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Congress Risks Going Too Far in Defending Future Elections

Revising how challenges to electoral votes are handled after a presidential election requires a scalpel, not a hammer.

By Ramesh Ponnuru

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The Electoral Count Act of 1887 is badly written, and its flaws present dangers to the country. The current bipartisan interest in revising the law, which sets forth how Congress handles challenges to electoral votes after a presidential election, is therefore welcome. But there are many ways a reform could go wrong, and legislators will have to be careful if their work is to count as an improvement.

The Founders deliberately, and probably wisely, rejected the idea that Congress should have much of a role in selecting the president. The thrust of the current reform effort should be to protect the prerogatives of the states and voters by making it harder for Congress to exploit the Electoral Count Act to expand its role.

As it stands, it takes only one representative and one senator to object to a state's electors in order to force the full Congress to vote. That threshold should be raised. A draft reform bill put forward by several senators would insist that one-third of both the House and the Senate register an objection before votes had to be taken. A less drastic step would be to make it one-fifth of each chamber, which is still high enough that it would have prevented votes on the meritless objections to presidential elections raised by Democrats in 2005 and Republicans in 2021.

The bill also draws up a short list of acceptable grounds for an objection and clarifies that the vice president plays a purely ministerial role in counting votes. It tightens the criteria for declaring that a state has "failed" in its duty to hold a proper election to determine how its electoral votes are cast. Both of these provisions move in the right direction.

The draft goes too far, however, by requiring a three-fifths vote of each chamber to sustain an objection. This is a tricky area because no Congress can bind a future one. That fact has two implications. The first is that each Congress that counts electoral votes has to agree to adhere to the terms of the Electoral Count Act. The second is that any supermajority requirements beyond those spelled out in the Constitution exist at the sufferance of majorities.

During the very moments a reformed law would be needed — moments of intense partisan conflict surrounding an election — there could be great pressure for a majority of Congress simply to eliminate the supermajority requirement, and maybe to amend other parts of the vote-counting procedure at the same time. The result would be to add an element of unpredictability that it should be one of the purposes of the law to minimize.

The draft bill runs into additional problems when it shifts its focus from regulating Congress to attempting to stop misconduct by state governments. If state authorities won't certify electors, it allows federal courts to do it. The Constitution, on the other hand, puts certification in the hands of states.

It may be possible to amend this provision so that it both addresses the rogue-state-official scenario the bill's drafters have in mind and complies with the Constitution. But anyone who wants to amend the Electoral Count Act is going to have to accept that no law is going to be able to yield a satisfactory solution to every conceivable pattern of misconduct. If most of our political actors lose any sense of duty to do what is right, no law is going to address that lack.

And there are trade-offs. The more a law guards against congressional corruption, for example, the less it will let Congress remedy offenses by the state governments. Choices are going to have to be made — and they should be made in line with our constitutional structure and our best judgment about the likeliest threats to a fair vote count.

There is a lot of muddled thinking about these issues, though. Michael Luttig, a former federal judge, just wrote a New York Times op-ed in favor of reform. He appeals to conservatives to support it because we, especially, should want to keep elections under the control of the states. Just a few paragraphs later, it turns out the revision he wants is a major expansion of the federal courts' role in the process.

Even the best version of a bill will have a rough time getting through Congress. Some Republicans are suspicious that Democrats will try to use the bill as a vehicle for all of their other ideas about voting. Some Democrats are suspicious of the bill because it's not a vehicle for all of those ideas. The path to success is narrow — which is all the more reason to keep this bill to the most modest dimensions possible.