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Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management

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This Article considers the possibility that a major dispute over the outcome of the 2020 presidential election could arise, even without foreign interference or some other extraordinary event, but rather just from the ordinary process of counting ballots. Building upon previous research on the "blue shift" phenomenon, whereby adjustments in vote tallies during the canvassing of returns tends to advantage Democratic candidates, it is easy to imagine a dispute arising if this kind of "blue shift" were consequential in the presidential race. Using examples from both Pennsylvania and Arizona, two states susceptible to significant "blue shifts" in previous elections, the article shows how the dispute could reach Congress, where it potentially might metastasize into a full-fledged constitutional crisis. The most frightening scenario is where the dispute remains unresolved on January 20, 2021, the date for the inauguration of the new presidential term, and the military is uncertain as to who is entitled to receive the nuclear codes as commander-in-chief. In order to avoid this risk, Congress should amend the relevant statute, 3 U.S.C. § 15.

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INTRODUCTION

It is Election Night 2020. This time it is all eyes on Pennsylvania, as whoever wins the Keystone State will win an Electoral College majority. Trump is ahead in the state by 20,000 votes, and he is tweeting "The race is over. Another four years to keep Making America Great Again."

The Associated Press (AP) and the networks have not yet declared Trump winner. Although 20,000 is a sizable lead, they have learned in recent years that numbers can shift before final, official certification of election results. They are afraid of "calling" the election for Trump, only to find themselves needing to retract the call—as they embarrassingly did twenty years earlier, in 2000. Trump's Democratic opponent, _____ (fill in the blank with whichever candidate you prefer; I will pick Elizabeth Warren since at the moment she is the front-runner according to prediction markets),[1] is not conceding, claiming the race still too close to call. Both candidates end the night without going in front of the cameras.

In the morning, new numbers show Trump's lead starting to slip, and by noon it is below 20,000. Impatient, Trump holds an impromptu press conference and announces:

1. *See Who Will Win the 2020 Democratic Presidential Nomination?*, PREDICTIT, https://www.predictit.org/markets/detail/3633/Who-will-win-the-2020-Democratic-presidential-nomination (last visited Oct. 22, 2019) [https://perma.cc/KC2R-WAH8] (showing that would-be bettors may wager thirty-nine cents per dollar of potential winnings should Senator Elizabeth Warren win the Democratic nomination, while twenty cents must be wagered on former Vice President Joseph Biden to win a dollar).

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> I've won reelection. The results last night showed that I won Pennsylvania by over 20,000 votes. Those results were complete, with 100 percent of precincts reporting. As far as I'm concerned, those results are now final. I'm not going to let machine politicians in Philadelphia steal my reelection victory from me—or from my voters!

Despite Trump's protestations, the normal process of canvassing election returns continues in Pennsylvania, and updated returns continue to show Trump's lead slipping away. First, it drops below 15,000. Then 10,000. Then 5,000. As this happens, Trump's tweets become increasingly incensed—and incendiary. "STOP THIS THEFT RIGHT NOW!!!" "DON'T LET THEM STEAL THIS ELECTION FROM YOU!!!"

Protestors take to the streets, in Pennsylvania and elsewhere. So far, the demonstrations, while rancorous, have remained nonviolent. Amid police protection, the canvassing process in Pennsylvania has continued, and Trump's lead in the state diminishes even further.

Then, several days later, the lead flips. Now, Warren is ahead in Pennsylvania. First by only a few hundred votes. Then, by a couple of thousand votes. Although the AP and networks continue to declare the race "too close to call," it is Warren's turn to take to the cameras declaring victory.

Trump insists, by tweet and microphone, "THIS THEFT WILL NOT STAND!!!" "WE ARE TAKING BACK OUR VICTORY."

So begins the saga over the disputed result of the 2020 presidential election.

This scenario is certainly plausible. Pennsylvania is, indeed, a pivotal state in the 2020 presidential election—and potentially poised to be the single state upon which the entire election turns. That role could also fall to Wisconsin, or Florida again, or even Arizona. But it just as easily could be Pennsylvania.[2]

Moreover, if the idea of a 20,000-lead on Election Night evaporating entirely during the canvassing of returns seems implausible, think again. Trump's lead over Hillary Clinton in Pennsylvania did not disappear completely, but it did drop by over 20,000 votes—23,659, to be precise—between Election Night and the final, official certification of the result in the state.[3] Nor was that a fluke. In 2018, the Democratic candidates for

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2. Analysis of which state(s) might be pivotal to the Electoral College outcome are based on various political websites, including 538, Cook Political Report, and 270 to Win. *See, e.g.*, *2020 Presidential Election Interactive Map*, 270TOWIN, https://www.270towin.com/ [https://perma.cc/V73N-DL5L] (listing Arizona, Florida, Nebraska's 2nd Congressional District, North Carolina, Pennsylvania, and Wisconsin as toss-ups).

3. *Compare Presidential Results*, WASH. POST, Nov. 10, 2016, at A43 (evidencing a 67,951-vote margin between Mr. Trump and Secretary Clinton), *with* GOVERNOR'S OFFICE OF THE COMMONWEALTH OF PA., CERTIFICATE OF ASCERTAINMENT OF PRESIDENTIAL ELECTORS (Dec.

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both governor and United States senator in Pennsylvania increased their leads over their Republican opponents by over 28,000 votes during the equivalent canvassing period in that midterm election.[4] Moreover, in each of the three presidential elections before 2016 (2004, 2008, and 2012), the Democratic candidate gained over 22,000 votes in Pennsylvania between Election Night and final certification of the official results.[5]

Thus, it is not unreasonable to expect Trump's Democratic opponent in 2020 to gain on Trump by over 20,000 votes in Pennsylvania during the period between Election Night and the final, official certification of the canvass. The key question is whether this kind of gain simply extends a lead that the Democratic candidate already has, comparable to what occurred in two statewide races in 2018. Or whether, instead, it cuts into a lead that Trump starts with on Election Night—and, if so, whether it is enough of a gain for Trump's Democratic opponent to overcome Trump's Election Night lead. In 2016, Hillary Clinton's gain of 23,659 votes during the canvassing process was not enough to flip Pennsylvania to her column. Instead, it reduced a Trump lead of 67,951 in the state to "only" 44,292.[6] But in 2020 a comparable gain for the Democrat could erase entirely a 21,000-vote Election Night lead for Trump, converting the result into a 2,500-vote margin of victory for the Democrat.

Pennsylvania is hardly aberrational in producing this kind of gain for Democratic candidates during the canvassing process. Although this phenomenon is still not widely understood by the electorate generally, scholars and even the media have begun to take notice. In 2014, I published an article entitled *The Big Blue Shift* to draw attention to this development, hypothesizing that it is best explained as an unintended byproduct of electoral reforms adopted in the wake of the 2000 fiasco,

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12, 2016), *available at* https://www.archives.gov/federal-register/electoral-college/2016-certificates/pdfs/ascertainment-pennsylvania.pdf [https://perma.cc/EJ37-V2SP] (proclaiming a 44,292-vote margin between the major-party candidates).

4. *Compare U.S. Senate Results*, WASH. POST, Nov. 8, 2018, at A26 (evidencing a 629,473-vote margin between Senator Casey and Representative Barletta), *with Official Returns Statewide: 2018 General Election*, COMMONWEALTH PA. (Nov. 6, 2018) https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=63&ElectionType=G&IsActive=0 [https://perma.cc/PFL8-UVB2] (illustrating a 657,589-vote margin between the major-party candidates).

5. The Democratic vote swings were 22,790-, 23,863-, and 26,146-votes, respectively. Edward B. Foley, *A Big Blue Shift: Measuring an Asymmetrically Increasing Margin of Litigation*, 28 J.L. & POL. 501, 537 (2013) [hereinafter *Big Blue Shift*], *available at* http://files.www.lawandpolitics.org/content/vol-xxvii-no-4/Foley_Color_116.pdf [https://perma.cc/NF3L-B9TV].

6. Trump's final official total for Pennsylvania was 2,970,733, and Clinton's was 2,926,441. PA 2016 CERTIFICATE OF ASCERTAINMENT, *supra* note 3. According to the initial returns reported in the Washington Post, Trump had 2,912,442, and Clinton has 2,844,491. *Presidential Results*, *supra* note 3. The difference between Trump's initial lead of 67,951 and his final victory margin of 44,292 is a shift towards Clinton of 23,659.

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most specifically the advent of provisional ballots and the increased use of absentee voting.[7] (One possible factor is that provisional ballots, which became nationally mandated by the Help America Vote Act of 2002 and which are necessarily counted during the canvassing process after Election Night once their validity has been verified, tend to be cast by voters of demographic groups who support Democratic candidates. But while this factor undoubtedly contributes to the phenomenon, the number of provisional ballots generally is not large enough to account for the entirely of the "blue shift" phenomenon, and the remainder of the explanation is still uncertain.) Whatever the exact causal mechanism—we are still in the early stages of studying the phenomenon—this kind of "overtime" gain by Democrats, after Election Night and before final certification of the canvass, achieved national salience in the 2018 midterms.[8]

Indeed, this blue shift flipped the result of one major election: the Arizona US Senate race. Martha McSally, the Republican candidate, held a lead of 15,403 votes a day after Election Day.[9] But by the time the canvassing of returns was complete, her Democratic opponent, Kyrsten Sinema had won by 55,900—a gigantic overtime gain of 71,303 votes during the canvassing process.[10]

But most consideration of the blue shift in 2018 focused on Florida. Both the United States Senate and governor's races in that perennial battleground ended up extremely close. A day after Election Day, the Republican candidates were ahead in both, but by only 30,264 votes in the Senate race and only 50,879 in the gubernatorial election.[11] As the

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7. *Big Blue Shift*, *supra* note 5.

8. *See* Edward B. Foley & Charles Stewart III, *The Election Might Not End on Tuesday Night — And That's Okay*, WASH. POST (Nov. 4, 2016), https://www.washingtonpost.com/opinions/the-election-might-not-end-on-tuesday-night—and-thats-okay/2016/11/04/b93e6ca4-a294-11e6-a44d-cc2898cfab06_story.html?utm_term=.8906211a1be5 [https://perma.cc/U88Y-VCLV] (discussing the phenomenon of the "overtime" vote ahead of the 2018 midterm general election); *see also* Edward B. Foley & Charles Stewart III, *Research Paper 2015-21: Explaining the Blue Shift in Election Canvassing* (Sept. 12, 2015) (unpublished manuscript) (on file with the Massachusetts Institute of Technology Political Science Department), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653456 [https://perma.cc/YDR9-APMU] (empirically analyzing the "overtime" vote phenomenon).

9. *U.S. Senate Results*, *supra* note 4 (demonstrating McSally's lead over her opponent the day after the election).

10. Official results are available on the Arizona Secretary of State's website. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS (Nov. 30, 2018), *available at* https://azsos.gov/sites/default/files/2018%201203%20Signed%20Official%20Statewide%20Canvass.pdf. [https://perma.cc/V7WW-GHUV].

11. *U.S. Senate Results*, *supra* note 4 (evidencing the Republican Senate candidate ahead of his Democratic opponent the day after the election); *Governor Results*, WASH. POST, Nov. 8, 2018, at A27.

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blue shift started to erode these leads, Republicans became fearful that their leads, like McSally's in Arizona, might disappear completely. Trump himself took to Twitter, proclaiming: "The Florida Election should be called in favor of Rick Scott and Ron DeSantis in that large numbers of new ballots showed up out of nowhere, and many ballots are missing or forged. An honest vote count is no longer possible-ballots massively infected. Must go with Election Night!"[12]

Ultimately, the GOP held on to win both these statewide races. The Democratic candidate for Senate, incumbent Bill Nelson, gained 20,231 votes during the canvass, but that still left Rick Scott with a narrow 10,033-vote margin of victory.[13] Likewise, the Democratic candidate for governor, Andrew Gillum, gained 18,416, leaving Ron DeSantis with a somewhat more comfortable 32,463-vote margin.[14]

Still, 2018 made this much clear: If the blue shift in a prominent midterm election can cause Trump to tweet about sticking with the Election Night tally in order to preserve a Republican lead, it is easy to imagine him doing something similar in the context of his own reelection effort in 2020. Thus, if Pennsylvania were to end up the pivotal state in the presidential election, and if Trump were to have a narrow lead there on Election Night, we can expect him to do whatever he can—tweeting and more—to freeze that lead in place and prevent a blue shift from erasing it.

We can endeavor to contemplate all the different ways Trump might try to stop an Election Night lead from slipping away, whether through litigation or otherwise. Fundamentally, however, it makes sense to focus on the possibility that there remains a basic conflict over the outcome of a pivotal state, like Pennsylvania. On the one hand, Trump keeps insisting that only the Election Night results, which show him in the lead, are valid. On the other hand, if the canvassing process does show that lead evaporating, thereby putting Trump's Democratic opponent ahead (or even just potentially so), then the Democrats will insist that the results shown by the canvass are the valid ones. The key question, then, is how this basic dispute plays out—and ultimately gets resolved.

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12. Michael Burke, *Trump Says Florida Elections Should Be Called for Scott, DeSantis*, HILL (Nov. 12, 2018), https://thehill.com/homenews/administration/416183-trump-says-florida-elections-should-be-called-for-scott-desantis [https://perma.cc/H4L8-CW8S].

13. *Compare U.S. Senate Results*, *supra* note 4, *with November 6, 2019 General Election: Official Results*, FLA. DEP'T ST. DIV. ELECTIONS (Nov. 6, 2018) [hereinafter *Florida General Election Results*], https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018& [https://perma.cc/R9AB-HUW8].

14. *Compare Governor Results*, *supra* note 11, *with Florida General Election Results*, *supra* note 13.

