



“Faithless Elector” Challenge Goes to Supreme Court

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On May 13, 2020, the Supreme Court is set to hear two cases, *Chiafalo v. Washington* and *Colorado Department of State v. Baca*, that could determine how much power states have to control the presidential selection process in the Electoral College. As a formal matter, the Constitution [provides](#) that state legislatures shall direct the appointment of presidential electors, who, in turn, cast ballots for President and Vice President. But in practice, every state legislature has determined that electors should follow the will of their state’s voters. The question in these cases is whether states may *require* electors to cast ballots for the presidential ticket favored by their voters, or whether electors retain the ultimate discretion to cast ballots for the candidates of their choice.

Factual Background

So-called “faithless electors” (or “anomalous electors”)—electors who cast ballots for a candidate other than the one expected by their state’s legislature—have existed since [early American history](#), though they have never tipped the outcome of an election. Electors’ reasons for voting their own way tend to be idiosyncratic. In [1988](#), for example, a West Virginia elector reversed her votes for President and Vice President as a symbolic protest against the Electoral College. In the [2000 election](#), a Washington, D.C., elector abstained from casting her vote to protest D.C.’s lack of congressional representation. And in [2004](#), one of Minnesota’s electors cast a presidential ballot for the Democratic Party’s vice presidential candidate, apparently by mistake.

In 2016, however, some electors attempted a [coordinated effort](#) to change the election’s outcome. Democratic electors Michael Baca of Colorado and Bret Chiafalo of Washington sought to rally support for a Republican alternative to Donald Trump despite state laws requiring them to vote for Hillary Clinton, the popular vote winner in both Washington and Colorado. Chiafalo and two other Washington electors ultimately cast their votes for Colin Powell, while Baca cast his vote for John Kasich. In all there were [seven](#) anomalous votes in the 2016 Electoral College, and several more electors indicated they would have voted anomalously if they were not restricted by state law.

For defying their state’s popular vote, Chiafalo and Washington’s other faithless electors were fined \$1,000. The [Washington Supreme Court](#) upheld the fines, ruling that the Constitution does not provide

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electors with absolute discretion to vote contrary to their state's direction. Things played out differently in Colorado. When Baca cast his anomalous vote, the state discarded his ballot and replaced him with an elector who voted for Hillary Clinton. After Baca sued, alleging that his constitutional rights as an elector had been violated, the [Tenth Circuit](#) determined that Colorado acted unconstitutionally by removing Baca because states may not interfere with an elector's exercise of discretion. The Supreme Court agreed to hear appeals from these two cases to resolve the conflict. (Justice Sotomayor is [recused](#) from the Colorado case due to her friendship with one of the litigants.)

Legal Background

[Article II](#) of the Constitution provides, "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." The [Twelfth Amendment](#), in turn, instructs, "The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves." The constitutional text is silent about whether states may compel electors to vote for a specific candidate.

[Political parties](#) are usually charged under state law with compiling their preferred slate of electors, and the party that wins the state's popular vote for President gets to have its slate of electors cast the official ballots. (Forty-eight states and the District of Columbia allot all their electoral votes to the winner of the statewide popular vote; Maine and Nebraska allot two electors to the winner of the statewide popular vote and one elector to the winner of the popular vote in each of the state's congressional districts.) Congress has prescribed [rules](#) for when and how electors' ballots shall be submitted and counted, and under current law Congress [defers to states](#) to resolve in the first instance "any controversy or contest concerning the appointment" of electors.

There is little case law on states' ability to regulate their electors. In 1892 the Supreme Court [recognized](#) that states' appointment power is "plenary," "exclusive," and "comprehensive." And in a 1952 case, [Ray v. Blair](#), the Supreme Court held that state political parties may require prospective presidential electors to pledge to vote for the party's nominees before being certified as electors. Specifically, the Court said, nothing in the Constitution prohibits an elector from "announcing his choice beforehand, pledging himself," and so nothing restricts states or parties from requiring these pledges. Recognizing "long-standing practice," the Court observed that through history "electors were expected to support the party nominees." But the Court did not address whether states may enforce these pledges, either by fining faithless electors or by replacing them.

Today [32 states](#) and the District of Columbia have enacted laws binding the political parties' designated presidential electors to cast their votes for the parties' nominees for President and Vice President. Some states, such as Washington and Colorado, have provided enforcement mechanisms for electors who violate their pledge. These enforcement efforts are now under review in the two cases before the Court.

Electors' Arguments

The electors [argue](#) the Constitution requires that presidential electors be free to cast votes without interference or sanction, and that the states' role extends only to appointing a slate of electors. Because the Constitution's text does not explicitly grant states the power to direct electors' votes, and because the Tenth Amendment reserves to states only the powers that states exercised before the Constitution was ratified (which would not include any powers related to the Electoral College), the electors urge the Supreme Court to side with the Tenth Circuit and hold that states lack the power to control electors' discretion.

