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A History of Elector Discretion – Part Two

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In its opinion in *Chiafalo v. Washington*, the Supreme Court disposes of the actual history of elector discretion as too inconsequential to merit its serious analysis. A history of elector discretion not only includes a history of the electors who exercised discretion when casting electoral votes, it also includes a history of commentary on the role of electors as the Constitution was created and, more importantly, as Congress was attempting to amend it. The Court almost completely ignores this history. When Congress crafted the Twelfth Amendment in 1803 it recognized that *"the right of choice [of president] […] devolve[s] upon"* the House of Representatives *from* the Electoral College. Section 4 of the Twentieth Amendment twice repeats this text. As the House Committee reporting the Twentieth Amendment reported it to the full House in 1932 it acknowledged that electors are free to exercise discretion. Parts II – V of this Article, which appeared in the previous issue, reviewed the history of elector discretion from the earliest days of the republic to the end of the nineteenth century. Parts VI – VIII of this article carry the narrative forward through the twentieth century to the present day.

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This is the second part of a two part Article. Parts I – V appeared in the previous issue. Part II presented a taxonomy of anomalous electors. Part III analyzed the roles played by anomalous electors in the four presidential elections held prior to ratification of the Twelfth Amendment. Part IV turned its focus to the Twelfth Amendment debates. Part V reviewed additional evidence from the nineteenth century from congressional debates on possible constitutional amendment, classic constitutional commentaries, and presidential elections.

Part VI shifts the focus to Congress in the twentieth century as it amended and implemented the Constitution. Part VI.A reviews Congress's pronouncements on elector discretion as it crafted what would become the Twentieth Amendment. Part VI.B jumps ahead to the early 1960s. In Part VI.B.1 the Article reviews the very brief congressional debates on the Twenty-Third Amendment in 1960. This amendment allows the District of Columbia to participate in presidential elections. Part VI.B.2 reviews a 1961 Senate subcommittee hearing in which Henry Irwin, an Oklahoma elector in 1960 who anomalously cast his electoral votes, testified. Part VI.B.3 reviews congressional debates that same year as Congress crafted legislation implementing the Twenty-Third Amendment. Part VI.C moves the calendar forward to 1969, the one time Congress debated whether or not to accept an anomalously cast electoral vote. It shows that a member of Congress grossly misinterpreted passages from the Twelfth Amendment debates as he attempted to show that the Eighth Congress intended that the will of the people

not be violated. The Eighth Congress was concerned that *the House of Representatives* might ignore the will of the people of the entire nation and put an intended vice presidential candidate in the Chief Magistrate's chair.

Part VII presents an account of anomalous electors in the last hundred years. Part VII.A tells the story of *statement-making* electors in this period. Part VII.B covers electors not simply making a statement. Part VII.B.1 tells the interesting story of Tennessee elector Preston Parks who appeared on both the Democratic slate and the States' Rights slate in 1948. Part VII.B.2 turns its attention to the States' Rights movement's attempt to deny John Kennedy a presidential victory in the Electoral College. This attempt to form a coalition of *alternative-seeking* electors foreshadows the Hamilton Electors' attempt to deny Donald Trump an electoral vote majority in 2016. Part VII.C reviews the anomalous electors of 2016.

Finally, Part VIII contemplates possibilities for anomalous electors with *Chiafalo* now the law of the land.

VI. TWENTIETH CENTURY CONGRESSES COMMENT ON ELECTOR DISCRETION

During the course of the twentieth century, Congress approved one constitutional amendment governing the mechanics of the presidential election process. It also approved other amendments impacting participation in the process. Congress took the opportunity to comment on the role of electors as it crafted these amendments and implemented one of them.

A. THE TWENTIETH AMENDMENT

The Twentieth Amendment is no more *merely a lame duck amendment* than the Twelfth Amendment is merely a bookkeeping provision.[346]

The Twelfth Amendment text acknowledging elector discretion hard-coded the March 4 inauguration date. Consequently, any proposal to change the start of a presidential term had to revise (or delete) this text. Making such a change gave Congress the opportunity to reassess this constitutional acknowledgement of elector discretion as it did much more than change the reference to Inauguration Day. As it crafted what would become the Twentieth Amendment over more than three decades, Congress never considered reneging on this acknowledgement.

Congress's recommitment to the "right of choice" language goes back to 1898 when Massachusetts Republican Senator George Frisbee Hoar

346. *See supra* note 167.

introduced an amendment that moved the start of the congressional and presidential terms to April 30 and simply changed the hard-coded reference accordingly.

> If the House of Representatives shall not choose a President, *whenever the right of choice shall devolve upon them*, before the 30th day of April, at noon, next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.[347]

When interest in changing the start of the terms revived in 1910, Congress recognized that additional changes might be needed to address the death of a president-elect.[348] Two years later a House report recognized the threshold crossed when the electors cast their votes.

> If the candidate for the chief magistracy of the Nation should die before the assembling of the electoral colleges on the second Monday of January, how should they vote? *Literally, the electors would have absolute control of the selection. In strictness there is as yet no President elect; the electoral colleges have plenary power of choice and, upon the original theory of the rights and duties of presidential electors, they may elect whomsoever they please.* … If a choice by the electoral colleges were instantly to be followed by induction into the Presidency, there would be no possible need for amendment of the Constitution, for *no amendment should impair the absolute freedom of choice by electors unless it is the plain will of the people to take their theoretical power away.*[349]

Although interest in changing the start of the terms waned over the next ten years, Congress did not completely disregard elector discretion. When the Sixty-Fifth Congress considered a proposal to eliminate the office of elector the proposal's supporters argued:

> *There is always a possibility, although not a probability, of an elector casting his vote against the party nominees.* As certain qualifications are prescribed for presidential electors, there is a chance that an elector may not be eligible for the

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347. 30 CONG. REC. 612 (1898).

348. *See* H.R. REP. No. 769, 61st Cong., 2d Sess. 1 (1910).

349. H.R. REP. No. 239, 62nd Cong., 2d Sess. 20–21 (1912) (emphasis added). This passage is from the report's reproduction of an article by J. Hampden Dougherty, "an able member of the New York bar." *Id.* at 6. The passage quoted is taken from J. Hampden Daugherty, *Presidential Succession Problems and Change of Inaugural Day*, 42 THE FORUM 523, 525 (1909).

> position. There is always a chance of an elector dying between the time of his election and the time of casting his vote for President and the counting of the votes by the Congress. This illustrates the danger of doing indirectly what should be done directly.[350]

A 1922 Senate report repeated the concern that electors were at best innocuous and at worst dangerous.[351]

Congressional interest in changing the start of the congressional and presidential terms revived during the Harding administration. Initially, proposed amendments made no changes to the presidential election process beyond changing "March 4" to "the beginning of the [presidential] term" as the date on which an elected vice president would serve as acting president in case no president were elected. Then three events related to the 1924 election motivated the Twentieth Amendment's evolution. First, President Warren Harding died in office in August 1923. Second, Wisconsin Republican Senator Robert La Follette ran as a Progressive in the 1924 presidential election capturing Wisconsin's thirteen electors and finishing a close second in three more states with twelve electors. Finally, La Follette died in June 1925 at age seventy, after having been seriously ill for only a month. His candidacy and subsequent death highlighted the possibility of a three-way presidential election going to the House with one of the three candidates dying, thereby leaving the House with no one to vote for from that candidate's party. Harding's death highlighted the possibility that the President-elect might die after the Electoral College voted but before Inauguration Day.

Neither the Twelfth Amendment nor early precursors of the Twentieth Amendment covered any of these scenarios.[352] Proposals to fill these gaps quickly appeared in early 1926. Section 3 of the Twentieth Amendment added the provision that "If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect

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350. S. REP. No. 165, Minority Report, 65th Cong., 2d Sess. 3 (1918) (the majority reported the proposal adversely).

351. *See also* S. REP. No. 933, 67th Cong., 4th Sess. 4 (1922) ("It is true that these presidential electors are pledged to vote for some particular man for President and for Vice President. At the very best, they are an unnecessary and useless part of our political machinery, but even though every candidate for presidential elector is pledged to vote for some particular man for President and Vice President, there can be no reason given for the existence of such an official. If he is only, to carry out the will of the voter, why not do away with his office entirely and permit the voter to carry out his own will by a direct vote?").

352. For the last proposal prior to Harding's death *see* 64 CONG. REC. 5204 (1923). For the last proposal prior to the 1924 election *see* 65 CONG. REC. 3968 (1924). The second session of the 68th Congress following the 1924 election did not seriously consider a lame duck amendment. For the first proposal following La Follette's death *see* 67 CONG. REC. 3968 (1924).

shall become President." Section 4 empowered Congress to make law to provide for a presidential or vice presidential candidate dying after the Electoral College had voted and before the House or Senate held a contingent election. It includes two statements of the "right of choice … devolv[ing]" upon one of the two chambers.[353]

Neither the Twentieth Amendment as adopted nor any of its precursors addressed candidate death prior to the casting of electoral votes. A House committee report explained why.

> A constitutional amendment is not necessary to provide for the case of the death of a party nominee before the November elections. Presidential electors, and not the President are chosen at the November election. The electors, under the present Constitution *would be free* to choose a President, notwithstanding the death of a party nominee. Inasmuch as the electors *would be free* to choose a President, "a constitutional amendment is not necessary to provide for the case of the death of a party nominee after the November elections and before the electors vote."[354]

No one spoke against this understanding of elector discretion as Congress debated what would become the Twentieth Amendment.[355] This is the last time Congress sent an amendment to the states changing the presidential election process.

B. THE TWENTY-THIRD AMENDMENT

When it implemented the Twenty-Third Amendment, Congress enacted a statute requiring District of Columbia electors to swear an oath but prescribing no legal consequences.

> Each person elected as elector of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he will vote for the candidates of the party

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353. U.S. CONST. amend. XX, § 4 ("The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a *President whenever the right of choice shall have devolved upon them*, and for the case of the death of any of the persons from whom the Senate may choose a Vice President *whenever the right of choice shall have devolved upon them*.") (emphasis added).

354. H.R. REP. NO. 345, 72d CONG. 1st Sess. at 5 (1932) (emphasis added). This exact same language first appeared in 1926. *See* H.R. REP. NO. 311, 69th CONG. 1st Sess. 6 (1926). It also appeared in reports in the two intervening Congresses.

355. For remarks expressing this understanding *see* 69 CONG. REC. 4208 (1928) (statement of Rep. Lozier); 74 CONG. REC. 5913 (1931) (statement of Rep. Griffin); 75 CONG. REC. 3381 (1932) (statement of Rep. Cable).

> he or she has been nominated to represent, and it shall be his duty to vote in such manner in the electoral college.[356]

The content of this statute has remained unchanged since it was originally enacted in 1961.

The Congress that enacted this provision understood it as merely providing "moral suasion" that electors should vote faithfully.[357] This statutory text provides no legal consequences for an elector who attempts to cast her electoral vote anomalously because no one in Congress understood Congress to have the power to bind the District's electors with legal consequences.[358] If Congress has no power to bind the District's electors with legal consequences then a state has no power to bind its electors with legal consequences.

1. The Eighty-Sixth Congress Crafts the Twenty-Third Amendment

The Twenty-Third Amendment sped through the second session of the Eighty-Sixth Congress. As introduced, Senate Joint Resolution 39 made provision for temporary gubernatorial appointments to the House of Representatives if half of that body became vacant (perhaps by virtue of a nuclear attack).[359] As the Senate debate on S. J. Res. 39 began, Florida Democrat Spessard Holland added a poll tax ban to the resolution.[360] On February 2, 1960, at the very end of the debate, New York Republican Kenneth Keating added text to S. J. Res. 39 providing the District of Columbia representation in the House and participation in the Electoral College.[361] Very little debate ensued and at the end of the day the Senate approved the addition of the Keating amendment by a vote of 63–25 before approving the entire, three-part amendment by a vote of 70–18.[362]

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356. Public Law 87-389, § 13(g), 75 Stat. 817, 819 (1961). Now codified as, D.C. CODE § 1–1001.08(g) (2017). The current statute replaces "he" and "him" with "he or she" and "him or her."

357. *See infra* text accompanying note 390.

358. *See infra* text accompanying notes 388–397 and 404.

359. 106 CONG. REC. 1320 (1960).

360. *Id*.

361. 106 CONG. REC. 1757–58 (1960). Kyvig notes "If District of Columbia enfranchisement or poll tax prohibition were to move forward, they needed to avoid the bottleneck of the [Senate] Judiciary Committee [dominated by southerners and chaired by James Eastland of Mississippi.] Therefore, both proposals were introduced on the Senate floor in February 1960 as additions to a measure that had emerged from committee because of cold war anxieties of the moment." DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 353 (1996).

362. For the debate *see* 106 CONG. REC. 1758–64 (1960). For the votes, *see id.* at 1764-65.

The Eighty-Sixth Congress's first sustained debate on the future Twenty-Third Amendment took place on April 6 and 7, 1960 in Subcommittee 5 of the House Judiciary Committee.[363] New York Democrat Emmanuel Celler chaired this subcommittee as it considered District representation in the House as well as participation in the Electoral College. These hearings served as a forum for the District's advocates to speak in favor of their interests rather than as a forum for crafting constitutional text. No one touched on the issue of Congress's power to set qualifications for presidential electors.

