



# **GUARDRAILS FOR THE GUARDIANS**

Reducing Secretary of State  
Conflict of Interest and Building  
More Impartial U.S. Election  
Administration

A REPORT BY THE ELECTION REFORMERS NETWORK

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AND BUILDING MORE IMPARTIAL U.S. ELECTION  
ADMINISTRATION**

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## ABOUT ELECTION REFORMERS NETWORK (ERN)

The Election Reformers Network is a nonpartisan 501c3 organization founded in January 2017 by experts in democracy promotion and election observation with extensive experience in the United States and overseas. ERN leverages this expertise to develop and support election reforms that can reduce polarization and increase public confidence in U.S. democratic institutions.

## THE AUTHORS

**KEVIN JOHNSON** is the founder and executive director of Election Reformers Network (ERN). Kevin has 19 years' experience in election reform programming, including three years with ERN, ten years as a Board Member of Common Cause Massachusetts, and seven years working on overseas democracy promotion with the National Democratic Institute. Kevin is on the Advisory Boards of Fairvote, Issue One, American Promise, and Voter Choice Massachusetts.

**LARRY GARBER** is an independent consultant, with more than 35 years of experience on election related work. Previously, he served on the faculty of the National Defense University, a senior policy-maker at the US Agency for International Development (USAID), mission director for USAID's West Bank/Gaza program, and as the Chief Executive Officer of the New Israel Fund.

**EDWARD MCMAHON** currently holds a joint appointment as Adjunct Associate Professor of Community Development and Applied Economics, and Political Science at the University of Vermont. He previously served as Dean's Professor of Applied Politics and Director of the Center on Democratic Performance (CDP) at Binghamton University (SUNY), as Senior Advisor for Democracy and Governance in USAID's Policy and Program Coordination Bureau and as a Regional Director for the National Democratic Institute.

**ALEXANDER VANDERKLIPP** is the Election Reform Fellow at Election Reformers Network, where he contributes to research and development of the ERN program portfolio. Previously, he worked on redistricting, turnout, and pro-voter election administration projects during internships for the Democracy Fund, the National Democratic Redistricting Committee, and U.S. Senator Gary Peters.

Designed by:  
**BEARBERRY CREATIVE**

A statue of Abraham Lincoln, shown from the chest up, leaning forward with his hands resting on a surface. He is wearing a dark suit and a white shirt with a bow tie. The background is a dark, textured wall with vertical lines.

# EXECUTIVE SUMMARY

In 33 states in the U.S., the position of chief election official is held by the secretary of state (or a similarly titled official), who is elected in partisan elections and takes office with allegiance to a political party.<sup>i</sup> **No other democracy in the world selects its most senior election officials in this manner.**

In seven states, the governor or the legislature appoints the secretary of state, which likewise results in a state chief election official with strong ties to a political party.

These structures create conflict of interest between the secretaries' responsibility as chief election officials to administer elections neutrally and their personal and professional interest in the success of a party fielding candidates. In states with elected secretaries of state, these individuals are frequently candidates themselves, whether for re-election or for higher office. These conflicts of

interest undermine voter confidence in elections, and they can lead to situations where partisan motivations affect election results.

While concerns over secretary of state conflict of interest have arisen from time to time, the issue has not been deeply studied, and this report aims to address that gap. Research for this report has focused on the structural sources of secretary of state conflict of interest and on the track record of partisan acts by secretaries serving over the past 20 years. This report also evaluates how most other democracies in the world restrict partisan behavior by senior election officials and foster norms of impartial administration.

The research findings and the recommendations for addressing these issues are summarized below.

## I. STRUCTURE

- › In none of the 50 states is senior election administration structured to provide the impartiality that is often considered essential to democratic elections. Impartial election administration often occurs in

<sup>i</sup> See Chapter 1 Section I. for a discussion on the use of titles in this report.

practice, but it is not built into the administrative design.


- › Review of conflict of interest laws at the state level finds that such laws do not constrain secretaries of state from acting to further their own interests as candidates or the interests of their party.
- › Several factors limit the impact of secretary of state conflict of interest on U.S. democracy, including the primary role of local officials in elections and the infrequency of close election results. The personal ethical commitments of individual secretaries of state also play an important positive role.
- › In normal times, election laws and election litigation can constrain the potential for harm from partisan allegiances of secretaries of state, but in a very close election in which results are disputed or in circumstances of disruption or emergency, the party allegiance of secretaries pose significant risks.
- › The position of secretary of state is not ideally suited to leadership in state election administration because of the position's other responsibilities and political functions.
- › States with election boards or commissions have designed those bodies with an emphasis on representing the two major political parties, not on achieving impartial election administration.

## II. TRACK RECORD

- › Egregious, highly consequential incidences of partisan bias by secretaries of state are rare, but less dramatic acts of partisanship have taken place more frequently. For example, of the 137 elected secretaries of state serving since 2000, 46 (one-third) have endorsed a candidate running in a race under their supervision, and 12 have served as co-chair (or equivalent) of a presidential election campaign.
- › Over the last 20 years, a secretary of state has simultaneously been a candidate for election and the state's chief election official 153 times. This total includes 52 candidacies by secretaries

of state for other major offices such as governor or senator. Secretaries who were also candidates have rarely recused themselves from involvement in phases of election administration that could benefit their own candidacy.

- › Forty percent of secretaries of state serving since 2000 have run for higher office while serving as secretary or after leaving office. This segment of secretaries has also taken partisan positions, such as publicly endorsing candidates, at a much higher rate than secretaries who did not run for higher office.
- › Only 26 percent of secretaries of state serving since 2000 came to the office with a background in election administration or with some other source of election expertise.
- › Approximately 20 percent of secretaries of state serving since 2000 have lost in court in lawsuits arising from circumstances where the secretaries' actions appeared to favor their political party.
- › Public opinion polls show fairly high approval ratings for election officials in general, but also indicate that partisanship among secretaries of state has a negative impact on voter confidence. A high-profile situation of conflict of interest in Georgia in 2018 significantly undermined voter confidence in that state. Americans have low confidence that a disputed election will be handled fairly, particularly voters who do not belong to the party of their secretary of state.
- › A critical threat to U.S. elections are the significant and divided concerns of Democrats about voter suppression and Republicans regarding fraud. Without impartial election administration, the U.S. lacks authoritative, respected, neutral voices to address these arguably overstated concerns.
- › Positive trends related to state election administration include an increase this decade in the number of secretaries of state with election backgrounds and fewer partisan endorsements in the 2020 presidential election cycle.
- › Importantly, many secretaries of state have



demonstrated significant impartiality in responding to the coronavirus. This includes 16 out of 23 relevant Republican secretaries who pushed in some way to expand voting by mail during primary season. In the context of President Trump's opposition to vote-by-mail, these steps are noteworthy examples of secretaries putting voters above party affiliation.

### III. U.S. ELECTION ADMINISTRATION IN INTERNATIONAL CONTEXT

- › The U.S. is the only democracy in the world that elects its most senior election officials, and the only democracy in the world where senior election officials oversee elections in which they are candidates.
- › The U.S. also appears to be the only democracy where it is an accepted, common practice for senior election officials to endorse competing candidates or positions on ballot initiatives, and the only democracy where senior election officials may serve on political campaigns.
- › Most other democratic countries appear to do a far better job than the U.S. at restricting partisan behavior by senior election officials and developing norms of impartial administration. This fact likely contributes to significantly higher voter confidence in most other democracies than in the United States.
- › In the majority of democracies, structurally independent entities have responsibility for administering elections. Some countries achieve impartial election administration with elections managed by dedicated entities within government, entities that over time have developed sufficient professionalism and insulation from politics.
- › In many countries, judges contribute to impartial election administration, either by serving on election administrative bodies or in the selection process for leaders of such bodies. The one significant recent attempt at independent election administration in the U.S., Wisconsin's Government Accountability Board (in place

from 2007 to 2016), likewise involved active or retired judges as board members and in the selection of board members.

- › The approach to election administration in the United States is in part a legacy of the country's early adoption of democracy and its unusually long-standing constitution. New and young democracies, lacking legacy institutions, have been better positioned to take advantage of many decades of learning and experimentation with election administration. Some older democracies have needed the opportunity of a constitutional reset to implement more impartial systems.
- › The history of systemic racial discrimination in elections has also influenced the U.S.'s approach to election administration. To maintain the Jim Crow regime, southern political leaders blocked federal involvement in elections for nearly a century, despite the clear authority of Congress to regulate elections for the House and Senate and to enforce the 15th amendment. Once such resistance to reform was overcome, the overwhelming need to address racial discrimination in elections has led the U.S. to prioritize voting-rights-focused reform, even as other countries were making administration-focused reforms, including those establishing impartial election administration.

### IV. REFORM

- › Fundamental change to the position of secretary of state may be difficult to achieve in the near term, given the need to amend state constitutions, the absence currently of major crises in this area to mobilize public opinion, and the preference among voters for electing election officials.
- › Some states have considered electing secretaries of state without party affiliation, but the track record of such nonpartisan elections for judges is not encouraging.
- › Achievable, meaningful reform should focus on establishing guardrails to limit partisan behavior and on increasing the likelihood that secretaries of state will be committed election



professionals rather than career politicians with interests in running for higher office. Changes in these areas can reduce the risk that partisan bias of secretaries of state will affect elections and voter confidence and can help build stronger norms of election neutrality.

- › The National Association of Secretaries of State (NASS) already plays an important role in limiting partisanship, and this role should be increased. In particular, the NASS should develop a model code of conduct for best practices in avoiding conflicts of interest that secretaries can adopt as they develop their own policies or as they strengthen existing policies. Such a code of conduct should address endorsements, campaigning, fundraising, and recusal in circumstances where a secretary of state is also a candidate for office.

required by their constitutions with additional oaths specifically for senior election officials.


- › The Republican Association of Secretaries of State and the Democratic Association of Secretaries of State are political action committees that become involved in elections through fundraising, endorsements and electioneering. Both organizations are run by and publicly associated with sitting secretaries of state, and both further the image of secretaries of state as players in elections rather than umpires. They should be disbanded or reconstituted as organizations that do not become involved in electioneering or candidate fundraising.
- › Reforms should also aim to reduce the likelihood of individuals who intend to run for higher office becoming secretaries of state

***Achievable, meaningful reform should focus on establishing guardrails to limit partisan behavior and on increasing the likelihood that secretaries of state will be committed election professionals rather than career politicians with interests in running for higher office.***

- › Prohibitions on campaign acts by secretaries of state, such as endorsements or chairing campaign committees, are supported by most secretaries and should not be controversial. Such prohibitions should be established by state laws.
- › State law should also address the situation of a sitting secretary of state running for office by calling for recusal in particular circumstances, such as recounts, or by establishing a principle that secretaries should recuse themselves from participation in decision-making that could benefit, or appear to benefit, their candidacy.
- › Most states do not have oaths of office that explicitly require a secretary of state to commit to impartiality. States should supplement oaths

and at same time increase election experience and professionalism in the office. States should consider prohibiting secretaries of state from becoming candidates for any elected office (other than, if applicable, re-election as secretary of state) during their term in office and for some years after their term in office. States could also establish criteria for individuals to run for or be appointed to the position of secretary of state, such as election administration experience or completion of an accredited certificate program in election administration.

- › In the long run, states should move toward global norms by reconstituting state election responsibility under a nonpartisan chief election official separate from the secretary of state. This official could be selected through a process involving a multi-stakeholder



commission, akin to a judicial nominating committee, to propose chief election official candidates for appointment by the governor and approval by the legislature. Likewise, existing state election boards should be reconstituted to be impartial as opposed to bipartisan.

The problems addressed in this report warrant serious attention. The 2005 bipartisan Commission on Federal Election Reform, co-chaired by President Jimmy Carter and former Secretary of State James Baker, recommended that states “reconstitute election management on a nonpartisan basis,” and many prominent election scholars have likewise called for fundamental reform of partisan secretaries of state. Seventy-five bills have been introduced over the last 20 years in 33 states to address partisanship in state election administration in some manner.

Now is a good time to move forward with reform in this area. In the area of gerrymandering reform, there is a growing consensus that self-dealing by legislatures in the redistricting process is unacceptable, which in turn is leading to the establishment of new entities designed to function impartially and independently. These initiatives can help guide reform in state election administration and further demonstrate the importance of impartiality in election rule-making.

For many years, secretaries of state have themselves been part of the solution to the problems created by the poor design of the positions they hold. For the 2020 elections, many secretaries have overcome extreme partisan rancor to help establish needed accommodations for voting in the context of the COVID-19 pandemic. Secretaries can likewise play a significant role in advancing the ideas discussed here for reform.

The problem of secretary of state conflict of interest exists in the context of a country facing accelerating partisanship and rapid destruction of political norms, where armed confrontation over election-related concerns is an increasingly imaginable scenario. This context demands that we address risks and potential sources for flash-points and conflict.



# CONTENTS

EXECUTIVE SUMMARY	4
ACKNOWLEDGMENTS	12
INTRODUCTION	14
CHAPTER 1: THE SECRETARY OF STATE OFFICE AND THE POTENTIAL FOR PARTISAN BEHAVIOR	18
I. State-Level Election Authority	20
II. Where Conflicts of Interest Arise	22
III. The Role of Secretaries of State in Elections and the Local-State Division of Responsibility	24
IV. Secretaries of State Backgrounds and Career Paths	26
V. Debating the Level of Influence Secretaries of State Have Over Elections and Results	27
VI. The Role of States' Conflict of Interest Laws	28
VII. The Problem of Addressing Electoral Problems through the Political Realm	30
VIII. The Importance of Secretaries' Personal Ethics	31
CHAPTER 2: THE TRACK RECORD OF PARTISAN BEHAVIOR BY SECRETARIES OF STATE SINCE 2000	32
I. Running for Office While Secretary of State	34
II. Campaign Positions and Political Endorsements	36
III. Partisan Acts and Decisions	38
IV. The Impact of Secretary of State Partisanship on Voter Confidence	39
V. Observations on Secretary of State Response to the Pandemic	42
CHAPTER 3: THE INTERNATIONAL PERSPECTIVE	44
I. Independent Election Administration, and New Democracies of the 20th Century	45
II. Older Democracies that have Transitioned to Independent Administration	47
III. Impartial Elections Organized by Governments	48
IV. Regular Judicial Involvement and Oversight	50
V. Understanding The Anomalous United States	51

CHAPTER 4: REFORM	52
I. Endorsements, Campaign Positions and Public Neutrality	53
II. Oaths of Office	54
III. Recusal	54
IV. Drawing More Election Professionals to the Secretary of State Position	55
V. Considering Nonpartisan Elections of Chief Election Officials	55
VI. New Dedicated, State-level Impartial Election Management Bodies	56
VII. Increasing the Relative Authority of Secretaries and Chief Election Officials	58
RECOMMENDATIONS FOR REFORM	60
CONCLUSION	62
Appendix A: Proposed State Legislation to Reform State Election Leadership or Address Conflict of Interest, 2000 to 2020	64
Appendix B: Party Composition of Secretary of State Positions, 2000 to 2020	66
Appendix C: Sample Principles of Election Officials and Election Official Code of Ethics	68
ENDNOTES	70

# FIGURES

FIGURE 1.	State Election Administration Categories	21
FIGURE 2.	2016 Election Performance by Category of State Election Leadership	21
FIGURE 3.	Composition of State Election Boards	22
FIGURE 4.	The Secretary of State Position and a Professional Political Career	29
FIGURE 5.	Comparison of Partisan Behavior Between Secretaries of State Who Ran for Higher Office with Those Who Did Not	29
FIGURE 6.	Secretaries of State with Prior Election Experience, 2000-2020	30
FIGURE 7.	Local Election Official Opinions on Whether Voting Has Gotten Easier	34
FIGURE 8.	Secretaries of State Who Were Also Candidates	35
FIGURE 9.	Comparison of Election Success Rates for Sitting Secretaries of State and Attorneys General	35
FIGURE 10.	Secretaries of State Serving in Campaign Leadership Positions for Presidential Candidates	36
FIGURE 11.	Frequency of Political Endorsements Made by Secretaries of State	37
FIGURE 12.	2018 CCES Opinion Data: “Do you approve of the way [election officials] are doing their job?”	40
FIGURE 13.	2018 CCES Opinion Data: Election Official Job Approval and Party Affiliation	40
FIGURE 14.	Perceptions of Fairness Nationally and in Georgia, 2018	41
FIGURE 15.	2010 CCES Opinion Data: “Who would win a disputed election in your state?”	41
FIGURE 16.	Worries about 2018 Election, by Party	42
FIGURE 17.	Actions by Secretaries on State to Facilitate Elections under COVID-19	43
FIGURE 18.	Gallup Confidence in Elections Poll	46
FIGURE 19.	Highest Ranked Democracies Grouped by Election Management Category	49
FIGURE 20.	Composition and Selection of Independent Redistricting Entities	57



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# INTRODUCTION

**Conflict of interest for secretaries of state has become prominent in discussions about the health of our democracy** largely because of controversies surrounding the 2000 and 2004 presidential elections in Florida and Ohio, as well as the 2018 Georgia gubernatorial election.

These controversies brought to the attention of American voters a long-standing vulnerability of America's democracy: that the most senior election administrators in the United States are partisan actors who sometimes advance their own interest as candidates, or the interests of their party's candidates, above the interests of voters.

Every democracy has some degree of vulnerability to the partisan leanings of election administrators. As discussed in Chapter 3, well-designed election administration and norms of impartial public service can reduce this risk, but involvement of imperfect humans is inevitable in the design of

administrative structures, in the selection or appointment of administrators, and in the performance of election administration. Completely impartial election administration is an unattainable ideal.

The United States has at times been very far from that ideal indeed. In Florida in 2000, with the presidential election in the balance, "the office of [Republican Secretary of State] Katherine Harris began acting as a wholly owned subsidiary of the George W. Bush Campaign," writes lawyer and journalist Jeffrey Toobin in his account of the election.<sup>1</sup> Toobin details Harris's many steps to stop or limit recounts in order to give candidate Bush the victory, actions taken in consultation with Bush campaign envoy, Mac Stipanovich, who, according to Toobin, spent the post-election period working from Harris' conference room.<sup>2</sup>

Another contested election four years later, for Governor of Washington, provides a useful counter-perspective. In that election, Democrat Christine Gregoire edged out Republican Dino Rossi by a mere 133 votes, or 0.0047 percent of votes cast, the closest gubernatorial election in more than a century.<sup>3</sup> A leading scholar on disputed



elections, Edward Foley of Ohio State University's Moritz College of Law, assessed the election and dispute-resolution process and concluded that "Secretary of State Sam Reed behaved impartially and admirably, throughout."<sup>4</sup> On a critical, divisive issue during the recount, Reed, a Republican, supported the more voter-inclusive interpretation against the interests of his party.<sup>i</sup>

The bipartisan Commission on Federal Election Reform, co-chaired by President Jimmy Carter and former U.S. Secretary of State James Baker, included among its recommendations in 2005 that "states should reconstitute election management on a nonpartisan basis to make them more independent and effective."<sup>5</sup> Prominent election law scholars Richard Hasen and Daniel Tokaji likewise called for fundamental reform of partisan secretaries of state in articles published in 2005 and 2009 respectively.<sup>6</sup>

These and other studies consider secretary of state issues as one topic among many election challenges. Jocelyn Benson, then Dean of Wayne State Law School and now Secretary of State of Michigan, published in 2010 what is still the only book-length work focused exclusively on secretaries of state, *State Secretaries of State: Guardians of the Democratic Process*. Based on interviews with 30 sitting secretaries, Benson provides a valuable window into the work of, and challenges faced by, secretaries of state. This report draws upon her work extensively, as the title of the report suggests.

Absent in this literature is an analysis of the extent to which the potential for conflicts of interest inherent in our secretary of state systems has in fact resulted in partisan actions by secretaries in support of one side in an election. To address this gap, we have sought to evaluate the partisanship track record of the 172 secretaries of state serving from 2000 to the present. To conduct this evaluation, we have developed an original dataset covering the following issues:

- › whether secretaries of state have **publicly endorsed candidates** running for office or

positions on ballot questions;

- › whether secretaries of state have **taken positions with campaigns**, such as honorary co-chair;
- › whether **judgments have been rendered against secretaries of state in lawsuits** arising from circumstances in which the secretaries' actions appeared to favor their political party;
- › whether secretaries of state had **prior election-related experience** before taking office;
- › whether secretaries of state have **run for elected office** while administering elections; and
- › whether secretaries of state have pursued a professional political career by **running for higher office while serving** as secretary or subsequently.

The results of our analysis of this data are discussed primarily in Chapter 2.<sup>7</sup>

A second gap in the literature is an analysis of the extent of legal constraints (or "guardrails") limiting secretaries of state from operating in a conflicted manner. Here, we have been supported by a comprehensive, pro-bono research project conducted by the law firm of Ropes & Gray. The Ropes & Gray team assessed the conflict of interest laws applicable and relevant to secretaries of state in the 33 states where the secretary is elected and serves as chief election official. The findings of this research are summarized in Chapter 1.<sup>8</sup>

Most studies touching on secretaries of state point out the prevalence across the democratic world of election administration that is structurally independent or that operates independently in practice. We discuss this issue in Chapter 3, exploring in greater depth than previous studies the context and implication of the wide gap between the U.S. and other democracies in this area.

In Chapter 4 we discuss the options for reform and present our recommendations. While we agree with the Commission on Federal Election

<sup>i</sup> Disclosure: the Chair of the Washington Republican Party at that time, Chris Vance, is a member of the Advisory Council of Election Reformers Network.

Reform and others that ultimately fundamental redesign of state election administration is needed, we recognize the significant political hurdles that must be overcome for change to happen. For that reason, we focus primarily on recommendations for incremental reforms that are more achievable politically and that can increase the likelihood of impartial election administration in the near term.

