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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON ELECTION LAW REVIEW

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

RE: Committee Member Suggestions for Committee Discussion

DATE: October 6, 2004

By letter dated September 2, 2004, Senator Joe Leibham, Chair of the Special Committee on Election Law Review, solicited committee member input on issues the Special Committee ought to examine. Committee members Bhend and Hesse submitted suggestions on their own behalf and committee member Nickolaus submitted suggestions on behalf of committee member Buechel and other county clerks. The issues raised in those responses are categorized and summarized below. The committee members making the suggestions are identified in brackets after the statement of the issue.

### **HELP AMERICA VOTE ACT (HAVA)-RELATED ISSUES**

#### **Cost of HAVA-Mandated Voting Equipment**

Committee members noted the potentially high cost that municipalities will have to bear to comply with HAVA's requirement that each polling place have at least one voting device that is accessible to individuals with disabilities. [Committee members Hesse and Bhend.]

- **Background**

Title III of HAVA, among other things, establishes various voting system standards that states must meet. Generally, the standards must be met by January 1, 2006. Under HAVA, the voting system used in an election for federal office must, among other things, be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation, including privacy and independence as for other voters. This requirement can be satisfied through the use of at least one direct record electronic voting system or other voting system equipped for individuals with disabilities at each polling place.

HAVA provided federal funding to assist the state in meeting the federal requirements. It is estimated that the primary sources of funding for the accessible voting equipment requirement will come from HAVA SEC. 102 funds (to be used by states to replace lever and punch card voting systems), HAVA SEC. 251 funds (so-called requirement payments available to states to assist in meeting various HAVA election administration requirements including the statewide voter registration system and voting equipment that will comply with HAVA's voting system standards), and state matching funds (the appropriation of which was required to qualify for certain federal HAVA funds).

According to the state's initial HAVA plan, Wisconsin's present voting systems fall short of the federal standards in providing access to individuals with disabilities. The state plan indicates that the state will evaluate disability access compliance for new voting systems and will develop an implementation and acquisition plan for compliant voting systems. The state plan also indicates that accessible voting equipment will be one of the priority uses of federal HAVA funds.

The staff of the Elections Board has estimated that compliance with the voting system standards requirement will cost approximately \$12 to \$18 million. (The state plan estimates approximately \$16.4 million.)

To date, the state has received approximately \$1.3 million in SEC. 102 funds and approximately \$43.1 funds in SEC. 251 funds (including the state match obligation). However, as final costs are not yet known, and because federal funds also need to be used to meet other federal mandates like statewide voter registration, it is unclear whether sufficient federal funds will be available to cover all of the costs of purchasing accessible voting equipment and ongoing programming and maintenance costs for such equipment.

- **Suggestions**

No specific suggestions were made. However, Kevin Kennedy, Executive Director of the State of Wisconsin Elections Board, who is a member of the Special Committee, will be making a presentation to the Special Committee at its October 13 meeting about HAVA and HAVA implementation issues.

### **Cost to Municipalities of Statewide Voter Registration System**

An issue was raised regarding implementation of the statewide voter registration system required by HAVA and the provision of state law allowing municipal clerks to enter into agreements with county clerks to enter and update registration information for the municipality into the statewide voter registration system. Primarily, the concern expressed was over the reasonableness of the fees that might be charged by counties. [Committee member Bhend.]

- **Background**

HAVA requires states to have a single, uniform, centralized, interactive computerized statewide voter registration list. Wisconsin must implement its list by January 1, 2006. 2003 Wisconsin Act 265 directed the Elections Board to develop, implement, and maintain the list. Presently, the board is in the process of selecting a vendor to design the list.

Generally, Act 265 imposed on municipal clerks the duty to update the list whenever the clerk receives information showing a change in elector data, such as a new address or a change in the eligibility status of an elector. However, Act 265 authorized municipal clerks to, by mutual consent, designate any other municipal clerk or county clerk as the clerk's agent to carry out the voter registration functions, including those relating to updating the statewide voter registration list.

- **Suggestions**

No specific suggestions were made. However, the member who raised the issue would prefer that any charges made under this provision be limited to "reasonable" charges.

## **VOTER REGISTRATION ISSUES**

### **Registration Workload**

It has been suggested that when voter registration materials are received by mail and the materials are improperly submitted or contain incorrect or incomplete information, the workload and costs of municipal clerks increases when they have to respond to incorrect submissions. [Committee member Hesse.]

