

Testimony of Michael Haas

Wisconsin Elections Commission

Senate Committee on Elections and Utilities
February 1, 2018

Room 201 Southeast, State Capitol
Public Hearing

Senate Bill 524 – Senate Substitute Amendment 1

Chairperson LeMahieu and Committee Members:

Thank you for the opportunity to provide testimony on Senate Bill 524. The Elections Commission has not taken a position on this bill but has requested that staff continue to work with its authors and supporters. This testimony summarizes our staff's input related to the Substitute Amendment. We appreciate that the Substitute Amendment addresses some of the issues we had identified in previous versions of the bill, and we appreciate the continued effort to make the bill more specific and clear.

While there is broad agreement that it is a challenge for some municipalities to process all absentee ballots on Election Day for high turnout elections, permitting municipalities to use voting equipment in the clerk's office before Election Day has a ripple effect on other processes and is not as simple of a solution as it might first appear. Because it is easy to get lost in the details of the absentee voting process, it is our responsibility to identify significant policy and administrative changes contained in the bill as well as issues which our staff believes have not been fully resolved in the Substitute Amendment.

I should also note that the Elections Commission directed staff to submit a request for a Legislative Council Study Committee to consider a long list of potential legislative changes to clarify and update provisions related to election procedures. Because we recognize that processing the increasing volume of absentee ballots on Election Day is a significant challenge in some municipalities, we have recommended that a Study Committee take a more comprehensive approach to the issue and consider all possible options.

Uniformity

In my testimony before the Assembly elections committee last November, I noted a general issue which may be worth some legal research in advance. That is the question of whether the proposed alternative process for casting an absentee ballot might create inconsistencies in the treatment of ballots and voters in different municipalities to such an extent that it might invite legal challenges as to its constitutionality.

Statutes are presumed to be constitutional, of course, and the Legislature has wide latitude in making policy decisions. But the bill creates several significant differences in the treatment of ballots and voters, and those differences would be due to the discretion of a municipal governing body rather than the voter's choice of voting method. In some instances, even absentee ballots voted in the clerk's office in the same municipality could be treated differently. Seeing or hearing about those differences, or about differences in a neighboring municipality that uses voting equipment when voting in the clerk's office may not only create some voter confusion, but some of the changes in the process described below may also prompt legal concerns regarding the uniformity of the voting process throughout the State.

Pointing this out does not win us friends amongst supporters of the bill, but it is our obligation to highlight this issue. If we failed to do so, the Legislature could rightfully ask why we did not identify the potential issue if the legislation is eventually passed and either voter confusion or legal challenges develop.

Significant Policy and Procedural Changes

Under current law all absentee ballots are returned by the voter in a certificate envelope signed by the voter and a witness. When the ballot is voted in the clerk's office, the clerk signs as the witness. If either signature is missing, the ballot is sent to the polling place with instructions for the election inspectors to reject the ballot. At the polling place, inspectors separate properly completed envelopes from their ballots, issue voter numbers and announce the voter's name before depositing the ballot into the voting equipment or ballot box. Any challenge to the ballot is made at the polling place when the voter's name is read.

The certificate envelope process can be unwieldy and lead to errors due to the specific requirements regarding completing the voter certificate and the number of staff and election inspectors who must handle the envelope before the ballot is cast on Election Day. The envelope procedures are in place, however, to ensure both security and privacy of the ballot. While eliminating the certificate envelope would simplify the process, using voting equipment ahead of Election Day instead should offer equivalent security and privacy protections.

In municipalities which adopt the alternative process of SB 524, absentee ballots submitted by mail would still follow the process of being returned in a certificate envelope. Most absentee ballots completed in the clerk's office would be deposited immediately into the voting equipment as they are at the polls on Election Day, without the use of a certificate envelope. But certificate envelopes would still be used when either the clerk or the voter "determines that such use is necessary."

When using voting equipment in the clerk's office, in-person absentee voters would be able to immediately see whether the voting equipment detected errors such as overvotes

or crossover votes, and to cast a corrected ballot if an error was made. Those voters would not be permitted to spoil their ballot and request a new one after the voting equipment has accepted their ballot. In contrast, voters submitting an absentee ballot by mail or using the certificate envelope in the clerk's office in the same community, and all absentee voters in communities not adopting the SB 524 process, would still have the option to spoil their ballot and request a new one in a timely manner, but would not have the same assurance that their ballot was able to be counted by the voting equipment prior to Election Day.

