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Recommended Citation

Citizen's Advocacy Center, *Challenges to Ballot Access and the Challenges Therein*, 6 DePaul J. for Soc. Just. 171 (2013)
Available at: <http://via.library.depaul.edu/jsj/vol6/iss2/4>

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CHALLENGES TO BALLOT ACCESS AND THE CHALLENGES THEREIN

I. INTRODUCTION

Voting is frequently referred to as the quintessential act of democracy, and voting rates are held up as barometers of civic participation. The right to vote in the United States is guaranteed for those who meet eligibility requirements, and purportedly the votes of individuals are symbolic of the capacity of the people to influence and shape government. The strength of an individual's vote increases when there is a healthy field of candidates and the citizenry has the ability to directly impact government decision-making through placing citizen-initiated referenda on the ballot. Thus, ballot choice is inextricably tied to the right to vote. Ballot choice is directly impacted by the consistency and fairness within the process of getting on the ballot and surviving the objection process utilized by those who seek to remove candidates and referenda from the ballot. As local government positions are the gateway to higher political office at the State level, examining the barriers at the point of entry in politics at the local level is crucial to evaluating the strength of the vote in Illinois.

In Illinois, the process by which candidates and citizens are able to gain access to the ballot is set forth by a complex statute with narrow deadlines. In addition to the complex requirements, the statute is applied inconsistently due to a decentralized electoral system. The complexity of election law combined with the decentralized nature of electoral boards results in ballot challenges that tilt the advantage toward incumbents and those with greater political experience who know how to navigate or manipulate the system. The result for the electors is diminished voter choice. As an illustration, with respect to candidate choice, in the first election after redistricting, only 24 of the state's 59 Senate districts, 40.7%, had candidates running from

both major parties.¹ In the House, 81 out of 118 districts, 68.6%, had only one party's candidates.² At the local level the landscape is also bleak. In the April 2011 election in the collar counties, there were 3,850 seats among municipalities, park districts, fire districts, library districts, and school districts. The number of candidates running for those seats was 5,320 in total. Only 19% of the candidates faced opposition. Forty-nine percent of the races were uncontested. The April 2013 elections similarly indicate a lack of candidate choice: at least 55% of the races in DuPage County were uncontested. One problem facing local elected bodies is the small pool of candidates interested in running for local seats. In exacerbation, qualified candidates who passed the necessary hurdles to get on the ballot may be unfairly kicked off through the objection process, thus disenfranchising voters by allowing them fewer candidates to choose from on the ballot.

With respect to the initiative and referendum process, Illinois citizens are granted the right to petition their governments by the State Constitution.³ Through this process, voters exact a different measure of "ballot choice" on a particular issue and are able to pursue binding referenda that government entities must adhere to, as well as advisory referenda that ostensibly help guide government policy. Whether an individual candidate is attempting to get and keep their name on a ballot, or a citizen group is seeking to place binding parameters on the structure of government, measures that ensure accountability in the petition process help determine the strength of a democracy. Accountability in the petition process mandates fairness for contesting petitions based on sufficiency or fraud.

¹ Charles N. Wheeler III, *Ends and Means: Nearly 80 legislative candidates have no competition*, ILLINOIS ISSUES (Feb. 2012) available at <http://illinois.uis.edu/archives/2012/03/ends.html>.

² *Id.*

³ ILL. CONST. art. 7, §11.

The Citizen Advocacy Center (CAC) facilitated a project focused on examining electoral board records at the local level, where individuals can have the most significant impact on government operations, and aimed to uncover twenty years of electoral board decisions in DuPage County and suburban Cook County to examine the consistency with which decisions are made to objections to nomination papers and petitions for referendum. Understanding a few features of Illinois' election infrastructure and the process by which candidates and referenda get on the ballot is integral to appreciating how ballot access practices operate to disenfranchise voters at the polls through poor candidate choice on the ballot, or through the lack of a referendum on a community-identified issue. Thus, the following features and processes are outlined before the analysis of the data is presented: electoral boards, the elements of filing nomination papers and petitions for referendum, making objections, and judicial review of electoral board decisions.

II. ELECTORAL BOARDS

Illinois has more units of government than any other state in the country, which accounts for the thousands of public bodies, seats for elected office, and the potential referendum questions to be placed on the ballot. Electoral boards in Illinois include, in part, 101 county officers electoral boards and over one thousand municipal electoral boards,⁴ all of which operate entirely independent of each other. Because most candidates and petition advocates rarely appeal local electoral board decisions to the circuit court level, local electoral boards have enormous power in shaping the civic landscape of the electorate by deciding which candidates and referendum questions stay on the bal-

⁴ There are 1299 municipalities in Illinois, according to the U.S. Census Bureau, available at <http://quickfacts.census.gov/qfd/states/170001k.html>.

lot. Moreover, the statutory composition of the electoral boards implicitly favors the status quo.

The Illinois State Board of Elections (SBE) is a weak entity that plays little role in ensuring consistency among the network of decisions that are derived from local electoral boards. The SBE acts as an electoral board with the authority to hear and rule upon objections to the following nominations: candidates for State offices; nominations of candidates for congressional, legislative and judicial offices of districts, subcircuits, or circuits situated in more than one county; nominations of candidates for the offices of State's attorney or regional superintendent of schools to be elected from more than one county; and petitions for proposed amendments to Illinois Constitution.⁵ It plays no role in ruling on objections to the nominations of candidates of local elections, the bulk of elections in our state.

Illinois has a highly decentralized electoral system, which means that hundreds of electoral boards hear objections made to candidate nominations or petitions for referendum. The composition of electoral boards is prescribed by law, and they typically consist of the elected officials from the jurisdiction in which the nomination papers or petition for referendum has been filed. For municipal elections, the municipal officers electoral boards hear objections to the nominations of candidates for municipal offices and petitions for referendum. Per statutory requirements, (1) the mayor, (2) the clerk, and (3) the longest sitting elected official usually comprise the municipal officers electoral board.⁶

For example, if candidate "Public Servant" is running for an aldermanic seat in the city of "Democracy Town" and the candidate's signature papers were challenged as being in non-compliance with the law, a subsection of public officials who sit on the City Council of Democracy Town are also convened as the Elec-

⁵ 10 ILL. COMP. STAT. 5/10-9(1) (2012).

⁶ 10 ILL. COMP. STAT. 5/10-9(3) (2012).

toral Board of Democracy Town to determine if candidate Public Servant has met all legal requirements. The same is true if a group of citizens organized to place a binding referendum on the ballot to institute term limits in Democracy Town and someone challenged the citizen group's petition as not meeting all legal requirements. A subsection of the Democracy Town City Council would serve as the Electoral Board of Democracy Town to determine if the petition in fact met legal requirements and can be placed on the ballot.

As entities convened to preside over hearings, the function of electoral boards is quasi-judicial. **As quasi-judicial bodies, electoral boards** have the authority to hear sworn witnesses, formally accept evidence, issue subpoenas, and render decisions based on law and fact.⁷ Quasi-judicial bodies are less formal than a traditional court of law but similar in that both sides are afforded an opportunity to present evidence and make legal arguments.

Courts view electoral boards as administrative agencies; for the purpose of judicial review, a court will review decisions on questions of law *de novo*, while regarding the board's findings of fact as *prima facie* true, and only overturning on appeal when they are against the manifest weight of the evidence.⁸ This means that an electoral board is an administrative body created to decide legal issues specifically related to the sufficiency of nominations papers or petitions for referendum that have been challenged by a qualified individual. As an administrative agency conducting a hearing, it is governed by fundamental principles of due process that dictate a fair hearing before an impartial tribunal.⁹

⁷ 10 ILL. COMP. STAT. 5/10-10 (2012).

⁸ *Druck v. Ill. State Bd. of Elections*, 899 N.E.2d 437, 441-442 (Ill. App. Ct. 2008).

⁹ *Girot v. Keith*, 818 N.E.2d 1232, 1237 (Ill. 2004).

