DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Kevin Kennedy:

This draft attempts to implement mandates imposed upon this state under the Help America Vote Act and to enable receipt of federal aid by this state under the Act. On balance, the burdens imposed upon this state under the Act probably outweigh the benefits gained, but in most cases the mandates stand independently of the aids, so there is relatively little to be gained by spurning the aids. Unfortunately, the Act overreaches in its breadth and detail so that it runs against the grain of state law and adds tremendous complication and confusion to state law with relatively little payoff. In many cases, we have a different way of getting at the same perceived problem and our way is arguably just as good as the federal way. Under this draft, we often end up using both ways to get at the problem, because the state law is not really supplanted or only partially so. In addition, there is a constant tension within P.L. 107–252 between two goals: enhancing electoral participation and voter rights vs. ensuring the integrity of elections, with one goal arguably undercutting the other. This tension is carried over into this draft.

In preparing this draft, I had to make many judgement calls either because the federal language was inherently problematic or it was not drafted in cognizance of Wisconsin law. Many issues are unresolved. We need to review this draft to ensure that it is the most logical way to approach the issue from Wisconsin's standpoint and hopefully end up with a draft that makes the best of the situation and wins bipartisan support so that early enactment will be facilitated. Specific comments follow:

1. This draft appropriates from general purpose revenue the minimum amount required to enable this state to receive federal financial assistance under P.L. 107–252. The draft also creates a sum certain appropriation account derived from general purpose revenue to be used for the same purpose [proposed s. 20.510 (1) (v)]. This appropriation can be used to meet federal mandates under P.L. 107–252 if federal assistance is insufficient or is not provided soon enough to meet these mandates by the deadline for compliance (2004). However, the draft does not appropriate any money under this appropriation. When it is known whether this money will be needed and, if so, how much will be needed, the appropriate amounts can be inserted by redraft or amendment. In addition, if it becomes necessary to provide more state money to comply with these mandates after enactment of this bill, this appropriation can also be used for that purpose.

2. Concerning proposed s. 5.02 (6m), which defines the types of identification that individuals other than military and overseas electors who register by mail and have not voted in a federal election in this state must provide before voting in their first federal election, this draft mirrors sec. 303 (b) (2) (A) of P.L. 107–252. Under this law, *any* piece of identification containing a photograph is acceptable. This will readily allow fraudulent pieces of identification to be used. I think the type of identification that we are looking for is an ID card issued by a governmental unit or some type of government–certified private entity so that we can rely upon the authenticity of the ID.

3. Proposed s. 5.061 implements sec. 402 (1) (2) of P.L. 107–252, which requires this state to set up an administrative procedure for handling complaints relating to violations of Title III of P.L. 107–252. This section raises several issues:

a. This state is supposed to resolve each complaint within 89 days (including the day the complaint is received) unless the complainant or complainants agree to extend this period. Under this draft, the decision of the board with respect to a complaint is appealable through at least two and possibly three levels of state courts and potentially in federal court. Consequently, there is no way that there can be a final resolution within 89 days. It's possible that appellants may not want to raise this issue, so I'm not sure what practical effect it will have.

b. Section 402 (a) (2) (I) of P.L. 107–252 provides that if this state misses the deadline for final resolution, "...the complaint shall be resolved under alternative dispute resolution procedures established for purposes of this section." The act does not say who would establish these procedures and who would resolve the dispute.

c. Even if we resolve the dispute within 89 days, in many cases that will be long after an election has been held and the winner has been certified, so there will be no effective remedy in many cases, unless the alleged violation was of such magnitude that it could have changed the election result. Because, it seems, the draft necessarily envisions overturning an election result in some cases, the draft provides for canvasses to be reopened and certificates of election to be withdrawn and reissued. However, since we are talking about federal elections exclusively here, we must remember that congress will be the final arbiter, and it's speculative whether any redetermination by this state would have any effect upon its decision.

