

Supplemental Testimony of Kevin J. Kennedy
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Responding to Concerns Raised at the Public Hearing of the
Assembly Committee on Campaigns and Elections and
Senate Committee on Elections and Local Government

October 27, 2015

Assembly Bill 388, Senate Bill 294

Chairperson LeMahieu, Chairperson Bernier and Committee Members:

At the joint committee hearing on October 13, 2015, Senator Leah Vukmir testified in favor of a bill (AB 388/SB 294) to restructure the Government Accountability Board. In support of the bill, Senator Vukmir cited a list of perceived problems with the agency. This document supplements my written testimony and addresses each of the concerns Senator Vukmir raised. The list below is extracted verbatim from Senator Vukmir's written testimony. Her points have been broken out and numbered for reference purposes. **The G.A.B.'s responses are in bold.**

1. In February of 2010, the GAB failed to mail postcards to inactive voters within 90 days of the November, 2010 election as required. A problem we will continue to see from the agency.

The G.A.B. could not meet the statutory deadline to mail postcards after the 2010 general election because all municipal clerks had not finished recording voter participation, a job which can take several months. The G.A.B. was also unable to mail postcards on time after the November 2012 election. Senator Lazich recognized the existing statute was unrealistic and sponsored SB 548 to move the deadline to June 15. According to page 756 of the Senate Journal, "Senator Fitzgerald, with unanimous consent, asked that the bill be considered for final action at this time." The bill was read a third time and passed. See 2013 Act 149.

The G.A.B. met the new deadline for mailing the 2014 postcards despite problems with the printer who was awarded the contract on a competitive bid.

2. In May of 2011, the GAB ruled that the recall for Senator Dave Hansen would be held on July nineteenth, while the recall for Senator Rob Cowles was held on August ninth, despite both Senators representing parts of Oconto and Brown

counties, thereby putting unnecessary burdens on county clerks, requiring them to administer two separate elections.

The timing of the 2011 recall elections was dictated by state statutes and the courts. The G.A.B. actually asked the judge overseeing the scheduling of recall elections to depart from the statutes and schedule them all on the same day because it would have simplified administration of the recall elections, but the court rejected that request.

3. In September of 2011, the GAB ruled that stickers could be affixed to student IDs in an effort to meet voter ID requirements. This ruling permitted universities to attach stickers with an issuance date, expiration date, and signature, making them a legal form of voter ID in Wisconsin. Approximately one month later, the GAB reversed the ruling. Honestly.

The statement that the G.A.B. reversed its ruling is incorrect. Wisconsin's colleges and universities asked the G.A.B. if they could use stickers so student photo ID cards could qualify as valid photo ID. The Board agreed, provided that the sticker or label contained proof that it was produced by the college or university. One month later, the Joint Committee for the Review of Administrative Rules (JCRAR) held a public hearing and some legislators expressed their opinion that the Board's decision needed to be promulgated as an administrative rule. That message was conveyed to the Board at its November 9, 2011 meeting. Director Kennedy recommended that the Board withdraw its motion regarding the use of stickers, but the Board upheld its decision regarding stickers. One week later, JCRAR passed a motion directing the G.A.B. to enact its policy decision as an administrative rule, and the G.A.B. initiated that process. This demonstrates the interaction between the Legislature, Board staff, and the Board in interpreting and administering election statutes.

During the time the photo ID law was enjoined by the courts, the G.A.B. was also enjoined from acting on the proposed administrative rule. In the meantime, colleges and universities informed the G.A.B. that they decided to go another direction and issue special student ID cards that comply with the photo ID law, making stickers unnecessary. As a result, the Board stopped promulgating a rule nobody was requesting.

4. In September of 2011, the GAB ruled that individual recall petitions with just one person's name on it could be filed. Arguably, this could allow third parties to fill out the forms in advance and only require the recipient to sign and send it in. In October of 2011, they reversed this ruling. Do you see a pattern here?

The Board did not reverse its opinion. State law contains no prohibition against a recall petition containing only one signature. In September 2011 the Board responded to a request for an opinion on that subject. When that opinion was misconstrued in the media and by some legislators, the Board further clarified its opinion to ensure the public understood what

information could and could not be pre-filled on recall petitions. At its meeting in November 2011, the Board adopted a motion clarifying that only the petition signer or circulator could complete the signer's street address and the full date on the recall petition, but that the municipality of residence and the month and year of signing could be pre-populated. This Board decision adopted staff's recommendations after hearing concerns raised by members of JCRAR, and maintained the status quo regarding the circulation and signing of recall petitions.

