

Testimony before the Senate Rules Committee on Electoral Count Act Reform

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Chair Klobuchar, Ranking Member Blunt, and members of this Rules Committee: I want to thank you very much for the opportunity to testify on reform of the Electoral Count Act (ECA).

Introduction

My remarks today are shaped by study of the statute and the basic principles that should guide reform in collaboration with other members of a bi-partisan group convened for this purpose by the American Law Institute. I co-chaired this group with Professor Jack Goldsmith of Harvard Law, a former Assistant Attorney General in the Administration of President George W. Bush. I came to this project after a long career of representing Democratic Party institutions and candidates, and a period of service to the Administration of President Barack Obama as White House Counsel.

Today, I am testifying in my personal capacity and the views expressed on particular issues are mine alone. I will, however, refer to the consensus Statement of Principles that our American Law Institute group produced, with reference to how these affect my approach to the proposals now under consideration. I also note for the record a piece that Professor Goldsmith and I recently coauthored to address certain misconceptions about ECA reform.¹

Before proceeding with specific comments, I note that ECA reform is unusual because it rests on broad agreement on the flaws of the Electoral Count Act and the considerable need for non- or bi-partisan reform

Political reform invariably involves numerous complexities and trade-offs. But one suspicion always looming in the background is that any proposed “reform” may have been put forward with the primary purpose of favoring one party or political interest, or that, regardless of intent, it will have that effect. Political reform becomes itself the source of political controversy, if not a flash point in partisan conflict. This has been my experience of over four decades with these kinds of debates.

Not so in the case of the Electoral Count Act. Practically everyone agrees that this 1887 statute is in urgent need of reform. And that agreement includes the general understanding that ECA reform need not, and would not, serve one party or interest. As it exists now, the statute is poorly conceived and badly drafted: it has been described as “turgid” and “repetitious” by some, and

¹ Bob Bauer & Jack Goldsmith, “Correcting Misconceptions About the Electoral Count Reform Act,” *Lawfare* (Jul. 24, 2009), available at <https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act>.

condemned as largely unintelligible by others. It is famous for one sentence that runs for 275 words—and is none the clearer for all that.

The ECA’s odd structure and obscure language also undercut what should be the statute’s core purpose: a dependable and enforceable framework to allow Congress to receive and count accurate tallies of electoral votes, properly certified by each state. Instead, in all the time that ECA has been on the books, it has lain simmering, in the words of one scholar, as “an explosive formula for legal and partisan warfare...”² We recently averted a full explosion.

In this testimony, I will address what I believe to be the key proposals and questions that have surfaced in the contemporary consideration of ECA reform. My aim is to engage with the basic architecture of bipartisan ECA reform, consistent with the ALI Statement of Principles, and then to engage with the following major issues, the resolution of which is necessary to achieve that architecture: 1) the role of the federal and state courts; 2) the question of when an external catastrophe, such as a natural disaster, may require a modified period of voting beyond Election Day; and 3) certain of the internal rules Congress would follow in conducting the final tally of electors’ votes at the January 6 joint session.

Basic Architecture of ECA Reform

The major bills under review—the Electoral Count Modernization Act and the Electoral Count Reform Act (hereafter, “ECRA”)—are organized around a core reform principle of utmost importance: our presidential elections should be run according to rules set in advance and in effect on Election Day. These rules must not be subject to change after the fact based on dissatisfaction with the result by the controlling party in a particular state or in Congress. As I have written elsewhere, in the piece that I co-authored with Jack Goldsmith, the central concern of ECA reform before this Committee is properly “to ensure that the popular vote is respected, in accordance with state and federal law.”³

This proposition seems beyond reasonable objection. It is grounded in basic understandings of how our democracy functions—understandings anchored in constitutional Due Process. As one constitutional scholar recently noted, the guarantee of Due Process resides at “the heart of constitutional democracy,”⁴ and ECA reform to enforce that guarantee is an appropriate exercise of Congress’ legislative authority under section 5 of the Fourteenth Amendment. Beyond these formal, fundamental constitutional precepts, this concern with Due Process comports with our deepest intuitions of what it means to have a “right to vote” in free and fair elections.

² Stephen A. Siegel, *The Conscientious Congressman’s Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004), available at <https://www.floridalawreview.com/wp-content/uploads/2010/01/Siegel-BOOK.pdf>.

