

## 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 Election Day.<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 uni-

formity 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 – one might even say 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.<sup>8</sup> Munic-

ipal 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.<sup>16</sup>

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>

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>

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.

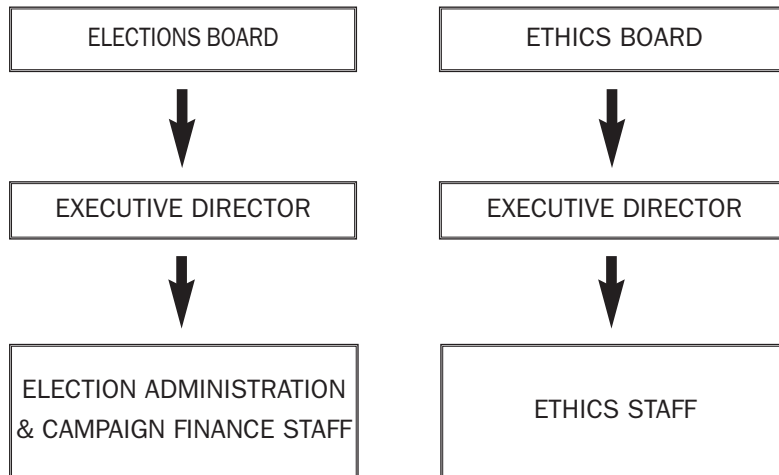
In 2007, the Wisconsin legislature enacted a law that significantly restructured the administration of elections at the state level. Under 2007 Wisconsin Act 1 ("Act 1"), responsibility over election administration is now vested in a six-person Government Accountability Board ("GAB").<sup>25</sup> This 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, reform-

# ORGANIZATIONAL CHARTS OF THE OLD AND NEW STRUCTURES OF WISCONSIN'S ELECTION SYSTEM

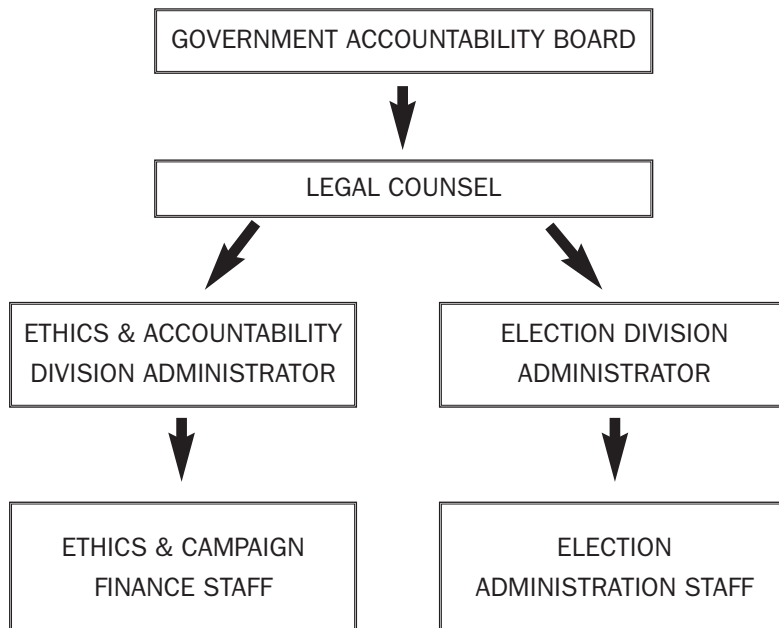
## CHART 1

Administrative Structure before 9/1/2007



## CHART 2

Administrative Structure after 9/1/2007



ers 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<sup>38</sup> 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 noncitizen 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 func-

tional 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 non-partisan 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.

