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Details:

(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

### 2007-08

(session year)

### Senate

(Assembly, Senate or Joint)

### Committee on ... Labor, Elections and Urban Affairs (SC-LEUA)

### COMMITTEE NOTICES ...

- [Committee Reports ...](#) **CR**
- [Executive Sessions ...](#) **ES**
- [Public Hearings ...](#) **PH**

### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- [Appointments ...](#) **Appt** (w/Record of Comm. Proceedings)
- [Clearinghouse Rules ...](#) **CRule** (w/Record of Comm. Proceedings)
- [Hearing Records ...](#) bills and resolutions (w/Record of Comm. Proceedings)  
(**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)  
(**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- [Miscellaneous ...](#) **Misc**

## Senate

### Record of Committee Proceedings

#### **Committee on Labor, Elections and Urban Affairs**

##### **Assembly Bill 295**

Relating to: public access to voter registration identification numbers.  
By Committee on Elections and Constitutional Law.

November 02, 2007 Referred to Committee on Labor, Elections and Urban Affairs.

January 8, 2008 **PUBLIC HEARING HELD**

Present: (5) Senators Coggs, Wirch, Lehman, Grothman and A. Lasee.  
Absent: (0) None.

##### Appearances For

- Molly Koranda — State Elections Board

##### Appearances Against

- None.

##### Appearances for Information Only

- Beverly Speer — Wisconsin Democracy Campaign

##### Registrations For

- Kevin Kennedy — Government Accountability Board

##### Registrations Against

- None.

##### Registrations for Information Only

- None.

January 16, 2008 **EXECUTIVE SESSION HELD**

Present: (5) Senators Coggs, Wirch, Lehman, Grothman and A. Lasee.  
Absent: (0) None.

Moved by Senator A. Lasee, seconded by Senator Lehman that **Assembly Bill 295** be recommended for concurrence.

Ayes: (5) Senators Coggs, Wirch, Lehman, Grothman and A. Lasee.

Noes: (0) None.

CONCURRENCE RECOMMENDED, Ayes 5, Noes 0

Adam Plotkin  
Committee Clerk



## Vote Record

### Committee on Labor, Elections and Urban Affairs

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Date: Wednesday, January 16, 2008

Moved by:   Lwall                        Seconded by:   Lehman  

AB   295                        SB \_\_\_\_\_                      Clearinghouse Rule \_\_\_\_\_  
 AJR \_\_\_\_\_                      SJR \_\_\_\_\_                      Appointment \_\_\_\_\_  
 AR \_\_\_\_\_                      SR \_\_\_\_\_                      Other \_\_\_\_\_

A/S Amdt \_\_\_\_\_  
 A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_  
 A/S Sub Amdt \_\_\_\_\_  
 A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_  
 A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

Be recommended for:  
 Passage                       Adoption                       Confirmation                       Concurrence                       Indefinite Postponement  
 Introduction                       Rejection                       Tabling                       Nonconcurrence

<u>Committee Member</u>	<u>Aye</u>	<u>No</u>	<u>Absent</u>	<u>Not Voting</u>
<b>Senator Spencer Coggs, Chair</b>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Senator Robert Wirch</b>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Senator John Lehman</b>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Senator Glenn Grothman</b>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Senator Alan Lasee</b>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Totals:</b>	<u>  5  </u>	<u>  0  </u>	_____	_____

Motion Carried                       Motion Failed

# State of Wisconsin \ Elections Board

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Madison, WI 53701-2973  
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E-mail: seb@seb.state.wi.us  
http://elections.state.wi.us



JOHN P. SAVAGE  
Chairperson

KEVIN J. KENNEDY  
Executive Director

August 8, 2006

Alan Lee  
Wisconsin Department of Justice  
17 West Main Street  
Madison, WI 53702

W/AB 295  
Materials

Dear Alan,

This letter follows up recent discussions between us describing the background on the use of a database tracking number in the Statewide Voter Registration System (SVRS). Concerns have been raised by language in Section 6.36 (1)(b)1.a., Wis. Stats., that restricts viewing of selected data items in SVRS including the "registration identification number" to persons other than an employee of the State Elections Board, a municipal clerk, deputy clerk, the executive director of a city board of election commissioners or a deputy designated by the executive director.

The requirement for establishing a computerized statewide voter registration list was created in the Help America Vote Act of 2002 (HAVA). HAVA Section 303 (a)(1)(A) provides that:

*"each state, acting through the chief State election official, shall implement in a uniform and nondiscriminatory manner, a single uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State..."* Emphasis supplied.

Wisconsin incorporated the requirement for a statewide voter registration list, along with other requirements mandated by HAVA, in 2003 Wisconsin Act 265, which was enacted on April 15, 2004. Among the provisions of that legislation is a requirement that the list contain "for each elector, a unique registration identification number assigned by the" State Elections Board (SEB). Section 6.36 (1)(a), Wis. Stats.

Drafting the proposed legislation began in November 2002. I initiated a series of conversations with Jeff Kuesel of the Legislative Reference Bureau, who is primarily responsible for drafting election and campaign finance related legislation. On January 10, 2003, I provided Jeff with a detailed set of comments and direction on the initial draft that I reviewed, LRB 0610/P4. Included in that letter was language addressing a misconception about the "unique voting identification number."

1. **Unique voting identification number.** In the draft there are several references to a voter obtaining a unique voting identification number from the Elections Board if the voter does not supply a Wisconsin operator's license number or the last 4 digits

*of the voter's social security number (SSN). The federal law requires an individual registering to vote to provide a driver's license number or the last 4 digits of their SSN or a statement that the individual does not have a driver's license or a social security number. If the individual does not have either element, then the Elections Board assigns the unique identification number to the voter's record in the state registration file.*

*This is not a number that will be given to the voter, but a number that will be used in the system to track the voter and match the voter against various data bases as required by the federal law. When the statewide voter list is designed, we will determine how that number will be generated. I do not envision that the Elections Board will distribute these numbers to voters at their request. The number will be part of the statewide voter list as a data management tool.*

*The draft should not contain references to this number in several locations that I will identify later. This will mean a change to Section 35.*

- 2. **Privacy issues.** Under federal law, the Department of Transportation treats the operator's license number as exempt from the public records law. The number has to be collected as part of the voter registration process and has to be included in the data base. I would like to provide in this legislation that the operator's license number and the last 4 digits of the social security number are not a public record. We may choose to generate the unique voting identification number in the same manner that the operator's license number is generated. We already shield address information from public access for voters that qualify under S. 6.47, Wis. Stats. The operator's license number and the last 4 digits of the social security number should not be accessible through this list because they are not accessible through DOT or the Social Security Administration.*

I have included a copy of all my correspondence with Jeff Kuesel that I have in my HAVA draft legislation file, including the January 10, 2003 letter. The drafting instructions have explicit language on what elements should be maintained as confidential. The instructions relate to the driver's license number and the last 4 digits of a voter's social security number (SSN). Later correspondence makes it clear that the voter's date of birth, any request for accommodation by a voter with disabilities and information about protected voters pursuant to Section 6.47, Wis. Stats. (voters who are victims of domestic abuse) should also be kept confidential.

At no point did I instruct Jeff to treat the registration identification number assigned by the SEB as confidential. However, it was included in the section that restricts viewing of selected data items in SVRS. It was in the draft legislation at an early point and was never addressed in future drafting instructions. The evolution of the treatment of the registration identification number can be traced in successive iterations of the initial drafts. LRB 03-0610/P4, LRB 03-0610/P5 and LRB 03-0610/1. I have attached an explanation from Jeff Kuesel.

There is no public policy reason to treat the registration identification number assigned by the SEB as confidential. It serves as a data management tool within SVRS. No one, other than authorized SVRS users, can use the number for any purpose. Those individuals are required to

sign a user agreement holding them accountable for protecting access to confidential information and the use of SVRS.

The SVRS number enables users to efficiently use the functionality of SVRS. The number enables election officials to update voter history, track correspondence and administer absentee voting. The number presently appears, in both numeric and bar code format, on the poll list used at the polling place. It also appears in the same format on absentee ballot labels and other correspondence labels.

The appearance of the number is not unique to the particular vendor providing the SVRS application. The functionality described above is used in several existing local applications. Any vendor would have to meet our design requirements.

The SEB's business requirements in its Request for Proposal (RFP) do not explicitly treat the unique identifier as confidential. (BR 125, 375) The business requirements specify that the application must enable a bar code to be printed on the poll lists for the purpose of updating voter history. (BR 379, 380) The RFP business requirements are accessible at: <http://elections.state.wi.us/docview.asp?docid=2036&locid=47>.

Accenture has advised SEB that the number can be easily removed from the poll lists and other reports presently made available by SEB. However that would put an undue burden on SEB and the local election officials who will use the system. Users will not be able to easily update voter history and track SVRS-related corresponded including absentee ballot functions.

During the course of deploying SVRS, SEB staff first noticed that there was a problem with the statutory language. At that point it was too late to seek a legislative correction in this session. SEB staff also received a question from the attorney for Wisconsin Voter Lists about the treatment of the SVRS number in several reports it had purchased from SEB. A copy of the correspondence is also enclosed.

The State Elections Board intends to request a legislative change to remove the term "registration identification number" from the list of confidential items in Section 6.36 (1)(b)1.a., Wis. Stats. The State Elections Board can take a number of steps to minimize the impact of the use of the SVRS tracking number in the conduct of the elections this fall. Specifically, the SEB can:

1. Direct local election officials to cover the number, including the bar code, when making copies of the poll list.
2. Direct poll workers to cover the number, including the bar code, when permitting observers to view the poll list on Election Day.
3. Suppress the number when running reports from SVRS in response to open record requests.

The SVRS tracking number has no attributes that warrant treating it as confidential. It is an essential functionality of SVRS that enables local election officials to administer elections more efficiently. The possibility that someone other than an employee of the State Elections Board, a municipal clerk, deputy clerk, the executive director of a city board of election

commissioners or a deputy designated by the executive director may view the number does not intrude on any expectation of privacy. An individual who does not have security access to SVRS cannot use the number for any purpose and learns nothing about a voter by viewing the number.

The State Elections Board is willing to work with your office to address this issue. If you need any additional information please contact me at 608-266-8087 or [kevin.kennedy@seb.state.wi.us](mailto:kevin.kennedy@seb.state.wi.us).