That topic first appeared in the Judiciary Committee report accompanying S. J. Res. 39, now stripped down to just District participation in the Electoral College and now containing an enforcement provision as Section 2. That report noted that the resolution's "language follows closely, insofar as it is applicable, the language of Article II of the Constitution."[364] It continued

> Section 2 of the proposed article provides that Congress shall have power to enforce this article by appropriate legislation. This section and section 1 of the proposed article, as well as other provisions of the Constitution (especially arts. I and II thereof) are authorizations to Congress to establish, among other things, the qualifications of electors and of voters in connection with national elections for President and Vice President as well as to provide for the conduct, manner, time, and place of elections.[365]

In the absence of any discussion specific to binding electors the most straightforward reading of the report's text is that it recognizes Congress's powers to set age, citizenship, residency, and other qualifications for electors as the states do under their Article II powers.

Republican Representatives George Meader of Michigan and William McCulloch of Ohio reiterated this equivalence during the House's sole, two-

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363. *District of Columbia Representation and Vote: Hearings Before Subcomm. Number 5 of the H. Comm. on the Judiciary on House Joint Resolution 529*, 86th Cong., 2d Sess. (1960). This document contains a useful recapitulation of attempts to give the District congressional representation and/or participation in presidential elections as far back as 1889. *Id*. at 70–110.

364. H.R. REP. No. 86-1698, at 4 (1960). As originally introduced by Senator Keating with a provision for House representation and Electoral College participation, section 1 began "*The people of the* District constituting the seat of government of the United States shall *elect* in such manner as the Congress shall *provide by law*: . . ." 106 CONG. REC. 1758 (1960) (differences from the final form of the Twenty-Third Amendment shown in *italics*).

365. H.R. REP. NO. 86-1698, *supra* note 364, at 4. On June 8 Rep. Celler introduced House Joint Resolution 757 containing just the Twenty-Third Amendment text. It was immediately referred to the Judiciary Committee. 106 CONG. REC. 12170 (1960). A day later the Committee reported it back without amendment. *Id.* at 12309. The accompanying report contained exactly the same language as just quoted. *See supra* text accompanying note 364364. H.R. REP. NO. 86-1770, at 3, 4 (1960).

hour debate on the Twenty-Third Amendment.[366] No one made any comments on whether the proposed amendment empowered Congress to bind the District's electors. Nor did anyone have much of anything to say when the proposed amendment went back to the Senate where, after no more than an hour's debate, it was approved without a recorded vote on June 16, 1960.[367]

2. An Anomalous Elector Appears Before a Senate Subcommittee

Oklahoma cast just over 59 percent of its popular vote for Richard Nixon in the 1960 election.[368] When Oklahoma's electors met, one of them cast his electoral votes for Harry Byrd for president and Barry Goldwater for vice president.[369] Oklahoma responded by enacting legislation imposing a $1,000 fine on an anomalous elector.[370]

When the two houses of Congress met separately and in joint convention on January 6, 1961, they noted receipt of two clashing sets of elector and electoral votes certificates from Hawaii.[371] Separately and in joint convention they addressed the multiplicity of returns from Hawaii. No one mentioned the anomalous elector from Oklahoma.[372]

The anomalous elector was Henry Irwin. On July 13, 1961 he testified before the Senate Judiciary Committee Subcommittee on Constitutional

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366. For Meader's comment *see* 106 CONG. REC. 175, 12553 (1960). For McCulloch's comment *see id.* at 12558. House Resolution 554 brought H.J. Res. 757 to the floor for no more than a two-hour debate and amendment limited to members of the Judiciary Committee. *Id.* at 12551. At the end of the brief debate Rep. Celler moved to replace the text of S.J. Res. 39 with the text of H.J. Res. 757. The House approved that change without a recorded vote and then approved the newly amended S.J. Res. 39 by another unrecorded vote. *Id.* at 12571.

367. For the Senate debate *see* 106 CONG. REC. 175, 12850–58 (1960). After trying to get the resolution steered back to the Senate Judiciary Committee, Senator Eastland tried to goad Senator Holland to add back the poll tax ban. *Id.* at 12854–55. Senator Barry Goldwater even found time during the debate to warn against the Soviet newspaper *Izvestia* trying to meddle in the 1960 presidential election. *Id.* at 12856.

368. SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS 150 (1963).

369. 107 CONG. REC. 277, 288 (1961).

370. OKLA. STAT. tit. 26, § 10-109 (originally added by Laws 1961, H.B. No. 538 § 3) ("Any person elected as Presidential elector *** after taking and filing the oath or affirmation prescribed * * * who violates said oath or affirmation by either failing to cast his ballot * * *" for his party's candidates for President and Vice President, 'or by casting his ballot for any other person shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1,000.'"). *See S. Subcomm. on Constitutional Amendments Hearings*, *supra* note 15, at 723. Now codified with slight changes as OKLA. STAT. tit. 26, § 10-109 (2017).

371. 107 CONG. REC. 259–260, 288, 289–90 (1961).

372. For the entire proceedings, *see id.* at 259–260, 277–278, 288–91.

Amendments during hearings it held on a plethora of Senate Joint Resolutions proposing constitutional amendments impacting the presidential election process.[373]

At the very start of the hearings Tennessee Democrat Estes Kefauver, the subcommittee chairman, referred to Irwin's anomalously cast electoral vote. "More recently, we have seen electors violate their popular mandates and vote in the electoral college for candidates other than those selected by the people of their States—*a right which is granted to electors by the Constitution*."[374]

The subcommittee hearings include a statement from Mollie Z. Margolin, legislative attorney, American Law Division, Legislative Reference Service, Library of Congress in which she noted that although a pledge such as the one at issue in *Ray v. Blair* was not unconstitutional, it was unenforceable.[375]

The subject of anomalous electors figured prominently during Henry Irwin's testimony after he described a plan hatched by a Lea Harris of Montgomery, Alabama to persuade Republican and southern Democratic electors to vote for someone other than John F. Kennedy or Richard Nixon.[376] After hearing the details of the Harris plan New York Republican Kenneth Keating, the other senator present, asked Irwin: "And your interpretation of the Constitution is that it is within the power of any elector who is elected to vote any way he wants to?"[377]

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373. For Irwin's testimony, *see S. Subcomm. on Constitutional Amendments Hearings*, *supra* note 15, at 562–655. The Subcommittee had twenty-three resolutions before them. Two of them (S.J. Res. 16, 102) covered the presidential nomination process only. Four of them (S.J. Res. 20, 54, 67, 71) only covered extension of suffrage to eighteen year olds. Two of them (S.J. Res. 58, 81) only covered a poll tax ban. Two of them (S.J. Res. 14, 90) only covered residency requirements. That left thirteen resolutions dealing with the mechanics of the presidential election process. Three of them (S.J. Res. 1, 23, 26) proposed replacing election by electoral vote with a direct vote of the people. Obviously, these proposals eliminated the office of presidential elector. So did all of the proposals retaining electoral votes or their equivalent. Six of them (S.J. Res. 2, 4, 9, 17, 28, 96) proposed fractional allocation of electoral votes in each state. One of them (S.J. Res. 48) proposed proportional integral allocation of electoral votes in each state. One of them (S.J. Res. 12) proposed two electors be chosen at large in each state and the remainder by single-elector district. Two of them (S.J. Res. 113, 114) mandated winner take all in each state. For the resolutions *see id.* at 3–29.

374. *Id.* at 2 (emphasis added). On March 12, 1947, the last day of Senate debate on the Twenty-Second Amendment, Rhode Island Republican Theodore Green proposed formation of a joint committee to consider revision of the presidential election process. The first issue proposed for consideration was "[w]hether or not the President and Vice President should be elected by the Electoral College, as at present, and if so whether or not the members should be legally bound to vote in accordance with their instructions." 93 CONG. REC. 1964 (1947). Green noted that "There is no provision in the law as to that." *Id.*

375. *S. Subcomm. on Constitutional Amendments Hearings*, supra note 15, at 717.

376. *Id*. at 601–25. *See infra* Part VII.B.2.

377. *Id.* at 630.

After Irwin demurred Keating asked: "Do I understand, based upon that, that it is your opinion that the Constitution permits an elector to vote any way he wants to?"[378]

This time Irwin made an unambiguous response: "Based upon that there is no question in my mind but what that is the case."[379]

Senator Keating concluded this part of the questioning by noting:

> Well, that is the only, about the only, statement you have made today with which I find myself in complete agreement. *I think that is permitted under the Constitution*, and the only question I have in mind is whether we ought not to remedy that so that such an incident as yours can never again occur . . . .[380]

Not once during the subcommittee hearings did any member of Congress suggest that the Constitution prohibited an elector from casting an anomalous electoral vote or that a state could enact a prohibition with legal consequences.[381] Nor did any member of Congress take such a position as it enacted legislation implementing the Twenty-Third Amendment.

3. The Eighty-Seventh Congress Enacts Enabling Legislation

The Twenty-Third Amendment is not self-executing. It requires congressional legislation for the District of Columbia's actual participation in the Electoral College. The Eighty-Seventh Congress considered the extent of congressional power granted by the Twenty-Third Amendment as it crafted legislation to implement the amendment following its ratification on March

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378. *Id*.

379. *Id.* at 631.

380. *S. Subcomm. on Constitutional Amendments Hearings*, *supra* note 15, at 631 (emphasis added).

381. A year later the subcommittee's chief counsel wrote

> Oklahoma's solution after its 1960 experience was a law requiring a sworn oath of a nominee for elector that he would vote for his party's candidate and imposing up to $1,000 fine if he votes otherwise. *This seems to concede his legal power to vote as he chooses if he is willing to incur the fine. Although the constitutionality of the penalty is not free from doubt, the legislative power over appointment would probably sustain its imposition against one who took and violated such an oath.*

James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 L. & CONTEMP. PROBS. 495, 509 (1962) (emphasis added).

29, 1961. Most of the debate focused on minimum voting age[382] and voter residency requirements.[383]

Discussion on the question of whether the Constitution empowers Congress to bind presidential electors with legal consequences occurred during House subcommittee hearings considering H.R. 5955 introduced by Virginia Republican Joel Broyhill, one of the draft bills to amend the District of Columbia Election Code to implement the Twenty-Third Amendment.[384] During these hearings one of the witnesses argued that the Twelfth Amendment *prohibits* binding electors with legal consequences.[385] No witness and no subcommittee member argued that the Twenty-Third Amendment gave Congress the power to bind electors with legal consequences.[386] All Congress could do would be to provide statutory text offering "moral suasion" that electors vote faithfully.[387]

Congress's power to bind the District's electors with legal consequences first arose during the testimony of Walter Tobriner, President of the District of Columbia Board of Commissioners, on May 15, 1961. During his testimony Tobriner noted that H.R. 5955 "contains no provision requiring that electors vote for candidates of the party which such electors represent. The Administration bill, however, would require electors to vote for the candidates of the party they represent."[388]

Following Tobriner's testimony Tennessee Democrat J. Carlton Loser asked: "Is there some Constitutional provision involving the question of electors, how they shall vote?"[389] The subsequent colloquy among Tobriner, Loser, and Alabama Democrat George Huddleston merits quotation *in extenso*.

> MR. TOBRINER. We are advised by the Department of Justice that there is no Constitutional prohibition of that

382. President John F. Kennedy urged Congress to adopt a minimum age of eighteen. 107 CONG. REC. 8023 (1961). For debates in the Senate *see id.* at 19688, 20203–04, 20215–17. In the end the Senate voted 38–36 to set the minimum age to 21. *Id.* at 20217.

383. During the House debates future Speaker John McCormack noted that setting a one-year requirement for the District would appear to the states to be a congressional stamp of approval for relatively long residency requirements. *Id.* at 15731. For the Senate's debates and (failed) votes on a shorter residency requirement *see id.* at 19688–90, 20204–10, 20211–15.

384. *To Amend the Act of August 12, 1955 Relating to Elections in the District of Columbia: Hearing on H.R. 5955 Before the Subcomm. Number 3 of the Comm. on the D.C.*, 87th Cong. (1961) [hereinafter *H.R. 5955 Hearings*].

385. *See infra* text accompanying notes 393–397.

386. *See infra* text accompanying notes 388–397 and 404.

387. *See infra* text accompanying note 390.

388. *H.R. 5955 Hearings, supra* note 384, at 20. The Administration bill was S. 1883 introduced by Nevada Democrat Alan Bible on May 16, 1961. *See* 107 CONG. REC. 8022–23 (1961). For Senate consideration of S. 1883 *see infra* text accompanying notes 402–404.

389. *H.R. 5955 Hearings*, *supra* note 384, at 34.

form. We raised the question in a discussion with them, but they advised us of that.

REP. LOSER. In the past, electors have voted for whomever they chose, haven't they?

MR. TOBRINER. That is true.

REP. LOSER. I just have some sort of impression or recollection that that grows out of some provision in the Constitution.

