

NATIONAL ELECTION LAW ANALYSIS

Helping States Comply with the Electoral Count Reform Act

Prepared by
Election Reformers Network
ElectionReformers.org
August 2023

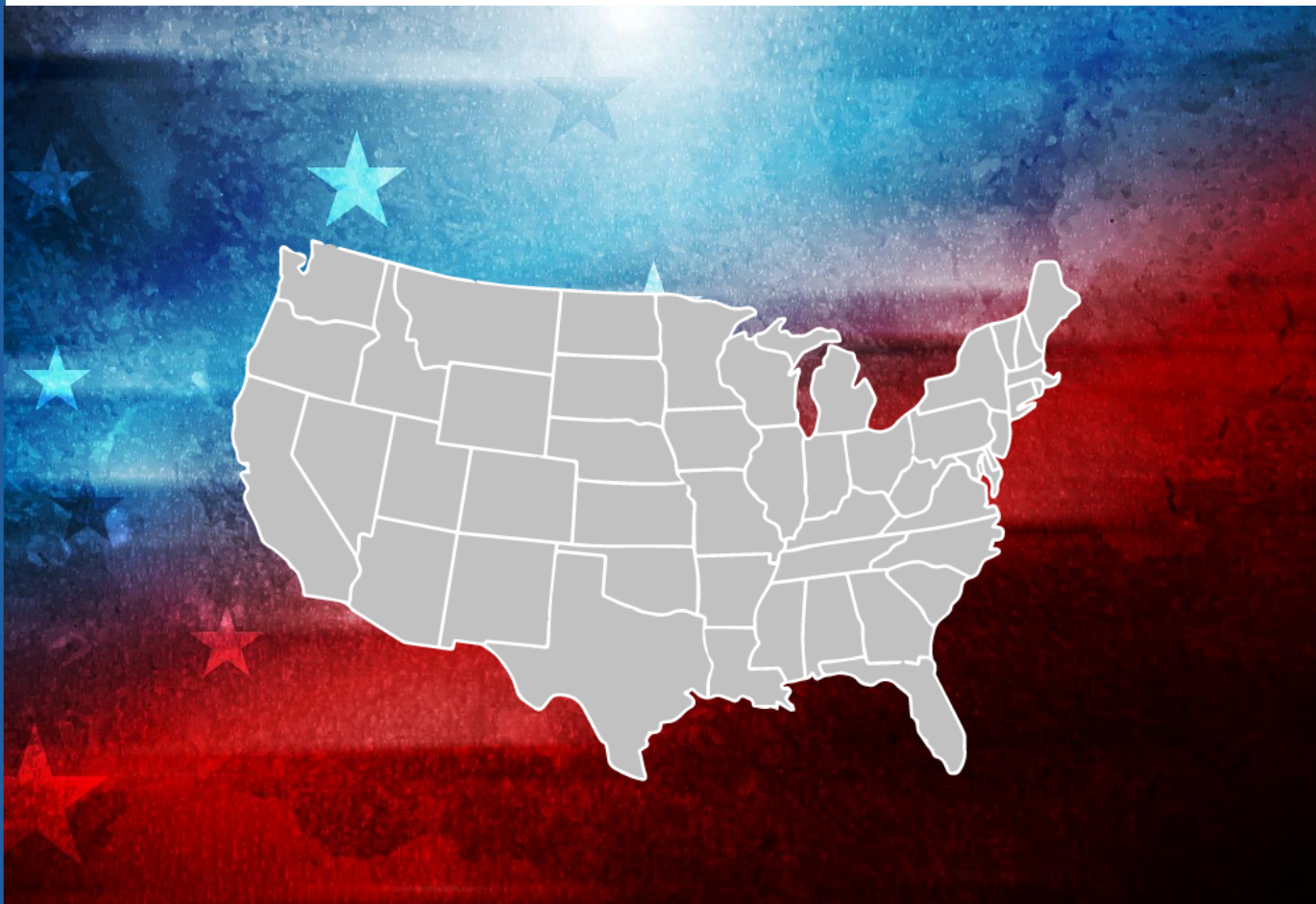


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Executive Summary

In response to the events that unfolded at the Capitol on January 6, 2021, Election Reformers Network was [among early voices](#) calling for reform of the Electoral Count Act (ECA), which had played a role in the legal theories behind efforts to overturn the presidential election. Shortly thereafter, a bipartisan group of lawmakers set about establishing a new, clearer framework to govern how presidential elections should proceed. That effort culminated in the Electoral Count Reform Act (ECRA), which was signed into law on December 29, 2022, by President Joe Biden.¹

Despite its national character, however, the presidential election—like every U.S. federal election—is administered state-by-state. States establish their own procedures for how voters cast their ballots, how those ballots are counted and confirmed, how objections to parts of the process may be raised and adjudicated, and how electors are chosen. State law also establishes how those electors meet and cast their votes for presidential and vice presidential candidates. The United States Constitution and federal law place a series of guardrails around these procedures, but states both fill in the gaps and execute the process.

Because of the ECRA’s passage, many states may find that the laws governing their presidential elections now require an update to comply with the new framework that Congress has established.

Policy Recommendations

This report summarizes the impact of the ECRA on state law. It provides six recommendations, subdivided into topics on what to look for and what to change.² Each recommendation starts by explaining the ECRA framework before describing how to adjust state law to fit that framework.

The recommendations need not always be adopted through legislation – some could be incorporated by rulemaking, or even referenced by courts when determining appropriate requirements, remedies, or deadlines in particular cases. For each recommendation, determining how to best translate it into state-specific action can proceed in several ways, depending on the state context. For example:

- Legislatures could assign the role of reviewing current law and making recommendations to a standing elections committee, to an ad hoc committee created for that purpose, or to their legislative services body.
- Executive officials like the governor, secretary of state, or attorney general could create a task force within their office to review laws, issue updated regulations/guidance, or make recommendations to the legislature (ideally in coordination with each other).
- Non-governmental institutions like good government groups or universities could create their own task force of academics, legal experts, retired public officials, and so on to do their own review and then lobby the legislature with their recommendations.

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

² This report serves as analysis and general guidance, not legal advice.

This report's six recommendations are divided into two broad categories: urgent and long-term.

The four **urgent** recommendations are:

1. Check post-election deadlines.

- Update existing state laws that reference deadlines.
- Establish firm, stable deadlines for canvassing votes.
- Establish that election processes, including audits and recounts, should be completed “as soon as possible, but no later than” the deadline.
- Consider including an ambitious default timeline along with the option for extended deadlines under specific circumstances.
- Establish firm filing and resolution deadlines for election contests.

2. Check certification roles and procedures.

- Clearly define which state executive has the duty to issue and transmit the certificate of ascertainment.
- Reference or mirror the language of the ECRA in describing the duties of the state executive.

3. Check contents of the certificate of ascertainment.

- Reference or mirror the language of the ECRA in describing the contents of the certificate of ascertainment.

4. Check elector roles and procedures.

- Update the date that electors meet.
- Set the place that electors meet by statute.
- Establish how vacancies are filled.
- Check other laws regarding electors for conflicts.

The two **long-term** recommendations are:

5. Check whether state law adequately anticipates how to handle election emergencies.

- Enact statutes providing express guidance on how an emergency is declared.
- Create a hierarchy of remedial election modifications.
- Consider also providing for a modified meeting location and other protective measures for the electors themselves.

6. Check state election contest procedures and other litigation procedures.

- Consider creating an expedited route for election contests and election litigation to be considered without appeal.

All these recommendations are further discussed in the full report that follows.

Preface

About Election Reformers Network

Election Reformers Network (ERN) advances common-sense rules that protect elections from the country's increasing polarization. Drawing on decades of experience at home and abroad, ERN develops model legislation and regulatory reforms to address long-standing structural problems in the U.S. election ecosystem. A nonpartisan 501c3 organization, ERN was founded in 2017. Advancing both federal and state policy changes, ERN's track record includes backing successful ballot initiatives for **independent redistricting in Missouri and Utah** and **canvass board reform in Michigan**; actively advocating **redistricting reform in New Mexico**; and introducing **election official ethics reform in Michigan**.

Our staff and board members draw on experience from prominent organizations including the Carter Center, Commission on Presidential Debates, Common Cause, Democracy International, Denver City and County Elections, International Republican Institute, Issue One, National Democratic Institute, National Democratic Redistricting Committee, the National Council on Election Integrity, and the National Task Force on Election Crises.

