



Written by [Steve Byas](#) on July 8, 2020

## Supreme Court: States May Punish “Faithless Electors”

In a rare 9-0 decision, the U.S. Supreme Court decided on Monday to reject two separate challenges to state laws in Colorado and Washington State that provide for either punishment or removal for “faithless electors.” A faithless elector is usually defined as an elector who does not cast his or her ballot for the presidential candidate who ran first in his or her state’s popular vote.



In Washington State, three electors were pledged to support the winner of that state’s popular vote — Democratic nominee Hillary Clinton — but decided to cast their vote for someone else, in a scheme to keep Republican nominee Donald Trump from winning the election when the Electoral College voted in December 2016. The scheme involved these three Democratic electors casting their ballots for former Secretary of State Colin Powell (supposedly a Republican, but one who almost always supports the Democratic Party nominee instead) with the hope that they could then get electors in states in which Trump won the popular vote to vote for some Republican other than Trump. The scheme failed, and the three were assessed \$1,000 fines. They argued that this was unconstitutional, that once elected as a presidential elector, there was nothing in the Constitution stopping them from voting for whomever they wished.

A second challenge, from Colorado, involved the removal of elector Michael Baca, a Democrat, who should have cast his vote for Hillary Clinton, the winner of the popular vote in the state. The 10th Circuit Court of Appeals — based in Denver — said that Colorado’s faithless elector law is unconstitutional.

But the Supreme Court rejected the arguments of the electors in both Colorado and in the state of Washington. Justice Elena Kagan issued an 18-page opinion, in which she wrote, In the 20th century, many states have passed faithless elector punishment laws, noting that such laws are on the books in 32 states and the District of Columbia. Some states remove faithless electors, which seems much more effective, as a \$1,000 fine seems a rather small amount of money to deter someone from affecting the outcome of a presidential election.

The Constitution says little, or as Kagan put it, “is barebones about electors.” Indeed, in Article II of the Constitution, it only says, “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 states may be entitled in the Congress.” (Emphasis added.) The 12th Amendment adds more language about electors, but nothing more of substance about how they are to be chosen or for whom they shall vote.

Kagan took from this that nothing in the Constitution “expressly prohibits states from taking away presidential electors’ voting discretion as [the state of] Washington does.” She added that of over 23,000 electoral votes cast since the first presidential election in 1789 which made George Washington the first president, there have only been 180 “faithless” votes — and one-third of those came in 1872, when the nominee of the Democratic Party died shortly after election day. “Putting those aside, faithless



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votes represent just one-half of one percent of the total.”

While Justice Clarence Thomas agreed with the outcome, he filed a separate opinion (joined in part by Justice Neil Gorsuch). In it, Thomas agreed that faithless elector laws are constitutional, but his argument noted that was because the Constitution does not say anything about whether the states have the power to require electors to vote for the candidates they are pledged to support. Under Thomas’ reasoning then, the states should be allowed to do as they wish under the concept of federalism, as expressed clearly in the 10th Amendment — “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.”

In other words, if the legislature of a state wants to dictate how an elector votes, it can do so. In the early years of the Republic, the majority of state legislatures simply appointed the electors. While not actually requiring them to vote for a specific candidate, they certainly could have picked only persons they could expect to back a particular candidate. As the years passed, more and more state legislatures enacted laws awarding the state’s electoral votes to the elector candidates of the political party whose nominee carried the state.

As Kagan argued, the original Electoral College system created by the Constitution’s framers did not anticipate political parties as we have today. Originally, state legislatures would select men they believed would soberly consider who would be the best person for the office of president of the United States. This system was, according to Alexander Hamilton, writing in *The Federalist Papers*, the one part of the Constitution with unanimous support. While not perfect, Hamilton contended that it was “excellent.”

Today, with the creation of political parties, each political party selects loyal members of their party to serve as candidates for the office of elector. These men and women are ordinarily hard-core members of the party, and are usually selected at party conventions as an honor for years of service to the party. This is why there are so few “faithless” electors. Then, on election day, voters cast their ballots for a slate of electors pledged to support the nominee of their political party. Whichever party’s nominee wins the most votes in the state (not necessarily a majority, but at least a plurality, or more than anyone else) winds up with all of the state’s electoral votes. (Minor exceptions exist in Nebraska and Maine, where an elector is chosen by popular vote in each congressional district, and two are chosen based on the state-wide popular vote).

The modern system is certainly not what the Founders intended — a system in which a select group of highly informed and respected men would sit down and choose the chief magistrate of the country, without regard to all the electioneering we see today. However, as Justice Thomas noted, the principle of federalism still leaves it up to each state to craft laws determining *how* those electors are to be chosen. The Electoral College, despite its critics, still protects the interests of the smaller states against the whims of the population centers of the country imposing its will on the lesser-populated areas of the country. It still maintains some semblance of the idea that the purpose of government is to protect the life, the liberty, and the property of each individual citizen, rather than give the majority the right to take away those rights from the states and its citizens.

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