REP. HUDDLESTON. . . . Many states list only the candidates for President and Vice President on their ballots. The electors themselves are appointed by the party governing body. But the Constitutional provision which has been interpreted to permit these electors to vote for whomever they please is still in effect. Once the electors are appointed and certified as the electors of that party, if that party carries the election, these electors are still authorised to vote for whomever they please.

REP. LOSER. But this Administration bill requires them to vote for the party which they represent.

REP. HUDDLESTON. *I think that has a moral suasion. I don't think that has any legal effect at all.*

MR. TOBRINER. *I don't think that could amend the Constitution.*

REP. HUDDLESTON. *I think that has no legal effect. I think it has a moral suasion.*

REP. LOSER. *I don't think it could amend the Constitution. What I am talking about is that this provision would be offensive to the Constitution.*

. . .

Does the Department of Justice conclude that the provision requiring electors to vote for the Presidential candidate of the party they represent is not offensive to the Constitution as it deals with electors?

MR. TOBRINER. *As Mr. Huddleston has said, there is no criminal or other means of enforcing that mandate of the statute. As he has said, and as I believe to be true, this is simply a moral suasion for the electors to vote for the candidates on whose ticket they are nominated.*

REP. LOSER. Are you saying, sir, that the provision of the bill is ineffective or is not compulsory that the electors vote for the candidate of the party they represent?

MR. TOBRINER. *There is no provision in the bill, sir, setting forth any compulsory means by which this may be enforced.*

> REP. HUDDLESTON. . . . *I think probably that is preferable to some naked statement that the electors are required to support a candidate, because that has no legal effect at all; whereas your oath would accomplish the same purpose because it also gives rise to a moral suasion.*
>
> *Where a man takes an oath, although that oath has no legal effect either, still a person thinks a long time before he violates an oath he has given. I think your provision would accomplish the same purpose from a legal point of view as the Administration bill*.[390]

When Subcommittee Chairman James Davis, a Georgia Democrat, asked if H.R. 5955 contained any penalties for violations, Walter Tobriner responded that no new penalties were needed. The existing statute already contained penalties for false registration or voting falsely.[391] By implication, there was no need for a penalty in response to an attempt to cast an electoral vote anomalously.

The following day the Subcommittee heard even more pointed testimony from Sturgis Warner, a member of the D.C. bar, who had been working on implementing the Twenty-Third Amendment with the District government and both major parties.[392] Aware that the Administration bill, S. 1883, had been introduced in the Senate, Warner noted:

> "Section 8(f) of the Administration bill, which was floating round in typed form yesterday, provides in the second sentence that 'each person elected as elector of the President and Vice President shall in the presence is of the Board take an oath that he will vote for the

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390. *Id.* at 34–37. The views expressed by Tobriner and Huddleston coincided with the positions taken by Tennessee Democrat Albert Gore and New Jersey Republican Clifford Case in the Senate's famous Solar System debate of March 20, 1956. After future President John F. Kennedy spoke in opposition to prohibition of the unit rule he continued by expressing support for a proposal *to amend the Constitution* to prohibit elector discretion. 102 CONG. REC. 5157 (1956). He continued by noting that "half of the States have already removed the danger of electoral college delegates not reflecting the views of the States. *States can take care of that situation themselves*." *Id.* (emphasis added). This drew a sharp response from Tennessee Democrat Albert Gore and New Jersey Republican Clifford Case:

> [Gore] … under the present system it is an elector's *constitutional right* to cast a ballot as he pleases. Legally he has the opportunity to do so. …
> [Case] I must disagree with the statement that an elector, even though there may be no law in his State requiring him to do so, is free to cast his vote as he wishes. He is not free, under our system. He is under the greatest obligation to conform with the-
> [Gore] Which is a moral obligation.
> [Case] Yes; a moral obligation, which is the greatest of all.

Id. (emphasis added).

391. *H.R. 5955 Hearings*, *supra* note 384, at 38.

392. *Id.* at 127.

> candidates of the party that he has been nominated to represent. It shall be his duty to vote in such manner in the Electoral College.'
>
> *That sentence*, I think, *is unconstitutional because we are operating under the Twelfth Amendment. We are not operating under some, as yet, unpassed amendment of the Electoral College*. As long as we are operating under the Twelfth Amendment, the electors, while they may be bound as a matter of loyalty to their party and may be required by their party to vote for a particular candidate for President, if they bolt – if they decide to bolt, as they did, for instance, in Alabama in 1956 – under the Twelfth Amendment they are *probably entitled to do so because the Twelfth Amendment does not provide that the electors shall be simply automata who are always bound to vote as a legal constitutional matter for the person their party has designated*."[393]

Representative Huddleston responded:

> I agree with what you have said there about the constitutionality of that particular provision, that it has no legal effect; and if it did go to the courts, that they would immediately declare it unconstitutional. I don't think there is any question about that in view of the cases, particularly the one you have cited – Ray against Blair – which was an Alabama case.[394]

Huddleston's suggestion that an oath/duty provision be retained for "moral suasion" did not satisfy Sturgis Warner, who told the Subcommittee "I don't like to have this Committee just go on record on something which I think as a lawyer is unconstitutional."[395] Warner concluded his testimony by telling the Subcommittee

> There is much disagreement about the effect of the Twelfth Amendment as to what it means. I think if anybody wants to change the Twelfth Amendment, they go through these various proposals that Senator Mansfield and others have suggested to either abolish or modify the Electoral College through constitutional means, through amending the constitution. I think that is the way to do it.
>
> But as long as you have got Ray and Blair, which is a good classical case, a discussion of what the Twelfth Amendment was intended to do – it was intended to break the Jefferson-Burr tie of 1800 and to provide that the electors should have used their discretion, their judgment. They were chosen for that purpose.

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393. *Id.* at 131–32 (emphasis added).
394. *Id.* at 132–33.
395. *Id.* at 133.

> Fine, if you want to pin them down. But I don't think unless you change the constitution that you can effectively pin them down.[396]

No member of the Subcommittee may have agreed with Warner's claim that any provision binding electors would be unconstitutional *because of the Twelfth Amendment.*[397] But no one disputed Warner's claim that electors could not be bound by statute.

Nor did anyone argue for the constitutionality of a binding provision when the House debated H.R. 8444, a revised version of H.R. 5955 and the ultimate vehicle for the revisions to the District Election Code. Noting that H.R. 8444 lacked an oath/duty provision,[398] California Democrat Jeffery Cohelan urged its addition. He did not make an argument that such a provision would be constitutional.[399] No one else addressed the matter. After a brief debate the House passed H.R. 8444 without a recorded vote.[400]

The oath/duty provision found its way into the D.C. statute via S. 1883, the administration bill. Nevada's Democratic Senator Alan Bible, its sponsor, said it contained one or two controversial provisions, most notably granting the vote to eighteen year olds.[401] When the Senate District of Columbia Committee held hearings on the bill, Walter Tobriner testified that it had been drafted by the District's Corporation Counsel in conjunction with the local Democratic and Republican Committees.[402]

After making five other points Senator Bible noted that "[s]ixth, the presidential electors nominated by a political party are required to vote for the candidates of the party they are nominated to represent, and electors must take an oath that they will vote for such candidates."[403]

Carl Shipley, Chairman of the District's Republican Committee, doubted that Congress could even do that. In a letter to Committee Staff Director Chester Smith dated June 2, 1961, Shipley noted

> it is proposed to require electors of President and Vice President to take an oath in the presence of the Board of Elections affirming that they will vote for the candidates of the party

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396. *H.R. 5955 Hearings*, *supra* note 384, at 134.

397. *See supra* text accompanying note 393.

398. For the text of H.R. 8444 *see* H.R. REP. NO. 87-895, at 8–9 (1961). None of the amendments made in committee are relevant to the current analysis. *See id.* at 1.

399. 107 CONG. REC. 15730 (1961).

400. *Id.* at 15732.

401. *Id.* at 8203. The other controversial provision was a residency requirement of only ninety days. *Stenographic Transcript of Hearings 2*, *Committee on the District of Columbia United States Senate*, 87th Cong. (1961).

402. *Stenographic Transcript of Hearings 2*, *supra* note 401, at 7-8.

403. *Id.* at 3.

> by which they were nominated. *Under the Federal Constitution I doubt very much whether Congress can bind an elector in that way.*[404]

The Hearings transcript contains no comment on Shipley's remark. Of course, applying *Ray v. Blair* to the District, Congress could require such an oath.[405] But that still left open the question of whether an elector could be *bound with legal consequences*.[406]

During the hearings neither Senator Bible, nor Republican J. Glenn Beall of Maryland, the only other senator present, made any mention of an elector's *duty* to vote faithfully or of any legal consequences for an elector attempting to vote *anomalously*. The bill contained none. In the absence of such provisions there was no need for anyone to argue for the constitutionality of the non-existent provisions.

With the House having passed H.R. 8444, the Senate Committee on the District of Columbia chose to apply the fruits of its hearings on S. 1883 to the House bill.[407] As now amended, H.R. 8444 contained the oath/duty provision.[408] The report accompanying the bill twice noted the presence of the oath/duty provision,[409] but never made an argument for its constitutionality. Once again, there was no need for that since the proposed text contained no penalties for anomalous electors.[410]

While summarizing the committee's amendments during the Senate floor debate on H.R. 8444, Senator Bible noted that the newly added oath/duty provision, ". . .[r]equire[s] a person elected as an elector of President and Vice President to take an oath or solemnly affirm that he or she will vote for the candidate of the party he has been nominated to represent; and that it shall be his duty to vote in such manner in the electoral college."[411]

This was the closest anyone came to suggesting that a District elector could not vote anomalously without facing legal consequences. Together with a comment Senator Bible made after passage,[412] *this is the only instance*

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404. *Id.* at 82.

405. Ray v. Blair, 343 U.S. 214, 227 (1952).

406. *Id.* at 230.

407. S. REP. NO. 87-869, at 2 (1961).

408. "Sec. 8(f) Each person elected as elector of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he will vote for the candidates of the party he has been nominated to represent, and it shall be his duty to vote in such manner in the electoral college." *Id.* at 9.

409. *Id.* at 2, 4.

410. Section 14 of the bill provided penalties for false registration, false voting, and false vote counting. *Id.* at 12–13.

411. 107 CONG. REC. 19687 (1961).

412. *See infra* text accompanying note 415.

in which a member of Congress described the oath/duty provision as anything more than a "moral suasion." No other senator even commented on the oath/duty provision before the Senate passed the bill by a vote of 66–6.[413]

With the Senate and House having passed different versions of H.R. 8444, a conference committee was needed to resolve the differences. In general, the conference committee resolved the differences, including the presence of the oath/duty provision, in favor of the Senate version.[414] When Senator Bible reported the committee's results to the Senate he told his colleagues "it was agreed that a duty would be imposed on a person chosen as an elector to vote in the electoral college for the candidate of the political party which he represents."[415] When Representative Davis reported the changes to the House he did not even mention the inclusion of the oath/duty provision.[416] As Congress considered this legislation no one mentioned the name of Henry Irwin, who had anomalously cast his electoral votes the previous year.

The Senate subcommittee that heard Henry Irwin's testimony issued a report covering many of the proposals presented to it.[417] Its section titled "The office of presidential elector" opened with the following comment. *"Under present constitutional provisions, the elector is free to exercise his independent judgment in voting, regardless of whether he is instructed by State law or has given a pledge*, or whether his own name was even on the ballot."[418]

This section concluded "[a]ll pending proposals would eliminate the possibility of independent or unpledged electors."[419] None of these proposals were sent to the states for ratification.

Congress never understood a state to have the power to prohibit or penalize an elector for exercising discretion as it considered revising the Constitution in the twentieth century.

In his 1965 State of the Union speech, President Lyndon Johnson told Congress "I will propose reforms in the electoral college–leaving undisturbed the vote by States–but making sure that no elector can substitute his will for that of the people."[420] Surely, there was no need for such a proposal if electors were already bound to cast their electoral votes faithfully.

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413. *Id.* at 20217. The six nay votes came from southerners Eastland, McClellan, Stennis, Talmadge, Thurmond, and Tower. None of them had expressed opposition to the bill as it was being debated. Presumably, they were trying to frustrate the District's ability to participate in the 1964 presidential election.

414. H.R. REP. NO. 87-1266, at 6 (1961).

415. *Id.* at 21052.

416. *Id.* at 21186.

417. For the hearings and their content *see supra* note 373.

418. S. REP. NO. 87-1305, at 9 (1962) (emphasis added).

419. *Id.* at 10.

420. 111 CONG. REC. 30–31 (1965).

