



ENHANCING FAIRNESS: WISCONSIN EXPERIMENTS WITH NONPARTISAN ELECTION ADMINISTRATION, 2001 – 2016

Daniel Dennehy and staff drafted this case study based on interviews conducted in the United States from August through November 2022. Case published February 2023.

SYNOPSIS

In the wake of a 2001 scandal over the use of government employees to assist political campaigns, public interest groups in the US state of Wisconsin pushed for reform of the state ethics and elections boards, which had been slow to respond to complaints about misuse of resources and had declined to refer suspected lawbreakers for prosecution. During the 2002 election period, gubernatorial candidates of both main parties joined the call to insulate election administration from partisan pressure. Five years of negotiation came to fruition in 2007, when the state senate and assembly voted to create a consolidated election and ethics agency directed by retired judges. The first nonpartisan election administration authority of its type in the United States, the new agency, called the Government Accountability Board, replaced a system that had vested governance of elections in a commission made up of members of both major parties. But eight years later, political alignments shifted. Arguing that the board had overreached in its handling of certain sensitive cases, state legislators in 2015 voted to shutter the institution and reverted to the pre-2007 system run by representatives of the two major political parties. This case illuminates both the circumstances that can drive politicians to introduce a nonpartisan election management system and the challenges associated with the design, implementation, and sustainability of the approach. (Note that the lead reformer in this case, Michael G. Ellis, died in 2018.)

INTRODUCTION

During the busy 2001 election season, *Wisconsin State Journal* reporter Dee Hall set some of her regular work aside and pitched in to help cover political campaigns. Michael (Mike) McCabe, a public interest leader, said Hall had told him she was surprised when she telephoned a member of an incumbent candidate's campaign staff and saw that the contact number included the Wisconsin state capitol's 266 prefix. She dialed the number and reached a legislative caucus office. The state's four legislative caucuses, two in each chamber, had staff members who were on the public payroll and provided research support to legislators from the main parties, the Republicans and the Democrats.¹ By law, the staff could play no role in campaigns.

Her suspicions raised, Hall began to investigate. Only two years earlier, the Wisconsin Democracy Campaign and Common Cause Wisconsin, two public interest organizations, had published a report alleging the caucuses had made illegal use of public employee time for campaign-related work. Editors at the *Wisconsin State Journal*, one of the state's largest newspapers, wanted to know more.

Hall reached out to McCabe, Wisconsin Democracy Campaign's new director, for more information. Caucus staff cost taxpayers almost \$4 million per year, she learned.² They carried out assigned research, helped frame policy options, and monitored the progress of proposed laws.³ Party leaders directed their work, but there was supposed to be a red line between activities that furthered the legislative process and campaign tasks.

Hall's story about the breach of that red line made front-page news across the state on May 20, 2001.⁴ Three days later, the Wisconsin Democracy Campaign, a nonprofit, nonpartisan watchdog group founded in 1995, filed with the ethics and elections board its complaints against the misuse of staff time. McCabe and Jay Heck, executive director of Common Cause Wisconsin, also decided to file a joint complaint with the elections board on June 6.⁵

The response disappointed civic groups. The boards negotiated a settlement with the legislature in mid-October that eliminated half of the caucus staff positions, moved remaining personnel to other jobs, instituted new rules requiring employees to account precisely for their uses of time, and, in exchange, agreed to terminate further inquiries. The party caucuses in each chamber paid fines of \$20,000 each, but the boards referred no one to district attorneys for possible criminal prosecution, nor did they file civil complaints; and the number of public employees on each legislative leader's staff doubled.⁶ No one was held accountable for what became known as the "legislative caucus scandal".⁷

Members of the public, joined by a few political leaders, began to question how effective the boards were at enforcing election and ethics laws. "We had experience with these agencies before, so I wasn't surprised they didn't act promptly on our complaints," McCabe recalled. "As the scandal grew, it shined even more of a light on how lame these agencies were."

James (Jim) Doyle, who was Wisconsin's attorney general at the time, authorized additional personnel needed for district attorneys to investigate the

allegations that the boards had not pursued. “They [the state boards] were too close to the legislature,” he said.

“The legislative caucus scandal created an atmosphere that made people feel they had to do something,” Doyle recalled in 2022. The question was what to do: what to propose, how to build a legislative coalition to win passage, and how to make change happen.

The problem of what to do landed in the office of state senator Michael G. Ellis, a Republican representing Neenah, a small city about 100 miles northeast of the capital, Madison. Before his election to the state senate, Ellis had served in the state assembly from 1975 through 1983. He had earlier voiced concern about growing partisanship at the ethics and elections boards. Ellis and his top aide, Michael Boerger, already had a working relationship with Heck, McCabe, and an earlier director of the Wisconsin Democracy Campaign—election activist Gail Shea—all of whom were part of a growing movement to change the way the state regulated its elections. After the legislative caucus scandal broke, Ellis began informal conversations with the three of them about possible reforms.

THE CHALLENGE

In the US federal system, election management rested mostly with the country’s 50 states, which had the power to regulate everything from voter registration and ballot design to rules governing absentee ballots and early voting. In 2001, when Hall’s article appeared, the states administered elections both for their own offices and for national-level posts, including the presidency (figure 1).

Nowhere in the United States had any state attempted to move from an election administration system in which party affiliation played a role in appointment—usually as part of a mutual policing model in which parties could check and balance each other—to one that was nonpartisan, wherein the commissioners who governed the election process had no party affiliations and did not campaign for their offices (text box 1).

Any such effort to introduce a new, nonpartisan, and consolidated elections and ethics agency would have to reckon with several likely difficulties. The first challenge was to design an agency in a way that its governance would be truly impartial. In 2001, Wisconsin followed a nonpartisan model of governance for its ethics board and a partisan model, with internal checks and balances, for election administration. But both had failed to prevent or investigate cases of inappropriate partisan influence and had stalled in implementing a variety of measures designed to support citizens’ right to know.⁸ The legislature had created the state ethics board in 1973 and the state elections board in 1974. The ethics board had six nonpartisan members—appointed by the governor and confirmed by the senate—and an executive director appointed by a majority vote of the board.⁹ Under supervision by the board’s directors, five staff

Figure 1: State Map and Profile



Located in the north-central part of the United States on the border with Canada, Wisconsin had a population of 5.364 million people in 2000 and 5.833 million people in 2022. Median household income in 2000 was slightly over \$43,790, and about 11% of the population lived at or below the national poverty line. Major manufacturing, accounting for about 22% of economic activity, was concentrated in the area around Milwaukee and other Lake Michigan port towns. Metal products and machinery, paper and other products, and agricultural processing were among the main sources of employment. Large industrial farms were increasing their share of the dairy production that had once made the state famous. Close to 70% of the population lived in urban areas. About 22.5% of the population aged 25 or older had bachelor's degrees or had completed other higher education.

At the time of the events profiled in this case study, the state's population was about 89% white, 3.6% Hispanic or Latino, 5.7% Black or African American, and .9% Native American. About 5% of the population was foreign-born. Wisconsin was less diverse than other states in the same region or with similar economies. About 18% of the population was older than the age of 65, and 22% were younger than 18.

Voter turnout in presidential election years was above the national average. Of those who registered to vote, 67 to 73% cast ballots during presidential elections held from 2000 through 2020. Turnout in general elections when a presidential choice was not on the ballot ranged from 44% to close to 60%.

Election data are from the Wisconsin Elections Commission. Other profile data come from Data Commons Place Explorer, accessed at https://datacommons.org/place/geoId/55?utm_medium=explore&mpop=Person&hl=en. Information from the 2000 census comes from US Department of Commerce, US Census 2000 accessed at <https://usa.ipums.org/usa/resources/voliii/pubdocs/2000/c2kprof00-wi.pdf> and the US Census, accessed at <https://www.census.gov/quickfacts/WI>. Other information on the Wisconsin economy comes from Malia Jones, "Putting Rural Wisconsin on the Map," accessed at <https://apl.wisc.edu/shared/tad/putting-rural-wisconsin#:~:text=By%20the%20Census%20definition%2C%2097,population%20lives%20in%20rural%20areas> and <https://www.britannica.com/place/Wisconsin/Economy>.

Text Box 1: Models of Election Management

International elections best-practice standards stress the need for impartiality in election administration. Achieving impartiality requires structural and functional independence from the executive branch and from short-term interference by members of the legislature who wish to influence election outcomes.

In a partisan election administration model, the chief election officer or supervisory board members are selected by voters in partisan elections or appointed by party-affiliated elected officials. There is no structural independence from party influence, even though in actual practice the person or persons so chosen may be even-handed in executing the responsibilities of the job.

