



How States Can Hold Rogue Election Officials Accountable and Defend State Law

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Key Takeaways:

- Recent elections have been marred by judge-made laws, last-minute changes by election officials, and poor administration.
- Lawmakers should enact real penalties for rogue election officials.
- Any changes to existing state election laws should be approved by the legislature.
- Lawmakers should grant the legislature the ability to intervene in election-related lawsuits in order to defend duly passed laws.

Why election accountability matters

American elections have a major PR problem and for good reason: Recent cycles have been defined by confusion, suspicion, and mistrust. Judge-made laws, last-minute changes by election officials, and poor administration have left far too many Americans wondering if their vote truly counts.

During the 2020 presidential election, partisan lawsuits aimed at established election procedures were filed by both Democrats and Republicans. **And many long-standing laws were changed at the last minute through unilateral guidance issued by state officials.** For example, in Michigan, the Secretary of State issued guidance to local jurisdictions indicating that mail ballot signatures should be presumed to be valid signatures.¹ The guidance further stated that if there are “any redeeming qualities” the signatures should be treated as valid.²

In Wisconsin, some local officials reportedly told voters during the April 2020 election that they could self-identify as “indefinitely confined.”³ This effectively circumvents the state’s voter ID laws as indefinitely confined voters do not have to provide identification.⁴

But even when the law is followed and unchanged, it can be poorly executed. This fosters confusion and distrust of the election system. Just ask the voters of Palm Beach County, Florida: Their 2018 midterm election was marred with repeatedly missed deadlines, allegations of ballots being duplicated behind closed doors, and incomplete reports.⁵

While other counties were able to complete their state-mandated recount in a timely manner, Palm Beach County devoted more than five weeks to complete the process.⁶ The former

Florida Secretary of State even described the Palm Beach County administrator's tenure as "combative incompetence."⁷

Governor Ron DeSantis used his legislatively granted authority to suspend the county's Supervisor of Elections.⁸⁻⁹ But the damage was done. Voters had new reasons to question the process, and in turn they had reason to question the legitimacy of the outcome.

If election officials continue to act outside the scope of their authority, voters will continue to lose trust in the democratic process and disengage. Fortunately, lawmakers have the ability to rein in rogue officials and restore voters' trust in elections.

SOLUTION 1: **Real penalties for election officials gone wild**

Voters need to have confidence that the election process is administered properly. Election officials play an important role in the administration of the election, but when rogue administrators fail to follow the law, voters may distrust the election outcome. Voters should be able to trust that election laws were followed and that their vote counts.

As noted, under Florida law, the governor may suspend rogue officials for malfeasance, neglect of duty, incompetence, and similar failures of duty.¹⁰ Following Florida's lead, Georgia and Iowa recently enacted similar policies. Georgia's reform allows for the suspension of local election administrators by the State Election Board.¹¹ In Iowa, election officials may be criminally prosecuted for technical infractions.¹²

Voters should have the confidence that there will be real consequences to protect the integrity of the election system. **To ensure voters' confidence in the legitimacy of the election, states should enact penalties for election officials gone wild.**



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SOLUTION 2: **Require elected officials to approve any changes to election laws**

During the 2020 election, judge-made laws and state officials' guidance altered existing election procedures. Citing COVID-19, officials mass mailed absentee ballots to voters and expanded eligibility for voting by mail.¹³⁻¹⁴ Additionally, lawsuits were filed by partisan activists in friendly courts to modify long-standing election deadlines.¹⁵ For example, in Michigan, Democrat groups sued to extend the deadline to receive postmarked mail ballots to two weeks after the election.¹⁶ Thankfully, this decision was reversed on appeal and the legislatively imposed deadline was reinstated.¹⁷

And the same thing happened in Georgia. Democrat groups sued to extend the mail ballot receipt deadline, requiring an appeals court to overturn a lower court decision and reinstate the original deadline.¹⁸

These types of last-minute changes to election processes create confusion and can cause voters to inadvertently miss deadlines or otherwise fail to comply with state law. A prime example of this problem occurred in Pennsylvania.

Pennsylvania law requires mail ballots to be postmarked and received on Election Day, but the Pennsylvania Democrat Party sued to allow ballots to be received three days after the election.^{19,20} After the final court decision, the Pennsylvania Secretary of State instructed local election officials to segregate ballots, only to change positions on the directive days later.²¹ Even worse, the Secretary of State unilaterally extended the deadline to cure certain issues with mail ballots—a decision that was later barred by a judge.²²

Pennsylvania is just one example of how non-legislative rulemaking diminishes the role of the legislature, thereby diminishing the voice of the public.

Thankfully, state lawmakers are fighting back and reclaiming their role.

Iowa now requires the state legislative council to approve any decisions by the chief election officer that may change the conduct of an election using emergency powers.²³ Kansas explicitly prohibits election officials and judges from altering election laws.²⁴ Georgia limits the State Election Board's authority to adopt emergency rules and requires notice to the Speaker of the House, chairpersons of the house committees on elections, and legislative counsel (among others).²⁵ And any emergency rule may be suspended by a majority vote of the house or senate judiciary committees within ten days of notification of the rule.²⁶

Lawmakers should enact reforms to explicitly prohibit election officials from making changes to state election law without legislative approval, protecting the integrity of election administration and restoring voters' trust in the process.



LAWMAKERS SHOULD ENACT REFORMS TO PROHIBIT ELECTION OFFICIALS FROM MAKING CHANGES TO STATE ELECTION LAW WITHOUT LEGISLATIVE APPROVAL.

