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David F. Levi: Welcome to *Reasonably Speaking* and *Judgment Calls*, the podcasts of The American Law Institute, what we call the ALI, and The Bolch Judicial Institute at Duke Law School. I’m David Levi, president of the ALI and director of the Bolch Institute. It is such a pleasure to be here today with two distinguished academics and public lawyers, Bob Bauer, and Jack Goldsmith. Bob Bauer is a Professor of Practice and Distinguished Scholar in Residence at NYU Law School. He served as White House Counsel to President Obama from 2009 to 2011. He has also served as Co-Chair of the Presidential Commission on Election Administration and as Co-Chair of the Presidential Commission on the Supreme Court of the United States, Jack Goldsmith is the Learned Hand Professor of Law at Harvard Law School. He served as Assistant Attorney General for the office of Legal Counsel in President George W. Bush’s first administration. The two of you recently wrote a book called "After Trump: Reconstructing the Presidency."

Levi: And it seems that you often work together on projects where you hope to find some common ground. ALI Director Ricky Revesz and I reached out to the two of you to chair a group of 10 distinguished persons from government, the academy, and practice to consider and propose reforms to the Electoral Count Act, or what we will be referring to as the ECA. Earlier this month, this group issued a set of proposals that each member of the group was able to agree to, which was a remarkable achievement by the two of you, given the diversity of their backgrounds, political and otherwise. Jack and Bob are here today to discuss these proposals. And we’re just very grateful to you both for bringing in such an interesting paper that everyone could agree to, despite their very different backgrounds and points of view, and for helping us to understand it. Let’s start with the constitutional structure and background relating to presidential election administration and, Jack, I’ll turn to you. Can you give us a thumbnail sketch of these provisions?

Jack Goldsmith: Sure, David. First, I wanted to thank you and ALI for inviting us to do this project. It was an honor to do it, and we were very grateful for the opportunity. And also thank you for this podcast. The main structural constitutional provisions that inform presidential elections come from Article Two of the Constitution and from the Twelfth Amendment, which amended article two. And there are basically three provisions. One, Article Two states that each state shall appoint in such manner as the legislature, the state legislature may direct a number of electors. And that basically is the provision that gives the states the primary

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responsibility to choose the electors who choose the president of the United States. Article Two also says it gives Congress an important power.

Goldsmith: It says that Congress can determine the time of choosing the electors and the day on which they give their votes. The states basically choose the electors for president, but Congress gets to choose the day of the election. And the third important provision is from the Twelfth Amendment. The Twelfth Amendment provides that the president of the Senate shall, in the presence of the Senate and the House of Representatives, open all their certificates and the vote shall then be counted. They’re talking about the certificates containing the electors from the states. And there are a couple of important ambiguities there that are worth noting. One is that the president of the Senate, who in many instances is the vice president, is given the power to open these certificates.

Goldsmith: And then it has this phrase in the passive voice that says, “And the votes shall then be counted” without specifying where the power to count lies. Is it in the president of the Senate? Is it in the two houses of Congress? That’s an important ambiguity that’s been an issue. Those are the main structural provisions. I’ll just add that there are lots of constitutional provisions that potentially come to bear on the selection of the president and how elections are conducted in the states, including the Equal Protection Clause as was famously at issue in *Bush vs. Gore*, and also the Due Process Clause, First Amendment Law, and the like, but I’ll stop there.

Levi: Thank you. That’s great. It’s actually fairly simply stated. And then on top of what maybe is deceptively simply stated is the ECA which was enacted after the Hayes Tilden election of 1876. And Bob I’ll turn to you. Can you give us some of the historical background and tell us what the ECA adds to this constitutional structure that Jack identified?

