

MAKING EVERY VOTE COUNT (MEVC)**DANGEROUS FLAWS IN THE PRESIDENTIAL ELECTION PROCESS THAT
THREATEN THE EXISTENCE OF OUR DEMOCRACY: REFORM PRIORITIES**

From one perspective, the 2020 presidential election was a great success. Voters turned out in record numbers, and their votes were counted fairly despite enormous partisan pressures that were brought to bear on our institutions. Local and state election officials—as well as federal and state courts—managed, in the face of illegitimate and often fraudulent resistance, to protect the integrity of our election processes. The resistance included unprecedented efforts by both elected and appointed federal and state officials, in the executive and legislative branches, to alter or nullify properly compiled election results.

From another perspective, however, the flaws in our system of electing presidents are clearer than ever. Our democratic system is in crisis, and our institutions and voters face tremendous challenges. Many Americans continue to believe that the 2020 election was stolen, and they are being primed to believe it could happen again. There is no guarantee that our institutions will successfully withstand future pressures from those who cynically manipulate our system to disenfranchise voters and stoke partisan bitterness and outrage. Indeed, in many states, there are ongoing efforts to make it easier to overturn the will of the voters, and Congress has been unable to counter those efforts by passing federal legislation to prevent election subversion.

Fortunately, many commentators and business leaders—and some Republicans who opposed the passage of broader voting rights legislation—increasingly recognize the dangers of federal inaction in the face of continuing threats to our presidential election system. A number of groups have proposed legislation that would correct deficiencies in the Electoral Count Act of 1887 (ECA). While the proposals differ in their details, all are based on the shared view that Congress must act now, in 2022, to prevent the sort of crises that arose after the 2020 election.

Congress has been aware of the need to reform the ECA and both Senate and House committees have been working on reform legislation since early this year. On February 1, Senators Klobuchar, King, and Durbin released a discussion draft of the Electoral Count Modernization Act. And over the past two weeks, a bipartisan group of sixteen senators has also been working to reform the ECA.

Since early last year, MEVC has focused on three urgent problems with the ECA, in recognition of the fact that other, similarly needed, and far broader reforms were being addressed in proposals from other able reform groups and by Congress.

I. States' Cancellation or Nullification of Their Citizens' Right To Vote for President

States have granted their citizens the right to vote in presidential elections for over 140 years. But recently, some states have attempted to, or considered how they might, interfere with that right or change the rules midstream and even after Election Day, ostensibly under the guise of ensuring the integrity of election results. State legislatures have sought to certify their own slates

of electors, at odds with the slates demanded by the state popular vote counts. New legislation must protect against state legislatures acting before or after Election Day to strip voters of their existing right to vote for their electors or to nullify their choice of electors. Moreover, no state should be allowed to alter its method of choosing presidential electors or its procedures for administration of its chosen method in a way that impairs access to ballots or constrains the fair counting of ballots.

II. Obfuscation/Denial of Actual Vote Counts

States have various ways of aggregating and then certifying their popular vote counts, and the ECA provides that such certifications submitted prior to a “safe harbor” date six days before the Electoral College meets (generally in mid-December) should be conclusive in determining the winner of the presidential election in each state. However, the ECA does not adequately address situations where a state might fail to submit its popular vote count by the safe harbor date, or otherwise call into question its popular vote count.

In the last election, too many federal and state officials, politicians, media figures, and social media outlets attempted to obfuscate accurate vote counts and persuade citizens that the vote counts announced by the so-called mainstream media were false. New legislation should clearly require states to provide actual vote counts to prevent:

- (a) states from declining to provide vote counts so as to enable the states themselves to directly certify their electors (for example, as part of a fraud); and
- (b) states from throwing the election to the House of Representatives by declining to certify electors and thereby subverting the intent of the Constitution and the founders.

To this end, state vote counts should be submitted promptly to government officials in all three branches of government, and an objective federal government official such as the Archivist of the United States should be required to tally an official national vote count—and make that vote count publicly available—prior to certifying electors.

III. Disputes Regarding Improper Certification

Disgruntled participants in the election process have obvious incentives to delay, disrupt, and otherwise interfere with the announcement of a final winner of the election. Endless litigation and other stalling tactics stoke public distrust in our democratic system. New legislation must provide ways to resolve any disputes that relate to reported votes and accompanying certification of electors in an open, fair, but expeditious process that provide for finality at least two weeks before Inauguration Day. For example, Congress might enact a federal right of action for any presidential candidate with a reasonable basis to claim that he or she is entitled to certification of his or her electors in a given state. Legislation might provide that the U.S. Supreme Court exercise appellate jurisdiction over any such claim, to avoid the sort of uncertainty that threatens public trust in the electoral process.



In our view, and in the view of many other leaders and commentators, Congress has the clear authority to address these problems, drawing upon the constitutional powers delegated to Congress in Articles I and II of, and the Fourteenth Amendment to, the Constitution, as well as the Supreme Court’s resulting longstanding recognition of congressional authority over federal elections in cases such as *Ex parte Yarbrough*, 110 U.S. 651 (1884), *Burroughs v. United States*, 290 U.S. 534 (1934), *United States v. Classic*, 313 U.S. 299 (1941), and *Buckley v. Valeo*, 424 U.S. 1 (1976). The time to exercise that authority is now, before the next electoral crisis threatens our democracy.