About the Authors

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Prior to joining ERN, Michael served as a Program Affiliate Scholar (2021-2023), the Associate Director of Lawyering (2020-2021), and as an Acting Assistant Professor (2018-2021) at NYU School of Law, where he received the Podell Distinguished Teaching Award. Michael also practiced political, appellate, and antitrust law at two major international law firms and clerked for the Honorable Norman H. Stahl of the U.S. Court of Appeals for the First Circuit and the Honorable Robert E. Payne of the U.S. District Court for the Eastern District of Virginia.

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Acknowledgements

ERN would like to thank the Campaign Legal Center, Protect Democracy, and RepresentUs for their helpful comments and feedback on this report.

Background on the Electoral Count Reform Act

To properly understand the scope of the Electoral Count Reform Act (ECRA), it helps to understand its history. Prior to the ECRA's passage, the process for states to submit their slates of electors to Congress was governed by the Electoral Count Act (ECA). The ECA was passed to prevent future disputes like those that had arisen in the Hayes-Tilden election of 1876, in which some states submitted conflicting accounts of their electors. The ECA's solution to this issue was to establish a process by which states would submit a “**certificate of ascertainment**,” under seal of the state, declaring exactly which electors had been chosen—and a process for how Congress should respond to any potential rival slates and certificates purporting to be the “real” certificate of ascertainment.

As time passed, the ECA's cracks began to show. Scholars began describing the law as outdated and ambiguous.³ Elections in 2000, 2004, and 2016 saw objections raised in Congress to electoral votes on grounds that seemed to stretch beyond those provided in the ECA.⁴ But, in the absence of any imminent threat that the results of an election might be overturned, the law remained unchanged and continued to govern the presidential election process.

In 2020, however, serious attempts to exploit the ECA's weaknesses demonstrated the true urgency of reform. Following the 2020 election, governors in Georgia and Arizona were pressured to disregard the popular election results in their states.⁵ Alternative slates of electors convened, and state legislatures were pressured to “appoint” those slates instead of the lawfully elected slates.⁶ Finally, the Vice President was pressured to disregard the lawful certificates of ascertainment and announce the alternative slates as appointed in his role presiding over the joint session of Congress.⁷ All of these efforts were buttressed by attempts to sow doubt in the veracity of the election results, to slow the count of electoral votes by objections raised in the joint session, and to create public pressure, which ultimately culminated in a mob storming the capitol itself and disrupting the electoral vote count.⁸

These efforts failed to overturn the election, but they highlighted weaknesses in the ECA and informed the decisions made in drafting the ECRA.⁹ **To address the weaknesses identified during the 2020 election cycle, the ECRA does the following:**

- Establishes that presidential elections be governed by the state laws in place *prior to Election Day*.
- Clarifies the duties and timeline for certification of every state's election results.

³ Calls to reform the ECA occurred immediately after the 2000 Bush-Gore election, e.g., Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653 (2002), and were revisited on the ten-year anniversary of that election, e.g., Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475 (2010), available at <https://repository.law.miami.edu/umlr/vol64/iss2/5>. In October 2020, a group of 40 experts issued a letter calling the ECA both “ambiguous” and “inadequate” and urging reform to avoid a crisis. *A Statement by Democracy and Elections Experts on Preventing an Election Crisis*, available at <https://issueone.org/wp-content/uploads/2020/10/Statement-from-Elections-Experts-Sep30.pdf>.

⁴ See Derek T. Muller, *Democrats Have Been Shameless About Your Presidential Vote Too*, N.Y. Times (Jan. 6, 2021).

⁵ Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, House Report 117-663, at 271 (Dec. 22, 2022), available at <https://www.govinfo.gov/app/details/GPO-J6-REPORT/summary> (hereinafter “Jan. 6 Report”).

⁶ *Id.* at 276.

⁷ *Id.* at 428.

⁸ *Id.* at 195-233.

⁹ For a more detailed assessment of how the ECA created vulnerability to election subversion and how it could be fixed, see Matthew A. Seligman, *Disputed Presidential Elections and the Collapse of Constitutional Norms* (Draft as of January 30, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283457. For a direct comparison on ECA provisions and how the ECRA improved upon them, see Campaign Legal Center, *Electoral Count Reform Act Implementation*, available at <https://campaignlegal.org/sites/default/files/2023-01/ECRA%20Implementation%20Explainer.pdf>.

- Clarifies that the duty of the Vice President to announce the results of each state is purely ministerial, and raises the bar for objections in Congress to state results.
- Replaces the ECA's vague reference to changed procedures due to a "failed election" with a clearer process to allow for an extended voting period in response to an emergency.

In July 2022, Senators Joe Manchin (D-WV) and Susan Collins (R-ME) introduced the ECRA along with 14 additional cosponsors, seven Democrats and seven Republicans. Over the next several months, amendments were made to the language to further enhance clarity, especially regarding election litigation procedures.¹⁰ By December 2022, the bill had 39 total cosponsors and was added to the Fiscal Year 2023 Omnibus Appropriations bill, which passed the House and Senate with bipartisan votes in both chambers before being signed by President Biden.

Impacted Areas of State Law

Like all federal elections, the presidential election is administered by states. State law defines almost all of the processes that go into holding the presidential election, conducting post-election audits or recounts, resolving post-election contests and litigation, certifying the results, assembling the appointed electors, and transmitting the votes of the electors to Congress to be counted.

When President Biden signed the ECRA, it instituted a new framework around many of these state rules. As a consequence, many state laws now conflict with federal law concerning the presidential election and must be changed. Additionally, states now have an opportunity to fill in areas explicitly left open by the ECRA for the exercise of state judgment and discretion.

Here is a broad overview of how the ECRA impacts state law and policy:

Certificates of Ascertainment

The governor must issue a certificate of ascertainment following the election, unless state law explicitly delegates that duty to another member of the state executive branch. The certificate must list the chosen electors, provide the canvass of votes for each slate of electors, bear the seal of the state, and include at least one security feature. A copy must be sent to the Archivist of the United States immediately after issuance and six copies must be sent to the electors themselves on or before the day of their meeting.

¹⁰ See Testimony of Professor Derek T. Muller, Hearing on *The Electoral Count Act: The Need for Reform* before the United States Senate Committee on Rules and Administration (Aug. 3, 2022), available at <https://www.rules.senate.gov/hearings/the-electoral-count-act-the-need-for-reform> (proposing technical amendments to language for clarity and precision in response to identified areas of potential ambiguity).

Timeline

The new law establishes several deadlines for the presidential election, including:

1. The date of the election itself,
2. The deadline for issuing the certificate of ascertainment, and
3. The date that the electors must meet and cast their votes.

As needed, existing state deadlines for vote counting, audits, recounts, contests, and litigation should be updated (or implemented) to bring them into compliance with the ECRA calendar.¹¹ Preliminary reviews by ERN of state policies indicate that several states may need to adjust these deadlines in their statutes or regulations.

Post-election Changes

The ECRA references laws adopted *prior to* Election Day in five different places, prohibiting policy changes after the election takes place. States should ensure that all laws in these areas are clear in advance of Election Day. Those five references are:

1. The rules governing how electors are appointed (the rules governing the presidential election),
2. The possibility of a modified period of voting due to an emergency (see below),
3. The rules governing filling of vacancies in the state’s electoral college,
4. The laws governing the “appointment and ascertainment” of electors, and
5. The place where the electors meet.

Role of Courts

The ECRA relies heavily on the courts to provide a backstop and mentions judicial actions in two places.

1. First, it clarifies that if a state or federal court orders the state executive to issue a new certificate of ascertainment or to revise the certificate of ascertainment, then the judicially ordered certificate is the one that Congress must rely on when counting the state’s electoral votes, even if the state executive had previously issued a contrary certificate.
2. Second, it provides a new process for resolving disputes brought by aggrieved presidential or vice presidential candidates before a three-judge federal court, but only in cases concerning disputes over the issuance or transmission of the certificate of ascertainment.

Emergencies

The ECRA removed the ECA’s problematic “failed election” language and replaced it with explicit authority for states to provide for a modified period of voting due to an emergency. Laws governing emergencies must be adopted prior to Election Day.

¹¹ For a helpful compilation of existing state deadlines, see *Canvass, Certification and Contested Election Deadlines and Voter Intent Laws*, NCL (Oct. 26, 2022), available at <https://www.ncsl.org/elections-and-campaigns/canvass-certification-and-contested-election-deadlines-and-voter-intent-laws>.

