

# The Electoral Count Reform Act and the Process of Electing a President

When Americans vote for president of the United States, they are actually voting to appoint their chosen candidate's slate of electors to vote in the Electoral College. Article II and the 12th Amendment of the Constitution establish the system for U.S. voters to elect the president indirectly, through the Electoral College. In 1887, Congress enacted the Electoral Count Act (ECA) to guide states and Congress in administering the presidential election process and counting electoral votes.

The 2020 presidential election and its aftermath highlighted the importance of this antiquated law and also its limitations. Despite attempts to exploit and break this law, the system held and Congress completed its count of the correct electoral votes to formalize President Biden's victory. Afterwards, Congress rallied on a bipartisan basis to update the law. Building on work in both chambers, a bipartisan group of senators crafted the Electoral Count Reform Act (ECRA) that became law in late 2022 as part of an omnibus spending bill (P.L.117-328).

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## Key Provisions of the Electoral Count Reform Act

U.S. presidential elections play out in a unique sequence of procedures that involve both state and federal actors. For more than a century, all states have used a popular vote system to determine which presidential candidate will be awarded the state's electoral votes in presidential elections.<sup>1</sup> After the popular votes are counted, the governor or other designated state executive certifies the winning slate of electors and these electors go on to cast their votes in the "Electoral College" – actually a series of meetings held on the same day in all 50 states and the District of Columbia – in mid-December (December 17 this election). Those electoral votes are then sent to Congress, where the House and Senate meet in joint session on January 6 to count the electoral votes. The Vice President, as President of the Senate, presides over the session.

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<sup>1</sup> National Task Force on Election Crises. "[A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election.](#)"

The ECRA modernized the 19th century version of this process to reduce ambiguity and potential for abuse. The thrust of the changes is to ensure that each state certifies and transmits to Congress one, correct slate of presidential electors by the federal deadline, and that Congress and the Vice President play appropriate, circumscribed roles in counting the electoral votes at the joint session of Congress.

The key changes are summarized below.

## Changes to the process in the states

- **The ECRA specifies that the voters must select the state’s electors on Election Day (November 5 in 2024) pursuant to the rules in place on that day.** This means the state legislature cannot change state election laws after Election Day. The only potential exception would be “extraordinary and catastrophic” circumstances that might force a modification to extend the voting period. Any such change must be made in conformity with state laws enacted prior to Election Day. As key sponsor Sen. Susan Collins explained, this exception is limited to rare circumstances such as “catastrophic natural disasters, terrorist attacks, or similar calamities.”<sup>2</sup> This “election emergencies” provision replaced a vaguer provision in prior law that was intended to address such extreme circumstances, but which some commentators had wrongly argued allowed states to appoint electors by other means after Election Day if they simply declared an election “failed.”<sup>3</sup>

- **The ECRA clarifies that the governor is the official who certifies the appointment of electors unless state law specifically grants that duty to another state executive in advance and sets a deadline for certification.** The ECRA creates an affirmative duty for the state executive to certify those electors in a “certificate of ascertainment” by the specified deadline (the second Wednesday of December - which in 2024 falls on December 11).<sup>4</sup> Congress is directed to treat that certificate as “conclusive.” If states fail to meet the ECRA’s requirement to certify their results on time and consistent with state and federal law, they risk potentially not having their electoral votes counted absent court intervention—although ECRA provides an expedited judicial procedure to require certification pursuant to law by the day before the electors meet (see below). This strengthens previous language that encouraged, but did not require, states to complete their certification of electoral votes by a “safe harbor” deadline.

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<sup>2</sup> Congress.gov. “Congressional Record.” September 24, 2024.

<https://www.congress.gov/congressional-record/volume-168/issue-199/senate-section/article/S9765-2>

<sup>3</sup> The earlier provision had been found at 3 U.S.C. § 2 and has now been removed. It provided that if a state held an election but somehow “failed to make a choice” on Election Day, the state legislature could choose the manner of appointing electors on a subsequent day. It was meant to accommodate run-off elections and extreme weather conditions that sometimes prevented the completion of elections on a single day.

<sup>4</sup> This deadline falls one day later than the previous safe harbor deadline.

The law also directs that the certificate of ascertainment include at least one security feature and be expeditiously transmitted to the Archivist of the United States, as well as to the state's electors for the winning candidate on or before the day they are scheduled to vote.