**State Elections Board**

Kevin J. Kennedy  
Executive Director

Enclosures: Drafting instructions to Jeff Kuesel  
E-mail response from Jeff Kuesel  
Correspondence with Attorney Mark Sostarich  
LRB 03-0610/P4, LRB 03-0610/P5, LRB 03-0610/1





STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER  
ATTORNEY GENERAL

Daniel P. Bach  
Deputy Attorney General

RECEIVED  
06 AUG 28 PM 4:16  
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Deputy Administrator  
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leeam@doj.state.wi.us  
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TTY 1-800-947-3529  
FAX 608/266-1656

August 24, 2006

Mike McCabe  
Executive Director  
Wisconsin Democracy Campaign  
210 North Bassett Street, Suite 215  
Madison, WI 53703

W/AB 295  
Materials

Dear Mr. McCabe:

You have asked the Department of Justice to review a July 21, 2006, communication from the Wisconsin State Elections Board (Board). In that communication, "SVRS Project Update #53," the Board noted that various voter information was confidential and must be protected appropriately. The Board also stated, "However, the SVRS [Statewide Voter Registration System] number assigned to voters who are not confidential and appears on poll lists in other SVRS reports is not treated as confidential." The memorandum stated "With certain exceptions voter registration and voter history information, including the SVRS voter ID number, is a public record and must be provided upon request."

You note that Wis. Stats. § 6.36(1)(b)1.a. provides that only election officials may view certain voter information including "registration identification number." Your letter expresses your concern that the Board is instructing election officials to ignore state law. You ask the Department of Justice for a determination "on the validity and applicability of the law including voter registration identification numbers among the information that is treated as confidential voter information." You also ask the Department to "order the Board to follow the law and rescind it's July 21 memo instructing local officials to disregard it."

Wis. Stats. § 6.36(1)(a) part of 2003 Wis. Act 265 which was enacted to bring Wisconsin into compliance with Help America Vote Act of 2002, requires the Board to require and maintain electronically an official registration list. The law requires that the list contains various information on each registered elector and, for each elector, a unique registration identification number assigned by the Board, the number of a valid operator's license issued to the elector under Ch. 343, if any, or the last four digits of the elector's social security account number, if any..."

Mike McCabe  
August 24, 2006  
Page 2

In a January 10, 2002<sup>1</sup>, letter to the Legislative Reference Bureau commenting on the initial drafts of what became 2003 Wis. Act 265, the Board's executive director described the voting identification number provided by the Elections Board: "The federal law requires an individual registering to vote to provide a driver's license number or the last 4 digits on their SSN or a statement that the individual does not have a driver's license or a social security number. If the individual does not have either element, then the Elections Board assigns the unique identification number to the voter's record in the state registration file.

This is not a number that will be given to the voter, but a number that will be used in the system to track the voter and match the voter against various data bases as required by the federal law. When the statewide voter list is designed, we will determine how that number will be generated. I do not envision that the Elections Board will distribute these numbers to voters at their request. The number will be part of the statewide voter list as a data management tool.

The draft should not contain references to this number in several locations that I will identify later. This will mean a change to Section 35."

In that same letter, the Board's executive director explained that because under federal law an operator's license number is exempt from the public records law, the Board wanted the legislation to provide that the operator's license number and the last four digits of the social security number would not be a public record. The letter noted "The operator's license number and the last four digits of the social security number should not be accessible through this list because they are not accessible through DOT or the Social Security Administration."

Later correspondence between the Board and the Legislative Reference Bureau note that the voter's date of birth and any request for accommodation by a voter with disabilities and information about protected voters should also be kept confidential. There is no further mention of any number assigned to the voter in the state registration file.

A review of the various drafts of the legislation and the Board's comments on each draft reveal that the Board originally asked only to have the operator's license number and last four digits of the social security number not be a public record. Although that clearly was the intent, neither the Board nor the Legislative Reference Bureau removed the language making the registration identification number not a public record.

In a recent email from the Legislative Reference Bureau to the Board's executive director, the drafter noted that at the time of the initial drafting the registration identification

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<sup>1</sup> This year appears to be a mistake. It should be 2003. The drafting process had not begun in January 2002.

numbers were only to be issued to those electors who did not have a driver's license or social security number. Because the driver's license and social security numbers would be confidential, at the time it made sense to keep the assigned numbers confidential because otherwise the law would be allowing public access to less than 1% of the identifiers. When it was later decided that each elector would be issued a registration identification number, a data base tracking number as it were, the language in the initial draft of the statute was not changed.

There are good, and obvious, reasons to keep driver's license and social security numbers confidential. There is no public policy reason to treat the registration identification number assigned by the Board as confidential. The only purpose the number serves is as a data management tool within the SVRS. There is no other use for the number. The number allows election officials to update voter history, track correspondence and administer absentee voting. The number appears in both numeric and barcode format on the poll list and also appears on absentee ballots and other correspondence labels. There is no reason to give a voter his or her tracking number. Anyone else learning a voter's tracking number would be unable to do anything with that number. The number is of no utility outside of the SVRS. Access to SVRS itself is restricted.

Although a review of the drafting history of 2003 Wis. Act 265 makes it apparent that the tracking number now used by the tracking number in the SVRS was not intended to be confidential, the fact remains that Wis. Stat. § 6.36(1)(b)1.a. includes "registration identification number" as confidential information. The Board has indicated that it will be asking the Legislature to amend the statute to remove the reference to the registration identification number. Until the statute is changed, however, it is reasonable to treat the tracking number as the registration identification number referred to in the statute because the statute certainly assumes that the Board will be assigning a number and demands that the number be confidential.

The Board has advised the Department of Justice that the number can be easily removed from the poll lists in other reports presently made available by the Board. If the number were removed permanently, however, election officials would not be able to update voter history and track other SVRS information. In order to comply with the statute, the Board will:

- 1) direct local election officials to cover the number, including the bar code, when making copies of the poll list.
- 2) direct poll workers to cover the number, including the bar code, when permitting observers to view the poll list on Election day.
- 3) suppress the number when running reports from SVRS in response to open record requests.

It appears that the Elections Board can comply with the requirements of Wis. Stat. § 6.36(1)(b)1.a.

Mike McCabe  
August 24, 2006  
Page 4

In response to your specific questions, therefore, the law certainly is valid and the Elections Board is not at liberty to ignore it. The Elections Board, however, has indicated it will comply with the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Lee". The signature is written in a cursive style with a large initial "A".

Alan Lee  
Deputy Administrator  
Division of Legal Services

AL:lkw

c: ✓ Kevin Kennedy



bill to remove the  
SRS # from the list  
of confidential info  
ask Mike McCabe

Kevin, 6-8087  
letter to Kevin <sup>call</sup> McCabe

w/AB 295  
materials

## State of Wisconsin \ Elections Board

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KEVIN J. KENNEDY  
Executive Director

APR 05 2007

April 5, 2007

The Honorable Spencer Coggs, Chair  
Senate Committee on Labor, Elections and Urban Affairs  
Room 123 South, State Capitol  
P.O. Box 7882  
Madison, WI 53707-7882

Dear Senator Coggs:

On behalf of the State Elections Board, I request that the Senate Committee on Labor, Elections and Urban Affairs introduce the enclosed legislation, LRB 2254/1. The legislation makes a critical change in the restriction on public access to certain information in the Statewide Voter Registration System

# State of Wisconsin \ Elections Board

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KEVIN J. KENNEDY  
Executive Director

APR 05 2007

April 5, 2007

The Honorable Spencer Coggs, Chair  
Senate Committee on Labor, Elections and Urban Affairs  
Room 123 South, State Capitol  
P.O. Box 7882  
Madison, WI 53707-7882

Dear Senator Coggs:

On behalf of the State Elections Board, I request that the Senate Committee on Labor, Elections and Urban Affairs introduce the enclosed legislation, LRB 2254/1. The legislation makes a critical change in the restriction on public access to certain information in the Statewide Voter Registration System (SVRS). The legislation removes the SVRS identification number from the list of items in Section 6.36 (1)(b)1.a., Wis. Stats., that are not available for public inspection.

The registration identification number assigned by the SVRS application has no indicia of privacy. It is a management tool used to track voter records in the SVSR. The number meets the state and federal statutory requirements to assign a unique identification number to each voter. By itself, the number reveals no confidential information about an individual.

The number appears on various documents including poll lists and other lists requested by the public. Only an authorized SVRS user, with the required permissions assigned by the State Elections Board, may utilize this number if the user has access to the system. Currently, the State Elections Board staff and local election officials have to take extraordinary steps to redact this information from the distribution of public documents provided by SVRS.

It is important to have the number appear on documents that may be subject to public inspection because it permits the local election official to look up the voter record without doing a search function in SVRS. It also enables local election officials who do not use scanning technology to update vote records more efficiently.

As I discussed with your staff, this matter was reviewed by the Attorney General's office last summer. I am enclosing a copy of the exchange of correspondence related to this issue from last August.

Thank you for your assistance with this request. I look forward to working with you and the committee members to secure passage of this legislation.

**State Elections Board**

A handwritten signature in black ink that reads "Kevin J. Kennedy".

Kevin J. Kennedy  
Executive Director

C: Members, Senate Committee on Labor, Elections and Urban Affairs



# Spencer Coggs



## State Senator

May 7, 2007

Mr. Kevin Kennedy  
Executive Director, State Elections Board  
17 W. Main St., Ste. 310  
Madison, WI 53701

Dear Mr. Kennedy,

Thank you for contacting the Senate Committee on Labor, Elections, and Urban Affairs to request the introduction of a bill regarding public access to voter registration identification numbers.

As you are aware, the Assembly Committee on Elections and Constitutional Law recently voted to introduce this legislation on behalf of the Elections Board. When the State Assembly passes this bill and it comes to our committee, I will certainly take appropriate action on the Assembly version of this legislation.

Thank you for bringing this subject to our attention. We look forward to working with you and our Assembly counterparts to forward this legislation.

Sincerely,

A handwritten signature in black ink that reads "Spencer Coggs". The signature is fluid and cursive, written in a dark ink.

AB 295

Senator Spencer Coggs  
Chairman, Committee on Labor, Elections, and Urban Affairs

Cc: Members, Committee on Labor, Elections, and Urban Affairs  
Rep. Sheryl Albers, Chair, Committee on Elections and Constitutional Law

SC:ajp





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**WISCONSIN LEGISLATIVE COUNCIL  
AMENDMENT MEMO**

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**2007 Assembly Bill 295**

**Assembly  
Amendment 1**

*Memo published: June 18, 2007*

*Contact: Jessica L. Karls, Staff Attorney (266-2230)*

Under *current law*, the Elections Board (Government Accountability Board on or after August 31, 2007) assigns a unique registration identification number to each elector on the official statewide voter registration list. Current law also provides that no person other than an employee of the board, a municipal clerk, a deputy clerk, an executive director of a city board of election commissioners, or a deputy designated by the executive director may view the date of birth, registration identification number, operator's license number, or Social Security account number of an elector, the address of an elector to whom an identification serial number is issued, or any indication of an accommodation to permit voting by an elector.

*2007 Assembly Bill 295* removes the registration identification number from the list of confidential information, thus making registration identification numbers accessible to the public.