There are two main alternatives. The first is a mutual-policing model in which election boards or commissions include members of each main party in anticipation that each party will check and balance the others. In the United States, which has two main political parties, the model is also known as *bipartisan election administration*. The approach has a number of vulnerabilities—especially in highly polarized political settings and in places with more than two parties—and alliances could undermine checks and balances.

The third option is *nonpartisan election administration*, in which board or commission members—and sometimes the chief election officer—are unaffiliated with parties and are selected by some means that makes them independent of party politics.

At the time of the events in this case study, US states embraced a range of approaches. The National Conference of State Legislatures in 2022 reported: “In 33 states, voters elect the chief election official. In most of those states, the elected chief election official is the secretary of state, but in Alaska and Utah, the role is held by the lieutenant governor. In six states—Delaware, Florida, New Jersey, Pennsylvania, Texas, and Virginia—the governor appoints the chief election official. In four states—Maine, New Hampshire, Oklahoma, and Tennessee—the chief election official is selected by the legislature. Both chambers have a role, except in Oklahoma, where responsibility lies solely with the state senate. In seven states—Hawaii, Illinois, Maryland, New York, North Carolina, South Carolina, and Wisconsin—and Washington, D.C., the chief election official is appointed by the state board or commission of elections.”

Seventeen states and Washington, D.C., had boards or commissions to oversee elections in the states or the district. In nine of those states, the National Conference of State Legislatures reported, the governor appointed people, who were then confirmed by the state senate; and boards were most often structured to be bipartisan, with a certain number of members from each major political party.

See discussion of international norms in Oliver Joseph, “Independence in Electoral Management: Electoral Processes Primer 1,” International IDEA, Stockholm, 2021, and Daniel P. Tokaji, “America’s Top Model: The Wisconsin Government Accountability Board,” 3 *UC Irvine Law Review* 575, 2013, <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1091&context=ucilr>. Data on the US states appears in <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>.

members investigated alleged violations of civil law and prosecuted the cases in administrative hearings, but the board and its staff relied solely on district attorneys for criminal investigations and prosecutions in the courts.

A year after it set up the ethics board, the legislature created the elections board, which assumed responsibility for administering campaign finance and election laws that had previously been part of the job of the secretary of state.¹⁰

The elections board was bipartisan and had eight members appointed for two-year terms and composed of one person selected by the governor, one person designated by the chief justice of the state supreme court, one each chosen by the majority and minority leaders of the state senate, one each chosen by the majority/minority leaders of the state assembly, and one each designated by the chief officials of political parties that mustered more than 10% of the vote in the state's previous gubernatorial election.¹¹ The board chose an executive director by majority vote.¹² Staff members had to be nonpartisan—that is, unaffiliated with any political party. The elections board had authority to conduct investigations into violations of civil law and to prosecute such cases, but it relied on district attorneys to handle criminal investigations and prosecutions and on the state attorney general's office for statewide investigations. Neither body had strong investigative powers. The legislature required the ethics board to secure funding for investigations before starting them, which enabled the majority in the legislature to stymie any probe that affected one of its members.

In practice, finding a way to identify potential board members who had no affiliations with either party could prove difficult. Many of the people with the knowledge and skills to run an election or manage an ethics board were likely to have had partisan affiliations or even to have run for office at some point in their lives. In Wisconsin, even judges were selected through elections, though at the time they were not allowed to affiliate with political parties. The reformers would have to think hard about how to define eligibility criteria and management practice in order to ensure impartiality.

Securing political support for reform posed a second significant challenge. Wisconsin's legislature consisted of a 33-member senate and a 99-member assembly. Senators served four-year terms, and representatives to the assembly served for two years. Reformers needed a simple majority vote in the two chambers of the legislature to pass laws but a two-thirds supermajority in each to override a veto by the governor. To enshrine a measure in the state constitution required a simple majority in each chamber during each of two successive legislative sessions and approval in a statewide referendum.

During the 2001–02 Wisconsin legislative session, Republicans controlled the state assembly, and Democrats controlled the state senate. To win support for reform required compromise. However, because assembly members were up for election every two years and because competition between the two main parties was often intense in a state fairly evenly divided between voters who leaned Republican and voters who leaned Democrat, forging a durable coalition was especially difficult.

Third, there were already signs that those who might face charges when district attorneys began to investigate were recruiting some of their peers to block the progress of new laws, arguing that reform was equivalent to an admission of guilt. Most prominent among those were Assembly Speaker Scott Jensen (Republican), Senate Majority Leader Chuck Chvala (Democrat), Assembly Majority Leader Steven Foti (Republican), and Assistant Majority

Leader Bonnie Ladwig (Republican), all of whom were charged in relation to the caucus investigations during 2002, along with one other legislative leader.¹³

Fourth, once the new system was in place, the director would have to introduce new management protocols to prevent the conflicts of interest and perceptions of partisanship that had plagued the past election board. That meant developing a new code of ethics, assessing previously enacted ethics and elections regulations, improving guidance and monitoring systems, and preparing new board members for jobs they were unaccustomed to.

Finally, the elections management system could not do its job without adequate funding. In the past, administrators had struggled to secure the budget allocation needed get funding to hire enough staff to administer elections and train clerks. (At the time, the state was facing its worst budget deficit in 20 years.) Because politicians had little incentive to approve spending for potential investigations into their own conduct, the legislature would need to agree on how to finance the various functions of both boards at an adequate level and without risk of political interference. “Fairly early on, what became very important was making sure there was a separate stream of funding” for investigations, recalled Heck, who remained director of Common Cause Wisconsin in 2022.

Despite those challenges, Ellis could draw on Wisconsin’s history as both a testing ground for reform and a laboratory of democracy to help persuade fellow legislators to listen.¹⁴ The state had pioneered a number of innovations—from workers’ compensation to a state income tax.

Ellis himself was part of that tradition. The *Capital Times*, a Wisconsin online news organization, described him in 2014 as “the kind of politician who hangs out at the bar after a long day of legislating, talking big about what he was going to do.”¹⁵ Once a high school teacher, Ellis entered politics after the city he worked in attached a streetlight to the telephone pole outside his bedroom window. One of his brothers had advised him that if he wanted the streetlight moved, he ought to run for a position in the municipal government.¹⁶ He did so and later successfully campaigned to serve in the state legislature, where, by 2001, he had held office for 30 years, first in the assembly and then in the senate. He was strongly committed to bipartisan compromise and to addressing problems that Wisconsin’s citizens considered important, including school funding, fiscal responsibility, restrictions on exploitative practices in payday lending, and clean government.

Ellis, who died in 2018, four years after stepping out of politics, thought that nonpartisan election administration was crucial and that both the ethics and election boards were increasingly beholden to the politicians who appointed them, according to Boerger, his aide. Boerger recalled Ellis explaining that during the 1990s it was common practice for people appointed to these boards to telephone the senate majority and minority leaders for instructions about how to vote on matters under consideration.

FRAMING A RESPONSE

As 2002 approached, the issue of election fairness was very much in the public eye. At the national level, Wisconsin Senator Russell Feingold (Democrat) had partnered with Arizona Senator John McCain (Republican) to introduce new campaign finance rules, and Feingold urged the Wisconsin legislature to be a leader in this cause rather than a laggard. Feingold backed Ellis's calls for reform.¹⁷

Campaign finance, which created avenues for special-interest influence, had become part of the public debate in Wisconsin, alongside reform of the boards, and Ellis and his allies tried to introduce proposals for addressing both. In Ellis's view, special interest money encouraged polarization and distracted from grassroots interests. And there were people in both of the main political parties who shared that concern.

The earliest public proposal for board reform came from Representative Tom Barrett, who was competing in the Democratic primary for governor.¹⁸ In July 2002, Barrett proposed combining the two boards into one nonpartisan body with resources and staff to investigate and enforce violations. He further suggested creating a nominating committee made up of two justices of the state Supreme Court, one faculty member each from the University of Wisconsin Law School and Marquette University Law School, and a representative of the League of Women Voters of Wisconsin. That committee would then appoint an eight-member board, with one member from each Wisconsin congressional district. And Barrett recommended that the new institution have the authority to conduct investigations and hire special prosecutors.¹⁹ Doyle, Barrett's primary election opponent, also made ethics and election reforms part of his platform, though he did not offer a concrete plan.