- **The new law creates an expedited pathway in federal court for legal challenges concerning the state executive's duty to issue and transmit the certificate of the appointed electors.** Specifically, an aggrieved candidate for President or Vice President can bring federal claims with respect to the issuance of the certificate or its proper transmission before a three-judge district court composed of two judges from a federal circuit court of appeals and one from a federal district court.<sup>5</sup> The ECRA also provides for a discretionary appeal from the three-judge court directly to the U.S. Supreme Court. The law calls for expedited procedures such that a final determination, including any potential Supreme Court decision, will occur before the Electoral College meets in each state (in 2024 on December 17). If a federal or state court determines that the facts of the election results require certification for a different candidate than the one reflected in the state executive's certification (or if there was no prior certification), then the court's ruling will be conclusive as to which slate of electors casts ballots in the Electoral College on the designated date.

- **The ECRA shifts the designated date for the presidential electors to meet and vote one day later, to the first Tuesday (rather than the first Monday) after the second Wednesday in December. In 2024 that date falls on December 17.**

### Changes for the Joint Session of Congress

The Constitution directs that Congress meet in a joint session to count electoral votes. The original Electoral Count Act added a series of rules, providing guidance on how objections could be raised and considered. The law directed Congress to hold the joint session on January 6 and laid out a framework for lawmakers to raise and debate any objections to the electoral votes.

The ECRA maintains the basic structure of that process but updates those rules in several key respects.

- The new law underscores that the Vice President's role in overseeing the counting is only "ministerial." The 12th Amendment says only that the 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 ECRA implements this provision by stating explicitly that this role is "solely ministerial" and that the Vice President "shall have no power to solely determine, accept, reject, or otherwise

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<sup>5</sup> 3 U.S.C. §5(d)

adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors.”<sup>6</sup>

- The 1887 law allowed, in some circumstances, for multiple slates of electors to be considered in Congress and for members of Congress to object to one or more of a state’s electoral votes so long as the objection was made in writing and signed by at least one member of the House and one member of the Senate. The new law is designed to make clear what is the one valid set of a state’s electoral votes that is conclusive upon Congress. It also raises the objection threshold to require one-fifth of the members of each chamber to support an objection for it to be considered. Once such an objection is made, the chambers would then divide to debate the matter for up to two hours. It takes a majority vote in each chamber to uphold an objection and both chambers must do so for the electoral votes in question to be rejected once lawmakers resume the joint session.<sup>7</sup> This process is repeated for as many states as needed if there are valid objections made. All objections to a given state’s electors must be addressed in the same two-hour session.

- The ECRA permits only two grounds for objections: that electors were “not lawfully certified” or that the vote of one or more electors was not “regularly given.”<sup>8</sup> These are narrow categories. As Senator Collins explained, “not lawfully certified” is limited to ensuring that the appointment is lawful under the terms of the ECRA. The “not regularly given” objection is focused on a specific set of post-election problems or controversies, such as an electoral college vote cast in the wrong form or that was the product of bribery or coercion.<sup>9</sup> Neither objection category extends to disputes about alleged fraud or defects in a state’s general election processes. The ECRA makes clear that such disputes are to be resolved under orderly processes under state and federal law long before the joint session of Congress meets.

- The ECRA also clarifies how to calculate a majority for purposes of confirming the winner when Congress counts the electoral votes. If a state submits fewer electoral votes than the number of electors the state is entitled to, or if any of a state’s electoral votes are rejected as not lawfully certified, that number will be subtracted from the denominator for purposes of determining a winning majority under the 12th Amendment.<sup>10</sup>

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<sup>6</sup> 3 U.S.C. §15(b)

<sup>7</sup> 3 U.S.C. §15(d)(2)(C)

<sup>8</sup> 3 U.S.C. §15(d)(2)(B)(ii)

<sup>9</sup> Congress.gov. “Congressional Record.” September 24, 2024.

<https://www.congress.gov/congressional-record/volume-168/issue-199/senate-section/article/S9765-2>.

<sup>10</sup> 3 U.S.C. §15(e)(2)

## Conclusion

The ECRA reflects a bipartisan, bicameral commitment to uphold a fair process for casting and counting electoral votes, and to recognize the valid winner of the presidential election. While no law can stop people from mounting bad-faith efforts to subvert the election, the ECRA has made such an effort much less likely to succeed by removing ambiguities and perceived flaws in the 1887 law. Importantly, Republican and Democratic members of the U.S. Congress updated this law behind a veil of ignorance before the glare of the 2024 presidential election. Elections are run in accordance with rules. Agreement on the rules before elections take place is a cornerstone of elections functioning. Going forward, it is important that all stakeholders recognize and properly implement these strengthened procedures in the 2024 presidential election to respect the will of the voters.

### ***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 mission of the nonpartisan National Task Force on Election Crises is to ensure free and fair elections by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except elections that are free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.*