

EXECUTIVE SUMMARY AND
RECOMMENDATIONS

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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**REDUCING SECRETARY OF STATE CONFLICT OF INTEREST
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

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Designed by:
BEARBERRY CREATIVE

A large, white marble statue of Abraham Lincoln, shown from the chest up, leaning forward with his right hand resting on a surface. The background is a dark, textured wall with vertical lines and a grid of small dots. The statue is set against a light blue and white background that transitions into the text area.

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. **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 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.

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.