



Supreme Court Clarifies Rules for Electoral College: States May Restrict Faithless Electors

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On July 6, 2020, the Supreme Court unanimously held that states may punish or replace presidential electors who refuse to cast their ballots for the candidate chosen by the voters of their state. In the case [Chiafalo v. Washington](#), a majority of the Court held that the State of Washington’s constitutional authority to appoint electors includes the power to impose a \$1,000 fine against electors who violate their pledge to support the candidate chosen in the state’s popular vote. In the related case [Colorado Department of State v. Baca](#), the Court upheld on the same grounds Colorado’s policy of replacing electors who attempt to cast a ballot for a person who did not win the state’s popular vote. This Legal Sidebar explains the Court’s decisions and reviews their broader implications.

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.” Under the [Twelfth Amendment](#), the electors “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.”

Today, states employ a [two-step process](#) to appoint their electors. First, states ask each political party to submit a slate of electors that it would like to represent the state. Second, states hold a general election in November—what is widely regarded as Election Day—where voters register their preference among candidates for President and Vice President. The party that wins the most statewide votes for its presidential ticket generally gets to have its slate of electors appointed by the state. (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.)

Because political parties choose the electors in the first instance, electors are expected to be loyal to their party and cast ballots for the party’s ticket if its candidates win the state vote. But that expectation has not always come true. Occasionally, so-called “faithless electors” cast ballots for candidates other than those their parties prefer—[sometimes as a form of political protest, sometimes as a strategic ploy, and sometimes, apparently, by mistake](#). To curb these surprises, [32 states](#) and the District of Columbia have

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enacted laws requiring electors to pledge to cast their votes for their parties' nominees for President and Vice President, with 15 states providing some form of sanction for electors who violate their pledge. The Supreme Court upheld the constitutionality of these pledge requirements in the 1952 case *Ray v. Blair* but had not yet weighed in on whether states may enforce the requirements with sanctions.

Washington and Colorado provide two representative illustrations of how some states seek to ensure that electors cast ballots for candidates supported by the states' voters. Washington requires prospective electors to pledge to support their party's candidates and, in 2016, subjected electors who violated their pledge to a \$1,000 fine. This punishment was imposed on Brian Chiafalo and two other Democratic electors who were appointed after Hillary Clinton won the state's popular vote but who chose instead to cast their ballots for Colin Powell. The electors challenged the fines as unconstitutional, arguing that states are powerless to restrict an elector's exercise of discretion. The [Washington Supreme Court disagreed](#), reasoning that nothing in the Constitution demands absolute freedom of choice for electors, and upheld the punishment.

Colorado, in turn, discards the ballot of any elector who fails to vote for the presidential ticket that won the most votes in the state's popular election, replacing rogue electors with alternates until all electors have submitted ballots for the ticket that received the most votes on Election Day. Democratic elector Michael Baca suffered this fate in 2016 after attempting to cast his ballot for John Kasich; his vote was nullified, and he was removed from his position as elector. Like the Washington electors, he challenged his state's law as an unconstitutional interference with what he viewed as a discretionary vote. But unlike the Washington court, the [Tenth Circuit ruled in favor of elector discretion](#) and struck down Colorado's law on the grounds that electors have a constitutional right to vote for whomever they wish. The Supreme Court agreed to hear appeals from these two cases to settle the issue.

Supreme Court Decision

In *Chiafalo v. Washington*, the Supreme Court unanimously held that states may penalize electors who fail to cast their ballots for the presidential ticket that won the state's popular vote. Justice Kagan authored a [majority opinion](#) joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, Gorsuch, and Kavanaugh, holding that state authority under Article II to appoint electors includes the power to require as a condition of appointment that electors pledge to support the state's popular vote winner and—as relevant here—to punish electors who violate that pledge. Justice Thomas authored an opinion concurring in the judgment, joined in part by Justice Gorsuch, arguing that states' power to prohibit faithless electors is more appropriately rooted in the Tenth Amendment. In *Colorado Department of State v. Baca*, the Court published a [one-sentence, per curiam order](#) reversing the Tenth Circuit for the reasons explained by the majority in *Chiafalo*. Justice Sotomayor was recused from *Baca* because of her friendship with one of the parties.

The majority opinion in *Chiafalo* read Article II of the Constitution to provide states with a broad power to appoint electors and determined that any limits on that power could be derived only from some other constitutional provision. Reviewing the Constitution's "barebones" text about the Electoral College process, the Court concluded that neither Article II nor any other part of the Constitution limited a state's ability to require electors to cast their ballots for the candidate that won the state's popular vote. According to Justice Kagan, Article II empowers states to appoint electors, and the Twelfth Amendment provides simple procedures for how the electors' ballots are to be submitted and counted. "Appointments and procedures," the Court summarized, "and ... that is all." The Court reasoned that if the Constitution's drafters intended to secure electors' prerogative to vote according to their own judgment, as some including [Alexander Hamilton](#) seem to have hoped, they could have adopted language from contemporary state constitutions that included explicit safeguards for the autonomy of electoral bodies that selected state officials. But the Court concluded the Twelfth Amendment's terse instruction that electors shall "vote by ballot" imposes no such requirement of elector independence.