*Assembly Amendment 1* provides that, in addition to the persons authorized under current law to view confidential information, the following persons are also authorized to view the information: a county clerk, a deputy county clerk, an executive director of a county board of election commissioners, and a deputy designated by the executive director. The amendment also replaces "deputy clerk" under current law with "deputy municipal clerk."

**Legislative History**

On June 14, 2007, the Assembly Committee on Elections and Constitutional Law introduced Assembly Amendment 1 by unanimous consent. The committee then recommended adoption of Assembly Amendment 1 and passage of 2007 Assembly Bill 295, as amended, on votes of Ayes, 7; Noes, 0; and Absent, 1.

JK:ksm





210 N. Bassett St., Suite 215 / Madison, WI 53703 / 608 255-4260 / [www.wisdc.org](http://www.wisdc.org)

**Testimony on Assembly Bill 295  
(public access to voter registration identification numbers)**

**Senate Committee on Labor, Elections and Urban Affairs**

**Tuesday, January 8, 2008**

Thank you for holding this hearing today. We testify on Assembly Bill 295 for information only.

The official voter registration list is a public record open for public inspection subject only to specified statutory exceptions outlined in Wis. Stats. 6.36(1)(b). Those exceptions as currently written include the unique voter registration identification numbers for each registered voter. The law has been in effect for more than three years, and as recently as July 2006 the Elections Board was advising local elections officials of the confidentiality requirements of the law without expressing any concern about the way the law was written. It was not until the Elections Board discovered it could not find a way to comply with the voter privacy law and remove the confidential voter registration numbers without making its computerized system inoperative that concerns were raised about supposed flaws in the law. The subsequent drafting of this legislation is a means to obscure the larger and more important issue – the incompetence of the global outsourcing firm chosen by the Elections Board to create the Statewide Voter Registration System (SVRS).

The Board staff admitted back in 2006 that when utilizing the SVRS developed by Accenture it is always necessary to input the voter registration numbers to properly operate the software system and to complete such tasks as maintaining voter histories and complying with other requirements mandated by Wisconsin law and the HAVA. There are no methods for removing the numbers from the system that would keep the system operative when performing these necessary functions.

Accenture very recently settled with the Elections Board out of court regarding their failure to meet contractual obligations for the new system. Accenture developed a standardized software system which it intended to use in multiple states to create each state's voter file. Contrary to public statements and contract agreements, the company failed to customize the software system taking into account the specifics of Wisconsin's elections laws and needs. A statutory change allows the Board to further avoid addressing the system's inadequacies. After spending millions of dollars, the state has received from Accenture a legally and practically unworkable voter registration system. The Elections Board's preferred remedy to one aspect of this boondoggle is to change the law that neither Accenture nor the state has yet figured out a way to comply with. AB 295 serves no useful purpose to voters. Its only purpose is to cover up for the fact that Accenture couldn't program its way out of a paper bag and spare the Elections Board in its final days and then the Government Accountability Board from having to clean up Accenture's mess.



## Senate Committee on Labor, Elections, and Urban Affairs

Testimony of Kevin J. Kennedy  
Legal Counsel  
Government Accountability Board  
January 8, 2008

Chairman Coggs and Committee Members:

Thank you for the opportunity to appear before this committee and testify in favor of Assembly Bill 295, as Amended.

Wisconsin Act 265 enacted April 15, 2004 recreated Section 57. 6.36 (1) (b), which designated the "registration identification number" as confidential and only accessible to election officials.

The registration identification number assigned by the SVRS application has no indicia of privacy. It is a management tool used to track voter records in the SVSR. The number meets the state and federal statutory requirements to assign a unique identification number to each voter. By itself, the number reveals no confidential information about an individual.

The number appears on various documents including poll lists and other lists requested by the public. Only an authorized SVRS user, with the required permissions assigned by the State Elections Board, may utilize this number if the user has access to the system. Currently, the State Elections Board staff and local election officials have to take extraordinary steps to redact this information from the distribution of public documents provided by SVRS.

It is important to have the number appear on documents that may be subject to public inspection because it permits the local election official to lookup the voter record without doing a search function in SVRS. It also enables local election officials who do not use scanning technology to update vote records more efficiently.

The Board would like to announce new functionality of the SVRS before the next election, and this 'confidential' designation is prohibiting us from releasing it. The new functionality is known as VPA, or Voter Public Access. VPA will allow you and your constituents to log onto the internet and determine whether they are in fact registered to vote, where their polling place is, which districts they live in and who the current office holders are, and, as required by HAVA, will be able to check whether their provisional ballot was counted for a particular election.

Unfortunately the screen that shows if the voter is registered contains this 'voter identification number.' We are unable to release this new productivity tool as long as the voter identification number is considered confidential.

The Amendment to this bill was requested by the County Clerks, who were not given access to any of the confidential information in the SVRS in the original legislation. Many of our county clerks have established formal contracts to provide the voter registration and election management services in the SVRS to smaller municipalities who may not have the staff or resources to maintain their own SVRS system. These are known as 'provider/relied' relationships. We agree that this amendment is required for our County Clerks to continue to manage the elections within their 'provider/relied' relationships.

As you know, we have a statewide Presidential Preference Primary election six weeks from today. I appreciate your prompt action on this bill and will answer any questions you may have at this time.

Thank you.

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From

# REGISTRATION

to

# RECOUNTS:

**The Election Ecosystems of Five Midwestern States**

A Project of *ELECTION LAW @ MORITZ* AT THE OHIO STATE UNIVERSITY  
MORITZ COLLEGE OF LAW

**By Steven F. Huefner, Daniel P. Tokaji, & Edward B. Foley**  
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### WISCONSIN FINDINGS

Wisconsin's current election system retains features of the political culture associated with the LaFollette era of progressive reform. Since 1976, the state has permitted voters to register at the polls on Election Day, a reform that has spurred exceptionally strong turnout. Wisconsin has mostly been free of the accusations that have dogged some election officials in other states, particularly those elected on a partisan basis. At the same time, Wisconsin's decentralized system of running elections – in which responsibility rests among 1,851 municipal clerks – has a downside. Foremost among the challenges is the difficulty of achieving uniformity in the administration of elections across the state. Key features of Wisconsin's election ecosystem are:

- *A culture of nonpartisanship and professionalism* in the administration of elections, which helps ensure consistency among Wisconsin's municipalities;
- *An Election Day registration system*, which has successfully increased turnout without increasing fraud, and has the added benefit of reducing reliance on provisional ballots;

- *Problems in the state voter registration database*, including slowness in the system, the inability to check voter records against other records, and problems in generating absentee ballots;
- *A system for resolving post-election disputes* that likely would be seriously tested in the event of a close statewide race, especially if Wisconsin were the critical state in a presidential election.

## **WISCONSIN REFORMS**

- Create a strong election division of the new Government Accountability Board.
- Improve the Statewide Voter Registration System.
- Reform the post-election dispute resolution processes.

## **CHAPTER 6: WISCONSIN'S ELECTION ECOSYSTEM PROGRESSIVE REFORM AND DECENTRALIZED ADMINISTRATION**

LIKE ANY OTHER STATE, Wisconsin's election ecosystem can only be fully understood in light of its history and political culture. Although Wisconsin today is associated with a progressive vision of democracy, that was not always the case. In the 1800s, "machine" politics was a prominent feature of Wisconsin government. Perhaps the most famous incident occurred in the 1855 gubernatorial election, at a time when Democrats controlled state politics. The party-boss candidate incumbent Democrat William Barstow won by 157 votes amid allegations of ballot tampering. This led the Republican challenger Coles Bashford to hold his own competing inauguration. For three months, the Wisconsin Supreme Court investigated while both candidates claimed victory. Eventually, the court found ballot tampering in fact had occurred, causing Barstow to resign and Bashford to be sworn in as the state's first Republican governor. This was hardly the end of political corruption in Wisconsin, however, as Governor Bashford ultimately left Wisconsin in disgrace after it was discovered that he had received some \$50,000 from railroad companies.<sup>1</sup>

A signal event in cleaning up Wisconsin's politics was the election of 1900, which ushered in an era of reform led by Robert LaFollette. LaFollette and his Progressive Republican allies sought to curtail corruption, limit the influence of political parties, and enhance participatory democracy.<sup>2</sup>

To a considerable extent, Wisconsin's current election system retains features of the political culture associated with the LaFollette era of progressive reform. Citizens of Wisconsin vote in exceptionally large numbers,<sup>3</sup> and since 1976, the state has permitted voters to register at the polls on ElectionDay.<sup>4</sup> At the state level, an administrator

appointed by and responsible to a bipartisan board oversees matters of election administration.<sup>5</sup> Wisconsin has mostly been free of the accusations that have dogged chief election officials in other states, particularly secretaries of state elected on a partisan basis. At the local level, election administration is primarily entrusted to municipal, rather than county, officials. Despite the fact that many of these officials are elected, they are generally respected for the professional and nonpartisan manner in which they administer elections.

At the same time, Wisconsin's decentralized system of running elections has a significant downside. In other states where elections are administered at the county level, the local entities responsible for administering elections may number only in the dozens. In Wisconsin, by contrast, elections are run at the municipal level, with state law vesting primary authority over election administration in city, town, and village clerks. There are 1,851 municipalities in the state, ranging in size from small towns with a single polling place to the City of Milwaukee, with 343,867 registered voters.<sup>6</sup> Foremost among the challenges that this fragmented system presents is the difficulty of achieving uniformity in the administration of elections across the state.

The most glaring example of this is the state's problem-filled transition to a statewide registration system mandated by HAVA, made especially difficult because most Wisconsin municipalities did not even have voter registration before 2006. Another issue, certainly not unique to Wisconsin, is the difficulty that the state might experience in the event of a contested statewide election. Wisconsin voters opted for Senator Kerry over President Bush by only a few thousand votes in 2004, and the state would likely have become a focal point for post-election jousting over the outcome had Ohio swung the other way. As discussed below, Wisconsin would then have faced the prospect of a fragmented recount and contest procedure that would have been difficult to resolve under the existing federal calendar.

Despite the state's progressive tradition, the nation's increasing partisanship attending issues of election administration since 2000 has not left Wisconsin unaffected. The most significant election administration dispute has been over voter identification. Wisconsin Republicans argue that such measures are needed to combat fraud, arguing that a photo identification requirement is needed to confirm that the person voting is really who he or she claims to be, especially given the state's liberal registration rules. Democrats on the other hand oppose photo identification requirements, arguing that there is little evidence of actual polling place fraud and that a photo identification requirement would disproportionately affect racial minorities and other groups who are already underrepresented in the electorate. Wisconsin's debate thus echoes the one raging throughout the country over the extent to which different electoral practices promote or hinder the values of access and integrity.

