THE ELECTORAL COUNT ACT: "REGULARLY GIVEN," THE DENOMINATOR PROBLEM, AND THE 101ST VOTE

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I. INTRODUCTION

Most American citizens would think the electoral process is a relatively simple one. Voters line up on Election Day, cast their votes in a claustrophobic booth (or send their ballots through the mail, a common occurrence in 2020),[1] receive an "I voted!" sticker, and watch the winner get announced later that night. One might assume the winner becomes "official" on election night and the new President is inaugurated on January 20. At the very least, it seems logical that the winner is officially recognized when the prospective loser concedes, but even this is not the case.[2] When people cast their votes for President and Vice President of the United States, they are not voting directly for their candidate but rather voting for *who will vote* for those positions. As established in the Twelfth Amendment of the United States Constitution, "[t]he [e]lectors shall meet in their respective states, and vote by ballot for President and Vice-President."[3] The elector's votes are then tabulated into a list, which is certified and sent to Congress, and addressed to the sitting Vice President in their role as President of the Senate.[4] The Vice President then opens the certificates during a joint session of both congressional houses, reads them aloud, and notes the results in the Houses' Journals to officially designate the winner as President-Elect.[5] With a system containing this

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[1] Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html.

[2] 3 U.S.C. § 15 (stating that the winner of the election is officially decided on January 6).

[3] U.S. CONST. amend. XII.

[4] *Id.*

[5] 3 U.S.C. § 15.

many steps, controversy and misfires are not only entirely possible, they are almost waiting to happen.

The infamously vague Electoral Count Act of 1887 ("Electoral Count Act"), particularly its use of the phrase "regularly given" in the context of electoral certificates, is one source of potential misfires. Though at times referred to as "unintelligible," the Electoral Count Act attempts to address potential issues in the vote certification process[6] by establishing a list of potential scenarios in which electoral vote certificates received by Congress can be rejected for irregularities. The Electoral Count Act also contains procedures by which the joint session of Congress can address these irregularities.[7]

Several of these provisions state that vote certificates can be rejected if the votes in question were not "regularly given."[8] While the Electoral Count Act uses this phrase four times in its language, it never establishes a definition for what "regularly given" means. The lack of a definition for "regularly given" is particularly glaring when the Electoral Count Act does establish a meaning for "lawfully certified," another vague term, by reference to a separate section.[9] Without a clear definition indicating under what circumstances votes should be rejected, it is essentially open season for members of Congress to interpret and declare votes not "regularly given" for any irregularities—whether the irregularities be substantial, minor, or merely theoretical and unproven. The Electoral Count Act needs clarifying language establishing exactly what "regularly given" means so that its provisions can be enacted with minimal room for dangerous misinterpretations.

Amplifying the issues of the nonexistent definition of "regularly given" is the fact that once electoral votes are successfully rejected, the "Denominator Problem" comes into play.[10] If an electoral vote certificate consisting of twenty electoral votes is rejected for not being

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[6] Ronald G. Shafer, *A Blizzard, a Disputed Electoral Vote Count and the 1887 Law Tying Pence's Hands*, WASH. POST: RETROPOLIS (Jan. 6, 2021, 1:27 PM), https://www.washingtonpost.com/history/2021/01/04/pence-1887-electoral-vote-count-act-trump-biden.

[7] 3 U.S.C. § 15.

[8] *Id.*

[9] *Id.* (referencing the certification of electors under 3 U.S.C. § 6).

[10] *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1541–42 (2021).

"regularly given," does that lower the denominator[11], or the amount of total "available" votes from 538[12] to 518 because one candidate's total electoral votes have dropped by twenty? Or does only the numerator[13] change, with a candidate who once had enough to win finding themselves lacking the required vote majority because the certificate from a state they won has been rejected? Either of these scenarios could determine the outcome of an election or potentially activate a procedure in the Twelfth Amendment that allows Congress to select the next President.[14]

The Vice President's role in election proceedings is also left notably unclear in both the Twelfth Amendment and the Electoral Count Act itself. While the Vice President presides over the electoral vote count as President of the Senate, it is never stated whether this role is merely ceremonial or if they have any power in the proceedings. In the event of a tie in the Senate to reject electoral votes, does the Vice President still cast their usual, constitutionally granted tie-breaking vote?[15] Should a Vice President running for re-election with their President be given the ability to cast a guaranteed tie-breaker and essentially re-elect their running mate, along with themselves?

Part II of this Comment will examine the background and provisions of the Electoral Count Act, analyzing its current relevance as well as providing a history of its enactment and a list of its relevant provisions. Part III will propose a clarifying definition of "regularly given" and explore the Denominator Problem. Part III will also propose an amendment to the Electoral Count Act that would establish a procedure for calculating the total number of votes required after a rejection has taken place. Part IV considers the Vice President's potential role, if any, in electoral count proceedings under both the Twelfth Amendment and the Electoral Count Act by examining a recent case and academic sources on the subject. Part V will briefly examine recent efforts in Congress to reform the Electoral Count Act.

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[11] *Denominator*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/denominator (last updated Sept. 21, 2022) (Stating that a denominator is the number in a fraction which denotes how many "pieces" exist overall).

[12] *2020 Electoral College Results*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/2020 (last updated Apr. 16, 2021).

[13] *Numerator*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/numerator (last updated Oct. 30, 2022) (Stating that the numerator is the smaller number in a fraction which denotes how many "pieces" of the whole are currently present).

[14] U.S. CONST. amend. XII.

[15] *Id.* art. I, § 3, cl. 4.

Finally, Part VI will propose revisions to the Electoral Count Act to address the legal uncertainty caused by the Electoral Count Act and Twelfth Amendment. This Comment will argue that while the Electoral Count Act is flawed due to the vague definition of "regularly given," and its unclear provisions are exacerbated by the Denominator Problem and the Vice President's insufficiently delineated role, Congress can remedy its problems so that it does not continue to serve as an electoral landmine.

II. THE ELECTORAL COUNT ACT OF 1887

While the Electoral Count Act's constitutionality has been debated in the past,[16] such a determination is outside the scope of this Comment. Since the Electoral Count Act has been around for over one hundred years without serious attempts to eliminate it, though a recent civil action did try,[17] it appears that it is here to stay. If it is generally accepted that the Electoral Count Act is not going anywhere, then it is only a matter of time before its vote rejection provisions become outcome-determinative for who becomes the future President. When that time comes, the country will want to be sure that there is no room for misinterpretation of a law that could determine the outcome of a presidential election.

A. *The Election of 1876*

To fully understand the purpose behind the Electoral Count Act, a brief history of the Electoral Count Act's creation is helpful. In the 1876 presidential election between Rutherford B. Hayes and Samuel Tilden, Tilden led by over 260,000 popular votes on Election Day.[18] The electoral counts of three states—Florida, Louisiana, and South Carolina—were still in question due to each having provided multiple conflicting electoral certificates, leaving their votes up in the air.[19] Additionally, the eligibility of one of Oregon's electors was being debated, leading to the submission of an initial certificate, plus a

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[16] *See generally* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2002).

[17] *See* Gohmert v. Pence, 510 F. Supp. 3d 435, 438–39 (E.D. Tex. 2021).

[18] *United States Presidential Election of 1876*, ENCYC. BRITANNICA, https://www.britannica.com/event/United-States-presidential-election-of-1876 (last visited Oct. 22, 2022).

[19] Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 FORDHAM L. REV. 1043, 1045–46 (2010).

second certificate replacing the disputed elector.[20] The electoral vote count was so close that if Hayes was awarded every contested vote, he would win by a single-vote margin.[21] The resulting deadlock lasted for months until an electoral commission resolved the conflict, electing Rutherford B. Hayes as President of the United States.[22]

After this electoral catastrophe passed, members of Congress began proposing several methods for correcting electoral disputes in the future.[23] Both constitutional amendments and joint rules of Congress were considered for the proposed solution to electoral conflicts.[24] The joint rule proposal would have required at least two Senators and three House members to sign any submitted electoral vote objections.[25] Legislators opposed this plan, however, as "allowing Congress to play an active role in the electoral count would violate separation of powers because it would take power from the President of the Senate (the Vice President) and give Congress too much power in determining who will be the next President."[26]

The idea of taking power from the Vice President stemmed from Representative Updegraff's belief that the power to count votes rested solely with the Vice President and could only be given to someone else through a constitutional amendment.[27] Senator Teller also voiced concern that the joint rule authorized the two houses of Congress to "inquire whether the electors had been or had not been elected in the manner provided by the various State Legislatures."[28] Such authorization would present a potential violation of the Constitution because Article II, Section 1, Clause 2 grants state legislatures the exclusive power to appoint electors.[29] Congress eventually moved away from a joint rule in favor of a statute, in part because a "traditional piece of legislation . . . was permanent in nature and less vulnerable to abuse in the event of one-party control of Congress."[30]

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[20] *Id.* at 1046.

