



## IRG Policy Reform: Elections Accountability

### 1. Introduction

The Wisconsin Elections Commission's (WEC) administration of our election laws in recent years has been problematic with respect to its ability to comply with relevant statutes as well as its willingness to act without partisanship. This has left many to wonder whether it can manage our elections with the integrity necessary to satisfy the legitimate expectations of our fellow Wisconsinites. In 33 of our sister states, citizens who have such concerns can hold top elections officials accountable by voting them out of office. Here in Wisconsin, however, our top elections officials (the unelected, partisan members of the WEC) are insulated from direct, democratic accountability.

For the reasons discussed below, the Institute for Reforming Government (IRG) believes the Commission's current structure prevents it from effectively administering Wisconsin's election statutes. **Because this is a systemic problem, and not simply a personnel matter, IRG believes the Commission should be abolished and its authority reassigned to an elected official who is directly accountable to voters.**

### 2. The Wisconsin Elections Commission

The Commission is the product of dissatisfaction with the previous entity responsible for administering our election statutes—the Government Accountability Board (GAB), which operated under the guidance of six gubernatorially-appointed retired judges. The dissatisfaction grew out of concerns that, although the Board was non-partisan as a matter of law, as a matter of practice it operated with a significant political bias. The legislature decided the best way to address concerns about the implicit political bias was to bring them out into the open.<sup>1</sup> So when it replaced the GAB, the legislature created an explicitly partisan body. The Commission's six members are appointed by the Governor, the Senate President, the Senate Minority Leader, the Speaker of the Assembly, and the Assembly Minority Leader.<sup>2</sup> Each of these constitutional officers may appoint one member, except for the Governor, who may appoint two.<sup>3</sup> Currently, the Commission's membership reflects a partisan balance of three Republicans and three Democrats. Because the commissioners regularly deadlock along partisan lines, most operational and enforcement decisions are made by Commission staff. The Commission's staff comprises an administrator nominated by the Commission and approved by the Senate, and her discretionary hires.<sup>4</sup>

### 3. Problems with the Status Quo

Although the staff members are at least nominally non-partisan, their administration of Wisconsin's election laws has been dogged by regular complaints of partisan favoritism, all leaning in only one direction.

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<sup>1</sup> The GAB was itself the product of dissatisfaction with *its* predecessor, the State Elections Board.

<sup>2</sup> Wis. Stat. § 15.61(1)(a).

<sup>3</sup> *Id.*

<sup>4</sup> Wis. Stat. § 15.61(1)(b) (administrator); Wis. Stat. § 5.05(3)(d) (staff hires).



One of the staff's most overt and egregious examples of partisanship was its refusal to allow the Green Party's presidential ticket, Howie Hawkins and Angela Walker, access to the ballot for the November 2020 election.<sup>5</sup> Although the Wisconsin Supreme Court inexcusably denied the request to address this matter, the staff's unlawful behavior took withering criticism from the constitutionalist jurists on the bench. In one dissent, Justice Rebecca Bradley noted that the staff's decision "irreparably harm[ed] the citizens of Wisconsin, along with the integrity of Wisconsin's entire election process."<sup>6</sup> In another, Justice Annette Ziegler said the staff "violat[ed] the sacred system of democracy that is the bedrock of the United States of America."<sup>7</sup>

Other staff decisions that came with a distinct partisan slant included its role in guiding the Center for Tech and Civic Life's "election-assistance" grants to heavily democratic municipalities,<sup>8</sup> authorizing clerks to use government resources to conduct what many saw as get-out-the-vote efforts (a traditionally partisan activity) such as Madison's "Democracy in the Park," giving permission to use unsupervised drop-boxes to collect absentee ballots, instructing clerks to count absentee ballots without accompanying written applications while simultaneously acknowledging its instructions were contrary to controlling law,<sup>9</sup> and promoting the mailing of "voter education" material such as brochures and PSAs in municipalities around the state. The staff's advice, authorization, and guidance has been so problematic that it is now the subject of a pending lawsuit.