To gain some perspective on the proportion of objections raised, consider that 1,260 candidates filed to run in federal, state, county, and other local races throughout Illinois for the April 2012 election.¹⁰ Focusing on only those objections in suburban Cook County, about 100 objections against nominations and petitions for the April 2012 election went before the Cook County Electoral Board.¹¹ County officers electoral boards hear and pass upon objections to the following nominations: candidates for county offices; for congressional, legislative, and judicial offices of a district, subcircuit, or circuit within a county's boundaries; for school trustees to be voted for by the electors of the county or by the electors of a township of the county; for the office of multi-township assessor; and for all special district offices.¹² For special districts situated in more than one county, the county officers electoral board of the county in which the principal office of the district is located has jurisdiction to hear and pass upon objections.¹³ This type of electoral board also hears objections to nomination petitions for precinct and township committeemen.¹⁴ A county officers electoral board is composed of (1) the county clerk (or an assistant designated by the county clerk), (2) the State's attorney of the county or her designated Assistant State's Attorney, and (3) the clerk of the circuit court (or an assistant designated by the clerk of the circuit court).¹⁵

Counties may elect to administer elections through a board of commissioners.¹⁶ DuPage County is unique in that it has the only countywide election commission in Illinois. The members

¹⁰ Pat Milhizer, *Election cycle sparks another round of legal actions*, CHICAGO DAILY LAW BULLETIN, Jan. 13, 2012 at 1.

¹¹ Pat Milhizer, *Election cycle sparks another round of legal actions*, CHICAGO DAILY LAW BULLETIN, Jan. 13, 2012 at 1.

¹² 10 ILL. COMP. STAT. 5/10-9(2) (2012).

¹³ 10 ILL. COMP. STAT. 5/10-9 (2012).

¹⁴ 10 ILL. COMP. STAT. 5/7-13 (2012).

¹⁵ 10 ILL. COMP. STAT. 5/10-9(2) (2012).

¹⁶ 10 ILL. COMP. STAT. 5/6A-1 (2012).

of the DuPage County Election Commission, which presides over objections to petitions, are appointed by the DuPage County Board Chair.¹⁷ The DuPage County Officers Electoral Board hears objections to the same types of nomination papers as do other county officers electoral boards.

Disqualification of a member from any electoral board is limited to a few situations presenting conflicts of interest. If an electoral board member is a candidate for an office involved in the objection, that member is to be replaced by a substitute, designated by statute.¹⁸ Where there is an improperly constituted electoral board, a court should not decide an appeal from the electoral board's decision on the merits but rather vacate the decision and remand the case below so the objections may be heard before a properly constituted board.¹⁹ Because electoral boards must abide by due process, the provision in the statute providing for substitutions of electoral board members has been applied by courts to contexts other than where a member was a candidate for an office involved in the objection. In *Girov v. Keith*, the Illinois Supreme Court found an unacceptable risk of bias where a member of the electoral board provided testimony as a witness before it and proceeded to adjudicate contested issues of fact regarding her own credibility.²⁰ In *Anderson v. McHenry Township*, the court deemed the electoral board improperly constituted where the members had a pecuniary interest in the outcome.²¹ Recently, a Cook County judge disqualified the members of the municipal officers electoral board in Cicero in what has been cited as an unprecedented ruling.²² The

¹⁷ See 10 ILL. COMP. STAT. 5/6A-3 (2012).

¹⁸ 10 ILL. COMP. STAT. 5/10-9 (2012).

¹⁹ *Kaemmerer v. St. Clair County Electoral Bd.*, 776 N.E.2d 900, 903-04 (Ill. App. Ct. 2002).

²⁰ *Girov*, 818 N.E.2d at 1237-38.

²¹ *Anderson v. McHenry Twp.*, 682 N.E.2d 1133, 1136 (Ill. App. Ct. 1997).

²² Joseph Ruzich, *Cicero leader, allies tossed off town electoral board*, CHICAGO TRIBUNE, Dec. 14, 2012 available at <http://articles.chicagotribune.com/>

judge agreed that it would be a financial conflict of interest for the electoral board to do its duties objectively, noting, “[a]ll members have vested interest in pay and benefits, including family members on the Cicero payroll, which may be affected by election results.’”²³

III. FILING NOMINATION PAPERS AND PETITIONS FOR REFERENDUM

An understanding of the content and format requirements, as well as legal treatment by appellate courts, for nomination papers and petitions for referendum are necessary to appreciate the fairness issues identified in analyzing the objections.

In order for a candidate to get their name on the ballot in Illinois (whether for statewide office or for political subdivisions of the state) they must comply with the many applicable provisions of the Illinois Election Code. A candidate must file a collection of documents, called nomination papers, with the election authority of the governing body.²⁴ The packet of nomination papers must contain:²⁵ 1) a statement of candidacy,²⁶ 2) the receipt for the filing of the candidate’s statement of economic interest,²⁷ and 3) signature sheets signed by a requisite number of registered voters in the district and certified by a notary public.²⁸ Each of these has several content and formatting

2012-12-14/news/ct-met-cicero-electoral-board-1215-20121215_1_electoral-board-town-president-candidate-cicero-leader.

²³ *Id.*

²⁴ See 10 ILL. COMP. STAT. 5/7-1 to 7-100, 8-1 to 8-17.1, 10-1 to 10-16 (2012).

²⁵ The Loyalty Oath, 10 ILL. COMP. STAT. 5/7-10.1 (2012), is an optional filing, found unconstitutional under the First and Fourteenth Amendments. *Communist Party v. Ogilvie*, 357 F. Supp. 105, 106 (N.D. Ill. 1972); *Socialist Workers Party v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972). Because it is optional and does not affect ballot access at the level of administrative review, it is omitted from this paper.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-4 (2012).

requirements, all of which may be a basis for objection against the candidate's nomination.

A. The Statement of Candidacy

The Statement of Candidacy is a sworn statement from the candidate establishing his or her qualifications to run for office at the time of the filing of the nomination papers.²⁹ The oath is sworn to confirm the facts stated in the Statement of Candidacy: (1) the candidate's name, (2) the candidate's address of residence, (3) whether the candidate seeks nomination at a party primary and designating which party (only for nominations by political parties), (4) that the candidate is a qualified voter at the stated address (and a qualified voter of the candidate's affiliated party, if a partisan election), (5) that he or she is legally qualified to hold the stated office, and (6) that he or she has filed or will file a Statement of Economic Interests.³⁰ An officer authorized to administer oaths in Illinois must witness the candidate's signature and notarize the Statement of Candidacy.³¹ The Statement requires the name of the candidate be limited to his or her given name, allowing the use of initials and/or a commonly-known nickname aside a surname; and it forbids the use of titles or honorifics.³²

B. Statement of Economic Interests

A Statement of Economic Interests, as required by the Illinois Governmental Ethics Act, must be filed by candidates with the Secretary of State,³³ and the receipt for the filing must be submitted to the clerk by the deadline for filing the nomination pa-

²⁹ See *Lewis v. Dunne*, 344 N.E.2d 443, 446-47 (1976).

³⁰ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-5 (2012).

³¹ 10 ILL. COMP. STAT. 5/7-10.1, 8-8, 10-5 (2012).

³² 10 ILL. COMP. STAT. 5/7-10.2, 8-8.1, 10-5.1 (2012).

³³ 5 ILL. COMP. STAT. 420/4A-105(a) (2012).

pers.³⁴ The candidate must file the Statement of Economic Interests within the same calendar year that the nomination papers, otherwise the nomination papers will be deemed insufficient.³⁵

C. *Signature Sheets*

Signature sheets for nomination papers and for petitions for referendum have similar features, and their similarities and differences are listed in turn. Each nomination petition should contain the following specific information: (1) a caption attesting that the signers are qualified electors of the jurisdiction and specified party, if any; (2) a paragraph stating the candidate's name address, and the office sought; (3) a list of signers and their addresses; and (4) a circulator's affidavit swearing to being a registered voter at the specified address, and to the best of the circulator's knowledge, the signers are qualified voters, and that the signatures are genuine, having been written in the presence of the circulator at the correctly stated address.³⁶

For nomination papers, the circulator attests to the dates on which a sheet was circulated, or the first or last day the sheet was circulated,³⁷ or that none of the signatures were signed more than 90 days preceding the last day for the filing of the petition.³⁸ Signature sheets for petitions for referendum should include the form of the public question to be placed on the ballot and the political subdivision or district in which it is to be submitted, and the date on which the public question was initiated by the filing of a petition.³⁹

³⁴ 10 ILL. COMP. STAT. 5/7-12(8), 8-8, 10-5 (2012).

³⁵ 5 ILL. COMP. STAT. 420/4A-105; 10 ILL. COMP. STAT. 8-8, 10-5 (2012).

³⁶ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-4 (2012).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 10 ILL. COMP. STAT. 5/28-3, 28-5 (2012). The form of the question may be dictated by the statute that authorizes the particular question, 10 ILL. COMP.