4. Concerning polling place accessibility:

a. In its treatment of s. 5.25 (4) (a), stats., relating to polling place accessibility and voting system design, this draft assumes, despite the language of federal law, that the focus of sec. 301 (3) of P.L. 107–252 is to address the needs of *physically* disabled individuals. If all mentally disabled individuals are to be guaranteed the right to vote to the same extent as nondisabled individuals, we would need to repeal s. 6.03 (1) (a), stats., which disqualifies from voting individuals who are under guardianship or who are adjudged to be incapable of understanding the objective of the elective process. Secondly, the breadth of this provision is obviously troublesome in that it guarantees that equipment be made available at *every* polling place sufficient to accommodate the needs of *every* potential elector with any conceivable disability, including, for example,

an individual who suffers from complete physical paralysis. I think the intent was probably to cover visually impaired people, but the language sweeps far beyond that group.

b. Is there any reason to retain s. 6.82 (1), stats., which provides for receipt of ballots at polling place entrances for electors who as a result of physical disability are unable to enter polling places, if all polling places are to be accessible?

5. Concerning proposed s. 5.87 (2), relating to uniform standards for the counting of votes cast or attempted to be cast with electronic voting systems, my assumption is that the standards under s. 7.50, stats., address the recurrent situations where the canvassers need to determine intent in jurisdictions where paper ballots are used. These standards may also apply in some situations where electronic voting systems are used. This draft, therefore, directs the board to fill in the gaps by prescribing standards for determining the validity of votes cast with electronic voting systems where s. 7.50, stats., does not address the issue that arises. If I am incorrect in assuming that s. 7.50, stats., addresses all the recurrent issues that arise in the counting of paper ballots, we need to change this draft.

6. With respect to the standards for electronic voting equipment under s. 5.91, stats., I did not include in this draft any corresponding standards for mechanical voting machines based upon the assumption that we will shortly be discontinuing the use of these machines. If this does not turn out to be the case, we will need to insert standards for these machines in the draft.

7. Concerning proposed s. 5.91 (18), which creates a new standard that requires electronic voting machines to produce a permanent paper record of each vote cast, what should be done with the permanent paper record of the votes cast with an electronic voting machine? Should the canvassing or recount laws be changed to require the record to be utilized in some way during the canvassing or recount process, or should the record merely be available for reference in case of a catastrophic failure? If so, nothing much has changed because this replicates the existing standard under s. 5.91 (11), stats. If the record is required to be produced and no use for the record is suggested, variations between jurisdictions may develop with regard to the use, if any, to be made of this record.

8. For purposes of the treatment s. 6.36, stats. (the statewide computerized voter registration list):

a. I assume that the requirement of sec. 303 (a) (1) (A) (iii) of P.L. 107–252 for a "unique identifier" for each elector means the operator's license number, the last 4 digits of the social security number, or the registration identification number issued by the board under proposed s. 6.285 (1). Because the last 4 digits of social security numbers will undoubtedly be duplicated in some cases, this draft provides in proposed s. 6.285 (2) for the board to assign supplemental identifying numerals or characters to an elector who uses the last 4 digits of a social security number so that the elector's number will be unique.

b. The requirement of sec. 303 (a) (1) (A) (iv) for the list to be "coordinated with other agency data bases within the state" is not reflected in this draft, except where the law

is specific about certain kinds of coordination, such as coordination with DOT. This provision is too vague to implement without further instructions. It should also be noted that some of these data bases, such as health records, are confidential under state or federal law.

c. The requirement under sec. 303 (a) (1) (A) (v) for any state or local election official to be provided with immediate electronic access to the information contained in the statewide registration list conflicts with s. 6.36 (2) (b), stats, which makes certain registration addresses confidential except to municipal clerks and their deputies. To my mind, given the federal language, there seems to be no way around making the address information available to all poll workers, which the legislature felt would compromise confidentiality. This move would also necessitate having two versions of the registration list –– one for use by poll workers and the other for public access and inspection. This would in turn complicate canvasses and recounts, the records of which are completely open presently. As a result of these complications, the draft does not conform to the federal mandate on this point so that you can first reflect on this issue. Please let me know if you want to do something more about this.