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I. FROM NOVEMBER 3, 2020 THROUGH DECEMBER 14, 2020

A. What Could Happen

Despite protests and counter-protests, and lawsuits and counter-lawsuits—each side accusing the other of attempting to steal an election that is rightfully theirs—Pennsylvania's election officials certify the result as a miniscule 2,500-vote victory for Warren, based on the strength of the "overtime" votes counted during the canvassing process. This official certification, of course, is not technically that Warren herself has won Pennsylvania's electoral votes, but rather than the slate of presidential electors pledged to Warren have won, based on the popular vote, the right to serve as the state's electors. Pennsylvania's governor so certifies pursuant to state law.[15] Also, as required by Congress, the governor sends this "certificate of ascertainment" to the National Archives, thereby notifying the federal government who has been officially appointed the state's electors.[16] These electors then meet on the day appointed by Congress (Monday, December 14) and indeed cast their 20 electoral votes for Warren. These electors then dutifully transmit a certificate of their votes to "the President of the Senate," as well as sending a copy to the National Archives, both submissions as specified by Congress.[17]

But this is not all that happens in Pennsylvania during this time. At Trump's urging, the state's legislature—where Republicans have majorities in both houses—purports to exercise its authority under Article II of the Constitution to appoint the state's presidential electors directly. Taking their cue from Trump, both legislative chambers claim that the certified popular vote cannot be trusted because of the blue shift that occurred in overtime. Therefore, the two chambers claim to have the constitutional right to supersede the popular vote and assert direct authority to appoint the state's presidential electors, so that this appointment is in line with the popular vote tally as it existed on Election Night, which Trump continues to claim is the "true" outcome. The state's Democratic governor refuses to assent to this assertion of authority by the state's legislature, but the legislature's two chambers proclaim that the governor's assent is unnecessary. They cite early historical practices in

15. *See* 25 PA. STAT. AND CONS. STAT. ANN. § 3166 (West 2019) ("[O]n receiving and computing the returns of the election of presidential electors . . . the Governor . . . shall enumerate and ascertain the number of votes given for each person so voted for, and shall cause a certificate of election to be delivered . . . .").

16. 3 U.S.C. § 6 (2018).

17. *See* 3 U.S.C. § 11 (2018) ("They shall forthwith forward by registered mail one of the [certificates so made by them] to the President of the Senate at the seat of government.").

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which state legislatures appointed presidential electors without any involvement of the state's governor.[18] They argue that like constitutional amendments, and unlike ordinary legislation, the appointment of presidential electors when undertaken directly by a state legislature is not subject to a gubernatorial veto.[19]

Although the governor refuses to certify this direct legislative appointment of presidential electors, the Republican-pledged electors who have been purportedly appointed by the legislature proceed to conduct their own meeting on the day that Congress has specified for the casting of electoral votes (again, Monday, December 14). At this meeting, they cast "their" 20 electoral votes for Trump. They, too, purport to certify these votes by sending a certificate to the President of the Senate and a copy to the National Archives, according to the procedures specified by Congress.

Thus, when Congress meets on January 6, 2021 to count the electoral votes from the states, there are two conflicting certificates of electoral votes from Pennsylvania. One submission, from the Democratic electors and reflecting the governor's certificate of ascertainment, records Pennsylvania's 20 electoral votes for Warren. The other, from the Republican electors and reflecting the legislature's purported direct appointment, records Pennsylvania's electoral votes for Trump.

And so, the controversy over Pennsylvania has reached Congress.

B. Analysis

It might seem far-fetched to think that the Pennsylvania legislature would attempt to negate the popular vote of the state's electorate in the

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18. *See* EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DECLINE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE 16–26, 55–61 (2019) (recounting practices of state legislatures both before and after adoption of the Twelfth Amendment).

19. One could consider the possibility that Pennsylvania's governor, or judiciary, might attempt to prevent the two chambers of the state's legislature meeting for this purpose. For this analysis, I shall assume that any such attempt would either not occur or not be successful. At the extreme, the Republican members of the state legislature would likely be able to find a place to assemble, even if it were not the official statehouse even if their meeting otherwise lacked the appearance of an official session of the state's legislative chambers. Even so, these Republican members of the state legislature could purport to be engaged in an official legislative session, even if meeting in unusual circumstances, and thus could purport to be appointing the state's presidential electors pursuant to the state legislature's constitutional authority to do so. The Trump-pledged Republican electors then could assert that they were meeting pursuant to this purported legislative appointment. (Moreover, even if these irregular legislative sessions never occurred, the Trump-pledged Republican electors might themselves meet, saying that they would have been appointed by the state's legislature if the legislature had not unlawfully been denied the opportunity to assemble, and thus their electoral votes should be considered by Congress as valid as if the legislature has successfully met to appoint them.)

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2020 presidential election. Even with Trump urging Republicans to make this move, it might be too much of a power grab. One would hope that American politics have not become so tribal that a political party is willing to seize power without a plausible basis for doing so rooted in the actual votes of the citizenry.[20]

Thus, ultimately, the likelihood of this scenario occurring may depend upon how much doubt can be cast upon the officially certified canvass of the popular vote—and thus the plausibility of the claim that the blue shift in the overtime count amounts to a theft of an Election Night victory that was rightfully Trump's. If during the canvass itself, Trump can gain traction with his allegation that the blue shift amounts to fraudulently fabricated ballots—along the lines of his 2018 tweet about Florida—then it becomes more politically tenable to claim that the legislature must step in and appoint the state's electors directly to reflect the "true" will of the state's voters, who otherwise would be deprived of the result they mandated as reflected on Election Night. (In 2000, Florida's legislature was preparing to take this kind of step, which became unnecessary once the Supreme Court halted the recount.)[21]

Unless and until we are in the midst of the situation itself, we can only speculate the kind of allegations that might be raised in an effort to cast doubt on overtime votes counted during the canvass. Presumably provisional ballots would be attacked as ineligible for counting, as would any absentee ballots not previously counted, because when one is ahead and attempting to preserve a lead, the goal is to shut down the counting process as much as possible. Heavily Democratic precincts would be closely scrutinized for any voting irregularities. An effort might be made to invalidate entire precincts, especially in urban areas, based on slight discrepancies—as often occur for innocent reasons—between the number of voters who sign the precinct's pollbooks and the number of ballots cast in the precinct.[22] Drawing upon the historical legacy of improper

20. But there is increasing concern that both major political parties in the U.S. do not share a commitment to conduct their electoral competition by means of a fair democratic process. *See, e.g.*, Michael Tomasky, *Do the Republicans Even Believe in Democracy Anymore?*, N.Y. TIMES (July 1, 2019), https://www.nytimes.com/2019/07/01/opinion/republicans-trump-democracy.html [https://perma.cc/A5T4-ZK5J] ("[R]ather than simply playing the game, the Republicans are simultaneously trying to rig the game's rules so that they never lose.").

21. Edward B. Foley, Bush v. Gore*: The Court Stops the Recount*, *in* ELECTION LAW STORIES 541, 542–43 (Joshua A. Douglas & Eugene Mazo eds., 2016).

22. There is some statutory and judicial authority in Pennsylvania that could be cited in an effort to support such invalidation of the votes from entire electoral districts. *See* 25 PA. STAT. AND CONS. STAT. ANN. § 3154 (West 2019); *see also In re* Dunmore Burrough Election, 42 Pa. D. & C. 215, 218–19 (Ct. Com. Pl. Lackawanna Cnty. 1941). Citing these sources here is not to endorse the idea that, correctly understood, they properly would support any such invalidation of votes in 2020, but rather only to observe that a litigant could endeavor to so cite them in an effort to prevail on this point.

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practices conducted by big-city machine politicians, including in Philadelphia, one can easily imagine Trump and his Republican supporters pointing to any evidence that might support a narrative of Philadelphian misdeeds undermining his victory. It would not take much to set this tale spinning. Remember what happened in Florida in 2018, specifically in Broward County: There, the local election administrator acted improperly with respect to the handling of ballots, and that became a potential basis for challenging the entire result statewide. If something similar happened in Philadelphia, one can imagine that Republicans would invoke it as grounds for discarding the results of the canvass and substituting instead directly appointed presidential electors.

Undoubtedly, Trump would go to court in an effort to prevent certification of the canvass based on the blue shift "overtime" vote. He would certainly be in a more favorable posture if a judicial decree blocked the counting of these extra votes and required, instead, that the canvass be certified with a result showing Trump having won the popular vote in the state. Even better, from Trump's perspective, would be a court order requiring the state's governor to certify a popular vote victory for his Republican slate of electors. Then there would be no need for the state legislature to appoint the Republican electors directly, and no conflicting submissions to Congress of two separate certificates of electoral votes from Pennsylvania. Instead, the President of the Senate would receive a single submission, based on this judicial decree, showing only Trump to have won the state's 20 electoral votes. Thus, Trump almost certainly would try to obtain this kind of court decree, either from state or federal court—or even both.

But Trump need not win in court in order to press his case to Congress. As long as he gets the state legislature to appoint his presidential electors directly, and those electors submit their purported electoral votes to the President of the Senate—who happens to be his vice president, Mike Pence—he has a fighting chance. His position is much weaker than if Pennsylvania sends Pence only one certificate of electoral votes that supports him. But Trump has no chance at all if Pennsylvania sends only one certificate that supports Warren.[23] Thus, if Trump cannot get a court to block the governor's certificate of ascertainment showing Warren's electors as duly appointed based on their popular-vote victory, then it is imperative from Trump's perspective that the state legislature purport to supersede this popular vote with its own direct appointment of the state's

23. This point assumes that the Democrats will control the House of Representatives, which will vote to accept the 20 electoral votes from Pennsylvania in favor of Warren. Only if Mike Pence could get away with nullifying those votes solely on his own (without any conflicting electoral votes from the state in favor of Trump)—an exceedingly implausible scenario—could Trump prevail in preventing Pennsylvania from giving Warren an Electoral College majority.

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presidential electors—and for Pence to receive from Pennsylvania a second certificate of electoral votes, ones cast for Trump based on this purported legislative appointment.

There is good reason to think that this purported legislative appointment of electors would be invalid as a matter of state or federal law, or both. To be sure, the federal Constitution unquestionably gives state legislatures the authority to engage in direct appointment of presidential electors. Moreover, it is also true that when exercising this federal constitutional authority there is no need for the state legislature to provide for gubernatorial involvement.[24] Thus, one might think that the two houses of the Pennsylvania legislature, without any legal obstacle, could supersede a popular vote with direct appointment of electors. While it might be undemocratic, it would not seem unlawful.

But that conclusion would be too quick. While it is undoubtedly true that for future elections a state legislature could change the method of appointing presidential electors from a popular vote to direct appointment, there are at least two significant legal obstacles to consider with respect to an attempt by a state legislature to assert direct appointment authority after a popular vote to appoint electors has already taken place.

First, insofar as this popular vote occurred pursuant to state legislation enacted using ordinary state legislative procedures, including presentment to the governor for possible veto, a strong argument can be made that this method of appointing electors cannot be undone except by a new state statute enacted using the same ordinary methods of legislation. In other words, even if the state legislature wants to return to a method of appointment with no gubernatorial involvement, the legislature first would need to repeal—by ordinary legislative methods—the statute that authorized appointment by means of a popular vote. Second, the legislature would need to change in this appointment method before, not after, electors had already been appointed by means of a popular vote. The legislature is always free to make this move for next time, but it cannot—at least not without violating the due process clause of the Constitution—undo an appointment of electors already made.[25]

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24. In the early days to the Republic, when state legislatures choose to appoint electors directly, they debated whether to do so in joint sessions of both legislative chambers, or separate sessions, but they did not view this legislative appointment as requiring gubernatorial assent. *See* FOLEY, *supra* note 18, at 17.

25. *See* Roe v. Alabama, 43 F.3d 574, 580–81 (11th Cir. 1995) (first quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); and then quoting Curry v. Baker, 802 F.2d 1302, 1315 (11th Cir. 1986)) ("The right of suffrage is 'a fundamental political right . . . .' If, however, 'the election process itself reaches the point of a patent and fundamental unfairness, a violation of the due process clause may be indicated . . . .'"). For a discussion of the election that gave rise to this *Roe v. Alabama*

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While these legal arguments are powerful, they ultimately may not matter. As we shall shortly see, what matters is whether or not Congress receives a submission of electoral votes from a state, not whether that submission is legally valid according to some standard that Congress might not recognize as binding. Thus, the two houses of Pennsylvania's legislature may not be legally entitled to negate popular appointment of the state's presidential electors after that appointment has occurred. The legislature may require concurrence of the governor before any such move could be considered a valid rescission of the statute authorizing popular appointment. Even so, if the two houses of the state legislature purport to do this, and if the electors purportedly appointed meet and cast their electoral votes—and, most importantly, if these electors send their electoral votes to the President of the Senate—then the President of the Senate has these electoral votes in hand. That is enough for Congress to consider the votes and potentially accept those votes as the authoritative electoral votes from Pennsylvania.

Also, it is worth noting that the strength of any argument against direct legislative appointment of presidential electors may depend heavily on the specific factual context in which such direct legislative appointment is attempted. In a genuine emergency, for example, it would not raise serious due process concerns for a state legislature to step in and appoint presidential electors directly when otherwise the state would risk losing its opportunity to participate in the presidential election altogether. Indeed, Congress itself has explicitly recognized that "the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct" if and when "any State has held an election for the purpose of choosing electors, and has failed to make a choice."[26] Thus, if there were a successful cyberattack on Pennsylvania's electoral infrastructure, thereby preventing the state from appointing presidential electors by means of a popular vote on Tuesday, November 3, there is

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precedent, as well as related rulings in the litigation, see EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 267–77 (2016) [hereinafter BALLOT BATTLES]. More recently, the American Law Institute (ALI) has developed principles for the resolution of ballot-counting disputes that identifies this "due process" concern as a paramount principle that all elections should follow. Specifically, section 201 of these ALI principles provides: "Whenever the state's rules and procedures for the counting of ballots have been prescribed in advance of an election . . . those rules and procedures shall be followed as prescribed, unless doing so would violate the U.S. Constitution or other federal law." The Reporters' Notes to Section 201 provide additional analysis of the relationship of the *Roe v. Alabama* due process precedent to this basic principle. A.L.I., PRINCIPLES OF THE LAW, ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES § 201, at 77–78 (2019) (discussing the *Roe* case in relation to principles of due process).

