

MAKING EVERY VOTE COUNT (MEVC)**BIPARTISAN EFFORTS TO REFORM THE ELECTORAL COUNT ACT**

The 2020 presidential election from voting day through Inauguration Day and beyond was the most disruptive, occasioned more efforts to subvert the election results, led to more uncertainty and violence, and undercut American voters' faith in their election system more than any other election in American history. These dangers were made possible by the gaps, ambiguities, and other defects in the Electoral Count Act of 1887. Accordingly, on both sides of the aisle, Congress is now focused on reforming the Act. There is an opportunity and a reasonable chance for Congress to craft and adopt critically needed ECA reform legislation.

Congress adopted the Act 145 years ago to establish rules and processes from Election Day to Inauguration Day. Its goal was to assure an accurate and widely trusted determination of who won the election and an effective transfer of power from the outgoing Administration to the new one. Although the 2020 election produced the most accurate and secure vote counting in history, the ECA otherwise failed fully to achieve both of its goals and would have failed entirely, but for the commitment of numerous election workers, officials, and judges to fair, accurate, and lawful presidential elections.

As a result of the 2020 presidential election experience, the ECA has been sharply criticized by judges, elected officials, and legal scholars. There is a growing bipartisan understanding that ECA reform is necessary to ensure the integrity of the country's election system, the public's trust in which was severely damaged by post-Election Day efforts to subvert the 2020 election.

I. Background

A bipartisan group of 16 Senators gathered three weeks ago to seek a consensus on legislation to prevent election subversion abuse. The members of the group are: Sen. Susan Collins (R-ME), Sen. Mitt Romney (R-UT), Sen. Lisa Murkowski (R-AK), Sen. Shelley Moore Capito (R-WV), Sen. Rob Portman (R-OH), Sen. Thom Tillis (R-NC), Sen. Todd Young (R-IN), Sen. Ben Sasse (R-NE), Sen. Roger Wicker (R-MS), Sen. Joe Manchin (D-WV), Sen. Jeanne Shaheen (D-NH), Sen. Kyrsten Sinema (D-AZ), Sen. Mark Warner (D-VA), Sen. Chris Coons (D-DE), Sen. Chris Murphy (D-CT), and Sen. Ben Cardin (D-MD). Shortly after the bipartisan group came together, Senators Amy Klobuchar (D-MN, Chair of the Senate Rules Committee), Angus King (I-ME), and Dick Durbin (D-IL) released a discussion draft of the Electoral Count Modernization Act in an effort to provide information about the issues to the bipartisan Senator group because of the Rules Committee's experience working on ECA reform legislation for over a year. The bipartisan Senator group has also stated that it will channel its recommendations through that Committee.

According to Senator Tillis, the bipartisan group is still “weeks into a process of discovery and scoping,” and it may not have a consensus work product until May or June.¹ Recent predictions are that it will take longer.

Reforming the Electoral Count Act is a complex undertaking. Making Every Vote Count has targeted three sets of issues among those in most critical need of reform. It has proposed specific reforms to (1) prevent states from nullifying their citizens’ votes for President by altering the rules of the game after Election Day; (2) prevent the obfuscation and denial of actual vote counts; and (3) resolve disputes over vote certification in an open, fair, but expeditious process.

Additional and detailed reforms are needed. Committees in both Houses of Congress have worked on these reforms for over a year with input from election officials, election law experts, and many other constituencies. MEVC strongly supports these efforts to protect against election subversion abuses in the future.

II. Additional Topics for ECA Reform Identified by the Bipartisan Senators Group

The bipartisan group has added to its scoping and discovery work four subtopics under the overarching topic of Electoral Count Act Reform: (a) Protecting Election Workers and Officials; (b) Voting Practices and Rights; (c) Election Assistance Commission and Help America Vote Act (HAVA) Grants; and (d) Presidential Transitions and Contingent Elections. The bipartisan Senators group has done well in choosing these subtopics to discuss, because they all involve issues that can lead to the subversion of the country’s presidential elections.

(a) Protecting Election Workers/Officials

This topic has attracted substantial attention and support because of the increasingly well-recognized need to protect election workers and officials from the types of overt intimidation and other abuses seen in the 2020 election and its aftermath. The reforms would cover attacks on election workers and election infrastructure, removal of election administrators, and grants for poll worker recruitment and training. Senator Collins, who convened the 16-member, bipartisan group of Senators, stated: “Everything can be on the table, but in the end we’ve got to really focus on the Electoral Count Act and some issues like protecting poll workers from threats of physical violence and reauthorizing the Election Assistance Commission.”²

(b) Voting Practices and Rights

The bipartisan group is also discussing issues related to voting practices, e.g., more robust protection of election records, ballot requirements, and other provisions promoting the accuracy, integrity, and security of the votes and vote counting.

¹ Burgess Everett, *A Bipartisan Deal to Stop Trumpian Election Subversion? Not so Fast*, POLITICO (Feb. 16, 2022), <https://www.politico.com/news/2022/02/16/trump-elections-congress-eca-00009229>.

² *See id.*

Depending on what the bipartisan group intends to address, its voting rights issues under this category could be the area of largest divergence between Democrats and Republicans. Reform proposals under this heading that were included in the failed Freedom To Vote Act and John Lewis Voting Rights Act might be compromised in the eyes of Senate Republicans who unanimously opposed those bills.