We have gathered feedback on some reform ideas via online surveys sent to secretaries of state and to state-level election reform and good government advocates.<sup>ii</sup>

state conflict of interest differently. On the one hand, many election reform advocates, including some in state legislatures, are convinced this system needs to change. Responding to election controversies, such as those in Florida in 2000, Ohio in 2004, and Georgia in 2018, reformers have introduced 75 bills in state legislatures over the last two decades to reform the structure of state election administration and reduce partisanship in state election leadership.<sup>9</sup>

On the other hand, current and former secretaries of state for the most part see limited risk to U.S. elections from partisanship in the process

***The problems posed by secretary of state conflicts of interest exist in the context of a country becoming unmoored, a country of accelerating partisanship and rapid destruction of norms of consensual political behavior, where armed confrontation over election-related concerns is an increasingly imaginable scenario. This context demands that we address risks and potential sources for flashpoints and conflict.***

In preparing this report, we have sought to leverage our backgrounds in election monitoring, election assistance and democracy promotion overseas.<sup>iii</sup> The mission of an election observer, properly understood, is always dual: to highlight existing problems and to provide reassurance when systems are functioning properly. We have endeavored to be true to both objectives, and to the impartiality and balance they require. We have also drawn on the bipartisan orientation that is a common element of monitoring missions sponsored by U.S. organizations, which often have senior Democratic and Republican co-leaders, and on the broad range of backgrounds represented by the Election Reformers Network Board of Directors and Advisory Council.


Two communities that are important audiences for this report view the topic of secretary of

by which they are elected or appointed. Many secretaries express confidence in their ability to keep their professional political life separate from their secretarial responsibilities. As one secretary of state put it, “I know when to take off one hat and put on the other.”<sup>10</sup>

There are arguments to support both perspectives. The risks inherent in our unique approach to selecting election officials are mitigated to a considerable degree by the professionalism and ethics of secretaries of state and by the dispersion of election responsibility to local election officials and others. Nevertheless, significant risks to elections and to voter confidence remain, and these risks are elevated in the already challenging circumstances of close and/or disputed elections or elections held under exceptional or emergency circumstances.

<sup>ii</sup> Some survey responses are discussed in the text, and more detail is available at [www.electionreformers.org/guardrails-resources/](http://www.electionreformers.org/guardrails-resources/).

<sup>iii</sup> See About section of this report on page 3 for more detail about the authors and Election Reformers Network.



The problems posed by secretary of state conflicts of interest exist in the context of a country becoming unmoored, a country of accelerating partisanship and rapid destruction of norms of consensual political behavior, where armed confrontation over election-related concerns is an increasingly imaginable scenario. This context demands that we address risks and potential sources for flash-points and conflict.

Our times demand that we rebuild the norms that are critical to democracy. We hope this report can be an important step in that direction.



# CHAPTER 1

## THE SECRETARY OF STATE OFFICE AND THE POTENTIAL FOR PARTISAN BEHAVIOR

### SUMMARY

- » Most states use processes to appoint or elect their secretary of state that date from time periods when secretaries were much less involved in elections. These methods do not include prohibitions or protection against partisan individuals taking those positions.
- » States with election boards or commissions have constituted those bodies to represent political parties, rather than to achieve impartial election administration.
- » A high percentage of secretaries of state have partisan political backgrounds and many continue political careers after they leave the position; only a small minority enter the office with election administration experience or expertise.
- » The role of secretaries of state in elections is limited by the dispersion of responsibility and decision-making across a range of actors, including local election officials and state legislatures, but secretaries do have significant influence.
- » State-level conflict of interest laws do not prevent secretaries acting to further their own interests or the interests of their party. Likewise, few oaths of office for secretaries include an explicit commitment that they conduct their work in a nonpartisan or impartial manner.
- » In this context, the most important protections against secretary of state conflict of interest are the generally high personal ethical standards of individual secretaries.

**For most states, the role, responsibilities and methods of selection of the secretary of state have changed little since early in each state's history.** Many state annals list a line of secretaries of state going back to the founding of the state, or indeed, into colonial history. New Hampshire, for example, established the post in 1680, elected, then as now, by the state legislature.

As the title “secretary of state” suggests, historically the role focused primarily on functions related to the official records of the state. In early days, an important function was keeper of the state seal, used to authenticate official documents.

In early U.S. history, the involvement of secretaries of state in elections was limited. Elections were organized by local officials and did not involve state-funded printed ballots or a voter registry until late in the 19th century.<sup>1</sup> Secretaries of state had other responsibilities that took up the bulk of their time. A 1946 roster of the functions of secretaries of state lists 11 functions performed by these officials, such as issuing corporate charters and registering trademarks; only two functions are election related: “administering election laws” and “publishing abstracts of votes.”<sup>2</sup>

Secretaries of state continue to have many responsibilities unrelated to elections today, and by some estimates approximately half of a secretary of state's time is dedicated to non-election work.<sup>3</sup> In three states (Arizona, Oregon and Wyoming), the secretary of state is next in line in succession to the governor, and in eight states the secretary is second in line, a status that again illustrates that the role of the secretary of state position is broader than the election function.<sup>4</sup>

Over time, elections have become more complicated and secretaries' roles in elections have expanded significantly. The 1993 National Voter

Registration Act mandated state-level involvement in the voter registration process, and that responsibility has grown further with the requirements of the Help America Vote Act, passed in 2002. Developments in election technology have increased the range of options for voting systems as well as the need for state-level coordination and approval of election equipment. The emergence of cybersecurity threats has put the office of the secretary of state on the front line of protecting election integrity.

In some cases, evolution toward greater responsibility at the state level has occurred as a response to perceived problems of overly decentralized election administration. In Illinois, a contributing factor to the revision of the state constitution in 1971 was concern over a situation where “each [local] election officer had his own rules and procedures, and any consistency of practices within the state was a consequence of informal relationships ... not statutory requirement.”<sup>5</sup>

Racial discrimination in elections and the reforms enacted to counter it have also substantially affected election administration in the U.S. During the Jim Crow era, election administration in much of the South routinely violated the Constitution, particularly the 15<sup>th</sup> Amendment prohibition against discrimination in voting on account of race. For nearly a century, to maintain the Jim Crow regime, southern political leaders blocked federal involvement in elections, despite the clear authority of Congress to enforce the 15<sup>th</sup> amendment and more generally to regulate elections for the House and Senate.

The Voting Rights Act (VRA) of 1965 authorized federal involvement in state elections for the first time, a change that affected the role of the secretary of state. The VRA provided enforcement nationwide of the 15th Amendment, and its preclearance mechanism, while it was in effect, gave the Justice Department the power to oversee proposed changes in laws and procedures in several states, counties and municipalities with a history of discrimination.

Given the centrality of racial discrimination in U.S. elections, the Voting Rights Act was clearly an essential and fundamentally important reform.



Indeed, in the view of many scholars, it was only with the passage of the VRA that the United States became a fully democratic country.<sup>6</sup>

But it is worth comparing the VRA with fundamental changes to election administration that occurred in the 20th century in other countries, such as the transition in Canada and Australia from provincially controlled elections to independent national-level election administration and the establishment in France of the role of the Constitutional Court in verifying election results. As a recent report by Elections Canada argues, these changes reflected an increasing expectation of impartiality: “the public in different countries came to insist that if democracy was to work properly, certain areas of the electoral process needed to be free of partisanship.”<sup>7</sup>

The particular path the U.S. has taken, given its unique history, has led to a paradoxical situation that is well illustrated in the area of redistricting and gerrymandering. Racial gerrymandering is well policed by law, but partisan gerrymandering is not, and parties can and do use the redistricting process to significantly tilt elections in their favor. Recently, some states have begun to curtail partisan gerrymandering by establishing independent redistricting commissions. These reforms, which have occurred in both Republican- and Democratic-controlled states and with support of both Republican and Democratic voters, bode well for a further evolution of American democracy toward a greater expectation of impartiality in the election system.<sup>8</sup>

## I. STATE-LEVEL ELECTION LEADERSHIP

Federal law requires every state to designate a chief election official (CEO) with authority over certain designated election functions. In 10 states the CEO is either appointed by or is the head of the state’s election board or commission. In the remaining 40 states the CEO role is filled by a state constitutional officer: the lieutenant

governor in two states, and the secretary of state (or commonwealth) in the other 38 (see Figure 1 for more detail). This report focuses particularly on those 40 positions, and for convenience refers to them using the terms “secretary of state” and “chief election official.”<sup>i</sup>

These categories entail important differences in the relationships senior election administrators have with the electorate and with other officials, such as governors, state legislators and party leaders. The categories also differ in that elected secretaries of state typically have a higher political profile in their state than appointed secretaries or election board members, by virtue of their statewide election.

In terms of performance in effectively administering elections, it is not clear that these categories differ significantly. Data tracked by the Election Performance Index on metrics such as average voter wait time, ease of registration, and percentage of eligible voters registered show rough parity among the categories, with a slight underperformance in states with appointed secretaries (see Figure 2).

Few states have made changes in the definition and selection method of their state senior election administration, although as we discuss in Chapter 4, proposed legislation for such changes is not uncommon. The most significant change in a state’s system of election administration over the past several decades occurred, and was then repealed, in Wisconsin. (See box on page 23).

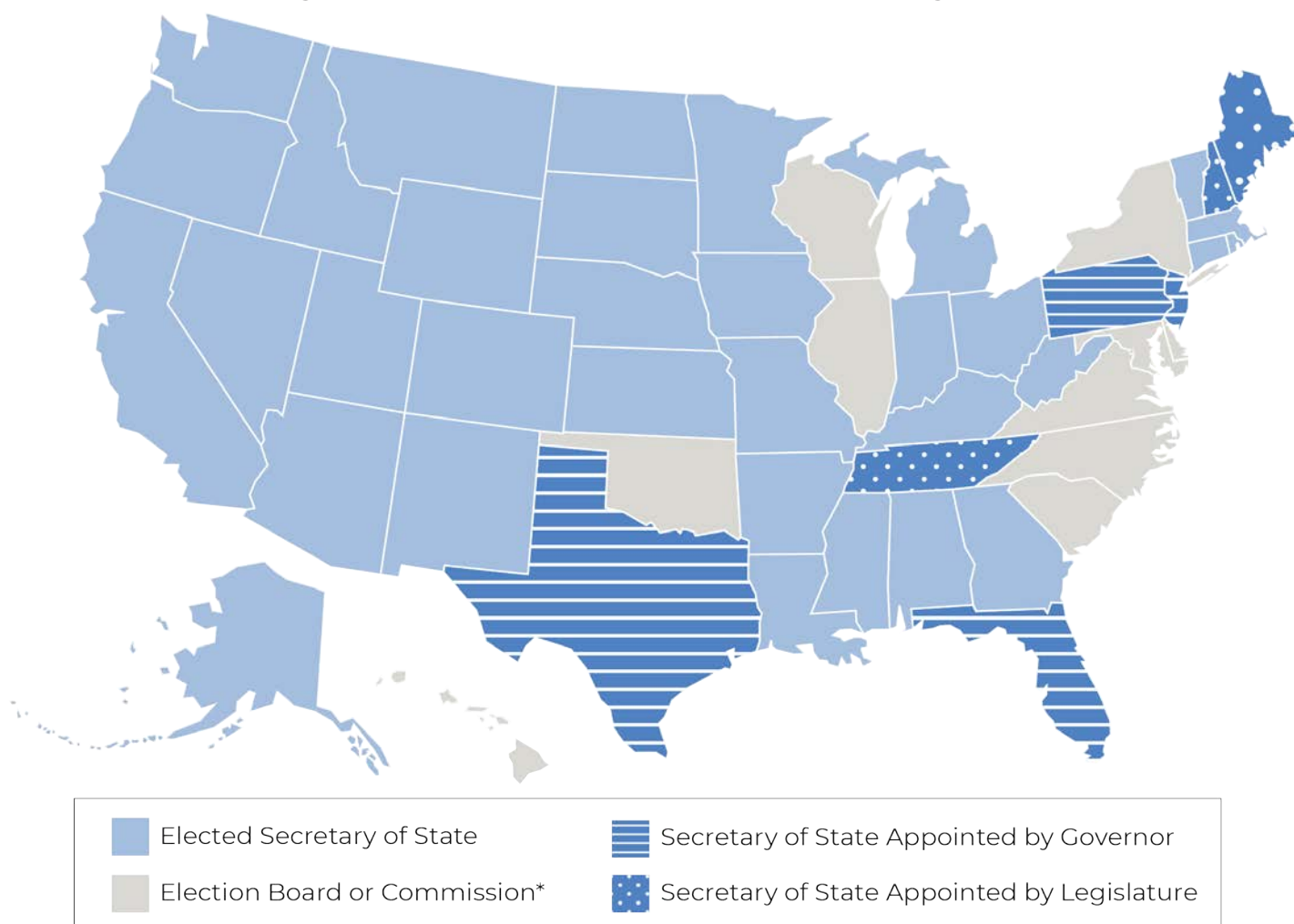
## STATES IN WHICH SECRETARIES OF STATE ARE ELECTED

All 33 states with elected secretaries conduct the election of the secretary on a partisan basis. Nonpartisan elections are used in some states for statewide offices and are common for local offices. Fifteen states elect supreme court justices in nonpartisan elections, though as we discuss in Chapter 4 research has demonstrated significant problems with the effectiveness of this election method.<sup>9</sup> No state, however, elects the secretary of state in a nonpartisan election.

<sup>i</sup> This usage excludes secretaries of state in states such as Wisconsin and Hawaii where the position exists but has no role in elections.



**Figure 1. State Election Administration Categories<sup>10</sup>**



Source: ERN Analysis of state government websites.

\* Arkansas, Georgia, Indiana, Kentucky, Rhode Island, South Dakota, and Tennessee share state election administration authority between a secretary of state and a bipartisan board or commission. However, the secretary of state in these states serves as the chief election officer.

No state has laws that address the particular circumstance of secretary of state candidates' receiving campaign contributions from a political party or related entities. In 2010 a coalition of reform organizations brought an initiative to the ballot in California to establish public funding for secretary of state campaigns in order to reduce potential conflicts of interest. The initiative, which would have been paid for via a tax on lobbyists, was voted down.<sup>11</sup>

All 33 states allow secretaries of state to run for re-election at least once. Seventeen have term limits; the other 16 do not. The longest serving elected secretary of state, Alvin Jaeger of North Dakota, is now serving his eighth term. Thirty-two of the 33 states elect secretaries for four-year terms (Vermont's secretary serves a two-year

**Figure 2. 2016 Election Performance by Category of State Election Leadership<sup>12</sup>**

Category	2016 Elections Performance Index Rating (Average)
Elected Secretary of State	74.05%
Appointed Secretary of State	71.54%
Election Board or Commission-Led	75.65%
<b>50-State Average</b>	<b>74.02%</b>

Source: MIT Election Data + Science Lab Election Performance Index

term). Seven of the 33 states hold elections for their secretary of state (and for other state offices) during presidential election years.

STATES IN WHICH SECRETARIES OF STATE ARE APPOINTED

Not surprisingly, most appointed secretaries of state are affiliated with the party of the source of their appointment, either the governor or the majority party in the legislature. New Hampshire Secretary of State Bill Gardner, a Democrat and the nation’s longest serving secretary of state, is a noteworthy exception, having been appointed and confirmed several times when Republicans controlled one or both chambers of the New Hampshire legislature. Over the past 20 years, there have only been three appointed secretaries of state not affiliated with a political party.

Legislatively appointed secretaries serve two-year terms in Maine and New Hampshire and a four-year term in Tennessee.

STATES WITH ELECTION BOARDS OR COMMISSIONS

Sixteen states have an election board or a commission (“boards,” to simplify), seven of which share responsibility for overseeing elections with an elected or appointed secretary of state (see Figure 3).

The structure and appointment of members of these bodies vary by state, but generally speaking all are structured to represent the state’s Democratic and Republican parties in the election administration process. In six states the boards have an even number from both parties, and in the other 11 both parties are represented but one has a majority.

No board has a seat for a representative of independent or third party voters and candidates, or for a representative of other relevant stakeholders such as local elected officials. No board requires one or more members be active or retired judges, which as we will see in Chapter 3 is a common practice overseas.

Figure 3. Composition of State Election Boards

Structured to Allow for One Party to Have a Majority	Structured to Allow Equal Number of Democrats and Republicans
Arkansas* Georgia* Kentucky* Maryland North Carolina Oklahoma Rhode Island* South Carolina South Dakota* Tennessee* Virginia	Delaware Hawaii Illinois Indiana* New York Wisconsin
*In these states, state election administration authority is shared between a partisan secretary of state and a bipartisan board.	

Some analysts have criticized this political approach to structuring election boards in the United States. For example, an assessment of election administration by Elections Canada “warn[ed] against allowing partisan political considerations to become central to the structure and procedure of an electoral commission.”<sup>13</sup> In Chapter 4, we discuss possible alternative approaches to election board design.

II. WHERE CONFLICTS OF INTEREST ARISE

The 40 secretaries of state who are chief election officials face conflicts of interest in two ways. First, secretaries are often candidates in elections they oversee. Sixty-six percent of elected secretaries serving since 2000 ran for re-election at least once. Secretaries also become candidates for other offices, often prominent statewide positions such as senator or governor, while still serving as secretary. No state prohibits sitting secretaries from pursuing such candidacies.

A second source of conflict of interest arises from secretaries’ being, in most cases, high-ranking

## WISCONSIN'S SHORT-LIVED INDEPENDENT ELECTION BOARD

Wisconsin's Government Accountability Board (GAB), in existence from 2007 to 2016, was a short-lived but significant attempt to establish impartial, state-level election administration.

The GAB replaced a prior board composed of representatives from the two parties, with a body made up of six former judges. GAB members were selected by the Governor, from lists of judges approved by a panel of Court of Appeals Judges, and confirmed by two thirds majority by the Senate. GAB members served six-year, staggered terms. All decisions of the board required approval from at least four of the six GAB members.

GAB members were prohibited from engaging in certain political activities, such as being a candidate for office or a member of a party; individuals who had engaged in political activities in the past were not prohibited from serving on the board.

Daniel Tokaji, election scholar and Dean of the University of Wisconsin Law School, observed that the manner of selection of the GAB was "designed to ensure that they will not favor either major party. This makes the GAB unique among state election administration bodies in the United States ... no other state has a chief election administration authority with the same degree of insulation from partisan politics."<sup>14</sup> Tokaji's study of the performance of the GAB during its first five years concluded that it "serves as a worthy model for other states

considering alternatives to partisan election administration at the state level."

Unfortunately the GAB became embroiled in political controversy regarding its investigation (under the Board's responsibility for the enforcement of campaign finance rules) of Governor Scott Walker for alleged campaign violations during a highly polarizing 2012 recall election. The GAB was accused of partisanship and of criminally leaking investigation documents, and in 2016 was replaced by the Republican-controlled legislature with a new, much less independent election board.

This series of events created an extraordinary level of partisan division in Wisconsin, particularly considering the broad bipartisan support for the GAB initially. Wisconsin Common Cause head Jay Heck called the dismantling of the GAB "one of the darkest days in the state's history" and "based on completely discredited charges, false premises, character assassination and outright falsehoods."<sup>15</sup> To Republican legislators, the GAB's aggressive investigations of Republican nonprofits constituted partisan spying, and demonstrated the futility of attempting nonpartisan administration.<sup>16</sup>

It is unfortunate that this controversy surrounding the GAB's investigative arm has effectively negated the advancement for the cause of impartial election administration achieved by the GAB's election arm. Judging by Tokaji's assessment, the GAB performed well at election administration, demonstrating "meticulous, careful, balanced, and judicious" decision-making as it effectively navigated several divisive issues in a balanced and nonpartisan manner.<sup>17</sup>

members of a political party. As such, secretaries have a personal interest in the electoral success of their party. Party success can increase opportunities for career advancement for its leading members, whether in their own prospects for future elections or in other policy positions. These

factors give secretaries of state an "incentive to make decisions that benefit their party."<sup>18</sup>

Both running for office and being a senior party member create interests for secretaries of state that are in conflict with their "relationship of trust," their responsibility to the electorate and

to all parties and candidates to conduct the election fairly and impartially.<sup>19</sup> In the words of the 2014 report of the Presidential Commission on Election Administration, “Those who run our elections are subjected to competing pressures from partisans and political constituencies, on the one hand, and their obligation to the voting public as a whole, on the other.”<sup>20</sup>

In a 2019 Election Law Journal article, Molly Greathead argues that such conflicts of interest should be addressed with the same seriousness applied to conflicts of interest for judges. “A chief election official is similar to a judge in that she must be the procedural decision maker in an adversarial process between opposing parties.”<sup>21</sup> Based on this analogy, “the same due process requirement of a fair and impartial decision maker in a trial should apply to officials in charge of overseeing elections.”

*Whether secretaries of state should be held to the same conflict of interest standards as judges is worthy of debate. What seems less debatable is that both should act impartially.*

This comparison between election officials and judges anticipates a point discussed in Chapter 3 regarding the reliance in other democracies on judges and the judiciary in election administration.<sup>22</sup> In the U.S., political norms treat these categories very differently. Thus, there was little concern over the speeches given at the 2020 National Democratic Convention by two Democratic secretaries of state, Jocelyn Benson of Michigan and Alex Padilla of California, compared to what the response would have been if state supreme court justices had addressed the convention instead.

Whether secretaries of state should be held to the same conflict of interest standards as judges is worthy of debate. What seems less debatable is that both should act impartially. Arguably, impartiality does not encompass appearing at a party nominating convention, and the absence of public comment about those appearances seems to reflect less public expectation of impartiality from these election officials than there ought to be.

### III. THE ROLE OF SECRETARIES OF STATE IN ELECTIONS AND THE LOCAL-STATE DIVISION OF RESPONSIBILITY

Conflicts of interest for secretaries of state are mitigated by the fact that most of the work of administering elections in the United States is done at the local level, and many of the decisions that most affect voters are made by local election officials (LEOs), such as county clerks and county boards of election. The specific responsibilities of LEOs vary by state and within states, but generally local election officials are responsible for registering voters; determining polling station locations; purchasing, testing and storing voting machines; designing ballots; mailing and receiving absentee ballots; recruiting, training and supervising poll workers; and tabulating results.