5. In continued pursuit of unrelenting ludicrousness, in December of 2011 the GAB ruled that "Mickey Mouse" is a valid signature on recall petitions if it is accompanied by a Wisconsin address. Mickey Mouse. From Disney World. A valid voter in the eyes of the Government Accountability Board.

The G.A.B. responded to concerns about potential recall signature fraud by building a recall database at a cost of more than \$75,000 and actively searching for duplicate signatures and fake names. There was no roadmap for such an effort and it was an unprecedented investment of staff time and resources. Out of 930,000 signatures submitted on petitions to recall the governor, there were 4,001 duplications and four fictitious signatures (Adolf Hitler, Mick E. Mous, Donald L. Duck, and I Love Scott Walker Thanks) which were not counted. The G.A.B. struck another 26,109 signatures for other deficiencies.

State law dictates that the responsibility for challenging fake, duplicate and otherwise insufficient signatures from a recall petition belongs to the official being recalled, not the G.A.B. The Board initially declined Friends of Scott Walker's demands to exceed the statutory requirements in examining the petitions. FOSW sued the G.A.B. in Waukesha County Circuit Court, where Judge Davis ordered the Board to create a database to find and eliminate duplicates. The Board complied with the order and created the database at considerable time and expense to taxpayers. Meanwhile, the Department of Justice appealed Judge Davis' ruling, which the Wisconsin Court of Appeals overturned in early February 2012. Despite this vindication of the Board's original position, the Board moved forward with creation of the recall database and checks for duplicate and fake names in the interest of transparency and public confidence in the recall petition review process.

Politifact Wisconsin recently examined this claim in the context of a Twitter message by Governor Walker and ruled it was false.
<http://www.politifact.com/wisconsin/statements/2015/oct/16/scott-walker/gov-scott-walker-says-board-wanted-accept-mickey-m/>

6. In May of 2012, a complaint was filed with the GAB that the AFL-CIO violated rules by sending mail outside of membership. The allegations were not investigated.

The G.A.B. takes all complaints seriously. However, state law makes it illegal to release information about complaints and investigations unless the Board has referred a matter to a district attorney, filed a civil complaint, dismissed a complaint after an investigation or found no probable cause to investigate. A legislator's lack of knowledge as to whether the Board has investigated a complaint does not mean the Board has not investigated it, and legislators and the public should be careful about speculation and false assumptions in such cases. Additional information regarding the Board's handling of confidential complaints cannot be released unless the Legislature removes the criminal penalties for G.A.B. staff who disclose information regarding agency investigations.

7. In September of that same year, an AFL-CIO report showed they paid the Center for Media and Democracy for lobbying. Never mind that CMD is not registered to lobby in Wisconsin. By now, this should not (?) come as a shock, the GAB again neglected to investigate.

The G.A.B. takes all complaints seriously. State law makes it illegal to release information about complaints and investigations unless the Board has referred a matter to a district attorney, filed a civil complaint, dismissed a complaint after an investigation or found no probable cause to investigate. A legislator's lack of knowledge as to whether the Board has investigated a complaint does not mean the Board has not investigated it, and legislators and the public should be careful about speculation and false assumptions in such cases. Additional information regarding the Board's handling of confidential complaints cannot be released unless the Legislature removes the criminal penalties for G.A.B. staff who disclose information regarding agency investigations.

8. In November of 2012, the Federal Elections Commission (FEC) fined the Professional Fire Fighters of Wisconsin and eleven of its former members for knowingly and willfully violating campaign regulations and laws. The GAB did not investigate any state law violations.

The FEC enforces federal law involving federal candidates, not state law. The G.A.B. takes all complaints seriously. State law makes it illegal to release information about complaints and investigations unless the Board has referred a matter to a district attorney, filed a civil complaint, dismissed a complaint after an investigation or found no probable cause to investigate. A legislator's lack of knowledge as to whether the Board has investigated a complaint does not mean the Board has not investigated it, and legislators and the public should be careful about speculation and false assumptions in such cases. Additional information regarding the Board's handling of confidential complaints cannot be released unless the Legislature removes the criminal penalties for G.A.B. staff who disclose information regarding agency investigations.

9. In December of 2012, GAB staff admitted to having involvement in the John Doe II investigation since August of that same year, but failed to inform the GAB Board. Interesting that they were willing to participate in that investigation, but not the two prior.

This is simply not so. The Government Accountability Board members were fully informed when the Milwaukee County District Attorney's Office contacted staff to ask questions about campaign finance law related to one of its investigations. This false allegation comes from a frivolous lawsuit filed by one of the targets of the investigation.

10. In February of 2013, the GAB failed to mail postcards to inactive voters prior to the April 2013 election. Again. This seems to be a constant problem for the GAB, despite their director testifying repeatedly in committee hearings and stating the contrary.