C. SOME MEMBERS OF THE NINETY-FIRST CONGRESS MISINTERPRET THE DEBATES IN THE EIGHTH CONGRESS

Congress has never refused to count the electoral votes cast by an anomalous elector for a living person.[421] Only one time has Congress debated the question of whether to accept an electoral vote cast by an anomalous elector for a living person.[422]

In 1968 Dr. Lloyd Bailey, a Republican elector in North Carolina, cast his electoral votes for George Wallace and Curtis LeMay rather than Richard Nixon and Spiro Agnew. Bailey had attended the Republican Party convention in his (second) congressional district in February, 1968 not seeking the nomination to be the presidential elector from the district but knowing that he would be nominated and chosen without opposition.[423] He willingly accepted the nomination without taking a pledge.[424] In February 1968 neither Richard Nixon's nomination nor his support from the North Carolina Republican Party was yet assured.[425] Bailey would later explain that he preferred Strom Thurmond and Ronald Reagan to Richard Nixon.[426]

With North Carolina having voted for a Republican presidential candidate once since Reconstruction,[427] Bailey's preferences seemed of little moment. He promptly forgot that he had been nominated to an electorship.

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421. For a compendium through 1992 *see* U.S. SENATE, SENATE MANUAL, S. Doc. No. 103-1, at 961 (1993). For additional anomalous electors since then *see infra* Part VII.

422. Congress has not hesitated debating questions relating to the legitimacy of electoral votes for other reasons. A blizzard hit Madison, Wisconsin on Dec. 5, 1856 making it impossible for Wisconsin's electors to meet. Instead they cast their electoral votes the next day, one day after the day prescribed by law. Congress spent the better part of two days debating whether or not to accept the electoral votes from Wisconsin. In the end they did. *See* Cong. Globe, 34th Cong., 3d Sess. 644–60, 662–68 (1857). For a survey of other congressional debates on whether or not to accept possibly illegitimately cast electoral votes see Kesavan, supra note 228, at 1678–94.

423. *Id*. at 36. Then as now North Carolina law required a political party to nominate one person from each congressional district. For the current statute *see* N.C. Gen. Stat. § 163-1(c). For the 1967 enactment of this provision *see* SESSION LAWS AND RESOLUTIONS PASSED BY THE GENERAL ASSEMBLY, 1965/66/67 848 (Winston Printing Co. 1967).

424. *Electing the President: Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, Ninety-first Congress, first session, on S.J. Res. 1, S.J. Res. 2, S.J. Res. 4, S.J. Res. 12, S.J. Res. 18, S.J. Res. 20, S.J. Res. 25, S.J. Res. 30, S.J. Res. 31, S.J. Res. 33, S.J. Res. 71, S.J. Res. 72, to amend the constitution relating to electoral college reform, January 23 and 24, March 10, 11, 12, 13, 20, and 21, April 30, May 1 and 2, 1969*, at 37, 43, 50 (GPO 1969). [hereinafter *Bailey Hearings*]

425. Nixon soon became the front runner among North Carolina Republicans. A.P., *Nixon is Favorite in North Carolina*, NEW YORK TIMES, March 3, 1968, at 37.

426. *Bailey Hearings*, *supra* note 42424, at 37, 50.

427. North Carolina voted for Herbert Hoover over Al Smith in 1928. In 1960 John F. Kennedy captured 52 percent of the Tar Heel State vote. Four years later Lyndon Johnson increased the Democrats share to 56 percent.

Bailey put a Wallace sticker on his bumper as the November election approached.[428] He even voted for the Alabamian after having been recently reminded that he was the *Republican* presidential elector candidate in his congressional district.[429]

After North Carolina's votes were counted it became clear that the electorate statewide had elected Lloyd Bailey as the elector from the Second Congressional District, much to his surprise.[430] Although George Wallace carried Bailey's district with 47.5 percent of the vote, Richard Nixon won the state with 39.5 percent.[431]

	Nixon	Humphrey	Wallace
CD2	28,753	43,393	65,237
Statewide	627,192	464,113	496,188

Table 6 - 1968 Presidential Vote in North Carolina

Bailey would later testify that he would have voted for Richard Nixon if he had cast his votes shortly after his appointment in November.[432] However, as the day to cast his votes approached Bailey became concerned that too many of the president-elect's appointees would not lead to the policy changes that Bailey thought the electorate wanted.[433]

Bailey announced his intentions in the local newspaper a day before the electors met.[434] A month later he further justified his vote by claiming that it represented the wishes of his district's voters.[435]

When Congress met to count the electoral vote on January 6, 1969 Maine Democratic Senator Edmund Muskie and Michigan Democratic Representative James O'Hara filed a formal objection to counting Bailey's electoral vote. In the end the Muskie-O'Hara objection failed by votes of 33-58

428. *State Elector to Back Wallace*, [Raleigh] NEWS-OBSERVER, December 16, 1968, at 1; 115 CONG. REC. 10.

429. *Bailey Hearings*, *supra* note 42424, at 37, 50.

430. *Id*.

431. Wallace carried four of the state's eleven congressional districts with Nixon carrying the rest. Bailey's second district gave Wallace his largest vote share. All data from *Dave Leip's Atlas of U.S. Presidential Elections*.

432. *Bailey Hearings*, *supra* note 42424, at 43.

433. Bailey mentioned Henry Kissinger, Daniel Moynihan, and Paul McCracken. *Id*. at 37, 50.

434. *Republican Elector Will Not Cast His Vote for President-Elect Nixon*, ROCKY MOUNT TELEGRAM, December 15, 1968, at 2; *Bailey Hearings*, *supra* note 42424, at 44. He later explained that he would have voted faithfully for Nixon to avoid sending the election to the House which he thought would have elected Hubert Humphrey president. *Id*. at 42, 55.

435. 115 CONG. REC. 205.

in the Senate and 170-228 in the House.[436] One aspect of the objectors' argument merits our attention here. They claimed that the Twelfth Amendment serves as the authority for the constitutionalization of elector faithfulness.

After acknowledging that "the Constitutional Convention intended that presidential electors shall be free agents"[437] Senator Muskie continued

> The 12th amendment was adopted on the assumption that electors in the future would also feel bound. The 12th amendment was adopted in order to avoid just those [1800-like] *stalemates* similarly arising.
>
> Why did they arise? Because the electors felt bound.
>
> The solution of the 12th amendment was to permit the electors to vote separately and to do that for President and Vice President; not to eliminate the practice of bound electors, but to act on the assumption that they would feel bound.[438]

Massachusetts Democrat Edward Boland made the most full-throated exposition of this aspect of the Muskie-O'Hara objection during the House debate.

> The 1800 election was not looked upon by the people of the time as a strange one-time anomaly that would never happen again if the electors simply did their independent duty. On the contrary, it was assumed on all sides that the 1800 experience would constantly repeat itself because it was assumed on all sides that electors would simply vote for the candidates they were pledged to vote for. … My basic point, Mr. Speaker, is that *it is not article II, section 1, which governs the electoral college today. It is the 12th amendment*. …
>
> In those debates, which are preserved in large part in the Annals of Congress, the remote ancestor of today's CONGRESSIONAL RECORD, *it is crystal clear from the debates that there was no significant body of opinion in the Congress which still clung to the notion that electors were free agents.*
>
> Let me quote very briefly from some of the remarks made during the debate on the 12th amendment:
>
> Senator Nicholas of Virginia:

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436. For the meeting of the joint convention *see* 115 CONG. REC. 145–46, 171–72 (1969). For the debate and vote in the House *see id.* at 146–71. For the debate and vote in the Senate *see id.* at 197–246.

437. 115 CONG. REC. 201 (1969).

438. *Id.* (emphasis added).

> The people hold the sovereign power, and it was intended by the Constitution that they should have the election of the Chief Magistrate.
>
> Senator Samuel Smith, of Maryland:
>
> Our object in the amendment is or should be to make the election more certain by the people.
>
> Representative Clopton of Virginia:
>
> He believed the provision, if conformed to the ideas suggested by him, would be more likely to insure the ultimate election of President and Vice President according to the will of the people, as the electoral votes are to be considered as their expression of the public will.
>
> Representative G. W. Campbell of Tennessee:
>
> He considered to be the duty of this House, in introducing an amendment to the Constitution on this point, to secure to the people the benefits of choosing the President, so as to prevent a contravention of their will as expressed by electors chosen by them.[439]

A review of these comments from 1803 in context indicates that they were all focused on diminishing the likelihood of a presidential election being thrown to the House of Representatives. A more careful review of these comments in context reveals that Representative Clopton and Senator Smith were particularly concerned with reducing the number of candidates passing to the House contingent election from five to two or three as a way to ensure that the ultimate decision was closer to the will of the people.

There is another, much deeper aspect in which Representative Boland misinterpreted the comments from 1803. Boland was concerned about anomalous electors ignoring the will of the people *of their own state*. In contrast, the speakers quoted from the Twelfth Amendment debates were concerned about the House of Representatives ignoring the will of the people *of the nation*.

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439. 115 CONG. REC. 166 (1969) (emphasis added). For the comments by Nicholas and Smith *see supra* text accompanying note 141. For Clopton's comment *see supra* text accompanying note 139. For Campbell's comment *see supra* text accompanying note 134.

VII. ANOMALOUS ELECTORS IN THE LAST HUNDRED YEARS

We now turn to more recent history.[440]

A. STATEMENT-MAKING ELECTORS SINCE WORLD WAR II

Lloyd Bailey was a statement-making elector.[441] There have been others since World War II. Congress never debated any of the electoral votes they cast.

In 1956 Alabama Democrat W. F. Turner voted for state Judge Walter Jones rather than Democratic presidential candidate Adlai Stevenson. When told by fellow electors of his obligation to vote for Stevenson, Turner replied, "I have fulfilled my obligations to the people of Alabama. I'm talking about the white people."[442]

In 1972 Virginia Republican elector Roger MacBride cast his presidential electoral vote for Libertarian John Hospers rather than Richard Nixon "in protest against Presidential leadership inexorably moving 'the Federal Government in the direction of ever-greater control over the lives of all of us.'"[443]

In 1976 Washington Republican elector Mike Padden cast his presidential electoral vote for Ronald Reagan rather than Republican nominee Gerald Ford as "an antiabortion protest."[444]

In 1988 West Virginia Democratic elector Margarette Leach named Lloyd Bentsen on her presidential ballot and Michael Dukakis on her vice

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440. With the exception of sixty-three electoral votes that could not be cast for the deceased Horace Greeley, there were no anomalously cast presidential electoral votes between 1828 and 1944 (inclusive). *See supra* Part V.C.1. (discussing Greeley). With the exception of eight electoral votes that could not be cast for the deceased Vice President James Sherman in 1912, there were no anomalously cast vice presidential electoral votes between 1900 and 1944 (inclusive). *See supra* note 229 (discussing Sherman).

441. *See supra* Part VI.C.

442. *Democratic Elector Deserts Stevenson*, NEW YORK TIMES, Dec. 18, 1956, at 34. Turner initially wanted to cast his vice-presidential vote for Alabama Attorney General (and future Governor) John Patterson. When told that he could not constitutionally vote for two Alabamians Turner cast his vice-presidential vote for Georgia Senator-elect Herman Talmadge. Turner was clearly unhappy with the direction in which the Democratic Party was heading.

443. *Electors Affirm Nixon's Victory*, NEW YORK TIMES, Dec. 19, 1972, at 17. MacBride himself would be the Libertarian Party candidate in 1976. *Libertarian Party Confirms Its Presidential Campaign*, NEW YORK TIMES, June 15, 1976, at 19.

444. *Electoral Vote Given to Reagan as Protest*, NEW YORK TIMES, Dec. 15, 1976, at A18. Telephone Interview with Mike Padden, State Senator, Washington Fourth Legislative District (April 7, 2020) (explaining to me that he considered Reagan to be stronger on pro-life issues than Ford and that Reagan was the future of the Republican party. In 2020 Senator Padden was reelected to a tenth term in the state legislature never having lost in any of his nine previous elections).

presidential ballot. She inverted her electoral votes in order to "protest the aged [Electoral College] system."[445]

In 2000 Barbara Lett Simmons, a Democratic elector from the District of Columbia, left her ballots blank to protest the District's lack of voting representation in Congress.[446]

B. ANOMALOUS ELECTORS IN THE SECOND HALF OF THE TWENTIETH CENTURY NOT SIMPLY MAKING A STATEMENT

As a civil rights revolution loomed in the future, some Southern Democrats sought to exploit the role of presidential electors to gain leverage in national politics. As early as 1944 slates of "uninstructed" elector candidates appeared on primary ballots in Mississippi and Texas.[447] Neither succeeded.[448] Four years later Dixiecrats organized as the States' Rights Party running South Carolina Governor Strom Thurmond for president and Mississippi Governor Fielding Wright for vice president.[449] The States' Rights Party carried four states with a total of thirty-eight electors. They all voted for the Thurmond-Wright ticket. So did Preston Parks, a presidential elector in Tennessee.[450]

1. Preston Parks: 1948 Confusion Elector

In 1948 Preston Parks cast the first anomalous presidential vote in the twentieth century. He was a *confusion* elector, appearing on both the Democratic and States' Rights elector slates in Tennessee. On Friday, February 27, Parks read a resolution to a meeting of Fayette County Democrats accusing President Truman of having deserted the South *and the Democratic Party* in light of his support for civil rights. The resolution opposed Truman's renomination.[451] It also called for copies to be sent to Tennessee's two senators and Representative Tom Murray, who represented Fayette County in the House of Representatives. On Monday, March 1, Rep. Murray read the resolution

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445. B. Drummond Ayres Jr., *Electoral College's Stately Landslide Sends Bush and Quayle Into History*, NEW YORK TIMES, Dec. 20, 1988, at 37.

