard "may afford a pretext for usurpation by Congress of the power to disenfranchise a State."). If Congress has a single set of returns that also has safe harbor status, then any appointment-related issues would presumably be resolved under the safe harbor section and could not (or should not) create grounds for rejection under scenario 1.

⁷⁰ See Wroth at 338 ("Presumably votes 'regularly given' are given in accordance with the requirements of the Constitution as to time and form. The language undoubtedly also means that the electors have acted without mistake or fraud. Does it have the further meaning that they have voted for an eligible candidate?"); Siegel at 619 n.474 ("regularly given" covers defects including "failing to comply with constitutional requisites for elector voting, such as not voting on the correct day, voting for a constitutionally disqualified candidate, or corruption in office."). See generally Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529 (2021).

Analysis

If there are conflicting returns, then safe harbor status is the first “tiebreaker” – i.e., if one set of electors has safe harbor status, then those returns are counted.⁷¹

This section also requires those electoral votes to be “regularly given.”⁷²

Scenario 3: Multiple returns claiming safe harbor status*Text*

but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law;

Analysis

If multiple slates of electors claim safe harbor status under the authority of different tribunals, then both houses must agree on which votes to count.

This describes a situation where multiple authorities claim to be the state’s true government.⁷³ Although remote to us today, competing state governments were fresh in the minds of ECA-era Members. In the Dorr Rebellion of 1841-42, middle class Rhode Islanders attempted to unilaterally establish a new form of constitutional government.⁷⁴ The rebellion led to the Supreme Court’s *Luther v. Borden* decision, which held that Congress (not the courts) must resolve intrastate power struggles.⁷⁵

Congress also faced competing returns in 1873 from dueling government bodies in Louisiana,⁷⁶ and the 1877 count posed variations of the same problem in three other states.⁷⁷ Of course, Congress and the Nation had also recently experienced the Civil War.

⁷¹ It is not clear whether simply claiming “safe harbor” status is enough to attain it, or whether Congress must affirmatively grant it. *See* Siegel at 618 n.469 (“Congress seemed to think that the answer to the question whether a state return merited [safe harbor] status would be readily apparent.”)

⁷² Unlike scenario 1, scenario 2 does not explain how to decide whether votes are “regularly given.” Scenario 2 also says nothing about the votes being “lawfully certified,” though perhaps that is deliberate and reflects reliance on safe harbor status to resolve a scenario 2 appointment-related conflict.

⁷³ This provision is limited to conflicting safe harbor tribunals, as opposed to conflicting certifications. In other words, conflicting gubernatorial certificates that merely reflect competing state canvasses would not seem to trigger this section.

⁷⁴ *See* Library of Congress Research Guides, Dorr Rebellion: Topics in Chronicling America (accessed Dec. 13, 2021), available at <https://guides.loc.gov/chronicling-america-dorr-rebellion>.

⁷⁵ *Luther v. Borden*, 48 U.S. 1, 35 (1849) (“Under [The Republican Guarantee Clause] of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.”).

⁷⁶ Two different bodies claimed to be the state’s true canvassing board. *See* Wroth at 329-30 (describing background).

⁷⁷ *See* Ballot Battles at 119-23 (describing dueling returns from Florida, Louisiana, and South Carolina).

Scenario 3 essentially codifies *Luther v. Borden* and maintains that a state government cannot be recognized, and its electoral votes cannot be counted, unless both houses of Congress agree to do so.⁷⁸

This provision also includes the “regularly given” caveat from Scenarios 1 and 2.⁷⁹

Scenario 4: Multiple returns, none of which have safe harbor status

Text

and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.

Analysis

If there are conflicting returns and none have safe harbor status, then the houses must agree in order for any votes to be counted.⁸⁰ This implies that if the houses disagree, then no votes from that state can be counted.⁸¹

This scenario cannot be fully understood without considering the “governor’s tiebreaker.”

The “governor’s tiebreaker”

Text

But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

⁷⁸ See, e.g., 8 Cong. Rec. 52 (1878) (statement of Sen. Edmunds) (“But if the two Houses find a state of things in the State so grave, so aggravated, so abnormal, so monstrous I might say as that there are two political bodies in a State having all the insignia of character and responsibility and status, then this bill provides that in a conflicting decision of such two bodies in respect of who are the electors of that State neither shall be received until the political power of this Government shall concur in determining which is the true one. That being determined, then of course the decision of the true one follows. It seemed to the committee impossible to provide any more satisfactory means of disposing of a difficulty of this grave, and I am glad to say, rare, character than this. We may with propriety say that the act of the State itself, when we know politically what the State is, shall determine whom it has chosen for its electors; but when the State is divided into two political powers, each having a *de facto* existence, that raises a political question which involves the recognition of the political relations of that State so far as they can be manifested through its actual government to the National Government of the United States, and we thought it safe to say, and indeed the only thing to say, that in a case of that character no State should be recognized in respect of its organized form of government as entitled to have a vote counted for President that the two great political bodies of the Federal Government should not agree in recognizing as the true State.”).

⁷⁹ As in scenario 2, scenario 3 says nothing about returns being “lawfully certified,” which is logical in the sense that a governor’s certificate, in and of itself, cannot resolve a dispute between competing state governments. *But see infra* pp. 13-14 (discussing the scope of the “governor’s tiebreaker”).

⁸⁰ This scenario is limited to resolving electors’ appointment status but is silent regarding whether those electors’ votes were lawfully cast. Notwithstanding that silence, Congress may presumably still reject votes it deems unlawfully cast.

⁸¹ See Wroth at 344 (concluding the same).

Analysis

The governor’s tiebreaker seeks to ensure that states are not disenfranchised at the count.⁸² Readers have long been confused about its scope.⁸³ Some argue that the tiebreaker only applies to scenario 4 because only then, when Congress lacks any safe harbor determination, can a governor’s certificate fill the void.⁸⁴ Others argue that it applies to scenarios 3 and 4, because in both cases the safe harbor cannot provide a determinative answer.⁸⁵ Still others say that it applies to scenarios 2, 3, and 4, reasoning that the ECA-era Congress sought above all to avoid disenfranchising states, and thus would have wanted the broadest application of the tiebreaker.⁸⁶

Whatever the correct answer, there is widespread confusion,⁸⁷ which poses a significant risk to future counts.

E) Procedures at the Count (3 U.S.C. §§ 15-18)

The ECA prescribes the procedures to be used at the electoral count.

As president of the Senate, the vice president presides over the joint session and “preserve[s] order.”⁸⁸ The Speaker sits next to the vice president but plays no formal role.⁸⁹ The vice president opens “all the certificates and papers purporting to be certificates of the electoral votes” in alphabetical order by state.⁹⁰ Four “tellers” appointed by the House and Senate read the certificates aloud, count, and tally the votes.⁹¹

Any objection to a state’s votes must be made immediately after the state’s certificate has been read.⁹² Objections must state their grounds in writing “clearly and concisely, and without argument,” and be signed by at least one Member of each house.⁹³ Upon receiving such an

⁸² Some ECA-era Members were concerned that future Members might manufacture competing returns in order to create a dispute between the houses, leading to the rejection of all votes from that state. *See* Siegel at 628 n.527. This was attempted in the 1877 Hayes-Tilden contest (Democrats manufactured a competing return from Vermont, which the presiding officer and Speaker refused to entertain). The governor’s tiebreaker protects against this ploy by ensuring that as long as the state’s governor has certified a slate of electors, a set of votes from the state will be counted.