Others were hard at work on the same issues. Governor Scott McCallum, a Republican, had already created a Task Force on Ethics Reform in Government, led by Kenneth Davis, the dean of the University of Wisconsin-Madison Law School. The task force issued a report in September 2002 that proposed combining the boards and creating an enforcement division. The enforcement division would consist of an investigator and an attorney who could litigate the cases in court.²⁰ The proposal located governance in a seven-member board whose members were selected by a committee composed of two people appointed by the governor, the state senate majority leader, the state assembly speaker, the supreme court chief justice, the Wisconsin bar president, and the University of Wisconsin System president.²¹

Ellis sought to identify a workable model from among those and other suggestions, recalled Boerger. The two also kept an eye on the legislative calendar and the temperature of public opinion in an effort to identify the right time to introduce a proposal. No legislation would likely win passage in the remaining months of the 2002 election year.

As the 2003–04 legislative session approached, the timing seemed propitious. In November 2002, the US Congress passed the Bipartisan Campaign Reform Act—commonly known as the McCain–Feingold Act—

limiting soft-money campaign contributions by interest groups and national political parties and requiring candidates for federal office to approve the content of all their advertising. The national model inspired Ellis to attempt something similar for Wisconsin elections, and he found an ally in Jon Erpenbach, a Democrat who became the state senate minority leader. Ellis then decided to push for additional change.

Bolstered by heightened public interest in campaign finance reform in the wake of the election and the passage of McCain–Feingold, Ellis asked Boerger to meet him at a local restaurant. There, Boerger said, Ellis sketched on a bar napkin the four reforms he wanted for the state elections and ethics boards: “combining the boards,” “freedom from influence by the legislature and the administration,” “not have its hands tied financially by its legislative budget if they were going to do investigations,” and “a new enforcement division.” The occasion was the first time that Ellis and Boerger had a clear picture of which elements of reform they would fight for in the legislature.

GETTING DOWN TO WORK

Once Ellis’s informal advisory group had agreed on the policy changes necessary, they turned their attention to building political support in Wisconsin’s legislature. In the 2002 election, voters selected Doyle, the Democratic candidate, as governor. Republicans (Ellis’s party) won control of the senate with an 18–13 majority and retained control of the assembly 58–41. The Republican party was divided between moderates like Ellis and members who championed a hardline, pro-market, small government, states’ rights, and religious liberty ideology. Ellis would have to build support within his own caucus to win passage.

Floating an idea

Ellis and Boerger were well aware that enacting state elections and ethics board reforms would be difficult. It would take time to build support and a sense of ownership. “There was a lot of skepticism, senators needing to get comfortable with the idea,” Boerger remembered.

Together with five other senators and six representatives, a mix of Republicans and Democrats, Ellis introduced the first reform proposal at the end of January 2003. The draft bill consolidated the two boards and located governance in a nine-member body, with eight members appointed by the state supreme court (whose members were themselves elected but not on party lines) plus a ninth member appointed by those eight. The nominated candidates had to be unaffiliated, meaning that they could not recently have run for office on a party ticket, registered as members of a party, or contributed campaign donations to a party. The new body could decide how to spend its budget, which was to be allocated on the basis of an annual estimate of the amount required for the board to do its job plus whatever additional amount was required—in consultation with the state’s controller.²² Further, it would have an enforcement division with a full-time special prosecutor to investigate and prosecute both

civil and criminal violations of laws concerning campaign finance, elections, lobbying, and ethics. The enforcement division could investigate at the discretion of the prosecutor—and without approval from the governance board.²³

Amendments by a legislative committee quickly reshaped the draft and reintroduced a partisan element. The revised text called for a minimum of six members. Four would be nominated by a committee made up of the chief justice and three people from universities or civil society. The governor would appoint people from that list and send the names to the senate for confirmation. The governor would also appoint one member of every political party with more than 1% of the vote in a statewide election. That modification opened the door to tied votes that could cause logjams—a risk the drafters were willing to take to maintain balance and force consensus decision making. The legislators also removed the proposed funding provisions from the original draft, instead allowing funding above amounts originally budgeted only for the enforcement division's special prosecutor.²⁴

The bill never made it out of the committee. Ellis's Republican colleagues voiced strong opposition to the text. At the time, Jensen, a Republican legislator who had been caught up in the caucus scandal, had just stepped down from his previous post as assembly speaker—though he continued to serve in the assembly—and was under indictment for three counts of felony misconduct in public office as a party to a crime. Jensen was popular in his district and had been reelected unopposed.²⁵ Republican leaders did not want to pass legislation that appeared to admit guilt in the caucus scandal, Boerger recalled. “As long as Jensen was out there fighting going to jail and feeling that he was going to be railroaded in Dane County,” whose district attorney had brought the charges, Boerger said, “there was no way.” Dane County was home to the state capital and to the University of Wisconsin–Madison campus. Its voters leaned Democratic at the time, and it lay outside of Jensen's district.

Ellis and his allies did not give up hope. Civil society pressure escalated at the end of 2004 and sparked more support for the proposals Ellis had offered. McCabe, the Wisconsin Democracy Campaign's executive director, helped guide the formation of a People's Legislature, which held its inaugural meeting during the first week of January 2005. Inspired by the Fighting Bob Fest, an annual Wisconsin gathering named after early-twentieth-century Progressive Party Governor Robert “Fighting Bob” La Follette, the People's Legislature engaged citizens in setting priorities for government and weighing policy options. Its 1,100 new members agreed that campaign finance reforms, consolidation of the state ethics and election boards, and stronger ethical standards should be front and center.²⁶ After the success of the first meeting, McCabe took the People's Legislature on the road to fairgrounds and other venues across the state to build public awareness and support.

Ellis decided to launch a second try. He again assembled a bipartisan group of state senators and representatives who could help reintroduce reform legislation in 2005.²⁷ The proposal mirrored the compromise version negotiated

months earlier, with the addition of a clause preventing members of the new proposed consolidated board from simultaneously holding other posts that were also subject to the code of ethics—meaning a post in an independent institution that exercised scrutiny over the other branches of government.²⁸ The committee voted to send the draft bill forward over the opposition of two members, who removed themselves as sponsors, still concerned about the fallout from indictments in the legislative caucus scandal.

Again, there was pushback. “The atmosphere in those days was thick with the unfolding consequences of the scandal, and emotions were high in both houses and on both sides,” Boerger said. Republican members of the Joint Finance Committee proposed an amendment that stripped the enforcement division of the proposed board of a special counsel to investigate and prosecute violations. One of this amendment’s backers had ties to a legislator convicted in the legislative caucus scandal.²⁹ Three Democratic committee members opposed the alteration, but the amended bill moved to the senate floor, where it was adopted by a 28–5 vote after minor changes.

The bill moved to the assembly. Ellis and Boerger negotiated a deal with Representative Mark Gundrum, a Republican, to help ensure passage, mindful of the unwillingness of some of those indicted in the legislative caucus scandal to sign on. At the center of the compromise was a seemingly arcane but consequential issue: which district attorneys could prosecute violations of election, ethics, and campaign finance laws. One option was to authorize the chief justice of the state supreme court to designate someone by means of a process of random selection.³⁰ Gundrum offered another approach, however: allow the district attorney in the home county of the person who allegedly violated the law to charge and prosecute.

“Bottom line was that the bill was never going to pass the assembly unless we did something to make sure Jensen didn’t have to go to jail,” Boerger remembered. The assumption was that the home-county district attorney, who was also an elected official, would be more lenient than would the district attorney of the county where the crime allegedly had been committed. Applied retrospectively, that provision would get Jensen off the hook. Ellis and civic groups opposed that approach, but Gundrum insisted it was both consistent with the state constitution and a necessary compromise for winning passage.

The assembly committee members insisted on a few more changes. “Republicans like Gundrum would say, ‘There’s no way in hell I am gonna accept the League of Women Voters having a say on this board,’” McCabe recalled. Provision for a civic association role in the nominating process dropped out. The committee also restructured the proposed board, now named the Government Accountability Board, expanding it from a six-member body to seven members—the seventh considered important for breaking a tie—and specifying that one member had to be a retired judge and four members had to be former prosecutors. A committee of four court of appeals judges would nominate candidates, and the governor would then appoint people from that list, subject to senate confirmation. Terms would be limited to four years.

Again, the proposed legislation stalled. The compromise draft reached the assembly floor, but despite all the agreements and amendments made in committee, some Republican legislators persuaded assembly leaders not to schedule the draft bill for a full hearing. The Democrats cried foul and threatened to launch a filibuster, which would force an extended session to complete regularly scheduled assembly business when many members wanted to return home.³¹

The situation then deteriorated still further. In late April, the Republican assembly leadership held a closed-door vote to kill the bill. McCabe called on the People's Legislature to gather at the state capitol.³² The protestors occupied the hallways and rallied outside the voting chamber.