We divide our discussion of Wisconsin's election ecosystem into five parts. First, we provide a structural overview of the state's election system, focusing on the delegation of authority to municipal election officials, as well as recent changes in state-level authority over election administration. Second, we examine Wisconsin's Election Day registration

system. Third, we discuss the debate over voter fraud and voter identification. Fourth, we examine the problems that have attended the implementation of Wisconsin's statewide registration database. Fifth, we examine the state's system for resolving post election disputes, including problems that might occur in the event of a contested presidential or other statewide election.

## STRUCTURAL OVERVIEW

In one sense, Wisconsin has one of the most ~~decentralized~~ ~~fragmented~~ election systems in the country. As a matter of state law, primary authority for running elections rests with officials at the municipal rather than the county level.<sup>7</sup> In Wisconsin, municipalities may be towns, villages, or cities. Each municipality has a clerk, who is in charge of overseeing the administration of elections in his or her jurisdiction. The statutory duties of municipal clerks include:

- the purchase and maintenance of voting equipment;
- the distribution of ballots to polling places;
- the delivery of absentee ballots;
- voter education;
- the accommodation of people with disabilities;
- reporting suspected election fraud to district attorneys;
- and otherwise ensuring compliance with state election laws.

Municipal clerks also have responsibility for the training of poll workers, making sure that they are familiar with both state law and the voting equipment used.<sup>9</sup>

To say that municipalities in Wisconsin vary greatly would be an extreme understatement.

In size, they range from tiny villages with only a handful of registered voters to the cities of Milwaukee and Madison. For example, in the November 2006 general election, the Village of Livingston (located about 65 miles west of Madison) reported only three voters, none of whom voted absentee.<sup>10</sup> By contrast, the City of Milwaukee reported a turnout of 172,676, with over 11,000 voters casting absentee ballots, and a total citywide voter registration of over 300,000.<sup>11</sup> A lengthy report following Milwaukee's 2004 election found serious administrative problems in voter registration, absentee ballots, polling place accessibility, poll worker recruitment and training, and other areas.

Especially troubling was the handling of registration forms, though it was believed that the implementation of the statewide registration database would mitigate some of these errors.<sup>12</sup>

Although the city has worked hard to make improvements, this experience exemplifies the difficulties in running elections in large urban municipalities. It is sometimes said that there are really two Wisconsins: Milwaukee, and the rest of the state. Milwaukee is not only larger but also much more racially and ethnically diverse than the rest of the state, with a higher percentage of people living below the poverty line. Scratching the

surface, however, reveals a much more complex reality. While Milwaukee is indeed the biggest city in the state, there are thirteen Wisconsin cities with populations over 50,000.<sup>13</sup> Yet most Wisconsin municipalities have fewer than 5,000 registered voters and, for this reason, under state law were not even required to have voter registration before 2006. Until then, fewer than 350 of the state's 1,851 municipalities actually had voter registration, although approximately three-quarters of the voting population lived in larger municipalities with voter registration.

The issues that Wisconsin's diverse municipalities face in running elections vary with their size. The City of Milwaukee faces huge challenges each election cycle in making sure its registration lists are accurate, recruiting and training enough qualified poll workers, and ensuring that absentee ballots are distributed sufficiently in advance of Election Day. Smaller jurisdictions face a different set of problems. A typical town clerk in a smaller jurisdiction may have a skeleton staff (if any at all), a small budget, and a number of other responsibilities in addition to elections. As of 2007, approximately 400 of Wisconsin's 1,851 municipal clerks did not have email access, a reality that complicates efforts to make sure that election officials are kept updated and that election administration is consistent across the state.

The mechanism for selecting municipal election officials is not uniform in Wisconsin. Some are elected on a nonpartisan basis and others appointed by the municipality's governing body. Any city or county with a population greater than 500,000 (currently only Milwaukee) must have a board of election commissioners, consisting of three members.<sup>14</sup> Those members are selected from lists provided by the two largest political parties in the jurisdiction – two commissioners from the majority party and one from the minority party.<sup>15</sup> Thus, in Milwaukee, the City Board of Elections Commissioners is responsible for administering elections, with the board's members and executive director appointed by the mayor.

Whether elections are administered by an elected clerk, an appointed clerk, or an appointed board, it is possible to imagine allegations of bias emerging. Even when election officials are not selected on a partisan basis, they might discharge their duties in a partisan manner. Yet there is little evidence that this has actually happened in Wisconsin's recent history. This may be attributable to the state's moralistic political culture, which places a high value on nonpartisanship and professionalism.

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In most states, county officials have primary responsibility for running elections. By contrast, in Wisconsin the duties of county officials are more limited, though they are certainly important. Wisconsin's seventy-two county clerks are responsible for making sure that municipalities have adequate supplies, most notably ballots.<sup>17</sup> In addition, county clerks are responsible for convening three-member canvassing boards that handle post-election recounts in federal, state, or county elections.<sup>18</sup> Typically, the county board of canvassers consists of the county clerk and two other members, one a Democrat and one a Republican, as a way of promoting neutrality. Wisconsin elects its county clerks, with candidates running as nominees for their party.<sup>19</sup>

*Bale*  
*D. Kennedy*

County clerks can play a critical role in getting municipal clerks within their jurisdiction on the same page, especially where changes must be made. An example is the transition to new voting technology, pursuant to HAVA's requirements, that took place prior to the 2006 elections. Although each municipality was responsible for choosing its own election system, the Clerk of Dane County (which includes the City of Madison and surrounding areas) worked to promote uniformity across the county. With the encouragement of the county clerk, the sixty-one municipalities in the county ended up moving to the same optical-scan voting technology. Later, the county clerk's office encouraged municipalities to adopt a consistent coding system and invited clerks to attend equipment demonstrations. The county clerk also became the purchasing agent for the machines that the municipalities selected to meet HAVA's disability access requirements.

In addition to providing ballots for all elections, Dane County assists its local officials by offering training for inspectors and clerks in the county. The county also serves as a registration "provider" for twenty-nine municipalities, assuming responsibility on their behalf for entering and maintaining information in the statewide voter registration system required by HAVA. As in other counties, the job of the county's elected clerk is not limited to elections. Yet the Dane County Clerk, himself a former municipal clerk,<sup>20</sup> reports that he spends more than half of his time on elections, much of it communicating with municipal clerks.

The high degree of municipal authority in Wisconsin undoubtedly has both benefits and costs. On the positive side, running elections at the local level means that each clerk is responsible for a smaller number of voters. This can make it easier to ensure that registration lists are accurate. It may also make it easier to recruit poll workers and may contribute to smoother election-day operations. Among the negatives are that the resources, both time and money, of municipal clerks are very limited. It can also be difficult to ensure consistency across the state, or even within a single county, given both the number of municipalities contained in each and the differences between them.

At the state level, Wisconsin law until 2007 vested ultimate authority over election administration with the State Elections Board (SEB). The board consisted of eight members, one designated by each of the following: (1) the chief justice of the Wisconsin Supreme Court, (2) the governor, (3) the majority leader of the state senate, (4) the minority leader of the state senate, (5) the speaker of the state assembly, (6) the minority leader of the state assembly, (7) the chair of the Democratic Party, and (8) the chair of the Republican Party.<sup>21</sup> The State Elections Board was also responsible for the enforcement of campaign finance laws, as well as the administration of elections.<sup>22</sup> In practice, much of the state level responsibility for election administration lay with the executive director of the State Elections Board, who, by statute, served as the chief election officer for the state and discharged the board's responsibilities on a day to day basis.<sup>23</sup> Like all employees of the board, the executive director was required to be nonpartisan.<sup>24</sup>

*24 years*

From 1983 until 2007, Kevin Kennedy served as the executive director of the Wisconsin State Elections Board. Mr. Kennedy's long tenure and reputation for professionalism and

nonpartisanship allowed him to exercise his election administration responsibilities with relatively little interference from the board, the partisan composition of which has varied during his tenure. On the whole, the office appears to have been reasonably successful in ensuring some consistency in the administration of elections across the state, notwithstanding the inherent difficulty of doing so given the number and diversity of local jurisdictions. In 2007, the Wisconsin legislature enacted a law that significantly restructured the administration of elections at the state level.

Under 2007 Wisconsin Act 1 ("Act 1"), responsibility over election administration is now vested in a six-person Government Accountability Board ("GAB").<sup>25</sup> This board consists entirely of retired judges. A committee consisting of appellate judges is responsible for submitting a list of possible GAB members to the governor, who is to select nominees from this list. GAB members must then be confirmed by the legislature. After the initial group of nominees, confirmation must be by a two-thirds vote of the state senate.<sup>26</sup> Any measure passed by the board must be taken by four of the GAB's six members. The structure is designed to ensure that every member of the board enjoys bipartisan support and that the board, as a whole, will act in an evenhanded manner. At the same time, it is conceivable that the four-vote requirement could lead to gridlock, if the board is evenly divided along ideological or partisan lines.

The creation of the GAB was prompted not by defects in the system for administering elections, but rather by dissatisfaction with how the state's campaign finance and lobbying rules were being enforced. In particular, good government groups believed that the state elections and ethics boards had been too lax in their enforcement of campaign finance, ethics, and lobbying laws. In addition, reformers sought to consolidate responsibility for overseeing state lobbying regulations, which previously had been vested in the State Ethics Board, with responsibility for enforcing campaign finance laws, which had been under the purview of the State Elections Board. Under Act 1, the position of the executive director of the State Elections Board – along with the elections board itself – has been eliminated. Although reforming the administration of elections was not the main purpose behind Act 1, the new structure will have an impact – perhaps a substantial one – on election administration.

The newly created GAB is required to employ legal counsel, as well as separate chief administrators, for the newly created "Elections Division" and "Ethics and Accountability Division." These divisions take on responsibilities previously performed by the executive directors of the State Elections Board and State Ethics Board. The other employees of the former elections and ethics boards will, by statute, automatically be transferred to the two divisions of the new GAB.<sup>28</sup> The GAB was scheduled to begin its work on September 1, 2007, or the 31st day after the legal counsel and division administrators were chosen. The first members of the GAB were chosen in July 2007, and the board's first meeting took place on August 23, 2007.<sup>29</sup> The six members of the board are Judges Michael W. Brennan, Tom Cane, David G. Deininger, William Eich, James B. Mohr, and Gerald C. Nichol. The GAB is presently looking to hire its legal counsel and has postponed major organizational decisions until that has been accomplished.<sup>30</sup>

It is too early to evaluate the new state structure for overseeing election administration in Wisconsin. This structure appears to be novel, insofar as no other state unifies ethics and elections administration under the authority of a single board.<sup>31</sup> The manner in which GAB members are chosen may ultimately improve public confidence in elections. The utilization of former judges, who are selected by a supermajority of the state senate, provides reason to hope that they will discharge their responsibilities without regard to partisan effects. At the same time, the fact that the GAB is composed of an even number of members and must act by majority vote creates the risk of deadlock. In addition, there is a possibility that election administration will get lost in the shuffle, given the enhanced focus on ethics and campaign finance regulation that motivated the enactment of Act 1. Alternatively, with the GAB's elections division now responsible *only* for election administration (and not for campaign finance), its ability to focus on this area may improve. It is also possible that the GAB will play a more aggressive role in election administration, rather than delegating to staff as has mostly been done until now, something that could have either positive or negative consequences. What is clear is that there is a pressing need to monitor how effectively the GAB handles matters of election administration that are within its charge, particularly with the attention that is likely to fall on Wisconsin's system during the 2008 election cycle.

