

## Comparison of Proposals to Update the Electoral Count Act of 1887

Issues in Current Law	National Task Force on Election Crises	PD-CLC-IO Proposal	Draft Electoral Count Modernization Act	House Administration	Cato Institute
<p><b>Election Timing.</b></p> <p><i>Article II gives Congress the authority to “determine the Time of choosing the Electors” – i.e., to establish Election Day and any exceptions to appointing electors on that day.</i></p> <p><i>Section 2 of the ECA currently sets “the Tuesday next after the first Monday in November” as Election Day, but also provides that if a state has held an election and “has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such state may direct.” The statute does not define what it means to “fail to make a choice,” though the history of the statute makes clear that it was meant primarily to accommodate run-off elections and situations in which it was physically difficult to complete an election (e.g. because of weather).</i></p>	<p>The ECA must clearly set the timing for states to choose their electors and define the narrow, emergency circumstances under which electors may be chosen after Election Day. The current statute alludes vaguely to the possibility that a state’s presidential election could result in “failure,” but provides no definition or constraints, thus creating the potential for misunderstanding and even abuse.</p>	<p><b>Provisions for “failed elections”:</b>  Recommends allowing ballots to be cast after Election Day only if an extraordinary event (like a widespread natural disaster or a terrorist attack) severely disrupts the popular election. The extraordinary event must have affected a significant portion of the voters in the state and there must be sufficient likelihood that the event affected the result. A state invoking this exception may extend the election by permitting voters to continue to cast ballots after Election Day or, in extreme/limited circumstances, the state may hold an exigent popular election that replaces the one that was disrupted on Election Day.</p> <p>Could also provide for judicial review of whether the exception applies and/or what the remedy should be (i.e., extending voting past Election Day or holding a replacement</p>	<p><b>Provisions for “failed elections”:</b> Allows an extended period of time for voting in a popular election if a candidate for President or Vice President files an action in federal court after Election Day (or as soon as possible) and demonstrates beyond a reasonable doubt a catastrophic event prevented or destroyed a potentially outcome determinative number of ballots. Extensions would be statewide and no more than 14 days.</p> <p>A catastrophic event includes a major disaster, act of terrorism, act of war, insurrection, power outage, arson or malicious destruction of property, or cyber attack.</p> <p>Provides criminal penalties for anyone who causes or conspires to cause a catastrophic event with the intent of forcing an extended election.</p>	<p><b>Provisions for “failed elections”:</b>  Recommends clarifying that this provision “only applies to natural disasters, terrorist attacks, and similar force majeure events.”</p> <p>Recommends consideration of “standards governing the scope of the event, defining how the section is triggered, and clarifying whether the section authorizes an extension of the original election or authorizes a second, separate election to be held.”</p>	<p><b>Provision for “failed elections”:</b>  Recommends narrowing the provision to cover only major natural disasters and the like, and to permit the use of run-off elections.</p>

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		<p>election).</p> <p><b>Election Day:</b> Recommends defining Election Day as the last day on which ballots may be cast in a popular election. Should also clarify that states may (but are not required to) permit ballots to be cast prior to Election Day and to be received, cured, counted, tabulated, and canvassed after Election Day in accordance with state law.</p>	<p><b>Election Day:</b> Defines Election Day as the day for appointing electors. For states choosing electors by popular vote, Election Day is the last day on which ballots may be cast in a popular election. Makes clear states may (but are not required to) permit ballots to be cast prior to Election Day and to be received, cured, counted, tabulated, and canvassed after Election Day in accordance with state law.</p>	<p><b>Election Day:</b> Recommends clarifying that states are not prohibited from election-related acts before or after Election Day, such as receiving or processing mail ballots and similar administrative processes.</p>	<p><b>Election Day:</b> Recommends clarifying “the scope of what it means to define election day, so that states are not hindered from counting early votes or going through post-election administrative processes.”</p>