⁸³ *See* Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loy. U. Chi. L.J. 309, 356-58 (2019) (summarizing scholarly disagreement). A brief note on the significance of the governor’s certificate in 19th-century election law: the certificate typically signified the culmination of the state’s canvassing and certification process, and thus created a prima facie right to hold the office, although that right could be overturned through a judicial contest. This prima facie right factored into Congress’s decision to give the governor’s certificate tiebreaker status. For a broader explanation, *see* Siegel at 568-73. For a discussion reflecting that understanding, *see* 17 Cong. Rec. 1022 (1886) (statement of Sen. Hoar).

⁸⁴ Wroth at 343. Contemporaneous legislative history tends to support this view. *See* Siegel at 665-67.

⁸⁵ Jack Maskell and Elizabeth Rybicki, Cong. Research Serv., RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by Members of Congress* 8-9 (Nov. 15, 2016), available at <https://fas.org/sgp/crs/misc/RL32717.pdf>.

⁸⁶ Siegel at 663-64.

⁸⁷ In all of these readings, though, the tiebreaker applies to scenario 4.

⁸⁸ 3 U.S.C. § 18.

⁸⁹ 3 U.S.C. §§ 15-16.

⁹⁰ 3 U.S.C. § 15.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

objection, the joint session suspends, the Senate withdraws to its chamber, and each house debates and votes on the objection.⁹⁴ The joint session may not consider the next state until any objections to the prior state have been disposed of.⁹⁵

Other questions or motions may also be raised⁹⁶ and may trigger a separation of the houses, but those other questions or motions remain subject to the same requirements, i.e., they may not be considered unless they are in writing and are signed by at least one Member of each house.⁹⁷

The joint session lasts until the count is complete and the result is declared.⁹⁸ Either house may recess until 10 a.m. the following day, but if the count remains unresolved after four days, no further recess may be taken.⁹⁹

When the houses separate to consider an objection or other question, each house may debate for up to two hours.¹⁰⁰ Each Senator and Representative may speak for up to five minutes and after two hours of debate, the presiding officer of each house calls a vote.¹⁰¹

These rules aim to resolve the count in a timely manner as the presidential inauguration approaches. They are one of the few aspects of the ECA that have avoided widespread criticism and even garnered some praise.¹⁰²

F) The Vice President's Role at the Count (3 U.S.C. §§ 15, 18)

Confusion over the vice president's role at the count¹⁰³ has plagued Congress almost since the Nation's founding¹⁰⁴ and continues to cause controversy.¹⁰⁵ The ECA sought to resolve the

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 3 U.S.C. §§ 16-17.

⁹⁷ This interpretation of the ECA stems from a precedent set by Vice President Al Gore at the 2001 count. *See* Siegel at 648-49 and accompanying notes (describing Gore's ruling).

⁹⁸ 3 U.S.C. § 16.

⁹⁹ *Id.*

¹⁰⁰ 3 U.S.C. § 17.

¹⁰¹ *Id.*

¹⁰² *See, e.g.,* Burgess, *supra* note 66, at 652 (“[The ECA’s procedural provisions] are apparently exhaustive. So far as human wit can divine, they will probably prevent any failure of the Congress to reach its decision in regard to the counting of the electoral votes before the expiration of the existing presidential term[.]”).

¹⁰³ The Constitution says that: “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.” U.S. Const. amend. XII. The original Constitution contained identical language. U.S. Const. art. II, § 1, cl. 3. The ambiguity is obvious: the language goes from clear and active (“The President of the Senate shall . . . open all the Certificates”) to unclear and passive (“and the Votes shall then be counted”). The Framers do not seem to have considered this question in Philadelphia, or if they did, the records are lost. *See* Wroth at 324 (“Close scrutiny of the debates of the Constitutional Convention reveals no direct discussion of these problems [one of which is the location of the counting power]. The possibility that a dispute might arise with which Congress would have to deal does not seem to have been considered.”).

¹⁰⁴ *See supra* p. 3 (describing 1801 count). In 1800, each house passed versions of a bill that would have created a joint committee to resolve electoral count disputes, which would have taken any such power away from the vice president. *See* Wroth at 326-27 (providing background). The debates surrounding that proposal touched on the counting power and indicated support for a pro-congressional view of the power. *See* CEV at 672-75 (1876) (statement of Sen. Saulsbury) (recounting excerpts of 1800 debates supporting the congressional counting power).

¹⁰⁵ *See, e.g.,* Ned Foley, *Trump on tape about Jefferson & 1800 election*, Electionlawblog.com (July 22, 2021), <https://electionlawblog.org/?p=123605> (linking to audio tape in which former President Trump cites President Jefferson’s actions in 1801 as evidence that Vice President Mike Pence could have unilaterally counted disputed electoral votes for Trump in 2021).

issue by designating the vice president as presiding officer¹⁰⁶ but strictly limiting his/her authority.¹⁰⁷

The vice president’s role under the ECA is two-fold: 1) custodian of the electoral returns, and 2) presiding officer at the count.¹⁰⁸

The custodial role derives from the Constitution, which instructs the electors to send their ballots to the vice president, who is then directed to “open” the ballots “in the presence of the Senate and House of Representatives.”¹⁰⁹ The vice president could, in theory, manipulate the count by deciding which votes should be opened.¹¹⁰ The ECA thus requires him or her to present to Congress all certificates “purporting to be” electoral votes. In doing this, the ECA reduces the vice president’s custodial role to a ministerial duty.

In his or her capacity as presiding officer, the ECA directs the vice president to:

- “Preserve order” at the joint session;¹¹¹
- Open “all the certificates and papers purporting to be certificates of the electoral votes” and hand them to the “tellers,” who are Members of Congress;¹¹²
- Call for any objections as the tellers read each certificate in alphabetical order by state;¹¹³
- Announce the decisions of both chambers regarding any objections or other questions;¹¹⁴ and
- Announce the “state of the vote” as ascertained by the tellers.¹¹⁵

These powers are narrow and limited, though there is some ambiguity regarding the ability to “preserve order”¹¹⁶ and announce the decisions of the respective chambers.¹¹⁷

¹⁰⁶ 3 U.S.C. § 15 (“Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.”).

¹⁰⁷ See Siegel at 636 (“Given the history of some support for the proposition that the Constitution granted the Senate President total power to count electoral votes, one goal of the ECA was to settle that the power to count the vote is held by Congress, organized as two separate houses, and is not in the President of the Senate.”) (internal quotations and citations omitted).

¹⁰⁸ See Siegel at 637 (drawing the distinction).

¹⁰⁹ U.S. Const. amend. XII (“The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, **directed to the President of the Senate; 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[.]**”) (emphasis added).

¹¹⁰ See Siegel at 637-39 (tracing historical instances in which vice president’s decision to present, or not present, returns had a substantive impact on the count).

¹¹¹ 3 U.S.C. §§ 15, 18.

¹¹² 3 U.S.C. § 15.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Siegel at 645-51 (analyzing the vice president’s power to preserve order and concluding that the ECA likely requires the vice president to accept any motion that meets the ECA’s procedural requirements and is not dilatory, and that Congress retains the power to appeal and reverse any decision of the vice president).