In general, secretaries of state can direct and constrain the work of local election officials by establishing directives and standards, but they do not have immediate authority over local election officials. Only in four states (Alaska, Kansas, Ohio, and Tennessee) do secretaries of state have some power to appoint or remove local election officials.<sup>23</sup>

Many more people work at the local election official level than at the secretary of state level. In many states, a single local election office in a large county or municipality may have several times the personnel of the secretary of state’s office.



Although secretary of state roles vary substantially across the U.S., most have significant responsibility in the following areas:

- › issuing directives for implementation of state and federal election legislation;
- › advocating to the state legislature regarding election laws;
- › maintaining the central state voter registration file;
- › investigating alleged violations and/or referring matters involving potentially criminal conduct to law enforcement;
- › serving as the chief spokesperson to the public regarding election-related matters;
- › formulating ballot question language and related voter education material;
- › certifying ballot access for state-level candidates and ballot questions;
- › approving voting equipment to be used in the state;
- › collecting and compiling financial and campaign disclosure statements from candidates;
- › establishing procedures for recounts in state-level elections; and
- › certifying election results.<sup>24</sup>

These functions differ in the degree to which they call for judgment—and consequently in the degree to which secretaries can influence elections through these processes. The list above is arranged with those functions that most allow for secretary of state discretion at the top, but circumstances can arise that create critical ambiguities and the need for difficult decisions in even the most rule-bound step of an election. In the disputed 2000 presidential election in Florida, the normally mechanical process of certifying results was transformed into a highly consequential test of ethics for Secretary of State Katherine Harris, who had some discretion under ambiguities in Florida law to delay certification until all recounts were completed but chose not to do so.<sup>25</sup>

Secretary of state discretion is substantial in the area of issuing directives to translate election laws and regulations into specific instructions for local election officials and others. Such directives can vary significantly by state. Thus, for example, even though the Help America Vote Act requires use of provisional ballots, states vary significantly on important details not specified in the act, such as whether to count the provisional ballot of a registered voter appearing at a station in the wrong district.<sup>26</sup>

The example of the disputed 2000 election in Florida raises the related issue of response to emergencies, a topic of increased relevance because of the COVID-19 pandemic. Some states give the secretary of state considerable authority in emergencies to take steps such as relocating polling stations or authorizing delays in canvassing or other deadlines. California law, for example, provides that the secretary “in consultation with county elections officials, shall establish the procedures and guidelines for voting in the event of a natural disaster or other state of emergency.”<sup>27</sup> In Wyoming, the secretary of state has the authority “to issue directives to county election officers necessary to ensure the proper conduct of elections... when there is a declared natural disaster or... emergency.”<sup>28</sup>

More states give this authority to the governor than to the secretary of state or election board, and many states arguably do not have sufficient provisions to guide decision-making regarding elections under emergency circumstances.<sup>29</sup> An assessment of elections during the 1918 pandemic raises a concern about “statutory constraints” on “election officials’ emergency powers ... that still exist today.”<sup>30</sup>

The author argues that granting greater emergency powers to election officials, as countries such as Canada do, is complicated in the U.S. by the issue of partisan affiliation. “It is far more problematic to grant election administration officials substantially increased discretion when those officials are overtly partisan... Indeed, the integrity of elections might be harmed if partisan officials’ powers were expanded in this country.”<sup>31</sup>

One of the challenges of the highly decentralized system in the United States is that it can be difficult for average citizens to parse out where election responsibilities lie and whom to hold accountable when things go wrong. As the highest-profile election officials in the state, secretaries of state may often be assumed to bear greater responsibility than in fact they have.

In many states, local election officials are elected, just as secretaries of state are. Of the more than 10,000 LEOs around the country, approximately 63 percent are elected, with the other 37 percent appointed at either the local or state level.<sup>32</sup> The issue of conflict of interest thus arises for local election officials as it does for secretaries of state, since elected LEOs also can often be in a situation of administering elections in which they are candidates.

The large number of elected LEOs across the country is sometimes given as a reason against attempting reform at the secretary of state level. However, the broader impact and higher profile of secretaries of state, combined with their seniority within state and national political parties, make secretary of state conflict of interest a more significant threat to fair elections.

## **IV. DEBATING THE LEVEL OF INFLUENCE SECRETARIES OF STATE HAVE OVER ELECTIONS AND RESULTS**

Some defenders of the current system argue that secretaries of state are too removed from the most critical phases of elections, such as vote counting, for a secretary's party allegiance to create significant risks. Former Wyoming Secretary Max Maxfield has claimed, "Even if I wanted to set out today to influence any county, [in] any election, I could not swing one vote."<sup>33</sup> Likewise, current New Mexico Secretary of State Maggie Toulouse Oliver argues that in her state the clarity and transparency of the rules "ensure there are no shenanigans. Every step of the process is open, transparent and guided by rules.

We have created a system that is as unriggable as possible."<sup>34</sup>

A survey of secretaries of state conducted for this report shows that this perspective is shared among other secretaries. Eight of the 10 secretaries who responded "agree" or "strongly agree" with the statement "the secretary of state position in my state does not have the ability to impact the results of even a very close election."<sup>35</sup>

Secretaries are understandably resistant to the idea that they are able – which may seem to imply they are also willing – to affect election results. At the same time, the idea that the position of the most senior election official in a state has no significant power or influence is hard to credit.

Former chief counsel to secretaries of state in Massachusetts David Sullivan disagrees that secretaries of state would be unable to affect election results: "The secretary of state in most states has significant power to run an election system and to tell local election officials what to do. To say the secretary of state does not have power is wrong."<sup>36</sup> Jocelyn Benson's study likewise acknowledges that secretaries' "ability to exercise judgment and influence over how elections are administered is significant." Similarly, a 2015 study of U.S. election administration concludes that secretaries of state have "a good bit of discretionary power."<sup>37</sup>

The potential impact of "a good bit of discretionary power" depends in part on how competitive elections are and whether results are close. In this regard, the U.S. has been lucky because of an otherwise unhealthy characteristic of its democracy: only a small minority of elections are competitive, and consequently close elections are rare. Because of the tendency of people to live near others who are like-minded, and because of safe districts created by partisan districting, there are few close general elections in the U.S., though close primary elections are much more common. Only 5 percent of all House of Representative elections since 2014 have been decided by a margin of 5 percentage points or less. For Senate elections, where gerrymandering is not a factor, that figure is 15 percent.<sup>38</sup>



The percentage of competitive elections could well increase. Independent redistricting commissions will likely have this effect, as could the implementation of ranked choice voting. Certainly, increasing competition by these and other means is desirable, but increasing impartiality of election administration will have to proceed in parallel.

In the U.S., the results of close elections are often very sensitive to turnout, making that a potential area of influence. Eight of the 10 secretaries responding to our survey agreed to some extent that “decisions taken by secretaries of state can meaningfully increase or decrease voter participation.”

Hence, former Wyoming Secretary Maxfield is right only in a very literal sense when he said, “I could not change even one vote.” Secretaries cannot change actual votes, but their actions can significantly affect election outcomes.

## V. THE ROLE OF STATES' CONFLICT OF INTEREST LAWS

Unfortunately, state conflict of interest laws do little to constrain secretaries of state. A recent study conducted for ERN by the law firm of Ropes & Gray concluded that “there is currently no U.S. state (i) which elects its Chief Elections Official and (ii) which exhibits a formal conflict of interest policy, statutory or otherwise, regulating the extent to which Chief Elections Officials can oversee their own elections or publicly advocate for, or act to advance the interests of, a political party, candidate, or ballot initiative outcome in an election under their oversight.”<sup>ii</sup>

In the absence of formal legal structures to constrain Chief Election Officials, the study identified:

*a patchwork of conflict of interest rules that could, in some states, be leveraged to*

*present a legal claim premised on conduct demonstrating a clear conflict of interest. This conduct may range from using the formal powers of office to create electoral advantages to relying on the implicit authority of the office to purposefully affect the outcome of an election. However, such a claim has little precedent and likely would not prove successful in most states.*<sup>39</sup>

Although many states have laws that impose significant fines or jail time for voting by ineligible individuals, none of the states examined by Ropes & Gray has a law specifically penalizing a secretary of state for actions taken with the intent

***The integrity of our elections ends up depending to an important degree on the ethical standards of the secretaries of state themselves.***

to sway an election. The study found that “No state possessed formal legal structures explicitly preventing CEOs from taking part in conflicted conduct whether to advance their own electoral interests or to purposefully aid a party, ballot initiative, or other candidate in an election they oversee.”<sup>40</sup>

“Our findings suggest that there are very few formal legal provisions in state law constraining election officials in the face of a conflict of interests,” said Patrick Roath, the Ropes & Gray attorney who oversaw the research project. “This presents a significant opportunity for future research, advocacy, and creative policy design.”

The analysts found that only two states, Nevada and Rhode Island, have conflict of interest laws

ii The study was a comprehensive, state-by-state assessment of conflict of interest law as applied to potential secretary of state conflict of interest conducted pro bono for ERN by the law firm of Ropes & Gray. A team of two Ropes & Gray lawyers and 22 summer associates conducted the 169-page review for ERN in 2019. The full report is available for viewing at: <https://electionreformers.org/ropes-and-gray-analysis/>

that could potentially limit conflicted conduct by CEOs. A key difference is that statutes in these states extend the context for conflict of interest to situations that do not involve pecuniary gain.<sup>41</sup>

Nevada law, for example “restricts the actions of public officials when voting upon or advocating for or against the passage of a matter in which the independent judgment of a reasonable person would be materially affected by the ‘official’s commitment in a private capacity to the interests of another person.’”<sup>42</sup>

Neither Nevada nor Rhode Island, however, has recorded a case involving the use of these statutes to constrain a secretary of state credibly accused of a conflict of interest in an election context.

Oaths of office also appear to offer only limited constraints in regards to secretary of state conflict of interest. Despite the uniqueness of election administration among public functions, no state has an oath of office designed especially for election officials. Secretaries of state who are chief election officials swear to the typically quite general oath of other statewide officials in their state. Only in 12 states do such oaths include language of impartiality or fairness, such as, for example, Iowa’s oath to “faithfully and impartially ... discharge all of the duties of the office.”<sup>43</sup>

## VI. SECRETARIES OF STATE BACKGROUNDS, CAMPAIGN FUNDRAISING, AND CAREER PATHS

Individuals with a wide range of backgrounds can and do run for secretary of state, but in general it is easier for candidates to gain the office who have close ties to a political party, which can provide financial and campaign support. Political ties are also of course important to gaining appointment as a secretary of state.

Though still low relative to other statewide offices, the cost of running for secretary of state has increased significantly in recent years, in part because of greater attention to the office from

both parties.<sup>44</sup> Fundraising for secretary of state elections in 2018 in 13 battleground states more than doubled over the average of the prior two election cycles, a significantly larger increase than for attorneys general elections over the same time period.<sup>45</sup>

In a 2014 opinion piece, former Secretaries of State Sam Reed of Washington and Phil Keisling of Oregon, warned of a “worrisome trend: that as money and partisan interest in these races exponentially rises, there is a real danger that these offices will become increasingly viewed as little more than extensions of partisan movements.”<sup>46</sup> Chad Peace, executive director of the California-based nonprofit Independent Voter Project, expressed a similar concern, stating that “In California, the next loyal party member in seniority when the position opens is often the secretary of state.”<sup>47</sup>

Analysis of the professional backgrounds of the 172 secretaries of state serving since 2000 confirms that the position is often held by individuals with backgrounds in partisan politics, often with ambitions to continue a political career. One hundred and fifteen of the 172 came to the office with prior experience as an elected official or with other political backgrounds, the vast majority as state representatives. Forty percent of secretaries of state continued a professional political career by running for another office (usually at the statewide level) while serving as secretary of state or after leaving office. These findings are illustrated in Figure 4.

Hypothetically speaking, secretaries of state whose future plans include running for governor or senator are likely to be more mindful of the needs and interests of their political party than secretaries committed to a career in election administration. This context increases the difficulty of making the kind of close call against one’s party that Sam Reed, a secretary who did not run for higher office, made in Washington’s disputed gubernatorial election in 2004.

Our analysis of public endorsements of candidates by secretaries of state (which is discussed in more detail in Chapter 2) supports this hypothesis. Secretaries of state who ran for higher

**Figure 4. The Secretary of State Position and a Professional Political Career<sup>49</sup>**

Category	Percent with Prior Experience as an Elected Official or Other Political Background	Percent that Ran for Higher Office While Secretary or After Leaving Office
Elected Secretaries of State	73%	45%
Appointed Secretaries of State	43%	20%
Republicans	66%	40%
Democrats	71%	42%
% of Total	67%	40%

Source: Analysis by ERN of ERN's Secretary of State Database. Data available at <https://electionreformers.org/guardrails-resources>

office, either while serving or after leaving office, were significantly more likely to make political endorsements or to serve on campaigns than those who did not run for higher office (see Figure 5).

An election expertise path to secretary of state is significantly less common than a political path. Of the 172 secretaries who have served since 2000, only 26 percent had worked previously in an election-related position, such as a state or local election official, or an election-related nonprofit or academic position.<sup>49</sup> (For more detail, see Figure 6.) In contrast, 31 states require attorney general candidates have law degrees, and in practice all state attorneys general have legal backgrounds.<sup>50</sup>

Election administration expert Amber McReynolds, who led the design and implementation of Colorado's vote-by-mail system, told an election conference audience in December 2019 that "we need election expertise in office and we need to redesign the secretary of state position to attract and promote people with that expertise."<sup>51</sup>

Encouragingly, the share of secretaries with election experience is increasing. This trend takes place within the context of growing institutional support for election professionalism that has

**Figure 5. Comparison of Partisan Behavior Between Secretaries of State Who Ran for Higher Office with Those Who Did Not**

	Ran for Higher Office	Did Not Run for Higher Office
Served on Political Campaign(s)	27%	8%
Made Political Endorsement(s)	48%	18%

occurred in response to problematic elections in the recent past. Some universities have integrated election administration into their curriculum, as called for by the 2014 report of the Presidential Commission on Election Administration, and the Election Performance Index established in 2013 by The Pew Charitable Trusts has allowed for measurability of key elements of election administration. The increasing professionalism of election administration, and the growing cost of secretary of state elections are two significant, and mostly opposing trends influencing who occupies the position in the future.

**Figure 6. Secretaries of State with Prior Election Experience, 2000-2020**

Category	Percent of Secretaries with Election Backgrounds		Types of Prior Election Experience
	Assumed Office Prior to 2010	Assumed Office 2011 - 2020	
Elected Secretaries of State	22%	37%	<ul style="list-style-type: none"> <li>• State election official</li> <li>• Local election official</li> <li>• Legislative committee on elections</li> <li>• Election law scholar</li> <li>• Election-related nonprofit or NGO leadership</li> </ul>
Appointed Secretaries of State	18%	15%	
Republicans	21%	29%	
Democrats	23%	38%	
<b>Total</b>	<b>21%</b>	<b>32%</b>	

## VII. THE PROBLEM OF RELYING ON THE POLITICAL REALM TO CONSTRAIN SECRETARY OF STATE PARTISANSHIP

Some defenders of the U.S. system of partisan secretaries of state argue that accountability before the electorate will police bad behavior. Jocelyn Benson in *Guardians of Democracy* emphasizes the importance of voters “hold[ing] [secretaries of state] accountable to using the office in a nonpartisan manner.”<sup>52</sup> She points out that both Katherine Harris and Ken Blackwell were defeated in elections for higher office following their controversial secretary of state tenures and concludes that “the power of the voter to protect the office from partisanship prevailed.”<sup>53</sup> Likewise, seven of 10 secretaries completing the survey for this report agreed to some degree that “accountability to the electorate via partisan elections is the most effective means to ensure secretaries of state appropriately manage any conflicts of interest.”<sup>54</sup>

Accountability after the fact, in the form of Harris and Blackwell losing subsequent elections, was probably cold comfort to Al Gore and John Kerry. It seems possible to imagine scenarios where there is no accountability at all, for example if secretary-of-state partisanship favors the party of most voters in a state. With voters showing increasingly divided concerns about our elections—Democrats worried about voter suppression and Republicans about fraud—voters may be more likely to support a candidate for secretary who addresses just the concern of their party rather than tackling both risks impartially.

This unjustified confidence in the electorate providing a mechanism for accountability is similar in some respects to the reasoning of the majority in the 2019 Supreme Court decision on partisan gerrymandering in *Rucho v. Common Cause*. In that decision the majority recognized the potential for partisan gerrymandering to “[lead] to results that reasonably seem unjust” but ruled that such issues are non-justiciable because it is for the political realm, rather than the courts to determine when a gerrymander is too partisan.<sup>55</sup>

As many observers commented at the time, a problem with this argument arises from the inherent risk that partisan influence on elections will be self-reinforcing in the political realm rather than self-correcting. A party in control of a state legislature can create districts that will allow it to maintain a majority of seats with a minority of votes, significantly reducing the likelihood that the political realm will address the harm. Secretary of state partisanship poses a less systemic risk than partisan gerrymandering, but it arguably shares the characteristic of being self-reinforcing rather than self-correcting.

Problematic reliance on the political realm exists elsewhere in our system, for example in the constitutional provision that the House and Senate have final authority to judge their own elections. The majority party has invoked this authority in several instances to rule in favor of its own candidate in a disputed election.<sup>56</sup>

These issues reflect a core weakness of our system that traces its origin to the Founders. The Founders had what Edward Foley calls a “naive belief that the constitutional arrangements they were making would keep the formation of political parties in check.”<sup>57</sup> This belief that parties, or “factions” in their terms, could be kept out of the country’s new institutions prevented the Founders from properly establishing, and limiting, the role of parties in our system. Many countries coming later to democracy took more care to limit the roles of parties, particularly in areas of where conflict of interest could naturally arise, such as in election administration and drawing of district boundaries.

## VIII. THE IMPORTANCE OF SECRETARIES’ PERSONAL ETHICS

Given the limited nature of the constraints on secretaries of state, the integrity of our elections ends up depending to an important degree on the ethical standards of the secretaries of state themselves. As former Connecticut Secretary of State Miles Rappoport put it, “Of course I played it straight, but I didn’t have to.”<sup>58</sup>

In interviews with Jocelyn Benson, several secretaries of state spoke of the principles guiding their work. For example, former Louisiana secretary Jay Dardenne said, “because obviously elections are so partisan and it creates such divisiveness within a state or between parties, it’s very important to me to conduct this office in a way that was going to be perceived as playing it right down the middle and to do what was appropriate and to ensure fairness and the integrity of the electoral process.”<sup>59</sup> Dardenne sponsored a law when he was serving in the state legislature requiring that chief election officials remain neutral in all state and federal races.<sup>60</sup>

South Dakota Secretary Chris Nelson echoed the sentiment: “We’re not going to tilt the process, we’re going to have a fair election, and in the end whoever wins we know is justly and properly elected.”<sup>61</sup> Former Washington Secretary Sam Reed said, “The key thing is that I am a partisan in name for running for office, but I conduct the office in a nonpartisan manner.”<sup>62</sup> Current Washington Secretary of State Kim Wyman, who was elected as a Republican, announced this year that she would not vote in the state’s primary because state law requires primary voters to sign a declaration stating which party they support.<sup>63</sup>

The many secretaries of state who “played it straight” deserve recognition for that public service. As we discuss in Chapter 4, one way to honor such commitment would be for the system to have sufficient guardrails that it is not possible for some, whatever percentage that may be, to not play it straight and to thereby put the credibility of our elections in jeopardy.





## CHAPTER 2

### THE TRACK RECORD OF PARTISAN BEHAVIOR BY SECRETARIES OF STATE SINCE 2000

#### SUMMARY

- » Research into secretaries of state serving since 2000 makes clear that partisan behavior occurs and has consequences.
- » In a small number of cases, partisan behavior has been highly consequential. In the Florida 2000 presidential election, Katherine Harris quite possibly changed the outcome of the Presidential election. Actions taken by Brian Kemp in Georgia in 2018 while simultaneously secretary of state and candidate for governor likely contributed to exceptionally low voter confidence in that state.
- » Less dramatic acts of partisanship have taken place at a higher rate. Of the 137 elected secretaries of state serving since 2000, 46 have made at least one public endorsement for a candidate running in a race under their supervision, and 12 have served as a co-chair of a presidential election campaign.
- » Twenty percent of secretaries of state serving since 2000 have lost lawsuits arising from circumstances where the secretaries' actions appeared to favor their political party.
- » Over the last 20 years, a sitting secretary of state has run for office 153 times. The available evidence suggests that in nearly all of those situations the secretary took no public step to recuse him- or herself from any conflict of interest.



- » Although public opinion polls show fairly high approval ratings for election officials, confidence that a disputed election will be handled fairly is low, particularly among voters who are members of a different party than the secretary of state in their state.
- » Many secretaries of state have demonstrated significant impartiality in responding to the COVID-19 pandemic.
- » The track record of secretary of state partisanship over the last 20 years should be viewed within the broader context of changes in election administration technology and procedures over the same period that, with some exceptions, have made voting easier.

**In a recent webinar, Ohio Secretary of State Frank LaRose said, “It’s 2020 and voting in this country has never been easier, safer, or more secure. Fraud is extremely rare, and I believe voter suppression is also rare.”<sup>1</sup> In a time of significant concerns about “meltdown” scenarios in the midst of pandemic conditions, LaRose’s comments may come as a surprise.**

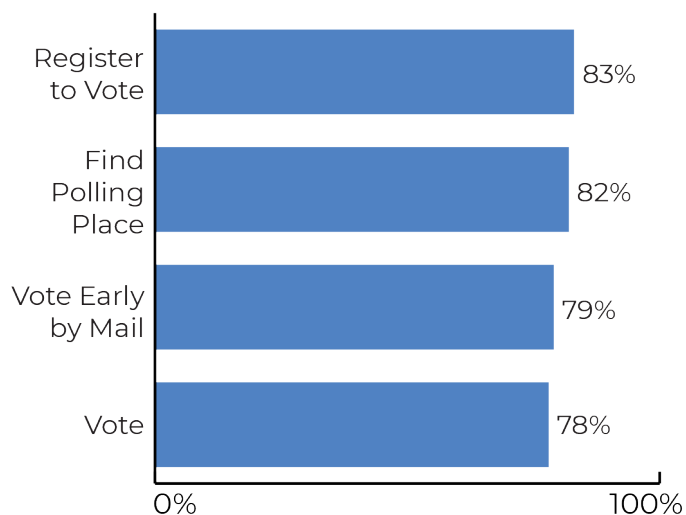
But as we turn to discussing the track record of secretary of state partisanship and conflicts of interest, it is important to consider this perspective and the ways in which U.S. elections have indeed improved.