[21] *Id.*

[22] *Id.* at 1046–47.

[23] *Id.* at 1060.

[24] *Id.* at 1047.

[25] Colvin & Foley, *supra* note 19, at 1061–62.

[26] *Id.* at 1070.

[27] *Id.* at 1069.

[28] *Id.* at 1066 (citation omitted).

[29] *Id.* at 1069; U.S. CONST. art. II, § 1, cl. 2.

[30] Colvin & Foley, *supra* note 19, at 1066.

Notably, modern academic thought also suggests that presidential elections carry an "anti-Congress" principle, and that Congress should not be trusted in deciding the next President.[31] Therefore, this idea of congressional non-interference in presidential elections is not an antiquated concept relegated to the nineteenth century, but an important part of the American political process. As Vasan Kesavan states in his article, *Is The Electoral Count Act Unconstitutional?*, "the Constitution mistrusts Congress in the process of presidential election[s]."[32] Thus, if the Electoral Count Act is to fit within this framework, it should not give Congress too great a role in determining the outcome of an election because doing so would run contrary to this principle. Congress seemed to keep this in mind while drafting its bill for deciding election disputes. While it was generally agreed that a tribunal like the 1877 Electoral Commission should exist to determine electoral disputes, there was frequent criticism over whether Congress itself should fill that role.[33] Eventually, Congress adopted a proposal referred to as the "Edmunds Bill" into what is now known as the Electoral Count Act of 1887.[34]

B. *Provisions of the Electoral Count Act*

The Electoral Count Act is deceptively simple. It states that both houses of Congress will meet in a joint session on January 6th at 1:00 p.m., with the Vice President presiding as President of the Senate.[35] The Vice President will open the electoral vote certificates, read the votes aloud, record the votes in the journals of the two houses, and announce the votes at the end to declare which candidates have been elected President and Vice President of the United States.[36] The Vice President will call for objections while counting the votes.[37] Once all objections are received,[38] the Senate withdraws to its chamber, whereupon the objections are given separately to each House to be voted on.[39]

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[31] Kesavan, *supra* note 16, at 1764.

[32] *Id.*

[33] Colvin & Foley, *supra* note 19, at 1080–81.

[34] *Id.* at 1056, 1081, 1086.

[35] 3 U.S.C. § 15.

[36] *Id.*

[37] *Id.*

[38] Provided they were in writing and signed by a Representative and a Senator.

[39] 3 U.S.C. § 15.

The next few provisions of the Electoral Count Act, establishing the process and standards for objections, are rather unclear. The Electoral Count Act states:

> 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.[40]

An analysis of "lawfully certified" and how it relates to "regularly given" follows in Part III of this Comment.

Parsing the Electoral Count Act's archaic language, Congress cannot reject a vote certificate if two conditions are met.[41] First, the certificate in question must be the only vote certificate from that state.[42] Second, the electoral vote certificate must have been "regularly given."[43] Congress may reject an electoral vote certificate when either, or both, of these conditions are not met.[44] The ramifications of this scenario will be further explored in Part III when discussing the Denominator Problem.

The Electoral Count Act continues with two provisions that, rather than dealing with a single vote certificate, instead present the question of a single state certifying and returning two separate vote certificates claiming two different electoral certificates. The Act states:

> If *more than one* return or paper purporting to be a return from a State shall have been received . . . 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[.][45]

According to Section 5 of the Electoral Count Act, a state's determination of controversies regarding which electors have been appointed is presumed to be conclusive if the determination was made

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[40] *Id.* (emphasis added).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] 3 U.S.C. § 15 (emphasis added).

pursuant to that state's law at least six days prior to the electors meeting to cast their votes.[46] Under this provision, if a single state sends multiple conflicting electoral vote certificates, only ones that were "regularly given" by electors will be counted.

This provision nearly came into effect during the 2020 Election between President Joseph R. Biden and then-incumbent Donald J. Trump. Though Biden carried the states of Georgia, Pennsylvania, Wisconsin, Nevada, and Michigan, thus winning their electoral votes, the legitimate electors' votes were not the only set of electoral votes sent out during the election.[47] Republicans in those states both discussed and attempted to form their own slates of pro-Trump electors to send alternate electoral vote certificates to Congress.[48] Additionally, Trump supporters in Arizona sent "a notarized facsimile of the state's certificate of ascertainment purportedly showing the state elected Trump" to the National Archives, whereupon it was discarded.[49]

These attempted alternate electors were ineffective, with the official electoral vote tallies listing President Biden as the winner of six of the states from which these alternate electors attempted to send electoral certificates.[50] Even if the so-called alternate votes eventually reached Congress, as electoral votes are required to under the Electoral Count Act,[51] they would not have had any effect. As election law expert Rick Hasen noted, "[t]hese electors have neither been certified by state executives nor purportedly appointed by state legislators."[52] Thus, "[t]hey don't have legal authority"[53] because they

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[46] 3 U.S.C. § 5.

[47] Ali Swenson, *'Alternate' Electors Won't Change Presidential Outcome*, AP NEWS (Dec. 17, 2020), https://apnews.com/article/fact-checking-afs:Content:9840583269.

[48] Nick Corasaniti & Jim Rutenberg, *No, There Aren't 'Alternate Electors' Who Can Vote for President Trump*, N.Y. TIMES (Dec. 15, 2020), https://www.nytimes.com/2020/12/15/technology/fake-dueling-slates-of-electors.html.

[49] Alison Durkee, *Trump Campaign Assembling Alternate Electors in Key States in Far-Fetched Attempt to Overturn Election*, FORBES (Dec. 14, 2020, 11:31 AM), https://www.forbes.com/sites/alisondurkee/2020/12/14/trump-campaign-assembling-alternate-electors-in-key-states-in-far-fetched-attempt-to-overturn-election/?sh=1a1f2d343213.

[50] *2020 Electoral College Results*, *supra* note 12.

[51] 3 U.S.C. § 15.

[52] Rick Hasen, *Trump Campaign Planning on Sending Alternative Slate of Electors to Congress, per Stephen Miller. It Won't Matter to the Outcome*, ELECTION L. BLOG (Dec. 14, 2020, 6:22 AM), https://electionlawblog.org/?p=119632.

[53] *Id.*

were not lawfully certified per Section 5 of the Electoral Count Act.[54] The alternate electors never reached a point where their votes could have been rejected for not being "regularly given." Their attempt, however, does serve as an illustration of how the "lawfully certified" provision can manage election disputes and is a clear example of the kind of situation that "lawfully certified" would cover. The same cannot be said, however, for "regularly given."

The Electoral Count Act's final provision mentioning "regularly given" is largely inconsequential to this Comment—merely using the phrase a final time without providing more context.[55] When more than one state authority claims to have certified the electors, the House and Senate will examine state law to determine which authority has the power to certify them and count "the votes regularly given of those [certified] electors."[56] To pin down a definition of "regularly given," the phrase itself must be examined more thoroughly. "Lawfully certified" appears exactly once in the Electoral Count Act, "certified" appears twice more,[57] and "lawfully certified" is elsewhere in the United States Code.[58] "Regularly given," despite appearing four separate times in the Electoral Count Act, is never given a statutory definition, nor is there any indication as to what scenario it could possibly refer to.[59] While the Electoral Count Act does not explicitly define "regularly given," its definition of "lawfully certified" provides a starting point for what "regularly given" does *not* mean.

III. WHAT "REGULARLY GIVEN" DOESN'T, COULD, AND SHOULD MEAN

The Electoral Count Act's most prominent rejection provisions rely significantly on the language of "regularly given," despite the term receiving no direct definition in the Act itself. Despite this, a general sense of the term's meaning can be gleaned from sources such as historical attempts at invoking it and legal scholarship discussing the Electoral Count Act. Taking these perspectives into account, Congress can establish a clarifying definition for "regularly given" that would prevent future misinterpretation of the Act's requirements.

