

State of Wisconsin\Government Accountability Board

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DATE: For the September 12, 2011 Meeting

TO: Government Accountability Board Members

FROM: Kevin J. Kennedy, Director and General Counsel

SUBJECT: Request for Attorney General Opinion on Governor/Lieutenant Governor Recall

Since the onset of the current recall initiatives, the staff has been asked by several individuals to weigh in on how a recall of the Governor would be conducted. The primary issue is the impact on the Lieutenant Governor if a recall is initiated against the Governor. The issue is rooted in the fact that the Wisconsin Constitution provides for the election of the Governor and Lieutenant Governor as a slate in the November general election. However, the Wisconsin Constitution also provides for the recall of an elective officer.

After a review of constitutional and statutory provisions related to recall, election, impeachment, succession and vacancy; and consultation among agency staff; it is our opinion that a recall initiative against the Governor does not include the Lieutenant Governor on the petition. If there is a desire to recall the Lieutenant Governor, it must be done by a separate recall petition containing at least 540,208 signatures, the same amount required for the Governor and any other statewide elected official.

Because the resolution of this issue has a significant impact on the two elected officials and any person or committee interested in organizing a gubernatorial recall effort; agency staff believes the Attorney General, as the State's chief legal official, should provide direction to the Government Accountability Board on this issue. Board staff has broached this subject with key officials at the Department of Justice. We have been advised to develop an analysis as part of any request.

Analysis

Question presented: Must a petition to recall the Governor include the Lieutenant Governor to be a valid petition?

Election

In April 1967, the State Constitution was amended to provide for the election of the Governor and Lieutenant Governor on a joint ticket effective for the 1970 General election. Article V, Section 3. The Constitution provides the executive power of the state shall be vested in the Governor and a Lieutenant Governor. Article V, Section 1. Eligibility for the two offices is set out in a single provision. Article V, Section 2. Constitutional references to the terms of the two offices were combined in a subsequent constitutional amendment adopted in April, 1979. This would suggest the two offices are inextricably linked by constitutional design.

However, the state constitution also has a number of separately detailed provisions related to each office. The powers and duties of the Governor are set out in Article 5, Section 4. There are no constitutionally delineated powers and duties for the Lieutenant Governor. There are specific powers granted to the Governor for pardon (Article V, Section 6) and approving or vetoing bills (Article V, Section 9) which make no mention of the Lieutenant Governor.

The only specific separate constitutional reference to the Lieutenant Governor (Article V, Section 7) describes when the Lieutenant Governor becomes Governor. There is no mention of recall in that provision.

Candidates for Governor and Lieutenant Governor are nominated separately at the partisan primary. Neither winning candidate has a choice about who they are paired with in the November general election. The linking of the election of the Governor and Lieutenant Governor may be primarily an issue of succession in the event of a vacancy in the office of Governor.

Recall

In November 1926, the State Constitution was amended to provide for the recall of elective officers. Article XII, Section 12. This section was amended in April 1981 to provide for a primary election with respect to recall elections. The constitutional recall provisions are directed at a specific elective officer. There is no mention of a joint recall against the Governor and the Lieutenant Governor. All constitutional references to the subject of a recall are singular. Article XIII, Section 12, Subsections (intro), (1),(3),(4),(5) and (6).

Similarly statutory references to recall of an elective official are also singular. Wis. Stats. §9.10 (1)(a),(b),(c),(d),(s); (2)(b) (c),(d); (3)(b),(bm),(c),(d); (5)(a),(b); (6). The statutory recall provisions are clear that a petition requesting the recall of more than one elected official shall be prepared and filed separately. Wis. Stats. §9.10 (2)(c). Similarly the recall election of more than one elected official can be held on the same date. Wis. Stats. §9.10 (5).

