Independent State Legislatures and Presidential elections: Addressing Misconceptions About Current Law and Prospects for Reform

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August 16th, 2022

During the recent Senate Rules Committee hearing on Electoral Count Act reform, Senator Angus King (I-ME) asked a question that seems to be on many minds: What is the independent state legislature theory and how would it impact the casting and counting of electoral votes under the Electoral Count Act? The bipartisan panel of experts was clear in response. The Electoral Count Act, current or reformed, would continue to constrain state legislatures even if the Supreme Court adopts the independent state legislature theory and frees state legislatures from state-level checks on their power to regulate federal elections. Indeed, these two areas of election law have little to do with one another. But with the landscape developing quickly and the stakes high, it is helpful to explore the issues in detail.

We offer this analysis, adding to the work of Professors Rick Pildes, Ned Foley, Derek Muller, and Rick Hasen (among others), as well as organizations including the Cato Institute, in an effort to bring more clarity to two topics that are now among the most urgent in election law.

What is the Electoral Count Act and why does it need to be updated?

The Electoral Count Act of 1887 (ECA) governs the process of casting and counting Electoral College votes for president and vice president. The statute sets the timeline for states to appoint presidential electors in November and for electors to cast their votes in December, and describes the process that Congress should follow when it convenes to count the states' electoral votes in January. As the nation learned in January 2021, the statute is badly in need of an update. It includes antiquated and ambiguous language and fails to offer clear guidance on key aspects of the process of counting electoral votes and resolving related disputes — weaknesses that render the statute open to misunderstanding or exploitation, and risk the peaceful transitions of power that have been a hallmark of U.S. democracy.

On July 20, 2022, a bipartisan group of Senators introduced the Electoral Count Reform Act (ECRA). The bill would provide much-needed clarity on the process of casting and counting electoral votes, strike a better balance between the roles of state and federal actors in that process, and eliminate many of the most concerning weaknesses in current law. Perhaps most importantly, the legislation would eliminate the dangerous concept of a "failed election," which risks being exploited by partisan actors wrongly suggesting that disputes over an election allow state legislatures to appoint electors themselves after Election Day. Specifically, the bill would more clearly require states to appoint electors on Election Day except in "extraordinary and catastrophic" circumstances, such as a major natural disaster, in which case states would be permitted to extend the time for voters to cast ballots.
Although the ECRA is the only legislation that has been introduced to date, it builds on previous reform proposals.

What is the independent state legislature theory?

Efforts to reform the Electoral Count Act are underway just as a once-marginal legal theory on the role of state legislatures in federal elections has taken center stage. The "independent state legislature" (ISL) theory contends that state legislatures have plenary authority to regulate federal elections, unchecked by other state-level constraints — including state constitutions, state courts, citizen ballot initiatives, and in extreme versions of the theory, gubernatorial veto. In a nutshell, proponents of the theory argue that the reference to state "legislatures" in the Elections and Electors Clauses of the Constitution means that, at the state level, *only* legislatures may regulate federal elections. The Supreme Court has never adopted the theory (indeed, it has previously rejected it), but recently agreed to hear *Moore v. Harper*, a congressional redistricting case out of North Carolina that raises the theory. While the case raises the specific question of whether state courts may use state constitutional provisions to strike down regulations of congressional elections imposed by the legislature, the Court could answer the question more broadly to remove additional state-level checks on legislatures under the Elections Clause (with potential implications for the Electors Clause as well).

As we and others have explained elsewhere, the ISL theory is dubious and it could have sweeping consequences if adopted. It would remove critical tools — likely state constitutions and potentially other state-level checks — against election interference and manipulation by partisan politicians. And, because the theory contends that *only* the state legislature may regulate federal elections, it could also limit the ability of career election officials and state courts to interpret ambiguous statutes in ways that make election administration workable. Moreover, because the ISL theory does not apply at all to *state* elections, the theory could result in a two-track system where state and federal elections take place on the same day and on the same ballot, but are governed by separate sets of sometimes-conflicting rules.

If adopted, would ISL allow a state legislature to appoint presidential electors after the state has held a popular election?

Senator King's question during the Senate Rules Committee hearing invoked a pressing concern raised in other venues: If the Supreme Court adopts the ISL theory, will state legislatures then be

permitted to appoint presidential electors themselves, even if the state has held a popular election for the purpose of choosing electors?

