

The Electoral Count Reform Act of 2022

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During the aftermath of the 2020 presidential election, the efficacy of the American electoral process and the 1887 Electoral Count Act was drawn to the forefront of the public consciousness. To many, the century-plus old law did not stand up to the scrutiny cast upon it by the multi-month dispute of the November 2020 election by then President Donald Trump and culminating in the January 6th attack on the Capitol. In response to this reckoning, Congress passed the Electoral Count Reform Act (ECRA) of 2022 in December.

ECRA seeks to imbue clarity and predictability in the electoral process. Notable clarifications and changes include:

- **No state may change its method of selecting electors after Election Day.** While Article II of the Constitution (and, in the case of the District of Columbia, the 23rd Amendment) determine how many electors each state has in the Electoral College, the states control how their slates of electors are chosen. ECRA does not take that power from the states, but rather prohibits them from changing their processes post-facto.
- **Unless otherwise specified by state law or constitution, the governor (and, in the case of D.C., the mayor) has the sole authority to issue a “certificate of ascertainment” formally appointing the winning slate of electors.** Previously, it was unclear which state “executive” was required to issue and transmit the certificate, leaving open debate about whether state legislatures or other statewide elected officials could appoint electors.
- **There is now an expedited judicial review for any action brought by a presidential or vice-presidential candidate under federal law about a certificate of ascertainment.** Any such suits will now go to a special three-judge federal court

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with the possibility of appeal directly to the Supreme Court. This expedited process is intended to facilitate the resolution of legal disputes prior to the meeting of the Electoral College in mid-December.

- **There is now a one-fifth threshold for consideration of an objection to a certificate of ascertainment before the joint session of Congress.** Previously debate on an objection could be forced by the vote of one Senator and one Representative, allowing stalling tactics to be easily utilized. Now, at least one-fifth of the Senators and at least one-fifth of the Representatives must sign an objection before it is considered.

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