In the not-too-distant past, the election environment in the U.S. included wholesale disenfranchisement of African Americans throughout the South and incidents of major election fraud unimaginable today. President Lyndon Johnson authorized subordinates to stuff ballot boxes to win his 1948 Senate election.<sup>2</sup> Jimmy Carter’s memoir of his first election describes the brazen fraud that initially cost him the race, so thinly concealed that, “the dead voted alphabetically.”<sup>3</sup>

The processes and technology of elections have undoubtedly improved in recent decades. The 2000 elections spurred the passage of the Help America Vote Act, which established new procedures to protect against errors in voter registration and removed some error-prone voting equipment systems.<sup>4</sup> Many important election improvements have also been adopted at the state level. Since 2002, 40 states and the District of Columbia have implemented online voter registration, and 19 states have adopted some form of automatic voter registration.<sup>5,6</sup> Thirty states are part of the Electronic Registration Information Center, which improves efficiency and integrity in voter rolls as citizens move between states.<sup>7</sup> Forty-two states currently offer pre-Election Day in-person or absentee early voting options.”<sup>8</sup>

On the opposite side of the spectrum, nine states have adopted a strict voter ID requirement, preventing a voter without a required form of ID from voting. While the impact of such laws is debated, there is little question that at least some eligible voters are prevented from voting and that minorities and the elderly are disproportionately affected. Concerns have also been raised about processes in different states for the necessary step of flagging voters who may have moved or passed away. News coverage of such “purges,” which typically do not mention the protections required by HAVA, may exacerbate these concerns to some extent, but this is appropriately an area closely monitored by

**Figure 7. Local Election Official Opinions on Whether Voting Has Gotten Easier**



Source: "Stewards of Democracy: The Views of American Local Election Officials."

voting rights advocacy organizations. Likewise, long lines at polling stations, particularly in lower income and minority communities, have been a problem in several areas, albeit one that experienced election administrators say is much more likely to be attributable to poor administrative decisions than intent to disenfranchise.<sup>9</sup>

A survey of local election officials conducted in 2018 provides support to the view of overall improvement. Large majorities expressed "high confidence in their state's ability to count ballots as intended" and "high confidence in the security of their own state's voter registration systems."<sup>10</sup> Large majorities of local election officials also think that since they began working in elections "it has gotten easier" to vote and to register to vote (see Figure 7).

In the context of such positive trends, what has been the extent of secretary of state conflict of interest? What are the most significant problems? And where do these issues fit within the broader range of election reform concerns?

## I. RUNNING FOR OFFICE WHILE SECRETARY OF STATE

The most significant instance of secretary of state conflict of interest in the last decade involved Georgia Secretary of State Brian Kemp. In 2018, Kemp ran for Governor while secretary of state and won a close and controversial election.

In the context of considerable media focus on the Georgia election, a wide range of accusations were made. Most of the media coverage did not mention that, as secretary, Kemp had supervised the rollout of a very successful Automatic Voter Registration program passed into law by the Georgia State legislature in 2016.<sup>11</sup> One accusation, that he was responsible for the closing of polling stations that led to long lines in some minority communities, is difficult to verify, given that control over polling station selection is a county supervisor responsibility in Georgia.<sup>12</sup>

But at least two accusations against Kemp are credible and significant. First, Kemp developed and implemented an "exact match" system for voter lists that flagged any voter with any inconsistency (e.g., a missing hyphen, a "Thomas" vs a "Tom") between registration records and social security and other databases. Kemp had implemented the system in 2016 by directive and was forced by a lawsuit to disband its use. He then successfully lobbied the Georgia state legislature to implement the program, arguing it was needed to prevent voting by non-citizens. In the lead-up to the 2018 election there were reports of 53,000 registration applications held up by false positives from the exact match system, 70 percent from minority voters.<sup>13</sup>

Second, days before the election, Kemp used his position as secretary of state to announce an investigation into the state election, an accusation that subsequent investigations found to be baseless. Election scholar Richard Hasen called this "false accusation" "the most egregious partisan action by an election official in the modern era."<sup>14</sup>

Hasen acknowledged, however, that there was no way of verifying that Kemp’s actions had changed the result: “The rhetoric about a stolen election is unproven.”<sup>15</sup>

The basic situation of Brian Kemp’s conflict of interest occurs remarkably frequently. Over the last 20 years a secretary of state has entered a race as a candidate while serving as the state’s chief election official 153 times (see Figure 8).<sup>16</sup> A share of these secretaries/candidates dropped out before the primary election; some lost in the primary; a total of 128 were ultimately on the ballot in a general election they supervised.

A critique of the institution of elected secretaries of state, which generates such conflicted situations, does not imply criticism of individual secretaries who run for office, particularly those who run for re-election, since states with elected secretaries provide no other way for individuals to stay in the position. Also, a comparison of the success rate of sitting secretaries of state running for office versus that of attorneys general provides no evidence of secretaries taking advantage of the office to help themselves win. As Figure 9 illustrates, secretaries of state are re-elected, and elected to higher office, at lower rates than attorneys general.

Nevertheless, secretaries of state competing in elections should respond to such a situation at a minimum with transparency. Our search of news records found only three instances in which a secretary of state proactively and publicly announced a plan for recusal when running for office (one of whom, it should be noted, is Kenneth Blackwell of Ohio, whose controversial handling of other categories of conflicts of interest is discussed in the next section).<sup>17</sup>

Brian Kemp was repeatedly called on to recuse himself during his campaign from decisions that could influence results, but he refused, citing the absence of any law requiring recusal and stating that his position’s lack of involvement with vote counting processes made recusal unnecessary.<sup>18</sup> Kemp certainly should not have participated in the decision, which arose in the week before his election, regarding an investigation of a political party for hacking.<sup>19</sup> Also, in

the immediate aftermath of the election, Kemp initially stated that there would be no need for him to recuse himself in the event of a recount.<sup>20</sup> Former Kansas Secretary of State Kris Kobach, who like Kemp ran for governor while serving as secretary, likewise initially insisted that he would not step aside in the case of a recount.

In contrast, Utah’s Republican Lieutenant Governor (and chief election official) Spencer Cox announced shortly after becoming candidate for Governor in 2020 that he would recuse himself from any role in the process he normally leads of responding to complaints.<sup>21</sup> Maggie Toulouse Oliver, New Mexico secretary of state, who considered running in the 2020 Democratic Primary for an open U.S. Senate seat, said in an interview

**Figure 8. Secretaries of State Who Were Also Candidates**

Candidacies for Re-Election as Secretary of State (excluding 2020)	101
Candidacies for Other Office while Secretary of State (Total)	52
Total Candidacies	153

**Figure 9. Comparison of Election Success Rates for Sitting Secretaries of State and Attorneys General**

	Attorneys General	Secretaries of State
Candidacies for Re-Election since 2000	133	101
Success Rate (excluding 2020)	92%	85%
Candidacies for Higher Office since 2000	61	52
Success Rate	43%	31%

that she would recuse herself if her race resulted in a recount.<sup>22</sup>

For some in the reform community, it is an unacceptable risk that this important aspect of our democracy is dependent on the individual ethics of secretaries. As Evan McMullin, former presidential candidate and co-Executive Director of Stand up Republic noted, “We should not have to be grateful to the Spencer Coxes for doing the right thing, the system should require it.”<sup>23</sup>

## II. CAMPAIGN POSITIONS AND POLITICAL ENDORSEMENTS

During his term in office, from 1999 to 2007, Ohio Secretary of State Ken Blackwell compiled what Ohio newspaper editorials called “an overtly partisan record” of “blatant partisanship in the conduct of elections.” Egregious acts included limiting access to voter registration by requiring registration forms on 80lb paper and preventing access to provisional ballots in direct violation of the Help America Vote Act.<sup>24,25,26</sup>

We focus here on two elements of Blackwell’s record, his position as co-chair of George Bush’s re-election campaign in Ohio and his public endorsement of an amendment question opposing gay marriage.

From the perspective of political parties, secretaries of state, as statewide office holders, are important public figures, whom parties call on to participate in state party events or to join with other elected officials of the party in certain public positions. Blackwell has said his role as co-chair of the Bush re-election campaign in Ohio was not an active position or one that he sought out, but was instead something asked of all senior Republicans in the state.<sup>27</sup>

Nevertheless, a secretary assuming such positions raises questions for voters about whether the secretary will conduct the election impartially. A survey conducted for this report of state level election nonprofit leaders found 26 of 31 agree or strongly agree with the statement, “When a secretary of state publicly aligns with

**Figure 10. Secretaries of State Serving in Campaign Leadership Positions for Presidential Candidates<sup>27</sup>**

2000	Harris, FL (R) Vigil-Giron, NM (D) Blackwell, OH (R)
2004	Brewer, AZ (R) Land, MI (R) Blunt, MO (R) Blackwell, OH (R)
2008	Rokita, IN (R)
2012	Treadwell, AK (R) Bennett, AZ (R)
2016	Williams, CO (R)
2020	Stapleton, MT (R)

an active candidate, by publicly endorsing that candidate or taking a position with that candidate’s campaign, voters become less confident in the impartiality of the election administration in the state.”<sup>29</sup>

Over the last 20 years, 12 secretaries of state have taken official campaign positions for presidential candidates (see Figure 10.)

This issue garnered considerable attention after the 2004 election, the second consecutive presidential election decided in a state where the secretary served as a campaign co-chair for one of the candidates. The 2005 report of the bipartisan

Commission on Federal Election Reform, chaired by Jimmy Carter and James Baker, strongly criticized such conflicted behavior:

*Election officials should be prohibited by federal and or state laws from serving on any political campaign committee, making any public comments in support of a candidate, taking a public position on any ballot measure, soliciting campaign funds, or otherwise campaigning for or against a candidate for public office. A decision by a secretary of state to serve as co-chair of his or her party's state presidential election committee would clearly violate these standards.<sup>30</sup>*

Laws were proposed around this time in some states explicitly prohibiting secretaries of state from campaign involvement, including (as noted in Chapter 1) a bill in Louisiana championed by Louisiana secretary of state Jay Dardenne.

Given this context, it is surprising that secretaries of state are taking these positions today. In November 2019 a “Trump Victory Team” was announced in Montana, with Montana Secretary of State Cory Stapleton serving as one co-chair.<sup>31</sup> Montana will likely not determine the presidency this year, but the state’s very close senate race could well affect control of the Senate. Although Secretary Stapleton has since resigned from the Trump Victory Team, in the event of a very close win for Republican candidate Steve Daines, voters in the state and nationwide may question

whether partisan motivations contributed in some way to that result.

Ken Blackwell also played an active role campaigning one side of a 2004 ballot question that he administered as secretary of state, for an amendment opposing gay marriage. Blackwell appeared on radio ads in favor of the amendment and promoted the amendment with public information resources. He also sent a letter to 1,500 state GOP members in August 2004 saying that amendment would be important in “determining where Ohio’s electoral votes will go,” implying a strategic calculation that the amendment would increase George Bush’s chance of winning the state.<sup>32</sup>

Few, if any, secretaries have advocated for a cause or candidate while in office to the same extent as Blackwell did, but a significant share of secretaries have publicly endorsed candidates. Since 2000, 29 percent of all secretaries of state have endorsed a candidate at least once, as Figure 11 illustrates.

A public pronouncement of support by the head of elections may cause voters to wonder if other candidates will be treated fairly. Research also indicates that personal preference can affect impartiality in procedures that involve discretion, such as the counting of provisional ballots.<sup>33</sup> It stands to reason that in an extremely close election, a secretary of state dedicated to one candidate might consciously or unconsciously attempt to move the needle in that candidate’s favor, or be perceived to do so.

**Figure 11. Frequency of Political Endorsements Made by Secretaries of State**

Method of Selection	Total Serving, 2000 - 2020	Secretaries Who Made at Least One Endorsement	Type of Endorsement
Appointed	35	4 (11%)	President: 3 General Party Endorsement: 1
Elected	137	46 (34%)	President: 3 Governor: 5 Other State Office: 6
Total	172	50 (29%)	



Secretaries of state sometimes make public endorsements of candidates not because of bad judgment about conflicts of interest but because they are required to do so by their party. Some state party rules, for example, require that a secretary of state from the party vote as a delegate in nominating conventions.

To date, the 2020 election cycle has seen fewer endorsements by secretaries of state than previous presidential years, which could be the start of a positive trend. However, a particularly noteworthy case of secretaries taking a public position on an election took place in June of 2020 when six Democratic secretaries of state appeared in a video ad that accused President Trump, the Republican nominee, of “clinging to

*Allowing endorsements in some elections but not others arguably overestimates the voters’ understanding of the division of election responsibilities and underestimates the potential for impact on voter confidence.*

a strategy” of “white supremacy.”<sup>34</sup> The ad was produced by the Democratic Association of Secretaries of State, a political action committee that supports and raises funds for Democratic candidates particularly in secretary of state races. A parallel organization exists for Republicans, the Republican Association of Secretaries of State. Both organizations are led by sitting secretaries, and both further the image of secretaries being players in elections, when they should be umpires.

Many secretaries try to avoid the appearance of partisanship by adopting personal oaths of impartiality. According to former Vermont Secretary of State Denise Markowitz, in 2008, “all but four or five” Secretaries of State adopted

personal policies of not participating in any campaign outside of their own, in order to ensure voter confidence in the office.<sup>35</sup>

Secretary Sam Reed maintained a policy while in office to not endorse positions on ballot questions or candidates for president because “the secretary of state oversees the initiative process... [and] has a role in convening [presidential] electors.” For other elections, Reed did not believe such a restriction is necessary because “we do not count candidate ballots and we don’t certify the candidates, we do certify results but that is just mechanical and is entirely based on the county results.”<sup>36</sup>

This nuanced distinction, allowing endorsements in some elections but not others, arguably overestimates the voters’ understanding of the division of election responsibilities and underestimates the potential for impact on voter confidence. Secretaries of state are the public face of a state’s election system, and few voters are likely to know the details of their relative involvement in different election categories.

As we shall see in Chapter 4, many state legislators have focused on the issue of partisan endorsements by secretaries of state as an area for reform.

### III. PARTISAN ACTS AND DECISIONS

Katherine Harris represents an extreme version of the background and career trajectory of secretaries of state discussed in Chapter 1. She came to the office of Florida’s chief election official with no particular expertise or background in election administration, having worked previously in the art world before successfully running for Florida state senate in 1994.<sup>37</sup> Her election to secretary of state was a step in a political career, one that, according to Jeffrey Toobin, she intended to continue and believed a George W. Bush presidency could help.<sup>38</sup> As mentioned in Chapter 1, Harris responded to the surprise of an extremely close and hugely consequential election results in her state with administrative decisions clearly designed to preserve Bush’s victory by limiting

the extent of recounts that could change that result.

Although most of Harris's decisions in the post-election period were immediately challenged in court, one decision that may well have changed the election was not. Procedures established by Florida's election director required that the automatic recount triggered by Florida law must include re-running all optical scan ballots through scanning machines. Instructions from Harris' office did not call for such procedures, and they did not take place in 18 counties, with a total of 1.58 million votes.<sup>39</sup> Counties that did re-run these ballots found discrepancies that added to Gore's vote total. According to Toobin, if Harris's office "had insisted that all counties follow the procedures, Al Gore may have been leading in the vote totals" after the automatic recount, with the burden therefore on Bush, rather than on Gore to disprove the result.<sup>40</sup>

Many claims have been raised both in the courtroom and in the public square, accusing other secretaries of bending the rules to benefit his or her party. How many of these claims are justified is a subjective question that cannot be answered definitively.

What can be said, based on review of lawsuits filed against secretaries who have served since 2000, is that approximately 20 percent of secretaries have received judgments against them in court in relation to actions that appeared to favor their political parties.<sup>41</sup> Some situations that have led to judgments against secretaries of state include:

- › delaying or ignoring implementation of election laws such as the National Voting Rights Act, presumably to limit registrations by voters expected to vote against the party of the secretary;<sup>42</sup>
- › including or excluding minor parties on the ballot to positively or negatively affect the vote tally for a major party; and<sup>43</sup>
- › challenging the citizenship and registration of voters based on a database-matching technique known to produce false positives, presumably to dissuade a group known to vote

against the party of the secretary of state from voting.<sup>44</sup>

In the case of Katherine Harris in Florida, exhaustive study of her actions in the aftermath of the election makes it possible to say that she in fact intended to help a Republican win the White House. It is harder to be certain about the motivations behind the examples listed above. As the next section illustrates, however, opinion polling suggests voters are concerned about intentional partisan influencing of elections by secretaries of state.

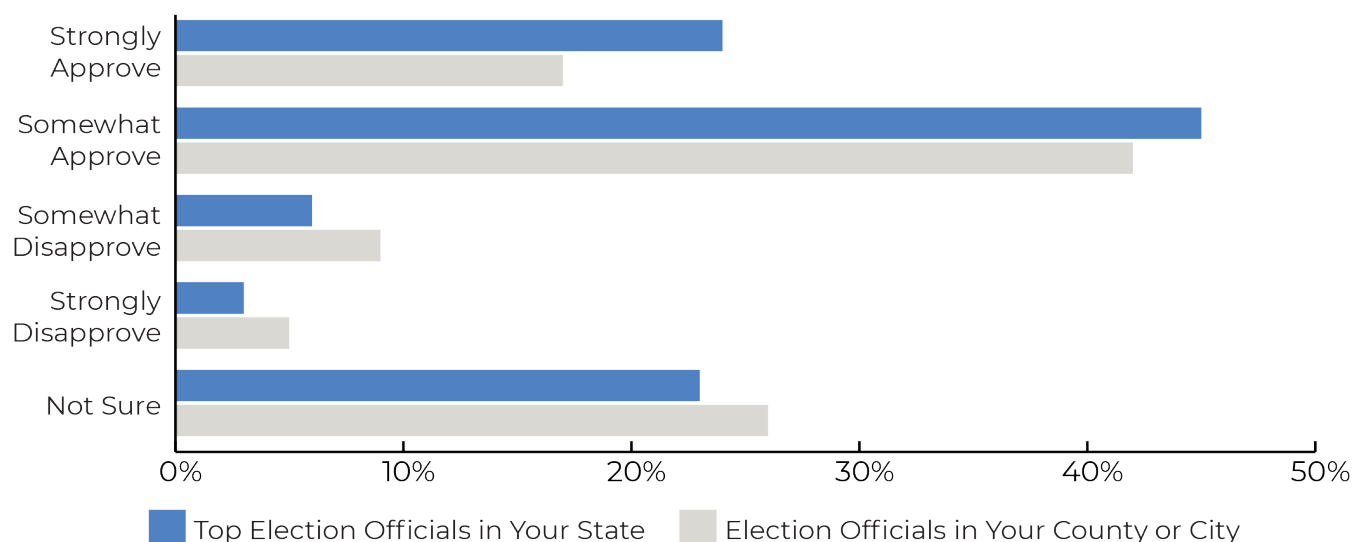
## **IV. THE IMPACT OF SECRETARY OF STATE PARTISANSHIP ON VOTER CONFIDENCE**

Public opinion polling suggests that while many voters have significant concerns about U.S. elections broadly, most voters' views are more positive regarding their own election experience.<sup>45</sup> As Figure 12 illustrates, based on data from the 2018 Cooperative Congressional Election Survey, 69 percent of voters somewhat or strongly approve of their local election administrator and 59 percent somewhat or strongly approve of the "Top Election Official in the State" (who is usually the secretary of state). Disapproval rates for both categories of administrators are low.

Further analysis of this data shows that voter approval is somewhat lower among voters of the opposite party of the "Top Election Official in the State," but the difference is less than might be expected. Democrats somewhat or strongly disapprove of the Top Election Official at a higher rate in states where the secretary of state is a Republican but only by a difference of five percentage points. A majority of both Democrats and Republicans somewhat or strongly approve of the Top State Election Official in states where that official is of the opposite party (see Figure 13).