- **Background**

State law requires that upon receipt of a registration form that has been submitted by mail, the municipal clerk receiving the form must examine the form for sufficiency. [s. 6.32 (1), Stats.] If the form is insufficient or if the clerk knows or has reliable information indicating that the elector is not qualified, state law requires the clerk to notify the proposed elector within five days, if possible, and request that the elector appear at the clerk's office or other registration center to complete a proper registration or substantiate the information presented. [s. 6.32 (2), Stats.] If the registration form is submitted later than the close of registration (generally, the second Wednesday before the election), the clerk must make a good faith effort to notify the elector that he or she may register at the clerk's office or at the polls on election day. [s. 6.32 (3), Stats.] If, on the other hand, the registration is sufficient, the clerk is to enter the elector's name on the registration list and transmit a first class letter or postcard to the registrant, specifying the elector's ward or aldermanic district and polling place. [s. 6.32 (4), Stats.]

- **Suggestions**

No suggestions were made.

## **ELECTION ADMINISTRATION ISSUES**

### **Poll Hours**

A suggestion was made that the structure of the current polling place hours be maintained. [Committee member Bhend.]

- **Background**

Under current law, polls in first, second, and third class cities must be open from 7:00 a.m. to 8:00 p.m. on election day. In fourth class cities, villages, and towns, the polls must be open from 9:00 a.m. until 8:00 p.m., but the governing body of the municipality may extend the hours to not earlier than 7:00 a.m. In recent legislative sessions, proposals have been introduced and debated to establish uniform polling place hours throughout the state from, generally, 7:00 a.m. to 8:00 p.m. Legislators from rural districts have often objected to such proposals, arguing that it is difficult to get poll workers to the polls that early in rural areas and that the number of voters in some rural areas does not justify extended poll hours.

- **Suggestions**

Maintain current law.

### **Minimum Age Requirement to Witness an Absentee Ballot**

A question was raised about the minimum age that a person must be in order to witness an absentee ballot. [Committee member Bhend.]

- **Background**

Generally, current law requires that an absentee ballot be marked in the presence of one witness. The witness must sign a statement on the outside of the ballot envelope. [s. 6.87, Stats.] The statutes preclude the witness from being a candidate at the election (except for a municipal clerk). [s. 6.87 (7) and (8), Stats.] However, in most cases, the election laws do not explicitly provide for a minimum age for a witness. However, for both military and overseas voters voting absentee, the statutes specifically provide that the witness must be an “adult U.S. citizen.” [See ss. 6.22 (2) (b) and 6.24 (4) (d), Stats.]

- **Suggestions**

No specific suggestions were made. However, one option would be to clarify in the statutes the age requirements for all witnesses of absentee ballots. Alternatively, current law could be maintained.

### **Reporting of Write-In Votes**

It was suggested that votes for write-in candidates who receive only a few votes or who do not file declarations of candidacy not be counted or be recorded simply as a “scattering.” [Committee member Nickolaus.]

- **Background**

Under current law, the name of each person who receives a vote in an election is recorded on the returns for that election. When a county or state canvass of an election is performed, the names of write-in candidates who receive a comparatively small number of votes may be omitted and their votes designated on the returns as “scattering votes.” [ss. 7.51 (4) (a), 7.60 (4) (c), and 7.70 (3) (f), Stats.]

- **Suggestions**

Current law should be changed so that only votes for registered write-in candidates in partisan elections are counted, unless no person is on the ballot or if a candidate whose name appears on the ballot is deceased. In addition, municipalities should be authorized to report votes for write-ins as “scatterings” unless they receive a substantial number of votes or no candidates appear on the ballot. Finally, write-in candidates should be required to file a declaration of candidacy with the appropriate filing officer or agency no later than 5:00 p.m. on the Thursday before the election in which the candidate seeks office in order to have write-in votes recorded, unless there are no other candidates on the ballot or if a candidate on the ballot is deceased.

The above approach is similar to the one taken by 2003 Assembly Bill 115 which was introduced by Representative Freese and others and cosponsored by Senator Fitzgerald and others. Assembly Bill 115 would have allowed any write-in candidate to file a declaration of candidacy with the appropriate filing officer or agency no later than 5:00 p.m. on the day before the primary or other election in which the candidate seeks office. The bill would have provided that the name of any write-in candidate need not be recorded on the returns for an election unless the candidate has filed a timely declaration of candidacy for the office for which he or she receives such votes. The provisions of the bill would not have applied if a write-in candidate had sought an office for which there were no candidates whose name appears on the ballot or if there appears on the ballot the name of a deceased candidate for the office that the write-in candidate seeks. The Assembly passed Assembly Bill 115, with an amendment, on March 18, 2003, but the Senate failed to take the bill up.

