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:

And the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

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 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.

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

But 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:

And 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:

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 semicolon, 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. Instead, according to Wroth, in this situation “no vote from the state is counted.” Wroth’s reasoning was that a governor’s 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

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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.
(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 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 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,

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.
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.”

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)? 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,

79. Id. at 633.
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 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:

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
electional votes of a state must be counted, while the Senate is insisting
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
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?