While the voter using voting equipment in the clerk's office would benefit from knowing immediately whether the ballot will be counted, that benefit will be restricted to specific municipalities that qualify for and also choose the alternative process. The in-person absentee voting process used, and the associated rights and consequences, would be determined by the majority vote of individual municipal governing bodies. In addition, the bill would also restrict the opportunity to use the alternative process to municipalities which have purchased newer voting equipment that includes the functionality to tabulate write-in votes, and that the Elections Commission determines to be prepared to implement the new procedures.

Elections Commission staff has identified several other significant policy and procedural changes to current law which the Legislature should be aware of, including the following:

1. The bill shifts the responsibility of processing in-person absentee ballots from election inspectors to municipal clerks and their staffs. This would involve new training and procedures for both clerks and for inspectors. In addition, because the major political parties have a statutory right to nominate individuals to serve as election inspectors, this seems to represent a policy change related to the respective roles of local election officials as much as an administrative change.
2. For county clerks that program voting equipment, Section 5.84(1)(b) would require the county clerk to schedule the programming at an earlier date as determined by municipalities which choose to conduct the alternate process. This may force counties to program voting equipment on an expedited schedule for all municipalities regardless of how many use the alternate process. It would also lengthen the time period between equipment programming and Election Day during which the programmed voting equipment memory devices need to be secured. The substitute amendment addresses an issue in the previous version related to the allowable period of alternative absentee voting by permitting it during the time that in-person absentee voting takes place.
3. Currently, all absentee ballots are secured by municipal clerks and transported to the polling place for processing on Election Day. This permits observers to see the processing of all absentee ballots and to hear the names of voters when they are announced. Wis. Stat. Section 6.982(5) would require clerks to retain the

absentee ballots cast using the alternative process and transmit all other absentee ballots to the polling place for processing. This change may affect perceptions related to the transparency of the process, particularly regarding the counting of write-in votes, and also requires different processes for different absentee ballots.

4. Similarly, the challenge process would be modified under Section 6.982(7). Challenges related to in-person absentee voters would be initiated at the clerk's office, meaning that potential challengers would need to attend voting hours for up to two weeks rather than only on Election Day. Any challenges made at the clerk's office would require the clerk to send the ballot to the polling place where the challenge would be resolved. Challenges to absentee ballots submitted by mail or through Special Voting Deputies would still be initiated at the polling place. The bill also requires voters in municipalities using the alternative process to state their name and address when requesting a ballot in the clerk's office, which is not currently required. In order to inform potential election observers, the clerk must send a notice of the voting hours to the two major political parties, but the bill does not specify if the notice is sent to party representatives at the state, county, or municipal level.
5. There are several issues related to the bill's provisions regarding the use of a write-in report to tabulate write-in votes. The bill adds a new requirement for voting equipment to be approved for use in Wisconsin, specifically that it include a write-in report functionality. The bill does not specify that the write-in report functionality is required in order for a municipality to adopt the alternative absentee process, but it does require the functionality on new voting equipment, even for municipalities that do not adopt the alternate absentee voting process. This could also potentially limit the variety of voting systems approved for use in Wisconsin if the equipment does not include the write-in report functionality or it does not comply with the statutory sections governing the tallying of write-in votes.

Currently, Wis. Stat. Section 5.85(2)(a) requires election officials to examine ballots for write-in votes and to count and tabulate the write-in votes. SB 524 does not alter this provision, meaning either there would be a conflict in the statutes related to tallying write-in votes using the alternate process, or write-in votes would be processed differently depending upon the method that the ballot is cast and the municipality of the voter.

6. The provision related to use of a write-in report functionality of voting equipment is problematic for another reason. Section 5.91(19) seems to make a distinction between newly approved voting equipment and equipment already in use. For the latter, the write-in report must comply with the existing statutory rules for determining elector intent of a write-in vote, after the Elections Commission has

tested that functionality. For newly approved equipment, the bill does not specify that the write-in report functionality must comply with the same statutory rules for determining elector intent.