### **County Clerk Participation in Board of Canvassers in Recount Process**

The suggestion was made that county clerks be allowed to serve on the Board of Canvassers even if they are on the ballot, so long as they are unopposed. [Committee member Nickolaus.]

- **Background**

Under current law, the county clerk and two qualified electors of the county appointed by the clerk constitute the County Board of Canvassers. The clerk must designate a deputy clerk who must perform the clerk’s duties on the Board of Canvassers in the event that the county clerk’s office is vacant, the clerk cannot perform his or her duties, or the clerk is a candidate at an election being canvassed. [s. 7.60 (2), Stats.] Generally, the Board of Canvassers is in charge of the recount process in the county.

- **Suggestions**

The county clerk who appears on the ballot of an election at an election ought to be able to serve on the Board of Canvassers if the clerk is unopposed on the ballot. This will avoid deputy clerks having to run the Board of Canvassers during high profile elections. In addition, an uncontested county clerk ought to be able to run a recount as long as the recount is not for the county clerk’s office.

### **Lack of Registration Personnel**

It has been suggested that more people need to be able to do registration functions prior to an election. [Committee member Nickolaus.]

- **Background**

Generally, under current law, the municipal clerk or the Board of Election Commissioners of a municipality are to administer elector registration within the municipality when registration is required. [s. 6.26 (1), Stats.] [Beginning in 2006, registration will be required in all municipalities.] A qualified elector of the state may apply to any municipal clerk or board of election commissioners to be appointed as a special registration deputy for the purpose of registering electors of the municipality. Such person may serve as a special registration deputy of more than one municipality. [s. 6.26 (2) (a), Stats.] In addition, effective for the Spring Primary of 2006, a qualified elector of the state may apply to the State Elections Board to be appointed as a special registration deputy of any municipality in the state. [s. 6.26 (2) (am), Stats., as created by 2003 Wisconsin Act 265.] An appointment may be revoked for cause at any time. [s. 6.26 (2) (b), Stats.]

The statutes require the Elections Board, by rule, to prescribe procedures for appointment of special registration deputies, for revocation of special registration deputies, and for training of special registration deputies by municipal clerks and boards of election commissioners. The procedures must be formulated to promote increased registration of electors consistent with the needs of municipal clerks and boards of election commissioners to efficiently administer the registration process. [s. 6.26 (3), Stats.]

Throughout the year, and before the close of registration, registrations may be made at the office of the municipal clerk or board of election commissioners, at the office of any register of deeds, or other locations. Registration deputies must be appointed for all locations. [s. 6.28 (1), Stats.] Registration forms may also be submitted by mail. [s. 6.30 (4), Stats.]

- **Suggestions**

County clerks should be authorized to perform registration in their counties. In addition, county clerks should be able to deputize people for registration purposes. Also, municipal clerks should be able to refuse to deputize registration deputies based on criteria set up by the municipal clerk. Finally, all voter registration deputies must be trained.

### **Timing of Certification and Ballot Delivery**

A suggestion was made regarding the timing of certification and delivery of ballots to better coordinate the timing thereof. [Committee member Nickolaus.]

- **Background**

Generally, under current law, the State Elections Board must transmit to each county clerk a certified list of all candidates on file in its office for which electors in that county may vote. The certification must be sent as soon as possible after the closing date for filing nomination papers or after

the canvass of the primary vote but not later than certain statutory deadlines. [s. 7.08 (2) (a), Stats.] For the spring primary, the latest date for sending notice of certification is the second Tuesday in January. For the spring election, the latest date is the first Tuesday in March (or the second Tuesday in January if no primary is required). For the September primary, the latest date is the third Tuesday in July. Finally, for the general election, the latest date is the fourth Tuesday in September. [s. 10.06 (1), Stats.] The certification must be sent by Type B notice, which also contains a facsimile ballot.

In addition, the county clerk is required to prepare a copy for the official ballots immediately upon receipt of the certified list from the Elections Board. [s. 7.10 (2), Stats.] The county clerk must distribute the ballots to municipal clerks no later than 31 days before each September primary and general election and no later than 22 days before each other primary and election. [s. 7.10 (3), Stats.]

- **Suggestions**

All certifications for an election should be due on the same date. Ballots should be delivered 25 days before the election. Ballot delivery should be a specific number of days after certification from the Elections Board. Finally, the Elections Board should send a draft of the ballot to county clerks along with a Type A (notice of election) notice to allow clerks to start their ballot setup.