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[54] *See* 3 U.S.C. § 5.

[55] 3 U.S.C. § 15.

[56] *Id.*

[57] *Id.*

[58] *See id.* (referencing the explanation of "lawfully certified" in 3 U.S.C. § 6).

[59] For a more general discussion on the potential ramifications of the term's ambiguity, see generally LAWRENCE DOUGLAS, WILL HE GO? (2020).

A. *There is No Formal Definition of "Regularly Given"*

The first use of "regularly given" occurs in the same sentence as the term "lawfully certified."[60] While "lawfully certified" is used in reference to the electors themselves, the same cannot be said for "regularly given." Rather, "regularly given" is consistently used in reference to the electoral vote certificates themselves, not the electors who meet to vote and send those certificates to Congress. The separate uses of these terms—as well as their different contexts—heavily imply that the terms refer to completely different standards and procedures and are not interchangeable. "Lawfully certified" can be understood to refer to any potential issues in certifying the electors themselves. This would include the wrong electors showing up to vote or electors failing to meet their constitutional qualifications.[61] This analysis, however, only informs what "regularly given" does *not* refer to and leaves open many possibilities for what the term could still potentially include.

1. Historical Attempts at "Regularly Given" Objections

In the past sixty years alone, the United States has seen at least five attempted "regularly given" objections during the certification of electoral votes. In 1969 a North Carolina elector voted for George Wallace instead of Richard Nixon, despite being pledged to the latter; the vote was counted despite a legislator objecting to the discrepancy.[62] The now-infamous 2000 election between George Bush and Al Gore saw Democratic Representative Sheila Jackson Lee object to Florida's electoral votes, believing that a plurality of the State's popular vote had been cast for Gore instead of Bush and thus the certificate was not "regularly given."[63] The objection failed when no senators joined, as required under the Electoral Count Act.[64] In 2005 Democratic Representative Stephanie Tubbs Jones unsuccessfully objected to Ohio's electoral votes because the electors were "unlawfully appointed," citing long voting lines and faulty voting machines.[65] If anything this was arguably more of a "lawfully certified" objection, as it pertained to whether the electors themselves were correctly appointed

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[60] 3 U.S.C. § 15

[61] U.S. CONST. art. II, § 1, cl. 2.

[62] Muller, *supra* note 10.

[63] *Id.* at 1542.

[64] *Id.*; 3 U.S.C. § 15.

[65] Muller, *supra* note 10, at 1542–43.

according to an accurate citizen vote. Even then, the objection had more to do with the popular vote itself, not the process of appointing and certifying the electors once the State's vote has been counted.

After the 2016 Election, Congress heard an objection from Democratic Representative James McGovern that "illegal activities engaged in by the Government of Russia" had influenced the votes and thus they were not "regularly given."[66] Much like Representative Jones's 2005 objection, Representative McGovern's objection is better characterized as a "lawfully certified" objection because it did not concern the electoral vote certificate itself. The objection instead challenged the validity of the electors chosen by the citizen vote. Finally, Republican Representative Paul Gosar objected to the certification process behind the choice of electors on January 6, 2021, though he claimed that he was objecting to the votes not having been "regularly given."[67] As history has indicated, there is no real consensus as to what "regularly given" means or what conditions would constitute a "not regularly given" electoral certificate. Nearly all these examples fit the definition of "not lawfully certified" more than they do "not regularly given." Bearing that in mind, if congressional history does not provide a clear definition of "regularly given," academic writings can, perhaps, shed some light on the ambiguous term.

Fortunately, the academic view of "lawfully certified" is rather straightforward. In *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, Stephen Siegel states that "[a] vote not 'lawfully certified' include[s] Congress's power to reject electoral votes due to preexisting constitutional infirmities."[68] This aligns with the previous analysis in this Comment, in that "lawfully certified" objections concern the lawful certification of the electors sent to the Electoral College. "Lawfully certified" can be consistently understood to mean the lawful certification of the electors who cast their votes for President and Vice President. Lawfully certified, therefore, does *not* refer to the electoral certificate the electors transmit to Congress to be read on January 6. With an understanding of "lawfully certified," pre-appointment concerns can be excluded from a potential definition of "regularly given," as those would already fall under the "lawfully certified" requirement.

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[66] *Id.* at 1543.

[67] *Id.* at 1531.

[68] Stephen Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 619 (2004).

Siegel's understanding of "regularly given," however, presents some potential issues if it were adopted. If "[a] vote not 'regularly given' included all improprieties in the electors' conduct in office,"[69] as Siegel claims, how would one define these improprieties? Siegel seems to be defining "not regularly given" as issues arising from an elector's conduct once they are lawfully certified, but what constitutes a significant enough problem to justify a "not regularly given" rejection? If an elector acted improperly once they were certified, such as by running late but still voting for the candidate they were pledged to, would that be enough of an "impropriety" to justify rejecting their votes? What about an elector who showed up on time but cast their vote for a candidate other than the one to which they were pledged? That second scenario has, in fact, happened a few times in American history, enough to warrant its own name—the "faithless elector."[70]

Thirty-three states have some form of law that requires electors to vote for the candidate to whom they are pledged.[71] Of these states, sixteen—just under half—do not impose any form of penalty for not doing so, nor any way to prevent an elector from voting "faithlessly" if they so choose.[72] The Supreme Court has noted that electors themselves have "no rights" and that the states have "broad power over electors."[73] Accordingly, the Court found in *Chiafalo v. Washington* that "faithless elector" laws restricting electors' choice in voting are constitutional, and that states are thus allowed to bind electors to vote for the candidate to whom they are pledged.[74]

Bearing that in mind, what happens to the votes of faithless electors from states that bind their electors but where the elector nevertheless casts their vote for an individual to whom they were not pledged? If the elector is casting their vote in a state like Nevada, then their faithless vote would be canceled, and the elector would be replaced.[75] In that situation, "regularly given" would never come into

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[69] *Id.*

[70] *See* 140 S. Ct. 2316, 2322 (2020); for a broader discussion on the potential interactions between faithless electors and the "regularly given" language, see generally DOUGLAS, *supra* note 59.

[71] *Faithless Elector State Laws*, Section of *Faithless Electors*, FAIRVOTE [hereinafter *FairVote List*], https://fairvote.org/resources/presidential-elections/#faithless-elector-state-laws (last visited Oct. 21, 2022).

[72] *Id.*

[73] *Chiafalo*, 140 S. Ct. at 2328.

[74] *Id.* at 2328–29.

[75] *FairVote List*, *supra* note 71.

play because a certificate with faithless votes would never reach Congress. In a state that has a faithless elector law but no penalty for violating it, however, is this enough of an "impropriety" to justify a "regularly given" objection under Siegel's proposed definition? Because it is a violation of state law, it is easy to assume that this would indeed count as an electoral vote that was not "regularly given," but this hypothetical is only applicable to roughly a third of the states in the country. Seventeen states have no laws whatsoever binding "faithless electors."[76] Are *their* faithless votes, despite not violating any state law, still an "impropriety" that would prompt a "regularly given" objection?

Siegel provides an alternate articulation of his "regularly given" definition—which marginally helps to clarify what should and should not count—and lists a handful of illustrative examples. Siegel's list of potential post-appointment grounds includes the elector not casting their vote by ballot, casting the vote on the wrong day, voting for a constitutionally unqualified candidate, or voting while influenced by bribery or corruption.[77] Thus, according to Siegel, "'[r]egularly given' covers all post-appointment grounds" for objecting to electoral certificates.[78] This, along with the previous statement of "all improprieties in the electors' conduct in office,"[79] can be read together to reach a new understanding. These two definitions can be combined to mean that "'regularly given' applies to all improprieties arising after an elector's appointment and certification." This further separates the definitions of "lawfully certified" and "regularly given." The latter can, at least, be understood to apply only to what happens after the electors have been appointed.

