



Trump falsely says Electoral Count Act talks prove he was right on Pence's power

Jon Greenberg

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On Jan. 6, 2021, former President Donald Trump thought his last hope to reverse his election defeat hinged on Vice President Mike Pence, and a creative reading of a 100-year-old law, the Electoral Count Act.

Trump argued that Pence could set aside the electoral votes from enough states — including Arizona, Pennsylvania and Michigan — to erase Joe Biden's winning margin.

Pence pushed back, saying he lacked the power to do that, and went ahead with the certification of Biden's victory.

Today, as a bipartisan group of senators led by Sen. Susan Collins, R-Maine, discuss revising the Electoral Count Act, Trump said the fact that they are even trying shows he was right.

"What they are saying, is that Mike Pence did have the right to change the outcome, and they now want to take that right away," Trump said in a [Jan. 30](#) statement. "Unfortunately, he didn't exercise that power, he could have overturned the Election!"

That is not what these senators are saying. What they do say is that the Electoral Count Act is poorly written, and that the limits on Congress and the vice president need to be spelled out more clearly to prevent the law from being abused.

Many of Trump's critics took his words about overturning the election to be a rare admission that he lost, and that he had sought to undo a legitimate result. But here, we focus solely on what he said about the vice president's power under the Electoral Count Act, and what lawmakers are trying to do to update the law.

A 135-year-old law

The Electoral Count Act of 1887 grew out of a string of disputed and close presidential elections from 1876 to 1884. It governs the final certification process after an election, the process that was interrupted on Jan. 6 by rioters.

The law lays out the steps for each state to finalize their results, certify a slate of electors representing those results, and send that list to Washington. It says that on Jan. 6, the results from

each state are opened, and the president of the Senate (typically the vice president) "shall thereupon announce the state of the vote."

The law's more complicated parts deal with what Congress should do if there is more than one slate of electors coming from official bodies in a given state, an issue that caused commotion during elections in the late 1800s.

In that situation, the Senate and House would each vote on who the lawful electors are. If the Senate and House disagreed, then the slate certified by the state's executive would be counted. But Trump's team asserted that the text gives the option for none of the votes to be counted in that circumstance.

That provision was the opening Trump hoped to use to derail the certification of Biden's win and usurp the presidency.

In a memo authored by Trump lawyer John Eastman, the plan was that when the tallies from Arizona, Georgia, Michigan, Pennsylvania, Wisconsin, Nevada and New Mexico were opened, Pence would announce "he has multiple slates of electors." Pence would set aside the votes and declare that there were no results from those states. (A set of faked electoral certificates from those states were part of this plan.)

But on Jan. 6, 2021, there were no competing slates of electors from any state. As each state's certificate was opened, Pence acknowledged that it was "the only certificate of vote from that State that purports to be a return from the State."

In a March 2021 paper about the Electoral Count Act, Boston University law professors Jack Beerman and Gary Lawson pointed out the legal implications of that.

"If there is no controversy coming from a particular state's legislature about the validity of that state's certification, there is probably nothing for the Vice President, or the federal courts, to decide," they wrote.

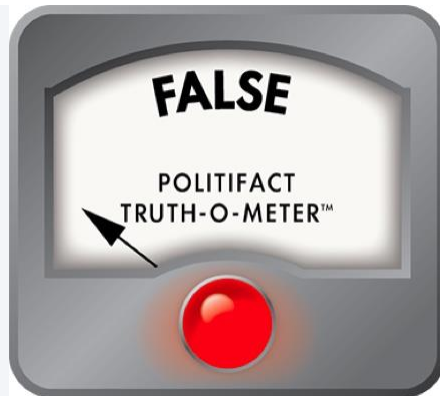
FEATURED FACT-CHECK



Mitch McConnell

stated on January 19, 2022 in in a Senate hearing

The Freedom to Vote Act is “a sprawling takeover of our whole political system.”



By Amy Sherman • January 24, 2022

As a separate matter, senators and representatives could raise objections about whether some states had followed their own voting rules, and they did on Jan. 6. Both chambers voted down those challenges. Regardless, that section of the law granted no authority to the vice president to unilaterally set votes aside.

"He has no power to 'change the outcome' or to 'overturn the election,'" said Michael McConnell, a former Republican-appointed federal judge and director of the Constitutional Law Center at Stanford Law School. "Once the electors chosen by the states met and voted on Dec. 14, 2020, the election was over."

Updating the law

To Benjamin Ginsberg, a legal scholar and former Republican Party lawyer, Trump's effort to seize the presidency by pressuring Pence was evidence that the Electoral Count Act is too poorly written to help the country weather a constitutional crisis.

"The former president made a hollow argument that tried to exploit what he tried to say was ambiguity in the law," Ginsberg said. "He didn't succeed because his argument was wrong. But since it has been raised and the language could be modernized, it makes good sense to restate the current law in even more clear, contemporary terms."

That is what Collins and a group of Republican and Democratic senators are working on. (One motivator for the bipartisan push: The current vice president is a Democrat.)

"We need to make very clear that the vice president's role is just ministerial, that he has no power, she has no power, to overturn the votes that are submitted by the states," Collins said in a [Jan. 26](#) television interview.

Collins added that the current law makes it too easy for lawmakers to interrupt the counting process. All it takes to trigger a two-hour debate is one senator and one representative to challenge the results from a given state.

There are other issues with the law.

Ginsberg and other scholars say that the law fails to say who at the state level — the governor or the secretary of state — has final say over the slate of electors. It is vague about the grounds for

challenging slates sent from any given state. Above all, it fails to set clear limits on Congress' power to reject the results certified by each state.

There is broad support for clarifying the Electoral Count Act, in Congress and beyond. The American Enterprise Institute, a market-oriented think tank, the libertarian Cato Institute and the Wall Street Journal editorial board have all expressed interest in rewriting the law.

One final point: Trump's statement assumed that any effort to change the law could only mean that people thought he was right about Pence's powers. Logically, there could be more than one reason to change the law. As Ohio State University constitutional legal scholar Edward Foley tweeted, "It's entirely consistent to think BOTH that Pence had no such authority, and ALSO that the Electoral Count Act should be clarified on this crucial point."

We reached out to Trump's office and did not hear back.

Our ruling

Trump said that discussions about changes to the Electoral Count Act show that Pence had the power to overturn the 2020 election results.

Legal scholars say that the law is poorly worded, and is vague on key points. But there's broad legal agreement that the law never gave Pence the power to overturn the election.

Lawmakers seeking to modify the law say they want to reduce the ambiguities and raise the bar for senators and representatives to challenge results from any given state.

We rate this claim False.