#### 4. Policy Solution: Direct Electoral Accountability

The lesson of the State Elections Board, the GAB, and the Commission is that partisan behavior is a constant; the variables are (1) whether the partisanship is implicit or explicit, and (2) whether the practitioners are directly accountable to the public or are instead insulated both functionally (by making them unremovable through democratic means) and rhetorically (by labelling them non-partisan). **Governmental authority is exercised most responsibly when it is premised on a forthright recognition of objective realities, and when those who exercise it are subject to electoral accountability.**

This is a general rule, of course, and one may find exceptions without too much difficulty. But by and large, this rule has a far better track record than its alternatives. Any reform of the Commission, therefore, should respect this rule by explicitly recognizing the inevitable partisanship, and by making the one who exercises this authority directly accountable to the people of Wisconsin.

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<sup>5</sup> Mr. Hawkins' "nomination papers were . . . rejected by unknown and unaccountable Wisconsin Elections Commission staff, not by a majority vote of the Commission itself." *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75 ¶32 n.2, 393 Wis. 2d 629, 645, 948 N.W.2d 877, 885 (Annette Kingsland Ziegler, J., dissenting).

<sup>6</sup> *Id.* at ¶ 84 (Rebecca Grassl Bradley, J., dissenting).

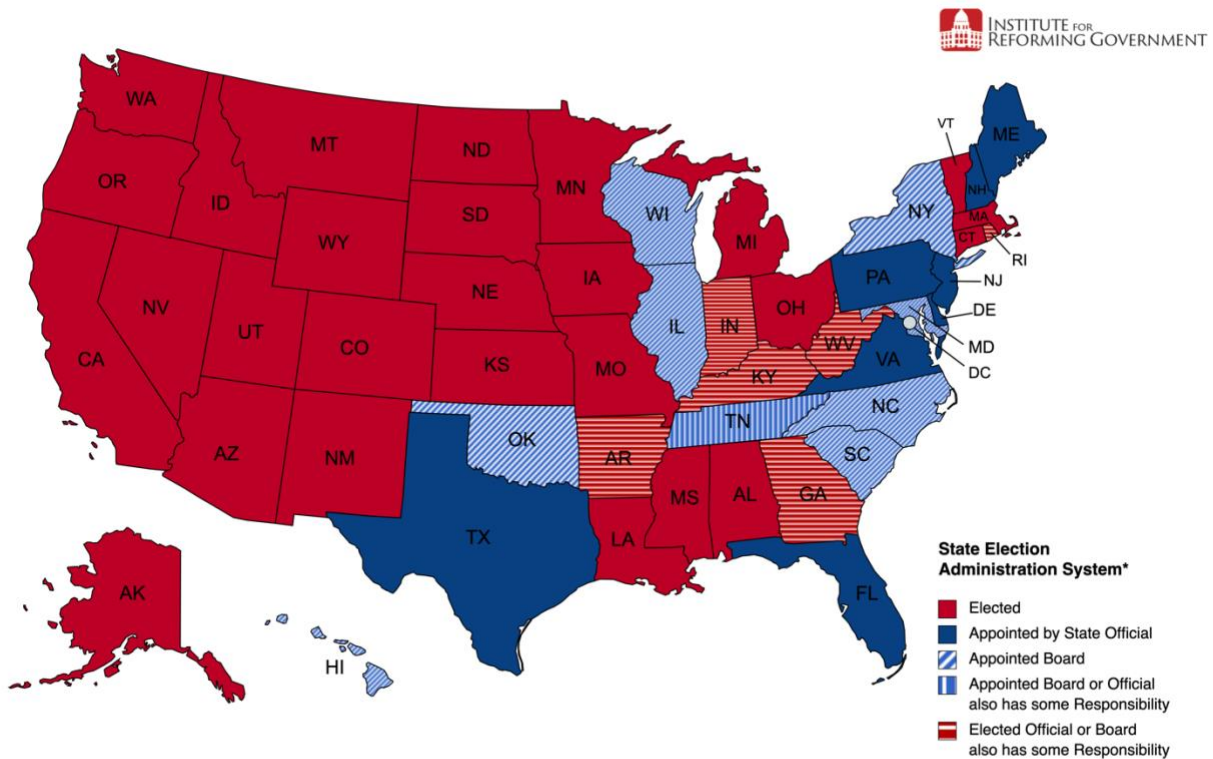
<sup>7</sup> *Id.* at ¶ 32 (Ziegler, J., dissenting).

