States Must Ensure Compliance with the Electoral Count Reform Act

Introduction

The 2020 presidential election and its aftermath highlighted the antiquated law governing how Congress counts the electoral votes for President. Although President Biden clearly won the November election, President Trump and some of his allies sought to exploit the Electoral Count Act of 1887 to overturn the will of the American voters. The system held and Congress did complete its count of the correct electoral votes to declare Biden the winner. Afterwards, Congress rallied on a bipartisan basis to update the law. Building on committee work in both chambers and outside expertise, 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).

States should now do their part and close gaps in their own laws regarding these issues. Most notably, states should (1) ensure that the timelines in state law related to a state’s presidential election align with the deadlines of the new federal law and (2) make clear who certifies the state’s winning slate of electors. Some states have already moved to adjust their laws to fully align with the ECRA. Others have ample time to do so, but should take action as soon as possible to reduce gaps or discrepancies that could create conflict.

What ECRA did

Together with the 12th Amendment, the Electoral Count Act governs the casting and counting of electoral votes for president and vice president. The ECRA modernized the 19th century version of the law, including by:

- Setting a firm deadline for states to certify the appointment of electors (six days before electors meet, which will be December 11, 2024 in the 2024 cycle).
- Clarifying that the governor is the official who certifies the appointment unless state law specifically grants that duty to another state executive in advance.
- Specifying that voting must take place on election day pursuant to the rules in place on that day, absent “extraordinary and catastrophic” circumstances from “force majeure” events. This replaced a dangerously vague provision that was used to suggest that legislatures could appoint electors by other means if they simply declared an election “failed.”
- Creating an expedited pathway in federal court for legal challenges to the governor’s certification without displacing other existing state and federal causes of action.
• Moving the date electors meet one day later, to the first Tuesday (rather than the first Monday) after the second Wednesday in December.
• Specifying that the Vice President’s role in overseeing the counting is only “ministerial.”
• Raising the threshold for congressional objections to one-fifth of each chamber.

What states should do

Align Dates: The clearest issue for potential state action is the deadline to ascertain and certify the state’s appointment of electors. The old ECA encouraged states to complete their certification of electoral votes by a “safe harbor” deadline that granted a presumption of legitimacy. The revised law replaces that regime with a firm deadline of six days before the electors meet to cast their votes, which translates into the second Wednesday of December. In 2024, that date will be December 11, 2024. If states miss that deadline, they risk not having their electoral votes counted. This is a stricter regime than the pre-existing rules, which advantaged certifications submitted six days before electors met but which did not have a hard cut-off date in the same way. So it is particularly important that states set deadlines for processing election results, and any recount or contest procedures, that allow them to reach a definitive result by federal deadlines. States should also adjust state law to reflect the one-day shift in the date that electors must meet in the states to cast their votes – the first Tuesday after the second Wednesday in December, or December 17 in 2024 – as some states have already done, to avoid any confusion or conflict.

Specify certifying official: States should also be sure they specify who is empowered to certify the election results if current state law is ambiguous on this point. The ECRA specifies that the governor must be the one to certify the state’s appointment of electors unless state law designates an alternative. If the Secretary of State or another official currently plays this certification role, it should be clearly designated in state law prior to election day.

Preparation and transmission of certificate: The ECRA specifies that the certificate of ascertainment must contain certain information and have at least one security feature. States should confirm that any state law or regulations regarding certification meets these requirements, with particular attention to the new requirement for a security feature (the law does not specify what kind). There are also new rules regarding proper transmission of the certificate, so state officials should update state rules or regulations accordingly or at least ensure there is no conflict.

Other issues: States should consider addressing any other discrete areas where they can readily act to clarify existing law or remove a possible problem with respect to implementation of ECRA. For instance, state law could provide for an alternative meeting place for electors in the event that the state capitol is unavailable due to an emergency. States may also want to consider adjusting existing law and procedures governing emergencies that would necessitate adjustments in voting rules. The federal law relies on state law in place on election day to govern such emergencies. States should seek to adopt any revisions to election emergency statutes well in advance of election dates, ideally on a bipartisan basis. The overarching
mandate is to lessen the risk of inconsistencies between state rules and the updated federal law in order to further minimize any risk of an election crisis.

For more information, please email the National Task Force on Election Crises at tfrequest@protectdemocracy.org.

About the National Task Force on Election Crises

The mission of the nonpartisan National Task Force on Election Crises 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.