August 2, 2022

The Honorable Amy Klobuchar
Chairwoman
Committee on Rules & Administration
United States Senate
Washington, D.C. 20515

The Honorable Roy Blunt
Ranking Member
Committee on Rules & Administration
United States Senate
Washington, D.C. 20515

Chairwoman Klobuchar and Ranking Member Blunt:

Protect Democracy commends the Senate Rules Committee for taking up the important issue of Electoral Count Act reform. History and common sense compel revision of this antiquated law, which governs the casting and counting of electoral votes for president and vice president. The law is unnecessarily confusing and vulnerable to misinterpretation. Given the events leading up to January 6, 2021, and the current climate of distrust, we can no longer ignore that ongoing risk. Fortunately, there is now a path forward and we call on Congress to take up and pass ECA reform this year.

The Electoral Count Act was a delayed response to the disastrous presidential election of 1876, when the lack of rules regulating Congress's counting of electoral votes nearly caused a constitutional crisis. Despite dense and sometimes ambiguous language, the law has largely served its purpose for more than a century, even if not perfectly. Yet in the aftermath of the 2020 election, disinformation about the election and ambiguities in the Electoral Count Act helped fuel a deadly attack on the Capitol and posed a threat to the peaceful transfer of power. Future elections remain vulnerable, and we cannot predict the full range of challenges that will test the ECA in the coming years.

Congress should do everything it can to ensure clear and fair rules of the road and build trust in future election outcomes. Reforming the Electoral Count Act certainly will not address all of the challenges confronting our elections and our democracy more broadly. Nevertheless, scholars, election lawyers and administrators, and other experts across the ideological spectrum have called for updating the Electoral Count Act as a key step to shore up our democratic foundation.

Lawmakers have answered the call. We commend Senator King for the draft legislation he released with Chairman Klobuchar and Senator Durbin in February, as well as the extensive report and recommendations issued by staff for House Administration Committee Chairperson Zoe Lofgren.

Now a bipartisan Senate working group, led by Senators Collins (R-Maine) and Manchin (D-West Virginia), has advanced the process considerably with a thoughtful proposal—the Electoral Count Reform Act (S. 4573). The group worked for months to understand the weaknesses in current law and has incorporated advice from outside experts, including a bipartisan group convened by the American Law Institute. In fact, the key features of the ECRA reflect extensive common ground among many ECA reform advocates—including the National Task Force on Election Crises, Campaign Legal Center, Issue One, The Cato Institute, The Niskanen Center, and our team at Protect Democracy.

In keeping with this broad consensus, the Electoral Count Reform Act would provide much-needed clarity on the process of casting and counting electoral votes, strike a better balance between the roles of state and federal actors in that process, and eliminate many of the most concerning weaknesses in current law. Specifically, it would:

- Require that states appoint presidential electors in accordance with state laws enacted before Election Day;
- Eliminate the risk of a so-called "failed" election and clarify that states may only appoint electors after Election Day in a narrow set of extraordinary or catastrophic circumstances, such as a major natural disaster;
- Create a clear federal duty for the governor of each state (or another official designated in advance) to certify and transmit a lawful slate of electors to Congress, and create an expedited process for candidates to enforce that duty in federal court before the meeting of the Electoral College, thereby ensuring Congress has only one lawful slate from each state to count when it convenes in January;
- Better ensure that lawful state election results are respected by Congress, including by clarifying the ministerial role of the vice president (acting as President of the Senate and presiding over the joint session), raising the threshold for congressional objections to one-fifth of each chamber, and adding more clarity to the limited grounds for objections; and
- Clarify how a majority of appointed electors is calculated for purposes of the Twelfth Amendment if a state fails to lawfully appoint some or all of its allotted electors.

There may be room to clarify and potentially improve the language of the Electoral Count Reform Act, and Protect Democracy welcomes thoughtful debate on this issue so long as it builds on the consensus and momentum reflected in the bill. We have an unprecedented opportunity to advance a bipartisan solution well in advance of the next presidential election—an opportunity that should be compelling to everyone committed to respecting the will of the voters and ensuring the peaceful transfer of power that has been a hallmark of our democracy. We hope that Congress will seize it.