The electors maintain that [founding-era sources](#) bolster their argument that the Constitution prohibits states from removing presidential electors, even where the electors vote contrary to a state-imposed requirement. For example, Alexander Hamilton advocated for the Electoral College in the [Federalist Papers](#), explaining that electors would possess the “discernment” necessary to choose America’s President, “acting under circumstances favorable to deliberation.” Moreover, the electors posit that the very term “[elector](#),” as originally understood and as used in other constitutional provisions, describes a person vested with judgment and discretion.

The electors also respond to several objections to their position. For example, they dismiss the argument that the states’ power to appoint electors necessarily includes the power to remove electors. While the Supreme Court has [recognized](#) that the President’s authority to appoint certain officials includes the power to remove those officials, the electors [argue](#) that this rule follows from the President’s special responsibility to execute the laws and does not apply to a state’s attempt to remove electors. As the Tenth Circuit [observed](#) below, “[u]nlike the President appointing subordinates in the executive department, states appointing presidential electors are not selecting inferior state officials to assist in carrying out a function for which the state is ultimately responsible.” Instead, that court said, when electors cast their votes they are exercising a federal function that cannot be limited or controlled by states.

The electors also address the states’ practical argument that allowing electors to defy the voters’ will could be seen as contrary to the modern expectations of U.S. democracy. While Article II empowers state legislatures to appoint electors any number of ways—they can make the appointments themselves, or they can delegate the appointment power in various ways to voters—the electors argue that a state’s choice of appointment method cannot change the electors’ constitutional power to vote according to their conscience. As [the Tenth Circuit concluded](#), “Although most electors honor their pledges to vote for the winner of the popular election, that policy has not forfeited the power of electors generally to exercise discretion in voting for President and Vice President.”

States’ Arguments

The states maintain that the Constitution’s silence should be interpreted in their favor, because courts [should not imply](#) restrictions on state power. They also offer a competing historical argument. Whatever Hamilton may have envisioned, the states counter that electors have been pledging themselves to vote for particular candidates since the [very first elections](#) for President. Indeed, [the states say](#), this reality was the context—and perhaps even the impetus—for the ratification of the Twelfth Amendment in 1804, which accommodated electors’ practice of voting for party tickets by permitting them to cast separate ballots for President and Vice President.

The states contend that *Ray v. Blair*, which permitted states to require prospective electors to pledge to support their parties’ presidential ticket, effectively compels the conclusion that states can enforce those pledges through fines or removal. What good is a pledge, the states ask, if it can be ignored without consequence? The electors argued in *Ray* that requiring a pledge was unconstitutional because it infringed upon their unfettered discretion. By rejecting such discretion, the electors argue, *Ray* [forecloses](#) the argument that electors have a constitutional right to violate their pledge.

Further, the states maintain the maxim that “the power to appoint includes the power to remove” is a [default presumption](#), and not unique to presidential authority. The Constitution is silent about who has power to remove rogue electors, but the [states argue](#) that power must lie somewhere in cases where, for example, electors accept bribes or secure appointment after lying about their eligibility. The most natural place to find that power, the states assert, is in the state legislature that holds the appointment power. And if the legislature may remove an elector for accepting a bribe, they say, then it ought to have the same power to remove or sanction an elector who violates other provisions of state law, such as a pledge to support the winner of the state’s popular vote.

Considerations for Congress

The [Twelfth Amendment](#) provides that “[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.” Because Congress has the exclusive power to count—or reject—electoral votes, one election law scholar has urged the Supreme Court to abstain from adjudicating the merits of this controversy and leave it to Congress to decide whether to count the vote of a faithless elector or the vote of his replacement. Under [this view](#), when Baca was replaced by Colorado after completing his ballot for John Kasich, he should have raised a protest to Congress, which may have included submitting his discarded ballot. Then Congress could have exercised its right to decide which ballot was in order—Baca’s, or Baca’s replacement’s—consistent with its [regular practice](#) of resolving Electoral College controversies. (These disputes have arisen, [for example](#), when territories submitted electoral votes before officially becoming states; when electors cast their ballots on the wrong date; when an elector died shortly after submitting his ballot; and when competing slates of electors arrived from the same state.) Given Congress’s independent role in the Electoral College process, Members may need to decide internally whether to count votes from electors who break their pledge.

If the Court does reach the merits and decides that states may not restrict electors’ discretion, another [amicus](#) argues Congress will have to act quickly to address significant opportunities for corruption. If electors are unbound from their pledge to follow the vote of their home states, the amicus fears that they could be bombarded by partisans and foreign interests lobbying them to vote for preferred candidates. Because campaign finance and other federal ethics laws [do not currently apply](#) to electors, these efforts could be almost entirely unregulated absent new legislation.

These cases are nominally about states’ power to control their electors, but they could have implications for Congress in at least one other way. Shortly after ratification of the [Twenty-third Amendment](#), which granted the District of Columbia the right to “appoint [electors] in such manner as Congress may direct,” Congress enacted a [statute](#) requiring D.C.’s electors to follow the District’s popular vote. The outcome of this case may invalidate that statute, or alternatively, open the door for Congress to impose sanctions on D.C. electors who violate their pledge.

Author Information

Jacob D. Shelly
Legislative Attorney

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