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Electoral College: Supreme Court Decides That States May Replace or Punish Presidential Electors Who Do Not Vote for the Candidate Who Won the Most Votes in the State, but Leaves Several Questions Unanswered

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Electoral College

Supreme Court Decides That States May Replace or Punish Presidential Electors Who Do Not Vote for the Candidate Who Won the Most Votes in the State, but Leaves Several Questions Unanswered

by Alan Raphael

In *Chiafalo v. Washington,* Docket No. 19-465 (decided July 6, 2020), and *Colorado v. Baca,* Docket No. 19-518 (also decided July 6, 2020), the Supreme Court unanimously determined that states may punish or remove presidential electors who fail to vote for the candidate who wins the most votes in the state. These rulings will curtail or end a rare, but recently more common, practice of electors voting for someone other than the candidate who won the most votes in the state. Although the decision leaves it up to states whether to have legal provisions allowing for the replacement or punishment of these "faithless electors," it is highly likely that these decisions will lead many states to change their laws to bind electors to their party's candidates and to replace or punish those who fail to live up to their pledge. These decisions leave unanswered two important questions: whether states could require electors to vote for the nationwide vote winner instead of the candidate who carried the state, and how electors should vote if the candidate who carries the state dies before the electors' votes are counted.

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Unlike most countries with a popular election for the head of the national government, the United States does not award the office to the person receiving the most votes. Instead, the person receiving a majority of the votes of the Electoral College becomes president. U.S. Const., Art. 2, Sec. 1; Amendment XII. If no person receives a majority, something which happened only once, in 1824, the election is decided in the House of Representatives with each state having one vote. Each state has a number of electors equal to the number of its members of Congress. U.S. Const., Art. 11, Sec. 1, Cl. 2. This provision states: "Each State shall appoint, in such Manner as the Legislature thereof may direct [the electors.]" In every state, all voters are eligible to vote for president and vice president. With two exceptions, the states have determined that all electoral votes go to the candidates for president and vice president who receive the largest number of votes in the state. The Supreme Court has previously ruled that the constitutional provisions permit the states to decide on the allocation of its electoral votes; the decision indicated that "…the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States." *McPherson v. Blacker,* 146 U.S. 1 (1892). (Michigan had the power to award an electoral vote to the candidate who won each House district with two votes going to the statewide vote winner.)

Some of those who wrote or ratified the Constitution expected the electors to exercise independent judgment as to who should be president, most notably Alexander Hamilton, who expressed that view in the *Federalist Papers*. Within ten years, political parties formed and supported candidates for national office. Political parties commonly selected candidates for the national executive offices, and parties chose electors who would vote for their party's candidates if that person won the most votes in the state. Of all the electoral votes cast since the beginning of the country, fewer than 1 percent of them have been cast for a person other than the candidate for whom the elector was expected to vote. Almost half of those votes occurred in 1872, when Democratic electors with few exceptions did not cast their votes for party candidate Horace Greeley, who had died between election day and the casting of the electors' ballots; because President Ulysses S. Grant had won the majority of the electoral votes in that year, the votes of Democratic electors did not affect the result of the election. Although there have been close votes in the Electoral College, no presidential election result has ever been altered by the votes of faithless electors.

Almost 70 years ago, the Court held that a state may require people selected as electors to pledge to support their party nominee. *Ray v. Blair,* 343 U.S. 214 (1952). That decision, however, did not determine whether states could require the elector to honor that pledge. Two-thirds of the states have enacted pledge requirements, and more than one-third have laws allowing for the replacement or punishment of an elector who does not vote for the popular vote winner in the state.

The number of faithless electors in 2016 was the greatest in our history, if one does not include the 1872 election. Ten electors, mostly in states carried by the Clinton-Kaine Democratic ticket, voted or sought to vote for persons other than their party nominees. A number of these, including the electors in the cases just decided by the Supreme Court, were part of the "Hamilton Electors" movement. The movement sought to persuade enough electors to vote for someone other than Donald Trump or Hillary Clinton in order to deny Trump the Electoral College majority and force the election into the House of Representatives where, they hoped, a more moderate Republican would be selected as president. KUOW broadcast 1/21/2019 (as to *Chiafalo*); NBC News broadcast 1/23/20 (as to *Baca*). The movement failed to achieve its objective.