### **Publication of Election Notices**

It was suggested that clerks be given more flexibility in their choice of the manner of publishing election notices. [Committee member Nickolaus.]

- **Background**

Generally, under current law, election notices that are required to be published may be published only in newspapers qualified under ch. 985, Stats. [s. 10.04 (1), Stats.] Such qualifications involve, among other things, the level of the newspaper's circulation. [See, generally, s. 985.03 (1) (a), Stats.] County clerks must publish election notices in all such newspapers published within the county, unless the county board provides otherwise by resolution. The Board of Election Commissioners or governing body of a municipality (city, town, or village) may authorize, by resolution, the publication of election notices in more than one newspaper. [s. 10.04 (2), Stats.]

- **Suggestions**

Municipal and county clerks should be allowed to include election notices in municipal or county newsletters that are sent to all residents instead of publishing notices in newspapers.

### **Notices of School District Referendum**

It was suggested that there is no requirement for school districts to notify the county clerk of any referendum if the county clerk is not responsible for preparing the ballots for the election. [Committee member Nickolaus.]

- **Background**

Current law generally requires all proposed constitutional amendments and any other measure or question that is to be submitted to a vote of the people to be filed with the official or agency responsible for preparing the ballots for the election no later than 42 days prior to the election at which the amendment, measure, or question will appear on the ballot. [s. 8.37, Stats.]

- **Suggestions**

All county clerks of counties with territory affected by a school district referendum should be provided notice under s. 8.37 of the school district referendum.

### **Recall Petitions**

It was suggested that the criteria for recall petitions should be changed. [Committee member Nickolaus.]

- **Background**

The State Constitution and statutes combine to authorize voters to petition for the recall of any incumbent elective official. The State Constitution, in art. XIII, s. 12, provides for the recall of any congressional, judicial, legislative, or county elective officer. The statutes additionally authorize the recall of other local elected officials. To initiate the recall process, voters must file a petition demanding the recall of the officeholder. [s. 9.10 (1) (a), Stats.]

Generally, a petition for recall of a state, congressional, legislative, judicial or county officer must be signed by electors equal in number to at least 25% of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. [art. XIII, s. 12 (1), Wis. Const., and s. 9.10 (1) (b), Stats.] A petition for the recall of a city, village, town or school district officer must be signed by electors equal in number to at least 25% of the vote cast for the office of President of the United States at the last election within the same district or territory as that of the officeholder being recalled. [s. 9.10 (1) (b), Stats.] Recall petitions must be filed with the same official or agency with whom nomination papers or declarations of candidacy for that office are filed. That official or agency is required to determine and certify to any interested person the number of signatures required on a recall petition. If no statistics are available to calculate the required number of signatures on a petition for recall of an officer, the number of signatures are determined according to a formula specified in the statutes. [s. 9.10 (1) (c) to (d), Stats.]

Although the form of all recall petitions must generally meet the same statutory requirements, e.g., each recall petition must have the words “RECALL PETITION” at the top in bold print, only a recall petition for a city, village, town or school district office must contain a statement of a **reason** for the recall which is related to the official responsibilities of the official for whom removal is sought. [s. 9.10 (2) (a) to (c), Stats.]

Before a petitioner can circulate or file a recall petition, the petitioner must file a registration statement applicable to political committees, groups and individuals under s. 11.05 (1) or (2), Stats. The petitioner must also include a statement indicating his or her intent to circulate a recall petition, the name

of the officer for whom recall is sought and, where applicable, a statement of a reason for the recall. [s. 9.10 (2) (d), Stats.]

A recall petition for the recall of a state, congressional, legislative, judicial or county officer must be offered for filing by 5 p.m. on the 60th day commencing after registration. A recall petition for the recall of a city, village, town or school district officer may be offered for filing no later than 5 p.m. on the 30th day commencing after registration. After the recall petition has been offered for filing, no name may be added or removed and no signature may be counted unless the date of the signature falls within the applicable periods identified above. [s. 9.10 (2) (d), Stats.] In addition, no recall petition may be filed prior to the expiration of one year after commencement of the term of office for which the officer is elected. [s. 9.10 (2) (s), Stats.]