The demonstration of public support for the draft legislation did not deter Republican leaders, however. The assembly voted 53–43 to allow the bill to die in committee.³³ Two of the bill's original Republican supporters were among its new opponents, falling in line with their leadership's closed-door vote. Ellis's effort to persuade his colleagues had failed a second time.

Sealing a deal

Civic organizations did not always agree on strategy, but by the fall of 2006 they were not going to allow legislators to block reform. “Everybody was trying to push the rock to the finish line by that point,” said Heck. Common Cause Wisconsin, the Wisconsin Democracy Campaign, and the League of Women Voters of Wisconsin came together in September to release an official reform agenda that covered campaign finance, state boards, election administration, judicial reforms, redistricting, and media reforms. The agenda called for a seven-member nonpartisan Government Accountability Board with an enforcement division responsible to “bring civil and criminal actions to enforce the state's elections, ethics, and lobbying regulation laws.”³⁴

Two other developments combined with civic group pressure to create an opening for passing the new law. First, convictions and sentences for most of those caught up in the legislative caucus scandal had been handed down in 2005, so the argument that reform would be an admission of guilt no longer held water. (Jensen was convicted in 2006 but appealed on the grounds that he should have been prosecuted by his home county district attorney, not by the Dane County district attorney. The state's supreme court directed that the case be re-tried in his home district. In a plea deal, the felonies were dismissed. Jensen paid a \$5,000 fine for violating standards of conduct for public officials in December 2010.³⁵)

If news of the court verdicts boosted election reform in the public consciousness, media coverage of campaign donations by four election board members, including one contribution to a candidate under active election board investigation, further heightened awareness.³⁶ At the time, Ellis told an Associated Press reporter that allowing board members to donate to candidates they regulated was “a charade.” The board members were supposed to be part

of an independent regulatory body, he said, “but they haven’t even pretended to be that.”³⁷

“By 2006–07, you had this incredible thing happening: Corruption was actually showing up in the polls as a top issue for voters,” McCabe said. “That created conditions where legislators felt they needed to act.”

Candidates for public office got the message. The Wisconsin Democracy Campaign regularly administered candidate questionnaires to help voters assess the policy positions of those on the ballot, including their support for state ethics and election board reforms.³⁸ The 2006 questionnaires suggested the time was ripe for making real progress; more candidates than ever supported reform. “By 2006, we had a majority of the elected legislators on record in support” of reforms, McCabe recalled.

The November 2006 general election shook up partisan alignments in the legislature and finally cleared the way for reform. Democrats gained control of the senate, prompting Republicans to make changes in their own leadership.³⁹ With voters paying much closer attention to political corruption, more elected representatives were supporting reform than ever before. A Wisconsin Democracy Campaign report found that 52 out of 99 assembly members and 29 out of 33 senators supported Government Accountability Board proposals by November 15, 2006.⁴⁰

During the weeks after the 2006 general election, Governor Doyle, a Democrat, stepped in to help broker an agreement. Ellis, Heck, McCabe, Gundrum, and Shea were included in these conversations, but they were no longer in the forefront.

Design issues, especially the selection criteria for board members, remained at the center of the negotiations. A working group of legislative leaders and the governor’s staff consulted among themselves, with outside experts, and with existing election board members. Kevin Kennedy, then director of the State Elections Board, said: “Some Republican assembly members thought the idea was that the board ought to consist of sitting district attorneys, and I pointed out, ‘Well, they could be prosecuting the very cases they’re dealing with in their roles. It might not be appropriate.’” In addition to this conflict-of-interest problem, there was another difficulty: Wisconsin voters selected district attorneys in partisan elections, rendering the proposal unsuitable for the task at hand.

“It took a long time to get to the point where the idea of retired judges came up,” McCabe recalled. The idea of appointing legal experts, judges, or prosecutors to board positions in order to create a nonpartisan elections management body had appeared in earlier drafts, but the idea of using retired judges came from civic group leaders and from the governor. In Wisconsin, voters selected circuit, municipal, and appeals court judges in nonpartisan elections, and Wisconsin judges’ tradition of and adherence to nonpartisanship remained strong in 2008, McCabe said. Judges were prohibited from being members of political parties, from endorsing other candidates, and from

contributing to and fundraising for partisan organizations. (Partisanship did become a problem in later judicial elections, however.⁴¹)

In December 2006, Doyle and the new legislative leaders announced a bipartisan agreement on legislation to establish the Government Accountability Board. The board's proposed structure echoed many aspects of the 2005 version, with a few notable changes. It called for a six-member board instead of seven, removed the legislature from any role in deciding whether to fund investigations, and made no mention of an enforcement division. The board's two divisions—elections and ethics—could carry out their own investigations and prosecutions of civil complaints but would have to refer criminal complaints to a district attorney.⁴²

Doyle called the legislature into special session in January 2007 and asked for a vote, knowing he could get the bill passed. "The public has demanded that Republicans and Democrats work together and we have done that with a fair, bipartisan solution to restore integrity to our political process," Republican Assembly Speaker Michael (Mike) Huebsch told reporters.⁴³

The Joint Committee on Legislative Operations sponsored and introduced the draft bill. This committee had majority and minority leaders from both the senate and assembly and was the main administrative decision-making body for the legislature. In that capacity, it was responsible for scheduling and for setting procedural rules. Because both Republican and Democratic leaders agreed from the beginning, obstacles were few.

Per the usual procedure, the bill went first to a senate committee, which held a public hearing. When it cleared that committee and the Joint Committee on Finance, it went to the floor of the senate, which gave unanimous support. Just before the close of the special session, the bill went to the assembly, where it a majority voted in favor after restoration of some of the initial language on funding and on expansion of the new agency's public advisory role. Doyle signed the bill into law on February 2, 2007⁴⁴ (text box 2).

Ellis, who was a member of the Senate Ethics and Government Committee, initially opposed the draft the governor and legislative leaders had crafted, which dropped provisions he considered important. Heck said Ellis had "blasted the proposal in committee." But eventually, Ellis yielded. "By that point, he realized that the train had left the station," Heck said, "and he came back around."

Moving from idea to reality

The new law stipulated a one-year transition period—January 2007 to January 2008—for the Government Accountability Board to become operational.

Board selection began. Retired judges learned of the posts from vacancy notices and through word of mouth. For many, public service had appeal. Judge John Franke, board member from 2014 to 2016, said, "I viewed the responsibility of presiding in a quasi-judicial capacity over the administration of election laws

Text Box 2: Government Accountability Board

The newly legislated Government Accountability Board had several distinctive features designed to foster impartiality.

Board eligibility and selection: Retired judges could apply for a board position if they had no political affiliation or political activity during the past year. Applicants were short-listed by a candidate committee that comprised court of appeals judges from Wisconsin's four appeals court districts. That short list, usually three or four candidates per opening, went to the governor, who selected a nominee from among those proposed. Confirmation required support by two-thirds of the Wisconsin Senate, although confirmation of the first six appointees was split between the senate and the assembly.

Staffing: The Government Accountability Board had one director, two division heads, and staff to support each division.¹ Only the post of director was new. Selected by the board, the director would serve as the state's chief election officer. Staff members could not affiliate with any political party.

Functions: The board oversaw election management and responses to complaints about alleged election law violations in the areas of campaign finance, lobbying rules and breaches of ethics. It could vote to name a special prosecutor for a case if warranted and could refer possible criminal cases to a district attorney. The board could also issue advisory opinions on matters within its jurisdiction in response to questions from elected officials and political organizations.²

See Daniel P. Tokaji, "America's Top Model: The Wisconsin Government Accountability Board," 3 *UC Irvine Law Review* 575, 2013, <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1091&context=ucilr>, and Wisconsin State Legislature, 2007 Wisconsin Act 1, February 2, 2007, <https://docs.legis.wisconsin.gov/2007/related/acts/1>.

¹ Daniel Tokaji, "America's Next Top Model," 3 *UC Irvine Law Review* 575, 2013, <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1091&context=ucilr>

² Wisconsin State Legislature, 2007 Wisconsin Act 1, February 2, 2007, <https://docs.legis.wisconsin.gov/2007/related/acts/1>

and election disputes as a new challenge and a great experience, and that was exactly how it turned out."

Once the candidate selection committee, consisting of four court of appeals judges, received and screened applications, it forwarded the nominations to the governor. Doyle, who was governor at the time, said he looked for specific qualities in his nominees: "What I was looking for were good, fair people. I thought it was helpful if they had some political background, because the questions that were going to come to them in this capacity were political questions, and they needed to understand how legislators do their work."

