



Ron Johnson's War on Free and Fair Elections

As Senator Ron Johnson prepares for an expected 2022 reelection run, he wants to restructure how elections are conducted.

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December 1, 2021

Joe Biden won Wisconsin in 2020 as part of a remarkable finish that saw the presidential contender flip five states that had gone for Republican Donald Trump in 2016 into the Democratic column four years later. The margin in Wisconsin was narrow, just 20,682 votes out of almost 3.3 million cast. But that was typical for Wisconsin, where four of the last six presidential elections have been decided by under 25,000 votes.

In a state where close elections are the norm, fair and impartial oversight of elections is vital.

Wisconsin has maintained that standard with a State Elections Commission staffed by nonpartisan professionals. Their handling of the 2020 election was vetted by the courts, and the recount process, which Trump demanded, actually increased Biden's winning margin.

Now, however, the state's senior US senator, Republican Ron Johnson, is pushing to disempower the elections commission and have the Republican-controlled state legislature take charge. A conspiracy theorist whose claims regarding the 2020 election are often more outlandish than those advanced by Trump, Johnson recently told Wisconsin Public Radio that he's "completely lost confidence" in the elections commission. He claimed that oversight of upcoming elections by partisan Republican leaders of the state Assembly and Senate would "restore confidence in our election system for everybody."

That's an absurd assertion. So absurd that key Republicans admit they are struggling with questions about how the takeover would work. But Johnson has amped up his agitation as the 2022 election approaches. The scandal-plagued senator has yet to announce that he will seek a third term, but Trump has already endorsed him, and Johnson's latest moves suggest he's preparing to make another run.

If Johnson runs, his race will be a hard one. A number of prominent Democrats—including Lieutenant Governor Mandela Barnes, State Treasurer Sarah Godlewski, and Outagamie County Executive Tom Nelson—are running, and the race could determine whether Democrats retain control of the Senate.

So perhaps it is not surprising that the embattled incumbent is angling to restructure oversight of elections. But it is surely unsettling, especially as Johnson's proposal arrives at a point when top Republicans in Wisconsin have been aggressively attacking the elections commission—going so far as to demand that administrator Meagan Wolfe resign, and to suggest that members of the commission should be charged with felonies for issuing guidance that made it easier to vote during the pandemic. Wolfe has refused to do so, telling Wisconsin Public Radio, “I do think that this is partisan politics at its worst. But at the same time, I have an obligation as the state's nonpartisan chief election official to rise above it.”

Not that many years ago, talk of a legislative takeover of Wisconsin elections would have been unthinkable. The state's progressive tradition rejected partisan meddling in elections. But Johnson and his allies have in recent years been taking their cues not from Wisconsin but from the former president, whose loss of the state in 2020 came after a terrible 2018 election cycle for the GOP, when the party lost contests for US senator, governor, attorney general, state treasurer, and secretary of state.

Republicans have reason to fear they might have trouble winning free and fair elections. So Johnson has begun arguing that Republican legislative leaders could tell local officials to ignore standards established by the bipartisan Wisconsin Elections Commission. So far, they've been

slow to take up his proposal. But there are fears that, if Trump latches on to it, the senator's scheme could gain traction.

If legislators were to begin meddling in the way that Johnson proposes, they would undermine the authority of the elections commission and create a chaotic mess where local election officials get mixed signals. Asked about that prospect, Johnson replied, "I would imagine some counties would follow the state Legislature's guidance, which is what I believe they should do, and some might follow what [the elections commission] says."

That chaos might suit Johnson's reelection prospects. But it is in conflict with how the courts have determined that elections should be administered.

Johnson is pinning his argument for legislative meddling on the Elections Clauses contained in Article I and Article II of the US Constitution, which say, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Johnson's theory is that because "there's no mention of the governor" in the language of the Elections Clauses, his partisan allies in the Wisconsin legislature are free to assert themselves.

The problem with that approach is, as CATO Institute analyst Andy Craig put it:

[State] power over elections has always been exercised through the normal process of lawmaking. In Smiley v. Holm, the Supreme Court ruled in 1932 that congressional redistricting is this sort of "lawmaking function" in which the state constitution's normal processes apply. That case explicitly settled a challenge to the governor's ability to veto such bills.

The line the Court has drawn is one of structural implication: sometimes the Constitution's reference to a "legislature" means the state's elected legislators acting as in effect a distinct body to play a particular role in a federal process, while other times the nature of the relevant function is inextricably tied up with state lawmaking. Administering elections, by both practical

necessity and longstanding practice, clearly falls into the latter category. And as Johnson's proposal reveals, it would be untenable to read the Elections Clause and the Electors Clause the way he wants.

“The outrageous statements and ideas Wisconsin Republicans have embraced aren't about making our elections stronger,” Democratic Governor Tony Evers said last week. “They're about making it more difficult for people to participate in the democratic process.” Evers, who is seeking a second term in 2022, says he'll fight Johnson and the Republicans at every turn. “When I ran for this office, I promised that I'd protect the right of every eligible person to vote,” Evers once reminded his Facebook followers, promising, “As long as I am governor of this great state, anti-democracy efforts will never see the light of day.”