Snapshot of Recommendations

To bring state laws into compliance with the ECRA, this report makes two categories of recommendations: urgent and long-term. The **urgent** recommendations are important for states to do in advance of the 2024 election to ensure that they meet the requirements of the ECRA. The **long-term** recommendations represent opportunities presented by the ECRA to rethink state policy around declarations of emergencies that may impact the presidential election, as well as how states handle presidential election contests and litigation.

Urgent Recommendations

- 1. Check post-election deadlines.** The ECRA states that the electors meet and cast their votes on the Tuesday after the second Wednesday in December: 42 days after Election Day. The state executive must issue the certificate of ascertainment six days prior to that meeting: 36 days after Election Day. States must therefore ensure that the state canvass of votes is complete no later than 36 days after the election, including any audits, recounts, or contests that may impact the final vote totals. States should also establish litigation procedures that would allow any state election litigation, including any appeals, to conclude no later than 36 days after the election.
- 2. Check certification roles and procedures.** Under the ECRA, the state executive must issue and transmit the certificate of ascertainment to the appropriate parties. The state executive is explicitly defined as the governor, unless state law assigns the duty to another state executive, such as the secretary of state. State law should clearly identify who is responsible for this duty, and describe or reference their role and responsibilities.
- 3. Check contents of the certificate of ascertainment.** The ECRA requires the certificate of ascertainment to include the names of the appointed electors, the canvass of votes given for the slates of presidential/vice presidential electors, the seal of the state, and at least one security feature. States should confirm that state law and/or any regulations or guidance governing certification satisfies these requirements, particularly the security feature requirement, which is new to the ECRA.
- 4. Check elector roles and procedures.** The ECRA changes the date that the electors meet by one day: from 41 days after the election to 42 days after the election (the first Tuesday after the second Wednesday in December). It also dictates that the place that the electors meet, as well as any rules regarding filling vacancies, be provided for in state law prior to Election Day. Finally, it makes some changes to how the electors transmit the results of their vote. States should ensure that their statutes list the correct date, provide for a meeting place (and potentially an alternate meeting place in case of emergency), and provide for any vacancy rules. They should also ensure that state statutes comply with the ECRA regarding the transmission of the electoral vote certificates.

Long-Term Recommendations

- 5. Check whether state law adequately anticipates how to handle election emergencies.** The ECRA removed the ECA's vague "failed election" language, and instead states that in the event of "force majeure events that are extraordinary and catastrophic," the state may provide a modified period of voting, according to laws "enacted prior to such day." States should examine their state laws and consider adding clear guidance for who has authority to determine whether such an emergency has

occurred, how to provide for a modified period of voting, and what limits and procedures officials must follow.

6. **Check whether state election contest and election litigation procedures could be improved.** The ECRA provides a new federal venue and process for a narrow category of litigation (challenges brought by candidates concerning the issuance or transmission of the certificate of ascertainment), but it does not preempt or displace any existing (and more common) state or federal causes of action. Because election contests and litigation occur on a short deadline and are politically charged, states could consider ways to ensure such disputes are resolved on an expedited basis and by a trusted body. This may involve allowing for disputes to be heard before the state supreme court in the first instance or adopting specialized state courts including politically balanced judicial panels that can hear and decide cases on an expedited basis without appeals.

Other Aspects of the Presidential Election

There is a lot more to the presidential election than what is covered in this report. For example, we do not address faithless elector state laws, proportional or district-based allocation of electors, the National Popular Vote Interstate Compact, nor the method of voting (such as ranked choice voting). These are important questions of state law but are not directly impacted by the ECRA, and so they are not addressed in this report.¹²

Expanded Discussion of Urgent Recommendations

The Election Reformers Network urges each state to compare their existing election code, including corresponding regulations, with the following recommendations. Statutory or regulatory changes may be called for to avoid disputes during the 2024 presidential election.

Recommendation 1: Check post-election deadlines

The ECRA establishes three very important dates, presented in Figure 1.

Days since election ¹³	2024 dates	Event
0	Tuesday, November 5	Election Day
36	Wednesday, December 11	Deadline for state executive to issue and transmit certificate of ascertainment to the federal archivist
42	Tuesday, December 17	Meeting of electors

Figure 1. Deadlines Established by the ECRA

The ECA included a very similar calendar, with almost the exact same dates (the same Election Day and a date one day earlier for issuing a certificate and for the meeting of electors), but the ECA treated the legal significance of those dates quite differently. The deadline for issuing the certificate came to be

¹² For a general overview of policy options for states reforming their laws governing presidential elections, see Wendy Underhill, National Conference of State Legislatures, *What the Electoral Count Reform Act Means for States* (Jan. 16, 2023), available at <https://www.ncsl.org/state-legislatures-news/details/what-the-electoral-count-reform-act-means-for-states>.

¹³ ECRA § 102(b) (codified at 3 U.S.C. § 1) (establishing Election Day as “the Tuesday next after the first Monday in November”); § 104(a) (codified at 3 U.S.C. § 5(a)(1)) (establishing the date for the state executive to issue and transmit the certificate of ascertainment as “the date that is 6 days before the time fixed for the meeting of the electors”); § 106 (a)(1) (codified at 3 U.S.C. § 7) (establishing the date for meeting of electors as “the first Tuesday after the second Wednesday in December”).

known as the “safe harbor date,” because if a state voluntarily met that deadline in issuing its certificate, then Congress was required to treat its determination as conclusive when counting electoral votes. In practice, most states did meet that deadline most of the time, but not all of the time. In 2020, Wisconsin was the only state that failed to issue its certificate by the safe harbor date, due to ongoing litigation. Under the ECRA, these deadlines are no longer optional. Because almost every state met the safe harbor deadline every election cycle, these deadlines should not be treated as more onerous than the calendar states followed already. However, state laws should recognize that they now must be met each cycle to comply with federal law.

Because the certificate of ascertainment must include the names of the appointed electors and the vote totals received by each presidential/vice presidential slate of electors, the entire vote count within each state must be complete by day 36, the deadline for the state executive to issue and transmit the certificate of ascertainment. That deadline implicitly means that anything that might impact the vote count must also be complete before day 36, such as any procedures for resolving provisional or challenged ballots, as well as any audits, recounts, or contests.

ECRA on Certificate of Ascertainment

Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

ECRA § 104(a) (codified at 3 U.S.C. § 5(a)(1))

RECOMMENDATION 1A - UPDATE REFERENCES TO THE ECA CALENDAR (IF ANY)

As an initial matter, state laws that explicitly reference the framework set by the ECA should be examined and revised. For example, under the ECA, the presidential electors met the first Monday after the second Wednesday in December, which was changed in the ECRA by simply substituting “Monday” with “Tuesday.” If state law provides for electors to meet on the date set by the ECA, it should be changed to the new date set by the ECRA.¹⁴ Likewise for any other references to presidential election certificates, the “safe harbor date,” and so on.

¹⁴ See, e.g., Cal. Elec. Code § 6904 (“The electors chosen shall assemble at the State Capitol at 2 o'clock in the afternoon on the first Monday after the second Wednesday in December next following their election.”). Some states, including North Dakota, Kansas, and Indiana, have already updated their state laws to replace “Monday” with “Tuesday.” See H.B. 1192, 68th Sess. (N.D. 2023), <https://www.ndlegis.gov/assembly/68-2023/regular/bill-index/bi1192.html>; H.B. 2087, Sess. of 2023 (Kan. 2023), http://www.kslegislature.org/li/b2023_24/measures/hb2087/; H.B. 1135, 123rd General Assembly, First Regular Sess. (Ind. 2023), <https://iga.in.gov/legislative/2023/bills/house/1335#document-f1e2012a>. As of the writing of this report, California is actively considering legislation to do so as well. See AB-507, 2023-24 Regular Sess. (Cal. 2023), https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240AB507.

RECOMMENDATION 1B - SET FIRM, STABLE DEADLINES USING “IN NO EVENT LATER THAN” LANGUAGE

States should set firm, stable deadlines prior to the deadlines set by federal law. By a “stable” deadline, we mean a fixed number of days after Election Day (rather than a calendar date, such as “December 1”¹⁵) so that the actual amount of time provided does not depend on when any given calendar date happens to fall in any particular election year. The actual deadline imposed will vary depending on the state and will be influenced by a number of factors, such as the size and population of the state and the particulars of the state’s election infrastructure (for example, whether the state accepts vote-by-mail ballots that arrive after Election Day).

