

**TESTIMONY OF  
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**HEARING ON  
THE ELECTORAL COUNT ACT: THE NEED FOR REFORM**

**UNITED STATES SENATE COMMITTEE ON RULES AND  
ADMINISTRATION**

**AUGUST 3, 2022**

Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Committee:

Thank you for inviting me to testify today on the Electoral Count Act of 1887 (“ECA”) and the need for reform.

That need is profound. The flaws in the ECA were on stark display in the attempted overthrow of the 2020 election results. Indeed, as I will discuss, their exploitation was a central part of the alleged conspiracy now under criminal investigation by federal and state authorities. The U.S. previously had a long record of peacefully transferring presidential power. That ended on January 6, 2021. The ECA’s flaws played a role in that breach—and the risk of undemocratic or violent efforts to seize power has not ended. As Vice Chair of the Select Committee to Investigate the January 6th Attack on the United States Capitol, Liz Cheney, warned, “it’s an ongoing threat,” and Americans “must understand how easily our democratic system can unravel if we don’t defend it.”<sup>1</sup> Reforming the ECA is essential to preventing a recurrence of the chaos we saw on January 6, 2021—or worse.

S. 4573, the *Electoral Count Reform and Presidential Transition Improvement Act of 2022* (“ECRA”)<sup>2</sup> is a significant effort to make badly-needed reforms. Introduced on July 20, 2022 by Senators Susan Collins and Joe Manchin, the ECRA is the result of thoughtful bipartisan negotiations. It is a good thing when leaders in both parties work together to find solutions to our nation’s most pressing concerns.

The result of their labor is a step forward on fixing the ECA—indeed, several steps forward. The ECRA makes key improvements such as striking the vague and dangerous failed election provision, clarifying that the role of the Vice President during the counting of electoral votes in Congress is purely ministerial, and raising the threshold for objections in Congress.<sup>3</sup>

These improvements, however, are not the sole matters that this Committee should confront, particularly at the first stage of the legislative process. We must also ask, does the initial form of the ECRA effectively respond to the many weaknesses in the ECA that were revealed in the campaign to overthrow the 2020 election—and to the ongoing risk of such attacks in 2024 and beyond.

In that regard, it is my view the Committee should build upon the foundation that the bipartisan negotiators have laid. As I detail below, there is room for improvement of a number of the provisions in the ECRA. Otherwise, we may actually create greater uncertainty in key aspects of counting electoral votes and invite unwelcome manipulation.

I believe that the Committee should focus its attention on the following four areas.

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<sup>1</sup> *Liz Cheney: Jan. 6 ‘conspiracy’ was ‘extremely broad...well-organized,’* CBS Sunday Morning (June 5, 2022), <https://www.cbsnews.com/news/liz-cheney-january-6-insurrection-conspiracy-to-overturn-election-was-extremely-broad-well-organized/>.

<sup>2</sup> *Electoral Count Reform and Presidential Transition Improvement Act of 2022*, S. 4573, 117th Cong., 2nd Sess. (2022) (“ECRA”).

<sup>3</sup> ECRA makes key improvements such as striking the failed election provision, clarifying that the role of the vice president is purely ministerial and raising the threshold for objections in Congress. On this latter change, ECRA sets the threshold at one-fifth of each chamber. The exact number is art not science but to intensify protections against manipulation attempts. I would set the level even higher, at one-fourth or one-third of each chamber.

First, there is the provision in section 102 of the ECRA that allows the extension of election day due to “extraordinary and catastrophic events.” The phrase “extraordinary and catastrophic events” should be better defined to avoid manipulation by the election denying officials now running to take control of the electoral process. As of July 28 of this year, there are still 26 election deniers running for governor, 15 running for attorney general, and 20 running for secretary of state.<sup>4</sup>

Second, adjustments must be made to the scant six-day window for federal litigation under the ECRA. There must be adequate time for any federal litigation should governors or others wrongly certify or refuse to certify electors or otherwise abuse the process. Six days is insufficient.

Third, to strengthen safeguards when the process moves to Congress, the Committee should consider clarifying the grounds for objection by replacing undefined and malleable terms preserved from the current ECA such as “lawfully certified” and “regularly given”—terms which have been a proven source of abuse in the past.<sup>5</sup>

Fourth and finally, we must provide clear procedural rules for the Congressional electoral count so that gaps and ambiguities that are carried over in the ECRA are not used to foment the kinds of chaos we saw on January 6, 2021.

These or similar concerns are shared by others, including two of our nation’s most distinguished constitutional scholars, Professor Laurence Tribe and Professor Erwin Chemerinsky, as well as by the dean of Washington reformers, Fred Wertheimer of Democracy 21, and by the constitutional scholar Thomas Berry of the libertarian Cato Institute.<sup>6</sup>

Before discussing the changes that I believe are needed to the ECRA, I think it is important to analyze the risks we face. I now turn to the events of January 6, its run up, and its aftermath.