446. B. Drummond Ayres Jr., *The Electors Vote, and the Surprises Are Few*, NEW YORK TIMES, Dec. 19, 2000, at B9.

447. V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 330 (Alfred A. Knopf 1949).

448. *Id*.

449. *See* J.B. Shannon, *Presidential Politics in the South*, 10 J. POL. 464 (1948) (contemporary view of Southern politics).

450. *See* 95 CONG. REC. 90 (1949) (the tally) (four states were Alabama, Louisiana, Mississippi, and South Carolina).

451. *Southern Governors to Go to Washington*, COM. APPEAL (Memphis), Feb. 28, 1948, at 3.

into the *Congressional Record*.[452] It was signed by Preston Parks. The resolution opened by noting that "the Democratic Party of Tennessee will soon hold a convention to select delegates to the Democratic National Convention."[453]

When the Tennessee Democratic Convention met in mid-April, it defeated an anti-Truman resolution after a floor fight, thanks to opposition from the middle and eastern parts of the state.[454] Preston Parks, of course, hailed from *western* Tennessee. In its place, the Convention adopted a resolution "pledging an uninstructed delegation" to the Democratic Convention in Philadelphia.[455] In addition, the Convention also named a set of twelve presidential elector candidates including Preston Parks.[456]

When the Democratic Convention met in Philadelphia, the Tennessee delegation cast all fifty of its votes for Richard Russell.[457] When the Convention nominated Truman, the Alabama and Mississippi delegations walked out, while the Tennessee delegation remained.[458]

Back in Tennessee, Preston Parks kept a low profile, until he became a regular news item ten weeks before the general election. On August 19, he issued a statement making it clear where he stood politically, and what he thought his political and legal obligations were.

> When I was nominated elector for the Eighth Congressional District in a caucus in Nashville in April, I clearly stated that I would not vote for President Truman in the Electoral College under any circumstances.
>
> Since the caucus was clearly informed of my stand, I do not feel that I am morally or legally bound to vote for Truman. To avoid any misunderstanding on the part of the voters of Tennessee, I wish to state that I will not, under any circumstances, cast my vote for Truman if I am named an elector. To further clarify my position, if named an elector I will cast my vote for Gov. J. Strom

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452. 94 CONG. REC. 1932 (1948).

453. *Id*.

454. *State's Democrats Reject Shelby's Plan*, COM. APPEAL (Memphis), Apr. 16, 1948, at 2.

455. *Id*.

456. *McKellar, Stewart and Crump Head Delegates to Convention*, COM.APPEAL (Memphis), Apr. 16, 1948, at 2; The electors would meet in Nashville, the state capitol, on Dec. 13. Just before the general election Democratic elector Charles Worley admitted "he did not know of his selection as a Democratic elector at the state convention last April 15 until he read about it in the paper the next morning." *Little Truman Interest Found*, COM.APPEAL (Memphis), Oct. 31, 1948, at 61.

457. *The Convention Ballot*, NEW YORK TIMES, July 15, 1948, at 4.

458. *Democrats Name Truman, Barkley*, NEW YORK TIMES, July 15, 1948, at 1.

> Thurmond and Gov. Fielding Wright, States' Rights nominees for president and vice president.[459]

This did not raise the hackles of Democrats in western Tennessee. *To the contrary*, Charles A. Stainback,

> [a] Somerville attorney and chairman of the States' Rights Democrats group formed here last Friday, has advocated a poll of all the regular electors to determine their stand. *His group plans to go forward with plans to name a new set of electors if these named in April do not pledge themselves to vote for Thurmond and Wright.*[460]

If the twelve persons chosen for the Democratic slate of electors back in April would not vote for Thurmond and Wright, then a separate States' Rights slate would be needed. When it appeared that the regular candidates on the regular Democratic slate were divided on how they would vote, Stainback sent out a statewide convention call to pick a States' Rights slate.[461] By the end of the month, two other candidates on the regular Democratic elector slate announced that they would support Thurmond and Wright.[462]

Preston Parks would become one of the States' Rights Party's most prominent spokesmen in Tennessee. At one rally he "[v]ividly . . . described 'what will happen if Harry Truman enforces his social revolution' in the South."[463] A newspaper photograph described him as "a regular Democratic Party elector, [who] swore he would never vote for Truman."[464]

The Tennessee Democratic Party did not arouse itself from its slumbers until mid-September when the newspapers reported that: "It also was uncertain what action, if any, would be taken in regard to the three Democratic presidential electors … who have declared themselves for the States' Rights nominees."[465]

A day later, the newspapers reported that the Democrats did what all slow-acting bureaucratic organizations do. They formed a committee of three "to determine whether the 12 electors can 'legally, properly and truthfully be listed on the ballot as a Democratic elector pledged to support the Democratic

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459. '*Won't Vote for Truman,' Says Preston Parks*, COM. APPEAL (Memphis), Aug. 20, 1948, at 4.

460. *Id.* (emphasis added).

461. *Tennessee Dixiecrats Will Gather Sept. 16*, COM. APPEAL (Memphis), Aug. 24, 1948, at 15.

462. *L. W. Morgan Joins States' Rights Ranks*, COM. APPEAL (Memphis), Aug. 29, 1948, at 11.

463. *L. C. Gaerig to Head Memphis Dixiecrats*, COM. APPEAL (Memphis), Aug. 31, 1948, at 1.

464. COM. APPEAL (Memphis), Aug. 31, 1948, at 13.

465. *Browning Is Charged with Dictating Policy*, COM. APPEAL (Memphis), Sept. 15, 1948, at 17.

Party's candidates for President and Vice President.' Electors found to be 'disloyal' will be declared unqualified and their positions vacated, the resolution said."[466]

Three days later, the Democrats named the committee's members.[467] The only opposition came from state committee members from Shelby County in western Tennessee. "The Shelby group took the position that, inasmuch as the electors had been named at a regular State Democratic Convention, it would require another convention to make a change – a change which the committee had no power to make."[468]

That bustle of Democratic activity came a day after the States' Rights party named a slate of twelve candidates "to vote for … Thurmond … and … Wright" including Malcolm Hill, L. W. Morgan, and Preston Parks "who already had slots on the Democratic slate."[469]

Suspecting that they were stymied by state law, the regular Democrats took the issue to Attorney General Roy Beeler, who "declined to furnish The Commercial Appeal with a curbstone version of what his official opinion would be."[470] Two weeks later, the Democrats' suspicion was confirmed. "W. F. Barry, an assistant state attorney general, said his study of the lawbooks indicated that the only strictly legal means of ousting the two electors would be to call a special session of the Legislature to amend the laws, and then call another State Democratic Convention."[471]

The only reason that *three* elector slots weren't implicated was that Larry Morgan had resigned his Democratic nomination before Assistant Attorney General Barry gave his opinion.[472] But, of course, neither Malcolm Hill nor Preston Parks had resigned his Democratic nomination.[473] At most, the regular Democratic Party could censure Parks and Hill for refusing to resign.

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466. *Party Leaders Back Truman, Start States' Righters Purge*, COM. APPEAL (Memphis), Sept. 16, 1948, at 1.

467. *Second Move Is Made by State Democrats*, COM. APPEAL (Memphis), Sept. 18, 1948, at 13.

468. *Open Breach in Tennessee's Democratic Party Crystalizes During Week*, COM. APPEAL (Memphis), Sept. 19, 1948, at 53.

469. *States' Righters Name Electors in Tennessee; Wright Warns Session*, COM. APPEAL (Memphis), Sept. 17, 1948, at 1.

470. *Beeler Will Decide on 'Stray' Electors*, COM. APPEAL (Memphis), Sept. 22, 1948, at 24.

471. *Duplicated Electors May Slow Up Count*, COM. APPEAL (Memphis), Oct. 6, 1948, at 17.

472. *Committee Meeting Is Called by Taylor*, COM. APPEAL (Memphis), Oct. 1, 1948, at 27.

473. Walter Armstrong, a fourth Democratic nominee for elector with States' Rights leanings, attempted to resign shortly before the election. That would have been too late to put

But that would run the risk of infuriating voters favoring the States' Rights ticket who the Democrats hoped would vote for the Democratic candidates for Governor and U.S. Senator.[474]

The prospect of Parks and Hill appearing on the ballot on both the Democratic and the States' Rights slate created another concern. How much split ticketing would there be and how long would it take to count the ballots for Tennessee's presidential electors?[475] At the time Tennessee employed long ballots for its election of presidential electors. A voter could choose to mark the circle next to each presidential ticket to vote for that ticket's full slate of electors or a voter could pick and choose as many as twelve individual electors. A Democratic voter not wishing to vote for Parks and Hill would have to make tick marks next to the names of the ten Democratic elector candidates other than the two Dixiecrats.

In addition to that concern about vote counting, the newspapers recognized that Parks and Hill had a political advantage. "By this dual listing, Democratic electors Preston Parks and Malcom Hill have obtained a head start on all the other 56 or more candidates for elector which will make them hard to beat, even if the States' Rights Party gets only a token vote in Tennessee."[476]

They should have added that if the state's vote for the Republican *ticket* barely exceeded the vote for the Democratic ticket then Parks and Hill might be appointed along with ten Republicans.

Voices began to rise in commentary if not quite in protest as the election neared. The League of Women Voters of Tennessee demanded that Parks and Hill "make known their choices of party to the State Election Commission."[477] *After* noting that "Presidential electors are free to vote for whomever they choose, as far as the Constitution goes," an editorial continued:

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a replacement on the ballot. *No Successor Is Seen for Memphis Elector*, COM. APPEAL (Memphis), Oct. 21, 1948, at 21. Armstrong pledged that if elected he would not appear at Tennessee's electoral college when it convened in Nashville, thereby making it possible to create a fillable vacancy. *Armstrong Clears It Up*, COM. APPEAL (Memphis), Oct. 29, 1948, at 6. He would keep that promise. *See infra* note 488.

474. *Party Seeks Answer to Electoral Tangle*, COM. APPEAL (Memphis), Oct. 8. 1948, at 36.

475. *Official Vote Canvass Nov. 8 May Prove Unusually Important*, COM. APPEAL (Memphis), Oct. 13, 1948, at 17.

476. *Electoral Confusion Is in Store for State*, COM. APPEAL (Memphis), Oct. 18, 1948, at 11.

477. *Pleasants Declines Invitation to Parade*, COM. APPEAL (Memphis), Oct. 17, 1948, at 2.

> It appears to us that Messrs. Armstrong,[478] Hill, and Parks are *morally bound* to stay on the Democratic ticket of electors under existing circumstances and cast their votes for Truman and Barkley *if the majority of voters in Tennessee so direct. It is a case where technicalities ought not to govern.*
>
> It is our hope that Tennessee will vote for Dewey and Warren and thus relieve these gentlemen of all responsibility in the matter.[479]

A Republican victory in Tennessee would have been the easy way out. If that had happened then Preston Parks would have been as well known to us as William Marbury would have been if John Adams had defeated Thomas Jefferson for the presidency in 1800. Parks would be even less well known than John Plater, the Maryland Federalist who in 1796 cast electoral votes for both Adams and Jefferson.

Malcolm Hill began to waver five days before the general election when he

> … denied that he would vote against President Truman "under any circumstances."
>
> ….
>
> If Mr. Truman should sweep Tennessee, but the vote is so close nationally that the fate of the Nation might rest on my Electoral College vote, it might be a different matter.
>
> It is also possible that if the Electoral College vote is close I could use my vote to bargain perhaps to get rid of McGrath (National Democratic Committee Chairman J. Howard McGrath) and some of that bunch in the party and get real Democrats into party offices.[480]

No such second thoughts were recorded from Preston Parks.

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478. As noted above, Armstrong had promised not to appear at Tennessee's Electoral College if elected. *See supra* note 473.

479. *Electors Morally Bound*, COM. APPEAL (Memphis), Oct. 24, 1948, at 6 (emphasis added). As Democrats, Parks and Hill received just under half of the votes cast. With their States' Rights votes thrown in they received almost 63 percent. Would the Democratic slate's failure to capture a majority of the popular vote have freed these electors from the moral obligation claimed by the *Commercial Appeal*? Ignoring technicalities in election law is a surefire recipe for a court date.

480. *11 Votes for Truman Possible, Hill Says*, COM. APPEAL (MEMPHIS), Oct. 28, 1948, at 2.