The signature sheets in either case should be of uniform size and bear the same heading.⁴⁰ The heading should contain a statement that the undersigned registered voters seek placement on the ballot of the name of the candidate, and if a partisan or political party election, the candidate's party affiliation, for the office specified, on the particular election and its date.⁴¹ The heading for a petition for referendum needs to state the election at which it is to be submitted where by law the public question must be submitted at a particular election.⁴² After signatures are collected, signature sheets should be signed by the circulator under oath before a notary that the signatures are genuine and were signed in the circulator's presence.⁴³ **The signature sheets must be bound securely and numbered consecutively.**⁴⁴

Recognizing a state's interest in limiting ballot access to serious candidates and in requiring a demonstration of qualification in order for running an election smoothly, a "modicum of support" demonstrated through signature requirements is considered a reasonable regulation on ballot access.⁴⁵ Thus, the Election Code prescribes the number of signatures each particular type of candidate must procure. The number of signatures differs depending on what office a candidate seeks.⁴⁶ The number of signatures needed for a petition for binding and advisory

STAT. 5/28-1, otherwise, the Election Code gives some guidance as to form of questions placed on the ballot., 10 ILL. COMP. STAT. 5/16-7 (2012).

⁴⁰ 10 ILL. COMP. STAT. 5/7-10, 10-4, 28-3 (2012).

⁴¹ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-4 (2012).

⁴² 10 ILL. COMP. STAT. 5/28-2(d) (2012).

⁴³ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-4, 28-3 (2012).

⁴⁴ *Id.*

⁴⁵ *Druck v. Ill. State Bd. of Elections*, 899 N.E.2d 437, 443 (Ill. App. Ct. 2008).

⁴⁶ The number may differ whether the election precedes or follows redistricting: Section 10-2 of the Code lists the signature requirements for political parties that seek to file nomination papers to have their candidate's names placed on the ballot both before and after redistricting. 10 ILL. COMP. STAT. 5/10-2 (2012).

referenda for local elections are also subject to minimum requirements,⁴⁷ ostensibly for similar reasons.

IV. THE OBJECTION PROCESS

After receiving a candidate's nomination papers or a petition for referendum, the election authority, which is the clerk at the municipal level, is under an obligation to inspect the nomination papers for apparent conformity with the Election Code.⁴⁸ The purpose of the inspection is not to conduct an extensive review to determine sufficiency, but rather to essentially verify at a glance that the requisite pieces are included.⁴⁹ A recent Illinois appellate court case states:

It would be paradoxical if, under the apparent conformity test, [a clerk] would be free to reject nomination papers that would otherwise be deemed to be in substantial compliance with the Election Code by the Board. Thus, deviations that are trivial, but still in substantial compliance with the Election Code, would be deemed in apparent conformity. To allow an election official to do more would give that official more power than authorized by statute, and would usurp power from

⁴⁷ See 10 ILL. COMP. STAT. 5/28-6 (2012). State statutes regulating a petition for referendum's substantive issue supersede the threshold stated in the Election Code.

⁴⁸ 10 ILL. COMP. STAT. 5/10-8 (2012) ("Certificates of nomination and nomination papers, and petitions to submit public questions to a referendum, being filed as required by this Code, and being in apparent conformity with the provisions of this Act, shall be deemed to be valid unless objection thereto is duly made within 5 business days after the last day for filing the certificate of nomination or nomination papers or petition for a public question . . ."). And for proposed statewide advisory public questions, the Board of Elections shall examine the petition sheets in each election jurisdiction section for conformity with the single jurisdiction signature requirement. 10 ILL. COMP. STAT. 5/28-8, 9 (2012).

⁴⁹ North v. Hinkle, 692 N.E.2d 352 (Ill. App. Ct. 1998).

the Board, which is authorized by law to hear objections to nominating papers.⁵⁰

Once the clerk deems the nominating papers to be facially sufficient, invalidation depends on an objection filed by an eligible party identifying specific deficiencies.⁵¹

The clerk must make all of the nomination papers and petitions for referendum available for public inspection until five days beyond the last day for filing to give objectors the opportunity to file their objections.⁵² Within five days of the last day for filing, any registered voter of a particular political subdivision or district in which a candidate or public question is to be voted on may object to either type of petition filed, whether for placement of a candidate on the ballot or a referendum on the ballot.⁵³ The objector's petition must state the (1) objector's name and (2) residence address, and (3) shall state fully the nature of the objections to the nomination papers or petitions for referendum, as well as (4) state the interest of the objector and (5) what relief is requested of the electoral board.⁵⁴

Notably, electoral boards cannot raise their own objections *sua sponte* to nominating petitions or petitions for referendum.⁵⁵ As a statutory creation, electoral boards' powers are restricted

⁵⁰ *Samuelson v. Cook County Officers Electoral Bd.*, 969 N.E.2d 468, 482 (Ill. App. Ct. 2012).

⁵¹ 10 ILL. COMP. STAT. 5/7-12.1, 8-9.1, 10-8, 28-4 (2012).

⁵² *Id.*

⁵³ *Id.* For petitions to amend Article IV of the Illinois Constitution and petitions for advisory question of public policy to be submitted to the voters of the entire State, a person may object during 35 business days after the last day for the filing of such petitions. 10 ILL. COMP. STAT. 5/10-8(A), (B) (2012). Requirements for objector's petitions are found in 10 ILL. COMP. STAT. 5/10-8.

⁵⁴ 10 ILL. COMP. STAT. 5/7-12.1, 8-9.1, 10-8, 28-4 (2012).

⁵⁵ *Delay v. Bd. of Election Cmm'rs.*, 726 N.E.2d 755, 758-59 (Ill. App. Ct. 2000).

by the powers listed in the Election Code, and it does not confer this authority.⁵⁶

Once the clerk receives an objection, he or she must send the original objection and the original nomination papers or the original petition for referendum to the chairman of the electoral board no later than noon of the second business day following the filing of the objection.⁵⁷ The clerk must also send a copy of the same documents to the affected candidate or petitioner.⁵⁸ Within 24 hours of receiving the objection and nomination papers, the chairman of the electoral board must notify the other electoral board members.⁵⁹ The electoral board must meet to rule on the objection within three to five days of its receipt.⁶⁰ For petitions for referendum, the final order must be entered not later than seven days after the hearing.⁶¹

Electoral boards must issue a written decision in open proceedings that are subject to the Illinois Open Meetings Act.⁶² The decisions of electoral boards are subject to judicial review; they constitute final orders that may be appealed to circuit court of the county in which the electoral board hearing was held.⁶³ The appealing party must file a petition with the circuit court and serve notice on the involved parties within five days after receiving the decision of the electoral board.⁶⁴ A court will overturn an electoral board's decision only if the manifest weight of the evidence vanquishes the board's decision.⁶⁵

⁵⁶ *Id.*

⁵⁷ 10 ILL. COMP. STAT. 5/7-12.1, 8-9.1, 10-8, 28-4 (2012).

⁵⁸ *Id.* For this reason, it is recommended for petitioners to include a cover sheet naming the principal proponent of the petition for referendum.

⁵⁹ 10 ILL. COMP. STAT. 5/7-12.1, 8-9.1, 10-10 (2012).

⁶⁰ *Id.*

⁶¹ 10 ILL. COMP. STAT. 5/28-4 (2012).

⁶² 10 ILL. COMP. STAT. 5/7-12.1, 8-9.1, 10-10 (2012).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Williams v. Butler*, 341 N.E.2d 394, 398 (Ill. App. Ct. 1976).

“Judicial review of the decision of an electoral board is intended to remedy arbitrary or unsupported decisions”;⁶⁶ however, litigation at the circuit court level is far more costly than at the local electoral board level, where most challenged candidates and referendum advocates represent themselves at the hearings. As such, most candidates and referendum opponents do not appeal decisions to the circuit court. Among the 84 FOIA responses containing records responsive to CAC’s FOIA requests (including a total of 166 candidates and petitions for referendum implicated in the objections), described *infra*, 10 indicated that one of the parties sought judicial review. It is notable that all of the parties who sought judicial review had legal representation.

V. JUDICIAL REVIEW OF ELECTORAL BOARD DECISIONS

Illinois courts agree that “access to a place on the ballot is a substantial right not lightly to be denied,”⁶⁷ and they parse the meaning of “substantial compliance” with the Election Code case by case, careful not to trample upon the exercise of the right through “unreasonable, frivolous, or unnecessary limiting requirements.”⁶⁸

Courts agree that countering fraud and maintaining the integrity of the election process are the legislature’s intent behind the requirements for the nomination and petition processes to counter fraud and maintain the integrity of the election process. Where deviations from pertinent Election Code provisions⁶⁹ in nomination papers and petitions for referendum were technical in nature, Illinois courts have found substantial compliance.⁷⁰

⁶⁶ *Reyes v. Bloomingdale Township Electoral Bd.*, 638 N.E.2d 782, 784 (Ill. App. Ct. 1994).

⁶⁷ *Williams*, 341 N.E.2d at 398.