7. Finally, it is unclear whether the Substitute Amendment requires that municipalities using the alternative process must have voting equipment which includes the write-in report functionality. That is not included as a requirement of the Commission approving a municipality to use the alternative process. But the bill also seems to prohibit handling ballots that have been deposited into the voting equipment, except for purposes of an audit, recount or storage, which means write-in votes could not be tallied through the handling of ballots by clerks or election officials. The bill creates a new Class I felony for any person who acts to ascertain the accumulating or final results from ballots cast under the alternative process before the close of the polls on Election Day, which would preclude the tallying of write-in votes on ballots cast during the alternative process until Election Day.

If the intent is to require the use of the write-in report functionality for the alternative process, one option would be to include that as part of the approval process rather than in the section related to approval of voting equipment that affects all municipalities. If the write-in report functionality is a requirement of using the alternative process, however, our initial assessment is that a small number of municipalities would qualify based upon the equipment currently in use.

8. Under current law, if a clerk becomes aware that a voter has died after submitting an absentee ballot, the ballot is identified using the certificate envelope and is rejected. In some cases, the fact of the voter's death does not become known until after the official canvass, but the rule is the same for all ballots. Under the Substitute Amendment, because in-person absentee voters would immediately insert their ballots into the voting equipment, it would be impossible to identify the ballot of such a voter who subsequently dies before Election Day. If the municipal clerk becomes aware that a voter using the alternative process has died, the clerk directs two election inspectors to randomly pull a ballot from the bag containing ballots of the deceased elector's ward from the day on which that elector cast the ballot, and that ballot is removed from the tabulated results. As with any drawdown procedures, it is more likely than not that the randomly selected ballot will not be the ballot of the disqualified elector.

This process involves some policy considerations as well as practical considerations. The current rule would remain for other absentee voters in the same municipality, and for all absentee voters in municipalities which do not adopt the alternate voting process. Also, the bill states that the clerk shall not sort

absentee ballots by ward when multiple wards are processed with a single memory device and tabulator. But in the case of removing a ballot due to a deceased elector, it appears that ballots in a bag containing multiple wards would need to be sorted.

Outstanding Administrative Issues

Elections Commission staff has also identified several administrative and technical issues that should be considered or remain unresolved in the Substitute Amendment, including the following:

1. The provisions related to the daily reconciliation to ensure that the number of ballots cast equal the number of ballots issued have been significantly clarified. However, if the numbers do not match, the clerk would deliver all ballot bags that are not reconciled and associated paperwork to the polling place to be reconciled after the polls close. We would want to keep an eye on that process as it may create complications.
2. The Substitute Amendment would also lessen the immediate impact on the Elections Commission regarding programming the statewide voter registration system. The bill requires the Commission to create a separate classification in the WisVote system for ballots issued during the alternative absentee voting process, which would be manageable. The bill also directs the Commission to work towards creating a way to sequentially number those ballots using WisVote, but does not require that task to be completed in order for the alternative process to be used. That upgrade poses more of a challenge, especially in avoiding confusion for other clerks using the system whose municipalities do not adopt the alternative process.
3. Wis. Stat. Section 6.982(5) requires the daily ballot bags to be kept in the clerk's possession and to remain sealed and secured unless needed for an audit, recount, or storage. Ballot bags may also need to be opened for reconciliation of ballots issued or due to deceased electors, and therefore it may be necessary to add "reconciliation" to the list of reasons that ballot bags may be opened.
4. We also appreciate that the Substitute Amendment establishes much clearer and more objective standards for the Elections Commission to certify that municipalities are qualified to implement the alternative absentee voting process. In Section 6.982(8)(a), we would recommend adjusting the timelines so that a municipality's implementation plan would be due at least 60 days prior to the first day of using the alternative process, and allowing the Commission up to 20 days to review and approve the plan. The current language using 30 days and 10 days may be problematic depending upon the number of municipalities submitting applications and whether or not there is a need to gather additional information or clarification from municipalities.

Thank you for the opportunity to share our thoughts with you. I hope this testimony will help inform the Legislature's consideration of this bill. As always, we would be glad to answer questions and work with you to address any questions or issues related to the bill.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael Haas". The signature is written in a cursive, slightly slanted style.

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