

Congress Must Update the Electoral Count Act to Guard Against Crises During Future Presidential Elections

America's ability to peacefully elect and inaugurate a president and vice president every four years is a hallmark of our democratic republic. Stable transitions of executive power define American governance, maintain our national security in times of change, and set the United States apart from countries in which elections are merely for show.

This American tradition is far too vulnerable to misunderstanding and manipulation. The federal law governing the casting and counting of electoral votes—the [Electoral Count Act of 1887](#)—is severely flawed and can no longer be relied upon to ensure a peaceful conclusion to presidential elections.

The Electoral Count Act (ECA) sets the timeline for states to appoint presidential electors in November and for electors to cast their votes in December; describes the process that Congress should follow when it counts the states' electoral votes in January; and explains how Congress should resolve disputes as to whether a slate of electors from a state (or which slate of electors, if there's more than one) should be counted. It does so, however, in terms that are often confusing and in language that has become arcane. It also leaves too much room for misuse. (For more information about the statute, see the Task Force's paper, [The Electoral Count Act & The Process of Electing a President](#).)

In its January 2021 [post-election report](#) and July 2021 [update](#), the nonpartisan National Task Force on Election Crises urged Congress to modernize the ECA so that it can provide a workable, durable framework for future elections.

The Task Force now reiterates in the strongest possible terms that Congress must act—well before 2024—to protect the country from an unprecedented constitutional crisis in the next contested presidential election.

Specifically, Congress must exercise its constitutional authority under Article II and the Twelfth Amendment to rectify several deficiencies in the Electoral Count Act's 130-year-old text:

- **Election Timing.** 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.¹

¹ For additional background on "failed" elections under current law, see the Task Force's paper, [A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election](#).

- **State Determinations.** 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 second-guessing by 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).
- **Vice President’s Role.** 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.
- **Objections.** The ECA must also make clear that Members of Congress may not simply substitute their own political 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.
- **Dispute Resolution.** Finally, 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.

In the 2020 election, the gaps and ambiguities in the Electoral Count Act exposed the country to uncertainty and turmoil, and nearly precipitated an even greater crisis. By making the improvements outlined above, Congress would eliminate the overwhelming majority of those risks and take an important step toward restoring Americans’ trust in the integrity of our elections.

Importantly, these updates would convey no partisan advantage or disadvantage: no party, faction, or bloc stands to gain in any predictable way from modernizing the ECA now, well before the 2024 election landscape has begun to take shape.

The Task Force is dedicated to the prevention and mitigation of election crises. In our view, modernizing the ECA may well be the single most important step Congress can take to prevent a crisis in the next contested presidential election.

About the National Task Force on Election Crises

The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The Task Force's mission is to prevent and mitigate a range of election crises by calling for critical preventative reforms to our election systems. The only electoral outcomes the Task Force advocates for are free, fair, and safe elections in the United States.