⁶⁸ *Id.*

⁶⁹ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-5 (2012).

⁷⁰ *See, e.g., Panarese v. Hosty*, 432 N.E.2d 1333, 1335 (Ill. App. Ct. 1982).

“[S]ubstantial compliance with the Election Code is acceptable when the invalidating charge concerns a technical violation . . .”⁷¹ because “technical violations are those that do not relate to the integrity of the election process.”⁷²

A court’s review of an electoral board’s decision usually begins with an analysis whether the provision in the Election Code is mandatory.⁷³ This is not a matter of merely looking at the statute’s language: “[n]o universal rule can be given to distinguish between directory and mandatory provisions.”⁷⁴ Instead, the courts look to legislative intent: “[w]hether a statute is mandatory or directory [depends upon] the legislative intention to be ascertained from a consideration of the entire act, its nature, its object and the consequences which would result from construing it one way or the other.”⁷⁵ As access to the ballot is a substantial right, Illinois courts seek express language in the statute that indicates that the lack of observance of a requirement is a fatal flaw to the nomination papers or the petition for referendum. Because the Election Code provides that an election shall be rendered void by failure of those involved in the process to perform certain duties, courts must interpret those particular provisions as mandatory.⁷⁶ On the other hand, where

⁷¹ *Madden v. Schumann*, 435 N.E.2d 173, 176 (Ill. App. Ct. 1982).

⁷² *Simmons v. DuBose*, 492 N.E.2d 586, 589 (Ill. App. Ct. 1996).

⁷³ *Jones v. Dodendorf*, 546 N.E.2d 92, 93 (Ill. App. Ct. 1989).

⁷⁴ *Havens v. Miller*, 429 N.E.2d 1292, 1296 (Ill. App. Ct. 1981) (citing *People ex rel. Agnew v. Graham*, 267 Ill. 426, 436 (1915)).

⁷⁵ *People ex rel. Meyer v. Gerner*, 219 N.E. 617, 620 (Ill. 1966) (quoting *People ex rel. Agnew v. Graham*, 267 Ill. 426, 436 (1915)).

⁷⁶ *See, e.g.*, 10 ILL. COMP. STAT. 5/10-5 (2012) (“Nomination papers filed under this Section are not valid if the candidate named therein fails to file a statement of economic interests as required by the Illinois Governmental Ethics Act in relation to his candidacy with the appropriate officer by the end of the period for the filing of nomination papers . . .”). *See also* ILL. CONST. art. 10, §2 (“Failure to file a statement within the time prescribed shall result in ineligibility for, or forfeiture of, office.”)

the statute does not expressly hinge validity on compliance, a failure to strictly comply, in the absence of fraud, is not fatal.⁷⁷

Further, even mandatory requirements may fall prey to technical violations; so even when a provision is found to be mandatory, courts may still apply the substantial compliance standard to the provision.⁷⁸ “The fact that some of those requirements are mandatory, as evidenced by the statute’s use of the word ‘shall,’ is no bar to the application of th[e] standard [of substantial compliance]. Our courts have repeatedly recognized that substantial, rather than strict, compliance is the proper standard by which to evaluate deviations from certain mandatory provisions of the Election Code.”⁷⁹ So, for example, “[t]he inclusion of one nonconforming petition sheet out of many cannot, by any stretch of the imagination, constitute a complete disregard for the provisions of section 7-10 [of the Election Code], justifying the application of such a rigorous standard.”⁸⁰ Similarly, where a circulator had inadvertently omitted his address from only one of five signature sheets, the court found substantial compliance.⁸¹

But “substantial compliance is not operative to release a candidate from compliance with the provisions intended by the legislature to guarantee a fair and honest election.”⁸² **Some of the provisions in the Election Code have been interpreted to be clear requirements for which wholesale disregard will defeat a nomination or petition for referendum.** For example, a circulator’s affidavit is a primary safeguard against fraudulent peti-

⁷⁷ *Courtney v. County Officers Electoral Bd.*, 732 N.E.2d 1193, 1195-96 (Ill. App. Ct. 2000).

⁷⁸ *Jones v. Dodendorf*, 546 N.E.2d 92, 93 (Ill. App. Ct. 1989).

⁷⁹ *Samuelson v. Cook County Officers Electoral Bd.*, 969 N.E.2d 468, 477 (Ill. App. Ct. 2012).

⁸⁰ *Id.* at 476.

⁸¹ *Panarese v. Hosty*, 432 N.E.2d 1333, 1335 (Ill. App. Ct. 1982).

⁸² *Madden v. Schumann*, 435 N.E.2d 173; 176 (Ill. App. Ct. 1982).

tions.⁸³ The statutory requirements that circulators of petitions sign a statement before an officer authorized to administer oaths to the effect that they circulated the petition and that the signatures were signed in their presence and are genuine “are designed to preserve the integrity of the electoral process and non-compliance with it constitutes a valid objection.”⁸⁴ An objection to petition sheets missing the circulator’s affidavit in a candidate’s nomination papers will be sustained.⁸⁵ The result is fewer signatures and it may affect the sufficiency of the nomination papers.

To illustrate strict compliance compared with substantial compliance, consider the Statement of Candidacy. While failing to produce a Statement of Candidacy as part of the nomination papers will invalidate the candidacy, when it is produced the Statement of Candidacy must be substantially in the form described by the Election Code.⁸⁶ Thus, while inclusion of the statement in a candidate’s nomination papers is mandatory, the sufficiency of the statement may be judged in light of the papers of the whole packet. The Illinois Supreme Court provided guidance for judging substantial compliance in *People ex rel. Howard v. Chicago and Eastern Illinois Railroad Co.*,⁸⁷ and its standard was reproduced, as it is below in its entirety, fifty years later in *People ex rel. Davis v. Chicago, Burlington and Quincy Railroad Co.*⁸⁸

The word “substantial,” as ordinarily used, means essential, material, or fundamental. A substantial copy of the form . . . designated in the statute must evidently be one that contains the essence of the

⁸³ *Havens v. Miller*, 429 N.E.2d 1292, 1299 (Ill. App. Ct. 1981).

⁸⁴ *Williams v. Butler*, 341 N.E.2d 394, 398 (Ill. App. Ct. 1976).

⁸⁵ *See, e.g., id.*

⁸⁶ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-4 (2012).

⁸⁷ *People ex rel. Howard v. Chicago and Eastern Illinois Railroad Co.*, 129 N.E. 846 (Ill. 1921).

⁸⁸ *People ex rel. Davis v. Chicago, Burlington and Quincy Railroad Co.*, 268 N.E.2d 411, 415 (Ill. 1971).

form in the statute, one giving the correct idea but not necessarily the exact expressions in the statutory form. The words of the statute, “. . . shall be substantially in the following form,” necessarily convey the idea that [the election document] is not required to be an accurate or exact copy but one which embodies or contains the substance or main features of [the election document] found in the statute. The legislature evidently did not intend that every word of the statutory form should be found in the form furnished . . . , and if enough of the words found in the statutory form, coupled with other apt words, are printed . . . that will mean the same thing to all of the voters as the words used in the statutory form, the statute will be substantially complied with.⁸⁹

In illustration of how nomination papers are deemed valid when examined wholly, consider the function of the Statement of Candidacy and the signature sheets: a candidate sought nomination in the 1976 primary election and the objection to his nominating papers was based on the candidate's failure to mention on each page of the signature sheets that the office sought was vacant.⁹⁰ The court stated,

The general purpose of [nomination papers] and related provisions of the Election Code is to provide an orderly procedure whereby qualified persons seeking public office may enter primary elections. The petitions signed by electors and the statement of candidacy sworn to by the prospective candidate are each intended to serve particular purposes in this regard. While their sufficiency

⁸⁹ *Id.* (quoting *People ex rel. Howard v. Chicago and Eastern Illinois Railroad Co.*, 129 N.E. 846, 848 (Ill. 1921)).

⁹⁰ *Lewis v. Dunne*, 344 N.E.2d 443, 444 (Ill. 1976).

must be determined with reference to the particular function each was designed to accomplish, it was not intended that for all purposes they should not be considered separate and apart as if the other did not exist.⁹¹

The fact that the candidate filed a Statement of Candidacy that referenced the vacancy of the seat he sought combined with the lack of conflict or inconsistency between the description of the office in the petitions signed by electors and the statement of candidacy dispelled any basis for confusion.⁹²

In applying the substantial compliance standard, Illinois appellate courts have come to conflicting conclusions, at least with respect to the requirement of pagination of the signature sheets. In *Williams v. Butler*, the court found that the omission of the number "191" from the otherwise consecutively numbered petition papers was not a basis for striking the petition because the requirement to consecutively number the signatures sheets was not mandatory.⁹³ Later, in *Jones v. Dodendorf*, the electoral board found that this provision was mandatory such that the lack of pagination on the signature sheets rendered the nomination invalid, stating that the requirement that the pages of nominating petitions and petitions for referenda be consecutively numbered preserves the integrity of the electoral process as a check against tampering.⁹⁴ In *Wollan v. Jacoby*, the court rigorously applied strict compliance against "page numbering defects"⁹⁵ and found the nomination papers invalid. But a year later, the court in *King v. Justice Party* declined to follow *Wollan* and found that despite page numbering defects substantial compliance was met.⁹⁶

⁹¹ *Id.* at 446.

