



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 8

TO: MEMBERS OF THE SPECIAL COMMITTEE ON ELECTION LAW REVIEW

FROM: Robert J. Conlin, Senior Staff Attorney, and Nicholas Zavos, Staff Attorney

RE: Recount Draw Down Procedures

DATE: February 23, 2005

At the December 15, 2004, meeting of the Special Committee, members asked staff to prepare a memorandum discussing the current statutory “draw down” procedure applicable to the recount process and any constitutional implications of such a procedure. This Memo addresses that issue.

Background

The Special Committee’s primary concern centered on provisions of s. 9.01 (1) (b), Stats., which require that the board of canvassers in a recount inspect the absentee ballot envelopes, identify any defective envelopes*, reduce the number of voters by the number of defective envelopes, and randomly draw from the absentee ballots voted a number equal to the number of defective ballot envelopes identified. Ultimately, the goal of this procedure is to make sure that the number of ballots does not exceed the number of voters as established by the poll list.

Specifically, the statute requires the following procedure at a recount:

- First, the poll lists must be compared to determine the number of voters.
- Then, the absentee ballot envelopes are examined for defective ones. Defective ballots are removed and the number of voters is reduced by the number of defective absentee ballot envelopes set aside.
- Next, the ballot container or bag containing the ballots is examined to make sure it has not been tampered with.

* An envelope is considered defective under this procedure only if it is not witnessed, if it is not signed by the voter, or if the certificate accompanying an absentee ballot that the voter received by fax or e-mail is missing.

- Then, the container or bag is opened and the contents removed. The ballots are counted.
- For each defective absentee ballot envelope laid aside under the above procedure, an absentee ballot is randomly withdrawn from the container or bag. (It is presumed that a ballot initialed only by the municipal clerk or deputy is an absentee ballot.)
- If there are more defective envelopes than there are probably absentee ballots, all of the probable absentee ballots are removed.
- If the number of ballots still exceeds the number of voters, all the ballots are turned face up to check for blank ballots. The blank ballots are then removed.
- If there are still too many ballots, all the remaining ballots are turned face down so that the initials may be checked. Any ballots missing the necessary signatures are then identified and a number of them, equal to the number of excess ballots, are randomly withdrawn.
- Finally, if the number of ballots still exceeds the number of voters, the remaining ballots are returned to the container or bag and a number of ballots equal to the excess are randomly drawn from the container or bag.
- Once the number of voters and the number of ballots agree, the ballots are counted as part of the recount.

The above-described recount process is similar in nature to a procedure at the local canvassing stage that also attempts to reconcile the number of voted ballots with the number of voters. Under that procedure, outlined in s. 7.51 (2), Stats., if the local board of canvassers determines that there are more ballots than voters based upon the poll list, the board must go through a number of steps including removing blank ballots and removing ballots missing the initials of the proper election officials. After taking these preliminary steps, if the number of ballots still exceeds the number of voters shown as voting on the poll lists, the canvassers must randomly draw from the remaining ballots until the number of voters as shown on the poll list corresponds with the number of ballots in the ballot box.

Committee members raised concern with the “draw down” procedure at the recount as being arbitrary and potentially resulting in an otherwise valid ballot being set aside. Committee members inquired as to whether such a procedure would violate an eligible voter’s right to vote.

Discussion

Generally speaking, a legislative enactment carries with it a presumption of constitutionality and the one challenging the constitutionality of a statute bears the burden of showing that the statute is unconstitutional beyond a reasonable doubt. A court will strive to construe a statute in such a way as to preserve it from constitutional infirmity, if possible. [See e.g., *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).]

Article III, Section 1 of the Wisconsin Constitution provides that every U.S. citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district. Article III further authorizes the Legislature to enact laws providing for absentee voting. [Art. III, s. 2 (3), Wis. Const.] However, Art. III, s. 3 guarantees each voter the right to cast a secret ballot.

The Legislature has clearly enacted absentee voting laws. Subchapter IV of ch. 6, Stats., is the Legislature's primary enactment with respect to absentee ballots. In that enactment, the Legislature has determined that voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. That privilege, the Legislature has found, must be carefully regulated to, among other things, prevent the potential for fraud or abuse. [See s. 6.84 (1), Stats.]

In general terms, the election statutes are to be construed to give effect to the will of the electors, notwithstanding informality or failure to fully comply with some of the requirements of those statutes. [s. 5.01 (1), Stats.] However, absentee ballots are often held to a higher standard. Section 6.84 (2), Stats., provides that with respect to the absentee ballot process, certain provisions are to be strictly construed. Specifically, this statute provides that the statutes relating to obtaining an absentee ballot; many of the provisions regarding voting an absentee ballot, including having the certification witnessed and signed by the elector; and the draw down procedures of the recount process, which are described above, must be considered mandatory and ballots cast in contravention of those statutes are not to be counted. [s. 6.84 (2), Stats.]