In short, no. Even a maximalist version of the ISL theory would not empower state legislatures to defy the *federal* constitution or disregard *federal* statutes, and none of the proponents of or experts on ISL suggest such a reading. In fact, in a recent article, Professor Michael Morley, a leading proponent of the ISL theory, explains that "[f]ederal law . . . constrains a legislature's ability to directly appoint electors" and outlines how both federal statutes and federal constitutional law would prohibit efforts by state legislatures to manipulate election results.

Most relevant here, while the Constitution leaves it to the states to determine the "manner" in which they appoint electors, it expressly empowers Congress to "determine the Time of chusing the Electors" (i.e., *when* states must appoint electors). Congress has exercised that power by enacting 3 U.S.C. § 1, which requires that electors be appointed "on the Tuesday next after the first Monday in November" (effectively, Election Day). Once that day has come and gone, it is too late for a state legislature itself to appoint electors or to otherwise alter the manner of appointment. Importantly, the same logic applies to efforts by state legislatures to enact laws in advance of Election Day that purport to reserve for the legislature the option to overturn or disregard the results of the election after the fact — state legislatures cannot reserve for themselves the option of violating federal law.

Finally, it is worth noting that in 2020, most arguments in favor of state legislatures appointing electors after the election were grounded in a misreading of 3 U.S.C. § 2 (providing that if a state holds an election and "fail[s] to make a choice," the state legislature can determine the manner of appointing electors after Election Day) — not the ISL theory. That provision of current law is, in effect, a congressionally-created exception to the mandate in 3 U.S.C. § 1 that electors all be appointed on the same day. It was meant to accommodate runoff elections and other events that prevent the completion of voting on Election Day, and is not fairly read to encompass claims of voter fraud or other irregularities, or mere delays in finalizing election results. Nevertheless, the vague and undefined language of the provision creates a potentially dangerous loophole that Congress should close (as all ECA reform proposals would do).

Would an updated ECA be less effective at curbing abuses by other state officials if the Supreme Court adopts the ISL theory?

In addition to worrying about state legislatures, some observers are understandably concerned about other state officials — governors in particular — going "rogue" and either refusing to certify the state's appointment of electors or purporting to certify an appointment that is contrary to the will of the voters. Indeed, one of the weaknesses in current law is that the governor's certification serves as a sort of "tiebreaker" if more than one slate of electors is sent to Congress and the chambers disagree as to which to count. This arguably creates a strategic incentive for a governor to try to certify an unlawful result.

The ECRA (and other reform proposals) would address this scenario by requiring that the governor of each state certify the state's appointment of electors in accordance with laws enacted prior to Election Day. (Congress's authority to determine the "time of chusing" electors necessarily includes the authority to require that the rules and processes used to make the choice be established before Election Day as well.) The ECRA also would make clear that the

governor's certification is subject to review by state and federal courts. Under the terms of the ECRA, Congress would be bound to treat the governor's certification as conclusive, *unless* "replace[d] or supercede[d]" by court order. The Supreme Court's adoption of ISL would have no bearing on this basic design, the purpose of which is to ensure that only one lawful slate of electors from each state is submitted to Congress to count.
That said, for the reasons described elsewhere in this article, there are ways in which state or local officials might interfere with the casting and counting of votes that are outside the scope of the ECA, and those risks may be exacerbated if the Supreme Court adopts the ISL theory.

How might the outcome in Moore v. Harper affect ECA reform more generally?

Other questions have arisen regarding the effectiveness of the ECA if the Supreme Court adopts the ISL theory. Again, one has very little to do with the other. In short, because state legislatures would — under any form of the ISL theory — continue to be bound by federal law, the ECA would continue to control regardless of what the Supreme Court decides in *Moore v. Harper*. Accordingly, the requirement in the ECA that states choose their electors on a specific day and that they do so pursuant to laws enacted prior to that day (a requirement that is even more clear in the ECRA) would continue to serve as an important federal law constraint.
But what if a state legislature concludes that the election was unconstitutional because the rules applied by election administrators or state courts deviated from the text of state statutes and thus intruded on the legislature's authority? For all of the reasons described above, a state legislature could not simply decide on its own to appoint electors after Election Day, whatever the justification. And even if a federal court were to later agree that an election was conducted in a way that violated ISL principles because it conflicted with laws in place before Election Day, it does not necessarily follow that the election as a whole would be deemed "unconstitutional" for that reason. In fact, the Supreme Court has been reluctant to change the rules of an election even during the months leading up to Election Day for fear of voter confusion and resulting disenfranchisement. The same principle — that at some point it is too late to change the rules — has even more force *after* Election Day when voters have already relied on the rules as they were understood in advance. *See, e.g.,* Andino v. Middleton, 141 S.Ct. 9 (2020). And that should be especially true when there was an opportunity to challenge the rules beforehand.