An example of deadline language that would be appropriate might read as follows: “The Secretary of State shall complete the canvass and announce their determination of the presidential election as soon as possible, and in no event later than 21 days after election day.” For states where 21 days is not a practical timeline, it could be longer, but note that it **must be fewer than 36 days**, and must provide time for any audit, recount, or election contest processes that cannot commence prior to the completion of the statewide canvass.

RECOMMENDATION 1C - ALL PARTIES RESPONSIBLE FOR CANVASSING VOTES SHOULD COMPLETE THEIR CANVASS “AS SOON AS POSSIBLE.”

Meeting the ECRA-mandated deadline will be difficult in some places. Unexpected things happen. Wherever possible, deadlines should build in buffers and expectations that duties should generally complete *before* deadlines. One simple way to set that expectation is to consistently set deadlines in the form “as soon as possible, but in no event later than . . .” rather than simply “by . . .” so that administrators will know to plan to complete their canvasses right away whenever possible.

Language to this effect appears in the election statutes for the state of New Jersey, for example: “The Board of State Canvassers shall meet at Trenton **as soon as practicable but no later than the 30th day after the day of election**, for the purpose of canvassing and estimating the votes cast for each person for . . . electors of president and vice president.”¹⁶

In most states, votes for presidential/vice presidential electors are canvassed at the local level first and then canvassed at the state level after. With these kinds of cascading timelines, it is particularly important to complete each step as soon as possible, with firm, stable deadlines at every step.

RECOMMENDATION 1D - CONSIDER HAVING BOTH A DEFAULT TIMELINE AND AN EXTENDED TIMELINE FOR CONTINGENCIES.

One way to encourage timely completion of the canvass is to provide a short, firm deadline to apply in most cases, but explicitly provide for an extended deadline (though one still consistent with the ECRA framework) in case of a few enumerated contingencies. These could include the initiation of a recount or audit, a declaration of emergency, or any delay ordered by a court.

¹⁵ See, e.g., Kan. Stat. § 25-3206(b) (“For the purpose of canvassing elections . . . the state board of canvassers shall meet . . . not later than December 1 next following the election.”). Setting a deadline of December 1 means that the canvass must be complete as early as 24 days or as late as 29 days after Election Day, depending on what day of the week November begins.

¹⁶ N.J. Stat. § 19:21-1.

Example Language and Calendar Following These Recommendations

Days since election	2024 dates	Event
0	Tuesday, November 5	Election Day
7 ◇	Tuesday, November 12	Default deadline for county (or other local) canvass
14 ↔	Tuesday, November 19	Extended deadline for county (or other local) canvass
21 ◇	Tuesday, November 26	Default deadline for statewide canvass
31 ↔	Friday, December 6	Extended deadline for statewide canvass
36 ⊕	Wednesday, December 11	Deadline for state executive to issue and transmit certificate of ascertainment to the federal archivist
42 ⊕	Tuesday, December 17	Meeting of electors

Key: ◇ = Default Deadline, ↔ = Extended Deadline, ⊕ = Hard Deadline Set by the ECRA

Figure 2. Sample Calendar Aligned with the ECRA

Below is an example of language implementing this calendar, though the actual form of such language will vary significantly from jurisdiction to jurisdiction.

Sample County and State Canvass Example Language

1) County canvass

- a) Immediately on closing the polls, the chief election official [or other designated official or board] in each county shall proceed to canvass the vote. Such canvass shall be completed and transmitted to the secretary of state as soon as possible, and in no event later than seven (7) days after Election Day, except as provided in subsection (b).
- b) In the event the county canvass cannot be completed by the deadline described in subsection (a) due to a declared emergency, the initiation of an audit or recount, or due to any court order, the canvass shall be completed as soon as possible, and in no event later than fourteen (14) days after Election Day.

2) State canvass

- a) Immediately upon receiving the county canvass from each county, the secretary of state [or other designated official or board] shall proceed to canvass the vote. Such canvass shall be completed and published as soon as possible, and in no event later than twenty-one (21) days after Election Day, except as provided in subsection (b).
- b) In the event the statewide canvass cannot be completed by the deadline described in subsection (a) due to a declared emergency, the initiation of an audit or recount, or due to any court order, the canvass shall be completed as soon as possible, and in no event later than thirty-one (31) days after Election Day.

Considerations When Revising Canvassing Timelines

Both pre- and post-election practices vary tremendously across jurisdictions, and so a one-size-fits-all timeline is not realistic. The following are several factors to check and consider when updating timelines.

Absentee deadlines and curing. If a state accepts ballots after Election Day, then counting all ballots will take longer than a comparable state that requires ballots to be in-hand by Election Day. In such states, processes should be holistically examined to find ways to reduce vote-counting time in general, and deadlines should be adjusted to ensure that administrators have the time they need to count all ballots before completing their canvass. For example, states should permit pre-processing of mailed ballots, starting during the early voting period (if there is one) or at least 72 hours before Election Day (if there is not).¹⁷

Recounts and audits. Post-election verification is a critical tool in ensuring voter confidence in the accuracy of election results. If a state provides for regular audits that can impact vote counts (as opposed to audits done for training and improvement purposes), then it should build in deadlines for audit completion that fit within the ECRA framework. For recounts, states should include clear dates for filing for a recount (if required) and for completing the recount. Recounts rarely impact margins enough to affect who wins, and so states should also consider adjusting their laws to minimize frivolous recounts. For example, since 2000, there have been 34 statewide recounts (including presidential recounts), and the average change in margin from these recounts was 0.03% of the vote, or 570 total votes; only three such recounts changed which candidate was the apparent winner, and each of these three took place in an election with a margin of less than 0.1%.

Interaction between presidential and non-presidential elections. Every state conducts various other state and federal elections on the same ballot as the presidential election, but only the presidential election is subject to the timeline constraints of the ECRA. If appropriate, states with particularly difficult conditions could split out the presidential and non-presidential canvass and recount processes, giving priority to the presidential election, to allow the other contests to have a more deliberate schedule.

RECOMMENDATION 1E - ESTABLISH FIRM FILING AND RESOLUTION DEADLINES FOR ELECTION CONTESTS

Election contests can begin as soon as the day the canvass is complete. If a presidential candidate or other party plans to file an election contest, they will generally know the grounds for their complaint prior to the completion of the statewide canvass. Courts understand that election contests must proceed very quickly, and so hearings can be scheduled and conducted promptly after a complaint is filed.

Consider the timeline followed by the court and parties in Arizona in 2020. The statewide canvass occurred on November 30, 2020, and Arizona Republican Party Chair Kelli Ward (in her capacity as an Arizona voter) filed her election contest the same day. The court scheduled its hearing to take place three days later on December 3. The hearing took two days, concluding on December 4, and the court issued its decision that day. The case was appealed directly to the Arizona Supreme Court, which heard the case and issued its opinion on December 8.

¹⁷ For a list of when processing of ballots may begin by state, see National Conference of State Legislatures, Table 16: When Absentee/Mail Ballot Processing and Counting Can Begin, *available at* <https://www.ncsl.org/elections-and-campaigns/table-16-when-absentee-mail-ballot-processing-and-counting-can-begin> (last visited April 26, 2023).

Roughly following this timeline, states could require that election contests be filed no later than one day after the statewide canvass. A hearing could be scheduled for no later than one week after filing. Then, the court could be required to announce its final determination in the contest as soon as possible, but in no event later than the date five days prior to the date required by the ECRA for the state executive to issue the certificate of ascertainment. Note that this timeline would only be practicable in a state that completes its statewide canvass no later than the day 23 days after Election Day (the example calendar above sets a default deadline of 21 days after Election Day for completion of the statewide canvass).

The example timeline above has an extended deadline for completion of the statewide canvass of 31 days after Election Day. If a canvass does take that long, then to reach a final determination prior to day 35 would require actions in election contests to be filed the next day, and for hearings to take place the next day or perhaps two days later, allowing two days for hearings. As the Arizona example from 2020 shows, that kind of timeline is possible, but it would not allow for appeal. See Recommendation 6 below for how judicial contest and litigation procedures might be updated to provide for resolution on an expedited basis without appeal.

Regardless, any contest timelines should always permit actions to be brought earlier than the listed deadlines. The party bringing the challenge will probably be interested in having more time to make their case, and the expectation should be that they will bring their challenges earlier in order for that to be possible.

