

ELECTORAL COUNT REFORM ACT IMPLEMENTATION

The [Electoral Count Reform Act of 2022 \(ECRA\)](#) updates the Electoral Count Act (ECA) of 1887; it was recently passed by Congress as part of an omnibus appropriations and policy package.¹ The ECA, as updated by the ECRA, provides the primary legal framework for casting and counting Electoral College votes in presidential elections. This explainer contains a summary of the ECRA's key changes to that process, as well as guidance on **ensuring that states' presidential election procedures comply with the updated federal law.**

In particular, states should consider updating state law to ensure current deadlines and requirements for canvass, recount, and contest procedures comply with the ECRA's certification timeline. Additionally, if a state's governor does not currently certify the appointment of presidential electors, the state may wish to update its law to clarify the designated executive for performing this duty. More detail on these recommendations can be found below.

The ECA has set a timeline for states to select presidential electors and transmit their votes to Congress for more than a century. The ECA also establishes procedures for how Congress counts the electoral votes and outlines the role of the vice president, who presides over this process under the 12th Amendment as the president of the Senate. However, until the ECRA became law, the original text of the ECA had not been updated since its enactment more than 130 years ago. The outdated statute was therefore rife with imprecise language, gaps, and ambiguities.

ECRA Summary

Campaign Legal Center (CLC) was heavily involved with the bipartisan effort to update the ECA. The bipartisan ECRA addresses the most concerning weaknesses in the old law by:

- Prohibiting state legislatures from changing the law after Election Day.

¹ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. P tit. I (2022).

- Providing procedures to resolve disputes about electors and election certifications in the courts before those disputes reach Congress.
- Strictly limiting opportunities for members of Congress to second-guess states' certified election results.
- Clarifying the vice president's ministerial role in the counting of electoral votes and reinforcing that the vice president does not decide election results.

The following table compares the previous version of the ECA with the ECRA's newly updated provisions:

Process	Electoral Count Act of 1887	Electoral Count Reform Act of 2022
State Appointment of Electors	Contained archaic language that some claimed could allow states to declare a "failed election" and change the rules for appointing electors after voters cast their ballots.	Provides that each state's electors shall be appointed on election day, in accordance with the laws of that state enacted prior to election day. (Section 102). Makes clear that the only permissible modification would be for a state, "as necessitated by force majeure events that are extraordinary and catastrophic," to extend voting beyond election day as provided for under pre-existing state law. ² (Section 102).
Certification of Election Results to Congress	Required the electors to meet in their respective states on the first Monday after the second Wednesday in November to officially cast their votes. Established an optional "safe harbor" for states that finalized their results	Establishes the following timeline that states must follow to certify electors: <ul style="list-style-type: none"> - The executive of the state must certify the state's appointment of electors to Congress six days before the electors meet, pursuant to state law enacted prior to Election Day. In the next

² "Force majeure" refers to unforeseen, external emergencies like a natural disaster.

	<p>six days before electors met. States were not required meet this deadline, but those that did could ensure that Congress would treat those results as “conclusive.”</p> <p>Did not define “executive” for the purpose of certification.</p>	<p>presidential election, this certification deadline will be December 11, 2024. (Section 104).</p> <ul style="list-style-type: none"> - Electors must meet in their respective states “the first Tuesday after the second Wednesday in December” (December 17, 2024)—one day later than in the past—to officially cast their votes (Section 104). <p>Defines the “executive” of the state for the purpose of certification as the governor, unless state law enacted prior to Election Day designates a “different state executive” (for example, the secretary of state) to certify the results. (Section 104).</p>
<p>Resolution of Disputes</p>	<p>Did not explicitly provide a role for the federal courts in resolving disputes about a state’s appointment of electors.</p>	<p>Creates an expedited procedure for federal courts to resolve disputes about a state’s appointment of electors before the electors vote. This ensures that Congress is not presented with competing slates of electors or rogue slates of electors that do not reflect the outcome of the election. (Section 104).</p>
<p>Counting of Electoral Votes by Congress</p>	<p>Allowed for the consideration of any objections to a state’s electoral votes that were made in writing and signed by one Senator and one Representative. A</p>	<p>Requires that any cognizable objection be made by one-fifth of each chamber of Congress and limits the permissible bases for such challenges. A majority vote by both chambers is required to sustain an objection,</p>

	majority vote in both chambers was required to sustain an objection, but the law was unclear as to how to resolve disputes if the two chambers disagreed with each other.	and if the two chambers disagree with each other, the objection is not sustained. (Section 109).
Clarifying the Ministerial Role of the Vice President	Enumerated purely ministerial roles for the vice president during the electoral vote-counting process (such as announcing the results) but did not explicitly state that the vice president may not play a substantive role in deciding which electoral votes to count.	Clarifies that the vice president may only hold “ministerial duties” in the electoral vote counting process and that they have “no power to solely determine, accept, or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors.” (Section 109).

Taken together, the above updates to the ECA significantly reduce the risk of election manipulation in future elections.

Effect of the ECRA on State Presidential Election Processes

While most of the changes to the ECA affect the process by which Congress must count each state’s electoral votes, two changes are important for state officials to bear in mind in preparing for the 2024 presidential elections:

1. The law’s new definition of the “executive” who must perform the certification of the state’s appointment of electors, and
2. The law’s updated deadline by which the certification must take place.

First, the new law specifies that the state executive who must certify the state’s appointment of electors is the governor, unless state law enacted prior to the election designates a different executive to perform the duty. If the governor does not currently certify a state’s appointment of electors, the state may wish to consider updating its law to make clear who the executive is for purposes of certification of the state’s appointment of electors.

Second, Section 104 of the ECRA provides that each state's executive must certify the state's slate of electors (including the results of the popular vote for president in the state) six days before the date on which the electors meet to officially cast their votes. The law also requires the electors to hold that meeting on "the first Tuesday after the second Wednesday in December," which will be December 17, 2024. Taken together, these provisions mean that state executives must certify their state's slate of electors by the **second Wednesday of December (December 11, 2024)** to meet the new deadline.

As preparations for the 2024 presidential election begin, we suggest **comparing the new certification deadline with the state's current deadlines** and requirements to make sure the state will comply with the new law. In particular, we urge election officials to work backwards from the executive certification deadline to determine whether their state's canvass, recount, and contest procedures are sure to be completed in the window between Election Day (November 5, 2024) and the certification deadline (December 11, 2024). If the recount and/or contest procedures lawfully available to candidates could potentially result in certification not being completed by December 11, 2024, election officials may need to work with the legislature in their state to make any necessary updates to the state's processes to meet the new deadline.

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