<p><b>State Determinations.</b></p> <p><i>Together with other parts of the statute, Section 5 of the ECA – the “safe harbor” provision – was crafted to encourage states to resolve any disputes as to the outcome of their elections (via judicial or other methods) in a timely fashion and to require Congress to respect such state-level determinations made in accordance with state law (and, implicitly, the Constitution).</i></p>	<p>The ECA must bolster the American people’s trust in election results by better protecting each state’s ability to adjudicate its own post-election disputes and limiting opportunities for partisan actors in Congress. This should include a way to enforce the “conclusive” nature of timely state-level determinations of election results (previously referred to as the “safe harbor” protection).</p>	<p><b>Safe Harbor:</b> Consistent with existing law, once states (and courts) have made a final determination about the election dispute, e.g., through recounts and post-election litigation, then Congress should be required to treat that final determination as conclusive when it counts electoral votes.</p> <p>Recommends requiring the governor, rather than an undefined “executive,” to certify the results of the election according to the state’s prescribed</p>	<p><b>Safe Harbor:</b> Retains the safe harbor concept to the extent that it provides that Congress should treat as “valid” a single slate of appointed electors submitted in accord with the requirements of the statute following a timely resolution of disputes under laws in place prior to Election Day.</p> <p>Requires states to make a “final determination” of its appointment of electors by December 20, and the governor each state to issue a certificate</p>	<p><b>Safe Harbor:</b> Would eliminate the safe harbor concept. Instead, “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. 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.”</p>	<p><b>Safe Harbor:</b> Continue to require states to decide before Election Day how electors will be chosen.</p> <p>Set the “safe harbor” deadline to the same day or a day before the Electoral College meets.</p> <p>Clarify that it is the governor, or another state officer identified ahead of time, rather than the “executive,” that must certify the results of the election.</p>

		<p>process for resolving disputes.</p> <p>Recommends providing an opportunity for a court to decide prior to January 6th whether a state has achieved conclusive status and then bind Congress to follow that decision.</p>	<p>of the state’s appointment of electors “as soon as practicable” after a final determination by the state, but effectively no later than December 29.</p> <p>If the governor fails to execute this duty, it falls to the state’s chief election official. If he or she fails to execute, then a candidate for President or Vice President may bring an action in federal court.</p> <p>The final determination “shall be made in accordance with the final election results as certified by the state official or body responsible for certifying final election results under the laws duly enacted by the state prior to election day,” unless modified by a state judicial or administrative proceeding that is final, or a final judgment from a federal court issued by December 20.</p> <p>If a state has not reached a final determination by December 20, any candidate for President or Vice President may bring a civil action in federal court to ensure an</p>	<p>*The proposal does not include a recommendation on how to address rival slates of electors from the same state because it concludes its other recommended reforms will prevent such a problem.</p>	
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<p><b>Vice President’s Role.</b></p> <p><i>The 12th Amendment provides that “[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted” – but says nothing more about the role of the President of the Senate (typically the Vice President).</i></p> <p><i>The history of the ECA suggests that it was crafted to provide for a limited role for the Vice President (certainly not one in which the Vice President has discretion to decide which electoral votes to count), but the language is somewhat ambiguous.</i></p>	<p>The ECA must make clear that the Vice President’s role in the presidential election process (as President of the Senate) is limited and ministerial, meaning that the Vice President does not have the power to decide controversies that might arise over counting electoral votes or to otherwise decide the outcome of the election. The current language of the statute leaves too much room for uncertainty regarding the Vice President’s responsibilities.</p>	<p>Recommends clarifying that the Vice President’s role is largely ceremonial and enumerating an exhaustive list of duties as presiding officer.</p> <p><b>Power of Presiding Officer:</b> Recommends clarifying that the Vice President’s, or any presiding officer’s, role does not include deciding which votes should be counted.</p>	<p>Clarifies the Vice President does not have the power to determine or resolve disputes over electors/electoral votes and provides the Vice President with a ceremonial role (in accord with the Constitution) opening the certificate of votes from a state after any objections have been resolved.</p> <p><b>Power of Presiding Officer:</b> Designates the President pro tempore of the Senate as the presiding officer, unless they are a candidate for President or Vice President, in which case the next most senior Member of the majority party in the Senate would preside. Also provides a role for the Secretary of the Senate.</p>	<p>Recommends narrowing “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.”</p> <p><b>Power of Presiding Officer:</b> Recommends the Senate President pro tempore serve as the presiding officer (rather than the Vice President), and “clarify[ing] that the presiding officer does not have substantive discretion over counting votes.”</p>	<p>Recommends allowing the Vice President to continue presiding but clarifying that “the vice president has no unilateral authority under the Constitution to decide which votes should be counted.”</p> <p><b>Power of Presiding Officer:</b> Recommends “making clear that the presiding officer, whoever that is, has no power to reject votes or alter the proceedings.”</p>