See response to #1. The G.A.B. could not meet the statutory deadline to mail postcards after the 2012 general election because all municipal clerks had not finished recording voter participation, a job which takes several months. Senator Lazich recognized the existing statute was unrealistic and sponsored SB 548 to move the deadline to June 15. See 2013 Act 149.

11. In May of 2014, the GAB staff admitted that they had not conducted post-election reviews to determine if individuals with ongoing felony sentences may have voted for the 16 elections held from February 2010 through April 2014. Finally, in July of 2014, the staff stated that these reviews had been completed.

The G.A.B. works closely with the Department of Corrections and Wisconsin's local election officials to ensure that convicted felons are removed from the voter rolls before elections, they are unable to reregister and vote until their rights are restored, and that any who do vote are referred for prosecution. The post-election audit is the third step in the process to ensure that clerks have completed the pre-election procedures and that no felons slipped through the cracks. The audits were temporarily delayed because the process was routinely identifying too many false positive matches and some District Attorneys told the G.A.B. to stop sending referrals until the problem could be fixed so that eligible voters were not accused of improperly voting,

One innocent person was actually charged with a felony based on a false positive match and the District Attorney publicly apologized. Because of these problems, the G.A.B. stopped the audits and reengineered the matching and auditing process. Once that was complete, we caught up on all the outstanding audits in a short period of time. Audits are now conducted in a timely manner and produce much more reliable matches.

Continuing a flawed audit process for the sake of compliance would have been a waste of taxpayer money and a misuse of scarce prosecutorial resources. The improved process uses a new technological solution that streamlined the exchange of information between the G.A.B., DOC, municipal clerk and district attorneys. This has decreased the time and staff resources for post-election felon audits, improved the response rate from involved partners and has increased the reliability of any referral for potential prosecution by the district attorney.

During this period, more than 16 million votes were cast and the completed audits identified 110 suspected cases of felon voting, which were referred to district attorneys for prosecution within the applicable statute of limitations.

12. In September of 2014, six administrative rules that were statutorily required in 2006 to be promulgated had not yet been promulgated. Staff indicates that they were occupied with other tasks.

The G.A.B. began work in 2008 and that year was consumed by the task of reviewing numerous opinions and guidelines of the former State Elections Board and State Ethics Board, as well as administrative rules. One of the rules LAB cited is far more recent, regarding a voter's signature on the poll list which is already contained in statutes and would be duplicative. One of the rules regarding free airtime on cable access channels is probably unconstitutional. The staff is currently working to promulgate all required rules.

The administrative rule process is very technical and time consuming, and requires additional steps at an agency headed by a board. G.A.B. staff attorneys have been occupied with many other legal priorities, which have delayed ruled promulgation. The topics of the identified rules have not prevented the agency from completing its responsibilities.

13. In December of 2014, the audit of the GAB revealed that the GAB did not complete audits of the electronic voting equipment used in the November 2008, November 2010, November, 2012 elections until October 2013, as statutorily required.

G.A.B. staff and local election officials completed these audits as required by law which found that the voting equipment audited functioned properly and accurately counted ballots. What was delayed were the G.A.B.'s final written reports on the results of these audits. If any of the audit results immediately after the election had indicated a problem with the accuracy of the voting equipment, the G.A.B. certainly would have escalated the priority of the audit report and addressed the problem. During the audit process, G.A.B. staff monitored local election officials' work and corrected their errors.

14. This audit revealed that from 2010-2013, staff did not assess penalties for statutory violations relating to late campaign finance reports for 655 of 674 late reports. Of the 19 penalties that were assessed, the amounts assessed were inconsistent with GAB's penalty schedule.

Statutes permit enforcement discretion, and staff followed the Board's policy of seeking compliance before imposing harsh financial penalties on late filers. Staff concentrated its efforts to ensure disclosure by receiving and processing the reports for public consumption, followed by imposing penalties when necessary as determined by the Board. The penalty schedule originally adopted by the Board in 2008 was unrealistic, and the schedule should have been revised sooner. When staff did deviate from the penalty schedule, it was because of mitigating and exacerbating factors. In most cases, the penalties were reduced. After the LAB audit the Board revised the penalty schedule and staff has adhered to it consistently.

As I stated in my original testimony, the reasons given for doing away with the G.A.B. are based on inaccurate, incomplete and, in many cases, completely false assertions by the proponents of this legislation. This point-by-point refutation of those specific assertions demonstrates that while the G.A.B. is not perfect, it is clearly not the "failed experiment" that some claim it to be.

Thank you for the opportunity to share my thoughts with you. I hope this testimony will help inform the Legislature's consideration of these bills. As always, I am available to answer questions and work with you in developing proposed legislation.

Respectfully submitted,



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