## **ELECTION DAY REGISTRATION**

It is common to refer to states as "laboratories of democracy." Wisconsin in particular has often been so labeled historically, due to its experiments with progressive reforms that began in the early twentieth century.<sup>32</sup> While the "laboratory" metaphor is a common one, it is all too rare for policymakers and observers to take a careful look at the distinctive features of a state's election system and assess how well they actually function. To the contrary, policy debates surrounding election administration often occur in a factual void, with much opinion but little evidence offered.

Wisconsin provides an ideal site for making good on the laboratory metaphor, by examining the evidence on how well the novel features of its system work. One of the most important aspects of Wisconsin's election system is Election Day Registration ("EDR"). Since 1976, state law has allowed eligible citizens to register to vote on the day of an election. Wisconsin is one of only nine states with EDR,<sup>33</sup> and its relatively long track record makes it an especially valuable state in which to consider how well it has worked.

In 2006, approximately 358,000 Wisconsin voters registered on Election Day, out of over 2.1 million people voting. Under state law, a citizen who is eligible to vote may appear at his or her polling place and register at that location. This procedure may also be used by voters who were previously registered elsewhere, either in or out of state, and moved without re-registering at their new address. In order to register on Election Day, voters must certify that they are qualified and have not voted elsewhere.<sup>34</sup> The voter must also provide acceptable proof of residence, such as a driver's license or other official ID card, university ID card, bank statement, utility bill, or paycheck.<sup>35</sup> A voter who cannot

provide documentary proof of residence may still register, if another voter in the same municipality corroborates (or “vouches” for) the address of the voter seeking to register.<sup>36</sup> Thus, a voter may make use of Wisconsin’s EDR process either by providing acceptable proof of residence or by having his or her residence corroborated by another voter.

Election officials with whom we spoke believed that EDR facilitates participation by eligible voters, and there is considerable empirical research to back up the claim that EDR does in fact increase turnout. Before instituting EDR in 1976, Wisconsin’s voter turnout was in the middle of the pack in comparison to other states. After the institution of EDR, Wisconsin moved to the front of the pack. This is consistent with the experience of Minnesota and Maine, the other two states that adopted EDR about the same time, both of which also subsequently saw a jump in their turnout. These three states sustained their high turnout rates in the years that followed, even as other states saw their turnout drop.<sup>37</sup> This trend continued in the 2006 elections, with the seven 38 EDR states averaging 48.7% turnout, compared with 38.2% in non-EDR states.<sup>39</sup>

Of course, this statistic alone would be insufficient to demonstrate a causal relationship between EDR and turnout; the high turnout might instead result from other factors, such as the political culture of states that have adopted EDR. When viewed in light of the substantial empirical research that has been done over the years, however, there can be little doubt that EDR has a significant positive effect on participation. This research shows that EDR has not only increased the size but also changed the composition of the electorate, making it more representative of the citizenry as a whole.<sup>40</sup>

One study found a significant reduction in the turnout gap among voters with different levels of educational attainment.<sup>41</sup> There is also evidence that EDR increases turnout rates for young voters and new state residents.<sup>42</sup> This is consistent with survey research showing that fewer voters perceive the registration process to be difficult in EDR states.<sup>43</sup> In addition to increasing turnout, EDR carries some benefits for election administrators. For one thing, EDR states are exempt from the National Voter Registration Act’s requirements that “fail-safe voting” be provided for those who move prior to an election.<sup>44</sup> Wisconsin election officials noted that other states’ election officials sometimes complain about the burden of complying with the NVRA’s requirements regarding registration list maintenance.<sup>45</sup> EDR also is useful for people who pre-registered only to have been erroneously left off the list or dropped by an administrative error.

Perhaps the most significant positive consequence of EDR is that it essentially eliminates the need for provisional ballots. States without EDR must use provisional ballots for voters who believe that they registered but whose names do not appear on the registration list when they arrive at the polls. But EDR eliminates the need for provisional ballots in these circumstances because voters may register at their polling place on Election Day, regardless of whether they previously registered. In general, the only circumstances in which a Wisconsin voter would cast a provisional ballot are: (1) if the voter registered by mail before an election without providing the documentation required by HAVA at the

time of registration, and also does not do so at the time of voting, or (2) if the voter has a driver's license but cannot provide the driver's license number when registering, as required by HAVA.<sup>46</sup>

Accordingly, provisional ballots are extremely uncommon in the State of Wisconsin.<sup>47</sup> The city clerk of Franklin, which has over 24,000 registered voters, stated that the city had only had three instances in which a provisional ballot could have been issued in 2006 and 2007. In each of those instances, the voters in question chose to go home and come back with appropriate documentation, rather than casting a provisional ballot. The clerk of the City of New London (approximately 3,700 registered voters) reported only having had one provisional ballot, while the Clerk of the Town of Dale (approximately 1,400 registered voters) reported having none. Even in the City of Milwaukee, the state's largest municipality, provisional ballots are exceedingly unusual. Only forty-one provisional ballots were issued in the November 2006 general election and, according to the Assistant Director of the Milwaukee Election Commission, approximately thirty of those were issued for improper reasons. EDR's detractors cite two main problems. The first is that it may complicate operations at polling places, by requiring poll workers to do something that is not required in non-EDR states. Although we are aware of no empirical research examining whether EDR worsens lines at the polls, it does seem reasonable that registering voters at the polls would consume some of the poll workers' time and attention and might necessitate additional staffing. On the other hand, this "cost" must be weighed against the benefit to poll workers – and thus to voters – of not having to deal with provisional ballots. The second argument is that EDR increases fraud. Wisconsin has been the site of headline-grabbing allegations of fraud and a vigorous campaign on the part of some legislators to require photo identification in order to vote.<sup>48</sup> This debate, as well as the substantial amount of evidence available in Wisconsin, makes the state an especially valuable one in which to investigate this claim.

## **FRAUD AND THE VOTER ID DEBATE**

Examination of Wisconsin's system also is especially useful given the fierce debate over voter fraud and the related debate over voter identification. The focal point for concerns about fraud has been the City of Milwaukee, in which there have been media reports of ineligible voting in recent election cycles.<sup>49</sup> As required by state law,<sup>50</sup> these matters have been referred to prosecutors, who have engaged in extensive investigations of voter fraud. Concerns about voter fraud have also led some Wisconsin legislators to propose that voters be required to show photo identification in order to have their votes counted.

At the outset, it is helpful to recognize two distinctions. The first distinction is between fraud and mistake. An example of fraud is someone knowingly attempting to vote twice, or a non-citizen intentionally attempting to cast a vote despite knowing that she is not eligible. An example of mistake is an ineligible felon voting in an election, without knowing that state law prohibits him or her from doing so. Under Wisconsin law, such a voter would not be guilty of fraud.<sup>51</sup> The second distinction is between fraud on the part of voters and fraud on the part of insiders such as election officials. An example of voter fraud is people double voting or pretending to be someone else they are not. Insider

fraud, by contrast, involves an election official (or someone else with special access) tampering with the voting process. Examples include stuffing ballot boxes or tampering with electronic voting machine's software to alter vote tallies.

There are few states in which allegations of voter fraud have received greater scrutiny than Wisconsin – and few municipalities in which they have received greater attention than the City of Milwaukee. In the course of preparing this report, we spoke to attorneys in the Milwaukee district attorney's office, as well as local and state election officials, in an effort to understand the allegations that EDR leads to increased voter fraud. On the whole, voting fraud is exceedingly rare. Although allegations of voting fraud have been widely publicized in the media, most all of these have evaporated upon closer investigation. We found a handful of documented instances of disenfranchised felons voting, but almost all of these appear to be people who did not know that they were prohibited from voting. Few documented cases of voter fraud exist, and, in the rare instances when it does occur, such fraud is of the "retail" (isolated incidents) rather than the "wholesale" (systemic) variety.<sup>52</sup> Almost all the documented incidents of ineligible voting, including both fraud and mistake, involve people who are ineligible due to felony convictions.

After allegations of fraud surfaced during the November 2004 election, a joint task force of the Milwaukee County District Attorney's Office, the Milwaukee Police Department, the U.S. Attorney's Office, and the Federal Bureau of Investigation began an inquiry.<sup>53</sup> The probe included allegations of double voting and of voting by felons who had not completed probation or parole.<sup>54</sup> After nearly a year of investigation, the task force found only a handful of isolated cases and no evidence of any broad conspiracy to engage in fraud. The U.S. Attorney's Office ultimately brought fourteen prosecutions for suspected violations in Milwaukee, twelve percent of all federal voting fraud cases brought in the country. The government won only five of those cases, failing to secure a conviction in every case where double voting was alleged.<sup>55</sup> The Milwaukee district attorney's office reports prosecuting two cases of felon voting arising from the 2004 election, obtaining convictions in both. This makes seven substantiated cases of ineligible people knowingly casting votes that counted, all of them felons.<sup>56</sup>

In 2005, the Republican Party of Wisconsin made additional allegations of voting fraud in connection with the 2004 election, but the U.S. Attorney's Office for the Eastern District of Wisconsin found "no evidence" of voting fraud by any of the individuals accused.<sup>57</sup>

Professor Lorraine Minnite of Columbia University conducted a study of fraud allegations in Wisconsin and other EDR states. Looking at the three federal election cycles between 1999 and 2005, Minnite documented only one instance of registration fraud, one incident of multiple voting, and one instance of absentee voting fraud in Wisconsin. There were no documented instances of voter impersonation in the state.<sup>58</sup>

Attorneys from the Milwaukee district attorney's office, including former D.A. Michael McCann, confirmed that they have not found evidence of organized voting fraud. Certain

types of election fraud, including voting more than once, are punishable as Class I felonies, while less severe infractions like electioneering are punishable as misdemeanors.<sup>59</sup> After the 2006 election, the State Elections Board requested that the Milwaukee D.A.'s office investigate twenty-eight "potential" cases of election fraud from that election.<sup>60</sup> On August 22, 2007, a Milwaukee jury found Michael Zore guilty of having voted twice, after officials caught him through the new statewide registration database,<sup>61</sup> and two other cases of alleged double voting in 2006 are pending.