As election day approached the leading pollsters projected Thomas Dewey capturing just over 350 electoral votes.[481] That total did not include Tennessee's twelve electoral votes. The Crossley poll projected a five percent Truman margin in the Volunteer State. The Gallup poll a wider twelve percent margin

Party	Crossley	Gallup
Democrat	48%	51%
Republican	43%	39%
States' Rights	8%	9%
Progressive	1%	1%

Table 7 - Tennessee Popular Vote Projections

Although the nation may have bucked the polls when the results came in, Tennessee did not. Standard reports of the Tennessee results present the vote as shown in Table 8.[482]

Party	Vote	Pct.
Democrat	270,402	49.14%
Republican	202,914	36.87%
States' Rights	73,815	13.41%
Progressive	1,864	0.34%

Table 8 - Standard Presentation of 1948 Tennessee Presidential Vote

Gallup appears to have done a particularly good job projecting Tennessee. Its poll hit the Truman-Dewey margin almost on the nose. Gallup got only one thing wrong. It underestimated the States' Rights party appeal by about one-third. Much less surprisingly, it failed to project separate vote counts for Preston Parks and Malcolm Hill who each got just under 344,217, the sum of the standard numbers presented for the Democratic and States' Rights parties.

Democrats	270,402
States' Rights	73,815
sum	344,217

Table 9 - Back of the Envelope Calculation of Votes for Parks and Hill

Table 10 presents the actual, per elector, popular vote totals taken from Tennessee's Certificate of Ascertainment[483] sent to United States Secretary

481. For state-by-state projections *see* Frederick Mosteller et al., THE PRE-ELECTION POLLS OF 1948; REPORT TO THE COMMITTEE ON ANALYSIS OF PRE-ELECTION POLLS AND FORECASTS 18–27 (Social Science Research Council 1949).

482. For example, *see* the presentation at *Dave Leip's Atlas of U.S. Presidential Elections*. Available at https://uselectionatlas.org.

483. Image of the original Tennessee Certificate of Ascertainment, National Archives and Records Administration (on file with author).

of State "as soon as practicable" and attached to the transmission of the state's electoral votes sent to the President of the Senate.[484]

Democrat		Republican		States' Rights	
Armstrong	270,410	Alexander	202,912	Anderson	73,826
Brown	270,412	Beliles	202,906	Ballew	73,819
Dossett	270,404	Bishop	202,901	Farrell	73,819
Hill	***270,317***	Bolen	202,900	Gaerig	73,818
Hofstead	270,401	Bruce	202,900	***Hill***	***73,819***
Jeter	270,399	Carter	202,901	Hilldrop	73,818
McFarland	270,403	Fisher	202,895	King	73,815
McGinness	270,402	Frazier	202,914	Lanier	73,816
Parks	***270,328***	Holtsford	202,904	Morgan	73,816
Rose	270,393	Raulston	202,924	***Parks***	***73,816***
Volz	270,398	Ridenour	202,915	Sharp	73,812
Worley	270,402	Shofner	202,913	Tardy	73,814

Table 10 - 1948 Tennessee Popular Vote per Elector (Parks and Hill Highlighted, Progressive Slate Omitted)

There appears to have been very little split-ticket voting at all. Not surprisingly, Malcolm Hill and Preston Parks received the fewest votes on the Democratic slate. In fact, on the Democratic slate Malcolm Hill received only 95 fewer votes than Harvey Brown, who received the most votes on the Democratic line. On the order of only one in every 3,000 Democratic voters voted for Brown but not Hill.[485]

Table 11 presents the per elector totals for the top twenty-four voter getters sorted in descending order.

Slate(s)	Name	Votes	Slate	Name	Votes
Dem/SR	Parks	344,144	Rep	Raulston	202,924
Dem/SR	Hill	344,136	Rep	Ridenour	202,915
Dem	Brown	270,412	Rep	Frazier	202,914
Dem	Armstrong	270,410	Rep	Shofner	202,913
Dem	Dossett	270,404	Rep	Alexander	202,912
Dem	McFarland	270,403	Rep	Beliles	202,906
Dem	McGinness	270,402	Rep	Holtsford	202,904
Dem	Worley	270,402	Rep	Bishop	202,901
Dem	Hofstead	270,401	Rep	Carter	202,901
Dem	Jeter	270,399	Rep	Bolen	202,900
Dem	Volz	270,398	Rep	Bruce	202,900

484. *See* 3 U.S.C. §§ 6, 9, 11. Under current law the Certificate of Ascertainment is sent to the Archivist of the United States "as soon as practicable." 3 U.S.C. § 6. In 1948 it was sent to the Secretary of State "as soon as practicable." *See* 62 Stat. 672, 673.

485. There is less variation for the Republican and States' Rights slates.

Dem	Rose	270,393	Rep	Fisher	202,895

Table 11 – Popular Vote per Elector – Sorted by Popular Vote

As expected, thanks to the votes accumulated on the States' Rights line Parks and Hill finished far ahead of the remainder of the Democratic slate. We shall return to this point.

Shortly after the election Malcolm Hill capitulated to a request from Tennessee Senator Kenneth McKellar that he vote for Truman and Barkley.[486] Preston Parks did not comment on his intentions.[487]

When the electors met in Nashville on December 13 Walter Armstrong kept his promise to remain absent. The other electors present elected former State Treasurer John W. Harton to fill Armstrong's vacancy.[488] Harton voted for Truman and Barkley as did Malcom Hill. Preston Parks did not, as he had said he would not for over nine months. The next day an article in the Memphis *Commercial Appeal* summarized the proceedings.

> Parks, whose name was also on the States' Rights electoral slate, told reporters just before the meeting that he would stick by his announced intention of supporting Thurmond.
>
> When the electors marked their ballots a few minutes later Parks scrawled the name of Thurmond for President and Fielding Wright for Vice President.
>
> …
>
> The individual balloting for President came over the protest of Charles R. Volz of Ripley. Volz, substitute elector placed on the ballot after Larry Morgan, a States' Righter, resigned last Summer, said concerning the vote.
>
> "The state didn't vote that way. It went Democratic all the way, and I think that's the way we ought to vote."
>
> Robert Kennerly, an assistant attorney general, told the group, however, that electors were privileged to vote individually, …

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486. *One of Two Anti-Truman Tennessee Electors 'Yields' to Returns and Shifts to President*, NEW YORK TIMES, Nov. 6, 1948, at 2.

487. *Id.*; *Electors Meet Dec. 13*, COM. APPEAL (Memphis), Nov. 25, 1948, at 23; *Electors Vote Dec 13*, COM. APPEAL (Memphis), Nov. 28, 1948, at 51; *State Electors to Vote*, COM. APPEAL (Memphis), Dec. 9, 1948, at 21; *Electors Will Cast Formal Votes Today*, COM. APPEAL (Memphis), Dec. 13, 1948, at 1.

488. Image of the Certificate of Substitute Electors, National Archives and Records Administration (on file with author). This certificate has twelve signatories including Harton's. It does not indicate what the vote was.

> Volz's move to have the attorney general's office study the matter was voted down six to four.[489]

Parks' votes for Thurmond and Wright were duly recorded and transmitted to the President of the Senate as required by the Constitution.[490]

The noted political journalist Arthur Krock commented on Hill and Parks in the *New York Times* shortly after they gave their votes. His comments merit reproduction *in extenso*.

> Of the 531 citizens who constitute the Electoral College, *Malcolm C. Hill* of White County, Tennessee, *alone employed the full scope of the Twelfth Amendment to the Constitution by reserving until after his selection by the voters his decision what national candidate he would support*.
>
> Another Tennessean, *Preston Parks* of Sommerville, who, like Mr. Hill, was a candidate for elector on both the Truman and States' Rights Democratic tickets in the state, *followed the modern custom of making and living up to a specific pre-election pledge*. He said that if chosen he would never vote for the national party candidate, Mr. Truman, but would vote for the States' Rights party nominee, Governor Thurmond of South Carolina. This pledge he redeemed despite heavy pressure to induce him to conform to the final position taken by his colleague on both tickets, Mr. Hill. *Yet legally under the Twelfth Amendment he was as free to support Mr. Truman after his election as any one of the 531 citizens who were named electors.*
>
> Because of Mr. Hill's different procedure, and because *he was given his certificate by the voters after he declined to make his intentions wholly clear, he gave a construction to his role as Presidential elector which reverts to the original concept of the Constitution and rarely if ever has been done since 1824.* The fact – dramatized by Mr. Hill – that any of the other 530 electors in the college could legally have done the same, despite any pre-election pledges (unless their state authorities gave them specific instructions under the act of 1887), is what has stressed the need of revising the archaic system by which Presidents and Vice Presidents are chosen.

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489. *One Tennessee Vote Cast Against Truman*, COM. APPEAL (Memphis), Dec. 14, 1948, at 30.

490. Image of the Certificate of Vote of Electors, National Archives and Records Administration (on file with author).

> …
>
> [Hill] contended that the only legal way to remove him from the regular Democratic ticket would be by action of another state convention. Thus he urged the state committee to assemble, and said that to such a group he would submit his resignation. But no new convention was called.
>
> A few weeks before Nov. 2 Mr. Hill issued a further statement. In this he said that his principal purpose was not to elect Governor Dewey but to throw the Presidential contest to the House of Representatives. There, each state having one vote apiece, the Southern states would be in a strong position to name the President, he pointed out.
>
> Yesterday he said that, if his vote could have achieved it, however, he would have sent the contest to the House supporting Governor Thurmond. In other words, he would never have given his vote to the President if it had been essential to a majority in the Electoral College. …
>
> *His view of his obligation as a Presidential elector is a rare reversion to the early days of the Republic*.[491]

When Preston Parks cast the first anomalous presidential electoral vote in the twentieth century one of the nation's leading political commentators bemoaned the fact that by adhering to a political pledge he had not exercised enough discretion.

2. The Unpledged Electors and Alternative-Seeking Electors of 1960

With a civil rights revolution looming, some Southern Democrats continued to seek ways to exploit the role of presidential electors. Not knowing who the Democratic presidential nominee might be, in February 1952 Georgia enacted into law a statute (for that election only) providing that electors "shall be chosen … without reference to any candidate for President or Vice-President of the United States and without the name of any candidate for President or Vice-President being printed on the official ballot in connection with the names of candidates for Presidential electors."[492]

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491. Arthur Krock, *In the Nation: The One Elector Who Exercised Free Choice*, NEW YORK TIMES, Dec. 16, 1948, at 28. I have *no idea* what the passage in parentheses about the Electoral Vote Act of 1887 is about. I see nothing in the act concerning specific instructions from state authorities to electors. *See* 24 Stat. 373.

492. Electors of President and Vice-President, §9, 1952 Ga. Laws 7, 12.

Satisfied (presumably) with the Stevenson-Kefauver ticket, Georgia's twelve electors voted for the regular Democratic ticket. It did not matter. Dwight Eisenhower won the electoral vote 442-89.[493]

In 1956 slates of unpledged electors ran in four southern states, finishing ahead of the Republican ticket in South Carolina.[494] The "Free Elector" movement hoped to field tickets in seven southern states in 1960.[495] In the end full slates of unpledged electors appeared on the November ballots alongside Democratic and Republican slates in Louisiana and Mississippi.[496] In Alabama twenty-four "free electors" and eleven regular Democrats vied for eleven slots on the Democratic slate in a contested primary. The "free electors" won six of them.[497]

In Mississippi the slate of eight unpledged electors narrowly edged out the Democratic slate in the general election.[498] In Alabama the combined slate of unpledged and regular Democrats won by over fourteen points.[499] In Louisiana the unpledged slate finished a respectable third.[500]

Shortly after Election Day it appeared as though all but fourteen of the electoral votes would be cast for Democrat John Kennedy or Republican Richard Nixon. Ultimately, John Kennedy received 303 electoral votes, thirty-four more than the majority of 269 (out of 537) needed for election by the Electoral College.[501] Kennedy's 303 vote total included three from Hawaii, not transmitted to Congress until January 4, 1961,[502] and twenty-seven

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493. For the tally *see* 99 CONG. REC. 130 (1953).

494. The unpledged electors captured 4.09% in Alabama, 7.21% in Louisiana, 17.31% in Mississippi, and 29.45% in South Carolina. *See* PETERSEN, *supra* note 368, at 118, 133, 139, 154.

495. Arthur Krock, *The South's Waning 'Free Elector' Movement*, NEW YORK TIMES, June 3, 1960, at 30.

496. Brian J. Gaines, *Popular Myths About Popular Vote-Electoral College Splits*, 34 PS: POL. SCI. & POL. 71, 72 (2001).

497. *Id.* Additionally, even though Georgia law did not require electors to make a pledge, the Georgia Democratic Party had a question put on its September primary "that would allow the Democratic primary voters to decide whether to allow electors to cast their ballots in the Electoral College as 'free Presidential electors' apart from the national Democratic presidential ticket." Patrick Novotny, *John F. Kennedy, the 1960 Election, and Georgia's Unpledged Electors in the Electoral College*, 88 GA. HIST. Q. 375, 386, 390 (Fall 2004).

498. The unpledged slate received 38.99% of the vote, the Democrats 36.34%, the Republicans 24.67%. PETERSEN, *supra* note 368, at 139.

499. *Id.* at 118.

500. The Democratic slate won 50.42% of the vote, the Republicans 28.59%, and the unpledged 20.99%. *Id.* at 118. In addition, in Arkansas a States' Rights slate pledged to Governor Orville Faubus won 6.76% of the vote. *Id.* at 119.

