

# Chiafalo v. Washington and Colorado Department of State v. Baca and the Obsolescence of the Electoral College

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## Intro:

The current voting system implemented in the United States via the Constitution utilizes an Electoral College to elect the president and vice-president. With the exception of Maine and Nebraska, currently under this system the states hold popular elections that determines how their share of the Electoral College will vote. A state's number of electoral votes is determined by the combined number of representatives they have in Congress. Thus, despite the appearance of voting for the president, a citizen's vote actually goes toward selecting the composition of their state's Electors. The presidential candidate who wins more than half of the Electoral College's votes (270 out of 538 votes) wins the presidency.

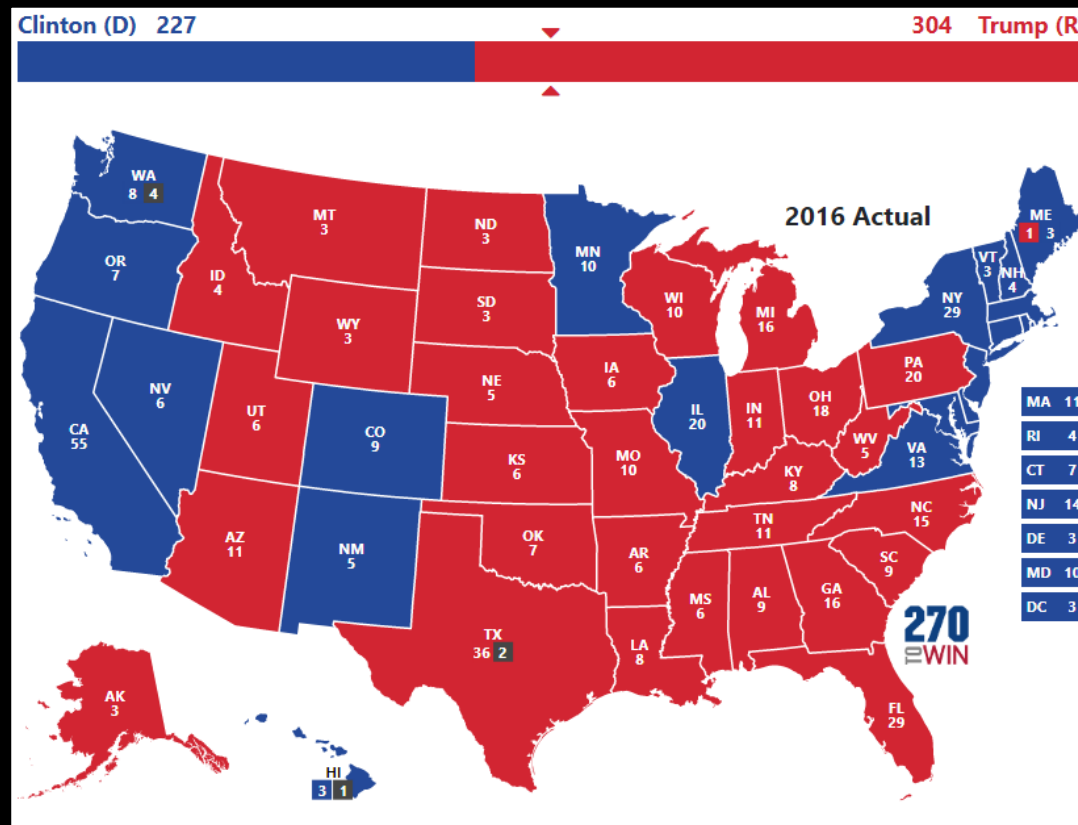
In the United States Supreme Court's 2019 term, the Court decided on the cases *Chiafalo v. Washington* and *Colorado Department of State v. Baca* each of which looked at the role that the presidential Electors play in this process. The Court further restricted the ability for Electors to exercise autonomy with their votes, essentially limiting their roles to that of a body of liaisons whose votes go toward their state's popular vote winner regardless of their own preferences. *Chiafalo* and *Baca* provide evidence that the electoral college's function has become obsolete, differing vastly from its supposed original intent that allowed the Electors to vote for the candidate whom they believed most meritorious and deserving of the presidency.

## Background:

The 2016 presidential election was only the fourth contest to feature an elected president who won the Electoral College while losing the popular vote. Relevant here are three Electors from Washington, Peter B. Chiafalo, Levi Jenet Guerra, and Esther Virginia John, and one from Colorado, Michael Baca, who were each penalized for breaking state laws that punished so-called "faithless Electors," or Electors who vote contrary to their state's pledge to vote for their state's popular vote winner. In Washington, Chiafalo, Guerra, and John were each fined \$1,000 on December 29, 2016 for breaking Washington's state law and "failing to vote for the nominee of their party" (Pet. For Certiorari Chiafalo, 12). In similar fashion, Baca broke his pledge to vote for Clinton and instead attempted to vote for John Kasich. However, unlike the Washington Electors whose votes still counted toward the electoral college, under Colorado law, Baca's vote was subsequently replaced with an Elector's ballot that was "properly cast... for Clinton" (Pet. For Certiorari Colorado, 4).

