

# Intelligencer

## Why Republicans Won't Help Fix the Law That Produced Chaos on January 6

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After the chaos of the 2020 presidential election, you'd hope the one thing that Democrats and Republicans would agree on is the need to clear up the laws that allowed for its messy conclusion. The congressional joint session on January 6 that provided the opportunity for an insurrection, multiple deaths, and a near-constitutional crisis illustrated the inadequacies associated with the statute that governed it: the Electoral Count Act of 1887, the little-noticed (prior to this year) and much-criticized statute put in place after the contested presidential election of 1876.

The ECA has provisions that are unclear (e.g., the precise role of the vice president who chairs the joint session that counts electoral votes and confirms the election results), illogical and pernicious (e.g., the low threshold for launching an electoral vote challenge, and the implied openness to competing slates of electors), or simply archaic (the procedures for state certification of electoral votes developed for the era when the votes were literally stored in strong-boxes and physically transferred to Washington before they were known).

There's nothing particularly partisan about the idea floating around in academic circles for cleaning up the 1887 law before its next deployment in 2024. And indeed, an array of conservative opinion leaders (including *National Review*'s Dan McCloughlin, the Cato Institute's Walter Olson, and Bloomberg View's Ramesh Ponnuru) have urged support for common-sense reforms of it. Perhaps most notably, Republican election lawyer *par excellence* Ben Ginsberg argued this week that the fuzzy law may not work to the advantage of GOP candidates in the near future:

Republicans should be in favor of clarifying the system now, if for no other reason than they will not be in as strong a position as they were in 2020.

For starters, a Democratic vice president will be presiding over the Senate when the Electoral College votes are opened. Suppose Trump runs again, and wins. Now, suppose Vice President Harris believes that Trump's reelection represents an existential threat to the country and does what Trump couldn't persuade Mike Pence to do ...

Neither party should think that it can game the system by using the ECA. In fact, of all people, Donald Trump should realize that what goes around often comes around. What seems advantageous in one electoral context often creates unintended consequences down the road. Despite such warnings, the project of reforming the ECA is languishing in Congress due to a lack of GOP support, as the *New York Times* reported earlier this week. It's as good a time as any to ask why congressional Republicans don't seem interested (so far) in this urgent project. There are three issues that would-be reformers must overcome:

### **The impetus for reform is coming from a January 6 inquiry Republicans are dead set against**

As I understand it, quiet discussions have been undertaken with Senate Republicans for months about fixing the law. But the case for doing something before 2024 has gone public primarily as a project of the House Select Committee to Investigate the Attack on the U.S. Capitol. The establishment of that committee, of course, was bitterly opposed by most House Republicans, and you cannot imagine many partisan GOPers reacting with anything other than disdain for the members of Congress quoted in the recent *Times* report as calling for ECA reform:

“There are a few of us on the committee who are working to identify proposed reforms that could earn support across the spectrum of liberal to conservative constitutional scholars,” said Representative Adam B. Schiff, Democrat of California and a member of the Jan. 6 committee. “We could very well have a problem in a future election that comes down to an interpretation of a very poorly written, ambiguous and confusing statute.”

Representative Liz Cheney, Republican of Wyoming and the vice chairwoman of the committee, said on Thursday that “the 1887 Electoral Count Act is directly at issue” and that the panel would recommend changes to it.

It's unclear whether the bulk of Republicans hate Schiff or Cheney more fiercely.

More generally, Republicans in both chambers of Congress and the party rank-and-file are said to be eager to “move on” from January 6, shifting the focus instead to the alleged bad governance of Joe Biden and congressional Democrats. You cannot talk about fixing the Electoral Count Act without talking about what happened on January 6.

### **Team Trump claimed the ECA is unconstitutional and hence irrelevant**

The official Trump attitude towards the Electoral Count Act was expressed forcefully by Trump advisor John Eastman, whose infamous memos laid out a strategy for an election coup in the fateful days leading up to January 6. According to Eastman, the statute is unconstitutional on two separate grounds. First, he claimed, its provisions for counting electoral votes violate the 12th Amendment's unconditional grant of authority to the vice president to deal with electoral votes however they want. Second, Eastman echoed the repeated arguments of Trump's lawyers that the ECA's state certification procedures violates the absolute and exclusive power of state legislatures to regulate both federal elections and the choice of presidential electors under Article I of the Constitution.

It seems unlikely that the president who once said, “I have an Article II, where I have the right to do whatever I want as president,” has the beginning of a clue regarding the constitutional arguments of his own lawyers. Nevertheless, the radical argument for the unconditional powers of the vice president and state legislatures that Eastman advanced is official MAGA gospel. The first argument will likely be dropped by Republicans in 2025 if there is a contested election, since Kamala Harris will be sitting in the same seat occupied by the perfidious Mike Pence in 2021. But the second argument, that Republican-controlled state legislatures can overrule governors, election officials, and even voters in determining election outcomes could still be in play.

### **Trump is a horse who prefers a muddy track**

So long as the Republican Party remains in thrall to Donald Trump and resigned to his likely 2024 comeback plans, its elected officials may be reluctant to do *anything* to clarify election procedures. For all the mostly specious arguments the 45th president and his allies advanced before and after the 2020 elections about voter fraud and the “Democrat steal,” his real strategy was to sow doubt in the integrity of the process. He wanted to make last November and future elections a test of partisan will, and he succeeded to a terrifying extent. Would he now discard any of that hard-won doubt by supporting a clarification of a key element of the presidential election machinery?

Perhaps Trump will surprise us by at least staying out of the way of Electoral Count Act reform efforts. Or perhaps congressional Republicans will summon the will to fix the 1887 statute in the reasonable expectation that the subject is too obscure and technical to arouse MAGA suspicions. But time’s running down if not out for dealing with much of anything in the hotly disputed arena of election and voting laws. A little disinterested patriotism from members of Congress in both parties is in order, but it probably won’t be forthcoming.