Peter Chiafalo and two others were among the 12 Democratic presidential electors elected from the state of Washington in the 2016 election. Pursuant to Washington State law, electors must "…perform the duties required of them by the Constitution and laws of the United States." RCW 29A.56. The state law does not explicitly require the electors to vote for the statewide vote winner, but it does provide for punishment of electors who do not by a fine of up to $1,000. The three Washington electors did not vote for Clinton, who carried the state, but instead voted for Colin Powell, a Republican former Secretary of State, for president; those votes were counted for Powell. The Washington Secretary of State fined each of these electors $1,000. The electors contested the fine, asserting that the Constitution permitted them as electors to vote for the person they believed should be president; an administrative proceeding and the Washington courts upheld the state action. *Chiafalo v. Washington,* No. 19-465 (Wash. Sup. Ct. 2019).

Colorado law requires presidential electors to cast their votes for the winner of their state's general election. Colo. Rev. Stat Sec. 1-4-304(1). If they refuse to do so, the statute declares a vacancy and allows the party to choose other electors. Michael Baca and two other Colorado electors declared after the election that they would vote for John Kasich, the Republican governor of Ohio who had unsuccessfully sought to be the Republican nominee, although they had been selected by the Democratic party whose candidate Hillary Clinton had carried the state. Baca cast his vote for Kasich and was replaced as elector; the replacement elector voted for Clinton. The other two electors reluctantly cast their votes for Clinton despite wanting to vote for Kasich. The three electors sued, alleging that their constitutional rights had been violated. The U.S. Court of Appeals for the Tenth Circuit ruled in their favor. *Baca v. Colorado Department of State,* 935 F.3d 887 (10th Cir. 2019).

The Supreme Court granted a writ of *certiorari* to review these rulings. The Court affirmed the Washington decision and reversed the Tenth Circuit ruling. It rejected the electors' claim that states could not require them to vote for the candidate of the party that selected them, the candidate who received the highest number of votes statewide.

Chiafalo filed a brief for both the Washington and Colorado cases, although separate counsel presented oral argument to the Court. Chiafalo argued that electors could not be limited in exercising their independent judgment in casting their votes in the Electoral College. In support, he asserted that the intent of the framers of the Constitution was that electors should do so, that small numbers of electors have done so without interference for over 200 years, that the lack of sanction for over 200 years to electors' acting independently indicates a consensus that electors had the right to do so, that nothing in the Constitution gives the states the power to restrict their free choice in voting, and that the state power to determine "the manner" of choosing electors does not include a power to direct their votes.

In its decision, the *Chiafalo* Court concluded that the Constitution allows states to require electors to vote for the candidate to whom the elector was pledged if that candidate wins the highest number of votes in the state. The Court found numerous reasons to reach this ruling. First, the Constitution "…convey[s] the broadest power of determination 'over who becomes an elector'" to the states, and they may impose conditions on their votes unless the condition violates some other provision of the Constitution. Second, although Hamilton and others may have believed that electors were to exercise independent judgment in casting their votes, the Constitution does not explicitly provide for electors to make independent judgments as to whom to select. Third, for over 200 years, electors have voted for candidates selected by others and only deviated from that course in about 1 percent of their votes, or ½ percent if the 1872 election is omitted. Fourth, the consensus that electors do not make independent choices has been bolstered in the past half century by the increasing number of states that have made electors pledge to support their party candidates and made provisions for states to replace or penalize those who act independently.

At present, two-thirds of the states require electors to pledge to vote for the candidate of the party that placed the electors on the ballot. About half of those states will replace faithless electors, as in Colorado, or punish electors for a noncomplying vote, as in Washington. In light of the Court's ruling in these cases and the unpopularity of these faithless electors' actions, it is likely that many more states will pass such laws. Because the remedy of replacing the electors so that their votes will not be counted is more effective and prevents any distortion in the election result, it is probable that most states will adopt a provision like that of Colorado, although some states might also adopt a criminal sanction, like Washington.

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Although public opinion surveys indicate that a large majority of the population would prefer to have a direct popular vote for president, without the operation of the Electoral College and with the person winning the most votes becoming president (or perhaps requiring a runoff among the two leading candidates if no person received a majority of the votes cast), such a change in the Constitution is highly unlikely. Approval of a constitutional amendment requires a two-thirds vote of both houses of Congress, plus a majority vote of three-quarters of states through legislative or popular vote. U.S. Const., Art. V. Congress last considered an amendment to end the Electoral College and substitute a national popular vote in 1969 and 1970, and it was not adopted. In 1969, a House vote approved the proposed amendment by a 5–1 margin. The issue died in the Senate after a vote to end debate (cloture motion) failed; it had the support of a majority of senators but not the 60 votes required to end debate. Because the Electoral College provides a disproportionate voice to states with low populations, a change in the Constitution would require approval by many smaller states, which would lose their greater leverage under the present system. Some legislators and candidates may propose replacing the Electoral College with a

nationwide popular vote, either because they believe it is justified or because it is a popular position, but there is little likelihood of such a proposal receiving a hearing and favorable vote in Congress, and even less chance of states agreeing to it if Congress approved.