Bob Bauer: Certainly. And let me add my thanks to ALI both for convening this group, which was an honor to participate in, and also for hosting this podcast. Thank you very much. The 1876 election produced no clear winner in the electoral college. Neither candidate received the majority of the electoral votes and states began turning in multiple slates, so Congress wasn’t even able to resolve the question of which slates should be counted in the column of particular states. As a result of that, Congress did this extraordinary thing, it established a commission to try to resolve the question. You can imagine during this period of time, lots of backroom dealing, as much politics, if not more politics than any consideration of constitutional or legal issues, or even vote counting accuracy issues. And what ultimately occurred was that the Democrats decided they could live with Rutherford B. Hayes so long as he agreed to withdraw federal troops from the South.

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Bauer: Long and short of it is Hayes was elected president, congress recognized that this was an ugly episode that was resolved in a particularly messy way. And 11 years later, and it did take more than a decade, Congress enacted the ECA. And the purpose of the ECA broadly speaking, it's a mess of a statute, it's incomprehensible in many places, very difficult to understand an application. And some of those are issues that are going to be one would hope addressed in ECA reform, but the statute fundamentally attempts to have the process be more orderly and Congress' role in it, a little clearer to incentivize states to resolve controversies in a timely fashion, so that Congress doesn't have a multiple slate problem. It did among other things set up a safe harbor date by which, and by the way, it doesn't operate quite the way the name implies, but it's a safe harbor date by which it was thought that states could qualify presumptive acceptance of their slates if they resolved controversies and submitted the slates by a particular date.

Bauer: And then it also adopted other procedures to assure transmission in timely fashion to the archivist of the United States for Congress to count the electoral votes, procedures by which Congress itself would fulfill its Twelfth Amendment duties. And those included the procedures by which objections could be raised by members and the procedures by which the two houses would consider and ultimately decide whether to sustain or reject those objections. That's fundamentally what the ECA attempted to do was to clean up a little bit after the 1876 election.

Levi: I know it's a complicated statute. Jack, what caused you and Bob to turn your attention to reform of the ECA in particular?

Goldsmith: Several things, David. One, as you said, Bob and I wrote this book together called *After Trump*, which was about reconstituting the presidency in terms of norm violations and law violations that were prevalent in the Trump administration, but actually had a longer tail going back. And we basically laid out a plan for reform that we thought should be akin and ambition to the reforms of the 1970s. And so we had come together to do this reform project. After the book was published, we established an organization called the Presidential Reform Project that aimed to implement some of these reforms. After that happened, we had the presidential election of 2020 and the events of January 6th, all of which highlighted something that had become increasingly clear going back actually a couple of decades.

Goldsmith: Namely, the ECA is a terribly worded statute that's full of ambiguities and might contain authority for Congress that might not be constitutional, that it allowed on January 6th, but not just on January 6th, in other elections for Congress to object

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to the electoral votes in the states in ways that didn't take much of a showing and the rules were very unclear. And of course the rules were unclear in general on January 6th, about the Vice President's role and the role of Congress in general. Bob and I, like a lot of people, started thinking about what could be done for future elections to improve this system. And we incorporated presidential election reform into our project. And just at the time that we were gathering our thoughts on this, you kindly invited us to convene this group. That's how we came together to do it.

Levi: It's an area in which one wants certainty. You want to wake up the next morning and know who the president is and not be concerned about all the ambiguities and the statutes. Bob, you want to add to that? Why do you think this is so important?

Bauer: Well, for all the reasons that Jack gave, and I'll mention one aspect of this that makes legal reform really urgent. One issue Jack and I address throughout our book when discussing other aspects of the institutional presidency and the problems we have with the constitutional guardrails, if you will, that should govern the exercise of presidential authority is the erosion of norms. Which is to say, we have constitutional requirements. We have legal requirements. And then of critical importance, of course, is how political actors fill in the gaps by accepting certain conventions about how they should behave. And for the most part, for a long time, and many of these episodes were cited in 2020, some of ECA's weaknesses were papered over by general agreement on how political actors should behave.

Bauer: Candidates conceded elections, and Congress proceeded in good faith to administer their responsibilities under the Electoral Count Act. And what we discovered in 2020 is those norms are giving way. They're eroding. And that makes the necessity of legal reforms all that more urgent because we're not able to rely anymore on a shared understanding of how these gaps should be addressed and what sort of behavior we can expect from actors to fundamentally honor what we believe are the key constitutional themes and expectations that we should all have.