26. 3 U.S.C. § 2 (2018).

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little doubt that the state's legislature could appoint electors directly as its chosen method for a backup method of appointment.[27]

In this particular circumstance, moreover, the governor would have no basis for standing in the way of this direct legislative appointment without any gubernatorial involvement; nor would due process pose any obstacle. Accordingly, as a matter of how persuasive a Trump effort at direct legislative appointment of electors would be, it might well depend on how successfully he could draw an analogy to a genuine emergency situation, like a cyberattack. If he were unable to convince anyone that the blue shift in the overtime count was anything other than the normal process of canvassing election returns, his argument for direct legislative appointment of electors would be correspondingly weak. Conversely, if he was able to convince at least his own Republican supporters that the blue shift was an electoral calamity comparable to a cyberattack, thereby nullifying the validity of the canvass and the overtime count, his argument that direct legislative appointment was necessary to fill the void left by the invalid blue shift would strengthen correspondingly at least in the eyes of his own supporters.

In any event, this analysis will proceed on the assumption that Mike Pence, as President of the Senate, receives two sets of electoral votes from Pennsylvania: one reflecting the count of the canvass, certified by the governor; and the other reflecting the legislature's assertion of its authority to directly appoint the state's electors.

II. FROM JANUARY 6, 2021, THROUGH JANUARY 20, 2021

A. What Could Happen

As January 6, 2021 approaches, the two parties take to cable news and social media to test various arguments as to why their candidate is the winner entitled to be inaugurated as president on January 20. Some Republicans take the especially aggressive position that Mike Pence, as President of the Senate, has the unilateral authority under the Twelfth Amendment to decide which certificate of electoral votes from Pennsylvania is the authoritative one entitled to be counted in Congress and that he, accordingly, will count the certificate from the electors appointed by the state legislature because the Constitution authorizes the state legislature to choose the method of appointing electors.

These Republicans point to the historical pedigree of this position, observing that Republicans made the same argument during the disputed

27. *See id.* ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

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election of 1876 and that at least some recent law journal scholarship has supported this position.[28] Unembarrassed by the apparent conflict of interest caused by Mike Pence simultaneously being a candidate for reelection and arbiter of the electoral dispute, these Republicans observe that Thomas Jefferson was in essentially the same position during the disputed election of 1800 and yet the Twelfth Amendment left this provision in place when Congress rewrote the procedures for the Electoral College afterwards. While it is true that an incumbent Vice-President might have a direct personal stake in the electoral dispute to be resolved, the Republicans argue, at least the glare of the spotlight is focused on whatever the vice president does in this situation, and everyone will be able to judge whether the vice president acted honorably or dishonorably in resolving the dispute.

Other Republicans offer an alternative argument, which would still lead to Trump's reelection. They contend that, under the proper interpretation of the operative federal statute—the Electoral Count Act of 1887—Pennsylvania's electoral votes must be discarded because both conflicting submissions of electoral votes from the state purport to be timely and authoritative under state law.[29] Because neither submission has inherently higher status from a federal vantage point, according to this alternative argument, both submissions in effect cancel each other out, and there are no electoral votes from Pennsylvania to be counted. Moreover, this argument continues, Pennsylvania's failure to appoint electors in a manner capable of recognition by Congress alters the arithmetic for determining which candidate won an Electoral College majority. Because Pennsylvania did not validly appoint any electors, only a total of 518 electors were appointed (the usual 538 minus Pennsylvania's 20). Trump won an undisputed 260 Electoral College votes apart from the controversy over Pennsylvania. Because 260 is a bare majority of 518, these Republicans contend that Trump has secured "a majority of the whole number of electors appointed," within the meaning of the Twelfth Amendment, and thus must be recognized as the duly elected president for a second term.

Democrats will have none of this. They contend that the constitutional argument that would give Mike Pence the power to declare himself and Trump reelected is preposterous and that, to the contrary, Congress has the authority to enact a law to govern the resolution of a dispute over the proper electoral votes from a state. The Electoral Count Act of 1887 is

28. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1688–90, 1699–1701 (2002).

29. 3 U.S.C. § 15 (2018).

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that law, they argue. They further contend that, properly interpreted, the statute requires the certificate bearing the governor's signature to be accepted by Congress as authoritative.[30] Even if one chamber of Congress wishes to repudiate the validity of that gubernatorial certificate, the Electoral Count Act requires its votes for Warren to be counted as long as one house of Congress considers it valid.[31] The Democrats observe that Speaker Nancy Pelosi already has made clear that *on January 6* a majority in the House of Representatives will vote to accept electoral votes from Pennsylvania as certified by the state's governor and thus America should be preparing for the inauguration of Elizabeth Warren as its next president on January 20.

As a fallback position, other Democrats argue that if the dispute over Pennsylvania remains unresolved on January 20, then no candidate shall have been "qualified" for either president or vice-president within the meaning of the Twentieth Amendment. Therefore, they argue, under the succession statute enacted by Congress, Nancy Pelosi, upon resignation as Speaker, is to serve as acting president until such time as the dispute is resolved and a president shall have "qualified" as recognized by Congress. While Pelosi herself has made abundantly plain her preference that Warren be recognized and inaugurated as the duly elected president, she is prepared to assume the responsibilities of acting president for as long as necessary, which is for as long as Republicans refuse to acknowledge the lawfulness and legitimacy of Warren's election. Since Republicans cannot prevail in this contest, these Democrats argue, they should acquiesce in Warren's election and thus avoid the extra complications associated with Pelosi operating as an Acting President.

Republicans, in turn, scoff at these arguments made by Democrats. They continue to claim that Trump is the one duly elected. They and Trump himself assert that the country must move forward toward the inauguration of Trump's second term on January 20.

B. Analysis

The procedures for handling a disputed presidential election that reaches Congress are regrettably, and embarrassingly, deficient. The country was spared the agony of having to suffer the invocation of these procedures in 2000. The dispute over that year's presidential election did not last all the way to Congress. Instead, Al Gore refused to carry that dispute forward—despite the contrary urging of his advisers, including

30. For further details of this statutory analysis, *see infra* pp. 351–61.
31. *Id.*

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Ron Klain—after the United States Supreme Court ruled against him in *Bush v. Gore*.[32]

There is absolutely no guarantee, however, that a disputed presidential election in 2020 would not reach Congress. Indeed, as explained above, the analysis here is premised on the assumption that Trump easily could take a dispute over an outcome-determinative blue shift in the overtime count all the way to Congress. Trump could do so by having the state legislature send a second certificate of electoral vote, ones supporting him, to "compete" in Congress against a conflicting certificate of electoral votes from the same state, these other ones supporting his Democratic opponent based on the blue shift count in overtime. Thus, as part of an effort to prepare for the risk of a disputed presidential election in 2020, it is imperative to consider how the embarrassingly deficient procedures might operate if they were actually called into play.

The Constitution itself says remarkably little relevant to this topic, and what it does say is shockingly ambiguous. Here is the applicable text of the Twelfth Amendment:

> [T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—
>
> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.[33]

The first thing to observe about this constitutional language is that the critical sentence is written in the passive voice: "the votes shall then be counted." Here, thus, is the first frustrating ambiguity. It could be the "President of the Senate" who does the counting; or, after the President of the Senate has finished the role of "open[ing] the certificates" then the whole Congress, in this special joint session, collectively counts the electoral votes.

Either way, this language contains no provision for what to do in the event of a dispute, whether with respect to the "certificates" to be "open[ed]" or with respect to the "votes" contained therein. It certainly says nothing about what to do if the President of the Senate has received two conflicting certificates of electoral votes from the same state, each

32. *See generally* Bush v. Gore, 531 U.S. 98 (2000) (per curiam); *see also id.* at 110 ("Because it is evident that any recount . . . will be unconstitutional . . . we reverse the judgement of the Supreme Court of Florida ordering a recount to proceed.").

33. U. S. CONST. amend. XII.

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certificate purporting to come from the state's authoritatively appointed electors. As the distinguished jurist Joseph Story observed early in the nineteenth century, this crucial constitutional language in the Twelfth Amendment appears to have been written without imaging that it might ever be possible for this sort of dispute to arise.[34]

Despite its ambiguity, or perhaps because of it, the peculiar passive-voice phrasing of this crucial sentence opens up the possibility of interpreting it to provide that the "President of the Senate" has the exclusive constitutional authority to determine which "certificates" to "open" and thus which electoral votes "to be counted." This interpretation can derive support from the observation that the President of the Senate is the only officer, or instrumentality, of government given an active role in the process of opening the certificates and counting the electoral votes from the states. The Senate and House of Representatives, on this view, have an observational role only. The opening and counting are conducted in their "presence"—for the sake of transparency—but these two legislative bodies do not actually take any actions of their own in this opening and counting process. How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. They have no constitutional way to act together as one amalgamated corpus. Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein.

This interpretation of the Twelfth Amendment is bolstered, moreover, by the further observation that the responsibility to definitively decide which electoral votes from each state are entitled to be counted must be lodged ultimately in some singular authority of the federal government. If one body could decide the question one way, while another body could reach the opposite conclusion, then there inevitably is a stalemate unless and until a single authority is identified with the power to settle the matter once and for all. Given the language of the Twelfth Amendment, whatever its ambiguity and potential policy objections, there is no other possible single authority to identify for this purpose besides the President of the Senate.

This role could have been vested in the chief justice of the United States, as is the constitutional authority to preside over the trial of an impeachment of the president. Or disputes of this nature could have been referred directly to the Supreme Court, as a singular corporate body, for definitive resolution there. But the Constitution does neither; nor does it make any other such provision. Thus, according to this argument, the

34. *See* BALLOT BATTLES, *supra* note 25, at 72 ("It seems to have been taken for granted that no question could ever arise on the subject.") (citations omitted).

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inevitable implication of the Twelfth Amendment's text is that it vests this ultimate singular authority, for better or worse, in the President of the Senate. Subject only to the joint observational role of the Senate and House of Representatives, the President of the Senate decides authoritatively what "certificates" from the states to "open" and thus what electoral votes are "to be counted."

Whatever each of us personally thinks of this interpretative argument, it is necessary to acknowledge that it has a significant historical pedigree.[35] It routinely had its advocates in the years leading up to the disputed election of 1876. During that intense dispute, it was conveniently invoked by Republicans, since the President of the Senate was one of their own at the time.[36] After the resolution of that ugly dispute, the argument was resurrected by some during the congressional debates that led to passage of the Electoral Count Act of 1887, including the claim that this Act is unconstitutional because it interferes with the exclusive authority vested in the President of the Senate to determine which electoral votes from the states to count. That claim was repeated after passage of this Act.[37] Indeed, it has been repeated recently—and forcefully—in a law review article written after *Bush v. Gore* in contemplation of what might transpire if and when another disputed presidential election ever reaches Congress.[38] Trump and his supporters would almost certainly invoke this argument if and when it was to his advantage to do so.

For as long as this argument has been made, however, it has had its vociferous detractors. The Necessary and Proper Clause, the counterargument goes, gives Congress ample legislative authority to fill the gaps and clarify the ambiguities that exist in the text of the Twelfth Amendment itself.[39] It would be unseemly (or worse) to leave the exclusive power to resolve disputes over the electoral votes of a state in the hands of the Senate president—especially when the Senate president is one of the candidates directly involved in the dispute, as has been the case multiple times, including Gore in 2000 and Nixon in 1960. Thus, it should be clear that Congress may invoke its Necessary and Proper Clause power to enact a statute that provides for an alternative mechanism for resolving a dispute over the electoral votes from a state.

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35. For a discussion of this history, see generally Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010).

36. Not the vice-president of the United States, who had died, but Thomas Ferry, President pro tempore.

37. *See* BALLOT BATTLES, *supra* note 25, at 151–60 (recounting the historical debates surrounding whether or not the Electoral Count Act of 1887 is constitutional).

38. *See generally* Kesavan, *supra* note 28.

39. *See* BALLOT BATTLES, *supra* note 25, at 125–32 (discussing the arguments and counterarguments surrounding the textual ambiguities of the Twelfth Amendment).

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According to this counterargument, the Electoral Count Act of 1887, as imperfect as it may be as a policy and legislative drafting matter, is an entirely appropriate exercise of this Necessary and Proper power as a matter of constitutional authority. Thus, there can be no constitutional objection to the procedures set forth in this Act on the ground that they deprive the Senate President of what otherwise would be exclusive authority to resolve this kind of dispute.

It is fair to say that this counterargument, on behalf of congressional power under the Necessary and Proper Clause, has had more adherents throughout history than the argument on behalf of exclusive constitutional power lodged in the President of the Senate. We shall momentarily turn to the Electoral Count Act of 1887 as an exercise of this Necessary and Proper Clause power, on the assumption that it is constitutionally valid no matter its statutory deficiencies. Nonetheless, it must be recognized that the argument on behalf of exclusive Senate President authority has never been thoroughly vanquished. How could it be unless and until there is a new constitutional amendment superseding the ambiguity of the Twelfth Amendment on this point? Thus, one must prepare for the possibility that this constitutional debate will recur, if and when the outcome of a presidential election potentially turns on which side of the argument prevails.

Before turning to the statute, there is another constitutional provision to consider. The Twentieth Amendment provides:

> If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.[40]

This provision contemplates the possibility that the time for inaugurating the new president—at noon, on January 20—may arrive without a new president having yet "been chosen." The most straightforward textual way this might occur is if it is abundantly clear to all that no candidate has received a majority of electoral votes. In that event, under the Twelfth Amendment the House of Representatives is supposed to elect a president by means of a special procedure in which each state's delegation to the House has one vote. But the Twelfth Amendment provides that an absolute majority of all states "shall be

40. U.S. CONST. amend. XII.

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necessary to a choice" and thus it is possible that the House will have failed to achieve this choice by the required majority vote before noon arrives on January 20. In this case, if the Senate has successfully exercised its parallel authority under the Twelfth Amendment to elect a new vice president (when no vice presidential candidate received an Electoral College majority), then this provision of the Twentieth Amendment makes clear that the vice president newly elected by the Senate under the Twelfth Amendment becomes "acting president" until such time as the House of Representatives manages to elect a president by the required majority vote.

