

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

COMMITTEE: Elections — favorable, without amendment

VOTE: 4 ayes — Berman, Bohac, England, C. Howard

2 nays — Burnam, Farias

1 absent — Anchia

WITNESSES: For — Eric Opiela; Skipper Wallace, Texas Republican County
Chairman's Association; (*Registered, but did not testify*: Tina Benkiser)

Against — Luis Figueroa, Mexican American Legal Defense and
Educational Fund (MALDEF); (*Registered, but did not testify*: Ken
Bailey, Texas Democratic Party; John Courage, True Courage Action
Network; Sonia Santana, ACLU-Texas)

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

BACKGROUND: Under Texas Constitution, Art. 4, sec. 22, 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 violations 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 since has been re-codified, but otherwise retains the same substantive language as at the time of this ruling.

Election Code, sec. 15.028 states that if the registrar determines that a person who is not a registered voter voted in an election, the registrar must execute and deliver to the county or district attorney with jurisdiction an affidavit stating the relevant facts. If the election covers territory in more than one county, the registrar also must deliver an affidavit to the attorney general.

DIGEST:

HB 1462 would amend Election Code, sec. 15.028 to establish the attorney general as an authority to whom a registrar would deliver an affidavit if the registrar determined that a person who was not registered to vote had voted in an election.

The bill would amend sec. 273.001 to authorize voters in a territory covered by an election to present affidavits alleging criminal conduct 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, 2007.

SUPPORTERS
SAY:

HB 1462 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 only 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, the county attorney or district attorney may choose for political reasons not to get involved. HB 1462 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 constitutionality issues raised in the 1957 *Shepperd* case because the bill would authorize the attorney general to investigate only when presented with affidavits or referrals and would not take away the 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:

HB 1462 would overreach in authorizing the attorney general to investigate alleged criminal violations of election laws throughout the state. By requiring a registrar automatically to give the attorney general, as well as the county or district attorney, an affidavit regarding voting by a person not registered, the bill could thwart local control.

HB 1462 could be a violation of the separation of powers and unconstitutional under *Shepperd* to the extent it authorized the attorney general to prosecute criminal violations without the consent of the local prosecuting attorney.

Also, the attorney general might not have original jurisdiction to investigate an allegation of an election violation, prosecute a case and bring it before a jury, and then represent the state on appeal.

OTHER
OPPONENTS
SAY:

Allegations of racial discrimination connected with an investigation of mail-in ballot fraud have been brought against the attorney general and the secretary of state in a federal lawsuit in the Eastern District of Texas. As

long as that lawsuit remains pending, the Legislature should take a guarded approach to expanding the investigative authority of the attorney general in alleged criminal violations of election law.

NOTES:

HB 1462 originally was set on the April 23 General State Calendar and was recommitted to committee on April 23.