³ Bauer & Goldsmith, *supra* n. 1.

⁴ Pam Karlan, “The Virtues of the Electoral Count Reform Act,” *Election Law Blog* (Aug. 1, 2022), available at: <https://electionlawblog.org/?p=131097>.

Although Article II, Section 1 of the Constitution provides for state legislatures to choose the manner of appointment of electors, every state has chosen to appoint electors by popular vote. Once that choice is made, and after the polls have closed and the ballots have been cast, the popular verdict cannot be overridden, consistent with our constitutional structure, simply because the outcome did not prove acceptable to state executives or legislative majorities. This Due Process protection prevents state executives from undermining the lawfully determined outcome of the election—whether they might do so independently of a state legislature or in collusion with it.

As the Supreme Court made clear in *Bush v. Gore*, “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”⁵

These Due Process guarantees are bolstered by and interact with Congress’ constitutional power to fix the date of the presidential election: to “determine the Time of chusing Electors, and the Day on which they shall give their votes.” Due Process requires that the rules in place on that day shall govern the outcome—not rules devised after the results from that day are known and partisans at the federal or state level— may be motivated to devise schemes to undermine them.

In addressing this key feature of ECA reform, the complexities and trade-offs of reform design come into play. The answer to the problem of election subversion at the state level does not lie in leaving Congress to engage in vote counting of its own after the fact. The Twelfth Amendment, which governs Congress’ role in the final tally of electoral votes, does not contain any suggestion that this body is charged with deciding which votes cast by eligible voters should be counted, and which not. Instead, the Constitution recognizes that states generally set the rules for participating in federal elections. Accordingly, state law provides the framework for the counting—and, if necessary, recounting—of ballots, as well as any election contests. As appropriate, federal and state constitutional guarantees of Due Process, Equal Protection, and free and fair elections may be enforced in state and federal court, as well. But nothing in the Constitution supports Congress’ displacement of the states’ voting counting and re-counting function in presidential elections.

The leading proposals all take as their departure point that Congress should not perform that function. This is the best constitutional understanding of the Congressional role, bolstered by the deep and broadly held concern that a majority in the Congress could in the worst of cases sweep aside the outcome of a popular election for no reason other than distaste for the results. Both political parties and voters not affiliated with either party would share revulsion at this prospect.

Because Congress should not be in the business of vote counting, it must ensure that it receives certificates from the states that accurately reflect which electors were chosen by the voters, pursuant to state law in place on Election Day. ECA reform should require states to comply with their state legal processes and to transmit to the Congress the lawful—not politically engineered or revised—certificate. Congress then has one valid certificate of electors from each state to include in its count.

The ECA as we have it now has a complex, impracticable series of provisions for managing the “multiple” slate scenario, with various related provisions such as a “safe harbor” that ostensibly treats

⁵ *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam).

as conclusive any slate that the state submitted within a specified period before the meeting of electors. But apart from the unintelligibility of this construction, there remains the reading of the ECA, which some members of Congress have advanced in the past, that Congress can ultimately do what it wishes on its own assessment of the vote count. The two Houses need only agree to sustain any baseless objection that a state's certified results should be disregarded because of falsely alleged fraud or irregularity. Similarly, there is a reading of the ECA that, unless two Houses specifically concur that it should not do so, Congress could accept a certificate that federal and state courts had previously held to be unlawful. This is untenable.

The leading reform proposals would attack the problem with a three-pronged approach:

- Congress provides that states must give effect to the votes counted under rules established before and in effect on Election Day, consistent with Congress' constitutional power to determine the date of the election.
- Congress establishes a procedure for ensuring that, for purposes of its Twelfth Amendment elector vote count, it is in receipt of the lawful certificates of electors reflecting the outcome of state legal process for vote counting, including any recounts, contests, or other post-election federal and state legal challenges.
- Congress then gives full effect to the outcome of this process for clarifying the certificates it should accept and include in the final tally.

The Role of the Courts

The ALI Statement of Principles proposed the establishment of a federal cause of action authorizing a presidential and vice-presidential candidate to challenge the failure of a state executive to transmit to Congress the lawful certificate of electors as established by state legal process. A court could issue relief in the form of a declaratory judgment and an injunction compelling the state executive's transmission of the lawful certificate. In this way Congress could establish with clarity the one certificate reflecting the popular vote selection of electors, in order that it may fulfill its Twelfth Amendment responsibilities.