A different picture emerges from an analysis of voter confidence data from the 2018 gubernatorial election in Georgia. In that case, a

**Figure 12. 2018 CCES Opinion Data: “Do you approve of the way [election officials] are doing their job?”**



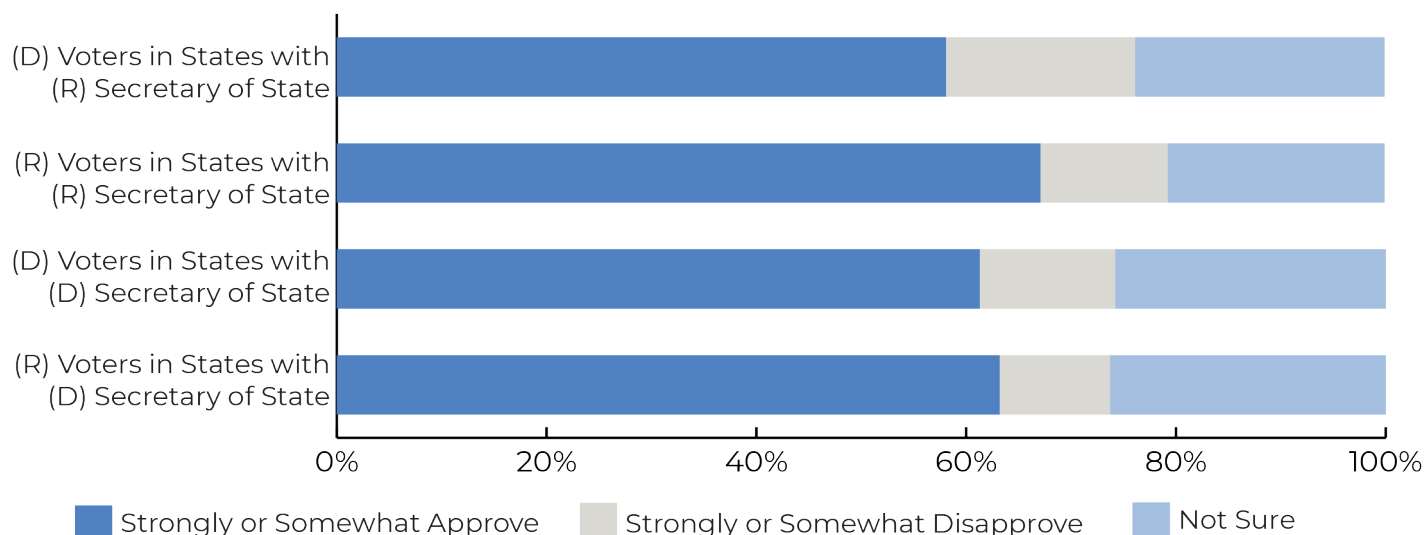
Source: Comparative Congressional Election Studies (CCES) Survey 2018, Election Reformers Network Analysis

huge difference appears in voter confidence between Republican and Democratic voters. The two charts in Figure 14 show responses in two November 2018 polls to questions about confidence that votes will be counted accurately, broken down by the political affiliation of respondents. The comparison shows that in Georgia, 70 percent of Democratic respondents thought it likely or very likely that many votes would not be counted, while only 30 percent of Democrats nationwide thought that votes are counted accurately only some of the time or never.

That these are from different polls muddies the comparison somewhat, but it is clear that a party-based trust gap arose in Georgia during Kemp’s tenure that is significantly larger than the national average.

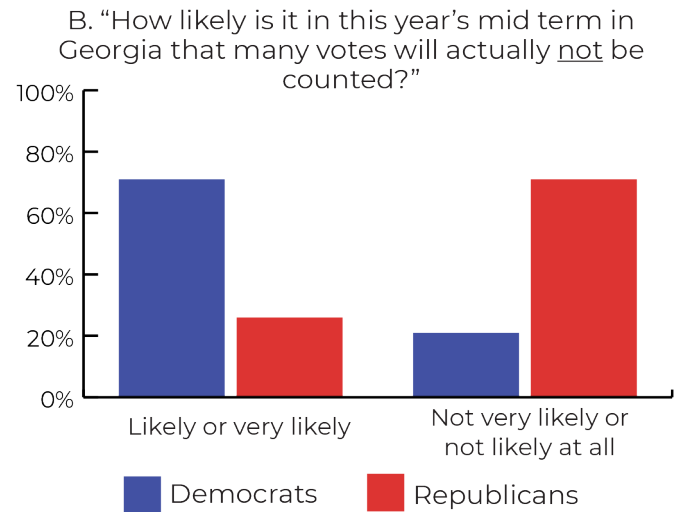
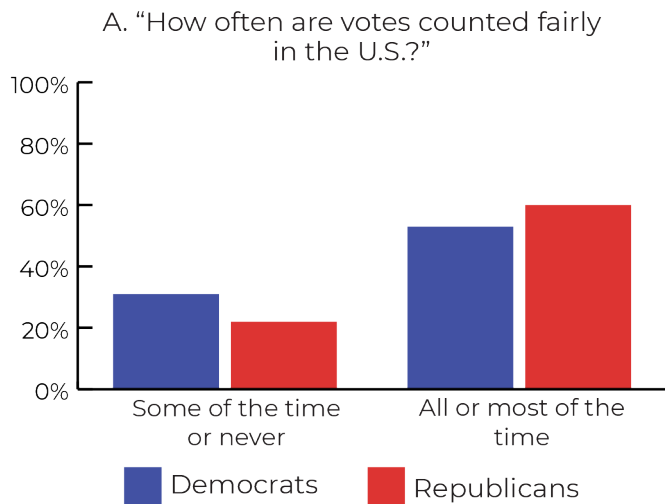
Another striking illustration of voter lack of confidence in state senior election officials, and of partisan impact on that lack of confidence, arises from a survey question asked in the 2010 Cooperative Congressional Election Study about how a disputed election would be handled. The two-part question began by asking, “If the vote

**Figure 13. 2018 CCES Opinion Data: Election Official Job Approval and Party Affiliation**



Source: 2018 CCES, Election Reformers Network Analysis

**Figure 14. Perceptions of Fairness Nationally and in Georgia, 2018**

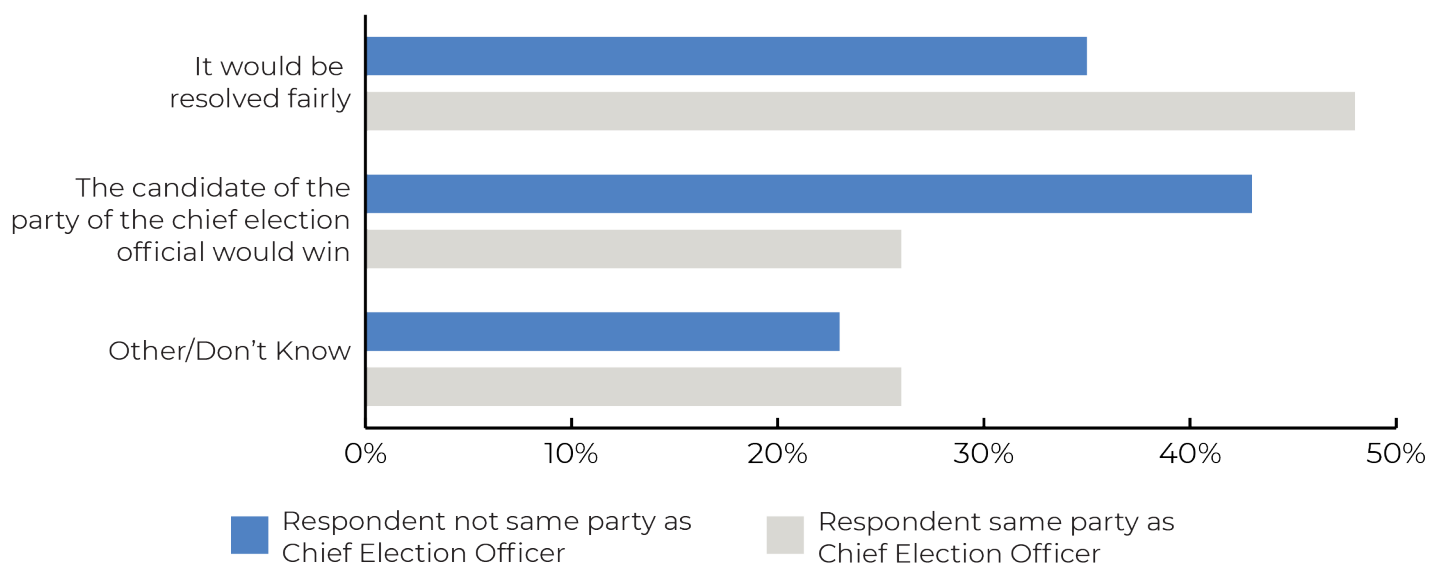


to elect the governor in your state was extremely close and a dispute arose, do you think state officials would settle this in a fair way?" Only 39 percent responded "yes;" another 32 percent said they did not know, while 29 percent responded "no." A follow-up question to those who said "no" or "I don't know" presented scenarios such as that "The election official would favor the candidate of his or her party," or "The Democrat Candidate would win." We aggregated the responses and broke out responses by party affiliation and found that 37 percent of voters said, effectively, that a disputed election would be decided in

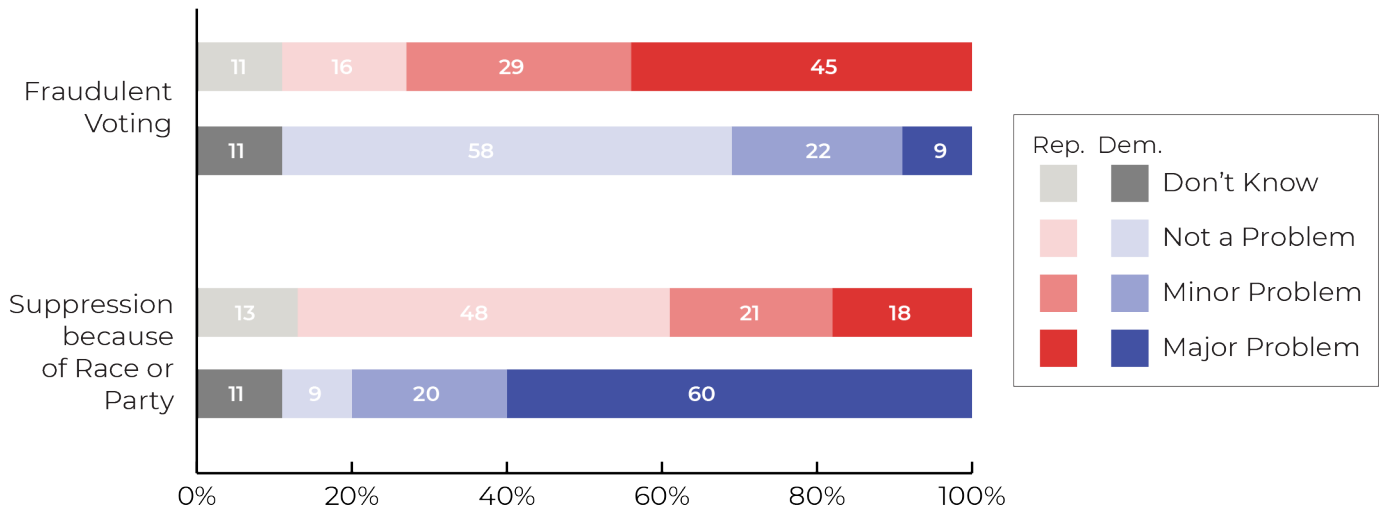
favor of the party of the chief election official in their state. We also found that voters affiliated with the same party as the chief election official were significantly more likely to have confidence that a dispute would be resolved fairly than voters of a different party (see Figure 15).

These findings are disturbing in several ways. First, only 39 percent of voters believing a close, disputed election would be resolved fairly illustrates remarkably low confidence. Second, respondents not of the party of their secretary of state show significantly more distrust. Third,

**Figure 15. 2010 CCES Opinion Data: "Who would win a disputed election in your state?"**



**Figure 16. Worries about 2018 Election, by Party**



Source: MIT Election Data and Science Lab

these data prompt the question of how voters could give high job approval ratings to officials they do not trust with what arguably should be the most important part of their job. Questions probing this aspect of voter confidence should be asked again in future surveys so that this angle on performance assessment can be explored further.

Problems in voter confidence also appear in data on issues of concern in election administration. As Figure 16 shows, the electorate in the United States is extraordinarily divided on questions of fraud and voter suppression. Seventy-four percent of Republicans saw fraudulent voting as a major or minor problem, compared to only 31 percent of Democrats. By contrast, 80 percent of Democrats saw voter suppression as a major or minor problem versus only 39 percent of Republicans.

These contrasting perspectives create a very challenging environment for election administrators, since addressing both concerns simultaneously can require actions in opposite directions. The lack of evidence of fraud uncovered by efforts such as President Trump's 2017 Commission on Election Integrity suggests the degree of concern over fraud here is unfounded. Likewise, as discussed earlier in this chapter, some problems attributed to intent to suppress the vote, such as long polling station lines, often arise from administrative mistakes instead. The elevation of these concerns can be blamed on social media

and on increasingly partisan traditional media, but our system of partisan secretaries of state also plays a role. Without clearly neutral senior election officials, voters have few sources of election information they can trust as impartial and data-driven. To make matters worse, several secretaries of state, most notably former Kansas Secretary Kris Kobach, have used the office as something of a bully pulpit to spread unsubstantiated claims.

## V. OBSERVATIONS ON SECRETARY OF STATE RESPONSE TO THE PANDEMIC

As of the drafting of this report in late summer 2020, we can offer preliminary comments on the response of secretaries of both parties to the politically divisive issue of whether and how to modify elections for conditions of a pandemic. So far, the response appears to be mostly positive, but significant challenges lie ahead.

The 45 states that had not previously established a system that mails a ballot to all voters by default faced a set of difficult decisions in response to the pandemic. The states with default vote-by-mail have implemented those systems incrementally over a period of years, which has allowed time for the necessary infrastructure, including signature recognition and ballot tracking systems, to be



**Figure 17. Actions by Secretaries of State to Facilitate Elections under COVID-19**

Secretary Party	"No excuse" <sup>π</sup> states in which the Secretary of State advocated for all voters to receive ballot applications during COVID	"Excuse required" <sup>Ω</sup> states in which the Secretary of State advocated for a COVID exception to excuse requirements
Democrat	7 / 10	3 / 3
Republican	10 / 13	6 / 10
<b>Total</b>	<b>17 / 23</b>	<b>9 / 13</b>

<sup>π</sup> States which do not require an excuse to apply for an absentee ballot.

<sup>Ω</sup> States which require an excuse, such as sickness, travel, or age, to apply for an absentee ballot.

established and tested and to provide the necessary training. Recognizing the need to provide more alternatives to in-person voting during the pandemic, many states have undertaken to quickly expand absentee balloting options. But the issue has become highly politicized because of President Trump's vocal opposition to vote by mail and his allegations that it would lead to cheating.

Data on absentee balloting patterns indicate that more Democrats than Republicans use this voting method, and polling of voter plans for 2020 reflect that same pattern. Analysts have written of a "blue shift" in election results as counting continues and possible early leads by Republicans based on in-person voting sometimes change when disproportionality Democratic absentee ballot totals are incorporated.<sup>46</sup>

In this context, it is encouraging that many Republican secretaries of state have taken steps to support or expand absentee voting. As Figure 16 illustrates, 16 of 23 relevant Republican secretaries of state, and 10 of 13 relevant Democrat secretaries, have supported mailing an application for an absentee ballot to all voters or supported accepting concern about the virus as an excuse for absentee voting.<sup>47</sup>

Given President Trump's high profile, non-negotiable public posture on this issue and his public attacks on plans to mail absentee ballot applications to all voters, it is noteworthy that

17 Republican secretaries have taken steps that could be politically difficult.<sup>48</sup> Indeed, two Republican secretaries of state have been named as defendants in lawsuits brought by the Trump campaign alleging that expansion of absentee balloting would threaten the integrity of the elections.<sup>49</sup>

In some states, rule changes to expand absentee voting only applied to the presidential primaries, but in most the new policies extend through November. Partial expansion of absentee balloting to older voters in some states, such as Alaska (where Lieutenant Governor Meyer sent absentee ballot applications exclusively to voters over 65), has drawn accusations of discrimination against young people in violation of the 26<sup>th</sup> Amendment, but such claims have to date been rejected by the courts.<sup>50</sup>

Many secretaries of state of both parties have also advocated for expansion of time windows for voters to vote early or for absentee ballots to be received or processed.



# CHAPTER 3

## THE INTERNATIONAL PERSPECTIVE

### SUMMARY

- » Most other democracies appear to do a far better job than the U.S. at restricting partisan behavior by senior election officials and developing norms of impartial administration. This pattern may contribute to public opinion polling showing greater confidence in the honesty of elections in most developed democracies than in the U.S.
- » Impartial election administration in other democracies results in many cases from structurally independent administrative bodies. Some countries with strong traditions of public administration have developed effective and neutral election administrative bodies within government ministries.
- » Regular judicial oversight and roles for judges in senior election positions contribute to impartial election administration in many countries.
- » Political consensus in support of impartial election administration has also played an important role, alongside legal and structural reforms.
- » The United States is a global outlier in election administration. No other democracy elects its senior election officials, and few if any allow senior election officials to publicly support candidates or positions on ballot initiatives, as the U.S. does.
- » The U.S. is one of only two major democracies without a national administrative body playing a management role in elections. National administration of election is common even among countries that, like the U.S., have a federal structure with substantial devolution of authority to states or provinces.

**Comparing American democratic institutions to those in other countries is useful generally, but in a discussion of partisanship in election administration, it is essential.** Viewed in isolation, the structures and track record discussed in the previous chapters are certainly problematic; viewed from an international perspective, they take on greater significance.

No other democracy functions as we do as regards partisanship in election administration. The U.S. is the only democracy in the world that elects its most senior election officials and the only democracy in the world where senior election officials oversee elections in which they are candidates.<sup>1</sup> The U.S. appears to be the only democracy where it is a common and accepted practice for senior election officials to endorse competing candidates or positions on ballot initiatives, and the only democracy where senior election officials may take a position of co-chair on a political campaign.

As data from the Gallup World Poll 2019 illustrates (see Figure 18, next page), the United States also lags when compared to its peers on voter confidence. It is not possible of course to draw a direct cause-and-effect link between the U.S.'s outlier status in election administration and this low rate of confidence, given the many, complicated factors that shape that metric, but it seems likely there is some connection.

Other countries of course have not created perfectly neutral, impartial election administration from imperfect humans. Election officials everywhere have biases and political preferences. All other democratic countries, however, appear to have done a better job than the U.S. of putting in place structures to reduce the risk of election officials acting on such preferences to support one side in elections. Other democracies also

appear to have done a better job establishing a cultural and political norm of impartial election administration.

An argument is often advanced in the United States, often by secretaries of state themselves, that partisanship cannot be kept out of election administration.<sup>2</sup> But the experience of the many democracies around the world that have developed effective impartial systems refutes this argument.

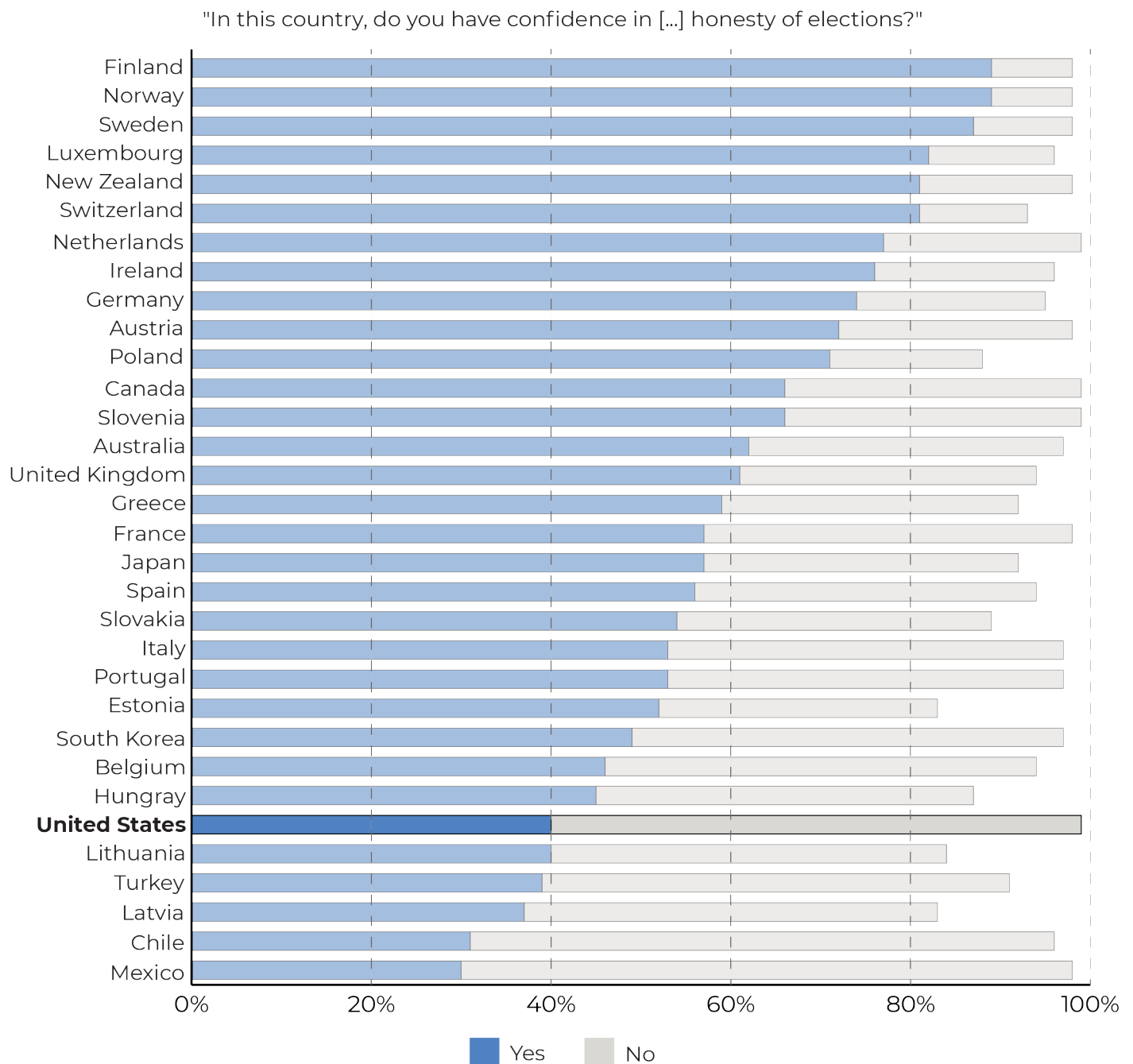
## **I. INDEPENDENT ELECTION ADMINISTRATION, AND NEW DEMOCRACIES OF THE 20TH CENTURY**

The wave of democratization that took place from the early 1970s through the end of the 20th century owes some of its success to the development of the independent model of election administration. The U.N.-affiliated ACE Electoral Network Project defines this model as “elections organized and managed by an EMB [Election Management Body] that is institutionally independent and autonomous from the executive branch of government; its members are outside the executive... it manages its own budget, and is not accountable to a government ministry or department.”<sup>3</sup>

Most of the countries of Central and Eastern Europe, newly liberated after the fall of the Berlin Wall, established independent election management bodies. Many countries new to democracy in Asia, Latin American and Africa did likewise. Although not a proof of causation, studies of democracies in transition suggest a link between the use of independent bodies and higher election integrity.<sup>4</sup>

A range of approaches are used to appoint the leadership of these independent commissions. In some cases, legislatures play a role, but many countries prioritize the role of the judiciary to keep legislative political dynamics at bay. One example is Costa Rica, where elections are run by the Supreme Election Tribunal, established in the constitution of 1949 with the status of a fourth

**Figure 18. Gallup Confidence in Elections Poll**



Source: Gallup World Poll 2019

branch of government. The three members of the Tribunal, who are all judges, are appointed to six-year terms by the Supreme Court in a process involving public input and designed to limit influence by the country's political parties.<sup>5</sup>

Actual de facto independence can be difficult to achieve, and in some countries independence has existed in name only. For example, the nominally independent Supreme Election Board of

Turkey succumbed to pressure from the ruling AKP party to annul the results of 2019 mayoral elections won by opposition parties.

