



Testimony of

Fred Wertheimer

President, Democracy 21

On Reforming the Electoral Count Act

Submitted to

Senate Rules Committee Hearing On

“The Electoral Count Act: The Need For Reform”

August 3, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Senate Rules Committee, Democracy 21 appreciates the opportunity to submit testimony to the Committee on the essential need to reform two antiquated 19th-century laws that govern the presidential election process.

These laws are the Presidential Election Day Act of 1845 (1845 Act) and the Electoral Count Act of 1887 (ECA), into which the 1845 Act was incorporated.

The Electoral Count Reform Act of 2022 (ECRA), introduced by Senators Susan Collins (R-ME) and Joe Manchin (D-WV) – and representing the work of a bipartisan group of Senators – is important and necessary reform legislation.

But there are also important changes that must be made in the ECRA to ensure the reform legislation effectively accomplishes its goals in preventing future efforts to steal the presidency.

The flaws in the 1845 Act and the ECA were brought into sharp focus by former President Donald Trump's attempted coup to overturn the presidential election in 2020, which Joe Biden had clearly won.

At stake in this reform effort is preserving the foundational concept that has governed our nation since George Washington decided not to run for a third term as President: the peaceful transfer of power.

For more than 200 years, the peaceful transfer of power has been the unwritten rule of our constitutional system of representative democracy. When Richard Nixon in 1960 and Al Gore in 2000 each lost an extremely close election, they honored this defining principle of our democracy.

But, 233 years after the birth of our nation, former President Trump shattered the rule that has served our nation for centuries and has been admired in democracies around the world.

After decisively losing the election, [Trump pursued every avenue he and his collaborators could think up to try to overturn the election result](#). In the process, Trump built a cult following of people who accepted his blatant lie that the election had been stolen from him, despite there being zero evidence for his false claim.

Trump's effort to steal the presidency teaches a vital lesson for the country about what could happen in future presidential elections if the 1845 Act and the ECA are not effectively repaired.

With his attempted coup and his Orwellian campaign about the election being stolen, [Trump cracked open the door for another autocratic, losing candidate in the future to attempt to steal the presidency](#).

That stark reality makes it essential that the ECRA is enacted free of loopholes that could be exploited in another attempt to steal the presidency. Given how close former President Trump came to overturning the 2020 election, there is no room for error in the reform legislation.

Importantly, the ECRA does effectively solve the major problem with the 1845 Act – the potential for a rogue state legislature to override the choice of the voters on Election Day, [an effort that Trump and his collaborators aggressively pursued](#).

[The 1845 Act](#) provides that state legislators can themselves name the presidential electors if they determine that the voters in their state have “failed to make a choice” on Election Day. This undefined language could allow a state legislature to declare – for whatever reason it chooses, including a spurious claim of widespread fraud – that the voters have “failed to make a choice” and then appoint its own presidential electors.

Trump and his hand-picked minion at the Justice Department, Jeffrey Clark, [tried to use the Department to set the stage for precisely such an effort](#), but they were blocked by top DOJ officials who refused to go along with the scheme.

The ECRA solves this dangerous problem by eliminating the “failed choice” option for state legislatures, thereby removing the ability of rogue state legislatures to override the choice of voters in their states and name their own presidential electors.

The ECRA contains other important reforms such as the codification of the long-held understanding that under the Constitution and the ECA, the Vice President has only a ministerial role in presiding over the congressional process of counting the electoral votes.

The ECRA, however, fails to effectively solve other key problems in the 19th-century laws and that failure could allow rogue state officials and rogue Members of Congress to reject the choice of the voters in a presidential election.

If these serious problems are not addressed and solved in the ECRA, Members of Congress must recognize that some future, rogue presidential candidate could use any such available loopholes to seek to overturn the loss of a presidential election. This could happen as early as the 2024 election.

The problems in the ECRA that must be addressed include the following:

- The judicial review process in the bill to check a governor’s improper certification of electors is unworkable;
- The standard for extending Election Day in “extraordinary and catastrophic” circumstances is too broad and gives states too much unchecked discretion; and
- The bill needs clearly enumerated standards that limit the ability of Congress to override a “conclusive” certification of presidential electors by a governor or a court.

The Judicial Review Process

The ECRA empowers a governor or other designated state official, after Election Day, to make a “conclusive” certification of electors, subject to judicial review. It is essential for that judicial review process to be able to deal effectively with a rogue governor’s improper certification of presidential electors or failure to certify any electors at all.

The judicial review process in the ECRA, however, is unworkable.

The ECRA allows a governor to certify the electors as late as six days before the Electoral College meets in mid-December to determine the winner of the election. It also provides for an aggrieved presidential candidate to bring a federal court challenge to a governor's certification (or failure to certify) in an expedited process before a special three-judge district court with a direct appeal to the Supreme Court.

If a rogue governor formally certifies the wrong electors but delays the certification until the deadline just six days before the Electoral College meets (or refuses to certify any electors), the judicial review process in the ECRA will not work.

The process simply does not provide enough time for a legal challenge to the governor's certification to be filed, briefed, argued, and decided by the three-judge court and then appealed, briefed, argued, and decided by the Supreme Court.

All of that cannot realistically happen in six days and thus the appeals process cannot serve its necessary purpose.

A governor's refusal to certify the winning electors in a state is not a fanciful proposition. For example, Kari Lake, currently the leading Republican gubernatorial candidate in Arizona, has said that if she had been governor in 2020 [she would not have complied](#) with the legal responsibility to certify Joe Biden as the winner of the 2020 presidential election in Arizona.

Under the ECRA as presently written, a presidential candidate cannot seek judicial review for a governor's failure to certify until six days before the Electoral College meets.