¹¹⁷ See *id.* at 642-45 (analyzing the vice president’s power to announce the chambers’ decisions and concluding that the power should not pose undue problems because, at least in theory, “the legal import of the Senate and House’s separate votes are entirely bright-line and almost self-applicable.”). One adviser to former President Trump argued that Vice

G) Additional Issue 1: the “denominator”

Past Congresses have struggled with an issue that the ECA leaves unaddressed: how to calculate the total number of electors for the purpose of calculating victory in the election (referred to here as the “denominator”).

The Constitution requires winning presidential candidates to obtain votes from “a Majority of the whole Number of Electors appointed.”¹¹⁸

This begs the question: how does one calculate “the whole number of electors appointed”?¹¹⁹

The Constitution speaks of electors “appointed,” and thus seems to draw a distinction between a failure in the appointment process, owing perhaps to a deficiency in the state’s election or to an elector’s constitutional ineligibility,¹²⁰ in which case the denominator should be reduced because the electors were not properly “appointed,” and a subsequent failure in the casting of electoral votes, such as a failure to vote on the day required by federal law, which should not affect the denominator.¹²¹

Congress has sometimes contradicted this principle.¹²² For example, in at least four pre-ECA instances, the denominator was reduced to account for electors who were validly appointed but did not vote due to death or disability.¹²³ Yet in another pre-ECA instance, a state’s votes were rejected altogether due to defects in the state’s canvass, yet the denominator was somehow unaffected.¹²⁴

President Pence was empowered to simply ignore the ECA altogether. *See READ: Trump lawyer’s memo on six-step plan for Pence to overturn the election*, CNN.com (Sep. 21, 2021), available at <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>. That adviser’s legal theory has been widely discredited. *See, e.g.*, Matthew Seligman, *The Vice President’s Non-Existent Unilateral Power to Reject Electoral Votes* (Oct. 1, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020.

¹¹⁸ U.S. Const. amend. XII.

¹¹⁹ The answer could determine the outcome of an election. If a state’s votes are rejected and the denominator is reduced, the opposing candidate could win outright, but if the denominator is unaffected, the election could be thrown to the House of Representatives. U.S. Const. amend. XII (“The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; **and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.**”) (emphasis added). In such an election, the House votes by state delegation, with each delegation receiving one vote. *Id.*

¹²⁰ U.S. Const. art. II, § 2, cl. 2 (“[B]ut no Senator or Representative, or Person holding an Office of Trust of Profit under the United States, shall be appointed an Elector.”).

¹²¹ For more on this distinction, see Wroth at 346 n.95. The constitutional convention rejected language that would have required winning candidates to obtain a majority of the whole number “of electors who have balloted,” indicating that the final language reflected a deliberate policy choice. *See* Max Farrand, 2 Records of the Federal Convention of 1787 515.

¹²² *See* Maskell at 3-4 (summarizing past inconsistencies in congressional practice).

¹²³ Wroth at 346 n.95 (citing instances from 1809, 1821, and 1865); Maskell at 8 (1817). Three of those instances can be found at CEV 40 (in 1809, it appears that one of Kentucky’s electors did not attend elector balloting day and Kentucky’s votes and denominator were reduced by one vote accordingly), 50 (in 1821, three electors died before elector balloting day and the denominator was reduced by three), and 226 and 229 (in 1865, one elector from Nevada missed the electoral college vote and Nevada’s votes and denominator were reduced by one), while the 1817 incident is omitted from formal congressional records but is described in other historical sources. *See, e.g.*, Maskell at 8 n.27.

¹²⁴ *See* Wroth at 346 n.95 (describing treatment of Louisiana’s vote at 1873 count).

In other examples, the historical record is unclear as to whether the denominator was reduced.¹²⁵ ECA-era Members themselves disagreed over this issue,¹²⁶ which remains unresolved today.

The presidency could be at stake in a dispute over the denominator. Congress would benefit from a revised ECA that clearly defines how the denominator is affected by different electoral scenarios.

H) Additional Issue 2: when a state “has failed to make a choice” (3 U.S.C. § 2)

3 U.S.C. § 2 provides that:

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

In 2020, supporters of former President Trump relied on this section to call for state legislatures to reverse the election,¹²⁷ and at least one state legislature claims the authority to unilaterally appoint electors if its governor has not certified the election by the safe harbor date.¹²⁸

The section has not been interpreted by courts, but its legislative history indicates that it was meant for natural disasters and states where a runoff might be required.¹²⁹ A clarification of the provision’s scope might help avoid future controversies.

I) Additional Issue 3: the scope of Election Day (3 U.S.C. § 1)

3 U.S.C. § 1 sets a single, uniform Election Day.¹³⁰ In the last election, former President Trump’s campaign argued that certain election administration procedures violated 3 U.S.C. § 1 by permitting acts to occur on days other than Election Day.¹³¹ That section may benefit from a clarification to ensure that similar arguments do not succeed in future elections.

¹²⁵ See Maskell at 10 (describing 1833 count, where records differ as to whether the denominator was reduced to account for two electors from Maryland who did not cast votes).

¹²⁶ See Siegel at 653 and accompanying notes (“Senate leaders raised [the denominator] issue while the ECA was under consideration, and they gave differing answers to the question.”). See also Maskell at 2-3 (reviewing historical record and concluding that “[i]t appears that the Congress itself, in adopting the [ECA], did not have a unified sense or understanding concerning [the denominator] question, and did not definitively decide the issue of which “majority of the whole number” to use when electoral votes were not accepted or received.”).

¹²⁷ See, e.g., Trip Gabriel and Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. Times (Jan. 5, 2021), <https://www.nytimes.com/article/electors-vote.html> (describing calls to overturn election results and discussing the statute). See also Petition for Writ of Certiorari at 23, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020), cert. denied sub nom. *Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451, 209 L. Ed. 2d 172 (2021) (citing 3 U.S.C. § 2).

¹²⁸ N.C. Gen. Stat. Ann. § 163-213(a).

¹²⁹ Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 Wash. & Lee L. Rev. Online 179, 185-191 (2020) (tracing legislative history of the provision, which dates to 1844). The provision was included in legislation that first set a uniform presidential Election Day. Until that point, states were permitted to hold presidential elections at any time within the 34 days prior to elector balloting day. See *id.* at 183-84.

¹³⁰ 3 U.S.C. § 1 (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”).

¹³¹ See, e.g., *Donald J. Trump for President, Inc. v. Way*, No. CV2010753MASZNQ, 2020 WL 6204477, at *2 (D.N.J. Oct. 22, 2020) (unsuccessfully arguing that state law permitting receipt of certain mail ballots within 48 hours of Election Day violates 3 U.S.C. § 1).

Part III) Proposals for Reform

Reform 1) Raise the Objection Threshold

Congress should raise the numerical threshold for objections under the ECA to one-third of each house, up from one Member from each house.

The increased threshold would ensure that objections are credible and enjoy substantial support in both chambers before the houses are forced to consider them.

