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# Cato Scholarship on Electoral Count Act Helped Drive Big Win

Fixing the law to avoid another January 6 confrontation

**O**n January 5, 2021, Cato research fellow Thomas Berry published a piece in *National Review* titled “GOP Senators’ Electoral College Stunt Is a Dead End.” A few days earlier, 11 Republican senators led by Ted Cruz (R-TX) had announced their plan to vote “to reject the electors from disputed states” when Congress convened to declare a winner of the 2020 presidential election, unless an “emergency 10-day audit” was completed. Berry explained how this plan was not just a terrible idea but also illegal under the Electoral Count Act (ECA) of 1887, passed as a belated response to the disputed Hayes-Tilden election in 1876. The article ended with Berry imploring senators to consider historical wisdom before “inviting a repeat of the chaos of 1876 today.”

The following day, it became apparent that they did not in fact consider historical wisdom.

Fast-forward to just shy of two years later, and Thomas Berry along with Cato senior fellow Walter Olson and staff writer Andy Craig were able to celebrate the work they did that helped lead to the passage of the first amendment to the ECA in over 130 years.

Throughout 2021, Cato repeatedly made the case for reforming the ECA, and as the first anniversary of the January 6 Capitol riot approached, many other journalists and scholars began to do the same. From the editorial board of the *Wall Street Journal* to David French at *The Dispatch* and Edward B. Foley in a *Washington Post* op-ed, all called on Congress to reform the ECA. With the stars aligning at last, we seized the moment.

As this subject had the potential to become an extremely polarized and partisan debate, it was important for Cato to use our unique voice to speak on it from a nonpartisan place. In a December 2021 blog post, Craig pointed out the “mess of ambiguities and contradictions” that were in the Electoral Count Act and how it

“opens the door for Congress to effectively decide the results of an election.” This post made clear, even for those who believed the conspiracy theories sur-

rounding the 2020 election, why they should support reforming and strengthening the ECA and that this was not simply a reaction from those who opposed Donald Trump. Berry followed Craig’s blog with a briefing paper entitled “The Legitimate Role of Congress in the Electoral Count.” All in all, Berry, Craig, and Olson published over 50 papers and articles on the need to reform the act.

With the momentum building, the strategy shifted, and then director of government affairs Jeff Vanderslice organized dozens of meetings with congressional offices to discuss the amendment. A coalition of supporters was formed, including the nonpartisan group Protect Democracy and a bipartisan Senate working group that authored the draft of the bill that would be known as the Electoral Count Reform and Presidential Transition Improvement Act of 2022, and eventually signed into law as part of the omnibus appropriations bill on December 29, 2022.

Berry saw that the key to success in getting this reform passed was emphasizing how the bill strengthened the Electoral College, and making clear the dangers of leaving ambiguities, whether real or alleged, that were the basis of legal schemes to throw the 2020 election results into doubt. The biggest victory in the new language, according to Berry, is raising the threshold to pause the count and trigger a debate from just a single member of each house to one-fifth of either house (87 representatives or 20 senators). None of the objections on January 6, 2021, came close to receiving the support now required. This simple change will go a long way toward ensuring that fringe theories supported by only a small fraction of either chamber or either party cannot be used to drag out the electoral count.

The Electoral Count Reform Act is an encouraging change and a credit to those who recognized an idea whose time had come and worked ceaselessly to see it through. This was more than a policy debate. It is an example of how Cato’s research and analysis can lead to policy change—sometimes over many years, and occasionally in a short time frame. ■