Doyle's first six board member nominations were three former circuit court judges and three former court of appeals judges. Only one nominee had ever held an elected partisan post. Another had served as chairman of the Wisconsin Public Service Commission from 1969 to 1975. Each appointee had to receive a two-thirds legislative vote of support. While awaiting confirmation, the members served in an acting capacity.

The board's first job was to appoint its legal counsel, the person who would become the chief election official. In November 2007, the judges recruited Kennedy, former director of the Wisconsin State Elections Board, for the post. "I think we made the absolute right choice," said David Deininger, one of the former circuit court judges on the board. "He was absolutely a nonpartisan,

good-government guy. He also had a wealth of knowledge and experience in elections and campaign finance areas.” Kennedy had worked at the state elections board since 1976 and had served as its director beginning in 1979.

“We made it a point to have at least a half-day training for each new board member,” Kennedy recalled. He prepared introductory materials, talked through the basics, introduced the staff, and offered plenty of opportunity to ask questions. He explained how his team developed the information and guidelines on the agency’s website, which supported both voters and the work of clerks. Among other things, the site offered ward-level data covering such topics as numbers of people registered, absentee ballots cast, types of voting machines used, complaints, and similar information.

There was no formal instruction in election law because the judges’ past experience equipped them to understand the statutes and the state constitution, said Judge Michael Brennan, one of the board members. Kennedy could cover the fine points later as the need arose. However, he did take pains to explain any new features of the complaints process.

Kennedy said he also wanted to ensure the board’s protocols met the standards laid out in the federal Help America Vote Act, passed in 2002. That act set mandatory minimum standards for states in several areas of election administration and provided various forms of assistance to help the states meet these requirements with respect to elections for federal office. It set up the country’s first voting system certification program, and notably, it also set standards for the recording, reporting, and handling of complaints (text box 3).

The board agreed to meet six times a year or more frequently as needed. Election schedules—and investigations, when merited—would drive the meeting dates. Each special prosecutor or in-house investigation provided a case update at least every 30 days, and the board had to meet, discuss, and vote to continue ongoing investigations at least every 90 days.⁴⁵ The board met in both open and closed sessions. Open sessions were for public comment and policy and guidance. Closed sessions were for review of investigations and complaints. Board decisions required a 4–2 vote.

The transition hit a few obstacles. No sooner did the new board convene than two members had to step off. The law stipulated that every board member had to have formerly served as a judge in a court of record in the state and had to have been elected to the position in which the judge served. But two of the appointees had resigned from their judgeships before the ends of their terms, and the Wisconsin constitution—as well as statutes—banned judges from holding any other office of public trust during the terms for which they were elected. Kennedy appealed to the state attorney general for advice, and the attorney general indicated that the two members in question had to step down.⁴⁶ The governor then nominated new members, who were subject to legislative confirmation.

During the years ahead, the use of temporary, acting appointments to fill some board positions created potential vulnerabilities and some instability in board membership. The downside of using acting appointments to fill vacancies

Text Box 3: The Help America Vote Act of 2002

To remedy problems associated with the presidential election of 2000, when poor ballot design and flawed counting procedures in the state of Florida complicated a close vote and landed the outcome in the Supreme Court, the US Congress took steps to improve the integrity of the electoral process. The Help America Vote Act of 2002 contained a number of mandatory requirements with which states had to comply—at least with respect to their management of federal elections. The requirements included, for example:

- Standards for election technology and voting systems, including quick detection of overvote and undervote
- Ballot design guidelines
- Maintenance of secure and accurate lists of registered voters, including a centralized, interactive, statewide list linked to all polling sites
- Methods for conducting provisional voting
- Methods for ensuring the accessibility of voter registration, polling places, and equipment to all voters, including those with disabilities, Native Americans, Alaska Native citizens, and voters with limited proficiency in the English language
- Uniform nationwide statistics and methods of identifying, deterring, and investigating voting fraud
- Methods for identifying, deterring, and investigating voter intimidation
- Methods of recruiting, training, and improving the performance of poll workers
- Standards for voter information, hotlines, and complaint systems

The act set up a federal commission to assist states and monitor progress, and it authorized federal financing to assist states with modernization and compliance.

See text of the law at https://www.eac.gov/sites/default/files/eac_assets/1/6/HAVA41.PDF.

was that a new governor could remove board members who were unconfirmed, replacing them with people believed to be more aligned with the governor's political party and lessening their formal independence from the political process. The legislature, by declining to act swiftly to confirm nominees, could also exert political influence by timing confirmations and removals in ways that suited the party that controlled the process. Deininger said he served on the board about four or five years during the period 2007 to 2014 and that he was appointed three times but confirmed only once.

A significant management challenge was to align protocols across Wisconsin's sprawling electoral administration, which consisted of core staff, more than 1,850 municipal clerks who managed elections in their localities, 87 county clerks who also played a central role, and volunteer poll workers and observers.

The headquarters staff tried to help the front-line election managers learn the laws and rules and run polling places effectively. About a quarter of the municipal clerks were new to their jobs in any given election year, and their two hefty manuals—one on law and one on administration—were difficult to master. Many municipal clerks also lacked sophisticated information technology

training. Diplomacy was often required to ensure the clerks did what they needed to do.

Moreover, the effort to harmonize state and federal policies as laid out in the 2002 Help America Vote Act was still in progress when the transition to the Government Accountability Board occurred. Some of the measures required extensive temporary staff support. For example, Wisconsin had no central voter registration database. “Wisconsin law provided that if you lived in a municipality with a population of fewer than 5,000 people, it was not mandatory to have voter registration,” Kennedy said. While most states ran their elections at the county level, Wisconsin administered elections through its municipalities, and smaller municipalities were not required to register voters prior to an election. “When you came into the polling place, the poll workers either knew you or recognized you or they could ask for identification,” Kennedy added. “None of the municipalities’ voter registration systems talked to each other.”

Kennedy hired more than 100 temporary staff to travel around the state, registering people to vote and training clerks to use a new electronic system that linked them to a central registration database, as required under the federal law. Accenture, a multinational information technology services company, had developed the software, completed the system in 2006, and worked with the state to resolve glitches. Kennedy’s office then assumed control.

Handling complaints and recalls amid polarization

The times were potentially treacherous for a statutory agency responsible for ensuring election fairness, however. In Wisconsin, as in many other parts of the United States, politics was becoming increasingly polarized. Public trust in government was also diminishing.

Within two years of its creation, the Government Accountability Board began to encounter a political backlash. The bipartisan coalition that had voted to establish the agency began to unravel. Ellis’s bargaining power ebbed. And the board itself sometimes struggled to communicate the rationale behind sensitive decisions.

Even in the early 2000s, when Ellis first tried to build support for a nonpartisan election management authority, there were early signs of emerging division among Republicans, some of whom would later align with the Tea Party, a national movement launched in 2009 that was fiscally and culturally conservative, supported small government, championed states’ rights, and eventually became a base for populism.

Voters tilted right during the 2010 elections and installed Scott Walker, a Tea Party Republican, as governor, while also flipping both chambers of the legislature from Democratic control to Republican majorities. “That was a rare thing to happen in Wisconsin,” Kennedy said. “Democrats in 2009 and 2010 had a chance to create a coherent agenda and didn’t. Republicans took over, and they had an agenda.”

The 2010 decennial census subsequently triggered redistricting, which the state constitution placed in the hands of the legislature, and the process yielded

gerrymandered safe districts for Republican candidates.⁴⁷ Although at the time there were more Democratic voters than Republicans in the state, Republicans would henceforth have a strong advantage in the state legislature. One of their first moves was to require photo IDs at the polls—something an estimated 11% of US citizens—many of them living in low-income communities—could not provide because of the expense and time required to obtain copies of birth certificates, marriage certificates, passports, and other necessary materials.⁴⁸

Ellis, champion of the level political playing field, saw his political stock decline. He had often taken positions that were at odds with those advanced by his new colleagues in the legislature. Although he supported conservative efforts to allow people to carry concealed guns, defended a narrow definition of marriage, and voted for smaller budgets—all positions that were part of his party's platform at the time—he was an independent voice. He backed measures to restrict special interest influence in elections: expanded public financing of campaigns, restrictions on soft-money ads, a system for regulating campaign contributions and spending, and holding hearings on whether to adopt a nonpartisan redistricting model.^{49,50} He had earlier pushed for a statewide property tax to support schools and provide a basic education grant for every child in every public school plus additional support for low-income students, whereas Walker wanted to extend school vouchers that allowed families to send their children to private schools, including religious institutions.⁵¹ These policy stances made Ellis a target for attack from the expanded right wing of his own party.