## REFERENCES

1. Wisconsin Historical Society, *Lies, Bribes and Capitol Stationary*, 1856, Wisconsin State Journal, available at [www.madison.com](http://www.madison.com). For more on the Bashford-Barstow election, see Richard N. Current, THE HISTORY OF WISCONSIN, VOLUME II: THE CIVIL WAR ERA, 1848-1873, at 226-30 (1976). For discussion of the LaFollette era of progressive politics in Wisconsin, see Robert C. Nesbit, WISCONSIN: A HISTORY 399-434 (2d ed. 1989).
2. James K Conant, WISCONSIN POLITICS AND GOVERNMENT: AMERICA'S LABORATORY OF DEMOCRACY 160-61 (2006); Robert C. Nesbit, *supra* note 1, at 399-434.
3. In 2006 there were 2,161,700 votes cast for governor of 3,448,767 registered voters (62.7%). See Wisconsin State Elections Board, 2006 Election Cycle, available at <http://elections.state.wi.us/subcategory.asp?linksubcatid=592&linkcatid=631&linkid=155&locid=47> (last visited Oct. 8, 2007).
4. WIS. STAT. ANN. § 6.55(2)(a).
5. WIS. STAT. ANN. § 15.61 (creating Wisconsin State Elections Board); WIS. STAT. ANN. § 5.05 (2006) (defining the duties of the Board). In 2007, as discussed more fully below, the Wisconsin Legislature passed Act 451 which granted the powers previously held by the State Elections Board to a Government Accountability Board. See WIS. STAT. ANN. § 5.05 (2007).
6. Wisconsin State Elections Board, 2006 Fall Election Cycle, Voter Turnout and Registration, <http://elections.state.wi.us/docview.asp?docid=11077&locid=47> (last visited Sep. 24, 2007). This figure includes all early registrations, late registrations, and Election Day registrations.
7. WIS. STAT. ANN. § 7.15.
8. WIS. STAT. ANN. § 7.15.
9. WIS. STAT. ANN. § 7.15(e).
10. Wisconsin State Elections Board, *supra* note 6. This figure includes all early registrations, late registrations, and Election Day registrations.
11. See City of Milwaukee Election Commission, Election Information, available at <http://www.city.milwaukee.gov/router.asp?docid=1717>.
12. City of Milwaukee Election Task Force, *Official Report 14* (June 27, 2005).
13. U.S. Census Bureau, State & County Quick Facts, available at <http://quickfacts.census.gov/qfd/states/55000.html> (last visited Sep. 24, 2007).
14. WIS. STAT. ANN. § 7.20.
15. WIS. STAT. ANN. § 7.20(2).
16. See James K. Conant, *supra* note 2, at 17.
17. WIS. STAT. ANN. § 7.10(1)(b).
18. WIS. STAT. ANN. § 9.01.
19. Wisconsin Legislative Reference Bureau, WISCONSIN BLUE BOOK 254 (2007), available at <http://www.legis.wisconsin.gov/lrb/bb/07bb/pdf/249-258.pdf>
20. Dane County Clerk Bob Ohlsen formerly served as Clerk for the Village of Waunakee.
21. For a party to qualify to select a member of the Elections Board, it must have qualified for a separate ballot in the most recent primary, and have received at least 10% of the vote in the most recent gubernatorial election. WIS. STAT. ANN. § 5.62(1)(b). Under this standard, only the Democratic and Republican parties currently qualify to select a member of the board.
22. WIS. STAT. ANN. § 5.61.
23. WIS. STAT. ANN. § 5.05 (2006). From December 2002 to May 2007, the board also had a Libertarian Party member, because that party's gubernatorial candidate received a sufficient percentage of the vote to qualify for a position on the board.
24. WIS. STAT. ANN. § 5.05(4) (2006).
25. WIS. STAT. ANN. § 5.05 (2007).
26. WIS. STAT. ANN. §§ 15.07, 15.60 (2007); 2007 Wisconsin Act 1 § 209(4). The initial GAB members need only be confirmed by a majority of the legislature (three by the State Assembly and three by the State Senate).
27. Wisconsin Legislative Reference Bureau, ETHICS REGULATION REFORM, LEGISLATIVE BRIEF 07-1.
28. "All full-time equivalent positions in the elections board are transferred to the government accountability board." Wisconsin Act 1, § 209(2)(b) (Feb. 2, 2007). S.B. 1 § 209(3)(b).
29. *Six Retired Judges Prepare for Service on New Government Accountability Board*, Jul. 10, 2007, available at <http://www.wicourts.gov/news/archives/2007/gab071007.htm>.
30. See Memorandum from Terry C. Anderson, *Interim Director, to Members, Government Accountability Board* (Aug. 16, 2007) (regarding the first meeting of the new board), available at <http://elections.state.wi.us/docview.asp?docid=11715&locid=47>.
31. *Id.*
32. James K. Conant, *supra* note 2, at xv-xvii.