The ECRA would not create a new cause of action but would instead provide for expedited review of an action that a presidential and vice-presidential candidates may bring under existing law. It would establish venue and three judge district court review in the first instance, subject to mandatory Supreme Court review. The court's judgment would be given "conclusive" effect for Congress' Twelfth Amendment purposes.

In my view, this is an example of a well-crafted compromise built around the same core reform principle: the state is held to compliance with legal processes in effect on Election Day, while Congress can ensure that it is tallying the votes from lawful certificates but stays out of the business of popular vote counting and recounting. And these expedited procedures apply only to this type of cause of action, filed for a narrowly defined purpose by a limited and defined class of plaintiffs—presidential or vice-presidential candidates.

This provision has attracted certain criticisms. Some are puzzling and clearly wrong: they suggest that this expedited review procedure may operate to supplant other avenues of litigation and judicial

review, especially at the state court level. It does nothing of the sort. Nothing in the pending proposals, including the ECRA, forecloses any current avenue of federal or state post-election litigation. There has also been the suggestion that the ECRA is not as clear as it could be about the conclusive effect to be given to any judicial determination resulting from this expedited process. I do not view the language as unclear but, regardless, Congress could decide to add language that would leave no doubt on this basic point to any reader approaching the reading in good faith

On this and other points of clarification, Congress should not hesitate to make full use of legislative history to accompany the ECRA. While the Supreme Court has made clear its skepticism of the use of legislative history in discerning the meaning of statutory terms in certain circumstances, ECA reform is distinctive. Congress is, after all, legislating to give effect to its constitutional responsibilities under the Twelfth Amendment. Congress's stated views of what key provisions of the bill mean could well receive respectful attention from the Court.

Another concern expressed in relation to the role of the courts in ECA reform is the proposed provision for mandatory Supreme Court review. The case for mandatory review is strong: the Court is likely to take any such case regardless, and there is an interest in finality—a decision by the highest court—which is well served by this approach. Imagine, for example, a petition for certiorari by these plaintiffs that the Court denies, but with strong dissents. This could cause some consternation that the issues at stake were left unresolved and, in our deeply polarized politics, encourage fevered speculation about the reasons. This would not serve the goal of a resolution that stands the best chance of drawing the widest possible acceptance.

However, this concern need not hold things up because little hinges in these circumstances on the difference between mandatory and discretionary review. With the possible exception of a challenge that is evidently frivolous on its face, the Court will almost certainly grant review of the lower court ruling on narrowly defined presidential challenges involving the transmission of the lawful certificates of ascertainment. Accordingly, if bipartisan support for ECA reform would be more effectively secured by adopting discretionary review, then this seems an altogether reasonable and appropriate “fix.” Moreover, there is an advantage to discretionary review that is appropriately taken into account in considering this change. It allows the Court to deny review of obviously trivial cases and thus disincentivizes strategic use of multiple filings of such cases to slow things down.

A last concern I would note is the time available for the filing and disposition of this action, which is subject to expedited treatment under the current legislative text.

First, it has been pointed out that the 5-day notice of an action against a state official would consume the entire review period. See 28 U.S.C. § 2284(b)(2). This is, again, easy to address.—Congress can eliminate this notice requirement for a presidential (or vice presidential) candidate challenge involving elector certification.

Second, there is the question of whether 6 days is enough time for the expedited review. As a general proposition, federal courts have demonstrated their willingness and ability to adjust their schedules to resolve this type of time-sensitive lawsuit of overriding national interest. Especially given the narrow scope of this kind of action—an action to secure vindication of state legal process, not a fact-intensive inquiry into the accuracy or integrity of the popular vote count—it would seem certain that they would do so in this case as well. Moreover, it is highly likely that the controversies over state

executive action involving a certificate will ripen well before the last day for formal state executive action or inaction such that the time for these suits likely would be longer than 6 days.

Here, too, any concern could be addressed by a slight revision. Congress could consider adding a few days to the process, though I understand that there are considerations on the other side, involving the time required for parliamentarians and other officials to prepare for the January 6 joint session.

The “Failed Election” Question

A second major proposed reform bears on the imperative that presidential elections be decided on rules set in advance and protected against rogue or pre-textual behavior to overturn unwanted popular vote results. This proposed reform addresses problems with provisions of the ECA that reference a “failed election” potentially allowing state legislatures to proceed to appoint electors in place of the voters should they consider an election to have “failed.”