Wisconsin conservative talk radio had started to excoriate Ellis a few years earlier. After Walker's election victory, that opposition to Ellis grew. The conservative media accused Ellis and his allies of "high treason for bucking Governor Scott Walker's proposed expansion of the school choice program," reported *The Capital Times*.⁵² Common Cause Wisconsin director Heck said that Wisconsin's special interest groups—parts of the business community, the association of realtors, and Right to Life Wisconsin, for example—as well as the Tea Party-aligned Club for Growth and Americans for Prosperity at the national level all opposed Ellis.⁵³ Ellis had opposition on the left as well, mainly from unions.

A US Supreme Court decision in June 2010 also struck a blow. Ellis had long worked to reduce the influence of special interests in politics, and the court's judgment in *Citizens United v. Federal Election Commission* made that goal much more difficult. Conservative nonprofit corporation Citizens United had produced a film about Democratic presidential candidate Hillary Clinton and wanted cable companies to make the film, which cast the candidate in a negative light, available to viewers for free during the month before the primary election. It sought relief against enforcement of the Federal Election Campaign Act, which restricted corporations' right to make campaign contributions and engage in electioneering. In a 5–4 decision, the court removed limits on corporate spending in elections as long as the spending was not coordinated with a candidate.

Heck later told the *Wisconsin State Journal* that Ellis’s enthusiasm for reform “seemed to wane precipitously” at that point, because the decision “opened up the floodgates for outside spending and made it much more difficult to counter that kind of money.”⁵⁴

In that politically charged context, the Government Accountability Board’s execution of its mandate took it into politically sensitive territory. The first clash emerged from recall elections in 2011 and 2012; the second, from a near repeat of the earlier practices that had given rise to the legislative caucus scandal.

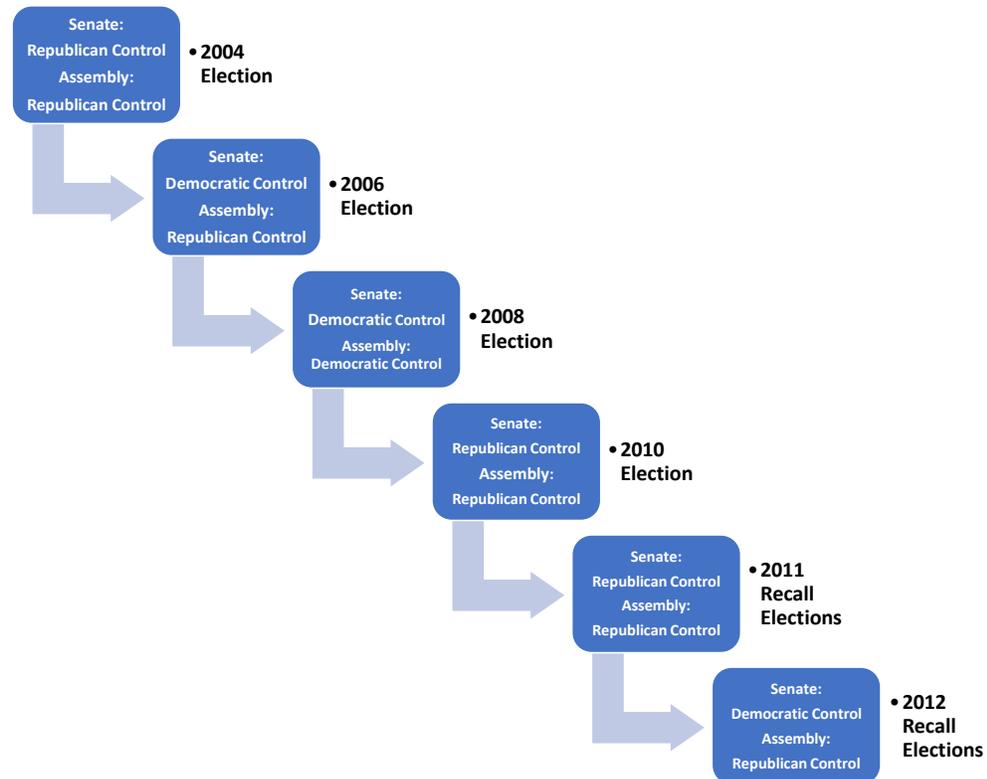
In early 2011, Walker and the Republican-controlled state legislature introduced a proposal to limit public employees’ collective bargaining rights. Opposed to the idea, Democratic legislators fled the state, hoping to delay the bill’s passage, and thousands of people converged on the state capital to protest Walker’s proposal. The incident led politicians from both main parties to support recall elections.

Anyone could trigger a recall vote in Wisconsin without offering a reason, as long as the petitioner could accumulate signatures equal to 25% of ballots cast in the most recent election for the post in question. The elected official being recalled had to have served in office for at least one year, which prevented Walker, elected in 2010, from being subject to a recall at the time. Voters sought to recall eighteen legislators, and the Government Accountability Board certified a total of nine (six Republicans, three Democrats) for recall elections in 2011. Two of the Republicans were successfully recalled and Democrats took their seats, but control of the legislature remained in Republican hands.⁵⁵ Each side alleged irregularities on the part of the other, as well as missteps by public officials.⁵⁶

The next year, more than a quarter of voters in the state signed petitions to recall Walker, the lieutenant governor, and four more Republican state senators. The recall election would become the most expensive election in the state’s history, partly as a result of out-of-state campaign contributions.⁵⁷ Walker and the lieutenant governor retained their posts, winning by a slightly larger margin than they had two years earlier, but the contest ousted the state senators who had been up for a vote. Although the results briefly shifted control of the state senate to the Democrats, the legislature was not in session at the time, and Republicans retook the majority in November. (figure 2).

The recall votes multiplied the administrative demands on Government Accountability Board staff, but they also generated ire toward the agency from those subject to recall. Board members met frequently and handed down large numbers of rulings related to the recall election. Those administrative rulings were inevitably divisive; there was always a loser. Both parties began to question the board’s fairness.⁵⁸ Members of the public began to join the fray. “I had staff who were pretty upset when protesters would walk around and say, ‘Off with Kennedy’s head!’” Kennedy said.

During the process, Walker sued the board, alleging it lacked adequate signature verification, and a county circuit court ruled in his favor. The dispute hinged on whether the board had to review each signature individually or

Figure 2: Shifts in Party Control, Wisconsin State Legislature

whether the law, as written, put the responsibility on candidates to challenge names. Reviewing hundreds of thousands of handwritten signatures was impractical given technical constraints and limited staffing, and moreover, Kennedy maintained, the law placed the onus on the parties to challenge any given signature. Nonetheless, the board purchased new signature recognition software and sought additional time to review signatures.⁵⁹ Kennedy ran his own name through the system and found 13 people with the same name, but he also learned that each was legitimate: There really were 13 Wisconsin citizens who shared his name. The demonstration did little to quell criticism, however. Even Ellis expressed dismay that the board had not automatically tossed out signatures reading *Mickey Mouse* or the names of other fictional characters, even though these were few in number. Still, the board managed to get through the tangle.

“It helped that the decisions were being made by trained decision makers with legal backgrounds,” Kennedy said. “We were sued at least 12 times, and in every single instance, we were eventually upheld. That helped take the temperature down a bit.”

The board faced further hostility when two investigations into alleged campaign finance violations during Walker’s 2010 gubernatorial race and subsequent 2012 recall suddenly became public. Tips triggered both investigations, which the appropriate division of the board pursued and then referred to district attorneys. In Wisconsin, a grand jury investigation led by a special prosecutor or by a district attorney without a jury—called a *John Doe*

investigation—could assess whether to issue an indictment. Both cases were handled in that manner, and the proceedings were kept under seal. Once district attorneys pursued charges, however, information about the cases became public and sparked a firestorm.

In the first instance, six of Walker’s former aides when Walker was a county executive were convicted on charges ranging from illegal use of public employee time for campaign purposes to misappropriation of funds from a nonprofit, to inappropriate behavior, to receipt of illegal campaign contributions. The campaign finance charge centered on contributions above the legal limit from a former president of Wisconsin & Southern Railroad, who asked employees to donate to Walker’s campaign and then reimbursed them from a combination of personal and corporate funds.⁶⁰

The second case alleged improper coordination between a conservative organization and the Walker campaign during the 2012 recall election.⁶¹ Walker sued the board to stop the investigation. Although his challenge failed in the lower courts, the state’s supreme court, in a split decision, later terminated the investigation on grounds that campaign finance law contained terms that were unconstitutionally vague.⁶² The judgment had the effect of further reducing restrictions on fundraising and on issue-advocacy campaigns while also increasing the perception among some that the Government Accountability Board had overreached.⁶³

The cases generated a political tornado and placed the nonpartisan experiment at risk. Kennedy responded by supporting his staff and by making processes as transparent as possible— even adding a camera that enabled people to watch aspects of the work he and the staff carried out.

