



Opinion: We could again stand on the ‘brink of constitutional crisis’ if we don’t reform the Electoral Count Act

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Jan. 6, 2021, left the country shaken and confused with claims of election fraud hanging in the air. Reforming the Electoral Count Act will help us stabilize our voting system and the Constitution.

In 1876, ambiguities in our country’s presidential election laws led to a showdown between Republicans and Democrats that pushed the country to the brink of a constitutional crisis. Three southern states sent competing slates of Electoral College electors to Congress; the presidency hung in the balance. With so much at stake and no clear rules in place to determine which electoral votes counted, only a controversial backroom deal averted a full constitutional meltdown.

To prevent such crises in the future, Congress passed the Electoral Count Act in 1887 to fill gaps in our election law. Unfortunately, experts of all political persuasions agree that, as currently written, the act is too ambiguous to fully protect our electoral process.

The 2020 presidential election again brought our country to the brink of constitutional crisis and chaos, as partisan extremists sought to exploit these ongoing ambiguities in our election laws. Some members of Congress threatened to substitute their own judgment for that of the states by making vague and unsubstantiated objections to state Electoral College slates. A violent mob threatened to thwart the lawful counting of those same state electoral votes, pressuring then-Vice President Mike Pence to exercise power he did not legally have to disregard some states’ electoral votes and thereby swing the election in favor of President Donald Trump.

No vice president — Republican or Democrat — should ever be in that precarious position again. Our legal system is supposed to help keep in check such lawless and partisan forces, whether they originate on the right or the left.

To avoid constitutional collapse, we need a reform

A bipartisan working group in the U.S. Senate, including Sen. Mitt Romney, is working to update the Electoral Count Act to put clearer rules in place for future elections. Sen. Mike Lee’s knowledge of the Constitution and legal experience enable him to demonstrate leadership in protecting American democracy from either political party by supporting this bipartisan group’s work to reform the act.

Extensive research by the Cato Institute has considered all aspects of Electoral Count Act reform, from specifying exactly what congressional objections to electors are permissible to clarifying the

role of the vice president. They've even addressed a looming question that's at the core of reform: Is the Electoral Count Act even constitutional?

Put simply, yes.

As the Cato Institute explains, the act is best understood as “permissible congressional ‘gap filling’” — meaning the Constitution contemplates that Congress can lay out basic vote-counting procedures, including a mechanism for determining which votes count when a state sends multiple, conflicting electoral slates to Congress.

Defining the scope — and the clear limits — of congressional power to determine which electoral votes count both accords with the framers' original constitutional design and protects the Electoral College. Without clear limits on congressional power to substitute its own judgment for that of the states, our elections become vulnerable to confusion and partisan forces that seek to undermine the integrity of our most sacred democratic process.

A guide to understanding the Electoral College

The Constitution itself lays out basic rules for states to choose electors and for how electors' votes will be counted.

These basic rules allow every state legislature to “direct” the “manner” for choosing their electors to the Electoral College, which ultimately chooses the new president. Every state legislature in the country has exercised this constitutional authority by specifying that state electors will be chosen by popular vote. States must fulfill their duty to follow their own laws and utilize their state judicial process to handle any irregularities. They must also comply with federal constitutional guarantees like due process and equal protection.

Congress, in turn, has the power to set the day that state electors will be chosen (and the day those electors will vote), which prevents state legislatures from changing their minds about the method for choosing electors after a popular election has already been held on the date Congress specified. State legislatures cannot disregard elections after the fact and substitute their own slate of electors who will vote for a candidate who lost the popular vote. But Congress has no free-wheeling power to interfere with state electoral slates or to substitute its own judgment for that of our sovereign states.

What a reformed Electoral Count Act should look like

Electoral Count Act reform should make clear that states have the right to determine the winners of their own elections. Specifically, reform must clarify the role of the vice president in the vote count and specify how — and on what grounds — Congress can challenge or discount a state's electoral slate.

The act can also help incentivize states to follow their own laws by creating a clear, expedited system for federal court review of legal challenges to state electoral slates and by ensuring that Congress is bound to accept duly-certified state slates.

We need clear rules, laid out in advance, for resolving election disputes to prevent partisan forces from gaming and undermining our electoral system. It's critical that Congress work to reform the act, answer the questions it leaves open to interpretation and comprehensively define the mechanism for counting electoral votes.

We need Sen. Lee to work with senators who will put American democratic systems ahead of political extremism and take this opportunity to update the Electoral Count Act. With each week that passes, we risk losing focus on reform as we move closer to the summer recess and the 2022 midterm elections. Necessary reforms need to be passed as soon as possible to avoid further stress on our electoral system.