The Washington and Colorado Electors sued their states to contest these restrictive pledge laws that disabled and punished the discretion they practiced in the 2016 election. In their reply to Washington's brief opposing the Supreme Court's intervention, the Washington Electors stated that their "primary motive [was] to insist that a state has no power to fine (or remove) electors for failing to vote one way or another" (Reply in Support for Writ of Certiorari, 11). While their legal reasoning for the pursuit of litigation stemmed from their effort to prevent restrictive state laws barring Elector discretion, the Electors' pursuit of faithless votes stemmed from their desire to prevent Donald Trump from becoming the next president. The Electors intended to use the discretionary powers that they believed they possessed to achieve this.

The faithless Electors challenged their punishments in court, with the Washington Electors reaching the Supreme Court of Washington and Michael Baca reaching the Tenth Circuit Court. These courts reached differing decisions regarding the power states can wield over their presidential Electors. Ultimately, the US Supreme Court granted certiorari to reconcile the differing conclusions reached by the two lower courts (*Chiafalo v. Washington*, 7). By granting certiorari, the Supreme Court agreed to decide what the true role of an Elector is, whether they have discretion when they vote, and whether states have the power to punish Electors who break their pledge.



Above: the 2016 Electoral map note the various faithless votes (Maine's "red" vote is not a faithless vote)

## Historical Interpretation of Electors:

The historical interpretation of the Constitution, the period surrounding its ratification, as well as previous Supreme Court decisions are vital to understanding the arguments produced by the states, faithless Electors, and the Supreme Court. To briefly summarize the states and faithless Elector arguments:

### Faithless Electors' argument:

- Hamilton's *Federalist 68* explains that Article II, Section 1 gives presidential Electors discretionary voting power
  - The pledges Electors take are not enforceable by law, replicating protections afforded to Congressmen under the Speech and Debate Clause
    - A pledge constitutes a moral obligation not punishable by law (Oral Argument of L. Lawrence Lessig, 14-15)
  - No faithless vote has ever been rejected and there have been over 180 anomalous votes (Consolidated Opening Brief for Presidential Electors, 46-47)
  - Dictionary definitions from the time period define "vote" to mean a discretionary action that cannot be controlled (Consolidated Opening Brief for Presidential Electors, 27)
- ### States' argument:
- The faithless Electors' reliance on *Federalist 68* causes them to overlook the fact that the Constitutional Convention decided *only* the methodology of selecting the Electors, not if they have discretion (Briefs for South Dakota and 44 States and The District of Columbia as Amici Curiae in Support of Colorado and Washington, 8)
  - Instead of focusing on the few faithless votes, the votes produced by faithful Electors reveals that they do not have discretionary voting power (Brief for Respondent State of Washington, 36)
  - The dictionary definitions provided by the faithless Electors only go so far to describe the role of Electors

With these arguments considered, the Supreme Court's decision looked to resolve the dispute. In fact, the Supreme Court used its own interpretation of the historical functioning of the Electoral College to come to its decision. This decision is important in understanding the true role of the Electors.

## SCOTUS' Decision:

The Supreme Court decision, which concluded that the states have the power to curb Elector discretion through the punishment of faithless Electors, can be summarized as:

- The proliferation of the two-party system led to the contemporary Electoral College, specifically after the passage of the Twelfth Amendment
  - Led to popular voting in states and the presidential candidates appearing on ballots instead of the presidential *Electors*
  - Electors would promise to vote for their party's candidate since the "Nation's first elections" (*Chiafalo v. Washington*, 15)
- Neither Article II nor the Twelfth Amendment explicitly prohibit a state from punishing a faithless Elector (*Chiafalo v. Washington*, 13)
- A vote does not require discretion to be considered as one (*Chiafalo v. Washington*, 12)
- Noting the pocket veto cases and select writings of James Madison, whenever there is interpretative uncertainty, the Constitution's true meaning can be derived from historical practice (*Chiafalo v. Washington*, 13)
  - Elector discretion not part of historical practice

Thus, states can now mitigate any unpredictability inherent with an Electoral College riddled with discretionary Electors. Electors are now accountable to the voters of their states and as such the electoral preferences of their states can be protected.

## The Electoral College's Obsolescence:

Because the role of the presidential Electors now deviates from the Hamilton model, where Electors were given discretionary voting powers for the president, the Electoral College can be even better understood as an institution that weights every states vote. Note that it already did before *Chiafalo* and *Baca*, but now that an Elector's vote is fully understood to represent the votes of their state, the problems already observed with an Electoral College are exacerbated. For instance, in 2016:

- One Electoral vote in New York accounted for approximately 260,000 voters
- One Electoral vote in Wyoming accounted for approximately 81,000 voters

As indicated above, a person's vote in Wyoming holds more sway than one's in New York.

Additionally, the Electoral College counts only the votes of a *state's* popular vote rather than the popular vote of the nation at large. This is despite the fact that the executive is a representative for the entire United States unlike their Congressional counterparts who work in DC on behalf of the constituents in their states. Thus, the votes of a *state's* losing party hold no weight for a position that is meant to represent the entire country.

It is therefore necessary to reform the methodology of electing the president, especially after the decisions in *Chiafalo* and *Baca* because without Elector discretion, the argument for an Electoral College makes even less sense.

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