The increased threshold would also ensure a timely completion of the count,¹³² prevent individual Members from obstructing the count,¹³³ and reduce the likelihood that Congress will reject a state's electoral votes.¹³⁴

Reform 2) Narrow the Vice President's Role

Vice presidents, who are usually candidates themselves,¹³⁵ should not preside at the count. Congress should narrow the vice president's role to its constitutional minimum, which is to simply receive electoral votes from the states, open the votes at the count, and hand the votes to the presiding officer.¹³⁶

The Senate president pro tempore, who is the only other official to preside at past counts¹³⁷ and has never been a candidate at the time of the count,¹³⁸ should preside instead.¹³⁹

¹³² Valid objections require the houses to separate, debate for up to two hours, and vote separately before reassembling. At the last count, it took over three hours to resolve a single objection. *See* 167 Cong. Rec. H98, H113 (2021) (showing that the houses withdrew from the joint session to begin debating Pennsylvania's votes at 12:20 a.m. and did not reassemble until 3:22 a.m.).

¹³³ Cultural norms have generally ensured a timely and orderly counting process. Unfortunately, those norms have eroded and, under today's rules, just one Member from each house could obstruct the count.

¹³⁴ No matter the circumstances, it would be extraordinary for Congress to reject electoral votes. It is sound public policy to ensure that Congress does not consider that step unless significant support already exists in both houses.

¹³⁵ Vice presidents have been on their party's ticket in 14 of the last 17 presidential elections. The vice president was the presidential nominee in four of those elections.

¹³⁶ U.S. Const. amend. XII (“[the electors] shall . . . transmit [their electoral votes] to the seat of the government of the United States, directed to the President of the Senate; 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[.]”).

¹³⁷ *See* Kesavan at 1697 (“If historical practice is any guide, the President of the Senate or the President pro tempore shall be (or at least may be) the presiding officer of the electoral count. One of these two officers has been the presiding officer of every electoral count since the beginning of the Republic—before and after the adoption of the Electoral Count Act.”). *See also id.* at 1702 n.219 (“It does appear that the President pro tempore acted in place of the Vice President in at least the electoral counts of 1809, 1825, 1857, 1877, and most recently 1969 when Vice President Hubert H. Humphrey “recused” himself from the electoral count.”). Records indicate that this was also the case in at least 1925, 1949, and 1965, when the office of vice president was vacant. *See* 66 Cong. Rec. 3509 (1925); 95 Cong. Rec. 89 (1949); 111 Cong. Rec. 136 (1965).

¹³⁸ In 1852, Senator William King (D-AL) was president pro tempore and the Democrats' vice presidential nominee. The Democratic ticket of Franklin Pierce and Senator King prevailed in the election, but Senator King stepped down as president pro tempore on December 20, 1852, before the count. *See About the President Pro Tempore, Presidents Pro Tempore*, United States Senate, <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm> (listing presidents pro tempore); CEV at 83 (record of 1853 count).

¹³⁹ Some have argued that the vice president implicitly wields constitutional counting authority that Congress cannot divest. *See* Kesavan at 1706 (“The Framers clearly thought that the counting function was vested in the President of the Senate alone.”). *See also* Wroth at 325-26 (“[In the 1790s] it was considered that the President of the Senate had the power to “count,” and thus to determine what votes were to be counted.”). For a thorough rejection of that view, *see* Seligman, *supra* note 117. As early as 1800, both houses of Congress agreed that Congress could assume total control over the count, and it is not clear that even the most favorable historical evidence supports the notion of vice-presidential

The ECA should also clarify that the presiding officer does not have substantive discretion over counting votes, meaning that he or she shall not be permitted to determine which votes are counted or not counted, or presented or not presented, and shall in all cases apply the rules of the ECA as written, in consultation with the congressional parliamentarians. The revised statute could also clarify certain procedural issues.¹⁴⁰

Reform 3) Ensure that Congress Receives Timely, Accurate Electoral Appointments

A) Eliminate the Safe Harbor

The safe harbor system does not work. 3 U.S.C. § 5 does not explain how to decide safe harbor status and as noted, Congress has never used the safe harbor provision in any way.¹⁴¹

Moreover, the scattered nature of modern election litigation makes it impossible to apply the safe harbor coherently. To give a few examples from 2020: do federal decisions qualify for safe harbor status?¹⁴² If so, which ones? Does the answer depend on the relief requested, or the identity of the plaintiff?¹⁴³ What does it mean for a contest to achieve “final” resolution by the safe harbor date?¹⁴⁴ What if a state has multiple cases touching on the election, only some of

discretion. *See Burgess* at 647 (“The framers of the constitution undoubtedly meant that the president of the Senate should count the electoral votes, but in making the count they did not think of anything more than mere enumeration. They did not think of his ever being placed under the necessity of ascertaining what should be counted.”). In any event, Congress firmly rejected that theory in 1865 by enacting the Twenty-Second Joint Rule. *See supra* p. 4. The ECA squarely asserts the congressional counting power, and that view has prevailed for over 130 years. *See* 18 Cong. Rec. 30-31 (1886) (statement of Rep. Caldwell) (“[The ECA] will decide, first, that the power to count the vote is not in the President of the Senate. Second, that it is in the two Houses of Congress, not ministerially merely, not as witnesses, ‘capable of nothing but inexplicable dumb show and noise’; but with power to count, and the consequent power to decide upon the legality of the votes to be counted.”). Ardent textualists would likely agree. The phrasing of Article II and the Twelfth Amendment suggest that the Framers went out of their way to avoid assigning the counting power to the vice president. *See* U.S. Const. amend. XII (“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.**”) (emphasis added).

¹⁴⁰ For example, the statute could codify Vice President Gore’s 2001 ruling that “other questions arising” at electoral counts, such as appeals of the chair and motions to recess, are subject to the ECA’s objection requirements. 147 Cong. Rec. 106 (2001). With respect to recesses, the ECA could clarify that while the motion to recess must meet the ECA’s usual requirements, *see supra* note 97, the motion may be sustained as to either house by a simple majority of that house. The ECA could also clarify that all decisions of the presiding officer are subject to appeal, and Congress might consider whether electors should be required to transmit their votes via a secure electronic transmission method, so that Congress is not forced to depend on the effectiveness of ground package transportation services.

¹⁴¹ *See supra* note 60.

¹⁴² *See, e.g., Trump v. Kemp*, 511 F. Supp. 3d 1325 (N.D. Ga. 2021) (denying President Trump’s motion for injunctive relief to decertify results of presidential election).

¹⁴³ *Compare* Complaint, *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 2, 2020) (Trump candidate for elector seeks decertification of Biden electors), *with* Complaint, *Pierson v. Stepien*, No. 1:20-cv-09266 (S.D.N.Y. Nov. 5, 2020) (voter seeks to halt Wisconsin recount process).

¹⁴⁴ If a state supreme court resolves a case before the safe harbor date, but a petition for certiorari is pending before the U.S. Supreme Court, is that decision “final”? This appeared to occur at least once following the 2020 election. *Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817 (Ariz. Dec. 8, 2020), *cert. denied*, 141 S. Ct. 1381, 209 L. Ed. 2d 125 (2021) (Arizona Supreme Court ruling issued on date of safe harbor deadline, petition for certiorari not filed until three days later, and certiorari not denied until February 2021).

which are resolved by the safe harbor date?¹⁴⁵ Does the absence of a “controversy or contest,” whatever those terms mean, result in the absence of safe harbor status, even if the state’s results are obvious?¹⁴⁶

One might instinctively seek to redesign the safe harbor, but the balance between state and federal litigation (which did not exist when the ECA was enacted) has rendered that task exceedingly difficult.¹⁴⁷ There is also the challenge of designing an enforcement mechanism.¹⁴⁸ Some person or entity must ascertain the safe harbor “status” to which

¹⁴⁵ *Compare In re Canvass of Absentee &/or Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 243 A.3d 2 (Pa. 2020) (Pennsylvania Supreme Court, on the safe harbor deadline, denies Trump campaign’s appeal of lower court decision to order certain absentee ballots counted), with *Metcalf v. Wolf*, No. 636 M.D. 2020, 2020 WL 7241120 (Pa. Commw. Ct. Dec. 9, 2020) (lower Pennsylvania court, one day after the safe harbor deadline, denies voters’ motion for injunctive relief to decertify the 2020 general election results in Pennsylvania).