### **The 2020 Election and the Fire Next Time**

U.S. District Court Judge David Carter has described the actions that led to the January 6 attack on the Capitol as “a coup in search of a legal theory.”<sup>7</sup> And when those responsible for January 6 started crafting that legal theory, they turned in part to the Electoral Count Act.

In his March 2022 ruling, Judge Carter sketched out the lines of that attempted coup, which the January 6 Committee has since developed over the course of its public hearings.<sup>8</sup> Led by former President Donald Trump, the plotters engaged in a sweeping effort to block the recognition of the

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<sup>4</sup> See Replacing the Refs, States United Democracy Center (July 29, 2022), <https://statesuniteddemocracy.org/resources/replacingtherefs/>.

<sup>5</sup> See *Counting Electoral Votes--Joint Session Of The House And Senate Held Pursuant To The Provisions Of Senate Concurrent Resolution 1*, 117th Cong. (2021).

<sup>6</sup> Laurence H. Tribe, Erwin Chemerinsky, & Dennis Aftergut, *The Electoral Count Act must be fixed. A new proposal doesn't go far enough*, The Washington Post (Aug. 1, 2022), <https://www.washingtonpost.com/opinions/2022/08/01/electoral-count-reform-act-suggested-changes/>; See also Fred Wertheimer, *Collins-Manchin Bill Repairs Flawed 19th-Century Presidential Election Laws, But Important Changes In Bill Are Needed*, Democracy21 (July 28, 2022); Thomas A. Berry, *Some Potential Improvements to the Electoral Count Reform Act*, Cato at Liberty (July 27, 2022, 2:11 P.M.), <https://www.cato.org/blog/some-potential-improvements-electoral-count-reform-act>.

<sup>7</sup> Order Re: Privilege of Documents Dated January 4-7, 2021 at 44, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 28, 2022), ECF No. 260.

<sup>8</sup> *Id.* See also *06/16/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

legitimate electors of his opponent, Joe Biden. That included advancing a pernicious campaign of lies and disinformation about the election,<sup>9</sup> filing or encouraging over 60 baseless lawsuits (all but one of which were dismissed and none of which established electoral fraud),<sup>10</sup> pressuring governors, secretaries of state and state legislative leaders to betray their duties under applicable law,<sup>11</sup> and urging members of the federal government, including at the United States Department of Justice<sup>12</sup> and in Congress,<sup>13</sup> to do the same.

A central part of this plan was an attack on the electoral certification process by exploiting the ambiguities or gaps in the ECA. The former president and those associated with him sought to advance competing slates of false Trump electors in seven key states that President Biden had legitimately won. This scheme has not only featured prominently in the January 6 Committee hearings<sup>14</sup> but also is at the center of both the federal and state criminal investigations.<sup>15</sup>

Those electors met on December 14 and advanced certificates that falsely proclaimed Trump the winner of the vote.<sup>16</sup> The gatherings were often surreptitious,<sup>17</sup> and one plotter admitted in writing that these were “fake” electors.<sup>18</sup>

All of these efforts were to set up the second step in an effort to exploit the ECA. The goal was for Vice President Pence to utilize the false slates to impede the January 6th meeting of Congress and frustrate the recognition of the electors of the genuine winner.<sup>19</sup>

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<sup>9</sup> See, e.g., Daniel Dale, *10 Trump election lies his own officials called false*, CNN Politics (June 16, 2022), <https://www.cnn.com/2022/06/16/politics/fact-check-trump-officials-testimony-debunking-election-lies/index.html>.

<sup>10</sup> See, e.g., William Cummings et al., *By the numbers: President Donald Trump's failed efforts to overturn the election*, USA Today News (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

<sup>11</sup> See *06/21/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

<sup>12</sup> See *06/23/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

<sup>13</sup> See, e.g., Rachael Bade et al., *Trump pressures congressional Republicans to help in his fight to overturn the election*, The Washington Post (Dec. 10, 2020), [https://www.washingtonpost.com/politics/trump-republicans-biden-election/2020/12/09/abd596ea-3a4e-11eb-9276-ae0ca72729be\\_story.html](https://www.washingtonpost.com/politics/trump-republicans-biden-election/2020/12/09/abd596ea-3a4e-11eb-9276-ae0ca72729be_story.html).

<sup>14</sup> See *06/16/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022). See also *06/23/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

<sup>15</sup> See, e.g., Alan Feuer & Maggie Haberman, *Justice Dept. Issues More Subpoenas in Trump Electors Investigation*, The New York Times (June 22, 2022), <https://www.nytimes.com/2022/06/22/us/politics/justice-dept-jan-6-subpoenas.html>; Zachary Cohen, *Georgia prosecutors say all 16 fake electors are targets in criminal probe*, CNN (July 19, 2022), <https://www.cnn.com/2022/07/19/politics/georgia-grand-jury-trump-electors/index.html>.