In Wisconsin the right to recall an elective official is a political issue, just as the initial election is political. Unlike other states there are no provisions in the Constitution requiring a reason for recall be articulated or evaluated by a court as a basis for commencing a recall effort. The Constitution sets a high threshold for effectuating a recall by requiring signatures equal to 25% of the vote cast for Governor in the preceding election. The Legislature has buttressed this threshold by limiting the time period for gathering signatures to 60 days from the time of registration with the appropriate filing officer.

As a political issue, the recall is targeted at the performance in office of a particular individual. A reasonable person would not impute the policy decisions of the Lieutenant Governor to the Governor as a basis for recalling the Governor. In a recall effort the focus is on the particular officeholder. For municipal offices a reason related to the official responsibilities of the officeholder is required to be listed on the petition. The courts reviewing these reasons have suggested the reason for recall is a decision to be made by the electorate in a recall effort. *In re Recall of Certain Officials of City of Delafield*, 63 Wis. 2d 362, 372, 217 N.W. 2d 277, 282, (Wis. 1974).

Removal

An elected official may be removed from office on the basis of his or her actions. The Constitution provides the basis for removal of state officers through impeachment for corrupt conduct in office or for crimes and misdemeanors. Article VII, Section 1. These bases for removal are tied to an individual, not imputed to another official by election on the same ticket. This section specifically contemplates removal of the Governor separately from the Lieutenant Governor by prohibiting the Lieutenant Governor from participating in a removal proceeding. The corresponding statutory provision specifies any civil officer of this state may be removed by impeachment. Wis. Stats. §17.06 (1). The constitutional and statutory provisions related to removal, like the parallel provisions for recall, are tied to a single officeholder.

Succession

The Lieutenant Governor becomes Governor upon the Governor's death, resignation or removal from office. Article V, Section 7. There is no constitutional provision that the Lieutenant Governor assumes the office of Governor any other way. It appears the primary reason for electing the two officeholders on the same ticket is to ensure a vacancy in the office of Governor reflects the electoral choice made at the general election. By statute a vacancy in the office of Governor is filled by the Lieutenant Governor. Wis. Stats. §17.19 (3m). Given succession to the office of Governor is the only constitutionally specified duty for the Lieutenant Governor, it does not follow that the Lieutenant Governor should be joined with the Governor in a recall effort since a recall effort is targeted to the actions of the officeholder not the officeholder's possible successor.

Vacancy

The statute defining how vacancies are caused does not include recall. Death, resignation, removal and residency are the primary bases for causing a vacancy along with conviction and sentencing for certain specified types of crimes. Wis. Stats. §17.03. In these cases, it is clear the Lieutenant Governor succeeds to the office of Governor. Under the constitutional and statutory recall provisions, the candidate receiving the most votes is entitled to the office, whether by retention because the incumbent prevailed or election because a challenger was selected by the voters.

Request for Opinion

If the agency has to administer a recall of a statewide officeholder, in this case the Governor, staff believes we should be proactive in addressing any outstanding issues. The Department of Justice represented the agency in 10 separate challenges related to the senatorial recall efforts. The Department of Justice has the authority to issue opinions on questions of law to provide direction for agency actions. Wis. Stats. §165.015 (1). We should avail ourselves of that opportunity.

Conclusion

The agency staff believes a recall effort against the Governor does not include the Lieutenant Governor. An effort to recall the Lieutenant Governor must be done by a separate recall petition. This conclusion is supported by the constitutional and statutory recall provisions which address a single officeholder. The purpose of a recall effort is to hold a particular elected official accountable to the voters. The constitutional provisions related to the Executive officeholders

focus exclusively on the Governor with the exception of the manner of election, qualifications and length of term. The Lieutenant Governor stands in the shoes of the Governor only in terms of succession to the office due to death, resignation or removal. The Governor is subject to a separate removal proceeding from the Lieutenant Governor and should also be subject to recall efforts separate from the Lieutenant Governor.

Proposed Motion: The Government Accountability Board directs staff to request an opinion of the Attorney General on whether an initiative to recall the Governor must include the Lieutenant Governor or whether the recall of either or both officials must be done separately.