

Bringing Guardrails and Structure to Election Fraud Investigations

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Issue Summary

Controversies in the aftermath of the 2020 Presidential election have resulted in numerous, often politically motivated, investigations related to accusations of election fraud. As various state and local actors call for and initiate these investigations, it is not always clear in each state which law enforcement agency is responsible for investigating allegations of various kinds of election fraud. It's also not clear who is responsible for initiating investigations.

The lack of clarity has resulted in investigations initiated and conducted by partisan, rather than neutral or politically balanced, authorities. Examples include the recount conducted by the Cyber Ninjas group in Arizona, initiated by the partisan Republican legislature, and an [effort](#) by “Constitutional Sheriffs” in concert with the partisan True the Vote organization.

To the extent these investigations continue to occur, they should do so with greater clarity and structure, with state procedures specifying the appropriate entities to initiate and investigate accusations, and the proper methods for conducting these investigations. Without these guardrails, these investigations will remain ripe for abuse by politically motivated actors, will remain unaccountable and lack transparency, and will themselves pose security risks to the election process.

The Current Lack of Clarity

Ideally, elections official would report cases of possible fraud according to clear rules. Concerns would be sent to a designated prosecutor (either state or local), who would then involve police or other specified law enforcement, if necessary, to conduct investigations.

However, in some states, silence in the law allows county clerks the discretion to refer possible voter fraud cases to either local prosecutors, state prosecutors, state police, or county sheriffs, or simply send the issue to the state's chief elections official so they can decide which prosecutors or investigative authorities should handle the case. This patchwork system and unconstrained discretion create the potential for partisan forum-shopping and politically motivated investigations. Further complicating matters is the overlay of the US Attorney in each state, who can also pursue allegations of federal election fraud.

In some instances, local law enforcement can also initiate their own investigations. In Kansas and Michigan, county sheriffs who acknowledge their support for former President Donald Trump

initiated voter fraud investigations on their own and without support of their respective Secretaries of State. In 2020 President Trump also ignited [concerns of voter intimidation](#) by suggesting that law enforcement officers be dispatched to the polls to monitor the integrity of the election and guard against fraud. The situation raised concerns among civil rights advocates that local law enforcement authorities could act (and intimidate) on behalf of President Trump.

The lack of clarity can be especially sensitive around the issue of access to voting machines. State laws typically do not contemplate the circumstances under which an investigatory authority can seize machines used in an election and investigate allegations of vote tampering or malfunctioning machines. Controversy has erupted [in Michigan](#) about unauthorized access to voting machines. Unauthorized access to voting machines by investigators poses a risk to the security of the machines if a knowledgeable technician can obtain codes or tinker with the software or hardware. When the security of a machine has been breached, elections officials consider the machine inoperable for future elections. Officials and voters would not be able to trust that the machine is functioning correctly. For example, Cyber Ninjas was given access to Maricopa County voting machines. The county later [declared](#) that the investigations constituted a security breach and that their machines needed to be replaced at a cost of about \$3 million. Where access to voting machines is necessary for an investigation, providing investigators access to the machines under a court order based on probable cause of machine tampering would be preferable and could place parameters around how an investigation can be conducted and who is allowed to observe. This limitation is crucial to avoid haphazard investigations that render millions of dollars of election equipment inoperable.

Examples of How States Handle Fraud Investigations

A look at a handful of states reveals a lack of specificity in state law on who can initiate an investigation and who investigates.

In Washington, each county's elected chief elections official – the county auditor – can refer cases of possible voting fraud to the county's prosecutor, who can send a case to the county sheriff. However, the auditor can also go directly to the sheriff. The Washington Secretary of State can also pursue investigations of fraud and hand evidence off to state prosecutors.

Colorado follows a similar process. The local elections official or the Secretary of State can initiate cases and then has discretion to select either state or local investigative authorities for help with pursuing the case.

Oregon has a bit more clarity, with investigations generally being channeled through the Secretary of State. Any evidence of voting fraud is forwarded by county clerks to the Secretary of State's Office, which conducts reviews and forwards cases to the state prosecutor. Members of the public can also file complaints about voter fraud and the Secretary of State is charged with reviewing the complaints for evidence of fraud. Cases that reveal evidence of possible fraud are forwarded to the state prosecutor. The state prosecutor, in turn, involves the Oregon State

Troopers if further investigative work is needed. The Secretary of State's office can initiate cases on its own rather than waiting for a complaint from a member of the public. But the Secretary of State typically investigates complaints filed by members of the public or county clerks. Of course, an allegation of someone voting in more than one state in a single federal election, can also be referred by election officials to their local US Attorney, who would then decide if the case is worthy of pursuit.

Case Study: Florida's "Election Police"

Florida Governor Ron DeSantis, citing concerns about voter fraud, created an elections investigative unit within the Secretary of State's Office, which is answerable to the Governor. The Office of Election Crimes and Security proved to be immediately controversial. Critics predicted that DeSantis would use the office to conduct partisan-motivated investigations and prosecutions.

So far the office has struggled with [jurisdictional issues, lack of staff, unsuccessful prosecutions, and claims that the agency is mainly pursuing unfair prosecutions against Floridians of color](#), some of whom are convicted felons who thought they had gained the right to vote when Florida passed a ballot measure striking down felon disenfranchisement. The jurisdictional problems in Florida illustrate the problem presented by laws that allow local prosecutors jurisdiction over some cases and state prosecutors jurisdiction over other cases. Such a system lacks clarity for the public and law enforcement.

The Florida experience provides a valuable case study of the complications involved with election fraud investigations and the need for clear, non-partisan, lines of authority in state law. Rather than boosting public confidence in the integrity of elections investigations, the Florida approach has drawn criticism, created doubt that the system is fair to all Floridians.

Recommendations:

1. States should establish a clear statutory framework for the conduct of election fraud investigations, including alleged voting fraud by individual voters, alleged voter registration fraud by individuals or groups, and allegations of vote tampering of all kinds, including tampering with voting machines.
2. The statutory framework should clarify which investigative authorities are responsible for initiating investigations and which authorities are responsible for conducting the investigations, and prevent additional state and local authorities from stepping into this lane and initiating their own investigations.
3. The statutory framework should also include a provision requiring an investigative authority to secure a court order, based on evidence of probable cause, in order to access voting machines and conduct any kind of investigation of machine tampering.
4. To minimize the risk of voter intimidation, state laws should also clarify that only the chief elections official of the state, in consultation with local elections officials, can request the

presence of law enforcement officers or the National Guard at polling places or ballot drop boxes, as opposed to local law enforcement acting on their own.

5. To minimize the risk of partisan investigations, or the appearance of partisan investigations, investigative authorities should be subject to non-partisan or bi-partisan oversight, as well as rigorous transparency requirements.