<p><b>Objections.</b></p> <p><i>The ECA currently requires only one Member</i></p>	<p>The ECA must make clear that Members of Congress may not simply substitute their own political</p>	<p><b>Threshold:</b> Recommends raising the threshold for objections to</p>	<p><b>Threshold:</b> Raises the threshold for objections to one-third of each</p>	<p><b>Threshold:</b> Recommends raising the threshold for objections to</p>	<p><b>Threshold:</b> Recommends raising the threshold for objections to</p>

<p><i>of each chamber of Congress to object, in writing, to the appointment of electors or to electoral votes. The cognizable grounds for such objections are only vaguely described as: whether or not an appointment of electors is “lawfully certified,” and whether the votes of appointed electors are “regularly given.”</i></p>	<p>preferences for the voters’ judgment expressed at the ballot box and carried out by the Electoral College. This should include raising the threshold for making cognizable objections to counting electoral votes well above the current requirement of only one Member of each chamber. And it should include defining narrow grounds upon which Members of Congress may base any objections. Generally speaking, Members should only be able to object to electoral votes from a state if the votes were the product of bribery or are objectively illegal, such as if they are for a candidate who is constitutionally ineligible to be president.</p>	<p>one-quarter of each chamber, rather than a single Member of each.</p> <p><b>Grounds for Objections:</b>  Recommends separating out objections to appointments of electors and objections to electors’ votes, and creating an exhaustive list of valid grounds for each.</p> <p>With respect to the appointment of electors, objections should include: (1) that the President of the Senate improperly excluded the valid slate of electors from consideration by Congress; (2) that a slate, different than the slate the President of the Senate determined to be valid has “safe harbor” status and is conclusive; (3) that no slate has “safe harbor” status, and a slate different than the submission the President of the Senate determined to be valid is in fact the valid slate pursuant to</p>	<p>chamber.</p> <p><b>Grounds for Objections:</b> Allows objections if: (1) a certificate of appointed electors is not valid; or (2) if an individual elector is ineligible to serve under Article II because they are a Representative or Senator, or hold an office of profit or trust under the United States, or an elector is disqualified from holding office under section 3 of the 14th Amendment.</p> <p>According to the draft, “valid” means: (1) if a certificate is not furnished pursuant to the statute, it is not valid; (2) if only one certificate has been furnished pursuant to the statute, it is valid; and (3) if more than one certificate has been furnished pursuant to the statute, the one furnished pursuant to a final order of a federal court is valid, and if there is no such</p>	<p>one-third of each chamber, rather than a single Member of each.</p> <p><b>Grounds for Objections:</b>  Recommends creating an exhaustive list of valid grounds for objections, including objections related to: (1) a state’s constitutional status, such as whether it has achieved statehood, cast more electoral votes than permitted, or failed to offer its citizens a republican form of government; (2) an elector’s constitutional eligibility; (3) a candidate’s constitutional eligibility, and (4) elector’s conduct in office, voting in violation of the constitutional requirements, or voting fraudulently, corruptly or faithlessly.</p> <p>Recommends <i>not</i> permitting objections related to the state’s appointment of electors (i.e. which candidate won).</p>	<p>one-fifth of each chamber, but the “exact number is less important than making sure an objection has some real and significant level of support before it can cause a delay in the proceedings.”</p> <p><b>Grounds for Objections:</b>  Recommends creating an exhaustive list of valid grounds for objections, including objections related to: (1) a state’s constitutional status, such as whether it has achieved statehood or cast more electoral votes than permitted; (2) an elector’s constitutional eligibility; (3) a candidate’s constitutional eligibility; and (4) electors were appointed or voted in defiance of a court order in force at the time and which has not subsequently been withdrawn or overruled.</p> <p>Any grounds for objection related to corruption should cover “only literal bribery.”</p> <p>Recommends <i>against</i> allowing objections if a state has failed to maintain a republican</p>