⁹² *Id.* at 447.

⁹³ *Williams v. Butler*, 341 N.E.2d 394, 396-97 (Ill. App. Ct. 1976).

⁹⁴ *Jones v. Dodendorf*, 546 N.E.2d 92, 95 (Ill. App. Ct. 1989).

⁹⁵ *Wollan v. Jacoby*, 653 N.E.2d 1303, 1304 (Ill. App. Ct. 1995).

⁹⁶ *King v. Justice Party*, 672 N.E.2d 900, 903 (Ill. App. Ct. 1996).

VI. SURVEY OF ELECTORAL BOARD DECISIONS

The Citizen Advocacy Center (CAC) examined local level ballot access by analyzing decisions issued by electoral boards in municipalities in suburban Cook and DuPage Counties and by the DuPage County Officers Electoral Board for a 20-year period, and reports on significant themes that emerged in the analysis. CAC submitted Freedom of Information Act (FOIA) requests in 2011 to each municipal officers electoral board in DuPage and Cook Counties and to the DuPage County Officers Electoral Board, for objections to candidate and referendum petitions. (See Table 1, *infra*.)

The FOIA requests asked each entity's FOIA officer to provide the following information for the previous 20 years: 1) all objections filed against candidacy petitions for municipal elections, 2) all objections filed against referendum petitions to be voted on in the municipal elections, 3) all petitions against which such objections were filed, and 4) all electoral board decisions resulting from the filing of the objections. Of the 141 FOIA requests submitted, CAC received 97 responses, 48 of which resulted in records and 36 of which indicated that the governing body had no records responsive to the FOIA request. Seven responses affirmatively indicated that the requested records had already been destroyed. Fifty-seven governing bodies either did not respond to the FOIA request or requested more time and did not follow up. Six of the objectors questioned the sufficiency of petitions for referendum, and all but one of those objections were sustained. See Table 1 for the type of response by electoral board in the following categories: records received, no records responsive, requested more time to follow up and failed, and non-responsiveness.

Of 166 individual objectors, seven individual objectors withdrew their objections, and fourteen objectors were found to have submitted deficient objections. Thirteen candidates with-

drew before the outcome of the electoral board hearing. Of the remaining 132 individual objectors' objections, twelve decisions were not provided through the FOIA response (although the outcome was included in the record for ten of them). Four of the candidates each received two objections.

A total of 432 bases of objections were filed in the contests, but only 130 bases for objections were mentioned in the decisions of electoral boards received through the FOIA requests. In other words, there were a total of 130 known outcomes for candidates or referenda on the ballot. Of those, 85 bases for objections were sustained, and 45 were rejected. (The results are in graph and table form below Table 1, *infra*.)

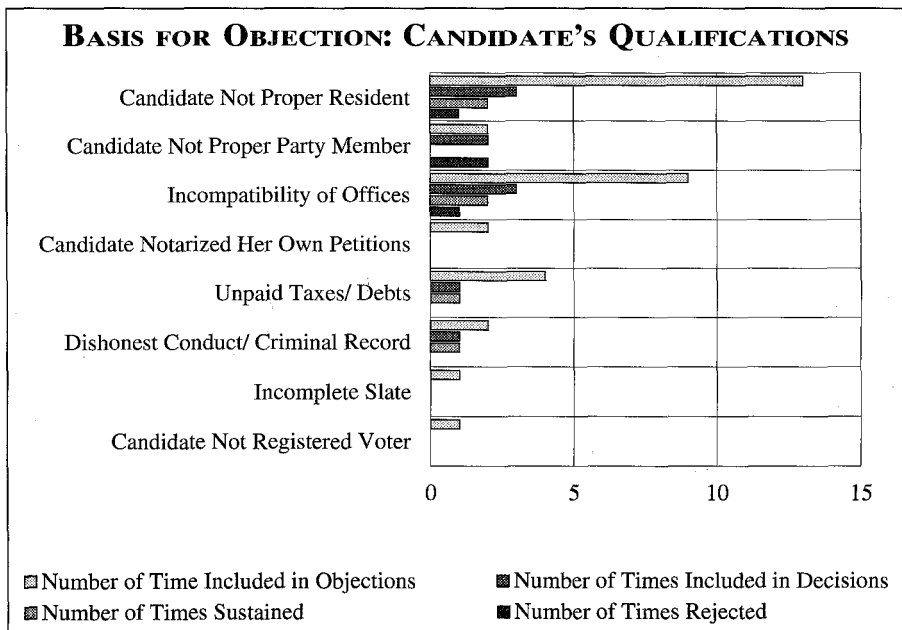
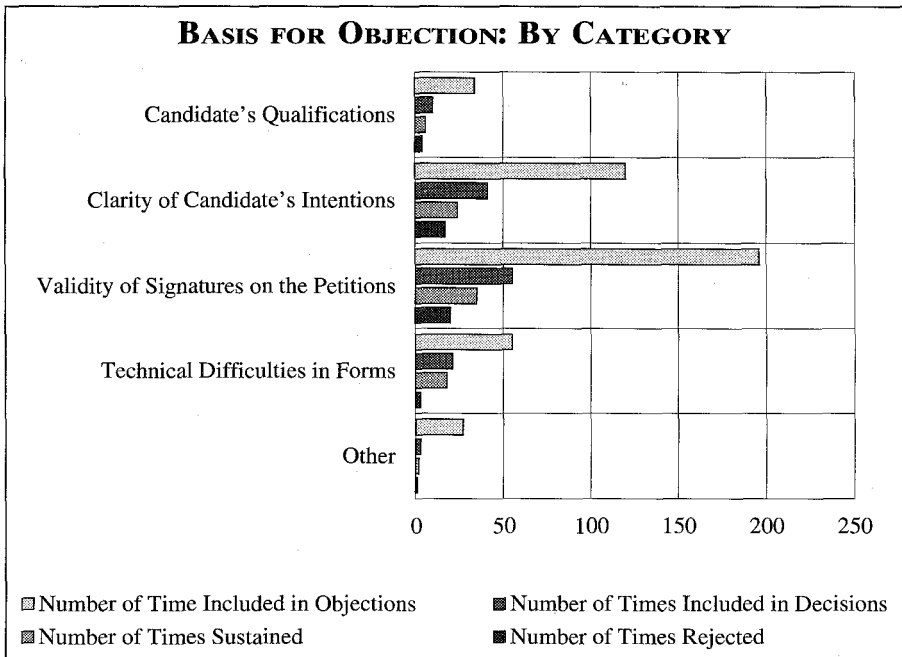
VII. CONCLUSIONS AND RECOMMENDATIONS FOR REFORM

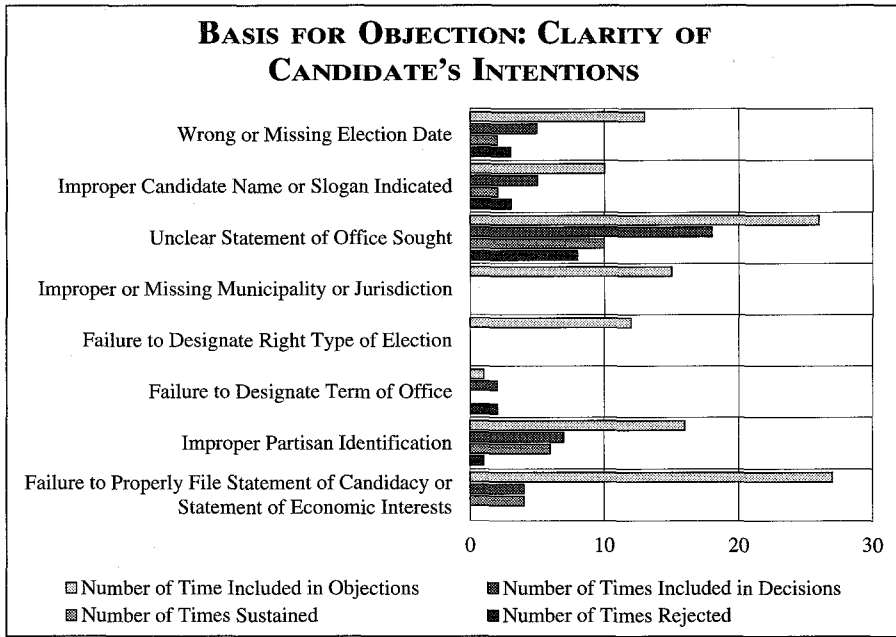
Three inter-related themes emerged from the analysis of the responses to the FOIA requests: lack of document retention by the electoral boards, inconsistent decision-making between and within electoral boards, and candidates and referenda questions eliminated from the ballot over easily remedied technical problems.