Nevertheless, it is noteworthy, and encouraging, that a broad range of countries have achieved some level of effective, de facto independence even though many lacked a tradition of democracy or independent public administration. India is one country in this category. Like the United

States, India is a large and diverse former British colony, and at independence Indian leaders faced the very daunting task of forging a nation out of a much larger and more disparate set of political entities than the 13 American colonies. That more than a hundred principalities and states, with dozens of languages, agreed to join the new Indian federation was miraculous to some observers.<sup>6</sup> India's National Election Commission, prescribed by the constitution as an autonomous entity responsible for all aspects of elections across the whole country, is widely credited with playing an important role in building cohesion in the new nation.<sup>7</sup>

Post-colonial United States was of course very different, notably in the extensive experience the American colonies had administering their own elections before independence. But the factors of state and local differences that are often cited in the U.S. to justify decentralized election administration are exactly the reasons centralized election administration was essential for India.<sup>8</sup>

## II. OLDER DEMOCRACIES THAT HAVE TRANSITIONED TO INDEPENDENT ADMINISTRATION

Although a large majority of the 146 countries classified as using the independent election administration model are newer democracies, a handful of older democracies have transitioned over the years to nationally administered elections under the authority of an independent election commission. This list includes former British colonies that share with the U.S. a political system dominated by two parties and single member district elections, such as Australia and Canada.

The Australian Election Commission established in 1984, has three commissioners, who are appointed by the Governor General, on the recommendation of the government. The chairperson of the AEC must be an active or retired judge of the Federal Court, selected from a list of three names put forward by the Chief Justice

of the Federal Court. A second position is the Electoral Commissioner, who must be the head of a public service agency. The AEC reports to a Parliamentary Standing Committee, which exercises oversight but cannot issue binding directives to the AEC on how to perform its duties.<sup>9</sup>

According to AEC Advisor Michael Maley, the creation of the AEC was motivated by a desire among the then ruling Labor party for "maximum possible impartiality." As Maley explains,

*The change [to the AEC] ... wasn't driven by any real sense that elections before had been run with any overt partisanship by the then (non-independent) Australian Electoral Office. In fact, the tradition here of civil servants being professional and neutral rather than partisan appointees meant that there had over the years been very little suggestion of partisan sympathies on the part of election officials; they mostly took pride in standing above politics... It was more that the move was part of a suite of reforms ..., which, it was thought, would be more credible if administered with the maximum possible impartiality.<sup>10</sup>*

Maley adds that "it would be unthinkable for a serving AEC official, or indeed a serving official of any Australian election management body (or, for that matter, any Australian civil servant), to endorse a candidate for election. It would also be a serious breach of the AEC's formal policy on 'Political Neutrality in the AEC.'"

In Canada, by contrast, differences in views on elections between provinces and parliament drove the transition to an independent election commission, according to former Chief Electoral Officer of Canada Jean Pierre Kingsley. Historically, Canadian elections were administered at the provincial level, paralleling the state-centric administration in the U.S. After World War I, provinces responded differently to the issue of suffrage for women, which led to consideration in the federal parliament of a more unified approach. Members of parliament also raised concerns about the potential for partisanship



at the provincial level affecting federal election results.<sup>11</sup> In 1920, Parliament established Elections Canada, the world's first independent EMB, and the Canadian Chief Electoral Officer.<sup>12</sup>

Elections Canada is responsible for all aspects of federal elections, including the maintenance of the election registry; the recruitment, management and training of polling place officials and returning officials; and the tabulation and certification of results. Elections Canada controls its own budget, which uniquely is submitted to Parliament after the fact.

The House of Commons appoints Canada's Chief Electoral Officer as an agent of Parliament not under the authority of a minister and located outside the departmental framework of government.<sup>13</sup> Initially, Chief Electoral Officers served until the age of 65; the term is now 10 years. The impartiality of the CEO is symbolized by the fact that he or she is not permitted to vote in any federal election, by-election or referendum.

According to Kingsley, no Chief Electoral Officer or provincial-level chief election official could publicly endorse a competing candidate or a position on a ballot initiative; doing so "would constitute cause for dismissal."<sup>14</sup>

This is not to suggest that political concerns or criticism about election administration do not exist in Canada. MPs of Canada's Conservative Party, for example, posed questions about whether Elections Canada was spending too much money to increase voter turnout among Canada's indigenous people.<sup>15</sup>

The establishment of de facto EMB independence in Canada seems to have arisen in part from ethical or normative elements that cannot be easily codified in law as well as from the structures described here. For example, although only a simple majority in the House of Commons is required to approve a proposed CEO, all of the seven CEOs in Canadian history have received unanimous approval. In voting unanimously, Canada's political parties, despite objections they may raise from a liberal or conservative perspective about election administration, have

recognized the larger value to the country of an election system anchored in broad political support.

### III. IMPARTIAL ELECTIONS ORGANIZED BY GOVERNMENTS

Advocates of independent election administration argue that it is essential to achieve high integrity elections. The set of best practices issued by The European Commission on Democracy through Law, states that "only transparency, impartiality and independence" will ensure proper administration of the election process."<sup>16</sup> An Elections Canada comparative study echoes this premise: "Independence from the political executive, and to a lesser extent from the legislature, has become a widely accepted international norm for the design and operation of EMBs."<sup>17</sup>

Some scholars have questioned such insistence on the independent model. Daniel Tokaji for example, claims: "The empirical research on EMBs does not support the conclusion that independence leads to better elections or greater public confidence. The formal independence of election management bodies is less important than their functional impartiality."<sup>18</sup> Other scholars have emphasized that where quality of government generally is high, independence of the election administration is less important to election integrity.<sup>19</sup>

Figure 19 gives some support to these views. Countries here are ranked by their "overall democracy index" score, as calculated by the Economist Intelligence Unit, and categorized by their system of election administration (see footnotes for explanation and source of categories). As the chart illustrates, a significant number of what are generally regarded as successful democracies use a governmental model of election administration.<sup>20</sup>

Sweden is an example of a country categorized as using the governmental model, where national

**Figure 19. Highest Ranked Democracies Grouped by Election Management Category**

Governmental Model		Mixed Model		Independent Model	
Country	EIU Index Score	Country	EIU Index Score	Country	EIU Index Score
Norway	9.87	Iceland	9.58	New Zealand	9.26
Sweden	9.39	Netherlands	9.01	Canada	9.22
Finland	9.25	United Kingdom	8.52	Australia	9.09
Ireland	9.24	Spain	8.29	Uruguay	8.38
Denmark	9.22	France	8.12	Mauritius	8.22
Switzerland	9.03	Japan	7.99	Costa Rica	8.13
Luxembourg	8.81			Chile	8.08
Germany	8.68			Portugal	8.03
Austria	8.29			South Korea	8.00

Source: "EIU Democracy Index 2019 - World Democracy Report." The Economist Intelligence Unit, 2020, [www.eiu.com/topic/democracy-index](http://www.eiu.com/topic/democracy-index).

The United States is given a score of 7.96 on this index, and is ranked number 25 among developed democracies.

election authority operates from within the Ministry of Culture. The current Minister of Culture in Sweden, Amanda Lind, owes her position to being elected as a member of parliament and being a senior member of the Green Party, part of the governing coalition. In some sense, therefore the individual ultimately in charge of elections in the country is vulnerable to the same potential conflicts of interests we have discussed in the United States. In practice, however, the election authority is "functionally equivalent to an independent body" on account of the "high degree of independence" of Sweden's public administration, according to Swedish election expert Professor Henrik Ekengren Oscarsson.<sup>21</sup>

According to Oscarsson, explicitly partisan acts by senior election officials such as endorsing candidates do not happen in Sweden, and the guiding force here is not rules but norms. "There are no formal rules that a head of election

authority should not be a party member, party activist or run for office. However, I think it would be extreme pressure to resign if that was the case. It is unthinkable to have an [election] director that is also a candidate for a party in an upcoming election."<sup>22</sup>

As in the U.S., election responsibility is highly decentralized in Sweden. Each of the 290 municipal councils elects a chairman and vice chairman of the local electoral board (valnämnd), which as in the U.S. have responsibility for recruiting and training polling station officials, for setting up and equipping polling stations and for the first count of votes. The central authority is responsible for the preparation of electoral rolls, voting cards, ballot papers and other electoral materials.<sup>23</sup>

Another normative element in Sweden, according to Oscarsson, is "the culture of high participation and high voter turnout," which "makes all political

actors want to gear the election administration to maximize voter turnout.”<sup>24</sup>

Sweden and the other eight governmental model countries listed in Figure 19 all elect members of parliament on the basis of proportional representation and party lists, whereas countries such as the United Kingdom, the U.S., Canada and Australia elect legislators individually in single member districts. Research by political scientist Sarah Birch suggests a relationship between proportional representation and the ability of countries to effectively administer elections without the greater protection of a structurally independent election management body. Her research finds that “elections held in single-member districts (SMD) under plurality and majority rule are more likely to be the object of malpractice than those run under proportional representation (PR).”<sup>25</sup>

*In some respects the United States is a victim of its own success, of its early adoption of democracy and its long stability and long-standing constitution. The world is on a democracy learning curve, and new and young democracies, lacking legacy institutions, have been better positioned to take advantage of that learning.*

Birch offers two reasons for this pattern. First “Candidates in SMD systems have more to gain from individual efforts to manipulate elections than is the case for candidates in PR contests.” (In PR, gaining a seat depends significantly on candidates’ ranking on party lists.) Second, “Malfeasance is more efficient under SMD rules,

in that the number of votes that must be altered to change the outcome is typically smaller than it is under PR.”<sup>26</sup>

This relationship between single-member-district election systems and greater risk to election integrity needs to be explored further and its implications understood for countries such as the United States and the United Kingdom that use SMD and do not have independent election commissions.

## IV. REGULAR JUDICIAL INVOLVEMENT AND OVERSIGHT

As noted in Chapter 1, the U.S. Constitution makes the House of Representatives and the Senate judges of their own elections, a provision that has in the past resulted in disputes being decided on the basis of which party is in the majority. In most other democracies, dispute resolution is now clearly reserved as a judicial rather than political process. As the IDEA’s International Handbook on Electoral Justice explains, “[Election dispute resolution] authority was gradually transferred, over the course of the 20th century, to judicial organs in the various democratic regimes – either regular courts as part of the judiciary, constitutional courts, administrative courts, or specialized electoral courts.”<sup>27</sup>

Some countries integrate judicial involvement as a regular element of the election process. In France, and in many former French colonies, the Constitutional Council (Conseil Constitutionnel) is responsible for hearing election complaints and has the determining role of certifying results. This role for the Constitutional Council was established in the 1958 Constitution of the Fifth Republic in response to abuses under the prior system, which, like the U.S., gave the country’s legislative chambers authority to “judge the eligibility of its members and of the regularity of their election.”<sup>28</sup>

In the U.S., judges deciding on election disputes are often themselves elected. Twenty-two states

elect State Supreme Court Justices, seven in partisan elections and 15 via nonpartisan elections. No other democracy uses a similar system. The political affiliation of judges addressing election disputes is at times a significant issue in U.S. elections.

The involvement of current or retired members of the judiciary has also increased in election administrative bodies, either as members or playing a role in the appointment process. The IDEA Electoral Justice handbook notes, “Some of the members of EMBs are often required to come from the judicial branch, or are appointed in a similar fashion to judges with the same requirements demanded of them.”<sup>29</sup>

## V. UNDERSTANDING THE ANOMALOUS UNITED STATES

These examples and patterns from overseas suggest that the structural issues in the U.S. system discussed in Chapter 1 and the risks and incidents of partisan actions discussed in Chapter 2 cannot be blamed on an absence of viable alternatives. Many countries around the world have figured out how to implement election administration that is more impartial than in the U.S. and that accepts less risk of partisan behavior than the U.S. does.

The countries discussed here share geographic or demographic characteristics that are often cited as reasons for why the U.S. has the system it has. The examples include countries with federal systems and strong devolution of authority to provincial or state governments, countries with large and multilingual populations, and countries with historical traditions of local autonomy.

There are several causes for U.S.’s remarkable outlier status.

First, in some respects the United States is a victim of its own success, of its early adoption of democracy and its long stability and long-standing constitution. The world is on a democracy

learning curve, and new and young democracies, lacking legacy institutions, have been better positioned to take advantage of that learning. By contrast, it was only during the U.S.’s time of national breakdown, the Civil War, that institutional change to address the most important shortcoming of our constitution, a legal basis for slavery, became possible. France arrived at a more effective balancing of the role of the judiciary in election administration and election disputes only under its fifth constitution.

A second, and related, point is that the path to more impartial elections in most countries has been through elections that are led and administered at the national level. National administration has become the norm. In every major democracy except the United States and the United Kingdom, at least some degree of election administration is directed from a national-level entity.<sup>30</sup>

In the U.S., the virtues of local election authority are often extolled, such as the adaptability to local conditions. But there are risks to decentralized election administration. One is the greater likelihood of single party dominance at a state or local level than nationally, which, in the context of decentralized elections, can lead to long-term capture of the election process by one party. The long dominance of the Democratic Party in the South and the Jim Crow regime were both enabled in part by decentralized election administration in the U.S.

Third, as the story of the Government Accountability Board in Wisconsin illustrates, American political divisions have become so high-stakes that it is difficult for parties to accept structures that require they take a step back to allow impartial or expertise-based leadership in election administration. The Canadian case illustrates a mutual recognition among political leaders of the benefit of taking election administration out of partisan hands. The U.S. has seen some similar developments, most notably in redistricting reform in Colorado, but the current political climate is not conducive to this cooperation in much of the country.





# CHAPTER 4

## REFORM

**It is clear that state systems in the U.S. create risks of partisan influence on elections, risks that most other democracies have done a better job at removing.** In normal times, election laws and election litigation can mostly be counted on to constrain the potential for harm from partisan allegiances of secretaries of state.

But these risks increase during exceptional election years, when an emergency like the COVID-19 pandemic arises, or when results are extremely close and disputed. Having a system that is ready for those challenges requires that the problem of partisan secretaries of state be addressed.

A starting point is the framing of clear and realistic goals. The analysis presented in the previous chapters suggests three such goals for secretary of state reform:

1. to increase significantly the likelihood that secretaries of state who serve as chief election officials will be professionally committed to administering elections fairly and impartially;
2. to establish guardrails that end, or significantly limit, partisan actions by secretaries of state who serve as chief election officials; and
3. to build the expectation of impartial election administration among all stakeholders, including voters, political parties, candidates and election officials.

These goals can be pursued through fundamental structural reform to state-level election administration, which in most cases will require state constitutional amendments, and through more modest, incremental changes that are more achievable in the near term. Ideas for specific reforms are discussed in this chapter, beginning with the more the incremental category.

A reform idea not explored here is one Chapter 3 seems to recommend most: a transition to national level election administration. There is little to no political support in the U.S. for a significantly expanded federal



role in U.S. elections, even if such a path would seem to offer some important advantages in both impartiality and uniformity of election processes.

## I. ENDORSEMENTS, CAMPAIGN POSITIONS AND PUBLIC NEUTRALITY

A survey conducted for this report found that most secretaries of state who responded agree that secretaries should not publicly endorse candidates.<sup>1</sup> Many also oppose secretaries' taking a position with a campaign, such as an honorary co-chair, and many have adopted personal ethic policies to guard against such conflicts of interest.<sup>2</sup> Collectively, via The National Association of Secretaries of State (NASS), secretaries in February 2020 unanimously reaffirmed that "NASS is dedicated to ensuring the conduct of elections in a fair and neutral manner."<sup>3</sup>

Over the past 20 years, 38 bills have been proposed in 18 states to prevent secretaries of state, election board members, and other senior election officials from taking positions on campaigns, fundraising for campaigns, endorsing candidates or endorsing positions on ballot questions. Several bills have come close to passage, and one passed in 2005: Colorado's prohibition against the secretary of state "serving as the highest ranking official, whether actual or honorary, in the campaign of any candidate for federal or statewide office."<sup>4</sup>

With polarization intensifying in the United States, and with the fragility of the U.S. democratic system becoming increasingly apparent, a renewed push for state legislative action is required. Bills should be enacted in state legislatures that broadly prohibit partisan actions by secretaries of state and election board members, including:

- › public endorsements of candidates running for office;
- › public endorsements of positions on ballot

questions;

- › accepting campaign positions for candidates or ballot questions; and
- › fundraising and electioneering for or against any candidate or ballot question.

These prohibitions should extend to races in all states; a senior official taking sides on an election in another state still raises questions about his or her ability to act truly neutrally in his or her own state. Such laws will need to provide exceptions

***Over the past 20 years, 38 bills have been proposed in 18 states to prevent secretaries of state, election board members, and other senior election officials from taking positions on campaigns, fundraising for campaigns, endorsing candidates or endorsing positions on ballot questions.***

for when a secretary of state is him- or herself a candidate. Later in this chapter, we discuss ideas for prohibiting secretaries from running other than for re-election, and for recusal when conflicts of interest arise for secretaries who are candidates for re-election.

In parallel to this state legislative effort, individual secretaries of state and the NASS can build on the steps that many have already taken to demonstrate commitment to neutrality. Secretaries who have already established policies for handling conflicts of interest should publicize those policies on their websites, and secretaries who have not should determine and publish such policies.

The NASS should facilitate this effort through the development of a model code of conduct for best practice in handling conflicts of interest (see some examples in Appendix C). Such a code should include a commitment against taking the public positions in favor of a candidate or ballot question discussed above. A code of conduct could also address more specific situations than will likely be covered in law, such as whether and how a secretary could attend a political event without such attendance constituting an endorsement.

## II. OATHS OF OFFICE

In 38 states, oaths of office taken by secretaries of state do not include explicit commitments to impartiality. Additionally, in all 50 states, the chief election officer takes the same oath of office as other comparable officials.<sup>5</sup> While all public servants are trusted to act in the public good, the responsibility of election officials must be held to a separate standard because elections are the foundation upon which democracy rests.

State chief election officials, and election officials at all levels, should be required to take an oath of office designed for the election administration context that includes a commitment to execute the duties of the office in a fair and neutral manner. A more detailed approach could include commitments to provide equal and ample opportunity for all eligible citizens to register and to vote and to ensure that results accurately reflect all valid votes.

New oaths of office could be added as provisions to state legislative bills regarding political activity outlined above. Congress, which established the requirement that states name chief election officials, could also address this issue and require state chief election officials swear an oath of impartiality.

## III. RECUSAL

The issue of when and whether secretaries of state should recuse themselves from duties

should be clarified. No states currently have laws explicitly requiring secretarial recusal; in four states over the last 20 years, legislation has been introduced to require such recusal, but none of the proposed laws have passed. As we have seen, some secretaries have personal policies of when they would recuse themselves as an ethical rather than a legal requirement, but there is no consensus among secretaries on this point.

As noted in Chapter 1, some have argued that secretaries of state should view recusal in the same manner that judges do. Election lawyer Molly Greathead argues that:

*“allowing an individual to play this dual role in an election [candidate and secretary of state] creates a risk of unfairness in the electoral process that violates due process. When these circumstances arise, there should be a presumption of bias, and a chief election official should be required to recuse herself from overseeing any election in the state until she is no longer on the ballot.”<sup>6</sup>*

Greathead’s approach, calling effectively for complete removal of the secretary of state from involvement in elections while on the ballot, can be considered as one end of a spectrum. A more modest approach would specify particular election processes a secretary would recuse her-/himself from, such as recounts and investigating complaints. A third alternative would rely on a more general standard and require recusal from any decision that a prudent person would consider as potentially conveying benefit to the candidate.

It is sometimes argued that secretaries of state do not have many options in terms of to whom to recuse, given the small size of state-level election offices and the fact that staff members with the necessary expertise, such as state election directors, are usually appointed by and serve at the pleasure of the secretary. But in every state there should be appropriate individuals, for example among former state election directors, chief election officials, or county clerks, who could step in and fill this role.

## IV. DRAWING MORE ELECTION PROFESSIONALS TO THE SECRETARY OF STATE POSITION

Later in this chapter we consider ideas for fundamental reform to elections as the means for selection of state chief election officials. The current systems are well-established institutionally and politically, however, and will not be changed easily. For those reasons, we suggest here rule changes that can reduce the negative effects of electing election officials by increasing the likelihood that election experts, rather than career politicians, will seek the office of secretary of state.

As noted in Chapter 1, 40 percent of secretaries of state serving since 2000 have run for higher office either while serving as secretary or subsequently. This segment of the secretary of state population is notably more prone to partisan acts such as endorsements of candidates and taking campaign positions.<sup>7</sup>

A rule change that could reduce the appeal of the office, for the most politically ambitious, and at the same time reduce incidence of conflict interest, would be to prevent secretaries of state from running for any office other than re-election until after the end of their term and to prevent secretaries from running for statewide office for some period after leaving office.

Some states impose similar restrictions on members of citizen-led redistricting commissions seeking an elected office to prevent commissioners from drawing district lines that could benefit themselves as candidates.<sup>8</sup>

A minority of secretaries of state serving during the past 20 years have come to the position with professional election experience, for example as a county clerk, or with election expertise from nonprofit work or academia, and it seems likely that individuals with this background will have a deeper professional commitment to fair elections.