Neither of Siegel's articulations of the phrase's meaning, nor his list of possible scenarios, addresses faithless electors and whether their votes, in any scenario, are "regularly given." This is important to note because although a single faithless elector has never swung an election, the issue extends beyond a single electoral vote. The Electoral Count Act is somewhat vague in its wording, and while it uses "regularly given" to refer to the votes themselves, it also regularly refers to the certificates or "returns" themselves in the same sentence.[80] An argument could be made that when votes are rejected under the Electoral Count Act, it is

[76] *FairVote List*, *supra* note 71.

[77] Siegel, *supra* note 68, at 670.

[78] *Id.* at 671.

[79] *Id.* at 619.

[80] 3 U.S.C. § 15.

not the individual votes being rejected but the certificate itself, along with all its votes. The Electoral Count Act states that the "vote or votes" that were not "regularly given" will be rejected, and it is thus arguable that all the "votes" on the certificate were not "regularly given," thus justifying rejection of the entire certificate.[81] Such a possibility could occur regardless of how many electors on that certificate were "faithful."

This is supported by the provisions for multiple returns, wherein the entire certificate that was not "regularly given" is rejected in favor of the correctly "given" certificate.[82] Because the rejection provision of the Electoral Count Act has never been successfully invoked and utilized, this potential misinterpretation is still a notable risk. A single faithless vote could potentially result in the entire certificate and all its votes being rejected. While a single vote is unlikely to swing an election, an entire certificate is more than capable of doing so. For example, imagine a close election with a slate of electors pledged to Candidate *X* from Party *A*, and that candidate is nearly tied with Candidate *Y* from Party *B*. If some of Candidate *X's* electors from Florida vote instead for Candidate *Z* from Party *A*, and this results in Florida's entire certificate being rejected due to not having been "regularly given," Candidate *X* might now lack enough votes to be declared President. At that point, the election would be thrown to the House of Representatives,[83] who could potentially vote Candidate *Y* into office instead. A definition of "regularly given" should thus include clarification that a "regularly given" electoral vote is one that complies with a state's faithless elector laws, as well as clarification on whether a single vote or an entire certificate of votes is being rejected upon a successful objection.

This Comment is not the first writing to seek a definition of "regularly given," as such a definition has been deemed "elusive" by Derek Muller in his article *Electoral Votes Regularly Given*.[84] Notably, Muller's understanding of "lawfully certified" aligns with Siegel's in that "lawfully certified" refers to problems with the state's certification of electors.[85] The meaning of "regularly given" is afforded more examination, concluding much like the above analysis that "regularly given" refers to the votes themselves, not the circumstances

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[81] *Id.*

[82] *Id.*

[83] U.S. CONST. amend. XII.

[84] Muller, *supra* note 10, at 1534.

[85] *Id.* at 1532.

surrounding the electors casting them.[86] Muller draws comparison to other uses of "regularly given" such as in tax payments, judgments, or testimonies, stating that "[t]he 'given' . . . suggests a transfer from one to another."[87] Muller further postulates that regularity "means that the 'giving' occurred according to law."[88] Thus, Muller's definition of "regularly given" would be that the electoral vote was cast pursuant "to the federal Constitution, federal law, and state law."[89]

In his analysis, Muller examines Siegel's[90] work on election law as cited above, as well as an article written by Professors Beverly Ross and William Josephson. Muller notes that in both articles, scholars agree that "regularly given" refers exclusively to grounds derived from issues arising after the appointment of presidential electors.[91] Muller's further endorsement of a post-appointment definition[92] helps illustrate that a potential definition of a vote not "regularly given" would be one that violates state law in some way after the appointment of the electors. Under this definition, charges of voter suppression as alleged in 2020[93] would not give rise to a "regularly given" objection during electoral vote certification, as one objection attempted in 2005.[94] Similarly, claims of voter fraud, such as the ones alleged in 2020,[95] would be equally invalid grounds for a "regularly given" objection. These scenarios are both pre-appointment issues, whereas "regularly given" is generally understood by scholars to apply to post-appointment issues. If the Electoral Count Act could be applied to voter suppression or fraud at all, it would arguably be under a "lawfully certified" objection. While one might be able to argue that voter suppression or fraud could lead to the unlawful certification of electors that goes against the true "will of the people," such a claim would not

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[86] *See id.* at 1535.

[87] *Id.* at 1534–35.

[88] *Id.*

[89] *Id.* at 1534.

[90] Muller, *supra* note 10, at 1535–36.

[91] *Id.*

[92] *Id.* at 1540.

[93] *See* Will Wilder, *Voter Suppression in 2020*, BRENNAN CTR. FOR JUST. (Aug. 20, 2021), https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020.

[94] *See* Muller, *supra* note 10, at 1542–43.

[95] *See* Chris Cillizza, *Mike Lindell Alleged Widespread Voter Fraud in Alabama. The GOP Secretary of State Says He's Dead Wrong*, CNN (Sept. 22, 2021, 2:45 PM), https://www.cnn.com/2021/09/22/politics/mike-lindell-alabama-john-merrill/index.html.

be the kind of post-appointment issue that would be objected to as a vote not "regularly given."

Muller also suggests that Congress could amend the Electoral Count Act to include a list of scenarios wherein votes would not be "regularly given."[96] For example, an elector could vote for a candidate that is not eligible for the office of President, or for two candidates from the same state.[97] A non- "regularly given" vote could also be the result of duress or bribery, or the votes could have not been reported to Congress according to law.[98] An exhaustive, exclusive list sounds ideal on its face because it would clearly delineate what scenarios would give rise to a "regularly given" objection, but it would also run into several potential issues. A list would, paradoxically, be potentially either too inclusive or too narrow, depending on how it was constructed. This issue will be examined more in the next section.

2. Fixing "Regularly Given"—Defusing an Electoral Landmine

While no "regularly given" objections under the Electoral Count Act have ever succeeded in rejecting electoral votes, this does not mean that objections can *never* result in that very scenario. If Congress is to have a limited electoral role in line with the anti-Congress principle, it stands to reason that their ability to reject electoral votes should be equally limited. Without a clearly understood definition of when a vote is considered "regularly given," there is conceivably no end to the number of potential objections that could be brought under the Electoral Count Act. Though there have not been an overwhelming number of "regularly given" objections in American history, their sheer diversity indicates that there is not a consistent understanding of what "regularly given" means in Congress, despite Congress being the body tasked with understanding and carrying out the provisions of the Electoral Count Act. Representative Jones in 2005,[99] Representative McGovern in 2017,[100] and Representative Gosar in 2021,[101] all cited problems that had occurred before the electors gathered to cast their votes. Representative Lee's objection in 2001[102] claimed that the

[96] Muller, *supra* note 10, at 1537.

[97] *Id.* at 1537–38.

[98] *Id.* at 1539–40.

[99] *Id.* at 1542–43.

[100] *Id.* at 1543.

[101] *Id.* at 1531.

[102] Muller, *supra* note 10, at 1542.

Governor had erroneously certified the wrong electoral vote return, a *post*-appointment issue arguably in line with Muller's proposed definition. The 1969 objection is an interesting case because it was an objection to a faithless elector. [103] This is still a post-appointment issue but one that has varying legality depending on the state.[104]

Clarifying language to define "regularly given" must be implemented to clear up several ambiguities in the existing Electoral Count Act and prevent future potential electoral vote certification conflicts. The difference between "lawfully certified" and "regularly given" should be clarified to indicate that "lawfully certified" refers to the selection of electors themselves, whereas "regularly given" refers to violations of the law in the actual giving of votes, after the electors have already been appointed.

The electoral college itself is a rejection of a parliamentary system, intended to make the executive "independent and firm."[105] The fact that Senators or Representatives cannot be appointed as electors points towards an intent for Congress to have a limited role in election matters.[106] Thus, any definition of "regularly given" must be a narrow one, open to as little misinterpretation (accidental or intentional) as possible. Because "regularly given" applies to the votes themselves, this definition must deal with situations arising after the electors are appointed. This distinction is critical to minimize Congress's potential impact on the outcome of an election. Otherwise, an overbroad definition of "regularly given" could be seen as an *expansion* of Congress's ability to influence an election rather than a limitation on it.

As stated above, a set list of situations that constitute when a vote is not "regularly given" raises its own set of complications, as it could potentially be both over and under inclusive. Regardless of whether the list is stated to be exhaustive or merely illustrative, it would run into complications. If a list such as Muller's is deemed to be merely illustrative, then it will run into the same problem that the Electoral Count Act currently has. The debate would instead turn on whether any given issue is "similar enough" to improprieties explicitly listed in the Electoral Count Act to give rise to a "regularly given" objection. While this narrows the scope of "regularly given," this still leaves the

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[103] *Id.* at 1541.