But what if the Senate has also failed to perform its function under the Twelfth Amendment and has not yet elected a vice president? In this case, it would seem that the Twentieth Amendment invokes the statutory line of succession that Congress has the power to adopt—although the Amendment does so somewhat ambiguously by switching to the word "qualified" from the previously used "chosen": "the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified."[41] Presumably, then, if all agree that no new president or vice president has yet been elected under the Twelfth Amendment by the time noon on January 20 arrives, then"[t]he Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President."[42] Assuming that Nancy Pelosi is reelected Speaker on January 3, 2021, then she would be in the position to become acting president if no new president or vice president has been elected by noon on January 20.

But what if it is disputed whether or not a new president has been "elected," "chosen," or "qualified" within the meaning of the Twentieth Amendment? Suppose Republicans claim that President Trump has been reelected, while at the same time Democrats argue that either Warren has been elected or, if not, then no one has (at least not yet). Thus, according to the Democrats, under the Twentieth Amendment it devolves to Nancy Pelosi, upon resignation as Speaker and from the House, to act as president.[43] The Twentieth Amendment does not seem to speak

41. U.S. CONST. amend. XX.

42. 3 U.S.C. § 19 (2018). I put aside the arguments made by the Amar brothers that it is unconstitutional for the Speaker of the House to be in the line of presidential succession. *See generally* Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Unconstitutional?*, 48 STAN. L. REV. 113 (1995). Even if that argument is sound with respect to the circumstance of a presidential death (in the middle of the president's term), it would seem inapplicable with respect to the operation of the Twentieth Amendment, which does not limit whom Congress may choose to act as President in the event of no "qualified" President-elect and Vice President-elect.

43. Republicans would be claiming that Pence had been reelected as vice president. Democrats

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specifically to this circumstance. It seems to assume that either it is clear that there is a new president-elect to be inaugurated at noon on January 20, or it is clear that there is not (and equally clear that there is no new vice president), in which case the need for an acting president is unambiguously triggered. The Twentieth Amendment does not seem to contemplate that it might be unclear, and thus disputed, whether there is a newly elected president to be inaugurated or, instead, whether an acting president is required for the time being.

How might this particular kind of ambiguity or dispute arise? For that, we turn to the astonishingly messy language of the Electoral Count Act of 1887.[44]

1. The Electoral Count Act

The key section of the Act is codified as 3 U.S.C. § 15. This section is itself a monstrosity, amounting to a virtually impenetrable maze of 807 words. It starts innocuously enough, requiring the opening and counting of electoral votes from the states—as required by the Twelfth Amendment—to commence at 1:00 p.m. on January 6, with both the Senate and the House of Representatives present in "the Hall of the House of Representatives" and the President of the Senate serving as "their presiding officer."[45] The section then provides that the opening and counting of each state's electoral votes will proceed state-by-state in alphabetical order. If there is only one submission of electoral votes from a state, the operation of the statute is acceptably straightforward and comprehensible: this submission must count according to electoral votes contained therein unless both houses of Congress, acting separately, agree to reject those electoral votes.[46]

The section's interpretative difficulties arise only if there are two or more conflicting submissions of electoral votes from the same state. To be sure, there is no difficulty under the section if both chambers of Congress agree to accept the same submission as the authoritative one

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would be disputing this as well, arguing instead that either Warren's running mate had been elected or that there was no new vice president yet, thereby requiring the responsibility of acting president to devolve upon Nancy Pelosi.

44. *See* BALLOT BATTLES, *supra* note 25, at 150–77 (analyzing the statute's genesis and legislative history).

45. 3 U.S.C. § 15 (2018).

46. This is why Trump cannot prevail if there is only one submission of electoral votes from Pennsylvania, and those are for Warren—as long as the Democrats retain control of the House (since it will be the new House sworn in on January 3, 2021). Only by Pence, as still President of the Senate on January 6, willing to declare the clear operation of the Electoral Count Act, 3 U.S.C. § 15, entirely irrelevant in this situation, could Pennsylvania's electoral votes not count for Warren in this situation. But, as indicated earlier, that seems so far-fetched to beyond the stretch of imagination.

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containing the valid votes to be counted. As one portion of this section puts it, "those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State."[47]

Thus, in the 2020 scenario we are contemplating—where the President of the Senate has received two submissions from Pennsylvania, one with the governor's certificate and the other based on the purported legislative appointment—if both the Senate and the House accepted the electoral votes bearing the governor's certificate as the proper ones (because they were cast by electors duly appointed pursuant to an accurate count of the state's popular vote according to the canvassing and other electoral laws of the state), the controversy would end in terms of what the statute provides. True enough, as a political matter, the fight may remain unsettled depending on exactly the nature of the Senate's vote. If only a few renegade Republicans—like Mitt Romney and Lisa Murkowski—joined all the Democrats to concur with the acceptance of the Warren electoral votes from Pennsylvania, thereby agreeing with the Pelosi-led vote in the House to do the same, Mike Pence might be tempted to assert a constitutional prerogative to supersede the provisions of the Electoral Count Act and, despite this joint agreement of the two congressional chambers, declare the legislatively appointed electors to be the authoritative ones from Pennsylvania.[48] But if Mitch McConnell leads the Republican-controlled Senate to agree with the Democratic-controlled House that the governor-certified electoral votes from Pennsylvania are the valid ones, it would seem impossible as a practical matter for Pence to prevail on his constitutional claim that he is entitled to overrule this bicameral (and bipartisan) determination of which electoral votes from Pennsylvania to count. For this reason, it makes all the difference in the world how Mitch McConnell chooses to lead the Republican conference in the Senate if this kind of situation occurs.

But what if the Senate and House disagree? What if, in other words, the Pelosi-led House votes to accept the electoral votes for Warren, while simultaneously the McConnell-led Senate votes to accept the electoral votes for Trump? Here is where the statutory morass of 3 U.S.C. § 15 becomes an interpretative quagmire. As scholars have recognized ever

47. 3 U.S.C. § 15.

48. The political tenability of a fight in this circumstance might depend on the mood of the country. If Trump's so-called "base" voters are relatively acquiescent in the outcome, then it would seem politically infeasible for Pence to override the judgment of both the House and the Senate even if the Senate's vote (like the House's) is mostly made up of Democrats. But if the Republican base is especially agitated, then it might embolden Pence to try to make this kind of move, knowing that he would have the support of Mitch McConnell and other Republican leaders—although he would lack the support of the Senate institutionally.

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since the adoption of the Electoral Count Act in 1887, its opaque and contorted text is susceptible to two different understandings of what is supposed to happen in this inherently fraught situation—a circumstance for which statutory clarity, rather than ambiguity, is acutely required.[49] This point is not to say that the two alternative interpretations are equally valid, or would appear so to a disinterested tribunal endeavoring to be genuinely nonpartisan in resolving a dispute of this kind. It is only to say that the two alternative interpretations are at least superficially tenable, with advocates for each among scholars and in the historical record. Thus, in an actual dispute either side would be able to invoke one of these alternative interpretations to support its position in the particular controversy at hand.

We can easily see how Democrats could forcefully apply this point and argue that, once the Senate and House have diverged on which submission of electoral votes from Pennsylvania should be counted, the operation of 3 U.S.C. § 15 requires that the submission bearing the governor's certificate is the one that must be accepted. The Democrats would quote this sentence in the statute: "But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." The Democrats would also cite a comprehensive post-2000 law review article, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, which makes the case for counting the electoral votes in the submission from the state that bears the governor's signature is the correct reading of the statute.[50]

It is harder, but not impossible, to make the counterargument that the proper reading of the statute as applied to this specific situation requires the rejection of both submissions of electoral votes from Pennsylvania. This counterargument takes the position that a gubernatorial certificate does not act as a tiebreaker when two (or more) certificates of submission of electoral votes from the same state claim "safe harbor" status under another section of the Electoral Count Act of 1887.[51] Those who followed, or have studied, the saga of the 2000 presidential election will remember this statutory section described as the "safe harbor provision." This section purports to bind Congress when a state has settled a dispute over its own electoral votes by a specified deadline—six days before the scheduled meeting of the electors—and according to rules existing in

49. *See generally* A.L.I., *supra* note 25 (identifying this "due process" concern as one that should be of utmost importance in all elections).

50. *See generally* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004).

51. 3 U.S.C. § 5 (2018).

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state law prior to the day for appointing electors by means of a popular vote in the state. Several scholars, including one from the Congressional Research Service, assert that when multiple submission of electoral votes from the same state all claim "safe harbor" protection, none can be counted—not even one bearing a gubernatorial certificate—unless *both* houses of Congress agree upon which submission is entitled to this "safe harbor" status.[52] These scholars quote a separate portion of the impenetrable text of 3 U.S.C. § 15:

> [I]n case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law . . . .

This language, these scholars contend, means that both Houses must agree to count electoral votes claiming safe-harbor status when other electoral votes from the same state are also making the same safe-harbor claim. In support of their contention that the electoral votes bearing the governor's signature cannot be counted in this situation, as long as one chamber of Congress objects, these scholars offer this reasoning:

> If the Houses cannot agree on the authoritative determination . . . no vote from the state in question is counted. This result follows regardless of the governor's action. Congress in this case looks to the executive certificate only as evidence of the decision reached by a tribunal authorized by the state legislature. If the decision of the authorized tribunal cannot be made out, then there is no valid return for the governor to certify.[53]

This interpretation of the statutory language may not be especially convincing; readers can judge for themselves. The important point is that that this interpretative reasoning exists, both in law review literature and Congressional Research Service analysis. It is available to be championed when doing so serves a partisan purpose. It cannot be dismissed as nonexistent, however much one might wish that to be the case.

In the context of the specific scenario under consideration, one can see how the electoral votes bearing the governor's signature would claim safe-harbor status. This would be especially true if the Pennsylvania Supreme Court affirmed them as the lawful electoral votes of the state and did so in a decision issued at least six days before Monday, December

52. Memorandum from Jack Maskell, Legislative Att'y, Am. L. Div., Cong. Research Serv. 9 (Jan. 2, 2001) [hereinafter Congressional Research Service Memorandum] (on file with author); L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 343 (1961).

53. Congressional Research Service Memorandum, *supra* note 52, at 8–9 (quoting Wroth, *supra* note 52).

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14. As part of this safe-harbor claim, the state supreme court would assert that it was acting pursuant to statutory authority adopted prior to Tuesday, November 3, the day for appointing the state's electors by means of a popular vote.

It is more difficult to see how an argument for safe-harbor status could be made for the electoral votes cast by the electors purportedly appointed by the state legislature directly, sometime after Tuesday, November 3, in response to the blue shift. It would seem that this kind of retroactive legislative move is precisely the kind of change in law that is not supposed to receive safe-harbor status.

And, yet, it is not entirely impossible to make the contrary argument, especially if the state legislature acts to make its direct appointment of electors before the safe-harbor deadline of six days before Monday, December 14. This argument would depend, again, on the claim that the state legislature was responding to an emergency analogous to a cyberattack. Surely, if there were a cyberattack—this argument would go—a direct legislative appointment of electors would be entitled to safe-harbor status if made within the requisite deadline, in order to avoid depriving the state of an opportunity to participate in the presidential election. This direct legislative appointment would occur pursuant to residual emergency authority that existed in state law prior to Tuesday, November 3. There is always such residual legislative authority in the context of a genuine emergency, this argument might add. Because the state legislature viewed the blue shift during the canvass as a theft of the popular will of the state, comparable to a cyberattack and thus an equivalent emergency, the direct legislative appointment of electors is entitled to safe harbor status in the one emergency situation as much as the other.

This argument might not seem especially strong, but it is enough to claim that under 3 U.S.C. § 15 neither of Pennsylvania's electoral vote submissions may be counted when the House has voted to count one and the Senate has voted to count the other. Because it is an argument that in this context supports Trump's claim to reelection, one would expect Republicans to make it in the run-up to January 6. The argument depends on the further proposition that, once it is determined that Pennsylvania has failed to appoint any electors capable of being recognized as authoritative by Congress, then Trump has a majority of votes from all electors authoritatively appointed: 260 of 518. One would thus expect Republicans to make that claim as well.[54] Thus, January 6 approaches in

54. This issue is also debatable, as has been recognized at least since the congressional debates on the Electoral Count Act. *See* BALLOT BATTLES, *supra* note 25, at 150–77 (discussing the

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this hypothetical scenario, the speculative chatter on cable and Twitter is that if the House and Senate divide over which electoral votes from Pennsylvania to accept, then Mike Pence as President of the Senate will proclaim that neither counts and will use that proclamation as the basis for declaring Trump re-elected by a majority of electors appointed.

Anticipating this move, Democrats in turn explore ways to prevent it. They argue that if the House refuses to continue participating in the procedure specified in 3 U.S.C. § 15 after Pence makes this erroneous and unlawful proclamation regarding Pennsylvania, then the opening of certificates and the counting of electoral votes from all remaining states cannot continue. They quote the very last sentence of 3 U.S.C. § 15: "No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of."[55] With the process stuck at Pennsylvania, and the count incomplete, there is no president-elect, the Democrats argue. Nor is there a vice president-elect. This means, they say, Nancy Pelosi is entitled to serve as acting president for as long as the stalemate remains, by virtue of the Twentieth Amendment.