State prosecutors in Milwaukee have documented no case of anyone going to the polls pretending to be someone else, and no prosecutions on these grounds appear to have been brought anywhere in the state in recent memory. There is no evidence from which to conclude that Wisconsin faces a widespread or concerted effort to commit voting fraud. As former Milwaukee D.A. McCann put it, when charges are brought against suspects in any kind of wrongdoing, the "coin of the realm" in the D.A.'s office is for them to provide incriminating information on others in an effort to reduce their own vulnerability. Were there an organized and systematic effort to commit voter fraud, he believes it would have come to light.<sup>62</sup> Election officials likewise expressed the view that it is very difficult to engage in voter fraud without getting caught.

There have been some incidents of unlawful voting – most commonly by ineligible ex-felons or those who have not yet attained citizenship – which do not constitute fraud, a crime that requires proof of intent. The *Milwaukee Journal-Sentinel* reported that 361 ineligible felons voted in the 2000 election. Even assuming that the *Journal-Sentinel*'s figure is correct, the likelihood of ineligible felons' votes affecting the result is small in a state where almost three million people turned out to vote in the 2004 general election. More serious are the Milwaukee Board of Elections' serious problems in recordkeeping, which account for most of the allegations of unlawful voting in Milwaukee in 2004.<sup>63</sup>

Wisconsin's experience is consistent with that of other EDR states. Professor Minnite's investigation of six EDR states over a six-year period found only ten cases of alleged voter fraud that "appeared to have some merit." Of these, only one was a case of voter impersonation at the polls, which was unrelated to that state's EDR law. Minnite also surveyed county prosecutors, who reported only a handful of documented cases of voter fraud. She concluded that "the collective evidence suggests that there has been very little vote fraud in EDR states over the past several election cycles." In fact, far from facilitating fraud, EDR may actually help discourage it by "bring[ing] the registration process into the polling place where it is conducted under the eyes and authority of election officials on one day, Election Day."<sup>64</sup> Whether or not one agrees that EDR deters fraud, there is little evidence – in Wisconsin or other EDR states – that the practice has increased it. Occurring against this backdrop of concerns over fraud is a vigorous debate over whether to require government-issued photo identification, such as a driver's license, in order to vote. Since 2003, Wisconsin's Republican-majority legislature has enacted three bills to require government-issued photo ID, all of which were vetoed by Democratic Governor Jim Doyle.<sup>65</sup> One election official described voter identification as something constantly hanging over debates regarding election administration in the state. As in other states, proponents of voter identification argue that it is necessary to curb

fraud, while opponents argue that it will disproportionately exclude certain groups of voters from participating. Wisconsin has more evidence than any other state on the types of potential voters who lack identification. A report prepared in 2001 for the Carter-Ford Commission estimated that, nationwide, 6-10% of eligible citizens do not have official state photo identification.<sup>66</sup>

In Wisconsin, much more precise data is available in the form of a study released in 2005 by John Pawasarat of the University of Wisconsin-Milwaukee. Pawasarat's study found stark differences in who has photo identification based on race, ethnicity, age, income, and geography. Statewide, over 80% of Wisconsin residents had a valid driver's license. By contrast, only 45% of African American males and 51% of African American females had a license. The results were even more dramatic for young adults. Pawasarat found that only 22% of African American men 18-24 had a valid license.<sup>67</sup> This study provides reasons for concern about the possible consequences of imposing a photo identification requirement on Wisconsin voters, particularly given the slender evidence that voter fraud is widespread and the fact that a stricter identification requirement would do nothing to stop disenfranchised felons from voting, by far the most frequent reason for ineligible votes being cast.

## **STATEWIDE VOTER REGISTRATION SYSTEM**

One of the most significant changes required by the Help America Vote Act ("HAVA") was that every state institute a statewide voter registration list.<sup>68</sup> Prior to that, local election officials had responsibility for maintaining voter lists in most of the states, including Wisconsin. HAVA's requirement arose from evidence of serious problems with the way that registration lists had been administered before 2002, the year of HAVA's enactment. An influential report prepared by the Caltech/MIT Voting Technology Project estimated that 1.5 to 3 million votes were lost due to registration problems in 2000,<sup>69</sup> probably more than the number of votes lost due to faulty voting equipment.

Congress believed that moving responsibility for registration lists from the local to the state level would improve their accuracy. In addition, Congress thought that the statewide registration list requirement would cut down on voting fraud, making it more difficult for people to register and vote in more than one place. Describing Congress' overriding objectives in passing the law, one of its principal co-sponsors, Representative Steny Hoyer, articulated it this way: to make it "easier to vote" but "harder to cheat."<sup>70</sup> Statewide voter registration lists, Congress thought, would simultaneously achieve both objectives. They would make it easier to vote by reducing registration glitches that had resulted in the failure to count many correctly cast votes. They would make it harder to cheat by increasing the likelihood that those engaged in voting fraud would be caught. In practice, the transition to statewide registration lists has been much more difficult than Congress anticipated. Wisconsin exemplifies these difficulties. After HAVA's enactment, the Wisconsin State Elections Board contracted with Accenture to create the software for its Statewide Voter Registration System ("SVRS"). The state allocated \$27.5 million of its federal funds for this transition. Accenture did not have experience in

creating a statewide voter registration database, but did engage in extensive discussions with state and local election officials aimed at developing a system that would meet both their needs and the requirements of HAVA. Accenture also secured contracts with the states of Kansas, Wyoming, Pennsylvania, and Colorado, but only Wisconsin ultimately retained Accenture's services.<sup>71</sup>

Wisconsin's transition to a statewide voter registration system has not gone smoothly. As one election official put it, the problems getting the system up and running properly have led to "profound frustration" on the part of many clerks.<sup>72</sup> Among the problems they have experienced are:

- Slowness of the system for officials trying to enter data, particularly in peak-use periods prior to elections.
- High costs to local government for workers required to enter data, partly due to the slowness of the system.
- Data entry errors, resulting in some newly registered voters not being placed on the list for the appropriate precinct.
- Inability of the system to generate lists of registered voters in a district ("walk lists," for candidates running for office).
- Difficulties in "mapping" specific addresses to particular electoral districts.
- The failure of the system to check against motor vehicle records, as required by HAVA.
- Ongoing delays in the system being able to check voting lists against state records of deaths and felons.
- Serious ongoing problems in the absentee voting module, which continues to function poorly and which some clerks find difficult to use.<sup>73</sup>

Some local elections officials attribute these problems to Accenture promising more than they could deliver. They "tried to build a Cadillac," as one election official put it, but ended up with something that does not yet satisfy the state's needs. To date, the state's system is still not fully compliant with HAVA.

Wisconsin's implementation of the SVRS was made more difficult because its elections are primarily administered at the municipal level, and because most of the state's municipalities did not even have voter registration prior to 2006. As noted above, under state law municipalities with fewer than 5,000 people were not required to have voter registration lists before then, and only 312 of the state's 1,851 municipalities (less than 17%) actually had registration lists before 2006.<sup>74</sup> While other states could combine existing local lists in order to meet HAVA's requirements, Wisconsin election officials

had to start from scratch in most municipalities. In Wisconsin, the sheer number of local governmental entities, along with the absence of pre-existing registration lists, made the transition especially challenging.

What added to these difficulties, some officials believe, was the fact that the transition to the SVRS was taking place at the same time as the transition to new voting technology. Making these dramatic changes in election administration overtaxed their already thin time and resources. Local election officials voiced mixed opinions as to whether the deadlines imposed by HAVA were realistic. Whatever the reason, the unresolved issues with the state registration database remain a persistent source of frustration. Despite the difficulties that the state has experienced, there is reason to hope that the SVRS will ultimately make Wisconsin's system function better than it has in the past. A fully functional SVRS would substantially diminish the likelihood of voting fraudulently without getting caught. In fact, the SVRS has already resulted in the detection and conviction of at least one double-voter.<sup>75</sup> While one conviction does not erase the serious difficulties that state and local election officials continue to experience, it does provide a ray of hope that Wisconsin's SVRS may ultimately achieve the goals that Congress envisioned.

## **POST-ELECTION DISPUTES**

It is widely accepted that the United States dodged a bullet in 2004, in that a very close presidential election did not result in the protracted post-election fight similar that had occurred four years earlier. Much of the attention focused on Ohio, where President Bush prevailed by some 119,000 votes, effectively sealing his re-election. Less commonly recognized is that, had Ohio gone for Senator Kerry instead, *Wisconsin* likely would have been the site of a lengthy and bitter post-election fight. In fact, Kerry's margin of victory in Wisconsin's 2004 general election was 11,384 votes or approximately 0.4%,<sup>76</sup> much smaller than Bush's 2.1% margin of victory in Ohio. If Kerry had taken Ohio, he still would have needed to carry Wisconsin to secure an Electoral College victory. It is therefore possible, even probable, that the Bush-Cheney campaign would have sought to challenge a Kerry victory in Wisconsin.

Considering how Wisconsin would have handled such a post-election dispute is a valuable thought experiment. Much, of course, would have hinged upon the basis upon which the losing candidate challenged the election. The five states discussed in this study each have their own ways of handling different types of election disputes, including those involving absentee ballots, voters who failed to sign in, or provisional ballots.<sup>77</sup> Regardless of the subject matter of the dispute, however, two significant problems would likely have arisen, had Wisconsin's presidential election been contested.

To be sure, these difficulties are not unique to Wisconsin. Nor are they unique to presidential elections, although, for reasons explained below, there are special reasons for concern in the event of a post-election presidential fight. The first concerns the institution(s) responsible for handling post-election disputes. As an initial matter, election inspectors (or poll workers) have responsibility for tallying votes at their

respective locations.<sup>78</sup> The county board of canvassers must then complete a canvass, and would be responsible for conducting a recount of a presidential election, should the appropriate petition be filed. In Wisconsin, each county board of canvassers consists of the county clerk – elected on a partisan basis – and two people appointed by the clerk to serve for two-year terms. Those appointed must be “qualified electors of the county,” and at least one must “belong to a political party other than the clerk’s.”<sup>80</sup> The practice has been for county clerks to appoint one Democrat and one Republican.

Wisconsin has substantial experience with conducting recounts over the years, most of which have been resolved amicably with minimal litigation. In fact, it is common for candidates not to hire lawyers for recounts in local elections. In the event of a contested presidential election, however, it is easy to imagine this process breaking down. This is particularly true given that each three-member board of canvassers can be expected to have either two Democrats or two Republicans, depending on the party of the county clerk. Even if everyone involved makes a sincere effort to act in a nonpartisan and neutral manner, representatives of one party’s candidate could be expected to charge unfairness in counties where the clerk – and therefore a majority of the board of canvassers – is of the other party. The consequence could thus be a replay of Florida’s messy 2000 recount, in which the public comes to doubt the neutrality of local officials conducting recounts, therefore undermining the integrity of the result.