[104] *See FairVote List*, *supra* note 71.

[105] Kesavan, *supra* note 16, at 1764–65.

[106] *Id.* at 1766.

category of potential objections too broad and prone to misinterpretation. If a list is deemed to be "exhaustive," however, this could potentially run afoul of the states' role in deciding how elections are run. An impropriety listed in the Electoral Count Act's list, such as an elector casting their vote "faithlessly," could be illegal in one state but legal in another.[107] The result could be a constitutional conflict where electoral votes could be objected to as not having been "regularly given" because the circumstances behind those votes fell into a category listed in the Electoral Count Act, despite the vote having complied with all applicable state law.

3. Muller's "Pursuant to Law" Definition Could Remedy These Concerns

Muller is correct in his determination that "regularly given" should apply to improprieties and irregularities that occur after the electors have been selected and appointed. Any pre-appointment irregularities would instead fall under "lawfully certified," as the Electoral Count Act states that electors must be "lawfully certified" before their votes can be "regularly given" in the first place.[108] Whether or not an electoral vote has been "regularly given" should be determined by examining the law of the state giving the certificate to Congress, as well as applicable federal election law and the Constitution.[109] Should Congress find a violation of any relevant laws, an argument could be made that the votes from that state were not "regularly given."

Such a rule would also apply in the case of faithless electors, which would subsequently vary depending on which state the electoral certificate was from. If the state in question requires electors to vote for whomever the citizen vote has pledged them to, as thirty-three states do,[110] then a faithless elector voting for another candidate would not have "regularly given" their vote, unless the State subsequently sent a second certificate after replacing the elector. In this scenario, that second certificate would have been "regularly given," as it would comply with the State's faithless elector law. If the State does not require an elector to vote for the candidate they are designated to,

[107] *See FairVote List*, *supra* note 71.

[108] 3 U.S.C. § 15.

[109] *See* Muller, *supra* note 10, at 1534.

[110] *See FairVote List*, *supra* note 71 (noting that thirty-three states require electors to vote for the candidate to whom they are pledged and cancel the votes of electors who vote faithlessly).

however, or the penalty for doing so does not involve replacing them (instead merely imposing a fine on the elector but keeping the vote as cast), then their vote should still be considered "regularly given" and counted accordingly.

With this definition, electoral count issues would be significantly reduced, though not eliminated altogether. Even with a clarified definition of "regularly given," there are still some potential problems that the Electoral Count Act poses. For example, if electoral votes do wind up getting rejected, whether because the electors were not "lawfully certified" or the votes were not "regularly given," how does this affect the actual vote count? The U.S. Constitution declares that "[t]he 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*."[111] If a "lawfully certified" objection succeeds, does that change the number of votes required, as the number of electors "appointed" has arguably changed? For that matter, does a successful "regularly given" objection have the same effect? These issues present themselves in a conundrum colloquially referred to as the "Denominator Problem."

B. *The Denominator Problem*

In mathematics, a numerator is defined as "the part of a fraction that is above the line and signifies the number to be divided by the denominator."[112] Likewise, a denominator is "the part of a fraction that is below the line and that functions as the divisor of the numerator."[113] In the context of a presidential election, the total number of electoral votes nationwide (in other words, the number of appointed electors) can be understood as the denominator. Therefore, the number of votes any presidential candidate has earned would be the numerator. In an election for the office of President, a candidate needs a majority of electoral votes to win.[114] The Constitution stipulates that each state possesses a number of electoral votes equal to the total number of Senators and Representatives that state has in Congress.[115] Additionally, the Twenty-Third Amendment, enacted in 1992, granted the District of Columbia electoral votes equal to "the whole number of Senators and Representatives in Congress to

[111] U.S. CONST. amend. XII (emphasis added).

[112] *Numerator*, *supra* note 13.

[113] *Denominator*, *supra* note 11.

[114] U.S. CONST. amend. XII.

[115] *Id.* art. II, § 1, cl. 2.

which the District would be entitled if it were a State, but in no event more than the least populous State."[116] Currently, the District of Columbia is allocated three electoral votes, the same number as Wyoming.[117] Adding these three votes to the current size of the House of Representatives (435 Representatives)[118] and the required 100 Senators in the Senate,[119] this equals a total of 538 electoral college votes.[120] This means that to win, a candidate for President must acquire a total of 270 electoral votes (the required numerator) out of 538 (the denominator).

The Electoral Count Act, however, is silent on what happens to rejected electoral votes if Congress simultaneously agrees to reject an electoral certificate and, thus, reject its electoral votes. This is particularly curious because the Electoral Count Act lays out an entire framework for rejecting electoral certificates but fails to indicate how a successful rejection affects the number of votes. The only scenario the Electoral Count Act explicitly mentions is Congress receiving two different certificates from one state, wherein an alternate, correctly submitted slate of electors should be counted instead.[121] As Muller notes, the form of the objection raised to electoral vote returns could very well determine what happens to the denominator when votes are successfully rejected.[122] "Traditionally, if Congress rejects the *appointment* of the elector, those votes are not included in the denominator. And if Congress rejects the *vote* of a validly appointed elector, those votes are included in the denominator."[123] If this is a consistent rule, then "lawfully certified" objections would change the denominator—the total number of electoral votes available—whereas

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[116] *Id.* amend. XXIII.

[117] *Distribution of Electoral Votes,* NAT'L ARCHIVES [hereinafter *Electoral Vote List*], https://www.archives.gov/electoral-college/allocation (last visited Oct. 21, 2022); *see also Population of the US States and Principal US Territories,* NATIONS ONLINE, https://www.nationsonline.org/oneworld/US-states-population.htm (last visited Oct. 21, 2022) (listing Wyoming as the least populous state).

[118] *The House Explained,* U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained (last visited Oct. 21, 2022).

[119] U.S. CONST. art. I, § 3, cl. 1; *Senators,* U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm (last visited Oct. 21, 2022).

[120] *Electoral Vote List, supra* note 117.

[121] 3 U.S.C. § 15.

[122] Muller, *supra* note 10, at 1545; for a more general discussion of the Electoral Count Act's unclear procedure in this regard and its potential consequences, see generally DOUGLAS *supra* note 59.

[123] Muller, *supra* note 10.

"regularly given" objections would not. In the case of "lawfully certified" objections, the elector themself has been removed from the number of certified electors, and thus available votes, altogether. When votes have not been "regularly given," however, the number of total available votes has not changed, but the number properly given to a given candidate has been reduced.

There is a precedent for this very thing occurring in previous electoral certifications. In the 1872 election, Senator Benjamin Franklin Rice objected to votes from Arkansas under a joint rule (as the Electoral Count Act had not yet been created) on two grounds.[124] The first was that "the official returns of the elections in Arkansas, made according to the laws of that state, showed that the people certified by the secretary of state as elected were not Arkansas's electors."[125] Senator Rice also asserted that "the returns read by the tellers were not certified according to law."[126] Because the two houses of Congress disagreed on whether to count the votes, the votes were not counted.[127] This is, in fact, the opposite of the Electoral Count Act's procedure, wherein the two houses must agree to *reject* a slate of votes certified by a state's executive or else they *shall* be counted.[128]

The 1872 election also saw a problem with Louisiana's votes, as that state had sent two different electoral certificates.[129] One return, signed by the Louisiana Secretary of State, had all eight Presidential votes going to Ulysses S. Grant and all eight Vice-Presidential votes going to Henry Wilson.[130] The other certificate, signed by the governor and Assistant Secretary of State, left the presidential votes blank and assigned all eight vice-presidential votes to Benjamin Gratz Brown.[131] Much like with Arkansas, Congress deliberated on which return to accept, eventually passing a resolution to not count any electoral votes from Louisiana at all.[132]

In 1872 the total number of electoral votes was 366, a majority of which would have been 184.[133] The teller sheets from that election had

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[124] *Id.* at 1545–46.

[125] *Id.* at 1546.

[126] *Id.* at 1546.

[127] *Id.*

[128] 3 U.S.C. § 15.