States should consider establishing similar filing and hearing deadlines for election litigation so that all state court determinations *can* be fully resolved before day 36, even if state law does not purport to require that litigation necessarily conclude by that date. Courts have traditionally assumed that litigation *should* be concluded sufficiently early to ensure a state's certificate of ascertainment is treated as conclusive in Congress and encouraging state courts to resolve all state claims before day 36 is consistent with this longstanding tradition and expectation.

Following is a calendar showing this proposed timeline alongside the proposed canvassing timelines described above.

Days since election	2024 dates	Event
0	Tuesday, November 5	Election Day
7 ◇	Tuesday, November 12	Default deadline for county (or other local) canvass
14 ↔	Tuesday, November 19	Extended deadline for county (or other local) canvass
21 ◇	Tuesday, November 26	Default deadline for statewide canvass
22 ◇	Wednesday, November 27	Deadline for filing election contests
30 ◇	Thursday, December 5	Last possible hearing date for election contests
31 ↔	Friday, December 6	Extended deadline for statewide canvass
32 ↔	Saturday, December 7	Alternate deadline for filing election contests
34 ↔	Monday, December 9	Alternate last possible hearing date for election contests
35 ◇	Tuesday, December 10	Last possible date for resolution of election contests
36 ⊕	Wednesday, December 11	Deadline for state executive to issue and transmit certificate of ascertainment to the federal archivist
42 ⊕	Tuesday, December 17	Meeting of electors

Key: ◇ = Default Deadline, ↔ = Extended Deadline, ⊕ = Hard Deadline Set by the ECRA

Figure 3. Sample Calendar Including Election Contests

Recommendation 2: Check certification roles and procedures

The ECRA mentions a few offices with specific duties. The “executive of each state” issues the certificate of ascertainment. That executive then transmits one copy to the Archivist of the United States and six copies to the electors. Additional officers mentioned in the ECRA regarding the duties of the electors themselves are discussed in Recommendation 4 below.

RECOMMENDATION 2A - CLEARLY DEFINE WHICH STATE EXECUTIVE HAS THE DUTY TO ISSUE AND TRANSMIT THE CERTIFICATE OF ASCERTAINMENT.

The first state officer mentioned in the ECRA is “the executive of each state,” who has the responsibility to issue the certificate of ascertainment and transmit it to the appropriate parties. The term “executive” was also in the ECA, but which person specifically qualified as the state executive was unspecified. The ECRA added the following definition for the term:

“[E]xecutive” means, with respect to any State, the Governor of the State (or, in the case of the District of Columbia, the Mayor of the District of Columbia), except when the laws or constitution of a State in effect as of Election Day expressly require a different State executive to perform the duties identified under this chapter.

By default, the “executive” of the state is its governor. However, it can be any other state executive if state law identifies them as the person with the responsibility to issue the certificate of ascertainment.

If a state wants the certificate of ascertainment to be issued and transmitted by its secretary of state, other chief election official, or some other state executive other than the governor, the state should adopt a statute clearly assigning those duties to that state executive prior to Election Day. If a state has

any statute that could be interpreted as doing that, but is not totally clear on the matter, the state should amend that statute to clarify which officer has the precise duties required by the ECRA.¹⁸

RECOMMENDATION 2B - REFERENCE OR MIRROR THE LANGUAGE OF THE ECRA IN DESCRIBING THE DUTIES OF THE STATE EXECUTIVE AND THE ELECTORS.

In defining the appropriate state executive, state law should restate or reference the duties of the state executive found in the ECRA to avoid any ambiguity.¹⁹ If no preexisting state law describes the duties, state law can simply reference the ECRA. If preexisting state law partially or incorrectly recites the duties, the law should be updated to mirror the requirements of the ECA and include the following:

1. A statement that the executive “shall issue a certificate of ascertainment of appointment of electors.”
2. A description of the contents of the certificate (see Recommendation 3 below).
3. A requirement that the executive shall “transmit to the Archivist of the United States, immediately after the issuance of a certificate of ascertainment of appointment of electors and by the most expeditious method available, such certificate of ascertainment of appointment of electors.”
4. A requirement that the executive shall “transmit six duplicate-originals of the certificate of ascertainment of appointment of electors to the electors” on or before a specified date no later than the date for the meeting of electors.

Prior references to transmitting certificates should be replaced, as they may include erroneous aspects, such as a reference to the United States Secretary of State (the recipient of the certificates prior to the designation of the Archivist as the recipient), or a reference to transmitting by “registered mail” (the prior requirement under the ECA that the ECRA replaced with “the most expeditious method available”).

Recommendation 3: Check contents of the certificate of ascertainment

Under the ECRA, the certificate must include two pieces of information: (1) the names of the appointed electors, and (2) a canvass (or other determination) of votes cast or given for all slates of electors. Additionally, the certificate must “bear the seal of the State,” and include “at least one security feature, as determined by the State, for purposes of verifying the authenticity of such certificate.”²⁰

These requirements were already present in the ECA, with the exception of the security feature. If no preexisting state law describes the contents of the certificate, state law can simply reference the ECRA. If preexisting state law or regulations describe the content, such laws, regulations, or other official guidance should be updated to add the requirement of a security feature and ensure that the other elements are present as well.

When providing for the canvass of votes, states should consider anything unique to their context. Most states elect an entire slate of electors by a statewide single-choice plurality vote. Two states (Nebraska and Maine) instead award electors by congressional district. Two states (Alaska and Maine) award electors by ranked choice voting. Another 16 states, as well as the District of Columbia, have joined the

¹⁸ See, e.g., Ariz. Rev. Stat. § 16-648 and § 16-212, which instruct the secretary of state to canvass the votes for presidential elector and instruct the presidential electors to vote according to the results of that canvass, but which do not clearly assign the duty to issue the certificate of ascertainment to either the secretary of state or any other state executive.

¹⁹ ECRA § 104(a) (codified at 3 U.S.C. § 5(b)).

²⁰ *Id.* at § 104 (codified at 3 U.S.C. § 5(a)(2)).

National Popular Vote Interstate Compact. A full set of recommendations for these contexts is beyond the scope of this report, but states with any of these elements should ensure that their state statutes do not create any ambiguities under federal law. For example, states with ranked choice voting should specify that the relevant determination of votes listed on the certificate of ascertainment is the final round of the ranked choice voting tabulation, in order to avoid any potential ambiguity.

Security features could include any number of elements that make documents harder to forge, such as microprint lines (tiny lines of text that can only be seen when magnified), the use of pantograph security paper (paper with a light-colored, patterned background), or more elaborate features like holograms or color-shift inks often used in paper currencies. Regardless, for the purposes of state law, it should suffice to include a statement that the certificate shall have “at least one security feature,” and then leave the choice of security feature to the executive so that the security feature can be more easily updated through administrative rulemaking or guidance over time.

Recommendation 4: Check elector roles and procedures

The ECRA changes the framework for the meeting time and place of electors in two ways: First, the date of the meeting of electors is moved back by a single day. The ECA had the date of electors meeting as the first Monday after the second Wednesday in December, and the ECRA simply changed the word “Monday” to “Tuesday.”²¹

Second, the ECRA changed the place of meeting for electors from being “at such place in each State as the legislature of such State shall direct,” to being “at such place in each State in accordance with the laws of the State enacted prior to election day.”²² This change probably does not affect any existing state laws, but rather appears to be part of the overall goal of the ECRA of replacing “legislature of such State shall direct” language with “in accordance with the laws of the State enacted prior to election day” throughout to clarify that states must act according to normal legislative procedures and not on some other, new authority, nor in an ad hoc way after the election has already occurred.

Likewise, rules regarding filling vacancies for electors must also be according to state laws adopted prior to Election Day.²³ This category includes the “faithless elector” laws that generally declare an elector as having resigned if they attempt to vote for someone other than their party’s nominee.

After the electors meet and vote, they create six certificates of their electoral college votes and seal up each one with one of the six duplicate-original certificates of ascertainment. The electors then immediately transmit one to the President of the Senate, two to the chief election officer of the state, two to the Archivist of the United States, and one to the local district court. These must be sent “by the most expeditious method available.”²⁴

When the chief election officer of the state receives their two copies of the sealed certificates, they must make one available for public inspection and keep the other in case the President of the Senate requests it.²⁵

²¹ *Id.* at § 106(a)(1) (codified at 3 U.S.C. § 7).

²² *Id.* at § 106(a)(2).

²³ *Id.* at § 103 (codified at 3 U.S.C. § 4).