The first major issue that came to light while analyzing the municipal FOIA responses was the lack of document retention across the electoral boards, particularly with respect to the decisions rendered. As indicated in Table 1, about one-third of the municipalities had no documents responsive to the FOIA request. Of those municipalities seven specifically indicated that the requested documents had already been destroyed. The majority of responding municipalities were only able to provide documents after 2007. Additionally, some municipalities had significant gaps in their documents. For example, the City of Wheaton released responsive documents from 1983, but had no additional responsive documents until the 2005 election cycle. Although one conclusion is that the City of Wheaton had no objections in the interim period, the more likely situation is that

TABLE 1: RESPONSIVENESS TO CITIZEN ADVOCACY CENTER'S FOIA REQUESTS, BY ELECTORAL BOARD, IN SUBURBAN COOK COUNTY AND IN DUPAGE COUNTY

	Records Provided **requested 5 additional days	No Records Responsive **requested 5 additional days	Requested More Time; Did Not Follow Up	No Response
Cook County *Municipality indicated that all requested documents had already been destroyed	Alsip Berkeley Burnham Calumet City Calumet Park Countryside Dolton Elmwood Park Forest Park Inverness Justice Lyons Markham Maywood Merrionette Park Niles** North River Midlothian Northlake Oak Forest Orland Park Palos Park Posen Prospect Heights Rochelle Rolling Meadows Sauk Village Schaumburg Schiller Park Stickney Thornton Wheeling Wilmette Winnetka	Berwyn Bridgeview Chicago Ridge* Deerfield Evergreen Park* Flossmoor Glenview** Golf Hillside Hodgkins Hoffman Estates Homewood Kenilworth LaGrange* Lansing* Lincolnwood Lynwood Matteson McCook** Northbrook Northfield* Palos Hills* River Forest River Grove Steger Streamwood* Worth	Arlington Heights Barrington Hills Blue Island Skokie South Holland Stone Park University Park Norridge Palatine Westchester Western Springs Worth	Barrington Bedford Park Bellwood Broadview Buffalo Grove Cicero Country Club Hills Deer Park Dixmoor East Dundee East Hazel Crest Ford Heights Forest View Frankfort Glencoe Glenwood Harvey Harwood Heights Hazel Crest Hometown Indian Head Park LaGrange Park Melrose Park Olympia Fields Orland Hills Park Forest Phoenix Richton Park Riverdale Riverside Robbins Rosemont South Barrington Tinley Park Willow Springs
DuPage County	Addison Bartlett Bolingbrook** Darien Downers Grove DuPage County Glendale Heights Lisle Lombard Roselle West Chicago Wheaton Winfield Woodridge	Batavia Bloomingdale Clarendon Hills Elk Grove Glen Ellyn Hinsdale Villa Park Wayne Westmont	Warrenville	Bensenville Carol Stream Elmhurst Hanover Park Itasca Naperville Oak Brook Terrace Willowbrook Wood Dale





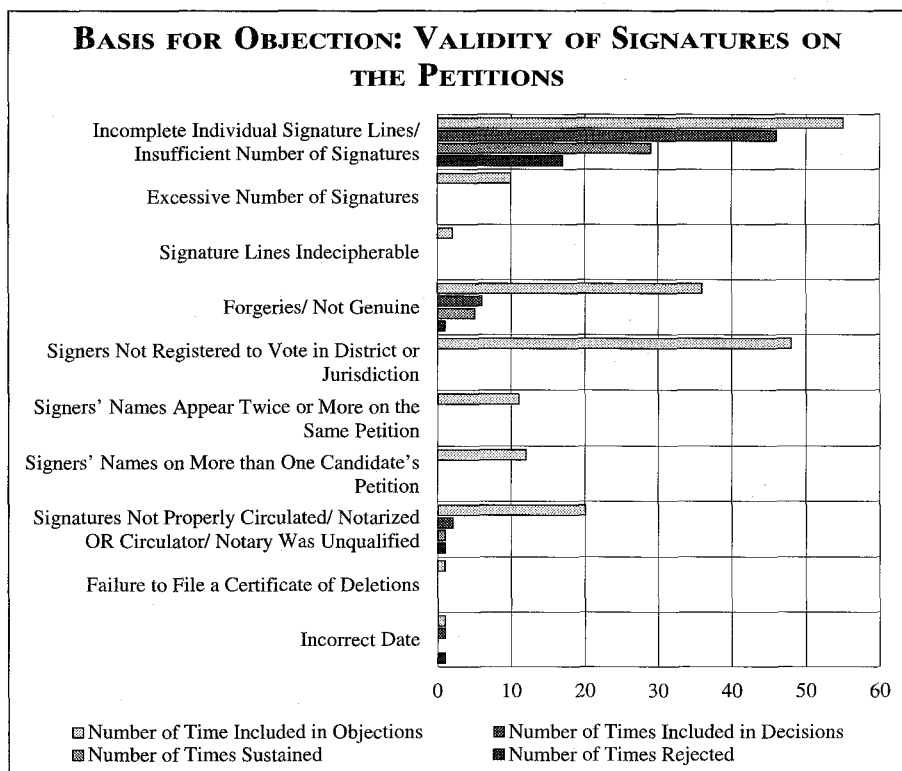
there were many objections and the records destroyed. This result is not surprising given that the Election Code mandates a short period of time for preservation of the records: “[a]ll nominating petitions shall be available for public inspection and shall be preserved for a period of not less than 6 months.”⁹⁷

In 2007 the Illinois Attorney General issued an opinion stating that the DuPage County Election Commission was subject to the Local Records Act and was required to comply with the provisions of the Local Records Act regarding document destruction.⁹⁸ To the extent the Election Code states specific document retention periods, the Local Records Commission must comply with them.⁹⁹ In 2009 the Illinois legislature codified this

⁹⁷ 10 ILL. COMP. STAT. 5/7-12(12) (2012).

⁹⁸ 2007 Op. Ill. Att’y Gen. 003 (2007).

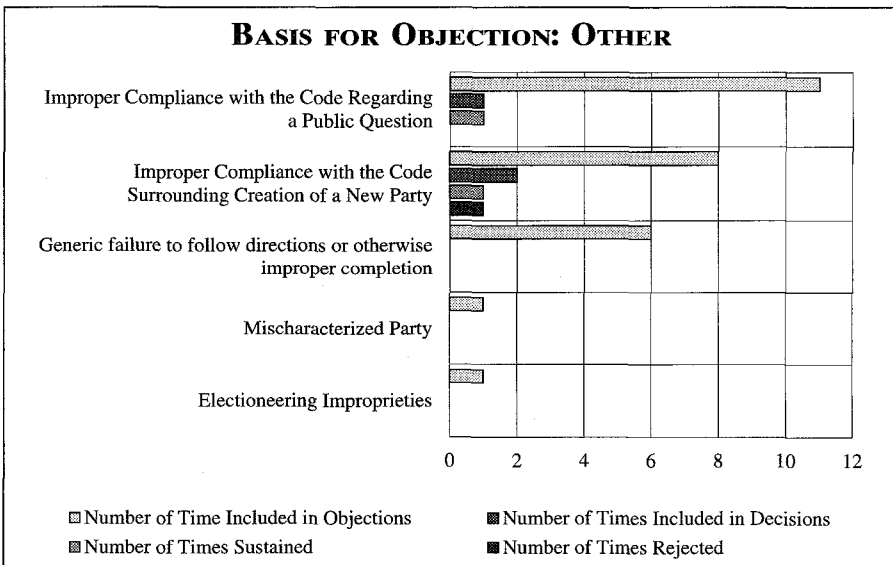
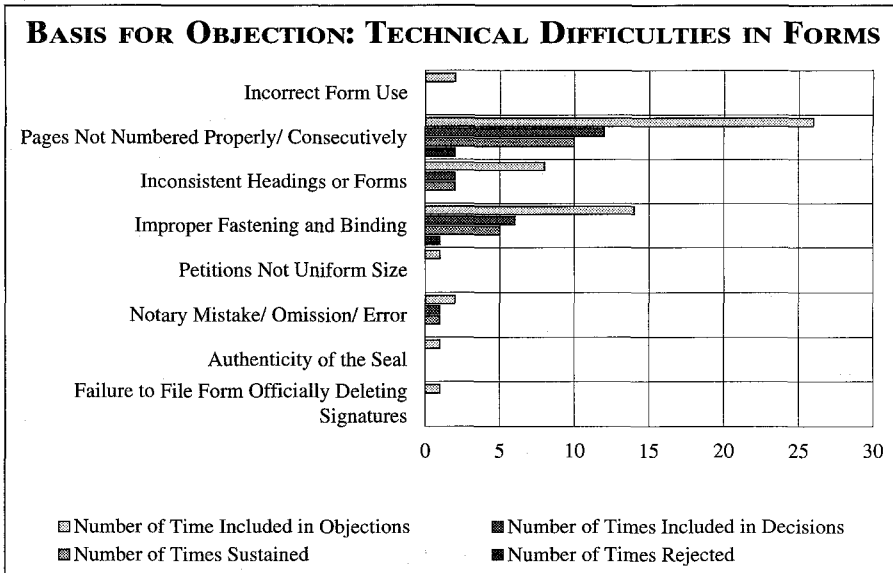
⁹⁹ *Id.*