In addition, while ISL might very well add uncertainty to the landscape of election law and administration, there would still be processes in place to adjudicate disputes. Many legal challenges to voting rules will be brought in advance (as they should) and administrative procedures like recounts and ballot challenges, which are familiar to election officials and the courts, will still be available. Post-election contests will also continue to be available in appropriate cases. Adoption of the ISL theory would not prevent adjudication of disputes or, as some have suggested, divest state courts of jurisdiction (after all, state courts have concurrent jurisdiction with federal courts over federal constitutional questions). At most, the ISL theory would permit federal court review of some state court decisions to determine whether those courts usurped power that the theory claims is granted to state legislatures by the federal constitution. In other words, if adopted, the ISL theory would *not* functionally nullify the requirement in the ECA that elections be conducted pursuant to state laws in place prior to Election Day.

But what if a state legislature gives itself a role in counting or certifying election results? We agree that a state legislature counting votes or certifying election results would be unsound (at best) as a matter of policy. Because of the way the Constitution divides responsibilities between the states and Congress, however, it is unlikely Congress can prevent this kind of legislative involvement in election administration, regardless of whether the Supreme Court adopts the ISL theory. In fact, the ISL theory generally comes into play here only if *state* constitutions (or related doctrines) would otherwise limit the role of state legislatures. But, through the ECA, Congress *can* require that legislatures who put themselves in this position follow their own rules established before Election Day, just as any other state actor would be required to do. In addition, state legislatures would still be bound by the Voting Rights Act and the Due Process and Equal Protection clauses of the Fourteenth Amendment — which should protect against any state actor arbitrarily refusing to count ballots once cast, or counting ballots inconsistently. *See, e.g.,* Bush v. Gore, 531 U.S. 98 (2000); Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995).

In short, while ISL may be extraordinarily disruptive and invite more interference in elections, a combination of Congress's authority to determine the required time of choosing electors and additional federal legal protections could still be used to prevent state legislatures from holding an election and then effectively overturning the election results by appointing different electors themselves.

Is ECA reform a waste of time (or a trap) if the Supreme Court adopts ISL?

For all of the reasons described above, the adoption of the ISL theory would have little effect on the ECA, either as currently written or as reformed. And the potential effects of ISL on elections certainly are no reason to consider ECA reform a waste of time. To the contrary, ECA reform can better secure presidential elections by more forcefully requiring states to appoint electors pursuant to laws enacted prior to Election Day (as the ECRA would).

Moreover, it is important that an updated ECA address the potential for mischief by *state and federal actors* alike. Congress's role is to count electoral votes, not second-guess how states conducted their elections — a very slippery slope, as we saw on Jan. 6, 2021. It is therefore important to make explicit the ministerial nature of the vice president's duties in the counting process, and to limit Congress's ability to object to lawful state election results. To ensure that Congress receives lawful slates of electoral votes to count, the ECRA (or similar legislation) would not only require that states comply with laws enacted prior to Election Day, it would also make absolutely clear when electors must be appointed (eliminating the "failed election" concept) and ensure that state and federal courts will serve as a check on refusals to certify results that are consistent with the actual outcome of the election. With those protections in place and unaffected by the ISL theory, there is no need — and, importantly, no constitutional basis — for making it easier for Congress to object to, or worse, reject state results.

Is the failure to address state legislative appointments of electors a gap in current ECA reform proposals?

Because the Constitution allows states to determine the manner in which they will appoint electors, under federal law, a state can choose not to hold an election at all and there is little Congress can do about it. Once a state has decided to hold an election, however, it is already clear that *post-election* legislative appointments of electors would be unlawful and that would continue to be true under the ECRA and other reform proposals. The fact that the ECRA and other proposals would not attempt to prevent legislative appointment of electors entirely (however desirable) is not a gap in those proposals, but a reality of U.S. constitutional design.

The fate of the independent state legislature theory and Electoral Count Act reform are critically important topics in election law right now, each or both of which may have a significant impact on future elections. But they raise distinct issues, and it is important to understand how they do — or, more importantly, do not — relate to one another, particularly as Congress continues its efforts to shore up the ambiguities and other weaknesses in the current ECA.