²⁴ *Id.* at § 107(a) (codified at 3 U.S.C. § 11).

²⁵ *Id.* (codified at 3 U.S.C. § 11(2)).

States should double-check their state laws for consistency with all of these requirements. The following short checklist should be followed:

- If state statutes include the date that electors meet, ensure that it has been updated with the new date set by the ECRA, or with more general language stating that electors will meet on the day required by federal law;
- State law should provide the place for electors to meet, and should also include the rules for changing that place in case of emergency;
- State law should provide for how vacancies in its electoral college are filled; and
- State law should not contravene the ECRA requirements in any other way, for example, by dictating that certificates be sent by registered mail, instead of by the most expeditious method available.

Expanded Discussion of Long-Term Recommendations

The ECRA implements new rules concerning election emergencies and election litigation. These aspects of the ECRA were designed to foreclose areas of potential abuse but are unlikely to create direct conflicts between existing state law and the ECRA on their own. Nonetheless, the new rules do present an opportunity for states to reconsider their approaches to emergencies and litigation and bring them into harmony with both federal law and best practices more generally.

Recommendation 5: Check whether state law adequately anticipates election emergencies

The ECRA removed a section of the ECA that allowed for the possibility that a state might hold an election, but nonetheless “fail to make a choice,” in which case the electors could be appointed on a subsequent day “in such a manner as the legislature of such State may direct.” The history of this language suggests that it existed solely to provide for state emergencies provisions and majority-requirements (such as runoffs) in state law.²⁶ However, this “failed election” language was seized upon to argue that a state legislature could “reclaim” its right to appoint electors due to allegations of fraud or other impropriety in the electoral process. Though legally meritless, such an interpretation warranted revising the section to clarify the more limited scope of appropriate actions a state legislature (or other state actor) might take in the event of an emergency.

In its place, the ECRA provides that states may provide for a modified period of voting, in accordance with laws passed prior to Election Day, and in response to an “extraordinary and catastrophic” emergency.

Two things that this new language *does not* permit: **First, it does not allow states to cancel or nullify an election and appoint electors themselves in the event of an emergency.** The provision is for a modified period of voting, which ensures that electors will still be chosen by the votes of the people themselves. **Second, it does not allow a state to change voting rules merely by asserting that an emergency has**

²⁶ See Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 NYU L. Rev. 1052 (2021); Richard H. Pildes and G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Cal. L. Rev. 1773, 1829 (2021); Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 Wash. & Lee L. Rev. Online 179 (2020).

occurred. The grounds for modifying voting dates must be provided in state law prior to the election and the ECRA explicitly states that the modified period of voting provision can only be triggered by “force majeure”²⁷ events that are extraordinary and catastrophic” to ensure that frivolous claims of emergencies cannot be used as a pretext for subverting the proper election result.²⁸

ECRA on Emergencies

“‘[E]lection day’ means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, **if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day**, election day shall include the modified period of voting.”

ECRA § 102(b) (codified at 3 U.S.C. § 21(1))

RECOMMENDATION 5A - ENACT STATUTES CLEARLY ESTABLISHING WHO MAY DECLARE AN EMERGENCY AND HOW THEY DO SO

States should respond to emergencies in accordance with state law. Such laws must balance the importance of a fast and effective response in uncertain situations and the exercise of great caution in providing state officials with the authority to modify how and when people may vote. On the one hand, if a law is too onerous in allowing modifications, the modifications may not be made in time to ensure voters’ right to vote. On the other hand, if a law is too liberal in allowing modifications, it may open the door to abuse and tempt state actors to interfere with an election.

A declaration of emergency should require more than one individual to modify an election. Some state laws allow elections to be modified or postponed due to a declaration of emergency by the governor alone.²⁹ While gubernatorial declarations of emergency may be appropriate in other contexts, when it comes to changing election rules, there should be an additional check in place. Colorado, for example, allows a change in election date after the relevant governmental body petitions a district judge, who must find that an election on the regularly scheduled date would be “impractical or impossible.”³⁰ Requiring the relevant officer to seek judicial approval to modify the election due to an emergency in this manner provides a good model for preventing abuse of discretion.

With or without judicial approval, **states should take care in establishing who may declare emergencies.** States where the chief election official may declare emergencies should adopt measures

²⁷ The term “force majeure” generally refers to an event outside of a party’s control that makes it impossible for them to complete some duty.

²⁸ See Testimony of Ambassador Norman L. Eisen (Ret.), Hearing on *The Electoral Count Act: The Need for Reform* before the United States Senate Committee on Rules and Administration (Aug. 3, 2022), available at <https://www.rules.senate.gov/hearings/the-electoral-count-act-the-need-for-reform>.

²⁹ See, e.g., Fla. Stat. Ann. § 101.733(1) (“The Governor may, upon issuance of an executive order declaring a state of emergency or impending emergency, suspend or delay any election.”).

³⁰ Colo. Rev. Stat. § 1-1-104(46).

to ensure impartiality, such as requiring an oath of impartiality in the conduct of election responsibilities. Impartiality in declaring election emergencies is particularly important for preventing abuse of discretion in the form of failure to declare an emergency or adopt appropriate election changes.

Regardless of who has the primary authority to declare emergencies, states may wish to consider granting some other limited set of parties (such as presidential campaigns or local election officials) the ability to petition a court for a declaration of emergency if the official otherwise designated to declare an emergency is unable or unwilling to do so. Local election officials in particular may be appropriate parties for such a special process since they have a better understanding of the needs of their communities and tend to be better trusted than state officials.³¹

States should also consider specifying the kinds of emergencies that may warrant modifying election rules. In New York, for example, additional days of voting may be provided in the event of “fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster.”³² A prospective listing of disaster types, along with a catch-all final item like “or other disaster,” can serve to narrow discretion when combined with judicial oversight, as courts typically interpret catch-all provisions as only encompassing things in the same category as those explicitly listed.³³

RECOMMENDATION 5B - CREATE A HIERARCHY OF REMEDIAL ELECTION MODIFICATIONS

In a 2020 law review article, Professor Michael Morley recommends that states distinguish among three kinds of election emergencies: (1) those of limited scope or duration, (2) those that impact many voters or make it impractical to conduct the election at all, and (3) those that cause a mass, long-term displacement of many voters.³⁴ He recommends that states then create a hierarchy of remedies, from changes to polling places and extended polling hours for the first category, to modified periods of voting for the second, and the most extreme remedy of temporary election cancellation for the third.

The ECRA does not permit a state to cancel its election due to an emergency, no matter how severe. Morley’s first two categories of emergencies, however, provide a helpful framework. A state should provide for a suite of election modifications appropriate to emergencies of limited scope or duration. Examples Morley provides of these modifications include relocated polling places, extended polling places hours, use of paper ballots without electronic tabulators or voting systems (for cases where electronic devices are inoperable, for example, due to a power outage), permitting alternative means of casting ballots (as in the now-familiar case of extending vote-by-mail privileges to limit the spread of a contagious disease), and allowing revotes in cases where ballots have been destroyed. In addition to these, states should provide for enhanced security for polling places and election workers in cases where there is a credible threat of violence.

Extending the overall period of voting for the election should also be available, but should only be the remedy in cases where smaller modifications are inadequate, and ideally should be ordered prior to Election Day (for example, if a hurricane is expected to affect a large area).

³¹ See generally, Jason D’Andrea, Sonia Montejano & Matthew Vaughan, *Presidential Election Disruptions: Balancing the Rule of Law and Emergency Response*, 1 Fordham L. Voting Rts. & Democracy F. 301 (2023), available at <https://ir.lawnet.fordham.edu/vrdf/vol1/iss3/5>.

³² N.Y. Elec. Law § 3-108(1).

³³ This is known as the “ejusdem generis” canon of construction.

³⁴ Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, 80 Wash. & Lee L. Rev. 359 (2023).

RECOMMENDATION 5C - CONSIDER ALSO PROVIDING FOR A MODIFIED MEETING LOCATION AND OTHER PROTECTIVE MEASURES FOR THE ELECTORS THEMSELVES

The recommendations for emergencies described above should apply generally—not only to the presidential election, but also to other federal, state, and even local elections. However, the presidential election includes one additional element that could be affected by emergencies: the meeting of presidential electors.