¹⁴⁶ If so, this could incentivize candidates to abstain from filing contests at all and simply send competing returns to Congress.

¹⁴⁷ The emergence of federal election litigation is a significant complication for the safe harbor. Prior to the 1960s, the federal judiciary was essentially uninvolved in policing voting rights. See *Taylor v. Beckham*, 178 U.S. 548 (1900) (rejecting jurisdiction over federal constitutional claims in contested Kentucky governor’s race). See also *Ballot Battles at 169-77* (recounting significance of *Taylor v. Beckham* in broader context of federal courts refusing to entertain constitutional voting rights claims). From the Supreme Court’s 1962 holding in *Baker v. Carr*, 369 U.S. 186 (1962) (legislative malapportionment claim presents justiciable cause of action under the Equal Protection Clause of Fourteenth Amendment), to *Reynolds v. Sims*, 377 U.S. 533 (1964) (Equal Protection Clause requires application of “one person one vote” principle to legislative districts), *Bush v. Gore*, 531 U.S. 98 (2000) (Florida’s recount procedures violate Equal Protection Clause), and beyond, see, e.g., *Republican National Committee, et al. v. Democratic National Committee, et al.*, 140 S.Ct. 1205 (2020) (staying a District Court injunction that extended the state’s absentee ballot postmark deadline in a presidential primary election on federal constitutional grounds), federal constitutional standards have become indispensable to election litigation, and the Supreme Court recently observed that those standards fully apply when states exercise their Article II “manner” authority. *Chiafalo v. Washington*, 140 S.Ct. 2316, 2324 n.4 (2020) (“Checks on a State’s power to appoint electors, or to impose conditions on an appointment, can theoretically come from anywhere in the Constitution. A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, see Art. II, § 1, cl. 5.”). Indeed, federal courts are already the forum of choice for election litigation: most lawsuits involving the pandemic and the 2020 presidential election were filed in federal, rather than state court, COVID-Related Election Litigation Tracker, Stanford-MIT Healthy Elections Project (accessed Aug. 13, 2021), available at <https://healthyelections-case-tracker.stanford.edu/> (showing that 331 of 628 total election cases and appeals arising out of the pandemic were filed in federal court), and even some cases filed in state court included federal claims. See *Statement of Contest, Law v. Whitmer*, No. 20 OC 00163 IB (Nov. 17, 2020) (Trump statement of contest in Nevada district court, filing available at <https://www.democracymocket.com/wp-content/uploads/2020/11/nov-17-doc-2-1.pdf>) (including Equal Protection claim within state contest). In short, federal constitutional issues loom large over today’s election landscape, and a safe harbor provision that excludes federal litigation would likely be underinclusive, yet an attempt to incorporate federal litigation inevitably creates the definitional difficulties described here.

¹⁴⁸ Today’s safe harbor is silent on that issue, and at least one commentator has argued that each house wields a “one-house veto” over safe harbor status. Siegel at 604-05 (“In addition to [the safe harbor’s] implied exceptions, [its] conclusivity principle is limited by an implicit understanding that underlies every application of [the safe harbor provision] when Congress meets to count electoral votes. When Congress receives an electoral vote, or set of electoral votes, claiming to have [safe harbor] status, Congress decides whether the claim is meritorious. Since “Congress” means the Senate and the House of Representatives acting concurrently, deciding that an electoral vote merits [safe harbor] status requires both houses of Congress to agree that it does. Each house might manifest its agreement through acquiescence. However, should an objection be made to counting an electoral vote that claims [safe harbor] status, the electoral vote would not be received as conclusive if either the Senate or the House of Representatives sustains the objection. There is, in effect, a one-house veto over an electoral vote achieving [safe harbor] status.”). If that is true, then the safe harbor is particularly unsafe.

Congress is bound, but who? The courts? Which courts?¹⁴⁹ The presiding officer? Far simpler would be to discard the safe harbor and ensure an accurate count by other means.

B) Ensure that Congress Receives Timely, Accurate Electoral Appointments

Congress should empower federal courts to ensure that each state submits timely, accurate electoral appointments to Congress. 3 U.S.C. § 6 already requires each governor to do precisely that.¹⁵⁰ A revised ECA could simply add a date by which the governor’s duty must be performed and authorize candidates to seek injunctive relief if the governor fails to perform the duty.¹⁵¹

Under this approach, Congress would receive one, accurate certificate of appointment from each state,¹⁵² and would thus have no need to consider electoral appointments or votes submitted by any other person or body (i.e., competing or “alternate” electoral slates).¹⁵³

¹⁴⁹ The safe harbor is nothing more than a promise by Congress to abide by the decision at issue, which might make some courts reluctant to declare the existence of “safe harbor status.” See, e.g., *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113–14 (1948) (“This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.”).

¹⁵⁰ See *supra* p. 9.

¹⁵¹ If a governor refused to comply with a court’s order, the court could appoint another person to perform the act instead. See Federal Rules of Civil Procedure, Rule 70(a) (“Party’s Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party’s expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.”).

¹⁵² In determining the accuracy of a state’s canvass, recount, or contest result, a court may need to account for existing judicial orders that by their terms affect or alter such canvass, recount, or contest result. To that end, Congress may want to consider repealing 28 U.S.C. § 1344, which vests federal courts with jurisdiction over election contests based on alleged violations of the Fifteenth Amendment. The provision explicitly excludes contests for various offices, including presidential elector, and has been interpreted by the Fifth Circuit to implicitly deny federal courts jurisdiction over constitutional claims that may affect the outcome of an election for those excluded offices. See *Keyes v. Gunn*, 890 F.3d 232 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018) (state legislative office); *Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948) (U.S. Senate). Section 1344 appears to have been the basis of a federal court’s decision in 1960 to dismiss a case alleging constitutional violations in that year’s presidential race. See *Texas Recount Denied*, N.Y. TIMES, Dec. 13, 1960, at 23 (“Judge Connally said in his ruling that Federal courts did not have jurisdiction in vote contests[.]”); see also Defendants’ Memorandum of Points and Authorities at 2-3, *McDaniel v. Daniel*, Civil Action No. 13,441 (S.D.T.X., filed Dec. 12, 1960) (on file with the author) (citing § 1344 as primary basis for lack of jurisdiction). This precedent is also binding in the 11th Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (accepting as binding all rulings of the former Fifth Circuit handed down before October 1, 1981, when the Eleventh Circuit became independent). The upshot is that federal courts in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas are currently unable to hear constitutional claims related to presidential elections, which is alarming. Section 1344 is also superfluous in light of other broad grants of federal jurisdiction. See 28 U.S.C. § 1331 (2018) (federal question jurisdiction); *id.* at § 1343(a)(3) (jurisdiction for constitutional violations); *id.* at § 1343(a)(4) (jurisdiction over violations of voting rights laws). A repeal of § 1344 would ensure that all federal courts can enforce voters’ constitutional rights in presidential elections. For more on § 1344 generally, see Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction over Election Contests, and the Political Question Doctrine*, 72 Fla. L. Rev. 1153 (2020).