Nonsense, Republicans retort. Democrats cannot trigger the Twentieth Amendment simply by walking out of the procedure for counting electoral votes under 3 U.S.C. § 15, these Republicans respond. They point to the very next section of the statute: "Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared."[56] Mike Pence, as President of the Senate, therefore can

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legislative history of the Electoral Count Act). The other side of this argument is that the denominator does not change, despite a state's failure to appoint electors able to be recognized as authoritative by Congress. The Constitution itself does not directly speak to this point, and the Electoral Count Act did not attempt to resolve this debate. Richard Posner addressed this issue in his book on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), arguing that it was one of many reasons that justified the Court's involvement in that disputed election. *See generally* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). Note: if the denominator-does-not-change side of the debate were to prevail, it would mean that no candidate receives a majority of electoral votes, and the election goes to the House of Representatives pursuant to the special one-vote-per-state procedure.

55. 3 U.S.C. § 15 (2018).

56. *Id.* § 16. Demonstrating a legislative intent that the electoral count be completed, this section continues:

> [N]o 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 meeting of the two Houses, no further or other recess shall be taken by either House.

Id.

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simply resume the process, with the next state (Rhode Island) and proceed to the end (Wyoming) even if the only members of the House and Senate remaining to watch are Republicans. In this way, the process of counting electoral votes under 3 U.S.C. § 15 could end with this basic dispute still remaining. Republicans would claim that Trump has been reelected, by virtue of Mike Pence's assertion to this effect pursuant to his understanding of § 15 as the presiding officer of its proceeding. Meanwhile Democrats would claim that the counting of electoral votes remains incomplete because of the attempted usurpation of authority by Pence in refusing to count the electoral votes from Pennsylvania bearing the governor's certificate, as required by the proper interpretation and operation of 3 U.S.C. § 15.[57]

Which position is correct under the Twentieth Amendment? Who decides, and how? If the election remains unsettled at this stage, what then?

III. JANUARY 6, 2021, THROUGH JANUARY 20, 2021

A. What Could Happen

At 1:00 p.m. on January 6, 2021, pursuant to 3 U.S.C. § 15 and the Twelfth Amendment, the Senate and House of Representatives gather in the House chamber for the counting of electoral votes of the states. Mike Pence presides in his role as President of the Senate, as specified by both the statute and the Constitution. Starting with Alabama, and continuing alphabetically, the counting proceeds smoothly until Pennsylvania. Pence announces that he is in receipt of two submissions purporting to be the state's electoral votes and under 3 U.S.C. § 15 he must submit both to the Senate and House for their separate consideration. The Senate then withdraws from the House chamber and, as expected, votes to accept the submission of electoral votes from the electors appointed by the state's legislature, while simultaneously the House votes to accept the submission certified by the state's governor.

When the Senate returns to the House chamber for the resumption of the joint session, Pence announces that because neither submission has

57. In this posture, the Democrats analytically would be making two distinct arguments, one statutory and the other constitutional. Their statutory argument would come first, and it would be that the proper interpretation of 3 U.S.C. § 15 requires the Senate President to recognize the Pennsylvania submission bearing the governor's signature as legally authoritative. If the Senate President errs in this statutory respect, then the Democrats would turn to their constitutional argument as a secondary line-of-defense: namely, under the Twelfth and Twentieth Amendments, properly interpreted in tandem, the electoral count cannot be complete without the institutional participation of the House; thus, if the House refuses to acquiesce in the process, it is an "Acting President" situation under the Twentieth Amendment.

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been accepted as authoritative by both houses of Congress, neither submission's electoral votes can be counted. At this there are howls of protests by Democrats in the chamber, who clamor their insistence that the electoral votes bearing the governor's certificate must be counted under the express terms of 3 U.S.C. § 15.[58] After much commotion, Pence manages to gavel the proceedings to order and repeats that his understanding of § 15, contrary to the views expressed by the Democrats, is that neither submission of electoral votes from Pennsylvania can be counted because of the split votes of the two congressional chambers. That is his ruling as presiding officer, and he is prepared to move on to the next state, Rhode Island.

The Democrats erupt in protest again and demand an opportunity to overrule Pence's patently erroneous interpretation of § 15. Pence again gavels the proceeding to order and announces that there is no method under 3 U.S.C. § 15, or the Twelfth Amendment, to overrule his rulings and announcements as presiding officer. The Senate and House do not act jointly as a unified combined body.[59] Under both 3 U.S.C. § 15 and the Twelfth Amendment, their joint role is solely as observers of the process. Each chamber has made its separate determination regarding Pennsylvania, and accordingly it is his role—Pence asserts—to announce the consequence of those separate determination. Based on his understanding of both the statute and the Constitution, and as advised by counsel, he had performed this necessary function, declaring both submissions from Pennsylvania ineligible to be counted, and now under the statute and Constitution he must move the proceedings on to the next state.

Then, Nancy Pelosi rises, demanding to speak. (Under 3 U.S.C. § 16, she sits "immediately upon [the Senate president's] left."). She announces that the joint meeting of two chambers is over, or at least suspended, unless and until Mike Pence is prepared to change his ruling and accept the electoral votes from Pennsylvania bearing the governor's signature. Absent that, the Senators are no longer welcome in the House chamber. When Pence insists that Pelosi has no authority to suspend the proceedings in this way, Pelosi declares that she will call upon the sergeant-at-arms of the House of Representatives to forcibly remove the senators from the House chamber unless the senators leave voluntarily. In order to avoid that spectacle, and in the hope that Republicans will

58. For a historical precedent of comparable howling, see BALLOT BATTLES, *supra* note 25, at 117–49 (discussing the dispute over the process of counting electoral votes in the 1876 election).

59. 3 U.S.C. § 18 (2018) ("While the two Houses shall be in meeting 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.").

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eventually triumph after cooler heads prevail, Pence reluctantly agrees to lead the Senators out of the House chamber.[60]

With the House now alone in its own chamber, and Speaker Pelosi presiding, the House (in a party-line vote) passes a resolution stating that the joint proceeding under the Twelfth Amendment and 3 U.S.C. § 15 is hereby suspended unless and until Vice President Pence publicly announces that he is prepared to count the electoral votes from Pennsylvania as certified by the governor. Until then the House has ordered its sergeant-at-arms to bar the reappearance of Pence or any other Senator in the House chamber. Pelosi, however, does not go so far as to bar Republican members of the House from leaving the chamber, and they do.[61]

With Pelosi and the Democrats refusing to budge, Pence and the Republicans decide they need to do what they can to continue the counting of electoral votes, even if they cannot return to the House chamber. Consequently, Pence invites senators and representatives to crowd into the Senate's chamber for this purpose. Only Republican senators and representatives show up, except for one designated Democratic Senator to protest the purported continuation of the proceedings as unlawful under 3 U.S.C. § 15 and the Twelfth Amendment.

Among other objections, this Democratic senator points out that 3 U.S.C. § 15 specifically requires that there be two "tellers" from each

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60. *Id.* § 17 contemplates the possibility of the House demanding a "recess" of the electoral count proceedings on January 6, based on an objection to how the process is being handled: "no recess shall be taken unless a question shall have arisen in regard to counting any such votes." Thus, although "the President of the Senate shall have power to preserve order" during the joint session itself, *see* 3 U.S.C. § 18, the Senate President cannot insist that no such "recess" occur, if the House has raised a question "in regard to counting any such votes." Consequently, Speaker Pelosi would be within her rights to insist upon suspension of the joint session, at least for a short period in which the House may wish to deliberate or "recess" while it determines its institutional position as a legislative chamber regarding the situation. In any event, if the House Speaker orders the House Sergeant-at-Arms to clear the House chamber, it would seem evident that the Sergeant-at-Arms would obey this direct order from the head of the House, rather than taking any contrary direction from the Senate President, whose presence in that chamber is at the invitation of the House. *See also* BALLOT BATTLES, *supra* note 25, at 142 (discussing a historical example of the House Speaker invoking the House Sergeant-at-Arms, although not during the deliberations of the joint session itself).

61. As against the argument that the Electoral Count Act precludes this kind of unilateral withdrawal from the counting process by the House, Speaker Pelosi asserts the House's inherent constitutional authority to govern its own conduct. In support of this argument, Speaker Pelosi can quote a recent law review article: "This plenary authority requires that the House and Senate be free to debate, make motions, and withdraw from the count at any time as they wish, the [Electoral Count Act] notwithstanding, subject, of course, to motions passing by the requisite majority of that house." Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 RUTGERS J.L. & PUB. POL'Y 340, 374 (2016).

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chamber to participate in the opening and counting of electoral votes from the states: "said tellers, having then read the [the submission of electoral votes from the states] in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates."[62] Because the House of Representatives is no longer participating, as declared in its formal resolution, there no longer are two tellers from the House to perform this statutory function. Because the two House tellers must have been "previously appointed" by the House, according to the explicit terms of 3 U.S.C. § 15, there is no authority vested in the President of the Senate or elsewhere to appoint substitute tellers from the House. In other words, this Democrat asserts, there can be no continuation of the joint proceeding under 3 U.S.C. § 15 without the institutional participation of the House, and the House has resolved that institutionally it will not invite the Senate back to its chambers for the continuation of the joint proceeding unless and until the President of the Senate announces that the electoral votes bearing the certificate of Pennsylvania's governor will be counted, per the terms of 3 U.S.C. § 15.

Notwithstanding this objection from the Democratic senator, Pence purports to proceed with the counting of electoral votes from Rhode Island to Wyoming. At the end, Pence announces that Trump has been re-elected president with a majority of votes, 260 out of 518 electors appointed, because Pennsylvania failed to appoint electors in a manner Congress could recognize as authoritative given the procedures set forth in 3 U.S.C. § 15. Later, with Pence and other Republicans at his side, including Mitch McConnell, Trump announces that he is proceeding to prepare to be inaugurated for a second term on January 20.

Meanwhile, with Warren and other Democrats at her side, Pelosi asserts that she is prepared to be inaugurated and sworn in as acting president, taking the presidential oath of office specified in Article II, serving as such until the counting of electoral votes is completed (with Pennsylvania's votes counted as cast by the electors certified by the state's governor). Pelosi makes clear her belief that Warren is the duly elected president, based on a proper counting of electoral votes. But she is prepared to serve as acting president, and fully expects to do so starting at noon on January 20, unless and until Pence beforehand—during the remainder of his term as vice president, which expires at noon on January 20—announces his recognition of Warren as president-elect. Pelosi further declares that, once it is noon on January 20, with Pence no longer President of the Senate, it will fall to the president pro tempore (Senator Chuck Grassley) to declare his willingness to accept Warren as president-elect in order for her to end her service as acting president.

62. 3 U.S.C. § 15 (2018).

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As the clock ticks toward noon on January 20, all of D.C.—indeed all of America—is in turmoil over what will happen. Neither Trump nor Pelosi is backing down. Both insist that at noon on January 20 they will take the presidential oath and begin to assert the powers of commander in chief. Both demand the full support and obedience of America's armed forces upon taking the presidential oath.

Attorney General William Barr announces that he believes the position of Trump and Pence is legally and constitutionally sound that they should be recognized as reelected for second terms. Pelosi dismisses Barr's announcement as nothing more than Trump's lawyer saying whatever Trump wants said. She argues that it is patently evident that Warren won the popular vote of Pennsylvania, and thus the election, and she is not going to let Trump, Pence, Barr, and the rest of the Republicans steal this election from Warren and the American people. She explains that she is prepared to serve as acting president solely to vindicate democracy and the proper counting of votes cast by the American people. While calling for calm among the public during these difficult times, Pelosi says that if the military, the FBI, and other federal security forces refuse to obey her orders as acting president starting at noon on January 20, then the American people must take to the streets in a massive nationwide demonstration of "people power" to show that their democracy will not be stolen from them.

Given this situation, what is the military to do starting at noon on January 20? Who should the military recognize as commander-in-chief? Who should get the "nuclear football" with the launch codes, Trump or Pelosi? On what basis should the military make this decision? How does the nation get out of this predicament? How can the nation avoid it in the first place?

B. Analysis: The Arizona Alternative

As important as it is to think through all the ramifications of the foregoing scenario based on Pennsylvania, it is equally important to recognize that something similar could happen with respect to another state. But if so, the scenario does not necessarily play out in exactly the same way. Indeed, the differences could prove significant.

Suppose, then, that the outcome-determinative blue shift occurs, not in Pennsylvania, but in Arizona. In other words, in 2020 the presidential election in Arizona undergoes the same phenomenon as the 2018 Senate race in Arizona, when the blue shift caused the lead to switch from McSally to Sinema. For the entire Electoral College to turn on Arizona, assume that the Democrat (Warren again, for sake of illustration) wins Pennsylvania on Election Night, and apart from Arizona's electoral votes Trump has 259 and Warren has 268. In this alternative scenario, assume

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Trump wins Wisconsin on Election Night. The previous scenario was based on Warren winning Wisconsin. Either outcome is possible, as Wisconsin is potentially the Electoral College "tipping state." A key point here, however, is that because the blue shift varies in magnitude in different states (with Wisconsin's historically small), the outcome in Wisconsin might be settled on Election Night even though it ends up mathematically the "tipping state" because another state—like Pennsylvania or Arizona—ends up shifting past the tipping point during the counting of "overtime" votes in the canvass.

With Arizona substituted for Pennsylvania in this way, we can imagine the scenario unfolding similarly in many respects. Trump would tweet apoplectically about the blue shift robbing him of a victory he won Election Night. Democrats, in turn, would demand the proper counting of votes during the canvass—just as occurred in 2018, when Sinema overtook McSally.

But we can imagine one crucial difference. It involves the state's governor. Pennsylvania's governor is a Democrat. Arizona's governor is a Republican. Why might this matter? Suppose the governor signs a new state law providing for direct appointment of the state's electors by the legislature—and then the governor certifies the appointment of these electors as authoritatively those of the states. Suppose, too, the governor refuses to certify the appointment of electors as shown by the final count of the popular vote, after the blue shift during the canvass.

Then, on January 6, the electoral votes from Arizona bearing the governor's certificate are the ones for Trump, cast by the electors appointed directly by the state legislature. The second submission of electoral votes from Arizona, those for Warren cast by the electors purportedly appointed by means of the state's popular vote, lack a gubernatorial certificate.