The official against whom the recall petition has been filed may challenge the sufficiency of the petition after the petition is offered for filing. The filing officer or agency is responsible for reviewing a verified challenge to a recall petition if it is made prior to certification of the petition. However, a person challenging the petition bears the burden of proving its insufficiency. [s. 9.10 (2) (f) and (g), Stats.] A petitioner may file a rebuttal to the challenge. [s. 9.10 (3) (b) and (4) (a), Stats.]

The statutes identify a number of specific items that may be challenged such as the sufficiency and validity of the signatures, but the statutes do not provide an exhaustive list. [s. 9.10 (2) (q), Stats.]

If the official with whom the petition is filed determines that the petition is sufficient, the official must schedule a recall election for the Tuesday of the sixth week following the date of filing the petition, or the day after that if Tuesday is a holiday. [art. XIII, s. 12 (2), Wis. Const., and s. 9.10 (3) (b) and (4) (a).] If the official finds the petition to be insufficient, the petitioner has five days to remedy the insufficiency. [s. 9.10 (3) (b) and (4) (a), Stats.]

After the official makes a final determination on the sufficiency or insufficiency of a recall petition for state, congressional, legislative, judicial, and county officers, the petitioner or the officer against whom recall is sought may file a petition for a writ of mandamus or prohibition with the circuit court for the county where the recall petition is offered for filing to determine whether the petition is sufficient. The court must give the matter precedence over other matters not given similar precedence by law. [s. 9.10 (3) (bm), Stats.]

The official against whom the recall petition is filed must be a candidate at the recall election without nomination unless the official declines or resigns within 10 days after the original filing of the petition. [art. XIII, s. 12 (4), Wis. Const., and s. 9.10 (3) (c) and (4) (c), Stats.] Other candidates for the office must file nomination papers not later than 5 p.m. on the fourth Tuesday preceding the election to have their names placed on the ballot at the recall election. [s. 9.10 (3) (c) and (4) (e), Stats.] All candidates for any town or village office, other than the official against whom the recall petition is filed, must file nomination papers, even if the town or village normally uses a caucus process for nomination. [s. 9.10 (4) (h), Stats.]

For state, congressional, legislative, judicial, and county offices, if more than two persons compete for a nonpartisan office, a recall primary must be held. The names of the two persons receiving the highest number of votes in the recall primary are then certified to appear on the ballot in the recall election, but if any person receives a majority of the total number of votes cast in the recall primary, a recall election may not be held. If the incumbent receives a majority of the votes cast, the incumbent is

retained in office for the remainder of the term. If another candidate receives a majority of the votes cast, that candidate is elected to serve for the residue of the unexpired term of the incumbent. [art. XIII, s. 12 (4) (b), Wis. Const., and s. 9.10 (3) (d), Stats.] For any partisan office, a recall primary must be held for each political party that is entitled to a separate ballot and from which more than one candidate competes for the party's nomination in the recall election. Independent candidates may only be shown on the ballot for the recall election. [art. XIII, s. 12 (4) (b), Wis. Const., and s. 9.10 (3) (e), Stats.]

For other municipal and school district officers, if more than two persons compete for an office, a recall primary is required. The names of the two persons receiving the highest number of votes in the primary are certified to appear on the ballot in the recall election. However, if any person receives a majority of the total number of votes cast in the primary, the recall election may not be held. If the incumbent receives a majority of the votes, he or she retains the office for remainder of the term. If another candidate receives a majority of the votes, that candidate is elected to serve for the remainder of the unexpired term of the incumbent. [s. 9.10 (4) (f), Stats.]

If a recall primary is necessary, the primary is held on the Tuesday of the sixth week after the recall petition is filed and the recall election is held on the Tuesday of the fourth week commencing after the recall primary. [s. 9.10 (3) (f) and (4) (g), Stats.]

A recall primary or election involving more than one official may be held on the same day. If more than one official of the same office designation elected at-large for the same term from the same district or territory is the subject of a recall petition, there is required to be a separate election contest for the position held by each official. Candidates must designate which position they are seeking on their nomination papers. Instructions must appear on the ballot to electors to vote for each position separately. [s. 9.10 (5) (a), Stats.]

An official being recalled may continue to perform the duties of his or her office until a certificate of election is issued to his or her successor. [s. 9.10 (5) (b), Stats.]

After one recall petition and recall election, no further recall petition may be filed against the same official during the term for which he or she was elected. [art. XIII, s. 12 (6), Wis. Const., and s. 9.10 (6), Stats.]

- **Suggestions**

Require recall petitions to state the grounds that constitute cause for a recall of officials, e.g., neglect of duty or official misconduct. Also, increase the number of signatures required on recall petitions.

RJC;jal:tlujal