Levi: And that brings us to the project. Bob, you and Jack, you put together a group that in addition to yourselves included Elise C. Boddie, Mariano-Florentino Cuéllar, Courtney Simmons Elwood, Larry Kramer, Don McGahn, Michael B. Mukasey, Saikrishna Prakash, and David Strauss, a very eminent group of people. How did you construct the membership of the group?

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- Bauer: We hoped to establish a group of people who had enormous experience and credibility on legal and institutional issues that we were addressing here but also would have credibility on all sides of the political debate. I say all sides because some people say both sides and then some people object and say there are more than two sides of the political debate. If you're an independent, you don't like to hear things characterized that way. But the idea general credibility, there could be no question that there are a range of backgrounds, experiences, and levels of expertise of different kinds of expertise reflected in this group. But we think it's a group that would be credible to anybody who would look to see whether or not it's a group whose judgment bore careful attention. And we really were very honored to be part of that group. It was an extraordinary group and we think it does have credibility where everyone might look for it in these circumstances.
- Levi: Jack, what was the work product that you were hoping for, and what process did you follow?
- Goldsmith: So, we didn't really know what kind of work product we wanted. We had a general idea that we wanted to address the hardest and most fundamental issues that were going to be at issue and reform. There are lots of trade-offs in any reform, lots of uncertainty. So, we came in thinking just in general, we wanted to tackle the biggest, hardest problems and focus on those and try to outline what the big picture and the fundamental questions were in reform, and then try to make progress on those. And we didn't have concrete views. I think Bob and I in our early discussions had different takes on maybe where the priorities should be, but that's what we went in thinking. But we didn't have a clear agenda at all. And the process that we used was we met and had wonderful discussions many times, often. And we worked through various issues and we swapped ideas by email and drafts of ideas and principles. And we just worked through the problems. And so that was basically the process.
- Levi: We're going to get into the substance of the paper that you released on April 4th of this month. You released a document called Principles for ECA Reform. And I don't want to scare our listeners off. It's just five pages long, but it covers an enormous ground. And it's an area of law that's quite complex. And the paper is structured in a way such that it contains what you call General Principles. That's the first part of the paper, the General Principles to Govern ECA Reform, and then in the second half of the paper, a set of more Specific Principles, again, focused on ECA reform. And you have five General Principles. And the first two are somewhat related. The first principle states that Congress lacks the constitutional authority to address every issue that may arise in the presidential election process. And the second principle states ECA Reform should not itself become the basis of fresh uncertainties about the presidential election process, the kind of first “do no harm” sort of principle. So, returning to you, Bob, what work are these two principles doing?

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- Bauer: The first one is meant to bring focus to the actual matter at hand, which is Congress’ role as Jack was describing, in pursuant to the Twelfth Amendment. That is the question really on the table. And, of course, there are other aspects of the presidential selection process. We saw how these controversies played out in the states, and there were roles played by different actors in the states by state officials, by state legislatures, in 2020 are declining to take certain action that was urged upon them by state courts. The goal of ECA reform is to clarify Congress’ role in this complex process. And so the first principle is intended to make it very clear that Congress has certain authorities. There are other authorities that does not have, and as you point out, that relates to the second principle that you cited. And that is that the ECA should do what it should do to address that congressional rule and ECA reform.
- Bauer: Rather, say, ECA reform should do what it should do to address that problem, but that it would be a mistake to have ECA reform viewed as sort of some comprehensive effort to resolve all of the questions that’s set up in the presidential selection process. It can’t do that. It can’t do as a constitutional matter. It almost certainly can’t do it as a sort of prudential matter. It would wind up traveling into areas that are likely to spark very sharp disagreement and make it harder to reach bipartisan consensus. And so for that reason, we wanted to sort of set the table with the first two principles about what precisely defined as carefully as possible the mission of the group was.
- Levi: That’s great. Thank you. Your third general principle is that ECA reform should clarify that Congress has an important but limited role in tallying electoral votes considered with the best understanding of the Twelfth Amendment and other relevant authorities. So Jack, can you explain what the third principle does? Seems related actually to the first two.
- Goldsmith: It is. It’s related to the first one, especially, but we wanted to emphasize both that Congress has an important role in tallying these votes, but that was also a limited role. And it clearly has this vital role in counting the electoral votes from the states. And it’s the last institutional step in the election of the president. And it also, we believe, has a narrow role in raising objections related to constitutional—We’ll get into this later in the principles but these are the kind of things that we think Congress has the authority to do. For example, to assess whether an elector meets constitutional criteria and the like. But we also wanted to emphasize how limited that role is because some interpretations of the ECA give Congress a much more robust role and in some efforts to use the ECA, give Congress a much more robust role in counting the votes, deciding which votes to count, and basically in some views in choosing the president, having its own take on choosing who the president should be.