opinion by amending the Election Code and subjecting election records to the provisions of the Local Records Act.¹⁰⁰

While the Election Code now explicitly requires local election officials to comply with the Local Records Act before destroying election documents, the legislature has done nothing to require electoral boards to retain all decisions and make them available on the Internet. Requiring the retention of all

¹⁰⁰ 10 ILL. COMP. STAT. 5/1-15 (2012); 50 ILL. COMP. STAT. 205/14a (2012). Under present law, government bodies overseeing elections under the Election Code must comply with the Local Records Act when destroying election related documents. The Local Records Act requires a government agency to seek approval from the Local Records Commission prior to destroying any documents that the agency determines have no administrative, legal, or fiscal value. 50 ILL. COMP. STAT. 205/10 (2012).



Basis for Objection: By Category	Number of Times Included in Objections	Number of Times Included in Decisions	Number of Times Sustained	Number of Times Rejected
Candidate's Qualifications	34	10	6	4
Clarity of Candidate's Intentions	120	41	24	17
Validity of Signatures on the Petitions	196	55	35	20
Technical Difficulties in Forms	55	21	18	3
Other	27	3	2	1
Total	432	130	85	45

Basis for Objection: Candidate's Qualifications	Number of Times Included in Objections	Number of Times Included in Decisions	Number of Times Sustained	Number of Times Rejected
Candidate Not Proper Resident	13	3	2	1
Candidate Not Proper Party Member	2	2	0	2
Incompatibility of Offices	9	3	2	1
Candidate Notarized Her Own Petitions	2	0	0	0
Unpaid Taxes/ Debts	4	1	1	0
Dishonest Conduct/ Criminal Record	2	1	1	0
Incomplete Slate	1	0	0	0
Candidate Not Registered Voter	1	0	0	0

Basis for Objection: Clarity of Candidate's Intentions	Number of Times Included in Objections	Number of Times Included in Decisions	Number of Times Sustained	Number of Times Rejected
Wrong or Missing Election Date	13	5	2	3
Improper Candidate Name or Slogan Indicated	10	5	2	3
Unclear Statement of Office Sought	26	18	10	8
Improper or Missing Municipality or Jurisdiction	15	0	0	0
Failure to Designate Right Type of Election	12	0	0	0
Failure to Designate Term of Office	1	2	0	2
Improper Partisan Identification	16	7	6	1
Failure to Properly File Statement of Candidacy or Statement of Economic Interests	27	4	4	0

CHALLENGES TO BALLOT ACCESS AND THE CHALLENGES THEREIN

Basis for Objection: Validity of Signatures on the Petitions	Number of Times Included in Objections	Number of Times Included in Decisions	Number of Times Sustained	Number of Times Rejected
Incomplete Individual Signature Lines/ Insufficient Number of Signatures	55	46	29	17
Excessive Number of Signatures	10	0	0	0
Signature Lines Indecipherable	2	0	0	0
Forgeries/ Not Genuine	36	6	5	1
Signers Not Registered to Vote in District or Jurisdiction	48	0	0	0
Signers' Names Appear Twice or More on the Same Petition	11	0	0	0
Signers' Names on More than One Candidate's Petition	12	0	0	0
Signatures Not Properly Circulated/ Notarized OR Circulator/ Notary Was Unqualified	20	2	1	1
Failure to File a Certificate of Deletions	1	0	0	0
Incorrect Date	1	1	0	1

Basis for Objection: Technical Difficulties in Forms	Number of Times Included in Objections	Number of Times Included in Decisions	Number of Times Sustained	Number of Times Rejected
Incorrect Form Use	2	0	0	0
Pages Not Numbered Properly/ Consecutively	26	12	10	2
Inconsistent Headings or Forms	8	2	2	0
Improper Fastening and Binding	14	6	5	1
Petitions Not Uniform Size	1	0	0	0
Notary Mistake/ Omission/ Error	2	1	1	0
Authenticity of the Seal	1	0	0	0
Failure to File Form Officially Deleting Signatures	1	0	0	0

Basis for Objection: Other	Number of Times Included in Objections	Number of Times Included in Decisions	Number of Times Sustained	Number of Times Rejected
Improper Compliance with the Code Regarding a Public Question	11	1	1	0
Improper Compliance with the Code Surrounding Creation of a New Party	8	2	1	1
Generic failure to follow directions or otherwise improper completion	6	0	0	0
Mischaracterized Party	1	0	0	0
Electioneering Improprieties	1	0	0	0

electoral board documentation would enable electoral boards to apply rules of law consistently, as well as would provide information as important election documents that delineate the electoral board decision-making process.

In order to increase public confidence in the local election system, election officials need to become more transparent and consistent in their decision-making. Transparency and consistency can be improved if the state amends the Election Code to require local election officials to retain electoral board decisions and associated documentation, indefinitely, rather than for the current time period, which most often results in documents maintained for less than one year. Election-related records provide general data about the political process, and electoral board decisions in particular have precedential value that could positively affect future decision-making. Other election-related documents may be destroyed according to the Local Records Act as soon as the governing body determines that they have no further value.

A second evident theme is inconsistent decision-making by electoral boards, which with the lack of document retention of electoral board decisions creates a disastrous combination for the ability of individuals to effectively defend petitions and for the integrity of our democracy. The hundreds of electoral boards in Illinois operate independently of one another with little accountability. Without centralized oversight, electoral

boards rule on citizen objections to nominating petitions and petitions for referendum inconsistently, resulting in both a lack of ballot access for candidates and referendum-seeking citizens who are not experienced with local politics, and diminished integrity in the process. Without a central authority figure, electoral boards create their own policies and procedures in a vacuum, ignoring the importance of consistency and predictability across and within municipalities and counties.

The majority of challenges to candidate petitions are based on technical errors in the candidate petition such as a lack of page numbers and printed signatures that do not bear evidence of fraud. The Election Code does not reveal with what precision compliance with the code would be assured.¹⁰¹ The documents received pursuant to the CAC FOIA requests indicate that municipal electoral boards use their discretion inconsistently. For example, when the Mount Prospect electoral board was presented with two separate objections both alleging that the candidate petitions contained no page numbers, the board came to two very different conclusions. The first, in 1997, resulted in the electoral board ruling that missing page numbers is “merely a technical violation” of the petition requirements and would not prevent the candidate from appearing on the ballot. The second objection, from 2009, resulted in the electoral board ruling that missing page numbers was fatal to the candidate’s petitions. This inconsistency occurred despite the 1989 appellate decision in *Jones v. Dodendorf*, which held in part that consecutively numbering the pages of a petition is mandatory under the Election Code and a complete lack of page numbers is fatal to the petition.¹⁰²

CAC’s research also revealed several examples of inconsistent decision making between municipalities. For example, a 2009 Winfield candidate wrote an inaccurate election date on his peti-

¹⁰¹ *Panarese v. Hosty*, 432 N.E.2d 1333, 1334 (Ill. App. Ct. 1982).