[129] Muller, *supra* note 10, at 1547.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 1548.

both numbers crossed out, however, listing the total number (or denominator) as 352 (the original total minus the rejected votes from Arkansas and Louisiana) with a majority consisting of 177 votes.[134] Effectively, the objections to the Arkansas votes were objections to the certification of the electors themselves and not their votes—put into terms consistent with the Electoral Count Act, they would be objections that the votes were not "lawfully certified." The Louisiana votes could arguably be considered a "regularly given" objection but could also potentially be "not lawfully certified" given the completely different distribution of votes between the two Louisiana certificates. Considering that the Twelfth Amendment states that the winner of the election is the candidate who receives a majority of the appointed electors,[135] it makes sense that a successful "lawfully certified" objection would lower the denominator.[136]

When votes are rejected for not having been "regularly given," the denominator should not change when determining the winner because the total number of electors, and thus the total number of electoral *votes*, remains the same. Rather, the number of votes that each candidate has legitimately won has changed by rejecting irregularly given votes from lawfully certified electors. This, combined with a narrower definition of "regularly given," would make it significantly more complicated—and thus less feasible—to manipulate electoral counts by changing the denominator to turn a previously losing candidate into the winner. Instead, a political party would have to control enough seats in both houses, having rallied enough Congress members to their cause to reject a substantial enough number of electoral votes in order to throw the election to the House of Representatives because a majority was not met. While this could theoretically be done in an obscenely close race by rejecting a single state with a high number of electoral votes, it is far more likely that the rejection of multiple states would be required to rob both candidates of a majority. Furthermore, even if a political party did manage to do this, they would then have to control enough House delegations—not individual seats—to vote their preferred candidate into office.[137]

For example, if Candidate *A* has 274 electoral votes to Candidate *B's* 264, but a "regularly given" objection simultaneously removes 20 votes from Candidate *A and* 20 votes from the denominator, this would

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[134] *Id.*

[135] U.S. CONST. amend. XII.

[136] *See* Muller, *supra* note 10, at 1550–51.

[137] U.S. CONST. amend. XII.

effectively flip the election in favor of Candidate *B*. This is because the denominator would change from 538 to 518, with 259 as the new required numerator to win. Candidate *A* would go from having 274 electoral votes to now possessing 254, lacking the required majority. Candidate *B*, however, would keep their 264 votes and win the presidency with their newly acquired majority. Instead, if "regularly given" objections changed only the numerator and not the denominator (with the denominator only changing if electors are deemed to have not been "lawfully certified"), then neither candidate would possess a majority, and the election would go to the House of Representatives to decide as stated in the Constitution.[138]

This clarification of the Electoral Count Act would not be without its own potential concerns. The Constitution states that if no candidate receives a majority of the electoral votes, then the election is given to the House of Representatives.[139] At first, one might assume that the party with the majority of Representatives in Congress would determine the next President, but this is not a guarantee. The Twelfth Amendment says that the House decides the next President if no candidate receives a majority of votes, but that each *representation* receives one vote, not each *Representative*.[140] This is a subtle but important distinction. Regardless of population or delegation size, every state receives only a single vote in this procedure. Even if one party has a per-member majority, this does not guarantee that they will have a *per-delegation* majority. As of November 3, 2020, the 116th Congress had a party split of 232 Democratic Representatives, 197 Republican Representatives, one Libertarian, and five vacancies.[141] In the same year, however, there were twenty-six states with a Republican majority, twenty-two with a Democratic majority, a tie in Pennsylvania, and a near-evenly split Michigan, with a slim Democratic majority.[142] With a split similar to this one, a minority party in Congress could vote their candidate into office simply through the sheer serendipity of controlling more House delegations, despite possessing less individual

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *116th United States Congress*, BALLOTPEDIA, https://ballotpedia.org/116th_United_States_Congress (last visited Oct. 21, 2022).

[142] Allison Durkee, *Here's How the House Could Decide the Presidential Election—And Its Democratic Majority Wouldn't Matter*, FORBES (Sept. 28, 2020, 2:52 PM), https://www.forbes.com/sites/alisondurkee/2020/09/28/how-the-house-could-decide-the-presidential-election-electoral-college-tie-contingent-election/?sh=67098c9f1bb6.

members. That is, a candidate whose party received less popular votes, less electoral votes, and only controlled a minority in the House could still wind up being elected into office. This is still preferable to the alternative.

If both "lawfully certified" and "regularly given" objections changed the denominator, flipping an election would be significantly easier. For the election to be thrown into the House, enough electoral votes need to be rejected under "regularly given" objections that neither candidate has received a majority, and even then, a flipped election would require a majority of the states—who might not necessarily vote along party lines—to vote for the candidate who initially lacked a majority of electoral votes. If "regularly given" objections did change the denominator, however, flipping an election would potentially only require a single successful vote—a vote to reject a significant-enough state that it would deprive the electoral winner of their majority while keeping the electoral loser over the threshold required for victory.

As a hypothetical, consider a situation with a mere one hundred electoral votes, split fifty-five for Candidate *A* to forty-five for Candidate *B*. If a successful "regularly given" objection removed eleven electoral votes from a state that Candidate *A* won, thus reducing the denominator to eighty-nine, then the required majority would become forty-five, which Candidate *B* possesses. As a result, this single vote has now flipped the election from Candidate *A* to Candidate *B*. A party that possessed a majority of members but represented a minority of states could easily do this if they voted on party lines. If a successful "regularly given" objection does not change the denominator, however, then this electoral vote dispute would go to the House to determine the next President. While this result could still be obtained through "lawfully certified" objections if "regularly given" objections left the denominator untouched, their very nature of applying only to pre-appointment grounds would make it inherently harder to garner enough support for multiple successful complaints on those grounds. Even with the proposed definition of "in accordance with state law," a series of "regularly given" objections would be easier to successfully pass especially if, as seen in 2021, state legislatures continue to pass laws that further frustrate and complicate the presidential voting process.[143] While the majority of these laws have impacted the popular

[143] *See* Jane C. Timm, *19 States Enacted Voting Restrictions in 2021. What's Next?,* NBC NEWS (Dec. 21, 2021, 7:02 AM), https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342.

vote, not the electoral voting process, there is a strong incentive for state legislatures to change how their state handles the electoral votes in the hopes of potentially influencing future elections.[144] If given the choice between one vote potentially flipping an election, or a requirement for *multiple* successful votes to be required for the same outcome, the procedure with more checkpoints is vastly preferable. Even if the second check in this system—the House voting to select the next President—may potentially have its own issues, having two checks on our electoral process would still be better than having only one.

Congress should amend the Electoral Count Act to specify the effect that both types of objections have on the electoral vote calculations. Should votes be objected to on the grounds that they were not "lawfully certified," the denominator should be lowered accordingly as the total number of possible electoral votes has now changed. If votes are rejected on the grounds that they were not "regularly given," however, only the numerator for that candidate should be lowered. This is because the total number of electoral votes that were attainable has not changed at all. Rather, only the number of votes attributed to that candidate has. For example, if a faithless elector (who has not been replaced) casts a vote for a candidate other than the one they were pledged to, that elector was still "lawfully certified." That elector's vote still exists as one of "the whole number of [e]lectors appointed" and should have gone to one of the candidates; thus, the total number of votes available should not change.[145]

Everything up until now has focused on the electoral votes themselves, but what about the officer presiding over the electoral vote certification? If the Vice President is meant to open and count the electoral certificates, do they get any say as to which certificates are rejected? There has been some speculation about the Vice President's role—or lack thereof—in electoral matters, but the Electoral Count Act is noticeably vague on this as well. If the Electoral Count Act's electoral vote rejection provisions are to ever be invoked effectively, the Vice President's role in its procedures must also be clearly understood.

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[144] *See id.*

[145] U.S. CONST. amend. XII.

IV. THE VICE PRESIDENT DURING THE ELECTORAL CERTIFICATION

In addition to aforementioned issues regarding the legal uncertainty of electoral vote counting, there is one additional potentially problematic factor in the electoral certification process—the Vice President. As President of the Senate,[146] the Vice President presides over the electoral vote count every four years.[147] As stated in the Electoral Count Act, "[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."[148] There has been some debate over whether the Vice President has any kind of authority or power during these proceedings, up to and including the unilateral rejection of electoral certificates, but these claims have largely been discredited, including by a former Vice President.[149] It is similarly unclear as to whether the Vice President's usual tie-breaking Senate vote would apply in a vote to reject electoral certificates.