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Goldsmith: So this is just another ... Again, this is a guiding principle that gets fleshed out later in the document, but the idea was meant to emphasize, yes, Congress has an important role, but, no, it’s not a comprehensive role in choosing the president.

Levi: And you would bump up against the limitations in the constitutional structure that you discussed when we started?

Goldsmith: We believe so. Yes.

Levi: So General Principle Four, that’s your fourth, states that ECA Reform should help check efforts by any state actor to disregard or override the outcome of an election conducted pursuant to state law in effect, prior to election day, including state law governing the process for recounts, contests, and other legal challenges. You then go on to say that this is the most difficult element of reform because the question of Congress’ role in addressing abuses of this kind can raise novel and difficult constitutional questions and generate sharp political disagreement. And that ECA reform cannot by itself address every conceivable problem that may arise within a state, many of which will require legal and political responses at the state level. Bob, you’ve already said a little bit about this but can you explain what the concern is here on the principle number four?

Bauer: Yes, I think it is a dominant concern for people who watch a lot of sharp political jockeying and the erosion of norms that governs sort of what our expectations are of the behavior of actors in our democratic process. And that is simply captured by the attempt to change the rules after the game is over. And someone’s been able to assess the score and found out that we’re on the losing end. That is obviously a huge challenge to anybody’s conception of a fair outcome of what we expect from the democratic process. Candidate A competes with Candidate B candidate, and Candidate A gets the most votes. Candidate wins. Candidate B, however, manages to secure a majority of ... Candidate’s B party is in the majority and tries to find a way to change the rules after the game is over. And so one thing ECA reform needs to make very clear is that for a number of reasons, we can talk about Jack has touched on one of them, Congress’s ability to set the data in election, you can’t have two dates.

Bauer: The election that produced an outcome you didn’t like and another election you hold afterwards to produce a different outcome that you might prefer. And then for other reasons that relate to due process and equal protection sorts of considerations, it needs to be very clear that sort of effort to change the rules after the game is over to alter an undesirable outcome cannot happen. Our democracy

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would simply founder on that occurring. And so that is the reason for the prominence of the principle and the importance of the principle that you cite. In application, there are some complexities. And we could talk about what some of them are. The fundamental point, however, still stands. And our effort was at the very outset in this group to establish baselines like that one that we simply have to enforce if we're going to have meaningful ECA reform that upholds our basic understanding of how the constitution is supposed to operate and what voters in the democratic process ought to be able to rely upon.

Bauer: And we can discuss some of it, but there are some novel questions that do come up about the role that Congress can have in policing misconduct in the states. Now, let me just mention something very specific here, which is, it goes back to the very first principle. There are other actors in the process, state and federal courts, for example, that police for some of that misconduct. There are constitutional guarantees that they enforce. And what we do in ECA Reform is make it very clear in our proposal that extent authority, of course, to address those kinds of problems, which are rule shenanigans like the one I described that would be left untouched by anything Congress does on ECA Reform. There would still be remedies available in federal and state court for some of the misconduct, shenanigans, mischief, however, you want to characterize them but they could take place that would challenge those basic democratic principles.