Attached for your reference is an overview of key provisions in the Electoral Count Reform Act, prepared by Protect Democracy and available on our website along with other resources.[1]

Sincerely,

Genevieve Nadeau
Counsel, Protect Democracy

[1] Protect Democracy's ECA webpage: https://protectdemocracy.org/project/electoral-count-act/

July 2022

Understanding the Electoral Count Reform Act of 2022

The Electoral Count Act of 1887 (ECA) governs the casting and counting of electoral votes for president and vice president every four years. The statute sets the timeline for states to appoint presidential electors in November and for electors to cast their votes in December, and describes the process that Congress should follow when it counts the states' electoral votes in January. The statute has remained largely the same for well over a century and is badly in need of an update. It includes antiquated and ambiguous language, and fails to offer clear guidance on key aspects of the process of counting electoral votes and resolving related disputes—weaknesses that render the statute open to misunderstanding or exploitation, and risk the peaceful transitions of power that have been a hallmark of our democracy.

On July 20, 2022, as part of S.4573, a bipartisan group of Senators introduced the Electoral Count Reform Act (ECRA), together with other proposed election reforms. The bill would provide much-needed clarity on the process of casting and counting electoral votes, strike a better balance between the roles of state and federal actors in that process, and eliminate many of the most concerning weaknesses in current law.

The following is an overview of key provisions in the bill.[1]

- **Requires that states appoint electors on Election Day in accordance with pre-existing law and eliminates the concept of "failed" elections. [Section 102]**

Current law (3 U.S.C. § 1) sets "the Tuesday next after the first Monday in November" as the date on which states must appoint their presidential electors (i.e., Election Day because all states appoint electors based on a popular election).

In addition, however, current law (3 U.S.C. § 2) also provides that if a state has held an election but somehow "failed to make a choice" on Election Day, then the state legislature may choose the manner of appointing electors on a subsequent day. (A version of this provision technically dates back to the Presidential Election Day Act of 1845 and thus preceded the ECA.) This provision was meant to accommodate run-off elections and extreme weather conditions that sometimes prevented the completion of elections on a single day. But the language is vague as to what it means for an election to "fail." As a result, some partisan actors have wrongly suggested that delays in counting votes or disputes about how an election was conducted can form the basis of a "failure" that would justify state legislatures appointing electors themselves after Election Day.

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[1] *For more explanation of current law, see Protect Democracy's website, or The Electoral Count Act & The Process of Electing a President by the National Task Force on Election Crises.*

The legislation would eliminate 3 U.S.C. § 2 entirely and instead provide that states must appoint electors on a designated date (the same date as current law), except that a state that holds a popular election may "modif[y] the period of voting as necessitated by extraordinary and catastrophic events as provided under laws of the state" enacted prior to Election Day. In doing so, the legislation eliminates the "failed election" loophole and the potential for partisan actors to exploit it.

Importantly, because it would allow only a modified (i.e., extended) voting period, and only when "necessitated" by events that qualify as "extraordinary and catastrophic," the bill would not allow state legislatures to step in to appoint electors themselves after Election Day. Nor would the bill allow claims of fraud to trigger the exception to appointing electors on Election Day.

- **Adds clarity to the process by which state officials ascertain and certify their election results to Congress. [Section 104]**

This legislation would make clear that the executive of each state is required to certify the state's appointment of electors (in essence, its election results) to Congress no later than six days before the date on which the Electoral College meets, and that he or she must do so "under and in pursuance" of state law enacted prior to Election Day. The bill defines "executive" to mean the governor unless the state designates another official in advance.

The bill would set "the first Tuesday after the second Wednesday in December" as the date on which the Electoral College must meet, only one day later than current law. It would further provide that Congress must treat the executive's certification as "conclusive" unless it is modified by an order of a state or federal court (with federal courts having the final say on issues of federal law, including ECRA itself).

- **Gives federal courts a clear and expedited role in ensuring that states send lawful certifications of election results to Congress. [Section 104]**

Current law does not explicitly provide any role for the federal courts in resolving disputes about a state's appointment of electors. This legislation would create an expedited procedure for federal courts to hear claims brought by presidential candidates pursuant to existing federal law (constitutional or statutory) with respect to a state executive's duty to issue and transmit to Congress the certification of appointed electors. Specifically, the bill incorporates other provisions of federal law (28 U.S.C. §§ 2284 and 1253) that provide for cases to be heard by a three-judge panel and then appealed directly to the Supreme Court. (The only difference is that ECRA would require that the panel be composed of two circuit judges and one district judge, rather than two district judges and one circuit judge.) The bill would require that any such case be heard by the Supreme Court "on an expedited basis, so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors."