<sup>16</sup> See, e.g., Aaron Blake, *The significance of Trump's fake electors, explained*, The Washington Post (June 7, 2022), <https://www.washingtonpost.com/politics/2022/06/07/significance-trumps-fake-electors-explained/>.

<sup>17</sup> See, e.g., Amy Gardner, Beth Reinhard, Rosalind S. Helderman, & Jacqueline Alemany, *Fake Trump electors in Ga. told to shroud plans in 'secrecy,' email shows*, The Washington Post (June 6, 2022), <https://www.washingtonpost.com/politics/2022/06/06/fake-trump-electors-ga-told-shroud-plans-secrecy-email-shows/>.

<sup>18</sup> Maggie Haberman & Luke Broadwater, *'Kind of Wild/Creative': Emails Shed Light on Trump Fake Electors Plan*, The New York Times (July 26, 2022), <https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html>.

<sup>19</sup> See, e.g., Aaron Blake, *An intriguing new detail on Trump's 'fake' electors*, The Washington Post (July 26, 2022), <https://www.washingtonpost.com/politics/2022/07/26/trump-fake-electors-arizona/>.

As it became clear on January 6 that the Vice President would refuse to go along and would, instead, perform his duty under the constitution and the ECA, the former president incited a mob he knew to be armed to attack the Capitol.<sup>20</sup> Indeed, the January 6 Committee has presented evidence that he wanted to march with them, erupted in anger when he could not, agreed with their chants to “hang Mike Pence,” targeted his Vice President with an inflammatory 2:24 pm tweet that was read to the mob on a bullhorn, and failed to take affirmative steps to stop the violence for 187 minutes.<sup>21</sup>

Only the heroic efforts of law enforcement officers and the bravery of the Vice President, our elected representatives and other government officials prevented this horrific explosion of violence from doing even more damage to the very core of the American democratic system. Despite all that, 147 Members of Congress voted to reject one or more slates of legitimate electors.<sup>22</sup>

January 6 has passed but the danger has not. Trump continues to attack the 2020 election and threaten future ones.<sup>23</sup> Many of those who supported the 2020 coup attempt remain active in the election denial movement.<sup>24</sup> Trump has inspired hundreds of election-denying candidates and bills from coast to coast.<sup>25</sup> They make no secret of their plan for future elections, including the 2024 presidential one: change the referees and change the rules so they can change the results.<sup>26</sup> In the words of Republican Congressman and January 6 Committee Member Adam Kinzinger, “the forces Donald Trump ignited that day [January 6] have not gone away. The militant, intolerant ideologies—the militias, the alienation, and the disaffection—the weird fantasies and disinformation. They’re all still out there, ready to go.”<sup>27</sup> In that sense, the coup has not ended, only gone into hibernation, ready to reemerge.

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<sup>20</sup> See Martin Pengelly, *Trump knew crowd at rally was armed yet demanded they be allowed to march*, The Guardian (June 28, 2022), <https://www.theguardian.com/us-news/2022/jun/28/trump-jan-6-rally-guns-capitol-attack>. See also Philip Bump, *Trump put Pence in more danger than we knew*, The Washington Post (June 16, 2022), <https://www.washingtonpost.com/politics/2022/06/16/trump-put-pence-more-danger-than-we-knew/>.

<sup>21</sup> *06/28/22 Select Committee Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022). See also *07/21/22 Select Committee Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

<sup>22</sup> See Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, The New York Times (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>.

<sup>23</sup> See, e.g., Jill Colvin, *Trump repeats false election fraud claims during speech in Washington*, PBS (July 26, 2022), <https://www.pbs.org/newshour/politics/trump-repeats-false-election-fraud-claims-during-speech-in-washington>.

<sup>24</sup> See, e.g., Heidi Przybyla, *Despite rebukes, Trump’s legal brigade is thriving*, Politico (July 5, 2022), <https://www.politico.com/news/2022/07/05/trump-maga-lawyers-00043917>.

<sup>25</sup> See *Replacing the Refs*, States United Democracy Center (July 29, 2022), <https://statesuniteddemocracy.org/resources/replacingtherefs/>. See also *Voting Laws Roundup: May 2022*, Brennan Ctr. for Just. (May 26, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022>.

<sup>26</sup> *Id.*

<sup>27</sup> *07/21/22 Select Committee Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022) (statement of Adam Kinzinger, Minority Member, The Select Comm. to Investigate the January 6th Attack on the United States Capitol).