Unanswered Questions

Because the federal courts consider only actual cases and controversies, the *Chiafalo* decision did not address two remaining issues, one of which might be an intriguing attempt to bring about a nationwide vote determining who wins the presidency without having to amend the Constitution.

What happens if a candidate dies after the election but before the casting of votes in the Electoral College? Only once before, in 1872, has the losing candidate died before the electors cast their votes. What if, instead, the deceased person was the candidate who received the electoral majority in the election? The *Chiafalo* Court clearly stated that it was not deciding the question of whether a state could require that the votes be cast for the deceased: "… because the situation is not before us, nothing in this opinion should be taken to permit the States to bind the electors to a deceased candidate." It noted that some states have drafted their pledge laws to give electors voting discretion when their candidate has died and that many other states would likely release electors from their pledge to the deceased candidate. This language suggests that the Court would decide that electors would not have to vote for a dead candidate, but indicates nothing of whether the electors could be bound to vote for someone designated by their state or national political party, and whether voting for someone else would merit removing or punishing the electors.

Would the Supreme Court allow states to direct electors to vote for someone who was the national vote winner but not the winner of the state's popular vote? Proponents of electing the national vote winner, despairing of their chances of amending the Constitution, have pushed the National Popular Vote Plan (NPVP or "Plan"). Under this proposal, states are asked to agree and enact state laws obligating electors to vote for the national vote winner regardless of who got the most votes in the state. At present, 16 states with a total of 196 electoral votes have agreed to this measure, which would not take effect unless states with a majority of electoral votes (270 at present) agreed to it.

The constitutionality of such an agreement is unclear in light of the reasoning of the *Chiafalo* decision. Because the Court does not decide hypothetical issues, a ruling on that issue would require all of the following: 1) states with 270 or more electoral votes adopt the NPVP; 2) these states change their laws regarding electors to require votes for the winner of the nationwide vote; 3) an election occurs in which the winner of the nationwide vote and the winner of the electoral vote as traditionally cast differ; 4) a majority of the electoral votes are cast for the nationwide popular vote winner or some of the electors vote for their party candidate despite the state law directing them to vote otherwise, and the outcome of the election is changed; and 5) a person or persons with standing sues and is not barred for any procedural reason from contesting the result of the electoral vote.

On the one hand, the *McPherson* decision held that states have the exclusive power of determining the manner of selecting electors; the *Chiafalo* decision concluded that states have great power over electors and can punish or remove them for casting votes contrary to the state law. The proponents of the NPVP would argue that these precedents indicate that adopting and enforcing the Plan would be within the power of the states under the Constitution. On the other hand, the Court in *Chiafalo* repeatedly indicated that the electors are expected and can be required to vote for the candidate receiving the most votes in the state. The NPVP does the opposite. The Plan would require electors to vote for the state loser in the election, if the state loser was the national vote winner. Because the electors are selected by their political parties, following the Plan would require fervent party members to vote for the candidate of the opposing party, although the electors' own party carried the state. It is easy to imagine that some strong party supporters might well defy state law. Unless their state law provided for their replacement, as Colorado did in the 2016 election, those votes would be counted even though they were cast contrary to the dictates of the state law.

Perhaps, by drawing attention to the Electoral College's power to thwart the popular will, *Chiafalo* may encourage consideration of a change in our method of selecting the president to allow for a nationwide popular vote, although the chances of success of an amendment adopting selection of the president by nationwide popular vote are doubtful.

In summary, the *Chiafalo* decision clearly establishes that states may remove or punish electors who do not vote for the candidate who wins the state's popular vote. Perhaps, by drawing attention to the Electoral College's power to thwart the popular will, it may encourage consideration of a change in our method of selecting the president to allow for a nationwide popular vote, although the chances of success of an amendment adopting selection of the president by nationwide popular vote are doubtful. The decision provides an impetus for states to alter their laws to allow them to act as Washington and/or Colorado did in 2016. The *Chiafalo* decision suggests that electors would not be bound to vote for a deceased candidate. It does not mention, and provides contradictory precedent, regarding the legality of the NPVP were it to be enacted.

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