Suppose the Senate and House again disagree on which electoral votes from Arizona to accept. The Senate accepts the ones with the governor's certificate. The House accepts the ones reflecting the popular vote.

Now, under this scenario, Pence rules that the votes with the governor's certificate must be counted. Now, Pelosi and the Democrats take the more dubious statutory position that neither submission of electoral votes from Arizona can be counted (because both are claiming safe-harbor status). Now, too, it is Pelosi and the Democrats who claim that, with Arizona having failed to appoint electors able to be recognized as authoritative by Congress, Warren has a majority of votes from the electors appointed: 268 of 527 (538 minus Arizona's 11).

When this impasse arrives, what happens? Does Pelosi kick Pence and the senators out of the House chamber, insisting that the counting of electoral votes cannot proceed with the next state (Arkansas) until Pence

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recognizes the correctness of her interpretation of 3 U.S.C. § 15? Does she make the same declaration that she is prepared to serve as acting president unless and until Pence and the Republicans are willing to accept Warren as president-elect based on the validity of the blue-shifted popular vote in Arizona?

From the perspective of the military, attempting to determine what to do in this impasse, does it make any difference whether it is the Pennsylvania or Arizona scenario? In other words, from the military's perspective, does it matter which side—Trump or Pelosi, Republicans or Democrats—has the benefit of the governor's certificate from the dispute state? Or, put yet another way, is it necessary for the military to make its own independent judgment of the correct interpretation of 3 U.S.C. § 15? Or, instead, is the military supposed to pass judgment on the democratic legitimacy of the blue-shifted popular vote in the disputed state, regardless of whether the governor of the state sides with the popular vote (as in the Pennsylvania scenario) or with direct legislative appointment (as in the Arizona scenario)? Or must the military take its legal orders from the attorney general, however patently partisan those legal orders might appear to be?

Given the uncertainties involved, and precariousness of the situation if the nation were to find itself in this position, perhaps Congress can undertake to clarify 3 U.S.C. § 15 in advance of the 2020 election. From this pre-election vantage point in 2019, it is equally uncertain whether it might be Pennsylvania or Arizona (or Florida, or maybe even North Carolina) that experiences this outcome-determinative blue shift. Thus, there is an advantageous "veil of ignorance" before the election occurs. Perhaps on a bipartisan basis, Congress can hammer out a new procedure to operate if it unfolds that there are multiple submissions of electoral votes from the same state. With a new and improved procedure from Congress to handle this situation, the goal would be no ambiguity on the potentially decisive issue of whether the submission bearing the governor's certificate is controlling, or instead whether none of the submissions can be counted unless both houses of Congress agree upon which one.

As contemplation of these scenarios demonstrate, this issue is one for which ambiguity is especially detrimental—and dangerous—to the nation.

IV. THE ROLE OF THE SUPREME COURT IN POTENTIAL ELECTORAL COUNT CONTROVERSIES

Thus far, I have largely left the judiciary out of my description of what might happen in Pennsylvania, or Arizona, as a dispute over "blue shift" ballots counted during the canvass unfolds in the aftermath of Election

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Night and on toward January 20, 2021. I have wanted to describe the issues as they might appear to various non-judicial actors, including the state's legislature, the state's governor, the President of the Senate, the Speaker of the US House, the military, and so forth. Whether or not the state or federal judiciary becomes involved in this type of dispute, each of these other institutional actors will need to consider the constitutional and statutory issues involved and will need to decide what action to take in the exercise of official responsibilities. The legal ambiguities so far considered are potentially important, and disconcerting, for all of these non-judicial actors.

Even so, it is worth considering more systematically what potential role courts might play, especially the Supreme Court at the apex of the nation's judicial system, and how judicial involvement might affect various non-judicial actors. Indeed, as a dispute over "blue shift" ballots gets closer and closer to noon on January 20, while remaining unresolved and thus increasingly tense, more and more eyes will look to the judiciary in the hope that it can get the nation out of this mess. Thus, is there some point at which the Supreme Court might find itself compelled to intervene, however reluctant it might be to do so given the widespread perception that its intervention in *Bush v. Gore* was not successful in achieving a solution recognized as rooted in law rather than politics? In other words, even if the Supreme Court were inclined to stay out of a dispute over the 2020 election, for fear of becoming politicized all over again, is there a point at which it would be forced to accept jurisdiction over a disputed issue and to adjudicate as best as it could according to its understanding of the applicable law (even if some might perceive its opinion as politically motivated)? After considering what the Court itself might do, one can then address how various non-judicial actors, including Vice President Pence and Speaker Pelosi, might react to the Court's ruling, including whether or not they would obey a direct judicial order from the Court. But first it is necessary to consider what the Court itself might do.

To conduct this analysis, it is best to divide the time period of a potential dispute into three distinct segments. First, there is the time prior to the meeting of the Electoral College on Monday, December 14, which we can characterize as the part of the overall process dominated by state law and the institutions of state government. Second, there is the time between this meeting of the Electoral College and the joint session of Congress on January 6, pursuant to the Twelfth Amendment and the Electoral Count Act, for receipt of the electoral votes from the states. This intermediary period is after the state government's role is complete but before the crucial congressional process begins. Third, there is the time between 1:00 p.m. on January 6, when the opening and counting of

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electoral votes from the states begins in the joint session of Congress and noon on January 20, when the transfer of power from one presidential term to the next occurs automatically by virtue of the explicit language of the Twentieth Amendment.[63] This two-week period is one in which federal law dominates and the institutions of the federal government control what happens. It would be possible to consider a fourth period, the time after noon on January 20; but insofar as it is of paramount importance to resolve any dispute before the clock strikes noon on January 20—so that there is no doubt who is constitutionally commander in chief at that moment and thus capable of activating the nuclear codes (among other military powers)—it is worth focusing on the possibility of judicial involvement, however reluctant, prior to this critical moment.

A. Before the Electoral College Meets on Monday, December 14

Article II of the Constitution requires that the presidential electors of every state meet on the same day to cast their votes for president.[64] Congress has specified that date as Monday, December 14, as Congress is entitled to do. Up until that time, state law may determine the method of appointing a state's electors, as Article II also provides.

Both state and federal courts can become involved in the process of determining the identity of the state's electors prior to when they meet to cast their electoral votes. State courts can do so pursuant to express delegations of power from the state's legislature, or pursuant to a purported exercise of authority derived from the state's constitution. In this respect, state court involvement would be similar to what occurred in Florida in 2000: As all will remember or can review the history, Florida's judiciary became actively involved in the fight over which political party's slate of presidential electors were to become the ones entitled to cast their state's official electoral votes. Whether or not these Florida state-court decisions were faithful interpretations of existing state law at the time was, and remains, debatable. There is no doubt that many observers, including some members of the federal Supreme Court, viewed the Florida Supreme Court as a lawless and partisan institution, because its purported "interpretation" of relevant state statutes was so aberrant from their text. But there is no doubt that Florida's judiciary had jurisdiction to address the various state-law issues that arose over the counting of votes in the 2000 election. Thus, Florida courts issued decrees against Florida election officials, like the secretary of state, that were

63. U.S. CONST. amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January . . . and the terms of their successors shall then begin.").

64. U.S. CONST. art. II, § 1, cl. 4 (emphasis added) ("The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; *which day shall be the same throughout the United States*.").

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within their judicial authority. In the same way, we can foresee state courts—in Pennsylvania, Arizona, or elsewhere—similarly issuing judicial decrees concerning the counting of "blue shift" votes. These courts could rule for or against either candidate's position on these issues, depending on the specific issues raised and evidence presented, and potentially depending also on the degree to which a state court might render rulings that to some could appear surprisingly lawless and partisan.[65]

Likewise, federal courts could become involved in the counting of ballots cast by citizens in presidential elections prior to the day on which the electors meet. The Supreme Court itself may become involved insofar as issues of federal law are raised by the way the state courts handle their own involvement in these cases. Again, the 2000 presidential election in Florida is illustrative: twice the Supreme Court granted certiorari review over federal constitutional questions arising from how the Florida Supreme Court conducted itself on appeal from lawsuits filed initially in state court.[66] Separate federal-court lawsuits were also filed in an effort to challenge vote-counting conduct undertaken by Florida officials. Although these lawsuits did not become dispositive at the Supreme Court in 2000, in the future this type of lawsuit could become the vehicle by which the Supreme Court makes a pronouncement on what federal law requires in terms of the counting of popular-vote ballots by state officials. Thus, the 2020 election could see federal-court involvement, including the Supreme Court's involvement, equivalent to what occurred in 2000.

But whatever that involvement might be, assuming that it does occur, it would not result in injunctions directed against the President of the Senate, or the Congress as a whole, concerning the conduct at the joint session of Congress on January 6. Nor, in all likelihood, would any judicial orders be directed to the presidential electors themselves or their meeting on December 14. Instead, the judicial orders would be directed to state and/or local election administrators, ordering them to count—or not to count—particular "blue shift" ballots. These judicial orders could prove crucial in determining which party's slate of presidential electors, Republican or Democratic, is officially certified the winner of the popular vote in the state. Potentially, too, these judicial orders might purport to bind and direct the governor to certify one of these two slates of electors as the officially authoritative ones.

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65. The ALI project is designed, in part, to reduce the likelihood that state courts in this type of situation would render rulings that appear lawless and partisan.

66. *See* BALLOT BATTLES, *supra* note 25, at 279–305 (reviewing the presidential election of 2000 and the Supreme Court's involvement).

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But it is difficult to foresee a judicial decree, from either a state or federal court, purporting to ban a party's slate of presidential electors from assembling on Monday, December 14. Perhaps there would be a declaratory judgment ordering that the meeting lacked any official status. But would the court order these individuals not even to assemble together to engage in discourse? Apart from raising questions regarding whether such an order would intrude upon congressional prerogatives under the Electoral Count Act (and the Twelfth Amendment), it would raise so many First Amendment and related difficulties as to seem unfathomable.

Thus, while state and federal courts may play significant roles in shaping the dynamics of a dispute that reaches Congress, by declaring who is the lawful winner of the state's popular vote and which slate of presidential electors the state's governor must certify as authoritative, ultimately neither the state nor federal judiciary can prevent a party's slate of presidential electors from purporting to meet on December 14 and acting as if they can cast the state's electoral votes—even if those individuals lack any indicia of authority under state law. As long as these individuals do meet and do purport to send their electoral votes to the President of the Senate, then even the intervention of the Supreme Court cannot stop a dispute regarding a state's electoral votes from reaching Congress.

B. Between December 14 and January 6

Once it is known that both the Republican and Democratic slates of electors in a particular state have met on December 14 and purported to cast their electoral votes and send them to the President of the Senate, then it is possible to envision a lawsuit attempting to order the President of the Senate, or Congress collectively, to accept one of these two submissions as the valid one. This lawsuit would attempt to have the court declare the lawfully correct interpretation of the Electoral Count Act and the Twelfth Amendment as applied to the particular situation, and to have the court order the President of the Senate (and Congress collectively) to act in accordance with this judicial interpretation. What is the chance of such a lawsuit being successful, meaning that it would result in the court issuing the decree requested (putting aside whether the decree would be obeyed)?

First, it is worth briefly mentioning that no state court would have authority to issue such a judicial order. Even if the state court purports to have a state-law reason for declaring one submission of electoral votes from the state as valid, and the other submission as invalid, the state court would be powerless to bind the President of the Senate or Congress to act in accordance with that state-law declaration. To be sure, the state court could render an official judgment, which could (and would) be presented

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along with the electoral votes it validates as a matter of state law. But if Congress decided to repudiate that state-court judgment and count the alternative submission of electoral votes from the state instead, the state court would be powerless to order Congress in contempt of its judicial decree and mandate that Congress comply instead. To sharpen the point: imagine both houses of Congress rejecting the position of the Arizona Supreme Court and deciding to count the electoral votes from Arizona that the state supreme court considered invalid. It remains possible, of course, that the state supreme court is correct about what is the position of state law on the matter, but it is within the constitutional prerogative of Congress to reach the opposite conclusion. The Arizona Supreme Court cannot issue an injunction against Congress demanding that Congress comply with its judicial decree. That would be constitutionally preposterous even if the Arizona Supreme Court is correct and Congress incorrect on the relevant issues of Arizona law.

What about the federal Supreme Court in this situation? Suppose, to use the Pennsylvania scenario, that the Democratic electors from Pennsylvania have the governor's certificate as well as a ruling from the Pennsylvania Supreme Court that they are the state's authoritative electors. These electors also were the winners of the popular vote, as determined by the canvass of returns pursuant to state law. The submission of these electors comes to Congress with as strong a pedigree in state law as imaginable. Meanwhile, the conflicting submission from the Republican electors is especially weak, having no gubernatorial certificate, no imprimatur of the state's judiciary, no popular-vote pedigree, and having only the assertion of direct appointment by the state legislature. Suppose further that these Democratic electors file suit in federal court, asking for an injunction that the president of the Senate and Congress accept their submission of electoral votes as the valid ones from Pennsylvania. Does the federal judiciary have the power to issue this injunction, given the strength of the submission on behalf these electoral votes?

This question is a tricky one. There is a strong argument that this injunction would be beyond the jurisdiction of the federal court, as a matter of either statutory or constitutional law. Justice Breyer took this position in his *Bush v. Gore* dissent, on the basis that Congress considered but declined to vest authority in the federal courts when deciding the procedures of the Electoral Count Act.[67] Justice Breyer also viewed this congressional judgment as consistent with the delegation of authority in the Twelfth Amendment itself:

67. *See generally* Bush v. Gore, 531 U.S. 98, 144–58 (2000) (Breyer, J., dissenting).