<sup>8</sup> A study conducted by the Wisconsin Institute for Law and Liberty concluded the grants resulted in increased turnout of democratic voters.

<sup>9</sup> The WEC's instructions regarding the conduct of recounts cites itself as the authority to dispense with the need for a written application while, in the same sentence, citing a statute and a controlling court of appeals case that directly contradict its position. Wisconsin Elections Commission, *Election Recount Procedures*, p. 7 n.5.



The IRG recommends that the legislature abolish the Commission and transfer its responsibilities to the elected Secretary of State. This is not a novel approach to administering a state's election laws—33 states directly elect their head elections officials. Of those, 25 utilize the elected office of the Secretary of State for this purpose, 2 empower their elected Lieutenant Governors, and 6 elect Commissioners. Of the remaining states, the legislature elects the chief elections officer in 3 states, 9, including Wisconsin, have an appointed board, and 5 have an appointed chief elections officer.



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\*Information on State Election Administration provided by NCSL: <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>

The Wisconsin Secretary of State's constitutionally-prescribed duties are exceedingly minimal, comprising only the obligation to "keep a fair record of the official acts of the legislature and executive department of the state, and [to], when required, lay the same and all matters relative thereto before either branch of the legislature."<sup>10</sup> Beyond that, the Secretary of State "shall perform such other duties as shall be assigned him by law."<sup>11</sup> The Secretary of State is currently a lightly-utilized office, and could administer Wisconsin's election laws through a simple legislative act transferring the Commission's responsibilities and FTEs to a new structure within the Secretary of State's office.

<sup>10</sup> Wis. Const. Art. VI §2.

<sup>11</sup> *Id.*



The new structure would mirror other state agencies with substantive oversight responsibilities. The office would be led by the elected Secretary of State, who would be empowered to appoint senior leadership staff, including a chief legal counsel, an elections administrator, and a communications executive.

Transferring the Commission's authority to the Secretary of State satisfies the goal of premising the exercise of governmental authority on objective realities, and making those who exercise it subject to electoral accountability. The Secretary of State is, obviously, a partisan actor. That, however, is an ever-present risk even when the chief elections official is nominally non-partisan. **At least in a Secretary of State model, the official must shoulder the consequences of allowing partisanship to sway the manner in which they perform their duties.**

And one of those consequences is that, every four years, the Secretary of State will stand for election in the fall along with all other partisan officers. Right now, there is substantial ire over the Commission's failings, but there is no outlet through which to express it because the commissioners are not answerable to our fellow Wisconsinites. If the top elections official is elected, however, that discontent will have a productive pathway, to wit, election of a new Secretary of State. And that knowledge should prospectively temper the official's willingness to administer the laws in a partisan fashion.

For the last few decades, the structure within which our election laws are administered has been on a trajectory towards a more effective and accountable system. Moving from the State Election Board to the Government Accountability Board addressed some of the defects of the former, but left the partisanship nominally hidden but functionally present, all without direct accountability to the people of Wisconsin. **Moving from the Government Accountability Board to the Wisconsin Election Commission brought its partisan nature from the subtext to the text, but still insulated it from direct accountability.** The final move in this trajectory is to keep the partisanship in the open, but introduce the remaining missing ingredient—direct electoral accountability. Assigning the Commission's duties to the Secretary of State will complete the transition to a responsible and accountable administration structure that will put us in the best possible position for restoring confidence in the integrity of our elections.