d. Section 303 (a) (2) (A) contains some specific procedures for removal of the names of voters from the statewide registration list, but provides that in the case of states described in 42 USC 1973gg–2 (b) [the National Voter Registration Act], the state shall remove the names of voters from the list in accordance with state law. Once again, although I don't think this exemption actually applies to Wisconsin, on the presumption that the exemption was intended to apply to this state, I have not picked up the federal purging requirements in this draft. Please let me know if this is not in accord with your intent. In addition, sec. 303 (a) (4) contains other requirements for maintenance of the registration list and further provides that states must "...adopt safeguards to ensure that eligible voters are not removed in error from the...list...." Unlike sec. 303 (a) (2) (A), this provision clearly applies to this state. My reading of it is that s. 6.50 (1) and (2), stats., would probably satisfy the maintenance requirements, but s. 6.50 (2m), stats., which permits a "positive purge" procedure, would not. Therefore, this draft repeals s. 6.50 (2m), stats. This draft does not reflect the mandate for safeguards because this is pretty vague, and it can probably be handled administratively by adopting and implementing sound management controls.

e. In sec. 303 (b) (3) (c) (i) of P.L. 107–252, there is an exemption from the voting identification requirement for military and overseas electors, *as defined by federal law* [42 USC 1973ff–6 (1) and (5)]. Unfortunately, our corresponding definitions in state law [ss. 6.22 (1) (b) and 6.24 (1), stats.] are broader. Therefore, some individuals who vote as military or overseas electors will not be entitled to the exemption. Also, some of the individuals who are "military electors" under state law are treated as "overseas electors" under federal law. Therefore, in proposed s. 6.36 (2) (c), I have used the narrower federal definitions. This distinction will probably create a headache for board staff and municipal clerks because they will need to tag the registration list with an indication of whether identification must be requested of an elector before the elector is permitted to vote. Parenthetically, a similar nuisance is created by the treatment of s. 6.865, stats., relating to absentee ballot requests and by proposed s.

6.276, which requires reports on absentee voting, because the same definitional problem occurs there too.

f. Currently, s. 6.22 (3), stats., exempts all military electors (as defined by state law) from registration requirements. Most of these electors presumably will not register. However, if they were registered before becoming military electors, under sec. 303 (b) (3) (c) (i) of P.L. 107–252 some, but not all, of these electors must be asked for identification before they are permitted to vote. Because the names of overseas electors will be on the registration list for federal elections, it might be easier to have the names of military electors on the registration list. Otherwise, we would need to keep a separate list of some of these names, which will beleaguer the board staff, the municipal clerks, and the inspectors. If it wouldn't cause too much confusion to keep the military electors exempt, however, I think there would be political support for the exemption.

g. In sec. 303 (b) (3) (c) (ii) of P.L. 107–252, there is an exemption from the voting identification requirement for elderly and handicapped voters who are provided with an alternative means of voting so that they are not required to use an inaccessible polling place. Because P.L. 107–252 requires all polling places to be accessible, I'm not sure this category of voters will actually continue to exist. If we were to try to give effect to something along this line, it seems to me that we would have to exempt all elderly and handicapped absentee voters from the requirement and that would be administratively difficult and would also perhaps raise equal protection issues. This draft, therefore, does not reflect this exemption.

h. Although sec. 303 (b) of P.L. 107–252 (the voting identification requirement for mail–in registrants) applies to individuals as of January 1, 2003, and to states as of January 1, 2004, since the requirement cannot be made retroactive and since no federal elections are scheduled to be held in this state in 2003, I am not perceiving much practical impact of this distinction. The draft, therefore, implements these provisions without a specific delayed effective date.

i. Section 303 (b) (4) of P.L. 107–252, which requires specific language to appear on voter registration forms, is not reflected in this draft because by its terms it does not affect states that are exempt from compliance with with 42 USC 1973gg et seq. [the National Voter Registration Act], and once again, I am assuming that that Act was not intended to apply to this state.

9. In s. 6.865, stats., which implements sec. 704 of P.L. 107–252, we are required to automatically send absentee ballots upon request to uniformed service and overseas voters (as defined by federal law) for the *next 2* general elections. I have left open the question what should be done if the voters want absentee ballots for state and local elections during the interval between these general elections. One reason is that, under this provision, the request carries over from municipality to municipality as long as the elector remains registered somewhere in this state. Also, because some of these voters are not on the registration list (see above comment), it may be difficult to keep track of them.

10. In proposed s. 6.96, I did not make provision for the marking of ballots issued pursuant to a state court order for extended polling hours because there is no statutory

authority for such an order to be issued. If you want to require marked ballots for voting conducted under a state court order, I would first address the issue of who would be permitted to issue such an order and under what circumstances. Because it is fairly easy to find a friendly circuit judge in some areas and because there is a potential for improper influence when a court acts without a full adversarial hearing, I would approach this issue with some caution. This is not to indicate that there aren't a few extreme situations where extended hours might be justifiable.