“Failed election” is not defined in the current law. This is dangerous, and the ALI Statement of Principles endorsed the position that this provision be amended to define failed election to include “extraordinary (catastrophic) events, such as a natural disaster,” but “exclude[] the pendency of legal challenges brought against the outcome of the popular vote...” The leading legislative proposals would also amend the provision, though in different ways, to this effect. They would also provide that, in the event of such extraordinary events, the remedy is an extended period of voting, not *post hoc* state legislative intervention to “redo” the election.

The ECRA would allow a state to extend a period of voting, only when “necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to such day.” A line of criticism suggests that this language is unnecessarily vague, giving rise to the possibility for rogue legislative conduct, and that grounds for extended voting periods should be catalogued in the bill’s text. However, states may proceed to legislate in response to this type of amendment, and their determination as to what is, and is not, extraordinary and catastrophic circumstances may vary. The ECRA limits any potential abuse in three ways: any such definition must be established by the state before election day; the remedy for any such circumstances is an extended period of voting, not a legislative appointment of new electors; and, even then, an extended voting period is available only in response to “extraordinary and catastrophic events.”

However, should strengthening or clarifying amendments be deemed appropriate, it seems that these could focus on two key elements:

- That what the state does *not* allow within the meaning of “extraordinary and catastrophic events” is more important for purposes of this bill than what it *does* allow. Congress should not try to specify all the “catastrophic and extraordinary” events that could prevent a vote from being completed on the designated day. But it should erect barriers to block pre-textual behavior, in the name of “extraordinary and catastrophic events,” to discard unwanted popular vote outcomes.
- To this end, the reform might specify that a state-ordered modification of the period of voting must occur prior to the close of polls, before results begin to come in and there is the danger that the state is motivated to modify the voting period for political reasons.

Rules for the Conduct of the Joint Session

Finally, ECA reform provides a clear and practical framework for the Joint Session, reflecting widespread consensus that the ministerial role of the Vice President should be stated expressly and that objections should become materially more difficult to lodge. The ECRA, for example, establishes that the Vice President's role is in the opening, and not the counting, of electoral votes, just as the Twelfth Amendment provides. In addition, given the processes set forth elsewhere in the ECRA to ensure that Congress receives the appropriate certification of electoral votes from each state, the ECRA increases the threshold for objection, requiring 20% of each chamber to sign on to an objection before it is to be considered.

There is one comment on the procedures for the Joint Session with which I would like to close. The ALI Statement of Principles provided that objections should be sharply limited: Those “grounded in explicit constitutional requirements [such as] the eligibility of candidates or electors, the time for the selection of electors, and the time by which electors must cast their votes...” The proposed ECRA would retain language from the current ECA, which allows for the rejection of elector votes not “regularly given.” One criticism now being leveled is that this language reopens the door to popular vote re-counting in Congress, by inviting an objection that an elector's vote is not “regularly given” because the vote by which the elector was chosen was fraudulent or irregular.

There is comfort to be had on this point from the best constitutional scholarship available, and one of the witnesses before the Committee today is a national authority on the constitutional history and appropriate reading of “regularly given.”⁶ Properly understood, the term applies to the action of the electors themselves— not any defect in the underlying popular vote. A reform that retains the language against this background, and with perhaps some elucidation in the legislative history, should allay any concerns about its breath and potential misuse.

More generally, any ambiguity in the basis for permissible objections is largely addressed by the combination of other signal features of proposed reform: the results of state and federal court litigation, including the conclusive effect given to federal court determination of the lawful certificate required from a state, and the increased thresholds for the making and sustaining of objections.

Conclusion

It is heartening that bipartisan support has developed for ECA reform. It is urgent: we should not risk another presidential election cycle under current law. And the pathway to this reform is now clearly illuminated. In considering reform, Congress cannot, as the ALI Statement acknowledged, “address every issue that may arise in the presidential selection process.” But if it adopts the architecture for this reform of the kind now before the Committee, Congress will have accomplished a great deal.

Thank you very much again for the invitation to testify. I look forward to answering your questions or assisting the committee and staff in any other way and at any other time.

⁶ See Derek T. Muller, *Electoral Votes Regularly Given*, 55 GEORGIA L. REV. 1529 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3875509.