

**POLITICS** | JAN. 31, 2022



# Trump Incoherently Attacks Electoral Count Act Reform

*By Ed Kilgore*



Mike Pence presiding over the joint session of Congress on January 6, 2021. Photo: Saul Loeb - Pool/Getty Images

Among the tiny group of wonks, lawyers, and lawmakers quietly working on an update for the Electoral Count Act of 1887, the last few

weeks have been very encouraging. Interest in the subject of reforming the arcane statute governing the tabulation and confirmation of presidential electors — a pro forma ritual every four years until 2021 — began with congressional Democrats and spread to congressional Republicans, with a bipartisan group of senators led by Republican Susan Collins meeting regularly now. In a Congress so recently and bitterly divided on voting rights thanks to hard-line Republican opposition to any new federally established rules, it's been encouraging to see a bit of progress on the urgent task of avoiding another attempted election coup by Donald Trump in 2024.

But now Trump is stumbling into the debate with poor information and bad intent:



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In a statement released on Sunday night attacking bipartisan efforts to reform the Electoral Count Act, Trump suggested Pence had the power to stop the results being certified in favor of Biden and admitted "Unfortunately, [Pence] didn't exercise this power..."

WOW. [pic.twitter.com/wm7ewTN6VI](https://pic.twitter.com/wm7ewTN6VI)

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This is a strange argument for Trump to be making. For one thing, the position that the Trump White House took in the infamous Eastman Memo, which was designed to convince Mike Pence to “send the election back to the states” by adjourning the joint session of Congress on January 6, was that the entire Electoral Count Act was an unconstitutional abridgment of the virtually unlimited powers of the vice-president endowed by the 16th Amendment and of state legislatures as set out

in Article II. It's unclear whether Trump understood his legal team's arguments, but if he did, he shouldn't care what "wacky Susan Collins" or the Congress does to "fix" an unconstitutional statute in ways that would make it even more unconstitutional.

More to the point, in 2025 the veep who would have such extensive powers to count or reject or "send back" electoral votes under the Trump-Eastman doctrine will be Kamala Harris, whom Trump has called a "monster" and a "communist."

Despite the inconsistency and incoherence of Trump's attack on Electoral Count Act reform, it could have an effect on MAGA bravos in Congress, including perhaps House Republican leader Kevin McCarthy, who had expressed an openness to fixing the statute not that long ago. The vice-president issue aside, there are provisions in a potential ECA reform bill that are more urgent than reining in a veep that most legal beagles think is already restrained by both Constitution and statute. As ECA expert Matthew Seligman recently explained, the big threat to democracy in 2024 could be an effort by a rogue MAGA governor to exploit the ECA's strong preference for gubernatorial certification of electors, which could require just one branch

of Congress (e.g., the likely soon-to-be-GOP-controlled House) to pull off a steal:



In any event, here's hoping that Trump moves on to another subject for his rants and raves, or that his friends in Congress understand the effect of an unreformed ECA in a very close presidential election may be a constitutional crisis, not necessarily a second term for Trump.