SOLUTION 3:

Let the legislature intervene in lawsuits to protect state law

There were an unprecedented number of partisan lawsuits filed during the 2020 election. Many of these lawsuits, once again, circumvented election laws passed by the state legislature. **Lawmakers should grant the legislature authority to intervene in election-related lawsuits in order to defend duly passed laws borne from the legislative process.**

Wisconsin stands out as a strong example. There, the legislature can intervene in lawsuits where the constitutionality of a statute is challenged, allowing lawmakers to join ongoing litigation.²⁷ This was recently upheld by the state Supreme Court.²⁸

Other states are following Wisconsin’s lead by creating avenues to be involved in election-related lawsuits: Florida now requires the legislature to be notified of settlement negotiations, consent decrees, or orders.²⁹ If the law is found to be invalid and the legislature amends the law to remove the unenforceable provision, litigants are required to drop any ongoing related cases.³⁰ And Georgia requires that the House and Senate Judiciary Committees be notified at least five days before settling a lawsuit or entering into a consent decree.³¹

Individuals should maintain the right to challenge laws that infringe civil liberties, but partisans should not be able to use the judiciary to circumvent the lawmaking process. Allowing the legislature to intervene will ensure that lawmakers may exercise the opportunity to defend the law, even if the executive does not. In turn, this will ensure the law is faithfully carried out, regardless of what party controls the executive branch.



Bottom line: State legislators should hold election officials accountable and reclaim their role as lawmakers.

Voters need confidence that the election process was administered fairly and within the bounds of the law. If they do not trust the process, they will question the legitimacy of the outcome and their elected officials. This threatens self-governance because it threatens civic engagement.

Thankfully, state lawmakers have simple tools to restore voters’ trust in elections.

¹ A Michigan court later invalidated this guidance. See *Genetski v. Sec’y of State*, Case No. 20-000216-MM (March 9, 2021), available at <https://townsquare.media/site/656/files/2021/03/Michigan-Court-Of-Claims-Republican-Party-vs-Secretary-of-State-Jocelyn-Benson-Signature-Verification.pdf>.

² *Ibid.*

³ Patrick Marley, “Nearly 200,000 Wisconsin voters did not have to show a photo ID in the April election,” *Milwaukee Journal Sentinel* (2020), <https://www.jsonline.com/story/news/politics/2020/05/26/200-000-wisconsin-voters-did-not-have-show-id-april-election/5246892002/>.

⁴ Wis. Stat. § 6.86(2).

⁵ Florida Department of State, “Letter to Governor Ron DeSantis,” Florida Department of State (2019), <https://www.flgov.com/wp-content/uploads/2019/01/Bucher-Recommendation.pdf>.

⁶ *Ibid.*

⁷ Ibid.

⁸ Staff, "Governor Ron DeSantis issues executive orders suspending Palm Beach County Supervisor of Elections Susan Bucher and accepting resignation of Dr. Brenda Snipes," Ron DeSantis 46th Governor of Florida (2019), <https://www.flgov.com/2019/01/18/governor-ron-desantis-issues-executive-orders-suspending-palm-beach-county-supervisor-of-elections-susan-bucher-and-accepting-resignation-of-dr-brenda-snipes/>.

⁹ FL Const. art. IV, § 7.

¹⁰ Ibid.

¹¹ Ga. Code § 21-2-33.1.

¹² Iowa Code §39A.6.

¹³ Nevada Secretary of State, "2020 General Election," Nevada Secretary of State (2020), <https://www.nvsos.gov/sos/elections/election-information/2020-election/2020-general-election>.

¹⁴ Alabama Secretary of State, "Secretary of State issues new guidance on absentee voting for November 3 General Election," Alabama Secretary of State (2020), <https://www.sos.alabama.gov/newsroom/secretary-state-issues-new-guidance-absentee-voting-november-3-general-election>.

¹⁵ Marc Levy, "Pennsylvania Democrats notch key election-related court wins," Associated Press (2020), <https://apnews.com/article/election-2020-pennsylvania-lawsuits-elections-philadelphia-0f0e6f48361df96d2d74d68ac6838709>.

¹⁶ Mich. All. for Retired Ams. v. Sec'y of State, Case No. 20-000108-MM (September 18, 2020), available at <https://www.democracydocket.com/wp-content/uploads/sites/45/2020/07/20-000108-MM-Opinion-and-Order.pdf>.

¹⁷ Mich. All. for Retired Ams. v. Sec'y of State, 2020 Mich. App. LEXIS 6931 (Oct. 16, 2020).

¹⁸ New Ga. Project v. Raffensperger, 976 F.3d 1278 (11th Cir. 2020).

¹⁹ 25 P.S. § 3146.8.

²⁰ Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

²¹ Pennsylvania Department of State, "Pennsylvania guidance for mail-in and absentee ballots received from the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020," Pennsylvania Department of State (2020), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020-10-28-Segregation-Guidance.pdf>.

²² Donald J. Trump v. Boockvar (2020), <http://www.pacourts.us/assets/files/setting-7739/file-10440.pdf?cb=aa5ec4>.

²³ Iowa Code §47.1.

²⁴ KS HB 2232, http://www.kslegislature.org/li/b2021_22/measures/documents/hb2332_enrolled.pdf.

²⁵ Ga. Code § 21-2-35.

²⁶ Ibid.

²⁷ Wis. Stat. § 803.09(2m).

²⁸ Wis. Stat. § 803.09(2m), upheld in Democratic Nat. Committee v. Bostelmann, 949 NW 2d 423 (Wi. 2020).

²⁹ Fla. Stat. § 97.029.

³⁰ Ibid.

³¹ Ga. Code § 21-2-36.