A rule change that would help bring more of this experience to the position, and help further professionalize election administration, would be to require that all candidates for secretary of state have some prior background in an election administrative role or complete an accredited certificate program in election administration.<sup>9</sup>

## V. CONSIDERING NONPARTISAN ELECTIONS OF CHIEF ELECTION OFFICIALS

Regarding more fundamental reform, the first issue to address is the idea of changing secretary of state elections to a nonpartisan status, one with candidates not listing a political party on the ballot. Public opinion polls show support for nonpartisan election of election officials, and the idea has gained interest among some reform organizations and state legislators.<sup>10</sup> Over the past 20 years, 17 bills have been introduced in 13 states proposing some form of this idea.<sup>11</sup>

*Forty percent of secretaries of state serving since 2000 have run for higher office either while serving as secretary or subsequently. This segment of the secretary of state population is notably more prone to partisan acts.*

Unfortunately, nonpartisan elections offer less promise than is often assumed, as extensive research into nonpartisan judicial elections has demonstrated. Twenty-two states choose judges at some level in nonpartisan elections, including 15 states where supreme court justices are elected in this manner.<sup>12</sup> But the literature indicates that

“nonpartisan judicial contests are no more about professionalism or competence than partisan ones.”<sup>13</sup> Because voters do not follow campaigns closely enough to know who the candidates are, much less how their positions or policies differ, party labels help voters “make informed voting decisions.”<sup>14</sup> In the absence of party labels, candidates look for ways to make their ideological positions known to voters, which can lead to election of more extreme candidates.<sup>15</sup>

The high-profile Wisconsin state supreme court race in April 2020 illustrates the inherent partisanship of ostensibly nonpartisan elections. That supreme court position is nominally nonpartisan and is elected via nonpartisan ballot, but

*The goal of this new institutional design should not be to separate election administration from the political realm but instead... “to strike an appropriate balance between independence and professionalism on the one hand and responsiveness and accountability on the other.”*

intense partisan divisions arose over whether the election should take place given the COVID-19 pandemic, based on assumptions about which party benefits from higher or lower turnout. The debate made amply clear that both parties and the electorate assessed the election in highly partisan terms.

This example, and this research more generally, suggests that if secretaries of state were elected in nonpartisan elections, candidates would still likely align themselves with parties, still seek

voters and support from parties and still enter office with a problematic allegiance to a party.

## VI. NEW DEDICATED, STATE-LEVEL IMPARTIAL ELECTION MANAGEMENT BODIES

Many secretaries of state perform admirable service to their state, the nation and to democracy by effectively and impartially administering elections. Nonetheless, it is difficult to reconcile the architecture of the position of secretary of state with the United States’ need for impartial state-level election administration. As this report illustrates, the position of an elected secretary of state is neither designed to attract impartial election professionals nor to prevent the kinds of partisan acts documented in Chapter 2. Because the holder of the position changes with the election cycles, and because in nearly all states senior state election staff are appointed by and serve at the pleasure of the secretary, the position does not lend itself to the long-term institutionalization of norms of impartiality seen in other democracies. Also, as discussed, secretaries of state have other roles both as leaders in state government and as statewide elected members of their political party that are at least a distraction and sometimes are in conflict with impartial election administration.

For these reasons, we recommend that states ultimately move to separating the election function from the office of the secretary of state and into a new dedicated entity.

Such an entity could either be led by an improved version of current U.S. state election boards or by a chief election official appointed in a process designed to ensure impartiality.

Regarding a board approach, as discussed in Chapter 1, all of the existing state election boards have been built for political representation, not for impartial election administration. Election boards should include members who are politically independent and who represent other



**Figure 20. Composition and Selection of Independent Redistricting Entities**

State	New Redistricting Entity	Composition	Member Selection (Summary)
Colorado	Two 12-Member Commissions (One for Congressional maps, one for State Legislatures)	$\frac{1}{3}$ Democrats $\frac{1}{3}$ Republicans $\frac{1}{3}$ Unaffiliated	All applicants reviewed by bi-partisan panel of retired judges. Six selected at random, six selected by judges, including four from short lists from R and D legislative leaders
Michigan	13-Member Commission	4 Democrats 4 Republicans 5 Independents or 3 <sup>rd</sup> Party	Applicants reviewed by Secretary of State. R and D legislative leaders may strike some, then commissioners selected at random.
Missouri <sup>Σ</sup>	State Demographer	1 Person	State Auditor selects short list from applications and sends to R and D legislative leaders. If they don't agree, a Demographer selected at random.
Utah	7-Member Commission	2 Must be Unaffiliated; Minority party likely to have 2 members	Majority and minority legislative leaders select three each, including one unaffiliated each. Governor selects one.

Σ Subject to change based on 2020 ballot initiative.

relevant stakeholders such as local election officials or citizens groups. Board design could also include a role for active or retired judges, which, as we have seen, is common among other democracies, and appeared to work well, at least initially, in Wisconsin. Board design should result in an entity that is beyond the control of political parties, but that is able to make decisions effectively.

Experience in the U.S. with different approaches to structuring boards should be enhanced in the coming years, as several states implement new independent redistricting commissions. Figure 20 summarizes key elements of new

redistricting entities being established in four states, illustrating themes relevant to improving election board design, such as a significant role for independents and an involvement of judges in the selection process.

An alternative to a board approach is for states to establish election leadership under a chief election official separate from the secretary of state. The manner of selection of such a chief election official is of course critical. One model to consider is the multi-stakeholder judicial nominating committee charged with proposing state supreme court nominee candidates in states such as Massachusetts. A committee to



propose chief election official candidates could comprise retired judges, representatives of the political parties, local election officials and representatives of nonpartisan citizens' organizations. A super-majority vote within this body could be required for candidates to be included in a slate from which the governor would select a nominee for approval by the legislature.

The goal of this new institutional design should not be to separate election administration from the political realm but instead to ensure impar-

*Steps to increase the independence and impartiality of state election leadership should be combined with steps to shift the state-local balance toward the state level and to strengthen the secretary of state in relation to other state officials.*

tiality. A 2016 Elections Canada report offers sound advice on that balance: the goal is not to “completely remove issues of electoral governance and administration from the domain of political judgment,” the authors write, but instead “to strike an appropriate balance between independence and professionalism on the one hand and responsiveness and accountability on the other.”<sup>16</sup>

## **VII. INCREASING THE RELATIVE AUTHORITY OF SECRETARIES AND CHIEF ELECTION OFFICIALS**


Reform that reduces or weakens the connection between a secretary of state or chief election official and a political party could potentially weaken the authority of these positions,

particularly vis-a-vis state legislatures, which could reduce their ability to advance the best interests of voters and of election integrity. The ideal senior election official is not an apolitical individual without connections to the political establishment but an election expert with integrity and the political skills needed to advance the best interest of voters in the state legislature and other policy domains.

Former Washington Secretary of State Sam Reed explains that “being politically engaged strengthens the role of an elected official.”<sup>17</sup> He notes that his state’s nonpartisan elected state superintendent of schools has been less successful in the state legislature advocating for schools than partisan elected secretaries have been advocating for voters.<sup>18</sup>

To counteract a potential decrease in political stature, the reforms discussed here should be combined with reforms that increase the authority and responsibility of secretaries and chief election officials. As discussed in Chapter 3, the United States is at the extreme end of the spectrum in terms of localization of election authority, a situation that is becoming more of a disadvantage as election administration becomes more complex and as local differences in election processes are called into question on equal protection grounds.

Devolution of authority reduces accountability. For example, when long lines appear at polling stations, it is unclear to voters who is responsible. Increasing the authority of the secretary of state can both help make elections more uniform and make secretaries more accountable. For these reasons we recommend that steps to increase the independence and impartiality of state election leadership should be combined with steps to shift the state-local balance toward the state level and to strengthen the secretary of state in relation to other state officials. Such changes will necessarily vary state by state, but areas that can be considered for greater secretary of state authority could include:

- 
- › decisions regarding election-related responses needed in an emergency or natural disaster;
  - › approval of voting machines for use in the state;
  - › oversight of polling station selection and provisioning; and
  - › oversight of local level election registration application and removal processes.

Financial resources also affect the relative authority of a secretary of state or chief election official. As noted in Chapter 3, a degree of financial independence from legislative bodies has been important to building election administration impartiality in other democracies. State reform can address this issue by providing assurance of sufficient funding for more robust state election leadership and by allowing the state to be a source of some support to local election offices.

# RECOMMENDATIONS

*Continues on next page*

## FOR THE 2020 ELECTION

### 1. SECRETARIES OF STATE SHOULD STRICTLY OBSERVE NEUTRALITY.

- » To bolster public confidence that these imperiled elections will be conducted impartially: Secretaries of state should not attend campaign events or political party functions.
- » The Democratic Association of Secretaries of State should remove from circulation the “Defeating White Supremacy” video ad released in June, and it and the Republican Association of Secretaries of State should refrain from involvement in any campaign.
- » More generally, secretaries of state should resolve to be umpires, not players in the electoral process.

### 2. SECRETARIES SHOULD GO THE EXTRA MILE TO PUT VOTERS FIRST THIS ELECTION.

In anticipation of problems during the election, such as delays in receiving and processing mailed ballots, or spikes in COVID-19 cases affecting election personnel, secretaries of state should prepare to take advantage of all remedies available in state law, including relevant state emergency provisions, and should publicize in advance of the election the steps they intend to take in such circumstances to ensure all eligible citizens can vote and all valid votes are counted.

### 3. THE FIVE SECRETARIES OF STATE WHO ARE RUNNING FOR OFFICE IN 2020 SHOULD RECUSE THEMSELVES FROM INVOLVEMENT IN DECISION-MAKING THAT COULD APPEAR TO INFLUENCE THEIR ELECTION.

## FOR THE NEAR TERM

### 1. NEW LAWS AND GUIDELINES SHOULD INCREASE IMPARTIALITY FROM STATE ELECTION LEADERS.

Several steps should be taken, including:

States should pass legislation broadly prohibiting secretaries of state and election board members from:

- » public endorsements of candidates running for office;
- » public endorsements of positions on ballot questions;
- » taking positions with campaigns for candidates or ballot questions; and
- » fundraising and electioneering for or against any candidate or ballot question.

States that do not have oaths of office that explicitly commit senior election officials such as secretaries of state to impartiality, should establish such oaths.

States should pass legislation requiring a secretary of state who becomes a candidate for election to recuse him or herself from any involvement in any decision that a prudent person would consider as potentially conveying benefit to the secretaries' candidacy. States could also extend this recusal requirement to specific election phases such as recounts.

The National Association of Secretaries of State should develop a model code of conduct for use by election officials at all levels, outlining best practices for practicing impartiality, for avoiding conflicts of interest and for recusal in cases of unavoidable conflict of interest.

The Republican Association of Secretaries of State and the Democratic Association of Secretaries of State should be disbanded or reconstituted as organizations that do not become involved in electioneering or candidate fundraising.

## **2. REFORMS SHOULD ENSURE ELECTIONS ARE RUN BY DEDICATED PROFESSIONALS.**

States should pass legislation to prohibit secretaries of state and election board members from becoming candidates for any elected office (other than, if applicable, re-election as secretary of state) during their term in office and any federal or statewide office for a period after their term in office.

States could also consider establishing criteria for individuals to run for or be appointed to the position of secretary of state, such as a minimum of one year of election administration experience or completion of an accredited certificate program in election administration.

## **3. JOURNALISTS, REFORM ORGANIZATIONS AND CITIZENS GROUPS SHOULD HELP BUILD A CULTURAL EXPECTATION OF IMPARTIAL ELECTION ADMINISTRATION.**

### **FOR THE LONG TERM**

#### **1. STATE LEVEL ELECTION ADMINISTRATION SHOULD BE RECONSTITUTED TO REMOVE STRUCTURAL SOURCES OF CONFLICT OF INTEREST AND PARTISANSHIP.**

States where the secretary of state serves as chief election official should separate those functions and move election responsibilities to a new office of the chief election official or to an election board.

Chief election officials should not be directly elected.

States where the chief election official is not appointed by an election board should design new processes for appointment of the chief election official that prevent politicization of the office. Such a process could include a nominating committee representing both political and nonpolitical stakeholders, which could name a list of nominees, for selection by the governor and approval by the state legislature. Design of such processes should draw on best practices internationally and on new models states are establishing for nonpartisan redistricting commissions.

#### **2. STATES ELECTION BOARDS SHOULD BE RECONSTITUTED TO BE APOLITICAL RATHER THAN BIPARTISAN.**

Changes to state election board structures should:

- » provide mechanisms for at least some board seats to be filled through a nonpolitical process, such as the process proposed above for selection of state chief election officials;
- » represent stakeholders in addition to the two largest political parties; ensure the nomination and approval of such additional seats are designed for impartiality; and not allow control by one political party.

#### **3. THE DIVISION OF AUTHORITY BETWEEN STATE AND LOCAL ELECTION OFFICIALS SHOULD BE REVISED TO INCREASE STATE-LEVEL RESPONSIBILITY AND RESOURCES.**

Steps to increase the independence and impartiality of state election leadership should be combined with steps to shift the state-local balance toward the state level and to strengthen the role of the secretary of state.

The Statue of Liberty stands prominently in the upper right portion of the page, set against a soft-focus background of a city skyline and a blue sky with light clouds. The statue is shown from the waist up, holding the torch aloft in its right hand and a tablet in its left. The background image is slightly faded to allow the text to be the primary focus.

# CONCLUSION

With this report, we have sought to shed light on the long-term structural sources of secretary of state conflict of interest. We have also tried to assess how frequently conflicted actions have occurred over the last 20 years, whether under the media spotlight or not. Putting these elements of the U.S. structure and track record into international context has helped to illustrate that most other democracies have developed better systems and face much less stress in their elections than the U.S. does. With all this in mind, we have put forward a set of recommendations for change, some we believe are achievable in the near term and others that require longer-term fundamental reform.

Election reform is gaining momentum in the U.S., as support advances for change in areas such as choice of electoral systems, campaign finance regulations, gerrymandering and voter access. Secretary of state conflict of interest differs in some respects from many of these election problems. Whether the underlying structural problem of our election administration causes issues of immediate concern depends on factors such as the changing personalities of secretaries in office and the margin of victory in elections. We may not see mass mobilization


in support of redefining state election administration as we have for anti-gerrymandering. The kind of fundamental change we call for here, and that others like the 2005 Commission on Federal Elections have called for, will likely take a long time.

But the core issues of fairness are easily grasped. As one election reform organizer we spoke with put it, “Why should one team’s shortstop get to call balls and strikes?”<sup>1</sup>

We believe the path to fundamental change should start with the more achievable incremental reforms discussed in this report. The incremental reforms we propose emphasize affirming and displaying nonpartisanship and building the understanding among political actors that partisanship is not appropriate behavior from secretaries of state. Actions like secretaries working together to adopt a code of conduct or states passing laws to require recusal in certain circumstances will build and reinforce the norm of impartiality that is needed in election administration at all levels.

A recent, highly regarded report by the Commission on the Practice of Democratic Citizenship made the point that





“improvement of our civic culture and of our institutions must go hand in hand. Each is necessary; neither on its own is sufficient.”<sup>2</sup> Likewise, building more impartial election administration in the United States will require both the structural changes addressed here and the work of journalists, reform organizations and citizens groups to call out acts of partisanship and build the norm of impartiality. The side of fairness can never have too many supporters.

The Election Reformers Network is committed to this process and to the careful work it will require. Already a range of potential partner organizations and individuals has emerged, from within the secretary of state community, the nonprofit reform world and beyond.

Daniel Tokaji has written, “The conflicts of interest inherent in the dominant U.S. model make it unsuitable for a country that aspires to be the standard-bearer for democracy around the world.”<sup>3</sup> The Election Reformers Network is led by a group of people who have worked to support democracy in many countries, and we have seen firsthand how the symbol of U.S. democracy has in fact inspired people in many countries around the world. Democracy does need standard bearers, and the U.S. can and should be one of them, but to do so effectively we must raise the standards to which we hold ourselves.

# APPENDIX A

## PROPOSED STATE LEGISLATION TO REFORM STATE ELECTION LEADERSHIP OR ADDRESS CONFLICT OF INTEREST, 2001 TO 2020

Source: National Conference of State Legislatures - State Elections Legislation Database

The scenarios described in this report have generated enough concern that, over the past 20 years, 75 pieces of legislation have been introduced in 33 states aimed at reforming some element of top-level state election administration. State legislatures have proposed establishing nonpartisan election commissions, making the secretary

of state a nonpartisan elected office, prohibiting secretary of state political activity, and requiring recusal in certain circumstances. The table below shows the bills grouped by category and presents examples of legislation. The full set of proposed legislation is available at: [www.electionreformers.org/guardrails-resources/](http://www.electionreformers.org/guardrails-resources/)

Category	Number of Bills	Example 1	Example 2	States Introducing Bills in this Category
Restrictions on election official involvement with campaigns	38	<p><i>Kansas, 2013 (H 2039):</i></p> <p>Relates to fair elections act, relates to secretary of state, relates to prohibitions of contributions to and endorsement of other elected officials.</p> <p>Not passed.</p>	<p><i>Colorado, 2005 (SB 206/198):</i></p> <p>Prohibits the Secretary of State from serving as the highest ranking official, whether actual or honorary, in the campaign of any candidate for federal or statewide office.</p> <p>Passed.</p>	<p>Arizona California Colorado Florida Georgia Illinois Indiana Kansas Louisiana Maryland Maine Michigan Mississippi New York Ohio Tennessee Texas Virginia</p>

Category	Number of Bills	Example 1	Example 2	States Introducing Bills in this Category
Nonpartisan election of secretary of state	38	<p><i>Kansas, 2020 (H 2508):</i></p> <p>Provides that the Secretary of State shall be elected on a nonpartisan basis and shall resign before running for another office.</p> <p>Not passed.</p>	<p><i>Oregon, 2009 (HB 565):</i></p> <p>Designates offices of Secretary of State, State Treasurer and Attorney General as nonpartisan.</p> <p>Not passed.</p>	<p>Alaska California Florida Kansas Mississippi New Mexico Oregon South Dakota Utah Washington West Virginia</p>
Other change in selection or role of Secretary or Board	14	<p><i>Florida, 2019 (H 1365; S 1802):</i></p> <p>An act relating to elections [...] revising responsibilities of the Secretary of State; providing that the Secretary of State shall be elected.</p> <p>Not passed.</p>	<p><i>Oregon, 2009 (HB 565):</i></p> <p>Transferring duties relating to conduct of elections and voter registration from the office of secretary of state to the Iowa ethics and campaign disclosure board.</p> <p>Not passed.</p>	<p>Arkansas Florida Hawaii Iowa Maine New Mexico South Carolina Utah</p>
Requirement that secretary recuse in certain circumstances or resign to run for higher office	6	<p><i>Maine, 2019 (H 619):</i></p> <p>Prohibits the Secretary of State from overseeing an election in which the Secretary of State is a candidate and transfers all responsibilities of the Secretary of State for that election to the first deputy secretary of state.</p> <p>Not passed.</p>	<p><i>Minnesota, 2001 (HF 333):</i></p> <p>Secretary of state prohibited from [...] participating in recounts for an office for which the secretary is a candidate.</p> <p>Not passed.</p>	<p>Maine Minnesota New Jersey Tennessee</p>

# APPENDIX B

## PARTY COMPOSITION OF EACH SECRETARY OF STATE POSITION, 2000 TO 2020

The chart below demonstrates the fluctuating partisan landscape of secretaries of state across the U.S. over the last twenty years. Because board states have bipartisan elements and typically see members serve

staggered terms, they are excluded from this chart. To view this data in greater detail, please visit [www.electionreformers.org/guardrails-resources/](http://www.electionreformers.org/guardrails-resources/).

State	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Alabama	Red	Red	Red	Blue	Blue	Blue	Blue	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Alaska	Blue	Blue	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Blue	Blue	Blue	Blue	Red	Red	Red
Arizona	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Blue	Blue
Arkansas	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
California	Red	Red	Red	Blue	Blue	Red	Red	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue
Colorado	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Blue	Blue	Red	Red	Red	Red	Red	Red	Red	Blue	Blue
Connecticut	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue
Florida	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Georgia	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Idaho	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Indiana	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
Iowa	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Blue	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red

State	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Kansas																					
Kentucky																					
Louisiana																					
Maine																					
Massachusetts																					
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Ohio																					
Oregon																					
Pennsylvania																					
Rhode Island																					
South Dakota																					
Tennessee																					
Texas																					
Utah																					
Vermont																					
Washington																					
West Virginia																					
Wyoming																					



# APPENDIX C

## SAMPLE PRINCIPLES OF ELECTION OFFICIALS AND ELECTION OFFICIAL CODE OF ETHICS

### PRINCIPLES OF ELECTION OFFICIALS

Source: National Center of Election Officials

#### We subscribe to these Principles:

- » Freedom is an inherent human right, but it is also fragile and can be lost through neglect or misuse.
- » Freedom requires responsibility.
- » Freedom can best be maintained and nurtured through the democratic process. The success of the democratic process requires fair and open elections which accurately reflect the intent of the electorate.

Therefore, it is our unique role as election officials to serve as gatekeepers of Democracy.

It is our sacred honor to protect and promote public trust and confidence by our conduct of accurate and fair elections.

As the public's guardians of freedom within a democratic society, we are responsible for the integrity of the process. Our role demands that these principles must be placed above personal or partisan gain.

Nurturing and protecting Democracy is a team effort in the profession of elections administration. Our task requires wisdom, courage and the desire to remain focused on our vision of free and impartial elections despite changes in our society and its laws.

By dedicated adherence to these Principles and Standards of Conduct, we demonstrate our loyalty to freedom, pride in our profession and a commitment to the excellence of the democratic process.

