



STATEMENT ON REFORMING THE ELECTORAL COUNT ACT

I. Introduction

In 1887, in an effort to resolve the uncertainties occasioned by the disputed Hayes-Tilden presidential election of 1876, Congress enacted the statutes collectively termed the Electoral Count Act (3 USC Sec. 1 et seq.) (“ECA”). In doing so, Congress intended to clarify the procedure for the counting of electoral votes and determining the winner of the presidency. Rather than clarifying the procedure, however, the ambiguously worded ECA obfuscates the procedure. The ambiguous language of the ECA has resulted in widespread confusion, as evidenced in 2000 during the Bush-Gore election (relating to the implementation of its “safe harbor” provision) and in 2021 when former President Trump and his supporters attempted to transform the ministerial role of the Vice President into a discretionary act to overturn the election of President Biden. Although that effort failed, it brought to light the ambiguities and inconsistencies in the ECA. Thus the ongoing efforts by the Congress to reform the ECA is a welcome remedy to prevent its future use to undermine Presidential election results.

Article IV, Section 4 of the U.S. Constitution (the “Guarantee Clause”) imposes upon the United States the responsibility to “guarantee to every State in this Union a Republican Form of Government.” Although the Guarantee Clause did not historically require popular election of a state’s presidential electors, all 50 states have for more than a century opted, either by statute or in their constitutions, for their electors to be chosen by popular vote, reflecting a fundamental belief that, in a republican form of government, the people choose their leadership through free and fair elections.

Consistent with this principle, the New York City Bar Association (the “City Bar”) remains committed to the objectives expressed in its recent report, *The Consent of the Governed: Enforcing Citizens Right to Vote*.¹ Specifically, the City Bar strongly urges the prevention of all attempts to undermine the will of the people in any American state or jurisdiction, including the District of Columbia. We therefore urge clarification of the ECA along the lines set forth below.

The City Bar remains equally committed to the rights of voters to participate in free and fair elections. Accordingly, we continue to urge the passage of the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act. However, as the passage of both of these important bills is uncertain, the City Bar urges the drafters of any ECA reform legislation to

¹ New York City Bar Association, *The Consent of the Governed: Enforcing Citizens’ Right to Vote*, Sept. 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/american-right-to-vote-election-reform-laws>. (All websites last visited Feb. 7, 2022.)

include key provisions of those two bills in the ECA reform legislation.

II. Clarification of ECA Provisions

In furtherance of the objectives stated above, the City Bar urges revision and clarification of the ECA in the following respects:

Clarify that the Vice President's role in receiving and counting electoral ballots is ministerial. Had former Vice President Pence accepted the fallacious argument advanced by some of the former President's supporters that the ECA confers upon the Vice President discretionary authority to reject a state's electoral delegation and refuse to count its votes, the results of the 2020 election would have been overturned. Although the former President's interpretation of the ECA was rejected in 2021 (as it was similarly rejected by the Congress in 1877 during the disputed election between Rutherford Hayes and Samuel Tilden), a more precise drafting of this provision would prevent such future attempts to improperly overturn the will of the voters as reflected in the Electoral College results.

Clarify that the role of Congress in its January 6th joint session proceedings is ministerial. The existing provision of the ECA provides that, for the electors from a state to be inoculated from challenge in Congress during the vote counting process, the results of any election dispute within that state must be resolved, under the state law in effect on Election Day, at least six days before the date on which electors from all 50 states are required to meet. Under current law, that "safe harbor" date is during the second week of December. To permit more time for the resolution of such disputes, we suggest that both that "safe harbor" date and the date on which presidential electors from all states meet should be moved to later dates in December.

Clarify that any role that Congress plays in challenging the legitimacy of a state's electoral delegation in the course of the January 6th joint session proceedings is strictly limited to specified exceptional circumstances, as set forth below.

1. Any objections to a state's electoral delegation should require the support of at least one-third of each house of Congress in order to be cognizable, and a supermajority of both houses to be sustained.

2. Objections on the basis of the vague grounds of "fail[ure] to make a choice" (3 USC Sec. 2) and "failed election" as grounds for objection should be expressly disallowed. Rather, objections should be based upon one or more of a series of clearly defined and specified grounds, including the following:

Constitutional Objections

(a) The elector in question voted in violation of constitutional requirements or voted fraudulently or corruptly.

(b) The elector in question voted on an untimely basis.

- (c) The elector in question is constitutionally ineligible to serve.
- (d) The elector in question voted for a constitutionally ineligible candidate.
- (e) A state submitted electoral votes exceeding the number to which it was entitled.
- (f) A territory submitted electoral votes prior to achieving statehood.
- (g) *True emergencies that prevent* Congress from counting electoral votes, including acts of terrorism and natural disasters.

We recognize that some potential disputes may be nonjusticiable. However, any resulting justiciable dispute between Congress and a state or jurisdiction submitting electoral votes should be resolved in federal court on an expedited basis.

III. The So-Called “Independent State Legislature” Theory

The City Bar continues to reject the validity of the “independent state legislature” theory, as explained in *The Consent of the Governed* report.² In order to avert attempts by state legislators or officials to overturn the results of the popular vote in a state’s presidential election, any proposed ECA reform legislation should include a provision making clear that a state legislature may not substitute its judgment for that of the state’s electorate. Rather, any dispute concerning the composition of an electoral delegation should be adjudicated in the state or federal courts, which are fully equipped to resolve such disputes. Further, the ECA should be amended to indicate clearly that the rules for selection of electors, and the selection of electors pursuant to those rules, cannot be changed after the popular vote has been cast. The only exception would be in the event of the post-election death or disability of an elector, in which case the state should be required to appoint a successor elector pledged to support the same presidential and vice presidential candidates as the deceased or disabled elector.

IV. Incorporate Key Provisions of the Proposed Freedom to Vote Act and the John Lewis Voting Rights Advancement Act into ECA Reform Legislation

In the interests of protecting voting rights and ensuring fair elections, the City Bar urges Congress to pass the proposed Freedom to Vote Act and the proposed John Lewis Voting Rights Advancement Act. As the passage of these two important bills may be unachievable at the present time, we urge Congress to incorporate into any proposed ECA legislation at least the following provisions of those bills, which are directly related to the purposes of the ECA amendments discussed above:

- (a) Criminalizing intimidation and harassment of election officials.
- (b) Blocking anti-democratic practices at the state level, such as substituting partisan election administrators for non-partisan administrators, purging voter rolls for partisan or other impermissible purposes (or with partisan or other impermissible effect),

² *Id.*, at 29-32.

eliminating polling places and adopting unfair voting practices.

(c) Making Election Day a federal holiday.

(d) Including the preclearance provisions of the John Lewis Voting Rights Advancement Act in any ECA reform legislation.

(e) Easing voter registration and identification requirements, including mandating automatic voter registration programs.

(f) Requiring that state legislatures may only remove non-partisan election administrators for cause (and making clear that any successor administrator must act in a non-partisan manner).

V. Conclusion

The City Bar believes that, once the selection of presidential electors is submitted to a state's voters, a republican form of government requires that the will of those voters in choosing their national leadership must be respected. We also believe that protecting the rights of eligible voters in each state to vote and to have their votes counted is equally important to a functioning democracy. Accordingly, the City Bar urges Congress to adopt the proposals outlined in this report in order to avoid subversion of future presidential elections and ensure that the composition of each state's electoral delegation accurately reflects the results of a free and fair election in that state.

Thank you for your consideration.

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