
Memorandum

Date: September 23, 2021

To: Sen. Wendy Rogers

From: Matt DePerno

Subject: Final Memo regarding Authority Over Elections and Electors

Can a State Legislature recall the state electors or decertify a national election upon proof of fraud in the election? The Answer is "Yes."

On August 14, 2021, I presented a memo to Sen. Wendy Rogers titled "Preliminary Memo regarding Authority Over Elections and Electors." That memo concluded that a State Legislature has the authority to recall the state elector or decertify a national election upon proof of fraud in the election. Importantly, this does not require proof of "all of the fraud."

On September 16, 2021, Ken Behringer prepared a memo to Sen. Michelle Ugenti-Rita that asked the question "*Is there a mechanism to decertify a presidential election?*" (the "Behringer Memo") The Behringer memo concluded there is no mechanism to decertify a presidential election outside of 3 U.S.C. §§ 5 and 15.

This memo disagrees with the Behringer Memo for the following reasons: (1) Sec. 5 is limited to the controversy of any appointment of electors and does not address decertification of an election; (2) Sec. 15 is limited to the counting of electoral votes and objections on January 6 and does not address decertification of an election based on fraud; (3) the Behringer Memo does not address decertification of an election upon proof of fraud; and (4) the Behringer Memo relies on *Trump v Kemp*, 511 F. Supp. 3d 1325 (N.D. Ga. 2021) which deals only with court authority to decertify an election (and only in the context of Secs. 5 and 15) but which does not deal with the State Legislature's authority to decertify an election.

In light of the Behringer Memo, we ask again whether a State Legislature can recall the state electors or decertify a national election upon proof of fraud in the election? **After again considering the constitutional authority of the State Legislature, the Constitution itself, and U.S. Supreme Court authority and precedent, the answer is definitively "Yes."**

States have authority over their elections, including national elections. "Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the new general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or *to punish any fraud in voting for electors*; but has left these matters to the control of the States." *In re Green*, 134 U.S. 377, 380 (1890) (emphasis added).

The United States Supreme Court opinions discussed herein are based on the overarching principles that the Constitution reserves to the national government only those expressly enumerated powers in Article I. All other powers not specifically reserved are delegated to the States and to the People. Indeed, "[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State." See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995).

The Ninth and Tenth Amendment work in tandem to consecrate this broad delegation of power to the States. In *Chiafalo v. Washington*, 591 U.S. _____, 140 S. Ct. 2316, 2324-25 (2020) "**Nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion.**" (emphasis added). Specifically, the Supreme Court noted that the Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee – **and the state voters' choice** – for President. Indeed, the Behringer Memo discusses this authority in broad strokes through the discussion of sections 5 and 15. However, Sec. 5 deals only with the controversies as to the appointment of presidential electors and does not address issues of fraud that subsequently arise. Likewise, Sec. 15 deals only with counting of electoral votes and objections as of January 6 and again, does not address issues of fraud that is subsequently demonstrated. To suggest that all issues of fraud in the November 3, 2020 election must be presented to Congress by January 6, 2021 pursuant to sections 5 and 15 in order to be considered fails to recognize the complexity of the issue. It also suggests that all issues of fraud related to elections are somehow codified in sections 5 and 15, which is not only false, but also fails to give proper weight to the authority presented in the Constitution and U.S. Supreme Court authority and precedent.

As we know, the Constitution is "barebones about electors." *Chiafalo, supra* at 2324-35. As it should be. The residual powers are left to the States. The Behringer Memo addresses Article II (only in the context sections 5 and 15). However, Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives. There are no restrictions or limitations.

The Twelfth Amendment then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. "Appointments and procedures and . . . **that is all.**" *Chiafalo, supra* at 2315 (emphasis added).

In prior cases, the Court has stated that Article II, §1's appointments power gives the States **full authority over presidential electors**, absent some other constitutional constraint. The Court has described that clause as "conveying the broadest power of determination . . ." *McPherson v. Blacker*, 146 U. S. 1, 27 (1892). See also *Chiafalo, supra* at 2324.

It would be meaningless if after giving full authority to the States over presidential electors, the State Legislature could not, upon a proper showing, recall those electors to decertify a fraudulent election. It would be equally meaningless to suggest that all fraud must be discovered and presented by January 6. As the Supreme Court said in *Chiafalo, supra*, the State has full authority absent some other constitutional constraint.

As far as the national government (and Constitution) is concerned, i.e., *federal law*, there are no such constraints. "Congress . . . has left these matters to the control of the States." *In re Green, supra* at 380. Therefore, each State Legislature has the power to recall electors and decertify their vote upon demonstrable proof of fraud. Indeed, this is the only way the State can guarantee that the People are represented. The Federal Government "is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316 (1819). "[T]he powers delegated by the . . . Constitution to the federal government are few and defined," while those that belong to the States "remain . . . numerous and indefinite." The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). Thus, "[w]here the Constitution is silent about the exercise of a particular power[,] that is, where the Constitution does not speak either expressly or by necessary implication," the power is "either delegated to the state government or retained by the people." See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (stating that the Federal Government's powers under the Constitution must be "expressly given, or given by necessary implication").