## **The Solution: Building on the Reforms**

We must measure the reforms the ECRA proposes against that ongoing threat to our democracy—considering the threat next time, not just the threat last time. As that noted strategist Wayne Gretzky once said, “skate to where the puck is going to be, not where it has been.” If 2020 showed us anything, anti-democratic forces can and will try to exploit any and every ambiguity in the law. We should assume future efforts will be even more intense.

Bearing that in mind, I will now detail four areas of ECRA revisions that would help remove textual ambiguity, curtail opportunities for mischief and manipulation, and resolve additional problems. This limited list of changes should not be construed as exhaustive. There are several other issues—large and small—identified by a cross-partisan array of scholars and observers that merit further consideration.<sup>28</sup> I have elected to focus on the four discrete issues which, if resolved, would make measurable improvements in the bill.

### **(1) “Extraordinary and catastrophic events” must be defined**

In the case of a “failed” election, current federal law allows states broad, and even frightening, leeway in selecting presidential electors. Specifically, 3 U.S.C. § 2 provides that:

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

But the ECA fails entirely to define the term “failed to make a choice.”<sup>29</sup> We saw how the ambiguity of the “failed” election provision could be exploited in the aftermath of the 2020 election when Trump and his allies tried to pressure legislatures in states won by President Biden to throw out their state’s votes and overturn the 2020 election.<sup>30</sup> To this day, the North Carolina state legislature still has in place a law that grants it unfettered authority to replace electors in the event that a certification is not issued by the governor prior to the safe harbor date outlined in the ECA.<sup>31</sup>

Left unchanged, this loophole could allow a state legislature to usurp the will of voters and replace the presidential electors they selected with electors chosen after the election by the legislature. That would be possible in the event that the legislature determined, on whatever arbitrary grounds they chose, that the voters “failed to make a choice.”<sup>32</sup>

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<sup>28</sup> See, e.g., Berry, *supra* note 6; Wertheimer, *supra* note 6; Tribe, Chemerinsky, & Aftergut, *supra* note 6.

<sup>29</sup> 3 U.S.C. § 2. This provision was originally codified as part of the Presidential Election Day Act of 1845.

<sup>30</sup> See, e.g., The Electoral Count Act of 1887: Proposals for Reform, Comm. on House Admin. at 18 (Jan. 2022, 117th Cong., 2nd Sess.) (citing Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. Times (Jan. 5, 2021), <https://www.nytimes.com/article/electors-vote.html>). See also *Petition for Writ of Certiorari* at 23, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451, 209 L. Ed. 2d 172 (2021) (citing 3 U.S.C. § 2).

<sup>31</sup> See the Electoral Count Act of 1887: Proposals for Reform, Comm. on House Admin. at 18 (Jan. 2022, 117th Cong., 2nd Sess.) (citing N.C. Gen. Stat. Ann. § 163-213(a)).

<sup>32</sup> 3 U.S.C. § 2.

The legislative history of this section indicates that it aimed to provide guidelines for states wherein a sudden natural disaster potentially necessitated a runoff.<sup>33</sup> A clarification of the provision’s scope would help avoid future controversies. The ECRA attempts to provide that clarification by striking the existing language of 3 U.S.C. §§ 1 and 2 and replacing both with newly drafted language:

(1) ‘election day’ means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting as necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to such day, ‘election day’ shall include the modified period of voting.<sup>34</sup>

By narrowing 3 U.S.C. § 2 to capture only genuine “catastrophic events” and by striking the language empowering state legislatures to appoint electors in the event of a “failure to make a choice,” the ECRA works to fetter state legislatures’ authority. On that score, this new language is an important improvement over current law.

Although the ECRA solves an important problem in this area, the proposal creates another. As Fred Wertheimer has pointed out,<sup>35</sup> the bill undercuts its attempt to narrow the failed election provision by relying upon a new set of vague terms and leaving them to be defined, presumably, by state law. The ECRA does so by connecting the definition of “extraordinary and catastrophic events” to a definition “provided under laws of the state enacted prior to such day.” States are unlikely to adopt the exact same definitions for these terms. Consequently, a number of obvious practical issues will likely ensue. In one state, for example, a large hurricane could trigger an extension of the election. But in a neighboring state that has codified a different definition for “catastrophic event,” that same hurricane might not trigger the extension of the election. Or, in this same scenario, the first state may say the election is extended for twenty days, while the other might only allow for a five or even no-day extension. Practical issues such as these will not only cause confusion. They may also nefariously impact the results of presidential elections.

The capacious language may invite the very same type of exploitation by bad-faith state legislatures the ECRA’s drafters sought to resolve—that is, their unlawful interference in the election. Given the creativity and brazenness of anti-democracy actors, we should all be alert to how this new provision could be exploited. For example, the relevant state law might say that extensive voter fraud (or even mere suspicions about it) can count as a “catastrophic” event.” Or state legislatures may not provide the narrowing definitions that the bill’s drafters expect them to, instead codifying their own vague definitions to provide partisan state actors leeway to manipulate election outcomes in real time.

