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Why can't the Legislature decertify electors?

This whole question boils down to the differences between legislative power to make laws and conduct investigations in support of the lawmaking function, which is vested in the legislature, and judicial power to fashion remedies when individuals' constitutional rights or the statutes are violated, which is vested in the courts. The legislature can conduct investigations and pass bills concerning the conduct of elections and the manner of appointment of presidential electors, and it can certainly make referrals for prosecution, etc., depending on its findings. But, it is for the courts to determine whether and to what extent individuals' rights, including the rights of candidates, were violated by election fraud or maladministration and fashion appropriate remedies, which could conceivably include "decertifying" the results of the presidential election depending on the facts.

Even if a legislative investigation into the 2020 presidential election were to discover significant fraud, any remedy would have to be sought in court by an aggrieved party (a candidate or a voter). In the American system of government, the legislature makes laws, and the courts resolve disputes over the application of law to facts in specific situations. The results of a legislative investigation could be used as evidence in court in civil or criminal proceedings, but the state legislature's constitutional power with respect to presidential electors, although broad, extends only to establishing the manner of appointment of presidential electors, which the legislature has done by law. The U.S. Constitution does not give the legislature the power to unilaterally alter the official results of an election in which presidential electors were appointed as provided by law, even if a legislative investigation finds the election was fraudulent (see "Manner of Appointment," below). Again, that is the role of the courts. There is no constitutional or statutory authority or process for the legislature to overturn the results of a presidential election in the state.

Likewise, absent fraud, whether the presidential election was conducted according to the manner established by law—"Democracy in the park" events, municipal clerks "curing" absentee ballot certificates, etc.—and what remedy is available if the law was violated, is also the prerogative of the courts. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Currently, there is litigation pending in Wisconsin challenging certain election practices in the wake of the 2020 presidential election.

It is true that there is disagreement in Arizona about whether the Arizona legislature has the power to decertify the presidential election in that state based on the potential results of the investigation in that state (see the attached research). (Note that John C. Eastman says in the podcast linked in the attached research that we are in uncharted territory and it makes sense to wait to talk seriously about a potential process until after the results of the legislative investigations are in.) However, the position taken here by Pennsylvania Senate President Pro Tempore Jake Corman with respect to legislative investigations in that state appears to be more consistent with the distinct constitutional grants of power to the legislature and the courts: "[I]f our work leads to someone else taking that work into a court of law, and changing those results, then so be it."

The Legislature has plenary power?

The point of the Supreme Court's decision in *Chiafalo* is that the legislature's power is plenary in the sense that presidential electors can be replaced or fined for failing to cast their vote as required by law duly enacted by the legislature—they have no inherent discretion. The case has no real bearing on the question at hand.

I know it's a bit dense. Here is one way to summarize the basic points:

1. The Constitution gives the legislature plenary power to establish how presidential electors are appointed, by what process.
2. The Wisconsin legislature has established that process by law—popular election, with no role for the legislature in certification of the results.
3. Changing that process, by, for example, giving the legislature a role in the certification (or decertification) of presidential electors, would require a law change.
4. The legislature has the power to investigate the conduct of elections in furtherance of its power to make laws and to exercise effective oversight.
5. The legislature is conducting investigations and has passed bills to address the election administration issues arising in the 2020 election—the governor has vetoed those bills. That is the legislature's constitutional role.
6. It is the constitutional role of the courts to resolve specific disputes over election results, including allegations of fraud and election maladministration.

And, you might add this last point, in the nature of “if the shoe were on the other foot”: If the legislature's “plenary” power meant that it could unilaterally reverse the results of a presidential election (or at least decertify or revoke the states' electoral college votes) despite having no statutory role in the process, that is not necessarily a road we want to go down. Hypothetically, in a state that voted for Trump in 2016, could the state legislature controlled by democrats have reversed the state's presidential election results (or at least withheld the state's electoral college votes for Trump) based on allegations of Russian interference in the election? One might reply that the election fraud would have to be real, but if “plenary” means the legislature—and only the legislature—decides, what recourse would there be to challenge that legislature's actions? If the reply is “the courts,” that is the basic point—the courts resolve these kinds of disputes rather than the political branches.

Manner of Appointment

Article II, section 1, clause 2 of the U.S. Constitution requires each state to appoint presidential electors “in such manner as the legislature thereof may direct.” While the U.S. Supreme Court has repeatedly held—most recently in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020)—that U.S. Const. art. II, § 1, cl. 2. confers a broad power on state legislatures, that power extends only to establishing the manner of appointment of presidential electors and is couched in the lawmaking function. The state legislature's power is “plenary” in the sense that the federal government has no role, and state legislatures are free to establish any number of different manners of appointment.

In Wisconsin, the legislature has directed that the manner of appointment of presidential electors shall be by a vote of the people at the presidential election. A state legislature may reserve to itself by law the authority to appoint the state's presidential electors, and several states did just that for a number of years following ratification of the U.S. Constitution. Conversely, a state legislature may, again by law, give the people of the state the power to appoint presidential electors at an election, as is the case now in Wisconsin and every other state. However, if, as in Wisconsin, state law gives the people of the state the power to appoint presidential electors at an election, the legislature has no unilateral authority to reverse the results of the election. Otherwise, voters' equal protection rights may be implicated. See *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Again, with respect to allegations of fraud in a presidential election, it would be up to a court to determine whether such fraud was extensive enough to alter the election results and what remedy, if any, is available.

It is important to note that U.S. Supreme Court Justice Clarence Thomas's opinion is that the U.S. Constitution does not confer a broad power on state legislatures with respect to the appointment of presidential electors, but only an "affirmative duty" to establish the manner of appointment. *Chiafalo*, 140 S. Ct. at 2329. Again, in *Wisconsin*, the legislature has carried out that duty by establishing laws providing for the popular election of president and vice president in the state. Ninth and Tenth Amendments

The Ninth and Tenth Amendments to the U.S. Constitution do not give the state legislature, acting alone, the power to reverse the results of a presidential election. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." That amendment does not confer any special power on the state legislature with respect to overturning the results of a presidential election. The rights implicated in a fraudulent election are primarily equal protection—one person, one vote—and, with respect to the losing presidential candidate, due process. Again, in the American system, such rights, when infringed, are enforced in court.

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That amendment too does not confer any special power on the state legislature with respect to overturning the results of a presidential election. The *Wisconsin* Constitution vests the lawmaking power in the state senate and assembly. That power is plenary (See *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 277 (1962)) and includes the power to investigate (*In re Falvey*, 7 Wis. 630, 638 (1858)), but the power to investigate is primarily tied to the power to "make or unmake laws." *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968). The legislature's power to pass laws and conduct investigations does not include any inherent authority to reverse the results of an election based on the findings of a legislative investigation. Again, absent a statutory or constitutional grant of power to the legislature, that power, to the extent that it exists, resides with the courts.