

The Wisconsin GAB: The Johnny Yoo of Election Administration

My blogging has been very sparse (nothing since May 2, 2009). That is not for lack of things to write about, but for the lack of time to write. One of the things consuming my time for the last year has been the usual and customary practice of election clerks in Wisconsin to destroy certain electronic election records and the legal cover provided by the Government Accountability Board (GAB) to carry out the destruction of those records. In the same way that [John Yoo provided](#) and [continues to provide](#) legal cover to President Bush and President Obama to violate [federal law](#), the GAB provides legal cover to clerks so that the clerks may destroy election records which the clerks deem too inconvenient to preserve and retain.

In order to set the context for the last two years on this matter I will show my fundamentalist, Christian roots and begin with a [creedal statement](#):

- I believe there cannot be effective oversight of an election (by an election official or by the public) if any election records are secret.
- I believe ballots are not secret, but anonymous.
- I believe the content of a removable memory card used by a voting machine during an election is an election record as that term is used in state and federal law.
- I believe that **ALL** of the content of a removable memory card is an election record.
- I believe the contents of a removable memory card contain an admixture of some or all of the following:
 - programming,
 - ballot "images"¹,
 - audit logs,
 - event logs,
 - vote totals at various levels of aggregation,
 - "ballot definition files"²,
 - audio files,
 - screen text,
 - page/screen layout,
 - whole, mountable file systems.
- I believe the above list is likely incomplete because the exact contents of a removable memory card are secret and vigorously protected as trade secrets.
- I believe election records should not be secret.
- I believe election records are records that should have an "[absolute right of access](#)". Under current law some election records in whole or in part are not even open records, much less records with an "[absolute right of access](#)".
- I believe the contents of a removable memory card used to aid in the administration of an election should be preserved and retained by jurisdictions for the same length of time as the jurisdiction is required to preserve and retain the poll registration lists used to administer the same election.
- I believe state law, [WI Stats. 7.23\(1\)\(g\)](#), requires the contents of a removable memory card used by a voting machine in the administration of an election be preserved and retained for 22 months

- I believe federal law, [Title 42, Chapter 20, Subchapter II, § 1974](#), for federal elections, requires the same; preservation and retention for 22 months
- I believe state law, [WI Stats. 7.24](#), requires the backups made of the contents of a removable memory card pursuant to [WI Stats. 7.23\(1\)\(g\)](#) remain in the custody and control of the election official for the entire retention period.
- I believe the contents of a removable memory card used in a voting machine is **MORE** important than the voter poll lists used in the same election. This is because the contents of the memory card actively and directly determine how the election is administered, where the poll books do not. If nothing else (and there is more), the contents of the removable memory card control how or if marks on the paper ballot or touches on the touch screen will be recognized and to whom votes will accrue based on those marks or touches. These are the election officials' duties under [WI Stats. 7.50](#) even if those duties have been delegated to an inscrutable black box.

The Government Accountability Board (GAB), its staff, and the clerks who head the [Wisconsin Towns Association](#), [Wisconsin County Clerks Association](#), and the [Wisconsin Municipal Clerks Association](#) do not agree with most, if any, of the above [credos](#).

I object to the notion that there can be such things as secret election records. No paper election record is secret.

- The ballot is not secret. It is anonymous.
- The confidential poll lists of [WI Stats 6.47](#) are not secret. They are confidential. They are known to those election officials for whom the knowledge is necessary in order to administer the election and only for the time needed to administer the election.

In contrast though, many electronic election records generated by electronic voting machines are regarded by the state as secret; more precisely trade secreted. The contents of these records are not available for inspection by the public and in many cases are not even known to the election officials who use those records to aid them in administering an election.

Again, I believe there cannot be effective oversight of an election (by an election official or by the public) if any of the election records are a secret.

In the summer of 2007, I began looking for election records which were not governed by the Help America Vote Act (HAVA), not part of the new equipment purchases, not part of the [new security regulations](#), not part of administrative rule [GAB5](#), but which were likely to be considered secret. I selected the 20-year old requirement to backup the contents of removable memory cards. The backups made under [WI Stats. 7.23\(1\)\(g\)](#) fit my criteria as election records of long standing, but which were likely be kept secret — via trade secrecy claims — from both the public and the election officials who rely on them.

My assumption that the backups were records of long-standing was incorrect as I reported [here](#) and [here](#). I discovered the statutory requirement to backup the contents of removable memory cards, in the 20-year history of the statute, had **never** been obeyed by any election official at any time.