The Court emphasized that the Twelfth Amendment was necessary, at least in part, to facilitate electors' practice of party-line voting. Before the Amendment was ratified in 1804, each elector cast two votes, with no distinction made between electoral votes for President and electoral votes for Vice President. The candidate receiving a majority of votes became President and the runner-up became Vice President. The problem, which soon became apparent, was that if electors for the most popular party submitted their two ballots for the party's candidates for President and Vice President, those candidates would tie and no one would receive the requisite majority—as occurred in 1800 (and, as the Court recognized, was later immortalized in the Broadway hit *Hamilton*). Alternatively, if those electors intentionally cast fewer votes for the intended Vice President, they risked allowing another party's presidential candidate to sneak into the top two. This was no hypothetical fear—the 1796 election resulted in a President and Vice President from rival parties. “By allowing the electors to vote separately for the two offices,” the *Chiafalo* Court concluded, “the Twelfth Amendment made party-line voting safe.” An Amendment ratified to accommodate party-line voting, the Court reasoned, should not be interpreted to prevent electors from binding themselves with declarations of party loyalty.

Noting that historical practice can help settle the meaning of disputed constitutional terms, the Court determined that “[e]lectors have only rarely exercised discretion in casting their ballots for President.” According to the Court's tally, only one half of 1 percent of all electoral votes in American history have been for a person other than the candidate who won the popular vote in the elector's home state, and these anomalous votes have never come close to affecting an outcome. Electors have been declaring their loyalty to their party's candidates since the nation's first contested election in 1796, and by the early 1900s states began requiring prospective electors to execute such a pledge as a condition of appointment. Washington's law, the Court concluded, “reflects a tradition more than two centuries old. In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen.”

The Court cautioned that states' power under Article II to condition the appointment of electors, while broad, is not limitless. For example, a state may not select its electors in a manner that violates the [Equal Protection Clause](#), and a state may not restrict which candidates electors may vote for in a way that conflicts with the [Presidential Qualifications Clause](#) (perhaps, for example, by requiring electors to pledge to vote only for candidates who possess previous government experience). Further, the Court explicitly refrained from deciding whether a state could enforce its pledge requirements if the state's popular vote winner died between Election Day and the date that electors submit their ballots.

In a [separate opinion](#) concurring in the judgment, Justice Thomas agreed with the majority that states have the power to require presidential electors to vote for the candidate chosen by their state. But in his view, that power is not derived from Article II or any other Electoral College provision of the Constitution. Rather, he would resolve the case under the [Tenth Amendment](#), which provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Because the Constitution does not explicitly prohibit states from enacting laws that punish or remove faithless electors, he would hold those laws are a valid exercise of state power. Justice Gorsuch joined the majority opinion and the portion of Justice Thomas's concurrence urging that constitutional silence should be resolved in the states' favor, suggesting his view is that the state laws could be upheld both on Article II and Tenth Amendment grounds.

Implications for Congress

The Twelfth Amendment assigns Congress the role of counting the votes submitted by electors and declaring a winner. [Historically](#), Congress's counting role has included the task of resolving controversies when a state's electoral votes are disputed. By [statute](#), Members of Congress may object to individual electoral votes or to state returns as a whole, and the objections are resolved by separate votes in the House and Senate. Because the Supreme Court affirmed states' right to replace faithless electors, and Congress [defers to states](#) to decide in the first instance “any controversy or contest concerning the

appointment of” electors, the Court’s decision may reduce the likelihood that faithless elector disputes will fall to Congress. But the potential for controversy persists in states that require electors to vote for the state’s popular vote winner but fail to attach any consequences for electors who vote for someone else. In such a scenario, Members of Congress may need to decide internally whether to count the anomalous votes.

In the event that electors fail to agree on a President and Vice President by majority vote, the Twelfth Amendment provides that the House of Representative shall choose the President and the Senate shall choose the Vice President. Faithless electors have never deprived a presidential candidate of an electoral majority, and by permitting states to punish or replace electors who vote independently, the Supreme Court’s decision makes it even less likely that faithless electors will splinter the vote and throw the election to the House and Senate.

The Supreme Court recognized that permitting states to bind electors to the state’s popular vote winner accords with “the trust of a Nation that here, We the People rule.” That democratic presumption notwithstanding, the Electoral College does limit popular rule by enabling a candidate to win the vote in enough individual states to accumulate an Electoral College majority despite failing to win the most votes nationally. To prevent this discrepancy, [some](#) Members of Congress have [proposed](#) amending the Constitution to [abolish](#) the Electoral College. As another means to a similar end, 15 states and the District of Columbia have enacted laws under the [National Popular Vote initiative](#) that would appoint electors pledged to the party that wins the national popular vote rather than to the party that wins the state’s popular vote. (These laws would take effect only if they are enacted by enough states that collectively control a majority of the 538 electoral votes; currently, the scheme needs the support of states with an additional 74 electoral votes.) By affirming that Article II allows each state to appoint electors “in whatever way it likes,” the Supreme Court’s opinion in *Chiafalo* could be read to suggest the plan, if enacted, would survive constitutional challenge.

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