In both 2016 and 2020, presidential electors themselves faced threats from supporters of losing candidates. The ECRA provides that the electors shall meet “at such place in each State in accordance with the laws of the State enacted prior to election day.”³⁵ States should consider providing by law for a default location as well as the option for a back-up location in case of an emergency, including credible threats against the electors.³⁶

Recommendation 6: Check state election contest and other litigation procedures

The ECRA affects state-based election contests or other litigation in two ways: First, by clarifying the timeline in a way that may affect the timing of state claims; and second, by clarifying that courts may order the executive to issue a new certificate of ascertainment after litigation, and that this judicially ordered certificate will replace and supersede the prior one.

The ECRA also provides a new three-judge federal court venue for aggrieved candidates for President and Vice President to bring claims regarding “the issuance of the certificate or the transmission of the certificate,” which is a very narrow set of circumstances. This venue provision does not displace any existing state or federal causes of action arising from the election. Because these claims are limited to only those specific grounds, this new provision should not affect state litigation.

Far from superseding state contest laws and procedures, the ECRA effectively requires them to be followed. The election must proceed according to laws passed prior to Election Day, and if a state or federal court finds that the certificate of ascertainment must be modified or replaced, the court gets the final say.

CONSIDER CREATING AN EXPEDITED ROUTE FOR ELECTION CONTESTS AND ELECTION LITIGATION TO BE CONSIDERED WITHOUT APPEAL

As described in Recommendation 1, the timelines for election contests and other election litigation can be uncomfortably tight. Additionally, these challenges are politically charged and high stakes, making trusted and timely procedures particularly important.

One way to balance these two goals is to provide for special expedited procedures and venue requirements. For example, election litigation (and potentially election contests) could be filed with the state supreme court in the first instance or be directly appealable to the state supreme court. Or a state might consider adopting a specialized short-term court specifically to hear these challenges, without appeal.³⁷ For example, in Iowa a specialized court with no appeal hears challenges involving presidential

³⁵ ECRA § 106(a)(2) (codified at 3 U.S.C. § 7).

³⁶ See, e.g., AB-507, 2023-24 Regular Sess. (Cal. 2023),

https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240AB507 (providing that, “[i]f it is unsafe to meet in the State Capitol due to a state of emergency proclaimed by the Governor . . . the Governor shall designate by written proclamation an alternative location for the electors to assemble” and “[t]he proclamation shall be filed with the Secretary of State”).

³⁷ See, e.g., Mike Parsons, Election Law Blog, *Counting on the Courts* (proposing a bipartisan federal court structure for disputed presidential elections) (Jan. 6, 2022), available at <https://electionlawblog.org/?p=126733>.

electors or elections to Congress. This court is composed of the chief justice of the state supreme court as well as four district court judges chosen by the state supreme court.³⁸

In states with partisan judicial elections, the judicial panel adopted pursuant to this recommendation could be created in a way that prevents partisan imbalance. Even without partisan elections, however, states should consider what approach is most likely to promote a stronger appearance of impartiality for voters in that state. This may simply be the state supreme court as currently constituted. Or it may involve a special court with composition rules restricting, for example, the number of judges that have been appointed by a governor of any particular party.

Conclusion

The presidential election draws the highest turnout, attracts the most media attention, and raises passions more than any other part of the American political process. That energy and engagement does not always end on Election Day. The 2000 election brought the importance of recounts and election litigation to the fore. The 2016 election put a spotlight on the role of presidential electors. And the 2020 election highlighted how the once dull act of counting electoral votes could turn into an explosive and even deadly occasion. The 2020 election laid bare the ambiguities and weaknesses of the outdated Electoral Count Act and demonstrated the dire need to update and improve existing presidential election procedures.

Despite the politically charged nature of the topic, the Electoral Count Reform Act was developed, amended, and passed through a remarkably bipartisan process. Its changes are common sense, unobjectionable tweaks to a technocratic process. They clarify existing rules and institute new rules that ensure the will of the voters in each state must take precedence, and that partisan officials cannot deny the clear voice of the people in their state.

This approach echoes a foundational goal that the Election Reformers Network considers a pillar of a properly-functioning democracy: shifting decision-making in elections away from interested parties—partisans, candidates, those with other conflicts of interest—and toward more neutral actors that can balance competing interests and ensure the rules are fair for all.

If you are a state policymaker who would like more guidance on how the ECRA might affect existing law in your state, please reach out to ERN. Our election law and policy experts can help you navigate the rules and identify the changes best suited for your state.

³⁸ See Iowa Code §§ 60.1–60.7.

Appendices

Appendix A: Activities Included Within “Ministerial Duties”

The act of canvassing (counting or tabulating) votes and certifying results should be purely ministerial: The official(s) tasked with canvassing votes and announcing the results should have no authority to declare a different result than the one presented to them. The ECRA formally recognizes a similar dynamic in the context of the Vice President’s duty to count the votes of each state’s electors. ECRA § 109(a) (codified at 3 U.S.C. § 15(b)).

The ministerial nature of canvassing votes and certifying results also applies within states to the various boards and officials responsible for counting and tabulating votes and publishing results. In recognition of this fact, states should consider adopting explicit provisions for those agencies and offices analogous to the ECRA’s clarifying declaration that the Vice President’s role is purely ministerial. Where they do not exist already, states should also consider establishing nonpartisan canvassing boards insulated from political parties and other interested actors. See Alexander Vanderklipp, [Election Reformers Network](#), *Political parties have major influence on who certifies elections in nearly every state* (Sep. 6, 2022).

As an example, in 2022, Michigan added a requirement to its state constitution that the canvassing and certification duties of the state canvassing board (and any county canvassing boards) are “ministerial, clerical, [and] nondiscretionary[.]” Michigan Const. Art. 2 § 7. Such explicit language provides additional clarity for election officials, courts, and the public alike. To be sure, courts have often declared vote counting and results certification to be purely ministerial in nature when canvassing officials have attempted to overstep their authority, and writ of mandamus actions can help enforce these limits when challenged. See, e.g., Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 William & Mary L. Rev. (forthcoming 2023); *Citizens for Marriage v. Bd. of Canvassers*, 688 N.W.2d 538 (Mich. Ct. App. 2004). But just as the ECRA provided an opportunity to clarify ambiguous statutory language and minimize the risks for exploitation and unrest demonstrated in 2020, so too do states now have an opportunity to make explicit the limited nature of canvassers’ roles and duties in the electoral process to avoid overreach and the need for eleventh-hour litigation.

Appendix B: Title 3, United States Code, Chapter 1, §§ 1–22

The following reflects the updated text for Sections 1 – 22 of Title 3 of the United States Code, as amended by the Consolidated Appropriations Act, 2023, H.R. 2617, Division P, Title I ([The Electoral Count Reform Act](#)).

CHAPTER 1—PRESIDENTIAL ELECTIONS AND VACANCIES

§ 1. TIME OF APPOINTING ELECTORS

The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.

§ 2. [REPEALED]

§ 3. NUMBER OF ELECTORS

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

§ 4. VACANCIES IN ELECTORAL COLLEGE

Each State may, by law enacted prior to election day, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.

§ 5. CERTIFICATE OF ASCERTAINMENT OF APPOINTMENT OF ELECTORS

(a) In General.—

(1) **Certification.**—Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

(2) **Form of certificate.**—Each certificate of ascertainment of appointment of electors shall—

(A) set forth the names of the electors appointed and the canvass or other determination under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast;

(B) bear the seal of the State; and

(C) contain at least one security feature, as determined by the State, for purposes of verifying the authenticity of such certificate.

(b) **Transmission.**—It shall be the duty of the executive of each State—

(1) to transmit to the Archivist of the United States, immediately after the issuance of a certificate of ascertainment of appointment of electors and by the most expeditious method available, such certificate of ascertainment of appointment of electors; and

(2) to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate.

(c) **Treatment of Certificate as Conclusive.**—For purposes of section 15:

(1) **In general.**—

(A) **Certificate issued by executive.**—Except as provided in subparagraph (B), a certificate of ascertainment of appointment of electors issued pursuant to subsection (a)(1) shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State.

(B) **Certificates issued pursuant to court orders.**—Any certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.

(2) **Determination of federal questions.**—The determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors shall be conclusive in Congress.

(d) **Venue and Expedited Procedure.**—

(1) **In general.**—Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to the following rules:

(A) **Venue.**—The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

(B) **3-judge panel.**—Such action shall be heard by a district court of three judges, convened pursuant to section 2284 of title 28, United States Code, except that—

(i) the court shall be comprised of two judges of the circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

(C) **Expedited procedure.**—It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, consistent with all other relevant deadlines established by this chapter and the laws of the United States.