For an added measure of assurance in the latter regard, it is declared that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others* retained by the People." U.S. Const., amend. IX (emphasis added). It was universally agreed by the Framers that there are *additional* fundamental rights, protected from governmental infringement, which exist alongside those specifically mentioned in the first eight amendments. "The [Ninth] Amendment . . . was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." I Annals of Congress 439 (Gales and Seaton ed. 1834). See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891), pp. 626-627. As "it cannot be presumed that any clause in the constitution is intended to be without effect . . . effect should be given to all the words it uses." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). See also *Myers v. United States*, 272 U.S. 52, 229 (1926). And, indeed, a right to political affiliation and political choice has been addressed as protected, at least in part, by this amendment. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94-95 (1947). This includes, of course, the fundamental right to vote. *Id.* See also *Reynolds v. Sims*, 377 U.S. 533, 560 (1964).

The Behringer Memo ignores this long history of cases, but instead focuses on *Trump v Kemp, supra*, by quoting "this Court finds no grounds upon which to independently order the decertification of Georgia's election results" (relying again on Sec. 15). However, the Behringer Memo fails to recognize that *Trump v Kemp* focused exclusively on a court's role (*i.e.* the judicial branch) in enforcement of the rules for appointment and objection to electors. Indeed, *Trump v Kemp* did not address in any way either the court's role or the State Legislature's role in recall of electors or decertification of an election upon a showing of fraud subsequent to January 6.

Indeed, this memo address that issue. That the right to vote is *the* fundamental and primary right among all other fundamental rights, enumerated or not, is evident in the fact it is self-executing. Infringement upon it *cannot* occur under the Constitution if the government is, in fact, one that is duly and *legally* chosen by the People. Any government that asserts a mandate to rule on the basis of fraud or illegality effectuates an instant infringement on the sovereign's will, of necessity, has no legitimacy. It is as violent a usurpation as would be the direct use of force to suppress the People. Only, it is more sinister and insidious. It is at once an uncontestable rejection of the values and ideals of the People and a silent assassination of their collective right to express them.

To countenance a fraudulent election is to deny the inherent sovereignty retained by the People to govern themselves. To allow one such as this to pass as valid with the level of skullduggery and fraud evident to everyone who cares to look and who is not blinded by the conspired obfuscation foist upon them by bureaucratic functionaries, technocrats, subversives in both political parties, and their corporate *and* foreign donors, and those who control, to the great detriment of public debate and discourse, the information from social media all the way to the transmission of the "news" to households across the nation, is to leave the sovereign citizens of this country little choice. Ignoring this treasonous crime destroys any remnants of faith in the proper and orderly functioning of a government that is *supposed* to serve them.

If the choice of the People has been adulterated by fraud, the Legislative branch and the People have a right, an obligation, and, indeed, a duty to call it out to ensure preservation of the Republic that is guaranteed to them by the Constitution; or indeed, to dissolve and abolish it altogether. The Declaration of Independence, Second Paragraph (July 4, 1776) (emphasis added). Indeed, the Behringer Memo suggests that fraud must be ignored and the Republic destroyed if such fraud is not discovered prior to January 6. Such a conclusion ignores the principles of the Founders and precedent of federal law as described herein.

Preservation of the Republic *can* be done by legislative decertification under the principle of the Tenth Amendment and the Supreme Court's interpretation of the broad discretion states have over electors. The state constitutions give broad authority to the People to recall all publicly elected officials. Of course, this extends to any public official charged with a duty to represent their will. And, this *must* be done, for under the Ninth Amendment, if the fundamental right to vote is to be protected, every illegally cast or counted vote must not be allowed to unconstitutionally disenfranchise the legal voter's fundamental, constitutional rights.

These rights that reside in the People are necessarily delegated to the State Legislature in the event that the latter must act *sua sponte* to correct a fraudulently held election. After all, the Legislature is the lawmaking authority in the state. Absent any restraints in the state or federal constitution (and there are none), it must act in the stead of the people where there is no actuating power given to the People under state law. In other words, the Legislature itself does not have to pass a state law to exercise its constitutional (both state and federal) authority.

A legislature's determination to decertify the votes cast by the electors or to otherwise decertify an election on demonstration of fraud in the election itself is nothing more than the Legislature's use of its reserved sovereign powers under the Tenth Amendment to protect those fundamental rights and privileges reserved to the People by the Ninth Amendment.

Indeed, the failure to do so would be a violation of the Legislature's role as a co-equal branch of government.