Naïvely thinking breaking the law might be a crime, I reported my discovery to the local District Attorney, who [declined to investigate](#). In January 2008, I elevated my report to the Office of the Attorney General of Wisconsin, who immediately kicked it over to the newly-created Government Accountability Board. I appeared before the GAB for nearly every meeting in 2008 arguing that obeying the statutes by preserving and retaining the contents of removable memory cards was not just good policy, but that failing to comply with [WI Stats. 7.23\(1\)\(g\)](#) is felony election fraud under [WI Stats. 12.13\(2\)\(b\)7](#).

From minute 1:35:00 to 1:44:10 of the [recording of the GAB August 10, 2009 meeting](#) is a summary of my contention that the GAB is "all promulgation and no enforcement"; an assessment which applies to the preservation and retention of the contents of removable memory cards. Since at least 1995, again in [2006](#), as part of the [Election Administration Manual](#), and as part of the [official record retention schedule](#), the GAB and its predecessor, the State Election Board, informed clerks of the State of their duty to make the backups required by [WI Stats. 7.23\(1\)\(g\)](#), however neither Board has done anything to verify that these election records were preserved and retained.

My concerns expressed in the August 10, 2009 meeting culminated in two documents prepared by the GAB staff addressing the issue of maintaining electronic election records: [the December 17, 2008 Memo](#) and the [December 18, 2008 Memo](#). I believe both to be flawed in that both documents counsel the municipal and county clerks to violate [WI Stats. 7.23\(1\)\(g\)](#) and/or [WI Stats. 7.24](#) in any one of several GAB-approved ways.

- Option C of the December 17, 2008 memo is best paraphrased as: "Let the vendors retain the records." This is an express violation of [WI Stats. 7.24](#), which reads [emphasis mine]:

The official or agency shall retain all election materials until destruction or other disposition is authorized under s. 7.23.

Prohibiting the outsourcing of record retention is not just good law it is good public policy. For examples of the problems associated with outsourcing election administration to private corporations and third parties, see ["Vendors are Undermining the Structure of U.S. Elections"](#) by Ellen Theisen of [VotersUnite.org](#).

- Option A of the December 17, 2008 memo counsels the clerks to backup the programming and data stored on the central election management software rather than retain the actual contents of the memory cards. This is advice to retain what **ought** to have been on the memory card in lieu of what was **actually** on the memory card. One only needs to watch [Hacking Democracy](#) to understand why this is bad policy and why the [GAB promulgated rules](#) in order to ensure what **ought** be on a removable memory cards is what is **actually** on the memory cards when those contents administer an election on behalf of the clerk. But, the GAB's policy is in direct opposition to the legislature's mandate. Backing up what is convenient and *might* be on a removable memory card rather than what is *actually* present on the memory card is expressly forbidden by [WI Stats. 7.23\(1\)\(g\)](#).

- Option 1 of the December 18, 2008 memo to the municipal clerks is a restatement of Option A, *"Backup whatever the vendors say is convenient to backup"* with the addition that if it is **claimed** the PROM pack has no initial programming on it, then don't backup the event logs or ballot "images"¹ or other information on the PROM pack either.
- Option 4 of the December 18, 2008 memo is a restatement and clarification of Option A: *"Backup what **ought** to be on the memory cards in lieu of backing up what is **actually** on the memory cards"*.

I spent the spring, summer, and fall of 2009 surveying which of the statute-violating GAB recommendations various clerks have adopted. Specifically, I asked various county clerks (and, in Oneida County, the municipal clerks) for the backups made on or before February 17, 2009 pursuant to [WI Stats. 7.23\(1\)\(g\)](#) of the memory cards used in the November 4, 2008 election. The results so far are:

- **City of Milwaukee:** No backups of Automark cards made. The City Election Commission contends both that the AutoMark is not a voting machine as that term is used in [WI. Stat. 5.08\(4m\)](#) and that even if it were a voting machine no backups are required because the Automark neither stores vote totals on the removable memory card nor tabulates votes. A file which is not the contents of the Optech memory card is kept in lieu of an actual backup of the Optech memory cards.
- **Washington County:** All copies of the backups I requested had been made, copies were delivered to me, and the copies seem to be complete backups of the binary data found on the memory cards used by the AccuVote OS and AccuVote TSx machines.
- **Sheboygan County:** Files which clearly are not the contents of the M100 memory cards are kept in lieu of a backup of the actual contents of the memory cards.
- **Oneida County:** The "let the vendor do it" approach was used. The vendor, ES&S, destroyed the records, made no backups, and states categorically that ES&S does not and will not retain election records on behalf of a customer jurisdiction. This contradicts the "research" done by the GAB staff described in the [December 17, 2008 memo](#).
- **Waukesha County:** Unknown. I made open records requests for the backups of 8 different memory cards. Seven of those open records are tied up by the County's claim that portions of the requested records are secret and that it will cost \$470 (\$67.14 per requested record) to redact the secret portions of 7 of the 8 backups requested. Access to copies of these 7 backups is contingent on my paying the \$470 fee. I am contesting both the fee and the claim that election records can be secret.
Regarding the eighth back up requested, the response was that the unnamed vendor to the Town of Waukesha has gone bankrupt and apparently has taken the records with them.