Levi: Your sixth and last general principle says that ECA reform should not affect the authority of the federal courts to address due process, equal protection, and other constitutionally-based claims of unlawful state action in the administration count and certification of a state's popular vote. Jack, what are you getting at here? And is it different than what Bob just discussed?

Goldsmith: It's very related to what Bob was just discussing. There's a robust jurisprudence in the federal courts on equal protection. *Bush v. Gore* was the most famous case involving equal protection in the presidential election context. There are due process principles that come to bear in federal court in assessing the legality of state elections. For example, some people think the right to vote, divide rights from due process. Something people think that a candidate has a property right and having won the election that can't be deprived of that due process. There are First Amendment principles that come to bear. And the reason to emphasize this is this is not actually something Congress is going to enact, this is something that is a background principle that's very important to understand against which Congress is legislating, and it goes back to some of the earlier principles, that Congress cannot, under the Constitution, and should not, answer every problem that might come up in the election of a president. There are various institutions with various roles, and this principle's just designed to emphasize that for many problems that will arise in a presidential election, the federal court stand ready, under various constitutional provisions, to police mischief in the states.

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Levi: You know, may I say, just as we discuss this, I see just how smart you and your colleagues on the group were in coming up with the general principles, and then having the specific principles, which we’re about to get into. Because these general principles, they’re foundational, and there’s a lot beneath them that maybe one wouldn’t agree on, the two of you might not agree on when you sort of drill down on some of these things. But you are able to agree on the overall point, and kind of the thrust of reform. And that’s just so important, I think.

Goldsmith: We thought it was important to kind of frame the space in which, and the basic assumptions in which we were acting. So, yes.

Levi: So let’s go to your specific principles, and the Specific Principles to Govern ECA Reform are grouped under three headings: Congressional Powers in Counting and Determining the Validity of Electoral Votes, Reform Related to the Electoral College Meeting Date, and Reforms Related to State Action to Override or Disregard the Outcome of the Vote Under Existing Law. So if we start with the first bucket, that’s congressional powers, and turning to you, Bob, there are five specific principles relating to congressional power. And can you summarize those five and tell us what’s going on with those?

Bauer: Yes. The ECA, for example, has a loose, and in some places, very hard to understand series of provisions that govern how Congress exercises authority for Twelfth Amendment purposes. Most notably, I’ll give you an example in 2020, there was a debate about the role of the vice president. Could the vice president of the United States suspend the proceeding, because the vice president concluded that certain slates before the Congress, duly transmitted by the states, by the National Archives were somehow, in some way, the wrong slates, didn’t reflect the true winner in the state? Could the vice president remove from the vice president’s sort of back pocket, if you will, another set of slates, say, “These were forwarded to me, and I’m going to put those in play as alternatives to the slates that we received in the ordinary course”?

Bauer: So it was important to define the vice president’s role as presiding officer of the Senate. It’s not an insignificant role. The vice president does, in fact, preside over the proceedings. So they have a procedural role, the vice president would have a procedural role that is clearly significant, but it does not extend to making substantive judgements about which slates to count and which slates not to count, which are the correct slates, and which are not, because the vice president operates as a presiding officer, but does not speak for the body. The body makes those decisions. So that was one aspect, and I think this is common to many of the ECA reform proposals that we thought it was important to include.

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Bauer: Then there’s a series of questions around who may raise objections, not who may raise them, because there are members of Congress who may raise them, but how many are required in the House and the Senate to bring an objection forward? What kind of objections can they make, and how are those actions disposed of? And we address that by strongly recommending that the objections be, and Jack mentioned this earlier, be grounded in very, very narrow constitutional considerations. For example, the failure of the elector of a candidate to meet constitutional eligibility requirements. It would not mean that an objection would call upon Congress to look behind the certification and decide whether votes in particular states have been counted correctly. That’s not Congress’ role.