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		<p>state law established before Election Day; (4) that an elector named in the submission the President of the Senate determined to be valid is a Representative or Senator, or holds an office of profit or trust under the United States, in violation of Article II; and (5) that an appointed elector is disqualified from holding office under section 3 of the 14th Amendment.</p> <p>With respect to electors' votes, objections should include: (1) that a purported certificate of votes by electors does not correspond to a valid appointment of electors, including whether a purported certificate of votes by electors is a forgery or otherwise not genuinely issued by the the validly appointed electors; (2) that an appointed elector did not vote in accord with a pledge to a candidate pursuant to state law; (3) that an elector cast votes for individuals residing in the same state, in violation of the 12th Amendment; (4) that an elector cast votes for President and Vice</p>	<p>certificate, then one reflecting the final determination of a state's recount, judicial, or administrative process is valid; (4) if there is no certificate that meets the above requirements, then there is no valid certificate.</p> <p>Allows objections to individual electors' votes at the same threshold if: (1) a vote was cast for candidates for President and Vice President both of which reside in same state as the elector; (2) a vote was cast for a candidate who is constitutionally ineligible to serve; or (3) a vote was cast on a day other than elector balloting day under the ECA.</p>		<p>form of government, or under section 2 of the 14th Amendment.</p>
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<p><b>Dispute Resolution.</b> <i>Together with other parts of the statute, Section 15 of the ECA is meant to guide Congress in resolving disputes (raised primarily through objections) as to the appointment of electors and/or counting particular electoral votes – in situations in which there is only one slate of appointed electors submitted by a state, and in which more than one slate is submitted by the same state. Among other things, it provides that when the chambers disagree as to which of multiple slates to count, “the votes of the electors whose appointment shall have been certified by the executive of the state . . . shall be counted.” But the language of the statute is</i></p>	<p>The ECA must be updated to establish procedures for dispute resolution in Congress as the final safeguards in truly extraordinary situations. The statute’s current mechanism for resolving disputes is both convoluted and insufficient, in that it describes extensive procedures for Congress to follow but fails to provide for a clear path to final resolution of a disputed election in many circumstances.</p>	<p><b>Sustaining Objections:</b> Recommends continuing the current rule that objections are subject to a majority vote in each chamber.</p> <p>If the chambers agree, then that governs the disposition of the objection.</p> <p>If the chambers disagree, then the rules differ depending on whether Congress has received one or multiple slates of electors purporting to be from the state at issue. If Congress has received only one submission, then that submission is valid unless both chambers vote to reject it. If Congress has received multiple submissions, then the statute should make absolutely clear</p>	<p><b>Sustaining Objections:</b> Requires three-fifths of all Members chosen and sworn in each chamber to vote in favor of an objection. A Member voting to sustain an objection may move to offer an alternative submission from the State, which must also be supported by three-fifths of all Members chosen and sworn.</p>	<p><b>Sustaining Objections:</b> Recommends setting the threshold to sustain an objection at a two-thirds supermajority of each chamber.</p>	<p><b>Sustaining Objections:</b> Recommends continuing the threshold to sustain an objection at a majority of each chamber, rather than requiring a supermajority.</p>

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<p><i>both confusing and arcane, thus creating the possibility of a constitutional crisis if the chambers are not able to agree on a resolution of disputes.</i></p>		<p>which submission should be considered valid. One way to do this is to assign the United States Supreme Court as a tiebreaker.</p>			
<p><b>Other</b></p>		<p><b>Vacancies in the Electoral College:</b> An updated ECA should authorize states to replace an elector in the event of a vacancy (if, e.g., the elector dies after Election Day but before the meeting of the Electoral College). But it should also require states to fill any vacancies pursuant to laws enacted prior to Election Day.</p>	<p><b>Denominator:</b> Removes an elector from the total number of validly appointed electors if an objection to the elector was sustained without replacement by an alternative.</p> <p><b>Presidential Transition Act:</b> Requires the GSA Administrator to announce the apparent winner of the election as soon as a candidate will receive a majority of the pledged votes of electors based on state certifications, but no later than December 20. If the Administrator does not make an announcement by December 20, the top two candidates shall be treated as the President-elect for purposes of the PTA.</p>	<p><b>Denominator:</b> Recommends clarifying that the denominator used in calculating which candidate won “a majority of the whole number of Electors appointed” (per the 12th Amendment) should be reduced if an elector’s appointment fails (e.g, because of a deficiency in a state’s constitutional status), but leaving the denominator untouched if an elector’s vote is rejected because of the elector’s conduct (e.g., because of fraud).</p>	<p><b>Denominator:</b> Clarify “how to calculate the denominator for determining what constitutes a winning majority of the votes.”</p>