A. *"Exclusive Authority and Sole Discretion?"*

After the 2020 Election resulted in President Joe Biden defeating then-incumbent Donald Trump,[150] Representative Louie Gohmert sued then-Vice President Mike Pence in federal court to try and declare the Electoral Count Act unconstitutional.[151] While the court dismissed the case due to a lack of standing (later affirmed by the appellate court[152] with certiorari denied by the Supreme Court[153]), it is

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[146] *Id.* art. I, § 3, cl. 4.

[147] U.S. CONST. amend. XII; 3 U.S.C. § 15.

[148] U.S. CONST. amend. XII; *see also* 3 U.S.C. § 15 ("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 . . . of the electoral votes, which certificates . . . shall be opened, presented, and acted upon . . . .").

[149] Alana Wise, *Pence Says He Doesn't Have Power to Reject Electoral Votes*, NPR (Jan. 6, 2021, 1:07 PM), https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/953995808/pence-says-he-doesnt-have-power-to-reject-electoral-votes; *see also* SUSAN COLLINS, ELECTORAL COUNT REFORM ACT OF 2022 (2022), https://www.collins.senate.gov/imo/media/doc/one_pager_on_electoral_count_reform_act_of_2022.pdf (a proposed bill that would clarify the Vice President's role as "ministerial"); for a more general discussion of the potential ramifications of this ambiguity, see generally DOUGLAS *supra* note 59.

[150] *2020 Electoral College Results*, *supra* note 12.

[151] Gohmert v. Pence, 510 F. Supp. 3d 435, 438–39 (E.D. Tex. 2021).

[152] Gohmert v. Pence, 832 F. App'x. 349, 350 (5th Cir. 2021).

[153] Gohmert v. Pence, 141 S. Ct. 972, 972 (2021).

still a good example of the lack of clarity over the Vice President's role in the electoral count, which creates problematic legal and political uncertainty in the event of electoral disputes. Gohmert claimed that alternate slates of Trump-voting electors had met in Arizona, Georgia, Pennsylvania, Wisconsin and Michigan, states which President Biden had won.[154] Gohmert claimed that the Vice President "has the 'exclusive authority and sole discretion' to determine which electoral votes should count."[155] Accordingly, Gohmert asked for a declaration that "'the Twelfth Amendment contains the exclusive dispute mechanisms' for determining an objection raised by a Member of Congress to any slate of electors."[156] Incidentally, it should be noted that while the Twelfth Amendment does contain provisions for how to resolve the issue of neither candidate receiving a majority, it contains no provisions regarding objections by a member of Congress.[157]

The "alternate" electors from Arizona also joined the suit as plaintiffs, alleging that they were injured when Governor Ducey of Arizona "unlawfully certified and transmitted the 'competing slate of Biden electors' to be counted in the Electoral College."[158] In reality, this "alternate slate" of electors from Arizona was just a group of nominee electors that had met and cast votes for Donald Trump despite him not winning said votes—they were not part of the formal electoral process.[159] This is in contrast to the contested votes from 1876, which involved multiple electoral vote certificates being returned to Congress, rather than simply a group of electors claiming to be the "real" electors.[160] Thus, these "alternate electors" (who were, in fact, the Republican Nominee-Electors)[161] were not "lawfully certified" as the Electoral Count Act would define them.[162] Ultimately, the case was dismissed due to neither Gohmert nor the Nominee-

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[154] *Gohmert*, 510 F. Supp. 3d at 438.

[155] *Id.* at 439.

[156] *Id.*

[157] U.S. CONST. amend. XII.

[158] *Gohmert*, 510 F. Supp. 3d at 441.

[159] *See generally* Swenson, *supra* note 47; Corasaniti, *supra* note 48; *see also 2020 Electoral College Results*, *supra* note 12 (reflecting that Biden won Arizona's electoral votes, not Trump).

[160] Colvin & Foley, *supra* note 19, at 1045.

[161] *Gohmert*, 510 F. Supp. 3d at 437–38.

[162] *See* 3 U.S.C. § 15 (referencing the certification of electors under 3 U.S.C. § 6).

Electors having suffered an injury by any action then-Vice President Pence had yet to take.[163]

Though *Gohmert v. Pence* did not invalidate the Electoral Count Act, it did illustrate the Electoral Count Act's and Twelfth Amendment's ambiguity regarding what role, if any, the Vice President has in accepting or rejecting electoral votes. If the Vice President is required to be there as a necessary part of the proceedings, do they have any power at all to influence them? Or is their role merely ceremonial—a glorified announcer as if they were hosting an electoral game show?

Even as far back as our nation's earliest elections, the Vice President did not unilaterally reject electoral votes for perceived irregularities. In 1796, Vice President John Adams accepted a disputed electoral vote certificate from Vermont.[164] The votes from Vermont faced some controversy, but even Adams' rival Thomas Jefferson said he "did not wish to make a fuss over the 'form' of the vote when the 'substance' was clear."[165] Four years later, during the Election of 1800, Jefferson was faced with an electoral vote certificate from Georgia that contained clerical irregularities when compared to other states' certificates.[166] Georgia had returned a single sheet of paper rather than the two that every other state provided.[167] Notably, this could have potentially constituted a "regularly given" objection under the Electoral Count Act (had it existed at the time) if a law stipulated the exact form an electoral certificate must take. Jefferson, however, disregarded the irregularity and moved the proceedings forward, counting the vote as normal.[168]

Though Jefferson did not help draft the Constitution itself,[169] he was a prominent politician and legal scholar at the time of the nation's founding, having played a major role in drafting the Declaration of

[163] *Gohmert*, 510 F. Supp. 3d at 441, 443.

[164] Ron Elving, *Objecting to Electoral Votes in Congress Recalls Bitter Moments in History*, NPR (Jan. 5, 2021, 5:00 AM), https://www.npr.org/2021/01/05/952883116/objecting-to-electoral-votes-in-congress-recalls-bitter-moments-in-history.

[165] *Id.*

[166] *See* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 588 (2004).

[167] *Id.*

[168] *Id.* at 601.

[169] *Meet the Framers of the Constitution,* NAT'L ARCHIVES, https://www.archives.gov/founding-docs/founding-fathers (last visited Oct. 22, 2022) (noting that Thomas Jefferson did not attend the Constitutional Convention).

Independence.[170] If the Vice President were able to—or more drastically, required to—reject electoral votes for perceived irregularities, Jefferson could have insisted that Adams do so. This is especially noteworthy when the rejection of an electoral certificate could have meant the difference between Jefferson winning or being the runner-up.[171]

B. *The 101st Vote*

"The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."[172] The Electoral Count Act, however, makes no mention whatsoever of whether the Vice President's usual tie-breaking vote applies during deliberations on objections to electoral vote certificates.[173] Furthermore, the Vice President does not always get a vote in Senate matters, but only when the Senate finds themselves in an even tie.[174] Thus, the Vice President's vote has a unique, distinct level of influence in Senate affairs—their vote is always conclusive and outcome-determinative for any matter in which it is cast. As stated previously, our electoral system can be seen as a rejection of the parliamentary system under which, in theory, Congress would select the next President.[175] If the Electoral Count Act is to fit within this idea of the electoral college electing the President, rather than Congress doing so, it stands to reason that the Act should not include a provision that would potentially allow a split Senate with a Vice President—inclined to a particular party—to selectively reject votes. To do so would effectively allow congressional election of the President by a party gaming the system in just the right way.

While the Constitution does grant the Vice President a tie-breaking vote in the case of Senate deadlocks, there is an argument to be made that the consideration of electoral vote objections is not strictly a Senate affair. Rather, the Electoral Count Act stipulates that in the case of an electoral vote objection, both houses of Congress must

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[170] Matthew Wills, *Who Wrote the Declaration of Independence?*, JSTOR DAILY (July 2, 2016), https://daily.jstor.org/who-wrote-the-declaration-independence.

[171] *See* Ackerman & Fontana, *supra* note 166, at 579.

[172] U.S. CONST. art. 1, § 3, cl. 4.

[173] 3 U.S.C. § 15 (stating that "such objections shall be submitted to the Senate for its decision" but failing to state whether the President of the Senate is included in this vote).