Bauer: And then there was the question of how many of those objections would be sufficient to call upon the two houses to consider them formally. We think at least that that threshold needs to be raised. It’s currently one member of each house, are sufficient to tie the Congress up, if you will, in the consideration of objections of almost any kind under the current ECA. And we thought the threshold for that needed to be increased, just as it is important, to have a clear understanding of at least the majority or more of the two houses that would be required to sustain an objection to electoral slates on the kind of narrow grounds that I was referring to earlier.

Bauer: And then last but not least, it was important to clarify that Congress should not treat disputes over an election as a quote-unquote “failed election” for purposes of one provision of the ECA. A failed election, for example, might occur because of a catastrophic act, a hurricane, some natural disaster that prevents the votes from being counted. But it cannot include, it seems to us, and our ECA reform would preclude taking into account that there are disputes about the outcome. That’s not a fate of the election. Those disputes are resolved through the legal process under state law, and it’s important that it be recognized that it’s not a failed election. It’s a disputed election, and that would not be a reason, for example, for Congress to turn the slates that states send in away.

Levi: This is also the place where you address the authority of the president of the Senate, which I think is usually the vice president, to count ballots. I think that’s the fifth of these specific proposals. Did you choose these five areas because you thought they were the most salient of the issues? I’m sure there probably are other issues that could have been treated in this way as well.

Bauer: Yeah, yes. We thought they were salient. They were critical to defining, consistent with the Constitution requires, what the actual role of Congress was in making objections, sustaining objections, the nature of objections, the vice

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president’s role, whether to recognize an election as a failed election, and under what circumstances. So we thought they were fundamental, and there are also repairs of broken or inadequate provisions, or incomprehensible provisions in the ECA.

Levi: So the next section includes just one principle, and that concerns reform relating to the Electoral College meeting date. And so tell us about this, Jack.

Goldsmith: Sure. I mean, the principle states that Congress should move the Electoral College meeting date to a later date than it currently is, and I’ll explain what that date is in a moment, to make sure that the states have more time to conduct recounts, and so that legal challenges can be resolved. So the idea here is, the ECA currently says that...specifies the date for the Electoral College to meet. This is when the electors actually show up in the states and vote. And the date for that is specified as ... I think it’s the Monday after the second Wednesday in December. And that was December 14, in the last election.

Goldsmith: As litigation has become much more complex and contested, there’s been a perpetual worry that that’s just not enough time. And so our basic suggestion is that it be moved back later in December. We don’t specify a date. We think Congress should figure out there are trade-offs there, because Congress needs time on the other end, before it meets in early January, to deal with problems that may arise. But we think on balance that that date should be moved back closer towards the end of the month. We didn’t specify it, simply because of all the things that can happen after the vote, and before the Electoral College meets. I think there’s a decent consensus that there needs to be more time, and that’s all we’re trying to accomplish there.

Levi: But this also reflects, I think, your general principles and the thrust of the paper, which is that this action will be in the states, and that’s where it should be. And Congress also needs time, but it has a more limited role. So it hopefully will need less time, because you’re taking time away from Congress and giving it to the states here, and you think that’s appropriate.

Goldsmith: We think that that’s appropriate, because we think there’s a lot more that needs to happen, and that might happen with regard to what happened in the states, and concerning state processes, and that Congress can do with less time on the other end.

Levi: So the third bucket of specific proposals includes Reforms Related to State Action to Override or Disregard the Outcome of the Vote Under Existing Law.

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And the first specific principle states that Congress should exercise its Article Two timing power to clarify that state legislatures and other state institutions do not have power, after the Election Day specified by Congress, to disregard the vote held pursuant to the state law in place on that day, or to select electors in a manner inconsistent with the state law in place on that day. So Jack, turning to you, can you tell us why you included this principle, and is this controversial?