¹⁵³ This approach is also consistent with Congress’s constitutional authority in presidential elections. Congress is tasked with certifying the election results, see U.S. Const. amend. XII, which empowers Congress to ensure that it possesses results to count to the extent such results exist. The Constitution grants Congress broad authority over the timing of presidential elections, see U.S. Const. art. II, § 1, cl. 4, which empowers Congress to set a deadline by which it must receive a state’s electoral appointments. Congress may also regulate the manner in which states’ “Acts, Records and Proceedings shall be proved,” U.S. Const. art. IV, § 1, which empowers Congress to require each state’s governor to submit certificates of appointment in a particular format. See 18 Cong. Rec. 45 (1886) (statement of Rep. Dibble) (adopting the same view).

Indeed, Congress has required governors to undertake some version of that duty since 1792. *See supra* note 63. The Constitution also tasks Congress with protecting the fundamental right to vote, *see* U.S. Const. amend. XIV, *Harper v. Virginia Bd. of Elections*, 383 U. S. 663 (1966), as well as protecting voters' due process rights, *see, e.g., Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), each of which empowers Congress to ensure that the electoral certificate it receives from each state accurately reflects the election results under the duly enacted laws of that state. The Necessary and Proper Clause bolsters each of these powers. U.S. Const., Art. I, § 8, cl. 18. In addition to these enumerated powers, Congress possesses an inherent "power of self-protection" to "preserve the purity" of presidential elections. *Burroughs v. United States*, 290 U.S. 534, 544-45 (1934). The Court has also limited the scope of judicial review in this area. *See id.* at 547-48 ("[t]he power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone."). The approach proposed here is clearly within these powers: it seeks only to ensure that Congress possesses timely, accurate election results, as determined under the laws of each state. *See also id.* at 545 ("The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election . . . is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."). *See also The Ku Klux Cases*, 110 U.S. 651, 657-58 (1884) (upholding Congress's power to regulate presidential and congressional elections and declaring "[t]hat a government whose essential character is republican, whose executive head and legislative body are both elective . . . has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."). Some may argue that even this narrow view of congressional power impairs the states' Article II "manner" authority. That position is based on a misunderstanding of the "manner" power, which speaks simply to the mode of electoral appointment and the implementation of that mode. *See, e.g., McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve congressional districts into which the state of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act."). *See also Chiafalo* at 2330 (Thomas, J., concurring) ("In context, it is clear that the Framers understood "Manner" in Article II, § 1, to refer to the mode of appointing electors – consistent with the plain meaning of the term."). Indeed, the Supreme Court has already distinguished between the states' "manner" authority and Congress's counting power. *Fitzgerald v. Green*, 134 U.S. 377, 379-80 (1890) ("In accord with the provisions of the constitution, congress has . . . regulated the manner of certifying and transmitting [electoral] votes to the seat of the national government, and the course of proceeding in there opening and counting them. [The Court then cited the ECA.] Congress has never undertaken to interfere with the manner of appointing electors, or where (according to the now general usage), the mode of appointment prescribed by the law of the state is election by the people, to regulate the conduct of such election . . . but has left these matters to the control of the states."). There are, of course, limits to Congress's power. If for example, Congress rejected a state's appointments or electoral votes for political reasons or for no reason at all, it would clearly have overstepped its bounds and judicial review might be appropriate. *See, e.g., Nixon v. United States*, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring) ("One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy,' judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.") (quotations and citations omitted).

Reform 4) Enact New Counting Rules

A) Define Congress's role at the count

Congress should enact new, clear, counting rules, which should rest on a clear theory of Congress's constitutional power at the count and mirror the scope of that power. Unfortunately, Congress has struggled to define its counting authority for over 200 years.¹⁵⁴ Some have argued that Congress's role is purely ministerial,¹⁵⁵ while others have claimed that Congress may intervene in counts as it sees fit.¹⁵⁶ This report proposes a middle path and argues that Congress's power depends on the type of issue presented.

Electoral issues can be grouped into two categories:

- 1) Those related to a state's electoral appointments (i.e., the question of “who won the state's election?”); and
- 2) All other issues, such as constitutional infirmities in an elector's eligibility or in the way that electors vote.

The two categories occupy different constitutional postures and demand different approaches. Congress's power is weakest with respect to appointment-related controversies: states select the “manner” in which electors are appointed,¹⁵⁷ and the Framers deliberately denied Congress the power to choose presidents.¹⁵⁸ Congress has broader authority to police all other issues, given that Congress holds the counting power and no other actor is constitutionally tasked with resolving those disputes.

Thus, this report proposes that, with respect to the first category, Congress should simply accept the single certificate that it receives from each state pursuant to the process described above, and objections to that certificate should not be permitted.¹⁵⁹

Congress should take a more assertive role in the second category and allow Members to raise objections on those grounds. In recognition of Congress's limited role in presidential elections, however, all objections should be subject to a supermajority requirement in each house.

The proposed grounds for objections are described in detail below.

¹⁵⁴ See Siegel at 551-66 (tracing historical congressional debates over the counting power).

¹⁵⁵ Siegel at 556 (citing 18 Cong. Rec. 47 (1886) (statement of Rep. Dibble)).

¹⁵⁶ Siegel at 557 (citing 13 Cong. Rec. 2650 (1882) (statement of Sen. Morgan)).

¹⁵⁷ U.S. Const. art. II, §1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

¹⁵⁸ See Max Farrand, 3 Records of the Federal Convention of 1787 500 (Gouverneur Morris explaining that the primary benefit of the electoral college is its avoidance of “[t]he danger of intrigue and faction if the [presidential appointment] should be made by [Congress].”). For more on the origins of the electoral college, including the Framers' concern with congressional power, see Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. Am. Hist. 35 (1986).

¹⁵⁹ See “Reform 3,” *supra* pp. 20-23. This approach would also prohibit competing or “alternative” electoral slates.

B) List the grounds for objections

The ECA should list each non-appointment objection that the Constitution allows,¹⁶⁰ and should require any objection to garner the support of supermajorities in both houses to be sustained.

Those objections are:

- State’s constitutional status
 - Territory vs. state
 - State submitted more electoral votes than it was entitled to
- Elector’s constitutional eligibility
 - Elector is constitutionally ineligible
- Candidate’s constitutional eligibility
 - Elector voted for constitutionally ineligible candidate
- Elector’s conduct in office
 - Elector voted in violation of constitutional requirements
 - Elector voted fraudulently or corruptly

Each category is described below.

i) State’s constitutional status

An objection could raise an issue related to a state’s constitutional status, such as whether a territory achieved statehood prior to casting its electoral votes,¹⁶¹ or whether a state submitted more electoral votes than it is entitled to.¹⁶² Both grounds for objection should be available at the joint session.

¹⁶⁰ It would damage the ECA’s legitimacy for a future Congress to need a power that it believes it has, only to discover that the ECA fails to provide it.