501. For the tally *see* 107 CONG. REC. 291 (1961).

502. For the documents Congress received from Hawaii *see id.* at 289–90. Final judgment was not made by the Hawaii courts until December 30, 1960. The final certified vote was 92,410 to 92,295, a margin of 0.06%. *Id.* at 290.

from Illinois, where the outcome remained in doubt for over a month and still remains disputed by some.[503]

Without these thirty electoral votes Kennedy's victory was vulnerable to the defection of as few as five Democratic electors. Representatives who would caucus as Democrats appeared to be in a position to control twenty-nine of the fifty state delegations in the newly elected House of Representatives.[504] However, eleven of those were states that had joined the Confederacy a century earlier. Sensing an opportunity to thwart John Kennedy's anticipated civil rights efforts, States' Righters in the South once again saw an opportunity to exploit the role of presidential electors. The fourteen unpledged electors chosen in Mississippi and Alabama were a start, but to have an impact on the outcome they would need to get at least five (and possibly more) regular Democratic electors to vote for someone other than John Kennedy to send the election to the House of Representatives. If enough electors from both political parties could coalesce on an alternative candidate that alternative might even win in the Electoral College.

Lea Harris, a Montgomery, Alabama, attorney, hoped to put such a plan into effect. In the end, his only taker was Henry Irwin, a Republican elector from Oklahoma. Irwin was a very conservative Republican who had made it clear (to anyone within listening distance) that he would not support Richard Nixon for president.[505] In April 1960 Irwin filed the necessary papers to appear on the July 5 Republican primary ballot for elector office number 5.[506] When the regular Republican vying for the same electorship withdrew his candidacy, Irwin was left as the only candidate for that office in the primary and he won the nomination unopposed.[507] On November 8 the Republican slate of electors won Oklahoma by a whopping 18 percent.[508]

A day after the election, Lea Harris took pen in hand and wrote to all presidential electors.[509] He suggested three alternatives to be considered at a

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503. The margin was 8,858 votes or 0.19% of 4,757,409 votes cast. PETERSEN, *supra* note 368, at 128. For a review (and analysis) of the disputed outcome *see* Edmund F. Kallina, *Was the 1960 Presidential Election Stolen? The Case of Illinois*, 15 PRESIDENTIAL STUD. Q. 113 (Winter 1985).

504. KENNETH C. MARTIS, THE HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS, 1789–1983, at 196 (1982). Republicans controlled seventeen delegations and four were evenly divided.

505. For Irwin's testimony *see S. Subcomm. on Constitutional Amendments Hearings*, *supra* note 15, at 599.

506. *Id*.

507. *Id.* at 599, 639.

508. PETERSEN, *supra* note 368, at 150. Irwin told the committee that he did not campaign in the general election. *S. Subcomm. on Constitutional Amendments Hearings*, *supra* note 15, at 641.

509. For Irwin's letter *see S. Subcomm. on Constitutional Amendments Hearings, supra* note 15, at 600–03. For additional correspondence from Harris, Irwin, and other electors *see id.* at 604–16 and 622–25.

proposed meeting of southern Democratic electors in Montgomery on November 18.

> A. The southern electors would remain faithful to Kennedy if he would adjust certain policy positions.
> B. If not, they could cast their presidential electoral votes for Lyndon Johnson and their vice presidential votes for John Kennedy.
> C. Finally, if there were enough interest nationwide,
> I. the southern convention would nominate a list of southerners for president,
> II. a convention of allied Republican electors would choose a presidential candidate from this list
> III. the Republican convention would also choose a vice presidential candidate.

Irwin claimed that as many as 200 Republican electors would have joined the coalition if at least sixty Democrats had committed to it.[510] As the calendar turned to December, the Harris effort began to coalesce on Virginia Senator Harry Byrd as its presidential choice and Arizona Senator Barry Goldwater as its vice presidential choice.[511]

In his testimony Irwin claimed there was significant support for the Harris plan, but was only able to provide the name of one person willing to commit to the plan, Mrs. Earl L. Moulton, a Republican elector-candidate in New Mexico whose slate was not elected.[512] Irwin even claimed that the Republican electors in eight states "agreed to caucus" among themselves[513] and that the California electors "tried to get Mr. Nixon himself to release the electors."[514] He even presented a resolution adopted by the Oklahoma electors on December 15, four days ahead of casting their votes, that "[i]n view of the impossibility of electing Richard M. Nixon, President" called on the Republican Party at the national and state level to release electors from any moral obligation to vote for Nixon.[515]

When December 19 came only Henry Irwin joined the fourteen unpledged electors from Alabama and Mississippi and voted for Harry Byrd for president and Barry Goldwater for vice president. These fourteen electors began the election cycle as *unpledged* electors. When an alliance seeking an alternate choice emerged after the general election they became *alternative-*

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510. *Id.* at 596-97.

511. *Id.* at 621.

512. *Id.* at 616, 621. (The Democratic slate ended up winning New Mexico by less than one percent.); PETERSEN, *supra* note 368, at 145.

513. *Senate Subcommittee on Constitutional Amendments Hearings*, *supra* note 15, at 625. (The eight states were California, Iowa, Kansas, Oklahoma, Oregon, South Dakota, Utah, Washington, plus New Mexico.). *Id.* at 625.

514. *Id*.

515. *Id.* at 621.

seekers. Similarly, Henry Irwin began the election cycle as a *renegade* elector who made it clear he had no intention of voting for the presidential candidate on whose elector slate he appeared. Following the general election he became an *alternative-seeker*. A year later he became the most prominent voice of the coalition that Lea Harris had tried to form.

In 1960 Lea Harris tried to form a coalition of *alternative-seeking* electors. Fifty-six years later, in 2016, the Hamilton electors would try to do the same.

C. THE ANOMALOUS ELECTORS OF 2016

In 2016 seven presidential electors successfully cast one or both of their electoral votes for someone other than their party's nominees.[516] Several others expressed an interest in doing the same. Most prominent were four Democratic electors in Washington and three Democratic electors in Colorado. In Washington three Democratic electors voted for Colin Powell for president and one voted for Faith Spotted Eagle. These four electors, presumably, cast their vice presidential electoral votes for Elizabeth Warren, Maria Cantwell, Susan Collins, and Winona LaDuke. Washington had a statute imposing a fine on an elector who casts an electoral vote anomalously. "… Any elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars."[517]

The four anomalous electors challenged the Secretary of State's imposition of these fines (in two separate actions). Administrative Law Judge Robert Krabill upheld the imposition of the fines.[518] In his orders upholding the fines Judge Krabill first noted, "Washington does not prevent electors from voting contrary to their pledges. It does not unseat electors who attempt to vote contrary to their pledges, and it has not criminalized electors voting contrary to their pledges."[519] Judge Krabill continued, "[t]he appellants have raised a Constitutional defense. They are free to make that record in the administrative hearing process, and they did. They can raise that defense on appeal in

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516. *See* 163 CONG. REC. H185, H189 (daily ed. Jan. 6, 2017) (Congress's tally of the 2016 electoral vote).

517. WASH. REV. CODE § 29A.56.340 (2017) (In 2019 Washington replaced this statute with a remove and replace statute similar to Colorado's.). *See* S.B. 5074, 66th Leg., Reg. Sess., § 7(3), at 4 (Wash. 2017), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/5074.SL.pdf [https://perma.cc/Z4Y3-LFTN] (This section is now codified as WASH. REV. CODE § 29A.56.090(3)).

518. There are two distinct cases. The judgment upholding the fines levied against the three electors who voted for Colin Powell is Guerra, Docket No. 010421 (Wash. State Off. of Admin. Hearing 2017), John, Docket No. 010421 (Wash. State Off. of Admin. Hearing 2017), Chiafalo, Docket No. 010424 (Wash. State Off. of Admin. Hearing. 2017).
The judgment against the elector who voted for Faith Spotted Owl is Satiacum, Docket No. 010760 (Wash. State Off. Of Admin. Hearing 2017).

519. *Guerra*, § 5.5; *Satiacum*, § 5.5.

court."[520] Three of the four Washington electors pursued an appeal to the Washington State Supreme Court and ultimately the U.S. Supreme Court.[521]

In Colorado Micheal Baca, Polly Baca, and Robert Nemanich expressed an interest in casting their presidential votes for someone other than Hillary Clinton.[522] Such votes would have been contrary to Colorado law, which states: "Each presidential elector shall vote for the presidential candidate and, by separate ballot, vice-presidential candidate who received the highest number of votes at the preceding general election in this state."[523] On November 18, 2016, Nemanich sent an email to Colorado Secretary of State Wayne Williams asking "'what would happen if' a Colorado state Elector 'didn't vote for . . . Clinton and . . . Kaine.'"[524] Through surrogates Secretary Wil-

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520. *Guerra*, § 5.8. For a similar statement *see Satiacum*, § 5.7.

521. Levi Guerra, Esther V. John, and Peter B. Chiafalo, who voted for Colin Powell, appealed. Robert Satiacum, who voted for Faith Spotted Owl, did not. For brief accounts of the procedural history of this case *see* Chiafalo v. Washington, 140 S. Ct. 2316, 2322-23 (2020). *In re* Guerra 441 P. 3d 807, 808–09 (Wash. 2019).

522. In addition, individual Democrat electors in Maine, California, and Minnesota expressed an interest in casting their electoral votes for someone other than Secretary Clinton. In Maine elector David Bright initially cast his presidential electoral vote for Bernie Sanders rather than Clinton. After being ruled out of order Bright cast his presidential electoral vote for Clinton. Scott Thistle, *Maine electors cast votes for Clinton, Trump– after protests inside and outside State House,* PORTLAND PRESS HERALD, (Dec. 19, 2016), https://www.pressherald.com/2016/12/19/maine-electoral-college-elector-says-he-will-cast-his-ballot-for-sanders/# [https//:perma.cc/T3W3-7TZW] (Bright does not appear to have pursued legal action.)
In California elector Vinzenz J. Koller expressed an interest in voting for "Mitt Romney, John Kasich, or another qualified compromise candidate" and sought a temporary restraining order against California state officials to block any attempt to cast his electoral vote for someone other than Hillary Clinton. A federal District Court denied Koller's request. Koller v. Brown, 224 F. Supp. 3d 871, 881 (N.D. Cal. 2016) Koller subsequently brought suit alleging "he was forced, coerced and intimidated by California officials to register his 2016 electoral vote for the Democratic candidates for those offices, Hillary Rodham Clinton and Timothy Kaine." Koller v. Harris et al., 312 F. Supp. 3d 814 (N.D. Cal. 2018). This case was dismissed as moot. *Id.* at 822. It was not appealed.
In Minnesota elector Muhammad Abdurrahman attempted to cast his electoral votes for Bernie Sanders for president and Tulsi Gabbard as vice president. Abdurrahman v. Dayton, Case No. 16-cv-4279, 2016 WL 7428193 *1 (D. Minn. 2016). Minnesota's Secretary of State refused to accept Abdurrahman's ballot, declared his electorship vacant, and named an alternate elector to fill the vacancy. The newly promoted alternate then voted for Clinton and Kaine. *Id*. Abdurrahman quickly brought suit alleging that his constitutional rights had been violated and seeking a preliminary injunction to block Minnesota's transmission of its electoral votes to the President of the Senate and the National Archivist. *Id.* The District Court denied Abdurrahman's injunction request and dismissed his suit for mootness and laches. *Id*. at *5. Abdurrahman unsuccessfully appealed the case to the Eighth Circuit. Abdurrahman v. Dayton, 903 F.3d 813 (8th Cir. 2018).

523. COLO. REV. STAT. § 1-4-304(5) (2017).

524. Second Amended Complaint at 8, Baca v. Colo. Dep't of State, Case No. 17-cv-1937-NYW (D. Colo. Oct. 25, 2017). [hereinafter *Baca et al.*, Second Amended Complaint]

liams responded that an elector violating the statute just cited would be removed, a replacement seated, and any such offending elector "would likely face either a misdemeanor or felony perjury charge."[525]

Polly Baca and Nemanich ultimately cast their electoral votes for Clinton and Kaine. Micheal Baca did not. When he tried to cast his vote in contravention of the Colorado statute he was removed from his electorship and replaced.[526] Having felt "intimidated and pressured to vote against their determined judgment," Micheal Baca, Polly Baca, and Robert Nemanich brought suit against the Colorado Department of State and Secretary Williams under 42 U.S.C. § 1983, claiming that Article II and the Twelfth Amendment prohibit any person or state from interfering with an elector's discretion to vote for whomever he or she chooses for president and vice president.[527] The U.S. District Court for the District of Colorado dismissed their case.[528] On appeal the Tenth Circuit affirmed the dismissal with respect to Nemanich and Polly Baca but reversed with respect to Micheal Baca.[529] The Colorado Department of State appealed and on July 6, 2020, in a brief *per curiam* statement the Supreme Court reversed "for the reasons stated in *Chiafalo v. Washington*[.]"[530]

In Texas two Republican electors cast their presidential electoral votes for John Kasich and Rand Paul rather than Donald Trump. One of them, presumably, cast his vice-presidential electoral vote for Carly Fiorina. No legal action ensued. Texas has no statute concerning how presidential electors cast their electoral votes.[531]

The final anomalous electoral vote came from Hawaii where Democratic elector David Mulinix cast his presidential electoral vote for Bernie Sanders and his vice-presidential vote for Elizabeth Warren, in contravention of state law. The Hawaii statute reads, "[t]he electors, when convened, if both candidates are alive, shall vote by ballot for that person for president and that person for vice president of the United States, . . . who are, respectively, the

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Many of the documents filed in this case are available at https://equalcitizens.us/legal-materials/ [https://perma.cc/QA7J-F7EA].