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> The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court.[68]

Justice Breyer is certainly correct that the congressional authors of the Electoral Count Act considered but rejected a role for the federal courts in the process of conducting the electoral count. They were disappointed, or even angered, at the role five justices played during the Hayes-Tilden dispute, and they wanted no more such judicial involvement.[69] Nor is there any reason to think that the authors of the Twelfth Amendment envisioned a role for the federal judiciary in the resolution of a dispute over the counting of electoral votes. Thus, despite the strength of the Democratic electors' claim on the underlying merits of their authoritative status, it would be a giant stretch to say that a federal court would grant them the judicial relief they (hypothetically) request.

Similarly, even if there is no absolute barrier to federal judicial relief in this posture, it is difficult to imagine Chief Justice Roberts wanting to lead the federal judiciary into intervening in the electoral dispute. The issue is in some sense unripe or premature. Until the joint session of Congress occurs on January 6, there has not yet been any action in violation of federal law. Even if pundits on cable news and Twitter speculate about what may happen on January 6—indeed, even if Mike Pence himself says what he is going to do—until it happens there is nothing to complain about. When the time actually comes to count Pennsylvania's electoral votes, both the Senate and the House may agree that it is the Democratic electors whose votes should count, and Mike Pence as President of the Senate may accept that result, in which case there is no basis or need for a federal-court injunction. Given this possibility, and given an inclination to exercise what Bickel called the "passive virtues,"[70] it seems unimaginable that a majority of the Supreme Court under the chief justice's leadership would permit a lower federal court to order what must happen at the January 6 joint session before that session actually occurs. The Court's pronouncement could come in the form of "balancing the equities" as a justification for denying preliminary injunctive relief, rather than as a categorical pronouncement regarding the political question doctrine or a similar limitation. Either way, the

68. *Id.* at 155.

69. *See* BALLOT BATTLES, *supra* note 25, at 132–39 (discussing the history surrounding the Hayes-Tilden dispute).

70. *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

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Democratic electors as plaintiffs would come away empty-handed, without the requested judicial relief.

C. Between January 6 and January 20

The considerations become more complicated if the January 6 proceedings take a turn that appears to many as abusively unlawful. To continue with the same example, we can imagine that the House of Representatives has voted to accept the Democratic electors as authoritative—based on the governor's signature, among other indicia—while the Senate does the opposite. Rather than ruling in favor of the Democrats, Pence as President of the Senate invalidates both conflicting certificates. At this point, the Democrats go straight to federal court, seeking an injunction to reverse Pence's ruling and rule the Democratic electors' votes as the valid ones from Pennsylvania. Does the Supreme Court now authorize this judicial remedy, even if it would not do so before January 6?

The case for this judicial decree is much stronger in this posture, particularly as the calendar moves closer to January 20 with the situation unresolved and both Trump and Pelosi announcing that they are prepared to assume the powers of commander-in-chief (in Pelosi's case as acting president) at noon that day. There still remains the force of Justice Breyer's dissent in *Bush v. Gore*—that neither the Constitution nor the Electoral Count Act contemplate a role for the judiciary even in this deadlocked posture. But the balance of equities shift increasingly in favor of judicial intervention as the conflict continues, and the practical need for an answer becomes imperative as January 20 approaches.

One way to increase the odds of judicial intervention would be to change the nature of the lawsuit. Instead of a claim brought by Democratic electors seeking an injunction against the president of the Senate or Congress, imagine a lawsuit brought by an individual whose personal rights would be affected if Nancy Pelosi is acting president, instead of Donald Trump being president, starting at noon on January 20. Suppose Pelosi has announced that right at noon her first executive order as acting president will be to permit transgendered individuals to serve in the military, thereby repudiating President Trump's executive order to the contrary. Suppose a transgendered individual sues, seeking the right to join the military based on this executive order on the assumption that Pelosi will be entitled to issue it at noon.

One can imagine a federal court adjudicating the validity of this executive order, in order to decide whether to grant the plaintiff the requested injunctive relief against the Department of Defense. Ordinarily, this kind of case would be a routine exercise of the federal judiciary's

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powers under *Marbury v. Madison*.[71] In this instance, the case is complicated by the fact that determination of the validity of the executive order requires a judicial pronouncement on the federal question whether Pelosi is—or will be—acting president as of noon on January 20. But this is a question of federal law that the Court must consider as part of the exercise of its ordinary jurisdiction. It does not require the Court to issue an injunction directly against the president of the Senate or Congress, with respect to the specific function of counting the electoral votes. Thus, it is easier to envision the Court issuing this kind of judicial decree, which at least would instruct the military as to who to obey as commander in chief starting at noon on January 20: Pelosi as acting president, or Trump as re-inaugurated. The military could then rely on this determination more broadly, including for the purposes of deciding who gets access to the nuclear codes, even if access to the nuclear codes is not itself a directly justiciable issue.

It is important to note, however, that this kind of judicial decree is not the same as telling Pence and Congress what to do under the Electoral Count Act and/or the Twelfth Amendment. This is potentially significant. If the hypothetical lawsuit brought by the Democratic electors were successful, it would lead to the consequence of the Democratic nominee (in this hypothetical, Elizabeth Warren) being declared president-elect. In other words, if the Court did order the president of the Senate to accept the electoral votes from Pennsylvania bearing the governor's certificate, then—assuming those 20 electoral votes are in favor of Warren and make the difference in the Electoral College outcome—this judicial decree would result in Warren taking the oath of office as president by virtue of the Twelfth Amendment.

By contrast, if the Court embraces Justice Breyer's view and refuses to issue a judicial order concerning the electoral count directly, but the Court accepts the proposition that Nancy Pelosi becomes acting president as long as the electoral count remains unfinished without the institutional participation of the House of Representatives in the Twelfth Amendment procedure, then the consequence is Pelosi become acting president, rather than Warren becoming president. That distinction could become significant in many ways, not merely the initial superficial ones.

Moreover, depending on how the Court views its role, its involvement might be unrelated to the "merits" of the presidential election itself. This point emerges if we compare the Pennsylvania and Arizona versions of the hypothetical we have been considering. The distinction between the two scenarios may be extremely significant for determining the correct

71. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the now-widely accepted concept of judicial review).

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application of the Electoral Count Act—especially if one takes the view that the governor's certificate is dispositive under the correct interpretation of the statute. But that point about the proper meaning of the Electoral Count Act may be irrelevant if the Court is deciding, not what Pence or Congress must do under the proper interpretation of that statute, but instead whether or not there is an acting president given solely the brute fact that the count of electoral votes under the Twelfth Amendment remains incomplete because of the institutional non-participation of the House of Representatives. The House might be entirely unjustified under the Electoral Count Act for the position it takes, but if the Court has no power to control the Twelfth Amendment proceeding and has only the power to declare the consequence of its being incomplete, then the judicial role may be limited to acknowledging that there is no president-elect under the Twelfth Amendment, even if the cause of that reality was some form of improper conduct.

The contemplation of this possibility only underscores the point made earlier: it would be so much better if Congress, in advance of the election, would eliminate, as much as possible, the ambiguities that exist in the Electoral Count Act process in order to diminish the likelihood that some of these difficult scenarios might arise.

CONCLUSION

We must hope that none of what is described in this article comes to pass. Instead, the nation will be well served if the outcome of the 2020 presidential election is so lopsided as to be impossible to dispute. Even if President Trump were inclined to resist a result that everyone else, including all Republican Senators accept, it would be impossible for him to cling to power as long as Congress conclusively concludes that his opponent is the winner. America's military will recognize Trump's opponent as the new commander in chief once Congress authoritatively declares this electoral outcome, and any protests from Trump to the contrary will be utterly ineffectual.

The problem would occur, if it does, when the two houses of Congress cannot agree as to which candidate won the presidential election. This kind of disagreement is unlikely to develop unless something happens that gives Republicans and Democrats in Congress a plausible basis for disputing the outcome. But a key premise of this article is that it would not take an extraordinary calamity, like a foreign cyberattack, for there to be conditions enabling partisans to dispute the result. Instead, a dispute engulfing Congress could arise from a situation as routine as the kind of "blue shift" described at the outset.

Given this possibility, it is truly irresponsible that Congress has not attempted to eliminate—in advance of the 2020 election—the

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ambiguities that plague the Electoral Count Act. The purpose of the statute is to handle the circumstance in which Congress is divided over the outcome of a presidential election. But the statute is woefully inadequate for its intended purpose. If Congress fails to remedy this inadequacy before ballots are cast, then the nation will have to cope as best as it can if the two houses of Congress disagree when they meet on January 6, 2021, to officially declare the result of the 2020 election. And the more it appears that Congress is unable to resolve this disagreement before noon on January 20, when the new president is to be inaugurated, the more it will appear necessary that the Supreme Court must settle the matter again, despite whatever reluctance it might have for a repetition of its role in 2000.

APPENDIX

Because the body of this article is written in the form of narrative scenarios, this Appendix is included to provide a more conventional analysis of the relevant legal provisions.

A. Text of the Electoral Count Act

3 U.S.C. § 15 is very long and best considered in chunks. It begins straightforwardly:

> 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.

It also acknowledges the fact that Congress may receive submissions of "purported" electoral votes of dubious status, and that this special joint session will consider each state in alphabetical order:

> Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates . . . .

At this point the language of the statute starts to get a bit opaque:

> [A]nd 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

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> of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

I suppose the immediately preceding passage is straightforward enough when there is no dispute: the votes will be counted and the result announced. But when there is a dispute the remainder of this statute provides for some pretty rough sledding. Of course, the existence of a dispute will be apparent if raised at the joint session:

> Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received.

Once this kind of objection exists, the key structural feature of the process is that the two chambers of Congress—the Senate and the House—are supposed to deliberate about the objection separately; no decisions are to be made by the combined joint session of the two bodies:

> When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision . . . .

It is the consequence of potentially divergent decisions by the Senate and the House that could cause trouble—because there is a need to know what happens if and when the Senate and House disagree over an objection of this nature.

At this point, the statute bifurcates its consideration of the situation depending on whether there is one or more "return" of electoral votes submitted for a state. If there is only one such return, the statute provides:

> No electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.

This passage immediately raises some questions: for example, what does it mean by "regularly given"? What does the cross-reference to 3 U.S.C. § 6 entail? It turns out that this latter question can be handled fairly easily. Section 6 provides that the "executive" of each state—presumably the governor—must give to the state's electors, as well as to the "Archivist of the United States"—official copies "under the seal of the State" of a document, called a "certificate of ascertainment," which shows those electors to be the individuals duly appointed as the state's electors "under

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and pursuant to the laws of such State." This certificate of ascertainment must include, insofar as is applicable, "the number of [popular] votes given or cast for each person for whose appointment any and all votes have been given or cast." Section 6 even provides that, in the event of a dispute over the appointment of a state's electors, the state's "executive" must send to the archivist an additional certificate showing the "final determination" of the "controversy or contest" according to the laws of the state. Thus, this passage of the statute contemplates that there might be disputation over a single "return" of electoral votes from a state, but fairly clearly seems to provide that this single return must be accepted as valid—"no electoral vote . . . shall be rejected"—unless *both chambers of Congress* agree to reject that return (and its electoral votes) as invalid. While neither chamber should reject the electoral votes of this single return unless they "have not been so regularly given," as a practical matter it doesn't seem that it would make a difference if there was confusion or disagreement over what "regularly given" means. If both chambers independently determine that they are not regularly given, then those electoral votes are rejected. If one chamber thinks they are regularly given, while the other does not, then those electoral votes must be accepted and counted when the joint session resumes.

It is now, when the statute begins to address the possibility that Congress receives multiple returns of electoral votes from the same state, that the rough interpretative terrain really begins:

> If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State . . . .

This portion of the statute, by its cross-reference to 3 U.S.C. § 5 (which is the so-called "Safe Harbor" provision), seems to require the counting of whichever return—and only that single return—that is compliant with Safe Harbor status, as defined in 3 U.S.C. § 5. The last clause of this portion acknowledges the possibility that the electors who cast a state's electoral votes may be "successors or substitutes" to those whose appointment complied with Safe Harbor status; but we can set aside this "successors or substitutes" qualification. The key point is the identification of which "return" of electoral votes, among multiple from the same state, is the single one that complies (if any does) with Safe Harbor status.

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To recall (as many may remember these points from *Bush v. Gore*), there are two key components to satisfying Safe Harbor status according to 3 U.S.C. § 5. The first is a timing prerequisite that has been dubbed the "Safe Harbor Deadline": the "final determination of any controversy or contest concerning the appointment of all or any of the electors of such State" must occur "at least six days before the time fixed for the meeting of the electors." In 2020, the Safe Harbor deadline is Tuesday, December 8. Given the way Congress has structured the relationship between Election Day in November and the meeting of the electors in December, the Safe Harbor deadline falls exactly five weeks after Election Day, which in 2020 is Tuesday, November 3.

The second crucial prerequisite to Safe Harbor status under 3 U.S.C. § 5 is that this "final determination" of any dispute over the appointment of a state's electors must be made "pursuant" to "laws enacted prior to the day fixed for the appointment of the electors," meaning enacted before Election Day (in 2020, November 3). It is not enough to meet the Safe Harbor *deadline* with the resolution of the dispute. If the basis for the resolution is new law adopted after Election Day, then the resolution fails to achieve Safe Harbor status even if the resolution occurs before December 8.

But if both key prerequisites are satisfied, it seems to follow that the return of electoral votes from the state that embodies this two-part compliance is the controlling return from the state, which must be counted by Congress to the exclusion of any other conflicting return from the same state. This consequence seems to be mandated by the explicit language of both 3 U.S.C. § 5 and 3 U.S.C. § 15. Section 5 states that a "final determination" meeting the two Safe Harbor prerequisites "shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." And § 15, as set forth above, says that "those votes, and only those, shall be counted which shall have been regularly given by" those electors whose appointment satisfies Safe Harbor status. Thus, both chambers of Congress seem obligated to count the one return (if there is more than one submitted) that is Safe Harbor compliant.