The second conceivable problem concerns the timetable for resolving disputed presidential elections. Under federal law, states must choose their presidential electors on the first Tuesday after the first Monday in November – Election Day.<sup>81</sup> All states now select their electors through statewide elections on this date, which in 2004 fell on November 2. Federal law further requires the electors chosen on this date to “meet and give their votes [for president and vice president] on the first Monday after the second Wednesday in December”<sup>82</sup> – that is, 41 days after the presidential election. This is the date on which the electors meet in each of the states, which in 2004 fell on December 13. Congress then convenes to open the votes cast by the electors and formally determines the president and vice president. In the 2004 election, the date for Congress’ convening was January 6, 2005.<sup>83</sup>

What happens in the event of a disputed election within a state? Federal law does not dictate how such disputes are resolved. Instead, it is up to the states to determine the procedures for resolving disputes over who won their presidential election. Federal law does, however, provide a so-called “safe harbor” date, six days before the electors meet in their states. In 2004, the “safe harbor” date was December 7. The relevant statute provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting

of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.<sup>84</sup>

What this means is that a state must reach a final determination of post-election disputes by the “safe harbor” date in order to be sure that this determination will be “conclusive” when its electoral votes are counted in Congress. Put negatively, a state that *fails* to reach a conclusive determination by the safe harbor date cannot be assured that the votes cast by its citizens will count. It would instead be up to the House of Representatives to decide who won that state’s electoral votes.

A close look at Wisconsin’s election law leads to some doubt that the state could have reached a conclusive determination by the safe harbor date of December 7 – or even by December 13, the date of the Electoral College meeting – had the result been challenged in 2004. Under Wisconsin law, a recount petition may not be filed before the “time of completion of the canvass.”<sup>85</sup> This date would fall in mid-November, two weeks after the election.<sup>86</sup> The recount would not begin until 9:00 a.m. on the morning after the last day for filing a recount petition and has to be completed within thirteen days after the recount is ordered. That means that a recount would probably extend through early December, before any judicial review can take place.<sup>87</sup>

No matter how quickly a recount is conducted, it would be difficult for there to be a final judicial resolution of any remaining disputes by the safe harbor date of December 7, 2004. Under Wisconsin law, the process for seeking review of a recount decision is to file an appeal in the appropriate circuit court, Wisconsin’s trial court, within five business days.<sup>88</sup> Once the circuit court decides the matter, a dissatisfied litigant has thirty days to file an appeal with the appropriate court of appeals<sup>89</sup> – and after that, to seek review in the Wisconsin Supreme Court. By that time, of course, the safe harbor date, the date for electors’ meeting, and probably even the counting of votes in the U.S. House would have long since passed. Wisconsin is certainly not the only state in which we can imagine such a scenario.<sup>90</sup> It does, however, present an especially troubling example, given that boards of canvassers effectively function as the court of first resort. As a matter of state law, it would appear to be impossible for a dissatisfied litigant – specifically, a presidential candidate – to secure adequate judicial review of an election dispute prior to the safe harbor date. That is true whether the dispute involves allegations of absentee ballots mistakenly not counted, ineligible felons’ votes being counted, faulty software on electronic voting machines, or ballot stuffing in a jurisdiction using paper ballots. While previous recounts in Wisconsin have proceeded without incident, it is not difficult to imagine a contested presidential election in the state getting thrown to Congress.

This possibility should not lead to panic, but instead to serious attention to the question of how the system for resolving post-election disputes can be adjusted so as to avoid a meltdown in 2008, or some future election. As we suggest in Chapter 9, it would be helpful for Congress to intervene by pushing back the safe harbor date. While the problem is particularly acute for presidential elections, given the safe harbor and Electoral College dates prescribed by federal law, the state’s scheme for resolving post-

election disputes could lead to problems in other elections as well. It is quite conceivable, for example, that fighting over a close gubernatorial contest could extend past the prescribed inauguration date. The fact that these problems have not yet occurred does not mean that they could not happen.

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18. WIS. STAT. ANN. § 9.01.
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20. Dane County Clerk Bob Ohlsen formerly served as Clerk for the Village of Waunakee.
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22. WIS. STAT. ANN. § 5.61.
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24. WIS. STAT. ANN. § 5.05(4) (2006).
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72. Annysa Johnson & Patrick Marley, *State's Voting System Faulted: Election Officials Say New Database Not Trustworthy*, MILWAUKEE JOURNAL-SENTINEL, Mar. 5, 2007 (quoting Neil Albrecht, Assistant Director, Milwaukee Election Commission).
73. For a discussion of these problems, see Letter from Susan Edman, Executive Director, Milwaukee Election Commission, to Barbara Hansen, Project Director, Statewide Voter Registration System, State of Wisconsin Elections Board, May 31, 2007 ("Edman Letter").
74. Electionline.org, *Holding Form: Voter Registration 2006* (July 2006), available at <http://www.electionline.org/Portals/1/Publications/ERIPBrief13.final.pdf>.
75. See *College Student Accused of Voting Twice in Primary*, A.P., Aug. 11, 2004; *Plea Deal Ends in Probation for Voting in Appleton*, Eau Claire, A.P., Jan. 10, 2005.
76. See Wisconsin State Elections Board, *Canvass Summary, Fall General Election, President & Vice President*, Nov. 2, 2004, available at <http://165.189.88.185/docview.asp?docid=1416&locid=47>.
77. Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L.&POL'Y REV. 350 (2007).
78. WIS. STAT. ANN. § 7.51.
79. WIS. STAT. ANN. § 9.01; *Wisconsin State Elections Board, Election Recount Procedures* (Nov. 2006). As noted above, a municipal board of canvassers has responsibility for canvassing an election taking place within its jurisdiction, while a county board of canvassers would have responsibility over federal, state, or county elections. There are no automatic recounts in Wisconsin; however, if the appropriate petition is filed by any elector (if a referendum) or candidate (if election for office) and the difference between the leading candidate and the next vote earner is less than 0.5% the recount shall be done at no cost. WIS. STAT. ANN. § 9.01(1)(ag). A flat fee of \$5 per ward is assessed for recounts with a vote difference of 0.5% to 2%. WIS. STAT. ANN. § 9.01(1)(1m). If the difference is over 2% the party requesting the recount shall pay the actual costs of conducting it. WIS. STAT. ANN. § 9.01(1)(2).
80. WIS. STAT. ANN. § 7.60(2).
81. 3U.S.C. § 1.
82. 3U.S.C. § 7.
83. The description of the process that appears in this paragraph and the one that follows draws heavily on Peter M. Shane, *Meshing State and Federal Presidential Election Law: The Need for Reform*, Nov. 30, 2004, <http://moritzlaw.osu.edu/electionlaw/analysis/2004/041130.php>.

84. 3U.S.C. § 5.

85. WIS. STAT. ANN. § 9.01(1).

86. See WIS. STAT. ANN. § 7.60(5)(a)(county clerks to certify no later than 14 days after general election); see also 2007-08 Wisconsin Election Calendar, available at <http://elections.state.wi.us/docview.asp?docid=11170&locid=47>.

87. Election Recount Procedures, *supra* note 79, at 7,15.

88. WIS. STAT. ANN. § 9.01(6)(a).

89. WIS. STAT. ANN. § 9.01(9).

90. See Peter M. Shane, *supra* note 83; Steven F. Huefner, *Reforming the Timetable for the Electoral College Process*, ELECTIONLAW@MORITZWEEKLY COMMENT, Nov. 30, 2004, <http://moritzlaw.osu.edu/electionlaw/comments/2004/041130.php>.

## **Wisconsin: NINE AREAS**

### **INSTITUTIONAL ARRANGEMENTS**

Primary authority for running Wisconsin elections lies in the state's 1,851 cities, villages, and townships. Municipal clerks, who may be elected or appointed, serve as the chief election official in most jurisdictions. Wis. Stat. Ann. § 7.15. They are also responsible for convening boards of canvassers, which have authority over municipal recounts. Wis. Stat. Ann. § 9.01(1)(ar). Counties with populations over 500,000 must also have a board of election commissioners, consisting of three members. Wis. Stat. Ann. § 7.20. County clerks have more limited election responsibilities, but are responsible for providing ballots and other supplies, and for convening county canvassing boards, which have authority over recounts for federal, state, and local elections that cross municipal lines. Wis. Stat. Ann. §§ 7.10, 9.01. At the state level, the Wisconsin legislature recently overhauled the structure of election administration to create a Government Accountability Board ("GAB"), which took over responsibilities formerly performed by the State Elections Board ("SEB") effective September 1, 2007. 2007 Wisconsin Act 1 ("Act 1"). The GAB consists of six former judges, each of whom was approved by a two-thirds supermajority of the state senate. The GAB is authorized by statute to employ an elections division administrator, who will execute the election administration functions formerly executed by the executive director of the state board of elections.

### **VOTER REGISTRATION/STATEWIDE DATABASE**

Since 1976, Wisconsin law has allowed Election Day Registration ("EDR"). Wis. Stat. Ann § 6.55. Eligible voters may register at the polls on Election Day, so long as either 1) they provide documentary proof of residence, such as a current and valid driver's license, utility bill, or bank statement, or 2) an eligible elector from the same municipality

corroborates the registrant's address. Wisc Code Ann. §§ 6.34(3), 6.55. Eligible voters may also register by mail twenty days or more before the election, Wisc. Stat. Ann § 6.30, or in person at a municipal clerk's office until 5:00 p.m. (or the close of business) on the day before the election, Wis. Stat. Ann § 6.29(2). Proof of residence is required for those who register after the third Wednesday before an election. Wisconsin contracted with Accenture to create the software for its Statewide Voter Registration System ("SVRS"), and the state has had well-publicized problems in getting the system up and running properly. As described more thoroughly in the accompanying text, the statewide registration database still suffers from serious problems, including slowness, data entry errors, problems generating lists, poor functioning of the absentee voting module, and inability to cross-check against felon, death, and motor vehicle records.

## **CHALLENGES TO VOTER ELIGIBILITY**

A Wisconsin voter's eligibility may be challenged in two ways: 1) during the registration process, and 2) at the polling place when voting. The burden of proof is on the challenger to disqualify an elector and ineligibility must be shown beyond a reasonable doubt. Wis. Stat. Ann. § 6.325. For a registration challenge, the challenger must submit a complaint-like affidavit. Both the challenger and the challenged voter then are asked to appear before the municipal clerk, who makes a ruling following a hearing. In jurisdictions with over 500,000 people (currently only Milwaukee), challenges to a registered voter must be made by the last Wednesday before the election. Wis. Stat. Ann. § 6.48. Polling place challenges may be made by an election inspector (poll worker) or by another voter. Wis. Stat. Ann. §§ 6.92, 6.93. Challenges may be made on the basis of age, citizenship, residency, or disqualification from voting. Election Day Manual at 48 (April 2006). Citizens disqualified from voting include those who are "unable to understand the objective of the election process" and felons who have not finished their sentences, including probation and parole. Wis. Stat. Ann. 6.03.