11. Proposed s. 6.97 implements the requirement in sec. 303 (b) (2) (B) of P.L. 107–252 for individuals attempting to vote who are required to provide identification but who fail to provide acceptable identification to be allowed to vote provisionally. Although federal law is a little vague on how this is to be handled, I tried to give the law some effect without delaying the municipal or later canvasses and requiring the canvasses to be reopened. Federal law requires the appropriate state or local election official to promptly determine whether the individual is qualified to vote. The draft provides that if the individual appears at the polling place, the inspectors shall inform the individual that he or she may provide identification to the clerk. It does not specify whether a fax or E–mail attachment would be sufficient. In any case, the draft provides that the inspectors shall immediately notify the municipal clerk if they mark a ballot due to missing or insufficient identification. The draft also provides that the clerk shall determine whether the individual is qualified to vote and, if the municipal board of canvassers is informed by the clerk, prior to completion of the canvass, that the individual is qualified to vote, the board of canvassers shall count the vote. Otherwise, the vote is not counted. Obviously, there is little time for the clerk to undertake an investigation and the draft does not specify to what extent the clerk should go to undertake this investigation and what type of verification is sufficient. For example, if the clerk finds a listed phone number for the individual at an address in the correct ward and finds that the number has not been disconnected, is that enough? If there is no number, what more should the clerk do to attempt verification? If different clerks react differently, may an election result be challenged on this basis? Please let me know if you want to amplify on this treatment.

12. Proposed s. 7.08 (6), which applies sec. 301 (5) of P.L. 107–252, directs the board to audit each voting system, as defined by federal law, that is used in this state following each general election. Federal law does not specify any audit interval; continuous compliance is required. The draft language is based on the notion that since federal elections generally occur biennially, it would seem that to apply this requirement in good faith, there should be some effort made to detect and remedy problems in one federal election before the next federal election is held, but, at the same time, if the problem is remedied by the time of the next regular federal election, that is soon enough. Please let me know if you want to see a different treatment of this issue.

13. Proposed s. 51.62 (3) (a) 4. is based upon sec. 291 (a) of P.L. 107–252. The federal provision requires the state protection and advocacy system to ensure full participation in the electoral process for individuals with disabilities. Under federal law, the protection and advocacy system serves individuals with developmental disabilities and mental illness. Because under s. 6.03 (1) (a), stats., a significant number of these individuals are not eligible to vote in this state, this draft directs the

state protection and advocacy agency to ensure full participation in the electoral process for *eligible electors*.

14. I have not included the provisional voting mandate under sec. 302 of P.L. 107–252 in this draft for two reasons: 1) Because under s. 6.55 (3), stats., the vote of an unregistered elector who can verify his or her residence is always counted unless successfully challenged, sec. 302 would seem to require a more restrictive treatment than we now have; 2) The unnumbered paragraph following sec. 302 (5) (B), which exempts states described in 42 USC 1973gg–2 (b) [the National Voter Registration Act] appears to be intended to exempt Wisconsin from compliance with sec. 302. However, the NVRA provision only exempts states that a) since August 1, 1994 have not required registration *for any voter in the state* with respect to an election for federal office; or b) since May 20, 1993 have permitted *all voters in the state* to register to vote in the polling place at the time of voting in an election for federal office. If you wish, we could set up a provisional voting procedure for those electors who arrive at the polls without acceptable proof of residence; however, this would complicate polling place and canvassing proceedings to attend to the needs of a relatively small number of electors who could in most cases produce some proof with relatively little diligence. If you believe that this approach to provisional voting will not be acceptable to the federal government or that we should try to deal with the electors who cannot verify their residences, we will need to address the provisional voting issue in this draft.

15. Section 302 (b) (2) (C) and (E) of P.L. 107–252 requires the posting in polling places of instructions concerning provisional voting rights and the procedure for casting a provisional ballot. Although there is no exemption provided from this requirement, since provisional voting is not treated in this draft (except in modified form when voting is conducted after hours pursuant to a federal court order and a separate individual notice is distributed), the draft does not address this posting mandate.

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