

Here's What Electoral Count Act Reform Should Look Like



The ECA [provides](#) that if a state has held an election but somehow “failed to make a choice” on Election Day, then the state legislature may choose the manner of appointing electors on a subsequent day. (A [version](#) of this provision dates back to the Presidential Election Day Act of 1845 and thus preceded the ECA. But it is now included in Title 3 of the U.S. Code alongside the ECA and, given the linkages between the statutes, should be updated along with the ECA.) This provision was meant to [accommodate](#) run-off elections and extreme weather conditions that sometimes prevented the completion of elections on a single day. It was not meant to provide an opening for politicians to

reject election results or override the will of the voters. But the language is vague, and, importantly, the statute itself does not define what it means for an election to “fail.” Accordingly, some partisan actors have [wrongly suggested](#) that delays in counting votes or disputes about how an election was conducted can form the basis of a “failure” that would justify state legislatures appointing electors themselves after Election Day. That argument is inconsistent with the history and intent behind the ECA, as well as its other provisions.

Under Article II of the Constitution and the 12th Amendment, *states* conduct presidential elections and submit the results to Congress to be counted. Congress’s limited role is to ensure that the submissions it receives from the states are authentic, in that they reflect the actual outcome of those elections consistent with state and federal law. The ECA’s “safe harbor” [provision](#) was intended to accomplish this. It provides that when a state finally resolves disputes pursuant to laws in place prior to Election Day, and does so by a certain date, the state’s final determination must be treated as “conclusive” by Congress—meaning Congress cannot second-guess the state’s election results or otherwise look behind the returns. But the statute does not include any enforcement mechanism to ensure Congress respects that promise. And vague terms in the ECA allowing Congress to reject electoral appointments as not “lawfully certified” or to reject electoral votes as not “regularly given” have been misunderstood (at best) by some members of Congress to justify objecting to state results.