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May 2, 2013

To: Members of the Senate Committee on Judiciary and Labor
From: Senator Glenn Grothman
Re: Senate Bill 154

Senate Bill 154 is legislation to clarify and expedite the process of review by a higher court of injunctions on state statute. This legislation allows a preliminary injunction to be immediately appealable to either the Supreme Court or an appellate court.

Under current law, individuals can challenge a state law and seek to immediately block that law in circuit court. If the circuit court judge decides the party has a reasonable chance of winning their case they grant a preliminary injunction. By taking this action, the circuit court judge stops the enforcement of the law while the circuit court hears the case. An injunction remains in place until there is a final decision, this can last many months or over a year.

The current process causes unnecessary uncertainty for job creators and residents of Wisconsin. Many citizens have expressed that they are confused by the status of laws when an injunction is placed on these laws.

When the State Legislature passes a law and the Governor signs it this reflects representation from around the state. The idea that a new law can be put on hold by an activist judge that may represent less than one half of one percent of the state's population is offensive and is changed in this important piece of legislation. This bill ensures that a law that applies to the entire state will be decided by a court presiding over a larger portion of the population of the state.

Please support this legislation to make preliminary injunctions immediately appealable to a higher court rather than after the circuit court issues the final ruling. This will help clarify the status of duly passed laws and make residents of Wisconsin certain that they are accurately being represented.

DAVID CRAIG

STATE REPRESENTATIVE

Senate Committee on Judiciary and Labor
Public Hearing, May 2, 2013
Senate Bill 154 Testimony
Representative David Craig, 83rd Assembly District

Dear Members of the Committee:

We authored this legislation to address the legal uncertainty Wisconsin residents and businesses are subject to as a result of injunctions on state statutes – injunctions ordered by judges only elected by a fraction of our state's population.

Increasingly, questions have been raised as to:

a) whether individual circuit court judges' rulings impact the state as a whole in regards to the implementation of state law; and

b) whether a ruling from a judge - elected by a small portion of the state - should prevent the statewide implementation of legislation passed by the duly elected statewide legislature, and signed by our Governor, having also been elected statewide, without allowing for an expedited review by a higher court.

Under this bill, if a circuit court or court of appeals places an injunction, restraining order, or other order that, upon entry, suspends or restrains the implementation of any state statute, it would be immediately appealable to a higher court. If such an appeal is made to a higher court within 10 days of entry of the lower court's order, the lower court's order will be immediately stayed pending an order by a higher court or a final and unappealable order disposing of the entire case. It is important to note that nothing in this legislation would prevent any court from entering an order that suspends or restrains the implementation of a state statute, or prevents a higher court from removing the stay should the higher court determine the lower courts order was reached appropriately.

This legislation would facilitate a fair and more efficient judicial system by ensuring that one judge cannot unilaterally prevent the implementation of state law without the possibility of an expedited review by a higher court. This legislation would also ensure that Wisconsin residents and businesses have a greater degree of certainty as to whether a law is or is not in effect during the disposition of a legal challenge. Lastly, this bill reaffirms that the three branches of our government remain separate, but equal, by only altering the process for the administration of injunctions, not interfering with the core function of the judiciary.

Thank you for your time.

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May 2, 2013

To: Senate Committee on Judiciary and Labor
Assembly Committee on Government Operations and Licensing

Re: Opposition to AB161/SB154

The League of Women Voters believes that all powers of government should be exercised within the constitutional framework of a balance of powers among the three branches: legislative, executive, and judicial. The proposal you are considering today would damage this fundamental safeguard which protects the rights of citizens from the abuse of governmental power.

Proponents of the reform complain that, currently, one judge elected by voters in one county is able to block implementation of a statute that was passed by the full legislature and signed by the Governor. Yet that is why we have higher courts. If the state believes a circuit court judge has incorrectly ruled a law to be unconstitutional, the state may appeal the ruling. The state may also seek permission to appeal a preliminary injunction.

For example, Attorney General Van Hollen sought a stay on the injunctions on the voter ID law from the two Circuit Court judges who imposed them. He also requested a stay from both of the Appeals Court districts now handling the cases and, more than once, from the state Supreme Court. A total of 15 judges and justices – not just one – have declined the opportunity to stay the injunctions.

Thus there is a process for staying a preliminary injunction on a law that has been ruled unconstitutional. It is not necessarily an easy process, but that is appropriate.