Goldsmith: I don't believe it is or should be controversial. Looked at one way, it's simply a matter of Congress specifying, exercising the intersection between its timing role and the state's role in setting the manner for the election of the electors, for the choosing of the electors. So Congress has a clear ... the clearest power it has with regard of presidential elections is choosing the timing of the election. And that means that the date on which Congress specifies the presidential election shall take place shall be the day on which the president is chosen. And the states have the power to choose the manner, but that power ends when Congress chooses the date of the election. And this is simply a matter of specifying when that is. The goal here is to make clear that states cannot change the rules after the election.

Goldsmith: There's worries about this happening, about that states will not like the results and will want to exercise their power to change the rules, change the counting of the rules, change how to ascertain, to...sorry, change the counting of the votes, change how to ascertain the votes, and there are lots of worries that states might be motivated to do this after an election that doesn't go a certain way that maybe certain institutions in the state don't like. This is a very important principle, just to clarify. The rules, the state laws in place on Election Day are the laws that govern, and Congress can achieve that by exercising its timing power. And so this is a quite important principle.

Levi: The paper then has a fairly detailed proposal for how to address the problem of multiple lists from any one state seeking recognition for purposes of Congress's Twelfth Amendment vote count responsibilities. Bob, can you explain to those of us who are not so steeped in this, what the problem of multiple lists is?

Bauer: The states are supposed to transmit to the Congress an envelope, essentially, a certification of the identity of electors and the votes they cast, so that the votes can be counted, and it can be determined who the winner of the election is. You could wind up, of course, that was an issue in the 1876 election, you could wind up with competing sources of authority in the states claiming that they have the actual list, the certificate that Congress ought to treat as the binding certificate for vote count purposes.

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Bauer: For example, the governor of the state might put in one certificate and the state legislature, presumably controlled by the other party, might say, “Well, that’s incorrect. Doesn’t reflect the true vote count. And we’re sending a different list pursuant to our constitutional authority to appoint electors. And so, we’re sending in that list.” You could imagine another circumstance in which the governor decides not to send in the list the governor should be sending in on a certified basis as a responsible state official, so there’s a list floating out of the position of the governor that the governor refuses to transmit and the state legislature transmits the list. So, the Congress has to decide which votes it should be counting.

Bauer: And as we noted, we think the objection procedure ought to be limited to objections that are clearly grounded in constitutional concerns, not objections that are free floating and go to the question of whether the votes were accurately counted in the states, because that we do not believe is a role Congress should play of deciding whether a certain category of ballot should or should not have been excluded from the count. And so, the goal is to find out which is the list, which is the list, the certificate, that Congress ought to be having the vice president open up and then tallied for the vote in the Congress.

Bauer: And we think that there is a basis for a limited cause of action, that presidents and vice presidential candidates can file in federal court to seek a judgment about which body or official in the state is responsible for sending in the certificate, the real certificate, the one that contains the votes that should be counted, and that the court also has a responsibility, or could have the power delegated by Congress under the ECA reform, to compel a recalcitrant state official who’s withholding that certificate to provide it to Congress so that Congress can perform its Twelfth Amendment constitutional responsibilities.

Bauer: I should add that these are complex constitutional questions, but we believe that even though this is a state vote count and a state certification, Congress has a federal duty under the Twelfth Amendment to count. And so, the declaratory judgment here that a federal court is called upon to render is a declaratory judgment clearly an aid of a federal duty, a duty to the Congress to provide that certificate. We also provide that in the event there is any constitutional question around compelling, say, a recalcitrant administrative official from providing the certificate, that that’s severable. Any constitutional question there doesn’t doom the entire statute, and the court can still issue, in support of Congress’s counting role, a declaratory judgment about which certificate containing which votes is the one from that stage [inaudible].

Levi: Why federal court? Did the group discuss that, the giving exclusive jurisdiction to the federal court?