The GAB staff has submitted to the legislature bills [AB-646](#) and [SB-435](#) in order to "remedy" the memory card backup "problem". The proposed legislation:

- Removes the requirement to make backups for non-federal elections.
- Removes the requirement to save the memory cards [in situ](#) for at least 21 days.
- Exempts ballot marking devices and central count scanners if it is claimed the equipment [does not tabulate votes](#). A relevant quote from this [report from the California Top to](#)

[Bottom Review](#) explaining why a central count scanner (such as used in Sauk and Juneau counties) would be exempted is:

*During the election, the GEMS server is **responsible for** performing image processing on the ballots scanned by the Central Count AV-OS. After the election, the GEMS server **tallies** the election results and is used for generating election result reports and databases.*

- Fails to require voting equipment certified by the GAB actually have the capability to create backups and to create those backups in a form or on a medium over which the clerks can maintain custody and control for the entire retention period.

This proposed legislation demonstrates the [failure to communicate](#) when there are fundamental and irreconcilable differences in world views. The GAB staff and I disagree on fundamentals such as:

- Are the contents of a removable memory card used to administer an election an election record?
- Whether records or not, should the contents of a removable memory card be preserved for at least as long as a poll list?
- If preserved, then preserved by whom?
- Does a concept similar to "[adverse possession](#)" apply to election statutes? I.e. if a statute has been un-enforced for the past 20 years by the responsible executives, then can the statute continue to be un-enforced for the next 20 years? I might consider that argument concerning [Wisconsin's Oleo regulations](#), but not for something as vital as elections.

The only remedy for parties with such irreconcilable differences is arbitration by a third party whose authority is accepted by the disputing parties. In the case at hand there are only five such parties with the authority to arbitrate the dispute among the GAB, the county and municipal clerks, and myself. I am open to suggestions if there are more than these five:

- The legislature,
- Any of the 72 county District Attorneys of the state,
- The Office of either US Attorney located in the state,
- A Wisconsin state court,
- A Federal court,

The Attorney General of the State of Wisconsin is not included here because under the same statute which created the GAB, the Office of the Attorney General of Wisconsin is prohibited from investigating election crimes unless there is a specific referral from the GAB or from a county DA.

I am now pursuing these avenues of arbitration.

- I have filed a statement with the Oneida County sheriff's department documenting my allegation that ES&S destroyed election records from the November 4, 2008 election.
- I have filed a statement with the Milwaukee office of the FBI documenting my allegation that the City of Milwaukee Election Commission destroyed election records from the November 4, 2008 election by failing to comply with [WI Stats. 7.23\(1\)\(g\)](#).
- I have filed a statement with the Milwaukee Police Department documenting my allegation that the City of Milwaukee Election Commission destroyed election records from the November 4, 2008 election by failing to comply with [WI Stats. 7.23\(1\)\(g\)](#).
- I am considering a mandamus action to force the GAB and/or the clerks of the state to comply with [WI Stats. 7.23\(1\)\(g\)](#)
- I am exploring how [unmerchantability](#) may affect the certification of a voting system. I do not believe the claim by the voting machine vendors that their systems:
 - can write to a removable memory card,
 - read from the removable memory card, but
 - cannot backup the removable memory card.

Again, I do not believe this, but, if true, then the vendors are admitting their systems are [unmerchantable](#) as that term is used in the under the Wisconsin Uniform Commercial Code. Consider the flash drive in your pocket. Do you believe that a system which can write to your flash drive and can read from your flash drive, cannot also make a backup of your flash drive? This is what the clerks claim the vendors have told them about the voting systems the clerks purchased with regard to removable memory cards instead of flash drives.

If voting systems are so poorly designed and constructed that there is no way to make backups of the removable memory cards, then those systems may well be so defective as to be [unmerchantable](#). This because the systems are unfit for the usual and customary purpose for which they were purchased: administering elections in a lawful manner.

That is the story so far with more developments to come.

¹ "Ballot images" are neither pictures nor some graphical representation of the ballot scanned; the terminology is part of the [Humpty Dumpty language](#) of the election industry.

² "Ballot Definition File" is another bit of the [Humpty Dumpty language](#) of the election industry. Often the "ballot definition file" is neither a single, separate file nor a complete definition of the ballot.