## **PROVISIONAL VOTING**

Provisional ballots are rare in Wisconsin because of EDR. They are used under two circumstances:

1) if the voter registered by mail before an election and did not provide the documentation required by HAVA at the time of registration and also does not do so at the time of voting, or 2) if the voter has a driver's license but cannot provide the driver's license number when registering, as required by HAVA. Wisconsin State Elections Board, FAQs, [http://elections.state.wi.us/faq\\_detail.asp?faqid=259&locid=47](http://elections.state.wi.us/faq_detail.asp?faqid=259&locid=47) (last visited Sep. 8, 2007). Voters who lack the required documentation or driver's license number may vote a provisional ballot, which will be counted if they provide the missing information by 4:00 p.m. on the day after the election. Wis. Admin. Code. [EIBd] 3.04.

## **EARLY AND ABSENTEE VOTING**

Wisconsin allows people to vote absentee if they are unable or unwilling to appear at the polls for any reason. Wis. Stat. Ann. § 6.20. Although the state legislature has defined absentee voting as a “privilege” that “must be carefully regulated to prevent fraud or abuse,” Wis. Stat. Ann. § 6.84(1), the state effectively has a “no-reason” absentee voting system. Absentee ballots may be obtained through applications filed by mail, fax, email, in person, or through an agent for voters who are hospitalized. Wis. Stat. Ann. § 6.86(1). Accompanying the absentee ballot sent to each voter is an envelope with postage prepaid. Wis. Stat. Ann. § 6.87(3)(a). The voter must cast his or her absentee ballot in the presence of a witness, who must sign to verify that the elector was really the one casting the ballot. Wis. Stat. Ann. § 6.87(4). People who are disabled or non-English proficient may vote their absentee ballots with assistance from a third party. Wis. Stat. Ann. § 6.87(5). Absentee ballots are available 21 days before an election (30 days before fall elections) and may be returned by mail or in person. Voters may request and mark an absentee ballot at their municipal clerk’s office until 5:00 p.m. the day before the election.

## **VOTING TECHNOLOGY**

Decisions about what voting technology to use are made at the municipal level, and Wisconsin uses a mix of optical-scan and direct record electronic (“DRE”) voting equipment. The state received money under Title I of HAVA, and was therefore required to eliminate the punch card systems formerly used in some municipalities, and the state enacted legislation specifically prohibiting the use of punch cards. Wis. Stat. Ann. § 5.91(14). All voting equipment used in Wisconsin must allow for straight-party ticket voting. Wis. Stat. Ann. § 5.91(2). Electronic voting machines must generate a voter verifiable paper record that may be used in a manual recount. Wis. Stat. Ann. § 5.91(18). Vendors of electronic voting machines must also place software components in escrow, which are to be made available in the event of a valid recount petition in a jurisdiction that uses electronic voting equipment, subject to confidentiality requirements. Wis. Stat. Ann. § 5.905(4). Wisconsin allocated \$18 million in HAVA funds to accommodate people with disabilities. The accessible equipment used by Wisconsin’s municipalities includes: 1) DRE systems with attached printers, 2) hybrid systems, which have a DRE-like interface that generates a paper ballot that may be read by an optical scan system, and 3) the Vote-PAD (“Voting on-Paper Assistive Device”), a paper ballot with tactile indications for voters with visual impairments.

## **POLLING PLACE OPERATIONS**

Wisconsin polling places are open from 7:00 a.m. until 8:00 p.m. and voters are entitled to three hours off in order to vote. Wis. Stat. Ann. § 6.78. Wisconsin law refers to poll workers as “election inspectors.” Each polling place using paper ballots must have seven election inspectors, and each polling place using electronic voting machines must have five. Wis. Stat. Ann. § 7.30. Inspectors are supposed to be identified by the parties and, when a vacancy occurs, it is supposed to be filled from lists submitted by the parties. Wis. Stat. Ann. § 7.30(2)(b). The majority party (the one that received the most votes in the last presidential or gubernatorial general election in the wards served by the polling

place) is entitled to one more inspector than the minority party. Wis. Stat. § 7.30(2)(a). In practice, the parties do not commonly submit lists of names, leaving it to municipal clerks to find poll workers. Although Wisconsin missed the Help America Vote Act's ("HAVA's") January 1, 2006 deadline for having an accessible voting machine in every polling place, ninety-five percent of polling places were reported accessible as of May 1, 2006. Wisconsin State Elections Board, Polling Place Accessibility Survey, <http://elections.state.wi.us/docview.asp?docid=3081&locid=47> (last visited Sep. 8, 2007). The State Board of Elections requested a compliance plan from the remaining jurisdictions to ensure accessibility by September 1, 2006.

## **BALLOT SECURITY**

Election fraud, bribery, and threatening an elector are felonies under Wisconsin law, punishable by up to 3.5 years in prison and a \$10,000 fine. Wis. Stat. Ann. §§ 12.09, 12.11, 12.12. As described in the accompanying text, state and federal prosecutors in Wisconsin have been vigorous in investigating and prosecuting voting fraud. The newly created Government Accountability Board ("GAB") will consolidate procedures for investigating and prosecuting election law violations. Its legal counsel or a prosecutor is empowered to prosecute civil violations of law, or to refer criminal matters to the appropriate district attorney. Wis. Stat. Ann. §§ 5.05(2m)(c)(4) & (11). The law establishing the GAB also creates a penalty of \$10,000 and up to nine months imprisonment for board members, investigators, prosecutors, or employees who leak information about an investigation. Wis. Stat. Ann. § 12.13(5). Although voting fraud is rare, there have been instances of bogus registration forms being submitted, mainly by third-party registration collectors being paid per returned form. Under a recently enacted law (Act 451), municipal clerks are required to forward to the GAB the names of all registration collectors, referred to as Special Registration Deputies ("SRDs"). SRDs may no longer be paid on a "rate that varies relative to the number of registrations obtained," and they must include their name on all registrations. Wis. Stat. Ann. §§ 6.26(4), 12.13(3)(ze). Violations are punishable by fines of \$1,000 and up to six months in jail. SRDs are also required to attend training once every two years. Wis. Stat. An. § 7.315(1)(b).

## **POST-ELECTION PROCESSES**

Election inspectors have the first responsibility for tallying votes cast at each polling place. Wis. Stat. Ann. § 7.51(2). Ballots and electronic voting equipment are then sent to the municipal clerk's office under seal. Wis. Stat. Ann. § 7.51(3)(a). The municipal board of canvassers is responsible for canvassing returns from elections taking place within a municipality. Wis. Stat. Ann. § 7.53. For federal, state, and county elections, the canvass is performed by the county board of canvassers. Wis. Stat. Ann. § 7.60. Following the county canvass, the clerk is required to certify the results of county-level elections and send ballots to the state level to be examined by the state board of elections (now the GAB). Wis. Stat. Ann. § 7.60. After the results are ascertained, the chair is to release the total votes for federal and state elections, certify a winner, and transmit results to the governor. Wis. Stat. Ann. § 7.70(3)(d) & (5)(a)-(b). A recount may be requested

by any candidate or, for referenda, by anyone voting for or against the measure in question. Wis. Stat. Ann. § 9.01(1). A recount is initiated through the filing of a recount petition, stating the reasons why a recount is believed necessary. Wis. Stat. Ann. § 9.01(1). Fees are required, depending on the margin of victory. Wis. Stat. Ann. § 9.01(1)(ag). The recount process is open to the public and to be performed by the same canvassers who completed the initial count. Wis. Stat. Ann. § 9.01(3) In effect, the board of canvassers functions as the court of first resort. The results of a recount may then be appealed to circuit court, with further appellate review available after that. Wis. Stat. Ann. § 9.01(6) & (9).

## GENERAL OBSERVATIONS AND RECOMMENDATIONS

Our examination of Ohio, Illinois, Michigan, Wisconsin, and Minnesota yields valuable insights for election administration across the United States. The specific background and traditions of each state substantially influence its election ecosystem. Nevertheless, we think it possible to draw some general lessons, which are set forth in Part III (Chapters 8 through 10). Our key observations and recommendations include:

- *Statewide equality should generally trump local autonomy.* It is critical for states to accord equal treatment to all their citizens, especially with respect to the casting and counting of ballots. Therefore, although each state ought to do more to foster local experimentation, this should occur only within a framework that guarantees the essential equality of the right to vote.
- *A strong state elections authority is critical.* The health of a state's election ecosystem depends on having an effective state elections authority, which can promote statewide consistency, avoid any appearance of bias, and provide helpful guidance to local election officials. State legislatures must give their election officials the tools to enforce consistency in the application of state law across counties and municipalities.
- *States should work to improve both access and accuracy by relaxing barriers to registration and complying with existing federal laws governing registration.* One way of doing this is Election Day Registration ("EDR"), a reform that has achieved great success in increasing participation in Minnesota, Wisconsin, and the other states in which it has been implemented. EDR also has the side-benefit of virtually eliminating the need for provisional ballots, although for a state fearful of EDR, an alternative would be "provisional EDR," in which new registrants at polling places would cast provisional ballots that would count upon verification of their registration information.
- *States should provide clear guidance on provisional ballots.* States that rely on provisional ballots must set clear rules for both who should receive a provisional ballot and the circumstances under which provisional ballots will be counted. It is also critical that the process for verifying and counting provisional ballots be transparent.

- *States should consider in-person early voting instead of expanded absentee voting.* In-person early voting promotes convenience, without the same risks of fraud and error that exist with liberalizing absentee voting by mail.
- *Election integrity efforts should focus on “insider” fraud.* Problems of election fraud today almost always involve absentee voting or insider corruption. States should avoid instituting practices that might constitute barriers to voter participation in the name of preventing fraud and focus on refining the checks against insider fraud.
- *State and local officials must continue to enhance poll worker recruitment and training.* Among the greatest challenges facing our democratic system is the difficulty in staffing polling places with an adequate number of sufficiently trained workers. Larger, economically depressed urban areas are especially likely to have problems. Local entities should be encouraged – and funded – to experiment with new ways of attracting and preparing poll workers.
- *States should reexamine their post-election procedures, to ensure the evenhanded and prompt resolution of disputes.* It is of the utmost importance that vote counting and recounting be conducted in an evenhanded manner, either by nonpartisan officials or bipartisan teams. None of these five states has in place a final arbiter of a post-election dispute with the institutional credibility that both sides would perceive as fair. In that sense, all of these states – and probably most states in the country – have failed adequately to prepare for the next election.
- *Congress should revisit the statute governing presidential election disputes.* The timetable for resolving presidential elections needs to be revised to give states more time to resolve post-election disputes before the “safe harbor” date under federal law (now thirty-five days after the election).