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Goldsmith: Sure. Well, yeah, thank you [inaudible]. The ultimate issue is a federal law question of the federal duty of the state official to transmit the certificate of the electors to the Congress. And we thought that in answering that federal question and the embedded state law question in that federal question, that the federal courts were the appropriate institution to do that. I mean, ultimately, the federal question will be reviewed by the Supreme Court whether we gave it to states or the federal government ... federal courts. Another reason to give it to the federal courts is that we can specify the jurisdiction, and we contemplated the creation of a three-judge panel so that there would just be two levels of review. It would be a three-judge panel and then the Supreme Court. So, the idea is time is of the essence. So, basically it was, this is a federal duty, we think federal courts are most competent and appropriate to adjudicate this federal duty, including the embedded state law claim, and it's just easier for Congress to ensure expedited review in the federal courts than it's in the state courts.

Levi: Yeah. So, I mean, the idea would be that there might be an expedited trial before because there may be fact findings that have to be made before a three-judge court, potentially. I don't think you nailed that down, but that's a possibility for Congress. And then with the appeal to-

Goldsmith: A possibility.

Levi: ...a direct appeal to the Supreme Court from the three-judge court.

Goldsmith: With language emphasizing the importance of being expeditious and that the court should answer to themselves, answer all the federal courts to themselves, answer these questions.

Bauer: And to clarify one, or to just restate as clearly as possible one other point, any fact finding wouldn't be directed toward resolving claims about whether votes were properly counted in the state. That remains something that Congress would itself not do and the federal courts on direction from Congress would not do it. The court's role is to identify, under state law, who in the body of official, in the world of official, which body or official is responsible under state law for trans submitting the certificate with the names of electors [inaudible].

Levi: I was thinking of that, and I was thinking that's probably what we would call a mixed question, or it could be a mixed question of law and fact because it might be dictated by past practice and there might be a dispute over what past practice was. Something of that sort. Well, that is actually the last of your specific principles, and we got through it in pretty good order. And it's a really a tribute

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to the way in which this is done because you do it very succinctly. Really, I hope our listeners take the time to actually to read it because it’s quite a marvelous piece of work. It could have been 500 pages, but instead, it’s five and it covers just a huge amount of territory. And for that reason, I think it’ll be read. So, the principles were released early this month, April 4, and Bob, what’s been the reaction?

Bauer: There’s an active debate taking place on Capitol Hill, and there’s been a lot of commentary, other proposals that have come before the Hill and that Congress has actively engaged in exploring all of them. And we’ve been very glad that they took notice of this proposal, of the ALI group proposal, and we have engaged with them to explain the proposal in greater detail and to answer questions that they have. And so, so far, we’ve been very gratified from two perspectives. Number one, we’re delighted to see that there’s still this energetic debate on ECA reform, and we need it. We need it. And so, that’s good news. And second, we seem to have helped inform that debate and, hopefully, maybe shape views on what form ECA reforms should take. So, right now, I would say, well, obviously there’s a lot going on in this world and before the Congress. We know that there’s a good debate going on and we’re very cheered by that. We’re very encouraged by the direction that the debate is taking.

Levi: That’s a cause for some optimism. I’m sure it’ll be a difficult process just because the issues are so difficult, and it involves presidential elections, so you’ve got the intersection of something innately quite complex with something on which a lot turns. Yeah.

Bauer: In an institution that is not known for dealing with difficult issues in a bipartisan way in recent years.

Levi: Well, that is true. But the ALI, on the other hand, is known for doing that, although we don’t even think of ourselves as partisan or bipartisan, we think of ourselves non-partisan. Really what you’ve done here is just, it’s so marvelous. Ricky and I, we had great hopes and we had such confidence in the two of you, but nonetheless, it wasn’t clear that one could hammer out general principles and specific principles and operate along, essentially, on the same page with people who approached these issues from very different backgrounds and experiences. And you did it and it’s just so remarkable. Thank you for being with us today, for explaining this important and complicated work and explaining it so clearly. It’s a promising first step and at a time when we need promising first steps. I want to thank all of our listeners for joining us today on *Reasonably Speaking* and *Judgment Calls*. I am David Levi. Goodbye.

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