## ELECTION OFFICIAL CODE OF ETHICS

Source: National Center of Election Officials

### **My Personal Pledge to Freedom, Democracy and My Profession:**

I uphold the Constitution of the United States and the laws, policies, and court decisions of federal, state and local jurisdictions;

I commit to excellence and competence by maintaining the highest level of knowledge of expertise in the elections process through continuing education and self evaluation;

I am accountable for maintaining public confidence in honest and impartial elections which I conduct in a fair, efficient and accurate manner;

I dignify voters by providing equal opportunity to participate in the democratic process;

I am responsible for just and equitable treatment of the general public, elected officials and members of my profession;

I manifest a positive role in community relations by being accessible and receptive to both individuals and groups;

I have the courage and stamina to protect the public's interest from manipulation for personal or partisan gain while respecting the rights of all;

I am flexible and innovative within the framework of the law in carrying out my duties on behalf of the public's interest;

I conduct all fiscal responsibilities with wisdom and integrity, and am accountable for all funds and resources committed to my charge;

I maintain a productive and efficient operation through a well-managed elections environment;

I maintain the highest level of integrity in performing all duties of my profession.


# ENDNOTES

## INTRODUCTION

- 1 Toobin, J. (2001). *Too close to call*. Random House, 75.
- 2 Toobin, 69.
- 3 Foley, E. (2015). *Ballot battles: The history of disputed elections in the United States*. Oxford University Press, 317.
- 4 Foley, 317.
- 5 Commission on Federal Election Reform. (2005). *Building confidence in U.S. elections*, 53.
- 6 Hasen, R. L. (2005). *Beyond the margin of litigation: Reforming U.S. election administration to avoid electoral meltdown*. 62 WASH. & LEE L. REV. 937, 974; Tokaji, D. P. (2009). *The future of election reform: From rules to institutions*. 28 YALE L. & POL'Y REV. 125, 131–32. [find the correct pages]
- 7 The dataset is available at <https://electionreformers.org/guardrails-resources/>
- 8 The full report can be accessed here: <https://electionreformers.org/guardrails-report/>
- 9 See Appendix A.
- 10 Condos, J., VT Secretary of State (14 Feb. 2017). “Remarks at U.S. State Department Visitors Program event,” Burlington, VT.

## CHAPTER 1

- 1 Hale, K., Montjoy, R., & Brown, M. (2015). *Administering elections: How American elections work*. Palgrave Macmillan.
- 2 Gardner, B. (Ed.). (2004). *Pillars of public service: A history of NASS*. 255.
- 3 Sullivan, D. (2020, May 14). [Interview]. Former Councilman, Massachusetts Secretary of State.
- 4 Ballotpedia.org. (2019). “How gubernatorial vacancies are filled.” [https://ballotpedia.org/How\\_gubernatorial\\_vacancies\\_are\\_filled](https://ballotpedia.org/How_gubernatorial_vacancies_are_filled)
- 5 Bernardini, C.R. (1978). “The Illinois State Board of Elections: A history and evaluation of the formative years, 17 *J. Marshall J. Prac. & Proc.* 321.

- 
- 6 See Arnwine, B., & Johnson-Blanco, M. (2013, Oct. 25). *Voting rights at a crossroads*. Economic Policy Institute.
  - 7 Thomas, P.G., & Gibson, L.R. (2014). *Comparative assessment of central electoral agencies*. Elections Canada. <https://www.elections.ca/content.aspx?section=res&dir=rec/tech/comp&document=p3&lang=e>
  - 8 For a discussion of bipartisan support for 2018 redistricting reform referenda see “HR1: Bipartisan Support for Popular Political Reform Evaporates in Congress,” K. Johnson, *Independent Voter News* (13 Mar. 2019).
  - 9 States electing state supreme court justices in nonpartisan elections are: AR, GA, ID, KY, OH, MI, MN, MS, MO, NV, ND, OR, WA, WV, WI. <https://ballotpedia.org>.
  - 10 A state constitutional amendment which eliminated the Secretary of State as an elected position was approved by voters in 1998. Florida’s last elected Secretary of State, Katherine Harris, left office in 2002.

In New Jersey, election duties transferred from Attorney General to Secretary of State effective April 01, 2008. Because the political dynamics and responsibilities of attorneys general vary greatly from those of a typical secretary of state, our data only reflects New Jersey Secretaries of State from 2008 onward.

- 11 *California Proposition 15, Public Funding of Some Elections (June 2010)*. Ballotpedia. [https://ballotpedia.org/California\\_Proposition\\_15,\\_Public\\_Funding\\_of\\_Some\\_Elections\\_\(June\\_2010\)](https://ballotpedia.org/California_Proposition_15,_Public_Funding_of_Some_Elections_(June_2010))
- 12 Average is based on ERN analysis of average Elections Performance Index rating of states in the elected, appointed, and board categories. The Elections Performance Index was established in 2013 by The Pew Charitable Trusts to provide a non-partisan, objective measure of how well each state is faring in managing national elections. More information and data are available at <https://electionlab.mit.edu/epi-press-release>
- 13 Thomas & Gibson, 10.
- 14 Tokaji, D. (2013). “America’s top model: The Wisconsin Government Accountability Board.” *UC Irvine Law Review*, 576.
- 15 Heck, J. (2015). “Darkness descends in Wisconsin: Statement of Jay Heck of Common Cause in Wisconsin on the Wisconsin Assembly vote on Assembly Bill 387 & 388.” <https://www.commoncausewisconsin.org/2015/11/darkness-descends-on-wisconsin.html>
- 16 See Joe Sanfilippo (2015 Sept. 19), “Partisan is not a four-letter word.” <https://madison.com>.
- 17 Tokaji, 607.
- 18 Tokaji, 582.
- 19 Lowenstein, D.H. (1989). “The root of all evil is deeply rooted.” *Hofstra L. Rev.* 18, 301.
- 20 Presidential Commission on Election Administration, “The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration,” 31
- 21 Greathead, M.C. (2019). “No man can be the judge of his own cause: Applying the principles of due process to our elections,” *Election Law Journal*, 18(4), 360.

22 See Chapter 3, Section IV.

23 Kimball, D.C., & Kropf, M. (2006). *The street-level bureaucrats of elections: Selection methods for local election officials*. *Review of Policy Research*, 23, 6, 1266-1268.

24 Hale et al., 32-33.

25 Toobin, 101.

26 *Findlaw*. (18 Mar. 2020). "What are the provisional ballot laws by state?" <http://www.findlaw.com/voting/my-voting-guide/what-are-the-provisional-ballot-laws-by-state.html>

27 California Election Code § 19104(a)(1).

28 Wyoming Election Code § 22-2-121 (f).

29 For a summary of state provision see "Election emergencies." National Conference of State Legislatures. <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>

30 Marisam, J. (2010). Judging the 1918 election. *Election Law Journal*, 9(2), 151-152.

31 Ibid.

32 Kimball & Kropf, 1261.

33 Benson, J.F. (2010). *State secretaries of state: Guardians of the Democratic process*. Routledge.

34 Toulouse Oliver, M. (28 Aug. 2019). [Interview]. Secretary of State of New Mexico, 35.

35 See <https://electionreformers.org/guardrails-resources/>

36 Sullivan, K. (2020, May 14). [Interview].

37 Election Reformers Network Analysis based on published records of election results. For more, see <http://electionreformers.org/guardrails-resources/>.

38 Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

43 Iowa Code § 63.10, <https://www.legis.iowa.gov/docs/code/2016/63.pdf>

44 Kopan, T. (2014, February 12). *The state races ignored — until now*. POLITICO. <https://www.politico.com/story/2014/02/secretary-of-state-elections-2014-103425>

45 See <https://electionreformers.org/guardrails-resources/>

46 Keisling, P., & Reed, S. (10 Dec. 2014). The troubling partisanization of elections for Secretary of State. *Governing*.



47 Ibid.

48 Some explanatory notes to this analysis: 1. “Higher office” refers to runs for senator, governor, attorney general, or other positions of equivalent prominence. 2. Since 2000, 28 of secretaries of state have overseen general or primary elections in which they have been a candidate for one of these higher offices. 3. Forty percent ran for “higher office” at least once after leaving the position.

49 <https://electionreformers.org/guardrails-resources/>

50 National Association of Attorneys General. (2020). *Who’s my AG?* <https://www.naag.org/naag/attorneys-general/whos-my-ag.php>.

51 McReynolds, A., Chief Executive Officer. (5 Dec. 2019). “Remarks at the conference of the National Association of Nonpartisan Reformers.” National Vote at Home Institute.

52 Benson, 35.

53 Ibid.

54 See <https://electionreformers.org/guardrails-resources/>

55 *Rucho v. Common Cause*, 588 U.S. \_\_\_\_ (2019), 30.

56 A noteworthy and relatively recent case of an election dispute decided by the House of Representatives rather than by judicial means involved the 1984 election for Indiana’s 8th Congressional District, which went to the Democratic candidate, with help from the Democratic majority in the House. “As even many Democrats would acknowledge later,” wrote Jeffrey Toobin, “it was as close to an outright theft as had occurred in modern American political history.... Newt Gingrich said that the fight over Indiana 8 marked a turning point in the radicalization of the Republican minority in the House of Representatives.” Toobin (2002), 44.

57 Foley, 48-49.

58 Rapoport, M. (22 Jan. 2020). [Interview]. Former Secretary of State of Connecticut.

59 Benson, 32.

60 Ibid.

61 Ibid.

62 Ibid.

63 Brunner, J. (24 Feb. 2020). Secretary of State Kim Wyman says she won’t vote in presidential primary due to partisan disclosure. *The Seattle Times*.

## CHAPTER 2

1 Caro, R. (1990). *The years of Lyndon Johnson: Means of ascent*. *Vintage*.

2 Carter, J. (1992). *Turning point: A candidate, a state, and a nation come of age*. *Times Books*.

3 Ibid.

- 4 National Conference of State Legislatures. (23 July 2020). *Online voter registration*. <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>
- 5 National Conference of State Legislatures. (14 April 2020). *Automatic voter registration*. <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>
- 6 Electronic Registration Information Center. (2019). *Which states are members of ERIC?* <https://ericstates.org/>
- 7 National Conference of State Legislatures. (10 July 2020). Voting outside the polling place: Absentee, all-mail and other voting at home options. <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>
- 8 McReynolds, A., Chief Executive Officer. (4 June 2020). [Interview]. National Vote at Home Institute.
- 9 Ibid.
- 10 Adona, N., Gronke, P., Manson, P., & Cole, S. (2019). Stewards of democracy: The views of American local election officials. *The Democracy Fund*.
- 11 Gronke, P., Director. (23 April 2020). [Interview]. Early Voting Information Center and Professor of Political Science, Reed College. <https://evic.reed.edu/author/gronkep/>
- 12 O.C.G.A. § 21-2-265
- 13 Williams, C., & Douglas, W. (17 Oct. 2018). Should Brian Kemp oversee his own governor's race? *Ledger-Inquirer*.
- 14 Hasen, R. (18 Nov. 2018). Why Democrats should not call the Georgia governor's race "stolen." *Slate*.
- 15 Ibid.
- 16 See <https://electionreformers.org/guardrails-resources/>
- 17 Ibid.
- 18 Kemp rejects Democratic calls to quit as Georgia's top voting official. (17 Aug. 2018). *Atlanta Journal Constitution*.
- 19 Kemp refuses to recuse if Georgia governor race with Abrams goes to a recount. (23 Oct. 2018). *CNN*.
- 20 Kris Kobach won't recuse himself from a recount in governor's race. No law requires it. (8 Aug. 2020). *Kansas City Star*.
- 21 Lt. Gov. Spencer Cox will distance himself from making calls on election complaints in the governor's race in which he's a candidate, (19 June 2018). *Salt Lake Tribune*.
- 22 Toulouse, (28 Aug. 2019).
- 23 McMullin, E., Executive Director. (May 2, 2020). [Interview]. Stand Up Republic.
- 24 Editorial: Failed election oversight. (25 July 2006). *Toledo Blade*.

- 25 We need a leader who can work with both parties. (31 Oct. 2006). *Lancaster Eagle-Gazette*.
- 26 12 Directive 2004-33. See *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 979-80 (n.d. Ohio, 2004).
- 27 Hearing - 2004 election and the implementation of the Help America Vote Act (HAVA). (21 Mar. 2005). 109th Congress.
- 28 Secretary Stapleton resigned from this post in August of 2020, prior to the presidential election.
- 29 See <https://electionreformers.org/guardrails-resources/>
- 30 Commission on Federal Election Reform. (2005). *Building confidence in U.S. elections*, 53.
- 31 Montana Republicans assist in Trump re-election effort. (11 Nov. 2019). *8KPAX News*.
- 32 Korte, G. (14 Sept. 2004). Marriage question seen as boon to Bush. *Cincinnati Enquirer*, 1.
- 33 Kimball, D., Kropf, M., & Battles, L. (2015). *Helping America vote? Election administration, partisanship, and provisional voting in the 2004 election*. 549.
- 34 Democratic Association of Secretaries of State - Defeating White Supremacy. (22, June 2020). *Democratic Association of Secretaries of State*. <https://www.youtube.com/watch?v=JoA4eWqC9wA>; see also <https://www.washingtonpost.com/politics/2020/06/22/democratic-secretaries-state-launch-ad-campaign-linking-voting-restrictions-white-supremacy/>
- 35 Benson, 50.
- 36 Reed, S. (31 Mar. 2020). [Interview]. Former Secretary of State of Washington.
- 37 Toobin, 60.
- 38 Toobin, 61.
- 39 Toobin, 66.
- 40 Ibid.
- 41 See <https://electionreformers.org/guardrails-resources>
- 42 *Black Political Empowerment Project v. Aichele et al.*, Civ. No. 12-cv-03808 (E.D.Pa., 2012). [https://casetext.com/brief/black-political-empowerment-project-v-aichele-et-al\\_memorandum-in-support-re-motion-for-preliminary-injunction](https://casetext.com/brief/black-political-empowerment-project-v-aichele-et-al_memorandum-in-support-re-motion-for-preliminary-injunction)
- 43 See <https://law.justia.com/cases/montana/supreme-court/2019/da-18-0414.html>
- 44 *LULAC v. Whitley*, Civ. No. 5:19-cv-00074 (W.D.Tex., Apr. 26, 2019).
- 45 Adona, N., & Gronke, P. (2018, Oct.). Understanding the voter experience: The public's view of election administration and reform. *The Democracy Fund*, 22-23.
- 46 Graham, D. A. (2020, August 11). Brace for the blue shift. *The Atlantic*. <https://www.theatlantic.com/ideas/archive/2020/08/brace-blue-shift/615097/>

47 The data in Figure 18 do not include the five states that had already established universal vote by mail prior to the 2020 election cycle. Consequently, the denominators of the fractions in the table and the text refer to total secretaries of state not including those five states.

48 Ignoring Trump and right-wing think tanks, red states expand vote by mail. (12 May 2020). *Electionland from Propublica*.

49 Dentzer, B. (2020, Sept. 21). "Judge rejects Trump's elections lawsuit." *Las Vegas Review-Journal*. <https://www.reviewjournal.com/news/politics-and-government/nevada/judge-rejects-trumps-elections-lawsuit-2126193/>

Samuels, Iris. "GOP, Trump campaign sue Montana over all-mail voting option." *Associated Press*, September 2, 2020. <https://apnews.com/928955dd8b800c9ad8e19024055871e3>

50 Kitchenman, A. (22 July 2020). "Lawsuit says Alaska's idea to send vote by mail requests to seniors is unconstitutional. KTOO and *Alaska Public Media*.

## CHAPTER 3

1 Hale et al., 37.

2 Benson, 28-29.

3 The independent model of electoral management. (2020). *ACE Electoral Network - Electoral Management*. <http://aceproject.org/ace-en/topics/em/ema/ema02/default>.

4 van Ham, C., & Lindberg, S. (2015). When guardians matter most: Exploring the conditions under which electoral management body institutional design affects election integrity. <https://doi.org/10.1080/07907184.2015.1099097>

5 Antonio, S. L., & Aguilar, I. (2014). Costa Rica: The supreme tribunal of elections. *ACE Electoral Network*. [https://aceproject.org/ace-en/topics/em/electoral-management-case-studies/costa-ri-ca-a-powerful-constitutional-body/mobile\\_browsing/onePag](https://aceproject.org/ace-en/topics/em/electoral-management-case-studies/costa-ri-ca-a-powerful-constitutional-body/mobile_browsing/onePag)

6 Guha, R. (2008). *India after Gandhi: The history of the world's largest democracy*. Macmillon, 159.

7 Ibid.

8 As an example of the argumentation in the U.S. for decentralized election administration as a response to local difference, see comments by Senator Mitch McConnell in April 2020 opposing "federalization" of elections: "The federal government is not going to take over the way we do elections. They're done at the state and local level and every state is different." <https://www.wsj.com/articles/partisan-fight-looms-over-voting-by-mail-11588167903>

9 Thomas & Gibson, 37-41.

10 Maley, "Re: Looking for some commentary on the background to the Australia Election Commission". Message to Kevin Johnson. May 15, 2020.

11 Kingsley, J. (May 5, 2020). [Interview]. Former Chief Electoral Officer, Elections Canada.

12 Advantages and disadvantages of the three different electoral management models. (2020). *ACE Electoral Network - Electoral Management*. <http://aceproject.org/ace-en/topics/em/ema/ema05/ema05b>.

- 13 Thomas & Gibson, 16-17.
- 14 Kingsley, J. "Re: requesting a short interview re history of the Canadian Chief Electoral Officer, possible lessons for US states". Message to Kevin Johnson May 12, 2020
- 15 Ibid.
- 16 European Commission for Democracy through law (Venice Commission), Code of good practice in electoral matters. (30 Oct. 2002). 26. <https://rm.coe.int/0900000168092af01>
- 17 Thomas & Gibson, 13.
- 18 Tokaji, D. (9 Sept. 2019). *Comparative election administration: A legal perspective on electoral institutions*, 3. See also p. 14: "functional impartiality is advanced not so much by independence from political actors, but through structured interaction among them."
- 19 van Ham, C. (2015). When guardians matter most: Exploring the conditions under which electoral management body institutional design affects election integrity. *Irish Political Studies*, 454-481. <https://www.tandfonline.com/doi/full/10.1080/07907184.2015.1099097>
- 20 See: <http://aceproject.org/ace-en/topics/em/ema/ema03/default>
- The Governmental Model:** Elections are organized and managed by the executive branch through a ministry (such as the Ministry of the Interior) and/or through local authorities.
- The Independent Model.** "Elections are organized and managed by an EMB; its members are outside the executive. Under the Independent Model, the EMB has and manages its own budget, and is not accountable to a government ministry or department."
- The Mixed Model.** "Under the Mixed Model, elections are organized by the component governmental EMB, with some level of oversight provided by the component independent EMB."
- 21 Ekengren Oscarsson, H. "Re: Looking for research re how EMBs in Sweden avoid conflicts of interest". Message to Kevin Johnson. May 13, 2020.
- 22 Ibid.
- 23 Brogren, H. (n.d.). *Sweden, governmental in form, independent in practice: A decentralized election system*.
- 24 Oscarsson, (2020, May 13).
- 25 Birch, S. (2007). Electoral systems and electoral misconduct. *Comparative Political Studies*, 40(12), 1533.
- 26 Ibid.
- 27 Orozco-Henríquez, J., Ayoub, A., & Ellis, A. (24 Nov. 2010). *Electoral justice: The international IDEA handbook*, 62. <https://www.idea.int/publications/catalogue/electoral-justice-international-idea-handbook>
- 28 Ibid.
- 29 Ibid.



30 Ellis, A. "Re: Election Reformers Network Project on US Election Administration: Comparative Practice Questions." Message to Kevin Johnson, June 27, 2020.

## CHAPTER 4

Photo: Leffler, Warren K. (1963). Civil rights march on Washington, D.C. [Photograph] Washington D.C.: Library of Congress. <https://www.loc.gov/item/2003654393/>

- 1 See <https://electionreformers.org/guardrails-resources/>
- 2 See, for example, *Guardians of the Democratic Process* (Benson, 2010), 51: "California Secretary Debra Bowen is one of the Secretaries who has adopted her own code of ethics, voluntarily, to prohibit herself from 'taking a position in a contest in which she is certifying the outcomes.' [...] Wyoming Secretary Max Maxfield is another who has proudly pledged complete impartiality, having 'made the decision personally, just to add an extra layer of confidence, that I will not endorse, participate, or campaign or support any candidate for the federal offices.'" ]
- 3 NASS resolution affirming the conduct of elections in a nonpartisan manner. (2020). *National Association of Secretaries of State*. <http://www.nass.org/node/114>.
- 4 See Appendix A.
- 5 Election Reformers Network analysis of oaths of office of the 50 states. See <http://electionreformers.org/guardrails-resources/>
- 6 Ibid.
- 7 See Chapter 1 Section VI.
- 8 Michigan Constitution, Art. 4 § 6 (e)
- 9 An example of such a program is <https://www.hhh.umn.edu/certificate-programs/certificate-election-administration>
- 10 Gronke, P. (19 Oct. 2018). The public supports election officials, but wants them to be non-partisan. *Early Voting Information Center*. <https://evic.reed.edu/commentary/the-public-supports-election-officials-but-wants-them-to-be-non-partisan/>
- 11 See Appendix A.
- 12 Ballotpedia.org. (2020). *Nonpartisan election of judges*. [https://ballotpedia.org/Nonpartisan\\_election\\_of\\_judges](https://ballotpedia.org/Nonpartisan_election_of_judges)
- 13 Ibid
- 14 Masket, S. (2016). *The Inevitable Party: Why Attempts to Kill the Party System Fail and How they Weaken Democracy*. Oxford University Press, 12.
- 15 Caldarone, R.P., Canes-Wrone, B., & Clark, T.S. (2009). *Partisan labels and Democratic accountability: An analysis of state supreme court abortion decisions*.
- 16 Thomas & Gibson, 15.

17 Reed, (31 Mar. 2020) [Interview].

18 Ibid.

## CONCLUSION

1 Peace, C. (April 15, 2020) [Interview].

2 American Academy of Arts and Sciences. (2020). Our common purpose: Reinventing American Democracy for the 21st Century. *American Academy of Arts and Sciences*, 2.

3 Tokaji, 608.