If Lake had been governor in 2020 and had refused to certify the Biden electors, as she says she would have done, it would have been extremely difficult, if not impossible, for the courts to act on her failure to certify in the six-day period for judicial review provided in the ECRA. This could have resulted in no Arizona electors voting in the Electoral College.

The time frame for judicial review must be expanded.

One way of accomplishing this would be to move back the date of the Electoral College meeting until later in December, leaving more time for judicial challenges between a deadline date for certification by the governor and the date of the meeting of the Electoral College when the electors vote for President.

There is no magic to the current date set by the ECA for the Electoral College to meet in mid-December. The date can be changed by Congress and moved closer to the end of December.

More time must be provided for a realistic judicial review process to be able to take place.

Related to the certification and judicial review process, the ECRA also should require that a governor certify the presidential electors chosen by the voters – an obvious but important legal requirement that is currently lacking and that can also serve as a standard for the courts to use in reviewing a challenge to a certification (or failure to certify) made by the governor.

Extending Election Day

In the course of solving the “failed to make a choice” problem in the 1845 Act, the ECRA created a new problem by providing that a state can extend Election Day if “necessitated by extraordinary and catastrophic events.” But, crucially, it leaves entirely to the states to define what constitutes an “extraordinary and catastrophic” event and provides no date certain by which the extended election must be held.

The standard in the ECRA is clearly intended to include events such as a terrorist attack or a weather-related or other natural disaster on, or near, Election Day.

But it is phrased so broadly and gives states so much unchecked discretion that it also leaves room for the state legislature to pass legislation before an election that would empower a rogue governor or rogue state legislature after an election to declare that claims of supposedly widespread voter fraud on or before Election Day constitutes an “extraordinary” event. This would open the door for manipulating for partisan purposes when and where the extended election would be held.

This problem can be addressed by providing a better-tailored definition of the “extraordinary and catastrophic” circumstances the provision is properly meant to cover, such as by using the term “force majeure,” a [suggestion also made by Andy Craig of the Cato Institute](#) who notes that the term has a well-developed legal definition.

The provision should also explicitly prevent “voter fraud” from being considered an “extraordinary and catastrophic” event. And, the provision should set a date certain by which any extended election must be concluded.

While it might seem farfetched to imagine a governor or state legislature claiming that “voter fraud” is an “extraordinary and catastrophic” event, the 2020 election and its aftermath showed the nation that there is no scheme too farfetched for a Trump or Trump-like nominee to undertake in attempting to steal a presidential election.

Standards For Congress To Apply

The ECRA provides that the certification of presidential electors by a governor or other designated state official shall be “conclusive.” It also provides an exception to this finality: if a reviewing court finds that the governor’s certification was in error, the court has the authority to require a revised certification to be issued and that certification is then “conclusive.”

But the ECRA also allows Congress, when counting the electoral votes, to reject a “conclusive” certification by a governor or a court and instead find that the electors from a state were not “lawfully certified” or that their votes were not “regularly given,” two terms in the current ECA that the proposed legislation does not change or define.

These various provisions of the ECRA are contradictory, as also pointed out by Andy Craig of the Cato Institute. In other words, the ECRA appears to say that the certification given by a governor or by a court is “conclusive” unless and until Congress finds it is not. The broad and ill-

defined standards to allow Congress to override a “conclusive” certification by a governor or a court – not “lawfully certified” or “regularly given” – are easily subject to abuse.

In order to prevent rogue Members of Congress from overriding a “conclusive” state certification of electors, we share the view expressed by [Craig of the Cato Institute](#) that the ECRA “should clearly enumerate the constitutionally valid reasons Congress might reject a vote,” and that these standards should be the only basis for Congress to override a “conclusive” state certification.

There are other technical changes that should also be considered as the Senate proceeds with its review of the ECRA.

For instance, the three-judge court statute, [28 U.S.C. § 2284\(b\)\(2\)](#), has a five-day notice requirement that should be waived (or shortened) for purposes of the judicial review provisions in the ECRA which, even if the time period for judicial review in the bill is expanded, as is necessary, may not be adequate to accommodate a five-day notice requirement.

Also, an existing jurisdictional statute relating to federal elections, [28 U.S.C. § 1344](#), should be repealed. That statute provides that federal courts may not hear cases “to recover possession of any office.” But it has been construed in certain Circuits to displace general grants of federal jurisdiction in election cases, thus depriving federal courts in those Circuits of all jurisdiction to hear federal election-related cases. This could be interpreted, for example, to include federal court review of a state governor’s certification of presidential electors. Repealing Section 1344 would clarify federal court jurisdiction for election matters and bring uniformity on this question to all Circuits.

Finally, it is unfortunate that that none of the essential provisions in the Freedom to Vote: John R. Lewis Act have been enacted or included in proposed legislation for consideration by the Senate. These provisions would have overridden the unprecedented state voter suppression and election sabotage laws enacted since 2020 and thereby would have protected the right of every eligible citizen to vote and have their vote properly counted. That vitally important Act was killed by a Senate filibuster in January.

The ECRA is necessary legislation to address the serious problems in two antiquated 19th-century laws, including the dangerous “failed election” provision in the 1845 Act.

It is not enough, however, to eliminate the ability of rogue state legislatures to override the will of the voters expressed on Election Day, but then leave room for rogue governors or rogue Members of Congress to accomplish that same result.

The ECRA must be revised in order that the final reform legislation passed by Congress ensures that all of the existing problems in the 19th-century laws are effectively resolved, but in a way that does not create new ones.

Congress must act now to ensure a Trump-like effort to steal a presidential election cannot be successful in the future.