OVERCOMING OBSTACLES

From 2011 onward, partisan passions were beginning to boil, and the Government Accountability Board often found itself the target. Citizens frequently misunderstood the board’s jurisdiction and asked it to pursue complaints on matters over which it had no authority, said Michael Haas, one of the board’s investigative team members. “People started looking for an outlet when their candidate lost,” he said.

Losing parties often suspected fraud, but the numbers of such cases were very low. In the heat of the moment, people sometimes found it hard to understand that the board could not cancel a voter’s registration or ignore a provisional ballot just because not all information matched. There were many possible innocent explanations for discrepancies. Fearing fraud, however, the legislature enacted stronger voter photo ID laws and a number of other measures that could have the effect of limiting ballot access, including a rule that sharply limited the amount of time voters who cast provisional ballots had to supply information required to have their ballots count.

Recounts, recalls, and lawsuits against the board added extra responsibilities to the already heavy workloads of the small office staff, which also found itself

scrambling to keep up with frequent changes in the state’s electoral laws. Staffers worked late—sometimes with protestors outside the door.

Kennedy tried to lower the political temperature by guiding aspiring candidates through the rules they had to follow to compete in an election and not run afoul of the law. “It is important that the board tell candidates what they need to do and to provide guidance,” he said. “Use a honey-and-sugar approach, incentives, instead of fining people for technical violations all the time.” He had followed that rule of thumb for years and found it helpful. Even people who wanted to run for judgeships often were unfamiliar with the legal details.

But there were worrisome signs that the new board’s days were numbered, despite its efforts to improve outreach and transparency. A legislative committee began auditing the board in 2014 and insisted on access to complaint investigation records. Even though the state attorney general ruled that the law protected those documents, the committee pointed out—as evidence of noncompliance with the audit—the board’s refusal to turn over information.⁶⁴ On a party-line vote, Republicans then passed a new act in March 2015 that gave the legislature the power to access board investigation records.⁶⁵

ASSESSING RESULTS

After the 2010 election, the Government Accountability Board operated in an increasingly difficult setting, with few strong allies in the legislature. As a statutory body not enshrined in the constitution, it could be replaced easily. In addition to the ire that the recall elections had created, an acrimonious recount took place in a 2011 election to the state’s supreme court when a county clerk mistakenly failed to upload correct vote totals from one municipality in her jurisdiction. The clerk’s error caused the board to declare the wrong winner in the close race, requiring a retraction and a declaration of the other candidate as the winner. The ousted candidate requested a statewide recount and filed a complaint with the board. The recount and the recalls drove momentum in political circles to return to a mutual-policing model with partisan board members.

Ellis became the first victim when he was accused of corruption in April 2014. Two men, complete strangers, approached him in a bar. They talked about politics. At some point, Ellis told them he had even considered forming a political action committee. It was, apparently, an idle thought because he never acted on it. It was also illegal. However, the two men, who had used a hidden camera, worked for far-right organization Project Veritas, headed by Club of Growth activist James O’Keefe, one of those who had long considered Ellis an obstacle, reported the *Wisconsin State Journal*.⁶⁶ Project Veritas patched together a video and released it.

Ellis, 73 years old at the time, announced his retirement within a week of the video release. He admitted the video looked bad, though he had not in fact done anything wrong and had backed off the idea he had mooted by the next morning. He lamented to a reporter from the States News Service, “There’s no room on the street anymore for people to walk down the middle of the road.”⁶⁷

At the time he left elected office, he was the longest-serving Republican in the state's history.

The board itself was the next victim. On October 9, 2015, 24 representatives and eight senators introduced a bill to “reorganize the Government Accountability Board.” Legislators rushed the bill through the committee and a floor vote in both chambers of the Wisconsin legislature, winning the assembly 56–37 and the senate 18–14. The votes split down party lines, with all Democrats opposed to the bill and the Republicans supporting the changes. The governor signed it.⁶⁸

Under the new law, the board was split in two, creating the Elections Commission, which oversaw elections and campaign finance, and the Ethics Commission, responsible for ethics and lobbying.⁶⁹ Once again, the election management body was made up of partisans, and for the first time, the ethics body was also made up of partisans. Each commission had six members nominated by the assembly speaker, the president of the senate, the minority leader in each chamber, and the governor, who could nominate two people: one Republican and one Democrat.

Kennedy, who had served as the state's chief election officer since 1979, retired in 2016 and received the National Association of State Election Director's distinguished service award, along with other honors. The election commission hired Haas, who had risen through the ranks and headed the board's elections division, as Kennedy's replacement. However, neither Haas nor Meghan Wolfe, who succeeded him, were ever confirmed by the senate and therefore served only in an acting capacity.

By many measures, both the Government Accountability Board and the bipartisan mutual-policing model commission that replaced it administered elections successfully. The Massachusetts Institute of Technology Elections Performance Index, which focused on metrics such as poll wait times, data completeness, ballot problems, and voter registration rates—though not the handling of complaints—ranked Wisconsin second in the country in 2008 and third in 2012. The state slipped to fourth place in 2016, but it continued to hold that position in 2020 despite challenges encountered in maintaining civil discourse among commissioners.⁷⁰ (With respect to a few dimensions, such as access for the disabled, for Native American communities, and for military and overseas residents, the state performed below the national average.)

Whether the shift back to a mutual-policing model affected impartiality in handling complaints, however, was harder to discern. The board did not disclose the grounds for deciding whether to investigate a complaint or to decline to do so—the kind of information that might flag favoritism. Only when cases reached the courts did evidence emerge. (text box 4)

In the absence of the kinds of data that would permit a systematic assessment of impartiality, observers had to fall back on imperfect metrics. One was the frequency of deadlock. Wisconsin Watch, a news outlet of the nonpartisan, nonprofit Wisconsin Center for Investigative Journalism, tracked the number of deadlocked decisions, beginning in 2016 and observed an

Text Box 4: Complaints Process under the Government Accountability Board and the Wisconsin Election Commission

The complaints process was an especially sensitive aspect of election management. Michael (Mike) Haas, who served as Wisconsin's Chief Election Officer, noted some important distinctions under Wisconsin law but indicated that during his time of service under the Government Accountability Board (GAB) and the Wisconsin Elections Commission (WEC), there were only small differences in process. (He left the WEC in 2020.)

"It's important to clarify what is meant by complaints and investigations," he said. "The G and the Wisconsin Elections Commission WEC received two types of complaints. Wisconsin Statute section 5.06 pertained to allegations that a local election official did not comply with the election laws. In those instances, the agency could only make a finding and if the law was violated, issue an order that the clerk comply with the law or that they not do it again. There were also complaints filed under section 5.05 which alleged violations... such as election fraud or election bribery. Under the GAB, but not the WEC, those complaints might also allege violations of campaign finance laws.

The section 5.05 complaints were confidential and the 5.06 were not. Typically, the only documents released publicly about section 5.05 complaints were the final resolution. Also, section 5.06 complaints were resolved simply by the complainant and election official submitting sworn statements while the 5.05 complaints might involve more of a confidential investigation, like what was done during the John Doe cases.

The WEC did not deal with many s. 5.05 complaints because those tended to be campaign finance matters which were under the jurisdiction of the Ethics Commission.

For section 5.06 complaints, the process evolved over time ... and I think it has changed even since I left. The GAB delegated authority to the director to issue determinations and the director would simply consult with the board chair before issuing the decision. Occasionally the board chair would ask for some edits to clarify the reasoning.

...At some point WEC members raised concerns about decisions being issued without the commission having an opportunity to weigh in. The commission tightened up the delegation of authority granted to the administrator by requiring draft decisions to be circulated among the commission members, who had a limited time to request that the matter be reviewed in a commission meeting. ...

Approval for investigations would only happen with section 5.05 complaints...and those decisions would be made in closed session..."