We are concerned that this is a "Catch-22 bill," and we believe some questions need to be addressed. For instance, if the bill were to be enacted and a judge later found it to be unconstitutional and blocked it, could that injunction then be automatically reversed? If so, there might be little incentive for the state to appeal the unconstitutionality ruling. Why bother, when there is no injunction?

Like redistricting, this is more a power issue than a partisan issue. We fear that if this bill is enacted, no political party in power in the future will be interested in reversing this intrusion upon the judiciary.

This bill could allow the legislature to pass unconstitutional laws without consequences, and it should be rejected.

Thank you.

Supreme Court of Wisconsin

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A. John Voelker
Director of State Courts

May 2, 2013

The Honorable Glenn Grothman
Chair, Senate Committee on Judiciary and Labor
Room 10 South, State Capitol
Madison, Wisconsin 53702

RE: Senate Bill 154, Relating to Injunctions Suspending or Restraining the Enforcement of a Statute

Dear Senator Grothman:

Thank you for the opportunity to comment on Senate Bill 154. Please accept this written testimony on behalf of the Legislative Committee of the Wisconsin Judicial Conference and on behalf of the court system. The Committee of Chief Judges is still reviewing the specifics of the bill. This written material is substantially similar to that presented yesterday to the Assembly regarding Assembly Bill 161.

Since the bill appears to have some inconsistencies, the Legislative Committee has not taken a position on SB 154. However, the committee does want to raise some questions about the possible interpretations and implications of the bill. I am also supplying explanatory materials about the appellate process in Wisconsin and about the separation of powers doctrine.

Wisconsin amended its Constitution in April 1977 to create an intermediate Court of Appeals and to define the jurisdiction of the Court of Appeals and the Supreme Court.

The constitutional provisions of Article VII, Section 3 provide five methods by which actions may reach the Supreme Court: (1) original action; (2) a writ necessary in aid of its jurisdiction; (3) review of judgments and orders of the Court of Appeals; (4) removal of cases from the Court of Appeals; and (5) certification from the Court of Appeals. Attached is a diagram illustrating those methods; it is called "How a case comes to the Supreme Court." In addition, I have also attached an article from 1985 titled "Discretionary Review by the Wisconsin Supreme Court."

It is unclear to us how the authors of this bill intend for its procedures to modify current methods of reaching the Supreme Court. Some of the questions the Legislative Committee is considering are:

- In what ways will the procedures outlined in SB 154 differ from the methods that already exist?

- How does a "petition for interlocutory review" differ from a Petition for Leave to Appeal or a Petition for Review?

- Does SB 154 maintain the Supreme Court's discretionary review in injunctive matters?

Another question about SB 154 relates to what we believe is an incorrect statement of current law contained in the first sentence of the Legislative Reference Bureau's (LRB) analysis. The analysis says "an interlocutory or final judgment issued by a court in an action for an injunction may not be stayed after the entry of the judgment or during the pendency of an appeal." This statement seems to run counter to the clear terms of Wisconsin Statutes §§ 806.08, 808.07, and 809.12, which seem to authorize the courts to take such action after an appeal has been filed. The Legislative Committee is unsure whether some provisions of SB 154 may be predicated on a misunderstanding of the current authority of the courts.

Provisions within SB 154 raises questions related to the separation of powers doctrine. Since the writing of our original Constitution, there have been books and reams of articles written on this topic. As Nowak, Rotunda and Young wrote in their treatise, *Constitutional Law,* the theory of separation of powers in state constitutions "is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes."

Wisconsin's legislative service agencies have supplied written information to the Legislature that may help it as it considers proposals that may implicate the separation of powers doctrine. I have attached the LRB "Governing Wisconsin" paper on the doctrine and also a Legislative Council staff memo called "Legislative and Judicial Authority," prepared in 2010 for a Council study committee.

For more extensive analysis, I have also attached two *Wisconsin Lawyer* articles on aspects of the topic, one from 1997 and one from 2004. In addition I have attached a 1989 *Temple Law Review* article that explores in great depth the struggles states have faced in addressing separation of powers issues.

We recognize the challenge faced by this committee and the Legislature as it considers SB 154 in light of the separation of powers doctrine. We hope the information we have provided and the questions we have raised will generate meaningful dialogue on the implications of SB 154 on the judicial process.

If you have any questions, please feel free to contact my office or our legislative liaison, Nancy Rottier.

Very truly yours,

A. John Voelker
Director of State Courts

AJV/NR/lai
Attachments

cc: Members, Senate Committee on Judiciary and Labor
Nancy Rottier

For additional materials submitted by the Director of State Courts, see folder for 2013 Assembly Bill 161.