As the bill is currently written, Congress has no power to prevent bad actors from extending their state’s election under the guise of baseless fraud allegations or from prohibiting the extension of

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<sup>33</sup> See Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 Wash. & Lee L. Rev. Online 179, 185-191 (2020).

<sup>34</sup> ECRA § 102 (emphasis added).

<sup>35</sup> Wertheimer, *supra* note 6.

an election only in certain precincts in order to maximize partisan outcomes. The bill, in sum, presents the opportunity for mischief.

But this issue is not without a remedy. Congress can use its constitutional authority to set the timing of presidential elections to craft the applicable definitions for these new standards in the statute.<sup>36</sup>

I respectfully disagree with commentators who assert that “extraordinary and catastrophic events” is too limiting a term to encompass “‘fraud’ and related ideas as a triggering event to alter the outcome of the vote.”<sup>37</sup> I wish there were a basis in the bill to be so confident. But the phrase “extraordinary and catastrophic events” is only limited to the extent “provided under laws of the State.” And, critically, the bill does not limit what those state laws should provide. The risk of abuse must be better addressed.

These concerns are not hypothetical. The recent wave of state legislation aimed at suppressing or interfering with the voting process should convince us of this. Indeed, since the 2020 election state legislatures across the country have introduced and passed a slew of “election interference” laws. These laws target local elections officials and the rules they rely upon to govern elections administration and enforcement and to ensure the will of the people is reflected. According to a States United report, by the end of the first quarter of this year 229 bills that would allow legislatures to “politicize, criminalize, or interfere with elections” had been introduced in 33 states.<sup>38</sup> Eighteen of those have already been enacted or adopted. The agenda of partisan election-denier state actors—which has been evidenced by the proliferation of election-interfering bills—poses a risk given the ECRA’s configuration basing the election-extension trigger on state law.

This section of the ECRA should reflect Congress’ intent when it was originally drafted in the ECA<sup>39</sup> to ensure the franchise is not hindered by natural disasters, terror attacks, and similar force majeure events. Without question, the definitions of those extension-triggering events will need to be carefully drafted. Without those revisions, the current bill presents a serious opportunity for manipulation.<sup>40</sup>

## **(2) The ECRA-related federal litigation provision should be further developed**

The current ECA allows for the possibility that a state submits “dueling slates” of electors. The plan to interfere with the elector count on January 6, 2021, hinged upon this dueling slates concept.

The ECRA attempts to close the dueling slates loophole (among others) by: (1) creating a deadline for the “executive of each state”—in most cases, the governor—to issue and transmit the certificate

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<sup>36</sup> See U.S. Const. art. II, § 1, cl. 4 (“The Congress may determine the **Time** of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”) (emphasis added).

<sup>37</sup> Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, Lawfare (July 24, 2022, 4:09 P.M.), <https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act>.

<sup>38</sup> *A Democracy Crisis in the Making*, States United Democracy Center (May 2022), [https://statesuniteddemocracy.org/wp-content/uploads/2022/05/DCITM\\_2022.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2022/05/DCITM_2022.pdf).

<sup>39</sup> See Morley, *supra* note 33 at 183 (“The legislative history of the federal Election Day statute for presidential electors demonstrates that Congress specifically intended to allow legislatures to hold such elections at a later date when necessary to respond to unexpected emergencies and natural disasters”). See also Thomas Berry & Genevieve Nadeau, *Here’s What Electoral Count Act Reform Should Look Like*, Lawfare (Apr. 4, 2022), <https://www.lawfareblog.com/heres-what-electoral-count-act-reform-should-look>.

<sup>40</sup> Wertheimer, *supra* note 6.



of ascertainment appointing electors, (2) giving that certificate conclusive status at the electoral count, and (3) providing a judicial remedy in case the governor (or other applicable authority) fails to fulfill this duty in a lawful manner.<sup>41</sup> The governor's obligation to issue and transmit the certificates under the ECRA thus attempts to ensure that each state submits timely, accurate electoral appointments to Congress and removes the possibility of a "dueling slate." Congress, theoretically, would only receive one, accurate certificate of appointment from each state and would not need to consider competing or "alternate" electoral appointments or votes submitted by any other person or body.

In the process of attempting to eliminate the "dueling slates" vulnerability, however, the ECRA also inadvertently opens up other issues related to any potential judicial review.