525. *Id*.

526. For a video of the episode *see Mayhem follows Colorado elector not voting party lines, his subsequent removal* (Denver 7 broadcast Dec. 19, 2016) https://www.youtube.com/watch?v=0kMvOkfpONE.

527. *Baca et al.*, Second Amended Complaint, *supra* note 524, at 10.

528. Order on Motion to Dismiss, Baca v. Colo. Dep't. of State, No. 17-cv-01937-WYD-NYW, (D. Colo. Apr. 10, 2018).

529. Baca v. Colo. Dep't. of State, 935 F.3d 887 (10th Cir. 2019). For a summary of the case's history *see id*. at 902–05.

530. Colo. Dep't. of State v. Baca, 140 S. Ct. 2316 (2020).

531. *See* TEX. ELEC. CODE §§ 192.001–007 (2017). Seventeen other states have no statutes concerning how presidential electors cast their electoral votes.

candidates of the political party or group which they represent[.]"[532] The State of Hawaii does not appear to have considered initiating any action against the anomalous elector. However, the Hawaii Democratic Party considered initiating such an action.

In a letter to the Oahu County Committee of the Democratic Party of Hawaii dated January 30, 2017, party member Carolyn Golojuch, MSW, proposed filing charges against Mulinix. Citing the statute just quoted, her letter proposed filing charges against Mulinix for "violating his duty as an Elector."[533]

After considering the issue Richard Halverson, Ph.D., Chair of the Oahu County Democratic Committee agreed to the factual claims in Golojuch's letter. He did not agree to pursue *legal* action against Mulinix.

> Now, that said, it is generally not the Party's place to punish its members for violations of Hawaii statutory law, particularly when the law itself provides no provision whatsoever for sanctions or penalties. …
>
> Therefore, your Committee recommends to the members of the Oahu County Committee that David Mulinix be issued a formal reprimand, which includes a three-year prohibition from holding any post in the Democratic Party of Hawaii for a period of no less than three years, effective upon the date of action by the Oahu County Committee. In that regard, your Investigative Committee notes that such a sanction will effectively bar Mr. Mulinix from becoming a presidential elector in 2020.[534]

The *political* consequences suggested by Oahu County Democratic Chairman Halvorson are exactly the consequences suggested as the First Congress debated the Assembly Clause in 1789.

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532. Haw. Rev. Stat. § 14-28 (2017). In 2019 eleven members of the Hawaii Senate cosponsored SB119, a bill that have (1) invalidated the vote of any elector who voted for someone other than the candidates "whose names appeared on the presidential election ballot" and (2) would have deemed the elector to have vacated his office. The bill added exceptions in case the presidential candidate (a) "released the elector without condition" or (b) "has become mentally disabled." The bill remained in Senate committee through May 7, 2020 when the legislature adjourned *sine die*. *See* https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=119&year=2020.

533. Email from Carolyn Golojuch, MSW to Oahu County Committee of the Democratic Party of Hawai'I (Jan. 30, 2017) (on file at https://www.oahudemocrats.org/agenda/2017-09-23/MulinixComplaint01.30.17.pdf).

534. DEMOCRATIC PARTY OF HAWAI'I, OAHU COUNTY INVESTIGATIVE COMMITTEE REPORT, (2017), https://www.oahudemocrats.org/agenda/2017-08-26/OCCMulinix.pdf.

When the First Congress debated the Bill of Rights, South Carolina Representative Thomas Tucker suggested amending the Assembly Clause to give the people the right "to instruct their Representatives."[535] Pennsylvania's Thomas Hartley immediately responded "the principle of representation is distinct from an agency."[536] Hartley continued,

> According to the principles laid down in the Constitution, it is presumable that the persons elected know their interests and the circumstances of their constituents, and being checked in their determinations by a division of the Legislative power into two branches, there is little danger of error. At least it ought to be supposed that they have the confidence of the people during the period for which they are elected; and *if, by misconduct, they forfeit it, the constituents have the power of leaving them out at the expiration of that time – thus they are answerable for the part they have taken in the measure that may be contrary to the general wish.*[537]

Members of Congress make a myriad of decisions on a wide range of questions. Presidential electors make only one pair of decisions. *Chiafalo* and *Baca* boiled down to the question of whether presidential electors are the electorate's representatives or merely their agents. In its rulings the Court held that a state can reduce its electors to mere agents.

VIII. THE FUTURE OF ANOMALOUS ELECTORS

In oral argument in *Baca* Colorado Attorney General Phil Weiser embraced the distinction between electors being the electorate's representatives or merely their agents. "Electors can either vote as proxy voters on behalf of the public, as we do here in Colorado, or they can be free agents. . . . By having this structure uniform across the several states, you give states the ability to choose which model they want."[538]

There are actually four categories to consider:

- States (like Texas and seventeen others) whose statute book puts nothing in the path of an elector wishing to exercise discretion.
- States and the District of Columbia whose statute book requires a candidate for an electorship to take an oath pledging to vote for her

535. 1 ANNALS OF CONG. 761 (Joseph Gale ed., 1789).
536. *Id*.
537. *Id.* (emphasis added).
538. Tr. of Oral Arg. 28:4-10, Baca.

party's candidate but provides neither penalty nor removal if an elector violates her pledge.

- California and formerly Washington where the statutes require a candidate for an electorship to take an oath pledging to vote for her party's candidate and provide a penalty if the elector violates her pledge but allows the anomalously cast electoral vote to stand.[539]
- States like Colorado (and now Washington) whose statute books reduce their electors to mere agents and removes them for attempting to act with discretion.[540]

The rulings in *Chiafalo* and *Baca* leave open the question of *their* applicability to the question of whether an elector in the first three categories of states can exercise discretion. They leave no such room in the fourth and final category of states *unless a presidential candidate has died*.

The Court pays cursory attention to this problem in a footnote toward the end of the *Chiafalo* opinion.

> The Electors contend that elector discretion is needed to deal with the possibility that a future presidential candidate will die between Election Day and the Electoral College vote. We do not dismiss how much turmoil such an event could cause. In recognition of that fact, some States have drafted their pledge laws to give electors voting discretion when their candidate has died. And *we suspect that in such a case, States without a specific provision would also release electors from their pledge*. Still, we note that because the situation is not before us, *nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate*.[541]

At a minimum, rather than depending on the Court's *surmises*, states that reduce their electors to mere agents should make sure their statute books include a provision that explicitly releases a presidential elector in case of a candidate's death or other unforeseen event.[542]

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539. California imposes a $1,000 fine and up to three years in prison for casting an anomalous electoral vote but does not remove the elector. *See* CAL. ELEC. CODE §§ 6906, 18002 (West 2019). For an elector's attempt to get a Temporary Restraining Order and a Preliminary Injunction *see* Koller v. Brown, 224 F. Supp.3d 871 (2016). Mr. Koller's attorney, Andrew J. Dhuey, has confirmed to me that his client would have been able to cast his electoral vote anomalously without being removed but would have faced a possible fine and prison term. Telephone conversation with Andrew J. Dhuey, July 8, 2020.

540. For a list *see Chiafalo*, 140 S. Ct. at 2322 n.2.

541. *Id.* at 2328 n.8 (emphasis added).

542. Seven states currently have such provisions in the statute books. In Indiana if a member of the ticket dies or withdraws the pledge is transferred to the successor candidate. IND. CODE § 3-10-4-1.7 (2019). In Wisconsin if a member of the ticket dies, the electors are

The 2020 presidential election featured two major party presidential candidates well into their seventies. It also featured an unprecedented number of legal challenges from the Trump campaign. Suppose Joe Biden had died in the forty-one-day interval between the general election and the day on which the electors gave their votes. A state whose statute book reduces its electors to mere agents without providing an explicit release provision might well look the other way and not take action against electors *legally* bound[543] to the dead candidate.

Even if *Chiafalo*'s impact is limited to just the states that remove electors attempting to violate their pledges there would still have been eight such states with seventy Biden electors that lack an explicit release provision. Table 12 collects these states.[544]

State	Biden Electors	State	Biden Electors
Arizona	11	Nebraska	1
Colorado	9	Nevada	6
Michigan	16	New Mexico	5
Minnesota	10	Washington	12

Table 12 - States with Biden Electors that Remove Electors Attempting to Vote Contrary to Pledge

released from voting for that candidate but not the other. WIS. STAT. § 7.75(2) (2019). In Utah if a member of the ticket dies or is convicted of a felony the electors are released from voting for that candidate (but not the other). UTAH CODE ANN. § 20A-13-304(3) (2019). In Tennessee if the presidential candidate dies then the electors are completely released and if the vice-presidential candidate dies (but not the presidential candidate) then the electors are released from their vice-presidential pledges. TENN. CODE ANN. § 2-15-104(c) (2019). In California and Hawaii if either member of the ticket dies the electors are completely released. CAL. ELEC. CODE § 6906 (West 2019); HAW. REV. STAT. § 2-14-18 (2019). In South Carolina the electors can be released from their pledges at the discretion of their state party's executive committee. S.C. CODE ANN. § 7-19-80 (2019).

543. How, exactly, does a *state* without an explicit release provision *release* electors from their pledges? The state, through its officers, might choose not to *take action* against such electors, but a *release* is an *action*.

544. For the statutory provisions *see* ARIZ. REV. STAT. ANN. § 16-212 (2019 Cum. Supp.); COLO. REV. STAT. § 1–4–304 (2019); MICH. COMP. LAWS § 168.47 (2008), MINN. STAT. § 208.46 (2019), MONT. CODE ANN. §§ 13–25–304, 13–25–307 (2019); NEB. REV. STAT. §§ 32–713, 32–714; NEV. REV. STAT. §§ 298.045, 298.075 (2017); N.M. STAT. ANN. § 1–15–9 (Supp. 2011); N.C. GEN. STAT. ANN. § 163–212 (2019); OKLA. STAT. tit. 26, §§ 10–102, 10–109 (2019); WASH. REV. CODE § 29A.56.090(3) (2019).
In addition, eight more states with thirty-nine Biden electors have statutory provisions binding electors but lacking an explicit removal provision. Connecticut (7), Delaware (3), Maine (3), Maryland (10), Vermont (3), Virginia (13). *See* CONN. GEN. STAT. § 9-176 (2019); DEL. CODE ANN. tit. 15, § 4303 (2019); ME. REV. STAT. ANN. Tit. 21-A § 805(2) (West 2019); MD. CODE ANN., Elec. § 8-505(c) (2019); VT. STAT. ANN. tit. 17, § 2732 (2019); VA. CODE ANN., Elec. § 24.2-203 (Michie 2019).

If Biden had died, the votes of as many as seventy *released* electors might have been subject to challenge. Given the volume of litigation brought by the Trump campaign in fact there is no reason to believe that such a release would have gone unchallenged in all of these states. That would have meant bitterly contested proceedings in as many as eight state court systems (spread over four circuits) in however few days there happened to be between the candidate's death and the day the electors gave their votes.

The Supreme Court would have been under extreme time pressure to resolve all these cases in the little time available to it. Even if it did, the Constitution and the United States Code give the final decision to Congress, a political body.

> Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. … The two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so *regularly given* by electors whose appointment has been so certified.[545]

Can there be any doubt that the January 6 vote on whether or not to accept electoral votes from electors *released* from their pledges without explicit statutory warrant would have been on anything other than partisan lines?

None of this should even be an issue. In 1932, as Congress made the most recent constitutional change to the presidential election process, a House committee report explained why that amendment contained a provision concerning candidate death after the casting of electoral votes *but not before*.

> A constitutional amendment is not necessary to provide for the case of the death of a party nominee before the November elections. Presidential electors and not the President are chosen at the November election. The electors, under the present Constitution *would be free* to choose a President, notwithstanding the death of a party nominee. Inasmuch as the electors *would be free* to choose a President, a constitutional amendment is not necessary to provide for the case of the death of a party nominee after the November elections and before the electors' vote.[546]

According to this explanation elector discretion in case of a candidate's death prior to the casting of electoral votes is not an *exception* case. It is a

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545. 3 U.S.C. § 15 (2014) (emphasis added). For a critique of the constitutional validity of congressional invalidation of electoral votes *see* Kesavan, *supra* note 228.

546. H.R. REP. NO. 345, 72d Cong. 1st Sess. 5 (1932) (emphasis added). For further detail *see supra* Part VI.A.

specific instance of a more *general* case. The Twentieth Amendment Congress acknowledged elector discretion. That should still be the law of the land. After *Chiafalo* it no longer is in general. Whether it is in case of a candidate's death is now an open issue in states that do not explicitly release their electors from any obligation to vote for a deceased candidate.