The problem arises, however, if the two chambers of Congress purport to disagree about which return (if any), among multiple returns, has achieved Safe Harbor status. This disagreement may be sincere, or it may be pretextual based on partisan posturing on one side or the other. Whatever the case may be, the acute question exists: what to do if the two chambers of Congress institutionally announce a disagreement over which, if any of multiple returns, is Safe Harbor compliant? It is on this

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crucial point that the ambiguity of the statute becomes especially vexing and distressing:

> [B]ut in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law . . . .

This portion of the statute seems to provide that, if more than one return from a state claims Safe Harbor status, then *neither* can count unless *both* chambers of Congress agree on which one is the single return truly entitled to Safe Harbor status. The words say "only" those electoral votes "shall be counted" which were cast by electors "the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law," meaning compliant with the Safe Harbor prerequisites.

Yet there is more to the statute, and it horribly complicates the matter. The next clause provides:

> [A]nd in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.

This clause seems to address the circumstance in which no return from a state claims Safe Harbor status but there is still the question of which among the multiple returns, if any, should be counted in Congress. The clause seems to say that in this circumstance the only return that can be counted is one accepted as valid by both houses of Congress. The clause, rather confusingly, seems to distinguish between valid appointment of electors and valid votes cast by validly appointed electors—recognizing that the two chambers of Congress (at least theoretically) might agree that duly appointed electors might for some reason cast unlawful votes (perhaps bribed), or that the purported returns of undeniably valid electors were fraudulent concoctions. But once that bit of confusion is cleared up, this clause seems to be saying that "only" those votes from electors that both Houses considered valid can be counted (when none of the multiple returns from the state has Safe Harbor pedigree).

But, wait, there's more (to invoke the spirit of Marisa Tomei's immortal performance in "My Cousin Vinny"). Immediately after the just-considered clause, 3 U.S.C. § 15 starts a new sentence:

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> But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

The troublesome question is how this new sentence relates to what preceded it. It seems to contradict everything that comes before insofar those earlier clauses seemed to require both chambers of Congress to agree in order for one of several disputed returns to count. Now it seems that, if the two chambers of Congress disagree, then to be counted is whichever return of electoral votes from a state (if any) were cast by electors "whose appointment shall have been certified by the executive of the State," meaning governor.

One conceptual possibility is that this new sentence operates upon the immediately preceding clause, the one concerning what to do when none of multiple returns are claimed to have Safe Harbor status. The other conceptual possibility is that this new sentence operates upon all preceding clauses involving multiple returns, both when none claim Safe Harbor status and when more than one so claim. Given the separation of this new sentence from what precedes it by a period rather than semi-colon, it can be argued—as it has been—that this punctuation is reason to favor the latter, broader interpretation, namely that the new sentence affect both circumstances, and not just the situation in which none of multiple returns claims Safe Harbor status. But whatever the strength of this interpretative argument based on the bare text of the statute alone, the fact is that the text is not sufficiently clear to rule out the possibility of alternative interpretations. And, what is especially troublesome, is that the existing literature on this point contains advocates for conflicting interpretations.

B. Existing Interpretations of 3 U.S.C. § 15

In 1961, a law professor named Kinvin Wroth (who later was dean at two different law schools, University of Maine and University of Vermont) wrote a law review article on the interpretation of the Electoral Count Act. In this article, Wroth took the position that under the proper interpretation of 3 U.S.C. § 15 the governor's certification was not controlling in the specific situation where two returns purport to claim Safe Harbor status.[72] Instead, according to Wroth, in this situation "no vote from the state is counted."[73] Wroth's reasoning was that a governor's

72. *See* Wroth, *supra* note 52, at 343 ("If the Houses cannot agree on the authoritative determination, or, if, as in the case of Louisiana in 1873, they agree that no determination was authoritative, the principle of the Twenty-second Joint Rule is applied and no vote from the state in question is counted. This result follows regardless of the governor's action.").

73. *Id.*

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certification can only be "evidence" of a return having Safe Harbor status; the governor's certification cannot give the return Safe Harbor status. Thus, if two (or more) returns purport to have Safe Harbor status, but the two Houses of Congress cannot agree on which one, then neither return (or none of them) is capable of superior status and each return must be rejected. In Wroth's own words: "If the decision of the authorized tribunal cannot be made out, then there is no valid return for the government to certify."[74] By contrast (under Wroth's interpretation of the statute), if no return claims Safe Harbor status, then the governor's certificate is in in a position for conveying which return from the state is authoritative.

In 2001, as Congress was preparing to receive the electoral votes in the 2000 presidential election, a report of the Congressional Research Service (CRS) embraced Wroth's view of the statute, citing and quoting Wroth's article extensively.[75] The CRS report added more arguments of its own, claiming that the legislative history of the Electoral Count Act supported Wroth's interpretation. The CRS reports quotes a Senator who played a particularly influential role in the drafting of the statute: "In the debates and final report of the Conference Committee, it is clear that the provision for the governor's certificate to control in the disagreement of the Houses was to apply only in the case of double returns without a state determination."[76] The CRS report adds its own gloss to this point: "it appears that the [legislative] intent was . . . to give a deferential position to the governor's certification only where there is *no* [timely] determination from a state authority under an election contest procedure."[77]

In 2004, however, a different law professor—Stephen Siegel—wrote a lengthy law review article that contradicted the Wroth-CRS interpretation and instead argued that the governor's certificate controls whenever the two Houses of Congress disagree over multiple returns from the same state, including when the two chambers disagree on which of multiple returns claiming Safe Harbor status is the one entitled to that status.[78] Siegel premised his alternative interpretation both on the punctuation of the statute's text—the period, rather than semi-colon, was a strong indication (in his view) that the new sentence concerning the

74. *Id.*

75. *See generally* Congressional Research Service Memorandum, *supra* note 52, at 9; Wroth, *supra* note 52, at 344–45 (asserting that when multiple submissions of electoral votes from the same state all claim "safe harbor" protection, none can be counted unless both houses of Congress agree upon which submission is entitled to this "safe harbor" status).

76. Congressional Research Service Memorandum, *supra* note 52, at 10 n.32.

77. *Id.* at 11.

78. *See generally* Siegel, *supra* note 50.

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governor's certificate applied to all of the preceding sentence, and not just its final clause—as well as his own differing view of the statute's legislative history. Based on his comprehensive analysis of what he acknowledged was an extensive and convoluted legislative record, involving a decade of debate between the disputed Hayes-Tilden election of 1876 and the eventual enactment of the statute in 1887, Siegel argued that the final compromise endeavored to minimize the circumstances in which a state would have no electoral votes counted because of a disagreement between the two chambers of Congress over which, of multiple returns, should be counted. Given this congressional preference for counting at least something from a state whenever possible, the congressional compromise settled on making the governor's certificate the tiebreaker in all circumstances in which the two chambers of Congress disagreed over which of multiple returns from the same state to count. In Siegel's own words: "[T]he governor's certificate as a fail-safe to prevent state disenfranchisement was a very conscious, if controversial, choice. Without it, the ECA would not have passed. . . . [G]ranting the state governor his tie-breaking authority clearly was the choice Congress made."[79] One question for consideration is whether it is possible to develop a nonpartisan scholarly consensus in advance of November 2020 on whether Siegel or Wroth-CRS has the better of this interpretative debate—and thus whether at least this potential source of disputation can be set aside.

C. Other Ambiguities Concerning 3 U.S.C. § 15

Even if the debate between Siegel and Wroth-CRS could be resolved, there are still other uncertainties concerning the application of 3 U.S.C. 15. Here are two worth considering:

First, a state's supreme court definitively resolves a dispute over the appointment of a state's electors prior to the Safe Harbor deadline, thereby seemingly giving these electors Safe Harbor status, *but* the state's governor does not certify this appointment. Instead, the state's legislature purports to override the state supreme court and appoint a different set of electors, and the governor certifies this legislatively appointed set. There is no pretense that the legislatively appointed electors have Safe Harbor status, but there is a question whether the legislative act deprives the state supreme court's decision of its authoritativeness under state law. What does 3 U.S.C. § 15 require in this instance? What if the House wants to count one set of electoral votes (those backed by the judicial decision), whereas the Senate wants to count the other set of electoral votes (those backed by the legislative act and the governor's certificate)?

79. *Id.* at 633.

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Notwithstanding the debate between Siegel and Wroth-CRS, is this an instance where the governor's certificate controls, or instead that neither return can be counted (or that the one backed by the judicial decision must count, notwithstanding the disagreement between the two chambers, because it is the only return capable of Safe Harbor status)?

Second, prior to the Safe Harbor deadline the governor certifies the appointment of the state's electors after completion of the state's procedures for counting the state's popular vote, *but* after the Safe Harbor deadline has passed (but before the meeting of the state's electors), evidence is discovered that the previously certified result is incorrect (perhaps it was absentee ballot fraud, as in North Carolina's congressional district in 2018, or some form of foreign cyberattack, or some other cause). The state's supreme court overturns the previous certification and declares the opposing set of electors the true winner of the state's popular vote, and the governor certifies this new result. But Congress has received both gubernatorial certificates, and the party favored by the first one is arguing that it is the only valid one because it is the only one with Safe Harbor status. What does 3 U.S.C. § 15 require in this situation. And if the House and Senate disagree, what happens given that both returns have the governor's certificate?

D. The Consequence of Not Counting Any Electoral Votes from a State?

Suppose, because of a cyberattack or otherwise, it is determined pursuant to 3 U.S.C. § 15, that a state has failed to appoint any electors and therefore has not valid electoral votes to count. How is that state to be considered in the calculation of whether any candidate has won a "majority" of electoral votes, as required by the Twelfth Amendment? The amendment states: "the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed." Normally, the number necessary for a majority is 270 because 538 is the total number of electors nationally. But if a state chose not to participate, then presumably its number would be subtracted from the denominator of 538. Is the same true if the state wanted to participate but was prevented from doing so because of a cyberattack? What if the state thought it appointed electors, but there was a dispute about this appointment, with the consequence that Congress refused to count any electoral votes from the state? Is this latter situation the same as a cyberattack that prevents appointment, or different for purposes of calculating the Twelfth Amendment denominator? In other words, is this denominator issue a unitary one, or is it instead variable depending on the particular circumstances that causes problems with the appointment of a state's electors? And, relatedly, what if the

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Senate and House diverge on how to handle this issue; is there a mechanism for determining an answer in the event of a bicameral divergence on this point?

E. Completion or Incompletion of the Electoral Count?

Given that 3 U.S.C. § 15 requires the counting process to consider one state at a time in alphabetical order, what happens if Congress appears to be stuck on a particular state (before any candidate has reached an indisputable majority of all electoral votes in the count)? Does the vice president of the United States, as President of the Senate and thus presiding officer over the special electoral count procedure under the Twelfth Amendment and 3 U.S.C. § 15, have constitutional or statutory authority to insist upon completion of the count in a timely manner (before noon on January 20), if the two chambers of Congress otherwise would remain mired in a dispute over a particular state?

There are various provisions of the Electoral Count Act that endeavor to move the count along, so that it does not become stuck or bogged down. 3 U.S.C. § 15 itself provides: "When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted." This provision seems to authorize the vice president to make some definitive pronouncements in light of disagreement between the two chambers. But the extent of the vice president's authority is unclear in this regard. And the very next (and last) sentence of 3 U.S.C. § 15 arguably cuts against permitting the vice president to take up the next state if there are unresolved matters concerning the state under immediate consideration: "No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of."

The next section of the United States Code, 3 U.S.C. § 16, contains additional provisions designed to achieve a timely completion of the electoral count:

> Such joint meeting 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 meeting of the two Houses, no further or other recess shall be taken by either House.

And, in the same vein, the following section, 3 U.S.C. § 17, provides:

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> When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

Perhaps most significantly, the next section, 3 U.S.C. § 19, states:

> While the two Houses shall be in meeting 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.

This provision, more than any other, would seem to empower the vice president to move the proceedings along if they are stuck because of a disagreement between the Senate and the House. Even so, "the power to preserve order" is not exactly the same as the power to render a final and definitive judgment concerning a consequential dispute of statutory interpretation; and if the House of Representatives is insisting that the electoral votes of a state must be counted, while the Senate is insisting that that they must be rejected—and if 3 U.S.C. § 15 is itself unclear on the consequence of this dispute under the particular circumstances (perhaps it is the situation when both returns have the governor's certificate)—then is it clear that the vice president can unilaterally announce a position on the matter and insist upon moving on to the next state? If the House of Representatives refuses to move on to the next state, because it does not consider the previous state resolved (despite the vice president's pronouncement), is it part of the vice president's authority "to preserve order" to insist that the count continue with the next state?

F. The Relevance of the Twentieth Amendment?

The Twentieth Amendment seems to contemplate the possibility that the counting of electoral votes may be incomplete and thus there might be neither a president-elect nor a vice president elect at noon on January 20, when the terms of the previous president and vice president expire, and thus there would need to be an acting president to be identified in a statute enacted by Congress:

> If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person

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> shall act accordingly until a President or Vice President shall have qualified.

But what if there is a debate on whether or not the situation exists where "a President shall not have been chosen"? Suppose the House of Representatives thinks the electoral count remains incomplete because of an intractable dispute, and thus in its view the situation calls for an acting president until the dispute is resolved, whereas the outgoing vice president (before noon on January 20) believes that the electoral count has been brought to a conclusion despite the House's objection, and thus the declared president-elect is entitled to all the powers of the office starting at the beginning of the new term. Does the Constitution, properly interpreted, provide an answer on whether the situation is one involving an acting president, as the House contends, or a president-elect, as the outgoing vice president contends?

Related, if there were to exist the situation at noon on January 20 of two simultaneous claims to the status of commander-in-chief—one from previously incumbent president claiming to have been declared re-elected by the outgoing vice president, and the other from the Speaker of the House claiming to assume the status of acting president given the House's declaration that there is no president-elect because the electoral count remains disputed and incomplete—do military officials, including those responsible for control of nuclear weapons, wishing to obey the lawful commander-in-chief know how to decide who is the lawful commander-in-chief?