My primary concerns arise from the truncated period for resolving governor-related litigation, as well as how the bill determines which certificates are given conclusive authority at the electoral count. The relevant language is as follows:

- (A) the certificate of ascertainment of appointment of electors issued pursuant to this section shall be treated as conclusive with respect to the determination of electors appointed by the State; and
- (B) any certificate of ascertainment of appointment of electors as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.<sup>42</sup>

Accordingly, the governor-issued certificate will be given conclusive status at the count unless there has been a federal judicial remedy prior to the meeting of the electors, in which case the court-ordered certificate stands.

The problem is one of timing. Alongside these conclusivity provisions, the bill sets the deadline for the governors to submit their certificates six days prior to the meeting of the electors—at which point those certificates are locked in. It is very likely that germane federal and/or state court litigation involving the canvass, certification, or a contest/recount will have begun well in advance of this six-day period. For any ECRA governor-related litigation, however, this could give candidates and courts as few as six days to resolve a dispute. This opens up an opportunity for so-called "rogue governors" to interfere with the elector certification process.

Imagine that a governor waits until the ECRA deadline and issues certificates that do not reflect the results of the popular vote. The candidates would only have six days to seek injunctive relief before the certificates are locked in on elector balloting day. The ECRA provides for an expedited federal review process, through which candidates can convene a three-judge panel pursuant to 28

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<sup>41</sup> ECRA § 104(a) ("Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.") (emphasis added); *Id.* ("Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to" a few discrete rules).

<sup>42</sup> *Id.*

U.S.C. § 2284. The bill failed to exempt such claims from the five-day notice requirement of 28 U.S.C. § 2284, however, leaving parties as little as one day to resolve all governor-related disputes.<sup>43</sup> That essentially precludes the possibility of a Supreme Court appeal.

Because only certificates that have been revised by court order before elector balloting day are deemed conclusive, a rogue governor's unlawful certificates may stand as the "lawful" certificates for the final elector count on January 6th. That's a problem.

Under certain circumstances, the unnecessarily truncated timeline set out by the ECRA could also hinder good faith governors from issuing legitimate certificates. In the event of a serious election contest, that contest may not have been resolved before the ECRA deadline for elector certificate submissions. The governor would then face an agonizing decision: either they do not issue the certificates (and thus fail to comply with federal law) or they knowingly issue possibly inaccurate certificates. Both outcomes are arguably worse than under current law, which builds in a "safe harbor" provision tied to meeting certain requirements six days before elector balloting day. Note that while the "safe harbor" has been viewed as an important mechanism for resolving electoral contests and certifying results, it is also widely misunderstood. It is only a safe harbor, not a deadline. Unnecessarily imposing a new conclusivity cut-off under the ECRA could create a situation in which a state cannot finish its legitimate canvasses and certification processes in time for the governor to fulfill their legal obligations. This also burdens state election officials, who would be forced to manage the canvass and certification processes on an extremely expedited timeline.

Two fixes are immediately obvious. First, bump back the electoral count day to expand the period for judicial review, bearing in mind the deadline for governors to submit the certificates. Second, exempt panels convened under the ECRA from the five-day notice requirement.

Let me add that although this is my own reaction to this provision, it is critically important that the governors and other stakeholders who will be charged with operating under this new scheme be extensively consulted. They navigated the ECA last time and did so well under extremely adverse circumstances. I cannot emphasize strongly enough that their views be taken into account. With their help, all the permutations that could unspool from this new expedited federal review system should be carefully thought out.

### **(3) The grounds for Congressional objections should be clarified**

At present, the grounds upon which Congress may issue an objection to the states' electoral votes that the ECRA provides mirror those outlined in the current ECA. Under the current ECA, there are two permissible grounds for rejecting the votes: (1) the electors' appointments were not "lawfully certified"; or (2) the electors' votes were not "regularly given."<sup>44</sup>

The ECA does not provide explicit definitions for these terms. Historically, "lawfully certified" has been understood to require that the issuance of the certificate of electors conform with the

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<sup>43</sup> 22 U.S.C. § 2284(b)(2) ("If the action is against a State, or officer or agency thereof, at least *five days*' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.") (emphasis added).

<sup>44</sup> 3 U.S.C. § 15.

ECA's rules and not otherwise be unconstitutional.<sup>45</sup> “[R]egularly given,” by contrast, refers to the casting of electoral votes. The phrase has been interpreted to prohibit votes that are constitutionally defective or are cast corruptly, though its exact scope is unknown.<sup>46</sup>

I agree with the sentiments of the Cato Institute's Thomas Berry that: the decision to leave section 15's definitions unclear is puzzling.<sup>47</sup> “[L]awfully certified” and “regularly given” are undefined by the text of the ECRA. Preserving these specific objection grounds without more will not deter bad-faith objections. Indeed, the retention of these ambiguous terms carries forward these oft-abused provisions of the ECA into the new bill.