33. The others are Idaho, Maine, Minnesota, New Hampshire, Wisconsin, Wyoming, Iowa, Montana, and North Carolina, the last three of which only recently adopted EDR. Iowa's HF 653 goes into effect on Jan. 1, 2008. North Carolina's HB 91/S195 was signed into law on July 20, 2007 and precleared by the DOJ on Aug. 8, 2007. See R. Michael Alvarez & Jonathan Nagler, *Same Day Voter Registration in North Carolina*, DEMOS (BRIEFING PAPER) (July 16, 2007); see also Election Day Registration Legislation State Legislatures, Demos, available at <http://www.demos.org/pubs/EDR%20legislation%20Aug%2016%202007.pdf>.
34. WIS. STAT. ANN. § 6.55.
35. WIS. STAT. ANN. § 6.34.
36. WIS. STAT. ANN. § 6.55(2)(b).
37. See Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 AM. POLITICS RESEARCH 74 (1994); see also Benjamin Highton, *Easy Registration and Voter Turnout*, 59 JOURNAL OF POLITICS 565, 568 (1997) (finding turnout about 10% higher in EDR states); Craig L. Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOC. SCI. QUARTERLY 170, 176-77 (2001) (finding a 6% increase with EDR, compared to states with a 30-day closing date for registration, with a persistent advantage in EDR states even in comparison to state with shorter closing dates).
38. This excludes North Carolina which only recently adopted its EDR system and thus has limited data as to its effect in that state.
39. Demos, *Voters Win with Election Day Registration: A Snapshot of Election 2006* (2007), available at [http://www.demos.org/pubs/voters\\_win\\_web.pdf](http://www.demos.org/pubs/voters_win_web.pdf).
40. Michael Alvarez, et al., *Election Day Voter Registration in the United States: How One-Step Voting can Change the Composition of the American Electorate*, CALTECH / MIT VOTING TECHNOLOGY PROJECT (2002); but see Craig L. Brians, *supra* note 37, at 170-71 (finding that EDR raised turnout, but resulted in only modest increases in the composition of the electorate).
41. See Benjamin Highton, *supra* note 37 (finding a turnout gap between most and least educated of 41% in non-EDR states and 30% in EDR states).
42. See Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 POLITICAL BEHAVIOR 29 (2000); Benjamin Highton, *supra* note 37, at 572.
43. See R. Michael Alvarez, et al., *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote*, VTP Working Paper #48, at 20 (2006).
44. 42 U.S.C. § 1973gg-2(b)(2).
45. 42 U.S.C. § 1973gg-6.
46. Wisconsin State Elections Board, *What Is a Provisional Ballot and Who Is Entitled to A Provisional Ballot?*, available at [http://elections.state.wi.us/faq\\_detail.asp?faqid=259&locid=47](http://elections.state.wi.us/faq_detail.asp?faqid=259&locid=47). The requirement that voters cast a provisional ballot if they do not have their driver's license is the result of an exchange between the U.S. Department of Justice ("DOJ") and the State Election Board. Previously, the state allowed a voter who could not produce his or her driver's license number to instead provide the last four digits of his or her Social Security number. In a June 13, 2006 letter to the Elections Board, DOJ took the position that this policy did not comply with HAVA. The Board subsequently adopted Emergency Rule EIBd 3.04, requiring that voters cast provisional ballots in these circumstances, to be counted if the driver's license number is provided by 4:00 p.m. on the day after the election. DOJ subsequently acknowledged that this rule resolved its concerns, and the rule became permanent in January 2007. See Memorandum from George A. Dunst, Legal Counsel, State Board of Elections, to Elections Board (Oct. 4, 2006) (relating to Election-Day Voter Registration - EIBd 3.04); Wisconsin Elections Board, *Wisconsin Election Day Voter Registration Clarified* (Aug. 9, 2006); Memorandum from George A. Dunst, Legal Counsel, State Board of Elections, to Elections Board (June 23, 2006) (regarding providing a driver's license number for purposes of voter registration).
47. Kimball W. Brace & Michael P. McDonald, *Final Report of the 2004 Election Day Survey*, 6-9, Tab 6A (2005) (reporting only 274 provisional ballots cast statewide in Wisconsin's 2004 general election).
48. See, e.g., Steven Walters, *Senate approves voter ID measure*, JS ONLINE, Apr. 14, 2005, available at <http://www.jsonline.com/story/index.aspx?id=318206>; *Voting Rights Group Denounces Attempts to Push Voter ID in Wisconsin Legislature*, DEMOS (June 28, 2005) available at <http://www.demos.org/page339.cfm>.
49. See, e.g., Greg J. Borowski, *Inquiry finds evidence of fraud in election*, JS ONLINE, May 11, 2005, <http://www.jsonline.com/story/index.aspx?id=324933>.
50. WIS. STAT. ANN. § 5.05(11).
51. WIS. STAT. ANN. § 12.13(1).
52. See, e.g., Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, April 12, 2007.
53. Steve Schultze, *No Vote Fraud Plot Found: Inquiry Leads to Isolated Cases*, Biskupic Says, MILWAUKEE JOURNAL-SENTINEL, Dec. 6, 2005.