Thus, if an absentee ballot with a defective envelope has been included in the ballot box and that fact is discovered during the recount process, it is clear that the ballot is not to be counted. From a legal standpoint, this conclusion certainly seems to be consistent with the Legislature's constitutional power to create special laws governing absentee ballots. The Wisconsin Supreme Court has noted on a number of occasions that while citizens have a right to cast a ballot, the Legislature retains the constitutional power to say how, when, and where those votes are to be cast. [See, e.g., *Gradinjan v. Boho*, 29 Wis. 2d 674, 139 N.W.2d 557 (1966), in which the court concluded that the Legislature could, upon reasonable grounds, require that absentee ballots be authenticated by the municipal clerk and that a ballot without such authentication could not be counted in calculating the results of an election because the Legislature could determine that fraud and violation of the sanctity of the ballot could much more readily be perpetrated by use of an absentee ballot than under the safeguards provided at a regular polling place.] However, from a policy standpoint, the question of whether this is a fair procedure would appear to be highlighted by the difficulty in determining which ballot was from the defective ballot envelope. Because nothing currently links a ballot envelope with the ballot that was contained in it once the ballot has been removed and placed in the ballot box, the recount canvassers will simply not know which ballot was cast in a defective envelope.

This process is arguably justifiable on legal and policy grounds when applied to absentee ballots. Given the Legislature's constitutional power to authorize special absentee voting provisions, and given the Legislature's finding that absentee voting is a privilege potentially subject to greater opportunities for fraud or undue influence, one can argue that the absentee ballot draw down process is reasonably and rationally focused on preventing fraud or the appearance of fraud. The procedure is premised on improperly cast absentee ballots being included in the ballot box and, as absentee ballots are readily identifiable because of the election official initials placed upon the ballot, randomly selecting from such ballots might be said to be adequately tailored to eliminate offending ballots. When persons exercise the privilege of casting an absentee ballot, they do so under a law that applies strict guidelines to how those ballots are to be cast and treated during a recount. Those procedures are clear and applicable to all those casting an absentee ballot. Whether a more fair mechanism is available to get at absentee ballots mistakenly allowed into the ballot box may be worthy of further discussion.

When the draw down process is applied to regularly voted ballots, as opposed to absentee ballots, the legal analysis may change. Because under the recount process, ballots may eventually be randomly drawn from all ballots, assuming eliminating blank ballots and those without the appropriate initials does not bring the count of ballots and voters into alignment, a possibility exists that a properly voted regular ballot will be eliminated in an effort to make the number of voters on the poll list and the number of voted ballots agree.

Given that a number of reasons may exist for the number of regularly voted ballots to exceed the number of names on the poll list, such as failure to mark the poll lists, a mistake in counting, or fraud, simply eliminating excess regular ballots may improperly deny the franchise to voters who cast a legal ballot. In *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941), the Wisconsin Supreme Court concluded that when a court used a statutory procedure applicable to the local canvass to draw down excess ballots after a recount without a finding of illegality or fault on the part of the person who voted it, such action effectively disenfranchised the affected elector. While the court noted that the board of canvassers was in a better position to review the poll lists and correct any inaccuracies than the circuit court was in, it nonetheless seemed to indicate that before such a vote could be excluded some evidence should have been adduced to support an inference of invalidity. The court noted that fraud should not be presumed. The court further posited that it was more likely that the election clerks made a mistake in checking someone who voted rather than an illegal or invalid vote being cast. The court stated that to reject the “excess” ballot without proof of illegality or fault on the part of the person who voted it would disenfranchise the voter.

Thus, the draw down procedure as applied to regular ballots may be more legally suspect than when the procedure is applied to absentee ballots. When the draw down is applied to regular ballots, the reasoning of *Ollmann* would seem to be applicable and the removal of a non-absentee ballot might be said to improperly affect a person’s right to vote without some showing of fraud or wrongdoing. It is possible that the poll list was improperly maintained and that eligible electors cast legal ballots but were not marked on the poll list or the mark was placed next to the name of a different elector. Although this would likely lead to the observation that more ballots were cast than there were voting electors, the truth may be otherwise. Nothing in the statutes specifically invalidates a ballot legally cast but for which the elector was not marked off on the poll list. Although *Ollmann* was not directly on point, a court may take the position of the *Ollmann* court and, in an attempt to save the statute from constitutional invalidity, narrow its application with respect to regular ballots and authorize the random draw down of such ballots only upon a showing of fraud or wrongdoing.

In any event, when at a recount it appears that there are more ballots than there were eligible voters, election law must still address the matter. Is it reasonable to presume, which current law seems to do, that “excess” ballots are the product of inappropriately cast ballots? If so, will any remedial process at the recount stage set the matter right and allow voters to have confidence that the improperly voted ballots were eliminated? In the alternative, is it reasonable to assume that “excess” ballots at the recount stage are merely the product of election officials’ failure to adequately follow the prescribed procedures, especially as the canvassing procedure on election night is supposed to reconcile the poll lists and eliminate excess ballots and poll workers during the election are supposed to keep accurate poll lists? Ultimately, the Special Committee may want to discuss these matters.