On the first ground for objection, Cato's Berry rightly observes that electors who were not “lawfully certified” by a state executive “should not be counted under the final counting rules *anyway*, whether objected to or not, because such electors would presumably not be ‘appointed under a [governor's certificate] issued pursuant to section 5.’”<sup>48</sup> Moreover, he aptly adds, “it's not obvious from the text of the ECRA when there could be an electoral vote that should rightfully be objected to under this standard *but* that would otherwise be counted at the final tabulation under the counting rules.” And, as Berry points out, “some such scenario must exist, or else this ground for objection would be entirely superfluous.”<sup>49</sup> An updated ECA should not contain superfluous provisions, especially ones involving the scope of Congressional authority to object at the electoral count.

Instead, Congress should enact new, clear, counting rules that fall squarely within Congress's constitutional power at the vote count. Prompting unguided speculation about whether one of the two grounds for objecting applies is not clear.

On the second ground for objection, commentators have agreed that providing a definition for “regularly given” would similarly clarify the ambiguity latent in this retained ECA term. While some<sup>50</sup> have sought to exhume the original meaning of this term, Cato's Berry rightly notes that “it should not be necessary to refer to complex historical research to understand the meaning of a law enacted in 2022.”<sup>51</sup>

Unless we do more, we can count on the fact that these provisions will not effectively safeguard against bad actors in Congress. If there is anything the attack on the 2020 election has taught us, it is that Members seeking to manipulate the count will exploit any ambiguity in federal law. After all, these are the exact same objection grounds that were used on January 6, 2021. Providing

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<sup>45</sup> See L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 Dick. L. Rev. 321, 338 (1961) (“[V]otes ‘lawfully certified to’ would seem to be votes certified to in accordance with the terms of the [ECA].”).

<sup>46</sup> See *id.* (“Presumably votes “regularly given” are given in accordance with the requirements of the Constitution as to time and form. The language undoubtedly also means that the electors have acted without mistake or fraud. Does it have the further meaning that they have voted for an eligible candidate?”); Stephen A. Siegel, *The Conscientious Congressman's Guide to the ECA of 1887*, 56 U. Fla. L. Rev. 542, 619 n.474 (2004) (“regularly given” covers defects including “failing to comply with constitutional requisites for elector voting, such as not voting on the correct day, voting for a constitutionally disqualified candidate, or corruption in office.”).

<sup>47</sup> Berry, *supra* note 6.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529 (2021).

<sup>51</sup> Berry, *supra* note 6.

Members of Congress who are intent on manipulating the count a plausible basis to object—superficial as it may be—presents a serious risk. It will cloak coup attempts.

We saw this kind of attempt to mask lawlessness when, after the Justice Department announced that there had been no evidence of widespread voter fraud in the 2020 election, President Trump attempted to pressure the Acting Attorney General, Jeffrey Rosen, and the Deputy Attorney General, Richard Donoghue, to declare that the election was “illegal” and “corrupt.” According to Donoghue’s recollection of the phone call during which this exchange occurred, Trump told him and Attorney General Rosen in plain terms, “Just say that the election was corrupt” and “leave the rest to me and the R[epublican] Congressmen.”<sup>52</sup>

A reformed ECA cannot leave key blanks for bad actors to fill in. Both Cato’s Berry and the Committee on House Administration’s Staff Report are instructive on drafting objection grounds that are founded in the Constitution and not susceptible to partisan manipulation.<sup>53</sup>

#### **(4) Clear procedural rules for the Congressional electoral count should be provided**

While the ECRA significantly clarifies muddles in the counting rules within the ECA<sup>54</sup>, the new language still contains significant ambiguities and omits a number of decisions related to the actual process for running the joint session.

Let’s start with the ambiguities. The updated section 15 requires the Vice President to:

[O]pen the certificates and papers purporting to be certificates of the votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors issued pursuant to section 5.<sup>55</sup>

As in the current ECA, the ECRA then calls for all such papers to be read and presented to Congress for potential objections in the alphabetical order of the states.

Several commentators have voiced criticisms of the choice to retain the phrase “purporting” in the updated rules.<sup>56</sup> When the ECA was enacted in 1887, its drafters were focused on the possibility of receiving multiple competing slates of electors supported by different state officials, a particularly salient concern during the post-Civil War period. The ECRA rightly moves away from accepting multiple slates as previously discussed—which then raises the question, why retain “purporting”?

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<sup>52</sup> Jeremy Herb, *Trump to DOJ last December: ‘Just say that the election was corrupt + leave the rest to me’*, CNN (July 31, 2021), <https://www.cnn.com/2021/07/30/politics/trump-election-justice/index.html>.