¹⁰² *Jones v. Dodendorf*, 546 N.E.2d 92, 94 (Ill. App. Ct. 1989).

tion and the election board still found his petitions to be “in substantial compliance” with the Election Code. On the other hand, a 2011 West Chicago candidate wrote an inaccurate election date on several pages of her petition. The board ruled to invalidate those pages with inaccurate dates thereby decreasing the candidate’s number of valid signatures to the point where she did not have the minimum number required to appear on the ballot. The lack of consistency in decision-making is troublesome because objectors and candidates have no way to predict objection outcomes. Without at least a minimum level of predictability, objectors may be deterred from filing valid objections and candidates may be deterred from running for office thereby reducing overall participation in the political process.

Although the SBE website as of this writing states that it is the “central authority for all Illinois election law, information and procedures in Illinois,”¹⁰³ it does not oversee whether electoral boards operate consistently between and among one another. In fact, although it proclaims to be the central authority for election law, the agency was stripped of the authority to issue advisory opinions interpreting the Election Code in 1987 when the Attorney General issued an opinion putting an end to the long-standing practice.¹⁰⁴ Noting that the General Assembly confined the SBE to “perform[ing] only such duties as are or may hereafter be prescribed by law,”¹⁰⁵ the Attorney General opined, “[a]lthough section 1A-8 of The [sic] Election Code [5 Ill. Cons. Stat. 10/1A-8] does authorize the State Board of Elections to ‘consult with election authorities concerning the conduct of elections and registration’, [sic] it neither expressly nor impliedly empowers the Board to issue general ‘advisory opin-

¹⁰³ “Frequently Asked Questions” available at <http://www.elections.il.gov/abouttheboard/qanda.aspx>.

¹⁰⁴ State Board of Election’s Power to Interpret the Election Code, 4 Op. Ill. Att’y Gen. 2 (1987) available at <http://www.illinoisattorneygeneral.gov/opinions/1987/87-004.pdf>.

¹⁰⁵ *Id.* (quoting Ill. Rev. Stat. 1985, ch. 46, par. 1A-1).

ions' interpreting the provisions of The Election Code or advising upon its application."¹⁰⁶ The opinion continues:

Administrative agencies, such as the State Board of Elections, may issue administrative statements or interpretations of statutes only to the extent that such statements or interpretations pertain to or implement the acts and procedures of the agency in performing its statutory duties and responsibilities. Thus, for example, it would be permissible for the State Board or its employees to issue statements describing the manner in which the Board will enforce specific statutes, or the interpretation given by the Board to statutes requiring or permitting agency action, such as hearing or filing requirements. It is impermissible, however, for the State Board to issue interpretations of statutes which relate generally to election matters but which do not pertain specifically to the functions and duties of the Board.¹⁰⁷

By promulgating rules that extended its substantive powers beyond interpreting statutes relating specifically to the performance of the SBE's functions and duties, to include the issuance of legal advice to local election officials, the SBE usurped the role of the Attorney General, who "is the legal officer of the State and has the duty to conduct the law business of the state, both in and out of court, including the power to interpret State law."¹⁰⁸ However, the Attorney General has not taken an active role in brokering conflicts in electoral board decisions.

The legislature should empower the SBE to provide opinions on the Election Code to help remedy the problem of inconsis-

¹⁰⁶ State Board of Election's Power to Interpret the Election Code, *supra* note 104 at 4.

¹⁰⁷ *Id.* at 2-3.

¹⁰⁸ *Id.* at 6.

tent decision-making. The decentralized system in Illinois gives election boards the discretion to rule on objections in a vacuum without regard for how their predecessors or similar bodies are ruling on the same issues. Currently, the SBE exercises general supervisory authority over voter registration and election laws in the state of Illinois.¹⁰⁹ One way to more efficiently tackle inconsistent decision-making by electoral boards and for preventing proponents of a petition for referendum and otherwise eligible candidates from making technical errors on their nomination papers and signature sheets is to grant the SBE the power to interpret the Election Code. In order to improve consistency, the state legislature needs to empower the SBE to better define the term “substantial compliance” as it relates to technical violations of the Election Code. The legislature should also empower the SBE to provide a series of binding opinions regarding the most common objections to candidate petitions. Implementation of these changes will increase consistency both within and between municipalities thereby improving voter and candidate confidence in the process.

The composition of electoral boards aggravates the problems of decentralization. In a recent survey of objections in the April 2013 consolidated elections, “[o]f those knocked off, most fell at the hands of panels stacked with members who had a political stake in their own decisions. Conflicts also went beyond simple politics: Even relatives ruled on their own family members’ cases.”¹¹⁰ This risk of bias only serves to encourage inconsistent application of the rules. Thus, an equally important measure to ensure consistency is to remove the potential for bias that exists in the current composition of electoral boards as well as the explicit but narrow recusal rule. Although courts have found that the Election Code provides for substitution by members of the

¹⁰⁹ ILL. CONST. art. III, §5; 10 ILL. COMP. STAT. 5/1A-1 (2012).

¹¹⁰ Joseph Ryan and Joe Mahr, *Democracy Denied*, CHICAGO TRIBUNE, Mar. 25, 2013 available at <http://graphics.chicagotribune.com/democracy-denied/>.

public to sit on electoral boards in place of those who present a risk of bias,¹¹¹ the legislature should codify this principle.

A third theme, and related to inconsistent decision-making, is that technical errors often keep candidates or referenda off ballots when fraud or the integrity of the election system are not implicated. The FOIA responses show that technicalities such as improper or inadequate binding and printed signatures are keeping candidates off the ballot despite legal precedent that such flaws are not fatal to a candidate's petition. Objections sustained on the basis of technical violations of the Election Code were often unexplained; few electoral boards cited precedent to support their rulings. For example, without explanation, the electoral board in Niles kept a candidate off the ballot because the candidate wrote "Trustee" for the office sought rather than "Village Trustee." However, again without explanation, the electoral board in Orland Park elected to keep candidates on the ballot despite the fact that they all used improper abbreviations like "Vill. Trst" for "Village Trustee." While it is heartening that electoral boards may not raise their own objections to nominating petitions *sua sponte*,¹¹² electoral boards wield power that is unnecessarily flexible and straddles the limits of abuse.

In addition to not having the power to interpret the Election Code, the SBE lacks other critical powers as an oversight agency. As it has been aptly written elsewhere,

[The SBE] does not have the ability, like some secretaries of state elsewhere, to remove local officials who do not perform satisfactorily. Without these powers, it is doubtful whether the SBE has the ability to compel the use of correct practices, short of going to court for a writ of mandamus. Moreover, it does not even have adequate re-

¹¹¹ See, e.g. Ruzich, *supra* note 22.

¹¹² Delay v. Bd. of Election Cmm'rs., 726 N.E.2d 755, 758-59 (Ill. App. Ct. 2000).

sources to monitor the procedures used by local jurisdictions, it appears unable to exercise even informal types of power, such as the power of persuasion.¹¹³

In order to improve consistency in decision-making, the legislature should explicitly empower the SBE to evaluate electoral board decisions for consistency, to remove electoral board members where necessary, and to provide guidelines as to what technical violations are in substantial compliance with the Election Code and which violations are fatal to the petition. Alternatively, the Illinois Attorney General's office should issue a formal opinion on these critical ballot access topics. While not a guarantee of accurate legal advice, guidelines for substantial compliance with the Election Code bolsters the ability and confidence of the electorate to run for elected office or petition for referendum and survive objections at electoral board hearings.

Finally, the State legislature should adopt legislation that permits a candidate to remedy certain technical violations at the clerk's office. Current law permits a candidate to withdraw his nomination papers, but the candidate cannot make changes to the nomination papers once they are submitted.¹¹⁴ The inability to remedy technical violations often results in invalidation of the nomination papers or the petitions for referendum, ultimately barring access to the ballot. Allowing changes to nomination papers such as paginating the signature sheets or better fastening the papers under supervision promotes the policy of maximum ballot access without sacrificing the guard against fraud.

In summary, the Illinois legislature should improve ballot access through amendments to the Election Code. The five recommendations in this report are summarized below:

¹¹³ Steven F. Huefner, Daniel P. Tokaji & Edward B. Foley, *From Registration to Recounts: The Election Ecosystems of Five Midwest States* 63 (The Ohio State Univ. Moritz Coll. of Law ed., 2007).

¹¹⁴ 10 ILL. COMP. STAT. 5/7-10, 8-8, 10-4, 28-3 (2012).

- Mandate that electoral board decisions and documentation must be retained indefinitely;
- Grant the SBE the authority to interpret the Election Code;
- Expand the recusal provision to encompass due process concerns and to explicitly provide for substitution of electoral board members by members of the public;
- Empower the SBE to evaluate electoral boards for consistency and remove electoral board members where necessary; and
- Allow candidates or proponents of referenda to make minor changes after filing for placement on the ballot, such as paginating the signature sheets or securely fastening them together.