Importantly, this legislation would not preclude candidates from bringing other election-related litigation in state or federal court except to the extent that the narrow set of claims described—regarding the executive's issuance and transmission of the certification of appointed electors—would be subject to an expedited procedure. And it would not affect state or federal claims available to voters.

These provisions of the bill, combined with others, would ensure that only one even arguably lawful slate of electors from each state is presented to Congress to count. This should address concerns about governors or other state officials going "rogue" and purporting to certify appointments of electors that do not reflect the outcome of the election.

- **Makes it absolutely clear that the Vice President's role in the electoral vote-counting process is ministerial. [Section 109]**

The 12th Amendment provides that, after they vote as part of the Electoral College, presidential electors must send certificates of their electoral votes to the president of the Senate (usually the vice president). But with respect to the vice president's role during the counting process, the 12th Amendment says only that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." The current ECA designates the president of the Senate as the presiding officer when Congress meets on January 6. The statute assigns the presiding officer specific duties, such as "preserving order," calling for objections, and announcing the results.

Contrary to arguments made during the last election, neither the 12th Amendment nor the ECA contemplates a role for the vice president—or any other presiding officer—that involves making substantive decisions about which electoral votes to count. That said, the law could be more explicit in order to foreclose any argument that the vice president has the power to decide the election.

This legislation would specify that the vice president's role in the process of counting electoral votes is limited to "ministerial duties" and that he or she has "no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors."

- **Makes it more difficult for members of Congress to make frivolous objections to state election results. [Section 109]**

Current law allows for objections to a state's electoral votes as long as those objections are made in writing and signed by one senator and one representative. It is therefore too easy for members of Congress to disrupt the counting process (and potentially make objections that unfairly undermine public confidence in the integrity of the election). The bill would raise the threshold required to make a cognizable objection to one-fifth of each chamber, while retaining the requirement that each chamber must sustain objections by a majority vote.

In addition, the bill specifies two grounds for objections, drawing on language in current law but more clearly distinguishing between the two grounds and indicating that both grounds are meant to be narrow.

The first objection the bill would allow is that "the electors of the state were not lawfully certified under a certificate of ascertainment of appointment of electors [as set forth earlier in the bill]." By its terms, this objection would apply only to the *appointment* of electors. Because the earlier provisions of the bill are designed to ensure that only one, lawful slate of electors is sent to Congress to count, this objection

should only be applicable in rare circumstances in which some actor (e.g., the vice president) purports to present a slate of electors that does not qualify as conclusive based on those earlier provisions.

The second permissible objection would be that "the vote of one or more electors has not been regularly given." By its terms, this objection would apply only to the *electoral votes cast* by lawfully appointed electors. The term "regularly given" is properly understood to encompass only a narrow set of legal infirmities with an elector's vote, such as an elector voting for an ineligible candidate or voting on the wrong day, or an elector voting as the result of bribery or other improper influence.

All of these provisions combined would improve on current law by better ensuring that Congress keeps to its constitutional role of counting electoral votes, and by making it more difficult for members of Congress to misuse the counting process to second-guess a state's appointment of electors.

❖ **Clarifies how a majority of appointed electors will be calculated. [Section 109]**

The 12th Amendment provides that "[t]he person having the greatest number of votes for President, shall be the President, if such number be the majority of the whole number of Electors appointed." Because the total number of electors that may be appointed (and usually are appointed) by the states is 538, a candidate with 270 or more electoral votes wins the election. But neither the Constitution nor the current ECA makes clear what happens to the calculation if either a state fails to appoint some or all of its allotted electors, or Congress rejects the *appointment* of one or more electors as not lawful.

This legislation would address this ambiguity by providing that in those cases, the "whole number of electors appointed"—the denominator in the calculation—will be reduced. The provision should make it more difficult to manipulate the process by depriving a candidate of a required majority in order to trigger a "contingent election" of the president by the House of Representatives or the vice president by the Senate (as provided for in the 12th Amendment). Because the bill does not explicitly address electoral votes that are rejected by Congress as *not lawfully cast* (i.e., not regularly given), the denominator presumably would not change in that circumstance.

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Reforms like those included in this legislation would significantly improve upon current law and better protect the electoral vote-counting system from gamesmanship without benefitting either political party. Protect Democracy calls on Congress to pass the strongest ECA reform possible this year—before the heat of the 2024 presidential election.

For more information, contact Genevieve Nadeau at genevieve.nadeau@protectdemocracy.org or Holly Idelson at holly.idelson@protectdemocacy.org, or visit our website: https://protectdemocracy.org/project/electoral-count-act/.