¹⁶¹ See *supra* p. 3. Theoretically, the question of whether a state has a republican form of government consistent with the Constitution’s “Guarantee Clause” could also arise in this context. U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”). See also 18 Cong. Rec. 31 (1886) (statement of Rep. Caldwell) (“Under section 4, article 4, of the Constitution “the United States shall guarantee to every State in the Union a republican form of government.” Suppose some State should enthrone a king, constitute a house of lords, and they should appoint electors, and send up but one return properly certified and finally determined . . . [s]hall an American Congress count such a vote?”). The clause is generally considered non-justiciable and its enforcement rests with Congress. *Luther v. Borden*, *supra* p. 12; *Pac. States Tel. & Tel. Co. v. State of Oregon*, 223 U.S. 118 (1912).

¹⁶² This could owe to a clerical error or could present itself under Section 2 of the Fourteenth Amendment, which requires a reduction in the electoral representation of any state that disenfranchises its adult male citizens. U.S. Const. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”). See 18 Cong. Rec. 31 (1886) (statement of Rep. Caldwell) (“Suppose under the fourteenth amendment, which deprives a State of electoral votes in proportion as that State shall have denied the right to vote to its citizens of color - suppose there is but one return of that State, duly certified, of the full number of electors, who is to decide the number to be deducted?”). Congress has never enforced the provision, and courts consider it non-justiciable. See, e.g., *Saunders v. Wilkins*, 152 F.2d 235 (4th Cir.

ii) Elector's constitutional eligibility

An objection could also challenge an elector's eligibility. The Constitution sets qualifications for electors:

[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.¹⁶³

The question of whether an elector impermissibly holds federal office has arisen in the past¹⁶⁴ and should be accounted for in the revised ECA.¹⁶⁵

iii) Candidate's constitutional eligibility

The Constitution sets qualifications for President:

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.¹⁶⁶

A candidate's constitutional eligibility has arisen previously¹⁶⁷ and should be available as an objection at the count.

iv) Elector's conduct in office

The Constitution prescribes a detailed process for casting electoral votes.

1945), *cert. denied*, 328 U.S. 870 (1946). The question of its scope, including whether it has any meaning after the Fifteenth Amendment's ratification, is for future Congresses to decide. *See* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 Wash. L. Rev. 379, 439 n.128 (2014) (citing scholarship on both sides of the question).

¹⁶³ U.S. Const. art. II, § 1, cl. 2.

¹⁶⁴ *See* CEV at 71-73 (at 1837 count, the likely ineligibility of several electors across multiple states was raised and their votes were counted anyway). *See also* Siegel at 577 (describing the same issue in 1877 with respect to an Oregonian elector).

¹⁶⁵ Today's ECA permits states to fill vacancies in their respective electoral colleges. 3 U.S.C. § 4. The revised ECA should clarify that an elector's ineligibility shall not be grounds for rejecting a corresponding vote from that state, provided that the ineligible elector is replaced prior to the casting of electoral votes.

¹⁶⁶ U.S. Const. art. II, § 1, cl. 5. The Constitution also includes other eligibility requirements which could arise. *See id.* at art. I, § 3, cl. 7 (disqualification from office as part of impeachment conviction); amend. XIV, § 3 (disqualification from office for engaging in insurrection while holding office); amend. XXII, § 1 (presidential term limits). Presidential qualifications also apply to vice presidential candidates. *See id.* at amend. XII.

¹⁶⁷ In 1873, a question arose as to whether a dead candidate is still a "person" for constitutional purposes. *See* CEV at 366 ("Mr. Hoar objects, the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot legally be counted, because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes and was not, a person within the meaning of the Constitution, this being a historical fact of which the two houses may take notice."). Congress rejected the votes. *See id.* at 408.

The votes must be cast:

- On the same day throughout the United States;¹⁶⁸
- “By ballot”;¹⁶⁹ and
- Distinctly for President and Vice President, one of whom is not an inhabitant of the elector’s state.¹⁷⁰

Each of these issues has arisen at past counts¹⁷¹ and should be included in the revised statute.

Fraud, bribery, and corruption are another category of elector-related defects. Although Congress has never rejected an electoral vote for corruption,¹⁷² the issue was clearly top of mind for the Framers,¹⁷³ and the ECA’s authors no doubt viewed corruption as disqualifying.¹⁷⁴ An elector’s involvement in bribery, fraud, or corruption should be added as a ground for objection.¹⁷⁵ Congress might also clarify the treatment of “faithless electors” in this provision.¹⁷⁶

¹⁶⁸ U.S. Const. art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; **which Day shall be the same throughout the United States.**”) (emphasis added).

¹⁶⁹ U.S. Const. amend. XII (“The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate[.]”).

¹⁷⁰ *Id.*

¹⁷¹ *See supra* p. 3 (discussing 1857 controversy over Wisconsin’s votes, which were cast on the wrong day); CEV at 246, 366 (objections raised to Nevada’s and Mississippi’s votes in 1869 and 1873, respectively, claiming votes were not cast by ballot); *id.* at 380-81 (objection raised in 1873 that Georgian electors impermissibly voted for presidential and vice presidential candidates, each of whom were residents of Georgia).

¹⁷² Siegel at 594 n.28.

¹⁷³ *See* The Federalist No. 68 (A. Hamilton) (“Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.”). Hamilton mentioned “corruption” three more times in defending the electoral college. *Id.* For a broad discussion of anti-corruption and constitutional design, *see* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009).

¹⁷⁴ *See* 8 Cong. Rec. 163 (1878) (statement of Sen. Merrimon) (arguing that Congress has the power to determine “whether any elector was bribed, whether his vote was purchased, [or] whether there was intimidation or fraud[.]”); *id.* at 70 (statement of Sen. Morgan) (“Other grounds of disqualification of electors may exist, such as . . . corruption through bribery[.]”).

¹⁷⁵ The precise scope of those terms is best left to future Congresses but would likely resemble similar statutory and case law. *See generally*, Cynthia Brown and L. Paige Whitaker, Cong. Research Serv., R44447, *Campaign Contributions and the Ethics of Elected Officials: Regulation Under Federal Law 7-17* (July 12, 2016), available at <https://crsreports.congress.gov/product/pdf/R/R44447/9> (detailing various bribery and fraud-related statutes).

¹⁷⁶ *See, e.g.*, 115 Cong. Rec. 147 (1969) (statement of Rep. Wright) (labeling a faithless vote “fraud” and a “deliberate betrayal of the wishes of the people [.]”). The Supreme Court recently affirmed that whether to “bind” electors to their party’s nominees is a question within the states’ Article II “manner” authority. *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020). A revised ECA might simply tie faithless votes to their respective state laws; if a faithless vote broke state law, then Members may object on grounds of fraud. If not, i.e., if the state has no laws purporting to restrict faithless electors, then the state and its voters had fair notice that its electors might vote their conscience, and rejection would be an

Listing these objections will eliminate uncertainty and ensure that Members are constrained from inventing new, illegitimate grounds for objections at future counts.

C) Extend the election calendar

As noted earlier, states have only 35 days to resolve elector-related controversies, while there are 18-24 days between elector balloting day and the joint session on January 6.¹⁷⁷ Under the rules proposed here, states would be relieved of their existing safe harbor deadline, which would ease pressure on election officials. Congress could then move elector balloting day back, perhaps to late December, allowing states more time to complete their canvasses and resolve any related contests.¹⁷⁸

New counting rules summarized

Appointments

Under the new counting rules, Congress would simply accept the single certificate it receives from each state and would decline to consider certificates or electoral votes submitted by any other person or body.