(c) Election Assistance Commission/HAVA Grants

Another subgroup is focusing on the Election Assistance Commission and grants to states under the Help America Vote Act of 2002 (HAVA). Congress passed HAVA to reform the voting processes after the 2000 election. The Act directs the Election Assistance Commission to carry out a range of election-related functions, including testing and certifying voting equipment and administering a national clearinghouse to promote information-sharing on best practices. The Commission, in turn, makes grants to state and local municipalities to encourage adoption of HAVA standards. However, the Commission has been plagued in recent years by lack of a quorum and underfunding, leading to calls for its total reorganization.³

Senator Collins has emphasized the importance of reauthorizing the Election Assistance Commission, a promising sign that these reforms can move forward as part of the larger ECA reform package.⁴

(d) Presidential Transitions and Contingent Elections

1. Presidential Transitions

By refusing to accept the outcome of the 2020 election, the Trump Administration delayed the presidential transition for a considerable period of time. This dangerous disruption of the continuity in our government was made possible because the Presidential Transition Act of 1963 gives the Administrator of the GSA, a political appointee, wide latitude to “ascertain” the “apparent successful candidates for the office of the President and Vice President.”⁵ Reforms are needed to assure the smooth and collaborative transfer of power across federal government operations to the new Administration and to avoid serious national security vulnerabilities.

Various groups have called for changes to the PTA, particularly, to clarify the conditions for activating the needed presidential transition process. The Klobuchar-King-Durbin discussion draft also contains reforms of the PTA, directing the Administrator to make the announcement

³ Tim Starks, *A Former Top US Election Official Urges Sweeping Security Improvements, Warning “Democracy Is in Trouble,”* CYBERSCOOP (Oct. 14, 2021), <https://www.cyberscoop.com/stanford-internet-observatory-masterson-cisa-2020-elections/>.

⁴ See *supra* note 2.

⁵ NAT’L ELECTION TASK FORCE ON ELECTION CRISES, *Strengthening Our Elections and Preventing Election Crises: Lessons and Recommendations from the 2020 General Election* 17 (Jan. 14, 2021), https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf.

earlier, based on the determinative certification of the President and Vice President winners on January 6.

There appears to be agreement that the PTA is in need of reform. The Klobuchar-King-Durbin discussion draft sets forth a number of straightforward proposals to clarify the language of the PTA. However, it's unclear how much bipartisan agreement there will be for including PTA reforms in the ECA package. On the other hand, unjustified obstruction of this critical transition does subvert the will of American voters.

2. Contingent Elections

The final area of focus for the bipartisan group is contingent elections. Although current knowledge about the content of this topic of discussion by the bipartisan group is limited, one fear is that if Congress, in processing electoral votes, rejects enough votes to subvert the validity of states' electoral slates, that step would trigger a contingent election under the 12th Amendment.⁶

In that scenario, the House itself would hold a contingent election for President decided by a single vote for each state, without regard for the massive population differences between states—a supremely undemocratic, inequitable, and dangerous outcome. The Senate would do the same for the election of Vice President.⁷ In effect, Congress would arrogate to itself the power that should belong to American citizens to select the incoming President and Vice President.

Another risk would be the use of contingency elections in the states themselves. Intentionally or unintentionally, contingency elections in even a few states would likely postpone the peaceful, fair, timely, and determinative transfer of power to the next President. Whether the bipartisan group intends its discussion to cover this topic at the level of Congress or at the state level or both is unclear. However, combining contingent elections and presidential transitions under the same topic may indicate that the group is more focused on contingent elections within Congress.

In short, there is strong evidence of bipartisan support both within and outside Congress that it should act now to prevent the crises, uncertainty, and havoc that arose after Election Day in 2020 and, in the absence of effective reforms, can recur in the 2024 and future presidential elections.

III. Political Considerations

The biggest threat to successful reform of the Electoral Count Act is excessive partisanship. As Senator Murphy pointed out, compromises will be required to draft legislation

⁶ THOMAS H. NEALE, CONG. RSCH. SERV., R40504, CONTINGENT ELECTIONS OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS (Oct. 2020), available at <https://sgp.fas.org/crs/misc/R40504.pdf>.

⁷ *Id.*

that Congress will enact. Both political parties have strong motivations to support ECA reforms. The need for reforms is apparent to a wide swath of the public, including the business community. Other segments of the public want to restore stability and confidence in our country's presidential election system, greater collaboration in our federal government, and less divisiveness in our society.

Senate minority leader Mitch McConnell (D-KY) has made clear his interest in reforming the post-Election Day processes for determining the winner of the presidency and for transitioning from one President to the next. The efforts of the bipartisan Senator group and Senator McConnell's support plus Senator Klobuchar's long-standing and continuing contributions to sensible reform could avoid the complexities and irrationalities of the Senate's filibuster process.

Achieving effective ECA reform means that Congressional Democrats should not overreach in their negotiations in the Senator bipartisan group or later when and if reform bills go to the floor of both Houses. Similarly, Republicans need to go beyond simply conceding that the Vice-President's authority on January 6 is stringently limited and agreeing to other minimally significant "gives." Of course, important specifics will need to be discussed, negotiated, and agreed on. Above these necessary activities, the touchstone is that the country needs them and the most important criterion in the discussions both in the bipartisan group and Congress generally should be what legislative measures best serve those needs.