54. See WIS. STAT. ANN. § 6.03(b).
55. See Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007. These prosecutions have been linked to pressure exerted by the DOJ on some U.S. Attorneys to prosecute fraud cases more aggressively. See also Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007 (reporting that Milwaukee's U.S. Attorney Steve Biskupic was targeted for potential dismissal after complaints by Karl Rove that he was being insufficiently aggressive in prosecuting voter fraud); Jacob Stein, *Report: Biskupic Was on the Chop List; He Got a Reprieve and Wasn't Fired, A Report Says As Congress Probes Firings of U.S. Attorneys*, WIS. STATE JOURNAL, Apr. 15, 2007 (reporting that Biskupic's name appeared on a list of prosecutors to be fired).
56. Brennan Center for Justice, *Wisconsin, 2004*, available at [http://www.truthaboutfraud.org/case\\_studies\\_by\\_state/wisconsin\\_2004.html](http://www.truthaboutfraud.org/case_studies_by_state/wisconsin_2004.html).
57. Letter from Steven M. Biskupic, *U.S. Attorney, to Rick Wiley, Republican Party of Wisconsin*, Aug. 22, 2005 (regarding alleged double voting).
58. See Lorraine Minnite, *Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security 6-9* (2007), available at [http://www.demos.org/pubs/edr\\_fraud\\_v2.pdf](http://www.demos.org/pubs/edr_fraud_v2.pdf).
59. See WIS. STAT. ANN. § 12.13.
60. Stacy Forster, *State Elections Board Finds 82 Possible Vote Fraud Cases*, MILWAUKEE JOURNAL-SENTINEL, Apr. 13, 2007.
61. Derrick Nunnally, *Man Convicted of Double Voting*, MILWAUKEE JOURNAL-SENTINEL, Aug. 22, 2007.
62. Some evidence exists of registration forms being turned in with names or addresses that do not exist, in cases where registration-gatherers are paid by the form. See Derrick Nunnally, *Two Plead Guilty to Election Crimes*, MILWAUKEE JOURNAL SENTINEL, Feb. 14, 2006 (reporting that two voter registration workers had been convicted of turning in bogus registration forms prior to the 2004 election). But there is no evidence of people actually attempting to vote under these bogus registrations. In response, the Wisconsin legislature enacted a statute prohibiting registration-gatherers from being paid for each registration they submit. WIS. STAT. ANN. § 12.13(3)(ze). Election officials and prosecutors believe that this has largely solved the problem, resulting in fewer false registration forms in the 2006 election cycle.
63. See Lorraine Minnite, *The Politics of Voter Fraud 35*, available at [http://projectvote.org/fileadmin/ProjectVote/Publications/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf) (citing evidence that "Milwaukee's Board of Elections was overwhelmed by its own incompetence and understaffing on Election Day [in 2004], resulting in massive record-keeping problems").
64. Lorraine Minnite, *supra* note 58, at 3-4.
65. General Assembly Bill 111 (Wis. 2003); General Assembly Bill 63 (Wis. 2005); Senate Bill 42 (Wis. 2005).
66. See John Mark Hansen, VERIFICATION OF IDENTITY, TASK FORCE ON THE FEDERAL ELECTION SYSTEM 4 (July 2001); see also Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006) (finding that 11% of those surveyed did not have current and valid government-issued photo ID).
67. John Pawasarat, *The Driver's License Status of the Voting Age Population in Wisconsin* (June 2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.
68. 42 U.S.C. § 15483.
69. Caltech MIT Voting Technology Project, VOTING WHAT IS WHAT COULD BE 9 (2001).
70. See Daniel Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1213 (2005).
71. Patrick Marley, *Delays Plague State Lists of Voters: Missing Deadline Will Add to Costs*, MILWAUKEE JOURNAL-SENTINEL, Mar. 23, 2006.
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. & POLY 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. 3 U.S.C. § 1.

82. 3 U.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. 3 U.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*, *Election Law @ Moritz Weekly 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 is to be 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. Wis. Stat. Ann. §§ 6.34(3), 6.55. Eligible voters may also register by mail twenty days or more before the election, Wis. 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 is 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).