<sup>53</sup> Berry, *supra* note 6; Andy Craig, Pol’y Analysis No. 931, *How to Pick a President: A Guide to Electoral Count Act Reform*, Cato Inst. (June 28, 2022), <https://www.cato.org/policy-analysis/how-pick-president-guide-electoral-count-act-reform>; The Electoral Count Act of 1887: Proposals for Reform, *supra* note 30 at 25.

<sup>54</sup> Edward B. Foley, *How John Kasich Could End Up Picking the Next President*, Politico Magazine (Mar. 20, 2016), <https://www.politico.com/magazine/story/2016/03/the-bizarre-130-year-old-law-that-could-determine-our-next-president-213645/>.

<sup>55</sup> ECRA § 109(a).

<sup>56</sup> I advanced this concept in my initial and informal reactions to the ECRA. See Norm Eisen (@NormEisen), Twitter (July 21, 2022, 11:37 A.M.), <https://mobile.twitter.com/NormEisen/status/1550142956350410753>; Berry, *supra* note 6.

There are several possible readings of the phrase.<sup>57</sup> In my view, the continued use of “purporting” directly contradicts the new ECRA provisions that would exclude alternate elector slates. Leaving that phrase in place only invites mischief. We’ve already glimpsed the possible consequences. On January 6, 2021, a senior aide to a Republican Senator attempted to arrange for the transmission to Vice President Pence of an alternate slate of electors—or, in the language of the ECA and ECRA, papers arguably “purporting to be certificates.”<sup>58</sup> We ought not leave that provision in place where it is ripe for exploitation. To truly rule out the possibility of dueling slates, as the ECRA is clearly designed to do, this malleable language must be removed.

The updated counting rules also fall short of establishing a clear process for running the joint session. For example, the ECRA does not adequately explain how to recess. In the absence of clear guidelines, a chamber could in theory continuously delay the count by recessing time and time again. Then there is the question of who can appeal a decision of the presiding officer. How many Members does it take to trigger a debate on an appeal? How long is that debate? These choices should be made now. Members will have opinions about voting thresholds and how powerful the presiding officer, in this case the Vice President, is in handling appeals.

Without clarifying these procedures, Members intent on manipulating the count may step in and twist them for their own purposes. We already saw this risk on January 6, 2021, when President Trump and his allies pressured Members of Congress to delay the electoral count. As the January 6 Committee hearings revealed, lawyer and top Trump advisor Rudy Giuliani tried to call Senator Tommy Tuberville and left a voicemail for another Senator imploring them and their Republican colleagues to “just slow [the count] down.”<sup>59</sup>

Stopping short of specifying these procedural provisions will give Members of Congress more tools with which they can attempt to usurp a valid presidential victory. Failing to get this reform right could empower bad-faith manipulation of the count and procedural chicanery.

## **Conclusion**

We face a dangerous time for our democracy. The flaws in the ECA provided cover for President Trump’s and his allies’ unlawful plan to overturn the 2020 presidential election. The bill before us seeks to shore up those weaknesses, and indeed many of the conceptual changes will do just that. But as this Committee and Congress move forward, getting the details right matters. We must do more in anticipating future threats—threats that remain all too clear and present.

My mother came to the United States after experiencing the dissolution of democratic order in Central Europe and the terrible consequences that followed. I later returned to the land of her birth as a diplomat. A lesson she taught me as a child is one that I heard over and over again during my

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<sup>57</sup> Berry, *supra* note 6 (“It’s genuinely unclear to me whether this language means, for example, that the vice president must present: 1. Any paper claiming to be the true votes of a state, even if its certificate does not match the single correct governor’s certificate; 2. Any paper attached to a certificate that appears on its face to be the true governor’s certificate, even if more than one is received and all but one is a forgery, or 3. Only the single paper that appears most likely to be the true list of votes accompanied by the true governor’s certificate. The bill’s language could arguably direct the vice president to take any one of these three courses, or perhaps more.”).

<sup>58</sup> *Ron Johnson says the alternate slate of pro-Trump electors that his top aide tried to get to Mike Pence on Jan. 6 came from Mike Kelly’s office. Kelly strongly denies that*, Politico (June 23, 2022, 4:35 P.M.), <https://www.politico.com/minutes/congress/06-23-2022/johnsons-latest-16-story/>.

<sup>59</sup> See 07/21/22 *Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

service and since from hundreds of other survivors and students of that tragic past: It can happen anywhere.

We Americans cannot afford to risk another attempted coup that twists our laws and institutions to serve its purposes. No democracy can be taken for granted, and it is only through careful and ongoing work that we can protect ours for generations to come. I thank the bipartisan negotiators of the ECRA for commencing that effort and the Chair, Ranking Member, the Committee and its staff for considering my suggestions for four key areas of improvement. We must assure that the ECRA does what it sets out to do and prevents future attempts to wrongly overturn a presidential election. Few things could be more important for our nation.