[174] *Id.*

[175] Kesavan, *supra* note 16, at 1765.

vote to reject the contested electoral certificate.[176] As this is a role given to all of Congress, not just specifically the Senate, the Vice President's tie-breaking vote could very well be seen as inapplicable to this particular process. In such a scenario, the potential concern of a fifty-fifty Senatorial deadlock would not be an issue due to how the Electoral Count Act is currently worded. The Electoral Count Act states that "the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given . . . ," meaning that a majority of both houses of Congress is necessary to reject the electoral votes.[177] If the Senate reaches an even split on a vote to reject electoral votes, then neither side has achieved a majority vote; thus, the Electoral Count Act's requirement has not been met and the electoral votes would not be rejected.

It is not out of the question to consider a scenario in which multiple irregularities in several states cause an evenly-split Senate to consider objections to multiple electoral vote certificates. Considering that the Senate was evenly split relatively recently,[178] this is not an unrealistic scenario. Should the House vote to reject the disputed electoral certificates, a Vice President could effectively be handed the ability to choose the next President by simply casting every tie-breaking vote in favor of accepting or rejecting votes to elect their chosen candidate. When considered along with the ambiguity of "regularly given" as discussed above, this scenario is made even more democratically precarious. A vague term, combined with a lack of clarity over whether the Vice President has their usual dispositive vote, could result in Congress being able to select the next President if enough electoral vote returns are objected to because the votes were not "regularly given."

The Vice President's role should be more explicitly defined in the text of the Electoral Count Act as merely ceremonial with little to no official power to influence the tallying of votes. There has been some academic discussion on this point, with some scholars noting that the Vice President's role, if any, should be limited to checking whether the votes are in compliance with constitutional and statutory

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[176] 3 U.S.C. § 15.

[177] *Id.*

[178] *Party Division, 117th Congress*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last visited Oct. 21, 2022) (noting that although there were fifty Republicans and forty-eight Democrats, the two remaining Independents aligned with Democrats to create an even fifty-fifty split at the time).

requirements.[179] Otherwise, the Vice President could find themselves "in an uncertain proceeding in which he might be an interested party."[180] Even this seems too great of an ability to grant to a single official, who could use mere formalistic technicalities to declare an entire certificate invalid for relatively trivial reasons. It is worth noting that the Senate rules allow for the Senate body to overrule decisions made by its chair, in this case the Vice President.[181] Even if the Vice President did have the power to unilaterally reject or accept electoral vote certificates, this would allow the Senate body to overrule a Vice President's decision regarding said vote certificates and force a vote on an objection to the certificate in question, as per the provisions of the Electoral Count Act.[182] In such a scenario, the two houses would restart the process by voting whether to reject the certificate, rendering any hypothetical role for the Vice President in checking certificate compliance completely superfluous. The broader conceptualization of the Vice President's power, the "exclusive authority and sole discretion" claimed in *Gohmert v. Pence*, is an equally egregious role to give to the Vice President in a proceeding where they very well might have a vested interest. [183]

In turn, the text describing the Vice President's role in counting electoral votes and receiving objections requires amending. Congress should amend the Electoral Count Act to state that "the President of the Senate shall have no power to reject votes through their own discretion, nor the ability to raise objections to electoral certificates on any grounds listed herein." The Electoral Count Act needs to clarify that the Vice President does *not* cast their tie-breaking vote should the Senate be tied because the electoral vote rejection process is a power given to both bodies of Congress, not specifically the Senate. Thus, a tie in the Senate should function as an acceptance of disputed votes, as the objection will not have received a majority in both houses. As it stands, the Electoral Count Act merely states that the President of the Senate shall be the presiding officer and shall open the electoral certificates.[184] Neither it nor the Twelfth Amendment make any mention of any power that the Vice President has to influence these

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[179] *See* Ackerman & Fontana, *supra* note 166, at 592–93.

[180] *Id.* at 593.

[181] RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 145 (1992).

[182] *See* 3 U.S.C. § 15.

[183] 510 F. Supp. 3d 435, 439 (E.D. Tex. 2021).

[184] 3 U.S.C. § 15.

proceedings.[185] Should these amendments be adopted, they will hopefully prevent any future debate about what power, if any, the Vice President has during the electoral certification process, such as their power regarding votes on objections and acceptance of electoral certificates.

V. RECENT EFFORTS IN CONGRESS

Recently, members of the House and Senate have introduced bills aimed at reforming the Electoral Count Act. One such bill which passed in the Senate as of late December of 2022, the "Electoral Count Reform and Presidential Transition Improvement Act," would "replace ambiguous provisions of the 19th century law with clear procedures that maintain appropriate state and federal roles in selecting the President and Vice President of the United States."[186] Most relevant to the issues outlined above, the bill clarifies that the Vice President's role is "solely ministerial" and raises the objection threshold from merely one member of each house to instead require one-fifth of each house.[187] A similar bill, "The Presidential Election Reform Act," which passed in the House as of September 21, 2022, would instead increase the required objection threshold to one-third of each chamber and include a similar clarification of the Vice President's role.[188] While clarity regarding the Vice President's role is a step in the right direction, neither bill clarifies the Electoral Count Act's vague "regularly given" language or the applicability of the Vice President's tie-breaking vote to senatorial electoral vote return disputes. Both bills clarify the role of the Vice President as merely ministerial or ceremonial but should also explicitly state that the tie-breaking vote

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[185] *Id.*; *see* U.S. CONST. amend. XII.

[186] Press Release, Josh Gottheimer, U. S. Congressman, Joint Release: House Members Introduce Bipartisan Reforms to the Electoral Count Act of 1887 (Sept. 14, 2022), https://gottheimer.house.gov/news/documentsingle.aspx?DocumentID=3694; Amy B Wang and Liz Goodwin, *Senate passes Electoral Count Act overhaul in response to Jan 6 attack*, WASH. POST (Dec. 22, 2022), https://www.washingtonpost.com/politics/2022/12/19/electoral-count-reform-omnibus/.

[187] Press Release, Josh Gottheimer, U. S. Congressman, Joint Release: House Members Introduce Bipartisan Reforms to the Electoral Count Act of 1887 (Sept. 14, 2022), https://gottheimer.house.gov/news/documentsingle.aspx?DocumentID=3694.

[188] Ariana Figueroa, *U.S. House Passes Bill Reforming Electoral Count Act to Stop Jan. 6 Repeat,* N.J. MONITOR (Sept. 21, 2022, 5:53 PM), https://newjerseymonitor.com/2022/09/21/u-s-house-passes-bill-reforming-electoral-count-act-to-stop-jan-6-repeat.

does not apply in the event of a tie in the Senate's vote to reject electoral votes. While both of these laws would help to improve the Electoral Count Act, more reform is still required to eliminate these lingering risks in our election system.

VI. CONCLUSION

The Electoral Count Act needs an amendment clarifying several of its provisions to ensure a smoother electoral process in the future. "Regularly given" should be defined as pertaining to electoral returns given pursuant to the Constitution, state, and federal law, a violation of which should include only electors' violations of law occurring after their certification. Improprieties and law violations that occurred before or during the process of electing the electors could instead be objected to as rendering the electors not "lawfully certified." Whether or not a faithless elector's vote counts as "regularly given" should thus be determined through reference to how the law of the elector's state treats faithless electors, assuming that state has not replaced the faithless elector in question. Should votes be rejected as not having been "regularly given," then the total number of votes required to win should remain the same as before the objection had occurred. This is to prevent an objection to a substantial-enough electoral return from flipping the entire election by lowering the required number of majority votes to such a degree that the presumed loser would now be declared the outright winner. Finally, the Electoral Count Act should clarify that the Vice President has no official power in submitting objections to the electoral count. The Vice President's vote should not be applied to ties in the Senate during these deliberations. Doing so would potentially grant a single member of government undue influence over the electoral process, a process in which they might have a vested interest.

Just because the Electoral Count Act has not yet affected the outcome of an election does not mean it never will, and as it exists right now, its provisions are insufficiently clear to be of any practical use to anyone. If anything, the Electoral Count Act is vague enough to be ripe for intentional misinterpretation by unscrupulous members of Congress seeking to change the outcome of an election. Should the Amendments this Comment proposes be implemented, the Electoral Count Act would work to cut off future electoral conflicts and ensure a smoother resolution of potentially contested future elections.

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