Objections

Members could then raise objections based on any of the below issues:

- State's constitutional status
 - Territory vs. state
 - State submitted more electoral votes than it was entitled to
- Elector's constitutional eligibility
 - Elector is constitutionally ineligible
- Candidate's constitutional eligibility
 - Elector voted for constitutionally ineligible candidate
- Elector's conduct in office
 - Elector voted in violation of constitutional requirements
 - Elector voted fraudulently or corruptly

All objections would be subject to a supermajority requirement in both houses, ensuring that Congress could never reject a state's electoral votes without the support of supermajorities in both houses.

Elector balloting day would be moved back, easing pressure on election officials.

These rules would streamline the counting process and avoid confusion at future counts.

inappropriate exercise of congressional power. *See Faithless Elector Laws*, Fairvote.org (2020), https://www.fairvote.org/faithless_elector_state_laws (Thirty-two states and the District of Columbia currently have laws restricting electors' independence).

¹⁷⁷ *See supra* p. 7.

¹⁷⁸ At least one similar proposal was made last year. S. 4517, 116th Cong. (2020) (proposing moving safe harbor deadline to January 1 and elector balloting day to January 2).

Reform 5) Clarify the Denominator

The ECA’s silence regarding the denominator invites future controversy. The revised ECA should specify how the denominator is impacted by the rejection of electoral votes.

The Constitution draws a textual distinction based on the elector’s appointment status:

*“The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed[.]”*¹⁷⁹

The ECA should track the Constitution’s text. If an elector’s appointment fails, then the denominator should be reduced, because the elector was not “appointed.” The same is true if a vote is rejected due to a deficiency in the state’s constitutional status – a state that is not entitled to an electoral vote cannot appoint an elector to cast that vote.

If, on the other hand, Congress rejects an electoral vote due to the elector’s conduct in office, then the denominator should remain untouched, because the elector was validly appointed and simply failed to cast a valid vote.

A more difficult question arises when an elector is constitutionally ineligible. Following the approach proposed earlier,¹⁸⁰ the ECA should provide that an elector’s ineligibility creates a vacancy, and if the state does not fill the vacancy with an eligible elector prior to the casting of electoral votes, then the denominator should be lowered, because an ineligible elector cannot cast an electoral vote.¹⁸¹

Reform 6) Define “Failed to Make a Choice”

As described, 3 U.S.C. § 2 allows a state to appoint electors after Election Day if the state “has failed to make a choice” on Election Day. That provision was a source of controversy in 2020¹⁸² and poses a risk to future elections.¹⁸³ The provision should be clarified.

¹⁷⁹ U.S. Const. amend. XII. The original Constitution contained identical language. U.S. Const. art. II, § 1, cl. 3. That language appeared to reflect a deliberate policy choice by the Framers to have the denominator hinge on electors’ appointment status. *See supra* note 121 (describing prior drafts of the clause at the convention).

¹⁸⁰ *See supra* note 165.

¹⁸¹ This framework adopts the view that an “appointment” may occur in the constitutional sense, even if the elector in question is constitutionally ineligible, but that such ineligibility immediately renders the seat vacant, and such vacancy may be filled in whatever manner the state provides, *see* 3 U.S.C. § 4 (“[e]ach State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.”), but that the electoral vote in question (and its underlying appointment) are forfeited if the state fails to fill the vacancy.

¹⁸² *See supra* p. 18.

¹⁸³ *See, e.g.*, Richard Pildes, *As House Hearings Begin on the Risk of Electoral Subversion, Here’s One Major Issue to Address*, Electionlawblog.com (July 25, 2021), <https://electionlawblog.org/?p=123649> (describing 3 U.S.C. § 2 as “a critical provision in federal election law that could well become the route through which state legislatures would subvert the presidential election.”).

3 U.S.C. § 2 was only intended for two situations: extreme weather, and states that might require runoff elections. There no longer appears to be any state in the latter category and Congress need not concern itself with that issue.¹⁸⁴

Congress should clarify that 3 U.S.C. § 2 only applies to natural disasters, terrorist attacks, and similar force majeure events.¹⁸⁵ That is what Congress had in mind when it first enacted this law, and that is what remains reasonable today.¹⁸⁶ Congress also might consider adding standards governing the scope of the event,¹⁸⁷ defining how the section is triggered,¹⁸⁸ and clarifying whether the section authorizes an extension of the original election or authorizes a second, separate election to be held.¹⁸⁹

Reform 7) Clarify the Scope of Election Day

As described, 3 U.S.C. § 1 sets a single, uniform Election Day, and in the last election former President Trump’s campaign argued that 3 U.S.C. § 1 prohibits states from undertaking certain election-related acts prior to or after Election Day, such as receiving or processing mail ballots.¹⁹⁰ Congress should clarify that 3 U.S.C. § 1 does not restrict states from permitting acts and procedures of that kind.¹⁹¹

¹⁸⁴ Even if a state purported to revive presidential runoff elections, Congress is empowered to foreclose that option by its constitutional authority over the election calendar. U.S. Const. art. II, § 1, cl. 4. Indeed, Congress could repeal 3 U.S.C. § 2 altogether if it so chose.

¹⁸⁵ *See, e.g.*, N.Y. Elec. Law § 3-108(1) (McKinney) (state may hold additional day of voting if “as the direct consequence of a fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster, less than twenty-five per centum of the registered voters of any city, town or village, or if the city of New York, or any county therein, actually voted in any general election.”); W. Va. Code Ann. § 3-1A-6(e)(1) (Secretary of State may implement emergency procedures “in the event of natural disaster as declared by the Governor of this state, terrorist attack, war or general emergency, if any of which occur during or immediately preceding an election.”).

¹⁸⁶ *See, e.g.*, Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 *Emory L.J.* 545, 553-87 (2018) (describing election-related impacts of the September 11th attacks and hurricanes Katrina, Sandy, and Matthew).

¹⁸⁷ For example, the statute might require that the event affects a portion of the state’s electorate that is potentially outcome determinative.

¹⁸⁸ The statute could task the state’s governor with declaring its activation, which would comport with a governor’s typical responsibility to declare emergencies. *See, e.g.*, N.Y. Exec. Law § 29-a(1) (McKinney) (authorizing governor to suspend laws “during a state disaster emergency”). The statute could also require written consent from each presidential candidate or create a cause of action permitting candidates to seek relief from a federal court.

¹⁸⁹ An extension of the election, rather than the authorization of a second, separate election, may help ensure that states remain within the confines of their duly enacted election laws.

¹⁹⁰ *See supra* p. 18.

¹⁹¹ Congress might also consider conforming changes to 2 U.S.C. §§ 1 and 7, which set uniform dates for Senate and House elections.

Part IV) Conclusion

This report has proposed raising the ECA’s objection threshold, narrowing the vice president’s role at the count, ensuring that Congress receives each state’s timely, accurate electoral appointments, enacting new counting rules, addressing the denominator, narrowing states’ ability to appoint electors after Election Day, and clarifying the scope of Election Day.

Taken together, these reforms would end any ambiguity about the timing of presidential elections, clarify Congress’s role at the count, and constrain Congress in future controversies. The reforms do not benefit either political party, and it is impossible to know in advance how they would affect future elections.

Confusion and chaos are not acceptable when the United States undertakes a transfer of power. If adopted, these reforms will help to ensure that the events of January 6, 2021, are not repeated at future counts.



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