(D) **Appeals.**—Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors.

(2) **Rule of construction.**—This subsection—

(A) shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States; and

(B) shall not be construed to preempt or displace any existing State or Federal cause of action.

§ 6. DUTIES OF ARCHIVIST

The certificates of ascertainment of appointment of electors received by the Archivist of the United States under section 5 shall—

(1) be preserved for one year;

(2) be a part of the public records of such office; and

(3) be open to public inspection.

§ 7. MEETING AND VOTE OF ELECTORS

The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day.

§ 8. MANNER OF VOTING

The electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution.

§ 9. CERTIFICATES OF VOTES FOR PRESIDENT AND VICE PRESIDENT

The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates of votes one of the certificates of ascertainment of appointment of electors which shall have been furnished to them by direction of the executive of the State.

§ 10. SEALING AND ENDORSING CERTIFICATES

The electors shall seal up the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice President, are contained therein.

§ 11. TRANSMISSION OF CERTIFICATES BY ELECTORS

The electors shall immediately transmit at the same time and by the most expeditious method available the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, as follows:

- (1) One set shall be sent to the President of the Senate at the seat of government.
- (2) Two sets shall be sent to the chief election officer of the State, one of which shall be held subject to the order of the President of the Senate, the other to be preserved by such official for one year and shall be a part of the public records of such office and shall be open to public inspection.
- (3) Two sets shall be sent to the Archivist of the United States at the seat of government, one of which shall be held subject to the order of the President of the Senate and the other of which shall be preserved by the Archivist of the United States for one year and shall be a part of the public records of such office and shall be open to public inspection.
- (4) One set shall be sent to the judge of the district in which the electors shall have assembled.

§ 12. FAILURE OF CERTIFICATES OF ELECTORS TO REACH PRESIDENT OF THE SENATE OR ARCHIVIST OF THE UNITED STATES; DEMAND ON STATE FOR CERTIFICATE

When, after the meeting of the electors shall have been held, no certificate of vote mentioned in sections 9 and 11 of this title from any State shall have been received by the President of the Senate or by the Archivist of the United States by the fourth Wednesday in December, the President of the Senate or, if the President of the Senate be absent from the seat of government, the Archivist of the United States shall request, by the most expeditious method available, the chief election officer of the State to send up the certificate lodged with such officer by the electors of such State; and it shall be the duty of such chief election officer of the State upon receipt of such request immediately to transmit same by the most expeditious method available to the President of the Senate at the seat of government.

§ 13. SAME; DEMAND ON DISTRICT JUDGE FOR CERTIFICATE

When, after the meeting of the electors shall have been held, no certificates of votes from any State shall have been received at the seat of government on the fourth Wednesday in December, the President of the Senate or, if the President of the Senate be absent from the seat of government, the Archivist of the United States shall send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged, and such judge shall forthwith transmit that certificate by the hand of such messenger to the seat of government.

§ 14. [REPEALED]

§ 15. COUNTING ELECTORAL VOTES IN CONGRESS

(a) **In General.**—Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.

(b) **Powers of the President of Senate.**—

(1) **Ministerial in nature.**—Except as otherwise provided in this chapter, the role of the President of the Senate while presiding over the joint session shall be limited to performing solely ministerial duties.

(2) **Powers explicitly denied.**—The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors.

(c) **Appointment of Tellers.**—At the joint session of the Senate and House of Representatives described in subsection (a), there shall be present two tellers previously appointed on the part of the Senate and two tellers previously appointed on the part of the House of Representatives by the presiding officers of the respective chambers.

(d) **Procedure at Joint Session Generally.**—

(1) **In general.**—The President of the Senate shall—

(A) open the certificates and papers purporting to be certificates of the votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors issued pursuant to section 5, in the alphabetical order of the States, beginning with the letter A; and

(B) upon opening any certificate, hand the certificate and any accompanying papers to the tellers, who shall read the same in the presence and hearing of the two Houses.

(2) **Action on certificate.**—

(A) **In general.**—Upon the reading of each certificate or paper, the President of the Senate shall call for objections, if any.

(B) **Requirements for objections or questions.**—

(i) **Objections.**—No objection or other question arising in the matter shall be in order unless the objection or question—

(I) is made in writing;

(II) is signed by at least one-fifth of the Senators duly chosen and sworn and one-fifth of the Members of the House of Representatives duly chosen and sworn; and

(III) in the case of an objection, states clearly and concisely, without argument, one of the grounds listed under clause (ii).

(ii) **Grounds for objections.**—The only grounds for objections shall be as follows:

(I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1).

(II) The vote of one or more electors has not been regularly given.

(C) Consideration of objections and questions.—

(i) **In general.**—When all objections so made to any vote or paper from a State, or other question arising in the matter, shall have been received and read, the Senate shall thereupon withdraw, and such objections and questions shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections and questions to the House of Representatives for its decision.

(ii) **Determination.**—No objection or any other question arising in the matter may be sustained unless such objection or question is sustained by separate concurring votes of each House.

(D) **Reconvening.**—When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No vote or paper from any other State shall be acted upon until the objections previously made to any vote or paper from any State, and other questions arising in the matter, shall have been finally disposed of.

(e) Rules for Tabulating Votes.—

(1) Counting of votes.—

(A) **In general.**—Except as provided in subparagraph (B)—

(i) only the votes of electors who have been appointed under a certificate of ascertainment of appointment of electors issued pursuant to section 5, or who have legally been appointed to fill a vacancy of any such elector pursuant to section 4, may be counted; and

(ii) no vote of an elector described in clause (i) which has been regularly given shall be rejected.

(B) **Exception.**—The vote of an elector who has been appointed under a certificate of ascertainment of appointment of electors issued pursuant to section 5 shall not be counted if—

(i) there is an objection which meets the requirements of subsection (d)(2)(B)(i); and

(ii) each House affirmatively sustains the objection as valid.

(2) **Determination of majority.**—If the number of electors lawfully appointed by any State pursuant to a certificate of ascertainment of appointment of electors that is issued under section 5 is fewer than the number of electors to which the State is entitled under section 3, or if an objection the grounds for which are described in subsection (d)(2)(B)(ii)(I) has been sustained, the total number of electors appointed for the purpose of determining a majority of the whole number of electors appointed as required by the Twelfth Amendment to the Constitution shall be reduced by the number of electors whom the State has failed to appoint or as to whom the objection was sustained.

(3) **List of votes by tellers; declaration of winner.**—The tellers shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

§ 16. SAME; SEATS FOR OFFICERS AND MEMBERS OF TWO HOUSES IN JOINT SESSION

At such joint session of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint session shall not be dissolved until the count of electoral votes shall

be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first session of the two Houses, no further or other recess shall be taken by either House.

§ 17. SAME; LIMIT OF DEBATE IN EACH HOUSE

When the two Houses separate to decide upon an objection pursuant to section 15(d)(2)(C)(i) that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter—

- (1) all such objections and questions permitted with respect to such State shall be considered at such time;
- (2) each Senator and Representative may speak to such objections or questions for up to five minutes, and not more than once;
- (3) the total time for debate for all such objections and questions with respect to such State shall not exceed two hours in each House, equally divided and controlled by the Majority Leader and Minority Leader, or their respective designees; and
- (4) at the close of such debate, it shall be the duty of the presiding officer of each House to put each of the objections and questions to a vote without further debate.

§ 18. SAME; PARLIAMENTARY PROCEDURE AT JOINT SESSION

While the two Houses shall be in session as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw under section 15(d)(2)(C)(i).

§ 19. VACANCY IN OFFICES OF BOTH PRESIDENT AND VICE PRESIDENT; OFFICERS ELIGIBLE TO ACT

(a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that—

- (1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice President-elect to qualify, then he shall act only until a President or Vice President qualifies; and
- (2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

§ 20. RESIGNATION OR REFUSAL OF OFFICE

The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

§ 21. DEFINITIONS

As used in this chapter the term—

(1) "election day" means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, "election day" shall include the modified period of voting.

(2) "State" includes the District of Columbia.

(3) "executive" means, with respect to any State, the Governor of the State (or, in the case of the District of Columbia, the Mayor of the District of Columbia), except when the laws or constitution of a State in effect as of election day expressly require a different State executive to perform the duties identified under this chapter.

§ 22. SEVERABILITY

If any provision of this chapter, or the application of a provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, and the application of the provisions to any person or circumstance, shall not be affected by the holding.