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Symposium: Constitutional doctrine and political reality in the faithless elector cases

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Our constitutional scheme for electing a president is a curious one indeed. We are all familiar with one of its features: the built-in imbalance between state population and state electoral power in the "Electoral College" (a term, incidentally, not found in the Constitution itself). Because Article II, Section 1 of the Constitution allocates to each state one "presidential elector" for each member of the House of Representatives to which the state is entitled, plus two additional electors (one for each of the state's senators), residents of smaller states end up with proportionately more electoral power than larger states; for instance, New York gets one elector for every 670,000 residents, while South Dakota gets one for every 295,000 of its residents.

There are, however, other less familiar but equally puzzling or noteworthy elements to the overall scheme. Who are those "electors," anyway? And what, exactly, do they do while serving in the "Electoral College"?
You can be forgiven for not having paid much (or any) attention to these questions since high school social studies class. Perhaps you notice when, every four years, a month or so after the presidential election, there is an announcement, buried at the back end of the newspapers and your news feed, that the Electoral College has met and formally ratified the election results. Most of us, I suspect, greet the news with a shrug; it's just a bit of "kabuki democracy" – purely ceremonial, and not, in the greater scheme of things, terribly important.

The constitutional text, and the original understanding of the Framers as to the meaning of that text, however, tell a very different story. Article II, Section 1, as modified by the 12th Amendment in 1804, lays out the basic scheme.

- The states each appoint their own electors, "in such Manner as the Legislature thereof may direct."
- The electors "meet in their respective States" on a date that "Congress may determine" and that "shall be the same throughout the United States." (It is currently the first Monday after the second Wednesday in December.)

- On that date, "the Electors shall meet in their respective states, and vote by ballot for President and Vice-President."
- The ballots are transmitted to the "seat of government of the United States" to be counted.
- The "person having the greatest number of votes for President, shall be the President [and] the person having the greatest number of votes as Vice-President, shall be the Vice-President."

On the face of it, then, and strange as it may seem to us today, the Framers of the Constitution contemplated that electors would not merely ceremonially ratify the president's election by others, but that they – the electors – would actually elect the president. As Alexander Hamilton put it in Federalist No. 68, the president would be chosen by "men most capable of analyzing the qualities adapted to the station," noting that a "small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation." Or, as Justice Robert Jackson wrote many years later in *Ray v. Blair*:

No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, is that electors would be free agents, to exercise an independent and nonpartisan judgment as to the [individuals] best qualified for the Nation's highest offices.

This system was part of the Constitution's ingenious method of diffusing the power to select officers of the new federal government by distributing it to different bodies, each ultimately accountable to "the People." Members of the House of Representatives would be chosen directly by "the People of the several States"; senators would be chosen by members of a different body – the state legislatures; and the president and vice-president would be chosen by yet a third body – the presidential electors.

Ingenious and unprecedented, yes, but it hasn't quite worked out as intended. The indirect election of senators was replaced by direct election in the 17th Amendment in 1913. And although the constitutional text concerning presidential elections has not been altered since 1804, the electors have never really played the role originally contemplated for them, because the states had something else in mind.

Remarkably enough, given that the Constitution gives states the power to enact pretty much whatever mode of appointing electors they would like, all 50 states have converged on a more or less identical system for choosing electors:

- Before any votes are cast, the political party representing each eligible presidential candidate must deliver a slate of proposed electors to state election officials;
- All proposed electors must pledge in some fashion that if appointed, they will vote for the candidate on whose slate they appear;
- Voters cast their ballots for one or another of the eligible presidential candidates on the first Tuesday in November;
- The votes are counted and the count certified; and
- The state appoints its entire complement of electors – winner-take-all – from the slate put forward by the party whose candidate received a plurality of the votes cast.

The system virtually ensures that the collective result of the electors' balloting is entirely foreordained, predetermined by the November vote tallies. Electors can be counted on to do what they have pledged to do, i.e., to vote for the candidate on whose slate they appeared.

But what if they don't?

This brings us to the so-called "faithless," or "anomalous," electors in the two cases at hand: *Chiafalo v. Washington* and *Colorado Department of State v. Baca*. In 2016, Hillary Clinton won the popular vote in both Washington and Colorado. In both states, however, a small number of electors, though they had been chosen by the Clinton campaign and pledged to vote for her, cast their electoral ballots for someone else – the Colorado electors for John Kasich, the Washington electors for Colin Powell. Colorado responded by rescinding the appointments of these electors and replacing them with electors who voted as directed; in Washington, the electors were each fined $1,000.
The (narrow) question in these cases is: Does the Constitution permit a state to control the behavior of its electors in this way, removing them from office or imposing some sort of punishment on them, if they break their pledge and vote contrary to state direction?

It is a question that the Supreme Court has never squarely addressed before. In my view (shared by the U.S. Court of Appeals for the 10th Circuit in the Colorado case, though not by the Washington Supreme Court in the Washington case), the answer is no. The constitutional argument is fairly straightforward. States have absolute power to appoint electors however they wish; but once electors have been appointed, they are federal government officials, performing a federal government function, and states may not interfere with the performance of federal functions by federal officials. This venerable constitutional principle is traceable back as far as Chief Justice John Marshall's 1819 opinion in *McCulloch v. Maryland*, which invalidated Maryland's attempt to impose a tax on banknotes issued by the Bank of the United States. A state may not order a member of its delegation in Congress, or one of its senators, or the Secretary of Agriculture who is a state resident, to take (or to refrain from taking) certain actions in their official capacities or risk punishment, and the same is true of the electors. In the 10th Circuit's words:
In short, while the Constitution grants the states plenary power to appoint their electors, it does not provide the states the power to interfere once voting begins, to remove an elector, to direct the other electors to disregard the removed elector's vote, or to appoint a new elector to cast a replacement vote. In the absence of such a delegation, the states lack such power.

What makes these cases particularly interesting, and particularly difficult, though, is the way this foundational constitutional principle butts up against practical and political realities. Over the last 200 years or so, our political institutions, and our entire political system, have been shaped by the expectation that electors are not free agents exercising their independent discretion to choose among the candidates. Imagine the disbelief and outrage that would have greeted the announcement on December 19, 2016, that the electors, exercising their independent and nonpartisan judgment, had chosen Colin Powell, or John Kasich – or Hillary Clinton, for that matter – to be our president. That's not how we, collectively, think the system works – even if that's how it works on paper, and how its designers intended it to work.

Paying heed to this principle of state noninterference in the performance of federal duties without unnecessarily destabilizing long-settled and deeply rooted expectations undergirding our electoral system would be no simple task for the Supreme Court in the best of times – and these are not the best of times. Indeed, it strikes me as a singularly inopportune moment for the court to be entering this fray. Not only are we in the midst of a social and economic crisis of unprecedented magnitude, but the final stage of a presidential campaign that is likely to be unusually bitter and contentious is about to begin. Constitutional doctrine and constitutional history may weigh heavily, as I believe they do, in the electors' favor here. But affirming the electors' independence from state control now – giving our political system no real opportunity to digest and adjust to the news before the next presidential election is upon us – strikes me as unwise. We have muddled through without clarification on this question for 200 years; another one won't kill us.

The pandemic gives the court the opportunity to move this case, as it has moved a number of other cases, onto next year's calendar. I'm very sorry it hasn't – yet – seized it.

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