

SUBJECT: Attorney general's investigative authority of criminal conduct in elections

COMMITTEE: Elections — committee substitute recommended

VOTE: 5 ayes — Denny, Bohac, Anderson, J. Jones, T. Smith

0 nays

2 absent — Anchia, Hughes

WITNESSES: For — Tina Benkiser, Republican Party of Texas; (*Registered, but did not testify*: Frank Reilly, Republican Party of Texas)

Against — (*Registered, but did not testify*: Suzy Woodford, Common Cause Texas)

On — (*Registered, but did not testify*: Elizabeth Winn, Secretary of State's Office)

BACKGROUND: Texas Constitution, Art. 4, sec. 22 states that the attorney general represents the state in all suits and pleas in the Texas Supreme Court in which the state may be a party. The attorney general is the chief law officer of the state and performs two principal functions: giving legal advice in the form of opinions to the governor, heads of departments and state institutions, committees of the Legislature, and county authorities; and representing the state in civil litigation.

Texas Constitution, Art. 5, sec. 21 establishes that county attorneys shall represent the state in all cases in the district and inferior courts in their respective counties, but if any county is included in a district in which there is a district attorney, the respective duties of the district attorneys and county attorneys in such counties will be regulated by the Legislature.

Election Code, ch. 273, grants the attorney general independent authority to investigate and prosecute criminal violations of election laws. In 1957, however, *Shepperd v. Alaniz*, 303 S.W. 2d 846 (Tex. Civ. App., San Antonio 1957, no writ) declared this provision unconstitutional, holding that it is the principal duty of district and county attorneys to investigate and prosecute violation of all criminal laws, including election laws, and

these duties cannot be taken away from them by the Legislature and given to others. The statute has since been recodified, but otherwise retains the same substantive language as at the time of this ruling.

DIGEST:

CSHB 3208 would amend Election Code, sec. 15.028 to establish the attorney general, as well as the county or district attorney having jurisdiction, as the authority to whom a registrar would deliver an affidavit if the registrar determined that a person who was not registered to vote voted in an election.

The legislation would change sec. 273.001 to authorize voters in a territory covered by an election to present affidavits alleging criminal conduct to the county or district attorney having jurisdiction in that territory or to the attorney general to investigate. The bill would repeal a provision authorizing the attorney general to investigate affidavits in connection with alleged election law violations only when a territory covered more than one county. The bill would direct the attorney general to investigate promptly affidavits delivered by a registrar under sec. 15.028 or complaints of alleged criminal conduct referred by the secretary of state under sec. 31.006.

The bill would state that following an investigation, if the prosecuting attorney, whether it be the attorney general or the local county or district attorney having jurisdiction, determined that criminal conduct had occurred, the prosecuting attorney would take all necessary actions in accordance with election law to prevent criminal conduct in connection with the election.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

SUPPORTERS
SAY:

CSHB 3208 would allow the attorney general to get involved promptly in investigations of alleged criminal conduct in violation of election laws. The attorney general currently has the statutory authority to investigate alleged criminal election violations if the election involves more than one county or if the allegations arise from a complaint referred to the attorney general by the secretary of state. In all other instances, the local county and district attorneys have the authority to investigate election fraud. Generally, these matters are not investigated or brought to trial by county or district attorneys for two reasons: some counties do not have sufficient

resources, while in other counties, political reasons may exist for the county attorney or district attorney not to get involved. HB 3208 would extend the attorney general's jurisdiction in Election Code violations so that it was consistent throughout the state. The bill would help local and district attorneys and would be a solution for those who fear local retribution from investigations and prosecutions.

The bill would not present the same constitutionality issues raised in the 1957 *Shepperd* case because this legislation would authorize the attorney general to investigate only when presented with affidavits or referrals and would not take away investigative duties of county or district attorneys. Tougher enforcement of election laws would go a long way toward ensuring fair and honest elections in Texas.

**OPPONENTS
SAY:**

CSHB 3208 would overreach in authorizing the attorney general to investigate alleged criminal violations of election laws throughout the state. It could be a violation of the separation of powers and unconstitutional under *Shepperd*.

NOTES:

The committee substitute modified the introduced version to conform to Legislative Council drafting. In addition, it added that the attorney general would have to "promptly" investigate these referrals.

HB 1804 by Denny, which would repeal Election Code, 15.028 related to a voter registrar notifying a prosecutor of a vote by a person not registered, has been referred to the Elections Committee. HB 913 by Denny, which would create a special office within the Texas Ethics Commission to investigate criminal conduct related to political funds and campaigns, has been referred to the House Elections Committee.