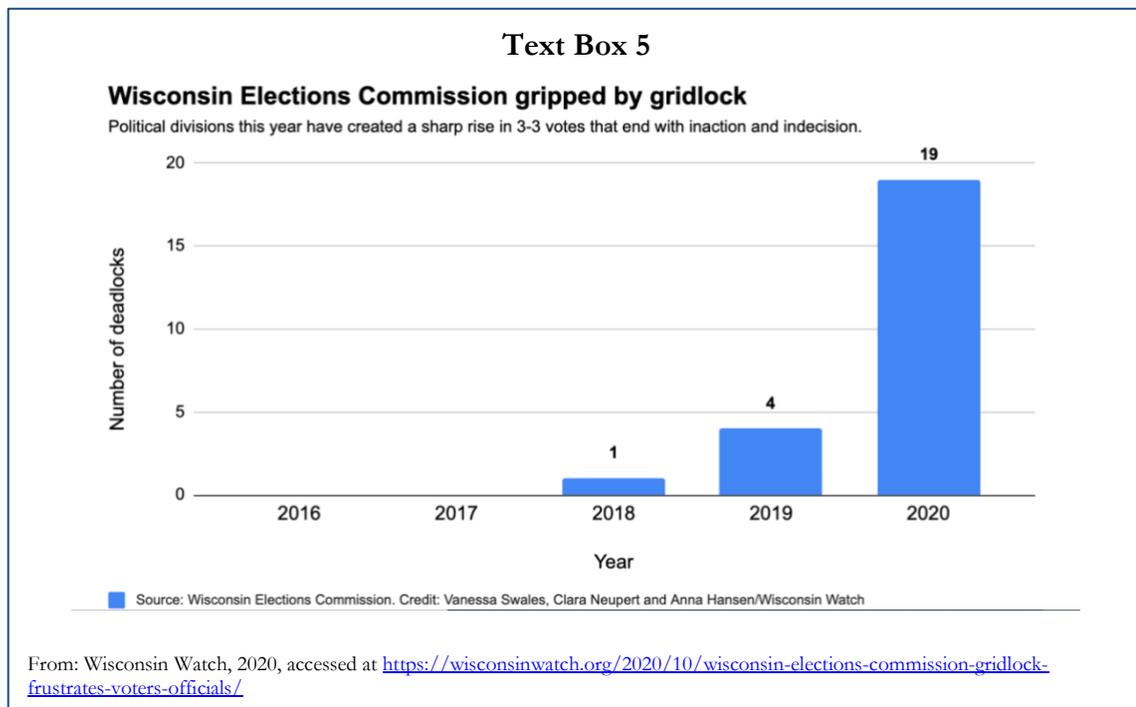
increase in 2019 and a sharp bump in 2020, an election year. "The commission has deadlocked at least 19 times in the 28 meetings it has held since the start of 2020, but only five times in the prior four years, according to meeting minutes, video recordings and livestream coverage," Wisconsin Watch wrote. (text box 5)

The increase in gridlock could have resulted from a rise in the number of decisions commissioners were asked to make or from the difficulty of the issues presented in 2020. However, the study authors attributed the resulting gridlock to increased partisanship among the commissioners, compared to their earlier counterparts on the Government Accountability Board.⁷¹

Wisconsin Watch reported that the deadlock and subsequent delegation of some judgments to municipal clerks had important consequences. “Because of the commission’s deadlock over disputed ballots, the village of Cambridge counted those it received without postmarks after primary day, but the city of Janesville didn’t,” wrote Vanessa Swales, one of the study’s authors. “There were even disparities within families. Christopher Koschnitzke’s vote-by-mail ballot was among the 5,640 spurned statewide for arriving too late, although his wife’s — mailed at the same time — was not. His absentee ballot envelope showed that his ballot had been signed by a witness and mailed on April 6, the day before the primary, but a clerk rejected it, noting that the postmark was not ‘readable.’”

Some of the civic groups that appeared before the board also noted that the tenor of hearings had shifted and it was less easy to discuss policy matters. Andrea Kaminski, former executive director of the League of Women Voters of Wisconsin, said that although the relationship with the elections commission created in 2016 was good, “the [earlier] Government Accountability Board always welcomed people and welcomed their opinions and didn’t try to intimidate them, but when people went to speak with the commission, it was almost as though they were being cross-examined.”

The strength of board members’ stated commitment to impartial election administration was another possible metric. The mutual-policing model assumed a commitment to the norm of impartiality. However, it also envisioned that equally matched partisan members would check and balance each other as a way of keeping everyone true to that obligation. If a commissioner publicly disavowed the need to be impartial or disavowed the need for hard evidence before taking an action that penalized others, there might be grounds for concern.



By this standard, there were reasons to question whether the board was committed to a level playing field in elections. Following the 2020 general elections, some commissioners used the public comment period to stoke citizens' claims of election fraud, although no significant fraud was ever detected. When the Democratic chair approved the results, one Republican commissioner declared: "You have violated the law as our chair. I have lost all confidence in you . . . you have destroyed the bipartisan nature of this commission."⁷² He encouraged publicly financed investigations into the commission itself.⁷³

The Associated Press reported in January 2023 that the same member who had voiced those views and who also served as a fake Republican elector in the 2020 presidential election said in an email newsletter that his party could be especially proud of lower 2022 election turnout in Black and Hispanic areas of Milwaukee, the state's largest city. The statement elicited protest from those communities on grounds that it appeared to endorse their disenfranchisement.⁷⁴

REFLECTIONS

In a 2013 law review article written before he became dean of the University of Wisconsin-Madison Law School, Daniel P. Tokaji asked, "Is there any hope for nonpartisan election administration in an era of intense political polarization?" He pointed to the state's defunct Government Accountability Board as a model, a possible way to escape hyperpolarization and a meltdown of democracy into competing accusations of voter suppression and voter fraud.⁷⁵

Wisconsin's experience underscored the difficulty of introducing and sustaining this kind of reform. Particular circumstances helped create an opportunity to shift from a mutual-policing model to a nonpartisan model. First, during the period 2002 through 2007, the vote shares of the two main political parties were closely matched, and the parties frequently alternated in power, giving each an interest in ensuring electoral fairness.

Second, there was substantial public support for ridding electoral politics of corruption, and civic organizations coalesced to keep that issue on voters' agendas. "We got greater traction not because of our advocacy skill but because of the way the issue broke through with the public and the media," said Wisconsin Democracy Campaign executive director Michael McCabe.

Third, the reform had a champion in the legislature to help forge a coalition and keep the process moving. Fourth, election fairness was part of the national zeitgeist, as exemplified by the 2002 Help America Vote Act and the McCain–Feingold Act. And fifth, Wisconsin had a vibrant local press and journalists who focused on monitoring state government performance and who reported consistently on transgressions of the rules.

Many of these circumstances had changed by 2014–15. The 2010 gerrymandering reduced the likelihood of alternation of parties in power and lessened the incentive to keep partisan politics out of the complaint process. With increased polarization at the national political, special-interest group activity divided public opinion about what constituted clean government and fair

elections. For example, after the Government Accountability Board was dismantled, attention in Wisconsin focused on tightening access to the vote, even though the state had very few instances of voter fraud. And throughout the United States, local journalism had suffered an enormous financial hit. Wisconsin lost six local papers and more than 600,000 newspaper readers from 1960 to 2014, and the papers' frequency of publication often decreased from daily to weekly.⁷⁶

Crucially, support for a nonpartisan election board no longer had a steady political champion who could forge cross-party coalitions. "Mike Ellis should be remembered as the 'father' and the brains behind the establishment of the nation's only nonpartisan, independent state agency charged with overseeing elections and ethics," said Jay Heck of Common Cause Wisconsin.⁷⁷ As of 2022, no one had stepped up to follow in Ellis's footsteps.

"It was a perfect storm before—in 2007," said Kevin Kennedy, chief elections administrator. The public support, the national mood, the incentives the parties faced, and the legislative champion were all in place at once. "Could we have another Government Accountability Board today?" Kennedy mused. "We wouldn't get a consensus. I doubt we could replicate that."

In other states or at other times, circumstances supportive of a nonpartisan election management system might once again come together. The Wisconsin experience indicated that if and when a favorable constellation of conditions appeared, legislators should make it difficult to repeal such reform without sober consideration and should consider which aspects of the electoral complaint process should be fully transparent, so as to insulate election agencies from suspicion.

Law school dean Tokaji noted that the board had always occupied a precarious position "because it was just a creature of statute and not of the state constitution," he said. "I think one of the lessons from this is, if you do want to create a more independent state election authority, you need to constitutionalize it," though he acknowledged that such an option was probably not open in 2002, when negotiations began. This option provided only limited protection for an independent, nonpartisan election body if one political party gained sweeping powers in states where constitutions were easy to amend. In Wisconsin, a simple majority of the two legislative chambers could rewrite constitutional provisions, subject to a popular referendum.

Tokaji said his own thinking had shifted a bit. "When we're talking about who runs our elections and, in particular, the risk that election deniers are going to take over some of these really important jobs, we are getting into the territory where election subversion may be a real possibility," he noted. "I've come to think that impartiality is far more important than independence." The unanswered question was whether it was possible to build that central commitment in the context of a partisan, mutual-policing model of election administration—or whether during times of deep political polarization an independent commission might be the only place this sense of obligation could flourish.

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